# STATE PARTICIPATION IN INTERNATIONAL ARBITRATION

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**SUMMARY.-** Introduction.- The protection of sovereignty at the international level.- Abandoning the Calvo Doctrine.- Towards a worldwide administrative law.- International arbitration as a consequence and as a catalyst for the internationalization of administrative contracts.- States in international commercial arbitration.- States in investment protection arbitration.- Can it be said that the Calvo Doctrine is returning?.- Developing countries and international arbitration.

It was at the end of the seventies when I received a call from my good friend Aron Broches, then the vice-president of the World Bank and director of its legal services at the time, letting me know that he was coming to Madrid and that he wanted to contact the person that would be responsible for the possible ratification of the 1965 Washington Convention, whereby the World Bank's arbitration centre, the ICSID, was created. I contacted the Spanish Ministry of Foreign Affairs and was told that the person in question was Ambassador Aldasoro, who was the Director-General for International Cooperation. It was easy to get a meeting with him because, at the time, Spain was in need of international financing and, under the circumstances, World Bank representation was welcome. We got to the Palacio de Santa Cruz on the scheduled date, where we were received with all possible honors. In the Ambassador's office, he greeted us warmly, until we started to talk about the purpose of our visit and he asked "What can I do for you?" Dr. Broches explained what the Washington treaty consisted of and how the ICSID worked. He did not need to say much, since our interlocutor at the Ministry of Foreign Affairs was very well informed, particularly about the Latin American countries' diplomatic understanding not to agree to create an arbitration center at the World Bank. Much to our surprise, Ambassador Aldasoro shot up out of his comfortable chair and informed us solemnly that he, in the offices of the Ministry of Foreign Affairs, could not consent to the felony (his own words) of requesting that Spain lose its sovereignty by ratifying an assignment of its jurisdictional rights to an international entity. The meeting ended abruptly and you can imagine the conversation we had amongst ourselves afterwards.

The official conception of sovereignty at the time involved an institutional understanding derived from administrative law handed down from the French Revolution. Administrative law and, therefore, the legal regime for administrative contracts were both of a domestic nature. Who could imagine that water treatment or the possible recycling of waste could ever go beyond the territorial scope of the relevant municipal government, or in extreme cases, the territorial limits of the State itself? Our law school professors taught us about the essential nature of administrative contracts and that they were deeply impregnated with the concept of public service. "*The Public Administration … assumes the objective service of watching over the general interest, in accordance with the principle of efficiency…*".[1] Consequently, public administrations enjoyed excessive powers in administrative contracts, such as *ius variandi*, a unilateral interpretation of the contract's provisions and, in exceptional cases, the possibility of cancelling the contractual commitments agreed upon therein. At that time, of course, no one would think of questioning whether the applicable law in administrative contracting was that of Spain's own legal system or, in the event of disputes arising with regard thereto, whether Spain was the only competent jurisdiction to judge them or not, particularly in contentious-administrative matters.

[1] García de Enterría, Eduardo; *Curso de Derecho Administrativo I*, Civitas Ediciones S.L., Madrid, 2002, p. 49.

The protection of sovereignty at the international level

If administrative law, led by the concept of public service, was of a local nature, international law consisted of a group of treaties, principles, case law from international courts and doctrine that were conceived under the principle of protecting the sovereignty of the national States. "*As the Body is the common Subject of Sight, the Eye the proper; so the common Subject of Supreme Power is the State; which I have before called a perfect Society of Men…The proper Subject is one or more Persons, according to the Laws and Customs of each Nation…*".[2] States were the only subjects of international law and they had the responsibility of providing diplomatic protection to their citizens.

This so-called diplomatic protection was a step toward transferring to an international level the different national regimes of administrative law that were in force at the time. In some ways, this protection was given amidst a good amount of hypocrisy, in order to justify the use of force when national laws were violated or when the rights of the respective citizens were violated in those countries that were in the throes of becoming independent from the metropolis. All one has to do is remember the loans that were cancelled and the relevant interest that was left unpaid by the emerging Republic of Mexico. The countries that were affected – Spain, France and England – met urgently in London to sign a treaty whereby the three powers decided to send their respective navies to Mexico in retaliation for

[2] Grotius, Hugo; *The Rights of War and Peace, Book I*, Liberty Fund, 2005, p. XXXII of the Introduction.

the rebellion and to declare their later military intervention in the Mexican territory. The treaty executed in London on October 31, 1861 indicates in its first Section "*H.R.H. the Queen of Spain, H.R.H. the Emperor of France and H.R.H. the Queen of the United Kingdom of Great Britain and Ireland, forced by the arbitrary and humiliating actions taken by the authorities in the Republic of Mexico, and finding it necessary to demand from such authorities more effective protection for the people and property of their respective subjects, as well as the fulfilment of the obligations that said Republic has undertaken therewith, have hereby come together to execute an agreement amongst themselves, with the purpose of combining their joint efforts…*".[3] When Benito Juárez, the elected President of Mexico, triumphantly entered the capital of the old Viceroyalty of New Spain on January 11, 1861, the payment of foreign debt was suspended; a decision that was understood by the three European powers to be arbitrary and humiliating and something they felt legitimized their decision to take "*the steps necessary to send their combined armed forces to the coasts of Mexico, by land and by water, … the total amount of which forces must be sufficient to seize and occupy the different forts and military positions on the Mexican coast*".

Spain entrusted this task to General Prim, who imposed his authority, as did his European colleagues. The consequences were clear: as expected, England collected its debts religiously; France took advantage of the situation to modify the institutional status of Mexico and impose the rule of Emperor Maximilian; while Spain lost its monies, assets and, in particular, its reputation, which it took a long time to later recover.

[3] Sintes, Luis Alejandre; *La aventura Mexicana del General Prim*, Edhasa , 2009, Annex 1, p. 321.

Therefore, the reaction of Latin America's intellectuals should come as no surprise. Firstly, by Andrés Bello in 1832 (*Principles of Peoples' Law"*). Later, by Carlos Calvo in his treatise *"Theoretical and Practical International Law in Europe and America"*, published in 1868. In a similar manner, by Luis María Drago, who was appointed as Minister of Foreign Affairs for the Republic of Argentina in 1902. He had just begun his duties as Minister when the armed intervention of various European powers took place, which was lead by Great Britain, Germany and Italy against Venezuela under the allegations that the latter had not paid the foreign debt it had undertaken to finance different public works. The demands of these Latin American intellectuals were clear: foreigners and nationals must be treated in like manner, but just that. The purpose of doing so was to avoid any privilege or advantage that foreigners may have sought through the diplomatic protection by their respective States.

The three fundamental elements of what has come to be known as the Calvo Doctrine are the following: 1) foreigners must waive their right to diplomatic protection and any other right stemming from international law; 2) the applicable law will be solely and exclusively that of the State in which the foreigner carries out their business activities; and 3) domestic courts have sole and exclusive jurisdiction to rule on possible disputes.

## Abandoning the Calvo Doctrine

*"Commercial freedom is in accordance with primary natural law… no nation may, by any means, justly impede two nations from trading together,*

*if they so desire."*[4] This commercial freedom will eventually become the rule at the international level.

The internationalization of economic relations requires reconsideration of some leading assumptions of international economic law. In contrast to concepts of international law being comprised of different nation States, like so many uncoordinated groups, the concept of international cooperation arises, where the sovereign States participate actively.

The 1958 New York Convention on the recognition and enforcement of arbitral awards was successful and today it constitutes the international instrument that has been ratified by the largest number of States worldwide. In Latin America Ecuador was the first to ratify it in 1962, followed by Mexico's ratification in 1971. Spain also adopted this fundamental instrument of international arbitration and was led to do so by its then minister of Foreign Affairs, Marcelino Oreja, in the midst of the country's political transition and, perhaps, as a demonstration of the changes in its institutional policy; going from the old regime's jurisdictional monopoly by the State to a procedural autonomy of the individual as a result of its newly acquired democratic freedom (Spain's Official State Gazette, the "BOE", of January 11, 1977).

In like manner, Paraguay ratified the 1965 Washington Convention in 1983. Its ratification was extended throughout the Latin American countries in the nineties. Spain could not fall behind, so it too adopted this instrument and it did so, not by losing its sovereignty, but rather by exercising its sovereign powers in the international sphere and by

[4] Grotius, Hugo; *The Free Sea*, Liberty Fund, 2004, p. 51.

participating in such an important international organisation which has since resolved so many investment-related disputes ("BOE" September 13, 1994).

The proliferation of bilateral treaties (more than 2,400) for the protection of investment and free trade agreements was a fundamental change . Spain executed a number of such international treaties. Within such treaties, a double principle exists that has served as inspiration for a new international economic law: foreign investors are guaranteed treatment according to international standards, and they are entitled to the protection of the international arbitral tribunals, vis-à-vis any violations of the treaty by the States.

This change, so radically, was a result of the liberal policies adopted in relation to the international movement of capital and technology, essential conditions for the development of the different countries. The present international financial crisis is now raising serious doubts about liberal policies; therefore, the risk of protectionism and a return to the concepts and policies that until very recently were considered as outdated, is appearing on the horizon. Time will tell where the uncertainties of the current economic and financial situations may lead us.

## Towards global administrative law

The demands of economic growth and development over the past few decades have led international organizations to establish certain criteria as a condition to enter the international capital markets. The World Trade Organization, the International Monetary Fund, the World Bank or the

OECD, amongst other international institutions, have all imposed general conditions for administrative contracts. It could be said that our legal system in the European Union has, to a large degree, changed the idea that public service is an entity reserved for the State in favour of private initiative and free competition.

I still remember Berthold Goldman solemnly affirming in arbitration conferences, time and again, that an international administrative contract is a contradiction in terms. That is, as this French expert used to say, it is either an administrative contract (and, therefore, subject to the extraordinary powers of the public administration and the exclusive domestic contentious-administrative jurisdiction) or it is an international contract and the principle of *pacta sunt servanda* is applicable.

The important infrastructure projects undertaken over the past few decades have required international financing. Administrative contracting followed criteria that could well be referred to as global administrative law. The so-called public procurement protocols are clear proof of this.

In the fight against corruption, transparency is a fundamental criterion when contracting such projects. At a recent conference of the ICCA on international arbitration held in Rio de Janeiro, Professor Guido Tawil rightly stated that today, administrative contracts are submitted to a myriad of legal systems of a global nature which, undoubtedly, limit the contractual prerogatives of the State (*About the Internationalization of Administrative Contracts, Arbitration and the Calvo Docrine*). Global administrative law for public contracting causes us to question many of the principles we studied in local administrative law, which derived from the criteria introduced into our legal systems which were based on the French Revolution.

<u>International arbitration as a consequence and as a catalyst of the internationalization of administrative contracts.</u>

Globalization has also had a direct impact on one of the basic pillars of administrative law. From the moment that foreign investors are entitled to defend themselves directly against sovereign States, through international arbitration, the sole and exclusive competence of domestic administrative courts is lost. Similarly, from the perspective of international law, we are seriously questioning the idea that only sovereign States are legitimate actors in international jurisdictions. Therefore, there is a break from the local conception of administrative law and the corresponding conception of sovereign states as the only actors in international public law. Natural and juridical persons are internationally authorized to sue States directly, without the intervention of their home states.

International arbitration is a consequence of internationalization, or rather, the globalization of administrative contracts. However, at the same time, it is a true catalyst for new developments. Arbitral case law has produced a true international legal doctrine, and has been a real catalyst for a new international economic law that draws no boundaries between private law and international public law.

France, the home of the modern administrative law, began the judicial abandonment of the sole and exclusive judicial competence over administrative contracts. On April 10, 1957 the *Cour d'Appel* in Paris (in the case *Myrtoon Steam Ship vs. Agent Judiciaire du Trésor*) decided that "*exclusivity refers to domestic contracts and is not applicable to contracts of an international nature*". This doctrine was later ratified by the *Cour de Cassation* on May 2, 1966 in the case of *Agent Judiciaire du Trésor vs. Galakis*. In France today, no one would question the possibility of international arbitration with regard to administrative contracts.

The same approach has been followed in Spain, where public administrations have accepted arbitration when required to do so by international financing entities. The legislation relating to administrative contracts (Law 30/2007, of October 30, on Public Contracting) and law on budgets (Law 47/2003, of November 26, General Law on Budgeting) govern it. Article 7.3 of the latter law confirms the rights of the Treasury may be submitted to arbitration "*…through a royal decree passed by the Council of Ministers, once the full State assembly has been held…*" In fact, the law on Public Contracting has allowed the Spanish public administrations to use international arbitration extensively; even in the contracts executed by its ministers with foreign companies, reference is made to "*what was agreed upon by the parties according to the rules and uses that are in force under international convention*". The wording of both laws clearly demonstrates that this practice that has become part of our legal life, since autarky was surrendered in favour of international participation and cooperation.

The so-called Calvo Doctrine was a logical and consistent response to unfair military intervention that, under the guise of "diplomatic protection", certain European and North American States used against the independent countries of Latin America. These policies were rightly referred to as "gunboat diplomacy". The global economy and the new conceptions of administrative and international law have lead States to participate actively both in international commercial and investment arbitration.

States in international commercial arbitration

The presence of States in international commercial arbitration proceedings has been frequent in recent decades. Starting with the economic recovery after World War II, it has been the States that have led the reconstruction of their respective economies and one could say that, particularly in the developing countries, certain economic and commercial projects could only be carried out with the direct participation or guarantee of the State. As a result, contracts containing a commitment to submit disputes to international arbitration were signed frequently. When disputes started to arise and, therefore, arbitration proceedings began, the defence of the States was often based on a battery of argument centred on jurisdictional immunity. Despite the contractual agreements made, the sovereign aversion to submitting the State to foreign or international courts meant sovereignty was defended through arguments of jurisdictional immunity. The arbitral tribunals, empowered by the international treaties and applicable rules performed their obligations under what has come to be known as "competence-competence". They affirmed their own jurisdiction over the sovereign States, delimiting jurisdictional immunity when interpreting international treaties and enforcing contractual commitments. Lord Wilberforce was right when he pointed out "*once a trader always a trader*". If the States, using their sovereign power, had signed contractual commitments that included arbitration clauses, the only thing that the arbitration tribunals could do was reject pleas of jurisdictional immunity and ratify their own competence.

Today it is quite common to find sovereign States and, particularly, state-owned companies as parties to international commercial arbitrations (both in *ad hoc* arbitration as well as administrated arbitrations). As an example, the International Chamber of Commerce statistics for financial year 2009 indicate that seventy-eight of the cases it heard related to States or state-owned companies; that is to say, they represented 9.5% of all the arbitration cases processed by the International Court of Arbitration.

It must be admitted that, when carrying out their duties, both arbitrators and administrating institutions take special care where the arbitration proceedings involve States, in the understanding that the relevant decisions directly affect the public spending in the respective countries and, ultimately, the citizens themselves; in terms of possible social services. Therefore, and as an example, it is the policy of the International Court of Arbitration at the ICC to take special consideration when sovereign States are involved and this can be seen in various decisions, such as the *prima facie* analysis, vis-à-vis third parties, regarding the existence and effects of the arbitral clause, the determination of the arbitral seat, issues relating to provisional measures, the establishment of the tribunal (the number of arbitrators, the verification of their independence, the appointment of an arbitrator, in the event that the State did not carry out the relevant appointment) and, particularly, when the draft arbitration award that is proposed by the arbitrators is considered for approval. In such cases, the Court strives to make its decisions during its general assembly, with the attendance of its numerous members from very different countries. By doing so, the aim is to guarantee an arbitral protection that is as effective as possible, when sovereign States are involved (See Eduardo Silva Romero, *ICC Arbitration and State Contracts,* ICC International Court of Arbitration Bulletin, vol 13/1, p. 34 *et seq*).

At this point, I would like to make special mention of two controversial issues; the treatment of official secrets and immunity from execution of arbitral awards.

During the period for gathering evidence, objections are often made to requests for certain types of proof, based on the existence of specific privileges. One of these privileges is that of lawyer-client relations, especially if we are in a situation where the lawyer is a company's in-house lawyer or where he/she represents the State, that is, when it is a lawyer whose sole client is one of the parties to the arbitration. This issue must be handled carefully keeping in mind the conflicting rules that may exist in different jurisdictions regarding the figure of a corporate or State attorney: In some countries this figure is considered a lawyer, while in others he or she is considered a member of the corporate staff and, as such, not covered by the legal professional privileges. More important are the objections of sovereign States against having to provide certain evidence, on the basis that such documents or witnesses are protected by domestic law and are official secrets. Officials responsible for documents or who know certain facts are obliged to secrecy and if they breach this obligation, they could even be held criminally liable in their country. On the other hand, the party or tribunal that orders such evidence to be produced can indicate that the applicable law for the arbitration proceedings may not be that of the country that protects its official secrets by law. This is a very common situation in cases of international arbitration involving questions of defence, but it also arises in other situations, where the State in question believes that the obligation to not reveal certain secret documents or facts must prevail. The arbitral jurisprudence is not consistent, and this issue requires a case-by-case approach. Arbitral tribunals and institutions, as well as domestic judges that have to address the matter via provisional measures, all analyze these cases carefully and tend to respect sovereign decisions in relation to official secrets, provided that the decision is not made in bad faith with the intention of impeding the arbitral tribunal from investigating the facts.

Once the arbitral award is dictated, the period of enforcement begins. Any party that wants an arbitral ruling to be enforced will normally come before the courts in the jurisdiction where the necessary assets exist against which the award can be enforced. Traditionally, the assets of a State are classified as *iure gestionis* or *iure imperii*; and mandatory enforcement of the award was only granted in those cases where the assets did not affect the sovereign powers at an international level (See K.H. Böckstiegel, *Arbitration and State Enterprises*, The Hague 1984). Questions have arisen over the years, when some States refused to recognize arbitral awards , on the basis of an exaggerated interpretation of their sovereign activities. This was especially the case in situations of the enforcement of an award against bank accounts. The case law that emerged in France in the year 2000 is of great interest, when the judgment of July 6 dictated by the *Cour de Cassation* (in the case *Creighton Limited of the Cayman Islands vs. the Ministry of Finance and International and Agricultural Affairs for the Government of Qatar*), extending the waiver of immunity from execution. The Court of Cassation considered that a State's agreement to submit itself to the ICC's rules of arbitration implies an automatic waiver of immunity from execution. The Rules of the International Chamber of Commerce oblige the parties that have agreed to submit a dispute to arbitration to carry out the award without delay. Given that that the London Court of International Arbitration, as well as the ICDR of the American Arbitration Association and the ICSID all impose similar obligations, it can be understood how important this new case law is, when analysing objections of immunity from execution.

<u>States in investment arbitration.</u>

Under the bilateral investment treaties for the protection of investment, sovereign States guarantee their foreign investors legal security. As a prior condition to obtaining international financing for large infrastructure projects, treaties have been signed and ratified that contain binding declarations by the receptor State of investment protection. Commitments are undertaken in broad legal terms, but which are the basis for specific claims and for fixing where liability is proved, damages and losses. The States confirm that foreign investors will receive the same treatment as national investors; that there will be no discrimination, that investors are going to receive fair and equitable treatment in order to guarantee the protection of the investment. With regard to expropriation, treaties, and subsequently arbitral case law, have created the so-called economic expropriation, with more flexible characteristics than those of a traditional expropriation under administrative law. The investment shall be considered to be expropriated when, due to the State's utilization of "*puissance publique*", the economic value of the investment has been affected. Arbitral tribunals have considered that a change of tax regime is a type of indirect expropriation, as well as the modification of the laws protecting the environment. Naturally this has raised controversy as to whether the protection of the investor provided for under international treaties should prevail or not over the sovereign rights related to tax or environmental matters. Many treaties have a most-favored-nation clause, meaning that the investor enjoys not only the guarantees established under the applicable treaty but also the most favorable guarantees contained in any other treaty that the Host state may have signed.

These investment protection treaties have a novel mechanism for forming an arbitral agreement. The case of *Lanco vs. The Republic of Argentina*[5] introduced the doctrine (which was later accepted unanimously by arbitral tribunals) that an arbitral agreement consists in the State's public offer to submit itself to arbitration under the treaty and in the acceptance of this offer by the investor in filing for arbitration. In this regard, the arbitral clause is based on a treaty of international public law and it generates, through the investor's individualized acceptance, an arbitration that is very similar to the arbitration of international private law, despite the fact that the State is acting as defendant.

With this new jurisprudence, investors must include legal risk amongst the multiple risks of a new investment. They must evaluate in what country they want to make their investment so that the investment may enjoy treaty based protection. In each case, the different legal precepts of the treaty must be analyzed thoroughly, in order to know whether we are dealing with an investment that is covered or not. In the arbitration proceedings *Salini*

[5] *Lanco Internacional Inc. vs. Argentina*, ICSID Case No. ARB/97/6, Preliminary decision on jurisdiction – December 8, 1998.

*vs. the Kingdom of Morocco*[6], the Tribunal understood the construction and exploitation of a highway by means of a concession to be an investment protected by treaty, in these proceedings between an Italian company and the Kingdom of Morocco. At first, the 1965 Washington Convention covered investments in the field of natural resources, oil, natural gas and mining; today, a good number of the disputes regarding the protection of investments involve disputes stemming from administrative concession contracts. The concept of "investor", that is, of the figure that may legitimately request international arbitral protection, has become ever more clearly defined over the past few years. In the case of *Lanco vs. the Republic of Argentina*[7] a line of case law was initiated whereby anyone that made an investment in a concessionary company could be considered as a party that could legitimately seek arbitral protection; that is, someone could, in their capacity as shareholder, be considered an investor.

This ruling *(Lanco vs. the Republic of Argentina*[8]*)* also adopts a very interesting doctrine to define the arbitral protection of investments. The concessionaire - an Argentinean company (partially owned by the North American company, Lanco, which held a minority stake) - entered into an administrative concession contract with the Municipal Government of Buenos Aires. The contract was, according to the administrative law of Argentina, compulsorily subject to the local laws and administrative courts. The claimant, shareholder of the concessionaire, sought protection under the treaty. The Republic of Argentina questioned the jurisdiction of the arbitral tribunal as the Republic of Argentina was not a signatory in the

[6] *Salini Construttori S.p.A and Italstrade S.p.A vs. the Kingdom of Morocco*, ICSID Case No. ARB/00/04, Decision on jurisdiction – July 23, 2001.
[7] *Lanco Internacional Inc. c. Argentina*, Caso CIADI No. ARB/97/6, *op. cit*.
[8] Ibid.

concession contract, rather the municipal government was. The Tribunal understood that the principle of attribution for international obligations made the Republic of Argentina a possible defendant, by treaty. The State argued that Lanco's demands should be resolved through the channels of contractual law in the jurisdiction expressly indicated in the concession agreement; on the other hand, the tribunal found that the contractual claims were one thing, which the concessionaire must seek to enforce before a contentious-administrative court, and yet another were the claims arising from the violation of the investment protection treaty. Thus an issue was raised that has been reiterated time and again in the history of arbitral tribunals of the distinction between a *contractual claim* and a *treaty claim.* If a municipality exercises its contractual powers, any disputes must be resolved through the local contentious-administrative courts; in contrast, if the Argentinean State is liable, on the principles of state responsibility, for the breach of the treaty through the use of *puissance publique,* then the dispute is within the jurisdiction of the international arbitral tribunal.

When considering their own jurisdiction, frequently arbitral tribunals analyze whether actions have been taken in good or bad faith, both on the part of the investor as well as on the part of the State. A State clearly acts in bad faith when in the exercise of one of its three powers a denial of justice has occurred. An investor acts in bad faith when fraud or corruption can be proven in the structure of the investment. International tribunals are conscious that protection cannot extend to actions performed in bad faith.

To summarize, therefore, over the past fifteen years international arbitration has evolved to include he protection of investment as well as traditional commercial arbitration. Natural and juridical persons have become active subjects in international law. They can litigate directly against sovereign States, in cases involving breach of treaty. Local administrative law has given way to global administrative law and, as a direct consequence, in international administrative contracts, domestic law is no longer hypothetically applicable, nor do the local contentions-administrative courts comprise a sole and exclusive jurisdiction. International arbitral tribunals are a result of this globalization of administrative law but, at the same time, they are catalysts for jurisprudence that is, case by case, defining effective international arbitral protection.

Is the Calvo Doctrine returning?

I do not want to close this speech on the participation of States in international arbitration without making certain observations regarding current international policy, aggravated by the economic and financial crisis.

International arbitration and, more specifically, investment protection has affected both developed and emerging countries. Complaints are frequently heard regarding the activity of and what is considered, in some cases, the excesses of international arbitrators. Doubts have been raised regarding the democratic legitimacy of conferring on private people, the arbitrators, an international jurisdiction that, at times, has such a decisive effect on life in the respondent states. It is forgotten that the treaties were voluntarily signed by the sovereign States and that the arbitration center of the World Bank is governed by the participating States themselves.

Even in the United States reforms are being proposed in relation to the protection of investment, which sound very much like a true revival of the Calvo Doctrine. A special sensitivity exists regarding the impact (more on a social than on an economic level) of arbitral decisions pursuant to the NAFTA treaty (between Mexico, Canada and the U.S.) and President Obama, in his campaign to the White House, indicated very clearly that foreign investors should not enjoy greater protection than U.S. citizens. In the work that is underway in the U.S. to review their system of international protection of investment, attempts are being made to soften the consequences that certain arbitral tribunals are drawing from general legal concepts. The understanding is that fair and equal treatment has been treated too generously by arbitral case law; another objective is to limit the effects arising from the conception of economic or indirect expropriation of arbitral tribunals. The aim is to keep the protection of foreign investors within fair limits, without arbitral tribunals being able to question State policy regarding the environment or the protection of social rights.

In Latin America international commercial arbitration is also being affected by the questions raised by investment protection. Considering that sovereign States are involved, the decisions made by arbitrators have a very serious impact on public opinion. The aura of secrecy and confidentiality that surrounds international commercial arbitration disappears when dealing with sovereign States whose commitments must be made public and are subject to parliamentary controls in their respective countries. At times, circumstances change. For example, although Brazil has signed some bilateral treaties for protecting investment, thus far it has not ratified any of them (including the Washington Convention) and it has kept itself outside ICSID’s activities. However, given the international emergence of

Brazil’s economy, questions arise as to whether Brazil’s avoidance of participation in the international investment protection system is based on considerations that existed for foreign investment in Brazil some years ago. Today Brazilian companies are investing outside its borders with no legal protection, except for that covered in the specific contracts signed, and, due to this, an important movement is underway to consider whether it is advisable for Brazil to join the international structure for investment protection. In the Brazilian example, it is clear that attracting investment does not always require the country to have first signed treaties. Foreign investment is very strong in Brazil, while in other countries of Latin America, foreign investment is fleeing, despite these countries having signed treaties to protect investment.

Separate mention must be made regarding international policy movements involving what has come to be called Project ALBA. Venezuela, with all the economic possibilities it has, is leading a strong challenge with regard to the systems for resolving disputes in institutions that have domiciles in the United States, whether such institutions are international or not. On May 2, 2007, Bolivia announced its withdrawal from the ICSID, and in February 2009, it passed a Constitution whose wording heavily reflects the postulates of the Calvo Doctrine. On December 4, 2007, Ecuador announced that it would not accept the arbitration of the World Bank in matters involving natural resources, such as oil, natural gas and mining. We are witness to a series of declarations and international policy movements to create Latin American arbitration institutions. All these States continue to receive international claims and continue to participate actively in arbitration, of both a commercial nature as well as those relating to the protection of investment. Time will tell whether these debates, still in the area of international policy, will eventually solidify into an international arbitration center for the Latin American countries themselves, which, as is logical, would be faced with the task of earning the confidence of foreign investors as its first assignment.

Sovereign States do not like to be put on trial. However, pragmatism must prevail. International arbitration has been successful and there have been numerous cases where States voluntarily abide by arbitral awards. Spain is a clear example. When an Argentine citizen called Mr. Maffezini had problems in Galicia with a State development company, he took the Kingdom of Spain to court[9]. The latter defended itself and, in the end, it was ordered to pay compensation for damages. Instead of questioning the rules of the game, the State accepted the arbitral decision and complied with it, while, at the same time, reaffirming its sovereignty. The Kingdom of Spain had plenty of possible grounds to seek the annulment of the arbitral award or to hinder its enforcement but it complied with its international obligations and abided by the award as issued.

## Developing countries and international arbitration

The voice of developing countries is often unheard when problems of international arbitration are being analyzed. We have created a legal structure, first of commercial arbitration and later for the protection of investments, which has become excessively complex. Therefore, it is a good idea, at times, to leave aside our points of view to visit the other side of arbitration. The dissident voices in the countries of Latin America should be heard. Their main criticisms could be divided into the following six categories:

[9] *Emilio Agustín Maffezini vs. the Kingdom of Spain,* ISCID Case No. ARB 97/7.

1.- Democracy is deficient in the international arbitration tribunals, which, in contrast to the States that participate in arbitration, are not a result of elections whereby the citizens choose their leaders. As we mentioned above, this criticism is not overly accurate, if we keep in mind that international arbitration is a product of treaties that have been negotiated and ratified by the different authorities and governing bodies of the participating States. This is even truer when referring to the bodies that administrate the arbitration, such as the ICSID, whose members, specifically, are the States that participate in the World Bank.

True, at times arbitration tribunals can go too far and they ignore the consequences of a sovereign State's participation. I am thinking, for example, about the recent decision of an arbitration tribunal to accept the request for interim relief lodged by the investor. The tribunal, comprised undoubtedly of three jurists of worldwide expertise and prestige, ordered a Latin American republic to withdraw the criminal lawsuits it had filed in relation to an investment made in the past. Can arbitration go so far? It is hard for me to conceive that the authorities of the country in question might actually withdraw the criminal charges, without the person that decides to comply with the arbitral ruling incurring criminal liability. As is logical, such arbitral actions trigger strong criticism by those who find that their sovereign powers and obligations threatened by arbitration.

2.- Modern international investment protection has been built, as we all know, upon bilateral and multilateral international treaties. Due to this, some arbitral awards raise debate as to where the limits lie regarding investors' protection. Does such protection authorize the arbitral tribunal to question the competence of the affected States to regulate such important subjects for their sovereignty as those relating to the applicable tax for certain businesses, environmental regulation, measures that affect citizens' social rights or the protection of health?

3.- Public opinion is very sensitive to matters relating to corruption, fraud or money laundering. In principle, everyone admits that the so-called trans-national public order imposes certain limits to contracting and, subsequently, to arbitral decision-making. For years, arbitrators remained passive, due to a lack of proof regarding corruption allegations; it is not easy to present strong proof, which could later be used before the criminal courts. Today, given the greater transparency that exists in arbitration proceedings, the arbitrators are more conscious of these situations. Among other things, because filing for international arbitral protection is based on good faith and good faith does not exist if the most elemental rules of ethical behaviour have been violated. Proof in this regard is easier to find in a global world with an aggressive public opinion.

4.-. The presence of States in international arbitration requires transparency. Those of us who practice arbitration in the area of international commerce especially value its confidentiality; there are plenty of cases where this separation from publicity is what allows parties to trust and submit themselves to the decision of the arbitrators. In some cases, including in commercial arbitration, decisions must be public if they have implications for third parties; for example, when the company in question is listed on the stock exchange. However, there is no question about the fact that States must submit to parliamentary control, which means that international arbitration may indeed require publicity, to which those who practice commercial arbitration are so allergic.

5.- International arbitration has been very important over the last few years in Latin America. The statistics kept by the International Chamber of Commerce and, particularly, the ICSID are good proof of this. There is no doubt about the fact that through arbitral tribunals international law for investment protection has become more Latin American. Only a few years ago, international law was a subject that was only dealt with in French and English; today, circumstances have changed but perhaps what has not yet been modified is the importance that Anglo-Saxon thinking has on the management of international arbitration. Individuals that do not understand Spanish are frequently appointed as presidents of arbitration tribunals that must solve problems in Latin American countries. The parties, including the Latin American States, have the feeling that if they do not appoint Anglo-Saxon law firms, they may be in a less advantageous position to defend themselves. It is often heard, therefore, that the arbitration proceedings in Latin America are, to a certain extent, "kidnapped" by the Anglo-Saxon world. Active participation by Latin American arbitrators and an ever increasing role of Latin American law firms is starting to change custom and usage. It is definitely thought-provoking to consider that, although arbitration is officially "bilingual", the decision making process itself is carried out in English with the arbitral tribunal and with an Anglo-Saxon mentality. It is argued that the problem is not a question of language or translation but one of mentality; to give an example, the legal concept of good faith is approached very differently in one culture or another.

6.- International arbitration has become a big business that is, moreover, excessively costly. The big law firms are the ones that are carrying out the macro-arbitral proceedings, when perhaps such proceedings could be simplified greatly. The long and tortuous “discovery battles”, the at times inexplicable “show” of cross-examination without substance and arbitral hearings that last well beyond several weeks, when a good prior written preparation might have taken but a few days - are all subjects to be reflected upon. What is clear is that the sovereign States are right sometimes when they complain about events that could be considered “gunboat arbitration”. Arbitral awards turn into long treatises, whose observations are, at times, far from the decision that the arbitrators have to make “*suum cuique tribuere*”; President Guillaume was right when he recently warned, in a brilliant conference in Geneva, about the pedantry that sometimes surrounds investment protection arbitrators, who, when they are drafting their awards, are thinking more of their own future glory (through doctrinal citation), than of the parties who requested such decision. Arbitrators are not international legislators. Their main duty is not that of creating international jurisprudence or law, but rather resolving the disputes that are brought before them, and providing adequate reasons for their decision.

The great world recession in which our economies have been immersed since 2008 is raising debate about assumptions that were previously unquestionable. After the collapse of the world economy, the free market and the so-called ‘Washington Consensus’ are giving way to the temptations of protectionism. If the economic doctrine of Milton Friedman is giving way, once again, to that of Keynes, it should be of no surprise whatsoever that in international economic law, appeals to State sovereignty are ever more frequent. With good reason, Carlos Fuentes spoke about globalization at a world level but demanding efficiency within each sovereign State.