Arbitration in International Economic Law

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1. Introduction

This paper discusses the evolving relationship between arbitration and international economic law (IEL) particularly the role that arbitration performs as an effective method to rule international economic disputes. The primary aim of this work is to address, in a nutshell, questions related to when, why and how arbitration and international economic law have become intrinsically interfaced, the scope and current implementation of arbitral proceedings in some areas of IEL as well as to indicate a number of challenges that the wave of international arbitrations are prompting, challenges that somehow could undermine its effectiveness and suitability as a consensual third party intervention vesting with the authority to adjudicate international economic disputes.

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Arbitration used to play a modest role in the settlement of economic controversies between states. Yet, in the last decades, arbitration has become instrumental in the area of IEL law not only resolving controversies among states or international organizations but also amid states and private entities or individuals. Currently, arbitral proceedings have been anticipated, with more or less extent, in all corners of IEL. Thus, arbitration is the most recurring legal vehicle to settle legal disagreements in both free trade agreements (FTAs) and bilateral investment treaties (BITs). Also, arbitration appears among the rank of mechanisms of dispute resolution accessible to members of the World Trade Organization (WTO). In addition, there are arbitration procedures available within the World Bank (WB) and the International Monetary Fund (IMF) where the initiative of establishing arbitral tribunals for settling controversies that arise out of sovereign debts has received valuable support. Otherwise, many international economic organizations promote the use of arbitration to resolve their disputes.

The connection between arbitration and IEL is the outcome of three major trends that occurred in the international arena during the last decades: first, the growing governance of IEL under a juridical and institutional rule-oriented pattern instead of a power-oriented one; second, the recognition that in certain instances private entities and even the individual should be entitled to legal personality as subjects of international law together with states and governmental organizations; and third, the increasing expansion of international arbitration as an appropriate remedy to handle economic disputes between nation-states and states with non-state actors. As expected, under the current international economic organizations promote the use of arbitration to resolve their disputes.


7 John H. Jackson, Global Economics and International Economic Law, 1 Journal of International Economic Law,
economic globalization the linkage between arbitration and IEL has become more prominent 9.

The structure of this paper is as follows: (I) a summary presentation of the backgrounds and further developments of both international arbitration and IEL; (II) a discussion of the leading factors that have put together these two disciplines; (III) a short account of the institutional workings of arbitration in international trade law, international monetary law and particularly in international investment law; (IV) a succinct description of some of the major challenges that arise from the use of arbitration in IEL, and (V) conclusions.

2. Developments in International Arbitration and International Economic Law

2.1. International Arbitration

International arbitration is a well established method of international dispute resolution. Its origins date back to the earliest records in history 10. According to the scholarly discourse, public and private arbitration was used with relative frequency by ancient cultures. As to public arbitration, the more emblematic example is perhaps the spreading of arbitration among the city-states in ancient Greece11. On the contrary, the Roman Empire was not very enthusiastic with the idea of public arbitration because of its hierarchical political organization and imperial vocation in foreign policy 12. However, there is conclusive evidence that arbitration had a significant place at the municipal level as part of the public Roman justice 13.

After the fall of the Occidental Roman Empire public arbitration was revived to some extent by German communities and other political entities existing at that time. During the Medieval Age there was a mild resurgence of public arbitration mostly triggered by territorial conflicts between principalities and feuds as well as by war damages and other types of compensation claims. Arbitration was used at that time in both international and national spheres 14 and as stated by


a recognized scholar, the involvement of the kingdoms and of the Catholic Church as adjudicative parties was not unusual; on the contrary, both played an active role in fostering international arbitration 15.

The importance of ancient and medieval precedents of inter-state arbitration should not be underestimated; quite the opposite, these arbitrations are stages of the historical development of the arbitral institutions even if ancient and medieval arbitrations were carried out without the degree of sophistication or technicality as existing arbitral proceedings. Further, these classic precedents provide a good understanding of the historical context upon which arbitration was established and advanced. In addition, classical and medieval arbitration shed light on the likelihood of a legal arbitral order16 based upon the immanent human predisposition to settle conflicts with the help of a neutral third party before engaging in the use of force. Last, but not least, the ancient and medieval precedents provide insights on the philosophical foundations of this legal institution, which offer a better explanation about its origin, evolution and pervasive development 17.

The beginning of modern inter-state arbitration is tied to the birth of public international law, which emerges in 1606 with the conclusion of the Treaty of Westphalia. This landmark treaty contains specific references to arbitration as an appropriate, peaceful and binding method for settling disputes among states 18. However, during the final decades of the 18th century and more precisely through the 19th century, arbitration was utilized more and more as an alternative dispute settlement mechanism as a form of voluntary submission to private adjudication in contrast with the use of political or diplomatic ventures 19.

By all accounts, the attractiveness of arbitration was based on its flexibility, the control of the parties on the subject-matter of litigation and the applicable law as well as the freedom of the parties to select the arbitrator. Moreover, awards handed down during arbitration, as opposed to what occurs when using political methods like negotiation and mediation, have an adjudicatory nature equivalent to a court judgment that turned awards into a legally enforceable decision.

The agreement to submit a dispute to arbitration between the U.S. and Great Britain pursuant to the Jay Treaty of 1794 is historically considered the first step forwards the implementation of modern inter-state arbitration. Thereafter, arbitration was used over and over by states. For example, the nineteenth

19 For a detailed account of the inter-state arbitration of those centuries see J. L Simpson and Hazel Fox International Arbitration, London, Steven & Sons Limited, 1959, pp 1-41.
century is recorded as one of the most prolific stages in the use of international arbitration for state disputes. Hundreds of arbitrations took place between the period of 1794 and the commencement of the XX century under the form of Sovereign Arbitrators, Independent Experts, Collegiate Courts, Arbitral Tribunals, Mixed Claim Commissions, General Claims Commissions, Ad-Hoc Commissions, etc.

Arbitrations from the Jay Treaty until the first quarter of the 20th century have performed, at least, a threefold function. One function was to offer an adjudicative alternative method of dispute resolution available to the states willing to submit their disputes to a third party empowered to settle the case through a binding award. Arbitration was at that time the only legal alternative dispute resolution competing with political or diplomatic methods such as negotiation or conciliation. This was a significant pace towards the legalization of the international justice. The second function of these arbitrations was to contribute to the development of principles and rules of international law. Many of the decisions contained in the awards ascertain, clarify and provide a better understanding of the customary rules and principles of international law as valid sources of international law. For instance, the modern law of treaties was influenced and shaped by arbitration awards. Another contribution of arbitration is related to the notion of sovereignty in the award rendered in the Palmas Island case. Other examples include the Smelter Factory case that resulted in a landmark decision related to international responsibility for environmental damage and the Beagle Channel Arbitration regarding interpretation of boundaries treaties and many customary rules and general norms pertaining to state responsibility for damages against individuals. The increase of arbitral-case law boosted the creation of the Permanent Court of Arbitration (PCA) in the Hague Conventions of 1899. Since that time, institutional arbitration with its ups and downs has always been available to the states as a reliable mechanism for settling their disputes. The third contribution of international arbitration was the instrumental role it played in the development of modern international law. Arbitration has contributed to the creation and evolution of international law. The awards rendered in a number of cases have influenced the development of international law. The Palmas Island case, for example, has had a significant impact on the law of state responsibility. The Smelter Factory case has contributed to the development of the law of environmental damage. The Beagle Channel Arbitration has influenced the interpretation of boundaries treaties. The awards rendered in these cases have clarified and provided better understanding of the customary rules and principles of international law.

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20 See H. La Fontaine, Pacisrie Internationale: Historic Documentaire des Arbitrages Internationaux, Martinus Nijhoff Publishers, 1997. This is a compilation of around two hundred interstate arbitrations that occurred during the 19th century. It is remarkable how Latin American countries, unfriendly towards arbitration during a good part of the 20th century, were frequent requesters of arbitration during the 19th century, as illustrated by Chile, Peru and Brazil and their frequent use of arbitration (Pasicrisie, supra 20 at XII-XX and at 651-658). See too, Lionel E. Summers Arbitration in Latin America, 3 California Western International Law Journal, 1972-1973, pp 5-11.


in promoting multilateral cooperation in the domain of international dispute resolution that can be seen from the distance as a testimony of the pioneer of the states’ endeavors to achieve a kind of globalized justice.\(^\text{27}\)

During the period of the World Wars, the most important effort for enhancing arbitration was made by private organizations like the Institute of International Law and the International Chamber of Commerce, the latter of which was a key organization for the progress of arbitration and international commercial law.\(^\text{28}\) Notwithstanding, the wars created a climate of reticence against third party intervention to settle inter-states disputes. Consequently, the use of the PCA was not fully utilized. It was the time when the international justice went through a deep crisis because of the World Wars. After 1945 the PCA became a dormant institution. But in the 1990’s the PCA was reevaluated, its functioning revamped, and the PCA started playing an important role as arbitral institution supporting the US-Iran Claims Tribunal and assisting the work of the United Nation Commission of International Trade Law (UNCITRAL).\(^\text{29}\)

As an aftermath of World War II, the United Nations was created which represented a defining moment in the formation of an effective system of inter-states disputes resolution. Article 33 of the Charter of the United Nations provides arbitration among the techniques applicable to resolve international disputes. In addition, the international adjudication was enhanced with the International Court of Justice (ICJ) that replaced the Permanent Court of International Justice.

As previously noted, international arbitration has been, and is now more than ever, the preferred legal resort among the panoply of means available to deal with disputes in both public and private international law. Facing the lack of a mandatory international justice, arbitration mitigated such absence and served as an alternative forum. The lack of compulsive jurisdiction of international courts doted of adjudicative powers, the shortcomings of the facultative jurisdiction and the inadequacy of international courts to hear economic disputes left the solution of conflicts at the expense of political or diplomatic adjustments. Since many disputes required to be settled in accordance to the rules and principles of international law, arbitration was the dominant recourse to fill the shortcomings of the international justice.\(^\text{30}\) Other assets of arbitration include the flexibility of arbitral proceedings, the confidentiality and privity between the parties, expeditiousness, and expertise, among others.\(^\text{32}\)

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30 See Karen Welles, Economic Conflicts and Disputes before the World Court, Kluwer Law, 1996, pp 179-216.
31 See Christine Gray and Benedict Kingsbury, Developments in Dispute Settlement Inter-State Arbitration since 1945, 63 The British Yearbook of International Law, 1992, pp 109-114.
32 Note: Confidentiality and privity without detriment to third-party standing.
2.2. International Economic Law

The growth and current structure of international economic law is linked with the economic liberalism that followed the industrial revolution during the second half of the 19th century until first decade of the 20th century; the breakdown of the free-trade economy during the period of the World Wars; the search of a multilateral economic order for the post-war; the struggle of developing countries’ to implement from the 1960’s to the 1980’s a new international economic order (NIEO); the process of liberalization of the international economy that followed the fall of the Soviet Union era, and the ongoing process of globalization.

The Industrial Revolution stirred a market economy with the spread of free trade principles. The role of states in the economy during this stage was overly non-interventionist and was consistent with the principle of “laisser faire laisser passer,” that prevailed during the second half of the 19th century. Nevertheless, states played a role in the fate of the international economy of the 19th century. For instance, economic understandings between states and particulars were implemented to liberalize foreign trade33. The clause of the most favored nation was recurrently applied by the states, and treaties of friendship commerce and navigation that proliferated through the 19th and during the first quarter of the 20th centuries34. These economic understandings, however, lacked the comprehensiveness and the multilateral scope that characterized the modern economic relations between states based upon legal principles of cooperation and interdependence35.

This trend of free-trade and market-based policies was interrupted because of the two World Wars. As a result, the international economy was affected and international trade was dominated by protectionism schemes adopted by the states to prevent unfavorable imbalances in their commercial exchanges36.

After World War II there were two major events that dominated the international arena: one political and the other of an economic character. The political event was the process of decolonization and the consequent emergence of new states, perhaps the most important occurrence of the international relations after World War II. In 1945 the United Nations Charter was adopted to deal with the challenges imposed by the birth of a new and heterogeneous international community. The United Nation’s structure was the political epicenter devoted to foster the political understandings among states.

36 Two representative legal instruments that show the extreme degree of protectionism in trade were The Halley-Smoot Tariff Act of 1930 in United States and the British response through Import Duties Act of 1932.
The second major event, economic in character, was the formation of an international economic structure to deal with international trade, monetary stabilization and foreign investments for development. A Bretton Woods system was designed to promote the post-war international economy framework of cooperation between states on basis of market-oriented policies\(^\text{37}\).

Accordingly, a three-fold institutional framework was put into place. The IMF, the World Bank Group and the ITO appeared the institutional pillars for the modern world economy. Unfortunately, the Bretton Woods System was destabilized with the non-ratification of the ITO Charter, the financial crisis in emerging economies and the faults in the implementation of the system\(^\text{38}\). The American position regarding the ITO was a major setback and had a negative impact on the functioning of the international economy. Although General Agreement on Tariffs and Trade (GATT) came into effect, a chapter that was part of the ITO Charter, the GATT was unable to deal with the world-wide set of challenges and complexities generated by international trade. The contribution of GATT to the development of international trade law was particularly relevant in the area of tariff reduction but the central problems related to world-wide exchanges of goods and services and economic development were put aside. Furthermore the GATT never was a receptive forum for developing countries’ proposals. The economic assumption of protection of infant-industries that was sustainably claimed by developing countries was hardly addressed in a few tariff concessions reflected in the Generalized System of Preferences\(^\text{39}\).

The absence of a coherent body of rules dealing with international trade provoked an economic clash during the 1960’s and 1970’s between developing countries and industrialized countries organized through free market principles. This conflict hastened the willingness of developing countries to establish a new international economic order\(^\text{40}\), which was reflected in the maintenance of the United Nations Conference for Trade and Development (UNCTAD) as a subsidiary organ of the United Nations, the United Nations Resolutions on the Sovereignty of Natural Resources and the Charter of Economic Rights and Duties of the States.

Regarding foreign investment protection at the time of the formulation of the NIEO, the legal status of the discipline was reflected in scattered customary rules and traditional principles of diplomatic protection. Further, exhaustion of

\(^{37}\) The international economic framework is better known as the Bretton Wood System because it was in Bretton Wood (New Hampshire-USA) the location were these discussions and decisions were approved by 44 states founders under the leadership of The United States and Great Britain.


local remedies was the sole way to redress the wrongdoings committed by the recipient state against a foreign investor. Accordingly, international investment law was defined once as an underdeveloped discipline in a célèbre case before the ICJ\textsuperscript{41}.

After World War II, the idea for a multilateral investment instrument was crystallized in the ABS-Shawcross Draft Convention of Investment Abroad\textsuperscript{42}. The provisions of the Draft are overwhelmingly pro-investor to such an extent that the Draft is considered the Magna Carta for the foreign investor. This bias of the ABS-Shawcross Draft put developing countries on guard against what developing countries considered an imbalanced document. The ABS-Shawcross Draft was never entered into force. In the 1960’s the OECD drafted and sponsored a multilateral investment agreement (MIA) without success. Meanwhile, the failure to implement a multilateral instrument for foreign investment was mitigated by the entering into force of the ICSID Convention and its arbitral mechanism for investment disputes, the formation a multilateral scheme of insurance to investment for political risk (MIGA) and by the impressive growth of Bilateral Investment Treaties that took place over the last 30 years. At present, the bilateral and regional approaches for foreign investment protection seem to be the preferred legal pattern chosen by states despite the trend for multilateralism in other areas of IEL\textsuperscript{43}.

The lack of consensus of how to organize the international economy fueled the formation of a theory on IEL characterized by its disheveled lack of coherence and identity. Consequently, the diplomatic or political route continued to have a preeminent place in IEL especially in the arena of multilateral trade negotiations. The same occurred in the department of international investment law where the controversies between host states and private investors could only be entertained in the course of diplomatic protection and exhaustion of domestic remedies before host state courts. In this way, the international economic system after World War II retained its power-oriented feature. This picture changed dramatically in the 1990’s with the fall of the Soviet Union, the commencement of the globalization of the economy, the culmination of the Uruguay Round and the succeeding of the WTO in 1995\textsuperscript{44}.


\textsuperscript{42} The Draft consolidated two previous projects; one prepared by the German banker, Hermann ABS, and the other by the British attorney, Lord Shawcross. The ABS-Shawcross Draft never saw daylight, but is considered a precedent for subsequent efforts taken to crystallize a multilateral investment treaty, like the OCDE in 1967. Regarding the ABS-Shawcross Draft, see Georg Schwarzenberger the ABS-Shawcross Draft Convention on Investment Abroad: A Critical Commentary, 9 Journal of Public Law, 1960, pp 147-171.

\textsuperscript{43} As to the debate between bilateralism and multilateralism in international investment law see Stephan W. Schill, The Multilateralization of International Investment Law, Cambridge University Press, 2009, pp 1-21.

\textsuperscript{44} About the development of multilateral trade see Gerald A Bunting, GATT and The Evolution of The Global Trade System: A Historical Perspective, 11 St John's Legal Comment, 1996, pp 505-521.
At present, in the light of globalization, IEL faces once more a test of identity. For instance, a gradual disappearance of the borders between public and private international law is occurring notably in foreign investment protection through the transfer of some cardinal principles of international business transactions into public international law. At present, there is a debate in the academia to ascertain the level of amalgamation between public and private approaches in IEL. It is still too soon to project a definitive conclusion in this respect. But without a doubt the most important change in the structure of IEL during the last decades was the progressive affirmation of the rule-oriented power in the international economic management, which allowed the countries to operate within a predictable juridical framework and with an institutional adjudicative venue to assert their rights. The legalisation took a sit in IEL putting the states a position of auto-limitation of their sovereign powers in furtherance of the primacy of the rule of law.

3. Interface between Arbitration and International Economic Law

3.1. The Leading Factors

The leading factors that made the bond possible between international arbitration and IEL included the shift from a power-oriented to a rule-oriented power in the governance of international economic relations; the relative recognition of individuals and private entities as subject of international economic law and the intensification of the use of arbitration as the favorite adjudicative mechanism for solving economic disputes between states as well as amid states and individuals.

The notion of legalisation in international affairs entails the implementation of binding regulations and procedures along with the application of an efficient system of legal remedies to ensure the compliance of the international commitments. The legalisation of international relations started in 1945 with the creation of The United Nations and is going through extraordinary development in other areas of international law such as human rights, humanitarian law, international criminal law, protection of the environment, and progressively in the domain of international economic relations.

The legalisation of international economic relations was slow-moving and most of the time confrontational. The fall of the Soviet Union and the ensuing American predominance as the only super-power in the world was a critical shift in favor to global legalisation. As a consequence, two of the most important areas

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46 Regarding the dimensions of legalisation in international relations in general see: Keneth Abbott, Robert Kheohane, Andrew Morasevik and Anne-Marie Slaughter, The Concept of Legalization, 54 International Organization, 2000, N0 3 pp 401-419.
of IEL developed legal and institutional frameworks. Thus, the multilateral trade reached momentum with the creation of the WTO and the same happened with the promotion and protection of foreign investment with the amazing multiplication of investments agreements particularly the so-called bilateral investment treaties. Until then, there was no room for adjudicative mechanism like arbitration or a permanent jurisdiction. The foundation of WTO and particularly the wave of bilateral investments agreements were crucial in the development of arbitration due to the existence, at that time, of a legal and institutional framework of the international economy. This new legal organization of international trade and investment requires the design of a predictable system of resolution of disputes in which arbitration has a place of particular significance.

The growing relationship between arbitration and international economic laws should be evaluate in the light of dramatic changes that came about in the international community after the end of World War II. These changes were particularly decisive in the development of an international economic legal order. The fall of socialist countries led to the rehabilitation of the market-based economic credo and its diffusion at world-wide range. Accordingly, fundamental changes took place in two key areas of the international economic arena: trade and investments. With respect to global trade the creation of the WTO was a landmark event for the multilateral trade system. The workings of panels, the improvement of the mechanisms of dispute settlement, and the inclusion of arbitration among the panoply of means available in the WTO are valuable accomplishments in the consolidation of the rule of law and in the resolution of trade disputes. Regarding investments, the creation of the ICSID and the multiplication of BITs that contain arbitration clauses constitute an unequivocal affirmation of the preeminence of the rule of law.

With respect to the legal status of the individual in international economic law the crucial question is to find out the scope of the legal personality of the individual with respect to states and international organizations. Legal personality basically encompasses two aspects, the first of which is the capacity of a private person or corporation to make a legal claim directly or seek judicial enforcement of a duty or right before an international jurisdiction. The second aspect relates to the ability of the individuals to participate in the process of elaboration of international rules as law-makers. In the field of human rights there is some significant progress in the standing of individuals before international jurisdictions. For example, in proceedings initiated by individuals before the European Court of Human Rights, states and individuals are considered mutatis mutandi as equals. This reality, however, is not extensive in the same degree to other branches of international law where the full legal personality of the individual can be contested. Regarding IEL, despite the progress made in this issue of the legal personality there are still barriers to overcome specifically in public international trade law and public international financial law. In these
areas, only states either acting directly or by an international organization are the law-makers and the holders of rights and obligations. By contrast, the capacity of the individual in the field of foreign investment is now quite well recognized. The examples of the Washington Convention that creates the arbitral mechanism within the ICSID and the Bilateral Investment Treaties that include arbitration clauses entitle the individual to request arbitration directly against the recipient state. This is a remarkable turning point concerning the legal status of the participants in IEL.

An individual does not possess legal capacity due to the government-to-government nature of the agreements in public international trade or in public international financial law. States and international organizations are the center of rights and obligations even when states act in direct benefit or interest of the individual. For instance, the WTO does not recognize any direct or legal standing to individuals and the same occurs within the IMF. It is true that both institutions have recently agreed to hear private intervention in proceedings before their disputes settlement bodies under the form of amicus curiae but that step forward does not mean that individuals have a complete participation as subjects of international law. For these two important areas of IEL individuals are still subjects of national law without active international personality. The problem of the individual is the lack of an inherent international legal personality as states and international organizations retain. The area of international law in which the individual obtains personality by decision of the States is through international treaties such as human rights protection.

See Qureshi and Ziegler, International Economic Law, supra note 1 at 36-41.

Translated as "friend of the courts," the amicus curiae allow a third party who is not part of the litigation to be heard by the court because the interest that such a third party has in the outcome of the case. The amicus curiae brief is seen as a useful tool in the area of protection of the so-called public interest, e.g., environment and human rights. In the sphere of international economic disputes the amicus curiae has gained procedural status that allows the third party to be heard. Because economic disputes like trade and investment used to bring issues that refer to public policy, the amicus curiae brief is developing quickly and currently is part of the proceedings before the WTO and the ICSID. In international monetary law, the IMF have become receptive in hearing arguments from NGOs about monetary policies that affect low-income countries, the protection of the environment or the implementation of human rights. For an evaluation of the role of the amicus curiae before International Courts and Tribunals, Lance Bartholomeusz, The Amicus Curiae Before International Courts and Tribunals, 5 Non-State Actors and International Law, 2009, pp 209-285. With respect to the third party participation in international economics disputes see Brigitte Stern, Civil Society's Voice in The Settlement of International Economic Disputes 22 ICSID Review, Foreign Investment Law Journal, Number (2) 2007, pp 280-348 and Iboronke T. Odumosu, Revisiting Participation in WTO and Investment Dispute Settlement; From Procedural Arguments to Public Interest Considerations, 44 Canadian Yearbook of International Law, 2006, pp253-303. Regarding the opportunities for NGOs involvement and forms of participation in the IMF see: Serge Ripinsky and Peter Van den Bossche, NGO Involvement in International Organization: A Legal Analysis, British Institute of International and Comparative Law, 2007, pp 177-187. As for the third parties status within WTO, LIN Shengling, An Analysis of the Role of NGOs in WTO, 3 Chinese Journal of International Law, 2004, pp 485-497. Regarding the pointed issue of third party intervention in the context of investment arbitration, see: Olivia Bennaim Selvi, Third Parties in International Investment Arbitration, 6 The Journal of World Investment & Trade No 5, 2005, pp 773-807; Brigitte Stern, Un Petit Pas de Plus: L’Installation De La Societe Civile Dans L’Arbitrage CIRDI entre Etat et Investisseur, 1 Revue d’Arbitrage, 2007, pp 3-43 ; Alexis Mourre, Are Amici Curiae The Proper Response to The Public Concerns on Transparency in Investment Arbitration ? 5 The Law and Practice of International Courts and Tribunals, 2005, pp 257-271; Florian Grisel/ Jorge E Vinuales L’ Amicus Curiae Dans L’ Arbitrage d’Investissement, 22 Foreign Investment Journal, 2007, pp 380-432 ; Carl Sebastian Zoellner, Third Party Participation and Transparency in ICSID Proceedings, in The ICSID; Taking Stock After 40 Years, Schriften zur Europäischen Integration und Internationalen Wirtschaftsordnung 7 Nomos, 2007, pp 380-432 and Tomoko Ishikawa Third Party Participation in Investment Treaty Arbitration, 59 International and Comparative Law Quarterly, 2010, pp 373-412.
It is not the first time the individual can access an international jurisdiction directly. Such situation was considered in former international instruments, for instance, the Convention of Washington 1097 that set up the Central America Court of Justice or the cases of the Arbitral Mixed Tribunals formed after World War I. But what is outstanding with the access of the individual to ICSID is the almost complete separation between ICSID’s jurisdiction and proceedings with respect to the national courts. As soon as states accept the resort of arbitral proceedings in investment disputes under ICSID administration there is no other jurisdictional mechanism applicable than the stipulations contained in the Convention.

The recognition of the legal personality of the individual in international investment law of allowing the individual to participate directly in international litigation without the resort of diplomatic protection is one of the most important achievements in IEL and is having a direct impact in the creation and application of rules and principles in other areas of IEL.

One of the most important consequences of the process of legalization of IEL is the relevant status of the treaty law-making as a source of international law. Since international law does not grant inherent personality to the individuals, states can allow individuals to participate in the formulation and application of international law and treaties are the best vehicle to create such an entitlement. There are many examples of this in international law: human rights, environmental protection, intellectual property, etc., where individuals enjoy standing to bring a cause of action. In IEL the legal personality of the individual has found a place in the field of foreign investment protection. The ICSID Convention is an example of that fundamental shift, making the individual the “ownership of claims” and we can expect that the participation of the individual in IEL can be expanded to the fields of international trade and international finance with more definitive actions likely to be taken in the future. The fact that individuals at present are allowed to participate in proceedings before the WTO and in some circumstances in the IMF advocating for public interests are positive movements in the recognition of the international personality of the individual in IEL.

The access of justice in IEL is one of the most important developments of the last decades. The enjoyment of full procedural capacity of the individual in the state-investor disputes meant a notable expansion of the concept of international personality. Likewise the recognition that the civil society is entitled to advocate for public interest under the form of amicus curiae is a very positive forward the

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consecration of the legal personality of the individual and affirmation of the humanization of international law.

In sum, while states and international organizations are instrumental and responsible of the development of IEL, the participation of individuals occurs in three levels: as the ultimate beneficiary of the IEL legal order, as subject of international law with legal personality to act directly at international stage, and finally as a representatives of the civil society generally organized through NGOs.

The spreading of arbitration in IEL is nothing but the denouement of an international economic atmosphere carved out in the multilateral trade system and foreign investment protection. Regarding international trade, the states seek to address the world economy creating a multilateral agreement capable to be enforced against the members states; in the case of foreign investment the rationale is to adjust the legal framework of protection of a specific economic resource with the promotion of mechanisms that encourage foreign investments as noted in the multiplication of bilateral investment treaties and the revamping of the arbitration laws at national level\

The economic crisis in Argentina and the political climate in countries such as Bolivia, Venezuela and Ecuador have occasioned that national courts of these countries are trying to find out a legal support in order to intervene in the outcome of ICSID arbitrations under the justification that the awards rendered should be reviewed where matters of public policy or unconstitutionality were at stake. Perhaps the more symbolic cases of this interventionism in ICSID arbitration decisions occurred in Argentina. During the latter 1990’s, Argentine was not able to comply with international agreements because of the severe economic internal crisis; some of the agreements Argentina was a party contained

51 During most of the 20th Century, Latin American countries had an antagonistic attitude against international arbitration. At least two historical factors shaped the reticence of Latin America countries against arbitration during the last century. One factor occurred after independence when arbitration was accepted as an alternative to the threat of armed intervention. Another factor was the abuse of the diplomatic protection by developed countries. The reception of the Calvo doctrine not only reached constitutional status but also was incorporated in some Latin-American Conventions. This reality was gradually changing during the 70’s and 80’s with the progressive consecration of International Commercial Arbitration in Latin America through some important multilateral treaties, the gradual acceptance of the New York Convention of 1958, the Panama Convention of 1975 and the creation of a regional system of dispute resolution based upon arbitration. But the real boom of arbitration in Latin America starts in the 90’s with the entered into force of national legislations in many Latin American countries that have become advanced models of both national and international arbitration. Furthermore, the participation of most of the Latin American countries in a patchwork of FTAs and BITs consolidated the status of arbitration as the preferred avenue to settle international economic disputes. For a detailed explanation of the background and factors that influenced the development of arbitration in Latin America and the status of arbitration within the schemes of economic integration agreements, see, Fernando Cantuarias Salaverry, Arbitraje Comercial y de Las Inversiones, UPC, Lima, 2008, in special Chapter III devoted to the issue of arbitration in Latin America pp 79-107; Fernando Cantuarias Salaverry Problematic of International Arbitration in Latin America, 20 Florida Journal of International Law, Special Edition, 2008, pp 147-178 and Claudia Frutos Peterson, L’Emergence de L’ Arbitrage Commercial International en Amerique Latine, L’ Harmattan, 2003, pp 136-167. Also, there are interesting insights and references in the following studies about the evolution of arbitration in Latin America: Franz Kundmuller Caminiti and Roger Rubio Guerrero, El Arbitraje del CIADI y El Derecho Internacional de Las Inversiones; Un Nuevo Horizonte, Lima Arbitration n (1) 2006, pp 69-112; Franz Kundmuller Caminiti, Globalización y Arbitraje en Inversiones, Lima Arbitration n (2) 2007, pp 1-41 and Fernando Cantuarias Salaverry, Existe una plaza “latinoamericana” para arbitrar internacionalmente? Lima Arbitration (3-4) 2008-2009, pp 128-150.
compromises subscribed in BITs which Argentina was not able to honor. The default of Argentine set off a wave of requests of arbitration before ICSID\textsuperscript{52}.

3.2. Institutional Developments

3.2.1. International Trade

The first institutional link between arbitration and inter-state trade disputes was established in Article 93 (2) of the Havana Charter of 1949 that created the ITO. This article was part of the Chapter on Consultation and Arbitration and defines the scope of arbitration accessible to the members of that organization.

In the original text of the GATT there is no mention of arbitration, however, article XXIII leaves open the possibility of arbitration through the recommendation of the contracting parties. The same happened after the 1979 Tokyo Round\textsuperscript{53}. In 1989, at the beginning of the Uruguay Round, members of the GATT agreed upon the GATT decision to improve the dispute settlement rules with the express mention of arbitration as an alternative means of dispute resolution among the GATT members\textsuperscript{54}.

With the creation of the WTO, arbitration became an important part of the mechanism of dispute settlement for multilateral trade. Arbitration was incorporated into the WTO Understanding of Dispute Settlement annexed to the WTO Charter, including Articles 21.3(c), 22.6, 22.7, 25 and 26.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes; Articles 4.11, 7.10 and 8.5 of the Agreement on Subsides and Countervailing Measures and Article XXI and XXII of the General Agreement on Trade in Services.

There are three circumstances, generally, when arbitration is used within the WTO. The first circumstance occurs during the phase of surveillance and adoption of the report rendered by the WTO dispute settlement bodies (Article 21.3). The purpose of the arbitration under Article 21.3 is to decide the reasonable time in which the reports issued by the Panels or the Appellate Body must be implemented\textsuperscript{55}. The reports are the decisions issued by Panels and Appellate Body and adopted by WTO members. If there is disagreements between the parties about the reasonable period of time the complaining party can request arbitration. The arbitration award is binding on the parties. The second circumstance addresses disagreement over the quantum of suspension of concessions against the losing


\textsuperscript{55} Disputes within the WTO are generally settled as follows: (i) after a period of consultations and negotiations WTO members are entitled to request a panel; (ii) the panel issues a report; (iii) the report is reviewed by an Appellate Body; (iv) a decision is made by the Appellative Body that goes to the Dispute Settlement Body (DSB); (v) the DSB, composed of representatives of all WTO members, implements the decision. See Norio Komuto, WTO Dispute Settlement Mechanism, 29 Journal of World Trade, 1995, pp 5-96.
party, found in Article 22.6. The third circumstance is found in Article 25 where WTO members may opt for arbitration in lieu of the proceedings under the panel and the appellate body. Under Article 25, if the parties consent, other WTO members may participate in the arbitral proceedings.56

3.2.2 International Monetary Institutions

Article XXIX(c) of the IMF Agreement provides for an arbitral tribunal to settle controversies between the members of the IMF during the liquidation of the Fund or as result of claims during the stage of withdrawal of any state member.57

As to financial institutions, namely the international development banks, the resort of arbitration is available in different instances. For example, loans and guarantee agreements under the World Bank contain a provision for arbitration through an ad-hoc procedure. The same occurs in cases of sovereigns borrowers that default on the loan. These states-borrowers may be sued before arbitral tribunals.58

An issue that has brought attention to the policy-maker and academics relates to the use of arbitration to deal with the sovereign debt. Two of the most important sources of the sovereign debt derive in the first place for loans obtained by states from other states or an international organization such as the IMF. The other source comes from privates creditors. It is the latter case arbitration is being considered as a dispute settlement mechanism. But it is still no clear the appropriateness of the use of arbitration in controversies on the sovereign debt but the topic has been arisen and validated from a contractual approach. It have been said that refers sovereign debt to an arbitral tribunal has the advantages to give the options to the parties to select reputed specialists to deal with the factual and legal complexities of the controversy, the private nature of arbitration that make arbitration procedures non-public and the time factor considered the expediency of the arbitral proceedings.59

The IMF favorably views the use of arbitration in controversies between a sovereign state and private creditors instead of litigating in national courts. In this sense, arbitration should operate as a contractual stipulation in the negotiations when restructuring a sovereign debt. Even though arbitration is a favorable venue, it is quite complex and there is no consensus in using arbitration

due to the potential negative implications against sovereign borrowers and the
capital markets. If the arbitration formula appears in a process of restructuring
a debt after default the main obstacle in accepting an arbitration compromise is
the refusal of the debtor country to pursue restructuration of the debt, which
can remain due. Another barrier against the use of arbitration can emerge
during the phase of enforcement of the award if the debtor state alleges the
unenforceability of the award on grounds of violation of constitutional norms.

Some arbitral tribunals established by the ICSID took a broad definition of
“investment” and considered that sovereign bonds can fall within the notion of
investment and thereby granted jurisdiction to hear the case in accordance with
Article 25 of the ICSID Convention.

3.2.3. Foreign Investment

There are major developments in the use of arbitration in international investment
law. It is in the realm of investment protection where the intersection of global
legalization, recognition of the legal personality of the individual and the
promotion of arbitration reaches an outstanding degree of accomplishment.

The legal treatment of foreign investment has dramatically shifted during
the last three decades and was marked by the dichotomy of the interests of
developed/developing countries and the disparity in terms of the balance of
payments between capital exporting and importing countries, which triggered
the promotion of a new international economic order sponsored by developing
countries within the United Nations.

Foreign investment regulation has its origin in the diplomatic protection and
property of aliens and dates back to the second half of the 19th century. Arbitral
Commissions were designed to deal with cases related to abuses of property
owned by foreigners or the denial of justice against aliens that took place mostly
in America after World War I.

The international legal instruments adopted at that time were the so-called
treaties of friendship commerce and navigation FNC. These treaties addressed
foreign investment issues and were used primarily by the European countries and
United States as well. On investment these treaties contained some of the basic
principles of protection of the foreign alien and property, the application of the
principle of the most favorable nation and the payment of just compensation in
case of taking.

The economic disturbances derived from the two World Wars interrupted
the implementation of the FNC treaties, which were retaken post-war. The FNC
of the post-war period maintained almost the same structure as the original
FNC treaties. The provisions of protection and promotion of investment were
scattered within the instrument along with stipulations on trade and navigation
including references to the ICJ as the competent forum to hear the controversies

An elaborated explanation on the subject is provided by Michael Waibel, Opening Pandora Box: Sovereign Bonds in
International Arbitration, 101 American Journal of International Law pp 711-759 and Shalendra D. Sharma, Resolving
Sovereign Debt Collective Action Clauses or Sovereign Debt Restructuring Mechanism, 38 Journal of World Trade,
2004, pp 627-646.

See Andreas Paulus, Treaties of Friendship Commerce and Navigation, in Max Plank Encyclopedia of Public
arising out of the FNC treaties. Since the new dynamic of the international economy imposed more detailed regulation and a better system of enforcement, the FNC became outdated and unable to cope with the demands of the modern world economy which explains its replacement by the BITs.62

The protection of foreign investment suffered a setback with the wave of expropriations carried out by the Soviet Union and Mexican revolution. The mechanism of diplomatic protection proved insufficient. Otherwise, many importing-capital countries applied at that time the so-called Calvo doctrine and Calvo clause63.

So, for a foreign investor, the only legal remedies available for wrongdoings committed by the host-state were the diplomatic protection and the exhaustion of internal remedies. Consequently, an unfriendly climate against foreign investments endured with the resulting detriment in the free circulation of capitals and economic development of states mainly in developing countries. Furthermore, diplomatic protection had the disadvantage of being a state right in which the state had the option of granting or not.

Regulation of international private investments in connection with economic development was considered in the ITO Charter of 1948. The investment provisions of the ITO Charter established minimum requirements apart from the recognition of the feasibility to achieve the promotion of foreign investments through bilateral or multilateral agreements. In this respect and pursuant to Article 93 of the ITO Charter the mechanism of arbitration was provided to deal with the settlement of differences.

At the end of the 1960's, one of the most important achievements that took place involved arbitration in international economic law. The era of investor-state disputes under the rules and principles of diplomatic protection and exhaustion of local remedies was reversed by the creation of the ICSID in 1966. This occurrence was a major achievement because the Convention’s provisions entitled private investors to bring a suit against a state without the recourse of the diplomatic protection and without necessity to the previous exhaustion of domestic remedies available in the host state. However at the time of the inception of the ICSID, states were engaged in a debate over the New International Economic Order (NIEO) within the United Nations with the intention of revising the terms of the international exchanges, the sovereignty

63 As stated in the Calvo Doctrine, foreign individuals or corporations should not be granted rights or other privileges not provided to nationals. Accordingly, claims of foreign investors should be heard before local authorities instead of diplomatic protection. Thus, the Calvo Doctrine works as an express waiver of diplomatic protection. The Calvo Clause is the derivative stipulation that reflects, in practice, the substance of the Calvo Doctrine. This Doctrine was launched as a direct response against the abuses produced in the exploitation of natural resources by foreign investors in Latin America. The Calvo Clause was the object of criticism and was considered the most emblematic legal barrier vis-a-vis investors. Due to the global economy, the Calvo Doctrine became old-fashioned and many have proclaimed
of natural resources and capitalize more advantages in state-private investment contracts. The UN Resolution on the Protection of the Natural Resources, the UN Declaration of the New International Economic Order and the Charter of Economic Rights and Duties of the States were the legal tools that developing countries laid down within UN. Moreover at the time of the North-South conflict developing countries found in the UNCTAD a way to create a balance against developed countries trade policies carried out within the GATT.

This daunting and hostile panorama against foreign investment dramatically changed with the globalization of the economy, which revitalized the ICSID and the use of arbitration for investment disputes.

The ICSID Convention is a quasi-universal treaty. As of now, there are 144 state members. Note that thanks to an innovative modification of the instrument states that are not members of the Convention may submit their controversies to the ICSID arbitration.

The arbitration mechanism established in the ICSID Convention is without a doubt the cream of the crop as compared to other arbitral proceedings established in the field of foreign investment protection. The ICSID arbitration and especially the machinery of enforcement and execution of awards has been envisaged as a self-contained regime with absolute independence of the national courts and is available to private parties who are relieved to request diplomatic protection which is rather a right of the state to grant it or not. This detachment from national jurisdictions is a major achievement and in essence what distinguish the effectiveness of The ICSID arbitration from their precedents.

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Note that the exhaustion of local remedies was not eliminated by the ICSID Convention but it is no longer
According to the ICSID provisions, arbitration is accessible when the state parties agree to submit their dispute to the ICSID, the dispute is a legal one between a contracting state and a national from another contracting state, and the subject-matter of the dispute qualifies as an investment. It follows that the ICSID has no compulsory jurisdiction. The parties must expressly consent in order to accede to ICSID arbitration. The conditions of accessibility have become very important in practice because they allow the ICSID Secretariat to make a previous jurisdictional control of the request to arbitration and decide whether the ICSID arbitration mechanism is the right forum to settle the dispute.

As foresaw by the drafters of the Convention, the Secretariat has dismissed some requests to be heard by the ICSID arbitration either because one of the parties never consented to submit the case to ICSID arbitration or the subject-matter of the dispute was not considered an investment.

The freedom of the parties to refer the dispute to ICSID arbitration correlates with their freedom of choice governing law in investment disputes. In this regard, a diversity of substantive law is available for the parties. However if no law was selected and the parties are in default, the arbitral tribunal is fully competent to fill the gap with other major sources of substantive law applicable to the merits of an investment dispute before the ICSID; namely, the law of the recipient state, investment treaties, and general rules of public international law.

Which applicable law is pertinent can be a very complex issue, especially when there are omissions or inconsistencies between the law chosen by the parties and the fundamental principles or rules of the international legal order. An example could take place when the parties’ election is a law that violates international law rules. This situation is implicitly contemplated in article 42 of the ICSID Convention that, on one side, consecrates the prevalence of the host state’s law but, on the other, provides the application of international law “as may be applicable.” Another aspect of the ICSID Convention that can be a source of misunderstandings arises when the law chosen by the parties does not give a comprehensive response on the applicable standard of investment protection. The standards of investment protection are historically enrooted in the sphere of public international law. Accordingly, the most accepted and developed standards of foreign investment protection are:

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67 In general terms investment means the risky placement of capital by a foreign investor in a host state that has a given duration and with expectation to get back profits or return. For more details about the juridical definition of investment see Jan Schokkaert and Yvon Heckscher International Investment Protection: Comparative Analysis of Bilateral Interstate Conventions, Doctrinal Texts and Arbitral Jurisprudence Concerning Foreign Investments, Bruyant, Bruxelles, 2009, pp 5-18.


a) Admission and establishment of foreign investor;
b) Application of the most favored clause and national treatment to foreign investor;
c) Full protection and Security;
d) Expropriation either direct or indirect;
e) Umbrella Clause; and
f) Treatment of Capital Transfer\textsuperscript{70}.

Concerning ICSID arbitration proceedings, despite the principle of freedom that the parties enjoy in the selection and processing of the case before the arbitral tribunal, there are mandatory rules laid out in the ICSID Convention. Thus, if there is a lack of agreement on the selection of arbitrators the chairman may make the selection. In such a case, arbitrators must be selected from the ICSID panel of arbitrators. In addition, the arbitral tribunal is empowered to dictate provisional measures ex officio without request from the interested party. But in practice, before an arbitral tribunal decides about provisional measures on its own initiative, the arbitral tribunal will give the parties an opportunity to present observations pursuant to ICSID Arbitration Rules Art 39 (3) and (4).

Three situations that can change the processing of the case before the ICSID include settlement, default or discontinuance. Settlement ends the proceeding and the terms of the settlement are res \textit{judicata}. Default implies that the defendant party fails to appear or the plaintiff does not present the case. Discontinuance results by either mutual decision of the parties or a party’s inaction to act during a period of time. Although settlement is, in some way, a form of discontinuance it should be considered as a form of award.

Considering the efficacy to settle investment disputes through arbitration the ICSID decided in 2006 to make arbitral services available to states that are non-parties of the ICSID Convention or to non-ICSID contracting states whose national is part of the dispute. The Additional Facilities Rules authorizes the Centre to handle fact-finding proceedings as well.

The concluding stage of the ICSID arbitration encompasses the issuance of the award, the mechanism of award review, as well as recognition, enforcement and execution.

An award by definition is a final decision and is binding on the parties but can be the object of certain specific remedies through supplementation, rectification, interpretation and revision. Moreover the final and binding legal nature of the award can be reversed with a declaration of annulment\textsuperscript{71}.

\textsuperscript{70} The standards of foreign investment protection represent the core of the substantive law available to the investor. Historically, the most important standard was direct expropriation but now the bulk of investor-states disputes are triggered by other standards such as national treatment, indirect expropriation, full protection and security, umbrella clause, among others. See Christoph H. Schreuer, \textit{Interrelationship of Standards}, in \textit{Standards of Investment Protection} edited by August Reinisch, Oxford University Press, 2008, pp 1-7. With respect to the role of international law in the formation of the standards of investment see Andrew Newcombe and Luis Paradell, \textit{Law and Practice of Investment Treaties: Standards of Treatment}, Wolters Kluwer, 2009, pp 99-119.

\textsuperscript{71} On recognition, enforcement and execution of awards rendered under ICSID see Luci Ree, Jan Paulson and Nigel
A contentious issue in annulment proceedings occurs when the arbitrators reconstruct the merits of the case acting rather as an instance of appeal instead of finding out whether any ground of annulment has taken place pursuant article 52 (1) of the ICSID Convention. So, one thing is the annulment proceeding under article 52 (1) of the ICSID Convention and another very different the review or whichever form of scrutiny on the merits of award which is not permitted under the ICSID rules.

4. Challenges IEL-Arbitration

4.1. Public International Trade Law

In the area of public international trade, arbitration has a multi-purpose use along with the quasi judicial mechanism created within the WTO through panels and the appellate body. When arbitration is seen as an alternative means, it is available to the WTO members as long as the parties agree to submit the case to arbitral proceedings. Article 25 of the WTO Understanding of Dispute Settlement is quite clear on the nature of expeditious arbitration. When arbitration is used as part of the adjudicative machinery of the WTO along with the panels and the appellate body, its function is more specific.

A challenge for arbitration within the WTO is related to the frequency in the use of arbitration under article 25. While the proceedings before panels and the appellate body has demonstrated to be the most requested course by WTO members, the proceedings are long and sometimes cumbersome. Members that use arbitration recognize its advantages, which include speediness, adjustability of the procedure and the possibility to lower litigation costs. Although arbitration is perhaps not tailored for controversies that involve interests of more than two parties, arbitration may be a very appropriate vehicle to adjudicate bilateral disputes in which the rights and obligations in question are clearly identified.

4.2. Public International Financial Law

As to arbitration in public financial law, a thorny issue is the feasibility of the use of arbitration for disputes that stem from the repayment of sovereign debt. Opinions are divided on this topic. Some consider that the best way to deal with this kind of disputes is through litigation before national courts while others see arbitration as a more appropriate forum. The experience is demonstrating the
The complexities and contentiousness of the use of arbitration to solve controversies between sovereign borrowers and private lenders.\(^{73}\)

### 4.3. International Investment Law

The proliferation of international investment treaties has brought about a multiplication of arbitral proceedings. This seems to indicate that states will continue to agree to put into force BITs as the prototype of legal instruments of investment promotion. As of 2008, almost 2,800 BITs were in effect\(^{74}\) and this amount has increased during the last years to roughly 3,000\(^{75}\).

Recurrent topics in which investment arbitration provokes intense debates are: the legal nature of investment arbitration, investment arbitration and transparency, investment arbitration and corruption, appellative mechanism, linkages, the one way street perception, and damages.

a) **Legal Nature of Investment Arbitration**

The legal nature of the investment arbitration is generally the first inquiry that needs to be addressed. This topic not only imports the doctrine but also has major and immediate practical effect. Despite the fact that investments are considered an economic activity the legal nature of a foreign investment protection cannot be equalized with international commercial activities. This distinction is made in the very instrument that creates the ICSID\(^{76}\) and at present, appears more notorious with the coexistence of rights and obligations that spring from two different legal instruments namely, the contract between the investor and the state and the treaty between states. But the interrelationship between contracts and treaties in the foreign investment legal regime is so close that the lines are often overlapping to such an extent that it is difficult to know when the obligations derive from the investor-state contract and when from the investment treaty. Even on the assumption that the distinction between contract and treaty can be established, the legal nature of the protection of a foreign investor before a sovereign state is located in a mixed area between public and private international law. Precisely, the awards rendered under the ICSID arbitration are proving that there is a blurred area between investment treaties and investment contracts, which shows how complicated it is to conciliate the private interests inherent to an investment operation with the public interests existing in the recipient state. The fact that investment arbitration can arise from different sources as clauses of stabilization, Ad-Hoc arbitrations, bilateral investment agreements or multilateral instruments which can exist along with the resort of diplomatic protection and the exhaustion of local remedies make more difficult to formulate a plain and comprehensive conceptualization of the

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\(^{73}\) On the problematic of arbitration and sovereign debt and the ICSID role see: Karen Halverson Cross, Arbitration as a Means of Resolving Sovereign Disputes, 17 American Review of International Arbitration pp 335-381.


\(^{76}\) Bruno Poulain, L’Investissement International: Definition ou Définitions? In Les Aspects Nouveaux du Droit des
legal nature of investment arbitration. The debate is still an open texture and the specialists have positioned themselves under diverse approaches.

b) Investment Arbitration and Transparency

Specialists praise secrecy as one of the advantages to submitting disputes to arbitration. That approach, perhaps indisputably correct in international commercial arbitration, is not validated in the field of investment treaty-based arbitration. Investment agreements use to embrace issues of public importance and for that reason the public access to hearings, procedures and awards becomes quasi-imperative. This trend in favor of transparency in the area of investor-state arbitration is gaining great acceptance in developed countries. Just to mention the example of the United States as a consequence of public pressure from different organizations representing the civil society enacted the US Trade Act of 2002 which includes provisions that make mandatory to secure standards of transparency and accessibility to state-investor arbitrations.

c) Investment Arbitration and Appellate Mechanisms

The preferred use of arbitration in foreign investment disputes has already generated an important amount of case-law particularly during the last decade and despite awards having no binding effects beyond the parties under dispute, the awards are taken into consideration and become many times a reliable reference for the solution of subsequent cases. Never the less, some awards rendered under the ICSID have revealed inconsistencies. Even when the case refers to the same facts and the same parties, arbitrators have issued awards that are in opposition creating discrepancies and disconnections. As a reaction, some observers advocate for the formation of a system of appellation for investment arbitration in order to preserve the predictability, consistency, transparency and accountability necessary for the legitimacy of a legal order.

d) Investment Arbitration and Corruption

Corruption exists everywhere. Corrupt practices in the context of foreign investment protection encompass not only conventional forms of bribery, i.e.,

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Regarding the forms of corruption in foreign investment and its impact on economic growth see Bert Denolf, The
corrupt officials or the buying of influence, but also a diversity of issues related to
the legality of the main and/or subsequent contracts. With respect to arbitration
proceedings, an allegation of corruption can be used as a defense for annulment
of the contract or the arbitration agreement. Also, there is some disagreement
among academics and practitioners on the scope of the competence of an arbitral
tribunal to investigate *ex-officio* charges of corruption against the parties and the
extent of the minimum standards of evidence and burden of proof offered by
the parties before an alleged charge of corruption

\(^{80}\).

c) **Investment Arbitration and Linkages**

Investments are not carried out as a self-contained regime but instead, interplay in
a definite socio-economic reality. It has been said that investments can influence
positive or negatively the enjoyment of public interests in the host states. For
instance, the repercussions of foreign investment activities on the environment and
human rights deserve close attention. Capital-importing states welcome foreign
investment with the understanding that developed capital will help to propel
economic development. But what happens when the investment is unfriendly with
public interests? The flood of foreign capital to developing countries increases in
unthinkable proportions but there is some concern in conciliating the promotion
of foreign investments in a sustainable and equitable manner. Although opinions
clearly differ, the potential tensions between international investment law and
environmental protection should be addressed

\(^{81}\).

Something similar occurs in the field of human rights protection where the
expectation is to balance both areas and not privilege one over the other. Since
there is no mention of human rights in the most important instruments of
promotion of investment some believe than human rights has only a peripheral
interest. In principle, the economic development should be fostered by investment
and this should improve the enjoyment of basis human rights

\(^{82}\).

f) **Investment Arbitration and the One Way Street Perception**

Some analysts believe that the current system of investment arbitration results
in an unfair imbalance in favor of the investor. This posture is supported by the
presumption that the legal design of the system seeks to maximize the benefits
and revenues of the investment and secured it through the biased mechanism

\(^{80}\) These issues are addressed by Hilmar Raeschle-Kessler, Corrupt Practices in Foreign Investment Context:
Contractual and Procedural Aspects, in Arbitrating Foreign Investment Disputes, edited by Norbert Horn, Kluwer

\(^{81}\) On this potential clash see: Ole Kristian Fauchauld, International Investment Law and Environmental Protection, 17

\(^{82}\) See Clara Reiner and Christoph Schreuer, Human Rights and International Investment Arbitration, in Human Rights
in International Investment Law and Arbitration, Oxford University Press, 2009, pp 82-96 and Ursula Kriebaum,
of investor-state arbitration in favor of the foreign investor, creating a one-way street effect.

Although there is not enough room here to discuss in depth this polarizing topic, the perception of investor-state arbitration is of supreme importance for the future of the regime of investment arbitration. Generally, investments are advanced to achieve two purposes: the protection of the foreign investor, and the promotion of economic development in the host-state. These purposes serve two types of different interests that are not necessarily conflicting, but distinguishable. For the investor, property and shareholders' rights are quintessential and host-states have the duty to protect these rights, whenever possible. For the recipient state, investments are perhaps considered the most suitable way to enhance economic development and the incoming transfer of technology. These two purposes are clearly mentioned in the preamble of the ICSID Convention. Some think that the ICSID legal design does not consecrate a reciprocal benefit. On one hand, awards are, according to critics, shown to be overly pro-investor oriented. On the other hand, the legal literature on foreign investment protection is overwhelmingly devoted to expanding the scope of the rights enshrined in the legal instruments of the investor's protection. Having said that, what about protections of the host state? Certainly, the investor owes some important duties to the host state's investment recipient. For instance, investors owe a duty of information with respect to details of the investment, feasibility, good execution of the investment, environmental impacts, quantification of benefits or information derived from the expertise and know-how of the foreign investor.

g) Investment Arbitration, Compensation and Damages

Although restoration, restitution in kind, specific performance, and other forms of non-pecuniary remedies can take place in investment arbitration, monetary compensation is by far the prevalent route for the resolution of investor-state disputes. Because of the impact that the calculation of monetary compensation has on the states this issue has, in recent years, become the object of debate from academics, practitioners and policy makers. The amount of money awarded by some arbitral tribunals against states have triggered lively reactions and is one of the causes that supports the advocacy to overhaul the current system of the investor-state dispute, particularly in the ICSID. The monetary burden that arbitrators imposed in some cases appears well reflected in the CME/Czech Republic case where the quantum of monetary compensation against the Czech Republic jeopardized the provision of an essential public service. From a legal standpoint, the challenge takes diverse angles. First, the pervasive question of

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84 The award rendered against Czech Republic was almost equal to the entire annual health care budget of the country.
whether there exists coherent standards of international responsibility derived from foreign investments; second, to what extent the traditional definitions of emergent damages and loss of profits can be validated and consequently be applied to investor-states’ disputes; third, considering the autonomy of the arbitrators to establish the amount of compensation, whether there is legal criteria that arbitrators are subjected to follow to avoid any hint of misjudgment and unfairness of the decision particularly when punitive damages or compensation for moral damages are awarded in such a way that might affect the legitimate expectations of the parties. The economic strain that some awards impose against states and the prospect of exorbitant monetary compensation in favor of the investor is creating a trend of thought that postulates that the system of investment arbitration has reached a level of illegitimacy and unfairness that should be, sooner or later, revised.

5. Conclusions

- Arbitration and IEL have reached a mutually supportive relationship. The more IEL expands the more arbitration appears as the appropriate channel to settle controversies in international economic relation. Arbitration is present with more or less degree in all corners of IEL public either international trade, public international finance or international investment law.
- The connection between arbitration and IEL is the resultant of three major trends that took place the last decades: first, the growing governance of IEL...
under a juridical and institutional rule-oriented pattern instead of a power-oriented one; second, the recognition that in certain instances private entities and even the individual should be entitled to legal personality as subjects of international law together with states and governmental organizations and third, the increasing expansion of international arbitration as a quite suitable remedy to handle economic disputes between nation-states and states with non-state actors. Needless to say that under the current economic globalization the linkage between arbitration and IEL has become more prominent.

- Arbitration is a well accepted method to settle dispute within The WTO. Accordingly, arbitrations proceedings are available as a substitute of the quasi judicial bodies that regularly conduct the disputes between WTO states members or as a mechanism for determining the degree of suspension of trade concessions against the losing party.

- Regarding public financial law, arbitration is envisaged within the institutional structure of the IMF regarding the interpretation of the IMF agreement as well as in the stage of withdrawal of IMF member. Otherwise, arbitration is surfacing at present as one of the most workable alternatives to resolve disagreements coming up in the frame of the sovereign debt of states.

- Arbitration has become a recurrent mechanism to settle disputes in inter-state economic disputes and in disputes between states and individuals what is the case in the area of international investment law.

- There are some challenges in using arbitration in IEL. In international trade the challenge is to increase the use of arbitration in controversies within the WTO. As to international finance the possibility to use arbitration for controversies arising out the sovereign debt could be tested. Regarding international investments due to the increase use of arbitration in investor-state controversies there are panoply of issues under evaluation. The cases of the legal nature of investment arbitration, the creation of mechanism of appeal, questions of transparency, corruption, linkages, the perception of a system of investment arbitration biased in favor of the foreign investor, and the calculation of monetary compensation have captured particular attention.