THE NATURE AND ENFORCEMENT OF INVESTOR RIGHTS UNDER INVESTMENT TREATIES: DO INVESTMENT TREATIES HAVE A BRIGHT FUTURE

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The number of investment treaties has surged in the past decade.[1] Even now, the United States[2] and Canada[3] are actively engaged in programs designed to facilitate the completion of multilateral treaties such as the Dominican Republic-Central American Free Trade Agreement (CAFTA-DR)[4] and Bilateral Investment Treaties (BITs). These investment treaties act like economic bills of rights, which grant foreign investors substantive protections and procedural rights to facilitate investment.[5] Sovereigns, meanwhile, may benefit from these treaties by obtaining increased foreign direct investment, which may

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[1] *See* Susan D. Franck, *The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1522-23 (2005) [hereinafter Franck, *Inconsistent Decisions*] (noting that countries have entered into over five multi-lateral treaties and over 1500 of the approximately 2100 BITs in the last twelve years); United Nations Conference on Trade and Development, *Investment Instruments Online: About*, http://www.unctadxi.org/templates/Page____644.aspx [hereinafter UNCTAD] (stating that the "number of BITs has increased dramatically . . . to a total of 2,181 by 2002"); UNCTAD, *Press Release: Bilateral Investment Treaties Quintupled During the 1990s*, Dec. 15, 2000, TAD/INF/PR/077, http://www.unctad.org/Templates/webflyer.asp?docid=2655&intItemID=2023&lang=1.

[2] U.S. Department of State, *Fact Sheet: U.S. Bilateral Investment Treaty Program*, http://www.state.gov/e/eb/rls/fs/22422.htm (last visited January 8, 2006); U.S. Department of State, *Press Release September 28, 2004: United States, Pakistan Begin Bilateral Investment Treaty negotiations*, http://www.state.gov/e/eb/rls/prsrl/2004/36573.htm; *see also* United States Trade Representative, Trade Agreements, http://www.ustr.gov/Trade_Agreements/Section_Index.html (last visited January 8, 2006) (describing the various free trade agreements being negotiated).

[3] *See* International Trade Canada, *Regional and Bilateral Initiatives: Canada's Foreign Investment Protection Agreements (FIPAs)*, *at* http://www.dfait-maeci.gc.ca/tna-nac/fipa-en.asp (last visited January 8, 2006) (describing Canada's investment treaty negotiations with India, China and Peru).

[4] During this past summer, CAFTA-DR was the subject of a variety of debates before the U.S. Congress but was finally passed by Congress and signed into law on August 2, 2005. Adam Entous, *Bush Signs Central American Pact after Tough Fight*, Aug. 2, 2005, http://news.yahoo.com/s/nm/20050802/pl_nm/trade_cafta_usa_dc. CAFTA-DR involves the United States, the Dominican Republic, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. United States Trade Representative, *CAFTA Briefing Book*, http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/Section_Index.html; *see also* United States Trade Representative, CAFTA-DR Final Text, http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (providing the finalized text of CAFTA-DR) [hereinafter Multilateral Investment Treaties such as CAFTA-DR and NAFTA are often referred to as MITs.] The North American Free Trade Agreement (NAFTA) is another example of a multilateral treaty. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 612 (entered into force Jan. 1, 1994), *available at* http://www.sice.oas.org/trade/nafta/naftatce.asp [hereinafter NAFTA].

[5] *See infra* notes 22-28; Franck, *Inconsistent Decisions, supra* note 1, at 1529-33.

promote the development of their country's infrastructure[6] and offer citizens basic services including access to clean water, electricity and roads.

With the expansion of investor rights and remedies, the number of disputes has increased. Ninety-two claims have been filed by investors in the past three years, representing half of the aggregate historical claims filed under investment treaties.[7] These disputes have a significant financial impact. Claims pending against Argentina involve "billions and billions" of dollars,[8] and a recent $500 million claim brought by Texas farmers under NAFTA's Chapter 11 relates to Mexico's alleged failure to protect their water rights.[9]

As the disputes have evolved and been resolved, there has been remarkable consistency in some areas, such as jurisdictional determinations,[10] but marked inconsistency in others.[11] This inconsistency has given rise to questions about the legitimacy and reliability of the investment treaty dispute resolution process.[12] The

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[6] *See infra* note 16 (noting the debate in the literature as to whether BITs achieve their stated goal of fostering foreign direct investment).

[7] Franck, *Inconsistent Decisions*, *supra* note 1, at 1521-22; The UNCTAD Secretariat, *Issues Related to International Arrangements: Investor-State Disputes and Policy Implications*, TD/B/COM.2/62 (Jan. 14, 2005), *available at* http://www.unctad.org/ en/docs/c2d62_en.pdf [hereinafter *Policy Implications*].

[8] See Michael D. Goldhaber, *Big Arbitrations*, AM. LAWYER (Summer 2003), http://www.americanlawyer.com/focuseurope/bigarbitrations.html; *see also* Charles H. Brower II, *Counsel Comment: Reform Priorities at International Trade and Investment Institutions*, 21 AM. SOC'Y INT'L L. 6 (Aug./Oct. 2005) (indicating that "ICSID's docket comprises some 90 cases involving $25 billion, as opposed to five cases involving $15 million ten years ago").

[9] BNA, *NAFTA Water Dispute Between Texas, Mexico Headed For Binding Arbitration Austin*, July 13, 2005, http://pubs.bna.com/ip/BNA/ied.nsf/is/A0B1C6B9H0; Western Water News, *Texas Farmers File Formal Notice of NAFTA Violation — Seek Damages from Mexico for Failure to Deliver Treaty Water*, October 2004, http://www.argentco.com/htm/f20041001.535005.htm.

[10] There has been remarkable consistency in areas related to jurisdiction, for example, where multiple tribunals organized under different treaties in cases involving different parties and different facts have reached similar conclusions. *See, e.g., Occidental Exploration and Production Co. v. Ecuador*, Final Award, LCIA Case No. UN 3467, ¶ 51, July 1, 2004, *available at* http://ita.law.uvic.ca/documents/oxy-ecuadorfinalaward_001.pdf [hereinafter *Occidental* Award] (noting *Lauder*, *Genin*, *Auguas del Aconquija*, *CMS*, *Azurix*, and *Vivdendi* have reached similar conclusions about distinguishing between claims based upon treaty, contract or domestic legislation).

[11] Franck, *Inconsistent Decisions, supra* note 1, at 1558-82.

[12] Ari Afilalo, *Meaning, Ambiguity and Legitimacy: Judicial (Re-)Construction of NAFTA Chapter 11*, 25 NW. J. INT'L L. & BUS. 279 (2005); Charles H. Brower II, *Structure Legitimacy and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37 (2000) [hereinafter Brower, *Structure*]; Charles N. Brower, *A Crisis of Legitimacy*, 26

investment treaty dispute resolution system is in its infancy; and, arguably it is experiencing classic growing pains while it functions to the satisfaction of some and the dissatisfaction of others. In *Democracy in America*, Alexis de Tocqueville wrote that, the "entire man is, so to speak, to be seen in the cradle of the child."[13] Likewise, the future of investment treaties can be envisioned as we watch the dispute resolution process take its first baby steps. While there may be times during which this dispute resolution process will falter, trips and falls provide vital information about how to avoid pitfalls and learn to walk with a confident stride through the world of global investment.

The symposium for which this paper was written discussed the evolution of investment treaties, whether they achieved their desired goals, and the mechanics of enforcing investment rights. This panel asked a fundamental but speculative question: what does the future hold for investment treaties?

The future of investment treaties is intertwined with the future of investment treaty arbitration. Whether Sovereigns[14] follow the active approach of the United States in promulgating investment treaties or the abstention approach of Ireland[15] will depend in part upon the perceived benefits of the treaties — namely, whether foreign investors are perceived to have too many or two few rights in light of the other costs and benefits of entering into investment treaties.[16] But this

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NAT'L L.J. B9 (Oct. 7, 2002) [hereinafter Brower, *Crisis*]; 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 (2003) [hereinafter Brower, *FTAA*]; Franck, *Inconsistent Decisions, supra* note 1; Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301 (2004); *but see* Judith A.E. Gill, *Inconsistent Decisions: An Issue to be Addressed or a Fact of Life?*, 2 TRANSNAT'L DISP. MGMT. (Apr. 2005) (on file with author) (describing the difficulties caused by inconsistent arbitration awards but suggesting there are inconsistencies in court decisions and inconsistencies will be addressed over time).

[13] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 29 (Joseph Epstein ed., Bantam Classic Book 2000) (1835).

[14] For the purposes of this article, "Sovereigns" are sovereign national governments, which consent to be a party to an investment agreement.

[15] Ireland does not have an active investment treaty program. It is only a signatory to one BIT and one MIT. *See* Agreement Between the Czech Republic and Ireland for the Promotion and Reciprocal Protection of Investments, June 28, 1996, http://www.unctad.org/sections/dite/iia/docs/bits/czech_ireland.pdf [hereinafter Ireland/Czech Republic BIT]; Department of Foreign Affairs, *Irish Treaty Series: Treaty Series 2001*, http://foreignaffairs.gov.ie/treaties/irish-treaty-series-database.asp?yy=2001&dd=2000 (describing Ireland's entry into the Energy Charter Treaty); *see also* E-mail from Klaus Reichert, Irish Barrister, to Susan Franck, Assistant Professor of Law, University of Nebraska College of Law (July 28, 2005) (on file with author).

[16] The purported benefits of entering into treaties are the creation of enhanced

question raises two distinct issues. First, are Sovereigns content with the procedural rights they grant to investors in BITs? Second, are Sovereigns content with the substantive legal rights they have ceded in investment treaties? At present, these two distinct questions are being conflated. The procedural framework for resolving investment treaty disputes has fostered a certain ambiguity about the meaning and scope of substantive guarantees.[17] Until the mechanism for resolving investment treaty disputes is improved to offer a process that renders a clearer, more predictable and consistent doctrine about the scope and application of investment rights, Sovereigns will be inhibited from making an informed evaluation of the utility of entering into investment treaties.[18] Should Sovereigns be unable to make such an

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foreign direct investment and incentives to develop the internal market. The costs of entering into treaties come from an abrogation of sovereignty, and the possibility of fiscal remuneration to investors for conduct deemed to violate the treaty. Other factors may also affect the future of investment treaties, including whether the other purported benefit of BITs — namely the procurement of foreign investment — is realized. Scholars remain split on the issue of whether BITs actually promote foreign investment. Some scholars suggest that countries enter into investment treaties as a result of economic pressures and a desire to prevent neighboring countries from obtaining a competitive advantage in the international marketplace, whereas other scholars disagree. *See* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA J. INT'L L. 639 (1998); Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite*, (The World Bank Policy Research, Working Paper No. 3121, 2003), *available at* http://econ.worldbank.org/files/29143_wps3121.pdf (suggesting BITs only marginally impact decisions to invest abroad); *but see* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITS Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 111-12 (2005) [hereinafter Salacuse & Sullivan] (suggesting that the development of international investment rules in BITs has had the effect of encouraging new capital flows). Other scholars, including Andrew T. Guzman, Jennifer Tobin, Deborah L. Swenson, and Jason W. Yackee, addressed these issues in the symposium entitled "Romancing the Foreign Investor: BIT by BIT" held at the University of California at Davis, March 4, 2005.

[17] Franck, *Inconsistent Decisions, supra* note 1, at 1558-82 (describing various sets of inconsistent decisions which have created ambiguity about the meaning of substantive rights in bilateral and multilateral investment treaties); *but see* 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 (2003) (suggesting a variety of trends that are visible after ten years of heavy litigation on the same substantive rights provided in NAFTA).

[18] *See* Susan D. Franck, *International Decision: Occidental Exploration & Production Co. v. Republic of Ecuador. Final Award. London Court of International Arbitration Administered Case No. UN 3467. At <http://ita.law.uvic.ca/documents/oxy-ecuadorfinalaward_001.pdf>. Arbitral tribunal, July 1, 2004*, 99 AM. J. INT'L L. 675, 680-81 (2005) [hereinafter Franck, *International Decision*] (suggesting that where there is enhanced certainty about the meaning of investment rights, Sovereigns can make more informed decisions about which rights they provide investors).

informed choice, there may be significant dissatisfaction after the fact that may disrupt both investment and international relations.[19]

Remarks in this paper first summarize certain basic concepts related to investment treaty arbitration. Second, the remarks describe the difficulties related to inconsistencies that arise in the context of investment treaty arbitration and explain why these inconsistencies are more challenging than those that exist in traditional arbitration. Third, the remarks summarize a framework for considering how best to address problems created by these inconsistencies in investment arbitration. Viewed through the lens of how indirect, direct, and hybrid measures can promote consistency and systemic efficiency, this paper concludes that the approach of "safeguard builders" — those who promote the use of structural safeguards in investment treaty arbitration — most effectively and efficiently brings consistency, clarity and predictability to the meaning of substantive treaty rights. By using various safeguards to promote consistency in arbitral decision-making, a Sovereign can assess on a more efficient, systematic and reliable basis the sovereignty it cedes and the reciprocal rights it gains for its citizens when negotiating an investment treaty.

I. INVESTMENT TREATY ARBITRATION IN A NUTSHELL

A BIT is an agreement between two Sovereigns that safeguards the investments made by investors from each country in businesses or projects located in the other's territories.[20] These treaties have a common origin[21] and function, where Sovereigns offer investors basic guarantees in the hopes of procuring foreign investment within their

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[19] For example, dissatisfaction with awards has caused some countries to consider withdrawing from their international obligations or resulted in public hearings as to utility of foreign direct investment. *See infra* notes 54-55 (describing the situation in the Czech Republic); Franck, *International Decision*, *supra* note 18, at 680-81 (describing the situation in Ecuador).

[20] MITs, like NAFTA and CAFTA-DR, function essentially in the same way as BITs but provide investment protection on a multi-lateral basis. NAFTA Chapter 11, *supra* note 4 and CAFTA-DR Chapter 10, *supra* note 4. They differ in other respects, however, and may address issues beyond investment protection rights. For example, they typically address issues such as rules of origin, customs obligations, sanitary, and phyto-sanitary measures and cross-border trade in services. *See* NAFTA Chapters 4, 5, 7, 15 *supra* note 4 and CAFTA-DR Chapters 4, 5, 7, 11, *supra* note 4.

[21] While each individual treaty has distinct permutations, the substantive rights in BITs have originated and evolved from investment rights provided in treaties of friendship, navigation and commerce and unsuccessful multilateral treaties. Franck, *Inconsistent Decisions, supra* note 1, at 1526-27, 1618; Daniel M. Price, *Some Observations on Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 421, 423 (2000).

jurisdiction.[22] These rights consist of a variety of general guarantees to substantive standards of protection for their investments, including appropriate compensation for expropriation, freedom from unreasonable or discriminatory measures, guarantees of national treatment, assurances of fair and equitable treatment of investments, promises that investments will receive full protection and security as well as treatment no less favorable than that accorded under international law, and a Sovereign's commitment to honor its obligations.[23] These substantive guarantees create a new system of international rights and obligations for the signatories. As a practical matter, the substantive standards in BITs have become the fundamental source of international law in the area of foreign investment, displacing customary international law as well as, in some cases, relevant domestic law.[24]

BITs also provide procedural rights that permit the enforcement of the substantive rights. Generally, two different types of parties can bring claims related to an investment treaty. First, Sovereigns can bring claims where a dispute arises about the interpretation or application of the treaty. This typically requires Sovereigns to settle disputes diplomatically and, as a last resort, through arbitration.[25] Sovereigns infrequently utilize this option,[26] perhaps in part because

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[22] *See supra* note 14; Salacuse & Sullivan, *supra* note 16, at 75-79.

[23] Franck, *Inconsistent Decisions, supra* note 1, at 1529-1532; Salacuse & Sullivan, *supra* note 16, at 83-85; Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection* 265-75, *in* RECUEIL DES COURS 299 (1997). Investment treaties also tend to provide other rights such as matters related to monetary transfers and operational conditions of investment. Salacuse & Sullivan, *supra* note 16, at 79.

[24] Salacuse & Sullivan, *supra* note 16, at 70, 112-13. The specific relationship between BITs and customary international, in particular, is challenging. One might also suggest that BITs complement customary international law and perhaps are a main source of it. *See generally* Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327 (1994).

[25] Treaties typically provide that Sovereigns should first try to resolve their disputes through diplomatic means, but if a dispute cannot be settled, the matter will be decided through arbitration. *See, e.g.,* Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Singapore, U.K.-Sing., art. 9, July 22, 1975, http://www.unctad.org/sections/dite/iia/docs/bits/uk_singapor1978.pdf; Revised US Model Bilateral Investment Treaty, art. 37, Feb. 5, 2004, http://www.state.gov/documents/organization/29030.doc [hereinafter Revised US Model BIT].

[26] The author is aware only of two instances where the State-to-State dispute resolution provisions have been utilized to seek clarification of the issues at issue in the investor-State proceeding. *See* Bernardo M. Cremades, *Has the Proliferation of BITs Gone Too Far: Is it Now Time for a Multilateral Investment Treaty*?, 5 J. WORLD INVEST. & TRADE 89, 90-91 (2004) (describing the new development of requesting

little difference exists between this option and the traditional method of espousing investment-related claims before the International Court of Justice.[27] Second, investors can directly bring a claim against a Sovereign for violation of a treaty, functioning in a manner similar to private attorneys general in the protection of the public interest.[28]

Investors now regularly bring investment claims, in part because this direct action lets investors choose where they will bring their claims.[29] In what amounts to a sophisticated choice of forum clause, some treaties require investors to choose between litigating their treaty claims in national courts and arbitrating their investment claims before an arbitral panel in a neutral forum, such as the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC) or an *ad hoc* tribunal organized under the UNCITRAL rules.[30] Other treaties require investors to arbitrate their claims, but let the investors choose the arbitral body that will administer the dispute.[31]

State-to-State arbitration to interpret a BIT); Giorgio Sacerdoti, *Has the Proliferation of BITs Gone Too Far: Is it Now Time for a Multilateral Investment Treaty?*, 5 J. WORLD INVEST. & TRADE 97, 99 (2004) (noting that the Czech Republic approached The Netherlands for bilateral consultations related to disputed issues in the *Lauder/CME* arbitrations and describing "a new form of parallel litigation-to ask for State-to-State arbitration under a BIT in order to interpret the very clause of a treaty which is at issue in arbitration"); *but see Policy Implications*, *supra* note 7, at 4 n.3 (suggesting that the only State-to-State claim has been filed between Chile and Peru related to *Luccehetti v. Peru*).

[27] Franck, *Inconsistent Decisions, supra* note 1, at 1536-37.

[28] Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219 (2001); Franck, *Inconsistent Decisions, supra* note 1, at 1538; *see also* Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT'L L. REV. 465, 471 (2005) (explaining how, even though investors have not participated in the negotiation of an investment treaty, they may still enforce the treaty's protections).

[29] Investors may wish to bring direct claims against Sovereigns for a variety of reasons. First, investors no longer have to ask governments to espouse their claims and let their dispute resolution form part of a larger international relations dialogue. Second, investors receive any damages awarded for breach of the treaty, subject to any taxes which their home jurisdictions may withdraw from their accounts. Third, the enforcement mechanisms — particularly in the case of arbitration — are stronger. *See* Franck, *Inconsistent Decisions, supra* note 1, at 1536-38.

[30] Franck, *Inconsistent Decisions, supra* note 1, at 1541-42.

[31] Agreement Between the Arab Republic of Egypt and the Republic of Poland for the Reciprocal Promotion and Protection of Investments, Egypt-Pol., art. 8(2), July 1, 1995, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/egypt_poland.pdf (only permitting arbitration before a variety of institutions); Agreement for the Promotion and Protection of Investments, Gr. Brit.-Sing., art. 8, July 22, 1975, 1018 U.N.T.S. 175 (providing ICSID with exclusive jurisdiction over investment disputes), *available at* http://www.unctad.org/sections/dite/iia/docs/bits/uk_singapor.pdf. Other treaties, however, require the substance of the disputes to be decided before a national

Investors have overwhelmingly accepted Sovereigns' standing offers to arbitrate[32] and have brought their claims before arbitral tribunals, which provide a neutral forum for resolving disputes against a Sovereign and render awards with streamlined enforcement mechanisms.[33] The investor begins the process by submitting the requisite notice and request for arbitration. The investor and the Sovereign each select one arbitrator. Typically, the party-appointed arbitrators then together appoint a third arbitrator as a Chair. The claim resolution procedures then commence in earnest. The parties gather their evidence and make arguments in private; and the tribunal renders an award that is enforceable worldwide.[34]

II. THE IMPACT OF INCONSISTENCY

Investment treaty arbitration has a dirty little secret that is becoming less secret every day.[35] Different tribunals come to different

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court but the damages phase to be evaluated by an arbitral tribunal. Agreement Concerning the Encouragement and Reciprocal Protection of Investments, P.R.C.-Ghana, art. 10, Oct. 12, 1989, http://www.unctad.org/sections/dite/iia/docs/bits/china_ghana.pdf (providing the following: the quantum phase of certain investment disputes is subject to ad hoc arbitration; the Stockholm Chamber of Commerce [hereinafter 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").

[32] In Jan Paulsson's classic formulation analyzing the contractual nature of the arbitration agreement for investment treaties, the dispute resolution provisions in investment treaties constitute a unilateral offer for arbitration that the investor accepts by initiating arbitration. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.-F.I.L.J. 232 (1995); *see also* Coe, *supra* note 17, at 1393; Cremades & Cairns, *infra* note 86, at 184 (describing how the "right to initiate an investor-State arbitration is treaty based; normally there is no contract between the parties and the right is unilateral in that it can be exercised by the investor but not the State"); *see generally* Andrea K. Bjorklund, *Contract Without Privity: Sovereign Offer and Investor Acceptance*, 2 CHI. J. INT'L L. 183 (2001).

[33] The author is unaware of any case where an investor has elected to bring its investment treaty claims before a national court. While investors may bring their domestic law claims before domestic courts, once investors are made aware that they may have an international remedy before a neutral, international tribunal, investors tend to elect to arbitrate their treaty claims.

[34] Franck, *Inconsistent Decisions, supra* note 1, at 1543-1545.

[35] Michael D. Goldhaber, *Wanted: A World Investment Court,* AM. LAWYER (Summer 2004) [hereinafter Goldhaber, *Investment Court*], *available at* http://www.americanlawyer.com/focuseurope/investmentcourt04.html. Investment treaty arbitration generally has been coming out of the proverbial closet in the last five years. In a now famous formulation, a *New York Times* article described investment treaty arbitration in the following manner: "Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a group of international tribunals handles disputes between investors and foreign

results under nearly identical textual treaty rights. But why do these different results matter?

The World Bank's International Center for the Settlement of Investment Disputes,[36] the body administering the majority of investment treaty cases, as well as other groups[37] have remarked on several occasions on the need for consistency. Although arbitration awards do not technically have *de jure* precedential value,[38] some commentators suggest these awards should have precedential weight similar to that enjoyed by decisions of Mixed Claims Commissions or arbitration awards rendered by the U.S.-Iran Claims Tribunal.[39] In any

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governments can lead to national laws being revoked and environmental regulations changed." Anthony DePalma, *NAFTA's Powerful Little Secret*, N.Y. TIMES**,** Mar. 11, 2001, at C1; *see also* Public Citizen's Global Trade Watch Advertisement, *Fast Track Attack on America's Values*, WASH. POST**,** Dec. 5, 2001, at A5; Bill Moyers, *Transcript: Trading Democracy — A Bill Moyers Special*, http://www.pbs.org/now/transcript/transcript_tdfull.html.

[36] *See* International Centre for the Settlement of Investment Disputes, *Possible Improvements of the Framework for ICSID Arbitration*, ¶¶ 6, 21-23 (Oct. 22, 2004), *available at* http://www.worldbank.org/icsid/improve-arb.pdf [hereinafter ICSID White Paper] (suggesting it may be "desirable to ensure coherence and consistency in case law generated in ICSID and other investor-to-State arbitrations", describing the intent to "foster coherence and consistency in case law" noting there "clearly is scope for inconsistencies in the case law," and suggesting that changes designed to foster "[e]fficiency and economy, as well as coherence and consistency"); 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. — F.I.L.J. 287, 352 (1997) (remarking that the "scope for inconsistent decisions in regard to essentially the same issues is obvious").

[37] *See, e.g.*, International Institute for Sustainable Development, *Comments on ICSID Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration*," June 15, 2005, § 3.2, at 6 http://www.iisd.org/pdf/2004/investment_icsid_response.pdf [hereinafter IISD Comments] (explaining that consistency is "a critical goal" and that "[c]onsistency breeds predictability, itself an important goal for investors, governments and other stakeholders.").

[38] NAFTA, for example, expressly provides that arbitration awards are only binding between the parties. NAFTA, *supra* note 4, art. 1136(1), 32 I.L.M. at 646; *see also* Statute of the International Court of Justice, art. 34(1), June 26, 1945, 59 Stat. 2055, U.N.T.S. 993 [hereinafter ICJ Statute] (not expressly providing that arbitral decisions are a form of precedent in international law but setting out a hierarchy of other types of precedent, including "judicial decisions"); *but see* ICJ Statute, *supra,* at art. 59 (providing that "the decision of the [International] Court [of Justice] has no binding force except between the parties and in respect of that particular case").

[39] *See* KENNETH S. CARLSTON, THE ROLE OF ARBITRATION IN INTERNATIONAL LAW 264 (1946) (suggesting that the "pronouncements of international tribunals are of equal value from the standpoint of the development of a system of international jurisprudence"); 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

event, arbitrators tend to consider decisions from previous tribunals.[40] Practitioners, investors, and Sovereigns rely upon such decisions as *de facto* precedent and indicators of their potential rights and liabilities.[41] The OECD has confirmed that treaty awards "have a significant impact on the State's future conduct."[42]

As a result, legal inconsistencies in the area of investment arbitration affect foreign investment decisions, economic development, and foreign relations. For investors, this means investment uncertainty. Unable to minimize or even accurately assess the relevant

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that "may inform the law of expropriation"); *see also* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 589 (1987) [hereinafter Schauer, *Precedent*] (noting that "[e]ven without an existing precedent, the conscientious decisionmaker must recognize that future conscientious decisionmakers will treat her decision as precedent"); *but see* Thomas Carbonneau, *The Elaboration of Substantive Legal Norms and Arbitral Adjudication: The Case of the Iran-United States Claims Tribunal*, *in* R. LILLICH, ED. THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981-1983 104, 128 (1984) (suggesting that awards rendered by the US-Iran Claims Tribunal "have been essentially devoid of substantive legal content and, as a result, [are] incapable of having much precedential value"); STEPHEN J. TOOPE, MIXED INTERNATIONAL ARBITRATION 371, 375, 378, 382-83 (1990) (suggesting awards from the US-Iran Claims Tribunal "nowhere state expressly what sources of law are being applied," noting awards sometimes do not cite legal sources for their decisions," discussing the "political pressure" which can manifest itself in awards, and concluding that "it would be unwise and misleading to treat the substantive output of the Iran-US Claims Tribunal as highly persuasive authority in other third-party adjudications of conflicts between states and foreign private parties" although some decisions "are helpful in other contexts at least by way of analogy"). In the context of ICSID arbitrations, where most investment treaty disputes are decided, Professor Schreuer has written an authoritative commentary on the ICSID Convention. CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2001). While Professor Schreuer accepts that the doctrine of binding precedent does not apply between different ICSID tribunals, in analyzing how tribunals refer to and apply previous decisions, the major assumption of the treatise is that studying previous decisions is a worthwhile exercise because practices and principles are likely to be applied again. Gill, *supra* note 12.

[40] 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, 689 (2004); Coe, *supra* note 17, at 1397; s*ee also* Ricardo Olivera García, *Dispute Resolution Regulation and Experiences In MERCOSUR: The Recent Olivos Protocol*, 8 NAFTA L. & BUS. REV. AM. 535, 544 (2002) (noting tribunals' use of previous awards in the context of dispute resolution under MERCOSUR).

[41] *See* Franck, *Inconsistent Decisions, supra* note 1, at 1612; *see also* Gill, *supra* note 12 (noting that while there "is no doctrine of precedent in international law, in terms of one tribunal's decision being binding on a subsequent tribunal, but one only has to read the awards given in published cases to appreciate the degree to which in practice previous decisions are treated as soft precedent in a way that, again, does not usually happen in ordinary commercial arbitration").

[42] OECD, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures: Statement by the OECD Investment Committee*, June 11, 2005, http://www.oecd.org/dataoecd/25/3/34786913.pdf [hereinafter OECD Statement].

commercial risks, the investor is left in an unpredictable situation. As transaction costs increase, the investor may ponder the utility of foreign investment given the systemic inefficiencies.[43] For Sovereigns, these arbitral inconsistencies mean that governments cannot exercise their legislative and regulatory powers[44] without exposing themselves to a litigation risk.[45] Treaty claims amount to more than "bet the company" disputes; they often become "bet the country" disputes.[46] Economic and political stakes are high, and getting a correct, clear, and reliable outcome — one explainable to taxpayers who will pay the bill — is vital.[47]

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[43] For example, given the uncertainty of the scope of investment protection under BITs, investors may experience difficulty knowing what sort of political risk insurance they may need to purchase. Franck, *Inconsistent Decisions, supra* note 1, at 1620 n.469; *but see* Joanna Page, *Political Risk Insurance: Is It Worth It?*, TRANSNAT'L DISP. MGMT. (June 2005), http://www.transnational-dispute-management.com/news/tdm2-2005_4.pdf (suggesting that investment treaty claims may be "be wider, more effective, and, since no premium is payable, cheaper" than political-risk insurance).

[44] In some circumstances, governments have abandoned schemes to regulate traditional areas arguably because of concerns about investment treaty claims. For example, cigarette manufactures have used NAFTA to inhibit Canada from enacting anti-smoking legislation. Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 133 (2003). There has not been an empirical or systematic analysis of the potential "chilling" effect of investment treaties on government regulation.

[45] *See* United Nations Conference on Trade and Development, *Research Note: Recent Developments in International Investment Agreements*, UNCTAD/WEB/ITE/IIT/2005/1 at 15 (Aug. 30, 2005), http://www.unctad.org/sections /dite_dir/docs//webiteiit20051_en.pdf (noting that, irrespective of whether a Sovereign wins or losses a case, the cost of defending a claim can be quite substantial and can range from as low as $1 million to $13.8 million per year).

[46] *See* Goldhaber, *Investment Court*, supra note 35 (noting that the more than thirty claims brought by investors against Argentina related to the devaluation of the peso are easily worth $10 billion); *see also* Paolo Di Rosa, *The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background And Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 42-43 (2004) (describing thirty-five claims against Argentina and noting that millions of dollars are at stake); *Policy Implications*, *supra* note 7, at 4 (noting that 34 of the 37 cases pending against Argentina relate to its currency crisis).

[47] Franck, *Inconsistent Decisions, supra* note 1; *see also* Charles N. Brower et al., *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT'L 415, 424-28 (2003) [hereinafter Brower et al., *Global Adjudication*] (describing the problems of multiple and conflicting awards and quoting one commentator who said inconsistency is "absolutely ridiculous, and highly regrettable for the fact that it makes the law look so stupid"); *infra* notes 54-55 and accompanying text (describing the fall-out from the *Lauder* cases); Goldhaber, *Investment Court*, *supra* note 35 (describing the comments of Professor Brigette Stern related to the Argentina cases where "[y]ou have the potential . . . for 20 arbitrations, one problem, and 20 solutions."); Julia Ferguson, *California's MTBE Contaminated Water: An Illustration of the Need For an Environmental*

A. The Inconsistent Decisions

There have been multiple cases with either inconsistent reasoning or results. Inconsistencies in awards generally devolve from varying permutations in commercial situations, government conduct, and the text of the specific treaty right. However, while some divergences reasonably may be attributed to meaningful distinctions in situation, conduct, or text; many other cases nevertheless remain problematic.

Some tribunals have evaluated a similar textual provision in a similar commercial and governmental context, but nevertheless come to different conclusions about the existence, applicability, or contours of a claimed right.[48] Likewise, tribunals evaluating the same right in the same treaty — albeit in different commercial contexts — have rendered divergent rulings upon the meaning and scope of such a right.[49]

Interpretive Note on Article 1110 of NAFTA, 11 COLO. J. INT'L ENVTL. L. & POL'Y 499, 505 (2000) (suggesting that NAFTA's "lack of certainty for future regulators" is inappropriate).

[48] For example, in the *SGS* cases, SGS provided customs services to governments, such as Pakistan and the Philippines, under service contracts. There were problems under those contracts. SGS brought a claim against Pakistan under the Swiss/Pakistan treaty alleging a violation of the so-called "umbrella clause;" likewise, SGS brought a claim against the Philippines for a violation of a textually similar "umbrella clause" in the Swiss/Philippines BIT. The issue for both tribunals was whether the "umbrella clause" transforms a breach of contract into a breach of treaty. Essentially, one tribunal said "yes" and the other said "no." *See* Franck, *Inconsistent Decisions, supra* note 1, at 1569-74; Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID (W. Bank) ARB/01/13 (Decision on Jurisdiction) (Aug. 6, 2003), http://www.worldbank.org/icsid/cases/SGS-decision.pdf; SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID (W. Bank) ARB/02/6 (Decision on Jurisdiction) (Jan. 29, 2004), http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf. Likewise, there is confusion over whether a Most Favored Nation (MFN) provision permits investors to take advantage of additional rights and, if so, which rights. Maffezini v. Kingdom of Spain, ICSID (W. Bank) ARB/97/7, ¶ 64 (Jan. 25, 2000) (Decision on Jurisdiction), http://ita.law.uvic.ca/documents/Maffezini-Jurisdiction-English_001.pdf (concluding that an MFN provision permitted an investor to take advantage of a more favorable procedural right in a different treaty); Plama Consortium Limited v. Bulgaria, ICSID (W. Bank) ARB/03/24, ¶¶ 200-223 (Decision on Jurisdiction) (Feb. 8, 2005), *available at* http://ita.law.uvic.ca/documents/plamavbulgaria.pdf (finding that an MFN provision could not be utilized to invoke a more favorable procedural right).

[49] Franck, *Inconsistent Decisions, supra* note 1, at 1574-81 (describing the trio of cases in which some cases decided that "fair and equitable" treatment was an additive right that is distinct from the international minimum standard of treatment whereas other tribunals concluded that it was not); *see also* S.D. Myers, Inc. (U.S.) v. Canada, (UNCITRAL) (Partial Award) (Nov. 13, 2000), http://ita.law.uvic.ca/documents/SDMeyers-1stPartialAward.pdf; Metalclad Corporation (U.S.) v. Mexico, ICSID (W. Bank) ARB(AF)/97/1 (First Partial Award) (Aug. 30, 2000), http://ita.law.uvic.ca/documents/MetacladAward-English.pdf; Pope & Talbot Inc. (U.S.) v. Canada,

The *Lauder* cases provide a tangible example of the impact of inconsistency, in the form of different results, where there are related parties, the same facts, and textually indistinguishable substantive rights. After the Velvet Revolution, an American financier, Ronald Lauder, decided to invest in the Czech Republic's first private TV station. Mr. Lauder originally wanted to invest directly in the Czech company that would own and operate the TV license. The newly created Czech Media Council, however, did not permit direct foreign ownership of the TV license. Instead, Mr. Lauder had to make an indirect investment in an investment vehicle, which in turn invested in a joint venture company that used the license, which would actually be awarded to a local Czech company. Creating TV Nova which — with its popular programming (including *Baywatch* reruns and nude weather forecasts) — became profitable in a year. Many of the profits were expatriated; and after revisions to the Czech Media Law, the Czech Media Council changed its mind about the way Mr. Lauder's investment was arranged. The Media Council then determined that the structure it previously had required violated the amended Czech Media Law.[50] A series of government investigations occurred that left the joint venture without use of the TV license and rendered Mr. Lauder's investment worthless.[51]

As a U.S. citizen, Mr. Lauder brought a claim against the Czech Republic under the U.S./Czech Republic BIT. But as he had structured his investment in TV Nova through a Dutch investment vehicle, this vehicle also had a claim against the Czech Republic under The Netherlands/Czech Republic BIT. Mr. Lauder and the Dutch firm each sought arbitration of their claims under the applicable BIT, resulting in separate arbitration proceedings in The Netherlands and the United States. Although based upon a common set of facts and nearly identical treaty rights,[52] on all but one point the two arbitral

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(UNCITRAL) (Award on Merits) (Apr. 10, 2001), http://ita.law.uvic.ca/documents/PopeandTalbot-Merit.pdf.

[50] Article 12(3) of the 1991 Czech Media Law 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." This was deleted in the revised law. Likewise, the revised law had a narrower definition of "broadcaster." Lauder v. Czech Republic, (UNCITRAL) ¶ 79 (Final Award) (Sept. 3, 2001), http://ita.law.uvic.ca/documents/LauderAward.pdf [hereinafter Lauder Award].

[51] Lauder Award, *supra* note 50. Czech Republic B.V. v. Czech Republic, (UNCITRAL) (Partial Award) (Sept. 13 2000), http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf [hereinafter CME Award]; *see also* Franck, *Inconsistent Decisions, supra* note 1, at 1559-67.

[52] Each treaty must be judged according to the specifically negotiated text; however, the textual rights in the US/Czech and Netherlands/Czech BITs had remarkably similar operative provisions. *See* Treaty Concerning the Reciprocal

tribunals came to diametrically opposed results. Both tribunals agreed that Mr. Lauder and his Dutch company had been discriminated against in the original grant of the TV license. However, the tribunal organized under the Dutch BIT held that there was also expropriation, failure to provide full protection and security, breach of an obligation to provide fair and equitable treatment, and violations of the minimum standard of treatment required by international law. The tribunal organized under the U.S. BIT disagreed with each of these conclusions.[53]

These inconsistencies have presented challenges. After the *Lauder* awards, there was discussion that the Czech Republic might consider pulling out of its BITs.[54] Meanwhile, Ronald Lauder testified before Congress about the unfavorable business environment in the Czech Republic and took out full-page ads in the *New York Times* telling U.S. investors why they should not invest in the Czech Republic.[55]

Encouragement and Protection of Investment, U.S.-Czech Rep. & Slovk., arts. II(2) and III, Oct. 22, 1991, http://www.unctad.org/sections/dite/iia/docs/bits/czech_us.pdf [hereinafter US/Czech BIT] (providing that (1) investment "shall at all times be accorded fair and equitable treatment," (2) no Sovereign "shall in any way impair by arbitrary or discriminatory measures the management, use, enjoyment, acquisition, expansion, or disposal of investments," (3) investment "shall enjoy full protection and security, and (4) investments "shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization except: for public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law"). 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., arts. 3(1), (2), and 5, Apr. 24, 1991, http://www.unctad.org/sections/dite/iia/docs/bits/czech_netherlands.pdf (providing that each Sovereign (1) "shall ensure fair and equitable treatment of the investments of investors," (2) "shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use enjoyment or disposal [of investments] by those investors," (3) shall accord to such investments full security and protection," and (4) neither Sovereign "shall take any measures depriving, directly or indirectly, investors of the other . . . unless . . . (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 provision for the payment of just compensation").

[53] Lauder Award, *supra* note 50; CME Award, *supra* note 51.

[54] *See* Petra Pasternak, *EU, U.S. Treaty Issues Unresolved*, PRAGUE POST**,** May 29, 2003, *available at* http://www.praguepost.com/P03/2003/Art/0529/busi4.php (suggesting that the Czech Republic may have needed to terminate the U.S./Czech BIT).

[55] *See* Peter S. Green, *Czech Senate A Safe Haven For Principal In Media War*, N.Y. TIMES**,** Nov. 11, 2002, at A8 (noting that Mr. Lauder responded with full page newspaper advertisements calling the Czech Republic unsafe for foreign investors); *Treatment of U.S. Business in Eastern and Central Europe: Hearing Before the Subcomm. on European Affairs of the Comm. On Foreign Relations of the U.S. Sen.*, 106th Cong., 2d Sess. 16-33 (2000) (statement of Ronald S. Lauder, Chairman Central

The *Lauder* cases are not isolated incidents. Argentina is subject to multiple treaty claims related to its recent currency crisis; these different claims may result in divergent applications of the same (or similar) treaty provisions and different conclusions regarding liability for the same government conduct.[56] As things stand, the problem will likely grow. Even now, the number of claims under BITs is exploding, and each one typically alleges damages in excess of US$100 million. Meanwhile, given the broad definition of "investor" and "investment," investors have greater incentives to heed the advice of counsel[57] and structure their investments through corporate layers with divergent nationalities to plant the seeds for "twin" or "triplet" cases similar to *Lauder*. This allows investors to minimize risks in one way: namely, by creating future opportunities to game the system and requesting arbitration of the same claims on behalf of affiliated parties under multiple BITs from different jurisdictions. Indeed, *Tokios Tokelės v. Ukraine*, suggests that prudent investors should pursue this strategy.[58]

B. The Challenges of Inconsistency

Irrespective of whether the forum is a court[59] or an arbitral

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European Media Enterprises).

[56] There are more than thirty claims brought against Argentina, which involve the same government measure (the devaluation of the peso). While they involve different and sometimes related investors, the treaty rights typically involve the same BIT, textually identical treaty rights, or substantially similar rights. *See, e.g.,* Investment Claims, *Orders and Awards*, http://www.investmentclaims.com/oa2a.html. Nevertheless, these different cases could result in inconsistent substantive determinations as to Argentina's liability. *See supra* note 47 and accompanying text (describing the possibility of inconsistency in the Argentina cases).

[57] *See, e.g.,* Allen & Overy, *The Rise of Investment Treaty Arbitration*, http://www.allenovery.com/asp/infocus.asp?pageID=3837; Appleton & Associates, *The Firm: Our Services*, http://www.appletonlaw.com/2c-services.htm; *see also* JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, 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.").

[58] *See* Tokios Tokelės v. Ukraine, ICSID (W. Bank) ARB/02/18, (Decision on Jurisdiction) (Apr. 29, 2004), http://www.worldbank.org/icsid/cases/tokios-decision.pdf (holding that a local Ukrainian company that had reincorporated itself in Lithuania could qualify as a foreign investor and benefit from the protections afforded by the Ukraine/Lithuania investment treaty).

[59] *See generally* John C. McCoid, II, *Inconsistent Judgments*, 48 WASH. & LEE L. REV. 487 (2001) (describing the difficulties of inconsistency in the context of domestic civil court litigation); Lauretta Drake, *Stop the Madness! Procedural and Practical Defenses to Avoid Inconsistent Cross-Border Judgments Between Texas and Mexico*, 9 J. TRANSNAT'L L. & POL'Y 209 (1999) (discussing difficulties caused by inconsistent judgments in transnational litigation); Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771 (1998) (describing the

tribunal,[60] some inconsistency can be expected in any dispute resolution system created by human beings. Inconsistency tends to signal errors, lends itself to suggestions of unfairness, creates inefficiencies, and generates difficulties related to coherence,[61] most notably a lack predictability,[62] reliability,[63] and clarity.[64] Scholars have

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difficulties of inconsistent verdicts within a single criminal trial and suggesting these result from mistakes, confusion, compromise, or lenity); *see also* Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 VT. L. REV. 555, 575-76 (2005) (noting that the desire to "act alike in all cases of a like nature" is an aspiration principle and that decision makers "are not held to a standard that requires them to produce entirely consistent outcomes, but they are expected to strive for consistency to the extent possible").

[60] The nature of arbitration itself, where there is no appellate mechanism and few opportunities to join parties and consolidate claims unless parties agree, leads to potentially inconsistent results. *See* Gill, *supra* note 12; Wolfgang Kühn, *How to Avoid Conflicting Awards: The* Lauder *and* CME *Cases*, 5 J. WORLD INV. & TRADE 7, 11-15 (2004); Christer Söderlund, *Lis Pendens, Res Judiciata and the Issue of Parallel Judicial Proceedings* 22 J. INT'L ARB. 301, 318-20, 322 (2005); *see also infra* notes 130, 140, 182, 186, 190, 192.

[61] A previous piece by this author addressed indicators of legitimacy, particularly determinacy and coherency. *See* Franck, *Inconsistent Decisions, supra* note 1, at 1584. This paper focuses more on by-products of those indicators, namely predictability, reliability, and clarity. These aspects are critical to investment treaty arbitration as they implicate an investor's planning of its commercial investments and the legality of Sovereign's chosen regulation. The predictability, reliability, and clarity of legal decisions governing investment treaties is fundamental to investors, citizens, and Sovereigns.

[62] Predictability refers to the ability to anticipate future decisions based upon previous determinations such that individuals can plan for the consequences — legal or otherwise — of their actions. Scholars have long accepted predictability is a pillar of the rule of law because it promotes confidence in the rule of law and increases the efficiency of dispute resolution. Joseph R. Grodin, *Are Rules Really Better Than Standards?*, 45 HASTINGS L.J. 569, 570 (1994).

[63] Reliability refers to the ability to depend upon previous determination and know with some certainty that one's conduct conforms to articulated rules and standards. In this sense, reliability is about the protection of justified expectations and the avoidance of arbitrary decisions. Such reliability and certainty promotes business innovation and development by letting firms know what they can and cannot do. Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection For Commercial Speech*, 54 CASE W. RES. L. REV. 1205, 1207-08, 1216 n.72 (2004); Allen, *supra* note 59, at 578.

[64] Clarity is the ability to ascertain and understand both the scope of a law and its application. Such clarity promotes predictability in the future and the reliance interests of investors, citizens, and Sovereigns. By eliminating speculation as to what the law is and avoiding a need for interpretation or explanation, clarity also promotes efficiency for Sovereigns, businesses, and citizens. *See* Paul E. Loving, *The Justice of Certainty*, 73 OR. L. REV. 743, 764 (1994). Some commentators suggest that looking for clarity in the "law as a whole" falls within rule of law goals of "norm-based" theories of law where there are common understandings of the meaning of legal rights and duties irrespective of what a tribunal might do in a particular case. Andrew N. Adler, *Translating and Interpreting Foreign Statutes,* 19 MICH. J. INT'L L. 37, 81 (1997); *see also* Michael C.

generally observed these challenges related to inconsistency. [65] However, inconsistency also has marginal benefits that can, in certain circumstances, enhance the long-term credibility of the dispute resolution process. These detriments and benefits require further explication.

1. Error signaling

Inconsistencies tend to reveal flaws in the structure of the system of resolving disputes and suggest that one (if not more) of the inconsistent decisions is legally incorrect. When inconsistency reveals the occurrence of error, "that manifestation of fallibility saps public confidence in the adjudicatory process and that inconsistency is thus harmful simply because of its signal."[66] Cases such as *Lauder* suggest the public perceives such a signal particularly where commentators openly remark such inconsistency, "brings the law into disrepute [and] brings arbitration into disrepute"[67] and "make[s] the law *look* stupid."[68]

Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 669-70 (1995).

[65] A number of other scholars have articulated that the justifications for adhering to rules or reasoning elucidated in previous decisions relate to factors such as the need for certainty and predictability in the law; the propriety in insuring that similarly situated litigants are treated equally; the judicial efficiency achieved by not reopening every past decision; and the appearance of justice, the avoidance of arbitrary decision making, and the value of stability. *See generally* RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION (1961); Thomas L. Fowler, *Of Moons, Thongs, Holdings and Dicta:* State v. Fly *and the Rule of Law*, 22 CAMPBELL L. REV. 253, 257-58 (2000); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368-372 (1988); Schauer, *Precedent*, *supra* note 39; Aaron Rappaport, *The Logic of Legal Theory: Reflections on the Purpose and Methodology of Jurisprudence*, 73 MISS. L.J. 559, 631-32 (2004); Paul W. Werner, *The Straits of Stare Decisis and the Utah Court of Appeals: Navigating the Scylla of Under-Application and the Charybdis of Over-Application*, 1994 BYU L. REV. 633 (1994). While they have tended to focus on U.S. court decisions and not the awards of international arbitral tribunals, there are other modern commentaries written on stare decisis and consistency, including but not limited those referenced in these remarks. *See generally* LAURENCE GOLDSTEIN, ED., PRECEDENT IN LAW (1987); EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031 (1995); Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 942-43 (1923); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281 (1990).

[66] McCoid, *supra* note 59, at 488; *see also* Allen, *supra* note 59, at 578-79 (discussing the relationship between consistency and correctness); *but see* Peters, *supra* note 65, at 2034 (arguing consistency can institutionalize erroneous results).

[67] Matthew Rushton, *Clifford Chance Entangled in Bitter Lauder Arbitrations*, LEGAL BUSINESS, Oct. 2001, at 108.

[68] *See supra* note 48 and accompanying text; *see also* Goldhaber, *Investment Court*,

2. Perceived unfairness

As recalled by Professor Schuaer's classic analysis of consistency and precedent, there is a concern to "treat like case alike"[69] and that failure to treat similar cases similarly "is arbitrary, and consequently unjust or unfair."[70] Consistency would likely promote the conception of fairness across the system, while inconsistency may lead to the opposite result. Although those who win specific cases are unlikely to complain about the result,[71] inconsistencies adversely impact others immediately affected by the result as well as future users of the system.[72] Indeed, prominent practitioners in investment treaty

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supra note 35 (acknowledging the public outcry that "[u]ltimately, there must be a right answer."); Brower et al., *Global Adjudication*, *supra* note 47, at 424-28; Charles N. Brower & Jeremy K. Sharpe, *Multiple and Conflicting International Arbitral Awards*, 4 J. WORLD INV. & TRADE 215, 216 (2003).

[69] Arthur L. Goodhart, *Precedent in English and Continental Law*, 50 L. Q. REV. 40, 56-58 (1934); PETER WESTEN, SPEAKING OF EQUALITY 210-19 (1990); *see also* Amy C. Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003) (discussing the distinction between consistency as a matter of *stare decisis* amongst non-parties and as a matter of issue preclusion between the same parties); Michael D. Bayles, *On Legal Reform: Legal Stability and Legislative Questions*, 65 KY. L.J. 631, 639-640 (1977) (suggesting that the need for certainty relates to fairness to those who have relied upon the rule, the efficiency of using precedent and the equality of treating similar cases similarly); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543 n.20 (1982); *but see* Anthony D'Amato, *Is Equality a Totally Empty Idea?*, 81 MICH. L. REV 600, 602 (1983); Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV 575 (1983).

[70] Schauer, *Precedent*, *supra* note 39, at 595-96. As Professor Schauer usefully explains "[t]he idea of fairness as consistency forms the bedrock of a great deal of thinking about morality. Whether expressed as Kantian universalizability, as the decisions that people would make if cloaked in a Rawlsian veil of ignorance about their own circumstances, or simply as The Golden Rule, the principle emerges that decisions that are not consistent are, for that reason, unfair, unjust, or simply wrong." *Id.* at 596; BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33-34 (1921); Allen, *supra* note 59, at 575; *see also* Adler, *supra* note 64, at 81 (arguing that the "[p]redictability of judicial decisions is desirable. Probably all legal systems aspire to protect parties' reliance interests, in order to prevent forum-shopping and to foster equal treatment, fair notice, stability, and security in private affairs"); *but see* Peters, *supra* note 65, at 2043, 2065-73 (suggesting that such equality based concerns for adjudicative consistency are not compelling).

[71] McCoid, *supra* note 59, at 489.

[72] In particular, there are difficulties related to issues such as planning and predictability. While Professor McCoid suggests that these difficulties should not be insurmountable because in many instances "there is simply no planning" based upon previous decisions, in the case of investment arbitration, there is evidence that investors and Sovereigns rely on these decisions — and the possibility of recovery or liability — in planning their activities. *See supra* note 59; *see also* Peters, *supra* note 65, at 2113-14 (suggesting that the goals of predictability and reliability may be illusionary, but acknowledging they may have more force in commercial and other contexts where

arbitration suggest that a system which generates inconsistent decisions, "cannot last long. It shocks the sense of rule of law or fairness."[73]

3. Inefficiencies

Inconsistency can also adversely affect efficiency. A variety of divergent rules and reasoning does not conserve the arbitral resources of parties or decision makers. It will cost investors and Sovereigns more to arbitrate claims in multiple fora, particularly for those cases where a single tribunal could just as easily decide the disputes. It may also increase the cost of decision-making as parties and arbitrators conduct additional analysis and expend additional effort, time, and money to explain inconsistencies and justify their positions. Without a stable body of basic, internationally-accepted doctrine, more consideration of individual questions is required, since there can be minimal justified reliance on the decisional rules used and applied in prior proceedings.[74]

4. Incoherency by-products

Inconsistency creates other challenges, including lack of predictability, reliability, and clarity as to the rule of law and its application.[75] Justice Brandeis reminds us that "in most matters it is more important that the applicable rule of law be settled than that it be

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parties plan their conduct in reliance of established doctrine).

[73] Goldhaber, *Investment Court*, *supra* note 35 (quoting Nigel Blackaby of Freshfields, Bruckhaus Deringer's Paris office).

[74] Schauer, *Precedent, supra* note 39, at 600; Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748 (1988); *see also* Maltz, *supra* note 65, at 370-71 (suggesting that "ability to rely on precedent no doubt simplifies the task of judging"); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 475 (2003) (suggesting efficiency and consistency are valuable when resolving international disputes); *but see* Rafael Gely, *Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis*, 60 U. PITT L. REV. 89, 132-33 (1998) (noting the efficiency caused by consistency but describing instances when courts ignore the need for consistency when outweighed by changed circumstances); Wasserstrom, *supra* note 65, at 72-73 (suggesting that efficiency is important but that it is not the only factor, otherwise dispute resolution systems would adopt methods such as flipping coins or casting dies to eliminate the rigors of legal reasoning).

[75] *See* Miranda Oshige McGowan, *Against Interpretation*, 42 SAN DIEGO L. REV. 711, 728 (2005) (noting that a failure to consider properly existing precedent may result in an improper consideration of the cost to "legal coherence, predictability, and to the principle of treating like cases alike").

settled right."[76] Although "correctness" remains a vital virtue, at times the mission of law is sometimes to achieve "certainty for certainty's sake, [and] consistency for consistency's sake."[77] For those participating in the global economy where there may be a variety of competing standards (or a lack thereof), the rule of law is essential; without it, there is a detrimental impact upon those governed by the rules and their willingness and ability to adhere to such rules.[78] Particularly where investors and Sovereigns wish to plan their investments and government activity, being able to predict how their conduct will implicate their legal rights and obligations is fundamental. Without such predictability, reliability and clarity, expectations are frustrated and there are challenges to the ordering of both public and private conduct.[79] This difficulty has sparked public critique that demands a more predictable dispute resolution system which allows "observers to assess which claims may be justified by government malfeasance, corruption or other mistreatment — and which claims may pose worrying threats to a government's ability to regulate for social, environmental or other important purposes."[80]

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[76] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Justice Scalia would have us remember something similar. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (explaining that "[r]udimentary justice requires that those subject to the law must have the means of knowing what it prescribes . . . There are times when even a bad rule is better than no rule at all."). The author is grateful to Professor Richard Rueben for making her aware of this article.

[77] Frederick Schauer, *The Generality of Law*, 107 W. VA. L. REV. 217, 233 (2004) [hereinafter Schauer, *Law*]; *but see* Peters, *supra* note 65, at 2115 (suggesting such an approach is "foolish").

[78] Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193, 200-02 (2001); Asli Ü. Bâli, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building In Iraq*, 30 YALE J. INT'L L. 431, 454 (2005); Delissa A. Ridgway & Mariya A. Talib, *Globalization and Development — Free Trade, Foreign Aid, Investment and the Rule of Law*, 33 CAL. W. INT'L L.J. 325, 335-36 (2003).

[79] Peters, *supra* note 65, at 2039 (noting that precedent provides "advantageous predictability in the ordering of private conduct, that it promotes the necessary perception that the law is stable and relatively unchanging, that it prevents frustration of private expectations, [and] that it serves the resource-saving goal of judicial efficiency"); *see also* James B. Bean Distilling Co. v. Georgia, 501 U.S. 529, 551-52 (1991) (O'Connor, J. dissenting) (explaining that "*stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them.").

[80] Luke Eric Peterson, *Briefing Paper No. 10: UK Bilateral Investment Treaty Programme and Sustainable Development*, at 10 (Feb. 2004), http://www.chathamhouse.org.uk/pdf/research/sdp/BinvestFeb04.pdf; *see also id.* at 6 (critiquing the overlapping and conflicting interpretations of treaty rights).

5. Beneficial aspects of inconsistency

Inconsistency is not necessarily destructive, however. For example, inconsistency can provide opportunities both to enhance the predictability of the law and to offer flexibility when discretion is desired.[81] As regards enhancing predictability, inconsistency can help identify flaws within the system and thereby offer opportunity to improve the process of the investment treaty dispute resolution system, leading to a positive change in the predictability and reliability of substantive doctrine in future arbitrations.[82] Inconsistency can also serve as a dynamic laboratory in the development of common and inter-related substantive rights among BITs.[83] Disagreements between courts and scholars, for example, can lead to a more considered jurisprudence.

In addition, facially inconsistent results may not indicate jurisprudential inconsistency. Facially inconsistent determinations may be reconcilable through norms of interpretation[84] that demonstrate that seemingly dissimilar cases are, in fact, legitimately distinguishable; likewise such norms might explain why textually

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[81] Justice Scalia describes this as a "personal discretion to do justice" where there is minimal reliance on a general rule of law and suggests that it could lead to enhanced justice as a result of the pronouncement based upon a totality of circumstances rather than a "judicially pronounced five-part test". Scalia, *supra* note 76, at 1175-77. Nevertheless, Scalia suggests avoiding this approach where possible and that instead "the Rule of Law, and the law of rules, be extended as far as the nature of the question allows." *Id.* at 1186.

[82] For example, by recognizing a structural problem in the process, an opportunity to correct the problem can create consistency and "strengthens external credibility, then minimizing internal inconsistency by standardizing decisions within a decision making environment may generally strengthen that decision making environment as an institution." *See* Schauer, *Precedent*, *supra* note 39, at 600.

[83] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (stating "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments"); *see also* Ann Althouse, *Vanguard States, Laggard States: Federalism And Constitutional Rights*, 152 U. PA. L. REV. 1745, 1745 (2004); Brower, *FTAA*, *supra* note 12, at 251, 257. While state courts have the capacity to petition the U.S. Supreme Court for *certiorari* where common issues of constitutional law are at issue, in investment treaty arbitration, there is no central repository for uniformly resolving common issues and rights.

[84] Indeed, rather than suggesting tribunals strictly adhere to the doctrine of *stare decisis*, which has the capacity to suffer from inefficiency, they might instead choose to apply a "rule of relevance" to determine which future cases are relevant to their decision making process. Schauer, *Precedent*, *supra* note 39, at 576-579; Martha D. Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1253-54 (2004); Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three Of A Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873, 950 (2001).

similar rights should be treated differently. By recognizing fundamental distinctions, "interpretation of treaties [with] identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in their respective contexts, objects and purposes, subsequent practice of parties and travaux préparatoires."[85] Arbitral decisions or commentary that provide reasonable explanations for making what might otherwise appear to be inconsistent distinctions can ultimately enhance the credibility and reliability of the process.

C. Challenges for the Investment Treaty Arbitration Hybrid

Investment treaty arbitration is a hybrid or "mixed" system — a system that grafts a traditionally private dispute resolution system onto an international treaty between Sovereigns.[86] This hybrid, which challenges arbitration's historical roots while simultaneously trying to secure its benefits for a broader group of legal actors, inevitably causes tension.[87] While the complexities caused by inconsistency are more pronounced in this hybrid, a variety of factors make it functionally distinct from traditional arbitration.[88]

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[85] The MOX Plant Case, Order on Provisional Measures, ¶ 51 (Dec. 3, 2001) 41 I.L.M. 405, 413 (Ire.-U.K.).

[86] Coe, *supra* note 17, at 1389-91; *see also* Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. INT'L & COMP. L. REV. 429, 430-31 (2004); William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1299-301 (2003); *see also* Bernardo M. Cremades & David J.A. Cairns, *The Brave New World of Global Arbitration*, 2 J. WORLD INV. 173, 183 (2002) (referring to investment treaty arbitration as "a hybrid between private arbitration and inter-State arbitration").

[87] One commentator suggests that it is "an important challenge to investor-state tribunals going forward to take a more consistent and institutionally coherent approach to the conduct of investor-state arbitration proceedings," but he also recognizes that "[p]rivate, international commercial tribunals historically have tended to focus almost exclusively on achieving justice in the single case before them. Governments and the public expect an approach to dispute resolution in public law cases that is more consistent and coherent across the full docket of cases." Bart Legum, *Trends and Challenges in Investor-State Arbitration*, 19 ARB. INT'L 143, 146-47 (2003).

[88] *See* Cremades & Cairns, *supra* note 86, at 183 (explaining that "Investor-State arbitration differs fundamentally from traditional international commercial arbitration in that its basis lies in treaties between States (either multilateral or bilateral) rather than private agreements. This treaty basis and the State party involvement mean that public international law has a prominent role in investor-State arbitrations" and suggesting this distinction "require[s] the re-examination and adaptation of some fundamental concepts and doctrines of arbitral law"); *see also* Nigel Blackaby, *Public Interest and Investment Treaty Arbitration*, 1 OIL & GAS L. INTELL. (2003) *available at* http://www.gasandoil.com/ogel/samples/freearticles/article_56.htm (explaining that "[t]reaty arbitration often raises fundamental issues of public interest which are usually

1. Origins and Purposes

Investment treaty arbitration has a different origin and purpose than traditional domestic commercial arbitration.[89] Investment treaty arbitration was created to provide a depoliticized dispute resolution process[90] for the adjudication of public law rights.[91] It was also created

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absent from international commercial arbitration").

[89] Investment treaty arbitration is international in nature. Courts, particularly the U.S. Supreme Court, and legislatures have treated international arbitration differently because the needs for uniformity and predictability are different from domestic arbitration. *See, e.g.*, Fla. Stat. Ann. §§ 684.01-.35 (West 2003) (establishing the Florida International Arbitration Act); Scherk v. Alberto-Culver Co., 417 U.S. 506, 519-20 (1974) (noting the importance of a unified system in the context of international arbitration); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629-30 (1985) (noting the special needs in the context of international arbitration to be sensitive to concerns of international comity and the need for predictability in the resolution of disputes); Sébastien Besson, *The Utility Of State Laws Regulating International Commercial Arbitration and their Compatibility With the FAA*, 11 AM. REV. INT'L ARB. 211, 211-12 (2000) (noting that some U.S. states have adopted a model international commercial arbitration law).

[90] *See supra* note 29 and accompanying text (describing need for investors to have home governments espouse claims on their behalf before the ICJ); Outcome of Summit of the Senate, Americas and Prospects for Free Trade in the Hemisphere, Before Subcomm. on Trade, H.R. Ways and Means Committee , 107th Cong. 1st Sess., Serial 107-22, 93 (2001) (statement of Daniel M. Price, Member, U.S. Council for International Business) (explaining that "[l]imiting investment dispute settlement to a state-to-state procedure will politicize disputes, leaving investors, particularly small- and medium-sized enterprises, with little recourse save what their government cares to give them after weighing the diplomatic pros and cons of bringing any particular claim"); Franck, *Inconsistent Decisions, supra* note 1, at 1536-38 (describing the shift away from closed-door diplomatic negotiations or the use of force); Alvarez & Park, *infra* note 93, at 366-70 (describing the evolution towards the current regime of investment treaty arbitration); *see also* Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAWYER 655, 659 (1990) (noting that in the 1970s the United Nations had identified 875 acts of government takings in 62 countries over a period of 14 years prior to the promulgation of BITs and indicating the U.S. Department of State was aware of 102 existing investment disputes between U.S. nationals and foreign governments, but suggesting that there was no effective protection for vindication of these rights).

[91] Bart Legum is the former head of the NAFTA Claims Division at the U.S. Department of State and has explained that treaty arbitration involves "matters of public importance." Mr. Legum has also described the "public law nature of these cases" and the "strong public interest" which "implicates a number of public and governmental interests; specific interest in the measure that is challenged in the case; general interest in the appropriate functioning of the investment protections . . . interest in the appropriate interaction between federal, state and local government authorities; and many others." Legum, *supra* note 87, at 144-45, 147 (2003); *see also* Cremades & Cairns, *supra* note 86, at 184-85 (suggesting that investment treaty arbitration is different in the public nature of the rights involved and the relevance of public

to provide a neutral forum[92] to avoid perceptions of an unfair advantage where one of the parties — namely the Sovereign respondent — would otherwise simultaneously be party, regulator, legislator and adjudicator.[93] In contrast, domestic commercial arbitration tends to involve resolving private law disputes;[94] removing disputes from an international diplomatic dialogue was rarely a concern of domestic commercial arbitration.[95] Instead, domestic

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international law).

[92] UNCTAD, *Course on Dispute Settlement, International Center for Settlement of Investment Disputes, 2.1 Overview*, UNCTAD/EDM/Misc. 232 (2003), http://www.unctad.org/en/docs/edmmisc232overview_en.pdf [hereinafter UNCTAD Overview] (explaining that "[r]ightly or wrongly, the courts of the host State are often not seen as sufficiently impartial" to render decisions in investment treaty disputes).

[93] In contrast to domestic arbitration, where parties may be from the same country, international commercial arbitration has flourished in part because the parties perceive it as a neutral forum. William W. Park, *Illusion and Reality in International Forum Selection*, 30 TEX. INT'L L.J. 135 (1995); Guillermo A. Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 366-67 (2003). With a common desire to improve the perceived fairness of the process, both international commercial and investment arbitration attempt to avoid a perceived home field advantage in favor of a neutral forum. Nevertheless, concerns about neutrality are more pronounced in the context of investment treaty arbitration. *See* Alvarez & Park, *id.* at 371 (noting that investors historically have had concerns that they would receive a "fair shake" in the event of controversy with the host government). This may be particularly true in countries which are struggling to develop and apply principles related to the rule of law and separation of powers. *See* Peterson, *supra* note 80 (noting that arbitration "can be a highly-attractive proposition, particularly where local courts are corrupt or unreliable").

[94] *See* Cremades & Cairns, *supra* note 86, at 192 (stating that "[i]nternational commercial arbitration is conventionally a form of private, if not always confidential, dispute resolution."). One notable exception to this is the adjudication of certain statutory actions, such as anti-trust and RICO claims. The use of arbitration to resolve these types of disputes is a relatively new phenomenon in the United States. *See* E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 296 n.10 (2002) (noting "federal statutory claims may be the subject of arbitration agreements"); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 480-81 (1998) (describing the shift in the U.S. Supreme Court's willingness to arbitrate statutory claims within the past 25-30 years); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (permitting arbitration of RICO claims); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (permitting arbitration of antitrust claims); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (permitting arbitration of securities claims). Not all countries, however, permit the adjudication of statutory or public law claims. *See* LEW et al., *supra* note 57, at 199 (noting that although there is a trend towards the greater arbitrability of disputes, this depends upon the country involved and involves "a balancing of the mainly domestic importance of resolving certain matters for exclusive decision of courts with the more general public interest of promoting trade and commerce through an effective means of dispute settlement").

[95] UNCTAD Overview, *supra* note 92, at 7 (stating that domestic courts "will often lack the technical expertise required to resolve complex international investment

commercial arbitration was traditionally extolled because it promoted efficiency, decreased the burden on judicial resources, and honored parties' freedom of contract.[96] These factors have less impact in the context of investment treaty arbitration, where disputes typically take several years to arbitrate.[97] Additionally, it is uncertain whether allowing parties to choose to arbitrate their investment treaty claims conserves judicial resources.[98] As regards the freedom of contract,

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disputes" and "[d]omestic courts of other States are usually not a realistic alternative" because of a lack of jurisdiction or the implications of sovereign immunity).

[96] Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 340 n.85 (2005); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23-25 (1991); *see also* Margaret L. Moses, *Privatized "Justice"*, 36 LOYOLA U. CHI. L.J. 535, 536-41 (2005) (discussing the U.S. Supreme Court's jurisprudence and willingness to enforce arbitration agreements even more so than traditional contractual arrangements). Domestic arbitration also helps remove the perceived risk of home court bias. *See supra* notes 33 and 93.

[97] In the author's experience, investment treaty arbitrations typically take anywhere from two to five years to render their decisions. *See, e.g.,* International Centre for the Settlement of Investment Disputes, *List of Pending Cases*, http://www.worldbank.org/icsid/cases/pending.htm (listing a variety of cases which go back in time to as late as 1998). This is not markedly different from resolving disputes before national courts, such as those in the United States. *See also* Jochen Zaremba, *International Electronic Transaction Contracts Between U.S. and EU Companies and Customers*, 18 CONN. J. INT'L L. 479, 519 (2003); *see also* Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 475 (1987) (noting that arbitration does not guarantee disputes will be resolved as quickly or as cheaply as in litigation and "efficiency may be frustrated by any number of dilatory factors before, during, and after arbitration"). The perception of greater efficiency remains in the context of international commercial arbitration; but this may depend in part on the efficiency of the national court system to which arbitration is being compared. Susan D. Franck, *The Role of International Arbitrators* ILSA J. INT'L & COMP. L. (forthcoming 2006); *see also* CHRISTIAN BÜGHRING-UHLE, ARBITRATION AND MEDIATION 139-47 (1996) (offering empirical evidence on the cost and speed of international arbitration but suggesting "on aggregate, international commercial arbitration is *moderately faster but not less costly* than litigation in the courts".

[98] In some cases, this is because the treaties do not give parties a right to go to court at all, and they can only arbitrate at a pre-selected arbitral institution. *See supra* note 31 and accompanying text. In other cases, this is because parties have not historically chosen to bring claims of international law violations before the domestic courts of Sovereigns being accused of wrongful conduct. Franck, *Inconsistent Decisions, supra* note 1, at 1542 n.78 (describing how practitioners are unaware of investors who have brought international law claims before national courts and suggesting instead that investors may bring domestic claims before domestic courts but if they are aware of international law claims, those are brought before international tribunals). There may be inefficiencies to permitting national court judges to decide treaty claims; while judges may be more adept at deciding issues with which they are familiar, namely domestic commercial law matters, this may be less true in a public international law context. *See* Todd Weiler, *Metalclad and the Government of Mexico: A Play in Three Parts*, 2 J. WORLD INV. 685 (2001) [hereinafter Weiler, *Metalclad*] (critiquing national court judges attempting to decide issues of international law); *see also* Charles H.

there are fewer concerns to protect in BIT arbitration. Unlike private commercial law contracts, treaties involve rights negotiated and granted between two Sovereigns.[99] As a result, there should be less of a concern about honoring the freedom of the investor who was neither a party to the negotiations nor a signatory to the treaty.[100]

2. Impact of Arbitral Awards

Investment treaty arbitration also differs markedly from domestic commercial arbitration because of the role that awards have played, continue to play, and will play in the future in the understanding of the substantive standards articulated in investment treaties. In particular, there are differences in the *de facto* precedential nature of the awards, their distribution to the public, and the reliance upon and use of the awards by tribunals in their reasoning. As previously mentioned, investment treaty arbitration awards function as *de facto* precedent.[101] Traditional arbitration awards do not serve the same function largely because the existing body of law and academic literature makes it unnecessary[102] and the awards are not made public.[103] The lack of

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Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 47 (2001) (expressing concerns about the role of national court judges in investment treaty arbitration); *but see* Council of Canadians v. Canada, Court file 01-CV-208141 (Decision by Pepall J.) (Jul. 8, 2005), http://www.dfait-maeci.gc.ca/tna-nac/documents/CoucilofCanadians.pdf (conducting a thorough analysis of public international issues related to NAFTA's constitutionality). If national courts could efficiently resolve both domestic and international law causes of action related to the same factual nexus, this might improve efficiency.

[99] LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 61-62 (2004).

[100] While domestic commercial arbitration might arbitrate a statutory right, such as a violation of antitrust laws, investment treaty arbitration is of a different caliber. It involves rights granted not just by one sovereign but two; and, unlike most statutory claims, investment treaty arbitration involves a defendant that is a Sovereign and not another private entity. Arguably, an investor functions as a third-party beneficiary of a BIT.

[101] *See supra* notes 41-42 and accompanying text (describing the *de facto* precedential effect of arbitration awards and noting the analogy to other forms of *de jure* precedent); *but see* Toope, *supra* note 39, at 383 (suggesting that, in the context of the U.S.-Iran Claims Tribunal, that where Sovereigns and private actors are involved in dispute resolution even though a tribunal purports to exert a "respect for the law', the tribunal is forced to display enormous flexibility — it must be willing to compromise. This has led to an essentially idiosyncratic approach to choice of law and even to the application of substantive legal principles.").

[102] In the commercial context, there is already a developed body of *de jure* precedent from national courts to which parties and arbitrators may refer and upon which they can rely.

[103] Confidentiality is a hallmark of commercial arbitration, and awards are not typically made available beyond the parties. Although a few awards on fundamental

disclosure means that tribunals or parties may be unaware that their decisions may be inconsistent.[104] In contrast, investment treaty arbitration has no fewer than three websites, a new Westlaw database dedicated to publishing awards[105] and organizations dedicated to obtaining and distributing information about awards.[106] To the extent that disclosure of inconsistent awards publicly signals the shortfalls in the dispute resolution process,[107] investment treaty arbitration has a challenge and an opportunity that commercial arbitration does not.[108]

As a result of the increasingly public dissemination of such awards and the dearth of *de jure* BIT precedent, investment treaty awards exhibit a reliance element that commercial arbitration determinations

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issues are published in the *Yearbook of International Commercial Arbitration* or in extracted and redacted format by the International Chamber of Commerce, it is challenging for parties and scholars to obtain actual awards. *See, e.g.,* International Chamber of Commerce, *Awards*, http://www.iccwbo.org/court/english/awards/awards.asp (last visited Oct. 2, 2005).

[104] In many jurisdictions, there is a presumption that arbitration is confidential. Ali Shipping Corp. v. Shipyard "Trogir", [1998] 2 All E.R. 136 (Eng.) (determining that England has an implied duty of confidentiality); *but see* Esso/BHP v. Plowman, 128 A.L.R. 391 (128) (holding that arbitrations in Australia are not confidential unless the parties so specify); Olivier Oakley-White, *Confidentiality Revisited: Is International Arbitration Losing one of its Major Benefits?*, 6 INT'L ARB. L. REV. 29 (2003). One by-product of confidentiality is inconsistency. As one practitioner noted, although different tribunals sometimes come to different decisions about the meaning of the same language in an insurance policy, "because those previous decisions remain unpublished and unavailable to third parties, the Tribunals are often unaware of them and any inconsistencies with their own determinations are subjected to little, if any, comment." Gill, *supra* note 12.

[105] *See, e.g.*, Investment Claims, http://www.investmentclaims.com (last visited Oct. 2, 2005), Investment Arbitration Resources Resource, http://ita.law.uvic.ca/ (last visited Oct. 2, 2005), and The World Bank Group, http://www.worldbank.org/icsid/cases/awards.htm (last visited Oct. 2, 2005). Westlaw also recently launched a new investment treaty arbitration database, APPLETON-ISR. The *ICSID Review: Foreign Investment Law Journal* also publishes copies of investment treaty cases.

[106] The United Nations recently conducted an investigation to isolate all the known investment treaty cases. *Policy Implications*, *supra* note 7. Likewise, the International Institute for Sustainable Development, regularly investigates and keeps the public informed about investment treaty cases. *See* IISD, *Investment Law and Policy News Bulletin* (June 30, 2005), http://www.iisd.org/investment/invest-sd/ (describing how energy firms are poised to notify Bolivia of potential investment treaty claims and US and Dutch investors in Estonian railway threaten BIT arbitration).

[107] *See supra* notes 61, 66-68 (describing the difficulty caused by the signaling function of inconsistency).

[108] When cases were first being decided, the distribution of awards may actually have resulted from an effort to treat "like cases alike." In areas where there is little precedent and one is dealing with issues of first impression, it is efficient for decision makers to look to previous decisions of others in related areas. However, one must have access to the materials to consider the implications for another case.

lack. In particular, investors, governments, and their counsel rely upon these awards in planning investments, making policy, and determining arbitration strategy; predictability and certainty are critical factors for all of these constituents.[109] In commercial arbitration access to the developed body of the applicable national law and related academic literature is readily available, but the same cannot be said for investment treaty arbitration. Unlike a standard commercial contract governed by the law of New York or England, investment treaties are a new form of international law, and the meaning of the substantive rights granted under them is less tested, and the tribunals have only recently begun to develop applicable governing principles. But beyond this gap in developed legal rules, a gap also exists in the scope of academic literature in the investment treaty area. The ICJ Statute, which sets out the hierarchy of precedent in international law, lists academic commentary as one of the sources, albeit subsidiary, upon which one might justifiably rely in international law decision-making.[110] Accordingly, the relative lack of legal scholarship regarding investment treaties both belies the early stage of development of the law governing investment treaties and impedes the further development of that law.[111]

3. The Impact of Third Parties

Investment treaty arbitration has an impact on third-parties that differs decidedly from that created by traditional commercial arbitration. As Professor Park has explained in the context of NAFTA, "[m]ore than most commercial arbitration, [investment treaty] disputes have considerable third-party effects."[112] The

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[109] Franck, *Inconsistent Decisions, supra* note 1, at 1611-12; *see also* Methanex Corp. (Can.) v. United States, (UNCITRAL) pt. IV(E) ¶9 (Final Award) (Aug. 3, 2005), http://www.state.gov/s/l/c5818.htm [hereinafter Methanex Award] (explaining the United States' position that foreseeability is desirable because otherwise this will "impede the decision-making processes of policy makers, who may seek to predict possible impacts of measures that they pass"); OECD Statement, *supra* note 42, at 11.

[110] *See* ICJ Statute *supra* note 38, (ranking "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").

[111] While some scholars were writing in this area in the middle of last century, there was a dearth of scholarship in this area, which is only now having a resurgence. *See generally* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (Todd Weiler, ed., 2006) [hereinafter Weiler, Leading Cases]; MEG KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 (forthcoming 2006). More scholarship in this area is nevertheless needed.

[112] Park, *supra* note 86, at 1300; *see also* Cremades & Cairns, *supra* note 86, at 193

Organization for Economic Co-operation and Development (OECD) acknowledges that "investor-state disputes often raise public interest issues which are usually absent from international commercial arbitration."[113] Even in the context of commercial arbitration, the impact of multiple parties and/or multiple contracts is one of the most challenging structural issues that affects the rights of third parties and the integrity of the dispute resolution system.[114] Nevertheless, the impact of multiple parties and/or multiple contracts in investment treaty arbitration is of a larger magnitude, and the downstream effect of inconsistency consequently is greater. As an immediate matter, taxpayers of the respondent Sovereign may be faced with paying an award that may be legally incorrect,[115] and these taxpayers have no rights within the treaty or other means of redress. [116] The lack of certainty in investment treaty arbitrations also may affect a government party's capacity and willingness to regulate or legislate

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(describing the challenges related to loss of sovereignty, lack of accountability and transparency, and other challenges to democratically elected institutions).

[113] OECD Statement, *supra* note 42, at 2; *see also* Bohuslav Klein, *How to Avoid Conflicting Awards: The* Lauder *and* CME *Cases*, 5 J. WORLD INV. & TRADE 19, 21 (2004) (explaining that "investment arbitrations have a much greater duty, they have much more power on one hand, but much more responsibility, on the other hand, because they are playing" with commercial and political interests).

[114] Because arbitration is a creature of contract, parties can only be subjected to a tribunal's jurisdiction to the extent they have agreed. Bringing in third parties or consolidating related claims is therefore a perennial challenge of arbitration. *See generally* Martin Bartels, *Multiparty Arbitration Clauses*, 2 J. INT'L ARB. 61 (1985); Stipanowich, *supra* note 97; Philippe Leboulanger, *Multi-Contract Arbitration*, 13 J. INT'L ARB. 43 (1996); *see also* Irene M. Ten Cate, *Multi-Party and Multi-Contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreements Under U.S. Law*, 15 AM. REV. INT'L ARB. 133, 135-69 (2005) (suggesting that court systems may be better suited to deal with multiple parties or contracts and acknowledging the different types of procedural mechanisms such as consolidation, joinder, intervention, interpleader, impleader, and class actions).

[115] *See* Peterson, *supra* note 80, at 6 (describing how after the Czech Republic lost an investment treaty case: "the public sector deficit of the Czech Republic was effectively doubled — and the government was forced to consider a variety of solutions to compensate the affected investor, including an increase in value added tax on goods and services"). If inconsistency goes in a Sovereign's favor and taxpayers need not pay, they are less likely to complain about the result. An investor might have a different perspective, however.

[116] The Sovereign might, however, take steps to terminate the investment treaty. *See* REED ET AL., *supra* note 99, at 61-62; PAUL E. COMEAUX & N. STEPHAN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW 109 (1996). To the extent that taxpayers might vote in a new administration to terminate or revise investment treaties, this may increase their capacity to affect indirectly future investment claims. This presumes, however, that taxpayers in a particular country have the capacity to elect their government officials democratically, freely and fairly. Some countries are still monarchies or have challenges in holding free and fair elections.

freely.[117] This affects citizens subject to that Sovereign's legislative and regulatory authority. Ultimately, investment treaty arbitration "has developed in a fundamentally new direction … by leaving the realm of purely private dispute resolution and entering a sphere with substantial public characteristics."[118]

4. Sketching Legal Boundaries

Given the distinctions between investment treaty arbitration and commercial arbitration, investment treaty arbitration's public, pan-national role creates a credibility challenge different from that created by domestic commercial arbitration.[119] The concerns of public citizens, the expectations of private investors, the needs of governments, the conduct of foreign relations, and decisions regarding international development come into play. Justice Scalia reminds us that the "the establishment of broadly applicable general principles is an essential component of the judicial process" and that decision makers should create standards that "establish the margins of tolerable diversity."[120] When there are no margins, the lack of a predictable and clear jurisprudence is of concern.

Investment treaty arbitration awards are still sketching out the meaning of substantive guarantees in investment treaties; and the inconsistency in some areas demonstrates the legitimate concerns about the existence of discernible margins.[121] Given the need for

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[117] *See* Been & Beauvais, *supra* note 44 (describing the challenges Canada faced in promulgating smoking regulations as a result of potential claims under NAFTA); Matthew Schaefer, *Conscientious State Legislators and the Cultures of Compliance and Liberalization Relating to International Trade Agreements*, 95 AM. SOC'Y INT'L L. PROC. 52 (2001) (suggesting that treaties like NAFTA can and should have an impact on contentious legislators); *but see* Janine Ferretti, *NAFTA and the Environment: An Update*, 28 CAN.-U.S. L.J. 81, 84 (2002) (commenting that "it is difficult to identify whether a regulatory 'chill' is happening"); David I. Spector, Note, *Trade Treaty Threats and Sub-National Sovereignty: Multilateral Trade Treaties and Their Negligible Impact on State Laws,* 27 HASTINGS INT'L & COMP. L. REV. 367, 369 (2004) (suggesting that under NAFTA's trade context, states are generally free to legislate without fear of actual harm for violating a U.S. trade obligation).

[118] Cremades & Cairns, *supra* note 86, at 208.

[119] *See* Legum, *supra* note 91, at 146 (noting that in the context of investment arbitration "[c]onsistency in dispute resolution procedures, in particular, serves important institutional purposes").

[120] Scalia, *supra* note 76, at 1185, 1186.

[121] Some claims, such as the right to "fair and equitable treatment" and the obligation to "honor its commitments" have been articulated for the first time in investment treaties and there is little jurisprudence from which to draw in "establishing the margins" of these rights. Franck, *Inconsistent Decisions, supra* note 1, at 1530-33. Meanwhile, rights such as guarantees of most favored nation or national treatment are

predictability, reliability and certainty in this hybrid forum with public implications, striving towards a goal of more consistency — rather than less — is a useful undertaking.[122]

The challenge created by inconsistency is, like many things, a question of degree. Where a dispute turns upon its particular facts or the totality of the circumstances, the parties and their lawyers must serve their function within the system and make an individual assessment of the case.[123] Where matters get more complex — with a higher degree of predictability expected and desired — is when the

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relatively untested in the context of investment law; there are some cases analyzing this in the international trade context, but there are suggestions that these cases graft uneasily into the context of investment treaty rights. *See Occidental* Award, *supra* note 10, at ¶¶ 174-76 (citing to WTO Appellate Body Report, Korea-Taxes on Alcoholic Beverages, Feb. 17, 1999, ¶ 118, www.wto.org, but suggesting that the use of "like products" used in the WTO trade context is distinguishable from "like situations" in the investment treaty context); *see also* David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks For the NAFTA Parties*, 14 AM. U. INT'L L. REV. 1025, 1103 (1999).

The law of expropriation might stand as one exception to this assertion. There is case law, for example, related to expropriation of investments in other contexts, such as national laws related to expropriation or international cases before the U.S.-Iran Claims tribunal or the International Court of Justice. International Technical Products Corp. v. Iran, Award No. 196-302-2, 9 Iran-U.S. Cl. Trib. Rep. 273 (1985); Elettronica Sicula S.p.A. (U.S. v. Italy), 1989 I.C.J. 15 (July 20). Nevertheless, there have been difficulties establishing the content of expropriation law, particularly in areas related to regulatory takings and creeping expropriation. Been & Beauvais, *supra* note 44; Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 STAN. ENVTL. L.J. 3 (2004).

[122] As arbitrators in the investment treaty context function more like neutral adjudicators — similar to independent judges adhering to the rule of law rather than "commercial men" making unreasoned, compromise awards — focusing on and promoting consistency is a laudable objective. *See* 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, 15-25 (2000) (analyzing the similarity of arbitrators and judges); *see also* International Law Association/Project on International 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, http://www.pict-pcti.org/ (last visited Dec. 5, 2005) (setting out principles of judicial conduct for international arbitrators); *see also* Catherine Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 84-119 (2005) (focusing on the adjudicative functions of arbitration and recommending greater impartiality of international arbitrators).

[123] Likewise, it is the function of arbitrators to comply with their mandate and exercise the quasi-judicial function of resolving disputes in a fair and impartial manner, according to the facts and law of the case. As Justice Scalia suggests, it is "rare, however, that even the most vague and general text cannot be given some precise, principled content — and that is indeed the essence of the judicial craft." Scalia, *supra* note 76, at 1183.

case invokes legal rules at a higher level of abstraction, such as the meaning of "fair and equitable treatment" or the meaning to be attributed to a particular, specialized type of treaty obligation.[124] The challenge for investment treaty arbitration is to secure the benefits of inconsistency while minimizing the burdens in order to optimize the efficiency and reliability of the dispute resolution process.

III. THE NEW FRAMEWORK

Given the concerns about the inconsistency and the legitimacy of the current investment arbitration system, there have been a plethora of *ad hoc* suggestions.[125] There is an emerging literature about the most effective methods for evaluating suggestions for reform and improving the efficiency and consistency of the investment treaty dispute resolution system.[126]

A. Types of Reform Efforts

Suggestions and efforts for reform generally break down into four categories: (1) the barrier building approach; (2) the arbitration rejecter approach; (3) a legislative approach; and (4) the safeguard

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[124] Gill, *supra* note 12.

[125] *See generally* Danile R. Loritz, *Corporate Predators Attack Environmental Regulations: Its Time to Arbitrate Claims Filed under NAFTA's Chapter 11*, 22 LOY. L.A. INT'L & COMP. L REV. 533 (2000); Stuart G. Gross, *Inordinate Chill: Bits, Non-NAFTA MITs and Host-State Regulatory Freedom — An Indonesian Case Study*, 24 MICH. J. INT'L L. 893 (2003); 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 (2001); 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 & DISP. RESOL. 77 (2000); Julie A. Soloway & Jeremy Broadhurtst, *What is in the Medicine Chest for Chapter 11's Ills*, 36 CAN. BUS. L.J. 388 (2002); Stephen Clarkson, *Systemic or Surgical? Possible Cures for NAFTA's Investor-State Dispute Process*, 36 CAN. BUS. L.J. 368 (2002); 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 (2001); Samrat Ganguly, *The Investor-State Dispute Mechanism (ISDM) and A Sovereign's Power to Protect Public Health*, 38 COLUM. J. TRANSNAT'L L. 113 (1999); Joel C. Beauvais, *Regulatory Expropriations under NAFTA: Emerging Principles & Lingering Doubts*, 10 N.Y.U. ENVTL. L.J. 245 (2002).

[126] Professor Brower took one of the first steps toward creating a framework of analysis in his seminal piece describing the indicators of legitimacy in the context of investment arbitration by borrowing largely from the work of Professor Thomas Franck in the public international law context. Brower, *Structure*, *supra* note 12; THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995). Since then, this work has been expanded and evaluated more systematically. *See generally* Franck, *Inconsistent Decisions, supra* note 1.

builder approach. The "barrier building" (or gatekeeper) approach focuses on creating hurdles that limit an investor's direct access to arbitration to prevent the evaluation of the investor's substantive rights. The "arbitration rejecter" approach views arbitration as an inappropriate mechanism, preferring that the substantive rights of parties to an investment treaty dispute return to a public forum. The "legislative" approach focuses on changing the text of treaties to provide greater clarity about the content and scope of investment rights. Meanwhile, "safeguard builders" suggest that the structure of investment arbitration can be modified to provide procedural safeguards that enhance the efficiency and reliability of the dispute resolution process.[127]

In order to evaluate the utility of these approaches, one must evaluate whether each generates a jurisprudence that is more consistent, predictable, and clear. Providing such predictability and clarity fosters the integrity of the dispute resolution process; likewise, it can create opportunities to enhance the utility of investment treaties.

The recommendations of the barrier builders and arbitration rejecters are unlikely to result in a consistent jurisprudence. In contrast, advocates of a legislative approach and safeguard building may have more useful suggestions. While the efforts of legislative reformers may be useful in creating certainty for treaties negotiated in the future, safeguard building reforms are most likely to have an immediate and effective impact in creating consistency and offering enhanced predictability about the meaning of substantive rights in investment treaty arbitration.

B. Disregarding Consistency: Barrier Builders and Arbitration Rejecters

The approaches of barrier builders and arbitration rejecters appear unlikely to develop a more consistent jurisprudence upon which investors and Sovereigns can rely. Rather, they are likely to inhibit the development of a consistent and predictable jurisprudence and may, in come circumstances, exacerbate the difficulties caused by inconsistent awards.

The approach of "barrier builders" or "gatekeepers" is designed to inhibit access to arbitration. These advocates recommend imposing procedural barriers, such as requiring government ministers screen and reject otherwise colorable claims. Procedural barriers are likely to decrease the number of claims brought to tribunals.[128] If fewer cases

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[127] Franck, *Inconsistent Decisions, supra* note 1, at 1587-1610.

[128] *See* Franck, *Inconsistent Decisions, supra* note 1, at 1589-94 for a general

need to be resolved, the number of inconsistent awards may also decrease. Nevertheless, this option neither addresses how to prevent inconsistency in cases being arbitrated nor explains or rectifies existing inconsistent decisions. Instead, by preventing tribunals from considering the nature of an investor's rights and a Sovereign's responsibilities, there is a risk that barrier building will prevent the development of jurisprudence that might otherwise provide guidance and clarity on the meaning of treaty rights.[129]

Another theoretical approach to resolving the problem of inconsistent arbitral awards is that forwarded by "arbitration rejecters." Arbitration rejecters recommend eradicating arbitration and returning investment disputes to a public forum, such as a national court.[130] Concerned with the integrity of the process, arbitration

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discussion of the approach and critique of the barrier building approach.

[129] Arguably, by increasing the number of claims, there is a concomitant risk of inconsistencies arising. Practice suggests, however, that this theoretical risk may not be significant as tribunals do tend to consider the reasoning of other tribunals and many arbitrators have repeated appointments as investment treaty arbitrators. *See* Franck, *Inconsistent Decisions, supra* note 1, at 1597-98 nn.372-75 (describing arbitrators who have been repeatedly appointed in investment treaty arbitrations). For example Professor Francisco Orrego Vicuña is a Professor of International Law at the Law School of the University of Chile and has been a member of various tribunals brought under investment treaties, including *Fedax N.V. v. Venezuela*, *Maffezini v. Kingdom of Spain*, *Wena Hotels Ltd. v. Arab Republic of Egypt*, *AES Summit Generation Ltd. v. Republic of Hungary*, *Enron Corp. v. Argentine Republic*, *CMS Gas v. Argentine Republic*, *PSGE Global Inc. v. Republic of Turkey*, *Sempra Energy Int'l v. Argentine Republic*, *Camuzzi Int'l S. A. v. Argentine Republic*, and *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*. *See* Prof. Dr. Francisco Orrego Vicuña, Heidelberg Center for Latin America, http://www.heidelberg-center.uni-hd.de/english/cv_orrego.html (last visited Dec. 5, 2005).

[130] Professor Michael Reisman has suggested a slightly different non-arbitral approach — namely the creation of one single body for resolving claims brought by investors under investment treaties. W. Michael Reisman, *Control Mechanisms in International Dispute Resolution,* 2 U.S.-MEX. L.J. 129, 136-37 (1994); *see also* Loritz, *supra* note 125, at 548-49; Coe, *supra* note 17, 1451-52 (suggesting that the ICJ might amend its statute to take primary jurisdiction. Such a body could go a long way towards providing a consistent doctrine as it would provide "one stop shopping" for the resolution of treaty claims. It might also have useful rules for consolidation and joinder of related claims. Such a body would foster the rule of law and likely promote predictability, reliability, and clarity within the doctrine, which is important in a hybrid area with the public implications of investment treaty arbitration. This approach would sacrifice certain benefits, however. In particular, although there would be certain gains in the efficiency in the resolution of related disputes, there would also be certain costs. Such a system may be inefficient and take longer to resolve claims than *ad hoc* arbitral tribunals. As experience from the US-Iran Claims Tribunal suggests, which is still deciding cases from the 1970s, this could be a very laborious exercise. Likewise, there will be no tribunals to act as a "dynamic laboratory" and to test and develop the law. *See* Franck, *Inconsistent Decisions, supra* note 1, at 1599. Another challenge to such a

rejecters assert that arbitration is not an appropriate venue for resolving treaty claims. Rather, they suggest other fora are more appropriate because arbitrators are unaccountable,[131] the disputes involve public rights, and a decision with democratic implications is subjected to an undemocratic process.[132]

Arbitration rejecters overvalue concerns about the integrity of the process, which can and should be addressed,[133] and undervalue concerns about the integrity of the result or the clarity of the doctrine.[134] The suggestion of returning issues to a variety of national courts could be viewed as antithetical to the goal of consistency. One need look no further than the emerging transnational judicial dialogue in other areas of international law and jurisprudence to see that courts, like arbitral tribunals, can reach disparate decisions on similar issues.[135]

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standing body would be the loss of party control in picking arbitrators. Typically party choice of arbitrator allows parties to "buy in" and believe they have more control over the process and the ultimate award. By establishing a single tribunal to hear all investment treaty claims from all countries, individual investors and Sovereigns would loose the ability to pick an arbitrator that works for their specific needs in a specific case. Nevertheless, the theoretical utility of such an approach must not be overlooked.

131 This does not address how that national court judges can also be criticized for being "unaccountable". For example, the U.S. judiciary was recently described as unaccountable decisionmakers. *See* Kathy Lohr, *Analysis: Christian Telecast Educates Faithful on High Court*, Remarks of Dr. James Dobson (transcript from NPR radio broadcast Aug. 15, 2005), http://www.npr.org/templates/story/story.php?StoryId=4800037, (discussing the "unelected, unaccountable and often arrogant judiciary").

132 See Franck, *Inconsistent Decisions, supra* note 1, at 1594-1601 for a critique of the approach of Arbitration Rejecters and suggestions about how to address their concerns without abandoning the arbitration system.

133 While ensuring the integrity of the arbitration process is an important element of its legitimacy, there are a variety of mechanisms to address this issue. *See* Franck, *Inconsistent Decisions, supra* note 1, at 1596-99; *see also infra* notes 149-96 (describing safeguard building reforms to enhance the legitimacy and consistency of investment treaty arbitration).

134 This lack of concern about consistency, in the context of investment treaty arbitration, overlooks the value of: (1) investors having predictable standards to plan their investments, (2) Sovereigns having reliable benchmarks through which to evaluate their governmental conduct, and (3) citizens having confidence in the integrity of a process which has a downstream effect upon their lives. *See* discussion *supra* Parts II(B) and II(C) (describing the value of consistency and its unique challenges in the context of investment treaty arbitration).

135 *See generally* Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005) (describing cases from foreign courts where they may consider other foreign precedent but may not adopt their reasoning or come to similar results); *see also* Chambers v. Bowersox, 157 F.3d 560, 570 (8th Cir. 1998) (considering foreign judicial decisions and explaining why the court is rejecting the views of these other courts); *but see* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1103-04

As explained by Justice Story in the context of state court judges, "Judges of equal learning and integrity, in different states, might differently interpret... a treaty of the United States" and this was why an interrelated federal system needed a structural safeguard — namely appellate review — to promote consistency.[136]

A series of different national courts coming to different conclusions is unlikely to provide a uniform and clear jurisprudence. Particularly where the local judiciary may be swayed by local concerns or feel unprepared to address questions of international law — rightly or wrongly, there may be concerns as to whether national court judges can or will follow the applicable rule of law.[137] A variety of national courts, some of which may not be guided by the rule of law but are instead affected by parochial influences or corruption, are unlikely to create reliable jurisprudence. Ultimately, using a network of national courts is unlikely to bring enhanced consistency to jurisprudence of the investment treaty network.[138]

To the extent that arbitration rejecters do express a concern for consistency, they appear to follow Justice Story's lead and recommend

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(2000) (discussing the role of national courts in an emerging global legal system and suggesting "these relationships enhance the salience and impact of international law").

[136] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). The author is grateful to Professor Michael Pitts for pointing her to this case. *See also* William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 67-69 (2002) [hereinafter Burke-White Community of Courts]; William W. Burke-White, *Regionalization of International Criminal Law Enforcement*, 38 TEX. INT'L L.J. 729, 757 (discussing fragmentation in international law).

[137] Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95 (1998); Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT'L L. 99, 131-32 (2004); *see also* Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV. 1, 1-2 (2003) (describing how in Eastern Europe "societies have struggled to rediscover the rule of law" and how in "impoverished kleptocracies of Africa, the challenge is even greater and the lack of even embryonic rule of law institutions is stark"); Frank K. Upham, *Who Will Find the Defendant If He Stays With His Sheep? Justice In Rural China*, 114 YALE L.J. 1675, 1709 (2005) (noting that "basic court judges in rural China have little in common with the visions dancing in senators' heads when they condition aid on progress toward the rule of law"); *but see* Department of Foreign Affairs and Trade, *AUSFTA Briefing 4: Message from the Minister for Trade* (2003), http://www.dfat.gov.au/trade/negotiations/us_fta/newsletter/ausfta_4_03.html (discussing comments by the Australian Trade Minister explaining the lack of investor-state dispute settlement in the US/Australia FTA by explaining "both Australia and the US have strong, independent and robust legal systems, which provide an effective avenue for our investors to pursue issues of concern to them. In that light, the need to create an alternative ISDS mechanism in an FTA . . . appears less compelling than it might be in other agreements.").

[138] Franck, *Inconsistent Decisions, supra* note 1, at 1601.

implementing a safeguard in the form of a transnational appellate body.[139] This reform would be challenging to implement because there is unlikely to be a cohesive political will to create such a supra-national body.[140]

C. Minimizing Inconsistency: Legislative Reformers and Safeguard Builders

Both legislative reformers and safeguard builders offer suggestions that address consistency more effectively and efficiently. Their recommendations for reform provide opportunities to minimize inconsistency through indirect, direct, and hybrid routes.

"Legislative" reformers advocate reducing inconsistency by providing enhanced textual clarity about the meaning of substantive rights. While some proponents of legislative reform have suggested simply eliminating inconsistently interpreted or ambiguous rights, legislative reformers typically recommend providing detailed definitions to give arbitrators clearer directives.[141] For instance, legislative reformers might suggest that if investment treaties guarantee freedom from "arbitrary and discriminatory treatment," Sovereigns may usefully include definitions for "arbitrary" and "discriminatory" in their treaties.[142] This approach has two benefits.

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[139] *See* Afilalo, *supra* note 12, at 280 n.8, 288 n.45 & 289 n.51 (describing the need for a NAFTA appellate body similar to the framework used in the European Union); Paterson, *supra* note 125, at 122-23 (recommending access to domestic courts be linked with a transnational court of appeal); *see also* discussion *infra* Part III(C) (describing the approach of safeguard builders).

[140] The same is not true for an appellate mechanism in the context of investment treaty arbitration. *See infra* note 186 (describing the United States' Trade Promotion Authority Act, which requires Sovereigns to consult on the creation of an appellate body); note 185 and accompanying text (noting how CAFTA-DR requires signatories to consult on the creation of an appellate body); note 182 and accompanying text (discussing ICSID's proposal for an appellate body); *but see* ICSID, *Suggested Changes to the ICSID Rules and Regulations: Working Paper of the ICSID Secretariat*, May 12, 2005, http://www.worldbank.org/icsid/052405-sgmanual.pdf [hereinafter ICSID Working Paper] (indicating that ICSID believes it is premature to attempt to establish an appellate body at the current time).

[141] *See* Franck, *Inconsistent Decisions, supra* note 1, at 1588-89 (describing and the approach of legislative reformers and offering a critique of their approach).

[142] *See* US/Czech Republic BIT, *supra* note 15, at arts. 1(1)(f), 2(2)(b) (prohibiting arbitrary or discriminatory measures and providing a definition of "nondiscriminatory" but not "arbitrary"); Agreement of the Government of the Kingdom of Thailand and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments, Feb. 18, 2000, art. 2(2), http://www.unctad.org/sections/dite/iia/docs/bits/thailand_zimbabwe.pdf (prohibiting only the impairment of investment by "unreasonable, arbitrary or discriminatory measures" but failing to define these terms).

First, it permits Sovereigns to choose more precisely which rights they wish to grant investors. Second, by elucidating the parameters of investor's substantive rights, this approach brings enhanced textual clarity to an individual treaty, which should generate consistent interpretation and application of matters under that treaty.

Legislative reformers currently leave untapped an opportunity for enhancing consistency. They could suggest revising procedural rights in investment treaties. By implementing and defining certain structural safeguards in the text of a treaty's dispute resolution provision, Sovereigns could create procedural enhancements that, which do not inhibit access to arbitration but nevertheless minimize the risk that different tribunals will reach inconsistent decisions.[143]

Despite the promise of the legislative approach, there are certain limitations. First, there is a risk that over-definition of rights may spawn more issues for litigation, which may also result in inconsistency. Second, renegotiating and revising the terms of more than 2100 bilateral investment treaties presents political challenges. As a practical matter, it means that legislative reformers are likely to enhance certainty and consistency only prospectively and on a treaty-by-treaty basis.[144] The has a marginal impact on reducing inconsistency throughout the remainder of the investment treaty network.

In contrast, safeguard builders offer solutions that may more efficiently and effectively address the challenges raised by inconsistent awards. Safeguard builders view arbitration as a useful forum for resolving treaty claims but acknowledge that structural safeguards could be put in place to enhance the efficacy of the dispute resolution process. By adapting the system to account for the challenges unique to investment treaty claims, safeguard builders hope to foster a dispute resolution system that reaches consistent, predictable, and reliable outcomes, in which the public, Sovereigns, and investors can have confidence.[145]

The safeguard building approach also provides an opportunity to create reform on a multi-lateral rather than treaty-by-treaty basis.[146] Considering treaties in isolation cannot resolve inter-connected rights,

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[143] *See infra* notes 146, 153, 167 and accompanying text (describing structural safeguards that could be implemented in a treaty itself).

[144] Although the change is slow, there is some evidence that this occurring now. *See UNCTAD* Research Notes on Recent Developments, *supra* note 45, at 4-7 (suggesting that older generations of BITs are being replaced by a new generation of BITs with more particularized treaty rights).

[145] Franck, *Inconsistent Decisions, supra* note 1, at 1601-25.

[146] For example, revision of arbitral rules, the creation of an appellate body, and the development of an academic literature all provide safeguards on a multi-lateral basis. *See infra* notes 156-58, 182-87 and accompanying text.

since the treaties have common roots and are intimately related.[147] While not identical, the more than 2100 existing BITs do have a high degree of uniformity in the substantive rights granted to investors.[148] Promoting the integrity of the network is therefore critical.

While no system of dispute resolution is perfect, safeguard building measures will promote the integrity of the dispute resolution process and increase the likelihood that investment treaty awards are decided in a consistent manner that results in consistent awards. Three different types of safeguard building measures have been proposed as means of achieving these objectives. First, safeguard builders recommend procedural mechanisms that can indirectly minimize the risk of obtaining conflicting decisions. These mechanisms increase a tribunal's ability to make fully considered and informed decisions in order to decrease the likelihood that awards will be decided inconsistently. Second, safeguard builders suggest the creation of institutions to rectify inconsistency, providing a direct method of ensuring consistency. Finally, there are hybrid mechanisms, which combine aspects of indirect and direct safeguard building methods in an effort to more comprehensively address current arbitral inconsistencies and foster the development of a predictable, reliable and clear jurisprudence.

1. Indirect Methods to Improve Consistency

Participants in and users of investment arbitration could adopt a variety of safeguards to provide opportunities to engage in considered decision-making. These reforms generally include measures designed to improve the transparency of the dispute resolution process, allow appropriate third-party participation in that process, and address the need for legal assistance to promote the equality of arms[149] while

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[147] *See* Franck, *Inconsistent Decisions, supra* note 1, at 1526-27, 1618-19 (gathering sources and describing the evolution of investment treaties and the interconnected nature of the substantive rights).

[148] Kaj Hobér, *Has the Proliferation of BITs Gone Too Far: Is it Now Time for a Multilateral Investment Treaty?*, 90 J. WORLD INV. & TRADE 93, 93 (2004).

[149] Equality of arms is traditionally a concept associated with fairness of proceedings, particularly in criminal law. It is rooted in the idea that there should be a reasonable opportunity to present a case. As explained by one scholar, "[t]he concept of equality of arms is one feature embedded within the wider concept of a fair trial. The concept requires a sense of "fair balance" between the parties. In instances involving opposing private interests . . . "equality of arms implies that each party must be afforded a reasonable opportunity to present his case — including his evidence — under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent." Michael Hayes Biderman, *A Potentially Dubious New Front in the War on Terrorism: State-Sponsored Civil Suits and the Omagh Bombing*, 14 TRANSNAT'L L. &

resolving disputes.

Giving tribunals and parties access to awards (and the documents that support the tribunal's reasoning) provides a useful opportunity to promote consistency. Tribunals can inform their own reasoning by considering the determinations and analysis of previous tribunals faced with similar issues; investors and Sovereigns can better plan their business or regulatory activities based on prior arbitral awards and reasoning; and citizens can be aware of the potential downstream implications of all arbitral decisions. At present, because of the confidentiality traditionally associated with arbitration, transparency occurs on an *ad hoc* basis (if at all) in investment arbitration.[150] This means, without party consent, awards need not be made public, pleadings and transcripts cannot be obtained, and hearings on public issues are not open to the public. Nevertheless, arbitration awards have found themselves in the public domain with increasing frequency,[151] and ICSID's recent proposals recommend changing its institutional rules to require the mandatory publication of excerpts of a tribunal's "legal conclusions."[152]

CONTEMP. PROBS. 803, 816-17 (2004).

[150] There have been some indications that parties are more willing to open their proceedings to the public. *See* NAFTA Free Trade Commission Joint Statement, http://www.dfait-maeci.gc.ca/trade/nafta-alena/statement-en.asp (discussing agreed transparency obligations). For NAFTA proceedings, subject to the need to protect specific sensitive information, Canada has declared it will consent to public hearings to which it is a party, and encourage investors to do the same. Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations, http://www.dfait-maeci.gc.ca/nafta-alena/open-hearing-en.asp (last visited Dec. 5, 2005). The public hearings in *UPS v. Canada, Methanex v. United States* and *Canfor v. United States* are evidence of this trend. *See* http://www.worldbank.org/icsid/ups.htm, http://www.worldbank.org/icsid/methanex.htm, and http://www.worldbank.org/icsid/canfor.htm; *see also supra* notes 167-70 (describing the increased transparency and access to documents in investment arbitration).

[151] There are many websites that make an effort to publish these awards. *See supra* note 105 and accompanying text. However, this does not stop the underground trading of awards among well-connected individuals. In practice, this may mean that some attorneys have access to awards which others do not. Particularly given the variety of divergent standards of professional ethics and obligations that might be involved, one might realistically imagine an attorney failing to disclose a case which might otherwise adversely affect his case. *See* Blackaby, *supra* note 88, (noting that "[a]ccess to many of the decisions is through a network of law firms active in this area; whilst it benefits the members of that 'magic circle' it is not right that those firms should have a wider array of jurisprudence with which to fight their case. Access should be equal to all — whether the sole practitioner [is] in middle America (who have been active in these cases) or the international law firm in Paris or Washington."). Likewise, an attorney might be prohibited from disclosing a case that might positively impact their case because of an ongoing obligation to a client to keep an award confidential.

[152] ICSID Working Paper, *supra* note 140, at 9; *see also* ICSID White Paper, *supra*

ICSID's proposal may not go far enough, however. Excerpting only the legal conclusions reached in connection with an award has many implications. First, it prevents tribunals from having a full factual context and a thorough appreciation for the legal reasoning that underlies the excerpted "legal conclusions."[153] Moreover, for scholars, tribunals, or others who wish to understand the bases for a decision, whether stated or unstated, the lack of access to underlying pleadings and transcripts is problematic.[154] Second, the lack of public dissemination fosters the underground trading of awards. This prevents equality of arms between parties who do not have the same knowledge of or access to recent or unpublished opinions.[155] Irrespective of whether a party does not have access to an award or wishes to conceal an adverse decision, tribunals may be prevented from considering the analysis of previous tribunals who have dealt with analogous issues.

The primary institutions that tend to administer investment treaty cases, such as ICSID, the ICC, and the SCC might therefore consider amending their rules or creating a protocol to provide for enhanced and timely access to awards and underlying materials related to investment treaty arbitration.[156] Permitting public dissemination of awards, pleadings, and transcripts, will provide opportunities for critique and scholarship, which may also aid in the development of a

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note 36.

[153] This may be a basis for the Organization for Economic Co-operation and Development's recent recommendation for the publication of arbitral awards, subject to the necessary safeguards to protect confidential business or governmental information. OECD Statement, *supra* note 42.

[154] Certain countries, particularly the United States and Canada, have provided that hearings will be open to the public. Statement of the Free Trade Commission on Non-Disputing Party Participation, http://www.dfait-maeci.gc.ca/nafta-alena/Nondisputing-en.pdf (last visited Dec. 5, 2005). For these countries, the public may be able to access a transcript of the hearing if they are unable to attend. *See* U.S Department of State, *Methanex v. United States of America*, http://www.state.gov/s/l/c5818.htm (last visited Dec. 5, 2005) (posting the transcripts for the nine days of hearings).

[155] OECD Statement, *supra* note 42, at 11; *see also supra* note 149 and accompanying text (explaining the importance of equality of arms).

[156] *See supra* notes 25 (describing an investor's broad range of options for bringing claims); *see also* Franck, *Inconsistent Decisions, supra* note 1, at 1541 n.75 (discussing which institutions get investment treaty claims); *Policy Implications*, *supra* note 7, at 5, 11 (indicating that approximately 106 treaty claims are brought at ICSID, 39 are *ad hoc* UNCITRAL arbitrations, and the 15 remaining cases have been brought before the SCC or ICC). Revising the rules of ICSID would go a long way towards addressing these concerns as a majority of cases proceed through ICSID. As many cases also proceed on an *ad hoc* basis under UNCITRAL Rules, it may be useful for UNCITRAL to issue revised rules. Likewise, in light of their increasing case load, the SCC and ICC may wish consider appropriate revisions to their rules.

consistent jurisprudence. Ensuring parties have equal access to the same awards — and are able to make arguments based upon those awards — should also aid tribunals in making reasoned and considered awards. This level of transparency indirectly provides tribunals with information to develop consistent jurisprudence in an efficient manner. Indeed, the publication of awards will "contribute to the further development of a public body of jurisprudence...and ultimately contribute to a more predictable and consistent system."[157] Moreover, once in place, modifications by arbitral institutions could have an immediate impact upon a large number of existing cases.[158]

Other types of transparency might improve the quality of a tribunal's decision making and indirectly promote consistency. Arbitration rules might give interested third parties an opportunity to be heard or make submissions. Beyond giving those impacted by a decision a voice in the process, there are significant benefits to allowing *amici* to participate.[159] Submissions from non-parties can make the arbitrators aware of issues or facts which they might not otherwise be aware.[160] Non-party submissions might also suggest alternative methods of legal analysis that the tribunal can consider and accept or reject during the course of its deliberations. Likewise, *amici* might present to the tribunal technical arguments or background that the parties have not supplied.[161]

Although there are costs associated with amicus participation for the parties, arbitrators, and *amici* themselves,[162] there are methods of minimizing the burden. For example, given the costs of participation

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[157] OECD Statement, *supra* note 42, at 11.

[158] This is the point of the OECD, which acknowledges that there "are a growing number of arbitration awards which are likely to influence future cases and this has argued for their systematic and quick publication." *Id.*

[159] Joseph D. Kearny & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 745-48 (2002) (describing the benefits and limitations of *amici* participation).

[160] *See* Patricia Isela Hansen, *Dispute Settlement in the NAFTA and Beyond*, 40 TEX. INT'L L.J. 417, 421 (2005) (explaining that *amicus* submissions can usefully expose tribunals to a broader range of facts and opinions than disputing parties as well as sensitizing tribunals to the broader social impact of their decisions).

[161] *See* Methanex Award, *supra* note 109, at pt. IV(B), ¶ 27 (referring favorably to a "carefully reasoned Amicus submission" from the International Institute for Sustainable Development); *see also* Hansen, *supra* note 160, at 421 (explaining that *amici* can help tribunals frame their decisions in ways that will minimize the risk of widespread misunderstandings and confusion).

[162] In particular, parties will typically need to review these submissions and need to spend time, money, and other resources preparing appropriate responses. Likewise, the tribunal will need to exert its resources to reviewing the *amicus* submissions and any responses.

to *amici* themselves, there are efficiencies in coordinating *amici* submissions to maximize the possibility of effective assistance to the tribunal.[163] Such cost and time saving coordination is likely to pass on similar savings to parties — who may wish to reply to *amici* submissions — and arbitrators — who will have to review and consider the *amici* submissions and party replies. Likewise, *amicus* participation might be restricted to those *amici* who are bringing a relevant matter to the tribunal of which it is not already aware.[164] Even without this restriction, however, the efficacy of third-party participation might be usefully enhanced by offering public access to pleadings so that the *amici* know the issues in dispute, understand the arguments of the parties, and tailor their arguments to eliminate duplication and add useful information.[165] In recognition of the benefits of third-party participation, ICSID recently proposed allowing the participation of third parties in investment treaty arbitrations under appropriate circumstances.[166] This suggestion serves as a useful

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[163] There have been over 300 interested parties in the *Aguas Del Tunari v. Bolivia* case, but nevertheless, these *amici* made a single submission to the tribunal. *See* South Centre I, *supra* note 166, at 11 (noting the 300 *amici* in the *Bolivia* case) *with* Center for International Environmental Law, *Three Hundred Citizen Groups Call on Secret World Bank to Open Up Bechtel Case Against Bolivia* (Aug. 29, 2002) http://www.ciel.org/Tae/Bechtel_Bolivia_Aug02.html (discussing how the 300 *amici* are working together). By working together, *amici* can share costs, increase the effectiveness of their advocacy, and minimize the burden on the tribunal and the parties. *See* Kearny & Merrill, *supra* note 159, at 752-54; IISD Comments, *supra* note 37, at 11 (suggesting that *amici* "will always tend to act responsibly in the face of a responsible and responsive process, and will seek among themselves to avoid undue duplication"); *see also* J. Harvie Wilkinson III, *The Question of Process*, 98 MICH. L. REV. 1387, 1389 (2000) (observing that the average number of amici briefs for a U.S. Supreme Court case is around four); Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807, 812 (2004) (observing that even though there may be a significantly larger number of individual amici there will be a limited number of briefs); Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 58 (2004) (suggesting that the costs of preparing one U.S. Supreme Court *amicus* brief can be as little as $50,000).

[164] *See, e.g.,* U.S. Supreme Court Rule 37(1),(2) (providing that an "*amicus curiae* brief that brings to the attention of the Court a relevant manner not already brought to its attention by the parties may be of considerable help to the Court" and setting out that the parties can either agree to let the amicus participate or the Court can decide, upon a motion by the *amicus*, to submit a brief); *see also* Kearney & Merrill, *supra* note 159 at 751-61(noting that in the 1950s and 1960s the Supreme Court tended to deny petitions to file *amicus* briefs but in the last 40 years there has been an 800% increase in the number of filings).

[165] *See also* IISD Comments, *supra* note 37, at 11 (suggesting that also "one has to know of an arbitration to be able to consider seeking *amicus* status").

[166] *See* ICSID Working Paper, *supra* note 140, at 11 (permitting non-parties with a "significant interest" in the proceeding to participate so long as they did "not disrupt

model for other arbitration institutions that may wish to consider amending their rules or offering a special protocol for investment treaty arbitration.

Beyond proposed changes to institutional rules, legislative reformers might also use treaty negotiations to provide a broader level of transparency and to promote procedures, such as public dissemination of awards, access to materials, and third-party participation, that maximize consistency.[167] In contrast to other countries, the United States and Canada have taken steps in their treaties to improve transparency in their dispute resolution mechanisms.[168] Specifically, the United States has included enhanced transparency in various Free Trade Agreements,[169] including the

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the proceeding, unduly burden, or unfairly prejudice either party; and that both parties are given an opportunity of presenting their observations on the non-disputing party submission"); *but see* South Centre, *Developments on Discussions for the Improvement of the Framework for ICSID Arbitration and the Participation of Developing Countries*, SC-TADP/AN/INV/1 9-11 (Feb. 2005), http://www.southcentre.org/tadp_webpage/research_papers/investment_project/icsid_discpaper_feb05.doc [hereinafter South Centre I] (suggesting that the participation of third parties was inappropriate and unduly burdensome); *see also* South Centre, *Proposed Amendments of ICSID Rules: Process Related and Substantive Issues on ICSID Reform for Developing Countries*, SC/TADP/AN/INV/1 (Aug. 2005), http://www.southcentre.org/tadp_webpage/research_papers/investment_project/icsid_discpaper_aug05.doc [hereinafter South Centre II].

[167] Legislative reformers typically discuss making changes to substantive rights to provide enhanced certainty. *See supra* notes 141-42 and accompanying text. Nevertheless, this same "legislative" approach of negotiating individual treaties can be used to build safeguards into the dispute resolution mechanism and to offer enhanced transparency in individual BITs as a method of indirectly reducing the risk of consistency.

[168] The most recent version of the US Model BIT, for example, usefully provides that the tribunal can accept and consider *amicus curiae* submissions from non-parties, pleadings will be made public, and — subject to concerns related to sensitive business information or nationality — the hearings will be public. *See* Revised US Model BIT, *supra* note 25, at arts 28, 29. Canada, likewise, has provisions for transparency including public access to hearings and documents, but they are more extensive than those of the United States, and even set out the standards for when arbitrators may accept submissions from non-parties. Canada's Model Foreign Investment Promotion and Protection Agreement, arts. 38-39, 2004, http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf.

[169] Chapter 10 of the US/Chile FTA establishes a more transparent dispute resolution process and offers protections such as giving a non-disputing party access to documents, requiring that tribunals send copies of the final awards to non-parties, and extending confidentiality in the case of sensitive business information and issues of national security. *See* United States-Chile Free Trade Agreement, arts. 10.19, 10.20, June 6, 2003, http://www.ustr.gov/new/fta/Chile/text/index.html; *see also* Scott Jablonski, *¡Sí, Po! Foreign Investment Dispute Resolution Does Have a Place in Trade Agreements in the Americas: A Comparative Look at Chapter 10 of the United States-Chile Free Trade Agreement*, 35 U. MIAMI INTER-AM. L. REV. 627, 630 (2003).

recently enacted Central American Free Trade Agreement, in which the United States incorporated provisions for public hearings and third-party attendance at arbitrations.[170]

Another indirect method of enhancing consistency is to promote a dispute resolution system in which there is equality of arms among the parties to ensure the full and fair resolution of the dispute. While parties are unlikely to possess identical financial or personal resources, the principle of "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case."[171] Recently, issues have arisen as to the equality of arms of parties resolving investment treaty disputes; more specifically, there is concern that developing countries, which may have unequal access to legal authority and expertise, may be unable to participate fully in the dispute resolution process.[172] For example, countries such as the Seychelles, which is defending an ICSID case[173] may have "an unreliable internet connection, no access to Westlaw or Lexis-Nexis, and no treatises on ICSID or investment arbitration" and instead defend themselves with only their "wits, a copy of the ICSID Convention and Rules, and two outdated English contract law treatises."[174] Likewise, when Argentina first began defending its treaty claims, Argentinean government lawyers did not have access to fundamental substantive law or arbitration doctrine. Since hiring outside counsel was not a viable option, government lawyers flew to the United States a few days prior to the hearings to do the necessary research and spent their own money to buy copies of key arbitration treatises.[175] This lack of equality of arms between the parties can

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[170] CAFTA-DR, *supra* note 4. CAFTA-DR's article 20.11(1) states that upon written notice to disputing parties, third parties shall be entitled to attend all hearings. Article 20.10(1)(a) goes further to state that there will be at least one hearing before the arbitration panel, and it shall be open to the public. *Id*. at art 20.11(1).

[171] Kayishema and Ruzindana, (Appeals Chamber), June 1, 2001, ¶¶ 63-71; Prosecutor v. Tadic, ICTY Case No. IT-94-1 (Appeals Chamber), July 15, 1999, ¶ 48.

[172] *See* Eric Gottwald, *Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in ICSID Arbitration* (2005) (unpublished manuscript, on file with author).

[173] CDC Group plc v. Republic of the Seychelles, ICSID (W. Bank) Case No. ARB/02/14 (Award) (Dec. 17, 2003), *available at* http://ita.law.uvic.ca/documents/CDCvSeychellesAward_001.pdf; CDC Group plc v. Republic of the Seychelles, ICSID (W. Bank) Case No. ARB/02/14 (Annulment Decision) (June 29, 2005) *available at* http://ita.law.uvic.ca/documents/CDCSeychellesAnnulmentDecision.pdf. This claim was brought under the ICSID Convention but was not an investment treaty claim per se.

[174] Gottwald, *supra* note 172, at 8 (*citing* Interview with Anthony Fernando, Attorney Gen. of the Sey. (Mar. 25, 2005)).

[175] Gottwald, *supra* note 172, at 10. Argentina now has a more developed in-house

create challenges for obtaining fully reasoned and considered awards, which contributes to obtaining consistent and reliable results.[176]

While ICSID has acknowledged the wish to train lawyers from developing countries,[177] beyond the useful potential for capacity building, it offers no suggestion for particularized legal advice or assistance once a dispute arises. It may be appropriate to consider the utility of offering a legal assistance center for developing nations involved in investment treaty arbitrations.[178] This legal assistance center might be similar to the Advisory Center for WTO Law, which exists to advise developing nations in trade disputes at the World Trade Organization (WTO).[179] By promoting the equality of arms, tribunals can deliberate with greater confidence that relevant arguments have been raised and briefed, which better enables them to make reasoned and appropriate decisions.

2. Direct Methods: Creating Institutions

Other, more direct methods could be used to rectify inconsistent awards. In particular, Sovereigns might create international institutions to ameliorate confusions caused by inconsistent awards or correct inconsistencies as they arise. Such institutions might take the form of a Free Trade Commission (FTC) or an appellate body.

FTCs such as the one established in the NAFTA, offer a built-in control to provide tribunals with interpretive guidance to avoid the temptation to go astray. FTCs are comprised of government ministers from signatory countries who meet to discuss trade-related activities and might also issue binding interpretations about the meaning of investment rights, which then become part of the applicable law of the

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legal team to defend it in investment treaty claims.

176 *See* Burke-White Community of Courts, *supra* note 136, at 67-70 (describing how a lack of resources and inequality of arms can adversely affect the quality of the decision making process).

177 *See* ICSID White Paper, *supra* note 36, at 14 (noting that ICSID has co-operated in the past to provide training programs for officials from developing countries on the arbitration of investment disputes); ICSID Working Paper, *supra* note 140, at 4 (suggesting that it will issue a separate paper in due course on the possibility of collaborative efforts to engage in training activities).

178 Gottwald, *supra* note 172, at 23-31.

179 *See* International Institute for Sustainable Development, *IISD Model International Agreement on Investment for Sustainable Development: Negotiators Handbook*,56 (2005) http://www.iisd.org/pdf/2005/investment_model_int_ handbook.pdf [hereinafter IISD Model International Agreement] (describing a legal assistance center derived from "the WTO Legal Advisory Center, created to assist developing countries in capacity building and by providing expert advice on trade law cases" and suggesting that a center "assist developing countries in responding to claims").

treaty.[180] While there has been some concern about how NAFTA's FTC has used its authority and whether an "interpretive" note might impermissibly amend a treaty,[181] FTCs offer the promise of enhanced consistency on a treaty-specific basis. They do not, however, offer broader coherence.

A slightly different safeguard — namely, an investment arbitration appellate body — could also be created. This appellate body has the potential benefit of immediately correcting inconsistencies within the network on a multilateral basis. "Getting it right" in a "bet the country" dispute is vital. While a more challenging reform to implement,[182] an appellate body would provide a critical opportunity to review awards, correct errors and establish a reliable body of law. ICSID's recent proposal for the creation of an Appeals Facility, offered a useful starting point but was recently taken off the table and described as "premature."[183] Interest in this suggestion remains, however.[184]

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[180] *See* NAFTA, *supra* note 4, at arts. 1131, 2001; Franck, *Inconsistent Decisions, supra* note 1, at 1604; Alvarez & Park, *supra* note 93, at 400; Coe, *supra* note 17, at 1410.

[181] Brower, *Structure*, *supra* note 12, at 78-79, 82; Weiler, *Metalclad*, *supra* note 98; Todd Weiler, *NAFTA Investment Arbitration and the Growth of International Economic Law*, 36 CAN. BUS. L.J. 405, 429 (2002) [hereinafter Weiler, *NAFTA*]; Paterson, *supra* note 125, at 110; *but see* Methanex Award, *supra* note 109, at pt. IV(C), ¶¶ 11-25.

[182] This might most usefully be done by drafting a multi-lateral convention, which would act as umbrella and permit Sovereigns to agree to subject individual BITs to the protection of a larger appellate body. Such an approach is theoretically appropriate as it recognizes the inter-related yet distinct nature of each BIT. Should countries fail to sign up to such a multi-lateral Convention, there will doubtless be problems with horizontal consistency in the sense that some BITs — but not others — had the benefit of access to an appellate mechanism. Nevertheless, the added value and procedural protections afforded by a single body should not be underestimated. *See generally* Franck, *Inconsistent Decisions*, *supra* note 1; *see also* Andrea K. Bjorklund, *The Continuing Appeal of Annulment?: Lessons from* Amco Asia *and* CME*, in* Weiler, Leading Cases, *supra* note 111, at 510-515.

[183] ICSID Working Paper, *supra* note 140, at 4. ICSID's White Paper notes that its proposal must necessarily relate to those Sovereigns that are signatories to the ICSID Convention. ICSID does suggest, however, that its Appeals Facility may be organized in such a way that it would be willing to accept appeals related to ICSID Additional Facility cases, *ad hoc* UNCITRAL arbitrations, and arbitrations provided under other dispute arbitration mechanism in an investment treaty. ICSID White Paper, *supra* note 36, at Annex at 1-2.

[184] IISD, Model International Agreement, *supra* note 179, at 55-56; IISD, Comments on ICSID, *supra* note 37, at 4-6 & 12-13. South Centre II, *supra* note 166, at 5-6; *see also supra* notes 139-40 and accompanying text (noting that arbitration rejecters also appreciate the utility of some sort of transnational judicial body to rectify inconsistency).

The U.S. Trade Promotion Authority Act suggests that, when negotiating future investment treaties, the U.S. will consider an appellate body for each treaty. The United States currently has obligations to negotiate about establishing appellate bodies with a variety of countries that have signed Free Trade Agreements with the United States.[185] This approach is likely to lead to the creation of bilateral, disaggregated appellate bodies. The existence of these various appellate bodies could exacerbate the current challenges of inconsistency by creating multiple bodies of appellate law, potentially resulting in different findings and results on the same issue.[186] In contrast to the approach currently suggested by U.S. legislation and treaty obligations, a single, permanent body charged with interpreting the network of investment treaties would more readily promote the creation of a reliable, predictable and clear jurisprudence.[187]

3. Hybrid Methods

A group of hybrid mechanisms also could be used to minimize problems of inconsistency. These hybrid approaches provide both indirect and direct procedural opportunities to minimize the degree of inconsistency, but they cannot rectify inconsistency fully.

Consolidation or concurrent hearings are useful procedural tools to minimize inconsistency. Consolidating claims that have common issues of fact or law provides an opportunity to promote consistent factual findings or legal conclusions. If a single tribunal decides a series of claims, this eliminates the possibility of different tribunals will reach different conclusions based on the same treaty or the same

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185 CAFTA-DR, *supra* note 4, at Annex 10-F (stating that "the Commission [FTC] shall establish a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter"); United States-Chile Free Trade Agreement, Annex 10-H, June 6, 2003, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf; United States-Singapore Free Trade Agreement, May 6, 2003, http://www.ustr.gov/new/fta/Singapore/final/2004-01-15-final.pdf; *see also* Revised US Model BIT, *supra* note 25; *see also* Revised US Model BIT, *supra* note 25, at 39 (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").

186 19 U.S.C. § 3802(b)(3)(G)(iv)(4) (2004) suggests that when negotiating future BITs and Free Trade Agreements there should be a provision — in each individual treaty — that would require an "an appellate body or similar mechanism to provide coherence to the interpretation of investment provisions in trade agreements". The Trade Promotion Authority Act does not speak of a multi-lateral appellate mechanism to create coherence across the network.

187 The structure of such an appellate body has been discussed in greater detail at Franck, *Inconsistent Decisions*, *supra* note 1.

conduct. Claims consolidation might, for example, usefully reduce the risk of inconsistency where a single government measure spawns a variety of claims.

As consolidation of claims is only occurs where both parties have agreed to consolidate, there are challenges with this approach. It might therefore be useful to articulate the right to consolidate in an investment treaty or in the relevant procedural rules.[188] This secures party consent in advance and will typically grant a tribunal authority to consolidate. This requirement of party agreement also means consolidation offers an incomplete solution.[189] If not all claims are being brought under an agreement permitting consolidation, party agreement to consolidate the claims must be sought after the fact;[190] and as a practical matter, this approval will be difficult to obtain. This means, for example, if U.S. investors bring a claim against Argentina under the U.S./Argentina BIT and German investors bring claims under the Germany/Argentina BIT and neither BITs have consolidation provisions, the U.S. and German investors will have no obligation to consolidate — even if this is precisely what the Argentinean government desires.[191] While consolidation may be a useful procedural mechanism, absent an applicable multinational consolidation convention, it has limitations.[192]

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[188] NAFTA, *supra* note 4, at art. 1126; *Canfor v. United States*, (Decision on Consolidation) (May 20, 2005) http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Consolidacion/acuerdos/050520_Orden_de_Tribunal_de_Acumulacion.pdf.

[189] Likewise, joinder is unlikely to minimize the possibility on inconsistent decisions. Joinder typically involves bringing an essential third party before a tribunal. The LCIA, for example, permits a consenting third party to be made a party to the proceedings at the request of one party. LCIA Arbitration Rules, art. 22.1(h), http://www.lcia-arbitration.com/ (last visited Dec. 5, 2005). Unlike a commercial claim where one party says a third party is responsible for the claimant's harm, joinder is of less utility. A Sovereign is ultimately responsible for how it has complied with its obligations; there generally is no third party with whom to apportion blame.

[190] The Revised US Model BIT, for example, expressly permits the consolidation of claims. *See* Revised US Model BIT, *supra* note 25, at art. 33. But, other treaties do not include such provisions. Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, Aug. 27, 1993, http://www.unctad.org/sections/dite/iia/docs/bits/ecuador_usa_sp.pdf (not including a right to consolidate); Ireland/Czech Republic BIT *supra* note 15 (same).

[191] This is not, however, the exclusive province of governments. For example, in the *Lauder* cases, the investors tried to consolidate the claim by having the same tribunal decide both cases; but the government rejected this offer. *See* Brower et al., *Global Adjudication, supra* note 47.

[192] At the American Society of International Law's Annual Meeting in April 2005, Bart Legum, former head of the U.S. Department of State's NAFTA Claims Division raised the possibility of an international consolidation convention related to treaty

Along a similar vein, treaties or institutional rules might expressly provide an opportunity for concurrent hearings of related cases. While different tribunals will still make individual decisions, having contemporaneously heard a common set of facts and arguments may increase the probability that similar cases will be decided in a similar manner.[193] Unless all parties in the related hearings have agreed to concurrent proceedings,[194] this procedural mechanism will have limited utility.[195]

Another hybrid mechanism provides tribunals with the authority to develop a consistent jurisprudence; but its prospective nature and inability to correct inconsistent decisions reflects its hybrid character. That mechanism includes the production of a cohesive academic literature on investment treaty arbitrations. In particular, a developed academic literature, carrying precedential value under the ICJ Statute,[196] could re-introduce certainty by establishing norms of

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claims. Carolyn Lamm, Moderator, Parallel Proceedings in International Litigation and Arbitration (April 1, 2005).

[193] Other practical tactics inherent in the arbitration process could also be used to minimize the possibility of inconsistent results. For example, tribunals selecting the third arbitrator might choose a common chair for related cases. Likewise, parties could simply elect to appoint the same arbitrator in related cases or agree that they will be bound by the determinations of a first tribunal. While this could reduce or eliminate the possibility of inconsistent decisions, it would be challenging to enshrine in institutional rules or a treaty. Such choices occur tactically and on a case-by-case basis.

[194] Parties could agree by way of the dispute resolution procedures articulated in the BIT, by agreeing to institutional rules that permit concurrent hearings, or by making an agreement after the disputes have arisen to engage in concurrent hearings.

[195] There are other procedural mechanisms that might be used to address consistency, but unfortunately these are not tenable in the context of investment treaty arbitration. Use of doctrines such as res judicata or *lis alibi pendens* are unlikely to minimize problems of inconsistency, as different claims typically involve different parties in interest and different causes of action. This was acknowledged in the *Lauder* cases given the distinctions between the claimant and the nature of the rights and obligations. Lauder Award, *supra* note 50, at 169-72; *see also* Kühn, *supra* note 60, at 11-15 (describing the challenges to using doctrines such as *lis pendens* and res judicata in the context of investment treaty arbitration); Bjorklund, Weiler, Leading Cases, *supra* note 111, at 516-21.

[196] *See* ICJ Statute, *supra* note 38, at art. 38, (describing the order of binding authority before the ICJ as "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"); *see also* Gabrielle Kaufman-Kohler, *Annulment of ICSID Awards in Contracts and Treaty Arbitrations: Are There Differences*, *in* INTERNATIONAL ARBITRATION INSTITUTE, ANNULMENT OF ICSID AWARDS 189, 220 (Emmanuel Gaillard & Yas Banifatemi, eds., 2004) (describing the lack of stare decisis at ICSID).

interpretation among treaties. Given the speed with which investors are filing cases and arbitrators are making awards, the law has moved ahead of the academic literature; scholars can play a vital role in bridging this gap and offering guidance about how to "square the circle" and harmonize public international law. Better yet, implementing this suggestion simply requires scholars to pick up a pen. While there may be differences in opinion and approach among academic commentators, this healthy debate is not problematic and ultimately should prove useful. Thorough probing of public international law issues will tease out critical distinctions, clarify areas of divergence and commonality, and, ultimately, provide tribunals with a considered discourse upon which they can reflect when struggling with the application of an emerging area of law — namely the law governing the meaning of those substantive rights under investment treaties — to varied and complex facts.[197] This discourse should provide tribunals with authority they can utilize to develop a clear, consistent, and reliable jurisprudence. This consistency can, in turn, provide the public, investors, and Sovereigns with increased certainty and predictability about their rights and obligations.

IV. CONCLUSION

Let us return to De Toqueville to bring these remarks full circle. In *Democracy in America* he wrote that the "great privilege of the Americans does not simply consist in their being more enlightened than other nations, but in their being able to repair the faults they may commit."[198] The United States need not have a monopoly on the capacity to recognize problems and rectify faults. Rather, it is the responsibility of Sovereigns to evaluate the consequences of ceding substantive rights in investment treaties and consider their implications for the future.[199] Users of investment treaty arbitration also must ensure that the dispute resolution process meets their needs by providing reliable results so that they can manage their investment

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[197] Justice Scalia has also commented that criticism from the academy is an effective check on inappropriate decision making. Scalia, *supra* note 76, at 1180. The challenge in the context of investment treaty arbitration is that the scholarship is in a more embryonic stage than the case law. *See supra* note 111.

[198] DE TOCQUEVILLE, *supra* note 13, at 266.

[199] Even controversial awards can have a positive impact upon the development of investment arbitration jurisprudence. Such awards provide information about the scope of rights that Sovereigns may be granting investors, which, in turn, provides Sovereigns with an opportunity to make more informed decisions about which rights — and the scope of such rights — they offer and manage their expectations about the process and substance more effectively. Franck, *International Decision, supra* note 18, at 680-81.

risks.[200]

By recognizing the unique problems caused by inconsistency in the context of investment arbitration, we can begin moving forward to consider how best to resolve these challenges. While the suggestions of barrier builders and arbitration rejecters merit consideration, ultimately they neither address nor minimize the challenges related to inconsistency and, in fact, may exacerbate some of the difficulties. In contrast, by utilizing the approaches of safeguard builders and, to some extent, legislative reformers, investment treaty arbitration can utilize indirect, direct and hybrid measures to bring greater clarity and consistency to the meaning investment treaty rights. In this manner, predictability, reliability, clarity, efficiency and consistency can revitalize the network of investment treaty disputes and address the concerns of citizens, investors and Sovereigns alike.

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[200] This might include retaining political risk insurance so as to protect their investment against adverse changes such as expropriation, discrimination, foreign exchange controls, or civil disturbances. There are a variety of institutions that offer such protection, including OPIC, MIGA and ECGD. *See* Franck, *Inconsistent Decisions, supra* note 1, at 1620-21 n.469.