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by P.C. Arias, Esq. and J.L. Sblendorio

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Judicial Intervention and Arbitral Awards: Expanding Human Rights Protections to International Arbitration in the Context of Enforcement Proceedings

By Paula C. Arias[1] *and Jessica L. Sblendorio*[2]

Abstract

Judicial conduct in the enforcement of an arbitral award, if challenged, can raise a number of implications and concerns. Relying upon the UNCITRAL Model Law and the New York Convention, as well as other applicable regional treaties governing the enforcement of arbitral awards, this article will analyze the interplay between the enforcement of awards and human rights when an award is denied enforcement or is recognized by national courts. More specifically, this article addresses whether and in what circumstances States may be found liable under international law when its domestic courts enforce or deny international arbitral awards, especially in cases where the human rights framework is implicated. This piece engages in a comparative analysis of the different regional systems that may have reasons to address these issues, though our particular focus is on jurisprudence from the European Court of Human Rights, and the Inter-American and African Courts, with the doctrines of the former particularly guiding our analysis.

While one of the goals of international arbitration is to avoid or reduce State intervention, State involvement undoubtedly occurs or cannot be entirely avoided at the end of an arbitration when parties seek to enforce the arbitral award. The actions taken by a State's courts in regards to enforcement proceedings can result in liability on the part of the State as a whole because "a wrongful failure to enforce an arbitral award or the underlying arbitration agreement, or the improper setting aside of an award, may invoke the international responsibility of the State whose courts have taken one of those actions."[3]

Moreover, the State's involvement in this context is subject to the international human rights legal framework. The fact that a State's involvement is minimal in commercial arbitration proceedings does not preclude a State from having to follow international human rights law. This paper proposes that the international human rights system provides important assistance to the world of international arbitration when a national court becomes involved in the arbitration process, specifically, in the recognition and enforcement of an arbitral award. International human rights establishes protections and guarantees for the arbitration parties, such as the right to property, the right to due process, and the right to a fair trial, and this

[1] Paula C. Arias is Lecturer in Law and Director of the international moot court program at the University of Miami, School of Law. She is a professor of international sales, international human rights, and other subjects of international public and private law. She is admitted to practice law in Florida, United States and Colombia, South America. She can be contacted at parias@law.miami.edu.

[2] Jessica L. Sblendorio is an associate in the Boston office of Haug Partners LLP. The views and opinions expressed in this article are those of the author and does not reflect the opinions of the firm or any of its attorneys or clients. She can be contacted at jsblendorio@haugpartners.com.

[3] D. Brian King and Rahim Moloo, *Enforcement after the Arbitration: Strategic Considerations and Forum Choice*, at 18 (2013), *available at* http://arbitrateatlanta.org/wp-content/uploads/2013/04/Enforcement-After-the-Arbitration.pdf. Generally speaking, courts do not review the merits of the underlying award in annulment, set-aside or enforcement proccedings. The court's mandate in these situations is instead rather limited. It concentrates on guarding that the proper and due process guarantees were observed and that the arbitration agreement was respected.

regime requires these rights to be respected by the administering domestic courts to avoid illegal results such as enforcing an invalid award or denying the enforcement of a valid award. Otherwise, the State may incur international liability for a breach of its international human rights obligations. To understand the interplay between the two bodies of international law and the legal implications, we will look closely at three regional human rights systems, namely, the European, Inter-American, and African systems.

I. Judicial Intervention in Arbitration

International arbitration has been evaluated and conceptualized based on its function and origin[4]—the origin being the arbitration clause between the parties whereby they agree to seek arbitration and the function being the resolution of a dispute agreed in the arbitration contract. In light of these two, the relationship between international arbitration and the judiciary is defined.

This relationship further supposes assistance during the arbitration process—judicial control of the arbitration and review or enforcement of the award.[5] This relationship, however, has a tendency to be limited to the least intervention of the judiciary due to its extensive use in the private sphere and the acceptance of this mechanism by the parties as an efficient and cost-effective tool.

The limitation of judicial intervention has its basis in the contractual nature of the mechanism.[6] International arbitration is born by the consent of the parties that seek to separate themselves from the domestic courts, seeking instead a neutral and autonomous adjudicatory forum for their disputes.[7] Consequently, different courts around the globe have adopted this reasoning to justify a limited intervention during the arbitration process, such as the United States Supreme Court, the French Supreme Court, the Argentinian Supreme Court, and the Peruvian Supreme Court.[8] The United Nations Commission on International Trade Law ("UNCITRAL") Model Law (hereinafter the "Model Law") also supports this non-intervention practice and policy.[9]

Notwithstanding the foregoing, many jurisdictions recognize that some degree of intervention by the State during the procedings may be necessary,[10] for example during the appointment of an arbitrator in the absence of an agreement,[11] during a challenge to an arbitrator,[12] or with respect to interim measures. Most jurisdictions further recognize that judicial intervention in the form of control over the final result – the award – is necessary. In fact, it is at the end of the process that judicial intervention plays the largest role.

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[4] FRANCISO GONZALEZ DE COSSIO, ARBITRAJE 17 (3d ed. 2011).
[5] Rukmini Das and Anisha Keyal, *Judicial Intervention in International Arbitration*, 2 NUJS L. REV. 585, 586 (2009).
[6] ROQUE CAIVANO, CONTROL JUDICIAL EN EL ARBITRAJE 51 (1st ed. 2011).
[7] ALEKSANDAR JAKSIC, ARBITRATION AND HUMAN RIGHTS - COMPARATIVE AND INTERNATIONAL LAW STUDIES 137 (2002).
[8] CAIVANO, *supra* note 6, at 98.
[9] United Nations Commission on International Trade law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006*, art. 5 (Vienna: United Nations, 2008), *available at* www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html ("UNCITRAL Model Law").
[10] CAIVANO, *supra* note 6, at 102.
[11] UNCITRAL Model Law, art. 11(3)(a) and (b).
[12] *Id.*, art. 13(3).

Pursuant to the Model Law, State judiciaries may assert control: (i) at the seat of the arbitration for purposes of set-aside proceedings,[13] and (ii) when recognizing and enforcing the arbitral award.[14] In both these instances, judicial control should not lie in the merits but should be focused exclusively on procedural grounds or those within the bounds of arbitral consent, except for the public policy exception. Thus, even though these two instances for intervention exist, they are still confined.

In sum, despite the ideal of autonomy and freedom of contract inherent in international arbitration, judicial intervention either in the form of assistance or during the recognition and enforcement stage demonstrates that this autonomy is not absolute.[15] Additionally, it further illustrates that State action is performed in the course of the private sphere and when that State action occurs not only do the principles and rules of international arbitration apply, but also the principles and rules of general international law, especially international human rights law.[16]

II. State Responsibility and Liability

A. Reaction of the Judiciary to the Arbitral Award

Once an arbitration has concluded and a final award has been issued, the parties will seek to either enforce or set aside the award in national courts. Recent statistical studies indicate that the majority of non-prevailing parties in international arbitration comply with the award.[17] In the case that the losing party does not comply with the arbitral award, the prevailing party will typically seek to enforce the award in a State where the losing party's assets are located.

The New York Convention,[18] for example, provides a robust mechanism for the enforcement of awards. To date, there are 159 States that have committed to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon,"[19] and the Convention imposes obligations on the member States not to evade these obligations on the basis of its domestic laws. This concept is further reinforced by the purpose and object of bilateral or multilateral treaties that indicate the parties agreed to a binding arbitration with a final award,[20] arbitration clauses, themselves, expressing the

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[13] *Id.*, art. 34.
[14] *Id*., art. 35.
[15] CAIVANO, *supra* note 6, at 98. This can be at the seat of arbitration, in the country of one or both of the parties, or in some third State where one of the party's assets may be located.
[16] JAKSIC, *supra* note 7, at 203.
[17] *See* King and Moloo, *supra* note 3, at 1 (2013) (noting that non-prevailing parties in international arbitrations comply with the arbitral award in approximately 90% of cases) (internal citation omitted); Queen Mary University of London, Survey, *International Arbitration, Corporate attitudes and practices*, at 8 (2008) (84% of participating counsel indicated that the opposing party had complied with the award in full in more than 76% of cases); UNCTAD Publication, Pink Series Sequel: Investor-State Dispute Settlement, at 156 (Jul. 24, 2014), *available at* http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf (reporting that most States had honored the obligations and paid awards voluntarily).
[18] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517 (1968) ("New York Convention").
[19] *Id*. art. III.
[20] *See e.g.* UNITED STATES DEP'T OF STATE, UNITED STATES MODEL BILATERAL INVESTMENT TREATY, art. 34 (2012), *available at* https://www.state.gov/documents/organization/188371.pdf (discussing awards and that "[e]ach Party shall provide for the enforcement of an award in its territory").

binding nature of awards,[21] applicable arbitration rules,[22] and the number of States that have adopted modern arbitration laws, including versions of the UNCITRAL Model Law.[23]

Prior to the enforcement of an award, the award must be "recognized" under the domestic law in order to give legal effect to the award and allow the prevailing party to commence execution of the award against the assets of the losing party. If the award is recognized, then the next stage of enforcement would be executing the award in that jurisdiction, which may require a number of authorities and/or State officials to assist the prevailing party in reaching the assets of the debtor and taking possession of them (or the market value of such assets).[24] However, if the award is set aside, or annulled, before it is submitted for recognition, then this may prevent the award from being enforced. Further, it is important to note that the grounds upon which enforcement can be refused under Article V of the New York Convention are very narrow and much of the burden on proving these grounds lies with the party opposing the enforcement of the award.[25]

B. Judicial Action as State Responsibility

Before addressing how the actions of the judiciary in the enforcement or non-enforcement of awards can give rise to human rights violations, it is important to understand the framework for attributing responsibility to the State for the wrongful act (i.e., the improper non-enforcement of an arbitral award). Customary international law of State responsibility explains that a State incurs international responsibility if it carries out an internationally wrongful act—this act must be an intentional action or an omission that breaches an international obligation that is attributable to the State.[26]

First, the breach of an obligation must come from a source of international law that is binding on the State concerned;[27] an example of this source would include a regional human rights treaty, such as the European Convention on Human Rights ("European Convention"). The rights codified under the European Convention, such as the right to a fair trial and the right to property under Protocol 1 that are discussed herein, may intersect with similar principles under investment law. For example, a due process claim brought under the fair and equitable treatment standard in a bilateral or multilateral investment treaty ("BIT" or "MIT") can originate from actions taken by a State's domestic courts in failing to enforce an arbitral

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[21] *See e.g.*, Lucy Reed and Lucy Martinez, "Treaty Obligations to Honor Arbitral Awards," *in* Doak Bishop (ed.), *Enforcement of Arbitral Awards Against Sovereigns*, 13 n. 5 (2009) ("The binding nature of the award in inherent in the concept of arbitration. It is often expressed in terms of *res judicata*. Since arbitration is based on agreement between the parties and this agreement includes a promise to abide by the resulting award, the award's binding force can also be based on the maxim *pacta sunt servanda*.") (internal citation omitted).

[22] *See e.g.*, UNCITRAL, ARBITRATION RULES, art. 34(2) (2013).

[23] *See generally* UNCITRAL Model Law.

[24] Deyan Draguiev, *State Responsibility for Non-Enforcement of Arbitral Awards*, 8 WORLD ARB. & MEDIATION REV. 577, 601, no. 4 (2014).

[25] New York Convention, art. V. *See also* King and Moloo, *supra* note 3, at 2 n. 5 (Under Article V, "two of the grounds can be raised *sua sponte* by the enforcing court: where the 'subject matter of the difference is not capable of settlement by arbitration under the law of that country' or where the recognition or enforcement of the award would violate public policy"). Importantly, public policy was not defined in the New York Convention and the manifestations and interpretations of public policy vary among different jurisdictions. *See* IBA Sub committee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, at 6-10 (Oct. 2015).

[26] Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, arts. 1-3, on Its Fifty Third Session, U.N. Doc. A/56/10 (2001) ("Draft Articles on State Responsibility").

[27] *See* United Nations, Statute of the International Court of Justice, art. 38 (Apr. 18, 1946).

award. Secondly, the acts and/or omissions at issue must be attributable to the State.[28] Lastly, there are a number of grounds for which a State may be exculpated, including consent, force majeure, necessity, self-defense, countermeasures against unlawful acts, and distress.[29] These requirements and exceptions are critical in determining whether State responsibility and liability can be invoked.

In cases of non-compliance with an arbitral award, the prevailing party may be forced to go to the losing party's home jurisdiction where its assets are located to seek enforcement. The action of the judiciary in these circumstances is what can give rise to these claims as actions undertaken by the State as internationally wrongful acts because the judiciary is clearly an organ of the State.[30] Other obstacles that may arise during the enforcement of the award can occur due to legal or factual issues, or both: "These may be obstacles arising from statutory provisions of the domestic law of the forum, erroneous applications of the domestic law of the forum (which is otherwise incompatible with international standards), or conduct (acts or omissions as questions of fact)—regardless of whether lawful or not under domestic law of the forum—by State officials or third parties whose conduct is attributable to the State."[31] The human rights obligations of the State, through its obligations under both international and regional human rights treaties, correlated to the right to property, right to due process, or the right to a fair trial, may be triggered by the State's actions in these types of circumstances in both the recognition and enforcement of an arbitral award. It is here and in this circumstance where the worlds of international arbitration and human rights intersect and raises questions of what is permissible by the judiciary within the human rights framework for the enforcement of arbitral awards.

C. Investment Law and Human Rights: Parallels

Investment law claims brought under either BITs or MITs stem from an international obligation that is breached by a wrongful act by the State against an investor. Such breaches form the basis of treaty claims, and some of these breaches may parallel certain human rights claims—for example, an alleged fair and equitable treatment violation may arise under similar circumstances to a human rights claim for breach of the right to a fair trial. Further, a treaty claim for expropriation stemming from a State's failure to recognize and enforce an award may simultaneously implicate the right to property under human rights law. The cases herein demonstrate factual circumstances where a parallel may be drawn between human rights claims and investment law claims. Notably, all the case examples discussed *infra* originally began as commercial arbitrations, and only upon failed enforcement of the awards did these cases become investor-State arbitrations. The key similarity between these cases and possible human rights violations from the non-enforcement of an award is grounded in

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[28] MALCOM SHAW, INTERNATIONAL LAW, 571-73 (7th ed. 2014) (discussing attribution of State liability).
[29] Draguiev, *supra* note 24, at 580 (citing Draft Articles on State Responsibility, arts. 20-25).
[30] Draft Articles on State Responsibility, art. 4(1) ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, **judicial**, or any other functions, whatever position is holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.") (emphasis added); *see also* Saipem S.p.A. v. The People's Republic of Bangladesh, ISCID Case No. ARB/05/7, Award (Jun. 30, 2009); White Industries Australia Ltd. v. Republic of India, Final Award (UNCITRAL Arb. Nov. 30, 2011).
[31] Draguiev, *supra* note 24, at 601.

action taken by the State that results in a breach of rights and a failure to enforce an arbitral award.[32]

To illustrate an example of where human rights and investment law may intersect, in *White Industries Australia Limited v. Republic of India*, the investment tribunal found that the delay in addressing White Industries' jurisdictional claims in the set aside proceedings amounted to undue delay and constituted a breach of the effective means provision of the Australia-India BIT. This finding was a result of a dispute that arose from the enforcement of an ICC arbitration award that was issued against an Indian respondent, Coal India.[33] In this case, White Industries, the Australian company, sought both to set aside and enforce the award. White Industries' application to enforce the ICC Award in India took more than nine years, and the company claimed that the failure of India's courts to enforce its ICC award amounted to a breach of the Australia-India BIT. Specifically, White Industries asserted that the delay by the Indian courts in enforcing the award amounted to a denial of justice and a failure to afford it due process under the investment treaty between two countries. "In effect, by failing to hear the matter within a reasonable period, India has failed to decide for or against the enforcement of the Award held by White during the period of nine years, in a matter in which the India courts are necessarily allowed only limited jurisdiction."[34] Ultimately, the nine-year delay was not found to amount to a denial of justice or a breach of the effective means or fair and equitable treatment provisions of the Australia-India BIT.[35] However, with respect to White Industries claim regarding a delay in its set-aside action, the tribunal found that India failed to provide effective means.[36] This ruling plainly demonstrates how State liability may arise from the actions of the judiciary in failing to set-aside or enforce an award.

Similarly, in *Frontier Petroleum Services Ltd. v. Czech Republic*,[37] the claimant, Frontier, had obtained interim and final awards in Swedish arbitration proceedings against a Czech company, Moravan-Aeroplanes ("MA").[38] However, MA declared bankruptcy before the awards were issued. When Frontier tried to enforce the awards in the Czech Republic against MA in a number of local courts, only one of the courts Claimant applied to for execution of the award against the now bankrupted company initially allowed for the execution of the award (although the proceedings were later discontinued), and Frontier was unable to collect on the awards issued by the Swedish tribunal.[39] Frontier subsequently brought a treaty claim against the Czech Republic alleging violations under the respective BIT for breach of the fair and equitable treatment and full protection and security provisions for its claims to money, here being the final arbitral award.[40] However, the tribunal rejected Frontier's claims, finding that the Czech courts' interpretation of international public policy was reasonable and that the

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[32] Due to the varying nature and interpretation of the rights as enshrined in both the regional human rights treaties and the respective BITs or MITs, claims brought under either the investment law or human rights law framework may still result in different outcomes based upon the applicable national laws and existing jurisprudence. Although understanding this parallel is important to connect how under similar factual circumstances claims can arise under both investment and human rights law, the focus of this paper is not on State responsibility under investment law. Rather, this paper centers on how State responsibility can and has arisen in the human rights arena in the context of the enforcement and setting aside of arbitral awards.

[33] White Industries Australia Ltd. v. Republic of India, Final Award (UNCITRAL Arb. Nov. 30, 2011).

[34] *Id.* ¶¶ 4.3.2, 4.3.4, and 4.3.7.

[35] *Id.* ¶¶ 10.3.1, 10.4.1-10.4.24.

[36] *See id.* ¶¶ 11.3-11.4.20.

[37] Frontier Petroleum Services Ltd. v. Czech Republic, Final Award (Perm. Ct. Arb. Nov. 12, 2010) ("*Frontier*").

[38] *Id.* ¶¶ 27-28, 116, 141.

[39] *See generally id.* ¶¶ 160-182

[40] *Id.* ¶ 184.

Czech courts did not act discriminatorily, arbitrarily, or in bad faith.[41] Notably, in its analysis of Frontier's claim for full protection and security, the tribunal there stated:

> [W]here the acts of the host state's judiciary are at stake, "full protection and security" means that the state is under an obligation to make a functioning system of courts and legal remedies available to the investor. On the other hand, not every failure to obtain redress is a violation of the principle of full protection and security. Even a decision that in the eyes of an outside observer, such as an international tribunal, is "wrong" would not automatically lead to state responsibility as long as the courts have acted in *good faith* and have reached decisions that are *reasonably tenable*. In particular, the fact that protection could have been more effective, procedurally or substantively, does not automatically mean that the full protection and security standard has been violated.[42]

Thus, although Frontier was unsuccessful in its claims, the issues in this arbitration demonstrate circumstances in which judicial actions could raise issues of state liability and invoke state responsibility.

With regards to the right for property, in particular the right to be free from unlawful expropriation, one example of an arbitration that may parallel a human rights claim for an expropriation is *Saipem S.p.A v. The People's Republic of Bangladesh*.[43] In *Saipem*, the investor brought claims arising out of the non-enforcement of an ICC award by the Bangladeshi courts under the Italy-Bangladesh BIT. Importantly, the dispute resolution clause in this BIT did not "expressly" entitle an investor to bring a claim of fair and equitable treatment, so instead Saipem brought a claim for expropriation.[44] Saipem's argument centered on the court's interference with its rights to arbitrate and its right to payment under the contract as determined by the ICC arbitral award and claimed that this amounted to an unlawful expropriation.[45] In its decision, the tribunal concluded that the conduct of the Bangladeshi courts "substantially depriv[ed] Saipem of the benefit of the ICC award and were tantamount to an expropriation of Saipem's residual contractual rights as crystallised in the ICC award."[46] Notably, the tribunal found that the setting aside of an award on its own would not be enough to constitute an expropriation—to be an expropriation the actions of the court must be illegal.[47] In this case, the tribunal found that the actions of the court were illegal because they amounted to an abuse of rights and also breached the State's obligations under the New York Convention.[48] There, the actions of the judiciary deprived the claimant of its property rights encompassed in the award, thus invoking State responsibility and liability.

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[41] *Id.* ¶¶ 302-305, 325-338, 363-416, 452-453, 464-468, 501-530; *see also* PLC Arbitration, *Refusal to enforce award did not violate obligations under BIT*, THOMSON REUTERS PRACTICAL LAW (Feb. 9, 2011), *available at* https://uk.practicallaw.thomsonreuters.com/2-504-7459?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.

[42] *Id.* ¶ 273.

[43] ISCID Case No. ARB/05/7, Award (Jun. 30, 2009).

[44] Promod Nair, *State responsibility for non-enforcement of arbitral awards: revisiting Saipem two years on*, KLUWER ARBITRATION BLOG (Aug. 25, 2011), *available at* http://arbitrationblog.kluwerarbitration.com/2011/08/25/state-responsibility-for-non-enforcement-of-arbitral-awards-revisiting-saipem-two-years-on/.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

These case examples showcase the parallels between human rights law claims for arbitral awards, discussed *infra*, and claims in arbitration proceedings regarding the enforcement or setting aside of an arbitral award. For example, White Industries' claim against India for breach of effective means could also have been successfully pled as a claim for the right to a fair trial under various human rights treaties.[49] In *Frontier*, the alleged claims may have provided a basis for a (successful) human rights claim for violation of the right to a fair trial and the right to property. The facts in *Saipem* could likewise have provided a parallel claim for violation of the right to property under various regional human rights treaties where the arbitral award itself may be considered to be the property of the prevailing party and any deprivation thereof by the State may trigger liability. Thus, although none of the parties in these cases asserted violations of human rights treaties, they theoretically could have. The facts underlying these arbitral claims are similar to the facts that other parties have relied on when asserting human rights violations, particularly in the conext of the non-enforcement of an arbitral award.

III. Arbitration and Human Rights

International human rights law establishes a framework for wrongful actions of the State,[50] whereas arbitration establishes a framework that focuses on the private[51] resolution of disputes.[52] At first glance there is not much interplay between these two bodies of international law, however, when the judiciary acts in relation to an international arbitration process, an action of the State is performed. Thus, if the action is wrongful, it may trigger the framework of international human rights law.

Even though the role of the State in international arbitration is limited, the State has a natural role in private commercial arbitration, since it would be impossible for this mechanism to be effective without the coercive power of the State that ultimately recognizes the award.[53] Thus, the parties must embrace the intervention, and the State must understand that its role in arbitration exists within the framework of human rights and is governed as such.

Despite the argument that human rights and international arbitration should operate exclusive of one another, there is also the argument as presented in this article, that when the judiciary intervenes in arbitration proceedings, international human rights may be considered as the appropriate law to guarantee fundamental rights as provided in different instruments for the recognition and enforcement of arbitral awards, including the European Convention of Human Rights, the American Convention of Human Rights, and the African Charter of Human and Peoples' Rights.[54] The structure and remedies under the international human rights framework may provide an alternative avenue of recourse in the event the State does not recognize or enforce a party's award, or where the State improperly recognizes or enforces an arbitral award.

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[49] *See, e.g.*, *Stran Greek Refineries and Stratis Andreadis v Greece*, Admissibility, merits and just satisfaction, App no 13427/87, Case No 22/1993/417/496, A/301-B, 1994 Eur. Ct. H.R. 48 (1994) (investor claimed a violation of Article 6(1) of the European Convention on Human Rights for a violation of the right to a fair trial).
[50] ANTONIO CASSESE, INTERNATIONAL LAW 375 (2d ed. 2005).
[51] *Private resolution* in the present discussion is to be understood as the mechanism of conflict resolution that does not involve the soverign power of the State to adjudicate. It is not to be understood in the context of commercial matters only.
[52] GARY BORN, INTERNATIONAL ARBITRATION LAW AND PRACTICE 1 (2d ed. 2015).
[53] CAIVANO, *supra* note 6, at 311.
[54] *See generally infra* Part III.A-C (discussing case examples of human rights claims for the enforcement or setting aside of arbitral awards under regional human rights systems).

The analysis in these sections examines fundamental rights, including the right to property, the right to judicial protection, and the right to due process, when there is an improper denial of the recognition and enforcement of the arbitral award pursuant to an overview of the legal doctrine of the different regional human rights systems. Particularly, this will be accomplished through a series of case studies on each regional system and how these systems compliment or relate to one another.

Although the focus of this article is on the international human rights implications in the enforcement of arbitral awards, it is important reemphasize that the underlying facts governing potential claims for international human rights violations in the respective regional human rights framework may also give rise to similar claims under investment law in the form of expropriation and breaches of fair and equitable treatment (namely, denial of justice claims) and full protection and security.[55] Thus, the coexistence of two different breaches of international law due to the same wrongful act provides the individual affected with two avenues to seek redress.

As an example, a breach of fair and equitable treatment brought forth as a denial of justice claim is triggered by the action of a State's courts and may invoke international responsibility.[56] The cases of *Frontier Petroleum*, *White Industries*, and *Saipem*, discussed *supra*, demonstrate how similar claims can and do arise under investment law claims. Similar to human rights claims, any of these breaches under investment law will be tied directly to the relevant and applicable treaty.

A. European Human Rights System

Of these three regional human rights courts, the European Court of Human Rights ("ECHR") is the only regional human rights body that has addressed claims and rendered judgments involving the enforcement or non-enforcement of arbitral awards on the grounds of the right to property (Article 1 of Protocol 1) and the right to a fair trial (Article 6 of the European Convention). This makes sense because of the three regional systems, the European human rights framework provides the greatest access in terms of its jurisdictional structure. Both natural and legal persons may directly bring complaints to the ECHR if the offending State is a party to the ECHR.[57] Thus, this paper primarily focuses on how parties have used the ECHR to help them obtain enforcement of their arbitral awards.

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[55] *See e.g.*, Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award (Nov. 12, 2010); Saipem S.p.A. v. The People's Republic of Bangladesh, ISCID Case No. ARB/05/07, Award (Jun. 30, 2009); White Indus. Austrl. Ltd. v. The Republic of India, UNCITRAL, Final Award (Nov. 30, 2011).

[56] Dan Cake (Portugal) S.A. v. Hungary, ICSID Case No. ARB/12/9 (Aug. 24, 2015) (finding a breach of fair and equitable treatment under a denial of justice claim against the Hungarian courts).

[57] The jurisdiction of the ECHR extends to all member States of the Council of Europe, which includes 47 States. In contrast, the Inter-American human rights framework requires a claimant to first petition the Inter-American Commission on Human Rights to begin an investigation, in the hopes that the Commission will later recommend the case to the Inter-American Court of Human Rights. *See* King and Moloo, *supra* note 3, at 33 (noting that the Inter-American Court of Human Rights "has extended the Convention's protection to injured shareholders in their personal capacities") (citing *Ivcher Bronstein v. Peru*, Judgment, Inter-Am. Ct. H.R. (Ser. C), No. 74 (Feb. 6, 2011)). The African Court on Human and Peoples' Rights falls somewhere in the middle, and allows both individuals and non-governmental organizations to bring claims against States who have signed onto an optional protocol, consenting to such jurisdiction. *See* Protocol on the Statute of the African Court of Justice and Human Rights, arts. 29, 30 (Jul. 1, 2008).

i. Right to Property (Article 1 of Protocol 1)

The right to property under the European Convention on Human Rights is contained in the First Protocol to the Convention[58] as Article 1, which states:

> (1) Every natural or legal person entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interests and subject to the conditions provided for by law and by the general principles of international law.
>
> (2) The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[59]

Interestingly, the characterization of the right to property in Article 1 does not reference property but refers more broadly to the concept of possession.[60] The scope of this right is limited to the ownership of movable or immoveable property, such as shares, intellectual property rights, and final arbitral awards, which qualify as possessions; but the ECHR has held that Article 1 does not guarantee the right to acquire property.[61]

The jurisprudence of the ECHR has interpreted Article 1 of Protocol 1 as having three rules; these permissible restrictions on the right to property will be allowed if it (i) is prescribed by law; (ii) is in the general or public interest; and (iii) fairly balances what is necessary in a democratic society.[62] Article 1 of Protocol 1 protects individuals or legal persons from arbitrary interference with their possessions by the State, but also recognizes the right of the State to control the use of or deprive the property of an individual or legal persons under the conditions specified in Article 1.[63] Similar to the other regional human rights frameworks, interference with the right to property by a State must pursue a general or public interest, such as for the payment of taxes or other contributions, and must not be done in an arbitrary manner and in accordance with applicable law.[64]

Several cases have addressed the interpretation of whether an arbitral award is protected under Article 1 of Protocol 1, and the Court has consistently held in these cases that arbitral awards are "considered . . . as instruments giving rise to *in personam* property rights, . . . which includes the right of possession."[65] The ECHR has not declared arbitral awards as

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[58] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5 ("European Convention").
[59] Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1., Mar. 20, 1952, E.T.S. 9.
[60] Pasquale de Sena, *Economic and Non-Economic Values in the Case Law of the European Court of Human Rights*, 208, 210 *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre-Marie Dupuy et al. eds., 2009).
[61] COUNCIL OF EUROPE, AIDA GRGIĆ ET AL., THE RIGHT TO PROPERTY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS – A GUIDE TO THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS PROTOCOLS, at 7 (2007), *available at* https://rm.coe.int/168007ff55 (internal citation omitted).
[62] *Id*. at 10, 12-15 (A measure that is must be necessary in a democratic society applies a proportionality test that "must strike a fair balance between the demands of the general interest of the community and the requirements of the individual's fundamental rights.") (internal citation omitted).
[63] *Id*. at 5.
[64] *Id*.
[65] Draguiev, *supra* note 24, at 594.

being akin to judgments but instead has treated awards as proprietary rights, which are therefore entitled to be respected and enforced in the same way other pecuniary rights would be.[66] The cases discussed below detail the development of the ECHR's jurisprudence on Article 1 of Protocol 1 and how the non-enforcement or failure to enforce arbitral awards can result in a violation of this Article through State action.

ii. Right to Fair Trial (Article 6)

The right to a fair trial is enshrined in Article 6(1) of the European Convention and provides: "In determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing with a reasonable time by an independent and impartial tribunal established by law. . . ."[67] This Article applies regardless of the parties' status, the type of legislation governing the dispute, and the nature of the authority with jurisdiction in the matter, such as a national court.[68] With regards to civil matters, whether Article 6 applies will depend on if (i) a dispute exists; (ii) the dispute relates to "rights and obligations" that can be recognized under domestic law; and (iii) the "rights and obligations" must be "civil" ones within the meaning of the European Convention.[69] Importantly, the right to a trial and the right to judicial access are not absolute—"[t]hey may be subject to limitations, but these must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired."[70]

With regards to the application of Article 6 to the enforcement of arbitral awards, the ECHR has concluded that the right to recover the proceeds of an arbitral award is a "civil right" under this Article.[71] As the ECHR noted in *Stran Greek Refineries* and *Regent Company*, there are two obligations member States of the ECHR have with "respect [to] the treatment of arbitral awards: (a) a prohibition on unfair treatment of the award creditor in courts, and (b) a requirement of reasonably prompt enforcement action."[72] In contrast to the standard for a denial of justice claim under investment law, the threshold for a violation under Article 6 is lower.[73] Yet, when there is a delay in the recognition of awards, taking into account the standards articulated by the New York Convention, this may not always be a successful defense that States can assert.[74] As an example, in *Stran Greek Refineries*, discussed *infra*, the six-year length of the proceedings was not a violation of Article 6, whereas the eight-year delay in *Regent Company*, discussed *infra*, did result in liability under Article 6.[75] Perhaps, a reason for the difference in outcomes may be that in *Stran Greek Refineries*, the judicial proceedings involved "a number of levels in judicial consideration" and the proceedings were stayed under domestic law; in contrast, in *Regent Company*, there was not a reasonable explanation for why there was a significant delay in the recognition of the award, and the

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[66] *Id*. at 594-95.
[67] European Convention, art. 6.
[68] EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, at 6 (updated Apr. 30, 2017), *available at* http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf.
[69] *Id*.
[70] *Id*. at 16.
[71] King and Moloo, *supra* note 3, at 40 (citing *Stran Greek Refineries and Stratis Andreadis v Greece*, Admissibility, merits and just satisfaction, App. No. 13427/87, Case No 22/1993/417/496, A/301-B, 1994 Eur. Ct. H.R. 48 (1994)).
[72] *Id*.
[73] Draguiev, *supra* note 24, at 602.
[74] *Id*.
[75] *Id*. at 603.

case had not even yet reached the appellate level at the time it was under consideration by the ECHR.[76]

An additional area where the Court has factored Article 6 into the context of enforcement of arbitral awards is on the issue of waiver. A waiver of a person's right to have one's case heard by a court or tribunal comes up often in civil matters, particularly in the form of arbitration clauses in contracts, and does not in principle violate the European Convention.[77] In the recent decision of *Tabbane v. Switzerland*, discussed *infra*, the ECHR examined for the first time the compatibility of a waiver of recourse against an arbitral award under Article 6. The dispute in *Tabbane* centered on an industrial and commercial partnership where one party wanted to enforce an option agreement, but the other parties refused to transfer their shares. Following this refusal, Colgate successfully initiated an arbitration under the option agreement to enforce the transfer of shares, and Mr. Tabbane moved to set aside the award in Swiss courts. The Swiss Supreme Court ultimately found the petition inadmissible and Mr. Tabbane appealed the decision to the ECHR, including an argument that the provision of Swiss law at issue was incompatible with Article 6(1). The ECHR noted in its decision that the right of access to court is not an absolute right and that contracting States can limit this right to some extent. As a result, the ECHR concluded that parties can waive their right to national courts in favor of arbitration and not be in breach of Article 6.

The ECHR has noted in its jurisprudence that waiver of a right to court in favor of arbitration must satisfy certain conditions: the waiver must be "permissible," "established freely and unequivocally," and "attended by minimum safeguards commensurate to its importance."[78] A limited number of national arbitration laws allow for foreign parties to waive the right to challenge an award, including Switzerland,[79] Sweden,[80] Belgium,[81] and France.[82] After the Court's decision in *Tabbane*, there is further guidance as to whether these types of provisions are compatible with the European Convention.

a. Case Study: Stran Greek Refineries and Stratis Andreadis v. Greece

An instructive case in the ECHR was the Court's decision in *Stran Greek Refineries & Stratis Andreadis v. Greece*,[83] which centered on the enforcement and validity of a domestic arbitral award and was the ECHR's first case that addressed human rights and arbitral awards. Two Greek nationals, a private limited company and its sole shareholder, had successfully undertaken arbitration against Greece for a dispute relating to a construction contract and received a multimillion-dollar award in 1984.[84] The Greek courts upheld the validity of the award in the court of first instance and in the court of appeals, but the Greek legislature passed a law that retroactively voided contracts concluded during the dictatorship government, which included the contract and its arbitration clause, as well as any awards arising from the contract.[85] The Court of Cassation had drafted an opinion ruling in favor of

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[76] *Id*.
[77] GUIDE ON ARTICLE 6, *supra* note 68, at 23.
[78] *Id.* (citing cases).
[79] Swiss Public International Law, art. 192.
[80] Swedish Arbitration Act, sec. 51.
[81] Belgium Judicial Code, art. 1718.
[82] French Code of Civil Procedure, art. 1522.
[83] *Stran Greek Refineries and Stratis Andreadis v Greece*, Admissibility, merits and just satisfaction, App no 13427/87, Case No 22/1993/417/496, A/301-B, 1994 Eur. Ct. H.R. 48 (1994) ("*Stran Greek Refineries*").
[84] King and Moloo, *supra* note 3, at 35.
[85] *Id*. (citing *Stran Greek Refineries*, ¶ 19).

Stran; however, after the passage of the law by the Greek legislature rescinding the contract and barring the award, the Court of Cassation upheld the constitutionality of the law, which in turn annulled Stran's award.[86]

Following the annulment of the award, Stran brought a claim to the ECHR, alleging that the Greek judiciary had violated its right to property under Article 1 of Protocol 1, as well as the right to a fair trial under Article 6 of the European Convention. [87] Applying a three part test, the ECHR concluded "that Greece's actions had upset the balance between protection of the right to property and the requirements of public interest," which resulted in a violation of Article 1 of Protocol 1.[88] The ECHR also found that Greece's actions violated Article 6(1), and awarded Stran full compensation, including the value of the entire award plus interest.[89]

Although this case concerned a domestic arbitral award, the principles articulated in *Stran* have been extended to the recognition and enforcement of international arbitral awards and have expanded the protections afforded under Article 1 of Protocol 1, particularly in two subsequent cases before the ECHR, *Regent Company v. Ukraine* and *Kin-Stib & Majkić v. Serbia*, which both raised claims under Article 1 and are discussed in more detail *infra*.[90] With regards to the question of when an arbitral award constitutes a "possession" under Article I, "the Court has confirmed [in subsequent cases] that the protections of [Article 1 of Protocol 1] extend to arbitral awards rendered in international cases, irrespective of the nationality of the parties to the underlying arbitration, or how the applicant came into possession of the award."[91] Secondly, the cases decided after *Stran* have clarified and "defined more expansively the types of interference with arbitral awards that may give rise to liability" under Article 1 of Protocol 1.[92] Lastly, two recent decisions, *Regent Company v. Ukraine* and *Kin-Stib & Majkić v. Serbia*, of the ECHR have "clarified the contours of the 'fair balance' test used to determine whether an interference with a possession ripens into a violation of" Article 1 of Protocol 1.[93]

b. Case Study: Regent Company v. Ukraine

The dispute in *Regent Company* arose from a breach of contract issue between a Czech company, COM s.r.o. ("COM"), and a Ukrainian state-owned company, Oriana. COM alleged that Oriana failed to comply with the contract regarding the processing of raw materials.[94] The arbitration proceedings were held in the International Commercial Arbitration Court ("ICAC") at the Chamber of Commerce and Industry of Ukraine, which issued a decision in favor of COM and ordered Oriana to pay damages to COM for breach of contract.

Following the arbitration, COM tried to enforce the award against Oriana in the Ukrainian courts in 1999, and onward. Ultimately COM's action was joined to other enforcement

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[86] *Id*. (citing *Stran Greek Refineries*, ¶ 22).
[87] *Id*. at 36-37.
[88] *Id*. at 37 (citing *Stran Greek Refineries*, ¶¶ 46, 74, 75).
[89] *Id*. (citing *Stran Greek Refineries*, ¶¶ 80-82).
[90] *Id*.
[91] *Id*.
[92] *Id*. at 38.
[93] *Id*.
[94] Regent Company v. Ukraine, App. No. 773/03, Eur. Ct. H.R. (Fifth Section) (Apr. 3, 2008) ("*Regent Company*").

proceedings pending against Oriana.[95] While COM was attempting to enforce the award, Oriana commenced bankruptcy proceedings.[96] By 2005, the responsible State entities had ceased any effort to enforce the award against Oriana's assets.[97] CMO eventually assigned its rights under the award to another foreign company, Regent Company.

After seven years of pending enforcement proceedings to no avail and while proceedings were still pending, Regent Company applied to ECHR alleging violations of Article 1 of Protocol 1 and Article 6(1) for the failure of the Ukraine courts to enforce the arbitral award. One of the objections of the Ukrainian government was that Article 6(1) did not apply to the proceedings; however, the ECHR held that Article 6 doesn't preclude setting up arbitration proceedings to settle private disputes between parties and that the word "tribunal" in Article 6(1) was not meant to encompass a court of law of the "classic kind."[98] Based upon this reasoning, the ECHR concluded that Article 6(1) was applicable because the ICAC was authorized to settle commercial arbitration disputes and that the proceedings related to the right to demand payment of a debt, which constituted a "civil" right, to which the ongoing enforcement proceedings related.[99]

With respect to Article 6(1), the ECHR concluded that although one of the main reasons for failing to enforce the award was the insolvency of Oriana, this was not an excuse for failure to comply with the obligations of Article 6(1).[100] Further, because State authorities had not taken recent steps to remedy the situation, the continued non-enforcement of the award was a violation of Article 6(1). The ECHR also found that by nature of the award, Regent had "possession" within the meaning of Article 1 of Protocol 1 through the assignment from CMO and its status as a creditor for the award, and that the award "gave rise to demand payment of a debt or to comply with a civil law obligation to provide compensation for pecuniary and non-pecuniary damages, which, being enforceable, should have also been afforded protection under Article 6 . . . ."[101]

As a result of the violations of Article 6(1) and Article 1 of Protocol 1, the ECHR ordered Ukraine to pay the total amount of the arbitral award as compensation. Additionally, because the judiciary failed to enforce the award over a period time without a reasonable excuse for the delay demonstrates that the judiciary's inadequate actions to enforce an award can result in a human rights violation.[102]

c. Case Study: Kin-Stib & Majkić v. Serbia

In the case of *Kin-Stib & Majkić v. Serbia*, the ECHR found that Serbia had violated Article 1 of Protocol 1 of the European Convention by the partial non-enforcement of an arbitral award issued in favor of Kin-Stib, a company based in the Democratic Republic of Congo and Miolrad Majkić, a former Serbian national (collectively "Claimants"). The Claimants and a state-controlled company, Generalexport, had a joint venture for the operation of a casino in a

[95] *Id*. ¶ 8.
[96] *Id*. ¶¶ 21-32.
[97] *Id*. ¶¶ 19-32.
[98] *Id*. ¶¶ 52-54.
[99] *Id*. ¶¶ 54-56.
[100] *Id*. ¶ 59.
[101] Draguiev, *supra* note 24, at 586; *see also Regent Company*, ¶¶ 61-62.
[102] As a note, the enforcement power of the ECHR comes from Article 46 and relies upon the contracting State parties to abide by the final judgment of the Court. Further, the final judgment is transmitted to the Committee of Ministers, who oversee the execution of the decision by the Court.

state-owned hotel in Belgrade. Due to financial difficulties, the casino closed and a number of disputes followed, including an arbitration between Claimants and Generalexport before the Foreign Trade Arbitration Court of the Yugoslav Chamber of Commerce in 1996.[103] The Claimants obtained an arbitral order that granted relief on part of their claims, and ordered Generalexport to pay compensation to Claimants for the inability to operate the casino and allow Claimants to retake possession of and manage the casino for five years after reopening it.[104]

Although the respondents did eventually pay their debt, they did not return possession of the casino as was required by the award.[105] Claimants initiated enforcement proceedings, which resulted in a number of fines for non-compliance with court orders on enforcement.[106] Eventually, the Serbian courts terminated enforcement proceedings in 2006 because the maximum statutory limit for issuing fines had been reached under the Serbian Enforcement Procedure Act.[107] Even though enforcement proceedings were recommenced and Generalexport was ordered to pay Claimants, the license to operate the casino was given to another company by Serbian authorities.[108]

Subsequently, the Claimants brought a complaint to the ECHR alleging a violation of Article 1 of Protocol 1. Relying on *Stran Greek Refineries*, the ECHR concluded that the award "undisputedly" constituted a possession under Article 1 and that the Serbian authorities "clearly [did] not take[] the necessary measures to fully enforce the arbitration award in question and have not provided any convincing reasons for that failure"[109]—for these reasons, the ECHR concluded that Serbia had violated Article 1 of Protocol 1. The ECHR awarded compensation of non-pecuniary damages and agreed that the Claimants were entitled to the lost earnings resulting from the non-enforcement of the award to let Claimants retake possession of the casino.

Thus, although the judiciary issued orders requiring the return of the casino premises, the State's actions through its state-owned entity, coupled with the judiciary being forced to terminate enforcement proceedings, resulted in a violation of human rights. This case example is distinct from the others discussed herein in that the ECHR did not award additional compensation for the violation of Article 1 of Protocol 1, but instead ordered only the Serbian government to comply with the compensation-related domestic judgments of the Serbian courts. Despite this difference from the other cases before the ECHR, this case further demonstrates how the ECHR has interpreted Article 1 of Protocol 1 with respect to the recognition and enforcement of arbitral awards.

d. Case Study: Tabbane v. Switzerland

In March 2016, the ECHR issued its decision in *Tabbane v. Switzerland*,[110] which for the first time evaluated the compatibility of a waiver to challenge an arbitral award with Article 6 of the European Convention. As background, in the late 1990s, a French company, Colgate-

[103] *Kin-Stib*, ¶¶ 11-12.
[104] *Id*. ¶ 12.
[105] *Id*. ¶¶ 14-20.
[106] *Id*. ¶ 22.
[107] *Id*. ¶ 22.
[108] *Id*. ¶ 23.
[109] *Id*. ¶ 84-85.
[110] Tabbane v. Switzerland, App. No. 41069/12, Eur. Ct. H.R. (Mar. 1, 2016) (original in French) ("*Tabbane*").

Palmolive Services SA ("Colgate"), entered into an industrial and commercial partnership with Mr. Noureddine Tabbane, and his three sons, to manufacture its products locally in Tunisia.[111] The parties signed a number of agreements detailing their financial and legal obligations, including an option agreement ("Option Agreement"), which gave Colgate the option to acquire shares held by Mr. Tabbane and his sons in a holding company, Hysys, which was linked to the partnership. In 2007, Colgate wanted to exercise this option, but Mr. Tabbane and his sons refused to transfer their shares.[112]

The Option Agreement contained an arbitration clause, which provided for arbitration under the ICC Rules and stated: "The decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law." Colgate initiated arbitration against Mr. Tabbane and his sons in 2008, requesting that they transfer their shares.[113] The seat of arbitration was in Geneva. The tribunal rendered the final award in 2011 in favor of Colgate.

Following the arbitration, Mr. Tabbane petitioned the Swiss Supreme Court to set aside the award. On January 4, 2012, the Supreme Court found that the petition was inadmissible because the parties had validly waived their right to challenge the award.[114] Mr. Tabbane and his sons lodged an application to the ECHR in July 2012, alleging that he had been denied access to a court in Switzerland and that Article 192 of the Swiss Public International Law ("SPILA"), which allows parties to waive recourse against arbitral awards in certain circumstances, was incompatible with Article 6(1) of the European Convention.[115]

In its decision, the ECHR noted that the right of access to court is not an absolute right and that contracting states can limit this right to some extent, "provided any such limitation pursues a legitimate aim and the means employed to achieve this aim are not disproportionate."[116] As a result of this, the ECHR held that parties can waive their right to national courts in favor of arbitration and not be in breach of Article 6. The ECHR noted the difference between compulsory and voluntary arbitration—compulsory arbitration must comply with the guarantees of Article 6 whereas voluntary arbitration does not.[117] Parties can waive their rights to have their dispute heard by an ordinary court and submit the dispute to arbitration, but the waiver must be voluntarily and freely consented to, lawful, and unequivocal.[118]

Here, the ECHR found that Mr. Tabbane voluntarily and expressly entered in the Option Agreement with the arbitration clause and without duress.[119] The Court also concluded that the waiver in the arbitration clause was unequivocal and had the minimum safeguards (i.e. Tabbane appointed an arbitrator of his choice; consented to Geneva as the seat of arbitration,

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[111] Nathalie Voser and Anya George, *ECtHR: Waiver of Recourse Against International Arbitration Award Not Incompatible with ECHR*, KLUWER ARBITRATION BLOG (Mar. 31, 2016), http://kluwerarbitrationblog.com/2016/03/31/ecthr-waiver-of-recourse-against-international-arbitral-award-not-incompatible-with-echr/?print=pdf.
[112] *Id*.
[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] Catherine A. Kunz, *Waiver of Right to Challenge an International Arbitral Award is not Compatible with ECHR:* Tabbane v. Switzerland, 5 EUR. INT'L ARB. REV. 125, 128 (2016) (citing *Tabbane*, ¶ 24).
[117] Voser and George, *supra* note 111.
[118] Kunz, *supra* note 116, at 128.
[119] *Tabbane*, ¶ 29.

and the Supreme Court's decision did not appear arbitrary).[120] Lastly, the ECHR concluded that Article 192(1) of the SPILA was compatible with Article 6(1) because the ECHR "does not provide for an *actio popularis* for the interpretation of the Convention rights or allow individuals to complain of statutory provisions of domestic law because they consider such provisions to be in breach of the [European Convention.]"[121] Furthermore, the Court concluded that the policy objectives of the Swiss legislature[122] were legitimate. The Court also referred to the second part of Article 192, which provides that the New York Convention still applies even where the parties have waived recourse to the Swiss Supreme Court.[123] Taken together, the ECHR found that Mr. Tabbane's right of access to the court was not impaired and that there was no violation of Article 6(1).

The impact of this decision may influence other countries to include similar provisions into their national arbitration laws. Although the judiciary here chose not to accept a challenge to the award, there was no wrongful act that occurred—the decision by the Swiss judiciary here was lawful and did not trigger violations. Had the waiver by Mr. Tabbane's failed to meet the criteria prescribed by the ECHR, then there may have been a human rights violation. The ECHR's decision in *Tabbane* provides clear requirements on how to properly waive the right of access to courts and what is permitted under domestic arbitration laws.

B. Inter-American Human Rights System

The intervention of the judiciary in international arbitration in the form of control, particularly in the scenario of recognition and enforcement of the arbitral award, as said before, supposes in itself a State action. This State action, as argued in this paper, and as expressed by the ECHR, is constrained by the international human rights framework. Additionally, when the State performing the action is a signatory to the American Convention on Human Rights, it does not only have to conform with the obligations and to respect the rights in the American Convention,[124] but also with the jurisprudence of the Inter-American Court of Human Rights ("IACHR").[125]

Neither the Inter-American Court nor the Inter-American Commission on Human Rights has had the opportunity to address a question similar to the one presented to the European Court of Human Rights in the cases *Stran Greek Refineries and Stratis Andreadis v. Greece*, *Regent Co. v. Ukraine*, *Kin-Stib v. Serbia*, and *Tabbane v. Switzerland*. However, the doctrine developed by the IACHR for the rights to fair trial, property and judicial protection in different contexts could lead to a similar decision as the one reached by the ECHR. Based on that, we affirm that an "irregular" denial or recognition and enforcement of an international arbitral award by a national court in the Americas could breach the obligation to protect and guarantee those human rights; and this violation of human rights could assist an arbitration party to achieve the recognition and enforcement, or its denial in the national courts, if the party were to seek redress relying on the American Convention.

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[120] Kunz, *supra* note 116, at 129 (citing *Tabbane*, ¶¶ 30, 31).
[121] *Id*.
[122] *Id*. ((i) "increasing the attraction and efficiency of arbitration in Switzerland, by avoiding a double control of the award in challenge and enforcement proceedings," and (ii) "reducing the caseload of the Supreme Court") (citing para. 33).
[123] Voser and George, *supra* note 111.
[124] American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 99 (1969) ("American Convention").
[125] Almonacid Arellano et al. v. Chile, Preliminary Objections, Merits, and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).

i. Right to Property (Article 21)

The American Convention was designed to protect broadly individual rights, and despite the economic nature of it, the right to property was included within chapter II among the civil and political rights.[126] The right to property is more progressive[127] since it recognizes that every individual has the right to own and enjoy property.

The Inter-American Court, and the Commission, have also taken a progressive approach by framing this right as an important one in a democratic society.[128] This characterization of the right to property in a democratic society has allowed the case law to advance and recognize the right to property in a variety of circumstances, particularly by "identifying property with every economic interest of an individual."[129] As a consequence, the right to property has been recognized in the context of a pension,[130] a copyright,[131] and a shareholder in a corporation.[132] Considering that an arbitral award supposes an economic interest of an individual, similar to the interest in a pension that has not been granted or a shareholder interest, an arbitral award would likely also be considered as property affording it the protections prescribed by Article 21.

Nevertheless, the American Convention prescribes that the right to property could be subordinated to the interest of society, which allows for its enjoyment to be restricted under specific circumstances to promote equality and societal wellbeing,[133] and pursuant to the formalities of the law.[134] Additionally, the State can restrict the enjoyment of the right to property only by providing just compensation. In light of this, the Inter-American Court has held that violations of the right to property are determined by the facts and not necessarily by formalities only, as the European Court has prescribed in the interference standard.[135]

Pursuant to this democratic perspective of the right to property, a decision denying the recognition and enforcement of the arbitral award has to be an exercise of the power of the State to subordinate it to the interest of society. The State must articulate reasons of public utility or social interest, compensate the individual, and process the limitation of one's property according to the formalities of the law, as guided by the arbitration legal framework, the New York Convention, the UNCITRAL Model Law, and/or by any other relevant binding law. Anything to the contrary would constitute a violation of human rights. Thus, the broad conceptualization of the right to property, similar to the one adopted by the ECHR, could be applied to protect a party's juridical and economic (monetary) interest granted by an arbitral award.

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[126] Pedro Nikken, *Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights*, 246, 249 *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre-Marie Dupuy et al. eds., 2009).
[127] VINCENT O. ORLU NMEHIELLE, THE AFRICAN HUMAN RIGHTS SYSTEM. ITS LAWS, PRACTICE, AND INSTITUTIONS 119 (2001).
[128] Salvador Chiriboga v. Ecuador, Excepción Preliminar y Fondo, Inter-Am. Ct. H.R. (ser. C) No. 179 (May 6, 2008).
[129] Nikken, *supra* note 126, at 250.
[130] Five Pensioners v. Perry, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 98 (Feb. 28, 2003).
[131] Palamara-Iribarne v. Chile, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 135 (Nov. 22, 2005).
[132] *Ivcher Bronstein v. Peru*, Judgment, Inter-Am. Ct. H.R. (Ser. C), No. 74 (Feb. 6, 2011).
[133] Sarmiento Ramirez Claudia and Nash Rojas, Claudio, *Resena historica de la Corte InterAmericana* (2008), *available at* www.anuariocdh.uchile.cl (last visited Dec. 15, 2017).
[134] American Convention, art. 21(2).
[135] Nikken, *supra* note 126, at 250.

ii. Right to Fair Trial and Right to Judicial Protection (Article 8 and Article 25)

The American Convention in Article 8 prescribes the right to a fair trial and in Article 25 prescribes the right to judicial protection. Even though, these two rights are distinct, they relate to one another and constitute "one of the basic pillars not only of the American Convention on Human Rights, but also of the Rule of Law itself in a democratic society (in the sense of the Convention),"[136] since the two rights pertain to the exercise of the power of the judiciary by the State. Taken together regarding the proposition presented in this article, the framework and principles of these two are relevant.

The right to judicial protection supposes the right to an effective, prompt and simple remedy to achieve the protection for the harm to fundamental rights granted by the legal system.[137] The right to a fair trial supposes the minimum guarantees (like a competent, independent, impartial tribunal, equal treatment of the parties and a public hearing) that need to be present in any judicial procedure to achieve the adequate protection of the individuals whose rights and obligations depend on a judicial determination.[138] Looking at this framework, when analyzing the judicial intervention of the arbitral award, it is imperative that the procedure of recognition and execution be carried out according to the New York Convention or equivalent because by virtue of the principle of pro-arbitration and other norms established in the New York Convention and/or in the arbitration law, this system supposes to be the most suitable, efficient, and adequate way to protect the fundamental right (the right to property) enshrined by law.

Additionally, the Inter-American Court (and the Commission) has been affirmative by requiring the presence of the minimum guarantees or due process in *any* judicial procedure, despite the nature of the claim or the organ who is providing the service to justice.[139] The New York Convention—or the applicable arbitration law—prescribes for the respect of certain formalities contained in its rules, which should be the minimum to be applied when deciding a request of recognition and enforcement of an arbitral award.[140] Since the New York Convention (or the Panama Convention) controls the matter together with any procedural aspect provided in the domestic forum,[141] the relationship between international human rights and international arbitration is not only apparent in the former body of law but also in the latter.

Thus, the procedure of recognition and enforcement of an award demands from the judicial system to meet all the procedural guarantees as conceived by the American Convention and the jurisprudence of the Inter-American Court (and the Commission), and the framework of the right to judicial protection. Otherwise, the final decision could be tainted by implicating the violation of human rights, which could be a desirable result for the arbitration party to achieve an appropriate remedy.

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[136] Genie Lacayo v. Nicaragua, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 30 (Jan. 29, 1997).
[137] Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4 (Jul. 29, 1988).
[138] Judicial Guarantees in States of Emergency (Arts. 27(2), 25, and 8 American Convention on Human Rights), Advisory Opinion OP-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9 (Oct. 6, 1987).
[139] Atala Rifo v. Chile, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).
[140] New York Convention, art. II.
[141] Albert Jan van den Berg, *The New York Convention of 1958: An Overview* XXVIII Y.B. COMM. ARB. (2003), at 12.

a. Case Study: Constitutional Court of Guatemala[142]

An international arbitration procedure took place pursuant to an arbitral agreement between two private corporations, including one that was a Guatemalan corporation. The international arbitral tribunal, constituted in accordance with the ICC Rules of Arbitration, issued a final award in that case, and the prevailing party initiated a procedure for the recognition and enforcement of the award in Guatemala. The Guatemalan corporation, the non-prevailing party, objected to the recognition and enforcement, arguing that there was no arbitration agreement between the parties. The national court denied the objection, declared the validity of the arbitral award and ordered its enforcement.

As a consequence, the Guatemalan corporation initiated a constitutional action, *amparo* or *writ of protection,* claiming that the court of recognition violated its fundamental rights of due process and defense. Specifically, the corporation alleged that the court failed to follow fundamental procedure by enforcing an allegedly defective arbitral award, i.e., one that was issued despite the fact that no arbitral agreement between the parties existed. Ultimately, the *amparo* court dismissed the claim and upheld the decision to recognize and enforce the award, finding that there was no harm to the corporation's constitutional right of due process. The corporation appealed, and the case went up to one of the highest courts in Guatemala, the Constitutional Court.

The Constitutional Court was tasked with a constitutional review of the actions and decisions of the lower court, the court of enforcement, which had recognized the award in the domestic system and rejected the objections presented by the respondent in the action. The Court determined that the petition for recognition and enforcement met all the requirements of the Arbitration Law in Guatemala and the New York Convention. The Court also concluded that the right of defense and contradiction was not harmed by the denial of the objections because the objections were filed out of the period, or timeframe, provided by the procedural law. Furthermore, the Constitutional Court found that there was not a violation of due process because the respondent asserted an inappropriate defense/remedy in the context of an exequatur.

In this case, the Court decided to respect the role of international arbitration as a body of law. It is important to emphasize, however, that the Court is also supposed to respect in every instance the domestic constitution, and the American Convention by virtue of the constitutionality of control. If the Court would have found a "violation" of the constitutional (and fundamental) rights when the lower court dismissed the objections presented by the respondent, it would have engaged in an analysis beyond the framework of the New York Convention, which limits the review of the judiciary to the circumstances provided in Article V. This kind of analysis would have disregarded the economic interest provided by the award validly rendered (the right to property), and the right to an effective remedy and fair trial, as required by the American Convention in light of the New York Convention.

Therefore, as this case demonstrates, the granting of the recognition and enforcement of an arbitral award supposes the interrelation between international human rights and international arbitration, which in some cases allows for international human rights law to serve as a valid tool or instrument for the award holder or the party defending itself against the award.

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[142] Guatemala 1. Constitutional Court of Guatemala, 5 April 2005 and 4 September 2008 *in* XXXVIII Y.B. COMM. ARB. (Albert Jan van den Berg ed., 2012), *available at* http://www.newyorkconvention.org/court+decisions/decisions+per+topic/guatemala+1.

C. African Human Rights System

The African Court of Human and Peoples' Rights has never addressed the question presented in this paper. However, understanding the precedent established by the ECHR and how the African Charter was envisioned and has since evolved, it could be posited that a possible violation of human rights could occur when a national court denies the recognition or enforcement of a foreign arbitral award for reasons other than those provided under the New York Convention, the arbitration law in the respective State (i.e. UNCITRAL Model Law, if it applies), and/or domestic procedural laws.

i. Right to Property (Article 14)

When the aforementioned occurs, the first right implicated is the right to property, which is encompassed as Article 14 of the African Charter on Human and Peoples' Rights. The African Charter recognizes that every individual has a right to property.[143] This right, as stated in the *Ogoni* case,[144] includes not only the right to access one's property and freedom from violation of such property or injury to it, but also the free possession and utilization and control of such property in a manner the owner deems adequate.[145] This is crucial in light of the fact that an arbitral award is, in essence, a property right, and thus its owner should have access to the ability to utilize it in an adequate manner. This can be accomplished only through the recognition and enforcement of the award, or through the perseveration of its validity in an annulment proceeding. Otherwise, the property right holder may be unable to exercise their human rights as guaranteed by the African Charter.

However, Article 14 provides the State with the power to encroach on private property to address a public interest need or in the general interest of the community, pursuant to the appropriate laws. The power of the State to encroach, or its power to limit the right, is ill-defined because "the general interest of the community or the interest of public need" are inherently vague concepts that allow the State immense discretion to solidify their meaning.[146] Nevertheless, the African Commission in its jurisprudence has elaborated on the limitation of the right to property by creating a more defined framework. This framework is based upon the principle of proportionality, which allows the State discretion as to the content of "the general interest of the community or the interest of public need," while also limiting the measure implemented that encroaches upon the right to ensure the State does not supersede the claimed interest or need.[147]

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[143] *See* Dino Noca v. Democratic Republic of the Congo, Communication 286/04, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 161 (Oct. 12, 2013), http://www.achpr.org/communications/decision/286.04/.

[144] *See* Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, Communication 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 186 (Nov. 25, 2009), http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf (citing Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Oct. 27, 2001), http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf).

[145] *Id*. ¶ 186.

[146] EVELYN A. ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICE AND PROCEDURE 142 (1996).

[147] *Id*. at 143.

Pursuant to the power of encroachment, when the State denies recognition or enforcement of the award, the State must conceptualize the public need or general interest of the community. This is because the judicial decision, as a State action, in the denial of the enforcement of an award interferes with the freedom of enjoyment or utilization of the right to property. This interference, which is just a manifestation of the discretionary power enshrined in Article 14, is a violation of a human right only if it is exercised without regard to the arbitration legal framework, the New York Convention, the UNCITRAL Model Law (if applicable), or any other relevant binding laws.

In conclusion, the African Charter, by recognizing the property right and granting the State the power to encroach, could be applied to protect the juridical interest of the party awarded an arbitral decision in its favor where judicial intervention is at play.

ii. Right to Fair Trial and Effective Remedy (Article 7)

The second right implicated is the right to a fair trial as enshrined in Article 7 of the African Charter on Human and Peoples' Rights. Similar to the right to property, the right to a fair trial was vaguely prescribed in the African Charter, and through the jurisprudence of the African Commission, the right has been more conceptualized. In principle, the right to a fair trial supposes the fundamental right to judicial protections of all persons in a democratic society.[148] The minimum judicial guarantees include the right to a fair and public hearing; an independent, competent, and impartial tribunal; an effective remedy; equality of arms; and reasonableness of the duration of the proceedings.[149]

When analyzing the judicial intervention of the arbitral award, either through enforcement or annulment, all of these guarantees are at stake because they are provided under Article 7 and are applicable in every instance where an individual seeks to be heard before a court. Despite the fact that the inalienable right in Article 7 was conceived for in a context different from the enforcement of an arbitral award, these types of claims still encompass the right to be heard in a court with the full bundle of guarantees. Hence, when a request for recognition and enforcement is presented, or a request for annulment is presented, the State must ensure that the legal framework of the enforcement and recognition of arbitral awards is properly implemented in order to avoid a violation of Article 7 of the Charter.

Considering the above, the African Charter, by framing the right to a fair trial as a broad right to access courts at every juncture, by default implicates the New York Convention, the UNCITRAL Model Law (if applicable), and the arbitration law of the State, as that is the appropriate framework to provide a resolution for a request for recognition of an arbitral award or its annulment. On the contrary, there is a possibility that a violation of human rights could occur, which again justifies the conclusion that the differing bodies of law must operate in conjunction.

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[148] ORLU NMEHIELLE, *supra* note 127, at 94.

[149] LOUISE DOSWALD-BECK AND ROBERT KOLB , INTERNATIONAL COMMISSION OF JURISTS, JUDICIAL PROCESS AND HUMAN RIGHTS: UNITED NATIONS, EUROPEAN, AMERICAN AND AFRICAN SYSTEMS: TEXTS AND SUMMARIES OF INTERNATIONAL CASE LAW 122-282 (2004).

a. Case Study: Pierre Fattouche v. Mzilika Zi Khumalo[150]

The South Gauteng High Court of South Africa decided a case in 2012 regarding the recognition and enforcement of an international arbitral award. The requesting party had a dispute with the respondent in an international arbitration procedure, conducted pursuant to an arbitration agreement contained in a sale of shares contract.

The enforcement court had two tasks: (i) analyzing whether the award contained a valid obligation for enforcement; and (ii) determining whether domestic law presented impediments to enforcement of the award in South Africa. The first task for the Court was to apply the New York Convention, which was incorporated into South Africa's Recognition and Enforcement Act, and determine if the applicant met all the requirements pursuant to Articles II and IV, and that none of the situations prescribed in Article V was present, which would bar the recognition and enforcement of the award. The second task required the Court to interpret the Protection of Business Act and the Constitution of South Africa in light of the request for recognition and enforcement because the Recognition and Enforcement Act requires ministerial consent when there is a civil transaction connected with the mining sector.

The Court determined that pursuant to the Recognition and Enforcement Act, the petitioner had met all the proper requirements. Subsequently, the Court noted that the ministerial consent requirement may be unconstitutional because it imposes an extra requirement that interferes with compliance of an international treaty, the New York Convention, which South Africa was bound by. However, the Court did not decide on the unconstitutionality of the provision requiring ministerial consent contained in the Protection of Business Act, it instead held that it was capable of deciding the case based upon the facts without a declaration of unconstitutionality. The Court recognized the award and ordered enforcement pursuant the Recognition and Enforcement Act.

In this case, the Court respected the framework of international arbitration law, which also meant respecting the right to due process and access to justice guaranteed by Article 7 of the African Charter. However, if the Court had decided otherwise, the denial of the recognition and enforcement of the arbitration award may have constituted a breach of the minimum guarantees and/or a denial of an effective judicial remedy, since the arbitration award would not have been enforced for reasons other than those prescribed by Article V of the New York Convention. Likewise, the right to property would likely have been violated without consideration of public interest or need. Taken together, this case demonstrates how the recognition and enforcement of an award by a national court may provide the basis for a human rights claim under a particular regional human rights framework, if done irregularly.

IV. Conclusion

As illustrated above, despite the apparent separation between international arbitration and international human rights, there are certain instances and points where both systems may intersect. During the points of intervention, namely the enforcement or denial of the recognition of arbitral awards, the State's continuing obligation to act in accordance with the

[150] Pierre Fattouche v. Mzilika Zi Khumalo, Case No. 508/2012, High Court, South Gauteng, Johannesburg, South Africa (May 2014), *available at* http://www.newyorkconvention.org/court+decisions/decisions+per+topic/south+africa+6.

international human rights framework may be triggered. Thus, as the use of international arbitration continues to expand as a preferred method for dispute resolution due to the claimed lack of bureaucracy, efficiency, and its cost effectiveness, it is imperative that States recognize the possible human rights ramifications of their involvement, create processes to ensure they are not faced with State liability for their actions, and ensure that the interests of individuals are properly upheld. Additionally, it is important that the arbitration stakeholders acknowledge that international human rights law provides protection due to the intervention of the judiciary during the recognition and enforcement of international or foreign arbitral awards, because the actions of the State need to adhere to well-recognized and foundational human rights law and minimum guarantees. Therefore, seeking recognition and enforcement of an international or foreign arbitral award pursuant the New York Convention, Panama Convention or equivalent thereof integrates some of the most fundamental human rights like property, fair trial and judicial protection as prescribed in the European Convention of Human Rights, the American Convention of Human Rights, and the African Convention of Human Rights.