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Legitimacy and Reform

The arbitral order has developed features of hierarchy that enable it to assert power over the disputing parties, and to defend its own autonomy with respect to other legal systems. While the regime interacts intensively with the domestic law and courts, these processes have strengthened the status of arbitral lawmaking, rather than subordinating it to state priorities. Indeed, arbitrators themselves have made much of the law that grounds the exercise of their own authority.

The regime's judicialization has also meant that legitimacy debates that have long swirled around courts, and their lawmaking, now beset arbitration. The literature on the legitimacy of judicial lawmaking, as a mode of governance, is both vast and contentious. There are no commonly accepted definitions, bodies of theory, or empirical measures of legitimacy when it comes to judge-made law. Instead, judicial lawmaking chronically produces anxiety, which is expressed in a variety of well-rehearsed legitimacy discourses. Organized by different normative precepts and analytical criteria, these discourses are typically incommensurate.

In this chapter, we approach legitimacy issues from multiple perspectives. Part I considers a functional notion of legitimacy that follows from the terms of our theory (Chapter 1) and findings (Chapters 2 to 5). The explosive success of arbitration took place only because an increasing number of companies, law firms, legal scholars, and state legislatures and courts chose to invest in it. In part II, we address debates that are directly relevant to the book. It is a blunt fact that, today, there is far more critical and reform-minded discussion than existed even a decade ago. We treat the growing intensity of structural criticism as important data to be assessed. Part III expresses our own normative views on proposals for institutional reform, from the perspective of judicialized arbitral governance. We argue that the institutional evolution of the field has generated its own peculiar legitimacy dilemmas that are best resolved through further judicialization. We advocate, in particular, routine publication of important awards, the development of mechanisms of appellate supervision, and an enhanced interface between tribunals and courts, both domestic and international. We also strongly favour the deployment of a more structured proportionality analysis when it comes to balancing property rights (of contractants and investors) and the public interest.

I. Functional Dynamics

The theory that guided our research focuses empirical attention on (a) the sources of social demand for new institutions and (b) the extent to which these demands are supplied by actors who accrue competences to do so, through (c) specific dynamics of pressure and feedback, including those issuing from legitimacy concerns. Virtually all social science theorizing about institutions—rules, principles, procedures (that is, law)—is permeated by functionalist logics. For the economist as much as the sociologist, the capacity of a rule system to reproduce itself over time, given recurrent crises and changing circumstances, is among the most important measures of that system's legitimacy. From this standpoint, the arbitral order is presumptively legitimate because the scope and significance of its authority has expanded, as powerful actors have invested in its development. Put differently, the actors that have the capacity to destroy the system—especially state officials in the major trading and capital-exporting states—have either acquiesced to the authority claims of the arbitral order, or actively supported those claims.

Judicialization

In Chapter 1, we proposed a theory of how arbitration would evolve as a legal system. Deductive and abstract, the theory does not purport to explain everything of importance, or to predict outcomes of discrete episodes. Instead, it focuses attention on a small number of specific mechanisms that are basic to institutional change and the accretion of judicialized authority. Under certain conditions, these mechanisms will combine to produce a causal system that connects three processes: (a) the delegation of disputes to arbitrators for settlement; (b) arbitral decision-making; and (c) the development of hierarchy such that the decision-making of tribunals would produce prospective lawmaking effects. We also claimed that outcomes predicted by the theory could be evaluated with respect to three 'models of arbitration' derived, in part, from delegation theory—the Principal-Agent [P-A] framework developed by social scientists. The judicialization of arbitration entails the steady obsolescence of the 'contractual model' and the emergence of the 'judicial model'. As the coherence of the regime developed, the arbitral order will gain capacity to defend its autonomy as a legal system in its own right, within an evolving pluralist-constitutional model, and to participate in the construction of international law. And, with any shift away from the contractual model, tribunals will owe a thicker set of fiduciary duties to a growing number of stakeholders.

The broad claim is that judicialization can be empirically tracked with reference to these models. Had the contractual model remained viable, then relatively little judicialization would have taken place. But that is not what one finds. Chapters 2 to 5 demonstrate that the core elements of the contractual model have either been abandoned altogether, or remoulded in ways that fit and undergird the judicial model. Today, tribunals owe primary fiduciary duties not only to the parties, but to

arbitral centres and the wider regime. These obligations, codified in the procedural rules of the major international arbitration centres [IACs], ground the effectiveness of the system. They confer authority on tribunals to manage recalcitrant parties, and of IAC officials to manage wayward tribunals (Chapters 2 and 3). Tribunals are required to give reasons for their decisions. Counsel and arbitrators, for their part, have long treated reasons as building blocks of precedent-based argumentation and justification (Chapters 4 and 5). Today, parties, tribunals, and IACs presume that settled lines of case law—*la jurisprudence constante*—will not be ignored, at least not without good reason. The more the judicial model has been institutionalized, the more inconsistent decisions are treated as signatures of (treatable) pathology.

The upshot is that the arbitrators are now major actors in transnational governance. The regulation of transnational economic activity involves a kaleidoscope of public and private organizations exercising authority for quite different purposes, not all of which are compatible. But transnational regulation, as a domain of governance, is not without structure,¹ arbitration being a prime example. Commercial and investment disputes are resolved, and awards enforced, with regard to an increasingly articulated, treaty-based interface, a legal ‘field’² that organizes dialogue between the arbitral order, domestic legal systems, and public international law (Chapters 1 and 2). The system is pluralistic, in that its viability depends upon mutual recognition, by otherwise autonomous regimes, of the authority of others that occupy the field. When one observes the outcomes produced within this field, through the lenses of the pluralist model, certain ‘constitutional’ elements come into view. The New York and ICSID Conventions, after all, require national judges to recognize the authority of arbitrators, while strongly implying that arbitrators take seriously the priorities of states as regards important public interests. One crucial frontier question is whether a fiduciary obligation, binding on arbitrators, to take into account the public interest will be codified, and by whom.

Delegation

Delegation theory, too, rests on functional logics that absorb some deeply held normative commitments. Express authorization does not resolve all legitimacy dilemmas, but it does narrow and focus debate. Consider a written constitution, containing a judicially enforceable charter of rights, enacted through popular referendum. Mainstream contemporary constitutional ideology has it that the sovereign People have delegated to a court (or to the judiciary) the responsibility to supervise the rights-regarding decisions of all other public officials. These arrangements fulfil the basic principles of formal legitimacy. Further, the drafters delegate inherent lawmaking powers to judges, to the extent that the rights provisions they write are substantively incomplete. Despite authorization, (seemingly irresolvable) debates

¹ Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, Oxford 2010); Alec Stone Sweet, ‘The Structure of Constitutional Pluralism’ (2013) 11(2) *International Journal of Constitutional Law* 491.

² Neil Fligstein and Doug McAdam, *A Theory of Fields* (Oxford University Press, Oxford 2012).

on the democratic legitimacy of judicial review rage on. It would seem that the more robustly judges perform their duties, the more their political legitimacy will be contested.

The arbitral order benefits from, and actively harnesses, the functional logics of delegation-as-authorization. In the commercial law of the most important legal systems in the world, the contract—a placeholder for the sanctity of party autonomy—is a privileged source of legitimation of the judge. Those who contract need enforcement; those who write incomplete contracts need an interpreter; those who interpret the law help to make it. These truisms apply to courts, and they apply to the arbitral tribunals that replace courts. It is a matter of great importance that the main source of the legitimacy of ICA is the contract, specifically, the arbitration agreement. National legislatures and courts in the major trading zones, too, have expressly delegated to the arbitral order, under the banner of party autonomy (Chapters 2, 4, and 5). Again, formal authorization—in this case, by contracting parties and state officials—does not preclude or settle legitimacy debates. But the stronger the normative commitment to transnational freedom of contract by IACs, users, scholars, and state officials, the more ineffectual critiques of ICA's political legitimacy are likely to be when it comes to reform.

The major source of legitimation in international law is the treaty, a contract between two or more states. Investment treaties establish arbitral authority and, to the extent that they are incomplete contracts, they confer inherent lawmaking powers on tribunals. As Chapters 4 and 5 have documented, arbitrators have been the authors of much of the substance of international investment law in the domains of the fair and equitable treatment standard [FET] and indirect expropriation, the two most important causes of action. When states, as Principals, have responded, they have mostly acted to codify the main tenets of arbitral case law; efforts to block the development of the jurisprudence have floundered (Chapter 5). It may be that recently produced model BITs, new draft treaties, and a wave of signed BITs that include WTO-style 'general exceptions' will combine to alter the development of ISA, a topic discussed further below. At this point, it suffices to restate the point just made with respect to contracts. States, as treaty-makers, have fully authorized arbitral lawmaking; ISA meets the basic criteria of formal legitimacy; but legitimacy debates have not been extinguished.

Structures of Norms and Authority

To reproduce itself—to remain viable—a legal system must either meet the functional needs of users, or endure attempts to build more effective arrangements. Mechanisms of institutional change are therefore of critical importance (Chapter 1). The evolution of ICA is an extraordinary example of a private, transnational community that has built an adaptive legal system from the ground up. The International Chamber of Commerce [ICC], the dominant organizational actor in the field for nearly a century, continuously consults users, legislates soft law as well as obligatory rules, recruits and socializes arbitrators into

the system, supervises awards, and directly engages national officials, including judges, at crucial points in the interface between the arbitral order and state law (Chapter 3). ICA is characterized by flexibility: multiple major IACs compete with the ICC for market share, which gives firms a variety of procedural arrangements from which to choose. And, because most awards are not published, arbitrators may feel freer to tailor awards to users' priorities. At least on the surface, treaty-based ISA is far more rigid: treaties are difficult to change, and the majority of awards will be published. Strong entrenchment and enhanced transparency has meant that tribunals, not states, have been the major substantive lawmakers in the domain of foreign investment (Chapters 4 and 5). Tribunals also initiated some important procedural innovations with implications for legitimacy debates, including the move to accept *amici* briefs from third parties, to which states acceded (Chapter 3).

As the arbitral order evolved its own systemic properties and institutional logics, its relationship with state law and national courts became more structured. Indeed, as we have stressed throughout the book, the formal legitimacy of ICA, as a legal regime, rests in part on institutional isomorphism, with respect to law and courts at the domestic level. Isomorphic processes produce convergence in norms and forms across organizational boundaries, facilitating the emergence and institutionalization of new 'fields' (Chapter 1). Although domestic legal systems and the arbitral order are formally separate realms, isomorphic dynamics have made the evolution of each system partly dependent on that of the other. The law of contract of the most important trading states has absorbed the basics of the new *Lex Mercatoria* when it comes to transnational contract law, for example. The ICC has always given a privileged place to party autonomy, and to trade usages when interpreting the parties' expectations as contractants. State officials have steadily adapted to the transnational community's approach to these and many other issues, not least through adopting model laws and conventions on contracts, arbitration, and recognition and enforcement of awards (Chapters 2, 3, and 4). For their part, arbitrators have developed case law that overlaps that of states, transnational/international public policy being a prime example (Chapter 4). Tribunals, when enforcing mandatory state law, do so in dialogues with state officials, taking cues from domestic approaches to similar legal questions (Chapter 5). This isomorphism has favoured the ongoing delegation, by state officials, of authority to the arbitral order. Without institutional convergence, and the ongoing negotiation of cooperative terms of engagement, serious conflicts of authority would be chronically produced, to arbitration's detriment.

What is indisputable is that a field of governance for transnational commerce, covering at least the major trading zones, has been institutionalized in law. The structure of authority within ICA is pluralist, and functionally divided, most obviously, in that arbitrators produce awards—typically interpreting and applying state law along the way—which courts enforce. These pluralist features are rooted in the New York Convention, which furnishes an indispensable, formal interface between the arbitral and domestic legal systems. Since 1958, the New York Convention has never been revised. At the same time, the terms of engagement between courts

and tribunals, and between the officials of IACs and states, have evolved to favour further convergence.

In treaty-based ISA, we found evidence, as others have,³ that tribunals are engaged in increasingly structured interactions with other international legal systems. As the international investment regime has gained in coherence, not least through the consolidation of arbitral case law, so has its capacity to engage across jurisdictional boundaries. It is today a blunt fact that tribunals in ISA produce more legal rulings applying general international law (general principles of law, the MFN principle, state responsibility and state police powers, and so on) than does the International Court of Justice [ICJ] or the World Trade Organization [WTO] courts, for example. ICSID has 214 pending disputes in arbitration (as of July 2016),⁴ and other IACs, including the ICC and SIAC, are actively positioning themselves to become bigger players in ISA. The density of the caseload, and the growing sophistication of the case law, means that the law made by tribunals is increasingly likely to impact the development of international economic law. It remains to be seen whether a stable field—in which the various legal regimes make and enforce international economic law in mutually regarding ways—will develop and how.

In sum, this matrix—of contracts, treaties, and convergent institutions and expectations—embeds international arbitration in a resilient legal field that is presumptively legitimate in a strong sociological sense. These points made, functional logics do not exhaust legitimacy concerns, and often obscure significant ones. Academic lawyers, in particular, have long engaged in more searching inquiry into the normative principles that underwrite systemic legitimacy, raising issues to which we now turn.

II. Whither Hierarchy?

The institutionalization of the judicial model is registered in the construction of hierarchies: those non-derogable rules of IACs that subject the disputing parties to the authority of tribunals (Chapter 2), and tribunals to the authority of IACs (Chapter 3). These rules are, today, reinforced in a pluralist, transnational regime. In ICA, domestic judges routinely enforce arbitral agreements, closing access to the courts;⁵ and tribunals and IACs strive to make judicial enforcement of their awards automatic. Hierarchy in arbitration serves the goal of effectiveness

³ Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, Cambridge 2016) [‘Kurtz’]. See also the contributors to Giorgio Sacerdoti (ed), *General Interests of Host States in International Investment Law* (Cambridge University Press, Cambridge 2014); Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford 2009).

⁴ This figure includes cases in annulment proceedings. See ‘ICSID Pending Cases with Details’ <<https://icsid.worldbank.org/apps/ICSIDWEB/cases/pages/pendingcases.aspx?status=p>> accessed 7 July 2016.

⁵ They recognize, for example, the doctrine of the separability of the arbitration agreement and that of the *Kompetenz-Kompetenz* of tribunals—see Chapters 2 and 4.

(Chapters 2 and 3). With the growth of a highly adversarial caseload, many of arbitration's consensual elements were abandoned, or fell into desuetude (Chapter 3). From this standpoint, coercive authority structures are justified, not least for those who contract and dispute, to the extent that they are necessary conditions of effectiveness. It is a striking fact that judicialization produced hierarchy precisely at the most important pressure points in proceedings, where collective action problems are most acute, and parties may seek to defect, and where judges may intervene on their own authority.

The construction of hierarchy has, nonetheless, proceeded unevenly. Some arbitral institutions have remained stubbornly resistant to judicialization, the most obvious of which are rules governing (a) the appointment of tribunals, (b) access to internal appellate review, and, for ICA, (c) the publication of awards. It is therefore a matter of great importance that resistance to more 'court-like' arbitration is coming under assault, in the name of the system's legitimacy, by power-holders *within* the system. With judicialization, the types of arrangements that count as necessary to the effectiveness of the regime going forward have expanded, to include criteria of legitimacy once thought to be antithetical to the very idea of arbitration.

Resistance: Appointment, Confidentiality, Appeal

As we have emphasized throughout the book, the arbitral order did not develop by design, or in a linear fashion. Rather, the structural properties that now organize the field evolved piecemeal, at different rates, in response to different stimuli, for varied purposes. While judicialization has transformed arbitration in important ways, it has also been blocked in others. Until recently, virtually all scholarly commentary from within the field has been supportive, even celebratory of the regime's triumphs. Elite arbitrators-turned-publicists have long laboured to explain and rationalize the evolving system, and to counter legitimacy critiques, as part of broader market-building agenda. They also urge appropriate reforms, if periodically and on the margins, either to satisfy users' demands, or in response to external challenges. What is new and important is that, in the past decade, powerful insiders have begun to question more openly principles of arbitration long considered to be foundational. These principles, remnants of concepts traditionally invoked to distinguish arbitration from adjudication, are challenged as sources of, rather than solutions to, ascendant legitimacy problems.

Consider one of the most resilient features of arbitration: the rules governing the constitution of the tribunal. In Chapter 3, we presented a simple strategic model of appointments under adversarial conditions that explains party-dominated appointments when it comes to three-member tribunals, and that of the house in proceedings to be conducted by a sole arbitrator. Most high stakes disputes will be settled by three-member tribunals, in which each party names a 'co-arbitrator' who then jointly selects a 'presiding arbitrator'. The procedures resolve some basic coordination problems, while comprising an important start-up mechanism: through an act of express delegation, the parties legitimize the tribunal. In both ISA and ICA,

they are also attacked as failing basic criteria of legitimacy, the most important of which are derived from the principle of impartiality that grounds notions of judicial independence. In ICA, what is being challenged is primordial, namely, the claim that a valid arbitral agreement is virtually all that is required to secure the legitimacy of all that follows.

The view that party-driven appointments would undermine the impartiality of arbitrators is as old as the ICC. But so is the view, fully consistent with the dictates of the contractual model, that party autonomy covers the constitution of the tribunal. If the dispute is a purely private, contractual affair, then there is no social benefit to be gained from constraining party autonomy in order to secure impartiality. In 1935, the ICC, struggling to centralize appointments in its own offices, warned users that ‘it happens more often than not that the arbitrators chosen by the parties merely act as [party] advocates’.⁶ But, when adversarialism exploded during that same decade, users insisted on retaining control. Today, as a distinguished arbitrator puts it, the constitution of the tribunal is guided by ‘the unique principle of international arbitration that a party is entitled to appoint, as one of the three decision-makers, a person of its own choosing ...’.⁷

For its part, the ICC relented, but not without pronouncing what is now a fiduciary duty of impartiality, today expressed as ICC Rule 11(1):⁸

Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.

Nonetheless, powerful incentives drive co-arbitrators to ensure that the pleadings of their respective appointing party are fully considered. Worse are those situations, of which experienced arbitrators routinely complain, wherein parties continuously feed co-arbitrators positions that they are expected to advocate within the tribunal, at each stage of the proceedings.⁹ In contrast to other areas of procedure, heightened adversarialism has not led to the loss of party control. Instead, savvy counsel now take great pains to vet candidates for appointment, in background checks and interviews (Chapter 3). Some go so far as to elicit a pre-commitment to espouse the appointing party’s pleadings going forward.¹⁰

⁶ International Chamber of Commerce, *International Commercial Arbitration—Practical Hints* (ICC Publishing, Paris 1935) 4.

⁷ Charles N Brower, ‘The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator’ (2010) 5(1) *Berkeley J Int’l Publicist* 4.

⁸ ICC Arbitration Rules (2012): This duty appeared relatively late in the history of international arbitration. For instance, it is only in 1975 that party-appointed arbitrators were required to ‘be independent of the party nominating’ them—see Article 2(4), ICC Rules of Conciliation and Arbitration (1975). The duty to ‘act fairly and impartially’ only appeared in 1998—see Article 15(2), ICC Rules of Conciliation and Arbitration (1998).

⁹ See Serge Lazareff, ‘L’arbitre singe ou comment assassiner l’arbitrage’ in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner* (ICC Publishing, Paris 2005) 477.

¹⁰ Gerald Aksen, ‘The Tribunal’s Appointment’ in Lawrence W Newman and Richard D Hill (eds), *The Leading Arbitrators’ Guide to International Arbitration* (Juris, New York 2014) 337.

This tension also finds expression in the growing practice of issuing dissenting opinions. Dissents were originally discouraged, as a threat to the collegiality of tribunals and the authority of awards. Indeed, the first dissent to an ICC award was removed by the ICC Court.¹¹ Today, the major IACs permit dissenting opinions, which are no longer rare (Chapter 3). It may well be that the purpose of such dissents is to highlight weaknesses in the award, in anticipation of annulment proceedings, a not ignoble objective in the context of the judicial and pluralist models. But, critics lament, many dissenting opinions are written primarily with an eye toward securing future appointments. Dissents, after all, are almost always written by co-arbitrators appointed by the losing party, in both ICA¹² and ISA,¹³ and available dissents typically restate the positions of the appointing party.

Discomfort with this situation has now burst into the open. Most important, Jan Paulsson (a leading practitioner, arbitrator, publicist, Vice-President of the ICC Court, Board Member of the AAA-ICDR, former President of the LCIA, among many other important positions) has sternly called for the abandonment of unilateral party appointments. For Paulsson, ‘the notion that the mere proclamation of an ethical rule achieves a legitimizing effect is obviously a mirage’, given the fact that ‘whatever the qualities of the nominee, the appointing party is focused on winning, not on ensuring the ideal of impartiality’. In his view, ‘the practice of unilateral nominations’ is itself ‘antagonistic to the idea of arbitration’—a rhetorical reversal of the classic view.

The best way [forward] is clearly to abandon the practice of unilateral appointments. This would involve a significant change in prevailing conduct and rules. References are occasionally made to ‘the fundamental right’ to name one’s arbitrator. But there is no such right. Moreover, if it existed, it would certainly not be fundamental. The original concept that legitimates arbitration is that of an arbitrator in whom both parties have confidence. Why would any party have confidence in an arbitrator selected by its unloved opponent?¹⁴

Paulsson’s proposals include the creation of an elite college of arbitrators from which the parties (acting jointly), IAC officials, or some other neutral body would appoint.

While some elite arbitrators side with Paulsson,¹⁵ other luminaries, including Brower, deny that there is any problem at all, while starkly rejecting reform

¹¹ ICC Case No 850 (unpublished). See also Florian Grisel, Emmanuel Jolivet, and Eduardo Silva Romero, ‘Aux origines de l’arbitrage commercial contemporain: l’émergence de l’arbitrage CCI (1920–1958)’ (2016) 2 *Revue de l’arbitrage* 1, 30–1.

¹² Alan Redfern, ‘Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly’ (2004) 20 *Arbitration International* 223.

¹³ Albert Jan van den Berg, ‘Dissenting Opinions by Party-Appointed Arbitrations in Investment Arbitration’ in Mahnoush H Arsanjani, Jacob Katz Cogan, Robert D Sloane, and Siegfried Wiessner (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff, Leiden 2010) 821. According to van den Berg’s data, nearly all dissenting opinions were issued by the arbitrator appointed by the losing party—see *ibid* 824.

¹⁴ Jan Paulsson, *The Idea of Arbitration* (Oxford University Press, Oxford 2014) Chapter 5: ‘Ethical Challenges’.

¹⁵ John Fellas, ‘Book Review: The Idea of Arbitration (Clarendon Law Series) by Jan Paulsson’ (2014) 30 *Arbitration International* 589.

proposals: ‘any proposal that would alter any of the fundamental elements of international arbitration constitutes an unacceptable assault on the very institution of international arbitration’.¹⁶ The first of these fundamental elements is, according to Brower et al, ‘the disputing parties’ freedom to play a direct role in the design of their arbitration, particularly including the right freely to select, individually and collectively, the members of the tribunal’.¹⁷

Barring a cataclysmic event, any scheme to create a stable college of private judges within ICA faces major hurdles. Given the decentralized, competitive environment in which the major IACs find themselves, the risk involved in moving first, without the prior consent of users, is a strong deterrent. There exist no grounds for thinking that users will support giving up their authority over appointments. A more likely first step would be for a major IAC to give each party a veto over the other’s choice—that is, the constitution of the tribunal would proceed under a consensus rule—thus reversing the default position. When parties deadlock, ICC officials choose (see Chapter 3). A list of IAC-preferred candidates, vetted for their commitment to impartiality, might well create a focal point for coordination, which could also favour the development of a *de facto* college.

In the meantime, the major IACs have strengthened procedures for challenging arbitrators for lack of impartiality and independence. The move is undergirded by the promulgation of an important statement of soft law that purports to express ‘best current international practice’:¹⁸ the International Bar Association’s *Guidelines on Conflicts of Interest in International Arbitration* (2004, revised in 2014). In 2006, the London Court of International Arbitration began to publicize the decisions of its Court on challenges to arbitrators;¹⁹ and, in 2015, the ICC moved to communicate the decisions of its Court on arbitrator challenges and replacement proceedings, if only to the disputing parties.²⁰ In a ‘Note’ released in February 2016, the

¹⁶ Charles N Brower, Michael Pulos, and Charles B Rosenberg, ‘So Is There Anything Really Wrong with International Arbitration As We Know It?’ in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation—The Fordham Papers (2012)* (Martinus Nijhoff, Leiden 2013) 3 [‘Brower et al’]. See also Charles N Brower and Charles B Rosenberg, ‘The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded’ (2013) 25 *Arbitration International* 7.

¹⁷ Brower et al (n 16). See also V V Veeder, ‘The Historical Keystone to International Arbitration: The Party-Appointed Arbitration—From Miami to Geneva’ in David D Caron, Stephan W Schill, Abby Cohen Smutny, and Epaminontas E Triantafyllou (eds), *Practicing Virtue: Inside International Arbitration* (Oxford University Press, Oxford 2016) 148: ‘The right of each party to appoint an arbitrator makes the arbitration the *parties*’ arbitrator, deciding *their* dispute with *their* tribunal. The preference by users for arbitration over litigation has many explanations, but one manifest reason is the sense of ownership by a party over the arbitral process because it has participated in the formation of the tribunal as to which all parties have consented’ (emphasis in the original).

¹⁸ International Bar Association, ‘IBA “Guidelines on Conflicts of Interest in International Arbitration”’ <http://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx> accessed 16 June 2016 [‘IBA Guidelines’], 2.

¹⁹ Thomas W Walsh and Ruth Teitelbaum, ‘The LCIA Court Decisions on Challenges to Arbitrators: An Introduction’ (2011) 27 *Arbitration International* 283.

²⁰ The President of the ICC Court stated that: ‘Providing reasons as to Court decisions will further enhance the transparency and clarity of the ICC arbitration process.’ See International Chamber of Commerce, ‘ICC Court to communicate reasons as a new service to users’ (8 October 2015)

ICC announced that transparency would henceforth be an objective to be pursued in defence of arbitration's legitimacy:

The Court endeavours to make the arbitration process more transparent in ways that do not compromise expectations of confidentiality that may be important to parties. Transparency provides greater confidence in the arbitration process, and helps protect arbitration against inaccurate or ill-informed criticism.²¹

The ICC will now publish information on such cases registered after 1 January 2016, including the arbitrators' names, nationality, the method of their appointment, and whether the proceedings are ongoing or closed,²² aligning it with practice at ICSID.

In ICA, confidentiality continues to trump transparency when it comes to publication of awards. All majors IACs pledge to guarantee, subject to waiver by the parties, confidentiality (Chapter 4), and it remains the mainstream view that ICA cannot do without it.²³ In the most recent White & Case/Queen Mary University survey of users (2015), 33 per cent of respondents ranked 'confidentiality' as 'one of the three most valuable characteristics of international arbitration', fifth on the list after 'enforceability of awards', 'avoiding' national legal systems, 'flexibility', and party 'selection of arbitrators'.²⁴

In ISA, confidentiality has steadily ceded ground to transparency, so much so that the former is virtually no longer defended (Chapter 4). All new ISA awards will eventually be published, we can now expect, even without a party's consent. Oral pleadings no longer take place behind closed doors, indeed, some are even televised. Legitimacy concerns have driven these changes. The more a proceeding involves the public interest and performance of public officials,²⁵ the greater the perceived need for transparency. In ICA, remnants of the traditional view, to the effect that arbitration is a purely private affair, still remain, and these legacies hamper the development of arbitral governance. Today, ICA tribunals frequently arbitrate important public interests in policy areas once considered 'in arbitrable' in

<<http://www.iccwbo.org/News/Articles/2015/ICC-Court-to-communicate-reasons-as-a-new-service-to-users/>> accessed 16 June 2016.

²¹ International Court of Arbitration, 'ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration' (22 February 2016) <<https://international-arbitration-attorney.com/wp-content/uploads/not-to-parties-on-conduct-of-ICC-arbitration.pdf>> accessed 16 June 2016, para 27.

²² *ibid* para 28.

²³ Lazareff bluntly characterizes the 'postulate that confidentiality is not part and parcel of commercial arbitration' as an 'absurdity': 'it is inconceivable that such a procedure, whether domestic or international, should take place in the public eye'. See Serge Lazareff, 'Confidentiality and Arbitration: Theoretical and Philosophical Reflections' in International Chamber of Commerce, *Confidentiality in Arbitration: Commentaries on Rules, Statutes, Case Law and Practice* (ICC Publishing, Paris 2009) 81.

²⁴ White & Case and Queen Mary, University of London, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015) <<http://www.arbitration.qmul.ac.uk/research/2015/>> accessed 16 June 2016, 6.

²⁵ Most ISA proceedings involve pleadings to the effect that a public official has taken decisions that do not meet procedural or substantive standards found in domestic law.

all major court systems, while these same courts have renounced robust review of awards (Chapter 5).²⁶ Further, states are often parties to ICA proceedings; in 2015, the ICC reported that 13 per cent of new filings involved a state or state entity.²⁷ In our view, present policies privileging confidentiality are intensely vulnerable on legitimacy grounds (Part III below). To the degree that IACs participate in transnational governance, rather than merely providing discreet triadic dispute resolution services, they should be held to the transparency requirements of courts.

Scholars are now actively debating the 'confidentiality-transparency problem',²⁸ and the major IACs are re-evaluating their policies on publishing awards²⁹ (Chapter 4). While the ICC has been issuing redacted awards since the 1930s, some of the other major IACs have only just begun to do so. The AAA-ICDR began publishing awards in its *Bulletin* in 2012,³⁰ joined by the SIAC that same year.³¹ Others continue to resist. The SCC makes available only a handful of awards per year, while the Hong Kong Centre³² releases none at all. The LCIA indicates, in its rules, that it will only publish awards upon the written consent of the parties,³³ but the provision is contradicted by the LCIA's own 'Notes for Parties' stating that the Centre 'does not publish Awards, or parts of Awards, even in redacted form'.³⁴

As with party-dominated appointments, it is unlikely that an IAC would risk moving first to abolish the veto on publication, although the ICC, the SIAC, and the Milan Arbitration Chamber are on record as wanting to publish more awards, even without express consent. At the same time, present policies not only hinder the development of precedent and other aspects of judicialized governance, they undermine the arbitral order's own claims to operate in the public interest.

With regard to appeal (Chapter 4), the fundamental tension between two values, (a) the finality of awards and (b) legal certainty, has not been resolved. In both ICA and ISA, we find a growing demand for appellate mechanisms that has not been met, partly for fear of reproducing the adversarial, delay-ridden

²⁶ See also Florian Grisel, *L'arbitrage international ou le droit contre l'ordre juridique* (LGDJ, Paris 2011) ['Grisel'], para 379.

²⁷ International Chamber of Commerce, '2015 ICC Dispute Resolution Statistics' (2016) 26(1) ICC International Court of Arbitration Bulletin 9.

²⁸ For an overview of the debate, see Joshua Karton, 'Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards' (2012) 28(3) *Arbitration International* 447; Catherine A Rogers, 'Transparency in International Commercial Arbitration' (2006) 54 *U Kan L Rev* 1301 ['Rogers'].

²⁹ For a survey of the publication policies of the major IACs, see New York City Bar, 'Report by the Committee on International Commercial Disputes: Publication of International Arbitration Awards and Decisions' (February 2014) <<http://www2.nycbar.org/pdf/report/uploads/20072645-PublicationofInternationalArbitrationAwardsandDecisions.pdf>> accessed 16 June 2016 ['Publication of International Arbitration Awards and Decisions'].

³⁰ The AAA-ICDR changed its rules to permit publication under certain conditions only in 2010.

³¹ In 2013, the SIAC amended its rules to allow it to 'publish any award with the names of the parties and other identifying information redacted': see Article 28.10, SIAC Arbitration Rules (2013).

³² The HKIAC states that, although publication is possible, it has never received a request to do so by the parties: see 'Publication of International Arbitration Awards and Decisions' (n 29), 9.

³³ Article 30, LCIA Arbitration Rules (2014).

³⁴ London Court of International Arbitration, 'LCIA Notes for Parties' (4 April 2016) <<http://www.lcia.org/adr-services/lcia-notes-for-parties.aspx>> accessed 16 June 2016.

pathologies of courts.³⁵ ICSID initiated internal assessments of the annulment system,³⁶ and the establishment of an appellate body.³⁷ The SIAC³⁸ has established a system of internal control similar to the ICC's, empowering its 'Registrar' to review 'draft awards' prior to their certification as final (Chapter 3). And the AAA-ICDR is the first to initiate a formal appeal process (Chapter 4), through its Optional Appellate Arbitration Rules of 2013,³⁹ while taking pains to express its strong attachment to the finality of awards. In the meantime, a determined minority of arbitrators and scholars propose the creation of an 'international court' for reviewing arbitral awards, which would have jurisdiction over annulment, enforcement, and recognition of awards, specifically in ICA.⁴⁰ And in ISA (discussed below), some major states are now seriously contemplating the creation of an appellate court, and Gabrielle Kaufmann-Kohler and Michele Potestà have recently produced a white paper for UNCITRAL proposing what appears to be a productive way forward.⁴¹

Models

As arbitration's importance has grown, so has scholarship that grounds normative reflection in a comparative-institutional analysis of judicial authority (see Chapter 1). The most important critical research in this vein focuses on ISA, following a seminal paper of 2006, written by Gus Van Harten and Martin Loughlin, in which the authors argue that ISA comprises a form of 'global administrative law'.⁴² Van Harten and Loughlin stress similarities of function between public law courts and ISA tribunals, while highlighting important differences between ISA and ICA:

³⁵ Florian Grisel, 'Control of Awards and Re-Centralisation of International Commercial Arbitration' (2006) 25 *Civil Justice Quarterly* 166, 171 et seq.

³⁶ International Centre for Settlement of Investment Disputes, 'Background Paper on Annulment for the Administrative Council of ICSID' (10 August 2012) <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment_English.pdf> accessed 16 June 2016.

³⁷ International Centre for Settlement of Investment Disputes, 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004) <<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>> accessed 16 June 2016.

³⁸ Rule 28.2, SIAC Arbitration Rules (2013).

³⁹ AAA-ICDR Optional Appellate Arbitration Rules (2013).

⁴⁰ Stephen M Schwebel, 'The Creation and Operation of an International Court of Arbitral Awards' in Martin Hunter, Arthur Marriott, and V V Veeder (eds), *The Internationalisation of International Arbitration* (Graham & Trotman and Martinus Nijhoff, London 1995) 115; Howard M Holtzmann, 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in Hunter et al (eds), *The Internationalisation of International Arbitration*, 109.

⁴¹ Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap', Geneva Center for International Dispute Settlement (paper commissioned by UNCITRAL), 3 June 2016 ['Kaufmann-Kohler and Potestà'].

⁴² Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *European Journal of International Law* 121.

Commercial arbitration originates in an agreement between private parties to arbitrate disputes between themselves in a particular manner, and its authority derives from the autonomy of individuals to order their private affairs as they wish. Investment arbitration, by contrast, originates in the authority of the state to use [it] to resolve disputes arising from the exercise of public authority. Investment arbitration is constituted by a sovereign act, as opposed to a private act, of the state and this ... makes investment arbitration more closely analogous to domestic juridical review of the regulatory conduct of the state.

Because the judicial review of public acts is inevitably implicated in governance, the political legitimacy of such arrangements should not be presumed but, rather, closely scrutinized.

When one actually does so, they argue, ISA is found lacking. Party-dominated appointment procedures in ISA are relatively more problematic, 'since it is not uncommon for a prominent figure in investment arbitration simultaneously to be sitting as an arbitrator in one case, representing an investor or state in another, and generally advising other clients on investment law'.⁴³ Further, when one considers ISA as a mode of administrative review and regulatory control, one notices that the regime has not developed stable standards of review, or appropriate doctrines of deference to public interests, as one expects well-functioning judiciaries to do. In 2006, when their article was published, the process of developing such standards was in its infancy, and remains incomplete today (Chapter 5). In the past decade, Van Harten⁴⁴—who advocates formal judicialization, including the creation of an appellate jurisdiction⁴⁵—and a growing group of scholars have taken up these issues in earnest.⁴⁶

We clearly embrace the ISA-as-governance formulation and, for reasons stated, believe that ICA should be subjected to the same searching questions. The fact remains, however, that ISA blends some relatively weak 'public law' functions with strong 'private law' remedies. Tribunals are charged with reviewing the treaty-conformity of state acts but, unlike a national administrative or constitutional court, they do not possess the power to invalidate such acts judged to be unlawful. Put differently, they exercise no sovereign authority *within* the legal order of the respondent state. Instead, tribunals award compensation where liability is found. The remedy—damages to successful claimants, rather than invalidation or

⁴³ *ibid* 148.

⁴⁴ Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press, Oxford 2013).

⁴⁵ Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, Oxford 2007) ['Van Harten']; Gus Van Harten, 'A Case for an International Investment Court' (2008) Working Paper No 22/08, Society of International Economic Law Inaugural Conference (Geneva) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424> accessed 16 June 2016.

⁴⁶ William Burke-White and Andreas von Staden, 'The Need for Public Law Standards of Review in Investor-State Arbitrations' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford 2010) 689; Stephan W Schill, 'Deference in Investment Treaty Arbitration: Reconceptualizing the Standard of Review' (2012) 3(3) *Journal of International Dispute Settlement* 577; Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4(1) *Journal of International Dispute Settlement* 197.

performance orders—gives to ISA a ‘private law’ complexion, akin to ICA in this respect.

As Anthea Roberts has argued, the choice of analogy by arbitrators and scholars can powerfully frame legal and normative arguments, often driving them to a conclusion.⁴⁷ If the analyst’s point of departure is the available remedy, rather than the nature of the act under review, a different set of analogies, with different normative implications, emerges. ISA instantiates a system of liability assessment for breach whose basic function is to override the ‘hold-up’ problem when it comes to foreign investment. States sign treaties to signal their commitment to investor protections; and they confer authority on arbitrators as a means of securing the credibility of those commitments (Chapter 2). It is the basic function of tribunals to assess liability and the level of compensation when states breach their obligations. States may well choose to breach promises made to investors,⁴⁸ including for sound public policy reasons. Under this view, the review of state acts is essential to the task of determining how much it will cost the state to breach the property rights of an investor, for any purpose the state may deem important. The view analogizes in the direction of an efficient breach model,⁴⁹ in which a duty to compensate comprises an escape hatch with respect to performance. Liability found, the judge’s role is to determine the appropriate compensation to the successful claimant, not to order performance on the part of the state. Because investors are the vulnerable parties when it comes to non-performance on the part of states, arbitral deference to the state is not presumptively warranted. Rather, tribunals should determine liability and damages on a case-by-case basis, through a process that will include an assessment of the importance of legitimate public interests, which is precisely what most tribunals do most of the time (see Chapter 5).

It bears emphasis that comparative-institutional analysis presumes that appropriate analogies are to be found in the judicial world—where debates about standards of review, deference, and efficient breach are commonplace—rendering traditional models of arbitration obsolete and irrelevant.

States as Critics

International arbitration is partly a creature of state delegation. Urged on by powerful private actors, the major trading states ratified the 1958 New York Convention (largely a project of the arbitral community) and withdrew objections to tribunals’ asserted authority to interpret and apply mandatory law. The extraordinary development of the New York Convention regime, as a quasi-constitutional interface between domestic courts and arbitrators, has been driven by competition among

⁴⁷ Anthea Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2012) 106 *American Journal of International Law* 1.

⁴⁸ Many tribunals have found that so-called ‘umbrella clauses’ and the FET cover specific promises made to investors by host states—see Chapter 5.

⁴⁹ Krzysztof Pelc and Johannes Urpelainen, ‘When Do International Economic Agreements Allow Countries to Pay to Breach?’ (2015) 10(2) *Review of International Organizations* 231.

these same states for arbitral business. Although there remain pockets of resistance, once disparate ‘islands of transnational governance’ have become a global archipelago (Chapter 2). In ICA, broad acquiescence on the part of states to arbitral authority has created important gaps in accountability, which we address in the next section. Most important, the absence of transparency in ICA renders it vulnerable to challenges to its political legitimacy. It is no longer acceptable, if ever it was, to conceptualize ICA as a purely private dispute resolution regime.

In ISA, states are both Principals (as treaty-makers) and respondents in proceedings. Tribunals become Agents of the same states over which they exercise authority, once a third-party beneficiary of an investment treaty—the investor—brings suit. From the standpoint of delegation theory, the peculiarity of the situation is explained by the nature of the commitment problem to be resolved. At the same time, the analyst expects states to monitor the performance of their Agents and, when dissatisfied, to seek to change how tribunals take decisions. Nonetheless, the *banc* of repeat arbitrators possesses distinct advantages over states in any specific proceeding. Respondent states are subjects of pre-existing treaty rules; states are locked in to arbitration; and their actions are the object of control with respect to arbitral case law whose evolutionary dynamics have proved difficult to constrain.

States can seek to reassert control over development of the regime by altering the determinants of the latter’s decision-making. The book reports findings on new investment treaties negotiated and signed since 2002. In one area of relative discontent—the application of the most favoured nation rule to dispute resolution procedures—states have largely succeeded in predicating compulsory jurisdiction on explicit state consent (Chapter 2). In other areas that have generated controversy, including interpretation of indirect expropriation and the fair and equitable treatment standard [FET], states have adapted to the main lines of arbitral case law, legitimizing that lawmaking (Chapter 5). This finding is important since, as the data show, most of the action takes place in these two domains.

States reveal their preferences, and weigh-in on the acceptability of current arrangements, through publishing model BITs and floating drafts of new treaties. We examined these texts in light of the P–A issues raised in the book. Two trends merit emphasis (as well as deeper consideration than we can give to them here).

First, when states have considered departures from the standard template for BITs,⁵⁰ the more radical proposals have been removed or diluted. The scaling back of reform ambitions has taken place during the drafting process itself, and after the release of a ‘draft model BIT’ for public comment. In the United States, the business community’s worries about reducing investment protections, including with regard to the FET, prevailed over those who sought to strengthen regulatory

⁵⁰ Brazil, which has signed but not ratified any BITs, has recently negotiated two new BITs, with Mozambique and Angola. The treaties, whose ‘ratification prospects ... remain dim’, do not provide for the FET or indirect expropriation, and arbitration can be initiated only by states (not an investor). See Clovis Trevino, ‘A Closer Look at Brazil’s Two New Bilateral Investment Treaties’ (*Investment Arbitration Reporter*, 10 April 2015) <<http://www.iareporter.com/articles/a-closer-look-at-brazils-two-new-bilateral-investment-treaties/>> accessed 16 June 2016.

prerogatives.⁵¹ In the end, the 2012 US Model BIT made only marginal adjustments to the 2004 Model it replaced. In 2008, the Norwegian Government issued a draft model that contained several revisionist features, including a requirement that investors exhaust local remedies before filing for arbitration. The Government dropped the provision in the 2015 version, after Norwegian business leaders and investors mounted protests.

The Indian Government has produced the most innovative model, which it submitted for comment in April 2015. The March draft: required exhaustion of local remedies; insulated from arbitral review ‘any legal issue’ that had been ‘finally settled by any judicial authority of the Host State’; and prohibited a tribunal from reviewing a host state’s determination that a state act under review was taken in the public interest, and thus deserving substantial deference. It left out the FET, preferring a ‘treatment of investment’ provision prohibiting ‘fundamental breaches of due process’ and ‘manifestly abusive treatment, such as coercion, duress and harassment’, presumably to block application of the case law on the ‘legitimate expectations’ of investors to disputes involving India (Chapter 5). Most intriguing, the March 2015 model contained a long list of investors’ ‘duties’ (anti-corruption, disclosure, and compliance with environmental and consumer protection law, human rights, and labour regulations, and so on), headings under which a host state could counter-sue the investor. After opposition by Indian business groups, and the publication of a critical commentary by its own Law Commission (composed of judges and representative of the bar),⁵² the draft was revised. In its final Model BIT, revealed in December 2015, the Indian Government maintained its stance on the ‘treatment of investment’, and limited the exhaustion of remedies requirement to a period of five years, but excised completely the other initiatives just mentioned.⁵³

The second important trend concerns derogation clauses, the addition of which reflects states’ concern for defending their regulatory prerogatives. The insertion of a ‘general exceptions’ provision, typically modelled on Article XX GATT (1947) or Article XIV GATS (1994), and the creation of carve-outs for ‘essential security interests’, taxation, and other sensitive areas, has clearly gained momentum. Canada initiated the practice, which then spread to a small handful of other states, as evidenced in BITs signed since 2002 (see Chapter 5). Virtually all of the new Model BITs and draft treaties we examined contain such general exceptions and

⁵¹ Luke Eric Peterson, ‘Analysis: United States Unveils “New” Model Bilateral Investment Treaty that Retains Protective Core, and Makes a Few Tweaks on Periphery’ (*Investment Arbitration Reporter*, 22 April 2012) <<http://www.iareporter.com/articles/analysis-united-states-unveils-new-model-bilateral-investment-treaty-that-retains-protective-core-and-makes-a-few-tweaks-on-periphery/>> accessed 17 June 2016.

⁵² Government of India, Law Commission of India, ‘Report No. 260: Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty’ (August 2015) <<http://lawcommissionofindia.nic.in/reports/Report260.pdf>> accessed 16 June 2016.

⁵³ Government of India, Law Commission of India, ‘Model Text for the Indian Bilateral Investment Treaty’ <https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf> accessed 16 June 2016 [‘Model Indian BIT’].

carve-outs, as well as statements to the effect that ‘it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor [or environmental] laws’.⁵⁴ To the extent that these preferences are consolidated in new treaties, they will favour further doctrinal integration of the trade and investment regimes,⁵⁵ as well as a more structured development of the proportionality principle (see below).

We do not consider these developments to be straightforward indicators of ‘backlash’, as others might. On the contrary, experienced arbitrators are likely to welcome these moves, insofar as they (a) comfort approaches to the ‘right to regulate’ developed by the most influential tribunals themselves (Chapters 4 and 5), and (b) leave tribunals less exposed as primary lawmakers. Significantly, new models and drafts also explicitly assert the host state’s ‘right to regulate’, including the Draft Model BITs of Norway and India, the draft Comprehensive Economic and Trade Agreement between Canada and the European Union [CETA], and the Trans-Pacific Partnership [TPP],⁵⁶ signed in February 2016 by twelve Pacific Rim states, including Australia, Canada, Japan, the United States, and Singapore.

Why have states not pursued a more radical reform agenda? In response, we would highlight three main factors. First, the generic problems of contracting and coordination are acute in international economic law. States have found it difficult to write more complete contracts when it comes to the most highly arbitrated domains of investment law: the provisions on indirect expropriation and the FET illustrate the point. The provisions of most new BITs, revised models, and draft treaties in these areas have consolidated, not repudiated, approaches that had already been mapped in major strains of arbitral jurisprudence. When it comes to broader issues of regime design, the decision-rule governing treaty-revision—consensus—favours inertia. Second, even when states have contemplated proposals to expressly restrict treaty protections for foreign investment, domestic investors and the national bar have pushed back. India has become a major capital exporter, and Indian investors want the same protections that their counterparts from other countries enjoy. Third, it has proven difficult, even for the most skeptical and disgruntled states (and scholars), to demonstrate that the regime is biased in favour of investors in a systemic sense,⁵⁷ or against developing states.⁵⁸ While more than

⁵⁴ Article 13(2), US Model Bit (2012). Such statements are also found in dozens of BITs signed since 2002.

⁵⁵ Kurtz (n 3).

⁵⁶ Office of the United States Trade Representative, ‘Trans-Pacific Partnership’ <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>> accessed 16 June 2016.

⁵⁷ Susan D Franck, ‘The ICSID Effect? Considering Potential Variations in Arbitration Awards’ (2011) 51(4) *Virginia Journal of International Law* 825. To our knowledge, the only relatively systematic empirical study that purports to have found pro-investor bias concerns decisions on jurisdiction; Gus Van Harten, ‘Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration’ (2012) 50 *Osgoode Hall Law Journal* 211.

⁵⁸ Susan D Franck, ‘Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes’ (2014) 55(1) *Virginia Journal of International Law* 13.

25 per cent of all filings are settled,⁵⁹ states prevail in most cases at the merits stage, their winning percentage topping 56 per cent.⁶⁰ Further, dominant lines of arbitral doctrine fully recognize their regulatory prerogatives.⁶¹ These points add up to a rather banal conclusion: most states, even those that are reform-minded, find the basics of the present regime to be in their interest. Scholars who have examined these same issues, in the light of relatively systematic data collection and analysis, have reached the same conclusions.⁶²

We do not want to be misunderstood. Structural reform is in the reach of states. Indeed, if even a handful of powerful states converged on preferences to remake the regime in some fundamental way, they would very likely succeed. They would need only to contract the new arrangements with one another, abandon old agreements, and then insist that their partners in BITs and regional treaties do likewise or be excluded from what would be, in effect, a new regime.

While the most powerful states continue to extend the scope of treaty-based ISA, the potential for structural change has recently opened up in the related areas of the appointment and appeal. A potential game-changer comes in the form of the draft of the Canada–EU CETA, which the parties released, ‘for information purposes’, in February 2016. The text proposes extensive judicialization, in the form of a permanent body of arbitrators and an appellate court, pushed by the European Commission and Germany.⁶³ (They thus embrace reform ideas advocated by Van Harten and others.) The parties envision the creation of a ‘multilateral investment tribunal and appellate mechanisms’, which would feature a ‘Tribunal’ to be composed of ‘at least 15 individuals’ possessing ‘expertise’ in international trade law. According to an ‘Ethics’ provision, persons named to this roster would be required to ‘refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international

⁵⁹ International Bar Association, ‘Investor-State Dispute Settlement: The Importance of an Informed, Fact-Based Debate’ (23 April 2015) <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=1dff6284-e074-40ea-bf0c-f19949340b2f>> accessed 16 June 2016.

⁶⁰ Statistics reported in Chapter 2.

⁶¹ Chapter 5. In *Charanne and Construction Investments v Spain* (SCC), Award of 21 January 2016, the first award to deal with the abolition of tax and tariff incentives for solar energy under the European Energy Charter, the Tribunal rejected the investors’ indirect expropriation and FET claims. The *Charanne* Tribunal stressed that, in a ‘highly regulated sector such as energy’, investors must exercise due diligence when it comes to the risk of regulatory change. In the absence of a contractually based stabilization clause, the Tribunal held, investors could not reasonably expect ‘that an existing regulatory framework will remain unchanged’. At least twenty such cases are now pending against Spain, along with proceedings brought against Germany, Italy, and other European countries that have pursued similar policies. The award is discussed in Luke Eric Peterson and Zoe Williams, ‘Spain Prevails on Merits in First of Many Energy Charter Treaty Claims in the Solar Sector’ (*Investment Arbitration Reporter*, 25 January 2016) <<https://www.iareporter.com/articles/breaking-spain-prevails-on-merits-in-first-of-many-energy-charter-treaty-claims-in-the-solar-sector/>> accessed 25 June 2016.

⁶² Chapter 5; Tomer Broude, Yoram Z Haftel, and Alexander Thompson, ‘Who Cares about Regulatory Space in BITs? A Comparative International Approach’ in A Roberts, P-H Verdier, M Versteeg, and P Stephan (eds), *Comparative International Law* (Oxford University Press, forthcoming). Among other findings, the authors show that states have chosen to reduce, not widen, their own ‘regulatory space’.

⁶³ The 2004 and 2012 Model BITs of the United States contain a similar provision.

agreement', and to 'comply' with the IBA Guidelines (noted above).⁶⁴ With regard to appointments, the parties, aided by the Chair of the CETA Joint Committee (an administrative official who represents state parties), would select members of arbitral 'Panels'. Where parties fail to agree, the Chair of the Joint Committee would organize appointment through the drawing of lots, from three lists of members of the Tribunal provided, respectively, by each party and the Chair herself.⁶⁵

The draft treaty also foresees the creation of an Appellate Tribunal, to be appointed by the Joint Committee. According to draft Article 8.28(1), disputants would be able to 'appeal an award ... within 90 days after its issuance'. Appeals would be processed by a three-member 'division', drawn at random from members of the Appellate Tribunal. Appellate Divisions would be authorized to 'uphold, modify or reverse a Tribunal's award' on grounds of 'errors in the application or interpretation of applicable law', 'manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law', and under the grounds of annulment set out in Article 52(1) of the ICSID Convention.⁶⁶ In draft Article 8.29, the CETA parties declare their commitment to pursuing, along 'with other trading partners', the creation of 'a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes'.

The draft CETA, which already has been the subject of sharp criticism by both proponents and opponents of reform,⁶⁷ is now being widely discussed by officials, arbitrators, and scholars. Kaufmann-Kohler and Michele Potestà, in their 2016 white paper for UNCITRAL, propose a relatively detailed blueprint for building an appellate regime, on the basis of the usual reasons (to build a coherent jurisprudence, to reduce instances of legal error, and so on; see Chapter 4). Their plan entails the creation of an appellate tribunal by multilateral convention, on which states would confer jurisdiction through an opt-in for parties to existing investment treaties, and through express provision in new treaties. They are fully aware of the risks involved:

First, if appeals were possible, they would soon become the rule, as states and investors who have lost a case could not afford *not* to file an appeal, be it only for reasons of internal accountability. Second, as 'ICSID experience with ad hoc annulment committees show, even corrective mechanisms intended to be severely restricted (indeed allowing no appeal even on points of law) have a tendency to duplicate the arbitral process itself in terms of duration, cost, complexity ...'⁶⁸ This could prove especially detrimental for States and investors with limited resources.⁶⁹

⁶⁴ IBA Guidelines (n 18), Article 29(8).

⁶⁵ IBA Guidelines (n 18), Article 29(7).

⁶⁶ The annulment system at ICSID is discussed in Chapter 4.

⁶⁷ Douglas Thomson, 'Canada Agrees to EU Proposals on ISDS' (*Global Arbitration Review*, 3 March 2016) <<http://globalarbitrationreview.com/news/article/34787/canada-agrees-eu-proposals-isds/>> accessed 16 June 2016; Alison Ross, 'Schwebel criticises EU Act of "appeasement"' (*Global Arbitration Review*, 24 May 2016) <<http://globalarbitrationreview.com/news/article/35352/schwebel-criticises-eu-act-appeasement/>> accessed 16 June 2016.

⁶⁸ Quoting Jan Paulsson, 'Avoiding Unintended Consequences' in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, New York 2008) 241, 260 (emphasis in the original).

⁶⁹ Kaufmann-Kohler and Potestà (n 41), 32.

The authors focus on appeal, and do not advocate important changes in the rules governing proceedings at the 'lower' level at which the dispute is settled in the first instance. Because the proposal seeks to minimize adjustment costs, largely eliminating the need for states to renegotiate agreements, and for arbitrators to alter their approach to the law, the proposal may have a chance of succeeding. We strongly support it.

III. Arbitral Governance and Reform

We advocate a series of reforms that would enhance the legitimacy of arbitral governance which, we assume, will continue to widen in scope and deepen in importance.

Transparency and Accountability

ICA suffers an accountability deficit that undercuts its claims to legitimacy as a transnational legal system. In our view, the present situation is unacceptable.

On the one hand, the regime has largely secured its own autonomy and effectiveness, the most compelling indicator of which is the routine recognition and enforcement of its award on the part of national judges of the major trading states in the world, without review on the merits. On the other hand, the vast majority of awards remain confidential. We thus have no means of assessing how arbitrators are doing their jobs, even when they are interpreting and applying mandatory state law (Chapter 5), and developing transnational/international public policy (Chapter 4). Tribunals hold hearings behind closed doors; they almost never allow submission of *amicus* briefs; and their awards are kept secret. The forces favouring inertia are powerful, but not always honourable.⁷⁰

Insofar as arbitration replaces courts in the regulation of transnational business, it should be subject to principles of public accountability, which entails meeting basic transparency requirements. These requirements should apply when the dispute (a) involves the distribution of an important public good, (b) is likely to have a substantive impact on third parties, or (c) involves 'public policy'—domestic or transnational/international. At the very least, enhanced transparency would cover disputes involving important consumer and environmental regulation, the arms trade, energy concessions, bribery and corruption, competition, and bankruptcy, as well as those involving the fundamental rights of third parties, whether expressed in international or domestic charters of rights. These conditions are more likely to be fulfilled when the parties to the dispute are public entities, but some disputes involving private firms will meet them as well.⁷¹

⁷⁰ As Hans Smit, a renowned arbitrator, once affirmed, 'arbitration can't be credible unless there is a certain measure of transparency, yet [c]onfidentiality exists because [corporate] executives don't want the public to know what stupid mistakes they make'—cited in Michael Goldhaber, 'The Court that Came in from the Cold' (*The American Lawyer*, May 2001).

⁷¹ Grisel (n 26), para 379. See also Florian Grisel and Jorge E Vinales, '*L'amicus curiae* dans l'arbitrage d'investissement' (2007) 23 ICSID Review—Foreign Investment Law Journal 380, 430–1.

In every proceeding in which these conditions are met, IACs should require the publication of the award, or a synopsis of the terms of settlement, redacted in appropriate ways to protect sensitive business information and trade secrets. Moreover, tribunals should possess the authority to open part or all of the proceedings to the public, where public interests are compelling, and to entertain *amicus* briefs from third parties. As we noted above, however, none of the leading institutions has an incentive to take the first step, for fear of offending users.

Publication would serve the value of legal certainty, promoting the building of a more coherent, precedent-based jurisprudence. It would ground the deference granted to awards by courts in legally defensible practices.⁷² The ICC and other IACs already engage in more intrusive supervision of tribunals when the proceedings raise significant public policy concerns. Publishing the resulting awards ought to confirm our trust in how they perform these important tasks, given that the ICC has long claimed that it performs as well or better than courts when it enforces mandatory law and public policy. To the extent that such a rule would backfire, driving parties into the courts, the advantages of arbitration, beyond secrecy, will be exposed as an exaggeration.

If arbitration does not embrace enhanced transparency, then the domestic courts in pro-arbitration states should review important awards more robustly. In 2012, responding to the rise and ‘judicialization’⁷³ of arbitration in Asia, the new Chief Justice of the Singapore Supreme Court strongly criticized the practice of unilateral party appointments and the absence of ‘visibility and public accountability’ of its decisions and lawmaking.⁷⁴ In 2016, the Chief Justice of England and Wales attacked the confidentiality of ICA proceedings as an unjustified affront to the principles of ‘open justice’, a ‘hallmark of democratic society’.⁷⁵ The New York City Bar Association, a strong supporter of international arbitration, recently reviewed the publication policies of the leading IACs, in order to ‘stimulate the ongoing debates within the international arbitration community about the pros and cons of publication and the different ways in which it can be done’.⁷⁶ It nonetheless found that, as of 2014, no IAC ‘reported any active consideration of changing policies or practices on publication of awards’.⁷⁷

Our view is predicated on the rejection of any sharp distinction between ICA and ISA, when it comes to transnational governance (Chapter 5). ICA does not always involve more ‘private’ than ‘public’ law and interests, even relative to ISA.

⁷² It would also lower the cost of entry to new users and arbitrators, helping to socialize them into the system.

⁷³ Sundaresh Menon, ‘International Arbitration: The Coming of a New Age for Asia (and Elsewhere)’ in Albert Jan van den Berg (ed), *International Arbitration: The Coming of a New Age? (ICCA Congress Series No 17)* (Wolters Kluwer, Alphen aan den Rijn 2013).

⁷⁴ *ibid* para 48.

⁷⁵ Lord Chief Justice of England and Wales Thomas of Cwmgiedd, ‘Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration’ (9 March 2016), The Bailii Lecture 2016 <<https://aberdeenuilaw.files.wordpress.com/2016/05/lcj-speech-bailli-lecture-201603091.pdf>> accessed 16 June 2016, paras 38–9.

⁷⁶ Publication of International Arbitration Awards and Decisions (n 29), 1.

⁷⁷ *ibid* 11.

In the types of ICA disputes that would meet the criteria just listed, the public interest is directly implicated, whereas, in some ISA disputes, it is clearly not. ISA, however, meets minimal standards of transparency. In 2006, states amended the ICSID Rules to permit tribunals to entertain third-party *amicus* briefs, and to broadcast hearings, innovations that tribunals had previously evolved on their own (Chapter 3).⁷⁸ New investment treaties and models routinely provide for the same, and the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, which requires publication of pleadings and awards, went into effect on 1 April 2014.⁷⁹

The rapid institutionalization of rules enhancing transparency and accountability in ISA may well exert an influence on the situation in ICA. As Rogers put it as early as 2006:

Investor-state arbitration may create pressure or at least inspiration for greater transparency. Even if the two systems are distinct in many ways, the membrane between the two systems is rather permeable. Many of the lawyers and arbitrators who staff investment arbitration established themselves in international commercial arbitration and continue to shuttle back and forth between the systems. Precedents and procedures from the investment context also migrate into the international commercial arbitration. Given the vigor of pressures for increased transparency in investment arbitration, it seems doubtful that they will stop at the blurred boundary between the two systems.⁸⁰

Today, even executives of IACs champion transparency,⁸¹ and now openly challenge the presumption of confidentiality,⁸² though concrete proposals for reform are lacking. One promising avenue might be for UNCITRAL to consider adapting some of its 'Rules on Transparency' for ISA, to ICA.⁸³

Arbitral Lawmaking and General Principles

When judges develop general principles of law, they become architects of their own legal systems, acting as primary lawmakers. Consider how scholars and judges

⁷⁸ Aurélia Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21 ICSID Review—Foreign Investment Law Journal 427.

⁷⁹ United Nations Commission on International Trade Law, 'UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration' (2014) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html> accessed 16 June 2016.

⁸⁰ Rogers (n 28), 1334–5.

⁸¹ See the remarks of the newly appointed President of the ICC International Court of Arbitration: Alexis Mourre, 'ICC Court to communicate reasons as a new service to users' (8 October 2015) <<http://www.iccwbo.org/News/Articles/2015/ICC-Court-to-communicate-reasons-as-a-new-service-to-users>> accessed 16 June 2016.

⁸² Stefano Azzali (then Secretary-General of the Milan Chamber of Arbitration and Secretary Treasurer of the International Federation of Commercial Arbitration Institutions), 'Confidentiality vs. Transparency in Commercial Arbitration: A False Contradiction to Overcome' (28 December 2012), NYU Transnational Notes <<http://blogs.law.nyu.edu/transnational/2012/12/confidentiality-vs-transparency-in-commercial-arbitration-a-false/>> accessed 17 June 2016.

⁸³ Robert Argen, 'Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration' (2014) 40(1) Brooklyn Journal of International Law 207.

describe their various functions. General principles, it is claimed, lay ‘down the essential elements of the legal order’,⁸⁴ express the ‘fundamental legal concepts and essential values of any legal system’,⁸⁵ and legitimate ‘all or any of the more specific [legal] rules in question’.⁸⁶ It is no exaggeration to state that much of the basic normative infrastructure of domestic and international law has been constituted by judge-made general principles. Arbitral tribunals, too, have made a great deal of constitutive law under the cover of a jurisprudence of principles, not least, to enhance their own authority and autonomy (Chapters 3 to 5). Since they cannot do without them, tribunals ought to develop general principles of law more transparently, and deploy them more consistently. When it comes to assessing the importance of public interests in the resolving of dyadic disputes, they can do no better than to develop a more structured version of proportionality analysis [PA].

General Principles

The ‘general principles of law’⁸⁷ comprise an authoritative and autonomous source of legal norms that international judges are under a duty to apply when relevant to a dispute at bar. At the same time, there is no codified statement of their content, and no authoritative, prescribed method for identifying them.⁸⁸ In domestic public law, the most important principles materialized in national judicial decisions as self-evident propositions, beginning in the late nineteenth century in Europe. Ever since, judges have only very rarely provided explicit justification for the appearance of a new principle. They have tended to rely on incremental doctrinal consolidation to do the work of legitimation, or on a citation to an elliptical judgment of another court. Once institutionalized in subsequent case law and scholarly commentary, judges will apply the principle as if it were an inherent component of the rule of law itself. In most important cases, judges rely on principles to compensate for the absence of basic texts, such as a charter of rights. The leading example is that of the French Supreme Administrative Court, the *Conseil d’État*, whose methods of discovery and consolidation broadly diffused across Europe, and then globally.

⁸⁴ Armin von Bogdandy, ‘Doctrine of Principles’ (2003) 10 NYU Sch of Law Jean Monnet Ctr, Working Paper No 9/03 <<http://www.jeanmonnetprogram.org/archive/papers/03/030901-01.pdf>> accessed 16 June 2016.

⁸⁵ Meinhard Hilf and Goetz Goettsche, ‘The Relation of Economic and Non-Economic Principles in International Law’ in Stefan Griller (ed), *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order* (Springer, New York 2003).

⁸⁶ Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press, Oxford 1978) 152.

⁸⁷ Article 38(1)(c), Statute of the International Court of Justice 33 UNTS 993: ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply ... the general principles of law recognized by civilized nations.’ We understand ‘by civilized nations’ to mean ‘in legal systems based on the rule of law’.

⁸⁸ Unlike ‘judicial decisions’ and the ‘writings of learned publicists’ (Article 38(1)(d), Statute of the International Court of Justice), the general principles are not defined as ‘subsidiary sources’ of law under Article 38. Instead, they are an autonomous source of legal norms whose legitimacy as positive international law is not in question. At the same time, Article 38(1)(c) is itself incomplete, in that it does not indicate how general principles, left unenumerated, are to be identified, let alone applied.

While the jurisprudence of general principles reveals strong features of judicial empowerment, much of the law actually made is defensive in nature (see Chapter 1). Due process norms are designed to assure disputants of the fairness of proceedings. Others serve to constrain the judge's lawmaking, or at least the process through which the judge decides. The proportionality principle, for example, with its distinctive series of tests, requires judges to evaluate arguments, and to justify their decisions, in particular ways. Courts can deploy principles to promote coherence in systems threatened by fragmentation, and to ground adjustments of the law in the face of external shocks and changing circumstances. At this point in the evolution of international law and courts—notoriously fragmented,⁸⁹ incomplete,⁹⁰ and (seemingly) beset by quasi-permanent crises of legitimacy, international judges and arbitrators need general principles more than their peers on established national courts.

Throughout this book, we have emphasized the gap-filling functions of general principles, as tools for managing dilemmas of incomplete commitment and contracting, but not to disguise arbitral lawmaking. The effectiveness of arbitration rests on a jurisprudence of general principles, the production of which is a robust indicator of judicialization, and of the applicability of the judicial and pluralist-constitutional models. In ICA, this jurisprudence comprises a foundational common law, anchoring claims of authority (from the standpoint of a tribunal's relationship to parties, Chapters 2 and 3) and of autonomy (from the perspective of the arbitral order's relationship to state law, Chapters 4 and 5). Much of this law is procedural in nature, though reason-giving requirements undergird substantive lawmaking in obvious ways. Further, 'transnational/international public policy' is arbitrator-made law, which important state courts have recognized as legitimate. In ISA, tribunals can and ought to develop general principles to fill gaps.⁹¹ States have expressly empowered arbitrators to enforce investor entitlements that are announced, typically, in provisions that are open-textured. The most obvious example is the FET, a protection that is common to virtually all investment treaties. Relatively quickly, arbitrators constructed the FET as a repository for a long list of general principles (also found in virtually all well-functioning domestic systems) that they use to assess the acts of host states (Chapter 5).

In the arbitral world, tribunals control the enumeration and application of principles. Nonetheless, the law they make, it is asserted, already exists to the extent

⁸⁹ International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006, UNGA Doc A/CN.4/L.682) <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> accessed 16 June 2016.

⁹⁰ In virtually all important treaty-based judicial systems, including those of the European Union, the GATT-WTO, and the ECtHR, states did not legislate a code of procedures, for example, and they left crucial provisions, such as derogation clauses, incomplete. See Alec Stone Sweet and Thomas Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO' (2013) 1(1) *Journal of Law and Courts* 61 ['Stone Sweet and Brunell'].

⁹¹ Emmanuel Gaillard and Yas Banifatemi, 'The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) 18(2) *ICSID Review—Foreign Investment Law Journal* 375.

that judges elsewhere have embraced the same principle. Those who worry about the legitimacy of judicial lawmaking will find no comfort in a jurisprudence that justifies newly minted law with reference to past episodes of judicial lawmaking. Still, general principles do not simply enable lawmaking; they constrain it in ways that help arbitrators meet the ‘crisis of legitimacy’ that besets all third-party dispute resolvers (Chapter 1). Due process and reason-based justification are today codified fiduciary duties of arbitrators (Chapter 3), owed to users, IACs, and state parties under the New York and ICSID Conventions.

The time has come for the arbitral community to be more forthcoming about the sources and purposes of the principles they use. Over the past century, general principles have accreted enough legitimacy to permit arbitrators to be more open (compared to their pioneering judicial counterparts) about why they need general principles, and to be clearer about how they derive them.⁹² In ICA, due to publication policies, we have virtually no reliable means of assessing the concrete impact of their deployment in any important domain of the law. In ISA, by contrast, tribunals are increasingly anxious to explicate the doctrinal foundations of the general principles they deploy, in light of the relevant practices of courts at both the national and international levels.⁹³ All arbitral tribunals, in both ICA and ISA, should be accountable to all stakeholders for how they govern through general principles.

Proportionality

Over the past sixty years, PA has become a centerpiece of the jurisprudence of the world’s most powerful national and international courts.⁹⁴ Today, it is the unrivalled, best-practice standard for adjudicating constitutional rights that are ‘qualified’ by limitation clauses that permit the state to burden the exercise of rights for important public purposes. Most rights found in modern constitutions (post-Second World War) are qualified, that is, very few rights are expressed in ‘absolute’ terms. At the international level, the proportionality principle has been adapted for use by the courts of the European Union, the European Convention on Human Rights [ECHR], and the WTO, in particular, to adjudicate treaty provisions that

⁹² Stephan W Schill, ‘International Investment Law and Comparative Public Law: An Introduction’ in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford 2010) 27–33.

⁹³ See the awards cited in Chapter 5, including: *International Thunderbird Gaming Corporation v Mexico* (NAFTA/UNCITRAL), Award of 26 January 2006, Separate Opinion of Thomas Wälde, paras 9–58; *Saluka Investments BV v The Czech Republic* (UNCITRAL), Award of 17 March 2006, paras 282–309; *Total SA v The Argentine Republic* (ICSID Case No ARB/04/01), Award of 8 December 2010, paras 105–34; *El Paso Energy International Company v The Argentine Republic* (ICSID Case No ARB/03/15), Award of 31 October 2011, paras 328–79.

⁹⁴ See Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 68 [‘Stone Sweet and Mathews’] (tracing the migration of proportionality from Germany to Canada, Israel, New Zealand, South Africa, and across Europe and to the European Union, the ECtHR, and the WTO); Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, Cambridge 2012) (discussing the diffusion of proportionality from Germany to Canada, Ireland, the United Kingdom, New Zealand, and to national legal systems in Asia and Latin America, as well as to international regimes).

permit states to claim derogations from their treaty obligations in the pursuit of important policy interests.⁹⁵

The proportionality principle is operationalized through a sequence of tests.⁹⁶ A state measure that fails any one of these tests is outweighed by a right or entitlement held by the claimant. In the first, ‘legitimacy’, stage, the judge ensures that the act under review was taken in pursuance of a proper governmental purpose. In the next, the ‘suitability’ stage, the government must demonstrate that the relationship between (a) the means chosen and (b) the ends pursued is rational and appropriate.⁹⁷ Governments rarely lose in the first two stages. The third step—‘necessity’—includes what Americans call a ‘narrow tailoring’ requirement, and has far more bite. At its core is a less restrictive means [LRM] test, through which the judge ensures that the measure under review does not curtail the right being pleaded more than is necessary for the government to achieve its declared purposes. In practice, judges do not invalidate a measure simply because they can imagine one less restrictive alternative to the law under review. Instead, the claimant typically bears the burden of presenting to the court one or more less harmful alternatives that were ‘reasonably’ available. The third step—balancing *stricto sensu*—is also known as ‘proportionality in the narrow sense’. In the paradigmatic balancing situation, judges consider the marginal social benefits of the act (already found to have been narrowly tailored) in relation to the marginal costs incurred to the rights claimant, in light of the facts. They do so in order to ensure that a relatively trivial addition to the public weal does not, say, extinguish a right in an important domain of liberty (disproportionately). Judges who rely heavily on this stage (notably, members of the German Federal Constitutional Court and the Israeli Supreme Court) also emphasize that balancing allows them to ‘complete’ the analysis, in order to check that no factor of significance to either side has been overlooked in previous stages.⁹⁸

We advocate the development of PA within ISA, and ICA where appropriate or all but required,⁹⁹ for a number of overlapping reasons. First, it would be clearly inappropriate (and probably fatal to the regime) for tribunals to treat investors’ protections as placeholders for, or functional equivalents of, absolute rights. As

⁹⁵ Stone Sweet and Brunell (n 90).

⁹⁶ Not all courts use this four-stage version of PA, combining two stages (steps one and two, for example, or steps three and four) into one—see Stone Sweet and Mathews (n 94).

⁹⁷ This mode of scrutiny is broadly akin to what Americans call ‘rational basis’ review, though, under PA, the appraisal of government motives and choice of means is more searching. See Jud Mathews and Alec Stone Sweet, ‘All Things in Proportion? American Rights Doctrine and the Problem of Balancing’ (2011) 60 *Emory LJ* 102–6 [‘Mathews and Stone Sweet’].

⁹⁸ Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 *U Toronto LJ* 393–5; Mathews and Stone Sweet (n 97), 106–8.

⁹⁹ It is appropriate when the mandatory law of a state requires proportionality analysis (see Chapter 5 with regard to European anti-trust law). Under German law, the judge is under a duty to ensure that his decision takes proper account of the constitutional rights in play (e.g. freedom of expression), in accordance with the proportionality principle—see Matthias Kumm, ‘Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7 *German Law Journal* 341. In the European Union, many labour and social rights are directly effective—that is they can be pleaded by one private party against another at bar—see Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, Oxford 2004) Chapter 4.

charted in Chapter 5, the most influential tribunals have adopted a balancing posture, which has driven some of them to deploy PA. In the domains of the FET and indirect expropriation—the two most important sources of pleadings and findings of liability in ISA—the strong trend is for tribunals to balance (a) an investor's entitlements under an investment treaty against (b) the host state's 'right to regulate', the latter being a competing principle¹⁰⁰ also conceived in limited, not absolute, terms. Second, PA furnishes a ready-made balancing structure, the effectiveness and legitimacy of which have been firmly established by the world's most prestigious courts. Standardizing its use would render the arbitral process more doctrinally consistent and transparent. A comprehensive framework of legal argumentation, it organizes how lawyers make claims and counterclaims, and how judges justify their rulings.

Third, PA enhances the flexibility of judges, all but requiring them to tailor rulings to the fact-specific contexts of disputes. It is important to emphasize that in balancing situation it is not the law, but the factual context, that varies across cases. Because PA does not tell the judge how to weigh the various interests and values at play in any case, it does not dictate correct legal answers to legal questions. Balancing 'interests'—or 'values'—that are incommensurate is a famously indeterminate mode of decision-making, to which PA provides procedural determinacy. Even in similar cases, different tribunals could well come to opposed conclusions about the proportionality (lawfulness) of a state act under review. If they are using PA, however, we would know exactly why—on what legal grounds and assessment of facts—they came to their respective conclusions.¹⁰¹

In ISA, states have not only countenanced balancing, they increasingly favour it. As noted, states now draft and sign treaties that contain WTO-style general exceptions that are likely to push tribunals toward the PA-based modes of analyses developed by the WTO Appellate Body. It is worth recalling that some tribunals have already embraced the Appellate Body's approach to proportionality, even in the absence of a general exceptions clause; they did so, in effect, by reading one into treaties in the guise of a host state's 'right to regulate' (Chapter 5). In this mode, the judge evaluates whether the means adopted by a state to pursue a legitimate public policy aim is 'necessary' to achieve that end.¹⁰² Even states that have declared their ambition to constrain arbitral discretion have not renounced necessity analysis. The original draft of India's Model BIT, for example, prohibited arbitrators from examining whether a state act was taken for a legitimate purpose, in a lawful manner,

¹⁰⁰ A host state's 'right to regulate' can be understood as a general principle or derived from the traditional police power doctrines of customary international law: see Prabhash Ranjan and Pushkar Anand, 'Determination of Indirect Expropriation and Doctrine of Police Power in International Investment Law: A Critical Appraisal' (unpublished draft) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2728839> accessed 16 June 2016.

¹⁰¹ See Chapters 4 and 5 for an analysis of relevant awards.

¹⁰² Not all tribunals deployed an LRM test, but their decisions would have been more convincing had they done so. In the European Union and the ECtHR, where one finds clauses that permit derogations from treaty obligations on the basis of 'necessity', judges use PA to adjudicate such claims.

which would have foreclosed PA altogether. The consultation process excised that provision. The published Indian Model BIT contains a general exceptions provision in Article 32(1), mimicking Article XIV of the GATS (1994):

Nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures of general applicability applied on a nondiscriminatory basis that are necessary to:

- (i) protect public morals or maintaining public order;
- (ii) protect human, animal or plant life or health;
- (iii) ensure compliance with law and regulations that are not inconsistent with the provisions of this Agreement;
- (iv) protect and conserve the environment, including all living and nonliving natural resources;
- (v) protect national treasures or monuments of artistic, cultural, historic or archaeological value.

A footnote to this provision echoes WTO case law, stating that: ‘In considering whether a measure is “necessary”, the Tribunal shall take into account whether there was no less restrictive alternative measure reasonably available to a Party.’¹⁰³

Scholarly discussion of the development of the proportionality principle within ISA has taken off.¹⁰⁴ The most important work, a recent book by Caroline Henckels,¹⁰⁵ comprehensively traces the evolution of PA and alternatives in the existing case law, against the backdrop of the principle’s institutionalization in the case law of the WTO, the European Court of Human Rights [ECtHR], and the European Union. Henckels argues that tribunals have much to gain from fully embracing PA, but that its benefits can be fully realized only through consistent application of its sequence of tests. We fully agree on this point. Henckels also elaborates a normative framework for considering the linked questions of deference and standard of review, to which PA provides at least partial answers.

¹⁰³ Model Indian BIT (n 53): Article 32: General Exceptions, fn 6.

¹⁰⁴ Jasper Krommendijk and John Morijn, “Proportional” by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration’ in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford 2009); Alec Stone Sweet, ‘Investor-State Arbitration: Proportionality’s New Frontier’ (2010) 4(1) *Law and Ethics of Human Rights* 47; Caroline Henckels, ‘Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration’ (2012) 15(1) *Journal of International Economic Law* 223; Benedict Kingsbury and Stephan W Schill, ‘Investor-State Arbitration As Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law’ (2012) 8 *Transnational Dispute Management* <<https://www.transnational-dispute-management.com/article.asp?key=1700>> accessed 16 June 2016 [‘Kingsbury and Schill’]; Alec Stone Sweet and Giacinto della Cananea, ‘Proportionality, General Principles of Law, and Investor-State Arbitration’ (2014) 46 *NYU Journal of International Law and Politics* 911.

¹⁰⁵ Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press, Cambridge 2015) [‘Henckels’].

Deference

States delegated extensive lawmaking powers to arbitrators, both directly and indirectly, and arbitral lawmaking has determined much of the regime's evolution. The greater ISA community has struggled to find an appropriate balance between discretion, delegated to arbitrators for the protection of foreign investment, and the deference owed to states. A major strain of critical scholarship maintains that tribunals should give far more deference to states than they have, a stance predicated on concerns about pro-investor bias in the system. The 'public law' nature of treaty-based ISA, it is asserted, supports this position, while pointing the analyst to the world of public law courts for analogical guidance. Proponents of greater deference also worry that arbitrators may be comparatively ill-equipped to engage in the judicial review of public acts, compared to judges on well-functioning, domestic administrative and constitutional law courts.¹⁰⁶ Arbitrators are outsiders to the system in which they intervene, the argument goes. Predisposed to viewing a dispute narrowly, in terms of their own mandate to enforce investment treaties, they will miss a dispute's wider public dimensions. They will typically lack the expertise required to make competent policy judgments in the context of complex and foreign regulatory environments. More broadly, robust, pro-investor bias threatens to constrict national policy space,¹⁰⁷ and to foreclose reforms in times of economic crisis,¹⁰⁸ when they are most needed. Tribunals, therefore, should explicitly develop deferential standards of review that reflect these risks.¹⁰⁹

However well founded these worries might be, the extant empirical research provides no support for the claim that awards on liability in ISA are biased in favour of investors. No study has shown that awards have reduced the policy space of host states, or deterred regulatory reforms. Further, tribunals have taken pains to recognize the regulatory prerogatives of states, either as an expression of the doctrines of 'police powers' in customary international law, or as a general principle of law. They then use the right to regulate as a doctrinal frame for showing deference, and for evolving standards of review, however inchoate such standards remain in the aggregate (Chapter 5). The most important lines of case law in this vein do, in fact, lay out a defensible theory of deference, albeit within a balancing posture that some may nonetheless consider objectionable. With regard to general measures, the vast majority of tribunals begin with a presumption of deference that can be rebutted by

¹⁰⁶ For a strong defence of these arguments, see Van Harten (n 45).

¹⁰⁷ Stephan W Schill, 'Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review' (2012) 3(3) *Journal of International Dispute Settlement* 578 ['Schill']: 'One central concern—among others—is that arbitral tribunals use the vague standards of investment protection to intrude into the regulatory space of host states and become the ultimate controller of central public policy decisions as they limit domestic courts and domestic regulators in exercising jurisdiction.'

¹⁰⁸ William Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (2010) 35 *Yale Journal of International Law* 283; Jürgen Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59 *International and Comparative Law Quarterly* 325.

¹⁰⁹ Schill (n 107), 577–607.

showing that a state has manifestly abused its right to regulate, against the backdrop of treaty obligations to which the state has freely entered.¹¹⁰

In our view, it would be inappropriate for tribunals to adopt formal deference doctrines, except insofar as the latter is required by express treaty provisions. Formal deference doctrines include those that classify an issue as *per se* non-justiciable (e.g. a categorical ‘political question doctrine’), or that place a burden on the claimant that is so high as to make review of state acts, in practice, all but impossible (e.g. under the so-called ‘Wednesbury unreasonableness’ test). In our view, PA ought to furnish the basic standard of review, at least under the indirect expropriation and FET headings. The objects of such pleadings should not be limited in advance. PA provides ample room for the expression of *de facto* deference to the states’ right to regulate.¹¹¹ How tribunals do so should depend on facts of the case, not on the basis of *a priori* categorical reasoning. We sketch the basics of the position here.

In the realm of treaty-based ISA, arbitrators are judges bound by the Vienna Convention on the Law of Treaties (1969). The Vienna Convention provides no support for formal deference doctrines. Instead, judges are bound by Article 31(1), the ‘general rule of interpretation’:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Where treaties are silent on the question, arbitrators possess inherent powers to determine the standard of review, in light of the purpose of the treaty—that is, the effective protection of foreign investment. Moreover, where treaties do not make derogation clauses self-judging, but rather justiciable under a necessity clause or doctrine, there is little of a formal nature to limit the tribunals’ discretion. In our view, tribunals ought to maximize effectiveness, of investment treaties and the regime as a whole; but this goal can *not* be achieved without appropriate deference to states’ regulatory prerogatives.

PA provides a well-tested framework for doing so. To be sure, PA embodies an intrusive standard of review, in which states bear the burden to justify, in light of legitimate public interests, acts that burden a right or entitlement. Judges and arbitrators can and do invoke a state’s ‘margin of appreciation’—a corollary of the right to regulate—thereby building ‘deference’ into the framework. But PA itself determines the size of a state’s ‘margin of appreciation’, in the context of a specific dispute.

Judges and arbitrators can express deference at each stage of PA. Arbitrators could use the first stage—that of ‘proper purpose’—to capture state acts expressly designed to punish, or coerce, an investor. A finding that the act under review also violates domestic law, as determined by the host state’s own courts, would strengthen such a decision. Notwithstanding such instances, the prong would serve

¹¹⁰ Giorgio Sacerdoti, ‘The Application of BITs in Time of Economic Crisis: Limits to Their Coverage, Necessity and the Relevance of WTO Law’ in Giorgio Sacerdoti (ed), *General Interests of Host States in International Investment Law* (Cambridge University Press, Cambridge 2014) 3.

¹¹¹ Kingsbury and Schill (n 104), 22.

as a placeholder for a tribunal's expression of consideration and respect. The same is true of the 'suitability' phase which, in the context of the review of general measures, commonly reduces to a weak version of a rationality test. 'It is clear that the law under review is an appropriate instrument for pursuing an important objective in the public interest', the tribunal can declare, without undermining its authority to determine liability on more searching grounds in the next stage of the analysis. If tribunals in ISA follow their counterparts on, say, the courts of the European Union and the WTO, necessity analysis will do most of the work. Why should it ever be acceptable for a host state to infringe on an investor's entitlements *more than is necessary to achieve the state's regulatory objectives*? It is indisputable that LRM testing pushes judges into a policymaking mode, in that it requires them to consider, counterfactually, the efficacy of alternative measures. Yet, even here, international judges have held that states have a right to determine the 'desired level of protection with respect to the objective pursued', and that the complainant bears the burden of identifying the 'alternatives to the measure at issue that the responding Member could have taken'.¹¹² Some tribunals in ISA have followed.¹¹³ Finally, the role of balancing in the strict sense is to ensure that a measure has not destroyed the viability of the investment in the name of securing a relatively trivial measure of a social good.

Balancing in the strict sense has been attacked for permitting judges to either protect a right too little or too much. Judges may 'balance a right away', or they might be tempted to substitute their own policy judgment for that of public officials.¹¹⁴ For this latter reason, and for reasons of relative institutional competence and political legitimacy, Henckels¹¹⁵ now argues that tribunals in ISA should conclude PA at the necessity stage. Judges should never move to balancing in the narrow sense. On this point, we disagree with Henckels. We see no compelling justification for arbitrators to refuse to take into consideration the marginal costs and benefits of the interests at play in an investment dispute. In 2012, Henckels agreed:

[R]esidual review of strict proportionality should be retained ... Not proceeding to this analytical stage in order to avoid explicit balancing may result in a measure being adjudged lawful even if its impact is especially severe relative to the importance of the measure and

¹¹² World Trade Organization, Report of the Appellate Body (AB-2007-4), 'Brazil—Measures Affecting Imports of Retreated Tyres', 156: 'It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken. [I]n order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued." If the complaining Member has put forward a possible alternative measure, the responding Member may seek to show that the proposed measure does not allow it to achieve the level of protection it has chosen and, therefore, is not a genuine alternative.'

¹¹³ Henckels (n 105), 169–70.

¹¹⁴ Stone Sweet and Mathews (n 94), 77.

¹¹⁵ Henckels (n 105), 168: 'The proportionality *stricto sensu* stage by its very nature can only operate to reduce the regulatory autonomy of states compared to the application of a necessity test, as it can result in a tribunal ruling unlawful the only way that the government has available to achieve its aim. It is strongly arguable, therefore, that least-restrictive means analysis should be the limit of review in investor-state arbitration.'

its objective—or where the measure and its objective could not reasonably be regarded as significant and important vis-à-vis its expropriatory effect. In such cases, tribunals would retain the power to employ strict proportionality analysis to declare expropriatory the only reasonable way of achieving what has already been judged to be a legitimate aim.

At the very least, tribunals ought to be able to assess state liability under an investment treaty in circumstances in which (a) the state has implemented a law in ways that extinguish an investment, and (b) implementation only achieves a very low level of social benefit.

We would also emphasize two additional points. First, in the world of domestic public law adjudication, the balancing judge possesses a formal veto, and reasons given in support of the veto will constrain future episodes of policymaking. Again, the available remedy ought to weigh heavily on the normative argument. In ISA, a finding of liability under the treaty (a matter of international not national law) will lead to an award of damages, but not to the invalidation or quashing of the measure under review. The logics of efficient breach are relevant to debates about deference. Second, if the balancing stage is closed off altogether, we would expect the relevant arguments, and the balancing, to flow into the proper purpose and necessity prongs.¹¹⁶ The ‘hydraulic’ dynamics of shifting burdens within balancing frameworks found elsewhere would likely manifest themselves with full force in the domains that matter the most in ISA: the FET and indirect expropriation.¹¹⁷ Such an outcome would undermine transparency, as well as the tribunal’s capacity to express deference precisely where it is due.

Transnational Legal Pluralism

Pluralism is a defining property of international arbitration. In any given proceeding, tribunals typically take into account diverse sets of norms issuing from different authorities: national lawmakers, treaty-makers, the codifiers of the *Lex Mercatoria*, contracting parties, and IACs. The situation is one of ‘source pluralism’. Comprised of independent IACs in competition with one another for business and influence, the arbitral regime is also pluralistic in a jurisdictional sense. At the international level, the New York Convention formally organizes a regime in which functions are divided: arbitrators render awards that domestic courts enforce. Pluralism means that the authority of arbitral awards—their legitimacy as enforceable legal acts—is produced through the coordination of two or more discrete systems of law. The judicialization of arbitration has altered how the

¹¹⁶ International courts, including the CJEU, the ECtHR, and the WTO, often carry out the balancing exercise at the necessity stage, collapsing the second and third steps.

¹¹⁷ For ‘hydraulic’ accounts of the effects of doctrinal change, see Ernest Young, ‘Executive Preemption’ (2008) 102 *NWUL Rev* 880: ‘There is a hydraulic quality to federalism doctrine: weakening one set of constraints on national power tends to create pressure to tighten others if the overall objective of meaningful balance is to be maintained.’ See also David Han, ‘The Mechanics of First Amendment Audience Analysis’ (2014) 55 *Wm & Mary L Rev* 1647, 1705–10, 1716: ‘[L]egal doctrine is often hydraulic in nature; whenever the rigidity in one doctrinal area exerts pressure on courts’ decisionmaking, that pressure often seeks release in other areas of the doctrine’.

New York Convention regime works, not least through the isomorphic dynamics discussed above.

A frontier issue, which we do not purport to settle in the book, is the extent to which these pluralist regimes are developing ‘constitutional’ properties (Chapter 1). We recognize that the usage of the word ‘constitutional’ to describe any legal system beyond the state is highly charged, symbolically and politically.¹¹⁸ We primarily use the term in a descriptive sense, in order to focus attention on the structural properties of the New York Convention as a legal regime. In our view, any stable legal framework that organizes how discreet legal systems coordinate with one another in ways that produce legal effects is ‘constitutional’ in a basic sense. The norms that undergird federal systems, allowing the federal and state ‘levels’ to interact productively with one another, are an obvious example; and it is worth noting that the first federal constitutions were typically considered to be compacts between sovereign states. To take a more contemporary analogue, since the 1980s, scholars and the Court of Justice of the European Union [CJEU] have asserted that the European Union underwent a profound process of ‘constitutionalization’ with the acceptance, by the national courts, of the basics of the CJEU’s doctrines of direct effect, supremacy, and other principles.¹¹⁹ At stake was whether EU legal norms would be enforced directly by national courts, upon request by a private party.¹²⁰ The New York Convention requires national courts to acknowledge the autonomy of the arbitral order, and to enforce its awards, subject to the inarbitrability and public policy exceptions.

Looking forward, further judicialization in the form of existing proposals to establish new forms of hierarchy within the arbitral regime would fundamentally alter how arbitrators and domestic judges engage one another under the New York Convention, in a constitutional pluralist direction. What would happen if the ICC moved to publish all important awards in which the tribunal applied mandatory law and enforced public policy, which state courts actually reviewed as proposed above? How would domestic judges react to the creation of a centralized appellate jurisdiction for ICA or ISA? Others have considered establishing a preliminary reference system,¹²¹ in which tribunals could request an interpretation of the applicable law from a court, when that law is unsettled on sensitive areas of public interest and policy. We could go on, but the answers to such hypotheticals appear clear. Assuming good faith on both sides, the dialogues between judges and arbitrators

¹¹⁸ See Neil Walker, ‘Taking Constitutionalism beyond the State’ (2008) 56 *Political Studies* 519.

¹¹⁹ For an overview of this literature, see Alec Stone Sweet, ‘The European Court of Justice and the Judicialization of EU Governance’ (2010) 5 *Living Reviews in European Union Governance* <<http://europeangovernance.livingreviews.org/Articles/lreg-2010-2/>> accessed 25 June 2016.

¹²⁰ The regime remains pluralist, however. Among other indicators, the CJEU asserts that EU law is directly applicable by national judges, and reserves for itself the final determination of the lawfulness of any EU act; in contrast, national constitutional courts typically assert the right to review the legality of EU law with reference to national charters of rights. Alec Stone Sweet, ‘A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe’ (2012) 1 *Journal of Global Constitutionalism* 53, 60–2.

¹²¹ Grisel (n 26), paras 431 et seq.

would become more structured, intensifying pressure to produce a coordinated jurisprudence on important questions implicating public interests. The potential for inter-judicial conflict, too, would be significantly increased. A supreme arbitral jurisdiction would not only be charged with defending the arbitral mission, but its own *bona fides* as a court, within a system of courts.

IV. Conclusion

We have argued that a judicialization process, which has steadily gathered force since the mid-1960s, has transformed international arbitration. Three factors have combined to sustain this process. First, the explosion in trade generated high-stakes disputes that, in turn, drove parties into highly adversarial postures. Second, the major IACs and a cadre of elite arbitrators decided that the future of the system hinged on its capacity to replace domestic courts. Since the early 1950s, they have worked steadily to build the institutional infrastructure that would allow them to succeed. Although all major IACs, including ICSID, continue to make provision for mediation and equity decisions, they now compete with one another to provide what is, in effect, private adjudication of transnational disputes. Third, states (treaty-makers), and the national courts of the major trading zones (enforcement mechanisms), have not only accommodated the expansion of adversarial arbitration, they have heavily invested in it (albeit with some lingering doubts), extending its reach and effectiveness. Today, what goes on in proceedings is hardly 'arbitration' at all, in the traditional sense of that term. The judicialization process has also fundamentally altered the political environment in which arbitration is embedded, spawning legitimacy dilemmas that press for more, not less, judicialization. The elements of the traditional model that remain in place—confidentiality (in ICA), party-dominated appointment procedures, and the absence of appeal—are under sustained attack, on legitimacy not efficiency grounds.

International arbitration has largely become a form of litigation, a substitute for courts. And the legitimacy crises that affect judicial governance, and the most effective of courts, are never settled.