

## The contribution of international courts and tribunals to the methodology of international law

### OC - (ILA-14187) - THE IMPACT OF THE INTERNATIONAL COURT OF JUSTICE ON THE DEVELOPMENT OF EVIDENTIARY RULES

Magdalena Bulit Goñi (Argentina)<sup>1</sup>

1 - Eversheds Sutherland

#### **Magdalena Bulit Goñi**

Working languages: Spanish, English, French Nationality: Argentine and Italian February – August 2019 FIETTA LLP, London | International Law intern. Assistance in the elaboration of legal memoranda concerning investment restructuring; represented claimant in document production phase of investment proceedings under ICSID rules and in the research and argumentation on quantum determination. Further assistance on law of the sea matters, pro bono cases, a cost submission, legal researches and structuration of argumentations and general business development. January 2019 - UNCTAD, Investment division, Geneva | External Consultant Review and analysis of investment policies and legislations in Latin America. Examination of the reasons grounding these policies and their consequences as well as their impact in the broader debate of investor-state dispute settlement reform. Analysis of specific topics in investment arbitration and study of their systemic implications. August – December 2018 (5 months) - QUINN EMANUEL, URQUHART & SULLIVAN LLP, Paris | International Arbitration intern. Represented claimant in reply on the merits and counterclaims phase in commercial proceedings under ICC rules, assisted claimant with expert's due diligence and choice in arbitration proceedings under ICC rules and a successful challenge of an arbitrator on conflict of issues grounds under AAA rules. Further assistance on a pitch for an investor state case and in the drafting of an award. Contact: Armand Terrien, armandterrien@quinnemanuel.com April – August 2018 (4 months) - UN INTERNATIONAL LAW COMMISSION (ILC), Geneva | Assistant of Dr. Eduardo Valencia-Ospina. Assistance with the work preparation for the 70th session of the ILC focusing on Protection of the environment in relation to armed conflicts and Succession of States in respect of State responsibility. Contact: Eduardo Valencia Ospina, evalenco@hotmail.com October 2014 – August 2017 (2 years, 10 months) - INTERNATIONAL AFFAIRS DIRECTION AT THE MINISTRY OF FINANCE, Buenos Aires | Legal advisor. Assistance concerning Argentina's sovereign debt and other international economic issues; study of legal strategies and briefs for different cases in various jurisdictions (judicial and arbitration). Analysis and drafting of international investment treaties, international financing contracts and other international legal documents. Support on the selection of three law firms to represent the government, the drafting of four bills, several presidential decrees and legal memoranda. General assistance in administrative and academic matters. Contact: Eugenio Bruno, eugeniobruno@mfin.gob.ar April 2007 – July 2013 (6 years, 2 months) -FIFTH CHAMBER OF THE FEDERAL ADMINISTRATIVE APPEALS COURT, Buenos Aires | Law Clerk to the Hon. Jorge Morán (Ad-Honorem, April 2007-June 2008) and to Hon. Pablo Gallegos Fedriani (July 2008 - July 2013). Assistance with the drafting of more than 400 judicial decisions after the analysis of the case files and with the research of jurisprudence and doctrine. General assistance in administrative and academic matters. Contact: Jorge Morán, jmoran@pjn.gob.ar EDUCATION AND ACADEMIC EXPERIENCE 2017 – 2018 GENEVA LL.M IN INTERNATIONAL DISPUTE SETTLEMENT (MIDS), GRADUATE INSTITUTE AND UNIVERSITY OF GENEVA | Awarded a full merit-based scholarship to attend. Master thesis on armed conflicts as a circumstance precluding wrongfulness in investment treaty arbitrations, with a focus on state of necessity and self-defence (graded 6/6). 2016 UNIVERSITAT POMPEU FABRA, BARCELONA SCHOOL OF MANAGEMENT | Diploma on "Economy and Finances for Lawyers"; attended in Argentina. Awarded a full merit-based scholarship. 2007 – 2014 UNIVERSITY OF BUENOS AIRES (UBA), SCHOOL OF LAW | Abogada (J.D. equivalent) with specializations in public international law and administrative law. Graduated 167th from 999 students. 2013 – 2014 UNIVERSITY OF PARIS II -PANTHÉON-ASSAS | Full merit-based scholarship given by the School of Law of the University of Buenos Aires (UBA) to attend courses during the fall semester. Teaching • Assistant Professor for Prof. Álvarez in the courses on Public International Law and Sources of Public International Law, both since July 2015 and obtained through contest and qualifications assessment. • Coach of the 2015-2016 and 2016-2017 representative teams of the School of Law of the UBA in the competition "Concours d'Arbitrage International de Paris". Selected Research • Member of the research team UBA on "Conflictive Personalities: The (de)construction of International Subjectivity". Stressing particularly the international subjectivity of failed states (August 2013 – December 2016). • Member of the UBA BIT mapping team on the UNCTAD University Mapping Project (February-June 2014 and 2015) and of the National University of La Plata team (2016), which involved the systematic study of different International Investment Agreements. • Initial Research Scholar within the framework of Research Projects of the School of Law of the UBA, for my personal project regarding the

existence of administrative law traces (especially regulatory) in international treaty arbitration (2013). Summer Courses • HAGUE ACADEMY OF INTERNATIONAL LAW | International Private Law Summer Programme (2017 31st July- 18th August). Awarded a full merit-based scholarship to attend. • INTERNATIONAL ACADEMY FOR ARBITRATION LAW | Summer course on international commercial and investment arbitration, full merit-based Gide Loyrette Nouel Scholarship; runner-up for the Laureate of the Academy Prize (2016 3th July – 23rd July). Other academic activities • Selected to present a paper on “War as a defence in investment treaty arbitration” at the 2019 Conference of Postgraduate and Early Professional/Academics of the Society of International Economic Law (SIEL) and King’s College (London). • Speaker at the conference “The United Nations 70 years after its creation” on “The Study of Sovereign Debt and its problems as an alternative to promote justice and international law”, School of Law, UBA, October 6, 2015. • Speaker IV Conference for Young Researchers on Law and Social Sciences on “Failed States, failed subjects?”, Gioja Research Institute, September 17-19, 2014. • Member of the UBA representative team to the Jessup International Law Moot Court Competition, which reached the semifinals of the international rounds (2013). • Member of the UBA Students Law Review (2011 - 2014), responsible for the group in charge of the publications on public international law. Selected Publications • Co-author with Milton Fellay of “Subjetividad internacional de los Estados Fallidos: Quo vadis?” in Natalia Marina Luterstein et al. *Repensando la subjetividad internacional*, Ed. Natalia Luterstein, (2018). ISBN 978-987-778- 952-2. • Co-author with Losada Revol of “The Refugee International Law”, chapter in *Handbook of International Human Rights Law*, Ed. by A. Travieso, 2017 (forthcoming). • Book review of *Droit du commerce international et des investissements étrangers*, Audit, Mathias, Bollée, Sylvain, Callé Pierre. LGDJ Lextenso, Paris, 2014, in *Revista Jurídica de Buenos Aires*, (2016) N° 93, ISBN of the online version: 0326-7431, 2016. • Case reporter on “Venoklim Holding BV v. Venezuela”, (ICSID Case No. ARB/12/22), editor Victoria Ritah Nalule (2016). • Translation from French to Spanish of the chapter “La ‘extensión’ de la cláusula compromisoria a los no signatarios” of Antonias Dimolitsa in the collective book *Cuestiones claves del arbitraje internacional*, Ed. Universidad del Rosario (Bogotá, Colombia) (2013). ISBN:9789587383287.

## **Abstract**

Rules of international courts and tribunals vary across the different jurisdictions, adapting themselves to the specific matter they cover or within the jurisdiction they are applied. Nonetheless, it is possible to observe a common ground among them: none has detailed rules concerning the taking and consideration of evidence in the proceedings. Another shared characteristic is that rules generally accord a broad discretion to the decision makers to address evidentiary matters (Article 48 of the Statute of the International Court of Justice, Article 27 of the UNCITRAL Arbitration Rules 2013; Rule 34 of the ICSID Rules of Procedure for Arbitration Proceedings).<sup>[1]</sup> This is the case of the International Court of Justice (“ICJ” or “Court”) and investment arbitration tribunals.

The rules’ silence does not seem to correspond to the impact that evidence has in the proceedings and, particularly, in the ultimate decision.

The practice of international courts and tribunals has complemented the lack of specific regulation concerning evidentiary issues. Indeed, the ICJ, through its jurisprudence, has set some rules on the taking of evidence and its consideration, as a way of example, in the case concerning application of the convention on the prevention and punishment of the crime of genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) the Court considered the value of testimonies examined by another tribunal (notably, the International Criminal Tribunal for the former Yugoslavia).

This work does not pretend to cover every and all the evidentiary rules that the ICJ has developed. Instead, it purports to focus on specific aspects such as particular issues of the admissibility of evidence, the burden of proof and the standard of proof and verify whether these considerations have had an echo in investment arbitration. In the case of a negative answer, the considerations of the arbitral tribunals will be compared to those of the ICJ. From this, this work pretends to ascertain the impact of the ICJ and arbitral tribunals to the development of evidentiary rules.

[1] The International Criminal Court with its Rules of Procedure and Evidence could be considered an exception when compared to the rest of the rules of international courts and tribunals as it has more detailed provisions. Still, for example, an ample discretion is recognised to the prosecutor.

**Palavras-chave : International Criminal Court, evidentiary rules, Rules of international courts**