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THE EMERGING CIVILIZATION OF INVESTMENT ARBITRATION
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The Emerging Civilization of Investment Arbitration

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In 1993 Samuel Huntington wrote about a looming clash of civilizations—what he predicted would be a cataclysmic showdown between civilizations characterized by different religions, history, languages, and traditions.[1] Investment arbitration can also be viewed as a clash (albeit non-violent) of civilizations. It is where international commercial arbitration runs into both techniques borrowed from U.S.-style no-holds-barred litigation and the staid and measured practice common before international tribunals such as the International Court of Justice; where public international law principles vie for supremacy with municipal law and the *lex mercatoria*; where common law emphasis on

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1. Samuel P. Huntington, *The Clash of Civilizations*, FOREIGN AFFAIRS, Summer 1993, at 22.

case law meets civil law emphasis on treaty (code) provisions. One could view proponents of each of these practices as bent on a civilizing mission, much like those professed by the former colonial powers as they sought to build empires in their preferred styles.[2] Competing arbitration colonizers seek to control investment arbitration and to imbue it with their preferred attributes, but none has yet prevailed. Instead one is beginning to see the evolution of a *sui generis* civilization that is combining elements of many pre-existing practices to create new norms suitable for the specialized mode of practice occasioned by the hybrid nature of investment arbitration.[3]

Investment arbitration often involves public international law grafted onto a substructure of private commercial arbitration. All arbitration is based on consent. A state's consent to the settlement of an investment dispute by arbitration can arise from a contract between the state and a foreign investor with respect to a particular project, from investment legislation passed by the state, or from an investment treaty between the state and the home state of the investor. Investment arbitration based on a contract is the most similar to regular commercial arbitration. The subject matter of the dispute is identified in advance and described in the contract between the investor and the state, and the governing law is ordinarily municipal law, although public international law can play a role. Given the significant number of investment treaties, arbitration based on investment legislation is now rare. Investment treaty arbitration, on the other hand, is blossoming.[4] A state, via an investment treaty, effectively offers advance consent to the settlement by arbitration of future disputes that are currently undefined but that are related to investments owned or controlled by foreign investors.[5] The claims against the state are usually based on international legal obligations found in the treaty, some of which are based on customary international law, such as the obligation not to expropriate except for a public purpose, without discrimination, and on payment of prompt, adequate, and effective compensation.[6]

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2. *See, e.g.*, MORT ROSENBLUM, MISSION TO CIVILIZE: THE FRENCH WAY 155-75 (1986) (describing in particular the manner in which France built its empire).

3. Zachary Douglas, *The Hybrid Nature of Investment Arbitration*, 74 BRIT. Y.B. INT'L L. 151 (2004).

4. By the end of 2006, there were at least 290 cases. UNCTAD, *Latest developments in investor-State dispute Settlement*, IIA MONITOR No. 1 (2008), at 1. This number represents known treaty-based cases, but does not include confidential treaty-based cases or those based solely on concession contracts. *Id.* at 1-2, n.1.

5. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.-F.I.L.J. 232 (1995).

6. *See, e.g.*, August Reinisch, *Legality of Expropriations*, *in* STANDARDS OF INVESTMENT PROTECTION 171, 172-78 (August Reinisch ed., 2008); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 89-96 (2008);

Many investment arbitrations, whether contract- or treaty-based, are held under the auspices of the Convention for Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention" or "Convention").[7] The Convention, which entered into force in 1966, offers a neutral forum for the settlement of investment disputes.[8] Consent to arbitrate a particular dispute under the ICSID Convention must be found elsewhere, as a state's ratification of the Convention means only that dispute settlement under the Convention is available in appropriate circumstances.[9] For ICSID Convention arbitration to be available, both the host state of the investment and the home state of the investor must be party to the Convention.[10] If only one party is covered by the Convention, the arbitration may be held under the ICSID Additional Facility Rules, or under other rules as the consent to arbitration permits.[11] Aside from those of the ICSID Convention and the ICSID Additional Facility, arbitral rules frequently employed in investment disputes include the UNCITRAL Arbitration Rules, the Stockholm Chamber of Commerce Rules, and the London Court of International Arbitration Rules, which were designed for use in commercial arbitrations, but which have shown themselves adaptable to use in investor-State disputes.[12]

Arbitrating under the ICSID Convention adds a public international law dimension even to contract-based investment disputes. Article 42 of the ICSID Convention is a choice-of-law clause that sets forth the laws to which an arbitral tribunal should turn when deciding disputes.

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State

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CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 207-21, 286-297 (2007).

7. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 U.N.T.S. (1966) 159 [hereinafter ICSID Convention].

8. *Id.*

9. LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 7, 21-23 (2004).

10. *Id.* at 7.

11. DOLZER & SCHREUER, *supra* note 6, at 223-25; MCLACHLAN, SHORE & WEINIGER, *supra* note 6, at 46-50; ANDREW NEWCOMBE & LUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 72-73 (2008).

12. DOLZER & SCHREUER, *supra* note 6, at 225-29; MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA §§ 1120.8-1120.11 (2008); August Reinisch & Loretta Malintoppi, *Methods of Dispute Resolution*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 691, 707-12 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

> party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.[13]

In practice, tribunals tend to turn to international law for gap-filling purposes.[14] In addition, arbitrating under the ICSID Convention also means that the dispute must meet the jurisdictional requirements of the ICSID Convention as well as any jurisdictional limitations contained in the governing treaty or investment agreement.

All of the procedural rules, whether designed specifically for use in commercial arbitrations or not, are based on commercial arbitration practice. Arbitrators are selected on an *ad hoc* basis to decide a particular dispute. Usually they sit in panels of three, with each party selecting one arbitrator, and the presiding arbitrator chosen either by consent of the parties, by the party-appointed arbitrators, or by an appointing authority if one of other applicable mechanisms fails. ICSID Convention is anational in that there is no "place of arbitration" whose law governs the procedure of the arbitration.[15] In non-ICSID Convention cases (including those brought under the ICSID Additional Facility), the place of arbitration is selected anew for each dispute. The selection of place of arbitration is a decision that can have important implications for the conduct of the arbitration as well as for the validity of any subsequent award.[16]

This marriage of public international law and international commercial arbitration has not always produced harmonious results. Particularly in investment treaty disputes, states have launched jurisdictional objections that add complexity and, usually, time to the arbitral proceedings. These often involve the elaboration of public international law principles regarding the nationality of claimants in addition to the elaboration of a procedural regime peculiar to investment arbitration. The confidentiality requirements of the rules under which investment disputes have usually been held have been challenged by

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13. ICSID Convention, *supra* note 7, art. 42.

14. CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 621-31 (2001).

15. *See* REED, *supra* note 9, at 8 (noting the delocalized and self-contained nature of ICSID Convention proceedings).

16. The arbitral law of the place of arbitration governs what kinds of assistance local courts can provide to an arbitral tribunal, including ordering provisional measures in aid of arbitration and ordering parties and even non-parties to provide evidence to the tribunal. *See, e.g.*, FOUCHARD, GAILLARD, & GOLDMAN, ON ARBITRATION 710-28 (Emmanuel Gaillard & John Savage eds., 1999); JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 355-77, 580-83, 616-25 (2003). Arbitral awards are subject to *vacatur* in the national courts of the place of arbitration. *See, e.g.*, FOUCHARD, GAILLARD, & GOLDMAN, *supra*, at 902-16; LEW, MISTELIS & KRÖLL, *supra*, at 373-76, 667-83.

international civil society as improperly secretive and adverse to the public interest. Gradually, albeit slowly, some transparency norms are developing, along with the possibility of participation in hearings by *amici curiae*. Notwithstanding the general rule in public international law that case law has no precedential value, arbitral awards are increasingly used as persuasive authority both by advocates and by tribunals.[17] The status of those awards as influential sources of authority has caused increasing problems with respect to arbitrator conflicts of interest. The aforementioned characteristics of investment treaty civilization are inter-related and reinforce each other. For example, the public availability of arbitral awards facilitates the subsequent referral to prior awards in the development of a *jurisprudence constante* in international investment law.[18] Reference to prior awards has led to more complex ethical issues for investment arbitrators.[19] Some of these issues will be resolved, but many more will emerge as investment arbitration continues its evolution to a fully-fledged legal system.

I. OBJECTIONS TO JURISDICTION AND COMPETENCE

Jurisdictional objections are not unique to investment arbitration. The principle of compétence-compétence—that arbitrators are empowered to decide whether or not they have the authority to hear the dispute before them—developed in the context of commercial arbitration.[20] Jurisdictional objections in the commercial context tend to

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17. *See, e.g.*, Andrea K. Bjorklund, *Investment Treaty Arbitral Awards as* Jurisprudence Constante, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265 (Douglas Arner, Isabella Bunn & Colin Picker eds., 2008) [hereinafter Bjorklund, *Investment Treaty Arbitral Awards*]; Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM J. INT'L L. 1014 (2007); Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129 (2007); Gabrielle Kaufmann-Kohler, *The 2006 Freshfields Lecture—Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 ARB. INT'L 357 (2007); Jan Paulsson, *Awards—and Awards*, *in* INVESTMENT TREATY LAW: CURRENT ISSUES III 95 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., 2008); Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 12, at 1188.

18. *See, e.g.*, Thomas W. Wälde, *The Present State of Research*, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 2004 (2006); Bjorklund, *Investment Treaty Arbitral Awards*, *supra* note 17.

19. *See* Bjorklund, *Investment Treaty Arbitral Awards*, *supra* note 17, at 279-80; Loretta Malintoppi, *Arbitrators' Independence and Impartiality*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 12, at 789, 802-07.

20. *See, e.g.*, Federal Arbitration Act, 9 U.S.C. § 3 (2009); John J. Barceló, III, *Who Decides the Arbitrators' Jurisdiction? Separability and Compétence-Compétence in Transnational Perspective*, 36 VAND. J. TRANSNAT'L L. 1115 (2003); LEW, MISTELIS & KROLL, *supra* note 16, at 332-54; William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks between Courts and Arbitrators*, 9 ARB. & DISP. RESOL. L.J. 19

focus on whether the claims are within the scope of the parties' agreement to submit a claim to arbitration.[21] Objections usually fall within two categories. First, is the subject matter of the claim so broad, e.g., does it involve both tort claims and contract claims, that it should be viewed as outside the competence of the arbitrators? Second, is there some doubt as to whether the parties actually agreed to seek resolution of the dispute by arbitration? Certainly counsel have been creative in their use of these arguments, but investor-State cases offer even greater flexibility for respondent states to attempt disposing of the case early on jurisdictional grounds. States have also argued that certain claims are inadmissible; that notwithstanding a tribunal's authority to hear the case, it should decline to exercise it in the given case.[22]

Most investment treaties offer advance consent to cases provided certain conditions are met by the investor seeking to submit a claim.[23] They also have temporal limitations and restrictions based on nationality.[24] Cases governed by the ICSID Convention offer even more opportunities for jurisdictional objections. For example, claimants must satisfy the definition of investment under the ICSID Convention, as well as under an investment treaty, if one applies.[25] The same is true with respect to nationality requirements. Recent amendments to the ICSID Convention, as well as some recent U.S. bilateral investment treaties ("BITs") and free trade agreements, have special provisions on frivolous claims that permit states to have expedited hearings on claims that are apparently without merit or that fail to state a cause of action on which relief can be granted.[26]

(2000); Alan Scott Rau, *Everything You Really Need to Know about "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1 (2003).

21. ALAN REDFERN, MARTIN HUNTER, NIGEL BLACKABY, & CONSTANTINE PARTASIDES, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 248 (4th ed. 2004) (noting that an arbitral tribunal derives its authority from the consent of the parties, and that it must stay within its terms of reference, competence, or authority).

22. For an excellent discussion of the distinction between objections to jurisdiction and admissibility, see Jan Paulsson, *Jurisdiction and Admissibility*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, LIBER AMICORUM IN HONOUR OF ROBERT BRINER 601, 601-08 (Gerald Aksen et al. eds., 2005)

23. *See, e.g.*, DOLZER & SCHREUER, *supra* note 6, at 242-43; Andrea K. Bjorklund, *NAFTA Chapter 11: Contract Without Privity: Sovereign Offer and Investor Acceptance*, 2 CHI. J. INT'L L. 183 (2001).

24. *See, e.g.*, MCLACHLAN, SHORE & WEINIGER, *supra* note 6, at 131-62 (discussing nationality); KINNEAR, BJORKLUND & HANNAFORD, *supra* note 12, at §§ 1116.5-1116.15, 1116.20-1116.27 (discussing nationality) & §§ 1116.28-1116.31 (discussing jurisdiction *ratione temporis*).

25. SCHREUER, *supra* note 14, at 121-41; Devashish Krishan, *A Notion of ICSID Investment*, *in* INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 61 (T.J. Grierson Weiler ed., 2008).

26. *See, e.g.*, ICSID RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION ADDITIONAL FACILITIES RULES) Ch. VIII, art. 45(6) (2006) ("Unless the

States have been extremely active in raising objections to jurisdiction and admissibility.[27] This is, in part, a natural tendency for a defendant. It is also a feature of the advance and imprecise nature of the consent given in investment treaties. When the actual dispute presents itself, a state might very readily assert that such a dispute was not the kind of dispute it contemplated when it signed the applicable treaty. Moreover, investment arbitration is extremely costly and time consuming. For example, in *PSEG v. Turkey*, costs and legal fees amounted to $20,851,636.62,[28] and *UPS v. Canada* took seven years to arbitrate.[29] States thus have a strong incentive to eliminate or narrow a case at an early stage. The section below details several frequently-raised jurisdictional objections; it is not exhaustive, as some disputes give rise to fact-specific objections and space constraints dictate selecting those most frequently raised.[30]

A. Procedural Infirmities

Most investment treaties lay out a number of procedural steps that claimants must take in submitting their claims to arbitration. These include: exhausting local remedies for at least a period of time before seeking relief under a treaty or waiving the right to seek those remedies; waiting a certain period after the allegedly offending measure is implemented before submitting a claim; and engaging in mandatory settlement talks with the host state. Claimants have sometimes sought to hasten the arbitration process by skipping or truncating these procedures.[31] States have ordinarily protested, but with a few exceptions, these objections have been unavailing.

For example, in *Ethyl Corporation v. Canada*, the tribunal distinguished between true jurisdictional objections, which relate to the

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parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal . . . file an objection that a claim is manifestly without legal merit."); 2004 U.S. Model BIT, art. 28(4)-28(6); Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art. 28(4)-28(6), Oct. 25, 2004.

27. *See, e.g.*, David A.R. Williams, *Jurisdiction and Admissibility*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 12, at 868; MCLACHLAN, MCLACHLAN, SHORE & WEINIGER, *supra* note 6, at 131-33, 160-64.

28. PSEG Global Inc. et al. (U.S.) v. Turkey, ICSID (W. Bank) Case No. ARB/02/05, ¶ 352 (Jan. 19, 2007) (Award).

29. The original statement of claim in *UPS* was filed on April 19, 2000, and the final award was filed on May 24, 2007. United Parcel Serv. of Am., Inc. (U.S.) v. Canada, (UNCITRAL) ¶ 2 (May 24, 2007) (Award).

30. For an overview of jurisdictional objections raised in NAFTA cases, see KINNEAR, BJORKLUND & HANNAFORD, supra note 12, at §§ 1101.10-1101.34.

31. *See, e.g.*, DOLZER & SCHREUER, *supra* note 6, at 247-53.

authority of a tribunal to act on the merits, and those relating simply to procedural provisions, which do not result in an absence of jurisdiction.[32] Canada challenged the tribunal's jurisdiction on the grounds, *inter alia*, that the claimant submitted its claim six months prior to the entry into force of the impugned legislation and that the claimant's consent to arbitration and waiver of its rights to pursue local remedies was not presented in perfect form.[33] The question for the tribunal was "[t]o what extent, if any, is Canada's consent to arbitration in Chapter 11 conditioned absolutely on the fulfillment of specified procedural requirements at a given time."[34] The tribunal, finding it had jurisdiction, declined to find that any of these imperfections had done more than cause inconvenience, a matter that could be handled in the eventual award of costs.[35]

The tribunal in *Waste Management v. Mexico* reached the opposite conclusion about the importance of the waiver. It determined that the filing of a defective waiver of the right to initiate or continue any proceedings in local courts required dismissal of the case on grounds of jurisdiction. The tribunal reasoned that filing the waiver was a condition precedent to the submission of any claims.[36] The *Ethyl* tribunal treated the filing of an appropriate waiver as a question of admissibility, whereas the *Waste Management* tribunal viewed it as a question of jurisdiction.

In *ADF v. United States*, the United States argued, unsuccessfully, that ADF's Notice of Intent to Submit a Claim to Arbitration was deficient because it did not adequately specify the North American Free Trade Agreement ("NAFTA") provisions the United States was alleged to have breached.[37]

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32. Ethyl Corp. (U.S.) v. Canada, (NAFTA/UNCITRAL) ¶ 58 (June 24, 1998) (Award on Jurisdiction), *reprinted in* 38 I.L.M. 708 (1999) [hereinafter *Ethyl Award*].

33. *Id.* at ¶ 14.

34. *Id.* at ¶ 60.

35. *Id.* The Pope & Talbot tribunal reached a similar conclusion with respect to a late-filed waiver on behalf of a subsidiary; it was "not willing to attribute such importance to the requirement for an investment's waiver in Article 1121(1)(b) as to make that waiver a precondition to the validity of a claim." Pope & Talbot, Inc. (U.S.) v. Canada, (NAFTA/UNCITRAL) ¶ 17 (Award in Relation to Preliminary Motion by Government of Canada to strike paragraphs 34 and 103 of the Statement of Claim from the Record) (Feb. 24, 2000).

36. Waste Management Inc. (U.S.) v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/98/2, ¶ 23 (June 2, 2000) (Award). The dissenting arbitrator suggested that the majority had improperly addressed the matter as a question of jurisdiction rather than admissibility; rather, the question did not go to the authority of the tribunal to hear the case, but rather to its ability to determine the merits. *Id.* at ¶ 58 (Highet dissenting).

37. ADF Group (Can.) v. United States, ICSID (W. Bank) Case No. ARB(AF)/00/1, ¶ 129 (Jan. 9, 2003) (Award).

> We find it difficult to conclude that failure on the part of the investor to set out an exhaustive list of 'other relevant provisions' in its Notice of Intention to Submit a Claim to Arbitration must result in the loss of jurisdiction to consider and rely upon any unlisted but pertinent NAFTA provision in the process of resolving the dispute.[38]

On the other hand, the tribunal upheld the United States' objections with respect to certain claims based on highway construction projects which had not been referred to in ADF's Notice of Intent. Because those claims were neither incidental nor additional to the specific project initially alleged, as required by the ICSID Arbitration (Additional Facility) Rules on amending claims, they were deemed inadmissible.[39]

Procedural formalities have only rarely been successful as bases for challenges to the jurisdiction of a tribunal. Particularly when it appears that the procedural flaw did not cause any prejudice to the respondent insofar as its defense preparations are concerned, or when the objections have concerned admissibility rather than jurisdiction, the claims have tended to fail.

B. *Objections* Ratione Personae

The nationality of the claimant has played an important role in a number of investment treaty disputes. Investment treaties permit investors that are nationals of one state to submit claims against nationals of another state. The customary international law principle of non-responsibility holds that a state has international legal obligations only to citizens of other states.[40] Thus, a frequent defense is that the claimant lacks standing to submit a claim because the claimant is not a national of the other contracting state party.[41] This defense can be raised both when the claimant is a national of a third state and when the claimant is actually a national of the host state itself.[42]

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38. *Id.* at ¶ 134.

39. *Id.* at ¶ 144.

40. *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 459-61 (6th ed. 2003) (noting purpose is to establish the nationality of the claim; stating "[t]he subject-matter of the claim is the individual and his property: the claim is that of the state.") (citations omitted); JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXTS, AND COMMENTARIES 264-65 (2002).

41. *See, e.g.*, MCLACHLAN, SHORE & WEINIGER, *supra* note 6, at 131-62; Roberto Aguirre Luzi & Ben Love, *Individual Nationality in Investment Treaty Arbitration: The Tension Between Customary International Law and* Lex Specialis, *in* INVESTMENT TREATY LAW: CURRENT ISSUES III, *supra* note 17, at 183-208.

42. *See, e.g.*, Victor Pey Casado v. Chile, ICSID (W.Bank) Case No. ARB/98/2, ¶¶ 274, 286 (April 22, 2008) (Award); Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID (W.Bank) Case No. ARB/02/7 (July 7, 2004) (Award); Waguih Elie George Siag & Clorinda Vecchi v. Egypt, ICSID (W.Bank) Case No. ARB/05/15 (April

The underlying issue is whether the protection of the treaty should be extended to the specific claimant. Has this particular investor made an investment that brings her within the protection of the BIT? One of the goals of an investment treaty is to encourage foreign direct investment, and the protections of the treaty extend only to those who fulfill the criteria. Some have argued that the customary international law on nationality, developed in the context of diplomatic protection, is interacting with the specific language on investor qualifications found in investment treaties and in the ICSID Convention to create a specialized law on nationality in the context of investment treaty protection.[43]

Several investment treaties have provisions against "sham" corporations—those incorporated in a jurisdiction solely to gain the protection of a treaty.[44] In the absence of such a provision, States have not always found it easy to deny those corporations the benefits of the treaty because of tribunal reluctance to pierce the corporate veil to identify the "true" ownership of a corporation.[45] In a recent case, however, the tribunal found that it lacked jurisdiction because the Dutch corporation, making the claim against Argentina on behalf of an Argentine corporation, was itself controlled by Argentine nationals.[46] The tribunal concluded it was entitled to pierce the corporate veil to identify "the real control and nationality of controllers" in order to determine whether the requirements of the ICSID Convention (Art. 25(2)(b)) were satisfied.[47] Even though the tribunal might not have pierced the corporate veil for purposes of determining whether the BIT conferred jurisdiction, it held that a separate inquiry involving veil-piercing was appropriate for purposes of ascertaining the applicability of

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11, 2007) (Decision on Jurisdiction); Champion Trading Co. (U.S.) v. Egypt, ICSID (W.Bank) Case No. ARB/02/9, ¶ 16 (Oct. 21, 2003) (Decision on Jurisdiction); Marvin Roy Feldman Karpa v. Mexico, ICSID (W.Bank) Case No. ARB(AF)/99/1 (Dec. 6, 2000) (Interim Decision on Preliminary Jurisdictional Issues); Olguín v. Paraguay, ICSID (W.Bank) Case No. ARB/98/5 (Aug. 8, 2000) (Decision on Jurisdiction).

43. Aguirre & Love, *supra* note 41, at 206-08.

44. These are usually called "denial of benefits" clauses. Article 1113 of NAFTA is an example: "A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise. . . ." *See, e.g.*, KINNEAR, BJORKLUND & HANNAFORD, *supra* note 12, at §§ 1113.1-1113.13. NAFTA Article 1113 is worded to permit the denial of benefits to a sham corporation that is owned or controlled by investors from a non-NAFTA Party—it does not permit a NAFTA Party to deny benefits if the sham corporation is owned by its own investor. The principle of non-responsibility must be invoked to object to jurisdiction in such a case.

45. *See, e.g.*, Tokios Tokelės (Lith.) v. Ukraine, ICSID (W. Bank) ARB/02/18, ¶ 36 (April 29, 2004) (Decision on Jurisdiction).

46. TSA Spectrum de Argentina S.A. (Neth.) v. Argentine Republic, ICSID (W. Bank) ARB/05/5 ¶¶ 147-62 (Dec. 19, 2008) (Award).

47. *Id.* at ¶ 152.

the ICSID Convention.[48] Even with a denial of benefits clause, however, States sometimes have had difficulty proving that a corporation was controlled by nationals not entitled to claim the protection of the treaty.[49]

In one much-criticized decision, a claimant's change in nationality during the pendency of the arbitration served as the successful basis for a jurisdictional challenge. In *The Loewen Group Inc. v. United States*, the Canadian claimant, a funeral home conglomerate, entered into bankruptcy proceedings and reorganized as a U.S. company.[50] The new entity assigned the NAFTA claim to a Canadian subsidiary, Nafcanco, formed solely to hold the NAFTA claim. The United States argued that the claimant had become a U.S. company and was therefore not entitled to maintain its NAFTA claim.[51] The tribunal agreed, and dismissed the claim. The claimant had violated the continuous nationality rule, which the *Loewen* tribunal viewed as requiring the claimant to hold the nationality from the time of the events giving rise to the claim to the date of its resolution.[52] This decision has given rise to much debate and criticism, as there is no consensus on what the continuous nationality rule actually requires.[53] Indeed, in 2000 the International Law Commission's rapporteur on diplomatic protection concluded that there was no rule of customary international law with respect to continuous nationality

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48. *Id.* at ¶¶ 155-56.

49. *See, e.g.*, Plama Consortium Ltd. (Fr.) v. Bulgaria, ICSID (W. Bank) ARB/03/24, ¶¶ 94-95 (Aug. 27, 2008) (Award); Generation Ukraine (U.S.) v. Ukraine, ICSID (W. Bank) ARB/00/9, ¶¶ 15.8- 15.9 (Sept. 15, 2003) (Award). In a recent Chapter 11 case, Canada has claimed that the investor, a U.S. national named Vito Gallo, is not an "investor" because he allegedly paid no consideration for his stake in the Canadian enterprise that is the investment Canada is alleged to have injured. Vito G. Gallo (U.S.) v. Canada, (UNCITRAL) ¶¶ 161-62 (Sept. 15, 2008) (Statement of Defence).

50. The Loewen Group Inc. (Can.) v. United States, ICSID (W. Bank) Case No. ARB(AF)/98/3, ¶ 220 (June 26, 2003) (Award).

51. A similar claim is at issue in *Grand River Enterprises Six Nations Ltd. v. United States*, in which the United States has alleged that one of the claimants, Arthur Montour, Jr., has failed to maintain his Canadian nationality at all times from the date that any claims arose through their resolution and that, even if he has retained Canadian nationality, he has not shown that it was his dominant and effective nationality to sustain his ability to assert a claim under Chapter Eleven. Grand River Six Nations Ltd. et al. (Can.) v. United States, (UNCITRAL) ¶ 86 (Aug. 29, 2005) (Statement of Defense of Respondent United States of America).

52. The Loewen Group Inc. (Can.) v. United States, ICSID Case No. ARB(AF)/98/3, ¶ 225 (June 26, 2003) (Award).

53. *See* EMMANUEL GAILLARD, LA JURISPRUDENCE DU CIRDI 788 (2004); Maurice Mendelson, *The Runaway Train: The "Continuous Nationality" Rule from the Panavezys-Saldutiskis Railway case to Loewen*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 97 (Todd Weiler ed., 2005); Noah Rubins, Loewen v. United States: *The Burial of an Investor-State Arbitration Claim*, 21 ARB. INT'L 1 (2005); Jan Paulsson, *Continuous Nationality in Loewen*, 20 ARB. INT'L 213 (2004).

because opinions and practice as to the range of dates on which a claimant must have the requisite nationality had varied so much.[54]

C. *Objections* Ratione Materiae

One frequently-raised jurisdictional objection is that the dispute in question does not involve an investment and thus fails to satisfy the requirements of the ICSID Convention, the applicable investment treaty, or both. Most investment treaties have very broad definitions of investment, and tribunals have tended to take an expansive approach towards the kinds of projects or commitments of capital that qualify as investments under investment treaties.[55] Though the definitions in different treaties vary slightly, they tend to follow a similar formula. "The formula commences with a wide inclusive phrase and then lists approximately five specific categories of rights. These categories generally include property, shares, contracts, intellectual property rights, and rights conferred by law."[56]

Disputes brought under the ICSID Convention, whether or not they are based on a concession contract or on a treaty, must also satisfy the jurisdictional limitations of the Convention. An investment might fall within the treaty definition without necessarily meeting the ICSID Convention's requirements. Article 25 requires that the dispute "arise out of" an investment, but does not define that term.[57] Tribunals have thus been forced to decide for themselves what criteria an investment should meet to qualify for protection under the Convention. The tribunal in *Salini v. Morocco* has been extremely influential in this respect. Building on a decision in *Fedax v. Venezuela*,[58] the *Salini* tribunal identified five criteria that an investment should meet to qualify under the Convention: (1) duration; (2) regularity of profit and return; (3) assumption of risk; (4) substantial commitment; and (5) significance for the host State's development.[59] Many tribunals followed the *Salini* tribunal's lead, such that the "*Salini* test" was, at least for a time, used as a shorthand for the definition of investment under the ICSID

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54. International Law Commission, Report to the International Law Commission on Diplomatic Protection, A/CN.4/506/Add.1 (April 20, 2000).

55. *See, e.g.*, Engela C. Schlemmer, *Investment, Investor, Nationality, and Shareholders*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 12, at 49, 55-62; KINNEAR, BJORKLUND & HANNAFORD, *supra* note 12, at §§ 1139.22-1139.31; Krishan, *supra* note 25, at 75-84.

56. MCLACHLAN, SHORE & WEINIGER, *supra* note 6, at 171.

57. ICSID Convention, *supra* note 7, art. 25(1); SCHREUER, *supra* note 12, at 121-25.

58. Fedax v. Venezuela, ICSID (W. Bank) Case No. ARB/96/3 (July 11, 1997) (Decision on Jurisdiction).

59. Salini Costruttori SpA (Italy) v. Kingdom of Morocco, ICSID (W. Bank) ARB/00/4 (Decision on Jurisdiction) (July 23, 2001), 42 I.L.M. 609 (2003).

Convention.[60] The *Salini* criteria were derived from Christoph Schreuer's treatise on the ICSID Convention.[61] Professor Schreuer was not, however, attempting to formulate the definition of investment that had been excluded from the ICSID Convention; he thought such an endeavor was premature.[62] Rather, he was simply describing the qualities typical of the investments that had been found to satisfy the jurisdictional criterion of the Convention.[63]

The *Salini* test has been criticized as too restrictive, and not all tribunals have followed its lead. For example, the *Biwater Gauff, Ltd. v. Tanzania* tribunal held that there was no basis for a "rote, or overly strict, application of the five *Salini* criteria in every case."[64] The drafters of the Convention had deliberately left the term "investment" undefined.[65] The tribunal was reluctant, therefore, to restrict its scope, particularly in a

60. *See, e.g.*, Krishan, *supra* note 25, at 66. Other tribunals that followed the Salini approach include Joy Mining v. Egypt, ICSID (W. Bank) Case No. ARB/03/11, ¶¶ 29-30, 41-63 (Aug 6, 2004) (Award on Jurisdiction); Consorzio Groupement LESI-DIPENTA v. Algeria, ICSID (W. Bank) Case No. ARB/03/08, ¶¶ II:3-28 (Jan. 10, 2005) (Award); Jan de Nul N.V. v. Egypt, ICSID (W. Bank) Case No. ARB/04/13, ¶¶ 90-106 (June 16, 2006) (Decision on Jurisdiction); Patrick Mitchell v. Congo, ICSID (W. Bank) Case No. ARB/99/7, ¶¶ 23-41 (Nov. 1, 2006) (Decision on Application for the Annulment of the Award); Helnan International Hotels A/s v. Egypt, ICSID (W. Bank) Case No. ARB/05/19, ¶ 77 (March 21, 2007) (Decision of the Tribunal on Objection to Jurisdiction and Recommendation on Provisional Measures); Saipem S.p.A. v. Bangladesh, ICSID (W. Bank) ARB/05/07, ¶¶ 98-100 (March 21, 2007) (Decision on Jurisdiction and Recommendation on Provisional Measures); Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID (W. Bank) Case No. ARB/05/10, ¶¶ 43-148 (May 17, 2007) (Decision on Jurisdiction).

61. SCHREUER, *supra* note 14, at 138-41; Krishan, *supra* note 25, at 67-68.

62. SCHREUER, *supra* note 14, at 140.

63. SCHREUER, *supra* note 14, at 140 ("These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention."); *see also* Julian Mortenson, *Subverting the Grand Bargain: Deference and Autonomy in International Investment Law* 24-32 (unpublished manuscript on file with the author). *But see* Krishan, *supra* note 25, at 67-68 (suggesting that the test arose "from an intellectual collusion between parties counsel, ICSID arbitrators, and scholars" and suggesting that Professor Schreuer advocated the test for jurisdictional purposes).

64. Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID (W. Bank) Case No.ARB/05/22, ¶ 312 (July 24, 2008) (Award). The tribunal is not the only critic of the *Salini* test; Dev Krishan and Julien Mortenson have also questioned its usefulness and pedigree. *See* Krishan, *supra* note 25; Mortenson, *supra* note 63, at 32-36. The tribunal in *Pey Casado v. Chile* has also questioned the usefulness of the five criteria and suggested that an investment need have only a monetary contribution of a certain duration that involves certain risks. Victor Pey Casado et Fondation Presidente Allende v. Chile, ICSID (W. Bank) ARB/98/2, ¶ 233 (Award) (May 8, 2008).

65. Julian Mortenson has conducted an in-depth analysis of the travaux préparatoires of the Convention to conclude that the drafters intended the definition to be broad, with the possibility for States individually to identify classes of disputes that they would not agree to submit to dispute settlement under the Convention. Mortenson, *supra* note 63, at 51-56.

manner that would contradict the broad definition of investment in most BITs.[66] The tribunal substituted a more flexible and pragmatic approach to what constitutes an investment under the Convention. In doing so, it rejected Tanzania's main argument, which was that an asset without any value could not qualify as an investment under the treaty.[67] Tanzania claimed that Biwater Gauff had invested in the project knowing it would be unprofitable but hoping it would lead to more profitable opportunities later, and that only investments "undertaken on the basis of a reasonable expectation that the investor will benefit economically" qualify as investments under the Convention.[68] The *Biwater Gauff* tribunal refused to draw any link between a party's motives for entering into an investment and its ability to qualify for protection under the ICSID regime.[69]

Objections based on the lack of an investment have been somewhat more successful than those based on the procedural requirements in most investment treaties.[70] Indeed, such objections have become *de rigueur* for defendant states.[71]

D. Jurisdiction Ratione Temporis

In investment treaty arbitrations, several states have alleged that tribunals lack jurisdiction *ratione temporis* because the allegedly offending events occurred prior to the treaty's entry into force. Most of the treaties are not retrospective, and so only offer protection against government measures that occur after the treaty's effective date. As the investment treaty regime matures, the frequency of these particular objections will likely diminish. If states follow through on their warnings of withdrawal from investment treaties, or if states allow their treaties to lapse when they are due for renewal, we may see objections *ratione temporis* on the other end of the treaty's lifespan. These objections have not been entirely successful, as often the claimant can point to an extended course of conduct, at least some of which occurred during the treaty's pendency. They have, however, narrowed the dispute in some cases, and may have limited the quantum of damages recoverable.

In *Mondev v. United States*, for example, the Canadian complainant challenged several measures taken by city authorities in Boston during

66. *Biwater Gauff*, ICSID Case No.ARB/05/22, at ¶ 314.
67. *Id.* at ¶¶ 287-89.
68. *Id.* at ¶ 287.
69. *Id.* at ¶ 321.
70. *See, e.g.*, DOLZER & SCHREUER, *supra* note 6, at 247-53.
71. *See, e.g.*, Krishan, *supra* note 25, at 19.

the mid-1980s, which it claimed unfairly limited its ability to exercise its contractually-protected rights to develop property in central Boston. Mondev pursued its allegations against the City and the Boston Redevelopment Authority in Massachusetts state courts, eventually reaching the state's highest court. The *Mondev* tribunal recognized the possibility that an act of continuing character that preceded the entry into force of the treaty could be the basis for a claim, in contradistinction to an act which was already complete, but continued to cause loss or damage.[72] Only that portion of the conduct that post-dates the entry into force can be the basis for any recovery. Mondev had not, however, demonstrated that the acts of the City of Boston or the Boston Redevelopment Authority had the requisite continuing character; thus, the only claims before the tribunal were those based on the 1995 decision of the Supreme Judicial Court of Massachusetts.[73]

NAFTA Chapter Eleven also has a limitations period, which requires that claims be brought within three years of the date when the investor "first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage."[74] The limitations period succeeded in narrowing the scope of the claim in question in one case, although in another the tribunal viewed the existence of a continuing breach as renewing the limitations period. In *Grand River Enterprises v. United States*, the claims relate to measures taken in the aftermath of the settlement in November 1998 of the litigation brought by several state attorneys general against tobacco producers.[75] The Master Settlement Agreement (MSA), which disposed of the claims, resulted in a significant increase in the cost of cigarettes sold by manufacturers who were part of the settlement agreement, a group that included most major tobacco manufacturers. Smaller non-participating tobacco manufacturers began to increase their market share because their cigarettes were offered at lower prices. U.S. states started to require those manufacturers who had not participated in the MSA to pay funds into escrow and to pay civil fines. The claimants in *Grand River* had neither deposited the funds nor paid the fines, and claimed they were unaware of their potential obligations both because they had

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72. Mondev International Ltd. v. United States of America, ICSID (W. Bank) Case No. ARB(AF)/99/2, ¶ 58 (Oct. 11, 2002) (Award).

73. *Id.* at ¶ 75.

74. North American Free Trade Agreement, done at Washington on December 8 and 17, 1992, at Ottawa on December 11 and 17, 1992, and at Mexico City on December 14 and 17, 1992, Can.-Mex.-U.S., *reprinted in* 32 I.L.M. 289 (1993) [hereinafter NAFTA]. NAFTA arts. 1116(2), 1117(2).

75. Grand River Enterprises Six Nations Ltd. (Can). v. United States, (UNCITRAL) (July 20, 2006) (Decision on Objections to Jurisdiction).

not received notice of the fines and penalties and because they had neither participated in nor had knowledge of the MSA until 2002.

Grand River filed its NAFTA claim in March 2004, and the United States argued that any measures taken prior to March 2001 should be excluded from the ambit of the case under NAFTA's limitations period. The United States was successful with respect to that portion of its argument, as the evidence showed that Grand River had indeed been aware of the MSA, and the consequences that would arise if it did not join, prior to March 2001.[76] They did not, however, exclude consideration of follow-on measures succeeding those introduced prior to March 2001, even though the United States had argued that those measures should be viewed as complementary to the preceding measures.[77]

In *UPS v. Canada*, the tribunal declined to dismiss the claims filed by UPS on time-bar grounds, even though the complained-of measures had been introduced more than three years before UPS had filed its claim.[78] The *UPS* tribunal found that UPS had alleged a "continuing breach" such that the limitations period was renewed: "[C]ourses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly."[79]

The limitations period has also given rise to estoppel arguments. In *Marvin Roy Feldman Karpa v. United Mexican States*, the claimant argued that the limitation should be viewed as having been suspended during the time that he had tried to work out with Mexico an agreement to continue his business, and also that Mexico should be estopped from claiming that any of its acts had occurred prior to the limitations period because it had assured Feldman that it would respond to his complaints and allow him to continue his business activities.[80] The *Feldman* tribunal dismissed both of Feldman's arguments. First, it noted that the limitations provisions in NAFTA are straightforward and contain no suggestion that they should be suspended for any reason.[81] Second, while the tribunal accepted that the estoppel argument might succeed if the state had directly acknowledged the existence of a claim, or, in exceptional circumstances, had by its behavior demonstrated awareness

76. *Id.* at ¶ 82.
77. *Id.* at ¶ 87.
78. United Parcel Serv. of Am., Inc. (U.S.) v. Canada, (UNCITRAL) ¶ 28 (June 11, 2007) (Award on the Merits).
79. *Id.*
80. Marvin Roy Feldman Karpa (U.S.) v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/99/1,¶ 53 (Dec. 16, 2002) (Award).
81. *Id.* at ¶ 58.

of the claim, Feldman had fallen short of meeting either of those criteria.[82]

E. Frivolous Claims

In the *Methanex* case, the third case to be brought against the United States under NAFTA Chapter Eleven, the United States argued that the case should be dismissed because Methanex "has not—and cannot—identify any substantive standard of customary international law implicated by the measures here, its claim under Article 1105(1) is inadmissible."[83] This was, effectively, a request for dismissal based on failure to state a claim for which relief could have been granted.[84] The tribunal dismissed these objections. Under the UNCITRAL Arbitration Rules, the tribunal could dismiss the claim for lack of jurisdiction, but the tribunal declined to find that jurisdictional objections included those based on admissibility.[85] According to the *Methanex* tribunal, the United States was effectively seeking a definitive interpretation of the relevant NAFTA provisions, which were questions for the merits.[86] Ultimately, after joining the United States' objections on jurisdiction and admissibility to the merits, the *Methanex* tribunal dismissed the claimant's case for want of jurisdiction because the claimant could not demonstrate a "legally significant connection" between the U.S. measures that were alleged to be a breach and its investments.[87]

After facing several claims in NAFTA Chapter Eleven cases, the United States amended its Model BIT to include a provision on preliminary objections: "Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article

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82. *Id.* at ¶ 63.

83. Methanex Corp. (Can.) v. United States, (UNCITRAL) ¶ 142 (Aug. 10, 2000) (Statement of Defense of Respondent United States of America).

84. *Cf.* FED. R. CIV. P. 12 (b)(6) (2009). The Methanex tribunal stated: "The USA's challenges to admissibility are based upon the legal submission that, even assuming all the facts alleged by Methanex to be true, there could still never be a breach of the individual provisions pleaded by Methanex. . . ." Methanex Corp. (Can) v. United States, (UNCITRAL) ¶ 109 (Aug. 7, 2002) (Partial Award of the Tribunal on Jurisdiction).

85. Methanex Partial Award, at ¶ 124.

86. *Id.* at ¶¶ 120-24.

87. Methanex Corp. (Can.) v. United States, (UNCITRAL) Part IV, Ch. E, ¶¶ 10, 22 (Aug. 3, 2005) (Final Award of the Tribunal on Jurisdiction and Merits); *cf.* KINNEAR, BJORKLUND & HANNAFORD, *supra* note 12, at §§ 1101.34-1101.40 (other NAFTA tribunals seem to have applied a less rigorous test of the necessary connection between the measure and the investment).

34."[88] The revisions to the ICSID Convention arbitration rules and the ICSID Additional Facility Rules also permit preliminary hearings with respect to "frivolous claims:"

> [A] party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (2) or to object, in the course of the proceeding, that a claim lacks legal merit.[89]

In a twist on the frivolity theme, one tribunal warned that it would not look kindly on "frivolous" jurisdictional objections.[90] Though perhaps tongue in cheek, the comment illustrates tribunal concern with the plethora of jurisdictional objections that have come to be a hallmark of an investment arbitration.

II. TRANSPARENCY

Transparency is a broad term that can cover many areas, both procedural and substantive. Some have argued that investment treaties, and possibly customary international law, require governments to maintain a certain level of transparency—openness and predictability—in their regulatory actions.[91] The extent to which this obligation exists is beyond the scope of this Article, which will restrict its focus to the

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88. 2004 U.S. Model BIT, Art. 28(4), *available at* http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.

89. ICSID Conv. Arb. R., Ch. V, R. 41(5); ICSID, Arb. (Additional Facility) R., Ch. VIII, art. 45(6). Paragraph 2 requires that a jurisdictional objection be filed no later than the date the counter-memorial is due to be filed or, in the case of an objection to an ancillary claim, no later than the date the rejoinder is due.

90. Glamis Gold, Ltd. (Can.) v. United States, (UNCITRAL) ¶ 11 (May 31, 2005) (Procedural Order No. 2 Revised).

91. The extent to which transparency is a substantive right is unclear. The tribunal in *Metalclad v. United States* found such an obligation in the preamble to NAFTA, but did not ground its decision in customary international law. Metalclad Corp. v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/97/1, ¶¶ 70-88 (Aug. 30, 2000) (Award). The *Metalclad* tribunal's finding on transparency was set aside by the court in the place of arbitration on the ground that no transparency obligations had been included in NAFTA Chapter Eleven, and the tribunal had identified no such obligation in customary international law that could be imported into Chapter Eleven by means of an existing provision. United Mexican States v. Metalclad Corp., 2001 BCSC 664, ¶¶ 66-76 (May 2, 2001).

procedural aspects of transparency that are starting to characterize investment arbitration.

Confidentiality is one of the distinctive features of international commercial arbitration. Most commercial arbitration rules provide for confidentiality as a matter of course, and the ability to keep the dispute private is one of the attributes distinguishing arbitration from litigation.[92]

The extent to which confidentiality is an inherent and immutable part of arbitration is controversial. The English courts have been most protective of the secrecy of arbitration proceedings.[93] The courts in Australia, instead of following the lead of the English courts, have said that particularly in matters touching on the public interest, any expectation of confidentiality must give way to the public's right to know.[94] Transparency principles are often invoked in opposition to confidentiality by those who support the claim that the public should have access to information about arbitrations involving matters of public concern. Investment arbitration falls within the ambit of arbitrations in which there is a clear and strong public interest.[95] Particularly in the NAFTA Chapter Eleven cases, tribunals and state parties to investment treaties are responding to the public interest in arbitration by making more information available to the public. Yet, there is no agreement on the necessary or desirable extent of disclosure in any given case.

Procedural transparency is a catch-all term that is somewhat imprecise. At the least, it covers access to information that a dispute is pending.[96] It can also encompass access to government attorneys and policy-makers who are charged with formulating the position of the

92. This confidentiality has always been subject to abridgement by subsequent set-aside proceedings in the courts of the place of arbitration, as most court proceedings are public. *See, e.g.*, Thomas Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT'L ARB. 213, 234-35 (2005).

93. *See, e.g.*, Hassneh Insurance Co. v. Stewart J. Mew, [1993] 2 Lloyd's Rep. 243; Ali Shipping Corp. v. Shipyard Trogir, [1998] 1 Lloyd's Rep. 643.

94. Esso/BHP v. Plowman, 183 C.L. R. 10 (1993); Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd., 36 N.S.W. L.R. 662 (1995).

95. *See, e.g.*, Joachim Delaney & Daniel B. Magraw, *Procedural Transparency*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 1112, at 721, 756 ("In some cases, it is the mere presence of the State or a State entity that gives rise to the need for transparency. In other cases, it is the subject-matter, the issues at stake, the political situation in the host State, or the amount of potential financial liability that gives rise to questions of public interest or public concern and thus, the need for transparency.").

96. The ICSID Secretariat currently lists all pending arbitrations, but investment arbitrations held under the rules of other institutions or under the UNCITRAL Rules need not be made public. *See, e.g.*, UNCTAD, *Latest Developments in Investor State Dispute Settlement*, IIA MONITOR No. 1 (2008), at 1-2 (noting the public registry at ICSID that permits knowledge of those claims); ICSID Conv. Arb. R., Ch. IV, § 1, art. 36(3); ICSID Arb. (Additional Facility) R., art. 4.

government with respect to the direction of a dispute. It might include access to the pleadings of the parties to the dispute, as well as the ability to attend hearings, possibly via closed-circuit television.[97] Often it will extend to access to awards, or at least to a summary of the result of the award.[98] It might even stretch to participation in the dispute by *amici curiae*—individual or groups who have an interest in the subject matter of the dispute and a desire to participate in it and perhaps influence the outcome.[99]

A. Access to Information

The trend towards transparency is evident in both contract and treaty arbitration. The pressure started in disputes brought under NAFTA Chapter Eleven, with third-parties seeking access to the pleadings and memorials in pending NAFTA cases.[100] Both the United States and Canada have strong cultures of open access to government information: the United States enacted the Freedom of Information Act in 1966[101] and Canada enacted its Access to Information Act in 1985.[102] Mexico has only recently started a program to increase public access to government documents. In March 2007, the Mexican Constitution was amended to guarantee a public right of access to government information.[103]

Although Mexico was initially reluctant, all three NAFTA governments have agreed to make NAFTA proceedings public. This agreement extends not only to awards, but also to the memorials and pleadings filed by the parties.[104] Allowing free access to information has

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97. *See, e.g.*, Delaney & Magraw, *supra* note 95, at 743-46.

98. *See, e.g., id.* at 775-76. The 2006 changes to the ICSID Arbitration Rules and the ICSID Arbitration (Additional Facility) Rules require the secretariat to publicize summaries of awards. ICSID Conv. Arb. R., Ch. IV, § 4, art. 48(4) ("The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal."); ICSID Arb. (Additional Facility) R., art. 53(3) (same).

99. ICSID Conv. Arb. R., Ch. IV, R. 37(2) (adding procedures for the participation of non-disputing parties); ICSID Arb. (Additional Facility) R.), Ch. VII, art. 41(3) (same); Delaney & Magraw, *supra* note 95, at 777-86.

100. *See, e.g.*, KINNEAR, BJORKLUND & HANNAFORD, *supra* note 12, at §§ 1120.28-1120.35, 1120.47-1120.48; Delaney & Magraw, *supra* note 95, at 741-50.

101. Freedom of Information Act, 5 U.S.C. § 552 (2009).

102. Access to Information Act, R.S.C., ch. A-1, s.1 (1985) (Can.).

103. Decreto por el que se adiciona un Segundo párrafo con siete fracciones al Articíulo 60. do la Constitución Política de los Estados Unidos Mexicanos, Diario Oficial 2 (July 20, 2007).

104. NAFTA Note of Interpretation (July 31, 2001). The relevant provisions provide as follows:

> 1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application

by now become the norm in both U.S. and Canadian investment treaty practice. The U.S. Model BIT and the Canadian Model Foreign Investment and Promotion Agreement ("Model FIPA") both provide for transparent proceedings.[105] Moreover, the recent free trade agreement (FTA) between Canada and Colombia, which is based on the Model FIPA, provides that documents submitted to, or issued by, an arbitral tribunal be made public, unless the parties agree otherwise.[106]

Transparency has not been embraced universally in investment arbitration. The recent amendments to the ICSID Convention Arbitration Rules and the ISCID Additional Facility (Arbitration) Rules allow access

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of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.

2. In the application of the foregoing:

a. In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.

b. Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:

i. confidential business information;

ii. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and

iii. information which the Party must withhold pursuant to the relevant arbitral rules, as applied.

c. The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.

d. The Parties further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, including confidential information.

3. The Parties confirm that nothing in this interpretation shall be construed to require any Party to furnish or allow access to information that it may withhold in accordance with Articles 2102 or 2105."

Id.

105. Treaty Between the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, Nov. 2004, art. 29, *available at* www.state.gov/documents/organization/38710.pdf; Agreement Between Canada and __ For the Promotion and Protection of Investments, Fall, 2003, art. 19, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/what_fipa.aspx?lang=en#structure.

106. Free Trade Agreement Between Canada and The Republic of Colombia, Nov. 21, 2008, art. 830, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/can-colombia-toc-tdm-can-colombie.aspx. The Agreement has not yet entered into force.

to the legal reasoning behind awards in cases administered by ICSID but expressly provide that awards shall be made public only with the consent of the parties.[107] They also stop short of requiring the disclosure of the pleadings or the memorials submitted by the parties. Other arbitral institutions such as the International Chamber of Commerce, the Stockholm Chamber of Commerce, and the London Court of International Arbitration have maintained rules of confidentiality.[108] The UNCITRAL Rules also provide for confidentiality of proceedings.[109] A working group charged with considering revisions to the UNCITRAL Rules (which were formulated in 1976) decided to discuss transparency in investment arbitrations after it finishes revising the basic arbitration rules.[110]

B. Amicus Participation

The requests of amici curiae to participate in investment arbitrations initially occurred in NAFTA Chapter Eleven cases. The first to decide the matter was the tribunal in *Methanex Corp. (Can.) v. United States*.[111] It was shortly followed by the tribunal in *United Parcel Service (U.S.) v. Canada*.[112] NAFTA Chapter Eleven and the applicable arbitration rules are silent as to the participation of *amici*, but both the *Methanex* and *UPS* tribunals determined that they had the discretion to accept written briefs by *amici*, although *amici* had no *right* to participate. Each tribunal grounded its decision in Article 15(1) of the UNCITRAL Arbitration Rules, which gives the tribunal the power to "conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."[113] As the *Methanex*

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107. ICSID Conv. Arb. R., Ch. IV, § 4, 48(5); ICSID Arb. (Additional Facility) R., Ch. IX, art. 53(3).

108. Delaney & Magraw, *supra* note 95, at 739-41.

109. U.N. Comm'n on Int'l Trade Law (UNCITRAL) Arb. R., G.A. Res. 31/98, arts. 25(4), 32(5), U.N. GAOR, 31st Sess., Supp. No. 17, U.N. Doc. A/31/17 (Dec. 15, 1976) [hereinafter UNCITRAL Arb. R.], *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf.

110. *Report of Working Group II (Arbitration and Conciliation)*, U.N. Comm'n on Int'l Trade Law (UNCITRAL), 49th Sess., at ¶ 8, U.N. Doc. A/CN.9/665 (2008).

111. Methanex Corp. (Can.) v. United States, (UNCITRAL) (Jan. 15, 2001) (Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae").

112. United Parcel Serv. of Am., Inc. v. Gov't of Canada, (UNCITRAL) (Oct. 17, 2001) (Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae). In *UPS*, the NGOs requested leave to intervene as parties, and in the alternative requested amicus status. The *UPS* tribunal determined it did not have the authority to permit their intervention as full parties, but that they could participate as *amici curiae* in appropriate circumstances. *Id.*

113. UNCITRAL Arb. R., *supra* note 109, at art. 15(1).

tribunal stated, "Article 15(1) is intended to provide the broadest procedural flexibility within fundamental safeguards, to be applied by the arbitration tribunal to fit the particular needs of the particular arbitration."[114] The *UPS* tribunal also found that the power conferred by Article 15(1) "is to be used not only to protect those rights of the parties, but also to investigate and determine the matter subject to arbitration in a just, efficient and expeditious manner."[115]

Both the *Methanex* and *UPS* tribunals were convened under the UNCITRAL rules. Their decisions did not directly answer the question whether ICSID Convention or ICSID Additional Facility tribunals would have like powers. Subsequent decisions by tribunals in ICSID Convention and ICSID Additional Facility cases, however, confirmed that those rules, although silent on the question of amicus participation, were sufficiently flexible to permit participation by *amici curiae*. In *Aguas Provinciales de Santa Fe S.A. v. Argentina*, an ICSID Convention tribunal concluded that Article 44 (prior to amendment) conferred on it the authority to accept *amici curiae* submissions in appropriate circumstances.[116] Eventually, in 2006, the ICSID Arbitration Rules and the ICSID Additional Facility Rules were amended to expressly permit the participation by *amici curiae*, subject to the tribunal's discretion.[117] In *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, the tribunal concluded that it could permit amicus participation based on the newly revised ICSID Additional Facility Rules.[118]

After these decisions, and particularly in light of the revisions in the applicable ICSID rules, it is almost presumed that investment tribunals have the authority to permit *amici curiae* participation.

Permitting *amici* to participate is predicated on the assumption that the decision is procedural only and does not affect the substantive rights of the parties. Initially, in the NAFTA context, Mexico was quite concerned that the decision was in fact substantive and might affect the

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114. Methanex Corp. (Can.) v. United States, (UNCITRAL) at ¶ 27 (Jan. 15, 2001) (Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae").

115. United Parcel Serv. of Am., Inc. v. Gov't of Canada, (UNCITRAL) ¶ 69 (Oct. 17, 2001) (Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae).

116. Aguas Provinciales de Santa Fe S.A. v. Argentina, ICSID (W. Bank) Case No. ARB/03/17, ¶¶ 11-16 (Mar. 17, 2006) (Order in Response to a Petition for Participation as Amicus Curiae); *see also* Aguas Argentinas, S.A. v. Argentina, ICSID (W. Bank) Case No. ARB/03/19 (May 19, 2005) (Order in Response to a Petition for Transparency and Participation as Amicus Curiae).

117. ICSID Conv. Arb. R., Ch. IV, R. 37(2) (adding procedures for the participation of non-disputing parties); ICSID Arb. (Additional Facility) R., Ch. VII, art. 41(3) (same).

118. Biwater Gauff (Tanz.) Ltd. (U.K.) v. Tanzania, ICSID (W. Bank) Case No. ARB/05/22, ¶¶ 48-55 (Feb. 2, 2007) (Procedural Order No. 5).

balance of powers in the investment treaty arbitration. In both the *Methanex* and *UPS* cases, Mexico argued that permitting amicus submissions would result in favoring the court processes of Canada and the U.S. over Mexico, because Mexican courts do not have amicus submissions and Chapter Eleven was a delicately balanced compromise between Mexico's civil law system and the common law legal systems of Canada and the United States.[119] It also seems likely that, because Mexican courts do not have an amicus-type practice, Mexican NGOs are likely less familiar with the procedures and strategies involved in filing such documents.

Similar concerns have caused developing countries to argue against greater participation by NGOs in WTO dispute settlement. They claim that NGO participation works to the disadvantage of developing countries because the NGO sector in the developed world is better organized, more experienced, and better funded.[120] For example, in *Aguas del Tunari v. Bolivia*, more than 300 aspiring *amici* wrote a letter to James Wolfensohn seeking to participate in the case.[121] A majority of the *amici* came from the developed world, with a large number of groups from the United States, Canada, Belgium, the Netherlands, and the United Kingdom, among others.[122] This geographic divide can give rise to accusations of uninvited interference with affairs in the developing world, notwithstanding the often well-meaning motivations of those NGOs seeking to play a role in a particular case.[123] In addition, there is

119. Methanex Corp. (Can.) v. United States, (UNCITRAL) ¶¶ 11-14 (Oct. 11, 2000) (1128 Submission of the Government of Mexico); United Parcel Serv. of Am., Inc. v. Gov't of Canada, (UNCITRAL) ¶¶ 56-57 (Oct. 17, 2001) (Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae).

120. *See, e.g.*, Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 275 (1997) ("NGOs from developing countries may also be less well financed than their industrial country counterparts and therefore less able to participate effectively."); WTO Minutes of General Council Meeting (Nov. 22, 2000), WT/GC/M/60, ¶ 38 ("[T]he Appellate Body's approach would also have the implication of putting the developing countries at an even greater disadvantage in view of the relative unpreparedness of their NGOs who had much less resources and wherewithal either to send briefs without being solicited or to respond to invitations for sending such briefs.") (Comment of India).

121. Demand for Public Participation in Aguas del Tunari S.A. (Bechtel) v. Republic of Bolivia, ICSID (W. Bank) Case No. ARB/02/3 (Aug. 29, 2002), *available at* http://democracyctr.org/bolivia/investigations/water/international_petition.htm.

122. *Id.*

123. *See* Andrea K. Bjorklund, *The Participation of Amici Curiae in NAFTA Chapter Eleven Cases* (March 22, 2002) [hereinafter Bjorklund, *Participation of Amici*] (paper prepared for the ad hoc experts group on Investment Rules), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/participate.aspx?lang=en; Charnovitz, *supra* note 120, at 275 ("[B]ecause many NGOs are from industrial countries, they amplify certain views—for example, on human rights or the environment—that may not be reflective of the views of developing countries.").

no way to ascertain who precisely is represented by NGOs. They presumably represent their members, but the extent to which they speak for non-members who share some interest in their mission is not clear.[124]

Permitting the filing of amicus briefs adds to the burdens of the parties, both in terms of attorney time and cost. Deadlines in investment treaty cases already test the limits of attorney resources, particularly for government parties who are obliged to obtain acceptance of arguments within different spheres of the government. Requiring that attorneys read and respond to amicus arguments will add to the costs of the proceeding. Arbitrators, too, will need to be paid for the time they spend reading the briefs and the parties' responses. While one could attempt to pass that cost on to the NGOs attempting to file briefs, it is not clear that investment tribunals have the authority to assess such costs, and the more likely result is that the parties will pay for that arbitrator time.[125] Moreover, at least to date, the *amici* have tended to support one side in a given arbitration. While that imbalance may diminish, tribunals will need to consider the inherent inequality injected into the proceedings should it permit several *amici* to submit briefs, especially if they all add to the arguments to which one side must respond. So long as the groups have aligned interests, one way to diminish costs would be for the tribunal to order them to coordinate their arguments to file a single submission.[126] Tribunals can also enforce page limits and limit *amici* to the presentation of those arguments in which they have specialized expertise.[127] There is no question, however, that participation by *amici*, particularly in high profile cases, will affect both the internal conduct of the proceedings and the external perception of the disputes.

The introduction of *amici* participation into investment arbitration may be seen as representing a victory of the common law over the civil law, and of the developed world over the developing world. It pushes investment arbitration more into a common-law, developed-country model of civilization, although it is still far short of full-on U.S. style litigation. This is at best a partial victory—correlative matters have to be

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124. *See* Delaney & Magraw, *supra* note 95, at 783; *see also* Peter J. Spiro, *NGOs and Human Rights: Channels of Power*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS (Edward J. Elgar ed., forthcoming 2009) (discussing NGO accountability).

125. The UNCITRAL Arbitration Rules provide that, in principle, "the costs of the arbitration shall be borne by the unsuccessful party," although if the tribunal considers it reasonable, "the arbitral tribunal may apportion [the costs] between the parties. . . ." UNCITRAL Arb. R., *supra* note 109, at R. 40(1). The ICSID Additional Facility Arbitration Rules and the ICSID Convention Arbitration Rules presume the costs will be divided in some manner between the parties, although they do not explicitly so state. *See* ICSID Arb. (Additional Facility) R., Ch. IV, art. 58; ICSID Conv. Arb. R., Ch. III, R. 28.

126. *See, e.g.*, Delaney & Magraw, *supra* note 95, at 781.

127. Bjorklund, *Participation of Amici*, *supra* note 123.

decided, and interested parties will likely have widely differing views on what is appropriate. In addition to the procedural problems mentioned above is the issue of access to information. The ability of *amici* to take full advantage of their position—to know the facts of the case and to craft their arguments so that they are not duplicative of those of the parties—depends on access to the parties' pleadings and memorials.

III. PUBLIC INTERNATIONAL LAW AND PRECEDENT

Investment arbitrations differ from ordinary commercial arbitrations because public international law plays a significant role in the cases. Investment tribunals both apply existing law and, arguably, create new law. While it is axiomatic that decisions of international courts and tribunals do not have formal precedential value,[128] it is nearly as axiomatic that such decisions often have a practical precedential value.[129] This is true for the ICJ and the appellate body of the WTO, and is increasingly true for investment arbitration.

This process would appear to be unavoidable. Some of the most frequently involved treated provisions—especially the obligation to afford fair and equitable treatment—are amorphous and contextually variable. Other treaty provisions, such as the obligation to provide most-favored-nation treatment, are ambiguous and controversial in their scope and effect. Furthermore, certain procedural matters, such as decisions regarding the place of arbitration, the appropriate allocation of costs, and the participation of *amici curiae*, play an important role in arbitrations but are not addressed thoroughly in investment treaties or in the applicable arbitral rules. Decisions thus fill lacunae in the rules.[130] These circumstances suggest that common-law oriented civilization is slowly establishing itself in investment arbitration. Yet civil lawyers are not strangers to the applicability of case law, and lawyers representing claimants and respondents from both the common and civil law traditions are relying on prior cases in making their arguments. These cases are one of the few sources available to both claimants and respondents when they are formulating their legal arguments.

Notwithstanding the practical considerations leading arbitrators towards placing weight on prior decisions, investment arbitration is ill

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128. Bjorklund, *Investment Treaty Arbitral Awards*, *supra* note 17, at 266; Commission, *supra* note 17, at 134; Kaufmann-Kohler, *supra* note 17, at 357; Schreuer & Weiniger, *supra* note 17, at 1189.

129. Bjorklund, *Investment Treaty Arbitral Awards*, *supra* note 17, at 266-67; Commission, *supra* note 17, at 132-33; Schreuer & Weiniger, *supra* note 17, at 1190-91.

130. *See* Forum Panel Discussion, *in* INVESTMENT TREATY LAW: CURRENT ISSUES III, *supra* note 17, at 313; Kaufmann-Kohler, *supra* note 17, at 368-73; Schreuer & Weiniger, *supra* note 17, at 1190-91.

suited to establish a formal system of precedent. The better analogy, and the approach towards which investment arbitration is headed, is to the *jurisprudence constante* of the French civil law tradition.[131] Such an analogy is appealing for several reasons. First, it recognizes that the starting point for analysis should be the language of the treaty—just as the starting point should be the code in a municipal civil law system.[132] Secondarily, but not insignificantly, tribunals would then turn to the decisions of other tribunals interpreting the same or similar treaty language. These decisions could be viewed as persuasive to the extent they were well reasoned.[133] Moreover, doctrine would develop through the accretions of awards decided in a consistent manner—the "method of small paces."[134]

Developing a full-fledged system of precedent in investment arbitration is undesirable for a number of reasons. Most investment treaties specifically preclude the use of awards as precedent. NAFTA Chapter Eleven, for example, states "An award made by a tribunal shall have no binding force except between the parties and in respect of the particular case."[135] This language does not, of course, prevent an award from being persuasive to the extent it is well-reasoned.[136] Second, it is questionable whether there is any "system" of investment arbitration at all. There are more than 2,500 investment treaties, and the obligations contained in them vary. Differences in the scope and language of a treaty provision should, and often do, lead to different outcomes.[137] Though it would be possible for mini-systems to grow up around individual treaties, no such structure has yet coalesced. Third, the field of investment arbitration, while growing rapidly, is still relatively new. Assigning too great a role to any one decision could lead to the establishment of norms that might soon be viewed as undesirable.[138]

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131. Bjorklund, *Investment Treaty Arbitral Awards*, *supra* note 17, at 272-74; GAILLARD, *supra* note 53.

132. Bjorklund, *Investment Treaty Arbitral Awards*, *supra* note 17, at 272.

133. *Id.*

134. M. Troper & C. Grzegorczyk, *Precedent in France*, *in* INTERPRETING PRECEDENT, 103, 137-38 (D.N. MacCormick & R.S. Summers eds., 1997).

135. North American Free Trade Agreement, U.S.- Can.-Mex., Art. 1136, Dec. 17, 1992, 32 I.L.M. 605 (1993).

136. Jan Paulsson suggests that there are awards . . . and awards, some of which will gain a greater following than others. Paulsson, *supra* note 17, at 97, 98-99. Anthony Sinclair has referred to a hierarchy of reason by which the best decisions will gain a following. Anthony C. Sinclair, *The Umbrella Clause Debate*, *in* INVESTMENT TREATY LAW: CURRENT ISSUES III, *supra* note 17, at 275, 280.

137. Bjorklund, *Investment Treaty Arbitral Awards*, *supra* note 17, at 272-73.

138. As discussed previously, earlier tribunals' adoption of the "*Salini*" test has now been disavowed by later tribunals, a result that many think is correct. *See supra* notes 55-71 and accompanying text.

Finally, there is no hierarchy of investment tribunals. In systems of government using *stare decisis*, there are formal rules or understandings about which decisions are binding and which are merely persuasive. There is a hierarchy of courts in which appellate bodies can correct errors made by the courts below. In contrast, there are no such hierarchies for investment arbitration. While the idea of an appellate body charged with ensuring the development of a cohesive body of law is desirable, it is, at least at present, neither politically nor practically viable.[139]

Notwithstanding these obstacles to establishing a formal system of precedent, the growing body of investment arbitration case law is an important contribution to investment law and to international law generally. Arbitral case law can enhance predictability for both claimants and host states. As Professor Schreuer has said, "drawing on the experience of past decisions pays an important role in securing the necessary uniformity and stability of the law. The need for a coherent case law is evident. It strengthens the predictability of decisions and enhances their authority."[140] Thus, there is an irony in the use of case law: the more it establishes norms that are generally accepted, the more it leads to predictability for states and investors, yet the more awards are imbued with persuasive authority the more it is possible that they will impose burdens on states that those states might have been unwilling to take on directly.

Arbitral case law also plays an important role in developing and harmonizing investment law. Legal development will likely come faster in some areas than in others. Resolution may come more readily in areas in which standards are malleable and tribunals have leeway to interpret them in any given case. For example, Professor Kaufmann-Kohler has suggested that resolution of the proper interpretation of the umbrella

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139. Andrea K. Bjorklund, Rapporteur's Report, *Improving the International Investment Law and Policy System*, Second Annual Columbia Conference on International Investment (unpublished manuscript on file with author); Schreuer & Weiniger, *supra* note 17, at 1202-03. *See generally* Audley Sheppard & Hugo Warner, et al., *Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System?*, 2:2 TRANSNAT'L DISP. MGMT. (April 2005). There is some possibility of correcting arbitral awards. The ICSID Convention allows for amendment of awards on very limited grounds. ICSID Convention, *supra* note 7, at art. 52. Annulment tribunals do not renew the merits of the underlying tribunal decisions and therefore could not be looked to as authoritative arbiters on the content or application of the law. The same could be said about municipal courts that recognize or enforce awards under the New York Convention: the grounds on which they may review awards are limited. New York Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, art. 5, 21 U.S.T. 2517, 330 U.N.T.S. 38. Moreover, municipal courts from different states do not form a coherent system on which a hierarchy of authority would be established.

140. Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 3 TRANSNAT'L DISP. MGMT. 10 (Apr. 2006).

clause, which requires a "yes" or "no" decision, will be more difficult than developing a coherent approach to an issue such as fair and equitable treatment.[141] While the jurisprudence surrounding it is far from uniform, there does appear to be some coalescence around the idea that legitimate expectations play a large role in assessing the merits of any given case.[142]

In addition, the extent to which a new rule underscores an existing norm or expectation may lead to more rapid definition of a legal principle—one thinks here of the fairly rapid acceptance of the participation of *amici curiae*, at least in theory. What was a novel idea in the *Methanex* case in 2000 is now quite generally accepted.[143]

Law harmonization will come, too, in time. As Jan Paulsson has said, with respect to substandard arbitral decisions—the unfit will perish.[144] This process will take time, however, as tribunals experiment with different solutions to problems. Establishing a *jurisprudence constante* requires a patient wait for the development of consistent applications of the law. Gradually one may expect its institution, and the emergence of key decisions that are judged to be influential starting points from which further analysis should flow. The development of norms through case law is another characteristic feature of investment arbitration. It is made possible and reinforced by the transparency norm, which means that prior awards are public and available to counsel and arbitrators.

IV. ARBITRATOR ETHICS AND CONFLICTS OF INTEREST

The guidelines by which arbitrators regulate their conduct are important in commercial arbitration as well as in investment disputes.[145] In large part because of the quasi-precedential and public nature of investment awards, the conduct of arbitrators in investment arbitrations presents special challenges. As Professor Kaufmann-Kohler has said, arbitrators, as decision makers, have an obligation to follow precedent

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141. Kaufmann-Kohler, *supra* note 17, at 29.

142. *See* Todd J. Grierson-Weiler & Ian A. Laird, *Standards of Treatment*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 12, at 259, 275-76, 287-90.

143. See discussion of *amici curiae*, *supra*, in the text accompanying notes 111-127. *See also* Forum Panel Discussion, *supra* note 130, at 315-16.

144. Jan Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, ICCA 2006, 3:5 TRANSNAT'L DISP. MGMT. (Dec. 2006).

145. *See, e.g.*, Loretta Malintoppi, *Independence, Impartiality, and Duty of Disclosure of Arbitrators*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT ARBITRATION, *supra* note 12; Leon Trakman, *The Impartiality and Independence of Arbitrators Reconsidered*, 10 INT'L ARB. L. REV. 999 (2007).

"so as to foster a normative environment that is predictable," and this obligation is heightened when a nascent legal system is struggling to develop rules.[146] The increasing tendency of arbitrators to address prior decisions is having an interesting, and not yet fully developed, effect on the conflict-of-interests norms applied to international arbitrators.

Arbitrators have recently been subject to challenge for so-called "issue" conflicts. If a person sits as an arbitrator in one case while working as counsel in another, and if the interpretation of a particular legal rule is a significant issue in each case, is it possible to challenge the arbitrator on the grounds of issue conflict? Will the arbitrator be inclined to issue a ruling that will favor her client as she argues the other case? Will she feel constrained from issuing the ruling she otherwise would have because of the possibility that it could be used against her client in the other case? While there is as yet no evidence of any abuse of authority or process by arbitrators, such concerns have given rise to challenges against arbitrators.[147] In one such case, Ghana argued that the arbitrator in question had an issue conflict because he would be espousing a pro-investor position on the interpretation of an issue of expropriation law that would be before him in his capacity as arbitrator in the case against Ghana.[148] The Dutch court charged with hearing the challenge determined that the arbitrator in question could not fill both the role of arbitrator and maintain his position as counsel in the other case.[149] The arbitrator resigned as counsel and retained his arbitral appointment.[150]

Arbitrators have also been challenged when they serve in two successive cases that involve similar factual or legal issues. Once the award in the first case is handed down, the parties in the second case may

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146. Kaufmann-Kohler, *supra* note 17, at 32-33.

147. *See, e.g.*, Christopher Harris, *Arbitrator Bias in Investment and Commercial Arbitration*, 5:4 TRANSNAT'L DISP. MGMT. (July 2008); Barton Legum, *Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures*, 21 ARB. INT'L 241 (2005); Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, DISP. RESOL. J. 60 (Feb./April 2006); Luke Eric Peterson, *Belgian Appeals Court rejects Poland's challenge to Arbitrator in Eureko case*, INVESTMENT TREATY NEWS (Switz.), Nov. 15, 2007 [hereinafter Peterson, *Eureko*], *available at* http://www.iisd.org/pdf/2007/itn_nov15_2007.pdf; Luke Eric Peterson, *Decrying past "contradictory" rulings, Argentina challenges arbitrator*, INVESTMENT TREATY NEWS, July 10, 2008 [hereinafter Peterson, *Argentina Challenges Arbitrator*]; Luke Eric Peterson, *Argentina and UK firm send arbitrator-challenge to venue where reasons are provided*, INVESTMENT TREATY NEWS, Oct. 30, 2007; *cf.* Carbonneau, *supra* note 92, at 233 (noting that in the domestic U.S. context, calls for broader disclosures by arbitrators were prompted by potential, rather than actual, abuse).

148. Republic of Ghana v. Telekom Malaysia Berhad, HA/RK 2004.667, ¶ 3 (Oct. 18, 2004).

149. *Id.* at ¶¶ 4-5.

150. Harris, *supra* note 147.

be concerned that the arbitrator has set views on a particular issue and challenge him on that basis. To date, this kind of challenge has not been successful.[151] These challenges are made possible by the growing norm of transparency which means awards are available to the public and thus can form a ground for challenge.[152] Their lack of success, so far, depends in large part on the fact that awards are not technically precedential, even if they exert some persuasive authority.

There is some suggestion of increased scrutiny of associations that hitherto raised no suspicion of a conflict of interest. Barristers resident in the same London chambers represent opposing sides in the same case without violating the ethics rules of the English bar, as the barristers do not usually practice together. In a recent ICSID case, however, the tribunal president, David Williams, and counsel for the respondent, David Mildon, were resident in Essex Court Chambers, and the claimant challenged Mr. Mildon's continued participation in the case.[153] The tribunal in that case declined to adopt a blanket rule that an arbitrator could not share chambers with an attorney appearing before the tribunal but concluded in that case that Respondent's counsel should resign to avoid the appearance of a conflict.[154] Neither party desired the resignation of the president of the tribunal.[155]

Many lawyers who frequently sit as arbitrators are severing their relationships with their law firms and even giving up legal practice entirely, so as to devote themselves full time to arbitration. This enables them to avoid both the conflicts that inevitably arise for those practicing in a large firm and the issue conflicts that are increasingly present. But this solution is perhaps over-broad. While it might eliminate the conflict a person might experience between her role as counsel and as arbitrator, it might not be feasible for those who do not have full-fledged arbitration practices. Moreover, it does not solve the problem of challenges against

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151. Peterson, *Eureko*, *supra* note 147; Peterson, *Argentina Challenges Arbitrator*, supra note 147; Harris, *supra* note 147, at n.36 and accompanying text.

152. Anthony C. Sinclair & Matthew Gearing, *Partiality & Issue Conflicts*, 5:4 TRANSNAT'L DISP. MGMT. (July 2008) (noting greater potential for issue conflicts with investment arbitration than with ordinary commercial arbitration); Levine, *supra* note 147, at 62 (same).

153. Hrvatska Elektroprivreda, d.d. (Croatia) v. Slovenia, ICSID (W. Bank) ARB/05/24 (May 6, 2008) (Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings).

154. *Id.* at ¶ 31.

155. *Id.* The tribunal was constituted before the respondent retained the barrister from Essex Court Chambers. Given the fact that neither party desired the resignation of the president, that the ICSID Convention contains a "cardinal rule" on the immutability of the tribunal, and various other acts of respondent that concealed the participation of Mr. Mildon until the proceedings were well launched, the tribunal determined it had the inherent authority to order the withdrawal of Mr. Mildon as counsel. *Id.* at ¶¶ 31-34.

arbitrators who have previously decided cases against a certain party, or who have previously handled cases with similar legal or factual issues.

Barring arbitrators from sitting in subsequent cases seems to fly in the face of the desire to have the most well informed, knowledgeable people possible handle investment disputes. This illustrates the delicate balance engendered by using *ad hoc* tribunals to decide investment arbitrations as compared to the practice of hiring permanent judges in national courts and in some international tribunals. One usually wants to nominate the best-qualified person for service on the judicial bench, and once that person is appointed no one suggests disqualifying her because she has gained expertise with respect to certain types of cases. Yet in investment arbitration, a prospective arbitrator with expertise on a particular issue may be challenged precisely because she or he has that expertise. This is clearly undesirable. Expertise should not be confused with bias. An arbitrator may be independent and impartial in her approach to a case even though she has experience relating to the legal principles likely to arise in a case; indeed that experience would seem to be an essential qualification, rather than an essential *dis*qualification.

V. CONCLUSION

The civilization of investment arbitration has developed defining characteristics, but its evolution is far from complete. As it matures it will develop further, borrowing from and refining techniques developed in other dispute settlement contexts as well as creating new practices peculiar to investment arbitration. Already investment arbitration departs from ordinary commercial arbitration in the number and frequency of jurisdictional objections offered by states seeking to limit their liability when faced with cases they often did not foresee. The burgeoning emphasis on transparency and public participation is at once a response to the public's fascination with investment arbitration and a facilitator of that fascination; international commercial arbitration, a largely private endeavor, has never captured public interest to the same extent. Investment tribunals are creating a jurisprudence that both elaborates on existing norms and fills gaps left by incomplete investment treaties. Arbitrators sitting on these tribunals are playing an important role in the development of international law, and they are coming under increased public scrutiny because of the significance of their role. Despite these identifiable characteristics, it would be premature to suggest that the civilization of investment arbitration is anywhere near its full flowering.