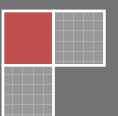


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**ENFORCEMENT OF ARBITRAL
MEASURES TO PROTECT PRIVATE
COMMERCIAL INVESTMENTS**



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BY

RODNY DANIEL

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By Rodny Daniel¹

1. Introduction

1.1 Because of the globalization of today's world village, communication network actually provides a wonderful possibility to transcend boundaries and bring closer all bodies forming the international community. Because of the dying out of all frontiers to the profit of a new type of social, human and technical communication interface, it becomes obvious that we all face an increasing demand of goods, corporate and public services and commercial cooperation. Companies, profit corporations, multinationals and private individuals investing abroad must first take into consideration two major situations, while obligations in either governance deficit zone or not remain the same for the investor.

1.1.2. To the question of whether investment should happen in a zone where exists an obvious governance deficit, in that particular case, the investment problem remains a major issue as investor must carefully scrutinize the hosting State situation prior effecting any investment. Some thoughts must absolutely be regarded skilfully as it might be complicate enough to overcome any economically or politically troubling situation when it suddenly appears.

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This is the point related to the controlling of information, access to database on various interrogative aspects such as :

- Do companies believe that wherever they invest they should be able to execute all processes and policies which give a possibility to respect domestic legislation and international instruments, as described in the “*Principes directeurs de l’OCDE à l’intention des entreprises multinationales*”?
- How companies can be informed on the real impact (positive and / or negative) of their investments in the host country and how do they evaluate the situation?
- Can investment companies apply international norms related to the conduct of corporate businesses that are important activities in deficit government zones, and as such contributing to the elaboration of these norms?
- These parameters may probably concern special areas such as human rights protection, security forces management², fight against corruption³, promotion of transparency and the responsibility of private and public enterprises.
- What particular measures do investment companies undertake to evaluate the country’s policy and the willingness of the host State to respect human rights?

2. Les Principes volontaires concernant la sécurité et les droits de l’homme.

3. Business principles for Countering Bribery: TI Six steps Process, Transparency International.

- Do investment companies exercise an intensified surveillance to respond to questions, such as : Do authorities and non political organizations in the host country respect human rights ? For example, if the country faces an armed conflict, do belligerent respect international humanitarian law?
- What is the situation about human rights in the regions which are not under real control and can international humanitarian law be respected in case of armed conflict?
- Which measures do investment companies undertake to find proper solutions to settle all arising conflicts via democratic dialogue and other peaceful means?

Quite often, governance deficit zones pose an important problematic concerning extreme situations. Therefore, companies must be in a strong position to manage security risk in these governance deficit zones and be present quite permanently. Under these circumstances, authorities play an essential part in the political and judicial process while maintaining law and order to respect their obligations towards human rights. It means these companies should have an interest to get their management practice in full equation with human rights. But, do we have the right practice about managing relations with public and private security services as described in “*Principes volontaires concernant la sécurité et les droits de l’homme*”?

Many questions may come out because multilateral investments in governance deficit zones are fully at risk and it is a fact that companies must do the needful to protect their personnel and efforts against violent conflicts, extortion and other criminal activities. Do companies hold regular consultations with public authorities in the host country?

In addition, what do companies do to verify the informational background of the host State and how do they evaluate the potential / possible risks that may suddenly arise ?

1.1.3. Is the investment to happen in a politically “stable” country with no governance deficit ? Domestic rules apply thereof and investment companies must also endorse domestic legislative acts. A politically organized environment, whatsoever, imposes its rules and obligations upon investors, therefore, the difficulty emanates from those companies targeting a more profitable business because of the weak domestic situation, the vulnerability of the host State, and the need for political leaders to get more. This psychological aspect of private commercial investment acts as a brake upon investment and however, should encourage investor to envision a sustainable investment fully complying with the different regulations in place. Tactically, this poses a problem as conflicts emerging between domestic law, international law and the appropriate measures to enforce all decision making lead to a point where arbitral measures must be reviewed, adapted or innovated according to the immediate investor-state posture.

2. Foreign Commercial Investment vs Foreign Trade Policy

2.1 There is no doubt that foreign investment is vital to economic growth. Investment creates jobs (but let us remember that there is an enormous difference between job and work!), increases domestic productivity, gives preferential treatment to export, raises living standards of the employed population, provides revenue and gives access to many other services.

Foreign commercial investment encourages democratic dialogue between employees and companies managers, implements better communication between investors and State. However, these situations generate particular conflicting cases which raise the question of arbitral settlement. Investor-State disputes

always show some kind of public interests because these issues are often absent from international commercial arbitration. Arbitral measures becomes as a third party participation within the angle of investor-state disputes settlement procedures. The point is how the current domestic rules apply to these issues? Our main difficulty is to describe the best steps to take the route towards improvement of transparency of the system at government level by the arbitral tribunals and the International Centre for the Settlement of Investment Disputes (ICSID).

In this regard, investment arbitral awards may have a significant impact on the State's future conduct, the national budget and the welfare of the people. So that, public interest in investment disputes is understandable. Increased transparency can contribute to enhancing effectiveness and continued acceptance of the system of investment arbitration.

In any situation wherever exists a governance deficit or not in any given country, ruling principles to observe remain identical for any investor. To name few of these principles:

1. Respect of all domestic codes and acts complying with the domestic market.
2. Respect of international law .
3. Respect of all international instruments such as fight against money laundering and corruption, anti-bribery action, human rights protection...
4. Increased vigilance in corporate management.
5. Avoidance of interference in local political activities.
6. Good knowledge and clear understanding of clients and commercial partners.
7. Denunciation of illegal acts.

Because of the growing number of arbitration awards which are likely to influence future domestic and international cases, it should be further considered which pace would be required to enhance the equality of the Parties, since today some parties and their representatives do not have the same knowledge and access to the most recent and yet unpublished opinions. The publication of arbitral awards would contribute to the further development of a public body of jurisprudence which would allow investors and host states to understand how investment agreements are interpreted and applied and ultimately contribute to a more predictable and consistent system. States reading an award are also free to consider whether there is anything in the award that needs to be taken into account in their future negotiations.

In the meantime, it is understood that any publication of awards should take into account the protection of confidential business and governmental information. The business community has made known its expectation that full clarity would be provided about which parts of the arbitration proceedings would be covered by extended transparency requirements under a reformed ICSID framework. There is also a view that the consent of the parties for the publication of the award should be requested at the close of the oral proceedings, rather than after the award is rendered. This would mean that the parties could be willing to consent to the publication of the award before they get to know the final outcome.

2.2. Governance and third party participation

Allowing third party submissions and access to hearings require a very qualified approach. In principle, there is merit in allowing interested parties to provide submissions and also to facilitate open hearings. Nevertheless, it would certainly be preferable that third party participation be subject to specific rules and guidelines and close monitoring as per the following considerations : (a) Very

important to have a threshold showing of substantive and legitimate interests by the third parties and also have them demonstrate that they are accountable, professional and transparent by disclosing the origin of the funds with which they operate⁴ ; (b) To ensure of their total independency and not backed by any of the disputing parties ; (c) To make sure that the terms of the third party participation does not enable them to either dictate the outcome or change the rules in the middle of the case.

Although full transparency in the proceedings could be enhanced by having at least part of the hearings held in the country or area where the problem has arisen, it is obvious that there is an important linkage between third party participation and access to all documentation related to the dispute, including notices of intent and arbitration, pleadings, memorials and briefs if third party submissions are required to demonstrate a substantive interest and address all matters within the scope of the dispute.

Actually, there is an important number of countries having allowed access to such documents unless they are in a right position to maintain a real confidentiality of all sensitive information. These countries include those of the NAFTA based on the Free Trade Commission's Interpretation of 2001, Canada and the United States based on their model BITs and Chile⁵, Singapore⁶, Central America-Dominican Republic⁷ and Morocco⁸, based on their FTAs with the United States. Non-disputing State parties to these agreements may make oral and written submissions to the Tribunal on issues of interpretation.

⁴ In a recent WTO case, the WTO Tribunal refused to consider an amicus brief which made public certain information ordered by the WTO to be kept confidential. The Tribunal found that this was not appropriate behavior for a "friend of the tribunal".

⁵ US-Chile Free Trade Agreement, signed on 6 June 2003, entered into force on 1 January 2004.

⁶ US-Singapore Free Trade Agreement signed on 6 May 2003, entered into force on 1 January 2004.

⁷ Central America –Dominican Republic Free Trade Agreement (CAFTA-DR) signed on August 5, 2004. The countries parties to the Agreement are: Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua.

⁸ US-Morocco Free Trade Agreement signed on 15 June, 2004.

Examples of such access linked to *amici curiae* submissions and/or open hearings are the three known NAFTA cases of Methanex, UPS and Canfor. Absolutely nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, subject to the application of Article 1137(4). Thus, nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by a Chapter Eleven Tribunal, apart from the limited specific exceptions set forth expressly in those rules.

At least and for international investment agreements that do not provide for third party participation, including access to documents and open hearings, arbitral tribunals will continue to deal with requests for access on an *ad hoc* basis, taking into account the true intent of the involved parties. Public interest groups have been advocating more transparency and participation in the proceedings because it sounds necessary to enhance the acceptability and credibility of arbitral decisions. Only a limited number of governments, committed to openness and transparency are publishing the arbitration proceedings and awards held in their country and insert relevant provisions in their new model investment agreements. This is one of the reasons why ICSID is nowadays proposing to modify its rules in order to take into account these new unforeseen developments. Evidently, there is a straight forward support among governments for the publication of arbitral awards subject to the protection of confidential business and governmental information. There is a more qualified reaction to third party participation including public access to other documents submitted to or issued by a tribunal. To this, many members think it is necessary to monitor specific rules and guidelines to effectively guide third party participation either in the form of *amici curiae* submissions or open hearings. Remembering that the function of an *amicus curiae* is to call the court's attention on some matter which might otherwise escape its attention⁹.

⁹ See 64 N.Y.S. 2d 510, 512

2.2.1. Governances as an old challenge

The concept of "governance" is not new. It is a very old concept, old as human civilization. In a simple way, governance means: « **The process of decision-making and the process by which decisions are implemented (or not implemented)** ». Governance can be used in several contexts such as corporate governance, international governance, national governance and local governance. These different situations where governance apply are called « governances » as it stands for many implications / applications of various types of decision-making and processes towards their final implementation and enforcement.

Government is one of the main actors in governance. There are other actors involved in the governance scheme and this depends on the level of government that is under discussions. In rural areas, for example, additional actors may include influential land lords, associations of peasant farmers, cooperatives, NGOs, research institutes, religious leaders, financing institutions, political parties, the military. The situation in urban areas is much more complex. There are amazing interconnections between actors involved in urban governance. At national level, and in addition to the above identified actors, media, lobbyists, international donors, multi-national corporations also play a powerful role in decision-making or in influencing the decision-making process. All of these potential actors other than government and the military constitute a powerful formation and together are part of the “civil society”. In some other countries, organized crime syndicates also influence decision-making, particularly in urban areas and at the national level. Positive governance contains major criteria which we are trying to define below.

First, positive governance is participatory (because men and women are active tangible resources and they are the « cornerstone » of a more human governance). Participation refers to the involvement of citizens in the development process.

The interaction between government and investor increases the level of participation where the interface between the public and the private sector is seriously improved.

Accountable because positive governance requires fair legal frameworks impartially enforced. In other words, the protection of human rights, especially for the minorities (ethnic, cultural, religious), must be safeguarded by an independent judiciary system, incorruptible law enforcement agents. Public officials must be answerable for government behavior and responsive to the entity from which their authority is derived. Being accountable also means establishing criteria to measure the performance of public officials, as well as oversight mechanisms to ensure that the standards are met.

« The litmus test is whether private actors in the economy have procedurally simple and swift recourse for redress of unfair actions or incompetence of the executive authority. Lack of accountability tends in time to reduce the state's credibility as an economic partner. It undermines the capacity of governments to sustain the long-term business confidence essential for growth-enhancing private sector investment. Looked at from this angle, accountability can help reduce sovereign risk. The accountability of public sector institutions is facilitated by evaluation of their economic and financial performance. Economic accountability relates to the effectiveness of policy formulation and implementation, and efficiency in resource use. Financial accountability covers accounting systems for expenditure control, and internal and external audits. »¹⁰.

Consensus oriented because a positive governance requires mediation of the different interests as to reach the best interests to the benefit of the whole community.

10 Governance: Sound development management, the elements of good governance, ADB.

This leads to a more flexible sustainable human development to enrich the ground of positive governance. Therefore, such result depends on the clear understanding of the historical, cultural, psychological, and social context of any given society.

Transparent because positive governance implies the fact that all decisions taken and their enforcement are done in an effective manner that follows the rules and regulations. As said above, transparency requires access to clear and available information provided to the general public in a comprehensive way by the media or information organization, and clarity about government rules, regulations and decisions should also be provided as well. Effective transparency in government decision making and public policy implementation reduces uncertainty and definitely curbs corruption among public officials. Unhappily, when power and the laws are concentrated in one hand, an alternative must be found out while using the influence or neutrality of companies acting and / or serving in the host country. Therefore, when these companies commence their commercial activities establishing business links with a decision-maker and / or a policy-maker to obtain a preferable market or bid, financing domestic causes out of the scope of public / private commercial interests, it becomes very difficult to re-stabilize the situation and withdraw from any previous unlawful commitment. From time to time, it might be necessary to impose limits on the closely related principles of transparency, but a serious difference should be made between information as a financeable commodity and information as a process to be used for the implementation of legal frameworks to give confidence to any sophisticated investor.

Responsive because positive governance demands institutions to serve the best interests of shareholders.

Predictability because any viable government should be able to regulate itself via laws, regulations and policies, which encompass well-defined rights, obligations, and duties as well as mechanisms for their enforcement and impartial settlement

of disputes. Predictability is about the fair and consistent application of these laws and implementation of government policies.

Government policies always affect the investment climate directly and economic actors require reasonable assurance about the future behavior of key variables such as prices, exchange rate, and employment levels. Predictability can be enhanced through appropriate institutional arrangements.

Effective and efficient as positive governance supposes that processes and institutions produce evident results that meet the needs of society while making the best use of resources at their disposal. The concept of efficiency in the context of positive governance also covers the sustainable use of natural resources and the protection of the environment.

Equitable and inclusive means, in other words, that all groups forming the national community, even including the weak and vulnerable ones, should have the opportunities to improve or maintain their well being to be an integrative part of this well organized community system. The topic of equity in international disputes settlement is really vast, complex and too controversial.

Respect and following the rule of law must be firmly applied towards positive governance. A country's legal environment must be conducive to development. Under this scheme, positive governance ensures that corruption is restricted, the opinions of minorities are taken into account and the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society, especially when the laws are in force and fully observed with a degree of flexibility. Otherwise, it becomes very easy to shift towards a dictatorial governance with an absolute control of concentrated power. And this type of situational spectrum discretely emerges in some modern countries. However, positive governance has become today, implicitly or explicitly, a core concept in most strategies implemented by the United Nations

and its partner organizations. Additionally, combining participatory action-oriented learning and capacity-building tools, the World Bank Institute (WBI), in collaboration with many units in the World Bank Group, supports countries in improving governance and controlling corruption.

2.2.2 Arbitration rules and competent decision making

As of this day, the traditional manner in which governmental measures are reviewed for compliance with international law in a private setting (referring to *in camera* proceedings) has come under increased scrutiny and criticism. International arbitration can provide the advantage of impartial and competent decision making. Nevertheless, a traditional commercial arbitration occurring between two private companies for instance, may run its course without public disclosure even in the case of existence of the dispute. Under the existing rules in this area, hearings are treated as entirely private matters and publication of the resulting award often depends on the decision of one or both parties.

There are cases in which published awards are edited to obscure the identity of the parties¹¹. The policy of confidentiality serves to expedite arbitrations, as well as to protect the confidentiality of information and reputation. There is no mechanism ensuring that the public will ever know about the claim brought, the positions taken by the parties, the decisions issued by the tribunals and the precise reasons for them. If the (usually three) arbitrators decide to hold a commercial dispute behind « *closed doors* » visibly this cannot be opposed to the fundamental principles of justice while these arbitrators may decide, otherwise, on the compatibility measures taken by a government with an investment treaty that could appear to be a bit more problematic.

¹¹ See Jack J. Coe, Jr. SYMPOSIUM: INTERNATIONAL COMMERCIAL ARBITRATION: “*Taking Stock of the NAFTA Chapter 11 in its Tenth year: An Interim Sketch of Selected Themes, Issues and Methods*” 36 Vanderbilt Journal of Transnational Law, 1381 October 2003.

In that case, let us analyze one particular point: How a group of anonymous arbitrators, in a case brought at the initiative of an investor (we are in the logic of two different types of foreigners), can conclude “behind closed doors”, where open and fair procedures are not ensured, that a decision taken by the national government which represents all the people of a country is illegal? This would mean that only foreign investors are in a position to use investment treaties arbitration, but *a contrario*, these “unilateral” mechanisms are not available to domestic investors. This leads to charges of « reverse discrimination ». In response to that criticized situation, there are important measures being studied to improve the transparency of investment treaty arbitration, as well as to ensure the real consistency of arbitration decisions.

In the meantime, there are some countries moving away from investment treaty arbitration and concluding investment agreements that do not adopt investment treaty arbitration as a means of disputes settlement¹². The increasing use of investment treaty arbitration shows that the legalization of international relations is proceeding well beyond the legal framework of the World Trade Organization.

In the past, investors typically turned to arbitration with a complaint against the government of a host country only after withdrawing from the country. Nowadays, the situation has greatly evolved and the complaint against the government of a host country can be registered while investors still operate in the country. Therefore, just a note to remind us that sometimes, the power of the disputant or claimant to appoint an arbitrator may turn into the « vice » of process.

¹² The investment chapter of the U.S.-Australia Free Trade Agreement

“Recently, however, there have been an increasing number of cases where an investing company files a complaint while maintaining its operations in the host country. On the side of investors, it should be noted that the increased use of investment treaty arbitration has resulted in greater predictability in the investment environment. Meanwhile, governments, as users of investment treaties or free trade agreements (FTAs) that include provisions for investment, should, when negotiating such a treaty or agreement, bear in mind, that fair and equitable treatment and MFN treatment obligations may generate unforeseen impacts when linked to investment treaty arbitration”¹³.

Arbitral procedures provide different levels of transparency. However, regarding the registration of a dispute when it is raised, let us further consider that in the examples of treaties such as BITs or Energy Charter which do not require investors to publicly manifest their intention to launch a dispute settlement process, public disclosure then depends on the arbitral rules chosen by the Parties or the will of the Parties to make such a disclosure where the rules do not control the matter. The registration procedure is knowledgeable as when the ICSID¹⁴ is chosen as the arbitration facility, though, the ICSID Secretariat applies a policy of registering all cases and the register includes the name of the Parties involved in the dispute, the date of registration and a short description of the dispute. According to the ICSID Convention in Article 48(5) of the ICSID Convention, the Centre may publish an award only when both parties give their consent. On the other hand, if another arbitral institution is chosen such as the ICC, there is no publication of registered cases. Since investment disputes account for a small part of the submitted disputes, it is rather difficult to have an exact knowledge of the existence, the number, and general nature of these investment disputes.

¹³ Kotera Akira (RIETI), Faculty Fellow, Professor of Graduate School of Arts and Sciences, University of Tokyo

¹⁴ Two thirds of all cases brought to ICSID since 1996 were filed within the last five years. Fourteen NAFTA proceedings have been brought to ICSID since 1994 and six under the UNCITRAL rules.

About the *ad hoc* (non-institutional) arbitration, it may take place anywhere without any requirement for registration. The most common rules used in an *ad hoc* arbitration process are the UNCITRAL rules, although UNCITRAL's Secretariat has no mandate to register cases or keep data of the use of its rules by investors. An increasing number of cases based on UNCITRAL rules are offered nowadays the administrative support of the ICSID Secretariat. The UNCITRAL rules in Article 32 (5) provide that an award may be made public "only with the consent of the parties", and the same confidentiality requirements apply under the other institutional rules. Quickly saying, the parties should, either prior to or after entering into their commercial relationship, elect to adopt and abide by the rules laid down by the administering authority such as the International Chamber of Commerce or the American Arbitration Association, or by commodity or maritime trade associations existing in the country.

Statistically, in about fifty per cent of the cases, ICSID obtains consent of the parties to publish the award. However, when one of the parties does not consent to the publication of the award by ICSID, the other party commonly releases it for publication.

Today, several arbitration institutions, as well as independent publishers, have started to regularly publish arbitral awards. For example the ICC publishes sanitized extracts of awards (the names of the parties as well as relevant details are always omitted) in its regular periodical bulletin¹⁵. Such publication of awards is done regularly unless the parties desire otherwise.

15 NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001.

On these facts, there has been a renewed effort towards a more transparent investment arbitration system which is reflected in the investment provisions of the most recent US Free Trade Agreements as well as in the new model US Bilateral Investment Treaty and Canada's Foreign Investment Promotion and Protection Agreements Negotiating Programme (FIPA). But, back to the 90's, the Multilateral Agreement on Investment did not include a limitation in the publication of awards. However, appropriate safeguards for the protection of business confidential information were incorporated into the proposed publication criteria¹⁶.

Though, in terms of transparency of arbitral proceedings, the main documents (Notice of Intent, Notice of Arbitration, pleadings, memorials, and briefs submitted to the Tribunal by a disputing party and any written submissions) related to the dispute settlement procedures must be made publicly available and the hearings must be open to the public. Canada's new FIPA contains similar provisions as well as in the most recent version of the US draft Model Bilateral Investment Treaty (Articles 28 and 29).

¹⁶ The multilateral agreement on investment: draft consolidated text investor-state procedures.

Article 16. Final awards d. The award shall be drafted consistently with the requirements of paragraph 17 and shall be a publicly available document. A copy of the award shall be delivered to the Parties Group by the Secretary-General of ICSID, for an award under the ICSID Convention or the Rules of the ICSID Additional Facility; by the Secretary-General of the ICC International Court of Arbitration, for an award under its rules; and by the tribunal, for an award under the UNCITRAL rules.

3. Investors - State Arbitration

Very recently international arbitration became a very important tool for private commercial interests as to resolve disputes with government bodies, thus to recover important losses that could have been caused by government action. Investment treaty arbitration is an increasingly important tool in the arsenal of international business.

The growing number of international investment agreements has today become a potential instrument to be properly used toward private investors with the purpose of protecting their rights. These mechanisms structure commercial transactions, anticipate potential disputes with government entities. In addition, these investment treaties are international agreements and can be embodied in Free Trade Agreements and other type of international agreements. According to the United Nations Conference on Trade and Development (UNCTAD), over 2,500 bilateral and regional investment treaties are in place today for most of which have been originated during the last twenty years. This exceptional development has created the possibility for foreign investors to deal with their host countries and has encouraged growth in international trade and commerce. For instance, and through arbitration, investors who have been negatively affected by the acts of a host country, such as the expropriation of property, now have a fair means to seek redress. The rights of private parties under these treaties to arbitrate disputes with countries are now in effect, but at the same time, there are flows of elements that need to be further discussed and improved such as elements of substantive law and procedure, enforcement of awards (including annulment proceedings under ICSID), conflict and convergence of interests in capital-importing and capital-exporting countries, restrictions on state sovereignty, analysis of recent investor-state arbitral jurisprudence, and, finally, the emergence of an international investment jurisprudence.

At least, but not the last, one understands that the purpose of these agreements is to encourage investment abroad by guaranteeing foreign investors' legal protection above that is provided by the host State's law. The load of international investment has been accompanied by the rapid development of a new field of international law that defines the rights, procedural obligations, and duties of host states towards foreign investors and creates procedures for resolving disputes in connection with those obligations. International investment treaties give investors a right to arbitration of claims. This international investment agreement usually bears two keys:

3.1 Most of the actual investment agreements contain large decision of investment. That further means any kind of business activity and commercial presence in foreign states could fall within the frame of an investment agreement. However, the agreements provide no exclusive but international investments to include everything needed from debt, equity interest and so to liens, common loans, and license, all kinds of tangible and intangible properties including industrial or intellectual property, contract rights, and so. Main issues that are frequently raised in arbitration under investment treaties include (a) obligations to compensate for expropriation, (b) obligations to provide fair and equitable treatment, and (c) obligations to grant most-favored nation treatment. Points (a) and (b) are quite often incorporated into arbitral decisions in cases where an investing company has suffered losses in a host country. However, it is very exceptional case that an arbitral tribunal supports an investing company's demand concerning compensation for expropriation.

Article 17. Confidential and Proprietary Information - Parties and other participants in proceedings shall protect any confidential or proprietary information which may be revealed in the course of the proceedings and which is designated as such by the party providing the information.

3.2. In addition, these agreements provide substantive obligations such as commitment to protect foreign investors and their investments against discriminatory treatment, protection against indirect or direct nationalization or exportation of foreign investment without full compensation, commitment to protect foreign investors against unfair or arbitrary government actions that may include denials of justices in the court.

Regarding fair and equitable treatment, however, investors are often awarded compensation with arbitration tribunals recognizing extensive rights of investors, and adopting a broader interpretation of the fair and equitable treatment obligations than is provided for under general international law. Through these arbitral decisions concerning the accordence of fair and equitable treatment, it is quite widely recognized that a host country's obligation to grant such treatment is greater than many countries who thought they had undertaken such under the various investment treaties. This, of course, raises the question of the legitimacy of investment treaty arbitration.

The most critical aspect of this kind of agreement is that it often provides a cover to foreign investors who may hold the host State liable for breaches committed by any branch of the government. Most significantly, these agreements provide response standing to bring claims including on behalf of many shareholders and investors. Finally, claims within international agreements are subject to some type of arbitration but are implemented through the International Center for the Settlement of Investment Disputes. As such, this ICSID is a broad institution affiliated with the World Bank. The arbitration is final, binding and subject to limited review in the domestic Court.

3.3 Another conflicting legal aspect is the challenge that opposes domestic law / customary law to international investment and arbitral jurisprudence.

For example, the Conseil d'Etat in France refused to consider the prevailing power of international law on *a posteriori* and contrary law and as such, prohibited Article 55 of the Constitution to extend its real effect as the rule that derives from this article was only applicable to anterior law. Therefore, « *Arrêt Nicolo* » of the 20th October 1989 came as a break of this system and brought the administrative legislator to a higher consideration of the legal issue. Under this understanding, it is obvious there is a higher power of international law on domestic law, unless the national government be a party to this multilateral treaty.

All international investment treaties under arbitration must not be *contra pacem*, but should be established in favor of public interests. Does public interest means “nationally” only, or made public world-widely? Though, the other problem that may arise is that if a country refuses to participate in a signatory forum as to recognize / endorse an international investment treaty, it becomes evident that a quorum of signatories may prevail and reduce the power of that one State and opens the door to many kind of actions. That brings to the point where world institutions (e.g the IMF, the World Bank, the UN) must go through an in-depth reform to comply with domestic interests, and for domestic States, the means and capability to follow and comply with the international legal system. In that case, BITs must be extensively regarded and considered between two entities, the State and the Investor, on a case by case basis.

Therefore, when the potential foreigner (investor) intends to open only a branch of its activities, while the headquarter and its main offices are in the country of origin, which treaty prevails as far as the host State provides a list of attractive incentives? Though, it is raised the problem of corporate nationality in case of claims against the host State as it is further related, indirectly, to commercially arbitrating territorial disputes. The practice of arbitration predates judicial settlement in international relations.

Third party settlement through arbitration is well suited to territorial disputes as “certainty and stability of international frontiers is vital for economic development and exploitation of natural resources, and an authoritative decision-making arbitral panel tends to imprint legitimacy on a solution that might otherwise be difficult to achieve in light of domestic political pressures”¹⁷.

¹⁷ Christine Gray & Benedict Kingsbury, *Developments in dispute settlement : Inter-State arbitration since 1945*, 63 BRIT. Y.B. INT’L. L 97, 108 (1992).

In conclusion

« *The essential feature of arbitration is that it produces an award that is final and binding* ». In the case of commercial compulsory arbitration, this rule is subject to the fact that the award complies with the parameters prescribed by the Parties in the compromise, and that the arbitration tribunal simply follows a fair and equitable procedure. For example, where a Tribunal fails to follow the rule of *audi alteram partem*, procedural objections may be raised. And as with any international award, comes the question of its enforcement. International investment arbitration today requires the profound study of an innovated legal structure where private commercial investment can be flexibly applied to respond to public interest. Redistribution of economic / financial power must be equally shared between foreign investors and host States on the basis of a new rule of international common law. Thus, comprehensive principles based on justice, reason, and common sense are determined by the social needs of any domestic community. Therefore, the principles are susceptible of adaptation to new conditions, interests, relations and usages as the progress of society may require.

Submission of controversy by agreement of the parties must also be submitted to a real reform and the impartiality of the arbitrator chosen by the parties to solve a dispute between them is today questionable in regard to interests in place. Arbitrators are bound by their own discretion rather than rules of law, equity, procedure, or evidence. Arbitration Act should govern the enforcement of arbitration awards. What if the arbitrator / mediator was granted judicial and legal power to act as a kind of *pro tem* judge advocate with the back up of a substantive law that encompasses investor's rights, duties, obligations, commercial practice, investment procedures, compliance with domestic law and customary usages, civil and criminal proceedings, commercial offence, compulsory risk insurance,

tools for evaluating a country risk, to name few, and which an Arbitral Parliament would have enacted!

There is no doubt that an arbitrator should definitely possess sufficient knowledge of the laws of his jurisdiction as well as of the rules of court procedures and evidence to prevent the representatives of the parties using their knowledge to subvert or unduly influence the inclination of the arbitrator... Yet, there would be a lot more to say on the hearings procedures and arbitration procedures as they are conducted in the Caribbean basin, and the legislator has a lot to do as it seems there is little judicial guidance available about Caribbean laws and the subject of arbitral awards in the Caribbean.

“To a large extent the laws governing the conduct of domestic arbitration and the relationship of the arbitral process to the courts of respective Caribbean territories have had their legislative origins in the relevant English law. Although each nation has its own particular legislation with amendments made from time to time from the adoption of the original law, an analytic comparison reveals certain similarities of wording and intent.

A further comparison will also reveal that the precedential legislation of the majority of countries in this region is the English Arbitration Act (14 Geo VI Cap. 27) of 1950 which consolidated, without substantial amendment, the earlier English Acts of 1889 to 1934. It is from this Act that most of the Caribbean English-speaking States derive their current legislation. It will be seen therefore that although there is a certain measure of unity between the arbitration laws of member states in CARICOM and because of their increasing commercial and cultural ties, a need for unified legislation on the subject of enlightened dispute management and settlement is long overdue”¹⁸.

¹⁸ Commercial Arbitration in the Caribbean: A Practical Guide. Contributors: M. J. Stoppi - author. University of the West Indies Press. Year: 2001.

Regionally, the nature of commercial contracts may be both inter-regional as well as international, particularly in construction and, to a lesser extent, shipping and other type of contracts. In such cases, prior to entering into any dispute resolution, reference required by the contract, definition and agreement of the seat or locus of the dispute and the applicable law is of great importance. The advantages of inter-regional commercial arbitration are defined by the International Chamber of Commerce International Court of Arbitration. Technology, industrialization and modern methods have a serious impact on the Caribbean growth and recently demanded a constant change in the regional process. Any dispute resolution component within commercial and investment processes require the implementation of a dynamic to progressively comply with the contemporary progress of society.

For illustration, the first roundtable between Central American countries and the Caribbean Community (CARICOM) was held in Trinidad & Tobago early August 2007. The amicable negotiations that should be held until December of this year focus on the effective rapprochement of these two regions. At the end of the first round, the two parties's representatives were satisfied about the progressive dialogue related to future commercial and economic relations between CARICOM on one side, and Central America and Panama on the other side¹⁹. Though, the thirteen Caribbean delegates who attended the economic and commercial forum between China and the Caribbean announced that the Chinese government would lend 530 Million USD to companies willing to invest in the sub-region. Dices are casted for a new generation of arbitrators along with a new arbitral investment jurisprudence providing consolidated interim / urgent measures...

¹⁹ Caribbean Net News, 25/08/2007

Following Jamaica's accession to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, known as the New York Convention, this major multilateral arbitration treaty enters into force in that state on 8 October 2002.

In a nutshell, public interest must first prevail on private interest, so that impartial arbitral measures can be properly enforced where all goods, corporate services and revenues will be equally shared...

Jamaica joined the increasing number of Caribbean states to acknowledge the importance of international arbitration in the modern economy. The New York Convention strengthens the role of arbitration in resolving international disputes by requiring courts in its member states to refer disputes covered by arbitration agreements to arbitral tribunals and to recognize and enforce foreign arbitral awards. The ICC International Court of Arbitration has long-standing experience of administering arbitration cases located in the Caribbean or involving parties or arbitrators of Caribbean origin.