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TRANSNATIONAL PUBLIC POLICY IN INTERNATIONAL ARBITRATION: HOW TO SECURE THE INTEGRITY OF THE ARBITRAL LEGAL ORDER

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Date 28 January 2015

RUSCALLA
GABRIELE

To my parents,
my *vitae magistri*

CONTENTS

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ABSTRACT

The thesis deals with a relevant topic of international arbitration that is the application of transnational public policy to international arbitration proceedings. The theory, which this work is based on, is the autonomy of the international arbitral legal order, disconnected from –without rejecting– the national legal orders as well as the international legal system.

The idea beyond this thesis is that the arbitral legal order is an autonomous system equipped of its own sources, actors, legal norms and judicial institutions. The fact that, in international commercial arbitration, the fate of an arbitral award is in the hands of national courts does not undermine the autonomy of the arbitral order. In fact, through the 1959 New York Convention, Member States established a system aiming at promoting a pro-arbitration attitude. As a result, the grounds to refuse recognition and enforcement of a foreign arbitral award are limited and narrowed: for instance, no review on the merits is provided.

The arbitral legal order is also an international order: the award reached by the arbitrators does not only settle a dispute between the parties. The award is a decision of international justice that might have a strong impact on the international community as a whole. This is valid for international investment arbitration where one of the parties is always a State or a State entity. But this is also true for international commercial arbitration, when non-commercial values (e.g. human and social rights, environmental protection, fight against corruption, illicit trafficking and international embargoes) are involved. Then, international arbitrators are not (only) "private judges" but they should be thought of as "international adjudicators" with a relevant ethical task.

The arbitral order is not only autonomous and international. It has become more and more transnational. First, the nature of the actors is very different: States, State entities, multinational corporations and individuals are ever more involved in arbitration proceedings. Second, applicable rules in international arbitration have different origins: sources are both public and private, both national and international. Due to these developments, a question is legitimate: is the current legal arbitration framework capable of dealing with these new challenges? In particular, is the notion of "international public policy" still effective with regard to the recognition and enforcement of foreign arbitral awards? There is no clear-curt answer to this question. However, the thesis wishes to claim the need of a transnational instead of an international dimension of public policy, at least when transnational commercial or non-commercial values are involved. To the wording "*A société transnationale, droit lui-même transnational*", the author of this work would add "[…] *ordre public transnational*".

The concept of "transnational public policy" is then studied. First, the author attempts to define the concept. Second, doctrinal critics against transnational public policy and its application by arbitral tribunals and national courts are analyzed. Third, the sources as well as the principles –procedural and substantive– falling under the chapeau of transnational public policy are discussed. To conclude, the impact of the application of this specific dimension of public policy over the several phases of an international arbitral proceeding is examined. The leitmotiv of the entire thesis is the relevance of the ethical role that transnational public policy plays in international arbitration.

INTRODUCTION

> *Le bien commun international exigerait que l'on s'abstienne de faire commerce avec n'importe quoi et avec n'importe qui. La vertu consisterait donc à renoncer aux profits attendus de tels échanges, soit parce qu'ils portent sur des objets qui devraient rester hors commerce, soit parce que l'Etat avec lequel ces échanges auraient lieu ne présente pas de garanties morales attendues de la communauté internationale.*[1]

In 1968, ecologist Garret Hardin published an article on the journal Science entitled 'The Tragedy of the Commons'. The article elaborated an economic theory that states that individuals acting independently and rationally according to their own self-interests, behave contrary to the best interests of the whole group:

> Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in the commons brings ruin to all.[2]

The tragedy of the commons theory has been more recently applied to environmental issues such as sustainability. In this case, the commons dilemma stands as a model for a great variety of resources problems in today's society such as water, forests, and non-renewable energy sources, mainly only and gas.

The theory can also be referred to other 'commons', such as the protection of the human dignity and human rights and, more broadly, the compliance with the moral rules that should govern international relations, including international economic relations. As a matter of fact, the theory could be easily applied to the relation between business interests and non-commercial values.

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[1] Philippe Fouchard, *Droit et morale dans les relations économiques internationales*, *in* ECRITS 517, at 520 (X. Boucobza, E. Gaillard and C. Jarrosson eds., 2007).

[2] Garret Hardin, 'The Tragedy of the Commons', 162(3859) SCIENCE 1243, at 1244 (1968).

Over the past decades, many international legal scholars have highlighted the increasing role of non-commercial values in international litigation and arbitration.[3] Also international organizations have undertaken several initiatives to ensure the protection of, *inter alia*, human rights, labor rights and environment in international business activities. These initiatives also include the establishment of working groups and committees involving all the economic actors, namely States, multinational corporations, professional institutions and NGOs.[4]

On their part, multinational corporations have adopted internal codes of conduct – corporate social responsibility codes – that mirror the values and standards promoted by the United Nations and other international institutions.

This variety of actors involved in the economic activities has not only changed the international economic relations scenario: it has also shaped new mechanisms to settle economic disputes. As Professor Koh described in his article of 1991, traditional litigation was replaced by the 'transnational public law litigation' that melds the "two conventional modes of litigation that have traditionally been considered distinct". Professor Koh outlined this process as following:

> In traditional domestic litigation, private individuals bring private claims against one another based on national law before competent domestic judicial fora, seeking both enunciation of norms and damages relief in the form of a retrospective judgment. In traditional international litigation, nation-states bring public claims against one another based on treaty or customary international law before international tribunals of limited competence.
>
> […]

[3] See, for instance, INVESTMENT LAW WITHIN INTERNATIONAL LAW (F. Baetens ed., 2013); Ernst-Ulrich Petersmann, International Economic Law in the 21st Century: Need for Stronger 'Democratic Ownership' and Cosmopolitan Reforms, EUI Working Papers (2012); HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni eds., 2009); Cherie Booth QC, 'Is There a Place for Human Rights in International Arbitration?', 24(1) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 109 (2009); Christian Tomuschat, *The Responsibility of Other Entities: Private Individuals*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 317 (J. Crawford, A. Pellet and S. Olleson eds., 2010); UNCTAD, Selected Recent Developments in IIA, Arbitration and Human Rights, IIA MONITOR No. 2 (2009); 'An International Arbitration Tribunal on Business and Human Rights?, 9(5) GLOBAL ARBITRATION REVIEW (25 September 2004).

[4] See, for instance, the Human Rights Council's 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' and its Addendum 'Uptake of the Guiding Principles on Business and Human Rights: findings from a 2013 questionnaire for corporations' submitted to the United Nations General Assembly on 5 May 2014 and 28 April 2014 respectively.

> Transnational public law litigation merges these two classical modes of litigation. Private individuals, government officials, and nations sue one another directly, and are sued directly, in a variety of judicial fora […]
>
> In these fora, these actors invoke claims of right based not solely on domestic or international law, but rather, on a body of "transnational" law that blends the two.[5]

The process of 'transnationalization' of disputes has involved international economic and commercial law as well. This field of international law is probably the most transnational one, due to the nature of its actors, sources and applicable rules. Arbitration is nowadays the dominant method of resolving private party disputes in international commerce as well as private-public investment disputes.[6]

As a result, if international economic relations are ever more transnational and if arbitration is the chosen settlement system for economic and commercial disputes, it is logical to define arbitration as a transnational dispute settlement system. This is also confirmed by political science scholars. For instance, Professor Stone Sweet, in outline the difference between the State-to-State model political organisation prevailing in the past (Westphalian model) and the current transnational reality, states:

> The Westphalian state, at least in its ideal typical form, provides a model of political organization that resolves fundamental questions concerning the relationships among boundaries, territory, jurisdiction, citizenship, and nationhood. It does so by equating state sovereignty with the internal control and external autonomy of national governments […] It implies that the state is only legally constrained in its relations with other states by rules upon which it and other states have agreed.
>
> […]
>
> [s]overeignty and control are detaching from one another rapidly, at least with respect to transnational commercial activity. In the past three decades, a growing and increasingly cohesive community of actors – including firms, their lawyers, and arbitration houses – have successfully created a transnational space. The space is comprised of a patchwork of private jurisdictions, of rules and organizations without territory, an

[5] Harold Hongiu Koh, 'Transnational Public Law Litigation', 100 YALE LAW JOURNAL 2347, at 2348-2349 (1991).

[6] RICHARD GARNETT, HENRY GABRIEL, JEFF WAINCYMER AND JUDD EPSTEIN, A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION (2000), at 1.

> offshore yet virtual space. There are islands of private, transnational governance.[7]

However, arbitration is not only a transnational dispute settlement mechanism. Over the years, arbitration has become a proper autonomous legal order with its own sources, applicable rules created by the arbitration community itself (e.g. lex mercatoria and trade usages) and judicial institutions administering the procedure (arbitral institutions such as the ICC, LCIA, CAM) as well as the jurisdictional issues and merits (arbitral tribunals of a dispute). As Yas Banifatemi has stated

> [i]f a 'system of law' is defined as a body of rules and principles through which rights and obligations are established and justice is administered, then […] arbitration is certainly a system of law.[8]

If a legal system aims at working efficiently, it has to develop its own public policy protecting its moral, economic, social values. Some scholars are still convinced that the existing methods to protect these values, i.e. international public policy and application of mandatory rules of law, are still efficient in today's arbitration disputes. Other scholars acknowledge the necessity to develop and apply the so-called transnational public policy, considered to be the only dimension of public policy able to address the challenges faced in current international arbitration proceedings. We certainly agree with this second theory.

As it will be discussed in the thesis, the application of transnational public policy is relevant for at least two reasons.

First, despite its critics, transnational public policy is an important instrument to increase recognition and enforcement of arbitration awards. As a matter of fact, awards violating public policy standards might encounter the refusal to their recognition and enforcement before national courts of those States whose public policy include also transnational public policy.

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[7] Alec Stone Sweet, *Islands of Transnational Governance, in* RESTRUCTURING TERRITORIALITY: EUROPE AND THE UNITED STATES COMPARED 122, at 122-123 (Christopher K. Ansell and Giuseppe Di Palma eds., 2004).

[8] Yas Banifatmi, *Mapping the Future of Investment Treaty Arbitration as a System of Law – Remarks, in* AMERICAN SOCIETY OF INTERNATIONAL LAW – PROCEEDINGS OF THE 103RD ANNUAL ASIL MEETING 323, at 323 (2010).

Second, transnational public policy raises relevant ethical issues that should always be considered in international trade and commerce.[9] As it was stressed by a French scholar,

> L'ordre public transnational a une fonction régulatrice des rapports des acteurs du commerce international (aussi bien privés que publics). Il trace des limites à la liberté des acteurs en fixant des règles du jeu permettant au système de perdurer. En effet, toute violation de l'éthique a nécessairement un coût pour la communauté et il faut trouver les moyens de moraliser les comportements.[10]

In Chapter 1, the author outlines the main features of the new international economic legal relations with particular focus on the transnationalization of international economic law, its sources and actors involved.

Chapter 2 develops the theory of international arbitration as an autonomous transnational legal order. The Chapter analyses the historical evolution of the nature of arbitration and demonstrates that international arbitration has all the features that characterize a complete legal system.

Chapter 3 focuses on the different dimensions of public policy (domestic, regional and international) as well as the application of mandatory rules in international arbitration proceedings.

Chapter 4 is devoted to the notion of transnational public policy. If it is true that a complete definition of the concept is difficult to reach, the arbitration practice shows that transnational public policy does exist. Moreover, national courts have also considered and applied transnational public policy in the recognition and enforcement of foreign arbitral awards. The Chapter underlines the main difference between transnational public policy and the other dimensions of public policy, that is its sources. As a matter of fact, contrary to the other

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[9] Bruno Oppetit, *Droit du commerce international et valeurs non marchandes*, *in* ETUDES DE DROIT INTERNATIONAL EN L'HONNEUR DE PIERRE LALIVE 309, at 309 (C. Dominicé, R. Patry and C. Reymond eds., 1993) ("Dans le commerce international, l'éthique a certainement un rôle primordial à jouer en raison de la place secondaire que tient l'Etat").

[10] Geneviève Gourdet, 'Revue des revues, L'évolution récente du droit économique français', 1994(1) REVUE INTERNATIONAL DE DROIT ECONOMIQUE 85, at 100. See also JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999), at 354 ("L'éthique, traduite par le concept d'ordre public transnational, sert alors à réguler le secteur du commerce international".

dimensions of public policy, transnational public policy standards derivate from both public and private sources. As a result its standards seem to be the most qualified public policy standards applicable to international arbitration, a legal system ever more transnational whose actors' range varies from States to multinational corporations.

Chapters 5 and 6 deal with procedural and substantive transnational public policy standards respectively and analyse the relevant arbitral practice.

CHAPTER 1

THE NEW TRANSNATIONAL ECONOMIC LEGAL SYSTEM

International arbitration as an academic discipline is often defined as part of international economic law. As a matter of fact, until a few years ago and beyond a few exceptions, law schools dedicated only small sections of international economic courses to international arbitration. The reason is evident: before being considered as an autonomous legal order, international arbitration was mostly thought of as a mechanism to solve international private economic disputes arisen from a violation of provisions included in either a commercial contract or an investment treaty.

This first chapter of this thesis focuses on the evolution of international economic relations, analyzing the institutional developments and the emergence of new actors –notably transnational corporations– that became participants so active and powerful that international legal scholars and practitioners have started questioning whether these private actors should be defined as subjects of international law. The debate is still ongoing; however, it is undoubted that private actors in international arbitration have the same rights and obligations as States.

Today, economic relations are not only international; they are also transnational in nature: transnational are the actors, the legal sources as well as the applicable rules. This new transnational dimension is analyzed in this first chapter.

A. The existence of 'transnational economic law'[11]

After the Second World War, the international community (composed of States) felt the need to create international institutions capable of stabilizing and governing the international economic relations. For such a reason, States met in 1944 at Bretton Woods for negotiations that led to the establishment of the International Monetary Fund (IMF)[12] and the World Bank Group[13]. A third institution dealing with trade relations and based on the well-known Havana

[11] For an interesting study on transnational law and transnational legal order, see TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE (G. Shaffer ed., 2013).

[12] Articles of Agreement of the International Monetary Fund, entered into force on 27 December 1945. Amended on 31 May 1968; 30 April 1976; 28 June 1990; 23 September 1997; 5 May 2008; 28 April 2008.

[13] The World Bank Group is composed of five different institutions: International Bank for Reconstruction and Development (IBRD), International Finance Cooperation (IFC), International Development Association (IDA),

Charter of 1948[14] was planned to be established but did not materialize due to criticism of the United States. However, an essential part of the Charter came into force giving birth to the General Agreement on Tariffs and Trade (GATT).[15] After almost eight years of negotiations (Uruguay Round), the States part of the GATT signed on 1 January 1995 the Marrakech Agreement [16] that established a new institution mainly dealing with the supervision and liberalization of international trade: the World Trade Organization (WTO).

The combination of the norms enacted by the above-mentioned international organizations (IMF, World Bank and WTO), are part of international economic law and are a response to the necessity that the international community had to ensure a higher stability of international financial and trade transactions. If defined narrowly, international economic law "only refers to the segment of public international law directly governing –rather than merely affecting– economic relations between States or international organizations".[17]

However, in the last decades, several phenomena changed the shape of the economic transactions at the international level. Globalization played an essential role in changing the international economic order, highlighting that the States alone are not capable anymore to give precise responses to new economic challenges and to coordinate the actions of new and very different actors. This absence of States' efficient initiatives led new actors to organize themselves on the basis of transnational rules of private origin created by the business community:

Multilateral Investment Guarantee Agency (MIGA), International Center for Settlement of Investment Disputes (ICSID). As for IBDR, the Articles of Agreement entered into force on 27 December 1945, and has been amended three times: 17 December 1965, 16 February 1989 and 27 June 2012. As for IFC, the Articles of Agreement entered into force on 20 July 1956, and has been amended four times: 21 September 1961, 1 September 1965, 28 April 1993 and 27 June 2012. As for IDA, the Articles of Agreement entered into force on 24 September 1960. The Convention Establishing the MIGA came into effect on 12 April 1988 and was amended on 14 November 2010. The ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States entered into force on 14 October 1966 and was amended on 10 April 2006.

[14] The Havana Charter, Final Act of the United Nations Conference on Trade and Employment was signed by on 24 March 1948 but never came into effect.

[15] The General Agreement on Tariffs and Trade entered into force on 1 January 1948.

[16] The Marrakesh Agreement establishing the World Trade Organization entered into force on 1 January 1995.

[17] Matthias Herdegen, 'International Economic Law', MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (online ed., 2013).

> Il en résulte que le droit qu'ils élaborent est avant tout un droit fait pour régir un groupement plus ou moins vaste de professionnels. Le droit transnational économique serait donc destiné à pailler l'absence ou le déficit de règles juridiques internationales ou nationales en la matière. Cela n'est pourtant pas sa seule fonction : il permet aussi aux grands opérateurs économiques d'échapper à l'application de certaines de ces règles, dont la maximisation du profit des opérateurs privés n'est pas l'unique objectif en dépit du triomphe actuel de l'idéologie capitaliste libérale. A la défaillance du droit d'origine publique comme raison au développement du droit transnational, s'ajoute donc une volonté de s'affranchir de règles souvent contraignantes.[18]

As it has been noted by an author, international law "has to contend with the phenomenon of legal pluralism which is challenging its monopoly of relations across borders, as other legal systems are claiming space: transnational, supra-State, legal networks and orders; a revitalized lex mercatoria and an emerging lex electronica; global law beyond the State, or post-State law".[19]

If this is valid for international law in general, it is even more applicable to the field of international economic law. As a matter of fact, one needs to admit that the scope of today's international law should incorporate other matters traditionally belonging to private international law such as international contracts or relations between States and individuals. Carreau and Marrella well defined this *new* international law by affirming that

> A l'époque actuelle, cette expression « droit international public » s'avère entièrement inadéquate dans la mesure où elle ne permet pas de rendre compte de la diversité des acteurs de la société internationale contemporaine. Le droit international doit gouverner les relations entre les acteurs de cette société transnationale. [Philip] Jessup a caractérisé le droit international contemporaine comme étant le droit transnational. Il définit ce droit transnational comme tout le droit qui règlement les actions ou les événements qui transcendent les frontières nationales. […] [C]ette approche du droit international entendu au sens de droit transnational correspond pleinement à la mondialisation croissante de la société

[18] Franck Latty, *Le droit transnational économique*, *in* DROIT DE L'ECONOMIE INTERNATIONALE 109, at 109 (P. Daillier, G. de La Pradelle and H. Ghérari eds., 2004). The author also shows that already in the Middle Age, people involved in commerce adopted their own private rules governing several business activities. See, Franck Latty, *Le droit transnational économique*, *in* DROIT DE L'ECONOMIE INTERNATIONALE 109, at 109-110 (P. Daillier, G. de La Pradelle and H. Ghérari eds., 2004). See also DOMINIQUE CARREAU, FABRIZIO MARRELLA, DROIT INTERNATIONAL (2012), at 67.

[19] Vera Gowland-Debbas, *An Emerging International Public Policy?*, *in* FROM BILATERALISM TO COMMUNITY INTEREST. ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 241, at 242 (U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer and C. Vedder eds., 2011).

> internationale. La diversité et la globalisation de cette dernière se traduisent tout naturellement tant par la diversification de ses sujets que par celle de ses sources de droit, les deux phénomènes allant de pair. A société transnationale, droit lui-même transnational.[20]

It is commonly accepted that the current transnational economic law finds its origins also in the legal instruments created at the beginning of the 20th century by the business community: for instance, the general principles of international law and the first version of the Inconterms drafted in 1936 by the International Chamber of Commerce (ICC) will be considered as fundamental sources of the so-called new *lex mercatoria*. As discussed in the following sections of this work, the arbitral jurisprudence can also be viewed both as a source of the transnational economic order and as a harmonizing system capable to unify this order.

Without any further discussion on the topic, we can conclude that the current status of the international economic relations shows that, even is not codified, a transnational dimension of the economic order exists, includes both private and public actors and is justified by the simple fact that such a transnational business community exists and needs new rules regulating its activities:

> [International commercial law] manifeste, de son côté, une aspiration certaine à l'unité et à l'universalité, sur la base d'une communauté économique internationale. Il s'accommode mal à ce titre d'une fragmentation de l'espace juridique international, et prône l'utilisation de notions juridiques unificatrices, telles que la lex mercatoria, les principes généraux du droit, ou l'ordre public réellement international.[21] (emphasis added)

B. Actors, participants and users of transnational economic law

The field of international economic law –broadly including international commercial and investment arbitration– can be considered as one of the most dynamic branches of international law. Such dynamism is demonstrated, for instance, by the evolution of the definition of "subjects of international law".

Today, it is commonly recognized that the supremacy of States and international organizations as subjects of international law is outdated: other entities have appeared on the

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[20] DOMINIQUE CARREAU, FABRIZIO MARRELLA, DROIT INTERNATIONAL (2012), at 69-70.

[21] BRUNO OPPETIT, PHILISOPHIE DU DROIT (1999), at 119.

scene of international relations, notably NGOs, individuals and transnational corporations.[22] These 'new' entities play an important role and need to be elevated at least to the rank of actors or participants of the international legal system –if we are not ready yet to define them 'subjects of international law'.

This evolution is particular evident in the field of investment arbitration, where the diplomatic protection played –and partially still plays– a relevant role.

1. International arbitration and diplomatic protection

Diplomatic protection[23] is an old institute of international arbitration. The International Law Commission has defined diplomatic protection with the following terms:

> For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is national of the former State with a view to the implementation of such responsibility.[24]

Diplomatic protection specifically concerns international investment arbitration, where the State is directly and publicly involved in the dispute. However, commercial arbitration is also affected by this phenomenon: let's think of State contracts[25] or those arbitrations that involve States or State entities without covering an investment.

The history of diplomatic protection may be described through three phases.

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[22] In this work, the terms 'transnational corporations' and 'multilateral corporations' are used as synonyms.

[23] See, in general, CHITTHARANJAN FELIX AMERASINGHE, DIPLOMATIC PROTECTION (2008); Ben Juratowitch, 'The Replationship between Diplomatic Protection and Investment Treaties', 23(1) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 10 (2008); John Dugard, 'Diplomatic Protection', MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (online ed., 2009).

[24] INTERNATIONAL LAW COMMISSION, Draft Articles on Diplomatic Protection, Fifty-Eights session, 2006, Article 1.

[25] For a discussion on State contracts see, for instance, A. F. Munir Maniruzzaman, 'State contracts in contemporary international law: monist versus dualist controversies', 12(2) EUROPEAN JOURNAL OF INTERNATIONAL LAW 309 (2001); GIORGIO SACERDOTI, I CONTRATTI TRA STATI E STRANIERI NEL DIRITTO INTERNAZIONALE (1972); Giorgio Sacerdoti, 'State contracts and international law: a reappraisal', 7 ITALIAN YEARBOOK OF INTERNATIONAL LAW 26 (1986-1987); Maurice Kamto, 'La notion de contrat d'état: une contribution au débat - Les états dans le contentieux économique international, I. Le contentieux arbitral', 2003(3) REVUE DE L'ARBITRAGE 722; Charles Leben, 'La théorie du contrat d'état et l'évolution du droit international des investissements', 302 RECUEIL DES COURS 265 (2003).

First, States applied diplomatic protection in economic disputes because international remedies to individuals and corporations under international law were not available.[26] This phase was characterized by a denial of the existence of other subjects of international law beyond States and international organizations. Only States could enjoy protection under international law and individuals' claims –including the ones of transnational corporations– could be brought before justice only by sovereign entities.

In the famous *Barcelona Traction* case[27], the International Court of Justice dealt with the issue of diplomatic protection, with particular focus on its application to corporations and stakeholders. The Court stated that:

> Diplomatic protection deals with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronts the rights of the territorial sovereign, a fact of which the general law on the subject has had to take cognizance in order to prevent abuses and friction. From its origins closely linked with international commerce, diplomatic protection has sustained a particular impact from the growth of international economic relations, and at the same time from the profound transformations which have taken place in the economic life of nations.[28]
>
> […]
>
> The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office.[29] (emphasis added)
>
> […]
>
> The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is

[26] Christoph Schreuer, *Investment Protection and International Relations, in* THE LAW OF INTERNATIONAL RELATIONS – LIBER AMICORUM HANSPETER NEUHOLD 345, at 345 (A. Reinisch and U. Kriebaum eds., 2007).

[27] See, for instance, Giorgio Sacerdoti, *Barcelona traction revisited: foreign-owned and controlled companies in international law, in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 699 (Y. Dinstein ed., 1989).

[28] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, ICJ, Judgment, 5 February 1970, ¶ 37.

[29] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, ICJ, Judgment, 5 February 1970, ¶ 70.

> acting consider that their rights are not adequately protected, they have no remedy in international law. Al1 they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress.[30] (emphasis added)

With the development of foreign investments, the actors involved in international disputes realized that diplomatic protection presented many negative aspects. As it was well described by Christoph Schreuer,

> Diplomatic protection carries serious limitations for the investor relying on it. The investor must have exhausted the local remedies available in the host State. Even more importantly, the investor has no right to diplomatic protection but depends on the political discretion of his government. The government may refuse to take up the claim. It may discontinue diplomatic protection at any time. It may waive the national's claim or agree to a reduced settlement. As soon as the national State has taken up the claim, it becomes part of the foreign policy process with all the attendant political risks.
>
> Diplomatic protection on behalf of investors also carries important disadvantages to the States concerned. It can seriously disrupt their international relations, at times leading as far as the use of force. Not infrequently, investment disputes have led to protracted litigations between the host State and the State of the investor's nationality before international arbitral tribunals, the Permanent Court of International Justice and the International Court of Justice.[31]

As a result, investment arbitration replaced the mechanism of diplomatic protection[32]: the investor has the right to recourse directly to an independent forum without any involvement of the home State –excluded rare exceptions. Disputes then became depoliticized and well balanced and 'law' took the place of politics and diplomacy –at least partially.

Three moments of this second phase are of particular relevance. First, during the preparatory meetings of the ICSID Convention, the then General Counsel of the World Bank, Aron Broches, affirmed that:

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[30] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, ICJ, Judgment, 5 February 1970, ¶ 78.

[31] Christoph Schreuer, *Investment Protection and International Relations*, *in* THE LAW OF INTERNATIONAL RELATIONS – LIBER AMICORUM HANSPETER NEUHOLD 345, at 345-346 (A. Reinisch and U. Kriebaum eds., 2007).

[32] Gabrielle Kaufmann-Kohler, *Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection*, *in* DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT 305, at 305 (L. Boisson de Chazournes, M. G. Kohen and J. E. Viñuales eds., 2012).

> The Convention would […] offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy.[33]

Second, this idea was incorporated in the 1965 ICSID Convention that provides at Article 27:

> (1) No Contracting State shall give diplomatic protection, or bring an international claim in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.
>
> (2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.[34]

Third, the rejection of diplomatic protection in the field of foreign investments was confirmed by the International Court of Justice that, in the *Diallo* case, ruled as following:

> In contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as treaties for the promotion and protection of foreign investments […] and also by contracts between States and foreign investors. In that context, the role of diplomatic protection has somewhat faded, as in practice recourse is only made to it in rare cases where treaty regimes do not exist or have proved inoperative.[35]

However, despite diplomatic protection is not the rule under the contemporary mechanism of investor-State arbitration anymore, home States maintain a limited role in the field. This led

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[33] ICSID, WORLD BANK, The History of the ICSID Convention: Documents concerning the origin and the formulation of the Convention on the Settlement of Investment Disputes between states and nationals of other states, Vol. II (1970), at 464.

[34] ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (entered into force on 14 October 1966; amended on 10 April 2006), Article 27.

[35] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ, Preliminary Objections, Judgment, 24 May 2007, ¶ 88.

some authors to define the current –and third– phase as the one characterized by 'remnants of diplomatic protection'.[36]

A typical example of this new type of diplomatic protection is the provision included in most bilateral investment treaties and multilateral agreements, offering arbitration between the two States party to the treaty.[37] Such arbitrations usually address issues of application and interpretation of treaty provisions[38], but they have also included claims of diplomatic protection.[39]

Another interesting example of the revival of the application of diplomatic protection is the possibility of the home State to intervene in an investor-State arbitration proceeding as *amicus curiae*. This mechanism has been considered as less problematic than a State-to-State arbitration because it would provide "the authentic view of the home state as to the contracting parties' intention, supported by contemporaneous documentation and/or witness testimony"[40] without the need of initiating another arbitral proceeding that would be parallel to the investor-

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[36] Christoph Schreuer, *Investment Protection and International Relations*, *in* THE LAW OF INTERNATIONAL RELATIONS – LIBER AMICORUM HANSPETER NEUHOLD 345, at 347 (A. Reinisch and U. Kriebaum eds., 2007).

[37] See, for instance, Article 10 of the French 2006 Model BIT; Article 37 of the US 2012 Model BIT; Article 9 of the Italian 2003 BIT; Article 27 of the Energy Charter Treaty.

[38] See, for instance, *Peru v Chile* mentioned in Award, *Empresas Luccherri, S.A. and Lucchetti Peru, S.A. v Republic of Peru*, ICSID Case No. ARB/03/04, 7 February 2005, ¶ 7 (Peru brought an arbitration claim in response to an earlier-initiated investor-state claim brought by the Chilean investor, Lucchetti, against Peru. The state-to-state arbitration was ostensibly designed to resolve a disagreement between Peru and Chile as to the proper interpretation of the Peru-Chile bilateral investment treaty. However, the state-to-state arbitration appears to have been abandoned after arbitrators in the separate *Lucchetti v Peru* investor-state case declined to suspend their own proceedings so that the state-to-state proceeding could be pursued); Award, *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, 29 September 2012. See, for doctrine, Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority', 55(1) HARVARD JOURNAL OF INTERNATIONAL LAW 1 (2014); Michele Potestà, *State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is there Potential?*, *in* INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF TULLIO TREVES 753 (N. Boschiero, T. Scovazzi, C. Pitea and C. Ragni eds., 2013).

[39] See, for instance, Final Award, Ad Hoc, *Republic of Italy v Republic of Cuba*, 15 January 2008 (Italy brought a claim on behalf of itself and several Italian investors alleging violations of the Cuba-Italy BIT. Italy contended that it had 'double standing' to bring a direct claim to vindicate its own substantive rights and a diplomatic protection claim to vindicate the rights of Italian nationals that had invested in Cuba. Cuba argued that the existence of an investor-state arbitration clause in the treaty prevented Italy from bringing a diplomatic protection claim. The tribunal rejected Cuba's argument but ultimately held that Italy's direct claim failed because its claim on behalf of its nationals failed).

[40] Yas Banifatemi, *Consistency in the interpretation of substantive investment rules: is it achievable?*, *in* PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 200 (R. Echandi and Pierre Sauvé eds., 2013).

State one. This mechanism is proposed by the 2014 UNCITRAL Rules on Transparency whose Article 5(1) provided that:

> The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.[41]

Finally, the ILC Draft Articles on Diplomatic Protection includes a set of provisions regarding diplomatic protection for legal persons (corporations and shareholders): this clearly shows that diplomatic protection in investment disputes in not fully disappeared.[42]

Accordingly, even though new actors gained importance in the international scenario, one could conclude that States still assume a role also in international economic disputes. For such a reason, we will briefly discuss the current role of the two main actors in international commercial and economic disputes: States and transnational corporations.

2. The actors of international commercial and economic activities: are all subjects of international law?

In the few last decades, in parallel to the increasing power of private enterprises and the internationalization of economic activities, States have lost their control over economic processes,

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[41] UNCITRAL, Rules on Transparency in Treaty-based Investor-State Arbitration (in force since 1 April 2014). See also UNCITRAL, Forty-Fourth Session, 'Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-third Session (Vienna, 4-8 October 2010)', UN Doc. A/CN .9/712, ¶¶ 49 and 78:

> It was observed that two possible types of amicus curiae should be distinguished and perhaps considered differently. The first type could be any third party that would have an interest in contributing to the solution of the dispute. A second type could be another State party to the investment treaty at issue that was not a party to the dispute. It was noted that such State often had important information to provide, such as information on travaux preparatoires, thus preventing one-sided treaty interpretation. In response, it was said that an intervention by a non-disputing State, of which the investor was a national, could raise issues of diplomatic protection and was to be given careful consideration. It was suggested that third parties who could contribute to the resolution of the dispute could be identified and invited by the arbitral tribunal to assist it. The home State of the investor could be one such third party.
>
> […]
>
> At the fifty-third session of the Working Group, it was observed that a State Party to the investment treaty that was not a party to the dispute could also wish, be invited, or have a treaty right to make submissions. It was noted that such State(s) often had important information to provide, such as information on the travaux preparatoires, thus preventing onesided treaty interpretation (A/CN.9/712, para. 49).

[42] INTERNATIONAL LAW COMMISSION, Draft Articles on Diplomatic Protection, Fifty-Eight session, 2006, Chapter III (Articles 9-13).

mainly because the traditional instruments of political authority are not in line with the size of current economic activities.

However, the State is still the manager of its geographical space, the element that controls the population over its territory and it is the only entity which can assure the internal and external security of a nation, cooperating to international peace and stability. This is particularly valid nowadays when transnational economic relations are extremely difficult to govern and national States need to balance their general public interests (e.g. balance of payment-related issues as well as non-commercial interests such as health, environment, labour) and the interests of foreign corporations investing on their territories.[43]

As a general rule, public international law recognizes full sovereign powers to the States:

> A fundamental principle of the international system is that states are sovereign and equal. As a result, states exercise sovereignty over their territories […] The consequence of a state's sovereignty is that a state has exclusive jurisdiction to prescribe, enforce, and adjudicate laws for its territory and the population living there […] The exit of capital from a state is subject to its exclusive sovereignty. Similarly, the entry of the capital to a second state is also subject to that state's sovereignty. It is well settled in international law that a state is also subject to that state's sovereignty. It is well settled in international law that a state has the right to control the movement of capital into its territory, to regulate all matters pertaining to the acquisition and transfer of property within its national boundaries, to determine the conditions for the exercise of economic activity by natural or legal persons, and to control the entry and activities of aliens. Thus, unless there is a specific treaty to the contrary, a home State may prevent or impose conditions on the exit of capital from its territory for purposes of foreign investment, and a host state may prohibit or impose conditions on the movement of that capital into its territory. Customary international law does not grant investors rights to move their capital from one country to another.[44] (emphasis added)

[43] See, for instance, GENERAL INTERESTS OF HOST STATES IN INTERNATIONAL INVESTMENT LAW (G. Sacerdoti ed., 2014).

[44] JESWALD W. SALACUSE, THE THREE LAWS IF INTERNATIONAL INVESTMENT. NATIONAL, CONTRACTUAL AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL (2013), at 76. See also RUDOLPH DOLZER AND CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012), at 141 ("In the recent years there are indications of an approach by tribunals that stresses the need for states to maintain a regulatory space: the host State's right to regulate domestic matters in the public interest has to be taken into consideration and a balance between the investor's rights and the host state's public interest has to be established").

Many investor-State arbitral tribunals have recognized this idea, confirming that States have the power to regulate their internal economic and political matters and to adopt new legislation[45] even in case such legislation has disruptive effects on the foreign investors.[46] The only prohibition "is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power".[47] However, the threshold to determine the non-respect of this prohibition is a very high one: as a result, a State has a great room for manoeuvre to impose its sovereign rights.[48]

States are sovereign, they have international rights and obligations and they are capable of bringing international claims: in other words they have international legal personality.[49] In accordance with the traditional view of international law, only these entities together with

[45] Award, *Impregilo S.p.A. v Argentine Republic*, ICSID Case No. ARB/07/17, 21 June 2011, ¶ 291 ("The legitimate expectations of foreign investors cannot be that the State will never modify the legal framework, especially in times of crisis […]").

[46] Dissenting Opinion of Samuel K.B. Asante, *Asian Agricultural Products Limited v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, 27 June 1990, ¶ 74.

[47] Award, *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No. ARB/05/8, 11 September 2007, ¶ 332 ("It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a *stabilisation* clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power"). See also, Final Award, *Ronald S. Lauder v Czech Republic*, UNCITRAL, 3 September 2011, ¶ 242 ("Furthermore, any country is entitled to organize its own organs as it pleases as long as this does not result in a discriminatory and arbitrary measure against a foreign investor, protected by the investment Treaty").

[48] Decision on Liability and on Principles of Quantum, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, 22 May 2012, ¶ 153 ("This applicable standard does not require a State to maintain a stable legal and business environment for investments, if this is intended to suggest that the rules governing an investment are not permitted to change, whether to a significant or modest extent. Article 1105 may protect an investor from changes that give rise to an unstable legal and business environment, but only if those changes may be characterized as arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard. In a complex international and domestic environment, there is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor").

[49] HERSCH LAUTERPACHT, INTERNATIONAL LAW. COLLECTED PAPERS. 1 GENERAL WORKS (E. Lauterpacht ed., 2009), at 141. International legal personality exists only if three cumulative capacities are present: (i) the capacity to bring claims accruing from the violation of international law; (ii) the capacity to enter into relations with other subjects of international law by concluding valid international agreements or creating customary international law; (iii) the capacity to enjoy privileges and immunities from national jurisdictions. See Math Northmann, *Non-State Actors in International Law*, *in* NON-STATE ACTORS IN INTERNATIONAL RELATIONS 59, at 64 (B. Arts, M. Northmann and B. Reinalda eds., 2001).

international organizations (composed of States) were defined subjects of international law: individuals were then considered only as objects by the international legal system.[50]

Such vision of international law has changed over the time and individuals have begun to be more and more active actors. After the First World War, the Peace Treaty of 1919 gave individuals belonging to specific minority groups the possibility to claim their rights against national States before international tribunals, the Mixed Arbitral Tribunals.[51]

Then, after the Second World War, in 1946 the International Military Tribunal of Nuremberg stated that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced".[52] That implicitly means that, if an individual is responsible for a violation of international law, he or she is somehow a subject rather than an object of international law.

Moreover, globalization and the increasing number of economic relations between private and sovereign entities led the scope of actors in international relations to reach well beyond the international legal subjects in the strict sense:

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[50] MATTHIAS HERDEGEN, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW 25 (2013). See also Michel Cosnard, *Rapport Introductif*, *in* COLLOQUE DU MANS. LE SUJET EN DROIT INTERNATIONAL 13, at 16-17 (Société Française pour le Droit International, 2005); HERSCH LAUTERPACHT, INTERNATIONAL LAW. COLLECTED PAPERS. 1 GENERAL WORKS (E. Lauterpacht ed., 2009), at 141.

[51] DOMINIQUE CARREAU, FABRIZIO MARRELLA, DROIT INTERNATIONAL 66 (2012). Other instances allowing individuals to bring a claim directly before international tribunals include the Statute of the proposed but unratified International Prize Court adopted at the Second Hague Peace Conference of 1907, under which private claimants were given the right to appeal to that Court against judgments of national prize courts; the Treaty which, in 1907, established the Central American Court of Justice between the five Central American Republics, providing that individuals were given the right of direct access to the Court; the Upper Silesian Convention of 1922 between Germany and Poland establishing a tribunal open to the nationals of both parties and giving it jurisdiction to entertain actions brought by nationals of either party against their own State, notwithstanding the contention of Poland that under international law an individual cannot invoke the aid of an international authority against his own State. The same tribunal held that a national of a third State, which was not a party to the treaty in question, could exercise rights enforceable before the Tribunal.

[52] *Judgment of the International Military Tribunal*, *in* The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (1950), at 447.

> International non-governmental organizations, transnational corporations, non-formal governmental forums, and inter-agency cooperation shape today's international economic scene and influence the formulation of rules and standards. In addition, the development of human rights standards and the possibility of investors to bring claims against a State before the International Centre for Settlement of Investment Disputes (ICSID) have strengthened the role and the legal standing of companies and individuals in international economic relations.[53] (emphasis added)

The presence and activity of non-State actors in international relations is a fact. If we define subjects of international law all entities capable of international rights and responsibilities, individuals and transnational corporation should be considered as such.[54]

The point to be investigated is whether international law has recognized and accepted this fact. As mentioned above, the traditional view of international law does not define individuals as its subjects. However, international jurisdictions and legal scholars have taken a different way.

In the Advisory Opinion concerning *Jurisdiction of the Courts of Danzig*, the Permanent Court of International Justice held that although in principle a treaty cannot, as such, create direct rights and obligations for private individuals, "the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by national courts".[55] The Court rejected the view that as the provisions of a treaty adopted in favor of Danzig railways officials have not been incorporated in Polish law, those officials had no enforceable right of action. On the contrary, the contracting States may agree to create in favor of individual rights enforceable directly not only before national but also before international tribunals. To the extent to which the Charter of the United Nations established the legal obligation of its members to respect human rights and fundamental freedoms, it conferred upon individuals a corresponding

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[53] MATTHIAS HERDEGEN, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW 25 (2013).

[54] Christian Walter, 'Subjects of International Law', IX The Max Planck Encyclopedia of Public International Law 634, at 639 (2012). ANTÔNIO AUGUSTO CANÇADO TRINIDADE, THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE (2011), at 3; PAUL REUTER, DROIT INTERNATIONAL PUBLIC (1993), at 235 and 238.

[55] *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have passed into the Polish Service against the Polish Railways Administration)*, PCIJ, Advisory Opinion, Series B – No. 15, 3 March 1928, at 17-18.

right not dependent for its international validity upon national legislation, and even though unaccompanied by effective provisions for its enforcement.[56]

Two decades later, in 1949, the International Court of Justice affirmed the following:

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States […] In the opinion of the Court, the [UN] Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international place […] That is not the same thing as saying that it is a State, which certainly is not or that its legal personality and rights and duties are the same as those of a State […] It does not even imply that all its rights and duties must be upon the international plane, and more than all the rights and duties of a State must be upon that plane. What it does mean is that it is subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.[57] (emphasis added)

The ICJ opinion pointed out two issues. First, it recognized that, while the State was the primary subject of the international legal system, the subjects of that system could change and expand depending on the needs of the international community and the requirements of international life. It does not say whether these needs and requirements are solely determined by States or by other means.[58]

Second, it distinguishes between partial and full legal personality. Under this distinction only States are accorded full legal personality, which implies that, in principle, States possess all international legal rights and are subjects to all international legal duties. By contrast, other

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[56] HERSCH LAUTERPACHT, INTERNATIONAL LAW. COLLECTED PAPERS. 1 GENERAL WORKS (E. Lauterpacht ed., 2009), at 142-143.

[57] *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ, Advisory Opinion, 11 April 1949, at 178-179. See also, *Legality of the Use of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ, 8 July 1996, at 66.

[58] Robert McCorquodale, *The Individuals and the International Legal System, in* INTERNATIONAL LAW 284, at 287 (M. D. Evans ed., 2010).

subjects of international law, in this specific case international organizations, are only considered partial subjects in the sense that their rights and duties are limited by the founding documents in which the respective rights and obligations are conferred upon the organization by the founding States. Consequently, their international personality is seen as being confined to the rights and duties mentioned in these founding documents, such as treaties, and as not stretching to other areas of international law.[59] Then, following this interpretation, in case these founding documents terminate or if a State withdraws from an international treaty, individuals lose their rights under international law.[60] However, Sir Lauterpacht rightly stated that:

> […] a person or organization may be a subject of international law –i.e. directly endowed by international law with rights and charged with duties- without at the same time enjoying full procedural capacity by way of being able to claim before international tribunals and agencies any rights thus granted. In fact, apart from the somewhat unreal emanations of the doctrine that only States –as the exclusive subjects of international law– possess procedural capacity in the international sphere, there is no true obstacle to further developments in that direction.[61] (emphasis added)
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> […]
>
> It is sufficient if such rights are created in their favor and are effectively vested in them […] International law is not exclusively a law governing the relations between sovereign States. It is wide enough, especially having regard to the applicability of general principles of law as one of its sources, to include agreements made by States with persons other than States and not expressly or by implication made subject to the municipal law of such States.[62] (emphasis added)

Individuals have been recognized as active actors of international law capable of bringing a claim before an international court also by the European Court of Justice. In *Van Gen den Loos* the Court ruled:

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[59] Christian Walter, 'Subjects of International Law', IX THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 634, at 640 (2012).

[60] Michel Cosnard, *Rapport Introductif*, *in* COLLOQUE DU MANS. LE SUJET EN DROIT INTERNATIONAL 13, at 51-52 (Société Française pour le Droit International, 2005).

[61] HERSCH LAUTERPACHT, INTERNATIONAL LAW. COLLECTED PAPERS. 1. GENERAL WORKS (E. Lauterpacht ed., 2009), at 144.

[62] HERSCH LAUTERPACHT, INTERNATIONAL LAW. COLLECTED PAPERS. 1. GENERAL WORKS (Elihu Lauterpacht ed., 2009), at 147.

> The European Economic Community constitutes a new legal order in international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and institutions of the Community.[63] (emphasis added)

Other international courts reached similar decisions. For instance, the Inter-American Court of Human Rights in the *Castillo Petruzzi* case held that

> The right of individual petition shelters, in fact, the last hope of those who did not find justice at national level. I would not refrain myself nor hesitate to add, - allowing myself the metaphor, - that the right of individual petition is undoubtedly the most luminous star in the universe of human rights.[64]

As a result, we agree that individuals and transnational corporations became *de facto* subjects of the international legal system. The existence of their powers to bring a claim before international courts and tribunals in different areas of international law fully supports this vision. The question here is whether the inclusion of individuals among the subjects of international law is to be considered in contradiction with the current structure of the international legal order. The answer should be negative. As explained by a French scholar,

> Si l'Etat peut former des engagements unilatéraux en droit international, rien ne devrait pouvoir l'empêcher de s'engager à tenir pour des produits internationaux qui lui sont opposables les engagements qu'il aura pris avec une personne privée (ce premier engagement unilatéral ayant la même validité en droit international que tout autre engagement unilatéral d'un quelconque Etat) et même de s'engager conventionnellement avec une personne privée. Car on voit mal comment un Etat qui peut reconnaître des droits et obligations à une personne privée dans son ordre juridique propre ne pourrait pas lui reconnaître des droits et obligations similaires dont le régime serait soumis à des règles internationales. Rien

[63] Judgment, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECJ Case No. 26/29, 5 February 1963, ¶ 3. For a recent discussion on this case, see REVISITING *VAN GEND EN LOOS* (H. Ruiz Fabri, G. F. Sinclair and A. Rosen eds., 2014).

[64] *Castillo Petruzzi and Others v Peru*, IACtHR, Concurring Opinion of Judge A. A. Cançado Trinidade, 4 September 1998, at 62.

> en droit international public n'exclut la validité de tels engagements étatiques […] On peut au contraire lire régulièrement dans les recueils des sentences des juridictions internationales l'affirmation selon laquelle un contrat entre un Etat et une personne privée étrangère lie les deux parties en faisant naître à leur charge des droits et des obligations, cela même si l'on décide de ne pas retenir les décisions qui ne qualifient pas expressément d'internationaux les droits et obligations ainsi produits ou qui n'affirment pas explicitement que la proposition selon laquelle une telle convention est obligatoire est une proposition de droit international. Le droit international attache ainsi parfois à un contrat conclu entre un Etat et une personne privée étrangère force obligatoire soumise au principe *pacta sunt servanda* […][65] (emphasis added)

In international economic law, it is the State that enables the individual to bring a claim either by ratifying the relevant treaty and/or through a contract agreed specifically by the State with the individual: we then find again the difference between partial and full legal personality proposed by the ICJ in its Advisory Opinion in the case *Reparation for Injuries*.

In this field of law, private multinational corporations exercise their power in two different ways: on the one hand, they act as independent players; on the other hand, they shape government policies and exert their influence behind the scenes.[66] As for their independent actions, the ability of the State to refuse to allow multinational corporations to bring international claims is often quite limited. In many instances the State, particularly a developing State, has little ability to resist a transnational corporation's request to be able to bring an international claim (or to ratify the relevant treaty to enable such a claim to be made). This is because the economic power of such individuals is far greater than that of many States.[67]

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[65] Jean Matringe, *Les effets juridiques internationaux des engagements des personnes privées*, *in* COLLOQUE DU MANS. LE SUJET EN DROIT INTERNATIONAL 117, at 119-120 (Société Française pour le Droit International, 2005). See also HERSCH LAUTERPACHT, INTERNATIONAL LAW. COLLECTED PAPERS. 1. GENERAL WORKS (Elihu Lauterpacht ed., 2009), at 146-147:

> There is no intrinsic necessity […] to confine international law – and its adjudicatory agencies – to relations between States. International law can properly be comprehended as regulating the rights and duties of States in the international sphere and, as a result of international custom and agreement, also in relation to entities other than States.

[66] Nicholas Bayne and Stephen Woolcock, *What is Economic Diplomacy*, *in* THE NEW ECONOMIC DIPLOMACY. DECISION-MAKING AND NEGOTIATION IN INTERNATIONAL ECONOMIC RELATIONS 1, at 3-4 (N. Bayne and S. Woolcock eds., 2013).

[67] Robert McCorquodale, *The Individuals and the International Legal System*, *in* INTERNATIONAL LAW 284, at 297-298 (M. D. Evans ed., 2010). However, the economic power of transnational corporations does not seem to be the only reason why individuals became so strong to contrast the supremacy of States in international law. As a

An example of influence beyond the scenes is the transnational corporations' ability to influence national governments in negotiating bilateral and multilateral investment treaties in order to see protected their private interests in international legal instruments,[68] or in bringing disputes to international economic legal bodies, such as under the dispute settlement procedures of the World Trade Organization. In fact, it is common knowledge that these trade disputes are often initiated, sponsored, and prosecuted by the private corporations that are affected by the trade action that is the subject of the claim.[69]

Although international case law and some scholars have shown support to the idea of individuals as subjects of international law, there are still dissenting voices. For instance, Professor Audit's idea is that "en tout état de cause, une personne privée, *a priori*, crée moins de droit, voire pas du tout de normes de droit international, à la différence d'un Etat ou d'une organisation international": as a result, he believes that individuals are not capable of creating international law rules.[70]

In order to avoid a doctrinal debate on the traditional wording 'subjects of international law', scholars have proposed other expressions to define the position of individuals and transnational corporations within the international legal order.

First, Philip Fouchard used the term 'operators':

> Ces relations sont d'abord soumises à un encadrement juridique dicté par les Etats, unilatéralement ou ensemble, par des traités ou des organisations

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matter of fact, in the field of human rights, where economic power is not involved, the Inter-American Court of Human Rights reached a similar conclusion. See, for instance, *Juridical status and human rights of the child*, IACtHR, Advisory Opinion, 28 August 2002, ¶ 34 ("Every human person is endowed with juridical personality, which imposes limits to State power. The juridical capacity varies in virtue of the juridical condition of each one to undertake certain acts. Yet, although such capacity of exercise varies, all individuals are endowed with juridical personality. Human rights reinforce the universal attribute of the human person, given that to all human beings correspond likewise the juridical personality and the protection of the Law, independently of her existential or juridical condition").

[68] Michel Cosnard, *Rapport Introductif*, *in* COLLOQUE DU MANS. LE SUJET EN DROIT INTERNATIONAL 13, at 52 (Société Française pour le Droit International, 2005).

[69] Robert McCorquodale, *The Individuals and the International Legal System*, *in* INTERNATIONAL LAW 284, at 298 (M. D. Evans ed., 2010).

[70] Mathias Audit, *Débats*, *in* COLLOQUE DU MANS. LE SUJET EN DROIT INTERNATIONAL 73, at 79 (Société Française pour le Droit International, 2005).

> internationales: il s'agit des règles à fort coloration de droit public, qui s'intéressent aux échanges internationaux d'un point de vue macro-économique, et que l'on regroupe sous l'appellation de droit international économique. Mais ces relations se nouent essentiellement entre des « opérateurs », personnes physiques et sociétés, dont le statut et les activités relèvent du droit privé; leurs rapports – micro-économiques – relèvent de cette autre branche du droit que l'on dénomme le droit du commerce international. A dire vrai, si cette distinction est commode, elle ne rend conserver à la matière son unité, et considérer les échanges économique internationaux de la manière la plus large, je préfère donc parler – même si l'expression est lourde – du droit des relations économiques internationales.[71] (emphasis added)

Such a choice suggests that Fouchard wanted to focus on the concrete role and function of transnational corporations in international economic law: their role –rather than their nature– leads such private entities to be defined as *de facto* subjects of international law.

Second, other scholars have referred to individuals as 'users of international law', to highlight that addresses of international norms other than States exist. It is a very broad category, including "legal and physical persons, states, devolved states, sub-governmental units, judges and lawyers, civil servants, members of the armed forces and the police, international organizations and their personnel, belligerents, insurgents, companies, associations, networks, groups, single physical persons, and the ever-present sui generis situations, within or beyond state boundaries, bearing or not legal personality under international law".[72] The legal basis of the existence of this category is that, even if it is not recognized as a subject of international law, an individual might nevertheless perform international rights and duties by the fact that international law is introduced into the domestic level.[73]

Finally, the more traditional expression 'non-State actors' is employed as well. It includes both categories of 'operators' and 'users' of international law and "connotes a dynamic presence,

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[71] Philippe Fouchard, *Droit et morale dans les relations économiques internationales*, *in* ECRITS 517, at 518 (X. Boucobza, E. Gaillard and C. Jarrosson eds., 2007).

[72] Emmanuel Roucounas, *The Users of International Law*, *in* LOOKING TO THE FUTURE. ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 217, at 220 (M. H. Arsajani, J. K. Cogan, Robert D. Sloane and S. Wiessner eds., 2011).

[73] Emmanuel Roucounas, *The Users of International Law*, *in* LOOKING TO THE FUTURE. ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 217, at 221 (M. H. Arsajani, J. K. Cogan, Robert D. Sloane and S. Wiessner eds., 2011).

action, participation, and even polemic in the phases of the elaboration, adoption, implementation and application of international law".[74] It underlines that international law moves in a socially multifarious environment, where diverse forces contribute to its shaping and development.

3. The relevant role of transnational corporations

Two decades ago, Rosalyin Higgins stated that it is futile to speak of 'subjects' or 'objects' of international law, since "there are […] only participants. Individuals are participants along with states, international organizations […] multinational corporations, and indeed private non-governmental groups".[75]

It is worth here mentioning how transnational corporations increasingly became actors (if not subjects) of the international legal order.

The phenomenon of the rise of multinational corporations has developed after the end of World War II. These economic entities, characterised by unity of control and internationalization of strategies, can achieve their economic objectives without considering borders and national interest of the home State.[76]

Carreau and Juillard have defined the transnational corporation as

> [U]n groupement de sociétés commerciales présentant une certaine permanence, placées sous la direction d'une mère, située en un État, et, comprenant des sociétés filiales ou affiliées situées en plusieurs autres États […] Ce qui la caractérise c'est la coordination et la hiérarchisation entre les diverses éléments qui composent le groupement: c'est la mère qui coordonne les activités des sociétés filiales et affiliées; et ces sociétés filiales et affiliées sont placées sous l'autorité de la mère.[77]

Moreover, they have specified that "l'entreprise multinationale, en tant que telle, ne possède pas la personnalité juridique: ce sont la mère, ses filiales et ses affiliées, qui, chacune, possèdent cette personnalité juridique au regard du droit de chacun des États dans lesquels elles

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[74] Emmanuel Roucounas, *The Users of International Law*, *in* LOOKING TO THE FUTURE. ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 217, at 218-219 (M. H. Arsajani, J. K. Cogan, Robert D. Sloane and S. Wiessner eds., 2011).

[75] ROSALYN HIGGINS, PROBLEMS AND PROCESS – INTERNATIONAL LAW AND HOW WE USE IT (1994), at 50.

[76] Giorgio Sacerdoti, 'Multinazionali (Imprese)', X(Commerciale) DIGESTO 3, at 4 (1994).

[77] DOMINIQUE CARREAU AND PATRICK JUILLARD, DROIT INTERNATIONAL ECONOMIQUE (2010), at 39-40.

opèrent. Mais, en pratique, et par commodité de langage, la pratique confère à l'entreprise multinationale la nationalité de la société mère"[78].

Despite their enormous powers, multinational corporations had hardly been recognized as entities capable of bearing rights and duties in positivist international law. Obviously, this position may have to change, given the reality that it is as dominant an actor on the international economic scene as the state. Many multinational corporations command financial resources that are greater than many states can muster and the number of their employees is sometimes higher than the population of some countries.[79]

In international investment and commercial arbitration, there is clear indication that multinational corporations possess both rights and duties. As a matter of fact, according to the principles applied in investment arbitration, States and multinational corporations are considered equal parties to a dispute once it has been brought to ICSID dispute settlement procedures. Furthermore, there is a clear tendency to hold them responsible for certain types of conduct, though at the moment this is done largely through domestic law. Yet, the recognition of the multinational corporation as a single entity and the recognition of its responsibility for violating international norms are slowly emerging.[80] As it was reminded by the International Law Association at the Washington Conference in 2014,

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[78] DOMINIQUE CARREAU AND PATRICK JUILLARD, DROIT INTERNATIONAL ECONOMIQUE (2010), at 40. Similar definitions have been proposed by other authors. For instance, Fisher affirmed that

> "Transnational corporations […] means an enterprise, comprising entities in two or more countries […] which operates under a system of decision-making permitting coherent policies and a common strategy, […] in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of the others, and in particular, to share knowledge, resources and responsibilities with the others". See, Peter Fisher, 'Transnational Corporation', VIII ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 515, at 515 (1985).

Francioni highlighted the four characteristics that an enterprise should fulfil in order to be considered as a multinational corporation: significant dimensions, high level of scientific and technological know-how, international management and incorporation of subsidiaries in different countries. As a result, the multinational corporation can be defined as a group of companies, which have autonomous personality and nationality, carry on business in several States and are subjected to a mother-company, which sets up the policy of the group. See, FRANCESCO FRANCIONI, IMPRESE MULTINAZIONALI, PROTEZIONE DIPLOMATICA E RESPONSABILITÀ INTERNAZIONALE (1979), at 12-16.

[79] DOMINIQUE CARREAU AND PATRICK JUILLARD, DROIT INTERNATIONAL ECONOMIQUE (2010), at 40.

[80] MUTHUCUMARASWAMY SORNARAJAH, THE INVESTMENT LAW ON FOREIGN INVESTMENT (2012), at 61-62.

> In any event, there is considerable support found in literature for the principle that at a minimum, private persons, including organized entities such as corporations, have the obligations not to commit such international crimes as piracy, slavery, war crimes, genocide, crimes against humanity (including apartheid), and possibly torture.[81]

This necessarily implies an international legal position of the corporation.[82] We already mentioned that non-State actors have been acting in international law through two main ways: on the one hand, they act as independent players; on the other hand, they shape government policies and exert their influence behind the scenes. This is particular valid for transnational corporations. On the one hand, these entities have imposed their role in international law by signing both investment contracts (State contracts) and purely commercial contracts with States and State entities to exploit natural resources and commercial contracts.[83] Transnational corporations' power has been so strong that States have accepted almost all their conditions, such as the inclusion of stabilization clauses in contracts,[84] and the delocalization of dispute settlement mechanisms through international arbitration and foreign applicable laws including international law, transnational law and general principles of law.[85]

On the other hand, multinational corporations also wield significant power to shape the laws (especially international investment law and international commercial law) to their advantage. Quite apart from wielding influence on their home states to ensure foreign investment protection, they are also able independently to influence the making of legal norms. Their role is

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[81] INTERNATIONAL LAW ASSOCIATION, Committee on Non State Actors, 'Third Report on Non State Actors', Washington Conference (2014), at 12. The report also mentioned the tort claims brought against corporations under the U.S. Alien Tort Claims Act for violations for the law of nations. The authors also referred to those specific cases in which private actors might incur international tortious liability, in the fields of environmental law, energy law, space law and the law of the sea. See, INTERNATIONAL LAW ASSOCIATION, Committee on Non State Actors, 'Third Report on Non State Actors', Washington Conference (2014), at 15-17.

[82] Christian Walter, 'Subjects of International Law', IX THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 634, at 639 (2012).

[83] DOMINIQUE CARREAU AND FABRIZIO MARRELLA, DROIT INTERNATIONAL (2012), at 66-67.

[84] Abdullah Al Farouque, 'Renegotiation and Adaptation of Petroleum Contracts: The Quest for Equilibrium and Stability', 9(2) JOURNAL OF WORLD INVESTMENT AND TRADE 113 (2008); Abdullah Al Farouque, 'The rationale and instrumentalities for stability in long-term State contracts. The context of petroleum contracts', 7(1) JOURNAL OF WORLD INVESTMENT AND TRADE 85 (2006); Piero Bernardini, 'Stabilization and Adaptation in Oil and Gas Investments', 1(1) JOURNAL OF WORLD ENERGY LAW AND BUSINESS 98 (2008).

[85] Charles Leben, 'La théorie du contrat d'état et l'évolution du droit international des investissements', 302 RECUEIL DES COURS 265, at 269-273 (2003).

an illustration of the fact that private power can be used to formulate norms with claims to be principles of international law. [86]

In the last decades, even though transnational corporations have significantly contributed to the economic and technological development of the host-States, some developing countries have often taken a critical view on the corporations' activities on their territory. Among the concerns of host countries (especially those with weak authorities) are: true or apparent imbalances of power, undue political influence in host countries, and insufficient regard for environmental interests or labor and human rights standards.[87]

The debate between transnational corporations and host-States was already well developed in the 1960s and 1970s. In particular, developing countries challenged the concept of inviolability of property, rights and interests of foreign investors, and exerted pressure on the United Nations, to obtain a new global regulation on the conduct of multinational enterprises. In particular, developing countries did not believe that the existence of the multinational enterprises could bring benefit to their economic and social development. Essentially it was argued that these entities were "l'instrument privilégié de l'exploitation économique et de la domination politique"[88].

As a result, the General Assembly of the United Nations adopted three documents: Resolution 1803 (XVII) of 14 December 1962 on 'Permanent Sovereignty over Natural Resources', Resolutions 3201 and 3202 (S-VI) of 1 May 1974 containing the 'Declaration and Programme of Action on the Establishment of a New International Economic Order' and, finally, Resolution 3281 (XXIX) of 12 December 1974, which contains the 'Charter of Economic Rights and Duties of States'[89].

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[86] MUTHUCUMARASWAMY SORNARAJAH, THE INVESTMENT LAW ON FOREIGN INVESTMENT (2012), at 62.

[87] MATTHIAS HERDEGEN, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW (2013), at 39-40.

[88] DOMINIQUE CARREAU AND PATRICK JUILLARD, DROIT INTERNATIONAL ECONOMIQUE (2010), at 40.

[89] Resolution 1803 of 14 December 1962 on 'Permanent Sovereignty over Natural Resources' was passed by the General Assembly by 87 votes to 2, with 12 abstentions. This Resolution was considered as a good compromise between developed countries and developing countries and it still reflects principles of current international customary law, in particular in matters relating to expropriation and nationalization. The main principles that are incorporated in this document are three. First of all, the establishment of an investment and every capital and activity

At the same time, the international community started negotiating codes of conduct for multinational corporations.

In the early 1970s, the United Nations Economic and Social Council requested that the Secretary General create a commission group to study the impact of transnational corporations on development processes and international relations. The UN created the Commission on Transnational Corporations in 1973, with the goal of formulating a corporate code of conduct for TNCs. The Commission's work continued into the early 1990s, but the group was ultimately unable to adopt an agreeable code due to various disagreements between developed and developing countries. The group was dissolved in 1994.[90]

In August 1998, the UN Sub-Commission on the Promotion and Protection of Human Rights established a Working Group on Transnational Corporations. The Working Group similarly attempted to create standards for corporations' human rights obligations. By 2003 they completed the final draft of the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'.[91] While the Norms received support

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relating to this investment are subject to the authorization of the host-State, which exercises the permanent sovereignty over national resources. Secondly, the host-State can adopt measures of expropriation and nationalization of foreign investments in its territory. Finally, Resolution establishes that once an investment is accepted by the host-State, every activity relating to the investment is subject to the rules of the contract instituting the investment, as well as to both domestic law and international law.

Resolutions 3201 and 3202 (S-VI) of 1 May 1974 containing the 'Declaration and Programme of Action on the Establishment of a New International Economic Order' were adopted by the General Assembly without vote. Even though the Resolutions contain fundamental economic and political concepts (e.g. Article 4 of Res. 3201 highlights the importance of the participation of all member States of the international community to regulating the global economic issues), they are not considered as successful acts, because of the strong opposition of the most Western countries and the weak collaboration among supporting countries.

Resolution 3281 (XXIX) of 12 December 1974 containing the 'Charter of Economic Rights and Duties of States' was adopted by the General Assembly by 120 votes to 6 with 10 abstentions. This Resolution was subject to the opposition of Western countries, notably because Article 2, which deals with foreign investments and transnational corporations, incorporated the requests of the developing countries. Article 2 establishes that every country has the right of setting up its legislation over foreign investments. Moreover, the same provision provides that the host-State is entitled to impose or enforce a variety of different kinds of performance requirements in connection with the establishment of the investment. Finally, in opposition to Resolution 1803, Article 2 does not refer to international law. Hence, according to this provision, treatment and protection of foreign investments are subject to the terms of the investment contract and to the rules of the domestic law.

The text of three Resolutions is available at: http://www.un.org/documents /resga.htm.

[90] http://unctc.unctad.org/aspx/index.aspx.

[91] UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

from some NGOs, the document encountered significant opposition from the business sector, and the Commission on Human Rights ultimately determined in 2004 that the framework had no legal standing.[92]

In an attempt to overcome the divisive debate regarding the human rights responsibilities of businesses, UN Secretary General Kofi Annan appointed Harvard professor John Ruggie as the UN Special Representative for Business and Human Rights in 2005.[93] Three years later, Ruggie presented the United Nations Human Rights Council with the 'Protect, Respect and Remedy' framework as a conceptual way to anchor the business and human rights debates.[94] In a 2008 resolution, the Human Rights Council welcomed Ruggie's report and extended his mandate for an additional three years. The Human Rights Council asked Ruggie to provide concrete recommendations on how the state could prevent abuses by the private sector, to elaborate on the scope of corporate responsibility, and to explore options for effective remedies available to those whose human rights are impacted by corporate activities.[95]

Over the next three years, Ruggie held extensive consultations with stakeholder groups including governments, businesses, and NGOs. Ruggie intended to create "an authoritative focal point around which actors' expectations could converge—a framework that clarified the relevant actors' responsibilities, and provided the foundation which thinking and action could build over time".[96] Ruggie's work resulted in the UN Guiding Principles on Business and Human Rights, which he presented to the Human Rights Council in June 2011. Ruggie stated,

> The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for states and businesses; integrating them within a single, logically coherent and comprehensive template; and

[92] http://business-humanrights.org/en/united-nations-sub-commission-norms-on-business-human-rights-explanatory-materials.

[93] UN Doc E/CN.4/RES/2005/69.

[94] http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx.

[95] UN Doc A/HRC/RES/8/7.

[96] U.N. HUMAN RIGHTS COUNCIL, 'The UN Protect, Respect, and Remedy Framework for Business and Human Rights' (September 2010), available at http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf.

> identifying where the current regime falls short and how it could be improved.[97]

The Human Rights Council unanimously endorsed the Guiding Principles, thereby creating the first global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity.

Another relevant attempt is the United Nations Global Compact, an initiative of Secretary-General Kofi Annan, first proposed at the World Economic Forum in Davos in 1999. The goal to promote 'responsible' global capitalism; that is, to promote the idea, through an ongoing process of dialogue and discourse, that TNCs can do well by doing good. The Global Compact asks companies to embrace, support, and promote a set of ten universal principles relating to human rights, labor, the environment, and anti-corruption, and to partner with the United Nations.[98]

Since its official launch on 26 July 2000, the initiative has grown to more than 12,000 participants, including over 8,000 businesses in approximately 145 countries around the world. The Global Compact involves all relevant social actors: companies, whose actions it seeks to influence; governments, labor, civil society organizations, and the United Nations as an authoritative convener and facilitator.[99]

Beyond the UN initiatives, common rules on the TNCs' conduct were established by the Guidelines for Multinational Enterprises project. This code was adopted by OECD in 1976 and has been subjected to several reviews, in 1979, 1984, 1991, 2000 and finally in 2011.[100] Since no OECD Member State has annexed the Guidelines in its legal system, the Guidelines are not binding under international law nor under national law. It is interesting to notice that, contrary to the primary aim of the UN code, the Guidelines want to conciliate the TNCs' activity with the objectives of the political economy of the host State. This is mainly because the idea of the

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97 UN Doc A/HRC/17/31, ¶ 14.

98 https://www.unglobalcompact.org/issues/human_rights/the_un_srsg_and_the_un_global_compact.html.

99 https://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html.

100 http://www.oecd.org/corporate/mne/.

project originated from the position of the TNCs' home countries, which wanted to contrast the oppositions of developing countries to the TNCs' activities[101].

Apart from these initiatives involving or sponsored by public actors, new soft-law instruments have appeared on the scene: the corporate social responsibility programmes. These voluntary codes have been adopted by many transnational corporations to respond to pressure from consumers, non-governmental organisations, shareholders, and other stakeholders to improve their social and environmental performance. Thus, corporate social responsibility has been briefly defined as a discipline that "explores the idea that social obligations do, may, or should attach to corporations".[102]

The OECD defined corporate social responsibility in the following terms:

> Corporate responsibility involves the search for an effective "fit" between businesses and the societies in which they operate. The notion of "fit" recognises the mutual dependence of business and society – a business sector cannot prosper if the society in which it operates is failing and a failing business sector inevitably detracts from general wellbeing. "Corporate responsibility" refers to the actions taken by businesses to nurture and enhance this symbiotic relationship.[103]

Similarly, the International Chamber of Commerce affirmed that "corporate responsibility (CR) is the voluntary commitment by business to manage its activities in a responsible way. More broadly, CR includes the efforts by business to contribute to the society in which it operates".[104]

Corporate social responsibility can originate from a single multinational corporation or from network of different entities. A relevant example is the Extractive Industry Transparency Initiative (EITI) that focuses on enhanced participation, transparency and accountability in the interest of sustainable development Such an initiative groups companies, government and NGOs

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[101] DOMINIQUE CARREAU AND PATRICK JUILLARD, DROIT INTERNATIONAL ECONOMIQUE (2010), at 46-47.

[102] KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW. EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL (2013), at 217.

[103] OECD, 'Corporate Responsibility: Private Initiatives and Public Goals' (2001), at 7, available at www.oecd.org.

[104] INTERNATIONAL CHAMBER OF COMMERCE, 'The Role of the United Nations in Promoting Corporate Responsibility', 21 June 2007, at 1, available at www.iccwbo.org.

to improve the commitment of the transnational corporations to respect human rights and environmental standards.[105]

Despite the relevance of these private codes of conduct, their efficacy is often challenged, since they are soft-law instruments traditionally non-enforced and non-applied by courts and arbitral tribunals. However, in the sections below, we will examine whether corporate social responsibility can be a source of transnational public policy.

[105] Adefolake Adeyeye, 'Corporate Responsibility in International Law: Which Way to Go?', 11 SINGAPORE YEAR BOOK OF INTERNATIONAL LAW 141, at 147 (2007).

CHAPTER 2

INTERNATIONAL ARBITRATION: A TRANSNATIONAL AUTONOMOUS LEGAL ORDER

International arbitration is not only a mechanism to settle transnational private economic disputes. From being purely contractual, it has become over the years a transnational system of justice, an autonomous legal order. International arbitration is autonomous externally, from the national legal orders, and internally, because it is governed by specific rules of law that are specific to its legal order. Rights and obligations are granted and imposed to all parties involved in international arbitration proceedings; arbitral tribunals administer justice and issue an award that is binding on the parties.

However, although the main features defining an autonomous legal order are present in international arbitration, there are stills some elements that might prevent its completeness. Confidentiality, the lack of a doctrine of precedents and the exponential internal fragmentation without an institutional hierarchy (e.g. there might be as many interpretations of the same legal standard as there are arbitral tribunals deciding on the matter) can be considered as the most evident 'obstacles' to the completeness of international arbitration as a legal order.

The nature of arbitration and the limits of the arbitral legal order are analyzed in this chapter.

A. The definition of the legal nature of international arbitration

Defining the legal nature of international arbitration has originated a long debate among the scholars of the field. Four main theories evolved throughout the years.[106]

The classical contractual theory was based on a persuasive unity of an arbitration agreement and an arbitration award: for the proponents of the contractual theory, an arbitral award was nothing more than a contract. An agreement between the parties was said to be the sole source of arbitrators' authority and arbitrators were deemed to act as parties' agents.

[106] JULIAN D. M. LEW, LOUKAS A. MISTELIS AND STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (2003), at 72-82; FRANK-BERND WEIGAND, PRACTIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION (2009), at 2-4.

In contrast, the jurisdictional theory, also known as the judgment theory, emphasized the task of an arbitrator, which was considered to be similar to the one of a judge. Consequently, the proponents of the jurisdictional theory asserted that an arbitral award should be treaty as an act of jurisdiction, as a judgment. Hence, for them, the source of the arbitrators' authority is the State, which delegates its powers to the arbitrators. An example of this theory is the approach that Italian courts have undertaken in the last years. In 2013, the Italian Corte di Cassazione stated that, as for domestic arbitration, international arbitration is also a jurisdictional mechanism to solve disputes:

> […] affinché il ricorso all'arbitrato possa considerarsi legittimo, occorre: a) che la deroga consacrata da volontà concorde delle parti su diritti disponibili opera nei confronti di una controversia conoscibile dal giudice ordinario; b) che l'arbitrato sia disciplinato da norme di legge che assicurino idonee garanzie processuali, non soltanto sul piano dell'imparzialità dell'organo giudicante, ma anche del rispetto del contradditorio; c) la possibilità di impugnativa (nei limiti in cui l'ordinamento processuale tipizza fattispecie di nullità) davanti agli organi della giurisdizione ordinaria.
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> Tali caratteri appaiono, per l'arbitrato rituale, tali da integrare i requisiti (attitudine dell'organo, ancorché diverso da una struttura giudiziaria assicurando alle parti una "soluzione giurisdizionale della controversia") richiesti dalla Corte Europea dei Diritti dell'Uomo per rispettare il § 6 della Convenzione di Roma del 5 novembre 1950.
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> Nel caso dell'art. 2652 c.c., la disciplina sulla trascrizione si muove, non solo sul piano degli effetti sostanziali della domanda giudiziale, ma anche su quello degli effetti del giudicato sui rapporti dipendenti, e verso i terzi. L'attribuzione al lodo di questa efficacia, non limitata alle parti, ma estesa ai terzi, non può che postulare la sua equiparazione a una sentenza dei giudici dello Stato, e, in ogni caso, ad una pronuncia giurisdizionale.
>
> […] l'articolo 816-quinquies che statuisce sull'ammissibilità dell'intervento volontario di terzi nel giudizio arbitrale e sull'applicabilità allo stesso dell'art. 11 cod. proc. civ. in tema di successione a titolo particolare nel diritto controverso e l'art. 819 bis c.p.c., al comma 1 n. 3, che prevede la possibilità per gli arbitri di rimettere alla Corte Costituzionale una questione di legittimità costituzionale, ai sensi dell'art. 23 l. 11.3.1953, n. 87. Ciò denota che gli arbitri esercitano una funzione giurisdizionale.
>
> […] una volta affermata in via generale la natura giurisdizionale dell'arbitrato rituale […] ciò va affermato anche per l'arbitrato estero, per la cui natura giurisdizionale militano –anzi– ulteriori elementi, con

> conseguente ammissibilità del regolamento preventivo di giurisdizione. (emphasis added)
>
> Anzitutto va osservato che l'oggetto della questione sottoponibile mediante regolamento di giurisdizione non "è se la controversia debba essere decisa dal giudice italiano o da quello straniero". Al contrario la questione è sempre quella dei limiti della giurisdizione italiana.
>
> […] l'art. 4 c. 2, l. n. 218/1995 espressamente dispone che la "*giurisdizione italiana può essere convenzionalmente derogata a favore di un giudice straniero o di un arbitrato estero se la deroga è provata per iscritto e la causa verte su diritti disponibili*".[107]

The same finding was confirmed by the Italian Constitutional Court that stated that arbitration may substitute the ordinary public justice considering that arbitration derives from ordinary jurisdiction some mechanism to achieve the same result of a *dictum* by a state judge:

> […] l'arbitrato costituisce un procedimento previsto e disciplinato dal codice di procedura civile per l'applicazione obiettiva del diritto nel caso concreto, ai fini della risoluzione di una controversia, con le garanzie di contradditorio e di imparzialità tipiche della giurisdizione civile ordinaria. Sotto l'aspetto considerato, il giudizio arbitrale non si differenzia da quello che si svolge davanti agli organi statali della giurisdizione, anche per quanto riguarda la ricerca e l'interpretazione delle norme applicabili alla fattispecie » […] il giudizio degli arbitri « è potenzialmente fungibile con quello degli organi della giurisdizione » (sentenza n. 376 del 2001).
>
> […]l'arbitrato rituale resta un fenomeno che comporta una rinuncia alla giurisdizione pubblica, esso mutua da quest'ultima alcuni meccanismi al fine di pervenire ad un risultato di efficacia sostanzialmente analoga a quella del dictum del giudice statale.
>
> […] Anche dall'esame della disciplina sostanziale emerge che, sotto molti aspetti, l'ordinamento attribuisce alla promozione del giudizio arbitrale conseguenze analoghe a quelle dell'instaurazione della cause davanti al giudice.[108]

The mixed theory arose from the critique of the two theories outlines above. It recognized that, although arbitration derived its effectiveness from an agreement between the parties, it had jurisdictional nature since the arbitrators applied the rules of procedure. Yet, arbitrators did

[107] *Luxury Goods International SA v Swaili Diffusioni S.R.L. in Liquidazione*, Corte di Cassazione, Italy, 8 October 2013.

[108] Corte Costituzionale, Italy, 16 July 2013.

neither perform a public function, not was the arbitral award merely a contract. Rather, it was hybrid in its nature.

Finally, the autonomous theory evolved considerably later. The theory dismissed all the traditional approaches and moved away from any attempts to describe the nature of arbitration using the classic concepts of contract and jurisdiction. Instead, the autonomous theory was based on the proposition that the character of arbitration could, in fact and in law, be determined by looking at its use and purpose. Moreover, it was expressed that arbitration could eventually operate outside the constraints of positive law or national legal systems. This last theory will be analyzed in detail in the following paragraph.

B. The establishment of an autonomous arbitral legal order. International arbitration as a transnational system of justice

In 1982, an author affirmed that international commercial arbitration was not yet a system and proposed to define it as a "system in *statu nascendi*".[109]

A few decades later, the same assertion is not valid anymore. International commercial arbitration and, more broadly, international arbitration, has been often described as an autonomous legal system different from the national legal systems as well as from the inter-State legal system.[110]

For instance, in relation to the entry into force of the 13 January 2011 Decree on the New French on Arbitration Law, the Honorary Chamber President of the Cour de Cassation declared that

> The Decree of 13 January 2011 optimizes and confirms the French view of arbitration law, which is essentially based on trust in arbitration as an institution and the recognition of the existence of a truly autonomous legal

[109] Jerzy Jakubowski, *Reflections on the Philosophy of International Commercial Arbitration and Conciliation, in* THE ART OF ARBITRATION. ESSAYS ON INTERNATIONAL ARBITRATION. LIBER AMICORUM PIETER SANDERS. 12 SEPTEMBER 1912-1982 175, at 185 (J. C. Schultsz and A. J. van den Berg eds., 1982).

[110] Emmanuel Gaillard, 'International Arbitration as a Transnational System of Justice', 16 ICCA CONGRESS SERIES 66, at 66 (2012). See also Emmanuel Gaillard, *Three Philosophies of International Arbitration, in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION. THE FORDHAM PAPERS 2009 305, at 307 (Arthur W. Rovine ed., 2010).

> order – especially insofar as international arbitration is concerned.[111] (emphasis added)

Judge Dominique Hascher –who underlined that the legal system of international arbitration is completely distinct from the national legal orders and the arbitral award is an international decision– anticipated the same approach some years before:

> The French concept of arbitration is based on the premise that there is an arbitral legal order, which is distinct from the legal order of individual States, including that of the seat of the arbitration or that of the States in which the award is to be enforced. It is this arbitral legal order –and no national legal order– that confers its juridicity to arbitration. The award is a decision of international justice and is *res judicata*.[112] (emphasis added)

The existence of an arbitral legal order should not be surprising. As a matter of fact, if a legal order is defined as "un ensemble structuré de normes revêtant tous les degrés d'impérativité et susceptibles de répondre à l'ensemble des questions relevant de la matière qu'il prétend régir; capable de concevoir ses sources; possédant des sujets et des organes susceptibles d'assurer la mise en œuvre des normes qu'il génère; et satisfaisant à une condition minimale d'effectivité"[113], one can easily affirm that an arbitral legal order does exist. If *esse est percipi*, then the arbitral legal order exists because it is perceived both in theory and in practice by the majority of arbitrators.[114]

At the beginning of the 20th century, Thomas Edward Scrutton defined the features a good legal system should have

> […] –at least four– attributes. Its judges should be incorruptible and impartial: that is one. The law they administer should be accurate, and founded on recognized principles: that is two. Justice or judgments should be given quickly: that is three. And justice should be accessible to citizens

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[111] Jean-Pierre Ancel, *Increasing the Efficiency of Arbitration in France*, *in* THE 13 JANUARY 2011 DEGREE. THE NEW FRENCH ARBITRATION LAW 9, at 9 (Paris - The Home of International Arbitration ed., 2011).

[112] Dominique Hascher, *France*, *in* IAI SERIES ON INTERNATIONAL ARBITRATION NO. 6. THE REVIEW OF INTERNATIONAL ARBITRAL AWARDS 97, at 97 (E. Gaillard ed., 2010).

[113] Emmanuel Gaillard, 'L'ordre juridique arbitral: réalité, utilité, spécificité', 55 MCGILL LAW JOURNAL – REVUE DE DROIT DE MCGILL 891, at 896 (2010).

[114] Emmanuel Gaillard, 'L'ordre juridique arbitral: réalité, utilité, spécificité', 55 MCGILL LAW JOURNAL – REVUE DE DROIT DE MCGILL 891, at 893 (2010).

> cheaply: and that is four. And if you find a system which combines there four attributes, I think you have got a good legal system.[115]

Does international arbitration fulfill these requirements? The answer seems to be positive. First, all international arbitral institutions' rules[116] as well as national arbitration acts and statutes[117] impose, with different wordings but similar contents, the arbitrators to be impartial and independent. Such condition is applicable both at the time of accepting their appointment and during the entire arbitration proceeding until the final award has been rendered. The relevance of these independence and impartiality standards has been emphasized by several soft-law instruments, such as the IBA Guidelines on Conflicts of Interest in International Arbitration.[118] Although not legally binding, these recommendations have been effectively used by several commercial and investment arbitral tribunals as well as by national courts.[119]

Second, the transnational rules applied by arbitrators in commercial disputes can be defined as a complete set of rules whose character is as mandatory as the rules in national legal orders. Moreover, the arbitral legal order is equipped of its own sources, actors and institutional bodies, typical elements of an autonomous legal order. In particular, it is often asserted that international arbitrators have become the judges of international commerce.[120]

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[115] Thomas Edward Scrutton, 'The Work of the Commercial Courts', 1 THE CAMBRIDGE LAW JOURNAL 6, at 7 (1921).

[116] See, for instance, Rules of Arbitration of the International Chamber of Commerce (2012), Article 11; Arbitration Rules of the London Court of International Arbitration (2014), Article 5; Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution (2012), Article 9; Arbitration Rules of the Chamber of Arbitration of Milan (2010), Article 18; Arbitration Rules of the Stockholm Chamber of Commerce (2010), Article 14; UNCITRAL Arbitration Rules (2010), Article 11; ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (2006), Article 14(1); ICSID Arbitration Rules (2006), Article 6.2.

[117] Decree No. 2011-48 of 13 January 2011 on the New French Law on Arbitration, Article 1456; English Arbitration Act 1996, Section 24.1.a; UNCITRAL Model Law on International Commercial Arbitration (2006), Article 12; US Federal Arbitration Act, Section 24.1.a.

[118] INTERNATIONAL BAR ASSOCIATION, Guidelines on Conflicts of Interest in International Arbitration, adopted on 23 October 2014.

[119] See, for instance, The IBA Conflict of Interest Subcommittee, a Subcommittee of the IBA Arbitration Committee, 'The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009', 4(1) DISPUTE RESOLUTION INTERNATIONAL 5 (2010); see also, SAM LUTTRELL, BIAS CHALLENGES IN INTERNATIONAL ARBITRATION: THE NEED FOR A 'REAL DANGER' TEST (2009), at 195 et seq.

[120] Emmanuel Gaillard, 'L'ordre juridique arbitral: réalité, utilité, spécificité', 55 MCGILL LAW JOURNAL – REVUE DE DROIT DE MCGILL 891, at 898 (2010).

As regards the third and fourth requirements, even though some scholars state that international arbitration would be potentially faster and less costly than litigation,[121] "on balance, international arbitration does not necessarily have either dramatic speed and cost advantages or disadvantages as compared to national court proceedings". [122] However, multinational corporations as well as States still opt for international arbitration when international commercial or investment disputes arise. This is mostly due to the fact that these disputes are usually complex and national courts are often unprepared to deal with many claims brought by the parties. My understanding is that if the same complex dispute is brought before a national court that court would probably take much longer time to reach a final judgment than an arbitral tribunal. In 2000, the Supreme Court of Cyprus stated:

> The length of time required for an action within the state judicial system, the use of time-consuming judicial means which add to the delay, the familiarity of arbitrators with their subject matter, the rigidity of regular judicial means, are some of the reasons for which the institution of arbitration has flourished and been established for disputes of various natures.[123]

Moreover, when a dispute involves political issues, as it is the case in investor-to-State proceedings, national courts might be subject to political pressure: that would create further issues and make the proceedings longer and less efficient.

A further element should be added to the previous list: the efficiency of the system in applying sanctions if the losing party does not comply with the terms of the final awards. As Emmanuel Gaillard stated, "l'effectivité de l'ordre juridique arbitral est, pour sa part, difficilement contestable. Si l'on considère que 90% des sentences arbitrales font l'objet d'une exécution spontanée et que, peu ou prou, 90% des 10% restants se voient maintenues ou assorties d'une exécution forcée par les juridictions étatiques appelées à en connaître, on mesure à quel

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[121] RICHARD GARNETT, HENRY GABRIEL, JEFF WAINCYMER AND JUDD EPSTEIN, A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION (2000), at 12-13.

[122] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION. VOL. I (2014), at 88.

[123] *Attorney General of the Republic of Kenya v Bank für Arbeit und Wirtschaft AG*, Supreme Court, Cyprus, 28 April 1999.

point l'ordre juridique arbitral n'a rien à envier, en termes d'effectivité, aux ordres juridiques nationaux".[124]

However, even though international arbitration is increasingly recognized as a system, there are still critics to the transnational approach that considers international arbitration as a mechanism transcending national legal orders. These critics usually focus on the relationship between arbitral tribunals and domestic courts in the arbitral process and, more fundamentally, on the underlying source of legitimacy and validity of international arbitration.[125]

In order to understand the basics of these different views, it is necessary to introduce briefly the different philosophical approaches to international arbitration. First, it is important to notice that arbitration is not a modern mechanism to solve disputes: it is older than State courts and it can be found in ancient laws, both Greek law and Roman law.[126] Second, arbitration is an extremely intercultural phenomenon and an universal human need and desire for an equitable solution of differences between people by an impartial person having the confidence of and authority from these people.[127] Third, arbitration is an evolutionary institution adapting itself and its legal principles to the needs of a community depending on its changing circumstances and requirements.[128] A clear example of this flexibility is the case of international commercial arbitration that applies and creates universal principles as a response to the universal challenges of the transnational economic order.

As an eminent French professor and expert of international arbitration stated

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[124] Emmanuel Gaillard, 'L'ordre juridique arbitral: réalité, utilité, spécificité', 55 MCGILL LAW JOURNAL – REVUE DE DROIT DE MCGILL 891, at 899 (2010).

[125] Emmanuel Gaillard, 'Transcending National Legal Orders for International Arbitration', 17 ICCA CONGRESS SERIES 371, at 371 (2013).

[126] Jerzy Jakubowski, *Reflections on the Philosophy of International Commercial Arbitration and Conciliation*, *in* THE ART OF ARBITRATION. ESSAYS ON INTERNATIONAL ARBITRATION. LIBER AMICORUM PIETER SANDERS. 12 SEPTEMBER 1912-1982 175, at 175 (J. C. Schultsz and A. J. Van den Berg eds., 1982).

[127] Jerzy Jakubowski, *Reflections on the Philosophy of International Commercial Arbitration and Conciliation*, *in* THE ART OF ARBITRATION. ESSAYS ON INTERNATIONAL ARBITRATION. LIBER AMICORUM PIETER SANDERS. 12 SEPTEMBER 1912-1982 175, at 176 (J. C. Schultsz and A. J. Van den Berg eds., 1982).

[128] Jerzy Jakubowski, *Reflections on the Philosophy of International Commercial Arbitration and Conciliation*, *in* THE ART OF ARBITRATION. ESSAYS ON INTERNATIONAL ARBITRATION. LIBER AMICORUM PIETER SANDERS. 12 SEPTEMBER 1912-1982 175 at 177 (J. C. Schultsz and A. J. Van den Berg eds., 1982).

> L'arbitrage commercial international illustre parfaitement le déroulement d'un tel processus d'acculturation : par osmose, les idées, les pratiques, les jurisprudences, avant même les législations nationales et les conventions internationales, ont progressivement convergé vers une reconnaissance générale de l'arbitrage comme mode principal de règlement des différends du commerce international et vers un consensus sur des principes, souvent très proches, d'organisation et de fonctionnement […] En définitive, l'arbitrage commercial international, par son esprit d'ouverture comparatiste, très proche de celui qui anime le droit international privé moderne, et par sa généralisation de son usage sur la base de principes assez largement acceptés d'organisation et de fonctionnement, tend de plus en plus à l'universalité, qui ne débouche d'ailleurs pas nécessairement sur l'uniformisation […] l'objectif est d'offrir un arbitrage universel, ce qui ne signifie pas qu'il ne peut être recherché que dans un comportement culturel et un système juridique identiques : l'universalité réside dans la reconnaissance par tous de quelques principes et d'une méthode.[129] (emphasis added)
>
> […] On peut dire que l'arbitrage international, dans sa vocation et son fonctionnement, exprime fondamentalement les valeurs de l'humanisme, encore que, sous la pression de la technique et de l'économie, il affirme aujourd'hui à un titre égal son caractère mécaniste. Il répond parfaitement, dans une perspective post-moderniste, aux exigences du principe de subsidiarité, ressurgi aujourd'hui des profondeurs de la culture européenne après des siècles d'exaltation de la souveraineté de l'Etat.[130] (emphasis added)

As noted above, legal theories or philosophies of international arbitration exist. The most relevant work on legal theory in international arbitration of the last years is surely the work of Professor Emmanuel Gaillard.[131] Gaillard analyses the different "visions, mental constructs, or representations that reflect what their proponents consider to be the source of legitimacy of international arbitration, namely the source of the arbitrators' power to adjudicate".[132]

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[129] Bruno Oppetit, 'Philosophie de l'arbitrage commercial international', 120(4) JOURNAL DU DROIT INTERNATIONAL 811, at 815-817 (1993).

[130] Bruno Oppetit, 'Philosophie de l'arbitrage commercial international', 120(4) JOURNAL DU DROIT INTERNATIONAL 811, at 827 (1993).

[131] EMMANUEL GAILLARD, ASPECTS PHILOSOPHIQUES DU DROIT DE L'ARBITRAGE INTERNATIONAL (2008). See also the English version, EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010).

[132] Emmanuel Gaillard, 'Transcending National Legal Orders for International Arbitration', 17 ICCA CONGRESS SERIES 371, at 372 (2013). See also Emmanuel Gaillard, 'International Arbitration as a Transnational System of Justice', 16 ICCA CONGRESS SERIES 66, at 67 (2012). For a definition of what Professor Gaillard means by 'representations' in international arbitration, see Emmanuel Gaillard, 'The Representations of International Arbitration', 1(1) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 1 (2011). In contrast with Gaillard's

The first representation that accounts for international arbitration in a comprehensive manner simply assimilates the arbitrator to a national judge exercising his or her function within a single national legal order, that of the seat of arbitration. In this conception the seat is understood as a forum.[133]

The second representation of international arbitration considers that the source of juridicity of an award does not derive from a single legal order –that of the seat– but rather from all legal orders that are willing, under certain conditions, to recognize the effectiveness of the award. In this multilocal representation, contrary to the monolocal approach, the law of the seat, while not completely disregarded, is considered to be just one legal order among others. It is no longer viewed as the exclusive source of the arbitrators' power to adjudicate. All laws that are likely to have a connection with a given arbitration are considered as having an equal say with regard to the validity of the award. The law of the country or the countries where enforcement is sought has indeed as much entitlement in this respect as that of the State in which the arbitration took place.[134]

The third representation of international arbitration is that which accepts the idea that the juridicity of arbitration is rooted in a distinct, transnational legal order, that could be labeled as the arbitral legal order, and not in a national legal system, be it that of the country of the seat or that of the place or places of enforcement. This representation corresponds to the international arbitrators' strong perception that they do not administer justice on behalf of any given State, but that they nonetheless play a judicial role for the benefit of the international community. In a world in which international transactions are increasingly common and where, as a result, there are ever more States in which enforcement of arbitral awards may be sought, the idea that a

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representations of international arbitration, Jan Paulsson proposed 'four competing propositions' [JAN PAULSSON, THE IDEA OF ARBITRATION (2014), at 30]:

> The first is that any arbitration is necessarily national; it lives or dies according to the law of the place of arbitration. This might be called *territorial* thesis. The second is that arbitration may be given effect by more than one legal order, none of them inevitably essential. This is the *pluralistic* thesis. The third is that arbitration is the product of *an autonomous legal order accepted as such by arbitrators and judges*. The forth is that arbitration may be effective under *arrangements that do not depend on national law or judges at all*. Whether such arrangements qualify as legal ordering may be debated.

[133] EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010), at 15.

[134] EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010), at 24-25.

single legal system, because it is that of the seat, can govern the binding force of international arbitration seems increasingly anachronistic. Arbitrators cannot be assimilated to the courts of the country of the seat of arbitration, not even through a legal fiction based on the hypothetical will of the parties.[135] The consequence of this transnational approach is that the legal basis of international arbitration is not to be found in national legislations nor in public international law norms, but in a third system: the arbitral legal order.[136]

Only the third vision, which truly constitutes the 'transnational' representation, accepts that international arbitration transcends national legal orders and that it constitutes a transnational system of justice sometimes labeled as the 'arbitral legal order'. According to this representation, national legal orders are not excluded from this transnational legal order, but the arbitral process no longer hinges on the particularities of the national legal order at the seat of the arbitration or elsewhere. Instead, this vision recognizes that the validity and legitimacy of international arbitration is rooted in the collectivity of national legal orders, as opposed to one or even several individual national legal systems. In other words, the arbitral legal order incorporates and reflects the trends stemming from national legal systems.[137]

This is the source of autonomy of the arbitral legal order. Such autonomy has two sides: international arbitration is autonomous externally, from the national legal orders, and internally, because it is governed by specific rules of law that are specific to its legal order.[138]

Transcending national legal orders is however not synonymous with the creation of an anational legal order, which would be characterized by a rejection of, or opposition to, national legal systems. To the contrary, the transnational view of international arbitration is a vision that embraces rather than rejects the laws derived from national legal systems. Thus, the transnational

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[135] EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010), at 35-36.

[136] Pierre Lalive, *L'ordre public transnational et l'arbitre international*, *in* LIBER FAUSTO POCAR VOL. II. NUOVI STRUMENTI DEL DIRITTO INTERNAZIONALE PRIVATO 599, at 602 (G. Venturini and S. Bariatti eds., 2010).

[137] Emmanuel Gaillard, 'Transcending National Legal Orders for International Arbitration', 17 ICCA CONGRESS SERIES 371, at 371 (2013).

[138] Philippe Fouchard, 'L'Autonomie de l'arbitrage commercial international', 1965(1) REVUE DE L'ARBITRAGE 99, at 102.

vision recognizes an arbitral legal order that is founded on national legal systems, while at the same time transcending any individual national legal order.[139]

This transnational representation no longer considers each State individually but rather focuses on the trends arising from the normative activity of the community of States. The main difference between the latter two representations is that the monolocal approach considers the plurality of States, while the transnational approach contemplates the collectivity of States.[140]

To summarize in a few lines what the approach of this representation is, we can use the words of Professor Gaillard who affirmed that

> Those who believe that, in a world of diversity, where the nationality of the parties, the place of the arbitration, the nationality of the arbitrators, and the applicable law are routinely different, and, as such, there is no compelling reason, other than a misplaced quest for an improbable harmony of solutions, to give any individual State, including that of the seat of arbitration, the sole authority to regulate the arbitral process and the ensuing award, will not mechanically accept the impact of an anti-arbitration injunction. They will recognize the arbitrators' freedom to apply transnational procedural rules, transnational choice of law rules, or even transnational substantial rules. They will disregard rules that offend transnational public policy, even where those rules have been selected by the parties of form part of the law of the seat of the arbitration. They will also, where appropriate, recognize an award that has been set aside in the so-called country of origin for idiosyncratic reasons, through a judgment that need not be given an absolute effect. As no doubt you will have gathered, my own preference goes to this truly transnational approach, which best corresponds to our globalized world.[141]

C. A foreign arbitral award is a decision of international justice

As noted in the previous sections, this transnational approach to international arbitration has been facilitated by the pro-arbitration interpretation that domestic courts of most jurisdictions have adopted in relation to the recognition and enforcement of foreign arbitral awards. It does not surprise that national courts have also confirmed the existence of an international arbitral legal

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[139] Emmanuel Gaillard, 'Transcending National Legal Orders for International Arbitration', 17 ICCA CONGRESS SERIES 371, at 371 (2013).

[140] EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010), at 37.

[141] Emmanuel Gaillard, *Three Philosophies of International Arbitration*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION. THE FORDHAM PAPERS 2009 305, at 308-309 (Arthur W. Rovine ed., 2010).

order, fully distinct from the national orders. Two decisions of the French Cour de cassation are worth mentioning.

In *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV)*[142], a French company (Omnium de Traitement et de Valorisation – OTV) entrusted an English company (Hilmarton) with the task of providing advice and coordination for a bid to obtain and perform a contract for works in Algeria. Hilmarton relied on the International Commerce of Chamber (ICC) arbitration agreement in order to obtain payment of the remaining balance of its fees. The award rendered in Geneva on 19 August 1988 dismissed this claim dismissed this claim. The award was declared enforceable in France even through it had been set aside in Switzerland. Himarton challenged the decision of the Cour d'appel de Paris which uphelp the enforcement order. It contended that, pursuant to Article V(1)(e) NYC, the recognition and enforcement should have upheld the enforcement should have been refused since it has been set aside in Switzerland. It argued further that the Cour d'appel de Paris also violated Articles 1498 and 1502 5° of the Code of Civil Procedure by granting effect to an award which had no legal existence since it had been set aside. The Cour de cassation affirmed the decision of the Cour d'appel de Paris and dismissed the action. Pursuant to Article VII NYC, it defend that the Cour d'appel de Paris rightly held that OTV could avail itself of French rules pertaining to the recognition and enforcement of foreign awards in international arbitration and notably Article 1502 of the Code of Civil Procedure, which does not include the same ground for refusal of recognition and enforcement of awards as set forth in Article V(1)5(e) NYC. The Cour de cassation added that the award rendered in Switzerland was an international award which was not integrated into the

[142] *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV)*, Cour de cassation, France, 23 March 1994. See also, *République arabe d'Egypte v Société Chromalloy Aero Services*, Cour d'appel de Paris, France, 14 January 1997 ("la sentence rendue en Egypte était une sentence internationale qui par définition, n'était pas intégrée à l'ordre juridique de cet Etat de sorte que son existence est demeurée établie malgré son annulation et que sa reconnaissance en France n'est pas contraire à l'ordre public international"); *Société Bargues Agro Industries SA v Société Young Pecan Company*, Cour d'appel de Paris, France, 10 June 2004 ("elle n'est pas intégrée dans l'ordre juridique belge de sorte que son éventuelle annulation par le juge du siège ne porte pas atteinte à son existence en empêchant sa reconnaissance et son exécution dans d'autres ordres juridiques nationaux"); *Société SA Lesbats et Fils v Volker le Docteur Grub*, Cour d'appel de Paris, 18 January 2007 ("il est en effet un principe fondamental du droit français de l'exécution des sentences rendues à l'étranger que l'annulation par le juge du siège ne porte pas atteinte à l'existence de la sentence en empêchant sa reconnaissance et son exécution dans autres ordres juridiques nationaux car l'arbitre ne fait pas partie intégrante de l'ordonnancement juridique de l'Etat du siège, dans notre cas, celui de la Belgique"). See also *Yukos Capital v OAO Rosnet*, Gerechtshof Amsterdam, The Netherlands, 28 April 2009; *Maximov v NLMK*, Tribunal de Grande Instance de Paris, France, 16 May 2012.

legal order of that State and therefore continues to exist notwithstanding the notion that it had been set aside and its recognition in France was not contrary to international public policy:

> La sentence rendue en Suisse était une sentence internationale qui n'était pas intégrée dans l'ordre juridique ce cet Etat, de sorte que son existence demeurait établie malgré son annulation et que sa reconnaissance en France n'était pas contraire à l'ordre public international.

In *Société PT Putrabali Adyamulia v Scoiété Rena Holding et Société Moguntia Est Epices*[143], an Indonesian company, Putrabali, sold a cargo of white pepper to a French company, Est Epices which later became Rena Holding. The contract provided for arbitration according to the Rules of Arbitration and Appeal of the International General Produce Association (IGPA). A dispute arose when the cargo was lost in shipwreck. The Indonesian company commenced arbitration in London in accordance with the IGPA Rules. In an award dated 10 April 2001, the arbitral tribunal held that the Rena Holding's refusal to pay was "well-founded" Putrabali challenged the award on a point of law before the High Court on the basis of the Arbitration Act 1996 for England and Wales, which partially set aside the award and held the Rena Holding's failure to pay for the cargo amounted to a breach of contract. In a second award dated 21 August 2003, the arbitral tribunal ruled in favour of Putrabali and ordered Rena Holding to pay the contract price. An enforcement order was issued by the President of the Tribunal de Grande Instance de Paris (First Instance Court of Paris) allowing recognition and enforcement of the 2001 award in France. Putrabali challenged the decision of the Cour d'appel de Paris of 31 March 2005 which dismissed the appeal against the enforcement order, on the grounds that, inter alia, the setting aside of arbitral award in a foreign country does not prevent the interested party from seeking enforcement of the award in France. Further, the Cour d'appel de Paris held that the enforcement of the 2001 award would not be contrary to international public policy. The Cour de cassation affirmed the decision of the Cour d'appel de Paris. It reasoned that an international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought:

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[143] *Société PT Putrabali Adyamulia v Scoiété Rena Holding et Société Moguntia Est Epices*, Cour de cassation, France, 29 June 2007. See also *Société ivorienne de raffinage v Teekay Shipping Norway AS*, Cour d'appel de Paris, France, 31 January 2008.

> La sentence internationale, qui n'est rattachée à aucun ordre juridique étatique, est une décision de justice internationale dont la régularité est examinée au regard des règles applicables dans le pays où sa reconnaissance et son exécution sont demandées.

Pursuant to Article VII of the New York Convention, it held that Rena Holding was allowed to seek enforcement in France of the 2001 award rendered in London in accordance with the arbitration agreement and the IGPA rules and could avail itself of the French rules on international arbitration, which do not list the setting aside of an award in the country of origin as a ground for refusing recognition and enforcement of that award.

If in the first decision, the French Cour de cassation had used the expression according to which the international arbitral award was not 'integrated in the legal order of the country of origin', in the second decision, the formulation goes further. As a matter of fact, the Court has affirmed that (i) an international arbitral award is not anchored in any national legal order at all and (ii) the existence of an autonomous arbitral legal order, in which the international arbitral award is anchored.[144]

The justification of the court's position is the fact that, since the international community made international arbitration the normal mechanism to solve international commercial disputes, the arbitral awards, as international decisions, are conferred jurisdiction by the international community and not by a single State or a group of States.[145]

This approach of the French courts has been described by the then President of the Cour de Cassation in these terms:

> Dans la conception de la jurisprudence française, la sentence internationale ne se rattache pas à l'ordre juridique de son pays d'origine, précisément parce qu'elle est internationale. Elle n'est donc pas le produit d'un ordre juridique, elle n'a pas de nationalité : elle émane, en effet d'une juridiction autonome, détachée du contexte juridique local, auquel elle n'est reliée que par les dispositions impératives du droit local sur

[144] Philippe Pinsolle, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali', 24(2) ARBITRATION INTERNATIONAL 277, at 281 (2008). See also Emmanuel Gaillard, 'Note – 29 juin 2007 – Cour de cassation (1re Ch. Civ.)', 2007(3) REVUE DE L'ARBITRAGE 517, at 519-520.

[145] Emmanuel Gaillard, 'Note – 29 juin 2007 – Cour de cassation (1re Ch. Civ.)', 2007(3) REVUE DE L'ARBITRAGE 517, at 521.

> l'arbitrage, qui sont peu nombreuses […] C'est l'affirmation de l'autonomie de l'arbitrage international : l'arbitrage, mode normal et habituel de règlement des litiges relatifs aux relations économiques internationales, constitue l'arbitre en véritable juridiction internationale de ce type de litiges.[146]

A different approach was adopted by the District Court of Columbia in a decision of 17 March 2006 in the case *TermoRio*[147]. In this case, the Court decided to deny the recognition of an arbitral award that had been annulled in Colombia. In this case, the US court did not consider the arbitral award as a primary norm but rather as a secondary norm whose fate depended on the Colombian court's decision declaring its invalidity.[148] This decision is a typical example of how much difference exists between the French and the U.S. approaches towards the definition of international arbitration as an autonomous legal system.

In relation to the *TermoRio* decision and in contrast to Gaillard's position, Jan Paulsson commented that

> So-called 'delocalized awards' are not thought to be independent of any legal order. 'Delocalization' refers to the possibility that an award may be accepted by the legal order of an enforcement jurisdiction whether or not the legal order of its country of origin has also embraced it. 'Plurilocalization' would perhaps have been a moral accurate term.[149]

In particular, Paulsson insists on the fact that the US decision, different from the French ones, is clear evidence that several legal orders exist in the arbitration field: the author's idea is that despite the very liberal approach of the French jurisdictions towards an autonomous arbitral

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[146] 'Rapport de Monsieur le Président Jean-Pierre Ancel (*Société PT Putrabali Adyamulia v Scoiété Rena Holding et Société Moguntia Est Epices*, Cour de cassation, Civ. 1, France, 29 June 2007, 05-18.053)', 2007(3) REVUE DE L'ARBITRAGE 507, at 509.

[147] *TermoRio SA ESP and al. v Electrificadora del Atlantico S.A. ESP et al.*, District Court, District of Columbia, United States, 17 March 2006. The decision was confirmed by a higher court in *TermoRio SA ESP and al. v Electrificadora del Atlantico S.A. ESP et al.*, Court of Appeals, District of Columbia Circuit, United States, 17 May 2007. See Jan Paulsson, 'Note – U.S. District Court, District of Columbia, 17 mars 2006', 2006(3) REVUE DE L'ARBITRAGE 796.

[148] Emmanuel Gaillard, 'Souveraineté et autonomie : réflexions sur les représentations de l'arbitrage international', 134(4) JOURNAL DU DROIT INTERNATIONAL 1163, at 1167 (2007). See also Philippe Pinsolle, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in *Putrabali*', 24(2) ARBITRATION INTERNATIONAL 277, at 292 (2008).

[149] JAN PAULSSON, THE IDEA OF ARBITRATION (2014), at 36.

legal order, it does not mean that the existence of such a legal order is accepted by other national jurisdictions and that it exists at the international level.[150]

D. Two obstacles to the establishment of an arbitral legal order: confidentiality and lack of a binding-precedents-doctrine

As noted, international arbitration is mostly viewed as an autonomous legal order by international arbitration scholars and also by national courts. The author of this work agrees in principle with the existence of an international arbitral legal order distinct from the domestic legal orders. However, a question is legitimate: in order to have a fully autonomous legal order, which approach should be taken in relation to the principle of confidentiality and the absence of effect of precedents in international arbitration?

As for the issue of confidentiality[151], its legitimacy has been the centre of several debates especially due to the growing pressure towards increased transparency in public interest-type arbitration. Some international arbitration experts are very favorable to maintaining such a standard because it is considered as "one of the attractions of arbitration in the eyes of arbitration users"[152]. Moreover, confidentiality should be ensured not only during the arbitral procedure but also at the end, thus preventing the publication of the arbitral award.[153] The same idea was expressed by a former secretary general of the Court of International Arbitration of the International Chamber of Commerce, who acknowledged that

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[150] JAN PAULSSON, THE IDEA OF ARBITRATION (2014), at 42.

[151] For an analysis of the confidentiality in international arbitration, see ILEANA M. SMEUREANU, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION (2011). See also Christoph Müller, 'La confidentialité en arbitrage commercial international: un trompe-l'œil?', 23(2) ASA BULLETIN 216 (2005).

[152] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage eds., 1996), at 733. It is interesting to notice that Professor Gaillard, who is of the opinion that an autonomous arbitral legal order exists, is a strong protector of the confidentiality standard. See also Serge Lazareff, *Confidentiality and Arbitration: Theoretical and Philosophical Reflections*, *in* ICC BULLETIN – SPECIAL SUPPLEMENT 81, at 81-82 (2009) ("What an absurdity to postulate that confidentiality is not part and parcel of commercial arbitration. It is inconceivable that such a procedure, whether domestic or international, should take place in the public eye […] Confidentiality thus has its roots in the desire for a system of justice suited to the world of commerce […] Confidentiality is justified in particular by the need to maintain the secrecy inherent in business dealings"); Leon E. Trackman, 'Confidentiality in International Commercial Arbitration', 18(1) ARBITRATION INTERNATIONAL 1 (2002).

[153] Eric Loquin, 'Les obligations de confidentialité dans l'arbitrage', 2006(2) REVUE DE L'ARBITRAGE 323, at 344.

> Indeed it became quickly apparent to me that should the ICC adopt a publication policy or any other policy, which would mitigate or diminish the strict insistence on confidentiality by the ICC, this would constitute a significant deterrent to the use of ICC arbitration.[154]

However, other scholars affirmed that the principle of confidentiality in international arbitration is not to be considered as *lege lata*[155] and, even in case it exists, its application depends on the specific circumstances of the case[156]. National courts have followed the same approach.[157]

Despite the debate over the existence or the absence of a clear and evident obligation of confidentiality in international arbitration, it is clear that the application of the principle might affect the development of an autonomous arbitral legal order. In particular, if compared with a national judge who is considered a real actor of the domestic legal order,

> La parole de ce prophète [arbitrator] demeure confidentielle; il ne peut pas être, comme le juge, un véritable acteur de l'ordre juridique. La voix de l'arbitre n'est pas audible, ou difficilement dans la société.[158]

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[154] 'Expert Report of Stephen Bond, Esq. in *Esso v. Plowmann*', 11(3) ARBITRATION INTERNATIONAL 273 (1995). See also GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION. VOL. II (2014), at 2782 ("Confidentiality of the arbitral proceedings serves to centralize the parties' dispute in a single forum and to facilitate an objective, efficient and commercially-sensitive resolution of the dispute, while also limiting disclosure to of the parties' confidences to the press, public, competitors and others".)

[155] Jan Paulsson and Nigel Rawding, 'The Trouble with Confidentiality', 5(1) ICC BULLETIN 48 (1994). See also Jean-Louis Delvolvé, 'Vraies et fausses confidences, ou les petits et les grands secrets de l'arbitrage', 1996(3) REVUE DE L'ARBITRAGE 373.

[156] JEAN-FRANÇOIS POUDRET AND SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION (2007), at 316 ("There is no uniform conception of confidentiality in arbitration. The notion varies with the situations and functions which it is supposed to cover and does not even apply equally to all participants in arbitral proceedings").

[157] See, for instance, *Bulgarian Foreign Trade Bank Ltd v A.I. Trade Finance Inc.*, Supreme Court, Sweden, 27 October 2000. The Court declared that there is not an obligation of confidentiality deriving by the simple existence of the arbitration agreement. See also *Esso Australia Resources Ltd. and consorts v Sidney James Plowman*, High Court, Australia, 7 April 1995. The Court denied the existence of the standard of confidentiality in international arbitration as regard documents produced by the parties during the arbitral proceedings. See also *United States v Panhandle Easters Corporation*, District Court of Delaware, United States, 15 August 1988. The US Court stated that no obligation of confidentiality exists because the ICC rules do not impose any such obligation to the parties to an arbitral proceeding. See also *Société National Company for Fishing and Marketting "Nafimco" v Société Foster Wheeler Trading Company AG*, Cour d'appel de Paris, France, 22 January 2004. The Cour d'appel decided that "la partie, qui requiert une indemnisation pour violation de la confidentialité de l'arbitrage doit s'expliquer sur l'existence et les raisons d'un principe de confidentialité dans le droit français de l'arbitrage international". Such a request means that the existence of an obligation of confidentiality is not evident.

[158] Jean-Pierre Ancel, 'L'arbitre juge', 2012(4) REVUE DE L'ARBITRAGE 717, at 723.

Even if one accepts and justifies the existence of the confidentiality standard in arbitration, the question arises why this principle is not adopted in State courts in matters of the same nature, since in such a case the attitude of the parties to the claim is the same. An author explained this difference on the basis of the general principle of the access of the public to oral hearings in domestic courts as an expression of public control over State courts.[159] Another question here seems legitimate: if one wants to establish a truly autonomous and complete legal order, would not be necessary to exercise a form of public control over the judicial bodies of this legal order, ie the arbitral tribunals?

As a consequence, the confidentiality is considered by the author of this work as a huge obstacle both to the definition of the concept of 'transnational public policy' and to the finding of its sources other than those of State origins.[160]

Confidentiality and the establishment of a system of binding precedent are strictly connected. In fact, where decisions are not publicly available, precedents cannot develop:

> That is exactly why precedent has played a relatively minor role in traditional international commercial arbitration which often remains confidential until resolution of a dispute.[161]

Legal precedents are usually used by judges in most national legal systems to ensure a more predictable, certain and foreseeable legal order.[162] The use of precedents in the domestic judges' reasoning facilitates this foreseeability. In international arbitration, as in international law, there is no directly or indirectly expressed obligation to follow legal precedents. Some

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[159] Jerzy Jakubowski, *Reflections on the Philosophy of International Commercial Arbitration and Conciliation*, *in* THE ART OF ARBITRATION. ESSAYS ON INTERNATIONAL ARBITRATION. LIBER AMICORUM PIETER SANDERS. 12 SEPTEMBER 1912-1982 175, at 182 (J. C. Schultsz and A. J. Van den Berg eds., 1982).

[160] Pierre Lalive, *L'ordre public transnational et l'arbitre international*, in LIBER FAUSTO POCAR VOL. II. NUOVI STRUMENTI DEL DIRITTO INTERNAZIONALE PRIVATO 599, at 604 (G. Venturini and S. Bariatti eds., 2010). As a matter of fact, how is it possible to outline the definition of transnational public policy and the various interpretations given by the arbitral tribunals if there is no access (or only a limited one) to the arbitral awards?

[161] August Reinisch, 'The Role of Precedent in ICSID Arbitration', 2008 AUSTRIAN ARBITRATION YEARBOOK 495, at 495.

[162] Gilbert Guillaume, 'The Use of Precedents by International Judges and Arbitrators', 2(1) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 5, at 5 (2011). See also Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture', 23(3) ARBITRATION INTERNATIONAL 357, at 359 (2007); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION. VOL. III (2014), at 3810-3817.

authors have affirmed that the international legal system would be more 'ordered' and predictable by imposing the international tribunals to respect previous decisions. The legitimate question is to what extent the use of precedents by international jurisdictions would create a more stable international legal order?

It is commonly recognized that, even though international jurisdictions are not bound to follow their own or other's precedents[163], they have developed a *de facto* case law[164]. This is true also for jurisdictions dealing with international economic law issues such as WTO dispute settlement system[165] and international investment tribunals.[166]

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[163] HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT (1982) at 13 ("The Court has not committed itself to the view that it is bound to follow its previous decisions even in cases in which it later disagrees with them").

[164] Gilbert Guillaume, 'The Use of Precedents by International Judges and Arbitrators', 2(1) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 5, at 5 (2011). See also HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT (1982) at 9-11 ("In fact, the practice of referring to its previous decisions has become one of the most conspicuous features of the Judgments and Opinions of the Court. That practice has assumed various forms. It ranges mere illustration and 'distinguishing' to a form of speech apparently indicating the authoritative character of the pronouncement referred to […] The continuity of jurisprudence […] has been prominent in the way in which the International Court of Justice has relied upon –or indirectly acknowledge the persuasive authority of– Judgments and Opinions of the Permanent Court of International Justice as well as its own pronouncements"). For an analysis of the use of precedents in the European Court of Human Rights, see Yonatan Lupu and Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights', 42(2) BRITISH JOURNAL OF POLITICAL SCIENCE 413 (2012). See also Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture', 23(3) ARBITRATION INTERNATIONAL 357, at 361 (2007); Guido Acquaviva and Fausto Pocar, 'Stare Decisis', MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (online ed., 2012).

[165] See, for instance, Giorgio Sacerdoti, *Precedent in the Settlement of International Economic Disputes: the WTO and Investment Arbitration Models, in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION 225 (A. W. Rovine ed., 2011).

[166] August Reinisch, The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some reflections From the Perspective of Investment Arbitration, in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION 107, at 123-124 (I. Buffard, J. Crawford, A. Pellet and S. Wittich eds., 2008). Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture', 23(3) ARBITRATION INTERNATIONAL 357, at 357 (2007). We are not discussing here the doctrine of precedents in international investment arbitration since investment awards are publicly available and the issue of confidentiality does not apply to this field. For discussions on precedents in investment treaty arbitration, see Judith Gill, 'Is There a Special Role for Precedent in Investment Arbitration?', 25(1) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 87 (2010); Lucy Reed, 'The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management', 25(1) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL (2010); Zachary Douglas, 'Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?', 25(1) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 104 (2010); J. Romesh Weeramantry, 'The Future Role of Past Awards in Investment Arbitration', 25(1) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 111 (2010); Frank Spoorenberg and Jorge E. Viñuales, 'Conflicting Decisions in International Arbitration', 8 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 91 (2009);

In international commercial arbitration, however, confidentiality plays a relevant role against the rise of a precedent doctrine. First, only a few international commercial awards are publicly available. Second, only a few of these awards refer to previous arbitral awards. Third, almost the entirety of the awards refer to precedents for procedural matters such as objection to jurisdiction, powers of the tribunal to order provisional measures, applicable law.[167]

The issue here is to understand whether the absence of reference to precedents is due to the arbitrators' lack of interest and trust in the *stare decisis* doctrine or whether this absence is due to some internal elements of the international arbitration system that could be changed.

In relation with this topic, arbitration scholars and practitioners can be grouped in three categories. To the first category belong people who do not believe to the existence and the necessity of a *stare decisis* doctrine in international arbitration:

> By its whole nature and constitution, an arbitral tribunal is far more ready, and far freer, than a conventional judicial tribunal to deal with the actual case in front of it. An arbitral tribunal is usually established to deal with a particular case. Once it has pronounced its decision, its function is over. In such cases, there is less need to be concerned with consistency of decisions. There is more scope for tailoring the award to the particular merits of the dispute.[168]

Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265 (C. B. Picker, I. D. Bunn and D. W. Arner eds., 2008); 'Special Issues on Precedent in Investment Arbitration', 5(3) TRANSNATIONAL DISPUTE MANAGEMENT (2008); Christoph Schreuer and Matthew Weiniger, *A Doctrine of Procedent?*, *in* OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1188 (C. Schreuer, F. Ortino and P. Muchlinki eds., 2008); Jeffrey P. Commission, 'Precedent in Investment Treaty Arbitration. A Citation Analysis of a Developing Jurisprudence', 24(2) JOURNAL OF INTERNATIONAL ARBITRATION 129 (2007); Domenico Di Pietro, 'The Use of Precedents in ICSID Arbitration: Regularity or Certainty?', 10(3) INTERNATIONAL ARBITRATION LAW REVIEW 91 (2007); Gabrielle Kaufmann-Kohler, *Is Consistency a Myth?*, *in* IAI SERIES ON INTERNATIONAL ARBITRATION NO. 5. PRECEDENT IN INTERNATIONAL ARBITRATION 137 (Y. Banifatemi ed., 2007); Christoph Schreuer, 'The Interpretation of Investment Treaties: Diversity and Harmonization', 3(2) TRANSNATIONAL DISPUTE MANAGEMENT (2006); Tai-Heng Cheng, 'Precedent and Control in Investment Treaty Arbitration', 30(4) FORDHAM INTERNATIONAL LAW JOURNAL 1014 (2006).

[167] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture', 23(3) ARBITRATION INTERNATIONAL 357, at 362-363 (2007).

[168] Alan Redfern, *International Commercial Arbitration: Winning a Battle*, *in* Private Investors Abroad: Problems and Solutions in International Business 11-1, at 11-12 (The Southwestern Legal Foundation ed., 1989). See also NIGEL BLACKABY AND CONSTANTINE PARTASIDES WITH ALAN REDFERN AND MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (2009), at 577.

The second category is composed of authors who, even if they do not exclude the existence of a precedent doctrine in international arbitration, do not realize its necessity in the field of international commerce law. In particular, Professor Kauffman-Kohler has pointed out that the fact that arbitrators want to maintain their "freedom to apply the law that allow [them] to 'mint' the rules to take into account the specificities of each case […]" does not match with the idea of precedent.[169] Furthermore, the same author went further affirming that

> In international commercial arbitration, there is no need for developing consistent rules through arbitral awards because the disputes are most fact-and contract-driven. The outcome resolves around a unique set of facts and upon the interpretation of a unique contract that was negotiated between private actors to fit their specific needs. Unsurprisingly, awards are published only sporadically in this context.[170]

The third category strongly supports the idea of precedents in international commercial arbitration. The members of this category have highlighted the fact that, in order to be considered as an autonomous system of justice ensuring predictability and certainty, international commercial arbitration needs to accept the role and existence of arbitral precedents:

> The persuasiveness of past arbitration awards implies to a certain extent that international arbitrators see themselves as part of a group of international adjudicators which role and *raison d'être* is to fulfil the particular needs of the international business community, and perceive arbitration as a free-standing and autonomous system of international justice […] The driving force of arbitral precedent is rather the arbitrators' desire to meet the parties' legitimate expectation that their dispute will be resolved by international adjudicators according to internationally accepted procedures and from an international perspective.[171]

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[169] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture', 23(3) ARBITRATION INTERNATIONAL 357, at 365 (2007).

[170] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture', 23(3) ARBITRATION INTERNATIONAL 357, at 375-376 (2007).

[171] Alexis Mourre and Alexandre Vagenheim, 'Arbitral Jurisprudence in International Commercial Arbitration: The Case for a Systematic Publication of Arbitral Awards in 10 Questions', available at http//www.kluwerarbitrationblog.com. See also GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION. VOL. III (2014), at 3822 ("These views [against precedent in international commercial arbitration] are incompatible with the adjudicative function and mandate of international arbitrators. It is not acceptable that arbitrators view their mandate as coming moderately close to applying the law or as being able to disregard settled authority if there is 'sufficient support' for doing so").

It means that if a series of arbitral awards is consistent and homogeneous on a specific legal question, these decisions will have "persuasive authority on arbitrators called upon to decide on the same issue".[172]

This approach is supported also by the arbitration practice. As a matter of fact, it is known that in same fields of international law, arbitrators refer to previous published awards to substantiate principles they want to affirm. Also in international commercial arbitration, some arbitral tribunals expressed the fact that they were influences by prior awards between the parties.

For instance, in an ICC Award, the arbitral tribunal stated that

> Enough has been said to show that the [previous] Decision is *res judicata* as between the ME company and the defendant, but not as between the claimant and the defendant. This does not mean that the [previous] Decision can be ignored. Parts of it represent an authoritative ruling on the position of ME country law on certain matters that may be relevant in this case.[173]

Furthermore, in another ICC Award, the arbitration tribunal confirmed this position:

> The arbitration is not bound by the X award; nor are the parties to these arbitration proceedings. There can be no issue estoppel. Nonetheless, it provided a helpful analysis of the common factual background to this dispute. Accordingly, we have borne its findings and conclusions in mind, whilst taking care to reach our own conclusions on the materials submitted by these parties in these proceedings.[174]

Finally, the famous *Dow Chemical* Award is worth mentioning. The arbitral tribunal ruled that

> The decisions of these tribunals [ICC arbitral tribunals] progressively create case law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of

[172] François Perret, *Is There a Need for Consistency in International Commercial Arbitration*, *in* IAI SERIES ON INTERNATIONAL ARBITRATION NO. 5. PRECEDENT IN INTERNATIONAL ARBITRATION 25, at 33 (Y. Banifatemi ed., 2007).

[173] Final Award, ICC Case No. 6363, 1991.

[174] Final Award, ICC Case No. 7061, 28 November 1997.

> international commerce, to which rules specific to international arbitration, themselves successively elaborated, should respond.[175]

After analyzing briefly the issues of confidentiality and use of precedents in international commercial arbitration, we can now draw some conclusions. It seems clear that in order to have precedential effect for purposes of foreseeability and certainty of the arbitral legal system, arbitral award should be available to future parties and tribunals. Thus, publication *versus* full confidentiality is strongly related to the issue of precedents. Our conclusions will be explained in three points.

First, confidentiality is not an overriding principle of international commercial arbitration: most arbitration statutes and arbitration rules do not contemplate a general principle of confidentiality.[176] This is implicitly recognized also by who strongly supports the existence of such a general principle. At the end of his analysis, Serge Lazareff admits that "if the parties wish to benefit from maximum confidentiality, they should resort to a clause".[177] It is clear that, if parties need to agree explicitly over a clause, the principle contained in that clause cannot be considered generally recognized by the international arbitration community. Confidentiality can also be dangerous for the arbitral procedure. In fact, when confidential, an award "may be just part of a series of other (related or unrelated) awards which may reinforce or contradict the submitted award's conclusion. Neither the tribunal nor the other party may be aware of the fact that the award submitted is just one part of a larger puzzle selected by the submitting party with its tactical preferences in mind".[178] As a consequence, one of parties or even the arbitral tribunal could miss the broad picture of a case.

Second, the statement indicating that a doctrine of precedent in international commercial arbitration does not exist is not correct. As matter of fact, several arbitral tribunals rely on

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[175] Partial Award, ICC Case No. 4131, 23 September 1982.

[176] Alexis Mourre and Alexandre Vagenheim, 'Arbitral Jurisprudence in International Commercial Arbitration: The Case for a Systematic Publication of Arbitral Awards in 10 Questions', available at http//www.kluwerarbitrationblog.com.

[177] Serge Lazareff, *Confidentiality and Arbitration: Theoretical and Philosophical Reflections, in* ICC BULLETIN – SPECIAL SUPPLEMENT 81, at 88 (2009)

[178] Thomas Wälde, *Confidential Awards as Precedent in Arbitration. Dynamics and Implication of Award Publication, in* IAI SERIES ON INTERNATIONAL ARBITRATION NO. 5. PRECEDENT IN INTERNATIONAL ARBITRATION 113, at 118 (Y. Banifatemi ed., 2007).

relevant national court authority and treat these decisions as precedents supporting their findings.[179] They would probably rely more frequently on arbitral tribunals' awards too, were these awards published.

Third, precedent in international commercial arbitration is not to be defined as precedent in national legal systems. Arbitration precedents do not necessarily need to be considered as binding decisions: on the contrary, they should be used as persuasive precedents, assisting the future arbitral tribunals (and national courts) to interpret difficult concepts typical of international commercial law[180] and to adopt decisions that are not completely contradictory with the prior ones. As a famous author in arbitration affirmed,

> The publication of arbitration awards would […] identify the real advantages of arbitration: specialist and expert arbitrators operating on the international level. The development of an arbitral case law would give to arbitration a greater certainty that presently existing, with respect to the probable attitude of the arbitrators, and would facilitate the commercial world's knowledge and acceptance of lex mercatoria. This would almost certainly obviate many recurring problems presented to arbitrators and would influence the negotiating attitudes and commercial decisions of businessmen. Above all, the systematic publication of arbitration awards would show that not only is arbitration an alternative to national courts as a system of dispute settlement, but it would prove conclusively that arbitration is the most appropriate forum in which to resolve disputes arising out of international commerce.[181]

Also, by using persuasive precedents, arbitrators "see themselves as part of a group of international adjudicators, whose role and *raison d'être* is to fulfil the particular needs of the international business community, and who think of arbitration as a free-standing and autonomous system of international justice".[182]

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[179] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION. VOL. III (2014), at 3825.

[180] Clauses such as 'force majeure', 'hardship', 'pay-if-paid' and 'pay-when-paid' are difficult to interpret and national courts are usually unfamiliar with these concepts.

[181] Julian D. M. Lew, *The Case for the Publication of Arbitral Awards*, *in* THE ART OF ARBITRATION. ESSAYS ON INTERNATIONAL ARBITRATION. LIBER AMICORUM PIETER SANDERS. 12 SEPTEMBER 1912-1982 223, at 232 (J. C. Schultsz and A. J. van den Berg eds., 1982).

[182] Alexis Mourre, *Precedent and Confidentiality in International Commercial Arbitration. The Case for the Publication of Arbitral Awards*, *in* IAI SERIES ON INTERNATIONAL ARBITRATION NO. 5. PRECEDENT IN INTERNATIONAL ARBITRATION 39, at 42 (Y. Banifatemi ed., 2007).

As a conclusion, the relevance of precedents in international commercial arbitration can be summarized and justified by the thought of a famous scholar in the field, Professor Philippe Fouchard, who wrote that if the international community of merchants aspires to give itself an autonomous system of law, this law has to be lade known to all those who have an interest in it. He also added that arbitrators should not resemble the ancient pontifex of antique Rome, who, jealously, kept the knowledge of the law for themselves.[183]

[183] PHILIPPE FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL (1965), at ¶ 631.

CHAPTER 3

THE DIFFERENT DIMENSIONS OF PUBLIC POLICY

The dimensions of public policy are several and applicable to different kinds of legal situations. Domestic public policy applied to domestic matters and it is the broadest among the different public policy dimensions. International public policy is that part of domestic public policy that serves as a ban of the application of a foreign law or the recognition and enforcement of a foreign judgment or award. Even if it deals with international matters, its nature is still national because it is based on moral, religious, historical, legal and economic elements belonging to a national jurisdiction. Over the years, another dimension of public policy arose that is the regional public policy. The case of the European Union public policy is explanatory especially in relation to EU antitrust matters.

The nature of transnational public policy is different both from domestic, international and regional public policy. Its sources are different and its application is very narrowed.

The method of transnational public policy is also different from the mandatory rules method. The former refers to a truly transnational approach disconnected from the national jurisdictions involved in an arbitration proceeding. The latter aims at protecting the interests that are usually purely domestic as domestic is its nature.

All public policy dimensions as well as the mandatory rules theory are studied in this chapter.

International public policy referred to by the 1958 NY Convention does not include transnational public policy. As a matter of fact, the concept is still viewed as the body of laws belonging to a domestic legal system and regulating legal relationships with a foreign element.[184] Thus, as affirmed by the International Law Association,

[184] See, for instance, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage eds., 1996), at 955. The authors suggested "international public policy can only mean the French conception of international public policy or, in other words, the set of values a breach of which could not be tolerated by the French legal order, even in international cases. The goal of the review by the courts is to determine whether it would be appropriate to allow the enforceability of the award in the French legal order. It is therefore perfectly natural that its enforceability should be examined in the light of the fundamental consideration of French law"). See also, Pierre Mayer, 'La sentence contraire à l'ordre public au fond', 1994(4) REVUE DE L'ARBITRAGE 615 at 650; JEAN ROBERT, L'ARBITRAGE – DROIT INTERNE – DROIT INTERNATIONAL PRIVÉ (1993), at 313-314; ALBERT

> [International public policy] is not to be understood […] as referring to a public policy which is common to many States (which is better referred to as "transnational public policy") or to a public policy which is part of public international law.[185] […] [i]n order to determine whether a principle forming part of its legal system must be considered sufficiently fundamental to justify a refusal to recognize and enforce an award, a court should take into account, on the one hand, the international nature of the case and its connection with the legal system of the forum, and, on the other hand, the existence or otherwise of a consensus within the international community as regards the principles under consideration (international conventions may evidence the existence of such a consensus). When said consensus exists, the term 'transnational public policy' may be used to describe such norms.[186]

Although some authors are sceptical with regard to its applicability to international arbitration[187], the majority of the practitioners and academics in the field have agreed on the existence of a transnational public policy.[188] As an author who deeply analysed the relation between transnational public policy and international arbitration underlined,

> L'existence, l'utilité et l'importance de la notion d'ordre public transnational ne peuvent plus être sérieusement contestées aujourd'hui

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JAN VAN DEN BERG, THE NEW YORK CONVENTION F 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 361.

[185] INTERNATIONAL LAW ASSOCIATION, Committee on International Commercial Arbitration, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards', New Delhi Conference (2002), ¶ 11. In this regard, it is interesting to notice that the International Law Association Committee on International Commercial Arbitration was initially tempted to promote the notion of a truly transnational public policy but the idea was abandoned. One of the main reasons was the impossibility to define a real corpus of principles on which agreement could be reached. Moreover, the addressees of the ILA Recommendations are States and domestic courts that are used to consider general principles as policies varying on the basis of the social and economic system of a country rather than as legal foregrounds. See Pierre Mayer, 'Recommandations de l'Association de droit international sur le recours à l'ordre public en tant que motif de refus de reconnaissance ou d'exécution des sentences arbitrales internationales', 2002(4) REVUE DE L'ARBITRAGE 1061, at 1061-1062.

[186] INTERNATIONAL LAW ASSOCIATION, Committee on International Commercial Arbitration, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards', New Delhi Conference (2002), Recommendation 2(b). See also Martin Hunter and Gui Conde de Silva, 'Transnational Public Policy and its Application in Investment Arbitrations', 4(3) THE JOURNAL OF WORLD INVESTMENT 367, at 367 (2003).

[187] See, for instance, Bernard Hanotiau and Olivier Caprasse, *Public Policy in International Commercial Arbitration*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 777, at 796 (E. Gaillard and D. Di Pietro eds., 2008). These two authors affirmed that even if widely accepted principles could take into consideration by the courts of the State where recognition or enforcement is sought, "a principle which would be part of what is called 'transnational public policy' will only be given effect by the courts of a given country if it can be considered part of the international public policy of that State". See also CHRISTOPHE SERAGLINI, LOIS DE POLICE ET JUSTICE ARBITRALE (2001), at 154.

[188] Pierre Lalive, *L'ordre public transnational et l'arbitre international*, *in* LIBER FAUSTO POCAR VOL. II. NUOVI STRUMENTI DEL DIRITTO INTERNAZIONALE PRIVATO 599, at 601 (G. Venturini and S. Bariatti eds., 2010).

> face aux nombreuses décisions judiciaires et arbitrales qui s'y réfèrent […] A notre époque de globalisation des rapports économiques et d'interdépendance accrue, on peut penser que cette évolution se poursuivra, en dépit des réactions nationalistes de certains ordres juridiques étatiques, ainsi que de certaines critiques doctrinales traditionnelles sur le caractère vague de la notion, sa prétendue imprévisibilité et le risque d'appréciations subjectives de l'arbitre.[189]

However, as for the national and international dimension of public policy, its transnational dimension is also a difficult concept to define. For such a reason, it is helpful to contextualise the phenomenon by researching its origins and its *raison d'être* before analysing its application to international arbitration.

It is common knowledge that the notion of transnational public policy is very controversial with regard to both its conceptual definition and its substantive content. However, through a comparative analysis of the existing case law, the doctrinal works and the exclusion of the elements that *do not* characterize transnational public policy, it is possible to outline at least the main features of the concept.

As a starting point, it is relevant to remind the common differentiation of the concept of public policy on the basis of its scope and content. First, one can distinguish "national public policy" from "international public policy", which again differs from the related concept of "transnational public policy", frequently referred to in international arbitration. Furthermore, another distinction is frequently made between "procedural public policy" and "substantive public policy".[190]

In the following sections we will try to outline how concepts such as 'domestic public policy' and 'international public policy' have been interpreted and how they relate to arbitration.

A. Domestic Public Policy

In order to define the scope of 'public policy', it has been suggested that

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[189] Pierre Lalive, *L'ordre public transnational et l'arbitre international*, *in* LIBER FAUSTO POCAR VOL. II. NUOVI STRUMENTI DEL DIRITTO INTERNAZIONALE PRIVATO 599, at 609 (G. Venturini and S. Bariatti eds., 2010).

[190] Marie Louise Seelig, 'The Notion of Transnational Public Policy and its Impact on Jurisdiction, Arbitrability and Admissibility', LVII(3) ANNALS FLB – BELGRADE LAW REVIEW 116, at 119 (2009).

> [A] distinction must be made between statutory provisions that *cannot* be derogated from, because they protect private interests against a stronger contracting party, and those that *may not* be derogated from, because they protect the public interest. The latter only form part of public policy.[191]

In a decision of 1853, the House of Lords described –but not defined– public policy as a "principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against 'public good'"[192].

However, as Paul Lagarde mentioned, the definition of public policy should not be the most relevant objective for a jurist:

> L'ordre public est le type même de la notion fonctionnelle […] le problème de la définition de l'ordre public est un faux problème […] l'incertitude et la souplesse sont au centre de la notion d'ordre public, et le juriste peut seulement en reculer les limites sans jamais les effacer.[193]

The hard task is to find its features, to collect them and to propose a comprehensive and common rationale. This is almost impossible because public policy is not definitive and abiding. As a matter of fact, public policy can be viewed as

> [T]he fundamental economic, legal, moral, political, religious and social standards of every state or extra-national community. Naturally public policy differs according to the character and structure of the state or community to which it appertains, and covers those principles and standards which are sacrosanct as to require their maintenance at all costs and without exception.[194] (emphasis added)

As a consequence, (i) public policy encompasses many standards any list of which would not be exhaustive; (ii) every state or community has its own public policy, defined by specific national conceptions[195] and no harmonization between the different public policies is possible at

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[191] MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION. LAW AND PRACTICE (2014), at 719.

[192] *Egerton v Earl Brownlow*, House of Lords, United Kingdom, 20 August 1851.

[193] PAUL LAGARDE, RECHERCHES SUR L'ORDRE PUBLIC EN DROIT INTERNATIONAL PRIVE (1959), at 177.

[194] JULIAN D. M. LEW, LOUKAS A. MISTELIS AND STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (2003), at 422.

[195] Bernard Hanotiau and Olivier Caprasse, *Public Policy in International Commercial Arbitration*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 777, at 778 (E. Gaillard and D. Di Pietro eds., 2008). See also, *Sarl Génie Mécanique zaïrois v AIG Euope*, Cour d'appel de Brussels, Belgium, 6 December 2000 ("Il est communément admis que sont d'ordre public les dispositions légales qui s'imposent avec une force particulière, et que 'l'ordre public' désigne, par

this level; (iii) the application of public policy for protecting some public interest principles is mandatory. A fourth point should be added, i.e. (iv) the mutation of social and economic standards of every state. Then, public policy is (or should be) an evolving concept that adapts itself to the historical evolution of a society in order to protect ever-contemporary basic principles.[196]

Public policy has a negative and positive function within the applicable law.[197] Negative public policy is expressed in three different ways. First, it affects the legal relationship between the parties. In every legal system a contract contrary to public policy is null and void.[198] Second, it purges any legal provision leading to an undesirable, unpredictable or inconsistent result.[199] Third, it outs the effects of a contravening arbitration award of judicial decision.[200]

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extension, l'ensemble des règles qui présentent ce caractère et auxquelles on ne peut déroger par des conventions particulières (article 6 du Code civil); N'est ainsi d'ordre public que la loi qui touche aux intérêts essentiels de l'Etat ou de la collectivité, ou qui fixe, dans le droit privé, les bases juridiques sur lesquelles repose l'ordre économique ou moral de la société"); Cour de cassation, Belgium, 15 March 1968 ("n'est d'ordre public que la loi qui touché aux intérêts essentiels de l'Etat ou le collectivité, ou qui fixe, dans le droit privé, les bases juridiques sur lesquelles repose l'ordre économique ou moral de la société").

[196] Karl-Heinz Böckstiegel, 'Public Policy and Arbitrability', 3 ICCA CONGRESS SERIES 177, at 180 (1987). See also Marie Louise Seelig, 'The Notion of Transnational Public Policy and its Impact on Jurisdiction, Arbitrability and Admissibility', LVII(3) ANNALS FLB – BELGRADE LAW REVIEW 116, at 118 (2009); CHARLES JARROSSON, LA NOTION DE L'ARBITRAGE (1987), at 225; Lord Peter Goldsmith, *An Introduction to International Public* Policy, *in* INTERNATIONAL ARBITRATION AND PUBLIC POLICY 3, at 6-7 (D. Bray and H. L. Bray eds., 2015). See also *Not indicated v Not indicated*, Tribunal Fédéral, Switzerland, 19 September 2000.

[197] The positive and negative functions of public policy draw from the a priori and a posteriori conceptions of public policy. A priori public policy is based on the idea that the ability to oust foreign law is an inherent characteristic of certain rules within the legal system. Historically, this approach coincided with the tendency to maximize the application of the lex fori in international cases. In turn, the a posteriori view of public policy looks at the effects of public policy on the local legal, social and economic system. This distinction was first proposed by F. von Savigny and is analyzed in detail by WERNER GOLDSCHMIDT, SYSTEMA Y FILOSOFIA DEL DERECHO INTERNATIONAL PRIVADO VOL I (1948), at 283 et seq.

[198] See, generally, PHILIPPE MALAURIE, L'ORDRE PUBLIC ET LE CONTRAT (1953). The effects of negative public policy may follow the application of, e. g., a statute providing for the invalidity of any contract in breach of public policy or containing provisions governing specific grounds such as incapacity or illegality.

[199] On the topic see Gerhard Kegel, 'The Crisis of Conflict of Laws', 112 RECUEIL DES COURS 91 (1964).

[200] Pierre Lalive, 'Transnational (or Truly International Public Policy and International Arbitration', 3 ICCA CONGRESS SERIES 257, at 261-262 (1987). See also MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION. LAW AND PRACTICE (3rd ed., 2014), at 721.

The positive function of public policy imposes essentials on the legal relationship. Arbitrators give effect to positive public policy by applying mandatory rules.[201] The operation of positive public policy does not require an offensive contract or chosen law. Rather, it is directly and automatically applicable. Whereas negative public policy leaves a gap in the applicable law, positive public policy provides the solution to the case.[202]

It may be argued that the discussion on the existence of a positive or negative function of public policy is purely academic. The negative function of public policy would be held redundant by its positive effects. Yet the distinction remains relevant in international arbitration. As a result of Articles II(1), III and V of the New York Convention, the jurisdiction of national courts in international arbitration is confined to the negative effect of public policy.[203]

B. International Public Policy

International public policy is a distinct concept, different from the domestic public policy on the one hand, and from the transnational public policy on the other hand.[204]

In relation to the domestic level of public policy, the International Law Association during the New Delhi Conference of 2002 clarified that

> "international public policy" is to be understood in the sense given to it in the field of private international law; namely, that part of the public policy of a State which, if violated, would prevent a party from invoking a

[201] Pierre Lalive, 'Transnational (or Truly International Public Policy and International Arbitration', 3 ICCA CONGRESS SERIES 257, at 263-264 (1987). "Eingriffsnormen", "lois d'application immediate" or "lois de police", they are a reflection of public policy. On this point see for instance, Marc Blessing, 'Choice of substantive law in international arbitration', 14(2) JOURNAL OF INTERNATIONAL ARBITRATION 39, at 58 (1997); INTERNATIONAL LAW ASSOCIATION, Committee on International Commercial Arbitration, 'Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards', London Conference (2000), at 18. For the relationship between mandatory rules and public policy see further CHRISTOPHE SERAGLINI, LOIS DE POLICE ET JUSTICE ARBITRALE INTERNATIONALE (2001).

[202] JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999), at 423 and 425.

[203] Otherwise the operation of public policy would amount to a decision on the merits. See for instance, *X SA v Y*, Tribunal Fédéral, Switzerland, 30 January 2002 ("I1 faut souligner à cet égard que l'ordre public, au sens de l'Art 190 al. 2 let. e LDIP, ne constitue qu'une simple clause de réserve ou d'incompatibilité, ce qui signifie qu'il a uniquement une fonction protectrice (ordre public négatif)". See also *Arab Republic of Egypt v Westland Helicopters Ltd*, Tribunal Fédéral, Switzerland, 16 May 1983.

[204] JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999), at 475 et seq.

> foreign law or foreign judgment or foreign award […] International public policy is generally to be narrowed in scope than domestic public policy.[205]

Before analyzing how international public policy is applied in international arbitration (*b*), it is worth describing briefly the role of international public policy in private international law (*a*).

1. The public policy exception in private international law and procedural law

As a starting point, it seems appropriate to clarify the relationship private international law and international procedural law. Private international law determines the applicability of specific rules of law in situations involving a choice between the laws of different countries. International procedural law also determines the applicable procedural law in litigation involving a foreign element. The main objective of international procedural law is to coordinate litigation between different courts by providing for rules on jurisdiction, *lis pendens* and the recognition of foreign judgments. The most relevant common point to these areas of law is that they both address problems resulting from the presence of an international (or foreign) element in a legal dispute.[206]

The European Union Member States have harmonized their legal systems and their common values with the purpose of assimilating the situation of litigants in cross-border settings in the European Judicial Area to the situation of litigants in purely domestic cases.[207] This harmonizing process started in 1999, when the Treaty of Amsterdam[208] entered into force and it has its current legal bases in Arts. 67(4) and 81(1) of the Treaty on the Functioning of the European Union[209], cornerstones of the development of judicial cooperation in civil matters

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[205] INTERNATIONAL LAW ASSOCIATION, Committee on International Commercial Arbitration, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards', New Delhi Conference (2002), at ¶ 11.

[206] Burkhard Hess and Thomas Pfeiffer, Study for the European Parliament on the Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law (2011), at 20.

[207] Communication of the EC Commission to the Parliament and Council of 1998, OJ C-33 of 13 January 1998.

[208] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts, signed on 2 October 1997, OJ C-340 of 10 November 1997.

[209] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, OJ C-326 of 26 October 2012. Article 67(4) reads "The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters". Article 81(1) states that "The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such

having cross-border implications. On the basis of its new competence in private international law and procedural law, the European Union has adopted several instruments covering a wide range of areas[210] including jurisdiction and the free movement of judgments[211], and the law applicable to contractual obligations[212].

The relation between private international law and procedural law on the one hand, and public policy on the other hand, is well described by Mancini:

> L'ordre public dans tout pays comprend aussi, dans la large acception du mot, les respect des principes supérieurs de la morale humaine et sociale tels qu'ils sont entendus et professes dans ce pays, les bonnes mœurs, les droits primitifs inhérents à la nature humaine, et les libertés auxquelles ni les institutions positives, ni aucun gouvernement, ni les actes de la volonté humaine ne pourraient apporter de dérogations valables et obligatoires pour ces Etats. Si les lois positives d'un Etat, un jugement étranger, ou les actes et contrats faits à l'étranger violaient ces principes ou ces droits, chaque souveraineté, loin d'accepter ces outrages à la nature et à la moralité humaine, pourrait à juste titre leur refuser tout effet et toute exécution sur son territoire.
>
> On peut rejeter non seulement les institutions incompatibles avec l'ordre moral, mais aussi celles qui sont incompatibles avec l'ordre économique établi dans une société, l'ordre économique étant compris dans la large acceptation de l'ordre public.[213]

One may wonder whether Mancini's theories are still applicable to today's circumstances. Even though public policy has never been fully defined[214], it has always played a relevant role as

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cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

[210] E.g. jurisdiction and free movement of judgments, return of children, matrimonial matters and parental responsibility, service of documents, insolvency, legal aid, mediation, small claims and maintenance proceedings.

[211] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L-012 of 16/01/2001.

[212] Council Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L-177 of 4 July 2008. The Regulation is based and replaces the Convention of 19 June 1980 on the law applicable to contractual obligations, OJ C-27 of 26 January 1998.

[213] Stanislao Mancini, 'De l'utilité de rendre obligatoire, sous la forme d'un ou de plusieurs traités internationales, un certain nombre de règles générales du droit international privé pour assumer la décision uniforme des conflits entre les différentes législations civiles et criminelles', 5 JOURNAL DE DROIT INTERNATIONAL PRIVE ET DE LA JURISPRUDENCE COMPAREE 221, at 297 (1874).

[214] However, it is worth mentioning how public policy has been described in relation to its functions: "L'exception d'ordre public rempli une triple fonction. Elle sert d'abord à éliminer les lois étrangères qui commanderaient une solution injuste, contraire au droit naturel […] L'ordre public assure également la défense des

a safeguard against unacceptable provisions of foreign law and against unacceptable foreign judgments.[215] The exception was included in every instrument because every States wanted to protect its own international coherence, guaranteeing the observance of those tenets which make up its fundamental elements. Some authors even regarded public policy as a general principle of law in the field of private international law, in the sense of Article 38.1(c) of the Statute of the International Court of Justice.[216]

However, if one considers the specific case of the European Union, the phenomenon of harmonization seems to reduce the need for a safeguard to avoid the application of unacceptable legal provisions of other Member States. As a consequence, the practical importance of the public policy clause in procedural law has been reduced considerably.

If this is valid for European procedural law, whose scope of application is limited to the European Union territory, EU private international law presents a relevant difference since its application covers also extra-Community situations. The public policy exception becomes then more relevant as third States' public policy values and principles may be different from the EU's ones.[217] This concern appears evident in some evolutions in the field of EU procedural law.

On 14 December 2010, the European Commission published a proposal for far-reaching amendments of the most important instrument of European civil procedure, the Regulation (EC) No 44/2001.[218] According to this proposal, the exequatur procedure of Articles 32 and 38 et seq. shall be replaced by a system of automatic recognition. Under the proposed draft Articles 38 and 42, a judgment of a Member State shall be accompanied by a form and shall be directly

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principes qui, sans prétendre à l'universalité, constituent les fondements politiques, sociaux de la civilisation française […] La troisième fonction de l'ordre public lui assigne la sauvegarde de certaines politiques législatives", PIERRE MAYER AND VINCENT HEUZE, DROIT INTERNATIONAL PRIVE (2010), at 150.

[215] Burkhard Hess and Thomas Pfeiffer, Study for the European Parliament on the Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law (2011), at 20.

[216] *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*, ICJ, Separate Opinion of Sir Hersch Lauterpacht, 28 November 1958, at 55. See also Franco Mosconi, 'Exceptions to the Operation of Choice of Law Rules', 217 RECUEIL DES COURS 9, at 56-57 (1989).

[217] Burkhard Hess and Thomas Pfeiffer, Study for the European Parliament on the Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law (2011), at 20.

[218] Proposal (EC) for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 14 December 2010.

enforceable in other EU Member States. On application, the court of origin shall issue the accompanying form, which shall certify the enforceability of the judgment and specify its content including its terms and additional decisions on interests and costs. The form shall enable the competent enforcement agents in other Member States to understand the foreign title and to immediately commence enforcement proceedings. As a result, the judgment of another EU Member State will be adjusted to the judgment of the courts of the Member States of enforcement.

However, the abolition of exequatur proceedings shall not entail the abrogation of the grounds for the refusal of recognition in equal measure. Although the draft aims at reducing the grounds for non-recognition, it nevertheless provides for remedies where some of the grounds of non-recognition shall be verified.

As far as European private international law is concerned, Regulations (EC) No. 593/2008[219] and 864/2007[220] (Rome I and Rome II) contain provisions on public policy and on mandatory rules of the forum. As the Regulations are applied universally and thus designate the law of non-Member States as well, this approach is not surprising: in fact, it is inconceivable that a State, when autonomously providing for the applicability of a foreign law, should want to deprive itself of the possibility of safeguarding the international coherence of its own legal system. [221] The legislative concept of these new Regulations then underlines the ongoing relevance of the public policy exception in substantive European private international law, due to the different interpretations of public policy adopted in third States.

However, even if it is still relevant in private international law, public policy operates as an exception, due especially to the fact that, in private international and procedural law, foreign law and foreign decisions are generally considered as having the same value as their domestic counterparts. This means that public policy is interpreted narrowly and the reliance on public

[219] Council Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L-177 of 4 July 2008.

[220] Council Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ L-199 of 31 July 2007.

[221] Franco Mosconi, 'Exceptions to the Operation of Choice of Law Rules', 217 RECUEIL DES COURS 9, at 30 (1989).

policy must be specifically justified by a manifest violation of values or principles.[222] This narrow interpretation was already proposed by Professors Giuliano and Lagarde in their Report on the Convention on the law applicable to contractual obligations[223] as well as in the Report of the sixth session of the Hague Conference of Private International Law, in 1928.[224]

2. International public policy in international arbitration

Two aspects deserve here a clarification.

First of all, as already noted, international public policy and domestic public policy represent different standards. An eminent author described this difference in these terms:

> [W]hat is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations […] The distinction is justified by the differing purposes of domestic and international relations.[225]

In other words, domestic public policy applies to citizens or residents of a state, whereas international public policy is "the domestic public policy applied in a particular state, by its courts, in connection with the recognition and enforcement of foreign laws, judgments and arbitral awards".[226]

This differentiation is clear in the New French Law on Arbitration whose Article 1520(5) reads "An award may only be set aside where […] 5° recognition or enforcement of the award is contrary to international public policy".[227]

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[222] FRANCO MOSCONI AND CRISTINA CAMPIGLIO, DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE. VOL. I PARTE GENERALE E CONTRATTI (2007), at 234. See also Burkhard Hess and Thomas Pfeiffer, Study for the European Parliament on the Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law (2011), at 28.

[223] Mario Giuliano and Paul Lagarde, Report to the Council on the Convention on the law applicable to contractual obligations, OJ C-282 of 31 October 1980, commentary to Article 16 'Ordre public'.

[224] Conférence de La Haye de droit international privé, *Actes sixième session* (1928), at 18.

[225] Albert Jan van den Berg, *The New York Convention Summary of Courts Decisions, in* ASA SPECIAL SERIES NO. 9 47, at 91 (1996).

[226] Stephen Jagusch, 'Issue of Substantive International Public Policy', 2008(2) STOCKHOLM INTERNATIONAL ARBITRATION REVIEW 115, at 116. See also Pierre Lalive, 'Transnational (or Truly International Public Policy and International Arbitration', 3 ICCA CONGRESS SERIES 257, at 260 (1987).

[227] Decree No. 2011-48 of 13 January 2011 on the New French Law on Arbitration.

Such an interpretation of international public policy is consistent with the reference to public policy in the 1958 New York Convention[228]. At Article V(2)(b), the Convention states that one of the possible exceptions to the recognition and enforcement of foreign arbitral awards is the violation of the public policy of the country where recognition and enforcement is sought.[229]

Even though the NYC provision does not expressly refer to international public policy,

> [t]here is no doubt that the reference in that provision to public policy is in fact a reference to the international public policy of the host jurisdiction.[230]

[228] The New York Convention on Recognition and Enforcement of Foreign Arbitral Award of 1958 entered into force on 7 June 1959. On the Convention, see Philippe FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL (1965), at 479; FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage eds., 1996), at 966; MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION. LAW AND PRACTICE (3rd ed., 2014), at 1417; FRANK-BERND WEIGAND, PRACTITIONER'S HANDBOOK ON INTERNATIONAL ARBITRATION (2002), at 399; JULIAN D. M. LEW, LOUKAS A. MISTELIS AND STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (2003), at 687; JEAN-FRANÇOIS POUDRET AND SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION (2007), at 793; NIGEL BLACKABY AND CONSTANTINE PARTASIDES WITH ALAN REDFERN AND MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (2009), at 634; GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION. VOL. II (2014), at 1253; GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION. VOL. III (2014), at 3394; TIBOR VARADY, JOHN BARCELO III AND ARTHUR TAYLOR VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE (2009), at 840; LOUKAS MISTELIS, CONCISE INTERNATIONAL ARBITRATION (2010), at 1; THOMAS CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION (2012), at 564; CHRISTOPHE SERAGLINI AND ORTSCHEIDT JÉRÔME, DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL (2013), at 901; ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981); Antonio Remiro Brótons, 'La reconnaissance et l'exécution des sentences arbitrales étrangères', 184 RECUEIL DES COURS 169 (1984); GIORGIO GAJA, INTERNATIONAL COMMERCIAL ARBITRATION – NEW YORK CONVENTION (1984); 'Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention', 9 ICCA CONGRESS SERIES (1999); DOMENICO DI PIETRO AND MARTIN PLATTE, ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS (2001); ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS. THE NEW YORK CONVENTION IN PRACTICE (E. Gaillard and D. Di Pietro eds., 2008).

[229] Article V(2)(b) of the 1958 New York Convention reads as follow: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: […] (b) The recognition or enforcement of the award would be contrary to the public policy of that country." (emphasis added) For a deep analysis of the history and interpretation of Article V(2)(b) of the 1958 NY Convention, see ANTON G. MAURER, THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION (2013), at 11-72; Bernard Hanotiau and Olivier Caprasse, *Public Policy in International Commercial Arbitration*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 777 (E. Gaillard and D. Di Pietro eds., 2008).

[230] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage eds., 1996), at 996.

Second, as in private international law and international procedural law, doctrine and case-law have confirmed that the concept of international public policy should be narrowly interpreted, thus considering that

> [n]ot every breach of a mandatory rule of the host country could justify refusing recognition or enforcement of a foreign award. Such refusal is only justified where the award contravenes principles which are considered in the host country as reflecting its fundamental convictions, or as having an absolute, universal value.[231]

This narrow interpretation is not surprising if one considers the main goal of the 1958 NY Convention that is "to uphold the finality of the arbitral award as much as possible"[232] and to take additional measures "which would contribute to increasing the effectiveness of arbitration"[233]. It is evident that a legal system is effective only when the judicial decisions are recognized and enforced: thus, the contrariety to public policy needs to be interpreted restrictively to give the national courts the opportunity to have a broader room to manoeuvre to uphold the award.

This thesis has been substantiated in practice by several national courts that have underlined the limited scope of the application of international public policy as regards both Article V(2)(b) of the 1958 NY Convention and Article 34(2)(*b*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration[234]. For instance, a Canadian court decided that

> will not recognize or enforce a foreign law or judgment … that is contrary to the forum's fundamental public policies, its essential public or moral interests, or its conception of essential justice and morality. Public policy serves a corrective function.[235] (emphasis added)

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[231] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage eds., 1996), at 996. See also, Albert Jan van den Berg, *The New York Convention Summary of Courts Decisions*, *in* ASA SPECIAL SERIES NO. 9 47, at 91 (1996) ("According to this distinction, the number of matters considered as falling under public policy in international cases is smaller than that in domestic ones"). See also Pieter Sanders, *Commentary*, *in* 60 YEARS OF ICC ARBITRATION 364 (ICC Publishing, 1984).

[232] ANTON G. MAURER, THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION (Revised ed., 2013), at 63. See also Bundesgericht, Switzerland, 2 July 2012.

[233] ANTON G. MAURER, THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION (Revised ed., 2013), at 63-64.

[234] UNCITRAL, '2012 Digest of Case Law on the Model Law on International Commercial Arbitration', at 160.

[235] *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and P.T. PLN (Persero)*, Court of Queen's Bench of Alberta, Canada, 24 October 2007.

English courts have followed the same principles:

> Exceptionally, the English court will not enforce or recognize a right conferred or a duty imposed by a foreign law where, on the facts of the particular case, enforcement of, as the case of recognition, would be contrary to a fundamental policy of English law. The court has, therefore, refused in certain cases to apply foreign law where to do so would in the particular circumstances be contrary to the interests of the United Kingdom or contrary to justice or morality.[236] (emphasis added)

A French court affirmed that, although it examined all elements relating to the existence of a violation of international public policy from both a legal and factual point of view and with no limitation, it was only the judge of the award rather than the judge of the arbitration proceeding. As a consequence, it only carried out an extrinsic review by examining whether the award's recognition or enforcement was compatible with international public policy.[237] Then, one can say that international public policy is a less strict notion of public policy than the notion applied by domestic law.[238]

Most jurisdictions adopted the same approach to narrowing the interpretation of international public policy and to limit its applicability in favor of the recognition and enforcement of arbitral awards.[239]

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[236] HALSBURY'S LAWS OF ENGLAND, VOL. 8, (IV ed.), at ¶ 418. As for the English case law, see *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v R'As Al Khaimah National Oil Co*, Court of Appeal of England and Wales, United Kingdom, 24 March 1987.

[237] *French SNF SAS v Netherland Cytec Industries BV*, Cour d'appel de Paris, France, 23 March 2006.

[238] See, for instance, *Sté Grands Moulins de Strasbourg v Cie Continentale France*, Cour de cassation, France, 15 March 1988; *Sté de Télécommunications Internationales du Cameroun v France Télécom*, Cour de cassation, France, 16 January 2003. See also UNCITRAL, '2012 Digest of Case Law on the Model Law on International Commercial Arbitration', at 160.

[239] For Germany, see *Seller v Buyer*, Bundesgerichtshof, Germany, 18 January 1990. In this decision, the court affirmed that the recognition of the awards does not lead to a result that is manifestly irreconcilable with any fundamental principle of German law and that what is required is rather an infringement of international public policy. In particular, the recognition of foreign arbitral awards is considered as governed normally by a less stringent regime than domestic awards.

For Hong Kong, see *Polytek Engineering Company Limited v Hebei Import & Export Corporation*, High Court of the Hong Kong Special Administrative Region, Hong Kong, 16 January 1998; *Shandong Hengri Acron Chemical Joint Stock Company v Petrochina International (Hong Kong) Corporation Ltd.*, Court of Appeal, In the High Court of the Hong Kong Special Administrative Region, Hong Kong, 25 July 2011; *Gao Haiyan and another v Keeneye Holdings Ltd and another*, Court of Appeal, In the High Court of the Hong Kong Special Administrative Region, Hong Kong, 2 December 2011.

The narrow application of the public policy exception in the New York Convention has two direct consequences on the policies adopted by domestic courts when recognition and enforcement of an arbitral award is sought. First, national courts should deny the recognition and enforcement of an award only when the public policy of the State was manifestly disregarded[240]

For Italy, see *SpA Abati Legnami v. Fritz Häupl*, Corte di Cassazione, Italy, 3 April 1987.

For Luxembourg, see *Kersa Holding Co. Luxembourg v Infancourtage*, Cour d'appel, 24 November 1993.

For New Zealand, see *Amaltal Corp. Ltd. V Maruha (NZ) Corp. Ltd*, Court of Appeal, New Zealand, 2003.

For the People's Republic of China, see *ED & F Man (Hong Kong) Co., Ltd. v China National Sugar & Wines Group Corp.*, Supreme People's Court, China, 1 July 2003; *GRD Minproc Limited v Shanghai Feilun Industrial Co.*, Supreme People's Court, China, 13 March, 2009; *Tianrui Hotel Investment Co., Ltd. v Hangzhou Yiju Hotel Management Co., Ltd.*, Supreme People's Court, China, 18 May 2010;

For Spain, see *Vinalmar, SA (Switzerland) v. Gaspar Peral y Cía*, Tribunal Supremo, Spain, 8 February 2000; *Saroc, S.p.A. (Italy) v. Sahece, S.A. (Spain)*, Tribunal Supremo, Spain, 4 March 2003.

For Switzerland, see *A SA (Switzerland) v. B Co Ltd (British Virgin Islands), C SA (Ecuador)*, Tribunal Fédéral, Switzerland, 8 December 2003; Tribunal Fédéral, Switzerland, 28 July 2010; Bundesgericht, Switzerland, 04 October 2010.

For the United States, see *Parsons & Whittemore Overseas Co. v Societe Generale de L'Industrie du Papier (RAKTA)*, Court of Appeals, Second Circuit, United States, 23 December 1974; *Southwire Co. (US) v Laminoirs-Trefileres-Cableries de Lens, S.A. (France)*, District Court, Northern District of Georgia, United States, 18 January 1980; *Fertilizer Corp. of India (India) v IDI Mgmt. Inc. (US)*, District Court, Southern District of Ohio, United States, 9 June 1981; *La Societe Nationale Pour La Recherche, La Production, Le Transport, La Transformation et la Commercialisation Des Hydrocarbures (Algeria) v Shaneen Natural Resources Company, Inc. (US)*, District Court, Southern District of New York, 15 November 1983; *Waterside Ocean Nav. Co. v Int'l Nav. Ltd.*, Court of Appeals, Second Circuit, 11 May 1984; *Geotech Lizenz A.G. v Evergreen Systems, Inc.*, District Court, Eastern District of New York, United States, 27 October 1988; *Industrial Risk Insurers v M.A.N. Gutehoffnungshutte GmbH*, Court of Appeals, Eleventh Circuit, United States, 22 May 1998; *Consorcio Rive S.A. de C.V. (Mexico) v Briggs of Cancun*, Inc. (US), Court of Appeals, Fifth Circuit, 26 November 2003; *Karaha Bodas Co. (Cayman Islands) v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Indonesia)*, Court of Appeals, Fifth Circuit, 23 March 2004; *Karen Maritime Ltd. v Omar International Incorporated*, District Court, Eastern District of New York, United States, 23 April 2004; T*ermoRio S.A. E.S.P. (Colombia) v Electranta S.P. (Colombia)*, Court of Appeals, District of Columbia Circuit, United States, 25 May 2007; *Telenor Mobile Communications AS (Norway) v Storm LLC (Ukraine)*, District Court, Southern District of New York, United States, 2 November 2007; *Republic of Argentina v BG Group PLC*, District Court, District of Columbia, United States, 21 January 2011; *Ameropa AG, v Havi Ocean Co.*, District Court, Southern District of New York, United States, 16 February 2011; *Ameropa AG (Switzerland) v Havi Ocean Co. LLC (United Arab Emirates)*, District Court, Southern District of New York, United States, 16 February 2011; *The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran, as Successor in Interest to the Ministry of War of the Government of Iran v Cubic Defense Systems, Inc., as Successor in Interest to Cubic International Sales Corpo*, Court of Appeals, Ninth Circuit, United States, 15 December 2011; *Sei Societa Esplosivi Industriali SPA v L–3 Fuzing and Ordnance Systems, INC.*, District Court, District of Delaware, United States, 17 February 2012; *Subway International B.V. v Panayota Bletas and John Bletas*, District Court, District of Connecticut, United States, 13 March 2012.

[240] The author of this work uses the expression 'manifestly disregarded' to embrace the several wordings employed by the different national courts. See, for instance, Pierre Lalive, 'Transnational (or Truly International Public Policy and International Arbitration', 3 ICCA CONGRESS SERIES 257, at 262 (1987). For Canada, see *Schreter v Gasmac*, Ontario Court (General Division), Canada, 13 February 1992. The Ontario court rejected the opposition to the application for recognition and enforcement of an U.S. American arbitral award made in Georgia and based its opposition among others on a denial of justice and a violation of public policy. The court noted that the concept of

or only in instances of most serious procedural and substantive injustice.[241] Second, the national courts have no authority to review the merits of a dispute.[242]

As a conclusion, it is clear that the 1958 NY Convention is based on a pro-enforcement policy and has aimed at giving an instrument to national courts to recognize and enforce as many foreign awards as is reasonably possible. This pro-enforcement policy is, as we will discuss below, one of the most relevant elements –if not *the* most important one– that has led several

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imposing public policy on foreign awards is meant to guard against enforcement of a foreign award which fundamentally offends local principles of justice and fairness, and where the procedural or substantive rules diverge markedly from those of the forum where enforcement is sought, or where there was corruption or ignorance on the part of the tribunal which could not be tolerated. See also *Yugraneft Corporation v Rexx Management Corporation*, Court of Queen's Bench of Alberta, Canada, 29 June 2007.

For UK courts, see *Westacre Investments Inc v. Jugoimport-SDRP Holding Co Ltd*, High Court of England and Wales, United Kingdom, 19 December 1997; *Gater Assets Ltd. V NAK Naftogaz Unkrainiy*, High Court of Justice, United Kingdom, 15 February 2008.

For French jurisdictions, see *French SNF SAS v Netherland Cytec Industries BV*, Cour d'appel de Paris, France, 23 March 2006. The court affirmed that since the French company did not prove any flagrant, effective and concrete violation of international public policy, there was no reason to ignore the decision of the arbitral tribunal; *French SNF SAS v Netherland Cytec Industries BV*, Cour de cassation, Civ. 1, France, 4 June 2008; *Linde AG and Linde Hellas Ltd. v Halyvourgike AE*, Cour d'appel de Paris, France, 22 October 2009.

For Germany, see Budesgerichtshof, Germany, 1971. The court decided that only severe defects in the arbitral proceeding or the arbitral award could violate German public policy and that the defects must violate fundamental principles of state and economic life. See also Budesgerichtshof, Germany, 15 May 1986; Budesgerichtshof, Germany, 1 February 2001.

For New Zealand, see *Downer-Hill Joint Venture v Government of Fiji*, High Court, New Zealand, 24 August 2004.

For Spain, see *Vinalmar, SA (Switzerland) v. Gaspar Peral y Cía*, Tribunal Supremo, Spain, 8 February 2000; *Saroc, S.p.A. (Italy) v. Sahece, S.A. (Spain)*, Tribunal Supremo, Spain, 4 March 2007.

For the United States jurisdictions see, *Hall Street Associates LLC v Mattel Inc.*, Supreme Court, United States, 25 March 2008; *NTT Docomo Inc. v Ultra D.O.O*, District Court, Southern District of New York, United States, 12 October 2010; *Tamini Global Company Ltd. V Kellog Brown & Root LLC*, District Court, Southern District of Texas, United States, 24 March 2011.

[241] UNCITRAL, '2012 Digest of Case Law on the Model Law on International Commercial Arbitration', at 159-160.

[242] See, for instance, *Applicant not indicated v Eton Properties Ltd and Eton Properties (Holdings)*, Court of Appeal, In the High Court of the Hong Kong Special Administrative Region, Hong Kong, 11 June 2009; *Shandong Hengri Acron Chemical Joint Stock Company v Petrochina International (Hong Kong) Corporation Ltd.*, Court of Appeal, In the High Court of the Hong Kong Special Administrative Region, Hong Kong, 25 July 2011; *Fratelli Variola S.p.A. v Kampffmeijer S.àr.l.*, Corte di Cassazione, Italy, 17 March 1982; *SpA Abati Legnami v. Fritz Häupl*, Corte di Cassazione, Italy, 3 April 1987; *C.G. Impianti SpA v. B.M.A.A.B. and Sons International Contracting Company WLL*, Corte di Appello di Milano, Italy, 29 April 2009; *Vigel S.p.A. v China National Machine Tool Corp.*, Corte di Cassazione, Italy, 8 April 2004. See also ; Ibrahim Fadlallah, 'L'ordre public dans les sentences arbitrales', 249 RECUEIL DES COURS 369, at 388-389 (1994).

authors to build a legal theory of international arbitration based on the existence and development of an international arbitral order.

C. Regional Public Policy: the case of the European Union

Another declination of public policy arose in the last decades in relation with the development of economic and political regions. The phenomenon is well represented by the European Union: some areas of European Union Law[243], such as European antitrust law[244], are regarded as a matter of public policy.

This was ruled by the European Court of Justice in the *Eco Swiss* decision:

> 35. […] it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances.
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> 36. However […] Article 81 EC (ex Article 85) constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 81(2) EC (ex Article 85(2)), that any agreements or decisions prohibited pursuant to that article are to be automatically void.
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> 37. It follows that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where

[243] Olivier Caprasse, *Arbitrage et ordre public européen*, *in* L'ORDRE PUBLIC ET L'ARBITRAGE 115 (E. Loquin and S. Maniciaux eds., 2014). Yves Brulard and Yves Quintin, 'European Community Law and Arbitration - National Versus Community Public Policy', 18(5) JOURNAL OF INTERNATIONAL ARBITRATION 533 (2001); Hans van Houtte, *From a National to a European Public Policy*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOUR OF ARTHUR T. VON MEHREN 841 (J. Nafziger and S. Symconides eds., 2002); Jean-Hubert Moitry, 'Right to a Fair Trial and the European Convention on Human Rights: Some Remarks on the République de Guinée Case', 6(2) JOURNAL OF INTERNATIONAL ARBITRATION 115, at 120 (1989); Christoph Liebscher, 'European Public Policy After Eco Swiss', 10(1) AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 81 (1999); Peter Schlosser, *Arbitration and the European Public Policy*, *in* ARBITRATION AND EUROPEAN LAW - REPORTS OF THE INTERNATIONAL COLLOQUIUM OF CEPANI 25 APRIL 25 1997 (1997), at p. 85; Laurence Idot, 'Note Courde cassation (1re Chambre civile) 15 mars 1988', 1990(1) REVUE DE L'ARBITRAGE 115. As regards public policy interpretation in the OHADA region (Organisation pour l'Harmonisation en Afrique du Droit des Affaires), see Eugène Assepo Assi, 'L'Ordre Public International Dans L'Acte Uniforme de L'Ohada Relatif à L'Arbitrage', 2007(4) REVUE DE L'ARBITRAGE 753.

[244] The relevant provisions concerning antitrust were originally contained in article 85 and following of the Treaty on European Union, then in article 81 of the Treaty Establishing the European Community, and can now be found in article 101 and following of the Treaty on the Functioning of the European Union. See Consolidated Version of the Treaty on the Functioning of the European Union, 30 March 2010.

> such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 81(1) EC (ex Article 85(1)).
>
> […]
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> 39. For the reasons stated in paragraph 36 above, the provisions of Article 81 EC (ex Article 85) may be regarded as a matter of public policy within the meaning of the New York Convention.[245] (emphasis added)

In its decision, the ECJ asserted two main points. First, a European public policy exists, at least as regards economic matters. Such regional public policy is superior to the public policy of every Member State and needs to be applied by national courts even when they have to decide the recognition and enforcement of a foreign arbitration award.[246]

This concept is not new and national courts had applied it, even before the famous *Eco Swiss* case. For instance, in 1998, the Austrian Supreme Court found that Arts. 81 and 82 of the EU Treaty, cornerstones of the rules and basic principles of the Common Market, were, given the principle of supremacy of EC law, part of the public policy of every EU member state.[247]

In France, the Cour d'appel de Paris ruled that Member States courts are required to review challenges to arbitration awards on the basis that they are contrary to public policy in respect of how they treat EC competition law. Moreover, such challenges may be made even if EC competition law was not raised before the arbitrators. It seems that the Cour d'appel de Paris

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[245] Judgment, *Eco Swiss Time Ltd v Benetton International NV*, ECJ Case No. 126/97, 1 June 1999. See commentaries of Laurence Idot, 'Note – Cour de justice des communautés européennes 1er juin 1999 – Eco Swiss China Time Ltd. v Benetton International', 1999(3) REVUE DE L'ARBITRAGE 639; Sylvaine Poillot Peruzzetto, 'L'ordre public international en droit communautaire. A propos de l'arrêt de la Cour de justice des Communautés du 1er juin 1999 (affaire Eco Swiss China Time Ltd), 127(2) JOURNAL DU DROIT INTERNATIONAL 299 (2000).

[246] Lambert Matray, *Arbitrage et ordre public transnational*, *in* THE ART OF ARBITRATION. ESSAYS ON INTERNATIONAL ARBITRATION. LIBER AMICORUM PIETER SANDERS. 12 SEPTEMBER 1912-1982 241, at 244-245 (J. C. Schultsz and A. J. van den Berg eds., 1982).

[247] *Kajo-Erzeugnisse Essenzen GmbH v DO Zdravilisce Ra-denska*, Oberster Gerichtshof, Austria, 20 October 1993 / 23 February 1998.

treated EC competition law as it would treat at least certain domestic law principles under its public policy review of arbitration awards.[248]

The same approach was adopted in Germany where a court decided that the fundamental principles of the Law against Restraint of Competition and the provisions of community carter law, codified especially in the EC Treaty are part of the public policy of Germany.[249]

The second point concerns the narrowed application of the public policy exception: the European Court of Justice as well as national courts have confirmed that the review of arbitration awards should be limited in scope even when a violation of European public policy is claimed. That means that (i) review of the merits of the arbitration award by national judges is not admissible and that (ii) refusal to recognize and enforce a foreign arbitral award should be possible only in exception circumstances.

As regards the issue of the review of the merits, an Italian court declared that

> Non è sindacabile sotto la violazione dell'ordine pubblico […] in relazione al procedimento per l'execuatur di un lodo esterno, la interpretazione che gli arbitri hanno reso del contratto concluso tra le parti per verificarne la conformità alla normativa comunitaria sulla concorrenza.[250]

Similarly, the French jurisdictions adopted the same interpretation by stating that

> Considérant […] que le juge de l'annulation peut certes, dans le cadre de ses pouvoirs de nature disciplinaire, porter une appréciation en droit et en fait sur les éléments qui sont dans la sentence déférée à son contrôle, mais pas statuer au fond sur un litige complexe qui n'a jamais encore été ni

[248] See *S.A. Thalès Air Defence v G.I.E. Euromissile et al.*, Cour d'appel de Paris, France, 18 November 2004. See also *SNF SAS S.A. v Cytec Industries BV*, Cour d'appel de Paris, France, 23 March 2006. The latter decision was confirmed by the Cour de cassation in *SNF SAS S.A. v Cytec Industries BV*, Cour de cassation, France, 4 June 2008. With regard to the decision of the Cour d'appel de Paris in the case *Thalès v Euromissile*, see commentary of Denis Bensaude, 'Thalès Air Defence BV v GIE Euromissile: Defining the Limits of Scrutiny of Awards on Alleged Violations of European Competition Law', 22(3) JOURNAL OF INTERNATIONAL ARBITRATION 239 (2005). As for the decision in the case SNF v Cytec, see Ibrahim Fadlallah, 'Société SNF v. Société Cytec Industries BV, Cour de Cassation (1re Ch. Civile), Not Indicated, 4 June 2008', 2008(3) REVUE DE L'ARBITRAGE 473.

[249] See *Licensee v Licensor*, Oberlandesgericht of Düsseldorf, Germany, 21 July 2004.

[250] *Nuovo Pignone S.p.a. v Schlumberger*, Corte d'appello di Firenze, Italy, 21 March 2006. See also *S.A. Thalès Air Defence v. G.I.E. Euromissile et al.*, Cour d'appel de Paris, France, 18 November 2004.

> plaidé, ni jugé devant un arbitre concernant la simple éventualité de l'illicéité de certaines stipulations contractuelles.[251]

As for the exceptional circumstances requirement, national courts have confirmed several times their reluctance to go beyond an extrinsic control of public policy and to confine such control to situations where the recognition or enforcement of awards would breach the national legal order in an unacceptable manner, such breach constituting a manifest and evident violation of an essential rule or a fundamental principle, including European competition laws.[252]

However, application of European public policy has a limit of geographical nature. As a matter of fact, the public policy rule must not be exclusive to a specific region and must sanction the interests of the international community as a whole. In a case decided in Switzerland, for instance, the Tribunal Fédéral found it doubtful that the provisions of - national or EU - competition law are among those fundamental legal or moral principles that are recognized in all civilized countries, to the point that their violation should be seen as a violation of public policy.[253]

D. Mandatory Rules of Law

As noted above, public policy has also a positive effect. Such effect is represented by the mandatory rules of law.[254] The concept of 'mandatory rule' is borrowed from private

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[251] *S.A. Thalès Air Defence v G.I.E. Euromissile et al.*, Cour d'appel de Paris, France, 18 November 2004.

[252] See *S.A. Thalès Air Defence v G.I.E. Euromissile et al.*, Cour d'appel de Paris, France, 18 November 2004 ("Considérant que la violation de l'ordre public international au sens de l'article 1502-5° du NCPC doit être flagrante, effective et concrète"); see also *SNF SAS S.A. v Cytec Industries BV*, Cour d'appel de Paris, France, 23 March 2006 ("En l'absence de toute démonstration par l'appelante d'une violation flagrante, effective et concrète de l'ordre public international, il n'existe aucune raison de tenir pour insignifiant ce qui a été jugé par le tribunal arbitral aux termes d'une instruction, et y substituer la propre appréciation de la cour"); see also *French SNF SAS v Netherland Cytec Industries BV*, Cour de cassation, Civ. 1, France, 4 June 2008; *Linde AG and Linde Hellas Ltd. v Halyvourgike AE*, Cour d'appel de Paris, France, 22 October 2009. As regards the decision *Linde v Halyvourgike* see commentary of François Xavier Train, 'Note 22 octobre 2009, Cour d'appel de Paris (Pôle 1 Ch. 1)', 2010(1) REVUE DE L'ARBITRAGE 128.

See also *Licensee v Licensor*, Oberlandesgericht of Düsseldorf, Germany, 21 July 2004 ("A violation of public policy requires that there is an evident violation of an essential law provision concerning, particularly, the legal and economic order of the enforcement state or of a right deemed fundamental in that state").

[253] *X SA v Y SA and Z SA*, Tribunal Fédéral, Switzerland, 13 November 1998. See also *Tensacciai SpA v Freyssinet Terra Armata R.L.*, Tribunal Fédéral, Switzerland, 8 March 2006. The court in this case decided that European or Italian competition laws do not belong to the realm of Swiss public policy as stated in art. 190(2)(e).

[254] On this issue, generally, see MANDATORY RULES IN INTERNATIONAL ARBITRATION (G. Bermann and L. Mistelis eds., 2011); FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard

international law and its content is difficult to define. Even more difficult is to define its relationship with public policy. Are those concepts identical, do they profoundly diverge, or do they have an overlapping sphere? A debate arose in particular around the notions of mandatory rules, overriding mandatory rules and public policy included in the Rome I Regulation.[255]

According to Francescakis, mandatory rules are "lois donc l'observation est nécessaire pour la sauvegarde de l'organisation politique, sociale, et économique du pays".[256] They determine their own field of application with the consequence that courts will apply them 'immediately', without prior reference to conflict of laws rules. This is why these provisions are called rules of immediate application. Among those rules, one generally includes statutes which protect weaker parties, such as employees and consumers, the economic order or a vital interest of the State.

The relationship between mandatory rules and international arbitration is known to be contradictory. On the one hand, mandatory rules "visent avant tout à protéger les intérêts qui peuvent être purement nationaux et particularistes, et elles sont en tout cas fortement marquées

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and J. Savage eds., 1996), at 847-859; CHRISTOPHE SERAGLINI, LOIS DE POLICE ET JUSTICE ARBITRALE INTERNATIONALE (2001); Luca Radicati di Brozolo, 'Arbitrage Commercial International et Lois de Police. Considérations sur les conflits de juridictions dans le commerce international', 315 RECUEIL DES COURS 262 (2005); Philippe Francescakis, 'Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflit de lois', REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1 (1966); Pierre Mayer, *L'interférence des lois de police*, *in* L'APPORT DE LA JURISPRUDENCE ARBITRALE 31 (ICC Publication No. 440/1, 1986); Pierre Mayer, 'Les lois de police étrangères', 108 JOURNAL DU DROIT INTERNATIONAL 277 (1981); Pierre Mayer, 'Reflections on the International Arbitrator's Duty to Apply the Law – The 2000 Freshfields Lecture', 17(3) ARBITRATION INTERNATIONAL 235 (2001); Serge Lazareff, 'Mandatory Extraterritorial Application of National Law Rules', 7 ICCA CONGRESS SERIES 550 (1996); Abul F. Munir Maniruzzaman, 'International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview', 7(3) JOURNAL OF INTERNATIONAL ARBITRATION 53 (1990); Luca Radicati di Brozolo, 'Mandatory Rules and International Arbitration', 23 THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 49 (2012); Jeff Waincymer, 'International Commercial Arbitration and the Application of Mandatory Rules of Law', 5(1) ASIAN INTERNATIONAL ARBITRATION JOURNAL 1 (2009); Karsten Thorn and Walter Grenz, *The Effect of Overriding Mandatory Rules on the Arbitration Agreement*, *in* CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 187 (F. Ferrari and S. Kröll eds., 2010); Marc Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration', 14(4) JOURNAL OF INTERNATIONAL ARBITRATION 23 (1997); Yves Derains, 'Public Policy and the Law Applicable to the Dispute in International Arbitration', 3 ICCA CONGRESS SERIES 227 (1986).

[255] Council Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L-177 of 4 July 2008. See Jonathan Harris, *Mandatory Rules and Public Policy under the Rome I Regulation*, *in* Rome I Regulation: The Law Applicable to Contractual Obligations in Europe 269 (F. Ferrari and S. Leible eds., 2009).

[256] Philippe Francescakis, 'Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflit de lois', REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 1, at 1 (1966).

par leur dimension étatique".[257] On the other hand, international arbitration is getting universal and ever-more-liberal. As a consequence, as noted already several times, arbitration became an autonomous order fully distinct from national legal orders.[258]

Despite this contradiction, a French scholar affirmed that

> L'hostilité de principe à l'encontre des lois de police en matière d'arbitrage international doit être vivement critiquée. Il existe un devoir incombant à l'arbitre de respecter l'ordre public étranger à la *lex causae*. Cette obligation concerne avant tout les lois de police. Les Etats ne peuvent tolérer que l'arbitrage soir un moyen de porter atteinte aux intérêts qu'ils entendent protéger par des lois de police. Il va donc de l'efficacité d'une sentence arbitrale et de la pérennité de l'arbitrage international que les arbitres respectent les lois de police étrangères au droit applicable au fond du litige.[259]

This approach is followed by Professor Seraglini:

> Il reste que ce type de lois [de police] peut être identifié dans tous les systèmes juridiques nationaux, car tout Etat entend faire prévaloir certains intérêts supérieurs à la volonté privée dans le commerce international.[260]

Professor Seraglini went further affirming that autonomy of the arbitral order is not in contradiction with the application of mandatory rules. On the contrary, he suggested that the use of mandatory rules in international arbitration is actually justified by the increase of international commerce and the development of globalization. As a matter of fact, according to him, globalization requires also the arbitrators to apply of mandatory rules to protect domestic state interests in both traditional sectors (e.g. consumer protection, fight against corruption, cultural diversity and environmental protection), and new fields of international trade, such as biotechnology and electronic commerce.[261]

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[257] CHRISTOPHE SERAGLINI, LOIS DE POLICE ET JUSTICE ARBITRALE INTERNATIONALE (2001), at 5.

[258] Philippe Fouchard, *L'arbitrage et la mondialisation de l'économie*, *in* PHILOSOPHIE DU DROIT ET DROIT ÉCONOMIQUE: QUEL DIALOGUE ?: MÉLANGES EN L'HONNEUR DE GÉRARD FARJAT 381, at 383-386 (J. Bart ed., 1999).

[259] JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999), at 299.

[260] CHRISTOPHE SERAGLINI, LOIS DE POLICE ET JUSTICE ARBITRALE INTERNATIONALE (2001), at 8.

[261] CHRISTOPHE SERAGLINI, LOIS DE POLICE ET JUSTICE ARBITRALE INTERNATIONALE (2001), at 9-11.

This doctrinal approach in favor of using mandatory rules in international arbitration considers that, when an arbitral award does not respect a mandatory rule falling within the scope of a state's international public policy, such award risks not to be recognized and enforced. For instance, Professor Mayer declared that

> En matière de reconnaissance des sentences arbitrales, la violation d'une loi de police intervient comme une cause d'*éviction* de la sentence en fonction de son contenu; c'est ce qui permet d'intégrer ce mécanisme dans le contrôle de la conformité à l'ordre public de la sentence. Il n'en demeure pas moins certains liens entre la méthode des lois de police, procédé de désignation de la loi applicable, et le recours à la notion de loi de police comme cause d'éviction d'une sentence. Parce que l'arbitre aura recouru à la méthode des lois de police, il aura appliqué la loi de police compétente et sa sentence échappera à l'annulation; inversement, pour s'en être tenu à la *lex contractus* choisie par les parties, il aura méconnu la loi de police et sa sentence sera annulée. De plus, dans le contrôle qu'il exerce, le juge est amené, avant de pouvoir se prononcer sur la conformité de la sentence à l'ordre public, à apprécier si la situation entrait dans le domaine d'application nécessaire de la loi de police.[262]

In his study on the relationship between mandatory rules and international arbitration, Professor Radicati di Brozolo proposed that, in order to satisfy the requirements of the international community, arbitrators should apply mandatory rules of those States which are connected to the dispute (not only the mandatory rules of the *lex contractus*), when they consider their objectives, the corresponding means and the consequences of their application to be legitimate:

> S'agissant de l'application des lois de police, l'arbitre doit tenir compte non seulement des intérêts des parties (qui peuvent avoir ace sujet des exigences en conflit entre elles), mais aussi des intérêts d'un ou même de plusieurs Etats incorpores dans ces lois.[263]

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[262] Pierre Mayer, 'La sentence contraire à l'ordre public au fond', 1994(4) REVUE DE L'ARBITRAGE 615, at 643-644. See also CHRISTOPHE SERAGLINI, LOIS DE POLICE ET JUSTICE ARBITRALE INTERNATIONALE (2001), at 157. Professor Seraglini affirmed that the absence of contrariety with public policy supposes that the lois de police of the forum have been respected. Acoording to his theory, an award which violates a loi de police of the forum will not overcome the public policy exception, because such a violation amounts to a violation of an interest considered fundamental by the forum State. See also JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999), at 505-517.

[263] Luca Radicati di Brozolo, 'Arbitrage Commercial International et Lois de Police. Considérations sur les conflits de juridictions dans le commerce international', 315 RECUEIL DES COURS 262, at 484 (2005).

Such a view of international arbitration, which has been defined 'Westphalian Approach' by Professor Gaillard, finds its *raison d'être* in the role of the State within the arbitration context. The State is viewed at the same time as a tolerant entity that allows arbitration to exist and as a powerful player capable to intervene in every phase of the arbitration proceedings:

> La tolérance et la collaboration des Etats dans le contexte de l'arbitrage demeurent indispensables à chaque moment du phénomène arbitral. Pour que 1' arbitrage ait lieu, les tribunaux étatiques doivent accepter de renoncer à exercer la compétence juridictionnelle; l'intervention des tribunaux est en revanche requise lorsque 1'exécution forcée s'avère nécessaire –ne fût-ce que quand les mécanismes assurant un respect spontané des sentences, certainement dotes d'un pouvoir contraignant considérable, se montrent insuffisants– où lorsqu'il s'agit de faire valoir les effets de la sentence dans l'ordre juridique interne. On pourrait ainsi conclure que ce n'est pas l'arbitrage qui est devenu a-national ou délocalisé, mais que ce sont plutôt les lois étatiques qui ont fini dans un certain sens par rejoindre la position des auteurs les plus « libéraux ».[264]

This conclusion is not surprising if one considers the basics of this approach. The authors belonging to this doctrinal approach conclude that the first source of arbitration is the State: they then justify the obligation of the arbitrators to take into account the mandatory rules to respect the exigencies of the international community of States.[265]

We consider these conclusions not fully correct and not matching with the evolution of international arbitration. As we will see below, international commercial arbitration became the principal method to solve international commercial disputes. This element together with the appearance of new actors and new rules in the international scene, the increase of trans-national business relations and the establishment of a new trans-national economic legal order, led the newly-established legal system to adopt a new public policy capable to address the new challenges of the business community. In such a new economic legal order, it is difficult to imagine the reason why an international arbitrator should take into account mandatory rules of

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[264] Luca Radicati di Brozolo, 'Arbitrage Commercial International et Lois de Police. Considérations sur les conflits de juridictions dans le commerce international', 315 RECUEIL DES COURS 262, at 285 (2005).

[265] CHRISTOPHE SERAGLINI, LOIS DE POLICE ET JUSTICE ARBITRALE INTERNATIONALE (2001), at 271. See also Luca Radicati di Brozolo, 'Arbitrage Commercial International et Lois de Police. Considérations sur les conflits de juridictions dans le commerce international', 315 RECUEIL DES COURS 262, at 492 (2005) ("L'arbitrage international demeure en définitive un système qui ne peut pas s'affranchir des Etats, et qui ne peut par conséquent bénéficier de plus de liberté que celle que les Etats sont prêts à lui accorder").

law of a specific state instead of referring to a set of principles and rules that better address the new superior requirements of the international community.

Emmanuel Gaillard describes this reality in the following terms:

> Because arbitrators do not administer justice on behalf of any specific State, they will naturally turn to the consensus reached by the international community on that issue when fulfilling their task. The existence of such a consensus, which in no way should be confused with a requirement of unanimity, can be recognized through an analysis of the solutions adopted in national laws and in international instruments having addressed the matter. Resolutions adopted by international organizations, private codification, and international conventions constitute relevant factors, to the extent that they reflect the existence of a consensus among States on the content of a rule.[266]

As a consequence, the application of mandatory rules would deny the transnational and universal vocation of arbitration[267] and should be considered "particulariste et a-morale" because it reflects exclusively a specific policy affirmed by a national State instead of representing universal values of the international community.[268]

The rejection of the mandatory rules of law methods in international arbitration has been supported by arbitral practice. In an ICC award, an arbitral tribunal refused to allow the mandatory rules contained in the Belgium Act of 27 July 1961 on the unilateral termination of exclusive distributionship agreements of an undetermined period to prevail over Italian law which had been chosen by the parties. The arbitral tribunal based its refusal on the fact that "in an international arbitration, the arbitral tribunal is not an institution of a national system".[269]

In another ICC case involving a State-owned company and a foreign party, the arbitral tribunal refused to examine the alleged violation of a mandatory rule of the country of the State-owned company on the ground that it did not form part of the law chosen by the parties and that it

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[266] EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010), at 131.

[267] Berthold Goldman, *Nouvelles réflexions sur la Lex Mercatoria*, *in* ETUDES DE DROIT INTERNATIONAL EN L'HONNEUR DE PIERRE LALIVE 241, at 251 (C. Dominicé, R. Patry and C. Reymond eds., 1993).

[268] Emmanuel Gaillard, 'Arbitrage commercial international, sentence arbitrale, droit applicable au fond du litige', 586-9-1 JURISCLASSEUR at 25-26 (1996).

[269] Final Award, ICC Case No. 6379, 1990.

was asserting that ignoring such rule "could be considered a violation of international public policy".[270]

Some arbitral tribunals went further highlighting the fact that arbitral tribunals do not aim at protecting specific interest of States by applying their rules. In an ICC award, the tribunal ruled that

> Dans le commerce international, il est très important que les règles produisent des résultats prévisibles, répondent à l'attente légitime des parties et prennent en compte les usages prédominants du marché international. Le tribunal estime qu'une approche fondée sur les intérêts étatiques serait inappropriée dans ce contexte. Cette approche a donné lieu à de nombreuses décisions judiciaires émises par des juges basées sur des spéculations imprévisibles sur ce que peuvent être les intérêts étatiques motivant les lois en conflit. Selon le tribunal, cette approche... n'a pas sa place dans l'arbitrage international.[271]

[270] Final Award, ICC Case No. 7047, 28 February 1994.

[271] Final Award, ICC Case No. 8385, 1995. See also Final Award, ICC Case No. 9333, 1988 ("Même à supposer (i) qu'il s'agit d'une loi de police et (ii) que l'arbitre admet qu'une telle loi peut être appliquée nonobstant l'élection d'une autre loi matérielle encore faudrait-il démontrer des intérêts puissants et légitimes des Etats-Unis à l'application de cette loi. De sérieux doutes à ce sujet pourront en effet résulter du fait que la loi FCPA ne vise pas en premier lieu à protéger l'ordre public fondamental des Etats-Unis mais qu'elle a pour but de restaurer la confiance du public dans l'intégrité des entreprises américaines dont la réputation été ternie par une série de scandales retentissants […] la lutte contre la corruption, *but* certes louable, ne justifie pas nécessairement l'exportation des *méthodes* ou du code de conduite singulier de la loi FCPA pour atteindre ce but"). See also Final Award, ICC Case No. 6329, 1992 ("la lutte contre le trafic de drogue présente un intérêt international évident, cela n'implique pas que toutes les méthodes utilisées par un Etat dans ce contexte doivent automatiquement être appliquées internationalement").

CHAPTER 4

THE TRANSNATIONAL DIMENSION OF PUBLIC POLICY

Different from the domestic, international or regional dimensions of public policy, transnational public policy seems to better address the current issues in international arbitration proceedings. As a matter of fact, if international arbitration has evolved as a transnational legal order adopting transnational legal rules, it seems logical that the applicable public policy be transnational too.

A precise definition of transnational public policy is notoriously difficult and the concept is also not applied in a uniform fashion.

This chapter aims at identifying and describing the main features of transnational public policy rather than proposing a clear-cut definition. First, the chapter will outline the attempts of the doctrine to propose a definition of transnational public policy. Second, the public and private sources of transnational public policy will be analyzed. Third, the chapter tries to disqualify all the critics made to transnational public policy by proposing for each critic a counterargument supporting the application of transnational public policy to international arbitration. Fourth, this chapter shows that international arbitral tribunals and national courts have applied the concept, even when reference was made to "international" rather than "transnational" public policy. Finally, the ethical role of transnational public policy is stressed. International arbitrators are not only judges of private commercial disputes between two parties: they should be thought of as international judges and, as such, they need to represent and protect the interests of the international community as a whole. That means that they have to establish and civilly sanction the offense against transnational public policy values, even when parties have not made any reference to these values.

A. An attempt to define the concept

As noted, the establishment of a new economic order perturbed the international legal order. With regard to the economic relations, public international law was not capable to address

the new challenges of the international community and a new body of rules was established for and with the help of the business community: the so-called transnational law.[272]

As a result, the current world society is characterized by legal pluralism. This means that transnational human activities, whether commercial or not, are not only regulated by State-made law. As a matter of fact, States are no longer the only source of law and, even when they are the source of law, very often, at least in commercial areas, companies, the economic actors, are the ones who came up with the idea and even led the negotiations.[273]

If a legal pluralism exists, it is also true that globalization had led to a uniforming process of the regulation of the economic activities:

> L'uniformisation mondiale a son assise économique. Plus qu'aucune mode de production le capitalisme est mondial, transnational. It transcende les économies nationales. Les techniques juridiques qu'il induit aussi. Le rapprochement entre les systèmes juridiques est un fait peu contesté. Les instruments juridiques de l'échange sont presque partout les mêmes. Qu'importe leur origine ![274]

The creation of a transnational legal order required the establishment of a specific public policy, different from the national ones and capable to deal with the new challenges of the transnational commercial activities including at least one foreign element. The logical result is the development of a transnational public policy.

Today, although the prevailing doctrine restricts the intervention of the international public policy of the State to safeguarding mandatory rules of fundamental principles which are particular to the *lex fori*, in certain countries, doctrinal writings or judicial decisions recognize a

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[272] Lambert Matray, *Arbitrage et ordre public transnational*, *in* THE ART OF ARBITRATION. ESSAYS ON INTERNATIONAL ARBITRATION. LIBER AMICORUM PIETER SANDERS. 12 SEPTEMBER 1912-1982 241, at 243 (J. C. Schultsz and A. J. van den Berg eds., 1982).

[273] Catherine Kessedjian, 'Transnational Public Policy', 13 ICCA CONGRESS SERIES 857, at 858 (2006).

[274] ALI MEZGHANI, DROIT INTERNATIONAL PRIVE, ETATS NOUVEAUX ET RELATIONS PRIVEES INTERNATIONALES (1991), at 336.

broader concept of public policy and give it a more or less marked "supranational" meaning or contents.[275]

However, even if scholars and arbitrators have used the concept[276], nobody really agrees on what transnational public policy is and how it should play out in arbitration. [277]

Some definitions have been proposed but they are far from giving a clear and complete picture of the concept. The International Law Association defined this dimension of public policy as

> […] one of even more restricted scope, but of universal application – comprising fundamental rules of natural law, principles of universal justice, jus cogens in public international law, and the general principles of morality accepted by what are referred to as "civilized nations". [278]

Moreover, according to the ILA Committee on International Commercial Arbitration,

> An example of a substantive fundamental principle is prohibition of abuse of rights. An example of a procedural fundamental principle is the requirement that tribunals be impartial. An example of a public policy rule is anti-trust law. An example of an international obligation is a United Nations resolution imposing sanctions. Some rules, such as those prohibiting corruption, fall into more than one category.
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> […]
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> An example of a substantive fundamental principle is the principle of good faith and prohibition of abuse of rights (especially in civil law countries). Other examples that are cited by courts and commentators include: pacta sunt servanda; prohibition against uncompensated expropriation; and prohibition against discrimination. The prohibition of activities that are contra bonos mores also comes within this category, for example the proscription against piracy, terrorism, genocide, slavery, smuggling, drug trafficking and pedophilia.

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[275] Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', 3 ICCA CONGRESS SERIES 257, at 276 (1986).

[276] Ibrahim Fadlallah, 'L'ordre public dans les sentences arbitrales', 249 RECUEIL DES COURS 369, at 398 (1994).

[277] Catherine Kessedjian, 'Transnational Public Policy', 13 ICCA CONGRESS SERIES 857, at 857 (2006).

[278] INTERNATIONAL LAW ASSOCIATION, Committee on International Commercial Arbitration, 'Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards', London Conference (2000), at 6-7. See also Audley Sheppard, 'Public Policy and the Enforcement of Arbitral Awards: should there be a Global Standard?', 1(1) Transnational Dispute Management (2004).

> An example of procedural public policy is the requirement that tribunals be impartial. Other examples of breaches of procedural public policy that are cited include: the making of the award was induced or affected by fraud or corruption; breach of the rules of natural justice; and the parties were on an unequal footing in the appointment of the tribunal. It may also be a breach of procedural public policy to enforce an award that is inconsistent with a court decision or arbitral award that has res judicata effect in the enforcement forum.[279]
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> […]
>
> An example of an international obligation is a United Nations Security Council resolution imposing sanctions. Such resolutions are immediately binding on Member States of the United Nations (pursuant to Chapter V, Article 25 of the United Nations Charter). The State must also respect the obligations in international conventions it has ratified.
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> Some aspects of international public policy may fall into more than one category. For example, bribery and corruption are generally considered to be contra bonos mores, and most courts will refuse to uphold agreements relating to corruption even when the parties and the acts of corruption are all foreign.[280] (emphasis added)

Catherine Kessedjian has proposed a more 'transnational' definition that is shared by the author of this work. In particular, Professor Kessedjian has highlighted the fact that norms belonging to transnational public policy are universal and they originate in civil society, business communities and the community of States:

> [Transnational public policy is] composed of mandatory norms which may be imposed on actors in the market either because they have been created by those actors themselves or by civil society at large, or because they have been widely accepted by different societies around the world. These norms aim at being universal. They are the sign of the maturity of the international communities (that of the merchants and that of the civil societies) who know very well that there are limits to their activities.[281]

Professor Chang-fa Lo described transnational public policy with similar terms, underlining that its definition does not depend merely on "the basic or fundamental value in a

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[279] The difference between substantive and procedural public policy will be discussed in CHAPTERS 5 and 6 below.

[280] INTERNATIONAL LAW ASSOCIATION, Committee on International Commercial Arbitration, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards', New Delhi Conference (2002), at ¶¶ 27-32. It is interesting to mention that, even if the ILA Committee referred to international public policy, all the principles mentioned at ¶¶ 27-32 certainly fall within the scope of transnational public policy.

[281] Catherine Kessedjian, 'Transnational Public Policy', 13 ICCA CONGRESS SERIES 857, at 861-862 (2006).

specific society" but on a "fundamental value of human beings recognized internationally".[282] However, contrary to our idea of transnational public policy, professor Lo limits the scope of the concept exclusively to these values included in international declarations, treaties or other instruments.[283]

Even though this point will be further investigated in the following chapters, it is worth mentioning here that we believe that transnational public policy values are also, and particularly, embodied in instruments that are not codified in the traditional instruments of public international law. Private codes, such as the corporate social responsibility codes, may also include these values. As a matter of fact, international law instruments, such as treaties, are already part of the national legal systems recognized by the international community and do not need to be 'elevate' to transnational public policy standards:

> Il n'est pas nécessaire de rechercher si les moyens en cause se réfèrent à l'ordre public international français ou à l'ordre public véritablement international, qui serait formé de principes fondamentaux communs à l'ensemble des nations, ou à la plupart d'entre elles […] l'ordre public que le gouvernement égyptien invoque en l'espèce résulte d'un traité international ; il est, en réalité, l'ordre juridique de la société étatique internationale, qui s'impose au juge français, lorsque du moins le traité considéré lie la France.[284]

It is then evident that a trans-nationalization of the concept 'international public policy' happened in international arbitration as well as in private international law.[285] Such trans-

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[282] Chang-fa Lo, 'Principles and Criteria for International and Transnational Public Policies in Commercial Arbitration', 1(1) CONTEMPORARY ASIA ARBITRATION JOURNAL 67, at 82 (2008).

[283] Chang-fa Lo, 'Principles and Criteria for International and Transnational Public Policies in Commercial Arbitration', 1(1) CONTEMPORARY ASIA ARBITRATION JOURNAL 67, at 82-85 (2008). See also, Kenneth-Michael Curtin, 'Redefining Public Policy in International Arbitration of Mandatory National Laws', 64(2) DEFENSE COUNSEL JOURNAL 271, at 282,283 (1997).

[284] Berthold Goldman, 'Note', 112(1) JOURNAL DU DROIT INTERNATIONAL 129, at 154 (1985).

[285] See, for instance, *Alitalia Linee Aree Italiane S.p.a. v Buonecore* Carmine, Corte di Cassazione, Italy, 26 November 2004:

> In particolare deduce che la nozione di ordine pubblico internazionale, costituente un limite all'applicazione della normativa di uno stato straniero al cittadino italiano, non può essere vista come una realizzazione del principio del favor lavoratoris capace di determinare l'applicazione di istituti propri della legge italiana, ma deve intendersi come quel complesso di principi ricavabili dagli accordi intentatali o plurinazionali, dagli atti di organizzazione a carattere universale aventi valore obbligatorio nonché dagli atti del diritto comunitario e dalle sentenze della Corte di Giustizia del Lussemburgo nonché dalla giurisprudenza internazionale. In una siffatta ottica l'ordine pubblico, di cui all'originario articolo 31 delle preleggi, non poteva coincidere con le norme inderogabili dell'ordinamento italiano ma doveva necessariamente coincidere con 'i principi essenziali del nostro ordinamento', ovvero con 'i

nationalization concerns both the sources and the content of the values protected by transnational public policy and the bodies that are in charge of guarantee the respect of such values.[286] As Professor Gaillard stated,

> [T]he transnational public policy method is not limited to the acknowledgment of the existence of extremely general principles [but] demonstrates that the international community has developed detailed rules that can be applied by arbitrators pursuant to transnational public policy.[287]

This view was anticipated a few years earlier by an ICSID arbitral tribunal that ruled that

> The term 'international public policy' […] is sometimes used with another meaning, signifying that an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora. It has been proposed to cover that concept in referring to 'transnational

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principi di carattere universale comuni alle nazioni di civiltà affini tesi alla tutela dei diritti fondamentali dell'uomo', ovvero ancora con 'i principi generali che informano l'intero ordinamento contravvenendo ai quali i lineamenti e l'armonia del sistema vengono stravolti'. (emphasis added)

The Court also highlighted the

> [...] evoluzione nel corso degli anni nell'individuazione della nozione di ordine pubblico sino ad assestarsi attualmente su parametri corrispondenti ad esigenze comuni ai diversi ordinamenti statali oppure, come avviene specialmente nel diritto del lavoro, rilevabili nell'ambiente sociale in cui il fatto della vita sociale da disciplinare in sede di diritto internazionale privato, sia strettamente collegato e, dunque, non soltanto i principi di ordine pubblico espressi dalla lex fori", con l'ulteriore conseguenza di una presa di distanza da una concezione dell'ordine pubblico internazionale enucleabile esclusivamente sulla base dell'assetto ordinamentale interno.

Finally, the Italian Supreme Court recognized that

> [...] ad una ricostruzione secondo la quale il limite dell'ordine pubblico Internazionale - essendo posto a salvaguardia dei principi fondamentali dell'ordinamento internazionale - andrebbe determinato avendo esclusivo riguardo all'importanza che i principi, alla base delle norme interne derogate da quelle straniere, rivestano nella comunità nazionale - è stata da tempo opposta un'altra opinione secondo la quale, invece, nel concretizzare la clausola dell'ordine pubblico, il giudice dovrebbe tracciare una distinzione tra i principi peculiari dell'ordinamento nazionale da un lato, ed i principi che questo ha in comune con la generalità degli altri ordinamenti statali, dall'altro, per negare applicazione soltanto alle norme straniere contrastanti con i secondi. (emphasis added)

See also Jacob Dolinger, 'World public policy: real international public policy in the conflict of laws', 17(2) TEXAS INTERNATIONAL LAW JOURNAL 167, at 172 (1982): "We would accept the classification of a 'third public policy' to distinguish world public policy from the internal public policy which forbids contractual clauses against basic legal principles-the *first* public policy-and from public policy in private international law, which blocks application of foreign law contracts and judgments contrary to internal public policy and thereby causes international effects-the *second* public policy. The *third* public policy is the one that establishes universal principles, in various fields of international law and relations, to serve the higher interests of the world community, the common interests of mankind, above and sometimes even contrary to the interests of individual nations".

[286] JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999), at 353. See also, Mathias Forteau, 'L'ordre public « transnational » ou « réellement international »', 138(1) JOURNAL DU DROIT INTERNATIONAL 3, at 7 (2011).

[287] EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010), at 131.

> public policy' or 'truly international public policy' […][288] (emphasis added)

The wording of the ICSID Tribunal in *World Duty Free v Kenya* raised an important issue: the international consensus as a fundamental requirement for a value to be considered under the transnational public policy chapeau. The question here is what international consensus means. In other words, does it mean that the protected standards and values should be universally recognized to fall within the scope of transnational public policy? The answer to this must be no. This was confirmed by a 1989 Resolution of the Institut de Droit International that stated:

> In no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community.[289] (emphasis added)

As several commentators have pointed out, it is excessive and impossible to reach a universal consensus with regards to values and standards of transnational public policy even in those areas of law when one expects to have the national legal systems agreeing on common principles.[290] For instance, "even in the area of ordinary criminal law such common rules exist only in the narrow area of international substantive criminal law on the basis of international treaties (genocide, drug trafficking, terrorism, slave trade, slavery, piracy)".[291]

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[288] Award, *World Duty Free Company Limited v The Republic of Kenya*, ICSID Case No. ARB/00/7, 4 October 2006, ¶ 139.

[289] INSTITUT DE DROIT INTERNATIONAL, 'Resolution No. 1 on Arbitration between States, State Enterprises or State Entities, and Foreign Enterprises', Session of Santiago de Compostela (1989) at Article 2, available at http://www.idi-iil.org. It is evident that, even though the expression used is 'international public policy' instead of 'transnational public policy', the Resolution does not refer to the international public policy as applied by every State. As a matter of fact, by adding 'as to which a broad consensus has emerged in the international community', the Resolution is clearly alluding to common public policy principles transcending the national legal orders and establishing a superior public policy, the transnational one.

[290] JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999) at 360. See also JULIAN D. M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION (1978), at 532. For the author, the principles of public policy are not found in mass opinion but "in the opinion of the healthy elements of the community". See also the discussion about the universality of the transnational public policy values in section C below.

[291] Pierre Karrer, *Article 187 of Swiss Private International Law Act, in* INTERNATIONAL ARBITRATION IN SWITZERLAND: AN INTRODUCTION AND COMMENTARY ON ARTICLES 176-194 OF THE SWISS PRIVATE INTERNATIONAL LAW STATUTE 479, at 520 (H. Honsell, N. P. Vogt, A. K. Schnyder and S. V. Berti eds., 2000).

However, the unreachable objective of making transnational public policy a universal concept would be the biggest obstacle to the establishment and definition of the concept itself.[292] As Emmanuel Gaillard stated,

> L'exception d'ordre public n'aurait plus aucune application si l'on exigeait qu'une règle soit, en droit positif comparé, absolument universelle pour être considérée comme appartenant à l'ordre public international. Le fait que la condamnation de l'apartheid, du trafic de drogue ou de la corruption corresponde à des valeurs très largement reconnues par la communauté internationale devrait suffire à justifier une réaction de l'ordre public international.[293]

The main reason why transnational public policy cannot be universal is the existence of fundamental social, civil and economic differences between the national States. As clearly explained by a French author,

> L'ordre public réellement international n'est pas, et ne sera jamais, un ordre public universel. Au premier abord, l'affirmation peut surprendre. Les précédents, les notions voisines, la terminologie utilisée invitent en effet à penser qu'à l'ordre public international au sens des droits nationaux s'oppose un ordre public international mondial, unique et permanent. Or, la diversité des civilisations, l'inégalité du développement économique et social des Etats montrent suffisamment le caractère utopique de cette vue.[294] (emphasis added)

As a conclusion, one could say that universality is not a requirement for a value to be considered as transnational public policy: its recognition by a broad number of nations is enough. In any case, there exist some factors that will diminish the differences between the nations: for instance the increasing application of transnational public policy rules in arbitral proceedings.[295] As it will be mentioned below, arbitrators become 'creators' of law and 'protectors' of the integrity of the arbitral legal order through the application of transnational public policy rules. Moreover, as mentioned above, global economy is another factor that mitigates the cultural

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[292] JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999), at 360.

[293] Emmanuel Gaillard, "Arbitrage commercial international, sentence arbitrale, droit applicable au fond du litige", 586-9-1 JURISCLASSEUR at 26 (1996).

[294] ANDRE CHAPELLE, LES FONCTIONS DE L'ORDRE PUBLIC EN DROIT INTERNATIONAL PRIVE (1979), at 512.

[295] Lambert Matray, *Arbitrage et ordre public transnational*, *in* THE ART OF ARBITRATION. ESSAYS ON INTERNATIONAL ARBITRATION. LIBER AMICORUM PIETER SANDERS. 12 SEPTEMBER 1912-1982 241, at 248-249 (J. C. Schultsz and A. J. van den Berg eds., 1982).

differences among nations that will more and more often adopt common standards and rules to uniform international trade and commerce.[296]

B. The sources of transnational public policy

The sources of transnational public policy are several and they have their origin in the intention of the international arbitrators to ground their decisions on universal norms. According to Eric Loquin,

> L'arbitre puise à toutes les sources du droit les règles de comportement aptes à satisfaire un sentiment de justice, qui, dans les relations internationales doit tender à l'universalité.[297]

Transnational public policy can be considered as the meeting point between different types of sources, defined by their origin and character. Since "the very process of formation and application of the norms of International Law has ceased to be a monopoly of the States",[298] we analyze below the public sources and the private sources involved in the creation of transnational public policy standards.

1. Public sources

The first type of public sources is *jus cogens*. These are mandatory standards which apply to all states of the international community.[299] Article 53 of the Vienna Convention on the Law of the Treaties attempted to provide a definition of this concept.[300] *Jus cogens* constitutes a public

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[296] JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999), at 361.

[297] Eric Loquin, *Les manifestations de l'illicite*, *in* L'ILLICITE DANS LE COMMERCE INTERNATIONAL 247, at 277 (P. Khan and C. Kessedjian eds., 1996).

[298] ANTÔNIO AUGUSTO CANÇADO TRINIDADE, THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE (2011), at 5.

[299] On this concept see Giorgio Gaja, 'Jus cogens beyond the Vienna Convention', 172 RECUEIL DES COURS 271 (1981); PAUL REUTER, DROIT INTERNATIONAL PUBLIC (1993), at 56-57; René-Jean Dupuy, *L'ordre public en droit international*, *in* L'ORDRE PUBLIC 103, at 107 (R. Polin ed., 1995).

[300] Article 53 of the 1969 of the Vienna Convention on the Law of the Treaties reads:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

policy applicable to international relations between subjects of international law, "un ordre public international au sens du droit des gens".[301]

The application of this concept to international commercial arbitration is not evident because it is not part of public international law. However, the application of *jus cogens* in international commercial arbitration is possible in two cases. First, when a State contract is the basis of the dispute and the international arbitrator decides to treat such dispute as a public international law dispute.[302] Second, when an international arbitrator finds that a party violated a norm of *jus cogens* that is recognized by most States of the international community.

The concept of *jus cogens* is extremely vague and often contested because it questions the principle of sovereignty of the States. However, it is useful to the arbitrator because an arbitrator does not belong to a specific forum. When an arbitrator decides to annul a contract or not to apply a law, he or she does not challenge the sovereignty of a State. Since the *jus cogens* is subject to a consensus of States[303], when arbitrators refer to it, they have the rare opportunity to rely on a standard that has a fully universal character.

The general principles established by Article 38 of the Statute of the International Court of Justice are another component of the transnational public policy.[304] These are principles under public international law that may be applied before an arbitrator in disputes involving State contracts.[305] Article 42 of the 1965 Washington Convention authorizes the arbitrator to apply the "principles of international law" to contracts concluded between a State and a private company,

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[301] Henri Rolin, *Vers un ordre public réellement international*, *in* HOMMAGE D'UNE GENERATION DE JURISTES AU PRESIDENT BASDEVANT 441, at 451 (1960).

[302] See Award, Ad Hoc, *Texaco Overseas Petroleum Company v The Government of the Libyan Arab Republic*, 19 January 1977.

[303] However, as it has already mentioned, consensus does not mean full universality. See PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC (1995), at 222.

[304] PAUL REUTER, DROIT INTERNATIONAL PUBLIC (1993), at 117 et seq; PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC (1995), at 259 et seq; Michel Virally, *Un tiers droit? Réflexions théoriques, in* LE DROIT DES RELATIONS ECONOMIQUES INTERNATIONALES, ETUDES OFFERTES A BERTHOLD GOLDMAN 373, at 382 (P. Fouchard, Ph. Kahn et A. Lyon-Caen eds.,1982).

[305] Henri Rolin, *Vers un ordre public réellement international*, *in* HOMMAGE D'UNE GENERATION DE JURISTES AU PRESIDENT BASDEVANT 441, at 448 (1960).

principles that typically equate to the general principles of Article 38 of the Statute of the ICJ.[306] According to Goldman, some of these principles form an international public policy "au sens plein du terme, car il s'agit de l'ordre public de la société internationale, dans les relations économiques".[307] The arbitrator can apply these principles also in disputes involving only private individuals: in this case, the principles of Article 38 of the ICJ Statute, as principles of transnational public policy, serve as inspiration to the arbitrator, as it is the case for *jus cogens*.

International conventions are also a fundamental source of inspiration in the discovery of transnational public policy. [308] In general, for the international arbitrator, international conventions are the sign of a broad consensus among States.[309] Arbitrators may take support on the existence of an international convention protecting fundamental values to generate a rule of transnational public policy. An international convention proves indeed that the same rule is shared by several States. Higher is the number of signatories, higher is the authority of the treaty. This, as Professor Mayer,

> [L]'adoption de règles par la voie conventionnelle traduit parfois l'attachement des Etats parties à des valeurs supérieures, qu'ils s'engagent mutuellement à respecter... L'arbitre pourra les invoquer, soit directement afin de mettre en échec telle prétention contraire, soit dans le cadre de l'exception d'ordre public opposée à la règle étatique normalement applicable. De quelque façon que l'on analyse la notion d'ordre public transnational - *jus cogens* de la *lex mercatoria*, ou réaction de la conscience individuelle de l'arbitre - il est préférable d'en justifier le contenu en se référant à des textes qui l'ont consacré de façon solennelle.[310]

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[306] Berthold Goldman, *Le droit applicable selon la Convention de la B.I.R.D., du 18 mars 1965, pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, in* INVESTISSEMENTS ETRANGERS ET ARBITRAGE ENTRE ETATS ET PERSONNES PRIVEES 133, at 150 (CREDIMI, 1969).

[307] Berthold Goldman, *Le droit applicable selon la Convention de la B.I.R.D., du 18 mars 1965, pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, in* INVESTISSEMENTS ETRANGERS ET ARBITRAGE ENTRE ETATS ET PERSONNES PRIVEES 133, at 151 (CREDIMI, 1969).

[308] ANDRE CHAPELLE, LES FONCTIONS DE L'ORDRE PUBLIC EN DROIT INTERNATIONAL PRIVE (1979), at 515 et seq.

[309] Pierre Mayer, *L'application par l'arbitre des conventions internationales de droit privé, in* L'INTERNATIONALISATION DU DROIT, MELANGES OFFERTS A YVON LOUSSOUARN 275, at 285 (1994).

[310] Pierre Mayer, *L'application par l'arbitre des conventions internationales de droit privé, in* L'INTERNATIONALISATION DU DROIT, MELANGES OFFERTS A YVON LOUSSOUARN 275, at 285 (1994).

Thus, an international convention allows, through its consensual nature, the arbitrator to find a valuable basis for transnational public policy values.

Do the non-binding rules, such as resolutions, opinions, recommendations and codes of conduct adopted by international organizations such as the UN or the OECD give birth to standards of transnational public policy? The question was asked by scholars with reference to the Universal Declaration of Human Rights of 1948. Lerebours-Pigeonniere, followed in this by Goldman[311], put forward the idea that due to its universal character, this declaration created values of truly international public policy.[312]

Some non-binding instruments contribute to building standards of transnational public policy on the condition that they achieve a broad consensus around common values.[313] The same can be said for conventions that never entered into force or for draft conventions. Despite the absence of binding value, these documents help together with other sources to create a transnational public policy where they establish the existence of a broad consensus.[314]

Similarly, the embargo measures adopted by the UN have an international origin because they are decided by the international community, within the more important international organization grouping most of the existing States. This feature legitimizes the application of embargo measures by an arbitrator. As a consequence, some authors affirmed that the UN

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[311] Berthold Goldman, La protection internationale des droits de l'homme et l'ordre public international dans le fonctionnement de la règle de conflits de lois, in RENE CASSIN AMICORUM DISCIPLORUMQUE LIBER, PROBLEMES DE PROTECTION INTERNATIONALE, TOME 1, 449, at 458 (1969).

[312] Paul Lerebours-Pigeonniere, *La Déclaration Universelle des Droits de l'homme et le droit international privé français au milieu du XX siècle, in* MELANGES RIPERT, 255, at 262-263 (1950).

[313] See Lambert Matray, *Arbitrage et ordre public transnational*, *in* THE ART OF ARBITRATION. ESSAYS ON INTERNATIONAL ARBITRATION. LIBER AMICORUM PIETER SANDERS. 12 SEPTEMBER 1912-1982 241, at 248 (J. C. Schultsz and A. J. van den Berg eds., 1982) ("On peut donner à ces normes, une force obligatoire immédiate à la condition d'admettre que ces normes expriment l'ordre public transnational. Mais cette conclusion n'est possible que si les normes font l'objet d'un consentement suffisamment généralisé pour y trouver l'expression d'un jugement de valeur collectif").

[314] Catherine Kessedjian, 'Transnational Public Policy', 13 ICCA CONGRESS SERIES 857, at 861 (2006).

embargo against Iraq was to be considered as part of the transnational public policy imposed on international arbitrators.[315]

The general principles of law, that is to say, the principles common to a majority of state legal systems, are also a major source of transnational public policy.[316] In this case, the source is not international: it is rather national because the public policy is deducted from the convergence of national laws. However, the content of principle is transnational because it is widely shared by a large number of national legal orders. The finding that a similar public policy rule is found in most legal systems is a decisive factor for the emergence of transnational public policy standards.[317] According to Bureau, this is evident: "Quant à l'incidence directe des principes généraux sur la notion même d'ordre public, celle-ci ne saurait plus guère être contestée".[318]

In order to establish the existence of a general principle of law reflecting transnational public policy standards, the arbitrator must implement a method that is well known by international arbitrators: the comparative analysis.[319] The arbitrator may identify common principles to different states involved in the dispute. In this way, the arbitrator respects the public policies of those States on whose territory the award is likely to be executed. It provides also the best efficiency of the award. For example, in the ICC award No. 1110 made by Judge Lagergren[320], and in the ICC award No. 3916 of 1982[321], the arbitrators first found that corruption was prohibited by national legislations of the States involved in the dispute before referring to a transnational public policy. Although the public policy common to the States involved in a

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[315] Bernard Grelon and Charles-Etienne Gudin, 'Contrats et crise du Golfe', 118(3) JOURNAL DU DROIT INTERNATIONAL 633 (1991); Giorgio Sacerdoti, 'Embargo irakeno, effetto sui contratti in corso ed efficacia delle clausole per arbitrato internazionale', 3 RIVISTA DELL'ARBITRATO 361 (1993). See also Final Award, CAM Case No. 1491, 20 July 1992.

[316] Franck Latty, *Le droit transnational économique*, *in* DROIT DE L'ECONOMIE INTERNATIONALE 109, at 112 (P. Daillier, G. de La Pradelle and H. Ghérari eds., 2004).

[317] Franck Latty, *Le droit transnational économique*, *in* DROIT DE L'ECONOMIE INTERNATIONALE 109, at 112-117 (P. Daillier, G. de La Pradelle and H. Ghérari eds., 2004).

[318] DOMINIQUE BUREAU, LES SOURCES INFORMELLES DE DROIT DANS LES RELATIONS PRIVEES INTERNATIONALES, VOL. II (Thesis, University of Paris 2, 1992), at 372.

[319] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage eds., 1996), at 813-818.

[320] Final Award, ICC Case No. 1110, 15 January 1963.

[321] Final Award, ICC Case No. 3916, 1982.

dispute is a form of transnational public policy, it is limited to a specific number of States. In this context, public policy does not claim to universality; it is of modest dimensions.

The arbitrator's approach may be more ambitious. He or she can extrapolate from all existing legal systems a public policy rule. The fact that an identical public policy rule is recognized both in civil law systems, common law systems, and legal systems inspired by the Koran leads to the recognition of a transnational public policy rule. This is the best way for the arbitrator to confer greater efficiency to an award.

Finally, the UNIDROIT Principles have a special role to play in building a transnational public policy. Contrary to the general principles of law discovered or invented by the arbitrators, these principles are legitimized by the authority of UNIDROIT. In May 1994, the 'Principles of international commercial contracts' were published.[322] According to Fouchard, Gaillard and Goldman these principles are a "remarkable work of comparative law, which has undoubtedly made a vital contribution to the development of transnational rules".[323]

2. Trans-national versus inter-national sources: the role of private soft-law rules

Can public policy have a private source? If the policy is public, it seems that it cannot find its source in private standards. However, in the field of international arbitration, the laws applied by the arbitrator are more and more often of private nature.[324] Therefore, it is not illogical that private sources are involved, without being the only ones, in the development of transnational public policy.

Private sources of international commercial law are, first of all, the usages of international trade.[325] In domestic law, legislation gives certain commercial usages a peremptory character. In

[322] See UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS: A NEW *LEX MERCATORIA*?, (ICC Publication No. 490/1, 1995); Andrea Giardina, 'Les principes UNIDROIT sur les contrats internationaux', 122 JOURNAL DU DROIT INTERNATIONAL 547 (1995).

[323] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage eds., 1996), at 817.

[324] Jean-Baptiste Racine, *Les normes porteuses d'ordre public dans l'arbitrage commercial international*, *in* L'ORDRE PUBLIC ET L'ARBITRAGE 7, at 20 (E. Loquin and S. Maniciaux eds., 2014).

[325] Philip Fouchard, *Les usages, l'arbitre et le juge*, *in* LE DROIT DES RELATIONS ECONOMIQUES INTERNATIONALES, ETUDES OFFERTES A BERTHOLD GOLDMAN 67 (P. Fouchard, Ph. Kahn et A. Lyon-Caen eds.,1982); Emamnuel Gaillard, *La distinction des principes généraux du droit et des usages du commerce*

international commercial law, international trade usages participate in the development of transnational public policy. Like any other standard of international commercial law, transnational public policy can therefore draw its source, at least in part, in commercial usages.

The example of private codes of conduct demonstrates this approach. Such codes create usages.[326] As such, they can give birth to a rule of transnational public policy. It is the consensus of economic and business actors around a same core value that elevates the simple usage to a rule of public policy. After founding that private codes of conduct were a "consensus sur le comportement que doit manifester un professionnel du commerce international", Kahn adds that "de ce consensus et de l'importance reconnue aux usages et aux comportements, on peut conclure qu'il existe un ensemble de règles qui forment une des composantes de l'ordre public transnational et dont l'originalité ou la spécificité est d'avoir pour origine les opérateurs eux-mêmes".[327]

The adoption by the business operators themselves –especially in the private codes of conduct– of a rule protecting a critical value is an important source of transnational public policy. Indeed, the public policy standard benefits the adhesion of the recipients of the rule. The authority of the transnational public policy is thus reinforced by the existence of professional standards.

Inspiring sources of transnational public policy are, for instance, the principles of Corporate Social Responsibility which have been developed in the United States and via informal transnational groups such as the Table Ronde de Caux. These principles are currently discussed extensively at least within the United Nations and the European Union. They are elaborated through a process different from the traditional process of norm creation. It is done either

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international, *in* ETUDES OFFERTES A PIERRE BELLET 203 (1991); INTERNATIONAL TRADE USAGES (ICC Publication No. 440/4, 1987)

[326] Gérard Farjat, *Réflexions sur les codes de conduite privés*, *in* LE DROIT DES RELATIONS ECONOMIQUES INTERNATIONALES, ETUDES OFFERTES A BERTHOLD GOLDMAN 47 (P. Fouchard, Ph. Kahn et A. Lyon-Caen eds.,1982); Richard Ferguson, 'The Legal Status of No-Statutory Codes of Practice', JOURNAL OF BUSINESS LAW 12 (1988); Filali Osman, 'Avis, directives, codes de bonne conduite, recommandation, éthique, etc: réflexion sur la dégradation des sources privées du droit', REVUE TRIMESTRELLE DE DROIT CIVIL 509 (1995).

[327] Philippe Khan, *Les réactions des milieux économiques*, *in* L'ILLICITE DANS LE COMMERCE INTERNATIONAL 477, at 491 (P. Khan and C. Kessedjian eds., 1996).

unilaterally by corporations themselves, or within the framework of NGOs, or under the auspices of an international governmental organization but essentially by non-state actors, i.e. corporations.[328] On 27 April 2006, the Secretary General of the United Nations came to the Stock Exchange in New York City where he launched the Principles for Responsible Investment. Those Principles were prepared by a group of leaders from the investment community with no participation from States. The institutions involved manage two trillion dollars in assets. The Principles are a set of global best practices which offer a path for integrating environmental, social and governance criteria into investment analysis and ownership practices.[329]

Finally, are there rules of transnational public policy specific to international trade, that are not found in any other legal order? The autonomy of the sphere of international trade would be then complete because original public policy rules would exist sanctioning behaviors that trade alone could tolerate. The defenders of the *lex mercatoria* then find the proof of the existence of standards belonging exclusively to the sphere of international trade.

As a conclusion, in order to admit the existence of a transnational public policy standard, the arbitrator must find that the same rule is originated in several sources and is shared by a majority of legal orders. In other words, and this is a very important observation, transnational public policy arises at the confluence of several sources. A rule of public policy is found for example, in an international convention, in a majority of national laws and by the professionals themselves in the several private codes of conduct. A single source is not enough to build a rule of transnational public policy. What is important is not the origin of the sources themself, but rather their convergence indicating that a particular rule is subject to a broad consensus.

In addition, the sources of transnational public policy are mixed. As Bruno Oppetit said, international arbitration is a "système mixte mi-pulic et mi-privé".[330] As a result, transnational public policy lies at the intersection of public and private sources. Transnational public policy is

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[328] Catherine Kessedjian, 'Transnational Public Policy', 13 ICCA CONGRESS SERIES 857, at 868 (2006).

[329] See http://www.unpri.org/.

[330] Bruno Oppetit, 'Philosophie de l'arbitrage commercial international', 120(4) JOURNAL DU DROIT INTERNATIONAL 811, at 820 (1993).

the proof of the convergence of interests taken into account on the one side by the States and the other side by the business and economic community.

To conclude this section with the words of Professor Kessedjian:

> Transnational public policy is composed of mandatory norms which may be imposed on actors in the market either because they have been created by those actors themselves or by civil society at large, or because they have been widely accepted by different societies around the world.[331]

C. Critics and justifications to the application of transnational public policy

1. The main critics

Transnational public policy has been subject to several criticisms that, however, do not seem to be substantiated by the arbitration practice. These critics can be grouped in four baskets and relate to the following points: (i) definition [critic No. 1]; (ii) differences in cultural and legal backgrounds of parties, arbitrators and national judges [critics Nos. 2, 3, 4]; (iii) relation between transnational public policy and application of national laws by national jurisdictions [critics Nos. 5, 6, 7]; (iv) absence of sanctioning effects [critic No. 8].

First, authors have highlighted the fact that public policy is an undefined concept in the domestic dimension. The application of transnational public policy values is even more difficult in a transnational dimension where the legal order is not always regulated and defined by clear rules.[332] Jan Paullson affirmed that

> Arbitrators should also be prepared to draw the necessary consequences from conduct inconsistent with the essential values of society –and in this respect they may be subject to ultimate judicial correction. But whereas the category of explicitly mandatory rules is large and growing, the need to invoke unwritten and abstract notions of public policy seems, in a world where positive law leaves little unsaid, vanishingly small, and the overruling of arbitral determinations therefore highly exceptional.[333] (emphasis added)

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[331] Catherine Kessedjian, 'Transnational Public Policy', 13 ICCA CONGRESS SERIES 857, at 859-860 (2006).

[332] Michael Reisman, 'Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration', 13 ICCA CONGRESS SERIES 849, at 855 (2006).

[333] JAN PAULSSON, THE IDEA OF ARBITRATION (2014), at 129.

As noted, the operation of transnational public policy is always connected to the circumstances of the case. For this reason, transnational public policy is inherently flexible or versatile. As affirmed by Graulich, "uncertainty and ambiguity as to its content is an essential characteristic of public policy".[334] Versatility here implies that transnational public policy has the potential to address unforeseen legal problems.[335]

Second, even if transnational public policy is considered legitimate when applied by international arbitrators, it would be difficult to be interpreted by the national judge who usually grounds its refusal to recognize and enforce a foreign arbitral award on the international public policy of his or her State.[336] According to Jan Paulsson, "irrespective of terminology all three manifestations of public policy [national, international and transnational] are necessarily national".[337] In other words, national judges apply that transnational dimension of the particular public policy characterizing a national legal system. However, this is not always valid and the fact that national judges have applied transnational public policy shows that their attitude towards the concept is not biased by their cultural and legal backgrounds.

Third, some authors argue that the formation of a transnational public policy is rendered impossible where parties with different cultural backgrounds enter into a commercial relationship.[338] Yet, this view departs from a conception of transnational public policy knit to national laws. As seen below, the public policy of the international community has an autonomous, axiomatic nature and is not concerned with national policy. Transnational public policy applies to the dispute between the parties and is not confined by the laws of a national state.

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[334] PAUL GRAULICH, PRINCIPES DE DROIT INTERNATIONAL PRIVE (1961), at 155.

[335] Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', 3 ICCA CONGRESS SERIES 257, at 276 (1986).

[336] Bernard Hanotiau and Olivier Caprasse, *Public Policy in International Commercial Arbitration*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 777, at 795-796 (E. Gaillard and D. Di Pietro eds., 2008).

[337] JAN PAULSSON, THE IDEA OF ARBITRATION (2014), at 208.

[338] See the discussion in Otto Sandrock, 'How Much Freedom Should an International Arbitrator Enjoy? The Desire from Freedom from Law v. The Promotion of International Arbitration', 3 AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 30, at 55 (1992).

Fourth, other authors conceive transnational public policy as beyond the reach of arbitrators, who will always be influenced by a certain cultural background: an arbitrator, the argument runs, has only his or her own moral standards as a reference. As a result, when deciding a dispute, the tribunal is placed in a legal vacuum, having the arbitrators' conscience as the sole source of determinative moral rules.[339] Given the difficulty in reuniting different moral references in an international dispute, arbitrators count only on the dictum of their own judgment, inevitably tainted by a certain cultural, ideological or legal background. This position does not invalidate the existence of transnational public policy as an axiom. Instead, it underlines the importance of defining the sources and content of transnational rules. While it is indeed difficult for arbitrators to 'delocalize' their moral judgment in the presence of conflicting cultures, this can be achieved by reference to universal rules of ethics and the other sources of transnational public policy.

The fifth critic refers to the 'dangerous' exercise of the arbitrators to apply transnational public policy standards thus overriding the law applicable to the dispute chosen by the parties.[340] Two counterarguments can be raised against this critic. *In primis*, the law chosen by the parties could be used to justify violations of transnational public policy standards that might be excluded by the domestic public policy. As Professor Fadlallah affirmed, "il ne faut pas en faire une arme contre les lois étatiques, mais simplement un instrument pour sanctionner des comportements condamnables, qui prennent la loi pour prétexte mais n'ont pas le souci de la respecter."[341] *In secundis*, as we will analyze below, the arbitrator is not only the judge of the private commercial disputes between two parties: he is comparable to the figure of an international judge and, as such, he needs to represent and protect the interests of the international community as a whole.[342]

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[339] Pierre Mayer, *La règle morale dans l'arbitrage international*, *in* ETUDES OFFERTES A PIERRE BELLET 379 (1991). See also Michael Pryles, 'Reflections on Transnational Public Policy, 24(1) JOURNAL OF INTERNATIONAL ARBITRATION 1, at 6 (2007); Alan Redfern, 'Comments on Commercial Arbitration and Transnational Public Policy', 13 ICCA CONGRESS SERIES 871, at 873 (2006).

[340] Michael Pryles, 'Reflections on Transnational Public Policy, 24(1) JOURNAL OF INTERNATIONAL ARBITRATION 1, at 4 (2007). See also Michael Reisman, 'Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration', 13 ICCA CONGRESS SERIES 849, at 851 (2006).

[341] Ibrahim Fadlallah, 'L'ordre public dans les sentences arbitrales', 249 RECUEIL DES COURS 369, at 398 (1994).

[342] Marie Louise Seelig, 'The Notion of Transnational Public Policy and its Impact on Jurisdiction, Arbitrability and Admissibility', LVII(3) ANNALS FLB – BELGRADE LAW REVIEW 116, at 123 (2009).

The sixth criticism facing transnational public policy is that it is a useless legal concept. This view stems from the observation of the content of public policy. If the content of transnational public policy is identical to that of the public policies in contact with the dispute, its application would have the same result as prescribed in those particular systems.[343] However, even though transnational yardsticks may be endorsed by national public policy[344], this view overlooks the controlling functions of transnational public policy.[345] The national law chosen by the parties to govern their contract may be offensive to the international community.[346] The contract may fully comply with a national law and be contrary to transnational public policy. As it was reminded by Jean-Baptiste Racine,

> Dès lors, l'ordre public interne, en cas de contrariété, doit, selon nous, logiquement plier devant l'ordre public international des Etats appelés à contrôler la sentence. De la même manière, l'ordre public interne, dans la même hypothèse de conflit, doit céder devant l'ordre public transnational. Il serait par exemple possible d'écarter une disposition d'ordre juridique interne si son contenu ou son invocation dans le litige était jugé contraire au principe de bonne foi dès lors que ce dernier serait qualifié de principe d'ordre public transnational.
>
> […]
>
> L'ordre public international des Etats doit aussi logiquement céder devant l'ordre public transnational.[347]

Seventh, another argument for the uselessness of the concept is that, in the context of judicial proceedings, any court invoking transnational public policy would reject its own law.[348] This objection can be rebutted on several grounds. First, the same can be said of the application

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[343] Michael Reisman, 'Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration', 13 ICCA CONGRESS SERIES 849, at 856 (2006). The author affirmed that, since there is no legal system allowing bribery or violation of basic human rights, there is no need to resort to other values than the ones included in the national public policies.

[344] Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', 3 ICCA CONGRESS SERIES 257, at 314 (1986).

[345] JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999) at 356.

[346] In this sense, see INSTITUT DE DROIT INTERNATIONAL, Final Report on the 'Resolution No. 1 on Arbitration between States, State Enterprises or State Entities, and Foreign Enterprises', Session of Santiago de Compostela (1989), at 196. See also, JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999) at 357.

[347] Jean-Baptiste Racine, *Les normes porteuses d'ordre public dans l'arbitrage commercial international*, *in* L'ORDRE PUBLIC ET L'ARBITRAGE 7, at 28 (E. Loquin and S. Maniciaux eds., 2014).

[348] Paul Lagarde, 'Public Policy', INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 51 (1994).

of a principle of public international law. Transnational public policy may well found such a principle. Second, by rejecting its own law the court accepts the supremacy of transnational public policy.

Finally, the eighth criticism, still claiming the usefulness of transnational public policy, asserts that if it prohibits a conduct, it does not have the ability to sanction it. This final function, according to this idea, is indeed a feature of the applicable national or State-to-State rules of law. [349] However, as international arbitrators readily refer to "truly international public policy" requirements, they grant them undeniable legal nature in their awards. The consequences arbitrators draw from international public policy considerations demonstrate, in reality, the aptitude of truly international public policy to sanction unlawfulness.[350]

2. The justifications: Transnational public policy exists and it is applied

Despite the critics, the existence and application of transnational public policy by international arbitrators is justified by several reasons.

The first reason is the autonomy of international arbitration and the fact that arbitrators have no forum.[351] As mentioned above, arbitrators apply rules that are more and more often transnational in nature. It led to the establishment of a transnational legal order to which a new public policy corresponds: in fact, as it was recognized by an author, a legal order does not exist without its natural public policy.[352]

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[349] ALEXANDRE COURT DE FONTMICHEL, L'ARBITRE, LE JUGE ET LES PRATIQUES ILLICITES DU COMMERCE INTERNATIONAL (2004), at 102.

[350] EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010), at 6-7.

[351] JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999) at 363. See also, HENRI BATTIFOL AND PAUL LAGARDE, TRAITE DE DROIT INTERNATIONAL PRIVE, TOME I (1995), at 588: "La notion [d'ordre public véritablement international], bien que passablement floue, reste cependant utile pour les arbitres du commerce international qui n'ayant pas de for et ne tenant leurs pouvoirs que de la volonté des parties, ont besoin d'un ordre juridique de référence anational pour écarter si nécessaire les règles de droit applicables aux litiges dont ils sont saisis"; Jean-Michel Jacquet, *L'ordre public transnational*, *in* L'ORDRE PUBLIC ET L'ARBITRAGE 101, at 103 (E. Loquin and S. Maniciaux eds., 2014).

[352] Antoon V. M. Struycken, *La lex mercatoria dans le droit des contrats internationaux*, *in* L'EVOLUTION CONTEMPORAINE DU DROIT DES CONTRATS 207, at 220 (Faculté de droit et des sciences sociales de Poitiers ed., 1987).

Another important justification of the existence of a transnational public policy is the fact that an international (arbitral) tribunal is in a better position to safeguard the vital interests of the international (business) community than a national court. Such safeguard is assured with the application of transnational public policy that can act in two ways. First, it intervenes as a corrective mechanism to block the application of a law that should supposedly be applied but would be contrary to the vital interests of the international community.[353] Second, the respect of transnational public policy standards is fundamental for a broad recognition and enforcement of the arbitral award:

> Le respect de l'illicite universel, exprimé par l'ordre public véritablement international est l'assurance d'une exécution universelle de la sentence.[354]

Finally, its application *in concreto* by international arbitral tribunals and national courts justifies the existence of and the discussion over the concept of transnational public policy.

a. The application by arbitral tribunals

Several arbitral awards have referred to the notion of transnational public policy, both explicitly and implicitly.

In an ICC award of 1951[355], the arbitral tribunal mentioned the concept of international public policy as a set of standards that govern our traditional civilization. In another ICC case arisen from an armed conflict between India and Pakistan, the sole arbitrator concluded that an arbitrator being neutral and applying anational rules was not obliged to take into consideration the international public policies of the parties involved in the arbitrators, but he had the only obligation to respect the truly international public policy.[356]

Reference to transnational public policy was also made in two other ICC awards dealing with European antitrust law[357] and the application of the Racketeer Influenced and Corrupt

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[353] JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999) at 357.

[354] Eric Loquin, *Les manifestations de l'illicite*, *in* L'ILLICITE DANS LE COMMERCE INTERNATIONAL 247, at 278 (P. Khan and C. Kessedjian eds., 1996).

[355] Final Award, ICC Case No. 761, 4 July 1951.

[356] Final Award, ICC Case No. 1664, 15 March 1972.

[357] Final Award, ICC Case No. 6905, 1990.

Organizations Act (RICO)[358] respectively. However, the arbitral tribunals in these two cases only mentioned the existence of transnational public policy without defining or applying the concept.

More recently, an arbitral tribunal stated that

> True it is also that, at least under a certain body of international arbitral practice and according to a number of modern writers on the subject, there is such a thing as a 'growing' body of 'transnational public policy' which may or should be followed by international commercial arbitrators, in a proper case, in particular in ICC arbitrations.[359]

The wording of this award points out the relevance of the application of transnational public policy to jurisdiction and admissibility of an arbitral tribunal when corruption or bribery are involved. With regard to these issues, two tendencies were adopted by arbitral tribunals. This two tendencies mirror also two different phases of international arbitration and its theoretical foreground.

The 1963 award of Judge Lagergren represents the first phase. As a sole arbitrator, he dismissed his jurisdiction over the case because the contract was illegal due to corruption practices between the parties. In particular, the arbitrator considered the illegality of bribe not only under a national perspective (i.e. seat of arbitration and seat of performance of the contractual relation) but also under an international point of view. The arbitrator concluded that

> Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.[360] (emphasis added)

Today, such an application of transnational public policy to dismiss jurisdiction would be contrary to the idea of international arbitration as an autonomous legal system according to which the arbitrator is the judge of the system and is obliged to sanction activities and behaviors that threaten the integrity of the system itself.[361]

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[358] Final Award, ICC Case No. 6320, 1992.

[359] Partial Award on Jurisdiction and Admissibility, ICC Case No. 6474, 1992.

[360] Final Award, ICC Case No. 1110, 15 January 1963.

[361] For a discussion on this issue, see Section IV-D-2.

As a consequence, Judge Lagergren's approach towards the application of transnational public policy rules to arbitrability has been replaced.

In an ICC Case, for instance, the sole arbitrator assumed its jurisdiction to state the nullity of the contract concluded through illicit payments. In particular the sole arbitrator's conclusion is not only

> […] conforme à l'ordre public français interne, elle résulte également de la conception de l'ordre public international tel que la plupart des nations le reconnaît. Si de telles pratiques ont pu être constatées dans certains pays, il est patent, néanmoins, que la communauté internationale des affaires et la plupart des gouvernement s'opposent à toute pratique corruptive.[362] (emphasis added)

In an ICC award of 1982, the question in dispute was the validity of a nexus of contracts between two Yugoslav firms and foreign firms. This was supposed to be an export-import transaction, but the export part of it was fictitious and solely designed to enable the Yugoslav firms to obtain –in violation of Yugoslav rules on foreign exchange and export credit– a credit in foreign currency for the purchase of consumer goods. The arbitrators first determined the true nature of the contractual operation and established the violation of Yugoslav law; they then concluded that such operations were contrary not only to Yugoslav law but also to morality and bonos mores. According to the award, since the object of the contract was contrary to mandatory or public law rules, as well as contrary to morality, it was absolutely null and void:

> Ce principe est admis dans tous les pays et par toutes les législations. Il constitue une règle internationale, un élément de droit commun des contrats dans le domaine international.[363]

The same conclusion was reached by another arbitral tribunal, confirming that contractual relationship involving corruption are contrary to transnational public policy and should be considered null and void:

> Un contrat ayant pour objet l'exercice d'un trafic d'influence par le versement de pots de vin est contraire à l'ordre public international

[362] Final Award, ICC Case No. 3913, 1981.

[363] Final Award, ICC Case No. 2730, 1982.

> français ainsi qu'à l'éthique des affaires internationales telle que conçue par la plus grande partie des Etats de la communauté internationale.[364]

In the ICC Case No. 5622[365], the arbitral tribunal decided similarly. In that case, the Algerian government initiated a tender related to a project in Algeria. The international tribunal found that the contract had been obtained in breach of Algerian law condemning corruption. The Tribunal then pondered whether it should assume jurisdiction in a case involving international corruption by considering two possible solutions: either reject its jurisdiction or assume jurisdiction, given that the nullity of the main contract would not entail *ipso iure* the nullity of the arbitration agreement.

The tribunal opted for the second solution, adding that corruption is condemned in several international texts originating from the United Nations, the ICC and the European Community and is well established in jurisprudence and arbitral doctrine. Importantly, it found that the contract was contrary to good morals and transnational public policy and therefore null and void:

> L'ordre public transnational est ici menacé par des comportements directement hostiles à des principes dont le fondement éthico-juridique est généralement admis.

The ICC Partial Award in Case No. 8420 reached a similar conclusion.[366] The arbitration concerned a contract concluded between a Syrian agent and an Italian supplier according to which the Syrian party would promote the sale of products supplied by defendant. Disputes over the agency agreement were submitted to the sole arbitrator under ICC Rules of Arbitration in Geneva. The supplier objected to the jurisdiction of the tribunal, arguing that the dispute fell under the exclusive jurisdiction of the Italian Labour Court as prescribed by Arts. 409 and 413 of the Italian Code of Civil Procedure (CCP).

Relying on Art. I90(2)(e) of the Swiss Private International Law Act, the arbitral tribunal found that the public policy to which the arbitrator needs to refer is "transnational universal public policy, even if the approach to this issue has to be of a pragmatic nature depending on the

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364 Final Award, ICC Case No. 8891, 1998.

365 Final Award, ICC Case No. 5622, 19 August 1988.

366 Partial Award, ICC Case No. 8420, 1996.

specific case". The tribunal found however that the mandatory jurisdiction of the Italian courts does not seem to correspond to or to contain in itself one of the fundamental principles of law which are to be applied regardless of the connection of the dispute to any specific country. Transnational public policy had thus a controlling function over a national mandatory law.

Another example can be found in the ICC Case No. 6248.[367] The defendant, a firm of building contractors, was acting on behalf of a joint venture contracted with a group of companies for the construction of a project. Claimant, acting as consultant for defendant, would assist defendant in trying to secure saving on costs of the project and in acquiring extensions of the total value of the project in the form of additional works.

The agreement contained an arbitration clause providing for ICC arbitration. A dispute arose between the Parties and the consultant initiated the arbitration claiming payment of sums paid to defendant, in addition to payment from the group for work done under the contract. Three such payments were made by the group to the defendant.

Defendant argued that the claimant was providing cover for the improper activities of its principal, Mr. Z who had, under cover of claimant, neglected the interest of the group and used his position as a consultant to obtain payments from defendant for private gain. The tribunal found there had been secret commission agreements which were against bonos mores and the practice in the domain of international commercial arbitration and transnational public policy.

Transnational public policy may also be applied implicitly. An example is found in the arbitration between *Sté des Grands Travaux de Marseille*, a French company, and *Pakistan Industrial Development Corp*, a Pakistani state owned company.[368]

The case concerned a contract for the construction of a pipeline for the transport of gas in Pakistan. After conclusion of the contract and commencement of the arbitration the government of Pakistan issued an Order which had the effect of declaring the rights of the debtor void ab initio should it decide to continue with the arbitral proceedings. The sole arbitrator expressly

[367] Final Award, ICC Case No. 6248, 1990.

[368] Final Award, ICC Case No. 1803, 1972.

upheld the international prohibition of abuse of rights, finding reliance on the Order "wholly repugnant" to standards of morality binding upon sovereign governments. The legal solution would be precisely the same had the tribunal stated that the effects of the Order were offensive to transnational public policy.

Another example of the inferred application of transnational public policy can be found in the award by the ad hoc tribunal in the Himpurna arbitration.[369] The dispute concerned a contract between the claimant and an Indonesian state electricity company to explore and develop geothermal resources in Indonesia. The contract entitled the claimant to build two power plants in Indonesia and sell the power to the Indonesian electricity company. In 1997 there was an economic crisis in Indonesia and respondent failed to purchase the energy supplied.

In the arbitration, Himpurna made several claims for breach of contract which were granted by the tribunal. At the quantum stage, the claimant sought to recover for loss of profits resulting from investments not yet made. The parties invoked several provisions of the contract and Indonesian law. Nonetheless, the arbitral tribunal did not find it necessary to rule on either of these objections, because in this matter it will apply the doctrine of abuse of right as an element of overriding substantive law proper to the international arbitral process.

Under the doctrine of abuse of rights a party may not make use of a right to avoid an obligation incumbent on it or the purpose for which the right was conferred beyond the limits of good faith. The doctrine has been described by the arbitration tribunal in the following manner:

> the principle is old; one need only recall Cicero's suns num jus, summa injuria. To say that the blind application of a rule may lead to iniquitous results is to recognise that the search for justice would fail if the law could do no more than validate relative positions of strength, or consolidate the status quo indefinitely. Thus, the exercise of a particular right may be inhibited if it would abuse the law.

Consequently, claimant was denied the right to invoke the contract to claim losses for a hypothetical investment as such reliance would be contrary to the doctrine of abuse of rights. The

[369] Final Award, Ad hoc, *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listruik Negara*, 4 May 1999.

tribunal proceeded thus in order "to prevent the claimant's undoubtedly legitimate rights from being extended beyond tolerable norms". The controlling functions of the abuse of rights doctrine, it is suggested, were identical in this case to those of transnational public policy.

In the investment arbitration practice, only one arbitral tribunal referred explicitly to transnational public policy. In the other cases where the arbitral tribunals considered the issue, reference was made to international public policy. However, the wording 'international public policy' has a different meaning depending on the arbitral practice one considers. On the one hand, if we consider international commercial arbitration, international public policy is, as noted, that part of national public policy applied in situations where a foreign element is involved. On the other hand, if we refer to international investment arbitration (especially ICSID arbitration), the same wording points out the public policy of the international legal system instead of a specific public policy of a particular legal system.[370]

As in international commercial arbitration, arbitral tribunals in the investment context affirmed that, since they are not attached to a specific forum, they are not obliged to consider and apply the public policy of a specific legal system:

> Même si l'on se trouvait en présence d'une matière relevant de l'ordre public interne du Sénégal, un Tribunal arbitral international n'est pas appelé à veiller à ce que l'ordre public interne d'un pays soit respecté pour décharger le Gouvernement de ce même pays d'une obligation que celui-ci reconnaît.[371] (emphasis added)

The first investment award discussing the issue of international public policy was *SIREXM v Burkina Faso*. In this case, the arbitral tribunal concluded that

> La question pour le Tribunal est en effet de savoir si le fait qu'un contrat a été conclu à la suite d'un manœuvre correspondant à un cas de corruption est de nature à entraîner son invalidité, pas seulement par application des principes concernant le dol en droit civil, mais aussi par invocation de

[370] For an analysis of the application of international public policy in international investment arbitration, see, for instance, Sébastien Manciaux, *L'ordre public international et l'arbitrage d'investissement*, *in* L'ORDRE PUBLIC ET L'ARBITRAGE 37 (E. Loquin and S. Maniciaux eds., 2014).

[371] Award, *Societé Ouest Africaine des Betons Industriels* (*SOABI) v Senegal*, ICSID Case No. ARB/8211, 25 February 1988, ¶ 4.56.

> l'ordre public compris soit dans le contexte national (en l'espèce burkinabé) soit dans un contexte international.[372]

However, despite this reference and the fact that the investment agreement was considered null and void because contrary to public policy, the arbitral tribunal did not specify which public policy (domestic/international or international/transnational) referred to in its decision.

In *Inceysa v El Salvadori*, the arbitral tribunal adopted an approach similar to the Lagergren's approach as regards the jurisdiction over a case. In the award, the tribunal stated that

> […] assuming competence to resolve the dispute brought before it would mean recognizing for the investor rights established in the BIT for investments made in accordance with the law of host country. It is not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which, as already indicated, is a principle of international public policy.[373] (emphasis added)
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> […]
>
> not to exclude Inceysa's investment from the protection of the BIT would be a violation of international public policy, which this Tribunal cannot allow. Consequently, this Arbitral Tribunal decides that Inceysa's investment is not protected by the BIT because it is contrary to international public policy.[374]

The notion of international public policy was also invoked by an award in the case of *World Duty Free v Kenya*. In this case, the investor had obtained a contract by paying a bribe to the Kenyan President. According to the tribunal,

> The term 'international public policy' […] is sometimes used with another meaning, signifying that an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora. It has been proposed to cover that concept in referring to 'transnational

[372] Award, *Société d'Investigation de Recherche et d'Exploitation Minière (SIREXM) v Burkina Faso*, ICSID Case No. ARB/97/1, 19 January 2000, ¶ 5.39.

[373] Award, *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, 2 August 2006, ¶ 249.

[374] Award, *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, 2 August 2006, ¶ 252.

> public policy' or 'truly international public policy' […][375] (emphasis added)

Accordingly, the tribunal found that claims based on contracts of corruption or contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.[376]

Reference to international public policy was also made by the arbitral tribunal in *Plama v Bulgaria*. In this case, the issue was the Claimant's non-compliance with the principle of good faith as recognized by international law:

> [t]he Tribunal has decided that the investment was obtained by deceitful conduct that is in violation with Bulgarian law […] It would also be contrary to the basic notion of international public policy – that a contract obtained through wrongful means (fraudulent misrepresentation) should not (sic) be enforced by a tribunal […] The Tribunal finds that Claimant's conduct is contrary to the principle of good faith which is part not only of Bulgarian law […] but also of international law.[377]

b. The application by national courts

Transnational public policy has been recognized and applied in arbitration cases by several national courts, especially in the Europe and North America.

In Italy, the Court of Appeal of Milan described the international public policy exception provided for by the 1958 New York Convention as a body of universal principles shared by nations of similar civilizations, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions.[378]

Also Swiss courts referred to the concept in several occasions. The Federal Supreme Court in a decision of April 1994 decided

> lorsque le tribunal arbitral doit appliquer un autre droit matériel que le droit suisse et qu'il n'est donc pas tenu de respecter l'ordre public suisse, rien ne justifie apparemment de corriger sa sentence, dans la procédure du

[375] Award, *World Duty Free Company Limited v The Republic of Kenya*, ICSID Case No. ARB/00/7, 4 October 2006, ¶ 139.

[376] Award, *World Duty Free Company Limited v The Republic of Kenya*, ICSID Case No. ARB/00/7, 4 October 2006, ¶ 157.

[377] Award, *Plama Consortium Limited v Bulgaria*, ICSID Case No. ARB/03/24, 27 August 2008, ¶¶ 143-144.

[378] *Allsop Automatic Inc. v Tecnoski snc*, Corte di Appello di Milan, Italy, 4 December 1992.

> recours de droit public, par une référence à l'ordre public de la Suisse. Par conséquent, l'application uniforme de l'art. 190 al. 2 let. e LDIP paraît devoir commander une interprétation extensive de la notion d'ordre public, soit le choix d'un ordre public transnational ou universel incluant "les principes fondamentaux du droit qui s'imposent sans égard aux liens du litige avec un pays déterminé".[379]

A few months later, the same court stated that transnational procedural public policy consists in a majority of nations abiding by the same public policy principles concerning international proceedings. In particular, the tribunal held that it is necessary to consider

> une notion universelle de l'ordre public, en vertu de laquelle est incompatible avec l'ordre public la sentence qui est contraire aux principes juridiques ou moraux fondamentaux reconnus dans tous les Etats civilisés.[380]

It is clear that, despite the use of the wording "international public policy", the Swiss Supreme Court wanted to refer to the transnational dimension of public policy.

In the UK, the House of Lords also referred to transnational public policy, though it used the adjective "international".[381] In this case, which was linked to the 1990 invasion of Kuwait by Iraq, Kuwait Airways claimed compensation for the confiscation of an aircraft by the Iraqi party. In defense, the Iraqi company invoked Resolution 369 taken by the Revolutionary Council of the Iraqi commandment, during the invasion of Kuwait, which decided the dissolution of the Kuwaiti company and the transfer of its assets to Iraqi Airways. According to Iraqi Airways, the said Resolution was part of Iraqi public policy.

The House of Lords underlined that on 2 August 1990 the United Nations Security Council adopted Resolution 660 which condemned the invasion of Kuwait as a breach of international peace and security (this was followed by a series of supplementary Security Council Resolutions). Therefore, the House of Lords stated that:

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[379] *Emirates Arabes et consorts v Westland Helicopters*, Tribunal Fédéral, Switzerland, 19 April 1994.

[380] *F., U. v W*, Tribunal Fédéral, Switzerland, 30 December 1994. See also Tribunal Fédéral, Switzerland, 6 September 1996; *X SA et al v Z SA*, Tribunal Fédéral, Switzerland, 13 November 1998; *Tensacciai SpA v Freyssinet Terra Armata R.L.*, Tribunal Fédéral, Switzerland, 8 March 2006; Tribunal Fédéral, Switzerland, 11 January 2010.

[381] *Kuwait Airways Corporation v Iraqi Airways Company et al.*, House of Lords, United Kingdom, 16 May 2002.

> It would be contrary to the international obligation of the United Kingdom were its courts to adopt an approach contrary to its obligations under the United National Charter and under the relevant Security Council Resolutions. It follows that it would be contrary to domestic public policy to give effect to Resolution 369 in any way.

Furthermore, the House of Lords added:

> This conclusion on English public policy does not reflect an insular approach. Our domestic public policy on the status of Resolution 369 does not stand alone. In recent years, particularly as a result of French scholarship, principles of international public policy (l'ordre public véritablement international) have been developed in relation to subjects such as traffic in drugs, traffic in weapons, terrorism, and so forth […] The public policy condemning Iraq's flagrant breaches of public international law is yet another illustration of such a truly international public policy in action. (emphasis added)

French courts also invoked transnational public policy in cases involving corruption or fraud or a violation of the good faith principle. In the *Ganz* case, the court stated that in international matters it was within the arbitrators' mission to uphold public policy and punish a conduct between international business partners contrary to good faith. The court underlined that, when considering allegations of fraud or theft, arbitrators were right not to attend to the interests of a state particularly when the state had become a party to the arbitration.[382]

The Paris Cour d'Appel implicitly referred to transnational public policy in a case involving corruption and bribe. The French court concluded that

> un contrat ayant pour cause et pour objet l'exercice d'un trafic d'influence par le versement de pots-de-vin est, en conséquence, contraire à l'ordre public international français ainsi qu'à l'éthique des affaires internationales telle que conçue par la plus grande partie des Etats de la communauté internationale.[383]

In 2003, a Canadian court invoked the concept of transnational public policy referring in a dispute involving the United Nations embargo to Libya following the Lockerbie plane crash. In particular, in order to challenge the jurisdiction of an arbitral tribunal under the IATA Rules, Air

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[382] *Sté Ganz v Sté nationale des Chemins de fer tunisiens*, Cour d'appel de Paris, France, 29 March 1991.

[383] *Société European Gas Turbines SA v société Westman International Ltd*, Cour d'appel de Paris, France, 30 September 1993.

France invoked an embargo measure, adopted by the Security Council in a Resolution 883 of November 1993 prohibiting any States to hear claims of Libyan parties. The Tribunal nevertheless declared the case arbitrable in a partial award. Air France challenged this award before the Court of First Instance and then before the Court of Appeals. The latter did not reject the appeal but declared it premature and reserved its right to scrutinize the final award in proceedings for grounds of annulment. However, the court recognized that Security Council Resolution 883 was part of a transnational public policy.[384]

As noted, national courts have referred to transnational public policy, both directly and indirectly. When they explicitly used the expression 'transnational public policy', it is clear that the concept must be interpreted as a universal public policy overriding the several international public policies of the particular national legal systems. However, such interpretation can be more difficult to justify when the national courts use the wording "international public policy". In such case, one needs to remind that transnational public policy is a presumptive part of the public policy or every nation aligned with the international community. Moreover, when the public policy exception was first introduced in the New York Convention, "it was understood that it has not equivalent to the political or international policies of a State".[385]

In other words, international public policy encompasses transnational public policy and needs to be applied –no matter what specific wording is employed– in those cases where vital values of the international community are breached.

D. The "ethical" role of transnational public policy

1. International arbitrators as developers of the law and protectors of the transnational arbitral legal order

A few years ago, in 1997, Philippe Fouchard, commenting a decision of an arbitral tribunal that did not judge illicit the international trade of pituitary glands taken from human corpses, affirmed that

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[384] *Air France v Libyan Arab Airlines*, Court of Appeals of Québec, Canada, 21 March 2003.

[385] *Schreter v Gasmac*, Ontario Court (General Division), Canada, 13 February 1992.

> Il n'existe donc pas encore, en ce domaine, un véritable ordre public international ou transnational que les arbitres, dénués de for national, pourraient dégager et appliquer, et qui remplirait une fonction éthique […] La morale aurait peut-être exigé une plus grande vigilance face à ce type de négoce international qui se développe aujourd'hui de manière inquiétante. Il n'empêche qu'aux yeux de beaucoup la formation, dans la jurisprudence arbitrale, d'un ordre public transnational n'est pas une utopie et qu'elle permettra de concilier les intérêts de la société marchande et les valeurs communes à toutes les civilisations.[386]

The content of this quotation is clear and partially reflects the current context of international arbitration. In a world where the international business community chose international arbitration as the method to solve most of the international trade, commercial and investment disputes, the role of the international arbitrator and its functions need to be clarified. This is particularly valid since we agree that arbitrators, as judges, have the power to 'create' the law[387], to apply to the merits of the disputes 'rules of law' rather than 'a law' (including rules of law that do not originate in a single national legal order), and to craft the arbitral procedure as they see fit.[388]

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[386] Philippe Fouchard, *Droit et morale dans les relations économiques internationales*, *in* ECRITS 517, at 521 (X. Boucobza, E. Gaillard and C. Jarrosson eds., 2007).

[387] Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', 3 ICCA CONGRESS SERIES 257, at 309 (1986). The arbitrator's role as 'social engineer' in creating and developing the law has been confirmed by several authors. For instance, Judge Michael Mustill declared that [Michael Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, *in* LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE 149, at 161 (M. Bos and I. Brownlie eds., 1987)]:

> [i]n making his award, the arbitrator does not simply expound a *lex mercatoria* which is already there, albeit inchoate; but rather creates new rules, which he then applies retrospectively to the original bargain. Yet, further away from the first concept is the notion that, in the absence of established norms, the arbitrators exercises a creative function, acting as a social engineer.

Similarly, Professor Lando stressed the creative role of the arbitrator in the development of the *lex mercatoria* [Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration', 34(4) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 747, at 747 (1985)]:

> The parties to an international contract sometimes agree not to have their dispute governed by national law. Instead they submit it to the customs and usages of international trade, to the rules of law which are common to all or most of the States engaged in international trade or to those States which are connected with the dispute. Where such common rules are not ascertainable, the arbitrator applies the rules or chooses the solution which appears to him to be the most appropriate and equitable. In doing so he considers the laws of several legal systems. The judicial process, which is partly an application of legal rules and partly a selective and creative process, is here called application of the *lex mercatoria*.

For an opinion *a contrario*, see Michael Reisman, 'Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration', 13 ICCA CONGRESS SERIES 849, at 850 (2006).

[388] Emmanuel Gaillard, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010), at 38. See also Lambert Matray, *Arbitrage et ordre public transnational*, *in* THE ART OF ARBITRATION. ESSAYS ON INTERNATIONAL

The source of legitimacy of these powers of the arbitrators is rooted in the views developed collectively by the international community through instruments such as the 1958 New York Convention, the UNCITRAL Model Law and the several guidelines and private codifications that express a common view as to how an arbitration should be conducted as to be recognized as a legitimate means of adjudication. In other words, the source of validity and legitimacy of the arbitral process is found in the collective normative activity of states.[389]

Two consequences can be drawn from the 'legitimation' of the arbitrators' powers.

First, international arbitrators do not administer justice on behalf of any particular state, but they play a role for the benefit of the international community.[390]

That leads to three assertions demonstrating the validity of the existence of a transnational public policy. The first assertion is generally accepted within the arbitration community: arbitrators do not belong to a specific national or regional forum.[391] If arbitrators do belong to a forum, "it would be the entire world".[392]

The second assertion is that international arbitrators, belong to a global legal forum, do not need to respect any *lex fori* and they are not bound to any particular system of conflict of laws.[393] This idea was also substantiated by the arbitral practice, when an arbitral tribunal opined

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ARBITRATION. LIBER AMICORUM PIETER SANDERS. 12 SEPTEMBER 1912-1982 241, at 247 (J. C. Schultsz and A. J. van den Berg eds., 1982): "Ainsi les arbitres ont-ils le pouvoir de formuler des principes de caractère général dont ils ne trouvent pas nécessairement l'origine dans un texte national ou international, mais qui expriment une règle morale suffisamment acceptée par la communauté internationale pour constituer une norme dont la transgression ne peut être acceptée".

[389] Emmanuel Gaillard, 'International Arbitration as a Transnational System of Justice', 16 ICCA CONGRESS SERIES 66, at 68 (2012). As noted, we do not fully agree with this definition of collectivity. For the purpose of this work, collectivity is to be defined as the *ensemble* of all the actors, public and private, of the transnational economic legal system.

[390] JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999), at 353.

[391] Jean-Baptiste Racine, *Les normes porteuses d'ordre public dans l'arbitrage commercial international*, *in* L'ORDRE PUBLIC ET L'ARBITRAGE 7, at 19 (E. Loquin and S. Maniciaux eds., 2014). See also Pierre Mayer, 'La liberté de l'arbitre', 2013(2) REVUE DE L'ARBITRAGE 339, at 339; Ibrahim Fadlallah, 'L'ordre public dans les sentences arbitrales', 249 RECUEIL DES COURS 369, at 382 (1994).

[392] EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010), at 1.

[393] Pierre Lalive, *L'ordre public transnational et l'arbitre international*, in LIBER FAUSTO POCAR VOL. II. NUOVI STRUMENTI DEL DIRITTO INTERNAZIONALE PRIVATO 599, at 601 (G. Venturini and S. Bariatti eds., 2010).

that "in an international arbitration, the arbitral tribunal is not an institution of a national system".[394]

The third and final assertion is that, if we accept that (i) any legal system has its own public policy and that (ii) a global legal system exists (at least in respect to transnational economic matters), then we also need to accept that the transnational public policy is the 'natural public policy' of international arbitrators.[395]

The second consequence of 'legitimation' of the arbitrators' powers is that arbitrators are judges. This has been stated by French case law establishing that the arbitrator is asked, as a judge, to respect ethical standards, to be independent and impartial and is subject to liability in case he or she commits mistakes during the mission.[396]

As a French legal authority affirmed,

> Dès lors qu'une prétention est soumise à une personne investie par le Droit du pouvoir d'accueillir ou de rejeter cette prétention par application d'une règle de Droit, on se trouve devant une juridiction. Or, l'arbitre est, par définition, une telle personne habilitée par le Droit à trancher une prétention juridique; il est donc un juge.[397]

One can go further. As a matter of fact, due to the powers attributed to the arbitrators, the increase of the use of arbitration for many economic- and business-related disputes, its judicial authority and international character, international arbitrators are not only private judges: they could be considered as organs of the international community, intended as the community of States or the international community of businessmen or both international communities. This is particularly true since States have not created, apart from a few exceptions, really international

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394 Final Award, ICC Case No. 6379, 1990.

395 Jean-Baptiste Racine, *Les normes porteuses d'ordre public dans l'arbitrage commercial international*, *in* L'ORDRE PUBLIC ET L'ARBITRAGE 7, at 19 (E. Loquin and S. Maniciaux eds., 2014).

396 Jean-Pierre Ancel, 'L'arbitre juge', 2012(4) REVUE DE L'ARBITRAGE 717, at 718.

397 HENRI MOTULSKY, ECRITS, T. II, ETUDES ET NOTES SUR L'ARBITRAGE (2010), at 7.

private law jurisdictions capable to settle commercial disputes between private actors. The field of international commercial arbitration seems to fill in this gap in the international legal order.[398]

Thus, international commercial arbitration became a very powerful system, a sort of parallel private justice for international commercial disputes and, at the same time, an important part of the international system thanks to the establishment of an international legal framework. This increase of power led also to an increase of responsibility for arbitrators who decide on a number of disputes that may have an impact on a large number of people in addition to the parties to the disputes themselves:

> […] arbitrators have more and more powers. The development of the law is now left in their hands. The regulation of society is left in their hands. The regulation of transnational activities is also left in their hands.[399]

2. The right and the duty of arbitrators to apply transnational public policy issues

> In no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community.[400]

The wording of this 1989 Resolution of the Institut de Droit International raises a question: if it is accepted that arbitrators are *de facto* the judges of the business community, one may wonder why arbitrators *could not* and *should not* apply transnational public policy. After all, if they are aimed at protecting the interests of the international business community and promoting certainty and predictability, they would do it better by applying international standards generally accepted by the international community (of businessmen and States) rather than defining the content of national or regional public policy norms.[401] In the words of a famous scholar,

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[398] Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', 3 ICCA CONGRESS SERIES 257, at 271-272 (1986)

[399] Catherine Kessedjian, 'Transnational Public Policy', 13 ICCA CONGRESS SERIES 857, at 862 (2006).

[400] INSTITUT DE DROIT INTERNATIONAL, 'Resolution No. 1 on Arbitration between States, State Enterprises or State Entities, and Foreign Enterprises', Session of Santiago de Compostela (1989) at Article 2, available at http://www.idi-iil.org.

[401] Sigvard Jarvin, 'The Sources and the Limits of the Arbitrator's Powers', 2(2) ARBITRATION INTERNATIONAL 140, at 156 (1986): "International arbitrators are, after all, better informed than national judges to

> Assuming there does exist a transnational public policy […], the question arises whether the international arbitrator has the power and the duty to take it into consideration either together with, or as a priority or even against one or the other relevant State public policies (of the forum, or of a foreign law such as the *lex contractus*, the law of the place of performance or possibly the law of a 'third' interested State).[402] (emphasis added)

The same scholar affirmed many years later that

> [C]e pouvoir de l'arbitre international est en même temps un devoir, une responsabilité, un privilège et un honneur, celui de contribuer à défendre, maintenir, promouvoir un ordre acceptable e la « Société internationale ». Il ne s'agit pas ici d'équité mais bien de droit.[403]

Even though the arbitrators' duty to apply transnational public policy derives from their power to do so, the sources of legitimacy of the power are slightly different from the sources of legitimacy of the obligation.

On the one hand, as for the power, its main source of legitimacy is the freedom of international arbitrators. Since, as noted several times, they are disconnected from any specific State, they can also apply *règles morales* that are not originated in a national legal order[404], without being required to justify their choice. This is especially valid due to the fact that certain disputes involving delicate issues (such as corruption, violation of environmental regulations or human rights basic principles) are solved better by rules that cover a larger part of the society rather than the only two interested parties.[405]

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know the practices and malpractices of international business and to create an internationally acceptable public policy with respect to business behavior".

[402] Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', 3 ICCA CONGRESS SERIES 257, at 273 (1986).

[403] Pierre Lalive, *L'ordre public transnational et l'arbitre international*, in LIBER FAUSTO POCAR VOL. II. NUOVI STRUMENTI DEL DIRITTO INTERNAZIONALE PRIVATO 599, at 610-611 (G. Venturini and S. Bariatti eds., 2010). See also, Jean-Baptiste Racine, *Les normes porteuses d'ordre public dans l'arbitrage commercial international*, *in* L'ORDRE PUBLIC ET L'ARBITRAGE 7, at 29 (E. Loquin and S. Maniciaux eds., 2014).

[404] Pierre Mayer, *La règle morale dans l'arbitrage international*, *in* ETUDES OFFERTES A PIERRE BELLET 379, at 393 (1991).

[405] Pierre Mayer, *La loi sur l'arbitre*, *in* ETUDES OFFERTS A PIERRE CATALA. LE DROIT PRIVE FRANÇAIS A LA FIN DU XXE SIECLE 225, at 239-240 (2001).

On the other hand, the most relevant source for the arbitrators' duty to apply transnational public policy is found in their mission: they are 'judges' and when they take a decision, even if they solve a commercial conflict between private persons, they dispense justice.[406] This decision has to be grounded on values such as efficiency and wisdom.[407]

A French author affirmed the same concept:

> L'arbitre, en tant que juge ordinaire des différends du commerce international, ne saurait méconnaître l'intérêt général: à ce titre il peut être conduit à mettre en œuvre des lois de police ou des règles d'ordre public ou encore un ordre public « réellement » international; bien plus: certains pensent que l'arbitre international, du fait de son autonomie, peut être appelé à appliquer la règle morale, non seulement sur renvoi de la règle juridique, mais aussi à la place de celle-ci, voire en l'évinçant. Cette tâche de défense d'intérêts collectifs reconnue à l'arbitre international inscrit alors la démarche de ce dernier dans la réaction anti-individualiste et dans une philosophie du bien commun, qui affirme la permanence des intérêts collectifs; elle manifeste, entre autres signes, l'essor contemporain de l'éthique qui se développe souvent aujourd'hui par des voies autonomes, en marge du droit. Dans cette perspective, la conjonction du droit et de la morale peut contribuer à fortifier la légitimité de l'arbitrage international, au risque d'en compromettre la sécurité.[408] (emphasis added)

In other words, due to the fact that international arbitrators are both manifestation and instrumentalization of the parties and international adjudicators, they have to establish and civilly sanction the offense against transnational public policy values[409], even when the application of transnational public policy could be an obstacle to the recognition and enforcement of the arbitral award.[410] This is specifically valid because an arbitral award is final and binding between the

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[406] Pierre Mayer, 'La liberté de l'arbitre', 2013(2) REVUE DE L'ARBITRAGE 339, at 340. See also, Jean-Baptiste Racine, *Les normes porteuses d'ordre public dans l'arbitrage commercial international*, *in* L'ORDRE PUBLIC ET L'ARBITRAGE 7, at 31.

[407] Jean-Pierre Ancel, 'L'arbitre juge', 2012(4) REVUE DE L'ARBITRAGE 717, at 723.

[408] Bruno Oppetit, 'Philosophie de l'arbitrage commercial international', 120(4) JOURNAL DU DROIT INTERNATIONAL 811, at 827 (1993).

[409] JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999), at 354.

[410] Jean-Baptiste Racine, *Les normes porteuses d'ordre public dans l'arbitrage commercial international*, *in* L'ORDRE PUBLIC ET L'ARBITRAGE 7, at 28-29 (E. Loquin and S. Maniciaux eds., 2014): "Dans cette situation, la position de l'arbitre est susceptible d'être inconfortable. En évinçant une règle d'ordre public international d'un Etat, il risque d'affaiblir l'efficacité de sa sentence. Mais en maintenant effet à la même règle en refusant de l'écarter, il risque de rendre une sentence heurtant la morale et le sentiment de justice. D'un côté, un argument utilitariste (l'efficacité de la sentence), de l'autre un argument éthique (le caractère juste de la solution). Il nous semble que c'est l'argument éthique qui devrait normalement prévaloir".

parties and the nullification of the finding on illegality is impossible in the phase of recognition and enforcement before the domestic courts that cannot review the merits of the decision.[411]

Unlike ICSID arbitrations, where it has been proposed that the arbitral tribunals "cannot ignore the fundamental interests protected by international law" and "should consider [transnational public policy] issues" when rendering the award[412], the case of international commercial arbitration is more complicated. As a matter of fact, international commercial arbitrators are asked to solve commercial disputes between private persons rather than controversies involving, in an evident way, public interests of the entire international community.[413] However, as it has been clearly asserted by an author,

> [t]he judgment should not be in conflict with general tendencies in solving such disputes. To respect the legal rules is necessary for State courts. But arbitrators, too, should take into account the potential impact of their award on the segment of trade in question and should, therefore, be in accordance with generally accepted values and principles. In this sense, an arbitration case is a link in the chain of life and cannot be treated in isolation […] It is essential to take into consideration the general impact of arbitral awards on future developments in the contractual practice particularly in the newest stage of the development of international commercial arbitration where the publication of such arbitral awards which are of interest, in view of future cases, is becoming a general practice.[414] (emphasis added)

Similarly, a French scholar stated that

> Ainsi, les arbitres internationaux sont-ils responsables de la bonne règle éloignée à la fois de la passion et du formalisme. La mise au point de solutions claires et équilibrées est la condition sans laquelle le commerce international ne peut poursuivre le remarquable développement qui a été

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[411] Richard Kreindler, 'Approaches to the Application of Transnational Public Policy by Arbitrators', 4(2) THE JOURNAL OF WORLD INVESTMENT 239, at 249-249 (2003).

[412] Martin Hunter and Gui Conde de Silva, 'Transnational Public Policy and its Application in Investment Arbitrations', 4(3) THE JOURNAL OF WORLD INVESTMENT 367, at 369 (2003).

[413] See for instance, Michael Reisman, 'Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration', 13 ICCA CONGRESS SERIES 849, at 850 (2006). The author has pointed that arbitrators need to be sensitive to public policy issues, but only of that country whose law the parties have chosen. Application of transnational public policy values would be then excluded.

[414] Jerzy Jakubowski, *Reflections on the Philosophy of International Commercial Arbitration and Conciliation, in* THE ART OF ARBITRATION. ESSAYS ON INTERNATIONAL ARBITRATION. LIBER AMICORUM PIETER SANDERS. 12 SEPTEMBER 1912-1982 175 at 184-185 (J. C. Schultsz and A. J. Van den Berg eds., 1982).

> le sien au cours des dernières décennies. Mission immense et exaltante, qui ne se borne plus à trancher quelques conflits ponctuels, mais doit, en dernière analyse, répondre au besoin de justice de milliards d'êtres humains.[415]

The reasoning stating that international arbitrators have a duty –and not only a right– to apply transnational public policy has two consequences.

First, the arbitral tribunals should not declare the inadmissibility of claims founded on rules such as the *nemo auditor propriam turpitudinem allegans*, preventing the parties from successfully relying on arguments based on their illegal conduct. This approach was followed by the sole arbitrator, Judge Lagergren, in the famous case *Argentine Engineer v British Company*[416], but it has been rejected by subsequent awards.[417] The reason of this switch of approaches is the fact that the protection of the superior interests of the international community requires the arbitrators to examine the merits and conformity of the contract with the requirements of transnational public policy.[418]

The second consequence relates to the relation between the application of transnational public policy and parties' expectations. In particular, the freedom of the arbitrators to apply rules that are not imposed by the parties has been criticized and it has been said that arbitrators lack their legitimacy in doing so. However, this critic does not match with the modern vision of

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[415] Lambert Matray, *Arbitrage et ordre public transnational*, *in* THE ART OF ARBITRATION. ESSAYS ON INTERNATIONAL ARBITRATION. LIBER AMICORUM PIETER SANDERS. 12 SEPTEMBER 1912-1982 241, at 251 (J. C. Schultsz and A. J. van den Berg eds., 1982).

[416] Final Award, ICC Case No. 1110, 15 January 1963. The case concerned a contract under which a British company had engaged an Argentine intermediary to obtain a public works contract in Argentina, in return for which the intermediary was to receive a commission of 10% of the value of the contract. When the British company refused to pay the commission, the dispute was referred to Mr Lagergren, as sole arbitrator. He considered that it had been clearly established that "the agreement between the parties contemplated the bribing of Argentine officials" and, referring to "the general principles denying arbitrators the power to entertain disputes of this nature rather than ... any national rules on arbitrability", he declined jurisdiction on the grounds that:

> [p]arties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.

[417] See for instance, Final Award, ICC Case No. 3916, 1982; Award, ICC Case No. 4145, 1984.

[418] Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', 3 ICCA CONGRESS SERIES 257, at 294 (1986). See also Karl-Heinz Böckstiegel, 'Public Policy and Arbitrability', 3 ICCA CONGRESS SERIES 177, at 201-201 (1986).

international arbitration as autonomous legal order adopted in this work. As it has been explained by an author,

> It would be a disservice to the parties, to the arbitration process and to the society at large to say that arbitrators can only look at issues which have been posed by the parties. By doing so, they would become accomplice to the grossest violations of transnational public policy and fuel the debate against arbitration that has already started […] the contractualization of activities essentially via self-regulation and the lack of true societal regulation via preventive norms have rendered the role of the judge or the arbitrator an essential one for the regulation of society.[419]

This approach was confirmed by the International Law Association that, at the end of its 73rd conference, adopted the Recommendations on Ascertaining the Contents of the Applicable Law in International Arbitration. The ILA Recommendation stated that

> In disputes implicating rules of public policy or other rules from which the parties may not derogate, arbitrators may be justified in taking measures appropriate to determine the applicability and contents of such rules, including by making independent research, raising with the parties new issues (whether legal or actual), and giving appropriate instructions or ordering appropriate measures insofar as they consider this necessary to abide by those rules or to protect against challenges to the award.[420]

In conclusion, the scope of the arbitrators' freedom is determined by the legal order which they belong to. We said that the natural legal order for international arbitrators is the transnational one. As a consequence, if such order exists, it also provides for norms of transnational public policy to be imposed to the arbitrators.[421]

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[419] Catherine Kessedjian, 'Transnational Public Policy', 13 ICCA CONGRESS SERIES 857, at 863-865 (2006).

[420] INTERNATIONAL LAW ASSOCIATION, 'Resolution No. 6/2008 - Recommendations on Ascertaining the Contents of the Applicable Law in International Arbitration', Rio de Janeiro Conference (2008), ¶ 13.

[421] Pierre Mayer, 'La liberté de l'arbitre', 2013(2) REVUE DE L'ARBITRAGE 339, at 345. See also ; Ibrahim Fadlallah, 'L'ordre public dans les sentences arbitrales', 249 RECUEIL DES COURS 369, at 384 (1994).

CHAPTER 5

PROCEDURAL TRANSNATIONAL PUBLIC POLICY

As domestic and international public policy, transnational public policy deals both with procedure and substance. The difference between substantive and procedural public policy in international arbitration has been defined as following: "the substantive is concerned with the merits of the award, while the procedural is concerned with how the arbitral tribunal arrived at the award […] this means that a court of law […] would be confronted with an issue of substantive public policy if the court found itself concerned, for example, that an award of punitive damages was in violation of domestic public policy. On the other hand, the court would be confronted with an issue of procedural public policy if the respondent complained that the arbitral tribunal's decision in favour of the claimant had been based mainly on a piece of evidence that was submitted after the arbitral hearing and to which the respondent had not been invited to respond".[422]

As Professor Kessedjian stated, "when dealing with procedural aspects of the arbitration process, it is now amply demonstrated that arbitration practice has created uniform rules of procedure specifically crafted for arbitration purposes".[423]

Chapter V focuses on some standards falling within the chapeau of procedural transnational public policy, such as due process, observance of the notice requirement and procedural good faith. The author does not discuss other standards of procedural public policy, likely to be defined as transnational, such as independence and impartiality of the arbitrators, the principle according public access to arbitration proceedings and transparency.

International arbitration is based on party autonomy.[424] The freedom of the parties to compose the arbitral procedure is constrained only by fundamental principles of due process imposed by national courts[425] and international tribunals.[426] As stated by one author:

[422] Fernando Mantilla-Serrano, 'Towards a Transnational Procedural Public Policy', 24(1) ARBITRATION INTERNATIONAL 333, at 334-335 (2004).

[423] Catherine Kessedjian, 'Transnational Public Policy', 13 ICCA CONGRESS SERIES 857, at 866-867 (2006).

[424] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage eds., 1996), at 650.

> Such principles, under names which vary and with differences in detail, are universally recognized and largely accepted as part of transnational public policy […] Observance of these principles of fairness and due process is strictly reviewed by the courts when the parties decide to lodge a recourse.[427]

The relevance of procedural transnational public policy is evident in the words of some distinguished scholars who have stated that the transnational approach to public policy is even more evident in the area of procedure than in relation to substantive issues:

> One of the most striking features of international commercial arbitrations is the way in which a common procedural pattern has emerged. Arbitrators are required to act fairly and impartially. The parties must be given a proper opportunity of presenting their respective cases. Submissions are usually presented in writing, accompanied by the documents on which reliance is placed. Under such rules as those of the IBA on the Taking of Evidence, requests for disclosure of documents are limited: there is no time or taste for "warehouse discovery". The tribunal will be expected to give effect to rules such as those governing legal professional privilege, which are themselves inspired by public policy considerations. The direct testimony of witnesses will be given in writing; and there may be a reasoned time for cross-examination.[428]

International tribunals have upheld procedural transnational public policy by recourse to the following principles: the principle of equality between the parties; the principle of contradiction (*audiatur et altera pars*); procedural good faith.

A. Due process

This section deals with the requirements of due process in arbitration proceedings. Due process requires that the parties are treated equally and given an opportunity to be heard and deal with the case of their opponent. We will deal with each principle in turn.

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[425] *Corporacion Transnacional de Inversiones, SA de CV et al and STET International, S.p.A. et al.*, Supreme Court, Canada, 22 September 1999; *Sovereign Participations International SA v Chadmore Developments Ltd.*, Cour d'Appel, Luxembourg, 28 January 1999. See also, Fernando Mantilla-Serrano, 'Towards a Transnational Procedural Public Policy', 24(1) ARBITRATION INTERNATIONAL 333 (2004).

[426] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage eds., 1996), at 650; Jean-Hubert Moitry, 'Right to a Fair Trial: Some Remarks on the République de Guinée Case', 6(2) JOURNAL OF INTERNATIONAL ARBITRATION 115, at 122 (1989).

[427] Mohamed Mernissi, 'Identifying and Applying the Law Governing the Arbitration Procedure', 9 ICCA CONGRESS SERIES 387, at 390 (1999).

[428] Alan Redfern, 'Comments on Commercial Arbitration and Transnational Public Policy', 13 ICCA CONGRESS SERIES 871, at 874-875 (2006).

1. Equality between the parties

The principle of equality between the parties is found at the heart of due process. When determining whether the parties are treated equally the tribunal enquires whether its decision constrains both parties in the same measure, in light of their relative position and the procedural history of the arbitration.

Equality requires, for instance, that all correspondence in the arbitration be communicated simultaneously to both parties in order to allow them an opportunity to adduce their comments. The same rule may bar claimant or respondent to always have the last word,[429] grant the parties an opportunity to present at least the same number of witnesses[430] or determine the suitability of an order for security for costs.

As a procedural principle, equality does not extent to a decision on the merits. As noted by the International Court of Justice in the North Sea Continental Shelf cases, "equity does not necessarily imply equality".[431] Yet, it may have an indirect impact on the substantive decision[432] by allowing a late submission,[433] the late filing of a counterclaim,[434] or the production of *amicus* briefs.[435]

[429] Order of Chamber Three, *Ebrahimi v Iran*, Iran-US Case No. 44, 26 July 1991.

[430] Where factual or expert witness statements are to take place in written form or at an evidentiary hearing.

[431] *North Sea Continental Shelf Cases (Germany v Netherlands and Germany v Denmark)*, ICJ, Judgment, 20 February 1969, ¶ 91.

[432] The distinction between substantive and procedural justice is often difficult to strike. Consider, for instance the discussion in Full Tribunal Award, Iran-US Case No. A27, 5 June 1998, ¶¶ 65 et seq. In order to determine whether there has been a departure from a fundamental rule of procedure, the merits of the dispute may have to be considered.

[433] Award, *David v Iran*, Iran-US Case No. 832, 23 April 1997; Award, ICC Case No. 9302, 1998.

[434] Award, *Time International v National Iranian Oil Co and Ahwaz Pipe Mill Co ATTI*, Iran-US Case No. 357, 12 March 1990.

[435] Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, *United Parcel Service of America, Inc v Government of Canada*, UNCITRAL, 17 October 2001.

2. Opportunity to present one's case

The principle according to which a party is entitled to be heard is grounded on the self-regulatory function of transnational public policy. An arbitral tribunal must, to a minimum, be receptive to the parties' case.[436]

As echoed by the ICSID ad hoc Committee in *Wena Hotels v Egypt*:

> It is fundamental, as a matter of procedure, that each party is given the right to be heard […] This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other.[437]

The duty of the tribunal is limited to giving the parties an opportunity to present their case at all stages of the arbitration. The requirement can thus be met where a party chooses not to participate in the proceedings.[438]

The precise content of the tribunal's duty is only determinable in light of the principle of equality and the procedural framework of the arbitration. Concerns with the proper administration of justice, cost efficiency and expediency[439] may lead the tribunal to exclude from the file irrelevant documents,[440] or fresh post-hearing submissions.[441]

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[436] RENÉ DAVID, ARBITRATION IN INTERNATIONAL TRADE (1985), at 291; Bernardo Cremades, 'Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration', 14(2) ARBITRATION INTERNATIONAL 157, at 168 (1998).

[437] Decision of the Annulment Proceeding, *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, 5 February 2002, ¶ 57.

[438] See for instance, Award, *American Manufacturing & Trading, Inc. v Zaire*, ICSID Case No. ARB/93/1, 21 February 1997. See also, Award, CIETAC, *Award on Dispute over Barter Trade for Manufacturing Equipment for Iron Wire with Electroplating Zinc*, 16 December 1990.

[439] Final Award, Ad hoc, *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listruik Negara*, 4 May 1999.

[440] Consider, for instance, the procedural decision o the tribunal in the Partial Award, *Sabet v Iran*, Iran-US Case Nos. 815, 816, 817, 30 June 1999 and Final Award, *Sabet v Iran*, Iran-US Case Nos. 815, 816, 817, 20 November 2000: "Claimants did not give an adequate explanation for their delay in submitting the documents, and that if the Tribunal were to admit these documents, it would have to give the Respondent an opportunity to comment on them, thus delaying resolution of these claims, the Tribunal concludes that the character and contents of the documents do not justify disrupting the orderly conduct of the proceedings in these Cases. The documents in question are therefore not admitted into evidence".

[441] See Award, *General Petrochemicals Corp. v Karkhanejat Towlidi*, Iran-US Case No. 828, 21 October 1991.

The opportunity to present one's case does not extend to the right to an oral hearing.[442] Parties may have a full opportunity to submit their arguments by other means. This is the rule in document based arbitrations.[443]

3. Contradiction

Due process requires that parties in the controversy must have an opportunity to correct or contradict any relevant statement prejudicial to their view.[444] The principle of contradiction is implied in the *audi alteram partem* rule of natural justice and present in both the common and civil law[445] and arbitral practice.[446]

As a rule of due process, the extent of contradiction must be ascertained in light of the procedural framework of the arbitration.[447] It is established however that where a party is allowed to amend a claim or introduce a new claim the other party must have a reasonable opportunity to respond to the new factual and legal issues raised in that claim.[448]

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[442] See Final Award, ICC Case No. 4975, 1988.

[443] As found by the courts in Canada, relying exclusively on written pleadings does not contravene natural justice. See for instance *Silverberg v Hooper*, Cour d'appel du Québec, Canada, 6 February 1990. See also, Yves Fortier, 'The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International – A Few Plain Rules and a Few Strong Instincts', 9 ICCA CONGRESS SERIES 396, at 401 (1999).

[444] The principle of contradiction has a more restrictive scope than the general right to be heard.

[445] Christopher Lord Staughton, 'Common Law and Civil Law Procedures: Which is the More Inquisitorial? A Common Lawyer's Response', 5(4) ARBITRATION INTERNATIONAL 351, at 355 (1989).

[446] Decision of the Annulment Proceeding, *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, 5 February 2002; Final Award, ICC Case No. 6268, 18 may 1990; Final Award, Ad hoc, *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listruik Negara*, 4 May 1999; Decision, Geneva Chamber of Commerce and Industry Case No. 130, 10 February 2000; Order of Chamber Three, *Ebrahimi v Iran*, Iran-US Case No. 46, 26 July 1991; Final Award, ICC Case No. 7047, 28 February 1994.

[447] Decision of the Annulment Proceeding, *Klöckner Industrie-Anlagen GmbH v Cameroon*, ICSID Case No. ARB/81/2, 3 May 1985.

[448] Final Award, *Westinghouse Electric Corporation v Iran Air Force*, Iran-US Case No. 389, 20 March 1997, ¶ 44, where claimant's request to introduce amended claim was judged inadmissible on those grounds. In the cases where amendments have not been permitted, prejudice to the other party was clear and was almost always the reason given. See, for instance, Award, *Reliance Group, Inc v Iran*, Iran-US Case No. 115, 10 September 1987; Award, *Harris Int'l Telecommunications, Inc v Iran*, Iran-US Case No. 409, 2 November 1987; Decision, *International Tel & Tel Corp v Iran*, Iran-US Case No. DEC 87-11045-1, 7 July 1989; Award, *Cal-Main Foods, inc v Iran*, Iran-US Case No. 340, 11 June 1984; Final Award, ICC Case No. 6573, 1991.

Where the tribunal is to conduct its own investigations into the facts, the principle is breached if the parties are not given a reasonable opportunity to present their case[449] in relation to the results of such investigations.[450] Where factual or expert witness statements are to take place, natural justice demands that parties should be given the opportunity to challenge the veracity or accuracy of the witnesses' testimony.

B. Observance of the notice requirement

The notice requirement is essential to the proper and fair conduct of the arbitration.[451] Article V(l)(b) of the New York Convention allows a party to avoid the effects of the award if it "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." This rule is absorbed by Article V(2)(b) of the convention to the extent it is received by public policy.

The notice requirement is indelibly knit to the exercise of fundamental procedural rights. It extends to the right to be informed of the commencement of the arbitration[452] and of all significant procedural steps in the arbitration, such as the appointment of the arbitrator(s),[453] the date, time, place[454] and subject matter of the hearing(s), the witnesses presented therein, and any procedural orders or awards. Further, all elements of proof invoked by a party on which the arbitrator is likely to found his decision must be properly communicated to the other party.[455]

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[449] Where site inspection is required, each party is entitled to the presence of its legal representatives.

[450] *Minmetals Germany GmbH v Ferco Steel Ltd*, Queen's Bench Division, Commercial Court, United Kingdom, 2 February 1999.

[451] JULIAN D. M. LEW, LOUKAS A. MISTELIS AND STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (2003), at 711.

[452] Decision, *Educational Testing Service v TOEFL*, WIPO Case No. D2000-0044, 16 March 2000.

[453] According to van den Berg, due process requires the name of the arbitrator to be included in the notice, in order to provide the notified party to exercise the right to challenge the arbitrator. See, Albert Jan van ben Berg, 'Commentary on the Cases Reported in Vol. VIII', VIII YEARBOOK OF INTERNATIONAL COMMERCIAL ARBITRATION 351 (1983).

[454] See, for instance, UNCITRAL Arbitration Rules, Article 28(1).

[455] Catherine Kessedjian, 'Principe de la contradiction et arbitrage', 1995(3) REVUE DE L'ARBITRAGE 381, at 382.

An express notice is not always required. This was a salient issue in *Compañía de Aguas del Aconquija and Vivendi v Argentina*.[456] In the arbitration, claimant alleged that the tribunals' decision to join the issues of jurisdiction and merits came unannounced and therefore it had not had a fair and full opportunity to be heard at every stage of the proceedings. In the annulment proceedings, the ICSID ad hoc Committee held that even if the parties were indeed surprised by the tribunal, the decision was not unprecedented in international decision making and express notice was not warranted.

The parties had had an ample opportunity to consider and present written and oral submissions on the issues, and the oral hearing was conducted to enable each party to present its case. In addition, as the tribunal's analysis of issues was clearly based on the materials presented by the parties, there was no departure from any fundamental rule of procedure.

The notice must be effective and timely. The formalities required for the notice are normally contained in a procedural order of the tribunal, the law of the seat[457] or the parties' agreement.[458] Article 4 of the LCIA rules provides, for instance, that the notice must in writing and served by registered postal, courier service or facsimile, telex, email or any other means of communication that provide a record of its transmission.[459] The rules contain also provisions dealing with a change of address and the dates of receipt or dispatch.[460] Breach of such rules does not amount to a breach of public policy where the notice is effectively communicated to the parties by other means.

A proper notice must also be timely. The requirement has grounded the decision of one arbitration tribunal to deny the admission of evidence relevant to a hearing where the evidence

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[456] Decision on Annulment, *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, ICSID Case No. ARB/97/3, 3 July 2000, ¶¶ 82-85.

[457] See, for instance, UNCITRAL Model Law, Article 3; English Arbitration Act 1996, Section 76.

[458] See, for instance, ICC Arbitration Rules, Article 3; WIPO Arbitration Rules, Article 4.

[459] See, LCIA Arbitration Rules, Article 4(1).

[460] See, LCIA Arbitration Rules, Article 4(2) to Article 4(4).

was only submitted the evening before the hearing.[461] The notice must allow a party sufficient time to build its defense.

This principle requires that the notice must not be misleading, upon u reasonable construction of the notice and the circumstances of the case. A strict test was followed, e.g., by the French Courts in *Brasoil*, where the construction by one party of the content of a notice was deemed to lead to n breach of due process by the tribunal.[462]

In *Brasoil*, the claimant alleged that defendant had fraudulently withheld documents and filed a request for reconsideration of a previous partial award on the grounds of procedural fraud. The defendant argued that the request was inadmissible in principle and filed an extensive submission on the merits of claimant's fraud claim. Claimant objected to the submission, arguing it went beyond the issue of inadmissibility in principle.

The tribunal subsequently set a one day hearing to discuss the issue of admissibility in principle of the request for reconsideration. At the hearing, the tribunal invited the parties to make submissions as to the factual existence of fraud. Claimant protested that it was not ready to discuss the factual existence of fraud, as it had understood the hearing had been set to discuss the issue of admissibility in principle of the request. In its procedural order the tribunal denied the request for reconsideration on the grounds that fraud had not been proven. Claimant brought annulment proceedings to the Paris Court of Appeal. The Court held that the claimant had not had an adequate opportunity to present its case[463] and set aside the award.[464]

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[461] Award, ICC Case No. 4237, 17 February 1984; Final Award, ICC Case No. 6573, 1991. In this last case, the tribunal refused to accept evidence submitted in the course of the hearing as it had closed the evidentiary proceedings seven months earlier, and expressly ruled that thereafter no further documents would be accepted in evidence. Moreover, the tribunal stated that there was no explanation why the documents were not timely submitted. As a result of the late submission, the tribunal clarified that defendant has no effective possibility of verifying and, if appropriate, challenging the statement's contents.

[462] *Braspetro Oil Services Company (Brasoil) v The Management and Implementation Authority of the Great Man-Made River Project*, Cour d'appel de Paris, France, 1 July 1999.

[463] *Braspetro Oil Services Company (Brasoil) v The Management and Implementation Authority of the Great Man-Made River Project*, Cour d'appel de Paris, France, 1 July 1999.

[464] The Court held that tribunal's order was in substance a final award and therefore in breach of the Article 25 of the ICC Arbitration rules (version of 1998), which provided for the scrutiny of the award by the ICC Court.

A similar situation arose in *Paklito v Kloclmer*,[465] where the tribunal dismissed a party's protest that it had understood the oral hearing to be a preliminary hearing and not a full hearing. The award was refused enforcement by the Supreme Court of Hong Kong for breach of due process.[466]

The construction of public policy in the above cases is extremely controversial and restricted to specific facts. The position of the courts may however lead tribunals to develop in future guidelines as to the format and content of notices introducing the different procedural steps of the arbitration.

C. Procedural good faith

Parties to arbitration proceedings must comply with the general principle of good faith. Good faith intervenes as a rule of transnational public policy where it becomes necessary to prevent an abuse of the arbitration process.[467] This occurs where a party interferes with the tribunal's duty to decide freely and fairly.

Transnational public policy comes into play where the evidence presented during the proceedings is tainted by some form of fraud and has a bearing on the tribunal's decision.[468]

Some national arbitration laws contain a provision permitting the setting aside of an award based on fraudulent evidence.[469] Article 1068 of the Netherlands Arbitration Act, for instance, provides that

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[465] Award, CIETAC, *Paklito Investment Ltd v Klochner East Asia Ltd*, 15 November 1990.

[466] *Paklito Investment Limited v Klockner East Asia Limited*, High Court, In the Supreme Court of Hong Kong, Hong Kong, 15 January 1993.

[467] On the existence of a general principle of good faith in arbitral proceedings, see Bernard Hanotiau, 'Complex Multicontract-Multiparty Arbitration', 14(4) ARBITRATION INTERNATIONAL 369 (1998); Van Vechter Veeder, 'The 2001 Goff Lecture – The lawyer's Duty to Arbitrate in Good Faith', 18(4) ARBITRATION INTERNATIONAL 431(2002). See also, Award, ICC Case No. 6149, 1990.

[468] See, for instance, *JJ Agro Industries Ltd v Texuna Int'l Ltd*, High Court, In the Supreme Court of Hong Kong, Hong Kong, 12 August 1992, where "the fraud consisted of kidnapping a witness from Texuna in the arbitration forcing him to make a false affidavit retracting material evidence favoring Texuna in the arbitration, causing false affidavits to be sworn as to the circumstances in which Mr. Savla's false affidavit was made and relying on the false affidavit in the arbitration and causing the arbitrator to rely on them".

> 1. Revocation of the award can take place only on one or more of the following grounds:
>
> (a) the award is wholly or partially based on fraud which is discovered after the award is made and which is committed during the arbitral proceedings by or with the knowledge of the other party;
>
> (b) the award is wholly or partially based on documents which, after the award is made, are discovered to have been forged;
>
> (c) after the award is made, a party obtains documents which would have had an influence on the decision of the arbitral tribunal and which were withheld as a result of the acts of the other party.

Although procedural fraud may appear in statutory law as a separate ground to resist enforcement it is absorbed by the notion of procedural public policy. The issue was raised during the *traveaux preparatoires* leading to the UNCITRAL Model Law. According to paragraph 297 of the Commission Report

> It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording 'the award is in conflict with the public policy of this State' was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.[470]

As pointed out by some national delegates, the separate statutory provisions prohibiting procedural fraud found in some jurisdictions were explained by the fact that Common Law countries did not recognize a general doctrine of *ordre public* in relation to arbitration procedures as known to the civil law.[471] The delegates consequently proposed a revision of Article 34 of the

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[469] See US, Arbitration Act, 9 USC Section 10, permitting judicial annulment of an arbitral award procured by corruption, fraud or undue means; India, Arbitration Ordinance, Section 34(1); Austria, International Arbitration Act, Article 19; Canada, Alberta Arbitration Act 1991, Section 45(i).

[470] UNCITRAL, Report on the work of its 18th session, Doc. A/40/17 (June 3-21, 1985), ¶ 297. See also, Gerold Herrmann, 'UNCITRAL adopts Model Law on International Commercial Arbitration', 2(1) ARBITRATION INTERNATIONAL 2, at 8 (1986); Audley Sheppard, 'Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards', 19(2) ARBITRATION INTERNATIONAL 217, at 223 (2003).

[471] *Société European Gas Turbines SA v société Westman International Ltd*, Cour d'appel de Paris, France, 30 September 1993; Switzerland, Tribunal Fédéral, 11 November 2002; *Unión de Cooperativas Agrícolas Epis-Centre v La Palentina SA*, Spain, Tribunal Supremo, 17 February 1998; Germany, Bundesgerichtshof, 15 May 1986.

Model Law. The proposal foundered since no generally acceptable formula could be devised.[472] Notwithstanding, procedural fraud has been subsequently recognized by the courts in the Common Law as a matter of public policy.[473]

Decided awards reveal two categories of procedural fraud, namely perjury[474] and forgery.[475] An arbitration tribunal will impose a high threshold of evidence in relation to procedural fraud.[476] As held by the Iran-US Claims Tribunal, an allegation of forgery must be proven with a higher degree of probability than other allegations. The proper standard of proof is that of "clear and convincing evidence".[477]

The difficulties faced by arbitration tribunals evaluating allegations of fraud is illustrated in another award by the same Tribunal:

> the Tribunal cannot, in the field of evidence as in any other field, make the domestic rules or judicial practices of one party prevail over the rules and practices of the other, in so far as such rules or practices do not coincide with those generally accepted by international Tribunals […] It is clear that the value attributed to […] evidence is directly related […] to a system of sanctions in case of perjury, which can easily and promptly be put into action and is rigorous enough to deter witnesses from making false statements. Such a system does not exist within international Tribunals and recourse to the domestic courts of the witness or affiant by the other party would be difficult, lengthy, costly and uncertain. In the

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[472] 'Commentary on the Articles of the Model Law: Part II of the Committee's Consultative Document on Model Law, Dated October 1987', 6(1) ARBITRATION INTERNATIONAL 49, at 61 (1990).

[473] *Schreter v Gasmac*, Ontario Court (General Division), Canada, 13 February 1992; *Corporacion Transnacional de Inversiones, SA de CV et al and STET International, S.p.A. et al.*, Supreme Court, Canada, 22 September 1999; *Hainan Machinery Imp & Exp Corp. v Donald & McArthy Pte Ltd*, High Court, Singapore, 29 September 1995; *JJ Agro Industries Ltd v Texuna Int'l Ltd*, High Court, In the Supreme Court of Hong Kong, Hong Kong, 12 August 1992.

[474] Award, Iran-US Case No. 164, 15 May 1996; Award, Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania Case No. 33, 30 September 1993; Final Award, *Trade & Transport, Inc v Valero Refining Co, Inc*, Society of Maritime Arbitrators Case No. 2699, 23 August 1990, where the tribunal agreed with the submission that the signature in one of the documents submitted as evidence has been forged. See also, Marianne Roth, 'False Testimony at International Arbitration Hearings', 11(1) Journal of International Arbitration 5 (1994).

[475] Award, Iran-US Case Nos. 842, 843 and 844, 22 May 1997.

[476] In order to confirm a breach of transnational public policy, a procedural irregularity must be such as to amount to bad faith, a willful disregard of due process of law or an extreme insufficiency of action which violate a sense of judicial propriety. See, for instance, Award, *Alex Genin Eastern Credit Limited, Inc and AS Baltoil v Republic of Estonia*, ICSID Case No. ARB/99/2, 23 June 2001.

[477] Award, Iran-US Case Nos. 842, 843 and 844, 22 May 1997.

> absence of any practical sanction […], oral or written evidence of this kind cannot be accorded the value given to them in some domestic systems. Also it cannot be discounted that the ethical barriers which prevent the making of statements not in conformity with the truth before national courts will not have the same strength in international proceedings, notably when the other party is a foreign government, the conduct of which was severely condemned by public opinion in the country of the other party.[478]

An allegation of fraud relating to evidence should be raised during the arbitral proceedings. Where proof of the fraud emerges after a partial or interim award has been rendered, that award may be reconsidered by the tribunal. As suggested in the dictum by the ad hoc tribunal in *Biloune v Ghana*,

> a court or Tribunal, including this international arbitral Tribunal. has an inherent power to take cognizance of credible evidence, timely placed before it, that its previous determinations were the product of false testimony, forged documents or other egregious 'fraud on the Tribunal.' Certainly if such corruption or fraud in the evidence would justify an international or a national court in voiding or refusing to enforce the award, this Tribunal also, so long as it still has jurisdiction over the dispute, can take necessary corrective action.
>
> The present Tribunal would not hesitate to reconsider and modify its earlier award were it shown by credible evidence that it had been the victim of fraud and that its determinations in the previous award were the product of false testimony.[479]

Where there the issue of fraud is raised during the arbitration proceedings the decision of the arbitrator is final.[480] Where the fraud is not disclosed to the arbitration tribunal during the proceedings, the aggrieved party may seek to challenge[481] or resist enforcement of the award.

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[478] Award, Iran-US Case No. 941, 6 March 1992.

[479] Awards, *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL, 27 October 1989 and 30 June 1990. The inherent right to revise the award has also been assumed by the Iran-US Claims Tribunal. See for instance, Decision, *The United States of America v Iran*, Iran-US Case No. B36, 17 March 1997.

[480] *Braspetro Oil Services Company (Brasoil) v The Management and Implementation Authority of the Great Man-Made River Project*, Cour d'appel de Paris, France, 1 July 1999.

[481] See, for instance, the *dictum* by Moore-Bick J in *Profilati Italia SRL v Paine Webber Inc & anr*, Commercial Court, United Kingdom, 23 January 2001: where an important document which ought to have been disclosed is deliberately withheld and as a result the party withholding it has obtained an award in his favor the court may well consider that he has procured that award in a manner contrary to public policy. See also, *European Gas Turbines SA v Westman International Ltd*, Cour d'appel de Paris, France, 30 September 1993, where the court

Should proof of forgery or perjury emerge after the proceedings have been formally closed, the tribunal retains a residual jurisdiction to reconsider the award if it can be reconvened.[482] Where reconsideration takes place, the tribunal will have an opportunity to exclude or amend in the operative part of the award any decisions based on fraudulent evidence.

At the enforcement stage, the courts will require that (i) the evidence sought to be adduced is of sufficient cogency and weight to be likely to have materially influenced the arbitrators' conclusion had it been advanced at the hearing; and (ii) the evidence was not available or reasonably obtainable either at the time of the hearing of the arbitration; or (b) at such time as would have enabled the party concerned to have adduced it in the court of supervisory jurisdiction to support an application to reverse the arbitrators' award if such procedure were available.[483]

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partially annulled an arbitral award on the grounds that it was based on a fraudulent report of expenses submitted by respondent in the arbitration applying the general principle of law *fraus omnia corrumpit*.

[482] *Fougerolle SA v Procofrance SA*, Cour de Cassation, France, 22 May 1992, where the court suggested that, based on general principles of law regarding fraud, in international arbitration the award mat be reconsidered by the arbitral tribunal provided that the arbitral tribunal remains constituted after the award has been made, or can be reconstituted. See also Decision, *Mark Dallal v The Islamic Republic of Iran*, Iran-US Case No. 149, 12 January 1984; Decision, *Henry Morris v The Government of the Islamic Republic of Iran*, Iran-US Case No. 200, 16 September 1983; Decision, *The United States of America v Iran*, Iran-US Case No. B36, 17 March 1997.

[483] *Westacre Investments Inc v. Jugoimport-SDRP Holding Co Ltd*, High Court of England and Wales, United Kingdom, 19 December 1997: the court clarified that under English law the conditions to be fulfilled are "(a) that the evidence to establish the fraud was not available to the party alleging the fraud at the time of the hearing before the arbitrators; and (b) where perjury is the fraud alleged i.e. where the very issue before the arbitrators was whether the witness or witnesses were lying, the evidence must be so strong that it would be reasonably be expected to be decisive at a hearing, and if unanswered must have that result.

CHAPTER 6

SUBSTANTIVE TRANSNATIONAL PUBLIC POLICY

This chapter explores the substantive standards developed by international tribunals to enforce transnational public policy. As defined by an international arbitration scholar, "as to the content of substantive transnational public policy, it certainly encompasses the most extreme forms of human conduct that offend public morals. This is a narrow category including prohibitions against activities such as piracy, terrorism, genocide, slavery, smuggling drug trafficking, bribery and corruption, and pedophilia. In the commercial context, substantive transnational public policy may also include the principle of observing obligations ("*pacta sunt servanda*"), the principle of good faith, the prohibition against uncompensated expropriation, the prohibition against discrimination and the protection of those incapable to act".[484] Other transnational substantive public policy standards include the protection of the environment –both natural and cultural–and the compliance with international embargoes.

Whilst public policy principles override the applicable law, they may also be reflected in a national policy. In those instances, one may wonder why tribunals have departed from the strict observance of national laws in deference to an autonomous public policy.

This question was addressed by the tribunal in ICC Case No 6329.[485] The dispute concerned whether a national statute dealing with traffic in illicit drugs should be applied to the merits. The tribunal considered that it should rely on an autonomous rule condemning such practices, justifying this decision in light of the distinction between the *goal* and *method* of the national provision. As illustrated by the tribunal,

[484] Stephen Jagusch, *Issues of Substantive Transnational Public Policy*, *in* INTERNATIONAL ARBITRATION AND PUBLIC POLICY 23, at 27-28 (D. Bray and H. L. Bray eds., 2015)

[485] See, Final Award, ICC Case No. 6329, 1992. See also, Final Award, ICC Case No. 9333, 1998.

> the fight against drug trafficking is obviously in the international interest, yet that does not imply that all methods employed by a state in this context ought to be automatically applied internationally.[486]

The tribunal in ICC Case No 9333[487], further clarified that while the objectives of a particular national statute may be praiseworthy that does not necessarily justify the export of the methods or code of conduct contained therein, particularly where such methods have attracted substantial international criticism.

A. Protection of the integrity of the global market

This section sheds light on the methods relied upon by international tribunals to identify and uphold the structural elements of the international community.

The sustainability of the international trade system requires the adoption of minimum, core moral standards by international businessmen who benefit from and inform that system. As stated in one arbitration award, in international business

> credit and credibility as expressed in companies' activities involve honesty, honourable dealing, prestige, keeping one's word and other such moral values, without which the world of business is unthinkable. Commerce (*cum merx* = with goods) is not only an activity "with goods", but also an activity in a specific world, in constant change and always in a hurry to find markets and opportunities of profit (*finis mercatorum est lucrum*). That is why *negotium* - in the sense of trade - means unrest (*neque otium* = there is no peace, no rest), i.e., the eternal search for various possibilities. In this world, mutual trust of the partners, as well as that of third parties in businesses - which essentially represent trade - is sometimes more important than the material values.[488]

International tribunals have strived to lay down a level playing field whereupon transnational companies engage in their business in the certainty that fundamental standards are

[486] Award, ICC Case No. 6329, 1992: "la lutte contre le trafic de drogue présente un intérêt international évident, cela n'implique pas que toutes les méthodes utilisées par un Etat dans ce contexte doivent automatiquement être appliquées internationalement".

[487] Final Award, ICC Case No. 9333, 1998.

[488] Award, Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania Case No. 33, 30 September 1993.

upheld. Public policy in international arbitration is inspired by a wider concern over the functioning, protection and development of the international market.[489]

1. Bribery and traffic of influence

All companies seek new outlets to increase their growth rate or at least to maintain a satisfactory competition level. In order to attain this goal, enterprises hire qualified personnel and have an effective production instrument at their disposal so that they can offer competitive products. In certain fields, the products or services offered do not differ significantly. Hence, the manager of an enterprise or the board of a company may be tempted to use various means, and particularly bribes to gain a competitive advantage in a certain country.

Bribery can be defined as an offer or request concerning the granting of a hidden and undue material advantage to the employee of a third party with the aim of influencing the third party in favor of the donor.[490] It involves the payment, receipt or solicitation of a private favor from a person exerting a public function or in a position of trust. On a commercial level, it includes also dealings with the employees or agents of a company to secure an advantage over competitors.

It is widely recognized that such practices are condemned by the international community[491] and undeserving of legal protection.[492] In a globalized world, corruption produces

[489] In achieving this goal, tribunals may resort to general legal principles such as good faith. See, Second Interim Award, ICC Case No. 4145, 1984. In construing these principles, arbitral tribunals take into account the consequences parties may be considered as having reasonably and legitimately envisaged. See for instance, Decision of the Tribunal on the Respondent's Further and Partial Objection to Jurisdiction, *Ceskoslovenska Obchodni Banka, A S v Slovak Republic*, ICSID Case No. ARB/97/4, 1 January 2000. In particular, the rules in an international treaty are interpreted in accordance with the ordinary meaning to be given to its terms in light of the treaty's object and purpose. See, for instance, Award, *Metalclad v Mexico*, ICSID Case No. ARB(AF)/97/1, 30 August 2000; Final Award, ICC Case No. 8423, 1994; Award, CRCICA Case No. 27/1992, 15 May 1993, where it was held that a contract must be interpreted according to the provisions of good faith in light of the commercial intention of the parties. See also, Award, ICC Case No. 3242, 1982, where the tribunal inferred from this rule that arbitrators are not bound by the characterization of the contract ascribed to it by the parties. Good faith may require the application of the *contra proferentem* rule. See, for instance, Award, Society of Maritime Arbitrators Case No. 2972, 26 April 1993; Award, *Flour Mill v Insurer*, Ad hoc, 25 February 1978; Award, ICC Case No. 3779, 13 August 1981; Award, *First Travel Corp v Iran*, Iran-US Case No. 34, 3 December 1985; Decision of the Tribunal on Objection to Jurisdiction, *Ceskoslovenska Obchodni Banka, A S v Slovak Republic*, ICSID Case No. ARB/97/4, 24 May 1999.

[490] Final Award, ICC Case No. 5622, 19 August 1988.

[491] See UN 2003 Convention Against Corruption, available at www.undoc.org; Article 11 of the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN doc

a ripple effect not only on the economic, social and political fabric of the country concerned but also that of the international community. Several international tribunals have expressly relied on transnational public policy to hold such arrangements void.[493]

Whilst truly international or transnational public policy condemns bribery in the strongest manner, "the delicate problem remains to determine precisely where the line should be drawn between legal and illegal contracts, between illegal bribery and legal commissions".[494]

The parties must assist the tribunal in a finding of corruption.[495] The difficulty in proving actual corruption is however illustrated in several arbitration awards.[496] It requires clear proof of a specific set of circumstances where wrongdoing is unequivocal. As stated in *Himpurna*,

> the members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum, divorced from reality. The arbitrators are well aware of the allegations that commitments by public-sector entities have been made with respect to major projects in Indonesia without adequate heed to their economic contribution to public welfare, simply because they benefited a few influential people. The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to

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E/CN4/Sub.2/2003/12/Rev.2 (2003). See David Weissebrodt and Muria Kruger, 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 901 (2003). See also, ICC Rules of Conduct on Extortion and Bribery in International Business Transactions 1999, available at www.iccwbo.org; UN Economic and Social Council Resolution 2014 (LXI) of 5 August 1976 on 'Corrupt Practices, Particularly Illicit Payments in International Commercial Transactions'; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997; Principle 7 of the Caux Principles for Business, available at www.cauxroundtable. org; Point VI of the OECD Guidelines for Multinational Enterprises, 2011 revision.

[492] Julian D. M. Lew, *Determination of Arbitrators' Jurisdiction and the Public Policy Limitation of that Jurisdiction*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 73, at 85 (J. Lew ed., 1987); Award, ICC Case No 5622, 19 August 1988.

[493] Award, ICC Case No. 5622, 19 August 1988; Award, ICC Case No. 2730, 1982; Award, ICC Case No. 3916, 1982; Award, ICC Case No. 3913, 1981; Award, ICC Case No. 6249, 1990; German, Bundesverfassungsgericht, 8 May 1985.

[494] Pierre Lalive, 'Transnational (or Truly International Public Policy and International Arbitration', 3 ICCA CONGRESS SERIES 257, at 276 (1987).

[495] Award, ICC Case No. 7047, 1994. See also, José Rosell and Harvey Prager, 'Illicit Commissions and International Arbitration: The question of Proof', 15(4) ARBITRATION INTERNATIONAL 329 (1999).

[496] Award, ICC Case No. 4145, 1984; Award, ICC Case No. 6401, 1991; Award, ICC Case No. 7047, 28 February 1994; Award, ICC Case No. 8891, 1998.

> give effect to contracts contaminated by corruption. But such grave accusations must be proven. There is in fact no evidence of corruption in this case.[497]

In appropriate circumstances arbitration tribunals have relied on the available evidence, adverse conclusions and the effects of the agreement to infer instances of corruption.

One example is ICC Case No 5622.[498] Defendant submitted an offer to the Algerian authorities in reply to an invitation to bids for certain works. It concluded a Protocol of Agreement with the claimant, under which claimant was to give legal and fiscal advice to defendant and coordinate its subcontractors, thereby helping to obtain the contract with the Algerian authorities. Defendant was to pay claimant a percentage of the price of the contract to be concluded with the Algerian authorities.

Defendant obtained the contract and paid claimant 50% of the agreed fee but refused to pay the remaining 50%, alleging that claimant's performance had been deficient. Claimant initiated ICC arbitration proceedings, claiming compensation. Defendant requested damages for the procedural costs.

The tribunal noted the difficulty it had in obtaining relevant evidence. In the arbitration the tribunal had to rely on testimonial evidence as allegedly claimant's file containing the details of the agreement had been stolen. Further, the people who played a key role within the defendant company had been dismissed by the company. The tribunal noted that it was 'strange' that the parties had not called the most relevant witnesses. It was claimed, for instance, that one of the key witnesses had been traumatized by his imprisonment in Algeria.

The witnesses that did testify revealed that claimant used its influence on the Algerian authorities, against payment, in order to have defendant's bid preferred to those of other companies.

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[497] Final Award, Ad hoc, *Himpurna California Energy Ltd v PT (Persero) Perusahaan Listruik Negara*, 4 May 1999.

[498] Award, ICC Case No. 5622, 19 August 1988.

According to the award, the tribunal had to ask two questions. First, was the agreement between the parties a simulated contract? And second, has defendant at least tacitly approved the Claimant's activities? The first question was answered affirmatively, as 50% of the fee was paid even though legal and fiscal advice and coordination, the purported subject matter of the contract, had never provided.

Turning to the second point, the tribunal held that on the facts acquiescence by the company had to be inferred. As stated by the tribunal,

> how else could it be explained that, during a period of three years, a company aiming at obtaining a major contract […] neither worried about nor requested information on its broker's work? Such behavior can only be logically explained if we admit that defendant tacitly approved of claimant's activity.[499]

The tribunal then distinguished between bribery and traffic of influence. It held that bribery had not been proved beyond doubt, despite the fact that one of the witnesses at the hearing had maintained that the representatives of Algeria had been 'taken care of' and that the correspondence between defendant and claimant had ambiguously mentioned payments 'which would have been made by defendant directly to local representatives'.

Yet traffic of influence was present. The tribunal further distinguished between traffic of influence and 'lobbying', by which an individual, company, committee, association or corporation - against payment uses his or its influence to promote or prevent the passage of legislation. The tribunal found lobbying a "perfectly legal activity which contains no illegal elements and does not violate morality".

On the facts, however, the parties had clearly gone beyond lobbying. The tribunal relied on the main characteristics of an illicit traffic of influence as follows:

> Traffic in influence always presupposes the intervention of an agent, sponsor, consultant or sales representative who contractually undertakes to support or sponsor the companies or consortia seeking to obtain public contracts in the countries concerned.

[499] Award, ICC Case No. 5622, 19 August 1988.

> The services company acting as 'sponsors, sales representative' etc. is established in a country other than the country where the services are rendered.
>
> The services company is generally not submitted to the restrictive legislation of the country where the services are rendered.
>
> The fees, commissions, honoraria or payments made to the services company amount to very large sums. The payments made appear disproportionate to the activities which have in fact been developed by the sales agent or sponsor. Further, there is in general no proof of such activities.
>
> The indication in the contract of the mutual obligations of the parties aims in fact at disguising reality. The real relation between the parties takes place in the backstage.

Noting that the applicable law did not contain a special provision dealing with traffic of influence, the tribunal relied on the notion of transnational public policy and declared the contract null and void, invoking the need to

> […] moralize commercial transactions and to ban traffic in influence from commercial life […] aiming at promoting high ethics in commercial transactions, both at a national and an international level, and to favor the growth of international trade in a context of fair competition.[500]

The tribunal concluded that one of the consequences of this type of arrangements is that recovery is excluded for all performance aimed at obtaining an illicit or immoral result, as "the arbitrator cannot grant the parties' claims without becoming somewhat of an 'accomplice', a role which he must refuse to play".[501] Consequently, claimant had to bear all costs of the arbitration. Defendant's claim for damages was denied as it had tacitly approved of Claimant's activities. Its claim did not 'deserve any protection'.[502]

Another instance where an agreement tainted by corruption was struck out by transnational public policy can be found in ICC Case No 6248.[503] In the arbitration, claimant was held to be nothing more than a post office box address providing cover for the improper activities

[500] Award, ICC Case No. 5622, 19 August 1988.

[501] Award, ICC Case No. 5622, 19 August 1988.

[502] Award, ICC Case No. 5622, 19 August 1988.

[503] Award, ICC Case No. 6248, 1990.

of a consultant to a Group of companies, who had abused his position to extort payments from defendant for his private gain instead of acting exclusively in the interest of the Group. It was of the essence in this case that the facts revealed both the breach of a fiduciary relationship, secrecy and a clear motive behind the agreement.

In addition, the tribunal held that an offensive arrangement may be made indirectly, where there is a chain of several parties between the parties to the agreement. According to the award it is irrelevant whether a claimant alleges that practices and moralities in a certain country are different from the ones of a European country.

ICC Case 9333 [504] provides further guidance as to how arbitration tribunals may investigate evidence indicative of corrupt practices. The method suggested by the tribunal can be described as follows.

First, the tribunal should first analyze the amount of the commission, whether it corresponds to the usages in the trade or is exorbitant in the circumstances of the dispute. The agent may just be greedy, or the principal may just have made a bad bargain. For the purposes of a finding of corruption, the amount of the commission should be considered in absolute terms, and not in accordance with the percentage rate.[505]

Second, an indication of corrupt practices can be inferred from the submission of documentary evidence. A company suspecting of corrupt practices, the tribunal added, should notify its agents of its anti-corruption policy and confirm in writing that its agent may be involved in the payment of bribes.

Next, another factor to consider is whether the company has allowed for a reduction of the contract price. If so, that reduction may also affect the commission granted to the agent and, consequently, the value of the bribes the employees of the company would receive.[506]

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[504] Final Award, ICC Case No. 9333, 1998.

[505] As noted by the tribunal, in a finding of corruption tribunals should also consider the circumstances upon which the contract was negotiated and concluded.

[506] This point was also raised in Award, ICC Case No. 4145, 1984.

Fourth, it is relevant to consider whether the company would have concluded the contract in the absence of any bribes.

Then, arbitrators need to take into account whether competitors in the marked have bribed or attempted to bribe employees of the company.

Finally, the relationship between the agent and the suspected representatives of the company is to be investigated, including whether it legitimately results in an exchange of information placing the principal in a better bargaining position.

It is irrelevant for the purposes of transnational public policy whether the breach is actual or consequential. Where the facts show there is an instance of corruption the agreement is deemed void, in whole or in part, for breach of public policy.[507]

2. Protection of the environment

The rational management of natural resources is ancillary to the higher interest of the international community in guaranteeing economic growth and the sustainability of the global market. The protection of natural resources is assured by transnational public policy and, to a different extent, national and international law.

Natural resources are closely knit to the notion of state sovereignty. The principle according to which states have sovereignty over natural resources has been recognized in arbitral case since the l970's[508] and underlies the notion of 'investment' for the purposes of bilateral and multilateral investment treaties.

[507] Award, ICC Case No. 3913, 1984; Award, ICC Case No. 3916, 1982; Award, ICC Case No. 5622, 19 August 1988. In Award, ICC Case No. 6497, 1994, the arbitrators held that although there was no direct evidence of corruption, on the evidence refusal to disclose banking documents relating to 33.33% of the contract was sufficient to establish bribery. The tribunal found such proportion of the contract void.

[508] Award, *Libyan American Oil Co. (LIAMCO) v Libya*, Ad hoc, 12 April 1977; Award, Ad Hoc, *Texaco Overseas Petroleum Company v The Government of the Libyan Arab Republic*, 19 January 1977; Award on Re-opening, *British Petroleum Co (Libya) Ltd v Libya*, Ad hoc, 1 August 1974; UNGA Resolution No. 626 (VII) of 21 December 1952; UNGA Resolution 1803 of 14 December 1962 on 'Permanent Sovereignty over Natural Resources'; UNGA Resolution 3281 (XXIX) of 12 December 1974 containing the 'Charter of Economic Rights and Duties of States'.

Sovereignty extends to the power of states to celebrate contracts with foreign parties enabling them to search for, cultivate or exploit natural resources. Where such agreements are entered into, transnational public policy binds the state or state entity, whose breach results in the obligation to compensate the other party.[509]

It is often the case that where human health[510] or species of fauna or flora are endangered the state will enact a statute restricting economic activity in certain areas. Should a private enterprise legitimately be required to disengage from an exploratory activity, such decision will be endorsed by the international community. However, transnational public policy places conditions on the re-nationalization of resources[511] and holds the state liable for the expropriation resulting therewith.[512]

International tribunals recognize the interest of the state in the rational use of natural resources, and the need to safeguard and improve the quality of life for its citizens and protect and restore the environment.[513]

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[509] Award, *Revere Copper & Brass Inc. v Overseas Private Investment Corp*, AAA Case, 24 August 1978; R. Doak Bishop, 'International Arbitration of Petroleum Disputes', XXIII YEARBOOK OF COMMERCIAL ARBITRATION 1131, at 1156 (1998); Award, *AGIP S.p.A. v. The Government of the People's Republic of the Congo*, ICSID Case No. ARB /77/1, 30 November 1979.

[510] See, for instance, Article 36 of ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2006), available at www.ilo.org.

[511] The arbitrators in the Final Award, *Liberian Eastern Timber Corp v Liberia*, ICSID Case No. ARB/83/2, 31 March 1986, laid down the conditions upon which an act of nationalization would be acceptable to the tribunal: the Government would have to point to some nationalization law; then it would have to show that its action was take for a bona fide public purpose; that it was non-discriminatory; and accompanied by a payment or appropriate compensation. On the same point, Rosalyn Higgins, 'The Taking of Property by the State: Recent Developments in International Law', 3 RECUEIL DES COURS 176 (1982). See also Award, *AMINOIL v Kuwait*, Ad hoc, 24 May 1982.

[512] Award, *Compañia del Desarrollo v Costa Rica*, ICSID Case No. ARB/96/1, 17 February 2000: the tribunal found that although a taking for environmental reason may be legitimate, "expropriatory environmental measures – no matter how laudable and beneficial to society as a whole– are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains".

[513] Award, *Ethyl Corp v The Government of Canada*, UNCITRAL/NAFTA, 24 June 1998, concerning the trade in or import for commercial purpose of a controlled chemical industry. The consensus within the international community to protect the environment is expressed in the proliferation of international instruments on the topic. See, for instance, the UN Convention on Biological Diversity 1992; The International Convention on Civil Liability for Oil Pollution Damage 1969; the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment 1993; the Declaration on the Right to Development 1986; the Rio Declaration on the Environment and Development 1992; The Plan of Implementation of the World Summit on Sustainable Development 2002; the United Nations Millennium Declaration 2000; the Rotterdam Convention on the Prior Informed Consent Procedure

In a commercial arbitral award, the tribunal clearly referred to transnational public policy standards to solve the dispute. In this case, after twenty years of exploitation of an offshore site in Africa, the State and the investing corporation started disputing over the responsibilities to restore the environment near the offshore site. The arbitral tribunal rules that: (i) the restoration of the environment after exploitation activities is not only a usage but also an international obligation; (ii) such restoration is mandatory event if it was not provided for by the contract concluded by the parties: (iii) the Montego Bay Convention of 1982 was applicable to the State; (iv) the corporation was bound to respect the precautionary principle in the conduct of operations on energy resources as it was part of customary international law.[514]

Yet the threat to the environment or public health must be effective. As noted in the award on liability in *S D Myers Inc v The Government of Canada*, an arbitration tribunal

> must take into account the general principles that emerge from the [...] concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns.[515]

Performance of the contract remains unaffected by a state measure where it poses no threat to the environment. This was a determining factor in *Tecnicas Medioambientales TECMED S A v Mexico*.[516] The ICSID tribunal had to decide a dispute over the Mexican authorities' failure to renew the license of a waste site held by TECMED's local Mexican subsidiary following a public outcry as to the possible environmental repercussions of the project.

The tribunal found that the investigation led by the Mexican Government itself revealed there had been no danger to public health or the environment and therefore the administrative decision revoking the license on environmental grounds was in breach of the BIT between Spain and Mexico.

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for Certain Hazardous Chemicals and Pesticides in International Trade 2004; the UNESCO Universal Declaration on the Human Genome and Human Rights 1997; The Vienna Convention on the Protection of the Ozone Layer 1985; the Montreal Protocol on Substances that Deplete the Ozone Layer 1987.

[514] Award unpublished, 2003. Reference is made by Thomas Clay, 'Arbitrage et environnement', 149 GAZETTE DU PALAIS 10, at 15 (2003).

[515] Award, *S D Myers Inc v The Government of Canada*, UNCITRAL/NAFTA, Ad hoc, 30 December 2002.

[516] Award, *Tecnicas Medioambientales TECMED S A v Mexico*, ICSID Case No. ARB(AF)/00/2, 29 May 2003.

A similar reasoning underlined the tribunal's decision in the *Metalclad* arbitration.[517] In this case, the investor started a NAFTA Chapter 11 arbitration alleging that it had been denied a construction permit to build and operate a hazardous waste facility in Guadalcazar, a local municipality in the United States of Mexico.

The municipality was concerned over the environmental impact of the project and created a nature reserve that included the construction site. Two independent technical studies determined that good engineering practices would make the site environmentally sustainable. Metalclad argued that it had secured all permits from the Federal Government, which had exclusive jurisdiction over the licensing of hazardous waste facilities.

The tribunal stated that one of the fundamental goals of NAFTA is to increase the transparency in local legal requirements. It therefore found Mexico in breach of the principle of fair and equitable treatment of foreign investors and liable for the expropriation. In a way typical of decisions based on public policy, the arbitral tribunal emphasized the importance of predictable environmental standards and permit procedures, at both the federal and local levels, in each of the NAFTA countries.[518]

Where such standards are clearly established, arbitration tribunals have given effect to the environmental protection policy. In the ICSID tribunal's decision in *Emilio Agustin Maffezini v The Kingdom of Spain*,[519] Emilio A. Maffezini, an Argentinian national, commenced proceedings against Spain under the 1991 Bilateral Investment Treaty between Argentina and Spain. Mr. Maffezini decided to establish and invest in a chemical products company in Galicia which he named Emilio A. Maffezini, S.A. (EAMSA). A Spanish entity called Sociedad para el Desarrollo Industrial de Galicia (SODIGA) offered advice regarding the investment.

Under the applicable law, chemical industries were specifically required to undertake an Environmental Impact Assessment (EIA). The law further required an EIA before consent was

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[517] Award, *Metalclad v Mexico*, ICSID Case No. ARB(AF)/97/1, 30 August 2000.

[518] Stephen L. Kass and Jean M. McCarroll, 'The Metalclad Decision Under NAFTA's Chapter 11', NEW YORK LAW JOURNAL (27 October 2000).

[519] Award, *Emilio Augustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, 13 November 2000.

given to certain public and private projects considered to have significant environmental implications. Suspension of projects could be ordered, particularly if work thereon began before the EIA was approved.

Arguing that SODIGA was a public entity whose acts and omissions were attributable to Spain, Mr. Maffezini claimed that SODIGA was responsible for the failure of the project because, among other grounds, it had pressured EAMSA to make the investment before the Environmental Impact Assessment process was finalized and its implications were known.

The Tribunal found it should carefully examine these contentions, since the Environmental Impact Assessment procedure is basic for the adequate protection of the environment and the application of appropriate preventive measures. This held true, the tribunal added, increasingly under international law. It found that claimant not only knew but ought to have known of the need to undergo an Environmental Impact Assessment and as such Spain could not be held responsible for the decisions taken by the claimant with regard to the EIA. The claim was dismissed by the tribunal.

Decided awards demonstrate that environmental concerns may also be relevant to mainstream international commercial tribunals.[520] Commercial tribunals have been willing to extend their jurisdiction to environmental issues and have recognized the role of corporations in ensuring environmental protection.[521]

[520] Award, *Unitramp v Koal Industries*, Society of Maritime Arbitrators Case No. 2014, 13 September 1984. In this case, compliance with environmental conservation procedures was deemed foreseeable in the ordinary course by all prudent businessmen and could not be recast as extraordinary to the degree that might excuse performance of a charterparty obligation using the lexicon of *force majeure*, acts of princes or *vis major*. Prima facie environmental concerns were also one of the factors leading to the grant of an interim measure in Interim Award, Case No. 1694, 12 December 1996.

[521] See, for instance, Principle 6 of the Caux Principles for Business; Point V of the OECD Guidelines for Multinational Enterprises; Rule 4 of the Asia Pacific Economic Cooperation (APEC) forum Business Code of Conduct.

3. Illicit trafficking

Illicit trafficking[522] amounts to an arrangement for the movement of goods with a detrimental effect on the international community. Any form of illicit trafficking is prohibited by transnational public policy.[523]

The characterization of what is 'illicit' is drawn from the object or performance of the contract. Arrangements illicit by their object include the sale of conventional weapons without an appropriate license,[524] atomic, biological and chemical weapons or their components,[525] endangered species,[526] non-medicinal drugs,[527] human beings.[528]

An arrangement is also illicit where performance entails piracy,[529] counterfeiting, theft[530] or the smuggling of goods.[531]

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[522] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage eds., 1996), at 850-851.

[523] Pierre Lalive, 'Transnational (or Truly International Public Policy and International Arbitration', 3 ICCA CONGRESS SERIES 257, at 283 (1987); Audley Sheppard, 'Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards', 19(2) ARBITRATION INTERNATIONAL 217, at 221 (2003).

[524] See, for instance, the Preamble of the UN Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime; the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials; the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects 1993.

[525] See, for instance, the Treaty on the Non-Proliferation of Nuclear Weapons; the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction signed on 10 April 1972; the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons on Their Destruction 1993.

[526] As restated in the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973.

[527] See, for instance, the Single Convention on Narcotic Drugs 1961; Convention on Psychotropic Substances 1971; Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

[528] See, for instance, the Protocol to Prevent, Suppress and Punish Trafficking Against Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime 2003; Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

[529] See, for instance, ICC (INTERNATIONAL MARITIME BUREAU), PIRACY AT SEA (1989) at 455. See also, WORLD CUSTOMS ORGANIZATION, Report 'Smuggling, Counterfeiting and Piracy: The Rising Tide of Contraband and Organized Crime in Europe' (April 2001).

[530] Such as stolen human body parts and cultural property. See UN Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995. See also, *Repubblica dell'Ecuador – Casa della Cultura Ecuadoriana v Danusso*, Corte d'Appello di Torino, Italy, 25 March 1982.

Most national courts today acknowledge the validity of export or import controls imposed by a friendly foreign country.[532] Likewise, tribunals recognize a national measure restricting trade in a certain product. It remains unclear, however, what the proper legal solution may be where a country imposes unilateral export controls or other protectionist measures in relation to otherwise merchantable assets.[533] A dispute may arise as to the effects such measures have on the legal relationship between the parties.

International tribunals have relied on the principle of territoriality when considering the validity of arrangements concerning the export of goods prohibited by one country. According to that method, the characterization of an international movement of goods as licit or illicit is based on an applicable national law. An international movement of goods is illicit if recognized as such either in the place of performance or under the law of the seat of arbitration.[534]

Other tribunals have adopted the transnational public policy approach and considered the effects of the unilateral ban on the international trade system. A leading example is the award by an ad hoc arbitration tribunal sitting in Germany.[535] The decision provides general guidance in this area and should be analyzed more closely.

The tribunal was considering a dispute as to whether a party was compelled to perform under a contract for the sale of 6000 sacks of semi-roasted coffee and 2000 sacks of Colombian

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[531] In national laws, the term 'smuggling' amounts to customs fraud consisting in the movemet of goods across a customs frontier in any clandestine manner. See, for instance, Article 1(d) of the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Custom Offences, 9 June 1977. For the inclusion of 'smuggling' in the notion of public policy see Pierre Mayer and Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards', 19(2) ARBITRATION INTERNATIONAL 249, at 255-256 (2003).

[532] *Sion Soleimany v Abner Soleimany*, Court of Appeal, United Kingdom, 30 January 1998.

[533] The issue is particularly relevant in commercial arbitrations, where there is no relationship between the state imposing the unilateral measure and the merchant. In investment cases the question whether a State entity is released from its obligations to an overseas buyer when the State embargoes the sale has consistently been answered in favor of the State entity. See, *C Czarnikow Ltd v Centrala Handlu Zagranicznego Rolimpex*, House of Londs, United Kingdom, 6 July 1978. The embargo leads to the obligation to compensate the investor for any expropriation incurred where, for instance, it carries the revocation of a shipping license. See, for instance, Award, *Middle East Cement Shipping and Handling Co v Republic of Egypt*, ICSID Case No. ARB/99/6, 12 April 2002.

[534] For instance, in Award, ICC Case No. 1399, 14 April 1996, a contract for sale of lighters in breach of Mexican customs was enforced by the tribunal on the grounds that the contract was to be performed in France and in accordance with the notion of *bona fide* in French law which did not repudiate the transaction.

[535] Award, Ad hoc, 19 March 1987.

'Excelso' semi-roasted coffee despite a restriction on exports imposed by the Colombian government. The contract was governed by German law as the law of the place of arbitration.[536]

Seller delivered 6000 sacks and then pleaded *force majeure*, alleging that the export of semi-roasted coffee from Colombia became illegal under Colombian law. According to the award, the restriction was aimed at guaranteeing that semi-roasted coffee sold to Columbian roasters for national consumption against moderate prices remained in the country.[537]

After the last day of the contract period for shipment, buyer bought the remaining coffee in the best available market. It then initiated arbitral proceedings before the German Coffee Association to recover the difference between the contractual price and the price paid for the coffee.

The arbitrators first examined defendant's contention that the contract was invalid since the export of semi-roasted coffee was forbidden in Colombia. The tribunal first established that this matter was not confined to the public policy of the German legal system.[538]

It then stated that to prepare, promote and profit from criminal activities, such as professional smuggling, would indeed be contrary to *bonos mores*. Yet, it continued, *bonos mores* does not bar the acquisition of goods freely available in the international market before and during the imposition of export controls.[539]

The tribunal held for claimant on the grounds that, in the absence of smuggling or other criminal activity, a country imposing a unilateral ban on exports tacitly consents to the sale of restricted goods already available in the international market, particular where it has not taken steps to have the ban recognized by the international community.[540]

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[536] Award, Ad hoc, 19 March 1987.

[537] Award, Ad hoc, 19 March 1987.

[538] As stated by the Tribunal: "Art. 134 of the German Civil Code does not apply to a foreign legal prohibition, because this legal prohibition is not directly connected with the German territory".

[539] Award, Ad hoc, 19 March 1987.

[540] E.g. by notifying consumer countries or the relevant international organization.

The approach of the tribunal is praiseworthy as it avoids sensitive considerations of international comity. The ratio of this decision is that illicit trafficking occurs where transnational public policy is effectively breached. A ban on trade imposed by a domestic-international public policy does not extent to a foreign transaction unless smuggling or some other activity prohibited by the international community is involved.

A unilateral ban on merchantable goods must be weighted against the need for performance of contractual arrangements and the stability of the global market. National measures affecting the international trade system arc integrated in a wider regulatory framework to which arbitration tribunals are not indifferent.[541]

4. Fraud

The prohibition of fraud in international commerce has been identified as an issue of public policy.[542] National courts have been unanimous in their condemnation of fraud.[543] In

[541] Consider, for instance, the preamble of GATT 1994; the Marrakesh Protocol of 15 April 1994; the Agreement on Import Licensing Procedures 1971; the Understanding on Rules and Procedures Governing the Settlement of Disputes Annexed to the GATT 1994; the Annex to the Decision on Notification Procedures, which calls for the notification of export restrictions. All the instruments are available at www.wto.org.

[542] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage eds., 1996), at 339. See also, David Caron and Lucy Reed, 'Public Policy in International Commercial Arbitration in Australia', 9(2) ARBITRATION INTERNATIONAL 167, at 171 (1993); Christopher B. Kuner, 'The Public Policy Exception to the Enforcement of Foreign Arbitral Awards', 7(4) Journal of International Arbitration 71, at 78 (1990); Serge Lazareff, 'Mandatory Extraterritorial Application of National Law', 11(2) ARBITRATION INTERNATIONAL 137, at 139 (1995) (identifying fraud as an issue of international public policy). As for the case law, see *Biotronik v Medford Medical Instrument Co.*, District Court, District of New Jersey, United States, 12 May 1976, finding that fraud is contained in the public policy defense; *Corporacion Transnacional de Inversiones, SA de CV et al and STET International, S.p.A. et al.*, Supreme Court, Canada, 22 September 1999; *Hainan Machinery Imp & Exp Corp. v Donald & McArthy Pte Ltd*, High Court, Singapore, 29 September 1995; *Westacre Investments Inc v. Jugoimport-SDRP Holding Co Ltd*, High Court of England and Wales, United Kingdom, 19 December 1997 (fraud in international commerce should invite the attention of English public policy in relation to contracts which are not performed within the jurisdiction of the English courts. That it should be the policy of the English courts to deter the exercise of personal influence short of corruption and fraud to obtain valuable contracts in foreign countries in which such activity is not contrary to public policy by refusing to enforce contracts would involve an unjustifiable in-road into the principle *pacta sunt servanda*).

[543] See UNCITRAL, Report on the work of its 18th session, Doc. A/40/17 (June 3-21, 1985), at 63. See also, *Ocean Warehousing B V v Baron Metals and Alloy Inc et al*, District Court, Southern District of New York, United States, 29 May 2001; *Riley v Kingsley Underwriting Agencies Ltd*, Court of Appeal for the 10th Circuit, United States, 17 July 1992; *Oriental Commercial and Shipping Co Ltd v Rosseel NV*, District Court, Southern District of New York, 4 March 1985; *Corporacion Transnacional de Inversiones, SA de CV et al and STET International, S.p.A. et al.*, Supreme Court, Canada, 22 September 1999; *Hainan Machinery Imp & Exp Corp. v Donald & McArthy Pte Ltd*, High Court, Singapore, 29 September 1995; *Kersa Holding Co v Infancourtage*, Cour d'appel, Luxembourg, 24 November 1993.

Dandong Slzuguang Axel Corporation, Ltd v Brilliance Machinery,[544] for instance, an arbitral decision oblivious to fraud was set aside even though the evidence was available to the arbitrator during the arbitration proceedings.

International arbitrators must consider contractual fraud with caution. Allegations of fraud in the procurement or performance of a contract arc frequently made for tactical reasons[545] and must be subject to a high standard of proof, beyond the "rough and tough" of the trade.[546] Further, a distinction must be drawn between fraud as an issue of formation of the will and fraud as a public policy defense. For a finding of fraud to belong to transnational public policy it must be of such gravity as to make a defense of consent unavailable.[547]

B. Other transnational non-commercial interests

1. Protection of cultural heritage

As a result of the systematic destruction of historical assets during the holocaust, the protection of cultural heritage has become one of the greatest concerns of the international community. The public policy character of this prohibition is described in the preamble to the UNESCO Convention, which draws attention to the fact that “the interchange of cultural property among nations for scientific cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations”.[548]

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[544] *Dandong Shuguang Axel Corporation, Ltd v Brilliane Machinery Company et al.*, District Court, Northern District of California, 1 June 2001.

[545] NIGEL BLACKABY AND CONSTANTINE PARTASIDES WITH ALAN REDFERN AND MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (2009), at 171.

[546] Award, CAM Case No. 1398, 18 March 1999; Final Award, ICC Case No. 6320, 1992; Final Award, Society of Maritime Arbitrators Case No. 2642, 28 March 1990; Final Award, ICC Case No. 6230, 1990; Awards, *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL, 27 October 1989 and 30 June 1990; Award, ICC Case No. 5649, 1987; Award, Italian Arbitration Association Case No. 76/98, 24 November 1999.

[547] Final Award, Case No. 6320, 1992.

[548] See the preamble to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970. See also Article 12 of the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN doc E/CN4/Sub.2/2003/12/Rev.2 (2003).

According to the convention, "it is essential for every State lo become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations. Its museums, libraries and archives should ensure that their collections are built up in accordance in accordance with universally recognized moral principles. The illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations".[549]

International arbitration tribunals have followed the lead of national courts in recognizing the need to protect cultural heritage.[550] The arbitrability of disputes concerning the protection or registration of cultural property is normally unopposed by national law.[551]

The leading arbitration award in this area is *Southem Pacific Properties v Republic of Egypt*,[552] also known as the Pyramids case. The tribunal was dealing with a dispute over a joint venture project to build a tourism complex on a plateau overlooking the pyramids. In 1974, the Ministry of Tourism of Egypt and EGOTH, the Egyptian General Organization for Tourism and

Hotels, undertook to transfer the right of usufruct of such property to the joint venture company and assist in obtaining all necessary local approval for the execution of the project. The land necessary for the project was granted to the joint venture by a Presidential Decree of 1975 and the project was finally approved by the Egyptian government in 1977, whereupon construction at the site began.

In late 1977, the pyramids project began to encounter political opposition in Egypt. Opponents of the project claimed that it posed a threat to undiscovered antiquities. In May 1978

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[549] See the preamble of the UN Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995. Michael Schneider, 'UNIDROIT Convention on Stolen or Illegality Exported Cultural Objects: Explanatory Report', 3 UNIFORM LAW REVIEW 476 (2001).

[550] On this topic, see Quentin Bryne-Sutton, 'Arbitration and Mediation in Art-Related Disputes', 14(4) ARBITRATION INTERNATIONAL 447 (1998); Emily Sidorsky, 'Cultural Property Disputes and the Draft UNIDROIT Convention Possible Applications of International Arbitration', 4(4) AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 475 (1993); Folarin Shyllon, 'The recovery of cultural objects by African States through the UNESCO and UNIDROIT Conventions and the role of arbitration', 2 UNIFORM LAW REVIEW 219 (2000).

[551] See, for instance, Article 14 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954.

[552] Award, *Southern Pacific Property (Middle East) Ltd v Egypt*, ICSID Case No. ARB/84/3, 20 May 1992. See also, Award, ICC Case No. 3493, 16 February 1983.

the Ministry of Information and Culture declared the land surrounding the Pyramids to be "public property" and the decrees granting the land to the joint venture and authorizing the project were revoked.

The arbitrators had to decide whether the Egyptian government was bound to the agreement or whether it had effectively discharged itself either by the cancellation orders resulting from the public outcry or by signing the UNESCO convention. The tribunal first held that neither the governmental decrees nor the UNESCO Convention, which was not in force in Egypt at the time of the decrees, applied to cancel the pyramids project. Yet, the tribunal concluded, as a matter of principle the protection of cultural heritage required that the project be discontinued upon discovery of the antiquities and inclusion of the "pyramids fields" in the World Heritage list.[553]

The tribunal's decision expresses the concerns of transnational public policy in this area. Regardless of the standard found in national or international law, public policy requires parties to abstain from any activity which may endanger the scientific value of historical records.

2. International embargoes

A ban on trade is normally the first weapon relied upon by the international community to impose its will on a rogue state. Tribunals have often been required to consider the effects of a ban on trade or other commercial activity with a particular state.[554]

Whilst most international trade restrictions fall within the jurisdiction of the World Trade Organization, the United Nations Compensation Commission[555] or Mixed Claim Commissions,

[553] On the facts, the Republic of Egypt had to compensate SPP for the expropriation resulting from its application to the World Heritage Committee. See, Award, *Southern Pacific Property (Middle East) Ltd v Egypt*, ICSID Case No. ARB/84/3, 20 May 1992.

[554] Jean-Hubert Moitry, 'L'arbitre international et l'obligation de boycottage imposée par un Etat', 118 JOURNAL DU DROIT INTERNATIONAL 349 (1991); Lambert Matray, *Embargo and Prohibition of Performance*, *in* ACTS OF STATE AND ARBITRATION 69 (K. Böckstiegel ed., 1997).

[555] Bruno Leurent, 'Views on the UNCC and its Adjudication of Contractual Claims', 17(1) JOURNAL OF INTERNATIONAL ARBITRATION 133 (2000).

judicial decisions have repeatedly extended such jurisdiction to commercial arbitration tribunals.[556]

Although there are no known cases where the tribunal declared an international embargo invalid on transnational public policy grounds, disputes have arisen over the extent the contract between the parties may be affected by an international embargo.

In most cases, embargo legislation triggers a hardship or force majeure clause in the contract.[557] Parties may elect to terminate the contract as a result of the embargo, whereby the task of the arbitrator is confined to the political risk borne by each party.[558]

The embargo becomes however a public policy issue where it calls for the ousting of the contract or the modification of a normal legal rule according to which contracts must be performed in accordance with their terms. One example of the public policy effects of an

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[556] *Fincantieri - Cantieri Navali Italiani SpA v M*, Tribunal Fédéral, Switzerland, 23 June 1992; *United Kingdom v Boeing Co*, Court of Appeal of the 2nd Circtuit, United States, 29 June 1993; *In Re Belship Navigation Inc v Sealift Inc*, District Court, Southern District of New York, United States, 28 July 1995; *Air France v Kéba Mbaye*, Cour Supérieure du Québec, Canada, 15 February 2000; *Air France v Libyan Arab Airlines*, Court of Appeals of Québec, Canada, 21 March 2003; *Drexel Burnham Lambert Ltd v Philipp Brothers*, Tribunal de Grande Instance Paris, France, 28 October 1988; *Philipp Brothers v Drexel*, Tribunal de Grande Instance Paris, France, 29 June 1989; Oberlandesgericht Hamburg, Germany, 26 January 1989; Bundesgerichtshof, Germany, 26 April 1990; *Benidai Trading Co Ltd v Gouws & Gouws Ltd*, Supreme Court, South Africa, 6 June 1977; *Bremer Handelsgesellschaft M B H v Ets Soules et Cit & Anthony G* Scott, Queen's Bench Division, Commercial Court, United Kingdom, 11 October 1984. For the minority view see, *Fincantieri Cantieri Navali Ital SpA v Iraq*, Corte d'appello di Genova, Italy, 7 May 1994. See, for doctrine, Giorgio Sacerdoti, 'Embargo iracheno, effetti sui contratti in corso ed efficacia delle clausole per arbitrato internazionale', 3 RIVISTA DELL'ARBITRATO 361 (1993).See also, Award, ICC Case No. 6719, 1991: the tribunal was deciding a dispute concerning agency agreements concluded in order to obtain a supply of military materials from Iraq. Defendant raised an exception of non-arbitrability founded on the United Nations Resolutions of 1990 relating to the Iraq embargo. The arbitral tribunal considered that:

> Il faut se garder de confondre l'application par l'arbitre international de dispositions d'ordre public d'une part et l'inarbitrabilité du litige d'autre part. Le seul fait que la nature du litige puisse amener l'arbitre à appliquer certaines règles juridiques d'ordre public ne signifie pas que le litige devient, par là-même, inarbitrable.

See also, INTERNATIONAL LAW ASSOCIATION, Committee on International Commercial Arbitration, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards', New Delhi Conference (2002), Recommendation 1(e).

[557] On the *force majeure*, effect of national and international sanctions against Iraq on the relationship between a company and its subcontractor see Final Award, CAM Case No. 1491, 20 July 1992.

[558] See Final Award, ICC Case No. 9473, 2 January 1999, where the contract was terminated following the embargo on British beef during the BSE crisis.

international embargo can be found in Chamber of National and International Arbitration of Milan Award 1491 of 1992.[559]

The Claimant had agreed to supply the main contractor with parts of a plant to be built in Iraq. Delivery of the first batch of products was to take place in November 1990. The arbitration clause in the contract provided for a sole arbitrator and further called for *arbitrato irrituale*, a decision according to the rules of law, under Italian law.

On 8 August 1990, EC Council Regulation No 2340 declared an embargo against Iraq whereupon the main contractor informed subcontractor that their contract was suspended. The Regulation forbade the parties, by means of vessels or aircrafts flying the flag of a EC Member State, to export any product originated in or coming from the EC to Iraq and Kuwait. Further it banned all activities which had as their object or effect the promotion of such sales or supplies.

The arbitrator was asked to decide the effect of the EC Regulation and other laws concerning the embargo on the main contractor as a party to the main contract and the subcontract between the parties.

The tribunal held that the embargo called for a non-restrictive interpretation in accordance with the goals set out by the UN Security Council decisions at an international level. The wording of Regulation No 2340 of 1990, “activities the object or effect of which is the promotion of sales or supplies to Iraqi parties” indicated that the Regulation's determining factor was not the parties' intention, but the activity’s objective capability to lead to the prohibited result. It followed that the subcontract between the parties was governed by those provisions and, therefore, affected by the embargo legislation.[560]

It was further held that the forbidden activities towards Iraq, which originally could be considered temporary, should now be considered definitive, taking into account that it was

[559] Final Award, CAM Case No. 1491, 20 July 1992.

[560] The subcontract undoubtedly and univocally concerned the production of a part of the works for the plant to be built under the main contract, which was well known to and accepted by subcontractor. The prohibition based on the EU Regulation and national legislation did not allow performance under the subcontract, since the subcontract univocally aimed at the execution of the main contract’s works, that is, had as its effect the promotion of supplies to Iraq.

impossible to foresee whether full normalization would be reached in the relationship with the Iraqi State.

In the final award, it was decided that the embargo must be upheld. In light of the broad wording of the prohibition and its mandatory character, the main contract between main contractor and the Iraqi customer could not be performed. The tribunal considered that the objective, absolute and definitive circumstances of the case rendered the contract between the parties unenforceable

3. The fight against terrorism

Transnational public policy will strongly condemn any agreement leading to a terrorist activity.[561] The ethos of the international community condemns any social or political change at the expense of human life. This proposition is illustrated by the proliferation of international legal instruments on the subject.[562]

The scarcity of case law and arbitral awards in this area is explained by the fact that terrorist activities are controlled by criminal law. In international arbitration the topic of terrorism is mostly relevant for the purposes of compensation, ascertaining the scope of a provision in an insurance contract and the effects of money laundering legislation.

[561] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage eds., 1996), at 824; Pierre Lalive, 'Transnational (or Truly International Public Policy and International Arbitration', 3 ICCA CONGRESS SERIES 257, at 285 (1987); Jan Paulsson, 'Towards Minimum Standards of Enforcement: Feasibility of a Model Law', 9 ICCA CONGRESS SERIES 574, at 582 (1999).

[562] Consider, for instance, the UN Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 26 January 1973; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 23 September 1971; Convention for the Suppression of Unlawful Seizure of Aircraft of 16 Deccmber1970; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 10 March 1988; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988; Convention on Offences and Certain Other Acts Committed on Board Aircraft of 14 September 1963; Convention on the Marking of Plastic Explosives for the Purpose of Identification of I March 1991; Convention on the Physical Protection of Nuclear Material of 3 March 1980; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons of 14 December 1973; International Convention Against the Taking of Hostages of 18 December 1979; International Convention for the Suppression of Terrorist Bombings of 12 January 1998, all available at www.unodc.org.

One of the most salient hurdles in this area is the establishment of a working definition of terrorism. The UN Convention for the Suppression of the Financing of Terrorism defines terrorism as an act falling within the scope of another UN convention dealing with terrorism or

> any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.[563]

In the unlikely event that the dispute directly or indirectly involves such an act, the intervention of transnational public policy will bar the effects of the parties' agreement. The question remains as to whether the arbitrators themselves are under an obligation to inform the relevant authorities of apparent terrorist activities. The issue can only be resolved in light of the applicable criminal law and the duty to report such activities therein or, in its absence, the moral obligation owed by the arbitrators, as individuals, to the international community.

[563] See Article 2(1)(b) of the UN Convention for the Suppression of the Financing of Terrorism of 25 February 2000 and the annex thereto.

CONCLUSIONS: THE EFFECTS OF THE APPLICATION OF TRANSNATIONAL PUBLIC POLICY ON AN ARBITRAL AWARD

There can be no denying that transnational public policy is nowadays more than an idea. As shown in this work, it has achieved broad acceptance as a concept and it has been recognized and applied by international arbitral tribunals as well as by national courts in the phase of recognition and enforcement. Emmanuel Gaillard noted that

> Although it may not be part of the substantive law of every sovereign state, genuinely international public policy is nevertheless a reality, and it is perfectly able to operate so as to override the law which would otherwise apply, just as the local conception of international public policy would operate in a national court.[564]

After discussing the origins, the role and the content of transnational public policy we briefly point here the consequences of its application to the different phases of an international arbitration proceeding. The first legitimate question to put forward is whether the arbitral tribunal has the power to investigate and rule over a violation of a transnational public policy standard.

The parties sometimes raise allegations of breach of transnational public policy: in this case, arbitrators are obliged to address them. However, when parties try to avoid raising such issues the question is whether the arbitral tribunal should decide the case solely on the basis of the evidence put forward by the parties or whether it can and should seek further information on its own motion.

This is the dilemma between the power of the arbitral tribunal to act *ultra petita* and the violation of public policy. Such dilemma is not only theoretical but has practical consequences as the 1958 New York Convention covers both public policy and *ultra petita* actions. On the one hand, article V(1)(c) provides that the recognition or enforcement may be refused if the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration:

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[564] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage eds., 1996), at 864.

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> […]
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

On the other hand, Article V(2)(b) deals with public policy and provides that the recognition and enforcement of a foreign award may be refused if the award is contrary to the public policy of the country where recognition or enforcement is sought:

> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
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> […]
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

When an arbitral tribunal recognizes the existence of a breach of transnational public policy and the parties provide no instruction, which provision of the New York Convention should prevail?

In an ICC Award of 1994, the majority of the arbitral tribunal stated that bribery must be clearly and unequivocally pleaded, that the burden of proof rested firmly on the party making the bribery allegation and that where bribery is not made an issue by the parties, the arbitral tribunal has no duty to investigate possible bribery:

> The majority also holds that bribery renders an agreement invalid. In arbitration proceedings, however, bribery is a fact which has to be alleged and for which evidence has to be submitted, and at the same time constitutes a defence, nullifying the claims arising from a contract. The consequences of this are decisive. If a claimant asserts claims arising from a contract, and the defendant objects that the claimant's rights arising

> from the contract are null due to bribery, it is up to the defendant to present the fact of bribery and the pertaining evidence within the time limits allowed to him for presenting facts. The statement of facts and the burden of proof are therefore upon the defendant. The word "bribery" is clear and unmistakable. If the defendant does not use it in his presentation of facts an Arbitral Tribunal does not have to investigate. It is exclusively the parties' presentation of facts that decides in what direction the arbitral tribunal has to investigate. If the claimant's claim based on the contract is to be voided by the defence of bribery, the arbitral tribunal, as any state court, must be convinced that there is indeed a case of bribery. A mere "suspicion" by any member of the arbitral tribunal, communicated neither to the parties nor to the witnesses during the phase to establish the facts of the case, is entirely insufficient to form such a conviction of the Arbitral Tribunal.[565] (emphasis added)

However, more recently, scholars in international arbitration have condemned this approach and underlined that, given the seriousness of the violations or transnational public policy standards, considerations of public policy should take precedence over other principles,[566] and arbitral tribunals have the right and the duty to investigate such violations *ex officio*.[567]

In particular, Bernardo Cremades proposed four reasons why an arbitral tribunal must investigate breaches of transnational public policy standards[568]:

> Firstly, an arbitral tribunal has a duty, as confirmed by Article [41 of the 2012] ICC Rules of Arbitration, to make every effort to ensure its award is enforceable in law, and any award that ignores evidence of bribery, money laundering or serious fraud carries a significant risk of subsequently being held to be contrary to public policy and therefore unenforceable. Secondly, and notwithstanding the private and often confidential nature of international arbitration, arbitral tribunals have a public responsibility to the administration of justice that is inseparable from their autonomy as recognised and respected by national courts. In fact, the public responsibilities of international arbitral tribunals are rapidly growing in prominence. This public responsibility requires arbitral tribunals not to condone bribery, money laundering or serious fraud. Thirdly, international arbitration is a service provided to States and businesses engaged in international trade and investment, and a proactive

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[565] Final Award, ICC Case No. 7047, 28 February 1994.

[566] Christian Albanesi and Emmanuel Jolivet, *Dealing with Corruption in Arbitration: A Review of the ICC Experience*, *in* SPECIAL SUPPLEMENT 2013: TACKLING CORRUPTION IN ARBITRATION 27, at 35 (ICC Publishing, 2013).

[567] See the discussion in CHAPTER 4.D.

[568] Although Professor Cremades specifically refers to corruption, fraud and money laundering, we believe that its arguments are easily applicable to all standards of transnational public policy.

> approach by international arbitrators best assists the considerable efforts States and businesses are making to develop and implement rules and systems to eliminate bribery and money laundering. Finally, weak or apathetic judicial authorities have been identified as one of the root causes of the persistence of corruption, and it is in the interests of the international arbitration community as a whole to assist actively in the elimination of corruption rather than risk being seen as a weak and complicit aid to its survival. Possible bribery of a foreign public official, money laundering or fraud must no longer be discreetly ignored by lawyers and arbitrators on the basis that such practices are an inevitable part of doing business in less developed regions of the world. Where a dispute arises and an arbitral tribunal is appointed, the parties expect the tribunal to know and understand trade practices in the industry and the region concerned, but they have no right to expect arbitrators to ignore either the applicable law or international public policy. Bribery, money laundering and fraud are not issues of moral choice for an arbitrator. They involve crimes, widely condemned in the international community, which under no circumstances must be condoned or facilitated by a reluctance of arbitral tribunals to recognise the true nature of these acts.[569] (emphasis added)

Are there any limits to the *ex officio* powers of an international arbitral tribunal to investigate a breach of transnational public policy committed by one of the parties involved in the proceedings? Although it is commonly accepted that such limits exist, their threshold has become lower over the years.

First limit: an arbitral tribunal has the right to bring into the procedure the investigation of a transnational public policy violation on the basis of the evidence that corroborates the seriousness of that violation. In the past, some arbitral tribunals ruled that the argument alleging violation of transnational public policy should be convincing and clear: otherwise, the tribunals should reject the arguments, even if some doubts exist.[570] More recently, arbitral tribunals have decided that the simple knowledge of the existence of violating practices is enough as the basis for the investigation. For instance, in the ICC Case No. 12990, the arbitral tribunal declared the

[569] Bernardo M. Creamdes and Davide J. A. Cairns, *Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud, in* DOSSIER OF THE ICC INSTITUTE OF WORLD BUSINESS LAW: ARBITRATION – MONEY LAUNDERING, CORRUPTION AND FRAUD 65, at 79-80 (ICC Publishing, 2003).

[570] See, for instance, Award, ICC Case No. 6497, 1994 dealing with bribery.

contractual relationship between the parties was null and void because a finding of corruption was consistent with the conditions prevailing at the time in the state in question.[571]

The same argument was already used in the ICC Case No. 3916 of 1982. In the award, he arbitral tribunal pointed out that it was a matter of public knowledge that, for years when the Greek company (respondent) was working in Iran (claimant), corruption or at least the trafficking of influence was the rule and that it was extremely difficult or impossible to be awarded public works contracts without recourse to these methods. After applying French and Iranian law, the arbitrator made reference to a legal principle generally recognized by civilized nations according to which agreements that are in serious violation of moral standards or international public policy are null and void or at least cannot be performed. It is evident that the arbitral tribunal used the wording 'international public policy' to refer to 'transnational public policy'.[572]

Second limit: the arbitral tribunal must fully inform of the suspicions the party or the parties suspected of a violation of transnational public policy and allowed the time and opportunity to make a full response. In case such opportunity is not given to the interested party, the award might be subject to refusal of its recognition or enforcement in accordance with article V(1)(b) of the New York Convention that reads:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> […]
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

In the ICC case No. 14920, the arbitral tribunal faced the complex situation to which the confrontation of the investigation of transnational public policy violations and due process issues may lead. In this case, the respondent was awarded a contract by a state and subcontracted certain

[571] Final Award, ICC Case No. 12990, 2005.

[572] Final Award, ICC Case No. 3916, 1982.

services for the performance of this contract to the claimant. As part of emergency legislation introduced by the state, a decree was passed terminating the contract. The claimant sought damages as the termination of the principal contract entailed the termination of the subcontract. During the proceedings, the respondent acknowledged the payment of bribes to state officials for the purpose of obtaining the contract. Faced with this situation, the arbitral tribunal stated as follows:

> All arbitrators are […] under an obligation to seriously oppose corruption. In view of this, if any accusations are made during arbitration proceedings that the underlying legal transaction is affected by corrupt practices, the arbitrator cannot ignore these facts but must instead investigate, collect arguments and evidence, to corroborate or reject the accusations and assess their implications on the parties' claims. (emphasis added)
>
> Pursuant to this duty, the Arbitral Tribunal added a procedural stage - not initially included in the Provisional Timetable - to give the parties ample opportunity to present their arguments regarding the effect which the acts of corruption would have on the case. (emphasis added)[573]

The question in this case is what happens when the arbitral tribunal gives the opportunity to the parties to present arguments and evidence on the violation of transnational public policy and the parties do not take any initiative. Should the arbitral tribunal's investigation continue or should the will of the parties not to consider the case prevail? We believe that, if evidence found by the arbitral tribunal fulfills the requirements mentioned above and confirms the existence of a breach of public policy, the arbitral tribunal should be able to carry out further investigations and to declare the nullity or unenforceability of the contract.

Third limit: the arbitral tribunal's power of investigations is confined to the evidence relating to the contractual relationship in question. In order to avoid the application of Article V(1)(c) of the 1958 NY Convention for *ultra petita* actions, the tribunal should not investigate evidence relating to other contracts, transactions of activities of the other party. It should firmly reject the argument that illegal activities in other contracts or circumstances are evidence that similar conduct taints the contract in dispute. Another limit concerning evidence is the fact that arbitral tribunals usually impose the burden of proof on the party statin that a violation of

[573] Award, ICC Case No. 14920, 2009.

transnational public policy exists. However, some scholars have proposed a reversal of the burden of proof, requiring the party in question to establish that it or its claims is not tainted by behavior that is contrary to transnational public policy:

> an appropriate way to make a determination may be to shift the burden of proof to the allegedly party to establish that the legal and good faith requirements were in fact duly met.[574]

At last, we outline what consequences the application of transnational public policy has on applicable law, jurisdiction, admissibility and recognition and enforcement of a foreign arbitral award.

A. Applicable law

Arbitral practice has shown that transnational public policy may be used to correct or discard an applicable law in two ways.

First, when the applicable law chosen by the parties does not contain a specific provision dealing with breach of public policy, transnational public policy intervenes to fill in this gap: in this case, transnational public policy exercises a supplementary function.

This was the case in ICC Case No. 5622 of 1988. The arbitral tribunal found that, since the chosen applicable law did not have a provision sanctioning the traffic of influence, transnational public policy was applicable. As a consequence, the tribunal declared the contract null and void and stated that there is a need to

> moralize commercial transactions and to ban traffic in influence from commercial life […] aiming at promoting high ethics in commercial transactions, both at a national and an international level, and to favour the growth of international trade in a context of fair competition.[575]

Second, transnational public policy may give legitimacy to the application of a foreign law that was not chosen by the parties. The limit here is that the foreign principle invoked has to fall within the chapeau of transnational public policy. ICC Case No. 6320 of 1992 is

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[574] Karen Mills, 'Corruption and Other Illegality in the Formation and Performance Of Contracts and in the Conduct of Arbitration Relating Thereto', 11 ICCA CONGRESS SERIES 288, at 295 (2003).

[575] Final Award, ICC Case No. 5622, 19 August 1988.

explanatory.[576] The arbitral tribunal adjudicated a claim regarding the alleged unconstitutionality of the Racketeer Influenced and Corrupt Organizations Act (RICO) under US law.

Even though the tribunal decided that it did not possess such authority, it could determine whether the same statute conformed to transnational public policy. The tribunal stated that transnational public policy provides substantive norms that mandatorily apply to the merits of the dispute notwithstanding an applicable domestic law in tension with it.

In this specific case, the tribunal decided that the treble damages rule provided under RICO could not apply since it would be contrary to the choice of law agreed upon and that the link between the US law and the dispute was insufficient. However, the arbitrators stressed that had the treble damages rule been part of transnational public policy, it would have been granted despite the application of Brazilian law.

B. Jurisdiction

In the past, arbitral tribunals declined jurisdiction on the grounds of a breach of a transnational public policy violation. This is the case, for instance, of the award of Judge Lagergren in the ICC Case No. 1110. The sole arbitrator decided that

> It cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously violate bonas mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators […] Parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in setting their disputes.[577]

However, such an approach is no longer valid and the doctrine of separability of the arbitration clause prevails: as a consequence, the illegality of the main contract does not affect the validity of the arbitration clause. It means that the arbitral tribunal has jurisdiction over the case and it can investigate the violation of a transnational public policy standard at the phase of merits.

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[576] Final Award, ICC Case No. 6320, 1992.

[577] Final Award, ICC Case No. 1110, 15 January 1963.

For instance, in ICC case 7047, it was alleged that part of the fee paid to a consultant to secure the sale of military equipment was to be used to bribe defense ministry officials. The arbitral tribunal accepted jurisdiction over the dispute, analyzed the allegations made and issued an award on the merits.[578] The award was challenged in England and Switzerland, where allegations of bribery were again raised. The English court found the award to be enforceable, basing its finding on the separability of the arbitration clause, the principle of *Kompetenz-Kompetenz* and the public policy of encouraging the enforcement of international arbitral awards.[579] The Swiss court also rejected the challenge to the award on similar grounds.[580]

The arbitral tribunal in the ICC Case No: 8891 confirmed the separability of the arbitration clause and stated:

> Alors même que la clause d'arbitrage est insérée dans un contrat nul, les arbitres sont compétents pour constater cette nullité en raison du principe de l'indépendance de la convention d'arbitrage, qui n'est pas affectée par la nullité du contrat principal.[581]

In international investment arbitration, the separability doctrine is not sufficient to confirm the jurisdiction of an arbitral tribunal over a case involving a violation of transnational public policy. In treaty-based investment arbitration, it has been held that only legal investments, which are in conformity with the relevant provisions of the bilateral or multilateral investment treaties, enjoy protection under the treaty: a breach of transnational public policy may invalidate the parties' consent to arbitration. As the tribunal in *Inceysa v El Salvador* stated,

> The offer [to arbitrate contained in an investment agreement] is subject to an implied condition that it is confined to *bona fide* investors […] Where the investor has acted corruptly, the right to arbitrate can be treated in exactly the same manner as the other substantive treaty rights, i.e. the

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578 Final Award, ICC Case No. 7047, 28 February 1994.

579 *Westacre Investments Inc v. Jugoimport-SDRP Holding Co Ltd*, High Court of England and Wales, United Kingdom, 19 December 1997.

580 *Jugoimport-SDRP Holding Company Ltd & Beogradska Banka v Westacre Investments Inc v.*, Tribunal Fédéral, Switzerland, 30 December 1994. The separability of the arbitration agreement was also recognized by an ICC arbitral tribunal in an unpublished award of 2003. See, Christian Albanesi and Emmanuel Jolivet, *Dealing with Corruption in Arbitration: A Review of the ICC Experience*, *in* SPECIAL SUPPLEMENT 2013: TACKLING CORRUPTION IN ARBITRATION 27, at 30 (ICC Publishing, 2013).

581 Award, ICC Case N. 8891, 1998.

> investor lacks clean hands and is estopped from claiming the benefit of the right to arbitration.[582]

Moreover, investment arbitral tribunals have decided that the host State's consent to submit an investment dispute to arbitration is limited to the condition that the investment is legal, in particular if the applicable treaty provides for an "accordance with law" clause. For instance, in an ICSID tribunal denied its jurisdiction stating that:

> International public policy consists of a series of fundamental principles that constitute the very essence of the State and its essential function is to preserve the values of the international legal system against actions contrary to it […] It is uncontroversial that respect for the law is a matter of public policy not only in El Salvador, but in any civilized country. If the Tribunal declares itself competent to hear the dispute between the parties, it would completely ignore the fact, above any claim of an investor, there is a meta-positive provision that prohibits attributing effects to an act done illegally. This Tribunal considers that assuming competence to resolve the dispute brought before it would mean recognizing for the investor rights established in the BIT for investments made in accordance with the law of the host country. It is not possible to recognize the existence of rights arising from illegal acts because it would violate the respect for the law which, as already indicated is a principle of international public policy.[583] (emphasis added)

Is there a difference between investment and commercial arbitration as far as the relation between jurisdiction and violation of transnational public policy is concerned? In international commercial arbitration, unlike what happened in the past, arbitral tribunals accept jurisdiction over a case, even when violations of transnational public policy are evident. On the contrary, in investment treaty arbitration the violation of transnational public policy has very disruptive consequences and the arbitral tribunal usually denies its jurisdiction. This is mainly due to the absence of the separability doctrine in investment arbitration and that the consent to submit a dispute to arbitration depends on the legality of the investment in question.

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[582] Award, *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, 2 August 2006, ¶¶ 215-216.

[583] Award, *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, 2 August 2006, ¶¶ 245-252.

C. Admissibility

Back in 2005, Professor Paulsson published an article on the difference between jurisdiction and admissibility in international law and international arbitration. In brief, he concluded that

> To understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds:
>
> - If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.
>
> - If the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility and the tribunal's decision is final.[584]

A line delimiting jurisdiction from admissibility was drawn a few decades earlier by Judge Fitzmaurice. According to him, an objection to jurisdiction "is a plea that the tribunal itself is incompetent to give any ruling at all whether to the merits or as to the admissibility of a claim", while a plea to substantive admissibility is "a plea that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits".[585]

As noted by a distinguished scholar, "distinguishing between jurisdiction and admissibility is very difficult".[586] This is evident in the above-mentioned award of Judge Lagergren of 1963. In declaring that "[p]arties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes", the sole arbitrator seems to indicate that (i) the tribunal was not competent in issuing any decision on the point and (ii) the claim was inadmissible because of the existence of corruption.

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[584] Jan Paulsson, *Jurisdiction and Admissibility*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION. LIBER AMICORUM IN HONOR OF ROBERT BRINER 601, at 617 (ICC Publishing, 2005).

[585] GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE (1986), at 438-439.

[586] Andrew Newcombe, *Investor Misconduct: Jurisdiction, admissibility or merits?*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 187, at 192 (C. Brown and K. Miles eds., 2011).

The ambivalence of the arbitrator's wording was also underlined by Professor Emmanuel Gaillard who stated:

> It has been noted that this decision was in fact based not so much on a finding of non-arbitrability, but rather on the inadmissibility of the claim founded on a rule similar to that reflected by the adage *nemo auditur propriam turpitudinem allegans*. In any event, this award has long been construed as holding disputes involving allegations of corruption to be non-arbitrable.[587]

How has the relation between admissibility of claims and violation of transnational public policy standards evolved in international arbitration? Two investment treaty-based arbitral tribunals are particularly relevant to answer this question: *World Duty Free v Kenya* and *Plama v Bulgaria*. In both cases, the arbitral tribunals dismissed the investor's claims inadmissible on grounds of egregious transnational public policy breaches.

In *World Duty Free v Kenya* the tribunal held that

> In light of domestic laws and international conventions relating to corruption, and in light of the decision taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, clams based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.
>
> […]
>
> Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of *ex turpi causa non oritur action*.[588]

The tribunal in *Plama v Bulgaria* referred to the reasoning of *World Duty Free v Kenya* and dismissed the investor's claim on grounds of public policy violations without going into the merits:

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[587] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and J. Savage eds., 1996), at 353-354.

[588] Award, *World Duty Free Company Ltd v Republic of Kenya*, ICSID Case No. ARB/00/7, 4 October 2006, ¶¶ 157 and 179.

> In consideration of the above and in light of the *ex turpi causa non oritur action*, this Tribunal cannot lend its support to Claimant's request and cannot, therefore, grant the substantive protection of the ECT.[589]

As "dismissing a claim as inadmissible […] is a very powerful tool and could be misused" and "finding that a claim is inadmissible is a decision as important as one on jurisdiction or the merits",[590] arbitral tribunals have recognized the need for a careful and restrictive approach towards the application of transnational public policy before applying such harsh sanctions at the admissibility phase. For instance, in *World Duty Free v Kenya* the tribunal ruled that

> [i]t has been rightly stressed that Tribunals must be very cautious in this respect and carefully check the objective existence of a particular transnational public policy rule in identifying it through international conventions, comparative law and arbitral awards.[591]

D. Recognition and enforcement of foreign arbitral awards

One of the main critics raised against transnational public policy is that its application by an arbitral tribunal could eventually be detrimental for the recognition and enforcement of the arbitration award. In particular, scholars have considered the application of transnational public policy as an attempt of the arbitrators to override the applicable law chosen by the parties, and to apply transnational standards that are not usually accepted by national courts. Such scholars stress the necessity of applying the international public policy of the several legal systems involved in the dispute rather than considering principles that are too far from national legal systems to be easily recognized and enforced.

The application of 'domestic' international public policy is seen as fundamental because national courts have the last dictum over the fate of an arbitration award transnational public policy could seem too abstract or, also, too distant from those national interests that an arbitration award should respect in order to be recognized and enforced in a specific jurisdiction.

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[589] Award, *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No. ARB/03/24, 27 August 2008, ¶ 146.

[590] Andrew Newcombe, *Investor Misconduct: Jurisdiction, admissibility or merits?*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 187, at 199 (C. Brown and K. Miles eds., 2011). The author also proposes that the admissibility approach is "particularly suited for egregious cases where the misconduct at issue should be explicitly denounced".

[591] Award, *World Duty Free Company Ltd v Republic of Kenya*, ICSID Case No. ARB/00/7, 4 October 2006, ¶ 178.

Of course, our view is different. We do not think of transnational public policy as an obstacle to the recognition and enforcement of an arbitration award. On the contrary we believe that national courts will more and more look at the transnational dimension of public policy to decide the destiny of an award. This is mainly because, as we tried to show in this work, an international award should be compared to an international decision issued by an international judicial body that is composed of adjudicators who should be thought of as international judges.

Without going into many details again, we would like to conclude with the words of a distinguished French scholar that outline the relation between the application of transnational public policy to international arbitration as follows:

> L'ordre public transnational peut cependant entrer en contradiction avec l'ordre public du lieu d'exécution probable de la sentence. Le problème se pose lorsque l'ordre public international du lieu d'exécution de la sentence est contraire à l'ordre public transnational. *A priori*, la thèse de la supériorité de l'ordre public transnational est remise en cause par la nécessité de conférer efficacité à la sentence. Si l'arbitre veut rendre une sentence conforme aux exigences du pays du contrôle de celle-ci, il va appliquer l'ordre public étatique au détriment de l'ordre public transnational. A l'inverse, si l'arbitre veut faire prévaloir l'ordre public transnational sur l'ordre public étatique, il exposera sa sentence à un refus d'exequatur.
>
> Il est, à nos yeux, nécessaire, dans tous les cas, d'appliquer l'ordre public transnational sans considération d'efficacité. Dans la grande majorité des hypothèses, l'ordre public transnational sera conforme aux ordres publics des Etats susceptibles de contrôler la sentence. L'ordre public transnational est le meilleur moyen d'assurer la plus grande efficacité a la sentence arbitrale. Dans les autres cas, au demeurant peu nombreux, l'arbitre doit se refuser de donner effet à un ordre public étatique contraire à l'ordre public transnational dans un seul but d'efficacité de la sentence. Imagine-t-on que l'arbitre donne effet à une loi de discrimination raciale au motif qu'elle appartient au droit du lieu d'exécution de la sentence ? L'arbitrage international ne doit pas être une justice « désincarnée ». L'efficacité ne doit pas être le seul objectif de l'arbitre. Il existe des intérêts supérieurs à ces intérêts purement utilitaristes, qui sont tirés d'une moralité internationale, ce que M. Gaillard appelle « *les exigences de justice universelle* ».[592] (emphasis added)

[592] JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999), at 428.

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10. INTERNATIONAL ARBITRATION AWARDS

- **International Commercial Arbitration Awards**

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Award, ICC Case No. 6497, 1994

Final Award, ICC Case No. 7047, 28 February 1994

Final Award, ICC Case No. 8423, 1994

Final Award, ICC Case No. 7626, 1995

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- **International Investor-to State Arbitration Awards**

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- **Iran-US Claims Tribunal Awards and Decisions**

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11. NATIONAL LEGISLATIONS

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English Arbitration Act 1996

US Federal Arbitration Act, Section 24.1.a