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The Blurring of the Public/Private Distinction or the Collapse of a Category? The Story of Investment Arbitration

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THE BLURRING OF THE PUBLIC/PRIVATE DISTINCTION OR THE COLLAPSE OF A CATEGORY? THE STORY OF INVESTMENT ARBITRATION

Guillermo J. Garcia Sanchez*

INTRODUCTION

Thirty-six years ago, in a seminal article on the public-private distinction, Professor Duncan Kennedy stated,

> When people hold a symposium about a distinction, it seems almost certain that they feel it is no longer a success. Either people can't tell how to divide situations up between the two categories, or it no longer seems to make a difference on which side a situation falls.[1]

There is no point in having a legal distinction if one cannot differentiate the categories from one another. Legal categories serve the purpose of treating situations "differently depending on which category of the distinction they fall into."[2] In other words, depending on how we conceptualize the procedure, public or private, the consequences for a particular case will change.[3] In the case of the arbitral process, the way we structure the procedure and the remedies available to the parties should be different depending on whether we consider the system as one that belongs to the private or the public realm.

Deborah Hensler and Damira Khatam's new article, *Re-inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, is an invitation to

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1 Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1349 (1982).

2 *Id.*

3 Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 46–47 (2013).

reevaluate the importance of maintaining the public-private distinction of adjudicating disputes through arbitration.[4] Their main argument regarding the distinction is that the arbitral procedure has changed as a consequence of the substantive issues resolved in this particular ADR system. Their survey of U.S. domestic, international commercial, and investment arbitration procedures shows that the contemporary cases in the three domains deal more often with policy discussions than with purely business-to-business transactions.[5] Hence, the arbitral system, which was originally conceived for commercial purposes, has become another way of litigating public law, but without the accountability mechanisms attached to public courts.[6] Privately paid arbitrators are deciding issues behind closed doors that belong to the public realm.[7] For example, in the international arena, the arbitral procedure is being used to challenge "democratically-adopted health, safety, and environmental protection regulations," and this has triggered reforms to bring additional accountability mechanisms of "public adjudicative procedures" into the arbitral proceedings.[8]

But why would a collapse of categories matter? To Hensler and Khatam it matters because the response to the blurring of the private-public lines has been to

> adapt arbitration procedures to resemble more closely public adjudicative procedures: to strengthen due process by relying more heavily on documentary evidence and live witness testimony and by requiring reasoned decisions, and to de-privatize the process by publishing arbitration awards, and (in the case of investor-state arbitration) to open up the process to third-parties, including inviting amicus briefs.[9]

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[4] Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Lines Between Private and Public Adjudication*, 18 NEV. L.J. 381. The comments presented in this article to Deborah R. Hensler and Damira Khatam's work were based on a draft provided to me on July 1, 2017. I am aware of the fact that the article had substantive changes made in its published version, but due to the nature of the publishing schedule, I did not have access to their final work. I apologize to the authors and the readers if my comments do not reflect their conclusions.

[5] *Id*. at 386. ("Controversies within each of the three domains reflect different historical circumstances and political dynamics. However, a common cause of controversy is the expansion of the scope of arbitration in each domain to disputes for which the procedure arguably was not originally intended, particularly disputes with significant public policy dimensions. The most frequent response to criticism of this expansion in each domain has been to adapt arbitration procedures to resemble more closely public adjudicative procedures: to strengthen due process by relying more heavily on documentary evidence and live witness testimony and by requiring reasoned decisions, and to de-privatize the process by publishing arbitration awards, and (in the case of investor-state arbitration) to open up the process to third-parties, including inviting amicus briefs.").

[6] *Id*.

[7] *Id*. at 413–14.

[8] *Id*. at 385–86.

[9] *Id*. at 386.

These are procedures close to what judges would do in regular trials.[10] To Hensler and Khatam, failing to categorize arbitration as a private ADR process has brought, as a consequence, the diminishing of "the value of private dispute resolution for truly private disputes without fully satisfying the need for public dispute resolution for public disputes."[11]

In the case of investment arbitration, the consequence to Hensler and Khatam is that States lose because businesses are challenging their policies, yet there are no accountability mechanisms attached to the procedure.[12] Investment arbitration has "turned into a weapon for corporations to undermine laws properly adopted by democratic governments."[13] Moreover, the effort to include new procedural protections in investment arbitration has only generated delays and increased the costs of disposition, without entirely giving the due process protections and public accountability that domestic courts can offer.[14]

In this paper, I agree in large part with Hensler and Khatam's contention that we are facing a collapse of the public-private distinction, at least in the case of investment arbitration. However, my view is also that the trend to include public law-oriented elements into the arbitral procedure misses a counter-intuitive point: that arbitrators interpret the remedies of the investment arbitration regime as belonging to a private system of adjudication. Even with all the transparency clauses and the so-called accountability mechanisms, arbitrators are construing the remedies available to them as if the system were purely private.[15] In ninety-nine percent of the cases that deal with public law disputes, arbitrators rely on mere monetary compensations when they find a breach of the investor's rights.[16] In other words, they might interpret public law, but the

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[10] It is not the intention of this article to analyze the changes in adjudicating public disputes but suffice it to say that the U.S. adjudicatory system went through a similar process in the 1970s where federal judges changed the way they perceived public adjudication. From a system where judges used to serve as "arbitrators" or "mediators" of disputes, to one where they order structural remedies and manage the conflict through complex performance orders. For the switch in the U.S. system, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281–82 (1976); see also Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 4 (1982). For a view of how the same perception changed globally, see generally Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19–23 (David M. Trubeck & Alvaro Santos eds., 2006).

[11] Hensler & Khatam, *supra* note 4, at 386–87.

[12] *Id*. at 412–20.

[13] *Id*. at 417.

[14] *Id*. at 421.

[15] *See generally* Rachel Brewster, *Pricing Compliance: When Formal Remedies Displace Reputational Sanctions*, 54 HARV. INT'L L.J. 259, 259 (2013) [hereinafter Brewster, *Pricing Compliance*]; Rachel Brewster, *The Limits of Reputation on Compliance* 323 (Harv. L. Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 09-37, 2009).

[16] Guillermo J. Garcia Sanchez, *The Hydrocarbon Industry's Challenge to International Investment Law: A Critical Approach*, 57 HARV. INT'L L.J. 475, 510 (2016); *see also* INT'L CTR. FOR SETTLEMENT OF INV. DISPS. (ICSID), THE ICSID CASELOAD—STATISTICS (ISSUE 2015-1) 13 (2015).

consequences of violating public law remain closer to the consequences of breaching a purely private commercial contract.[17]

The irony is that there is always an opportunity to price the violation of a contract and this deceives foreign investors who believe that the system is supposed to prevent governments from taking certain actions.[18] By treating the breaches of public law as breaches of private contracts, the arbitrators have signaled to governments that they can factor in the costs of enacting legislation, forcing the renegotiation of a contract, or unlawfully expropriating foreign assets. Ultimately, the best that an arbitrator will tend to do is to order monetary compensations.[19] This fact leaves open an important question: Can we still hold that arbitration has now become a public adjudicatory procedure if the parties can openly breach their obligations and pay for doing so? Can we sustain that such a public system is affecting state sovereignty if the governments can ultimately keep engaging in their unlawful conduct as long as they are willing to pay for it? Can we sustain this idea even if governments that decide not to pay face no global authority that can force them to do so?[20] The following subsections will show how, contrary to what most of the contemporary literature states,[21] conceptualizing investment arbitration as a public law procedure only hides the fact that key procedural elements of investment arbitration remain truly private.[22]

I. WHY DO WE NEED TO DISTINGUISH BETWEEN PRIVATE AND PUBLIC LAW IN THE CASE OF INTERNATIONAL ARBITRATION?

Hensler and Khatam's article follows the same line of classification that the general literature does when it comes to international arbitration. The general trend is to distinguish between commercial and investment arbitration as if they belong to different categories, one more closely related to private law and the other one related to public law. The former is described as a "dispute resolution mechanism of choice for international traders."[23] The latter is defined as

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[17] Sanchez, *supra* note 16, at 521.
[18] Brewster, *Pricing Compliance*, *supra* note 15, at 259.
[19] Sanchez, *supra* note 16, at 520.
[20] *See generally* Edward Baldwin et al., *Limits to Enforcement of ICSID Awards*, 23 J. INT'L ARB. 1, 1 (2006); Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631, 631, 662 (2005); Charity L. Goodman, Comment, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PA. J. INT'L ECON. L. 449, 481 (2007).
[21] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 5, 166 (2007); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 123 (2006); Armin Von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 LEIDEN J. INT'L L. 49, 71 (2013).
[22] Hensler & Khatam, *supra* note 4, at 412. ("Originally, the rules for investor-state arbitration were similar to those of ordinary international and domestic commercial arbitration.").
[23] *Id*. at 401.

a semi-public adjudicatory process "dealing with investment disputes that arise between foreign investors and host States."[24] According to Hensler and Khatam, "[I]nvestor-state arbitration was designed to provide an alternative for foreign investors to bring suit against a sovereign nation in that nation's domestic courts when the sovereign entity allegedly breached a contract."[25] However, according to them, States, in an effort to bring public accountability to the arbitration proceeding, have forced the arbitral institutions to add features that are closely related to the work of domestic courts.[26] Instead of an alternative to local courts, they are mimicking the work of the court system without fully implementing the institutional accountability mechanism available at the national level.

Hensler and Khatam's views of the investment arbitration regime are consistent with the work of scholars such as Gus Van Harten, Martin Loughlin, Stephan Schill, Armin von Bogdandy, and Ingo Venzke, who argue that the system has affected the way States decide and guide public policy.[27] In their words, international investment tribunals "often assume the role of domestic administrative or even constitutional courts, which are possibly deficient or biased in the host country."[28] These tribunals have moved "into the space of polit-

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[24] THOMAS E. CARBONNEAU & WILLIAM E. BUTLER, INTERNATIONAL LITIGATION AND ARBITRATION: CASES AND MATERIALS 621 (2d ed. 2013).

[25] Hensler & Khatam, *supra* note 4, at 385.

[26] *Id*. at 421.

[27] VAN HARTEN, *supra* note 21, at 166; Van Harten & Loughlin, *supra* note 21, at 121–22 ("Our argument is that, owing to this unique conjunction of features, the regulatory conduct of states is, to an unusual extent, subject to control through compulsory international adjudication. Having highlighted these features, we then claim that investment arbitration is best analogized to domestic administrative law rather than to international commercial arbitration, especially since investment arbitration engages disputes arising from the exercise of public authority by the state as opposed to private acts of the state. . . . [T]he regime of international investment arbitration which has been rapidly developing since the 1990s provides not simply a singularly important and under-appreciated manifestation of an evolving system of global administrative law but that, owing to its unique features, it may in fact offer the only exemplar of global administrative law, strictly construed, yet to have emerged.");Von Bogdandy & Venzke, *supra* note 21, at 57. For broader views of global administrative law, see Stephan W. Schill, *International Investment Law and Comparative Public Law—An Introduction*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 3 (Stephan W. Schill ed., 2010); Armin Von Bogdandy et al., *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, *in* THE EXERCISE OF PUB. AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW 3, 4–32 (2010); Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. & POL. 663, 671 (2005) ("It can be said that there is no realm of human activity wholly untouched by ultra-state or global rules. Goods and functions that escape State control are regulated at the global level."); Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* 1–8 (N.Y.U. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 09-46, 2009).

[28] Von Bogdandy & Venzke, *supra* note 21, at 57–58 ("A further function comes into view if one considers international courts with respect to other institutions of public authority that

ical decision-making that has, at least traditionally, been reserved for administrations or legislatures."[29] Arbitrators began to reason and solve cases involving core public policies where the general population had an interest due to the relation between the cases and the host country's economic development.[30] Take for example the cases involving Venezuela or Ecuador where the governments depend on private actors to develop oil and gas fields, and at the same time the State revenue depends on around fifty percent of the rents generated by these industries.[31] When these governments force a contract renegotiation or change their tax codes to capture more rents, they are not only changing the

call for control and legitimation, i.e. in a separation-of-powers or checks-and-balances perspective. . . . In a *vertical* dimension, international courts control domestic authority against yardsticks of international law. International human rights courts provide the classic example, but other courts have joined them. International trade law, strongly shaped by judicial practice, for example, contains detailed prescriptions for domestic regulators. Notably, domestic provisions that are deemed to contradict international trade law can be challenged by a member of the WTO before they have been applied and without a burden on the claimant to show an individual legal interest in the case. The function of controlling domestic public authority also applies to awards rendered by ICSID tribunals.").

[29] *Id.* at 58.

[30] Roberts, *supra* note 3, at 45–46; *see also* Hensler & Khatam, *supra* note 4, at 414 (arguing that "unease with investor-state arbitration grew when multinational corporations adopted a new strategy of using the procedure to challenge legislative mandates that were intended to improve public health and safety or protect the environment").

[31] Sanchez, *supra* note 16, at 500. For cases involving Venezuela and extractive industries, see Rusoro Mining Ltd. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/12/5, Award, ¶ 9 (Aug. 22, 2016); Crystallex Int'l Corp. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/11/2, Award, ¶ 6 (Apr. 4, 2016); Highbury Int'l AVV v. Bolivarian Republic of Venez., ICSID Case No. ARB/14/10, Decision, ¶ 1 (Nov. 21, 2014); Venez. Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, ¶ 29 (Oct. 9, 2014); Anglo Am. PLC v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/14/1, Pending (Oct. 2, 2014); Nova Scotia Power Inc. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/11/1, Award, ¶ 1 (Apr. 30, 2014); Highbury Int'l AVV v. Bolivarian Republic of Venez., ICSID Case No. ARB/11/1, Award, ¶ 1 (Sept. 26, 2013); Universal Compression Int'l Holdings, S.L.U. v. Bolivarian Republic of Venez., ICSID Case No. ARB/10/9, Order of the Tribunal Suspending the Proceeding, ¶ 1 (Sept. 16, 2013); ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, ¶¶ 1–2 (Sept. 3, 2013); OPIC Karimun Corp. v. Bolivarian Republic of Venez., ICSID Case No. ARB/10/14, Award ¶ 20 (May 28, 2013); Eni Dación B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/4, Order Taking Note of Discontinuance (Apr. 18, 2008); see also Mobil Cerro Negro, Ltd. v. Petróleos de Venez., S.A., ICC Arb. Case No. 15416/JRF/CA, Final Award, 19 (Dec. 23, 2011) (involving a dispute between Exxon Mobil subsidiary and a Venezuelan national oil company). For cases involving Ecuador, see Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, ¶¶ 1–2 (Sept. 12, 2014); Burlington Res. Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶¶ 1, 3 (Dec. 14, 2012); Repsol YPF Ecuador, S.A. v. Republic of Ecuador, ICSID Case No. ARB/08/10, Order Taking Note of the Discontinuance of the Proceeding, ¶ 1 (Feb. 9, 2011); Murphy Expl. and Prod. Co. Int'l v. Republic of Ecuador, ICSID Case No. ARB/08/4, Award on Jurisdiction, ¶ 31 (Dec. 15, 2010); Chevron Corp. v. Republic of Ecuador, UNCITRAL PCA Case No. 2009-23, Claimants' Notice of Arbitration 1 (Sept. 23, 2009).

rules of the game for foreign investors, they are making sure that government will not collapse in the face of economic crises.[32]

The negative perception of investment arbitration as a deterrent mechanism for public policy that affects private interest has been present even in the United States.[33] For example, Senator Charles E. Schumer of New York has publicly stated that treaties that contain investment arbitration provisions "indicate that savvy, deep-pocketed foreign conglomerates could challenge a broad range of laws we pass at every level of government, such as made-in-America laws or anti-tobacco laws."[34]

Why would arbitral institutions be out of place when deciding such public matters? In the end, States lawfully consented in the treaties to submit the disputes to the jurisdiction of arbitral tribunals.[35] They had the sovereign prerogative to decline signing the international agreements.[36] The response of the main opponents of the system to this question is that investment arbitration tribunals lack the legitimacy to modify public policy.[37] As opposed to domestic systems,

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[32] *See generally* Osmel Manzano & Francisco Monaldi, *The Political Economy of Oil Contract Renegotiation in Venezuela*, *in* THE NATURAL RESOURCES TRAP: PRIVATE INVESTMENT WITHOUT PUBLIC COMMITMENT (William Hogan & Federico Sturzenegger eds., 2010); Sanchez, *supra* note 16, at 500; Francisco Monaldi, *The Impact of the Decline in Oil Prices on the Economics, Politics and Oil Industry of Venezuela*, CTR. ON GLOBAL ENERGY POL'Y (COLUM. U.), Sept. 2015, at 13–14; Francisco Monaldi, The Political Economy of Foreign Investment in the Oil Industry: The Case of Venezuela and Other Latin American Countries 30 (Aug. 2006) (unpublished manuscript) (on file with the XIV International Economic History Congress in Helsinki, Finland).

[33] Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 366 (2003) (explaining how the U.S. used to promote investment arbitration in the 1990s and now is seeking to restrict arbitration in investment treaties).

[34] Jonathan Weisman, *Trans-Pacific Partnership Seen as Door for Foreign Suits Against U.S.*, N.Y. TIMES (Mar. 25, 2015), https://www.nytimes.com/2015/03/26/business/trans-pacific-partnership-seen-as-door-for-foreign-suits-against-us.html [https://perma.cc/CCL3-RK2D]. This narrative has been present in mainstream media. Anthony Depalma, *Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES (Mar. 11, 2001), http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html [https://perma.cc/LR87-ZBCG] (arguing that "the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors under the North American Free Trade Agreement.").

[35] Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 642 (1998); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 914 (2005).

[36] *See generally* Nancy A. Welsh et al., *Using the Theories of Exit, Voice, Loyalty, and Procedural Justice to Reconceptualize Brazil's Rejection of Bilateral Investment Treaties*, 45 WASH. U. J.L. & POL'Y 105, 106–07 (2014) (arguing that, in the case of Brazil, its refusal to ratify the treaties is in fact a success story since the government has been available to attract foreign investment even without the treaties).

[37] VAN HARTEN, *supra* note 21, at 5 ("[A]rbitrators are able to award damages as a public law remedy without having to apply the various limitations on state liability that evolved in

where courts and administrators are subject to transparency requirements, efficiency principles, due process, and the control of superior courts, the investment tribunals are not accountable to anyone.[38] For example, Gus Van Harten argues that the proceeding is not designed to allow superior courts to review the decisions made by arbitrators.[39] They are not sitting bodies, many of them have conflicts of interests, and there is no appeal process.[40] In other words, states are shifting their decision-making process towards private foreign interest to satisfy an illegitimate authority, and in the process, they are giving away an essential part of their sovereignty. The opponents of the arbitral regime gained momentum when the Transpacific Partnership was being negotiated and forced arbitral institutions to include more transparency-related principles.[41]

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domestic legal systems to balance the objectives of deterrence and compensation against the competing principles of democratic choice and governmental discretion."); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1494 (2006) (arguing that, for a view on how international administrative law could gain legitimacy, global policy-making could develop legitimate standards as the U.S. federal agencies did during their time of crisis); Hensler & Khatam, *supra* note 4, at 386 ("[C]ritics view it as illegitimate for public policy disputes to be decided behind closed doors by private individuals who are privately paid."); Von Bogdandy & Venzke, *supra* note 21, at 58 (Von Bogdandy and Venzke depart from Van Harten on this issue. They claim that "[c]ontrolling domestic authority contributes in many constellations to its legitimation. The review of public acts against general standards by an independent institution is one of the most powerful legitimating mechanisms.").

38 VAN HARTEN, *supra* note 21, at 159, 173 ("There has been widespread criticism of investment treaty arbitration for its lack of openness, and rightly so, for this issue goes to the heart of the problem of using arbitration to resolve regulatory disputes. Here, I refer to openness both as the principle that the public should have access to information about adjudicative decision-making and the notion that, in some cases, the legitimacy of adjudicative decisions which affect regulatory concerns may require views other than those of the claimant and respondent to be represented in the process. . . . Regardless of whether they are 'distinguished former judges', 'respected scholars and practitioners', or 'former government officials', all arbitrators lack the independence of the most junior tenured judge. This is an outcome of combining public law system of state liability with private arbitration. The dependence of arbitrators on government and business belies the claim that investment treaty arbitration removes sensitive disputes from the political realm and subjects them to the rule of law.").

39 *Id*. at 166. ("These states cannot look to the decisions of a single adjudicative body with a stable membership to draw together diverse readings of the treaties, many of which will establish varying bases for investor entitlements to compensation, into a firm jurisprudence. Incoherence poses a particular problem for states in this context because of the system's unique combination of state liability and international arbitration.… This impact on state decision-making is accentuated in the context of regulation of international business. All governments decision-making depends to a degree on the ability of legislatures and administrations to know the boundaries of sovereign power and the consequences of the unlawful use of that power. Introducing damages as a remedy in public law heightens the fiscal uncertainty that accompanies regulation . . ."). Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1547–57 (2005).

40 VAN HARTEN, *supra* note 21, at 173; Van Harten & Loughlin, *supra* note 21, at 147–49.

41 Hensler & Khatam, *supra* note 4, at 412–15.

At this point, Hensler and Khatam's main argument departs from the primary opponents of investment arbitration. Their main critique is precisely that, when it comes to investment arbitration, the system "began to morph into a semi-public process."[42] To Hensler and Khatam the accountability mechanisms that the opponents of the investment arbitration regime have been able to push contaminate the essence of arbitration. As an example, on the devolution of the system, Hensler and Khatam point to the new rules that include provisions that allow—if there is no objection by a party—for the general public to attend the oral hearings, for the awards to be publicly available, and for neutral third parties to submit amicus curiae.[43] To Hensler and Khatam, investment arbitration begins to look more like a system of public adjudication, losing the benefits of arbitration without fully integrating the checks and balances of a traditional judicial system.

Hensler and Khatam's critique misses an essential element of the adjudicatory proceeding: the remedies available to the arbitrators. Rather than a system moving from a private-oriented procedure to a more public one, I argue that regarding the remedies attached to the ADR system, it has moved the opposite way. The investment arbitral proceedings were designed to dissuade the international unlawful conduct of the host governments, and they included the possibility of ordering injunctions if necessary, yet the contemporary arbitrators have re-conceptualized the system as one where the consequences of breaching public law are to be treated as breaches of private contracts among private actors.

II. THE ORIGIN OF THE INVESTMENT ARBITRATION REGIME: A BLENDING OF PUBLIC AND PRIVATE ADJUDICATION

There is a consensus in the literature that the contemporary investment arbitration regime was designed by global institutions, particularly by the World Bank, to give international legal security to foreign capital so that it would flow into the developing nations that were coming out of colonialism.[44] The assessment of the World Bank designers assumed that global companies feared "political risks, such as outright expropriation without adequate compensation, governmental interference short of expropriation which substantially deprive[d] the investor of the control or the benefits of his investment, and non-observance by the host government of contractual undertakings on the basis of which the investment was made."[45] Foreign investors feared that weak institutions in the

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[42] *Id.* at 412. (In their own words: "[S]omething curious happened—at least when viewed from a historical perspective: from a private procedure along the lines of traditional domestic and international commercial arbitration, investor-state arbitration began to morph into a semi-public process.").

[43] *Id.* at 412–13.

[44] ARON BROCHES, SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 161 (1995).

[45] *Id.* at 161–62.

developing world would translate into future changes in regulation or out-front illegal expropriations.[46] It did not matter that a particular government wanted to reach a fair deal with the foreign investor; that the State lacked strong modern democratic institutions, such as a reliable court system, left the threat of regulatory changes intact once the investments were made.[47] In the view of the designers, a legal instrument would help host governments by tying their hands to the mast.[48] Putting it differently, the designers presumed that the threat of international litigation would modify the decision-making process of the host government regarding private foreign interests.[49] The investors were awarded rights

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[46] José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L. L. 223, 225 (2011) ("Bilateral investment treaties (BITs) are efforts by states to bind themselves to the mast to avoid the tempting sirens calling for breaches of investment contracts or nationalizations without compensation.").

[47] Emma Aisbett, *Bilateral Investment Treaties and Foreign Direct Investment: Correlation Versus Causation*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 395, 398 (Karl P. Sauvant & Lisa E. Sachs eds., 2009) ("The need for an externally supported commitment device is motivated by the presence of sunk costs of investment which can lead to dynamic inconsistency of optimal policy for the host. Before the investor makes the investment, the host's optimal policy is to promise good conditions such as low taxes. After the investment takes place and costs are sunk, the optimal policy for the host is to extract rents up to the value of the sunk costs, that is, to directly or indirectly expropriate the investment. . . . BITs can solve the problem because they provide extranational arbitration of investor compensation claims and thereby help the host to credibly commit not to change its policy toward the investment."); Guzman, *supra* note 35, at 658–59 ("Dynamic inconsistency exists when a preferred course of action, once undertaken, cannot be adhered to without the establishment of some commitment mechanism. The problem is akin to wanting to 'tie oneself to the mast' but being unable to do so. . . . In the international setting, however, the dynamic inconsistency problem is a significant barrier to efficient foreign direct investment. The central problem is that a sovereign state is not able, absent a BIT, to credibly bind itself to a particular set of legal rules when it negotiates with a potential investor. Regardless of the assurances given by the host before the investment and regardless of the intentions of the host at the time, the host can later change those rules if it feels that the existing rules are less favorable to its interests than they could be. Domestic legal structures, critical to the credibility of contractual promises among private parties under domestic law, are no longer adequate to ensure compliance with the initial agreement.").

[48] BROCHES, *supra* note 44, at 162–63 ("These proposals contemplate the establishment by intergovernmental action of institutional facilities for the settlement through conciliation and arbitration of investment disputes between participating states and the nationals of other participating states. . . . Use of these facilities for conciliation and arbitration would be entirely voluntary. No government and no investor would ever be under an obligation to go to conciliation or arbitration without having consented to do so. But once having consented they would be bound to carry out their undertaking and, in the case of arbitration, to abide by the award. For this scheme to be fully effective, it should be embodied in an international convention. . . . These proposals contemplate that, given the consent of the host government, the investor would have direct access to the conciliation and arbitration facilities, without the intervention of his national government, thus giving further emphasis to the growing recognition of the individual as a subject of international law. . . This development of existing international law would have the great merit of helping to remove investment disputes from the intergovernmental political sphere."); Alvarez, *supra* note 46, at 225.

[49] Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 398 (2011) ("The cen-

under international treaties regulated by public international law that in theory allow them to argue that the duty of the State is to avoid engaging in internationally illegal acts such as discriminatory, unfair, and unjust practices against foreigners.[50] In case the host government breached these international obligations, the foreign investor could request, through an arbitral proceeding, that the arbitrators stop and reverse the action (i.e., respect the regulatory framework, maintain the concession, fulfill the contractual obligations).[51]

As such, developing nations would benefit from participating in the investment arbitral system in two ways. They would increase the flow of international capital into their jurisdiction, and they would avoid diplomatic confrontations with the home States of global corporations.[52] Moreover, by creating arbitral institutions, such as the World Bank's International Center for the Settlement of Investment Disputes (ICSID), the global organizations affiliated with the United Nations system would be relieved from "intervening in investment disputes between States and foreign nationals."[53]

III. THE ORIGINAL PUBLIC LAW ORIENTED REMEDIES

If the purpose was to dissuade conduct of the host governments, then what were the remedies available in the arbitration regime? The vast majority of the Bilateral Investment Treaties do not contain a detailed section on remedies.[54] I

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tral premise of investment treaties is that states that agree to the disciplines and rigors of international investment law will enjoy benefits that offset the various costs. In exchange for giving up what might be called 'policy space,' or some measure of regulatory autonomy, host states expect, or hope, to receive increased flows of investment.").

[50] *See infra* Part III.

[51] *See infra* Part III.

[52] BROCHES, *supra* note 44, at 162 (Aron Broches, who was one of the designers of the ICSID system, argued in 1963 that the establishment of an international rule of law for foreign investment would allow the companies to feel secure to do the adequate investment abroad and foster development); Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 427–28, 441 (2010) ("A fundamental purpose of investment treaties, as indicated by their titles, is to protect and promote investment. . . . The most common explanation for the BIT puzzle is that developing countries sign investment treaties in order 'to *promote* foreign investment, thereby increasing the amount of capital and associated technology that flows to their territories.' "); Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 167–69 (2005).

[53] CARBONNEAU & BUTLER, *supra* note 24, at 621; *see also* BROCHES, *supra* note 44, at 263. ("ICSID can serve the dual objectives of stability and flexibility in host country-investor relations. Advance agreement to have recourse to ICSID can be an incentive for investors to assume long-term commitments and, in the words of a recent UNIDO Report, for a host state 'to rely less on its sovereignty prerogative and choose procedures for solving conflicts which do not involve conflict escalation.' ").

[54] *See, e.g.*, Investment Treaty with Honduras, Hond.-U.S., art. X, XII, July 1, 1995, S. TREATY DOC. NO. 106-27; Investment Treaty with the Republic of Ecuador, Ecuador-U.S., art. VI, VII, Aug. 27, 1993, S. TREATY DOC. NO. 103-15; Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., art. VIII, Nov. 14, 1991, S. TREATY DOC. NO. 103-2; Vertrag zwischen der Bundesrepublik Deutschland und

argue that this omission is not out of legislative negligence, rather it was presumed that the arbitrators could order, except when specified differently, any remedy that would be appropriate given the type of breach.[55] The possibility of ordering performance remedies is consistent with one of the oldest legal maxims: for there to be an interest protected by the law there must be an adequate remedy to the injured party (*ubi jus ibi remedium*).[56] For instance, the Energy Charter states only that "[t]he awards of arbitration, which *may* include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu *of any other remedy granted*."[57] Hence, the Energy Charter does implicitly recognize that arbitrators can award other types of remedies.[58] Pecuniary compensation is an option if arbitrators

der Argentinischen Republik über die Förderung und den gegenseitigen Schultz von Kapitalanlagen [Treaty on the Encouragement and Reciprocal Protection of Investments], Arg.-Ger., art. 10, Apr. 4, 1991, 1910 U.N.T.S. 171; Convenio Entre el Estímulo y Protección Recíproca de las Inversiones Entre La Republica de Venezuela y El Reino de Los Países Bajos [Agreement on Encouragement and Reciprocal Protection of Investments], Neth.-Venez., art. 12, Oct. 22, 1991, 1788 U.N.T.S. 45. It is noteworthy that the current U.S. model BIT from 2012 does replicate in Article 34 the North American Free Trade Agreement (NAFTA) Chapter 11 formula, but this was not the case in many of the BITs signed by the U.S. during the 1990s. *See* North American Free Trade Agreement, Can.-Mex.-U.S., art. 1135, 1136, Dec. 17, 1992, 32 I.L.M. 289 (1993); *2012 U.S. Model Bilateral Investment Treaty*, U.S. DEP'T ST., https://www.state.gov/documents/organization/188371.pdf [https://perma.cc/SH3S-4QCW] (last visited Feb. 23, 2018).

[55] One of the few international investment agreements signed in the 90s that contains an explicit mention on the type of remedies is NAFTA's Chapter 11, Article 1135. North American Free Trade Agreement, Can.-Mex.-U.S., ch. 11, art. 1135, Dec. 17, 1992, 32 I.L.M. 289 (1993). ("1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.").

[56] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (Neill H. Alford, Jr. et al. eds., The Legal Classic Library 1983) (1768). For a contemporary debate in the United States regarding the connection of ubi jus ibi remedium and due process, see generally Tracy A. Thomas, *Ubi Jus, Ibi Remdium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004).

[57] THE INTERNATIONAL ENERGY CHARTER CONSOLIDATED ENERGY CHARTER TREATY art. 26(8) (2016), http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf [https://perma.cc/4945-CXC8] (emphasis added). For an analysis of the Energy Charter Treaty and its remedies section, see generally Anna de Luca, *Non-Pecuniary Remedies Under the Energy Charter Treaty*, 3 OIL, GAS ENERGY LAW 1, 1–2 (2015). (explaining that the option of pecuniary remedies for actions taken by sub-national governments was introduced in the Treaty as a compromise solution with Canada, which raised concerns regarding the Federal Government's constitutional authority to compel state governments to modify legislation or policies in breach of the Treaty).

[58] De Luca, *supra* note 57, at 1. ("By only limiting the power of tribunals to award non-pecuniary remedies in the case of unlawful measures of sub-national governments or authorities of Contracting States, the provision vests, as a rule, arbitral tribunals instituted under the

decide not to order other type of remedies, but it is not the default rule. Arbitrators should at least justify their decision to rely on damages if they decide not to order performance remedies.

In the same vein, the ICSID Convention states in Article 54 that "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the *pecuniary obligations* imposed by that award within its territories as if it were a final judgment of a court in that State."[59] In other words, only the section of the award that contains pecuniary damages can be automatically enforceable. Unlike in international commercial arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, there is no need to request that national authorities recognize the award.[60] For the rest of the remedies, the winning claimant would need to have the award recognized domestically.[61] But, this provision does not preclude arbitrators from ordering other types of remedies.

In fact, the history of the negotiation of the ICSID Convention shows that the drafters "emphasized that awards could well order the performance or non-performance of certain acts but all that could be enforced would be the obligation to pay damages if the party did not comply with that order."[62] Pecuniary obligations were the primary option if performance failed or for cases where there was an apparent lack of effective, prompt, and adequate compensation for expropriation.[63] In the words of Aron Broches, who designated the contemporary arbitral system, "It may be assumed, however, that awards will wherever possible impose pecuniary obligations, in the form of liquidated damages, penalties or otherwise, in case of non-compliance with obligations of specific performance."[64] Some ICSID tribunals recognize that they can order other types of

ECT with the authority to grant both pecuniary remedies (i.e., compensation) and non-pecuniary remedies (i.e., orders for specific performance) in all other cases.").

59 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 54(1), Mar. 18, 1965, 17 U.S.T. 1270 (emphasis added).

60 Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 1, June 10, 1958, 330 U.N.T.S. 38.

61 CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 1138 (2d ed. 2009). (In the words of Christopher Schreuer, "There is no doubt that an obligation imposed by an award that is expressed not in monetary terms but in terms of an obligation to perform a particular act or to refrain from a certain course of action is equally binding and gives rise to the effect of *res judicata*.").

62 *Id*. at 1137. (Schreuer citing comments by Mr. Broches).

63 *Id*. ("The restriction of the obligation to enforce to pecuniary obligations deals with the difficulty that might have arisen if the award provides for forms of relief that are unknown to the law of the country where enforcement is sought. For instance, in some countries the courts may not have the power to order specific performance. Art. 54(3) provides that execution shall be governed by the law of the State where the execution is sought. Since enforcement of pecuniary obligations is presumably available under every legal system, this provision eliminates the problems that could arise from different procedures for the enforcement of judgments.").

64 BROCHES, *supra* note 44, at 235. ("It will be noted, first, that enforcement under Article 54 is limited to the pecuniary obligations imposed by an award. In other words, enforcement

remedies because "in addition to declaratory powers, [they have] the power to order measures involving performance or injunction of certain acts."[65] In the words of another tribunal, "[S]pecific performance is a permissible remedy in international law. An international tribunal has the power to grant specific performance."[66] In sum, there is nothing in the history of the design of the contemporary investment arbitral system that prevents us from concluding that arbitrators were given powers to "order non-pecuniary relief such as an injunction or an order of specific performance."[67] These powers are closely related to public adjudication that seeks to prevent the action from continuing the violation of rights. Injunctive relief as a corner stone of public adjudication contrasts with private ADR procedures where money damages are the default relief and represent the only enforceable remedy.[68]

The inclusion of performance remedies in the powers of the investment tribunals is consistent with the views of other international courts like the Permanent Court of International Justice (PCIJ) and its successor the International Court of Justice (ICJ) on the international responsibility of the State for wrongful acts. In 1928 the PCIJ stated that "[t]he essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[69] If restitution was not possible, then "payment of a sum corresponding to the value which a restitution in kind would bear."[70] In the 1980s the ICJ confirmed that the role of international courts is first to seek the cessation of the

does not extend to negative or positive injunctions. It may be assumed, however, that awards will wherever possible impose pecuniary obligations, in the form of liquidated damages, penalties or otherwise, in case of non-compliance with obligations of specific performance.").

65 Enron Corp. v. The Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 13 (Jan. 14, 2004).

66 Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan, Case No. V (064/2008), Final Award, at ¶ 47 (Arb. Inst. Stockholm Chamber of Com. 2010), https://www.italaw.com/sites/default/files/case-documents/ita0024_0.pdf [https://perma.cc/6Y4A-34AP] (the tribunal asserted the power to grant specific performance after recognizing that the 2001 Draft Article on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission of the United Nations were applicable to the case).

67 Christoph Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 ARB. INT'L 325, 325 (2004).

68 Gervase MacGregor et al., *Overview: Economic Damages*, GLOBAL ARB. REV. (Apr. 19, 2017), http://globalarbitrationreview.com/reference/1139793/overview-economic-damages [https://perma.cc/HD7L-NQ75]. ("The key driver of international commercial arbitrations is almost always the claimant's desire to recover damages—to a greater degree even than in disputes in the domestic courts.").

69 Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 125 (Sept. 13) (The case dealt with an expropriation of a German company in Poland. Germany argued that the expropriation violated the Treaty of Versailles and Articles 6–22 of the Convention Concerning Upper Silesia. The PCIJ found first that the expropriation had been illegal and then stated its doctrine on the consequences).

70 *Id.*

international wrongful act or omission, as opposed to setting a price to the breach of the international obligation.[71] Based on these precedents, the Secretary General of the United Nations resolved in a 1986 arbitration case that

> [t]he authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued.[72]

The view of these judicial authorities was consistent with the interpretation of early international investment proceedings. For example, in *Texaco (TOPCO) v. Libyan Arab Republic* the tribunal argued that "any possible award of damages should necessarily be subsidiary to the principal remedy of performance itself. . . . [T]he Libyan Government, the defendant, is legally bound to perform these contracts and to give them full effect."[73] In that case, the tribunal found that the Libyan government, by nationalizing the oil industry, breached its contractual obligations under the deeds of concession, and as a consequence the tribunal ordered a *restitutio in integrum*.[74]

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[71] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 149, ¶ 292 (June 27); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 44, ¶ 95 (May 24).

[72] Rainbow Warrior Affair (N.Z. v. Fr.), 20 R.I.A.A. 215, 270 (1990).

[73] Texaco Overseas Petrol. Co. v. Gov't of the Libyan Arab Republic, 53 I.L.R. 389, 508, 511 (1977).

[74] It is important to note that another tribunal regarding the Libyan nationalization process took a different approach. The tribunal in LIAMCO v. Libya, after finding that there had been an expropriation of the assets of the oil company, stated "it is impossible to compel a State to make restitution, this would constitute in fact an intolerable interference in the internal sovereignty of States. . . . Further, restitution presupposes the cancellation of the nationalization measures at issue, and such cancellation violates also the sovereignty of the nationalizing State." Libyan Am. Oil Co. v. Gov't of the Libyan Arab Republic, 20 I.L.M. 124–25 (1981). Nevertheless, I argue that this case involved a traditional expropriation of foreign assent. Consequently, the compensation-expropriation spectrum was consistent with the remedies available for expropriations. For a distinction of this spectrum and its application to other types of investment rights, see the discussion further down in this section, see BP Expl. Co. (Libya) Ltd. v. Gov't of the Libyan Arab Republic, Award, 53 I.L.R. 297, 353 (1973) (observing that when investors file a complaint at the international level *restitutio in integrum* can only be achieved when the wrongdoing State agrees to it. Whatever happens at the remedy stages of the proceeding is independent of the will of the home State of the foreign investor. This conclusion stands in contrast to state-to state international disputes, such as the ones that arise from the exercise of diplomatic protection); AGIP Spa. v. Gov't of the Congo, 67 I.L.R. 319, 338–39, at ¶¶ 86–88 (ICSID 1979); Amoco Int'l Fin. Corp. v. Iran, 27 I.L.M. 1314, 1358 (1988) (arguing that "[i]n no system of law are private interests permitted to prevail over duly established public interest, making impossible actions required for the public good. Rather private parties who contract with a government are only entitled to fair compensation when measures of public policy are implemented at the expense of their contract rights. No justification exists for a different treatment of foreign private interests.").

IV. THE ESSENCE OF THE PRIVATE REGIME: MONETARY COMPENSATION

Notwithstanding the fact that the system, as designed originally, provided arbitrators the power to order injunctions and performance, most contemporary tribunals' decisions have not ordered a State to modify its illegal behavior, to reform its decision-making process to respect contractual terms with foreign interests, or to change legislation that is affecting the business interests of foreign investors.[75] The way the regime's remedies operate in practice does not follow the logic of public law adjudication. Rather, it continues being one of private litigation. The act is to remain as it stands, affecting the injured party, and the losing party is only required to pay compensation for the breach. In only two of the 228 cases where States were found in breach of their international obligations have arbitral tribunals ordered remedies that were not monetary awards.[76] Arbitrators have treated all the rights contained in the Bilateral Investment Treaties (BITs) as breaches of private contracts, instead of searching for an adequate remedy for each right. This practice has become so common that commentators assume that the system was created so that investors could request monetary compensations from foreign governments.[77] Nevertheless, as expressed in the previous subsection, the opposite is true. The traditional view on the wrongful acts of the State and the spirit of the investment arbitration regime allows arbitrators to order performance remedies before monetary compensations are considered. However, investment tribunals decide to stick to pecuniary obligations.

What motivates contemporary arbitrators to ignore their full remedial powers? Some commentators blame it on the litigants. They argue that claimants have "defined their demands in monetary terms" as opposed to requesting other types of remedies.[78] Others, like M. Sornarajah, take the view that it would be a

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These last two cases are examples of the effects of the compensation-expropriation spectrum.

[75] *See supra* Part III.

[76] In 46 percent of the 497 cases administered by the International Center for the Settlement of Investment Disputes (ICSID) the tribunals upheld the investor's claims. THE ICSID CASELOAD—STATISTICS, *supra* note 16, at 7, 14. The exception is Goetz v. Burundi, where the claimants demanded the reinstatement of a tax and custom free zone certificate.

[77] *See* IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 7–8 (2009) (this is one of the few books on compensation, but only covers the existing principles for calculating damages. In its own words "the calculation of compensation and damages pursues the aim of transforming legal claims into concrete amounts of money. . . . The obligation to pay compensation or damages may be based on different legal claims. In international investment law, three causes of action can generally be identified: expropriation, breaches of international law, and breaches of contracts."); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 435 (2004) (in his book that explains the regime instead of including a chapter on remedies, he dedicates a whole chapter on compensation for nationalization of foreign investments that reviews the methods and discussions around the payment for full compensation).

[78] Schreuer, *supra* note 67, at 332 ("The fact that in the cases so far published, ICSID tribunals have nearly always framed the obligations imposed by their awards in pecuniary terms

futile act for the tribunals to order performance remedies because "[w]hat is sought in an award is not a legal opinion but an award capable of enforcement and there does not exist any machinery for the enforcement of an award against a state party for the specific performance of a contract."[79] Nevertheless, even pecuniary damages are hard to recover from entities that enjoy sovereign immunity.[80] It is true that "ICSID awards are more enforceable than most international obligations," but they ultimately rest "on the legitimacy of the obligation and a state's desire to comply."[81]

Professor Thomas W. Wälde provided an alternative answer to why arbitrators have relied so much on compensatory remedies.[82] He argues that investment tribunals tend to avoid giving "detailed reasoning for remedies and damages" because they often leave that to experts presented by the parties.[83] According to his review of arbitral decisions, "After the tribunal has indulged at length in lengthy legal debates on issues the arbitrators and counsel are trained for and familiar with, the compensation award suddenly emerges as if a white rabbit pulled by a magician out of his black hat."[84] Compensation then relies exclusively on the jurisprudence and logic of expropriation cases.[85] Con-

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is not due to a belief that they lack the power to proceed otherwise. Rather, the cases involved situations in which the investment relationship had broken down and the claimants have preferred to frame their demands in monetary terms.").

[79] SORNARAJAH, *supra* note 77, at 281 (although he does recognize in previous paragraphs (p. 279) that "[a]n award in a dispute arising from a state contract with an alien is usually based on three types of remedies. The first is the possibility that the arbitrator may order specific performance of the contract. The second is that the award could be declaratory in nature. The third is the usual and most important of the remedies—payment of monetary compensation.").

[80] CARBONNEAU & BUTLER, *supra* note 24, at 405–07 (explaining the evolution of the doctrine of sovereign immunity in the U.S. "under which States, their instrumentalities, and their property enjoy immunity from the exercise of jurisdiction and the enforcement of judgments by courts of other States").

[81] Alvarez, *supra* note 46, at 244 ("[I]t is always hard to secure payment from an entity that enjoys sovereign immunity. Although ICSID awards are more enforceable than most international obligations, they are not immune from the fundamental weakness of all such obligations: namely, that enforcement rests in the end on the legitimacy of the obligation and a state's desire to comply."); Edward Baldwin et al., *Limits to Enforcement of ICSID Awards*, 23 J. INT'L ARB. 1, 3 (2006); Goodman, *supra* note 20, at 465–66. Furthermore, as stated by the arbitral tribunal in the *Mohammad Ammar Al-Bahloul v. Tajikistan* case, "possible problems of enforcement do not in and of itself make specific performance an impermissible remedy." Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan, Case No. V (064/2008), Final Award, at ¶ 50 (Arb. Inst. Stockholm Chamber of Com. 2010), https://www.italaw.com/sites/default/files/case-documents/ita0024_0.pdf [https://perma.cc/6Y4A-34AP].

[82] *See* Thomas W. Wälde, *Remedies and Compensation in International Investment Law*, 5 TRANSNAT'L DISP. MGMT. 1, 1 (2005).

[83] *Id.* at 5.

[84] *Id.*

[85] *Id.* at 8. ("The dominant view—both in arbitral jurisprudence and literature—on remedies and damages in investment arbitration is almost exclusively formed by the experiences with un- or under- compensated expropriation. The background of most experiences for arbitral

temporary arbitrators see their remedies' power "through the prism of the expropriation debate: [t]hat means first the 'standards of expropriation' ('full, prompt, adequate', 'market or genuine value') and, second, how to value property that was taken."[86] This view ignores the fact that contemporary BITs contain more rights than only the right to receive a prompt, adequate, and effective compensation in case of expropriation.

The vast majority of the contemporary investment cases do not deal with direct expropriations as in the past, but with actions that tend to "leave the formal property rights intact, but undermine the normal commercial functioning of the bundle of property rights in a business."[87] The State in the majority of the cases acts both as regulator and as a party to a contract, and as such engages in actions that are not expropriations, but rather actions that affect the "fair and equitable" treatment of the investor.[88] Instead of expropriating assets directly, States take measures that discriminate against foreign investors, that breach their legitimate expectations, or that deny them justice in local court.[89] The "expropriation-compensation" prism of analysis is often not appropriate to dissuade these conducts.[90] Just as Hensler and Khatam recognize in their article, the most controversial cases are related to regulatory challenges such as

> claims against the United States and Canada seeking relief from stricter environmental regulation, against Germany for deciding to phase out nuclear power plants in the wake of the nuclear reactor disaster in Fukushima, against Canada for challenging a Canadian (trial) court's interpretation of the scope of patent protection for a pharmaceutical product (upheld by that country's federal Court of Appeals), and against Guatemala for setting electric utility customers' fees lower than the corporation had anticipated at the time of its investment.[91]

These are not cases related to traditional expropriations.

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jurisprudence before the advent of direct investor-state arbitration are individual or large-scale expropriations: in the 1920s and again after 1945 (takeover of Communist regimes, decolonisation & subsequent economic, state-oriented nationalism, New International Economic Order policies).").

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.* ("Moreover, the expropriation prism also dominates the view of other forms of governmental conduct affecting investors in breach of the non-conventional new disciplines of investment treaties—such as abuse of the dual power of government as both regulator and contract party to escape from the binding force of contracts, but also discrimination ('national treatment') and the types of abuse of government powers grouped together in the discipline of 'fair and equitable treatment' (e.g. denial of justice, breach of legitimate expectations). An expropriation-compensation analysis is often not appropriate for these non-conventional investment treaty disciplines. If applied to the fullest extent, it tends to lead to excessive awards, and the logic which seemingly requires expropriation-type awards then acts as a disincentive to apply the novel investment disciplines effectively and in an acceptable way.").

91 Hensler & Khatam, *supra* note 4, at 416.

According to Thomas Wälde, there is "need to free tribunals from the dominance of exclusive expropriation analysis and to develop an approach to remedies and damages that is appropriate for each specific investment treaty discipline."[92] For example, tribunals could order the cessation of injurious conduct. Arbitrators could order parties to provide satisfaction in different ways, such as apologies, public statements, or recognition of unlawfulness. Moreover, in particular cases, they could order the restitution, not only of tangible property, but intangible rights such as intellectual property or contractual rights and the cancellation of administrative and judicial orders. In cases of concessions and licenses to exploit natural resources, they could also order non-monetary compensatory remedies. Examples of such remedies could be offering similar business opportunities, equivalent properties, licensed-based investments, or participation in joint ventures with State owned-companies.[93] In fact, if arbitral tribunals were ordering this type of remedy, they would be acting more like national judges than as arbitrators resolving private disputes as Hensler and Khatam suggest. Regarding this point, Hensler and Khatam only recognize that "when corporations prevailed, they asked courts to confirm the arbitrators' award, just as would happen if a business won an award against another business in a domestic arbitration case."[94] However, this does not change their conclusion that investment arbitration is operating more like a public law adjudicatory proceeding.

CONCLUSION

Hensler and Khatam's article is an excellent addition to the academic discussions on arbitration, and particularly on investment arbitration. Their article challenges us to reevaluate the public-private distinction in the context of this widely employed ADR mechanism. However, Hensler and Khatam retain some optimism in their conclusion. They believe that we can still maintain the distinction and that we can keep some disputes in the realm of the private procedure and leave others, such as the ones involving discrimination, to the realm of public courts.[95] However, as I have described in the previous paragraphs investment arbitration continues to be a private oriented process because arbitrators exercise more restraint than judges when it comes to ordering injunctive relief. Even with the powers to order other types of remedies, they are afraid of ordering States to take actions that will stop violating investor's rights.

Consequently, when it comes to identifying the public/private distinction I feel more inclined to believe that the collapse of the categories has reached a point of hopeless contradiction. In the words of Duncan Kennedy, a breakdown of a distinction appears "when troublemakers begin to argue that the distinction

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92 Wälde, *supra* note 82, at 8.
93 *Id*. at 22–24.
94 Hensler & Khatam, *supra* note 4, at 416.
95 *Id*. at 421.

is incoherent because, no matter how you try to apply it, you end up in a situation of hopeless contradiction."[96] There is no longer a benefit of keeping them apart. What has emerged in the case of investment arbitration is a new category where the State and the corporations benefit by pricing the breach of their obligations. Even if both sides complain in public debates about the existence of unaccountable arbitrators, the investors get paid, and the governments keep their policies intact. Moreover, some studies even suggest that States can price the breach and still attract foreign investment.[97] Hence, the system cannot even ensure that the reputation of the State, if it decides not to pay, will affect the flows of foreign capital.[98]

A curious contradiction on the narrative emerges as we try to fix the distinction. At the domestic level, the victims of arbitral proceedings are customers, employees, collective action beneficiaries, and small companies who are abused by big corporations but cannot receive adequate justice.[99] The victims are the ones pushing to include due process and more accountability into the system or to take away the dispute from private arbitrators and bring it back into the court system.[100] The "good guys" are the "have-nots" who are the primary victims of the arbitral procedure.[101] The "bad guys" at the domestic level are the big corporations that can manipulate the arbitral proceedings to their benefit. At the international arena, as argued in the cases, the victims are the big companies whose property is affected and confiscated, but who would rather keep the procedural system intact.[102] In the international arbitral procedure, the

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96 Kennedy, *supra* note 1, at 1351.

97 Lauge N. Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2009/2010, at 539 (2010); Brewster, *Pricing Compliance*, *supra* note 15, at 294–95; Yackee, *supra* note 49, at 400.

98 *See generally* Aisbett, *supra* note 47; Brewster, *Pricing Compliance*, *supra* note 15, at 259; Yackee, *supra* note 49, at 399.

99 Hensler & Khatam, *supra* note 4, at 393–99. *See generally* IMRE SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 7–11 (2013).

100 *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N. Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/KJN3-FKYX]; Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System*,' N. Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html [https://perma.cc/5CJC-Z3ZR]; *Sen Franken and Judge Gorsuch on Arbitration*, C-SPAN (Mar. 22, 2017), https://www.c-span.org/video/?c4662732/sen-franken-judge-gorsuch-arbitration [https://perma.cc/GZB2-RJXF].

101 *See* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW SOC. REV. 95, 124 (1974).

102 *See, e.g.*, Mike Cherney, *Cargill Wins $77M From Mexico over NAFTA Violation*, LAW360 (Sept. 21, 2009, 7:33 PM), https://www.law360.com/articles/123636/cargill-wins-77m-from-mexico-over-nafta-violation [https://perma.cc/6ZZE-RVFC]; Robert Rapier, *How Venezuela Ruined Its Oil Industry*, FORBES (May 7, 2017, 8:45 PM), https://www.forbes.com/sites/rrapier/2017/05/07/how-venezuela-ruined-its-oil-industry/

victims are the "haves" who would like to adjudicate things through the private proceedings.[103] It is the State, the perpetrator of the violation, who wants to create a system with more accountability, to make the system more transparent, to clarify the powers of the arbitrators. The violators of the obligations would rather have judges deciding the dispute than private international arbitrators deciding behind closed doors. In the international system, the "bad guys" violating investor's rights become the victims of the arbitral proceeding.

[https://perma.cc/3AL4-88LX]; *Argentina Settles Five Investment Treaty Awards*, ALLEN & OVERY (Nov. 7, 2013), http://www.allenovery.com/publications/en-gb/Pages/Argentina-settles-five-investment-treaty-awards.aspx [https://perma.cc/JU5W-8X2D].

[103] *See generally* Galanter, *supra* note 101, 128–35.