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“Arbitration and Development: Some ideas to reevaluate Arbitration to promote development through Investment”

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Arbitration and Development

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Abstract

International Investments have a virtuous impact on the economy of the country, creating jobs and increasing productivity. However, in some cases, disputes can occur between the investor and the country that receives the investment. In those cases, the concept of *development* can contribute to achieve a fair resolution to said conflicts.

The most important Arbitration system that regulates the relation between investors and countries is the International Centre for Settlement of Investment Disputes (ICSID). The Treaty that created ICSID, makes a reference to the necessity of cooperation to achieve *economic development*. Thus, it is necessary to reach a balance between the necessity of protecting the investment and the right of the state to accomplish sustainable development. In this regard, in the case *Salini c. Marruecos*, the Court makes some references to the concept of investment considering different aspects. One of them is the contribution to the development of the receiving State. However, the concept of investment is still controversial due to the fact that a specific definition was not follow by the Arbitrators throughout the different cases.

Among different countries, Argentina is a significant precedent in the international investment regime, a country that signed several Bilateral Investment Treaties during the 90’s. In those years, Argentina received important flows of investment in different sectors of its economy. After the crisis of 2001, Argentina became the most sued State before the ICSID. Argentina had 54 cases in the ICSID, of which 46 are concluded and 8 are still pending. Argentina is a leading case of a country that decides to open its economy, has an economic crisis and then starts to be sued on many occasions. Argentina could be taken as a model of the application of said policies and its consequences.

Some other countries -Bolivia, Ecuador, Venezuela, South Africa- have left the system of ICSIS considering that its development cannot be achieved through International Investments. Other important countries -Brazil, Russia, India- are not contracting States to the ICSIS Convention.

The majority of the countries which follow the Islamic Law are contracting States of the ICSIS. For that reason, they could learn from the experience of different states and the application of incentives to achieve economic development.

The ICSIS is an important institution that could contribute to achieve both economic and social development in different countries. Hence, the concepts of *development* -economic and social- and *investment*, are analyzed in different cases with the objective of contributing to the generation of confidence for investors and accomplishing human and economic development.

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Arbitration and Development

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Introduction

International Investments have a virtuous impact on the economy of a country, creating jobs and increasing productivity. However, in some cases, disputes can occur between an investor and the country that receives the investment. In those cases, the concept of *development* can contribute to achieve a fair resolution to said conflicts.

There are common issues regarding international investment which have become global. Crises of underdeveloped countries have consequences on developed countries such as migration, terrorism, health, among others. For that reason, development must be an international goal. Currently, different organizations such as the United Nations, the Organization for Economic Co-operation and Development (OECD) have, among their objectives, to achieve a sustainable development.

The solution is not simple, as a conflict of interest may arise. The developed countries - generally, exporters of capital- are focused on the protection of the investment and their companies. The developing countries -importers of capital- compete to bring the investment to their own countries.

In this paper, we will analyze different cases in the framework of ICSID. In those cases, we will examine the concept of development and its relationship with investments, focusing on the main aspects that the arbitrators consider when solving the cases.

After that, we will summarize the history of Argentina and its relationship with foreign direct investment (FDI). We will analyze the characteristics of the country and some economic measures that were taken during the last decades, considering the main aspects of the 2001 crisis and some cases brought before ICSID.

Subsequently, we will describe the evolution of different ideas related to the concept of *development*. In that sense, after World War II, the concept of development was focused on

increasing the Gross National Product (GNP), but after the 2000’s, the Washington Consensus, the agenda changed to the Sustainable Development Goals (SDG).

Lastly, we will analyze the concept of *development* and its relationship with investments. We will describe the different approaches to the concept of *development* and, consequently, its diverse conception of investment, concluding with a brief summary of the exposed ideas.

1. International Arbitration system

Tawil¹ has described the relation between Latin American countries and arbitration through time. During the XVIII century, there were several military interventions against Latin American countries because of matters related to debts and investment. For that reason, two regional doctrines were developed as a reaction to such interventions.

Firstly, the Drago doctrine - based on a note sent in 1902 by the Argentine Chancellor Drago to the United States House of Representatives - sought to prohibit the use of force to collect public debt from the Latin American States. The second -the Calvo doctrine- denied, based on the principle of equality of States, that foreigners had special rights and privileges and stressed that disputes relating to their claims against the receiving States should be settled exclusively in accordance with the laws of said states and before their courts.

Globalization is not only economic but also comprehends social and political dimensions. Indeed, there is not just one globalization process, each one has its own logic and times². This phenomenon has universalized some markets and has caused an important change in the world’s political order and regarding one of its main concepts: the sovereign state. Consequently, the internal character of the general public law was modified.

According to Castro³, an international Argentinean analyst, the participation in globalization should be intended to integrate into transnational production chains and attract FDI. Emerging countries must attract direct investment from global companies. Developing countries that do

¹ G. S. Tawil. *Los tratados de protección y promoción recíproca de inversiones. La responsabilidad del Estado y el arbitraje internacional*. (La Ley 2000-D, 1106 • Derecho Constitucional - Doctrinas Esenciales) Tomo III, 893. P. 12 *et seq.*

² M. Carbonelli. *Globalización y derecho. Algunas coordenadas para el debate*”, en AA.VV: *La Globalización y el Orden Jurídico. Reflexiones Contextuales*. Universidad Externado de Colombia, Bogotá, 2007, Page 19 quoted by Aguilar Valdez, Oscar *Sobre las fuentes y principios del derecho global de las contrataciones públicas*. Ed. Abeledo Perrot. Buenos Aires Page 2

³ J. Castro. *El Desarrollismo del Siglo XXI*, (Pluma Digital Ediciones, Buenos Aires, 2013) p. 147

not succeed in inserting themselves into these transnational production chains are marginalized in the new world scenario and become irrelevant.

In that context, in order to promote FDI, numerous Latin American countries signed bilateral investment protection and promotion treaties, expressly providing for the option in favor of international arbitration, following the example of several countries in Asia and Africa as well as the nations of Central Europe from the end of that decade and the beginning of the 1990s.

Through the Bretton Woods system, international organizations were created focused on ensuring certain guidelines and policies on international finance, economic development and trade. Mainly, these institutions are the International Monetary Fund (IMF), the World Bank (WB) and the International Trade Organization (ITO).

The purpose of FDI Law is the protection of foreign property by the government of the receiving state⁴. The most important Arbitration system that regulates the relation between investors and countries is the International Centre for Settlement of Investment Disputes (ICSID). The Centre is one of the organizations of the WB Group, created by the Treaty (ICSID Convention) which entered into in force in 1966. At this moment, 154 countries are contracting states.

International investment protection regime is based on two principles⁵. On the one hand, international protection is granted to investors and their investments through International Investment Agreements and, on the other hand, the regime is based on both the principles of international customary law and the principles of law that have been evolving over the years.

The ICSID Convention refers to the necessity of cooperation to achieve *economic development*. Thus, it is necessary to reach a balance between the need of protecting investments and the right of the state to accomplish sustainable development.

In this sense, the first paragraph of its Preamble states: “*Considering the need for international cooperation for economic development, and the role of private international investment therein*”. After that, the word *development* does not appear in throughout the Convention. Developing appears to be the final goal in order to achieve such purpose, investment needs to be considered as an important tool and treated in such way.

⁴ K. N. Schefer, *International Investment Law*. (Edward Elgar. Massachusetts.v2013) P. 2.

⁵ O. E. García-Bolívar, *Definiendo la inversión en el CIADI: Por qué el Desarrollo Económico debería ser el Elemento Fundamental*. (Investment Treaty New. N° 2 T. 3. 2012)

In fact, the WB *Guidelines on the Treatment of Foreign Direct Investment* -soft law instrument- only states in its preamble that “a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular, in terms of improving the long term efficiency of the host country through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade”.

1.1. Jurisdiction of ICSID and main cases

Article 25⁶ of the Convention states that the Centre will have jurisdiction over the matters directly related to an investment. The concept of *investment* is essential in international investment law, because it refers to the *ratione materiae* element of a claim. In other words, if there is no investment, the arbitrators will not have the competence to address the case⁷.

According to Perrone⁸, “the World Bank wanted to open the ICSID facility to disagreements concerning legal rights, contractual rights, or property rights, rather than political or commercial disputes. The authorities of the bank had two concerns regarding the scope of jurisdiction. On one hand, they wanted to cover a large variety of disputes, but on the other hand, they aimed to leave aside political and commercial claims. The concept of investment represented a middle ground that served to leave these two categories outside the jurisdiction of ICSID”.

The ICSID Convention contains no definition of the term “investment” as used in article 25. For that reason, we must analyze different decisions about that term in order to clarify the concept.

There are several decided cases connected to the concept of investment and its relationship with development within the meaning of Article 25. We selected *Salini, Joy Mining, Phoneix Action, CSOB, Patrick Mitchell, L.E.S.I.-DIPENTA, Siemens, Bayindir, and Jan de Nul, and*

⁶ Article 25 states that “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally”.

⁷ K. N. Schefer, Krista. *International Investment Law*. (Edward Elgar. Massachusetts. 2013) P. 59.

⁸ M. N. Perrone, *The International Investment regime and foreign investors’ rights: another view of a popular story*. (Thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy. 2013) P. 142

Malaysian Historical Salvors in order to analyze different aspects of that relationship. As we mentioned above, the ICSID Convention does not provide a definition of “investment” and there is no doctrine of *stare decisis* in ICSID jurisprudence. Thus, the concept of investment is still controversial due to the fact that a specific definition was not followed by the Arbitrators throughout the different cases

a) *Salini Costruttori S.P.A. and Italstrade S.P.A. Claimants against Kingdom of Morocco*⁹:

This case is important because refers to the relationship between investment and development, as the Tribunal mentions the concept of investment considering different aspects. One of them is the contribution to the development of the receiving State.

The Italian company, Salini, made an investment related to public infrastructure, a highway, providing Morocco with know-how on construction in relation to the work to be accomplished. Consequently, the contribution of said company to the economic development of the Moroccan State is clear as the purpose of the highway is to serve the public interest. In fact, in most countries, the construction of infrastructure falls under the tasks to be carried out by the State or by public authorities.

After the decision made in this case, different Tribunals referred to the *Salini test* in order to confirm the existence of an investment. According to this test, the notion of investment implies the presence of the following elements: (i) a contribution of money or other assets of economic value, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the host State’s development.

Hence, because of the Convention’s preamble, it might add the contribution to the economic development of the host State of the investment as an additional condition.

b) *Joy Mining Machinery Limited and The Arab Republic of Egypt*¹⁰:

Despite the Tribunal having declared that the Centre lacks jurisdiction and the Tribunal lacks competence to consider the claims made by the Company, it makes interesting references to the concept of investment and its relationship with development.

⁹ *Salini Costruttori s.p.a and Italstrade s.p.a v. Kingdom of Morocco (ICSID - Decision on Jurisdiction) (Case No. ARB/00/4) [July 23, 2001].*

¹⁰ *Joy Mining Machinery Limited and The Arab Republic of Egypt (ICSID – Decision on Jurisdiction -Case No. ARB/03/11).* In this case, the Tribunal decision contemplates that the General Organization for Industrial and Mining Projects of Egypt is under the obligation to observe the Contract forum selection clause in the Cairo Regional Arbitration Centre governed by the UNCITRAL

Firstly, the difference between this case and *Salini v. Morocco* is this last case, it was a major project for the construction of a highway and required heavy capital investment, services and other long-term commitments. The risk was quite evident considering the elements of duration, regularity of profit and contribution to development. Instead, in *Joy Mining* the contract involves the Provision of Longwall Mining Systems and Supporting Equipment for the Abu Tartur Phosphate Mining Project.

The Tribunal held that the contract between the parties was a normal sale contract, considering that the duration of the commitment was not particularly significant, as the price of the contract was paid in its totality at an early stage, and there was also no regularity of profit and return. Nor was there any risk apart from those typically associated with a commercial contract.

c) Phoenix Action, LTD. Claimant v. The Czech Republic Respondent¹¹:

The petition of the claimant was rejected, considering that it was not acting in “good faith”. The investment did not comply with the standard of the Salini test which must be complemented with the following requirements: a) assets invested in accordance with the laws of the host State and b) assets invested *bona fide*.

The tribunal concluded that on different occasions, the contribution of an international investment to the development of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes “development”. A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the economy of the host State. Indeed, the concept of investment is to be shaped by the elements of contribution/duration/risk and should therefore in principle be presumed.

d) Annulment Committee in the case of Patrick Mitchell v The Democratic Republic of Congo¹²:

A Military Court of Congo ordered Mr. Mitchell’s firm to be put under seals, for that reason documents qualified as compromising and other items were seized. The employees of the firm were forced to leave the premises and two lawyers were put in prison.

With regard to development the Tribunal considered “...the existence of a contribution to the economic development of the host State as an essential – although not sufficient –

¹¹ Phoenix Action, LTD. Claimant v. The Czech Republic Respondent (ICSID Case No. ARB/06/5)

¹² Annulment Committee in the case of Patrick Mitchell v The Democratic Republic of Congo: (ICSID Case No. ARB/99/7)

characteristic or unquestionable criterion of the investment, does not mean that this contribution must always be sizable or successful; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case” (Paragraph 33).

In some way, this arbitral tribunal limited the concept of development, considering that it is challenging to measure the consequences of an investment in the development of a country.

e) *Consorzio Groupement L.E.S.I.-DIPENTA v. People’s Democratic Republic of Algeria*¹³:

The Consortium of Companies was awarded for building a dam in Algeria. The claim was declared inadmissible, because the Consortium did not have standing, and the Arbitral Tribunal lacked jurisdiction to understand on it.

Furthermore, the Tribunal considered that a contract should fulfil three conditions in order to be considered an investment in the terms of the Convention. With regard to development, the Tribunal said that it is difficult to determine it and it is implicitly covered by the other three criteria (Contribution/Duration/Risk).

f) *Siemens A.G. vs. The Argentine Republic*¹⁴:

The claimant had won a bidding process in 1998, after the Government took office in 1999, the new authorities suspended the contract alleging technical problems. On May 18, 2001, the Respondent terminated the Contract by Decree No. 669, issued under Emergency Law 25.344. On July 23, 2001, Siemens had notified the Respondent of a breach of the Treaty between Germany and Argentina.

Regarding the interpretation of the Treaty in force, the Tribunal considered that its purpose was to protect and to promote investments. “The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favorable conditions for the investments of nationals or companies of one of the two States in the territory of the other State. Both parties recognize that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of

¹³ *Consorzio Groupement L.E.S.I.-DIPENTA v. People’s Democratic Republic of Algeria* (ICSID Case No. ARB/03/08)

¹⁴ *Siemens A.G. vs. The Argentine Republic*, (ICSID Case No. ARB/02/8. Jurisdiction Award).

both countries. The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative” (Paragraph 81).

In summary, in this case, the Tribunal refers to the importance of investment in order to stimulate private initiatives.

g) Bayindir Insaat Turizm Ticaret Ve Sanayi a.ş. vs Islamic Republic of Pakistan¹⁵:

The Arbitral Tribunal has jurisdiction over the dispute submitted considering that the National Highway Authority (NHA) was a public corporation established by the Pakistani Law to assume responsibility for the planning, development, operation and maintenance of Pakistan’s national highways and strategic roads.

Bayindir submitted several claims regarding payment and four claims for extension of time invoking different omissions by Pakistan.

The Arbitral Tribunal, applying the *Sallini Test*, considered that Bayindir had contributed to the development of Pakistan in terms of know-how, equipment, personnel and in financial assistance.

h) Malaysian Historical Salvors against The Government of Malaysia (ICSID Case No. ARB/05/10)¹⁶:

The petition of the plaintiff was rejected considering that the contract between the parties was not an investment. The purpose of the contract was for salvage the cargo of a British vessel that sank off the coast of Malaysia in 1817.

Under the Contract, the claimant was required, among other activities, to apply its expertise, labor and equipment to carry out the salvage operation, and to invest and spend its own resources, assuming all risks of the salvage operation, financial and otherwise.

As a summary of this section, in the cases that we analyzed the concept of development does not appear to be clear. The *Salini Test* gave a benchmark that other arbitral tribunals have followed but the concept of development is far from being resolved. Indeed, there is a consensus that FDI contributes to the economy of a country, however it is difficult to measure the concrete advantages to the development of each country.

¹⁵ Bayindir Insaat Turizm Ticaret Ve Sanayi a.ş. vs Islamic Republic of Pakistan (ICSID Case No. ARB/03/29. Decision on jurisdiction).

¹⁶ Malaysian Historical Salvors against the Government of Malaysia (ICSID Case No. ARB/05/10. Decision on Jurisdiction)

2. The case of Argentina

Among different countries, Argentina is a significant precedent in the international investment regime, signing several Bilateral Investment Treaties (BIT) during the 90’s. In those years, Argentina received important flows of investment in different sectors of its economy. After the 2001 crisis, Argentina became the most sued State before the ICSID, having 54 cases, of which 46 are concluded and 8 are still pending.

Argentina has a territory of 2.7 million km², being the eighth biggest country in the world. If the marine land is added, the territory increases 1 million km² more. However, according to the 2010 census, Argentina had 40 million people occupying the 32nd position globally. This population is concentrated in the City of Buenos Aires and its contiguous zone, where 13 million persons live.

Argentina also has serious imbalances as almost a third of its population lives in 1% of its territory. Added to this, the concentration of productive activities in the provinces of Cordoba, Santa Fe, Mendoza, the City and the Province of Buenos Aires, obstruct the execution of public policies in a homogeneous way.

Every country has its special characteristics and, clearly, Argentina is not the exception. In this regard, J. Street¹⁷ describes the case of Argentine economy as representing “...a curious case of a relatively primitive society that was suddenly transformed into an advanced agricultural and commercial system and that subsequently fell into a condition of persistent unsatisfactory growth. This condition often has been described as economic stagnation, and although there have been intervals of apparent improvement, the generally sluggish trend of the economy has been evident long enough to exhibit pronounced secular characteristics”.

2.1. A brief Argentine history summary

After the Spanish conquest, the Argentine territory was part of the Viceroyalty of the Peru, created in 1542, headquartered in Lima. In 1776, the Viceroyalty of the Río de la Plata was instituted, with its capital located in Buenos Aires.

¹⁷ J. H. Street, *The Ayres-Kuznets Framework and Argentine Dependency*, *Journal of Economic Issues*, (1974) Available at: 8:4, 707-728, DOI: 10.1080/00213624.1974.11503224, <<https://www.tandfonline.com/doi/abs/10.1080/00213624.1974.11503224>> accessed July 15, 2019

The declaration of independence was in 1816. Argentina had several civil wars that could be resolved in 1853 with the proclaimed of the Constitution. It is relevant to mention that this Constitution refers to the “progress clause” as a faculty of the National Congress¹⁸. Perceptibly, this article indicates the idea of that moment, considering the welfare of all provinces, promoting industries, the importation of foreign capital, among other projects.

Alberdi¹⁹ -the drafter of the Constitution- considered that the progress of the new country would be reached by entering into Treaties with foreign countries, immigration programs, religious tolerance and the construction of railroads. He thought that if the national capital were not enough to achieve those objectives, it would be necessary to allure foreign investments.

As Dalla Via²⁰ refers, even the Constitution was proclaimed on a time that liberal economic ideas were at their apogee, it provides the State with an important role in order to achieve economic development.

During the nineteenth century, private investment increased a lot in developing countries, especially in the United States, Canada, Australia and Argentina, as well as in Brazil, Mexico and India. London was the main financial center²¹.

There are no official statistics on Argentina's economic growth and structure before 1900. However, there is a consensus that Argentina experienced relatively high growth rates from 1870 until the World War I. It has been estimated that the Gross National Product (GDP) grew during those years at a rate of at least 5% during the 50 years prior to the World War I, while the population increased at an annual rate of 3.4%²².

¹⁸ National Constitution (1853) Article 64 Subsection 16. It is incumbent upon Congress (...) to provide for the prosperity of the country, for the advancement and welfare of all provinces, and for the progress of enlightenment, by dictating general and university plans of instruction, and by promoting industry, immigration, the construction of railroads and navigable canals, the colonization of nationally owned lands, the introduction and establishment of new industries, the importation of foreign capital, and the exploration of inland rivers, by laws protecting these ends, and by temporary concessions of privileges and stimulus rewards.

¹⁹ J. B. Alberdi, *Bases y Puntos de Partida para la organización política de la República Argentina*. (Ed. Losada. Buenos Aires 2003) P. 101 et seq.

²⁰ A. Dalla Vía, *Derecho Constitucional Económico*. (Ed. Lexis Nexis. Buenos Aires 2006). P. 368

²¹ E.A. Cardoso & R. Dornbusch, *Handbook of Development Economics*, (Volume II, Edited by H. Chenery and T. N. Srinivasan 1988, Elsevier Science Publishers B.V. Chapter 6), P. 560

²² M. Rapoport, *Historia Económica, Política y Social de la Argentina (1880-2003)* (Ed. Emecé Buenos Aires. 2009) P. 97

It is widely accepted²³ that after World War I and during the great depression -1930s-, Argentine economy was deeply affected as well as its special relation of symbiosis with Great Britain which had collaborated with its expansion. Argentina used to sell primary products and Great Britain financed the expansion of the railroads and sold manufactured products.

During Perón’s government (1946-1955), Argentina tried to implement a process of industrialization, the same as the Government of Arturo Frondizi (1958-1962) but those policies could not be maintained throughout time²⁴.

The 80’s were not a good decade for South American economies and Argentina was no exception. In the year 1989, inflation was more than 2000% and the change of government brought forward due to the economic turmoil.

Inflation was a real problem in subsequent years, for that reason in 1991, Law 23,928 was passed, and it stated the conversion rate between the Argentinean peso and the American dollar. Article 4 provided that Central Bank reserves could not exceed the monetary base. It was an effective economic measure to reduce inflation. Argentina renounced its monetary public policy in order to reduce inflation. Former Minister of Economy, Cavallo²⁵, who implemented this plan, explained that the idea was to create a new monetary system, protecting the value of the currency, affected by 40 years of inflation.

Since the end of the 1980’s, Argentina started a process of privatization of state-owned companies. Law 23,696 authorized the privatization and the concession of different important companies in sectors such as communications, energy, channels, transport, among others.

Under Article 19 of Emergency Law 23,697 -passed in 1989- the Congress authorized the Executive Branch to sign Treaties with foreign governments that have insurance systems for the export of capital.

²³ M. Rapoport, *Historia Económica, Política y Social de la Argentina* (1880-2003) (Ed. Emecé. Buenos Aires 2009); J. Castro, *El Desarrollismo del Siglo XXI*, (Pluma Digital Ediciones, Buenos Aires. 2013), J. H. Street, *The Ayres-Kuznets Framework and Argentine Dependency*, (Journal of Economic Issues, 1974) 8:4, 707-728, DOI: 10.1080/00213624.1974.11503224

²⁴ For instance, international oil contracts were implemented during its term because of the energy crisis to guarantee self-supplying of energy. However, during the government of Illia (1963-1966) those contracts were annulled, and Argentina had to import energy after some years. After 20 years, President Alfonsín (1983-1989) was from the same party as Illia, but he tried to implement similar energy public policy than Frondizi without success. J. O. Zavala, *Racionalización para el Desarrollo*. (Ed. Depalma. Buenos Aires 1991). P. 96.

²⁵ D. Cavallo, *Pasión por crear*. (Ed. Planeta. Buenos Aires. 2001) P. 163.

The National Constitution (1994) provides different sections related to the human rights. For instance, Article 41 states the right to a healthy environment. Article 75 -subsection 17²⁶- recognizes different ways of understanding human development, considering the special customs and cultural traditions of native people. Furthermore, the new progress clause²⁷ (Article 75, Subsection 19) refers to a different concept of progress, considering human development, cultural diversity, social justice, the generation of employment, among different principles.

In this regard, the new progress clause indicates not only the economic progress -as the Constitution of 1853- but human development and the harmonic growth of the country. As Gelli²⁸ explains, the Constitution reconciles economic progress and stability with the human development.

Argentina²⁹ has signed more than 50 BITs in order to encourage investments from countries such as United States, China, Germany, Spain, United Kingdom, Russia and Italy, among others. Most of them were signed during the 90’s. According to Article 75.22 of the Constitution, International Treaties have superior hierarchies to the Law.

Another important issue related to the economy is the external debt, in 1973 was of USD 4 billion, in 1982 -dictatorship ruled the country between 1976-1983- was of USD 43 billion,

²⁶ National Constitution (1994) Article 75 Subsection:17 It is incumbent upon Congress (...) 17. Recognize the ethnic and cultural pre-existence of Argentina's native people. Guarantee respect for their identity and the right to bilingual and intercultural education; recognize the legal status of their communities, and the community possession and ownership of the lands they traditionally occupy; and regulate the delivery of other lands that are suitable and sufficient for human development; none of them shall be alienable, transmissible or subject to encumbrances or embargoes. Ensure their participation in the management of their natural resources and other interests affecting them. The provinces may concurrently exercise these powers.

²⁷ National Constitution (1994) Article 75 Subsection 19. It is incumbent upon Congress (...) To provide what is conducive to human development, to economic progress with social justice, to the productivity of the national economy, to the generation of employment, to the professional training of workers, to the defense of the value of money, to research and to scientific and technological development, its dissemination and exploitation. To provide for the harmonious growth of the Nation and the population of its territory; to promote differentiated policies that tend to balance the unequal relative development of provinces and regions. For these initiatives, the Senate will be the Chamber of origin. To enact laws of organization and of base of the education that consolidate the national unity respecting the provincial and local particularities; that assure the non-delegable responsibility of the State, the participation of the family and the society, the promotion of the democratic values and the equality of opportunities and possibilities without any discrimination; and that guarantee the principles of gratuitousness and equity of the state public education and the autonomy and autarchy of the national universities. Enact laws that protect cultural identity and plurality, the free creation and circulation of the author's works, artistic heritage and cultural and audiovisual spaces.

²⁸ M. A. Gelli, *Constitución de la Nación Argentina Comentada y Concordada*. (4° Ed. Buenos Aires, Ed. La Ley. Buenos Aires. 2008) P. 200

²⁹ Available at http://www.sice.oas.org/ctyindex/ARG/ARGBITs_s.asp accessed July 30, 2019

increasing more than 700%. Between 1993 and 1999 the debt increased from U\$D 69 billion of dollars to U\$D 121³⁰.

Figure 1 shows the evolution of FDI in Argentina between the 1980’s and 2017. In the 80’s, the percentage was low, less than 1% of the GNP, while in the 90’s the percentage increased considering the BTI and the sale of various state companies.

According to the WB Statistics, in the 70’s and 80’s FDI, net inflows (% of GDP) was on average less than 1%³¹, in the 90’s it increased to 2.5%, and after 2002 it decreased around 2%. The most important company YPF (from the Spanish, *Yacimientos Petroliferos Fiscales*), dedicated to the exploration and production of oil and gas, was sold to the Spanish company Repsol in 1999, which explains the increase of FDI in that year³².

FIGURE 1



Data: own elaboration based on World Bank.

In figure 1, we can see the volatility of FDI in Argentina, depending on domestic and foreign issues. Indeed, the most important decrease was in 2001 -domestic crisis- and in 2008 with the international turmoil.

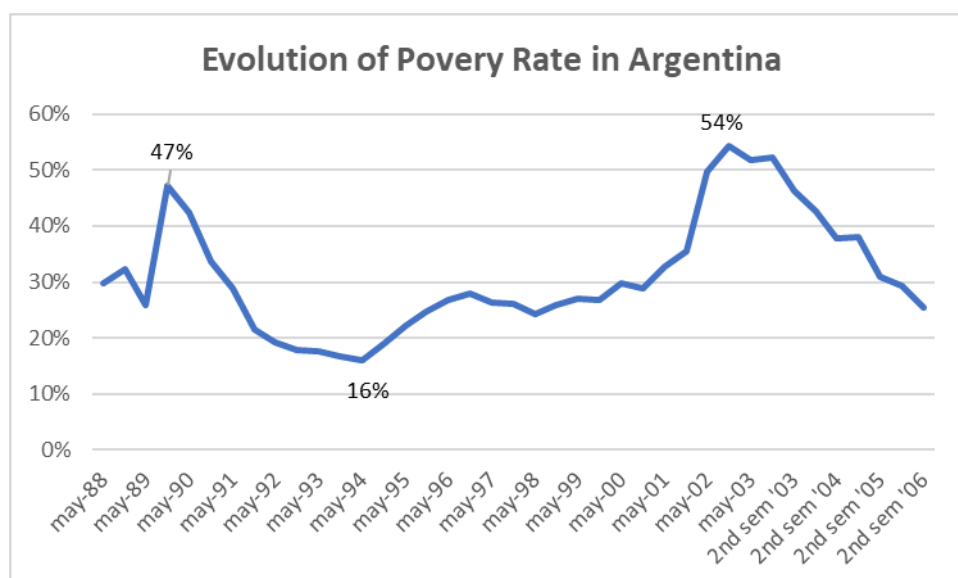
³⁰ M. Rapoport, *Historia Económica, Política y Social de la Argentina (1880-2003)* (Ed. Emecé Buenos Aires, 2003) P. 797

³¹ In the 70’s the average was 0,264938; in the 80’s 0,652075; in the 90’s 2,586729; in 2000, 2,164879 and since 2010 to 2017 the average is 2,091364.

³² In 2012 Repsol equity was expropriated by the Government by virtue of Law 26,741 and in 2014, Argentina and Repsol made an agreement regarding the value of the company, approved by Law 26,932.

Figure 2 shows the evolution of poverty in the period of 1988-2006³³ in the contiguous area of the city of Buenos Aires. The major crisis of 1989 and 2001 caused the increase of poverty rate. In both periods, the rate increased up to 50%. This situation is extended to different sectors of the economy³⁴. In the second semester of 2018, the rate of poverty reaches around 32%³⁵.

FIGURE 2



Data: National Institute of Statistics and Census (From the Spanish INDEC)

As we mentioned above, in 2001 Argentina declared the default of its national sovereign debt. The rate of poverty increased to 40% of population. Law 25,561 stated social, economic, administrative, financial and exchange emergency. Furthermore, said Law abrogated the convertibility between the Argentine Peso and the US dollar which affected the public contracts of international companies in different sectors as communications, energy, public works, among others.

Decree 311/2003 created the Renegotiation and Analysis of Public Contracts Unit with the intention to restore the economic balance of the contracts between the State and the privatized companies. It is important to notice that the process of renegotiation was not accomplished

³³ The sequence comprehends the period between 1988-2006 because after that year there was controversy regarding the methodology of the national statistics.

³⁴ Regarding to unemployment and underemployment, in 1988 15.4% of population was in that situation, in 1990 17.9%, in 1994 20.9%, and in 1999 29.4%, that shows how an economic system does not use its production factors – land, capital and work- causing social crises.

³⁵ <https://www.indec.gov.ar/indec/web/Nivel3-Tema-4-46>, Consulted 31/07/2019, 16:00.

totally. In general terms, Argentina had compromised to maintain fees in dollars in order to incentive international investment flows. However, after 2001 default, said policy could not be continued.

Consequently, Companies which had invested in Argentina started to sue the country before the ICSID. Approximately 40 cases are related to the 2001 crisis. As Binder³⁶ indicates, the Argentine crisis can be considered as a prototype of a financial and economic emergency, where the state must deviate from its previous economic policy to prevent its collapse, failing to comply with its international investment obligations.

Argentina used to use the state of necessity as a defense, but it was rejected in ten out of twelve decided cases. Only two out of twelve Tribunals accepted the Argentina’s necessity defense. For that reason, they criticized most of the decisions as to be excessively restrictive to the state sovereignty³⁷.

As we mentioned, in 2001 Argentina declared the default of its debts, reaching agreements with the majority of its creditors in 2005 and concluding with most of them in 2010. Notwithstanding that, some of the creditors -holdouts-, have continued with some cases. In the same way, Resolution 598/2013 of the Ministry of Economy and Public Finance approved several agreements³⁸ in order to conclude different arbitral procedures against Argentina, paying the pending amounts.

In conclusion, Argentina could be taken as an example of a country that decides to open its economy to the free flow capital without good social results, having an economic crisis and then triggers several claims.

³⁶ C. Binder, *Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns or the Benefits of a Public International Law Approach to Investment Arbitration*. In *Foreign Investment, International Law and Common Concerns*. (Edited by, Tulio Treves, 2014. Francesco Seatzu and Seline Trevisanut. Ed. Routledge. New York. 1° Ed) P. 2 et seq.

³⁷ W.W. Burke-White, *The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID system* (in M. Waibel, Nin M. Waibel, N. Blackaby and G. Bottini (eds), *The Backlash against Investment Arbitration*, Leiden: Kluwer Law International, 2010) p. 5 et seq.

³⁸ CMS Gas Transmission Company v. República Argentina” (case ICSID ARB/01/8), dated May 12, 2005; “Continental Casualty Company v. República Argentina” (ICSID No. ARB/03/9), dated September 5, 2008; Vivendi Universal S.A. y Compañía de Aguas del Aconquija S.A., in the case “Compañía de Aguas del Aconquija S.A. y Vivendi Universal S.A. (antes “Compagnie Générale des Eaux”) c/ República Argentina” (Caso CIADI N° ARB/97/3), dated August, 2007; Azurix Corp., “Azurix Corp. v. República Argentina” (caso CIADI No. ARB/01/12), dated July 14, 2006, and in the case “National Grid P.L.C. v. República Argentina”, dated November 3, 2008, concluded in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law.

Likewise, it is important to notice that Argentina has not decided to leave the ICSID system, but to comply with the decisions.

3. The concept of development and its relationship with investment

As explained above, the ICSID Convention does not provide a precise definition neither the term *investment* nor *development*. In this section we will analyze the different theories related to *development* through time. Development³⁹ is a phenomenon that comprehends different aspects of a society, for instance, there are economic, cultural and geographic theories related to development.

Theoretical framework⁴⁰, there are three approaches to development - neoclassical, Marxian, and structuralist – each one with its own characteristics. Obviously, different theories and authors can be found in each approach. The neoclassical theory is based on Adam Smith’s idea of the invisible hand theory. It is based on the idea that free market can assign economic resources efficiently with incentives and prices.

In contrast, the historical Marxian approach describes the forces of production, represented by available technology at any point in historical time, and the existing relations of production, represented by the institutions governing ownership and access to the factors of production. The fundamental aspect of this theory is that the international economic order is divided between an industrial center and the agrarian periphery. Underdeveloped countries concentrate on the export of basic agricultural products while developed countries export manufactured products.

In other words, the structuralist school emerged in Latin American⁴¹, with a certain degree of rupture with the visions focused on Europe and, therefore, marking the specificity of Latin American development. Basically, the structuralist idea is based on the "Economic Commission for Latin America and the Caribbean" (from the Spanish CEPAL) 1950s vision which articulated certain matters such as: (i) the critique of the traditional theory of international trade; (ii) the attempt of industrialization; (iii) planning for development; (iv)

³⁹ M. J. Trebilcock, and M. Mota Prado, *Derecho y Desarrollo*, (Siglo XXI, Buenos Aires, 2017) P. 37 et seq.

⁴⁰ P. Bardhan. *Handbook of Development Economics*, Volume I, Edited by H. Chenery and T. N. Srinivasan, Elsevier Science Publishers B.V. Chapter 3, (1988) P. 5 et seq.

⁴¹ Sztulwark, S. *El Estructuralismo latinoamericano*. (Universidad Nacional de General Sarmiento. 2005 1° Ed. Buenos Aires). P. 10 et seq.

regional integration; (v) the need for structural transformations with the holistic vision of development and (vi) the importance of its social dimension. One example of the execution of these policies is the construction of a modern steel mill in South Korea in 1965, in the called the “worst business proposition in human history”⁴².

According to Shik Lee⁴³, in the 1950s and 1960s the concept of development primarily was concentrated in economic growth or improvement in national income. After that, the concept of development has become more holistic since then emphasizing non-economic values that are believed to enhance human life, v.gr. political participation, right to property, gender equality, access to clean and safe environment and the rule of law.

However, the holistic view does not concentrate on the social constraints that inhibits the realization of the holistic goals of development. Thus, there are economic constraints that limit the promotion of non-economic values. For instance, economic resources are necessary in order to finance education and different social rights. In that sense, Holmes and Sunstein⁴⁴ indicate that all the rights recognized in the legal system involves costs. Moreover, it is not only social rights that require institutional mechanisms. All rights are positive and require financing by the State.

As the Perspectives on Global Development 2019 of the World Bank describe⁴⁵, ideas about development have been evolving since the World War II, with different paradigms dominating mainstream thinking and practice from one time or another. During the post-war year and the 60s, the focus was on industrialization, planning and structural transformation.

During the 80’s and 90’s, John Williamson⁴⁶ unified the economic and political ideas for reaching development in the so-called "Washington Consensus". The paper specified ten economic policy issues with which "Washington" agreed. "Washington" means the complex

⁴² At the time, Korea was one of the poorest countries in the world, relying on natural resource-based exports, however, it could not only start the production in 1973 but in the 80’s, it was considered one of the most cost-efficient producers of low-grade steel in the world. H. J. Chang, *The worst business proposition in human history: The appropriate role of state-owned enterprises in developing countries*. (Cuaderno de Economía • Publicación del Departamento de Economía, Facultad de Ciencias Empresariales, Universidad Católica del Uruguay 2013). P. 2 et seq.

⁴³ Shik Lee Y., *Law and Development*, (Theory and Practice. Routledge. New York 2019) P. 25 et seq.

⁴⁴ S. Holmes and C. Sunstein, *The costs of rights. Why liberty depends on taxes*. (Norton & Company, New York. 1999)

⁴⁵ World Bank, *Perspectives on Global Development. Rethinking Development Strategies* (2019).

⁴⁶ J. Williamson, *What Washington Means When Referring to Economic Policy Reforms*. Chapter 2 from *Latin American Adjustment: How Much Has Happened?* (Edited by John Williamson. Published April 1990) Available: <https://www.piie.com/commentary/speeches-papers/what-washington-means-policy-reform> accessed July 20, 2019.

politic-economic-intellectual integrated international bodies (IMF, WB), the U.S. Congress, the Federal Reserve, Senior Government Officials and expert groups.

Said common ideas were related to: budgetary discipline, changes in public expenditure priorities (from less productive areas to health, education and infrastructure); tax reform aimed at seeking broad tax bases and moderate marginal rates; financial liberalization, especially of interest rates; search for and maintenance of competitive exchange rates; trade liberalization; opening up to FDI; privatizations; deregulation; guarantee of property rights. As we analyzed, these policies were implemented in Argentina and in different parts of the world without success.

Nevertheless, said consensus was not universal and different approaches to the public policies existed. One of them is the “Washington Dissensus”⁴⁷. According to some authors, Williamson has focused on efficiency not fairness because the Washington of the 80’s was not concentrated in those topics. For that reason, they conceived recommendations in order to encourage a new agenda, reducing poverty and promoting equity without sacrificing growth⁴⁸.

After that the “Washington consensus” was the main paradigm prioritizing macroeconomic stability and promoting structural adjustment. Since the 2000s, a goal-based approach has led to the creation of the Millennium Development Goals and their successor, the Sustainable Development Goals (SDG), regarding the conceptualization of development.

The concept of development was, at the beginning, related to the richness of a country⁴⁹. For that reason, the richest countries were considered as the most developed. Another position took into account development as the absence of poverty. Global initiatives, as the Oxford Poverty & Human Development Initiative (OPHI), considered different dimensions of poverty, including aspects such as infant mortality, years of schooling and access to drinking water, among others.

⁴⁷ N. Birdsall, and A. de la Torre, *El Disenso de Washington. Políticas económicas para la equidad social en Latinoamérica*. (Resultados de la “Comisión de reforma económica en sociedades latinoamericanas sin equidad”, patrocinada por el Fondo Carnegie para la Paz Internacional y el Diálogo Interamericano 2001).

⁴⁸ The general topics were: Fiscal discipline based on clear rules and procedures: not spending more than what is collected; tempering the variations of the financial market; implementing social safety nets, unemployment insurance, school and food subsidies; access to education for the less affluent sectors; increasing the tax burden on higher income sectors; strengthening workers' rights: well-paid jobs, the possibility of negotiating agreements directly with employers, increased labor productivity; avoiding all types of discrimination based on race, ethnicity or sex; Elimination of obstacles for small and medium enterprises; Competitiveness of rural markets, ensuring effective agrarian reform and Incorporation of consumer protection mechanisms.

⁴⁹ M. J. Trebilcock and M. Mota Prado *Derecho y Desarrollo*, (Siglo XXI, Buenos Aires 2017), P. 2 et seq.

In this line, Amartya Sen⁵⁰ says that, after the World War II, writers on development were concentrated on ways to achieve economic growth increasing the GNP and total employment. Undoubtedly, the process of economic development cannot be separated from the expansion of the supply of food, clothing, housing and educational facilities, among others. However, the relation between GNP and living conditions is not straightforward. Hence, “work on development economics need not await a complete ‘solution’ of the concept of development”. For that reason, the author⁵¹ considers that the development objectives must concentrate on promoting individual liberty, generating possibilities to persons in order to choose style of life’s that they consider valuable.

Lately, a broader concept of development is used. The SDG⁵², adopted by all United Nations Member States in 2015, “...provides a shared blueprint for peace and prosperity for people and the planet, now and into the future”.

As Shik Le⁵³ refers, the need for the prioritization -between different development goals- does not mean that non-economic values should be excluded from the notion of development. Instead, it denotes that developing countries should consider the resource constraints that they face.

In that sense, Lin⁵⁴ describes that the sustained growth of a developing country depends on the cumulative improvement of its productivity levels and the only way to achieve this is through technological innovation for productivity increase. Likewise, in developing countries it is essential that the policy of technological innovation develops industries following the line of comparative advantages, in order to accelerate their economic growth.

Stiglitz⁵⁵ describes that growth depends on four essential factors: (i) growth of capital stock (investment), (ii) technical progress (research and development), (iii) use of natural resources and population growth and (iv) improvements in the quality of life of the working population

⁵⁰ A. Sen, *Handbook in Economics*. The concept of development. (*Handbook of Development Economics*, Volume I, Edited by H. Chenery and T. N. Srinivasan 1988, Elsevier Science Publishers B.V. Chapter 61988) P. 11

⁵¹ A. Sen, *Desarrollo y Libertad*, (Ed. Planeta. Buenos Aires 2000) P. 29

⁵² The 17 sustainable development goals (SDGs) to transform our world: GOAL 1: No Poverty. 2: Zero Hunger. 3: Good Health and Well-being. 4: Quality Education. 5: Gender Equality. 6: Clean Water and Sanitation. 7: Affordable and Clean Energy. 8: Decent Work and Economic Growth. 9: Industry, Innovation and Infrastructure. 10: Reduced Inequality. 11: Sustainable Cities and Communities. 12: Responsible Consumption and Production. 13: Climate Action. 14: Life Below Water. 15: Life on Land. 16: Peace and Justice Strong Institutions. 17: Partnerships to achieve the Goal.

⁵³ Y. Shik Lee, *Law and Development, Theory and Practice*. (Routledge. New York 2019) P. 26 et seq.

⁵⁴ J. Y. Lin, *Demystifying the Chinese Economy*, (Cambridge, Cambridge University Press. 2012)

⁵⁵ J. E. Stiglitz, *La Economía del Sector Público*. (2º Ed. Barcelona. Antoni Bosch. 1995) P. 781

(human capital). He explains that there is a debate about the importance of investment to achieve global growth. Some authors, such as Jorgenson, Harvard Professor, consider that the increase of productivity depends on the capital stock, but another group, such as Solow, MIT Professor, thinks that the most important aspect is technical progress. However, both groups agree that if investment decreases in a specific economy, the rate of economic growth will be affected.

In the same sense, Aschauer⁵⁶ also specifies that there is an equation for specifying product growth according to public capital and existing infrastructure.

$$Y = f(K * KG)$$

Y= result private sector

K= Private sector capital

KG= Public sector capital

Therefore, we can observe how the productivity result of the private sector is directly related to the public capital that is in charge of promoting it. However, scholars⁵⁷ have demonstrated that growth causes investment, but investment does not always lead to growth, as growth depends on a multitude of factors that cannot be fully captured by developments by FDI or domestic investment

These theories can explain different realities and phenomena. Certainly, there are different approaches depending on the author that analyzing the facts. Diverse type of investments has different consequences in the economy of a country. Externalities can be a concept that could help to solve some cases. Indeed, if an investment contributes to development in some way, it could be used as a parameter by the arbitrators in order to analyze the case.

For instance, in Salini’s case, the arbitrators mentioned that the Italian company would contribute to the economy of the host country. Infrastructure triggers positive externalities in a country, allowing new activities and an efficient economy. In opposition, if the investment is only focused on the extraction of natural resources, eventually, in case of a conflict, it should be less protected than other with high positive externalities.

⁵⁶ D. Aschauer, *why is infrastructure important?* Federal Reserve Bank of Boston in its journal Conference Series (1990); available at: <https://ideas.repec.org/a/fip/fedbcpr/y1990p21-68n34.html>; accessed February 2, 2019 P. 4.

⁵⁷ C. Calderón & N. Loayza & L. Servén; The World Bank *Greenfield Foreign Direct Investment and Mergers and Acquisitions: Feedback and Macroeconomic Effects*. World Bank Policy Research Working Paper 3192, January 2004. P. 18

As explained above, the concept of development is proved to be highly controversial. There are different kinds of motivations and interests between developed and developing countries. In the 90’, in the framework of OICD, it was an attempt to create a general treaty of investment and it could not be reached because of the opposition of the different point of views.

Certainly, a concept of development that all the different parties feel comfortable with, has not been able to reach. Indeed, throughout time, we analyzed different theories and approaches related to development. However, that should not let us down. That is the first step in order to think of solutions.

4. Ideas to reevaluate international arbitration and its relationship with development

Kissinger⁵⁸ explains that “the international system which lasted the longest without a major war was the one following the Congress of Vienna” (1815). The causes of that could be found in the legitimacy and equilibrium, shared values, and balance-of-power diplomacy. As we analyzed, the ICSID system grew based on the Bretton Wood system which reflects this equilibrium.

Consequently, in order to achieve an inclusive arbitration system, it is necessary to work over an equilibrate new system. Nowadays, the investment regime is in a legitimacy crisis⁵⁹. Bolivia withdrew from the ICSID Convention in 2007, Ecuador in 2009, Venezuela in 2012, South Africa in 2013. In fact, the common denominator for this situation is that said countries are underdeveloped and so required special considerations over their development and not only the construction of dispute resolution system.

Each country has its own reason to leave the system. It is not the purpose of this paper to discuss it, but there is an interesting reason why they decided to do it. For instance, in the case of South Africa⁶⁰, post-apartheid measures implemented a policy to ensure that the majority native community enjoys better life conditions. Foreign investment had traditionally flowed into companies owned by minority groups, for that reason they sue the Country in a famous

⁵⁸ H. Kissinger, *Diplomacy*. (Simon & Schuster Paperbacks. New York 1994). P. 811.

⁵⁹ T. Tulio, F. Seatzu, and & T. Seline *Foreign Investment, International Law and Common Concerns*. Routledge. 2014)

⁶⁰ A.R. Hippolyte *Reevaluating the Role of Foreign Investment in Economic Development: Investment Protection and the Subordinate Role of Developing Countries’ Interests in Investor-State Arbitration*. Available at: <http://ssrn.com/abstract=2529297> accessed August 7, 2019. P. 70.

case⁶¹. Consequently, South Africa had to leave the system in order to achieve its public policy.

The majority of the countries which follow the Islamic Law are contracting States of the ICSID. For that reason, they could learn from the experience of different states and the application of incentives to achieve economic development. Other countries -Brazil, Russia, India- are not contracting States to the ICSID Convention.

In this sense, as mentioned above, some authors write about how certain institutions act as fetters on the development⁶². Certainly, every country has its particularities, depending on its size, power, population, economic culture, among others. These characteristics may encourage a country to be part of a Convention that could benefit to develop. For that reason, law and development scholars should place more emphasis on local situations.

Latin American authors, as this region is the most unequal in the world are concentrated on these aspects. In the 50’s and 60’s, in the framework of "Economic Commission for Latin America and the Caribbean"⁶³were focused on the theory of development. In this context, nowadays, there are authors from Peru⁶⁴, Brazil⁶⁵, who studied the relation between investment and development in globalization time.

Furthermore, Latin American countries protect investment through its own regulation with the objective of the sustainable development. For instance, Ecuador⁶⁶ -similar to El Salvador⁶⁷- states that the promotion investment regime has the objective of encouraging economic and social development. Other countries -such as Mexico⁶⁸, Paraguay⁶⁹, Bolivia⁷⁰ and Dominican Republic⁷¹- focus on the concept of national development in order to protect

⁶¹ Piero Foresti, Laura de Carli and Others v South Africa ICSID Case No. ARB(AF)/07/ 01

⁶² P. Bardhan. *Handbook of Development Economics*, (Volume I, Edited by H. Chenery and T. N. Srinivasan, Elsevier Science Publishers B.V. Chapter 3, 1988) P. 45

⁶³ R. Prebisch. *Capitalismo Periférico. Crisis y Transformación*. Ed. Fondo Cultura Económica. México 1° Ed. 1981
C. Furtado *Formación económica del Brasil*, 1962 Ed. Fondo Cultura Económica. México 1° Ed.

⁶⁴ F. Kundmüller Caminiti. *Estado, Inversiones, Desarrollo Económico y el Arbitraje en el CIADI. Circulo de Derecho Administrativo*. Universidad Católica del Perú. 2007. Available:
revistas.pucp.edu.pe/index.php/derechoadministrativo/article/download/.../15148 accessed August 10, 2019.

⁶⁵ O. E. García-Bolívar, *Definiendo la inversión en el CIADI: Por qué el Desarrollo Económico debería ser el Elemento Fundamental*. Investment (Treaty New. N° 2 T. 3 2012) P. 4 et seq.

⁶⁶ Promotion Investment Law N° 46 RO/219 19/12/97

⁶⁷ Decree N° 732/1999 Legislative Branch.

⁶⁸ Foreign Investment Law N° DOF 20-08-2008

⁶⁹ Investment Law N° 117/91

⁷⁰ Investment Law N° 1182

⁷¹ Foreign Investment Law N° 16-95

investments. Argentina⁷², Chile⁷³, Colombia⁷⁴, Nicaragua⁷⁵ and Perú⁷⁶ also protect investments in similar ways.

These laws highlight the importance of investment to the different countries in order to achieve economic growth. However, as we have analyzed in the previous heading, nowadays the concept of development is broader, not only focused on economic growth but also on social and environmental outcomes.

Consequently, arbitrators should consider in their decisions a more comprehensive concept of investment. In this sense, Sauvant⁷⁷ indicates that some of the regime’s weaknesses depend on its legacy. The arbitration system was constituted in a time of significant power asymmetries between the capital exporting -generally developed- and capital importing -generally developing countries- and the FDI flows were unidirectional, North-South. Nowadays, there is an environment to promote sustainable development, climate change, sustainable economic growth, greater public involvement in policy and rulemaking; “...and a desire for the preservation of policy space and balanced rights and responsibilities on the part of governments and international investors”.

Indeed, all of the contracting states of the United Nations adopted in 2015 the SDG, which should “...encourage the flow of substantially higher amounts of sustainable FDI in the framework of a widely accepted enabling investment framework that regulates the relationships between governments and international investors in a balanced manner”. In other words, generating FDI with “sustainability characteristics” contributing to the economic, social and environmental development of host countries. The dispute-settlement regime is certainly essential to the general system turns it effective.

In the same sense, the idea of a new international investment system⁷⁸ is based on efficiency and fairness. Insecurity or distorted conditions of investment are risk factors which reflect on the expected rates of return, as countries with high risks can only attract investments on

⁷² Foreign Investment Law N° 21.382.

⁷³ Foreign Investment Law N° 20.848.

⁷⁴ Legal stability investors Law N° 963.

⁷⁵ Foreign Investment Law N° 127.

⁷⁶ Private Investment Law approved by Decree N° 162-92-EF

⁷⁷ K. P. Sauvant (2017) “*Reforming the International Investment Regime: Two Challenges*”, in Julien Chaisse, Tomoko Ishikawa and Sufian Jusoh, eds., *Asia’s Changing Investment Regime: Sustainability, Regionalization, and Arbitration* (Singapore: Springer, 2017).

⁷⁸ K. V. Moltke, *An International Investment Regime? Issues of Sustainability*. (International Institute for Sustainable Development. Canada 2000). P. 13

projects with high rates of return. In those cases, good projects could remain unfunded due to financial issues.

For that reason, the European Union (EU) is working on a project to create a multilateral investment court (MIC)⁷⁹ with the objective of setting up a permanent body for settlement of investment disputes in order to promote coherent and unified decisions. The EU is the world’s biggest recipient and source of FDI⁸⁰. The idea is that the MIC would eventually replace the ICSID. The Treaty is being negotiated so there is not a final idea about the MIC but there are general concepts that should be considered.

In the case of Argentina, as explained above⁸¹, in similar cases⁸² with similar facts, where Argentina argues with the defense of necessity, and the four Tribunals have issued different awards, generating a crisis of legitimacy under ICSID system. The composition of the said panels is essential, as some arbitrators overlapped the tribunals. In a system as ICSID, that lacks appellate review authority, that situation could be considered dangerous because they have participated in similar cases on different tribunals which might have affected their impartiality.

If the states do not believe that investor-state arbitration system respects their rights, they will not consent to it with the risk of collapse. In order to restrain those risks, different solutions were suggested, such as the creation of appellate review authority and evaluation of the margin of appreciation as a decision-making framework for the consideration of state policies.

As we mentioned under the previous heading, development is a broad concept, hard to define. Consequently, in a concrete case it should be considered with the rest of the aspects of the case. Usually, it will be difficult to measure.

⁷⁹ Available at: <https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/> Accessed July 13, 2019.

⁸⁰ European Commission President Jean-Claude Juncker (2017) *State of the Union Address*, 13 September 2017

⁸¹ W.W. Burke-White, *The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID system* in M. Waibel, Nin M. Waibel, N. Blackaby and G. Bottini (eds), *The Backlash against Investment Arbitration*, Leiden: Kluwer Law International, 2010, P. 5 et seq.

⁸² The four cases mentioned are: *CMS; LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. Arb/02/1, Decision on Liability (Oct. 3, 2006), Enron Award, *Enron Corp. Ponderosa Asset, L.P. v. Argentine Republic*, ICSID Case No. Arb/01/3, Award (May 22, 2007); and *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. Arb/02/16, Award, ¶ 391 (Sept. 28, 2007) The arbitral panel in the *CMS* case consisted of Francisco Orrego Vicuna (President), Marc Lalonde and Francisco Rezek. The *LG&E* panel consisted of Tatiana de Maekelt (President), Francisco Rezek, and Albert Jan van den Berg. The *Enron* panel consisted of Francisco Orrego Vicuna, Albert Jan van den Berg and Pierre Yves Tschanz

Most of the countries want to generate investment in their territories. Capital is essential to accomplish an increase of economy. For instance, Dubai has created an international Financial Centre Court in order to transform its economy into one of the world’s leading financial centers⁸³.

Companies must maximize shareholders’ wealth⁸⁴ maximizing the price of existing shares. This objective not only directly benefits shareholders but also presents advantages for the company. Certainly, companies compete for the creation of wealth by directing scarce resources for their most productive use. Indeed, profit maximization - used in microeconomic analysis - refers to the efficient use of financial resources but does not refer to the time interval in which profits are measured, since current profits can be increased by eliminating long-term investments⁸⁵.

In general, international investment will focus on those sectors of the economy which are highly profitable in order to get recovery rates. That is very reasonable, as private actors are looking for profit. However, there are different kinds of investments, focusing on the comparative advantages or on infrastructure and public services. These kinds of investment should be more protected by the system as they generate positive externalities to the economy of a country. Other kinds of investment do not cause good externalities and can even cause damage to the environment. Those investments should have less protection and the arbitrators should consider that consequences in their decisions.

The problem consists in adequately characterizing the concept of development. What is or is not regarded as a case of "development" depends inescapably on the notion of what things are valuable to promote. The dependence of the concept of development on evaluation becomes a problem to the extent that (i) the valuation functions accepted by different people differ from each other, and (ii) the process of change involved in development alters the valuations of the people involved⁸⁶.

⁸³ J. K. Krishnan, *The Story of the Dubai International Financial Centre Courts: A Retrospective*. 2018. Motivate Publishing House.

⁸⁴ Nowadays, this concept is under debate. Available at <https://www.economist.com/briefing/2019/08/22/big-business-is-beginning-to-accept-broader-social-responsibilities?fsrc=scn%2Fli%2Fpe%2Fed%2Fauto>. Accessed September 1, 2019

⁸⁵ A. Keown, W. Petty, and D. Scott, and J. D. Martin, *Introducción a las finanzas. Translate: The logic and practice of Financial Management*. 2° Ed. Madrid. Simon & Schuster Company (1999). P. 3 et seq.

⁸⁶ Bardhan. P (1988) Handbook of Development Economics, Volume I, Edited by H. Chenery and T. N. Srinivasan, Elsevier Science Publishers B.V. Chapter 3, Page 27.

Economic development is certainly a concept that can be very broad and potentially can encompass many different elements. García Bolívar⁸⁷ considers that in future the arbitral panels should provide a comprehensive analysis of issues such as: (i) the way in which the economic development within the context of International Investment Agreements; (ii) what qualifies as a contribution to development (iii) how a contribution can be measured; and (iv) whether any negative factor relating to investment or conduct of the investor (such as violations of the investor's human rights, corruption or damage to the environment) is relevant. As we mentioned, usually, private investments are focused on profit. Studies have analyzed⁸⁸ the rate of return of different projects, concluding that 30 % of proposed import-substituting projects were harmful for domestic economies. The projects with more protection from import competition had lower social rate of return. For instance, projects oriented to exportation had lower average production costs than the projects focused on import substituting, protected by tariffs.

Conclusion

In this paper we described the concept of *development* and its relationship with investment in various cases held before the ICSID. As we analyzed, there is not a unique definition for said concept. We examined cases against Morocco, Egypt, Algeria, Malaysia and Pakistan, among other countries, where arbitrators looked at each case individually. From this, we cannot deduct a common form of treatment to said relationship.

We took Argentina as an example of a country that was connected to the world and received an important flow of FDI. Despite its special characteristics, the history of Argentina could explain that FDI is important to achieve economic growth, but it must be accompanied by other measures. Currently, Argentina is facing another economic crisis and it is not clear how this will be resolved.

Other countries, decided to leave the ICSID system, because they consider that its development will not be accomplished within that framework.

⁸⁷ O. E. García-Bolívar, *Definiendo la inversión en el CIADI: Por qué el Desarrollo Económico debería ser el Elemento Fundamental*. (Investment Treaty New. N° 2 T. 3 2012)

⁸⁸ E. Cardoso, R. Dornbusch, *Handbook of Development Economics*, Volume II, Edited by H. Chenery and T. N. Srinivasan, Elsevier Science Publishers B.V. Chapter 3, (1988) P. 27. They quoted: Reuber, G. (1973) *Private foreign investment in development*. Oxford: Clarendon Press. Lall, S. and Streeten, P. (1977) *Foreign investment, transnationals and developing countries*. Boulder: Westview Press.

If the ICSID is to be maintained in the future, it must consider not only the interests of investors but the special conditions of a country.

Sustainable Development Goals appear to be a global objective that must be achieved by the countries. There are some problems in underdeveloped countries that triggers issues in developed countries, which constitute the incentive to promote a new fair arbitration system which considers both interests developed and underdeveloped countries.

Consequently, arbitrators should consider in their decisions the contribution of the investment to the development of the host state. It is difficult to measure the concrete relation between investments and development. However, that aspect might not be a restraint to the arbitrator’s analysis, considering that the conclusion must be related with the other aspects of an investment (risk, duration and contribution).

Thus, the concept of *development* can contribute to accomplish such goals considering that it could be used as a parameter that arbitrators can apply in a concrete case in order to get a fair decision. The broad scope of *development* could be used as a way of protecting private investments and, on the other hand, countries could use as an argument to protect its public policies.

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