THE PROBLEMS OF USING THE LATEST INSTITUTIONAL ARBITRATION RULES FOR INVESTMENT TREATY DISPUTES

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ABSTRACT

International arbitration institutions have been requested to administer an increasing number of investment disputes. In investment arbitration, a responding state usually stipulates its standing offers to arbitrate in the bilateral investment treaty (BIT). When choosing a specific arbitration institution to settle an investment dispute, the arbitration rules of that organization become the procedural rules governing the arbitral proceeding. Nevertheless, when an institution's arbitral rules are modified after the BIT conclusion, the issue of temporal application of arbitration rules occurs. If there are temporal conflicts of arbitration rules, should the treaty parties' consent to arbitrate always refer to the latest version of the arbitration rules?

This paper begins by navigating several prominent institutions' rules and the practice of international commercial arbitration. Then, this paper examines the investor-state dispute settlement provisions embedded in BITs to comprehensively analyze how BITs refer to those arbitration rules. Taking the decisions of emergency arbitral proceedings in investment arbitration as examples, this paper questions the "dynamic reference" approach to interpreting treaty parties' consent to arbitrate and argues that assuming the latest arbitral rules were always applied may not be appropriate for investment arbitration due to its unique features. Building on such an understanding, this paper proposes an interpretative approach to assist investment arbitral tribunals in better deciding the applicable version of arbitral rules when temporal conflict arises. Additionally, this paper offers legislative proposals to clarify the scope of states' consent to arbitrate in terms of the applicable version of arbitral rules.

Keywords: International investment treaty, Arbitration rules, Investment arbitration, Temporal application, Temporal conflicts, Dynamic reference

I. INTRODUCTION

Investor-state arbitration is now a primary dispute settlement method when host states' breach their legal obligations under the bilateral investment treaty (BIT). Contemporary

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investment treaty practices offer foreign investors arbitration administration institutions and corresponding arbitration rules to govern investment arbitral proceedings. Forums that solve investment disputes include the International Centre for Settlement of Investment Disputes (ICSID) and *ad hoc* tribunals established under the arbitration rules of procedures of the United Nations Commission for International Trade Law (UNCITRAL). These forums are the most common venues for settling investment disputes embedded in BITs. In addition to ICSID and UNCITRAL, some BITs may designate well-known international arbitration administration institutions to serve as alternatives for investors to bring investment arbitrations against host states. These major global arbitral organizations include the International Chamber of Commerce (ICC), the Arbitration Institute of the Chamber of Commerce in Stockholm (SCC), and the International Chamber of Commerce or the London Court of International Arbitration (LCIA).[1]

The majority of disputes these institutions administer are commercial between private parties. Hence, their arbitral or institutional rules are generally for commercial arbitration. To r respond to the needs of disputing parties, institutional arbitration rules are frequently revised and updated. Some of the amendments are trivial and merely involve modest administrative matters. Others might involve more substantial reforms that fundamentally reshape the dynamic of arbitral proceedings. When arbitration rules are modified between the time the BITs conclude and the time investment arbitration proceedings commence, the issue of temporal conflict of arbitration rules arises. In other words, which version of arbitration rules shall apply? Should the version that was in effect when the BITs concluded be applicable? Or instead, should the latest version be used when arbitration is initiated?

While the issue of the temporal conflict of arbitration rules is not new to international commercial practice, a less explored question is whether the doctrine and theory addressing temporal conflict of arbitration rules developed in the context of commercial arbitration can be automatically applied to investment arbitration. Specifically, if the latest version of arbitration rules contains special procedures and other significant procedural revisions that go beyond the state parties' standing offer to arbitrate set out in the BIT, it is imminent to resolve how to balance respecting the will of contracting parties with the investors' right to resort to procedural enhancements provided by the latest arbitration rules. In particular, treaty practice shows that a number of BITs only generally refer to the arbitration institutions and the procedural settings without specifying a particular version of arbitration rules. When there is a temporal conflict of a set of arbitral rules, does a state's general consent to arbitrate by virtue of an arbitral institution or arbitral procedure encompass the consent to apply any subsequent modifications of the arbitral rules of relevant institutions? If yes, what impacts will it bring to how the investment treaty arbitration operates?

This paper briefly provides a background of the temporal conflict of arbitration rules and explores how international commercial arbitration practice has decided which version to apply. This paper then traces investor-state dispute settlement clauses in BITs to demonstrate different models of referencing arbitral institutions or their rules. Using the emergency arbitral procedure of the SCC and its relevant case laws, this paper the issue of temporal application of arbitral rules in the context of investment disputes and implications from a systemic perspective. In particular, this paper establishes an analytical framework to guide future investment arbitral tribunals in determining which versions of arbitration rules to apply when confronting temporal conflict of arbitral rules.

[1] See Article 8.3(c) of the *Belgium-Luxembourg Economic Union and Barbados* BIT.

II. THE TEMPORAL CONFLICT OF ARBITRATION RULES ISSUE IN INTERNATIONAL COMMERCIAL ARBITRATION

Temporal conflict between different versions of arbitration rules is a recurring issue in international commercial arbitration facing arbitral tribunals and national courts. Developing this issue could shed light on investment treaty arbitration. This section examines the practice concerning temporal application of arbitration rules in international commercial arbitration and comparatively analyzes the (non)applicability of some reasoning for investment treaty arbitration developed in international commercial arbitration.

A. Party autonomy and the formation of arbitration agreement

Our inquiry starts with the paramount principle of party autonomy in international commercial arbitration. As a consensual form of dispute resolution, the parties may freely decide when and how to proceed.[2] When the parties decide, their agreement to the applicable arbitration procedure becomes an important term of the arbitration agreement, and shall be respected by the court and arbitral tribunal to the extent that it is not in conflict with mandatory rules of the seat.[3] This principle is recognized in both international and national instruments.

Article II of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), for example, states that "each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences …". And, if an arbitral award is made that is not in accordance with what the parties agreed on – "[t]he composition of the arbitral authority or the arbitral procedure" – then it might be refused enforcement in national courts according to Article V(1)(d) of the same convention. UNCITRAL Model Law on International Commercial Arbitration (the Model Law) takes it a step further by expressly stipulating that "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings" in Article 19 (Determination of rules of procedure). That provision of the Model Law is generally accepted in Model Law jurisdictions.[4] In jurisdictions that do not adopt the Model Law, the autonomy of the parties to determine how the arbitral proceeding should be conducted is, for the most part, also explicitly or implicitly recognized.[5] Judicial and arbitral practices across different jurisdictions also confirm commercial parties' right to agree upon the desirable procedure rules.[6]

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[2] NIGEL BLACKABY ET. AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶¶ 1.53-1.61, 6.07 (6th ed., 2015); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 82-83, 97-98 (3rd. ed., 2021).

[3] *See* BORN, *supra* note 2, at 681-83.

[4] *Id*., at 132-89; BLACKABY ET. AL, *supra* note 2, ¶¶ 6.07-6.08; Manuel a. Gomez and Ikram Ullah, *Article 19: Determination of Rules of Procedure*, *in* UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION-A COMMENTARY 547-49 (Ilias Bantekas et., al., eds., 2020); for the wide adoption of UN Model Law Article 19, *see also* PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION IN UNCITRAL MODEL LAW JURISDICTIONS 339-45, 817-27(4th ed., 2019).

[5] BLACKABY ET. AL, *supra* note 2, ¶¶ 6.07-6.08; BORN, *supra* note 2, at 132-89; EMMANUEL GAILLARD & , JOHN SAVAGE, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 30-35(1999).

[6] *Id*.

Therefore, commercial parties undoubtedly enjoy a wide range of autonomy in dictating the terms and conditions under which they would like to conduct the arbitration, including whether to choose institutional or *ad hoc* arbitration.[7] However, while the parties enjoy such broad autonomy, commercial parties rarely practice contemplating detailed procedural rules in their arbitration agreements. In most situations, the commercial parties simply refer to a set of rules or refer to a desired arbitral institution should a dispute arise.[8] This process is by no means a derogation from the principle of the aforementioned party autonomy. Instead, by referring to a specific set of rules or rules of certain arbitral institutions, the parties have exercised their autonomy to formulate the applicable arbitration procedure, and the rules referred to are incorporated as part of the arbitration agreement.[9]

Parties still undoubtedly dictate the applicable arbitration procedure when they refer to a specific set of rules; however, problems arise when the designated rules change after the arbitration agreement is formed. Considering there is usually a gap between executing commercial contracts (in which arbitration agreement is a part) and the dispute occurring, and considering that arbitral institutions frequently revise their arbitration rules, commercial parties commonly find themselves facing a temporal conflict of arbitration rules.[10] The easy-to-solve temporal conflict between arbitration rules for commercial parties, of course, is to agree on a specific set of arbitral rules or a way to determine which rules should apply.[11]

However, the parties often fail to designate the rules in their contractual arbitration clause, and any agreement between the parties made after the dispute occurs is not always attainable. In these situations, tribunals must determine how to construct the parties' agreement regarding the applicable procedural rules when they lack an explicit choice.[12] Namely, which version of arbitration rules can be inferred from the parties' intent?[13]

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[7] In this article we refer to *ad hoc* arbitration as a concept contrary to institutional arbitration. In *ad hoc* arbitrations, the arbitral proceedings do not receive assistance from arbitral institution's apart from those regarding logistical matters. *See e.g.*, RÉMY GERBAY, THE FUNCTIONS OF ARBITRAL INSTITUTIONS 6-18 (2016); JEFFREY MAURICE WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 210 (2012).

[8] *See e.g.*, BORN, *supra* note 2, at 270; Elizabeth Shackelford, *Party Autonomy and Regional Harmonization of Rules in International Commercial Arbitration*, 67 U. PITT. L. REV. 897,900-03 (2006).

[9] *Id*.

[10] *See generally* BLACKABY ET. AL, *supra* note 2, ¶¶ 1.162. Arbitral Institutions such revise the arbitration rules more often then 20 years ago. In the last ten years, ICC have adopted 3 revisions (2012, 2017, 2021); HKIAC also adopted two revisions (2013 and 2015), SIAC 2 revisions (2013 and 2016) and LCIA 2 revisions (2014 and 2020).

[11] For example, HKIAC Model Clause provides "Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non- contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted."(emphasis added by the authors). *See Model Clause*, HKIAC, *at* https://www.hkiac.org/arbitration/model-clauses (last visited March 20, 2022).

[12] *See e.g.*, BORN, *supra* note 2, at 1426-33; Shackelford *supra* note 8, at 903-04; Simon Greenberg & Flavia Mange, *Institutional and Ad Hoc Perspectives on the Temporal Conflict of Arbitral Rules*, 27(2) J. INT'L ARB. 199, 207 (2010).

[13] *Id*.

B. Two Relevant Points in Time: Date of Contract or Date of Arbitration?

Under this particular context, while the arbitration rules may be subject to several modifications after commercial parties designated the rules as governing rules for their arbitration, the rules at two points in time are of specific relevance: the time of contract (formation of the arbitration agreement) and the time of submission of the dispute for arbitration.[14]

Arguments supporting time of contract put forward that when concluding an agreement to arbitrate, the parties are unable to know the exact content of future versions of arbitration rules; therefore, they are unable to incorporate such rules into the agreement.[15] This straightforward intent provides better certainty to the commercial parties. Under this argument, the consented procedure for arbitration is fixed at the time of contract. As a result, the parties need not worry about any future changes.

However, this static view of the parties' choice of arbitration rules is not without flaw. Critics point out that freezing the applicable arbitration rules at the time of contract might not only deviate from the genuine desire of commercial parties, but can even be impractical in many cases. Noting that the good faith commercial parties generally desire professionally and efficiently settling the disputes, commentators argue that it is more reasonable to construct that the parties would have agreed on the better, updated rules to govern their arbitration proceeding,[16] especially considering that oftentimes the arbitration agreement is concluded long before a dispute arises. Therefore, applying the rules at the time of contract might stop the parties from receiving the benefit of any developments that transpired during the intervals.[17]

To improve time and to offer better quality dispute resolution services is exactly the reason major arbitral institutions revise their arbitration rules every several years.[18] These revisions may include responses to influential new judicial decisions or major changes in commercial practices.[19] The parties that retain the older version of rules, will be denied the benefit of better newer rules. In some extreme situations, the parties might even expose the arbitration proceedings to the risk that the arbitral award be set aside due to the award violating public policy since the older rules do not respond to the judicial developments at the seat or internationally. One significant example is the famous *Dutco* decision of French *Cour de Cassation*, which set aside an ICC arbitral award on the ground that the constitution of the tribunal, made in accordance with the ICC rules at the time, violated

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[14] BORN, *supra* note 2, at 1499-1500; Shackelford *supra* note 8, at 903-04; Greenberg & Mange, *supra* note 12, at 207-09; JOEL DAHLQUIST, THE USE OF COMMERCIAL ARBITRATION RULES IN INVESTMENT TREATY DISPUTES 202-03 (2021); NATHALIE LENDERMANN, PROCEDURE SHOPPING THROUGH HYBRID ARBITRATION AGREEMENTS 243-44 (2017).

[15] Greenberg & Mange, *supra* note 12, at 200.

[16] For the general presumption that the parties wish to settle the dispute efficiently, *see* WAINCYMER, *supra* note 7, at 12-23; Robert, B. Kovacs, *Efficiency in International Arbitration: An Economic Approach*, 23(1) AM. R. INT'L ARB. 155 (2012); Loukas Mistelis, *Efficiency—What Else?: Efficiency as the emerging defining value of international arbitration: between systems theories and party autonomy*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 349 (Shultz & Ortino, eds., 2020).

[17] BLACKABY ET. AL, *supra* note 2, ¶1.162; GERBAY, *supra* note 7, at 36-37, 61-63; DAHLQUIST, *supra* note 14, at 203-05; Shackelford *supra* note 8, at 904-07.

[18] *See e.g.*, LENDERMANN, *supra* note 14, at 109-110; JASON FRY, SIMON GREENBERG, FRANCESCA MAZZA, THE SECRETARIAT'S GUIDE TO ICC ARBITRATION ¶ 3-185 (2012); MICHAEL MOSER & CHIANN BAO, A GUIDE TO THE HKIAC ARBITRATION RULES ¶¶ 3.20-22, 3.32 (2017).

[19] *Id*.

public policy. [20] After this decision, nearly all major international arbitral institutions made corresponding changes to their rules.[21]

Also considering that commercial parties generally do not negotiate the detailed procedure of arbitration; rather, they choose a reputable arbitral institution or its rules. In this sense, the parties' true intention is more likely to enjoy the institution's efforts to provide better services. [22] In the current environment, the party can foresee that the institutional arbitration rules will undergo regular revision every several years.[23]

From the arbitral institutions' view, administering an arbitration is difficult under out-of-date rules. Not only might the staff be unfamiliar with the old rules, but some old practices might be rendered inefficient due to the changing business environment.[24] It is safe to say that the arbitration rules that occur later in time tend to be more efficient and effective, which is what commercial parties generally desire.

C. Relevant Arbitral and Judicial Practices Support a Strong Presumption in Favor of the Rules at the time of Arbitration

As Greenberg and Mange comprehensively investigated, it is unsurprising, in general, that arbitral tribunals and national courts strongly presume to favor choosing the rules at the time of submission.[25]

A line of English case law has subscribed to that view, and with the English High Court confirming that "if an arbitration agreement requires an arbitration to be held according to the rules of a particular institution, that agreement *prima facie* refers to the rules current at the time when the arbitration is begun."[26] In Shakelford's words, if the parties intended for the outdated rules to apply to future disputes, "they could have so provided".[27] Singaporean cases followed the same trend in Car & Cars v. Volkswagen A.G. et., al.,[28] Black & Veatch Singapore Pte. Ltd. v. Jurong Engineering Ltd,[29] and AQZ v ARA.[30]

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[20] BKMI Industrienlagen GmbH & Siemens AG v. Dutco Construction, Cour de Cassation (1er Chambre Civile), Pourvoi N° 89-18708 89-18726, 7 January 1992 [Case excerpt], in Yearbook Commercial Arbitration 1993 Volume XVIII, 140-42 (Van den Berg ed., 1993). For the implications and influences of the case, *see* Eric Schwartz, *Multi-Party Arbitration and the ICC*, 10(3) J. INT'L ARB. 5 (1993); FRY, ET. AL., *supra* note 18, ¶¶ 3-472; Jean-Louis Delvolve, *Multipartism: The Dutco Decision of the French Cour de cassation*, 9(2) ARB. INT'L 197 (1993).

[21] *See e.g*, FRY, ET. AL., *supra* note 18, ¶¶ 3-472; BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS ¶¶444-57 (1ST ED., 2006).

[22] BORN, *supra* note 2, at 87-88, 892-93, 2300-02.

[23] BLACKABY ET. AL, *supra* note 2, ¶1.162; GERBAY, *supra* note 7, at 36-37, 61-63; DAHLQUIST, *supra* note 13, at 203-05; Shackelford *supra* note 8, at 904-07.

[24] *Id*.

[25] BORN, *supra* note 2, at 1499-1502; Greenberg & Mange, *supra* note 11, at 210.

[26] China Agribusiness Development Corporation v. Balli Trading, High Court of Justice, Queen's Bench Division (Commercial Court) (England and Wales), 2 Lloyd's Rep 76 (1998), 20 January 1997.

[27] *See* Shackelford *supra* note 8, at 907 (citing Offshore International SA).

[28] Car & Cars v. Volkswagen A.G. et., al., High Court of Singapore, [2009] SGHC 77, April 3, 2009, *available at* https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/2009-sghc-77.pdf.

[29] Black & Veatch Singapore Pte. Ltd. v. Jurong Engineering Ltd, Singapore Court of Appeal, [2004] SGCA 30, July 8, 2004;

[30] AQZ v ARA, High Court of Singapore, [2015] SGHC 49, Feb. 13, 2015, *available at* https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/2015-sghc-49.pdf.

Only a few cases hold differently. For instance, it is reported that in one French case, the court considered

Arbitral decisions and practices of arbitral institutions also support applying the latest rules. This view is expressed in the institutional arbitration rules as well the model clause. Take the ICC Arbitration Rules as an example. Article 6(1) provides that "Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement."[31] The parties are "advised against agreeing on application of a previous version of the [r]ules".[32] Where reference to earlier versions of ICC rules is made, the secretariat of the ICC Court of Arbitration will suggest the parties consider adopting current rules.[33] The model clause, however, does not refer to either point in time in connection with the applicable arbitration rules.[34]

In the Hong Kong International Arbitration Centre's (HKIAC) arbitration rules, Article 1.4 provides a similar effect.[35] The HKIAC model clause recommends the parties include language to indicate their intention to solve the dispute "under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted."[36] Singapore International Arbitration Centre (SIAC) Rules Article 1.2 is to the same effect.[37] The model clause of SIAC also recommends the users refer to the latest rules when submitting the dispute.[38]

Some other institutions adopt a more aggressive approach. For instance, the Arbitration Rules of the German Arbitration Institute (DIS) Article 1.1 provides that "These rules apply to international and domestic arbitrations in which disputes are to be settled pursuant to the Arbitration Rules of the German Arbitration Institute (DIS) (the 'Rules')." This provision is understood to mean that the parties are not allowed to opt for previous versions of the DIS rules.[39] The London Court of International Arbitration (LCIA)'s approach is slightly

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that an administration contract was formed between the arbitral institution publishing arbitration rules, and the parties of arbitration agreement referring to its arbitration rules, and such contract was formed at the time of the arbitration agreement concluded. On this view, the court found that when lacking a reference to the version of the arbitration rules, the rules effective at the time of contract shall apply. *See* Greenberg & Mange, *supra* note 11, at 208-09.

[31] ICC Rules Art. 6(1), 2021 version. The provision remains the same since 2012 version.

[32] FRY, ET. AL., *supra* note 18, ¶ 3-185.

[33] FRY, ET. AL., *supra* note 18, ¶ 3-186.

[34] The ICC Model Arbitration Clause, *see Arbitration Clause*, INTERNATIONAL CHAMBER OF COMMERCE, *at* https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/ (last visited Aug. 15, 2021) ["All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."]

[35] HKIAC Rule Art. 1.4, "Subject to Article 1.5, these Rules shall come into force on 1 November 2018 and, unless the parties have agreed otherwise, shall apply to all arbitrations falling within Article 1.1 in which the Notice of Arbitration is submitted on or after that date."

[36] Model Clause, HONG KONG INTERNATIONAL ARBITRATION CENTRE, *at* https://www.hkiac.org/arbitration/model-clauses (last visited Aug. 15, 2021)

[37] SIAC Rules Art. 1.2, "These Rules shall come into force on 1 August 2016 and, unless otherwise agreed by the parties, shall apply to any arbitration which is commenced on or after that date."

[38] However, the language of the SIAC model clause "Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules) for the time being in force" has raised disputes on what "for the time being in force" mean. The High Court of Singapore in several cases held that this means "the rules of time of submission". *See generally* JOHN CHOONG, MARK MANGAN, AND NICHOLAS LINGARD, A GUIDE TO THE SIAC ARBITRATION RULES ¶¶ 5.03-5.06 (2018).

[39] DAVID QUINKE, THE DIS ARBITRATION RULES - AN ARTICLE-BY-ARTICLE COMMENTARY 94-95 (2018).

different. The preamble of LCIA Rules provides that an agreement to submit dispute for arbitration under LCIA Rules shall mean that the LCIA Rules at the time of contract as well as "such amended rules as the LCIA may have adopted hereafter to take effect before the commencement of the arbitration" shall both be incorporated into the agreement.[40]

D. The Qualification or the Limit of the Pro-latest Rules Assumption

The foregoing analysis portrays the practice in national court, arbitral tribunals and arbitral institutions as generally supporting the application of the rules at the time of arbitration. In most situations, this assumption is in line with the commercial parties' expecting the dispute to be solved professionally and efficiently.

However, when revising arbitral rules is so significant that they cannot be reasonably considered foreseeable for commercial parties, the presumption in favor of the rules at the time of arbitration is much less strong. As Shakelford indicated, where there is a "wholesale replacement" instead of mere "amendment" of arbitration rules, the parties' consent should not extend to those new rules. [41]

Though the authors are unaware of any direct authority on this topic, commentators have formed their arguments from cases involving fundamental changes in other aspects. The research on the judicial treatments to arbitration agreements during Yugoslavia's dissolution and Germany's reunification shed some light. One of the common issues facing those parties was that the designated arbitral institutions no longer existed (such as the case of the Foreign Trade Arbitration Court in Belgrade) or were merged into another arbitral institution (such as the case of the Court of Arbitration at the Chamber of Foreign Trade of the German Democratic Republic, which was ultimately merged into the DIS).[42] The judicial decisions confirm that when there are fundamental changes of this kind for which the parties could not possibly foresee at the time of contract, the designation of arbitral institutions shall not be automatically transferred to an existing one as that will go against the parties' true intention.[43] Despite the GDR Court of Arbitration having a merger agreement with DIS, the German Federal Court of Justice (*Bundesgerichtshof*, BGH) still held that "an arbitral institution is not entitled to transfer [the duties to administer arbitration cases] to another institution without the parties' consent."[44]

This understanding aligns with the principle of party autonomy, and the idea that certain fundamental changes cannot be unilaterally executed by the arbitral tribunal and influence the parties' arbitration agreement applies to significant modification of arbitration rules. While parties of commercial arbitration generally crave to solve the dispute efficiently and to benefit from the updated rules, it takes quite a stretch to consider the commercial parties giving a blank cheque agreement to anything the arbitral institution might change in the future. Therefore, if the arbitration rules have undergone a fundamental change after the time of contract to the extent that the parties cannot reasonably expect, such a change cannot be considered part of the parties' agreement. The contrary view will

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[40] Maxi Scherer, *Chapter 4: Drafting an LCIA Arbitration Agreement*, *in* ARBITRATING UNDER THE 2020 LCIA RULES: A USER'S GUIDE 50-51 (Scherer et. al., eds, 2021).
[41] Shackelford, *supra* note 8, at 907-912.
[42] For comprehensive reviews for the two scenarios, *see* Alan Uzelac, *Succession of Arbitral Institutions*, 3 CROAT. ARB. Y.B. 71 (1996); LENDERMANN, *supra* note 14, 185-190.
[43] LENDERMANN, *supra* note 14, 185-190.
[44] Cited from *Id*.

render the parties as rubber stamping their consent to every subsequent change made by the arbitral institution.

Several arbitral institutions are aware of this issue and more cautiously revise their arbitration rules. For instance, HKIAC Rules (2018) Article 1.5 provides that the newly introduced "early determination proceedings" do not apply to arbitration agreements concluded before the new version of HKIAC Rules came into force.[45] Similarly, when revising the 2013 arbitration rules, the HKIAC Rules also limit the applicability of the emergency arbitrator proceeding, consolidation of multiple arbitrations, and initiation of single arbitration under multiple contracts to any arbitration agreements concluded before the 2013 version took effect. These limitations resulted from the idea that certain modifications are significant and should not be retroactively applied without offering the parties the opportunity to comment. [46]

ICC is another arbitral institution that adopts a more cautious approach. In its 2012 arbitration rules modification, Article 29(6)(a) expressly limited the temporal scope of emergency arbitrator's proceedings to arbitration agreements concluded after the 2012 rules came into force.[47] Similarly, in the 2021 version of the ICC rules, the amount in dispute rose from two million to three million US Dollars. However, that change only applies to the disputes in which parties agreed to arbitrate on or after January 1, 2021.[48]

E. Summary

In this section, we demonstrate the assumption that the rules at the time of arbitration shall apply in international commercial arbitration where there is no explicit choice of one version of arbitration rules. This construct is based on both the commercial parties' general intention to efficiently and effectively resolve the dispute as well as the commercial parties seldom bothering to stipulate a detailed dispute resolution process over delegating the task to experts they trust. We also demonstrate that favoring the latest version of arbitration rules shall be qualified by the parties' foreseeability. If the revision of arbitration rules has gone far enough to constitute a fundamental change and was unforeseeable at the time of contract, then such change cannot become part of the parties' consent.

III. AN OVERVIEW OF ARBITRATION RULES CONTAINED IN INVESTOR-STATE DISPUTES UNDER INVESTMENT TREATIES

Investment arbitration is modeled on commercial arbitration. In addition to the ICSID, certain commercial arbitral institutions such as ICC, SCC, and LCIA can play an important role in resolving investment treaty disputes between foreign investors and host states. Through investor-state dispute settlement provisions in BITs, these specific arbitral institutions or related arbitral rules become optional fora or procedural rules investors can use to initiate an investment arbitration against host states. In other words, foreign investors

[45] Unless otherwise agreed by the parties: (a) Article 43 and paragraphs 1(a) and 21 of Schedule 4 shall not apply if the arbitration agreement was concluded before the date on which these Rules came into force; and (b) Articles 23.1, 28, 29 and Schedule 4 shall not apply if the arbitration agreement was concluded before 1 November 2013.

[46] Moser & Bao, *supra* note 18, ¶5.09.

[47] ICC Arbitration Rules (2013), Art. 29(6).

[48] ICC Arbitration Rules (2021), Appendix VI, Article 1(2)

would be able to select their preferred commercial arbitration institutions as investment arbitration venues. In this situation, related arbitration institution rules and procedures may be applicable to disputes arising from BITs. As a result, the question of applicable versions of arbitration rules may also occur, especially for those BITs that were signed decades before. The following sections describe principal models in the BITs that specify arbitral institutions or arbitral rules.

A. Institutional Arbitration Rules

1. ICC Rules

An increasing number of BITs refer to the ICC Rules, especially for countries like Taiwan that cannot join the ICSIC Convention. For instance, Article 9.16 of the Taiwan-Singapore Economic Partnership Agreement provides that the claimant may submit the claim under the ICC Arbitration Rules if the investment dispute cannot be resolved through consultations or negotiations. [49] Similarly, Article 17.4 of the Taiwan-Japan BIT states that the investment dispute may be submitted to international arbitration, including but not limited to the ICC arbitration rules.[50] Article 7 of the Taiwan-Nigeria BIT specifies the ICC as the forum to arbitrate the dispute and further stipulates parties' consents to use the ICC Arbitration Rules (1998) as the procedural rules. [51] In addition to Taiwan, other countries may also select the ICC Arbitration Rules as the governing procedural rules to resolve the disputes arising from their BITs. For example, Article 12.3 of the Belgium-Luxembourg Economic Union and the Montenegro BIT stipulates that the parties agree to submit the investment dispute for settlement through arbitration conducted by the ICC.[52] Article 8 of the UK-Turkmenistan BIT also stresses that disputing parties may agree to refer their disputes to the ICC. [53] Considering the special nature of investment treaty arbitrations, the recent amendments of ICC Arbitration Rules incorporate provisions specifically being applied to this type of dispute.

2. SCC Rules

The SCC Rules is another frequently used set of institutional rules used in investment treaty disputes, and the SCC is said to be the forum for settling these disputes in about 120 BITs.[54] Notably, the SCC is included in the Energy Charter Treaty (ECT) as one of the three dispute settlement forums for ECT members. Article 26.4 of the ECT states that the ECT-related investment disputes may be submitted to "an arbitral proceedings under the

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[49] Taiwan-Singapore Economic Partnership Agreement, Art. 9.16 "…the claimant may submit the dispute: (a) under the ICC Arbitration Rules…to any other arbitral institutions or under any other arbitration rules, if the disputing parties so agree."

[50] Taiwan-Japan BIT, Art. 17.4 "…the investment dispute…may be submitted to an international conciliation or arbitration, including…arbitration under Rules of Arbitration of the International Chamber of Commerce and any arbitration in accordance with other arbitration rules agreed upon by the disputing parties."

[51] Taiwan-Nigeria BIT, Art. 7 'Each contracting Party hereby consents to submit any dispute or difference…through arbitration in the International Chamber of Commerce. For the arbitration procedure, the rules of arbitration 1998 of the International Chamber of Commerce shall be applied."

[52] Belgium-Luxembourg Economic Union and Montenegro BIT Art. 12.3 "…dispute shall be submitted for settlement by arbitration to…the Arbitral Court of the International Chamber of Commerce in Parties."

[53] See also Article 8 of the UK-Turkmenistan BIT…: Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to: (b) the Court of Arbitration of the International Chamber of Commerce.

[54] https://sccinstitute.com/our-services/investment-disputes/

Arbitration Institute of the Stockholm Chamber of Commerce.[55]" Additionally, the SCC and its arbitration rules are favored by European countries and are included in their earlier versions of BITs. For instance, Ad Article 5(ii)(b) of the Protocol of Italy-China BIT authorizes the arbitral tribunal to make reference to the SCC Rules when determining its own arbitral procedure.[56] Likewise, Article 8.2 of the Demark-Russia BIT provides that the investor is entitled to submit the dispute to the SCC if such dispute fails to be resolved within a certain period.[57]

3. LCIA Rules

The LCIA also brands itself as the forum to arbitrate both commercial and investment disputes. However, BIT practices rarely choose the LCIA and its rules to conduct investment treaty arbitrations. For example, Article IX.4(d) and Schedule 1 of the United Kingdom-Colombia BIT specify that the disputing parties may agree to refer their dispute to the LCIA and use LCIA Rules to govern the arbitral proceeding.[58] Other BITs adopt an open-ended approach, in which the dispute can be conducted under any arbitration institution and its rules agreed upon by the parties. Article VI.3(iv) of the United States-Armenia BIT stipulates that the dispute can be submitted to "any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.[59]" In these mutual cases, the investment arbitral jurisprudence has referred to the LCIA Rules as the governing procedure in the investment arbitration.[60]

B. Investment Treaty Practices Regarding the Applicable Version of Arbitration Rules

The aforementioned treaty practices exemplified associated "arbitration systems that may be used"[61], including arbitration institutions or arbitration procedure that are provided in BITs. Instead of adopting a specific reference to a particular version of arbitral rules, most states seem only to indicate the name of an arbitration institution or related arbitration procedure. In this regard, the Taiwan-Nigeria BIT offers an exception. Article 7 of the Taiwan-Nigeria BIT "explicitly" refers to the specific 1998 version of the ICC Arbitration Rules as applicable to a dispute.[62] In effect, subject to the fixed and predetermined date of

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[55] Article 26(4) of Energy Charter Treaty.

[56] Protocol of Italy-China BIT, Ad article 5 (ii) (b) "The arbitral tribunal shall determine its own arbitral procedure. But it may, while determining its own procedure, make reference to the arbitral procedures of the Arbitration Institute of the Stockholm Chamber of Commerce…"

[57] Demark-Russia BIT, Art. 8.2 "If the dispute cannot be settled in such a way within a period of six months from the date of written notification of the claim, the investor shall be entitled to submit the case either to: …(b)the Institute of Arbitration of the Chamber of Commerce in Stockholm."

[58] United Kingdom-Colombia BIT, Art. IX.4(d) "… The investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to: …(d) a tribunal constituted in accordance with the Rules of Arbitration of the arbitral institution in the Contracting Party in whose territory the investment is made, as specified in Schedule 1 to this Agreement." Schedule 1 "The United Kingdom: the London Court of International Arbitration."

[59] Article VI.3(iv) of the United States-Armenia BIT.

[60] See, e.g., TS Investment Corp v. Republic of Armenia, Award, LCIA (Aug. 1, 2011).

[61] See *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, 3 July 2013, Decision on the Objection to Jurisdiction for Lack of Consent and Dissenting Opinion of the Decision on the Objection to Jurisdiction for Lack of Consent, para. 25.

[62] Article 9.3 of Russian-Canada BIT provides that "…In that case, the dispute shall then be settled in

the version of a rule, any dispute arising from the Taiwan-Nigeria BIT would be arbitrated in accordance with the specific earlier version regardless of subsequent changes of ICC arbitral rules made in 2012, 2017, or2021.

In contrast, some BITs may adopt a flexible approach to cover UNCITRAL rules. For instance, Article 8.2(b) of the China-Ukraine BIT provides that an ad hoc arbitral tribunal can be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), and the parties to the dispute may agree in writing to modify these rules. Under this approach, disputing investors and the respondent state maintain the right to modify and agree upon UNCITRAL rules to conduct ad hoc arbitration. Article 9 of the Austria-Lithuania BIT states that a dispute may be submitted to arbitration in accordance with "the UNCITRAL arbitration rules, as amended by the last amendment accepted by both Contracting Parties at the time of the request for initiation of the arbitration procedure…." Accordingly, the last amendment of UNCITRAL arbitration rules would be applicable to the investment disputes. In this sense, the interests of treaty parties and the disputing investor are both considered while using the most recent version of arbitration rules. Under Article 22 of the China-Canada BIT, a disputing investor may submit the claim to arbitration under "the UNCITRAL Arbitration Rules, as supplemented or modified by the rules set out in this Agreement or adopted by the Contracting Parties." Based on this model, only treaty parties are left the right to determine the version or updates of the UNCITRAL Arbitration Rules. To the extent that a new amendment of arbitral rules is applicable to an investment dispute, it is especially notable that arbitration institutions' revisions to their rules would automatically become part of the dispute settlement system underlying the operation of BITs.

In most cases, states may provide general consent to using a specific arbitration institution's procedures or rules without mentioning the applicable version of arbitral rules or related issues on subsequent modification under BITs. In this sense, how such general reference should be interpreted when new updates of arbitration rules are in place at the time of the commencement of arbitration might pose a particular challenge for BITs.

IV. WHICH VERSIONS OF INSTITUTIONAL ARBITRAL RULES SHOULD BE APPLIED IN INVESTMENT DISPUTES? TAKE EMERGENCY ARBITRATOR PROCEDURE AS EXAMPLES

A number of arbitral institutions have recently introduced an "emergency arbitrator" procedure into their system.[63] to provide a party in need of interim relief an interim decision before the constitution of an arbitral tribunal. Appointed "emergency arbitrators" will render their interim decision within a very strict timeframe.[64] The emergency arbitrator's

conformity with the Arbitration Rules of the United Nations Commission on International Trade Law, as adopted in Resolution 31/98 of the United Nations General Assembly on 15 December 1976." See also Article 9.3 of the *Bosnia and Herzegovina and Italy* BIT; *Italy-Bulgaria* BIT; *Italy-Nigeria* BIT.

[63] Examples can also be found in ICC, ACICA, CANACO, HKIAC, LCIA, NAI, SCAI, SCC and SIAC.

[64] For instance, the SCC Rules require that the appointment should be within "24 hours of receipt of the application for the appointment of an emergency arbitrator," see SCC Rules, Art. 32(4), App. II Art. 4(1). The ICC Rules state that an emergency arbitrator should be appointed "within as short a time as possible, normally within two days." See ICC Rules, Art. 29(1), App. 2(1).

decision can be an order or an award, [65] which binds the parties.[66] When it comes to the applicability of emergency arbitration in investment disputes, different arbitration institutions adopt varied regulatory models. As mentioned in the previous section, some arbitral institutions specify the temporal scope of applications, which set out that the rules are applicable to all arbitrations commenced after the effective date of the rules. That is, although the new rules were not in effect at the time an arbitration agreement came into effect, an arbitration commenced after the effective date of the new rules would still be subject to the rules. Other institutions indicate the applicability of the emergency arbitration mechanism in specific types of disputes. For instance, even if the ICC Rules established the emergency arbitration mechanism after its 2012 version, Article 29.5 of the ICC Rules excluded this mechanism in investment disputes based on BITs.[67] The SIAC Investment Arbitration Rules (2017) requests the disputing parties of the investment treaty disputes to express their willingness to "opt-in" to the emergency arbitration, making its use almost impossible in investor-state disputes.[68] Unlike the above rules, the SCC allows its rules of emergency arbitrators to be applied in all kinds of disputes without distinguishing between commercial arbitration and investment treaty disputes.[69] As of today, all known emergency arbitrations in investment disputes have been initiated in the forum of the SCC.[70] Therefore, our focus will be on those investment emergency arbitrations adjudicated by the SCC Rules.

According to the SCC, the institution received 42 applications for emergency arbitration since this mechanism was first introduced in 2010. Subject to limited information, there seems to have been at least 10 investment treaty-based arbitrations with references to investors' applying for emergency relief measures, which counts for 24% of all emergency arbitration cases.[71] These 10 emergency decisions made by the SCC emergency arbitrators arose from alleged violations of BITs or the ECT.[72] In investment disputes, these accessible emergency arbitrators have been asked to determine the scope of the BIT parties' consent to arbitration.[73] The next section discusses SCC emergency awards where the issue of the temporal application of the arbitral rule of the arbitral institution was raised by the respondent state.

A. SCC Awards on the Temporal Scope of Emergency Arbitrator Procedures

According to the practice report regarding the emergency arbitrator decisions rendered in 2014, the SCC Emergency Arbitrations 2014/053 (*Tsikinvest LLC v. Republic of*

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[65] Some view an emergency decision as final and enforceable under the New York Convention.
[66] SCC Rules, Art. 32(4), APP. II Art. 9(1).
[67] ICC Arbitration Rules, Art. 29.5.
[68] SIAC Arbitration Rules, Schedule 1.
[69] By contrast, an emergency arbitration is not available under the ICSID arbitration rules neither the UNCITRAL Rules. The ICC also excludes its emergency rules from treaty-based arbitration.
[70] Lars Markert & Raeesa Rawal, *Emergency Arbitration in Investment and Construction Disputes: An Uneasy Fit?*, 37(1) J. INT'L ARB. 131, 135 (2020)
[71] Alexey Pirozhkin, *Emergency arbitrator's decisions in Investment Treaty Disputes at the SCC* (2014-2019), 6-7, https://sccinstitute.com/media/1718853/emergency-arbitrators-decisions-in-investment-treaty-disputes-at-the-scc-2014-201.pdf.
[72] These ten known cases are: TSIKInvest LLC v. Moldova, SCC EA No. 2014/053; Griffin Group v. Poland, SCC EA No. 2014/183; JKX Oil & Gas, Poltava Petroleum Co. v. Ukraine, SCC EA No. 2015/002; Evrobalt LLC v. Moldova, SCC EA No. 2016/82; Kompozit LLC v. Moldova, SCC EA No. 2016/95; Puma Energy Holdings (Luxembourg) SARL v. Benin, SCC EA No. 2017/092; Mohammed Munshi v. Mongolia, SCC EA No. 2018/007; Okuashvili v. Georgia, SCC EA (case no. unknown).
[73] Markert & Rawal, *supra* note 70.

Moldova)[74] and 2014/183 (*Griffin Group v. Poland*) involve arguments as to the applicable version of the SCC Rules. As noted, "[t]he respondent contested jurisdiction arguing that [(a)] the respondent envisaged a previous version of the SCC Rules, not including any [Emergency Arbitrator] procedure, at the time of signing the [t]reaty; and [(b)] even if the parties had envisaged later versions of the SCC Rules to apply, the [Emergency Arbitrator] procedure was such an extraordinary qualitative change [to] the SCC Rules that the respondent could not be regarded as having given advance consent to the procedure. The respondent submitted that it was an extraordinary change of the later version of the SCC Rules to give adjudicative functions to somebody other than the tribunal."[75]

The emergency arbitrator in *Griffin Group v. Poland* referred to Article 31 of the Vienna Convention on the Law of Treaties, where a treaty provision is to be interpreted in accordance with its meaning, context, and object and purpose. The emergency arbitrator entailed that "[w]hen a treaty is formulated in terms whose content is susceptible of evolving over time, it is fair to presume that the contracting states intended their treaty content to evolve accordingly, unless of course there is evidence of contrary intention."[76] Given this, the aforementioned SCC report summarized the emergency arbitrator's analysis, which indicated that "the parties generally should be deemed to have referred to the later applicable version of the SCC Rules, when the agreement referred to an institution instead of a set of rules.[77]" The emergency arbitrator further ascertained that "[t]he arbitration agreement was perfected in 2014, when the investor accepted the offer to arbitrate, and selected SCC as the applicable forum. Both at the time of signing the Treaty and on its entry into force, the critical time for selecting the applicable version of the SCC Rules was the time of conclusion of the parties' agreement. Therefore, the emergency arbitrator concluded, the SCC Rules of 2010 were applicable."[78] Also, the contracting states to the treaty had not excluded application of the emergency arbitrator rules in their offer to arbitrate, which they could have done.[79] In sum, the emergency arbitrator rejected the respondent's objection that "the addition of an emergency procedure was an extraordinary qualitative change of the SCC Rules" given that "there have been several qualitative changes to the older versions of the SCC Rules."[80]

In the case of SCC Emergency Arbitration 2016/082— *Evrobalt LLC v. Republic of Moldova*[81], the question as to whether Article 10 of the Moldova-Russia BIT may be said to include the 2010 version of the SCC Rules and its emergency interim measures rules were raised.[82] According to the emergency arbitrator, at the time the two contracting parties signed the Treaty in 1998, the applicable SCC Rules were the 1988 version. When the

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[74] Lotta Knapp, *SCC practice: Emergency Arbitrator Decisions Rendered 2014 (2015)*, http://www.sccinstitute.com/media/62020/scc-practice-emergency-arbitrators-2014_final.pdf

[75] *Id.*

[76] *Id. See also* Kompozit v Moldova, Evrobalt LLC v Moldova, and JKX Oil & Gas, Poltava Gas, Poltava Petroleum Company v Ukraine.

[77] Lotta Knapp, *SCC practice: Emergency Arbitrator Decisions Rendered 2014 (2015)*, http://www.sccinstitute.com/media/62020/scc-practice-emergency-arbitrators-2014_final.pdf

[78] *Id.*

[79] SCC Arbitration Rules Annex II.

[80] Lotta Knapp, *SCC practice: Emergency Arbitrator Decisions Rendered 2014 (2015)*, http://www.sccinstitute.com/media/62020/scc-practice-emergency-arbitrators-2014_final.pdf .

[81] Award on Emergency Measures, 30 May 2016. Georgios Petrochilos Emergency Arbitrator, Seat of the Emergency Proceedings: Stockholm.

[82] Article 10.2 of the Moldova-Russia BIT.

contracting parties ratified the Treaty in 2001, the 1999 SCC Rules had been in force. Under international law, ratification constitutes "the international act… whereby a State establishes on the international plane its consent to be bound by a treaty[83]." Since both Moldova and Russia had indicated their consent to be bound by the BIT without expressing their objections to the application of 1999 version of the SCC Rules, the emergency arbitrator perceived that

> "[I]t was within the reasonable contemplation of the Republic of Moldova and the Russian Federation that arbitration pursuant to the Arbitration Rules of the "Arbitration Court of the Stockholm Chamber", in the terms of Article 10(2)(b) of the Treaty, meant arbitration pursuant to the version of the SCC Rules extant at the time the arbitration was commenced.[84]"

Additionally, the 2010 SCC Rules contains the same intertemporal interpretative rule as the 1999 Rules, by which "these Rules will be applied to any arbitration commenced on or after this date, unless otherwise agreed by the parties."[85] Under the 2010 SCC Rules, the time of commencement of a proceeding as indicated in an emergency arbitrator proceeding is the date that the claimant's application is to be received by the SCC. As a result, the emergency arbitrator agreed that there is a *prima facie* basis that the 2010 SCC Rules apply to the case pursuant to Article 10(2)(b) of the Treaty.[86] Moreover, according to the emergency arbitrator, "[i]t is inherent in a standing offer to arbitrate set out in an investment treaty that the offer may be acted upon by an investor throughout the life of the treaty.[87]" To properly read Article 10(2)(b), the emergency arbitrator added that "the reference to SCC arbitration should be construed as *a dynamic reference* to the version of the SCC Rules in effect at the time of the commencement of the arbitration.[88]" The contracting parties should have known that the SCC Rules had been revised several times when they signed the BIT. They would have frozen the applicable version of the SCC Rules, but they did not do so.[89] Similar adjudication was also shared by The SCC emergency arbitrator in *Kompozit LLC v. Moldova was similarly adjudicated, and* assumed the contracting parties shall have knowledge and expectation regarding the possible future amendments of the SCC Rules, including the introduction of the emergency arbitration. Hence, the emergency arbitration adopted the deemed consent argument and upheld the applicability of the emergency arbitration stipulated in the SCC Rules (2010).[90]

In light of this rulings, the SCC emergency arbitrators consider that the meaning of an investor-state dispute settlement clause, which generally refers to a particular arbitral institution or its arbitral rules without specifying the version, can be interpreted dynamically. Given that a treaty provision of this kind can be said to have an evolving character, it can be presumed that the contracting states intended their treaty content to evolve. Under the SCC Rules, the latest version of the arbitral rules at the time of the commencement of a proceeding should serve as the applicable arbitral rule for a dispute

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[83] VCLT Art. 2.
[84] *Id.* ¶ 29.
[85] *Id.* ¶ 28.
[86] *Id.*
[87] Id. ¶ 30.
[88] *Id.*
[89] *Id.*
[90] Kompozit LLC v. Moldova, SCC EA No. 2016/95, supra n. 26, para. 38.

arbitrated under existing BITs. This dynamic treaty interpretation means that a dispute relating to a BIT concluded, for instance, in the early 1990s, would apply a new rule and follow a new emergency arbitrator procedure appearing in 2010 and remaining in the 2017 version.

In addition to the issue of temporal application of the SCC Rules, another procedural hurdle argued by respondent states against the applicability of emergency arbitration in investment disputes concerns overriding the "cooling off" clauses in BITs. The cooling-off provision is an arbitral prerequisite, which requires the claimants to undertake efforts to amicably settle the dispute or seek remedies in the host state's local courts for a certain period before they initiate arbitration. Four SCC emergency arbitration cases currently address the applicability of the cooling-off period in emergency arbitration. In these four cases, emergency arbitrators unanimously concluded that the cooling-off period shall not be considered a bar to emergency arbitration proceedings because applying the cooling-off period requirement would be contrary to the nature and purpose of the emergency arbitration proceedings.[91]

B. Re-evaluating the Interpretive Approach Adopted by the SCC Tribunal

As noted, the SCC Emergency Arbitrators recognize that a state has given its consent to use "the emergency arbitrator procedure" in the latest version of the SCC rule at the time of the commencement of the proceedings. In order to establish their jurisdiction, the emergency arbitrators view that a state's general reference to the SCC under a BIT should be interpreted as a "dynamic reference." That is, states have agreed to use the later rules of the SCC after the entry force of the BIT because a change in the SCC rules should have been contemplated by contracting parties by the time the BIT signed. In addition, the version of the arbitration rules in effect at the time of the commencement of the proceedings should be deemed as the applicable version of rules in a given dispute because it is the date that a disputing investor accepts the offer to arbitrate.

In our view, the SCC Emergency Arbitrators' decisions may overly simplify the legal issue of temporal application of arbitration rules, especially in investment arbitration. Arbitration operates on a consent-consensus. It is seemingly difficult to imagine how a state could give its consent to an emergency arbitrator proceeding by referencing a specific arbitral institution since this novel arbitral procedure did not exist at the time of the BIT's conclusion. If the SCC Emergency Arbitrators' awards are the proper reading of such a general reference clause, then the consequence is that any updates and revisions in the later version institutional rules would "automatically" govern the investment arbitration procedure under the BIT and become applicable to any subsequent disputes. In such a case, the arbitral institutions would be required to "retrospectively" apply its new rules to the older BITs.

From the perspective of treaty implementation, the security and predictability should be fundamental elements of the dispute settlement system embedded in the treaty. In the context of BITs, maintaining a proper balance between the interests of private investors and the host state is expected to be established in a more stable and legitimate ISDS mechanism. In our view, determining the applicable arbitration rules is integral to the dispute settlement system. Leaving the design and conduct of a dispute settlement

[91] Kyongwha Chung, *Emergency Arbitrator Procedure in Investment Treaty Disputes: To Be or Not To Be*, 20(1) J. WORLD INVEST. & TRADE 98 (2019). Pirozhkin, *supra* note 71, at 7-8.

procedure entirely to a non-governmental arbitral institution, without involving contracting parties, might make others question the legitimacy. While we agree that the arbitration rules shall be constantly reviewed and revised so as to remedy the deficiencies of the rules and polish the arbitral proceedings, presuming that the revised arbitration rules are more beneficial to the disputing parties is not without the need to further contemplate the unique nature of investment arbitration. Therefore, we will envisage the appropriate roadmap for investment tribunals when faced with the temporal conflicts of arbitration rules in an investment dispute.

C. The Interpretative Approach that Should be Adopted When Facing Changing Arbitration Rules

While applying the latest version of arbitration rules might be justifiable, we believe the SCC tribunals fail to solidly analyze justification for the temporal application of the arbitration rules at the time when the arbitration is commenced. Most importantly, the SCC tribunals rendered their conclusions on the basis of "dynamic reference", which basically reasoned that the choices of arbitral institutions in BITs imply that the treaty parties accept the proceedings be governed by any sets of rules published by those institutions. Such reasoning, however, lacks careful consideration of the different natures between commercial arbitration and the investor dispute settlement mechanism, where the latter is governed by treaties, thus concerning the interpretation of states' will.[92] While some SCC emergency arbitrators cite Article 31 of the VCLT to polish their analysis, they fall short in carefully examining the elements set forth in this article, including exploring the most appropriate version of arbitration rules in the given dispute. In this regard, we perceive that the arbitral tribunal should appropriately resort to the interpretation rules set forth in Article 31 of the VCLT to justify the use of "dynamic reference" and conclude that the updated version of arbitration rules shall be applied in a given dispute.

To elaborate, Article 31 of the VCLT provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[93]" However, the circumstance may evolve after the conclusion of a treaty that cannot be executed by treaty negotiators. Therefore, treaty interpreters, namely those international adjudicators, inevitably contemplate whether they should fully obey the treaty drafters' intent when negotiating the treaty; or conversely, they should actively consider the subsequent changes of circumstance that might affect their understanding of specific treaty terms.

The VCLT fails to provide a clear rule to determine whether an evolutive or contemporaneous interpretation of the treaty terms shall be adopted in a given situation.[94] There are competing arguments regarding whether international adjudicators shall consider the temporal variations when interpreting the treaty. The tension between the two diverse views remains unsettled–should the interpreters ascertain the meaning of a treaty at the time of its conclusion or should they respond to contemporary circumstances and reflect those evolutions in treaty terms accordingly.

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[92] Mariana França Gouveia & João Gil Antunes, *The Suitability of the Emergency Arbitrator for Investment Disputes*, 6(2) E-PÚBLICA 9, 23-24 (2019).
[93] VCLT, art. 31.1.
[94] *See* CHANG-FA LO, TREATY INTERPRETATION UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES: A NEW ROUND OF CODIFICATION 258 (2017).

1. Principle: The updated arbitration rule should be applied

The dynamic reference interpretive approach may be understood as an "object and purpose" test under the VCLT. Scholars emphasize that the normative framework of the treaty may be unable to reflect the changing circumstances after the conclusion.[95] When determining the applicable version of arbitration rules in a given dispute, we believe the objective and purpose test under the VCLT should be exercised to explore parties' attitudes toward the temporal application of updated arbitration rules. In general, states are primarily motivated to conclude BITs to stimulate foreign investments that offer investors substantive legal guarantees and effective dispute settlement mechanisms (i.e., investment arbitration). Such guiding principles are incorporated in the preambles of BITs. For example, the preamble of the Taiwan-Philippine investment agreement highlights both parties' intention to create "favorable conditions for investments in the territories represented by each Party.[96]" Likewise, the preamble of the BIT between China and Tanzania stresses that the conclusion of the BIT is to "create favourable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party.[97]" One of the most critical indicators for foreign investors to evaluate whether to establish their investments in the host state is how functional the arbitration is. Considering that functionality, it is legitimate and reasonable to accept arbitration rules when initiating the claim. As mentioned, the temporal application of the most up-to-date version of arbitration rules should be the default principle since arbitral institutions amend their arbitration rule to improve the quality and efficiency of the arbitral proceeding to satisfy parties' need to effectively settle. Such a rationale parallels the object and purpose of the BITs, namely, to offer an impartial and timely dispute settlement mechanism for the harmed investors to claim for monetary compensation or other forms of redress. An updated version of arbitration rules that incorporates the elements that make the proceedings more efficient and transparent could strengthen the protection of investors. Thus, the new rules should be presumably consistent with BITs parties' intention when they concluded the BIT and required an investment arbitration to be held in accordance with the rules of particular arbitral institutions.

Moreover, the assumption of adopting the latest version of arbitration rules can also find support from domestic procedural laws. The doctrine of the temporal application of procedural rules indicates that the rules regarding procedural matters could retroactively apply to all legal relationships that happened before the revisions as opposed to substantive laws that generally prohibit the *ex post facto* application.[98] Hence, since most of the modifications belong to procedural revisions, we perceive that, in general, the doctrine regarding the temporal application of procedural rules shall be applicable in the context of investment arbitration. Nevertheless, in cases with a significant revision, the SCC's ruling solely based on the doctrine of "dynamic reference" seems to be insufficient. The ruling alone fails to result in the conclusion that applies the version of the arbitration rules that existed at the date of commencement of the investment arbitral proceedings. Instead, exercising the object and purpose test provided by Article 31.1 of the VCLT and extracting

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[95] *Id*.
[96] Taiwan-Philippines IIA, Preamble.
[97] China-Tanzania BIT, Preamble.
[98] *See, e.g*., Jackie M. McCreary, *Retroactivity of Laws: An Illustration of Intertemporal Conflicts Law Issues through the Revised Civil Code Articles on Disinherison*, 62(4) LA. L. REV. 1321, 1328 (2002).

the preambles of BITs, which stress the importance of creating favorable conditions and an effective/efficient dispute settlement mechanism for investors, offers a more persuasive argument for the temporal application of arbitration rules.

2. Exception: The updated arbitration rule should not be applied

(1) The rationales

The default rule suggests the application of the arbitration rules for the time being in force. We believe this rule is has exceptions, especially in the context of investment arbitration, because of the unique characteristics of ISDS that cause the application of the updated arbitration rules to be inappropriate. In other words, while we acknowledge that the so-called "dynamic reference" may contribute to modernizing the ISDS proceeding and lead to better international investment regulatory framework[99], such an evolutionary or retroactive approach should in no way be which would run counter to the intentions of the BIT parties.

The legitimacy of investment tribunals originated from BITs parties' delegations. The principal-agent theory provides that the relationship between states and international courts or tribunals is like principals and agents.[100] Hence, the courts or tribunals shall not exceed the scope of delegation since the agents' legitimacy is solely based on the principals' consent. As an international tribunal, investment arbitration tribunals should act consistently with the mandates granted by BIT parties to prevent "agent slippage".[101] In the context of BITs, which are legal regimes involving a high level of delegation but a low level of treaty precision, the interpretive power is shared by the BIT parties and arbitral tribunals. However, the *ad hoc* nature of the investor-state arbitration system has triggered an even greater concern of inappropriately interpreting the investment treaty contexts and misreading the treaty parties' understanding of the application. Failing to respect the BIT parties' intention would worsen the legitimate crisis of the investment treaty system because such a controlling mechanism exercised by states is absent, posing the risk for arbitral tribunals to "assert and establish new legal norms, often in unintended ways." Hence, as Osadchiy insightfully observed, "Investment treaty tribunals have repeatedly emphasized that arbitrators should be particularly circumspect when asked to curb the exercise of sovereign powers, should not impose their will on state authorities, nor place an unfair burden on the Government.[102]" The determination of the particular set of applicable arbitration rules is an integral part of investment arbitration; hence, carefully analyzing the contemplation of the BIT parties when they entered into the treaty is necessary. Considering the trusteeship between BITs parties and the arbitral tribunal, choosing a version of arbitration rules shall by no means drastically deviate from the default structural setting of the BIT that parties concluded. Otherwise, the dynamic

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[99] Makane Moise Mbengue & Aikaterini Florou, *Judicial Taboo in Investment Arbitration*, *in* EVOLUTIONARY INTERPRETATION AND INTERNATIONAL LAW 260 (Georges Abi-Saad et. al. eds., 2019). Greenberg & Mange, *supra* note 12, at 200-202.

[100] *See* Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 641-44 (2005).

[101] Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104(2) AM. J. INT'L L. 179, 186 (2010).

[102] Maxim Osadchiy, *Emergency Relief in Investment Treaty Arbitration: A Word of Caution*, 34 J. INT'L ARB. 239, 248 (2017).

reference approach would constitute the *de facto* revision of the treaty without mutual consent from treaty parties.

Second, the nature of BITs and investment arbitration differs significantly from that of international commercial arbitration. In the context of ISDS, the respondent state's consent to launch the arbitration may be manifested through the BITs themselves. And the BIT parties would stipulate a list of arbitral institutions and their institutional arbitration rules to be the forum and procedural rules. [103] Unlike commercial arbitration, the provision on consent to arbitration in a BIT is offered in advance by the state, and the investment arbitration could be initiated solely by investors from the other BIT party. This structural design deprives the BIT parties of expressing whether they consent to engage in the arbitral proceeding governed by the updated rules in force at the time the arbitration is commenced. In the case that the revisions of rules are significant, we believe the automatic application of the revised arbitration rules without specific state consent will worsen the legitimacy crisis of international investment law, which has been characterized as exhibiting "an incumbent lack of transparency and legal uncertainty.[104]" As Reisman points out: "The basic theory of arbitration is simple and rather elegant. Arbitral jurisdiction is entirely consensual…The arbitrator's powers are derived from the parties' contract. Hence, in the classic sense, an arbitrator is not entitled to do anything unauthorized by the parties: *arbiter nihil extra compromissum facere potest*....[105]" Therefore, the arbitral tribunal should carefully determine the applicable versions when the respondent state has opposed being governed by the arbitration rules in force at the time the arbitration is initiated.

The issue of temporal conflicts of applicable arbitration rules is relevant to the "public" nature of investment dispute, namely the investment arbitration is governed by BITs and the considerations of public policy of the host states play a more pronounced role than in the forum of commercial arbitration. Aside from the conventional objectives that BITs would like to pursue, other goals include economic cooperation on investment issues; the stimulation of economic development; higher living standards; promotion of respect for internationally recognized worker rights; and maintenance of health, safety, and environmental measures. These objectives are gradually recognized and highlighted in the recent international investment agreements. As a result, unlike international commercial arbitration of which primarily concerns the contractual obligations and monetary interests between private parties, the investment award rendered by investment tribunals may immediately affect governmental decisions that involve the public interest.

(2) The circumstances to exclude the application of the latest arbitration rule

a. The BIT parties have expressed their intention to apply specific version of arbitration rules

First, the application of the latest arbitration rules shall be excluded if the parties intend to "freeze" the version applicable when they concluded the BITs. Such expression would be demonstrated by identifying the specific version of arbitration rules that the parties agree

[103] Sadie Blanchard, *State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration*, 10 WASH. U. GLOBAL STUD. L. REV. 419, 424 (2011).
[104] *Id*. at 419.
[105] W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989(4) DUKE L. J. 739, 745 (1989).

to be the governing procedural rules of the dispute. For example, as elaborated in the *supra* section, Article 9.3 of the Russia-Canada BIT states that any disputes arising from the BIT shall be settled in accordance with the 1976 UNCITRAL Arbitration Rules. Likewise, Article 1(t) of the Japan-Georgia BIT also predates the version of the UNCITRAL Arbitration Rules to be the 2010 version. With these types of clear mandates, the arbitral tribunals shall respect the BIT parties' intention and apply the predated version of arbitration rules, even if such rules have been revised since the investment arbitration commenced.

In addition, even without specifying the applicable version of rules, designating the arbitration rules concerning the temporal application could also empower the disputing parties, especially the respondent state, to indicate the desired version of arbitration rules. Specifically, if the arbitration rules provide the disputing parties the discretion to decide the applicable version that they would like to use, then such choice shall bind the investment arbitral tribunal because it is the consensus of the parties that shall be respected in accordance with the principle of party autonomy. For instance, while the emergency arbitration procedures were introduced in the ICC in 2012, Article 29(6)(a) of the ICC Rules contains "'transitional provisions' exempting the application of the new Emergency Arbitrator Provisions where the arbitration agreement was concluded before the new Rules come into force" to recognize the dramatic changes that might be brought by such new provisions.[106] Similar regulatory models regarding the temporal conflicts of arbitral rules are also found in the HKIAC Arbitration Rules and SIAC Arbitration Rules, both of which grant the disputing parties the rights to choose a previous version of rules as the procedural regulations governing the arbitral proceedings.[107] Therefore, if the underlying BITs refer to arbitration under the HKIAC or SIAC, the host states can insist on using the institutional rules at the time the BITs were concluded.

b. The changes are significant that cause the *de facto* revisions of the BITs

The ISDS cases, which retrospectively applied the emergency arbitration procedures, would substitute the procedural provisions stipulated by the BIT to some extent. For example, the SCC tribunals in three ISDS disputes against Moldova contended that the cooling-off clause in Moldova's BITs would not constitute a legal obstacle to an emergency procedure. Following their logic, introducing the emergency arbitrator procedure in the context of investment arbitration could bypass or override certain prerequisites before initiating investment arbitration claims provided in the BIT, such as the cooling-off periods and the rule of exhaustion of local remedies. [108] We believe that such an assertion seems to neglect the difference between investment arbitration and commercial dispute. As previously iterated, the governing law of an investment dispute is the BIT between the respondent state and the investor's home country. Without undergoing the modification procedures embedded in the BIT, the investment tribunal should not directly substitute the

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[106] Justin D'Agostino et al., *First Aid in Arbitration: Emergency Arbitrators to the Rescue*, KLUWER ARB. BLOG (Nov. 15, 2011), http://arbitrationblog.kluwerarbitration.com/2011/11/15/first-aid-in-arbitration-emergency-arbitrators-to-the-rescue/.

[107] HKIAC Rule Art. 1.4.

[108] *See* Janice Lee, *Is the Emergency Arbitrator Procedure Suitable for Investment Arbitration?*, 10(1) CONTEMP. ASIA ARB. J. 71, 82 (2017). Alexandr Svetlicinii, *Emergency Arbitration in the Investor-State Dispute Settlement Cases: Challenges and Perspectives for Arbitration Institutions*, 8(1) KLRI J. L. & LEGISLATION 1, 17-18 (2018).

procedural provisions under the BIT by applying updated arbitration rules that contradict the BIT. Also, accepting the creation of a particular form of arbitration or imposing certain procedural requirements on disputing parties automatically following arbitral institutions would create confusion or chaos for the application of dispute settlement provisions under a BIT. Given that the mechanism of interim relief is now increasingly embedded in the dispute settlement provisions of contemporary BITs[109], determining how to reconcile the differences between the provisional measures in the BIT and the emergency arbitration could also be complicated.

In a more extreme scenario, there is a recent trend toward more comprehensive settings for investment arbitration proceedings in BITs. Such reformation covers a wide range of topics that would substantially modify the structure of the ISDS system, such as the composition of arbitral tribunals, the qualification of arbitrators, the involvement of non-disputing parties, and provisions that relate to transparency. If the theory of "dynamic reference" is unconditionally shared and adopted by future investment arbitral tribunals, the dispute settlement provisions in the BITs would be directly replaced by the revised arbitration rules of the institutions. In our view, this assertion fails to respect the countries' sovereign power as the BIT contracting parties and may result in overarchingly impacting a state's existing investment treaty system.

To clarify whether the contracting parties of the BIT have accepted to use arbitration rules of the institution, some factors could assist arbitral tribunals in determining whether the amended arbitration rules should be applied. For instance, the scale and importance of the revisions made in the arbitration rules may be one critical factor to evaluate if such changes can be reasonably expected and contemplated by the contracting parties of the BIT. The Swiss Federal Tribunal in *Komplex v. Voest-Alpine Stahl* demonstrates how to exercise this test. the tribunal decided which version of the ICC Rules to apply based on the importance of the modifications made in the updated version. If the revisions concern the essential provisions, such as the rules of challenging the arbitrators, then the arbitration rules at the time of the conclusion of the arbitration agreement shall apply since the disputing parties are unable to contemplate those amendments. In contrast, the minor modifications in the revised arbitration rules for the purpose of reinforcing the efficiency of the arbitral proceedings or are complementary could still be applicable even though such revisions were made after the conclusion of the arbitration agreement.[110] While this case is not an investment dispute, the criteria adopted by the Swiss Federal Tribunal are worthy of reference when determining the applicable arbitration rule when said rule was revised after the conclusion of the BIT. Hence, in the context of investment arbitration, the fundamental revisions of institutional arbitration rules, such as the creation of emergency arbitration or even the establishment of an appeal facility, should be considered significant revisions and would fall outside the scope of the BIT parties' common intention when the treaty was concluded. We perceive that the revised arbitration rules should only be used if such application is of a "complementing" nature and would not constitute *de facto* significant revisions of BITs.

c. Impractical Consequence for the Host States

[109] See e.g., NAFTA Art. 1136.

[110] JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 79 (2007) (citing the case Komplex v. Voest-Alpine Stahl).

Arbitral institutions often revise their arbitration or institutional rules to reflect the needs of the market and users. There might be a wide range of revisions, some of which might be modest; others might involve substantial changes. In commercial arbitration, the disputing parties may presumptively welcome applying the most updated arbitral rules to their commercial disputes because that arbitration agreement concluded before the commencement of the proceeding. However, that situation/circumstance might not be the case for investment treaty arbitration in which a state's consent to arbitration is contained in a BIT signed long before the adoption of new rules of an arbitral institution. States have virtually assumed no role in the revision of the arbitrational rules of arbitral institutions, nor have they been informed of such revisions. Arbitral institutions traditionally focus on commercial arbitration, led by private businesses and practitioners. In this sense, whether a state's interest can be properly reflected in the amendment of an arbitral rule remains questionable.

Even if both the BIT and the arbitration rules of the institutions are silent on the applicable version of rules, the investment tribunal should still be circumspect to using the updated rule if such was reasonably contemplated by the BIT parties and would result in unreasonable impacts against the respondent states. In fact, any introduction of new procedures in investment arbitration, such as the application of emergency arbitration, may pose serious challenges on respondent states to participate in the emergency arbitration procedure. As shown in the SCC emergency arbitrators' cases, Moldova was unable to participate in the emergency arbitral proceedings given the extremely short period for the respondent state to submit their arguments. Some commentators indicate that respondent states are unable to fully participate in the emergency arbitration procedure due to the rigid timeframe and the lack of sufficient resources and competence.[111] To elaborate, an emergency arbitrator must render its decision on an interim measure within an extremely short period.[112] However, the standards for granting interim relief may also involve *prima facie* substantive claims and merits. Even if short-lived and provisional in nature, any decisions rendered by emergency arbitral tribunals may still result in a significant impact during the merit stage.[113] In practice, unlike the claimant, who has adequate time and fruitful resources to prepare a submission to the emergency arbitrator proceeding, the financial weakness of those developing states causes these host governments to appear and eventually be marginalized from the whole proceeding. For example, linguistic and language issues might become significant challenges for those respondent states where English is not their native language. Additionally, it is also impossible to obtain qualified legal representation and assess suitable legal counsel within such a short time because the government usually has to undergo an internal administrative or public procurement procedure to complete the hiring process. These dilemmas raise fundamental concerns of procedural fairness since the host state could not meaningfully respond to the arguments made by foreign investors.[114] The principle of equality of arms, including the rights to be heard and financial equality, is the fundamental procedural principle in investment arbitral

[111] *See* Joel Dahlquist, *Emergency Arbitrators in Investment Treaty Disputes*, KLUWER ARBITRATION BLOG (March 23, 2016), http://kluwerarbitrationblog.com/2015/03/10/emergency-arbitrators-in-investment-treaty-disputes/

[112] In SCC, it is 5 days. And in SIAC, it is 14 days.

[113] Osadchiy, *supra* note 102, at 250.

[114] *Id.*

proceedings.[115] Investment tribunals have a duty to restore procedural fairness by rejecting the use of amended arbitration rules in force on the date of the commencement of the arbitration if such application would derogate the principle of equality of arms.[116] This duty of the tribunal, if breached, can lead to annulment under the ICSID Convention or New York Convention as a "serious departure from a fundamental rule of procedure" or be the equivalent grounds for challenging the enforceability of arbitral awards.[117]

D. Legislative Approach to Mitigate the Temporal Conflicts of Arbitration Rules

As has been demonstrated, the so-called "dynamic reference" approach adopted by the SCC arbitral tribunals that directly extends BIT parties' consent to any version of institutional arbitration rules is problematic. Those questionable arbitral jurisprudence with respect to the host state's intention of applying emergency arbitration procedure demonstrates the urgent need to resolve ambiguities with respect to the BIT treaty language regarding the temporal application of revised institutional arbitration rules. We propose two possible approaches to shed light on guiding arbitral tribunals to correctly apply arbitration rules when those rules have been revised and are different from the version at the conclusion of BITs.

1. Clarifying the Applicable Arbitration Rules in BITs

The contracting parties of the BIT might consider clarifying their common intention regarding the applicable version of institutional arbitration rules by modifying relevant legal provisions. To elaborate, if states really intend to give advance consent empowering the arbitral institutions to determine what arbitration rules would apply in a dispute "after" the signing of the BIT, there should be a clear expression of treaty language that delivers parties' specific consent. Certain BITs limit the temporal scope of the applicable arbitration rules to the version that existed when the BIT was concluded. This regulatory model clearly indicates states' common intention and prevents ambiguities concerning the applicable version of arbitration rules. For instance, Article 1 of the Canadian Model Investment Treaty specifies the term "UNCITRAL Arbitration Rules" to be the 1976 version.[118] Article 7 of the Taiwan-Nigeria investment agreement states that "For the arbitration procedure, *the rules of arbitration 1998 of the International Chamber of Commerce shall be applied* (emphasis added)[119]" Conversely, other BITs use the treaty language including "in force", "as amended", or "in the latest version" following the listed arbitral rules to imply that the contracting parties would accept any rules updated by those institutions. For instance, Article 13.7 of the Taiwan-India investment agreement clarifies the "ICC Arbitration Rules" to be the "Rules of Arbitration of the International Chamber of Commerce, in force as from 1 January 2012 *and as amended thereafter* (emphasis added).[120]" Article 9 of the Austria-Lithuania BIT provides that investors can submit the

[115] Thomas W. Wälde, *Equality of Arms, in* INVESTMENT ARBITRATION: PROCEDURAL CHALLENGES, IN ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 161 (Katia Yannaca-Small ed., 2010).
[116] *Id*.
[117] Svetlicinii, *supra* note 108, at 17-18.
[118] Canadian Model Investment Treaty, Art. 1.
[119] Taiwan-Nigeria Investment Agreement, Art. 7.
[120] Taiwan-India Investment Agreement, Art. 13.7

arbitration claim in accordance with "the UNCITRAL arbitration rules, *as amended* by the last amendment accepted by both Contracting Parties *at the time of the request for initiation of the arbitration procedure*…. (emphasis added)[121]." We envisage that such a legislative approach should be the most effective way to address the evolutionary interpretation adopted by arbitral tribunals that unduly extend states' consent to a certain set of arbitration rules. In this regard, note that the choice of the applicable substantive law usually forms a part of the BIT. In the absence of an explicit consent, it seems questionable if a general forum selection clause itself can encompass a state's consent regarding the specific version of the arbitration rules.

Another BIT provision, which also deserves further clarification to avoid potential uncertainty of applicable arbitration rules, is the most favored nation (MFN) clause. That is, whether an investor can resort to the MFN clause in the BIT at issue and import more recent arbitration rules from another BIT entered into by the host state with a third country. The claimant might be incentivized to pursue such an MFN argument to enjoy the procedural benefits that are not offered by the given BIT. For instance, an emergency arbitrator procedure is not available for investment treaty arbitration under the ICSID, the ICC, or the UNCITRAL rules. Therefore, an investor might argue that an emergency arbitrator procedure in the SCC provides more favorable treatment than those applied in other arbitral institutions in terms of the shorter timeframe to receive an interim decision. In this vein, the legal issue now turns to whether the arbitration rules, or more broadly, the dispute resolution provisions, are inextricably relevant to investment protection; thus, the new rules can be used because of the MFN clause. [122] The past ISDS jurisprudence has extremely varied perspectives regarding the scope of the MFN clause. For those that hold a positive attitude toward extending the application of the MFN, the tribunal in *Maffezini v. Spain*, for example, affirmed that the dispute settlement arrangements in BITs are "closely linked to the material aspects of the treatment accorded." Hence, "if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause.[123]" In contrast, the tribunal in *Plama Consortium Limited v. Bulgaria* opposed relying on the MFN clause to harmonize the dispute settlement provisions since "a host state which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs that it has concluded….Such as chaotic situation…cannot be presumed [to be the intent] of Contracting Parties.[124]" While the validity of the claimants' MFN claim regarding the introduction of dispute resolution provisions in third-party BITs is disputed, we would like to highlight that the fundamental nature of the MFN clause should not be neglected. Namely, the MFN clause is the *ejusdem generis* principle. In other words, MFN clauses "can only attract matters belonging to the

[121] Other similar reference includes "in the latest version agreed by the States parties at the time of the claim," see Austria-Latvia BIT (1994).

[122] *See* Stephanie L. Parker, *A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties*, 2(1) ARB. BRIEF 30, 45 (2012).

[123] Emilio Agustín Maffezini v. The Kingdom of Spain, paras. 55-56, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (Jan. 25, 2000).

[124] Plama Consortium Ltd. v. Republic of Bulgaria, para. 219, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005).

same category of subject as that to which the clause itself relates.[125]" The International Law Commission also stresses that the MFN clause confers "only those rights which fall within the limits of the subject-matter of the clause.[126]" Hence, as the arbitral tribunal in *Plama* case elaborated, given that the dispute resolution provisions were contemplated during the negotiation, the contracting states cannot be presumed to have expanded the scope of the MFN clause to incorporate the set of rules of arbitral proceedings from the third-party BIT negotiated in an entirely different background and context.[127] The *Plama* decision is further elaborated by the *Salini* case, where the arbitral tribunal ascertained that any intention to import dispute settlement provisions into a basic treaty through the MFN clause shall be clearly and unambiguously consented by the BIT parties.[128] As a result, bearing the *ejusdem generis* principle in mind, we argue that in the absence of clear and unambiguous consents from the BIT parties, the claimants should have no legal basis to resort to the MFN clause in the basic treaty to argue that the latest version of arbitration rules incorporated in the BIT between the respondent state and third-countries shall be applied. For greater certainty, numerous countries have clarified the scope of the MFN clause in their BITs. For example, Article 4.3 of the Taiwan-Vietnam investment agreement states that the MFN clause does not "encompass international dispute resolution procedures or mechanisms[129]" Article 8.7.4 of the European Union-Canada Comprehensive Economic and Trade Agreement specifies the "treatment" in the MFN clause does not include "procedures for the resolution of investment disputes between investors and states provided for in other BITs and other trade agreements.[130]" In our view, these regulatory models can better explore the common intention of the contracting states concerning the applicable arbitration rules.

2. Addressing the Temporal Conflicts through the Arbitration Rules

The preamble of the SCC arbitration rules deems the disputing parties, including host states in investment arbitration, have consented to engage in arbitration by the amended rules in force on the date the arbitration commenced. The SCC's model to tackle the temporal conflicts of the rules, however, is not the universal principle. As seen in the development of the arbitral practices, different arbitration institutions may have adopted different approaches to address the temporal conflicts.[131] Take the following emergency arbitration procedures as examples.[132] Article 29.6 of the 2021 ICC Arbitration Rules

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[125] Stephen Fietta, *Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?*, 8 INT'L ARB. L. REV. 131, 132 (2005).

[126] International Law Commission, Draft Articles on Most-Favoured-Nation Clauses, Art. 9.1 (1978).

[127] Plama Consortium Ltd. v. Republic of Bulgaria, para. 207, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005).

[128] Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan, para. 103, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Nov. 9, 2004).

[129] Taiwan-Vietnam Investment Agreement, Art. 4.3.

[130] European Union-Canada Comprehensive Economic and Trade Agreement, Art. 8.7.4.

[131] Some arbitral institutions apply their new rules on a prospective basis. For instance, the ICC Rules on emergency arbitrator proceeding do not apply to contracts concluded before January 1, 2012, the effective date of the new ICC Rules, unless the parties agree otherwise. In this regard, the SIAC, the HKIAC and the LCIA adopt the same approach as the ICC.

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directly excludes their application to investment treaty disputes.[133] The SIAC Arbitration Rules provide for an "opt-in" mechanism, where states "have the discretion to determine what protections, if any, they wish to confer on investors, in the form of the right to obtain expedited interim relief, and under what circumstances or under which treaties."[134] With such a regulatory model, the emergency arbitrator procedure will not be automatically available for all investment disputes unless state parties have expressly agreed.[135] Likewise, HKIAC Rules (2018) Article 1.5 provides that certain provisions do not apply to arbitration agreements concluded before the 2018 version of the HKIAC Rules. These significant changes include the early determination mechanism in its 2018 version, an emergency arbitrator proceeding, consolidation of multiple arbitrations, and initiation of single arbitration under multiple contracts, which were added into the HKIAC Rules in its 2013 revision.[136] In our view, the rationale to exclude these revisions being applied retroactively is due to the significance of certain modifications and should not be applied retroactively without offering the parties the opportunity to make comments.

In addition to institutional arbitrations, *ad hoc* arbitrations may also be confronted with temporal conflicts of applicable rules. There are a significant number of BITs referring to the UNCITRAL Arbitration Rules. Hence, it is equivalently important to establish a mechanism to guide arbitral tribunals to apply a specific version of arbitration rules. In this regard, the negotiation history of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration offers a comparable example. In the course of discussion at the UNCITRAL Working Group, some members suggested that a reference to the UNCITRAL Arbitration Rule in existing BITs could be dynamically interpreted, which can enable the Transparency Rules to apply automatically as "part of that evolving system of UNCITRAL arbitration."[137] However, other members opposed this suggestion. .[138] The Working group ultimately held the position that a "dynamic approach" might impermissibly modify past treaties without state consent.[139] The countries participating in the negotiation also agreed that "the provision should not result in retroactive application of the revised version of the Rules to arbitration agreements and treaties concluded before its adoption."[140] As stipulated in Article 1 of the Transparency Rules, for treaties concluded on or after the effective date of the Rules (i.e., April 1, 2014), the Rules should be applied unless the treaty parties have agreed otherwise.[141] By contrast, for treaties concluded pre-dating the entry into force of the Rules, the Rules apply only to the extent that the disputing parties or treaty

LCIA adopt the same approach as the ICC.

[133] ICC Arbitration Rules 2021, Art. 29.6.

[134] Gary Born et al., *International Arbitration Alert: New SIAC Investment Arbitration Rules* 10 (2017), at https://www.wilmerhale.com/uploadedFiles/Shared_Content/Edito rial/Publications/WH_Publications/Client_Alert_PDfs/2017-01-25-new-SIAC-investment-arbitration-rules.pdf.

[135] SIAC Arbitration Rules Rule 27.4; Schedule 1.

[136] HKIAC Arbitration Rules Art. 1.5.

[137] See UNCITRAL, 'Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Fourth Session (New York, 7-11 February 2011)' 37.

[138] See UNCITRAL, 'Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Eighth Session (New York, 4-8 February 2013)' 25.

[139] UNCITRAL, 'Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Third Session (Vienna, 4-8 October 2010)' 86–91.

[140] UNCITRAL, 41st Session, U.N. Doc A/CN.9/646, at 16–17, para. 72.

[141] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Art 1(1).

parties expressly agree to their application.[142] In this regard, through the Convention on Transparency in Treaty-based Investor-State Arbitration,[143] signatories agree that the Rules shall apply to investor-state arbitration conducted under treaties concluded before April 1, 2014, regardless of the applicable arbitration rules. The negotiation history of the UNCITRAL Transparency Rules in the Treaty-based Investor-State Arbitration reveals that in the context of investment treaty arbitration, any revisions of the procedures in investment dispute resolution shall not retroactively alter the scope of the parties' consent when the BIT concludes. In our view, the discussion concerning temporal conflicts of UNCITRAL rules could fairly demonstrate sovereign states' relatively conservative attitude toward the so-called "dynamic reference" or retrospective application of arbitration rules in investment disputes.[144]

V. CONCLUSION

Determining the applicable version of arbitration rules in investment arbitration poses difficult questions to the tribunals when rules are changed after the conclusion of the treaty instruments that provide a basis for arbitration.

In this paper, we covered this temporal conflict issue in the commercial arbitration context and illustrated how this issue creates problems in investment arbitration. As we demonstrated, the key issue is whether the change in the rules is unforeseeable to the contracting parties, thus falling beyond the scope of the parties' consent to arbitrate.

While the ultimate question lies upon "the scope of consent" by the contracting parties, we argue that presuming in favor of the latest version prevailing in commercial arbitration should be qualified or limited under certain circumstances. This presumption is due to the different nature of the two regimes– the investment arbitration regime demands more security and predictability as well as practicality to the state parties. The cases involving the SCC's emergency arbitrator's mechanism abundantly demonstrated this point.

To effectively address temporal conflict, we propose that clarifying the applicable version of the arbitration rules in BITs should be the first option. Alternatively, as reflected in various arbitral institutions' practice, the issue may also be addressed through the arbitration rules that are conscious of specifying the applicable version of its arbitration rules when the temporal conflict occurs. This paper is optimistic that the proposed approaches to mitigate the temporal conflicts will provide useful guidance to tribunals facing a similar issue.

[142] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Art 1(2).
[143] Mauritius Convention was adopted by the General Assembly of the United Nations on 10 December 2014. The Convention was opened for signature on 17 March 2015.
[144] Greenberg & Mange, *supra* note 12, at 210-13.