The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions

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The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions

Cover Page Footnote
Visiting Associate Professor of Law, University of Minnesota Law School. Prior to writing this Article, the author's private practice focused exclusively on international arbitration at Allen & Overy's International Arbitration Group in London, and at Wilmer, Cutler & Pickering's International Group in Washington, D.C. The author also received a U.S.-U.K. Fulbright Grant to research international arbitration. The author wishes to thank Professor David D. Caron, Professor David A. Gantz, Professor Andrea K Bjorklund, Dr. Loukas Mistelis, and Mr. Doak Bishop, as well as the faculties at the University of Minnesota Law School, the University of Nebraska-Lincoln College of Law, and Drake University Law School for their valuable comments and suggestions during the process of drafting this Article. The author is particularly grateful to Mary Rumsey and the law library at the University of Minnesota Law School for their invaluable research support during the drafting of this Article.
ARTICLES

THE LEGITIMACY CRISIS IN INVESTMENT TREATY ARBITRATION: PRIVATIZING PUBLIC INTERNATIONAL LAW THROUGH INCONSISTENT DECISIONS

Susan D. Franck

INTRODUCTION

Before 1995, only a handful of arbitrations involved claims under investment treaties. During the last five years, however, the number of cases has exploded. There are now over sixty known arbitrations involving investment treaties, and these claims typically involve amounts ranging from U.S. $120 million to “billions and billions” of dollars.¹ The consequence of this growth is that decisions about public

¹ See Michael D. Goldhaber, Big Arbitrations, Focus Eur., Summer 2003, at 22 available at http://www.americanlawyer.com/focuseurope/bigarbitrations.html. This Article details a series of cases involving sovereign states that are or have been sued for breaches of investment treaties. These cases include the following: (1) the “Czech TV Debacle” where the Czech Republic was sued for over U.S. $500 million; (2) the “Argentine Currency Crisis Claims” where the Republic of Argentina was sued for “billions of dollars”; (3) the “Lebanese Mobile Phone Fight” where U.S. $1.05 billion was disputed in a case involving the Republic of Lebanon; (4) the “Czech-Slovak Bank Battle” where the Slovak Republic was sued for U.S. $1 billion in damages; (5) the “Japanese-Czech Banking Battle” where a U.S. $1 billion claim was made against the Czech Republic; (6) the “Port Services Disputes” where claims are being brought claiming that the Islamic Republic of Pakistan owes approximately U.S. $350 million and the Republic of Philippines owes U.S. $120 million; (7) the “Building Bridges in Pakistan” where a claim for U.S. $450 million was made against the Islamic Republic of Pakistan; (8) the “Turkish Power Plant Joint Venture” where the Republic of Turkey is being sued for U.S. $300 million; (9) the “Argentine Water Dispute” alleging
issues with economic and political consequences are resolved in private before different sets of individuals who can and do come to conflicting decisions on the same points of law—and no single body has the capacity to resolve these inconsistencies.

In the past twelve years, countries ("Sovereigns") have entered into approximately 1500 new Bilateral Investment Treaties ("BITs") and


2. *See* Matthew Saunders, *Bilateral Investment Treaties Oil the Wheels of Commerce: An Increase in BITs in Recent Years Is Helping to Encourage and Protect International Business*, IBA in the News, June 23, 2004, at http://www.lexisnexis.com/publisher/EndUser?Action=UserDisplayFullDocument&orgId=1746&topicId=26635&docId=l:214719388&start=24.html. Saunders explains that investment treaty arbitrations "operate in the arena of public international law and interpret [investment treaties] through the application of public international law principles and conventions, commonly less amenable to clear definition than is the case in the arena of private law." *Id.* This situation "often results in less certainty as to outcome in [investment treaty] claims than might often be the case before a domestic court or a contract based international arbitration." *Id.*; *see infra* notes 434-37 and accompanying text (noting that investment treaty awards do not have precedential value).

around five multilateral investment treaties in order to attract foreign investment by granting broad investment rights to foreign investors and creating flexibility in the resolution of investment disputes. The existence of this broad network of interrelated rights means that, when difficulties arise—as they inevitably do—there is a patchwork of mechanisms to resolve the investment disputes.

Some public international law rights have been articulated for the first time in investment treaties—such as the right to “fair and equitable treatment” and a Sovereign’s obligation to “observe its commitments.” Tribunals have applied these standards differently and made divergent findings on liability. Rather than creating certainty for foreign investors and Sovereigns, the process of resolving investment disputes through arbitration is creating uncertainty about the meaning of those rights and public international law.

As investment arbitration is still in its infancy but in the middle of its first “growing pains,” it is appropriate to help the jurisprudence develop, acknowledge the difficulties in the current framework, and find ways to minimize the looming legitimacy crisis. In this manner, investment arbitration will not be thrown out with the proverbial bathwater and international arbitration will be firmly on track to promote international justice.

Part I of this Article describes the historical and legal framework of investment treaties. Against this background, Part II of this Article examines the rise of investment treaty arbitration. In Part III, this Article discusses the present remedies available to address inconsistent decisions. Part IV describes three major sets of inconsistent decisions that have caused uncertainty about the meaning of rights in investment treaties. Part V of this Article reviews the literature, considers indicators of legitimacy, and offers a new framework for analyzing

4. There are also a number of multilateral investment treaties containing rights and obligations similar to BITs. Examples of such treaties include NAFTA and the ECT. See supra note 1 and accompanying text.

previous suggestions for reform. Part VI argues that present efforts for promoting legitimacy in investment treaty arbitration are insufficient and recommends the implementation of both preventative and corrective measures. This Article recommends increasing academic commentary and analysis of investment treaty rights and enhancing transparency of the arbitration process in order to prevent inconsistencies from occurring. This Article also proposes corrective reforms to remedy inconsistent decisions. Rather than having a treaty-by-treaty approach that might otherwise be suggested by the literature and the obligations of the U.S. government, this Article proposes the establishment of an independent, permanent appellate body with the authority to review awards rendered under a variety of investment treaties. In this manner, legitimacy, transparency, determinacy, and coherence can be reintroduced into the entire network of investment treaty disputes, and the concerns of citizens, investors, and sovereigns alike can be addressed.

I. THE EVOLUTION AND IMPACT OF INVESTMENT TREATIES

Foreign investment is a vital tool for economic development and global prosperity. It allows developing countries to develop local industries and receive funds from foreign investors to improve the country's infrastructure. Meanwhile, investors obtain financial returns and gain a foothold in the markets of the future.  

6. For example, the United States has certain obligations that suggest the creation and use of an appellate body will be subject to extensive debate. See U.S.-Central American Free Trade Agreement, June 1, 2004, at annex 10-F [hereinafter Central American FTA] (stating that “the FTC shall establish a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals under the Investment Chapter of the Agreement”), available at http://www.ustr.gov/new/fta/Cafta.final/10-investment.pdf; United States-Chile Free Trade Agreement, June 6, 2003, U.S.-Chile, ch. 22 [hereinafter Chile FTA], available at http://waysandmeans.house.gov/media/pdf/chile/hr2738chilesummary.pdf; United States-Singapore Free Trade Agreement, May 6, 2003, U.S.-Sing. [hereinafter Singapore FTA], available at http://www.mti.gov.sg/public/PDF/CMT/FTA_USSFTA_Agreement_Final.pdf; U.S. Dep't of State, Update of U.S. Model Bilateral Investment Treaty, at annex D (Feb. 5, 2004) [hereinafter Amended U.S. Model BIT] (providing that “[w]ithin three years after the date of entry into force of the Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards”), at http://www.state.gov/documents/organization/29030.doc; Letter from George Yeo, Minister for Trade and Industry of Singapore, to Robert Zoellick, U.S. Trade Representative (May 6, 2003) (on file with author) (requiring that “[w]ithin 3 years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered”); see also Bart Legum, The Introduction of an Appellate Mechanism: The U.S. Trade Act of 2002, in Annulment of ICSID Awards 289, 295 (Emmanuel Gaillard & Yas Baniatemi eds., 2004) (describing the potential bilateral nature of an appellate mechanism).

7. See, e.g., Marian Nash (Leich), Bilateral Investment Treaties United States—Argentina, 87 Am. J. Int'l L. 433, 433 (1993) (explaining that the U.S.-Argentina BIT,
As the global economy continues to expand during turbulent economic conditions, investors are becoming more sophisticated about how they plan investments and resolve disputes related to those investments. Investment treaties play an increasingly prominent role in the initial decision to invest in a developing nation, the structure of the investment, and the methods of maximizing commercial benefits if there are difficulties with the investment. This part describes the historical evolution of investment treaties and discusses why the investment treaty movement has been successful.

A. The Evolution of Investment Treaties

In order to avoid the historical difficulties associated with "gunboat diplomacy," countries have promulgated treaties to promote foreign investment and instill confidence in the stability of the investment en-

“which contains an absolute right to international arbitration of investment disputes, removes U.S. investors from the restrictions of the Calvo Doctrine and... [b]y providing important protections to investors and creating a more stable and predictable legal framework for investment, the BIT helps to encourage U.S. investment” (citation omitted)).

8. See Kenneth J. Vandevelde, The Economics of Bilateral Investment Treaties, 41 Harv. Int'l L.J. 469, 469, 489, 498 (2000) [hereinafter Vandevelde, The Economics] (stating that “BITs appear to have positively affected investment flows” and concluding that the “evidence is that BITs have been at least marginally successful in increasing investment flows”); see also UNCTAD, BITs in the Mid-1990s, supra note 3, at 122 (noting that despite the three-year time gap between the signing of a BIT and foreign investment, investors increasingly regard BITs as a normal feature of the institutional structure); Kenneth J. Vandevelde, Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties, 36 Colum. J. Transnat'L L. 501, 523-24 (1998) [hereinafter Vandevelde, Investment Liberalization] (explaining that BITs stabilize favorable investment clients and thus reduce investment risks); infra note 469 (describing political risk insurance that investors can use to minimize investment risk). Research from the World Bank also suggests that BITs can marginally impact investors' decisions to invest in foreign countries. See Joel C. Beauvais, Regulatory Expropriations Under NAFTA: Emerging Principles & Lingering Doubts, 10 N.Y.U. Envtl. L.J. 245, 253 (2002) (explaining that “[t]he BIT revolution has been accompanied by a major shift in capital-importing countries' regarding foreign direct investment” and “an explosion in capital imports to developing countries”); Mary Hallward-Driemeier, World Bank, Do Bilateral Investment Treaties Attract FDI? Only a Bit... and They Could Bite (2003) (Working Paper No. 3121), at http://econ.worldbank.org/files/29143_wps3121.pdf. As more investors have won investment treaty arbitrations, businesses have begun actively considering treaty rights when structuring their investments so as to take full advantage of potentially available international rights. See infra note 46. But see K. Scott Gudgeon, United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards, 4 Int'l Tax & Bus. L. 105, 111 (1986) (noting that the U.S. Model BIT was not promulgated “with an intent to catalyze investment decisions” and that the drafters of the Model BIT were unaware of any link between BITs and investment flows); Patricia M. Robin, The BIT Won't Bite: The American Bilateral Investment Treaty Program, 33 Am. U. L. Rev. 931, 942-43 (1984) (describing the lack of evidence substantiating a relationship between BITs and capital flows).
This movement began with Treaties of Friendship, Commerce and Navigation, but soon moved beyond this as these treaties were limited commitments that did not have a forum for resolving disputes. There were soon efforts to enact multilateral investment treaties, which would grant investors and sovereigns a series of rights and obligations in the hopes of fostering foreign direct investment. Given the difficulties in promulgating sweeping reforms on a multilateral basis, these initiatives were largely unsuccessful.


Thereafter, various countries turned to bilateral treaties to secure rights for international investors and encourage efforts to promote stable investment climates.\(^{13}\) Sovereigns quickly learned that investment treaties can be a major tool for "enhanc[ing] the type of asset protection that facilitates wealth-creating cross-border capital flows, bringing net gains for both host state and foreign investor[s]."\(^{14}\) The existence and negotiation of BITs has had a great influence on the formulation of international public policy,\(^{15}\) and these treaties are now a touchstone of international relations.\(^{16}\) While many of these investment treaties were initially between capital exporting and capital importing countries, at present, many investment treaties have been concluded between developed countries, and developing nations have

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\(^{16}\) Although it is difficult to determine the precise number of BITs in effect because the numbers are always increasing, at present there are over 2100 BITs. See UNCTAD, Investment Entrustments Online: About, at http://www.unctad.org/templates/Page___644.aspx (last updated June 9, 2004) (stating that the "number of BITs has increased dramatically . . . to a total of 2.181 by 2002"); see also Jessica S. Wiltse, An Investor-State Dispute Mechanism in The Free Trade Area of the Americas: Lessons from NAFTA Chapter Eleven, 51 Buff. L. Rev. 1145, 1153 (2003). In a frequently cited 1984 Comment on BITs, one commentator posited that participation occurred in three stages. The first stage involved Germany and Switzerland signing agreements with a variety of less developed countries in the early 1960s. The second stage occurred throughout the 1960s and into the 1970s when France, the United Kingdom, the Belgo-Luxembourg Economic Union, the Netherlands, and Norway involved themselves in the program. The final stage began in the late 1970s and continued into the early 1980s when Japan and the United States became increasingly involved. See Robin, supra note 8, at 941-42; see also Bilateral Treaties, supra note 9, at 9-11 (describing why Sovereigns are interested in concluding investment treaties); Andrew J. Shapren, NAFTA Chapter 11: A Step Forward in International Trade Law or a Step Backward for Democracy?, 17 Temp. Int'l & Comp. LJ 323, 327-28 (2003) (describing the United States's embarkation on the bilateral investment treaty program in the 1980s).
also signed investment treaties among themselves.\textsuperscript{17} As investments continue to flow between developed and developing countries, investment treaties can no longer be seen purely from the point of view of industrialized nations.\textsuperscript{18}

The number of BITs has exploded in recent years.\textsuperscript{19} In the 1990s alone, investment treaties were negotiated at a rate of one every other day.\textsuperscript{20} Several multilateral investment treaties were also enacted.\textsuperscript{21} At the same time as the number of bilateral investment treaties quintupled,\textsuperscript{22} foreign direct investment has also experienced a fivefold increase.\textsuperscript{23} Unsurprisingly, given the success of bilateral treaties, even

\begin{quote}

18. Giorgio Sacerdoti, \textit{Bilateral Treaties and Multilateral Instruments on Investment Protection}, in 269 Recueil Des Cours 255, 299 (1997); see also UNCTAD, Bilateral Investment Treaties 1959-1999, at 1, 8, U.N. Doc. UNCTAD/ITE/IIA/2 (2000) [hereinafter UNCTAD BITs] (explaining that initially “BITs were concluded between a developed and a developing country” but that this pattern changed in the 1990s when “the dividing line for BIT partners between capital exporting and capital importing countries no longer holds true and, in many instances, countries approach BITs with the dual purpose of protecting their outward investments to, while attracting inward investment from, the other BIT partner”), at http://www.unctad.org/en/docs/poiteiiad2.en.pdf.


20. Vandevelde \textit{The Economics}, \textit{supra} note 8, at 469.


22. See UNCTAD BITs, \textit{supra} note 18, at iii (explaining that the 1990s saw a rise in the number of treaties “from 385 at the end of the 1980s to 2857 at the end of the 1990s”); see also Parra, \textit{ICSID, supra} note 21, at 41-42 (calculating that 65 BITs were concluded by the end of the 1960s, another 86 signed during the 1970s, and another 211 in the 1980s, before the 1990s “veritable explosion in the number of BITs” estimated at 960 to 1300 new BITs).

23. Valpy FitzGerald, International Investment Treaties and Developing Countries (Inst. of Dev. Studies), at http://www.ids.ac.uk/tradebriefings/ti9.pdf (last visited Feb. 3, 2005) (Trade & Investment Background Briefing No. 9); see also Sacerdoti, \textit{supra} note 18, at 261 (describing the massive increase in foreign direct investment in the past decade).
broader regional investment agreements, such as the Free Trade Agreement of the Americas, are now under consideration.  

**B. What Makes Investment Treaties So Special?**

The proliferation of investment treaties is due in part to the rights in the treaties themselves. Investment treaties have two fundamental innovations, which represent a departure from previous international agreements.  


26. See Robin, *supra* note 8, at 943 (describing how BITs help secure overseas investments and stabilize the overall investment climate).

27. See Gantz, *The Evolution*, supra note 12, at 683 (explaining that, in the context of NAFTA, the dispute resolution provision sets mandatory standards for the treatment of foreign investments and investors and also provides for binding arbitration disputes related to those standards).


29. This trend may be due in part to the large number of investment treaties based on Model BITs. Many countries such as the United States, the United Kingdom, the Netherlands, Germany and Switzerland have similar model BITs that are used when negotiating trade and investment agreements. See, e.g., U.S. Dep’t of State, Updated U.S. Model Bilateral Investment Treaty (Feb. 5, 2004), at http://www.state.gov/documents/organization/29030.doc; Dolzer & Stevens, *supra* note 3, at 167-254 (providing the text of model BITs from Austria, Denmark, Germany, Hong Kong, the Netherlands, Switzerland, the United Kingdom, and the United States).

30. European BITs, for example, typically require a host government to provide fair and equitable treatment to investments, permit the free transfer of the foreign company’s earnings (unless there is an extraordinary trade deficit), and permit expropriation only when there is a public purpose and appropriate compensation. Robin, *supra* note 8, at 942; see also *infra* notes 34-41 and accompanying text (describing the substantive rights provided in a variety of different investment treaties).
granted to investments, the types of investments that are covered, and when the coverage begins and ends.\textsuperscript{31}

There are different permutations of the substantive rights granted to investors.\textsuperscript{32} A typical investment treaty generally provides investors with a combination of up to seven different substantive rights.\textsuperscript{33} First, investors are often guaranteed the payment of adequate compensation in the event an investment is expropriated.\textsuperscript{34} Second, Sovereigns are prohibited from enacting currency controls so as to promote the free flow of capital.\textsuperscript{35} Third, Sovereigns are required not to discrimi-
nate on the basis of nationality; this typically means investors cannot be treated worse than the Sovereign’s own citizens or other foreigners. Fourth, Sovereigns promise to treat investments fairly and equitably. Fifth, Sovereigns promise to provide full protection and secu-

and without delay into and out of its territory. Such transfers include: (a) contribution to capital; (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment; (c) interest, royalty payments, management fees, and technical assistance and other fees; (d) payments made under a contract, including a loan agreement; and (e) compensation [for expropriation and losses due to armed conflict], and payments arising out of an investment dispute.

Treaty Between the Government of the United States of America and the Government of the Republic of Uzbekistan Concerning the Encouragement and Reciprocal Protection of Investment, Dec. 16, 1994, U.S.-Uzb., S. Treaty Doc. No. 104-25 (1995), available at http://www.unctad.org/sections/dite/iia/docs/bits/us_uzbekistan.pdf. The Finland-Kuwait BIT provides that each Sovereign affirms that its legislation concerning foreign currencies is based upon the principle of free movement of capital and that the transfer of payments in connection with an investment is free. Transfers shall include in particular, though not exclusively: (a) the principle and additional amounts to maintain or increase the investment; (b) the returns; (c) repayment of loans; (d) royalties and fees . . . ; (e) the proceeds from the liquidation or the sale of whole or any part of the investment; (f) unspent earnings and other remuneration . . . ; (g) amounts spent for the management and maintenance of an investment and a variety of other compensations related to violations of the BIT.


37. The specific formulation of this right will depend on the specific treaty at issue. Article 1105(1) of NAFTA provides that “[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.” NAFTA, supra note 1, art. 1105, 32 I.L.M. at 639-40. Article II(3)(a) of the U.S.-Estonia BIT provides that “[i]nvestment shall at all times be accorded fair and equitable treat-
Sixth, sovereigns guarantee that investments will not be treated less favorably than the minimum standard required by customary international law. Finally, Sovereigns sometimes agree to honor commitments they have made regarding an investment.
While some of these rights are a confirmation of obligations Sovereigns owe under customary international law, others are new.

Most treaties delineate which investors and investments are entitled to receive substantive protections. Establishing entitlement to protection is an important threshold issue as it permits investors to obtain protection and bargaining leverage of investment treaties. The standards that must be met are typically broad, and to secure the benefits of an investment treaty, there must be a qualifying person or entity (the *ratione personae* requirement), a qualifying subject matter (the Netherlands-Philippines BIT provides that each country “shall observe any obligation arising from a particular commitment it may have entered into with regard to a specific investment of nationals of the other Contracting Party.” Agreement Between the Kingdom of the Netherlands and the Republic of the Philippines for the Promotion and Protection of Investments, (n.d.), Neth.-Phil., art. 3(3), at http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_philippines.pdf (last visited Jan. 22, 2005). Similarly, the Malaysia-UAE BIT provides that each party “shall observe any obligation it may have entered into in the documents [sic] of approval of investments or the approved investment contracts by investors.” Malaysia-UAE BIT, supra note 38, art. 13(3). The Mauritius-UK BIT also provides that each country “shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other country.” Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius, May 20, 1986, U.K. & N. Ir.-Mauritius, art. 2(2), at http://www.unctad.org/sections/dite/iia/docs/bits/uk_mauritius.pdf.


42. *Ratione personae* is generally understood to mean the person or entity covered by a particular treaty. See Black’s Law Dictionary 1263 (6th ed. 1990) (defining *ratione personae* as “[b]y reason of the person concerned; from the character of the person”); see also UNCTAD, International Centre for Settlement of Investment Disputes, 2.4 Requirements of Ratione Personae, U.N. Doc. UNCTAD/EDM/Misc.232/Add.3 (2003) (outlining the requirements for being considered a *ratione personae* under the ICSID Convention; these requirements tend to be similar to those of investment treaties), available at http://www.unctad.org/en/docs/edm_misc232add3_en.pdf. The term “investor” is broadly defined; its application is rarely disputed. See Raul Emilio Vinuesa, *Bilateral Investment Treaties and the Settlement of Investment Disputes Under ICSID: The Latin American Experience*, 8 Law & Bus. Rev. Am. 501, 506 (2002) (explaining that each investment treaty provides its own definition of “nationals, individuals, or juridical persons” who are entitled to benefit from “rights and obligations created or recognized by the treaty”); and noting that BITs generally define a foreign investor broadly). But see Todd Weiler, *NAFTA Chapter 11 Jurisprudence: Coming Along Nicely*, 9 Sw. J. L. & Trade Am. 245, 269 (2002-2003) [hereinafter Weiler, *Coming Along*] (remarking that, unlike many bilateral investment treaties, NAFTA provides a specific protocol to determine who is an investor and what is an investment). Classification as an “investor” is most contentious when the investor’s nationality is in question. For example, in a case decided a few months ago, the definition of an investor was particularly contentious where a Ukrainian company owning 99% of the shares and comprising two-thirds of the management of a Lithuanian company sued for a violation under the Ukraine-Lithuania BIT. Tokios Tokelės v. Ukraine, Decision on Jurisdiction, ICSID (W. Bank) Case No. ARB/02/18 ¶ 21 (2004), available at http://www.worldbank.org/icsid/cases/tokios-judgment.pdf. In Tokelės, the tribunal held that the investor, though the company was controlled and owned by Ukraine nationals, was still a Lithuanian investor within the meaning of the Ukraine-Lithuania BIT. The majority explained that the investment treaty set the bar of corporate na-
ratione materiae requirement) and a dispute within a qualifying time frame (the ratione temporis requirement). The impact of these three "standing" requirements is that—depending entirely upon how the in-

tionality low, permitting nationals of one state to incorporate in the other, and to sub-
sequently reinvest in their home territory as "foreign" investors. Id. ¶¶ 14, 18, 28, 30-
32, 38, 41-43, 71, 86; Soufraki v. United Arab Emirates, Final Award on Jurisdiction, ICSID (W. Bank) Case No. ARB/02/7 (2004) (dismissing a case brought under an in-
vestment treaty wherein a national of Canadian and Italian background could not demonstrate that he was an Italian national and therefore permitted to benefit from the UAE-Italy BIT), available at http://ita.law.uvic.ca/documents/Soufraki.pdf. But see Champion Trading Co. v. Arab Republic of Egypt, Case No. ARB/02/9, discussed in Philippe Pinsolle, Jurisdictional Review of ICSID Awards, 5 J. World Investment & Trade 613, 615-16 (2004) (discussing unpublished award where arbitrators found ju-
risdiction over some companies but not natural persons who were the shareholders because of a failure to meet the nationality requirement). In a vigorous dissent, Pro-

43. Ratione materiae generally refers to those requirements that ensure an invest-
ment is covered by a particular treaty. See Black's Law Dictionary, supra note 42, at 1262 (defining the term as "[b]y reason of the matter involved; in consequence of, or from the nature of, the subject-matter"); see also UNCTAD, International Centre for Settlement of Investment Disputes, 2.5 Requirements of Ratione Materiae (2003) (outlining requirements for ratione materiae under the ICSID Convention, which has been interpreted in a manner relatively similar to requirements for investment trea-
ties, even though the term "investment" is not specifically defined in the ICSID Con-
ties tend to broadly define "investment." See Vinuesa, supra note 42, at 506; Weiler, Coming Along, supra note 42, at 269 (describing the broad definition of investments). For example, as articulated in the Model BIT for Great Britain, a typical BIT provi-
sion regarding investments might provide the following:

For the purposes of this agreement: (a) "investment" means every kind of asset and in particular, though not exclusively, includes: (i) movable and immovable property and any other property rights such as mortgages, liens or pledges; (ii) shares in and stock and debentures of a company and any other form of participation in a company; (iii) claims to money or to any per-
formance under contract having a financial value; (iv) intellectual property rights, goodwill, technical processes and know-how; (v) business concessions conferred by law or under contract, including concessions to search for, cul-
tivate, extract or exploit natural resources.

Dolzer & Stevens, supra note 3, at 229; see also id. at 187-88, 219-20 (describing an equally broad definition of investment in German and Swiss Model BITs).

44. This essentially requires that the dispute arose when both parties were legally entitled to have access to the system concerned. For example, in Mondev Interna-
tional Ltd. v. United States, a tribunal held the claim was invalid under NAFTA be-
cause the alleged breach of the treaty occurred before NAFTA was in force. Mondev International Ltd. v. United States ¶ 57-70, at www.naftalaw.org (last visited Jan. 22, 2005); see also ECT, supra note 1, art. 1, 32 I.L.M. at 613 (explaining that "existing" as well as new investments are covered by the BIT); U.S.-Argentina BIT, supra note 39, art. XIV (providing that the BIT applies to investments "existing at the time of entry into force" as well as "investments made or acquired thereafter").
vestment is structured\(^4\) and the rules of the relevant investment treaty—investments that relate to more than one country might permit investors to benefit from more than one investment treaty simultaneously. For example, a U.S. citizen making an investment in the Czech Republic through a Dutch company may receive rights under both the U.S.-Czech Republic BIT and the Netherlands-Czech Republic BIT. This possibility creates an incentive for investors to structure investments that provide them with legitimate expectations of benefiting from rights under at least one investment treaty, if not multiple treaties.\(^6\) When the same set of facts permits arbitrations under different treaties, this enhances the potential for inconsistent decisions.

II. THE IMPACT OF INVESTMENT TREATY ARBITRATION

With the proliferation of investment treaties, investors have more treaties that they can use to sue Sovereigns. This part considers the evolution of investment arbitration, the benefits to giving investors a direct cause of action against Sovereigns, the current state in investment arbitration, and the actual process of initiating investment treaty arbitration against a Sovereign.

\(^4\) See Saunders, supra note 2 (explaining that “BITs can, if their role is properly understood and investments are suitably structured, provide an invaluable measure of protection to investors often exceeding in its utility the sort of protections available before domestic courts or contract based arbitration tribunals”).

\(^6\) In the future, investors are likely to actively consider how to structure their investments in manners which improve the commercial position. Indeed, it is precisely the job of lawyers to advocate effectively for their clients and use all available options to improve their client’s position. See, e.g., Philip Dunham & George K. Foster, Current Trends in Investment Treaty Arbitration, Focus Eur., June 2004, at A6 (arguing investors “should always consider whether or not an applicable treaty is in force when contemplating new ventures or seeking redress”), available at http://www.coudert.com/publications/articles/040515_5_ForeignArbitration_fe.pdf; Allen & Overy, The Rise of Investment Treaty Arbitration (n.d.) (suggesting investors “structur[e] transactions so that [they] can take advantage of as many investment treaty rights as possible”), at http://www.allenover.com/asp/infocus.asp?pageID=3837 (last visited Jan. 22, 2005); see also Julian D.M. Lew et al., Comparative International Commercial Arbitration 769 (2003) (noting that “investments made by a subsidiary of a global corporation will now fall under at least one BIT”). In one case, a local company reincorporated itself in a foreign company before reinvesting in its home country through the foreign company; the local investors effectively became “foreign” in the eyes of the BIT. There was no evidence that investors intentionally created and/or used its new corporate nationality to benefit improperly from the BIT. Tokeléš, supra note 42, ¶ 56 (noting that there was no attempt to conceal the investor’s national identity and the Lithuanian company was not created for the purpose of gaining access to ICSID arbitration under the BIT); Tokeléš Dissent, supra note 42, ¶ 21 (same).
A. The Evolution Towards Investment Arbitration

Since at least 1794, arbitration has been used as a mechanism for fostering foreign investment and providing a neutral forum to resolve international disputes.\(^4\) Although there have been bumps and bruises as international arbitration has evolved\(^4\) into an independent discipline with impartial and expert decision makers, arbitration is now the preeminent method for resolving complex international disputes\(^4\) and imminently preferable to other options, such as the use of force or informal solutions (such as closed-door diplomatic negotiations).\(^5\)

Arbitration of investment disputes was not once as widely used as it is now.\(^5\) This was primarily because individual investors had no standing and no direct cause of action against a Sovereign for a violation of international law that adversely affected their investment.\(^5\) Rather, investors were forced to lobby their home country to espouse a claim on their behalf at the International Court of Justice (the “ICJ”), which resulted in only episodic investment disputes\(^5\) and even

49. See generally Joanne K. Lelewer, International Commercial Arbitration As a Model for Resolving Treaty Disputes, 21 N.Y.U. J. Int’l L. & Pol. 379 (1989). See also Susan D. Franck, The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity, 20 N.Y.L. Sch. J. Int’l & Comp. L. 1, 1-2 (2000) (explaining that arbitration is the preferred dispute resolution mechanism for international disagreements). Arbitration was historically perceived as promoting respect for the rule of law. This respect is necessary for investment stability, and is particularly relevant when investors are concerned about facing investment dispute resolution conducted by a foreign sovereign. This concern is exacerbated when the defendant is the Sovereign. Delocalized arbitration, by contrast, offers a neutral forum where impartial tribunals with specialist expertise could make determinations pertaining to investments in a way that would bolster investor confidence and foster greater certainty. Alvarez & Park, supra note 14, at 369-70.
50. Lelewer, supra note 49, at 379; see also Sacerdoti, supra note 18, at 413 (noting that “the overt use of force has been banished in the last decades” but explaining that “friendly solutions have often required years if not decades”).
51. There is evidence that investment treaty arbitration was successful from its infancy in the early 1980s. See, e.g., Bilateral Treaties, supra note 9, at 10-11 (describing three cases where invoking a BIT successfully resolved the dispute); Gudgeon, supra note 8, at 130; Robin, supra note 8, at 943 n.89 (referring to the ICC’s claims that BITs afforded effective protection for overseas investments). But see Lelewer, supra note 49, at 399 (noting that “insufficient use has been made of arbitration as a mechanism for the enforcement of treaties in public international law”); Sacerdoti, supra note 18, at 453 (stating in 1997 that “one must stress that the number of arbitrations held under BITs and in accordance to their disputes settlement clauses has been irrelevant. Moreover, only in very few ICSID cases until now was jurisdiction based on a BIT clause”).
smaller numbers of successful claims. In the happy event that a Sovereign espoused its investor's case, and the ICJ did find a violation of international law, there were two drawbacks. First, an aggrieved investor would not necessarily receive the compensation for the Sovereign's illegal conduct. Second, the only enforcement tool available to the ICJ is the enactment of a Security Council Resolution, which is not commercially useful where an investor seeks financial compensation.

With these limitations, the remaining alternative for aggrieved investors was to initiate litigation before national courts. This option was not attractive to investors who, presuming they could establish a colorable cause of action, found themselves in the Sovereign's court litigating against the Sovereign.

In an effort to address these concerns, investment treaties made two fundamental shifts for the resolution of investment-based disputes. First, the treaties gave investors a direct cause of action for damages. This means investors are no longer at the mercy of the limited availability of ICJ jurisdiction; J.G. Merrills, International Dispute Settlement 112-23, 139-44 (2d ed. 1991) (explaining the jurisdiction and authority of the ICJ).

54. Jones, supra note 9, at 529.
55. Prior to the evolution of investment treaties, investors were required to go before the ICJ. This process required the investor to go to its host government, its home government, and say "Please bring my claim before the International Court of Justice." The state might choose to do that, or it might not choose to do that; the decision was purely political. The prospect was that an investor who suffered significant economic harm had its redress contingent upon the political will and political calculation of its own government.


56. See Jose E. Alvarez, The New Dispute Settlers: (Half) Truths and Consequences, 38 Tex. Int'l L.J. 405, 416 (2003) (remarking that ICJ cases do not always secure compliance and that the ICJ relies "by conscious design on the most political of bodies, the Security Council, for [its] effectiveness"); see also UNCTAD, Dispute Settlement, General Topics, 1.2 International Court of Justice 23, U.N. Doc. UNCTAD/EDM/Misc.232/Add.19 (2003) (explaining that an ICJ judgment "is binding upon the parties in accordance with Article 2 and Article 94(1) of the United Nations Charter"), available at http://www.unctad.org/en/docs/edmmisc232add19_en.pdf. If a party fails to comply with the judgment, the opposing party can apply to the United Nations Security Council which will either "make recommendations" or "decide upon measures" to give effect to the judgment. Id. 57. See Vandevelde, supra note 9, at 162 (noting that ICJ judgments are generally only enforceable through the U.N. Security Council and stating that "[a] judgment by the ICJ, in effect, could be worthless").

58. See Sacerdoti, supra note 18, at 413-14 (noting that local courts, although competent to decide disputes involving investments, are rarely satisfactory to the foreign investor).

59. This alleviates difficulties faced by investors when their sovereign country does not find it politically expedient to bring their case before the ICJ. The freedom granted by investment treaties might, for example, have freed the Belgium investors in Barcelona Traction from having to petition Canada to hear their claims regarding
of international politics and governmental bureaucracy when deciding
to initiate dispute resolution, and can avoid their litigation being swal-
lowed by the larger foreign relations dialogue.60 Second, without the
need for a separate contract with a dispute resolution mechanism, in-
vestment treaties gave investors a choice of neutral settings for resolv-
ing their grievances.61

Overall, these shifts have created a private cause of action against
Sovereigns, which permits investors to act like “private attorney gen-
erals,” and places the enforcement of public international law rights in
the hands of private individuals and corporations. These shifts were a
major innovation. They created a mechanism to bolster investors’
confidence that they will receive a “fair shake” when resolving dis-
putes with Sovereigns,62 thus reducing the risks associated with in-
vestment and, arguably, increasing the incentive to investment abroad.

B. The Rise of Investment Arbitration

Given that the International Centre for Settlement of Investment
Disputes (“ICSID”) and investment treaties have been available to
investors since the 1960s, it is somewhat surprising that the number of
claims under investment treaties has accelerated only in the last few
years.63 Perhaps arbitration is now coming of age because of the
growth in foreign investment during the last decade, the network of
investment treaties, and the need for a neutral setting.64

Filings at ICSID—one of the potential institutions to which one can
submit investment treaty arbitrations—have increased from a level of
approximately one per year in the 1980s to one or two per month in
2001.65 Practitioners on both sides of the Atlantic agree that the world

expropriation, and having the ICJ make an adverse ruling on jurisdiction due to the
investors’ nationality. Barcelona Traction, Light & Power Co. (Belg. v. Spain), Sec-
ond Phase, 1970 I.C.J. 3 (Feb. 5).

60. Daniel M. Price, Some Observations on Chapter Eleven of NAFTA, 23 Hast-

61. See infra note 79 and accompanying text (explaining how no direct contract is
needed between the investor and Sovereign, but rather the offer to arbitrate is a uni-
lateral offer that the investor accepts by initiating arbitration).

62. The desire for neutrality and fairness was one of the reasons the United States
insisted that NAFTA contain arbitration provisions protecting foreign investment.
Alvarez & Park, supra note 14, at 371.

63. Although more than 120 cases have been submitted to ICSID, the vast major-
ity were submitted in the past five years. See Saunders, supra note 2. ICSID only ac-
counts for a portion of investment treaty cases; it is only one of a variety of methods
used to settle investment treaty disputes.

64. See Coe, Taking Stock, supra note 1, at 1399-1400 (explaining that, under
NAFTA, investment arbitrations have been influenced by the flow of investments).

65. Luke Peterson, Change Investment Litigation, Bit by BIT, Bridges Between
Trade and Sustainable Development, May 2001, at 11 [hereinafter Peterson, Change
Investment] (quoting William D. Rogers, Address at the Inter-American Develop-
is experiencing an exponential explosion of claims brought under a variety of investment treaties. Particularly within the last year, there has been a dramatic increase in the number of investment treaty arbitrations. Counsel with ICSID confirm the explosion in the number of investment treaty cases and have indicated that this trend is likely to continue.

C. What Is Investment Treaty Arbitration?

Investment treaties provide a unique dispute resolution mechanism that investors can invoke to seek redress for treaty violations. Rather than having to resolve a dispute with a Sovereign through the cumbersome process of domestic litigation, investors can arbitrate their claim with a panel of arbitrators, a process that is often faster and more efficient. In recent years, there has been a significant increase in the number of investment treaty arbitrations.


William D. Rogers, senior trade and arbitration partner at Arnold & Porter, predicted “a flood of litigation under the BITs.” Peterson, *Change Investment*, supra note 65, at 5. Investment arbitration practitioners confirm this increase in investment arbitrations, including Lucy Reed, a leading investment arbitration partner at Freshfields Bruckhaus Deringer LLP in New York. Telephone Interview with Lucy Reed, Partner, Freshfields Bruckhaus Deringer LLP (July 28, 2004) [hereinafter Reed Interview]; see also Telephone Interview with Juliet Blanch, Partner, Norton Rose (Aug. 10, 2004) [hereinafter Blanch Interview] (noting that there has been a “massive rise” in the number of investment treaty claims as more lawyers begin to understand and utilize the rights available under the investment treaty network); Telephone Interview with Stephen Jagusch, Partner, Allen & Overy (July 27, 2004) [hereinafter Jagusch Interview] (noting the “exponential growth” in the number of investment treaty arbitrations during the last five years as investors and their lawyers have recognized their rights); Telephone Interview with Philippe Pinsolle, Partner, Shearman & Sterling LLP (July 27, 2004) [hereinafter Pinsolle Interview] (describing the increase in investment treaty arbitration during the last five years as investors “realize the investment treaty network”).

See Dunham & Foster, supra note 46.


See Obadia, supra note 19; see also ICSID, *About ICSID*, at http://www.worldbank.org/icsid/about/main.htm (last visited Jan. 22, 2005) (indicating that the number of cases submitted to ICSID has significantly increased in recent years). But see Alvarez & Park, supra note 14, at 366 (explaining that following NAFTA and the subsequent wave of cases, there was increased awareness regarding the downsides of arbitration, including the possibility that vital economic and political matters might be decided in private by tribunals consisting largely of foreigners); Luke Eric Peterson, *All Paths Lead out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties* 3-4 (2002) [hereinafter Peterson, All Paths] (noting an NGO that announced there are “ample grounds for criticizing” the status of investment treaty arbitrations and private resolution of highly sensitive regulatory and policy issues), at www.iisd.org/pdf/2003/investment_nautilus.pdf.
some ICJ process or the Sovereign's court, investors can proceed directly to arbitration. Investors do not lightly sue governments as they are aware that Sovereigns will staunchly defend their corner; and, as a result, when initiating arbitration, investors undertake a major financial risk with the possibility of minimal recovery. As a practical matter, investors typically bring claims after non-legal routes such as commercial discussions have been unsuccessful.

70. Sovereigns are often unwilling to entrust their disputes to the courts of another nation, while foreign investors often have little faith in the courts of their host country. This is particularly relevant in the case of sensitive infrastructure projects: Investors may be legitimately concerned that they would not be able to protect their investments should the need arise. See generally Thomas W. Wildé, *Investment Arbitration Under the Energy Charter Treaty—From Dispute Settlement to Treaty Implementation*, 12 Arb. Int'l 429 (1996).

71. There are, however, often "cooling" periods which are applicable. For example, many investment treaties require investors to wait three to six months after the investor notifies a Sovereign of a dispute before an arbitrator can submit the request for arbitration. *See German Model BIT, art. 11(2), in Dolzer & Stevens, supra note 3, at 194* (providing for a six month waiting period); *Great Britain Model BIT, art. 8(2), in Dolzer & Stevens, supra note 3, at 234* (noting the three month waiting period found in the British Model BIT); *see also Swiss Model BIT, art. 9(2), in Dolzer & Stevens, supra note 3, at 225* (noting the BIT requires twelve months to pass from the time notice of the dispute is given to the Sovereign before recourse may be sought in arbitration); *Jose E. Alvarez*, *Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exxon-Florio*, 30 Va. J. Int'l L. 1, 36 n.191 (1989) (describing waiting periods in U.S.-Morocco BIT); Keith Molkner, *A Comparison of the Legal Regimes for Foreign Investment in Russia, Kazakhstan, and Kyrgyzstan*, 11 Int'l Tax & Bus. L. 71, 100 (1993) (describing various waiting periods).

Some investors, however, have been able to "jump the gun" and initiate arbitration before the expiration of the waiting period. *See Lauder v. Czech Republic, Final Award, ¶¶ 187-91 (2001) (UNCITRAL) [hereinafter London Award] (noting that although the claimant waited only 17 days before filing the request for arbitration, the failure to abide by the cooling period did not deprive the tribunal of jurisdiction), available at http://www.cetv-net.com/iFiles/1439-lauder-cr_eng.pdf; Ethyl Corp. v. Canada ¶¶ 74-88 (1998) (UNCITRAL), 38 I.L.M. 708 (1999) (acknowledging that while the claimant only waited nine days after the disputed legislation went into effect before filing its request for arbitration, its claim would not be barred for failure to abide by the procedural rules set out in the investment treaty); *see also Maffezini v. Kingdom of Spain, Decision on Jurisdiction, ICSID (W. Bank) Case No. ARB/97/7 (2000) (holding that the claimant could decrease the "cooling off period" from six to three months due to another treaty's most favored nation provision), available at http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf.*


73. Claimants filing under NAFTA have recovered substantially less than the amounts originally sought. Coe, *Taking Stock, supra note 1. For example, in Pope & Talbott v. Canada, the tribunal only awarded U.S. $461,566 although the investor sought U.S. $507 million. Pope & Talbot v. Canada, Damages Award, ¶ 91 (2002), at http://www.naftalaw.org.*

74. Laird, *supra note 72, at 229. Juliet Blanch, the Global Head of Norton Rose's International Arbitration Group, explains that in her experience, investors are initially reluctant to initiate arbitration against a Sovereign. Rather, investors try to resolve disputes by negotiations and only if that route completely fails will they commence arbitration. Blanch Interview, *supra note 66; see also Jagusch Interview, supra note 66* (explaining that investment arbitration has traditionally been the last resort
Investment treaties generally offer investors a choice of where they can bring their disputes, often including the Sovereign’s own national courts or arbitration. Some treaties give investors a very narrow set of choices, but the trend is to provide investors with a range of options (such as tribunals organized under ICSID, the International Chamber of Commerce (“ICC”), the Stockholm Chamber of Commerce (“SCC”) and/or the United Nations Commission on International Trade Law (“UNCITRAL”) Rules). Not surprisingly, given

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75. Parra, Provisions, supra note 21, at 288. The investor’s options will vary based on the rights enumerated in the applicable treaty. For instance, some treaties provide investors with a full range of options when seeking recourse, including the national courts, ad hoc arbitration under the UNCITRAL Rules, arbitration before the ICSID, the International Chamber of Commerce (“ICC”), or the Stockholm Chamber of Commerce (“SCC”). Anecdotal evidence suggests that the ICC and SCC have very light investment arbitration caseloads. See Peterson, All Paths, supra note 69, at 32 n.8 (noting that approximately one percent of the ICC’s 500 cases are investment treaty claims, and the SCC believes it has had a maximum of three such cases).


77. There are a variety of treaties that let investors pick from a variety of dispute resolution options. See Agreement Concerning the Reciprocal Promotion and Protection of Investments, Aug. 8, 1995, Belr.-Turk., art. VII, reprinted in 6 Int’l Ctr. for Settlement of Investment Disputes, Investment Treaties, (explaining an investor’s arbitration options, including ICSID, ad hoc UNCITRAL arbitration, ICC arbitration,
their concerns about getting a “fair shake,” investors generally arbitrate disputes on a confidential basis before a panel of arbitrators.78

When there is an investment dispute, investors evaluate the dispute resolution provision of a relevant treaty and determine if they have standing to initiate the treaty’s dispute resolution mechanism. While the scope and content of these provisions differ, the provisions in the investment treaty are generally understood to constitute a unilateral

and the courts of Belarus or Turkey having jurisdiction); Agreement for the Reciprocal Promotion and Protection of Investments, July 1, 1995, Egypt-Pol., art. 8(4) (allowing investor-state disputes to be settled by SCC arbitration; ICC arbitration, ad hoc arbitration under the UNCITRAL Rules, or ICSID arbitration), at http://www.unctad.org/sections/dite/iia/docs/bits/egypt_poland.pdf; Treaty Concerning Business and Economic Relations, Mar. 21, 1990, U.S.-Pol., art. IX [hereinafter U.S.-Poland BIT] (giving investors the choice of arbitrating at ICSID, through the ICSID Additional Facility Rules, through ad hoc UNCITRAL based arbitration, or using the rules of “any arbitral institution” that both parties agree to), at http://www.unctad.org/sections/dite/iia/docs/bits/US_poland.pdf; Agreement on the Promotion and Protection of Investments, Mar. 20, 1990, Italy-Bangl., art. 9, reprinted in 3 Int’l Ctr. for Settlement of Investment Disputes, Investment Treaties (providing that investment disputes can be resolved in the national courts, through ICSID arbitration, or through ad hoc UNCITRAL arbitration).

78. See, e.g., Mark Friedman & Gaetan Verhoosel, Arbitrating over BIT Claims, Nat’l L.J., Sept. 15, 2003, at 15 (describing BIT treaty claims and suggesting that investors often view BIT arbitrators as more fair than foreign courts). While none of the practitioners interviewed for this Article were aware of investors proceeding with investment treaty disputes before national courts, Juliet Blanch at Norton Rose has noted that some investment claims go to national courts, but this usually occurs when investors are unaware that they have an option to bring their claims against a Sovereign in a forum other than the Sovereign’s own national courts. See Blanch Interview, supra note 66. Investment treaty awards are largely confidential, and the vast majority of these cases are resolved by panels under the ICSID framework. There are also a significant number of decisions made by ad hoc tribunals operating under the UNCITRAL Rules. See Jagusch Interview, supra note 66 (estimating that half of investment treaty cases are submitted to ICSID and that, of the remaining half, as many as two-thirds are submitted to UNCITRAL arbitration); Pinsolle Interview, supra note 66 (estimating that approximately two-thirds of investment cases are arbitrated at ICSID, identifying two ICC investment arbitrations, and noting that the remainder are either UNCITRAL or SCC arbitrations); Reed Interview, supra note 66 (stating that the consensus is that most investment disputes are filed with ICSID and noting no one likely knows the precise number of UNCITRAL cases); see also Royal Inst. of Intl’l Affairs, International Environmental Disputes: International Forums for Non-Compliance and Dispute Settlement in Environmental Related Cases 9 (2001) (stating that “ICSID arbitration is one of the main mechanisms for the settlement of investment disputes under four recent multilateral trade and investment treaties”), at http://www.riia.org/pdf/research/sdp/envdisputes.pdf; Thomas L. Brewer, International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment, 26 Law & Pol’ly Int’l Bus. 633, 655-56 (1995) (explaining that one of the reasons ICSID is important is that “most bilateral investment treaties designate it as the prospective arbitration center for disputes, refer to it as an appointing authority, or indicate that its rules would be applicable in ad hoc arbitrations”); Malcolm D. Rowat, Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA, 33 Harv. Int’l L.J. 103, 118 (1992) (noting that “the frequency with which ICSID arbitration clauses are included in investment laws and treaties... illustrates ICSID’s growing stature among investors and host countries”).
offer by the Sovereign to settle disputes by arbitration, which the investor accepts by initiating arbitration under the treaty. The dispute process generally follows a relatively standard set of procedures, including: (1) submitting a notice of dispute to the Sovereign, (2) complying with the applicable waiting period, (3) electing where to resolve the dispute, and (4) taking the chosen procedure forward in accordance with the chosen mechanisms articulated in the investment treaty.

The next step in the process is appointment of the arbitral tribunal, which typically permits each party to appoint one arbitrator and requires the chair to be selected jointly by the two party-appointees, often with the help of an institution. It is standard for both party-appointed arbitrators and chairs to be well-known and respected figures in the areas of international public, economic, and investment law. The remainder of the procedure (including the process of procedural meetings, memorials and replies, interim relief, evidence gathering, hearings, awards, and annulment or set aside) depends

79. See Lew et al., supra note 46, at 764, 768; Jan Paulsson, Arbitration Without Privity, 10 ICSID Rev.-Foreign Investment L.J. 232 (1995); see also Coe, Taking Stock, supra note 1, at 1393 (explaining that NAFTA contains a “continuing offer to a class of potential claimants to arbitrate claims fitting within subject matter and temporal parameters enunciated in NAFTA’s text”); Sacerdoti, supra note 18, at 418 (describing how a Sovereign’s consent to ICSID arbitration “may be expressed in a law on foreign investments or in a multilateral or bilateral treaty, such as a BIT, made with a contracting State of which the investor is a national”).


82. See infra notes 371-75 and accompanying text (describing the credentials and background of investment arbitrators).

83. Each investment agreement specifies the institution to be used in case of a dispute. Each institution has a wide variety of rules, applied during the general dispute resolution process. See ICSID Additional Facility Rules, supra note 81, arts. 6, 9; ICSID, ICSID Convention, Regulations and Rules: Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings [hereinafter ICSID Rules], at http://www.worldbank.org/icsid/basicdoc/partD.htm (last visited Feb. 4, 2005); ICC Rules, supra note 81, arts. 9-10; SCC Rules, supra note 81, art. 16; UNCITRAL Rules, supra note 81, arts. 6-8, 15 I.L.M. at 704-05. For example, an investor who selects ad hoc arbitration under the UNCITRAL Rules is bound by the rules articulated in the individual investment treaty, the UNCITRAL Rules, and the law of the place of arbitration (generally determined by the arbitrators or the applicable institution).
upon the rules of the arbitration mechanism that the investor elected. and the arguments of the parties. Typically, parties exchange memorials setting out their case, evidence is exchanged, the parties make further submissions, both the evidence and law is debated during an oral hearing, and, thereafter, the tribunal issues an award.

As investment arbitration is based upon a model of commercial arbitration where there are strong presumptions of confidentiality, even though a Sovereign is involved, the dispute resolution process is not transparent. This means, unless one is a party (an investor or a

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84. See Jones, supra note 9, at 535 (describing the general process of a NAFTA investment treaty arbitration).

85. For example, if a Sovereign raises a jurisdictional objection, there may be a separate phase of the arbitration to address the issue of jurisdiction after which the dispute can proceed to the merits phase if appropriate. In contrast, some arbitrations combine both the merits and the jurisdictional phase. See, e.g., UNCITRAL Rules, supra note 81, art. 21 (2), 15 I.L.M. at 709-10 (noting that “the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question” but permitting the tribunal to “proceed with the arbitration and rule on such a plea in their final award”); see also Amended U.S. Model BIT, supra note 6, art. 28(4)(b) (requiring the tribunal to suspend proceedings on the merits if preliminary objections are filed).


87. There are a variety of critiques regarding the lack of transparency in the arbitration process: a variety of law review comments as well as NGOs have expressed numerous concerns about the procedural aspects of the arbitration process. See Ctr. for Int'l Envtl. Law, Synthesis of Major Concerns (Nov. 2003) (outlining CIEL's concerns regarding transparency), at http://www.ciel.org/Tae/FTAA_Miami_Nov1303.html; Howard Mann & Konrad von Moltke, NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment 3 (1999) [hereinafter Mann & von Moltke, NAFTA's Chapter 11] (expressing concern about the lack of transparency and inability to appeal decisions), at http://www.isisd.org/publications/publication.asp?no=408; Mann & von Moltke, Protecting Investor Rights, supra note 74, at 18-22 (outlining a variety of concerns regarding the transparency of the investor-state dispute resolution process); Pub. Citizen's Global Trade Watch, NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy (Sept. 2001) (expressing concern over the closed-door process of dispute resolution and the lack of publicly available documents), at http://www.citizen.org/publications/release.cfm?ID=7076; Shapren, supra note 16, at 329-30 (suggesting that arbitration “is a closed and unaccountable” process, minimal documentation about cases is available, there is no provision for amicus participation, and no standard appeals process); Julia Ferguson, Note, California's MTBE Contaminated Water: An Illustration of the Need for an Environmental Interpretive Note on Article II110 of NAFTA, 11 Colo. J. Int'l Envtl. L. & Pol'y 499, 505, 515 (2000) (describing the investor-state process as non-transparent and secretive). But see Lucien J. Dhooge, The North American Free Trade Agreement and the Environment: The Lessons of Metalclad Corporation v. United Mexican States, 10 Minn. J. Global Trade 209, 265-66, 278, 287-88 (2001) (critiquing the lack of transparency). While there are difficulties associated with transparency, some view these fears as slightly exaggerated. See infra notes 91, 92, 451 and accompanying text (describing the increasing transparency of the decision-making process and the variety of methods for holding decision makers accountable); see also naftalaw.org, Homepage, at http://www.naftalaw.org (last visited Feb. 4, 2005) (making pleadings, orders, awards,
Sovereign), there is minimal access to the pleadings and evidence, there is little opportunity for amici curiae participation, and often the decisions themselves are confidential and not made available to the public. Given the public nature of the rights at issue, parties are disseminating more awards and, in limited instances, tribunals permit third parties to participate in the dispute process. The United States and Canada, in contrast to other countries, have also taken the rare step of incorporating transparency obligations into recent trade agreements and model investment treaties.

III. CURRENT OPTIONS FOR ADDRESSING INCONSISTENT DECISIONS

Inconsistent decisions generally arise under three typical scenarios. First, different tribunals can come to different conclusions about the same standard in the same treaty. This might, for example, involve the North American Free Trade Agreement ("NAFTA") tribunals coming to different conclusions about the meaning of the same and other documentation in NAFTA cases publicly available). Nevertheless, particularly as the need for confidentiality in private commercial disputes does not necessarily apply in investment arbitration, the choice of a private decision-making body for public issues is an area for further consideration.

88. The level of confidentiality will be determined both by the applicable arbitration rules as well as the arbitration law at the place of arbitration. As a result, there is a broad spectrum of potential confidentiality obligations. Compare Esso/BHP v. Plowman, 128 A.L.R. 391 (holding that arbitrations in Australia are not confidential unless the parties so specify), with Ali Shipping Corp. v. Shipyard "Troigr," 2 All E.R. 136 (1998) (determining that England has an implied duty of confidentiality). See also Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, art. 48(5), 4 I.L.M. 532, 540 (1965) [hereinafter ICSID Convention] (preventing publication of an award without the parties' consent); ICSID Rules, supra note 83, arts. 6, 48(4) (requiring arbitrators to sign a form promising to keep all information confidential and preventing ICSID from publishing awards without party consent); SCC Rules, supra note 83, arts. 9, 20(3) (requiring the SCC Institute to maintain the confidentiality of the dispute and the arbitral tribunal to keep the proceedings confidential); UNCITRAL Rules, supra note 81, art. 32(5), 15 I.L.M. at 713 (providing that, although there is no express requirement for general arbitration confidentiality, that the consent of the parties be obtained prior to award amount disclosure).


NAFTA article. Second, different tribunals organized under different treaties can come to different conclusions about disputes involving the same facts, related parties, and similar investment rights. These types of cases will typically involve investments that have been structured to take advantage of multiple investment treaties so that, when a dispute arises, claims can be brought by related corporate entities under different treaties. Finally, different tribunals organized under different investment treaties will consider disputes involving a similar commercial situation and similar investment rights, but will come to opposite conclusions. The increase in the number of investment arbitrations and the tactical structuring of investments to create claims under multiple investment treaties increases the likelihood of inconsistent decisions.

Under the current framework, the options for addressing these inconsistent decisions are limited. There is no coherent system for addressing inconsistencies across the investment treaty network and, as demonstrated by the discussion of the relevant cases in Part IV, there is no uniform mechanism to correct inconsistent decisions. A patchwork of mechanisms was inherited from international commercial arbitration, but these neither permit review of the merits nor correction of legal errors. Instead, there are narrow options to review awards to address procedural deficiencies.

These narrow options range from requesting a modification of an award under applicable rules to attacking the award in national courts on a limited number of grounds. In the first instance, a dissatisfied party can ask either the tribunal or an arbitral institution to review and modify an award. The rules applicable to the arbitration strictly circumscribe what type of conduct might justify modification, and only minor clerical errors tend to be corrected. As a result, this option is not often used and is unlikely to result in a review of the merits or a substantive change to the award.

The most utilized option in investment arbitration for attempting to remedy inconsistent decisions is to attack the award after it is made. Specifically, parties that have received inconsistent arbitral awards

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91. See ICSID Rules, supra note 83, art. 49 (providing parties forty-five days to request a rectification of a clerical or arithmetical error or a decision on a question which the tribunal failed to address, provided the parties meet a variety of conditions, including the payment of a fee); ICC Rules, supra note 81, art. 29(1) (noting the tribunal may correct clerical, computational, or typographical errors within thirty days); SCC Rules, supra note 83, art. 37 (permitting the correction of awards for "miscalculation" and "clerical errors"); UNCITRAL Rules, supra note 81, art. 36, 15 I.L.M. at 715 (permitting a party thirty days to request a correction of clerical, typographical, or computational mistakes). But see ICC Rules, supra note 81, art. 27 (requiring that the award be scrutinized by the ICC Court).

have options to either: (1) annul the award or (2) try to vacate an award at the seat of the arbitration and/or contest enforcement at the place where enforcement is sought. But which option is available depends wholly upon whether an award is rendered under the ICSID Convention\(^9\) or under a different system (for example an ad hoc arbitration conducted under the UNCITRAL Rules).\(^9\)

**A. Attacking Inconsistent Awards Rendered Under the ICSID Convention**

In order to have an ICSID Convention arbitration, both the investor's country and the Sovereign must be signatories of the ICSID Convention and there must be a qualifying dispute.\(^9\) For these ICSID Convention arbitrations, a losing party can only attack an award under the ICSID Convention. ICSID permits parties to seek annulment of an award through an ad hoc committee of three arbitrators who are appointed entirely by ICSID.\(^9\) An annulment proceeding is not an appeal of the legal merits,\(^9\) rather, the ad hoc committee examines the procedural propriety of the award. Annulment under the ICSID Convention is quite limited. The five available grounds are: (1) the original arbitral tribunal was not properly constituted, (2) the arbitral tribunal manifestly exceeded its powers, (3) a tribunal member was corrupt, (4) there was a serious departure from a fundamental rule of procedure, or (5) the award does not state the reasons upon which it was based.\(^9\) A tribunal's mistake of law or fact cannot justify the annulment of an award as neither of these are enumerated grounds.\(^9\)

When ICSID arbitration was first being tested, there was a tendency to construe the limited bases of review broadly in order to re-examine the substantive merits of the case. Subsequent ad hoc com-

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93. ICSID Convention, *supra* note 88, art. 52, 4 I.L.M. at 541.
94. In a “pure” ICSID arbitration (where the Sovereign and the state of which the investor is a national are both signatories to the ICSID Convention), the ICSID Convention applies to enforcement of ICSID awards. However, where only one of the parties to the arbitration is a signatory to the ICSID Convention, there are generally two options: (1) ad hoc arbitration under the UNCITRAL Rules, or (2) the ICSID Additional Facility that is supervised by ICSID but outside the ICSID treaty framework for enforcement purposes. See, e.g., Alvarez & Park, *supra* note 14, at 374-75.
95. In order to have an ICSID Convention award, both the investor's country and the Sovereign must be signatories of the ICSID Convention, the dispute must qualify for ICSID jurisdiction under article 25 of the ICSID Convention, the dispute must be registered at ICSID, and the dispute must proceed further to the ICSID Arbitration Rules. See generally Christoph H. Schreuer, The ICSID Convention: A Commentary (2001).
96. ICSID Convention, *supra* note 88, art. 52, 4 I.L.M. at 541.
97. Schreuer, *supra* note 95, at 891-94.
98. ICSID Convention, *supra* note 88, art. 52(1), 4 I.L.M. at 541; Schreuer, *supra* note 95, at 881-1075; *see also* Pinsolle, *supra* note 42 (discussing the “manifest disregard” standard).
mittees, however, confirmed the limited nature of review. If a committee finds one of the five enumerated defects, it has the authority to annul the award completely or in part. Once an annulment proceeding is completed, there are no further opportunities to challenge inconsistent ICSID awards, and they are fully enforceable as court judgments. Ultimately, because legal errors cannot be corrected in ICSID awards, the possibility of inconsistent awards is an accepted reality at ICSID, and the correctness of decisions has been sacrificed for the sake of finality.

B. Attacking Inconsistent Awards Not Rendered Under the ICSID Convention

Several significant investment treaty arbitrations have occurred at ICSID under their Additional Facility Rules, under the auspices of another prominent institution, such as the ICC, and in ad hoc arbitration conducted under the UNCITRAL arbitration rules. While most investment arbitrations take place under the auspices of ICSID, there are a variety of legal, commercial, and tactical

100. Schreuer, supra note 95, at 901-03; see also Rubins, Judicial Review, supra note 92, at 360 n.4 (suggesting that in light of two recent annulment cases, Wena Hotels v. Arab Republic of Egypt and Aguas de Aconquijija & Vivendi v. Argentina, there is a much more narrow and conservative approach to ICSID annulment).

101. ICSID Convention, supra note 88, art. 52(3), 4 I.L.M. at 541.

102. Similar to a final judgment in the Sovereign's Court, arbitration awards are immediately enforceable under the ICSID Convention as if they were a final judgment of the Sovereign's courts. ICSID Convention, supra note 88, art. 54, 4 I.L.M. at 541-42; see also Gabrielle Kaufmann-Kohler, Globalization of Arbitral Procedure, 36 Vand. J. Transnat'l L. 1313, 1320 (2003) (noting that ICSID awards are enforced in the same manner as local judgments); Eilhu Lauterpacht, International Law and Private Foreign Investment, 4 Ind. J. Global Legal Stud. 259, 273 (1997) (explaining that signatories to the ICSID Convention must provide “domestic legislation for the direct enforceability of ICSID awards just as if they were the judgments of foreign courts”).

103. See Schreuer, supra note 95, at 893-94 (explaining that there are two potentially conflicting principles at work in the annulment process—“substantive correctness” and finality—and that ICSID annulment rules were designed to balance these concerns by providing emergency relief for egregious violations of select basic principles.

104. Rubins, Judicial Review, supra note 92, at 360-61; see also infra Part IV (discussing two Czech Republic arbitrations that occurred on an ad hoc basis under UNCITRAL Rules).

105. See ICSID, ICSID Cases, at http://www.worldbank.org/icsid/cases/cases.htm (last visited Feb. 4, 2005); supra note 78 and accompanying text (describing where investment treaty cases are commonly brought).

106. There are some instances when arbitration might be impermissible; in particular, the ICSID Convention is not permitted if both nations are not parties to the ICSID Convention. This restriction may, however, be evaded if the ICSID Additional Facility Rules are used, and if one sovereign is party to the ICSID Convention. See ICSID Convention, supra note 88, art. 25, 4 I.L.M. at 536 (requiring, in order for the Convention to have jurisdiction that one party be a Contracting State (i.e., a signatory to the ICSID Convention) and that the other party be a national of another Contracting State); Jake A. Baccari, The Loewen Claim: A Creative Use of NAFTA’s Chapter 11, 34 U. Miami Inter-Am. L. Rev. 465, 487-88 (2003) (stating that “[i]f only
reasons that an investor might not initiate investment arbitration under the ICSID Convention.

Attacking non-ICSID Convention awards is different, but not easier. Unlike under the ICSID Convention, awards rendered under either the New York Convention\textsuperscript{109} or the Panama Convention\textsuperscript{110} do not

the investor or the government is a party to the [ICSID] Convention but not both, the claim may be brought under the Additional Facility Rules of the ICSID Convention\textsuperscript{9}"; Patrick Del Duca, The Rule of Law: Mexico’s Approach to Expropriation Disputes in the Face of Investment Globalization, 51 UCLA L. Rev. 35, 88 n.298 (2003) (noting ICSID’s requirement that both states be parties to the ICSID Convention before the treaty is applicable, and considering that only the United States is party to the ICSID Convention of all the NAFTA member states, making the ICSID Convention inapplicable as between NAFTA members); Gregory W. MacKenzie, ICSID Arbitration As a Strategy for Levelling the Playing Field Between International Non-Government Organizations and Host States, 19 Syracuse J. Int’l L. & Com. 197, 222 (1993) (explaining the requirements for ICSID jurisdiction). Likewise, if the requirements for jurisdiction under article 25 of the ICSID Convention are not met, it would be desirable to use another arbitration mechanism to resolve the dispute. For example, if the dispute does not arise directly out of an investment, ICSID does not have jurisdiction. Amco v. Republic of Indonesia, Decision on Jurisdiction, TT 122-27, ICSID (W. Bank) Case No. ARB/81/1, 27 I.L.M. 1281, 1310 (1998) (holding tax fraud counterclaim was not within the jurisdiction of an ICSID tribunal because it did not arise directly out of the investment). See generally Schreuer, supra note 95; see also R. Doak Bishop et al., Strategic Options Available when Catastrophe Strikes the Major International Energy Project, 36 Tex. Int’l L.J. 635, 654 (2001) (describing ICSID’s jurisdictional mechanisms); George M. von Mehren et al., Navigating Through Investor-State Arbitrations—An Overview of Bilateral Investment Treaty Claims, 59 Disp. Resol. J. 69, 75 (2004).

107. There are also commercial reasons that indicate it may be more appropriate to arbitrate outside ICSID. ICSID Arbitration Rules, for instance, do not provide for interim relief, important in the context of commercial disputes when time is of the essence. As an alternative, if the investment treaty provides for ad hoc arbitration, one might prefer to select the UNCITRAL Arbitration Rules which provide interim measures. See UNCITRAL Rules, supra note 81, art. 26, 15 I.L.M. at 711. Likewise, a party might wish to choose an entity like the ICC which, in addition to interim relief, also provides institutional oversight on areas related to review of awards. See ICC Rules, supra note 81, arts. 23, 27. These choices depend upon the procedural mechanisms provided in the applicable default rules.

108. There are a variety of tactical reasons for choosing to arbitrate outside of ICSID. For example, considering ICSID’s unique right to reject arbitration requests, if there are concerns about the request’s acceptance, one might choose to bypass ICSID, saving time and money by initially initiating arbitration through an alternative arbitration mechanism. See ICSID Convention, supra note 88, art. 36, 4 I.L.M. at 538 (permitting ICSID to refuse registration if the dispute is “manifestly outside the jurisdiction” ICSID); see also Peterson, All Paths, supra note 69 (suggesting that the inclusion of a “menu” of arbitral options may permit investors to “rule shop” for rules most favorable to their interests). Likewise, if one wanted to avoid ICSID oversight, perhaps because of confidentiality concerns arising out of the fact that registration of a Notice of Arbitration is available to the public, one might choose a mechanism other than ICSID arbitration. See ICSID, List of Pending Cases, at http://www.worldbank.org/icsid/cases/pending.htm (last visited Feb. 4, 2005) [hereinafter List of Pending Cases] (listing cases that are currently pending before ICSID).

have an internal annulment procedure. As they are not enforceable as judgments, enforcement and recognition must be sought from local courts.\(^{111}\) This emphasis on national courts—rather than internal annulment procedure—has an impact upon inconsistent awards. It means that dissatisfied parties have more opportunities than their ICSID counterparts to forum shop and attack awards.\(^{112}\) Inconsistent arbitral awards can be attacked: (1) at the seat of arbitration in a vacatur application, and (2) at a place where enforcement is sought.\(^{113}\)

http://www.uncitral.org/english/status/status-e.htm (last modified Apr. 16, 2004) [hereinafter UNCITRAL NYC Signatories] (listing countries that have ratified the New York Convention; this list does not include countries such as Bermuda, the Cayman Islands, Iraq, Taiwan, Turkmenistan, Tajikistan, and the United Arab Emirates). In order to receive a “New York Convention award” and qualify for enforcement under the New York Convention, both parties to the dispute must be signatories of the New York Convention and the award itself must be rendered in a country that is also a signatory to the New York Convention. Domenico Di Pietro & Martin Platte, Enforcement of International Arbitration Awards: The New York Convention of 1958, at 22-29 (2001).

110. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42 [hereinafter Panama Convention], available at http://www.oas.org/juridico/english/treaties/b-35.htm. The New York and Panama Conventions are similar. Di Pietro & Platte, supra note 109, at 18. Enforcement under the Panama Convention, however, is limited to “commercial transactions,” arguably a more limited requirement than the “defined legal relationship, whether contractual or not, concerning a matter capable of settlement by arbitration” provision found in the New York Convention. Panama Convention, supra, art. 1; New York Convention, supra note 109, art. II, 21 U.S.T. at 2519; James J. Woodruff, II, The Use and Enforcement of Arbitration Agreements in U.S. Courts with a Focus on the Western Hemisphere, 11 Currents: Int’l Trade L.J. 51 (2002). In contrast to the New York Convention, which has more than 130 signatories from around the globe, the Panama Convention has a much smaller reach and has been signed by only nineteen, mostly South American, countries. See UNCITRAL NYC Signatories, supra note 109 (listing signatories to the New York Convention); Organization of American States’ Secretariat for Legal Affairs (“OAS”), B-35: Inter-American Convention on International Commercial Arbitration, at http://www.oas.org/juridico/english/Sigs/b-35.html (last visited Feb. 4, 2005) (listing the signatories of the Panama Convention).

111. Annulment is the only remedy available under the ICSID Convention. Enforcement of the New York Convention, on the other hand, provides mechanisms for setting aside or challenging awards at the enforcement stage. ICSID Convention, supra note 88, art. 53, 4 I.L.M. at 541; see also Marc R. Poirer, The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist, 33 Envtl. L. 851, 865 n.61 (2003) (noting the relative difficulty of challenging ICSID awards as compared to New York Convention Awards).

112. One of the difficulties faced when choosing the arbitration’s venue is the local variations that can arise. Although the place of arbitration affects the law applicable to any vacatur proceeding, it can also impact the practice of law restrictions, rules governing third-party intervention and amicus briefs, the availability of appeal, the speed with which the docket advances, the trust in the integrity of the local judiciary, the ability to avoid specific judges, rules regarding the cost, and expertise of the local bench and bar in the law of international investment, treaties, and arbitration. Coe, Taking Stock, supra note 1, at 1444; William W. Park, Illusion and Reality in International Forum Selection, 50 Tex. Int’l L.J. 135, 180-81 (1995) [hereinafter Park, Illusion and Reality].

113. Gary B. Born, International Commercial Arbitration 704-05 (2d ed. 2001); Alan Redfern & Martin Hunter, Law & Practice of International Commercial Arbi-
This part considers how to attack arbitration awards in both of these contexts and the implications for increasing the number of national courts involved in “rectifying” inconsistent decisions.

1. Attacking Awards at the Place of Arbitration

Inconsistent arbitral awards can be challenged at the place of arbitration. This means the judicial review of an award is governed by the local arbitration law of the arbitral seat. While the grounds for challenging awards tend to be narrow, certain trends have emerged for the review of awards at the seat of arbitration. At one end of the spectrum, national laws permit the awards to be reviewed on issues of law. At the other end of the spectrum, national legislation only permits a challenge on specific, narrow grounds designed to promote the procedural integrity of the arbitration process.

Some countries permit review of certain aspects of the merits. If an arbitration has a seat in the United Kingdom, the United States, New Zealand, or Argentina, there are opportunities to evaluate

\[\text{citation} 415-89\ (3d \text{ed.} 1999); \text{see also Park, Illusion and Reality, supra note 112, at 181-82\ (1995) (noting the distinction between challenging awards at the seat of arbitration and enforcement of awards).}\]

114. In England, Wales, and Northern Ireland, the 1996 Arbitration Act permits parties to ask English courts to rule on substantive points of law at issue in the arbitration at two different junctures: section 45 allows a court to determine a preliminary point of law that substantially affects the rights of the parties at the outset of a case; section 69 permits courts to rule on issues of law decided by the parties that substantially affect the parties' rights when the decision is “obviously wrong” or involves a question of “general public importance” and the award is “at least open to serious doubt.” 1996 English Arbitration Act, in Russell on Arbitration 427, 448, 456-57 (22d ed. 2003); see id. at 433 (limiting the scope of these provisions to arbitrations in England, Wales, and Northern Ireland); Stewart R. Schackleton, Annual Review of English Judicial Decisions on Arbitration—2000, 4 Int'l Arb. L. Rev. 178, 193-94 (2001).

115. The United States permits reviews to include notes on a “manifest disregard of the law.” Such a finding permits courts to strike down decisions in cases where arbitrators understood the law, correctly stated it, and subsequently ignored it. Carter v. Health Net of Cal., Inc., 374 F.3d 830, 838 (9th Cir. 2004); Pike v. Freeman, 266 F.3d 78, 86 (2d Cir. 2001); Fahnestock & Co. v. Waltman, 935 F.2d 512, 516 (2d Cir.1991); see also infra notes 129, 136 and accompanying text (describing the “manifest disregard” standard under U.S. law).

116. Section five of the Second Schedule of the 1996 New Zealand Arbitration Act permits review for issues of law. Tomas Kennedy-Grant, New Zealand, in International Handbook on Commercial Arbitration, at annex I-22 (Jan Paulsson ed., 2004) [hereinafter International Handbook]. Although this arises primarily in the context of domestic arbitrations, this could be relevant in international arbitration should the parties agree to such a provision (i.e., in an investment treaty or otherwise). See id.

117. Horacio A. Grigera Nañón, Argentina, in International Handbook, supra note 116, at 28 [hereinafter Argentina] (noting that the Argentine Civil Code permits appeal on both law and facts providing that “the same appeal may be instituted against an arbitral award as may be instituted against court judgments, as long as such appeal has not been waived in the agreement to arbitrate”). Appeal on issues of law may only be available, however, for awards rendered in Argentina involving domestic disputes. Id. There is no indication, however, of what constitutes a “domestic” dispute.
the legal merits. The trend, however, is not to review the merits but to circumscribe the scope of judicial review—typically through narrow standards similar to grounds enumerated in the New York Convention. In countries such as Switzerland, France, South Africa, and Costa Rica, the grounds for setting aside are based upon procedural integrity. In contrast, other countries, such as South Korea,

Most countries have enacted very limited grounds for vacating arbitral awards, and many of these are similar to the grounds for denying enforcement under the New York Convention. Robert Briner, Switzerland, in International Handbook, supra note 116, at 30-31, 33-36, annex II [hereinafter Switzerland] (recognizing that Swiss arbitration law sets out a series of standards in article 190 justifying vacatur of an arbitral award that are similar to the New York Convention, and also, provided the parties have not excluded bases for enforcement under article 190, allows the enforcement standards of the New York Convention to act as the default); Howard M. Holtzmann & Donald Francis Donovan, United States, in International Handbook, supra note 116, at 62 [hereinafter United States] (noting that the specific grounds for vacating and enforcing awards under the Federal Arbitration Act, though not identical, are nevertheless similarly construed by the courts); Tang Houzhi & Wang Shengchhang, People’s Republic of China, in International Handbook, supra note 116, at 35, 41, annex II (noting that, under the 1995 Arbitration Law of the People’s Republic of China, the grounds for setting aside an award and refusing enforcement of an award in article 70 refer to the same substantive standards as in article 260 of the Chinese Civil Procedure Law); Falil S. Nariman, India, in International Handbook, supra note 116, at 41 (noting that set aside and enforcement actions are both governed by standards articulated in the New York Convention).

In Switzerland, there are only five grounds upon which an award may be vacated: (1) improper constitution of the arbitral tribunal; (2) lack of jurisdiction of the arbitral tribunal; (3) when the award goes beyond the issues submitted for consideration or fails to consider an issues it was required to decide; (4) failure to adhere to due process; or (5) violation of public policy. Switzerland, supra note 118, at 33-36, annex II, art. 190.

Article 1502 of the French Arbitration Law provides standard grounds for setting aside awards, including: (1) an arbitration agreement does not exist, is invalid, or has expired; (2) the tribunal was irregularly constituted; (3) the arbitrator has not rendered a decision in accordance with his/her mandate; (4) due process has not been respected; or (5) the decision is contrary to international public policy. Yves Derains & E. Goodman-Everard, France, in International Handbook on Commercial Arbitration 57-60.

Section 33 of the South African Arbitration Act of 1965 more narrowly defines reasons for vacating awards. Awards may be set aside for: (1) arbitrator misconduct, (2) a gross irregularity or an excess of power in the arbitration, or (3) an improperly obtained award. Patrick M.M. Lane, South Africa, in International Handbook, supra note 116, at 22, annex I-11.

In Costa Rica, appeals must relate to nullification. The issue of nullification may arise in the following situations: (1) an award is rendered after the time period for making it has expired, (2) the claim was inappropriately submitted for arbitration, (3) due process was violated, (4) the decision was contrary to public policy, or (5) the tribunal lacked jurisdiction. Costa Rica, in International Handbook, supra note 116, at annex I-15-16, arts. 64-67.

The grounds for setting aside an arbitration award in South Korea are the following: (1) where the appointment of arbitrators was not conducted in accordance with the law or the arbitration agreement; (2) a party was incompetent or his representative has now been lawfully appointed; (3) an award calls for action prohibited by Korean law; (4) there was not due process; (5) there was a forced confession; (6) there was forged evidence or false testimony; (7) a judgment or administrative decision al-
Indonesia, Israel, and Saudi Arabia have broader grounds designed to invite more challenges and sometimes permit vacatur for contradictory reasoning. This presumably means contradictory reasoning within a single award, but the statutes do not prohibit reviewing courts from considering contradictions with other awards.

Regardless of the grounds enumerated in national legislation, there is a residual opportunity to challenge an award. This is true irrespective of whether a court is interpreting a broad statute or is broadly interpreting a narrow statute. Particularly because investment treaties the basis of the award; or (8) newly discovered evidence materially affects the award. Soonwoo Lee, Korea, in International Handbook, supra note 116, at 21-22, Arbitration Law of Korea, art. 13, annex I-3 to -4.

124. Indonesian arbitration law specifically permits an award to be set aside if it "contains contradictory decisions." Sudargo Gaetama, Indonesia, in International Handbook, supra note 116, at annex I-4, art. 643. There are also a variety of other grounds justifying vacatur in Indonesia, including: (1) the decision goes beyond the terms of reference; (2) the arbitrators were without mandate; (3) the arbitrators were not competent to render an award in the absence of others; (4) the award decides issues not before the tribunal; (5) the tribunal failed to decide issues before it; (6) the procedural formalities have been "infringed" upon; (7) the award is based on "false" documents; (8) "decisive" documents are discovered after the award has been rendered; and (9) the award is based upon fraud or deceit. Id.

125. Section 24 of the 1968 Israel Arbitration Law provides that awards can be set aside when: (1) the arbitration agreement is invalid; (2) the arbitrators were not properly appointed; (3) the arbitrators acted without authority; (4) a party was not given an opportunity to state its case; (5) the arbitrator did not determine an issue; (6) the arbitrators did not give reasons for their decision; (7) the award was not in accordance with the law; (8) the award was made after the period for making it expired; (9) enforcement would be contrary to public policy; or (10) any of the grounds established for setting aside an Israeli court's final judgment. Smadar Ottolenghi, Israel, in International Handbook, supra note 116, at 21-22, annex I-5.

126. The requirements in Saudi Arabia are slightly broader, permitting vacatur when: (1) there is no valid arbitration agreement; (2) an arbitrator was biased; (3) there was no fair hearing; (4) an arbitrator exceeded his/her authority; (5) the tribunal's composition was not in accordance with the arbitration agreement; (6) the form and contents of the award do not comply with statutory obligations; and (7) the award violates public policy. Saudi Arabia, in International Handbook, supra note 116, at 28-29 [hereinafter Saudi Arabia].

127. See supra note 124 (describing Indonesia's position); see also Argentina, supra note 117, at 28 (noting that in Argentina, a ground for annulment occurs when an "award contains contradictory decisions rendering it incongruous"); Angélicos C. Foustoucos & Stelios Koussoulis, Greece, in International Handbook, supra note 116, at 32, Greek Code of Civil Procedure, art. 897, annex II-9 to -10 (permitting annulment where an award "is not incomprehensible or if it contains contradictory provisions").

128. Even where local law might permit a full appeal, Professor Brower suggests that NAFTA's agreement to final and binding arbitration prevents a judicial review of the merits of NAFTA awards. Charles H. Brower II, Structure, Legitimacy, and NAFTA's Investment Chapter, 36 Vand. J. Transnat'l L. 37, 83 (2000) [hereinafter Brower, Structure]; see also Saudi Arabia, supra note 126, at 28 (noting it is "unclear" whether Saudi Arabia would include "a review of the merits of the award").

129. In the United States, awards can be set aside for "manifest disregard" of the law despite the fact that this ground is not enumerated in the Federal Arbitration Act. See Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (articulating the "manifest disregard" dictum followed by subsequent courts), overruled on other grounds by Rodriguez de
ties do not specify the place of arbitration, there may be an opportunity for parties to select a place of arbitration that has advantageous vacatur rules or judges who are likely to interpret a statute broadly.

2. Attacking Awards at the Enforcement Phase

Initiating a vacatur proceeding is an option to challenge the award at the place of arbitration. In contrast, there are also indirect opportunities to attack awards by blocking an award’s enforcement; and these challenges can be made in different courts where successful parties are trying to enforce upon assets.

The standards for blocking enforcement under the New York or Panama Conventions are relatively similar to those reasons for setting aside awards—but provide more uniformity as the treaties have been ratified by many countries and those standards have been implemented in local legislation. This means, for example, that the New


130. In contrast to investment treaties, the ICSID Convention designates Washington, D.C. as the default place of arbitration. ICSID Convention, supra note 88, arts. 62-63, 4 I.L.M. at 543.

131. Although the parties can, in theory, agree to the place of arbitration, this does not often happen as a result of competing tactical considerations. Consequently, the place of arbitration is often determined by the arbitration institute pursuant to the applicable rules; this should minimize a possible adverse impact caused by “forum shopping.” See ICSID Additional Facility Rules, supra note 81, art. 20 (permitting the tribunal to set the place of arbitration in consultation with ICSID); ICC Rules, supra note 81, art. 14 (permitting the ICC Court to set the place of arbitration); SCC Rules, supra note 81, art. 13 (permitting the SCC Institute to set the place of arbitration); UNCITRAL Rules, supra note 81, art. 16, 15 I.L.M. at 708 (allowing the arbitral tribunal to set the place of arbitration).


133. As noted earlier, the ICSID Convention’s internal annulment procedure makes the Convention inapplicable to NAFTA disputes as neither Canada nor Mexico are signatories to the ICSID Convention. Consequently, challenges to NAFTA awards occur within the courts of the place of arbitration, which apply local standards for vacatur. There have been three vacatur actions under NAFTA (two initiated by Mexico and one by Canada), and all have occurred in Canadian courts. Enforcement under NAFTA uses the New York Convention’s normal method of enforcing foreign commercial arbitration awards. Coe, Taking Stock, supra note 1, at 1386 n.8; see also Coe, Domestic Court Control, supra note 132 (describing enforcement mechanisms of
York Convention, although adopted in various forms, has created an overall structure that limits the grounds for attacking arbitral awards. Specifically, enforcement may be denied only when: (1) the parties to the arbitration agreement were under some incapacity or the agreement was otherwise invalid; (2) the losing party was not given proper notice of the arbitration proceedings or was otherwise unable to present its case; (3) the award addresses issues beyond the scope of the submission to arbitration; (4) the arbitral procedure was not in accordance with the parties' agreement or contradicted the law of the place of arbitration; (5) the award has not become binding on the parties or has been set aside by a court in the country where the award was made; (6) the subject matter of the dispute is not capable of settlement by arbitration; and (7) recognition would be contrary to the public policy of the country of enforcement.\(^{134}\)

Because of the New York Convention's structure, awards cannot be annulled or appealed. More to the point, none of the enumerated grounds permits an award to be denied recognition because it is wrong as a matter of law or inconsistent with other arbitral awards. Nevertheless, as with vacatur, narrow grounds for denying enforcement of an award do not necessarily prevent a local court from interpreting the provisions expansively to take a "hard look" at the award in a manner that might appear to be a review of the legal merits.

3. The Difficulties Arising from National Court Intervention

Given an investor's opportunity to choose the method of resolving treaty disputes with sovereigns\(^{135}\) and its ability to apply to many national courts in efforts to secure enforcement of an award, domestic arbitral regimes have an increasing influence on the consideration of NAFTA and describing the perceived potential for disparate results among domestic courts).

134. New York Convention, supra note 109, art. V, 21 U.S.T. at 2520. The grounds for denial of enforcement are similar under the Panama Convention. The Panama Convention provides that recognition may be refused under the following conditions: (1) when "the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made"; (2) when "the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense"; (3) the decision "concerns a dispute not envisaged in the agreement between the parties to submit to arbitration"; (4) the "constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties"; (5) "the decision is not yet binding on the parties or has been annulled or suspended"; (6) "the subject of the dispute cannot be settled by arbitration"; or (7) recognition "of the decision would be contrary to the public policy." See Panama Convention, supra note 110, art. 5.

135. See supra notes 75-78 and accompanying text (noting how investors can choose the dispute resolution method and, as a result, may have the opportunity to forum shop by picking ad hoc arbitration over ICSID Convention arbitration).
inconsistent arbitral awards. As nations with limited resources are obligated to make massive cash outlays for violations of investment treaties, they will become more aggressive in their attacks on unfavorable arbitral awards, and push the investor-state struggle back into national courts. In the well-known Metalclad case, for example, the ultimate outcome of the award was in part dictated by the application of domestic Canadian arbitration law. If the reviewing Canadian court had found that the NAFTA award was not “commercial” within the meaning of British Columbia’s International Commercial Arbitration Act, the court could have reviewed the award for errors of law under the domestic arbitration law. Instead, it applied the more

136. For example, neither the standards enumerated in the U.S. Federal Arbitration Act nor the UNCITRAL Model Law on Arbitration (adopted by Canada) generally permit a reviewing court to inquire into the merits of the case. This would arguably preclude a court from inquiring into the legal basis for decisions, and thus prevent the correction of inconsistent decisions. Rubins, Judicial Review, supra note 92. But see supra note 129 and accompanying text (describing how U.S. courts review arbitration awards for “manifest disregard” of the law).

137. This is certainly true for developing nations. With limited national resources and small gross domestic products, developing nations may be willing to fight even harder to retain what resources they have. Moreover, investment awards are often colored by issues of sovereignty and political ideology, and may be accompanied by domestic political pressure compelling Sovereigns to challenge awards, even if only to show their constituents that all available methods of recourse have been exhausted. Rubins, Judicial Review, supra note 92, at 375. The surprising development is that capital-exporting nations are increasingly willing to avidly fight investment treaty cases tooth and nail. This holds particularly true in the context of claims made against Canada and the United States under NAFTA: “[W]hen the shoe is on the other foot perceptions of fairness may be quite different, and the industrialized countries may not be enthusiastic about playing by the same rules.” Alvarez & Park, supra note 14, at 367. Regardless of the respondent’s status as a capital-importing or capital-exporting country, the right standards must be applied in the right way so as to avoid unfair application of an unfair standard.


140. The reviewing court held that the award was “commercial” and, as a result, reviewed the decisions using the limited grounds for review found in the International Commercial Arbitration Act, which had limited grounds for review similar to the New York Convention. See Metalclad Judgment, supra note 139, ¶¶ 39-49 (holding that the International Commercial Arbitration Act was applicable because the investment was of a commercial nature and arose out of an investment relationship). Some commentators suggest that, even in this limited set aside context, the court handled matters of substantive accuracy. See Charles H. Brower II, Beware the Jabberwock: A Reply to Mr. Thomas, 40 Colum. J. Transnat’l L. 465 (2002) [hereinafter Brower, Beware] (probing further into the analysis of Judge Tysoe); Charles H. Brower II, Investor-State Disputes Under NAFTA: The Empire Strikes Back, 40 Colum. J. Transnat’l L. 43, 43, 68 (2001) (referring to Judge Tysoe’s “four elements of heightened review”); Coe, Judicial Review, supra note 1, at 1411; Todd Weiler, Metalclad v. Mex-
deferential review of the International Commercial Arbitration Act, which was based upon the standards in the UNCITRAL Model Law that do not favor a review on the merits.

As more courts begin to consider vacatur or a challenge to enforcement, an increase in the number of reviewing courts adds the possibility for further obfuscation of the meaning of international investment rights. First, there is an increased risk of politicizing the oversight of arbitral awards. As issues of international and domestic public policy “loom large” there is a real possibility that national courts will be tempted to use local law to vitiate an award. Second, because of the lack of uniformity and the patchwork nature of the oversight, clever investors will strategically pick forums to favor their interests. Since enforcement proceedings may be brought in multiple jurisdictions where there are assets, the possibility of going to different fora encourages dissatisfied parties to forum shop for the best result and promotes inefficiency. The practical reality is that practitioners must be willing to consider the issues of national courts to defend their client’s interests—whether a court at the seat of arbitration or where enforcement is sought. While active representation of a client’s interests should not necessarily undermine the legitimacy of the system, these active challenges may lead to an increase in diverse interpretations of the same award in different forums. With an increase in the number of courts where awards can be attacked and the lack of any centralizing authority, there is a strong possibility that domestic courts will be unable to harmonize the impact of inconsistent decisions. Should reviewing courts choose to promote incoherent and indeterminate decisions, the legitimacy of the arbitration system will be further undermined.

140. Rubins, Judicial Review, supra note 92, at 361.
141. See id. at 203 (noting that “[d]omestic courts are also ill-equipped to promote substantive unification because they are not subject to any centralizing authority”). These difficulties are exacerbated when related parties bring multiple treaty claims pertaining to the same investment and one award is rendered under the ICSID Convention, leaving the others able to apply to a variety of national courts.
IV. THE INCONSISTENT DECISIONS

In the past five years, there have been a variety of inconsistent decisions in investment treaty arbitration. Inconsistency creates uncertainty and damages the legitimate expectations of investors and Sovereigns. Investors that have structured their investments in a manner to take advantage of coverage afforded by investment treaties suddenly discover they will not receive those benefits. Likewise, Sovereigns find themselves in an untenable position of explaining to taxpayers why they are subject to damage awards for hundreds of millions of U.S. dollars in one case but not another.

The inconsistent cases generally break down into three categories: (1) cases involving the same facts, related parties, and similar investment rights, (2) cases involving similar commercial situations and similar investment rights, and (3) cases involving different parties, different commercial situations, and the same investment rights. Although focusing on all the inconsistencies in publicly-available awards is beyond the scope of the present Article, it is vital to focus upon those awards that have spawned the greatest concerns among investors, Sovereigns, practitioners, NGOs, and academics. This Article therefore considers the Lauder arbitrations, the SGS arbitrations, and a series of cases under NAFTA, all of which have attracted public attention and concern. In all of these decisions, investment treaty tribunals have come to different—if not completely diametrically opposed—conclusions about issues of public international law. Although some commentators suggest that an occasional “wrong”

145. See infra Part IV.A.
146. See infra Part IV.B.
147. See infra Part IV.C.
decision is a small price to pay for promoting aggregate gain through investment arbitration,\textsuperscript{150} the magnitude and the increasing frequency of the inconsistency suggests that this conclusion should be reconsidered.

A. The Lauder Arbitrations

Two arbitral tribunals—one in Stockholm and one in London—made arbitration history by arriving at two different decisions over what essentially amounted to the same dispute [hereinafter "the Lauder cases"]\textsuperscript{151} A Stockholm tribunal held that the Czech Republic breached a variety of its obligations to the Dutch corporate arm of a U.S. investor under the Netherlands-Czech Republic BIT.\textsuperscript{152} Ten days before, on the same set of facts, a London tribunal held that the Czech Republic only discriminated against the U.S. investor in violation of the United States-Czech Republic BIT.\textsuperscript{153} Jeremy Carver, a partner at Clifford Chance who represented the Czech Republic, explained that the result "brings the law into disrepute, it brings arbitration into disrepute—the whole thing is highly regrettable."\textsuperscript{154}

1. The Factual Background

In 1992, Ronald S. Lauder, an American financier, wanted to create the first private television station in the Czech Republic—TV Nova. Mr. Lauder and his investment vehicle, the Central European Development Corporation ("CEDC"),\textsuperscript{155} originally intended to make a di-

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rect investment in a license-holding television station that would be run with a local partner, Dr. Vladimir Železný. While petitioning the Czech Media Council ("Media Council") for the license, Dr. Železný and his local company, Central European Television 21 ("CET 21"), represented that CEDC would be a "direct participant" in the license and contribute finances and programming to the television station.

CET 21 was eventually granted the license. Mr. Lauder and CEDC's direct investment did not occur as planned, however. Rather, after consultation with, direction from, and approval by, the Czech Media Council, the license was only granted to CET 21 and the Media Council required the foreign investment to occur indirectly through a joint venture company, CNTS. CNTS had three participants: (1) CET 21 who would provide the license, (2) CEDC who would provide the financing, programming, and know-how, and (3) a Czech bank who would provide further financing. CNTS would then unconditionally, unequivocally, and on an exclusive basis have the right to use, exploit, and maintain the license; and, in this manner, Mr. Lauder and his investment vehicle could use a "split" ownership structure to exploit the license and operate TV Nova. The Me-

156. London Award, supra note 71, ¶¶ 48-50.
157. Id. ¶¶ 64, 70.
158. The Media Council's decision to award the license to CET 21 and its foreign investor was the subject of severe political criticism. Id. ¶ 58.
159. Id. ¶¶ 60, 64.
160. Id. ¶¶ 59, 61, 64, 68, 70, 222; see also Stockholm Award, supra note 155, ¶¶ 429, 435 (explaining CEDC's investment "was monitored, directed and approved by the Media Council"). As explained by the 1997 Report of the Media Council to the Czech Parliament, the reason why this model came into existence was the Council's fears of a majority share of foreign capital in the license holder's Company:

    When granting the license to the Company CET 21, for fear that a majority share of foreign capital in the license holder's Company might impact the independence of full-format broadcasts, the Council assumed a configuration that separates the investor from the license holder himself. That is how an agreement came into existence (upon a series of remarks from the Council) by which the Company CNTS was established the majority owner of which is CEDC/CME.

London Award, supra note 71, ¶ 229 (emphasis added); see Stockholm Award, supra note 155, ¶ 83; see also id. ¶¶ 436, 440 (noting that the decision to grant the license to CET 21 created massive political uproar and made a direct shareholding in CET 21 "politically impossible").
161. London Award, supra note 71, ¶ 69.
163. See Stockholm Award, supra note 155, ¶ 452 (explaining that a split structure—which required a separation of the license holder and the operator—was the legal basis for the investment).
dia Council believed this arrangement would be more acceptable to the Czech government and public opinion than an arrangement that gave foreign capital direct ownership.\textsuperscript{164}

Although TV Nova was expected to break even after four years, with an attention-grabbing schedule of nude weather forecasts and Baywatch reruns, the station was profitable during the first year of operation.\textsuperscript{165} Although most of the profits were expatriated, business went along smoothly. This happy scenario eventually changed. In 1994, there was further political criticism of the structure of TV Nova\textsuperscript{166} and a change in the membership of the Media Council.\textsuperscript{167} Eventually, in 1995, the Czech Parliament amended its Media Law in a manner that affected the nature of Mr. Lauder's investment, including a narrower definition of the term "broadcaster."\textsuperscript{168}

As a result, in 1996, the Media Council reversed its previous position as regards the approval of "split" structure between the license holder and the operator\textsuperscript{169} and began to make life difficult for CNTS. In particular, it then commenced administrative proceedings against CNTS asserting that, as a result of the corporate structure of TV Nova, CNTS was operating the station without a license and broadcasting illegally.\textsuperscript{170} The Supreme State Attorney Office also undertook a criminal investigation regarding TV Nova's authority to broadcast.\textsuperscript{171} At that time, Dr. Železný defended TV Nova's operating structure and argued that it had been approved by the Media Council.\textsuperscript{172} Under increasing pressure, however, CNTS modified its corporate structure and the descriptions of its broadcasting business, although ostensibly CNTS' partners asserted the nature of their commercial relationship had not changed.\textsuperscript{173} After the changes were

\begin{footnotes}
\item[164] Id. ¶ 11.
\item[165] Rushton, supra note 154, at 108; see also Stockholm Award, supra note 155, ¶¶ 14, 458.
\item[166] The Czech Parliament’s Committee for Science, Education, Culture, Youth and Physical Training was one of these critics. London Award, supra note 71, ¶ 74.
\item[167] The membership of the Media Council changed during the summer of 1994. Id. ¶ 78.
\item[168] There were two critical changes in the Czech Media Law: (1) article 12(3) of the 1991 Media Law, which had provided that “[i]n addition to conditions stated in paragraph 2, the decision to grant a license also includes conditions with the license-granting body will set for the broadcasting operator,” was deleted; and (2) more narrowly defined a “broadcaster” as solely the individual to whom the license was granted. Id. ¶ 79.
\item[169] Stockholm Award, supra note 155, ¶ 460.
\item[170] London Award, supra note 71, ¶ 97.
\item[171] Id. ¶¶ 91, 94.
\item[172] Id. ¶ 84; Stockholm Award, supra note 155, ¶¶ 503, 523.
\item[173] London Award, supra note 71, ¶¶ 89, 104; see also Stockholm Award, supra note 155, ¶ 505 (explaining that the shareholders “did not give in on a voluntary basis” because “it was clear that without the amendment requested by the Council the broadcasting License would be endangered”); id. ¶ 513 (noting the threat of administrative proceedings “was fundamental because a withdrawal of the License in the same way as interference with CNTS’ broadcasting operations would have destroyed
\end{footnotes}
made, both the criminal and administrative proceedings were suspended.\footnote{174}

But these superficial changes did not end TV Nova’s difficulties. In 1998 and 1999, Dr. Železný\footnote{175} began to acquire programming for CET 21 from sources other than CNTS and Mr. Lauder’s profits began to decrease. Dr. Železný also requested other corporate changes, particularly related to revenues, and relied upon the Media Council’s previous conduct and potential future actions to justify the changes. In 1999, Dr. Železný wrote privately to the Media Council requesting that it confirm the Council’s understanding that CET 21 did not have an exclusive relationship with CNTS and could order services from other providers.\footnote{176} Without disclosing the ex parte request from Dr. Železný, the Media Council issued a March 1999 letter “parroting nearly verbatim” from Dr. Železný’s request and stating that “[b]usiness relations between the operator of broadcasting and service organizations are built on a nonexclusive basis.”\footnote{177} Dr. Železný later used this correspondence as the basis for severing CET 21’s dealings with CNTS,\footnote{178} and the Media Council did not intervene.\footnote{179} After August 5, 1999, Dr. Železný began broadcasting TV Nova using a new company, which was under his control.\footnote{180}

2. The Procedural History

Before CET 21 severed its ties with CNTS, on August 2, 1999, CNTS and Mr. Lauder’s company wrote to the Czech Parliament challenging the Media Council’s behavior and suggesting that the Media Council’s actions may have amounted to violations of the U.S.-Czech Republic BIT.\footnote{181} Seventeen days later, Mr. Lauder initiated proceedings against the Czech Republic pursuant to the U.S.-Czech Republic BIT. Mr. Lauder’s investment vehicle, CME, initiated proceedings

\begin{footnotes}
\footnotetext{174}{London Award, supra note 71, ¶¶ 108, 116, 121; Stockholm Award, supra note 155, ¶¶ 494-95, 501.}
\footnotetext{175}{During the difficulties in the last several years, Dr. Železný had substantially increased his control over CET 21. See London Award, supra note 71, ¶¶ 76, 98.}
\footnotetext{176}{Id. ¶ 129.}
\footnotetext{177}{Id. ¶ 130; Stockholm Award, supra note 155, ¶ 128.}
\footnotetext{178}{See, e.g., London Award, supra note 71, ¶ 133 (indicating that CET 21 was entering into contracts with third parties).}
\footnotetext{179}{Stockholm Award, supra note 155, ¶¶ 570, 572-74.}
\footnotetext{180}{London Award, supra note 71, ¶ 138; Stockholm Award, supra note 155, ¶ 18; see also id. ¶ 555 (explaining that the letter was “fabricated in collusion between Dr. Železný and the Media Council behind the back of CNTS (TV NOVA) to give CET 21 a tool to undermine the legal foundation of CME’s investment”).}
\footnotetext{181}{London Award, supra note 71, ¶ 137.}
\end{footnotes}
against the Czech Republic under the Netherlands-Czech Republic BIT in 2000. Although there was an opportunity to consolidate the proceedings under both BITs, the Czech Republic objected to the same tribunal hearing both cases.\(^{182}\)

3. The Two Awards

One of the few common conclusions the two tribunals made was that Lauder and his Dutch investment vehicle had been the victims of discrimination. Beyond that point, the two tribunals came to diametrically opposed conclusions on issues related to expropriation, fair and equitable treatment, full protection and security, and compliance with minimum obligations under international law.

Both the Dutch-Czech Republic and U.S.-Czech Republic BITs had similar prohibitions on the arbitrary and discriminatory treatment of investments.\(^{183}\) While the London tribunal did find that the Czech Republic engaged in an arbitrary and discriminatory measure, its holding was limited to the 1993 time period when Mr. Lauder was prevented from making a direct investment in CET 21.\(^{184}\) As the basis for its conclusion, the London tribunal pointed to the 1997 Report of

\(^{182}\) *Id.* ¶¶ 173, 178; Stockholm Award, *supra* note 155, ¶¶ 40-41, 412.

\(^{183}\) Article II(2)(b) of the U.S.-Czech Republic BIT provided that:

> Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Article 3 VI and VII, a measure may be arbitrary and discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

U.S.-Czech Republic BIT, *supra* note 153, art. II(2)(b); see London Award, *supra* note 71, ¶ 216. Article 3(1) of the Netherlands-Czech Republic BIT provided that each country “shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.” Netherlands-Czech Republic BIT, *supra* note 39, art. 3(1); Stockholm Award, *supra* note 155, ¶ 24.

\(^{184}\) In coming to this conclusion, the London tribunal considered the plain meaning of the treaty. In particular, the tribunal noted that the treaty requires both an arbitrary and a discriminatory measure. Both aspects must be considered in order to avoid giving inappropriate meaning to the word “and” and rendering part of the standard redundant. London Award, *supra* note 71, ¶ 219. Noting that the U.S.-Czech Republic BIT does not define the term “arbitrary,” the panel relied upon *Black's Law Dictionary*’s definition of “arbitrary” as “depending on individual discretion... founded on prejudice or preference rather than on reason or fact.” *Id.* ¶ 221. The London tribunal found the conduct arbitrary because it was neither founded on reason or fact—nor was the decision based upon the Czech Republic’s Media Law, a law that expressly accepted applications from companies with foreign equity participation. *Id.* ¶ 232. The tribunal also analyzed the meaning of national treatment and found that the treatment must be at least as favorable as to a Czech National as defined in article II(1). *Id.* ¶ 220. The tribunal held the measure to be discriminatory because it treated foreign investments less favorably than domestic investment. The tribunal noted that, as a result of the political opposition, it is probable that there would have been no political outcry if Lauder’s company had been of Czech origin. *Id.* ¶ 231.
the Media Council that stated, "[w]hen granting the license to the Company CET 21, for fear that a majority share of foreign capital in the license holder’s Company might impact the independence of full-format broadcasts, the Council assumed a configuration that separates the investor from the license holder himself." 185 This distinction, based upon the national origin of the investor, was the sole basis of the London tribunal’s finding of discrimination. 186 The London tribunal went on to hold that the later conduct of the Media Council was not arbitrary and discriminatory within the meaning of the U.S.-Czech Republic BIT. The panel reasoned that: (1) various conduct by the Media Council was insufficient to rise to the level of a “measure” particularly when the conduct “merely expresses the general opinion of a regulatory body regarding the proper interpretation” of the law; 188 (2) the initiation of administrative proceeding was neither arbitrary nor discriminatory as it constituted a normal exercise of regulatory duties of the Media Council; and (3) CME’s amendment of its administrative documents was consensual since Mr. Lauder’s company was aware of its legal position. 191

The Stockholm tribunal took a different view of the facts. Focusing on the evisceration of the arrangements underlying the investment and perceived government coercion, the Stockholm tribunal found the Media Council’s conduct in 1996 and 1999 deprived CME of exclusive rights, and this conduct was unreasonable and thus in violation of the

185. Id. ¶ 229 (quoting a 1997 report of the Media Council to the Czech Parliament). Other portions of the report explained the CNTS “model came into existence [because of] the Council’s fears of a majority share of foreign capital in the license-holder’s Company.” Stockholm Award, supra note 155, ¶ 83.

186. London Award, supra note 71, ¶¶ 230-33. The tribunal, however, did not award any damages for the breach of the treaty as the harm alleged was too remote from the damaged claimed and Mr. Lauder did not show that the acts of CET 21 were so unexpected that they were actually the cause of the ultimate harm. Id. ¶¶ 234-35.

187. For example, the tribunal held that the replacement of members of the Media Council in 1994 “did not amount to an arbitrary and discriminatory measure.” Id. ¶ 240. Likewise, the personal opinion of a member of the Media Council, which may or may not reflect the Media Council’s opinion on the same subject could not amount to an arbitrary or discriminatory measure. Id. ¶¶ 246-47. Further, a letter from the Media Council that explained the opinion of a regulatory body regarding the proper interpretation of the Media Law could not amount to a measure within the meaning of the treaty and had no independent legal effect. Id. ¶¶ 282-84.

188. Id. ¶ 282.

189. Here, the tribunal explained that there was sufficient evidence that the Media Council thought or could legitimately think that CNTS was violating the Media Law. Id. ¶¶ 249-54. Because it was a normal exercise of regulatory duties, the exercise of discretion was not arbitrary. Id. ¶ 255. Similarly, a letter from a governmental agency that a commercial actor uses to extricate itself from unfavorable commercial terms cannot constitute an arbitrary measure, particularly when there were reasonable grounds for the basis of the letter’s conclusion. Id. ¶¶ 276-77, 285.

190. Likewise, the Media Council’s exercise of authority was not discriminatory because a variety of other companies that were controlled by Czech entities (and not a foreign investor) were also subject to similar investigations. Id. ¶¶ 256-58.

191. Id. ¶¶ 272-73.
treaty. But as a violation would require a measure that was both unreasonable and discriminatory, the tribunal concluded the Media Council’s conduct “smacks of discrimination against the foreign investor.”\(^{(192)}\) There was no analysis of existing case law; and, in contrast to the London tribunal, no explanation of how the Media Council’s various regulatory activities amounted to a measure.

The two tribunals came to different decisions as regards the issues of expropriation. The standards of expropriation set out in the U.S.-Czech Republic BIT and the Netherlands-Czech Republic BIT were essentially the same.\(^{(193)}\) The London tribunal held the Czech Republic “did not take any measure of, or tantamount to, expropriation of [Mr. Lauder’s] property rights . . . since there was no direct or indirect interference by the Czech Republic in the use of Mr. Lauder’s property or with the enjoyment of its benefits.”\(^{(194)}\) The London tribunal noted that Mr. Lauder’s property rights were maintained until the contractual relationship between CET 21 and CNTS was over—even though the relationship may have changed over time. They further noted that, even if Mr. Lauder had been deprived of his property rights, the Media Council’s conduct was not expropriation since it did not benefit the Czech Republic.\(^{(195)}\)

In contrast, the Stockholm tribunal found expropriation. The tribunal reasoned that the Media Council coerced CNTS and colluded with Dr. Železný, via overt acts and omissions, to destroy the commercial value of the investment.\(^{(196)}\) Specifically, the Media Council’s reversal of position regarding the appropriate structure of CNTS eradicated a previously exclusive commercial relationship. The Stockholm tribunal also determined that the Media Council should

\(^{(192)}\) Stockholm Award, supra note 155, at ¶ 612.

\(^{(193)}\) U.S.-Czech Republic BIT, supra note 153. Article III(1) of the U.S.-Czech Republic BIT provides that:

Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (expropriation) except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles or treatment provided for in Article II(2).

Id; London Award, supra note 71, ¶ 199. Article 5 of the Netherlands-Czech Republic BIT provides that neither country “shall take any measures depriving, directly or indirectly, investors of . . . their investments unless the following conditions are complied with: (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory; (c) the measures are accompanied by just compensation.” Stockholm Award, supra note 155, ¶ 24.

\(^{(194)}\) London Award, supra note 71, ¶ 201.

\(^{(195)}\) Id, ¶¶ 202-03.

\(^{(196)}\) The Stockholm tribunal noted that the Media Council was obligated to secure and defend the 1993 structure of TV Nova after it had attracted foreign investment on the basis of that structure. Stockholm Award, supra note 155, ¶ 530. Similarly, the Media Council’s collaboration with Dr. Železný was to put pressure on the foreign investor to destroy the legal basis of the investment. Id. ¶¶ 554-55, 572, 585.
have withdrawn the March 1999 letter;\textsuperscript{197} and at the very minimum, the Media Council should not have sat silent while the legal basis for the investment was deteriorating.\textsuperscript{198} These twin factors lead the Stockholm tribunal to find expropriation because there was no prospect of reviving the exclusive use of the license, which had been the basis of the original investment.\textsuperscript{199}

The two tribunals also differed on whether the Czech Republic violated its obligation to provide fair and equitable treatment, even though the two investment treaties had similar obligations.\textsuperscript{200} Noting that the Media Council had a duty to ensure observance of the Media Law, the London tribunal explained that it was not inconsistent to enforce the law absent a specific undertaking, and thus, it would not refrain from doing so.\textsuperscript{201} Since there was no such undertaking and the Media Council commenced proceedings because of its concerns about illegal broadcasting,\textsuperscript{202} the London tribunal held there was no breach of the fair and equitable treatment obligation.\textsuperscript{203} The Stockholm tribunal again came to an opposite result. Explaining that the Media Council intentionally undermined the investment, the Stockholm tribunal held the Czech Republic violated its obligation to provide fair and equitable treatment to investors "by evisceration of the arrangements in reliance upon w[which] the foreign investor was induced to invest."\textsuperscript{204}

There were also similar protections for investors as regards full protection and security,\textsuperscript{205} but again, there were opposite conclusions. The London tribunal held that there was no failure to provide full protection and security to Mr. Lauder's investment. The London tribunal explained that the Czech Republic's change in the Media Law was not a danger to Mr. Lauder's investment,\textsuperscript{206} and the Czech Repub-

\textsuperscript{197} Id. ¶ 600.
\textsuperscript{198} Id. ¶ 572.
\textsuperscript{199} Id. ¶¶ 607-09.
\textsuperscript{200} The U.S.-Czech Republic BIT provided that investments "shall at all times be accorded fair and equitable treatment." U.S.-Czech Republic BIT, supra note 153, art. II(2)(a); see also London Award, supra note 71, ¶ 292. The Netherlands-Czech Republic BIT provides that each country "shall ensure fair and equitable treatment to the investments of investors." Netherlands-Czech Republic BIT, supra note 39, art. 3(1); Stockholm Award, supra note 155, ¶ 24.
\textsuperscript{201} London Award, supra note 71, ¶¶ 296-97.
\textsuperscript{202} Id. ¶¶ 299, 301.
\textsuperscript{203} Id. ¶ 293.
\textsuperscript{204} Stockholm Award, supra note 155, ¶ 611.
\textsuperscript{205} The U.S.-Czech Republic BIT provided that investments "shall enjoy full protection and security." U.S.-Czech Republic BIT, supra note 153, art. II(2)(a); London Award, supra note 71, ¶ 308. The Netherlands-Czech Republic BIT likewise provided that each country "shall accord [to the investments of investors of the other state] full protection and security." Netherlands-Czech Republic BIT, supra note 39, art. 3(2); Stockholm Award, supra note 155, ¶ 24.
\textsuperscript{206} London Award, supra note 71, ¶ 311.
lic should not be liable to Mr. Lauder for Dr. Železný’s efforts to extricate himself from their commercial relationship.207

Again, the Stockholm tribunal reached a dramatically different result. Explaining that a Sovereign is obligated to ensure that neither amendment of laws nor action of administrative bodies results in a withdrawal or devaluation of an investment, the Stockholm tribunal concluded that the Czech Republic had not provided full security and protection. The Stockholm tribunal explained that the Media Council’s action and inaction in 1996 and 1999 “were targeted to remove the security and legal protection of the Claimant’s investment in the Czech Republic.”208 There was (1) no analysis of the meaning of this standard and why it applied in the present case, and (2) minimal consideration of existing case law and/or academic literature that might shed light on the proper analysis and application of the facts.

The last area of major disagreement was the Czech Republic’s obligation to comply with principles of international law, which were similar under both treaties.209 The London tribunal found that the Czech Republic had not broken a particular principle of international law.210 In contrast, the Stockholm tribunal listed the variety of treaty breaches and concluded the Media Council’s actions were not compatible with principles of international law. The multiple breaches, therefore, were “together a violation of the principles of international law assuring the alien and his investment treatment does not fall below the standards of customary international law.”211

4. The Judgment of Sweden’s Svea Court of Appeal

Faced with these two inconsistent decisions and the possibility of a damage award from the Stockholm tribunal in the order of U.S. $500 million,212 the Czech Republic did the only reasonable thing it could—

207. See id. ¶ 304. The tribunal noted that there is no obligation to protect foreign investment against loss of value resulting from the acts of persons whose acts cannot be attributed to the State. See id. ¶ 308 (citing Dolzer & Stevens, supra note 3, at 61).

208. Stockholm Award, supra note 155, ¶ 613.

209. The U.S.-Czech Republic BIT provided that investments “shall in no case be accorded treatment less” than that which conforms to principles of “international law.” U.S.-Czech Republic BIT, supra note 153, art. II (2) (a); London Award, supra note 71, ¶ 208.

210. Based upon the evidence presented, the London Award held Mr. Lauder did not show a specific obligation in international law that would be broader than the other four BIT provisions.

211. Stockholm Award, supra note 155, ¶ 614.

212. CME initially claimed damages in the order of U.S. $560,000,000, which was the value of CNTS, but in the damage phase of the arbitration, CME only requested an award of U.S. $495,200,000. CME Czech Republic BV v. Czech Republic, Final Award, ¶ 31 (2003) (UNCITRAL), at http://www.cetv-net.com/iFiles/1439-Final_Award_Quantum.pdf. The tribunal issued a final award in favor of CME in the order of U.S. $269,814,000 plus 10% interest per annum. Id. at 161 (the tribunal’s decision, ch. IX).
it asked the Swedish courts to vacate the Stockholm Award. Starting from the general presumption that its review was quite narrow and arbitration awards should be set aside only in exceptional circumstances, the Swedish court refused to set aside the Stockholm Award. The Svea Court of Appeal acknowledged the existence of the London Award but determined it had no jurisdiction to reconcile the two decisions. Although it did consider the issue of whether lis pendens or res judicata should form a basis for setting aside the Stockholm Award, the court explained that because the two awards involved different parties and were rendered under different treaties entered into by different Sovereigns, it believed application of those two doctrines was inappropriate.

The contradictory results of the two Lauder cases suggest that at least one of the awards (or a part thereof) was wrong. The injustice of this logical conclusion undermines the legitimacy of investment arbitration, particularly where public international law rights are at stake and the legitimate expectations of investors and Sovereigns are mismanaged. Likewise, the limited ability of the Svea Court of Appeal to remedy this situation suggests that it is appropriate to reconsider solutions (whether preventative or corrective) to address this gap and put investment treaty arbitration back on track to providing a reliable, predictable, and coherent jurisprudence.

B. The SGS Cases

Other inconsistent cases have considered the meaning of the “umbrella clause” and promises of Sovereigns to honor their “commitments” and observe their “obligations.” Umbrella clauses are designed to protect investors’ contractual rights against interference

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213. Svea Court of Appeal Judgment, supra note 155, at 84-85.
214. Id. at 2. The Court of Appeal acknowledged the existence and outcome of the London Award. Id. at 6. The Swedish court did not, however, have jurisdiction to set aside the English award and the decision of the London tribunal could not impact the reasoning of the Swedish court.
215. The Czech Republic claimed that there were other reasons for setting aside the Stockholm award, including failure to apply the applicable law and procedural misconduct of the tribunal in excluding the Czech arbitrator from deliberations. Although these points are beyond the scope of the present Article, the Svea Court of Appeal was unpersuaded that any of the articulated reasons could form a basis for setting aside the award.
216. As a matter of Swedish law, and what the court understood to be other legal systems, the “[i]dentity between a minority shareholder, albeit a controlling one, and the actual company cannot . . . be deemed to exist in a case such as the instant one.” Id. at 98.
217. Id. at 95.
218. The votes from the two arbitrations total as follows: (1) 6-0 in favor of finding that discrimination occurred in 1993, (2) 4-2 in favor of finding no other form of discrimination occurred, and (3) 4-2 in finding that there was no expropriation, no denial of fair and equitable treatment, no failure to provide full protection and security, and no failure to comply with obligations under international law.
LEGITIMACY CRISIS

from a breach of contract or an administrative or legislative act.\textsuperscript{219} The interpretive difficulty is whether the rights within an “umbrella clause” are sufficient to override an ambiguity in international law\textsuperscript{220} and transmute a breach of contract into a treaty violation. In the SGS cases, one ICSID tribunal held that the “umbrella clause” cannot transform a failure to pay fees under a concession contract into a treaty breach, while another ICSID tribunal came to the opposite conclusion.

1. SGS v. Islamic Republic of Pakistan

\textit{SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan}\textsuperscript{221} was the first international arbitration to consider the meaning and application of the “umbrella clause” in an investment treaty. The issue confronting the arbitrators was whether an “umbrella clause” in a treaty transforms a breach of a contract into a breach of a treaty. The Pakistan tribunal definitively said: “no.”

SGS and Pakistan had entered into a contract, whereby SGS provided certain customs-classification services and Pakistan paid for the privilege of increased efficiency in its customs collection. This Pre-shipment Inspection Agreement (the “PSI Agreement”) functioned well for several years, but after disagreements about the adequacy of the parties’ mutual performance, the agreement ended.\textsuperscript{222}

Like many commercial relationships that go awry, a dispute arose between SGS and Pakistan about allegations of breach of contract (including Pakistan’s failure to make payments) and the validity of Pakistan’s termination of the PSI Agreement.\textsuperscript{223} Although the PSI Agreement contained an arbitration clause requiring disputes to be resolved in Pakistan,\textsuperscript{224} SGS tried to bring its contract claims before

\textsuperscript{219} Dolzer & Stevens, supra note 3, at 81-82; see also supra note 40 and accompanying text (describing the “umbrella clause” and providing examples of how this right is enumerated in different investment treaties).

\textsuperscript{220} As a matter of general international law, it is unclear whether a breach of contract or other regulatory measure is sufficient to constitute a breach of an international obligation. Dolzer & Stevens, supra note 3, at 82. Compare F.A. Mann, \textit{State Contracts and State Responsibility}, 54 Am. J. Int'l L. 572, 574 (1960) (explaining that a breach of contract “may have occurred, yet the case is unlikely to give rise to a claim for ‘breach of contract’ in international law”), with Robert Y. Jennings, \textit{State Contracts in International Law}, 37 Brit. Y.B. Int'l L. 156, 162 (1961) (stating “there is no reason at all to prevent international law from holding that what is no breach of contract in the proper law is nevertheless deemed to be a breach of contract for the purposes of international law”).


\textsuperscript{222} Id. ¶¶ 11-12, 16.

\textsuperscript{223} Id. ¶¶ 16, 17.

\textsuperscript{224} Id. ¶ 15. Specifically, the arbitration agreement provided that:

Any dispute, controversy or claim arising out of, or relating to this Agreement, or breach, termination or invalidity thereof, shall as far as it is possible
the Swiss courts. When SGS was unsuccessful, Pakistan initiated arbitration to resolve the contract claims. Eleven months thereafter, SGS sent a notice of dispute to Pakistan, which alleged that the wrongful termination and failure to make payment under the PSI agreement were violations of the Switzerland-Pakistan BIT. Two days later, SGS submitted a Request for Arbitration to ICSID claiming that Pakistan’s conduct violated the Switzerland-Pakistan BIT in a variety of different ways, including a failure “to constantly guarantee the observance of [its] commitments.”

Before they could consider the merits of SGS’s claims that Pakistan breached the BIT by breaching the PSI Agreement, the Pakistan tribunal first considered whether SGS was improperly reformulating the breach of contract claims as an investment treaty claim. The Switzerland-Pakistan BIT provided that each Sovereign “shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the Investors” from the other Sovereign. SGS argued that this clause had the effect of elevating a simple breach of contract into a treaty claim under international law, and that this was justified because such “umbrella clauses” were included in investment treaties to remedy the lack of clarity about whether breach of contract under domestic law is sufficient to elevate a claim into a violation of international law. Not surprisingly, Paki-

Id.


226. Pakistan Award, supra note 221, ¶ 35. The request also made a variety of other allegations, including that Pakistan failed to promote SGS’s investment, failed to protect SGS’s investment, impaired SGS’s enjoyment of its investment, failed to ensure fair and equitable treatment of its investment, and engaged in inappropriate expropriation. Id.

227. Switzerland-Pakistan BIT, supra note 225, art. 11; see Pakistan Award, supra note 221, ¶ 53 (quoting article 11).

228. This means that each time a Sovereign violates a provision of a contract, the Sovereign also violates norms of international law and the BIT at the same time. Id. ¶¶ 98-99. In oral argument, SGS’s counsel stated that if I am the government and if I breach a contract, by the same token I will breach a treaty, so that the useful effect of this is to create [a] mirror effect, to say that I will violate in essence, and that’s what it does, it may be far-reaching but that’s what it does, to elevate breaches of contract as breaches of the treaty.

Id. ¶ 99.

229. See id. ¶ 98 n.108 (describing SGS’s reliance on Dolzer & Stevens’ book on bilateral investment treaties and the comments of the former Secretary-General of ICSID, Ibrahim Shihata).
stan disagreed and countered that there can be no claim for breach of
the treaty until the dispute "ripens" and there was a determination
that the contract was breached.230

The Pakistan tribunal concluded that article 11 of the Switzerland-
Pakistan BIT could not transmute SGS's contract claims into BIT
claims. While the tribunal's analysis began with the rather non-
contentious principle that the same set of facts might give rise to dif-
ferent claims under local and international law, the tribunal com-
mented that "the State may breach a treaty without breaching a con-
tact, and vice versa, and this is certainly true of these provisions of
the BIT."231 Construing the text of the BIT in light of its object and
purpose,232 the tribunal concluded there was simply no

convincing basis for accepting [SGS's] contention that Article 11 of
the BIT has the effect of entitling a Contracting Party's Investor,
like SGS, in the face of a valid forum selection clause, to "elevate"
its claims grounded solely in contract with another Contracting
Party, like the PSI Agreement, to claims grounded on the BIT, and
accordingly to bring such contract claims to this tribunal for resolu-
tion and decision.233

The tribunal acknowledged that the "commitments" which were to
be "constantly guarantee[d]" were not limited to contractual com-
mitments.234 Yet the Pakistan tribunal simultaneously expressed con-
cern that an overly broad interpretation of the standard would be sus-
ceptible of "almost indefinite expansion" and would lead to claims
that were "so automatic and unqualified and sweeping in their opera-
tion [and] so burdensome in their potential impact" upon Sover-
eigns.235 Instead of relying upon the text of the treaty, out of its con-

230. Id. ¶ 54.
231. Id. ¶ 147. The tribunal also noted that the treaty claims and contract claims
appeared reasonably distinct in principle. Id. ¶ 148.
232. This is required by the Vienna Convention. Vienna Convention on the Law of
(1969) [hereinafter Vienna Convention on Treaties].
233. Pakistan Award, supra note 221, ¶¶ 164-65.
234. The tribunal suggested that "commitments" was probably broader than pure
contractual matters and might also address statutory, administrative, or other gov-
ernmental obligations. Id. ¶ 166.
235. Id. ¶¶ 166-67. As it apparently believed that a finding to the contrary would
open the floodgates of investment treaty arbitration, the tribunal went to great
lengths to explain the ramifications of (what it considered to be) the harmful con-
sequences of SGS's "extraordinarily expansive" position. Id. ¶ 171. In particular, the
tribunal suggested adopting SGS's position was untenable because: (1) it would in-
corporate a number of government contracts and municipal laws into actionable
"commitments"; (2) it could make other provisions of the BIT superfluous—namely
those requiring promotion of investments and most favored nation treatment (which
would permit SGS to benefit from provisions in the UK-Pakistan BIT); (3) it would
nullify the specifically negotiated dispute settlement mechanism in the PSI Agree-
ment; and (4) given the physical location of the "umbrella clause" in the treaty—
which was in a substantially different location than the rest of the substantive rights—it
would be inappropriate to treat article 11 as a substantive obligation. Id. ¶¶ 168-70.
cerns resulting from the possible "slippery slope" of investment arbitrations, the tribunal announced a new rule of investment treaty interpretation: there must be "clear and convincing evidence" of a shared intent of Sovereigns to transform contract breaches into treaty claims. Expressing an unwillingness to derogate from principles of international law that a violation of a contract entered into between a Sovereign and an investor is not by itself a violation of international law, the tribunal held the only "commitments" which were actionable under the treaty are those attributable to a Sovereign itself as a legal person under the law of state responsibility. In enunciating this narrow rule for treaty violations, the Pakistan tribunal gutted the meaning of the BIT's "umbrella" clause and rendered it a textual anomaly. Not only had the tribunal announced a new evidentiary rule for investment treaty arbitration, which was not found in the treaty itself, but the tribunal's conclusion meant that the "umbrella clause" itself essentially became a nullity even though the two Sovereigns made the effort specifically to include the provision.

2. SGS v. Republic of the Philippines

The tribunal in SGS Société Générale de Surveillance S.A. v. Republic of the Philippines came to a decidedly different result through a decidedly different analysis.

While the tribunal's reasoning in each of these departments leaves something to be desired, a full analysis of the decision is beyond the scope of the present article but would, however, be a fruitful use of future scholarship.

236. Id. ¶ 167. Interestingly, the tribunal commented that it was not "pointed to any other evidence of the putative common intent" of Switzerland and Pakistan on the parties' intention as regards the "umbrella clause." Id. As the tribunal had not yet announced its sweeping new rule regarding "putative common intent," the parties were not on notice that they may have needed to provide evidence as regards the Sovereign's intentions of agreeing to the "umbrella clause." Moreover, given the confidential nature of the proceedings, Switzerland was not able to participate in the arbitration; yet as a party to the arbitration, Pakistan was able to deny that it ever had an intention to transform contract breaches into treaty breaches. Id. ¶ 173. Later documents have suggested that Switzerland did not intend the BIT to be construed in the narrow fashion suggested by the Pakistan tribunal. See ICSID Tribunal's Interpretation of BIT Article 11 Worries Swiss, 19 Mealey's Int'l Arb. Rep. 3, 3-4 (2004). This article describes a letter written by Swiss authorities stating that they:

are alarmed about the very narrow interpretation given to the meaning of Article 11 by the tribunal, which not only runs counter to the intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments on such provisions.

Id.

237. Pakistan Award, supra note 221, ¶ 167.

238. Id. ¶ 166.

The facts of the Philippines case are similar to those in the Pakistan case but more straightforward. SGS contracted with the Philippines to provide import supervision services (the “CISS Agreement”), whereby SGS would provide services to improve the customs clearance and control process in the Philippines. After a change in inspection policies resulting from shifts in the GATT-WTO valuation system, the Philippines failed to renew the CISS Agreement. A dispute arose when the Philippines allegedly failed to pay amounts due under the CISS Agreement. Although the CISS Agreement contained an exclusive jurisdiction clause in favor of the Philippines courts SGS commenced ICSID arbitration on the ground that its contract claim could be elevated to a treaty claim under the “umbrella clause” in the Switzerland-Philippines BIT.

Article X(2) of the Switzerland-Philippines BIT provided that each Sovereign “shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other” Sovereign. Looking at the text of the BIT, the tribunal noted that the use of the word “shall” implies a substantive right and the term “any obligation” is capable of applying to obligations arising under local law—such as those arising from a contract. As the tribunal succinctly put it, article X(2) “would appear to say, and to say clearly, that each [Sovereign] shall observe any legal obligation it has assumed, or will in the future assume, with regard to specific investments covered by the BIT.” Rather than expressing concern about deranging from traditional rules of international law as the Pakistan tribunal had, the Philippines tribunal found it was “legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.”

240. Id. ¶ 1, 19-24. In particular, SGS provided certifications to exporters based on preshipment inspections it conducted on behalf of the governments of countries purchasing goods made in the Philippines. Id. ¶¶ 12-13.
241. Id. ¶ 14.
242. Id. ¶¶ 35-41.
243. The CISS Agreement provided that “[a]ll actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila.” Id. ¶ 22.
244. Id. ¶ 2, 65.
246. Philippines Award, supra note 239, ¶ 115 (emphasis added).
247. Id. ¶ 116. But see Sir Gerald Fitzmaurice, The Law & Procedure of the International Court of Justice 372 (1986) (explaining that as regards grants given to investors, “there can be no presumption in favour of an intention to grant more rather than less, and . . . the presumption must be in favour of the least that is consistent with the language used” and citing Judge Basdevant’s decision in the Minquiers case that said
the *Pakistan* tribunal’s decision on the basis that the BIT’s text was “different and rather vaguer,”48 the *Philippines* tribunal criticized the previous decision for a variety of reasons, including: (1) its fear of “indefinite expansion,” (2) its presumption against a broad interpretation of the treaty, (3) the over-reliance on the physical location of the umbrella-clause, and (4) the failure to give any clear meaning of the umbrella clause.249 The tribunal concluded that the umbrella clause “makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments.”250 Although the *Philippines* award represented a radical departure from the *Pakistan* award in both reasoning and result, there was one commonality: neither tribunal proceeded to the merits of the action.251

Even though the *Philippines* tribunal had the opportunity to consider the *Pakistan* award and discussed the case in its own decision, reconciling the two awards is challenging—particularly in light of the *Philippines* tribunal’s rejection of much of the reasoning in the *Pakistan* award. Using a textual approach to consider the rights granted by the specific treaty, it may be possible to explain the different outcomes on the basis of the differences in the substantive rights granted by the “umbrella clauses” of each treaty. Another solution may be that one of the awards is unsound. The present uncertainty about the application of the umbrella clause will continue to perplex both Sovereigns, who may be unsure of the scope of legitimate government activity, as well as investors, who believe their rights may have been violated.

**C. The NAFTA Cases**

There are various issues in NAFTA jurisprudence that reflect inconsistencies in arbitral decisions.252 This Article, however, focuses on

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249. *Id.* ¶¶ 121-26.
250. *Id.* ¶ 128.
251. Even though the *Philippines* tribunal held it did have jurisdiction to determine contractual claims between an investor and a Sovereign, it stayed its jurisdiction. As SGS failed to allege any colorable BIT claims other than the umbrella clause and the parties agreed to submit their contractual disputes to the *Philippines* courts, the *Philippines* tribunal decided to let the contractual claims in the *Philippines* courts proceed. *Id.* ¶¶ 175-76.
252. Inconsistencies in investment arbitration are not necessarily overt, but the subtleties are by no means less problematic. There is, for example, an area of inconsistency about the need to exhaust local remedies before initiating arbitration. See William S. Dodge, *Loewen v. United States: Trials and Errors Under NAFTA Chapter 11*, 52 DePaul L. Rev. 563 (2002); see also Elettronica Sicula, S.p.A (“ELSI”) (U.S.v. Italy), 1989 I.C.J. 15, 42 (July 20) (holding that customary international law requires foreign investors to exhaust domestic remedies before pursuing an international
the area that has attracted the most attention and generated the most concern: the meaning of "fair and equitable treatment" under article 1105. Article 1105 provides that: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." The debate in early jurisprudence was whether this meant that "fair and equitable" was a guarantee of minimum treatment under international law or whether it was an "additive" right with independent meaning. The answer to this issue is fundamental. If "fair and equitable treatment" is an additive right, investors can bypass an older test for showing a violation of international law, which provides compensation only in egregious cases. In es-

claim, but noting that this could be waived by treaty); Interhandl Case (Switz. v. U.S.), 1957 I.C.J. 5, 27 (Oct. 24) (same, but not noting that this could be waived by treaty). Nothing in Chapter 11 of NAFTA expressly indicates whether investors are required to exhaust local remedies before proceeding to arbitration. The overall structure of NAFTA suggests that there is no such requirement and, by providing a mechanism to arbitrate, NAFTA countries are bypassing the traditional rule under customary international law that they need to exhaust local remedies. Two tribunals have considered the need to exhaust local remedies, and they both found that exhaustion is not required. See Feldman v. Mexico, ICSID (W. Bank) Case No. ARB(AF)/99/1, ¶¶ 71-78 (2002) (noting that article 1121 gives preference to international arbitration and is a departure from the general rule of customary international law that requires the exhaustion of local remedies and that an interpretation to the contrary would cause a tribunal to "be prevented from making a decision simply by delaying local court proceedings"), at http://www.worldbank.org/icsid/cases/feldman_mexico-award.pdf; Metalclad Award, supra note 138 (explaining that because article 1121 of NAFTA permits investors to waive their rights to initiate or continue proceedings before administrative tribunals or courts, Mexico was correct to assert that local remedies do not need to be exhausted). In contrast, the Loewen tribunal found that investors must exhaust local remedies before proceeding to make a claim under NAFTA. Loewen Corp. v. United States, ICSID (W. Bank) Case No. ARB(AF)/98/3, ¶¶ 158-63 (2003) (holding that article 1121 "involves no waiver of the duty to pursue local remedies in its application of a breach to international law"), at http://www.naftalaw.org. But see Agreement for the Reciprocal Promotion and Protection of Investments, Dec. 11, 1990, Jam.-Switz., art. 9(4), reprinted in 3 International Centre for the Settlement of Investment Disputes (noting that if arbitration is initiated under the investment treaty, a Sovereign "may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration").

253. NAFTA, supra note 1, art. 1105(1), 32 I.L.M. at 639-64.
254. F.A. Mann was one of the major commentators suggesting that "fair and equitable treatment" was an additive right in investment treaties. He based this opinion wholly upon the United Kingdom-Philippines BIT. In his seminal piece, Mann explained that while "it may be suggested that arbitrary, discriminatory or abusive treatment is contrary to customary international law, unfair and inequitable treatment is a much wider conception which may readily include such administrative measures... as are not plainly illegal in the accepted sense of international law." F.A. Mann, British Treaties for the Promotion and Protection of Investments, 52 Brit. Y.B. Int'l L. 241, 242-43 (1981). He went on to conclude that fair and equitable treatment was not merely a restatement of the minimum standard but extends "far beyond the minimum standard." Id. at 244.
255. See Neer v. United Mexican States, 4 R.I.A.A. 60 (1926) (holding that the treatment of an alien, in order to constitute international delinquency should amount to negligence or a gross violation of customary international law).
sense, investors recover more easily and Sovereigns find themselves unexpectedly liable.

The trio of cases under NAFTA, which considered the application of the same substantive standard within the same investment treaty, came to radically different decisions about how the standard of “fair and equitable treatment” should be interpreted and applied. This early NAFTA jurisprudence spanned the spectrum from decisions considering fair and equitable treatment as part of international law standards to decisions finding it was an additive right.

1. *S.D. Myers, Inc. v. Canada*

*S.D. Myers* was the second tribunal to consider the scope of “fair and equitable treatment” and came to a different decision than other tribunals.\(^{256}\) Focusing on the nexus between fair and equitable treatment and discrimination, the tribunal held that there is a violation of article 1105 when “an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective”;\(^{257}\) and, as discrimination amounts to such treatment, it violates obligations to fair and equitable treatment.\(^{258}\)

In the *S.D. Myers* case, Canada needed to pass regulations to be in compliance with environmental standards under the Basel Convention.\(^{259}\) When it enacted a facially neutral measure that prohibited the transportation of PCBs across borders, however, this resulted in de facto discrimination against U.S. investors. In particular, U.S. investors who owned a PCB remediation which required shipment of contaminated material to the U.S. to destroy the PCBs, were prevented from conducting waste disposal in Canada.\(^{260}\) Having noted such statements from Government officials that the “handling of PCBs should be done in Canada by Canadians,”\(^{261}\) the panel held that the

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\(^{257}\) Id. \(\S\) 263.


\(^{260}\) S.D. Myers Award, *supra* note 256, \(\S\) 91, 105-06.

\(^{261}\) Specifically, the government minister said, “[i]t is still the position of the government that the handling of PCBs should be done *in Canada by Canadians.*” *Id.* \(\S\) 116; *see also* id. \(\S\) 185 (quoting the government minister who said “handling of PCBs should be done in Canada by Canadians. We have to take care of our own problems”).
investor was denied fair and equitable treatment under NAFTA because the measure was discriminatory and designed to target one U.S. company.\textsuperscript{262}

The tribunal’s analysis of article 1105 is the most intriguing aspect of its decision. Starting with the text of article 1105\textsuperscript{(1)}, the tribunal concluded that the phrase “fair and equitable” could not be read in isolation but, rather, must be read in conjunction with the introductory phrase “treatment in accordance with international law.”\textsuperscript{263} The tribunal acknowledged the legitimate need of governments to regulate matters within their own borders, but it concluded that international law ultimately must determine whether the regulation is sufficiently egregious to amount to a violation of article 1105.\textsuperscript{264} Given the protectionist and discriminatory intent, the favoring of nationals over nonnationals and the prevention of S.D. Myer’s planned business activity, the \textit{S.D. Myers} tribunal concluded that the discrimination in that case was sufficient to cause a violation of article 1105.\textsuperscript{265}

2. \textit{Metalclad Corporation v. United Mexican States}

\textit{Metalclad}\textsuperscript{266} had the distinction of being the first arbitration where a NAFTA investor made a successful claim under article 1105, but had a different approach than \textit{S.D. Myers}.\textsuperscript{267} While much has been written about the \textit{Metalclad} decision,\textsuperscript{268} the core of the case revolves around the holding that “Metalclad’s investment was not accorded fair and equitable treatment in accordance with international law.”\textsuperscript{269} When making its initial decision to invest in Mexico, Metalclad consulted with Mexican federal and state authorities about the type of permits required to construct and operate a hazardous waste facility.\textsuperscript{270} Relying on those representations, Metalclad made the investment; but later, local municipal officials said Metalclad did not have the appro-

\begin{footnotesize}
\begin{enumerate}
\item See id. ¶¶ 255-56, 266, 268.
\item Id. ¶¶ 258, 262.
\item Id. ¶¶ 263-64.
\item Id. ¶¶ 162, 193, 266, 268. The tribunal did, however, leave open the possibility that a breach of a rule of international law “may not be decisive in determining” whether an investor has been denied fair and equitable treatment under article 1105. Id. ¶ 264.
\item Metalclad Judgment, supra note 139.
\item Metalclad Award, supra note 138, ¶ 74.
\item Id. ¶¶ 30-36.
\end{enumerate}
\end{footnotesize}
priate permits and prohibited Metalclad's operations.\textsuperscript{271} Noting the detrimental reliance on the representations of the Mexican officials and the lack of a transparent regulatory procedure, the Metalclad tribunal held this created a breach of the obligation to guarantee fair and equitable treatment.\textsuperscript{272}

The tribunal analyzed article 1105 through the lens of the Vienna Convention on the law of treaties, which sets out standards for interpreting treaties, including adherence to the plain meaning of a treaty's text.\textsuperscript{273} While the tribunal considered certain textual aspects of NAFTA, such as the stated purpose to provide transparency,\textsuperscript{274} it quickly moved to an interpretation focused upon the overall object and purpose of NAFTA,\textsuperscript{275} which obviously is subject to more subjective interpretation once analysis becomes more divorced from text.\textsuperscript{276}

\textsuperscript{271} Id. §§ 52-59.
\textsuperscript{272} Id. §§ 87-89, 99.
\textsuperscript{273} The Vienna Convention specifically provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on Treaties, supra note 232, art. 31(1), 1115 U.N.T.S. at 340.
\textsuperscript{274} In particular, the tribunal considered that NAFTA article 102(1), which sets out NAFTA's objectives, and focused on the need for transparency. Metalclad Award, supra note 138, ¶ 76. NAFTA provides that the objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to: a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; b) promote conditions of fair competition in the free trade area; c) increase substantially investment opportunities in the territories of the Parties; d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory; e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement. See NAFTA, supra note 1, art. 102(1), 32 I.L.M. at 297. The tribunal also briefly considered article 1802(1), but never went on to explain how this provision impacted its ultimate conclusion. Metalclad Award, supra note 138, ¶ 71. Article 1802(1) provides that each country "shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them." NAFTA, supra note 1, art. 1802(1), 32 I.L.M. at 681.
\textsuperscript{275} Metalclad Award, supra note 138, §§ 70-71, 74-75.
\textsuperscript{276} Subject to the caveats of the Vienna Convention, there is a great deal that the discipline of legislative interpretation could usefully share with the interpretation of treaties. For example, such an examination can remind decision makers that, at its most fundamental level, "interpretation" is the textual analysis of words and concepts used by sovereign nations. Concepts of intent and purpose can be useful interpretive aids at later stages or when dealing with ambiguous concepts and language. See William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation As Practical Reasoning, 42 Stan. L. Rev. 321 (1990); Philip P. Frickey, From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation, 77 Minn L. Rev. 241 (1992); see also William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 626, 690 (1990)
The tribunal ignored other textual provisions of NAFTA—such as those describing how NAFTA would provide transparency—when it jumped, with minimal justification, to the conclusion that the failure to ensure regulatory transparency was a violation of article 1105. Noting the failure to provide a transparent and predictable framework for the investor’s business planning and investment, the tribunal found that Mexico’s conduct “demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in expectation that it would be treated fairly and justly in accordance with the NAFTA,” and this led to the conclusion that Metalclad “was not treated fairly or equitably under NAFTA.”

By failing to consider the plain meaning of the words in article 1105, the Metalclad tribunal apparently considered that “fair and equitable” (suggesting that statutory text is important and may be the best evidence of legislative intent or purpose).

277. In focusing on the “transparency” allegedly required by article 1105, the tribunal ignored other provisions of NAFTA, particularly chapter 18, which are dedicated to ensuring a transparent investment environment. See, e.g., NAFTA, supra note 1, ch. 18, 32 I.L.M. at 681-83 (providing generally for mechanisms related to the publication, notification and administration of laws, i.e., areas generally related to the establishment of transparent investment regimes); see also id. arts. 509-10, 32 I.L.M. at 360-62 (discussing transparency-enhancing provisions for customs administration); id. arts. 718-19, 32 I.L.M. at 380-81 (permitting notice and comment for sanitary and phytosanitary measures); id. arts. 909-10, 32 I.L.M. at 389-90 (requiring notice and comment for technical barriers to trade); id. art. 1306, 32 I.L.M. at 655-56 (providing for transparency in the telecommunications sector); id. arts. 1008-16, 32 I.L.M. at 614-19 (describing government procurement obligations); id. art. 1411, 32 I.L.M. at 659-60 (providing for transparency in the financial services sector).

278. If, however, the Metalclad tribunal had analyzed the standard differently, they might well have come to the same result. There is authority, for example, that the obligation to provide a transparent regulatory environment is part of international law. See, e.g., WTO Appellate Body, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R ¶¶ 180-84 (Oct. 12, 1998) (holding that a regulatory system lacked transparency and involved “arbitrary discrimination” because individual applications were denied without notice, an opportunity to be heard, or the provision of reasoned, written decisions), available at http://www.worldlii.org/int/cases/WTOAB/1998/6.html; Owners of the Tattler v. Great Britain, 6 R.I.A.A. 48, 49-51 (1920) (imposing liability due to a lack of clarity in licensing laws applicable to foreigners). Note that although the result may have been the same, the reasoning would have been different had the tribunal stayed true to the text of NAFTA. An analysis more faithful to NAFTA and the member-states’ expectations and intentions might have focused on how the failure to provide transparency was a violation of the treatment obligations under customary international law.

279. The tribunal initially explained that the absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA. See Metalclad Award, supra note 138, ¶ 88. The tribunal referred to questionable situations such as the failure to provide Metalclad notice of the meeting and the opportunity to make its case regarding its permit application. Id. ¶ 91.

280. Id. ¶ 99.

281. Id. ¶ 101.
is a positive right that was independent from customary international law. While the tribunal’s reasoning has been subject to different interpretations, the most reasonable conclusion is that the Metalclad tribunal thought the words “including fair and equitable treatment” should mean “plus [or perhaps and] fair and equitable treatment.” These flaws and the over-reliance on transparency came back to haunt the Metalclad tribunal. The fallout of the award was set by a reviewing court in Canada, but other tribunals followed and expanded the Metalclad approach until NAFTA’s Free Trade Commission issued an interpretive statement to minimize confusion.

3. Pope & Talbot, Inc. v. Canada

Pope & Talbot involved claims related to the verification process related to the United States-Canada Softwood Lumber Agreement. The tribunal took a broader approach to the interpretation of NAFTA’s article 1105 than Metalclad and concluded the regulatory conduct of the Canadian government violated its obligation to provide fair and equitable treatment. Noting that the Canadian government made various, unexplained demands during an antidumping verification, the tribunal explained that Canada’s “imperious insistence on having its way” could not be explained by rational legal reasoning. Although this emphasis suggests that article 1105 would be limited to issues of procedural fairness, the breadth of the tribunal’s reasoning indicates otherwise. Put simply, Pope & Talbot concluded that the “fair and equitable treatment” standard in article 1105 was not a concept subsumed within a Sovereign’s obligations to provide minimum standards of treatment under international law; rather, it was an “additive” standard in addition to minimum guarantees under international law. The tribunal came to this conclusion after an analysis of

283. See id. (noting that the tribunal never fully explained how it understood the “fair and equitable” treatment standard, suggesting that there are a variety of interpretations to the tribunal’s award, but arguing that the tribunal concluded that treatment in accordance with international law includes fair and equitable treatment). The difficulty with Mr. Weiler’s analysis is that, if the tribunal had meant to suggest this, it could have done so. See infra notes 324-25 and accompanying text (describing the basis for finding that transparency is part of customary international law).
284. See generally Metalclad Judgment, supra note 139.
285. See infra Part IV.C.3 and accompanying text (describing the even more expansive reasoning of the Pope & Talbot tribunal).
287. Id. ¶ 195.
288. Id. ¶ 173. At least one commentator has summarized this course of conduct as actions by a Canadian official that “the tribunal appeared to surmise . . . possibly constituted a form of retaliation or punishment for the investor having brought its case.” See Weiler, NAFTA Investment Arbitration, supra note 267, at 416.
289. Pope & Talbot Award, supra note 286, ¶¶ 105-18. The tribunal came to this conclusion even though neither of the parties argued that “fair and equitable treat-
various BITs, which typically require fair and equitable treatment in addition to whatever treatment is required by international law, but it ignored the text of other BITs that were textually distinct from NAFTA. Even though its approach deprives other words in article 1105 of meaning the tribunal suggested that NAFTA’s text actually demanded finding an “additive” right. The tribunal explained that NAFTA parties could not possibly have intended to agree to a minimum standard of treatment that would provide investors in BITs with better treatment than in BITs in which NAFTA parties were members. By focusing on more nebulous concepts of purpose and intent and remedying perceived absurdities, Pope & Talbot ran afoul of NAFTA’s text and failed to provide interpretive determinacy to NAFTA. Moreover, in its rejection of the approach of S.D. Myers, it created incoherence within the jurisprudence and did little to stabilize the legitimate expectations of investors and Sovereigns.

4. The Interpretive Note

In light of these divergent approaches, some coherence was required for the system to retain its integrity. As a result, the three NAFTA countries used their powers under NAFTA to issue an Interpretive Note to declare that article 1105 only encompassed the minimum standard of treatment in customary international law.  

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though some commentators\textsuperscript{297} and jurists\textsuperscript{298} have expressed concern about the legitimacy of the Interpretive Notes, later NAFTA tribunals have applied article 1105 (albeit sometimes reluctantly) in a more uniform fashion.\textsuperscript{299} This is an unusual remedy permitted by NAFTA’s text; Sovereigns do not typically step in and rectify areas of inconsistency.

V. RECONSIDERING INVESTMENT ARBITRATION

As a result of the increased number of cases generally, and the increasing number of inconsistent decisions, there is a rising concern about whether the current ad hoc arbitration framework is the appropriate manner of resolving treaty disputes.\textsuperscript{300} In the past, duplicate arbitrations were rarely encountered and were not a principal point of interest to commentators.\textsuperscript{301} This is no longer the case. The Secretary General of ICSID has noted that the “scope for inconsistent decisions in regard to essentially the same issues is obvious”\textsuperscript{302} and the SGS awards demonstrate that new waves of inconsistent decisions are alive and well—not just for NAFTA,\textsuperscript{303} but also for other investment trea-

\begin{itemize}
  \item Id.
  \item \textsuperscript{298} Pope & Talbot v. Canada, Award on Damages, ¶¶ 8-24 (2002) (criticizing the choices made by the Free Trade Commission in the Interpretive Note and questioning the binding nature of the statements), at http://www.naftalaw.org.
  \item \textsuperscript{300} See, e.g., Dhooge, supra note 87, at 282-89.
  \item \textsuperscript{301} Gabrielle Kaufmann-Kohler, \textit{Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?}, in Annulment of ICSID Awards 189, 219 (Emmanuel Gaillard & Yas Banifatemi eds., 2004) (noting that inconsistent decisions are a “new scenario” and that “[s]uch inconsistencies run counter to the uniform development of the law [and that t]here is a risk that inconsistent decisions discredit the system” and Sovereigns, investors, and the public may lose confidence in the dispute resolution mechanism); Stanislaw Soltysinski & Marcin Olechowski, \textit{Observations on the Svea Court of Appeal Judgment}, in Stockholm Arb. Rep., 2003, at 230, at http://www.sccinstitute.com/upload/shared_files/artiklar/tjeckiska_republiken.pdf;.
  \item \textsuperscript{302} Parra, \textit{Provisions}, supra note 21, at 352.
  \item \textsuperscript{303} See Brower, \textit{Structure}, supra note 128, at 49 (suggesting that there are a variety of allegations regarding the legitimacy of certain NAFTA decisions); see also Frederick M. Abbott, \textit{The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration}, 23 Hastings Int’l & Comp. L. Rev. 303, 308 (2000) (describing NAFTA’s potential legitimacy problem); Afilalo, supra note 1, at 52 (stating that NAFTA “suffers from a crisis of legitimacy”); Ari
ties. As lawyers continue to advise clients to structure investments in a manner where they can simultaneously use multiple investment treaties for the same dispute, this issue will increase in prominence. In the future, there may not just be "twin" inconsistent decisions—there might well be triplets and quadruplets.

Prominent practitioners have noted that "[a]ny system where diametrically opposed decisions can legally coexist cannot last long. It shocks the sense of rule of law or fairness." Given that issues of legitimacy cut to the heart of the utility of using arbitration, the literature must address the concerns underlying the legitimacy crisis in a meaningful way. Otherwise, conflicting awards based upon identical facts and/or identically worded investment treaty provisions will be a threat to the international legal order and the continued existence of investment treaties. This Article therefore considers factors affecting legitimacy and provides a framework for analyzing previous suggestions for reforms and evaluates how to improve the current system and promote the just administration of the law.
A. The Indicators of Legitimacy in Investment Arbitration

The rule of law is essential to those participating in the global economy. Without the clarity and consistency of both the rules of law and their application, there is a detrimental impact upon those governed by the rules and their willingness and ability to adhere to such rules, which can lead to a crisis of legitimacy. Legitimacy depends in large part upon factors such as determinacy and coherence, which can in turn beget predictability and reliability. Related concepts such as justice, fairness, accountability, representation, correct use of procedure, and opportunities for review also impact conceptions of legitimacy. When these factors are absent individuals, companies and governments cannot anticipate how to comply with the law and plan their conduct accordingly, thereby undermining legitimacy.

Determinacy involves using rules to convey clear and transparent expectations. In the context of investment arbitration, this means that investors’ rights and Sovereigns’ obligations are expressly spelled out. Many rules, however, are inevitably indeterminate as they cannot feasibly predict, in advance, all the situations to which the rule might possibly apply. Investment treaties, like other types of rules, often enumerate a vague standard in an effort to use discretion to promote fairness or facilitate agreement. There are costs to this approach, however, as indeterminate rules obscure the boundaries of appropriate conduct and also facilitate the creation of justifications for non-

309. See James Willard Hurst, Problems of Legitimacy in the Contemporary Legal Order, 24 Okla. L. Rev. 224, 224 (1971) (suggesting that “[l]egitimacy means simply the grounds on which at any given time most of the people accept, or are willing to use, the legal order as they find it” and that it is premised upon the idea that “law should be good for, and justly serve, the people who live within it”); Marjorie E. Kornhauser, Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America, 50 Buff. L. Rev. 819, 830-31 (2002) (explaining that legitimacy justifies the moral authority of the existing order and any substantial challenge to legitimacy threatens the capacity to govern).
310. See Thomas M. Franck, The Power of Legitimacy Among Nations 49 (1990) [hereinafter Thomas Franck, The Power of Legitimacy] (explaining that the indicators of rule legitimacy in international law are determinacy, symbolic validation, coherence, and adherence); see also Brower, Structure, supra note 128, at 52-86 (describing Professor Franck’s approach to legitimacy and using it as a useful prism for analyzing shortcomings in the NAFTA context). Professor Thomas Franck is unrelated to the author of this Article.
Such a difficulty raises concerns about the effectiveness and correctness of the rules and undermines the legitimacy of the standard.

Even if standards in investment treaties have low textual clarity, they are not per se illegitimate. By having an "authority recognized as legitimate" to provide clarification on the meaning and application of rules, interpretation can rectify textual indeterminacy. The success of such "interpretive determinacy," however, depends upon who does the interpretation, their authority to interpret, and the coherence of the decisions they reach. The issue facing investment arbitration is whether a neutral arbitral tribunal composed of private individuals, such as public international law experts who may be chosen by the parties, can and actually does apply investment rights in a correct and coherent manner.

Coherence is another key element of legitimacy; it requires consistency of interpretation and application of rules in order to promote perceptions of fairness and justice. As aptly explained by Professor Thomas Franck, "[a] rule is coherent when its application treats like cases alike when the rule relates in a principled fashion to other rules in the same system. Consistency requires that a rule, whatever its content, be applied uniformly in every 'similar' or 'applicable' instance." Even the different application of the same rule does not necessarily undermine legitimacy "as long as the inconsistencies can be explained to the satisfaction of the community by a justifiable (i.e. principled) distinction." This means that incoherence can be clarified on a case-by-case basis or by rationally connecting meaning with other rules. In this manner, facially inconsistent decisions can become coherent and minimize perceived injustice and unfairness.

Establishing such a coherent jurisprudence is difficult, however, with new and relatively untested standards. When there are a minimal number of cases and it is a challenge to find other appropriate areas of developed jurisprudence from which to draw, decisions are often seen as more "lawless." This challenge is relevant in investment...
treaty arbitration where new standards are being applied for the first time, clever investors are testing the boundaries of their rights, and arbitrators do not have the luxury of drawing upon a mature jurisprudence.\footnote{321} Perhaps this explains why Charlie Brower, a former judge on the U.S.-Iran Claims Tribunal, has expressed the need for “a hierarchy of decisional instances” and “comparative uniformity of decisions” in investment arbitration.\footnote{322} Once investment arbitration jurisprudence has an opportunity to develop, and cases define parameters regularly and consistently, indeterminate rules can move past the initial “growing pains” to gain greater coherence.\footnote{323} The resulting transparency of rules and fairness of application can then minimize the tensions related to perceived unfairness between investors, who have reasonable expectations of investment stability, and Sovereigns, who have obligations to their nationals and expectations about the extent of their bargained-for treaty obligations.\footnote{324} Such transparency will also promote legitimacy by enhancing the perception that tribunals render decisions according to the correct procedures and thereby promote just and honest decision making.\footnote{325}

Thus far, however, the lack of determinacy and coherence in treaty arbitration has raised the specter of a legitimacy crisis. There are a variety of institutions that complain about particular aspects of the investment treaty process, including stated concerns about the transparency and privacy of the decision-making process, which lead to a lack of representation,\footnote{326} the “chilling effect” upon important local regulation\footnote{327} and subsequent impact on sovereignty,\footnote{328} and the supposed bias

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\footnote{321. Tribunals have, however, been able to draw on case law from the World Trade Organization and the International Court of Justice in analyzing certain international law standards. This has the benefit of “adherence” to established international and institutional norms and can enhance the legitimacy of investment arbitration. Thomas Franck, Fairness, supra note 312, at 41-46.}

\footnote{322. See Judge Brower, supra note 305.}

\footnote{323. See Thomas Franck, The Power of Legitimacy, supra note 310, at 62.}

\footnote{324. Thomas Franck Fairness supra note 312, at 440-41.}

\footnote{325. Caron, supra note 311, at 561; Junne, supra note 311, at 191.}

\footnote{326. Lerner, supra note 308, at 285; see also Gantz, Potential Conflicts, supra note 11.}

\footnote{327. Stuart G. Gross, Note, Inordinate Chill: Bits, Non-NAFTA MTS, and Host-State Regulatory Freedom—An Indonesian Case Study, 24 Mich. J. Int'l L. 893, 899 (2003); see also Dhooge, supra note 87, at 281; Mann, supra note 74, at 34.}

\footnote{328. As a result of certain NAFTA cases, some commentators have articulated concerns about U.S. sovereignty. In particular, there have been concerns that foreign corporations can challenge domestic legislation and executive orders can be “second guessed” by arbitrators thus “depriving domestic governments of the right to govern in the way that they see fit.” Dhooge, supra note 87, at 273-78, 283; Shapren, supra note 16, at 347; see also Jones, supra note 9, at 545 (suggesting that powerful foreign investors “may have the opportunity to hold governments hostage” by threatening litigation with an intent to influence government decision making); Shapren, supra note 16, at 327 (noting the concern that foreign investors are granted rights above domestic citizens and that some aspects of NAFTA may cause countries to give up their sovereignty). But see Price, NAFTA, supra note 55, at 113 (explaining that al-}
of arbitrators.\textsuperscript{329} Many of these concerns are symptoms of a larger problem: the ability to determine with certainty the respective rights and obligations of investors and Sovereigns in a given situation. As suggested by certain aspects of the \textit{Lauder}, \textit{SGS}, and \textit{NAFTA} cases, there is not yet a simple formula for immediately distinguishing between compensable and non-compensable regulatory activities.\textsuperscript{330} So given this steep learning curve, why bother to invest in investment arbitration?

Despite the "growing pains," the literature acknowledges that using arbitral tribunals to resolve investment disputes has been an important factor in fostering foreign investment, encouraging transfers of capital and know-how exchanges, and providing a basis for the long-term benefits of investors and sovereigns alike.\textsuperscript{331} But even champions of investment arbitration suggest that improvements could usefully be made.\textsuperscript{332} This Article therefore turns to the various suggestions which have been made by commentators, politicians, and academics who have previously considered mechanisms to address concerns about legitimacy in the current system.

B. Previous Suggestions for Reform

In the past, the academic literature has considered mechanisms for reform on an ad hoc basis. This Article, however, synthesizes a framework for analyzing those previous suggestions for reforming investment treaty arbitration. Previous suggestions tend to fall into four different categories. "Legislators" recommend changes to the text of investment treaties to create more specifically defined rights in hopes of capping arbitral discretion and providing greater clarity. "Barrier Builders" wish to impose pre-conditions to arbitration and minimize

\textsuperscript{329} See Lerner, \textit{supra} note 308, at 282-83; see also Beauvais, \textit{supra} note 8, at 262-63 (arguing that arbitrators are neither independent nor accountable and thus judicial legitimacy is sacrificed). Despite Professor Lerner's concerns regarding arbitrator bias, in practice, this has minimal impact upon the outcome. Investment treaty arbitrators are obligated to be independent and impartial. \textit{See infra} notes 361, 365-76 and accompanying text. Should arbitrator bias prove to be a problem, there are mechanisms in place to correct this error, including annulment proceedings, vacatur at the seat of arbitration, enforcement proceedings, and a direct suit against the arbitrator for damages. \textit{See generally} Franck, \textit{supra} note 49.

\textsuperscript{330} Dhooge, \textit{supra} note 87, at 282.

\textsuperscript{331} See Alvarez & Park, \textit{supra} note 14, at 394, 396; Coe, \textit{Taking Stock}, \textit{supra} note 1, at 1385-86; Price, \textit{NAFTA}, \textit{supra} note 55, at 114.

\textsuperscript{332} See Alvarez & Park, \textit{supra} note 14, at 366 (suggesting the system could benefit from "minor tinkering"); Coe I, \textit{supra} note 1, at 1385-86 (explaining that dispute resolution under NAFTA is not "fundamentally flawed," but is not completely "free of troubling features").
investors' access. "Arbitration Rejecters" believe that arbitration is simply the incorrect forum for the resolution of investment treaty disputes and advocate the use of alternative public institutions to resolve investment disputes. Finally, "Safeguard Builders" suggest structural modifications to the arbitration mechanism to promote legitimacy. This Article will address each one of these categories in turn.

1. The Legislative Approach

"Legislative" reformers advocate reducing inconsistency and promoting legitimacy by providing textual certainty in investment treaties. While some commentators suggest more specific enumeration of investors' substantive rights is required, others recommend completely deleting certain unclear terms. These commentators accept that arbitration is an appropriate forum for interpreting investment rights, but they prefer to give arbitrators specific guidance about the meaning and scope of governmental obligations. Both categories of suggestions are based upon the premise that the lack of textual determinacy in investment treaties is a mischief that makes the application of the rule in arbitration illegitimate.

Legislative reformers are correct that Sovereigns could more precisely define substantive rights if they wished to further enhance textual determinacy. To some extent, this is already happening when Sovereigns negotiate investment treaties. For example, many investment treaties prohibit "discrimination," but then go on to define "discrimination" so as to give guidance about the type of governmental distinctions that are offensive as a matter of public international law. Likewise, given the confusions thus far about the interpreta-

333. See Wiltse, supra note 16, at 1184-87 (suggesting that the best way to deal with the ambiguities arising from broadly defined or ill defined terms is to amend NAFTA's substantive rights and definitions); Gross, supra note 327, at 956 (arguing that (1) governments should "seek to clarify provisions in each treaty concerning expropriation, fair and equitable treatment, and investment definitions ... through negotiated amendment" and (2) there should be an amendment of "the definition of a qualified investment ... to include only those investments which are valid as matter of host-country law" and that BITs "should be clarified so as to make provision of protection ... explicitly subject to both parties' consent"); see also Mann & von Moltke, NAFTA's Chapter 11, supra note 87, at 7 (expressing concern about the "expansive definitions" in NAFTA).

334. See Godshall, supra note 268, at 300 (suggesting elimination of NAFTA's "tantamount to expropriation" standard because of its lack of determinacy).

335. Julie A. Soloway, NAFTA's Chapter 11: The Challenge of Private Party Participation, J. Int'l Arb., June 1999, at 3 (explaining that the "lack of clarity in Chapter 11 prevents the establishment of a secure and stable framework for investments"); see also Ferguson, supra note 87, at 503 (explaining that the "vague language" of NAFTA allows investors to "abuse" the dispute resolution process). But see Beauvais, supra note 8, at 287-88 (suggesting that modification of NAFTA's substantive legal standards is inappropriate, particularly as NAFTA parties are unlikely to pursue changes).

336. U.S.-Czech Republic BIT, supra note 153, arts. 1(1)(f), 2(2)(b) (prohibiting...
tion of phrases such as "fair and equitable treatment," in the latest U.S. Model BIT, the United States has taken the bold step of defining standards more precisely.\textsuperscript{337} The renegotiation of thousands of investment treaties would obviously be a mammoth undertaking and, therefore, is an impractical solution at present.\textsuperscript{338} The more realistic option is, in the future, to provide particularized guidance about the meaning of ambiguous rights, such as "fair and equitable treatment" and the so-called "umbrella clause," which have resulted in inconsistent arbitral awards.

Further definition of substantive rights in investment treaties is only a partial solution, however.\textsuperscript{339} Overly specific definitions will sacrifice the flexibility and equity that exists in the present system and may also prematurely stunt the development of new areas of law. Perhaps more importantly, in an attempt to cover every possible scenario, over-definition can create absurd results; instead of being a "cure" to a legitimacy crisis, this can defeat the purpose and intent of the rule and create further difficulties. Even if the provisions of investment treaties are "broad," "vague," or "uncertain,"\textsuperscript{340} this does not make the standards illegitimate. Coherent interpretation of the rights promotes justice and legitimacy. While it may be useful to provide further textual definition to investment rights, if treaty arbitration is allowed to continue its evolution, interpretive determinacy ultimately will have a greater impact on the scope of rights and will infuse potentially ambiguous textual standards with enhanced clarity.

2. The Barrier Building Approach

A second set of commentators appear to accept arbitration as a legitimate dispute resolution mechanism, but dislike how investors use it. These commentators generally advocate the creation of preconditions to arbitration, which impose de facto barriers to bringing

discriminatory treatment and providing a definition of "nondiscriminatory"). \textit{But see Agreement for the Promotion and Reciprocal Protection of Investments, Feb. 18, 2000, Thail.-Zimb., art. 2(2) (prohibiting only the impairment of investment by "unreasonable, arbitrary or discriminatory measures" but failing to define these terms further), at http://www.unctad.org/sections/dite/iia/docs/bits/thailand_zimbabwe.pdf.}

\textsuperscript{337.} Amended U.S. Model BIT, \textit{supra} note 6, art. 5.

\textsuperscript{338.} When investment treaties come up for renewal, however, this may be an appropriate junction for Sovereigns to consider revising the scope and language of the substantive rights provided to investors.

\textsuperscript{339.} This approach also does not address the legitimacy of the arbitration mechanism itself.

\textsuperscript{340.} For instance, in the context of NAFTA, various commentators have noted that provisions of Chapter 11 leave abundant room for interpretation. See Afilalo, \textit{supra} note 1, at 4; Dhooge, \textit{supra} note 87, at 283; Price, \textit{NAFTA}, \textit{supra} note 55, at 109; Solloway, \textit{supra} note 335, at 13; see also Bernardo M. Cremades & David J.A. Cairns, \textit{The Brave New World of Global Arbitration}, 3 J. World Invest. 173, 194-95 (2002) (looking at the standard for expropriation and noting how the breadth of the standard creates uncertainty).
claims—particularly claims with public health or environmental implications.\textsuperscript{341} The “barrier building” reforms run across a broad gamut but usually require investors to obtain some kind of governmental approval. At the more flexible end of the spectrum, investors would be required to submit their dispute to preliminary governmental examination and request for approval to an investor’s own government. This approach seems to have found some champions in Congress, notably former presidential candidate John Kerry.\textsuperscript{342} A tougher approach is to have government ministers serve as “gatekeepers.” This approach gives more than one government an opportunity to reject an investor’s claim, even if it might otherwise be colorable as a matter of law.\textsuperscript{343} An even more rigorous approach involves the wholesale rejection of investor-Sovereign dispute resolution,\textsuperscript{344} and a return to the old mechanism where investment disputes were brought on a Government-to-Government (“G2G”) basis.\textsuperscript{345} These recommendations are

\textsuperscript{341} See Wiltse, supra note 16, at 1188 (describing proposed procedural barriers to block unmeritorious claims); Samrat Ganguly, Note, The Investor-State Dispute Mechanism (ISDM) and a Sovereign’s Power to Protect Public Health, 38 Colum. J. Transnat’l L. 113, 166 (1999) (suggesting, for claims involving a government’s right to legislate public health issues, the creation of a governmental or non-governmental mechanism capable of preventing unmeritorious claims); see also Mann & von Moltke, NAFTA’s Chapter 11, supra note 87, at 7 (expressing concern at investors’ “unfettered ability” to initiate claims under investment treaties).


\textsuperscript{343} This might mean, for example, that government officials from the two Sovereigns would first be given an opportunity to consider an investment dispute and, if both parties determine there is no violation, the investor is prevented from bringing a claim. Beauvais, supra note 8, at 294; Ferguson, supra note 87, at 518-19; Godshall, supra note 268, at 296-97.

\textsuperscript{344} At first blush, this might actually appear to be an “arbitration rejecter” position that would prefer a return to a public forum. As a practical matter, however, G2G dispute resolution creates barriers to an investor’s pursuit of its claim for damages. The political approvals necessary for a Sovereign to advocate on its investor’s behalf involve a cumbersome process and are rarely obtained. See supra notes 54-57 and accompanying text (describing the old ICJ process of dispute resolution).

\textsuperscript{345} See Lerner, supra note 308, at 289-90 (suggesting that, in denial of justice cases brought under NAFTA, disputes be resolved under chapter 20, which permits the resolution of G2G disputes). Some commentators recommend a wholesale return to G2G dispute resolution, while others suggest that perhaps only categories of claims
designed to redress concerns about the mischief caused by investors bringing unmeritorious claims, which arguably have a detrimental impact on sovereignty and a Sovereign’s ability to pass legislation affecting their citizen’s health, safety, and public morals. This concern is driven, in part, by concerns about determinacy and coherency—namely, a Sovereign having advance notice of the potential scope of their legitimate regulatory authority.

The “cure” for this supposed “ill,” however, neither stands up to scrutiny nor addresses the core problem it wishes to solve. Investment treaties do not trespass unnecessarily on sovereignty. Sovereigns choose to enter into investment treaties. In order to obtain the benefits arising from investment treaties, Sovereigns negotiate treaties and determine what rights they will cede and the responsibilities they will undertake. If Sovereigns wish to cede less sovereignty, Sovereigns should do so during negotiation. Moreover, investment treaties need not apply wholesale, and sensitive legislative areas are often carved out from the substantive protections provided by BITs. Investment treaties do not prevent Sovereigns from passing legislation

should be subject to G2G dispute resolution. Compare Daniel R. Loritz, Corporate Predators Attack Environmental Regulations: It’s Time to Arbitrate Claims Filed Under NAFTA’s Chapter II, 22 Loy. L.A. Int’l & Comp. L. Rev. 533, 548 (2000) (suggesting the wholesale abandonment of investor-to-state arbitration and a return to G2G arbitration), with Beauvais, supra note 8, at 294 (arguing for the “radical” solution of only permitting “certain classes of claims, such as those raising serious public policy issues” to be resolved in a G2G setting).

346. See, e.g., Ferguson, supra note 87, at 519 (suggesting that the procedural changes would decrease investor’s strategic use and abuse of NAFTA where public policy is concerned).

347. See Lawrence L. Herman, Settlement of International Trade Disputes—Challenges to Sovereignty—A Canadian Perspective, 24 Can.-U.S. L.J. 121, 122 (1998) (stating that “there is no doubt that, as treaty parties, the contracting States have accepted international obligations that bind them contractually and thus affect their traditional freedom of action”); see also S.S. Wimbledon (U.K., Fr., Italy & Japan v. Ger.), 1923 P.C.I.J. (ser. A) No. 1, at 25 (June 28) (concluding a treaty is not an abandonment of sovereignty, rather “the right of entering into international engagements is an attribute of State sovereignty”).

348. For example, certain sensitive sectors can be carved out from the substantive protections granted in treaties. See U.S.-Czech Republic BIT, supra note 77, at annex I (permitting the U.S. to carve out insurance, energy and power production, banking, and telecommunications from the national treatment guarantees); U.S.-Poland BIT, supra note 77, at annex I (same); OECD, supra note 12, at 4 (describing the methods for making exceptions and exemptions in investment treaties); Saamir Elshihabi, The Difficulty Behind Securing Sector-Specific Investment Establishment Rights: The Case of the Energy Charter Treaty, 35 Int’l Law. 137, 137 (2001) (explaining that many investment treaties outline specific exceptions to national treatment and typically fall within strategic sectors such as defense, energy, or telecommunications). But see Gustavo Vega C. & Gilbert R. Winham, The Role of NAFTA Dispute Settlement in the Management of Canadian, Mexican and U.S. Trade and Investment Relations, 28 Ohio N.U. L. Rev. 651, 682-83 (2002) (noting that even though Mexico exempted areas from NAFTA, it has nevertheless opened for investment in industries related to railroads, telecommunications, satellite transmission, as well as banking and petrochemicals).
related to health, safety, and welfare. Rather, these treaties provide incentives for Sovereigns to act in a manner that does not violate public international law and is free from inappropriate expropriation, discrimination, and the like. Should they violate the obligations they have undertaken, Sovereigns pay compensation for the resulting harm.

If the real goal of the barrier builders is to discourage frivolous lawsuits, there are other methods to address this concern. International arbitration tribunals are not shy about making costs orders. Cost sanctions can be applied either during a case or after an award to discourage vexatious litigation. As litigation can easily cost more than U.S. $1 million a year, having to pay for two sets of lawyers is a significant deterrent to bringing or defending unmeritorious claims. More importantly, addressing this concern does not require modification to the current investment arbitration regime. It requires parties to investment arbitration to be stalwart in their requests for costs and for tribunals to become more active in shifting the costs of the arbitration to those bringing frivolous claims.

349. In any event, governments often do not even realize that their regulatory conduct could contribute to a claim under an investment treaty—thus suggesting that there is minimal "chilling" impact upon a government's ability and desire to govern. See Adam Liptak, Review of U.S. Rulings by NAFTA Tribunals Stirs Worries, N.Y. Times, Apr. 18, 2004, at A20 (noting that Massachusetts Supreme Judicial Court Judge Margaret Marshall was surprised and shocked to learn of the possibility that a NAFTA tribunal could "review" a state court decision, notwithstanding the fact that the Mondev case, which challenged a decision by the Massachusetts Supreme Judicial Court, had been decided during the previous year).

350. See Ferguson, supra note 87, at 519; Loritz, supra note 345, at 548.


352. See ICSID Rules, supra note 83, ch. 5, R. 28 (giving the tribunal wide latitude on the allocation of costs); ICC Rules, supra note 81, art. 31 (giving the tribunal discretion to fix the proportion of the costs to be borne by the parties); SCC Rules, supra note 81, art. 40 (giving tribunals the discretion to allocate costs); UNCITRAL Rules, supra note 81, art. 40, 15 I.L.M. at 716 (giving tribunals the discretion to allocate costs between the parties).

353. This is a figure based upon the author's personal experience, but the exact amount will obviously involve the nature of the dispute, the arguments raised by the parties, and the adversarial nature of the litigation, for example. See also Peterson, All Paths, supra note 69, at 18 (noting that ICSID has estimated that the average cost for arbitrators' fees alone is in the order of U.S. $220,000, reporting that the Czech Republic has reported spending U.S. $10 million in legal fees); Blanch Interview, supra note 66 (explaining that the average minimum yearly cost (including expert and tribunal fees) can be in the order of GBP 700,000 (approximately U.S. $1,280,000) per year but that costs could go as high as GBP 2,250,000 (approximately U.S. $4,117,000) per year); Reed Interview, supra note 66 (noting that a case can cost "a minimum of $1 million to develop" and indicating that they typically cost much more).

354. See infra notes 393-96 and accompanying text (suggesting that the modification of institutional rules might also be helpful in this respect to provide additional...
By adding extra limitations upon an investor’s right to seek arbitration,\textsuperscript{355} barrier builders go beyond their specific concerns about sovereignty for public health and environmental issues. It is likely that the vast majority of investment arbitration cases would potentially fall within the ambit of “public policy”\textsuperscript{356} and be subjected to the political whims of governmental decision makers—even commercial disputes, such as the SGS cases—because there are no determinate standards for establishing what falls within the nebulous construction of “public policy.” Indeed, any definition would be subject to varying interpretations by recalcitrant Sovereigns looking for opportunities to minimize their arbitration risk and investors looking to minimize their commercial damage. In practice, the recommendations of barrier builders turn back the clock fifty years and inhibit investors’ direct access to Sovereigns who have allegedly misbehaved. Prohibitive access barriers are what the investor-state mechanism was designed to avoid, and suggestions for modification must be tempered with the recollection of why it was created in the first place. From an economic perspective, a legal solution that relies upon the screening of a claim’s legal, social, or political merits risks damaging the fabric of cross-border economic cooperation and wealth creation.\textsuperscript{357} Evolution has occurred precisely because Sovereigns want to promote foreign investment and recognize that investors need guarantees of a “fair shake” and other mechanisms that will stabilize the investment environment and minimize investment risk. If, for example, there was a return to the G2G mechanism at the ICJ that so many Sovereigns have rejected as an inappropriate hurdle, the prosecution of meritorious claims will be in-

\textsuperscript{355} Limitations on investors’ rights to initiate investment arbitration exist already. For example, almost all investment treaties require investors to wait through a “cooling off” period, which is designed to promote negotiation and settlement, before they can initiate arbitration. Further, many treaties have “fork in the road” provisions which prevent investors from bringing an arbitration claim if they have already initiated a claim before the Sovereign’s administrative tribunals and national courts. Reed et al., supra note 31, at 56-59.

\textsuperscript{356} See Dhooge, supra note 87, at 284-85 (suggesting that public policy issues should be “immunized” from investor-state dispute resolution but noting that the definition of “public policy” would be difficult).

\textsuperscript{357} Alvarez & Park, supra note 14, at 400.
hibited and Sovereigns will be permitted to get away with otherwise inappropriate conduct. The result is that the law would develop slowly—if at all—and there would be even fewer opportunities to secure interpretive determinacy and a coherent jurisprudence. Thus, the solution advocated by barrier creators paradoxically reduces legitimacy and increases perceptions of unfairness.

In any event, investment arbitration is governed by rules and applicable law; when functioning properly, the substantial likelihood is that the process will not be abused and legitimate regulatory activity will not be undercut. While investors and Sovereigns may wish the system to become more determinate and coherent, there are better methods for achieving these worthwhile goals than by prescribing the wrong antidote for investment arbitration's present malady.

3. The Rejection of Arbitration and a Return to a Public Forum

Some commentators reject the idea that arbitration is an appropriate way to resolve investment disputes and instead advocate returning these disputes to a public forum. These suggestions vary across a broad spectrum. At one end are those who would permit investors to bring claims—but only before national courts—perhaps similar to the manner in which issues are resolved in the European Union. At the other end of the spectrum are those who would replace investor-Sovereign arbitration with a mechanism that would require such claims to be brought before a permanent judicial body, perhaps akin to the International Court of Justice.

Some Observations, supra note 60, at 427-28. See Afilalo, supra note 1, at 9, 45, 51 (arguing that NAFTA involves “a delicate exercise in supranational constitutionalization” and therefore recommending that original jurisdiction over NAFTA disputes be transferred to national courts, which operate in conjunction with a permanent NAFTA appellate tribunal); see also Robert K. Paterson, A New Pandora’s Box?: Private Remedies for Foreign Investors Under the North American Free Trade Agreement, 8 Willamette J. Int’l L. & Disp. Resol. 77, 122-23 (2000) (suggesting that access to domestic courts could be linked to a transnational court of appeal).

A standing court might resemble the European Court of Justice or the U.S.-Iran Claims Tribunal. Professor Michael Reisman, focusing primarily upon a permanent bi-national tribunal similar to the U.S.-Iran Claims Tribunal, imagined a court with a limited and stable membership, capable of promoting the development of a consistent doctrine, and ensuring transparency of the decision-making process. W. Michael Reisman, Control Mechanisms in International Dispute Resolution, 2 U.S.-Mex. L.J. 129 (1994). Reisman suggests a single international arrangement, and notes that even where there is a complex free trade regime between multiple political economies, such a tribunal might “provide a degree of consistency to decisions.” Id. However, Professor Reisman also suggests that where there is a complex free trade regime between multiple political economies, the need for such a tribunal might be even more greatly enhanced as it would “provide a degree of consistency to decisions.” Id. at 136-37; see also Nigel Blackaby, Public Interest and Investment Treaty Arbitration, in International Commercial Arbitration: Important Contemporary Questions (Albert Jan van den Berg ed., 2002) (advocating for a permanent judicial body to decide investment disputes, which should be composed of eminent practitio-
The critiques from "arbitration rejecters" are twofold. First, they reject the use of arbitrators as decision makers because they believe arbitrators are biased, lack pedigrees that promote legitimacy and, therefore, have little incentive to come to reasoned decisions. Second, they express concern about the lack of public participation in a mechanism that decides public rights. As a result, the arbitrators and their process cannot be trusted and are, therefore, unable to provide a legitimate dispute resolution mechanism. While

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361. Ganguly, supra note 341, at 123-24 (suggesting that arbitrators are subject to influence, which may be the result of a shared nationality, political or economic philosophy, or legal culture, and suggesting that arbitrators in practice are pressured to advocate for a nominating party). But see ICC Rules supra note 81, arts. 7, 9, 11 (requiring arbitrators to be "independent," permitting the ICC Court to consider arbitrators' "nationality, residence and other relationships with the countries of the parties or the other arbitrators" before confirming an arbitrator's appointment, and setting up a mechanism for removing arbitrators for a lack of independence); SCC Rules, supra note 81, arts. 17-19 (requiring arbitrators to be impartial and independent and setting out the framework for disqualifying arbitrators who fail to adhere to this standard); UNCITRAL Rules, supra note 81, arts. 9-12, 15 I.L.M. at 706-07 (providing that arbitrators must disclose "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence" and setting up procedures for challenging arbitrators who act improperly). ICSID is particularly exacting about the qualifications and independence of its arbitrators. See ICSID Convention, supra note 88, arts. 14, 39, 4 I.L.M. at 534, 539 (placing limitations upon arbitrators' nationality, requiring arbitrators to be "of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment"); ICSID Rules, supra note 83, ch. 1, art. 9 (permitting disqualification of arbitrators who fail to comply with the requisite standards in the ICSID Convention).

362. Professor Brower suggests that he is "reliably informed that most arbitrators expect to receive only a single appointment to serve in Chapter 11 disputes." Brower, Structure, supra note 128, at 65. However, his comment is confined only to those disputes under NAFTA—and he has not considered the broad number of appointments that arbitrators can have to resolve under investment treaties more generally (such as BIT disputes and other MIT disputes). Professor Brower acknowledges that the Honorable Benjamin Civiletti has sat in at least three NAFTA arbitrations. Id. at 65 n.156; see also infra notes 372-74 and accompanying texts (providing a small excerpt of those cases involving the repeat appointment of respected international arbitrators).

363. See Abbott, supra note 303, at 308 (describing problems with "private arbitrators ruling on critical questions of public health," but noting that on at least one case involving an issue of access to justice, one of the arbitrators was Judge Abner Mikva, characterized as a distinguished jurist by Professor Abbott). The appointment of someone of Judge Mikva's stature is not an isolated incident, however. See infra notes 371-75 and accompanying text.
these are important considerations, they do not withstand scrutiny and also create legitimacy issues with their "cure" to investment arbitration's ills.

In order to ensure the legitimacy of investment arbitration, decision makers who will be safeguarding interpretive determinacy must themselves be recognized as legitimate. There is little merit, however, to the suggestion that arbitrators should not decide investment disputes because they are biased and unaccountable decision makers. There are specific mechanisms to address difficulties related to arbitrator bias. In particular, there are rules that allow arbitrators to be challenged and removed when they are not independent or impartial. Arbitrator bias and misconduct are also grounds for challenging arbitration awards. Further, there are mechanisms that already address the purported unaccountability of investment arbitrators. First and foremost, arbitration awards are subject to scrutiny on a variety of levels by institutions and courts. Equally as important is the im-

364. See supra notes 314-15 and accompanying text (describing how decision makers must have an authority recognized as legitimate in order to promote interpretive determinacy).

365. See Aldo Berlinguer, Impartiality and Independence of Arbitrators in International Practice, 6 Am. Rev. Int'l. Arb. 339, 340-41, 373 (1995) (describing the obligations of neutrality in arbitration); M. Scott Donahey, The Independence and Neutrality of Arbitrators, J. Int'l Arb., Dec. 1992, at 41 (explaining that in "international arbitration, a party [appointed] arbitrator may be predisposed to his appointing party's position, but must conduct himself and render his decision in good faith and [in] an independent manner"); Lord David Hacking, Well, Did You Get the Right Arbitrator, 15 Mealey's Int'l Arb. Rep. 32, 35 (2000) (explaining that at the forefront of appointments by international arbitration institutions "is a concentration upon the appointment of arbitrators who are, and can be seen to be 'neutral' and 'independent' of the parties"); J.D. Wangelin, Buttressing the Pillars of Arbitration, 19 Mealey's Int'l Arb. Rep. 27, 28 (2004) (noting that one of the pillars of international arbitration is that "an impartial, and expert, tribunal or arbitrator will decide the case").

366. Generally, before accepting appointments, arbitrators are required to sign statements of independence and impartiality. There are also mechanisms in place for challenging arbitrators should they appear to lack this independence or impartiality. See supra note 361 (describing the institutional rules requiring independence and impartiality and mechanisms for challenge).

367. See supra note 98 and accompanying text (noting that corruption is a base for annulling awards under the ICSID Convention and that bias may be a ground for vacatur of an award); see also Maureen A. Weston, Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration, 88 Minn. L. Rev. 449, 464-65 (2004) (explaining that arbitrator bias is a basis for vacating awards in the United States).

368. When an award is issued by the ICC, including awards under investment treaties, the ICC is required to review awards and can—and often does—subject it to a set of criticisms that can change aspects of the award. ICC Rules, supra note 81, art. 27; Eric A. Schwartz, The Resolution of International Commercial Disputes Under the Auspices of the ICC International Court of Arbitration, 18 Hastings Int'l & Comp. L. Rev. 719, 723-24 (1995); see also W. Laurence Craig et al., International Chamber of Commercial Arbitration 377-80, 379 n.4 (3d ed. 2000) (describing the ICC review process and noting that some have suggested that the ICC court's review powers could be very broad); Christopher R. Drahozlal, Judicial Incentives and the Appeals Process, 51 SMU L. Rev. 469, 501 n.142 (1998) (quoting Gary B. Born, International
impact of the “arbitrator marketplace” where professional credibility and word-of-mouth recommendations play a role in both the appointment and re-appointment of arbitrators. In multi-million and multi-billion dollar disputes, parties will not accept an arbitrator who is likely to be challenged for bias, who cannot fully consider the facts and laws at issue, and who may be incapable of rendering an enforceable award. As a result, many of the arbitrators in investment treaty cases are of the highest international order and are distinguished former judges, respected scholars and practitioners as well as...
former government officials or others who have worked with international organizations. There is also the possibility that arbitrators might be liable for inappropriate conduct. These significant checks minimize the risk of bias and unaccountability and weigh heavily in favor of a conclusion that international arbitrators are legitimate decision makers who can promote justice through the proper application of law. Moreover, the unique core benefits of arbitrators such as flexibility, expert decision making, speed, and enforceability would be lost by rejecting arbitration out of hand.

Loewenfeld's appointment in the Corn Products International case, the Fireman's Fund Insurance case, the Ridgepointe Overseas Developments case, and his role as President in the Gas Natural SDG, S.A. case).

Albert van den Berg is a Dutch arbitration practitioner, who has written extensively on the subject of international arbitration, and has served on many investment treaty cases. See List of Pending Cases, supra note 108 (noting that Mr. van den Berg is arbitrator on the BP America Production case, the Plama Consortium case, the ADC Affiliate Limited case, the Pan American Energy case, the Enrho St case, the LG&E Energy case, and has served as President of the Fireman's Fund Insurance case). Mr. Yves Fortier is a Canadian practitioner who was formerly the president of the London Court of International Arbitration. See id. (noting Mr. Fortier serves as an arbitrator in the OKO Osuuspankkien Keskuspankki Oyj case, the Champion Trading Company case, and the PSEG Global Inc., case, and that he is also President of a number of cases, including the Cemex Asia Holdings case, the Fraport AG Frankfurt Airport Services case, and the Soufraki case); see also naftalaw.org, Homepage, at http://www.naftalaw.org (last visited Feb. 4, 2005) (noting Mr. Fortier was an arbitrator in the UPS case). Ahmed S. El-Kosheri is a leading Egyptian arbitration practitioner. See List of Pending Cases, supra note 108 (noting that El-Kosheri was an arbitrator in the SGS v. Philippines case, the Goetz case, and the Enrho case); see also List of Concluded Cases, supra note 373 (noting El-Kosheri was the president in the Asian Agricultural Products case).

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In addition, there is a long tradition of decision making in international commercial arbitration. This historical tie and “pedigree” also helps promote legitimacy as it signals arbitration’s overall importance in the current social order. See Thomas Franck, Fairness, supra note 312, at 34 (explaining that legitimacy is enhanced by “symbolic validation” which communicates authority and demonstrates that the symbol has a “significant part in the overall system of social order” and therefore continuity of a signal—such as the use of an arbitrator to decide international disputes—exemplifies the stability of expectation and fairness).

In addition, parties can tailor the arbitration mechanism to their particular problem. This often increases the efficiency of the proceedings, and may yield a level of cost effectiveness not found in court proceedings.
The second criticism of arbitration rejecters—namely the nonpublic nature of the current arbitration system—merits more attention and does, on the surface, suggest that bringing disputes to a public forum promotes legitimacy. Having national courts decide investment disputes would, in some respects, promote transparency and interpretive determinacy as decisions would be made in public before a publicly accountable body. Indeed, it would go a long way towards providing one of the fundamental building blocks of legitimacy—namely representation, in a fair and democratic manner, of those affected by a decision.

Transparency is not necessarily best served by placing disputes in a traditional “public” forum. There are no international standards of transparency for national courts, and levels of transparency differ. For example, unlike the United States, in England and Wales, although court hearings may be public, documents produced during discovery are deemed confidential until relied on in court. Given this divergence, if transparency of the decision-making process is the ultimate objective, expressly defining the parameters of transparency in an investment treaty’s dispute mechanism is a more effective means of promoting transparency than sending disputes to a variety of national courts with different standards.

At first blush, sending disputes to a public body seems likely to enhance legitimacy by promoting public scrutiny. Having to sue a Sov-
ereign in the Sovereign’s national court is unlikely to promote legitimacy, however, as the integrity of the judges in certain national courts may create problems with interpretive determinacy where judges are perceived to be unfair, ineffective, or unable to conduct themselves in accordance with the correct legal procedures. Specifically, judges may either be perceived to be biased or may actually favor the Sovereign over foreign investors. By putting “domestic courts on the front line,” investors would be exposed to the vagrancies, eccentricities, and perceived “home field advantages”—and presumably the local interests—of municipal courts. Even in the European Union (“EU”) model, there is a tendency for national courts to support national governments; and this is why even the EU has found the national court model, in isolation, does not work. These perceptions of neutrality and fairness are the precise concerns that neutral arbitral tribunals were designed to promote.

A free standing arbitral court affiliated with the ICJ comes closer to creating a workable solution. The judges could be a more balanced and neutral set of decision makers with a stable membership. This solution does not necessarily overcome the difficulties related to the perceived bias of decision makers, however. Judges, like arbitrators and all other human beings, carry their personal experiences, cultural background, and political preferences with them. Political factors have, for example, been important variables in ICJ cases such as the “notorious” split opinion concerning the legality of the use of nuclear weapons or refusal to answer the World Health Organization’s request for an advisory opinion on such weapons. Moreover, limiting the first-instance decision makers to a narrow set of judges has particular consequences. It eliminates the flexibility of the process that permits the inclusion of technical expertise, which facilitates perceptions of fairness and permits parties to psychologically “buy-in” to the arbitration. It also prevents parties from choosing among the unlim-

386. See Dodge, supra note 252, at 577.
388. This exemplifies why the European Union approach also requires the creation of an appellate body. Afilalo, supra note 1, at 41-43.
389. A panel of three neutral individuals, where personal prejudices can be balanced out by fellow co-arbitrators, is surely more legitimate than one national judge.
390. Threat of Use of Nuclear Weapons, 1996 I.C.J. 226, 265-67 (July 8); Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 66, 84 (July 8); see also Alvarez, supra note 56, at 418-19 (describing a variety of cases in which the effect of politics contributed to decisions from the ICJ).
391. For example, if the dispute involves the interpretation of a Spanish language document, a tribunal would benefit by having at least one member of a panel with a Spanish language background. See Coe, Domestic Control, supra note 132, at 203 n.120 (noting that NAFTA tribunals often have unique expertise, including a considerable background in international arbitration, fluency in a principal language, and substantial familiarity with the substantive law).
ited roster of persons, which might otherwise permit a dispute to advance quickly and could thereby delay the administration of justice.

In addition, returning cases to the suggested public forums also does not fully address issues regarding coherence. A series of different national courts is unlikely to provide a uniform jurisprudence, particularly where courts feel a need to support local interests and the judiciary may not be familiar with complex issues of international law. This does little to enhance the legitimacy of the decision-making process and ensure that disputes are decided in a correct manner. Therefore, it would still be necessary to have a supervisory body to check discretion, provide an opportunity to redress the inappropriate influence of local interests, and minimize the appearance of unfairness. Although having one permanent court consider issues of public international law would help create a coherent body of investment treaty jurisprudence, there is still no check on the court’s discretion should the court simply “get it wrong.” Where crucial international rights are at stake and a large damage award could wreak havoc with a developing nation’s economy, “getting it right” is vital.

Ultimately, shifting disputes to a public forum cannot completely “cure the ill” of a legitimacy crisis—rather, it places the unavoidable bubble of discretion into another place. If the goals are to improve transparency, accountability, and uniformity of interpretation—there are methods of improving the current framework without putting the discretion only in the hands of national judges or a single, unappealable court.

4. Building Arbitration Safeguards

The final category of reformers have suggested mechanisms to improve the integrity of the arbitration process so as to enhance determinacy, increase jurisprudential coherence, and foster a sense of justice. At their core, these commentators believe in the utility of arbitrating disputes in the first instance, but acknowledge the need for further procedural safeguards. Their suggestions are a mix of preventative and corrective suggestions and, as such, can be used either in isolation or in conjunction with other measures. One set of commentators makes suggestions to prevent inconsistency and promote legitimacy, namely revising institutional rules. Other commentators offer corrective solutions that could be used to alleviate difficulties from inconsistent decisions. One set suggests building an internal review mechanism in each investment treaty so that an institution, such as a free trade commission, can issue interpretive guidance. Another group recommends the establishment of an independent appellate body to review the awards of arbitral tribunals.392

392. Charlie Brower, a former judge in the U.S.-Iran Claims Tribunal, has endorsed the concept of a supranational appellate body such as the International Court
a. Reform of Arbitration Rules

A few commentators have suggested that arbitration rules be revised to prevent difficulties arising from inconsistent decisions.\textsuperscript{393} Such revisions might relate to ensuring the transparency of the arbitral process or establishing arbitral review bodies to permit review of investment treaty awards. The theory behind these suggested reforms is to decrease the possibility of inconsistent decisions and maximize transparency to minimize concerns regarding fairness.

While this option has received little attention to date, its promise lies in the practical nature of the innovation. In contrast to other options, which might require rather cumbersome amendments to investment treaties or overhaul of major international agreements, the revision of institutional rules could be accomplished more efficiently. Specifically, arbitration institutions might consider the utility of adding a specific protocol that would be applicable to investment treaty arbitration. Institutions could establish working groups drawn from a broad background of arbitration practitioners, former government officials, and others to establish a uniform code of “best practices” for investment arbitration in order to take account of the unique public implications of investment treaty arbitration.\textsuperscript{394} These best practices

\textsuperscript{393} E-mail from Professor Thomas Walde, to Susan Franck, Noah Rubins, and Doak Bishop (July 7, 2004) (on file with author) (regarding lecture at British Institute for International and Comparative Law in May 2004); see also Blackaby, \textit{supra} note 360, at 362 (suggesting that modifications or supplements to various institutional rules may be a useful option).

\textsuperscript{394} This might also help address Sovereigns’ concerns about the consistency of procedure. Legum, \textit{supra} note 90, at 146-47.
could, in turn, form the basis for revisions of, or supplements to, current institutional rules. For example, ICSID could amend its Additional Facility Rule 53(3) to indicate that, in the case of investment treaty arbitration, parties are deemed to consent to publication of the award.395 Similarly, the ICC or SCC would make minor amendments to their rules, which might, in the case of investment arbitration, permit amicus participation and publication of awards. In an effort to provide disincentives for the bringing of unmeritorious claims, institutions might also consider revising cost-shifting rules to give tribunals clearer direction regarding when cost shifting is appropriate.396

The difficulty of this approach, however, is that the rules may not apply uniformly across the investment treaty network. Investors usually receive a choice about where to initiate arbitration; and investment treaties do not always permit investors to choose institutions such as the ICC or SCC. If investors were limited to choosing between UNCITRAL and ICSID arbitration (which is often the case), instituting the best practice protocols could prove more difficult. The UNCITRAL Rules have not been modified since 1978, and it could be a challenge to instigate the political will to revise or supplement those rules. Further, while ICSID's Additional Facility Rules might fare somewhat better,397 revision of the ICSID Rules would be constrained by the requirements of the ICSID Convention. The need to revamp the ICSID Convention may prove to be a real barrier to reform. Although the lack of uniformity would promote choice for investors, the potential for forum shopping creates perceptions of unfairness and is a threat to the integrity of the process. Overall, however, it is an area that merits further consideration and discussion—particularly for re-

395. ICSID Additional Facility Rules, supra note 81. Making a similar revision to the ICSID Arbitration Rules may prove more difficult as it would require an amendment of both the rules and the ICSID Convention. See ICSID Convention, supra note 88, art. 48(5), 4 I.L.M. at 540 (providing that ICSID shall not publish awards without party consent); ICSID Rules, supra note 83, art. 48(4) (same). Any revision of the ICSID Rules should distinguish between other types of arbitrations brought by investors that involved disputes under normal commercial agreements, such as concession contracts. These cases involve commercial issues and municipal law, and they do not involve the interpretation of investment treaties and public international law rights. As such, those policy points which would otherwise weigh in favor of transparency are absent and, therefore, presumptions of confidentiality should not be displaced. After this Article was accepted for publication, ICSID published a discussion paper regarding the possible improvements to the framework of ICSID arbitration, which begins to explore opportunities for addressing issues related to change in ICSID's own rules to open up the process and provide for greater transparency. ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration 9-11 (Oct. 22, 2004) (ICSID Discussion Paper), at http://www.worldbank.org/icsid/improve-arb.pdf.

396. See Gotanda, supra note 351, at 23.

397. ICSID's Additional Facility procedure is not constrained by the provisions of the ICSID Convention. See ICSID Additional Facility Rules, supra note 81, art. 3 (stating that Additional Facility proceedings "are outside the jurisdiction of [ICSID and] none of the provisions of the [ICSID] Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein").
forms related to expanding public access and transparency for public issues.

b. The Free Trade Commission Approach

Another option for promoting legitimacy is to initiate corrective safeguards to minimize the impact of runaway tribunals. Commentators have recommended incorporating a built-in control mechanism in investment treaties—a Free Trade Commission ("FTC") that will issue interpretive guidance about the meaning of investment rights—to enhance legitimacy that some commentators suggest should be incorporated into other investment treaties.  

NAFTA, for example, has a Free Trade Commission, made up of trade ministers from the three NAFTA Sovereigns, to issue binding interpretations that become part of the applicable law. This guidance-giving mechanism could arguably aid in the prevention of inconsistent decisions and creation of coherent doctrine. Using a FTC approach, on a treaty-by-treaty basis, individual FTCs could quickly issue binding interpretations to establish common meanings and a unified jurisprudence. Such a centralized mechanism would reduce incoherency and protect investment expectations of investors and regulatory prerogatives of Sovereigns. As there may be difficulty in securing the agreement of multiple Sovereigns to the exact text of an Interpretive Note, as a practical matter, this mechanism may be used infrequently and is akin to an "emergency escape route" in areas of acute incoherence.

Despite the promise of this "elixir," commentators suggest the FTC mechanism is inappropriate. Arguing that NAFTA parties have thus far used Interpretive Notes in a nonpublic, self-serving manner

398. Beauvais, supra note 8, at 287-88; Dhooge, supra note 87, at 285-86; Ferguson, supra note 87, at 517-18; Loritz, supra note 345, at 547; see also Alvarez & Park, supra note 14, at 400 (suggesting notes of interpretation may help reconcile the arbitral process with the public's interest); Herman, supra note 347, at 136 (suggesting the use of Interpretive Notes in the GATT model could help guide resolution of investment treaty disputes).

399. See NAFTA, supra note 1, art. 1131, 32 I.L.M. at 645.

400. See Loritz, supra note 345, at 548 (explaining that one of the benefits of Interpretive Notes is that they can be established quickly).

401. See Coe, Taking Stock, supra note 1, at 1410.

402. Corporate investors, for example, need certainty so that they can strategically formulate their investments on the basis of a clear and reliable regulatory framework so as to maximize profits and justify their conduct to their shareholders.

403. Government regulators, for example, need certainty about the scope of their obligations so that they can legislate and regulate in a manner that will not subject the Sovereign to liability for breach of international law. A lack of coherence and consistency in tribunal awards may lead to a loss of government certainty and public understanding of the obligations Sovereigns have undertaken. See, e.g., Mann, supra note 74, at 42.

404. Various commentators have noticed with some dismay that the process of issuing the Interpretive Note was conducted entirely in private without an opportunity for
that has exceeded their authority, they suggest that Interpretive Notes debilitate the system rather than help achieve the desired legitimacy.

The FTC model is useful in the respect that it can promote interpretive determinacy and a coherent body of jurisprudence. By failing to seek the input by those who are impacted by the Interpretive Note, however, the NAFTA parties failed to offer fair treatment and representation to investors. The critics are correct to note that the manner in which the mechanism has been used calls into question the legitimacy of the FTC's authority and application of its power. As the core concern appears to be how the FTC exercises its authority, the solution is to place limits on unfettered discretion to promote the legitimate use of power. Such limitations might be akin to the checks and balances in administrative law under the United States Administrative Procedures Act, which was designed to promote transparency and prevent arbitrary, capricious acts that amount to an abuse of discretion.

In practice, this might mean that Sovereigns could render Interpretive Notes after an opportunity for notice and comment so that they can consider the impact of their decisions; alternatively, it might mean that issuing Interpretive Notes could be subject to review should it amount to an abuse of discretion or an excess of authority.
These mechanisms have been tried and tested in the United States as an appropriate method for balancing legitimate regulatory needs of Sovereigns against the commercial concerns of the governed. Should a similar mechanism be incorporated into future investment treaties, it could aid transparency and result in Interpretive Notes that promote coherence and determinacy. But should Interpretive Notes continue to be used in a problematic manner, the “quick fix” offered to restore jurisprudential coherence may do more harm than good in the long run.

c. Establishment of an Appellate Body

Eliminating the arbitration of investment disputes would be detrimental.\(^{410}\) The beauty of arbitral tribunals is their ability to conduct independent, expert decision making with “greater autonomy, control [and] efficiency” than other available mechanisms.\(^{411}\) As aptly put by Professor Elihu Lauterpacht, arbitration is “an important component of the international system and cannot be done away with. We should contemplate the possibility that its value may be enhanced if it is linked to a system of appeal.”\(^{412}\) Whereas the ICSID annulment procedures and opportunities to challenge awards after the fact provides an opportunity to ensure the sanctity of procedures and to ensure the dispute resolution process is occurring in a legitimate way,\(^{413}\) an appellate mechanism would promote correct decision making and legal reasoning.

Particularly in light of recent cases,\(^{414}\) there has been an increased call to create an appellate body. Politicians, in particular, have expressed the desire for an appellate process.\(^{415}\) Already, the United States must consider the creation of bilateral appellate bodies for some free trade agreements.\(^{416}\) The goal of an appellate body would

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410. See Alvarez & Park, supra note 14, at 398-99 (explaining it “would be fundamentally unsound to call into question the use of neutral binding arbitration itself as the preferred means for resolving cross-border investment disputes” as this would ultimately do “more harm than good” and could backfire on the United States’ foreign interests).

411. Coe, Taking Stock, supra note 1, at 1418.

412. Elihu Lauterpacht, Aspects of the Administration of International Justice 112 (1991). The author is grateful to Doak Bishop for pointing out the existence of this quotation.

413. David D. Caron, Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal, 7 ICSID Rev.-Foreign Investment L.J. 21, 23-24 (1992); see also supra Part III (discussing opportunities for challenging awards after they are rendered).

414. See supra Part IV.

415. Some academics have expressed concern over the lack of appellate review in investment arbitration. See Blackaby, supra note 360, at 364; Lerner, supra note 308, at 286-87.

416. See, e.g., Chile FTA, supra note 6, at annex 10-H; see also 19 U.S.C. § 3802(b)(3)(G)(iv) (2000) (requiring, in granting the President his trade promotion au-
be to provide a public forum for the review of public disputes and create a determinate and coherent jurisprudence. In their seminal piece suggesting reforms for international commercial arbitration, William H. Knul, III and Noah D. Rubins argue an appellate body is necessary in "bet the company" international disputes. The reasoning applies with even more force in "bet the country" disputes, particularly if certain arbitration users (Sovereigns) have little faith in the dispute resolution mechanism and can terminate investment treaties.

By having a small and stable membership, an appellate body could focus on establishing a clear and coherent body of law and "correcting legal errors in specific cases"; meanwhile arbitral tribunals can use their expertise and focus on their own institutional competency: developing a factual record, clarifying issues in dispute, and applying legal principles. Together this means an appellate body could restore faith in the system, promote consistency, provide predictability, and reduce the risk of inconsistent decisions to make the system sustainable and legitimate in the long term.

The precise form and mandate of an appellate body leaves room for a considerable amount of debate. The commentators suggest reforms in a variety of different flavors but almost exclusively in the context of

418. One of Knul and Rubin's primary critiques of commercial arbitration is that it does not address the concerns of arbitration users, specifically corporate counsel. Analyzing empirical evidence, they note that fewer business people are willing to use arbitration because it is unpredictable and offers few opportunities to redress unfair decisions. Id. at 532 n.5. However, the difficulty with the empirical evidence used lies in the fact that a large segment of those surveyed were U.S. business people; only a very small segment of those polled were of the international business community. See David B. Lipsky & Ronald L. Seeber, The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations 7 (1998) (explaining that their study was performed on "general counsel or chief litigators for the Fortune 1000 corporations in the United States"). Likewise, in the second study referred to by Knul & Rubins, fifty United States and European lawyers were polled, many of whom were not corporate counsel, but themselves avid users of international arbitration. Knul & Rubins, supra note 354, at 532. As a result, the sample is unlikely to be a reliable indicator of the concerns of corporate counsel. See Christian Bühring-Uhle, Arbitration and Mediation in International Business 403-15 (1996) (describing the results of a survey on arbitration in international business disputes). Nevertheless, these studies do suggest that Sovereigns are more likely to have confidence in, and more likely to participate in, an arbitration system where they believe there is predictability and the opportunity to redress unfair decisions. See Caron, supra note 413, at 48-49 (describing an encounter where a general counsel was distressed when there was no opportunity to appeal in an adverse decision involving a million dollar investment dispute).
419. See supra note 31 (describing a Sovereign's ability to end investment agreements).
NAFTA or a specific investment agreement. One commentator suggests that a NAFTA Appellate Body could be composed of Chief Justices of the Mexican, Canadian, and United States Supreme Courts.\textsuperscript{421} Another commentator has suggested that ad hoc arbitral tribunals be used to provide appellate review of investment arbitration awards.\textsuperscript{422} Others have suggested the establishment of an appellate body affiliated with a recognized international institution to provide plenary review for investment arbitration awards.\textsuperscript{423}

While the first suggestion serves a laudable objective, it would marginally enhance legitimacy. Appointing justices of national supreme courts is difficult for several reasons. First, national court judges are subject to the traditional criticisms regarding bias, particularly when it is troubling to rely upon the judgment of individuals who are accountable to the very Sovereigns whose conduct is being evaluated. The credibility of the system is enhanced by calling on those individuals with the requisite legal and technical expertise who are neutral and detached from national political considerations. Second, calling on sitting justices is likely to create a practical problem of efficiently resolving disputes. Full-time supreme court justices are unlikely to have time to take up a new position as an appellate arbitral judge. Third, in the context of broader multinational investment treaties, such as the Free Trade Agreement of the Americas, it would be difficult to achieve balanced representation. If an appellate body required judicial representation from every country with an investment treaty, this problem would be exacerbated. Such an overwhelming number of judges may be unable to render a coherent body of law.

The second suggestion, to use ad hoc tribunals to provide appellate review, only marginally enhances legitimacy. There would still only be minimal guarantees of transparency as the decision making would still be in private and the publication of awards would not be required.

\textsuperscript{421} Abbott, supra note 303, at 308; see also Afilalo, supra note 1, at 53 (suggesting that a “NAFTA Court” would be arranged as follows: (1) contain at least one sitting national judge from each of the NAFTA member states, (2) yearly appointment and election, and (3) if NAFTA expanded to the Free Trade Agreement of the Americas, the number of judges would also shift to reflect the number of newly admitted states, providing for one sitting judge per state).


\textsuperscript{423} Brower, Structure, supra note 128, at 91; see also Afilalo, supra note 1, at 42-43, 52-53 (observing that (1) there is no “NAFTA court” charged with developing and applying the law and therefore, there is only a minimal judicial framework to insure the uniform interpretation of NAFTA and (2) recommending that a NAFTA appellate tribunal could render written, reasoned opinions with precedential value to contribute to the development of the law); Paterson, supra note 359, at 123 (suggesting the consideration of “an appellate body . . . to determine questions of law under NAFTA”).
Moreover, as a series of ad hoc appellate tribunals could come to inconsistent decisions about an existing inconsistent decision, this exacerbates the challenge of creating a coherent jurisprudence. While it does provide a further check on the discretion of arbitral tribunals, there are more effective mechanisms for promoting the overall objective of legitimacy.424

The third suggestion of establishing a permanent appellate body merits more consideration. Some scholars recommend that the ICJ have appellate jurisdiction over investment treaty cases.425 They rightly note that the ICJ’s unique membership and structure—with continuity of membership, independence, and expertise in international law—would go a long way towards improving the efficacy of an appellate option. This option has three practical drawbacks, however. First, the ICJ Statute only permits G2G dispute resolution and does not allow resolution of investor-Sovereign disputes. Although an amendment to the ICJ Statute might be possible, the scope of the carve-out would require careful drafting, and securing the requisite political will to revise the statute could prove challenging. Second, the enforcement mechanism for ICJ decisions is relatively weak. In contrast to the ICSID, New York, and Panama Convention awards, which have tried and tested enforcement mechanisms, enforcement of an ICJ determination must be sought through the United Nations Security Council. Particularly when there are other options available, it is inappropriate to chip away at the power of the enforcement mechanism. Third, the ICJ has minimal experience acting as an appellate body,426 and may therefore find it somewhat difficult to “switch hats”

424. In its recent discussion paper, the ICSID Secretariat suggests that it might be useful to provide for an Appeals Panel of fifteen elected individuals, but that parties (as a default) would then have an opportunity to select a mini-appeals panel comprised of three members. See ICSID Secretariat, supra note 395, at annex 3-4. This is an interesting concept, which has its foundations in the system of subsidiary chambers familiar among international dispute settlement bodies, and while it has the benefit of potentially creating a systematic and coherent set of decisions, it still does not address how inconsistent outcomes rendered among different appellate bodies will be addressed.

425. Coe, Taking Stock, supra note 1, at 1451; see also supra note 392 and accompanying text (describing proposals for a permanent appellate body made by Judges Schwebel and Holtzman and endorsed by Judge Brower).

426. The ICJ’s jurisdiction is twofold: (1) to deliver judgments in contentious cases submitted by Sovereigns and (2) to issue non-binding advisory opinions at the request of certain U.N. organs and agencies. Curtis A. Bradley, International Delegations, the Structural Constitution, and Non-Self-Execution, 55 Stan. L. Rev. 1557, 1570-72 (2003); Nancy Combs et al., International Courts and Tribunals, 37 Int’l Law. 523, 523 (2003). The ICJ does not, therefore, regularly review decisions or take appeals, even when it has the capacity to do so. See Paul Stephen Dempsey, Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation, 32 Ga. J. Int’l & Comp. L. 231, 267-68 (2004) (explaining that where a dispute arises under the Chicago Convention on Aviation, Sovereigns can obtain a ruling from the Council, which can then be appealed to the ICJ); Isabella Diederiks-Verschoor, The Settlement of Aviation Disputes, 20 Annals Air & Space L.
VI. NEW METHODS FOR ADDRESSING INCONSISTENT DECISIONS

No system of dispute resolution is perfect. There are inevitably challenging transitions which require a re-examination of the bedrock principles upon which the system was founded. Investment arbitration is now at this critical juncture. Part of the difficulty caused by inconsistent decisions in investment arbitration is that it is experiencing "growing pains." This evolution is inevitable and was even anticipated.430 Not unlike the initial breaking-in period for the ICSID Convention, this growth process "is especially delicate because of the ab-

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427. Coe, Taking Stock, supra note 1, at 1452 n.318; see Bette E. Shifman, The Revitalization of the Permanent Court of Arbitration, 23 Int'l J. Legal Info. 284, 285 (1994); see also Redfern & Hunter, supra note 113, at 58 (describing the expertise of the Permanent Court of Arbitration); J. L. Bleich, A New Direction for the PCA: The Work of the Expert Group, in The Flame Rekindled: New Hopes for International Arbitration 17, 41-42 (Sam Muller & Wim Mijs eds., 1994) (explaining that the PCA "needs to offer unique services" particularly in state/non-state disputes); Tjaco T. van den Hout, Introduction, in Institutional and Procedural Aspects of Mass Claims Settlement Systems, at vii (Int'l Bureau of the Permanent Court of Arbitration ed., 2000) (noting the important role of the PCA, mentioning the desire that the PCA be utilized more fully and referring to a U.N. Assembly that "invited States to consider making greater use of the PCA's facilities").


430. It was acknowledged during treaty negotiations that certain standards were vague, and the assumption was made that the meaning of the standard would develop through arbitration. See Vandeveld's note 9, at 76 (explaining that the obligation to provide "fair and equitable treatment" is "vague and its precise content will have to be defined over time through treaty practice, including perhaps arbitration under the disputes provisions" (internal quotations omitted)).
sence of any previous interpretation of [a treaty] and the lack of sufficiently clear or consistent indications from prior international practice.

Even NAFTA, the most litigated investment treaty, has not yet established a "mature jurisprudence" but after ten years, "substantive trends" are beginning to emerge.

The fact is that investment awards are not technically precedential. The ICJ Statute suggests that tribunals should not rely on private arbitral decisions as binding authority, and while arbitral tribunals do consider each other's opinions, there is no guarantee that the reasoning or conclusions will be determinative in later cases. As

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432. See also Coe, Taking Stock, supra note 1, at 1407 (describing the difficulties associated with a unified approach to similar issues of law when there are issues of first impression).

433. Id. at 1385; see also Kaufmann-Kohler, supra note 301, at 189, 220 (noting the additional lack of stare decisis in the context of ICSID annulment proceedings).

434. See NAFTA, supra note 1, art. 1136(1), 32 I.L.M. at 646 (binding only the parties to a NAFTA award); see also Weiler, NAFTA Investment Arbitration, supra note 267, at 407 (noting there are no formal rules of precedent in investment treaty arbitration, but it is not unusual for tribunals to rely upon the reasoning and existence of another).

435. In particular, the ICJ does not expressly provide that private arbitral decisions are a recognized source of international law. The ICJ Statute provides that,

[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

ICJ Statute, supra note 52, art. 38(1), 59 Stat at 1060. In contrast to private arbitral awards, decisions from Mixed Claims Commissions and the U.S.-Iran Claims Tribunal, which involved public decision making more akin to the process of making "judicial decisions," are more likely to be treated as having precedential force. See Jason L. Gudofsky, Shedding Light on Article 1110 of the North American Free Trade Agreement (NAFTA) Concerning Expropriations: An Environmental Case Study, 21 Nw. J. Int'l L. & Bus. 243, 260 n.46 (2000) (suggesting that the determinations made by the U.S.-Iran Claims Tribunal are judicial decisions that "may inform the law of expropriation," but also referring to previous ICSID awards in the same manner); see also Raj Bhala, The Myth About Stare Decisis and International Trade Law (pt. 1), 14 Am. U. Int'l L. Rev. 845 (1999) (discussing the de facto precedential value accorded to GATT panels and WTO panel and appellate body decisions).

436. See Bhala, supra note 435; ICJ Statute, supra note 52, art. 59, 59 Stat. 1t 1062 (providing that "the decision of the Court has no binding force except between the parties and in respect of that particular case").

437. See Philippines Award, supra note 239, ¶ 97 (noting that the ICSID Convention only provides that awards are "binding on the parties" and further explaining that "there is no doctrine of precedent in international law" and "no hierarchy of international tribunals" and that there is "no good reason for allowing the first tribunal
a practical matter, however, private investors, governments, and arbitral tribunals rely on previous awards to interpret similar provisions in investment treaties. As explained by Professor David A. Gantz, it is a “common practice” for private investors and governments to refer to prior investment tribunal decisions that appear to favor them, and it is inevitable that arbitral tribunals interpreting similar provisions of investment treaties will consider and follow those previous decisions. Indeed, the result is sensible as—when dealing with issues of first impression—investors and Sovereigns alike will consult a variety of sources when evaluating their potential rights and liabilities. This also explains, for example, why NAFTA jurisprudence has an immense sphere of influence that other tribunals are willing to consider. Indeed, as long ago as 1946, Kenneth Carlston explained that “the pronouncements of international tribunals are of equal value from the standpoint of the development of a system of international jurisprudence.”

The current system of creating ad hoc, disparate decisions on related issues of public international law must be unified. “Getting it right” is essential to an area where there is little analogous jurisprudence. (in time to resolve issues for all later tribunals); see also supra notes 431-37 and accompanying text (describing the lack of stare decisis in investment arbitration).

438. Philippe Pinsolle, a leading investment arbitration partner at Shearman & Sterling LLP in Paris, states that he regularly uses investment awards particularly because the “law is not stable” in the area of investment arbitration. Pinsolle Interview, supra note 66. Stephen Jagusch, a recognized investment arbitration specialist at Allen & Overy LLP in London, similarly explains that when advising clients, he pays “close attention to the reasoning” of awards and that previous awards “whilst not binding, are persuasive.” Jagusch Interview, supra note 66; see also Blanch Interview, supra note 66 (indicating that she uses treaty awards in “the persuasive sense in submissions” and to engage in a “current analysis” of the potential rights and obligations in an investment treaty); Reed Interview, supra note 66 (stating that Freshfields Bruckhaus Deringer “definitely use[s] awards” even though the awards are not binding because they are influential for arbitrators, particularly those awards that “well and critically” analyze treaties and the ICSID Convention and “well and critically” apply the law to the facts).

440. Coe, Taking Stock, supra note 1, at 1397.
441. See id. at 1409 (describing how arbitrators are willing to consult the “reasoning of other NAFTA tribunals” and how, at times, this yields a more uniform result); see also Alvarez, supra note 56, at 406-07 (describing “the rise of de facto stare decisis” and the “impact of international precedents”) (emphasis added); Mann, supra note 74, at 41 (describing the impact of previous arbitration awards and noting that “previous cases will always play an important part in practice in a Tribunal’s decision-making process, even if they are not legally binding on them”). But see Philippines Award, supra note 239, ¶ 97. The tribunal noted that although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State.

Id.
442. Carlston, supra note 48, at 264.
dence and tribunals interpret public rights.\textsuperscript{443} While a minor degree of inconsistency may be useful, as it permits a challenge to the fundamental principles of the system and fosters the considered evolution of law, it is possible to have too much of a good thing. Tribunals are doing their utmost to review previous decisions, avoid previous mistakes, and harmonize their decisions to create a coherent body of law;\textsuperscript{444} nevertheless, the stakes in investment arbitration are simply too great to sit by idly while issues of public international law are being decided inconsistently, in private.

The question is not whether perfection is possible—but how to minimize errors, abuses, and ambiguities in a way that promotes legitimacy. There are a variety of changes that could be made to the present system to do this. While some of the suggested modifications are incremental and more “preventative” (designed to prevent inconsistencies before they occur), other reform efforts are more substantive and would require both institutional adjustments and changes to the investor-Sovereign dispute mechanism as currently delineated in investment treaties.

A. Preventative Solutions

There are a variety of mechanisms which would serve to minimize the risk of inconsistent decisions. They are not aimed at trying to rectify inconsistency after the fact but are aimed at preventing the inconsistency from arising in the future. Solutions might range from such incremental improvements as a development of the academic literature to including provisions in investment treaties or institutional rules to provide enhanced transparency.

A developed academic literature, with precedential value under the ICJ Statute that could be relied upon during deliberations, would decrease the risk of inconsistent decisions. Given the speed with which investors are filing cases and arbitrators are issuing awards on issues of international significance, the law has moved ahead of the scholarship. It is vital that scholars step in to bridge this gap and provide the guidance necessary to harmonize public international law.\textsuperscript{445} In the case of inconsistent decisions, commentators could provide guidance to “square the circle” and identify strains of reasoning that reconcile

\textsuperscript{443}. Investment arbitration is traditionally referred to as “mixed” arbitration because it has the characteristics of both inter-state arbitration and private international commercial arbitration. See Coe, \textit{Taking Stock}, supra note 1, at 1389.

\textsuperscript{444}. In his seminal review of Chapter 11, Professor Coe explains that in the past ten years, NAFTA tribunals have taken “reasoned adjudications” into account, which can include decisions from tribunals convened under the ICSID Convention as well as other ad hoc arbitral tribunals. \textit{Id.} at 1403, 1405-06.

\textsuperscript{445}. See Beauvais, \textit{ supra} note 8, at 285-86 (noting that certain standards under NAFTA, namely articles 1102 and 1105 “merit much greater attention than they have yet received in the literature”).
apparently contradictory awards. Without such direction, however, the dispute resolution process will be subject to increasing criticism and in danger of losing its integrity, particularly where the legitimate expectations of investors and the international obligations of Sovereigns are at stake.

Arbitral tribunals have already consulted the writings of academics and other distinguished publicists as a result of a need to find reasoning, authority, and legitimacy, and arbitration specialists have cried out for further academic analysis to bridge the gap between theory and practice. A thorough, probing, and reasoned analysis of the jurisprudence and the development of a coherent doctrine will spur debate and help achieve a level of coherence that will promote the legitimacy of investment arbitration. In particular, given the increasing importance of the rights granted under investment treaties and the inconsistencies in the current jurisprudence, scholarship is needed to evaluate how concepts such as "fair and equitable treatment" and the "observation of commitments" are applied in private arbitrations. Commentators can then consider whether previous awards were decided correctly, provide guidance to resolve contradictions within the jurisprudence, and suggest how standards should be applied in the future. With proper guidance and information, arbitrators may be in a better position to resolve disputes in a more considered, uniform, and predictable manner, and lawyers can give their clients more reliable advice. In this manner, scholarship can establish norms of interpretation to reintroduce certainty.

446. Although there may be disagreements within the literature, these discussions are likely to provide an informed basis for the analysis, discussion, and application of standards in the future.

447. See Metalclad Judgment, supra note 139, ¶ 124 (referring to Professor Schreuer's article on the ICSID Convention, which related to comments later contained in his ICSID treatise); Coe, Taking Stock, supra note 1, at 1403, 1403-09 (noting that NAFTA tribunals are considering the comments of academic literature, including texts, commentaries, and publications but are doing so on a relatively limited basis); Coe, Domestic Court Control, supra note 132, at 205-06 (noting that NAFTA-related literature is growing and has already influenced courts reviewing investment treaty awards).

448. When asked whether academic scholarship can contribute to investment arbitration, several respected investment arbitration practitioners—who have represented both investors and Sovereigns—resoundingly supported the need for further academic commentary. See Blanch Interview, supra note 66 (noting that scholarship contributes to the public dissemination of information and debate and that scholars are uniquely situated to distill and analyze investment arbitration and provide tactical and strategic thinking); Jagusch Interview, supra note 66 (explaining that scholarship can contribute "a vast amount" and "provide valuable guidance" because tribunals "tend to rely heavily on scholarly writings, particularly when the arbitrators are the first to decide important matters of principle"); Pinsolle Interview, supra note 66 (stating that scholarship can contribute "a lot!" to investment arbitration); Reed Interview, supra note 66 (explaining that scholarship provides "critical analysis of the developing jurisprudence of awards").
Improving investment arbitration through scholarship is particularly attractive as it does not require mustering the political will of Sovereigns, investors, and NGOs; it depends entirely on the willingness of commentators to enter the fray, offer analysis, and provide clarity. While some scholars have already begun this process,\(^4^9\) others should continue to pursue this fruitful area to prevent inconsistency before it occurs—particularly as scholarship is a form of persuasive authority as a matter of international law.\(^4^5^0\)

This may only be half of the battle, however, as commentators need access to awards and underlying materials to critique decisions and reconcile inconsistent awards. Other incremental measures would therefore be necessary to prevent inconsistent decisions. While this Article discussed some of these options earlier in the review of the literature,\(^4^5^1\) other “legislative” amendments might also prove useful. For example, individual investment treaties could specify a neutral place of arbitration. This approach would minimize the perceived unfairness of one aspect of “forum shopping.” It would also help increase certainty as the courts and their national standards for vacating awards would be identified at the outset. By minimizing the number of venues where awards could be subject to attack, this would also decrease the possibility of mixed interpretations by national courts. This approach also permits Sovereigns to identify a neutral place of arbitration where the local judiciary have international law and arbitration experience, which would also further minimize the risk of deviations among national courts. While identifying the place of arbitration would require a treaty-by-treaty modification,\(^4^5^2\) there would not be one single court to review vacatur issues. Although this inevitably introduces variations into the review process, overall, identification of


\(^4^5^0\) *ICJ* Statute, supra note 52, art. 38(1)(d), 59 Stat, at 1060 (providing that the “teachings of the most highly qualified publicists of the various nations” are a “subsidiary means for the determination of rules of law”).

\(^4^5^1\) It could prove useful to determinacy to more specifically enumerate treaty rights. Likewise, by increasing transparency through institutional rules, more well-considered and well-reasoned awards may result, serving to enhance consistency and predictability.

\(^4^5^2\) This would, in part, arise out of the need to preserve the neutrality of the place of arbitration. Not all countries are likely to see the same venue as “neutral” and disconnected with the interests of each Sovereign nation entering into an investment agreement.
place of arbitration reduces the current level of risk and provides greater legitimacy to the process.\textsuperscript{453}

There are also measures which could enhance the transparency of the process that could either be incorporated through the revision of institutional rules or the provision of transparency guarantees in investment treaties. The appropriate level of transparency would be, at a minimum, the publication of investment treaty awards and related materials, as well as a provision which would give tribunals discretion to admit applications from third parties to act as amici curiae and make submissions.\textsuperscript{454}

Although arbitration awards do not have precedential value and thus, some might suggest disclosure of these awards and their underlying materials\textsuperscript{455} would be harmful, this argument cannot stand. First, as a practical matter, attorneys rely upon the existence of published awards to provide advice to their clients, evaluate their rights and obligations, and minimize uncertainty. In particular, attorneys advising investors on the structure of their investments will consider how the decisions might affect an investor's potential rights and its best investment strategies; likewise, attorneys advising governments about the feasibility and their potential exposure to liability for planned regulatory conduct will look to published awards when considering the best way to implement legitimate policy choices. This reliance is understandable as the decisions are, of course, the best available evidence about the future risks and obligations for investors and Sovereigns alike. Having a more transparent system where both groups can make choices in a predictable context will bolster the legitimacy of investment treaties and the arbitration process. Second, further publication of awards will enhance a tribunal's ability to consider more fully the legal issues in their own case. At present, many tribunals consider the reasoning and analysis contained in previous awards. This is a welcome development and should be encouraged; rational distinctions based on reasoned decisions enhance arbitration's coherence and promotes justice. Third, subjecting awards to public scrutiny is another check on the discretion of a private body which provides an in-

\textsuperscript{453} Sovereigns are unlikely to renegotiate the 2100-plus treaties currently in effect. However, when moving forward with negotiations, there is no reason to not identify the place of arbitration. Likewise, the parties should seek to provide clarification on this issue when investment treaties are up for renewal.


\textsuperscript{455} It would also be necessary to provide public access to the written pleadings and other submissions. Without such information, award analysis would occur in a vacuum. The insights from commentators are likely to be more probing, developed, and advanced if they are based upon the substantive documents that form the award's foundation. Perhaps in acknowledgement of this fact, the Amended U.S. Model BIT provides for disclosure of such documents. Amended U.S. Model BIT, \textit{supra} note 6, art. 29(1).
centive for thorough, considered, and well-reasoned awards. Tribunals should also have the ability to consider submissions from amici curiae or interested third parties. In this manner, tribunals will be able to consider alternative arguments from interested individuals and evaluate more fully the public implications of their decisions. Particularly when dealing with public policy issues where third parties could be adversely impacted by a tribunal's award, having greater information and submissions which reflect the interests of an interested body can improve the decision-making process. Further, giving those impacted by the dispute a chance to be represented and participate in the outcome enhances the fairness of the process and makes the ultimate award more palatable.

Although the suggested transparency is more difficult to accomplish than academics deciding individually to contribute to the literature, these revisions could be accomplished in two relatively straightforward manners. First, as suggested above, arbitration rules could be amended to provide for broader transparency in investment treaty cases. Second, Sovereigns negotiating investment treaties could add specific provisions to the dispute resolution mechanism that would permit enhanced transparency. As these sections of the treaty are essentially glorified arbitration agreements, there is nothing (except a Sovereign's own policy choices and the treaty negotiation process) to prevent the inclusion of broader public participation. Using these simple mechanisms will go a great way to providing an incremental improvement to investment treaty arbitration and enhancing its justice-promoting objectives.

B. Establishing an Investment Arbitration Appellate Court

 Arbitrators inevitably create "new international law" founded on the norms present in investment treaties when they apply the substantive rights in investment treaties to the facts of actual disputes. A single, unified, permanent body charged with developing international law and creating consistent jurisprudence will promote legitimacy more than disaggregated arbitrations that come to different conclusions on the same issue. Such a body—composed of an established

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456. See supra Part V.B.4.a.
458. See, e.g., Coe, Taking Stock, supra note 1, at 1449 (noting that an appellate body that can construe provisions common to many BITs would have benefits beyond those in NAFTA). While concerns related to finality and (hopefully) faster and cheaper dispute resolution feature prominently in the context of domestic arbitration, as a functional matter, these concerns do not apply as strongly in the context of international investment arbitration. Unlike domestic commercial cases, there is an underdeveloped academic case law and a limited body of precedent upon which to draw in the context of investment treaty disputes; investment rights have implications on the capacity of sovereign governments who need to regulate and legislate; and there are implications upon the public as the rights do not purely impact private commercial
group of respected decision makers that is detached from municipal concerns and analyzing similar standards—will enhance the probability of centralization and standardization without as readily arousing questions about neutrality and independence.\textsuperscript{459} The important question that remains is the following: what mandate should such a body have and what form should it take?

An Investment Arbitration Appellate Court must be concerned with the legitimacy of the system as a whole. Its mandate should permit it to review awards promulgated under more than one investment treaty and focus upon the overall network of investment treaties. Thus far, the broader need for coherence has been ignored in favor of a treaty-by-treaty approach. This is overly simplistic and stands to have a deleterious effect on the long-term legitimacy of investment arbitration.

A single investment treaty is part of a related network, and commentators acknowledge the links between the rights in the various investment treaties.\textsuperscript{460} For example, as Professor Jose E. Alvarez colorfully put it, NAFTA is a “bilateral investment treaty on steroids.”\textsuperscript{461} Because of the related nature of the rights in investment treaties, NAFTA awards have “immediate relevance outside of the three NAFTA countries.”\textsuperscript{462} This is to be expected because of the utility in having consistent interpretations of similar international law standards, which happen to be contained in different investment treaties.\textsuperscript{463} Retaining the legitimacy of the network as a whole is, therefore, of critical importance.

Considering treaties in isolation is an inappropriate method for resolving rights that implicate other investment treaties. The fundamental oversight in focusing on individual treaties is that the legitimacy of transactions. While there is no question that an appellate mechanism would sacrifice a degree of finality, the more important issue is whether the degree of finality sacrificed is worth the long term gain in the increase of correct and legally defensible decisions that will promote integrity and efficiency within the overall system.\textsuperscript{459} \textsuperscript{\textit{Id.}} at 1447.

460. \textit{See Price, Some Observations, supra} note 60, at 423 (noting that principles in NAFTA were drawn from a large and growing network of investment agreements and that those “principles are now incorporated into BITs and other investment agreements of [U.S.] trading partners and are accepted by much of the developing world”); \textit{see also} Brower, \textit{Structure, supra} note 128, at 44 (explaining that “observers of international investment law will note that Chapter 11 of NAFTA bears a family resemblance to bilateral investment treaties”).


463. \textit{See Gantz, The Evolution, supra} note 12, at 687 (noting that business interests hope to maintain broad NAFTA protections because a weakening in NAFTA language might have implications for U.S. investor rights under a number of BITs); \textit{see also} Coe, \textit{Taking Stock, supra} note 1, at 1391-92 (explaining that a “crude but descriptive portrayal of [NAFTA’s] Chapter 11 is that it is a bilateral investment treaty (BIT) inserted into a multi-lateral free trade agreement”).
an investment treaty network is based on the coherence of treaty jurisprudence as a whole. Given the overwhelming similarity of the rights promulgated in investment treaties, it is vital to make a comprehensive effort to harmonize and clarify the development of these standards. Similar provisions of related investment treaties should be analyzed and applied in similar ways; likewise, where decisions appear contradictory, rational bases that consider the network as a whole can create valid bases for distinction. This process promotes clarity throughout the network and permits the articulation of a reliable body of international economic and public international law. Such uniformity promotes the confidence of the investment arbitration system.\(^4\) If this point is overlooked, however, the decentralization of decision making and ad hoc adjudications will produce further variations in approach and principle.\(^5\)

If there had been an opportunity for a reviewing court to address the inconsistencies in both the Lauder and SGS cases, the logical inconsistencies in the cases could either be corrected or explained. This means there is a need for an international body to provide appellate review and legal guidance on the meaning of rights contained in investment treaties; but there is no international court at present to meet this need. For this reason, this Article proposes that a single Investment Arbitration Appellate Court be created to permit the review of all investment arbitration awards for errors of law and legal interpretation. This standard could, for example, be similar to the legal review permitted by the European Court of Justice or the World Trade Organization.\(^6\) Like domestic appellate courts in common law coun-

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465. See Coe, Taking Stock, supra note 1, at 1407 (noting that, under NAFTA, “the decentralization built into Chapter 11’s system of ad hoc adjudications has produced variations in approach, tone and principle”); see also id. at 1408 (explaining that the “decentralized and fragmentary nature of international law sources and the differing backgrounds of the arbitrators and advocates have combined with many questions of first impression to generate differing approaches to identical issues”). This decentralization is the natural flaw in the treaty-by-treaty appellate mechanism suggested by the United States Trade Promotion Authority Act. See Legum, supra note 6. Likewise, because the appellate mechanism recommended by ICSID cannot provide coherency of the entirety of the investment treaty network, but only those cases subjected to ICSID arbitration, its framework will not address the systemic issues that must be addressed to sustain the integrity of the entirety of the investment treaty network.

tries and higher courts in civil law countries, an Investment Arbitration Appellate Court would engage only in the interpretation of law to avoid divergent applications and interpretations of law.\textsuperscript{467} This would permit tribunals to review fundamental issues, which are common to investment treaties, including disputed legal interpretations related to both jurisdiction and the merits.\textsuperscript{468} Review at this level will enhance certainty about what rights investors have and for what conduct Sovereigns are liable.\textsuperscript{469}

\begin{footnotesize}
\textsuperscript{467} Konstantin J. Joergens, \textit{True Appellate Procedure or Only a Two-Stage Process? A Comparative View of the Appellate Body Under the WTO Dispute Settlement Understanding}, 30 Law \& Pol'y Int'l Bus. 193, 206-07, 211 (1999). Tying the standards used by an appellate body to established institutions will promote legitimacy through symbolic similarities (i.e., a recognition value) and adherence to recognized standards will establish its position in the international legal order. Brower, \textit{Structure}, supra note 128; Thomas Franck, \textit{The Power of Legitimacy}, supra note 310, at 135-37, 183-86; see also Thomas Franck, \textit{Fairness}, supra note 312, at 34-38, 41-46.

\textsuperscript{468} Investment treaties generally have similar standards about who are qualifying investors and what are qualifying investments that form the basis of a tribunal's jurisdiction. Likewise, investment treaties have similar substantive rights, which form the basis of an award on the merits. See supra notes 32-40 and accompanying text. Therefore, it makes sense to permit review of a tribunal's award on jurisdiction and the merits.

\textsuperscript{469} Some may express dissatisfaction with the approach as it takes away "grey areas" that might otherwise be used during the arbitration process. This concern should not withstand scrutiny. Investors and Sovereigns actually benefit from review of legal issues. As a practical matter, the enhanced certainty from legal review will permit investors to construct their investments more effectively. Particularly at the transactional stage, they will know what specific provisions, for example, they will need to negotiate into their contracts and what protections they should seek in their political risk insurance. See Export Credit Guarantee Department ("ECGD"), Products and Services, at http://www.ecgd.gov.uk/index/ps_home/overseasinvestment/overseasinvestment_oii.htm (last visited Jan. 22, 2005) (offering political risk insurance to U.K. investors); Multilateral Investment Guarantee Agency ("MIGA"), Overview of MIGA's Investment Guarantee Services, at http://www.miga.org/screens/services/guarant/guarant.htm (last visited Jan. 22, 2005) (offering political risk insurance to qualifying foreign investors);
\end{footnotesize}
Such a court, however, should not review awards for issues of due process and proper procedure. These considerations can and should be addressed effectively through the mechanisms currently available in the New York, Panama, and ICSID Conventions, which have a long and established jurisprudence. Although the precise mechanism to clarify the scope of these conventions and their interaction with an Investment Arbitration Appellate Court may require additional international instrument(s), any such court should not disturb some of the most successful international conventions of all time.

An appellate body requires authority to carry out its mandate. Namely, it must have a mandate not only to decide the appeal but also have power to effectuate its determinations. There are several powers that an Investment Arbitration Appellate Court would need. Specifically, if the court determined that an award was sound, it should have the power to uphold the award. Likewise, it should also have the authority to affirm the award but for different reasons if the court believes the analysis is legally unsupportable. If, however, the court holds that a tribunal has erred as a matter of law, it should have the authority to clarify the appropriate standard, offer guidance as to the proper scope of the rule of law, and remand the case. This could be accomplished by remanding the dispute with instructions to the original tribunal to render a "final amended award." This authority would provide the appellate body with an opportunity to correct errors of law and inconsistencies, and thereby correct legal errors and perceived unfairness. There is no need to remand a decision to a different tribunal or replace the court’s decision. The original tribunal already has an intimate familiarity with the parties, the facts, and the issues that other entities lack. In contrast, establishing a new tribunal and initiating an entirely new set of proceedings would be a waste of resources and would create unnecessary delay. The court’s primary objective should be to provide clarity and consistency regarding legal

Overseas Private Investment Corporation ("OPIC"), Insurance Department, at http://www.opic.gov/Insurance (last visited Jan. 22, 2005) (offering political risk insurance to U.S. investors). By building in these mechanisms early, it increases the likelihood that investors’ commercial needs will be met without having to resort to expensive and risky investment arbitration. Similarly, Sovereigns gain greater clarity about the scope of their legal rights and obligations, which permits them to plan their own government activities more effectively. Ultimately, as long as the jurisprudence is moving in a more coherent direction that sustains the system as a whole, this benefits investors and Sovereigns alike who wish to create a sustainable system.

470. Having a separate court of appeal should also make individuals reviewing awards less likely to trespass into consideration of the legal merits of the decision. Whether it be an ad hoc committee organized under the ICSID Convention or a national court reviewing enforcement under the New York Convention, knowing that there was an independent opportunity to review issues of law should make those entities less likely to focus on that issue, allowing them to instead focus on the specific due process grounds enumerated in those conventions.

471. See supra notes 457-69 and accompanying text (describing the mechanisms under which an Arbitration Appellate Court could be organized).
rights in investment treaties, not to render final and binding awards that apply the law to the facts. Requiring cases to be remanded to the tribunal will allow the arbitrators to use their unique factual knowledge to apply those facts to the proper legal standards. It also permits amended awards to become enforceable in the same manner, for example, as final awards under the New York Convention.472

An Investment Arbitration Appellate Court requires sufficient transparency and public participation to promote justice in the consideration of public rights. In order to address the potential impact on third parties and sensitive public policy issues,473 there should be transparency in the appeals process similar to what was proposed earlier for enhanced transparency related to arbitrations. Namely, there should be an opportunity for amici curiae and other appropriate third parties to make submissions. Particularly at this level, where public scrutiny should act as a check on discretion and an incentive for accountable decision making, the pleadings, the hearings of the court, and its ultimate determination should be available to the public. This level of scrutiny should ensure the integrity of the process and promote reasoned decisions that lead to a developed jurisprudence.

Certain measures may need to be effected, however, in order to ensure the integrity of the process and minimize opportunities to manipulate the procedure. In particular, certain safeguards which are available in the arbitration proceedings—such as cost shifting for the bringing of unmeritorious appeals—should also be available in the appellate context. Likewise, to promote efficiency, there should be strict timetables within which parties must make their applications to appeal or lose their right to appeal. For example, a thirty-day limitation would ensure that decisions to appeal are made quickly and there is a degree of finality. It may also be useful to indicate a time frame within which the court should render its decision. The slight cost of sacrificing some degree of finality to create a temporal window for the appellate process is ultimately preferable to a dispute resolution system that renders incoherent decisions and adversely affects the expectations of investors and Sovereigns.

Aside from its mandate, the form of an Investment Arbitration Appellate Court would also be critical. It would require both the appropriate institutional “home” and the appropriate membership. As suggested previously, organizing a court under the auspices of the

472. This should by-pass the issue of whether a decision of the Arbitration Appellate Court would itself need to be deemed an arbitration award for the purposes of the New York Convention.
Permanent Court of International Arbitration could prove very useful. In the context of suggesting the creation of a similar court, Judge Howard M. Holtzmann suggested that a court could be located in the Hague so as to benefit from the administrative expertise and physical facilities of the Permanent Court of Arbitration as well as the great library resources available at the Peace Palace.  

The membership of such an appellate body would be fundamental as it is an indicator of the authority and legitimacy of the decision makers. Ideally, the parameters for appointment would be debated publicly to give interested parties—such as investors, Sovereigns and NGOs—the opportunity to voice their concerns and ensure the appointment of the most appropriate set of individuals. The standard for appointment for the ICJ Statute might form a starting point. The ICJ statute requires the election of judges that represent “the main forms of civilization and the principal legal systems of the world.” More definition would prove useful, however, to promote the perception that the appointment process is fair and the decision-makers are appropriate. For example, it might also be worthwhile to codify the informal “gentlemen’s agreement” that ensures the membership will broadly and transparently mirror the membership of the U.N. Security Council or some other type of geographical mix. Specifically, to retain its perceptions of legitimate authority, appellate judges should come from a variety of backgrounds, and the mix would fairly need to represent both developed and developing countries. The standards for appointment should also enumerate the qualifications of judges to ensure a mix of expertise in areas such as arbitration, economics, investment law, and public international law. In addition, to ensure the legitimacy of the decision makers, it might also be able to require “judicial” expertise by calling for members of the court to have acted previously as arbitrators, judges in the first instance, or appellate judges. These agreed standards could then be articulated in the convention or other agreement which establishes the appellate court. 

There are other important factors related to the formation of the court, including who is responsible for appointment, how many judges should there be, and what the terms of appointment should be. Obviously, the best method of promoting legitimacy is to have a neutral institution with the requisite international arbitration background, such as the Permanent Court of International Arbitration, to appoint judges in accordance with agreed upon standards. It would also be appropriate to have a large number of judges on the court, perhaps

474. Holtzmann, supra note 392, at 114.
475. ICJ Statute, supra note 52, art. 9, 59 Stat. at 1056; see also Merrills, supra note 53, at 137 (noting that the importance of this standard “can hardly be over-emphasised” because it contributes to the legitimacy of the ICJ and promotes adequate representation).
476. Schwebel, supra note 392, at 117.
eleven. This will promote proper geographical representation, help to balance out competing cultural backgrounds, and improve the quality of the deliberations without unduly eliminating quality arbitrators from the pool of those who could make decisions in the first instance. As suggested by Judge Stephen M. Schwebel in a slightly different context, judges could be appointed for a fixed term—perhaps for ten years—to ensure that there is some consistency of the decision makers and foster the emergence of a coherent doctrine. It would also be useful for judges at the appellate court to be bound to standards of judicial conduct in the same manner as other members of the international judiciary. This promotes confidence in the neutrality, independence, and the integrity of the judges.

There is no doubt that the implementation of such an Investment Arbitration Appellate Court would be a challenging undertaking, particularly as Sovereigns are unlikely to renegotiate the over 2100 investment treaties currently in existence. Nevertheless, the increased legitimacy that is gained by having a supervising body cannot be overlooked or underestimated. There are two opportunities to create such an appellate court. First, such a mechanism could be established in conjunction with negotiating high-level regional multilateral agreements—for example, the Free Trade Agreement of the Americas, which is currently under consideration. Using this opportunity would not create coherence with all the worldwide investment treaties, but

477. This balances the approaches of the ICJ, which has a membership of fifteen judges, with the membership of the WTO Appellate Body, which has seven judges. Int'l Court of Justice, General Information—The Court at a Glance, at http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html (last visited Feb. 5, 2005); DSU, supra note 466, art. 17, 33 I.L.M. at 1236–37; see also Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 Harv. Int'l L.J. 271, 272–73 (2003) (describing the number of judges in a variety of other international courts). At present, there is a relatively discrete group of individuals who regularly act as investment arbitrators and may have an appropriate background to serve on an appellate court. Having too many members of an appellate court may deprive investment treaty arbitration of some of the best legal minds for deciding cases of the first instance. Likewise, there would need to be an economic incentive for arbitrators to give up lucrative practices to take on the responsibility of becoming a judge on an appellate court. While compensation of judges is an important practical consideration, it should be a lower priority than determining the theoretically correct “mix” of decision makers. Seven judges may not be able to provide a representative balance of perspectives; likewise, fifteen judges may deprive first instance tribunals of some of the keenest intellects while creating unnecessary economic challenges. Therefore, eleven judges may provide an appropriate “balance of experiences” to create a more even handed and considered result. This is also in line with the composition of other appellate bodies, which often number eleven members. *Id.*

478. Schwebel, supra note 392, at 117.


480. Blackaby, supra note 360, at 365.
could promote regional coherence to a much larger extent than other

treaty-by-treaty approaches.

Second, a new international convention could be adopted to create
the Investment Arbitration Appellate Court. While mustering the po-

citical will to enact and ratify such a convention might well prove tax-

ing, it is by far the most practical approach as it would permit debate
about the appropriate nature of an appellate body and rectify incon-
gruities in the present system. Indeed, it would probably be more ef-

tective than the renegotiation of a network of 2100 treaties that might
otherwise be required by a “legislative” approach. Creating an appel-
late system, for example, seems facially inconsistent with the ICSID
annulment procedures. But as a review of legal issues and legal inter-
pretation was specifically excluded from the ICSID Convention’s an-
nulment grounds, creating a separate mechanism to review legal er-
orrs could be squared with the system. It would, however, need to
be accomplished by way of a separate protocol which might, for ex-
ample, permit appeals to the Appellate Body prior to permitting ap-
plication for annulment. By implementing such an appellate body in a
manner which is consistent with international law, but does not im-
pinge on the enforcement mechanisms already in place, investment
arbitration will ensure its long-term survival by creating a forum
where diametrically opposed decisions can either be explained or cor-
rected.

CONCLUSION

If investment treaty arbitration is to fulfill its promise, mechanisms
must be implemented to promote greater sensitivity to the public in-
terest and to minimize the risk of inconsistent decisions. Otherwise
“investor/government arbitration may fall prey to public pressure aris-
ing from a backlash” and suffer from crib death before it can strug-
gle through its initial growing pains. By using several incremental
mechanisms to prevent inconsistent decisions from arising, the legiti-
macy of the system can be improved. The ultimate utility of the sys-
tem, however, will not be fully realized until an appellate court is cre-
ated which permits correction of legal errors, which might otherwise
inappropriately bankrupt developing nations, stifle legitimate regula-
tory activity, or deprive investors of their legitimate expectations. By
using both preventative and corrective forces, arbitration can fulfill its
justice-promoting objective and help the law develop in a harmonized
and equitable manner.

481. By having a separate mechanism to review awards for errors of law, this may
actually increase the probability that national courts in vacatur or enforcement pro-
ceedings will be likely to inquire into the merits of disputes.
482. Alvarez & Park, supra note 14, at 399.