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The Role of Arbitration within Today's Challenges to the World Community and to International Law*

by KARL-HEINZ BÖCKSTIEGEL**

I. TODAY'S CHALLENGES TO THE WORLD COMMUNITY

IN RECENT decades, arbitration has grown from a traditional dispute settlement system mostly used in certain countries into one used worldwide both for domestic and even more for international disputes. And the parties relying on arbitration in their contracts and later in their disputes are no more only private enterprises, but also states, state institutions and – as I will mention later – international organisations.

In this context, if the world community now uses arbitration, the status of and new challenges to the world community tend to have a much greater impact on arbitration than in earlier times.

Since the end of the Second World War, major and fundamental changes have taken place regarding the international community of states, its economic and social environment, and also regarding its legal environment and framework. Without going into a long list, one may just mention the development of so many former colonies into independent states and the formation and growth of the United Nations. The much cited 'globalisation' has brought about not only economic but also social and political changes in many countries, as well as regionally and internationally. A more specific illustration is my own country, Germany's role in the world community which has changed dramatically from

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the outlaw after the Second World War to a re-unified Germany as a respected and active major player today. And an even more obvious specific illustration is China's growth into a major global player and the new status of Hong Kong as a part of China.

Though many of these changes have brought about advantages for the states and their citizens, many old problems have remained and new problems have arisen. In Germany, we are still struggling with the consequences of re-unification. In Europe, old and new members of the Union will have to work hard to realise the potential great advantages available. You are more familiar than I with today's difficulties in Asia and the Pacific Region. The United Nations have not always and everywhere been a success story. Human rights violations are still found in many states. Both industrial and developing countries face old and new challenges in their social and economic structures. Conflicts, including military conflicts, between states and inside states with certain groups in society are still found in many regions of the world. International terrorism has grown in recent years into a fundamental challenge to international peace and development. Environmental problems seem to grow in many parts of the world, as well as for the world community at large.

Since contracts as well as disputes reflect the status and needs of society and its members, it is not surprising that all these changes and challenges to the world community have an impact on international arbitration.

II. TODAY'S CHALLENGES TO INTERNATIONAL LAW

But before I become more specific, let me shortly turn to the present status and challenges of international law, because international arbitration is, of course, imbedded in the general framework of international law.

It can be no surprise that international law reflects the challenges of the world community. Over the last decades, both by the United Nations and otherwise, the procedural and substantive legal framework of the international community has been developed into an impressive body of law. Since there is no time here to go into detail, let me mention two examples from fields with which I am personally familiar.

A first example we all know is international dispute settlement, and I will return to it later.

As a second example, let me at least shortly point out the entirely different field of space law. The exploration and commercial use of outer space has become a regular feature both for governments and for private enterprises from which we all already benefit by worldwide communication, weather forecasts, disaster warning, navigational systems and the like via satellites. For this area, a major body of international law by widely accepted conventions and other instruments has been created by the United Nations, the European Space Agency and similar bodies.

Compared to these and other success stories of recent progressive development of international law, one must not overlook that certain positions taken by the

present administration of the leading world power, the USA, in the interpretation and implementation of international law and in renegotiating treaties, have for good reason been heavily criticised. Leading authors such as Stephen Schwebel, a former US Judge and President of the World Court,[1] and Jan Paulsson,[2] have blamed the USA for bringing about a regressive development of international law in important areas.

But, while this may be a short term development due to a certain national administration, in other areas, international law has not been able to keep pace with new changes and challenges in the world community.

International terrorism provides an unfortunate but obvious example in this context. The traditional rules on military action by states, within the United Nations and outside, in conventions and customary international law, did not and could not foresee this challenge in all its aspects, and it is no surprise that strong differences of opinion and conflicts arise regarding their applicability and application and their need to be reviewed and rewritten in the common interest, both for protection against the new threats and for legally satisfying rules applicable to all states. For several years, a task force of the International Bar Association (IBA)[3] has tried to elaborate legal standards in this regard, but has rather achieved a better view of the difficulties. A committee of the International Law Association (ILA)[4] has started its work on the use of force by states and may come up with first approaches at the forthcoming ILA Conference in Toronto next June. In any event, noting the difficulties faced by the UN Security Council in trying to reach consensus on security matters, the recently published considerations by Gasteyger[5] on the feasibility of a new World Security Organisation may be rather wishful thinking than realistic expectation.

Human rights violations are a continuing concern. In this context, one has to be aware that what some call the Western notion of human rights is not shared in an identical manner by all other cultures and societies in the world. But international law provides various international and regional instruments for the protection of human rights, binding either by treaty or customary international law. Using that standard, a number of states not only violate the human rights of their own citizens or certain groups thereof, but also insist on their national sovereignty against what they call interference with their internal affairs.

Another challenge – but also an opportunity – for international law comes from the much discussed economic globalisation of the world. The fundamental approach of traditional international law, as seeing the world as a mosaic of separate national jurisdictions, each under the sovereignty of a state, is not

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1 Stephen M. Schwebel in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum for Robert Briner* (Paris, 2005), p. 815 *et seq*.

2 Jan Paulsson, *Denial of Justice in International Law* (Cambridge, 2005), particularly pp. 228, 247.

3 *See* report by Adrienne Margolis in *International Bar News* (December 2004) p. 39.

4 ILA Committee on the Use of Force, chaired by Prof. Mary-Ellen O'Connell (US) with Dr Judith Gardam (Australia) as its Rapporteur.

5 Curt Gasteyger in *Liber Amicorum Robert Briner*, *supra* n. 1 at p. 327.

sufficient to cope with the global activities of multinational enterprises which, for understandable reasons, try to use the relative advantages of each state's jurisdiction and economic environment for their own benefit. The growing harmonisation of national laws provides a more level playing field, both for private enterprises and for the states involved. One striking example of such harmonisation is the success story of the UNCITRAL Model Law on Commercial Arbitration which has been adopted by a great number of states throughout the world.

This harmonisation needs support and continuing follow-up by a steadily increasing body of international law. For this, the Law of the Sea Convention, the new Montreal Convention for Air Transport Liability, the International Convention on the Sale of Goods, and the various conventions on intellectual property, are stimulating examples. Equally relevant is the framework for cooperation provided by governmental organisations such as the International Monetary Fund and the World Bank, the International Civil Aviation Organisation (ICAO), the World Intellectual Property Organisation (WIPO) and similar bodies. Hong Kong has just been the site of a further very important example, namely the World Trade Organisation (WTO) which made at least some progress in its Doha Round at the Hong Kong Conference last December. As, in many countries, one has become more aware of the global importance of the protection of the environment, it may be noted that the Kyoto Protocol has recently come into force, though there is still a long way to go.

At the regional level, we already see a further step in international law: supranational organisations such as the European Union, to which by now 25 Member States have actually transfered important parts of their sovereignty.

Also, non-governmental organisations play a major role in promoting the internationalisation of rules for the conduct of the global economy. An outstanding example is the International Chamber of Commerce which, with the input from the international business community, over many decades has elaborated rules of its own such as the INCOTERMS and its Arbitration Rules, and has also initiated the elaboration, and finally ratification, of international conventions for important fields of international trade and investment. The International Air Transport Association (IATA), with its membership of most internationally active airlines, has played a similar role in initiating conventions on international aviation.

The International Law Association (ILA), also a non-governmental organisation, of course, goes much further in its scope by its interest in all fields of international law, public and private. Regarding many fields of international law, the ILA has played and is playing an important role in the progressive clarification and interpretation of the law, its development, and also in the discussions regarding its unsolved challenges. This is illustrated by the long list of its committees and study groups that have presented reports and resolutions in the past. If you look at the conference proceedings of the most recent Berlin Conference in 2004, you find reports on fields and issues of the highest relevance for modern day international relations and law.

III. THE ROLE OF ARBITRATION IN THIS CONTEXT

(a) Wide Options for International Dispute Settlement

Now, turning more specifically to international dispute settlement, we have to realise that it provides more options and is used in practice more than ever before in history for the peaceful solution of disputes. The role of the International Court of Justice today is of much more significance than earlier. Even for politically most sensitive disputes has it been possible to form and use specific judicial bodies, as I have experienced in my function at the Iran–United States Claims Tribunal at The Hague. Not every such judicial body finds a general support by all major states, as the example of the International Criminal Court shows, which the present administration of the USA does not accept. But in many important fields of international law, there is wide acceptance by all relevant states. The World Trade Organisation's dispute settlement machinery is widely used. And for international investment, most of the by now more than 2,400 Bilateral Investment Treaties (BITs) provide for arbitration between the host state and foreign investors, which is used in a growing number of cases administered either by ICSID of the World Bank or other mechanisms.

At the non-governmental level, international commercial arbitration, such as of the ICC and the LCIA, has become the generally accepted method of dispute settlement between private enterprises and for international government contracts including a worldwide enforcement of arbitral awards by the New York Convention of 1958.

At the regional level, the European Union has a fully available court system for the by now vast body of European law through the European Court of Justice in Luxemburg. The European Human Rights Convention offers legal protection to Europeans against their own and foreign states by its separate Court in Strassburg. In Asia, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) has been available for a long time. And in North America, NAFTA provides a widely used arbitration system for the protection of investors.

In addition, some arbitration institutions formed at the national level play an important role not only for domestic, but also for international disputes. Examples are the Hong Kong International Arbitration Centre (HKIAC), the China International Economic and Trade Arbitration Commission (CIETAC), the Singapore International Arbitration Centre (SIAC) in Asia, as well as in Europe the national arbitration institutions in Austria, Germany, Sweden and Switzerland, and in the USA, the American Arbitration Association.

(b) Politically Sensitive Disputes

Judicial adjudication has even been used much more than before to deal with highly politically sensitive disputes. One group of examples which cannot concern us any further here are the various criminal law tribunals, starting with the Nuremberg War Crimes Tribunal after the Second World War, to the present International Criminal Court and the various specific courts formed to deal with

war and human rights crimes in Europe and Africa. This may be the only kind of judicial machinery that can deal with terrorism, though its impact on preventing that new challenge should not be overestimated.

But regarding many other challenges, even if politically sensitive, arbitration may be able to help in finding a peaceful settlement. Let me shortly mention two examples with which I have become familiar as an arbitrator.

The first is the Iran–United States Claims Tribunal at The Hague, formed after the Iranian Revolution of 1979 by instruments of public international law, the so-called Algiers Accords, to decide all disputes between the two states and their citizens. The Tribunal, in its almost 4,000 cases, using the UNCITRAL Arbitration Rules with some alterations, has issued a large body of decisions and awards. They are of interest not only, because – unlike in most arbitrations – they are all published, but also because they deal with most procedural problems occurring in international arbitration and with a great many substantive questions relevant in other and later international arbitrations and particularly modern investment disputes. As some of you will know, the Tribunal was not an easy institution to work in or even to lead. The fundamental political as well as cultural differences between the two states and between many of the persons involved presented a continuous challenge. Nothing could be taken for granted. As President of the Tribunal, my guideline was: Try hard to achieve the best, but be prepared for the worst. And indeed, procedurally, not seldom the worst case scenario did occur. Looking back, it is still astonishing that in spite of the many opposing political and economic interests and rather frequent confrontations at the Tribunal, it achieved its task to process and decide several thousand cases in an orderly manner.

My second example is the United Nations Compensation Commission (UNCC) which was formed after the first Iraq War following Iraq's invasion of Kuwait to deal with foreign claims against Iraq under the supervision of the United Nations Security Council. Again, the UNCITRAL Rules served as guidance, though the procedure had a number of specific characteristics normally not used in arbitration. Enforcement of awards running into billions of US dollars was available from the large funds coming from a portion of the income Iraq had from the oil sales permitted by the United Nations in the so-called Oil for Food Program. From my experience as panel chairman of the UNCC, it seemed to me that the adjudication worked rather well in spite of the obvious political sensitivity of the disputes and the millions of claims, such as by Egyptian workers, for which computer programs had to be developed which later were helpful in other mass claim adjudications.

Furthermore, in this context of politically sensitive arbitrations, one may mention the inter-state cases after the hostilities between Eritrea and Yemen as well as between Eritrea and Ethiopia, the *TABA* case between Israel and Egypt, the *Rann of Kutch* case between India and Pakistan, and the *Beagle Channel* case between Argentina and Chile.

(c) Inter-state Disputes

With other observers, one can probably consider the Jay Treaty concluding the American Revolutionary War as the beginning of modern inter-state arbitration. In any event, we find it used frequently already late in the nineteenth and throughout the twentieth centuries. Indeed, the peace movement of that period considered international adjudication and arbitration as a substitute for war in settling international conflicts. The Hague Peace Conferences of 1899 and 1907 created the Permanent Court of Arbitration (PCA). And after the League of Nations had been founded, a further step was the creation of the Permanent Court of International Justice (PCIJ). But, as we know, neither of these institutions was widely used in settling international disputes in the period up to the Second World War.

After the Second World War, the United Nations replaced the League of Nations and the International Court of Justice (ICJ) replaced the Permanent Court. But again, for some years, neither of them were widely used. In recent years, the situation somewhat changed, as more cases were and are submitted to the ICJ, and not only by states from Europe and the Americas, but also from states all over the world, particularly Africa. Important issues are often at stake, such as the use of force in international relations, boundaries of states, the law of neutrality, genocide, state and universal jurisdiction, the law of treaties, the powers of the UN Security Council, terrorism and environmental law.

Furthermore, the option of creating Chambers of the ICJ with judges selected by the parties was used several times for disputes between states in procedures similar to arbitration.

Other than the Permanent Court of Justice, the Permanent Court of Arbitration continued to be in existence and available after the Second World War. But only recently has it started playing a role in practice, as the PCA is frequently called on for the appointment of arbitrators under the UNCITRAL Rules, and also as the PCA takes an interest in matters of international arbitration through meetings and publications.

Outside these institutional frameworks, a number of ad hoc inter-state arbitrations have taken place determining land and maritime boundaries, aviation rights, state responsibility and other matters.

(d) Investment Disputes between States and Private Enterprises

Inter-state adjudication and arbitration cases often, in substance, dealt with interests and rights of nationals of one of the two states rather than of the state itself. However, since traditionally only states were recognised as subjects of international law and, in particular, had standing to sue another state in international proceedings, the private persons involved could not be procedural parties themselves and their home state, by ways of the traditional concept of diplomatic protection, had to sue the other state.

An early exception were certain concession contracts which provided mostly for ad hoc arbitration in which the private company receiving the concession, in return for its investment, was granted the right to start arbitral proceedings directly against the granting state. This led to well known arbitration cases like ARAMCO, AMINOIL and the like.

Similarly, even without a concession, if states, state institutions and state enterprises concluded commercial contracts with foreign private companies on subjects such as infrastructure or construction projects, they often accepted arbitration clauses referring to commercial arbitration. In fact, over many years, up to 10 per cent of all ICC arbitrations involve such state parties.

However, a fundamental change came with the rise of modern bilateral and multilateral treaties on the promotion and protection of foreign investment leading to today's great number of investment arbitrations.

The topic brings back memories of more than 40 years ago. The International Law Commission (ILC) of the UN was already then drafting texts on state responsibility, work it only concluded in recent years under the leadership of James Crawford. From the business world, the so-called Abs/Shawcross Convention was drafted for a multilateral treaty on investment protection. It failed just as did the OECD Draft Convention decades later. New discussions are under way now in this respect. But in any event, since then, the framework for investment protection has changed considerably both regarding the applicable substantive and procedural legal frameworks.

First, there are changes regarding *substantive* law: much of the earlier ideological discussions stemming from the former socialist countries and continued under the auspices of the so-called 'new international economic order' have either disappeared or lost most of their impact on the legal discussion. The relevant public international law has been codified to a large extent, not by a worldwide multilateral convention, but in particular by the about 2,400 BITs containing mostly the same or similar substantive protection provisions. Here it may be noted that China has concluded some 112 BITs and is second only to Germany in the number of BITs. In this context, it is to be noted that most of the earlier Chinese BITs limited investor–state arbitration to rather narrow circumstances, for *e.g.* the amount of compensation owing in confirmed cases of expropriation, but that the most recent renegotiated Chinese BITs with Germany and the Netherlands provide for much wider investor–state arbitration similar to the traditional model of BITs of most other countries. Regional treaties such as the European Union and NAFTA have brought about some multilateralism of general investment protection between certain states connected by large volumes of trade and investment. The Energy Charter Treaty has added a further multilateral framework for an important specific sector.

A great number of decisions of international tribunals have clarified the meaning of the most important notions and substantive protective rules. This jurisprudence includes some decisions of the International Court of Justice, many decisions of ICSID, ad hoc, ICC and LCIA tribunals which are only published with the consent of the parties, and particularly the by now 30 volumes of

decisions of the Iran–United States Claims Tribunal in The Hague which are published without exception.

Specific national laws have been created in many states, including many developing countries, for the promotion – and at the same time protection – of foreign investment.

And finally, the much discussed economic globalisation has given greater flexibility to the international business community to provide its own protective measures by the shaping of corporate structures and contracts.

I have submitted in earlier publications conclusions and suggested implementations on the specific issues arising in contracts and arbitrations between states or state enterprises on one side and foreign private enterprises on the other side.[6] More recently, from my own investment cases, it seems that particularly relevant *substantive* law questions which still remain are the following:

- What is the substantive law applicable to contracts between the investor on one side and the state or state institutions or enterprises on the other side?
- What measures are tantamount to expropriation?
- Under which circumstances does non-action of a state qualify as expropriation because the state had a duty to take protective action?
- When does a 'mere' breach of contract qualify as a breach of a BIT?
- What is the effect of alleged corrupt practices?
- Under which conditions may the corporate veil be lifted between a state and its institutions or enterprises with separate legal personality?
- Can the state or state institutions claim acts of state as force majeure?
- What amounts to 'changed circumstances' affecting obligations or the continuation of long-term contracts?
- To evaluate the amount of compensation due, is the DCF method appropriate and how should it be applied?
- Should the 'sovereign risk' element used in ratings of international financial markets be used to establish the quantum of lost profits?

Similarly to the substantive framework, the *procedural framework* for the settlement of international investment disputes has been considerably developed.

Many of the substantive legal frameworks I mentioned, treaties as well as national investment laws, at the same time provide expressly for some kind of dispute settlement beyond or to the exclusion of the national courts of the investment state. Most investment contracts contain clauses referring disputes to various kinds of ad hoc or – mostly – institutional arbitration.

What dispute settlement machineries are mostly used in practice? ICSID has a fast growing number of cases from all regions of the world. Also, the number of

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6 *See e.g.*, K.H. Böckstiegel, 'The Legal Rules Applicable in International Commercial Arbitration Involving States or State Controlled Enterprises' in *ICC International Arbitration, 60 Years On: A Look at the Future* (Paris, 1984), p. 117; and *Arbitration and State Enterprises: Survey on the National and International State of the Law and Practice* (Deventer/Netherlands and Paris, 1984), p. 113S.

NAFTA cases has grown, though it seems that the attitude specifically in the USA has changed towards NAFTA in a sense that some have called a new Calvo Doctrine. Be that as it may, it is to be noted that the USA has recently renegotiated a number of its BITs and limited the scope of investor–state arbitration. Park, Aguilar Alvarez[7] and, more recently, Paulsson[8] have published criticism on this. The arbitration procedure of the new Energy Charter Treaty already has its first cases and will probably play a considerable role in the future. While not specially created for investment disputes, the ICC, the LCIA and the UNCITRAL Rules are also frequently used for investment cases.

Regarding the procedure used in practice, of course, one relies primarily on the rules provided by the arbitral institutions. However, if we look more closely at these rules, we see many similarities and often identical solutions. This is the result of the modernisation of almost all relevant arbitration rules in recent years, trying to take into account the experience and demands of arbitration practice. Additional instruments such as the IBA Evidence Rules, the IBA Conflict of Interest Guidelines, and the UNCITRAL Notes on arbitral procedure contribute as well to a global harmonisation. And finally, as most rules leave a wide margin of discretion to the arbitral tribunal to shape the procedure as it considers best fit for its case at hand, one finds that this discretion is used very similarly in practice regarding such frequent and important issues as case management in general and in particular interim measures, relying on a full written procedure including written statements by witnesses and experts, a limited disclosure of documents, shortened oral hearings focussing on cross and re-direct examination and additional questions by the arbitrators, and finally post-hearing briefs.

All this results in a global harmonisation of arbitral procedures, at least in international commercial and investment cases. Again, judging from my own recent experience as an arbitrator in investment cases, particularly relevant *procedural* questions are:

- Generally, what are the specific considerations in procedures between states or state institutions on one side and foreign private enterprises on the other side?
- How does one deal with procedures and decisions of the national courts of the investment state regarding the investment?
- Are interim measures of protection by the arbitral tribunal appropriate in this context?
- Vice versa, how does one react to injunctions by a national court addressed to the parties, their lawyers, or the tribunal itself?
- Does the involvement of a state as a party require a different application of rules on the disclosure of documents and other discovery measures?

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7 G. Aguilar Alvarez and W. Park, 'The New Face of Investment Arbitration: Capital Exporters as Host States under NAFTA Chapter 11' in ICCA Congress Series No. 11, p. 302 and republished with amendments in (2003) 28 *Yale Law Journal* 365.

8 Paulsson, *supra* n. 2 at p. 230.

- Does submission to arbitration by the state include a waiver regarding enforcement of awards?

(e) International Law in Commercial Arbitration

While arbitration has in many ways become an important feature in international relations and in the framework and enforcement of international law, vice versa as well, international law is relevant in many ways for and in commercial arbitration.

The most obvious relevance in our context comes from instruments of public international law which directly deal with or provide for international commercial arbitration. This category includes the well-known arbitration conventions and similar instruments such as the various Geneva instruments and particularly the New York Convention. For these, the relevance as such is obvious, but the concrete application may still meet many difficulties as we know from reports on the situation in many Convention states and from the present discussions on preliminary measures at UNCITRAL meetings. Quite a different type of instrument are the BITs, most of which provide for arbitration between the two states as well as for arbitration between the host state and the foreign investor. In this context, one may also mention the investment arbitration procedure provided by Chapter 11 of NAFTA which has been widely used already and is the subject of quite some discussion nowadays. Again, quite a different type is represented by the Algiers Accords which established the Iran–United States Claims Tribunal at the Hague, as I mentioned earlier.

Another kind of relevance in the context of our topic can be seen, if subjects of public international law provide arbitration services. Examples used to be individual socialist states when they formed specific national foreign trade arbitration courts which were mandatory for trade between socialist countries and optional for trade with Western countries. Today, arbitration services provided by intergovernmental organisations are available. Some play a prominent role in practice, such as ICSID arbitration provided by the World Bank. Other examples are the arbitration centres of WIPO, regional centres of the United Nations such as those in Cairo and Kuala Lumpur, and of the American states. Another kind of service is provided by UNCITRAL through its well-known instruments such as the Arbitration Rules and the Model Law, which have a wide impact throughout the world, and by UNIDROIT through its various instruments.

Furthermore, in past and present practice, subjects of public international law have been and are parties in many cases of international commercial arbitration. In most of these cases, states as well as their bodies, institutions or enterprises are involved. In this context, many issues, questions and difficulties arise. But in view of my own publications on this topic, I will resist the temptation to go into more detail here. Let me only point out the less common situation that another category of subjects of public international law, namely an intergovernmental organisation, is a party in international commercial arbitration. From a case

which received some publicity and thus is not fully confidential, I can report that in a commercial arbitration between a Canadian group of companies and the United Nations, we faced a number of issues rather unusual in commercial arbitration. One was the relevance of the UN Charter and the role of member states for the issues of liability and confidentiality. Another was the applicable substantive law, since there was no choice of law clause in the respective contracts and any national law of a member state seemed unfit so that, with the agreement of the parties, we ended up relying on the UNIDROIT Principles for international contracts.

Finally, in quite a number of ways, principles of public international law can become applicable as part of the substantive law in international commercial arbitration. First, there used to be and still are (sometimes) certain contracts such as concession contracts or so-called economic development agreements which contain a choice of law clause expressly selecting public international law, or at least the General Principles of Law which are part of it according to Article 38 of the ICJ Statute. Then, there are references to public international law in the rules of certain institutions such as Article 42 of the ICSID Convention. But even without such express authorisations, as was done many years ago by the tribunals in the *Lena Goldfields*, *Aramco* and *Aminoil* cases, certain parts of public international law may be considered relevant as part of the applicable substantive law, particularly if states are involved as parties. Nowadays, this may particularly be true for the Convention on the Law of Treaties, mandatory decisions of the UN Security Council such as those establishing foreign trade embargoes, the European Human Rights Convention, and the competition and antitrust law of the European Union. Furthermore, the General Principles of Law or certain principles of international customary law may be applied such as those on state responsibility elaborated by the International Law Commission, or those supplying guidance of what can be considered international public policy. Finally, it may be argued that certain obligations of private law contracts are transformed into obligations under public international law either by umbrella clauses in BITs or as being covered by the property protection provisions in BITs or in customary international law.

IV. CONCLUSION

I have aimed here to outline some major aspects of the interrelationship between today's status and challenges to the international community and international law on one side, and international arbitration on the other side.

Domestic arbitration does not exist in a vacuum but is subject to and influenced by its national political, economic and legal environment, as well as the practice of state courts and the usages of the national business community.

For the different regions of the world, cultural differences will continue to play a role regarding the settlement of disputes. For the Asian region, where previously mediation and conciliation were primarily used to solve disputes, a study of the

Asian Development Bank[9] confirmed that, as markets expand beyond the national frontiers, informal dispute settlement mechanisms become less reliable and formal institutions and procedures with powers of decision and enforcement more important. This is confirmed by the new renegotiated BIT between China and Germany which offers a much wider scope for investors to pursue international arbitration in case of disputes with the host state. On the other hand, the Asian tradition may have an impact on arbitration in other parts of the world in promoting arbitral procedures in which an amicable settlement is proactively sought with the consent of the parties. Some of you may know that this is also a practice in German domestic arbitration, while in many other jurisdictions this role of the arbitrators is either forbidden or at least not found in practice.

International law is the product and legal reflection of state and business practice in the international community. But its rule of law also provides the much needed framework for peaceful cooperation between states, for the effective functioning of the international marketplace, and the legal security needed to promote international investment.

In turn, international arbitration reflects the international community as its political and economic environment, and international law as its legal environment. Their development and progress as well as their challenges have and should have an impact on the development and progress of the codification and practice of international arbitration. Good arbitration practice will have to take that into account.

On the other hand, the growing codification and implementation of international dispute settlement, and particularly of international arbitration, present an important contribution and guidance, if not for a solution, at least for a peaceful and civilised processing of many challenges to today's world community and international law.

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9 *See* report by M.C.W. Pinto in *Liber Amicorum Robert Briner*, *supra* n. 1 at p. 640.