

# Convention Violations and Investment Claims

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## I. RIGHTS IN SEARCH OF REMEDIES

In theory, treaty commitments remain a foundation of international law, often expressed in the adage *pacta sunt servanda*: 'agreements are to be kept'.<sup>1</sup> In practice, however, some treaty violations remain without realistic sanctions. Here as elsewhere, the divergence between theory and practice remains greater in practice than in theory.

Mature legal thinking implicates more than one principle. The Convention requires that signatory nations give effect to the treaty. Article II and Article III contain mandatory language, stating that contracting states 'shall recognize' (respectively) arbitration agreements and arbitral awards. If a national constitution so requires, giving effect to agreements and awards might call for implementing legislation. If a country fails to implement the Convention, its national courts might well look to domestic constitutional law rather than treaty provisions. Such failure to implement the Convention nevertheless constitutes a breach of treaty obligation.

Similar lines of analysis obtain when national judicial decisions interfere unduly with respect to the New York Convention.<sup>2</sup> However, the availability of remedies in such cases remains highly fact specific.<sup>3</sup> In some instances, investment treaties offer a way to close the gap between theory and practice, permitting investors to bring

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<sup>1</sup> See Ian Brownlie, *Principles of Public International Law* 579–609 (6th ed., 2003); J.L. Brierly, *The Law of Nations* 317–45 (Humphrey Waldock ed., 6th ed., 1963); F.A. Mann, *Studies in International Law* 327–359 (1973).

<sup>2</sup> For a decision confirming, in the context of an investment treaty, that governmental measures include judicial decisions, see *Loewen Group, Inc. & Raymond L. Loewen v. U.S.A.*, ICSID Case No. ARB (AF)/98/3, Interim Award on Jurisdiction, 5 Jan. 2001.

<sup>3</sup> In summary, Article II of the Convention provides that national courts should respect the agreement to arbitrate, and Article III imposes a duty to recognize and enforce awards. See Article Convention on Recognition and Enforcement of Foreign Arbitral Awards, 10 Jun. 1958, 3 U.S.T. 2517, 330 U.N.T.S. 38. Twenty-four countries originally signed the Convention. The rest have joined by accession or succession. The most recent ratifications bring to 148 the total number of countries bound by the treaty.

private actions against a host country rather than relying on government-to-government measures.

Not all failure to respect the New York Convention fits within the framework of investment treaties. Many clear Convention violations remain without remedy, due to the absence of any relevant ‘investment’ providing the jurisdictional hook on which to hang a claim.

The contours of national respect for the New York Convention might be addressed by comparing two strands of analysis. The first, represented by the ICISD decision *Saipem v. Bangladesh*, implicate arbitral tribunal jurisdiction with respect to domestic court decisions that allegedly run afoul of the New York Convention. By contrast, in another line of cases no practical mechanism seems to exist for challenge to the invocation of parochial American procedure to defeat award recognition under the Convention.

The modest aspiration of this note lies in an exploration of how and why the two types of cases differ. As we shall see, a key distinction lies in the existence of an ‘investment’ to trigger arbitration of treaty breaches by the country allegedly failing to respect the New York Convention.

## II. RECOURSE TO INVESTMENT TREATIES: *SAIPEM V. BANGLADESH*

### (a) *The Underlying Dispute*

In March 2007, an arbitral tribunal opened the door to a damages award for breach of the New York Convention.<sup>4</sup> An Italian construction company (Saipem) had contracted to build a gas pipeline in northeastern Bangladesh. The counterparty was a state entity, the Bangladesh Oil Gas & Mineral Corporation, commonly called Petrobangla. Ultimately, the transaction went sour. The contractor claimed additional costs that Petrobangla refused to pay. Controversy also arose with respect to return of a warranty bond and retention monies requested by the Italians.

Saipem referred its claim to arbitration, pursuant to a clause in the parties’ agreement that provided for dispute resolution in Dhakar under the Rules of the International Chamber of Commerce (ICC). An arbitral tribunal was constituted,<sup>5</sup> and proceeded to render awards in favour of Saipem with respect to jurisdiction, liability and quantum of damages.<sup>6</sup> During and after the proceedings, courts in Bangladesh made various orders with respect to the arbitration. The Supreme

<sup>4</sup> *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case ARB/05/07, 21 Mar. 2007. The tribunal was composed of Professor Kaufmann-Kohler, Professor Christoph Schreuer and Sir Philip Otton.

<sup>5</sup> The eminent tribunal included Dr Werner Melis as Chairman, and Professor Riccardo Luzzatto and Professor Ian Brownlie. The laws of Bangladesh were applicable to the merits of the dispute. English was the language of the arbitration.

<sup>6</sup> In May 2003, the tribunal found Petrobangla to have breached its obligations and awarded Saipem USD 6 million plus Euro (EUR) 110,000 plus interest and return of the bond.

Court issued an injunction restraining Saipem from continuing with the ICC arbitration. Ultimately, that Court ruled that there was ‘no award in the eye of the law’ finding that the arbitral proceedings were illegal and without jurisdiction.<sup>7</sup>

(b) *The ICSID Proceeding*

In response to the alleged interference with the ICC arbitration by Bangladeshi courts, Saipem filed a second arbitration, this one under the rules of the International Centre for the Settlement of Investment Disputes (ICSID). This new claim (for USD 12.5 million plus relief concerning the warranty bond) was brought pursuant to the bilateral investment treaty between Bangladesh and Italy (the Italo-Bangladeshi BIT), with the respondent as the Republic of Bangladesh itself, rather than the state agency. Article 5 of the BIT provides that investments may not be expropriated (nor subject to measures equivalent to expropriation) without prompt, adequate and effective compensation.

Contending that immaterial rights can be expropriated, Saipem asserted that Bangladesh had expropriated not only its contract claims, but also an entitlement to arbitrate under the ICC Rules. According to Saipem, this was covered by the Italo-Bangladesh BIT, which in Article 1 extends its protection to any ‘right accruing by law or by contract’. In response, Bangladesh raised jurisdictional objections based on both the BIT itself and Article 25 of the ICSID Convention, which extends jurisdiction to ‘any legal dispute arising directly out of an investment’ between the host state and the foreign investor.

The ICSID Tribunal accepted jurisdiction.<sup>8</sup> In so doing, the arbitrators had to address multiple questions related to the nature of investments and the type of fact patterns capable of constituting an expropriation.

Noting that the notion of investment in the Italo-Bangladeshi BIT includes ‘credit for sums of money’,<sup>9</sup> the Tribunal construed those words to cover rights under an award ordering payment of amounts due to the prevailing party. In so doing, the tribunal focused on the rights arising out of the underlying contractual relationship. These rights were found to have been crystallized by the ICC award.<sup>10</sup> Consequently, the arbitrators did not need to make a final ruling on the argument that the arbitration agreement itself constituted a financial right covered by Article 1 of the BIT.<sup>11</sup>

Having determined that Saipem had made an investment as defined under the Italo-Bangladeshi BIT, the Tribunal went on to find that the facts as alleged by the Claimant were capable of constituting an expropriation under Article 5 of the BIT. The essence of the allegation was that an unlawful disruption and a de facto annulment of the ICC Arbitration by Bangladeshi courts deprived Saipem of the

<sup>7</sup> Agreement of 20 Mar. 1990 between Government of the Republic of Italy and Government of the People’s Republic of Bangladesh on the Promotion and Protection of Investments. The treaty entered into force on 20 Sep. 1994.

<sup>8</sup> Jurisdictional Award of 21 Mar. 2007, ICSID Case. No. ARB/05/07.

<sup>9</sup> Bangladesh-Italy BIT, Art. 1(1)(c).

<sup>10</sup> Jurisdictional Award of 21 Mar. 2007, paras. 125–127.

<sup>11</sup> *Ibid.*, at para. 128.

amounts awarded in the ICC arbitration, thus amounting to an illegal expropriation.

Finally, the Tribunal rejected the contention that the substance of Saipem's claim constituted a private contract action rather than an investment treaty claim. Bangladesh had argued that the claim was nothing more than a contract action 'dressed as a treaty claim'. In response, the Tribunal noted that Saipem did not request relief under its agreement with Petrobangla, but rather claimed that the alleged breach of the New York Convention constituted a violation of the protection mandated for foreign investors under the investment treaty.<sup>12</sup>

In its award on jurisdiction, the Tribunal determined that the alleged violation of the New York Convention could constitute a breach of the investment treaty. This conclusion was confirmed in the award on the merits. The Tribunal found that the Bangladeshi actions were contrary to international law, in particular to the principle of abuse of rights and the New York Convention; and hence Bangladesh was found to have expropriated Saipem's investment in contravention of the BIT.<sup>13</sup> Doubtless the award will serve as a springboard for future claims related to the New York Convention.

Not all state practices that disregard the Convention will be actionable, however. Some investment in the offending country must provide a jurisdictional underpinning for actions against the breaching state. Breach without remedy will likely continue in instances exemplified by certain American decisions that invoke notions of forum non conveniens and lack of 'minimum contacts' to justify failure to recognize arbitral awards. To these cases, we now turn our attention.

### III. JURISDICTION AND FORUM NON CONVENIENS

#### (a) *An American Trilogy*

In many countries, implementation of international conventions implicates an intricate interplay of the treaty text with constitutional mandates and federal statutes. This complexity presents itself crisply in three American federal appellate decisions: *Base Metal*,<sup>14</sup> *Glencore Grain*<sup>15</sup> and *Monégasque de Reassurances*,<sup>16</sup> which under one line of argument place the United States in breach of its obligations under the New York Convention.

<sup>12</sup> '[T]he essence of Saipem's case is that courts of Bangladesh acted in violation of the New York Convention . . . ' *Ibid.* at para. 141.

<sup>13</sup> *Saipem S.p.A. v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Award (30 June 2009) ¶170. Cf. Ruth Teitelbaum, Case Report on Saipem v. Bangladesh, 26:2 Arbitration International 313 (2010).

<sup>14</sup> *Base Metal Trading, Ltd. v. OJSC 'Novokuznetsky Aluminium Factory'*, 283 F.3d 208 (4th Cir. 2002).

<sup>15</sup> *Glencore Grain Rotterdam B.V. v. Shivnath Rai Hamarain Co.*, 284 F.3d 1114, 1122 & n. 5 (9th Cir. 2002), upholding a district court decision refusing to recognize an award made against an Indian rice exporter deemed not to be present in or having assets in the district.

<sup>16</sup> *Monégasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine*, 311 F.3d 488, 498–501 (2d Cir. 2002). See also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248–249 (1981).

In each instance, the court dismissed a petition to confirm a foreign arbitral award subject to the New York Convention. In the first two, courts concluded that it lacked personal jurisdiction over the foreign respondent, and thus could not enforce the awards. The third case, *Monégasque de Reassurances*, decided that award confirmation had been sought in an unsuitable forum and thus had to be refused.

With respect to all of these cases, any investment treaty remedy for breach of the New York Convention (a matter to be explored below) appears conceptually far-fetched. Bilateral and multilateral investment treaties, as well as the ICSID Convention, presuppose an investment within the country whose responsibility has been invoked. Without some investment, the jurisdictional predicate for arbitration remains absent.

Unlike the *Saipem* case, no investment had been made in the United States by the prevailing party in the arbitrations which gave rise to the trilogy of above-cited cases. Indeed, the heart of these decisions lies in the court's inability to find connections between the arbitration's winner and the United States such as to justify (under American principles) consideration of a recognition request.

(b) *Interplay of National Law and the New York Convention*

These controversial cases highlight the contours for interaction of the New York Convention and national law. All three decisions came as a surprise to an arbitration community, among which considerable scholarly comment has been generated.<sup>17</sup> Moreover, a report by the Association of the Bar of the City of New York suggests that a sound basis exists for enforcement of New York Convention awards solely on the basis of assets located within the forum.<sup>18</sup>

To understand what happened, one must recall that the US Constitution speaks of 'supreme law of the land' with respect to three (not one) sources of legal authority: the Constitution itself, federal statutes and international treaties.<sup>19</sup> While the Constitution has long been deemed to trump other sources of law,<sup>20</sup> the interaction between treaties and statutes remains less clear.<sup>21</sup> Although not free from scholarly debate,<sup>22</sup> acts of Congress and treaties would normally remain on

<sup>17</sup> See, e.g., William W. Park & Alexander Yanos, *Treaty Obligations and National Law*, 58 *Hastings L. Rev.* 251 (2006);

<sup>18</sup> The International Commercial Disputes Committee of the Association of the Bar of the City of New York, *Lack of Jurisdiction and Forum Non Conveniens As Defenses To The Enforcement Of Foreign Arbitral Awards* (Apr. 2005), reprinted 15 *Am. Rev. Intl. Arb.* 407 (2006). [Hereinafter *New York City Bar Report*]. The Report suggests that the holding in *Glencore* is correct, but questions the reasoning and result in *Base Metal*. The Report also argues that an agreement to arbitrate in one New York Convention country is not sufficient to constitute consent to enforcement in other Convention states, and that forum non conveniens should not generally serve as a ground for dismissing an action to confirm or enforce a Convention award.

<sup>19</sup> Article VI, Section 2 of the US Constitution reads as follows: 'The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land.'

<sup>20</sup> *Reid v. Covert*, 354 U.S. 1, 16–17 (1957).

<sup>21</sup> See generally, *Missouri v. Holland*, 252 U.S. 416, 435 (1920), upholding the Migratory Bird Treaty Act of 1918, which gave effect to an earlier treaty between the United States and Great Britain providing for the protection of birds that travelled between the United States and Canada.

<sup>22</sup> See Vasani Kesavan, *The Three Tiers of Federal Law*, 100 *Nw. U. L. Rev.* (2006) 1479.

the same level. One might prevail over the other due to a 'later in time' rule or some indication of congressional intent, but not to any inherent value derived from status as either treaty or legislation. Conflict over application of treaties has been addressed in contexts as mundane as real estate taxation<sup>23</sup> and as emotionally charged as capital punishment.<sup>24</sup>

According to rules of international law, neither a constitutional mandate nor the enactment of a statute provides an excuse for a treaty violation.<sup>25</sup> Prevailing opinion holds that an act wrongful under the law of nations remains so even if a nation's internal law deems otherwise.<sup>26</sup> Observers are thus led to a closer examination of what the New York Convention has to say about award recognition.

(c) *Construing the New York Convention*

(i) *Rules of Procedure where Relied Upon*

The New York Convention mandates award recognition subject to a narrowly drafted litany of defences.<sup>27</sup> None of these includes either lack of 'minimum contacts' (the ground for non-recognition in *Base Metal* and *Glencore Grain*) or forum non conveniens (invoked in *Monégasque de Reassurances*).

The Convention does, however, provide in Article III for award recognition 'in accordance with the rules of procedure of the territory where the award is relied upon'. Until recently, most observers considered that this provision related to the *form* of enforcement, not the *conditions* for enforcement.<sup>28</sup> Contracting states certainly possess discretion with respect to minor ministerial matters, such as the amount of filing fees or rules about where enforcement motions must be brought. However, no clear support exists for the proposition that the 'procedure where

<sup>23</sup> See Foreign Investment in Real Property Tax Act, Pub. L. No. 96-499, § 1125 94 Stat. 2682, 2690 (codified in scattered sections of 26 U.S.C.), which provides that no treaty shall exempt or reduce the tax otherwise imposed on gain by foreigners from disposition of American real estate.

<sup>24</sup> See *Breard v. Greene*, 523 U.S. 371, 376 (1998), *Medellin v. Texas* (cert. granted, 127 S.Ct. 2129, 2007), *Avena and other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. No. 128, 43 I.L.M. 581 (2004).

<sup>25</sup> See, e.g., Vienna Convention on the Law of Treaties Art. 27, 23 May 1969, 1155 U.N.T.S. 331 ('A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.').

<sup>26</sup> Under Art. III of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, '[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.' *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. (No. 10) at 1, U.N. Doc. A/56/10 (2001) [hereinafter *ILC Report*]. See also Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. a (1987).

<sup>27</sup> These defences relate both to procedural fairness (invalid arbitration agreement, lack of opportunity to present one's case, arbitrator excess of jurisdiction, and irregular composition of the arbitral tribunal) and to the forum's public policy. Different considerations may obtain in respect to awards rendered in the United States, even when the New York Convention applies because the dispute implicates international commerce or involves foreign parties and is thus considered 'non domestic'. See *Yusuf Ahmed Alghanim & Sons v. Toys 'R' Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997). With respect to awards not covered by the New York Convention, other standards would apply. See, e.g., *Int'l Bechtel Co. v. Dep't of Civil Aviation of Dubai*, 360 F. Supp. 2d 136, 137-38 (D.D.C. 2005).

<sup>28</sup> See Albert Jan van den Berg, *The New York Arbitration Convention of 1958*, 236-41 (1981). Hereinafter, 'Van den Berg'.

relied upon' language was intended to serve as a backdoor escape from recognition of legitimate foreign awards.

To illustrate, determining where to seek award enforcement takes on a special dimension in countries with a federal system. In the United States, enforcement motions are normally brought in federal (not state) courts.<sup>29</sup> By contrast, in Switzerland such actions will be heard by the cantonal (not federal) judiciary.<sup>30</sup> The difference relates simply to enforcement modalities, not conditions that serve to bar recognition itself.

Read in context, the 'rules of procedure' language in Convention Article III gives contracting states latitude in fashioning the practical mechanics of award enforcement. The provision indicates that the process for obtaining award enforcement or recognition is flexible, to be determined by local procedures. This language relates to *how* recognition will be granted, not *whether* recognition will be granted at all.

(ii) *The approach in Monégasque de Reassurances.*

The decision in *Monégasque de Reassurances* took a different view, however, seizing upon the reference to 'rules of procedure' to justify invocation of forum non conveniens, and recognizing limitations only with respect to measures that discriminate against foreign awards when compared with domestic arbitral decisions.<sup>31</sup>

In taking this approach, the court included an extended discussion of the United States Supreme Court characterization of forum non conveniens as 'procedural rather than substantive,' emphasizing that the doctrine is applied in the enforcement of domestic awards as well. The conclusion in *Monégasque* was that the Convention's only limitation on procedural rules was 'the requirement that the procedures applied in foreign cases would not be substantially more onerous than those applied in domestic cases'.<sup>32</sup>

(iii) *Drafting History*

In concluding that the New York Convention imposes no limitations other than non-discrimination on procedural rules at the enforcement forum, the court in *Monégasque de Reassurances* seems to have gone astray as a matter of both logic and history. Relying on the drafting history of the New York Convention, the court suggested that the non-discrimination language was proposed by Belgium, and

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<sup>29</sup> In addition, a respondent may remove an enforcement action from state to federal court. See 9 U.S.C. §§ 203–05.

<sup>30</sup> On the enforcement of a foreign award under Art. 194 of the Swiss LDIP/IPRG, see Paolo Michel Patocchi & Cesare Jermini, *Foreign Arbitral Awards*, in *International Arbitration in Switzerland* 625–675 (Stephen Berti ed., Helbing & Lichtenhahn/Kluwer, 2000).

<sup>31</sup> *Monégasque de Reassurances v. Naftogaz Ukraine*, 311 F.3d 488 (2d Cir. 2002) at 496.

<sup>32</sup> *Ibid.* at 496.



supported by the United States, only after efforts to establish uniform standards had failed.<sup>33</sup>

History does not support the court's conclusions. To the contrary, the debate on Article III confirms that the reference to 'rules of procedure' relates simply to formalities for an application to confirm or enforce, including fees and the pro forma structure of the request. There is no evidence that the language was intended to incorporate doctrines that permit or require courts to prune their dockets in normal commercial litigation.

As an initial matter, it is important to remember that the relevant language in Convention Article III originated not with the Belgian delegate,<sup>34</sup> or any other delegate, but was instead taken verbatim from the predecessor to the New York Convention.<sup>35</sup> Article 1 of the 1927 Geneva Arbitration Convention provided that 'an arbitral award . . . shall be recognized as binding and shall be enforced in accordance with the rules of procedure of the territory where the award is relied upon'.<sup>36</sup> In contrast, the Belgian proposal that the Second Circuit referred to would have resulted in a substantially different version of the New York Convention. Each country would have enforced foreign arbitral awards in the identical manner as for domestic awards.<sup>37</sup>

More significantly, the comments from delegates most closely involved with the adoption of the present Convention's wording show an expectation at odds with the Second Circuit's interpretation of that article. For example, the representative from the United Kingdom (author of the prohibition on fees more onerous than those applicable to domestic awards) explained that the purpose of his proposal was to ensure that a foreign award that met the conditions of the Convention should be 'enforceable without unnecessary inconvenience'.<sup>38</sup> Similarly, the report of the Secretary General of the United Nations Economic and Social Council highlights that reference to 'rules of procedure' was not an attempt to incorporate by reference all of the arcane rules of procedure applicable in each jurisdiction in which the Convention would be applicable, but rather to refer to the basic method by which a party must file an application to have an arbitral award recognized or enforced.<sup>39</sup>

Thus, the Convention's drafting history indicates that it was not meant to authorize courts to provide open-ended grounds on which to dismiss recognition of otherwise valid awards. To the contrary, the prevailing view supports the

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<sup>33</sup> The chief source of the Second Circuit's information seems to have been a law review article, Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049 (1961).

<sup>34</sup> Indeed, the comments of the Belgian delegate actually run counter to the argument that Article III of the draft Convention was concerned principally with making the award operative. U.N. Doc. E/CONF.26/SR.10, at 7 (27 May 1958).

<sup>35</sup> Van den Berg, at 234.

<sup>36</sup> 1927 Geneva Convention, Art. I.

<sup>37</sup> See U.N. Doc. E/CONF.26/SR.10, at 5.

<sup>38</sup> *Ibid.* at 7 (comments of Mr Wortley).

<sup>39</sup> The Secretary-General, Note on the Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 6 Mar. 1958, ¶¶ 7–8, U.N. Doc. E/CONF.26/2 (6 Mar. 1958).



exclusivity of the reasons for refusal of recognition as set forth in Convention Articles V and VI, which relate to basic procedural fairness, substantive public policy and adjournment in deference to foreign court proceedings.<sup>40</sup> Although a Convention country can certainly set up ministerial conditions for award enforcement, such as making the application to the correct court or paying a reasonable filing fee, the Convention drafters did not expect the recognition forum to establish outright procedural bars to award confirmation.

(d) *National Practice*

The practice of countries other than the United States provides little support for the acceptance of local procedural impediments to enforcement of New York Convention awards. Except for claims against foreign sovereigns,<sup>41</sup> few non-American jurisdictions condition enforcement of Convention awards on a link with the transaction, the parties or their property.<sup>42</sup> Many Western legal systems exercise jurisdiction without regard to the type of minimum contacts required by the United States,<sup>43</sup> and international law generally prohibits invocation of a country's internal law to eviscerate its international agreement.<sup>44</sup>

(e) *Public Interests and Proper Parties*

Unlike limits on personal jurisdiction, the doctrine of forum non conveniens does not rest on constitutional underpinnings,<sup>45</sup> but derives instead from a court's inherent power to manage its own docket.<sup>46</sup> Once described as 'a supervening venue provision' that comes into play when a trial court declines jurisdiction,<sup>47</sup> forum non conveniens implicates a multistage analysis. No level of the analysis

<sup>40</sup> *Yusuf Ahmed Alghanim & Sons v. Toys 'R' Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997).

<sup>41</sup> Questions of sovereign immunity pose different concerns, since the objection of the respondent state relates to jurisdiction under principle of *international* (not just local) law. For example, before Swiss courts will execute an award against the assets of a foreign sovereign, an 'internal connection' (*Binnenbeziehung*) must exist between Switzerland and either the parties or the transaction. See *Circulaire du Département Fédéral de Justice et Police, Jurisprudence des Autorités Administratives de la Confédération* 224 (26 Nov. 1979). The principle was applied to one aspect of the LIAMCO saga. See *Socialist Libyan Arab Popular Jamarihiya v. Libyan American Oil Co.*, Bundesgericht [BGer] [Federal Court] 19 Jun. 1980, 20 I.L.M. 151, 159–60. See also Georges R. Delaume, *Economic Development and Sovereign Immunity*, Am. J. Intl. L. 319, 340 (1985).

<sup>42</sup> New York City Bar Report, pages 6–7, suggests that several countries (including China and Japan) impose such restrictions.

<sup>43</sup> See French Code Civil, Art. 14 C. civ. [Fr.] (jurisdiction based on the nationality of the plaintiff); German Zivilprozeßordnung [ZPO] [civil procedure statute] Art. 23 (Ger.) (jurisdiction on the basis of property alone); English CPR Part 6.20 (jurisdiction based on applicable substantive law). Compare the position in Switzerland, where applicability of Swiss law requires courts to accept jurisdiction in the context of a forum selection clause. See Art. 5, *Loi fédérale sur le droit international privé*. See also § 1062 ZPO.

<sup>44</sup> See Restatement (Third) of the Foreign Relations Law of the United States § 311(3) (1987). For a discussion of a related (but conceptually distinct) point, see Jan Paulsson, *May a State Invoke its Internal Law to Repudiate Consent to International Commercial Arbitration?* 2 Arb. Intl. 90 (1986).

<sup>45</sup> See generally Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 Cal. L. Rev. 380, 386–89 (1947).

<sup>46</sup> See *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukr.*, 311 F.3d 488, 498–501 (2d Cir. 2002).

<sup>47</sup> See also *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981). For a recent discussion of the doctrine as a means to defend against lawsuits in federal courts, see David W. Rivkin & Suzanne M. Grosso, *Forum Non Conveniens: A Doctrine on the Move*, 5 Bus. Law Intl. 1 (2004).

implicates bright lines.<sup>48</sup> Determining whether to honour the plaintiff's choice of forum requires first a finding on whether an adequate alternative forum exists. If so, courts may proceed to balance what have been called 'the private and *public* interests' that bear on where the case should be adjudicated.<sup>49</sup> Consequently, courts do not dismiss on forum non conveniens grounds when no adequate alternative forum exists, or when a balancing of interests indicates that dismissal would not be appropriate.<sup>50</sup>

Under a proper application of these principles, the instances will be few and far between when the doctrine of forum non conveniens justifies dismissal of a motion to confirm a New York Convention award. The breach of a treaty obligation is no light matter, and the United States has a vital public interest in following through with its international commitments. Treaties should normally outweigh the other interest factors (public and private) that militate in favour of dismissal.<sup>51</sup>

Rare as they may be, some instances will exist when courts may be justified in refusing, on forum non conveniens grounds, to recognize an award covered by the New York Convention. One example might be found in the need to determine what entities were properly subject to the arbitrators' jurisdiction, a problem that existed in very facts that gave rise to *Monégasque de Reassurances*.<sup>52</sup> We remember that the court upheld dismissal of an action brought by a foreign reinsurer that had been subrogated to rights against a Ukrainian entity called 'Naftogaz,' which was arguably an instrumentality of the Government of the Ukraine. On the face of the arbitration agreement, the state was not a party to the arbitration agreement.

The question of 'who is the proper party' is not uncommon to international or domestic arbitration, and arises frequently in connection with actions against so-called non-signatories.<sup>53</sup> Courts must often determine whether arbitration is

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<sup>48</sup> See *Gross v. British Broad. Corp.*, 386 F.3d 224, 230 (2d Cir. 2004).

<sup>49</sup> *Piper Aircraft Co.*, 454 U.S. at 246 (emphasis added).

<sup>50</sup> See *Iragorri v. United Tech. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001).

<sup>51</sup> For example, under this analysis, the Ninth Circuit's decision in *Melton v. Oy Nautor Ab* should not stand given that the respondent in that case had assets in the district and it was unreasonable to compel the petitioner to travel to Finland to get paid. No. 97-15395, 1998 WL 613798, at \*\*2-3 (9th Cir. 4 Sep. 1998).

<sup>52</sup> 311 F.3d 488, 498-501 (2d Cir. 2002).

<sup>53</sup> The term 'non-signatory' has long served as a useful shorthand reference to persons whose right or obligation to arbitrate may be problematic, even though the FAA provides for enforcement of an unsigned written provision to arbitrate, such as an exchange of telegrams, emails or sales forms. Lack of signature does not in itself, however, taint an arbitration clause under the FAA. When enforcement under the New York Convention is in question, the issue becomes more complex. Some agreements to arbitration must be signed, while others need not be. The nub of discord centres on punctuation, with the focus of attention on the comma preceding the phrase 'signed by parties' in Convention Art. II. Some courts interpret the signature requirement to apply only to the words 'an arbitration agreement' found just before the comma. Others apply the signature requirement to everything in the early part of the sentence, including reference to arbitral clauses in contracts. The answer may be significant where the Convention provides the only basis for federal courts to exercise jurisdiction. See *Kahn Lucas Lancaster v. Lark Int'l Ltd.*, 186 F.3d 210, 218 (2d Cir. 1999) (finding that 'signed by the parties' applied to arbitral clauses encapsulated in broader contracts as well as separate arbitration agreements).

appropriate with respect to a person that did not agree to arbitrate. Parent-subsidiary relationships provide fertile ground for disagreements,<sup>54</sup> leading courts occasionally to extend the burdens and benefits of an arbitration clause. In such instances, courts must be rigorous in their investigation of the parties' real intentions on the existence or scope of arbitral authority,<sup>55</sup> resisting the temptation to apply vague verbal formulae independent of the commercial context.<sup>56</sup>

In *Monégasque de Reassurances*, the question arose whether the Ukraine could be made liable on an award by reason of piercing the corporate veil between the government and a state-owned corporation.<sup>57</sup> The district court felt this issue was better decided by the Ukrainian courts than those in New York and dismissed the request to confirm the award.<sup>58</sup>

The appellate court agreed.<sup>59</sup> Dismissal of the confirmation motion was held justifiable not only because the Ukrainian courts were deemed to provide an adequate forum for resolution of the corporate veil question, but also because the Ukraine had a more significant interest than the United States in the award enforcement action.<sup>60</sup>

The aspect of *Monégasque de Reassurances* that has concerned some arbitration lawyers lies not so much in the case itself, but the danger that other courts might misapply its problematic dictum concerning Article III of the New York Convention. An unduly broad scope for 'rules of procedure' would create a risk of excessive disregard of awards.<sup>61</sup> Like many cases that are rightly decided on their facts, *Monegasque* has announced principles that must be handled with great caution.

#### (f) Consent to Jurisdiction Clauses

Pragmatic reactions can be expected to the risk that awards recognition becomes contingent on the loser's 'minimum contacts' with the United States.<sup>62</sup> One response might be the routine inclusion of consent to jurisdiction clauses in international arbitration agreements.<sup>63</sup> As the market reacts to the fact that the

<sup>54</sup> See *Ceska Sporitelna, a.s. v. Unisys Corp.*, No. 96-4152, 1996 U.S. Dist. LEXIS 15435, at \*12 (E.D. Pa. Oct. 10, 1996) (remarking that the general rule is 'that only signatories to a contract can be bound by an arbitration clause found within the contract'); *Thomson-CSF v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995) (recognizing five exceptions to the general rule that arbitration agreements do not bind non-signatories: incorporation by reference, assumption, agency, piercing of corporate veil and estoppel).

<sup>55</sup> See *Sphere Drake Ins. v. All Am. Ins.*, 256 F.3d 587, 589-591 (7th Cir. 2001).

<sup>56</sup> For a problematic case in this connection, see, e.g., *Contec Corp. v. Remote Solution Co. Ltd.*, 398 F.3d 205 (2d Cir. 2005). Cf. *JSC Surgutneftegaz v. Harvard College*, 2005 WL 1863676 (S.D.N.Y. 2005).

<sup>57</sup> *Monégasque de Reassurances v. NAK Naftogaz of Ukr.*, 311 F.3d 488, 492 (2d Cir. 2002).

<sup>58</sup> *Ibid.* at 493.

<sup>59</sup> *Ibid.* at 500-501.

<sup>60</sup> *Monegasque*, 311 F.3d at 498-501.

<sup>61</sup> *Ibid.* at 495.

<sup>62</sup> By contrast, problems raised by *forum non conveniens* (as evidenced in *Monégasque de Reassurances*) remain less amenable to contractual remedy, given that public interests as well as private affect a court's determinations on the appropriateness of forum.

<sup>63</sup> For cases evidencing a longstanding benevolent attitude toward judicial jurisdiction clauses, see *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972) and *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596 (1991).

United States is not that arbitration-friendly, an evolution in arbitration clauses can be expected to include language making clear that the parties, at least *ex ante*, wish to eliminate the surprise obstacles resulting from uncertain fact patterns.<sup>64</sup>

The direction of such clauses could take different routes. It might be that some clauses explicitly provide for awards to be recognized in any court of a contracting state to the New York Convention. These clauses would expressly waive any objection to the competence of such courts, including without limitation defenses based on lack of personal jurisdiction or the absence of property in the recognition forum. The drafters might go on to provide that neither side will, on the basis of *forum non conveniens* or similar notions, seek dismissal of a motion for award confirmation. Simpler clauses might state that both parties consent to the personal jurisdiction of any court where award recognition may be sought.

#### IV. WHENCE AND WHITHER

Assuming damages can be proven, breach of obligations under the New York Convention may in some instances give rise to an actionable claim under a bilateral investment treaty. As in other areas of the law, much will depend on the factual configuration of the particular case.

The recent decision in *Saipem v. Bangladesh* illustrates how disruption of an ICC arbitration, allegedly in breach of a New York Convention obligation, can also implicate a bilateral investment treaty that gives direct rights to the prevailing party. By contrast, much judicial failure to respect the Convention will likely remain without practical sanction. Such seems to be the case with respect to the American decisions that rely on parochial notions of jurisdiction and discretion as grounds for non-recognition of foreign awards.

Only time will tell whether the international legal order will evolve to accord new mechanisms to promote respect for the New York Convention. As Rudyard Kipling (and others) might have written, that is a story for another day.

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<sup>64</sup> The New York City Bar Report notes at page 4, '[Arbitration clauses] provide that the parties consent to recognition and enforcement of any resulting award in any jurisdiction and waive any defense to recognition or enforcement based upon lack of jurisdiction over their person or property or based upon *forum non conveniens*.' One can only speculate whether such clauses might one day become as commonplace as 'consent to judgment' clauses in domestic American arbitration. See FAA § 9, providing that in domestic arbitration the parties must 'have agreed that a judgment of the court shall be entered upon the award' and must also specify the court for entry of judgment. By contrast, FAA § 203 make such stipulations unnecessary for most international contracts.