

2005

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

Susan D. Franck

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521 (2005).

Available at: <https://ir.lawnet.fordham.edu/flr/vol73/iss4/10>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

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

Cover Page Footnote

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

ARTICLES

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

*Susan D. Franck**

INTRODUCTION

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

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

1. See Michael D. Goldhaber, *Big Arbitrations*, Focus Eur., Summer 2003, at 22 available at <http://www.americanlawyer.com/focuseurope/bigarbitrations.html>. This Article details a series of cases involving sovereign states that are or have been sued for breaches of investment treaties. These cases include the following: (1) the “Czech TV Debacle” where the Czech Republic was sued for over U.S. \$500 million; (2) the “Argentine Currency Crisis Claims” where the Republic of Argentina was sued for “billions of dollars”; (3) the “Lebanese Mobile Phone Fight” where U.S. \$1.05 billion was disputed in a case involving the Republic of Lebanon; (4) the “Czech-Slovak Bank Battle” where the Slovak Republic was sued for U.S. \$1 billion in damages; (5) the “Japanese-Czech Banking Battle” where a U.S. \$1 billion claim was made against the Czech Republic; (6) the “Port Services Disputes” where claims are being brought claiming that the Islamic Republic of Pakistan owes approximately U.S. \$350 million and the Republic of Philippines owes U.S. \$120 million; (7) the “Building Bridges in Pakistan” where a claim for U.S. \$450 million was made against the Islamic Republic of Pakistan; (8) the “Turkish Power Plant Joint Venture” where the Republic of Turkey is being sued for U.S. \$300 million; (9) the “Argentine Water Dispute” alleging

issues with economic and political consequences are resolved in private before different sets of individuals who can and do come to conflicting decisions on the same points of law²—and no single body has the capacity to resolve these inconsistencies.

In the past twelve years, countries (“Sovereigns”) have entered into approximately 1500 new Bilateral Investment Treaties (“BITs”)³ and

the Republic of Argentina owes U.S. \$300 million; (10) the “Egyptian Textile Business Dispute” where the Arab Republic of Egypt is being sued for U.S. \$250 million; and (11) the “Oil Contract Bidding Dispute” where a U.S. \$200 million claim was brought against the Republic of Trinidad and Tobago. *Id.*; see also Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 Vand. J. Transnat’l L. 1381, 1400-01 (2003) [hereinafter Coe, *Taking Stock*] (describing the extensive amount of damages claimed under NAFTA despite the slim chances of recovery). These cases only involve claims brought under bilateral investment treaties. They do not involve claims pursued under multilateral agreements. See e.g., European Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 360 [hereinafter ECT], available at <http://www.encharter.org/upload/1/TreatyBook-en.pdf>; North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 612 (entered into force Jan. 1, 1994) [hereinafter NAFTA], available at <http://www.sice.oas.org/trade/nafta/naftatce.asp>. At the time of the writing of this Article, at least five cases were filed under the ECT, with at least one finding against a sovereign state. See Luke E. Peterson, *Swedish Firm Wins Energy Charter Treaty Case Against Republic of Latvia*, Invest-SD: Investment L. & Pol’y Wkly. News Bull., Dec. 19, 2003, at http://www.iisd.org/pdf/2003/investment_investsd_dec19_2003.pdf (describing the ECT award rendered against Latvia); Luke E. Peterson, *UK-Based Firm Pursues Energy Charter Treaty Claim Against Kyrgyzstan*, Invest-SD: Investment L. & Pol’y Wkly. News Bull., July 2, 2004 (on file with author) (explaining that a new claim filed against Kyrgyzstan is the fifth known case to surface under the ECT); see also Ari Afilalo, *Constitutionalization Through the Back Door: A European Perspective on NAFTA’s Investment Chapter*, 34 N.Y.U. J. Int’l L. & Pol. 1, 5 (2001) (indicating that in *Methanex v. United States*, a case brought under NAFTA, a private investor is seeking close to U.S. \$1 billion in damages from the U.S. government).

2. See Matthew Saunders, *Bilateral Investment Treaties Oil the Wheels of Commerce: An Increase in BITs in Recent Years Is Helping to Encourage and Protect International Business*, IBA in the News, June 23, 2004, at <http://www.lexisnexis.com/publisher/EndUser?Action=UserDisplayFullDocument&orgId=1746&topicId=26635&docId=1:214719388&start=24.html>. Saunders explains that investment treaty arbitrations “operate in the arena of public international law and interpret [investment treaties] through the application of public international law principles and conventions, commonly less amenable to clear definition than is the case in the arena of private law.” *Id.* This situation “often results in less certainty as to outcome in [investment treaty] claims than might often be the case before a domestic court or a contract based international arbitration.” *Id.*; see *infra* notes 434-37 and accompanying text (noting that investment treaty awards do not have precedential value).

3. These BITs (or, individually, a “BIT”) are individually negotiated treaties between two sovereign states (each a “Sovereign”). See generally U.N. Conference on Trade and Dev. (“UNCTAD”), *Bilateral Investment Treaties in the Mid-1990s*, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998) [hereinafter UNCTAD, *BITs in the Mid-1990s*]; Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (1995).

around five multilateral investment treaties⁴ in order to attract foreign investment by granting broad investment rights to foreign investors and creating flexibility in the resolution of investment disputes. The existence of this broad network of interrelated rights means that, when difficulties arise—as they inevitably do—there is a patchwork of mechanisms to resolve the investment disputes.

Some public international law rights have been articulated for the first time in investment treaties—such as the right to “fair and equitable treatment” and a Sovereign’s obligation to “observe its commitments.” Tribunals have applied these standards differently and made divergent findings on liability. Rather than creating certainty for foreign investors and Sovereigns, the process of resolving investment disputes through arbitration is creating uncertainty about the meaning of those rights and public international law.⁵

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

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

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

5. This has recently become a topic of discussion. *See, e.g.*, British Inst. of Int’l & Comparative Law, Appeals and Challenges to Investment Treaty Awards: Is It Time for an International Appellate System?, *at* <http://www.biicl.org/edetail.asp?eventid=419&menuid=18> (May 7, 2004); *see also* Michael D. Goldhaber, *Wanted: A World Investment Court*, *Focus Eur.*, Summer 2004 [hereinafter Goldhaber, *Wanted*], *at* <http://www.americanlawyer.com/focuseurope/investmentcourt04.html>. It will also be discussed at the Institute for Transnational Arbitration and the American Society of International Law’s Spring Conference, as well as at the Seventh Hague Joint Conference on Contemporary Issues of International Law on International Institutional Reform in June-July 2005. *See* ITA-ASIL, Spring Conference, Arbitration and the Involvement of Non-Parties: Transparency, Intervention and Appeal, *at* http://asil.intracommunities.org/calendar?view_mode=DisplayYearViewAction&session_id=41b74e656c867853_93318&DisplayYearViewAction=on&date=2005-07-09 (last visited Jan. 22, 2005); ASIL, Seventh Hague Joint Conference on Contemporary Issues of International Law, International Institutional Reform, *at* <http://www.asil.org/events/7thHagueConference.html> (last visited Jan. 22, 2005).

previous suggestions for reform. Part VI argues that present efforts for promoting legitimacy in investment treaty arbitration are insufficient and recommends the implementation of both preventative and corrective measures. This Article recommends increasing academic commentary and analysis of investment treaty rights and enhancing transparency of the arbitration process in order to prevent inconsistencies from occurring. This Article also proposes corrective reforms to remedy inconsistent decisions. Rather than having a treaty-by-treaty approach that might otherwise be suggested by the literature and the obligations of the U.S. government,⁶ this Article proposes the establishment of an independent, permanent appellate body with the authority to review awards rendered under a variety of investment treaties. In this manner, legitimacy, transparency, determinacy, and coherence can be reintroduced into the entire network of investment treaty disputes, and the concerns of citizens, investors, and sovereigns alike can be addressed.

I. THE EVOLUTION AND IMPACT OF INVESTMENT TREATIES

Foreign investment is a vital tool for economic development and global prosperity. It allows developing countries to develop local industries and receive funds from foreign investors to improve the country's infrastructure. Meanwhile, investors obtain financial returns and gain a foothold in the markets of the future.⁷

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

7. *See, e.g.*, Marian Nash (Leich), *Bilateral Investment Treaties United States—Argentina*, 87 Am. J. Int'l L. 433, 433 (1993) (explaining that the U.S.-Argentina BIT,

As the global economy continues to expand during turbulent economic conditions, investors are becoming more sophisticated about how they plan investments and resolve disputes related to those investments. Investment treaties play an increasingly prominent role in the initial decision to invest in a developing nation, the structure of the investment, and the methods of maximizing commercial benefits if there are difficulties with the investment.⁸ This part describes the historical evolution of investment treaties and discusses why the investment treaty movement has been successful.

A. *The Evolution of Investment Treaties*

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

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

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

vironment.⁹ This movement began with Treaties of Friendship, Commerce and Navigation,¹⁰ but soon moved beyond this as these treaties were limited commitments that did not have a forum for resolving disputes.¹¹ There were soon efforts to enact multilateral investment treaties, which would grant investors and sovereigns a series of rights and obligations in the hopes of fostering foreign direct investment. Given the difficulties in promulgating sweeping reforms on a multilateral basis, these initiatives were largely unsuccessful.¹²

9. See Kenneth J. Vandeveld, *United States Investment Treaties: Policy and Practice* 7-22 (1992) (describing the evolution of foreign policy from the use of military force to treaties of friendship, navigation, and commerce, and finally to bilateral investment treaties); Ray C. Jones, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?*, 2002 *BYU L. Rev.* 527, 529-31 (describing the shift from "gunboat diplomacy" to investment treaties); see also Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 *Nw. J. Int'l L. & Bus.* 327, 329-33 (1994) (discussing the evolution of bilateral investment treaties); Jeswald Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 *Int'l Law.* 655, 656-58 (1990) (discussing the evolution of bilateral commercial treaties, bilateral investment treaties, and treaties of friendship, commerce and navigation); Int'l Chamber of Commerce, *Bilateral Treaties for International Investment* 5-8 (1977) [hereinafter *Bilateral Treaties*] (Pub No. 303; describing the progress of bilateral investment treaties).

10. E.I. Nwogugu, *The Legal Problems of Foreign Investment in Developing Countries* 119-22 (1965) (describing the historical shift from protecting investments to treaties of friendship, commerce and navigation).

11. See, e.g., Gudgeon, *supra* note 8, at 108; see also David R. Adair, *Investors' Rights: The Evolutionary Process of Investment Treaties*, 6 *Tulsa J. Comp. & Int'l L.* 195, 196-98 (1999) (describing the evolution of treaties); David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 *Geo. Wash. Int'l L. Rev.* 651, 719-20 (2001) [hereinafter Gantz, *Potential Conflicts*]; Todd S. Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 *U. Pitt. L. Rev.* 541, 570-76 (1994) (describing the United States' shift from treaties of friendship, commerce and navigation to BITs).

12. M. Sornarajah, *International Law on Foreign Investment* 231-37 (1994); see also UNCTAD, *Fair And Equitable Treatment* at 11-12, U.N. Doc. UNCTAD/ITE/IIT/11 (Vol. III), U.N. Sales No. E.99.II.D.15 (1999) (noting that the Havana Charter of 1948 did not enter into force), at <http://www.unctad.org/en/docs/psiteiitd11v3.en.pdf>; UNCTAD, *Lessons from the MAI*, U.N. Doc. No. UNCTAD/ITE/ITT/Misc.22, U.N. Sales No. E.99.II.D.26 (1999) (describing the Organization for Economic Cooperation and Development's ("OECD") decision to discontinue negotiations on the multilateral investment agreement), at <http://www.unctad.org/en/docs/psiteiitm22.en.pdf>; Adair, *supra* note 11, at 209-219 (describing the 1995 draft Multilateral Agreement on Investment ("MAI") promulgated by the OECD); David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States—Chile Free Trade Agreement*, 19 *Am. U. Int'l L. Rev.* 679, 696 (2004) [hereinafter Gantz, *The Evolution*] (noting that the failed MAI would have had BIT-type language applicable to disputes among major developed countries); Directorate for Fin. and Enterprise Affairs, OECD, *Relationships Between International Investment Agreements* (2004) [hereinafter OECD] (Pub. No. 2004/1; explaining that the Havana Charter failed to provide a comprehensive, multilateral set of investment rules), at <http://www.oecd.org/dataoecd/8/43/31784519.pdf>; OECD, *Multilateral Agreement on*

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

Investment: Documentation from the Negotiations, at <http://www.oecd.org/daf/mai/toc.htm> (last visited Jan. 22, 2005).

13. See Anahid M. Ugurlayan, *Armenia: Privatization and Foreign Direct Investment in a Climate of Political and Economic Instability*, 23 Loy. L.A. Int'l & Comp. L. Rev. 427, 447-48 (2001) (noting that a goal of the U.S.-Armenia BIT was to promote and facilitate private investment and minimize risk). See generally Salacuse, *supra* note 9, at 660-61 (explaining that BITs have promoted foreign investment while creating clear international rules and effective enforcement mechanisms to protect and promote investment); Kenneth J. Vandeveld, *The Bilateral Investment Treaty Program of the United States*, 21 Cornell Int'l L.J. 201 (1988); Kenneth J. Vandeveld, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 Mich. J. Int'l L. 621 (1993).

14. Guillermo A. Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 Yale J. Int'l L. 365, 366 (2003).

15. Adeoye Akinsanya, *International Protection of Foreign Direct Investment in the Third World*, 36 Int'l & Comp. L.Q. 58 (1987); Gerald Aksén, *The Case for Bilateral Investment Treaties*, in *Private Investors Abroad—Problems and Solutions in International Business in 1981*, at 357 (Martha L. Landwehr ed., 1981); Aron Broches, *Bilateral Investment Protection Treaties and Arbitration of Investment Disputes*, in *The Art of Arbitration*, Liber Amicorum Pieter Sanders 63 (Jan C. Shultsz & Albert Jan Van den Berg eds., 1982).

16. Although it is difficult to determine the precise number of BITs in effect because the numbers are always increasing, at present there are over 2100 BITs. See UNCTAD, *Investment Entrustments Online: About*, at http://www.unctadxi.org/templates/Page_644.aspx (last updated June 9, 2004) (stating that the “number of BITs has increased dramatically . . . to a total of 2,181 by 2002”); see also Jessica S. Wiltse, *An Investor-State Dispute Mechanism in The Free Trade Area of the Americas: Lessons from NAFTA Chapter Eleven*, 51 Buff. L. Rev. 1145, 1153 (2003). In a frequently cited 1984 Comment on BITs, one commentator posited that participation occurred in three stages. The first stage involved Germany and Switzerland signing agreements with a variety of less developed countries in the early 1960s. The second stage occurred throughout the 1960s and into the 1970s when France, the United Kingdom, the Belgo-Luxembourg Economic Union, the Netherlands, and Norway involved themselves in the program. The final stage began in the late 1970s and continued into the early 1980s when Japan and the United States became increasingly involved. See Robin, *supra* note 8, at 941-42; see also *Bilateral Treaties*, *supra* note 9, at 9-11 (describing why Sovereigns are interested in concluding investment treaties); Andrew J. Shapren, *NAFTA Chapter 11: A Step Forward in International Trade Law or a Step Backward for Democracy?*, 17 Temp. Int'l & Comp. L.J. 323, 327-28 (2003) (describing the United States's embarkation on the bilateral investment treaty program in the 1980s).

also signed investment treaties among themselves.¹⁷ As investments continue to flow between developed and developing countries, investment treaties can no longer be seen purely from the point of view of industrialized nations.¹⁸

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

17. See Agreement on the Promotion and Protection of Investments, May 9, 1980, Sing.-Sri., 1202 U.N.T.S. 333, available at http://www.unctad.org/sections/dite/ia/docs/bits/srilanka_singapore.pdf; Bilateral Treaties, *supra* note 9, at 4 (noting that there are at least eleven BITs between developed countries);.

18. Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, in 269 Recueil Des Cours 255, 299 (1997); see also UNCTAD, *Bilateral Investment Treaties 1959-1999*, at 1, 8, U.N. Doc. UNCTAD/ITE/IIA/2 (2000) [hereinafter UNCTAD BITs] (explaining that initially "BITs were concluded between a developed and a developing country" but that this pattern changed in the 1990s when "the dividing line for BIT partners between capital exporting and capital importing countries no longer holds true and, in many instances, countries approach BITs with the dual purpose of protecting their outward investments to, while attracting inward investment from, the other BIT partner"), at <http://www.unctad.org/en/docs/poiteiia2.en.pdf>.

19. See Eloise Obadia, *ICSID, Investment Treaties and Arbitration: Current and Emerging Issues*, ICSID News, Fall 2001, at 4 (explaining that "there has been an extraordinary proliferation of ... BITs" over the last decade), available at <http://www.worldbank.org/icsid/news/n-18-2-4.htm>.

20. Vandevelde *The Economics*, *supra* note 8, at 469.

21. These treaties include NAFTA, the Agreement of the Members of the Association of South East Asian Nations for the Promotion and Protection of Investments (the "ASEAN Agreement"), the Cartagena Free Trade Agreement, the Colonia Investment Protocol of the Common Market of the Southern Cone, the Buenos Aires Investment Protocol of Mercosur, and the ECT. Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID Rev.-Foreign Investment L.J. 287, 291-92 (1997) [hereinafter Parra, *Provisions*]; see Antonio R. Parra, *ICSID and the Rise of Bilateral Investment Treaties: Will ICSID Be the Leading Arbitration Institution in the Early 21st Century?*, 97 Am. Soc'y Int'l L. Proc. 41, 43 (2000) [hereinafter Parra, *ICSID*].

22. See UNCTAD BITs, *supra* note 18, at iii (explaining that the 1990s saw a rise in the number of treaties "from 385 at the end of the 1980s to 1857 at the end of the 1990s"); see also Parra, *ICSID*, *supra* note 21, at 41-42 (calculating that 65 BITs were concluded by the end of the 1960s, another 86 signed during the 1970s, and another 211 in the 1980s, before the 1990s "veritable explosion in the number of BITs" estimated between 960 to 1300 new BITs).

23. Valpy FitzGerald, *International Investment Treaties and Developing Countries* (Inst. of Dev. Studies), at <http://www.ids.ac.uk/tradebriefings/ti9.pdf> (last visited Feb. 3, 2005) (Trade & Investment Background Briefing No. 9); see also Sacerdoti, *supra* note 18, at 261 (describing the massive increase in foreign direct investment in the past decade).

broader regional investment agreements, such as the Free Trade Agreement of the Americas, are now under consideration.²⁴

B. What Makes Investment Treaties So Special?

The proliferation of investment treaties is due in part to the rights in the treaties themselves. Investment treaties have two fundamental innovations, which represent a departure from previous international agreements.²⁵ First, they grant investors a series of specific substantive rights, which help contribute to the stable investment climate of an investment.²⁶ Second, they offer investors direct remedies to address violations of those substantive rights.²⁷ The first of these will be addressed in this part, and the impact of direct right of access will be discussed further in Part II.

The provisions of investment treaties are remarkably similar.²⁸ While there are variations in the specific substantive rights and obligations that result from treaty-specific negotiations, there are several trends in the rights that Sovereigns choose to provide.²⁹ In general, Sovereigns agree to protect the investments of investors from the other Sovereign in their own territory. They do this by delineating the specific substantive standards that govern the host state's treatment of an investment.³⁰ In essence, the treaties indicate what rights are

24. The Free Trade Agreement of the Americas ("FTAA") is currently being negotiated and is due to be finalized in 2005. *See generally* Gantz, *The Evolution*, *supra* note 12; FTAA, Antecedents of the FTAA Process, at http://www.ftaaalca.org/View_e.asp (last visited Jan. 22, 2005).

25. *See generally* Dolzer & Stevens, *supra* note 3; Vandevelde, *supra* note 9.

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

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

28. Vandevelde, *The Economics*, *supra* note 8, at 471.

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

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

granted to investments, the types of investments that are covered, and when the coverage begins and ends.³¹

There are different permutations of the substantive rights granted to investors.³² A typical investment treaty generally provides investors with a combination of up to seven different substantive rights.³³ First, investors are often guaranteed the payment of adequate compensation in the event an investment is expropriated.³⁴ Second, Sovereigns are prohibited from enacting currency controls so as to promote the free flow of capital.³⁵ Third, Sovereigns are required not to discrimi-

31. Many investment treaties have a sunset provision that permit them to expire after 10 years upon notification of termination, but also have an option to renew. *See generally* Paul E. Comeaux & N. Stephan Kinsella, *Protecting Foreign Investment Under International Law* 109 (1997); Lucy Reed et al., *Guide to ICSID Arbitration* 61-62 (2004).

32. *See* Reed et al., *supra* note 31, at 40. Reed explains that investment treaties "are the product of negotiation between two sovereign States, and the exact scope and content of [investment treaties] vary considerably—even among those signed by a single country. The variances reflect the States' different investment approaches and respective bargaining positions." *Id.*

33. *See generally* Dolzer & Stevens, *supra* note 3; *see also* Parra, *Provisions, supra* note 21, at 288-89; Ibrahim F.I. Shihata, *Recent Trends Relating to Entry of Foreign Direct Investment*, 9 ICSID Rev.-Foreign Investment L.J. 47, 56 (1994); Vandeveld, *Investment Liberalization, supra* note 8, at 506-07, 522.

34. The Argentina-Jamaica BIT provides that neither country shall take any measure of nationalization or expropriation or any other measure having the same effect against investments in its territory belonging to investors of the other [country], unless the measures are taken in the public interest, on a non-discriminatory basis and under due process of law. The measures shall be accompanied by provisions for the payment of prompt, adequate and effective compensation. Agreement Between the Government of Jamaica and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investments, Feb. 8, 1994, Jam.-Arg., art. 4(1), at http://www.unctad.org/sections/dite/ia/docs/bits/argentina_jamaica.pdf. Similarly, the Bosnia and Herzegovina-Sweden BIT provides that investments "shall not be nationalised, expropriated or subjected to requisition or to measures having effect equivalent to nationalisation or expropriation . . . except for a public purpose related to the internal needs and under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation." Agreement on the Promotion and Protection of Investments Between Sweden and Bosnia and Herzegovina, Oct. 31, 2000, Swed.-Bosn. & Herz., art. 4(1), at http://www.unctad.org/sections/dite/ia/docs/bits/sweden_bosnia.pdf. In addition, the Cambodia-Croatia BIT provides that countries

shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another [country] or take any measure or measures having equivalent effect . . . except: (a) for a purpose which is in the public interest, (b) on a non-discriminatory basis, (c) in accordance with due process of law, and (d) accompanied by payment of prompt, adequate and effective compensation . . . [which] shall be paid without delay.

Agreement Between the Government of the Republic of Croatia and the Government of the Kingdom of Cambodia on the Promotion and Reciprocal Protection of Investments, May 18, 2001, Croat.-Cambodia, art. 5 [hereinafter Cambodia-Croatia BIT], at http://www.unctad.org/sections/dite/ia/docs/bits/croatia_cambodia.pdf.

35. Article V(1) of the U.S.-Uzbekistan BIT provides that both countries shall permit all transfers relating to a covered investment to be made freely

nate on the basis of nationality; this typically means investors cannot be treated worse than the Sovereign's own citizens or other foreigners.³⁶ Fourth, Sovereigns promise to treat investments fairly and equitably.³⁷ Fifth, Sovereigns promise to provide full protection and secu-

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

Treaty Between the Government of the United States of America and the Government of the Republic of Uzbekistan Concerning the Encouragement and Reciprocal Protection of Investment, Dec. 16, 1994, U.S.-Uzb., S. Treaty Doc. No. 104-25 (1995), available at http://www.unctad.org/sections/dite/ia/docs/bits/us_uzbekistan.pdf. The Finland-Kuwait BIT provides that each Sovereign

affirms that its legislation concerning foreign currencies is based upon the principle of free movement of capital and that the transfer of payments in connection with an investment is free. Transfers shall include in particular, though not exclusively: (a) the principle and additional amounts to maintain or increase the investment; (b) the returns; (c) repayment of loans; (d) royalties and fees . . . ; (e) the proceeds from the liquidation or the sale of whole or any part of the investment; (f) unspent earnings and other remuneration . . . ; (g) amounts spent for the management and maintenance of an investment and a variety of other compensations related to violations of the BIT.

Agreement Between the Republic of Finland and the State of Kuwait for the Protection and Promotion of Investments, Mar. 10, 1996, Fin.-Kuwait, art. 7, at http://www.unctad.org/sections/dite/ia/docs/bits/finland_koweit_eng_fn.pdf.

36. Article 3 of the Denmark-Lithuania BIT provides that neither country "shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory" and that neither country shall subject investors or investments "to treatment less favourable than that which it accords to its own [investments or returns and] investors or to investors of any third State." Agreement Concerning the Promotion and Reciprocal Protection of Investments (with exchange of notes), Mar. 30, 1992, Den.-Lith., art 3(1-3), 1787 U.N.T.S. 245, 247, available at http://www.unctad.org/sections/dite/ia/docs/bits/denmark_lithuania.pdf. Article 2(2) of the China-Sweden BIT provides that investments "shall not be subject to treatment less favourable than that accorded to investments by investors of third States." Agreement on the Mutual Protection of Investments, Mar. 29, 1982, Swed.-P.R.C., at http://www.unctad.org/sections/dite/ia/docs/bits/china_sweden.pdf. Article 3(1) of the Germany-Kenya BIT provides that foreign investments shall not be accorded "treatment less favourable than [the Sovereign] accords to investments of its own nation or companies or to investments of nationals or companies of any third State." Treaty Between the Federal Republic of Germany and the Republic of Kenya Concerning the Encouragement and Reciprocal Protection of Investments, May 3, 1996, F.R.G.-Kenya, at http://www.unctad.org/sections/dite/ia/docs/bits/germany_kenya.pdf.

37. The specific formulation of this right will depend on the specific treaty at issue. Article 1105(1) of NAFTA provides that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." NAFTA, *supra* note 1, art. 1105, 32 I.L.M. at 639-40. Article II(3)(a) of the U.S.-Estonia BIT provides that "[i]nvestment shall at all times be accorded fair and equitable treat-

rity to an investment.³⁸ Sixth, sovereigns guarantee that investments will not be treated less favorably than the minimum standard required by customary international law.³⁹ Finally, Sovereigns sometimes agree to honor commitments they have made regarding an investment.⁴⁰

ment." Treaty Between the Government of the United States of America and the Government of the Republic of Estonia for the Encouragement and Reciprocal Protection of Investment, Feb. 16, 1997, U.S.-Est., art. II(3)(a) [hereinafter U.S.-Estonia BIT], at http://www.unctad.org/sections/dite/ia/docs/bits/us_estonia.pdf. Similarly, the Poland-Egypt BIT provides that each country "shall ensure fair and equitable treatment within its territory of the investments of the investors of the other" country. Agreement Between the Arab Republic of Egypt and The Republic of Poland for the Reciprocal Promotion and Protection of Investments, July 1, 1995, Egypt-Pol., art. 3(2) [hereinafter Poland-Egypt BIT], at http://www.unctad.org/sections/dite/ia/docs/bits/egypt_poland.pdf.

38. Article II(3)(a) of the U.S.-Estonia BIT provides that investments "shall enjoy full protection and security." U.S.-Estonia BIT, *supra* note 37. The Australia-Uruguay BIT similarly provides that each party "accord within its territory protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments." Agreement Between Australia and Uruguay on the Promotion and Protection of Investments, Sept. 3, 2001, Austl.-Uru., art. 3(3), at http://www.unctad.org/sections/dite/ia/docs/bits/australia_uruguay.pdf. In slight contrast, article 2(2) of the Malaysia-United Arab Emirates BIT provides that "investments shall at all times enjoy full protection and security, in a manner consistent with international law." Agreement Between the United Arab Emirates and the Government of Malaysia for the Promotion and Protection of Investments, Oct. 11, 1991, U.A.E.-Malay., art. 2(2) [hereinafter Malaysia-UAE BIT], at http://www.unctad.org/sections/dite/ia/docs/bits/malaysia_uae.pdf.

39. Express reference to international law standards is not always present in investment treaties; however, some treaties do apply the minimum standards of international law. Sacerdoti, *supra* note 18, at 347. Another example of the application of international law standards is found in article 3(5) of the Netherlands-Czech Republic BIT, which provides that the countries will treat investments at least as well as required by "obligations under international law existing at present or established hereafter." Agreement on Encouragement of Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, Neth.-Czech Rep.-Slovk., art. 3(5) [hereinafter Netherlands-Czech Republic BIT], at http://www.unctad.org/sections/dite/ia/docs/bits/czech_netherlands.pdf (last visited Jan. 22, 2005). The U.S.-Argentina BIT provides that the foreign investments "shall in no case be accorded treatment less than that required by international law." Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, U.S.-Arg., art. II(2)(a), 31 I.L.M. 128 [hereinafter U.S.-Argentina BIT], available at http://www.unctad.org/sections/dite/ia/docs/bits/argentina_us.pdf. The Canada-Poland BIT provides that investments "shall at all times be accorded fair and equitable treatment in accordance with principles of international law." Agreement Between the Government of Canada and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments, Nov. 14, 1991, Can.-Pol., art. III(1), available at http://www.unctad.org/sections/dite/ia/docs/bits/canada_poland.pdf.

40. These agreements are known as "umbrella clauses." Not all countries have "umbrella-clauses." Dolzer & Stevens, *supra* note 3, at 81-82. Article II.2(c) of the U.S.-Jamaica BIT provides that "each Party shall observe any obligation it may have entered into with regard to investments." Treaty Between the United States of America and Jamaica Concerning the Reciprocal Encouragement and Protection of Investment, Feb. 4, 1994, U.S.-Jam., Protocol, S. Treaty Doc. No. 103-35 (1994), available at http://www.unctad.org/sections/dite/ia/docs/bits/us_jamaica.pdf. Likewise, the

While some of these rights are a confirmation of obligations Sovereigns owe under customary international law, others are new.

Most treaties delineate which investors and investments are entitled to receive substantive protections. Establishing entitlement to protection is an important threshold issue as it permits investors to obtain protection and bargaining leverage of investment treaties. The standards that must be met are typically broad,⁴¹ and to secure the benefits of an investment treaty, there must be a qualifying person or entity (the *ratione personae* requirement),⁴² a qualifying subject matter (the

Netherlands-Philippines BIT provides that each country "shall observe any obligation arising from a particular commitment it may have entered into with regard to a specific investment of nationals of the other Contracting Party." Agreement Between the Kingdom of the Netherlands and the Republic of the Philippines for the Promotion and Protection of Investments, (n.d.), Neth.-Phil., art. 3(3), at http://www.unctad.org/sections/dite/ia/docs/bits/netherlands_philippines.pdf (last visited Jan. 22, 2005). Similarly, the Malaysia-UAE BIT provides that each party "shall observe any obligation it may have entered into in the documents [sic] of approval of investments or the approved investment contracts by investors." Malaysia-UAE BIT, *supra* note 38, art. 13(3). The Mauritius-UK BIT also provides that each country "shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other" country. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius, May 20, 1986, U.K. & N. Ir.-Mauritius, art. 2(2), at http://www.unctad.org/sections/dite/ia/docs/bits/uk_mauritius.pdf.

41. See Todd Weiler, *The Ethyl Arbitration: First of Its Kind and a Harbinger of Things to Come*, 11 Am. Rev. Int'l Arb. 187, 188 (2000) (describing the "incredibly wide-ranging application" of the definitions of investor and investment in NAFTA).

42. *Ratione personae* is generally understood to mean the person or entity covered by a particular treaty. See Black's Law Dictionary 1263 (6th ed. 1990) (defining *ratione personae* as "[b]y reason of the person concerned; from the character of the person"); see also UNCTAD, International Centre for Settlement of Investment Disputes, 2.4 Requirements of Ratione Personae, U.N. Doc. UNCTAD/EDM/Misc.232/Add.3 (2003) (outlining the requirements for being considered a *ratione personae* under the ICSID Convention; these requirements tend to be similar to those of investment treaties), available at http://www.unctad.org/en/docs/edmmisc232add3_en.pdf. The term "investor" is broadly defined; its application is rarely disputed. See Raúl Emilio Vinuesa, *Bilateral Investment Treaties and the Settlement of Investment Disputes Under ICSID: The Latin American Experience*, 8 Law & Bus. Rev. Am. 501, 506 (2002) (explaining that each investment treaty provides its own definition of "nationals, individuals, or juridical persons" who are entitled to benefit from "rights and obligations created or recognized by the treaty"; and noting that BITs generally define a foreign investor broadly). But see Todd Weiler, *NAFTA Chapter 11 Jurisprudence: Coming Along Nicely*, 9 Sw. J. L. & Trade Am. 245, 269 (2002-2003) [hereinafter Weiler, *Coming Along*] (remarking that, unlike many bilateral investment treaties, NAFTA provides a specific protocol to determine who is an investor and what is an investment). Classification as an "investor" is most contentious when the investor's nationality is in question. For example, in a case decided a few months ago, the definition of an investor was particularly contentious where a Ukrainian company owning 99% of the shares and comprising two-thirds of the management of a Lithuanian company sued for a violation under the Ukraine-Lithuanian BIT. *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, ICSID (W. Bank) Case No. ARB/02/18 ¶ 21 (2004), available at <http://www.worldbank.org/icsid/cases/tokios-decision.pdf>. In *Tokelés*, the tribunal held that the investor, though the company was controlled and owned by Ukraine nationals, was still a Lithuanian investor within the meaning of the Ukraine-Lithuania BIT. The majority explained that the investment treaty set the bar of corporate na-

ratione materiae requirement)⁴³ and a dispute within a qualifying time frame (the *ratione temporis* requirement).⁴⁴ The impact of these three “standing” requirements is that—depending entirely upon how the in-

tionality low, permitting nationals of one state to incorporate in the other, and to subsequently reinvest in their home territory as “foreign” investors. *Id.* ¶¶ 14, 18, 28, 30-32, 38, 41-43, 71, 86; Soufraki v. United Arab Emirates, Final Award on Jurisdiction, ICSID (W. Bank) Case No. ARB/02/7 (2004) (dismissing a case brought under an investment treaty wherein a national of Canadian and Italian background could not demonstrate that he was an Italian national and therefore permitted to benefit from the UAE-Italy BIT), available at <http://ita.law.uvic.ca/documents/Soufraki.pdf>. But see Champion Trading Co. v. Arab Republic of Egypt, Case No. ARB/02/9, discussed in Philippe Pinsolle, *Jurisdictional Review of ICSID Awards*, 5 J. World Investment & Trade 613, 615-16 (2004) (discussing unpublished award where arbitrators found jurisdiction over some companies but not natural persons who were the shareholders because of a failure to meet the nationality requirement). In a vigorous dissent, Professor Prosper Weil (who was also the president of the tribunal) warned that this type of a decision could lead to the misuse of the ICSID system. See Tokios Tokelés v. Ukraine, Dissenting Opinion of Professor Prosper Weil, ICSID (W. Bank) Case No. ARB/02/18 ¶¶ 1, 20-22 (2004) [hereinafter Tokelés Dissent], available at http://www.worldbank.org/icsid/cases/tokios-dissenting_opinion.pdf. In a unique step, Professor Weil has since resigned as president of the tribunal. Luke E. Peterson, *Chairman of Tribunal Resigns After Dissenting in Investment Arbitration*, Invest-SD: Investment Law & Pol’y Wkly. News Bull., July 2, 2004 (on file with author).

43. *Ratione materiae* generally refers to those requirements that ensure an investment is covered by a particular treaty. See Black’s Law Dictionary, *supra* note 42, at 1262 (defining the term as “[b]y reason of the matter involved; in consequence of, or from the nature of, the subject-matter”); see also UNCTAD, International Centre for Settlement of Investment Disputes, 2.5 Requirements of Ratione Materiae (2003) (outlining requirements for *ratione materiae* under the ICSID Convention, which has been interpreted in a manner relatively similar to requirements for investment treaties, even though the term “investment” is not specifically defined in the ICSID Convention), at http://www.unctad.org/en/docs/edmmisc232add4_en.pdf. Investment treaties tend to broadly define “investment.” See Vinuesa, *supra* note 42, at 506; Weiler, *Coming Along*, *supra* note 42, at 269 (describing the broad definition of investments). For example, as articulated in the Model BIT for Great Britain, a typical BIT provision regarding investments might provide the following:

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

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

44. This essentially requires that the dispute arose when both parties were legally entitled to have access to the system concerned. For example, in *Mondev International Ltd. v. United States*, a tribunal held the claim was invalid under NAFTA because the alleged breach of the treaty occurred before NAFTA was in force. *Mondev International Ltd. v. United States* ¶ 57-70, at www.naftalaw.org (last visited Jan. 22, 2005); see also ECT, *supra* note 1, art. 1, 32 I.L.M. at 613 (explaining that “existing” as well as new investments are covered by the BIT); U.S.-Argentina BIT, *supra* note 39, art. XIV (providing that the BIT applies to investments “existing at the time of entry into force” as well as “investments made or acquired thereafter”).

vestment is structured⁴⁵ and the rules of the relevant investment treaty—investments that relate to more than one country might permit investors to benefit from more than one investment treaty simultaneously. For example, a U.S. citizen making an investment in the Czech Republic through a Dutch company may receive rights under both the U.S.-Czech Republic BIT and the Netherlands-Czech Republic BIT. This possibility creates an incentive for investors to structure investments that provide them with legitimate expectations of benefiting from rights under at least one investment treaty, if not multiple treaties.⁴⁶ When the same set of facts permits arbitrations under different treaties, this enhances the potential for inconsistent decisions.

II. THE IMPACT OF INVESTMENT TREATY ARBITRATION

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

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

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

A. *The Evolution Towards Investment Arbitration*

Since at least 1794, arbitration has been used as a mechanism for fostering foreign investment and providing a neutral forum to resolve international disputes.⁴⁷ Although there have been bumps and bruises as international arbitration has evolved⁴⁸ into an independent discipline with impartial and expert decision makers, arbitration is now the preeminent method for resolving complex international disputes⁴⁹ and imminently preferable to other options, such as the use of force or informal solutions (such as closed-door diplomatic negotiations).⁵⁰

Arbitration of investment disputes was not once as widely used as it is now.⁵¹ This was primarily because individual investors had no standing and no direct cause of action against a Sovereign for a violation of international law that adversely affected their investment.⁵² Rather, investors were forced to lobby their home country to espouse a claim on their behalf at the International Court of Justice (the "ICJ"), which resulted in only episodic investment disputes⁵³ and even

47. See generally Alvarez & Park, *supra* note 14, at 366-67.

48. See Kenneth S. Carlston, *The Process of International Arbitration* 259-64 (1946).

49. See generally Joanne K. Lelewer, *International Commercial Arbitration As a Model for Resolving Treaty Disputes*, 21 N.Y.U. J. Int'l L. & Pol. 379 (1989). See also Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. Sch. J. Int'l & Comp. L. 1, 1-2 (2000) (explaining that arbitration is the preferred dispute resolution mechanism for international disagreements). Arbitration was historically perceived as promoting respect for the rule of law. This respect is necessary for investment stability, and is particularly relevant when investors are concerned about facing investment dispute resolution conducted by a foreign sovereign. This concern is exacerbated when the defendant is the Sovereign. Delocalized arbitration, by contrast, offers a neutral forum where impartial tribunals with specialist expertise could make determinations pertaining to investments in a way that would bolster investor confidence and foster greater certainty. Alvarez & Park, *supra* note 14, at 369-70.

50. Lelewer, *supra* note 49, at 379; see also Sacerdoti, *supra* note 18, at 413 (noting that "the overt use of force has been banished in the last decades" but explaining that "friendly solutions have often required years if not decades").

51. There is evidence that investment treaty arbitration was successful from its infancy in the early 1980s. See, e.g., *Bilateral Treaties*, *supra* note 9, at 10-11 (describing three cases where invoking a BIT successfully resolved the dispute); Gudgeon, *supra* note 8, at 130; Robin, *supra* note 8, at 943 n.89 (referring to the ICC's claims that BITs afforded effective protection for overseas investments). But see Lelewer, *supra* note 49, at 399 (noting that "insufficient use has been made of arbitration as a mechanism for the enforcement of treaties in public international law"); Sacerdoti, *supra* note 18, at 453 (stating in 1997 that "one must stress that the number of arbitrations held under BITs and in accordance to their disputes settlement clauses has been irrelevant. Moreover, only in very few ICSID cases until now was jurisdiction based on a BIT clause").

52. See Statute of the International Court of Justice, June 26, 1946, art. 34(1), 59 Stat. 1055, 8 U.N.T.S. 993 [hereinafter ICJ Statute] (noting that "[o]nly state[s] may be parties in cases before the [International] Court [of Justice]").

53. See Ian Brownlie, *Principles of Public International Law* 677-90 (6th ed. 2003) (describing the organization and jurisdictional authority of the ICJ); John Collier & Vaughn Lowe, *The Settlement of Disputes*, in *International Law* 132-69 (1999) (noting

smaller numbers of successful claims.⁵⁴ In the happy event that a Sovereign espoused its investor's case,⁵⁵ and the ICJ did find a violation of international law, there were two drawbacks. First, an aggrieved investor would not necessarily receive the compensation for the Sovereign's illegal conduct. Second, the only enforcement tool available to the ICJ is the enactment of a Security Council Resolution,⁵⁶ which is not commercially useful where an investor seeks financial compensation.⁵⁷

With these limitations, the remaining alternative for aggrieved investors was to initiate litigation before national courts.⁵⁸ This option was not attractive to investors who, presuming they could establish a colorable cause of action, found themselves in the Sovereign's court litigating against the Sovereign.

In an effort to address these concerns, investment treaties made two fundamental shifts for the resolution of investment-based disputes. First, the treaties gave investors a direct cause of action against a Sovereign for damages.⁵⁹ This means investors are no longer at the mercy

the limited availability of ICJ jurisdiction); J.G. Merrills, *International Dispute Settlement* 112-23, 139-44 (2d ed. 1991) (explaining the jurisdiction and authority of the ICJ).

54. Jones, *supra* note 9, at 529.

55. Prior to the evolution of investment treaties, investors were required to go before the ICJ. This process required the investor to

go to its host government, its home government, and say "Please bring my claim before the International Court of Justice." The state might choose to do that, or it might not choose to do that; the decision was purely political. The prospect was that an investor who suffered significant economic harm had its redress contingent upon the political will and political calculation of its own government.

Daniel M. Price, *NAFTA Chapter 11 Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 Can.-U.S. L.J. 107, 112 (2001) [hereinafter Price, *NAFTA*].

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

57. See Vandevelde, *supra* note 9, at 162 (noting that ICJ judgments are generally only enforceable through the U.N. Security Council and stating that "[a] judgment by the ICJ, in effect, could be worthless").

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

59. This alleviates difficulties faced by investors when their sovereign country does not find it politically expedient to bring their case before the ICJ. The freedom granted by investment treaties might, for example, have freed the Belgium investors in *Barcelona Traction* from having to petition Canada to hear their claims regarding

of international politics and governmental bureaucracy when deciding to initiate dispute resolution, and can avoid their litigation being swallowed by the larger foreign relations dialogue.⁶⁰ Second, without the need for a separate contract with a dispute resolution mechanism, investment treaties gave investors a choice of neutral settings for resolving their grievances.⁶¹

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

B. *The Rise of Investment Arbitration*

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

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

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

60. Daniel M. Price, *Some Observations on Chapter Eleven of NAFTA*, 23 *Hastings Int’l & Comp. L. Rev.* 421, 427 (2000) [hereinafter Price, *Some Observations*].

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

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

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

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

65. Luke Peterson, *Change Investment Litigation, Bit by Bit*, Bridges Between Trade and Sustainable Development, May 2001, at 11 [hereinafter Peterson, *Change Investment*] (quoting William D. Rogers, Address at the Inter-American Development Bank Conference, (Oct. 26-27, 2000)), at <http://www.ictsd.org/English/BRIDGES5-4.pdf>. During the first six months of 2003,

is experiencing an exponential explosion of claims brought under a variety of investment treaties.⁶⁶ Particularly within the last year,⁶⁷ there has been a dramatic increase in the number of investment treaty arbitrations.⁶⁸ Counsel with ICSID confirm the explosion in the number of investment treaty cases and have indicated that this trend is likely to continue.⁶⁹

C. What Is Investment Treaty Arbitration?

Investment treaties provide a unique dispute resolution mechanism that investors can invoke to seek redress for treaty violations. Rather than having to resolve a dispute with a Sovereign through the cumber-

ICSID registered fifteen new arbitration proceedings and twenty-six arbitration proceedings during the 2003 fiscal year. Stephen Jagusch & Matthew Gearing, *International Centre for Settlement of Investment Disputes (ICSID)*, in *Arbitration World: Jurisdictional Comparison* 58-59 (J. William Rowley, Q.C. ed., 2004).

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

67. *See* Dunham & Foster, *supra* note 46.

68. *See* Gonzalo Flores, *Energy and International Law: Development, Litigation, and Regulation*, 36 Tex. Int'l L.J. 1, 8-9 (2001) (noting that ICSID has experienced an "unprecedented increase in its caseload": out of the thirty pending cases of 2001, twenty-three were brought under investment treaties, one under an investment law, and only six under the arbitration provisions of an investment contract). The increased use of institutions such as ICSID reflects the growing acceptance of arbitration as a viable means of settling disputes between foreign investors and Sovereigns. Andrés R. Sureda, *ICSID: An Overview*, 13 World Arb. & Mediation Rep. 166, 169 (2002).

69. *See* Obadia, *supra* note 19; *see also* ICSID, About ICSID, at <http://www.worldbank.org/icsid/about/main.htm> (last visited Jan. 22, 2005) (indicating that the number of cases submitted to ICSID has significantly increased in recent years). *But see* Alvarez & Park, *supra* note 14, at 366 (explaining that following NAFTA and the subsequent wave of cases, there was increased awareness regarding the downsides of arbitration, including the possibility that vital economic and political matters might be decided in private by tribunals consisting largely of foreigners); Luke Eric Peterson, All Paths Lead out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties 3-4 (2002) [hereinafter Peterson, All Paths] (noting an NGO that announced there are "ample grounds for criticizing" the status of investment treaty arbitrations and private resolution of highly sensitive regulatory and policy issues), at www.iisd.org/pdf/2003/investment_nautilus.pdf.

some ICJ process or the Sovereign's court,⁷⁰ investors can proceed directly⁷¹ to arbitration. Investors do not lightly sue governments⁷² as they are aware that Sovereigns will staunchly defend their corner; and, as a result, when initiating arbitration, investors undertake a major financial risk with the possibility of minimal recovery.⁷³ As a practical matter, investors typically bring claims after non-legal routes such as commercial discussions have been unsuccessful.⁷⁴

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

71. There are, however, often "cooling" periods which are applicable. For example, many investment treaties require investors to wait three to six months after the investor notifies a Sovereign of a dispute before an arbitrator can submit the request for arbitration. See German Model BIT, art. 11(2), in Dolzer & Stevens, *supra* note 3, at 194 (providing for a six month waiting period); Great Britain Model BIT, art. 8(2), in Dolzer & Stevens, *supra* note 3, at 234 (noting the three month waiting period found in the British Model BIT); see also Swiss Model BIT, art. 9(2), in Dolzer & Stevens, *supra* note 3, at 225 (noting the BIT requires twelve months to pass from the time notice of the dispute is given to the Sovereign before recourse may be sought in arbitration); Jose E. Alvarez, *Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 Va. J. Int'l L. 1, 36 n.191 (1989) (describing waiting periods in U.S.-Morocco BIT); Keith Molkner, *A Comparison of the Legal Regimes for Foreign Investment in Russia, Kazakstan, and Kyrgyzstan*, 11 Int'l Tax & Bus. L. 71, 100 (1993) (describing various waiting periods). Some investors, however, have been able to "jump the gun" and initiate arbitration before the expiration of the waiting period. See *Lauder v. Czech Republic*, Final Award, ¶¶ 187-91 (2001) (UNCITRAL) [hereinafter London Award] (noting that although the claimant waited only 17 days before filing the request for arbitration, the failure to abide by the cooling period did not deprive the tribunal of jurisdiction), available at http://www.cetv-net.com/iFiles/1439-lauder-cr_eng.pdf; *Ethyl Corp. v. Canada* ¶¶ 74-88 (1998) (UNCITRAL), 38 I.L.M. 708 (1999) (acknowledging that while the claimant only waited nine days after the disputed legislation went into effect before filing its request for arbitration, its claim would not be barred for failure to abide by the procedural rules set out in the investment treaty); see also *Maffezini v. Kingdom of Spain*, Decision on Jurisdiction, ICSID (W. Bank) Case No. ARB/97/7 (2000) (holding that the claimant could decrease the "cooling off period" from six to three months due to another treaty's most favored nation provision), available at http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf.

72. Ian A. Laird, *NAFTA Chapter 11 Meets Chicken Little*, 2 Chi. J. Int'l L. 223, 228-29 (2001).

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

74. Laird, *supra* note 72, at 229. Juliet Blanch, the Global Head of Norton Rose's International Arbitration Group, explains that in her experience, investors are initially reluctant to initiate arbitration against a Sovereign. Rather, investors try to resolve disputes by negotiations and only if that route completely fails will they commence arbitration. Blanch Interview, *supra* note 66; see also Jagusch Interview, *supra* note 66 (explaining that investment arbitration has traditionally been the last resort

Investment treaties generally offer investors a choice of where they can bring their disputes, often including the Sovereign's own national courts or arbitration.⁷⁵ Some treaties give investors a very narrow set of choices,⁷⁶ but the trend is to provide investors with a range of options (such as tribunals organized under ICSID, the International Chamber of Commerce ("ICC"), the Stockholm Chamber of Commerce ("SCC") and/or the United Nations Commission on International Trade Law ("UNCITRAL") Rules).⁷⁷ Not surprisingly, given

for corporations following years of nonperformance by Sovereigns). *But see* Pinsolle Interview, *supra* note 66 (noting that large companies initiate arbitration as a last resort, but suggesting that this may not always be the case when the investor is an individual). NGOs espouse a slightly different view, however. *See* Howard Mann, Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investment Rights 28 (2001) (suggesting that investors have turned investment treaties from "shields" into "swords"), available at <http://www.iisd.org/publications/publication.asp?pno=270>; Howard Mann & Konrad von Moltke, Protecting Investor Rights and the Public Good: Assessing NAFTA's Chapter 11, at 12-13 (2003) [hereinafter Mann & von Moltke, Protecting Investor Rights], at http://www.iisd.org/pdf/2003/investment_ilsd_background_en.pdf (same); Peterson, *supra* note 65 (same).

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

76. Certain investment treaties have limited mechanisms for resolving disputes. *See* Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Oct. 12, 1989, P.R.C.-Ghana, art. 10 (providing the following: the quantum phase of certain investment disputes is subject to ad hoc arbitration; the SCC is the default appointing authority; and, although no specific procedural rules are established, the tribunal can use either the SCC or ICSID rules "as guidance"), at http://www.unctad.org/sections/dite/ia/docs/bits/china_ghana.pdf; Treaty Concerning the Encouragement and Reciprocal Protection of Investments, July 22, 1985, U.S.-Morocco, art. VI, Protocol, S. Treaty Doc. No. 99-18 (providing the ICSID with exclusive jurisdiction over investment disputes), available at http://www.unctad.org/sections/dite/ia/docs/bits/us_marocco.pdf; Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Dec. 13, 1983, U.S.-Haiti, art. VII (permitting only the ICC to resolve investment disputes), at http://www.unctad.org/sections/dite/ia/docs/bits/us_haiti.pdf; Agreement for the Promotion and Protection of Investments, July 22, 1975, Gr. Brit.-Sing., art. 8, 1018 U.N.T.S. 175 (providing ICSID with exclusive jurisdiction over investment disputes), available at http://www.unctad.org/sections/dite/ia/docs/bits/uk_singapor.pdf; *But see* Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Nov. 27, 1981, Somal.-F.R.G., art. 10 (allowing state-to-state arbitration but prohibiting investor-state arbitration in Somalia's only BIT), at http://www.unctad.org/sections/dite/ia/docs/bits/germany_somalia.pdf.

77. There are a variety of treaties that let investors pick from a variety of dispute resolution options. *See* Agreement Concerning the Reciprocal Promotion and Protection of Investments, Aug. 8, 1995, Belr.-Turk., art. VII, *reprinted in* 6 Int'l Ctr. for Settlement of Investment Disputes, Investment Treaties, (explaining an investor's arbitration options, including ICSID, ad hoc UNCITRAL arbitration, ICC arbitration,

their concerns about getting a “fair shake,” investors generally arbitrate disputes on a confidential basis before a panel of arbitrators.⁷⁸

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

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

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

offer by the Sovereign to settle disputes by arbitration, which the investor accepts by initiating arbitration under the treaty.⁷⁹ The dispute process generally follows a relatively standard set of procedures, including: (1) submitting a notice of dispute to the Sovereign, (2) complying with the applicable waiting period, (3) electing where to resolve the dispute, and (4) taking the chosen procedure forward in accordance with the chosen mechanisms articulated in the investment treaty.⁸⁰

The next step in the process is appointment of the arbitral tribunal, which typically permits each party to appoint one arbitrator and requires the chair to be selected jointly by the two party-appointees, often with the help of an institution.⁸¹ It is standard for both party-appointed arbitrators and chairs to be well-known and respected figures in the areas of international public, economic, and investment law.⁸² The remainder of the procedure (including the process of procedural meetings, memorials and replies, interim relief, evidence gathering, hearings, awards, and annulment or set aside)⁸³ depends

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

80. See, e.g., Parra, *Provisions*, *supra* note 21, at 303-12; Appleton & Assocs., NAFTA: The NAFTA Investor-State Process, at <http://www.appletonlaw.com/3dProcess.htm> (last visited Feb. 4, 2005).

81. ICSID, Additional Facility Arbitration Rules arts. 6, 9 [hereinafter ICSID Additional Facility Rules], at <http://www.worldbank.org/icsid/facility/facility.htm>; Int’l Court of Arbitration, Rules of Arbitration arts. 9-10 (effective Jan. 1, 1998) [hereinafter ICC Rules], at http://www.iccwbo.org/court/english/appointing_authority/all_topics.asp#rules; SCC, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce art. 16 (1999) [hereinafter SCC Rules], at http://www.chamber.se/arbitration/english/rules/scc_rules.html; UNCITRAL, Arbitration Rules arts. 6-8, 15 I.L.M. 701 (1976) [hereinafter UNCITRAL Rules], available at <http://www.uncitral.org/english/texts/arbitration/arb-rules.htm>; see also Sacerdoti, *supra* note 18, at 429.

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

83. Each investment agreement specifies the institution to be used in case of a dispute. Each institution has a wide variety of rules, applied during the general dispute resolution process. See ICSID Additional Facility Rules, *supra* note 81, arts. 6, 9; ICSID, ICSID Convention, Regulations and Rules: Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings [hereinafter ICSID Rules], at <http://www.worldbank.org/icsid/basicdoc/partD.htm> (last visited Feb. 4, 2005); ICC Rules, *supra* note 81, arts. 9-10; SCC Rules, *supra* note 81, art. 16; UNCITRAL Rules, *supra* note 81, arts. 6-8, 15 I.L.M. at 704-05. For example, an investor who selects ad hoc arbitration under the UNCITRAL Rules is bound by the rules articulated in the individual investment treaty, the UNCITRAL Rules, and the law of the place of arbitration (generally determined by the arbitrators or the applicable institution).

upon the rules of the arbitration mechanism that the investor elected,⁸⁴ and the arguments of the parties.⁸⁵ Typically, parties exchange memorials setting out their case, evidence is exchanged, the parties make further submissions, both the evidence and law is debated during an oral hearing, and, thereafter, the tribunal issues an award.

As investment arbitration is based upon a model of commercial arbitration where there are strong presumptions of confidentiality,⁸⁶ even though a Sovereign is involved, the dispute resolution process is not transparent.⁸⁷ This means, unless one is a party (an investor or a

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

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

86. See generally Olivier Oakley-White, *Confidentiality Revisited: Is International Arbitration Losing One of Its Major Benefits?*, 6 Int'l Arb. L. Rev. 29 (2003).

87. There are a variety of critiques regarding the lack of transparency in the arbitration process: a variety of law review comments as well as NGOs have expressed numerous concerns about the procedural aspects of the arbitration process. See Ctr. for Int'l Envtl. Law, *Synthesis of Major Concerns* (Nov. 2003) (outlining CIEL's concerns regarding transparency), at http://www.ciel.org/Tae/FTAA_Miami_Nov1303.html; Howard Mann & Konrad von Moltke, *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment* 3 (1999) [hereinafter Mann & von Moltke, *NAFTA's Chapter 11*] (expressing concern about the lack of transparency and inability to appeal decisions), at <http://www.iisd.org/publications/publication.asp?pno=408>; Mann & von Moltke, *Protecting Investor Rights*, *supra* note 74, at 18-22 (outlining a variety of concerns regarding the transparency of the investor-state dispute resolution process); Pub. Citizen's Global Trade Watch, *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy* (Sept. 2001) (expressing concern over the closed-door process of dispute resolution and the lack of publicly available documents), at <http://www.citizen.org/publications/release.cfm?ID=7076>; Shapren, *supra* note 16, at 329-30 (suggesting that arbitration "is a closed and unaccountable" process, minimal documentation about cases is available, there is no provision for amicus participation, and no standard appeals process); Julia Ferguson, Note, *California's MTBE Contaminated Water: An Illustration of the Need for an Environmental Interpretive Note on Article 1110 of NAFTA*, 11 Colo. J. Int'l Envtl. L. & Pol'y 499, 505, 515 (2000) (describing the investor-state process as non-transparent and secretive). But see Lucien J. Dhooge, *The North American Free Trade Agreement and the Environment: The Lessons of Metalclad Corporation v. United Mexican States*, 10 Minn. J. Global Trade 209, 265-66, 278, 287-88 (2001) (critiquing the lack of transparency). While there are difficulties associated with transparency, some view these fears as slightly exaggerated. See *infra* notes 91, 92, 451 and accompanying text (describing the increasing transparency of the decision-making process and the variety of methods for holding decision makers accountable); see also [naftalaw.org](http://www.naftalaw.org), Homepage, at <http://www.naftalaw.org> (last visited Feb. 4, 2005) (making pleadings, orders, awards,

Sovereign), there is minimal access to the pleadings and evidence, there is little opportunity for amici curiae participation, and often the decisions themselves are confidential and not made available to the public.⁸⁸ Given the public nature of the rights at issue, parties are disseminating more awards and, in limited instances, tribunals permit third parties to participate in the dispute process.⁸⁹ The United States and Canada, in contrast to other countries, have also taken the rare step of incorporating transparency obligations into recent trade agreements and model investment treaties.⁹⁰

III. CURRENT OPTIONS FOR ADDRESSING INCONSISTENT DECISIONS

Inconsistent decisions generally arise under three typical scenarios. First, different tribunals can come to different conclusions about the same standard in the same treaty. This might, for example, involve the North American Free Trade Agreement ("NAFTA") tribunals coming to different conclusions about the meaning of the same

and other documentation in NAFTA cases publicly available). Nevertheless, particularly as the need for confidentiality in private commercial disputes does not necessarily apply in investment arbitration, the choice of a private decision-making body for public issues is an area for further consideration.

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

89. For example, in *Methanex*, arbitrators made transcripts of the hearing on the merits available to the public. *Methanex v. United States*, Transcripts for Merits Hearing (2004), at <http://www.naftalaw.org>. In *Methanex* and *UPS*, third parties have been granted the right to file amici curiae briefs. *United Parcel Serv. v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, ¶¶ 61-73 (2001), at <http://www.naftalaw.org>; *Methanex v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", ¶¶ 31-53 (2001), at <http://www.naftalaw.org>.

90. *See* Singapore FTA, *supra* note 6, art. 15.20 (requiring certain documents to be made publicly available and requiring hearings to be open to the public); Canada's Model Foreign Investment Promotion and Protection Agreement (2004), arts. 34-35, at <http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf>; Amended U.S. Model BIT, *supra* note 6, art. 29 (same); *see also* Barton Legum, *Trends and Challenges in Investor-State Arbitration*, 19 Arb. Int'l 143, 144-46 (2003) (describing the shift from confidentiality to transparency in investment arbitration).

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

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

These narrow options range from requesting a modification of an award under applicable rules to attacking the award in national courts on a limited number of grounds. In the first instance, a dissatisfied party can ask either the tribunal or an arbitral institution to review and modify an award. The rules applicable to the arbitration strictly circumscribe what type of conduct might justify modification, and only minor clerical errors tend to be corrected.⁹¹ As a result, this option is not often used and is unlikely to result in a review of the merits or a substantive change to the award.

The most utilized option in investment arbitration for attempting to remedy inconsistent decisions is to attack the award after it is made.⁹² Specifically, parties that have received inconsistent arbitral awards

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

92. Noah Rubins, *Judicial Review of Investment Arbitration Awards*, in *NAFTA Investment Law & Arbitration: Past Issues, Current Practice, Future Prospects* 354 (Todd Weiler ed., 2004) [hereinafter Rubins, *Judicial Review*]; see also Franck, *supra* note 49, at 15 (explaining when vacatur of an arbitration award may be appropriate).

have options to either: (1) annul the award or (2) try to vacate an award at the seat of the arbitration and/or contest enforcement at the place where enforcement is sought. But which option is available depends wholly upon whether an award is rendered under the ICSID Convention⁹³ or under a different system (for example an ad hoc arbitration conducted under the UNCITRAL Rules).⁹⁴

A. Attacking Inconsistent Awards Rendered Under the ICSID Convention

In order to have an ICSID Convention arbitration, both the investor's country and the Sovereign must be signatories of the ICSID Convention and there must be a qualifying dispute.⁹⁵ For these ICSID Convention arbitrations, a losing party can only attack an award under the ICSID Convention. ICSID permits parties to seek annulment of an award through an ad hoc committee of three arbitrators who are appointed entirely by ICSID.⁹⁶ An annulment proceeding is not an appeal of the legal merits,⁹⁷ rather, the ad hoc committee examines the procedural propriety of the award. Annulment under the ICSID Convention is quite limited. The five available grounds are: (1) the original arbitral tribunal was not properly constituted, (2) the arbitral tribunal manifestly exceeded its powers, (3) a tribunal member was corrupt, (4) there was a serious departure from a fundamental rule of procedure, or (5) the award does not state the reasons upon which it was based.⁹⁸ A tribunal's mistake of law or fact cannot justify the annulment of an award as neither of these are enumerated grounds.⁹⁹

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

93. ICSID Convention, *supra* note 88, art. 52, 4 I.L.M. at 541.

94. In a "pure" ICSID arbitration (where the Sovereign and the state of which the investor is a national are both signatories to the ICSID Convention), the ICSID Convention applies to enforcement of ICSID awards. However, where only one of the parties to the arbitration is a signatory to the ICSID Convention, there are generally two options: (1) ad hoc arbitration under the UNCITRAL Rules, or (2) the ICSID Additional Facility that is supervised by ICSID but outside the ICSID treaty framework for enforcement purposes. *See, e.g.,* Alvarez & Park, *supra* note 14, at 374-75.

95. In order to have an ICSID Convention award, both the investor's country and the Sovereign must be signatories of the ICSID Convention, the dispute must qualify for ICSID jurisdiction under article 25 of the ICSID Convention, the dispute must be registered at ICSID, and the dispute must proceed further to the ICSID Arbitration Rules. *See generally* Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001).

96. ICSID Convention, *supra* note 88, art. 52, 4 I.L.M. at 541.

97. Schreuer, *supra* note 95, at 891-94.

98. ICSID Convention, *supra* note 88, art. 52(1), 4 I.L.M. at 541; Schreuer, *supra* note 95, at 881-1075; *see also* Pinsolle, *supra* note 42 (discussing the "manifest disregard" standard).

99. Malcolm D. Rowat, *supra* note 78, at 116.

mittees, however, confirmed the limited nature of review.¹⁰⁰ If a committee finds one of the five enumerated defects, it has the authority to annul the award completely or in part.¹⁰¹ Once an annulment proceeding is completed, there are no further opportunities to challenge inconsistent ICSID awards, and they are fully enforceable as court judgments.¹⁰² Ultimately, because legal errors cannot be corrected in ICSID awards, the possibility of inconsistent awards is an accepted reality at ICSID, and the correctness of decisions has been sacrificed for the sake of finality.¹⁰³

B. *Attacking Inconsistent Awards Not Rendered Under the ICSID Convention*

Several significant investment treaty arbitrations have occurred at ICSID under their Additional Facility Rules, under the auspices of another prominent institution, such as the ICC, and in ad hoc arbitration conducted under the UNCITRAL arbitration rules.¹⁰⁴ While most investment arbitrations take place under the auspices of ICSID,¹⁰⁵ there are a variety of legal,¹⁰⁶ commercial,¹⁰⁷ and tactical¹⁰⁸

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

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

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

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

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

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

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

reasons that an investor might not initiate investment arbitration under the ICSID Convention.

Attacking non-ICSID Convention awards is different, but not easier. Unlike under the ICSID Convention, awards rendered under either the New York Convention¹⁰⁹ or the Panama Convention¹¹⁰ do not

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

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

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

109. Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention], available at <http://www.uncitral.org/english/texts/arbitration/NY-conv.htm>; see also UNCITRAL, Status of Conventions and Model Laws, at

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

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

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

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

112. One of the difficulties faced when choosing the arbitration’s venue is the local variations that can arise. Although the place of arbitration affects the law applicable to any vacatur proceeding, it can also impact the practice of law restrictions, rules governing third-party intervention and amicus briefs, the availability of appeal, the speed with which the docket advances, the trust in the integrity of the local judiciary, the ability to avoid specific judges, rules regarding the cost, and expertise of the local bench and bar in the law of international investment, treaties, and arbitration. Coe, *Taking Stock*, *supra* note 1, at 1444; William W. Park, *Illusion and Reality in International Forum Selection*, 30 *Tex. Int’l L.J.* 135, 180-81 (1995) [hereinafter Park, *Illusion and Reality*].

113. Gary B. Born, *International Commercial Arbitration* 704-05 (2d ed. 2001); Alan Redfern & Martin Hunter, *Law & Practice of International Commercial Arbitration* (1999).

This part considers how to attack arbitration awards in both of these contexts and the implications for increasing the number of national courts involved in “rectifying” inconsistent decisions.

1. Attacking Awards at the Place of Arbitration

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

Some countries permit review of certain aspects of the merits. If an arbitration has a seat in the United Kingdom,¹¹⁴ the United States,¹¹⁵ New Zealand,¹¹⁶ or Argentina,¹¹⁷ there are opportunities to evaluate

tration 415-89 (3d ed. 1999); *see also* Park, *Illusion and Reality*, *supra* note 112, at 181-82 (1995) (noting the distinction between challenging awards at the seat of arbitration and enforcement of awards).

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

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

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

117. Horacio A. Grigera Naón, *Argentina*, *in* International Handbook, *supra* note 116, at 28 [hereinafter *Argentina*] (noting that the Argentine Civil Code permits appeal on both law and facts providing that “the same appeal may be instituted against an arbitral award as may be instituted against court judgments, as long as such appeal has not been waived in the agreement to arbitrate”). Appeal on issues of law may only be available, however, for awards rendered in Argentina involving domestic disputes. *Id.* There is no indication, however, of what constitutes a “domestic” dispute.

the legal merits. The trend, however, is not to review the merits but to circumscribe the scope of judicial review—typically through narrow standards similar to grounds enumerated in the New York Convention.¹¹⁸ In countries such as Switzerland,¹¹⁹ France,¹²⁰ South Africa,¹²¹ and Costa Rica,¹²² the grounds for setting aside are based upon procedural integrity. In contrast, other countries, such as South Korea,¹²³

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

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

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

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

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

123. The grounds for setting aside an arbitration award in South Korea are the following: (1) where the appointment of arbitrators was not conducted in accordance with the law or the arbitration agreement; (2) a party was incompetent or his representative has now been lawfully appointed; (3) an award calls for action prohibited by Korean law; (4) there was not due process; (5) there was a forced confession; (6) there was forged evidence or false testimony; (7) a judgment or administrative decision al-

Indonesia,¹²⁴ Israel,¹²⁵ and Saudi Arabia,¹²⁶ have broader grounds designed to invite more challenges and sometimes permit vacatur for contradictory reasoning. This presumably means contradictory reasoning within a single award, but the statutes do not prohibit reviewing courts from considering contradictions with other awards.¹²⁷

Regardless of the grounds enumerated in national legislation, there is a residual opportunity to challenge an award. This is true irrespective of whether a court is interpreting a broad statute¹²⁸ or is broadly interpreting a narrow statute.¹²⁹ Particularly because investment trea-

ters the basis of the award; or (8) newly discovered evidence materially affects the award. Soonwoo Lee, *Korea*, in *International Handbook*, *supra* note 116, at 21-22, Arbitration Law of Korea, art. 13, annex I-3 to -4.

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

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

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

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

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

129. In the United States, awards can be set aside for "manifest disregard" of the law despite the fact that this ground is not enumerated in the Federal Arbitration Act. See *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (articulating the "manifest disregard" dictum followed by subsequent courts), *overruled on other grounds by Rodriguez de*

ties do not specify the place of arbitration,¹³⁰ there may be an opportunity¹³¹ for parties to select a place of arbitration that has advantageous vacatur rules or judges who are likely to interpret a statute broadly.¹³²

2. Attacking Awards at the Enforcement Phase

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

The standards for blocking enforcement under the New York or Panama Conventions are relatively similar to those reasons for setting aside awards—but provide more uniformity as the treaties have been ratified by many countries and those standards have been implemented in local legislation.¹³³ This means, for example, that the New

Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); see also *United States*, *supra* note 118, at 53, 58 (describing the “non-statutory ground of ‘manifest disregard’ of the law of evidence” as a basis for vacating an award in the United States); Norman T. Braslow, *Contractual Stipulation for Judicial Review and Discovery in United States-Japan Arbitration Contracts*, 27 Seattle U. L. Rev. 659, 692 (2004) (describing the manifest disregard doctrine emanating from *Wilko v. Swan*); Noah Rubins, “Manifest Disregard of the Law” and Vacatur of Arbitral Awards in the United States, 12 Am. Rev. Int’l Arb. 363 (2001) (describing the application of “manifest disregard” in various circuits).

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

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

132. Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA?*, 19 J. Int’l Arb. 185, 187 (2002) [hereinafter Coe, *Domestic Court Control*]; Rubins, *Judicial Review*, *supra* note 92, at 389-90.

133. As noted earlier, the ICSID Convention’s internal annulment procedure makes the Convention inapplicable to NAFTA disputes as neither Canada nor Mexico are signatories to the ICSID Convention. Consequently, challenges to NAFTA awards occur within the courts of the place of arbitration, which apply local standards for vacatur. There have been three vacatur actions under NAFTA (two initiated by Mexico and one by Canada), and all have occurred in Canadian courts. Enforcement under NAFTA uses the New York Convention’s normal method of enforcing foreign commercial arbitration awards. Coe, *Taking Stock*, *supra* note 1, at 1386 n.8; see also Coe, *Domestic Court Control*, *supra* note 132 (describing enforcement mechanisms of

York Convention, although adopted in various forms, has created an overall structure that limits the grounds for attacking arbitral awards.

Specifically, enforcement may be denied only when: (1) the parties to the arbitration agreement were under some incapacity or the agreement was otherwise invalid; (2) the losing party was not given proper notice of the arbitration proceedings or was otherwise unable to present its case; (3) the award addresses issues beyond the scope of the submission to arbitration; (4) the arbitral procedure was not in accordance with the parties' agreement or contradicted the law of the place of arbitration; (5) the award has not become binding on the parties or has been set aside by a court in the country where the award was made; (6) the subject matter of the dispute is not capable of settlement by arbitration; and (7) recognition would be contrary to the public policy of the country of enforcement.¹³⁴

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

3. The Difficulties Arising from National Court Intervention

Given an investor's opportunity to choose the method of resolving treaty disputes with sovereigns¹³⁵ and its ability to apply to many national courts in efforts to secure enforcement of an award, domestic arbitral regimes have an increasing influence on the consideration of

NAFTA and describing the perceived potential for disparate results among domestic courts).

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

135. See *supra* notes 75-78 and accompanying text (noting how investors can choose the dispute resolution method and, as a result, may have the opportunity to forum shop by picking ad hoc arbitration over ICSID Convention arbitration).

inconsistent arbitral awards.¹³⁶ As nations with limited resources are obligated to make massive cash outlays for violations of investment treaties, they will become more aggressive in their attacks on unfavorable arbitral awards, and push the investor-state struggle back into national courts.¹³⁷ In the well-known *Metalclad* case,¹³⁸ for example, the ultimate outcome of the award was in part dictated by the application of domestic Canadian arbitration law.¹³⁹ If the reviewing Canadian court had found that the NAFTA award was not “commercial” within the meaning of British Columbia’s International Commercial Arbitration Act, the court could have reviewed the award for errors of law under the domestic arbitration law.¹⁴⁰ Instead, it applied the more

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

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

138. *Metalclad Corp. v. United Mexican States*, ICSID (W. Bank) Case No. ARB(AF)/97/1 (2000) [hereinafter *Metalclad Award*], available at <http://www.worldbank.org/icsid/cases/mm-award-e.pdf>.

139. As Vancouver was the seat of arbitration, British Columbia’s courts had jurisdiction over the Mexican government’s vacatur application. *See Mexico v. Metalclad Corp.*, Reasons for Judgment of the Honorable Mr. Justice Tysoe, 39 B.C.L.R. 389, 393 (2001) [hereinafter *Metalclad Judgment*], available at http://www.worldbank.org/icsid/cases/metalclad_reasons_for_judgment.pdf.

140. The reviewing court held that the award was “commercial” and, as a result, reviewed the decisions using the limited grounds for review found in the International Commercial Arbitration Act, which had limited grounds for review similar to the New York Convention. *See Metalclad Judgment*, *supra* note 139, ¶¶ 39-49 (holding that the International Commercial Arbitration Act was applicable because the investment was of a commercial nature and arose out of an investment relationship). Some commentators suggest that, even in this limited set aside context, the court handled matters of substantive accuracy. *See* Charles H. Brower II, *Beware the Jabberwock: A Reply to Mr. Thomas*, 40 Colum. J. Transnat’l L. 465 (2002) [hereinafter *Brower, Beware*] (probing further into the analysis of Judge Tysoe); Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 Colum. J. Transnat’l L. 43, 43, 68 (2001) (referring to Judge Tysoe’s “four elements of heightened review”); Coe, *Judicial Review*, *supra* note 1, at 1411; Todd Weiler, *Metalclad v. Mex-*

deferential review of the International Commercial Arbitration Act, which was based upon the standards in the UNCITRAL Model Law that do not favor a review on the merits.

As more courts begin to consider vacatur or a challenge to enforcement, an increase in the number of reviewing courts adds the possibility for further obfuscation of the meaning of international investment rights. First, there is an increased risk of politicizing the oversight of arbitral awards. As issues of international and domestic public policy “loom large” there is a real possibility that national courts will be tempted to use local law to vitiate an award.¹⁴¹ Second, because of the lack of uniformity and the patchwork nature of the oversight, clever investors will strategically pick forums to favor their interests.¹⁴² Since enforcement proceedings may be brought in multiple jurisdictions where there are assets, the possibility of going to different fora encourages dissatisfied parties to forum shop for the best result and promotes inefficiency.¹⁴³ The practical reality is that practitioners must be willing to consider the issues of national courts to defend their client’s interests—whether a court at the seat of arbitration or where enforcement is sought. While active representation of a client’s interests should not necessarily undermine the legitimacy of the system, these active challenges may lead to an increase in diverse interpretations of the same award in different forums. With an increase in the number of courts where awards can be attacked and the lack of any centralizing authority, there is a strong possibility that domestic courts will be unable to harmonize the impact of inconsistent decisions.¹⁴⁴ Should reviewing courts choose to promote incoherent and indeterminate decisions, the legitimacy of the arbitration system will be further undermined.

ico: *A Play in Three Parts*, 2 J. World Invest. 685 (2001) [hereinafter Weiler, *A Play*], available at <http://www.naftaclaims.com/Papers/JWI%20Article%20Final.pdf>. But see J. Christopher Thomas, *A Reply to Professor Brower*, 40 Colum. J. Transnat’l L. 433 (2002) (disputing that Justice Tysoe conducted a “heightened” judicial review).

141. Rubins, *Judicial Review*, *supra* note 92, at 361.

142. See, e.g., David A.R. Williams, *Challenging Investment Treaty Arbitration Awards—Issues Concerning the Forum Arising from the Metalclad Case*, in *International Commercial Arbitration: Important Contemporary Questions* 452 (Albert Jan van den Berg ed., 2002) (suggesting that “[i]f the choice of the claimant investor may possibly lead to different outcomes then surely that is primarily a matter for the investor to consider” but failing to consider the impact of inconsistency on Sovereigns).

143. Coe, *Domestic Court Control*, *supra* note 132, at 199-200.

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

IV. THE INCONSISTENT DECISIONS

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

The inconsistent cases generally break down into three categories: (1) cases involving the same facts, related parties, and similar investment rights,¹⁴⁵ (2) cases involving similar commercial situations and similar investment rights,¹⁴⁶ and (3) cases involving different parties, different commercial situations, and the same investment rights.¹⁴⁷ Although focusing on all the inconsistencies in publicly-available awards is beyond the scope of the present Article, it is vital to focus upon those awards that have spawned the greatest concerns among investors, Sovereigns, practitioners, NGOs, and academics. This Article therefore considers the *Lauder* arbitrations,¹⁴⁸ the *SGS* arbitrations,¹⁴⁹ and a series of cases under NAFTA, all of which have attracted public attention and concern. In all of these decisions, investment treaty tribunals have come to different—if not completely diametrically opposed—conclusions about issues of public international law. Although some commentators suggest that an occasional “wrong”

145. See *infra* Part IV.A.

146. See *infra* Part IV.B.

147. See *infra* Part IV.C.

148. The *Lauder* cases generated a great deal of commentary. See Peter S. Green, *Czech Republic Pays \$355 Million to Media Concern*, N.Y. Times, May 16, 2003, at W1; Peter S. Green, *Czech Senate a Safe Haven for Principal in Media War*, N.Y. Times, Nov. 4, 2002, at A8; Peter S. Green, *New Arbitration Claim in Battle over Czech TV Station*, N.Y. Times, Aug. 9, 2003, at W3; Robert Volterra et al., *Swedish Court of Appeal Upholds Conflicting Award in Parallel BIT Arbitration Proceedings*, Mondaq Bus. Briefing, July 17, 2003, available at 2003 WL 57495760.

149. At the time of writing the author is only aware of one piece of academic commentary considering the *SGS* cases; this is unsurprising given the recent nature of the decisions. Bernardo M. Cremades, *Disputes Arising out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues*, 59 J. Disp. Resol. 78, 83-84 (2004), available at http://www.aryme.com/aryme/esp/adr_world_observer/observatorio/titulares_abierto/2004/200407/20040707.asp. Law firms, however, have already begun to discuss the implications of *SGS* cases. See Dunham & Foster, *supra* note 46; Freshfields, *Contractual Claims in Investor State Arbitration* (May 2004), at <http://www.freshfields.com/places/asia/publications/pdfs/8281.pdf>; Jeremy Winter, Baker & McKenzie, *Using “Umbrella Clauses” in Investment Treaties As a Basis for Turning a Breach of Contract Lawsuit into an ICSID Arbitration*, (May 2004), at <http://www.bakernet.com/NewsLetters/Article.asp?ArticleID=3708&EditionID=426&URL=%2FNewsLetters%2FNewsletter.asp&NLID=30>; see also Goldhaber, *Wanted*, *supra* note 5 (expressing concern about the *Lauder* and *SGS* cases).

decision is a small price to pay for promoting aggregate gain through investment arbitration,¹⁵⁰ the magnitude and the increasing frequency of the inconsistency suggests that this conclusion should be reconsidered.

A. *The Lauder Arbitrations*

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

1. The Factual Background

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

150. Alvarez & Park, *supra* note 14, at 399.

151. The *CME* tribunal held there was a treaty violation because the Czech Republic eviscerated the arrangements on which the investor relied when making its investment. The *Lauder* tribunal, on the other hand, held there was no inconsistent conduct amounting to unfair and inequitable treatment. Although a Swedish court recently reconsidered the *CME* decision’s legitimacy, neither the court nor the academic literature thus far provides a satisfactory answer about how or if these cases can be reconciled.

152. See Netherlands-Czech Republic BIT, *supra* note 39.

153. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Oct. 22, 1991, U.S.-Czech Rep. & Slov. [hereinafter U.S.-Czech Republic BIT], at http://www.unctad.org/sections/dite/ia/docs/bits/czech_us.pdf.

154. Matthew Rushton, *Clifford Chance Entangled in Bitter Lauder Arbitrations*, Legal Bus., Oct. 2001, at 108.

155. The original investor was the Central European Development Corporation GmbH, which was a German company. Czech Republic v. CME Czech Rep. B.V., Judgment of the Court of Appeal, Case No. T 8735-01 [hereinafter Svea Court of Appeal Judgment], at http://www.cetv-net.com/iFiles/1439-english_translation_of_the_svea_judgment.pdf (last visited Feb. 4, 2005). This company eventually transferred most of its shares to CME Media Enterprises B.V. which, in turn, provided its shares to CME Czech Republic B.V. London Award, *supra* note 71, ¶ 77. It was this entity that was the claimant before the Stockholm tribunal. CME Czech Rep. B.V. v. Czech Republic, Partial Award, ¶¶ 5-7 (Sept. 13, 2001) [hereinafter Stockholm Award], at <http://www.mfcr.cz/static/Arbitraz/en/PartialAward.pdf>;

rect investment in a license-holding television station that would be run with a local partner, Dr. Vladimír Železný.¹⁵⁶ While petitioning the Czech Media Council (“Media Council”) for the license, Dr. Železný and his local company, Central European Television 21 (“CET 21”), represented that CEDC would be a “direct participant” in the license and contribute finances and programming to the television station.

CET 21 was eventually granted the license.¹⁵⁷ Mr. Lauder and CEDC’s direct investment did not occur as planned, however. Rather, after consultation with, direction from, and approval by, the Czech Media Council,¹⁵⁸ the license was only granted to CET 21¹⁵⁹ and the Media Council required the foreign investment to occur indirectly through a joint venture company, CNTS.¹⁶⁰ CNTS had three participants: (1) CET 21 who would provide the license, (2) CEDC who would provide the financing, programming, and know-how, and (3) a Czech bank who would provide further financing.¹⁶¹ CNTS would then unconditionally, unequivocally, and on an exclusive basis have the right to use, exploit, and maintain the license;¹⁶² and, in this manner, Mr. Lauder and his investment vehicle could use a “split” ownership structure to exploit the license and operate TV Nova.¹⁶³ The Me-

CME Czech Rep. B.V. v. Czech Republic, Dissenting Opinion (2001), at <http://www.mfcr.cz/static/Arbitraz/en/DisentingOpinion.pdf>.

156. London Award, *supra* note 71, ¶¶ 48-50.

157. *Id.* ¶¶ 64, 70.

158. The Media Council’s decision to award the license to CET 21 and its foreign investor was the subject of severe political criticism. *Id.* ¶ 58.

159. *Id.* ¶¶ 60, 64.

160. *Id.* ¶¶ 59, 61, 64, 68, 70, 222; *see also* Stockholm Award, *supra* note 155, ¶¶ 429, 435 (explaining CEDC’s investment “was monitored, directed and approved by the Media Council”). As explained by the 1997 Report of the Media Council to the Czech Parliament, the reason why this model came into existence was the Council’s fears of a majority share of foreign capital in the license holder’s Company:

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

London Award, *supra* note 71, ¶ 229 (emphasis added); *see* Stockholm Award, *supra* note 155, ¶ 83; *see also id.* ¶¶ 436, 440 (noting that the decision to grant the license to CET 21 created massive political uproar and made a direct shareholding in CET 21 “politically impossible”).

161. London Award, *supra* note 71, ¶ 69.

162. *Judgment by the Svea Court of Appeal, Stockholm, Rendered in 2003 in Case T8735-01, The CME v. Czech Republic Case*, in Stockholm Arb. Rep., 2003, at 169 [hereinafter SCC Institute Article] at http://www.sccinstitute.com/_upload/shared_files/artiklar/tjeckiska_republiken.pdf.

163. *See* Stockholm Award, *supra* note 155, ¶ 452 (explaining that a split structure—which required a separation of the license holder and the operator—was the legal basis for the investment).

dia Council believed this arrangement would be more acceptable to the Czech government and public opinion than an arrangement that gave foreign capital direct ownership.¹⁶⁴

Although TV Nova was expected to break even after four years, with an attention-grabbing schedule of nude weather forecasts and Baywatch reruns, the station was profitable during the first year of operation.¹⁶⁵ Although most of the profits were expatriated, business went along smoothly. This happy scenario eventually changed. In 1994, there was further political criticism of the structure of TV Nova¹⁶⁶ and a change in the membership of the Media Council.¹⁶⁷ Eventually, in 1995, the Czech Parliament amended its Media Law in a manner that affected the nature of Mr. Lauder's investment, including a narrower definition of the term "broadcaster."¹⁶⁸

As a result, in 1996, the Media Council reversed its previous position as regards the approval of "split" structure between the license holder and the operator¹⁶⁹ and began to make life difficult for CNTS. In particular, it then commenced administrative proceedings against CNTS asserting that, as a result of the corporate structure of TV Nova, CNTS was operating the station without a license and broadcasting illegally.¹⁷⁰ The Supreme State Attorney Office also undertook a criminal investigation regarding TV Nova's authority to broadcast.¹⁷¹ At that time, Dr. Železný defended TV Nova's operating structure and argued that it had been approved by the Media Council.¹⁷² Under increasing pressure, however, CNTS modified its corporate structure and the descriptions of its broadcasting business, although ostensibly CNTS' partners asserted the nature of their commercial relationship had not changed.¹⁷³ After the changes were

164. *Id.* ¶ 11.

165. Rushton, *supra* note 154, at 108; *see also* Stockholm Award, *supra* note 155, ¶¶ 14, 458.

166. The Czech Parliament's Committee for Science, Education, Culture, Youth and Physical Training was one of these critics. London Award, *supra* note 71, ¶ 74.

167. The membership of the Media Council changed during the summer of 1994. *Id.* ¶ 78.

168. There were two critical changes in the Czech Media Law: (1) article 12(3) of the 1991 Media Law, which had provided that "[i]n addition to conditions stated in paragraph 2, the decision to grant a license also includes conditions with the license-granting body will set for the broadcasting operator," was deleted; and (2) more narrowly defined a "broadcaster" as solely the individual to whom the license was granted. *Id.* ¶ 79.

169. Stockholm Award, *supra* note 155, ¶ 460.

170. London Award, *supra* note 71, ¶ 97.

171. *Id.* ¶¶ 91, 94.

172. *Id.* ¶ 84; Stockholm Award, *supra* note 155, ¶¶ 503, 523.

173. London Award, *supra* note 71, ¶¶ 89, 104; *see also* Stockholm Award, *supra* note 155, ¶ 505 (explaining that the shareholders "did not give in on a voluntary basis" because "it was clear that without the amendment requested by the Council the broadcasting License would be endangered"); *id.* ¶ 513 (noting the threat of administrative proceedings "was fundamental because a withdrawal of the License in the same way as interference with CNTS' broadcasting operations would have destroyed

made, both the criminal and administrative proceedings were suspended.¹⁷⁴

But these superficial changes did not end TV Nova's difficulties. In 1998 and 1999, Dr. Železný¹⁷⁵ began to acquire programming for CET 21 from sources other than CNTS and Mr. Lauder's profits began to decrease. Dr. Železný also requested other corporate changes, particularly related to revenues, and relied upon the Media Council's previous conduct and potential future actions to justify the changes. In 1999, Dr. Železný wrote privately to the Media Council requesting that it confirm the Council's understanding that CET 21 did not have an exclusive relationship with CNTS and could order services from other providers.¹⁷⁶ Without disclosing the *ex parte* request from Dr. Železný, the Media Council issued a March 1999 letter "parroting nearly verbatim" from Dr. Železný's request and stating that "[b]usiness relations between the operator of broadcasting and service organizations are built on a nonexclusive basis."¹⁷⁷ Dr. Železný later used this correspondence as the basis for severing CET 21's dealings with CNTS,¹⁷⁸ and the Media Council did not intervene.¹⁷⁹ After August 5, 1999, Dr. Železný began broadcasting TV Nova using a new company, which was under his control.¹⁸⁰

2. The Procedural History

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

the Claimant's investment"). The change in the corporate documents required CNTS to relinquish its exclusive right to use CET 21's license—which meant CET 21 could obtain programming from other sources and CNTS would have to compete to receive the economic benefits associated with the license. *See* SCC Institute Article, *supra* note 162, at 170.

174. London Award, *supra* note 71, ¶¶ 108, 116, 121; Stockholm Award, *supra* note 155, ¶¶ 494-95, 501.

175. During the difficulties in the last several years, Dr. Železný had substantially increased his control over CET 21. *See* London Award, *supra* note 71, ¶¶ 76, 98.

176. *Id.* ¶ 129.

177. *Id.* ¶ 130; Stockholm Award, *supra* note 155, ¶ 128.

178. *See, e.g.*, London Award, *supra* note 71, ¶ 133 (indicating that CET 21 was entering into contracts with third parties).

179. Stockholm Award, *supra* note 155, ¶¶ 570, 572-74.

180. London Award, *supra* note 71, ¶ 138; Stockholm Award, *supra* note 155, ¶ 18; *see also id.* ¶ 555 (explaining that the letter was "fabricated in collusion between Dr. Železný and the Media Council behind the back of CNTS (TV NOVA) to give CET 21 a tool to undermine the legal foundation of CME's investment").

181. London Award, *supra* note 71, ¶ 137.

against the Czech Republic under the Netherlands-Czech Republic BIT in 2000. Although there was an opportunity to consolidate the proceedings under both BITs, the Czech Republic objected to the same tribunal hearing both cases.¹⁸²

3. The Two Awards

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

Both the Dutch-Czech Republic and U.S.-Czech Republic BITs had similar prohibitions on the arbitrary and discriminatory treatment of investments.¹⁸³ While the London tribunal did find that the Czech Republic engaged in an arbitrary and discriminatory measure, its holding was limited to the 1993 time period when Mr. Lauder was prevented from making a direct investment in CET 21.¹⁸⁴ As the basis for its conclusion, the London tribunal pointed to the 1997 Report of

182. *Id.* ¶¶ 173, 178; Stockholm Award, *supra* note 155, ¶¶ 40-41, 412.

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

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

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

184. In coming to this conclusion, the London tribunal considered the plain meaning of the treaty. In particular, the tribunal noted that the treaty requires both an arbitrary and a discriminatory measure. Both aspects must be considered in order to avoid giving inappropriate meaning to the word "and" and rendering part of the standard redundant. London Award, *supra* note 71, ¶ 219. Noting that the U.S.-Czech Republic BIT does not define the term "arbitrary," the panel relied upon *Black's Law Dictionary's* definition of "arbitrary" as "depending on individual discretion . . . founded on prejudice or preference rather than on reason or fact." *Id.* ¶ 221. The London tribunal found the conduct arbitrary because it was neither founded on reason or fact—nor was the decision based upon the Czech Republic's Media Law, a law that expressly accepted applications from companies with foreign equity participation. *Id.* ¶ 232. The tribunal also analyzed the meaning of national treatment and found that the treatment must be at least as favorable as to a Czech National as defined in article II(1). *Id.* ¶ 220. The tribunal held the measure to be discriminatory because it treated foreign investments less favorably than domestic investment. The tribunal noted that, as a result of the political opposition, it is probable that there would have been no political outcry if Lauder's company had been of Czech origin. *Id.* ¶ 231.

the Media Council that stated, “[w]hen granting the license to the Company CET 21, for fear that a majority share of foreign capital in the license holder’s Company might impact the independence of full-format broadcasts, the Council assumed a configuration that separates the investor from the license holder himself.”¹⁸⁵ This distinction, based upon the national origin of the investor, was the sole basis of the London tribunal’s finding of discrimination.¹⁸⁶ The London tribunal went on to hold that the later conduct of the Media Council was not arbitrary and discriminatory within the meaning of the U.S.-Czech Republic BIT. The panel reasoned that: (1) various conduct by the Media Council was insufficient to rise to the level of a “measure”¹⁸⁷ — particularly when the conduct “merely expresses the general opinion of a regulatory body regarding the proper interpretation” of the law;¹⁸⁸ (2) the initiation of administrative proceeding was neither arbitrary¹⁸⁹ nor discriminatory¹⁹⁰ as it constituted a normal exercise of regulatory duties of the Media Council; and (3) CME’s amendment of its administrative documents was consensual since Mr. Lauder’s company was aware of its legal position.¹⁹¹

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

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

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

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

188. *Id.* ¶ 282.

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

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

191. *Id.* ¶¶ 272-73.

treaty. But as a violation would require a measure that was both unreasonable *and* discriminatory, the tribunal concluded the Media Council's conduct "smacks of discrimination against the foreign investor."¹⁹² There was no analysis of existing case law; and, in contrast to the London tribunal, no explanation of how the Media Council's various regulatory activities amounted to a measure.

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

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

192. Stockholm Award, *supra* note 155, at ¶ 612.

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

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

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

194. London Award, *supra* note 71, ¶ 201.

195. *Id.* ¶¶ 202-03.

196. The Stockholm tribunal noted that the Media Council was obligated to secure and defend the 1993 structure of TV Nova after it had attracted foreign investment on the basis of that structure. Stockholm Award, *supra* note 155, ¶ 530. Similarly, the Media Council's collaboration with Dr. Železný was to put pressure on the foreign investor to destroy the legal basis of the investment. *Id.* ¶¶ 554-55, 572, 585.

have withdrawn the March 1999 letter;¹⁹⁷ and at the very minimum, the Media Council should not have sat silent while the legal basis for the investment was deteriorating.¹⁹⁸ These twin factors lead the Stockholm tribunal to find expropriation because there was no prospect of reviving the exclusive use of the license, which had been the basis of the original investment.¹⁹⁹

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

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

197. *Id.* ¶ 600.

198. *Id.* ¶ 572.

199. *Id.* ¶¶ 607-09.

200. The U.S.-Czech Republic BIT provided that investments "shall at all times be accorded fair and equitable treatment." U.S.-Czech Republic BIT, *supra* note 153, art. II(2)(a); *see also* London Award, *supra* note 71, ¶ 292. The Netherlands-Czech Republic BIT provides that each country "shall ensure fair and equitable treatment to the investments of investors." Netherlands-Czech Republic BIT, *supra* note 39, art. 3(1); Stockholm Award, *supra* note 155, ¶ 24.

201. London Award, *supra* note 71, ¶¶ 296-97.

202. *Id.* ¶¶ 299, 301.

203. *Id.* ¶ 293.

204. Stockholm Award, *supra* note 155, ¶ 611.

205. The U.S.-Czech Republic BIT provided that investments "shall enjoy full protection and security." U.S.-Czech Republic BIT, *supra* note 153, art. II(2)(a); London Award, *supra* note 71, ¶ 308. The Netherlands-Czech Republic BIT likewise provided that each country "shall accord [to the investments of investors of the other state] full protection and security." Netherlands-Czech Republic BIT, *supra* note 39, art. 3(2); Stockholm Award, *supra* note 155, ¶ 24.

206. London Award, *supra* note 71, ¶ 311.

lic should not be liable to Mr. Lauder for Dr. Železný's efforts to extricate himself from their commercial relationship.²⁰⁷

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

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

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

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

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

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

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

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

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

212. CME initially claimed damages in the order of U.S. \$560,000,000, which was the value of CNTS, but in the damage phase of the arbitration, CME only requested an award of U.S. \$495,200,000. CME Czech Republic BV v. Czech Republic, Final Award, ¶ 31 (2003) (UNCITRAL), at http://www.cetv-net.com/iFiles/1439-Final_Award_Quantum.pdf. The tribunal issued a final award in favor of CME in the order of U.S. \$269,814,000 plus 10% interest per annum. *Id.* at 161 (the tribunal's decision, ch. IX).

it asked the Swedish courts to vacate the Stockholm Award. Starting from the general presumption that its review was quite narrow and arbitration awards should be set aside only in exceptional circumstances, the Swedish court refused to set aside the Stockholm Award.²¹³ The Svea Court of Appeal acknowledged the existence of the London Award but determined it had no jurisdiction to reconcile the two decisions.²¹⁴ Although it did consider the issue of whether *lis pendens* or *res judicata* should form a basis for setting aside the Stockholm Award,²¹⁵ the court explained that because the two awards involved different parties²¹⁶ and were rendered under different treaties entered into by different Sovereigns, it believed application of those two doctrines was inappropriate.²¹⁷

The contradictory results of the two *Lauder* cases suggest that at least one of the awards (or a part thereof) was wrong.²¹⁸ The injustice of this logical conclusion undermines the legitimacy of investment arbitration, particularly where public international law rights are at stake and the legitimate expectations of investors and Sovereigns are mismanaged. Likewise, the limited ability of the Svea Court of Appeal to remedy this situation suggests that it is appropriate to reconsider solutions (whether preventative or corrective) to address this gap and put investment treaty arbitration back on track to providing a reliable, predictable, and coherent jurisprudence.

B. The SGS Cases

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

213. Svea Court of Appeal Judgment, *supra* note 155, at 84-85.

214. *Id.* at 2. The Court of Appeal acknowledged the existence and outcome of the London Award. *Id.* at 6. The Swedish court did not, however, have jurisdiction to set aside the English award and the decision of the London tribunal could not impact the reasoning of the Swedish court.

215. The Czech Republic claimed that there were other reasons for setting aside the Stockholm award, including failure to apply the applicable law and procedural misconduct of the tribunal in excluding the Czech arbitrator from deliberations. Although these points are beyond the scope of the present Article, the Svea Court of Appeal was unpersuaded that any of the articulated reasons could form a basis for setting aside the award.

216. As a matter of Swedish law, and what the court understood to be other legal systems, the “[i]dentity between a minority shareholder, albeit a controlling one, and the actual company cannot . . . be deemed to exist in a case such as the instant one.” *Id.* at 98.

217. *Id.* at 95.

218. The votes from the two arbitrations total as follows: (1) 6-0 in favor of finding that discrimination occurred in 1993, (2) 4-2 in favor of finding no other form of discrimination occurred, and (3) 4-2 in finding that there was no expropriation, no denial of fair and equitable treatment, no failure to provide full protection and security, and no failure to comply with obligations under international law.

from a breach of contract or an administrative or legislative act.²¹⁹ The interpretive difficulty is whether the rights within an “umbrella clause” are sufficient to override an ambiguity in international law²²⁰ and transmute a breach of contract into a treaty violation. In the *SGS* cases, one ICSID tribunal held that the “umbrella clause” cannot transform a failure to pay fees under a concession contract into a treaty breach, while another ICSID tribunal came to the opposite conclusion.

1. *SGS v. Islamic Republic of Pakistan*

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

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

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

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

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

221. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, ICSID (W. Bank) Case No. ARB/01/13 (2003) [hereinafter *Pakistan Award*], available at <http://www.worldbank.org/icsid/cases/SGS-decision.pdf>.

222. *Id.* ¶¶ 11-12, 16.

223. *Id.* ¶¶ 16, 17.

224. *Id.* ¶ 15. Specifically, the arbitration agreement provided that:

Any dispute, controversy or claim arising out of, or relating to this Agreement, or breach, termination or invalidity thereof, shall as far as it is possible

the Swiss courts. When SGS was unsuccessful, Pakistan initiated arbitration to resolve the contract claims. Eleven months thereafter, SGS sent a notice of dispute to Pakistan, which alleged that the wrongful termination and failure to make payment under the PSI agreement were violations of the Switzerland-Pakistan BIT.²²⁵ Two days later, SGS submitted a Request for Arbitration to ICSID claiming that Pakistan's conduct violated the Switzerland-Pakistan BIT in a variety of different ways, including a failure "to constantly guarantee the observance of [its] commitments."²²⁶

Before they could consider the merits of SGS's claims that Pakistan breached the BIT by breaching the PSI Agreement, the *Pakistan* tribunal first considered whether SGS was improperly reformulating the breach of contract claims as an investment treaty claim. The Switzerland-Pakistan BIT provided that each Sovereign "shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the Investors" from the other Sovereign.²²⁷ SGS argued that this clause had the effect of elevating a simple breach of contract into a treaty claim under international law,²²⁸ and that this was justified because such "umbrella clauses" were included in investment treaties to remedy the lack of clarity about whether breach of contract under domestic law is sufficient to elevate a claim into a violation of international law.²²⁹ Not surprisingly, Paki-

be settled amicably. Failing such amicable settlement, any such dispute shall be settled by arbitration in accordance with the Arbitration Act of the Territory as presently in force. The place of arbitration shall be Islamabad, Pakistan and the language to be used in the arbitration proceedings shall be the English language.

Id.

225. *Id.* ¶¶ 31, 32; see also Accord Entre la Confédération Suisse et la République Islamique du Pakistan Concernant la Promotion et la Protection Réciproque des Investissements, July 11, 1995, Switz.-Pak. [hereinafter Switzerland-Pakistan BIT], at http://www.unctad.org/sections/dite/iia/docs/bits/Switzerland_pakistan_fr.pdf.

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

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

228. This means that each time a Sovereign violates a provision of a contract, the Sovereign also violates norms of international law and the BIT at the same time. *Id.* ¶¶ 98-99. In oral argument, SGS's counsel stated that

if I am the government and if I breach a contract, by the same token I will breach a treaty, so that the useful effect of this is to create [a] mirror effect, to say that I will elevate in essence, and that's what it does, it may be far-reaching but that's what it does, to elevate breaches of contract as breaches of the treaty.

Id. ¶ 99.

229. See *id.* ¶ 98 n.108 (describing SGS's reliance on Dolzer & Stevens' book on bilateral investment treaties and the comments of the former Secretary-General of ICSID, Ibrahim Shihata).

stan disagreed and countered that there can be no claim for breach of the treaty until the dispute “ripens” and there was a determination that the contract was breached.²³⁰

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

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

The tribunal acknowledged that the “commitments” which were to be “constantly guarantee[d]” were not limited to contractual commitments.²³⁴ Yet the *Pakistan* tribunal simultaneously expressed concern that an overly broad interpretation of the standard would be susceptible of “almost indefinite expansion” and would lead to claims that were “so automatic and unqualified and sweeping in their operation [and] so burdensome in their potential impact” upon Sovereigns.²³⁵ Instead of relying upon the text of the treaty, out of its con-

230. *Id.* ¶ 54.

231. *Id.* ¶ 147. The tribunal also noted that the treaty claims and contract claims appeared reasonably distinct in principle. *Id.* ¶ 148.

232. This is required by the Vienna Convention. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340, U.N. Doc. A/Conf 39/28 (1969) [hereinafter Vienna Convention on Treaties].

233. Pakistan Award, *supra* note 221, ¶¶ 164-65.

234. The tribunal suggested that “commitments” was probably broader than pure contractual matters and might also address statutory, administrative, or other governmental obligations. *Id.* ¶ 166.

235. *Id.* ¶¶ 166-67. As it apparently believed that a finding to the contrary would open the floodgates of investment treaty arbitration, the tribunal went to great lengths to explain the ramification of (what it considered to be) the harmful consequences of SGS’s “extraordinarily expansive” position. *Id.* ¶ 171. In particular, the tribunal suggested adopting SGS’s position was untenable because: (1) it would incorporate a number of government contracts and municipal laws into actionable “commitments”; (2) it could make other provisions of the BIT superfluous—namely those requiring promotion of investments and most favored nation treatment (which would permit SGS to benefit from provisions in the UK-Pakistan BIT); (3) it would nullify the specifically negotiated dispute settlement mechanism in the PSI Agreement; and (4) given the physical location of the “umbrella clause” in the treaty—which was in a substantially different location than the rest of the substantive rights—it would be inappropriate to treat article 11 as a substantive obligation. *Id.* ¶¶ 168-70.

cerns resulting from the possible “slippery slope” of investment arbitrations, the tribunal announced a new rule of investment treaty interpretation: there must be “clear and convincing evidence” of a shared intent of Sovereigns to transform contract breaches into treaty claims.²³⁶ Expressing an unwillingness to derogate from principles of international law that a violation of a contract entered into between a Sovereign and an investor is not by itself a violation of international law,²³⁷ the tribunal held the only “commitments” which were actionable under the treaty are those attributable to a Sovereign itself as a legal person under the law of state responsibility.²³⁸ In enunciating this narrow rule for treaty violations, the *Pakistan* tribunal gutted the meaning of the BIT’s “umbrella” clause and rendered it a textual anomaly. Not only had the tribunal announced a new evidentiary rule for investment treaty arbitration, which was not found in the treaty itself, but the tribunal’s conclusion meant that the “umbrella clause” itself essentially became a nullity even though the two Sovereigns made the effort specifically to include the provision.

2. *SGS v. Republic of the Philippines*

The tribunal in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*²³⁹ came to a decidedly different result through a decidedly different analysis.

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

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

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

Id.

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

238. *Id.* ¶ 166.

239. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID (W. Bank) Case No. ARB/02/6 (Jan. 29, 2004) [hereinafter *Philippines Award*], available at <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>.

The facts of the *Philippines* case are similar to those in the *Pakistan* case but more straightforward. SGS contracted with the Philippines to provide import supervision services (the “CISS Agreement”), whereby SGS would provide services to improve the customs clearance and control process in the Philippines.²⁴⁰ After a change in inspection policies resulting from shifts in the GATT-WTO valuation system, the Philippines failed to renew the CISS Agreement.²⁴¹ A dispute arose when the Philippines allegedly failed to pay amounts due under the CISS Agreement.²⁴² Although the CISS Agreement contained an exclusive jurisdiction clause in favor of the Philippines courts,²⁴³ SGS commenced ICSID arbitration on the ground that its contract claim could be elevated to a treaty claim under the “umbrella clause” in the Switzerland-Philippines BIT.²⁴⁴

Article X(2) of the Switzerland-Philippines BIT provided that each Sovereign “shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other” Sovereign.²⁴⁵ Looking at the text of the BIT, the tribunal noted that the use of the word “shall” implies a substantive right and the term “any obligation” is capable of applying to obligations arising under local law — such as those arising from a contract. As the tribunal succinctly put it, article X(2) “would appear to say, and to say clearly, that each [Sovereign] shall observe *any legal obligation it has assumed, or will in the future assume*, with regard to specific investments covered by the BIT.”²⁴⁶ Rather than expressing concern about derogating from traditional rules of international law as the *Pakistan* tribunal had, the *Philippines* tribunal found it was “legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.”²⁴⁷ Although the *Philippines* tribunal attempted to distinguish

240. *Id.* ¶¶ 1, 19-24. In particular, SGS provided certifications to exporters based on preshipment inspections it conducted on behalf of the governments of countries purchasing goods made in the Philippines. *Id.* ¶¶ 12-13.

241. *Id.* ¶ 14.

242. *Id.* ¶¶ 35-41.

243. The CISS Agreement provided that “[a]ll actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila.” *Id.* ¶ 22.

244. *Id.* ¶¶ 2, 65.

245. Accord Entre la Confédération Suisse et la République des Philippines Concernant la Promotion et la Protection Réciproque des Investissements, Mar. 31, 1997, Switz.-Phil. [hereinafter Switzerland-Philippines BIT], at http://www.unctad.org/sections/dite/ia/docs/bits/Switzerland_philippines_fr.pdf; see also Philippines Award, *supra* note 239, ¶¶ 34, 114 (quoting article X, “Other Commitments,” of the Switzerland-Philippines BIT).

246. Philippines Award, *supra* note 239, ¶ 115 (emphasis added).

247. *Id.* ¶ 116. But see Sir Gerald Fitzmaurice, The Law & Procedure of the International Court of Justice 372 (1986) (explaining that as regards grants given to investors, “there can be no presumption in favour of an intention to grant more rather than less, and . . . the presumption must be in favour of the least that is consistent with the language used” and citing Judge Basdevant’s decision in the *Minquiers* case that said

the *Pakistan* tribunal's decision on the basis that the BIT's text was "different and rather vaguer,"²⁴⁸ the *Philippines* tribunal criticized the previous decision for a variety of reasons, including: (1) its fear of "indefinite expansion," (2) its presumption against a broad interpretation of the treaty, (3) the over-reliance on the physical location of the umbrella-clause, and (4) the failure to give any clear meaning of the umbrella clause.²⁴⁹ The tribunal concluded that the umbrella clause "makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments."²⁵⁰ Although the *Philippines* award represented a radical departure from the *Pakistan* award in both reasoning and result, there was one commonality: neither tribunal proceeded to the merits of the action.²⁵¹

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

C. The NAFTA Cases

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

treaties "should be interpreted in favour of the grantor, in the sense of restricting the gift").

248. *Philippines Award*, *supra* note 239, ¶ 119.

249. *Id.* ¶¶ 121-26.

250. *Id.* ¶ 128.

251. Even though the *Philippines* tribunal held it did have jurisdiction to determine contractual claims between an investor and a Sovereign, it stayed its jurisdiction. As SGS failed to allege any colorable BIT claims other than the umbrella clause and the parties agreed to submit their contractual disputes to the Philippines courts, the *Philippines* tribunal decided to let the contractual claims in the Philippines courts proceed. *Id.* ¶¶ 175-76.

252. Inconsistencies in investment arbitration are not necessarily overt, but the subtleties are by no means less problematic. There is, for example, an area of inconsistency about the need to exhaust local remedies before initiating arbitration. See William S. Dodge, *Loewen v. United States: Trials and Errors Under NAFTA Chapter 11*, 52 DePaul L. Rev. 563 (2002); see also Elettronica Sicula, S.p.A. ("ELSI") (U.S.v. Italy), 1989 I.C.J. 15, 42 (July 20) (holding that customary international law requires foreign investors to exhaust domestic remedies before pursuing an international

the area that has attracted the most attention and generated the most concern: the meaning of “fair and equitable treatment” under article 1105. Article 1105 provides that: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”²⁵³ The debate in early jurisprudence was whether this meant that “fair and equitable” was a guarantee of minimum treatment under international law or whether it was an “additive” right with independent meaning.²⁵⁴ The answer to this issue is fundamental. If “fair and equitable treatment” is an additive right, investors can bypass an older test for showing a violation of international law, which provides compensation only in egregious cases.²⁵⁵ In es-

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

253. NAFTA, *supra* note 1, art. 1105(1), 32 I.L.M. at 639-64.

254. F.A. Mann was one of the major commentators suggesting that “fair and equitable treatment” was an additive right in investment treaties. He based this opinion wholly upon the United Kingdom-Philippines BIT. In his seminal piece, Mann explained that while “it may be suggested that arbitrary, discriminatory or abusive treatment is contrary to customary international law, unfair and inequitable treatment is a much wider conception which may readily include such administrative measures . . . as are not plainly illegal in the accepted sense of international law.” F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 Brit. Y.B. Int’l L. 241, 242-43 (1981). He went on to conclude that fair and equitable treatment was not merely a restatement of the minimum standard but extends “far beyond the minimum standard.” *Id.* at 244.

255. *See Neer v. United Mexican States*, 4 R.I.A.A. 60 (1926) (holding that the treatment of an alien, in order to constitute international delinquency should amount

sence, investors recover more easily and Sovereigns find themselves unexpectedly liable.

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

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

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

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

to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency).

256. *S.D. Myers, Inc. v. Canada*, Award (2000) (UNCITRAL) [hereinafter *S.D. Myers Award*], at <http://www.naftalaw.org>.

257. *Id.* ¶ 263.

258. *Id.* ¶ 266. *But see S.D. Myers, Inc. v. Canada*, Concurring Opinion of Dr. Brian Schwartz, ¶¶ 224-64 (2000) (UNCITRAL), at <http://www.naftalaw.org>.

259. The Basel Convention is a treaty dealing with the international traffic in PCBs and other hazardous wastes. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 649 (1989), available at <http://www.basel.int/text/con-e-rev.pdf>.

260. *S.D. Myers Award*, *supra* note 256, ¶¶ 91, 105-06.

261. Specifically, the government minister said, "[i]t is still the position of the government that the handling of PCBs should be done *in Canada by Canadians*." *Id.* ¶ 116; *see also id.* ¶ 185 (quoting the government minister who said "handling of PCBs should be done in Canada by Canadians. We have to take care of our own problems").

investor was denied fair and equitable treatment under NAFTA because the measure was discriminatory and designed to target one U.S. company.²⁶²

The tribunal's analysis of article 1105 is the most intriguing aspect of its decision. Starting with the text of article 1105(1), the tribunal concluded that the phrase "fair and equitable" could not be read in isolation but, rather, must be read in conjunction with the introductory phrase "treatment in accordance with international law."²⁶³ The tribunal acknowledged the legitimate need of governments to regulate matters within their own borders, but it concluded that international law ultimately must determine whether the regulation is sufficiently egregious to amount to a violation of article 1105.²⁶⁴ Given the protectionist and discriminatory intent, the favoring of nationals over nonnationals and the prevention of S.D. Myer's planned business activity, the *S.D. Myers* tribunal concluded that the discrimination in that case was sufficient to cause a violation of article 1105.²⁶⁵

2. *Metalclad Corporation v. United Mexican States*

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

262. See *id.* ¶¶ 255-56, 266, 268.

263. *Id.* ¶¶ 258, 262.

264. *Id.* ¶¶ 263-64.

265. *Id.* ¶¶ 162, 193, 266, 268. The tribunal did, however, leave open the possibility that a breach of a rule of international law "may not be decisive in determining" whether an investor has been denied fair and equitable treatment under article 1105. *Id.* ¶ 264.

266. *Metalclad Judgment*, *supra* note 139.

267. Todd Weiler, *NAFTA Investment Arbitration and the Growth of International Economic Law*, 36 Can. Bus. L.J. 405 (2002) [hereinafter Weiler, *NAFTA Investment Arbitration*].

268. Dhooge, *supra* note 87; Chris Tollefson, *Metalclad v. United Mexican States Revisited: Judicial Oversight of NAFTA's Chapter Eleven Investor-State Claim Process*, 11 Minn. J. Global Trade 183 (2002); Lauren E. Godshall, Note, *In the Cold Shadow of Metalclad: The Potential for Change to NAFTA's Chapter 11*, 11 N.Y.U. Envtl. L.J. 264 (2002); Jesse Williams, Comment, *Regulating Multinational Polluters in a Post-NAFTA Trade Regime: The Lessons of Metalclad v. Mexico and the Case for a "Takings" Standard*, 8 UCLA J. Int'l L. & Foreign Aff. 473 (2003).

269. *Metalclad Award*, *supra* note 138, ¶ 74.

270. *Id.* ¶¶ 30-36.

prate permits and prohibited Metalclad's operations.²⁷¹ Noting the detrimental reliance on the representations of the Mexican officials and the lack of a transparent regulatory procedure, the *Metalclad* tribunal held this created a breach of the obligation to guarantee fair and equitable treatment.²⁷²

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

271. *Id.* ¶¶ 52-59.

272. *Id.* ¶¶ 87-89, 99.

273. The Vienna Convention specifically provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on Treaties, *supra* note 232, art. 31(1), 1115 U.N.T.S. at 340.

274. In particular, the tribunal considered that NAFTA article 102(1), which sets out NAFTA's objectives, and focused on the need for transparency. *Metalclad Award*, *supra* note 138, ¶ 76. NAFTA provides that

the objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to: a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; b) promote conditions of fair competition in the free trade area; c) increase substantially investment opportunities in the territories of the Parties; d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory; e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

See NAFTA, *supra* note 1, art. 102(1), 32 I.L.M. at 297. The tribunal also briefly considered article 1802(1), but never went on to explain how this provision impacted its ultimate conclusion. *Metalclad Award*, *supra* note 138, ¶ 71. Article 1802(1) provides that each country "shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them." NAFTA, *supra* note 1, art. 1802(1), 32 I.L.M. at 681.

275. *Metalclad Award*, *supra* note 138, ¶¶ 70-71, 74-75.

276. Subject to the caveats of the Vienna Convention, there is a great deal that the discipline of legislative interpretation could usefully share with the interpretation of treaties. For example, such an examination can remind decision makers that, at its most fundamental level, "interpretation" is the textual analysis of words and concepts used by sovereign nations. Concepts of intent and purpose can be useful interpretive aids at later stages or when dealing with ambiguous concepts and language. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation As Practical Reasoning*, 42 Stan. L. Rev. 321 (1990); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 Minn L. Rev. 241 (1992); *see also* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 626, 690 (1990).

The tribunal ignored other textual provisions of NAFTA—such as those describing how NAFTA would provide transparency²⁷⁷—when it jumped, with minimal justification,²⁷⁸ to the conclusion that the failure to ensure regulatory transparency was a violation of article 1105.²⁷⁹ Noting the failure to provide a transparent and predictable framework for the investor's business planning and investment, the tribunal found that Mexico's conduct "demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in expectation that it would be treated fairly and justly in accordance with the NAFTA,"²⁸⁰ and this led to the conclusion that Metalclad "was not treated fairly or equitably under NAFTA."²⁸¹

By failing to consider the plain meaning of the words in article 1105, the *Metalclad* tribunal apparently considered that "fair and equitable"

(suggesting that statutory text is important and may be the best evidence of legislative intent or purpose).

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

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

279. The tribunal initially explained that the absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA.

See Metalclad Award, supra note 138, ¶ 88. The tribunal referred to questionable situations such as the failure to provide Metalclad notice of the meeting and the opportunity to make its case regarding its permit application. *Id.* ¶ 91.

280. *Id.* ¶ 99.

281. *Id.* ¶ 101.

is a positive right that was independent from customary international law. While the tribunal's reasoning has been subject to different interpretations,²⁸² the most reasonable conclusion is that the *Metalclad* tribunal thought the words "including fair and equitable treatment" should mean "plus [or perhaps and] fair and equitable treatment."²⁸³ These flaws and the over-reliance on transparency came back to haunt the *Metalclad* tribunal. The fallout of the award was set by a reviewing court in Canada,²⁸⁴ but other tribunals followed and expanded the *Metalclad* approach²⁸⁵ until NAFTA's Free Trade Commission issued an interpretive statement to minimize confusion.

3. *Pope & Talbot, Inc. v. Canada*

Pope & Talbot involved claims related to the verification process related to the United States-Canada Softwood Lumber Agreement.²⁸⁶ The tribunal took a broader approach to the interpretation of NAFTA's article 1105 than *Metalclad* and concluded the regulatory conduct of the Canadian government violated its obligation to provide fair and equitable treatment. Noting that the Canadian government made various, unexplained demands during an antidumping verification,²⁸⁷ the tribunal explained that Canada's "imperious insistence on having its way" could not be explained by rational legal reasoning.²⁸⁸ Although this emphasis suggests that article 1105 would be limited to issues of procedural fairness, the breadth of the tribunal's reasoning indicates otherwise. Put simply, *Pope & Talbot* concluded that the "fair and equitable treatment" standard in article 1105 was not a concept subsumed within a Sovereign's obligations to provide minimum standards of treatment under international law; rather, it was an "additive" standard in addition to minimum guarantees under international law.²⁸⁹ The tribunal came to this conclusion after an analysis of

282. Weiler, *NAFTA Investment Arbitration*, *supra* note 267, at 411-12.

283. *See id.* (noting that the tribunal never fully explained how it understood the "fair and equitable" treatment standard, suggesting that there are a variety of interpretations to the tribunal's award, but arguing that the tribunal concluded that treatment in accordance with international law includes fair and equitable treatment). The difficulty with Mr. Weiler's analysis is that, if the tribunal had meant to suggest this, it could have done so. *See infra* notes 324-25 and accompanying text (describing the basis for finding that transparency is part of customary international law).

284. *See generally* *Metalclad Judgment*, *supra* note 139.

285. *See infra* Part IV.C.3 and accompanying text (describing the even more expansive reasoning of the *Pope & Talbot* tribunal).

286. *Pope & Talbot, Inc. v. Canada*, ¶¶ 6-7 (2001) (UNCITRAL) [hereinafter *Pope & Talbot Award*], at <http://www.naftalaw.org>.

287. *Id.* ¶ 195.

288. *Id.* ¶ 173. At least one commentator has summarized this course of conduct as actions by a Canadian official that "the tribunal appeared to surmise . . . possibly constituted a form of retaliation or punishment for the investor having brought its case." *See Weiler, NAFTA Investment Arbitration*, *supra* note 267, at 416.

289. *Pope & Talbot Award*, *supra* note 286, ¶¶ 105-18. The tribunal came to this conclusion even though neither of the parties argued that "fair and equitable treat-

various BITs, which typically require fair and equitable treatment in addition to whatever treatment is required by international law,²⁹⁰ but it ignored the text of other BITs that were textually distinct from NAFTA.²⁹¹ Even though its approach deprives other words in article 1105 of meaning,²⁹² the tribunal suggested that NAFTA's text actually demanded finding an "additive" right.²⁹³ The tribunal explained that NAFTA parties could not possibly have intended to agree to a minimum standard of treatment that would provide investors in BITs with better treatment than in BITs in which NAFTA parties were members.²⁹⁴ By focusing on more nebulous concepts of purpose and intent and remedying perceived absurdities,²⁹⁵ *Pope & Talbot* ran afoul of NAFTA's text and failed to provide interpretive determinacy to NAFTA. Moreover, in its rejection of the approach of *S.D. Myers*, it created incoherence within the jurisprudence and did little to stabilize the legitimate expectations of investors and Sovereigns.

4. The Interpretive Note

In light of these divergent approaches, some coherence was required for the system to retain its integrity. As a result, the three NAFTA countries used their powers under NAFTA to issue an Interpretive Note to declare that article 1105 only encompassed the minimum standard of treatment in customary international law.²⁹⁶ Al-

ment" was additive. Although the parties differed as to the implications, they both agreed that, for the purposes of article 1105, the concept of fair and equitable treatment is subsumed within the concept of international law. *Id.* ¶¶ 106-08.

290. *Id.* ¶¶ 110-16.

291. NAFTA requires treatment in accordance with international law "including fair and equitable treatment." NAFTA, *supra* note 1, art. 1105, 32 I.L.M. at 639-40. Other investment treaties, including those cited by the *Pope & Talbot* tribunal, do not define the right in that manner. Rather, they have a free standing right, which is not linked to international law. See *Pope & Talbot Award*, *supra* note 286, ¶ 111 (quoting the U.S. model bilateral investment treaty from 1987, which requires that "investments shall at all times be accorded fair and equitable treatment").

292. Specifically, this approach negates the word "including." NAFTA, *supra* note 1, art. 1105, 32 I.L.M. at 639-40.

293. *Pope & Talbot Award*, *supra* note 286, ¶ 113. The *Pope & Talbot* tribunal was bold enough even to suggest that the *S.D. Myers* tribunal had not conducted a textually faithful analysis of NAFTA and for this reason declined to be bound by that decision's reasoning. *Id.* ¶ 113 n.108.

294. *Id.* ¶¶ 110-11, 115-18.

295. *Id.* ¶¶ 115-16, 118 (focusing on NAFTA's "object and purpose," NAFTA's "aim," and the desire to avoid "egregiously unfair" and a "patently absurd result").

296. NAFTA Free Trade Comm'n, Notes of Interpretation of Certain Chapter 11 Provisions, at § B (July 31, 2001), at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>. The notes specifically state that:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is re-

though some commentators²⁹⁷ and jurists²⁹⁸ have expressed concern about the legitimacy of the Interpretive Notes, later NAFTA tribunals have applied article 1105 (albeit sometimes reluctantly) in a more uniform fashion.²⁹⁹ This is an unusual remedy permitted by NAFTA's text; Sovereigns do not typically step in and rectify areas of inconsistency.

V. RECONSIDERING INVESTMENT ARBITRATION

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

quired by the customary international law minimum standard of treatment of aliens.

Id.

297. Brower, *Structure*, *supra* note 128, at 48-49, 78-79; Weiler, *Coming Along*, *supra* note 42, at 259-60; Weiler, *NAFTA Investment Arbitrations*, *supra* note 267, at 417, 434.

298. *Pope & Talbot v. Canada*, Award on Damages, ¶¶ 8-24 (2002) (criticizing the choices made by the Free Trade Commission in the Interpretive Note and questioning the binding nature of the statements), at <http://www.naftalaw.org>.

299. See *ADF Group Inc. v. United States*, Award of the Tribunal, ICSID (W. Bank) Case No. ARB(AF)/00/1 (2003), available at <http://www.worldbank.org/icsid/cases/ADF-award.pdf>; *Mondev Int'l Ltd. v. United States*, Final Award (2002), at <http://www.naftalaw.org>. For a thorough discussion of an analysis of the application of article 1105 before and after the Interpretive Note in the context of *Pope & Talbot*, please refer to David A. Gantz's article on this subject. David A. Gantz, *NAFTA Chapter 11 Arbitration Tribunal, 2000-2002*, 97 Am. J. Int'l L. 937 (2003).

300. See, e.g., Dhooge, *supra* note 87, at 282-89.

301. Gabrielle Kaufmann-Kohler, *Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?*, in *Annulment of ICSID Awards* 189, 219 (Emmanuel Gaillard & Yas Banifatemi eds., 2004) (noting that inconsistent decisions are a "new scenario" and that "[s]uch inconsistencies run counter to the uniform development of the law [and that t]here is a risk that inconsistent decisions discredit the system" and Sovereigns, investors, and the public may lose confidence in the dispute resolution mechanism); Stanisław Sołtysinski & Marcin Olechowshi, *Observations on the Svea Court of Appeal Judgment*, in *Stockholm Arb. Rep.*, 2003, at 230, at http://www.sccinstitute.com/_upload/shared_files/artiklar/tjeckiska_republiken.pdf.

302. Parra, *Provisions*, *supra* note 21, at 352.

303. See Brower, *Structure*, *supra* note 128, at 49 (suggesting that there are a variety of allegations regarding the legitimacy of certain NAFTA decisions); see also Fredrick M. Abbott, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 *Hastings Int'l & Comp. L. Rev.* 303, 308 (2000) (describing NAFTA's potential legitimacy problem); Afilalo, *supra* note 1, at 52 (stating that NAFTA "suffers from a crisis of legitimacy"); Ari

ties.³⁰⁴ As lawyers continue to advise clients to structure investments in a manner where they can simultaneously use multiple investment treaties for the same dispute, this issue will increase in prominence. In the future, there may not just be “twin” inconsistent decisions—there might well be triplets and quadruplets.³⁰⁵

Prominent practitioners have noted that “[a]ny system where diametrically opposed decisions can legally coexist cannot last long. It shocks the sense of rule of law or fairness.”³⁰⁶ Given that issues of legitimacy cut to the heart of the utility of using arbitration, the literature must address the concerns underlying the legitimacy crisis in a meaningful way. Otherwise, conflicting awards based upon identical facts and/or identically worded investment treaty provisions will be a threat to the international legal order and the continued existence of investment treaties.³⁰⁷ This Article therefore considers factors affecting legitimacy and provides a framework for analyzing previous suggestions for reforms and evaluates how to improve the current system and promote the just administration of the law.

Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 27 Geo. Int'l Envtl. L. Rev. 51, 53-54 (2004) (suggesting NAFTA suffers from a lack of legitimacy); Stephen Clarkson, *Systemic or Surgical?: Possible Cures for NAFTA's Investor-State Dispute Process*, 36 Can. Bus. L.J. 368, 369 (2002) (describing NAFTA's “low legitimacy and high potential for continuing controversy”); Shapren, *supra* note 16, at 325 (describing how NAFTA has “fail[ed] to provide a reliable framework”); Ferguson, *supra* note 87, at 505 (noting the absence of precedent in NAFTA and suggesting this “lack of certainty for future regulators” is inappropriate). *But see* Godshall, *supra* note 268 (stating that NAFTA is “on the brink of losing its legitimacy”).

304. See Beauvais, *supra* note 8, at 263 (suggesting that, as the opportunity to review investment treaty awards is limited, “there is little prospect of reviewing arbitrary, erroneous or inconsistent decisions”).

305. Charles N. Brower, *Charles N. Brower Delivers Keynote Address at Premier Arbitration Conference*, 13 World Arb. & Mediation Rep. 270 (2002); Charles N. Brower, *A Crisis of Legitimacy*, Nat'l L.J., Oct. 7, 2002, at B9 [hereinafter Judge Brower]. In May 2004, there was also a recent DC Bar Conference entitled, *Why Your Arbitration Agreement Matters: Anticipating Disputes in International Transactions*, which discussed arbitration issues that must be considered by transactional lawyers. See E-mail from Mark Kantor, to Robert Pritchard (July 6, 2004) (on file with author).

306. See Goldhaber, *Wanted*, *supra* note 5 (quoting Nigel Blackaby of Freshfields Bruckhaus Deringer's Paris office).

307. This may be a reason for Sovereigns to issue a notice of termination and end an investment treaty pursuant to a sunset provision. See *supra* note 31 and accompanying text (explaining that most investment treaties are only initially valid for ten years but can be extended); see also Juliette Kerr, *Ecuador's Procurator-General Says Most Oil Companies Violated Contracts*, World Markets Analysis, Sept. 22, 2004 (noting that the Republic of Ecuador has considered suspending or nullifying its investment treaties in response to unfavorable decisions).

A. *The Indicators of Legitimacy in Investment Arbitration*

The rule of law is essential to those participating in the global economy.³⁰⁸ Without the clarity and consistency of both the rules of law and their application, there is a detrimental impact upon those governed by the rules and their willingness and ability to adhere to such rules, which can lead to a crisis of legitimacy.³⁰⁹ Legitimacy depends in large part upon factors such as determinacy and coherence, which can in turn beget predictability and reliability.³¹⁰ Related concepts such as justice, fairness, accountability, representation, correct use of procedure, and opportunities for review also impact conceptions of legitimacy.³¹¹ When these factors are absent individuals, companies and governments cannot anticipate how to comply with the law and plan their conduct accordingly, thereby undermining legitimacy.

Determinacy involves using rules to convey clear and transparent expectations.³¹² In the context of investment arbitration, this means that investors' rights and Sovereigns' obligations are expressly spelled out. Many rules, however, are inevitably indeterminate as they cannot feasibly predict, in advance, all the situations to which the rule might possibly apply. Investment treaties, like other types of rules, often enumerate a vague standard in an effort to use discretion to promote fairness or facilitate agreement. There are costs to this approach, however, as indeterminate rules obscure the boundaries of appropriate conduct and also facilitate the creation of justifications for non-

308. René Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. Rev. 229, 231.

309. See James Willard Hurst, *Problems of Legitimacy in the Contemporary Legal Order*, 24 Okla. L. Rev. 224, 224 (1971) (suggesting that "[l]egitimacy means simply the grounds on which at any given time most of the people accept, or are willing to use, the legal order as they find it" and that it is premised upon the idea that "law should be good for, and justly serve, the people who live within it"); Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 Buff. L. Rev. 819, 830-31 (2002) (explaining that legitimacy justifies the moral authority of the existing order and any substantial challenge to legitimacy threatens the capacity to govern).

310. See Thomas M. Franck, *The Power of Legitimacy Among Nations* 49 (1990) [hereinafter Thomas Franck, *The Power of Legitimacy*] (explaining that the indicators of rule legitimacy in international law are determinacy, symbolic validation, coherence, and adherence); see also Brower, *Structure*, *supra* note 128, at 52-86 (describing Professor Franck's approach to legitimacy and using it as a useful prism for analyzing shortcomings in the NAFTA context). Professor Thomas Franck is unrelated to the author of this Article.

311. David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 Am. J. Int'l L. 552, 560-61 (1993); G.C.A. Junne, *International Organizations in a Period of Globalization: New (Problems of) Legitimacy*, in *The Legitimacy of International Organisations* 189, 191, 195 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

312. Thomas M. Franck, *Fairness in International Law and Institutions* 30 (1995) [hereinafter Thomas Franck, *Fairness*]. Determinacy has the same qualities of transparency and is synonymous with clarity. Thomas Franck, *The Power of Legitimacy*, *supra* note 310, at 52.

compliance.³¹³ Such a difficulty raises concerns about the effectiveness and correctness of the rules and undermines the legitimacy of the standard.

Even if standards in investment treaties have low textual clarity,³¹⁴ they are not *per se* illegitimate. By having an “authority recognized as legitimate” to provide clarification on the meaning and application of rules, interpretation can rectify textual indeterminacy. The success of such “interpretive determinacy,” however, depends upon who does the interpretation, their authority to interpret, and the coherence of the decisions they reach.³¹⁵ The issue facing investment arbitration is whether a neutral arbitral tribunal composed of private individuals, such as public international law experts who may be chosen by the parties, can and actually does apply investment rights in a correct and coherent manner.

Coherence is another key element of legitimacy; it requires consistency of interpretation and application of rules in order to promote perceptions of fairness and justice.³¹⁶ As aptly explained by Professor Thomas Franck, “[a] rule is coherent when its application treats like cases alike when the rule relates in a principled fashion to other rules in the same system. Consistency requires that a rule, whatever its content, be applied uniformly in every ‘similar’ or ‘applicable’ instance.”³¹⁷ Even the different application of the same rule does not necessarily undermine legitimacy “as long as the inconsistencies can be explained to the satisfaction of the community by a justifiable (i.e. principled) distinction.”³¹⁸ This means that incoherence can be clarified on a case-by-case basis or by rationally connecting meaning with other rules.³¹⁹ In this manner, facially inconsistent decisions can become coherent and minimize perceived injustice and unfairness.

Establishing such a coherent jurisprudence is difficult, however, with new and relatively untested standards. When there are a minimal number of cases and it is a challenge to find other appropriate areas of developed jurisprudence from which to draw, decisions are often seen as more “lawless.”³²⁰ This challenge is relevant in investment

313. Thomas Franck, Fairness, *supra* note 312, at 31; Thomas Franck, The Power of Legitimacy, *supra* note 310, at 53-54.

314. For example, one might suggest that the standard of “fair and equitable treatment” lacks textual clarity. *See infra* note 430 and accompanying text (describing Vandevelde’s comments about the need to interpret the standard of fair and equitable treatment). *But see* Singapore FTA, *supra* note 6, art. 15.5 (defining the term “fair and equitable” more precisely); Amended U.S. Model BIT, *supra* note 6, art. 5 (same).

315. Thomas Franck, Fairness, *supra* note 312, at 33-34; Thomas Franck, The Power of Legitimacy, *supra* note 310, at 61, 82.

316. Thomas Franck, Fairness, *supra* note 312, at 33, 38-41.

317. *Id.* at 38.

318. Thomas Franck, The Power of Legitimacy, *supra* note 310, at 163.

319. *Id.* at 163, 167, 180.

320. *Id.* at 50-66; Thomas Franck, Fairness, *supra* note 312, at 30-34; *see also* Brower, *Structure*, *supra* note 128, at 63-66; Dodge, *supra* note 252, at 572.

treaty arbitration where new standards are being applied for the first time, clever investors are testing the boundaries of their rights, and arbitrators do not have the luxury of drawing upon a mature jurisprudence.³²¹ Perhaps this explains why Charlie Brower, a former judge on the U.S.-Iran Claims Tribunal, has expressed the need for “a hierarchy of decisional instances” and “comparative uniformity of decisions” in investment arbitration.³²² Once investment arbitration jurisprudence has an opportunity to develop, and cases define parameters regularly and consistently, indeterminate rules can move past the initial “growing pains” to gain greater coherence.³²³ The resulting transparency of rules and fairness of application can then minimize the tensions related to perceived unfairness between investors, who have reasonable expectations of investment stability, and Sovereigns, who have obligations to their nationals and expectations about the extent of their bargained-for treaty obligations.³²⁴ Such transparency will also promote legitimacy by enhancing the perception that tribunals render decisions according to the correct procedures and thereby promote just and honest decision making.³²⁵

Thus far, however, the lack of determinacy and coherence in treaty arbitration has raised the specter of a legitimacy crisis. There are a variety of institutions that complain about particular aspects of the investment treaty process, including stated concerns about the transparency and privacy of the decision-making process, which lead to a lack of representation,³²⁶ the “chilling effect” upon important local regulation³²⁷ and subsequent impact on sovereignty,³²⁸ and the supposed bias

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

322. See Judge Brower, *supra* note 305.

323. See Thomas Franck, *The Power of Legitimacy*, *supra* note 310, at 62.

324. Thomas Franck *Fairness* *supra* note 312, at 440-41.

325. Caron, *supra* note 311, at 561; Junne, *supra* note 311, at 191.

326. Lerner, *supra* note 308, at 285; see also Gantz, *Potential Conflicts*, *supra* note 11.

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

328. As a result of certain NAFTA cases, some commentators have articulated concerns about U.S. sovereignty. In particular, there have been concerns that foreign corporations can challenge domestic legislation and executive orders can be “second guessed” by arbitrators thus “depriving domestic governments of the right to govern in the way that they see fit.” Dhooge, *supra* note 87, at 273-78, 283; Shapren, *supra* note 16, at 347; see also Jones, *supra* note 9, at 545 (suggesting that powerful foreign investors “may have the opportunity to hold governments hostage” by threatening litigation with an intent to influence government decision making); Shapren, *supra* note 16, at 327 (noting the concern that foreign investors are granted rights above domestic citizens and that some aspects of NAFTA may cause countries to give up their sovereignty). But see Price, *NAFTA*, *supra* note 55, at 113 (explaining that al-

of arbitrators.³²⁹ Many of these concerns are symptoms of a larger problem: the ability to determine with certainty the respective rights and obligations of investors and Sovereigns in a given situation. As suggested by certain aspects of the *Lauder*, *SGS*, and *NAFTA* cases, there is not yet a simple formula for immediately distinguishing between compensable and non-compensable regulatory activities.³³⁰ So given this steep learning curve, why bother to invest in investment arbitration?

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

B. Previous Suggestions for Reform

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

though treaties such as *NAFTA* restrict sovereignty, they also check excessive unilateral exercises of sovereignty, and thus prevent violations of public international law standards); Laird, *supra* note 72, at 225-26 (explaining that *NAFTA*, in reality, has had very little impact on national sovereignty although it remains “a relatively limited, although powerful in the correct circumstances, legal remedy”).

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

330. Dhooge, *supra* note 87, at 282.

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

332. See Alvarez & Park, *supra* note 14, at 366 (suggesting the system could benefit from “minor tinkering”); Coe I, *supra* note 1, at 1385-86 (explaining that dispute resolution under *NAFTA* is not “fundamentally flawed,” but is not completely “free of troubling features”).

investors' access. "Arbitration Rejecters" believe that arbitration is simply the incorrect forum for the resolution of investment treaty disputes and advocate the use of alternative public institutions to resolve investment disputes. Finally, "Safeguard Builders" suggest structural modifications to the arbitration mechanism to promote legitimacy. This Article will address each one of these categories in turn.

1. The Legislative Approach

"Legislative" reformers advocate reducing inconsistency and promoting legitimacy by providing textual certainty in investment treaties. While some commentators suggest more specific enumeration of investors' substantive rights is required,³³³ others recommend completely deleting certain unclear terms.³³⁴ These commentators accept that arbitration is an appropriate forum for interpreting investment rights, but they prefer to give arbitrators specific guidance about the meaning and scope of governmental obligations. Both categories of suggestions are based upon the premise that the lack of textual determinacy in investment treaties is a mischief that makes the application of the rule in arbitration illegitimate.³³⁵

Legislative reformers are correct that Sovereigns could more precisely define substantive rights if they wished to further enhance textual determinacy. To some extent, this is already happening when Sovereigns negotiate investment treaties. For example, many investment treaties prohibit "discrimination," but then go on to define "discrimination" so as to give guidance about the type of governmental distinctions that are offensive as a matter of public international law.³³⁶ Likewise, given the confusions thus far about the interpreta-

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

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

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

336. U.S.-Czech Republic BIT, *supra* note 153, arts. 1(1)(f), 2(2)(b) (prohibiting

tion of phrases such as “fair and equitable treatment,” in the latest U.S. Model BIT, the United States has taken the bold step of defining standards more precisely.³³⁷ The renegotiation of thousands of investment treaties would obviously be a mammoth undertaking and, therefore, is an impractical solution at present.³³⁸ The more realistic option is, in the future, to provide particularized guidance about the meaning of ambiguous rights, such as “fair and equitable treatment” and the so-called “umbrella clause,” which have resulted in inconsistent arbitral awards.

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

2. The Barrier Building Approach

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

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

337. Amended U.S. Model BIT, *supra* note 6, art. 5.

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

339. This approach also does not address the legitimacy of the arbitration mechanism itself.

340. For instance, in the context of NAFTA, various commentators have noted that provisions of Chapter 11 leave abundant room for interpretation. *See* Afilalo, *supra* note 1, at 4; Dhooge, *supra* note 87, at 283; Price, *NAFTA*, *supra* note 55, at 109; Soloway, *supra* note 335, at 13; *see also* Bernardo M. Cremades & David J.A. Cairns, *The Brave New World of Global Arbitration*, 3 J. World Invest. 173, 194-95 (2002) (looking at the standard for expropriation and noting how the breadth of the standard creates uncertainty).

claims—particularly claims with public health or environmental implications.³⁴¹ The “barrier building” reforms run across a broad gamut but usually require investors to obtain some kind of governmental approval. At the more flexible end of the spectrum, investors would be required to submit their dispute to preliminary governmental examination and request for approval to an investor’s own government. This approach seems to have found some champions in Congress, notably former presidential candidate John Kerry.³⁴² A tougher approach is to have government ministers serve as “gatekeepers.” This approach gives more than one government an opportunity to reject an investor’s claim, even if it might otherwise be colorable as a matter of law.³⁴³ An even more rigorous approach involves the wholesale rejection of investor-Sovereign dispute resolution,³⁴⁴ and a return to the old mechanism where investment disputes were brought on a Government-to-Government (“G2G”) basis.³⁴⁵ These recommendations are

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

342. Some politicians have suggested to the Bush Administration that the government screen requests for arbitration, while others have urged that the government reject such a screening procedure. Letter from Max Baucus (D-Mont.), Senate Finance Committee Chairman, to Robert Zoellick, U.S. Trade Representative (Mar. 26, 2002), reprinted in *Baucus Welcomes Options Administration Is Considering on Investor-State Disputes*, 20 Int’l Trade Rep. (BNA), at 529 (Jan. 2, 2003). But see 148 Cong. Rec. S4298-02 (daily ed. May 14, 2002) (statement of Sen. Grassley) (stating that “[c]ritics of the investment provisions insist that the investor-State dispute settlement process has somehow run amok. Not true”); Grassley Urges Zoellick to Reject Government Screening for Investor Suits, Int’l Trade Daily (BNA), Apr. 1, 2002, available at <http://www.bna.com>. Senator John Kerry proposed amendments to the Andean Trade Preferences Act which would require investors to seek governmental approval to bring arbitrations and give Sovereigns the right to prohibit arbitration where claims lack “legal merit.” S.A. 3430, 107th Cong., 148 Cong. Rec. S4505-93 (2002) (Kerry Amendment to H.R. 3009).

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

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

345. See Lerner, *supra* note 308, at 289-90 (suggesting that, in denial of justice cases brought under NAFTA, disputes be resolved under chapter 20, which permits the resolution of G2G disputes). Some commentators recommend a wholesale return to G2G dispute resolution, while others suggest that perhaps only categories of claims

designed to redress concerns about the mischief caused by investors bringing unmeritorious claims, which arguably have a detrimental impact on sovereignty and a Sovereign's ability to pass legislation affecting their citizen's health, safety, and public morals.³⁴⁶ This concern is driven, in part, by concerns about determinacy and coherency—namely, a Sovereign having advance notice of the potential scope of their legitimate regulatory authority.

The “cure” for this supposed “ill,” however, neither stands up to scrutiny nor addresses the core problem it wishes to solve. Investment treaties do not trespass unnecessarily on sovereignty. Sovereigns choose to enter into investment treaties.³⁴⁷ In order to obtain the benefits arising from investment treaties, Sovereigns negotiate treaties and determine what rights they will cede and the responsibilities they will undertake. If Sovereigns wish to cede less sovereignty, Sovereigns should do so during negotiation. Moreover, investment treaties need not apply wholesale, and sensitive legislative areas are often carved out from the substantive protections provided by BITs.³⁴⁸ Investment treaties do not prevent Sovereigns from passing legislation

should be subject to G2G dispute resolution. Compare Daniel R. Loritz, *Corporate Predators Attack Environmental Regulations: It's Time to Arbitrate Claims Filed Under NAFTA's Chapter 11*, 22 Loy. L.A. Int'l & Comp. L. Rev. 533, 548 (2000) (suggesting the wholesale abandonment of investor-to-state arbitration and a return to G2G arbitration), with Beauvais, *supra* note 8, at 294 (arguing for the “radical” solution of only permitting “certain classes of claims, such as those raising serious public policy issues” to be resolved in a G2G setting).

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

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

348. For example, certain sensitive sectors can be carved out from the substantive protections granted in treaties. See U.S.-Czech Republic BIT, *supra* note 153, at annex I (permitting the U.S. to carve out insurance, energy and power production, banking, and telecommunications from the national treatment guarantees); U.S.-Poland BIT, *supra* note 77, at annex I (same); OECD, *supra* note 12, at 4 (describing the methods for making exceptions and exemptions in investment treaties); Saamir Elshihabi, *The Difficulty Behind Securing Sector-Specific Investment Establishment Rights: The Case of the Energy Charter Treaty*, 35 Int'l Law. 137, 137 (2001) (explaining that many investment treaties outline specific exceptions to national treatment and typically fall within strategic sectors such as defense, energy, or telecommunications). But see Gustavo Vega C. & Gilbert R. Winham, *The Role of NAFTA Dispute Settlement in the Management of Canadian, Mexican and U.S. Trade and Investment Relations*, 28 Ohio N.U. L. Rev. 651, 682-83 (2002) (noting that even though Mexico exempted areas from NAFTA, it has nevertheless opened for investment in industries related to railroads, telecommunications, satellite transmission, as well as banking and petrochemicals).

related to health, safety, and welfare.³⁴⁹ Rather, these treaties provide incentives for Sovereigns to act in a manner that does not violate public international law and is free from inappropriate expropriation, discrimination, and the like. Should they violate the obligations they have undertaken, Sovereigns pay compensation for the resulting harm.

If the real goal of the barrier builders is to discourage frivolous lawsuits,³⁵⁰ there are other methods to address this concern. International arbitration tribunals are not shy about making costs orders.³⁵¹ Cost sanctions can be applied either during a case or after an award to discourage vexatious litigation.³⁵² As litigation can easily cost more than U.S. \$1 million a year,³⁵³ having to pay for two sets of lawyers is a significant deterrent to bringing or defending unmeritorious claims. More importantly, addressing this concern does not require modification to the current investment arbitration regime. It requires parties to investment arbitration to be stalwart in their requests for costs and for tribunals to become more active in shifting the costs of the arbitration to those bringing frivolous claims.³⁵⁴

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

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

351. See John Yukio Gotanda, *Awarding Costs and Attorneys’ Fees in International Commercial Arbitrations*, 21 Mich. J. Int’l L. 1 (1999) (describing the various national laws and institutional rules that permit cost shifting, noting that arbitral tribunals shift cost but suggesting that clearer rules on cost shifting would permit more effective cost awards).

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

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

354. See *infra* notes 393-96 and accompanying text (suggesting that the modification of institutional rules might also be helpful in this respect to provide additional

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

guidance). In the context of commercial arbitration, Knull and Rubins suggest certain mechanisms would minimize abuse of procedure and foster use of arbitration. These suggestions include: (1) cost shifting and other sanctions to prevent non-meritorious claims and post-award conduct, (2) security for costs, (3) placing monetary limitations that would set a minimal amount to trigger the right to appeal, (4) minimizing the scope of review based upon the issue in dispute, and (5) waiver of judicial remedies to request vacatur or oppose enforcement. William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 Am. Rev. Int'l Arb. 531, 559-63 (2000). While the first two may well prevent the bringing of non-meritorious claims, the last three will not necessarily remedy the harm caused by inconsistent arbitration awards. Generally, they promote finality and do not provide an opportunity to correct "wrong" decisions or provide explanations to reconcile inconsistent decisions.

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

356. See Dhooze, *supra* note 87, at 284-85 (suggesting that public policy issues should be "immunized" from investor-state dispute resolution but noting that the definition of "public policy" would be difficult).

357. Alvarez & Park, *supra* note 14, at 400.

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

In any event, investment arbitration is governed by rules and applicable law; when functioning properly, the substantial likelihood is that the process will not be abused and legitimate regulatory activity will not be undercut.³⁵⁸ While investors and Sovereigns may wish the system to become more determinate and coherent, there are better methods for achieving these worthwhile goals than by prescribing the wrong antidote for investment arbitration's present malady.

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

Some commentators reject the idea that arbitration is an appropriate way to resolve investment disputes and instead advocate returning these disputes to a public forum. These suggestions vary across a broad spectrum. At one end are those who would permit investors to bring claims—but only before national courts—perhaps similar to the manner in which issues are resolved in the European Union.³⁵⁹ At the other end of the spectrum are those who would replace investor-Sovereign arbitration with a mechanism that would require such claims to be brought before a permanent judicial body, perhaps akin to the International Court of Justice.³⁶⁰

358. Price, *Some Observations*, *supra* note 60, at 427-28.

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

360. A standing court might resemble the European Court of Justice or the U.S.-Iran Claims Tribunal. Professor Michael Reisman, focusing primarily upon a permanent bi-national tribunal similar to the U.S.-Iran Claims Tribunal, imagined a court with a limited and stable membership, capable of promoting the development of a consistent doctrine, and ensuring transparency of the decision-making process. W. Michael Reisman, *Control Mechanisms in International Dispute Resolution*, 2 U.S.-Mex. L.J. 129 (1994). Reisman suggests a single international arrangement, and notes that even where there is a complex free trade regime between multiple political economies, such a tribunal might “provide a degree of consistency to decisions.” *Id.* However, Professor Reisman also suggests that where there is a complex free trade regime between multiple political economies, the need for such a tribunal might be even more greatly enhanced as it would “provide a degree of consistency to decisions.” *Id.* at 136-37; see also Nigel Blackaby, *Public Interest and Investment Treaty Arbitration*, in *International Commercial Arbitration: Important Contemporary Questions* (Albert Jan van den Berg ed., 2002) (advocating for a permanent judicial body to decide investment disputes, which should be composed of eminent practitio-

The critiques from "arbitration rejecters" are twofold. First, they reject the use of arbitrators as decision makers because they believe arbitrators are biased,³⁶¹ unaccountable,³⁶² lack pedigrees that promote legitimacy³⁶³ and, therefore, have little incentive to come to reasoned decisions. Second, they express concern about the lack of public participation in a mechanism that decides public rights. As a result, the arbitrators and their process cannot be trusted and are, therefore, unable to provide a legitimate dispute resolution mechanism. While

ners with an equal balance from capital-importing and capital-exporting states); Loritz, *supra* note 345, at 548-59 (suggesting that NAFTA should be re-drafted to provide for a *supranational* court to adjudicate all investment disputes); Joint ABA/CBA/BM Working Group on Dispute Settlement et al., *Report on Dispute Settlement Procedures in the North American Free Trade Agreement*, 27 Int'l Law. 831, 832-33 (1993) (advocating the creation of a North American Trade Tribunal to adjudicate NAFTA disputes but in the context "NAFTA's Terms" and not antidumping and countervailing duty disputes). The difficulty with these suggestions is that they place individual agreements in a vacuum and fail to promote interpretive determinacy and coherence for the same or similar standards in different investment treaties.

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

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

363. *See* Abbott, *supra* note 303, at 308 (describing problems with "private arbitrators ruling on critical questions of public health," but noting that on at least one case involving an issue of access to justice, one of the arbitrators was Judge Abner Mikva, characterized as a distinguished jurist by Professor Abbott). The appointment of someone of Judge Mikva's stature is not an isolated incident, however. *See infra* notes 371-75 and accompanying text.

these are important considerations, they do not withstand scrutiny and also create legitimacy issues with their "cure" to investment arbitration's ills.

In order to ensure the legitimacy of investment arbitration, decision makers who will be safeguarding interpretive determinacy must themselves be recognized as legitimate.³⁶⁴ There is little merit, however, to the suggestion that arbitrators should not decide investment disputes because they are biased and unaccountable decision makers.³⁶⁵ There are specific mechanisms to address difficulties related to arbitrator bias. In particular, there are rules that allow arbitrators to be challenged and removed when they are not independent or impartial.³⁶⁶ Arbitrator bias and misconduct are also grounds for challenging arbitration awards.³⁶⁷ Further, there are mechanisms that already address the purported unaccountability of investment arbitrators. First and foremost, arbitration awards are subject to scrutiny on a variety of levels by institutions³⁶⁸ and courts.³⁶⁹ Equally as important is the im-

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

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

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

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

368. When an award is issued by the ICC, including awards under investment treaties, the ICC is required to review awards and can—and often does—subject it to a set of criticisms that can change aspects of the award. ICC Rules, *supra* note 81, art. 27; Eric A. Schwartz, *The Resolution of International Commercial Disputes Under the Auspices of the ICC International Court of Arbitration*, 18 Hastings Int'l & Comp. L. Rev. 719, 723-24 (1995); see also W. Laurence Craig et al., *International Chamber of Commercial Arbitration* 377-80, 379 n.4 (3d ed. 2000) (describing the ICC review process and noting that some have suggested that the ICC court's review powers could be very broad); Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. Rev. 469, 501 n.142 (1998) (quoting Gary B. Born, *International*

pect of the “arbitrator marketplace” where professional credibility and word-of-mouth recommendations play a role in both the appointment and re-appointment of arbitrators.³⁷⁰ In multi-million and multi-billion dollar disputes, parties will not accept an arbitrator who is likely to be challenged for bias, who cannot fully consider the facts and laws at issue, and who may be incapable of rendering an enforceable award. As a result, many of the arbitrators in investment treaty cases are of the highest international order³⁷¹ and are distinguished former judges,³⁷² respected scholars³⁷³ and practitioners³⁷⁴ as well as

Commercial Arbitration in the United States 13 & n. 57 (1994)) (noting the ICC “[c]ourt’s review is in theory non-substantive, but has sometimes been viewed as touching on the merits of the decision”).

369. As described above, there are a variety of options to requesting annulment, seeking vacatur, or challenging enforcement. *See supra* Part III.

370. *See* Coe, *Taking Stock*, *supra* note 1, at 1437 (describing the hope that arbitrators have of future appointments and the “word-of-mouth” process in the “arbitrator marketplace”); Jan Paulsson, *Ethics, Elitism, Eligibility*, J. Int’l Arb., Dec. 1997, at 14 (noting that “[w]hatever their motivation, arbitrators tend to want to be *reappointed*” and that “[t]here is simply no international cabal working to protect mediocre cronies” (emphasis in original)). The world of investment treaty arbitration arbitrators is quite small, however, and in the context of a larger group of arbitrators (i.e., consumer arbitration in the United States), the same degree of self-regulation may not be present.

371. *See* Paulsson, *supra* note 370, at 19-20 (noting that distinguished individuals who have left judicial, diplomatic, and other careers have become highly sought after and well respected arbitrators).

372. For example, Sir Anthony Mason, A.C., K.B.E., is the Former Chief Justice of the High Court of Australia, has served as an arbitrator in various ICSID and investment treaty cases. *See* List of Pending Cases, *supra* note 108 (noting that Sir Anthony is the President of the *Loewen v. United States* tribunal and is sole arbitrator in *CDC plc v. Republic of the Seychelles*). Likewise, Judge Stephen Schwebel, former U.S. Judge of the International Court of Justice, has served on various cases related to investment treaties. *See id.* (noting that Judge Schwebel is an arbitrator in the *Soufraki* case); *see also* Stockholm Award, *supra* note 155; [naftalaw.org](http://www.naftalaw.org), Homepage, at <http://www.naftalaw.org> (last visited Feb. 4, 2005) (noting that Judge Schwebel was an arbitrator in the *Mondev* case). Another example of an experienced and desired arbitrator is Charles N. Brower, a former Judge from the U.S.-Iran Claims Tribunal, who has been an arbitrator in a variety of cases. *See* List of Pending Cases, *supra* note 108 (noting that Judge Brower has been appointed as an arbitrator in the *Telefónica S.A.* case, the *ADC Affiliate Limited* case, and the *Siemens A.G.* case); *see also* [naftalaw.org](http://www.naftalaw.org), Homepage, at <http://www.naftalaw.org> (last visited Feb. 4, 2005) (noting that Judge Brower was an arbitrator in the *Ethyl* case).

373. Professor Prosper Weil is a distinguished French academic at Université de Droit, d’Économie et de Sciences Sociales de Paris and has served on various investment treaty cases. *See* ICSID, List of Concluded Cases, at <http://www.worldbank.org/icsid/cases/conclude.htm> (last visited Jan. 22, 2005) [hereinafter List of Concluded Cases] (noting that Professor Weil was on the *AES* case, the *Goetz* case, and the *Tokios Tokelés* case). Likewise, Professor James Richard Crawford is an International Law Chair at Cambridge and has served on various ICSID tribunals. *See id.* (noting that Professor Crawford was an arbitrator in the *SGS v. Philippines* case, and the *JacobsGibb* case); *see also* [naftalaw.org](http://www.naftalaw.org), Homepage, at <http://www.naftalaw.org> (last visited Feb. 4, 2005) (noting that Professor Crawford was an arbitrator in the *Mondev* case). Professor Andreas Loewenfeld, a professor of international law at New York University, has also been appointed in several investment cases. *See* List of Pending Cases, *supra* note 108 (describing Professor

former government officials or others who have worked with international organizations.³⁷⁵ There is also the possibility that arbitrators might be liable for inappropriate conduct.³⁷⁶ These significant checks minimize the risk of bias and unaccountability and weigh heavily in favor of a conclusion that international arbitrators are legitimate decision makers who can promote justice through the proper application of law.³⁷⁷ Moreover, the unique core benefits of arbitrators such as flexibility,³⁷⁸ expert decision making,³⁷⁹ speed,³⁸⁰ and enforceability³⁸¹ would be lost by rejecting arbitration out of hand.

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

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

375. Mr. Daniel M. Price is currently a partner at Sidley Austin Brown & Wood LLP, but previously served as the USTR Principal Deputy General Counsel, where he negotiated trade and investment agreements with the former Soviet Union, Eastern Europe, and Latin America, and was the lead negotiator on investment issues in the NAFTA. See List of Pending Cases, *supra* note 108 (noting that Mr. Price is an arbitrator in the *Tokios Tokelés* case). Mr. Lloyd N. Cutler was an arbitrator in the London Award. See *supra* note 71. Mr. Cutler is currently Senior Counsel at Wilmer Cutler Pickering Hale and Dorr LLP; prior to that, he served as White House Counsel to President Clinton and President Carter, Special Counsel to the President on Ratification of the Salt II Treaty, the President's Special Representative for Maritime Resource and Boundary Negotiations with Canada, and was the Senior Consultant, President's Commission on Strategic Forces.

376. See Franck, *supra* note 49.

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

378. Parties can tailor the arbitration mechanism to their particular problem. This often increases the efficiency of the proceedings, and may yield a level of cost effectiveness not found in court proceedings.

The second criticism of arbitration rejecters—namely the nonpublic nature of the current arbitration system—merits more attention and does, on the surface, suggest that bringing disputes to a public forum promotes legitimacy. Having national courts decide investment disputes would, in some respects, promote transparency and interpretive determinacy as decisions would be made in public before a publicly accountable body.³⁸² Indeed, it would go a long way towards providing one of the fundamental building blocks of legitimacy—namely representation, in a fair and democratic manner, of those affected by a decision.³⁸³

Transparency is not necessarily best served by placing disputes in a traditional “public” forum. There are no international standards of transparency for national courts, and levels of transparency differ. For example, unlike the United States, in England and Wales, although court hearings may be public, documents produced during discovery are deemed confidential until relied on in court.³⁸⁴ Given this divergence, if transparency of the decision-making process is the ultimate objective, expressly defining the parameters of transparency in an investment treaty’s dispute mechanism is a more effective means of promoting transparency than sending disputes to a variety of national courts with different standards.³⁸⁵

At first blush, sending disputes to a public body seems likely to enhance legitimacy by promoting public scrutiny. Having to sue a Sov-

379. Parties can select arbitrators that may have a particular professional background or area of expertise that will facilitate the resolution of disputes. It is often helpful in a technical area to have commercial expertise on a panel so as to minimize the costs associated with “educating” the tribunal on a complex area of law.

380. Resolving investment disputes through a set of ad hoc tribunals can increase the speed of decision making as the arbitrator’s sole mandate is to resolve the single dispute for which the ad hoc tribunal was formed. Even though arbitrators may have busy diaries, they typically have more time to resolve disputes, whereas an entity such as the ICJ already has a full docket of public international law disputes.

381. Compared with mechanisms such as mediation, conciliation, and ICJ determination, the ultimate award is relatively enforceable and has limited grounds for attack. See Beauvais, *supra* note 8, at 254; Rubins, *Judicial Review*, *supra* note 92.

382. Afilalo, *supra* note 1, at 42-43.

383. Junne, *supra* note 311, at 191, 214-15.

384. Civil P. R. of England and Wales, pt. 31.22; see also Mark L. Tyler et al., *Electronic Discovery Issues: Disclosure Requirements in Britain, Canada & Australia*, 65 Def. Couns. J. 208, 212-13 (1998) (noting that the position is similar in Australia and Canada). The underlying principle is that although the existence of proceedings and the hearing of proceedings are a public matter, documentation disclosed between the parties and not produced to the court remains private and outside of the scope of the public interest in understanding the outcome of those proceedings. See Katsuya Uga, *Development of Concepts of “Transparency” and “Accountability” in Japanese Administrative Law*, 1 U. Tokyo J.L. & Pol’y 25, 25-26 (2004) (noting the recent developments regarding transparency in Japanese law).

385. Likewise, if one was to create a treaty that would establish a freestanding court to decide investment disputes in the first instance, it would be important to define the scope of transparency properly. See *infra* Part VI.A (describing how rules could be modified in investment arbitration to promote transparency).

ereign in the Sovereign's national court is unlikely to promote legitimacy, however, as the integrity of the judges in certain national courts may create problems with interpretive determinacy where judges are perceived to be unfair, ineffective, or unable to conduct themselves in accordance with the correct legal procedures. Specifically, judges may either be perceived to be biased or may actually favor the Sovereign over foreign investors. By putting "domestic courts on the front line,"³⁸⁶ investors would be exposed to the vagrancies, eccentricities, and perceived "home field advantages"—and presumably the local interests—of municipal courts.³⁸⁷ Even in the European Union ("EU") model, there is a tendency for national courts to support national governments; and this is why even the EU has found the national court model, in isolation, does not work.³⁸⁸ These perceptions of neutrality and fairness are the precise concerns that neutral arbitral tribunals were designed to promote.³⁸⁹

A free standing arbitral court affiliated with the ICJ comes closer to creating a workable solution. The judges could be a more balanced and neutral set of decision makers with a stable membership. This solution does not necessarily overcome the difficulties related to the perceived bias of decision makers, however. Judges, like arbitrators and all other human beings, carry their personal experiences, cultural background, and political preferences with them. Political factors have, for example, been important variables in ICJ cases such as the "notorious" split opinion concerning the legality of the use of nuclear weapons or refusal to answer the World Health Organization's request for an advisory opinion on such weapons.³⁹⁰ Moreover, limiting the first-instance decision makers to a narrow set of judges has particular consequences. It eliminates the flexibility of the process that permits the inclusion of technical expertise,³⁹¹ which facilitates perceptions of fairness and permits parties to psychologically "buy-in" to the arbitration. It also prevents parties from choosing among the unlim-

386. See Dodge, *supra* note 252, at 577.

387. See Coe, *Taking Stock*, *supra* note 1, at 1417-18.

388. This exemplifies why the European Union approach also requires the creation of an appellate body. Afilalo, *supra* note 1, at 41-43.

389. A panel of three neutral individuals, where personal prejudices can be balanced out by fellow co-arbitrators, is surely more legitimate than one national judge.

390. Threat of Use of Nuclear Weapons, 1996 I.C.J. 226, 265-67 (July 8); Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 66, 84 (July 8); see also Alvarez, *supra* note 56, at 418-19 (describing a variety of cases in which the effect of politics contributed to decisions from the ICJ).

391. For example, if the dispute involves the interpretation of a Spanish language document, a tribunal would benefit by having at least one member of a panel with a Spanish language background. See Coe, *Domestic Control*, *supra* note 132, at 203 n.120 (noting that NAFTA tribunals often have unique expertise, including a considerable background in international arbitration, fluency in a principal language, and substantial familiarity with the substantive law).

ited roster of persons, which might otherwise permit a dispute to advance quickly and could thereby delay the administration of justice.

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

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

4. Building Arbitration Safeguards

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

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

a. *Reform of Arbitration Rules*

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

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

of Arbitral Awards proposed by luminaries such as the one advocated by former ICJ Justice Stephen Schwebel. Judge Brower, *supra* note 305; *see also* Judge Howard M. Holtzmann, *A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards*, in *The Internationalisation of International Arbitration: The LCIA Centenary Conference 109* (Martin Hunter et al. eds., 1995) (suggesting an appellate framework that would require creation of a court to review enforcement of international arbitration awards); Judge Stephen M. Schwebel, *The Creation and Operation of an International Court of Arbitral Awards*, in *The Internationalisation of International Arbitration*, *supra* (agreeing with Judge Holtzmann and setting out a more specific framework for the creation of an International Court of Arbitral Awards). The difficulty with such proposals is that they would also include analysis of commercial arbitration awards under the New York Convention. This is inappropriate as the policy concerns in investment treaty arbitration (i.e., an undeveloped body of case law, public international law rights, and transparency of process on issues that impact public policy) are not as fundamental in the private commercial setting. Resolving a contractual dispute between two private parties on a commercial issue with a developed and consistent body of case law where there may be an ongoing commercial relationship to preserve with confidentiality, is fundamentally different than evaluating a government environmental regulation under a public international law analysis that could potentially impact the economy, health, and/or welfare of an entire country. These important differences require a fundamentally different approach when addressing issues impacting investment treaty arbitration.

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

394. This might also help address Sovereigns’ concerns about the consistency of procedure. Legum, *supra* note 90, at 146-47.

could, in turn, form the basis for revisions of, or supplements to, current institutional rules. For example, ICSID could amend its Additional Facility Rule 53(3) to indicate that, in the case of investment treaty arbitration, parties are deemed to consent to publication of the award.³⁹⁵ Similarly, the ICC or SCC would make minor amendments to their rules, which might, in the case of investment arbitration, permit amicus participation and publication of awards. In an effort to provide disincentives for the bringing of unmeritorious claims, institutions might also consider revising cost-shifting rules to give tribunals clearer direction regarding when cost shifting is appropriate.³⁹⁶

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

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

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

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

forms related to expanding public access and transparency for public issues.

b. *The Free Trade Commission Approach*

Another option for promoting legitimacy is to initiate corrective safeguards to minimize the impact of runaway tribunals. Commentators have recommended incorporating a built-in control mechanism in investment treaties—a Free Trade Commission (“FTC”) that will issue interpretive guidance about the meaning of investment rights—to enhance legitimacy that some commentators suggest should be incorporated into other investment treaties.³⁹⁸ NAFTA, for example, has a Free Trade Commission, made up of trade ministers from the three NAFTA Sovereigns, to issue binding interpretations that become part of the applicable law.³⁹⁹ This guidance-giving mechanism could arguably aid in the prevention of inconsistent decisions and creation of coherent doctrine. Using a FTC approach, on a treaty-by-treaty basis, individual FTCs could quickly⁴⁰⁰ issue binding interpretations to establish common meanings and a unified jurisprudence.⁴⁰¹ Such a centralized mechanism would reduce incoherency and protect investment expectations of investors⁴⁰² and regulatory prerogatives of Sovereigns.⁴⁰³ As there may be difficulty in securing the agreement of multiple Sovereigns to the exact text of an Interpretive Note, as a practical matter, this mechanism may be used infrequently and is akin to an “emergency escape route” in areas of acute incoherence.

Despite the promise of this “elixir,” commentators suggest the FTC mechanism is inappropriate. Arguing that NAFTA parties have thus far used Interpretive Notes in a nonpublic,⁴⁰⁴ self-serving⁴⁰⁵ manner

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

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

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

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

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

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

404. Various commentators have noticed with some dismay that the process of issuing the Interpretive Note was conducted entirely in private without an opportunity for

that has exceeded their authority,⁴⁰⁶ they suggest that Interpretive Notes debilitate the system rather than help achieve the desired legitimacy.⁴⁰⁷

The FTC model is useful in the respect that it can promote interpretive determinacy and a coherent body of jurisprudence. By failing to seek the input by those who are impacted by the Interpretive Note, however, the NAFTA parties failed to offer fair treatment and representation to investors. The critics are correct to note that the manner in which the mechanism has been used calls into question the legitimacy of the FTC's authority and application of its power. As the core concern appears to be how the FTC exercises its authority, the solution is to place limits on unfettered discretion to promote the legitimate use of power.⁴⁰⁸ Such limitations might be akin to the checks and balances in administrative law under the United States Administrative Procedures Act, which was designed to promote transparency and prevent arbitrary, capricious acts that amount to an abuse of discretion.⁴⁰⁹ In practice, this might mean that Sovereigns could render Interpretive Notes after an opportunity for notice and comment so that they can consider the impact of their decisions; alternatively, it might mean that issuing Interpretive Notes could be subject to review should it amount to an abuse of discretion or an excess of authority.

notice and comment by investors, third parties or international law experts. See Brower, *Structure*, *supra* note 128, at 82; Weiler, *A Play*, *supra* note 140.

405. See Brower, *Structure*, *supra* note 128, at 82 (explaining that the interpretations have been used to "gratify narrow self-interests"); see also Paterson, *supra* note 359, at 110 (suggesting that the authority of the Free Trade Commission could be "a route for political interference in tribunal decisions").

406. In particular, the criticism is that the Interpretive Note was an ultra vires amendment of NAFTA rather than interpretive guidance for tribunals to follow. For example, commentators and arbitrators have noticed that there is a difference between "international law" and "customary international law," and the Interpretive Note's conclusion that the two phrases mean the same thing is somewhat suspect. Brower, *Structure*, *supra* note 128, at 78-79; see also Pope & Talbott v. Canada, Award on Damages ¶¶ 21, 47 (2002) [hereinafter Pope & Talbott Damages Award], at <http://www.naftalaw.org>; Methanex, Second Opinion of Professor Sir Robert Jennings (2001), at <http://www.naftalaw.org>; Weiler, *NAFTA Investment Arbitration*, *supra* note 267, at 429. While the distinction between interpretation and amendment can be subtle, the degree of speculation regarding the Note's appropriateness suggests, at a minimum, the appearance of impropriety. There is some concern that where the Free Trade Commission exceeds its authority in issuing an Interpretive Note, an arbitral tribunal has the authority to reject the note. See Pope & Talbott Damages Award, *supra*. This issue has not yet been definitively considered by an arbitral tribunal.

407. See Shapren, *supra* note 16, at 349 (suggesting that the value of the Free Trade Commission cannot be decided until the Interpretive Note's effect has been established); see also Thomas Franck, The Powers of Legitimacy, *supra* note 310, at 79 (noting that "gains in a rule's legitimacy . . . tend to be dissipated, in practice, when the application of the standard ends up with unilateral, self-serving exculpatory interpretations of those rules by interested parties").

408. Alvarez & Park, *supra* note 14, at 398; Brower, *Structure*, *supra* note 128, at 93.

409. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-559, 701-706 (2000)).

These mechanisms have been tried and tested in the United States as an appropriate method for balancing legitimate regulatory needs of Sovereigns against the commercial concerns of the governed. Should a similar mechanism be incorporated into future investment treaties, it could aid transparency and result in Interpretive Notes that promote coherence and determinacy. But should Interpretive Notes continue to be used in a problematic manner, the "quick fix" offered to restore jurisprudential coherence may do more harm than good in the long run.

c. Establishment of an Appellate Body

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

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

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

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

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

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

414. See *supra* Part IV.

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

416. See, e.g., Chile FTA, *supra* note 6, at annex 10-H; see also 19 U.S.C. § 3802(b)(3)(G)(iv) (2000) (requiring, in granting the President his trade promotion au-

be to provide a public forum for the review of public disputes and create a determinate and coherent jurisprudence. In their seminal piece suggesting reforms for international commercial arbitration, William H. Knull, III and Noah D. Rubins argue an appellate body is necessary in "bet the company" international disputes.⁴¹⁷ The reasoning applies with even more force in "bet the country" disputes, particularly if certain arbitration users (Sovereigns) have little faith in the dispute resolution mechanism⁴¹⁸ and can terminate investment treaties.⁴¹⁹

By having a small and stable membership, an appellate body could focus on establishing a clear and coherent body of law and "correcting legal errors in specific cases";⁴²⁰ meanwhile arbitral tribunals can use their expertise and focus on their own institutional competency: developing a factual record, clarifying issues in dispute, and applying legal principles. Together this means an appellate body could restore faith in the system, promote consistency, provide predictability, and reduce the risk of inconsistent decisions to make the system sustainable and legitimate in the long term.

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

thority, that future trade agreements have "an appellate body or similar mechanism to provide coherence to the interpretation of investment provisions in trade agreements").

417. Knull & Rubins, *supra* note 354, at 531, 559-61.

418. One of Knull and Rubin's primary critiques of commercial arbitration is that it does not address the concerns of arbitration users, specifically corporate counsel. Analyzing empirical evidence, they note that fewer business people are willing to use arbitration because it is unpredictable and offers few opportunities to redress unfair decisions. *Id.* at 532 n.5. However, the difficulty with the empirical evidence used lies in the fact that a large segment of those surveyed were U.S. business people; only a very small segment of those polled were of the international business community. See David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* 7 (1998) (explaining that their study was performed on "general counsel or chief litigators for the Fortune 1000 corporations in the United States"). Likewise, in the second study referred to by Knull & Rubins, fifty United States and European lawyers were polled, many of whom were not corporate counsel, but themselves avid users of international arbitration. Knull & Rubins, *supra* note 354, at 532. As a result, the sample is unlikely to be a reliable indicator of the concerns of corporate counsel. See Christian Bühring-Uhle, *Arbitration and Mediation in International Business* 403-15 (1996) (describing the results of a survey on arbitration in international business disputes). Nevertheless, these studies do suggest that Sovereigns are more likely to have confidence in, and more likely to participate in, an arbitration system where they believe there is predictability and the opportunity to redress unfair decisions. See Caron, *supra* note 413, at 48-49 (describing an encounter where a general counsel was distressed when there was no opportunity to appeal in an adverse decision involving a million dollar investment dispute).

419. See *supra* note 31 (describing a Sovereign's ability to end investment agreements).

420. Brower, *Structure*, *supra* note 128, at 92.

NAFTA or a specific investment agreement. One commentator suggests that a NAFTA Appellate Body could be composed of Chief Justices of the Mexican, Canadian, and United States Supreme Courts.⁴²¹ Another commentator has suggested that ad hoc arbitral tribunals be used to provide appellate review of investment arbitration awards.⁴²² Others have suggested the establishment of an appellate body affiliated with a recognized international institution to provide plenary review for investment arbitration awards.⁴²³

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

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

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

422. Noah Rubins, *Observations of Noah Rubins*, in Stockholm Arb. Rep., 2003, at 202 n.25 (2003), at http://www.sccinstitute.com/_upload/shared_files/artiklar/tjeckiska_republiken.pdf; *see also* Knull & Rubins, *supra* note 354 (describing the creation of an appellate tribunal in the context of commercial arbitration).

423. Brower, *Structure*, *supra* note 128, at 91; *see also* Afilalo, *supra* note 1, at 42-43, 52-53 (observing that (1) there is no "NAFTA court" charged with developing and applying the law and therefore, there is only a minimal judicial framework to insure the uniform interpretation of NAFTA and (2) recommending that a NAFTA appellate tribunal could render written, reasoned opinions with precedential value to contribute to the development of the law); Paterson, *supra* note 359, at 123 (suggesting the consideration of "an appellate body . . . to determine questions of law under NAFTA").

Moreover, as a series of ad hoc appellate tribunals could come to inconsistent decisions about an existing inconsistent decision, this exacerbates the challenge of creating a coherent jurisprudence. While it does provide a further check on the discretion of arbitral tribunals, there are more effective mechanisms for promoting the overall objective of legitimacy.⁴²⁴

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

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

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

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

from a court of first instance to one which reviews arbitral awards. As a result, it may be more useful to establish an appellate body organized under the auspices of an independent and internationally recognized but underutilized institution,⁴²⁷ the Permanent Court of Arbitration at the Hague (the "PCA"),⁴²⁸ which could oversee a separate chamber for the review of investment treaty awards and appoint judges with the requisite experience and background. Organization under the PCA may be particularly useful as it already permits disputes between private parties and Sovereigns.⁴²⁹

VI. NEW METHODS FOR ADDRESSING INCONSISTENT DECISIONS

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

335, 336-38 (1995) (noting that the ICJ has played no significant role in resolving aviation disputes). *But see* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77; Vienna Convention on Consular Relations (Para. v. U.S.), 1988 I.C.J. 99 (Apr. 9), available at <http://www.icj-cij.org/icjwww/idecisions.htm>; Jehanne E. Henry, *Overcoming Federalism in Internationalized Death Penalty Cases*, 35 Tex. Int'l L.J. 459, 480 (2000) (describing how the Convention on Consular Relations has been used to give ICJ jurisdiction and allow for the review of capital punishment decisions in the United States); Schwebel, *supra* note 392, at 119-20 (noting that the ICJ's predecessor, the Permanent Court of International Justice, "examined three appeals from arbitral awards").

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

428. The PCA was established by the July 29, 1899 signing of the Hague Convention for the Pacific Settlement of International Disputes. See *The Hague Conventions and Declarations of 1899 and 1907*, at 41 (James Brown Scott ed., 1915).

429. Redfern & Hunter, *supra* note 113, at 58.

430. It was acknowledged during treaty negotiations that certain standards were vague, and the assumption was made that the meaning of the standard would develop through arbitration. See Vandeveld, *supra* note 9, at 76 (explaining that the obligation to provide "fair and equitable treatment" is "vague and its precise content will have to be defined over time through treaty practice, including perhaps arbitration under the disputes provisions" (internal quotations omitted)).

sence of any previous interpretation of [a treaty] and the lack of sufficiently clear or consistent indications from prior international practice"⁴³¹ can create significant difficulties.⁴³² Even NAFTA, the most litigated investment treaty, has not yet established a "mature jurisprudence" but after ten years, "substantive trends" are beginning to emerge.⁴³³

The fact is that investment awards are not technically precedential.⁴³⁴ The ICJ Statute suggests that tribunals should not rely on private arbitral decisions⁴³⁵ as binding authority,⁴³⁶ and while arbitral tribunals do consider each other's opinions, there is no guarantee that the reasoning or conclusions will be determinative in later cases.⁴³⁷ As

431. See *Holiday Inn v. Cameroon* ICSID (W. Bank) Case No. ARB/81/2, ¶ 118 (1981), reprinted in 1 ICSID Rev.-Foreign Investment L.J. 90 (1986) (expressing concern about the application of the ICSID Convention in one of the first ICSID annulment proceedings).

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

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

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

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

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

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

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

437. See *Philippines Award*, *supra* note 239, ¶ 97 (noting that the ICSID Convention only provides that awards are "binding on the parties" and further explaining that "there is no doctrine of precedent in international law" and "no hierarchy of international tribunals" and that there is "no good reason for allowing the first tribunal

a practical matter, however, private investors, governments, and arbitral tribunals rely on previous awards to interpret similar provisions in investment treaties.⁴³⁸ As explained by Professor David A. Gantz, it is a “common practice” for private investors and governments to refer to prior investment tribunal decisions that appear to favor them, and it is inevitable that arbitral tribunals interpreting similar provisions of investment treaties will consider and follow those previous decisions.⁴³⁹ Indeed, the result is sensible as—when dealing with issues of first impression—investors and Sovereigns alike will consult a variety of sources when evaluating their potential rights and liabilities. This also explains, for example, why NAFTA jurisprudence has an immense sphere of influence⁴⁴⁰ that other tribunals are willing to consider.⁴⁴¹ Indeed, as long ago as 1946, Kenneth Carlston explained that “the pronouncements of international tribunals are of equal value from the standpoint of the development of a system of international jurisprudence.”⁴⁴²

The current system of creating ad hoc, disparate decisions on related issues of public international law must be unified. “Getting it right” is essential to an area where there is little analogous jurispru-

in time to resolve issues for all later tribunals”); *see also supra* notes 431-37 and accompanying text (describing the lack of stare decisis in investment arbitration).

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

439. *See* Gantz, *The Evolution*, *supra* note 12, at 689.

440. Coe, *Taking Stock*, *supra* note 1, at 1397.

441. *See id.* at 1409 (describing how arbitrators are willing to consult the “reasoning of other NAFTA tribunals” and how, at times, this yields a more uniform result); *see also* Alvarez, *supra* note 56, at 406-07 (describing “the rise of de facto stare decisis” and the “impact of international precedents”) (emphasis added); Mann, *supra* note 74, at 41 (describing the impact of previous arbitration awards and noting that “previous cases will always play an important part in practice in a Tribunal’s decision-making process, even if they are not legally binding on them”). *But see* Philippines Award, *supra* note 239, ¶ 97. The tribunal noted that

although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State.

Id.

442. Carlston, *supra* note 48, at 264.

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

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

A. Preventative Solutions

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

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

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

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

445. See Beauvais, *supra* note 8, at 285-86 (noting that certain standards under NAFTA, namely articles 1102 and 1105 “merit much greater attention than they have yet received in the literature”).

apparently contradictory awards.⁴⁴⁶ Without such direction, however, the dispute resolution process will be subject to increasing criticism and in danger of losing its integrity, particularly where the legitimate expectations of investors and the international obligations of Sovereigns are at stake.

Arbitral tribunals have already consulted the writings of academics and other distinguished publicists as a result of a need to find reasoning, authority, and legitimacy,⁴⁴⁷ and arbitration specialists have cried out for further academic analysis to bridge the gap between theory and practice.⁴⁴⁸ A thorough, probing, and reasoned analysis of the jurisprudence and the development of a coherent doctrine will spur debate and help achieve a level of coherence that will promote the legitimacy of investment arbitration. In particular, given the increasing importance of the rights granted under investment treaties and the inconsistencies in the current jurisprudence, scholarship is needed to evaluate how concepts such as "fair and equitable treatment" and the "observation of commitments" are applied in private arbitrations. Commentators can then consider whether previous awards were decided correctly, provide guidance to resolve contradictions within the jurisprudence, and suggest how standards should be applied in the future. With proper guidance and information, arbitrators may be in a better position to resolve disputes in a more considered, uniform, and predictable manner, and lawyers can give their clients more reliable advice. In this manner, scholarship can establish norms of interpretation to reintroduce certainty.

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

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

448. When asked whether academic scholarship can contribute to investment arbitration, several respected investment arbitration practitioners—who have represented both investors and Sovereigns—resoundingly supported the need for further academic commentary. See Blanch Interview, *supra* note 66 (noting that scholarship contributes to the public dissemination of information and debate and that scholars are uniquely situated to distill and analyze investment arbitration and provide tactical and strategic thinking); Jagusch Interview, *supra* note 66 (explaining that scholarship can contribute "a vast amount" and "provide valuable guidance" because tribunals "tend to rely heavily on scholarly writings, particularly when the arbitrators are the first to decide important matters of principle"); Pinsolle Interview, *supra* note 66 (stating that scholarship can contribute "a lot!" to investment arbitration); Reed Interview, *supra* note 66 (explaining that scholarship provides "critical analysis of the developing jurisprudence of awards").

Improving investment arbitration through scholarship is particularly attractive as it does not require mustering the political will of Sovereigns, investors, and NGOs; it depends entirely on the willingness of commentators to enter the fray, offer analysis, and provide clarity. While some scholars have already begun this process,⁴⁴⁹ others should continue to pursue this fruitful area to prevent inconsistency before it occurs—particularly as scholarship is a form of persuasive authority as a matter of international law.⁴⁵⁰

This may only be half of the battle, however, as commentators need access to awards and underlying materials to critique decisions and reconcile inconsistent awards. Other incremental measures would therefore be necessary to prevent inconsistent decisions. While this Article discussed some of these options earlier in the review of the literature,⁴⁵¹ other “legislative” amendments might also prove useful. For example, individual investment treaties could specify a neutral place of arbitration. This approach would minimize the perceived unfairness of one aspect of “forum shopping.” It would also help increase certainty as the courts and their national standards for vacating awards would be identified at the outset. By minimizing the number of venues where awards could be subject to attack, this would also decrease the possibility of mixed interpretations by national courts. This approach also permits Sovereigns to identify a neutral place of arbitration where the local judiciary have international law and arbitration experience, which would also further minimize the risk of deviations among national courts. While identifying the place of arbitration would require a treaty-by-treaty modification,⁴⁵² there would not be one single court to review vacatur issues. Although this inevitably introduces variations into the review process, overall, identification of

449. See, e.g., Stephen Vascianne, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 Brit. Y.B. Int'l L. 99 (1999) (concerning the concept of “fair and equitable treatment” in investment treaties and international investment law); see also Andrea K. Bjorklund, *Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence*, in *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* 253 (Todd Weiler ed., 2004) (conducting an extensive analysis about the exhaustion of local remedies requirement, which has been an area of inconsistency in recent arbitration awards).

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

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

452. This would, in part, arise out of the need to preserve the neutrality of the place of arbitration. Not all countries are likely to see the same venue as “neutral” and disconnected with the interests of each Sovereign nation entering into an investment agreement.

place of arbitration reduces the current level of risk and provides greater legitimacy to the process.⁴⁵³

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

Although arbitration awards do not have precedential value and thus, some might suggest disclosure of these awards and their underlying materials⁴⁵⁵ would be harmful, this argument cannot stand. First, as a practical matter, attorneys rely upon the existence of published awards to provide advice to their clients, evaluate their rights and obligations, and minimize uncertainty. In particular, attorneys advising investors on the structure of their investments will consider how the decisions might affect an investor's potential rights and its best investment strategies; likewise, attorneys advising governments about the feasibility and their potential exposure to liability for planned regulatory conduct will look to published awards when considering the best way to implement legitimate policy choices. This reliance is understandable as the decisions are, of course, the best available evidence about the future risks and obligations for investors and Sovereigns alike. Having a more transparent system where both groups can make choices in a predicable context will bolster the legitimacy of investment treaties and the arbitration process. Second, further publication of awards will enhance a tribunal's ability to consider more fully the legal issues in their own case. At present, many tribunals consider the reasoning and analysis contained in previous awards. This is a welcome development and should be encouraged; rational distinctions based on reasoned decisions enhance arbitration's coherence and promotes justice. Third, subjecting awards to public scrutiny is another check on the discretion of a private body which provides an in-

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

454. See Andrea K. Bjorklund, *The Participation of Amici Curiae in NAFTA Chapter Eleven Cases*, at <http://www.dfait-maeci.gc.ca/tna-nac/participate-en.asp> (Mar. 22, 2002).

455. It would also be necessary to provide public access to the written pleadings and other submissions. Without such information, award analysis would occur in a vacuum. The insights from commentators are likely to be more probing, developed, and advanced if they are based upon the substantive documents that form the award's foundation. Perhaps in acknowledgement of this fact, the Amended U.S. Model BIT provides for disclosure of such documents. Amended U.S. Model BIT, *supra* note 6, art. 29(1).

centive for thorough, considered, and well-reasoned awards. Tribunals should also have the ability to consider submissions from amici curiae or interested third parties. In this manner, tribunals will be able to consider alternative arguments from interested individuals and evaluate more fully the public implications of their decisions. Particularly when dealing with public policy issues where third parties could be adversely impacted by a tribunal's award, having greater information and submissions which reflect the interests of an interested body can improve the decision-making process. Further, giving those impacted by the dispute a chance to be represented and participate in the outcome enhances the fairness of the process and makes the ultimate award more palatable.

Although the suggested transparency is more difficult to accomplish than academics deciding individually to contribute to the literature, these revisions could be accomplished in two relatively straightforward manners. First, as suggested above,⁴⁵⁶ arbitration rules could be amended to provide for broader transparency in investment treaty cases. Second, Sovereigns negotiating investment treaties could add specific provisions to the dispute resolution mechanism that would permit enhanced transparency. As these sections of the treaty are essentially glorified arbitration agreements, there is nothing (except a Sovereign's own policy choices and the treaty negotiation process) to prevent the inclusion of broader public participation. Using these simple mechanisms will go a great way to providing an incremental improvement to investment treaty arbitration and enhancing its justice-promoting objectives.

B. *Establishing an Investment Arbitration Appellate Court*

Arbitrators inevitably create "new international law" founded on the norms present in investment treaties when they apply the substantive rights in investment treaties to the facts of actual disputes.⁴⁵⁷ A single, unified, permanent body charged with developing international law and creating consistent jurisprudence will promote legitimacy more than disaggregated arbitrations that come to different conclusions on the same issue.⁴⁵⁸ Such a body—composed of an established

456. See *supra* Part V.B.4.a.

457. Parra, *Provisions*, *supra* note 21, at 361.

458. See, e.g., Coe, *Taking Stock*, *supra* note 1, at 1449 (noting that an appellate body that can construe provisions common to many BITs would have benefits beyond those in NAFTA). While concerns related to finality and (hopefully) faster and cheaper dispute resolution feature prominently in the context of domestic arbitration, as a functional matter, these concerns do not apply as strongly in the context of international investment arbitration. Unlike domestic commercial cases, there is an underdeveloped academic case law and a limited body of precedent upon which to draw in the context of investment treaty disputes; investment rights have implications on the capacity of sovereign governments who need to regulate and legislate; and there are implications upon the public as the rights do not purely impact private commercial

group of respected decision makers that is detached from municipal concerns and analyzing similar standards—will enhance the probability of centralization and standardization without as readily arousing questions about neutrality and independence.⁴⁵⁹ The important question that remains is the following: what mandate should such a body have and what form should it take?

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

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

Considering treaties in isolation is an inappropriate method for resolving rights that implicate other investment treaties. The fundamental oversight in focusing on individual treaties is that the legitimacy of

transactions. While there is no question that an appellate mechanism would sacrifice a degree of finality, the more important issue is whether the degree of finality sacrificed is worth the long term gain in the increase of correct and legally defensible decisions that will promote integrity and efficiency within the overall system.

459. *Id.* at 1447.

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

461. Jose E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. Miami Inter-Am. L. Rev. 303, 304 (1997).

462. Coe, *Taking Stock*, *supra* note 1, at 1397.

463. See Gantz, *The Evolution*, *supra* note 12, at 687 (noting that business interests hope to maintain broad NAFTA protections because a weakening in NAFTA language might have implications for U.S. investor rights under a number of BITs); see also Coe, *Taking Stock*, *supra* note 1, at 1391-92 (explaining that a “crude but descriptive portrayal of [NAFTA's] Chapter 11 is that it is a bilateral investment treaty (BIT) inserted into a multi-lateral free trade agreement”).

an investment treaty network is based on the coherence of treaty jurisprudence as a whole. Given the overwhelming similarity of the rights promulgated in investment treaties, it is vital to make a comprehensive effort to harmonize and clarify the development of these standards. Similar provisions of related investment treaties should be analyzed and applied in similar ways; likewise, where decisions appear contradictory, rational bases that consider the network as a whole can create valid bases for distinction. This process promotes clarity throughout the network and permits the articulation of a reliable body of international economic and public international law. Such uniformity promotes the confidence of the investment arbitration system.⁴⁶⁴ If this point is overlooked, however, the decentralization of decision making and ad hoc adjudications will produce further variations in approach and principle.⁴⁶⁵

If there had been an opportunity for a reviewing court to address the inconsistencies in both the *Lauder* and *SGS* cases, the logical inconsistencies in the cases could either be corrected or explained. This means there is a need for an international body to provide appellate review and legal guidance on the meaning of rights contained in investment treaties; but there is no international court at present to meet this need. For this reason, this Article proposes that a single Investment Arbitration Appellate Court be created to permit the review of all investment arbitration awards for errors of law and legal interpretation. This standard could, for example, be similar to the legal review permitted by the European Court of Justice or the World Trade Organization.⁴⁶⁶ Like domestic appellate courts in common law coun-

464. See Weiler, *NAFTA Investment Arbitration*, *supra* note 267, at 407.

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

466. The Appellate Body of the World Trade Organization has a Dispute Settlement Understanding, which provides that “[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.” Marrakech Agreement Establishing the World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Annex 2, Legal Instruments—Results of the Uruguay Round vol. 31, 33 I.L.M. 1226 (1994) [hereinafter DSU]. Article 168(a) of the European Community Treaty and article 51 of the Statute of the European Court of Justice (“ECJ”) limit ECJ appeals on points of law. Treaty Establishing the European Community, Feb. 7 1992, art. 168a(1), O.J. (C224) 1 (1992); Protocol on the Statute of the Court of Justice of the European Eco-

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

nomic Community as Amended by Council Decision of 24 October 1998, Establishing a Court of First Instance, in *Basic Community Laws 222-23* (Bernard Rudden & Derrick Wyatt QC eds., 6th ed. 1996). In contrast, ICSID's discussion paper also proposes a review for "serious errors of fact." ICSID Secretariat, *supra* note 395, at annex 4. Even if errors of fact were narrowly defined, this trespasses unnecessarily on the fact findings of the arbitral tribunal. The tribunal is in a position to have heard the evidence first hand and to have assessed the credibility of material witnesses. As an appellate body, it would not have the same intimate connection with the facts, thus giving them the power to correct "serious errors" of fact seems inappropriate. In contrast, giving an appellate court the authority to review errors of law fits within its particular institutional competence: the rendering of coherent legal decisions. One issue, however, which has not been addressed is whether it may be necessary to provide a check within the appellate system to prevent a flood of appeals. It may, for example, be useful to make arbitration discretionary, such that the appellate court will have the opportunity to decide whether to take an appeal, instead of wholly relying upon a dissatisfied party to bring a claim. Such a check might, for example, take the form of United States Supreme Court Rule 10, which provides that appeal is not a matter of right but will be granted for "compelling reasons" related to conflicting discussions on an important matter. Sup. Ct. R. 10.

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

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

469. Some may express dissatisfaction with the approach as it takes away "grey areas" that might otherwise be used during the arbitration process. This concern should not withstand scrutiny. Investors and Sovereigns actually benefit from review of legal issues. As a practical matter, the enhanced certainty from legal review will permit investors to construct their investments more effectively. Particularly at the transactional stage, they will know what specific provisions, for example, they will need to negotiate into their contracts and what protections they should seek in their political risk insurance. See Export Credit Guarantee Department ("ECGD"), *Products and Services*, at http://www.ecgd.gov.uk/index/ps_home/overseasinvestment/overseasinvestment_oii.htm (last visited Jan. 22, 2005) (offering political risk insurance to U.K. investors); Multilateral Investment Guarantee Agency ("MIGA"), *Overview of MIGA's Investment Guarantee Services*, at <http://www.miga.org/screens/services/guarant/guarant.htm> (last visited Jan. 22, 2005) (offering political risk insurance to qualifying foreign investors);

Such a court, however, should not review awards for issues of due process and proper procedure. These considerations can and should be addressed effectively through the mechanisms currently available in the New York, Panama, and ICSID Conventions, which have a long and established jurisprudence.⁴⁷⁰ Although the precise mechanism to clarify the scope of these conventions and their interaction with an Investment Arbitration Appellate Court may require additional international instrument(s),⁴⁷¹ any such court should not disturb some of the most successful international conventions of all time.

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

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

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

471. See *supra* notes 457-69 and accompanying text (describing the mechanisms under which an Arbitration Appellate Court could be organized).

rights in investment treaties, not to render final and binding awards that apply the law to the facts. Requiring cases to be remanded to the tribunal will allow the arbitrators to use their unique factual knowledge to apply those facts to the proper legal standards. It also permits amended awards to become enforceable in the same manner, for example, as final awards under the New York Convention.⁴⁷²

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

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

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

472. This should by-pass the issue of whether a decision of the Arbitration Appellate Court would itself need to be deemed an arbitration award for the purposes of the New York Convention.

473. See Luke Eric Peterson, *All Paths Lead out of Rome: Divergent Paths of Dispute Settlement* (2002), available at www.iisd.org/pdf/2003/investment_nautilus.pdf; see also Charles N. Brower, *NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA*, 97 Am. Soc'y Int'l L. Proc. 251, 252-63, 257 (2003) (expressing concern about NAFTA's “transparency deficit,” but noting improvements).

Permanent Court of International Arbitration could prove very useful. In the context of suggesting the creation of a similar court, Judge Howard M. Holtzmann suggested that a court could be located in the Hague so as to benefit from the administrative expertise and physical facilities of the Permanent Court of Arbitration as well as the great library resources available at the Peace Palace.⁴⁷⁴

The membership of such an appellate body would be fundamental as it is an indicator of the authority and legitimacy of the decision makers. Ideally, the parameters for appointment would be debated publicly to give interested parties—such as investors, Sovereigns and NGOs—the opportunity to voice their concerns and ensure the appointment of the most appropriate set of individuals. The standard for appointment for the ICJ Statute might form a starting point. The ICJ statute requires the election of judges that represent “the main forms of civilization and the principal legal systems of the world.”⁴⁷⁵ More definition would prove useful, however, to promote the perception that the appointment process is fair and the decision-makers are appropriate. For example, it might also be worthwhile to codify the informal “gentlemen’s agreement” that ensures the membership will broadly and transparently mirror the membership of the U.N. Security Council⁴⁷⁶ or some other type of geographical mix. Specifically, to retain its perceptions of legitimate authority, appellate judges should come from a variety of backgrounds, and the mix would fairly need to represent both developed and developing countries. The standards for appointment should also enumerate the qualifications of judges to ensure a mix of expertise in areas such as arbitration, economics, investment law, and public international law. In addition, to ensure the legitimacy of the decision makers, it might also be able to require “judicial” expertise by calling for members of the court to have acted previously as arbitrators, judges in the first instance, or appellate judges. These agreed standards could then be articulated in the convention or other agreement which establishes the appellate court.

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

474. Holtzmann, *supra* note 392, at 114.

475. ICJ Statute, *supra* note 52, art. 9, 59 Stat. at 1056; *see also* Merrills, *supra* note 53, at 137 (noting that the importance of this standard “can hardly be over-emphasised” because it contributes to the legitimacy of the ICJ and promotes adequate representation).

476. Schwebel, *supra* note 392, at 117.

eleven.⁴⁷⁷ This will promote proper geographical representation, help to balance out competing cultural backgrounds, and improve the quality of the deliberations without unduly eliminating quality arbitrators from the pool of those who could make decisions in the first instance. As suggested by Judge Stephen M. Schwebel in a slightly different context, judges could be appointed for a fixed term—perhaps for ten years—to ensure that there is some consistency of the decision makers and foster the emergence of a coherent doctrine.⁴⁷⁸ It would also be useful for judges at the appellate court to be bound to standards of judicial conduct in the same manner as other members of the international judiciary.⁴⁷⁹ This promotes confidence in the neutrality, independence, and the integrity of the judges.

There is no doubt that the implementation of such an Investment Arbitration Appellate Court would be a challenging undertaking, particularly as Sovereigns are unlikely to renegotiate the over 2100 investment treaties currently in existence.⁴⁸⁰ Nevertheless, the increased legitimacy that is gained by having a supervising body cannot be overlooked or underestimated. There are two opportunities to create such an appellate court. First, such a mechanism could be established in conjunction with negotiating high-level regional multilateral agreements—for example, the Free Trade Agreement of the Americas, which is currently under consideration. Using this opportunity would not create coherence with all the worldwide investment treaties, but

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

478. Schwebel, *supra* note 392, at 117.

479. *See, e.g.*, Int'l Law Ass'n/Project on Int'l Courts and Tribunals, Study Group on the Practice and Procedure of International Courts and Tribunals, Pre-final Text on Judicial Independence: The Burgh House Principles on the Independence of the International Judiciary, at <http://www.pict-pecti.org> (last visited Jan. 22, 2005).

480. Blackaby, *supra* note 360, at 365.

could promote regional coherence to a much larger extent than other treaty-by-treaty approaches.

Second, a new international convention could be adopted to create the Investment Arbitration Appellate Court. While mustering the political will to enact and ratify such a convention might well prove taxing, it is by far the most practical approach as it would permit debate about the appropriate nature of an appellate body and rectify incongruities in the present system. Indeed, it would probably be more effective than the renegotiation of a network of 2100 treaties that might otherwise be required by a "legislative" approach. Creating an appellate system, for example, seems facially inconsistent with the ICSID annulment procedures. But as a review of legal issues and legal interpretation was specifically excluded from the ICSID Convention's annulment grounds, creating a separate mechanism to review legal errors could be squared with the system.⁴⁸¹ It would, however, need to be accomplished by way of a separate protocol which might, for example, permit appeals to the Appellate Body prior to permitting application for annulment. By implementing such an appellate body in a manner which is consistent with international law, but does not impinge on the enforcement mechanisms already in place, investment arbitration will ensure its long-term survival by creating a forum where diametrically opposed decisions can either be explained or corrected.

CONCLUSION

If investment treaty arbitration is to fulfill its promise, mechanisms must be implemented to promote greater sensitivity to the public interest and to minimize the risk of inconsistent decisions. Otherwise "investor/government arbitration may fall prey to public pressure arising from a backlash"⁴⁸² and suffer from crib death before it can struggle through its initial growing pains. By using several incremental mechanisms to prevent inconsistent decisions from arising, the legitimacy of the system can be improved. The ultimate utility of the system, however, will not be fully realized until an appellate court is created which permits correction of legal errors, which might otherwise inappropriately bankrupt developing nations, stifle legitimate regulatory activity, or deprive investors of their legitimate expectations. By using both preventative and corrective forces, arbitration can fulfill its justice-promoting objective and help the law develop in a harmonized and equitable manner.

481. By having a separate mechanism to review awards for errors of law, this may actually increase the probability that national courts in vacatur or enforcement proceedings will be likely to inquire into the merits of disputes.

482. Alvarez & Park, *supra* note 14, at 399.

Notes & Observations