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Contributors to this issue:

Professor Kaj Hober: Professor at Upsala University of Sweden

Dr Maryam Pourrahim: PhD candidate at Fribourg University of Switzerland

Dr S. Mohammadali Abdollahi: PhD candidate at Shahid Beheshti university of Tehran

Dr Nima Nasrollahi Shahri: Assistant professor at Science and Culture University of Tehran

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Contents

Dr Sirous Motevassel is the founder and CEO of the Modern International Law Studies Centre. He is an attorney at law. He completed his bachelor at laws and master of International law at Shirzad University and obtained his PhD of International Law from Shahid Beheshti University. He is been working as arbitrator in international investment disputes and serves as a member DIAC-40 Young Practitioners Group in Dubai International Arbitration Centre.

Founder's Note

By Dr. Sirous Motevassel

Another issue of the Modern International Law Studies Center's journal is published. I thank the merciful Lord for giving me the ability to take another step in this direction. I thank God for bestowing upon me, contriver colleagues who work with enthusiasm as they have in the past. And I prostrate to the Almighty for the presence of great professors and thinkers who do not withhold working with passion and interest in the Board of Advisors of the Center in the path of development and promotion of knowledge.

This issue of the journal takes a close look at aspects of International Investment Arbitration that are new and innovative in their own kind.

Due to the development of International Investment Arbitration in recent years and the need to change the practice and legal doctrine, Modern International Law Studies Center, which was established to study the contemporary issues of International Law, has accordingly allocated this issue of the journal to International Investment law and Arbitrations therein.

Many substantive awards delivered by international investment arbitrators in recent years have been based on the old model of International Investment Agreements (IIAs). In 2018, for example, at least 50 substantive awards were delivered in Investor-State Dispute Settlement (ISDS) most of which were based on International Investment Agreements (old models) (IIAs), many of which were concluded before 1990. Given the important role that arbitration awards play as one of the sources that are relied upon by arbitrators, the United

Nations Conference on Trade and Development (UNCTAD) in November 2019 emphasized on the development and updating of investment arbitration treaties.

Modern International Law Studies Center is also pleased to explore different aspects of this development in this issue, taking advantage of the views of prominent researchers in the field.

While thanking the esteemed lawyers who have presented their valuable articles in this issue, I hope that the topics will be useful for dear scholars.

The horizon is open to embrace you
Take a step! Make clamors!
Hang in for freedom and happiness!
Learn a lesson from this midnight breeze,
And shine and reflect your nature every moment!
(Fereydoun Moshiri)

With best wishes,
Sirous Motevassel

Prof Dr Kaj Hober is Professor of International Investment and Trade Law at Uppsala University, Sweden, as well as Honorary Professor at the Chinese University of Hong Kong. He is an associate member of 3 Verulam Buildings, Gray's Inn, London and a former board member and chairman of the Arbitration Institute of the Stockholm Chamber of Commerce.

Foreword

by Professor Kaj Hober

For many decades now, indeed for centuries, arbitration has been an efficient and reliable method of settling international disputes.

It is believed that the first arbitration clause was included in a peace treaty in 3000 BC between the two Mesopotamian states Lagash and Umma. References to arbitration can also be found in Roman and ancient Greek law.

The modern era of international arbitration, as between states, started with the Jay Treaty on 19 November 1794 between the United Kingdom and the United States. Subsequent to the creation of the Permanent Court of International Justice, and the International Court of Justice, respectively, many interstate disputes have been, and are being, submitted to these courts rather than to arbitration. This notwithstanding, interstate arbitration continues to be an important dispute settlement mechanism.

In the commercial sphere, international arbitration is since long the preferred method of settling disputes. Even though important international treaties came into being before the Second World War- such as the Geneva Protocol of 1923 and the Geneva Convention of 1927 – it was not until after the Second World War that international commercial arbitration started to play an important role. One very important step was the adoption of

the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Other important steps include the 1976 UNCITRAL Arbitration Rules, revised in 2010, and the 1985 UNCITRAL Model Law on International Commercial Arbitration, as revised in 2006.The UNCITRAL Model Law has resulted in considerable harmonization of arbitration legislation in many countries.

All these measures and steps have created a legal environment which makes it possible for almost any kind of commercial dispute to be resolved through arbitration .One area ,however ,where arbitration has been used only to a limited extent is intellectual property, in particular with respect to disputes concerning patents .In most jurisdictions it is not permissible to settle patent disputes through arbitration. In some jurisdictions it is, however, permissible. In the modern world of rapid technological development, the possibility to arbitrate patent disputes is becoming an issue of growing importance. The contribution by Maryam Pourrahim discussing arbitration in disputes concerning Standard Essential Patents is therefore welcome and sheds further light on the challenges involved.

In addition to interstate arbitration and international commercial arbitration there is a third category of arbitration which has grown enormously in volume and importance during the last 20-25 years, viz., investment treaty arbitration .Arbitrations falling into this category are all based on investment protection treaties, be they bilateral or multilateral .The vast majority of such treaties have arbitration clauses which entitle investors to commence international arbitration against host states. The dramatic growth of investment treaty arbitrations has in many respects redrawn the map of international arbitration.

The heart and sole of every investment protection treaty is protection against expropriation, which represents the most severe form of governmental interference with the property and property rights of foreign investors. Under international law it is generally accepted that a state has the right to expropriate property, but only under certain conditions. One of these conditions is that the state pay compensation for the expropriated property. In almost every investment treaty arbitration the investor will be asking for compensation, because he is of the view that his investment has been expropriated. Another important standard of protection found in most treaties is the fair and equitable treatment standard, the breach of which by the host state entitles the investor to compensation.

Many investment treaty arbitrations are conducted on the basis of the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules, or the Arbitration Rules of the Stockholm Chamber of Commerce. In many respects investment treaty arbitrations are conducted in a similar way as international commercial arbitration.

In many respects investment treaty arbitration has been a success, among other things because such arbitrations provide both investors and host states with a neutral forum for the settlement of disputes. Despite the undeniable usefulness and efficiency of investment treaty arbitration, critical voices have been raised. They have mostly come from host states having lost an arbitration and from NGOs. The critical voices have in turn generated a multitude of reform ideas and proposals. In an interesting contribution, Dr Nima Nasrollahi Shahri discusses one such idea, viz., to distance investment treaty arbitration from commercial arbitration.

In another contribution S. MohammadAli Abdollahi takes the Court of Arbitration for Sport in Lausanne, Switzerland as the starting point for a proposal on the appointment of arbitrators in the EUs proposal for reforming the settlement of international investment disputes.

Both articles are interesting and valuable contributions to the ongoing debate about the need to reform investment treaty arbitration.

There is no shortage of views, ideas and proposals concerning this debate. It remains to be seen if and when the reform efforts will be crowned with success.

Maryam Pourrahim is a doctoral researcher in a joint program at the University of Tilburg, the Netherlands, and the University of Fribourg, Switzerland. Interested in IP, competition law and technologies, Maryam Pursues her doctoral thesis on the Standard Essential Patents under the EU and US antitrust laws. She completed an LLM in international and European commercial and economic law at the University of Lausanne, achieved her master's in international commercial law and her bachelor's in judiciary law from the University of Beheshti and Tehran respectively.

Arbitration in SEP/FRAND disputes

Maryam Pourrahim

PhD candidate at the University of Fribourg, Switzerland. (Maryam.pourrahim@unifr.ch)

1. Set the context

In a digital economy of information and communication technologies, the interplay between patents and standards is a crucial element for innovation, growth and development. While, patents empower innovative R&D investors to gain an adequate return on their investments, standards allow interoperability and simplify the production of end–use items. A Standard Essential Patent (SEP) protects technologies essential to a standard. It is impossible to manufacture standard–compliant products such as smartphones or tablets without using technologies covered by SEPs. There are thousands of SEPs reading on technologies implemented in various standards such as Wi–Fi or 4G. To set the industry-wide technical standards, companies work together in Standard Development Organisations (SDOs) such as ISO, ETSI and IEEE. Companies choose one

technology which is essential to a standard and exclude other technologies. Thus, competing technologies and companies may face a barrier to enter to market and may potentially be excluded from the market, which can be regarded problematic in view of competition law.

Combining exclusivity with public availability, SEPs are a mix of conflicts between patents and standards. While standards as implying collective use and broad dissemination should be publicly available, patents give an exclusive right to their owners. Once a technical patent becomes essential to incorporate in a product, the standard implementers prefer using those essential patents without payment or at a very low cost. On the other side, the SEP holder who heavily invested in the essential patent seeks a beneficial *quid pro quo*. This conflict arises not only between private interests of two businesses fighting for more benefits, but it also is a matter of public interest: consumer welfare and public policy of competition law. For instance, smartphone users expect legitimately to have compatible devices in terms of a technology standard – say 4G standard – regardless of their smartphone brand. This interoperability, which can be considered as a public interest, occurs once the 4G SEP holders provide the 4G implementers with licensing agreements. The agreements between these undertakings should not be concluded in violation of competition law.

It is commonly perceived that the problem can be solved by a fair and reasonable royalty given to the SEP holders by the implementers for the SEPs at issue. In fact, patentees agree to make their SEPs available under fair, reasonable, and non–discriminatory (FRAND) terms[1]. This way, the implementers acquire access to the SEPs necessary for its incorporation into the standard–compliant products. SEP holders also receive an adequate "consideration" in return to their investment as well as enough incentives for future innovation and development. FRAND mechanism not only solves the conflict between implementers and patentees, but also ensures the interoperability amongst various devices particularly in sectors such as ICT that highly demands it. Most SDOs through their IPR Policies require their participants to make a FRAND commitment for their patented technology once they are included in a standard.

[1] Since 1992, the European Commission has required the European standard setting bodies to make European standards available to all persons wishing to use European standards on FRAND terms.

Many conflicts and contradictions, nevertheless, still exist in practice, which have led to a growing number of disputes and litigations referred to as "patent war"[2]. These disputes usually are centred around the FRAND commitment made by SEP holder to the relevant SDO means in concrete terms. Other disagreements rang from the typical IP question on the validity and enforceability of patents, the essentiality of technical standard or patent infringement, to the typical competition law concerns including SEP holders' abusive behaviour or unfair trading to finally the quintessential case in contract law which is breach of contractual obligation. In a nutshell, ironically, one may say that the problem solver i.e. FRAND mechanism turns itself into a troublemaker.

It is no longer only smartphone producers, telecommunication service providers or online shops that have to deal with the licensing of ICT SEPs. As a matter of fact, new market sectors including agriculture, waterworks, and automobile have already started to incorporate themselves into digital environments which are mostly based on ICT standards such as the 4G standard.

A great number of new players have entered the game whose corporate cultures and know–how may be different from those of established ICT players familiar with the realities of the sector. Despite bringing positive effects, it can also be a source of conflict. Hence, digital transformation increases the importance of appropriate conflict resolution mechanisms for SEP/FRAND licensing. That is to say, once parties cannot reach an agreement of FRAND terms and seeking injunction is strictly restricted to the SEP holders in face of the willing implementers[3], the only way to unlock the stalemate is to ask an independent third party to settle the problem. However, the

[2] Patent wars are trembling the smartphone industry. What commenced after Apple v Google Android clash has converted now to a lengthy legal vortex that is going to include many parties from Amazon to ZTE.

[3] For more detail concerning injunction in SEP context, see: Pourrahim, M. (2019). Injunction in SEP: a fundamental right or an abusive behaviour. In: Dunand, Jean–Philippe, Dupont, Anne–Sylvie, Mahon, Pascal (eds). Le droit face à la révolution 4.0. Programme doctoral romand de droit. Zurich: Schulthess Verlag. Pp: 311–327.

huge rise of standards–related patent litigation has led to suggestions that such disputes could also be efficiently resolved through alternative dispute resolution (ADR) and in particular arbitration.

2. Arbitration vs. court litigation

Although arbitration is known for its various advantages over court litigation, assessing its effectiveness in SEP/FRAND context needs more examination. In this regard, following advantages for arbitration can be addressed:

- Possibility for parties to choose experts who not only have legal knowledge, but also know the complex technical and economic SEP/FRAND features.
- Assessing various patent portfolios is a big challenge for both judges and arbitrators. However, due to the greater flexibility in their scope, in the design of their proceedings, and in their decision criteria, arbitral tribunals are in a better position to handle this challenge than a state court which is basically designed for investigating individual patents.
- SEP portfolios consist of many patent families i.e. groups of patents granted by different jurisdictions but concerning the same technical invention. While courts are limited to territorial principle and to domestic SEPs of the portfolio, arbitration proceedings can be more flexible as it includes the entire SEP portfolios and can avoid conflict of law or potential forum shopping. While there is a single arbitral proceeding for entire SEP portfolio, on the other side, there are several national litigations each of which deals only with domestic SEPs in the portfolio resulting in different judgments that can be contradictory to each other. This single proceeding also outweigh arbitration over courts as it saves time and cost tremendously.
- Confidentiality is more observed in arbitration as the proceedings and awards are not public[4].
- Arbitration award are often binding and final unless the parties agree on an appeal procedure.

[4] Whether this feature is an advantage or drawback is debatable. But, what is mostly agreed upon is striking a balance between the business secret of parties and right to information.

3. Arbitration experience in SEP context

Arbitration plays a role as a fast-growing mechanism to settle SEP/FRAND disputes. In recent years, the telecommunications sector involving large companies such as Qualcomm, BlackBerry and Nokia are turning to international arbitration[5]. The International Court of Arbitration of the International Chamber of Commerce (ICC) for instance, has already arbitrated some SEP/ FRAND cases[6]. This increasing attention to arbitration in SEP context is accompanied by several legal developments such as follows:

1. On both sides of the Atlantic, antitrust authorities and SEP holders subject to FRAND commitment agree more in arbitrating FRAND disputes where there is a violation of antitrust or competition law. The EU Commission and the US Federal Trade Commission (FTC) have both acknowledged potential use of arbitration as a suitable option to facilitate the determination of SEP/FRAND proceedings[7]. In the same vein, the Court of Justice of European Union (CJEU) on the *Huawei* case rules that where the parties do not reach an agreement on the details of the FRAND terms, they may agree to request an independent party to settle the dispute[8].
2. The EU Commission through a new Communication in 2017, encourages the use of arbitration in SEP context stipulating that this mechanism can offer "swifter and less costly dispute resolution"[9].
3. Some SDOs have also inserted arbitration mechanism in their IP policies. For instance, Article 14.7 of DVB IP Policy states that "disputes on the terms offered by

[5] See e.g. BlackBerry v. Qualcomm (https://www.ipwatchdog.com/2017/06/02/blackberry-settles-arbitration-qualcomm-940-million-contract-dispute-patent-royalties/id=83882/).
[6] See e.g. the arbitral proceedings between InterDigital and Huawei, 30.09.2016 (www.sec.gov/Archives/edgar/data/1405495/000140549516000076/idcc-q39302016.htm); Nokia and LG Electronics (lexislegalnews.com/articles/20489/icc-issues-confidential-award-in-nokia-patent-dispute-with-lg-electronics)
[7] For the Commission see e.g. *Samsung* (Case AT.39939) Commission Decision, C [2014] 2891 final, Brussels, OJ C 350, 4.10.2014. (https://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf); for the FTC see e.g. *In the Matter of Motorola Mobility LLC & Google Inc.*, Decision and Order, FTC Jul.24, 2013, Docket No. C-4410. (https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf).
[8] Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp.*, EU:C:2015:477, para. 68.
[9] EUROPEAN COMMISSION, Communication on Setting Out the EU Approach to Standard Essential Patents, COM (2017) 712 Final, Brussels, 29.11.2017, p. 11.

a member may be resolved by arbitration"[10].

4. The WIPO Arbitration and Mediation Centre makes available tailored model submission agreements that parties may use to refer a dispute concerning the determination of FRAND terms. These model agreements seek to ensure a cost-and time- effective FRAND determination and have been developed further to a series of consultations conducted by the WIPO Centre with leading patent law, standardization and arbitration experts from several jurisdictions[11]. The WIPO also offers special guidance for SEP/FRAND ADR[12]. This guidance addresses important matters including scope, appointment procedure, procedural schedule, applicable law, confidentiality, interim measures and appeal.
5. The Munich IP Dispute Resolution Forum, in 2018, provided the "FRAND ADR Case Management Guidelines" which specifically set out a series of guidelines on FRAND issues and ADR mechanism including arbitration[13]. The Guidelines aim to assist corporate and legal decision makers in designing an efficient and strategic approach to FRAND disputes. They contain some distinctive features, such as assistance in defining the scope of FRAND-ADR proceedings, balancing confidentiality with public policy considerations, and evaluating the possibility to appeal the awards.

3– Arbitration challenges in SEP/FRAND disputes

Arbitration covers various IP subject matters in SEP/FRAND cases including licensing agreement and setting FRAND conditions. However, in many jurisdictions, disputes concerning patent validity and infringement have been traditionally viewed as inappropriate for arbitration, given the great public interest in challenging invalid patents. The US, for instance, in response to the growing public concerns about the enormous cost of patent litigation, removed this problem through Patent Act Amendment recognizing voluntary arbitration as a valid means for adjudicating disputes related to the validity and infringement of patents[14]. In France, arbitration is possible in cases concerning the validity

[10] Digital Video Broadcasting (DVB), (https://dvb.org/wp-content/uploads/2019/12/dvb_mou.pdf).
[11] See https://www.wipo.int/amc/en/center/specific-sectors/ict/frand/annex1/.
[12] WIPO, Guidance on WIPO FRAND Alternative Dispute Resolution (ADR) (2017) (https://www.wipo.int/export/sites/www/amc/en/docs/wipofrandadrguidance.pdf).
[13] See www.ipdr-forum.org/guidelines.
[14] 35 U.S.C. § 294(b).

of a patent, however, an arbitrator may not declare a French patent invalid; or in the Netherlands, the validity of a patent still falls within the exclusive jurisdiction of the District Court of The Hague.

Another challenge is regarding choice of law: a) the law applicable to the conduct of the arbitration proceedings, b) the law governing the arbitration clause, and c) the law applicable to the substance of the dispute. While the first is governed by the *lex loci arbitri,* the answer of the last two are challenging in SEP/FRAND cases. A patentee participating in an SDO's standard setting gives a commitment to license its patents under FRAND terms if those patents become "essential" to that standard. Therefore, when patentee makes FRAND commitment, there is no official contract between him and the implementer yet. The main dispute is usually on concluding that missing contract. Hence, when no contract exists thus far, discussion over choice of applicable law about any clause including that of arbitration is absurd.

Additionally, there is no consensus what FRAND commitment nature is; whether it is a promise to grant a licence, a third-party beneficiary contract, or a competition law obligation[15]. However, FRAND commitment certainly is in no way a contract between SEP holders and implementers who are not even known at the time of making such commitment. It makes no sense to look for applicable law to the substance of the dispute, which is typically chosen by the parties at the time the contract is concluded[16]. However, the lack of governing law on substance of FRAND-related disputes is not a specific problem of arbitration, because jurisdictions have no substantive law which sets FRAND terms. In fact, they have different rules for choice of law and varied substantive laws including patent, contract and competition law, each of which are given weight in a litigation. The EU Commission stipulates that "there is not one-size-fit-all solutions to what FRAND is: what

[15] This controversy raises a number of crises in arbitration context as well; for instance, in the third-party beneficiary assumption, one question is whether the arbitration clause applies to third–party beneficiaries.

[16] The SDOs can add *ex ante* arbitration clause in their IPR policies and require their participants to consider it as a part of FRAND declarations. However, apart from the question on its practicality, whether this policy is legitimate or is an excessive intervention in parties' freedom is disputable.

can be considered fair and reasonable differs from sector to sector and over time".

Empirical comparison and detailed economic analysis of similar licensing agreements have significant role in FRAND determination. This combination of different laws with empirical study and economic analysis makes choice of law very difficult if not impossible. That may explain why in the recent arbitration between *InterDigital* and *Huawei*, despite the agreement between the parties on arbitration, they could not agree on the governing law[17].

The final challenge is related to the enforceability of arbitration awards from two aspects: On the one hand, according to Article V(2)(b) of New York Convention, the competent authority of the country where the enforcement is sought may refuse to recognise and enforce an award which would be contrary to its public policy of the country. Competition law, on the other hand, which plays a strong role in SEP/FRAND disputes is regarded as a matter of public policy within the meaning of the New York Convention[18]. Hence, the arbitral awards in violation of European competition law (Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)) would breach public policy and be declared unenforceable by reviewing courts. Accordingly, the important question is whether arbitrators are required to apply EU competition law, or they can restrict themselves to what the parties submitted. Advocate General Wathelet in his opinion in the *Genentech* case, favours a comprehensive EU competition law assessment independent of the parties' submissions[19]. He argues that limiting the scope of the review of arbitral awards on the ground that whether the infringement of public policy was raised and debated before the arbitrators is contrary to

[17] InterDigital Commc'n, Inc. v. Huawei Inv. & Holding Co., 166 F. Supp. 3d 463 (S.D.N.Y. 2016).
[18] According to the CJEU, the provisions of Articles 101 of TFEU is a matter of public policy: Case C-126/97 *Eco Swiss China Time Ltd. v. Benetton Int'l N. V.,* EU:C:1999:269, paras. 36–39; similarly, the Commission lays out that the Article 102 TFEU is a matter of public policy too: Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.4.2004, at § II-A-3.
[19] Opinion of Advocate General Wathelet, 17 March 2016, Case C-567/14, EU:C:2016:177, paras 55–72.

the effectiveness of EU law.

He also states that the arbitrators' task is to interpret and apply the contract binding to the parties which may naturally need to apply EU law as well "if it forms part of the law applicable to the contract (*lex contractus*) or the law applicable to the arbitration (*lex arbitri*). In his view, arbitrators, are not responsible of reviewing compliance with European public policy rules. Instead it is the responsibility of the reviewing courts of Member States to do this task during an action for annulment or proceedings for recognition and enforcement[20].

However, in the absence of CJEU's judgement, the question whether an arbitration award should be compliance with competition law is still open.

The second aspect is the old controversy existing in international arbitration on whether or not courts shall enforce arbitral awards which are not made under specific national law. This interpretation was seen in the *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc.* case where *Gould* interpreted Article V(1)(e) of the New York Convention that the Convention applies only to arbitral awards made in accordance with the national arbitration law of a Party State and the party against whom enforcement is sought may establish that enforcement should not be granted if it can show that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made[21]. In other words, the possibility of enforcing arbitral awards grounded under substantive general principles of law may be treated differently, as opposed to awards made under national law. The Ninth Circuit having rejected this interpretation concluded that "an award need not be made under a national law for a court to entertain jurisdiction over its enforcement pursuant to the Convention"[22].

This misunderstanding may frequently happen in SEP/FRAND context. As discussed earlier, FRAND disputes are governed under different laws and hugely affected by each case fact, ambient conditions, and legal and economic analyses.

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[20] *Ibid*. para. 61.
[21] 887 F.2d 1357 (9th Cir. 1989), para. 35. (https://law.resource.org/pub/us/case/reporter/F2/887/887.F2d.1357.88-5881.88-5879.html)
[22] 887 F.2d 1357 (9th Cir. 1989), para. 40.

4. Conclusion

Arbitration in SEP/FRAND context has received attention increasingly in the eyes of technology standards players, public authorities and policy makers. As an effective mechanism with significant advantages, arbitration has showed its capability to settle SEP/FRAND disputes. It is progressively being equipped by a variety of guidelines and practices provided by different legal bodies such as WIPO Arbitration Centre and Munich IP Dispute Resolution Forum. However, arbitration as a newly used mechanism still faces challenges including compliance with competition law that calls for a higher degree of public authorities' attention and academic study.

Dr. S. Mohammadali Abdollahi has received his M.A. and Ph.D. in international law from Shahid Beheshti University (SBU). His main field of interest is Alternative Dispute Settlement (ADR), international arbitration and sports arbitration. He has published articles mostly on international arbitration in academic journals. He has also acted as legal advisor and advocate in several arbitration cases before international arbitration tribunals.

Arbitrator's Appointment in EU's Proposal for ISDS Reform and the Experience of Court of Arbitration for Sport

S. Mohammadali Abdollahi

Ph.D. Candidate, International Law, Shahid Beheshti University

I. Introduction

Since the notorious *Lauder*[23] case, Investor-State Dispute Settlement (ISDS) has faced trenchant criticisms over its consistency and coherence. The *Lauder* case was followed by a series of judgments rendered in disputes initiated as a result of 1990s economic crisis in Argentina[24], during which international investment community witnessed different arbitral tribunals rendering conflicting, even contradictory, awards in similar, or even same, situations. In *CMS* and *LG&E* cases, for instance, which were both related to the same situation in Argentina, the first tribunal rejected Argentina's defense based on 'necessity'[25], while the second tribunal accepted the same defense[26]. The sharp contrast between the two awards should be considered having the facts in mind that the parties to both disputes were a US company investing in Argentina, the applicable law was 1991 BIT between the

[23] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Arbitration Tribunal, Award, September 3, 2001
[24] For a detailed discussion on the Argentina disputes *see* William W. Burke-White, *The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System*, 3 Asian J. WTO & Int'l Health L. & Policy 199 (2008)
[25] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID, Case No. ARB/01/8, Award, April 20, 2005, ¶331
[26] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID, Case No. ARB/02/1, Decision on Liability, October 3, 2006, ¶257

United States and Argentina, and the parties submitted almost the same arguments before each tribunal.

The emergence of conflicting awards, which is apt to increase in future[27], is considered a threat for the consistency and coherence of the ISDS[28], since it definitely affects the predictability and stability of the entire system[29]; the characteristics which are fundamental to each legal system[30]. Concerns over consistency of ISDS have not remained in academic debates only, but has penetrated in the institutional arena as well. In 2004, Secretary-General of the International Center for the Settlement of Investment Disputes (ICSID) pointed to the desirability of an appellate mechanism within the ICSID structure to address concerns over consistency of arbitral awards[31], but the idea was shelved due to lack of support from member states[32]. Later, the issue has been being examined in the Organization for Economic Co-operation and Development (OECD) since 2002 and was reflected in its subsequent Working Papers on International Investment[33]. The study, in addition to the identifying concerns over inconsistency of awards in ISDS, proposed some issues for discussions among States for future reforms[34]. Furthermore, the issue was discussed in the United Nations Conference for Trade and Development (UNCTAD), which devoted its 2015 World Investment Report to 'Reforming International Investment Governance'. The Report suggested certain options for future reforms of ISDS, including an appellate mechanism or a standing investment court[35].

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[27] Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Fordham L. Rev. 1521, 1583 (2005)
[28] ICSID, *Suggested changes to the ICSID rules and regulations*, Working Paper of the ICSID Secretariat, May 12, 2005
[29] Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AJIL 361, 375-76 (2018)
[30] Franck, *supra* n. 5, at 1584
[31] ICSID, *Possible Improvements to the Framework for ICSID Arbitration* 14, ICSID Secretariat Discussion Paper, 22 October 2004, 14
[32] Suggested changes to the ICSID rules and regulations, *supra* n. 6, at 4
[33] *See* e.g. David Gaukrodger and Kathryn Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, pp. 58-63
[34] *Ibid.*, at 62
[35] UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* 134-35 (United Nations Publications 2015)

In recent years, and subsequent to a number of withdrawals from the ICSID Convention[36] and other threats to do so[37], the matter has become the center of attention for the investment community, to the extent that many scholars describe it as a 'legitimacy crisis'[38].

Based on the above background, the United Nations Commission on International Trade Law (UNCITRAL) mandated its Working Group III (WG III) to work on the 'possible reform of investor-State dispute settlement'[39]. Due to instructions of the UNCITRAL that the WG III shall discharge its mandate through a government-led process and participation of all stakeholders[40], all governments, institutions and scholars in the field were invited to attend its sessions and participate in the deliberations on the subject matter of ISDS reforms[41].

One of the proposals submitted to the WG III is the submission from the European Union and its member States received by the WG III on 18 January 2019[42]. The submission mainly relates to the establishment of a standing mechanism for the settlement of international investment disputes.

The present essay suggests that the EU's submission would quite transform the nature of ISDS from '*arbitration*' to a '*court-like*' mechanism, while addressing the present concerns does not necessarily call for such transformation. The idea is specifically supported by reference to the experience of the Court of Arbitration for Sport (CAS). To this end, the following section will briefly explain main aspects of the EU's submission and relevant criticisms, which will set the scene for the third section on some thoughts on the aforementioned submission. The essay concludes with the idea that by introducing some

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[36] Bolivia, Ecuador and Venezuela withdrew from ICSID in 2007, 2009 and 2012 respectively. *See* Zhiyong Zhang, *How to Reform Investor-to-State Dispute Settlement Mechanism: EU's Practice and Implication*, 6 J. WTO & China 27, 29 n. 8 (2016)

[37] For instance, Pakistan announced in 2016 that it will no longer consent to arbitration clauses in its BITs. *See* David M. Howard, *Creating Consistency through a World Investment Court*, 41 Fordham Int'l L. J. 1, 25 (2017)

[38] Franck, *supra* n. 5, at *1521*; *See also* Ilija Mitrev Penusliski, *The Backlash Against Investment Arbitration* 507-508 (Michael Waibel et al. eds., Kluwer Law International 2010); N. Jansen Calamita, *The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime*, 18 J. World Inv. & Trade 585, 586 (2017); Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 Eur. J. Int'l L. 875, 894 (2011)

[39] UNCITRAL, *Report of the United Nations on International Trade Law* 264, U.N. Doc. A/72/17 (2017)

[40] *Ibid.*, at 264

[41] UNCITRAL WG III, *Annotated Provisional Agenda* 1-2, U.N. Doc. A/CN.9/WG.III/WP.141 (2017)

[42] UNCITRAL WG III, *Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union and its Member States*, U.N. Doc. A/CN.9/WG.III/WP.159/Add.1 (2019)

amendments to the EU's proposal, it would be possible to address the present concerns, while retaining the nature of the mechanism as 'arbitration'.

II. EU's Submission for ISDS Reform

Based on the main concerns identified by the WG III with regard to ISDS[43], the EU suggests that the concerns are, on the one hand, 'systemic', and, on the other hand, 'intertwined'[44], and thus, any successful reform should address all concerns in a systemic approach[45]. The EU then argues that these intertwined concerns may be addressed most appropriately through establishing a 'standing mechanism' for ISDS[46].

The proposed standing mechanism would consist of a 'first instance', which would act similar to the current arbitral tribunals[47], and an 'appellate Tribunal', which would hear appeals from the first instance tribunals on grounds of errors of law or manifest errors in the appreciation of facts[48]. Other aspects of such mechanisms, such as duration, costs, transparency, enforcement, financing etc. are also discussed in the EU's submission[49].

An important part of the EU's submission, however, is its approach towards the adjudicators and their appointment. According to the submission, the standing mechanism shall consist of 'full-time adjudicators' without any outside activities[50]. The adjudicators should be selected from among individuals who are qualified for the appointment, in their home countries, to highest judicial offices or be jurisconsults of recognized competence in international law[51]. They are also subject to strict ethical requirement, especially regarding their independence and impartiality[52].

Some scholars have expressed concerns over EU's model with regard to the full-time adjudicators. The idea is that a standing body with full-time adjudicators who will take

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[43] These concerns include (i) lack of consistency, coherence, predictability and correctness of arbitral decisions; (ii) Concerns pertaining to arbitrators and decision makers; (iii) cost and duration of ISDS cases. *See* UNCITRAL WG III, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (advance copy)*, U.N. Doc. A/CN.9/964 (2018)
[44] UNCITRAL WG III, *supra* n. 20, at 10
[45] *Ibid.*, at 10
[46] *Ibid.*, at 40 et seq.
[47] *Ibid.*, at 13
[48] *Ibid.*, at 14
[49] *Ibid.*, at 28 et seq.
[50] *Ibid.*, at 16
[51] *Ibid.*, at 20
[52] *Ibid.*, at 18-19

office for a fixed period and will not be appointed by the disputing parties may not be described as 'arbitration' anymore[53], but would be more similar to a 'court system'[54].

This is while arbitration has acquired global popularity, *inter alia*, due to its broad extent of party autonomy, which enables 'the parties' to appoint their arbitrators, and to decide over the arbitration institution and the *lex arbitri*[55]. By depriving the parties from such freedom and leaving this task with an appointing authority of a standing court, the arbitration would be emptied from one of its inherent aspects. In such a scenario, it is also argued that if the procedure is not qualified as arbitration, any awards rendered by the said standing court would not be enforceable based on the current enforcement instruments, such as the 1958 New York Convention[56].

III. How to Retain the Nature of ISDS as 'Arbitration'?

It may be understood from the above discussion that the main challenge with regard to the appointment of arbitrators relates to the balance between the need to guarantee impartiality, independence, and expertise of the arbitrators, and at the same time, to preserve party autonomy over their appointment.

To achieve that balance, the use of 'closed lists' would be recommendable. Applying closed lists in arbitration, although is not unprecedented[57], is mostly developed by the CAS in the settlement of sport disputes. CAS maintains several lists of arbitrators and mediators, including a General List, Football List, Anti-Doping List and Mediators List, which are all published on its website[58] and are updated periodically. CAS rules require that any individual may only be appointed by the parties as arbitrator if his/her name appears on the arbitrators' list of the CAS[59].

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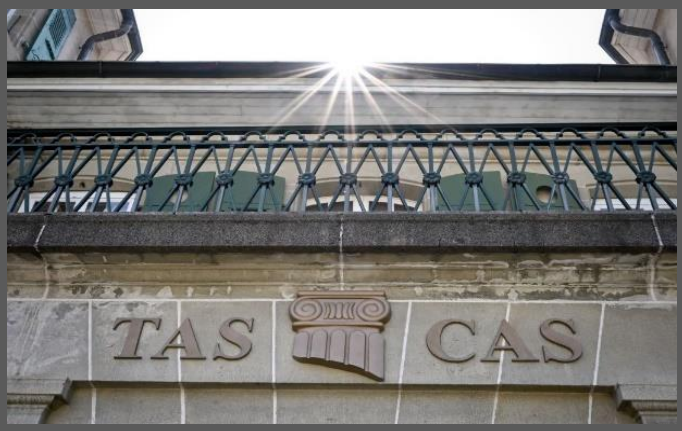
[53] August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 J. Int'l Eco. L. 761, 766 (2016)
[54] UNCITRAL, *Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS), Note by the Secretariat* 25, U.N. Doc. A/CN.9/917 (2017)
[55] Giovanni Zarra, *The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?*, 17 Chinese J. Int'l L.137, 176 (2018)
[56] UNCITRAL, *supra* n. 32, at 27
[57] *See* e.g. GTA Dispute Resolution Rules, Article 17
[58] *See* https://www.tas-cas.org/en/index.html (accessed at 12 May 2020)
[59] Court of Arbitration for Sport, *Code of Sports-Related Arbitration* R33 (2019), available at https://www.tas-cas.org/en/icas/code-statutes-of-icas-and-cas.html (accessed at May 14, 2020) [hereinafter Code of Sports-Related Arbitration]

Closed lists are criticized to limit parties' freedom of choice, as it was the case in *Lazutina & Danilova*[60], but at the same time they are perceived to guarantee high-quality dispute resolution through expertise of experienced figures in the field[61]. CAS arbitrators are selected by the ICAS from among personalities 'with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language'[62].

ICAS members are representatives of different stakeholders in world of sports, namely International Olympic Committee (IOC), National Olympic Committees (NOCs), International Federations (IFs), and athletes[63]. Therefore, first, disputing parties 'indirectly' select the lists members and then, will directly appoint their arbitrators for each dispute from the relevant list. At the same time, they are assured that arbitrators possess the required knowledge and experience in the field.



Furthermore, CAS arbitrators are subject to strict provisions to preserve their independence and impartiality. *Firstly*, CAS arbitrators, similar to most arbitration rules, are required to immediately disclose any circumstances which may cast doubt over their independence and impartiality[64]. Any violation of this rule may result in the disqualification of the challenged arbitrator[65] or removal of his/her name from CAS lists[66].

[60] In 2003, two athletes contested, *inter alia*, the closed-list policy as undermining their freedom to appoint an arbitrator of their choice. The Swiss Federal Tribunal rejected this challenge, ruling that the closed list system was justified by the need for sports-specific legal expertise, timely resolution of such disputes, and consistency. *See* Philippe Cavalieros & Kim Janet, *Can the Arbitral Community Learn from Sports Arbitration*, 32 J. Int'l Arb. 237, 247 (2015)
[61] Despina Mavromati & Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* 149 (Kluwer Law International 2013)
[62] Code of Sports-Related Arbitration, S14
[63] *Ibid.*, at S4
[64] *Ibid.*, at S18, R33
[65] *Ibid.*, at R34, R36
[66] *Ibid.*, at S19; *See also* Philippe Cavalieros & Kim Janet, *Can the Arbitral Community Learn from Sports Arbitration*, 32 J. Int'l Arb. 237, 250 (2015)

Secondly, in contrast to many arbitration rules which are silent on the so-called double-hatting[67], CAS has appropriately regulated this risk for independence and impartiality of its arbitrators. From its 2010 amendment, CAS has expressly prohibited the double-hat practice of its arbitrators[68], so they 'may not act as counsel for a party before the CAS'[69].

In sum, the CAS has provided a reasonable balance between the aforementioned goals of expertise, independence, and impartiality, while it still grants the parties a broad choice to appoint their desired arbitrator from a pool of well-qualified personalities in the field.

IV. Conclusion

The EU's proposal to establish a standing court for ISDS contains various aspects which may benefit ISDS, but should be studied in an independent research. Its prescription for the appointment of adjudicators, however, may be criticized, since it *unnecessarily* transforms the nature of arbitration to court-like structures. The said shift is described as '*unnecessary*', since the relevant concerns over the appointment of arbitrators in ISDS may be addressed without such a systemic reform, and through creating a balance between the desired goals of independence, impartiality, expertise, and, most importantly, party autonomy.

As concisely discussed above, the CAS practice may be used as a model in this regard. Scrutinizing the CAS experience may offer some hints for architectures of the future system to preserve arbitral nature of ISDS to the greatest extent possible. Of course, it is undeniable that applying such model to ISDS definitely requires further detailed research, but the matter worth such scrutiny due to distinct advantages of arbitration as the main method investment dispute settlement. As Professor Frank has wittily quoted from Elihu Lauterpacht, arbitration is 'an important component of the international system and cannot be done away with.'[70]

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[67] Double-hat is called to an individuals practice both as an arbitrator and counsel, which is considered by many scholars to affect his/her independence and impartiality under certain circumstances.
[68] Mavromati & Reeb, *supra* n. 38, at 145
[69] Code of Sports-Related Arbitration, R34, S18
[70] Franck, *supra* n. 5, at 1606

Dr. Nima Nasrollahi Shahri, PhD, International law (Allameh Tabataba'i University), LLM, oil and gas law (University of Dundee), LLM, International Commercial Law (Shahid Beheshti University), is a partner at Elite Pars Law Firm and heads the Energy and Investment Law practices of the firm. He has advised major international oil companies with respect to their participation in Iranian oil and gas projects. He is also member of faculty and the Director of the Oil and Gas LLM program at the University of Science and Culture in Tehran, where he is now supervising several dissertation theses.

Recalibrating Investment Arbitration; the Need to Move away from Commercial Arbitration[71]

Dr. Nima Nasrollahi Shahri[72]

Assistant Professor at Science and Culture University of Tehran

With the increase in the number of Bilateral Investment Treaties (BITs) has come an increase in the number of arbitration cases between investors and host states, according to UNCTAD reports, from five in 1995 to 337 in 2010.[73] Many cases result in huge awards in favor of investors which inevitably need to be paid from host states' taxpayers' pockets. In these cases, the arbitral decisions could conceivably restrict the state's policy making powers. This, along with many other reasons, has given rise to debates as to the legitimacy of Investment State Dispute Settlement (ISDS). Much of this could be traced back to

[71] The title of this article was inspired by an excellent talk entitled "Recalibrating International Investment Law' delivered by Eric De Brabandere at Boston College Law School on November 15 2017. The talk is available on YouTube at https://m.youtube.com/watch?v=Xt5xjZDXR3Y&t=1533s. last accessed 20 June 2020.

[72] Nima Nasrollahi Shahri is an assistant professor at Science and Culture University of Tehran and directs the oils and gas law department. He is also a partner at Elite Pars Law Firm in Tehran, where he practices claims management, arbitration, and dispute settlement in the energy sector.

[73] . J Prez, M Gistelinik, D Karbala, Sleeping Lions, International Investment Treaties, state Investor dispute and access to food, land and water, Oxfam 2011 p4.

similarities between ISDS and commercial arbitration which is not easily reconcilable with the public international law nature of ISDS

In retrospect, similarities between these two dispute settlement mechanisms appear not only natural but somewhat inexorable. Investment arbitration was developed at a later point in time compared to commercial arbitration as a model to resolve disputes concerning alleged violations of investment standards by host states. The very first instance of exploiting alternative dispute resolution methods to resolve investment disputes was attempts of the World Bank to mediate between Iran and United Kingdom in the wake of the nationalization of oil industry in Iran in 1951[74]. Interestingly, Iran was unwilling to submit to the World Bank mediation since it posited that the World Bank could not serve as a neutral mediator owing to its links with the developed world. Later on,the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (ICSID)[75] established ICSID Center which maintains clear links and affiliation to the World Bank.

Earlier models of BITs and investment treaties did not contain an arbitration clause and subjected disputes to the jurisdiction of the courts of the host state, but gradually arbitration was replaced in later models. By this time, arbitration was already an established mechanism in commercial disputes. There is therefore no surprise that investment arbitration grew to be modeled on international commercial arbitration as far as the procedures and forms are concerned. For the same reason, most international arbitration institutions handle investment arbitration alongside commercial cases, based on the same rules of procedure. This means that investment disputes are more often than not decided by the same type of people who handle commercial disputes. This is while investment arbitration is different in many respects. Most importantly, in investment arbitration one side of the dispute, i.e. the respondent, is necessarily a state. States' obligations, which are the main theme of the dispute, are rooted in international law but

[74] Nathan K. V. S. K., The ICSID Convention: The Law of the International Centre for Settlement of Investment Disputes , JurisNet, LLC (June 1, 2000)
[75] Convention on the Settlement of Investment Disputes between States and Nationals of other States (adopted on 18 March 1965, entered into force on 14 October 1966) 575 UNTS 159, ICSID Convention. The original text is reprinted in Rosemary G. Rayfuse and Elihu Lauterpacht, ICSID Reports: Reports of Cases Decided on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (vol 1,
Cambridge University Press 1993) 3 et seqq.

the means of adjudication is private. This creates a divide between substance and form. Put differently, the same people who arbitrate commercial disputes follow the same procedures to decide on issues of a completely different nature.

This imbalance between form and substance in the area of investment arbitration is most visible when states resort to other areas of international law such as human rights law with which commercial arbitrators are likely unacquainted. For example, investment tribunals get uncomfortable when human rights arguments are advanced by states to justify deviations from BIT obligations[76].

This brief note discusses why there is a need for investment arbitration to move away from what it originated from i.e. commercial arbitration. ICSID pioneered making changes to its rules in 2006 to make them better compatible with public international law concerns. UNCITRAL followed suit by introducing UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in 2014. Having said this, discussions of legitimacy in investment arbitration still raises eyebrows among the commercial arbitration circle[77].

1. International Investment Law; Form Versus Substance

International investment law is a broad field comprising of substantive investment law and procedural investment law. Most academic books written on international investment law cover either of these two fields[78]. Substantive investment law is rooted in public international law and its rules are derived mainly from bilateral investment treaties signed between countries across different levels of development as well as some regional or sector specific multilateral investment treaties such as the Energy Charter Treaty. Investment dispute settlement on the other hand is administered by arbitration institutes, ICSID, or ad hoc arbitration tribunals forms based on UNCITRAL Arbitration Rules.

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[76] See for Example: Nima Nasrollahi Shahri, The Place of Human Rights in ICSID Structure and Arbitration, PhD thesis defended at Allameh Tabataba'i University in September 2017.
[77] See for example Gary Born Talk on Bilateral Arbitration Treaty Regime on YouTube available at : https://m.youtube.com/watch?v=qXIYlExG_D0 last accessed 20 June 2020.
[78] See for example: Jeffery Commission and Rahim Moloo, Procedural Issues in International Investment Arbitration (Oxford, May 2018)
Or:
Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, (Oxford, December 2012)

Investment standards, which could be referred to as substantive investment law, include *inter alia* Non-discrimination, Fair and Equitable Treatment, National Treatment, Most Favored Nations Treatment as well as compensation to be paid in case of expropriation and nationalization. These standards, which were once subject of heated debate between developing and developed countries[79], are now fairly established and are commonly found in BITs.

Investment arbitration, which is similarly agreed upon in international treaties, is the mechanism envisaged to avert referral of investment disputes to the courts of host states, which may be considered pre-disposed to be biased in favor of the host state. Arbitration clauses in treaties generally refer to an arbitral institution that provides services in connection with investment treaty arbitration proceedings and has its own arbitration rules, e.g. International Centre for Settlement of Investment Disputes ("ICSID"), the Permanent Court of Arbitration ("PCA"), the Stockholm Chamber of Commerce ("SCC") or the International Court of Arbitration of the International Chamber of Commerce ("ICC"). Some BITs refer disputes to ICSID additional facilities in case either the host state or the country of nationality of the investor have not acceded to ICSID convention. Some other BITs including most BITs concluded by Islamic Republic of Iran refer disputes to ad hoc arbitration under UNCITRAL Arbitration Rules. In all cases, the rules of procedure are either inspired by or completely similar to those used in commercial arbitration.

Many procedural factors that are commonly referred to as advantages of commercial arbitration i.e. confidentiality, privity of arbitration agreement or finality of awards[80] are increasingly viewed as the main pitfalls of investment arbitration in view of the public international law character of ISDS.

[79] Eric De Brabandere, International Investment Laws, Sources of Rights and Obligations, (Martinus Nijhoff Publishers,2012) p 112.
[80] See Margaret Moses, The Principles and Practice of International Commercial Arbitration, (Cambridge University Press, 2008), p 49.

2. Relevance of Investment Arbitration to International Law:

Since one party to an investment dispute is necessarily a state, public international law has an important role to play in investment arbitration. For one thing the main occupation of an investment tribunal is to assess the states' allegiance to its obligations under the BIT, an international instrument.

ICSID Convention recognizes parties' choice of the applicable law, but at the same time also secures a place for international law in case the parties fail to make an option. Article 42 of ICSID convention highlights public international law as part of the applicable law to an investment dispute.

Article 42 of ICSID stipulates that "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable…"

According to Aron Broches[81], reference to international law clearly refers to international law in the sense of article 38 of the ICJ Statute. He posits that the tribunal should first look into the law of the country concerned and then the result should be measured against the yardstick of international law. In this sense international law is a supervisory source compliance with which is mandatory.

In many arbitration cases, tribunals have applied public international law to the case. In fact, in the majority of BITs, international law is selected along with the domestic laws of the investment-importing country i.e. the host state. Even in cases when parties had explicitly selected the domestic laws of a particular country as the law applicable to the dispute, tribunals have highlighted the controlling and supervisory role of public international law.

[81] Aron Broches was the General Counsel of the World Bank the main drafter and negotiator of the ICSID Convention; and he became the first Secretary-General of ICSID.
Aron Broches, Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, ICSID Review—Foreign Investment Law Journal, Vol. 2, No. 2, p. 287 (1987)

3. Investment Arbitration Legitimacy Crisis and Human Rights

"The so-called legitimacy crisis of investment treaty arbitration as ISDS seems to be propelled by a growing skepticism of some states"[82]. The skepticism towards investment treaty arbitration is most pronounced among the Latin American states which has driven Bolivia, Venezuela, and Ecuador to withdraw from ICSID in recent years[83]. Ecuador completely split from ISDS by disengaging from all BITs. Brazil, on the other hand, has never even ratified any of the investment treaties it negotiated and has no intention to change this practice in the future[84].

"The Background of the legitimacy crisis is manifold but seems to be at least partially rooted in the public international law element of ISDS." For example, the need for transparency, which is affiliated with the human right to information as per public international law, and confidentiality of the arbitration system are often cited as a ground for illegitimacy of ISDS[85].

There are also claims that ISDS is systematically biased in favor of investors and that investors, particularly those coming from developed countries are treated favorably. Some quantitative studies seem to verify these concerns[86]. These studies often investigate how BITs are interpreted in favor of investors and how such favorable interpretation is accentuated when investors come from a developed background. In the same vein, the institutional links between ICSID and the World bank have been called into question[87].

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[82] Gus Van Harten, "Arbitrator Behavior in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration" Osgoode Hall Law Journal 50.1 (2012): 211-268.

[83] Andrés A. Mezgravis, 'The Arbitration Review of the Americas 2014: Venezuela' (17 October 2013) Global Arbitration Review; Rodrigo Jijón-Letort and Juan M. Marchán, 'The Arbitration Review of the Americas 2018: Ecuador' (29 August 2017) Global Arbitration Review.

[84] Kathryn Gordon and Joachim Pohl, 'Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World' (2015) OECD Working Papers on International Investment 2015/02

[85] J.Atic(2004) "Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process". In NA FTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects, edited by Todd Weiler, p. 135.

[86] Gus Van Harten, "Arbitrator Behavior in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration" Osgoode Hall Law Journal 50.1 (2012): 211-268.

[87] [87] Susan Franck, "Empirically Evaluating Claims About Investment Treaty Arbitration", North Carolina Review, Vol. 86, p. 1, 2007.

Another major bone of contention is the stance of investment tribunals towards human rights law as part of public international law. Human rights law is particularly relevant when the legally permissible operations of foreign investors encroach on the human rights of populations residing in the host state. Hence, states resort to human rights arguments to justify their non-fulfilment of investment obligations. In many of such cases, investment tribunals have shown a propensity to disregard human rights arguments advanced by states or amicus curiae submissions from NGOs or indigenous communities. ICSID's decision to reject the petition submitted jointly by the European Center for Constitutional and Human Rights and indigenous communities on 26 June 2012 sparked some debate in the academia [88]. The tribunal held that Human Rights law had no relevance to the case. However, in another case Suez (and others) v Argentine Republic (Case No ARB/03/19 dated 30th July 2010) the ICSID Tribunal stated: "Argentina is subject to both international obligations i.e. human rights and treaty obligation [sic], and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive".

The first decision in ICSID wherein Human Rights issues were thoroughly discussed and examined, and at the same time, the presence of a relationship between Human Rights and Investment Law was confirmed —though tacitly— was Mondev in 2002. This is the sole case where ICSID's reliance on Human Rights results in favor of the host state.

Different reasons could be cited to justify reluctance of arbitral tribunals to give weight to human rights arguments of host states. Professor Moshe Hirsch argues that investment tribunals' unwillingness to give much weight to human rights arguments has to do with the socio-cultural divide between the two legal regimes. While it is commonplace to use norms from other legal regimes in investment tribunals, with the exception of Mondev (2002)

[88] . See for example: ECCHR Commentary: " Human rights inapplicable in international investment arbitration: A commentary on the non-admission of ECCHR and indigenous communities as amici curia before the ICSID Tribunal" Berlin July 2012.

award[89], tribunals have consistently opposed the incorporation of human rights in investment disputes[90]. He believes that the cultural distance between these two branches of international law and their different social settings justify the normative gap. Therefore, as long as there is not a change in the socio-cultural setting within any of the communities or the way these two branches interact, the normative differences are expected to remain in place.

4. Conclusion:

When ICSID system was designed, it was imagined that around 95 percent of cases would be under investment contracts and concessions and not under investment treaties.[91] This is probably the reason why "the model of commercial-style arbitration was transplanted to the system for the settlement of investor-State disputes, without differentiating between contract-based and treaty-based disputes"[92]. This initial presumption is not withstand the test of time and now the vast majority of investment disputes are treaty based.

Today, we stand at a daunting juncture, where due to growing concerns and mounting criticism, there is a risk that the whole system of ISDS may collapse. This system reflects a compromise designed to resolve longstanding differences between developing and developed countries in public international law and has thus far successfully achieved many of its original goals. Now that experience has lay bare its defects giving rise to skepticism, it is time to remodel the ISDS system by accommodating the dissenting voices coming from developing countries.

The author of this piece believes that in order for ISDS to be revitalized before it reaches its unfortunate demise, it should distance itself from commercial arbitration with all strings attached. To do so, a whole new system should be designed based on specifications of investment state disputes which is more compatible with the public international law nature of investment law. The Multilateral Investment Court project advanced by the European Commission is one such response to promote consistency in investment

[89] *Mondev International Ltd. v. United States of America*, *ICSID Case No. ARB(AF)/99/2.*
[90] Some of the case in which human rights arguments were rejected for varying reasons include: Biloune , Eur-otunnel, Azurix, Siemens and Sampra awards.
[91]JC Thomas and HK Dhillon, 'The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards' (2017) 32(3) ICSID Rev–FILJ 459
[92] Colin Brown, The 3d Vienna Investment Arbitration Debate 22 June 2018 The European Union's approach to investment dispute settlement. Available online at: https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157112.pdf accessed 20 June 2020.

arbitration[93]. It has now transpired that sporadic efforts to reform ISDS pioneered by ICSID in 2006, which initially enticed much enthusiasm, have proven inadequate. Therefore, a new balance must be struck between the interests of capital exporting countries and capital importing countries.

[93] David M. Howard, Creating Consistency Through a World Investment Court, Fordham International Law Journal, Volume 41, Issue 1.