BELT AND SILK ROAD INITIATIVE: A NEW GAME CHANGER OF TRANSNATIONAL INVESTMENT IN ASIA

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Abstract

The advent of globalisation in this modern age and highly diversified world paves way for a new era of economic alliance of states in Asia through the establishment of China's Belt and Silk Roads Initiative (BRI), comprising the Silk Road Economic Belt (SREB) and the 21st Century Maritime Silk Road (MSR), which connects the East and the West in order to promote and sustain leverage in the transition of the world from western hegemony to a policy of peace, mutual respect, and coordination under China's helm. In this pursuit, China continues to use BRI not only as an economic but as a geo-political strategy to broaden its sphere of land and maritime control against the opposing hegemony among its neighbouring countries, the East and the West. This paper delves into the theories and praxis of investor state arbitration as well as issues on transparency of the Bilateral Investment Treaties (BIT) and international investment agreements (IIAs) as tools for governance of investor-state dispute settlement (ISDS) in the light of the accelerating transnational investments under the BRI in Asia and the member-economies within the APEC belt. It is theorised in this paper that complexities in ISDS mechanisms can be remedied by establishing a multilateral investment court in order to foster legitimacy and transparency on arbitral tribunals and therefore, address the issues on the malleable and amorphous nature of public policy to promote not only the economic interest of the State parties and foreign investors but also the sustainable development of the people.

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Introduction

The advent of globalisation in this modern age and highly diversified world paves way for a new era of economic alliance of states in Asia through the establishment of Belt and Silk Roads Initiative (BRI) which connects the East and the West in order to promote "community of shared destiny"[51] and sustain leverage in the transition of the world from western hegemony to a policy of peace, mutual respect, and coordination. In this pursuit, BRI is being used as an economic and geo-political strategy to broaden the sphere of land and maritime control against the opposing hegemony among the neighbouring countries, the East and the West. Although the Belt and Roads Initiative (BRI) has been the earliest vehicle of the world for international trade for more than six centuries ago, still its enduring past continues to reverberate until this modern day as it intersects with the different realms of land and maritime silk road as well as in redefining moments of the technological and digital network services within the prism of the fluid norms of transnational investment arbitration.

This paper deals with transnational investment arbitration and its impact on the growing economy of Asian neighbouring countries and other members of the Asia Pacific Economic Cooperation (APEC). As Asia moves towards re-building economic bloc, the Belt and Silk Roads Initiative (BRI) strengthen the foothold of Asian countries in transnational investments particularly through the dynamic economic cooperation of the Association of Southeast Asian Nations, the Brunei Darussalam-Indonesia-Malaysia-Philippines East ASEAN Growth Area (BIMP-EAGA), as a catalyst for the economic resiliency and stabilisation of the region to complement with the American and European economies. The burgeoning transnational investments in the economic hub will undoubtedly prevent a domino effect that happened in the past such as the 1997 Asian crisis and the 2008 financial crisis as well as the recent negative economic repercussion of the global pandemic COVID-19.

[51] Arase, David. 2015. China's Two Silk Roads Initiative: What it Means for Southeast Asia. Southeast Asian Affairs. Yushof Ishak Institute, citing Xi Jin Ping Silk Road's agenda for Eurasian connectivity and regional economic cooperation.
https://www.jstor.org/stable/44112796

As BRI gained momentum in accelerating transnational investments in the pipeline, it is inevitable, however, that complexities on litigating investment disputes and recognition and enforcement of investment arbitral awards in foreign jurisdictions may crop up. The increasing number of transnational investments and cross-border business transactions and the corresponding projected increase in the number of commercial and investment disputes involving State parties and foreign investors (i.e., state to state disputes, state to investor disputes, and investor to investor disputes) emboldened by the Bilateral Investment Treaties (BITs) and other international investment agreements (IIAs) as investor-state dispute settlement (ISDS) mechanisms have become a niche to enrich the fertile ground for the flourishing landscape in the narratives of transnational investment arbitration in Asia. These narratives give birth to issues on transparency of the Bilateral Investment Treaties (BIT) and international investment agreements (IIAs) as tools for governance of investor-state dispute settlement (ISDS) for these befuddle the rights and obligations of the State parties and foreign investors taking into account the actors involved in the process, the restrictive sovereign immunity of states, and issues on the legitimacy of the arbitral institutions spearheaded through the BRI for it reflects power asymmetry between the global North and the global South - the developed and developing State parties, which are mostly Asian countries like the Philippines.

While new vehicles have been formed to help with the financing, such as the Silk Road Fund, most of the funding for these projects will actually come from the "state-directed development and commercial banks", not to mention China's multilateral approach to investment including private-public partnerships.[52] This means that foreign investors within the realm of BRI can be a group of "state-directed development and commercial banks" whose activity from the standpoint of State party may be either public or private. These are problematic particularly when it comes to the recognition and enforcement of investment arbitration award(s) in view of the malleable concept of public policy and the varying application and interpretation of the restrictive immunity of the sovereign states. As explained by Rafols (1984), 'given by the diversity of governmental structures, there are public functions which may be undertaken by entities that do not form part of the government machinery, and that

[52] Xi, J., 2017a, page 5, see also OECD, Business and Finance Outlook, 2018, p. 3

there are no universal accepted canons for the characterisation of this activity as being commercial or private as opposed to being governmental or public.'[53] According to Alvarez and Park (2003), if these are not resolved, "investor/government arbitration may fall prey to public pressure arising from a backlash"[54] and would "suffer from crib death before it can struggle through its initial growing pains"[55] which may be both detrimental to the economic interest of the foreign investors and State parties in the BRI global investment plans.

In many cases, foreign investors have used ISDS to challenge measures adopted by States in the public interest (for example, policies to promote social equity, foster environmental protection or protect public health) [which may have negative repercussion to the State parties that will ultimately do a balancing act in weighing the alternative options]. There are also issues on whether the three arbitrators, appointed on an *ad hoc* basis, would guarantee sufficient legitimacy to assess the validity of States' acts, particularly if the dispute involves sensitive public policy issues.[56] It is against this context that the Belt and Silk Roads Initiative (BRI) serves as a new game changer in the field of investment arbitration for it squarely creates new actors and norms for transnational public policy that are significant in terms of the recognition and enforcement of investment arbitration awards within and outside the circle of the participating economies.

I. THE INVESTOR-STATE ARBITRATION (ISA) IN THE LIGHT OF THE BELT AND SILK ROADS INITIATIVE

China itself has endorsed arbitration as the appropriate method of dispute resolution for BRI projects,[57] and host country parties can generally be expected to acquiesce in

[53] Rafols, Roy Joseph M. 1984. Sovereign Immunity: Comparative Perspective. Ateneo Law Journal. Vol. XXIX.
[54] Alvarez, Guillermo A, and William W. Park. 2003. The New Face of Investment Arbi- tration: NAFTA Chapter11, 28 Yale J. Int'l L. 365, 366; Franck, Susan. 2005. The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law Through Inconsistent Decisions. Fordham Law Review. Volume 73, Issue 4.
[55] Franck, Susan. 2005. The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law Through Inconsistent Decisions. Fordham Law Review. Volume 73, Issue 4.
[56] United Nations Conference on Trade and Development, No. 2. June 2013
[57] Grimmer, Sarah & Charemi, Christina. 2017. Dispute Resolution along the and Road, GLOBAL ARB. REV. (May 22, 2017),

the inclusion of arbitration clauses in their contracts as the most practicable means of finding a neutral forum.[58] The Government of China and Chinese arbitral institutions are taking measures to facilitate the establishments of BRI-related arbitrations in their home country. In October 2016, for instance, one of more than 200 local arbitration commissions in China - the Wuhan Arbitration Commission - announced its establishment of a "'One Belt, One Road' Arbitration Court" to govern disputes involving Chinese enterprises. It can be seen from this strategy that the major cities in China intends to comply with international standards since China has long been a party to the New York Convention. Chinese parties to BRI contracts reasoned that they feel more comfortable in their home territory with institutions that are familiar with Chinese business practices and are accustomed to conducting proceedings in Chinese. Some may also feel that because Chinese institutions are generally funding the projects, the use of Chinese venues and arbitral institutions is appropriate.[59]

In the midst of this prevailing environment, it has been said that enforcement of foreign arbitral awards would be difficult in China; however, Chinese proponents argued that this old Chinese interpretation/statement was largely irrelevant today.[60] Traditionally, China has restricted unilateral consent to arbitration to disputes on the amount of compensation to be granted in cases of expropriation.[61] Controversies on other matters, such as the existence of expropriation itself, or breaches of treatment obligations, were to be settled in domestic courts, or could be submitted to arbitration by mutual consent of the investors and national authorities (*e.g.*,China–Korea BIT, Art. 9.3).[62] A number of international investment agreements (IIAs) require foreign investor to fulfill certain procedural requirements prior to the filing of the arbitration claim. The most usual procedural restrictions pertain to waiting periods[63] and the

[58] Norton, Patrick M. 2018. China's Belt and Road Initiative: Challenges for Arbitration in Asia. U. PA Asian Law Review.
[59] ibid. Norton, Patrick M. 2018.
[60] Chaisse, Julien. 2013. Investment Claims against Asian States-- a legal analysis of the statistics, trends and prospects. Centre for Financial Regulation. Working Paper No. 14. October 2013. Chinese University of Hongkong Faculty of Law.
[61] Jie Wang (2009) Investor-State Arbitration: Where Does China Stand? 32 Suffolk Transnat'l L. Rev. 496, 501.
[62] Iberdrola Energia S.A. v. Republic of Guatemala, ICSID Case No. ARB/09/5, Award, 17 August,
[63] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v.Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November, 2005, para. 102.

exhaustion of local remedies.[64] These are the types of requirements commonly found in Sino–foreign BITs.[65] Prior to the launch of arbitration, foreign investors must hold negotiations with China's authorities to reach an amicable settlement. Should these negotiations fail to bring the parties to commonly agreed solution within a six-month period, the investor may bring the claim to international arbitration. The exhaustion of local remedies requires foreign investors to seek relief to their claim through domestic procedures before bringing the international dispute. Ordinarily, the investors are required to file a claim before the competent domestic court. Should the domestic court fail to settle the dispute, or fail to reach a decision within a given period of time, the investors are entitled to proceed with international proceedings.[66]

As explained by China International Economic and Trade Arbitration Commission (CIETAC) Director in Boston, "a foreign BIT award and award made by an ICSID tribunal should be enforced without impediments."[67] This differentiates the dynamics of traditional BITs and IIAs from the new-generation of Sino–foreign IIAs which are characterised to be free from substantial restriction(s) and grants unilateral consent to disputes concerning all disciplines of the agreement.[68] These new and recent IIAs are likely to generate litigation before ISA on their own or through the application of most-favored-nation treatment (MFN) clauses in the light of the *Maffezini vs Kingdom of Spain* case. Indeed, several tribunals have applied MFN clauses to relieve claimants of having to comply with a "prior recourse" obligation.[69] However, some other tribunals and arbitrators which have rejected attempts to apply MFN clauses to relieve claimants in complying with a "prior obligation [70] recourse" have created a schism across awards which may well become an issue when further exploring China's

[64] Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, 2 July, 2013, para. 6.2.9.
[65] Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic,ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July, 2006, para. 41.
[66] ibid
[67] Wang, Jie. 2009. Investor-State Arbitration: Where Does China Stand? 32 Suffolk Transnational L. Rev. 496, 501.
[68] China's BIT with Mozambique of 2001 (Art. 7.3.)
[69] Emilio Agustín Maffezini vs Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January, 2000.
[70] Wintershall vs Argentina, ibid.

IIAs.[71] Chaisse (2013) recommends to adopt the principle of MFN treatment as it is of paramount importance to the Asian investment regime for it creates opportunities for investors against these states that have developed rather restrictive provisions. It is noteworthy that the more a country has entered into various IIAs, the more it is necessary to utilise MFN for future litigation. Malaysia, China and Vietnam are among the Asian states that pay the greatest attention to MFN since these three countries have already granted rights to a great number of their party investors and investments.[72]

II. NVESTOR-STATE- ARBITRATION (ISA) EMBODIED IN BITs AND IIAs

The above-mentioned norms of investment arbitration mechanisms within the prism of the BRI is juxtaposed to the existing precepts and principles of investment state dispute settlement under the BITs and other international investment agreements (IIAs). BITs grant investors a number of rights and remedies such as the following: (i) guaranteed payment of adequate compensation in the event an investment is expropriated; (ii) prohibition of the host country enacting currency control to prevent the free flow of capital; (iii) prohibition of discrimination against the investor in favour of the host country's citizens or other foreigners; (iv) fair and equal treatment by the host country; (v) provision of full protection and security of the investment by the host country; (vi) guarantee by the host country that the investor will not be treated less favourably than the minimum standard required by customary international law; (vii) an agreement of the host country to honour commitments made to the investors.[73] Many host country governments and foreign investors utilised BITs as a form of investor state arbitration (ISA) due to various factors such as but not limited to the following, to wit: negative consequences may follow if the host country government withdraw from the BITs.

[71] Chaisse, Julien. 2013. Investment Claims against Asian States-- a legal analysis of the statistics, trends and prospects. Centre for Financial Regulation. Working Paper No. 14. October 2013. Chinese University of Hongkong Faculty of Law.
[72] ibid
[73] Franck, Susan D. 2005. The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 Fordham L. Rev. 1521 (2005).

The bilateral investment treaties ordinarily have a term of ten to fifteen years, with no right of termination of a treaty during that period. Hence, BIT is beneficial as it contains "continuing effects" clause which provides that investments made, acquired or approved prior to the date of the termination of the treaty will be protected by the treaty's provisions for a further term of 10 to 20 years.[74] This "umbrella clause" is a provision commonly found in BITs that requires each contracting nations to observe all investment obligations they have assumed with respect to investors from other contracting nations. This type of clause brings independent investment arrangements between a contracting nation and private investors from the other contracting nation under the treaty's "umbrella protection". Its purpose is to create an international obligation to observe investment agreements that investors may enforce when BIT confers a direct recourse of action to arbitration.[75] There are two major substantive standards for protection in most BITs. These are the Most Favoured Nation Treatment (MFN) and National Treatment (NT) clauses. The inclusion of these clauses in the BITs is important considering that investors can generally rely on the MFN provision in its treaty to obtain more beneficial treatment than the host State may have agreed to grant investors from another.[76] On the other hand, the Fair and Equitable Treatment (FET) is also one of the strengths of BITs. The FET clauses will be violated if the host State acts in a way that is 'arbitrary, grossly unfair, unjust or idiosyncratic' or engages in 'discriminatory[77] conduct or acts in a way that is inconsistent with the investor's legitimate expectations.[78] There may also be requirements to maintain a stable business environment that is consistent with reasonable investor expectations.[79]

The obligation to provide 'full protection and security' is concerned with failure of the State to provide physical protection for the investors and protect them from actual

[74] Salacuse. Jeswald W. 2010. The Emerging Global Regime for Investment, 51 Harvard International LJ, 471-472 (2010).
[75] Wong, Jarrod. 2006. Umbrella Clauses in Bilateral Investment Treaties, Of Breaches of Contract, Treaty Violations and the Divide between the Developed and the Developing Countries in Foreign Investment Disputes, 14 Geo Mason L. Rev, 135, 142-143.
[76] Jones, Doug. 2013. Investor-State Arbitration in Times of Crisis. National Law School of India Review, Vol. 25, No. 1 (2013), pp. 27-61
[77] Waste Management, Ine v. Mexico (No2), at 1 98 (ICSID Case No. ARB (AF)/00/Award of 30 April 2004).
[78] Técnicas Medioambientales Teemed SA v. Mexico, at 1 154 (ICSID Case No.ARB(AF)/00/2, Award of 29 May 2003); see also , MTD Equity Sdn Bhd and MTD Chile SA v. Chile, 11 111-15 (ICSID Case No ARB/01/7, Award of 25 May 2004); Saluka Investments BV v. Czech Republic, at H 300-8 (UNCITRAL Arbitration, Partial Award of 17 March 2006).
[79] LG&E v. Argentina, ICSID Award, May 29, 2003)

damage, either caused by State officials, or of others where the State has failed to exercise due diligence.[80] However, it has also been interpreted as extending beyond mere physical protection of the host State to provide legal protection for the investor's rights.[81] In all instances, States should ensure that they have exhausted all measures that are not harmful to foreign investors before they take such actions, because in the event of an investor-State dispute arising later, they will need to show evidence that the harmful measure was the only option available in order to run a successful defence. As already noted, according to the Draft Articles, 'only option available' means that the defense must not be invoked if a State has other lawful means to preserve the interest, even if those means are 'more costly or less convenient'.[82] Shavell (1995) mentions three advantages of arbitration for the parties concerned: (1) it may lower the costs and risks of dispute resolution because resort to arbitration is likely to reduce the total costs of dispute resolution and to avoid exposure to unreliable jury verdicts; (2) it may create better incentives for parties to a contract to perform, thus increasing the joint value that the parties' relationship produces, because of the greater accuracy of private dispute resolution,[83] and (3) it may reduce the number of trials because the lower costs of arbitration should incentivise parties to resort to arbitration rather than going to trial.[84]

These international law precepts and precepts of investment laws provide the State and the investors with great discernment on mobilising BITs and IIAs as well as other international agreements to sustain the landscape of investment regimes whether through multilateral or regional, economic bloc. As Jones (2013) pointed out, investors have variety of protections under the treaties and international customary law which have been outlined above to base their claims upon. The success of their claim is dependent upon their capability to meet the threshold of various standards of international law. [85] Aside from these ISDS mechanisms, investors may also resort to

[80] Asian Agricultural Products, LTD vs Sri Lanka (ICSID Award, June 27, 1990)
[81] Jones, Doug. 2013. Investor-State Arbitration in Times of Crisis. National Law School of India Review, Vol. 25, No. 1 (2013), pp. 27-61
[82] ibid
[83] Shavell, Steven. 1995. Alternative Dispute Resolution: An Economic Analysis, 24 J. LEGAL STUD. 1 (1995).
[84] ibid
[85] Jones, Doug. 2013. Investor-State Arbitration in Times of Crisis. National Law School of India Review, Vol. 25, No. 1 (2013), pp. 27-61

"diplomatic protection" or inter-state claim whereby the investor's home State can bring a claim on behalf of the investor against the host State before the International Court of Justice is available, however, it is rarely used by States. Investors may also consider suing States through alternative regimes, such as under WTO law or a FTA services chapter. In these manner, private investors who possess sufficient influence can lobby their governments to initiate State-to-State dispute settlement proceedings at the WTO and under an FTA services chapter in order to circumvent unfavourable developments in investment law. However, the limitations of these options include home State to retain discretion and control over the claims process, and the process is less likely to be invoked for smaller investors or projects.

It must be emphasised also that investors, especially those that do not have a great deal of political influence or have less significant investments, have little recourse against the actions of host States above and beyond investor-State arbitration. [86] While it is indeed true that there are wide avenues for the spring of investment opportunities as the world crunched with the growing globalisation and interdependent global trade between the Global North and South, the intricacies of the trade and commercial disputes appurtenant with it can, nevertheless, be handled by the available ISDS mechanisms. However, this is with a caveat that it will be utilised in accordance with the framework of international law, international customary laws, and state sovereignty without compromising, on the other hand, the rights of foreign investors, party autonomy and mutuality principles between and among the contracting parties. Indeed, the journey towards a vibrant investment arbitration in the Global South may be a long winding road, however, its development may carry on as the world sails towards its goal.

III. CRITICISM OR WEAKNESSES OF ISA EMBODIED IN BITs AND IIAs

While there are huge opportunities involved in BRI investments, the emergence of arbitral institutions and its corresponding adaptations with the growing times abound everywhere. These include the recent updating of SIAC investment arbitration rules in January 2017, the establishment of Belt and Road Commission by International

[86] ibid

Chamber of Commerce (ICC) in March 2018, and HKIAC's Belt and Road Advisory Committee in April 2018. However, it is noteworthy that the existing ISDS mechanisms and investor-state arbitration (ISA) also suffer from backlash and need further improvement. The critics of ISDS argued that BITs unduly favour the interests of investors. The expropriation and FET provisions of BITs have resulted in States being forced to compensate investors, even for legitimate and public interest regulatory change in times of crisis, including environmental and social regulations. Further, ISDS can limit a country's ability to efficiently restructure following a financial crisis since ISDS mechanisms can allow individual bond to arbitrate against a host State attempting to legitimately rescue its economy.[87]

The ISA system has been under serious attack from a variety of parties since 2007 because of the "legitimacy crisis".[88] Some scholars claim that the ISA system has a pro-investor bias and puts States in a disadvantaged position.[89] These criticisms are based on the observations that (1) the current international investment law regime is lopsided with extremely unequal terms of agreement imposed on developing countries by their stronger BIT partners;[90] (2) the dissatisfaction of some states with the wide interpretive authority of investment tribunals, which results from the usually vague and open-ended BIT language;[91] and (3) general allegations that the outcomes of the ISA proceedings are biased in favour of investors.[92] Second, developing states argue that the ICSID system particularly favours investors from the developed world and disadvantages developing states, and is biased in favour of the Global North.[93] Third, many also consider the ISA system to be elitist: arbitrators are usually white, male, and from the developed North.[94] In view of the state involvement in ISA, there is a

[87] Sovereign Debt Restructuring and International Investment Agreements, HA Issues Note, UNCTAD, No. 2 (July 2011).
[88] Riesenberg, David P. Note, Fee-Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule, 60 DUKE L.J. 977, 986–87 (2011).
[89] ICSID in Crisis: Straight-Jacket or Investment Protection?, BRETTON WOODS PROJECT (July 10, 2009), https://www.brettonwoodsproject.org/2009/07/art-564878.
[90] Chung, Olivia. 2007. Note, The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration, 47 VA. J. INT'L L. 953, 962 (2007).
[91] Giest, Alison. 2017. Comment, Interpreting Public Interest Provisions in International Investment Treaties, 18 CHI. J. INT'L L. 321, 330 (2017).
[92] supra, note 39.
[93] Brower & Blanchard, Franck
[94] Eberhardt, Pia & Olivet, Cecillia, 2012. Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fueling an Investment Arbitration Boom, TRANSNAT'L INST. & CORP. EUR. OBSERVATORY, at 36 (Nov. 2012), https://www.tni.org/files/download/ profitingfrominjustice.pdf.

growing sentiment that proceedings should better account for public interests than commercial arbitration, which emphasises the private interests of investors.[95] The rising number of investment claims and the considerable costs of the arbitral process will lead to "regulatory chill."

This refers to the allegation that nation states will not optimally regulate international investors due to fears of having to be the respondent state in investment arbitration.[96] Lastly, given the perception that states' right to regulate is threatened by ISA, some scholars believe that national sovereignty is also diminished.[97] The United Nations Conference on Trade and Development ("UNCTAD"), in its World Investment Report 2015, also summarised the major concerns surrounding the ISA regime. It describes the concerns as follows, *viz*:

> the current mechanism exposes host States to additional legal and financial risks, often unforeseen at point of entering into the IIA and in circumstances beyond clear-cut infringements on private property, without necessarily bringing any benefits in terms of additional FDI flows; that it grants foreign investors more rights as regards dispute settlement than domestic investors; that it can create the risk of a "regulatory chill" on legitimate government policymaking; that it results in inconsistent arbitral awards; and that it is insufficient in terms of ensuring transparency, selecting independent arbitrators, and guaranteeing due process.[98]

Some of these countries claim that the system is dominated by the Western world and does not provide the neutrality and impartiality which it is supposed to have.[99] This bias is traced in the way in which rules of international trade, commerce and

[95] Arcuri, Alessandra & Montanaro, Francesco. 2018. Justice for All: Protecting the Public Interest in Investment Treaties, 59 B.C. L. REV. 2791, 2804 (2018).
[96] Korzun, Vera. 2017. The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs, 50 VAND. J. TRANSNAT'L L. 355, 383 (2017).
[97] Giest, Alison. 2017. Comment, Interpreting Public Interest Provisions in International Investment Treaties, 18 CHI. J. INT'L L. 321, 330 (2017).
[98] ibid.
[99] Hodgson & Campbell, Sonia E. Rolland, The Return of State Remedies in Investor-State Dispute Settlement: Trends in Developing Countries, 49 LOY. U.

investment are crafted, applied and adjudicated between Third World and developed countries or between Third World countries and the interests of world hegemony. Regime bias therefore refers to examining the choices made between alternative ways of crafting legal rules, the meanings ascribed to a particular rule whether in its application by an administrative agency, or at the adjudication stage by a domestic judicial body, or an international tribunal.[100] In this sense, developing countries should consistently contest outcomes adverse to them, with alternatives that serve their best interests, rather than merely focusing on bias as the inevitable outcome of the origin of the rules in industrial economies or to the lopsided nature of the bargaining power of Third World states relative to developed countries or multinational capital.[101]

The issues on legitimacy and transparency on the part of the ISDS mechanisms can best be addressed by having an independent and impartial judge in the arbitral tribunal. According to Faure (2020), if judges come from different regions of the world (and not only the "white" North) a higher degree of acceptability in the developing world could be virtually guaranteed. Decision making could probably be even cheaper and speedier than under the current ad hoc arbitration model.[102]

IV. HARMONISATION OF PUBLIC POLICY EXCEPTION FOR EFFECTIVE ENFORCEMENT OF ARBITRAL AWARDS

Investment disputes are often considered as public in nature because it involves the State as a party, and often involve complex issues of public interest and public policy. This is problematic because private investment tribunals, 'wield enormous power displacing local courts and making decisions about the rules that govern major portions of host country economies and, by extension, their societies'.[103] In order to benefit from foreign investment, States may then, in certain situations, have to

[100] Falk, Stevens & Rajagopal (undated). (said that Third World coalitions like the Non-Aligned Movement, the G-77, and others have lost almost all geopolifical relevance).
[101] Thuo Gathii, James. 2008. Third World Approaches to International Economic Governance; Richard Falk, Stevens, Jacqueline, & Rajagopal, Balakrishnaneds., Routledge 2008; Falk, Stevens & Rajagopal eds.).
[102] Faure, Michael, & Wanli Ma. 2020. Investor-State Arbitration: Economic and Empirical Perspectives, 41 MICH. J. INT'L L. 1 (2020).
[103] Leader S. 2006. Human rights, risks, and new strategies for global investment. J Int Econ Law 9:657–705, p. 684.

compromise their regulatory power. Therefore, 'a delicate balance needs to be struck between the regulatory powers of the host State and the need to legally protect the interests of foreign investors.[104] For a long period, the lack of public interest and strong judicial enforceability kept international arbitration unpopular which ultimately cause negative impact to international commerce. Thus, to promote arbitration and international commerce alive, international community ratifies the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which took a pro-enforcement stand that would be beneficial to investors. In view of this groundbreaking milestone, many countries lauded the New York Convention for it creates predictability in the recognition and enforcement of arbitral awards boosting confidence to investors in international arbitration.

However, the New York Convention also provides a framework for national courts to refuse enforcement of arbitral awards based on "irregularities" related to the status of the award, the conduct of the arbitral proceedings, and validity of the arbitration agreement. It listed 'public policy' as one of the irregularities or grounds for denying the enforcement of arbitral awards. It allows national courts not to give effect to an award that contradicts the fundamental principles of the forum state's legal system.[105] Since the time when the New York Convention took effect, national courts have formulated wide-ranging interpretations of public policy. Among these interpretations, however, it provides an overarching common theme that "public policy exception" serves as a safety zone for the parties to protect public interest by authorising the national courts to decide whether an arbitral award and its recognition or enforcement is contrary to the public policy of the forum State where enforcement is being sought.[106]

[104] Gazzini, T. 2012. Bilateral investment treaties. In: Gazzini T, De Brabandere E (eds) International investment law: the sources of rights and obligations. Martinus Nijhoff, Leiden, pp 99–132, p. 113.
[105] Huseyin Alper Tosun. 2019.Public Policy Concepts in International Arbitration. California Digital Library. University of California.
[106] ibid.

A. PUBLIC POLICY EXCEPTION, MEANING

Public policy exception is considered a safety valve to protect parochial public interest.[107] It is indeed a fluid yet enigmatic thing for it has been an "obstacle to international arbitration procedures particularly in the recognition and enforcement of foreign arbitral awards"[108] as it enables the courts of a country to refuse recognition and enforcement of arbitral awards in the country where their enforcement is sought.[109] Article V(2)(b) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides that the recognition and enforcement of an arbitral award may be refused if a court finds that it would be contrary to the public policy of the forum of the State.[110] The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UNCITRAL Model Law) also contains a similar provision in Article 36(2)(b), which states that an arbitral award may be refused on the grounds that "the recognition or enforcement of the award would be contrary to the public policy of this State."[111] The public policy exception indeed represents a safety net for the unusual situations in which a legal system cannot recognise and enforce an award without undermining its very foundations.[112]

The courts serve as the competent authorities[113] to decide whether the recognition and enforcement of an arbitral award contravenes the forum State's public policy (*lex*

[107] Sammartano, Mauro Rubino. 2001. International Arbitration Law and Practice, 2nd ed. 2001, at 503.
[108] Huseyin Alper Tosun. 2019.Public Policy Concepts in International Arbitration. California Digital Library. University of California.
[109] Hanotiau, Bernard, and Olivier, Caprasse. 2008. Public Policy in International Commercial Arbitration, in Enforcement of Arbitration Agreements and International Arbitral Awards, New York Convention in Practice. (Emmanual Gaillard & Domenico Di Pietro eds., 2008), at 787-828; Cordero-Moss, Giuditta. 2013. International Arbitration is not only International, in International Arbitration: Different Forms and their Features (Giuditta Cordero-Moss eds., 2013), at 19.
[110] Briner, Robert & Hamilton, Virginia. 2008. The History and General Purpose of the Convention, the Creation of an International Standard to Ensure the Effectiveness of Arbitration Agreements and Foreign Arbitral Awards, in Enforcement of Arbitration Agreements and International Arbitral Awards, New York Convention In Practice (Emmanual Gaillard & Domenico Di Pietro eds., 2008), at 3-39.
[111] Art. 34 (2) UNCITRAL Model Law.
[112] Guide to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations Commission on International Trade Law (UNCITRAL) Secretariat. See also Jan Paulsson, The New York Convention in International Practice, Problems of Assimilation, ASA SPECIAL SERIES NO. 9, 100 (1996); Misr Misr Insurance Co. v. Alexandria Shipping Agencies Co, [1991] COURT OF CASSATION, EGYPT.
[113] Kurkela, Matti S, and Turunen, Santtu, 2010. Due Process in international Commercial Arbitration, 2nd Ed, 2010, p. 18.

fori). The Court has the discrete authority *ex officio*[114] to deny enforcement claims.[115] Through time, national courts have already developed varied interpretations and diverse applications of the public policy exception, which have given rise to complications in the enforcement of arbitral awards internationally.[116] Some scholars consider the public policy defense exception as one of the greatest threats,[117] or at least a concerning loophole,[118] for commercial arbitration. However, other scholars noted that the public policy exception in commercial disputes is illusory, that is, almost never succeeding as a defence to the recognition and enforcement of arbitral awards.[119] Courts should review the application of the public policy defence in situations where enforcement would condone unfair and unacceptable outcomes, thus making it more than a theoretical defence.[120] At the end of the day though, the public policy defense has been used narrowly by most courts, which conforms to the Convention's pro-enforcement purpose.[121]

In the Philippines, the Supreme Court ruling in *Mabuhay Holdings Corporation v Sembcorp Logistics Limited, G.R. No. 212734, 5 December 2018*, is a golden development in the field of arbitration for it strengthens the Philippines' pro-pro-enforcement policy. The Court ruled that "[m]ere errors in the interpretation of the law or factual findings would not suffice to warrant refusal of enforcement under the public policy ground. The illegality or immorality of the award must reach a certain threshold such that, enforcement of the same would be against [the Philippines'] fundamental tenets of justice and morality, or it would blatantly be injurious to the public, or the interests of the society."[122]

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[114] ibid
[115] Cole, Richard. 1986. The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards, 1(2) OHIO ST J DISP RESOL. 365 (1986).
[116] Yang, Inae. 2015. A Comparative Review on Substantive Public Policy in International Commercial Arbitration, 70 DISP RESOL J., 49 (2015), at 51.
[117] Junker, Joel R. 1977. The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral *Awards,* CAL. W. INT'L L.J. 228, 229-30 (1977).
[118] supra, note 63
[119] Sanders, Pieter. 1979. A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign *Arbitral Awards,* 13 INT'L L., 270 (1979).
[120] Bouzari, Eloise Henderson. 1995. The Public Policy Exception to Enforcement of International Arbitral Awards, Implications for Post-NAFTA Jurisprudence, 30 TEX. INT'L L. J. 205 (1995), at 218.
[121] Moses; Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974).
[122] Mabuhay Holdings Corporation v Sembcorp Logistics Limited, G.R. No. 212734, 5 December 2018

On the other spectrum, however, the ruling leaves the national courts no power to decide on the issues pertaining to the Article V(1)(c) of the New York Convention particularly the basis of the *kompetenz-kompetenz* principle and the finality of the arbitral tribunal's determination of facts or interpretation of law due to party autonomy. While the international community lauded this Supreme Court ruling as another milestone in the development of the landscape on investment and commercial arbitration, there is still a long road when it comes to its practical applications in the future when similar issue on narrowing the concept of public policy has become the battle point in the domestic arena of the Philippine courts.

B. HARMONISATION OF PUBLIC POLICY

The concept of public policy refers to principles or rules admitted by the legal system of a State. However, it has also something to do with other elements such as similar procedural principles of states, the international nature of the arbitration process, and the consensus within the international community.[123] Some have argued that public policy is derived from "the comparison of the fundamental requirements of national laws and of public international law in particular."[124] According to Gaillard (1999), notwithstanding whether the case in domestic or international, a breach of public policy, as a set of values, cannot be tolerated by the national legal order.[125] The aim of the court is to assess whether the arbitral award is enforceable in the national legal order. As a result, the court should examine the enforcement demand in accordance with the fundamental considerations of its own law, but there is nothing to prevent the court from adopting other instruments inspired from concepts broadly accepted outside of that nation.[126] The international consensus among States becomes concrete when those States agree on international conventions by creating dispute resolution systems. If an award is contrary to these conventions, it justifies refusal of its

[123] Kurkela, Matti S., & Turunen, Santtu. 2010. Due Process in International Commercial Arbitration, 2nd ed. 2010, p. 18
[124] Lalive, Pierre. 1987. Transnational (or Truly International) Public Policy and International Arbitration, in Comparative Arbitration: Practice and Public Policy in Arbitration. Pieter Sanders eds., 1987), at 262-263.
[125] Gaillard, Emmanuel & Savage, John. 1999. Fouchard Gaillard Goldman on International Commercial Arbitration, Gaillard & Savage eds., 1999.
[126] ibid.

recognition and enforcement based on this transnational character of public.[127] In a transnational public policy context, foreign law may become relevant to the law of *lex fori*, where fundamental principles of both forums are "identical to, similar to, or in consensus with the fundamental principles of those of the international legal community."[128] Nevertheless, public policy has been defined as an "unruly horse"[129] by some and "a nebulous, concept that changes from State to State" by others.[130] The Federal Court of Australia stated that "it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in [the] jurisdiction [where enforcement is sought] which enliven this particular statutory exception to enforcement,"[131] viz:

> [T]he scope of the public policy ground of refusal is that the public policy to be applied is that of the jurisdiction in which enforcement is sought, but it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular statutory exception to enforcement. The public policy ground does not reserve to the enforcement court a broad discretion and should not be seen as a catch-all defense of last resort. It should not be used to give effect to parochial and idiosyncratic tendencies of the courts of the enforcement state.[132]

Further, it is not enough to simply categorise the public policy exception as a "mandatory rule" (lois de police) to prevent the enforcement of foreign arbitral awards.[133] Every single public policy rule is mandatory, but not every mandatory rule

[127] Mayer, Pierre & Sheppard, Audley. 2003. Sheppard, Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards,19(2) ARB. INT'L. 217 (2003).
[128] ibid
[129] Richardson v Mellish (1824) 2 Bing 229, 252 (Burrough J), retrieved from Luke Villiers, *Breaking in the* "Unruly Horse": The Status of Mandatory rules of Law as a Public Policy Basis for the Non-Enforcement of *Arbitral Awards,* 18 AUSTL. INT'L L. J., 156 (2011), at 161.
[130] Okekeifere, Andrew I. 1999. Public Policy and Arbitrability under the UNCITRAL Model Law, 2(2) INT. A.L.R., 70 (1999).
[131] Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd., Federal Court, Australia, 23 March 2012, retrieved from Albert Monichio, Luke Nottage & Diana Hu, International Arbitration in Australia: Elected Case Notes and Trends, 19 AUSTL INT'L J., 181(2012), at 203.
[132] ibid.
[133] Kurkela & Turunen, supra,

forms part of public policy.[134] However, in the arbitral proceedings, the arbitrator should not ignore the mandatory rules of the legal system of a choice of law by the parties.[135] Tosun (2019) emphasised that the public policy exception has the potential to create great unpredictability and the loss of confidence in the arbitral process depending on how it is interpreted. For instance, if it is interpreted broadly to include statutory violations, then the enforcement of arbitral awards become less predictable and more tied to the forum state's domestic laws. If, on the other hand, public policy is interpreted as violating some more universal moral standard, then the enforcement of arbitral awards will become more predictable. He further recommends that a narrower approach to public policy is necessary, so that arbitral awards do not become subject to the many unique laws of different forums. The point of international considering that the goal of international arbitration is to move away from domestication to a more standard international set of norms in the dispute resolution process.[136]

V. ESTABLISHING MULTILATERAL INVESTMENT COURT (MIC)

Taking it from the perspective of China"s BRI and its intention to establish a regional economic hub in Asia and beyond, it is viewed that the tentacles of transnational public policy creep in showing the praxis of the normative behaviour of "one size does not fit all" agenda in the field of investment arbitration. It is theorised in this paper that the harmonisation of public policy exceptions can be made by the establishing a multilateral investment court in Asia to cater on the burgeoning transnational investments disputes and Belt and Roads Initiative (BIR). In this manner, the aggrieved contracting parties (i.e., state parties, private investors) will have an appellate system for the foreign arbitral awards in the midst of the legal pluralistic society.

[134] Sheppard, Audley. 2003. Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral *Awards*,19(2) ARB. INT'L. 217 (2003), at 231.
[135] Sammartano, Mauro Rubino. 2001. International Arbitration Law and Practice, 2nd ed. 2001, at 503.
[136] Huseyin Alper Tosun. 2019. Public Policy Concepts in International Arbitration. California Digital Library. University of California.

Furner (1958) stressed that the enforcement through New York Convention has a potential problem of uncertainty because of a reciprocity reservation under Article I(3)[137] "which provides that [a]ny State may … declare that it will [only] apply the [New York] Convention to the recognition and enforcement of awards made only in the territory of another Contracting State."[138] The New York Convention requires the country where the arbitral award is made to give consent to be bound under the Convention in order for the rules of the New York Convention to apply.[139] To ensure enforcement of the arbitral award, the party involved should elect to arbitrate in a country that is a signatory to the New York Convention.[140] For example, China would only enforce arbitral awards made in countries that recognise arbitral awards made in China.[141] The same is true with Bulgaria which would enforce the award made in non-signatory countries if those countries would enforce arbitration made in Bulgaria.[142] Cuba would enforce the arbitration if there is a signed mutual reciprocity agreement between the two parties in the dispute.[143] Inconsistent application of the reciprocity principle, as it relates to the, enforcement of the New York Convention creates a barrier to enforce arbitration awards and increases legal uncertainty for parties involved.[144] In the existing structure, the parties need to appeal to the court in the place where the arbitration was held.[145] There is inconsistency regarding the national court's power over annulment of arbitral awards made outside of their territory.[146]

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[137] Furner, Courtney. 1958. Uncertainty Regarding the Existence and Future of the Reciprocity Reservation Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Terralex Connections, Dec. 6, 2018.
[138] New York Convention, Art. I(3).
[139] supra, note 88.
[140] Caron, David and Caplan, Lee & Lee M. Caplan, UNCITRAL Arbitration Rules: A Commentary.
[141] Wu, Alfre, et al., 2019. Belt and Road Initiative Managing Disputes Risk When Working with States and SOEs in Infrastructure and Construction Projects, NORTON ROSE FULBRIGHT (May 2019), https:// www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/international-arbitration-report—- issue-12.pdf?la=en&revision=2af60927-1ed7-46ae-b317-5af59b72c270.
[142] Furner, supra, note 88
[143] ibid
[144] ibid
[145] Stothard, & Jenna Anne de Jong. 2017. Request for Reconsideration in ICSID and UNCITRAL Arbitrations, NORTON ROSE FULBRIGHT (June 2017), https://www.nortonrosefulbright.com/en/knowledge/publications/5fc4ee47/requests-for-reconsideration-in-icsid-and-uncitral-arbitrations.
[146] Hamid, Gharavi. The International Effectiveness of the Annulment of an Arbitral Award.

As may be mirrored from the foregoing perspectives, it is concluded that the establishment of a multilateral investment court (MIC) is a good platform to harmonise the public policy exception. Zárate (2019) agrees with the creation of MIC provided that it follows democratic principles. It is believed that the MIC will pave the way to address the issue on legitimacy and transparency of foreign arbitral award of arbitral institutions as it bespeaks of the harmonised public policy exceptions that often becomes a ground for the non-recognition and non-enforcement of foreign arbitral awards.[147]

IX. CONCLUSION AND RECOMMENDATION

Considering that China's BRI does not exclusively rely on BITs and IIAs as ISDS mechanisms but instead extends to the soft norm tool of Memorandum of Understanding (MOU) applying the ancient Chinese philosophy *tianxia* (all under heaven) with other actors such as "state-directed development and commercial banks" (which under international law has no legal binding force compared to BITs and IIAs), this type of ISDS mechanism has a huge impact on the recognition and enforcement of foreign arbitral awards. It has deep implications on public policy exception, which is an amorphous soft norm that can be a contentious issue when it comes to recognition and enforcement of arbitral awards. Thus, there is a need for the institutionalisation of solid legal framework for the investment state arbitration system that is independent of the BITs and IIAs to be signed and negotiated by State parties and investors. Until and unless domestic and international space promulgated such institutional infrastructure to enliven the market without transgressing the Westphalian notion of state sovereignty and the social deficits concomitant with the BITs and IIAs, neighbouring Asian countries and the participating APEC members would be braver enough to embark on this new game of the Belt Road and Silk Road Initiative. State and foreign investors are certainly eyeing on investor-state arbitration mechanisms that would give them the best advantageous positions or at the least, the better Solomonic solution of the game, as well as a pro-enforcement environment as spotlights for the success of foreign investment.

[147] Zárate, José Manuel Alvarez. 2019. Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?. Investment Policy Brief. Vol. 18. June 2019.

The recent Philippine Supreme Court ruling in *Mabuhay* case was indeed a great prelude, though the long road is not over yet as there are still ramifications that need to be filled and addressed. Success is not only the collaborative effort of the private sector and foreign investment firms but also the government in order to adapt with the changing landscapes of investment arbitration in the domestic and international sphere and attract foreign investments to trickle the fruits of development in the remotest and far flung areas of the Philippines. It is further recommended that the United Nations adopt the establishment of the multilateral investment court in order to foster legitimacy and transparency among arbitral tribunals and therefore, address the issues on the malleable and amorphous nature of public policy to promote not only the economic interest of the State parties and foreign investors but also the sustainable development of the people.

References

A. Literature

Arase, David. 2015. China's Two Silk Roads Initiative: What it Means for Southeast Asia. Southeast Asian Affairs. Yushof Ishak Institute. https://www.jstor.org/stable/44112796

Arcuri, Alessandra & Montanaro, Francesco. 2018. Justice for All: Protecting the Public Interest in Investment Treaties, 59 B.C. L. REV. 2791, 2804 (2018).

Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v.Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November, 2005, para. 102.

Bouzari, Eloise Henderson. 1995. The Public Policy Exception to Enforcement of International Arbitral Awards, Implications for Post-NAFTA Jurisprudence, 30 TEX. INT'L L. J. 205 (1995), at 218.

Briner, Robert & Hamilton, Virginia. 2008. The History and General Purpose of the Convention, the Creation of an International Standard to Ensure the Effectiveness of Arbitration Agreements and Foreign Arbitral Awards, in Enforcement of Arbitration Agreements and International Arbitral Awards, New York Convention In Practice (Emmanual Gaillard & Domenico Di Pietro eds., 2008), at 3-39.

Caron, David and Caplan, Lee & Lee M. Caplan, UNCITRAL Arbitration Rules: A Commentary.

Chaisse, Julien. 2013. Investment Claims against Asian States-- a legal analysis of the statistics, trends and prospects. Centre for Financial Regulation. Working Paper No. 14. October 2013. Chinese University of Hongkong Faculty of Law.

Chaisse, Julien, and M. Matsushita. 2013. "Maintaining the WTO's Supremacy in the International Trade Order: A Proposal toRefine and Revise the Role of the Trade Policy Review Mechanism", *Journal of International Economic Law* 16, no. 1 (22 January, 2013): 9–36, doi:10.1093/jiel/jgs043.

Chung, Olivia . 2007. Note, The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration, 47 VA. J. INT'L L. 953, 962 (2007).

Cole, Richard. 1986. The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards, 1(2) OHIO ST J DISP RESOL. 365 (1986).

Eberhardt, Pia & Olivet, Cecillia, 2012. Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fueling an Investment Arbitration Boom, TRANSNAT'L INST. & CORP. EUR. OBSERVATORY, at 36 (Nov. 2012), https://www.tni.org/files/download/ profitingfrominjustice.pdf.

Faure, Michael, & Wanli Ma. 2020. Investor-State Arbitration: Economic and Empirical Perspectives, 41 MICH. J. INT'L L. 1 (2020).

Franck, Susan D. 2005. The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 Fordham L. Rev. 1521 (2005). Falk, Stevens & Rajagopal, Rajagopal

Furner, Courtney. 2018. Uncertainty Regarding the Existence and Future of the Reciprocity Reservation Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Terralex Connections, Dec. 6, 2018.

Gaillard, Emmanuel & Savage, John. 1999. Fouchard Gaillard Goldman on International Commercial Arbitration, Gaillard & Savage eds., 1999.

Gazzini, T. 2012. Bilateral investment treaties. In: Gazzini T, De Brabandere E (eds) International investment law: the sources of rights and obligations. Martinus Nijhoff, Leiden, pp 99–132, p. 113.

Giest, Alison. 2017. Comment, Interpreting Public Interest Provisions in International Investment Treaties, 18 CHI. J. INT'L L. 321, 330 (2017).

Grimmer, Sarah & Charemi, Christina. 2017. Dispute Resolution along the and Road, GLOBAL ARB. REV. (May 22, 2017),

Hamid, Gharavi. The International Effectiveness of the Annulment of an Arbitral Award.

Hanotiau, Bernard, and Olivier, Caprasse. 2008. Public Policy in International Commercial Arbitration, in Enforcement of Arbitration Agreements and International Arbitral Awards, New York Convention in Practice. (Emmanual Gaillard & Domenico Di Pietro eds., 2008), at 787-828; Cordero-Moss, Giuditta. 2013. International Arbitration is not only International, in International Arbitration: Different Forms and their Features (Giuditta Cordero-Moss eds., 2013), at 19.

Hodgson & Campbell, Sonia E. Rolland, The Return of State Remedies in Investor-State Dispute Settlement: Trends in Developing Countries, 49 LOY. U.

Hui Lu, et al., China Belt and Road Initiative 2 (Rand Europe, 2018)

Huseyin Alper Tosun. 2019. Public Policy Concepts in International Arbitration. California Digital Library. University of California.

Jones, Doug. 2013. Investor-State Arbitration in Times of Crisis. National Law School of India Review, Vol. 25, No. 1 (2013), pp. 27-61

Junker, Joel R. 1977. The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral *Awards,* CAL. W. INT'L L.J. 228, 229-30 (1977).

Korzun, Vera. 2017. The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs, 50 VAND. J. TRANSNAT'L L. 355, 383 (2017).

Kurkela, Matti S., & Turunen, Santtu. 2010. Due Process in International Commercial Arbitration, 2nd ed. 2010, p. 18

Lalive, Pierre. 1987. Transnational (or Truly International) Public Policy and International Arbitration, in Comparative Arbitration: Practice and Public Policy in Arbitration. Pieter Sanders eds., 1987), at 262-263.

Leader S. 2006. Human rights, risks, and new strategies for global investment. J Int Econ Law 9:657–705, p. 684.

Mayer, Maximillian. 2018. How history is being rewritten for China's Belt and Road Initiative. International Affairs Blog. https://medium.com/international-affairs-blog/how-history-is-being-rewritten-for-chinas-belt-and-road-initiative-414e0b98c36 (accessed on May 4, 2020)

Mayer, Pierre & Sheppard, Audley. 2003. Sheppard, Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards,19(2) ARB. INT'L. 217 (2003).

McConnaughay, Philip J., and Ginsburg, Thomas B. 2006. Arbitration in the Philippines, Chapter 7, International Commercial Arbitration in Asia, 2nd Edition.

Norton, Patrick M. 2018. China's Belt and Road Initiative: Challenges for Arbitration in Asia. U. PA Asian Law Review.

Okekeifere, Andrew I. 1999. Public Policy and Arbitrability under the UNCITRAL Model Law, 2(2) INT. A.L.R., 70 (1999).

Rafols, Roy Joseph M. 1984. Sovereign Immunity: Comparative Perspective. Ateneo Law Journal. Vol. XXIX.

Riesenberg, David P. 2011. Note, Fee-Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule, 60 DUKE L.J. 977, 986–87 (2011).

Salacuse, Jeswald W. 2010. "The Emerging Global Regime for Investment", 51 *Harvard International Law Journal*,427–472 (2010) at 446.

Sanders, Pieter. 1979. A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign *Arbitral Awards,* 13 INT'L L., 270 (1979).

Sammartano, Mauro Rubino. 2001. International Arbitration Law and Practice, 2nd ed. 2001, at 503.

Shavell, Steven. 1995. Alternative Dispute Resolution: An Economic Analysis, 24 J. LEGAL STUD. 1 (1995).

Sheppard, Audley. 2003. Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral *Awards*,19(2) ARB. INT'L. 217 (2003), at 231.

Stothard, & Jenna Anne de Jong. 2017. Request for Reconsideration in ICSID and UNCITRAL Arbitrations, NORTON ROSE FULBRIGHT (June 2017), https://www.nortonrosefulbright.com/en/knowledge/publications/5fc4ee47/requests-for-reconsideration-in-icsid-and-uncitral-arbitrations.

Thuo Gathii, James. 2008. Third World Approaches to International Economic Governance; Richard Falk, Stevens, Jacqueline, & Rajagopal, Balakrishnaneds., Routledge 2008; Falk, Stevens & Rajagopal eds.).

Wang, Jie. 2009. Investor-State Arbitration: Where Does China Stand? 32 Suffolk Transnat'l L. Rev. 496, 501.

Wang, Michael, and Chow, Geoffrey. 2018. Introduction to New Silk Road-One Belt One Road Initiative. https://www.researchgate.net/publication/333390269_Introduction_to_New_Silk_Road-One_Belt_One_Road_Initiative (accessed on May 4, 2020).

Wong, Jarrod. 2006. Umbrella Clauses in Bilateral Investment Treaties, Of Breaches of Contract, Treaty Violations and the Divide between the Developed and the Developing Countries in Foreign Investment Disputes, 14 Geo Mason L. Rev, 135, 142-143.

Wu, Alfre, et al., 2019. Belt and Road Initiative Managing Disputes Risk When Working with States and SOEs in Infrastructure and Construction Projects, NORTON ROSE FULBRIGHT (May 2019), https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-

pdfs/international-arbitration-report—-issue-12.pdf?la=en&revision=2af60927-1ed7-46ae-b317-5af59b72c270.

Xi, J., 2017a, page 5, see also OECD, Business and Finance Outlook, 2018, p. 3

Yang, Inae. 2015. A Comparative Review on Substantive Public Policy in International Commercial Arbitration, 70 DISP RESOL J., 49 (2015), at 51.

Zárate, José Manuel Alvarez. 2019. Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?. Investment Policy Brief. Vol. 18. June 2019.

B. Reports/Documents

United Nations Conference on Trade and Development, No. 2. June 2013

Action Plan on the Belt and Road Initiative, St. Council China, March 30, 2015)

Transnational Dispute Management, 2017.

National Economic and Development Authority (NEDA); see alsohttps://business.inquirer.net/296539/covid-19-impact-govt-to-review-build-build-build-project-list (accessed on April 1, 2020)

U.N. Conference on Trade and Development, Investor–State Disputes Arising from Investment Treaties: A Review, at 3–4, U.N. Doc. UNCTAD/ITE/IIT/2005/4 (Feb. 2006).

UNCTAD. 2019. Developing countries in Asia receive more than $500 billion in investments.

UNCTAD.World Investment Report 2019 Special Economic Zones

International ArbitrationStatistics 2016—Busy Times for Arbitral Institutions, GLOBAL ARB. NEWS (Jun.26, 2017), www.globalarbitrationnews.com [https://perma.cc/9HVW-RJRC].Statistics for the individual arbitral institutions may be found on their websites: HONG KONG INTERNATIONAL ARBITRATION CENTRE, www.hkiac.org[https://perma.cc/PE9T-7JKU]; SINGAPORE INTERNATIONAL ARBITRATIONCENTRE, www.siac.org.sg [https://perma.cc/AKP5-W45C].

International Arbitration Statistics; CHINA INTERNATIONAL,ECONOMIC AND TRADE ARBITRATION COMMISSION, [https://perma.cc/RHL3-6NA4].

Improving the System of Investor–State Dispute Settlement: An Overview dated Dec. 12, 2015.

China-Related Investment Arbitrations: Three Recent Developments, HERBERT SMITH FREEHILLS dated July 17, 2017, https://hsfnotes.com/arbitration/2017/07/17/china-related-investment-arbitrations-three-recentdevelopments/.

China's BIT with Mozambique of 2001 (Art. 7.3.)

Sovereign Debt Restructuring and International Investment Agreements , HA Issues Note, UNCTAD, No. 2 (July 2011).

ICSID in Crisis: Straight-Jacket or Investment Protection?, BRETTON WOODS PROJECT (July 10, 2009), https://www.brettonwoodsproject.org/2009/07/art-564878.

New York Convention, Art. I(3).

Art. 34 (2) UNCITRAL Model Law.

Guide to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations Commission on International Trade Law (UNCITRAL) Secretariat. See also Jan Paulsson, The New York Convention in International

Practice, Problems of Assimilation, ASA SPECIAL SERIES NO. 9, 100 (1996); Misr Misr Insurance Co. v. Alexandria Shipping Agencies Co, [1991] COURT OF CASSATION, EGYPT.

C. Cases

Emilio Agustín Maffezini vs Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January, 2000.

Iberdrola Energia S.A. v. Republic of Guatemala, ICSID Case No. ARB/09/5, Award, 17 August,

Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, 2 July, 2013, para. 6.2.9.

Mabuhay Holdings Corporation v Sembcorp Logistics Limited, , G.R. No. 212734, 5 December 2018

Moses, Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974).

Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic,ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July, 2006, para. 41.

Pan American Energy vs. Argentina, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July, 2006, para. 41.

Richardson v Mellish (1824) 2 Bing 229, 252 (Burrough J), retrieved from Luke Villiers, *Breaking in the* "Unruly Horse": The Status of Mandatory rules of Law as a Public Policy Basis for the Non-Enforcement of *Arbitral Awards,* 18 AUSTL. INT'L L. J., 156 (2011), at 161.

Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd., Federal Court, Australia, 23 March 2012, retrieved from Albert Monichio, Luke Nottage & Diana Hu, International Arbitration in Australia: Elected Case Notes and Trends, 19 AUSTL INT'L J., 181(2012), at 203.

D. **Website**

https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2112 (accessed on April 30, 2020)

Recognition and Enforcement—ICSID Convention Arbitration, INT'L CTR. FOR SETTLEMENT INV.DISP., https://icsid.worldbank.org/en/Pages/process/Recognition-and-Enforcement-Convention-Arbitration.aspx

Process Overview, INT'L CTR. FOR SETTLEMENT INV. DISP., https://icsid.worldbank.org/en/pagesprocess/overview.aspx (accessed on May 4, 2020)

https://www.eccp.com/events/?id=430 (accessed on May 1, 2020)

https://www.expertguides.com/articles/one-belt-one-road-construction-and-investor-risks-anddisputes