Fundamental Rights and International Arbitration: Arbitral Awards and Constitutional Law

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This paper aims at discussing and analyzing the scenarios in which constitutional law may or may not play a role in international arbitration. It will focus on international investment arbitration and is centered on the relationship between constitutional law, fundamental rights and arbitral awards. The aim is to explore when and how fundamental rights guaranteed by constitutional law provisions may be invoked by advocates in arbitral proceedings.

The intricacies of the relationship between constitutional law, fundamental rights and arbitral awards are appearing more and more in investment arbitration. One can think for instance of the CMS Gas case where Argentina asserted that the country’s economic and social crisis affected fundamental rights and that giving effect to an investment treaty “would be in violation of such constitutionally recognized rights”;1 or also of the Siemens case in which Argentina argued that in light of the social and economic conditions prevailing at that time in Argentina, recognition of property rights would contravene fundamental rights incorporated in the Constitution.2 Until now, the foray into the “constitutional order” by the arbitral tribunal in the Sempra case remained perhaps one of the most prominent examples of an arbitral award seeking to preserve a State’s constitutional order. Dealing with the Argentine crisis, the tribunal considered that the “real issue is whether the constitutional order and the survival of the State were imperiled by the crisis” and found subsequently that “the constitutional order was not on the verge of collapse”.3

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1. CMS Gas Transmission Co v. Argentina (ICSID Case No. ARB/01/08), Award of 12 May 2005, para. 114.
2. Siemens v. Argentina (ICSID Case No. ARB/02/08), Award of 6 February 2007, para. 75.
Fundamental rights here do not only encompass the rights of investors (right to property, customary standards of investment protection, etc.) but also the rights of other stakeholders (such as local and indigenous communities). Fundamental rights here are also taken in a broader sense than human rights. Fundamental rights are a more generic category embracing human rights (right to life, right to a clean environment, freedom of expression, right to a fair trial, right to health, etc.) as well as other rights which may be labeled "public policy-related rights".

This latter category refers to rights that States have to guarantee as the primary custodians of the general interest within their jurisdiction but also as primary guardians of the public order on their territory. They are not subject to an exhaustive listing and may vary depending on the national constitutions in question. Furthermore, they are not always rights in the classical legal perception of this term, and may include legal "values" on which a State must rely in formulating public policies and also in contracting with private actors such as investors.

As examples of "public-policy rights", one may mention the supremacy of the rule of law, social justice, due process, distribution and redistribution of social goods and products, accountability, transparency, and prior consultation of local communities with respect to exploitation of natural resources.

The relationship between arbitral awards, fundamental rights, and constitutional law will be seen through a public international law perspective. In other words, the general idea of this paper will be to identify how and to which extent international law "allows" constitutional law to play a role in international arbitration. Advocates may face hurdles invoking constitutional law (Sects. II and III below), but it is also noticeable that references to constitutional law in international arbitration may also occur through certain paths thus giving advocates room to refer to constitutional law (Sect. IV below).

II. THE HURDLE OF CONSTITUTIONAL LAW AS A "FACT"

In the Polish Upper Silesia case, the Permanent Court of International Justice (PCIJ) explained that

"from the standpoint of International law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures. The Court is certainly not called upon to interpret the Polish law as such, but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention."

The concept of “municipal laws” as foreseen by the PCIJ embodies constitutional law. Constitutional law is a “fact” in the context of international arbitration. As it has been stressed, “International tribunals are properly reluctant to conclude that national law contradicts international law.” In those circumstances an advocate would only be allowed to ask an arbitral tribunal to determine whether a State in applying its constitutional law is acting in conformity with its international obligations.

An advocate may, a fortiori, refer to constitutional provisions in order to formulate claims of violations of international law with regard to fundamental rights. As stressed by the International Court of Justice (ICJ) in the Laarand case, any international tribunal can hold that a domestic law (including constitutional law) has been the cause of the violation of international law. The arbitrator in the Georges Pinson case emphasized that considering national constitutions as “facts” implies that “tout tribunal international, de par sa nature, est obligé et autorisé à les examiner à la lumière du droit des gens”.

In the Bernardus Henricus Funnekotter case, Zimbabwe attempted to invoke the argument that a state of necessity or emergency existed and that relieved it of its responsibility for complying with applicable provisions of the bilateral investment treaty (BIT) between The Netherlands and Zimbabwe. Among the reasons for justifying such a state of necessity, Zimbabwe referred to its “domestic law” (referring also implicitly to its constitutional law). The ICSID tribunal observed that, Zimbabwe domestic law may provide the tribunal “useful information on the situation which prevailed in Zimbabwe from 2002 to 2005”. However, the tribunal considered that

“in any event, it is on the basis of the applicable rules of International Law that, in conformity with Article 9(3) of the BIT, the Tribunal must decide whether or not there was at the time a state of necessity which could have made lawful deprivation of property without compensation. In other words, ultimately international law, not the domestic law of Zimbabwe, must determine the effect any state of emergency would have on the dispute before the Tribunal.”

Besides these aspects, let’s imagine a case in which an advocate attempts to prove that the mere fact that the constitutional standard of protection of a given fundamental right has been complied with by a State is tantamount mutatis mutandis to compliance with a said standard of protection as required by international law. To give a concrete example in the field of foreign investment protection, Art. 27 of the Mexican Constitution reads as follows:

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7. GAMI Investments, Inc. (Claimant) and The Government of the United Mexican States (Respondent), Final Award, 15 November 2004, para. 41.
10. Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe (ICSID Case No. ARB/05/6), Award of 22 April 2009, para. 103 (italics added).
11. Ibid. (italics added).
"The laws of the Federation and the States, in their respective jurisdictions, will determine the cases in which public utility requires the occupation of private property. The procedures used by the administrative authority to acquire this property will be according to these laws. The price fixed for indemnification of the expropriated property will be based on its fiscal value as figured at the appraiser's or assessor's office."  

Mexico is a Party to the North American Free Trade Agreement (NAFTA). NAFTA Chapter 11 (Investment) includes a different wording than the Mexican Constitution with regard to the basis of compensation in case of expropriation. Indeed, NAFTA Art. 1110(2) reads as follows:

"Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('date of expropriation'), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value."

Could an advocate in a NAFTA dispute claim that Mexico would comply with its obligation under NAFTA Chapter 11 to provide compensation on the basis of the "fair market value" for the reason that it would have granted compensation on the basis of the "fiscal value" under the Mexican Constitution?

The answer appears to be negative. As stated by the ICJ in the ELSI case with respect to the legality of a requisition under the Treaty of Friendship, Commerce and Navigation between Italy and the United States of America (FCN (1948)), the

"question arises irrespective of the position in municipal law. Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty."

A similar point of view involving an issue of fundamental rights arose in the Avena case before the ICJ. In casu, the question was whether the legality of clemency proceedings to review and reconsider convictions and sentences was to be assessed in light of the US Constitution or in light of international law (here, the Vienna Convention on Consular Relations). In other words, could a defendant be effectively barred from raising the issue

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of the violation of his rights under Art. 36 of the Vienna Convention on Consular Relations and be limited to seeking the vindication of his rights under the US Constitution?

The ICJ gave a clear-cut answer on the relationship between international law and constitutional law with respect to fundamental rights. According to the Court:

"in a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention,\(^ {14}\) the defendant raises his claim in this respect not as a case of 'harm to a particular right essential to a fair trial' — a concept relevant to the enjoyment of due process rights under the United States Constitution — but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law.\(^ {15}\)

The Court pointed out that "what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention."\(^ {16}\)

Thus, no matter if the clemency proceedings are an integral part of the overall scheme for ensuring justice and fairness in the legal process within the US criminal justice system and Constitution. What matters is that "the clemency process as practiced within the criminal justice systems of different States in the United States can, in and of itself, qualify as an appropriate means for undertaking the effective review and reconsideration of the conviction and sentence"\(^ {17}\) fully taking into account the violation of the rights set forth in the Vienna Convention on Consular Relations.

What are the lessons that can be drawn from this in terms of arbitration advocacy? First of all, national constitutions are and remain "facts" from a public international law perspective. From that perspective, an advocate should rather invoke fundamental rights as incorporated in international legal instruments to formulate his or her strategy. A strategy consisting of relying on constitutional law to preclude the application of international obligations would be meaningless and susceptible of failing before an international arbitral tribunal. As the tribunal concluded in LG&E v. Argentina, "international law overrides domestic law when there is a contradiction since a State cannot justify non-compliance of its international obligations by asserting the provisions of its domestic law."\(^ {18}\)

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14. Consular rights under Art. 36(1) of the Vienna Convention on Consular Relations are not prima facie fundamental rights. But when they pertain to fundamental rights such as the right to life, they present the characteristic of fundamental rights.


16. Ibid. (italics added).

17. Ibid.

18. LG&E Energy Corp. and Argentine Republic (ICSID Case No. ARB/02/1), Decision on Liability of October 2006, para. 94.
It is not relevant prima facie that constitutional law guarantees fundamental rights if the threshold or standard of protection is lower or substantially different from the one required by international law. International law does not foresee any renvoi to the constitutional law in a State. Domestic law (including constitutional law) may play a role not in itself "but only as one factual element among others, or as evidence". It is not possible to allude to a continuum juris between constitutional law and international law.

In other words, an advocate may refer to constitutional law to justify performance of international obligations. In those situations, constitutional law only qualifies as a "fact" and is not of such a nature as to exclude or override the application of international law (i.e., fundamental rights as being protected under international law) in international arbitration proceedings.

III. THE HURDLE OF GENERAL INTERNATIONAL LAW

Another issue is when an advocate faces a hurdle when resorting to constitutional law to prevent the enforcement or execution of an international award or when invoking a constitutional provision which is in violation of international law.

Invoking constitutional law to challenge a right protected under international law or to defeat international arbitral awards may sound unorthodox. Coming to general international law, it suffices to mention Art. 27 of the Vienna Convention on the Law of Treaties (1969). This provision reads as follows: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (italics added). Art. 27 is considered as reflecting customary international law and is thus binding on States whether or not they are parties to the Vienna Convention on the Law of Treaties.

What is its effect when an advocate is tempted to challenge international arbitral awards on the basis of constitutional law or to invoke a constitutional provision which is contrary to rights as protected under international law instruments? This question raises several issues.

An advocate when resorting to constitutional law to prevent the enforcement or the execution of an international award faces the hurdle of general international law. Let's take the example of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). This instrument provides that an award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the ICSID Convention. In other words, the parties to an ICSID dispute are obliged to abide by and comply with the award and every Contracting State is required to recognize the award as binding and to enforce the pecuniary obligations imposed by the award as if it were a final decision of a domestic court.

Let's consider then that an advocate attempts to challenge an ICSID arbitral award before a domestic court on the basis of constitutional grounds, and that the challenge succeeds on those grounds. De facto, it appears that the domestic court (organ of the State under art. 4 of the ILC Articles on State Responsibility) has invoked "internal law".

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to justify "failure to perform a treaty", i.e., the ICSID Convention. This constitutes a breach of international law,\textsuperscript{20} as was said by the PCIJ in the \textit{Polish Nationals in Danzig}\textsuperscript{21} and in the \textit{Free Zones}\textsuperscript{22} cases several decades ago.

In particular, in the first case, the PCIJ stated that:

\begin{quote}
"It should ... be observed that, while on the one hand, according to generally accepted principles, a State cannot rely as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."
\end{quote}

This finding is applicable by extension in the relations between States and foreign investors as governed by BITs and customary standards of investment protection.

Indeed, the PCIJ was dealing with fundamental rights conferred on individuals. The PCIJ noted that "the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled exclusively on the bases of the rules of international law and the treaty provisions in force between Poland and Danzig".\textsuperscript{24} The Court moreover concluded that "the application of the Danzig Constitution may however result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law, as for instance in the case of a denial of justice in the generally accepted sense of that term in international law".\textsuperscript{25}

In casu, the PCIJ was referring implicitly to the right to a fair trial - a fundamental right under international legal instruments - that may have been denied by the application of the Danzig Constitution. Thus, the question of the relationship between constitutional law and fundamental rights is not new for international permanent jurisdictions.

Neither is it new in the context of international arbitration. In the Georges Pinson case (1928), the arbitrator had to deal with similar issues relating to the relationship between constitutional law and fundamental rights as defined under international law. The

\textsuperscript{20} By analogy, see \textit{SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan} (ICSID Case No. ARB/01/13), Procedural Order No. 2 of 16 October 2002 in ICSID Review - Foreign Investment Law Journal (2003) p. 293 at p. 300. The tribunal said: "The right to seek access to international adjudication must be respected and cannot be constrained by an order of a national court. Nor can a State plead its internal law in defence of an act that is inconsistent with its international obligations. Otherwise, a Contracting State could impede access to ICSID arbitration by operation of its own law."

\textsuperscript{21} \textit{Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory}, PCIJ, Series A/B, Advisory Opinion of 4 February 1932.

\textsuperscript{22} \textit{Case of the Free Zones of Upper Savoy and the District of Gex}, PCIJ, Series A/B, Judgment of 7 June 1932.

\textsuperscript{23} \textit{Polish Nationals in Danzig}, op. cit., fn. 21, p. 24 (italics added).

\textsuperscript{24} \textit{Ibid.}, p. 25 (italics added).

\textsuperscript{25} \textit{Ibid.} (italics added).
Mexican Constitution of 1857 provided that aliens who had Mexican children were to be considered Mexican, unless they manifested the intention to conserve their foreign nationality. It also provided that Mexican citizenship would be lost by reason of serving officially the Government of another State. A law of 1886 provided that children born in Mexico of an alien father should be considered as Mexicans, unless within one year after reaching majority they should manifest their intention to retain the nationality of their parent before the political authority of the place of their residence.

The arbitrator held that the Constitution of 1857 was inapplicable to claimant’s father, rejecting vehemently the Mexican Agent’s position according to which “si acaso legara a existir (una Constitución en el sentido de ordenar la confiscación de derechos de propiedad extranjeros), como ella sería la Ley Suprema del país tendría que acatarse por encima de los Tratados, pues éstos no pueden tener mayor fuerza que la misma Constitución”. The arbitrator judged such an assertion as being against the “axioms of international law.”

He declared:

“Je ne peux me dispenser d’examiner la question de savoir si la disposition constitutionnelle invoquée par l’agence mexicaine serait à l’abri de tout reproche de contradiction avec le droit des gens, si elle prétendait, en effet, imposer à l’étranger, par surprise et contre son gré, la nationalité mexicaine. Car s’il est vrai que, en règle générale, tout Etat est souverain pour déterminer quelles personnes il considérera comme ses ressortissants, il n’en est pas moins vrai […] que cette souveraineté peut être limitée par des règles du droit des gens, règles qui peuvent s’enraciner non seulement dans des traités formels, mais encore dans une communis opinio juris sanctionnée par le droit coutumier.”

From the foregoing, it seems difficult to deduce that an advocate in international arbitration could challenge or defeat an international arbitral award on the basis of constitutional law grounds if those grounds are contrary to rules and principles of international law, including those protecting fundamental rights. The issue is not new or unknown in international practice and the solutions given in the cases referred above show some clear reluctance of international courts and tribunals (permanent and arbitral) to give such effect to constitutional law.

In the same vein, it seems illusory to consider that an advocate could invoke a provision of constitutional law to defeat the object and purpose of international legal instruments dealing with the protection of fundamental rights. For instance, it is not possible for an advocate to rely on a Constitution which provides for the acquisition of land without compensation. Zimbabwe tried to do so in February 2000. One remembers that that constitutional amendment (which was defeated in a referendum) was part of the “Land Acquisition Program” which authorized the Government of Zimbabwe to acquire

26. The facts of the case refer to “sons” instead of children. For the sake of clarity we will refer to “children” in the context of the present contribution.
27. Georges Pinson (France) v. United Mexican States, op. cit., fn. 9, p. 393, para. 32.
28. Ibid.
29. Ibid. (emphasis added). No English translation to our knowledge.
compulsorily any rural land when the acquisition was deemed reasonably necessary for agricultural settlement purposes, i.e., for public purposes.

One may indeed doubt the possibility for an advocate to invoke constitutional provisions such as the one contained in Sect. 16A(1)(c) of the April 2000 Zimbabwe Constitution. This provision was introduced to replace the amendment mentioned above and which was defeated in a referendum. Sect. 16A(1)(c) provided that “the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement” and that, if the former colonial power fails to pay, then “the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement”. In the *Bernardus Henricus Funnekotter* case, it was for instance specified that the “Dutch Embassy in Harare repeatedly advised the Government of Zimbabwe of its obligations under the BIT concluded between The Netherlands and Zimbabwe” and that “the Zimbabwean Ministry of Foreign Affairs sent to the Embassy a *Note Verbale*, dated 21 November 2000, stating that property protected by investment agreements would be exempt from acquisition”. This shows indication and acknowledgement (even from Zimbabwe in casu) that constitutional law cannot defeat treaty obligations, in particular when those obligations protect fundamental rights of investors such as the right to property and the right to compensation.

However this acknowledgement did not prevent Zimbabwe from contending before the arbitral tribunal, that the measures it took in depriving Dutch farmers of their properties were taken in conformity with its “Constitution” and in pursuance of “public interest”. The tribunal did not address specifically that issue of “public interest” since it decided that violation of the obligation to pay just compensation as foreseen by the BIT between The Netherlands and Zimbabwe was sufficient to find violation of the BIT.

This being said, one needs now to turn to another aspect of the question surrounding the relationship between constitutional law, fundamental rights and arbitral awards. We have dealt with some of the hurdles that an advocate may face when invoking constitutional law in international arbitration proceedings. Another dimension of the relationship between constitutional law, fundamental rights and arbitral awards arises when considering the situation in which some fundamental rights are only provided for in constitutional law but not in international treaties applicable in a specific dispute or customary law. Here there is a gap in international law which may be closed by constitutional law. The field of investment arbitration sheds some light on this issue.

32. *Ibid*.
34. *Ibid.*, para. 84.
IV. CONSTITUTIONAL LAW AS THE “PRIMARY LAW” IN RELATION TO FUNDAMENTAL RIGHTS: POSSIBLE PATHS

A concrete path is for example Art. 42(1) of the ICSID Convention. This provision reads as follows: “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable” (italics added).

From the elements developed in the first part of this paper, one may therefore disagree with the position of the ad hoc Committee in Amco v. Indonesia according to which: “Article 42(1) of the Convention authorizes an ICSID tribunal to apply rules of international law only to fill up lacunae in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms.”

This is a misleading affirmation. Both legal systems, i.e., international law and the host State law, have a role to play. As stated by the tribunal in the resubmitted case of Amco v. Indonesia:

“Article 42(1) refers to the application of host-State law and international law. If there are no relevant host-State laws on a particular matter, a search must be made for the relevant international laws. And where, there are applicable host-State laws, they must be checked against international laws, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as ‘only’ ‘supplemental and corrective’ seems a distinction without a difference.”

If one may subscribe more easily to the position of the tribunal in the resubmitted case of Amco v. Indonesia, there is still a missing element in both quotations. It is related to the fact that the “host State law” (including constitutional law) may fill the gaps in international law in investment arbitration. An advocate is allowed to make claims based on constitutional law to sustain his or her argument of the “host State law” applicable to a dispute as long as that constitutional law is not contrary to international law and as long as that constitutional law is filling up the lacunae of international law (for instance with regard to fundamental rights to be taken into account in a particular dispute).

Let’s take the example of a recent investment dispute, i.e., Cementownia “Nowa Huta” S.A. v. Republic of Turkey. In casu, a new Electricity Market Law (Law 4628) was enacted by Turkey through which the entire transmission network would be operated by a State-owned company: the Turkish Electricity Transmission Joint Stock Company (TEIAS). After its enactment, Law 4628 became a matter of dispute in Turkish court proceedings. Various members of the Turkish Parliament challenged the law on the grounds that it violated the articles of the Turkish Constitution dealing with the safeguard

38. *Cementownia “Nowa Huta” S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2), Award of 17 September 2009.
of the rule of law, the freedom to conclude agreements and the protection of private property. Subsequently, provisional Art. 4 of Law 4628 was annulled by the Constitutional Court. The latter's decision reads as follows: "An agreement concluded by a company shall be deemed to have been nullified if the company has failed to complete transfer of a power generating and distribution plant owned by the government by June, 2001."³⁹

A request for arbitration was filed by Cementownia, a Polish company, since both Poland and Turkey were signatories to the Energy Charter Treaty (ECT). According to Cementownia, by terminating Concession Agreements, Turkey had violated Art. 10(1) ECT, which provides that "investments of investors of other Contracting Parties shall enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal"; as well as Art. 13 ECT, which provides that "investments may not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation except in certain specified conditions, one of which is that the nationalization or expropriation be accompanied by the payment of prompt, adequate and effective compensation".⁴⁰

The arbitral tribunal did not reach a judgment on the merits since Cementownia did not fulfill the condition of being an investor of another Party under the ETC. Nevertheless, it is interesting to note that besides traditional standards relating to investment protection (most favored nation (MFN), expropriation, fair and equitable treatment, full protection and security), the ECT does not emphasize the protection of fundamental rights such as the protection of private property, the rule of law, the right to a fair trial, the freedom to conclude agreements, etc. Since one main aspect of the dispute between Cementownia and Turkey related to the legality of the latter's actions in light of the Turkish Constitution, it might be considered that an advocate could have been in the position to invoke the said Constitution to supplement and strengthen the provisions of the ECT with respect to the protection of foreign investment.

For example, more and more arbitral awards⁴¹ hold that a denial of due process or procedural fairness may amount to a breach of the fair and equitable treatment (FET) standard. Due process is often guaranteed under national constitutions. The recourse to constitutional law by an advocate (or an arbitral tribunal) may permit substantiation of the content and scope of the FET standard and better identification the fundamental rights directly in linkage with the FET standard.

Nevertheless, the importance of relying on constitutional law appears more crucial in instances where an international treaty is not dealing with specific fundamental rights such as the rights of certain communities, e.g., rights of indigenous peoples. This is the

³⁹. Quoted in ibid., para. 10.
⁴¹. See, for example, Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29), Award of 27 August 2009. See also, The Loewen Group, Inc. and Raymond L. Loewen (Claimant) v. United States of America (Respondent) (ICSID Case No. ARB(AF)/98/3), Award of 26 June 200.
case within the framework of NAFTA. The *Glamis Gold, Ltd.* case\(^\text{42}\) is illustrative of that point. Glamis Gold, Ltd., a Canadian mining company, brought proceedings against the United States, claiming that the United States breached obligations owed to it under Chapter 11 of the NAFTA. In particular, Glamis claimed that the United States expropriated rights possessed by Glamis to mine gold in southeastern California and that the United States denied Glamis fair and equitable treatment in its attempts to utilize those rights.

In particular, the dispute raised a conflict between Quechan religious beliefs and the Glamis "Imperial Project". A First Amendment issue was raised by the Quechan, as explained in the Report of the US Director of the Bureau of Land Management quoted in the arbitral award:

> "The Quechan believe that this is a conflict between their protected right to practice religion under the First Amendment to the Constitution and the 1872 Mining Law; that by allowing the mining to occur the government will have violated their rights under the First Amendment and destroyed their ability to practice their religion where it must be practiced. What are our responsibilities to ensure that we do not violate the First Amendment? What are our responsibilities to the mining claimant to ensure that his proprietary rights are protected?\(^\text{43}\)"

The US also asserted that it was confronted with "an issue of first impression and involving a conflict of alleged constitutional concerns".\(^\text{44}\)

Here we are facing an interesting scenario. NAFTA Chapter 11 (Investment) does not refer to the "host State law" as part of the applicable law that an arbitral tribunal must apply to decide an investment dispute.\(^\text{45}\) According to NAFTA Art. 1131, a tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law". Thus the "host State law" (including constitutional law) is not referred to expressly in the text of that provision.

This situation has not yet prevented NAFTA Chapter 11 tribunals from showing "deference" or "comity" to domestic law (and by extension to constitutional law), in particular with respect to fundamental rights issues. The arbitral tribunal in the *Glamis Gold, Ltd.* case considered for instance that there was no violation of the fair and equitable treatment under NAFTA Art. 1105 partially because the US government had to take into account indigenous communities' rights. In the words of the arbitral tribunal,

> "It is clear from the record that the bill addresses some, if not all, of the harms caused to Native American sacred sites by open-pit mining. The tribunal agrees with Respondent's assertion that governments must compromise between the interests of

\(^{42}\) *Glamis Gold, Ltd. (Claimant) and United States of America (Respondent), ICSID/UNCITRAL, Award of 8 June 2009.*


\(^{45}\) Most BITs do not refer to the "host State law."
competing parties and, if they were bound to please every constituent and address every harm with each piece of legislation, they would be bound and useless.\textsuperscript{46}

This highlights a certain tendency at recognizing the freedom of governments to make their own choices in ensuring the respect of fundamental rights within their jurisdiction. Any advocate dealing with international arbitration cannot ignore that state of facts. One may even presume that the application of constitutional law in the context of an arbitral award implies meta-juridical considerations and transcends advocacy's strategies or the powers of an arbitral tribunal. Indeed, as stated by the arbitral tribunal in S.D. Myers:

"When interpreting and applying the 'minimum standard', a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.\textsuperscript{47}\n
Arbitral tribunals have been very keen to acknowledge obligations for States: obligation of due process, obligation to implement and/or national law as well as the obligation to control local authorities, etc. One can surely have in mind the award of the arbitral tribunal in the GAM1 case. In that case, Mexico advanced that an ICSID tribunal does not have the mandate to control the application of national law (and thus, constitutional law) by national authorities. The tribunal through a straightforward answer declared that:

"This contention misconceives the role of international law in the context of the protection of foreign investment. International law does not appraise the content of a regulatory programme extant before an investor decides to commit. The inquiry is whether the State abided by or implemented that programme. It is in this sense that a government's failure to implement or abide by its own law in a manner adversely affecting a foreign investor may but will not necessarily lead to a violation of Article 1105 (FET standard). Much depends on the context. The imposition of a new licence requirement may for example be viewed quite differently if it appears on a blank slate or if it is an arbitrary repudiation of a preexisting licensing regime upon which a foreign investor has demonstrably relied.\textsuperscript{48}\n
\textsuperscript{46} Glamis Gold, Ltd. (Claimant) and United States of America (Respondent), op. cit., fn. 42, para. 804 (italics added).

\textsuperscript{47} S.D. Myers, Inc. (Claimant) and Government of Canada (Respondent), Partial Award, 13 November 2000, para. 261 (italics added).

\textsuperscript{48} GAM1 Investments, Inc. (Claimant) and The Government of the United Mexican States (Respondent), op. cit., fn. 7, para. 91 (italics added).
The last sentence in the quoted passage is of interest. It demonstrates that legal obligations do not operate in a vacuum. They are inherently linked to rights. In other words, the obligation of due process entails for example a right to due process; the obligation to implement and enforce national law implies a right to the rule of law, etc. This nexus of obligations and rights forms what may be called "legitimate expectations". It is exactly those legitimate expectations that may be taken into account by an advocate when relying on constitutional law in the context of international arbitration. Legitimate expectations allow piercing the veil of formalism. The question is no longer whether constitutional law (and the fundamental rights contained therein) is formally applicable in the context of international arbitration but whether private persons (e.g., investors) can (must?) expect States to comply with fundamental constitutional requirements.

It seems that the pathway of a reference to "legitimate expectations" may help better integrate constitutional law in the context of international arbitration. As stated by the tribunal in the *Teemed* case, "in light of the good faith principle established by international law, [the FET] requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment".49  

Constitutional law appears to be more and more relied upon in international arbitration through an "informal" path. The concept of "transnational public policy"50 reflects such a development. At this level, constitutional law is not referred to expressly in arbitral awards. Arbitrators prefer to rely on a sort of "global constitutional law" (or global administrative law for others)51 or "international public order of most States"52 to

49. *Tecnicas Medioambientales Teemed S.A. v. The United Mexican States*, (ICSID Case No. ARB (AP)/00/2), Award of 29 May 2003, para. 154 (italics added).


51. See Benedict KINGSBURY and Stephan SCHILL, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law", in *ICCA Congress Series no. 13*, pp. 5-68; José E. ÁLVAREZ, "Common Language, Common Challenges: The Evolving International Investment Regime", in a speech at the International Law Weekend, New York, 23 November 2009, p. 2. explains that

"Today, investor-State arbitral awards, ever more abundant, are building, atop the slender common language of the ‘international minimum standard’ or ‘FET’, an elaborate body of global principles of ‘good governance’ that the international community is increasingly coming to expect from States that purport to adhere to the rule of law. As my colleagues at NYU have suggested, the investment regime, along with other contemporary human rights regimes, is constructing a global administrative law. These tribunals are now elaborating a cluster of common normative principles ... (1) requiring States to respect the legal values of stability, predictability and consistency, (2) to protect legitimate expectations, (3) grant procedural and administrative due process and avoid denials of justice, (4) require transparency, and (5) insist on reasonableness and proportionality when deploying the power of the State."

(On file with the author.)

give weight to certain norms or fundamental rights in the context of international arbitration. The concept of "transnational public policy" encompasses such a phenomenon.

Such a rationale was endorsed by the arbitral tribunal in World Duty Free v. Kenya in which the tribunal decided that:

"In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken on this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal." 53

Constitutional law can definitely play a major role in the field of international arbitration to ensure the respect of fundamental rights, to promote public interest and above all to root arbitral awards "in the real world where people live, work and die". 54

Indeed, as stated by the arbitral tribunal in the Calenergy's Himpurna California Energy Ltd. case:

"The members of (an) Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum, divorced from reality. ... The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption." 55

V. CONCLUSION

What if constitutional law was always there? One cannot conclude a paper on constitutional law and its relevance for arbitration advocacy without taking into consideration that some BITs refer expressis verbis to the "laws and regulations" of the host State. We have already discussed above that the host State "law" may incorporate in our view constitutional law. When an international treaty embodies an expression such as "laws and regulations", the use of the plural form indicates in our sense that constitutional law is definitely to be scrutinized by advocates and arbitrators when dealing with fundamental rights in international arbitration. This is the only way of giving

55. Himpurna California Energy Ltd (Bermuda) v. PT. (Persero) Perusahaan Listrik Negara (Indonesia), Final Award, 4 May 1999, para. 219 (italics added).
effect utile to the expression “laws and regulations”. In this context, one may disagree with restrictive interpretations tending at limiting that expression to “legislation specifically addressing investments by foreign investors” or to “general legal framework consisting of tax laws, labour laws, environmental laws, corporate laws, competition laws, and intellectual property laws”. Constitutions are “laws” of countries. The South African Constitution (1996), for example, states clearly that the “Constitution is the supreme law of the Republic”.

So yes, constitutional law was and is always relevant in arbitration advocacy, and particularly when it comes to fundamental rights and public policy. Dealing with the relationship between constitutional law, fundamental rights and arbitral awards seems to be an “understandable fact of life". Nevertheless, that relationship shows that more than ever international arbitrators are called to rule upon matters of transnational law and transnational public policies.

International law is not hermetic to such transnational concerns. In the field of international investment arbitration, international law more than in any other field needs that “global constitutional law” to substantiate the content of some fundamental standards. The content of standards like the “FET” standard or the “minimum standard of treatment” has evolved and will more and more evolve in the coming years in light of constitutional law developments in order to foster a better balance between public policy aspects and investment rights aspects.


58. See Michael REISMAN, “Keynote Address to the Conference”, Foreign Investment: New Horizons in Asia, Seoul, South Korea, 13 April 2007, p. 5. Professor Reisman speaks about a “workable international system ... accommodating many conflicting interests”. (On file with the author.)