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Martin HUNTER and Gui CONDE E SILVA

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P.O. Box 5134, 1211 Geneva 11, Switzerland  
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# Transnational Public Policy and its Application in Investment Arbitrations

Martin HUNTER\* and Gui CONDE E SILVA\*\*

## I. INTRODUCTION

### *Public Policy—International Public Policy—Transnational Public Policy*

The term “public policy” is not easy to define. Back in 1978, Julian Lew wrote in his published Ph.D. thesis:

“The uncertainty and ambiguity as to its actual content is one of the essential characteristics of public policy.”<sup>1</sup>

The position has not changed much since then. It may not be possible to be more precise than to say that public policy is a reflection of the fundamental principles of a given society in its moral, religious, economic, political and legal environment.

“International public policy” is a particularly confusing expression. It does not mean, as some might think, that it is “international” in the sense that public international law is international. Pieter Sanders explained that:

“... international public policy, according to a generally accepted doctrine, is confined to violation of really fundamental conceptions of legal order in the country concerned.”<sup>2</sup>

This does not add much by way of clarification, except to emphasize that it relates to the legal order *in the country concerned*. The international public policy of one country may not be the same as the international public policy of another country.

By contrast, the concept of “transnational public policy” involves the identification of principles that are commonly recognized by political and legal systems around the world. Pierre Lalive called it:

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\* Barrister, Essex Court Chambers, London; Professor of International Dispute Resolution, Nottingham Law School, The Nottingham Trent University.

\*\* LL.M., Kings College; Ph.D. candidate and Schmitthoff Teaching and Research Fellow, School of International Arbitration, CCLS, Queen Mary, University of London.

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The authors may be contacted at: «martinhunter@mailsaq.net» or «g.conde-e-silva@gmul.ac.uk».

<sup>1</sup> Julian D.M. Lew, *Applicable Law in International Commercial Arbitration*, Oceana, Dobbs Ferry, New York, 1978, p. 531.

<sup>2</sup> Pieter Sanders, *Commentary*, in *60 Years of ICC Arbitration*, ICC Publishing, Paris, 1984.

"... the osmosis ... of the (really international) public policy of the law of nations, upon, or in, the concept of transnational public policy ..."<sup>3</sup>

Another way of expressing the idea might be "the general principles of morality accepted by civilised nations".<sup>4</sup>

It follows that transnational public policy is likely to be narrower in scope, but more uniform, than international public policy.

### *Investment Arbitrations*

Many international commercial arbitrations involve "investments". However, for present purposes, this article will limit the discussion to arbitrations involving disputes between a host State (or governmental agency) and a foreign private investor—that is, not government-to-government investments, nor internal investment, nor private investment in private commercial projects.

The point of departure for discussion of most aspects of investment disputes is found in the Convention, Rules and practices of the International Centre for Settlement of Investment Disputes. Article 25 of the ICSID Convention confines the jurisdiction of a tribunal to "disputes" arising directly out of an "investment". Although the Convention does not define the term "investment dispute",<sup>5</sup> parties have a wide discretion to establish for themselves that their transaction involves an "investment" for the purposes of Article 25 of the Convention.<sup>6</sup> Nonetheless, it remains:

"... within the sole discretion of each Contracting State to determine the type of investment disputes that it considers arbitrable in the context of ICSID."<sup>7</sup>

Some bilateral investment treaties (BITs) leave the definition entirely to the law of the contracting State in whose territory the investment is made.<sup>8</sup> Others provide examples of what may constitute an "investment". For example, the BIT between Panama and the United States<sup>9</sup> provides that an investment means "every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts".<sup>10</sup>

<sup>3</sup> Pierre Lalive, *Transnational (or Truly International) Public Policy*, in *VIII International Congress on Arbitration*, ICCA, New York, May 1986, Congress Series No. 3, Kluwer, The Hague, pp. 295–296.

<sup>4</sup> International Law Association, *Report on the Sixty-Ninth Conference*, London, 2000, p. 345.

<sup>5</sup> Charles Chatterjee, *The Arbitration between American Manufacturing & Trading Inc. v. The Republic of Zaire*, *Journal of International Arbitration*, Vol. 16, No. 1, 1999, p. 37.

<sup>6</sup> Areas such as loans, suppliers' credits, outstanding payments, ownership of shares and construction contracts have been found to be within the parties' discretion.

<sup>7</sup> Georges R. Delaume, *ICSID and the Transnational Financial Community*, 1 *ICSID Rev.-F.I.L.J.*, 1986, pp. 237–256, at pp. 239–240; Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 *ICSID Rev.-F.I.L.J.*, 1986, p. 1, at p. 4.

<sup>8</sup> For example, the Agreement Between The Government of Canada and The Government of the Republic of Argentina for the Promotion and Protection of Investment, done in Toronto, Canada, 5 November 1991, Article 1(a); available at: <http://www.sice.oas.org/bits/canaarg.asp>.

<sup>9</sup> Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment; available at: <http://www.sice.oas.org/bits/panusa1.asp>.

<sup>10</sup> *Ibid.*, Article 1(d).

## II. SOURCES OF TRANSNATIONAL PUBLIC POLICY

Public policy has many sources.<sup>11</sup> These include the fundamental principles of natural law, universal justice, *jus cogens*, the general principles of morality accepted by civilized nations,<sup>12</sup> international custom, arbitral precedent and the spirit of international treaties. This list is not exhaustive and is far from providing a clear and precise definition of what rules or principles should be elevated to the status of transnationality. Which rule or principle should be applied in a particular case will depend on the facts and the way in which the arbitral tribunal "sees" the case at the relevant time. The tribunal will endeavour to ascertain the core values and objectives applicable to transnational investments.

But does the arbitral tribunal exceed its mandate when it applies such principles? Article 42(1) of the Washington (ICSID) Convention provides that:

"The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable." (emphasis added).

International law will apply even where the parties choose a national law. Chapter 11 of the North American Free Trade Agreement (NAFTA) merely provides that arbitral tribunals shall decide the issues in dispute in accordance with the NAFTA and applicable rules of international law. Most BITs adopt broadly the same position.<sup>13</sup>

It follows that most (but not all<sup>14</sup>) investment arbitrations arise under the dispute resolution and substantive provisions of international treaties, not out of a direct contractual relationship between an investor and a host State. This will influence the position of the arbitral tribunal, as it cannot ignore the fundamental interests protected by international law. Thus, the arbitral tribunal not only can, but should, consider these issues when rendering its award.

In investment arbitrations, public policy issues classically arise (directly or indirectly) in the following areas:

- subjective non-arbitrability (or incapacity of the State to arbitrate);

<sup>11</sup> International Law Association, *supra*, footnote 4, p. 345.

<sup>12</sup> See Article 38 of the Statute of the International Court of Justice. See also *Fedax N.V. v. Republic of Venezuela*, Decision of 11 July 1997 on Objections to Jurisdiction, and Award of 9 March 1998 in ICSID Case No. ARB/96/3, 37 ILM, 1998, pp. 1378–1398, where the ICSID Tribunal decided in accordance with general principles of law, which, along with the relevant BIT, provided the basis for the Decision on Jurisdiction and the Award on the Merits. In *Company Z and others (Republic of Xanadu) v. State Organization ABC (Republic of Utopia)*, Award of April 1982, *Yearbook Commercial Arbitration*, Vol VIII, 1983, p. 94, and *Amco Asia Corp. v. Indonesia*, ICSID Arbitral Award on Jurisdiction of 25 September 1983, 23 ILM, 1984, pp. 351–383, the arbitral tribunals decided in accordance with the principles of good faith. Also, in *Indonesia v. Amco Asia Corp.*, Annulment Decision of 16 May 1986, the principle of *pacta sunt servanda* dictated the outcome of the Award.

<sup>13</sup> The BIT between Panama and the United States, *supra*, footnote 9, provides in its Article VIII(2) that disputes shall be decided "in accordance with the applicable rules of international law".

<sup>14</sup> See, for example, International Chamber of Commerce (ICC) Arbitration *SPP (Middle East) Ltd. v. Egypt (SPP)*, ICSID Award of 20 May 1992 in ICSID Case No. ARB/84/3, *Yearbook Commercial Arbitration*, Vol. XIX, 1994, pp. 51 *et seq.*

- absence of special powers by the signatory of an arbitration agreement;<sup>15</sup>
- unilateral rescission of an arbitration agreement;<sup>16</sup>
- immunity from jurisdiction;
- restrictive interpretations of State contracts;<sup>17</sup>
- expropriation;<sup>18</sup>
- bribery;
- fraud;
- contracts in violation of a UN resolution or embargo;
- protection of the environment;
- tax law; or
- exchange control regulations.

### III. THE APPLICATION OF TRANSNATIONAL PUBLIC POLICY BY INTERNATIONAL ARBITRAL TRIBUNALS

If asked, many international arbitrators would claim that they have never applied transnational public policy principles in formulating their awards. This is no doubt true at a subjective, conscious level, but the reality is often different. Take the published Award on Liability in *S.D. Myers Inc. v. The Government of Canada*<sup>19</sup> as an example. If the Tribunal had been told that it had in fact applied no less than six principles of transnational public policy in its First Partial Award (on liability), the individual arbitrators would no doubt have been astonished. Yet consider the following passages:

"The Vienna Convention also contains, in Article 27, a general principle that a party may not invoke the provisions of its own internal law as justification for its failure to perform a treaty." (para. 203).

and:

"The Preamble to the NAFTA, the NAAEC [North American Agreement on Environmental Co-operation] and the international agreements affirmed in the NAAEC suggest that specific provisions of the NAFTA should be interpreted in light of the following general principles:

- Parties have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other States;
- Parties should avoid creating distortions to trade;

<sup>15</sup> See ICC Arbitration Award No. 3896, *Framatome-Atomic Energy Organization of Iran*, Clunet 1983, 914, note S. Jarvin, *Yearbook Commercial Arbitration*, Vol. x, 1985, p. 47.

<sup>16</sup> See the *Losinger* case, in P.C.I.J., Series A-B, Fasc. Nos. 67 and 69; Series C, Fasc. No. 78; and *Topco Calasiatic v. Libyan Government*, Clunet 1977, 350, 374 No. 79, and 379 Nos. 87-88, note 19.

<sup>17</sup> See, for example, ICSID Award *Amco Asia Corporation et al. v. Indonesia*, ILM XXIII, 1984, p. 351 (jurisdiction); and ILM XXIV, 1985, p. 1022 (merits).

<sup>18</sup> See the *Topco Calasiatic* case, *supra*, footnote 16; and the *Aminoil-Kuwait* case, Clunet, 1982, 869, 900 No. 143; the *Liamco* case, ILM XX, 1981, pp. 1-87, and 120-121.

<sup>19</sup> The awards in this case can be found at, *inter alia*: «<http://www.appletonlaw.com>»; «<http://www.dfait-maeci.gc.ca>»; and «<http://www.naftalaw.org>».

- environmental protection and economic development can and should be mutually supportive.” (para. 220).

and:

“In the Tribunal’s view, these principles are consistent with the express provisions of the Transboundary Agreement and the Basel Convention. A logical corollary of them is that where a State can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade. This corollary also is consistent with the language and the case law arising out of the WTO family of agreements.” (para. 221).

and:

“The Tribunal considers that the interpretation of the phrase like circumstances in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns.” (para. 250).

and:

“The principle of international law stated in the *Chorzow Factory* (Indemnity) case is still recognised as authoritative on the matter of general principle: ‘The essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.’” (para. 311).

and:

“The Tribunal already has suggested that whatever precise approach is taken, it should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation.” (para. 315).

The Arbitral Tribunal in that case acknowledged in the Award that it was instructed by the Treaty to apply the provisions of the NAFTA and international law.<sup>20</sup> The Award in question nowhere mentions the term “public policy”, let alone “transnational public policy”. What conclusion can be drawn from this? Does it mean that, without being aware of it, the Arbitral Tribunal made some decisions by applying transnational public policy principles that were outside its mandate? Or does it mean that transnational public policy is in fact synonymous with public policy in *international law*?

Case-law and the relevant literature suggest that the difference between “domestic international” and transnational (or “truly international”) public policy lies in the individual’s approach to international law.<sup>21</sup> A judge sitting in a national court will have his or her own view of what constitutes the international public policy of his or her country and may, indeed, be bound by precedent. Consequently, the judge’s approach will be based on local social and economic interests and the core principles of the relevant national legal system. Most national courts never find themselves in a situation

<sup>20</sup> NAFTA Article 1130.

<sup>21</sup> The position is widely accepted in the literature; see, for example, Lew, *supra*, footnote 1; Lalive, *supra*, footnote 3; and International Law Association, *supra*, footnote 4.

in which they are obliged to consider extraneous and possibly overriding elements. This said, in recent years national courts have shown a willingness to give the interests of the international community considerable weight when dealing with international transactions within their own national legal systems.<sup>22</sup>

International arbitral tribunals, at least in the context of investment disputes, do not face this problem. When investors place their investments under the protection of a bilateral or multilateral treaty, they intend to reduce the interference of domestic law so as to create a favourable investment environment.<sup>23</sup> Arbitral tribunals should therefore pay little, if any, heed to arguments from the host country that rely on their own national law to override a rule or principle of transnational public policy.<sup>24</sup> Thus, transnational rules or principles should be applied even if the host government claims that they have not been integrated into its legal system, on constitutional grounds or otherwise.<sup>25</sup> In other words, an international arbitral tribunal should not permit a respondent host government to escape its transnational obligations by invoking a rule of its own internal (or even international) public policy (*ordre publique*).<sup>26</sup>

This idea is consistent with the trend prevailing in recent awards concerning investment disputes and State contracts.<sup>27</sup> It can also be derived from positions such as Article 42 of the Washington Convention.<sup>28</sup> The underlying reasoning is that the direct application of principles of transnational public policy has a corrective function in relation to both the applicable national and international law of a given country.<sup>29</sup>

It follows that only the arbitral tribunal is in a position to establish whether transnational public policy should be applied and under what conditions. In an investment dispute of the type under discussion in this commentary, the arbitral tribunal is placed above the level of national law,<sup>30</sup> as it has no single national legal system from which to draw the principles that control transnational investments.

International trade law arbitrations provide rich pastures for the researcher in this field, partly because the awards are in the public domain and partly because the

<sup>22</sup> See Lalive, *supra*, footnote 3.

<sup>23</sup> This was the proposition in *Ceskoslovenska Obchodni Banka v. Slovak Republic (Ceskoslovenska Banka)*, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, 14 ICSID Rev.-F.I.L.J. 1, 1999, pp. 250-283.

<sup>24</sup> One example is the application of the principle of effectiveness (*effet utile*) of BITs.

<sup>25</sup> Such was the position in *SPP*, *supra*, footnote 14.

<sup>26</sup> See, for example, *Société Ouest-Africaine des Bétons Industriels v. Senegal*, Jurisdictional Decision of 1 August 1984 in ICSID Case No. ARB/82/1, 6 ICSID Rev.-F.I.L.J. 1, 1991, pp. 46-48.

<sup>27</sup> See Ibrahim F.I. Shihata and Antonio R. Parra, *Applicable Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention*, 9 ICSID Rev.-F.I.L.J. 2, 1994, pp. 183-213, at p. 212.

<sup>28</sup> See A. Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Recueil des Cours, Vol. 136, 1972, at p. 342.

<sup>29</sup> See *Amco Asia Corp. v. Indonesia*, Final Award of 5 June 1990 in ICSID Case No. ARB/81/8, *Yearbook of Commercial Arbitration*, Vol. xvii, 1992, pp. 73-105.

<sup>30</sup> Pierre Mayer, *Reflections on the International Arbitrator's Duty to Apply the Law: The 2000 Freshfields Lecture*, 17 Arb. Int'l, 2001, p. 235.



applicable law is identified in the treaties with precision. The *Beers Award*,<sup>31</sup> for instance, concerned a sale of alcohol from the United States at a time when Canada had a mandatory rule imposing the use of wholesalers by foreign suppliers. The Arbitral Tribunal found that Canadian legislation was in breach of the principle of national treatment and Article III.4 of the General Agreement on Tariffs and Trade. As the principle of national treatment is one of the core principles of the transnational law governing investment disputes, it should be considered as a fundamental element of transnational public policy.

#### IV. STATE RESPONSIBILITY

Consideration of transnational public policy is particularly apposite in the area of State responsibility. It is sometimes triggered by the purported reliance by governmental agencies on *force majeure* events caused by its government owner (for example, an internationally unauthorized boycott on trade with nationals of another State) or a State's alleged lack of constitutional control over the conduct of its political subdivisions.<sup>32</sup>

In *Metalclad*,<sup>33</sup> 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 about 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 Arbitral Tribunal found that Mexico's conduct amounted to an expropriation and that the host government was in breach of the principle of fair and equitable treatment of foreign investors. Further, it stated that one of the fundamental goals of NAFTA is to increase foreign investments and the transparency in local legal requirements.

By focusing on the values underlying the Treaty, in a way of typical of decisions based on public policy considerations, the Arbitral Tribunal emphasized:

<sup>31</sup> GATT Dispute Case DS23/R-39S/206, 16 March 1992.

<sup>32</sup> See *Compañía de Aguas del Aconquija S.A. and Vivendi v. Argentine Republic*, Award of 21 November 2000 in ICSID Case No. ARB/97/3, 40 ILM, 2001, pp. 457-473.

<sup>33</sup> *Metalclad v. Mexico*, Award of 30 August 2000 in ICSID Case No. ARB(AF)/97/1, 16 ICSID Rev.-F.I.L.J. 1, 2001, pp. 165-202.

"... the importance of predictable environmental standards and permit procedures, at both the federal and local levels, in each of the NAFTA countries."<sup>34</sup>

In the reasons for its Decision, the Arbitral Tribunal engaged in a balancing of values, adhering to the spirit of the law. When faced with an attempt to frustrate a cross-border investment, the Tribunal focused on the effects of national legislation upon transnational objectives. In this sense, public policy is a flexible and dynamic concept, to be used as a corrective mechanism. It can also be a tool to balance complex and often conflicting goals, such as protection of the environment while assuring the rights of foreign investors.<sup>35</sup>

The application of transnational public policy to the conduct of States will thus be triggered when there is a breach of a fundamental interest of the international community. By its very nature, transnational public policy is based on internationally and commonly recognized principles that must be accepted without question. This proposition would be frustrated if a State were to be allowed to escape liability by imputing the breach of its subsidiary organs or officials. As one arbitral tribunal found:

"... the principle of international law which the Tribunal is bound to apply is that which establishes the international responsibility of States when unauthorized or *ultra vires* acts of officials have been performed by State agents under cover of their official character. If such unauthorized or *ultra vires* acts could not be ascribed to the State, all State responsibility would be rendered illusory."<sup>36</sup>

Another example of transnational public policy in investment arbitrations may be derived from the issue of the responsibility of a State for insurrections within its borders. In *Asian Agricultural Products Ltd. v. Sri Lanka*,<sup>37</sup> the Arbitral Tribunal affirmed that a State was liable for losses suffered by foreign investors where it was demonstrated that the government in question failed to provide the standard of protection required, either by treaty or under customary international law. Liability would in principle exist regardless of whether the damages occurred during offensive acts of insurgents or were the result of government counter-insurgency activities. Similarly, acts of violence and looting have been deemed to trigger the international responsibility of States.<sup>38</sup>

Although State responsibility may arise from recourse to the principles of transnational public policy, it should only be used as a last resort. A party alleging a violation of law giving rise to international responsibility has the burden of proving its

<sup>34</sup> Stephen L. Kass and Jean M. McCarroll, *The 'Metalclad' Decision Under NAFTA's Chapter 11*, New York Law Journal, 27 October 2000.

<sup>35</sup> Which is in itself a fundamental principle in cross-border investment; see *Ceskoslovenska Banka*, *supra*, footnote 23.

<sup>36</sup> *Spp (Middle East) Ltd. v. Egypt (Spp)*, Award of 20 May 1992 in ICSID Case No. ARB/84/3, 32 ILM, 1993, pp. 933-1038.

<sup>37</sup> *Asian Agricultural Products Ltd. v. Sri Lanka (Asian Agricultural Products)*, Final Award of 27 June 1990 in ICSID Case No. ARB/87/3, 30 ILM, 1991, pp. 580-627, and Dissenting Opinion, at pp. 628-655; 6 ICSID Rev.-F.I.L.J. 2, 1991, pp. 526-573.

<sup>38</sup> See *American Manufacturing & Trading, Inc. v. Zaire*, Award of 21 February 1997 in ICSID Case No. ARB/93/1, 12 International Arbitration Report, 1997, No. 4, pp. A-1-A-20. In this case, the parties had authorized the Court to apply principles of international law.

assertion.<sup>39</sup> Further, the principle of State accountability should only operate where the breach is grave and manifest.

### *Expropriation*

Transnational public policy may also come into play when foreign-owned property is expropriated. A classic example arises where a State attempts to evade responsibility by enacting legislation designed to facilitate expropriation. In *Compañía del Desarrollo v. Costa Rica*,<sup>40</sup> the Arbitral Tribunal found that a Costa Rican law on the appraisal and valuation of expropriated property should be consistent with accepted principles of international law. The mandatory application of international law was found to be in accordance with the policy of protection of foreign investment. Although the Arbitral Tribunal did not use the expression "transnational public policy", its inclusion in the text of the Award would not have affected the decision or the reasoning.

### *Compensation*

The role of transnational public policy becomes evident when attention is focused on the objectives of compensation for an unlawful interference with contractual rights. In *Sapphire International Petroleum v. NIOC*,<sup>41</sup> a case dealing with an unlawful taking, the arbitrator stated:

"According to the generally held view the object is to place the party to whom they are awarded in the same pecuniary position they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion."

In *Amco Asia Corp. v. Indonesia*,<sup>42</sup> the sole arbitrator took the view, quoting the Permanent Court of Justice in *Chorzow Factory*,<sup>43</sup> that, in an unlawful nationalization, there must be restitution to re-establish the situation that would otherwise have existed or, if this is not possible, payment of a sum corresponding to the value of such restitution.

The principle of compensation in the event of nationalization—lawful or unlawful—is one of the generally recognized principles of international law<sup>44</sup> and should be included within transnational public policy.

<sup>39</sup> *Asian Agricultural Products*, *supra*, footnote 37, 6 ICSID Rev.-F.I.L.J. 2, 1991, pp. 527 *et seq.*

<sup>40</sup> *Compañía del Desarrollo v. Costa Rica*, Award of 17 February 2000 in ICSID Case No. ARB/96/1, 15 ICSID Rev.-F.I.L.J. 1, 1999, award: pp. 169–204; decision on rectification: pp. 206–210; 39 ILM, 2000, pp. 1317–1337.

<sup>41</sup> (1963) 35 ILR 136.

<sup>42</sup> Final Award of 5 June 1990 in ICSID Case No. ARB/81/8, *Yearbook Commercial Arbitration*, Vol. xvii, 1992, pp. 73–105.

<sup>43</sup> P.C.I.J., Series A, No. 17, at 47.

<sup>44</sup> See *Benvenuti & Bonfant v. Congo*, ICSID Award of 8 August 1980, ILM XXI, 1982, pp. 740–766.

## V. PROCEDURAL TRANSNATIONAL PUBLIC POLICY

Article 52 of the ICSID Convention sets out various grounds for annulment. These include corruption on the part of a member of the tribunal, serious departure from a fundamental rule of procedure, and failure to state the reasons on which the award is based. The first two of these generally fall within the scope of transnational public policy.<sup>45</sup>

The way in which these principles are applied in practice may be demonstrated by examples. In *Goetz v. Burundi*,<sup>46</sup> the Tribunal applied the principle applied by the International Court of Justice that it is not bound to confine its consideration to the material formally submitted to it by the parties.<sup>47</sup> It may make its own analysis of the fundamental principles:

“The vigilance which the court can exercise which aided by the presence of both parties to the proceedings has a counterpart in the care it has to devote to the proper administration of justice in a case in which only one party is present.”<sup>48</sup>

*Burden of proof*

Another matter which frequently preoccupies arbitral tribunals in the context of procedural public policy is the burden of proof. It is generally accepted that there is a broad general principle that places the burden of proof on a claimant.<sup>49</sup> Nevertheless, international arbitral tribunals tend to approach the question of burden of proof with a high degree of pragmatism. The most commonly applied principle is that a party who wishes to rely on a fact must prove that fact to the satisfaction of the tribunal.<sup>50</sup> The standard of proof that will be required to “satisfy the tribunal” depends on how surprising the fact may be. Allegations of fraud against a businessman will need to be proved to a high standard. On the other hand, proving the weather conditions at a construction site in a desert on a certain date, for example, may require no more than a copy of a local newspaper containing a published meteorological report for the relevant date.

The Arbitral Tribunal in *Asian Agricultural Products*<sup>51</sup> stated that there is an established international law rule that:

“... a party having the burden of proof must not only bring evidence in support of his

<sup>45</sup> Lalive, *supra*, footnote 3, pp. 295–296.

<sup>46</sup> *Goetz v. Burundi*, Award of 10 February 1999 in ICSID Case No. ARB/95/3, 15 ICSID Rev.–F.I.L.J. 2, 2000, pp. 457–527.

<sup>47</sup> *Nicaragua v. United States of America*, I.C.J. Reports, 1986, p. 25, para. 30.

<sup>48</sup> *Jamahiriya Libyan Arab Republic v. United States of America*, paras. 37 and 42, available at: «[http://www.icj-cij.org/icjwww/idocket/ilus/ilusjudgment/ilus\\_ijudgment\\_980227\\_frame.htm](http://www.icj-cij.org/icjwww/idocket/ilus/ilusjudgment/ilus_ijudgment_980227_frame.htm)».

<sup>49</sup> See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Grotius Publications, Cambridge, U.K., 1987, p. 327, and the supporting authorities referred to therein.

<sup>50</sup> See Durward V. Sandifer, *Evidence before International Tribunals*, University Press of Virginia, Charlottesville, Virginia, 1975, p. 127.

<sup>51</sup> *Asian Agricultural Products*, *supra*, footnote 37, at 6 ICSID Rev.–F.I.L.J. 2, 1991, pp. 527 *et seq.*

allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof."<sup>52</sup>

In pursuing this burden, the parties should have the opportunity to present their arguments. Transnational public policy, however, does not encumber an international arbitral tribunal to follow the rules of evidence of any particular national court.

As a general principle, the probative force of any evidence presented is for the tribunal to determine. In case a party adduces some evidence that *prima facie* supports his allegation, the arbitral tribunal may determine that burden of proof shifts to the opposing party.<sup>53</sup>

## VI. CONCLUSIONS

With some exceptions, national courts have generally applied the *international* public policy of their own national legal systems when called upon to apply public policy considerations in disputes arising out of international transactions. By contrast, the International Court of Justice and international arbitration tribunals tend to apply "truly international", or *transnational*, public policy. In many cases, the relevant principles may be the same. In other cases, they may not be identical. For example, an international transaction for the importation of liquor into Saudi Arabia may be unlawful on public policy grounds applicable in Saudi Arabia, but such a transaction would not be contrary to transnational public policy.

Where an international arbitral tribunal in a commercial dispute is mandated to apply a *national* substantive law chosen by the parties, in ordinary circumstances there appears to be sound basis for that tribunal to move outside the boundaries of the *international* public policy of the national law in question. The international public policy rules of any particular nation may or may not be congruent with the common, shared, values accepted as principles of *transnational* public policy. If they are not, the tribunal may find itself confronted by a difficult task.

Although judicial decisions of national courts and the writings of authoritative scholars have played a significant part in its development, transnational public policy is largely created by international arbitral tribunals in cases where a State or governmental body is involved. In particular, the richest source for study of transnational public policy is in the awards of international tribunals in investment disputes, where, by definition, one of the parties (usually the Respondent) is a State or State entity.

<sup>52</sup> Id.

<sup>53</sup> As in the International Court of Justice's *Ambatielos (Greece v. United Kingdom)*, 12 R.I.A.A. 83 (1956) and *Asylum (Colombia v. Peru)* (1950), I.C.J. 266, 1950 WL 10) cases.

In most investment disputes (in the sense used in this article), the chosen substantive law may be a national law, but more often—for example, in Chapter 11 of the NAFTA and some BITS—the arbitral tribunal is instructed to apply the provisions of the treaty and international law. This in turn mandates the arbitral tribunal to apply transnational public policy, which may be considered to be a rather specialized part of public international law.

The term “international public policy” is a “red herring”, because it tends to confuse the casual observer into thinking that it invokes supra-national elements. In fact, as demonstrated by two great twentieth century scholars, Pieter Sanders and Pierre Lalive, the term “international public policy” is used to mean the *international*, as opposed to the *internal*, public policy (*ordre publique*) applied by *national* courts.

The term “transnational public policy” means, as described by Lalive, “truly international” or “really international”. The present commentators might prefer to see it described as “supra-national” public policy. One possible way of looking at it may be that the State, through its laws and its national courts, polices the conduct of parties that fall within the scope of its authority by applying its own conception of morality. Where the conduct of the State itself is in question and an international tribunal is called upon to pass judgement on that conduct, the principles to be applied are not the public policy rules of that State but *internationally* and *commonly* recognized shared values of morality. This is by no means the only application of transnational public policy, but it serves as a useful example of the ways in which supra-national elements may be applied in appropriate cases.