REVISTA

DERECHO SOCIAL
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EL CENTENARIO DE LA OIT,
UN AÑO DESPUÉS DE LAS CONMEMORACIONES

NÚMERO 13, JULIO DE 2020

JULIO A DICIEMBRE DE 2020, FECHA DE CIERRE ABRIL 2020

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DESPUÉS DE CIEN AÑOS DE SOLEDAD: EL REENCUENTRO DE LA PROTECCIÓN INTERNACIONAL DEL TRABAJO CON EL ARBITRAJE

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ENTIDAD EDITORA

Dykinson, S.L.

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CENTRO DE ESTUDIOS SAGARDOY

SAGARDOY
BUSINESS&LAW SCHOOL

ISSN 2341-135X

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"Many years later, as he faced the firing squad,
Colonel Aureliano Buendía was to remember
that distant afternoon when his father took him
to discover ice."

*(*Gabriel García Márquez, *One Hundred Years of Solitude)*

SUMARY: I. INTRODUCTION: FROM BIRTH TO GLOBALIZATION IN THE WORLD OF INTERNATIONAL LABOR PROTECTION AND INTERNATIONAL ARBITRATION. II. BEYOND THE ICC: EVOLUTION AND CHANGE IN THE WORLD OF INTERNATIONAL ARBITRATION. III. THE PROTECTION OF INTERNATIONAL LABOR STANDARDS THROUGH INTERNATIONAL ARBITRATION. IV. CONCLUSION.

ABSTRACT: This article explores the interplay between two important legal regimes: international labor protection and international arbitration. It aims to underscore their potential alignment and ability to supplement each other, despite having followed independent trajectories during most of their institutional history and being generally percei-

ved to be at odds. As this article explains, the institutionalization of international labor protection and international arbitration have a common origin. Both ideas were promoted during the peace building efforts undertaken in the aftermath of the First World War as part of a new form of international governance geared to advance economic development, social justice, and above everything, world peace. This article also shows that the arrival of globalization toward the end of the 20th century, served as a catalyst for international arbitration and international labor to converge, or at least, to get closer to each other. International arbitration has become increasingly relevant to non-governmental organizations (NGOs), global union federations (GUFs), and other civil society actors, and has the potential for helping to deliver justice by ensuring compliance with International Labor Standards and other principles that cannot be enforced through traditional means.

RESUMEN: Este artículo explora la interrelación entre dos ordenamientos jurídicos importantes: la protección internacional del trabajo y el arbitraje internacional. Su objetivo es resaltar la posible alineación y capacidad de complementarse que tienen entre sí, a pesar de haber seguido trayectorias independientes durante la mayoría de su historia institucional y de su aparente contrariedad. Tal como se explica en este artículo, la institucionalización de la protección internacional del trabajo y del arbitraje internacional tienen origen común. Ambas ideas fueron promovidas durante los esfuerzos de construcción de paz luego del fin de la primera guerra mundial como parte de una nueva forma de gobernanza internacional dirigida a promover el desarrollo económico, la justicia social y sobre todo la paz mundial. Este artículo también demuestra que la llegada de la globalización a finales del siglo veinte sirvió de catalizador para la convergencia entre el arbitraje y la protección internacional del trabajo. El arbitraje internacional ha venido adquiriendo relevancia para las organizaciones no gubernamentales (ONG), las uniones sindicales globales (USG) y otros entes de la sociedad civil. El arbitraje internacional tiene el potencial de contribuir a impartir justicia mediante el cumplimiento de los estándares laborales internacionales y otros principios cuya ejecución no es posible a través de los mecanismos tradicionales.

PALABRAS CLAVE: Estándares Laborales Internacionales, OIT, Arbitraje Internacional, Globalización, Resolución de Conflictos.

KEY WORDS: International Labor Standards, ILO, International Arbitration, Globalization, Dispute Resolution.

I. INTRODUCTION: FROM BIRTH TO GLOBALIZATION IN THE WORLD OF INTERNATIONAL LABOR PROTECTION AND INTERNATIONAL ARBITRATION

This article explores the interplay between two important legal regimes: international labor protection and international arbitration. It aims to underscore their potential alignment and ability to supplement each other, despite having followed independent trajectories during most of their institutional history and being generally perceived to be at odds. Interestingly, the institutionalization of international labor protection and international arbitration have a common origin. Both ideas were promoted during the peace building efforts undertaken in the aftermath of the First World War as part of a new form of international governance geared to advance economic development, social justice, and above everything, world peace.[1] The starting point in this process was the signing of the Treaty of Versailles and subsequent actions that took place in 1919 and thereafter. Through these efforts, the western allies sought to rewire the political, economic and social foundations of a new global order.

In the case of international labor, the establishment of a Permanent Organization for the Promotion of the International Regulation of Labour Conditions (later renamed the International Labour Organization, or ILO) was expressly incorporated in the 1919 Treaty.[2] Regarding international arbitration, the establishment of a Court of Arbitration by the International Chamber of Commerce (ICC) occurred in 1923. Nevertheless, the ICC itself was launched in 1919, only a few months apart from the founding of the ILO, by the delegates to the International Trade Conference held in Atlantic City.[3] During the remainder of the 20th century, these two major international organizations, the ILO and the ICC, adopted their own structures, developed their distinct institutional identities, and pursued their own agendas. Despite having been driven by the same general desire for global development and peace, they took entirely different paths, and were often perceived to be serving different constituencies.

1 PHELAN, E., "The Contribution of the ILO to Peace", *International Labour Review*, vol. 59, 1949, p. 607.
2 INTERNATIONAL LABOUR OFFICE, *The Labour Provisions of the Peace Treaties,* ILO, Geneva, 1920.
3 CHAMBER OF COMMERCE OF THE U.S., *International Trade Conference*, 1919, p. 470.

The arrival of globalization toward the end of the 20th century, served as a catalyst for international arbitration and international labor to converge, or at least, to get closer to each other. Globalization has had a direct impact on the flow of capital, technology and labor,[4] and indirectly, on almost every other human activity. In general terms, globalization has been usually depicted as a providential phenomenon bound to erase national barriers. Its main promise is to promote an unprecedented flow of commerce, progress, and information. More access is supposed to mean more wealth and equality for more people. The irony, however, is that a world with little or no barriers has also become a world exposed to a number of unique *global* harms. These have ranged from terrorism and drug trafficking, to environmental pollution and human rights abuses. Furthermore, the unprecedented flow of people and goods between countries has also made diseases incredibly easy to propagate. Perhaps, the most vivid example of the latter is the COVID-19 pandemic, which spread around the world in less than two months. At the time of writing (May 2020), the pandemic has claimed the lives of hundreds of thousands of people worldwide, cost trillions of dollars to the global economy, and —in countries such as the US— has also caused the worst level of unemployment since the Great Depression.[5] All projections indicate that the situation is likely to get worse, leaving a long lasting impact on global supply networks,[6] and obviously on international labor protection.

On the other hand, the prospect of an erosion of national borders, has been interpreted by some as a threat to their own idea of culture, identity and security. As a result, the recent decades have also seen a surge of ultranationalist, radical, and xenophobic sentiments in different parts of the world. In response, public and private actors have led or taken part in numerous regulatory efforts, ranging from international treaties and domestic laws, to industry norms and informal practices. Whereas such actions have yielded some positive results, there are still areas where the legal system have fallen short of offering acceptable solutions. The lack of a reliable enforcement mechanism is a particularly needy area in this regard. The current state of affairs has also led to criticism about the legitimacy and effectiveness of the traditional transnational labor protection regimes, which obviously includes the ILO. It is against this background of globalization with its respective ups and downs, that international labor protection and international arbitration may find some common ground. One contributing factor has been the expansion of international arbitration beyond the realm of commercial disputes, and its increased utilization by govern-

4 GIDDENS, A., *Runaway World: How Globalization is Reshaping Our Lives*, Routledge, 1999.

5 RUSHE, D., "US job lossess have reached Great Depression levels. Did it have to be that way?", *The* Guardian, 9 May 2020 https://www.theguardian.com/world/2020/may/09/coronavirus-jobs-unemployment-kurzarbeit-us-europe accessed 24 May 2020.

6 CALVER, D., "How to Keep Supply Chains Reliable When the World's Upended", *Insights by Stanford Business*, 28 May 2020, https://www.gsb.stanford.edu/insights/how-keep-supply-chains-reliable-when-worlds-upended accessed 30 May 2020.

ments, international organizations, civil society organizations, and not just the traditional business parties.

During the century that passed since its creation in 1919, the ILO has undertaken significant efforts —with varying degrees of success— to raise labor standards around the world, and to help shape regulated national labor markets.[7] The organization has endeavored to accomplish its goals through a system of International Labor Standards (ILS) contained in both binding and non-binding legal instruments, named respectively Conventions and Recommendations, which set out the basic principles and rights at work.[8] The current legal framework of the ILO comprises 189 Conventions and 205 Recommendations. The general level of acceptance of ILS is relatively high, but their enforceability is weak. Compliance with ILS is supposed to depend on three different mechanisms, to wit, "promotion and supervision, technical assistance, and complaints and sanctions".[9] However, in reality, when a party fails to comply with their obligations, the possibility of enforcement goes from little to none.

The ILO has largely relied on its perceived legitimacy, which derives in part from its condition as United Nations agency, and also from its tripartite structure. This latter feature means that governments, employers, and worker representatives have equal participation in the enactment and implementation of international standards and policies. Regarding its specific role, during the second half of the 20th century, the ILO became a development agency of sorts as it switched its role to providing advice and engaging in technical cooperation with its members. The universal legitimacy of the agency was further cemented when, in 1969, the Nobel Committee awarded it the prestigious Peace Prize as recognition for its efforts to 'promote fraternity among nations by ensuring social justice'.[10] Today, the ILO has 187 member states, which is a testament of the widespread governmental support for its mission.

Notwithstanding these meaningful endorsements, the ILO has also been subject to criticism by some, for "locking in the international division of labor, to the advantage of affluent capitalist countries",[11] for allowing the erosion of its tripartite representation, for becoming politized, for failing to uphold due process, and for not protecting human rights. In fact, it was precisely because of some of these allegations that the United States

7 STANDING, G., "The ILO: An Agency for Globalization?", *Development and* Change, vol. 39(3), 2008, p. 355.

8 INTERNATIONAL LABOUR ORGANIZATION, *Rules of the Game: An Introduction to the Standards-Related Work of the International Labour Organization,* International Labour Office, Geneva, 2019.

9 ALLAN, K., "A 'Stick' in the World of 'Sunshine and Carrots': Using Binding Arbitration in Global Framework Agreements to Regulate Labour Standards and Multinational Corporations in Global Supply Chains", Victoria University of Wellington, 2018, p. 35.

10 https://www.un.org/en/sections/nobel-peace-prize/international-labor-organization-ilo/index.html accessed 22 May 2020.

11 STANDING, G., *cit.* p. 357.

of America (US) decided to suspend its contributions and withdraw from the organization in 1975.[12] Even though, the US rejoined the organization five years later, the ILO has continued to endure some reproach for not being able to fulfill its goals. Given the high stakes in the debate regarding international labor protection, the criticism levied against the ILO is not immune from geopolitical or economic interests. In any case, the purpose of this article is neither to pass judgment, nor to evaluate the performance of the ILO during its first century of existence. Besides, the complicated state of affairs regarding the international protection of labor rights is such, that any solution to the contemporary problems in this area cannot rest solely on the shoulders of one single entity. A specific problem that international arbitration could help address is the lack of an effective transnational enforcement mechanism for disputes related to compliance with international labor standards.

The remainder of this article will take a closer look at the contemporary framework of international arbitration, and its expansion beyond the realm of commercial disputes (Section II). Furthermore, this article will address the evolution of international labor protection, with special focus on the challenges of enforcing international labor standards, and the potential offered by international arbitration (Section III).

II. BEYOND THE ICC: EVOLUTION AND CHANGE IN THE WORLD OF INTERNATIONAL ARBITRATION

The idea of appointing a third party to decide a squabble between two or more disputants is very old and even predates the existence of official courts.[13] Even after the modern state claimed the monopoly of the administration of justice —obviously a fiction— arbitration continued to be utilized by countless parties as a preferred, and sometimes even as the exclusive, dispute resolution mechanism. Members of religious, ethnic and other close-knit communities have been known for their predilection of arbitration over any other means.[14] Merchants from different parts of the world have also relied on

12 The US's intent to withdraw from the ILO was notified by Secretary of State Kissinger to the Director General of the ILO, Francis Blanchard on November 5, 1975, and took effect two years later as per the ILO Constitution. See, KISSINGER, H., "Letter dated 5 November 1975 from Mr. Henry A. Kissinger, Secretary of State of the United States of America, to Mr. Francis Blanchard, Director of the International Labour Organisation", *International Legal Materials* 14, 1975, p. 1582-84.

13 TOD, M., *International Arbitration Amongst the Greek*, Clarendon Press, Oxford, 1913.

14 BERNSTEIN, L., "Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions", *Michigan Law Review*, vol. 99, 2001, p. 1724; GÓMEZ, M., "Precious Resolution: The Use of Intra-Community Arbitration by Jain Diamond Merchants", *Belgian Review of Arbitration B-Arbitra,* vol. 2, 2013) p. 119.; RICHMAN, B., "How Community Institutions Create Economic

arbitration for centuries.[15] The empowerment of a trusted decision-maker chosen by the parties themselves, whose ruling is grounded on a specific set of rules or standards applied through a swift and private procedure; can be more attractive than the most efficient judiciary. There are, of course, some important values in public adjudication;[16] but the prospect of a tailor-made justice may offer an unparalleled level of legitimacy to some.

Arbitration is usually presented as "a creature of contract",[17] which basically means that it cannot exist unless the parties agree to it. How specific or broad said agreement should be, what can and cannot contain, and when should an arbitration agreement be deemed valid; are questions that have occupied the attention of many contemporary legal systems during the last few decades. The increased popularity of arbitration —in both its domestic and international forms— has inevitably amplified the overlap between the latter and national courts. This has, in turn, caused inevitable frictions and debates regarding both procedure and substance. One of the most important problems refers to the *arbitration-as-contract* issue, and its impact on the allocation of powers between judges and arbitrators. At the heart of the matter lies the *who* question, that is, whether judge or arbitrator should have the power to decide certain matters —apart from the dispute itself— such as the arbitrability of the subject matter, challenges to the existence of the agreement to arbitrate, or an "express remedy limitation in a contract".[18] In some countries, like the US, the debate has divided the arbitral community, the courts, and garnered a great deal of attention among legal scholars.[19]

The contractual nature arbitration is of particular significance in the realm of disputes involving consumer, labor and employment rights. These are areas where contracts of adhesion are commonplace, and concerns about whether the weaker party (e.g. the consumer or the employee) can give proper consent to arbitrate are frequent. The scrutiny about the contractual nature of arbitration is also relevant to the analysis of a more general question about whether arbitration should be permitted in cases where significant power imbalances exists between the parties, or when the rights at stake are of a kind protected by public policy considerations. This is why in the particular case of labor-related disputes, some national regimes have imposed restrictions on certain types of labor and employment arbitration or banned it altogether.[20] The regulatory landscape in this field is

Advantage: Jewish Diamond Merchants in New York", *Law and Social Inquiry*, vol. 31, 2006, p. 383.

15 MOGLEN, E., "Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law", *Yale Law Journal,* vol. 93, 1983, p. 135.

16 FISS, O., "Against Settlement", *Yale Law Journal*, vol. 93(6), 1984, p. 1073.

17 FAURE, J., "The Arbitration Alternative: Its Time Has Come", *Montana Law Review,* vol. 46, 1985, p. 199.

18 RAU, A. and BERMANN, G., "Gateway-Schmateway: An Exchange between George Bermann and Alan Rau", *Pepperdine Law Review,* vol. 43(5), 2016, p. 469.

19 HORTON, D., "Arbitration About Arbitration", *Stanford Law Review,* vol. 70, 2018, p. 363.

20 GUERRERO-ROCCA, G., "¿Arbitraje Laboral más allá del previsto en la nueva LOPT?", *Opinio-*

also particularly complex, in part due to the differences between collective and individual labor relations, the substantive protection of the specific rights and interests involved (e.g. minors, women, migrants), and the types of disputes that each engenders.[21]

While it is true that some other types of arbitration (e.g. commercial) have faced much less resistance, thus allowing them to grow and even thrive with relative ease; judges have not always viewed arbitration as a viable alternative to litigation. Right around the time when the ICC launched its Court of Arbitration, there was still a widespread sentiment among judicial circles that arbitration was an attempt to oust the jurisdiction of the courts.[22] According to this view, the monopoly of the administration of justice should rest on the courts, and private citizens should not be able to alter it through a simple agreement. In some countries like the US, certain groups, mostly from the business sector, had been lobbying for a statutory recognition of arbitration since the early 1900s, but the real catalyst was the end of the First World War.

As Szalai has pointed out, "various writings and speeches during the war and immediately following the war conceptualized commercial arbitration as part of a broader effort to maintain peace".[23] In fact, a plan to end the war devised by New York cotton merchant Charles Bernheimer in 1915, was "based on principles of commercial arbitration".[24] The public support garnered by Bernheimer's plan helped build the necessary momentum for the passage of the New York arbitration statute in 1920[25] and the Federal Arbitration Act (FAA) in 1925.[26] The pro-arbitration movement also benefited from the support of a disgruntled business sector whose members were "increasingly dissatisfied with the long delays suffered in courts as with their difficulty to seize and address the new, more technical cases that came with large-scale industrialization".[27]

The newly minted statutory framework gave US arbitration a much-needed official recognition and the effectiveness it desperately needed. Perhaps the main accomplishment

nes de la Procuraduría General de la República, Procuraduría General de la República, Caracas, 2002.; TARASEWICZ, Y. and BOROFSKY, N., "International Labor and Employment Arbitration: A French and European Perspective", *ABA Journal of Labor and Employment Law,* vol. 28(2), 2013, p. 349.

21 BARLETT, A., "Labor Arbitration in the United States and Britain: A Comparative Analysis", *Case Western Reserve Journal of International Law*, vol. 14, 1983, p. 299.

22 WOLAVER, E., "The Historical Background of Commercial Arbitration", *University of Pennsylvania Law Review,* vol. 83(2), 1934, p. 132.

23 SZALAI, I., "Modern Arbitration Values and the First World War", *American Journal of Legal History,* vol. 49(4), 2007, p. 355.

24 BERNHEIMER, C., *Peace Proposal: A Business Man's Plan for Settling the War in Europe,* 1915; SZALAI, cit.

25 New York Laws of 1920, Chapter 275, effective April 19, 1920.

26 Title 9, US Code, Section 1-14, was first enacted on 12 February 1925 (43 Stat. 883), codified on 30 July 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233). Chapter 2 (New York Convention) was added on 31 July 1970 (84 Stat. 692), additional Sections were passed by the US Congress in October of 1988 and renumbered on 1 December 1990 (PLs669 and 702); Chapter 3 (Panama Convention) was added on 15 August 1990 (PL 101-369).

27 SGARD, J., "The International Chamber of Commerce, Multilateralism and the Invention of International Arbitration", *unpublished manuscript,* 2019, p. 8.

was the inclusion of provisions that recognized the validity, irrevocability and enforceability of arbitration agreements, thus ending the longtime frustration that resulted from the ability of a party to obstruct an arbitration by revoking their agreement before an award was rendered. The FAA was initially conceived as a starting point, a general "framework for federal courts to support a limited, modest system of private dispute resolution for commercial disputes".[28] Nevertheless, as years of judicial practice later revealed, the US Supreme Court gave the FAA such an expansive interpretation that one of its own justices bemoaned that instead of "ascertaining congressional intent with respect to the FAA, the Court had built it into 'an edifice of its own creation".[29]

A valuable supplement to the significant legislative efforts of the 1920s was the establishment of arbitral institutions by members of the business and legal communities. One of the most emblematic was the American Arbitration Association (AAA), which to this day remains one of the premier dispute resolution service providers in the US. In 1996, the AAA established an international division named the International Centre for Dispute Resolution (ICDR), as part of an effort to expand its services to different parts of the world. To this day, the ICDR has offices in New York City, Mexico City, Singapore and Bahrain. Furthermore, during the First World War years, the US government "sanctioned a body called the National War Labor Board ('NWLB') to handle disputes related to the mobilization for war",[30] which helped expose American industries to arbitration in their own soil.

Whereas the American businessmen who led the efforts to legalize and institutionalize arbitration are commonly portrayed as trailblazers, some of their ideas came from Europe. Historical records show how a series of visits between French and American businessmen in 1915-16 sparked the interest of the Americans in creating a dispute resolution system akin to the French merchant courts.[31] US companies were also exposed to arbitration in cities like London and Hamburg, which helped them witness firsthand the advantages of this extra-judicial dispute resolution method. In turn, once the lobbying efforts to promote arbitration intensified in the US, those businessmen were able to share their positive experiences with their American colleagues, and more importantly, with the legislators.

The connection between arbitration and the post-war peace efforts was an important one. It not only helped legitimize the ICC, but also gave it an opportunity to align itself with an almost utopian and "high-value though largely unspecified ideological appeal".[32]

28 SZALAI, I., "Exploring the Federal Arbitration Act through the Lens of History", *Journal of Dispute Resolution,* 2016, p. 115.
29 O'CONNOR, S., *Concurring opinion in Allied-Bruce Terminix Co. v Dobson*, 513 U.S. 265, 283 (1995).
30 SZALAI, 2007, cit.
31 SZALAI, 2007, cit.
32 SGARD, cit. p. 12.

The ICC's role during those early years was not to just generate business opportunities for its members. More significantly, the organization took a leading role in helping "break the deadlock over the settlement of reparations".[33] It also helped resolve tariff barriers, and other important issues that could help jumpstart the world economy while contributing to maintain peace. The influence of the ICC in world politics and their involvement in activities otherwise reserved to diplomats earned the organization the moniker *Merchants of Peace.*[34] During that period, ICC leaders were the driving force behind the 1923 Geneva Protocol on Arbitration Clauses[35] and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.[36] Even though world peace could not be maintained for long, and another world war broke in 1939, ICC international arbitration continued to grow.

During the Second World War, the ICC Court relocated briefly from Paris to Stockholm, where it continued to administer cases, and some of its members remained active despite their countries being entrenched in armed conflict. In the aftermath of the Second World War, the ICC lobbying efforts continued with the proposal for a treaty dealing with international arbitration awards. In 1958, after many twists and turns that go beyond the scope of this article, the General Assembly of the United Nations adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[37] largely based on a text drafted several years earlier by the ICC. Ironically, despite the protagonist role played by the Americans since the early days of international arbitration, and the importance of the British in the field and to the world of international commerce; neither the US nor the United Kingdom were among the initial supporters of the treaty. In fact, at the time of adoption both countries abstained and only ratified the treaty in 1970 and 1975, respectively.[38] Despite these initial hiccups, during the last decades of the 20th century, the New York Convention became one of the most significant and widely ratified international law instruments in the world.

As of May of 2020, the number of state parties to the New York Convention is 163, and the amount of judicial activity dealing with its interpretation and application seems to be constantly on the rise. The widespread perception is that the New York Convention is the backbone of international arbitration. The force of the Convention is based on three key components. The first one, is the ample scope of application, contained in Article

33 KELLY, D., "The International Chamber of Commerce", *New Political Economy,* vol. 10(2), 2005, p. 1.
34 RIDGEWAY, G., *Merchants of Peace: Twenty Years of Business Diplomacy through the International Chamber of Commerce, 1919-1938,* Columbia U. Press, New York, 1938.
35 PROTOCOL ON ARBITRATION CLAUSES, League of Nations, *Treaty Series,* vol. 27, p. 157.
36 MARCHISIO, G., *The Notion of Award in International Commercial Arbitration: A Comparative Analysis of French Law, English Law, and the UNCITRAL Model Law,* Kluwer Law International, 2016.
37 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, *United Nations Treaty Series*, vol. 330, No. 4739, p. 3.
38 MARTINEZ, R., "Recognition and Enforcement of International Arbitral Awards under the United Nations Convention of 1958: The 'Refusal' Provisions", *The International Lawyer*, vol. 24, p. 487, 491.

ISSN: 2341-135X / DOI: 10.14679/1191

I, which permits to use the Convention for the recognition and enforcement of awards made in as many types of disputes (e.g. contractual or not, commercial or not) as each contracting state decides. This is a particularly valuable feature of the Convention, which has permitted the expansion of international arbitration beyond its conventional focus on commercial disputes. The second key component are the two obligations imposed on each contracting state and its courts by Articles II and III, regarding a presumption favoring the agreement and the award, respectively. More specifically, under Article II, each state is expected to "recognize an agreement in writing under which the parties undertake to submit in writing to arbitration all or any differences". The mandate of Article III to the courts is to "recognize arbitral awards as binding and enforce them". Finally, the third pillar of the Convention is the limitation of the grounds to refuse the recognition and enforcement of arbitral awards to *only* seven situations listed in Article V. As a result, arbitral awards shall be enforced, "unless the resisting party is able to prove otherwise"[39] or the enforcing court finds on its own motion that the dispute was not arbitrable or that granting recognition and enforcement would violate public policy.

Given that the main drivers behind the promotion of the New York Convention —and of international arbitration in general— were business leaders, it should come as no surprise that the most significant growth in the field has been for commercial disputes. The efforts undertaken during the last few decades, both at the international and domestic levels, to advance and protect commercial arbitration are second to none. Some examples of the former can be found in the works of the United Nations Commission on International Trade Law (UNCITRAL or the Commission). Since the second half of the twentieth century, the Commission drafted a Model Law on International Commercial Arbitration (1985, 2006),[40] and a set of Arbitration Rules (1976, 2010, 2013),[41] adopted by the General Assembly of the United Nations and promoted widely. The main idea behind these efforts was to harmonize and encourage uniformity in the regulation and use of commercial arbitration around the world. To this day, 83 states and a total of 116 jurisdictions are Model Law adopters, thus confirming its widespread acceptance.

UNCITRAL has continued to reinforce the international legal framework for the resolution of commercial disputes through the recent adoption a Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Media-

39 MARCHISIO, G., *cit.*

40 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006* (Vienna: United Nations, 2008).

41 United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules, Resolution 31/98, adopted by the General Assembly on 15 December 1976, with amendments as adopted by Resolution 65/22 of 6 December 2010, and further amendments adopted by Resolution 68/109 of the General Assembly of 16 December 2013.*

tion (2018),[42] and a Convention on International Settlement Agreements Resulting from Mediation (The 2019 Singapore Convention on Mediation).[43] The expansion of international arbitration beyond commercial disputes became particularly important due to the continued growth of investor-state disputes during the last two decades. The international legal framework of investor-state dispute settlement (ISDS), rests on an array of bilateral and multilateral investment treaties, with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[44] at the center of it. The ICSID Convention has been ratified by 154 states.

In recent years, the complexity of the contemporary landscape of ISDS prompted UNCITRAL to direct its attention away from the purely commercial facet of arbitration, and into the unique issues affecting the ISDS context. Investor-state disputes have proved to be very different from the ones that arise between private commercial parties. One of the most noticeable differences is obviously the fact that in ISDS, one of the parties happens to be a state or an agency of a state. As a result, ISDS are concerned with issues related to state immunity, validity of government contracts, transparency concerns, legal representation issues, and costs. This last matter is particularly critical given that for states, the economic side of a dispute almost invariably touches upon the use of public funds, which in turn has an impact on their developmental needs.

ISDS mechanisms are also concerned with international treaty regimes, the interpretation and application of public international law norms and principles, and foreign direct investment. Given that the underlying dealings between host states and foreign investors touch on many industries or economic activities; ISDS mechanisms are prone to impact all areas of government action, including the protection of the environment, management of natural resources, public health, labor and other human rights. It is precisely the effect of ISDS on these and other matters of public concern what led to the adoption in 2014 of a UNCITRAL-backed Convention on Transparency in Treaty-Based Investor-State Arbitration ("Mauritius Convention on Transparency").[45] More recently, the UNCITRAL Secretariat appointed a special Working Group (WG III) to undertake a comprehensive deliberative process between states and other stakeholders, with the charge to identify the

42 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, amending the Model Law on International Commercial Conciliation, 2002, adopted by General Assembly Resolution 73/199 of 3 January 2019.*

43 United Nations Convention on International Settlement Agreements Resulting from Mediation, New York, 20 December 2018, adopted by General Assembly Resolution 73/198. *United Nations Treaty Series*, vol. 330, No. 4739, p. 3.

44 ICSID Convention*, Regulations and Rules. Washington, D.C.: International Centre for Settlement of Investment Disputes, 2003.*

45 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, New York, 10 December 2014, adopted by General Assembly Resolution 69/116. *United Nations Treaty Series.*

main concerns regarding ISDS, to consider whether ISDS reform is desirable, and if so, to formulate any recommendations to the Commission.

For almost three years, WG III has been holding sessions at the U.N. headquarters in Vienna and New York, during which state members, international governmental organizations and other observers have been able to provide input, voice their concerns, and propose potential solutions to the current challenges posed by ISDS. The Commission has been particularly determined to ensure that the deliberation process remains "inclusive and fully transparent",[46] and has sought support from development agencies so representatives from developing states can participate. All of this reveals that international arbitration is not only important to multinational corporations (MNCs) and states. Given its impact on the economy and other parts of society, international arbitration has become increasingly relevant to non-governmental organizations (NGOs), global union federations (GUFs), and other civil society actors. Its potential for helping to deliver justice by ensuring compliance with important legal principles that cannot be enforced through traditional means, has taken arbitration beyond its traditional narrow definition. International arbitration can no longer be seen just as a cost efficient, expedite and private form of dispute resolution. As I suggest in the following section, the impact of globalization on the social, economic and political realities, has put pressure on different actors to devise strategies and seek novel forms to protect rights. In the particular case of international labor standards, it seems that international arbitration might be part of such a strategy.

III. THE PROTECTION OF INTERNATIONAL LABOR STANDARDS THROUGH INTERNATIONAL ARBITRATION

Globalization has been seen as the panacea that helped bring down barriers and carried modernity to even the most remote places in the world. Globalization, however, has also come at a high cost. Ironically, the same new technologies that facilitate access and dissemination of information for education and scientific knowledge, have also served as vehicles for the dissemination of hate speech and cyberattacks. Similarly, the global shipping networks that make it possible for a medical ventilator designed in the Netherlands and manufactured in the US to be delivered to a small rural hospital in Thailand;

46 United Nations General Assembly, UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Thirty-ninth session, New York, 30 March—3 April 2020, A/CN.9/WG.III/WP.189. https://undocs.org/en/A/CN.9/WG.III/WP.189 accessed 30 May 2020.

are also the source of pollution that harms marine giants and the world's ecosystem.[47] The list of examples can go on; and even though we cannot say that there is a flipside to every advantage offered by globalization, the amount of challenges seems to outweigh some of its purported benefits.

More than ever before, manufacturing and other related processes are scattered across countries. As a result, national legal systems are forced to step in and regulate conduct that takes place in their territories or that has an impact on their population and national interests. Domestic laws do not operate in a vacuum. They are intertwined with international norms and principles, thus engendering a complicated regulatory patchwork that is sometimes difficult to apply, and even more so to enforce. The oversight of global production chains also depends on the cooperation and coordination between international organizations like the ILO and other actors such as the International Monetary Fund (IMF), and World Bank (WB).[48] Another important layer in this global system of governance is in the hands of MNCs themselves. Recent years have seen an upsurge in the number of MNCs that have adopted industry standards, codes of conduct, and other forms of transnational private ordering geared to protect a catalog of universal rights. The regulation of labor markets is one prime example of this transnational system. Take for instance, the practice known as social dumping, which companies use to maximize profits or to gain other competitive advantages by lowering their labor costs.[49] Some common manifestations of social dumping are the hiring of lower-paid migrant workers, the outsourcing of production to other countries with inferior labor standards, or taking advantage of regulatory gaps between countries. Social dumping occurs across states, within national borders, or just inside an organization; so the only way to fight it is through a multipronged strategy that involves all the actors mentioned above.

Despite the laudable efforts by members of the transnational corporate sector to lead by example, the urge to remain competitive and maximize profits makes self-regulation to unreliable. The relative ease with which modern communications, transit, and capital flows across national borders, has eroded many constraints to MNCs and intensified the likelihood of transnational runaway shops. As a result, when an MNC wants to avoid unionization, or the conditions in a particular country become financially unattractive to its bottom line, it can easily move its manufacturing and other processes to another cou-

47 PIROTTA, V., GRECH, A., JONSEN, I., LAURANCE, W., and HARCOURT, R., "Consequences of Global Shipping Traffic for Marine Giants", *Frontiers in Ecology and the* Environment, vol. 17(1), 2018, p. 39.

48 STALLINGS, B., "Globalization and Labor in Four Developing Regions: An Institutional Approach", *Studies in Comparative International Development,* vol. 45, 2010, pp. 127–150.

49 KISS, M., "Understanding Social Dumping in the European Union", *Briefing*, March 2017. https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)599353 accessed 28 May 2020.

ntry. Conversely, the prospect of attracting foreign capital might encourage countries to avoid implementing certain labor standards, relax existing ones, or simply avoid enforcing them.[50] The literature refers to this phenomenon as a *race to the bottom*, but even though some —usually developing— states compete with other nations to lower the bar or take undue advantages from a regulatory gap; others are just caught in it or do not have an alternative. States are not the only contributors to this problem, but also corporate actors, and sometimes even workers.

Finding an adequate solution to the situation requires a balancing act between competing interests, that is, between those that demand better labor standards, and those that demand greater labor flexibility. The increased awareness —especially among MNCs and similar actors— regarding the need to protect human rights in general, and labor rights in particular, reveals some alignment between stakeholders who are usually at odds. One way how such convergence of interests has materialized is through the conclusion of global framework agreements (GFAs). These are instruments "negotiated between a multinational enterprise and a Global Union Federation (GUF) in order to establish an ongoing relationship between the parties and ensure that the company respects the same standards in all the countries where it operates".[51] GFAs have become increasingly popular since the early 2000s to the point that more than one hundred MNCs and every important GUF have entered into one or more GFA to this day.

One key characteristic of GFAs is that they "replicate or are based on other pre-existing international instruments and principles"[52] included in the core ILO Conventions, the ILO Declaration on the Fundamental Principles and Rights at Work of 1998, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policies, the ILO Resolution Concerning Decent Work in Global Supply Chains of 2016, and other international instruments.[53] GFAs are a step forward in the efforts to ensure compliance with ILS, particularly in light of the inadequacy of domestic and international remedies. In the case of the latter, despite the evolution of international law during the last decades, which has allowed principles of transnational labor law to break through the traditional public/private divide;[54] old-fashioned international law mechanisms just cannot solve the problem.[55]

50 DAVIES, R. and VADLAMANNATI, K., "A Race to the Bottom in Labour Standards? An Empirical Investigation, *Journal of Development Economics,* vol. 3, 2013.

51 INTERNATIONAL LABOUR OFFICE (ILO), "Global Financial Agreements: A Global Tool for Supporting Rights at Work", *ILO Online,* 31 January 2007, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_080723/lang--en/index.htm accesses 30 May 2020.

52 HADWIGER, F. "Global Framework Agreements: Achieiving Decent Work in Global Supply Chains", *International Labour Office,* 2015. p. 18.

53 Ibid.

54 ALVAREZ, J., "Frameworks for Understanding the ILO", in POLITAKIS, G., KOHIYAMA, T., and LIEBY, T. (Eds.), *ILO 100 Law for Social Justice*, International Labour Organization, 2019, p. 76.

55 ELIASOPH, I., "A Missing Link: International Arbitration and the Ability of Private Actors to Enforce Human Rights Norms", *New England Journal of International and Comparative Law,* vol. 10, 2004, p. 83.

As referenced earlier, the ILO has undergone important transformations throughout its hundred years of existence. Some of the milestones include, the 1944 Declaration of Philadelphia, the 1969 Nobel Peace Prize awarded to the ILO, the adoption of the 1998 Declaration of Fundamental Principles of Rights at Work, and a compendium of resolutions, monitoring activities, and partnerships. Through more recent actions, the ILO has demonstrated being attuned to the impact of globalization on labor rights. While it is true that some global challenges have outpaced the regulatory capabilities of the ILO, the main problem does not seem to be rooted in the lack of regulation or in the supposedly outdated structure of the ILO. The absence of an effective adjudication mechanism is critical. In order to fulfill their purpose, International Labor Standards not only need to be adopted, but also observed. Furthermore, in absence of voluntary compliance, there needs to be a reliable enforcement mechanism. That is, one that has the ability to compel a party to defend itself against a claim, and that requires the parties to comply with the resulting outcome (i.e. judgment, ruling).[56]

The notion of an effective enforcement mechanism for the protection of labor rights is not new. In 1906, during the diplomatic conference that led to the adoption of the International Convention respecting the Prohibition of the Use of White Phosphorus in the Manufacture of Matches, the British government unsuccessfully proposed the adoption of an enforcement mechanism that relied on arbitration.[57] A specific suggestion for the inclusion of an enforcement mechanism embedded in the ILO structure was brought to the negotiation table by the French Minister of Labor in 1918, but it never got sufficient traction.[58] Years later, when the ILO Constitution was adopted, the only provision that allowed something akin to enforcement was article 33, but it fell short of conferring an explicit sanctioning power. It empowered the ILO's Governing Body, to "recommend to the Conference such action as it may deem wise and expedient to secure compliance",[59] in case a country refused to fulfill the recommendations of a Commission of Inquiry, or a decision by the International Court of Justice. Since the founding of the ILO, thirteen such commissions have been established,[60] but the only time an article 33 action has been invoked was when the government of Myanmar refused to comply with Convention No. 29 on Forced Labor.[61] Even then, the perception was that the measures were ineffective.[62]

56 HELFER, L. and SLAUGHTER, A-M., "Toward a Theory of Effective Supranational Adjudication", *Yale Law Journal,* vol. 107, 1997, p. 273, 285.
57 CHARNOVITZ, S., "The Lost Story of the ILO's Trade Sanctions", in POLITAKIS, G., KOHIYAMA, T., and LIEBY, T. (Eds.), *ILO 100 Law for Social Justice*, International Labour Organization, 2019, p. 219.
58 Ibid.
59 ILO Constitution, article 33.
60 ILO, "Complaints/Commissions of Inquiry (Art. 26)" https://www.ilo.org/dyn/normlex/en/f?p=1000:50011:::NO:50011:P50011_ARTICLE_NO:26 accessed 30 May 2020.
61 ILO, "ILO Governing Body opens the way for unprecedented action against forced labour in Myanmar", 17 November 2000, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007918/lang--en/index.htm accessed 30 May 2020.
62 ALVAREZ, cit., p. 80.

Some of the structural shortcomings of the ILO can be addressed by linking it with other regimes such as the World Trade Organization (WTO), so the former can benefit from "the powerful coercion mechanisms, such as trading sanctions, which are available to" the WTO.[63] The rationale behind this idea lies on the fact that "many international regimes are like linkage machines by their very nature".[64] The idea of linking institutions is laudable and might work well in some cases, but the WTO dispute settlement mechanism also faces compliance problems.[65] More than a mere linkage between international legal regimes, the challenges of globalization demand a multi-prong approach that does not rule out state participation or the use of their domestic courts. There are jurisdictions like the US, where the legal system allows the filing of claims based on violations of human rights committed abroad, included some rights protected by ILS. The main law is known as the Alien Tort Statute or Alien Tort Claims Act (ATS or ATCA),[66] and it grants jurisdiction to federal courts to process a lawsuit filed by an alien for a tort only, committed in violation of international law. Originally adopted in 1789, the ATS remained dormant for many years until it was used successfully in the Filartiga case.[67]

Over time, ATS-based litigation multiplied,[68] and what some anticipated as a possible opening of the judicial floodgates to foreign plaintiffs, was instead gradually regulated and limited by the courts, particularly with regard to corporate liability.[69] As the ATS door was being closed, other strategies remained open for human rights victims.[70] Another federal statute that has been used for claims related to the violation of human rights is the Trafficking Victim Protection Act (TVPA).[71] Also in the US —but at the state level—, California has enacted legislation to specifically target the violation of labor standards. The premier example is the Transparency in Supply Chains Act of 2012,[72] which requires companies to disclose their business practices to the public, including their efforts to prevent human trafficking in their supply chains. Even if based on victim-friendly statutes, domestic litigation faces some important hurdles that translate into enforcement inefficiencies. The

63 ELIASOPH, cit.
64 ALVAREZ, J., "The WTO as Linkage Machine", *American Journal of International Law,* vol. 96(1), 2002, p. 146-158.
65 DAVEY, William J., "Compliance Problems in WTO Dispute Settlement", *Cornell International Law Journal*, vol. 42, 2009.
66 ALIEN TORT STATUTE, US Code Section 1350.
67 FILARTIGA v. Peña-Irala, United States Court of Appeals, Second Circuit, 630 F.2d 876, 1980.
68 KIOBEL v. Shell Petroleum Development Company of Nigeria, Ltd., United States Court of Appeals, Second Circuit, Decision of 17 September 2010.
69 STERIO, M., "Corporate Liability for Human Rights Violations: The Future of the Alien Tort Claims Act", *Case Western Reserve Journal of International Law*, vol. 50, 2018, p. 217.
70 ALTHOLZ, R., "Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-Kiobel", *California Law Review,* vol. 102, 2014, p. 1495.
71 BEALE, S., "The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts", *Case Western Reserve Journal of International Law*, vol. 50, 2018, p. 17.
72 SUPPLY CHAINS ACT, California Civil Code Section 1714.43, January 2012.

most important one is, perhaps, the jurisdictional limitation, as a result of which the court can only review cases that have some connection with that state.

As we explore and compare the different procedural avenues available to enforce transnational labor rights, international arbitration stands out as a promising choice. The main advantage of international arbitration lies on the fact that it is backed by a robust enforcement regime contained in the New York Convention, which as mentioned earlier, is one of the most successful international treaties in the world. The widespread acceptance of this regime is a testament of its international legitimacy, which is also supplemented by the relatively recent adoption of arbitration legislation in almost every country. Many of these laws, are also based on the UNCITRAL Model Law, or at least show some alignment to international standards.

For years, international arbitration was portrayed as an exclusive club dominated by commercial *haves* (i.e. resourceful business parties who were also repeat players of the system). The main participants in the system were members of an elite of European and North American corporations, their powerful lawyers, and a handful of institutions based in London, Paris, and New York. Unsurprisingly, the ICC Court of Arbitration was one of these institutions. Nevertheless, the new global reality of the last decades of the twentieth century, opened the international arbitration doors to workers, human rights victims, groups of consumers, and other *have nots.*[73] Whereas some important distortions and shortcomings remained, and are yet to be resolved; at least part of the system has moved towards becoming "an instrument for developing fair and efficient procedures for resolving different categories of disputes, for mediating conflicting national laws and policies, for securing effective transnational regelation, and for generating international public policy norms".[74] Some examples of this evolution can be seen in the rise of international class arbitration, the development of codes of conduct for arbitrators, counsel and parties, procedural guidelines, and other forms of soft law regarding transparency. Other signs of progress can be found in the calls for regulating third-party funding as part of a broader concern regarding access to justice, and the adoption of policies encouraging diversity and inclusion.

It was a matter of time before international arbitration left its business cocoon and began to be incorporated into a broader variety of agreements, including GFAs. A major breakthrough in this regard was the Accord on Fire and Building Safety in Bangladesh (BA) signed in the aftermath of a major accident occurred in 2013, which claimed the lives of 1,133 factory workers in the Asian country. BA was signed between more than 220

73 ROGERS, C., "The Arrival of the "Have-Nots" in International Arbitration", *Nevada Law Journal*, vol. 8, 2007.
74 *Ibid* p. 384.

companies representing major brands and retailers from different parts of the world, two major GUFs —IndustriALL Global Union and UNI Global Union— and eight of their affiliates. The main purpose of the BA was to create a legally binding commitment to ensure the completion of a safety remediation, the establishment of an independent safety inspection program, and other measures to improve working conditions for millions of Bangladeshi garment workers.[75] The signatories to the BA adopted the same international arbitration mechanism used "by corporations around the world to enforce the commitments made to them in commercial contracts with their ordinary business partners".[76] In 2016, two claims were filed by IndustriALL Global Union and UNI Global Union for violation of articles 12 and 22 of the BA before the Permanent Court of Arbitration, and the process unfolded with the utmost efficiency and respect for the confidentiality of the respondent corporations.[77] Both cases were eventually settled in 2018.[78]

The global docket of cases involving the enforcement of labor rights like the ones just mentioned is still thin, but the significance of the BA is a sign of hope for both international arbitration and the effective protection of international labor standards. Even in the unlikely event that one of the states signatories of a GFA is not a party to the NY Convention, or has made a commercial reservation when ratifying it; the international arbitration regime is still "far superior to the relatively ineffective and indirect coercion mechanisms employed by many organizations, such as the ILO".[79] Several more reasons play in favor of using international arbitration in this context. First, the familiarity of MNCs, states, and other stakeholders with arbitration, and the widespread perceived legitimacy of the system. Second, the greater possibility of access to the system facilitated by the potential to obtain outside funding, qualified counsel, experts, and other resources traditionally unavailable to non-corporate actors. And, third, the fact that globalization has contributed to blur the lines between business and human rights, thus forcing traditionally opposed stakeholders (i.e. MNCs and GUFs) to develop converging interests to uphold certain universally principles that are also protected by international law norms and domestic legislations.

75 Bangladesh Accord https://bangladeshaccord.org/about accessed 30 May 2020.

76 HENSLER, B. and BLASI, J., "Making Global Corporations' Labor Rights Commitments Legally Enforceable: The Bangladesh Breakthrough", *Workers Rights Consortium*, 18 June 2013.

77 For an overview of the cases and the procedural postures of the parties, see, PORTOMEME, Zaydée, International Arbitration Case Report: IndustriALL Global Union and UNI Global Union v. Respondent A (PCA Case No. 2016-36) and IndustriALL Global Union and UNI Global Union v. Respondent B (PCA Case No. 2016-37) World Arbitration and Mediation Review, Vol. 11, No. 2, 2017, p. 229.

78 Permanent Court of Arbitration PCA, "PCA Press Release: Settlement of Bangladesh Accord Arbitrations", 17 July 2018. https://pca-cpa.org/en/news/pca-press-release-settlement-of-bangladesh-accord-arbitrations/ accessed 30 May 2020.

79 ELIASOPH, cit. p. 25. See also, HOWSE, R., "The World Trade Organization and the Protection of Workers' Rights", *Journal of Small and Emerging Business Law,* vol. 3, 1999, p. 131, 133.

IV. CONCLUSION

As this article described, the institutionalization of international arbitration and international labor protection —through the founding of the ICC and the ILO, respectively— were the progeny of a concerted effort to promote international economic development and a long-lasting peace in the aftermath of the First World War. Despite the separate trajectories that these regimes took during a century since their establishment, their underlying ideals and values came from the same proponents. During all these years, each of these transnational legal regimes, have grown and developed in almost complete solitude with respect to the other, while undergoing their own twists and turns, and ending in the same place where it all started. In some way, the story resembles the hundred years of adventures of the members of the Buendía family, imagined by Gabriel García Márquez in his famous novel One Hundred Years of Solitude.[80] The ICC and the ILO are like two siblings separated at birth that meet many years later, only to realize how much they have in common, and how much they can accomplish together. The hope is that unlike the Buendías, who did not have a second opportunity on earth, international arbitration and international labor protection continue to grow together and are able to materialize the ideals of a more peaceful and just world, just as their promoters envisioned in 1919.

80 GARCÍA MÁRQUEZ, G., *One Hundred Years of Solitude*, Harper & Row, New York, 1970.