

**Arbitration Under International Investment Agreements:
A Guide to the Key Issues**

Edited by: Katia Yannaca-Small
ISBN13: 9780195340693, ISBN: 0195340698
Published: May 2010, Oxford University Press USA
Country of Publication: USA, Binding: Hardback
Price: £135.00 (available with discount, for TDM/OGEMID members only, contact us for details)

Chapter 8

“Equality of Arms” in Investment Arbitration: Procedural Challenges*

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INTRODUCTION

“Equality of arms” is a foundation principle of investment arbitration procedure. A government sued on the basis of an investment treaty, signed to encourage foreign and private investment by promising effective protection, should prosecute its case vigorously but within the framework of the principles of “good faith” arbitration,¹ the applicable

* This chapter is drawn from a longer one prepared for this book by Thomas W. Wälde at the time of his tragic death, which cut short extensive discussion of editorial changes. Therefore, the editor takes responsibility for any possible departures from his intended meaning. The chapter, in turn, was based on a presentation made at an IHEI–University of Paris II colloquium in April 2008. A disclosure is necessary: Thomas Wälde reviewed, for Claimant, the state of international procedural principles to deal with the extensive interception of e-mail between client and international counsel in the pending *Libananco v. Turkey* case and advised in several other cases where electronic interception by Respondent against Claimants was practiced. The chapter identifies generically situations of arbitral misconduct specific to states and possible procedural remedies. This chapter and a forthcoming article by Dr Abba Kolo on witness intimidation in investment disputes cross-fertilized each other. Professor Wälde expressed his gratitude to numerous commentators on OGEMID for highlighting specific situations and cross-references in response to his query posted in August 2008, with particular thanks to Judge Stephen Schwebel, Dr Chester Brown, and Dr Andres Rigo.

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1 The duty to arbitrate in good faith can be inferred from the Preamble of the Vienna Convention on the Law of Treaties: “Every treaty in force is binding upon the parties to it and must be performed in good faith.” Also the ILC Model Rules on Arbitral Procedure, 1958: “An undertaking to adjudicate “constitutes a legal obligation which must be carried out in good faith”.

arbitration rules, and with respect to “equality of arms.” However, such self-restraint is difficult for some governments, particularly if the investment dispute is seen as a domestic political risk, if the government is used to controlling internal adjudication directly or indirectly, and if there is not a clear internal separation of powers between the dual roles of the government as contracting and dispute party on one hand, and as sovereign, regulator, and “owner” of a massive machinery of government on the other.

This chapter looks at some of the ways “equality of arms” can be impaired by abuse of a Respondent State’s resources and powers and the means available to arbitral tribunals to redress the balance. This is a relatively new issue in international arbitration, and this chapter seeks to develop the major approaches, concepts, and principles for tribunals and counsel for managing this problem.

It also looks, in passing, at other issues which may affect equality of arms in investment arbitration: intervention by *amicus curiae* and measures to enhance public access to the procedure.

GOVERNMENTS COMPARED TO OTHER PARTIES WHO MAY ENGAGE IN MISCONDUCT

While particular types of litigation misconduct may more frequently be engaged in by States, one needs to bear in mind that a good deal of such misconduct can be, and at times is, committed by private parties. Forgery and concealment of documents, illegal surveillance of communications (mail, phone, e-mail, and computer hacking), intimidation of the participants in arbitration (arbitrators, party representatives, counsel, experts and witnesses), lies, and false testimony are not reserved for States only.² Arbitration against or between business oligarchs in countries with an underdeveloped system of “rule of law” seems often to involve the use of private detectives to spy on and sometimes visibly follow arbitrators, either to intimidate them or to find evidence for suspected corruption; eavesdropping; threatening witnesses; and forgery, including forged “evidence” of arbitrator corruption.³

V. Veeder, *The Lawyer’s Duty to arbitrate in Good faith*, 18 *ARB. INT’L* (2001) 431, 438; *Methanex v. U.S.*: “In the tribunal’s view, the Disputing Parties each owed in this arbitration a general legal duty to the other and to the tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of equal treatment and procedural fairness being also required by Article 15(1) of the UNCITRAL Rules”, Final Award, August 3, 2005, para. 54; American Law Institute/UNIDROIT Principles of Transnational Civil Procedure, Art. 11.2: “The parties share with the [tribunal] the responsibility to promote a fair, efficient and reasonably speedy resolution of the proceeding. The parties must refrain from procedural abuse. . . .”

2 Bernard Hanotiau, *Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings*, in *INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS*, ICCA Congress Series No. 11, Kluwer, 2003, pp. 261–87.

3 See for instance the *PETREC* case (against NNPC) which reportedly involved both fabrication of forged documents purportedly showing evidence of arbitrator corruption and (at least) telephone surveillance, *Gulf Petro Trading Co., Inc. v. Nigerian Nat’l Petrol. Corp.*, CA 5 (Tex)

But some governments, particularly in authoritarian systems with weak “rule of law,” find it difficult to refrain from using the many means at their disposal to frustrate the arbitration or steer it in their favor. Pierre Lalive⁴ noted that a State or State-controlled entity may have “difficulties to accept a basic tenet of arbitral procedure, i.e. the principle of equality of the parties.”⁵ Politically, investment disputes are sensitive, and they may involve actions by a new government to disown or frustrate agreements made by prior governments⁶ and strong political condemnation of an earlier government’s dealings with foreign businesses. They may involve the application of public policies important to the government. A loss of such an international arbitration claim can be, therefore, politically very embarrassing. The government, and the particular politicians and civil servants responsible, will therefore be under immense pressure not to lose—at least not during their tenure.⁷

Some governments are particularly prone to deploying the powers of the State in internal disputes, e.g., police, security services, government-controlled press and mass campaigning, tax auditing, environmental compliance control and permitting, travel restrictions, control over postal services, telephones, now Internet and e-mail, and the justice system (prosecution, courts, bailiffs).⁸ Accordingly, there is a certain political logic in the use of such services in investor disputes seen by the Respondent government as creating an internal or external political risk. A classic example of a Chief of State’s active interest in investment disputes is Josef Stalin’s keen interest in the progress of the Lena Goldfields case in the 1930s.⁹

The deployment of bad-faith litigation tactics by a State in investment disputes is substantially different from the use of similar tactics by private litigants. Governments as a rule have more comprehensive and stable machinery at their disposal than a

2008, January 7, 2008, 512 F.3d 742 www.legaloil.com/NewsItem.asp?DocumentIDX=1144303925&Category=news.

- 4 P. Lalive, *Some Threats to International Investment Arbitration*, in 1 ICSID REV. 26, 37 (1986); see also Boivin, *International Arbitration with States: An Overview of the Risks*, 19 J INT’L ARB. 285 (2002); H. Fox, *States and the Undertaking to Arbitration*, 37 ICLQ 1 (1988); K. Hobér, *Arbitration involving States*, in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION 651 ff (Newmann & Hill, 2nd ed. 2008).
- 5 The State, said Lalive, “often finds it hard to adjust to the ‘rules of the game’: it sometimes expects or even requests, directly or indirectly, certain procedural privileges requiring the tribunal to reconcile some flexibility with the fundamental equality of the parties and elementary requirements of justice.” Lalive noted the “dual role” of the State: As contract party (in contractual arbitration) or for purposes of investment promotion by guarantees of protection it promises submission to an adjudicatory regime it does not control; but, as government, sovereign and involved in the domestic political process, it wishes to avoid, evade, frustrate and, most of all, not lose a case initiated by a foreign investor.
- 6 On the political and economic dynamics of investment disputes, see Wälde, *Renegotiating acquired rights in the oil and gas industries: Industry and political cycles meet the rule of law*, 1 J WORLD ENERGY LAW & BUSINESS 55–98 (2008).
- 7 *Ibid.* On the dynamics of state-investor disputes.
- 8 The *Barcelona Traction* case triggered by the then-Franco-ruled government of Spain against a foreign utility investor is an example: J. Brooks, *Annals of Finance*, TDM.
- 9 See the historical vignettes by V. Veeder on Soviet concession disputes, in particular the *Lena Goldfields* Arbitration, *supra* note 1

ruthless “oligarch” to deploy unacceptable means such as intimidation and spying. An oligarch, for example, will have to operate in collusion and under the protection of a State; such protection is by nature unstable. With control of the levers of government, public, formal, legal or secret, the State as a rule will not be disturbed by the existing institutions of justice (police, prosecution, courts); they will be part of its litigation conduct or at least will be persuaded or compelled to tolerate or support it. In case of private litigants, there is at least usually the possibility that such conduct can be managed with the help of the State’s system of justice; but if the State itself is responsible for such conduct, no effective help is available.

It is for these reasons that the authoritative *Tadic v. Prosecutor* judgment¹⁰ required the court to go beyond what domestic courts would normally have to do in such situations and take a proactive role in restoring the equality of arms and not just procedural equality before the tribunal. That distinction is essential; it goes beyond the *audiatur et al. tera pars* principle. The idea of a proactive duty to ensure the equality of arms has emerged out of European Convention on Human Rights (ECHR) jurisprudence. However, the scope and limits of that duty are at present not fully understood or defined.

METHODS OF UNDUE INTERFERENCE

Corruption

The “classic” method of undue influence on arbitration is by corrupting or intimidating the arbitration tribunal, or at least a majority of it.¹¹ But while there have been persistent rumors of corruption of international courts composed of “tenured judges,” there has, so far, been no known case of corruption of an investment tribunal.¹² Perhaps investment tribunal members are more senior and experienced and thus better able to avoid inappropriate appearances. Having their reputation at stake, i.e., their essential professional capital, acts as a powerful incentive against corruption which would be likely to become known in the very collegial but competitive senior international arbitrator community. A professional arbitrator has much more to lose than a one-off

10 <http://www.un.org/icty/tadic/trialc2/judgement/index.htm>.

11 Hanotiau, *supra* note 2, at 262; A. SAYED, *Corruption, in INTERNATIONAL TRADE AND COMMERCIAL ARBITRATION* (2003).

12 In the *PETREC* case (a commercial arbitration), corruption of arbitrators was alleged by the repeatedly losing Claimant but consistently rejected by various national courts; the case seems to have involved forged correspondence with an arbitrator purportedly showing corruption, see *supra* note 3. Hanotiau reports from commercial arbitration—a U.S. case where chairman and counsel shared a hotel room and cases of alleged favoritism—e.g., one-sided listening, ex parte meetings, or “a party-appointed arbitrator having drinks every evening with the party which appointed him”, *supra* note 2, at 263, 264. But these cases seem to involve conduct on the borderline between not appropriate (but not corrupt) behavior on one hand and behavior that is only viewed as inappropriate through the lens of the party that lost a case and thereupon searches for reasons for a challenge. For a view of how bad-faith litigation can “taint” an international adjudication, see the separate opinion by *ad hoc* Judge Y. Fortier in the *Qatar-Bahrain* case, I.C.J., March 16, 2001.

arbitrator or a fixed-term international judge dependent on political support for appointment and reappointment.¹³

Direct or Indirect Pressure on Arbitrators

Direct or indirect pressure on the arbitrators seems, however, much more frequent. Many practitioners report that co-arbitrators, in particular if appointed by government, seem to take instructions, report back, and feel obliged, at least in public, to take positions intended to please their appointing party.¹⁴

Indeed, the alleged partiality of party-appointed arbitrators feeds much of the gossipy backbiting at arbitration conferences. A frequent arbitrator with good standing in the “market” is much less likely to breach the formal rules and expectations of independence and neutrality than a national arbitrator with no prior international practice, in particular one who is a civil servant or otherwise directly dependent on the State.¹⁵ However, the “local” or state-employed or -funded co-arbitrator, being much more dependent on the State, is consequently also much less persuasive within the tribunal.

Much of such influencing will go on informally in the “black box” of communications and relationships between co-arbitrator and the State, with little evidence unless the pressure was exercised in a particularly clumsy and visible way.

13 It is therefore not surprising that it is not easy to find the “national” or “*ad hoc* judge” joining the ICJ’s majority against their sponsoring countries. But note: the very first contentious case in the PCIJ, *S.S. Wimbledon*, Judge Anzilotti voted with the majority against Italy’s position. In the ICJ, Judge Sir Arnold McNair voted against the UK position on jurisdiction in the *Anglo-Iranian Oil Co. Case*. Judge Schwebel voted against positions of the United States a dozen times, including its ultimate positions in *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement*, *Vienna Convention on Consular Relations* (1998), *La Grand* (1999); while dissenting from the judgments of the Court in *Military and Paramilitary Activities in and against Nicaragua*, he voted against various positions in the case of the United States. There also are instances of judges *ad hoc* voting against positions of the State that appointed them: Madame S. Bastid, *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the case concerning the Continental Shelf*; Sir Elihu Lauterpacht, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Yugoslavia*). Van Harten, 182–83, believes “tenured judges” are guaranteed to be more virtuous than professional *ad hoc* arbitrators keen for the next appointment. But it is possible that, in quite narrow markets, the wish and at times need to get reappointed exercises, through competition, reputation, and informal transparency, a much greater discipline for adjudicative integrity. Frequent appointments may thus serve as a continuous discipline.

14 Hanotiau, *supra* note 2, at 264; P. Lalive, *supra* note 4, at 29.

15 Note here the Svea Court of Appeal in the *CME v. Czech Republic* set aside case on the evident self-isolation, continuous leakage of internal tribunal papers (including after the award to support the challenge) to the Respondent and attempts to delay issuance of the CME award in order to ensure that the *Lauder* tribunal’s award was published first by the Czech-appointed co-arbitrator: 42 ILM 811 (2003). Partisan conduct by a party-appointed arbitrator seems to be frequent, in particular if the State has a hold over a national acting as co-arbitrator, i.e., presumably frequent situations that are illustrated by the *Himpurna* case (see below). But the more such partisan conduct is visible, the less it is effective. If questionable behavior within an international court becomes visible to its other members, it is also likely to become ineffectual.

Some States have gone beyond informal persuasion, pressure, and communication with their co-arbitrators. With such States, the professional and honest State-appointed co-arbitrator can be in an impossible situation: fulfil the professional role demanded by the formal rules and the powerful expectations of the arbitration community and risk severe sanctions of a State whose expectations of absolute loyalty and subservience are not met. Jacques Werner reports an arbitration against a State enterprise where one of his co-arbitrators was assassinated after he participated in the arbitration, against a local court injunction.¹⁶ Some of these background elements—authoritarian State, antisuit injunction to disrupt the operation of the tribunal, State enterprise as Respondent—were also present in the well known *Himpurna* case where the State's co-arbitrator tried to participate in the arbitration, against warnings delivered to him at home, only to be met at the airport by the government's security services and compelled to return and thus leave a truncated tribunal to decide.¹⁷ The solution for tribunals has been either to simply take cognizance of such matters and go on with an apparently captive co-arbitrator¹⁸ or, if the government-appointed co-arbitrator refuses to participate or is compelled to stop, to operate as a truncated tribunal.¹⁹

If the Claimant finds evidence of undue pressure (or volunteered subservience) of an arbitrator with respect to the State, it can try to challenge the arbitrator. A successful challenge, however, may allow the State to replace a clumsy appointee with a more competent and thus more persuasive one—so that the opposing party will often not challenge, preferring to leave the other party to be served haplessly by a visibly subservient arbitrator.

16 J. Werner, *The Frailty of the Arbitral Process in Cases Involving Authoritarian States*, 1 J WORLD INVESTMENT 321 (2000); the jailing of the former Secretary-General of CIETAC has been associated by several observers with participation in an arbitration between Pepsi Cola and a Chinese competitor where he agreed with the award; a dissent may have been a safer bet; see J. Paulsson, *Enclaves of Justice*, TDM 1007; Wu Ming, *The Strange Case of Wang Shenchang*, 24 ARB INT'L 63 (2007).

17 *Himpurna California Energy Ltd. (Bermuda) v. Republic of Indonesia* (Final Award, October 16, 1999), 15 MEALEY'S INT'L ARB. REP. A-1 (2000); also *Himpurna v. Indonesia*, Procedural Order No. 7. LOU WELLS, MAKING FOREIGN INVESTMENT SAFE, PROPERTY RIGHTS AND NATIONAL SOVEREIGNTY 232 ff (2007), disputes some aspects of this account as against J. Werner, *When Arbitration Becomes War*, 19 J INTL ARB 7–103 (2000). The different factual accounts by, on one hand, Professor Wells, and, on the other hand, the tribunal awards and arbitration literature, have been the subject of OGEMID discussion in August 2008. But it is not contested that the Indonesian government tried to compel its own co-arbitrator to undermine the arbitration by withdrawing and that he, in the end, withdrew. On the ability of truncated tribunals to decide, see S. Schwebel, in INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS, 61 (Cambridge 1987).

18 That has, according to the author's confidential information, also been the practice of an international court when partiality, or more, of its president was suspected or known to the other judges. The early years of the Iran-U.S. Claims tribunal had instances of inappropriate (including physically violent) behavior by party-appointed judges. These instances illustrate the tremendous tensions under which nationals, appointed by their state, often have to operate.

19 Hanotiau, *supra* note 2.

In addition, if an arbitrator's serious misconduct has deprived one party of a fair hearing, courts have been willing to annul an award.²⁰ The equality of arms as a key component of the "fair hearing" and "integrity of process" is therefore not necessarily compromised by a subservient arbitrator except if the subservience covers the majority or the whole of the tribunal.

There is a question if subservience of arbitrators, including the chair, can arise out of their desire or, in cases of professional arbitrators, their need to be well considered by prospective Claimants and Respondents and, in particular, by the leading international arbitration law firms, the major appointing firms who can have a significant influence over their livelihood. While such dependencies may exist and be a systemic challenge for investment arbitration, parties (both State and Claimant) have ways to defend themselves. They appoint their own arbitrators; co-appoint the chair, if they manage to find consensus; usually have an informal possibility of consultation close to a veto on appointment proposals by some institutions (in particular ICSID); and can challenge co-arbitrators and chairpersons, in particular under the IBA Guidelines.²¹ A substantial disequilibrium of arms is therefore not easy to discern though it may exist in particular situations.

Intimidation of Local and International Counsel, Experts, and Witnesses

Anecdotal reporting indicates that some Respondent States may use the many means at their disposal, sometimes formal but mostly rather informal, to intimidate. While this is less well documented for investment disputes or commercial disputes with State enterprises,²² there have been published reports on the response of authoritarian

20 Hanotiau, *supra* note 2, at 275, with further references; he suggests that challenges based on overt acts of favoritism rarely succeed while *ex parte* communications focusing on the merits may justify the setting aside.

21 IBA Guidelines on Conflict of Interest in International Arbitration, 2004, which include in its "orange" list, Art. 3.1.3, that "[t]he arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties," and Art. 3.3.7: "The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm." The IBA Guidelines are not seen as perfect, they have serious gaps and have been criticized to reflect too much the interests of major law firms (and English barristers' chambers) but they are for investment arbitration probably the closest relevant instrument for providing soft-law standards for conflict of interest requiring disclosure and providing the basis for challenges. They need to be applied together with the older (1987) IBA Rules of Ethics for International Arbitrators. It would make sense to develop, perhaps in a working group between ICSID and the other international arbitration institutions and UNCITRAL an up-to-date set of conflict standards for investment arbitration.

22 The national co-arbitrator's assassination reported by Jacques Werner, or the compulsion of the national co-arbitrator to return home and refrain from participation in a hearing reported for the *Himpurna* case, suggest that if States go so far as to intimidate (and assassinate) their own co-arbitrators, they will be even more likely to intimidate other participants in the arbitration process which are exposed to their power and in a more vulnerable position, see *supra* note 17.

governments to the analogous situation of complaints to the European Court of Human Rights. Party representatives and the other participants in arbitration can be harassed, obstructed, or intimidated through tax auditing and prosecution or permitting (work, residence, visa, etc).²³ Intimidation, surveillance,²⁴ obstruction of the work of counsel, interception of communications have been, and continue to be, reported in cases where foreign companies or no longer politically favored oligarchs are in dispute with now-favored oligarchs, the government, or its State companies.²⁵

While witness and counsel intimidation may have a long tradition in authoritarian States, it has become more acute in a type of investment dispute that has developed fairly recently: claims by an offshore holding company owned or controlled beneficially, in full or in part, by nationals of the host State.²⁶ In such cases, the client's beneficial owners, as residents, may be exposed to the host State's state powers.²⁷

23 Government actions to obstruct recourse to the European Court of Human Rights have included assassination, rape, torture, and physical and psychological intimidation of the complainant, its counsel and its family. M GOLDHABER, A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 125–27 (Rutgers 2007).

24 The *Methanex v. U.S.* tribunal, speculated on such possibility: "It would be wrong for the USA *ex hypothesi* to misuse its intelligence assets to spy on Methanex (and its witnesses) and to introduce into evidence the resulting materials into this arbitration. . . .", Final Award, *supra* note 1, para. 54. For the most recent discussion of extensive interception of client-counsel e-mail, see *Libananco Holdings Co. Limited v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, June 23, 2008, published on <http://ita.law.uvic.ca>. paras. 72 ff.

25 Report by the Rapporteur for the Council of Europe, S. Leutheusser-Schnarrenberger, 2005 (available at <http://assembly.coe.int>); also on TDM.

26 E.g., the situation that underlay the *Tokios Tokelés v. Ukraine* and the *Rompetrol v. Romania* cases. Also *Libananco v. Turkey*, *supra* note 24.

27 That same exposure also exists when the claimant is a foreign national, but he/she (or staff and shareholders) are resident in the host state. See *Biloune v. Ghana*, p. 13: Claimant was arrested and held without charge and then deported (harassment took place before a claim was raised but after the dispute had broken out), award in excerpts available at www.tldb.de; claimant allegations in *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, July 3, 2008, para. 75; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, October 12, 2008, para. 161; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award and Separate Opinion, July 27, 2007, para. 51; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16 Award, July 29, 2008, para. 217; *CCL v. Republic of Kazakhstan*, SCC Case 122/2001, Award, 2004, 1 SIAR 123 (2005), p. 22; *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, para. 46; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005, Award on Jurisdiction, 2007, 5.4.; *Biloune v. Ghana*; ICJ case of *Diallo v. Congo* (www.icj-cij.org). Damages for harassment and intimidation were awarded in *Pope & Talbot Inc. v. The Government of Canada*, Award on Damages, May 31, 2002; *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award, February 6, 2008, para. 290: "physical duress exerted on the executives of the Claimant, was malicious." "[D]uress" was raised in *Trans-Global Petroleum, Inc. v. Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, May 12, 2008, para. 59; *Eureko B.V. v. Republic of Poland*, Partial Award and Dissenting Opinion, August 19, 2005, paras. 236, 237: "[C]ertain of the acts of harassment . . . are disturbing and appear to come close to the line of treaty breach . . . If such actions were to be repeated and sustained, it may be that the responsibility of the government of Poland would be incurred by a failure to

These cases may also have a more local personal and political dimension, evoking greater passions within the government and the controlling politicians than if the dispute is with an essentially foreign party.

Intimidation of local counsel, experts, and witnesses can also occur through more indirect levers of government power, e.g., blacklisting for government, State-owned or State-linked businesses, denial of promotion for academics, and major or minor forms of bureaucratic harassment. These forms of intimidation are difficult to identify; local counsel, experts, and witnesses will be or become unavailable either because they are aware that such intimidation will ensue or because informal signals have been sent to them, warning them to keep a distance from the dispute.²⁸ In most cases, the intimidatory message will come through a “nod and a wink,” a telephone call, a inquiry about the expert or witness’s involvement that appears on the face innocuous but carries a clear message.²⁹ In other cases, it will be through the opening of an apparently unrelated government action, e.g., a tax inquiry or a review of compliance with regulations

prevent them.” The only breach identified in *Pope-Talbot*, (Award on Damages, paras. 68, 69) was administrative harassment of the Claimant after the claim was raised, including a threat of criminal investigation, threats of reduction of export quotas, and misrepresentation to the Minister by the senior civil servant administering the Claimant’s required permitting. Alleged in *Genin and others v. Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, but no finding in favor of claimant.

28 Note Werner’s account of how his government-appointed co-arbitrator advised him that he could no longer afford to participate in the arbitration.

29 In the *Hub Power v. WAPDA* case (N. Kaplan, J INTL ARB. 19 (2002) 245), it is reported that Pakistani generals attended court hearings and interrupted the (domestic court) proceedings to remind the court of the national importance of WAPDA. In both the *Enron* and *Sempra* cases, Argentina obtained an injunction preventing the former Energy Minister and witness for the Claimants from testifying at the hearing on the merits, on the argument that he had violated a confidentiality obligation with the Government. The tribunal admitted his written statements and considered the witness covered by Arts. 21 and 22 of the ICSID Convention., see *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, September 28, 2007, at para. 31; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007, at paras. 141, 142. Another reply mentioned criminal prosecutions raised against Claimant employees as a reprisal for raising an arbitration claim, one in Europe and one in the Middle East (with no further details provided). In *Occidental v. Ecuador*, Claimant alleged that the contract termination was a reprisal for the Claimant’s success against the government in an earlier tax case; in *City Oriente v. Ecuador*, the tribunal considered criminal prosecution against Claimant’s executives as intimidation following the raising of the ICSID claim, *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, November 2007, paras. 64 ff.; Ecuador was ordered to refrain from criminal prosecution for conduct that gave rise to the dispute. One needs to distinguish administrative harassment before a case is raised, e.g., *Azurix v. Argentina*, Award, July 14, 2006, para. 263, on Claimant’s factual submission and tribunal decision (arbitrary measures) at para. 442 from harassment and intimidation that is directly linked to the arbitration procedure itself. But in both cases, the treaties’ obligation of fair and equitable treatment, full protection, and abstention from “arbitrary measures” apply both to the pre-arbitration and the arbitration situation.

through which the message is sent: If you go on, you will be in trouble, and we have the means to get you into trouble.³⁰

Direct or indirect intimidation by a Respondent State is difficult for a tribunal to deal with. First, full evidence will be hard to come by; few witnesses that have been intimidated will want to come forward. The arbitral tribunal will here have to follow the example of the ECHR³¹ and operate a system of adverse inferences and reversal of the burden of proof. It cannot expect the Claimant, in the face of indications of a reasonable probability of intimidation by the State, to provide full proof. As with proving corruption, arbitral tribunals will need to use a system of indicators (“red flags”).³² If the host State is known for using intimidation, and if there are indications that intimidation may have been used, then it should be up to the State to prove that no intimidation was used. Simply referring to its law or internal administrative guidelines which prohibit such conduct is not enough. The issue is not if the State has good laws but if it has managed to get its services to obey them.³³

Second, the tribunal will have to assess whether the unavailability of witnesses and experts or the intimidation of counsel and party representatives is likely to change the equality of arms to the substantial disadvantage of claimant. For example, if an expert (e.g., on local law) comes up with flimsy excuses which may indicate intimidation, that should not be enough if there are sufficient alternatives. But if all possible experts on a relevant issue become unavailable, that would indicate both the possibility of intimidation and serious harm to the ability of the Claimant to prosecute its case.

Within its possibilities, tribunals can try to protect witnesses and experts on the model of criminal and civil procedures in national law, e.g., by hearing *in camera*, videoconferencing, and accepting written testimony if intimidation appears the most plausible and not fully explained cause for the witness’s withdrawal. But its possibilities are much more limited than domestic courts which can rely on its justice system (e.g., witness protection programs).

30 Review of regulatory compliance is particularly effective in countries where the rules are of such a high standard but also contradictory so that noncompliance is universal. Unrealistic rules combined with widely practiced and accepted noncompliance provides the government with a lever to intimidate everybody, see A. LEDENEVA, *HOW RUSSIA REALLY WORKS* 20–25 (Cornell University Press 2006)

31 The European Court of Human Rights has operated a reversal of the burden of proof in the case of physical intimidation; indications (“red flags”) that point toward intimidation were sufficient, and no full proof was required. See Tekim, *ECOHR Report of April 17, 1997*, at para. 199

32 The method of “red flags”—essentially rebuttable presumptions—is often used when the misconduct is typically confidential and hard to prove, e.g., when certain contextual facts suggest corruption, but the very fact cannot be proven, or when they suggest discrimination and harassment of a foreign investor on the behest of a powerful and politically well-connected competitor as in *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1; T. Martin, *International Arbitration and Corruption, An Evolving Standard*, TDM 2004; L. Low and M. Burton, *The OECD, OAS and COE Antibribery Conventions: 2000*, ABA Third Annual Symposium on the Implementation of the OECD Convention, Bruges.

33 On the legal implications of comprehensive noncompliance and nonenforcement of regulation, see S. Hindelang, *No Equals in Wrong? The issue of equality in a state of illegality*, 7 *JWIT* 883 (2006).

If local or international counsel are intimidated or prevented from effectively aiding in the prosecution of the case, the tribunal will have powers to order the Respondent to arrange for travel permits and give credible safe-conduct guarantees or to cease and desist from intimidation and harassment. The tribunal can negotiate with the parties' otherwise flexible and effective arrangements (if necessary, secured financially). In case of noncompliance, it can impose sanctions including costs, adverse inferences, and reversal of a burden of proof.

Authoritarian governments have as a rule preferred to operate within the formal appearances of the law.³⁴ They will therefore be inclined to often use indirect intimidation and obstruction, e.g., private actors only invisibly controlled by government services.³⁵ The proper way to deal with such hidden control is to invoke the duty of government to provide effective protection.³⁶ If there is no sufficient proof of control,³⁷ the international responsibility of the State to protect aliens³⁸ needs to be applied in combination with the duty of good-faith arbitration so that the State has a heightened responsibility to protect, first, alien participants who have to travel to the State (e.g., international counsel), but also—under the good-faith litigation principle—nationals who are witnesses, experts, and domestic counsel. The obligation of the government to protect the security and integrity of the arbitration process can also be founded on the substantive disciplines of the applicable investment treaty, for example, the duty to afford “fair and equitable” treatment or provide “most constant protection and security” (Art. 10 (1) ECT). The obligations incumbent on the State from the treaty do not end when a claim is raised but extend throughout the arbitration. That reflects the dual role of the government—as party to the dispute but also as sovereign, responsible for good governance in its country.

Obstruction of Legal Representation

The right to legal representation is a fundamental part of “due process” and “fair administration of justice” (Article 6 (b) and (c) ECHR).³⁹ The equality of arms will,

34 H. JAMES, *THE DEUTSCHE BANK AND THE NAZI ECONOMIC WAR AGAINST THE JEWS*, 2001—on the legalistic techniques used to effect “Aryanization.” See also the analysis of the *Lena Goldfields, Barcelona Traction*, cases, *supra* notes 1, 9.

35 Note also the references in *Metalclad v. Mexico* (*supra*), and the procedural order of the *Biwater-Gauff v. Tanzania* tribunal to harassment and intimidation which on the face appears “spontaneous” but looks as though it might have occurred through invisible instigation and support by government services; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No 2, May 24, 2006.

36 That has been the suggestion raised in *Eureko B.V. v. Republic of Poland*, Partial Award and Dissenting Opinion, August 19, 2005, paras. 236–37.

37 For attribution of non-State actors to the State in case of control, see. Art. 8 of the ILC Articles on State Responsibility; note commentary (Crawford ed., Cambridge University Press 2002) at pp. 110–13.

38 M. SHAW, *INTERNATIONAL LAW* 694 *et seq* (Cambridge University Press, 5th ed. 2003).

39 Art. 6 (b) “adequate time and facilities for the preparation of his defense,” (c) “to defend himself in person or through legal assistance of his own choosing.”

as a rule, be seriously impaired if there is substantial interference by the host State with domestic and international counsel of the claimant.⁴⁰ Types of interferences are numerous.⁴¹ They include:

- Obstruction of access of lawyers to their clients. This can be a particular problem in investment cases if the equitable owners of a corporate holding company, the foreign investor as a natural person, or its staff reside in the Respondent State.
- Interception of communications, including illegal entry into computers and Web sites (“hacking”). If one party is aware of all internal plans within the other party (identification of witnesses, experts, strengths and weaknesses, legal and factual strategy, remuneration arrangements, financial situation), it has an immense strategic advantage. It can persuade (or intimidate) experts and witnesses identified, it can manipulate the arbitration so that the other side reaches the bottom of its war chest and can exploit weaknesses discussed confidentially in the client-counsel relationship.⁴²
- Intimidation, indirectly or indirectly through non-State actors secretly encouraged by government services, including blacklisting of domestic counsel. A large Respondent State using the major arbitration law firms has a lever for denying claimants the use of the best expertise (as do major private commercial companies at times).

40 On the protection of communications between client and counsel, see R. Mosk & T. Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 ICQL 345, 379 (2001); Rapporteur on the Yukos prosecution to the Council of Europe, para. 37, paras. 4 and 8; UN Basic Principles on Role of Lawyers, 1990, Art. 16—highlights intimidation and improper interference and “Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential,” IBA Rule on Taking of Evidence 9(2): recognizes privilege for legal and ethical reasons; most recent case of ECJ: *Akzo v. EU Commission*, 2007, available at <http://eur-lex.europa.eu>.

41 See the jurisprudence of the ECHR under Art. 6, reported (up to 1994) in Harris et al.; Sabine Leutheusser-Schnarrenberger, COE report 2005 relating to the prosecution against M. Khodorkovsky and Yukos, Decision on Preliminary Issues in *Libananco v. Turkey*, *supra* note 24.

42 The confidentiality of the client-counsel relationship (“privilege”) is part of an effective legal representation under Art. 6 but is also protected by Art. 8 of the ECHR and qualifies as a fundamental element of international due process. Art. 9.2(b) of the IBA Rules of Evidence in International Commercial Arbitration, Commentary, BLI (2000) p. 35; ECHR 30 January 2007; *Ekinici & Akalin v. Turkey* case; ECHR case of March 25, 1992; *Campbell v. United Kingdom*; *Smirnov v. Russia* (ECHR June 7, 2007); the client-counsel privilege has been recognized recently by the European Court of Justice in the *Akzo v. European Commissions* case of September 17, 2007. *Golder v. United Kingdom* (1975). The right to a fair trial includes the right to communicate freely with a counsel; the EU Code of Conduct for Lawyers at 2.3 says, “Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer. The lawyer’s obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client.” Lanz v. Austria, 50–52, “an accused’s right to communicate with his defense counsel out of hearing of a third person is part of the basic requirements of a fair trial.” It required “very weighty reasons” to justify surveillance in case of suspected collusion and found a breach of Art. 6(3) (b) and (c), Judgment of January 31, 2002, on ECHR Web site, www.echr.coe.int.

The tribunal has first to identify where and how specifically interference with the effective access to counsel (and with client-counsel privilege) has occurred and how it is most likely to affect the equality of arms. The tribunal must be aware that it is likely to have seen only the “tip of the iceberg,” with most of what really happened remaining hidden. Then it has the difficult examination of how to rebalance the disturbed equilibrium. Normal sanctions—like cost, adverse inferences, exclusion of illegally obtained evidence—may not always be able to restore the equality. In serious cases, the tribunal may simply end its functions without *res judicata* effect for the Claimant.⁴³ But such “termination, even with full cost on Respondent” does not remedy the damage: the Claimant would have to restart the arbitration with another tribunal, with new uncertainty, risk, and cost. If there has been surveillance, only full reciprocal disclosure for both parties could fully restore the equality of arms, since all of the Claimant’s internal intelligence would be known to the Respondent, but such a measure would be difficult to police—as is any order of discovery and disclosure. Nevertheless, it should not be discounted: if one party could show that the other party has concealed parts of the internal communication between itself and its counsel against such an order, this would pave the ground for stronger and more general procedural sanctions.

Financial Attrition by the Much Better Funded Party

A serious challenge for the equality of arms can arise if one party fully exploits access to vastly greater financial resources for litigation. That may be part of litigation strategy by financially better funded governments against “junior” Claimant companies. Full use (or abuse) of the arbitral procedure⁴⁴ can grow the cost of arbitration beyond what the “war chest” of the other party can bear. Under this strategy, a Respondent government may delay arbitral appointments; challenge arbitrators and chairpersons repeatedly once appointed; obtain antisuit injunctions from their domestic courts; raise every procedural and jurisdictional objection possible; maximize the time periods requested for every phase; insist on as many physical hearings as possible; change counsel; use appointment of experts and witnesses to compel the other party to do likewise for rebuttal; and engage to a procedural maximum in post-award challenges and obstruction of enforcement.

⁴³ That was, in a corruption case, the famous (and controversial) conclusion reached by Judge Lagergren as arbitrator: J.G. Wetter, *Issues of corruption before international arbitral tribunals* in ICC case No. 1110, ARB. INT. 1994, p. 277. For the acceptance of the power to “dismiss actions, assess attorneys’ fees, impose monetary penalties or fashion other appropriate sanctions for conduct which abuses the judicial process,” *cf* *Kensington v. Congo* (case of a law firm intimidating an expert for the other party), S.D.N.Y. Aug 23, 2007, 2007 US Dist. LEXIS 63115; *Waste Management v. Mexico*, ICSID Case No. ARB(AF)/00/3, Decision on Preliminary Objections of June 26, 2002 left open the possibility that it had the power to dismiss a claim . . . “for the purpose of protecting the integrity of the tribunal’s processes or dealing with genuinely vexatious claims,” at para. 49. On the power, in extreme circumstances, to “grant the request of the other party to dismiss the case,” Hanotiau, *supra* note 2, at 286.

⁴⁴ P. Lalive, *supra* note 4, at 30–33.

Tribunals have difficulty restricting the exploitation of procedural tactics that are available under the applicable rules. Since tribunals are wary about creating grounds for subsequent challenge for not providing a fair hearing,⁴⁵ the incentive is, rather, to accommodate the party which uses procedural obstruction both for delay and for depleting the opponent's "war chest," in particular if it is a State. In the end, the party with a much smaller litigation fund is likely to have run out of means to challenge an award for failure of the tribunal to intervene at the point when the substantial disequilibrium between both parties became apparent.

Financial equality has not yet been considered as a factor relevant to defining the equality of arms.⁴⁶ The presumption, as in other areas of law, is that both parties are considered equal in litigation irrespective of their financial ability or litigation competence. That, however, does not exclude examining a party's strategy to abuse procedural rights in order to exploit the other party's financial weakness. The right approach is for tribunals to be conscious that such tactics, particularly in a situation of a manifest financial balance between the parties, can amount to bad-faith arbitration and also a substantial lack of equality of arms. If there are enough indications of that, the tribunal has the duty (sanctionable by annulment) to work toward restoring the equilibrium by choosing the most cost-efficient ways compatible with a fair hearing to progress the case. That is not an easy balance, but the principle of "equality of arms" should provide the tribunal with a counterweight.

Concealment of Documents, Obstruction of Discovery, and False Testimony

Governments sometimes invoke "crown" or "executive privilege" to refuse to comply with discovery requests.⁴⁷ Tribunals have as a rule accepted the concept of "executive privilege" in principle but subject to their ultimate determination whether it is justified in the particular case, rejecting government claims that it should be "self-judging". Denying reasonable discovery, however, affects the equality of arms. Tribunals therefore have to navigate carefully between reasonable accommodation of the special nature of government and tolerating abuse of the dual role of government as both arbitration party and sovereign.

45 *E.g.*, the annulment of the AMCO Asia v. Indonesia arbitral award under Art. 52 of the ICSID rules, which may appear to some observers as a relatively minor oversight of the tribunal with no serious consequence.

46 To the author's knowledge.

47 Mosk & Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 ICLQ 345, 363–67; S.D. Myers v. Canada, Partial Award, November 13, 2000, paras. 39 *et seq.*; Pope-Talbot v. Canada, Decision, September 6, 2000, 7 ICSID Rep. (2005), relying on art. 9(2)(f) of the IBA Rules of Evidence: "The Arbitral Tribunal shall . . . exclude from evidence or production any document . . . for any of the following reasons: . . . (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a Government or a public international institution) that the Arbitral Tribunal determines to be compelling . . ."). Biwater-Gauff v. Tanzania, Procedural Order No. 2 of May 4, 2006, p. 9.

Investment tribunals, unlike State courts, have no way of effectively compelling a State party to comply with discovery requests or to punish concealment of documents, forgery,⁴⁸ or fraudulent submission or testimony. However, they can take secondary sanctions: they can deploy the prospect of “adverse inferences” as an incentive for compliance with discovery requests but also against invocation of “executive privilege” not condoned by the tribunal⁴⁹; they can also use cost sanctions for “bad-faith” arbitration with both a compensatory element to reflect costs unnecessarily incurred by the tribunal and claimant but arguably also with a punitive element.⁵⁰ There is precedent for the concept that an award should be annulled in case of fraudulent submission of information,⁵¹ an approach which requires a showing that there was a reasonable possibility that the fraud, concealment, or withholding of information had some adverse impact on the outcome.

“Legitimate” Exercise of Government Powers

Government action directly or indirectly targeting the Claimant will often be based on its governmental role but, simultaneously and at times intentionally, will enhance the position of the government in the international arbitration. That dual role can create ample opportunities for abuse to improve its litigation position. It is relatively easy to separate both roles, e.g., by a “Chinese Wall” between criminal prosecution and conduct of the arbitration. But the more a country is authoritarian and the more such breaches have been reported in other situations, the more likely it is that a claimed Chinese Wall will have large holes, allowing the Respondent State to use confidential information obtained through criminal investigation or other forms of government enforcement action directed against individuals or companies, such as tax audits or environmental compliance monitoring. The issue has emerged in investment arbitration as nationals try

48 Such as occurred by Qatar in its maritime delimitation case against Bahrain.

49 On the extent to which executive privilege is usually accepted: Mosk & Ginsburg, *supra* note 40, legitimate invocation is as a rule accepted but not if it appears to be an abuse of the privilege and evidence of bad-faith litigation. The additional consideration to be taken into account is equality of arms.

50 For a survey of authorities on cost sanctions in case of bad-faith (or manifestly incompetent) arbitration, see the author’s separate opinion, in *Thunderbird v. Mexico*, at paras. 124 *et seq.*, and also in particular, *Methanex v. USA*, *Generation Ukraine v. Ukraine*; punitive damages for willful misconduct in the *Karaha Bodas* case (2007 US Dist. LEXIS 31702) of US\$500,000 for false testimony by officials of state enterprises; also *Desert Line v. Yemen*, 2008 at para. 304: “considering . . . that it insufficiently cooperated in providing documents and testimonial evidence” for imposing a cost sanction, in addition to the “moral damage” for harassment suffered by Claimant’s staff. The *Desert Line* case illustrates that the tribunal’s sanctions for misconduct can be both of a “procedural” character (as one should qualify the cost sanction) but also of a substantive character, as is the nature of the “moral damages.” To quote, “Claimant’s executives suffered the stress and anxiety of being harassed, threatened and detained . . .; the Claimant has suffered a significant injury to its credit and reputation and lost its prestige; the Claimant’s executives have been intimidated by the Respondent,” at paras. 286–91.

51 *European Gas Turbines Case*, REV. ARB. 1994, p. 359.

to arbitrate against their own State through an offshore holding company. Moreover, the issue tends to arise frequently in authoritarian States, with the investment dispute being just one facet of a larger bitter battle within the country, and, apart from an ECHR complaint, investment arbitration being the only chance for the affected party to have fair adjudication.

Again, there are two conflicting principles: first, the existence of an international investment dispute cannot “freeze” government enforcement powers; second, governments must not be allowed to enhance their litigation position by abusing governmental powers. This very complex issue mirrors similar questions that have arisen when State enterprises, to excuse noncompliance with contract, invoke force majeure because of prohibiting government regulation or refusal to permit.⁵²

Tribunals faced with such challenges have to weigh the legitimate exercise of State powers against the equally imperative requirement (sanctioned under Art. 52 of the ICSID Convention by annulment) to maintain and proactively restore the equality of arms. This means, first, that a clear abuse of State powers against opponents in order to undermine the arbitration cannot be tolerated, and second, that a government’s legitimate and good-faith exercise of its public responsibilities, without discrimination, arbitrariness or abuse, will rarely be of concern to the tribunal—provided that effective safeguards are in place to ensure the government action is not motivated by the investment dispute and that the findings from the prosecution are not used by it as international litigant. However, in reality, elements of legitimate criminal prosecution may be mixed with elements of political motivation and clandestine use for the arbitration. Moreover, there will be problems of evidence. Authoritarian states will try to disguise an abuse of State power under a cloak of legal correctness in formal terms. What they appear to do formally and publicly will often not be the same as what occurs through secret and informal channels. To deal with these risks to the equality of arms is the true challenge.

As mentioned before, in discussing intimidation,⁵³ the proper approach to use is to “lift the veil” from what happens in closed or clandestine channels.⁵⁴ The interaction within government agencies is essentially a “black box”. We see external outcomes, but we rarely if ever find out what caused them.⁵⁵ In such cases, arbitral and judicial procedure have developed a reversal of the burden of proof or presumption that the party which has access to the relevant evidence must carry the burden of proof.⁵⁶

52 H.K. Böckstiegel, *The Legal Rules Applicable in international commercial arbitration involving states or state-controlled enterprises*, in ICC, 60 YEARS OF ICC ARBITRATION, 1984, at 117–76 (E. Gaillard & J. Younan eds., 2008), on other issues arising out of the combination of commercial and governmental conduct by the State.

53 See discussion of “red flags” *supra* note 32.

54 That is also the approach of the U.S. Foreign Corrupt Practices Act; A. Sayed, *Corruption in International Trade and Commercial Arbitration*, 2003; David Cairns, *Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering, and Fraud*, in ARBITRATION: MONEY LAUNDERING, CORRUPTION AND FRAUD 651 (Kristine Karsten & Andrew Berkeley eds., ICC Publication 2003).

55 See the author’s separate opinion, *International Thunderbird Gaming Corporation v. The United Mexican States*, January 26, 2006, paras. 107, 114.

56 See here the Turkish-Greek Mixed tribunal, *Megalidis v. Turkey*, of July 26, 1928, which uses the method of international arbitration, on other issues arising out of the combination of

This chapter suggests that legitimate exercise of governmental police powers against participants in the arbitration must be accepted, provided there is sufficient and credible indication that the exercise of police powers (prosecution, tax assessment, et al.) could not have been triggered by the state's concerns over the investment arbitration or that the results could not have been used to enhance the state's litigation position in the arbitration⁵⁷. The more general indicators (e.g., acceptance of the rule of law as indicated, for example, by the various governance quality surveys) or specific indicators suggest the likelihood that the government may have launched its police powers because of the initiation of the claim or that results relevant for the arbitration may have been leaked formally or informally, the more does a presumption arise that the government has abused its powers to further its litigation chances and thus tilted the equality of arms in its favor. The tribunal has to infer the plausible scope of the iceberg when it sees only the tip, and the respondent has to prove that there is no iceberg under the tip.

Lifting of the Confidentiality of the Proceeding and Granting Third-Party Access

A feature of modern investment arbitration, in particular under the NAFTA but also ICSID, has been the lifting of the traditional confidentiality of the proceeding. Awards, but also the submissions of the parties and interim orders by the tribunal, are published. Access is provided to the hearing itself. Third parties, essentially activist nongovernmental organizations, are allowed to submit amicus briefs. All that is widely applauded as a move toward greater transparency, required by the public interest at

commercial and governmental conduct by the state inference in case of a Respondent State which was unwilling to produce evidence under its control relying on the maxim "*omnia presumuntur contra spoliatorem*." The tribunal inferred that the Claimant's factual assertions were correct; these could have been rebutted by Turkey if it had made the evidence under its control available. A more recent example is the NAFTA Chapter XI *Feldman v. Mexico* case, in which the tribunal identified the external and visible effect which suggested discriminatory tax enforcement against a foreign investor but not against a powerful Mexican company carrying out the same business. The tribunal noted that there was little evidence that the enforcement was intentionally discriminatory against the foreign investor but concluded that the Claimant had introduced sufficient evidence of *de facto* discrimination to raise a presumption and shift the burden of proof. (*Feldman v. Mexico*, para.177.) The tribunal went on to look at the Claimant's notoriety and threats of litigation of which officials had to be aware at the time the tax action was initiated, to conclude that the conditions for discrimination existed, *ibid.*, para.180.

⁵⁷ See the *City Oriente v. Ecuador* tribunal, requesting the government to refrain from initiating or continuing a criminal investigation related to the core of the ICSID dispute. The tribunal based this on the principle that no party should undertake measures to aggravate the dispute, pursuant to Art. 47 of the ICSID Convention and Rule 39(1) of the ICSID Arbitration Rules (preservation of rights of the requesting party), *City Oriente v. Ecuador and Petroecuador*, Procedural Order, 2007, para. 55, arguing for "provisional measures prohibiting any action that affects the disputed rights, aggravates the dispute, frustrates the effectiveness of the awards, or entails having either party take justice into their own hands"; see also the Procedural Order No 2 in *Biwater-Gauff v. Tanzania*, *supra* note 35.

stake in investment disputes.⁵⁸ However, such procedural reforms, which go well beyond the arbitration procedures referred to in investment treaties, can significantly affect the equality of arms, particularly for junior company claimants.

The introduction of amicus briefs by NGOs, which as a rule oppose the Claimant, impose the cost of review and attempted rebuttal. Amicus briefs can also directly or indirectly impugn the investor or the social acceptability of the investor's conduct, without supplying evidence or being subjected to cross-examination. Even if tribunals do not refer to such depreciatory comment, this does not mean that they are ineffectual ("*semper aliquid haeret*"). The Claimant has, therefore, to try to mobilize its own supporters, normally through an industry association. Governments can also use non-State actors to carry out action against Claimants, mainly intimidation⁵⁹ and, under the guise of transparency and "freedom of information" rules, disclose information to the public in order to apply pressure on the Claimant.

The tribunal in *Biwater-Gauff v. Tanzania*⁶⁰ faced some of these issues. It sought to reduce both the impact of external campaigning against the Claimant and collusion between activist NGOs and the government likely to affect the integrity of the arbitral process by providing a set of rules close to a "Code of Conduct" to the parties. These rules deal, *inter alia*, with public disclosures and interpose the tribunal as an "approval authority". The tribunal also recommended that:

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

The example set by the *Biwater* tribunal merits further development toward a set of guidelines of reasonable conduct of the parties with respect to outside political and public relations and links to NGO campaigning. Similarly, the rules starting to get developed for NGO submissions, in particular transparency of control and funding, need to evolve further as amicus briefs become more frequent.⁶¹

58 H. Mann, *Transparency and Consistency in International Investment Law*, at 213, and M. Tracton, *Provisions in the New Generation of U.S. Investment Agreements to Achieve Transparency and Coherence in Investor-State Dispute Settlement*, in *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES* 201 (K. Sauvart ed., 2008); on the efforts to introduce such instruments into the UNCITRAL rules, see J. Levine, *Current Trends in International Arbitral Practice as Reflected in the Revision of the UNCITRAL Arbitration Rules*, TDM 2008.

59 If Claimant can prove informal connivance of government services with intimidatory and harassment action by facially private actors, the government can be responsible under Art. 8 of the ILC Articles—most prominently the Iran hostages case or the U.S. "Contras" case; see Crawford's Commentary on the ILC articles, *supra* note 37. See also S. Manciaux, *The Relationship between states and their instrumentalities in investment arbitration*, in *STATE ENTITIES IN INTERNATIONAL ARBITRATION* 195 (E. Gaillard & J. Younan eds., 2008).

60 *Biwater-Gauff v. Tanzania*, Procedural Order No. 3, September 29, 2006, which refers, at para. 163, to the need both to prevent a further aggravation of the dispute and to preserve an "even playing field for the parties," available at <http://ita.law.uvic.ca>.

61 *Ibid.*, Procedural Order 2; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, May 19, 2005, paras. 17–29.

Manifestly Incompetent Legal Representation

Both States and Claimants may have difficulties in obtaining the quality of legal representation that the by-now highly specialized field of international investment arbitration requires. Ideally, the expertise deployed will include both public international law, international arbitration (and international judicial procedure in a wider sense), and comparative public/administrative law. It will go beyond rules and concepts that may be academically known and researchable, to include the much more arcane areas of the advocacy and politics of investment arbitration, e.g., arbitrator and chair selection; proclivities of appointment institutions; and personal, professional, institutional, and philosophical linkages and preferences. A party, Respondent, or Claimant not served by professionals experienced in this newly emerging field is quite likely to be at a considerable handicap. There are awards which indicate that one of the parties (or both) was unable to mount a reasonably competent claim or defense.⁶² This applies both to junior companies with no prior foreign investment experience (arguably the most frequent Claimants) and small developing countries with no prior Respondent experience.

Junior companies, in particular, will often have stumbled in their first foray abroad due to lack of international business experience. They may stumble equally when choosing advocates. Without sufficient funds for litigation, they may be limited to those firms or independent practitioners keen on but not prepared for international arbitration and therefore ready to accept contingent-fee arrangements. Governments can be handicapped when relying exclusively on their internal legal services, in particular when, unlike the services of frequent Respondents such as, e.g., the United States, Iran, Canada, Mexico, Argentina, they lack experience.

This raises the question of whether the tribunal has a duty to restore the equality of arms in a case of the manifest incompetence of legal representation that seriously undermines one party's ability to put its case. There are two opposing principles. The principle of the presumed equality of the parties in the adversarial process suggests that each party must have the opportunity to obtain effective legal representation; whether that occurs in reality is irrelevant for the court. On the other side, there is a view that the tribunal is responsible for a true equality of arms; complete absence of legal representation⁶³ or manifestly inadequate legal representation requires the court to intervene in one way or the other.⁶⁴ There may be precedents in domestic adjudicatory

62 *E.g.*, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003; *see also* *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Award, December 17, 2003.

63 *Bogdanov et al. v. Republic of Moldova (Bogdanov case)*, SCC, Award, September 22, 2005 (G. Cordero Moss, sole arbitrator); In this case, the sole arbitrator had to deal with a not appearing Respondent, note comment by G. Cordero Moss, *Tribunal's Initiative or Party Autonomy?*, on TDM 2007.

64 Inquisitorial and adversarial elements are present in most adjudicatory regimes, both common and civil law: J Jolowicz, *Adversarial and Inquisitorial models of civil procedure*, 52 ICLQ 281 (2003), *reprinted in* J. JOLOWICZ, *ON CIVIL PROCEDURE* 175 (2000).

procedure⁶⁵ for courts to intervene when the legal representation is so manifestly incompetent that in effect one party is not properly legally represented. International tribunals sometimes seem to be inclined to take a manifest and grave lack of equality in legal representation into account, but that is dangerous territory as they expose themselves to challenges on the charge of partiality.⁶⁶

In one investment case where the Respondent did not appear,⁶⁷ the tribunal did not simply accept the Claimant's submission of facts and law (which would lead to something akin to a default judgment) but felt obliged to examine it more closely than if both parties had been present. It is worth noting that in ICJ proceedings where the Respondent State fails to appear, the ICJ cannot simply enter a default judgment but has to satisfy itself "that the claim is well founded in fact and law."⁶⁸

There are no similarly clear precedents for dealing with the challenge to equality of arms from manifestly incompetent legal representation. However, the possibility for the tribunal of engaging in a "legal dialogue" with both parties may provide an opportunity to raise, in a way that cannot be seen as partisan, the need for legal expertise at a level that the complexity of the case requires.

Tribunal Powers to Restore the Equality of Arms Affected by Abuse of Government Powers

Tribunals have a duty, if necessarily proactively, to restore "equality of arms"—a foundation principle of investment arbitration procedure—in particular if affected by the abuse by the Respondent of its dual role as both equal-level party to an arbitration and, simultaneously, as sovereign State. That duty of the tribunal, which goes beyond the mere ordering of the proceeding before it, can lead, if breached, to annulment under Article 52 of the ICSID procedure as a "serious departure from a fundamental rule of procedure" or the equivalent conditions for challenges of arbitral awards before domestic courts.⁶⁹

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

66 For a discussion of comparative (court) litigation approaches, see JOŁOWICZ, *supra* note 64. The German principle of the required "dialogue between the court and the parties" (which is not far from the modern system of English litigation following the Woolf reforms) legitimates, or even requires, that the court raises legal questions the parties may have overlooked. That can at times favor the party with a less effective legal representation. One should assume that in case of a manifest and grave imbalance between the parties, tribunals will frequently intervene more proactively.

67 *Bogdanov et al. v. Moldova*, *supra* note 63.

68 ICJ Statute, article 53(2). The Court's power to question and ask explanations—Art. 49—can also provide a way to restore the balance at least to some extent.

69 On ICSID annulment, *see* C. SCHREUER WITH L. MALINTOPPI, A. REINISCH AND A. SINCLAIR, *THE ICSID CONVENTION: A COMMENTARY* (Cambridge University Press, 2nd ed. 2009.); A. Crivellaro,

In effect, arbitral tribunals (as international courts) often apply a *de facto* deference: They abstain from coercive measures through assistance of domestic courts (which would not be practical); they may often be more lenient with respect to discovery; they will “go soft” on remedies involving specific performance and rather prefer financial compensation. They may often be more lenient with deadlines, evidence of manipulation, relations of witnesses, experts (and co-arbitrators) with the government. There is a considerable dilemma between formal tribunal role and power and principles on one hand, and the pragmatic solution of such tensions through the procedural action of the tribunal on the other. There is good sense in appreciating that governments may not be as efficient as most commercial Claimants in terms of internal organization, deadline compliance, and project management. But, as Pierre Lalive said many years ago, “One of the Arbitrator’s delicate tasks is to reconcile here a need for some flexibility . . . with the fundamental equality of the parties and the elementary requirements of justice.”⁷⁰

Investment tribunals, unlike in commercial arbitration, cannot expect domestic courts and national justice systems to help. Their main power lies not only in the right to design and apply procedural rules, which generally allow tribunals considerable leeway to manage the procedure before them, but also in the fact that the Respondent State does not wish to lose the case or individual stages (procedural orders; jurisdictional decision; award on damages and cost) because it has alienated the tribunal. There is no doubt that the evidence of serious misconduct can “pollute the whole case.”⁷¹ Not only will tribunals be influenced in their perception of facts by serious misconduct by one party; but also the application of the law (including the assessment of damages and cost) allows explicit sanctions for a party that arbitrated in bad faith. Moreover, it is recognized in authorities on advocacy⁷² that serious misconduct by a party can, consciously or subconsciously, affect the way the merits of its case are considered. That leverage allows tribunals, often under the shadow of possible procedural orders, to negotiate precautionary measures to prevent or remedy the consequences of intimidating government conduct, e.g., hearing of witnesses *in camera*, by video, or even just on the basis of a written testimony; safe conduct passes for counsel, witnesses, experts, and party representatives; and appointment of tribunal experts to review sensitive or secret documents.

in Ch. Leben (2009); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, February 5, 2002, para. 57; “minimal standards of procedure to be respected as a matter of international law”; *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, December 22, 1989; “A clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides: The parties shall be treated with equality. . . .”, at para. 5.06; the only ICSID annulment for breach of the fundamental rule of procedure was *AMCO Asia v. Indonesia*, Decision of December 3, 1992, Annulment of Supplemental Judgement; in this case, the tribunal had committed an arguably quite minor procedural flaw by not repeating its request to the government to respond on a minor issue that had no significance for the outcome.

70 P. Lalive, *supra* note 4, at 137.

71 *Ad hoc* Judge Y. Fortier in the *Qatar-Bahrain* case, *supra* note 12.

72 ANTONIN SCALIA/BRYAN GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES: ON ADVOCACY* 26–30 (2008).

“Inherent powers” is the key concept that provides substance to fulfill the tribunal’s duty to restore, proactively, the equality of arms. Based on this concept, the tribunal has sufficient means at its disposal to safeguard the fairness and integrity of its judicial process.⁷³ International courts and tribunals have exercised their function, going beyond their technical rules of procedure, on the foundation of “inherent” or “implicit” powers, i.e., powers that are necessary to “conserve the respective rights of the parties and to ensure (the) tribunal’s jurisdiction and authority are made fully effective.”⁷⁴ The boundaries of “inherent powers” are not as yet clearly defined. They should be seen as determined by the judicial character of a tribunal and thus can be inferred from comparative law of civil, criminal, and administrative procedure.⁷⁵ What is within the accepted boundaries of judicial remedies based on the “inherent powers” concept is subject to evolution. The extreme deference shown by the International Court of Justice in inter-state disputes will not be appropriate in investor-state disputes; here, it is rather the model of the major systems of administrative procedure which can provide guidance. It is with this general concept in mind that the following sections examine particular procedural remedies available to courts to sanction a party’s misconduct and restore the equilibrium of arms between the Claimant and Respondent State.

Exclusion of the Misbehaving Party from the Process

Exclusion from the game is, throughout human society, the ultimate sanction for extremely grave misconduct. In adjudication, it can only be applied with considerable caution as total or even partial exclusion of a party can clash with the principle of “*audiatur et al. tera pars*,” though common principles of abuse of right can overcome this principle. But it should only be thought of as *ultima ratio* after warnings, recommendations, and procedural and interim orders have failed to correct serious and continued misconduct with a grave impact on the integrity of the process. It is appropriate as a possible sanction (and deterrent) in case lesser measures have failed to work.

73 Ch. Brown, *The Inherent Powers of International Courts and Tribunals* (2005), 76 BRITISH YEARBOOK OF INTERNATIONAL LAW 195; confirmed by *Libananco v. Turkey*, at para. 78: “nor does the tribunal doubt for a moment that like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process,”.

74 Iran-U.S. Claims Tribunal, *E-Systems et al.* (1983); Inter-American Court of Human Rights: *Genie Lacayo* case; ICJ: *Nuclear Tests* case: “inherent jurisdiction . . . to maintain its judicial character.” ICJ Rep 1974, 259–60, para. 23; for more comprehensive references; see Gaeta, *Inherent Powers of International Courts & Tribunals*, in *MAN’S INHUMANITY TO MAN* 359 (Vohrah ed., 2003); Ch. Brown, *supra* note 73, at 55–82. Inherent powers are increasingly recognized in the “technical rules” of procedure, e.g., the UNCITRAL Arbitration Working Group’s proposed revision to the model law (Art. 17(2)(b)): “the tribunal would have the authority to order a party to “take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself.”

75 On the limits of “implicit” powers in the habit of “deference” by the International Court of Justice: Ch. Brown, *supra* note 73, at 78–81.

There are authorities for full or partial exclusion of counsel, or even a party, for serious misconduct before a tribunal or court.⁷⁶

There is no authority available for a default judgement even in case of one party's serious misconduct. If a party were to be excluded for grave misconduct, precedent suggests that the procedure applied in case of a not-appearing party should be followed.⁷⁷ That would mean that the tribunal has to examine the factual submissions of the party which participates at least for plausibility and to fully examine its legal theories, with research *sua sponte* and on the principle *iura novit curia*.

Contempt

Contempt of court is a common-law principle that gives to the court wide powers to safeguard its authority.⁷⁸ To the extent it overlaps with the principle of "inherent powers," arbitral tribunals will have power to deal with contempt, though not the same range of powers as a national court, i.e., an organ of government. Custody, for example, must be excluded while exclusion is possible. Also, while domestic courts can refer misconduct (e.g., by counsel, witnesses, experts, party representatives) to prosecutors, investment arbitral tribunals cannot rely on other instruments of the justice system, at least not the justice system of the host State.⁷⁹ Accordingly, while the

⁷⁶ *European Gas Turbines* (REV. ARB. 1994, p. 359)—an ICC Award was annulled by the Paris Court of Appeal on the ground that Respondent had submitted a fraudulent report of expenses to the arbitral tribunal. The court applied the principle of *fraus omnia corrumpit*; *Arrow case* (2000, C.P. Rep. 59); "Where a litigant's conduct puts the fairness of the trial in jeopardy . . . the court is entitled—indeed, I would hold, bound—to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him." *Logicrose* (Chancery Division [1998] E.G.C.S. 114) a party should be prevented from continuing to litigate where his conduct made a fair trial of the action impossible, "The deliberate and successful suppression of a material document is a serious abuse of the process of the court and may well merit the exclusion of the offender from all other participation in the trial. The reason is that it makes the fair trial of the action impossible to achieve and any judgment in favor of the offender unsafe." Even if the document is produced, the offender still may be excluded from the proceedings "if it were no longer possible to remedy the consequences of the document's suppression despite its production." *Waste Management II* at para. 49, left open the possibility that it had the power to dismiss a claim on this basis "for the purpose of protecting the integrity of the tribunal's processes or dealing with genuinely vexatious claims." That principle applies as well to Respondents as to Claimants, but it is of little use to Claimant except in cases where Claimant considers it better to be able to restart the case (at considerable loss of money and time) again with a "fresh slate."

⁷⁷ *Bogdanov v. Moldova* and the article by G. Cordero Moss, TDM 2007, *supra* note 63.

⁷⁸ Lord Diplock in *Sunday Times* case: contempt of court is punishable "because it undermined the confidence of the parties and of the public in the due administration of justice. The due administration of justice required that all citizens should have unhindered access to the courts; that they should be able to rely on an unbiased decision based only on facts proved in accordance with the rules of evidence."

⁷⁹ For a discussion of disregard of the ICJ's interim orders, see. *U.S. v. Iran* (Tehran hostages) ICJ Reports 1980, p. 3; *La Grand* ICJ case (Germany v. U.S.), ICJ Reports 2001, 466; ICJ in *Armed Activities* (DR Congo v. Uganda) Judgement, December 19, 2005, para. 345(7).

“contempt power” of international investment tribunals cannot be rejected simply because judges are public officials and arbitrators in treaty-based cases are “private” persons,⁸⁰ it is limited by both the nature of the adjudicatory process and the limited means available to tribunals for enforcing their orders.

Cease and Desist Orders

Tribunals have extensive powers to issue interim and/or procedural orders.⁸¹ They can accordingly order the Respondent to ensure that its services stop the misconduct at issue.⁸² If the State complies, that will solve the issue of future conduct. But if past conduct has caused irremediable harm (e.g., full interception of client-counsel electronic communications), this measure may be useful but not sufficient to restore the equality of arms. A cease and desist order thus fits well into the menu of the remedies available to a tribunal to respond to a serious disequilibrium between the parties, but it needs to be complemented by other measures, in particular compensatory rather than just prospective and prohibitive ones. There is also the risk that the State (or uncontrolled or uncontrollable “rogue” elements within the State or informally associated with the State) will continue the incriminated conduct under cover while the State issues formal directions merely to satisfy the tribunal. The challenge for the tribunal is therefore to develop a system of sanctions and incentives which makes it more likely that its orders will be effectively complied with.

Nonadmissibility of Evidence Procured with Improper Means

There is extensive, though not absolute, authority that evidence procured with improper (illegal or unethical) means is not admissible.⁸³ For example, in *Methanex v. U.S.*, a

⁸⁰ The distinction between “public” judges and “private” arbitrators is often made, e.g., in the criticism by Van Harten, *supra* note 13, at 153 *et seq.* But while arbitrators in a commercial dispute could be described as “private persons,” that does not apply to arbitrators appointed by the parties on the basis of an international law treaty. They are, in essence, public *ad hoc* judges, at one end of the spectrum between dispute-specific appointments, the part-time members of the WTO Appellate Body and the full-time fixed-term judges of the ICJ).

⁸¹ Ch. Brown, 2007, pp. 119–51.

⁸² ICJ, La Grand: para. 124, *Case concerning the Rainbow Warrior*, RIIA Vol XX 1990 p. 217, 270, para. 114 cited with approval in *Enron and Ponderosa v. Argentina*, ICSID Case ARB/01/3, Decision on Jurisdiction, January 14, 2004 at para. 79; *Biwater-Gauff v. Tanzania*, Procedural Order of September 2006: “refrain from taking any steps which might undermine the procedural integrity.” (p. 43), “ensure a level playing field,” “minimize the scope for any external pressure on any party, witness, expert or other participant in the process,” “avoid trial by media” (referring to Art. 17 of the newly revised UNCITRAL Model law); *see also City Oriente v. Ecuador*, Decision on Revocation of Provisional Measures, May 2008, para. 111, where Claimant raised the risk of proceedings being affected by potential social and media pressure due to the strong political essence of the arbitration.

⁸³ M. Reisman and E. Freedman: *The Plaintiff’s Dilemma: Illegally obtained evidence and admissibility in international adjudication*, 78 AM J INT’L L 737 (1982); in response, *see* H. Thirlway,

comparatively harmless case of “dumpstering”—search in a garbage container on private, but accessible premises—led to nonadmissibility of the evidence discovered in this way.⁸⁴ The power to exclude evidence is also recognized in Article 9 of the IBA Rules on Taking of Evidence though as a possibility (“may”), not as an absolute command; the IBA Rules refer to considerations of privilege but also to fairness and equality of the parties.

While it may be appealing for a tribunal to solve the embarrassing issue of a government obtaining evidence illegally (e.g., theft, intercept, intimidation, torture) by excluding it from the “record” of the case, that may not solve the disequilibrium between the parties. Evidence obtained by the government improperly may help it to find other evidence in proper ways; evidence that has been submitted to a tribunal is impossible to erase from recollection. Moreover, there is intelligence obtained improperly that is not submitted to the tribunal (and hence cannot be excluded) but which will help to develop an effective counter-strategy. For example, interception (by e-mail, phone, or bugging) of discussion of possible experts, witnesses, and documents can help the respondent government to discourage the participation of experts and witnesses under its influence or arrange for inconvenient documents to vanish. As with cease and desist orders, an order declaring evidence inadmissible may be a proper and necessary measure but not one that restores the disrupted equilibrium. Its main effect lies, first, in a measure of dissuasion: the parties to whom such an order is addressed may comply because they take the order seriously, or, at least, because they worry over the risk if they are caught out in noncompliance. Second, noncompliance, if identified, can lead to further, more serious, sanctions.

Adverse Inferences

The most frequently invoked principle is the power of arbitral tribunals to draw adverse inferences in case of a party’s misconduct, e.g., noncompliance with discovery or other orders, concealment of evidence, fraud and forgery, lies, etc.⁸⁵ The concept of “adverse inferences” has never been fully made clear. In essence, it means that the tribunal can, within its powers of assessing evidence, take into account a party’s misconduct,

Dilemma or Chimera?—Admissibility of illegally obtained evidence in international adjudication, 78 AJIL 622 (1984); R. Wolfrum, *International Courts and Tribunals, Evidence*, in Zimmermann et al. (eds.) 2006, op. cit. The *Libananco v. Turkey* tribunal (cited *supra*) at para. 80 noted that “the tribunal may consider other remedies available apart from the exclusion of improperly obtained evidence”; that suggests it considered the inadmissibility of illegally obtained evidence as an evident, but not exclusive, remedy.

⁸⁴ See also ECJ: Teixeira de Castro v. Portugal, JCP 1999, I, 105, no. 38 (infiltration of cover agents).

⁸⁵ Hanotiau, *supra* note 2, at 285: “International arbitrators invariably take the wrongful or illegal conduct into consideration by awarding in favor of the other party or drawing adverse inferences,” see also p. 286; L. Enrique Graham, *Interim Measures*, ICCA conference paper, Dublin 2008; CH. BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 108–10 (2007); J. Sharpe, *Drawing Adverse Inferences from the non-production of Evidence*, 22 ARB INTL (2006) 549.

i.e., determine that the party whose misconduct is at issue has not proved the facts it has to prove or that the other party, in spite of not offering evidence that otherwise would be necessary, has proved its facts. Adverse inferences can therefore include a reversal of the burden of proof and can facilitate proof by prima facie evidence. Tribunals can, for example, accept a party's submission of what an expert or witness might have said had she not been intimidated.⁸⁶ Adverse inferences, however, cannot change the legal assessment of the tribunal—except that tribunals, consisting of human beings, will be influenced by the evidence of grave and relevant misconduct by a party. There are also cases where law and fact are closely intertwined, so that the application of law to the fact (rather than the more theoretical interpretation of the rules applicable) may also be influenced by adverse inferences.

The concept of “adverse inferences” is a very fluid concept; it is part of the implicit leverage the tribunal has over a recalcitrant party. The fluidity of the concept itself may enhance the tribunal's leverage. There are real questions as to how far adverse inferences can go, which are beyond the scope of this chapter. However, it appears that this concept is not only the most popular, but also one of the most effective tools a tribunal has to counter a party's misconduct. Its effectiveness lies partially in the ambiguity of what it actually means (or, perhaps expressed more positively, the flexibility of its application to different factual situations). It allows a tribunal to subtly threaten adverse results for the misbehaving party without having to take a clear stance on more controversial measures such as exclusion or contempt.

Cost Sanctions and Punitive Damages

That misconduct of a party—bad faith or highly incompetent arbitration can be sanctioned by courts and tribunals is generally accepted.⁸⁷ It is arguable (but not established)

⁸⁶ Case v. Iran, 3 U.S. CL. TRIB. (1983) 66–69; *Riahi v. Iran*, dissent by Judge Brower, 37 IRAN-U.S. CL. TRIB. (203) at p. 176: tribunal should have drawn inferences adverse to the Respondent and assumed that the requested documents, if submitted, would have substantiated the Claimant's assertions.” For further details and examples, see forthcoming Kolo, *supra*, (article with the author), in particular to Judge Brower's dissent in *Riahi v. Iran* arguing that the tribunal should not rely on “obviously coerced testimony” and allow its “processes to be corrupted.”

⁸⁷ *Generation Ukraine v. Ukraine*, at 24.6: lack of discipline in arbitration; needless complication of examination of claims; *Victor Pey Casado v. Chile*: Respondent to pay \$2 million of Claimant's legal fee because it failed to cooperate with the arbitration, 2008, paras. 726–30; *Letco v. Liberia*, 1986, 2 ICSID Rep. 343, 378: Liberia to pay Claimant's legal representation cost because of bad faith—it attempted to use Liberian courts in order to nullify results of arbitration. For an analysis of the practice of cost decisions, see R. DOLZER, C. SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 276, 277 (Oxford University Press 2008), and my Separate Opinion in: *Thunderbird v. Mexico*, 133 ff., concluding that prevailing practice is that each party bears its own legal representation cost except in case of bad faith, highly incompetent arbitration or exceptional circumstances. In the *Karaha Bodas v. Pertamina* case (April 30, 2007, 2007 US Dist. LEXIS 31702): US\$500,000 to be paid as “there should be a substantial penalty”; at issue was misrepresentation by one of the executives of Respondent; *Kensington v. Congo* (S.D.N.Y. 2007) intimidation of expert by law firm for Respondent: “[C]ourts may sanction parties, attorneys, or law firms . . . includ[ing] the ability to dismiss actions, assess

that tribunals have also an inherent “contempt of tribunal” power to levy fines for misconduct based on the analogy with common law courts,⁸⁸ going beyond damages.

Misconduct may also be taken into account in the context of assessment of damages by the tribunal. Tribunals have some degree of discretion in assessing damages; opinion is divided whether, for example, compensation for expropriation can have a punitive element or not, but there are some authorities supporting consideration of punitive elements.⁸⁹ Compensation for expenditures incurred unnecessarily by the other party because of its opponent’s misconduct, or expenditures frustrated by the misconduct, should generally count as compensable, either in the cost decision or in a damages award. Even if a Claimant does not prevail with its claim, the Respondent’s misconduct can be sanctioned in the form of a cost decision which awards not only tribunal costs, but, against the normal rule, also legal representation and party costs.

Finally, one should bear in mind that arbitral misconduct by the State may also breach its duties of “fair and equitable treatment” and of providing “constant protection and security,” e.g., by intimidation and harassment and thus give rise to a separate claim for compensation.⁹⁰

CONCLUSION

This chapter has dealt with a relatively new issue in international arbitration: the special procedural challenges faced by the tribunal in an investment arbitration when the State, as Respondent, exploits its dual role both as sovereign and equal-level party to the arbitration and thus seriously affects the required equality of arms. Some of the issues raised can also occur in normal commercial arbitration, e.g., in particular, but not exclusively, with parties in authoritarian states where the rule of law has weak roots, and the linkages between States and powerful businesses (“oligarchs”) are strong and close. They have also occurred in the past in commercial arbitration against States. The risks to the integrity of the arbitral process have also increased to the extent that new types of investment disputes pit local businesses against governments with which they have fallen out politically; this intensifies the antagonism and increases the exposure of the claimant (and its supportive players) to machinations of the State against them.

Given the relative newness of the issue, this chapter cannot provide an exhaustive treatment, but it develops the major approaches, concepts, and principles for guiding tribunals and counsel in managing such risks. The overarching principle is the “equality of arms,” which has found expression as a proactive duty of courts and tribunals to

attorneys’ fees, impose monetary penalties, or fashion other appropriate sanctions ‘for conduct which abuses the judicial process.’” In *Lac Minerals* (1990) FSR 441, it was recognized that monetary compensation can be awarded for breach of attorney-client privilege.

88 Ch. Brown, 2007, *supra* note 85, at 56.

89 Wälde/Sabahi, *Compensation of Damages in Investment Disputes*, in *HANDBOOK OF INTERNATIONAL INVESTMENT LAW* (Muchlinski et al., eds., Oxford University Press 2008).

90 See the previously cited cases, *Pope-Talbot v. Canada*; *Desert Line v. Yemen*; and the *obiter dictum* in *Eureka v. Poland*.

restore the equality of arms in the *Tadic* case. It is recognised as a key element of any process of adjudication worth its name. While tribunals may and often should go about managing these issues pragmatically, in essence they are under a duty, sanctioned by annulment, to maintain and restore the equality of arms within their powers. Their powers go beyond the technical arbitration rules; the principle of “inherent powers” provides a broader foundation. As tribunals grapple with such challenges, they should rely on their explicit and implicit procedural powers, learning from how other international courts and tribunals, as well as the courts in the major legal systems, deal with them. There is one significant difference, though: domestic courts can rely on the support of their country’s judicial system; in investment disputes, international tribunals as a rule cannot refer misconduct by a Respondent State to the courts and prosecutors of this State. This difference means that international investment tribunals have a heightened responsibility to deal with risks to the integrity of the arbitral process themselves.

It should be borne in mind that, under the applicable treaty, governments remain obligated toward foreign investors throughout the arbitration process. The arbitration relates directly to the “investment” and the “investor” which are covered by the treaty. Serious misconduct by the State towards the Claimant during the arbitration should therefore be covered by the pertinent obligations of the treaty, primarily the duty of “fair and equitable treatment” and the obligation to provide “constant security and protection,” the “due diligence” obligation imported into treaties from customary international law. Breaches of these obligations after a claim has been raised and during the arbitration can lead to distinct remedies, e.g., orders by the tribunals for specific performance (i.e., cease and desist), to financial compensation and, possibly, to other remedies such as a public apology. This interaction between the substantive obligations under an investment treaty and the procedural duty of the State (arguably also both parties) has not as yet been properly identified or explored in detail but is foreshadowed in several awards.⁹¹

⁹¹ *Pope-Talbot v. Canada; Desert Line v. Yemen; Eureka v. Poland*; as cited earlier, *Saluka v. Czech Republic*, Partial Award, 2006 at para. 308: “According to the ‘fair and equitable treatment’ standard, the host state must never disregard the principle of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities.”

Chapter 8 "Equality of Arms" in Investment Arbitration: Procedural Challenges"
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Arbitration Under International Investment Agreements: A Guide to the Key Issues

Edited by: Katia Yannaca-Small

ISBN13: 9780195340693, ISBN: 0195340698

Published: May 2010, Oxford University Press USA

Country of Publication: USA, Binding: Hardback

Price: £135.00 (available with discount, for TDM/OGEMID members only, contact us for details)

Investor-state arbitration is a relatively new dispute settlement mechanism that allows foreign investors the opportunity to seek redress for damages arising out of breaches of investment-related treaty obligations by the governments of host countries. Claims are submitted to independent, international arbitration tribunals, which are called upon to interpret the treaty at hand. Because of the public interest involved in these cases, the awards of these tribunals are subject to much scrutiny and debate. Thus, it has already generated hundreds of cases and created new legal disciplines, inspiring a continuous string of legal writings. This book describes the process of investor-state arbitration in all of its phases, and provides the reader with comprehensive insight into investor-state arbitration.

Arbitration Under International Investment Agreements: A Guide to the Key Issues includes contributions from many of the leading experts in the field, from private practitioners and academics to government and international organization officials. In this way, the book differs from other books on this topic because it includes contributions from all actors involved, providing more credibility in an area in which one of the main criticisms is bias against governments. This book provides pragmatic and reliable analysis of all aspects of this evolving topic.

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