IS INTERNATIONAL ARBITRATION UNIVERSAL?

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I. INTRODUCTION .......................................................... 497

II. A UNIVERSAL NOTION OF INTERNATIONAL ARBITRATION .... 499
    A. Public Law – Private Law ............................................ 499
    B. Purpose of international arbitration ............................. 504
    C. The Place of Arbitration ............................................ 505
    D. Arbitrators ............................................................ 505
    E. Secrecy ............................................................... 506
    F. Institutional Commonality .......................................... 506
    G. Enforcement of Arbitral Decisions .............................. 507
    H. Law to be applied ................................................... 509
    I. International Arbitration and Public International Law .... 511
    J. Binding Precedent ................................................... 516
    K. Is there a common notion of international arbitration? ... 519

III. IRAN-UNITED STATES OF AMERICA CLAIMS TRIBUNAL .......... 523
    A. Background .......................................................... 523
    B. The Need for International Arbitration ......................... 527
    C. Law to Be Applied .................................................. 529
    D. Enforcement of the Iran-USA Claims Tribunal Decisions ... 532
    E. International Arbitration and Policy ............................ 533

IV. CONCLUSION ............................................................ 534

I. INTRODUCTION

Due to diversity in parties to (e.g., states, international organizations, corporations and individuals) and subjects of (e.g., state responsibility, investment, commercial transaction, violation of the international commercial contract) international arbitration, it would seem cogent to argue that international arbitration is comprised of many types. Most importantly, the question arises as to whether there is a common denominator of “public” and “private” international arbitration. Whomever the parties to and whatever the subjects of international arbitration may be, is it possible to talk about an all-encompassing and universal concept of international arbitration? This paper answers in the affirmative, arguing that there is a common concept of international arbitration. However, in doing so, this paper does not deny the existence of specific types of international arbitration – state-to-state

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arbitration, international investment arbitration, international commercial arbitration and so forth. Rather, it aims to determine whether a definite and rigid distinction between public international law arbitration and private international law arbitration is feasible.

International peace and security is the primary purpose of the United Nations. To fulfill this purpose, Article 33 of the United Nations Charter provides for the peaceful settlement of disputes through negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies and arrangements, or other peaceful means. Adjudication (i.e., arbitration and judicial settlement through permanent international courts) is an important way of settling international disputes. Binding decisions issued by international adjudication are an attractive option for parties to international disputes.

Classical international law considers the state the original and essentially ontological subject of international law. Indeed, the United Nations Charter does not refer to non-state actors in Article 33 and seems to represent classical international law in that only states are to be parties to international dispute settlement mechanisms. Yet, an effective international dispute settlement system also requires the participation of non-state actors. Arguably, the international system could integrate non-state actors through non-adjudicatory dispute settlement methods, such as mediation. This article refutes this notion. It is possible for non-state actors to be important stakeholders in international adjudication. Indeed, non-state actors already play an important role in international arbitration, and it is this fact that makes international arbitration all the more inclusive and universal.

The second section of this paper explores the universality of international arbitration from various perspectives. The third section further contextualizes and conceptualizes international arbitration through a specific case, namely the Iran-United States of America Claims Tribunal. The article then concludes that international arbitration is a universal concept that supersedes the distinction between public and private law.

2. Id.
3. Id. at 4.
4. Id. at 8.
5. Id. at 5.
7. Spain, supra note 1, at 5.
8. Id. at 49.
II. A UNIVERSAL NOTION OF INTERNATIONAL ARBITRATION

A. Public Law – Private Law

International arbitration is generally deemed to differentiate between state-to-state arbitration and arbitration between private law subjects (corporations or individuals). Inter-state arbitration is seen as a matter of public international law, whereas private law arbitration is regarded as resting within the domain of contract law, private international law or civil procedural law. Nonetheless, some common characteristics exist in both public law and private law arbitration and identifying these common characteristics allows us to surmise that international arbitration is a universal concept representing some universal sensitivities, regardless of whom the parties to and what the topics of international arbitration may be.

In this respect, one can argue that international commercial arbitration is a direct or an indirect consequence of state sovereignty and is thus a reflection of public law. Granted, one can also maintain that international commercial arbitration is contract-based. Although at first glance, it is corporations themselves that decide to resort to international arbitration, in the background, it is states that legalize and legitimize arbitration. It is thanks to state consent that international commercial arbitration exists in the first place. This is the public law aspect of international commercial arbitration. However, a deeper examination would suggest that the establishment of the international arbitration tribunal, the determination of the limit of competences of the arbitrators and the referral of specific questions to international arbitration, are all matters under the control of the contracting parties to international arbitration. Thus, arbitrators are responsible only to the parties of the dispute before the arbitration tribunal.9 The limit of their competence is determined by the parties to the dispute.10 In this context, the parties establish the tribunal and arbitrators are accountable only to parties, not to the general public as such.11 This is the private law aspect of international arbitration.

The private law dimension of commercial arbitration is arguably predominant in that in the majority of cases, an international commercial contract is in question. In commercial contracts, parties are in equal status and do not exert state or public power against the other.12 Even though a non-contractual liability (tort liability) may also emerge in international

10. Id.
12. Id. at 59.
commercial arbitration, this is still between two private parties that have equal rank. Besides, non-contractual liability may be closely linked to the contractual liability in question before the arbitration tribunal.13

Nevertheless, public law shadows the private nature of commercial arbitration. The establishment of international commercial arbitration tribunals, the competences of the arbitration tribunal and the binding effect of the decision of the arbitration tribunal are all subject to the mandatory rules of the place of arbitration.14 Some national rules and principles are so central to national legal systems that they do not allow their violation, even though a contract.15 Thus, international commercial arbitration, which apparently relies on the consent of private parties, in fact, operates under the shadow of the mandatory rules of national public law, rules that imply minimum standards of justice and morality. These standards are called public policy in systems under common law and public order (ordre public in French) in countries governed by civil law.16 Indeed, national laws shall consent to international arbitration and shall not find resort to international arbitration in violation of public order (or public policy).

Mandatory rules are confirmed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.17 Under the Convention, state parties to the Convention can refuse recognition and enforcement of arbitral awards by invoking public order, or if the subject of arbitration is not found suitable for arbitration in the state where recognition and enforcement are sought.18 This proves that states are sensitive to the risks and potential damage international arbitration among private parties may cause. Such private risks are countered through a public international law instrument – the New York Convention.19

In the background of a commercial arbitration that takes place between two private parties (natural persons or corporations), there exists an explicit or implicit consent of the states of which these private parties are citizens.20

14. Id. at para. 397.
15. Id. at para. 398.
18. Id.
National laws supervise the validity of an arbitration agreement, the limit of the jurisdiction of the arbitration tribunal and the enforcement of the arbitration decision. Supervisory national law is either that of the place of arbitration or the place where the arbitral decision is enforced. Supervision by national laws and national courts disprove the argument that international commercial arbitration is wholly built upon the consent of private parties. This has to do with the understanding that international arbitration does not function as a private matter in a vacuum, as well as the fact that international arbitration has implications for society at large.

If a legal relationship or a transaction has impact upon society, public law has a role to play. Arguably, arbitration agreements and the disputes resolved through arbitration have wider implications than those merely restricted to private parties. Due to this understanding, the shadow of the state is felt in international commercial arbitration. Only thanks to explicit agreements and implicit understandings among states can private parties resort to international commercial arbitration.

The distinction between international commercial arbitration and public international law arbitration is arguably based upon the private law–public law distinction. The private-public law divide is in most instances determined by the identity of stakeholders. Thus, when both parties are private individuals or corporations, we assume that there is a private law relationship. When one of the parties happens to be a state, the public law dimension enters the stage. The more public power – such as in the shape and the presence of the state – is felt, the more we are in the realm of public law. Indeed, arguably, the more states and international organizations make themselves visible, the more private international law issues transform into issues pertaining to public international law.

Arguably, there exists a liberal mindset that underpins the distinction between public law and private law. In this context, the functions of the state are limited to a number of issues. States are occupied with national defense, internal security and the delineation and dispensation of justice and its mechanisms. Other matters are left to non-state actors and private individuals. While the state acts in a limited number of fields under a specific

21. Id. at 6.
22. Id. at 2.
24. Id. at 1265.
26. Id. at 282.
law (public law), other matters are dealt with by private subjects (e.g., individuals and corporations) under private law. 27 Private law provides for the equality of stakeholders, in contrast to public law, where public interest, public order, public policy and the primacy of the state are the ultimate values to be considered.

However, this theoretical distinction has, at present, become ambiguous. Now, states are active in many fields – transport, environment, education, health, the safeguarding of living standards and the protection of national economic resources. 28 States are also aware of the fact that their means to achieve all their targets in the aforementioned fields may not be sufficient. 29 They therefore interact with other states and the subjects leading to what may be termed a “social and economic international law.” 30 In this intensely interactive international law, comparing and contrasting national law principles possess a certain expediency. Indeed, both in inter-state arbitration and in international commercial arbitration, general principles of law stem from these comparative studies.

If a state is a party to arbitration, notwithstanding the commercial nature of the dispute, there is also a public law dimension of the arbitration. It is impossible to isolate the state from public concerns. States, whether they engage in commercial transactions or public international law affairs, have singular responsibilities vis-à-vis their own peoples. 31 This is most obvious in international investment law, as it is in this field that public services (electricity, water, gas... etc.), customs regulations, public health, environmental concerns and the protection of cultural goods may be questioned. 32 From the public's perspective, a state negotiating these sensitive matters with profit-seeking multinational companies may pose (public) risks. 33

One can counter that not every case of international arbitration involving a state can be considered under public law. A state can be party to international commercial contracts and may, like a prudent merchant or a corporation, engage in ordinary commercial transactions. A state may therefore also be a party before an international commercial arbitration tribunal – such as before the International Chamber of Commerce (ICC)

27. Id.
28. Id.
29. Id.
30. Friedman supra note 25, at 282.
31. Schill, supra note 11, at 72.
32. See id.
33. Id. at 75–76.
Arbitration – without its usual prerogative of superior, distinctive public powers.\(^{34}\)

Moreover, it is not wholly correct to qualify and define arbitration as between two corporations – and not involving any state – as a necessarily pure case of private international law or international commercial law arbitration. The dispute between corporations may well concern the general public.\(^{35}\) The public interest, public service(s) and public order may also be at issue in what would otherwise appear to be a private dispute between two companies.\(^{36}\) Recognition and enforcement of a decision pertaining to commercial arbitration may be problematic before national courts due to those concerns. Indeed, arbitrators, when making their decisions, take into consideration the probability of recognition and subsequent enforcement of their decisions by national courts.\(^{37}\) Thus, a seemingly private arbitration among corporations becomes a matter for public law due to the gatekeeper function of national courts, which exert public law powers.\(^{38}\) National courts may refuse recognition and enforcement on the grounds of public policy.\(^{39}\)

Thus, drawing a purported distinction between public law and private law arbitration through the identity of the disputing parties or through the existence or absence of an international commercial contract may not be the most robust approach. Instead, the question of whether the arbitration concerns public policy and national interests should also be considered. If the public is affected to a substantial degree by international commercial arbitration, public law enters the stage.\(^{40}\) Thus, the values and principles of public law—such as transparency, legal security, predictability, democracy and the rule of law—also become significant considerations.\(^{41}\)

Arguably, this intertwining of public law and private law and lack of a definite distinction between the two presents some disadvantages. For instance, in international investment law, in the case of an investment contract between a corporation and a host state, it may be difficult to determine the precise boundary or threshold before which the relationship is


\(^{36}\) Id.

\(^{37}\) See generally id.

\(^{38}\) Id. at 60.

\(^{39}\) Weelock, supra note 19, at 292.


\(^{41}\) See generally Teitelbaum, supra note 35.
one of private law and after which point the issue enters the domain of public law. The boundary is one that needs to be delineated because until a certain threshold, the state acts as an equal partner vis-à-vis the corporation. Yet, in some matters, the state acts within the context of its public powers in the name of public interest and public policy, where concerned. Thus, a delicate balance— not an exact science— is struck between the economic interests and legitimate expectations of the investor and public interests (health, education, environment, labor rights . . . etc.) that are to be protected by the state. Indeed, the Permanent Court of International Justice, in the Lighthouse decision, deemed a concession contract made between a state and a corporation involving a public service as not amenable to ordinary categories of private law. Hence the need for a certain degree of common sense in the functioning of international arbitration. In this context, arbitrators have a significant role in the incorporation of common sense into the arbitral process, a role that also necessitates a degree of flexibility in the consideration by arbitrators of private law and public law concerns.

B. Purpose of international arbitration

International arbitration has a common denominator for all kinds of disputes and parties in terms of the purpose pursued. In all cases, arbitrators are focused upon the resolution of the dispute before them. An arbitral tribunal cannot directly consider a purported international public interest or another value. Moreover, an arbitral tribunal that has been founded to settle a specific dispute should not pursue an international public policy. An arbitration tribunal does not have to directly consider the totality of international law, nor does it feel bound to improve international law. An arbitration tribunal does not have to follow a precedent or systematic jurisprudence. Although an arbitral tribunal would consider the mandatory rules and public order of the country in which the arbitral decision is expected to be enforced, its jurisdiction is limited by the responsibilities assigned by

42. Id. at 56.
43. See generally Lighthouses Case Between Fr. and Greece, 1934 P.C.I.J. (ser. A/B) No. 62 (Mar. 17).
44. Id.
45. Bower, supra note 9, at § 1.
46. Id. at § 7.
47. Id.
48. Id.
49. Id.
the parties to the arbitral tribunal. Each arbitration tribunal is an independent entity, distinct from others, and does not have to entertain systematic concerns regarding international law and international arbitration law.

C. The Place of Arbitration

Parties to a public or private international law arbitration are free to determine the place of arbitration, a liberty that contributes to the impartiality and independence of the tribunal. In other words, whatever the subject matter of the arbitration may be and whoever the parties may be, the free determination of the place of arbitration is a valid principle. This is a common trait of all arbitrations.

D. Arbitrators

Arbitrators are expected to be impartial and independent in fulfilling their duties. In fact, in the state-to-state arbitration that was being practiced in the 19th and during the beginning of the 20th century, arbitrators were regarded as agents of the states that had chosen them. They were, on the bench, representing states and stressing the case of the state that had appointed them to the tribunal. Thus, arbitration was seen as sort of a continuation of classic diplomacy on another platform, and the arbitrators were seen as representatives of their respective states. However, over time, this understanding of the function of the arbitrator progressively gave way to the later notion of the impartial arbitrator.

The commonality between state-to-state, state-to-corporation and corporation-to-corporation arbitration is that in all three kinds of arbitration, arbitrators have the same duty in that they shall endeavor to convince both parties that they have conclusively resolved the dispute. A strong impression that the dispute has been settled by arbitrators should be imparted to the disputing parties. Thus, the institution of arbitration, more than scientific rules and strict determinism, rather relies on a policy and approach that aims

50. Brower, supra note 9, at § 43.
52. Id. at § 7(b).
53. Id.
54. Id. at § 37.
55. Id.
56. Kreindler & Kopp, supra note 51, at § 37.
to give the impression that the contention has been categorically ended by
the arbitrators.

E. Secrecy

Another commonality between public international law and private
international law arbitration is secrecy.57 As a rule, in all arbitrations, the
arbitral decision and the proceedings and the identity of the disputing parties
are to remain confidential.58 Although some in the doctrine argue that there
is no presumption or rule of secrecy regarding arbitral proceedings and
decisions, in practice, secrecy prevails and arbitral decisions are published
only with the consent of the parties involved.59

Even though the reasons and the judgments of the International Center
for the Settlement of Investment Disputes (ICSID) arbitral decisions have
been partially published since 2006, this is an exception in international
arbitration.60 Indeed, ICSID arbitration is the most transparent kind of
arbitration and may be a bedrock of developments in international arbitration
law. For instance, this relative openness of ICSID arbitrations may pave the
way for the adoption of the rule of binding precedents in ensuing ICSID
arbitration.

F. Institutional Commonality

Arguably, international arbitration has a certain universal dimension as
to its institutional structure. The foremost evidence of this is the Permanent
Court of Arbitration, under the supervision of which numerous types of
arbitration are conducted.61 The ability of the same institution to conduct
both arbitration pertaining to public international law and to private
international law and the diversity with regard to the parties in its arbitration
proceedings (state, corporations or individuals) would suggest that encoded
within international arbitration are universal principles that are valid for all
kinds of arbitration.62 Indeed, in its first decades, the Permanent Court of
Arbitration dealt primarily with state-to-state arbitrations in the field of

57. Id. at § 7(c).
58. Id.
59. Id.
60. See generally Antonio Parra, Enhancing Transparency at ICSID,
62. Id.
public international law, whereas nowadays most of the disputes it handles are international commercial and investment disputes. The popularity of the Permanent Court of Arbitration in recent years can be linked to its engagement with commercial and investment issues.

The fact that the Permanent Court of Arbitration is an international organization established through an international treaty between states, alongside the fact that it is a public international law institution, have not been seen as obstacles that prevent it from dealing with commercial and investment disputes. It could therefore be argued that the Permanent Court of Arbitration does not see any rigid distinction between public international law and private international law and has purportedly accepted that international arbitration has some universal dimension on an institutional basis without being hindered by the public law-private law distinction.

G. Enforcement of Arbitral Decisions

Decisions pertaining to both public international law and private international law arbitration are final and binding. Arbitral decisions cannot be subject to scrutiny on the merits. The enforcement of a public international law arbitral decision is, in the final analysis, in the hands of the states that are party to the arbitration. However, as states consent to arbitration beforehand, this is an indicator of their willingness to enforce it. Arbitral decisions pertaining to private international law (international commercial arbitration and international investment arbitration) can be set aside by arbitral institutions (such as the ICC or the ICSID) due to procedural irregularities, or their recognition and enforcement can be denied by national courts on grounds of public policy or public order. Still, arbitral decisions cannot be appealed against its merits, which in turn enhances the reliability and the speed of the arbitration and decreases the costs. This is an


64. See generally PERMANENT CT. OF ARB., supra note 61.

65. Id.


67. Id. at § 7(d).

68. Id.

69. Id. at § 7(a).


71. Kreindler & Kopp, supra note 51, at § 7(e).
advantage of international arbitration in comparison with other methods of dispute settlement. Indeed, the prohibition of the reconsideration of the merits of an arbitral decision is one of the most important elements distinguishing it from national court decisions.\textsuperscript{72}

In state-to-state, state-to-corporation and corporation-to-corporation arbitrations, the ultimate authority of enforcement is the state.\textsuperscript{73} In the event of a state not willing to implement a state-to-state arbitral decision, there seems no other way aside from diplomatic and political overtures to persuade or coerce the recalcitrant state to comply.\textsuperscript{74} Thus, in legal terms, there is little that can be done. On the one hand, due to the principle of sovereign immunity, a state court cannot try another state.\textsuperscript{75} On the other hand, due to the fact that international courts lack compulsory jurisdiction, the dispute may not come before any international court at all.\textsuperscript{76}

In the case of international commercial or investment arbitration involving the state as a party to the dispute, if the state loses the case, and if it does not comply with the arbitral decision, a decision for the recognition and enforcement of the judgment may be sought in state courts. The same is true of corporation-to-corporation arbitration. State courts are thus essential in the enforcement phase of arbitral decisions. Yet, the enforcement phase against a state is substantially more problematic than it is against a corporation. The state may resist recognition and may not acknowledge enforcement decisions taken by other states’ courts. The non-complying state may invoke sovereign immunity and argue that state property which cannot be enforced upon without state consent – has a large scope.\textsuperscript{77}

In the case of commercial and investment arbitrations, the significant role of the state courts cannot be passed over. Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, state courts can invoke “national” public policy – not an international public policy – against foreign arbitral awards.\textsuperscript{78} Every state

\begin{flushleft}
\textsuperscript{72} Id.
\textsuperscript{73} See generally Christine Gray & Benedict Kingsbury, Developments In Dispute Settlement: Inter-State Arbitration Since 1945 (1992).
\textsuperscript{74} Gary Born, A New Generation Of International Adjudication, 61 DUKE L. J. 775, 828 (2012).
\textsuperscript{76} See generally Kreindler & Kopp, supra note 51.
\textsuperscript{77} IAN BROWNlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 343 (Oxford University Press, 7th ed. 2008).
\textsuperscript{78} James D. Fry, Desordre Public International Law under the New York Convention: Wither Truly International Public Policy, 8 CHINESE J. OF INT’L L. 81, 83 (2009).
\end{flushleft}
has its own specific public policy and the state court has full discretion in interpreting its own national public policy. 79 Neither the New York Convention nor any other international treaty can limit the public policy considerations of a state. 80 In this context, the issue of public policy is concerned with the most fundamental notions of justice and morality, which could be invoked only in exceptional cases. 81 Thus, public policy can limit the effectiveness and the enforcement of international commercial and investment arbitration.

It is important to point out that many states would not accept a convention on the recognition and enforcement of foreign arbitral awards without the provision of national public policy. 82 Public policy protects public interest – it does not protect specific private interests. In this respect, the problem is whether states can agree on common notions of morality and justice, notions which would entail an international dimension. The current enforcement regime of state-to-state arbitration and the New York Convention do not give much hope in that regard. An international public policy would need an international conception of common sense and deliberate global policy on the part of nations. Such a prospect – of the formation of international public policy – seems distant.

H. Law to be applied

Three kinds of law are applied in international commercial arbitration agreements: substantive law, procedural law and mandatory public laws. These three laws may be different from each other. Most importantly, mandatory rules may be different from one state to another. Every state may have different sensitivities and thus different mandatory rules. The arbitral tribunal thus necessarily considers both the mandatory rules of the place of arbitration and the mandatory rules of the place of the enforcement of the contract. 83

One view states that arbitral tribunals are successful in that they simultaneously evaluate the public policies of a few countries and make their decision compatible with the mandatory laws of all these countries. 84 Thus, arbitrators could be labeled as experts that maintain and preserve the well-being and the efficient functioning of the international arbitration system.

79. Id.
81. Gibson, supra note 23, at 1244.
82. Fry, supra note 78, at 134.
83. Reza Baniassadi, supra note 40, at 69–70.
Arguably, arbitrators who consider and reconcile different national public policies for the sake of the enforceability of their decisions form an international public policy of sorts. Arbitrators can therefore be seen as conducting an international public policy based on common sense.

In this respect, arguably, all national laws derive their validity from public international law, which in turn becomes the source of national laws. Thus, national rules on the conflict of laws, which include public policy considerations, could also be framed within public international law. With this in mind, it becomes all the more normal that arbitrators take into consideration national public policies, which are part of national laws. International law and national law are interdependent and constitute a whole.

It could also be maintained that arbitrators are not focused solely upon the disputes before them; they are well aware of the fact that if their decisions are not enforced by state courts, both their careers as arbitrators and the institution of international arbitration as such would be called into question. Thus, every arbitrator views international arbitration, albeit indirectly, in a holistic manner. Arbitrators cannot be viewed merely as the instruments of the parties to the dispute but must remain focused on isolated disputes.

In this regard, international commercial arbitration progresses on two practical axes. First of all, arbitrators have a wide margin of discretion. The tension between public law and private law and the contradiction between mandatory laws and the free will of parties are resolved through the trust placed in and via the discretion granted to arbitrators. Second, in rare instances national courts oppose the enforcement of international commercial arbitral rulings. Most national courts interpret national law narrowly and prefer to preserve the autonomy of international commercial arbitration. Consequently, a delicate balance is at issue. While international commercial arbitration widens in scope and limits state sovereignty, countries feel more secure under the umbrella of national public policy.

86. Gibson, supra note 23, at 1253.
87. Id. at 1247.
88. Id.
89. Id. at 1261.
90. Id. at 1244.
91. Papillon Grp. Corp. (Pan.) v. 1) Arab Rep. of Syria, 2) Arab Adver., 3) Gen. Establishment of External Commerce, Final Award, Case No. 12923 of 2007, E.C. 10 (ICC Int'l Ct. Arb.) ("[t]he reason is that every commitment on the part of the State involving a renunciation, on its part, of a part of its sovereignty should be expressed officially by the competent state authority, which is not the case here... "). Accordingly, States which allow its citizens (natural persons or corporations) to go to international commercial arbitration rather than national courts give a concession in terms of their sovereignty.)
I. International Arbitration and Public International Law

The recognition and the enforcement of foreign arbitral awards take place through the foremost instrument of public international law – the international treaty.\(^\text{92}\) Treaties are concluded to prevent national courts from obstructing the smooth functioning of international arbitration.\(^\text{93}\) Similarly, the United Nations International Trade Commissions’ (UNCITRAL) model law has been adopted by many states.\(^\text{94}\) This model law has been promulgated under the auspices of the United Nations and ensures similar national rules on arbitration worldwide.\(^\text{95}\) The adoption of the rules of international commercial arbitration by the foremost public international law institution, namely the United Nations, through the votes of the diplomatic representatives of states, demonstrates the intertwining of public international law and private international law with regard to international arbitration.

Likewise, the UNCITRAL rules for international arbitration are the product of the years when the international community tried to reconcile public international law and private international law. More precisely, the UNCITRAL rules are the product of the struggle between the capitalist and the communist blocs during the Cold War.\(^\text{96}\) The pioneers of both camps – the United States of America and the Soviet Union – decided that international arbitration was a plausible way to settle their political and commercial disputes.\(^\text{97}\) The bone of contention was the delineation of the rules of arbitration.\(^\text{98}\) Equally important was to determine which arbitral institution and tribunals would be established.\(^\text{99}\) While the American state and western corporations did not want to go to the Moscow Court of Arbitration, the Soviets did not trust the International Chamber of Commerce’s (ICC) International Court of Arbitration, which they – the Soviets – believed merely reflected the interests of the western capitalist system.\(^\text{100}\)

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\(^{93}\) *Id.* at 331.

\(^{94}\) *Id.* at 337.

\(^{95}\) *Id.*


\(^{97}\) *Id.*

\(^{98}\) *Id.*

\(^{99}\) *Id.*

\(^{100}\) *Id.* at 295–96.
The problem of finding suitable procedural rules and the right institution for international arbitration was finally resolved in 1977 through an agreement between the Soviet Chamber of Commerce and Industry, the American Arbitration Association and the Stockholm Chamber of Commerce. Although these institutions were at the forefront of the negotiations, the governments were intensely active in the conclusion of this agreement. After this agreement, many US-Soviet commercial disputes were brought to the Stockholm Arbitration Court under UNCITRAL rules, testimony to the fact that international politics, international law and international common sense are the real factors behind the development of international arbitration.

At this point, it is plausible to mention the public international law aspect of the International Center for the Settlement of Investment Disputes (ICSID). The ICSID was established via an instrument of public international law, namely the ICSID Convention. ICSID adjudication may be qualified as a branch of public international law adjudication, hence not subject to national law. The inability to invoke domestic law against international law is one of the most important principles of public international law. In this respect, ICSID arbitral awards are judicial decisions, as indicated in Article 38 of the Statute of the International Court of Justice and are a source of international law. It is impossible to invoke national public order or public policy against ICSID arbitral awards and, ICSID arbitral decisions cannot be annulled by national courts. Likewise, ICSID arbitral decisions have direct applicability in national laws without the need for any national transaction whatsoever.

In this respect, international investment law and international investment arbitration are linked to international law via one of the most important problems of international law: the protection of aliens. The

102. Id.
104. Id.
106. Swissson Doo Skopje v. Former Yugoslav Rep. of Maced., ICSID Case no. ARB/09/16, ¶ 345 (July 26, 2012) (“It is not possible to quantify the damages with certainty, but it is well established in international law that difficulty in ascertaining damages does not preclude being awarded [damages] in the event of a breach . . .”). Indeed, ICSID arbitral tribunals act like classical international courts.
treatment of a states' citizens by other states has always been a crucial topic of international law; the usual approach adopted by states is to defend their citizens and/or corporations when their interests conflict with another state or are threatened by another state. States thus ensure respect for the rules of international law in the person of their subjects.108 This issue has gained all the more importance in the 21st century thanks to accelerating globalization and interconnectedness between states, private individuals and corporations. Indeed, international arbitration has always been one method (amongst others, such as diplomacy and military intervention) used to deal with the issue of the protection of aliens.109

In other words, how the private individuals and corporations of a state are treated by another state is a matter for public international law. Likewise, the topic of private international law (the conflict of laws) is the element of foreignness in legal relations. In private international law itself, legal disputes, which also contain foreign elements, are to be resolved at the national level.110 Private international law is therefore, in fact, national law; it is specific to every nation. When a dispute is connected to more than one national law, private international law determines which national law is to be applied to the dispute.111 Under the "national" private international law, national courts may have to apply foreign law.112

As the treatment of aliens is a matter for international concern and public international law, private international law legislations of various states may conduct a certain correspondence among themselves. States, being fully aware of the implications of the application of domestic law to aliens, try to coordinate legislation in this field, although they are not obliged to do so.113 In this, states are wholly cognizant of the importance of respecting the rights of aliens and of their own inability to rely solely upon the national interest.

The intertwining of private international law and public international law can be witnessed in other instances, too. Thanks to the Charter of Economic Rights and Duties of States as proclaimed by the United Nations General Assembly, one can infer that public international law arbitration and private international law arbitration derive from similar conditions and are

111. Id.
112. Id.
113. Id.
the outcome of the same historical process.\footnote{See generally Charter of Economic Rights and Duties of States, G.A. Res. 29 (XXIX) A. U.N. Doc. A/Res/29 (XXXIX) (Dec. 12, 1974) [hereinafter Charter].} Both public international law and private international law principles are referred to in this document.\footnote{Id. at art. 2(a).} Article 2(a) of the Charter states that each state has the right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities.\footnote{Id. at art. 2(b) ("Each state has the right to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of the host state. Every state should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph.").} It is thus demonstrated that the relationship among states is based upon the (mutual) recognition of national economic sovereignty, a reflection of classical international law.

Article 2(b) of the Charter states that transnational corporations are to be subject to law and the courts of the state in which they operate, an endorsement of the application of "national" private international law.\footnote{Id. at art. 2(c) ("Each state has the right to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case, where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means.").} Likewise, Article 2(c) stipulates that disputes pertaining to nationalization, expropriation and transfer of property shall be resolved by the law and the courts of the host state, endorsing the primacy of national law over public international law.\footnote{Charter, supra note 114, at art. 13(3).}

Crucially, the 1974 General Assembly Resolution proclaiming the Charter of Economic Rights was not endorsed by the developed western nations but was passed as a result of the votes of the 'poor'/developing countries.\footnote{See generally id.} This situation is a clear indication that international law, in the field of both state-to-state and state-to-investor relations, is problematic. Indeed, in the \textit{Texaco v. Libya} arbitral decision, the arbitrator declared that the 1974 General Assembly resolution did not reflect customary international
law and that it had been passed thanks solely to the votes of unindustrialized nations.120

This should not mean that public international law and international commercial arbitration cannot be regulated together. For instance, although UNCITRAL rules are designed for mainly international commercial arbitration, they could also be applied in inter-state arbitrations and mixed arbitrations.121 Indeed, the Iran-United States Claims Tribunal and the Eritrea-Ethiopia Claims Commission – mixed arbitrations – employed UNCITRAL rules in slightly adapted versions.122 UNCITRAL rules can be applied to international investment arbitration, too. Still, it is important to point out that UNCITRAL rules do not determine every detail of international arbitration. These rules determine fundamental procedural criteria and standards, with the remaining loopholes to be filled by the parties to the dispute and the arbitrators.123 International arbitration is thus accorded the utmost flexibility and discretion.124

As to the common regulation of public international law and international commercial arbitration, international investment arbitration is a case in point. International investment arbitration is neither pure public international law arbitration nor a typical international commercial arbitration. One party to the dispute is the investor (a private individual or corporation) and the other party is the host state.125 The state enters into a contract (e.g., a concession contract) with the investor.126 After this contract comes into force, the investor may run into political and commercial risks in the host country.127 Hence international investment law and arbitration, while regulating these political and commercial risks, has brought the investor and the host country onto the same platform. The prime example of this is ICSID arbitration. ICSID arbitration functions in line with procedural


124. See generally Brower, supra note 9.

125. ICSID, supra note 103.

126. Id.

127. Id.
rules as determined by the ICSID Convention.\(^{128}\) In fact, the application of these procedural rules is a reflection of public international law.\(^{129}\) National procedural rules cannot be invoked against the procedural rules, as indicated in the ICSID Convention.\(^{130}\)

As a matter of fact, the ICSID Convention was concluded with a view to the contracts made between investors and host states (e.g., concession contracts), not to current popular treaties that detail the protection and promotion of investment between states.\(^{131}\) Still, ICSID arbitration could be considered both a manifestation of public international law arbitration as well as international commercial arbitration. Indeed, when a state does not comply with the ICSID arbitral award, the state of the private individual or the corporation that won the arbitration case could invoke the material breach of the international treaty – the ICSID Convention.\(^{132}\) In other words, a seemingly wholly commercial arbitration between an investor and the host state becomes a matter for classic public international law. The state, which does not comply with the ICSID arbitral award, is in violation of the ICSID Convention and becomes responsible in international law for its internationally wrongful act. The private dispute between the investor and the host state, which is based on a contract, morphs into a public international law dispute between two states.

\[J. \quad \text{Binding Precedent}\]

Another point of commonality between public and private international law arbitration is the absence in both of binding precedent, a fact that leaves arbitrators a considerable margin of discretion.\(^{133}\) Although the arbitral tribunal may refer to previous arbitral rulings, it is not bound to do so, and even if it does, these references do not connote a binding effect.\(^{134}\) Thus, in principle, every arbitral case is deemed \textit{sui generis}, and every dispute is seen as possessing specific and singular conditions. This rule has to do with the

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129. See generally Inci Ataman-Figanmese, supra note 107.

130. See generally ICSID Convention, supra note 128.

131. Id. at art. 42(1).

132. Id. at arts. 53, 54(1).


134. Id.
sensitivities of states and corporations regarding the (non-)binding effects of previous rulings.

In this context, international arbitration is a modest enterprise. It does not purport to reconcile conflicting decisions. One cannot speak of a definite and coherent international arbitration law; but merely individual and isolated arbitral decisions. One cannot use the method of induction in international arbitration and claim that earlier rulings will ultimately determine the later rulings. In principle, international arbitration does not have a vast discourse or a general theory or a language or a formula, which explains and rationalizes past arbitral decisions in a coherent manner. International arbitration is neither a theoretical construct nor a general explanation, but an empirical international dispute settlement method.

By not ceding to the principle of binding precedent, international arbitration has avoided falling into the trap of an artificial security. Indeed, sometimes a single exceptional arbitral decision may be more influential than a multitude of decisions and may challenge and change parameters that had been established by previous arbitral decisions. Thus, one cannot speak of an arbitral jurisprudence. International arbitration somewhat implies that a grand discourse of a purportedly consistent jurisprudence would not respond to large scale political, economic and commercial crises that international arbitration claims to deal with.

A rigid and structured jurisprudence might limit international arbitration more than necessary. This implies that what is most important in international arbitration is the common sense and discretion of arbitrators. Indeed, an effort to reconcile various arbitral decisions under the binding precedent notion would cover up or postpone small inconsistencies and crises. Yet the price to be paid for such a system would be a much greater inconsistency and, ultimately, large-scale crises.136

The lack of binding precedent in international arbitration could be explained by the fact that most arbitral decisions are not published at all. There is an element of truth in this assertion. Indeed, one cannot refer to arbitral decisions and their reasoning if they are not accessible to arbitrators or to researchers. The international arbitration community cannot establish judicial consistency amidst such secrecy. Equally important, one cannot conduct scholarly and academic research on the existence of binding precedent without access to previous arbitral awards.

Nevertheless, the sole reason for the lack of binding precedent is not the non-publication of (most) arbitral awards. For instance, although ICSID

135. See generally KARL POPPER, THE POVERTY OF HISTORICISM (Beacon Press, 2002) (This view of international arbitration is in line with the philosopher Karl Popper’s criticism of historicism – to be trapped in the earlier decisions and conditions in deciding the future).

136. NASSIM NICHOLAS TALEB, ANTIFRAGILE 5, 82, 106 (Great Britain, 2012).
arbitral awards have been accessible for the most part since 2006, there is still no binding precedent established within the ICSID. For that to occur, a common international understanding and a deliberate policy are needed. More importantly, it should be admitted that current international arbitration is not a rigidly scientific method of dispute settlement. Only an international arbitration, which has the claim to be scientific, can establish the principle of binding precedent in its decisions. Yet, neither the international law community nor the international arbitration community has arrived at such an understanding.

We see the typical example of this in the International Court of Justice (ICJ), the foremost court of public international law. Although the decisions of the Court have been public since its inception, the Court does not follow the principle of binding precedent.137 Actually, the lack of binding precedent is clearly confirmed by Article 59 of the Statute of the ICJ138, with a similar situation also existing in the World Trade Organization (WTO), which cites its previous rulings. However, official and definitively binding precedent is notably absent, as well as the international will and common sense required in the ICJ jurisprudence and WTO panel decisions to establish binding precedent.

Scientific knowledge regulates and interprets similar situations in similar ways, ensuring – or, as an ideal, striving and hoping to ensure – predictability and security. However, international law has still not reached this stage of precision as regards to its mechanisms of dispute settlement. In fact, the references to previous rulings by international courts demonstrate the existence of common sense on the part of judges and arbitrators, whilst the lack of binding precedent demonstrates the lack of reliability of these references.

International arbitration limits state sovereignty by vesting instances outside national jurisdiction with judicial authority. States allow the resolution of political, economic, commercial and investment disputes outside national courts. Instead of the national judge, the “expert” arbitrator takes the stage. Such a concession on the part of state sovereignty, naturally, requires some guarantees for the state, one of which is the lack of binding precedent. The thought being that states do not want to be restricted by previous decisions through binding precedent and so will have greater margin of manoeuvre.

If that is the mindset of states, an interpretation on binding precedent should also be made from the perspective of corporations. Why is there no binding precedent in international commercial arbitration? In fact, there is a parallel between state-to-state arbitration on the one hand and the

137. See generally ICJ Statute, supra note 133.
138. ICJ Statute, supra note 133, at art. 59.
corporation-to-corporation arbitration on the other. Just as state sovereignty is an obstacle to the principle of binding precedent, corporate sovereignty (autonomy, independence) is also an obstacle to binding precedent. Corporations prefer to see every dispute as a new dispute that is to be evaluated under distinct circumstances. On this view, every contention should be resolved within its own particular set of circumstances. Corporations are subjects of international law and in their attitude towards the notion of binding precedent, they in fact act under the paradigm of classical international law.

K. Is there a common notion of international arbitration?

There may be an objection to the assertion that state-to-state arbitration, state-to-corporation arbitration and corporation-to-corporation arbitration are too similar. In international commercial arbitration and international investment arbitration, at stake in the majority of cases is a commercial or investment contract. However, in the case of state-to-state arbitration, a dispute related to public international law is in question, for example, a border dispute, the sharing or distribution of natural resources, a states’ responsibility for an internationally wrongful act, among others. As such, in the case of commercial and investment arbitration, the arbitral tribunal is constrained by the contract between the disputing parties, whereas in arbitration between states pertaining to public international law, arbitrators have more discretion.\(^\text{139}\)

For instance, in international commercial arbitration, a dispute may be resolved solely by reference to the commercial contract, without application of any national law at all. The real ‘sovereign’ in commercial arbitrations is thus the contract. For example, if some clauses (e.g., the supervening impossibility of performance or a fundamental change of circumstances) are not placed in the contract, then an arbitral tribunal would probably conclude that the parties have chosen silence on this issue and that the contract has to be fully complied with without exception. Parties, at the conclusion of the contract, shall be aware of the fact that the contract cannot be adapted to new circumstances and that the cancellation of the contract would probably not be endorsed by the arbitral tribunal.\(^\text{140}\) However, here it may also be stated that in state-to-state arbitration a contract may be at issue. States could

\(^{139}\) Id.

conclude classical public international law treaties or commercial contracts among themselves.\textsuperscript{141} Both constrain the discretion of the arbitral tribunal.

To make a distinction solely based upon the identity of the parties to the dispute would not be the most robust of moves, either. For instance, in the International Chamber of Commerce (ICC) Arbitral Tribunal, states and state companies can be parties to the dispute. States – the ultimate embodiment of public law – can be a party to a fully commercial arbitration.\textsuperscript{142} States may have commercial affairs to be resolved before international commercial arbitration bodies. In such situations, it would not be true to speak of the sovereign immunity of the state. Yet, the fact that a state has consented to international commercial arbitration does not mean that state property can be attached. For the attachment of state property, special approval on the part of the state is needed. This proves that international commercial arbitration does not and cannot cross some red lines of classical public international law.

However, it should be pointed out that when one of the parties is a state, it is rare to limit the jurisdiction of the arbitral tribunal to the sole consideration of the treaty or contract. In particular, in international investment treaties (i.e., bilateral treaties on the protection and promotion of investment), some issues are not regulated in sufficient detail. In these treaties, many concepts may be defined in ambiguous and general terms. For instance, the term “investment” is not defined in the ICSID Convention and it may not be sufficiently defined in bilateral investment treaties either.\textsuperscript{143} Indeed, in many ICSID cases, one of the most important objections put forward by the host state is the lack of investment.\textsuperscript{144} The same kind of ambiguity may exist in a contract between the host state and the investor corporation. For instance, implementation of the contractual term “fair and equitable treatment” in concrete cases is subject, to a great extent, to the discretion of the arbitral tribunal.\textsuperscript{145}

In the functioning of international investment law, four sources of law are considered: public international law, international investment treaties, the contract between the investor and the host state, and the national law of the host state.\textsuperscript{146} All four are considered at the same time. In other words, in

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\textsuperscript{142} Id.

\textsuperscript{143} See Generally ICSID Convention, supra note 128.


\textsuperscript{146} ICSID Convention, supra note 128, at art. 42(1).
international investment arbitration, the focus of the arbitral tribunal is not solely upon state-to-state treaties or a state-to-corporation contract. Consideration of all these four sources of law by the ICSID Arbitral Tribunal is the evidence of the fact that international investment law does not reside outside the domain of general international law and is not an isolated branch of law. The case of *Asian Agricultural Products Ltd v. Republic of Sri Lanka* confirms this in the clearest of terms:

A bilateral investment treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.\(^{147}\)

This is, in fact, in line with the interpretation of treaties in public international law. Under the Vienna Convention on the Law of Treaties, general international law is an important factor in interpreting an international treaty.\(^{148}\)

Another peculiarity of the ICSID – with regard to the interlinking of public law and private law – is that public international law may encompass private international law. For instance, if the investor-host state contract does not mention resort to ICSID arbitration, an international investment treaty between the investor’s state and the host state that refers to the ICSID may pave the way for arbitration in the case of a dispute with regard to the investor-state contract. Thus, the contract is protected under the umbrella of a public international law treaty. A private law relationship (commercial and investment relationship) is embedded in a public international law relationship.

This has to do with the perception of private individuals and corporations in international law. Actually, the present perception is the consequence of an evolution in the field. The Permanent Court of International Justice, in its *Serbian Loans* decision, stated that international law is to be applied only among nations.\(^{149}\) Legal relationships involving actors other than states would be subject to national laws, reflecting the

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typical positivist perspective on international law.\textsuperscript{150} As such, the only subjects of international law were states, implying that those disputes without a state-to-state character should be solved under a national law.\textsuperscript{151} However, at present, this view has changed. Today, state-to-corporation and corporation-to-corporation disputes are, besides national laws, also subject to international law and general principles of law.\textsuperscript{152}

As a matter of fact, many general principles of international law derive from national private laws.\textsuperscript{153} For instance, national private law principles such as \textit{pacta sunt servanda} (‘agreements must be kept’) and \textit{bona fides} (‘principle of good faith’) are commonly invoked in public international law and with regard to international commercial contracts.\textsuperscript{154} Notwithstanding private law foundations, general principles of law lead to certain similarities between public law and private law and bring a systematic and constitutional dimension to international law.\textsuperscript{155} Thus, international arbitration finds a common ground on the basis of general principles of law.

As far as the determination of the relationship between the four sources of international investment arbitration is concerned, the common sense and the expertise of the arbitrator play an important role. The discretion of the arbitrator is crucial in interpreting these four sources and applying them to a concrete case. For instance, the arbitrator may decide to resort to general principles of law that help alleviate the (possible and) eventual rigidity of international investment arbitration and which may lead to a generalization of law.\textsuperscript{156} Thus, international arbitration cannot be deemed a mechanic and deterministic method of dispute settlement. International arbitration is a method where experts – arbitrators – with their common sense and general principles are at the center stage. This is a universal rule valid for both public international law and private international law arbitration.

In this respect, mixed arbitrations can be helpful to further conceptualize and contextualize a universal concept of international arbitration. Mixed arbitration brings various parties and sources of law together.\textsuperscript{157}


\textsuperscript{151} Eliehu Lauterpacht, \textit{supra} note 149, at 272.

\textsuperscript{152} \textit{Id.}

\textsuperscript{153} HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 45 (1927).

\textsuperscript{154} \textit{Id.} at 57.

\textsuperscript{155} \textit{Id.} at 5.

\textsuperscript{156} Campbell McLachlan, \textit{supra} note 150, at 373.

arbitration can therefore be an interesting laboratory to determine whether there is a common notion of international arbitration, whoever the parties and whatever the issue. In this respect, the Iran-USA Claims Tribunal is a case in point.\textsuperscript{158} Indeed, this article will, in the following section, attempt to further explore and interpret the nature of international arbitration through this particular tribunal.

III. IRAN-UNITED STATES OF AMERICA CLAIMS TRIBUNAL

A. Background

The Iran-USA Claims Tribunal was established by the two countries through a treaty in 1981 and it is still in force, adjudicating public international law contentions and commercial and investment disputes.\textsuperscript{159} For example, the Tribunal on the one hand handles state responsibility for internationally wrongful acts whilst also dealing with damages stemming from violations of commercial and investment contracts.\textsuperscript{160} This tribunal is a platform allowing both states and their citizens (natural persons and corporations) to invoke their claims.\textsuperscript{161}

The fact that private individuals and corporations can invoke their claims on an international platform is a conspicuous development of the 20\textsuperscript{th} century. Mixed arbitral tribunals and commissions have ensured the participation of individuals and corporations in international dispute settlement. Diplomatic protection by the state of which individuals and corporations are citizens has been replaced by individuals and corporations


\textsuperscript{159} Id.

\textsuperscript{160} Id.

\textsuperscript{161} Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, January 19, 1981, art. VII, \textit{reprinted in} 20 I.L.M. 223 (1981) [hereinafter Claims Settlement Declaration]; Iran v. U.S., 5 Iran-U.S. Cl. Trib. Rep. 251, 261–62 (1984) ("While this tribunal is clearly an international tribunal Claims Settlement Declaration established by treaty and while some of its cases involve disputes between the two Governments and involve the interpretation and application of public international law, most disputes (including all of those brought by dual nationals) involve a private party on one side and a Government or Government-controlled entity on the other, and many involve primarily issues of municipal law and general principles of law. In such cases, is the rights of the claimant, not of his nation, that are to be determined by the Tribunal. This should be contrasted with the situation of espousal of claims in international law.").
directly asserting their rights before mixed commissions and tribunals.\textsuperscript{162} Indeed, in the event of diplomatic protection, the state may not defend the interests of the individual or the corporation to the fullest extent.\textsuperscript{163} The state may engage in a balancing act, whilst also taking into consideration certain political and strategic issues too.\textsuperscript{164} In classical international law, a state not defending (or not properly defending) the interests of its individuals and corporations vis-à-vis another state is not responsible.\textsuperscript{165} This does not result in denial of justice but is rather an issue wholly at the discretion of the sovereign state.

The international system, which was established after 1945, opened its gates to private individuals and corporations and vested them with remedies outside the mechanism of diplomatic protection. In particular, in the field of international protection of human rights and international investment law, individuals and corporations gained the right to sue states. Arguably, at this stage of the development of international law, individuals and corporations not provided with recourse to an international judicial hearing can invoke denial of justice.

The juxtaposition of public international law and commercial and investment law in the Iran-USA Claims Tribunal is all the more apparent in that, before the establishment of this tribunal, the USA brought its dispute before the International Court of Justice, which found (the government of) Iran responsible for the interventions into American diplomatic facilities (embassies and consulates) in Iran.\textsuperscript{166} Yet, this ruling did not end the Iran-USA dispute; enforcement of this decision remained problematic. Moreover, there were numerous other claims by American and Iranian individuals and corporations which could not be voiced in the International Court of Justice, an inter-state court. The USA resorted, initially, to a classical public international judicial authority (the ICJ); when this initiative did not bring forth the expected outcome, an arbitral tribunal comprising both public international law and commercial-investment dimensions of the dispute was founded. In this instance, international arbitration emerged as complementary to classical public international law.

As mentioned earlier, the Iran-USA Claims Tribunal is not the first hybrid arbitral tribunal in history. In 1794, the USA and Britain, through the


\textsuperscript{163} See id. at 11.

\textsuperscript{164} See id.

\textsuperscript{165} See id. at 5.

Jay Treaty; established a mixed arbitral tribunal where, in addition to boundary disputes between the two states, property and contract claims by citizens of either state against the other were settled. The peculiarity of this arbitration tribunal was that disputes were settled in terms of justice, equity and international law, the latter, along with general principles of law, playing an important role in the working of the tribunal. In this respect, the Iran-USA tribunal is arguably the foremost arbitral tribunal due to the diversity of its parties, its scope in terms of subjects (public international law, commercial law, investment law), and its duration.

Equally important, the tribunal was established by the common accord of two countries that happen to be on terms that can at best be described as not cordial. Normally, international arbitration operates among states and corporations that are on friendly terms, and interact in a spirit of reconciliation. Hence, the Iran-USA Claims Commission is important in that it has been dealing with disputes between two countries (and their citizens) that do not enjoy diplomatic relations, highlighting the adaptability and flexibility of international arbitration.

It should also be noted at this juncture that the Iran-USA Claims Tribunal encouraged the settlement of differences outside the Tribunal. This proves that, rather than being an adversarial procedure, international arbitration is a common sense procedure, which leads to settlement as soon as possible without being stuck in procedural formalities. Indeed, the policy pursued by international arbitration is to settle political, commercial and investment disputes as soon as possible in an effective and practical way without resorting to intricate procedural rules.

A similar notion of common sense is visible in the Tribunal’s attitude with regard to the exorbitant claims made by some American corporations against Iran. These claims were based on the argument that as a result of the Iranian revolution, not only were specific contracts, with resulting damages, breached but losses in the lucrative Iranian market were incurred which had to be indemnified by the Iranian authorities. The claims were


168. See generally id.


171. Id. at 34.

172. See id. at 27.

173. Id. at 34.
dismissed by the Tribunal, which stated that Iran was not obliged to pay damages because of the Iranian Revolution. Thus, the pathway of demanding speculative damages from Iran based on the Revolution was blocked. On the one hand, this is proof of the fact that state sovereignty as regards the determination of the domestic political regime is inalienable; Iran did not bear any responsibility to the international community for its regime change. On the other hand, the verdict was evidence that the tribunal chose to consider the violation of current contracts and related damages, and not speculative losses, which would be difficult to both justify and to calculate. This is, in a way, the confirmation of the fact that those traders and investors who invest in a foreign country take a certain risk in their dealings. Businessmen and the states of which they are citizens should be aware of the fact that there is always a possibility of political and economic upheaval in the countries they invested in. This should be factored into the risk assessments that are part and parcel of international business transactions.

Although relations between the USA and Iran may have deteriorated after 1979, the two governments and their citizens enjoyed substantial political and economic ties before the revolution. A considerable number of American individuals and corporations had invested in Iran, whilst numerous Iranian individuals and institutions kept accounts in USA banks. Yet, after the Revolution, the two states began applying mutual political, economic and legal sanctions. While the USA froze Iranian accounts in American banks, Iran nationalized American property and investments in Iran. Many American individuals and corporations sued Iran in the American courts.

It is doubtful whether national court decisions are effective against a foreign country. It is possible that a state recognizes the domestic court rulings of another state but for that to occur either an international treaty should exist between the two states in that regard or the two states should be on friendly terms. In the case of the USA-Iran relationship, neither condition held. In particular, it is highly implausible, due to the sovereign immunity principle anchored in international law, for the decisions of a domestic court to be invoked against a foreign country.

Indeed, in the Jurisdictional Immunities of the State ruling, the International Court of Justice (ICJ) concluded that the decisions taken by

174. Id. at 27.
175. Gillespie, supra note 170, at 19.
176. Id.
177. Id.
Italian courts against Germany were in breach of international law. These decisions required German payment of damages to Italian victims of war during World War II, the victims’ plight cited as violations of international human rights law and international humanitarian law. The Italian courts’ verdicts led to the subsequent appropriation of the German state properties in Italy. The ICJ found the Italian state responsible and at fault by allowing these domestic court decisions (civil claims) to be taken and enforced in violation of German state immunity. The Court called upon Italy to rectify this mistake.

B. The Need for International Arbitration

The establishment of the Iran-USA Claims Tribunal makes the necessity of international arbitration in the settlement of international disputes apparent. While domestic arbitrations are generally an alternative to domestic courts, international arbitration is in many cases the only feasible path to settlement in the international arena. International political, legal and commercial disputes are thought to be best resolved through international arbitration, not domestic courts. It is interesting to note that in international commercial arbitration, most of the time a national law is applied to the dispute, yet instead of domestic courts applying national law, international commercial arbitration provides for arbitrators applying national law. Hence, the sensitivity in this particular area is about the authority to apply national law, but not to the use of national law as such.

For instance, in the International Chamber of Commerce Arbitration Court, in case no.13730, the arbitral court presided over and evaluated a contract (vis-à-vis its cancellation) between a Japanese manufacturer and its

179. See generally Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), 2012 I.C.J. 99 (Feb. 3).
180. Id.
181. Id.
182. Id.
183. Id. at 59. The dispositive of the judgment is as follows:

The Court finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945. The Court finds that the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect.
Polish distributor, a contract subject to Japanese law. The arbitral tribunal applied the general principles of Japanese contract law (fair treatment, good faith, prevention of abuse of rights) to the case and found the Japanese manufacturer’s cancellation of the contract in conformity with these principles. Although the Japanese manufacturer’s acts demonstrated some contradiction in its relationship with the distributor and Japanese law of contract was found to be ambiguous in some respects, in the end, the arbitrators did not find the cancellation of the contract by the Japanese manufacturer invalid.

As a rule, national laws and national court decisions cannot be invoked against foreign states. Thus, parties to a dispute would prefer to bring their dispute to an international adjudication, which would be under their control — through international arbitration. International arbitration is the proof of the fact that states refrain from resorting to unilateral political, diplomatic and legal initiatives. It would be fair to assume that political, diplomatic, commercial and legal problems are intertwined. Nevertheless, although one of the respective parties may overtly cite only one of these problems, the other problems are almost also inevitably invoked. It would therefore seem more efficient to resolve this matrix of problems via the same authority in a holistic, technical and objective way. Yet, the permanent international courts (e.g., the International Court of Justice) may not possess the necessary characteristics to deal with all these problems. Private individuals and corporations, for instance, cannot sue before the International Court of Justice.

Indeed, the 1981 Algiers Accord – which established the Iran-USA Claims Tribunal – provided the Tribunal with three heads of jurisdiction. First, the two states can resort to the Tribunal for problems concerning the contracts involving goods and services. Second, citizens of both countries can sue the other country involving trade and investment; the locus standi of individuals and corporations in this regard is independent from that of the two countries, and is actually what makes the tribunal mixed. Third, both countries can have recourse to the Tribunal for the interpretation and

184. See generally Distributor (Pol.) and Daughter Company of Distributor (Isle of Man) v. Manufacturer (Japan) and Manufacturer Europe (European Country), Case No. 13730 of 2013, 38 Y.B. Comm. Arb. 79, ¶39 (ICC Int’l Comm. Arb.).
185. Id. at ¶ 86.
186. Id. at ¶ 89.
188. Christopher & Mosk, supra note 169, at 169.
189. Claims Settlement Declaration, supra note 161, at art. II.
190. Id.
implementation of the 1981 Algiers Accord. This jurisdiction of the Tribunal is about the interpretation of an international treaty. The Vienna Convention on the Law of Treaties plays an important role in this interpretation. As is clear from these three heads of jurisdiction, the Tribunal was expected to approach Iran-USA disputes in a systematic and holistic way. If the national courts of Iran and USA were to decide all these disputes, the resultant decisions would have lacked a common understanding and a general perspective, and contradictions would have emerged among these decisions.

C. Law to Be Applied

The Iran-USA Claims Tribunal is also important in that it applied not only national rules, but also general principles of international commerce (lex mercatoria). The contribution of the Tribunal to international commercial law is therefore undeniable. Moreover, the Tribunal dealt with technical issues involving contractual liability, responsibility and damages, and also, directly or indirectly, handled politically sensitive issues. Indeed, the Tribunal adjudicated upon the Treaty of Amity between the two states, the extent of damages, the rate of interest, expropriation, nationalization, dual citizenship, rates of exchange, wrongful expulsion, and violations of contract, treaty interpretation and supervening impossibility of performance of contracts.

This is a natural outcome in that the disputes between the two states and their citizens concern both public international law and international commercial matters. The lack of any other remedy for the settlement of these diverse disputes paved the way for the establishment of this arbitral tribunal as a corollary of common sense. Indeed, the Tribunal applied public international law principles and international commercial principles together on the same platform, both being the corollary of common sense.

UNCITRAL rules, with a slight adaptation, constitute the procedural rules of the Tribunal, which proves that UNCITRAL rules can be employed not only by international commercial arbitration tribunals (for which they

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191. Id.
194. Id.
195. Id.
196. Pinto & McAsay, supra note 122, at 18.
were originally conceived), but also for state-to-state arbitration. This is also evidence of the fact that the notion of international arbitration is universal, whomever the parties to the dispute may be. Universality exists in terms of the procedural rules of international arbitration.

It is stated in article 34 of the Rules of Procedure of the Tribunal that the parties can reach a settlement among themselves and have the settlement approved by the Tribunal. Indeed, more than half the Tribunal’s decisions are achieved this way, without direct adjudication of the dispute, a reflection and instantiation of classical diplomacy. States can, if need be, reach settlements behind closed doors and can evade any harmful publicity in terms of their national interests before an international tribunal.

Some argue that the Iran-USA Claims Tribunal is too politicized and that arbitrators reach verdicts in line with their political inclinations. By contrast, in international commercial arbitration, economic and technical concerns, rather than political issues, dominate. Consequently, one cannot cite this Tribunal’s decisions as precedents in international commercial arbitration. In this context, Iran-USA Claims Tribunal should be qualified as public international law arbitration. Arguably, this qualification of the Iran-USA arbitration has to do with the desire of private law professors to view private law as a systematic and coherent structure. On this view, integrating public international law into private law through mixed arbitration is not plausible.

Although the Iran-USA Tribunal decided many disputes in the light of national law and international law, the fact is that the Tribunal also referred to general principles of law, thus enabling a certain intertwining of public international law with private international law. The language of general principles of law resorted to by the Tribunal demonstrates the intent to find common ground between Iran and the USA. The damaged relationship between the two countries has, in some cases, led the Tribunal to refer not to their national laws but to general principles of law. Indeed, Article V of


198. Tribunal Rules of Procedure, supra note 197, at art. 34.


200. See id.

201. Caron, supra note 192, at 105.

202. Id.

203. Id.

the “Claims Settlement Declaration” signed by Iran and USA requires the settlement of disputes on the basis of respect for law and through compliance with principles of commercial and international law.\(^\text{205}\) In sum, general principles of law have been seen as the instruments with which to reconcile these two states.

General principles of law are in question, both in terms of public international law and international commercial law.\(^\text{206}\) Indeed, general principles of law have increased the Tribunal’s margin of manoeuvre, which seemingly conflicts with the tradition of private international law, where, somewhat automatically, the national law to be applied to the dispute is determined. In other words, general principles of law may denationalize the law applied to the dispute at hand and thus increase the discretion of the Tribunal.\(^\text{207}\) The Tribunal itself did not feel obliged to apply a specific national law to disputes.\(^\text{208}\)

Indeed, in some cases, through relying on general principles of law, the Tribunal did not even apply the national law explicitly indicated in the international commercial contract.\(^\text{209}\) For instance, although in the contract it was clearly stated that Iranian law was to be applied to the disputes arising from the contract, the Tribunal did not, in fact, apply Iranian law.\(^\text{210}\) In another case, the Tribunal rejected the application of Iranian law to the contractual dispute by invoking the principle of “fundamental change of circumstances”.\(^\text{211}\) The fact that the law to be applied to the dispute, whether it be a public or private international law dispute, is not necessarily a national law is evidence of the trust that is placed in international arbitration.\(^\text{212}\)

Most importantly, in this Tribunal, the public law-private law divide has been partially blurred due to general principles of law.\(^\text{213}\) Although an

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205. Claims Settlement Declaration, supra note 161, at art. V. The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.


207. Id. at 317.

208. Id. at 327.


210. Id.


212. See generally id.

213. See generally Hanessian, supra note 204.
international treaty established the Iran-USA Claims Tribunal, the Tribunal also has dealt with private law disputes as if it is a national court.\textsuperscript{214} In doing so, the Tribunal sometimes deliberately does not take into account the conflict of laws or national laws at all.\textsuperscript{215} Hence, the Tribunal proves that international arbitration is an institution able to take an independent initiative and settle disputes in a pragmatic manner.

\textbf{D. Enforcement of the Iran-USA Claims Tribunal Decisions}

Article IV(3) of the Claims Settlement Declaration, underlying the Iran-USA Claims Tribunal, states that any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.\textsuperscript{216} Indeed, American courts have held that the Tribunal’s decisions are to be recognized and enforced by the American justice system in terms of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.\textsuperscript{217} Therefore, the Tribunal’s decisions are deemed foreign commercial arbitral decisions by the American courts.

Indeed, the procedural rules of the Tribunal are the UNCITRAL rules, with only a slight change. UNCITRAL rules are conceived for international commercial arbitration. Crucially, UNCITRAL rules require that the mandatory laws of the place of arbitration be complied with.\textsuperscript{218} Hence, the Iran-USA Arbitral Tribunal cannot hand down decisions in violation of the mandatory laws and public policy of Dutch law, the place of arbitration in this particular case. Significantly, there were no objections to this on the part of the USA or Iran when signing the Algiers Accord establishing the Tribunal.\textsuperscript{219} The supremacy of Dutch law over the Tribunal is notable, with state-to-state and state-to-corporation (or state-to-private individual) decisions of the Tribunal to be deemed as Dutch arbitral awards.\textsuperscript{220}

The fact that a national law – Dutch law – is designated as the law applicable to arbitration proves that the Iran-USA Claims Tribunal is not a classical inter-state arbitration. Likewise, the fact that neither Iran nor the

\begin{itemize}
  \item \textsuperscript{214} See generally \textit{id.}.
  \item \textsuperscript{215} \textit{Id.} at 311.
  \item \textsuperscript{216} Claims Settlement Declaration, supra note 161, at art. IV(3).
  \item \textsuperscript{217} \textit{Ministry of Def. of Islamic Republic of Iran v. Gould Inc.}, 887 F.2d 1357, 1358 (9th Cir. 1989).
  \item \textsuperscript{218} UNCITRAL, supra note 123, at art. I(2). These rules should govern the arbitration except that where any of these rules is in conflict with the provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.
  \item \textsuperscript{219} Caron, supra note 192, at 146.
  \item \textsuperscript{220} See \textit{id.}.
\end{itemize}
USA can object to the enforcement of arbitral decisions handed down against them, along with the impossibility of invoking sovereign immunity, are evidence of the interlinking of public international law and private international law arbitration. Importantly, the UNCITRAL rules as adopted by the Tribunal do not provide for any differentiation in the enforcement of arbitral awards, whether they are given for a dispute between two states or a dispute between a state and a citizen of the other state.221

Interestingly, the Tribunal does not look for any connection between private law claims and public international law claims.222 Private or public international law claims could be invoked independently of each other without any need for direct connection between the two. For instance, a corporation did not have to prove that as a result of the violation of a commercial contract, a right in the realm of public international law is also violated.223 Corporations do not have to invoke denial of justice, nor is it necessary to prove the responsibility of the state for an internationally wrongful act.224 Violation only in one sphere (public or private) is sufficient to plea before the Tribunal; no direct link between the two spheres is needed to sue before the Tribunal, pointing to a coterminous relationship between the two spheres, rather than one marked by interdependence.225

E. International Arbitration and Policy

In normal times, state-to-state arbitration, commercial arbitration and investment arbitration take place as single arbitrations, focusing on specific and limited disputes. By contrast, mixed arbitration is generally resorted to in the aftermath of political and economic crises and upheavals. After the crisis, complaints by states, corporations and private individuals accumulate. Mixed arbitration deals with the totality of these claims in the framework of a single institution. In this respect, the Iran-USA Claims Tribunal is a typical example of mixed arbitration.

Mixed arbitration enables public international law and private international law actors to settle their disputes on the same platform. It also enables and ensures a certain intertwining of public law and private law. Mixed arbitration, on the one hand, integrates individuals into international

221. See generally UNCITRAL, supra note 123.


223. See id.

224. See id.

225. See id.
law while on the other develops the notion of responsibility in international law. Indeed, the Iran-USA Claims Tribunal fulfilled both functions.226

This mixed situation is also seen with regard to the professionalism of arbitrators. In fact, public international law arbitrators and private international law arbitrators (commercial law arbitrators) do not normally encroach upon each others’ domain; the scholars and lawyers that deal with both types of arbitration are relatively few in number. Nonetheless, this division is based on professional interests and inclinations rather on a rigid distinction between two purportedly distinct types of arbitration.227 This distinction has more to do with the experts, technicians and professionals willing to specialize in relatively narrow areas and their sense of community arising from this specialization. Indeed, the Iran-USA Claims Tribunal proved that the same arbitral tribunal can deal with both public international law and private international law concerns, and with disputes between states, corporations and private individuals alike.

**IV. CONCLUSION**

International arbitration is a universal concept and a flexible institution transcending the public law/private law divide. The purpose, the place and the secrecy of international arbitration, the function of arbitrators, institutional commonality, the enforcement of arbitral decisions, the law to be applied in arbitration and the lack of binding precedent all point to the idea that international arbitration is a method of dispute settlement based upon common sense. Whomever the parties to and whatever the subjects of international arbitration may be, one cannot posit a definite or absolute differentiation between public and private international law arbitration. Indeed, arbitration’s universality and flexibility are most visible in mixed arbitrations – such as the Iran-USA Arbitral Tribunal – where a high number of diverse disputes following a crisis push the limits of creativity in the founding and the functioning of international arbitration.

226. Iran v. United States, 5 Iran-U.S. Cl. Trib. Rep. 251, 261 (1984). While this Tribunal is clearly an international tribunal established by treaty and while some of its cases involve disputes between the two Governments and involve the interpretation and application of public international law, most disputes (including all those brought by dual nationals) involve a private party on one side and a Government or Government-controlled entity on the other, and may involve primarily issues of municipal law and general principles of law. In such cases, it is the rights of the claimant, not of his nation, that are to be determined by the Tribunal.

227. Rogers, supra note 84, at 1001, n. 149.