CONDUCTS OF THE PARTIES IN INVESTMENT STATE ARBITRATION THAT CAN UNDERMINE THE PRINCIPE OF EQUALITY OF ARMS

La conducta de las partes en un arbitraje estatal de inversión que puede desvirtuar el principio de igualdad de condiciones

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Resumen

La doble postura que juega el Estado en los acuerdos de inversión, al igual que durante los procedimientos arbitrales, continuamente puede desafiar a los inversionistas que han decidido iniciar un proceso en contra del Estado con base a obligaciones establecidas en un tratado. De conformidad con la supremacía estatal, el Estado se encuentra en un nivel superior durante cualquier procedimiento, por encima de las partes privadas, ya sean nacionales o extranjeras, y frecuentemente, el Estado adopta reacciones básicas hacia las impugnaciones de los inversionistas que han decidido iniciar un arbitraje internacional.

Palabras claves

Principio de igual de condiciones, arbitraje estatal de inversión, doble postura del Estado, tribunal arbitral.

Summary

The dual role played by the state in investment agreements, as well as during arbitration procedures, can continually challenge investors who have decided to initiate proceedings against a State based on treaty obligations. According to state supremacy, the state rests upon a higher level when in any procedure, higher than that of private parties, whether being a national or a foreigner, and frequently, the State adopts basic reactions to possible challenges of the investors who have decided to initiate international arbitration.

In this study, the author will investigate those challenges presented to the parties during the proceedings and the ways in which the courts have dealt with the principle of equality of arms to level the parties.

Key Words

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Equality of Arms, investment state arbitration, dual role of the State, arbitral tribunal.

Sumario: 1. The dual role of the State 2. Peculiarities that might rise in the conduct of the parties

1. The dual role of the State

When referring to Investment State Arbitration, it is notorious that the government is used to playing a double role that comes to controlling internal adjudication, directly or indirectly, where a separation of powers is not transparent between the dual roles of the administration as contracting and dispute party on one hand (to the BIT), and as a sovereign, regulator, and "owner" of the administration of government on the other.[2]

International investment agreements,[3] especially when dealing with dispute resolution clauses establishing international dispute resolution mechanisms, tend to limit the sovereignty of states. Hence, most states view arbitration as a loss of liberty and an acceptance of constraints that limit its freedom with the acceptance of the dispute resolution mechanism.[4] Some states purposely try to avoid their treaty obligations by abusively practising their policing powers with the intention of investigating crimes within their territories.[5]

Entitlement for 'deference' of a state often enlightens and influences implicitly, the way a state behaves regarding an investment dispute and not infrequently the way tribunals react to the state's position. This only praises the importance of the principle of equality of arms. It is, throughout comparative laws on civil or administrative procedure, international law in general and investment arbitration in particular, recognized as a key component of the principle of 'procedural fairness', 'integrity of process' or 'good administration of justice' which courts have to apply.

When a *"serious departure from a fundamental rule of procedure"* occurs, it might be one of the limited reasons for annulment under Article 52 of the ICSID Convention. It has been confirmed by the ICJ, in a case involving employees of an international organisation (i.e. a non-reciprocal situation), in the statutes of

[2] Thomas W. Wälde, "Equality of Arms" in Investment Arbitration: Procedural Challenges, Arbitration under international investment agreements: A guide to the key issues, Oxford University Press, USA, May 2010, USA. P. 162 (Kolo, 2010) (Karl, 2008) (Walde T. W., 2010)

[3] Joachim Karl,Redefining Sovereignty in International Economic Law 225, 232–238 (Wenhua Shan, Penelope Simons & Dalvinder Singh eds., Hart Publishing 2008).

[4] Abba Kolo, Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal, 26 Arb. Int'l. 43, 43–85 (Kluwer Law International 2010) (citing R. Boivin, International Arbitration with States: An Overview of the Risks, 19 J Int'l Arb. 285, 286 (2002))

[5] Randy E. Barnett, The Proper Scope of the Police Power. 79 Notre Dame L. Rev. 429-495 (2004) (Ginsburg, Evidentiary Privileges in International Arbitration, 2001) (Financial Times, 2008) (Summers, 1993) (Louis Henkins, 1993) (Van Aaken, 2012) (Mirzayev, 2012) (Barnett, 2004)

international and national arbitration rules and in the jurisprudence of investment tribunals. The principle of equality of arms has been developed in the jurisprudence of the ECtHR ("European Court of Human Rights"), which is the most extensive jurisprudence of non-state actor complaints against a state available internationally, based primarily on Article 6 of the European Convention on Human Rights (ECHR).[6] ECtHR jurisprudence on Article 6 indisputably confirms the current status of the customary international law of procedure.

Article 52(1)(d) of the ICSID Convention does not identify what constitutes a 'fundamental rule of procedure'. Ergo, it is necessary to pinpoint the 'fundamental rule of procedure' by undertaking a comparative approach to assume a posture of the common centre. Modern jurisprudence by international courts and tribunals is in such a way the key method to identify what has been considered as a "fundamental rule of procedure".

One of the most important cases decided by an International Court is *Iodic v. Prosecutor.*[7] The appellant in this case brought to notice the principle of equality of arms, stating that the court did not achieve, although it tried, to aid him to identify the documentation and witnesses necessary for his defence; because his witnesses were intimidated, hence his defence was seriously affected.

The prosecution claimed that it was not the court's responsibility to help him identify the documentation and witnesses, but its role was limited to providing the parties with "procedural equality". However, the defence argued that the court had the responsibility to create fundamental conditions of equality. The Appeals Chamber relied on established ECHR jurisprudence according to which *"each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent"*. It concluded that *"equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case"*.

Subsection 1: Weariness to the position of the State[8]

As you can see, the position of the state as a sovereign country creates a hesitation for investors to initiate claims before an international organization. The investors will also be uncertain when states intentionally initiate criminal

[6] ECHR, Art. 6, Right to a fair trial (excerpts): ' 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ... 3 Everyone charged with a criminal offence has the following minimum rights: ... (b) to have adequate time and facilities for the preparation of his defense'.

[7] Iodic v. Prosecutor. Appeals Chamber of the International Tribunal for Human Rights Violations in the former Yugoslavia, Judgment of 15 July 1999, in particular at para. 30 et seq., with, in note 54, an extensive reference to ECtHR cases.

[8] Mirzayev, Ruslan. 'International Investment Protection Regime and Criminal Investigations'. Journal of International Arbitration 29, no. 1 (2012): 71–106.

proceedings, not in good faith, against foreign investors under the pretext of its sovereign right to regulate internal matters and the use of their police power to investigate crimes within their territories.

This type of allegations against states has been made, under the conviction that the state abuses their sovereign rights with the dishonest intent to indirectly expropriate foreign investments, to put pressure on a political opponent or a well-known business person or to intimidate the investor initiating arbitration. Occasionally the evidence is clear that the investigations are discriminatory against investors from a foreign country. There have been complaints about decisions of national courts or public entities (of the host state) to convict crimes against foreigner investors for a breach of license terms, non-payment of taxes (even when not accompanied by fraud) or any other breach of national legislation to have a holding over them. In such cases, the investor will argue that there are unclear laws and deliberate misinterpretation, with the intent of implicating them in criminal proceedings. Criminal proceedings may be initiated or fabricated on the grounds of the investigation made by a public entity (the Prosecutor's office) that deliberately will find evidence to implicate the investor in criminal activities. Even if the evidence and grounds are not tempered, if these proceedings are not carried out in good faith any ambiguity can be interpreted against investors.

Secondly, when a state is a party in arbitration, when initiated on legitimate grounds, criminal proceedings may have a hostile effect on the arbitration and damage the integrity of the arbitral proceedings. By conducting criminal investigations, states will have access to files that can be used by investors as evidence in arbitration, conduct surveillance of communications of the foreign investors and intimidate their witnesses (by any means that will prevent them from attending the arbitral proceeding, even arresting them or hindering their credibility). Even if the actions of the state are not done in bad faith, the effect it will cause to the arbitration will be adverse on the integrity and main procedural principles of the arbitral hearings. Even if their role as a party to the arbitration does not limit their power to investigate crimes in their territory, the usage of such advantage parallel to an arbitration proceeding cannot be seen as acting under the principle of "good faith" towards the arbitration.

There have been different cases in which states have been suspected to abuse their state powers for their own benefit. The case of the Quiborax illustrates how a state may abuse its sovereign powers to avoid its obligation to arbitrate and/or to gain some procedural advantage.

The Quiborax case is a recent case that deals with the limits of a state's police powers. Applicants are Quiborax SA ('Quiborax'), Allan Fosk and Non Metallic Minerals SA (collectively, 'Claimants'), filed a request for provisional measures before an investor-state court constituted under the rules of the International

Centre for Settlement of Investment Disputes (ICSID).[9] Claimants alleged that the respondent the Plurinational State of Bolivia initiated criminal proceedings to intimidate them.[10]

The dispute originated when the Bolivian government by Presidential decree revoked the concessions owned by the Claimants. The Claimants allege that the cancelation of the Bolivian Concessions was a confiscatory measure that violated their rights as foreign investors in Bolivia under the "*Acuerdo entre la República de Bolivia y la República de Chile para la Promoción y Protección Recíproca de Inversiones*" (the "*BIT*"). The claimants requested the government to engage in friendly consultations under the applicable bilateral investment treaty (BIT) between Chile and Bolivia.[11] The Bolivian government called an inter-ministerial meeting to discuss the Claimants' position. The meeting concluded that the government's position was weak and the case was about to become 'an international predicament for Bolivia'. Shortly after this meeting, the Ministry of Foreign Affairs of Bolivia ordered the Bolivian Superintendence of Companies to conduct a corporate audit on one of the Claimants.[12] The corporate audit did not result in finding irregularities that would have supported the government's position.

In 2006, the Claimants filed a request for arbitration before the ICSID. The parties then reached an oral agreement to suspend the arbitration proceedings but were resumed due to "inconsistent settlement negotiations" caused by Bolivia.[13]

Subsection 2: Difference between the treatment of the State and the Investors[14]

Information asymmetries between the parties pose the biggest problem: each party has information about itself (private information) that the other does not have, giving rise to potential opportunism. Thus, contract theory analyzes problems of adverse selection, and moral hazard.[15] Parties entering into contracts usually face a problem; the contract should be optimal from an *ex ante* perspective, i.e. 'it should encourage the parties at the time of the conclusion of the contract to invest in the contractual relationship so as to maximize the anticipated joint benefits'. However, at the same time, parties want to write a contract that is optimal *ex post*, i.e. 'a contract that is still value maximizing after all future uncertainties have been resolved as of the time of performance'. These two partially conflicting goals create an inherent tension, because *ex ante* each party would like to ensure the

[9] Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No.ARB/06/2, Decision on Provisional Measures (Feb. 26, 2010).
[10] Id. at § 46.
[11] Id. at § 8.
[12] Id. at § 23.

[13] Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction (Sep. 27, 2012). § 22
[14] Procedural challenges in Investment arbitration under the shadow of the dual role of the State.
[15] Van Aaken, Anne. International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis. Journal of International Economic Law 12(2), 516

commitment of the other but subsequent events might render inflexible commitments inconsistent with the contractual objective of maximizing the joint surplus. This problem becomes acute in long-term contracts such as BIT's but also in state contracts.

Local bias, this means that the investor does not receive equal national treatment. The national courts tend to protect their own corporations and firms, in which case they adopt a nationalistic mentality.

Until recently, foreign investors faced a serious barrier in judicial compensation or remedies for uncompensated expropriation and other damages caused by the host state. The national courts of the home state would not likely adjudicate such a decision out of "deference" to the state's immunity. Such immunity would be considered untouchable and absolute, even if the claims of the investor held grounds to be supported before the courts.

Another asymmetry between the investors and the host state is that the previous would often be faced with unresponsive remedies from the local courts. Sometimes, the host state will have a deficient judicial system that can simply not deal with plaintiffs of such magnitude. This is a challenge that many investors need to reflect on when considering investing in another state.

In Latin America, the Calvo Doctrine proposes the idea that international liability cannot be invoked when national judicial remedies have been provided. In a way the response of this doctrine is that when foreign investors have suffered abuses, the following propositions will apply:

> *"… a) international law requires that the host state accord national treatment to aliens, b) national law governs the rights and privileges of aliens, c) national courts have exclusive jurisdiction over disputes involving aliens, who may therefore not seek redress by recourse to diplomatic means, d) international adjudication is inadmissible for the settlement of disputes with aliens."*[16]

Mexico has been a big supporter of this doctrine, to the point that just recently before the negotiations for NAFTA has abandoned it. *The North American Dredging Company of Texas (U.S.A) v. United Mexican States case*[17], in which the United States of America on behalf of the firm sued for the recovery of the losses

[16] Louis Henkins, et al., International Law 685 (3 ed. 1993), also Lionel Summers, La Clause Calvo: Tendences Nouvelles, 12 Rev. de Droit Int'l 229, 232 (1933)

[17] North American Dredging Company of Texas (U.S.A.) v. United Mexican States (31 March 1926) Reports of International Arbitral Awards. http://legal.un.org/riaa/cases/vol_IV/26-35.pdf

and damages caused by the breaches of a contract between Mexico and the dredging firm. The contract contained a Calvo Clause preventing them from redressing recourse trough diplomatic ways. However, the North American Dredging Tribunal held that a foreign investor or contractor could indeed relinquish its rights to certain types of international protection by signing a Calvo Clause. Nonetheless, this was not the case for other state acts that constitute a violation to international law such as denial of justice or expropriation.

This section addresses some of the procedural challenges that investors come across when being part to an investment dispute, according to treaty-based arbitration against states, some peculiarities regarding procedural privileges invoked by the respondent state (host state of investment as defendants to the arbitration) and actions which can only be accountable to the state under the abuse of its sovereign powers. These challenges can lead to an ethical challenge on whether or not the risk of the integrity of the arbitral procedure has been compromised with the states actions.

Under Treaty-based investment arbitration certain degree of the procedures (and in certain cases the institutional framework) have relied on the procedural rules of international commercial arbitration. The reason for this dependence on the procedures of international commercial arbitration is, mostly, because of the tradition that investor-state arbitration is based on, mainly with concession contracts, but also in international claims commissions; secondly, that states have so far abstained from the idea of creating a permanent international 'investment court' based on the model of the existing international treaty courts (e.g. the International Court of Justice (ICJ), International Tribunal for the Law of the Seas ("ITLOS"), World Trade Organization (WTO) Appellate Body) both in bilateral and multilateral treaty settings.

The ICSID Convention, to some extent, stands out among the other institutions for it provides a self-standing dispute resolution system based on the Convention and (the investor can raise a direct claim before the centre) the ICSID Rules of Procedure, following the administrative guidelines and practices and with the support of the ICSID Secretariat, as part of the World Bank Group. Generalist international arbitrators largely populate ICSID courts; even the ICSID system complies with on *ad hoc* arbitration modelled from the general international arbitration rules.

2. Peculiarities that might arise in the conduct of the parties

Subsection 1: Conducts of the parties that can undermine Equality of Arms

I. Pressure on the Arbitration Tribunal

A believed method of undue influence on arbitration is when one of the parties intends to corrupt or intimidate the arbitration tribunal or some of its members. However there have been rumours of corruption of tribunals in international courts.

There is no known case, so far, in which “tenured judges” have been comprised in an investment arbitration tribunal. Perhaps one of the reasons for the latter is that the members of an investment tribunal tend to be senior members and more experienced, consequently better able to avoid inappropriate advances the parties may propose.

Considering that arbitration is known for being a closed community, to be appointed as an arbitrator one must have a reputation for being an “honourable” person and inevitably professional, thus the person cannot risk his or her reputation. The latter must guarantee that the members of the arbitration have an incentive to prevent corruption, which could be the competitive nature of arbitrators and their position in the international arbitrator community. By accepting incentives from the parties, the arbitrator has much more at stake, since they could lose political support for appointment and reappointment.

II. Strategy of Financial Wearing by the better Funded Party or Third Party Funding.

A serious issue to uphold the equality of arms is when one of the parties fully exploits their unlimited financial resources for the arbitration. When one of the parties is better funded the proceedings strategy against the “smaller” party can be used to undermine their position.

Using the arbitral procedure to its full extent can considerably enlarge the costs for the arbitration beyond what the parties can endure. The strategy for the respondent (in this particular case the state or state entity) will likely be to take actions to delay the arbitral proceeding such as: delaying the arbitral appointments; challenging the arbitrators repeatedly; obtaining antitrust injunctions from domestic courts; raising procedural and jurisdictional objections; requesting to lengthen time periods in every phase of the procedure; insist on personal hearings; change counsellors; appoint experts and witnesses in order to harass the other party’s rebuttal; and challenge and obstruct, as much as possible, the enforcement of the award. This strategy will make it hard if not impossible for the “smaller” party to bear the costs of such an extended and complicated procedure.

The arbitral tribunal can barely control the actions taken by the respondent, since they are made available under the applicable rules. Though, tribunals are unconvinced about allowing such requests by the party, the idea of not providing the parties with a fair hearing, will permit them from accommodating the party’s request, which would likely turn into a procedural obstacle for the delay and draining of the opponents. Eventually, the “smaller” party in the litigation will likely run out of funds to challenge the award. If this where to happen, the tribunal would have failed to present the parties with equality of arms.

However, disequilibrium of the parties funding has yet to be considered a factor relevant to defining equality of arms. There is always an expectation as to the

parties' equality during the proceedings unrelated to their financial ability or their counsellor's competence. That does not mean that a party may use the strategy of financial attrition to abuse procedural rights or to exploit the other party's financial weakness. The suggested approach, for the arbitral tribunals, should be to develop sensible tactics, particularly when it is evident that there is a financial disequilibrium between the parties, where there is evidence as to the bad-faith of one of the parties to undermine the equality of arms. As an indicator of that, the tribunal has the duty (annulment) to work toward restoring the equality of arms by choosing the most cost-efficient means to conduct a fair hearing to advance the case. This will not be easy to accommodate; however, the tribunal may empower themselves in the principle of "equality of arms" as a counterweight to the parties' actions.

III. Intimidation of Party Representatives, Local and International Counsel, Experts and Witnesses

Another peculiarity that can arise in investment arbitration and can threaten to undermine the equality of arms principle relates to the use of the "sovereign" powers of the state to intimidate the other party (either his representatives, experts or witnesses). Though there is no real documentation for investment disputes or commercial disputes with state entities, reports have been published on the response of authoritarian governments to the analogous situation of complaints at the European Court of Human Rights.[18] The claimant representatives and other contributors to the arbitration have presented complaints of harassment, obstruction, or intimidation through tax auditing, criminal persecution or an increase in administrative permits (work, residence, visa, etc.). [19] Such intimidation, surveillance, obstruction of the work of the counsel, interception of communications have been, and continue to be, reported in cases where foreign companies are in dispute with politicians, the government, or State companies. [20]

Even if intimidation is typically known to happen in authoritarian governments, it has become a topic of discussion in investment disputes. Some claims against the state's power of intimidation relate to a more local, personal and political dimension; mainly by provoking different sentiments of nationalism within the government and local authorities since the dispute is with a foreign party. There are certain strategies that the state can come up with to intimidate the investors' counsel, experts, and witnesses, either by direct or indirect controls of government power (such as blacklisting for government, state-owned or state-linked

[18] Himpurna California Energy Ltd (Bermuda) v. Republic of Indonesia, Final Award of 16 October 1999, (2000) 15 Mealey's Int'l Arb. Rep. AI; see also, Himpurna v. Indonesia, Procedural Order No. 7. Lou Wells, Making Foreign Investment Safe, Property Rights and National Sovereignty (2007) p. 82. The assassination of a national co-arbitrator reported by Jacques Werner, and the compulsion of the national co-arbitrator to return home and refrain from participating in a hearing reported in the Himpurna case, suggest that if states are prepared to go so far as to intimidate (and assassinate) their own co-arbitrators, they will be even more likely to intimidate other participants in the arbitration process who are exposed to their power and in a more vulnerable position.

[19] Kensington v. Congo (case of law firm Cleary Gottlieb intimidating an expert for the other party)

[20] Financial Times, 5 June 2008, on the dispute between BP, its Russian (oligarch) partners with involvement in Russian government services.

businesses, denial of promotion (work and academics), and major or minor forms of government harassment). Sometimes the counsellor, witnesses or experts might not directly know what is happening or have yet to be notified of the decision that the government has adopted against them. In some cases, they will become aware of the actions adopted against them either because they are aware and frightened by the position they hold in the dispute that will ensure the direction the tribunal might adopt or because unofficial messages have been sent to them, urging them to maintain certain positions or to abstain from being participants to the dispute. In certain cases, the message might not come directly but rather be disguised as a gesture, look or an inquiry, which will carry a hidden message. As stated before, sometimes the intimidation might come from an unsuspecting decision or government action, perhaps a tax inquiry or an inspection of compliance by the authorities through which a warning is issued to stop the actions in order to avoid further problems with the state.

Depending on the type of intimidation (direct or indirect intimidation) it becomes more difficult for the tribunal to act and retain the equality of arms. Firstly, because it might become problematic to have the witness, counsellor or expert come forward about the actions that are being taken against them.[21]

The arbitral tribunal may restore the equality of arms between the parties by following the ECtHR and activate a system of adverse inferences and reversal of the burden of proof. It cannot be expected that the investor would need to provide full proof of the events. Arbitral tribunals will then need to implement a system of indicators ("red flags")[22], as it is used to prove corruption. If there is any indication that the State had been using intimidation, and the indications found as to prove these asseverations, then it is the State who would have the burden of proof to deny the accusations made against them. Referring to the national legislation prohibiting the conduct would not be enough for the State, on the contrary, the burden of proof does not fall on the state to demonstrate that they have adopted the necessary legislation to prevent such actions, but rather to disproof that the action has taken place.

Subsequently, the tribunal will need to verify whether or not the unavailability of the witnesses and experts or the intimidation of counsel and party representatives will influence a change in the equality of arms as a disadvantage for the claimant. For example, if an expert came up with an invalid excuse to refuse the appointment for reasons that might imply intimidation that should not be enough to consider that

[21] Aydin v Turkey Aydin v Turkey (1998) 25 EHRR 251.

[22] The method of "red flags" - essentially rebuttable presumptions - is regularly used in cases where misconduct is typically confidential and complicated to prove, e.g. when certain contextual facts suggest corruption but the fact itself cannot be proven, or when they suggest discrimination and harassment of a foreign investor on the behest of a powerful and politically well-connected competitor, as in Feldman v. Mexico (December 16, 2002) ICSID; T. Martin, 'International Arbitration and Corruption, an evolving Standard' in TDM (2004); L. Low and M. Burton, The OECD, OAS and COE Anti-bribery Conventions: ABA Third Annual Symposium on the Implementation of the OECD Convention (Bruges, 2000).

intimidation has taken place, if there still are sufficient alternatives. However, if all possible experts specialized in a relevant issue become unavailable, it may raise questions as to indicate that intimidation and serious harm has taken place regarding the ability of the Claimant to prosecute its case.

The aim of this is to procure the possibility of protecting witnesses and experts from outward influence like it is done in criminal and civil procedures, some possibilities can be that the hearings take place through videoconference, recording or by accepting written testimonies. However, it should be taken into consideration, that the resources for these procedures might be more limited than those of national courts relying on their own judiciary system (e.g., witness protection programs).

With regards to international counsellor intimidation (specifically preventing the counsellor from entering the country) then the tribunal may take provisional measures ordering the state to arrange permits and give guarantees on the cease and desist the intimidation. The tribunal may negotiate with the parties on adopting more flexible and effective accommodations for the arbitration, if needed. In case of noncompliance (with the previous decision), the tribunal may impose sanctions, which can include payment for the arbitration costs, adverse inferences, and reversal of the burden of proof.

As previously discussed, it is more common for authoritarian governments to induce in such practices like intimidation and as a rule they prefer to operate as though they are complying with the formal requirements of the law. The proper way of dealing with this is that the government accepts that they are not providing effective protection to witnesses, experts and counsellors and as such they are exercising hidden control over such collaborators of the arbitration. If there are no means to prove that the state is accountable for such acts and if there isn't sufficient proof, then the state will be in breach of treaty obligations and leave foreign investors unprotected and the state would also have breached its duty of good-faith arbitration. Therefore, the State has an important responsibility to protect, first of all the collaborators to the arbitration who have to travel to the State (e.g., international counsel or experts) but also, this responsibility falls upon the state of the nationals who act as witnesses, experts, and domestic counsellors.

The arbitral tribunal may also rely on the principle of fair and equitable treatment of the parties and the responsibility of the state to provide *"most constant protection and security".*[23] The state should not have the obligation to act when claims are raised against them, but they should be extended throughout the arbitration. This is one of the opportunities when the dual role of the state is perceived during the arbitral proceedings, in which even though the state entity is party to the arbitration, it is also responsible for the good governance and administration of the nation.

[23] Art. 10 (1) ECT.

IV. Obstruction of Legal Representation

Having legal representation for the parties is a fundamental right for the development of "due process" and "fair administration of justice".[24] If there was an interference of the host state with the national or international counsel of the claimant, the equality of arms will as a rule be seriously impaired. There are different types of actions that may constitute as interference by the host state, such as: a restriction of access for the client to their lawyers, surveillance on their communications and blacklisting their lawyers.

First of all, we will address the interference of the state by restricting the access to lawyers by the investors.[25] This can be a particular problem in investment cases when the rightful owners of a corporate holding company, the foreign investor (natural person), or its staff reside in the Respondent State.

Second, another type of interference is when the host state initiates proceedings for the surveillance of the communications of the claimants, including illegal access to computers and Web sites ("hacking"). The knowledge of inside and privileged information of the other party (identification of witnesses, experts, strengths and weaknesses, legal and factual strategy, remuneration arrangements, financial situation), will give the host state the upper hand in the proceedings and be a strategic advantage. It can persuade (or intimidate) identified experts and witnesses, it can manipulate the arbitration so that the other side reaches the bottom of its war chest and can exploit weaknesses discussed confidentially in the client-counsel relationship.

Third, another way of intimidation which the state may incur in is to apply direct or indirectly pressure through non-state actors who are secretly advised to adopt administrative decisions against the counsel, including blacklisting the counsel. A large state will usually be advised by a major arbitration law firm hence having a lever over the claimant to present better expertise (as do major private commercial companies at times).

The tribunal has to first determine if an intervention has happened; it must provide questions as to where and how the interference with the regards to access to counsel (client-counsel privilege) has occurred and how it is most likely to affect the equality of arms. The tribunal will not be able to determine all that happened between the parties, it will only be capable of "scratching the surface", but most

[24] Article 6 (b) and (c) ECHR "…adequate time and facilities for the preparation of his defense; (c) to defend himself in person or through legal assistance of his own choosing."

[25] Mosk and Ginsburg, 'Evidentiary Privileges in International Arbitration' in (2001) 50 ICLQ 345 p. 379. On the protection of communications between client and counsel; UN Basic Principles on the Role of Lawyers, 1990, art. 16 highlight intimidation and improper interference and provide that *"Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential"*; IBA Rules on Taking of Evidence, art. 9(2) recognizes privilege for legal and ethical reasons. See the most recent European Court of Justice (ECJ) case, Akzo v. EU Commission (2007), available at http://eur-lex.europa.eu.

actions will remain unseen. Then the tribunal will need to locate a means to restore the disturbed equilibrium.

Normal sanctions (cost, adverse inferences, exclusion of illegally obtained evidence) may not always be able to restore the equality between the parties. In serious cases, the tribunal may simply end its functions without any *res judicata* effect for the claimant.[26] But such actions to terminate, even at the full cost for the Respondent´s state, do not remedy the damage nor does it restore the equality of arms: The Claimant would have to restart the procedure with a newly appointed tribunal, new uncertainty and challenges, risks, and costs. In case that the interference was through surveillance, the full reciprocal disclosure for both parties could create equilibrium between the parties and restore the equality of arms. The Respondent State would have inside advantageous information on all of the Claimant's intelligence, however there would not be any certainty as to how much information has been disclosed or discovered. Nevertheless, it should not be discarded that if one party could prove that the other (Respondent State) has concealed parts of the internal communication between itself and its counsel, against such an order, this would allow for stronger and more general procedural sanctions.

V. Lifting of the Confidentiality of the Proceedings – Rules of transparency

A new characteristic of modern investment arbitration, now more perceivable in NAFTA, UNCITRAL, ICSID and other non-governmental institutions; decision that has been taken in order to lift the confidentiality of the proceedings, not just for the publication of the awards, but also for the submissions of the parties, the interim orders of the tribunal are published.

In certain cases, access is granted to the hearing. Third parties, essentially activist of non-governmental organizations, are allowed to submit amicus briefs. The actions taken by the arbitration institutions has opened up the scope of arbitration and has been highly acclaimed as an innovative step towards greater transparency, however the sensitivity of the subject and the importance to allow access to these important decisions. However, the procedural reforms, which surpass the arbitration procedures referred to in investment treaties, can significantly affect the equality of arms, particularly for small foreign investors.

The submissions of amicus briefs by NGOs, which generally oppose the Claimant, increase the cost of review and attempted rebuttal. Amicus briefs can also directly

[26] This was the famous (and critiqued) conclusion reached by Judge Lagergren as arbitrator in a corruption case: J.G. Wetter, "Issues of Corruption before International Arbitral Tribunals in ICC Case No. 1110" in (1994) 10 Ark Int'l 211. For acceptance of the power to *"dismiss actions, assess attorneys' fees, impose monetary penalties or fashion other appropriate sanctions for conduct which abuses the judicial process",* see Kensington v. Congo (on case of law firm Cleary Gottlieb intimidating an expert for the other party), SDNY, 23 August 2007, Lexis 63115. See also Waste Management v. Mexico, ICSID Case No. ARB(AF)/00/3, Decision on Preliminary Objections of 26 June 2002, para. 49, left open the possibility that it had the power to dismiss a claim *"for the purpose of protecting the integrity of the tribunal's processes or dealing with genuinely vexatious claims". On the power, in extreme circumstances, to 'grant the request of the other party to dismiss the case'".*

or indirectly attack the investor or the social acceptability of the investor's conduct, without necessarily providing supplying evidence or being subjected to cross-examination. Even if tribunals do not refer to such denigrating remarks, is not to be considered that they are ineffectual ("*semper aliquid haeret").* The Claimant has then to encounter supporters, which normally can be found in the industry or commercial associations. Governments will also associate with non-state actors to carry out actions against Claimants (intimidation) and under the pretence of transparency and freedom of information, release information (publicly) to apply pressure on the Claimant.

The tribunal in Biwater-Gauff v. Tanzania[27] faced some of these concerns. It pursued to reduce the impact of campaigning against the Claimant and conspiracy between activist NGOs and the government, presumably to disturb the integrity of the arbitral proceedings, by providing a set of rules close to a "Code of Conduct" for the parties. These rules dealt, *inter alia*, with public disclosures and in regard to the tribunal as an "approval authority". The tribunal also recommended that:

> "*All parties refrain from taking any steps which might undermine the procedural integrity, or the orderly working, of the arbitral process and/or which might aggravate or exacerbate the dispute.*"

The example set by the arbitral tribunal in the merits of this case illustrated the progress toward a fixed set of guidelines on sensible conduct of the parties with regards to outside political and public relations and links to NGO campaigning. Similar rules are being developed for NGO submissions, in regard to transparency issues, control and funding.

VI. Openly Incompetent Legal Representation

It might be difficult for both States and Claimants to obtain quality legal representation especially since international investment arbitration requires that the representatives have high qualifications. Preferably, the parties will try to find the expertise of a person who is specialized in both international public law, international arbitration (international judicial procedure), and comparative administrative law.

Possibly, it would be well considered that the representatives of the parties had academic knowledge beyond rules and concepts in the areas previously mentioned, this will include the deeper areas of advocacy and politics of investment arbitration, e.g., arbitrator and chair selection; proclivities of appointment institutions; and personal, professional, institutional, and philosophical linkages and preferences. A party, Respondent, or Claimant not represented by professionals experienced in this developing field is quite likely to be at an imbalance in regard to the other party. There are awards, in which it is stated by the tribunal that the parties (either one or both) did not observe to present a

[27] Biwater-Gauff v. Tanzania. Procedural Order No. 3 (29 September 2006), paragraph 163 to the need both to prevent a further aggravation of the dispute and to preserve an 'even playing field for the parties'.

reasonably competent claim or defence[28]. This applies both to minor companies with no prior foreign investment experience and small developing countries, probably with no prior experience.

Smaller companies, often struggle with the first arbitral proceeding due to lack of experience. They may stumble equally when choosing representation. However, the struggle with the funding, may also limit the firms or the counsel willing to participate in international arbitral proceedings based on contingent-fee arrangements.

With regards to the government representatives, the respondent can sometimes be limited as to rely exclusively on their internal legal services, especially when the services from the states that are frequently involved in such State-investors disputes as, e.g. the United States of America, Iran, Canada, Mexico, Argentina, lack experience. Questions have been raised on whether or not the arbitral tribunal has the responsibility to restore the equality of arms with respect to manifest incompetence of legal representation of one of the parties.

Two positions have been adopted. The first being that the principle of equality of the parties in the confrontational process suggests that each party must obtain the same legal representation or experience, in reality it is irrelevant for the court to decide on this respect. The second position is completely contrary to the first one, since it views it as the responsibility of the parties to maintain an equality of arms; hence, the complete absence of legal representation or manifestly inadequate representation forces the arbitral tribunal to intervene in one way or the other. There have been precedents in domestic adjudicatory procedures in which the Courts have intervened because it was noticeable that the party was not properly represented.[29] Although, international tribunals sometimes seem to be inclined to take the evident and serious lack of equality with respect to legal representation into consideration, there must be weariness into exposing themselves to be challenged on the charge of bias.[30]

In Bogdanov et al. v. Republic of Moldova, the Respondent did not appear[31], however the tribunal did not simply accept the Claimant's submission but felt a

[28] Generation Ukraine v. Ukraine ICSID CASE No. ARB/00/9, 16 September 2003; see also, CDC v. Seychelles. Annulment Proceeding ICSID CASE No. ARB/02/14, June 29,2004.

[29] Richardson v. Lynda Rivers, A1993/02 of 23 August 2004 is a Scottish case, in which the Sheriff Principal Iain Macphail in the appeal established that: *"Thus the duty to secure equality of arms for a litigant rests primarily upon his or her advocate. The court's duty to intervene ... as in this case will arise only in exceptional circumstances where it is clear to the court that there is a substantial inequality of arms which the advocate has taken no effective steps to remedy ... The need for such intervention may therefore be rare"*.

[30] Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240 (3d Cir. Mar. 6, 2013), that highlights a long-standing controversy regarding the standard to be applied in determining whether confirmation (Mosk, 2013)(American Bar Association, 2003)of an arbitral award may be denied when an arbitrator's impartiality is questioned.

[31] Bogdanov et al. v. Republic of Moldova, SCC Award of 22 September 2005 (Cordero Moss, sole arbitrator); note comment by G. Cordero Moss, 'Tribunal's Initiative or Party Autonomy' in TDM (2007).

more thorough examination was necessary for it felt it was important that both parties were present at the time of the submission.

There are no similar clear precedents for dealing with the challenge to equality of arms from manifestly incompetent legal representation.[32] However, the possibility for the tribunal to initiate legal discussions with both parties may provide an opportunity to question, if the tribunal is taking side with either party, the need for specialized experience at a level of representation of the parties is so complex that restoring the equality of arms and providing both parties have equal representation is almost impossible.

VII. Concealment of Documents, obstruction of discovery and False Testimony

This is intimately related to Discovery requests and the privilege that sometimes governments invoke s "*crown*" or "*executive privilege*"[33] to refuse to comply with the requests. Some International Tribunals have, with certain delicacy, accepted "*executive privilege*", nonetheless the tribunal may determine if the privilege is justified in the particular case.[34]

The brittle situation of having a state as one of the parties to the arbitration, might affect the equality of arms in terms of denying reasonable discovery. It has been challenging then for Arbitrators to accommodate the special nature of governments and tolerating their abuse of "privileges" because of their dual role (Party to the arbitration and Sovereign State).

Investment tribunals, unlike State courts, have no means to compel a State (respondent) to comply with discovery requests. The tribunal will also lack the power to penalize concealment of documents, falsification, or fraudulent submission of documents. Conversely, the dispute tribunal may undertake different sanctions to prevent this, such as: first, deploy the prospect of "adverse inferences" as encouragement for satisfaction of the discovery requests and also as a defence against "executive privilege"; second, imposing costly sanctions under the claim of "bad-faith" in the arbitration procedure. There is a precedent for the concept that an award should be annulled in the European Gas Turbines case, because fraudulent information was submitted, it is worth the while to analyse this case

[32] American Bar Association, Task Force on the Model Definition of the Practice of Law Report 4-5 (Aug. 2003), available at http://www.abanet.org/cpr/model-def/taskforce_ rpt_803.pdf, also Palmer v. Ernst & Young, LLP, No. 97747, 2007 Mass. Super. Ct. LEXIS 109, at *9 (Apr. 11, 2007) noting that UPL rules intended to protect public *"from being advised and represented in legal matters by incompetent and unreliable persons, over whom the judicial department could exercise little control"*.

[33] Tom Ginsburg & Richard M. Mosk, "Evidentiary Privileges in International Arbitration" (Coase-Sandor Institute for Law & Economics Working Paper No. 656, 2013). P.364 "*Crown privilege protects government documents and communications the disclosure of which would be harmful to national security or diplomatic relations"* also determines that *"This (executive) privilege allows the President and other high officials to withhold certain communications within the Executive Department from the courts and Congress"*.

[34] Corfu Channel Case (1949) ICJ Reports, 32. See also Prosecutor v. Blaskic, Decision on the Objections of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, Case No. IT-95-14-PT, Tr. Ch. II, 18 July 1997.

since there was a reasonable possibility that the fraud, concealment, or withholding of information had some unfavourable impact on the outcome of the award.[35]

When assessing a claim of privilege, the arbitrators ought to consider whether the privilege occurs within the law of the jurisdiction, especially when it relates to the evidence submission. If this were to happen arbitrators would have to contemplate the importance of the evidence, when it was formed and how it occurred, and the possibility that the parties anticipated that the ruling of the evidence would be by local privilege rules or by the law of the domicile (in case of the witnesses).

Arbitrators differ from state court with respect to the fact that they do not have to consider local policy interests; hence they should procure only the genuine expectations of the parties to be considered. Arbitrators should diffuse the claims of privilege empowering the principle of "good faith" in arbitration above these privileges. By doing so, the rules of jurisdiction (with regards to privilege) will not be as important as the procurement of evidence.

Subsection 2: Discussion of the disequilibrium between the parties

The State may usually adopt a dual role, in which it can either present itself as a Sovereign State o as a "mere party" in the procedures. The dual role of the state is often played as the government disposes. Sometimes the government will target (directly or indirectly) the Claimant adopting the role that abroad will improve their position in the international arbitration. That use of its dual role can produce generous opportunities for abuse to raise its litigation power.

If the tribunal where to separate the roles of the state, e.g., by a "Chinese Wall"[36] between criminal proceedings and behaviour during the arbitration (Liebscher) (Van Aaken, 2012) (Sinclaire, 2004) it can be questioned since that the more authoritarian the state is, the more breaches will be reported; hence, the much sought Chinese Wall will have gaps that will allow for the respondent to use the information obtained for criminal proceedings and take actions against investors.

The House of Lords in the KPMG Case[37] has addressed the issue of Chinese walls, in this case that Prince Jefri, brother of the Sultan of Brunei, presented before the High Court against the accounting firm, KPMG. The firm was carrying

[35] European Gas Turbines, (1994) Reb. Arb. 359.

[36] Chinese Walls: Maintaining client confidentiality, available (Chinese Walls: Mantaining client confidentiality). The Chinese wall *"is an internal measure adopted by a firm to ensure that information gained while acting for one client does not leak to people in another part of the same firm who are acting for another client to whom that information may be highly relevant. The principal aims are to protect client confidentiality and, if the firm is carrying on "investment business", to ensure fair treatment of all the firm's clients or customers as required by the statements of principle made pursuant to the Financial Services Act 1986".*

[37] House of Lords (Bolkiah v KMPG) on the use of Chinese Walls.

out investigations for the Brunei Investment Agency (BIA) into its affairs, including investigations into certain dealings in which the prince may have been involved (as Head of the BIA). Sultan Brunei sought ruling to prevent KPMG from carrying on their investigations in the BIA. In the first circuit court, Justice Pumpfrey granted the injunction in favor of the prince. KPMG appealed before the Court of Appeals to have the decision overturned.

The decision of the Court of Appeals was not unanimous. Two of the judges (Lord Justices Woolf and Otton) overturned the first instance ruling, but the third judge (Lord Justice Waller) dissented. Woolf LJ said that there were issues suitable for the Law Lords to consider, so the injunction was allowed to stand, provided that a hearing was to take place, otherwise the Court of Appeals will have to reconsider it. Justice Woolf LJ also indicated that Chinese walls were capable of removing real risks of information leaks and it was wrong to assume otherwise.

It is perceivable that the use of the dual role of the State can bring two conflicting principles: first, if proceedings for international investment disputes are initiated it does not mean that the government enforcement powers are dismissed; second, governments should not take advantage of their position as states abusing governmental powers to increase their litigation position.

Tribunals that face the previous challenges should take into consideration their actions not wanting to allow for the abuse that States could incur in by abusing their powers, such action will be against the equally imperative requirement (sanctioned under Art. 52 of the ICSID Convention by annulment[38]) to maintain and proactively restore the equality of arms.

This means that the abuse of State powers cannot be tolerated by the arbitral tribunal, secondly that a government's correct execution of their public responsibilities (based on good faith and under legitimate reasons), will rarely be of concern to the tribunal, only if it assures to protect and ensures that the government actions are not motivated by the dispute.

However, it is hard to differentiate the political motivation and clandestine use of arbitration to initiate legitimate criminal prosecution. Additionally, it is possible that the submission of evidence will likely cause problems in the criminal procedure. It is evident that an authoritarian state will try to conceal the abuse under a veil that they were acting based on their police powers.

[38] ICSID Convention (1965). Article 52 provides that either party may request annulment on the following grounds: *"(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based*".

As it is with corruption and intimidation, the proper approach is to “lift the veil” from what happens when the eye is not upon the state or what takes place under clandestine channels. The interaction of government agencies is essentially a closed action, where you cannot tell what is truly happening. The external action of the government is what becomes visible to the public eye, however the motivation and discussions behind such actions are rarely, if not never, presented. This is the reason that arbitration and, to some extent, judicial procedures have undertaken the necessity to reverse the burden of proof.[39]

This section has provided an overview on the disequilibrium caused by the legitimate exercise of governmental police powers against claimants (investors) in the arbitration procedure and, provided that sometimes, the tribunal must accept this differences as sufficient and credible indication that the exercise of such powers would not be activated by the state to obtain a favourable litigation position due to concerns over the arbitration dispute.

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