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NON-PARTICIPATION BY STATES IN INVESTOR-STATE ARBITRATION PROCEEDINGS

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Non-participation by states in international adjudicatory proceedings is not novel. This practice has invited considerable academic scrutiny, including in recent years. The past decade has demonstrated that claims of a decline in the practice of non-participation were misguided. In fact, the inquiry now seems to have shifted from deciphering the permissibility of non-participation to assessing its legitimacy and efficacy as a strategic tool. Unfortunately, this discourse has not extended to investor-state arbitral proceedings so far. This is unfortunate given the recent re-emergence of this practice in investor-state disputes as well. This article seeks to fill this gap in literature, by examining whether non-participation is a legitimate and effective strategic tool available to states for undermining investor-state arbitral proceedings that they perceive to be without jurisdiction. Specifically, it explores whether international law imposes a duty upon objecting states to participate in investor-state arbitral proceedings. And if yes, it assesses whether a non-participating state may also convey its position to the tribunal through irregular communications. While the ultimate decision to not participate in a proceeding or communicate with the tribunal through irregular communications vests with a state, and also depends on the political considerations involved, this inquiry hopes to trigger a conversation that would facilitate this decision-making in each case.

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"*[A] frequent feature of the public sittings held by the International Court of Justice . . . in a contentious case before it has been that the table reserved and marked in the Great Hall of Justice for the respondent party has been backed by no more than a line of empty chairs.*"[1]

- Hugh Thirlway

"*If history repeats itself, and the unexpected always happens, how incapable must Man [or Woman] be of learning from experience!*"[2]

- George Bernard Shaw

I. INTRODUCTION

In 1985, Hugh Thirlway, the former Principal Legal Secretary to the International Court of Justice (ICJ), prominently discussed the practice of respondent states to not appear before the ICJ in contentious proceedings. Thirlway was referring to the increasing instances of non-appearances before the Court in the 1970s[3] that the respondent states adopted to complement their objection to the jurisdiction of the Court. But his description was not confined to the past. It was soon, quite prophetically, followed by the United States of America's (US) decision to abstain from the proceedings in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*.[4] This was the proverbial peak of the strategic phenomenon of non-appearance, which "had almost become the norm rather than the exception, a situation widely seen as symptomatic of a major crisis of confidence in the Court."[5] This is because a state's refusal to participate in a proceeding is commonly

[1] HUGH THIRLWAY, NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE 1 (1985) [hereinafter Thirlway].

[2] George Bernard Shaw, *Man and Superman: A Comedy and a Philosophy, in* 3 SELECTED PLAYS WITH PREFACES 243 (1948).

[3] *See, e.g.*, Nuclear Tests Case (N.Z. v. Fr.), Judgment, 1974 I.C.J. 457 (Dec. 20) [hereinafter *Nuclear Tests* case (N.Z. v. Fr.)]; Fisheries Jurisdiction Case (U.K. v. Ice.), Judgment, 1973 I.C.J. 3 (Feb. 2); Aegean Sea Continental Shelf Case (Greece v. Turk.), Judgment 1978 I.C.J. 3 (Dec. 19) [hereinafter *Aegean Sea Continental Shelf* case].

[4] *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (Jun. 27) [hereinafter *Military and Paramilitary Activities* case].

[5] Alexander Wentker, *Venezuela's Non-Participation Before the ICJ in the Dispute over the Essequibo Region*, EJIL: TALK! (Jun. 29, 2018), https://www.ejiltalk.org/venezuelas-non-participation-before-the-icj-in-the-dispute-over-the-essequibo-region/.

considered as "a way of [signalling] to one's opponent, other governments, the tribunal, and the public not to expect compliance."[6]

The phenomenon of non-appearance, or as subsequently explained — 'non-participation' — by states in international law proceedings is novel neither in practice nor academic scholarship. As Peter Tzeng details, between the establishment of the first Central American Court of Justice in 1907 and 1971, there were about seven cases of partial non-participation by states in inter-state proceedings.[7] The period of 1972-1986 witnessed another eight instances of non-participation, most of which were final and not partial.[8] And while the period between 1987 and 2012 saw a decline in such instances, non-participation has now re-emerged as a strategic tool.[9] Indeed, in the past decade, plethora of states have chosen to abstain themselves from the adjudicatory proceedings before the ICJ or those conducted in accordance with the United Nations Convention on the Law of the Sea (UNCLOS)[10]. These states include China,[11] Pakistan,[12] Venezuela,[13] the US,[14] Kenya,[15] and Russia,[16] to name a few. This has predictably reinvigorated the discussion about non-participation by respondent states in inter-state adjudicatory proceedings.[17]

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[6] Bernard H. Oxman, *Nonparticipation and Perceptions of Legitimacy*, 37 BERKLEY J. INT'L L. 235, 246 (2019) [hereinafter Oxman].
[7] Peter Tzeng, *A Strategy of Non-Participation Before International Courts and Tribunals*, 19(1) L. & PRACTICE INT'L COURTS & TRIBUNALS 5, 12 (2020) [hereinafter Tzeng].
[8] *Id.* at 14.
[9] *Id.* at 16-18.
[10] *See, e.g.*, The Arctic Sunrise case (Neth. v. Russ.), Case No. 22, Order 2013/3 of Oct. 25, 2013, ITLOS Rep. 224 [hereinafter, *Arctic Sunrise* case]; Croat. v. Slovn., Final Award, Perm. Ct. Arb. Case No. 2012-04, Jun. 29, 2017; the Duzgit Integrity Arbitration (Malta v. Sao Tome & Principe), Award on Reparation, Perm. Ct. Arb. Case No. 2014-07, Dec. 18, 2019.
[11] The South China Sea Arbitration (Phil. v. China), Award on Jurisdiction and Admissibility, Perm. Ct. Arb. Case No. 2013-19, Oct. 29, 2015 [hereinafter *South China Sea* Arbitration].
[12] Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.), Judgment, 2016 I.C.J. 552 (Oct. 5) [hereinafter *Marshall Islands* case].
[13] Arbitral Award of 3 October 1899 (Guy. v. Venez.), Judgment, 2020 I.C.J. 455 (Dec. 18).
[14] Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.), Order, 2018 I.C.J. 708 (Nov. 15).
[15] Maritime Delimitation in the Indian Ocean (Som. v. Kenya), Judgment, 2021 I.C.J. Gen. List No. 161 (Oct. 12).
[16] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. V. Russ.), Order, 2022 I.C.J. Gen. List No. 182 (Mar. 16).
[17] Frédéric Mégret, *Russia's Non-Appearance before the ICJ against Ukraine: Of not so Vanishing Acts and their Vanishingly Thin Justification*, EJIL:TALK! (Mar. 12, 2022), https://www.ejiltalk.org/russias-non-appearance-before-the-icj-against-ukraine-of-not-so-vanishing-vanishing-acts-and-their-vanishingly-thin-justification/; Nyanje John, *Kenya's*

Given this context, it is unsurprising that non-participation in inter-state adjudicatory proceedings has invited intense academic scrutiny.[18] However, this scrutiny did not extend to the regime of investor-state arbitration. This is despite the fact that for varying reasons, states also refrained from participating in investor-state arbitral proceedings[19] — a practice that has only continued to gather momentum in recent years.[20] The purpose of this article is, therefore, to fill this gap in literature.

Non-Appearance and Withdrawal: The Melodrama before the ICJ, AFRONOMICSLAW (Oct. 12, 2021), https://www.afronomicslaw.org/category/analysis/kenyas-non-appearance-and-withdrawal-melodrama-icj; Christoph Saake, *Maritime Delimitation, Non-Appearance, and Acquiescence: A Comment on the Oral Hearings in the case of Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, VÖLKERRECHTSBLOG (Apr. 15, 2021), https://voelkerrechtsblog.org/maritime-delimitation-non-appearance-and-acquiescence/; Andreas Zimmermann, *"To Appear Or Not To Appear This Was The Question" – The Saga of Kenya's Non-Appearance in the Kenya – Somalia Maritime Delimitation in the Indian Ocean Case*, EJIL:TALK! (Mar. 29, 2021), https://www.ejiltalk.org/to-appear-or-not-to-appear-this-was-the-question-the-saga-of-kenyas-non-appearance-in-the-kenya-somalia-maritime-delimitation-in-the-indian-ocean-case/; Joel O. Otieno, *Dead End: What Kenya's Withdrawal from the Maritime Case with Somalia Means*, HORN: INT'L INST. STRATEGIC STUD. (Mar. 17, 2021), https://horninstitute.org/dead-end-what-kenyas-withdrawal-from-the-maritime-case-with-somalia-means/.

[18] James D. Fry, *Non-Participation in the International Court of Justice Revisited*, 49 COLUM. J. TRANSNAT'L L. 35 (2010) [hereinafter Fry]; Stanimir A. Alexandrov, *Non-Appearance before the International Court of Justice*, 33 COLUM. J. TRANSNAT'L L. 41 (1995) [hereinafter Alexandrov]; Keith Highet, *You Can Run But You Can't Hide - Reflections on the U.S. Position in the Nicaragua Case*, 27 VA. J. INT'L L. 551 (1986); Gerald Fitzmaurice, *The Problem of the 'Non-Appearing' Defendant Government*, 51(1) BRIT. Y.B. INT'L L. 89 (1980) [hereinafter Gerald].

[19] S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo, ICSID Case No. ARB/77/2, Award (Aug. 8, 1980), 1 ICSID Rep. 330 [hereinafter S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo]; Kaiser Bauxite Company v. Jam., ICSID Case No. ARB/74/3, Decision on Jurisdiction and Competence (Jul. 6, 1975), 1 ICSID Rep. 296 (1993); Liberian Eastern Timber Corporation (LETCO) v. Liber., ICSID Case No. ARB/83/2, Award (Mar. 31, 1986), 2 ICSID Rep. 346 [hereinafter Liberian Eastern Timber Corporation (LETCO) v. Liber.]; American Manufacturing & Trading, Inc. (AMT) v. Republic of Zaire, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997), 5 ICSID Rep. 11; Antoine Goetz & Others v. Burundi (I), ICSID Case No. ARB/95/3, Award (Feb. 10, 1999).

[20] Aeroport Belbek LLC & Mr. Igor Valerievich Kolomoisky v. Russ., Press Release, Perm. Ct. Arb. Case No. 2015-07 (Jan. 6, 2016); PJSC CB PrivatBank v. Russ., Press Release, Perm. Ct. Arb. Case No. 2015-21 (Mar. 30, 2016); PJSC Ukranafta v. Russ., Press Release, Perm. Ct. Arb. Case No. 2015-34 (May 2, 2016); Stabil LLC & Others v. Russ., Press Release, Perm. Ct. Arb. Case No. 2015-35 (May 2, 2016); Everest EState LLC et al. v. Russ., Press Release, Perm. Ct. Arb. Case No. 2015-36 (Aug. 9, 2016); Limited Liability Company Lugzor and Others v. Russ., Press Release, Perm. Ct. Arb. Case No. 2015-29 (Dec. 13, 2017); NJSC Naftogaz of Ukraine and Others v. Russ., Judgment of the Hague

This article explores whether non-participation is a legitimate and effective strategic tool available to states for undermining investor-state arbitral proceedings that they perceive to be without jurisdiction. The expression 'legitimate' or 'legitimacy' refers to the notion of legal legitimacy, which is "defined as a property of an action, rule, actor or system which signifies a legal obligation to submit to or support that action, rule, actor or system."[21] In other words, this article wonders whether states can legitimately, and if yes, should they, not participate in investor-state arbitral proceedings that they object to. It answers both questions negatively and explains that states have an implied duty to participate in investor-state arbitral proceedings that they may have purportedly consented to, and that in any circumstance, their non-participation is unlikely to yield any significant advantages. Rather, unlike the proceedings before the ICJ, non-participation in investor-state arbitral proceedings is likely to compromise the states' abilities to effectively put forth their case.

Part II commences by defining what this article understands by 'non-participation' in an investor-state arbitral proceeding. Part III addresses the question of legitimacy of non-participation by assessing whether there is a duty, or an obligation, upon states to participate in adjudicatory proceedings that they may have consented to.[22] Part IV thereafter addresses the question of efficacy of non-participation as a strategic tool by assessing whether non-participation precludes a state from conveying its objections to an arbitral tribunal through irregular communications. Part V concludes.

II. DEFINING 'NON-PARTICIPATION'

The expression 'non-participation' in an adjudicatory proceeding can mean different things. While complete abstention from a proceeding would undoubtedly constitute an instance of non-participation, it can also occur in different forms based on the objective sought to be attained.

Non-participation can include instances where a state initially participates in the written advocacy phase of a proceeding by filing its pleadings, but subsequently refuses to appear before the court or the tribunal during the oral hearing. This was the approach adopted by Pakistan before the ICJ in the case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*

Court of Appeal, ¶¶3.12-3.13, Perm. Ct. Arb. Case No. 2017-16 (July 19, 2022); Oschadbank v. Russ., Ruling of the Paris Court of Appeal, ¶4, Perm. Ct. Arb. Case No. 2016-14 (Oct. 22, 2019).

[21] Christopher A. Thomas, *The Uses and Abuses of Legitimacy in International Law*, 34 OXFORD J. LEGAL STUD. 729, 735 (2014).

[22] The article uses the terms 'duty' and 'obligation' interchangeably.

(Marshall Islands Case), reasoning that it did "not feel that its participation in the oral proceedings will add anything to what has already been submitted through its Counter-Memorial".[23] Its decision was likely aided by the fact that both India and the United Kingdom, the respondents in the mirror proceedings commenced by Marshall Islands, had agreed to participate in the oral hearing.[24] In such circumstances, Pakistan's non-participation may have been motivated by considerations of costs and efficiency, as opposed to any strategic benefit.

Potentially, it can also include a situation as in the *Nuclear Tests (New Zealand v. France) Case* (*Nuclear Tests Case*).[25] In these proceedings, France, which had objected to ICJ's jurisdiction, appeared but refused to abide by the applicable norms for participating in a proceeding before the Court. Its representatives neither wore the traditional counsels' robes at the hearing nor addressed Judge *ad hoc* Palmer, and responded only to the permanent judges during the proceedings.[26] Such non-participation is purely symbolic, motivated by political and strategic reasons, and intended to reflect consistency with the jurisdictional objection raised.

A clearer example of a state's decision to not participate for political considerations, as a symbol of protest, emerged in the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*. After the ICJ had affirmed its jurisdiction to decide Nicaragua's claims, President Juan Manuel of Colombia expressed the state's intention to no longer participate in the further proceedings before the Court reasoning that "Colombia respects the rule of law, but also expects the respect for the rule of law and that has not happened today."[27] This would have been consistent with the common belief that where "the respondent that believes there is no jurisdiction may be concerned that an appearance to contest jurisdiction legitimates the proceedings."[28] However, eventually, Colombia decided to participate in the proceedings before the Court, including in the oral hearing,[29] which some scholars described as "the right path".[30]

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[23] *Marshall Islands* Case, *supra* note 12, ¶8.

[24] Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Ind.), Judgment (Jurisdiction and Admissibility), 2016 I.C.J. Rep., 255 (Oct. 5); Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Ind.), Preliminary Objections, I.C.J. Rep., 833 (Oct. 5).

[25] *See Nuclear Tests* case (N.Z. v. Fr.), *supra* note 3.

[26] Fry, *supra* note 18, at 60-61.

[27] Andres Sarmiento Lamus & Walter Arévalo Ramírez, *Non-appearance before the International Court of Justice and the Role and Function of Judges ad hoc*, 16(3) L. & PRAC. INT'L CTS. & TRIBUNALS 398, 400-401 (2017) [hereinafter Lamus & Ramirez].

[28] Oxman, *supra* note 6, at 241-242.

[29] *See,* Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.), Judgment, 2022 I.C.J. (Apr. 21).

Given this diversity, scholars provide varied descriptions of what is meant by 'non-participation'. Thirlway adopts a lopsided approach, and centres his description on Article 53(1) of the Statute of the ICJ (ICJ Statute). Article 53 states that "[w]henever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim."[31] Referring to this provision, Thirlway conflates non-participation in the proceeding with non-appearance before the Court, and limits the latter to those "procedural circumstances in which Article 53 becomes applicable."[32] This would encompass instances similar to non-participation by Pakistan in the *Marshall Islands* Case, but not by France in the *Nuclear Tests Cases* in which France did participate in the proceedings without strictly complying with the applicable norms.

Zimmerman adopts a more nuanced approach. According to him, Article 53 of the ICJ Statute refers to two separate circumstances relating to a state's failure to appear before the Court on the one hand, and its failure to defend its case on the other. Acknowledging this premise, Zimmerman appears to treat a state's non-appearance before the Court in a hearing distinct from the non-presentation of its submissions; even if both situations fall within the ambit of Article 53.[33] This article concerns the former, and not the latter, circumstance. Indeed, while a state's failure or refusal to file its memorial within the fixed time-limit may be a procedural non-compliance and thus, a reflection of its failure to defend its case, it would not be an instance of non-appearance if the state appears before the Court.

However, both descriptions are unavailing in the context of the analysis envisaged by this article. They remain rooted to the text of Article 53 of the ICJ Statute. While the jurisprudence developed in cases of non-appearance before the ICJ remains relevant to this analysis, the issue of non-participation in investor-state arbitration proceedings encompasses considerations beyond the text of Article 53 of the ICJ Statute. To this extent, these descriptions, though relevant, are of limited assistance.

James Fry provides a broader, more conceptual, definition of non-participation. He elaborates that "non-participation [by a state] is the failure to do whatever is

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[30] Walter Arévalo Ramírez & Andres Sarmiento Lamus, *Consequences of non-appearance before the International Court of Justice: Debate and Developments in relation to the Case Nicaragua v. Colombia*, 14(2) REVISTA JURÍDICAS 9, 26 (2017) [hereinafter Ramirez & Lamus].

[31] Statute of the International Court of Justice, art. 53(1), Oct. 24, 1945, U.N.T.S. No. 993 [hereinafter ICJ Statute].

[32] Thirlway, *supra* note 1, at 33.

[33] THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1144 (Andreas Zimmerman et. al. eds., 2006) [hereinafter Zimmerman].

expected to be done by a disputant at any point in a proceeding."[34] Fry's description is neither rooted to Article 53 nor confined to non-appearance before a court or tribunal during the oral hearing. It can include the approaches adopted by both Pakistan and France. However, such a description is "far too broad: States engage in unexpected conduct all the time over the course of a given proceeding, even when they are fully participating."[35] This then blurs the distinction between non-participating states and participating states which do not subscribe to each procedural requirement of the proceeding. The latter includes situations such as delayed filing of a written memorial, the non-payment of advance on costs by the respondent state, or the non-presentation of a witness requested for cross-examination. This is illogical given that "[n]on-compliance with a time limit does not automatically lead to default but carries its own sanctions."[36]

Further, Fry's broad understanding is also inconsistent with the practice of the ICJ. Previously, the Court has resorted to Article 53 only when states have abstained from appearing before it in a hearing either from the beginning, or at a subsequent stage of the proceedings. But where a state has committed a procedural default, for instance, failing to raise preliminary objection within the fixed time-limit,[37] the Court does not ordinarily address the situation by reference to Article 53.

Accordingly, this article prefers to adopt the definition of "non-participation" provided by Tzeng, *albeit* adjusting it to the paradigm of investor-state arbitral proceedings. Tzeng defines non-participation as "a situation in which a formal party to the proceedings does not formally participate in one or more aspects of the proceedings."[38] In this context, he adds that "[a]cts of not formally participating include not appointing an agent, not attending a procedural meeting, not submitting a written pleading, and not attending an oral hearing."[39] Accordingly, Tzeng consciously restricts the notion of non-participation to instances of formal non-participation, excluding any other procedural default by a participating state. The word "formal" denotes that non-participation must concern the proceedings themselves, as opposed to a mere refusal to participate in the constitution of the forum or accept an unfavourable outcome of a case Illustratively, he distinguishes between a state's delayed filing of a written pleading

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[34] Fry, *supra* note 18, at 43.

[35] Tzeng, *supra* note 7, at 9.

[36] CHRISTOPH H. SCHREUER ET. AL., THE ICSID CONVENTION – A COMMENTARY 717 (2nd ed., Cambridge Univ. Press 2009) [hereinafter Schreuer et. al.].

[37] Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. Rep. 213 (Jul. 13) (where the Court considered one of Nicaragua's preliminary objections not raised in its Counter Memorial, without any reference to Article 53 of the I.C.J. Statute).

[38] Tzeng, *supra* note 7, at 9.

[39] *Id.* at 10.

from its decision to not file a written pleading at all; while the latter would amount to non-participation, the former will not. This makes Tzeng's definition narrower, and more appropriate for this analysis, than the one endorsed by Fry.

Mirroring Tzeng's description, this article understands non-participation in investor-state arbitral proceedings as: a situation in which the host state, whose purported offer to arbitrate is accepted by an investor to commence an arbitral proceeding, does not formally participate in one or more aspects of the proceeding after the constitution of the arbitral tribunal.

The latter component — 'after the constitution of the arbitral tribunal' — is necessary to exclude situations where the state fails to nominate an arbitrator or participate in exceptional proceedings before an emergency arbitrator[40]. This is because in such cases, the states' failure is often a result of delays in their internal administrative processes, as opposed to reasons of efficiency or strategy. As some scholars note, states are structurally less suited to defend its interest in any emergency arbitration (EA) proceeding for one or more of the following reasons: lack of proficient English speakers in their legal staff, absence of internal competence to handle investor-state disputes, difficulties for a state (and not a corporation) to engage an external counsel through transparent tender processes, and the time reasonably required by a state (and not a corporation) to process the requisite approvals in accordance with internal law.[41] This tendency is also prevalent in inter-state proceedings.[42] Therefore, given the lack of clarity in the states' underlying motivations, and "fundamental questions of procedural fairness" raised by investor-state EA[43], this article does not consider these situations as instances of non-participation by states in investor-state arbitral proceedings.

Against this backdrop, this article now proceeds to assess the legitimacy as well as efficacy of non-participation by states in investor-state arbitral proceedings.

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[40] *See, e.g.,* TSIKInvest LLC v. Mold., ¶¶9, 60, SCC Emergency Arb. No. EA 2014/053, Award, Apr. 29, 2014 [hereinafter TSIKInvest LLC v. Mold]; Evrobalt LLC v. Mold., ¶5, SCC Case No. 2016/082, Award on Emergency Measures, May 30, 2016; Kompozit LLC v. Mold., ¶17, SCC Arbitration EA No. 2016/095, Emergency Award on Interim Measures, June 14, 2016 [hereinafter Kompozit LLC v. Mold]; Mohammed Munshi v. Mong., ¶11, SCC Arbitration EA No. 2018/007, Award, Feb. 5, 2018 [hereinafter Mohammed Munshi v. Mong].

[41] Joel Dahlquist, *Emergency Arbitrators in Investment Treaty Disputes*, KLUWER ARB. BLOG (Mar. 10, 2015), http://arbitrationblog.kluwerarbitration.com/2015/03/10/emergency-arbitrators-in-investment-treaty-disputes/ [hereinafter Dahlquist].

[42] Oxman, *supra* note 6, 242.

[43] Dahlquist, *supra* note 41.

III. DUTY OF STATES TO PARTICIPATE IN CONTENTIOUS PROCEEDINGS

In the context of international law proceedings, non-participating states are often characterised as a defaulter.[44] For instance, Shabtai Rosenne articulates that the *Corfu Channel case*[45] demonstrated "the strictness of the conception of 'default' in international practice, and the relative, and not absolute, quality of the rights of the appearing party . . . who is thereby merely placed in a certain procedural position, defined by Article 53 of the [ICJ] Statute."[46]

This labelling extends to investor-state arbitration as well, with many arbitral institutions characterising either party's failure or refusal to participate as a 'default' .[47] For instance, Article 30 of the UNCITRAL Arbitration Rules, 2021 and Article 35 of the SCC Arbitration Rules, 2017, both titled '[d]efault', entitle an arbitration tribunal to proceed with the arbitration proceedings even if the respondent fails to submit its statement of defence or does not appear at a hearing without sufficient or good cause. This nomenclature is consistent with the corresponding provision in each instrument as to the submission of pleadings. Article 21(1) of the former set of Rules provides that the "respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal."[48] Likewise, Article 29(2) of the latter states that "[w]ithin the period determined by the Arbitral Tribunal, the Respondent shall submit a Statement of Defence . . . "[49] The use of the word 'shall' in both provisions implies the mandatory character of this requirement. This may, in turn, suggest that a respondent has a procedural obligation to participate in an arbitration proceeding and file its written submissions; the breach of which constitutes a default.

However, beyond the realm of procedure, this nomenclature assumes that states which do not participate in proceedings before the Court or an investor-state arbitral tribunal also violate an international law obligation or duty.[50] But is this

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[44] Gerald, *supra* note 18; Statute of the International Tribunal for the Law of the Sea art. 28, Dec.10, 1982, 1833 U.N.T.S. 561 [hereinafter Statute of the ITLOS].

[45] The Corfu Channel Case, Judgment, 1949 I.C.J. Rep. 4 (Apr. 9); Nuclear Tests Cases (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253 (Dec. 20) [hereinafter *Nuclear Tests* Cases (Austl. v. Fr.)].

[46] SHABTAI ROSENNE, THE INTERNATIONAL COURT OF JUSTICE: AN ESSAY IN POLITICAL AND LEGAL THEORY 414 (Leyden & A. W. Sijthoff eds., 1957).

[47] U.N. Comm'n on Int'l Trade Arbitration Rules, art. 30 (2021) [hereinafter UNCITRAL Arbitration Rules]; Stockholm Chamber of Commerce Arbitration Rules, art. 35 (2017) [hereinafter SCC Arbitration Rules].

[48] UNCITRAL Arbitration Rules, *supra* note 47, art. 21(1).

[49] SCC Arbitration Rules, *supra* note 47, art. 29(2).

[50] Christopher Greenwood, *Review of Non-appearance before the International Court of Justice by Hugh Thirlway*, 44 CAMBRIDGE L. J. 303, 311 (1985) [hereinafter Greenwood].

accurate? The significance of this question is heightened by two further considerations. *First*, in most instances of non-participation, the respondent state is also disputing the jurisdiction of the Court or tribunal, which may create doubts about the applicability of the procedural rules invoked. *Second*, neither any institutional rules nor any other source of international law explicitly obligates a respondent state to appear at a hearing.

Answering this question is, thus, central to assessing the legitimacy of non-participation in investor-state arbitral proceedings as a strategic tool. To decipher if states can legitimately refrain from participating in such proceedings, it is necessary to first ascertain whether international law imposes a duty or obligation upon states to this effect. If such a duty exists, non-participation cannot be regarded as a legitimate tool to oppose the jurisdiction of an international law court or tribunal, notwithstanding the perceived correctness of the jurisdictional objection.

It is on this question that Hugh Thirlway and Jerome Elkind once famously disagreed. While their disagreement arose in relation to non-participation by states before the ICJ, it nevertheless provides an appropriate argumentative framework to analyse respondent states' duty (or lack thereof) to participate in investor-state arbitral proceedings.

A. Hugh Thirlway and the Emphasis on Sanction

Hugh Thirlway denied the existence of a duty to participate in proceedings before the ICJ through a textual approach. He explained that "the idea of an obligation . . . [compelling] a state to participate fully in the proceedings not only would rob Article 53 [of the ICJ Statute] of any meaning whatsoever, but would also be wholly unworkable."[51] Since the expression "parties" in Article 59 of the ICJ Statute did not refer to only those states that participated in the proceedings, non-participating states were bound by a judgment of the Court. Thus, the important question was only whether international law explicitly imposed an obligation on states to participate, and if it provided any sanction in case of a state's failure to comply. To Thirlway, the answer to this question was a resounding no.

On this premise, Thirlway argued that one could not claim that "an obligation of states named as parties in proceedings to appear in those proceedings is supported by the existence of any sanction in the form of a 'default judgment' in the sense of a judgment different in content from that which would otherwise be given in the case."[52] Simply put, the ICJ Statute did not authorise the Court to either compel the participation of a respondent state, or issue a default judgment without trial

[51] Thirlway, *supra* note 1, at 65.
[52] *Id.* at 67.

against the non-participating state as is permissible under Rule 12.1 of the United Kingdom's Civil Procedure Rules and Directions. Ultimately, it was not the non-participation of a state that was reprehensible, but the accompanying attitude that it would ignore a judgment against it.[53] Accordingly, Thirlway considered that "[t]he whole function of Article 53 . . . disproves the existence of any general legal duty to co-operate to the extent of actively defending a case."[54]

Thirlway's analysis is consistent with the text of ICJ Statute, and instruments commonly invoked in investor-state arbitral proceedings, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (ICSID Convention).

The ICJ Statute and the Rules of the Court (ICJ Rules), envisage the participation of respondent states. Article 42(1) of the ICJ Statute, for instance, provides that the parties shall be represented by agents.[55] Article 43(2) equally contemplates the submission of counter-memorials by respondent states, along with all papers and documents in support.[56] This is supplemented by Article 42 of the ICJ Rules that requires the Registrar to also transmit copies of any application or notification by the applicant state to respondent states.[57] A similar framework exists to facilitate a respondent state's participation in the oral proceedings.[58]

The ICJ Statue further contains a provision to specifically address non-appearance by a respondent state in contentious proceedings, namely Article 53. As previously stated, in case of non-participation, Article 53(1) entitles the other party to call upon the Court to decide in favour of its claim.[59] However, Article 53(2) thereafter affirms that "[t]he Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and in law."[60] Both components of Article 53 are discussed in further detail in the next part.

Evidently, neither Article 53 nor another provision of the ICJ Statute or Rules impose an explicit obligation or duty upon the respondent states to participate in contentious proceedings. They merely create a procedural framework that facilitates such participation, without explicitly mandating it. In other words, it contemplates the participation of respondent states, creates an expectation to this

[53] Greenwood, *supra* note 50.
[54] Thirlway, *supra* note 1, at 71.
[55] ICJ Statute, *supra* note 31, art. 42(1).
[56] *Id.* art. 43(2); Rules of the Court, art. 45(1) (1978) [hereinafter ICJ Rules].
[57] ICJ Rules, *supra* note 56, art. 42.
[58] ICJ Statute, *supra* note 31, art. 43(5); *Id.* arts. 54-72.
[59] ICJ Statute, *supra* note 31, art. 53(1).
[60] *Id.* art. 53(2).

effect, and provides for the continuation of the proceedings in case this expectation is breached; — nothing more. Crucially, neither the ICJ Statute nor the ICJ Rules provide for any sanctions that follow in case of non-participation of a respondent state. This is consistent with the language of Article 42 of the ICJ Rules, which refers to "other States entitled to appear before the court",[61] as opposed to being obligated to do so.

For investor-state arbitral proceedings, the ICSID Convention creates a similar framework. Article 36(2) of the Convention requires the Secretary-General to send a copy of the request to arbitration to the respondent state.[62] From this point, the respondent state is expected to participate in the constitution of the arbitral tribunal[63], formulation of the procedural framework of arbitration,[64] filing of written submissions,[65] and the oral hearing,[66] thereby creating an expectation to this effect.

Article 45 of the ICSID Convention then specifically deals with instances of non-participation, and essentially corresponds to Article 53 of the ICJ Statute. Article 45(1) provides that "[f]ailure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions."[67] It codifies the principle of non-frustration, which means that "arbitral proceedings will not be thwarted by one side's lack of co-operation."[68] Thereafter, Article 45(2) adds that "[i]f a party fails to appear or to present his case at any stage of the proceedings, the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so."[69] This provision encompasses the principle that the "appearing party's assertions will not be accepted just because the other party does not co-operate and hence does not contest them."[70]

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[61] ICJ Rules, *supra* note 56, art. 42.
[62] ICSID Convention, Regulations & Rules: Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 36(1) (2022) [hereinafter ICSID Convention].
[63] ICSID Convention, Regulations & Rules: ICSID Arbitration Rules, r. 19(1) (2022) [hereinafter ICSID Arbitration Rules].
[64] *Id.* r. 29(4).
[65] *Id.* r. 30.
[66] *Id.* r. 32.
[67] ICSID Convention, *supra* note 62, art. 45(1).
[68] Schreuer et. al., *supra* note 36, at 709.
[69] ICSID Convention, *supra* note 62, art. 45(2).
[70] Schreuer et. al., *supra* note 36, at 709.

This broad framework is supplemented by Rule 42 of the ICSID Arbitration Rules. If a party fails to appear or present its case at any stage of the arbitral proceedings, Rule 42(1) entitles the other party to "request the Tribunal to deal with the questions submitted to it and to render an award."[71] Upon such request, Rule 42(2) requires the tribunal to give the non-participating party a grace period not exceeding 60 days.[72] But once such grace period has expired, in terms of Rule 42(3), "the Tribunal shall resume the consideration of the dispute" and the "[f]ailure of the defaulting party to appear or to present its case shall not be deemed an admission of the assertions made by the other party."[73]

Therefore, like the ICJ Statute, the ICSID Convention also does not explicitly impose upon a state a duty or obligation to participate in investor-state proceedings.[74] It too contemplates such participation, but does not venture beyond prescribing the consequence of non-participation, i.e., the continuation of the arbitral proceedings without any admission of facts or law. This is confirmed by the drafting history of the Convention, as explained by Christoph Schreuer:

> One episode in the drafting of Art. 45 carries the implication that the parties' co-operation in ICSID arbitration is obligatory. At one point it was proposed to add the words "where it was under an obligation to do so" after the words describing failure to appear and to present a case. This proposal was opposed by Mr. Broches, since it seemed to imply that the constitution of the Tribunal did not in itself impose an obligation of appearance. Thereupon, the proposal was defeated in a vote by a wide margin.[75]

This equally holds true for other institutional rules invoked in investor-state arbitral disputes, such as the UNCITRAL Arbitration Rules 2021[76] and the SCC Arbitration Rules 2017.[77] These rules neither mandate the participation of, nor prescribe any sanctions against, a non-participating state other than to preserve the continuation of arbitral proceedings.

In his subsequent works, Thirlway reaffirmed his stance. He argued that since Article 53 merely "enables the Court to proceed to a decision notwithstanding the non-appearance, the nonappearance is without legal effects or sanction, and

[71] ICSID Arbitration Rules, *supra* note 63, r. 42(1).
[72] *Id.* r. 42(2).
[73] *Id.* r. 42(3).
[74] Schreuer et. al., *supra* note 36, at 720.
[75] *Id.*
[76] UNCITRAL Arbitration Rules, *supra* note 47, art. 30(1)(b), 30(2)-(3).
[77] SCC Arbitration Rules, *supra* note 47, art. 35(2)-(3).

therefore, it is meaningless to speak of a *legal* duty to appear."[78] In summary, "the absent state does not rely on a right not to appear: but since neither its opponent nor the Court has a right to insist that it do appear, it is under no duty to appear, or may assert a *privilege* not to appear" (emphasis supplied).[79]

Finally, Thirwlay's critique was not merely theoretical. It found some support in the jurisprudence developed by the ICJ. Notably, the Dissenting Opinion by Judge Gros with respect to the Provisional Measures order in the *Nuclear Tests Cases* adopted a similar approach. While criticising the ICJ's failure to rely on Article 53, Judge Gros noted that a state's "[f[ailure to appear is a means of denying jurisdiction which is recognized in the procedure of the Court, and [therefore] to oblige a State to defend its position otherwise than by failure to appear would be to create an obligation not provided for in the Statute."[80] As such, while a non-participating state assumes the risk of not supplying the Court with all the possible material relevant to its defence, that is a risk a state is free to take.[81]

Equally, the tribunal in the *South China Sea Arbitration* acknowledged that "Article 9 of Annex VII to the Convention [UNCLOS] anticipates the possibility that a party may not appear before the arbitral tribunal", which provides China the freedom "to represent itself in these proceedings in the manner it considered most appropriate, including by refraining from any formal appearance, as it has in fact done."[82]

B. Jerome Elkind and Normative Surrender

Jerome B. Elkind, erstwhile professor at the University of Wyoming, did not consider Thirlway's analysis convincing. He challenged it as chartering into the Austinian territory of positivism. Instead, Elkind espoused his theory of 'normative surrender' to argue that states were duty-bound to participate in international law proceedings before the ICJ.

To Elkind, an act of normative surrender possessed three characteristics: "(1) the Austinian fallacy that a norm which cannot be enforced is not a legal norm; (2) an over-emphasis on the consent of States; and (3) the fallacy that a norm which leaves States with a wide margin of appreciation as to the mode of enforcement is

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[78] Hugh Thirlway, *"Normative Surrender" and the "Duty" to Appear before the International Court of Justice: A Reply*, 11 MICH. J. INT'L L. 912, 912 (1990) [hereinafter Thirlway: "Normative Surrender" and the "Duty" to Appear before the ICJ].
[79] Thirlway, *supra* note 1, at 81.
[80] Nuclear Tests Cases (N.Z. v. Fr.), Order, 1973 I.C.J. Rep. 135, 153 (June 22) (dissenting Opinion of Gros, J.).
[81] *Id.*
[82] *South China Sea* Arbitration, *supra* note 11, at ¶ 1180.

not a legal norm."[83] Adopting this framework, he deemed the recognition of a state's privilege to not participate in proceedings before the Court as a form of normative surrender, intended to deny the normative legal content of the applicable legal norms.[84]

Elkind's hypothesis was two-fold:

First, with respect to the first and third characteristics, Elkind explained that they only pertain to the enforceability of a norm, which is distinct from the issue of its existence. The mere fact that neither the ICJ Statute nor the ICJ Rules empower the Court to sanction a state for its non-appearance did not by itself imply that states have no legal duty to appear before it.[85] This criticism is heighted in case of investor-state arbitral proceedings under the SIAC Investment Rules, 2017, Rule 24(m) of which, not only empowers a tribunal to "proceed with the arbitration notwithstanding the failure or refusal of any Party . . . to attend any meeting or hearing", but also "to impose such sanctions as the Tribunal deems appropriate in relation to such refusal or failure."[86]

In any event, Elkind's criticism resonates with the drafting history of Article 53 of the ICJ Statute. Article 53 is a verbatim adoption of its predecessor in the Statute of the Permanent Court of International Justice (PCIJ).[87] The task of drafting the PCIJ Statue was vested with an advisory committee. At the 28th meeting of the Committee, a memorandum was tendered in relation to the issue of non-participation, which contrasted the prevalent continental procedure in this regard on the one hand, with the English procedure dealing with non-participation by a respondent on the other. In case of such non-participation, while the former deemed the plaintiff's allegations of fact to be admitted by the absentee defendant, the English procedure required the plaintiff to nonetheless prove its case notwithstanding the defendant's non-participation.[88] The text of Article 53 confirms the Committee's preference for the English system.[89] However, this was initially objected to by certain members, namely Mr. Hagerup and Mr. Ricci-Busatti. They argued that "the inclusion of a special provision would be justified

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[83] Jerome B. Elkind, *Normative Surrender*, 9 Mich. J. Int'l L. 263, 287 (1988) [hereinafter, Elkind: Normative Surrender].
[84] *Id.*
[85] Jerome B. Elkind, *Duty to Appear before the International Court of Justice*, 37 INT'L & COMPAR. L. QUARTER 674, 680 (1988) [hereinafter Elkind].
[86] Sing. Int'l Arb. Centre Investment Rules, r. 24(m) (2017) [hereinafter SIAC Investment Rules].
[87] Thirlway, *supra* note 1, at 1.
[88] Proces-Verbaux of the Committee of Jurists to Draft the Statute for a Permanent Court of International Justice, 28th Meeting, The Hague, 569 (1920) [hereinafter Proces-Verbaux].
[89] *Id.*

only if it were to operate in the interests of the plaintiff and to punish the other party for its dereliction in failing to come to the Court."[90] As such, the Committee considered the possibility of sanctioning a state in case of its non-participation. But such a proposal was eventually dropped for being incompatible with the framework of international affairs.[91] Given the horizontal nature of international law, and the principle of sovereign equality, it was deemed inappropriate to enable the Court to sanction a state for its non-participation. Thus, the primary reason for non-inclusion of sanctions for non-participation was political and pragmatic, as opposed to a desire to confer on states a right or a privilege to not participate in contentious proceedings.[92] Viewed from this perspective, the absence of sanctions in the ICJ Statute does not, by itself, preclude the existence of a duty to participate in contentious international law adjudicatory proceedings.

Second, with respect to the second characteristic of state consent, Elkind explained that while the jurisdiction of the ICJ is consensual, the principle of consent is wrongly invoked to justify an instance of non-participation by a respondent state. In other words, a false impression is created that the consent must be obtained from the respondent state at each stage of the proceedings in a specific case.[93] Indeed, the *Nuclear Tests Cases,*[94] the *Aegean Sea Continental Shelf Case,*[95] and the *South China Sea Dispute*,[96] provide some fitting examples of this statement.

However, this emphasis on state consent lacks nuance. As Elkind notes, "the problem arises when a state which has generally accepted the compulsory jurisdiction of the Court is unhappy with the specific case which has been filed against it,[97] and thereafter, refrains from participating in a particular proceeding. In such cases, the principle of consent is wrongly invoked to provide a spurious justification for a state reneging on its earlier obligation;[98] thereby, satisfying the second characteristic of an instance of normative surrender.[99] For these reasons,

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[90] Elkind, *supra* note 85, at 680.
[91] Proces-Verbaux*, supra* note 88.
[92] Elkind, *supra* note 85, at 680.
[93] *Id.* at 676.
[94] *Nuclear Tests* Cases (Austl. v. Fr.), *supra* note 45; *Nuclear Tests* Case (N.Z. v. Fr.), *supra* note 3.
[95] *Aegean Sea Continental Shelf* Case, *supra* note 3.
[96] *South China Sea* Arbitration, *supra* note 11.
[97] Elkind, *supra* note 85, at 677.
[98] *Id.*
[99] *See* Brian McGarry, *Enforcing An Unenforceable Ruling In The South China Sea*, THE DIPLOMAT (Jul. 16, 2016) https://thediplomat.com/2016/07/enforcing-an-unenforceable-ruling-in-the-south-china-sea/ (For a similar argument in relation to *The South China Sea Arbitration* case).

Elkind describes a state's alleged privilege to not participate in contentious proceedings before the ICJ as a form of normative surrender.

The latter criticism applies with greater force in the context of investor-state arbitral proceedings. Consistent with the principle of good faith, Article 25(1) of the ICSID Convention codifies the general rule that "[w]hen the parties have given their consent, no party", including the state, "may withdraw its consent unilaterally."[100] Interpreting this provision, investor-state tribunals have emphasised that a state can only withdraw its consent to arbitrate if it has not been accepted.[101] Once an investor validly perfects the parties' consent to arbitration by accepting the state's standing offer to arbitrate in the treaty or law or contract invoked, "such consent is irrevocable."[102] Thereafter, states' subsequent attempts to withdraw their consent or not participate in such proceedings neither affects the validity of a consequent decision nor reduce its binding value.[103]

Accordingly, Elkind convincingly negated Thirlway's analysis by drawing a distinction between the existence and enforceability of a norm. Indeed, this criticism constrained Thirlway to acknowledge, without abandoning his position, that so long he and Elkind agreed with respect to the consequences of non-participation, their disagreement may only be semantic.[104] He appeared to concede that "appearance before the [ICJ] may be classified, by those who find it a more appropriate approach, as a duty, provided it is appreciated that it is a duty for which the only sanction is Article 53 of the Statute."[105]

C. *Recognising the Implied Duty to Participate*

Importantly, Elkind's analysis does not merely culminate with a criticism of Thirlway's analysis. It also provides the tools to discern an implied duty of states to participate in contentious proceedings before the ICJ, which remain relevant in the context of investor-state arbitral proceedings. The existence of such a duty is, as detailed below, discernible from the principles of (1) *pacta sunt servanda* and good

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[100] ICSID Convention, *supra* note 62, art. 25(1); *see also* Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between the States and Nationals of Other States, ¶23 (Mar. 18, 1965).
[101] Lanco Int'l Inc. v. Arg., ICSID Case No. ARB/97/6, Jurisdiction of the Arbitral Tribunal, ¶41 (Dec. 8, 1998); ABCI Inv. Ltd. v. Tunis., ICSID Case No. ARB/04/12, Decision on Jurisdiction, ¶93 (Feb. 18, 2011).
[102] Abaclat & Others (formerly Giovanna A. Beccara & Others) v. Arg., ICSID Case No. ARB/07/5, Decision on Jurisdiction, ¶439 (Aug. 4, 2011).
[103] *Military and Paramilitary Activities* Case, *supra* note 4, at ¶27.
[104] Thirlway: "Normative Surrender" and the "Duty" to Appear before the ICJ, *supra* note 78, at 916.
[105] *Id.* at 917.

faith, (2) competence-competence, and (3) the interpretation of unilateral declarations by a state.

First, states enjoy the discretion to voluntarily consent to the jurisdiction of the ICJ by any of the methods envisaged in Article 36 of the ICJ Statute. Indeed, the general rule of international law is that the conduct of a state can only be challenged before its own judicial organs, in accordance with its own laws.[106] This is an extension of its sovereignty, which requires that an international law court or tribunal could only exercise its jurisdiction over a state with its consent.[107] Thus, international law disputes "are placed in a different legal environment in that the jurisdiction of the Court [or tribunal] is based upon the consent of sovereign states and compulsory jurisdiction is lacking."[108]

However, once such consent is provided, "the duty to appear is a natural by-product of the rule of *pacta sunt servanda* combined with the undertaking in those instruments to submit certain disputes for decision by the Court."[109]

The existence of such a duty is further affirmed by the principle of 'good faith', a foundational principle of international law,[110] that governs all aspects of legal relations,[111] including the interpretation of treaty provisions.[112] It requires, among other things, that the parties deal honestly and fairly with each other, represent their motives and purposes truthfully, and refrain from deriving unfair advantages.[113] The significance of this principle is heightened in investor-state arbitral proceedings administered by the ICSID. Rule 3 of the ICSID Arbitration Rules categorically states that "[t]he Tribunal and the parties shall conduct the proceeding in good faith and in an expeditious and cost-effective manner."[114] The 'good faith' principle encompasses a duty to participate in, and not frustrate an investor-state arbitral proceeding, or for that matter any international law adjudicatory proceeding. It is for this reason that the tribunal in *LETCO v. Liberia*,

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[106] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. 244-255, ¶67 (Jun. 27) (Oda, J., dissenting) [hereinafter Nicar. v. U.S., dissenting opinion of Oda, J.]

[107] Case of the Monetary Gold removed from Rome in 1943 (Preliminary Question), Judgment, 1954 I.C.J. 19, 32 (June 15).

[108] Nicar. v. U.S., dissenting opinion of Oda, J., *supra* note 106, at ¶68.

[109] Elkind: Normative Surrender, *supra* note 83, at 286.

[110] Emily Sipiorski, Good Faith in International Investment Arbitration, ¶1.03 (2019).

[111] Inceysa Vallisoletana SL v. El Sal., ICSID Case No. ARB/03126, Award, ¶230 (Aug. 2, 2006).

[112] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

[113] Phoenix Action, Ltd. v. Czech, ICSID Case No. ARB/06/5, Award, ¶107 (Apr. 15, 2009).

[114] ICSID Arbitration Rules, *supra* note 63, at r. 3.

while allocating costs, characterised Liberia's non-participation in the arbitral proceeding as "procedural bad faith."[115]

The above assertion resonates with the Resolution adopted by the Institute of International Law on Non-Appearance before the ICJ states (Resolution).[116] Although the Resolution does not recognise the duty of a state to participate in contentious proceedings, Article 2 nevertheless clarifies that "[i]n considering whether to appear or to continue to appear in any phase of proceedings before the Court, a State should have regard to its duty to co-operate in the fulfilment of the Court's judicial functions." Resultantly, the principles of *pacta sunt servanda* and good faith cumulatively impose an implicit duty on a respondent state to participate in any contentious proceeding that it is alleged to have consented to.

Second, this implied duty is undisturbed by the fact that the State may have objections to the jurisdiction of the Court, or in case of investor-state disputes, an arbitral tribunal. In either scenario, the principle of competence-competence entitles the ICJ[117] and an investor-state arbitral tribunal[118] to determine its own jurisdiction. With respect to investor-state disputes, tribunals specifically explain that it is only for an investor-state arbitral tribunal to "determine whether it has jurisdiction, and the scope of its jurisdiction, on the basis of all the relevant facts and arguments presented by the Parties."[119] This assertion remains consistent with the principle of international law that the "establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself."[120] As a corollary, while a respondent state is entitled to adopt any position with respect to the jurisdiction of the forum seized, it is not entitled to unilaterally reach a conclusive and binding determination in this regard.

Accordingly, since an international law court or tribunal already possesses the jurisdiction to assess its own jurisdiction, the respondent state, by merely contesting such jurisdiction, also becomes the party to the dispute and the proceedings.[121] Article 1 of the Resolution notes, "[e]ach State entitled under the Statute to appear before the Court and with respect to which the Court is seized of a case is *ipso facto*, by virtue of the Statute, a party to the proceedings, regardless of

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[115] Liberian Eastern Timber Corp. (LETCO) v. Liber., *supra* note 19.
[116] *See generally*, Inst. Int'l L., Resolution on Non-Appearance before the International Court of Justice (1991) [hereinafter Resolution on Non-Appearance before the ICJ].
[117] ICJ Statute, *supra* note 31, art. 36(6).
[118] ICSID Convention, *supra* note 62, art. 41(1).
[119] Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkm., ICSID Case No ARB/12/6, Decision on Respondent's Objection to Jurisdiction, ¶119 (Feb. 13, 2015).
[120] Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 I.C.J., 432, 450, ¶37 (Dec. 4).
[121] Alexandrov, *supra* note 18, at 49; *see also Military and Paramilitary Activities* Case, *supra* note 4 at 23.

whether it appears or not."[122] This understanding reaffirms a state's implicit duty to participate in contentious proceedings even in a scenario where it objects to the jurisdiction of the Court or an arbitral tribunal.

Third, the existence of an implicit duty to appear before the Court or an arbitral tribunal is also bolstered by the principle of international law relating to unilateral declarations expounded by the ICJ in the *Nuclear Tests Cases*. This is particularly so when a state's standing offer to arbitrate is contained in an investment legislation, as opposed to a treaty, which is required to be interpreted in accordance with such *sui generis* principles.[123]

In the *Nuclear Tests Cases*, the ICJ had, *albeit* in different circumstances, held that "[w]hen it is the intention of the state making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking; the State being legally required to follow a course of conduct consistent with the declaration."[124] This principle also applies, at least by analogy, in the present context. Indeed, while purportedly consenting to the jurisdiction of the Court[125] or an investor-state tribunal,[126] states agree to consider any consequent decision or award binding and comply with them.[127] Therefore, by purportedly consenting to the jurisdiction of the Court or an arbitral tribunal, states also undertake to act consistently with these terms. This again implicitly casts a duty on states to participate in contentious proceedings notwithstanding the absence of any sanction. Otherwise, their non-participation would contradict their purported acceptance of the jurisdiction of the Court or an investor-state arbitral tribunal and the undertaking to be bound by the resultant decisions and awards. In such a scenario, to borrow words from Elkind,

> It involves a remarkable use of language to contend that a legal duty freely undertaken to recognize the Court's jurisdiction as compulsory involves no legal duty. There is a legal duty to act consistently with that recognition, to accept the process of the

[122] Resolution on Non-Appearance before the ICJ, *supra* note 116, art. 1.
[123] Tidewater Investment SRL & Tidewater Caribe, C.A. v. Venez., ICSID Case No. ARB/10/5, Decision on Jurisdiction, ¶85 (Feb. 8, 2013); CEMEX Caracas Inv. B.V. & CEMEX Caracas II Inv. B.V. v. Venez., ICSID Case No. ARB/08/15, Decision on Jurisdiction, ¶78 (Dec. 30, 2010); Brandes Investment Partners, LP v. Venez., ICSID Case No. ARB/08/3, Award, ¶80 (Aug. 2, 2011).
[124] *Nuclear Tests* Case (N.Z. v. Fr.), *supra* note 3, at ¶46.
[125] ICJ Statute, *supra* note 31, art. 59.
[126] ICSID Convention, *supra* note 62, art. 53(1); SIAC Investment Rules, *supra* note 86, r. 30.11; SCC Arbitration Rules, *supra* note 47, art. 46; UNCITRAL Arbitration Rules, *supra* note 47, art. 34(2).
[127] Resolution on Non-Appearance before the ICJ, *supra* note 116, art. 4.

> Court and to allow the Court to decide questions of disputed jurisdiction.[128]

Christoph Schreuer concurs with this understanding. He notes that "[t]he general circumstances of ICSID arbitration support the view that non-cooperation with the tribunal is a breach of an obligation. Participation in the Convention, together with consent to arbitration, establishes not only jurisdiction but also an obligation to participate actively in the resulting procedure."[129]

A similar sentiment was echoed by Judges Wolfrum and Kelly in their joint separate opinion in the *Arctic Sunrise* case[130] while addressing Russia's non-participation in proceedings commenced pursuant to the UNCLOS. They reasoned that:

> "in case of States having consented to a dispute settlement system in general . . . [their] non-appearance is contrary to the object and purpose of the dispute settlement system . . . Judicial proceedings are based on a legal discourse between the parties and the co-operation of both parties with the international court or tribunal [and] non-appearance cripples this process."[131]

Accordingly, Article 28 of the applicable Statute,[132] which is analogous to Article 53 of the ICJ Statute, "should not be understood as attributing a right to parties to a dispute not to appear; it rather reflects the reality that some States may, in spite of their commitment to co-operate with the international court or tribunal in question, take this course of action."[133]

In view of the above, to deny the existence of a legal duty to appear simply due to the absence of any coercive mechanism to compel a state's participation is puerile. It is premised on a false equivalence between the municipal law and international law systems.

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[128] Elkind: Normative Surrender, *supra* note 83, at 286.
[129] Schreuer et. al., *supra* note 36, at 720.
[130] *See generally*, The Arctic Sunrise Case (Neth. v. Russ.), Case No. 22, Order 2013/3 of Oct. 25, 2013, ITLOS Rep. 224, (Joint Separate Opinion of Judge Wolfrum and Judge Kelly) [hereinafter *Arctic Sunrise* Case: Joint Separate Opinion of Judge Wolfrum and Judge Kelly].
[131] *Id.* ¶6.
[132] Statute of the ITLOS, *supra* note 44, art. 28.
[133] *Arctic Sunrise* Case: Joint Separate Opinion of Judge Wolfrum and Judge Kelly, *supra* note 130, at ¶6.

> While the legal structure within all but the most primitive societies is hierarchical and authority is vertical, the international system is horizontal, consisting of . . . independent states, all equal in legal theory (in that they all possess the characteristics of sovereignty) and recognising no one in authority over them.[134]

Equally, it obscures the distinction between the existence and enforcement of a norm. To the contrary, a comprehensive understanding of the framework of international law and investor-state dispute settlement affirms the states' implied duty to participate in contentious proceedings before investor-state arbitral tribunals, or another international law forum. This duty emanates from a cumulative appreciation of the principles of *pacta sunt servanda*, good faith, and competence-competence. While such participation cannot be coerced, this inability merely reflects the limitations of international law. It does not make the states' non-participation legitimate.

As succinctly summarised by *the South China Sea Arbitration* tribunal:

> China is not free, however, to act to undermine the integrity of these proceedings or to frustrate the effectiveness of the Tribunal's decisions. The Convention and general international law limit the actions a party may take in the course of ongoing dispute resolution proceedings. China has fallen short of its obligations in this respect.[135]

IV. THE CURIOUS CASE OF IRREGULAR COMMUNICATIONS

Notwithstanding the concerns about its legitimacy, it is clear that states' duty to participate in any contentious international law proceedings, including in investor-state disputes, remains unenforceable. This leaves open the question of ascertaining the efficacy of non-participation as a strategic tool. Indeed, in the context of proceedings before the ICJ, some scholars prefer to view "non-participation not as a *problem*, but rather as a *strategy*" (emphasis supplied).[136]

To assess the efficacy of non-participation as a strategic tool, one must consider whether it prevents the non-participating state from conveying their position to the investor-state arbitral tribunal through informal means. This includes irregular communications to the tribunal in the form of position papers, letters, *note verbales*, and similar correspondences, along with supporting documents. If such irregular

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[134] MALCOLM N. SHAW, INTERNATIONAL LAW 6 (2008).
[135] *South China Sea* Arbitration, *supra* note 11, at ¶1180.
[136] Tzeng, *supra* note 7, at 8.

communications are not precluded, non-participation will likely provide states with an effective method to subject the tribunal to political pressure by forecasting the possibility of non-compliance,[137] without compromising their ability to advance their position. Ultimately, a "close relation exists between non-appearance, compliance and enforceability of judgments."[138]

In this light, this part specifically analyses the curious case of irregular communications by reference to (1) the procedural framework under the ICSID Convention and the ICJ Statute regarding the submission of irregular communications, (2) the inconsistent practice of international courts and tribunal in this regard, (3) the procedural framework under the various non-ICSID instruments prominently invoked in investor-state arbitration proceedings, and (4) the (in)tangible disadvantages of non-participation that may obviate any perceived strategic advantages emanating from the submission of irregular communications.

First, the starting point of this analysis is again instruments such as the ICSID Convention and the ICSID Rules. While Article 45 of the ICSID Convention specifically deals with instances of non-participation, it does not sufficiently guide the tribunal's approach. Rule 42 of the ICSID Arbitration Rules provides a more comprehensive response in this regard. Specifically, Rule 42(4) prescribes that notwithstanding the non-participation of states, "[t]he Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law."[139]

Accordingly, in ICSID arbitrations, non-participation shifts the onus of inquiry from the objecting state to the arbitral tribunal, which must now examine the participating party's arguments on its own motion.[140] This in turn not only "puts an extra burden on the tribunal but also on the cooperating party. The latter may be called upon to prove assertions which might otherwise be accepted as uncontested."[141] Crucially, the "tribunal's duty to investigate the veracity and persuasiveness of the cooperating party's assertions may induce it to look at irregularly received communications from the defaulting party."[142]

To this extent, the legal framework under the ICSID Convention and the ICSID Arbitration Rules corresponds to Article 53 of the ICJ Statute. Article 53 serves a dual purpose. It confirms that non-participation by a state does not preclude

[137] Oxman, *supra* note 6, at 244.
[138] Ramirez & Lamus, *supra* note 30, at 13.
[139] ICSID Arbitration Rules, *supra* note 63, at r. 42(4).
[140] Schreuer et. al., *supra* note 36, at 712.
[141] *Id.* at 712.
[142] *Id.*

adjudication; thereby, preserving the right of the participant state(s) to have their dispute adjudicated by the ICJ.[143] Simultaneously, it requires the ICJ to satisfy itself as to its jurisdiction and the foundations of the claim to ensure that its decision is justified in both procedure and substance.[144] Applicable to proceedings on the merits of the dispute and incidental proceedings alike,[145] the provision seeks to ensure that in any case of non-participation, neither party is placed at a disadvantage.[146] This, in turn, increases the burden of the Court and the participating state.[147]

The expression "satisfy itself" in Article 53(2) "implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence."[148] Indeed, the Court has the power and the responsibility to seek relevant information on its own accord from public international organizations[149] or from the parties for elucidation of any aspect of the matters in issue.[150] Thus, simply declaring the irregular communications of the non-participating states to be inadmissible is incompatible with Article 53(2).[151] The sole limitation being that "the Court cannot by its own enquiries entirely make up for the absence of one of the parties."[152] Considering the similarities between the text of Article 53 of the ICJ Statute and Rule 42 of the ICSID Arbitration Rules, one would expect investor-state tribunals, or at least ICSID tribunals, to adopt a similar approach.

Moreover, non-participation, in theory, enables a state to communicate its submissions to the Court or an arbitral tribunal without conforming to the applicable procedural rules or deadlines. For instance, according to Article 43(2) of the ICJ Statute, the parties' "communications shall be made through the Registrar, in the order and within the time fixed by the Court"[153] with a certified copy of each documents produced provided to the other party.[154] Article 56(4) of the Rules of

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[143] Alexandrov, *supra* note 18, at 43.
[144] *Id.*
[145] Zimmerman, *supra* note 33, at 1144; *see also* Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Order on Provisional Measures, 1979 I.C.J. General List No. 64, ¶13 (Dec. 15).
[146] *Military and Paramilitary Activities* Case, *supra* note 4, at ¶ 31.
[147] Oxman, *supra* note 6, at 244.
[148] *Military and Paramilitary Activities* Case, *supra* note 4, at ¶ 29.
[149] ICJ Statute, *supra* note 31, art. 34(2).
[150] ICJ Rules, *supra* note 56, art. 62(1).
[151] Alexandrov, *supra* note 18, at 58.
[152] *Military and Paramilitary Activities* Case, *supra* note 4, at ¶ 30.
[153] ICJ Statute, *supra* note 31, art. 43(2).
[154] *Id.* art. 43(3).

the Court also mandates that "no reference may be made during the oral proceedings to the contents of any document which has not been produced in accordance with Article 43 of the Statute . . . unless the document is part of a publication readily available."[155] Thus, as a general rule, no party is entitled to rely on a document not produced before the Court in the prescribed manner, unless it satisfies the available exceptions.[156]

Likewise, the ICSID Arbitration Rules require the pleadings to be "filed within the time limits set by the Tribunal."[157] Further, Rule 31(3) prescribes what a counter-memorial by a state must contain. It states that a "counter-memorial . . . or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law in the last previous pleading; a statement of law in answer thereto; and the submissions."[158] Rule 33, which deals with the marshalling of evidence, also provides that,

> each party shall, within time limits fixed by the Tribunal, communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed.[159]

Crucially, the Rules require the parties to "co-operate with the Tribunal in the production of the evidence", with the tribunal being competent to "take formal note of the failure of a party to comply with its obligations . . . and of any reasons given for such failure."[160]

In a nutshell, by not participating in the arbitral proceeding, a non-participating state is at liberty to ignore these obligations and procedural requirements and still have its submissions considered by the tribunal. This potentially provides it a significant strategic advantage, including the ability to surprise the other party by making untimely pleadings and submissions. As explained by Stanimir Alexandrov, this "places the non-appearing State in as good a position as if it had actually

[155] ICJ Rules, *supra* note 56, art. 56(4).
[156] *But see* Practice Direction IX (1) of I.C.J. (which States that any recourse to such exception *is not to be made in a manner* that undermines the general rule that all the documents in support of a party's contentions *shall* be annexed to its written pleadings or produced in accordance with Article 56(1)-(2) of the Rules of the Court.).
[157] ICSID Arbitration Rules, *supra* note 63, r. 31(1).
[158] *Id.* r. 31(3).
[159] *Id.* r. 33.
[160] *Id.* r. 34(3).

appeared. In fact, in certain aspects such a position could even be more advantageous."[161] Equally, it incentivises respondent states to not participate in contentious proceedings, and instead engage in the "non-appearance technique of litigation",[162] of deliberately timed submissions to frustrate the opponent.[163]

In theory, these perceived advantages suggest that non-participation may be an effective tool for states in investor-state arbitral proceedings, notwithstanding the concerns as to its legitimacy. However, a closer scrutiny reveals that this is not necessarily the case.

Second, despite the legal framework of Article 53 of the ICJ Statue, the practice of the ICJ, and for that matter other international law tribunals, towards non-participating states lacks consistency. While the Court and other tribunals have considered the irregular communications made by the non-participant states[164], they have equally declined to do so where circumstances so required.[165] This was, for instance, the circumstance in the *Arctic Sunrise* Case, wherein the tribunal refused to consider Russia's belatedly submitted position paper by reasoning that:

> . . . [t]he Tribunal decided to take no formal action on Russia's Position Paper given that: (i) it was brought to the Tribunal's attention at a very late stage of this phase of the proceedings following Russia's consistent failure to participate in this arbitration; and (ii) according to Russia, the Position Paper does not constitute a formal submission in this proceeding. Furthermore, the Tribunal is satisfied that the relevant issues are fully addressed in this Award.[166]

In this regard, a comparison with Article 7(2) of the draft Commentary to the Code of Conduct[167] for arbitrators in International Investment Dispute may not be out of place. Article 7(1) of the Code generally prohibits *ex parte* communications

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[161] Alexandrov, *supra* note 18, at 55.
[162] Keith Highet, *Evidence, the Court, and the Nicaragua Case*, 81 AM. J. INT'L L. 56 (1987).
[163] Fry, *supra* note 18, at 66.
[164] Trial of Pakistani Prisoners of War (Pak. v. India), Order, 1973 I.C.J. 328 (July 13); *Military and Paramilitary Activities* case, *supra* note 4, at ¶30; Fisheries Jurisdiction Case (U.K. v. Ice.), Judgment, 1974 I.C.J. 3 (July 25); *Aegean Sea Continental Shelf* case, *supra* note 3; *see also* Zimmerman, *supra* note 32, at 1163.
[165] *Arctic Sunrise* Case, *supra* note 10.
[166] *Id.* at ¶68.
[167] Commentary to the Code of Conduct (Initial Draft), 2022, art. 7(2), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/220825_initial_draft_commentary_to_coc_upload_version.pdf.

between a litigant and arbitrator, except in select limited circumstances.[168] However, in any case, Article 7(2) clarifies that "*ex parte* communication shall not address any procedural or substantive issue" either relating to or which can be reasonably anticipated to arise in the international investment dispute proceeding.[169] By analogy, one can reasonably expect investor-state tribunals to adopt a similar approach in dealing with irregular communications, which need not be *ex parte*.

Further, even when the Court or tribunal accepts similar irregular communications, it provides the other party an opportunity to respond;[170] thereby, diminishing the extent of any perceived advantages. Indeed, providing the other party an opportunity to respond to irregular communications influences the amount of weight they may be given.[171]

This balanced approach derives support from Article 3 of the Resolution. On the one hand, Article 3(a) states that "if the circumstances so warrant", the Court should "invite argument from the appearing party on specific issues which the [c]ourt considers have not been canvassed or have been inadequately canvassed in the written or oral pleadings".[172] This naturally increases the burden of the ICJ and the participating party. But, on the other hand, Article 3(2) urges the Court to "take whatever other steps it may consider necessary, within the scope of its powers under the ICJ Statute and the Rule of Court, to maintain equality between the parties."[173] This, in turn, enables an approach similar to that adopted by the *Arctic Sunrise* case tribunal.

For this reason, some scholars opine that "any State involved in a future non-appearance needs to contemplate the risk of attempting an informal communication with the Court . . . since the Court can take different approaches in its evaluation of this information, depending of its content, time and channel of presentation."[174] Likewise, they consider that in inter-state adjudicatory proceedings before the ICJ, "[n]on-appearance [has] rarely served the cause of the recalcitrant State."[175] This insistence is bolstered in case of investor-state disputes. Till date, to the author's knowledge, none of the investor-state arbitral proceedings

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[168] *Id.* art. 7(1).
[169] *Id.* art. 7(2).
[170] *South China Sea* Arbitration, *supra* note 11, at ¶ 89(c).
[171] Lamus & Ramirez, *supra* note 30, at 403.
[172] Resolution on Non-Appearance before the ICJ, *supra* note 116, art. 3(a).
[173] *Id.* art. 3(b).
[174] Ramirez & Lamus, *supra* note 30, at 25.
[175] Alina Miron, *Palestine's Application the ICJ, neither Groundless nor Hopeless. A Reply To Marko Milanovic*, EJIL: TALK! (Oct. 8, 2018), https://www.ejiltalk.org/palestines-application-the-icj-neither-groundless-nor-hopeless-a-reply-to-marko-milanovic/.

in which the state did not participate have led to a favourable award for the state. In fact, some consider this tendency has contributed to Russia's decision to participate in investor-state arbitral proceedings, and actively fight on issues of admissibility and jurisdiction, as well as liability, quantum, and enforcement, after initially refusing to do so.[176]

Third, it is unclear whether investor-state arbitral tribunals conducting proceedings in terms of institutional rules other than those of ICSID will adopt a similar approach. For instance, the UNCITRAL Arbitration Rules, 2021 do not specifically require the tribunal to satisfy itself in the same way as Rule 42(4) of the ICSID Arbitration Rules or Article 53 of the ICJ Statute. To the contrary, Article 30 of the UNCITRAL Arbitration Rules, 2021 appears to adopt a more discretionary approach. It states that "[i]f a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it."[177]

The SCC Arbitration Rules, 2017 prescribe an identical framework. Article 35(2) provides that if a party "fails to appear at a hearing, or otherwise fails to avail itself of the opportunity to present its case, the Arbitral Tribunal may proceed with the arbitration and make an award."[178] The provision does not explicitly articulate an arbitral tribunal's duty to satisfy itself and ensure that neither party, including the non-participating state, is placed at a disadvantage. To the contrary, Article 35(3), couched in near-punitive terms, prescribes that "if a party, without good cause, fails to comply with any provision of, or requirement under, these Rules or any procedural order given by the Arbitral Tribunal, the Arbitral Tribunal may draw such inferences as it considers appropriate."[179]

Therefore, in arbitral proceedings conducted in accordance with these (and other similar) rules, the non-participation by a respondent state may evoke a different reaction from the tribunal. Although this would not entitle an investor to an award in default, it is equally conceivable for an arbitral tribunal to not conduct an extensive inquiry as that contemplated by the ICSID Arbitration Rules or the ICJ Statute. Indeed, this was the precise approach adopted by the emergency

[176] Daniel Hrcka & Nicholas Peacock, *Recent Developments In "Crimea" Investment Arbitration Claims*, HSF NOTES (Oct. 30, 2019), https://hsfnotes.com/arbitration/2019/10/30/recent-developments-in-crimean-investment-arbitration-claims/.
[177] UNCITRAL Arbitration Rules, *supra* note 47, art. 30(3).
[178] SCC Arbitration Rules, *supra* note 47, art. 35(2).
[179] *Id.* art. 35(3).

arbitrators in four cases pursuant to the SCC Arbitration Rules.[180] As one commentator notes, "none of the host [S]tates in the four cases . . . participated in the EA proceedings. The emergency arbitrators accepted investor's claimed basis for jurisdiction as true and did not conduct separate examination."[181] This is because under the framework of the SCC Arbitration Rules, emergency arbitrators "tend not to make an independent inquiry on the evidence proving such requirements and instead accept the Claimant's factual assertions."[182] It is for this reason that irrespective of the urgencies involved, states are advised to "properly raise a jurisdictional objection at the appropriate time."[183]

Fourth, outside this legal framework, non-participation in investor-state arbitral proceedings also results in certain intangible and tangible disadvantages, which must be balanced against any perceived strategic advantages emanating from the non-participation of states.

With respect to intangible disadvantages, non-participation by a state is likely to upset the members of the tribunal, lower the credibility of the arguments informally communicated, and thus, increase the risk of an adverse decision or award. It is ostensibly for this reason that the ICJ and other international law tribunals express their disappointment or regret at the conduct of the non-participating states. After all, despite its claims to objectivity and apolitical character, judicial decisions, awards, and "[j]udgments are based on values and choices of a political nature and are not the product of distinctly legal reasoning, of a neutral, objective application of legal expertise."[184] Legal rules and doctrines merely constitute the commonly used language to justify the agreed outcomes, and clothe them with the appearance of objectivity.[185]

As far as tangible disadvantages are concerned, non-participation by a state is, in case of an adverse final award, likely to dictate the allocation of costs by the tribunal between the disputing parties. Indeed, investor-state arbitral tribunals

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[180] TSIKInvest LLC v. Mold, *supra* note 40; Evrobalt LLC v. Mold., Emergency Arb. No. EA 2016/082 (May 30, 2016); Kompozit LLC v. Mold, *supra* note 40; Mohammed Munshi v. Mong, *supra* note 40.

[181] Qian Wu, *Jurisdiction of Emergency Arbitrator In Investment Treaty Arbitration*, KLUWER ARB. BLOG (Jun. 28, 2019), http://arbitrationblog.kluwerarbitration.com/2019/06/28/jurisdiction-of-emergency-arbitrator-in-investment-treaty-arbitration/.

[182] *Id.*

[183] *Id.*

[184] J. Stuart Russel, *The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy*, 18 OTTAWA L. REV. 1, 12 (1986).

[185] Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory,* 94(1) YALE L. J. 1, 5 (1984).

remain competent to, and have previously allocated costs based on these factors by taking into consideration the non-participating state's failure to cooperate or conduct itself in good faith during the proceedings.[186] For instance, Article 42(1) of the UNCITRAL Arbitration Rules, 2021 prescribes the general rule that "[t]he costs of the arbitration shall in principle be borne by the unsuccessful party or parties."[187] And while an arbitral tribunal may allocate costs differently, it must do so "taking into account the circumstances of the case."[188] In the same vein, Article 49(6) of the SCC Arbitration Rules, 2017 provides that unless otherwise agreed by the parties (an unlikely scenario where a state does not participate in the proceedings), "the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances."[189] This enhances the financial value of risks undertaken by a non-participating state.

Given these circumstances, while states may choose to not participate in investor-state arbitral, or for that matter any other international law proceedings, for political reasons, it is questionable whether such conduct results in any strategic advantages. Rather, their non-participation in investor-state arbitral proceedings is likely to create disadvantages and adversely affect the outcome of the underlying dispute.

V. CONCLUSION

The preceding analysis enables us to definitively answer the questions initially posed concerning the legitimacy and efficacy of non-participation as a strategic tool.

While states are entitled to not participate in investor-state arbitral proceedings due to the absence of a coercive mechanism, such non-participation lacks legitimacy. It contradicts their purported consent to the jurisdiction of an arbitral tribunal, undertaking to consider their decisions and awards binding, and a general recognition that arbitral tribunals are competent to assess any objections in regard to their jurisdiction. These considerations, coupled with the principle of good faith, impose an implied duty on states to participate in investor-state arbitral proceedings.

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[186] Schreuer et. al., *supra* note 36 at 726; S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo, *supra* note 19 at ¶ 1.33; Liberian Eastern Timber Corp. (LETCO) v. Liber., *supra* note 19 at, ¶¶ 119-120.
[187] UNCITRAL Arbitration Rules, *supra* note 47, art. 42(1).
[188] *Id.*
[189] SCC Arbitration Rules, *supra* note 47, art. 49(6).

As a strategic tool, the efficacy of non-participation in investor-state arbitral proceedings is equally questionable. While states may prefer to not participate for political considerations, such conduct also leaves them vulnerable to both tangible and intangible disadvantages. Further, the emerging practice of investor-state arbitral tribunals, and other international law fora, suggests that a non-participating state cannot be certain of its ability to convey its position to the tribunal through irregular communications. This puts a non-participating state at a tremendous disadvantage, which is unlikely to be outweighed by perceived political advantages of non-participation.

Ultimately, the decision to participate or not in an investor-state arbitral proceeding is that of states, to be taken in accordance with the prevailing political considerations. Indeed, despite these conclusions, this article does not discount the possibility that such political considerations may, in some cases, make non-participation by a state an appropriate recourse. But barring such circumstances, it is hoped that the preceding analysis marks the beginning of a continuing conversation about non-participation by states in investor-state arbitral proceedings, which could aid the community of states to reach the appropriate conclusion in each case.