

International Arbitration and Globalization: The Battle Between Private “Justice” and Public Law

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Some Issues to Think About

- What is International Arbitration today?
- Is arbitration “justice”?
- The institutionalization of informal institutionalization
- Governance, public law and “justice”
- The growth in discontent with international arbitration and public law
- Conclusion

What is International Arbitration today?

- Not a static question, is evolving
- Presumptively: Private ***adjudication*** of a dispute between two commercial parties
- “Commercial” arbitration was the original defining motif
- By agreement of the parties in the dispute
- Who (notionally) choose the forum and usually the law to apply
- Primary purpose:
 - Resolution of private commercial disputes
 - It’s your money or its my money, we can figure out how to decide that

What is International Arbitration today?

- Growth of arbitration (facts), also impacts what it is
 - Commercial arbitration
 - International private parties
 - 5-6 fold increase in number of known cases at top 5 arbitration centres, 1992-2011
 - National arbitration
 - Commercial in principle
 - But shows impact on public law when consent and choice of law becomes unequal and formalistic
 - US Supreme Court decision in Epic Systems Corp v. Lewis, May 2019 at https://www.supremecourt.gov/opinions/17pdf/16-285_q8l1.pdf
 - Example of the tail wagging the dog now!

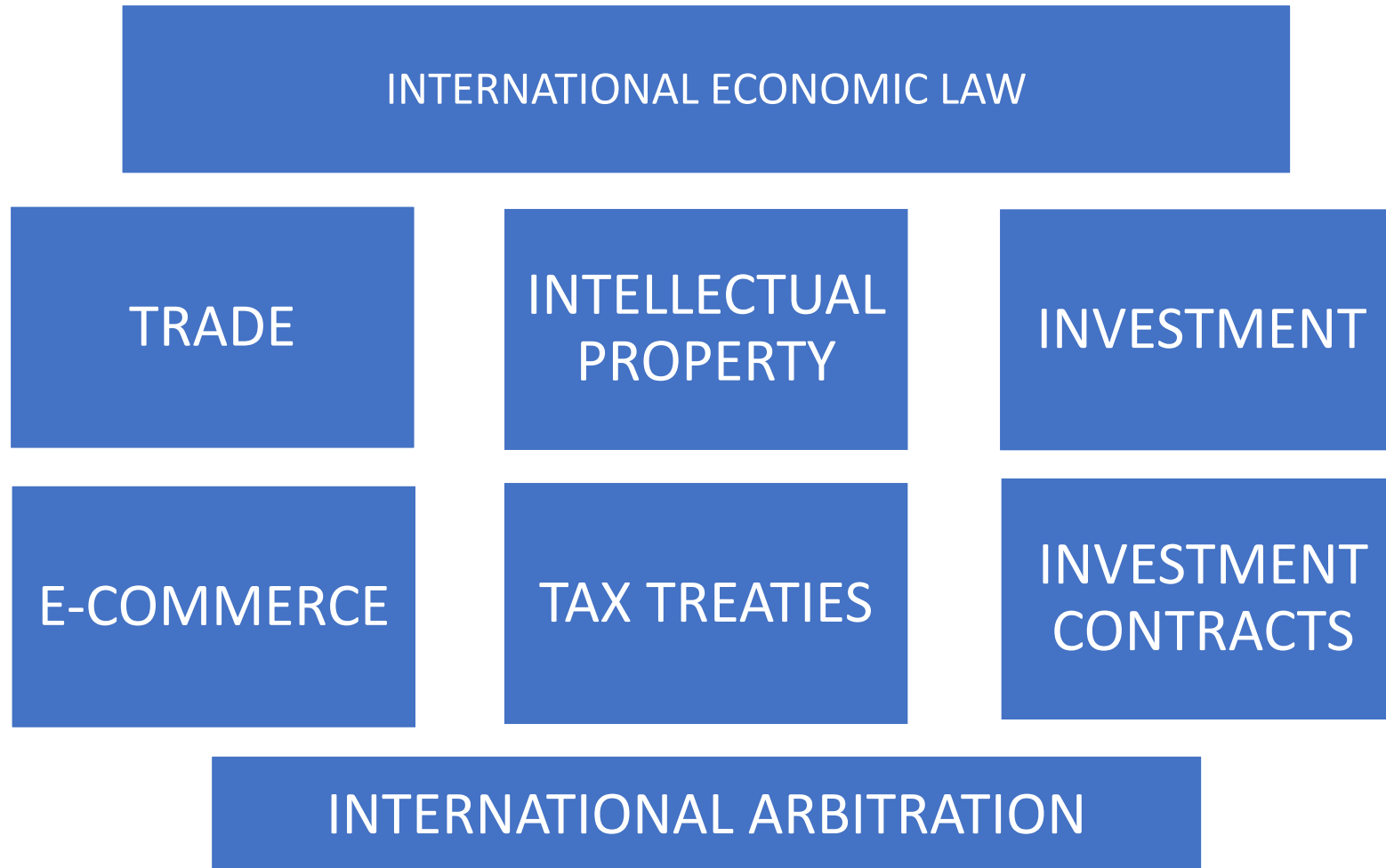
What is International Arbitration today?

Growth, con't:

- Investor-State arbitration: over 1000 treaty based cases today in last 25 years, and growing, but treaties just one source
 - Treaty-based: 1000+
 - Contract based: no known numbers
 - Domestic law base: no known numbers
- Fictionalized as “commercial arbitration” to ensure enforcement

What is International Arbitration today?

- Growth con't: Arbitration growing as an underpinning of more parts of international economic law



What is International Arbitration today?

Examples:

- E-commerce: right to move data with effectively no controls between investment and investor in foreign states protected
- International tax: OECD exploring options for taxpayer-state arbitration in context of digital commerce proposals
 - And general push to enhance taxpayer certainty
- Investment contracts: inclusion of international arbitration directly and indirectly via treaty ISDS clauses

Is international arbitration “justice”?

- Adjudication of a dispute \neq justice
- Reflects concept of one-off adjudication, not systemic legal impacts and consequences
- Justice is a holistic, systemic issue
- Adjudication is a minimalist issue
- This concept cannot apply in a world of, eg. investment treaties with 1000+ cases

Is international arbitration “justice”?

- Problems:
 - Lack of oversight: rules very constrained to review arbitral awards
 - Annulment
 - Judicial review:
 - Self restraint by courts to be “arbitration friendly” part of soft/self governance mechanisms
 - Conflicts of interest
 - Arbitration against states is a big business (\$10M+ per arbitration)
 - Inconsistency
 - Legal right to be wrong in law
 - “How dare you, no arbitrator will ever deliberately choose a path they know is wrong in law!”
 - Can a legal system be said to be about “justice” or “the rule of law” when correctness in law is not its core value?
 - Does this setting corrupt?

Is arbitration “justice”?

- The Arrogation of Roles:

“The motive behind the insistence that FET is identical with the minimum standard under customary international law is evidently to minimize its practical impact. But the effect of this insistence may well be the opposite of what is intended by those who advocate it. Dolczer has pointed out that the more likely consequence will be to accelerate the development of customary law through the practice on FET clauses in treaties.” (Christoph Schreuer, “Fair and Equitable Treatment”, pp. 125 et seq, at p. 131, in Hoffmann, Anne K, ed., *The Protection of Foreign Investments Through Modern Treaty Arbitration*, Swiss Arbitration Association, ASA Special Series No. 34, **2010**.)

- Arbitrators converting themselves to legislators by overriding clear intent (against most basic International Rule of Law, VCLT)
- Arbitration decisions cumulatively becoming part of legislation by linkage to C.I.L.: And this is the point!

The institutionalization of informal institutionalization

- LACK OF ORGANIZATIONAL STRUCTURE IN INTERNATIONAL ARBITRATION DOES NOT MEAN THERE IS NO ORGANIZING STRUCTURE
 - Converts a formal structure to an informal one
 - And hides the structure
 - No one place to go to to exercise control or impact direction
 - No one governing body
 - As opposed to governing “club”
 - Less transparent, but no less impactful for it

The institutionalization of informal institutionalization

- LACK OF ORGANIZATIONAL STRUCTURE IN INTERNATIONAL ARBITRATION DOES NOT MEAN THERE IS NO ORGANIZING STRUCTURE
- Multi-polar system, and increasingly so
- But also a self-replicating system
 - Berge and St. John: role of World Bank, especially for contracts and domestic law
 - Catherine Rogers: Legal and economic elites working at replication at the national and international levels:
 - *“Our theory is that in order to access professional opportunities, local elites in developing and emerging economies demonstrate their understanding of and support for international arbitration by introducing into their local legal systems reforms that benefit international arbitration. These reforms come in ready-made toolkits that are easy to adopt, and that indirectly transmit the rule-of-law norms.”*

The institutionalization of informal institutionalization

- “LEX MERCATORIA” TO “LEX MERCATOCRACY”
- The term lex mercatoria [or merchant law] is used to designate the concept of an a-national body of legal rules and principles, which are developed primarily by the international business community itself based on custom, industry practice, and general principles of law that are applied in commercial arbitrations (Commercial Arbitration, International) in order to govern transactions between private parties, as well as between private parties and States, in transborder trade, commerce, and finance.
- Debate on “A-national” (Schill) v. “transnational” (Gaillard), but does it matter?
- Lex Mercatocracy: who manages it!

The institutionalization of informal institutionalization

- Informal system includes
 - Conferences
 - processes of appointment
 - formalistic diversity to hide lack of diversity
 - peer recognition and mutual promotion
 - notional self-governing (arbitrator challenges)
 - Etc.
- Undergirded by formal legal system limiting state court reviews on judicial review and enforcement
- And informal systemic goal to be arbitration friendly
- **REAL PROCESSES, IN REAL TIME, WHOSE IMPACTS ARE MAGNIFIED AND ENTRENCHED BY ABSENCE OF FORMAL SYSTEMIC AND ORGANIZATIONAL CONTROLS**

Governance, public law and justice

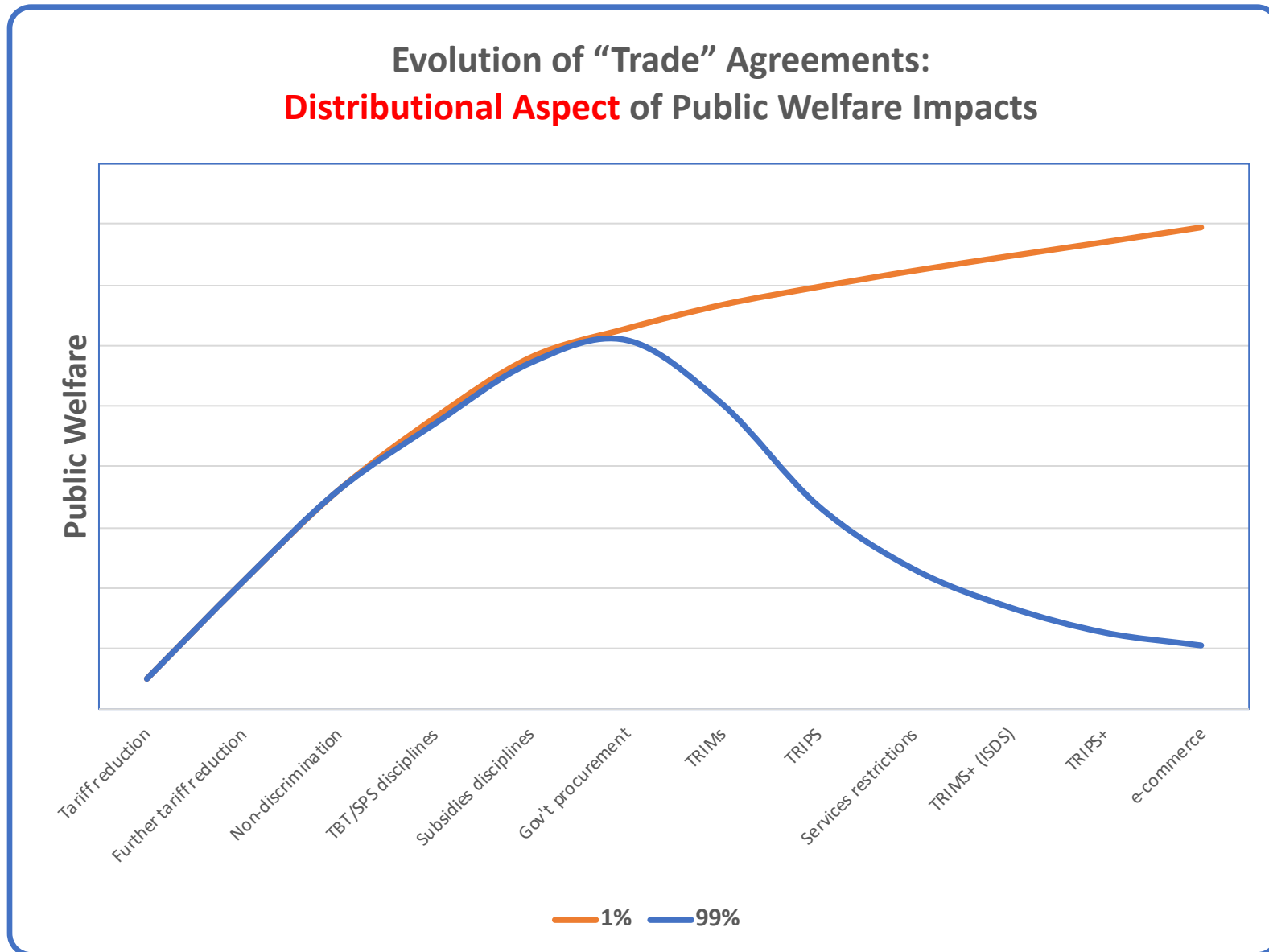
- Public law is different from private commercial disputes
- Basic requirements of public law adjudication in a democratic context:
 - Transparency (marginal improvements in treaty arbitration, none in contract-based)
 - Access by all stakeholders
 - Making full linkages of full scope of law, not setting off private rights v. public rights and obligations (no tail wagging)
 - Appeal process that is open and transparent itself
 - Correctness in law is a core value

Governance, public law and justice

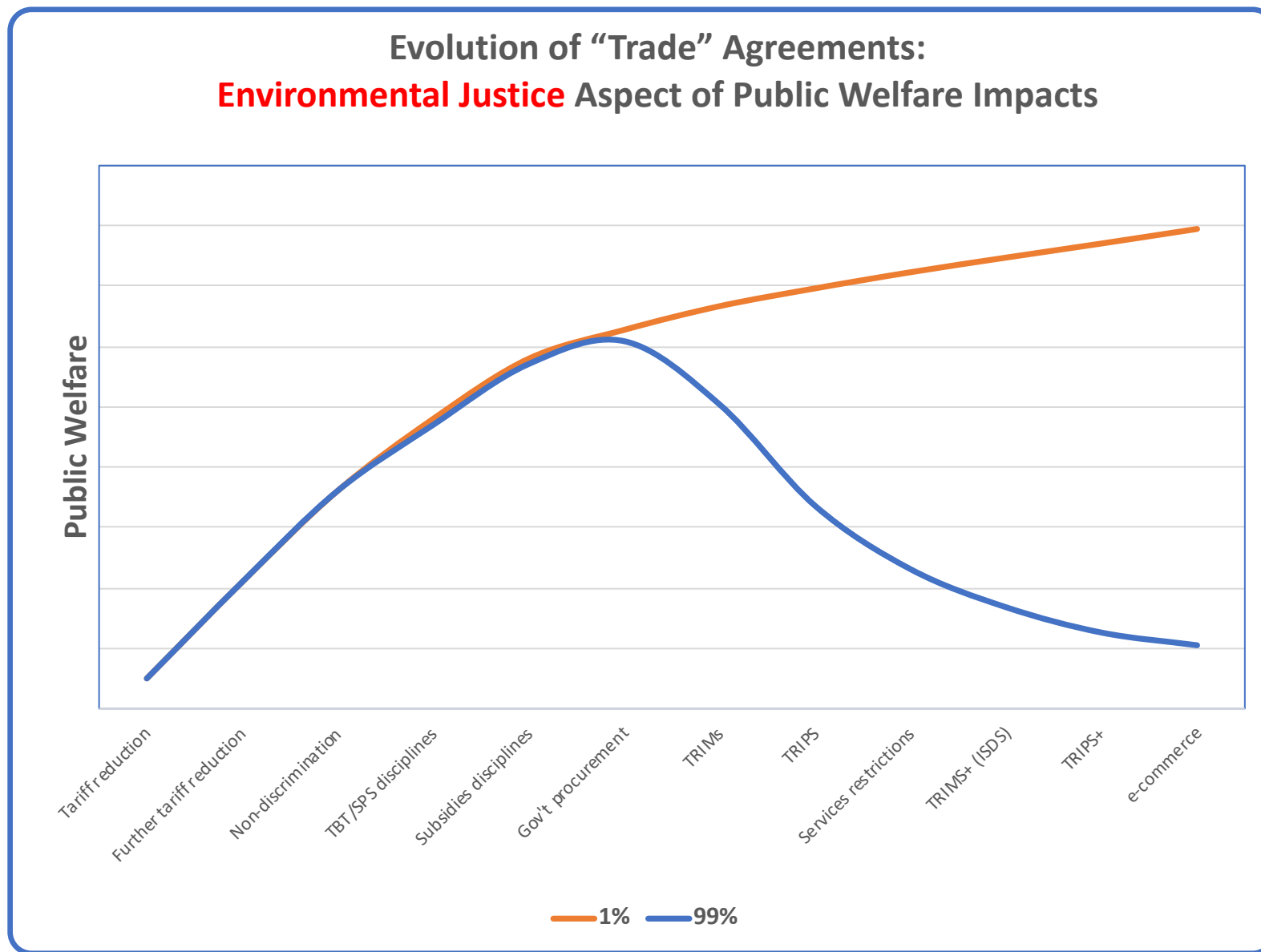
Is international arbitration fit for purpose?

- Depends on how you see the purpose:
 - Provide justice in adjudicating public law?
 - Manifestly not fit for purpose
 - Change the public law?
 - In particular, change the balance between public law rights and obligations (applying to all) and private law rights and obligations of the Lex Mercatocracy class
 - Perfectly fit for this purpose:
 - *“Furthermore, the rise of arbitration will have the inevitable effect that arbitration tribunals increasingly concretize and develop the normative foundations governing state-market relations.”* (Schill)
 - “Weaponizing” arbitration? Actual claims and threats

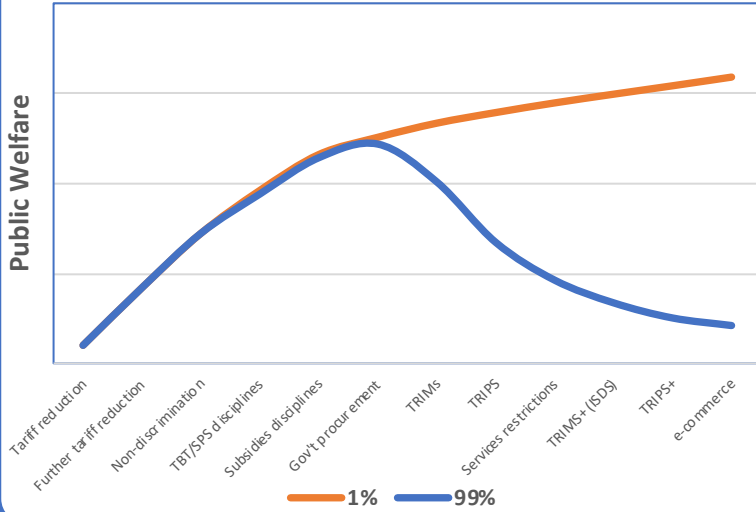
Governance, public law and justice



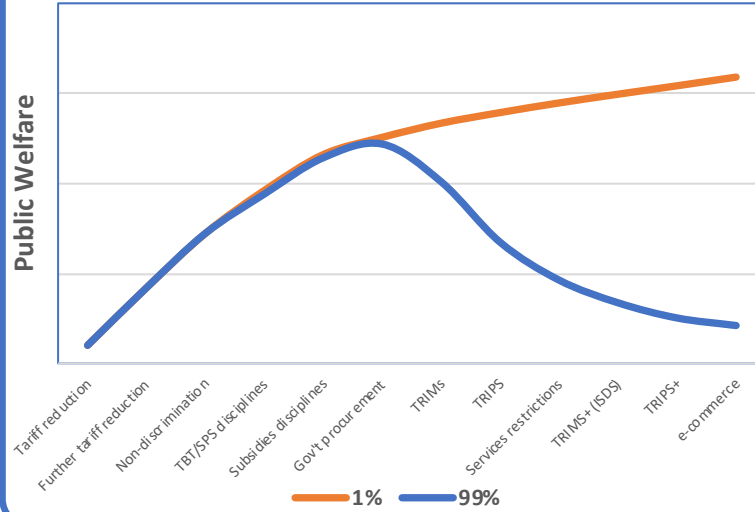
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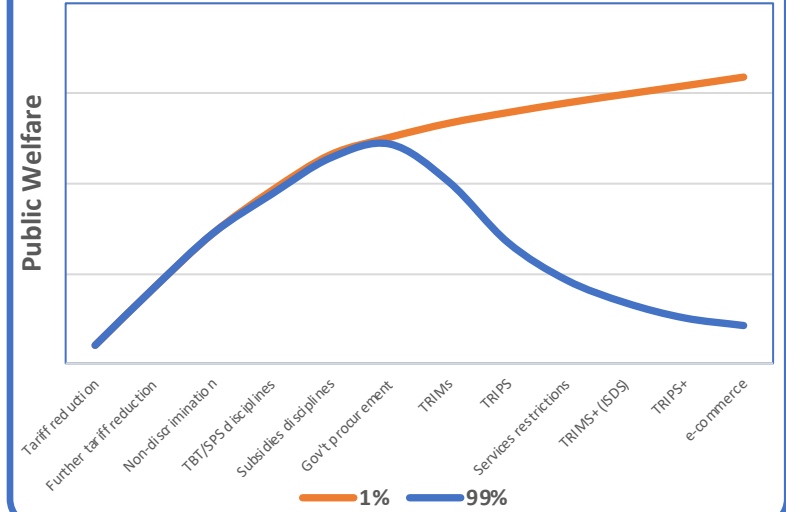
Public Welfare Impacts
Country A



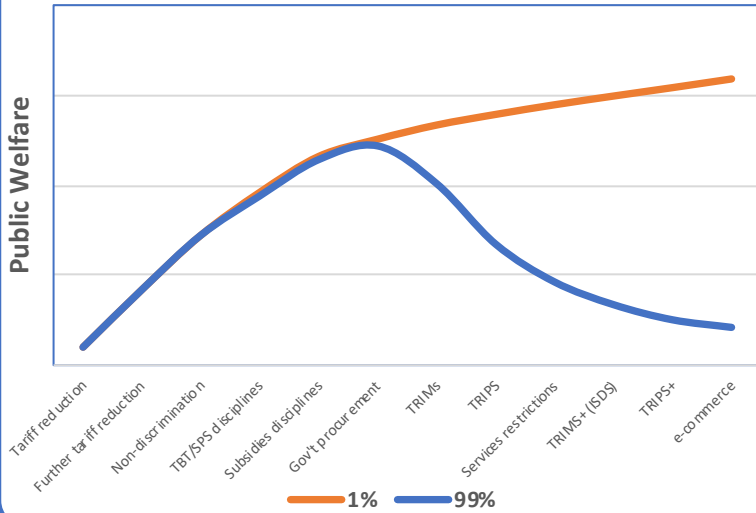
Public Welfare Impacts
Country B



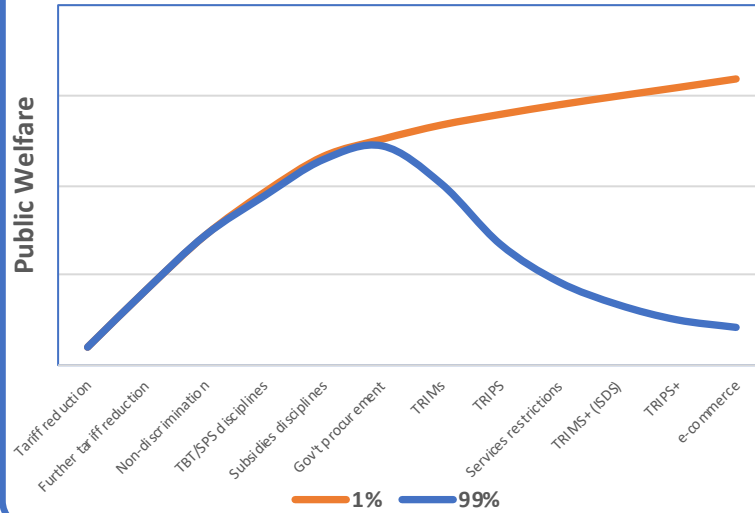
Public Welfare Impacts
Country C



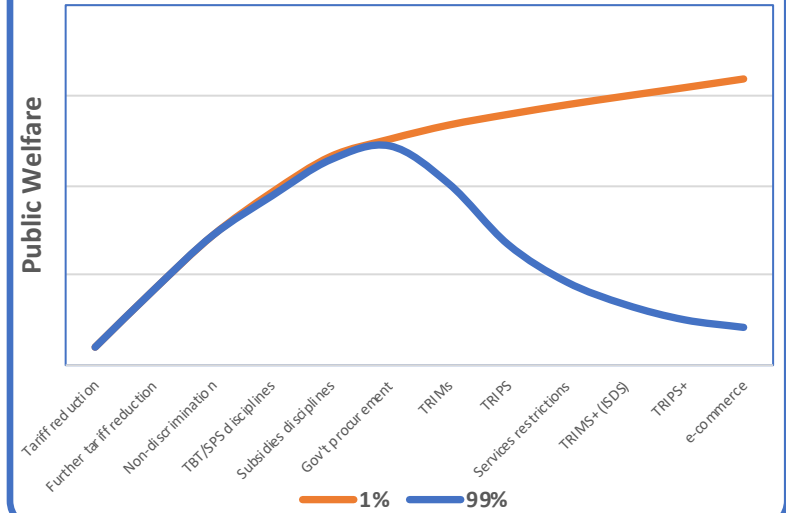
Public Welfare Impacts
Country D



Public Welfare Impacts
Country E



Public Welfare Impacts
Country F



Governance, public law and justice

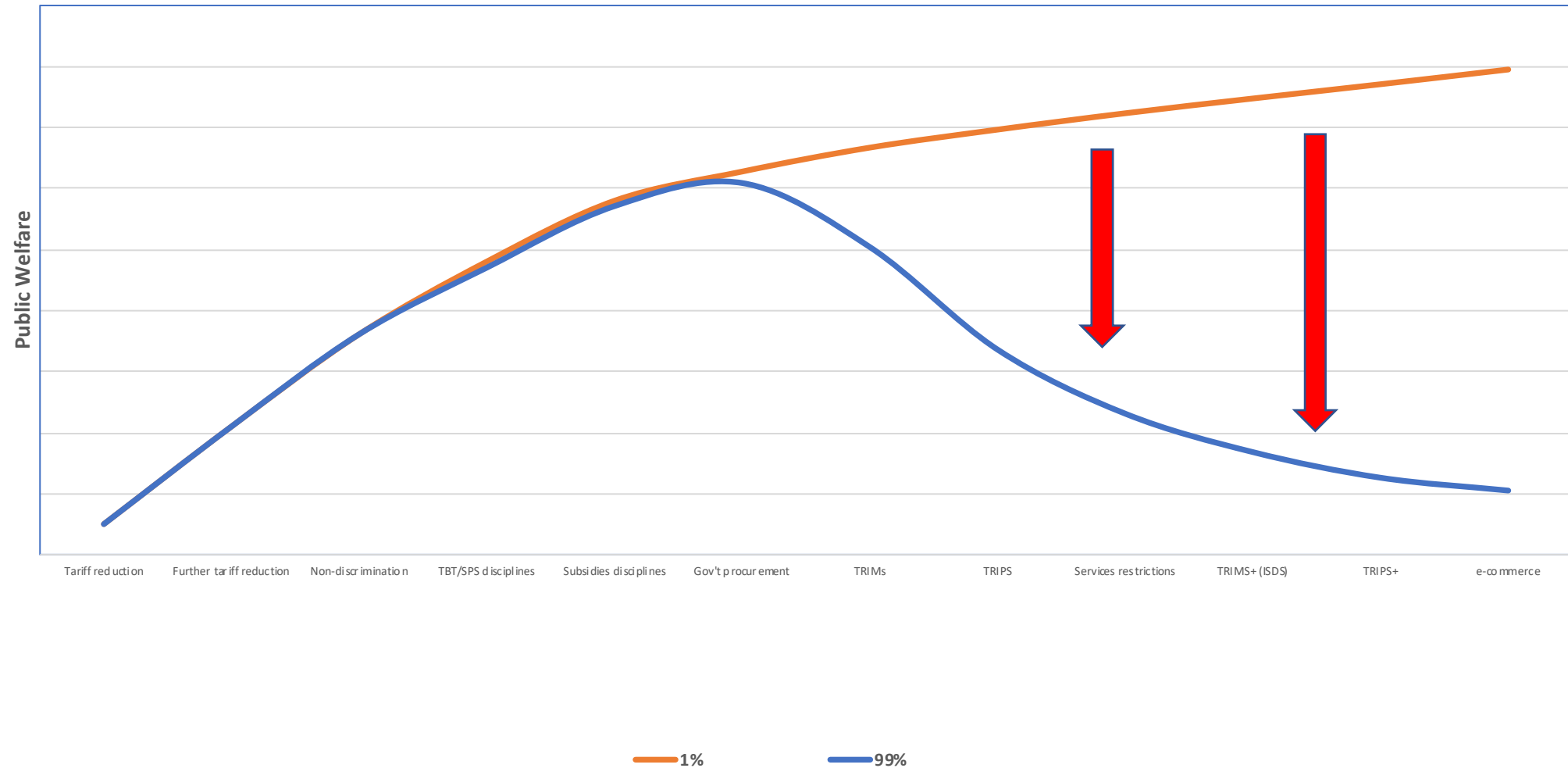


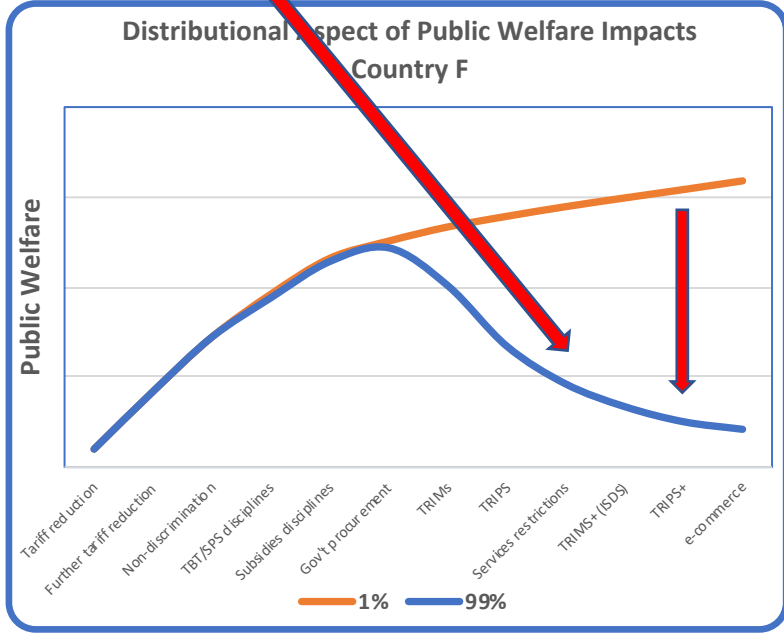
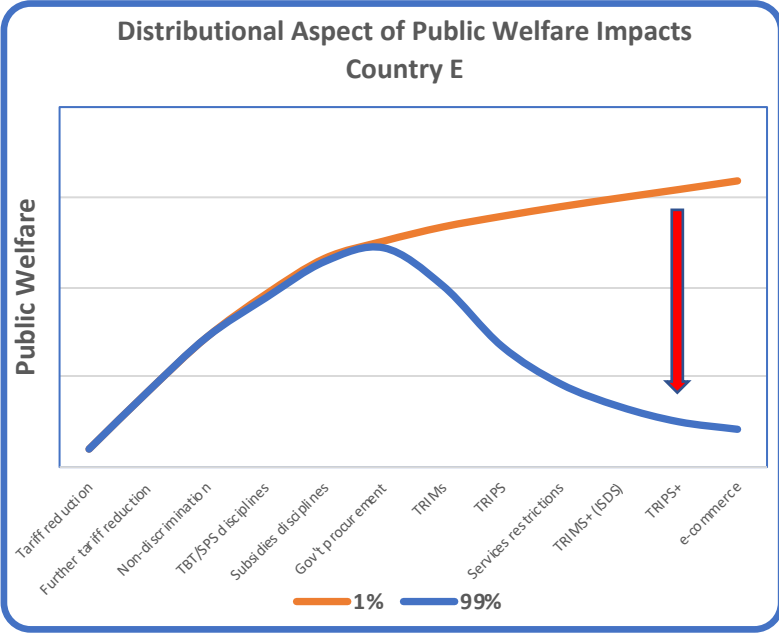
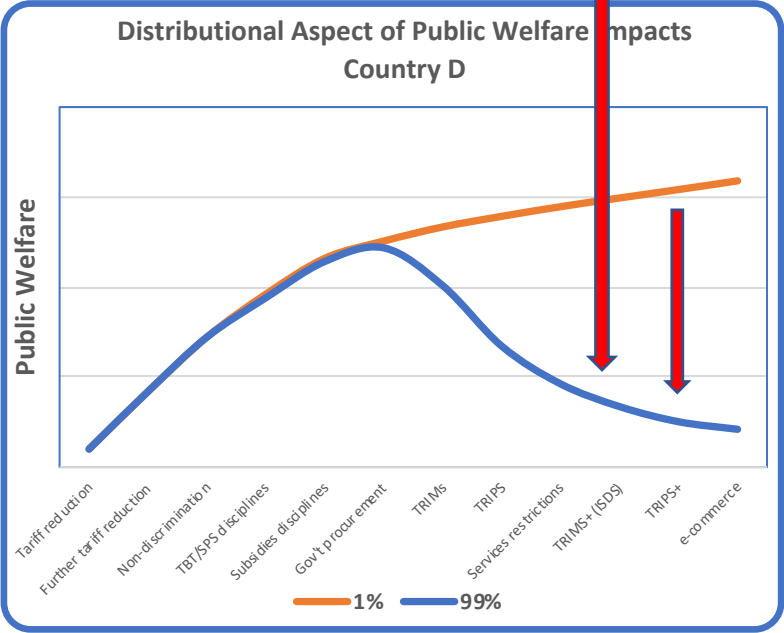
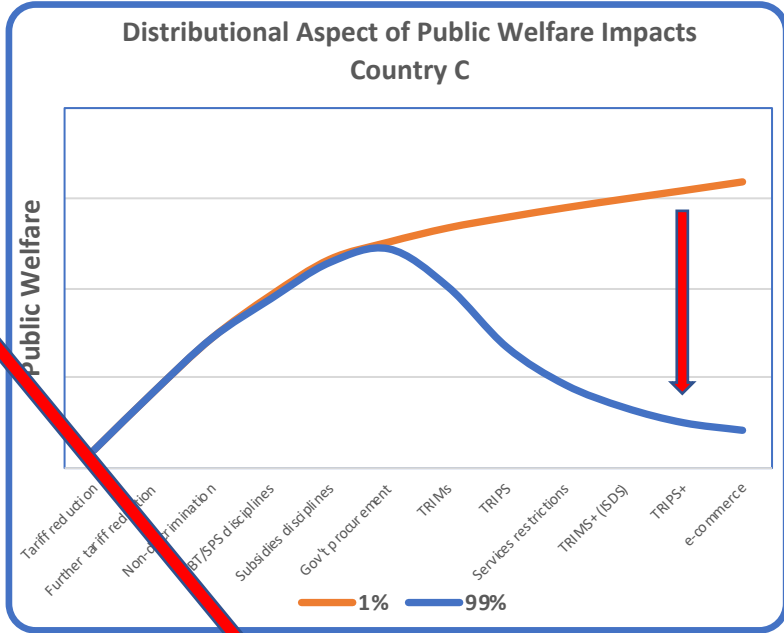
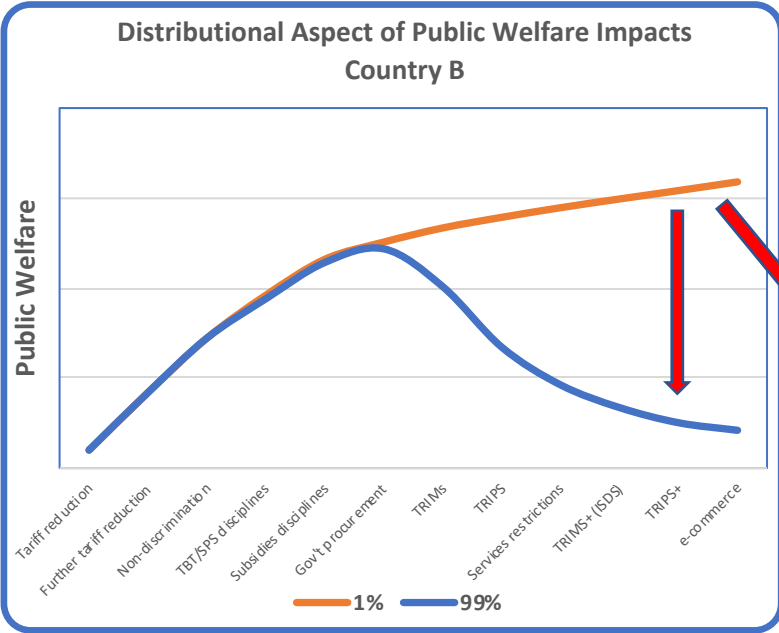
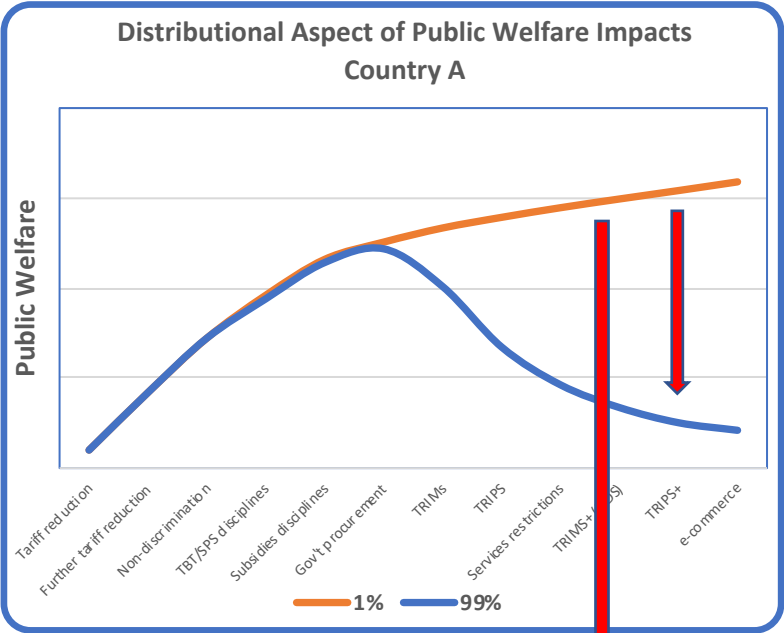
International economic law is legalizing and entrenching the distributive and other effects:

- Evolution of “trade” agreements from creating opportunities for economic activity to **entrenching a set of legal rights to maximize profit**
 - Minimize production costs, responsibility for externalities, etc
- Necessarily at the expense of other economic and public stakeholders
 - Any given product or investment can only produce a finite set of benefits, how they are distributed is critical

Governance, public law and justice

Distributional Aspect of Public Welfare Impacts
Country A





The growth in discontent with international arbitration and public law

- Scope of discontent growing: Impact on public law and policy space
- Brazil
- South Africa
- Broader African context (Pan-African investment code, etc)
- India
- EU: Investment Court
 - Achmea case: can be seen as courts fighting back against usurpation of public law justice space
- USMCA
- APEC
- Energy Charter Treaty

Conclusion:

- Mismatch: international arbitration not fit for purpose of achieving justice in public law adjudication
- Goal is transforming public law, not justice in public law
 - Underlying goal of creating separate and hierarchically superior transnational law system to redefine goals and roles of national public law in relation to the economy
- UNCITRAL process: Hope for real change?
 - Totally part of the socializing system in international arbitration
 - Will it be tinkering to save the system versus change to fix the system
- “By serving the interests of the business world, ICA governance supports the providers of investment and the engines of economic growth. It is best left to its own devices; though discreet assistance – not interference – by the state is welcome and sometimes necessary.” (Mattli and Dietz, 2019)