

REFLECTIONS ON THE INVESTOR-STATE TREATY ARBITRATION SYSTEM AND THE POSSIBILITY OF APPLYING PRINCIPLES OF ADMINISTRATIVE LAW*

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Summary: This article encourages a reflective analysis on the current investor-state treaty arbitration system and the possibility of applying administrative law principles to this system. It mainly reflects on those political, international and academic concerns that have surfaced in relation to the alleged legitimacy crisis this arbitration system is facing. This paper tends to provide an idea of how to minimize and avoid the imbalance in the relationship between states and investors in the current International Investment Arbitration System. This paper suggests some temporary solutions to the legitimacy crisis as the best way of imparting justice and protecting the state of law at both the national and international levels. The proposal formulated throughout this article seems to be taken place within the international investment arbitration practice due to the current concerns and questions surrounding the current arbitral system, since it could be affirmed that now is the right time to initiate the practice of referring to domestic (administrative) law principles in international regulatory disputes. Conversely, the reluctance of investment arbitrators to refer to this particular source of law can be regarded, in the long-term, as a contribution to the current crisis of legitimacy that the international investment arbitration system is facing.

Content: a. Introduction; b. States measures against the investor-state arbitration system; c. International concerns regarding the investor-state arbitration system; d. Academic concerns regarding the investor-state arbitration system; e. Seeking a balanced relationship between state regulatory power and investment protection; f. Principles of administrative law: i. As a source of reference for investment arbitrators and ii. As a way to reinforce the legitimacy of the investor-state arbitration system; g. Summary.

a. Introduction

In the last ten years, due to the increasing application and interpretation of the Fair and Equitable Treatment (FET) standard by arbitral tribunals, the international investment arbitration practice has shifted to public law matters in order to resolve regulatory issues arising from international investor/state disputes. This practice has given rise in consequence to certain concerns and questions from some host states, particularly those from developing countries.¹ These questions range from political, legal and academic concerns as will be seen later on.

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¹ For example: Bolivia; Ecuador; Venezuela; Argentina and South Africa. However this list also includes some developed countries such as Australia and the European Union.

Within the context of these concerns and questions, it has been argued that the current arbitral practice has been compromising the legitimacy of the system itself due to the review of a state's domestic public policy and regulatory power at an international level and to the determination of a state's international responsibility arising out of the exercise of its public authority.² It is reasonable to state that these various concerns and questions have also taken place due to the continuing restriction on the freedom of the state to exercise its sovereign regulatory power and to adopt new policies in the interest of its national welfare.³

This alleged limitation upon the sovereign regulatory power of a state has been carried out by various heterogeneous arbitral interpretations of principles of international investment law⁴ – at an international level – on those sovereign rights allowing the state to regulate its domestic economy. These interpretations embrace different arbitral understandings, which have based on the various interpretations of obligations established in a given BIT, such as the interpretations of national treatment, and of fair and equitable treatment.⁵ This argument is of particular importance within the international investment arbitration system, if it is taken into consideration that the current arbitral practice is led by the idea of evaluating a state's national regulatory conduct in accordance with international investment law principles mainly i.e., in particular, in accordance with the FET standard.

Furthermore, it can be said that these concerns can also be based on the current arbitral practice of concluding a regulatory case without sufficiently resorting to domestic law principles to due the lack of consideration afforded to those legal elements that gave grounds to the adoption of a certain regulatory measure of the state, e.g., the consideration of domestic (constitutional and administrative) law principles. Instead of considering such legal grounds, arbitral tribunals have adhered to the idea that the national conduct of a state and its legal agenda should be as a 'fact'.⁶

The question that must now be asked is how a certain regulatory conduct of the state can be considered as a 'fact' when the legal nature of a BIT dispute should be taken into account.⁷ In this regard, it could also be questioned whether international and national laws are completely separate from each other in terms of reviewing the unilateral power of the state.⁸

The current arbitral practice has given rise to a series of theories that have caught the state's attention. These concerns are based on the following factors related to current arbitral practice: (i) the idea which suggests that BIT obligations guarantee a level of 'good

² See M. Sornarajah, *The Clash of Globalisations and the International Law on Foreign Investment* (Centre for Trade Policy and Law, Ottawa) <<http://www.carleton.ca/ctpl/pdf/papers/sornarajah.pdf>> (Last visit 07/04/2009).

³ See, e.g., *Perenco Ecuador LTD v. Republica del Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/08/6) May 8, 2009 – Decision sobre Medidas Provisionales.

⁴ See, e.g., *CME Czech Republic BV (The Netherlands) v. The Czech Republic* (2001) and *Ronald S. Lauder v. The Czech Republic* (2001); and *SGS Societe Generale de Surveillance, S.A. v. Islamic Republic of Pakistan* (2003) and *SGS Societe Generale de Surveillance, S.A. v. The Republic of the Philippines* (2004), quoted by J. Gill, *Inconsistent Decisions: An Issue to be Addressed or a fact of life*, in F. Ortino, A. Sheppard, and H. Warner, *Investment Treaty Law – Current Issues Volume 1* (British Institute of International and Comparative Law, London 2006), pages 23-28.

⁵ See *Siemens A.G. v. Republica Argentina* (ICSID Case No. ARB/02/8) August 2, 2004 – Decision on Jurisdiction, paragraph 139.

⁶ See *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL Arbitration Rules) January 26, 2006 – Final Award, on paragraph 27. See also Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, UK, 2009), pages 69-72, pages 69-72.

⁷ See *Azurix Corp. v. la Republica Argentina* (ICSID Case No. ARB/01/12) July 14, 2006 – Final Award, paragraph 58.

⁸ See the dualism and monism theories in I. Brownlie, *Principles of Public International Law* (Seventh Edition, Oxford University Press, Oxford 2008), chapter 2, pages 31-34.

governance⁹; (ii) the need to consider political aspects of a host state;¹⁰ (iii) the consideration of sensitive matters related to economic policy and foreign affairs policy by investment arbitrators;¹¹ (iv) the international responsibility of a state derived from a BIT;¹² (v) the consideration of not only investment matters, but issues relating to alleged corruption and criminal conduct by investment tribunals;¹³ (vi) the obligation of the investor to fulfil the commitments and intentions of the BIT;¹⁴ (vii) the risk of considering minimum misconduct by an official as a violation of a BIT provision;¹⁵ (viii) the dynamic nature of international law;¹⁶ (ix) the need of complementing the public purpose criterion;¹⁷ (x) the alleged disproportional burden upon national individuals in comparison with foreigners, due to the fact that the foreigners do not take part in elections;¹⁸ (xi) the state's forced consent to arbitrate.¹⁹ These various factors therefore serve to illustrate from where the concerns have derived, and these factors are by no means exhaustive.

Some actions have been taken recently by diverse sectors (mostly by states) to mitigate and prevent the negative effect which the current investor-state arbitration system has upon the interests of a host state at the national and international level. Examples of these actions which have been taken to mitigate the detrimental effects arising out of this arbitration system are as follows:

b. State measures against the investor-state arbitration system

The treaty-based investor-state arbitration system is currently under the legal and political scrutiny of some contracting states, particularly host states. A significant number of these host states have already taken actions or measures either to review the terms and conditions of their current BITs or to denounce or terminate them. Examples of these various state measures taken against investor-state treaty arbitration are as follows:

Ecuador:²⁰ The government of Ecuador decided: (i) to withdraw from the ICSID Convention,²¹ and (ii) to request from the approval of the National Assembly to

⁹ See *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 6, on paragraph 56. See also Opinion of the Committee on Development; suggestion number 6. *Report on the Future European International Investment Policy dated 22 March 2011* – European Parliament Website <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0070+0+DOC+XML+V0//EN>> (Last visit 28/04/2011).

¹⁰ See *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5) September 23, 2003 – Final Award, paragraph 124.

¹¹ See *Siemens v. Argentina* (2004), *supra* note 5, paragraph 57.

¹² *Ibid.*, paragraph 139.

¹³ See *Azurix v. Argentina* (2006), *supra* note 7, paragraph 56. See also *Thunderbird v. Mexico* (2006), *supra* note 6.

¹⁴ See *TSA Spectrum de Argentina, S.A. v. La Republica Argentina* (ICSID Case No. ARB/05/5) December 19, 2008 – Final Award, paragraph 70.

¹⁵ *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL Arbitration Rules) December 2006 – Separate Opinion, on paragraph 13. See also *Azurix v. Argentina* (2006), *supra* note 7, paragraph 391.

¹⁶ *Waste Management, Inc v. Estados Unidos Mexicanos* (ICSID Case No. ARB(AF)/00/3) April 30, 2004 – Final Award, paragraph 92.

¹⁷ See *Azurix v. Argentina* (2006), *supra* note 7, paragraph 311.

¹⁸ *Ibid.*, paragraph 311.

¹⁹ In this case, Costa Rica was forced to accept arbitration, otherwise it would not receive funds from an International Organization. See *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID No. ARB/96/1) February 17, 2000 – Final Award.

²⁰ Organization of American States – Foreign Trade Information System – UTRS Reports (Ecuador) <http://www.sice.oas.org/ctyindex/USA/USTR_Reports/2011/NTE/ECU_e.pdf> (Last visit 05/06/2011).

²¹ *Ibid.*, the decision was notified to the World Bank in July 6, 2009 and became effective on January 7, 2010.

terminate some BITs as they were ‘unconstitutional’.²² The Ecuadorean Constitutional Court found that the provisions of the Ecuador-USA BIT were in conflict with Article 422 of the national constitution 2008,²³ which establishes the principle of supremacy, thus the provisions of the BIT were considered to be ‘unconstitutional’.²⁴ Finally, the Ecuadorean National Assembly authorized the Executive to terminate some of the BITs.²⁵

Bolivia: On May 2, 2007, the Bolivian government decided to withdraw from the ICSID Convention. This decision was based on the following ideas: (i) the argued bias on the part of ICSID tribunals in favour of foreign investors; (ii) the alleged antidemocratic nature of ICSID tribunals due to their closed-door policy and the non-appealable nature of their decisions; (iii) the concern about the high costs of ICSID facilities; (iv) the huge amounts of compensation awarded by ICSID tribunals in favour of foreign investors; (v) the criticized role of ICSID in trying to be both judge and jury in the same case; and (vi) the alleged violation of Article 135²⁶ (i.e., violation of the principle of submission to Bolivian law) of the Bolivian National Constitution.²⁷

South Africa:²⁸ The South African government prepared a report that contains its official position relating to its current BIT policy. Throughout this report, the government stated that: (i) North-South negotiations were undertaken in order to favour developed countries’ interests along with the interests of large, politically influential corporations; (ii) the imposition of damaging binding investment rules may affect the country’s development; (iii) the failure to encourage or enhance the country’s development under the application of those binding investment rules; (iv) the rights created by BITs which entitle foreign investors to seek compensation from a host state when a new regulatory measure is adopted by the latter, even if the adoption of the measure is done in the benefit of the public interest; and (v) the prevailing necessity of reviewing and scrutinizing BIT provisions in order to guarantee the

²² Ibid., See also H. Rondon de Sanso, *Aspectos Jurídicos Fundamentales del Arbitraje Internacional de Inversión* (Editorial Ex libris, Caracas, 2010), on page xii.

²³ Article 422 is part of the Title IX (Supremacy of the Constitution), Chapter First (Principles) of the Ecuadorian Constitution and states that ‘The Constitution is the supreme law of the land and prevails over any other legal regulatory framework. The standards and acts of public power must be upheld in conformity with the provisions of the Constitution; otherwise, they shall not be legally binding.

The Constitution and international human rights treaties ratified by the State that recognize rights that are more favourable than those enshrined in the Constitution shall prevail over any other legal regulatory system or action by a public power.’ (Translated into English by the Author).

²⁴ On November 24, 2010, the Constitutional Court ruled that Article 422 of the Constitution limits the State to cede its sovereign jurisdiction through by concluding BITs. Organization of American States – Foreign Trade Information System – UTRS Reports (Ecuador) < http://www.sice.oas.org/ctyindex/USA/USTR_Reports/2011/NTE/ECU_e.pdf > (Last visit 05/06/2011).

²⁵ See, e.g., the Ecuador-Honduras BIT; the Ecuador-Dominican Republic; the Ecuador-Guatemala BIT; and, the Ecuador-Nicaragua BIT. Source: Ministerio de Relaciones Exteriores – Republica del Ecuador – Sistema de Tratados <<http://web.mmrree.gob.ec/sitrac/Consultas/Busqueda.aspx>> (Last visit 05/06/2011).

²⁶ Article 135 of the 1967 Bolivian Constitution concluded that: ‘All companies established for operations, development or businesses within the country shall be considered as national and shall be subject to the sovereignty, laws and authorities of the Republic’. (Translated into English by the Author). This Constitution was derogated by the Constitution of the Plurinational State of Bolivia of 2009.

²⁷ *Bolivia Decide Salir del CIADI* – Alliance for Responsible Trade < <http://www.art-us.org/content/bolivia-decide-salir-del-ciadi> > (Last visit 05/06/2011).

²⁸ See Republic of South Africa’s Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009 <http://www.thedti.gov.za/ads/bi-lateral_policy.pdf> (Last visit 03/10/2009).

country's interest and to ensure the free implementation of legitimate social and economic priorities.

Venezuela:²⁹ The Venezuelan government announced its intention to withdraw from the ICSID Convention. This decision was officially formalized on 25th January 2012.³⁰ Previously, the National Assembly had appealed to the Executive to do so on 2nd February 2008.³¹ At this time, the government had also considered, in accordance with Article 25 of the Convention, the option of excluding from the jurisdiction of the ICSID Convention some sensitive national matters such as the review of the regulatory conduct of the state.

Additionally, Venezuela announced its intention to terminate some BITs, in particular the Netherlands-Venezuela BIT.³² This last announcement has been made due to the legal and political concerns on the abuse of the principle of legal personality by some foreign companies. Within this context, these concerns have been founded on the 'strategic' registration of foreign investors as Dutch companies in order to subsequently gain access to and protection from the BIT provisions.³³

Lastly, Venezuela has also been evaluating the possibility of amending the existing Venezuelan investment law or promulgating a new one in order to encourage economic national development. That is to say the promulgation of a new investment law which promotes foreign investments rather than only protecting them.

Argentina: Between 2007 and 2010, the Republic of Argentina questioned the content of three arbitral awards given by ICSID tribunals.³⁴ These cases concerned the Argentina-France BIT and the Argentina-USA BIT, respectively.³⁵

Argentina requested the annulment of these arbitral awards based mainly on the following arguments: (i) the tribunal was not constituted properly; (ii) the tribunal stepped beyond its remit by not considering the applicable law; (iii) the tribunal did not deliver decisions with well-explained reasoning; (iv) the amount of compensation was wrongly calculated; (v) the lack of legitimacy surrounding one of the arbitrators; and (vi) the disregard concerning the argued *state of necessity* of Argentina caused by the financial crisis during the 90s.

²⁹ See Rondon de Sanso, *supra* note 22.

³⁰ Comunicado Oficial del 25/01/2012 titulado 'Gobierno Bolivariano denuncia convenio con CIADI'. Ministerio del Poder Popular para las Relaciones Exteriores, República Bolivariana de Venezuela Venezuela <http://www.mre.gov.ve/index.php?option=com_content&view=article&id=18939:mppre&catid=3:comunicados&Itemid=108> (Last visit 26/01/2012).

³¹ *Acuerdo de la Asamblea Nacional sobre la Campaña de la Transnacional Exxon Mobil contra Petróleos de Venezuela, S.A.* de fecha 02 de Febrero de 2008; publicado en la Gaceta Oficial de la República Bolivariana de Venezuela No. 38.869 de fecha 13 de febrero de 2008.

³² This BIT was denounced by Venezuela on 30 April 2008.

³³ *Venezuela denuncia tratado de Inversiones con Holanda* – El Universal Website <http://www.eluniversal.com/2008/05/01/eco_art_venezuela-denuncia-t_01A1549161.shtml> (Last visit 25/02/2011).

³⁴ The first case was *Compañía de Aguas de Aconquija, S.A. et al v Argentine Republic* (ICSID No. ARB/97/3) August 10, 2007 – a decision on the Argentinean Republic's request for annulment of the award which was delivered on 20 August 2007; the second case was *Sempra Energy International v Argentine Republic* (ICSID No. ARB/02/16), June 29, 2010 – a decision on the Argentinean Republic's application for the annulment of the award; and the third case was *Enron Creditors Recovery Corp and Ponderosa Assets, LP v the Argentine Republic* (ICSID No. ARB/01/3), July 2010, 30 – a decision on the application for annulment made by the Argentinean Republic.

³⁵ The first case concerned the Argentina-France BIT, the other two cases related to the the Argentina-USA BIT.

Ultimately, these three requests for annulment were acknowledged, processed and decided by *ad hoc* committees in which two out of three requests were decided in favour of Argentina and consequently annulled.³⁶

United States of America:³⁷ On May 14, 2009, the Committee on Ways and Means of the U.S. Congress discussed some political concerns regarding the future International Investment Treaties (IIT) programme and the public interest of the country, in particular the legal effects derived from the investment obligations of the NAFTA. During the 1st Session of the 111th Congress House Hearing, the following points were highlighted: (i) the requirement of more regulatory and policy space; (ii) the revision of investment protections which have been drafted too broadly; (iii) the granting of equivalent rights to national and foreign investors; (iv) the exclusive jurisdiction of national courts to resolve foreign investment matters; (v) the now limited access to Investor/State Treaty Arbitration (ISTA); and (vi) the misuse of the investor-state arbitration mechanism to challenge legitimate measures taken in the public-interest.³⁸

Australia:³⁹ The Australian government decided to review its international trade policy in order to increase its national prosperity and sustainability by ‘the inclusion of reasonable labour and environmental standards in trade agreements’. For this reason, the government decided: (i) to ‘no longer pursue investor-state arbitration provisions in future economic agreements with developing countries’; and (ii) not to negotiate BITs that ‘confer [through investor-state dispute resolution provisions] [greater] legal rights on foreign businesses than those available to domestic businesses’.⁴⁰

Indeed, the current legal and political concerns surrounding the treaty-based investor/state arbitration practice do not exclusively arise from national states. Concerns are also expressed by various multilateral organizations. Examples of these concerns at the international level are further described in the following sub-heading.

c. International concerns regarding the investor-state arbitration system

International organizations like states have also started to express their points of view, which are similar to the state’s legal and political concerns, regarding the current practice of treaty-based investor/state arbitration and the international investment law implications on the progressive economic development of the world. The following organizations have articulated their concerns under the following premises:

³⁶ The first case was rejected by the arbitral tribunal and the other two cases were decided in favour of Argentina.

³⁷ U.S. House of Representatives, 111th Congress, 1st Session, Transcript, *Hearing on Investment Protections in U.S. Trade and Investment Agreements*, May 14, 2009, Serial 111-20 <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:53473.wais> (Last visit 26/06/2011).

³⁸ See Alvarez, J. E., *Chapter Five: The Once and Future International Investment Regime*, ITA Academic Council, Malibu, January 15-16, 2011, on page 1.

³⁹ *Trading our way to more jobs and prosperity* – Department of Foreign Affairs and Trade – Australian Government <<http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf>> (Last visit 05/06/2011).

⁴⁰ *In policy switch, Australia disavows need for investor-state arbitration provisions in trade and investment agreements* – Investment Arbitration Reporter < <http://www.iareporter.com/articles/20110414>> (Last visit 10/05/2011).

European Parliament (EP):⁴¹ On March 22, 2011, the Committee on International Trade of the European Parliament published a report on the future European international investment policy.

This report draws attention to the following matters: (i) the conclusion of more than 1,200 BITs between EU member states and third states; (ii) the inconvenience of relying on a wide definition of ‘direct foreign investment’; (iii) the problems and different interpretations caused by the vague language used in BITs, in particular, leading to the possible conflict between private interests and the regulatory tasks of public authorities; (iv) the political concern about considering the acceptance of legislative acts as a potential violation of the principle of ‘fair and equitable treatment’; (v) the necessity of defining a European investment policy which meets the expectations of both the investors and host states; (vi) the importance of not only protecting investors, but also guaranteeing the protection of the state’s right to exercise its regulatory power through its public authorities in accordance with its policy coherence for development; and (vii) the need to draft a non-mandatory guideline to be used by the member states as a BIT model to enhance certainty and consistency.

The committee also considered it necessary to define in a clear manner the investments to be protected as well as to clearly formulate the definition of each of the minimum standards of treatment, e.g., national treatment, most-favoured-nation treatment, fair and equitable treatment.

The Committee further expressed its deep concern over ‘*the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the ruling out of legitimate public regulations*’. (Emphasis added).

The Committee also suggested the incorporation of a clause into a BIT that impedes EU member states from adjusting their social and environmental legislation in order to attract investment.

Finally, the Committee considered that the current mechanisms to settle disputes (including investment arbitration) *should be deeply reviewed* in order to guarantee a higher level of transparency. It was also stated that this revision should also include the review and/or the amendment of the ICSID Convention and UNCITRAL rules, respectively.

One last point of interest regarding the content of this document is found in the suggestions made by the Committee on Development to the Committee on International Trade. The suggestion is listed at number 4 of the list and states that ‘fairness in investment agreements entails allowing *developing countries to*

⁴¹ *Report on the Future European International Investment Policy dated 22 March 2011* – European Parliament Website <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0070+0+DOC+XML+V0//EN>> (Last visit 28/04/2011).

discriminate between different investments on the basis of their contribution to development objectives'.⁴² (Emphasis added).

United Nations Conference on Trade and Development (UNCTAD): On May 2010, the UNCTAD published a report entitled 'Investor-State Disputes: Prevention and Alternatives to Arbitration'.⁴³ Throughout this report, the UNCTAD highlighted the following concerns regarding investor-state arbitrations: (i) the increase of the already high costs of investor-state arbitration in recent years (including the higher amounts of compensation to be paid by the host state in addition to the high costs of arbitration proceedings); (ii) the 'significant increase in the average time frame for claims to be settled by a final award and executed subsequently' (including the dilatory procedural strategies used by the parties such as separating jurisdiction from merits); (iii) the difficulty of managing investor-state disputes and the substantial loss of control over the procedure by the contracting parties of a BIT; (iv) the often hostile relationship between the investor and the state after the conclusion of the arbitral award; (v) the state fears 'about frivolous and vexatious claims that could inhibit legitimate regulatory action by governments'; (vi) the crisis of legitimacy surrounding the treaty-based investor-state arbitration system (due to the conflicting arbitral awards and to the evaluation of the host state's regulatory conduct); and (vii) the investor-state arbitration's heavy emphasis on the payment of compensation as a unique solution to the dispute, whilst other possibilities for a solution between to the parties, such as reaching compensatory agreements, are left aside.

Finally, the report concluded that 'the current international investment law community finds itself at a crossroads concerning the use of appropriate methods to the resolution of international investment disputes'.⁴⁴

Organization of Petroleum Exporting Countries (OPEC): As part of the implementation of the new Venezuelan oil policy, the Venezuelan government decided to 'renationalize' its oil industry.⁴⁵ In achieving its aim, in 2005 the government initiated an amicable process with all international oil companies (IOCs) investing in the Venezuelan territory to renegotiate their petroleum agreements and subsequently transfer them to the new business scheme established within the new Oil Law (2001), i.e., the scheme of mixed companies (joint ventures with a majority participation of the state).

However, during this transferral process, two IOCs did not accept the terms and conditions proposed by the government and therefore the government decided to appropriate their assets that were in the country.

⁴² See, e.g., suggestion number 4, on page 14 of *Report on the Future European International Investment Policy dated 22 March 2011* – European Parliament Website <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0070+0+DOC+XML+V0//EN>> (Last visit 28/04/2011).

⁴³ *Investor-State Disputes: Prevention and Alternatives to Arbitration* – UNCTAD Series on International Investment Policies for Development – UNCTAD, New York and Geneva, 2010 <http://www.unctad.org/en/docs/diaeia200911_en.pdf> (Last visit 12/04/2011).

⁴⁴ For more documents published by the UNCTAD in this regard, the author recommends to visit <<http://www.unctad.org/templates/Page.asp?intItemID=2340&lang=1>>.

⁴⁵ For a detailed discussion of this topic, see H. Rondón de Sanso, *El Régimen Jurídico de los Hidrocarburos – El Impacto del Petróleo en Venezuela* (First Edition, Epsilon Libros, Venezuela 2008). See also P. D. Cameron, *International Energy Investment Law –The Pursuit of Stability* (Oxford University Press, UK, 2010).

As a consequence of not reaching a mutual agreement on the amount of compensation for their assets within the country, the two IOCs decided to take legal actions against Venezuela through treaty-based investment arbitrations and contractually-based commercial arbitrations, before the ICSID and ICC, respectively.

Before requesting a commercial arbitration, one of the IOCs decided to request more than four *ex parte* preventive measures – in various jurisdictions simultaneously – against the Venezuelan National Oil Company (PDVSA) for a total amount of approximately US\$ 12,000,000,000.00.

As a government reaction to the disproportionate legal actions requested by this IOC against Venezuela's interests, the Venezuelan government decided to take its concern to the OPEC Conference.

Consequently, on March 5, 2008, the OPEC Conference published a press release through which Venezuela's concern regarding international arbitration was addressed.⁴⁶ The Conference (i) expressed its unanimous support of Venezuela and acknowledged its sovereign right over its natural resources; and (ii) 'called for resolving [investor/state arbitration] through good faith and amicable negotiations'.

This later submission was formulated with an additional suggestion by the conference to partake in investor/state arbitration. The suggestion was limited to highlighting that investor/state arbitration should be solved through the amicable negotiations, but 'excluding *ex parte* pre-judgement measures *which will make finding fair solutions more difficult*'. (Emphasis added).

To sum up, it can be stated that legal and political concerns regarding the current investor/state arbitration practice have transcended the frontiers of national states and international organizations to invade the sphere of academia. It is true to state that various academics have jointly expressed their views regarding this arbitral matter. This point is explained in the following sub-heading which addresses what constitutes the first joint academic expression of some recognized scholars on this topic.

d. Academic concerns regarding the investor-state arbitration system

On August 31, 2010, an academic concern was jointly expressed through the publication of the article entitled '*Public Statement on the International Investment Regime*'.⁴⁷ The concern articulated in this publication on the current international investment system was shared by a significant group of scholars.⁴⁸

⁴⁶ *Press Release No 4/2008 – 148th Meeting of the OPEC Conference, Vienna – Austria* – OPEC Website <http://www.opec.org/opec_web/en/961.htm> (Last visit 02/10/2010).

⁴⁷ *Public Statement on the International Investment Regime dated August 31, 2010* – Osgoode Hall Law School, York University (Toronto, Canada) – York University Website < http://www.osgoode.yorku.ca/public_statement/ > (Last visit 26/11/2010).

⁴⁸ Gus Van Harten – Associate Professor of Law (Osgoode Hall Law School – York University); David Schneiderman – Professor of Law and Political Sciences (University of Toronto); Muthucumaraswamy Sornarajah – Professor of Law (National University of Singapore); Peter Muchlinski – Professor of Law (University of London (SOAS)); Sol Picciotto – Emeritus Professor of Law (Lancaster University); Craig Scott – Professor of Law (Osgoode Hall Law School – York University); Kyla Tienhaara – Research Fellow in Environmental Governability (Australian National University); Obiora Okafor - Professor of Law (Osgoode Hall Law School – York University); Stepan Wood - Professor of Law (Osgoode Hall Law School – York University); Amanda Perry-Kessaris - Professor of Law (University of London (SOAS)); Kevin Gallagher - Associate Professor of International Relations (Boston

A declaration of the concern surrounding this arbitral system was first made by the Osgoode Hall Law School, York University, Toronto, Canada as it drew attention to the ‘harm done to the public welfare by the international investment regime’ and ‘[the] hampering of the ability of government to act for their people’. It can be stated that this document represents the first open academic expression against the current investor/state arbitration practice.⁴⁹

This academic declaration was headed by a list of general principles relating to the international investment regime in general. These principles are summarized as follows: (i) the promotion of public welfare; (ii) the access to an open and independent judicial system for the resolution of disputes; (iii) the governments’ responsibility to encourage the beneficial impacts of foreign investments whilst limiting the harmful effects of it; and (iv) the right of the state to regulate on behalf of the public welfare.

Subsequently, the article also identifies some of the current problems with the international investment practice, such as (i) the overly expansive interpretations by international arbitrators of provisions contained in investment treaties, through their arbitral awards; (ii) the overriding interests of foreign investors over the right of the state to regulate on behalf of the public welfare; and (iii) the serious effect that some arbitral awards may have upon democratic choice and the capacity of governments to act in the public interest.

Based on these three main criticisms of the current arbitral practice, it was suggested that: (i) municipal law should be the primary legal framework for the regulation of investor/state relations; (ii) investment treaty arbitration appears not to be a fair, independent and balanced method for the resolution of investment disputes; (iii) the possibility of giving society active participation in the process of taking decisions that affects its rights and interests should be

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⁴⁹ It has also been said that ‘[i]n some cases arbitral tribunals have gone too far one way, with the result that states have begun to step in and cut back on certain rights intended to protect investors’. See A. Sheppard, and M. Hunter, *Introduction: An Overview of the Relationship Between Courts and Investment Treaty Arbitration* in Ortino, Sheppard and Warner, *supra* note 4, on page 165.

considered; (iv) the idea of opting for the conclusion of investment contracts rather than investment treaties due to the possibility of the former to incorporate domestic law into the regulation of its investor/state relationship; (v) the idea of concluding investment contracts in accordance with the principles of public accountability and openness as well as the guarantee of preserving the rights of the state to regulate in good faith and for a legitimate purpose; (vi) the creation of a fair and balanced mechanism in the investment contract that allows the parties to renegotiate the interests at stake; and (vii) the problem of concluding multilateral investment agreements due to their lack of fairness, balance, basic requirements of openness and judicial independence.

The group of scholars conclude by recommending that (i) *states should review* their BITs in order to withdraw from or renegotiate them to replace or reduce the use of investor/state arbitration; (ii) *states should strengthen* their domestic justice system; and (iii) *international organizations and the international business community should refrain* from promoting the international investment regime due to the serious risk that this regime poses to governments' national interests.

Finally, it can be asserted that this public statement draws attention to the increasing concern (from some developing countries such as Venezuela, Bolivia, Ecuador and Argentina) related to the interpretation of investment treaties made largely in favour of investors. It was emphasized that the current investment arbitral practice is significantly prioritizing the protection of investors' properties and economic interests over the right of the state to regulate to protect its national welfare.⁵⁰ It is therefore of importance to refer to the theory which suggests that this investment arbitral practice is affecting the balance between investors' interests and public regulation in international law. Consequently, it can be affirmed that this unbalanced relationship between the state and investors seems also to be generating a conflict of interests and subsequently has a negative effect on the legitimacy of the current international investment arbitration system. This latter concern is the main discussion in the next upcoming sub-heading where this last point is developed.

e. Seeking a balanced relationship between state regulatory power and investment protection

Under the current international investment arbitration system, it has been established that foreign investors are initially at a legal disadvantage⁵¹ in comparison to the unilateral powers of the host state (e.g., exorbitant powers).⁵²

The main argument has been that these unilateral powers not only embrace the state's ability to take legal measures towards the protection and promotion of its domestic economy and development, but these unilateral powers also have an unintentional effect of protecting the *status quo* of foreign investors' interests. For example, it has been said that this effect has

⁵⁰ P. Eberhardt and C. Olivet, *Profiting from injustice – How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, published by Corporate Europe Observatory and the Transnational Institute, Brussels/Amsterdam, November 2012.

⁵¹ It has been stated that 'the whole purpose and *raison d'être* of international investment law is to provide investors with a certain elevated level of protection'. See I. Marboe, *State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests*, in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 381.

⁵² See *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 15, on paragraph 104. See also T. W. Wälde, "Equality of Arms" in *Investment Arbitration: Procedural Challenges in Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, USA, 2010), on page 162.

created a kind of an ambivalent picture about the roles of the state regarding foreign investment since it wishes to attract investment but, on the other hand, it needs to control and regulate investments.⁵³

Furthermore, it has also been argued that this disadvantage has created an unequal legal relationship between investors and states at the international level. In other words, the state has appeared as a powerful party in a BIT relationship rather than as a sovereign state empowered to adopt measures to protect and promote not only national investors' interests, but also those of foreign investors. Therefore, it has been considered that foreign investors are *individuals legally weak* in front of the legal apparatus of the state.⁵⁴

Obviously, this opinion derives from the clash between the interests of the capital-exporting states (e.g., developed countries) and the interests of the capital-importing states (e.g., developing countries) as well as from the adoption of economic measures by each of these global economic players on grounds of protecting their own economic interests.⁵⁵ Nonetheless, it has been suggested that studies such as the present article can help to provide a mechanism to establish a framework of predictability and stability between states and investors.⁵⁶

In addition, another concern that has arisen is related to the concept of 'interest' or of 'common interest' which seems to require more attention within the expanding international investment arbitration system due to the fact that its legal implications are currently vague at the international level and therefore, are 'very slow to appear'.⁵⁷

Nonetheless, it is important to emphasize that it has been pointed out that a BIT must not be interpreted in favour of or against investors.⁵⁸ Conversely, it has been stated that '[a] BIT itself [has to be interpreted as] an instrument agreed [by two contracting sovereign states] to encourage and protect investment'.⁵⁹ That is to say, the contracting states are in equal positions in relation to each other, whereas the host state and foreign investors are not in equal positions in relation to each other under international or national law.

Within this context, it has been asserted that the private investor has been granted the opportunity to be temporarily in an equal position through the possibility of requesting a private right of action against sovereign states at the international level.⁶⁰ This action has been qualified as the unilateral action of the foreign investor.⁶¹ This temporary right is created through the consent of the states to incorporate a clause, within a BIT's provisions, to arbitrate public-law matters or regulatory issues arising from a violation of the BIT's provisions, in particular the violation of the FET standard.

⁵³ See Sheppard and Hunter, *supra* note 49, on page 165; and M. Sornarajah, The International Law of Foreign Investment (Second Edition, Cambridge University Press, UK 2004), on page 101.

⁵⁴ See *Azurix v. Argentina* (2006), *supra* note 7, paragraphs 311-313. See *Thunderbird v. Mexico* (2006) – Separate Opinion, *supra* note 15, paragraph 86.

⁵⁵ See Sornarajah, *supra* note 53, on pages 5 and 35; and Sornarajah, *supra* note 2.

⁵⁶ See R. Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. Int'l L. & Pol. 953 (2006), on page 1.

⁵⁷ See P. Reuter, Introduction to Law of Treaties (Kegal Paul International, London and New York, 1995), on page 6.

⁵⁸ See *Azurix v. Argentina* (2006), *supra* note 7, paragraph 307.

⁵⁹ *Ibid.*

⁶⁰ See A. G. Adaralegbe, Concurrent Jurisdiction Between Treaty and Domestic Tribunals: An Examination of Jurisdiction-Regulating Mechanisms Within the Investor-State Treaty Arbitration System and Their Effectiveness (CEPMLP, University of Dundee, PhD Thesis, 2009), on page 154.

⁶¹ See Sornarajah, *supra* note 53, on page 3.

Despite the difficulty of assessing the impact of the interaction between the forces of capital-exporting and capital importing states and their different sets of norms relating to investment protection, the encouragement and protection of investments sought by a given BIT implies – without doubt – the interplay of a wide range of economic, political and historical factors which have been shaping the development of international investment law.⁶² In simple terms, it has been the inevitable interaction between states and investors that has given rise to the existence of this new system of international investment arbitration.⁶³ Therefore, this interaction should be considered a two-way relationship rather than a one-way relationship so that both players are part of the growing global solidarity.⁶⁴ If this suggestion of considering some domestic administrative law principles when dealing with international regulatory disputes is implemented, the alleged legitimacy crisis⁶⁵ of the current international investment arbitration system could be mitigated.⁶⁶ Moreover, it can be considered to be the best form of stabilisation between the parties involved (e.g., reaching ‘an equitable deal’).⁶⁷

In fact, it has been argued that ‘[a] state seeks to balance [its competing functions of attracting investment and of controlling it] through its investment laws’.⁶⁸ One of the manners to reach this balance is through creating ‘a nice balance of international interests in the protection of investment and the interests of the host state in regulating the process having its own benefits on mind.’⁶⁹

Within this reasoning, it is opportune to highlight that one of the most difficult tasks for any public law lawyer is to determine with clarity the scope of the norms to be applied to international regulatory disputes in order to reach the above-mentioned investor-state balance. Obtaining this balance will subsequently guarantee the coexistence of international and national standards in a way that may be acceptable – in terms of international law – to both states and investors. Hence, the main challenge has been identified as the problem resulting from the application (separately or jointly) of some principles of international and national laws due to the non-static nature of the law that results in constant changes in both laws.⁷⁰

It can be suggested that one of the temporary solutions to this unbalanced investor-state relationship is the consideration of or reference to some principles of domestic (constitutional and administrative) law alongside international law in the current international investment arbitration regime (particularly the FET standard when international regulatory disputes are at stake). This practice can be framed within the proposal formulated by W. Burke-White and

⁶² Ibid., on page 5.

⁶³ R. Gilpin, *The Political Economy of International Relations* (1987), 33; quoted by Sornarajah, supra note 53, on page 17.

⁶⁴ See Reuter, supra note 57, on page 3.

⁶⁵ See B. Kingsbury, and S. W. Schill, *Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality* in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 75.

⁶⁶ See S. Schill, *International Investment Law and Comparative Public Law – An Introduction*, in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 6.

⁶⁷ See G. Kahale III, *The Upoat Surrounding Petroleum Contract Renegotiations*, 82 Oxford Energy Forum (August 2010) – Oxford Institute for Energy Studies, on page 5.

⁶⁸ See Sornarajah, supra note 53, on page 101; and W. Burke-White, and A. Von Staden, *The Need for Public Law Standards of Review in Investor-State Arbitrations* in S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 695.

⁶⁹ See Sornarajah, supra note 53, on page 18.

⁷⁰ See *Waste v. Mexico* (2004), supra note 16, on paragraph 92.

A. Von Staden of considering ‘public law standards of review [into] investor-state arbitrations’ as ‘a margin of appreciation’.⁷¹ Similarly, this practice could conceivably help investment arbitrators in their difficult tasks of assessing the regulatory conduct of a state at the international level. In particular, the fact that unilateral powers of states have not been codified at the international level has yet to be taken into account.⁷² Furthermore, it can be stated that the fact that administrative law rights have been currently included within the definition of foreign investment demonstrates the growing importance of administrative law within the expanding international investment arbitration system as an international mechanism to protect the subjective rights of the private individuals involved.

This observation demonstrates the importance of international arbitrators to consider domestic law principles when carrying out the difficult task of assessing the regulatory control of a state over foreign investments. However, this practice implies the arbitral exercise of considering the regulatory conduct of the state in accordance with standards and principles that have not been fully developed yet. Nevertheless, this exercise at least provides a worldwide feeling that the rights and legal traditions of the states are being considered which can consequently serve to strike a fair balance between states and investors. Achieving this fair balance can also help alleviate the criticism concerning the legitimacy of the international investment arbitration system.

In summary, it has been asserted that international investment treaties (IITs) ‘are an agreed set of rules that serve to attract foreign investment by reducing the space for unprincipled and arbitrary actions of the host state and thus contributing to good governance, which is a necessary condition for the achievement of economic progress in the host state.’⁷³ Based on this idea, along with the lack of a set of guidelines to address the unilateral power of the state at the international level and the unbalanced relationship between states and investors interests,⁷⁴ the following sub-heading generally summarizes the main aim of this paper.

f. Principles of Administrative law

It has been acknowledged by the UNCTAD that ‘international arbitration, alongside the resort to national courts of the host State, *has been the most commonly used method for the settlement of international investment disputes*’.⁷⁵ (Emphasis added). This statement is supported by the fact that investor-state treaty arbitration cases amounted to 390 cases by the end of 2010 which involved 83 different governments from both developed and developing countries.⁷⁶

This number of cases serves to reflect the indubitable importance of investor-state treaty arbitration within the (national and international) public law sphere due to the considerable evaluation and assessment of the domestic regulatory conduct of a host state to settle a certain international legal dispute transparently. This is particularly so when it has been emphasized

⁷¹ See Burke-White and Von Staden, *supra* note 69, on page 720.

⁷² Mobil Corporation *et al v.* Bolivarian Republic of Venezuela (ICSID Case ARB/07/27) June 10, 2010 – Decision on Jurisdiction.

⁷³ See Dolzer, *supra* note 57.

⁷⁴ *Ibid.*, on page 972.

⁷⁵ *Investor-State Disputes: Prevention and Alternatives to Arbitration* – UNCTAD Series on International Investment Policies for Development – UNCTAD, New York and Geneva, 2010, on page 1. <http://www.unctad.org/en/docs/diaeia200911_en.pdf> (Last visit 12/04/2011).

⁷⁶ UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA Issues Note, No. 1, March 2011 <http://www.unctad.org/en/docs/webdiaeia20113_en.pdf> (Last visit 25/06/2011).

that domestic law principles must be examined to determine whether a host state's conduct has respected the obligations imposed by an international investment treaty (IIT) in particular in accordance with the provision containing the FET standard.⁷⁷

A further issue of importance which ought to be emphasized is the increasing tendency of incorporating administrative law rights within the definition of foreign investment. It has been stated that this inclusion 'greatly restricts the right of the state to exercise regulatory control over the foreign investment.'⁷⁸

The frequent use of these arbitral tribunals, along with the sovereign will of the contracting states to incorporate administrative law rights within the definition of investment in a certain BIT (to resolve any regulatory controversy between one of the contracting states and a national of the other contracting states), demonstrates the awareness on the part of these contracting states in creating a kind of temporary 'supranational tribunal' to deal with matters of public law and policy and regulatory issues.

It is true that the traditional concern in the public law and policy arena is that the practice of applying and interpreting the provisions of domestic administrative law was an exclusive task of national courts and jurisdictions. Nonetheless, the concurrent jurisdiction⁷⁹ which exists between these two legal mechanisms to deal with regulatory disputes demonstrates and confirms the importance of dealing with public law matters at two different (parallel) levels (e.g., national and international).

These two different (parallel) levels of resolving public-law disputes (particularly regulatory disputes) require the consideration of traditional sources of law including municipal and international laws. This need is more pressing due to the fact that under both of the most important administrative law systems (e.g., British and French) there are analogous mechanisms to resolve private individual claims against their public administrations which have existed for more than seventy five years such as administrative review and judicial review. Particular consideration should be given to the French system, as there is a special jurisdiction which is known as administrative-contentious jurisdiction. This distinct jurisdiction was created with the objective of providing private individuals with a special forum to challenge the rights and prerogatives of their public administrations.

Additionally, it is significant to emphasize, that under these analogous mechanisms, there is an established set of principles of (administrative) law which have been developed for over seventy five years. These principles have also been a frequent point of reference for domestic jurists to resolve this kind of regulatory individual-state controversy. This latter submission acquires more importance in the investment world if the way in which arbitral tribunals interpret and apply domestic law principles when considering the FET standard is taken into consideration.

One of the problematic issues with the current investment arbitral practice and these two parallel levels of judging regulatory issues is the very restricted manner (known as the strict 'no other means available' approach⁸⁰) in which the different sources of law (jointly or

⁷⁷ See Dolzer, *supra* note 55, on page 955.

⁷⁸ See Sornarajah, *supra* note 53, on page 15.

⁷⁹ For an extended study on the current jurisdiction between national courts and investment tribunals, the author recommends: Adaralegbe, *supra* note 60.

⁸⁰ See Burke-White and Von Staden, *supra* note 68, on page 695.

separately) are considered, when these sources should be considered to be all-in-one source of wisdom for any jurist. More precisely, it is true that there is a restricted approach in the consideration of these different sources of law, but it is also true that neither national nor international laws prohibit any administrator of justice from resorting jointly to those municipal or international mechanisms or sources of law which can expedite the administration of justice when dealing with regulatory disputes.

Thus, the present article proposes that international arbitrators particularly when dealing with regulatory disputes should resort or make reference to one of the sources of law, such as the principles of domestic (administrative) law, in a manner which imparts justice in a fair, transparent and equitable manner. The main objective of this proposal can be found in the following sub-heading which basically summarizes the issues raised throughout this article.

- i. Principles of domestic administrative law as a source of reference for investment arbitrators

Many BITs such as the USA-Argentina BIT⁸¹ and the USA-Panama BIT include within their definition of ‘investment’⁸² *administrative law rights* such as licences and permits. As already stressed, this inclusion implies the necessity of resorting to administrative law principles when resolving a BIT regulatory dispute. This is due to the fact that this inclusion seems to restrict the exercise of the sovereign power of the host state over foreign investment. Similarly, another group of BITs have included the term ‘administrative acts’ in the clause related to the arbitration mechanism. An example of this is found in article 10 (1) of the Colombia-Spain BIT.⁸³

Furthermore, another group of BITs, such as the Colombia-Switzerland BIT and the USA-Ecuador BIT, have made a direct reference to *national administrative courts* to settle a treaty dispute, particularly in those cases where the contracting states have provided the investor with the option of either resorting to a domestic administrative court or resorting to an IIT’s arbitration in the case of a BIT dispute.

Additionally, it has been said that ‘[m]any treaties conserve the regulatory regimes of the host state by confining the scope of the treaty... to investments “*made in accordance with the laws, policies and regulations*” of the host state.’⁸⁴ (Emphasis added). Examples of such a limitation are found in article 1; of the Bulgaria-China BIT; of the China-Bahrain BIT; and the Venezuela-Vietnam BIT. These types of articles serve to emphasize that the foreign investment has to follow the required domestic legal steps before it can be recognised as a protected foreign investment under a certain BIT’s provisions.

Moreover, the majority of BITs refer to the ICSID Convention in order to determine the law applicable to an investor-state investment dispute. In this context, article 42 of the Convention states that:

⁸¹ This treaty includes within the definition of investment, ‘any right conferred by law or contract, and any licenses and permits pursuant to law...’.

⁸² An example of this definition is worded as follows ‘any right conferred by law or contract, and any licenses and permits pursuant to law...’.

⁸³ Article 10 (1) of the Colombia-Spain BIT states ‘for submitting a claim with regard to administrative acts to a domestic forum or to arbitration provided under this Section, *it will be indispensable to previously exhaust the governmental procedures which have been provided for.*’ (Emphasis added). (Translated into English by the Author.)

⁸⁴ Sornarajah, *supra* note 53, on page 266.

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. (Emphasis added).

Thus, it is primarily up to the parties to determine the applicable law to the dispute by agreement. The Convention here does not classify or discriminate the sources of law. Conversely, this task is left to the discretion of international arbitrators. However, as already mentioned, recent practice serves to illustrate that arbitral tribunals have taken account of the increasing necessity of relying on, or referring to, domestic law principles as a source of legal reference or a legal guideline to resolve regulatory issues.⁸⁵

Thus, the question arises as to whether these legal principles can be a useful reference for investment arbitrators when dealing with a treaty-based regulatory dispute. Especially, if this practice is considered to be a mechanism which may help to minimize the risk of nullity of the resulting award⁸⁶ as well as a way of increasing the legitimacy of the investment arbitration system.⁸⁷ It has been asserted that ‘the need for public law standards of review is... urgent, as arbitral tribunals are transformed into public law, quasi-constitutional adjudicators’.⁸⁸

Furthermore, it is important to take into account that some investment treatment standards have also been considered as relative standards *par excellence*.⁸⁹ Examples of these standards are fair and equitable treatment, national treatment and most-favoured-nation treatment.

A response to the question concerning the usefulness of referring to these domestic law principles in regulatory disputes can be found in the proposal formulated by Professor T. Wälde in his separate opinion in *International Thunderbird Gaming Corporation v The United Mexican States* (UNCITRAL Arbitration Rules, 2005). It was stated that ‘[t]he common principles of the principal administrative law systems are... *an important point of reference for the interpretation of investment treaties* to the extent [that] investment treaty jurisprudence is not yet firmly established.’⁹⁰ (Emphasis added).

Similarly, a more conservative answer to the same question can be inferred from certain statements which have been made in the academic arena. In this regard, it was expressed through the *Public Statement on the International Investment Regime* that ‘municipal law

⁸⁵ See, e.g., *Mobil v. Venezuela* (2010), supra note 72, paragraph 81. See *Azurix v. Argentina* (2006), supra note 7, paragraph 67. See also *Occidental Exploration and Production Company v. The Republic of Ecuador* (London Court of International Arbitration Administered Case No. UN 3467) July 1, 2004 – Final Award, paragraphs 58 and 137; and *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21) July 30, 2009 – Final Award, paragraphs 69.

⁸⁶ See C. Schreuer, L. Malintoppi, A. Reinisch, and A. Sinclair, *The ICSID Convention – A Commentary* (Second Edition, Cambridge University Press, UK, 2010), on page 554.

⁸⁷ See Sornarajah, supra note 53, on page 343.

⁸⁸ See Burke-White and Von Staden, supra note 68, on page 694.

⁸⁹ See Republic of South Africa’s Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009, supra note 28, on page 47.

⁹⁰ Paragraph 28.

should be the primary legal framework for the regulation of investor/state relations'.⁹¹ (Emphasis added).

Furthermore, as Professor M. Sornarajah stated, the viability of this proposal will largely depend on the establishment or, perhaps, acknowledgment of 'common standards of procedural protection against the use of discretionary power of administrative bodies [which] may be discernible in trade and investment areas'.⁹²

Finally, it has been stated that '[an] arbitral tribunal may indeed have little choice but to adopt approaches that are similar to those adopted by domestic courts and other international courts and tribunals when faced with comparable [regulatory] conflicts between important interests that must all be weighed in the legal appraisal'.⁹³

- ii. The use of domestic administrative law principles as a way to reinforce the legitimacy of the investor-state arbitration system

During the last five years, legal and political criticisms have not only been expressed against the investor-state arbitration system but also against the host state's power to regulate foreign investors/investments.

These criticisms do not only come from various states, but also emanate from international organizations and academia, as discussed earlier in this article. These criticisms are affecting, in a way or another, the legitimacy of this emerging system. These criticisms include the disapproval about 'the lack of democratic control and accountability' of this system.⁹⁴ It is of importance to highlight that evidence of this legitimacy crisis is found in the constant conflict of interests between private individuals and the regulatory power of the state.⁹⁵ At the international level, this conflict derives from the diverse natures of some of the investment treatment standards such as the FET standard, which play an important role within the area of public law and are considered relative standards *per excellence*.⁹⁶

It could be said that this conflict between private individuals and the regulatory power of the state has created theory which suggests that 'the adoption of legitimate legislation [could lead to] a state being condemned by international arbitrators for a breach of the principle of "fair and equitable treatment"'.⁹⁷ On the contrary, the adoption of such legislation/law as well as of some regulatory measures should instead be considered as acts made for the protection of the national welfare by the state. Within this context, the necessity of relying on a new legal

⁹¹ *Public Statement on the International Investment Regime dated August 31, 2010* – Osgoode Hall Law School, York University (Toronto, Canada) – York University Website < http://www.osgoode.yorku.ca/public_statement/ > (Last visit 26/11/2010).

⁹² See Sornarajah, *supra* note 53, on page 104.

⁹³ See Kingsbury and Schill, *supra* note 65, on page 78.

⁹⁴ See S. W. Schill, *International Investment Law and Comparative Public Law* (Oxford University Press, UK 2010), on page 7; and G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Monographs in International Law, Oxford University Press, UK 2007).

⁹⁵ *Report on the Future European International Investment Policy dated 22 March 2011* – European Parliament Website < <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0070+0+DOC+XML+V0//EN> > (Last visit 28/04/2011). See also Kingsbury and Schill, *supra* note 64, on page 75.

⁹⁶ See Republic of South Africa's Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009, *supra* note 28, on page 47.

⁹⁷ *Report on the Future European International Investment Policy dated 22 March 2011* – European Parliament Website, *supra* note 95.

investment law framework that can be used as mechanism to enhance certainty and coherence has been stressed.⁹⁸

Further evidence of this legitimacy crisis is found in the recent withdrawal of some Latin American countries from the ICSID Convention.⁹⁹ In addition, a more serious example can be found in the current tendency of both developing countries and developed countries to review, renegotiate or terminate their BITs (as was explained sub-section (b) of this article).

Moreover, it is opportune to emphasize that one of the main concerns of host states regarding the current international investment system is the aspect related to the inclusion of a wider variety of disciplines into BITs which are also critical to their development. It has been argued that this inclusion is becoming increasingly complex.¹⁰⁰ In particular, this relates to the greater legal rights that are granted to foreign investors as compared to those rights given to domestic investors at the international level.¹⁰¹

Nevertheless, the principal concern of host states is the preservation of '[o]ne of the most fundamental elements of state sovereignty [which] is both the right and the duty of governments to regulate economic activities and act in the broader public interest'.¹⁰² This preservation is largely guaranteed by referring to those principles of law that have given rise to the particular administrative acts, i.e., by referring to the principle of domestic administrative law. Moreover, there is an additional element to this type of government action which is to ensure that national legitimate interests are not compromised.

Consequently, it can be said that the performance of this administrative conduct will always be protected by the law of any democratic society and will be reinforced by the application of a consolidated and homogenous set of legal principles such as the principles of administrative law.

Conclusively, it is important to emphasize within the context of this article, the statement made by W. Burke-White and A. Von Staden in the article entitled *The need for public law standards of review in investor-state arbitrations* which states that 'any move by ICSID tribunals towards a consistent and coherent standard of review appropriate for the context of public law disputes... would increase the investor-state arbitration system's overall legitimacy'.¹⁰³

g. Summary

The investor-state treaty arbitration system has given rise to various political, legal and academic concerns. The criticisms made about the system increase every year, particularly on regulatory issues arising from international investment arbitration. For this reason, it can be asserted that one of the chief reasons for these various concerns and criticisms is the

⁹⁸ Ibid.

⁹⁹ See Schill, supra note 94, on page 6.

¹⁰⁰ See Republic of South Africa's Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009, supra note 28, on page 47.

¹⁰¹ *Trading our way to more jobs and prosperity* – Department of Foreign Affairs and Trade – Australian Government <<http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf> > (Last visit 05/06/2011).

¹⁰² See Republic of South Africa's Government Position Paper on Bilateral Investment Treaty Policy Framework Review – June 2009, supra note 28, on page 47.

¹⁰³ See Burke-White and Von Staden, supra note 68, on page 719.

assessment of a host state's regulatory conduct and also the review of certain public-law matters by investment arbitrators at the international level due to the application and interpretation of the FET standard.

Additionally, with regard to the current practice of this arbitral system, another concerning issue from a legal point, which has been stressed repeatedly, is the existence of compromising and apparent international restrictions on the sovereign power of state to regulate, as it may violate some standards of international investment law such as fair and equitable treatment. Consequently, some states, in response to this apparent restriction on their sovereign power, have taken governmental and political actions that are affecting the legitimacy of this arbitral system. These actions range from the revision of the terms and conditions of BITs, to the consideration of denouncing or terminating these international agreements. For example, countries like Ecuador; Venezuela; Bolivia; South Africa; and Australia have already taken governmental measures which could be seen as putting the legitimacy of this investment arbitration system at risk. Similarly, international organizations such as the European Parliament, UNCTAD and OPEC, in addition to a group of academics, have also expressed their concerns about this system.

Despite the concerns and questions surrounding this system, there is a common intention, within the international arena, to find the right equilibrium between the interest of foreign investors and the regulatory power of the host state.

A temporary solution to this current crisis of legitimacy is the consolidation of these two groups of interests by allowing reference to be made to some principles of domestic (constitutional and administrative) law in the current international investment arbitration practice through the application of the FET standard when international regulatory disputes are being resolved. It can be affirmed that this exercise can bring a certain level of transparency and fairness into the currently criticized dispute resolution mechanism.

Adopting this solution becomes more important if it is taken into consideration that investment arbitration, apart from national courts, has been the most common mechanism used to resolve regulatory disputes between private individuals and states. The proposed solution of referring to administrative law principles is one of the most prompt cures to the argued lack of legitimacy surrounding the investment arbitration system. This practice requires investment arbitrators to rely more on their administrative law knowledge and expertise by applying the principle of *iuris novit curia* (the court knows the law).

Indeed, given the analogy between the public law functions of the investor-state treaty arbitration mechanism and the domestic legal remedies, it can be said that both have been designed to mainly resolve regulatory disputes between the state and private individuals. Both parallel levels of state regulatory review have also been designed to protect private individuals from the unlawful or arbitrary conduct of the host state. In this context, it can also be said that this arbitration system has mainly been designed as a temporary forum to provide private individuals with a special tool to challenge the domestic rights and privileges of the host state at the international level. This particular point shows, amongst other aspects, that investment arbitrators are arbitrators of law rather than arbitrators of equity since they are required to assess the domestic regulation of the host state in accordance with the applicable law chosen by the BIT's contracting parties in order to determine the state's international responsibility.

In this respect, the autonomy of the contracting parties plays an important role as, frequently, the contracting (sovereign) states will establish the law applicable to a possible regulatory dispute in advance. Many contracting states do this through the body of a BIT or in default, they leave it to the ICSID Convention or UNCITRAL rules. The general rule is that the parties agree on application of the law of the contracting state party to the dispute, i.e., the host state's law (*lex situs*) in conjunction with the applicable provisions of international law. However, it must be noted that these applicable law provisions do not expand upon what sources of law should or should not be applied to the treaty-based dispute. BIT provisions, ICSID Convention and UNCITRAL rules only make reference to the law of the contracting state party to the dispute which leaves the relevant sources of law to be determined by a particular international investment tribunal.

As mentioned before, in determining the applicable law to an investor/state regulatory dispute, investment arbitrators have been recently starting to look for and rely on non-international rules and principles to carry out this entrusted task. These non-international sources have been mainly found in, and taken from, domestic legal sources such as legislative and administrative acts, i.e., the domestic regulation of the host state. In this regard, it has been said that '[t]he most fertile, but underutilised, source of principles for developing coherent conceptions of investment protection standards are general principles of law recognised in municipal legal systems'.¹⁰⁴ It is important to draw attention to the fact that in many arbitral proceedings, the most popular and traditional practice of resorting to these domestic acts has been through the opinion of legal experts and affidavits.

Nevertheless, through recent arbitral awards, some investment tribunals and some arbitrators have already started to expressly recognise or point out the necessity of resolving investor/state regulatory disputes by resorting to domestic law and domestic law principles, particularly when applying the FET standard. This necessity has been mainly based on the fact that there is a lack of rules governing the unilateral acts of states in international law and is also due to the fact both customary international law and international investment law are both constantly evolving as is the (administrative) law of any democratic society.

Furthermore, it can be asserted that neither a BIT nor the ICSID nor the UNCITRAL rules impede or prevent investment arbitrators from applying some principles of domestic (administrative) law belonging to a host state that essentially form part of the host state's natural law when dealing with regulatory disputes. A guideline on what domestic (administrative) law principles should be applied to a certain investor-state regulatory dispute does not exist in international law. Hence, this task is left to international arbitrators.

This suggested practice of referring to domestic (administrative) law principles as 'a margin of appreciation standard of review'¹⁰⁵ can help investment arbitrators in their difficult task of assessing the regulatory conduct of a state at the international level. This is particularly so if account is taken of the fact that the unilateral powers of the states have not yet been codified at the international level and '[i]nternational law is insufficiently mature compared to domestic legal systems'.¹⁰⁶ Furthermore, it has been asserted that 'the integrity of the law of the host state is also a critical part of development and a concern of international investment

¹⁰⁴ See Douglas., *supra* note 6, on page 89.

¹⁰⁵ See Burke-White and Von Staden, *supra* note 68, on page 720.

¹⁰⁶ C. B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction* 41 Vand. J. Transnat'l L. 1083 (2008), on page 1119.

law'.¹⁰⁷ It therefore seems that reference by investment arbitrators to administrative law principles may help to mitigate the risk of considering the regulatory conduct of the host state as a potential international breach of an IIT provision. This suggested practice may also help to prevent public law adjudicators from relying on their own subjective opinion too much.¹⁰⁸

Due to the lack of any prohibition in applying such principles, this article encourages international arbitrators to resort or refer to sources of law such as the principles of domestic (administrative) law in international regulatory disputes as a way to impart justice in a fair, transparent and equitable manner. In particular, if it is taken into account that 'the *sui generis* character of international law is an increased reliance on existing domestic legal systems for development of substantive international law'.¹⁰⁹

The reluctance of investment arbitrators to refer to this particular source of law can be regarded in the long term as a contribution to the current crisis of legitimacy that the international investment arbitration system is facing. Vivid examples supporting the existence of this crisis are found in the recent withdrawal of some Latin American countries from the ICSID Convention, as well as the revision, renegotiation or termination of some BITs by various (developed and developing) states.

Taking all these factors into account, it could be said that now seems to be the right time to initiate the practice of referring to these sets of domestic (administrative) law principles in international regulatory disputes due to the current concerns and questions surrounding the current practice of the well-known system of international investment arbitration.

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¹⁰⁷ *Fraport v. Philippines* (Preliminary Objections), paragraph 402, quoted by Douglas, *supra* note 6, on page 72.

¹⁰⁸ See Douglas, *supra* note 6, on page 90.

¹⁰⁹ See Picker, *supra* note 106, on page 1092.