

Procedural Transparency in Investor-State Arbitration

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Meinen Eltern

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Dublin, 31 October 2018 _____

Summary

Chapter 1, after some introductory remarks, examines whether arbitral hearings are open to the public under existing investment agreements and arbitration rules they reference. Chapter 2 presents the hypothesis for a right of public access to arbitral hearings in the investment treaty arbitration system, finding that at least two premises must be true for there to be such a right: there must be a general principle of open justice under international law and arbitrators must be making law. These premises are then examined. Chapter 3 identifies the New York Convention and the ICSID Convention as tools for implementing a right of public access to arbitral hearings and examines the role of investment arbitrators in that process. Chapter 4 compares the introduction of a right of public access to arbitral hearings with proposed multilateral mechanisms for investor-state dispute resolution. Chapter 5 offers concluding remarks and points to some limitations.

This research project sought and benefitted from the interplay between legal theory and insights gained from original empirical research. The empirical research was undertaken with a view to establishing that a system of flexible *stare decisis* exists in the investment arbitration system. *Appendix B* gives an overview of the 125 arbitral awards studied; they range from 1999 to 2017. The evidence suggests that tribunals, despite their *ad hoc* nature and despite any assertions to the contrary, operate as if they were a single court in a single jurisdiction, such is the degree of pull prior decisions exert on later arbitral tribunals. It is further observable that arbitral tribunals not only routinely follow the *ratio decidendi* of prior decisions but that they also specify the rules developed by prior tribunals, thereby specifying treaty norms over time and across treaties. The phenomenon of cross-treaty reliance contributes to the creation of a single body of international investment law. What is more, the practice of creating long lines of consistent decisions is proof that a system of flexible *stare decisis* exists in investment arbitration. This *jurisprudence constante* would not exist if prior arbitral decisions did not exert a considerable degree of pull on later tribunals. It should be noted that arbitrators routinely rely on prior jurisprudence, an emerging consensus, or a common ground in general. The reliance on such generalities suggests that arbitrators at least indirectly acknowledge their jurisgenerative function.

If arbitrators enjoy a jurisgenerative function, it is at least plausible that the principle of open justice should apply to investor-state arbitration. A prerequisite for the applicability of the principle of open justice to investor-state arbitration, a child of international law, is the existence of a principle of open justice within the meaning of Article 38(1)(c) of the ICJ Statute in the first place.

In a second set of empirical research, the constitutions of the world were studied in English or in English translation, in addition to the jurisprudence in select jurisdictions. *Appendix A* gives an overview of the constitutional prong of this analysis, indicating in which constitutions a principle of open justice finds explicit or implicit protection. The robustness of a general principle of international law depends on the universality of its recognition. It is with the greatest possible robustness in mind that this research was undertaken. In addition, the quest for a general principle of open justice served a second purpose. Since it is argued that courts have the ability to enforce a right of public access to investment arbitration via the possible non-enforcement of awards on the grounds of open justice, it is crucial for the principle of open justice to be recognised in individual jurisdictions. The decentralised enforcement of the principle of open justice qua courts depends on the local protection of that principle. The empirical research illustrates that a principle of open justice is recognised in 121 constitutions and that it at least could find implicit protection in the majority of the remaining constitutions and jurisdictions.

Given the near-universality of the principle of open justice, the potential reach of a right of public access to investment arbitration is huge. Such a right could be implemented by domestic courts in both common law and civil law jurisdictions around the world. The idea that courts could play a central role in the paradigm shift from confidentiality to greater transparency in investment arbitration is inspired by *Delaware Coalition of Open Government v Strine*, a case on a right of public access to Delaware Arbitration in the United States. The United States, with their strong First Amendment qualified right of public access to trials, serves as a point of departure and comparison throughout much of this thesis. Other jurisdictions considered include Argentina, Australia, Canada, Germany, Ireland, Switzerland and the United Kingdom – each chosen in light of its status as an exemplar of the common law or civil law approach and as a source of relevant case law. A study of regional and international human rights instruments rounds off the analysis which is complimented by an analysis of the historical roots of open justice.

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My PhD research benefitted immeasurably from my time as a Junior Visiting Fellow at the Graduate Institute of International and Development Studies in Geneva. The Graduate Institute is a world-renowned institution for the study of international dispute settlement. Whilst there, I received illuminating feedback both from Professor Zachary Douglas, my academic contact at the Graduate Institute, and from Professor Fuad Zarbiyev. The words of encouragement both from Professor Roger P. Alford and Professor Stephan Schill were equally helpful. What is more, the extremely well-equipped Library of the United Nations Office at Geneva granted me much appreciated access during my time in Switzerland. It was there that I studied the constitutions of the world.

Many ideas included in this thesis were refined at conferences and seminars. Some of the ideas included in chapters 2 and 3 were presented at the UK Branch Annual Conference of the International Association of Legal and Social Philosophy at the Queen’s University Belfast in 2015 and at a doctoral seminar organised by the Geneva Center for International Dispute Settlement (CIDS) in 2016. Some elements of chapter 4 were presented at the Irish Association of Law Teachers Annual Conference in 2017. That same year, I presented on *A Right of Public Access to Investor-State Arbitration* at the International Postgraduate Research Conference in Trinity College Dublin and at a postgraduate research seminar in the School of Law, Trinity College Dublin. In 2018, I was preoccupied with the general idea and theoretical aspects of arbitral law-making and presented on the topic to the Irish Jurisprudence Society. On top of that, I shared my views on *The Self-Perpetuating Nature of Arbitral Law-making in Investor-State Arbitration* at the Postgraduate Alternative Dispute Resolution Conference “Looking to the Future and Beyond: New Approaches to ADR” at the University of Leicester School of Law and at the Ontario Legal Philosophy Partnership Philosophy of Law Conference at McMaster University. I would like to thank the participants of these various events for their insightful comments and suggestions.

Some of the elements included in chapters 2 and 3 were published in the Dispute Resolution Journal of the American Arbitration Association in July 2018. Furthermore, a portion of chapter 4 was published in the Dispute Resolution Journal in September 2017 and a longer version of the same material was published in the Irish Journal of European Law in December 2016. I am humbled and honoured that the two papers published in the Dispute Resolution Journal were each awarded the Rory Brady Prize for Excellence in International Conflict Management established by the American Arbitration Association. I am grateful to the organisers of this essay competition and to the American Arbitration Association for sponsoring the award.

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LIST OF ABBREVIATIONS

ABQB	Alberta Court of Queen’s Bench (Canada)
AC	<i>Law Reports Appeal Cases</i> , published by the Incorporated Council of Law Reporting for England and Wales
ACHPR Rules of Court	African Court on Human and People’s Rights Rules of Court
All ER	<i>All England Law Reports</i> , published by LexisNexis
Art	Article
ASEAN	Association of Southeast Asian Nations, Bangkok (Established 1967)
BCSC	British Columbia Supreme Court (Canada)
BGH	<i>Bundesgerichtshof</i> [German Federal Court of Justice]
Bing	<i>Bingham’s Common Pleas Reports</i> , published in English Reports
BIT	bilateral investment treaty
BLEU	Belgium-Luxembourg Economic Union
BT-Drs	<i>Drucksachen des Deutschen Bundestages</i>
BVerfG	<i>Bundesverfassungsgericht</i> [German Federal Constitutional Court]
CAFTA-DR	Free Trade Agreement between Central America, the Dominican Republic, and the United States of America, signed 5 August 2004, entered into force 1 January 2009
CanLII	Canadian Legal Information Institute
CETA	Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States, signed 30 October 2016
Ch	Chapter
Cir.	Circuit (US Federal)
CJEU	Court of Justice of the European Union, Luxembourg (Established 1952)
CJEU Statute	Statute of the Court of Justice of the European Union
CLR	<i>Commonwealth Law Reports</i> , published by Lawbook Company
COMESA	Common Market for Eastern and Southern Africa
Const.	Constitution

CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam, signed 8 March 2018
CRCICA	Cairo Regional Centre for International Commercial Arbitration, Cairo (Established 1979)
CRCICA Rules	CRCICA Arbitration Rules, in force 2011
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), signed 4 November 1950
ECOSOC	United Nations Economic and Social Council (Established 1945)
ECR	<i>European Court Reports</i> , published by Court of Justice of the European Union
ECtHR	European Court of Human Rights, Strasbourg (Established 1959)
ECtHR Rules	Rules of Court of the European Court of Human Rights
EEC Treaty	Treaty establishing the European Community
EWCA	Court of Appeal (England and Wales)
EWHC	High Court (England and Wales)
F 2d, F 3d	<i>Federal Reporter</i> (US), 2nd and 3rd Series, published by West Publishing
FET	fair and equitable treatment
FTA	free trade agreement
GVG	<i>Gerichtsverfassungsgesetz</i> [German Courts Constitution Act]
HCA	High Court of Australia
IACtHR	Inter-American Court of Human Rights (Established 1979)
IACtHR Rules of Procedure	Rules of Procedure of the Inter-American Court of Human Rights
IACtHR Statute	Statute of the Inter-American Court of Human Rights
IBA	International Bar Association
ICC	International Chamber of Commerce, Paris (Established 1919)
ICC Rules	ICC Rules of Arbitration, revised and in force as from 1 March 2017

ICCPR	International Covenant on Civil and Political Rights, signed 19 December 1966, entered into force 23 March 1976
ICJ	International Court of Justice, The Hague (Established 1945)
ICJ Rules	Rules of Court of the International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes, Washington DC (Established 1966)
ICSID Additional Facility Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the ICSID Secretariat
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force 14 October 1966
ICSID Rules	ICSID Rules of Procedure for Arbitration Proceedings
IEHC	High Court of Ireland
ILRM	<i>Irish Law Reports Monthly</i> , published by Round Hall Press
ITLOS	International Tribunal for the Law of the Sea (Established 1996)
ITLOS Rules	Rules of the International Tribunal for the Law of the Sea, adopted 28 October 1997, as amended 17 March 2009
ITLOS Statute	Statute of the International Tribunal for the Law of the Sea
J	Judge
KB	<i>Law Reports, King's Bench</i> (England and Wales)
LCIA	London Court of International Arbitration, London (Established 1892)
LCIA Rules	LCIA Arbitration Rules, revised and in force as from 1 October 2014
MARC	Arbitration and Mediation Center of the Mauritius Chamber of Commerce and Industry (Established 1996)
MARC Rules	MARC Arbitration Rules, revised and in force as from 21 May 2018
Mauritius Convention	United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, adopted 10 December 2014, entered into force on 18 October 2017

MCCI	Mauritius Chamber of Commerce and Industry (Established 1850)
NAFTA	North American Free Trade Agreement, signed 17 December 1992
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed 10 June 1958
OJ	Official Journal of the European Union
ONSC	Ontario Superior Court of Justice (Canada)
OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic, signed 22 September 1992
P	<i>Law Reports, Probate</i> (England and Wales)
p / pp	page / pages
para / paras	paragraph / paragraphs
PCA	Permanent Court of Arbitration, The Hague (Established 1899)
RON	Romanian leu, the currency of Romania
QB	<i>Law Reports, Queen's Bench</i> , published by the Incorporated Council of Law Reporting for England and Wales
QCCA	Cour d'appel du Québec (Québec Court of Appeal)
QCCS	Cour supérieure du Québec (Superior Court of Québec)
S Ct	<i>Supreme Court Reporter</i> , published by West Publishing
SCC	Stockholm Chamber of Commerce, Stockholm (Established 1917)
SCC Rules	Arbitration Rules of the SCC Arbitration Institute, revised and in force as of 1 January 2017
Sch	Schedule
SDNY	Southern District of New York (US District Court)
SKQB	Saskatchewan Court of Queen's Bench (Canada)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPP	Trans-Pacific Partnership between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and the United States of America (Withdrawn), signed 4 February 2016
tr	translator

UDHR	Universal Declaration of Human Rights
UNCITRAL	United Nations Commission on International Trade Law, Vienna (Established 1996)
UNCITRAL Rules 1976	UNCITRAL Arbitration Rules adopted by the resolution of the General Assembly of the United Nations in December 1976
UNCITRAL Rules 2010	UNCITRAL Arbitration Rules adopted by the resolution of the General Assembly of the United Nations in December 1976 and revised in 2010
UNCITRAL Rules 2013	UNCITRAL Arbitration Rules adopted by the resolution of the General Assembly of the United Nations in December 1976 with new article 1, paragraph 4, as adopted in 2013
UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, in effect since 1 April 2014
UNCTAD	United Nations Conference on Trade and Development, Geneva (Established 1964)
UNTS	<i>United Nations Treaty Series</i> , published by the Secretariat of the United Nations
US	<i>United States Supreme Court Reports</i> , published by LexisNexis
USC	United States Code
VCLT	Vienna Convention the Law of Treaties
WD Va.	Western District of Virginia (US District Court)
WLR	<i>Weekly Law Reports</i> , published by Justis
WTO	World Trade Organization, Geneva (Established 1995)

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- Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Preliminary Objections) (Judgment) [1998] ICJ Reports 275
- North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Reports 3

WTO Dispute Settlement Body

- WTO, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts* – Report of the Appellate Body (2005) WT/DS286/AB/R (*EC—Chicken Cuts*)

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- 1962 Jun. 29 Traité entre la République fédérale d'Allemagne et la République fédérale du Cameroun relatif à l'encouragement des investissements de capitaux (entered into force on 21 November 1963)
- 1963 Feb. 7 Treaty between the Federal Republic of Germany and the Republic of Sudan concerning the Encouragement of Investments (entered into force on 24 January 1967)
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- 1985 Mar. 16 Treaty between St. Lucia and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 22 July 1987)
- 1986 Mar. 25 Treaty between Saint Vincent and the Grenadines and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 8 January 1989)
- 1986 Apr. 12 Treaty between the Federal Republic of Germany and the People's Republic of Bulgaria concerning the Reciprocal Encouragement and Protection of Investments (entered into force on 10 March 1988)
- 1986 Apr. 30 Vertrag zwischen der Bundesrepublik Deutschland und der Ungarischen Volksrepublik über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 7 November 1987)

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- 1991 Oct. 21 Tratado entre la Republica de Chile y la Republica Federal de Alemania sobre fomento y recíproca protección de inversiones (entered into force on 8 May 1999)
- 1991 Oct. 31 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Albanien über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 18 August 1995)
- 1991 Nov. 14 Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investments (entered into force on 20 October 1994)
- 1992 Feb. 28 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Litauen über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 27 June 1997), 2033 UNTS 349
- 1992 Sep. 22 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Kasachstan über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 10 May 1995), 2023 UNTS 397
- 1992 Sep. 24 Treaty between the Federal Republic of Germany and Jamaica concerning the Reciprocal Encouragement and Protection of Investments (entered into force on 29 May 1996)
- 1992 Nov. 11 Convenio entre el Gobierno de Malasia y el Gobierno de la Republica de Chile sobre la Promoción y Protección de las Inversiones (entered into force on 4 August 1995)
- 1992 Nov. 12 Vertrag zwischen der Republik Estland und der Bundesrepublik Deutschland über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 12 January 1997)
- 1993 Feb. 15 Vertrag zwischen der Bundesrepublik Deutschland und der Ukraine über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 29 June 1996)
- 1993 Apr. 2 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Belarus über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 23 September 1996)
- 1993 Apr. 3 Vertrag zwischen der Bundesrepublik Deutschland und der Sozialistischen Republik Vietnam über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 19 September 1998)

- 1993 Apr. 20 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Lettland über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 9 June 1996), 2033 UNTS 409
- 1993 Apr. 28 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Usbekistan über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 23 May 1998), 2071 UNTS 23
- 1993 Jun. 25 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Georgien über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 27 September 1998), 2071 UNTS 193
- 1993 Aug. 11 Tratado entre la Republica Federal de Alemania y la Republica del Paraguay sobre Fomento y Recíproca Protección de Inversiones de Capital (entered into force on 3 July 1998)
- 1993 Oct. 28 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Slowenien über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 18 July 1998), 2132 UNTS 521
- 1994 Jan. 21 Treaty between the Federal Republic of Germany and the Republic of Namibia concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 21 December 1997)
- 1994 Feb. 28 Treaty between the Federal Republic of Germany and the Republic of Moldova concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 15 June 2006), 2377 UNTS 215
- 1994 Mar. 30 Agreement between the Federal Republic of Germany and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments (entered into force on 15 November 1997)
- 1994 Sep. 13 Tratado entre la Alemania y Costa Rica sobre fomento y recíproca protección de inversiones (entered into force on 24 March 1998)
- 1994 Nov. 10 Convenio entre el Gobierno de la República del Perú y el Gobierno de la República Argentina sobre Promoción y Protección Recíproca de Inversiones (entered into force on 24 October 1996)
- 1994 Dec. 2 Bilateral Investment Treaty between Barbados and the Federal Republic of Germany (entered into force on 11 May 2002)
- 1995 Jan. 30 Convenio entre la República del Perú y la República Federal de Alemania sobre Promoción y Protección Recíproca de Inversiones (entered into force on 1 May 1997)
- 1995 Feb. 24 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Ghana über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 23 November 1998)
- 1995 Mar. 21 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Honduras über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 27 May 1998), 2071 UNTS 159

- 1995 Jul. 10 Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments (entered into force on 13 July 1998; unilaterally denounced on 3 June 2017)
- 1995 Sep. 29 Agreement between the Republic of Zimbabwe and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 14 April 2000), 2432 UNTS 3
- 1995 Dec. 21 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Armenien über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 4 August 2000)
- 1995 Dec. 22 Vertrag zwischen der Bundesrepublik Deutschland und der Aserbaidzhanischen Republik über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 29 July 1998)
- 1996 Jan. 31 Agreement between the Government of Hong Kong and the Government of the Federal Republic of Germany for the Encouragement and Reciprocal Protection of Investments (entered into force on 19 February 1998)
- 1996 Mar. 11 Abkommen zwischen der Bundesrepublik Deutschland und der Demokratischen Volksrepublik Algerien über die gegenseitige Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 30 May 2002)
- 1996 Mar. 21 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Ecuador über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 12 February 1999; unilaterally denounced on 18 May 2018)
- 1996 Apr. 30 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Kuba über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 22 November 1998)
- 1996 May 3 Treaty between the Federal Republic of Germany and the Republic of Kenya concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 7 December 2000)
- 1996 May 6 Tratado entre la Republica de Nicaragua y la Republica Federal de Alemania sobre fomento y protección recíproca de inversiones de capital (entered into force on 19 January 2001), 2193 UNTS 435
- 1996 May 14 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Venezuela über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 16 October 1998)
- 1996 Jun. 14 Agreement between the Federal Republic of Germany and the State of Qatar concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 19 January 1999), 2054 UNTS 145
- 1996 Jun. 25 Vertrag zwischen der Bundesrepublik Deutschland und Rumänien über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 12 December 1998)

- 1996 Aug. 9 Agreement between the Federal Republic of Germany and the Lao People's Democratic Republic concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 24 March 1999), 2109 UNTS 31
- 1996 Sep. 10 Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der mazedonischen Regierung über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 17 September 2000), 2157 UNTS 183
- 1996 Sep. 12 Treaty between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments (entered into force on 13 February 1998)
- 1996 Oct. 22 Vertrag zwischen der Bundesrepublik Deutschland und Burkina Faso über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 21 November 2009)
- 1996 Oct. 29 Abkommen zwischen der Bundesrepublik Deutschland und dem Königreich Saudi-Arabien über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 8 January 1999), 2075 UNTS 377
- 1997 Mar. 18 Agreement between the Lebanese Republic and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments (entered into force on 25 March 1999), 2070 UNTS 351
- 1997 Mar. 21 Vertrag zwischen der Republik Kroatien und der Bundesrepublik Deutschland über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 28 September 2000), 2132 UNTS 381
- 1997 Apr. 18 Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments (entered into force on 1 February 2000), 2108 UNTS 19
- 1997 Jun. 21 Agreement between the Federal Republic of Germany and the United Arab Emirates for the Promotion and the Reciprocal Protection of Investments (entered into force on 2 July 1999), 2084 UNTS 355
- 1997 Aug. 28 Vertrag zwischen der Bundesrepublik Deutschland und der Kirgisischen Republik über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 16 April 2006)
- 1997 Aug. 28 Vertrag zwischen der Bundesrepublik Deutschland und Turkmenistan über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 19 February 2001)
- 1997 Dec. 11 Vertrag zwischen der Bundesrepublik Deutschland und der Republik El Salvador über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 15 April 2001), 2156 UNTS 433
- 1998 Mar. 30 Agreement between the Federal Republic of Germany and Brunei Darussalam concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 15 June 2004), 2304 UNTS 171

- 1998 Aug. 25 Agreement between the United Mexican States and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments (entered into force on 23 February 2001), 2140 UNTS 393
- 1998 Sep. 15 Abkommen zwischen der Bundesrepublik Deutschland und der Gabunischen Republik über die gegenseitige Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 4 July 2007), 2470 UNTS 185
- 1998 Nov. 5 Treaty between the Federal Republic of Germany and Antigua and Barbuda concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 28 February 2001), 2146 UNTS 9
- 1998 Nov. 26 Agreement between the Swiss Confederation and the Republic of Mauritius on the Promotion and Reciprocal Protection of Investments (entered into force on 21 April 2000)
- 1999 Feb. 15 Agreement between the Federal Republic of Germany and the Kingdom of Cambodia concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 14 April 2002), 2183 UNTS 129
- 1999 Sep. 29 Treaty between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment (entered into force on 30 May 2001)
- 2000 Feb. 7 Treaty between the Federal Republic of Germany and the Democratic Socialist Republic of Sri Lanka concerning the Promotion and Reciprocal Protection of Investments (entered into force on 16 January 2004)
- 2000 Feb. 18 Agreement between the Government of the Kingdom of Thailand and the Government of the Argentine Republic for the Promotion and Reciprocal Protection of Investments (entered into force on 7 March 2002)
- 2000 Mar. 28 Treaty between the Federal Republic of Germany and the Federal Republic of Nigeria concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 20 September 2007), 2481 UNTS 343
- 2000 May 23 Treaty between the Federal Republic of Germany and the Republic of Botswana concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 6 August 2007), 2470 UNTS 327
- 2000 Jul. 10 Agreement between the Government of the Federal Republic of Germany and the Palestine Liberation Organization for the benefit of the Palestinian Authority concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 19 September 2008)
- 2001 Aug. 3 Accord entre le Gouvernement de la République de Maurice et le Gouvernement de la République du Cameroun (entered into force on 1 January 2008)
- 2001 Aug. 6 Vertrag zwischen der Bundesrepublik Deutschland und Königreich Marokko über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 12 April 2008)

- 2001 Oct. 18 Treaty between the Federal Republic of Germany and Bosnia Herzegovina concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 11 November 2007), 2501 UNTS 155
- 2002 Mar. 6 Vertrag zwischen der Bundesrepublik Deutschland und Republik Mosambik über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 15 September 2007), 2485 UNTS 207
- 2002 Apr. 4 Agreement between the Czech Republic and the United Mexican States on the Promotion and Reciprocal Protection of Investments (entered into force on 13 March 2004)
- 2002 May 29 Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments (entered into force on 1 April 2003)
- 2002 Jun. 24 Treaty between the Kingdom of Thailand and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 20 October 2004), 2286 UNTS 159
- 2002 Aug. 17 Agreement between the Federal Republic of Germany and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investments (entered into force on 23 June 2005), 2364 UNTS 638
- 2003 Mar. 27 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Tadschikistan über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 25 May 2006), 2384 UNTS 51
- 2003 May 6 Free Trade Agreement between the United States of America and Singapore (entered into force on 1 January 2004)
- 2003 May 14 Agreement between the Federal Republic of Germany and the Republic of Indonesia concerning the Promotion and Reciprocal Protection of Investments (entered into force on 2 June 2007; unilaterally denounced on 1 June 2017)
- 2003 Jun. 6 Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile (entered into force on 1 January 2004)
- 2003 Oct. 17 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Guatemala über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 29 October 2006), 2416 UNTS 113
- 2003 Oct. 30 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Angola über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 1 March 2007), 2424 UNTS 125
- 2003 Dec. 1 Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments (entered into force on 11 November 2005), 2362 UNTS 253

- 2004 Jan. 19 Treaty between the Federal Republic of Germany and the Federal Democratic Republic of Ethiopia concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 4 May 2006), 2771 UNTS 215
- 2004 Jun. 15 Free Trade Agreement between the United States of America and the Kingdom of Morocco (entered into force on 1 January 2006)
- 2004 Aug. 5 Free Trade Agreement between the Dominican Republic, the United States and Central America (entered into force on 1 January 2009)
- 2004 Sep. 17 Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership (entered into force on 1 April 2005)
- 2004 Oct. 15 Agreement between the Federal Republic of Germany and Socialist People's Libyan Arab Jamahiriya concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 14 July 2010), 2692 UNTS 217
- 2005 Mar. 2 Treaty between the Federal Republic of Germany and the Republic of Yemen concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 28 March 2008)
- 2005 Apr. 20 Treaty between the Federal Republic of Germany and the Islamic Republic of Afghanistan concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 12 October 2007), 2554 UNTS 119
- 2005 Jun. 16 Agreement between the Arab Republic of Egypt and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 22 November 2009), 2637 UNTS 183
- 2005 Jun. 24 Agreement between the Government of the United Mexican States and the Government of the Republic of Iceland on the Promotion and Reciprocal Protection of Investments (entered into force on 28 April 2006)
- 2005 Aug. 23 Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (entered into force on 21 July 2007)
- 2005 Nov. 4 Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment (entered into force on 31 October 2006)
- 2006 Jan. 16 Agreement between the Republic of Austria and the Republic of Guatemala for the Promotion and Protection of Investment
- 2006 Jan. 19 Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area (entered into force on 1 January 2009)
- 2006 Apr. 12 Free Trade Agreement between the United States of America and the Republic of Peru (entered into force on 1 February 2009)
- 2006 May 12 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the

- Promotion and Reciprocal Protection of Investments (entered into force on 25 July 2007)
- 2006 Jun. 23 Free Trade Agreement between the Republic of China (Taiwan) and the Republic of Nicaragua
- 2006 Aug. 1 Vertrag zwischen der Bundesrepublik Deutschland und der Republik Madagaskar über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 17 October 2015)
- 2006 Sep. 8 Treaty between the Federal Republic of Germany and the Republic of Trinidad and Tobago concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 17 April 2010), 2679 UNTS 23
- 2006 Sep. 9 Agreement between Japan and the Republic of the Philippines for an Economic Partnership (entered into force on 11 December 2008)
- 2006 Nov. 8 Abkommen zwischen der Bundesrepublik Deutschland und der Republik Guinea über die gegenseitige Förderung und den gegenseitigen Schutz von Kapitalanlagen (entered into force on 14 August 2014)
- 2006 Nov. 9 Agreement between the Government of the Russian Federation and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments (entered into force on 1 May 2009)
- 2006 Nov. 14 Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments (entered into force on 20 June 2007)
- 2006 Nov. 22 Free Trade Agreement between the United States of America and Colombia (entered into force on 15 May 2012)
- 2007 Jan. 22 Agreement between the Government of the Republic of Indonesia and the Government of the Kingdom of Denmark Concerning the Promotion and Protection of Investments (entered into force on 15 October 2009)
- 2007 Feb. 5 Treaty between the Federal Republic of Germany and the Kingdom of Bahrain concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 27 May 2010)
- 2007 May 21 Agreement between the Government of the United Mexican States and the Government of the Republic of India on the Promotion and Protection of Investments (entered into force on 23 February 2008)
- 2007 May 30 Treaty between the Federal Republic of Germany and the Sultanate of Oman concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 4 April 2010), 2675 UNTS 19
- 2007 Jun. 28 Free Trade Agreement between the United States of America and Panama (entered into force on 31 October 2012)
- 2007 Jun. 30 Free Trade Agreement between the United States of America and the Republic of Korea (entered into force on 15 March 2012)

- 2007 Oct. 26 Agreement between the United Mexican States and the Slovak Republic on the Promotion and Reciprocal Protection of Investments (entered into force on 8 April 2009)
- 2007 Nov. 13 Agreement between the Federal Republic of Germany and the Hashemite Kingdom of Jordan concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 28 August 2010), 2771 UNTS 157
- 2008 Jan. 16 Agreement between Japan and the Lao People's Democratic Republic for the Liberalisation, Promotion and Protection of Investment
- 2008 Feb. 19 Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (entered into force on 1 January 2012)
- 2008 May 29 Free Trade Agreement between Canada and Peru (entered into force on 1 August 2009)
- 2008 Jul. 11 Agreement between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments (entered into force on 6 June 2009)
- 2008 Jul. 30 Free Trade Agreement between Australia and Chile (entered into force on 6 March 2009)
- 2008 Aug. 7 Comprehensive Economic Partnership Agreement between India and the Republic of Korea (entry into force on 1 January 2010)
- 2008 Nov. 21 Agreement between Japan and the Republic of Peru for the Promotion, Protection and Liberalisation of Investment (entered into force on 10 December 2009)
- 2008 Nov. 21 Free Trade Agreement between Canada and Colombia (entered into force on 15 August 2011)
- 2008 Nov. 22 Bilateral Agreement for the Promotion and Protection of Investments between the Government of the Republic of Colombia and the Government of the People's Republic of China (entered into force on 2 July 2013)
- 2009 Feb. 4 Agreement between the Belgium-Luxembourg Economic Union and the Republic of Colombia on the Reciprocal Promotion and Protection of Investments
- 2009 May 5 Agreement between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments (entered into force on 24 November 2011)
- 2009 May 6 Agreement between Canada and the Czech Republic for the Promotion and Protection of Investments (entered into force on 22 January 2012)
- 2009 May 8 Agreement between the Government of Romania and the Government of Canada for the Promotion and Reciprocal Protection of Investments (entered into force on 23 November 2011)

- 2009 May 29 Agreement between the Government of the Republic of Korea and the Government of the Republic of Rwanda for the Promotion and Protection of Investments (entered into force on 16 February 2013)
- 2009 Jun. 28 Agreement between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments (entered into force on 14 December 2009)
- 2009 Jul. 8 Agreement between the Government of the Republic of Azerbaijan and the Government of the Syrian Arab Republic on the Promotion and Reciprocal Protection of Investments (entered into force on 4 January 2010)
- 2010 Mar. 17 Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Columbia (entered into force on 10 October 2014)
- 2010 May 14 Free Trade Agreement between Canada and the Republic of Panama (entered into force on 1 April 2013)
- 2010 Jul. 6 Agreement between the Government of the Republic of Korea and the Government of the Republic of Colombia for the Promotion and Protection of Investments
- 2010 Jul. 20 Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments (entered into force on 14 March 2012)
- 2011 Feb. 16 Comprehensive Economic Partnership Agreement between Japan and the Republic of India (entered into force on 1 August 2011)
- 2011 Feb. 18 Comprehensive Economic Cooperation Agreement between the Government of Malaysia and the Government of the Republic of India (entered into force on 1 July 2011)
- 2011 Mar. 11 Agreement between the Government of the Republic of Turkey and the Government of the United Republic of Tanzania Concerning the Reciprocal Promotion and Protection of Investments
- 2011 Sep. 12 Agreement between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment (entered into force on 11 September 2015)
- 2011 Sep. 26 Agreement between Canada and the State of Kuwait for the Promotion and Protection of Investments (entered into force on 19 February 2014)
- 2011 Oct. 25 Agreement between the Government of the Republic of Turkey and the Government of the Republic of Azerbaijan on the Reciprocal Protection and Promotion of Investments (entered into force on 2 May 2013)
- 2012 Apr. 12 Agreement between the Government of the Republic of Turkey and the Government of the People's Republic of Bangladesh concerning the Reciprocal Promotion and Protection of Investments

- 2012 Apr. 24 Agreement between the Government of the Republic of Turkey and the Government of the Republic of Cameroon concerning the Reciprocal Promotion and Protection of Investments
- 2012 May 22 Agreement between the Government of the Republic of Turkey and the Government of the Islamic Republic of Pakistan concerning Reciprocal Promotion and Protection of Investments
- 2012 May 22 Free Trade Agreement between Australia and Malaysia (entered into force on 1 January 2013)
- 2012 Jul. 18 Agreement between the Government of the Republic of Turkey and the Government of the Gabonese Republic concerning the Reciprocal Promotion and Protection of Investments
- 2012 Sep. 9 Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (entered into force on 1 October 2014)
- 2012 Nov. 29 Agreement between the Government of the Kingdom of Bahrain and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (entered into force on 30 July 2014)
- 2013 Jan. 9 Agreement between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments (entered into force on 12 May 2014)
- 2013 Feb. 21 Free Trade Agreement between the Republic of Colombia and the Republic of Korea (entered into force on 15 July 2016)
- 2013 Feb. 22 Agreement between the Government of the United Mexican States and the Government of the State of Kuwait on the Promotion and Reciprocal Protection of Investments (entered into force on 28 April 2016)
- 2013 Mar. 12 Agreement between the Government of the Republic of Turkey and the Government of the Republic of Gambia concerning the Reciprocal Promotion and Protection of Investments
- 2013 May 17 Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (entered into force on 9 December 2013)
- 2013 Jul. 10 Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation (entered into force on 1 December 2013)
- 2013 Nov. 5 Free Trade Agreement between Canada and the Republic of Honduras (entered into force on 1 October 2014)
- 2014 Mar. 3 Agreement between Canada and the Republic of Cameroon for the Promotion and Protection of Investments (entered into force on 16 December 2016)

- 2014 Apr. 08 Agreement between the Government of the Republic of Kenya and the Government of the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments
- 2014 Apr. 08 Free Trade Agreement between Australia and the Republic of Korea (entered into force on 12 December 2014)
- 2014 Apr. 13 Agreement between the Government of the Republic of Kenya and the Government of the State of Qatar for the Reciprocal Promotion and Protection of Investments
- 2014 Apr. 23 Agreement between the Government of the Republic of Belarus and the Government of the Kingdom of Cambodia on the Promotion and Reciprocal Protection of Investments
- 2014 May 6 Agreement between Canada and the Federal Republic of Nigeria for the Promotion and Protection of Investments
- 2014 May 6 Agreement between the Government of the United Arab Emirates and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments
- 2014 Jun. 3 Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments (entered into force on 17 April 2015)
- 2014 Jun. 5 Agreement between the Government of the Republic of Korea and the Government of the Republic of the Union of Myanmar for the Promotion and Protection of Investments
- 2014 Jun. 20 Agreement between the Government of Montenegro and the Government of the Republic of Moldova on Promotion and Reciprocal Protection of Investments (entered into force on 23 June 2015)
- 2014 Jun. 25 Agreement between the Government of the Republic of Mauritius and the Government of the Arab Republic of Egypt on the Reciprocal Promotion and Protection of Investments (entered into force on 17 October 2014)
- 2014 Jul. 8 Agreement between the Government of the Republic of Korea and the Government of the Republic of Kenya for the Promotion and Protection of Investments (entered into force on 3 May 2017)
- 2014 Jul. 28 Agreement between the Government of the Republic of Colombia and the Government of the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments
- 2014 Aug. 27 Agreement between the Government of Burkina Faso and the Government of the Republic of Singapore on the Promotion and Protection of Investments
- 2014 Sep. 1 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments (entered into force on 27 April 2015)
- 2014 Sep. 22 Free Trade Agreement between Canada and the Republic of Korea (entered into force on 1 January 2015)

- 2014 Oct. 5 Agreement between the Government of the State of Israel and the Government of the Republic of the Union of Myanmar for the Reciprocal Promotion and Protection of Investments
- 2014 Oct. 23 Agreement between Japan and the Republic of Kazakhstan for the Promotion and Protection of Investment (entered into force on 25 October 2015)
- 2014 Nov. 23 Agreement between the Government of the Republic of Kenya and the Government of the United Arab Emirates
- 2014 Nov. 27 Agreement between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments (entered into force on 5 August 2016)
- 2014 Nov. 28 Agreement between Canada and Mali for the Promotion and Protection of Investments (entered into force on 8 June 2016)
- 2014 Nov. 30 Foreign Investment Promotion and Protection Agreement between Canada and Cote d'Ivoire (entered into force on 14 December 2015)
- 2014 Dec. 7 Agreement between the Government of the Kyrgyz Republic and the Government of the United Arab Emirates on the Promotion and Reciprocal Protection of Investments
- 2015 Jan. 26 Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment (entered into force on 14 April 2017)
- 2015 Feb. 5 Agreement between Japan and Ukraine for the Promotion and Protection of Investment (entered into force on 26 November 2015)
- 2015 Feb. 10 Agreement between Japan and Mongolia for an Economic Partnership (entered into force on 7 June 2016)
- 2015 Feb. 26 Agreement on Investment under the Framework Agreement Establishing a Free Trade Area between the Republic of Korea and the Republic of Turkey
- 2015 Mar. 23 Free Trade Agreement between New Zealand and the Republic of Korea (entered into force on 20 December 2015)
- 2015 Apr. 20 Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments
- 2015 May 5 Free Trade Agreement between the Government of the Republic of Korea and the Government of the Socialist Republic of Viet Nam (entered into force on 20 December 2015)
- 2015 May 8 Agreement between the Macedonian Government and the Government of the Kingdom of Denmark for the Promotion and Reciprocal Protection of Investments (entered into force on 30 June 2016)
- 2015 May 27 Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea

- 2015 Jun. 1 Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea (entered into force on 20 December 2015)
- 2015 Jun. 17 Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (entered into force on 20 December 2015)
- 2015 Jun. 19 Agreement between Japan and the Sultanate of Oman for the Reciprocal Promotion and Protection of Investment (entered into force on 21 July 2017)
- 2015 Jul. 08 Agreement between Australia and Japan for an Economic Partnership (entered into force on 15 January 2015)
- 2015 Sep. 20 Agreement between the Government of the United Arab Emirates and the Government of the Republic of Mauritius for the Promotion and Reciprocal Protection of Investments
- 2015 Sep. 25 Agreement between the Government of the Republic of San Marino and the Government of the Republic of Azerbaijan on the Promotion and Reciprocal Protection of Investments
- 2015 Dec. 14 Free Trade Agreement between Singapore and Turkey (entered into force on 1 October 2017)
- 2015 Dec. 13 Agreement between the Government of the Kyrgyz Republic and the Government of the State of Kuwait for the encouragement and reciprocal protection of investments
- 2016 Jan. 18 Agreement between the Government of the Federal Republic of Nigeria and the Government of the United Arab Emirates on the Reciprocal Promotion and Protection of Investments
- 2016 Jan. 19 Agreement between the Government of the United Arab Emirates and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments
- 2016 Jan. 19 Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (entered into force on 30 August 2017)
- 2016 Feb. 5 Agreement between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment (entered into force on 26 April 2017)
- 2016 Feb. 10 Agreement between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments (entered into force on 6 September 2016)
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Chapter 1

Introduction

I. Introduction

*Publicity is the very soul of justice.*¹

The aim of this thesis is to contribute to a paradigm shift from confidentiality to greater procedural transparency in investor-state arbitration by providing a theoretical framework for that paradigm shift and by demonstrating how greater transparency could be achieved in practice.² The term procedural transparency is used here as a synonym for public access to arbitral hearings. The publication of arbitral awards and the public's right of access to these arbitral awards, while at least of equal importance, is not the subject of this thesis.

In investment treaty arbitration,³ as a rule and despite recent efforts to change this, it is still predominantly within the power of the disputing parties to close arbitral hearings to the public. This rule stems from the historical roots of arbitration as a private dispute resolution mechanism and the understanding that arbitral tribunals derive their authority from the disputing parties who are in control of the process. In arbitration, it is the parties who, within certain limits, define the parameters of the resolution of their dispute. It is the disputing parties who choose the applicable arbitration rules and the applicable law. It is the parties who choose their own arbitrators. The parties opt for arbitration because party autonomy is greater in arbitration. Because arbitration typically takes place outside the public legal machinery and is thought to be confined in its effect to the disputing

¹ *Scott v Scott* [1913] AC 417, at 477 (quoting Jeremy Bentham).

² On the trend towards greater transparency in investor-state arbitration, see Nigel Blackaby, Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) para 2.188.

³ The expressions *investment treaty arbitration*, *investment arbitration* and *investor-state arbitration* are used interchangeably in this thesis.

parties, the disputing parties have always enjoyed relative freedom when it came to the *modus operandi* of arbitration. This relative freedom was transplanted from commercial arbitration to investor-state arbitration where it now clashes with growing expectations of transparency.⁴

The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration⁵ (Rules on Transparency) and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration⁶ (Mauritius Convention) are the most recent efforts to increase procedural transparency in investment treaty arbitration. Yet, neither instrument has found widespread application yet. With the mills of implementation and ratification grinding slowly, this thesis considers a rights-based approach to procedural transparency in investment treaty arbitration.⁷ It proposes that courts could implement a right of public access to arbitral hearings by refusing to enforce those arbitral awards that are based on hearings that were wrongly closed to the public. The proposed rights-based approach is

⁴ Julie A. Maupin, 'Transparency in International Investment Law: The Good, the Bad and the Murky' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013) 142-171, at 160-161 (noting that the "public concern over intrusion by 'secret tribunals' into sovereign regulatory powers is itself politicizing the disputes and generating a popular backlash against the entire IIL regime" and that "a growing number of commentators from the commercial arbitration world appear to accept that transparent proceedings should be the norm in investor-state disputes"). See also *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 3, 29 September 2006, para 114 ("[T]here is now a marked tendency towards transparency in treaty arbitration"); Andrea J. Menaker, 'Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 129-160.

⁵ UN General Assembly, *Resolution adopted by the General Assembly on 16 December 2013 on the report of the Sixth Committee (A/68/462): United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)*, 68th Session, UN Doc A/Res/68/109 (18 December 2013).

⁶ UN General Assembly, *Resolution adopted by the General Assembly on 10 December 2014 on the report of the Sixth Committee (A/69/496): United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, 69th Session, UN Doc A/Res/69/116 (18 December 2014).

⁷ See also Catherine A. Rogers, 'Transparency in International Commercial Arbitration' (2006) 54 *University of Kansas Law Review* 1301-1337, at 1308 ("[T]he right of public access seems self-evident in the context of WTO proceedings and investor-state arbitration, where transparency is important to the institutions' perceived legitimacy.").

an original approach that is efficient, allows for flexibility in implementation and is cost-effective. It thus fulfils all three requirements for reform as set out by the UNCITRAL Working Group on Investor-State Dispute Settlement Reform.⁸

The benefit of a rights-based approach to procedural transparency is that domestic courts already have the relevant mechanisms at their disposal to trigger the openness of arbitral hearings. All that is required is their recognition of a general principle of open justice and their application of that principle to investment treaty arbitration. This thesis not only argues that a general principle of open justice exists under international law but also that it is applicable to investment treaty arbitration. This hypothesis is based on the premise that the principle of open justice applies to all proceedings in which law is made and that, in the investment treaty arbitration system, arbitrators are making law, following a system of flexible *stare decisis*. There may very well be other good reasons for the presumptive openness of arbitral hearings⁹ but this thesis focuses on the reality of arbitral law-making and its consequences for a right of public access to arbitral hearings – both in theory and in practice. This focus is deeply rooted in the belief that arbitral law-making is of such basic importance that it supersedes all other reasons for procedural transparency. Indeed, the recognition and implementation of a right of public access to investor-state arbitration could be transformative. Its recognition and implementation would not only have the added benefit of rendering the investment treaty arbitration system more legitimate but it

⁸ UN Commission on International Trade Law, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23-27 April 2018)*, 51st Session, UN Doc A/CN.9/935 (14 May 2018) para 44.

⁹ cf Julie A. Maupin, ‘Transparency in International Investment Law: The Good, the Bad and the Murky’ in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013) 142-171, at 160-161 (listing the rule of law, access to justice and public accountability as rationales for open and transparent investment treaty arbitration proceedings “subject to necessary measures for the protection of privileged information”).

would also render the system more sustainable,¹⁰ while being compatible with all the other benefits of arbitration such as the disputing parties' right to choose their own arbitrators. The following sections give a typical example of investor-state arbitration. They also explain the problem of private hearings in investor-state arbitration, the originality of the suggested solution and the methodology and structure of this thesis.

A. *Vattenfall I* as a Typical Example of Investor-State Arbitration

Vattenfall I,¹¹ the first such arbitration against Germany, is a typical example of investor-state arbitration as it involves a legitimate expectations claim by an investor. The proceeding was initiated by the Swedish power company of the same name under Article 26(4)(a)(i) of the Energy Charter Treaty.¹² *Vattenfall* alleged that the water use permit for its coal-fired power plant at Hamburg Moorburg was more restrictive than anticipated. If the original permit were to stand, *Vattenfall* would not be able to use its power plant to full capacity. The Hamburg Authority for Urban Development and Environment had imposed several restrictions on *Vattenfall* in conformity with relevant environmental measures to protect fish – regarding the maximum amount of cooling water to be used from the Elbe river, the maximum temperature of the cooling water to be returned to the Elbe and the minimum oxygen level of the Elbe water to be maintained at all times.¹³ In its request for arbitration under the Energy Charter Treaty, *Vattenfall* argued that it had

¹⁰ Catherine Rogers, 'Transparency in International Commercial Arbitration' (2005-2006) 54 *University of Kansas Law Review* 1301-1337, at 1308 (noting that "the right of public access seems self-evident in the context of WTO proceedings and investor-state arbitration, where transparency is important to the institutions' perceived legitimacy"). See also *Richmond Newspapers, Inc. v Virginia* 448 US 555, at 572 ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

¹¹ *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG (Sweden and Germany) v Germany (Vattenfall I)*, ICSID Case No ARB/09/06, Request for Arbitration, 30 March 2009; *Vattenfall*, ICSID Case No ARB/09/6, Award embodying the parties' settlement agreement rendered on 11 March 2011, pursuant to ICSID Arbitration Rule 43(2), 11 March 2011.

¹² *Vattenfall*, ICSID Case No ARB/09/06, Request for Arbitration, 30 March 2009, para 13.

¹³ *ibid* paras 37-38.

been treated unfairly and inequitably and that its legitimate expectations had been disappointed. In the opinion of Vattenfall, the water use restrictions contradicted an earlier agreement with the Hamburg government (the ‘Moorburg Agreement’), in which Vattenfall had agreed, upon suggestion by the government, to increase the size of the planned power plant. Vattenfall had originally planned to build a smaller power plant which would have needed less water from the Elbe river. Vattenfall also argued that the water use permit contradicted an earlier statement made by the Hamburg Authority for Urban Development and Environment. Vattenfall sought compensation for its losses and damages in the total amount of EUR 1.4 billion¹⁴ and the right to seek supplemental payments in the future.¹⁵ Before the arbitral tribunal could issue an award on the merits, the disputing parties reached a settlement.¹⁶ Article 2(b) of the settlement required the issuance of a modified water use permit. Germany complied with the settlement and alleviated many of the restrictions attached to the original water use permit.

Vattenfall is a typical example of a dispute arising under an investment treaty. Disputes often arise when authorities make promises regarding relevant permits, enticing investors to invest, and when permits then either fail to materialise or fall short of the investor’s expectations. Even though Germany was able to escape liability for its likely treaty breach by reaching a settlement with Vattenfall, the Vattenfall saga may not be over just yet. It is the case that the modified water use permit may still violate Germany’s obligations under the Habitats Directive.¹⁷ In 2017, the CJEU held that Germany, by authorising the original Moorburg power plant without conducting an appropriate assessment of its

¹⁴ *Vattenfall*, ICSID Case No ARB/09/06, Request for Arbitration, 30 March 2009, para 45.

¹⁵ *ibid* para 79.

¹⁶ *Vattenfall*, ICSID Case No ARB/09/6, Award embodying the parties’ settlement agreement rendered on 11 March 2011, pursuant to ICSID Arbitration Rule 43(2), 11 March 2011.

¹⁷ The Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora (Habitats Directive).

implications for the environment, failed to fulfil its obligations under the Habitats Directive.¹⁸ If the original assessment was poor, it is at least questionable whether the new, more lenient water use permit complies with Germany's obligations under the Habitats Directive. Yet, had the dispute not been settled, the tribunal likely would have found against Germany. *Vattenfall* is a reminder that investor-state arbitration is designed to hold governments accountable for breaching their promises to foreign investors, at times even if the breach occurred to comply with national laws or regulations.

B. Investor-State Arbitration and the Problem of Private Hearings

Investor-state arbitration is a worldwide phenomenon; it may be contract-based or treaty-based. In this thesis, the expression 'investor-state arbitration' means 'investor-state arbitration that is treaty-based' and is therefore synonymous with the expression 'investment treaty arbitration'. More than 3,300 bilateral or multilateral investment treaties span the globe today¹⁹ with the 1959 Germany-Pakistan BIT²⁰ being the first such investment treaty in time.²¹ Typically, investment treaties exclusively offer foreign investors and investments special protections. Most treaties grant foreign investments, and foreign investors with respect to their investments, fair and equitable treatment and

¹⁸ ECJ, Judgment of the Court of 26 April 2017 in Case C-142/16 (finding that the Federal Republic of Germany had failed to fulfil its obligations under Article 6(3) of the Habitats Directive which reads:

Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.).

¹⁹ UNCTAD, *International Investment Agreements Navigator* <<http://investmentpolicyhub.unctad.org/IIA>> accessed 25 October 2018 (noting the total number of bilateral investment treaties and treaties with investment provisions as 3,334 of which 2,668 are in force).

²⁰ Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments of 25 November 1959 (entered into force on 28 April 1962), 457 UNTS 24.

²¹ Pedro J. Martinez-Fraga and Joaquín Moreno Pampín, 'Reconceptualising the Statute of Limitations Doctrine in the International Law of Foreign Investment Protection: Reform Beyond Historical Legacies' (2018) 50 *New York University Journal of International Law and Politics* 789-884, at 838.

full protection and security. In addition, states, in their investment treaties, typically promise to treat foreign investors no less favourably than their own domestic investors (national treatment) and no less favourably than investors of any third state (most-favoured-nation or MFN treatment).²² The free transfer of means and funds and the protection from expropriation are also typical guarantees to be found in investment treaties. From the perspective of foreign investors, the benefit of investment treaties is that most treaties allow foreign investors to directly²³ sue their host states before arbitral tribunals for treaty breach. The perceived benefit is that investor-state arbitration is a neutral forum for dispute resolution on the international plane – largely removed from the particularities of domestic jurisdictions.

If a foreign investor wishes to sue a host state for treaty breach, the foreign investor can take up the host state on its standing offer to arbitrate in the applicable investment treaty.²⁴ When initiating arbitral proceedings, the foreign investor submits a dispute under specific arbitration rules²⁵ of which there is usually a choice under investment treaties – a choice that is for the foreign investor to make. It is the rule that both the foreign investor and the

²² On the consequences of the MFN clause, see Fritz Alexander Mann, *Further Studies in International Law* (Clarendon Press 1990) 245 (noting that “the scope [of treaties] is increased by the operation of the most-favoured-nation clause”). See also Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) para 1.07 (“[T]he inclusion of most-favoured-nation (MFN) clauses in most BITs drives convergence in treaty drafting, as each State strives to ensure that the benefits that it is extending to the nationals of one State are consistent with obligations already undertaken in prior treaties.”).

²³ Gus Van Harten, ‘Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law’ in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 627-657, at 631 (noting that “investment treaties remove the investor’s duty to exhaust local remedies”).

²⁴ *ibid*:

[T]he state’s consent to arbitration is generalized and prospective extending in effect to any individual or organization that qualifies as an investor under the treaty; it is not limited to disputes arising from a specific relationship or historical event.

²⁵ Anthea Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2013) 107 *American Journal of International Law* 45-94, at 45 (noting that the procedural rules available under investment treaties largely stem from procedural rules “developed [...] in the context of international commercial arbitration and investor-state contracts”).

state choose one arbitrator each and that they agree on the presiding arbitrator. Once the arbitral tribunal is constituted, it is up to the arbitrators to interpret and apply the norms under the applicable investment treaty and to adjudicate on the dispute. It is a particularity of investor-state arbitration then, that, despite the multitude of international investment treaties, arbitrators are not confronted with a great variety of investment treaty provisions. Most investment treaties grant foreign investments, and foreign investors with respect to their investments, the same or similar protections. The widespread use of identical or similar provisions across different investment treaties²⁶ enables arbitrators to interpret the ‘same’ provisions time and again. Instead of interpreting provisions from scratch in every dispute, many arbitral tribunals instead interpret investment treaties “as if they emanate from a single source and constitute a body of investment law principles that is applicable

²⁶ On the widespread use of the provision of fair and equitable treatment, see Arif H. Ali and Kassi Tallent, ‘The Effect of BITs on the International Body of Investment Law: The Significance of Fair and Equitable Treatment Provisions’ in Catherine A. Rogers and Roger P. Alford (eds), *The Future of Investment Arbitration* (Oxford University Press 2009) 199-221, at 199 (noting that fair and equitable treatment is a “near-ubiquitous requirement in modern investment treaties”); Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (Kluwer Law International 2012) 92 (noting that “[t]he FET standard is included in all modern investment treaties”) – a study of bilateral investment treaties (BITs) Germany is a Contracting Party to confirms this: **116 out of 128 BITs** in force between Germany and another state (Afghanistan, Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Benin, Bosnia and Herzegovina, Botswana, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, Chile, China, Congo, Democratic Republic of the Congo, Costa Rica, Côte d’Ivoire, Croatia, Cuba, Czech Republic, Dominica, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Gabon, Georgia, Ghana, Guatemala, Guinea, Guyana, Haiti, Honduras, Hong Kong, Hungary, India, Indonesia, Israel, Jamaica, Jordan, Kazakhstan, Kenya, Republic of Korea, Kuwait, Kyrgyzstan, Lao People’s Democratic Republic, Latvia, Lebanon, Lesotho, Libya, Lithuania, Mali, Malta, Mauritania, Mauritius, Macedonia, Mexico, Republic of Moldova, Mongolia, Mozambique, Morocco, Namibia, Nepal, Nicaragua, Nigeria, Oman, Occupied Palestinian Territory, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Russian Federation, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Serbia, Sierra Leone, Slovakia, Slovenia, Somalia, Sri Lanka, Sudan, Swaziland, Syrian Arab Republic, Tajikistan, United Republic of Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Zambia, Zimbabwe) promise to accord investments *fair and equitable treatment* or *fair and equitable treatment in accordance with the principles of international law, fully equitable treatment* or *just and equitable treatment*. **12 out of 128 BITs** in force between Germany and another state do not contain a provision on fair and equitable treatment. See BITs between Germany and Greece, Iran, Liberia, Madagascar, Malaysia, Niger, Pakistan, Romania, Rwanda, Senegal, Singapore and Togo. These numbers are up to date as of 10 August 2018.

independently of the governing treaty.”²⁷ When deciding whether a foreign investor was accorded fair and equitable treatment, for example, tribunals, as a rule, take into account how previous tribunals interpreted ‘fair and equitable treatment’ – often irrespective of the fact that previous tribunals interpreted this phrase in the context of a different treaty.²⁸ In other words, arbitrators treat the norms in different treaties as if they were codifications of the same standard.

The practice of relying on previous arbitral decisions, in turn, leads to the specification of treaty norms over time.²⁹ This specification of treaty norms equals arbitral law-making. Therein lies the source of the problem. If arbitrators routinely rely on prior decisions, the ratio decidendi of these prior decisions impact future disputing parties. It is thus the case that the conduct of host states may be judged against rules developed by arbitrators in the resolution of prior disputes under treaties to which the host states did not consent. More important than the lack of state consent to particular specifications of treaty norms is the fact that arbitrators are making law at all. If arbitrators, through their creation and reliance on arbitral precedent, are making law, this means that the ratio decidendi of any and all past disputes may one day impact future disputing parties. Since foreign investors can sue host states for treaty breach, it is imperative for host states to know what a treaty breach

²⁷ Stephan W. Schill, ‘Ordering Paradigms in International Investment Law: Bilateralism – Multilateralism – Multilateralization’ in Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) 109, at 124.

²⁸ cf Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) para 1.75 (noting that “findings arrived at in prior awards on particular provisions are cited and relied upon as authorities in the interpretation of different investment treaties”). For a description of this phenomenon, see also Zachary Douglas, ‘Nothing if not Critical for Investment Treaty Arbitration: *Occidental, Eureko and Methanex*’ (2006) 22 *Arbitration International* 27-52, at 28 (referring to *Tecmed v Mexico* and noting that the “quoted obiter dictum in that award, unsupported by any authority, is now frequently cited by tribunals as the only and therefore definitive authority for the requirements of fair and equitable treatment”).

²⁹ On the arbitral specification of treaty norms over time, see also Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 336.

entails, in other words, what the law is. It is only in firm knowledge of the law that states participating in the investment treaty arbitration system (participant states) can conform with it. It is to this end that representatives of participant states should be able to observe proceedings in the investment treaty arbitration system as it is in arbitral proceedings that arbitrators develop the law against which they judge state conduct. Not only states have a right in attending arbitral hearings as third parties, it is suggested that the citizens of participant states have a right of access too – for three reasons. First, if found to have breached an investment treaty, states may be obliged to pay damages in the billions out of public funds, the use of which is a matter of public interest. Secondly, individuals have a right to know the law against which entities to which they belong and by which they are represented are judged.³⁰ Since human beings are the “final addressee of all legal norms, of national as well as international origin,”³¹ citizens of states participating in the system of investor-state arbitration are the final addressees of international investment law. As final addressees of international investment law, citizens of participant states have a right to attend arbitral hearings in which that law is developed by arbitrators. Thirdly, citizens of states participating in the system of investor-state arbitration are also direct addressees of international investment law; namely, in their capacity as potential foreign investors. In their capacity as potential foreign investors, citizens of participant states enjoy rights under investment treaties, if they invest in a foreign jurisdiction with which their home states have concluded an investment treaty. Both in their capacity as citizens of participant

³⁰ It is not necessary for the applicability of the principle of open justice to investment treaty arbitration that members of the public have an actual interest in the proceedings. Cf *Re R Ltd* [1989] ILRM 757, at 766:

The actual presence of the public is never necessary but the administration of justice in public does require that the doors of the court must be open so that members of the general public may come and see for themselves that justice is done. It is in no way necessary that the members of the public to whom the courts are open should themselves have any particular interest in the cases [...]. Justice is administered in public on behalf of all the inhabitants of the State.

³¹ Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press 2011) 16.

states and in their capacity as potential foreign investors may citizens wish to advocate amending investment treaties, if arbitrators develop the law into an unwanted direction. Public access to hearings would contribute to an understanding of the law – a prerequisite for advocating change. What is more, a right of public access to arbitral hearings would enable states and their citizens to exercise control over arbitrators, their lawmakers.

So far the ideal. The problem is that to date most hearings still take place behind closed doors.³² Typically, it is up to the disputing parties to open or close arbitral hearings to the public. In most investment treaty arbitrations, the disputing parties opt for hearings *in camera*, though there are some examples of openness. In *Vattenfall II*,³³ the hearing on jurisdiction, merits and quantum, for example, was held in public. It took place at the World Bank in Washington D.C. between 10 and 12 October 2016. The videos of the hearings are available online.³⁴ It is the exception, however, that hearings are public. That arbitral hearings take place *in camera* is the norm due to provisions in nearly all known investment treaties and arbitration rules that permit the parties to close the hearings. Such provisions, which the second part of this chapter examines in detail, were inserted by states into investment treaties or by arbitration institutions into arbitration rules. They are remnants of international commercial arbitration, a system which served as a template for investment treaty arbitration. In general, it is perceived as a benefit of arbitration “that it

³² Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) para 2.196 (examining confidentiality in commercial arbitration and investor-state arbitration and concluding that “[t]he fact that arbitral hearings are held in private still remains a constant feature of arbitration”).

³³ *Vattenfall AB, Vattenfall GmbH, Vattenfall Europe Nuclear Energy GmbH, Kernkraftwerk Krümmel GmbH & Co. oHG, Kernkraftwerk Brunsbüttel GmbH & Co oHG v Federal Republic of Germany (Vattenfall II)*, ICSID Case No ARB/12/12 (Albert Jan van den Berg, Charles N. Brower, Vaughan Lowe, Arbitrators – Energy Charter Treaty).

³⁴ ICSID, *Hearing: Vattenfall AB and others v Federal Republic of Germany (ICSID Case No ARB/12/12)* <<https://livestream.com/ICSID/events/6515750>> accessed 25 October 2018.

is a private proceeding, in which the parties may air their differences and grievances [...] without exposure to the gaze of the public and the reporting of the media.”³⁵

In the past, arbitral tribunals noted the advantages of confidentiality. In *Amco v Republic of Indonesia*,³⁶ the tribunal reminded the disputing parties of their duty under international law not to exacerbate an ongoing dispute and recommended that public statements about cases be short and accurate.³⁷ In *Metalclad v United Mexican States*,³⁸ a case in which Mexico had made an application for a confidentiality order,³⁹ the tribunal, even though dismissing the application, noted “that it would be of advantage to the orderly unfolding of the arbitral process [...] if during the proceedings [the parties] were both to limit public discussion of the case to a minimum.”⁴⁰ In *Loewen v United States of America*,⁴¹ a case in which the United States had requested that all filings, as well as the minutes of oral proceedings, be treated as open and available to the public,⁴² the tribunal, in rejecting the request, repeated the *Metalclad* benefits of confidentiality⁴³ and noted that Article 44(2) of the ICSID Additional Facility Rules prohibited the publication of minutes without the consent of the parties.⁴⁴ Article 44 has since been eliminated from the ICSID Additional

³⁵ Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) para 2.196.

³⁶ *Amco Corporation and others v Republic of Indonesia*, Decision on Request for Provisional Measures, 9 December 1983, (1983) 1 ICSID Rep 410.

³⁷ *ibid* 412. See also Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) para 2.184.

³⁸ *Metalclad Corporation v The United Mexican States*, ICSID Case No ARB(AF)/97/1, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information, 27 October 1997 (Sir Elihu Lauterpacht, Benjamin R. Civiletti, José Luis Siqueiros, Arbitrators – NAFTA).

³⁹ *ibid* para 1.

⁴⁰ *ibid* para 10.

⁴¹ *Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, 5 January 2001 (Sir Anthony Mason, L. Yves Fortier, Abner J. Mikva, Arbitrators – NAFTA).

⁴² *ibid* para 24.

⁴³ *ibid* para 26.

⁴⁴ *ibid* para 25.

Facility Rules⁴⁵ but Regulation 22 of the ICSID Administrative and Financial Regulations still contains the same prohibition.⁴⁶ The *Loewen* case is peculiar insofar as both parties had consented to the publication, though Loewen had requested that nothing be published before the conclusion of the arbitration.⁴⁷ Given the consent of both parties to the eventual publication of relevant documents, the *Loewen* decision was unnecessarily restrictive. Its mention of the *Metalclad* finding that Article 44(2) is “directed to the parties as well”⁴⁸ is unpersuasive. If both parties consent to the eventual publication of relevant documents, a prohibition to publish these documents without the consent of the disputing parties is not a ground for their non-publication. The tribunal in *Loewen* should have supported the disputing parties in their endeavour instead of outright rejecting a request for publication.

In a system in which it is the norm that the transcripts of hearings may not be published without the consent of the parties and may even remain unpublished despite the parties’ consent to publication, it is difficult to imagine that the openness of arbitral hearings could one day be the norm. It was with a view to rendering the openness of arbitral hearings the norm in investment treaty arbitration that this research project was undertaken, resulting in the original and innovative proposal of an enforceable right of public access to investor-state arbitration based on a general principle of open justice. The next section explains why this idea is ground-breaking, how it differs from other proposals and how it could transform the procedural landscape of investment treaty arbitration.

⁴⁵ Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 132 n290.

⁴⁶ ICSID Administrative and Financial Regulations, Regulation 22(2):

If both parties to a proceeding consent to the publication of (a) reports of the Conciliation Commission; (b) arbitral awards; or (c) the minutes and other records of proceedings; the Secretary General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments.

⁴⁷ *Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, 5 January 2001 (Sir Anthony Mason, L. Yves Fortier, Abner J. Mikva, Arbitrators – NAFTA) para 24.

⁴⁸ *ibid* para 25.

C. The Originality of the Suggested Rights-based Solution

Much has been written about arbitral precedent in the investment arbitration system,⁴⁹ the judicialization of investment arbitration and the need to introduce greater transparency,⁵⁰ also to appease public dismay with the dispute resolution mechanism that, so far, has not been able to rid itself off its air of wrongful secrecy. Some efforts to introduce greater transparency exist, e.g., the UNCITRAL Rules on Transparency, the Mauritius Convention and a dedicated ICSID YouTube channel that is known for airing selected

⁴⁹ Jeffery P. Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' (2007) 24(2) *Journal of International Arbitration* 129-158; Jeffery P. Commission, 'Precedent in Investment Treaty Arbitration: The Empirical Backing' (2007) 4(5) *Transnational Dispute Management* <www.transnational-dispute-management.com/article.asp?key=1064> accessed 14 October 2018; Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity of Excuse?' (2007) 23(3) *Arbitration International* 357-378; Christoph Schreuer and Matthew Weiniger, 'A Doctrine of Precedent?' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1188-1206; Charles N. Brower, Michael Ottolenghi and Peter Prows, 'The Saga of CMS: Res Judicata, Precedent, and the Legitimacy of ICSID Arbitration' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 843-864; Brooks W. Daly and Fedelma Claire Smith, 'Comment on the Differing Legal Frameworks of Investment Treaty Arbitration and Commercial Arbitration as Seen Through Precedent, Annulment, and Procedural Rules' in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009) 151-164; Catherine Kessedjian, 'To Give or Not to Give Precedential Value to Investment Arbitration Awards?' in Catherine A. Rogers and Roger P. Alford (eds), *The Future of Investment Arbitration* (Oxford University Press 2009) 43-68; Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 321-361; Andrés Rigo Sureda, 'Precedent in Investment Treaty Arbitration' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 830-842; Jan Paulsson, 'The Role of Precedent in Investment Arbitration' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 699-718; Pedro J. Martinez-Fraga and Harout Jack Samra, 'The Role of Precedent in Defining Res Judicata in Investor-State Arbitration' (2012) 32(3) *Northwestern Journal of International Law & Business* 419-450; Florian Grisel, 'Precedent in Investment Arbitration: The Case of Compound Interest' (2014) 2 *Peking University Transnational Law Review* 217-227; Florian Grisel, 'The Sources of Foreign Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E. Viñuales (eds), *The Foundations of International Investment Law* (Oxford University Press 2014) 213-233, at 223-233; Moshe Hirsch, 'The Sociology of International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E. Viñuales (eds), *The Foundations of International Investment Law* (Oxford University Press 2014) 143-167, at 158-167; Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 151-168.

⁵⁰ United Nations General Assembly, *Resolution adopted by the General Assembly on 10 December 2014*, 69th session, UN doc A/RES/69/116 (18 December 2014) 1 (recognising, in the context of recommending the Mauritius Convention for signature, "the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations").

arbitral hearings. Yet, these efforts have not born much fruit. The doors to hearings in investment arbitration remain largely closed to the public and hearings remain largely unseen. This thesis explores uncharted terrain – the analysis of a genuine citizen’s right of public access to arbitral hearings in investment arbitration, indirectly enforceable by domestic courts at the enforcement stage of arbitral awards. The suggested right of public to arbitral hearings would not be absolute but qualified, as hearings could still be closed temporarily if the protection of confidential information so requires. The term ‘citizens’ here refers to the citizens of those states that have ratified one or more investment treaties, the relevant community of states. The first person to mention the idea of a right of public access to investor-state arbitration was Catherine A. Rogers in 2006.⁵¹ Yet, Rogers did not elaborate on the legal source or enforcement of such a right, though she did discuss the right of public access to adjudicative proceedings in domestic law systems.⁵²

In short, a citizen’s right of public access to arbitral hearings under international law – as developed in this thesis – rests on all the work that has gone before it on persuasive arbitral precedent and the judicialization of investor-state arbitration but it also goes a step further. While the majority view, according to Florian Grisel, still remains that “there can be no rule of precedent in investment arbitration as investment tribunals do not belong to a legal

⁵¹ Catherine A. Rogers, ‘Transparency in International Commercial Arbitration’ (2006) 54 *University of Kansas Law Review* 1301-1337, at 1308 (“[T]he right of public access seems self-evident in the context of WTO proceedings and investor-state arbitration, where transparency is important to the institutions’ perceived legitimacy.”). For another mention, see also Howard Mann, ‘Transparency and Consistency in International Investment Law: Can the Problems be Fixed by Tinkering?’ in Karl P. Sauvant with Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008) 213-221, at 219 (“Secrecy in many cases as to the very existence of an arbitration, lack of access to documents, closed hearings, and, in many cases, no public release of the final or interim decisions make a mockery of this basic principle [of open justice].”).

⁵² Catherine A. Rogers, ‘Transparency in International Commercial Arbitration’ (2006) 54 *University of Kansas Law Review* 1301-1337, at 1304.

system allowing such a rule,”⁵³ and that “no rule of *stare decisis* exists in the field of investment arbitration,”⁵⁴ this thesis exposes these views as wishful thinking. In reality and despite the non-authorisation of a rule of *stare decisis* by states, arbitrators generally follow a flexible rule of *stare decisis* in investor-state arbitration. This thesis agrees with Grisel “that precedent [...] is the material source of foreign investment law, namely the process through which norms of foreign investment law emerge.”⁵⁵ Yet, in conformity with legal theory, it also goes a step further by recognising the existence of a rule of *stare decisis* as a precondition for the emergence of law through the reliance on precedent in the first place. If there was no rule binding arbitrators in their determinations, they would not be making law.⁵⁶ This interdependency between the necessary existence of some rule of *stare decisis* and arbitral law-making has been overlooked so far.

⁵³ Florian Grisel, ‘The Sources of Foreign Investment Law’ in Zachary Douglas, Joost Pauwelyn and Jorge E. Viñuales (eds), *The Foundations of International Investment Law* (Oxford University Press 2014) 213-233, at 224.

⁵⁴ *ibid* 225. See also Jeffery P. Commission, ‘Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence’ (2007) 24(2) *Journal of International Arbitration* 129-158, at 158 (noting that “precedent in investment treaty arbitration is in some respects similar to that of precedent in England at the time of Bracton’s *De Legibus*, when there was not as yet any doctrine of binding *stare decisis*”); Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 323 and 330 (noting “the absence of a doctrine of binding precedent (or *de iure stare decisis*)” in investment treaty arbitration); Jan Paulsson, ‘The Role of Precedent in Investment Arbitration’ in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 699-718, at 699 (suggesting that “there is no international rule of *stare decisis*”).

⁵⁵ Florian Grisel, ‘The Sources of Foreign Investment Law’ in Zachary Douglas, Joost Pauwelyn and Jorge E. Viñuales (eds), *The Foundations of International Investment Law* (Oxford University Press 2014) 213-233, at 225. See also Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 321 (noting that “the generally coherent body of [international investment] law is not a product of mere coincidence, but is fostered by an inter-award dialogue and the widespread practice in investment treaty arbitration of citing and following earlier awards”).

⁵⁶ On the requirement of general rules binding judges for judges to be making law, see John Chipman Gray, *The Nature and Sources of the Law* (2nd edn, The Macmillan Company 1921) 109:

[I]f any organized body of men has persons or bodies appointed to decide questions, then that body has judges or courts, and if those judges or courts in their determinations follow general rules, then the body has Law and the members of the body may have rights under that Law.

This thesis demonstrates that a flexible doctrine of stare decisis indeed exists in the field of investment arbitration. It conceptualises all arbitral tribunals in the field of investment arbitration as forming a single court – a conceptualisation that is novel and perhaps as provocative as it is accurate. Backed by empirical evidence, this thesis suggests that the degree of pull later arbitral tribunals ascribe to earlier arbitral decisions is most similar to the degree of pull a highest court within a single jurisdiction would ascribe to its own earlier decisions. Given that a flexible doctrine of stare decisis exists in the investment treaty arbitration system⁵⁷ and that arbitrators are making law for the community of states participating in that system, the exploration of a general principle of open justice under international law and its applicability to investment treaty arbitration was a next logical step – not explored before in the field of investment arbitration.

What is most innovative about the suggested right of public access to arbitral hearings under international law is that it is subject to judicial enforcement, at least indirectly. This link between arbitral law-making and a right of public access to arbitral hearings, first explored in detail here, and the indirect enforcement of such a right by domestic courts are what sets this thesis apart from prior approaches to greater transparency investor-state arbitration. Where other approaches stress “the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations”⁵⁸ or categorise the investment treaty arbitration system “as an internationalized version of ‘public law proceedings’”⁵⁹ and, on that basis, recommend

⁵⁷ cf Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 330 (noting “[t]he creation of *de facto stare decisis*” in investment treaty arbitration).

⁵⁸ United Nations General Assembly, *Resolution adopted by the General Assembly on 10 December 2014*, 69th session, UN doc A/RES/69/116 (18 December 2014) 1.

⁵⁹ Alessandra Asteriti and Christian J. Tams, ‘Transparency and Representation of the Public Interest in Investment Treaty Arbitration’ in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 787-816, at 815.

states, arbitrators and investors “to draw on domestic public law experiences”⁶⁰ and to voluntarily offer public access to hearings,⁶¹ this thesis suggests a rights-based approach. The advantage of a rights-based approach is its force vis-à-vis solutions that depend on voluntary compliance. In addition, a rights-based approach transcends the debate whether investment arbitration, despite its roots in commercial arbitration, is best categorised as an internationalized version of public law proceedings. The correct label is of secondary importance;⁶² for the principle of open justice to apply to investor-state arbitration it is sufficient that arbitrators are making law in a system of self-government.

D. Methodology

This research project sought and benefitted from the interplay between legal theory and insights gained from original empirical research. The empirical research was undertaken with a view to establishing that a system of flexible *stare decisis* exists in the investment treaty arbitration system. The 125 arbitral awards studied range from 1999 to 2017. That a system of flexible *stare decisis* exists in the system of investor-state arbitration is an insight gained from this original empirical research. It is an insight that was long overdue, if not recognised yet.⁶³ This insight reveals a gap between arbitral practice and arbitral theory. In practice, arbitrators routinely refer to the non-binding nature of prior decisions.

⁶⁰ Alessandra Asteriti and Christian J. Tams, ‘Transparency and Representation of the Public Interest in Investment Treaty Arbitration’ in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 787-816, at 815.

⁶¹ *ibid* 815-816 (noting at 816 that “[i]n terms of international law, nothing obliges states, tribunals, or other members of the investment community to follow the approach adopted in systems of domestic public law”).

⁶² See also Julie A. Maupin, ‘Public and Private in International Investment Law: An Integrated Systems Approach’ (2014) 54(2) *Virginia Journal of International Law* 367-435, at 435:

To ponder whether the international investment regime is a transnational public governance regime or a private dispute settlement system is to ask the wrong question. International investment law is at once neither and both of these things. They are two sides of the same coin, and each shapes and defines the other.

⁶³ UN Commission on International Trade Law, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23-27 April 2018)*, 51st Session, UN Doc A/CN.9/935 (14 May 2018) para 43 (preliminarily suggesting “introducing or implementing a system of *stare decisis*” in investor-state arbitration in order to achieve greater consistency).

Yet, such routine statements, despite their commonality, are imprecise in light of the considerable pull prior decisions exert on later tribunals in practice. It was an objective of the empirical research to uncover this pull and to define its degree. The evidence suggests that arbitral tribunals, despite their ad hoc nature and despite any arbitral or scholarly assertions to the contrary, operate as if they were a single court in a single jurisdiction, such is the degree of pull prior decision exert on later arbitral tribunals. The type of law-making in the investment treaty arbitration system is sophisticated and warrants attention. It is observable that arbitral tribunals not only routinely follow the ratio decidendi of prior decisions but that they also specify the rules developed by prior tribunals, thereby specifying treaty norms over time and across treaties. This arbitral practice of creating long lines of consistent decisions of increasing sophistication are proof that a system of flexible stare decisis exists in investment treaty arbitration. This *jurisprudence constante* would not exist if prior arbitral decisions did not exert a considerable degree of pull on later tribunals.

The data collected forms the basis for the argument that arbitrators do not only create and follow precedent but that they are also law-makers, following a self-ascribed doctrine of flexible stare decisis. The data on arbitral precedent informed figures 7 to 19 and can be found in *Appendix B*. It is hoped that the data collected complements the existing data on precedent in investor-state arbitration of which there is very little to date.⁶⁴ 125 sample decisions in which arbitrators define the meaning of ‘fair and equitable treatment’ were examined chronologically. The first research question was how often arbitrators rely on prior decisions when defining the meaning of ‘fair and equitable treatment’. The second

⁶⁴ Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 151 n180 (noting that “[t]here is a paucity of empirical research on precedent in [investor-state arbitration]”).

research question was which decisions were relied upon by arbitrators when defining ‘fair and equitable treatment’ and under which international agreements these decisions were rendered. *Appendix B* demonstrates the arbitral practice of relying predominantly on other arbitral decisions when defining the meaning of ‘fair and equitable treatment’. Secondly, *Appendix B* demonstrates that arbitrators often rely on prior arbitral decisions rendered under treaties other than the treaty they are interpreting. The phenomenon of cross-treaty reliance contributes to the creation of a single body of international investment law.⁶⁵ ‘Reliance’ in this context means that a tribunal not only mentions a prior decision, but draws some meaning from the prior decisions and leans on that meaning for guidance or support. ‘Reliance’ does not include instances where arbitral tribunals consider a decision irrelevant or where they quote from a decision without making the content of the quote their own. *Appendix B* thus does not include decisions that were mentioned by a tribunal without relying on it, either explicitly or impliedly. Since the line between the mention of a case and the implied reliance on a case can be difficult to draw, the collected data set may seem incomplete to those who would draw the line elsewhere. *Appendix B* also includes instances where arbitrators relied on the *arbisprudence*⁶⁶ of prior tribunals, an emerging consensus, or a common ground in general. The reliance on such generalities suggests that arbitrators at least indirectly acknowledge their *jurisgenerative* function.

⁶⁵ For a theoretical appraisal of cross-treaty interpretation, see Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 355-356:

Even if some tribunals emphasize the independence of every treaty relationship, and thus seemingly favour bilateral rationales, the predominant approach is to use precedent as a source of investment law in intra-treaty and cross-treaty interpretation alike. The use of precedent thus generates uniformity in the application of investment treaty concepts within and across various treaty relationships.

⁶⁶ The expression ‘*arbisprudence*’ was coined by Peter Owen at the 1992 Calgary University arbitration conference and has since been adopted by Charles N. Brower, Michael Ottolenghi and Peter Prows. See Charles N. Brower, Michael Ottolenghi and Peter Prows, ‘The Saga of CMS: Res Judicata, Precedent, and the Legitimacy of ICSID Arbitration’ in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century* (Oxford University Press 2009) 843-864, at 845 fn 17 and 857.

If, however, arbitrators enjoy a jurisgenerative function, it is at least plausible that the principle of open justice should apply to investor-state arbitration. A prerequisite for its applicability to investor-state arbitration, a child of international law, is the existence of a general principle of open justice within the meaning of Article 38(1)(c) of the ICJ Statute in the first place. In a second set of empirical research, the constitutions of the world were studied in English or in English translation, in addition to the jurisprudence in select jurisdictions. *Appendix A* gives an overview of the constitutional prong of this analysis, indicating in which constitutions a principle of open justice finds explicit or implicit protection. The robustness of a general principle of international law depends on the universality of its recognition. It is with the greatest possible robustness in mind that this research was undertaken. In addition, the quest for a general principle of open justice served a second purpose. Since it is argued that domestic courts have the ability to enforce a right of public access to investment treaty arbitration via the possible non-enforcement of awards on the grounds of open justice, it is crucial for the principle of open justice to be recognised in individual jurisdictions. The decentralised enforcement of a general principle of open justice qua courts depends on the local protection of that principle. The empirical research shows that a principle of open justice is recognised explicitly in the texts of 121 constitutions and that it at least could find implicit protection in the majority of the remaining constitutions and jurisdictions.

Given the near-universality of the principle of open justice, the potential reach of a right of public access to investor-state arbitration is huge. Such a right could be recognised and implemented by domestic courts in both common law and civil law jurisdictions around the world. The idea that domestic courts could play a central role in the paradigm shift from confidentiality to greater procedural transparency in investment treaty arbitration is

inspired by *Delaware Coalition of Open Government v Strine*⁶⁷ – a case on a right of public access to Delaware Arbitration in the United States. The United States, with their strong First Amendment qualified right of public access to trials, serves as a point of departure and comparison throughout much of this thesis. Other jurisdictions considered include Argentina, Australia, Canada, Germany, Ireland, Switzerland and the United Kingdom – each chosen in light of its status as an exemplar of the common law or civil law approach and as a source of relevant case law. A study of regional and international human rights instruments rounds off the analysis which is complimented by an analysis of the historical roots of open justice.

E. Structure

The second part of chapter 1 examines whether arbitral hearings are open to the public under existing investment treaties and arbitration rules they reference. Chapter 2 presents the hypothesis for a right of public access to investor-state arbitration, finding that at least two premises must be true for there to be such a right: there must be general principle of open justice under international law and arbitrators must be making law. These premises are then examined. Chapter 3 identifies the New York Convention and the ICSID Convention as tools for implementing a right of public access to investment treaty arbitration and examines the role of arbitrators in that process. Chapter 4 compares the benefits of a right of public access to arbitral hearings with the promises of multilateral mechanisms for investor-state dispute resolution. Chapter 5 offers concluding remarks and points to some limitations.

⁶⁷ *Delaware Coalition for Open Government, Inc. v The Honorable Leo E. Strine, Jr., and Others* 894 F Supp 2d 493 (2012) (United States District Court for the District of Delaware); *Delaware Coalition for Open Government, Inc. v The Honorable Leo E. Strine, Jr., and Others* 733 F 3d 510 (3d Cir. 2013).

II. Status Quo of Procedural Transparency in Investor-State Arbitration

Whether arbitral hearings are open to the public under existing investment treaties and the arbitration rules they reference is the topic of this section. This section includes a survey of how many agreements require arbitral hearings to be presumptively open to the public, either directly – or indirectly through the incorporation of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Rules on Transparency). In addition, this section discusses suggested solutions to the problem of secret hearings.

A. The ICSID Convention and ICSID Arbitration Rules

The ICSID Arbitration Rules (ICSID Rules) and the ICSID Arbitration (Additional Facility) Rules are among the most prominent and among the most frequently relied on instruments for the resolution of investor-state disputes under international investment agreements. 736⁶⁸ out of more than 3,300 agreements available on the *International Investment Agreements Navigator*⁶⁹ contain a reference to the International Centre for Settlement of Investment Disputes (ICSID). To date, 467 out of 855 known treaty-based investor-state arbitrations have been conducted under the ICSID Rules, whereas 54 have been conducted under the ICSID Additional Facility Rules.⁷⁰ Article 44 of the ICSID Convention⁷¹ states that any arbitration proceeding shall be conducted, except as the parties otherwise agree, in accordance with the ICSID Rules in effect on that date on which the parties consented to arbitration. Rule 32(1) of the ICSID Rules 2006 specifies that the oral procedure before a tribunal shall consist of the hearing of the parties, their

⁶⁸ This number only includes international investment agreements that include the term “ICSID” and that came up as a result of a text search on 31 July 2018 for the term “ICSID” on the *International Investment Agreements Navigator*. The total number might be considerably higher.

⁶⁹ UNCTAD, Division on Investment and Enterprise, *International Investment Agreements Navigator* <<http://investmentpolicyhub.unctad.org/IIA>> accessed 31 July 2018.

⁷⁰ UNCTAD, *International Dispute Settlement Navigator* <<http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution>> accessed 20 August 2018.

⁷¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), 18 March 1965, 575 *United Nations Treaty Series* 159.

agents, counsel and advocates, and of witnesses and experts. Rule 32(1) does not mention members of the public as possible spectators. The rule sets out, however, that, *unless either party objects*, a tribunal, after consultation with the Secretary General,⁷² may allow other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. If a tribunal opens the arbitral hearings to the public, it must establish procedures for the protection of proprietary or privileged information (rule 32(2), second sentence). In this respect, the ICSID Rules 2006 are identical to the ICSID Additional Facility Rules.⁷³ It follows that under both sets of rules the disputing parties may object to the admission of the public to arbitral hearings.

B. The UNCITRAL Arbitration Rules and the UNCITRAL Rules on Transparency⁷⁴

The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules) are another prominent set of arbitration rules. 788⁷⁵ out of more than 3,300 international investment agreements available on the *International Investment Agreements Navigator* contain a reference to the UNCITRAL Rules.⁷⁶ To date, 262 out of 855 known treaty-based investor-state arbitrations have been conducted under the

⁷² The Secretary General is the legal representative and the principle officer of the International Centre for Settlement of Investment Disputes. See Article 11 of the ICSID Convention.

⁷³ See Schedule C of the ICSID Additional Facility Rules.

⁷⁴ United Nations General Assembly, *Resolution adopted by General Assembly on 16 December 2013: United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)*, 68th session, UN doc A/RES/68/109.

⁷⁵ This number only includes international investment agreements that include the term “UNCITRAL” and that came up as a result of a text search on 31 July 2018 for the term “UNCITRAL” on the *International Investment Agreements Navigator*. The total number might be considerably higher.

⁷⁶ UNCTAD, Division on Investment and Enterprise, *International Investment Agreements Navigator* <<http://investmentpolicyhub.unctad.org/IIA>> accessed 25 October 2018 (listing 3,334 investment treaties on that date of which 2,668 are in force).

UNCITRAL Rules.⁷⁷ Article 28(3) of the UNCITRAL Rules 2013 provides that hearings shall be held *in camera*, unless the parties agree otherwise.⁷⁸ There is thus a presumption of confidentiality under the UNCITRAL Rules 2013. Article 1(4) of the UNCITRAL Rules 2013 specifies, however, that, subject to Article 1 of the Rules on Transparency, the UNCITRAL Rules 2013 include the Rules on Transparency.

(i) Presumption of Openness under the Rules on Transparency

Article 6(1) of the Rules on Transparency in turn states that, subject to Articles 6(2) and 6(3), hearings for the presentation of evidence or for oral argument (hearings) shall be public. This means that proceedings under the Rules on Transparency are *presumptively open to the public*. This is a milestone in investor-state arbitration, not least because of the wide prevalence of the UNCITRAL Rules, of which the Rules on Transparency automatically form part, if the underlying investment agreement has been concluded on or after 1 April 2014⁷⁹ and the Contracting Parties have not agreed otherwise. That proceedings are presumptively open means that it is within the power of the tribunal to close hearings to the public. Article 6(2) of the Rules on Transparency provides that a tribunal may decide to partially close hearings where this is necessary to protect confidential information or the integrity of the arbitral process. Article 7(7) of the Rules on Transparency specifies that the arbitral process is in jeopardy, if an act could hamper

⁷⁷ UNCTAD, *International Dispute Settlement Navigator* <<http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution>> accessed 20 August 2018.

⁷⁸ The same rule can be found in Art 27(3) of the SCC Rules; Art 26(3) of the ICC Rules (requires the approval of the arbitral tribunal in addition to the approval of the disputing parties); Art 19(4) of the LCIA Rules (requires the approval of the parties to be in writing).

⁷⁹ Parties to a treaty concluded before 1 April 2014 and disputing parties are free to opt for the applicability of the Rules on Transparency. See Art 1(2) of the UNCITRAL Rules on Transparency:

In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, these Rules shall apply only when: (a) The parties to an arbitration (the “disputing parties”) agree to their application in respect of that arbitration; or (b) The Parties to the treaty or, in case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application.

the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties or members of the tribunal, or in comparably exceptional circumstances. The tribunal may assess whether the arbitral process is in jeopardy on its own initiative or upon the application of a disputing party (*see* Art 7(7) at the beginning). In addition, Article 6(3) of the Rules on Transparency allows a tribunal to hold all or part of the hearings *in camera*, where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible. The reference to *comparably exceptional circumstances* in Article 7(7) grants tribunals great discretion when deciding whether to close proceedings to the public. The closure of hearings for *logistical reasons* is a similar loophole. Instead of allowing the closure of entire hearings where “any original arrangement for public access to a hearing is infeasible”, it would have been better to require disputing parties and the tribunals to live-stream their hearings should physical access be impossible to facilitate. Article 6(3) only suggests – but does not require – that a tribunal organises public attendance through video links or such other means as it deems appropriate. Despite these considerable shortcomings, the Rules on Transparency, when applicable, introduce an unprecedented degree of procedural transparency in investment arbitration.

(ii) The Limited Effectiveness of the Rules on Transparency

It is the case, however, that the effectiveness of the Rules on Transparency, despite or perhaps because of their ambitious design, remains limited. For the UNCITRAL Rules on Transparency to apply automatically, the following requirements must be fulfilled: The dispute must have been initiated under an investment agreement concluded on or after 1 April 2014 that provides for investor-state arbitration under the UNCITRAL Rules 2013, including the Rules on Transparency. It is further necessary that the investor who initiates the arbitration against the host state opts for the applicability of the UNCITRAL

Rules 2013, including the Rules on Transparency, among the options available under the applicable investment treaty, if there are options, which is usually the case. This section examines the practical impact of the Rules on Transparency; namely, how many investment agreements implemented the Rules since they came into effect and how effective the Rules are in rendering arbitral hearings open to the public.

Out of 2,235 international investment agreements available in full text in English on the *International Investment Agreements Navigator* there are 62⁸⁰ that provide for investor-state dispute settlement and that have been signed on or after 1 April 2014.⁸¹ The

⁸⁰ Unless stated otherwise, the numbers in this section are up to date as of 3 August 2018.

⁸¹ CPTPP of 8 March 2018; Republic of Korea-Republics of Central America FTA of 21 February 2018; Colombia-United Arab Emirates BIT of 13 November 2017; Rwanda-United Arab Emirates BIT of 1 November 2017; Cabo Verde-Mauritius BIT of 13 April 2017; Israel-Japan BIT of 1 February 2017 (entered into force on 5 October 2017); Morocco-Nigeria BIT of 3 December 2016; Chile-Hong Kong, China SAR BIT of 18 November 2016; Argentina-Qatar BIT of 6 November 2016; Nigeria-Singapore BIT of 4 November 2016; Rwanda-Turkey BIT of 3 November 2016; Canada-EU CETA of 30 October 2016; Morocco-Rwanda BIT of 19 October 2016; Canada-Mongolia BIT of 8 September 2016 (entered into force on 24 February 2017); Japan-Kenya BIT of 28 August 2016; Austria-Kyrgyzstan BIT of 22 April 2016; Canada-Hong Kong, China SAR BIT of 10 February 2016 (entered into force on 6 September 2016); Iran-Japan BIT of 5 February 2016 (entered into force on 26 April 2017); TPP of 4 February 2016; Mexico-United Arab Emirates BIT of 19 January 2016; Iran-Slovakia BIT of 19 January 2016 (entered into force on 30 August 2017); Nigeria-United Arab Emirates BIT of 18 January 2016; Kuwait-Kyrgyzstan BIT of 13 December 2015; Singapore-Turkey FTA of 14 November 2015 (entered into force on 1 October 2017); Azerbaijan-San Marino BIT of 25 September 2015; Mauritius-United Arab Emirates BIT of 20 September 2015; Japan-Oman BIT of 19 June 2015 (entered into force on 21 July 2017); Australia-China FTA of 17 June 2015 (entered into force on 20 December 2015); China-Republic of Korea FTA of 1 June 2015 (entered into force on 20 December 2015); Eurasian Economic Union-Viet Nam FTA of 29 May 2015 (entered into force on 5 October 2016); Canada-Guinea BIT of 27 May 2015; Denmark-Macedonia BIT of 8 May 2015 (entered into force on 30 June 2016); Republic of Korea-Viet Nam FTA of 5 May 2015 (entered into force on 20 December 2015); Burkina Faso-Canada BIT of 20 April 2015; Republic of Korea-New Zealand FTA of 23 March 2015 (entered into force on 20 December 2015); Republic of Korea-Turkey Investment Agreement of 26 February 2015; Japan-Mongolia EPA of 10 February 2015 (entered into force on 7 June 2016); Japan-Ukraine BIT of 5 February 2015 (entered into force on 26 November 2015); Japan-Uruguay BIT of 26 January 2015 (entered into force on 14 April 2017); Kyrgyzstan-United Arab Emirates BIT of 7 December 2014; Canada-Côte d'Ivoire BIT of 30 November 2014 (entered into force on 12 December 2015); Canada-Mali BIT of 28 November 2014 (entered into force on 8 June 2016); Canada-Senegal BIT of 27 November 2014 (entered into force on 5 August 2016); Kenya-United Arab Emirates BIT of 23 November 2014; ASEAN-India Investment Agreement of 12 November 2014; Japan-Kazakhstan BIT of 23 October 2014 (entered into force on 25 October 2015); Israel-Myanmar BIT of 5 October 2014; Canada-Republic of Korea FTA of 22 September 2014 (entered into force on 1 January 2015); Canada-Serbia BIT of 1 September 2014 (entered into force on 27 April 2015); Burkina Faso-Singapore BIT of 27 August 2014; Colombia-Turkey BIT of 28 July 2014; Kenya-Republic of Korea BIT of 8 July 2014 (entered into force on 3 May 2017); Egypt-Mauritius BIT of 25 June 2014 (entered into force on 17 October 2014);

following paragraphs examine these investment agreements in some detail with a view to establishing the applicability of the Rules on Transparency to proceedings under these agreements and their effectiveness. The first step to establishing whether the Rules on Transparency are applicable to arbitral hearings is to establish whether the UNCITRAL Rules are applicable in the first place. Figure 1 *below* illustrates that under 57 of the 62 agreements, the investor has a choice as to the applicable arbitration rules, a particular version of the UNCITRAL Rules being one option and the ICSID Rules being another option. That investors have a choice as to the applicable rules is the norm. It is therefore unusual that four out of the 62 agreements do not grant investors a choice but instead mandate the applicability of the UNCITRAL Rules⁸² or the applicability of the ICSID Rules⁸³ – yet, in one case only with regard to submitting claims against one of the two signatory states.⁸⁴ The text of one out of the 62 agreements is inconclusive as to whether investors have the option to submit a claim under the UNCITRAL Rules.⁸⁵

Republic of Moldova-Montenegro BIT of 20 June 2014 (entered into force on 23 June 2015); Republic of Korea-Myanmar BIT of 5 June 2014; Georgia-Switzerland BIT of 3 June 2014 (entered into force on 17 April 2015); Greece-United Arab Emirates BIT of 6 May 2014 (entered into force on 6 March 2016); Canada-Nigeria BIT of 6 May 2014; Belarus-Cambodia BIT of 23 April 2014; Kenya-Qatar BIT of 13 April 2014; Kenya-Turkey BIT of 8 April 2014; Australia-Republic of Korea FTA of 8 April 2014 (entered into force on 12 December 2014).

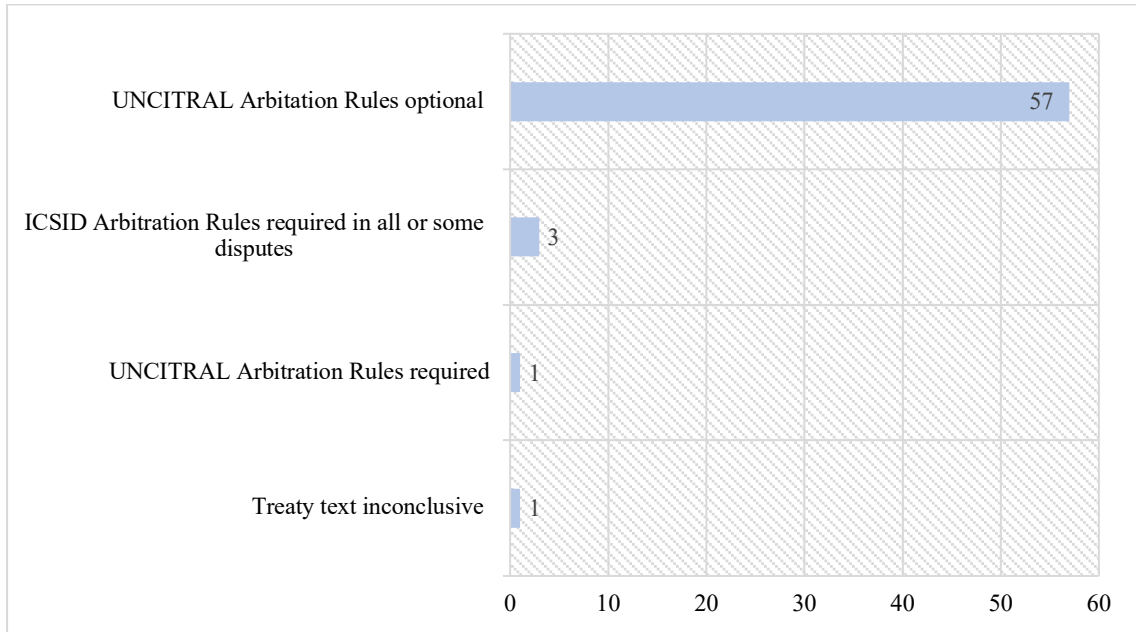
⁸² Canada-Hong Kong, China SAR BIT of 10 February 2016 (entered into force on 6 September 2016), Art 23(1).

⁸³ Cabo Verde-Mauritius BIT of 13 April 2017, Art 8(6); Kenya-United Arab Emirates BIT of 23 November 2014, Art 10(2)(b).

⁸⁴ Nigeria-United Arab Emirates BIT of 18 January 2016, Art 10(2).

⁸⁵ Colombia-United Arab Emirates BIT of 13 November 2017, Art 16(1)(c) (noting that, in addition to submitting claims under the ICSID Convention, investors may also submit their claims to “an Arbitral Tribunal under any other arbitration institution or any other arbitration rules, agreed by the Contracting Parties”).

Figure 1: UNCITRAL Arbitration Rules as an Option under International Investment Agreements signed on or after 1 April 2014



That UNCITRAL Arbitration Rules are an option under the majority of treaties signed on or after 1 April 2014 does not necessarily render the Rules on Transparency applicable, however. For the latter to be applicable qua their inclusion in the UNCITRAL Rules, the investment treaty must include the UNCITRAL Rules 2013, for it is only this particular version that includes the Rules on Transparency. Out of the 62 agreements studied, 40 agreements offer investors the choice to opt for ‘the UNCITRAL Arbitration Rules’⁸⁶ or

⁸⁶ CPTPP of 8 March 2018, Arts 9.1 and 9.19(4)(c); Republic of Korea-Republics of Central America FTA of 21 February 2018, Art 9.17(4)(c); Morocco-Nigeria BIT of 3 December 2016, Art 27(1)(b); Argentina-Qatar BIT of 6 November 2016, Arts 14(2)(c) and 14(3)(e); Rwanda-Turkey BIT of 3 November 2016, Art 10(2)(b)(iii); Canada-EU CETA of 30 October 2016, Arts 8.1 and 8.23(2)(c); Morocco-Rwanda BIT of 19 October 2016, Art 8(2)(iii); Japan-Kenya BIT of 28 August 2016 (entered into force on 14 September 2017), Art 15(4)(b)(iii); Austria-Kyrgyzstan BIT of 22 April 2016, Art 14(1)(c)(iii); Iran-Japan BIT of 5 February 2016 (entered into force on 26 April 2017), Art 18(2)(b); TPP of 4 February 2016, Arts 9.1 and 9.19(4)(c); Kuwait-Kyrgyzstan BIT of 13 December 2015, Art 10(3)(b); Azerbaijan-San Marino BIT of 25 September 2015, Art 12.2(c); Japan Oman BIT of 19 June 2015 (entered into force on 21 July 2017), Art 15(4)(c); Eurasian Economic Union-Viet Nam FTA of 29 May 2015 (entered into force on 5 October 2016), Art 8.38(3)(b); Denmark-Macedonia BIT of 8 May 2015 (entered into force on 30 June 2016), Art 9(2)(b); Republic of Korea-Viet Nam FTA of 5 May 2015 (entered into force on 20 December 2015), Art 9.19(1)(c); Japan-Mongolia EPA of 10 February 2015 (entered into force on 7 June 2016), Art 10.13(4)(c); Japan-Ukraine BIT of 5 February 2015 (entered into force on 26 November 2015), Art 18(4)(c); Japan-Uruguay BIT of 26 January 2015 (entered into force on 14 April 2017), Art 21(3)(c); Kyrgyzstan-United Arab Emirates BIT of 7 December 2014, Art 10(3)(a); Japan-Kazakhstan BIT of 23 October 2014 (entered into force on 25 October 2015), Art 17(4)(c); Colombia-Turkey BIT of 28 July 2014, Art 12(6)(b); Georgia-

‘the UNCITRAL Arbitration Rules in their most recent form.’⁸⁷ Either reference is sufficient. If a treaty and the arbitration agreement based on that treaty do not specify a particular version of the UNCITRAL Rules, they are presumed to refer to the UNCITRAL Rules in effect on the date of commencement of the arbitration.⁸⁸ For treaties signed on or after 1 April 2014, those are presently the UNCITRAL Rules 2013. It is also sufficient if an investment treaty specifies that the applicable rules are “the UNCITRAL Arbitration Rules, as applicable on the date of signature of [the] Agreement.”⁸⁹ Since 1 April 2014, the applicable UNCITRAL Rules are the UNCITRAL Rules 2013, unless the investment treaty specifies other rules to be applicable. Some treaties indeed specify other rules to be applicable. Some investment treaties only offer investors the option to opt for the UNCITRAL Rules as revised in 2010⁹⁰ or as adopted in 1976,⁹¹ at least until further

Switzerland BIT of 3 June 2014 (entered into force on 17 April 2015), Art 10(2)(b); Greece-United Arab Emirates BIT of 6 May 2014 (entered into force on 6 March 2016), Art 10(3)(b); Belarus-Cambodia BIT of 23 April 2014, Art 8(2)(d); Kenya-Qatar BIT of 13 April 2014, Art 9(3)(c); Kenya-Turkey BIT of 8 April 2014, Art 9(2)(c); Australia-Republic of Korea FTA of 8 April 2014 (entered into force on 12 December 2014), Art 11.16(3)(c). Similarly, Egypt-Mauritius BIT of 25 June 2014 (entered into force on 17 October 2014), Art 10(4).

⁸⁷ Canada-Guinea BIT of 27 May 2015, Arts 1 and 24(1)(3); Burkina Faso-Canada BIT of 20 April 2015, Arts 1 and 25(1)(3); Canada-Côte d’Ivoire BIT of 30 November 2014 (entered into force on 12 December 2015), Arts 1 and 23(1)(c); Canada-Mali BIT of 28 November 2014 (entered into force on 8 June 2016), Arts 1 and 23(1)(c); Canada-Senegal BIT of 27 November 2014 (entered into force on 5 August 2016), Arts 1 and 23(1)(c); Canada-Serbia BIT of 1 September 2014 (entered into force on 27 April 2015), Arts 1 and 24(1)(c); Canada-Nigeria BIT of 6 May 2014, Arts 1 and 24(1)(c). Similarly, Chile-Hong Kong, China SAR BIT of 18 November 2016, Arts 1 and 21(4)(a); Canada-Mongolia BIT of 8 September 2016 (entered into force on 24 February 2017), Arts 1, 23(1)(3) and 23(2); Canada-Hong Kong, China SAR BIT of 10 February 2016 (entered into force on 6 September 2016), Arts 1, 23(1) and 23(2).

⁸⁸ cf UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as revised in 2013), Art 1(2).

⁸⁹ Rwanda-United Arab Emirates BIT of 1 November 2017, Art 14(1)(c).

⁹⁰ Israel-Japan BIT of 1 February 2017 (entered into force on 5 October 2017), Arts 1(t) and 24(4)(c); Singapore-Turkey FTA of 14 November 2015 (entered into force on 1 October 2017), Arts 12.1 and 12.15(3)(c); Republic of Korea-Turkey Investment Agreement of 26 February 2015, Arts 1.1(1) and 1.17(5)(c); Israel-Myanmar BIT of 5 October 2014, Art 8(2)(e); Kenya-Republic of Korea BIT of 8 July 2014 (entered into force on 3 May 2017), Art 11(2)(b)(iii).

⁹¹ Nigeria-Singapore BIT of 4 November 2016, Arts 1 (“UNCITRAL Arbitration Rules means the Arbitration Rules of the United Nations Commission on International Trade Law, as adopted by the United Nations General Assembly on December 15, 1976”) and 13(2)(c); Mexico-United Arab Emirates BIT of 19 January 2016, Arts 1(8) and 11(3)(c); ASEAN-India Investment Agreement of 12 November 2014, Arts 20(4)(j) and 20(7)(d); Canada-Republic of Korea FTA of 22 September 2014 (entered into force on 1

notice.⁹² These older versions do not include the Rules on Transparency. One agreement also specifically *excludes* the Rules on Transparency.⁹³ Article 9.12(4)(c) of the China-Australia Free Trade Agreement states that a claimant investor may submit a treaty claim under the UNCITRAL Rules, except as modified by this Agreement and the side letters.⁹⁴ The side letters confirm that, unless the signatories agree otherwise, the Rules on Transparency are not applicable.⁹⁵ What occurs also, albeit seldomly, is that one signatory offers claimant investors the option to submit claims under the UNCITRAL Rules 2013, including the Rules on Transparency, whereas the other signatory either excludes the UNCITRAL Rules⁹⁶ or only the Rules on Transparency⁹⁷ for claims submitted against them. Clarity is still better than uncertainty. Some investment treaties are altogether inconclusive as to whether the UNCITRAL Arbitration Rules apply,⁹⁸ or which version is applicable.⁹⁹ Figure 2 shows the percentage of the investment treaties that incorporate

January 2015), Arts 8.23(1)(c) and 8.45; Burkina Faso-Singapore BIT of 27 August 2014, Arts 1 and 11(3)(c).

⁹² China-Republic of Korea FTA of 1 June 2015 (entered into force on 20 December 2015); Korea-New Zealand FTA of 23 March 2015 (entered into force on 20 December 2015).

⁹³ See Australia-China FTA of 17 June 2015 (entered into force on 20 December 2015), Art 9.12(4)(c) in combination with the Side Letters on Transparency Rules.

⁹⁴ Australia-China FTA of 17 June 2015 (entered into force on 20 December 2015), Annex IV, Letter from Andrew Robb, Minister for Trade and Investment, to Gao Hucheng, Minister of Commerce (17 June 2015) (stating that the side letters form an integral part of the Agreement).

⁹⁵ Australia-China FTA of 17 June 2015 (entered into force on 20 December 2015), Annex IV, Letter from Gao Hucheng, Minister of Commerce, to Andrew Robb, Minister for Trade and Investment (17 June 2015).

⁹⁶ Nigeria-United Arab Emirates BIT of 18 January 2016, Art 10(2).

⁹⁷ Iran-Slovakia BIT of 19 January 2016 (entered into force on 30 August 2017), Art 14(4):

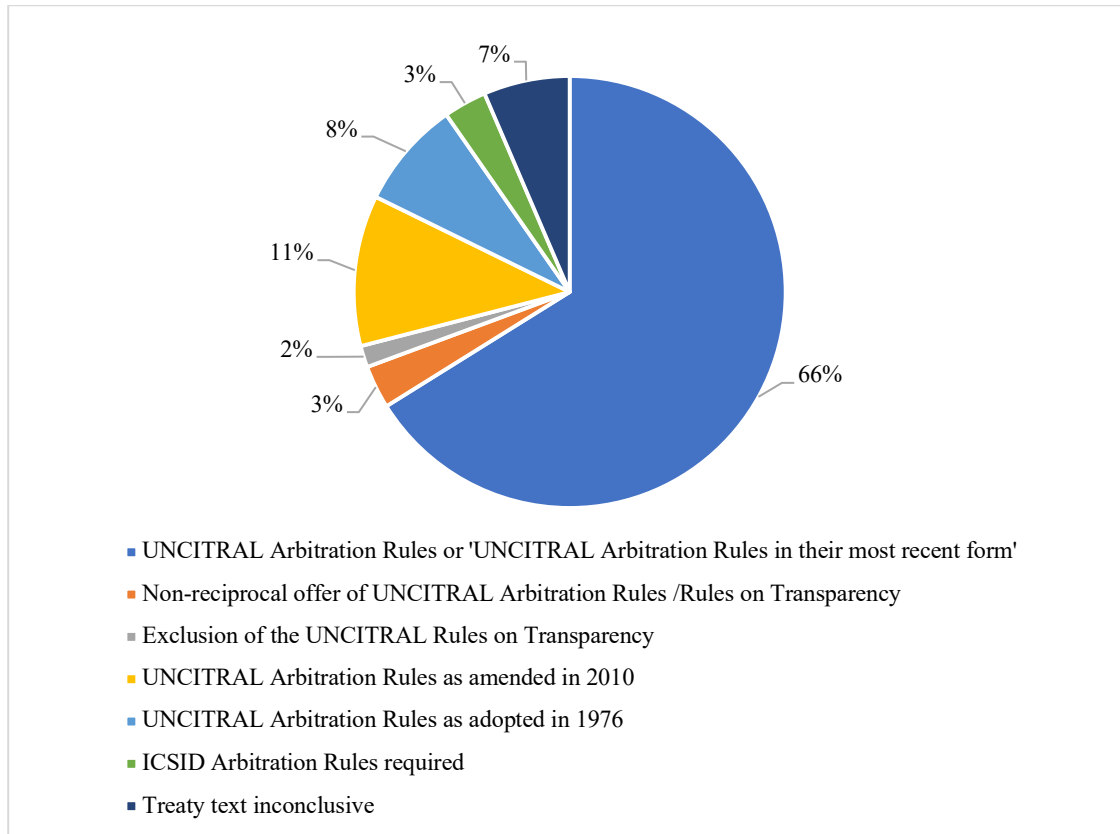
The UNCITRAL rules on transparency in treaty-based investor-State arbitration shall apply to any international arbitration proceedings initiated against the Slovak Republic pursuant to this Agreement. The Islamic Republic of Iran shall duly consider the application of the UNCITRAL rules on transparency in treaty-based investor-State arbitration to any international arbitration proceedings initiated against the Islamic Republic of Iran pursuant to this Agreement. [...].

⁹⁸ Colombia-United Arab Emirates BIT of 13 November 2017, Art 16(1)(c).

⁹⁹ Mauritius-United Arab Emirates BIT of 20 September 2015, Art 10(4)(d) (noting that if claims are submitted under the UNCITRAL Arbitration Rules, they are to be submitted “in accordance with the [Rules], as amended by the last amendment accepted by both Contracting Parties”); Republic of Moldova-Montenegro BIT of 20 June 2014 (entered into force on 23 June 2015), Art 8(2)(c); Republic of Korea-Myanmar BIT of 5 June 2014, Art 11(2)(b)(iii) and fn 5.

the Rules on Transparency qua their inclusion of ‘the UNCITRAL Arbitration Rules’ or ‘the UNCITRAL Arbitration Rules in their most recent form’.

Figure 2: Incorporation of Specific Versions of the UNCITRAL Arbitration Rules in International Investment Agreements signed on or after 1 April 2014



The status quo is that the majority of investment treaties signed on or after 1 April 2014 incorporate the Rules on Transparency qua their inclusion of ‘the UNCITRAL Arbitration Rules’ or ‘the UNCITRAL Arbitration Rules in their most recent form’. This does not lead to their automatic application, however. Where there is a choice as to the applicable Arbitration Rules, the applicability of the Rules on Transparency still depends under all but three of the 62 investment agreements on investors opting to submit claims under the UNCITRAL Arbitration Rules. If claimant investors wish to circumvent the applicability of the Rules on Transparency, they are usually still free to submit claims instead under different arbitration rules offered under the investment agreement. The signatories of several investment agreements recognised this loophole and either (a) rendered the Rules

on Transparency applicable to all investment arbitration proceedings¹⁰⁰ or (b) included a separate treaty provision mandating all arbitral hearings to be presumptively open to the public.¹⁰¹ The trend towards more procedural transparency, at least on paper, is palpable in the treaties signed on or after 1 April 2014. What transpires is that even the exclusion of the Rules of Transparency does not necessarily signal the signatories' opposition to the presumptive openness of arbitral hearings. Out of the twelve investment treaties that include pre-2013 UNCITRAL Arbitration Rules, three render arbitral hearings open to the public despite or because of the non-applicability of the Rules on Transparency.¹⁰² Article 10.27(2) of the Korea-New Zealand FTA reads, for example:

The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure which

¹⁰⁰ Austria-Kyrgyzstan BIT of 22 April 2016, Art 14(3); Georgia-Switzerland BIT of 3 June 2014 (entered into force on 17 April 2015), Art 10(3); Greece-United Arab Emirates BIT of 6 May 2014 (entered into force on 6 March 2016), Art 10(4).

¹⁰¹ CPTPP of 8 March 2018, Art 9.24(2); Republic of Korea-Republics of Central America FTA of 21 February 2018, Art 9.22(2); Chile-Hong Kong, China SAR BIT of 18 November 2016, Art 28(2); Canada-EU CETA of 30 October 2016, Art 8.36(1) and (5); Canada-Mongolia BIT of 8 September 2016 (entered into force on 24 February 2017), Art 30(2); TPP of 4 February 2016, Art 9.24(2); Mexico-United Arab Emirates BIT of 19 January 2016, Art 20(2); Canada-Guinea BIT of 27 May 2015, Art 31(2); Burkina Faso-Canada BIT of 20 April 2015, Art 32(2); Republic of Korea-New Zealand FTA of 23 March 2015 (entered into force on 20 December 2015), Art 10.27(2); Canada-Côte d'Ivoire BIT of 30 November 2014 (entered into force on 12 December 2015), Art 30(2); Canada-Mali BIT of 28 November 2014 (entered into force on 8 June 2016), Art 30(2); Canada-Senegal BIT of 27 November 2014 (entered into force on 5 August 2016), Art 31(2); Canada-Republic of Korea FTA of 22 September 2014 (entered into force on 1 January 2015), Art 8.35(2); Canada-Serbia BIT of 1 September 2014 (entered into force on 27 April 2015), Art 31(2); Canada-Nigeria BIT of 6 May 2014, Art 32(2); Australia-Republic of Korea FTA of 8 April 2014 (entered into force on 12 December 2014), Art 11.21(2).

¹⁰² Mexico-United Arab Emirates BIT of 19 January 2016, Arts 1(8) and 20(2); Republic of Korea-New Zealand FTA of 23 March 2015 (entered into force on 20 December 2015), Arts 10.2 and 10.27(2); Canada-Republic of Korea FTA of 22 September 2014 (entered into force on 1 January 2015), Arts 8.45 and 8.35(2).

may include closing the hearing for the duration of any discussion of protected information.

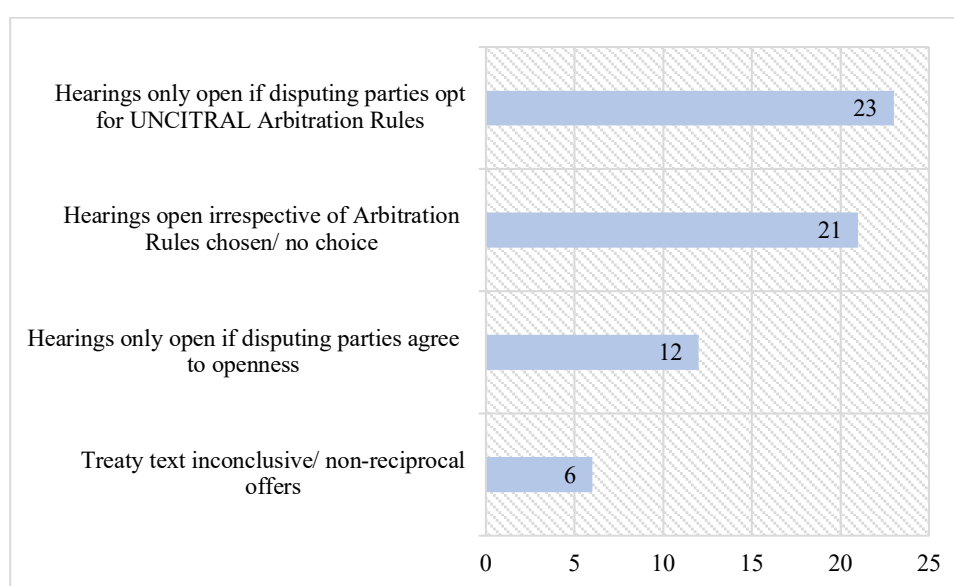
This provision of the Korea-New Zealand FTA is stricter than the Rules on Transparency which may have led to its inclusion in the first place. It is not uncommon either that even those states that include the Rules on Transparency in their treaties, modify them by including stricter rules applicable to all investment arbitrations in their treaties. The modification of the Rules on Transparency is often express. Article 8.36(1) of CETA, for example, provides that the Rules on Transparency, *as modified by this Chapter*, shall apply. Article 8.36(5) of CETA reads:

Hearings shall be open to the public. The Tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hearings. If the Tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection.

This provision of CETA modifies the Rules on Transparency for the better. Under Article 8.36(5) of CETA, a tribunal does not have the authority to close arbitral hearings to the public for logistical reasons (cf Art 6(3) of the UNCITRAL Rules on Transparency). Investment agreements modified as such provide both a broader and a stricter rule for the presumptive openness of arbitral hearings than the Rules on Transparency. Out of the 62 agreements signed on or after 1 April 2014, seventeen provide a stricter framework than

the Rules on Transparency, either independently of them¹⁰³ or in modification of them.¹⁰⁴ What all provisions on public access to arbitral hearings and the Rules on Transparency have in common is that they all shift the choice as to openness of arbitral hearings to the tribunal away from the disputing parties – provided that the Rules on Transparency are applicable. Figure 3 shows the status quo of the disputing parties’ choice as to the openness of arbitral hearings.

Figure 3: Choice as to the Openness of Arbitral Hearings under International Investment Agreements signed on or after 1 April 2014



Under 21 of the 62 investment treaties studied, hearings are presumptively open to the public irrespective of the will of the disputing parties. Under these 21 investment treaties,

¹⁰³ Mexico-United Arab Emirates BIT of 19 January 2016, Arts 1(8) and 20(2); Republic of Korea-New Zealand FTA of 23 March 2015 (entered into force on 20 December 2015), Arts 10.2 and 10.27(2); Canada-Republic of Korea FTA of 22 September 2014 (entered into force on 1 January 2015), Arts 8.45 and 8.35(2).

¹⁰⁴ CPTPP of 8 March 2018, Art 9.24(2); Republic of Korea-Republic of Central America FTA of 21 February 2018, Art 9.22(2); Chile-Hong Kong, China SAR BIT of 18 November 2016, Art 28(2); CETA of 30 October 2016, Art 8.36(1) and (5); Canada-Mongolia BIT of 8 September 2016 (entered into force on 24 February 2017), Art 30(2); TPP of 4 February 2016, Art 9.24(2); Canada-Guinea BIT of 27 May 2015, Art 31(2); Burkina Faso-Canada BIT of 20 April 2015, Art 32(2); Canada-Côte d’Ivoire BIT of 30 November 2014 (entered into force on 12 December 2015), Art 30(2); Canada-Mali BIT of 28 November 2014 (entered into force on 8 June 2016), Art 30(2); Canada-Senegal BIT of 27 November 2014 (entered into force on 5 August 2016), Art 31(2); Canada-Serbia BIT of 1 September 2014 (entered into force on 27 April 2015), Art 31(2); Canada-Nigeria BIT of 6 May 2014, Art 32(2); Australia-Republic of Korea FTA of 8 April 2014 (entered into force on 12 December 2014), Art 11.21(2).

investors presently either have no choice as to the applicability of the UNCITRAL Arbitration Rules 2013 (one treaty¹⁰⁵) or no choice as to the applicability of the Rules on Transparency (three treaties¹⁰⁶) or no choice as to applicability of treaty provisions that mandate hearings to be presumptively open to the public (seventeen treaties¹⁰⁷). Under 23 investment agreements, hearings are only presumptively open to the public if claimant investors opt for arbitration proceedings under the UNCITRAL Arbitration Rules.¹⁰⁸ Under twelve treaties it is up to the disputing parties to close arbitral hearings to the public irrespective of the arbitration rules chosen if there is a choice.¹⁰⁹ The text of six

¹⁰⁵ Canada-Hong Kong, China SAR BIT of 10 February 2016 (entered into force on 6 September 2016), Arts 1, 23(1) and 23(2).

¹⁰⁶ Austria-Kyrgyzstan BIT of 22 April 2016, Art 14(3); Georgia-Switzerland BIT of 3 June 2014 (entered into force on 17 April 2015), Art 10(3); Greece-United Arab Emirates BIT of 6 May 2014 (entered into force on 6 March 2016), Art 10(4).

¹⁰⁷ CPTPP of 8 March 2018, Art 9.24(2); Republic of Korea-Republic of Central America FTA of 21 February 2018, Art 9.22(2); Chile-Hong Kong, China SAR BIT of 18 November 2016, Art 28(2); CETA of 30 October 2016, Art 8.36(1) and (5); Canada-Mongolia BIT of 8 September 2016 (entered into force on 24 February 2017), Art 30(2); Mexico-United Arab Emirates BIT of 19 January 2016, Art 1(8) and 20(2); TPP of 4 February 2016, Art 9.24(2); Canada-Guinea BIT of 27 May 2015, Art 31(2); Burkina Faso-Canada BIT of 20 April 2015, Art 32(2); Republic of Korea-New Zealand FTA of 23 March 2015 (entered into force on 20 December 2015), Arts 10.2 and 10.27(2); Canada-Côte d'Ivoire BIT of 30 November 2014 (entered into force on 12 December 2015), Art 30(2); Canada-Mali BIT of 28 November 2014 (entered into force on 8 June 2016), Art 30(2); Canada-Senegal BIT of 27 November 2014 (entered into force on 5 August 2016), Art 31(2); Canada-Republic of Korea FTA of 22 September 2014 (entered into force on 1 January 2015), Arts 8.45 and 8.35(2); Canada-Serbia BIT of 1 September 2014 (entered into force on 27 April 2015), Art 31(2); Canada-Nigeria BIT of 6 May 2014, Art 32(2); Australia-Republic of Korea FTA of 8 April 2014 (entered into force on 12 December 2014), Art 11.21(2).

¹⁰⁸ See Rwanda-United States Arab Emirates BIT of 1 November 2017; Morocco-Nigeria BIT of 3 December 2016; Argentina-Qatar BIT of 6 November 2016; Rwanda-Turkey BIT of 3 November 2016; Morocco-Rwanda BIT of 19 October 2016; Japan-Kenya BIT of 28 August 2016 (entered into force on 14 September 2017); Iran-Japan BIT of 5 February 2016 (entered into force on 26 April 2017); Kuwait-Kyrgyzstan BIT of 13 December 2015; Azerbaijan-San Marino BIT of 25 September 2015; Japan-Oman BIT of 19 June 2015 (entered into force on 21 July 2017); Eurasian Economic Union-Viet Nam FTA of 29 May 2015 (entered into force on 5 October 2016); Denmark-Macedonia BIT of 8 May 2015 (entered into force on 30 June 2016); Republic of Korea-Viet Nam FTA of 5 May 2015 (entered into force on 20 December 2015); Japan-Mongolia EPA of 10 February 2015 (entered into force on 7 June 2016); Japan-Ukraine BIT of 5 February 2015 (entered into force on 26 November 2015); Japan-Uruguay BIT of 26 January 2015 (entered into force on 14 April 2017); Kyrgyzstan-United Arab Emirates BIT of 7 December 2014; Japan-Kazakhstan BIT of 23 October 2014 (entered into force on 25 October 2015); Colombia-Turkey BIT of 28 July 2014; Egypt-Mauritius BIT of 25 June 2014 (entered into force on 17 October 2014); Belarus-Cambodia BIT of 23 April 2014; Kenya-Qatar BIT of 13 April 2014; Kenya-Turkey BIT of 8 April 2014.

¹⁰⁹ See Cabo Verde-Mauritius BIT of 13 April 2017; Israel-Japan BIT of 1 February 2017 (entered into force on 5 October 2017); Nigeria-Singapore BIT of 4 November 2016; Singapore-Turkey FTA of 14

investment agreements is inconclusive¹¹⁰ or does not include reciprocal offers of applicable arbitration rules.¹¹¹

In sum, the impact of the UNCITRAL Rules on Transparency is sobering. At present, their application is mandatory under a total of merely four investment treaties signed on or after 1 April 2014, of which one has not entered into force yet. Their systematic weaknesses lie in their non-mandatory nature and their ties to the UNCITRAL Rules 2013. More often than not, investment agreements offer investors a choice as to the applicable arbitration rules, a choice between the UNCITRAL Rules, under which the Rules of Transparency may be applicable depending on the applicable version of the UNCITRAL Arbitration Rules, and other arbitration rules, under which the disputing parties have the power to close arbitral hearings to the public. More often than not, the applicability of the Rules on Transparency does not extend to arbitration rules other than the UNCITRAL Arbitration Rules 2013. The greatest shortcoming is that the UNCITRAL Arbitration Rules 2013 only include the Rules on Transparency if the investment treaty was signed on or after 1 April 2014. The majority of investment treaties were signed before then. It is those older generation investment treaties that are still

November 2015 (entered into force on 1 October 2017); Australia-China FTA of 17 June 2015 (entered into force on 20 December 2015); China-Republic of Korea FTA of 1 June 2015 (entered into force on 20 December 2015); Republic of Korea-Turkey Investment Agreement of 26 February 2015; Kenya-United Arab Emirates BIT of 23 November 2014; ASEAN-India Investment Agreement of 12 November 2014; Israel-Myanmar BIT of 5 October 2014; Burkina Faso-Singapore BIT of 27 August 2014; Kenya-Republic of Korea BIT of 8 July 2014 (entered into force on 3 May 2017).

¹¹⁰ Colombia-United Arab Emirates BIT of 13 November 2017, Art 16(1)(c); Mauritius-United Arab Emirates BIT of 20 September 2015, Art 10(4)(d); Republic of Moldova-Montenegro BIT of 20 June 2014 (entered into force on 23 June 2015), Art 8(2)(c); Republic of Korea-Myanmar BIT of 5 June 2014, Art 11(2)(b)(iii) and fn 5.

¹¹¹ Iran-Slovakia BIT of 19 January 2016 (entered into force on 30 August 2017), Art 14(4); Nigeria-United Arab Emirates BIT of 18 January 2016, Art 10(2).

invoked most often in new investment disputes.¹¹² The next section examines potential solutions to the problem of confidential arbitral hearings in investor-state arbitration.

C. Potential Solutions to the Problem of Private Hearings

There seem to be at least four potential solutions to the problem of confidential arbitral hearings in investor-state arbitration:

- extending the applicability of the Rules on Transparency to arbitrations under treaties signed before 1 April 2014, and to arbitrations conducted under rules other than the UNCITRAL Arbitration Rules 2013;
- amending those arbitration rules that grant disputing parties the power to close arbitral hearings to the public;
- adding provisions on procedural transparency to existing investment treaties;
- extending the principle of open justice to investor-state arbitration with national courts safeguarding the openness of arbitral hearings at the enforcement stage of the arbitral process.

This section examines to which extent the first three solutions are already being pursued, and their shortcomings, and suggests the pursuit of the fourth solution which is then examined in the remainder of this thesis.

(i) Extending the Applicability of the Rules on Transparency

The solution of rendering the Rules on Transparency applicable to investment arbitrations under investment agreements signed before 1 April 2014 and to arbitrations conducted under rules other than the UNCITRAL Arbitration Rules 2013 is already being pursued.

Article 1(2) of the Rules on Transparency states that these Rules shall apply to

¹¹² UNCTAD, ‘Investor-State Dispute Settlement: Review of Developments in 2017’ (2018) 2 *IIA Issues Note: International Investment Agreements* 1-39, at 1 (noting that “[t]he majority of the invoked treaties date back to the 1980s and 1990s”).

UNCITRAL arbitral proceedings under investment agreements concluded *before* 1 April 2014, (a) if the parties to an arbitration (the “disputing parties”) agree to their application in respect of that arbitration; or (b) if the contracting parties to the treaty or, in the case of a multilateral treaty, the state of the claimant and the respondent state, have agreed after 1 April 2014 to their application.¹¹³ Absent such specific consent, the Rules on Transparency may still apply based on the Convention on Transparency in Treaty-based Investor-State Arbitration¹¹⁴ (Mauritius Convention). The Convention is an attempt to extend the applicability of the Rules on Transparency to arbitrations under treaties concluded before 1 April 2014 without the need for states to amend treaties individually. If states ratify the Mauritius Convention without making a reservation as to its applicability,¹¹⁵ the Rules on Transparency apply to *any* investment arbitration under any investment treaty between them and other signatories of the Mauritius Convention, as long as the investment treaty was concluded before 1 April 2014 and irrespective of whether the arbitration is initiated under the UNCITRAL Rules (Art 2(1) of the Mauritius Convention). Under Article 2(1) of the Mauritius Convention, the Rules on Transparency apply also, if an investor agrees to the applicability of the Rules on Transparency with a host state that has ratified the Mauritius Convention. This provision allows investors – from states that *did* make a relevant reservation or that *did not* ratify the Convention – to agree on the application of the Rules on Transparency with the host state. The Convention, if signed without reservations, contains the unilateral offer to conduct investment arbitrations in accordance with the Rules on Transparency. The Mauritius

¹¹³ cf Vienna Convention on the Law of Treaties, Art 39.

¹¹⁴ United Nations General Assembly, *Report of the United Nations Commission on International Trade Law on the work of its forty-seventh session: Report of the Sixth Committee*, 69th session, UN doc A/69/496.

¹¹⁵ Article 3(1)(a) and (b) of the Mauritius Convention confirm that states may limit the application of the Rules on Transparency to specific investment agreements and to arbitrations initiated by investors under specific arbitration rules. States may also decide against making a unilateral offer to claimant investors to conduct investor-state arbitral proceedings in accordance with the Rules on Transparency (Article 3(1)(c) of the Mauritius Convention).

Convention is still in its infancy, however. It opened for signature on 17 March 2015 in Port Louis, Mauritius, and has since been signed by only 23 states,¹¹⁶ of which only Cameroon, Canada, Mauritius and Switzerland have since ratified the Convention.¹¹⁷ To date, its application is thus limited to investment arbitrations under treaties concluded between Cameroon, Canada, Mauritius and Switzerland. That is three treaties to date,¹¹⁸ of which two have entered into force.

In sum, the Mauritius Convention is ambitious in its aim to render investment arbitrations more transparent and presumptively open to the public. Yet, its success hinges on states ratifying the Convention, on states ratifying the Convention without making too many reservations and, at times, on investors agreeing to its applicability. Article 3(1)(a) and (b) of the Mauritius Convention confirms that states may limit the application of the Rules on Transparency to specific investment treaties and to arbitrations initiated by investors under specific arbitration rules. States may also decide against making a unilateral offer to investors to conduct arbitral hearings in accordance with the Rules on Transparency (Art 3(1)(c) of the Convention). Yet, under Article 3(1)(c) of the Convention states can also limit its applicability to arbitrations in which they are not the respondent. If all states

¹¹⁶ Australia (signed 18 July 2017); Belgium (signed 15 September 2015); Benin (signed 10 July 2017); Plurinational State of Bolivia (signed 16 April 2018); Cameroon (signed 11 May 2017); Canada (signed 17 March 2015); Congo (signed 30 September 2015); Finland (17 March 2015); France (17 March 2015); Gabon (29 September 2015); Gambia (20 September 2017); Germany (17 March 2015); Iraq (13 February 2017); Italy (signed 19 May 2015); Luxembourg (signed 15 September 2015); Madagascar (signed 1 October 2015); Mauritius (signed 17 March 2015); Netherlands (signed 18 May 2016); Sweden (17 March 2015); Switzerland (signed 27 March 2015); Syrian Arab Republic (24 March 2015); United Kingdom of Great Britain and Northern Ireland (17 March 2015); United States of America (signed 17 March 2015). See UNCITRAL, *Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)* <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html> accessed 31 July 2018.

¹¹⁷ UNCITRAL, *Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)* <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html> accessed 31 July 2018.

¹¹⁸ Cameroon-Canada BIT of 3 March 2014 (entered into force on 16 December 2016); Cameroon-Mauritius BIT of 3 August 2001; Mauritius-Switzerland BIT of 26 November 1998 (entered into force on 21 April 2000).

made that reservation, the Mauritius Convention would not apply automatically in any investment arbitration. Its dependence on specific state consent is therefore also its weakness, as is its reach. The Convention, even if ratified by all states without any reservations, only extends the applicability of the Rules on Transparency to arbitrations under investments treaties signed *before* 1 April 2014, not afterwards. As demonstrated above, the majority of new investment treaties do not require arbitral hearings to be open to the public, even if the Rules on Transparency are incorporated. Under the vast majority of newer investment treaties, the disputing parties have a choice as to the applicable arbitration rules. If the disputing parties have a choice as to the applicable arbitration rules and absent treaty provisions mandating the presumptive openness of arbitral hearings or the applicability of the Rules on Transparency, disputing parties must only choose arbitration rules that allow them to close the hearings to the public to avoid procedural transparency. The Mauritius Conventions does not provide a solution for this dilemma, irrespective of the status of its ratification.

(ii) Amending the ICSID Arbitration Rules

If disputing parties are able to circumvent the applicability of rules requiring the openness of arbitral hearings by opting for arbitration rules other than the UNCITRAL Arbitration Rules where possible, perhaps those other arbitration rules should be amended. The rules chosen most often other than the UNCITRAL Arbitration Rules are the ICSID Arbitration Rules. This section briefly examines proposals for the amendment of the ICSID Rules. The most recent proposals for the amendment of the ICSID Rules were published on 2 August 2018.¹¹⁹ They contain the following proposed Rule 47 on the Observation of Hearings:

¹¹⁹ International Centre for Settlement of Investment Disputes (ICSID), *Proposals for Amendment of the ICSID Rules* (ICSID Secretariat, 2 August 2018).

- (1) The Tribunal shall allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal to observe hearings, unless either party objects.
- (2) The Tribunal shall establish procedures to prevent the disclosure of confidential information to persons observing the hearings.
- (3) The Centre shall publish recordings and transcripts of hearings, unless either party objects.¹²⁰

Such an amendment, apart from introducing the possibility that recordings and transcripts be published,¹²¹ would not be materially different from the *existing* Rule 32(2) of the ICSID Arbitration Rules¹²² which reads:

Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

Neither Rule requires arbitral hearings to be open to the public against the wishes of the disputing parties. The proposed amendment therefore would not improve public access to arbitral hearings under the ICSID Arbitration Rules.

¹²⁰ International Centre for Settlement of Investment Disputes (ICSID), *Proposals for Amendment of the ICSID Rules, Volume 3 – Working Paper* (ICSID Secretariat, 2 August 2018) 211; cf identical Rule 57 in ICSID, *Proposals for Amendment of the ICSID Rules, Volume 2 – Consolidated Draft Rules* (ICSID Secretariat, 2 August 2018) 122.

¹²¹ ICSID, *Proposals for Amendment of the ICSID Rules, Volume 3 – Working Paper* (ICSID Secretariat, 2 August 2018) para 458 (noting that “[p]roposed AR 47(3) is a new provision, and requires publication of recordings or transcript of a hearing unless either party objects”).

¹²² *ibid* para 456 (noting that the “[p]roposed AR 47(1) maintains the current Rule allowing public access to hearings unless either party objects”).

(iii) Amending International Investment Agreements

If, of course, investment treaties required all investment arbitrations to be presumptively open to the public, these provisions would supersede any provisions in arbitration rules that derogate from them. Yet, that is far from being the case. Only 38 out of 2,235¹²³ or 1.7 per cent of investment treaties available on the *International Investment Agreements Navigator* in full text in English allow for investor-state arbitration and, in addition, require arbitral hearings to be presumptively “open to the public” without granting the disputing parties, or either of the disputing parties,¹²⁴ a right to object.¹²⁵ Figure 4 below visualises this disparity between the number of treaties that, in their treaty text, require arbitral hearings to be presumptively open to the public (38) and those that do not (2197).

Figure 4: Existence of Treaty Provisions Requiring Arbitral Hearings to Be Presumptively “Open to the Public”



¹²³ This number is up to date as of 31 July 2018. It includes international investment agreements that provide for state-to-state dispute resolution only.

¹²⁴ For examples of consent dependant openness, see Australia-China FTA of 17 June 2015 (entered into force on 20 December 2015), Art 9.17(3) (prescribing that the openness of arbitral hearings depends on the consent of the respondent); Canada-China BIT of 9 September 2012 (entered into force on 1 October 2014), Art 28(2); Canada-Czech Republic BIT (signed 6 May 2009; entered into force 22 January 2012), Annex B, Section (1) (prescribing that the openness of arbitral hearings depends on the respondent’s determination of whether openness is in the public interest).

¹²⁵ For this survey, the author of this thesis initially searched for the term “open to the public” in the text of international investment agreements that are available on the *International Investment Agreements Navigator*. The survey is thus limited to the 2,235 investment agreements available on that database in full text in English on 31 July 2018.

States most frequently opted to include one out of the following treaty provisions (or a variance thereof), if hearings under the treaty were to be presumptively open to the public:

- Hearings under this Section shall be open to the public. The Tribunal may hold portions of hearings *in camera* to the extent necessary to ensure the protection of confidential information.¹²⁶
- The Tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.¹²⁷

¹²⁶ See Canada-Burkina Faso BIT of 20 April 2015, Art 32(2); Canada-Côte d'Ivoire BIT of 30 November 2014 (entered into force on 14 December 2015), Art 30(2); Canada-Mali BIT of 28 November 2014 (entered into force on 8 June 2016), Art 30(2); Canada-Senegal BIT of 27 November 2014 (entered into force on 5 August 2016), Art 31(2); Canada-Serbia BIT of 1 September 2014 (entered into force on 27 April 2015), Art 31(2); Canada-Nigeria BIT of 6 May 2014, Art 31(2); Canada-Cameroon BIT of 3 March 2014 (entered into force on 16 December 2016), Art 30(2); Canada-Honduras BIT of 5 November 2013 (entered into force on 1 October 2014), Art 10.35(1); Canada-Tanzania BIT of 17 May 2013 (entered into force on 9 December 2013), Art 30(2); Canada-Benin BIT of 9 January 2013 (entered into force 12 May 2014), Art 33(2); Canada-Kuwait BIT of 26 September 2011 (entered into force on 19 February 2014), Art 30(2); Canada-Slovak Republic BIT of 20 July 2010 (entered into force on 14 March 2012), Annex B, Art 1(1); Canada-Panama BIT of 14 May 2010 (entered into force 1 April 2013), Art 9.30(2); Canada-Jordan BIT of 28 June 2009 (entered into force 14 December 2009), Art 38(1); Canada-Latvia BIT of 5 May 2009 (entered into force on 24 November 2011), Annex C, Art 1(1); Canada-Colombia FTA of 21 November 2008 (entered into force on 15 August 2011), Art 830(2); Canada-Peru FTA of 29 May 2008 (entered into force on 1 August 2009), Art 835; Canada-Peru BIT of 14 November 2006 (entered into force on 20 June 2007), Art 38(1). Cf Investment Agreement for the COMESA Common Investment Area of 23 May 2007, Arts 28(6) and 28(7).

¹²⁷ See TPP of 4 February 2016, Art 9.24(2); New-Zealand-Republic of Korea BIT of 23 March 2015 (entered into force on 20 December 2015), Art 10.27(2); Canada-Republic of Korea FTA of 23 September 2014 (entered into force on 1 January 2015), Art 8.35(2); Australia-Republic of Korea of 8 April 2014 (entered into force on 12 December 2014), Art 11.21(2); New Zealand-Taiwan, Penghu, Kinmen and Matsu Agreement of 10 July 2013 (entered into force on 1 December 2013), Art 27(2); Australia-Chile FTA of 30 July 2008 (entered into force on 6 March 2009), Art 10.22(2); US-Rwanda BIT of 19 February 2008 (entered into force on 1 January 2012), Art 29(2); US-Republic of Korea FTA of 30 June 2007 (entered into force on 15 March 2012), Art 11.21(2); US-Panama FTA of 28 June 2007 (entered into force on 31 October 2012), Art 10.21(2); US-Colombia FTA of 22 November 2006 (entered into force on 15 May 2012), Art 10.21(2); Taiwan-Nicaragua FTA of 23 June 2006 (entered into force on 1 January 2008), Art 10.21(2); US-Peru FTA of 12 April 2006 (entered into force on 1 February 2009), Art 10.21(2); US-Oman FTA of 19 January 2006 (entered into force on 1 January 2009), Art 10.20(2); US-Uruguay BIT of 4 November 2005 (entered into force on 1 November 2006), Art 29(2); CAFTA-DR of 5 August 2004

These provisions modify arbitration rules and conventions where the international investment agreement refers to diverging arbitration rules and conventions. Even though the above survey is limited to the 2,235 international investment agreements available in full text in English on the *International Investment Agreements Navigator*, it reflects the fact that only a small percentage of international investment agreements require investor-state arbitral proceedings to be presumptively open to the public without granting the disputing parties, or either of the disputing parties, a right to object. The amendment of existing treaties by adding provisions on procedural transparency is an avenue that could be pursued. Yet, its short-term success seems unlikely given the slow-grinding mills of international treaty negotiations. The study of newer investment treaties signed since 1 April 2014 has shown that not all states are in favour of treaty provisions on procedural transparency in the first place. If states do not include such provisions in their newer treaties, it is unlikely that they are willing to amend their existing treaties accordingly.

D. Conclusion and Outlook

Save with the approval of the disputing parties, the public generally does not have access to investor-state arbitral hearings. Under the ICSID Convention, the ICSID Arbitration Rules and the ICSID Arbitration (Additional Facility) Rules, the arbitral tribunal may grant the public access to arbitral hearings, *unless either party objects*. Similarly, under Article 28(3) of the UNCITRAL Arbitration Rules, Article 27(3) of the SCC Rules, Article 26(3) of the ICC Rules and Article 19(4) of the LCIA Rules arbitral hearings are

(entered into force on 1 January 2009), Art 10.21(2); US-Morocco FTA of 15 June 2004 (entered into force on 1 January 2006), Art 10.20(2); US-Chile FTA of 6 June 2003 (entered into force on 1 January 2004), Art 10.20(2); US-Singapore FTA of 6 May 2003 (entered into force on 1 January 2004), Art 15.20(2); FTA between the European Union and its Member States and Singapore (in negotiation); CETA of 30 October 2016, Annex 9-C to the ISDS Section, Art 2.

to be held in private, *unless otherwise agreed by the parties*. It is therefore the rule that procedural transparency occurs only at the discretion of the disputing parties.

The Rules on Transparency are an exception to this rule. Their application, however, is not mandatory, save in those very rare instances, in which an investment treaty requires their application (one treaty) or extends their application to all arbitral proceedings under the investment treaty (three treaties), or in which the Mauritius Convention requires their applicability (three treaties). Presently, the application of the Rules on Transparency is mandatory under not even 0.03 per cent of all treaties available on the *International Investment Agreements Navigator* in full text in English (2,235¹²⁸). Another exception to the rule are treaties that require arbitral hearings to be presumptively “open to the public” without granting the disputing parties, or either of the disputing parties, a right to object. To date, that is the case for 38 out of 2,235 or 1.7 per cent of investment agreements available on the *International Investment Agreements Navigator* in full text in English. 32 of these 38 agreements have entered into force. The low number of investment treaties that require the applicability of the Rules on Transparency, or that require arbitral hearings to be open to the public, signifies that investment arbitration still predominantly takes place behind closed doors, unless otherwise agreed by the disputing parties, or unless otherwise agreed by the Contracting Parties to an investment agreement subsequent to its entry into force.

Solutions to this issue have been suggested but none is likely to deliver results in the short-term. The amendment of existing investment agreements takes time and requires political will which is not existent in all states. Even if the Mauritius Convention should

¹²⁸ This number is up to date as of 31 July 2018. It includes international investment agreements that provide for state-to-state dispute resolution only.

one day be ratified by all states, if that ever occurs, its reach would not extend to investment agreements signed after 1 April 2014. What is more, the recent proposals for the amendment of the ICSID Rules maintain the status quo of procedural transparency only at the discretion of the disputing parties. These proposals therefore represent a missed opportunity for the introduction of greater transparency in investment treaty arbitration. Until such time as the Mauritius Convention may, one day, be signed by all states, or until such time as all treaties contain a provision requiring hearings to be open to the public, it is worthwhile considering a fourth option on how to significantly increase procedural transparency in investor-state arbitration: the non-enforcement of awards based on proceedings that were wrongly closed to the public.

This thesis unpacks this proposal. It argues that procedural transparency in investor-state arbitration does neither depend on states ratifying the Mauritius Convention nor on states amending their investment agreements. If there is a general principle of open justice that is applicable to investor-state arbitration, courts could implement this principle by refusing to enforce arbitral awards based on proceedings that were wrongly closed to the public. By doing so, or even if only by contemplating doing so, courts could trigger the presumptive openness of arbitral hearings. This rights-based avenue is suggested as an addition to the political processes at work towards more procedural transparency. The rights-based avenue, it is argued, is not only more efficient but, because of its relative independence from political processes, also more promising in the short term. In what follows, chapter 2 examines whether there is a general principle of open justice that is applicable to investment arbitration. Chapter 3 examines the implementation of a right of public access to investor-state arbitration under the New York Convention and the ICSID Convention and the role of arbitrators in implementing a right of public access. Chapter

4 examines the promises of multilateral mechanisms for investor-state dispute resolution.

Chapter 5 offers concluding remarks and points to some limitations.

Chapter 2

A Right of Public Access to Investor-State Arbitration

I. Introduction

Chapter 2 argues that there is a general principle of open justice that is applicable to investment arbitration hearings. It is argued that arbitral tribunals make law as if they were a single court. It is suggested therefore that rules otherwise applicable to trials should be applicable to investor-state arbitration. In particular, the principle of open justice should be applicable to investor-state arbitration. Such a proposition is perhaps unconventional, certainly novel, but, in the apt words of Denning LJ: “If we never do anything which has not been done before, we shall never get anywhere.”¹ Chapter 2 is inspired by *Delaware Coalition for Open Government v Strine*,² a case in which the First Amendment right of public access was applied to a specific kind of arbitration.

II. Hypothesis and Argument for a Right of Public Access

Hypothesis: If there is a general principle of open justice under international law that derives from the principle of democracy (a) and if arbitrators are making law for all states participating in the system of investment treaty arbitration (b), thereby governing in a system of self-government (c), arbitral proceedings must be open to the public.

It may be useful to begin by outlining two assumptions underlying this hypothesis. The first assumption is that the right of public access to court proceedings is rooted in the idea

¹ *Packer v Packer* [1954] P 15, 22 (English Court of Appeal) (Denning LJ).

² *Delaware Coalition for Open Government, Inc. v The Honorable Leo E. Strine, Jr. and Others* 894 F Supp 2d 493 (2012) (United States District Court for the District of Delaware); *Delaware Coalition for Open Government, Inc. v The Honorable Leo E. Strine, Jr., and Others* 733 F 3d 510 (3d Cir. 2013).

of self-government. The second assumption is that judges are making law,³ that law-making is a government function and that the bodies that make law are government bodies for they create norms that are binding on the community which they serve.⁴ If it is then not the people but courts that are creating norms that are binding on the community which they serve, court proceedings must be open to the public in order to best realise the idea of self-government. The self-government in the instance of courts creating norms that are binding on the community which they serve is restricted to the public observing and thereby controlling courts in fulfilment of their function as law-makers. This type of self-government is second-best to true *self*-government, i.e., government by the people.⁵ Government by the people in this context would entail all members of a society in which a legal system is in force, or their representatives,⁶ acting as judges, authoritatively determining what the law is in each individual case.

³ On judges as law-makers, see Joseph Raz, 'The Institutional Nature of Law' (1975) 38(5) *Modern Law Review* 489-503, at 493 ("The courts apply the law by rendering judgments which are themselves norms."); William M. Landes and Richard A. Posner, 'Legal Precedent: A Theoretical Analysis and Empirical Analysis (1976) 19 *Journal of Law and Economics* 249-307, at 249:

When the parties to a legal dispute are unable to agree on the meaning of the governing statute as applied to their dispute, litigation may ensue in which that meaning will be an issue for the court to resolve. The court's resolution will define the specific requirements of the statute in the circumstances presented by the case and thus create [...] a specific rule of legal obligation applicable to like circumstances.

⁴ Alec Stone Sweet and Florian Grisel coin the term of the arbitrator as 'Agent-of-the-Community' in Alex Stone Sweet and Florian Grisel, 'Transnational Investment Arbitration: From Delegation to Constitutionalization?' in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 118-136, at 133.

⁵ It was the case in classical Athens that judicial proceedings were more participatory. As they were more participatory, they were democratic to a greater degree than judicial proceedings in modern legal systems are. On this point, see Adriaan Lanni, 'Publicity and the Courts of Classical Athens' (2012) 24 *Yale Journal of Law & the Humanities* 119-135, at 119-120.

⁶ Such was the case in classical Athens. See Douglas M. MacDowell, *The Law in Classical Athens* (Thames and Hudson 1978) 34 ("[The idea] was to regard a limited number of ordinary citizens as representing all the citizens: a part of the community stood for the whole, and the decisions of the part counted as decisions of the whole.").

If then arbitrators in investor-state arbitration are making law, they have some authority to govern on behalf of all states participating in the ‘system’ of investor-state arbitration. If arbitrators are making law, they are creating norms that are binding on the community which they serve.⁷ The community in investor-state arbitration does not only encompass the disputing parties but also potential future disputing parties, states and the citizens of those states. It is suggested that it is the act of law-making by arbitrators – not necessarily the topic of investor-state disputes⁸ – that triggers the right of public access.⁹ It is argued that law-making, if an inherent function of arbitrators, requires the introduction of a right of public access to investor-state arbitration, assuming that investor-state arbitration is a system of self-government. The introduction of a right of public access would be required in such a scenario because, in a system of self-government, the price for making law is granting a right of public access to the proceedings in which law is made in return.

In short, it is the argument of this thesis that investor-state arbitration is not *arbitration* in the sense that it may be traditionally understood. Since, in traditional arbitration, “[o]ne case is not authority for another”¹⁰ arbitrators, typically, are not making law. In investor-state arbitration, arbitrators are making law, however. *Ergo*, investor-state *arbitration* is mislabelled. If investor-state arbitration is mislabelled, it must be described differently. It is at the core of this thesis that, in investor-state arbitration, arbitral tribunals are making

⁷ cf John Chipman Gray, *The Nature and Sources of the Law* (2nd edn from the author’s notes by Roland Gray, The Macmillan Company 1921) 1 (“The Law of a community consists of the general rules which are followed by its judicial department in establishing legal rights and duties.”).

⁸ cf Gary B. Born, *International Commercial Arbitration, Volume II* (2nd edn, Kluwer Law International 2014) 2829 (“[There is nothing inherent in the nature of investor-state disputes that necessarily requires dispensing with confidentiality obligations”).

⁹ See already Sonja Heppner, ‘A Right of Public Access to Investor-State Arbitral Proceedings?’ (Kluwer Arbitration Blog, 9 December 2015) <<http://arbitrationblog.kluwerarbitration.com/2015/12/09/a-right-of-public-access-to-investor-state-arbitral-proceedings/>> accessed 25 October 2018.

¹⁰ Earl S. Wolaver, ‘The Historical Background of Commercial Arbitration’ (1934) *University of Pennsylvania Law Review* 132-146, at 132.

law,¹¹ their function being similar to courts in national legal systems. This does not mean that, in investor-state arbitration, tribunals *are* permanent courts. Investor-state arbitral tribunals, as is usual in arbitration, exist only for the duration of a particular case.¹² Yet, what is unusual in investor-state arbitration is that arbitrators, by making law, act *as if* they were judges in a court of law.¹³ If arbitrators, by making law, act as if they were judges in a single court of law, the principle of open justice, as it is applicable to court proceedings, should apply to arbitral proceedings also.

III. Inspiration: *Delaware Coalition for Open Government v Strine*

The idea for a *right* of public access to investor-state arbitration as developed in this thesis is inspired by the case *Delaware Coalition for Open Government v Strine*.¹⁴ It is an important, if not the only, case to date in which a court held that a specific type of voluntary arbitral proceedings must be presumptively open to the public.¹⁵ In *Delaware Coalition for Open Government v Strine*, both the United States District Court for the

¹¹ cf Stephan W. Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' (2011) 12 *German Law Journal* 1083, at 1087 (noting that "investment treaty tribunals engage in building a treaty-overarching system of international investment law").

¹² *ibid*, at 1086 and 1093.

¹³ cf Jason Webb Yackee, 'Controlling the International Investment Law Agency' (2012) 53(2) *Harvard International Law Journal* 392, at 411 (noting that investor-state arbitral tribunals, because of their power to make laws, are "not so different from conventional courts"); Alec Stone Sweet and Florian Grisel, 'Transnational Investment Arbitration: From Delegation to Constitutionalization' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 118-136, at 136 ("With judicialization, arbitrators increasingly behave as courts do.").

¹⁴ *Delaware Coalition for Open Government, Inc. v The Honorable Leo E. Strine, Jr., and Others* 894 F Supp 2d 493 (2012) (United States District Court for the District of Delaware); *Delaware Coalition for Open Government, Inc. v The Honorable Leo E. Strine, Jr., and Others* 733 F 3d 510 (3d Cir. 2013).

¹⁵ For the view that compulsory arbitration must be presumptively open to the public, see European Commission, *Report of 12 December 1983: Lars Bramelid and Anne Marie Malmström against Sweden* (Applications Nos 8588/79 and 8589/79) p 14:

[T]he Commission notes that a distinction must be drawn between voluntary arbitration and compulsory arbitration. Normally Article 6 [of the ECHR] poses no problem where arbitration is entered into voluntarily [...]. If, on the other hand, arbitration is compulsory in the sense of being required by law, [...] the parties have no option but to refer their dispute to an Arbitration Board, and the Board must offer the guarantees set forth in Article 6(1) [of the ECHR].

District of Delaware and the United States Court of Appeals for the Third Circuit applied the First Amendment right of public access to the Delaware Business Arbitration Programme (Delaware Arbitration). Both courts held that Delaware Arbitration must be open to the public. It was these judgments requiring proceedings that were labelled *arbitration* to be open to the public that inspired the examination of a right of public access to investor-state arbitration. The idea is that if there is a First Amendment right of public access to Delaware Arbitration, perhaps investor-state arbitration should be open to the public also. If Delaware Arbitration triggers a constitutional right of public access to specific *government* proceedings, perhaps investor-state arbitration triggers a similar right under international law. This section first explains the First Amendment right of public access, its underlying rationale and the specifics of the Delaware Business Arbitration Programme, before examining *Delaware Coalition for Open Government v Strine*. This section concludes with defining the requirements for a right of public access to investor-state arbitration, which will then be examined in the sections that follow.

A. The First Amendment Right of Public Access to Specific Government Proceedings

The First Amendment right of public access to specific government proceedings, as it exists today, was developed by the United States Supreme Court in *Richmond Newspapers, Globe Newspaper, Press-Enterprise I*, and *Press-Enterprise II*.¹⁶ In *Press-Enterprise II*, the United States Supreme Court held that there is a right of public access to a specific government proceeding, if “the place and process have historically been open to the press and general public”¹⁷ and if “public access plays a significant positive role in

¹⁶ *Richmond Newspapers, Inc., et al., v Commonwealth of Virginia et al. (Richmond Newspapers)* 448 US 555, 100 S Ct 2814 (1980); *Globe Newspaper Company v Superior Court for the County of Norfolk (Globe Newspaper)* 457 US 596, 102 S Ct 2613 (1982); *Press-Enterprise Company v Superior Court of California, Riverside County (Press-Enterprise I)* 464 US 501, 104 S Ct 819 (1984); *Press-Enterprise Company v Superior Court of California, Riverside County (Press-Enterprise II)* 478 US 1, 106 S Ct 2735 (1986).

¹⁷ *Press-Enterprise II* 478 US 1, at 8, 106 S Ct 2735, at 2740.

the functioning of the particular process in question.”¹⁸ It is not necessary for a particular process to have historically been open to the public. It is rather sufficient for the *type*¹⁹ or *kind*²⁰ of proceeding to have historically been open to the public – as criminal and civil trials have long been.²¹ The formal description of a process as administrative, judicial or otherwise is irrelevant; what is relevant is how the process can be categorised considering its actual content.²² In other words, it is necessary to look beyond the label of a proceeding and determine whether it functions like a proceeding that has historically been open to the public.²³ This test has become known as the logic and experience test. Even though the logic and experience test was developed by the United States Supreme Court in the context of criminal court proceedings,²⁴ preliminary juror examinations²⁵ and preliminary hearings as conducted in California,²⁶ the logic and experience test has since been applied by lower courts in other contexts; namely, to other aspects of criminal trials,²⁷ to civil

¹⁸ *Press-Enterprise II* 478 US 1, at 8, 106 S Ct 2735, at 2740.

¹⁹ *Press-Enterprise II* 478 US 1, at 8, 106 S Ct 2735, at 2741 (opinion of the Court).

²⁰ *El Vocero de Puerto Rico v Puerto Rico* 508 US 147, at 150, 113 S Ct 2004 (1993).

²¹ *Richmond Newspapers* 448 US 555, at 580 fn 17 (plurality opinion) (“Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.”).

²² *New York Civil Liberties Union v New York City Transit Authority* 684 F 3d 286, at 299 (2d Cir. 2012).

²³ *Press-Enterprise II* 478 US 1, at 7, 106 S Ct 2735, at 2740 (Burger CJ, delivering the opinion of the Court).

²⁴ *Richmond Newspapers* 448 US 555; *Globe Newspaper* 457 US 596.

²⁵ *Press-Enterprise I* 464 US 501.

²⁶ *Press-Enterprise II* 478 US 1, at 10.

²⁷ See *In re Application of National Broad. Co. (United States v Myers)* 635 F 2d 945, at 952 (2d Cir. 1980) (judicial records – here: videotapes of defendants); *In re Application of the Herald Co. (United States v Klepfer)* 734 F 2d 93, at 99 (2d Cir. 1984) (pre-trial suppression hearings); *United States v Haller* 837 F 2d 84, at 86-87 (2d Cir. 1988) (plea agreements and plea hearings); *United States v Suarez* 880 F 2d 626, at 630-631 (2d Cir. 1989) (information on the payment of court appointed counsel); *United States v Abuhamra* 389 F 3d 309, at 323-324 (2d Cir. 2004) (bail hearings); *United States v Alcantara* 396 F 3d 189, at 191-192 (2d Cir. 2005) (sentencing hearings).

trials,²⁸ to deportation hearings,²⁹ to administrative hearings³⁰ and to Delaware Arbitration.³¹ Lower courts have also extended the First Amendment qualified right of public access to municipal planning meetings and to wild horse gathers on public lands.³² In sum, even though originally developed by the United States Supreme Court in the context of criminal trials, the logic and experience test has since found application in areas other than criminal trials. The next section will analyse the First Amendment right of public access to specific *government* proceedings more closely with a view to understanding its roots and its underlying rationale.

²⁸ See *Rapid City Journal v Delaney* 804 N W 2d 388 (2011) (Supreme Court of South Dakota) (First Amendment right of public access to civil trials); *Rushford v New Yorker Magazine* 846 F 2d 249 (4th Cir. 1988) (First Amendment right of public access to documents filed in connection with a summary judgment motion in a civil case); *Publicker Industries, Inc. v Cohen* 733 F 2d 1059 (3d Cir. 1984) (First Amendment right of public access to civil trials); *Westmoreland v CBS* 752 F 2d 16 (2d Cir. 1984) (recognising a First Amendment right of public access to civil trials but denying a First Amendment right to televise court proceedings); *In re Continental Illinois Securities Litigation* 732 F 2d 1302 (7th Cir. 1984) (finding that “policy reasons for granting public access to criminal proceedings apply to civil cases”); *Brown & Williamson Tobacco Co. v Federal Trade Commission* 710 F 2d 1165 (6th Cir. 1983) (First Amendment right of public access to civil trials); *Newman v Graddick* 696 F 2d 796 (11th Cir. 1983) (acknowledging a First Amendment right of public access to “civil trials which pertain to the release or incarceration of prisoners and the conditions of their confinement”). See also *In re Iowa Freedom of Information Council* 724 F 2d 658, at 661 (8th Cir. 1983) (stating that the Supreme Court’s reasoning for finding a First Amendment right of public access to criminal trials *clearly supports* its application “to contempt hearings, proceedings which are partly civil, partly criminal in nature.”).

²⁹ See *Detroit Free Press v Ashcroft* 303 F 3d 681 (6th Cir. 2002) (First Amendment right of public access to deportation hearings). But see *North Jersey Media Group, Inc. v Ashcroft* 308 F 3d 198 (3d Cir. 2002) (applying the logic and experience test but denying a First Amendment right of public access to “special interest” deportation hearings). See also Jonathan L. Hafetz, ‘The First Amendment and the Right of Access to Deportation Hearings’ (2004) 40(2) *California Western Law Review* 265-319; Jeff D. Holdsworth, ‘In the Name of National Security: The Creppy Directive, and the Right of Access to Special Interest Deportation Proceedings’ (2012) 3 *Creighton International and Comparative Law Journal* 35-43.

³⁰ See *New York Civil Liberties Union v New York City Transit Authority* 684 F 3d 286 (2d Cir. 2012).

³¹ *Delaware Coalition for Open Government v Strine* 733 F 3d 510 (3d Cir. 2013).

³² *Whiteland Woods, L.P. v Township of W. Whiteland* 193 F 3d 177, 181 (3d Cir. 1999) (First Amendment right of public access to municipal planning meeting). *Leigh v Salazar* 954 F Supp 2d 1090 (2013) (District Court, District of Nevada) (First Amendment right of public access to wild horse gathers upon public grounds). See also Matthew D. Bunker and Clay Calvert, ‘Could Wild Horses Drag Access Away from Courtrooms? Expanding First Amendment Rights to New Pastures’ (2013) 18(3) *Communication Law and Policy* 247-264. But see *United States v Miami University* 294 F 3d 797, 824 (6th Cir. 2002) (denying a First Amendment right of public access to student disciplinary board meetings).

(i) Roots and Rationale for the First Amendment Right of Public Access

The rationale for the First Amendment right of public access to government proceedings is the idea of *self*-government. The idea of *self*-government requires that government proceedings that affect the populace at large must be presumptively open to the public for otherwise the idea of *self*-government would be compromised. This section traces the steps from the wording of the First Amendment to its interpretation as a hallmark of self-government. The First Amendment reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The First Amendment, in its wording, does not mention the notion of self-government or any right of public access to government proceedings. Yet, according to the plurality opinion in *Richmond Newspapers*, implicit in the right to free speech is the right to gather information as “[f]ree speech carries with it some freedom to listen.”³³ For the plurality opinion in *Richmond Newspapers*, this freedom to listen, or this right to ‘receive information and ideas,’³⁴ prohibits the government from summarily closing courtroom doors to members of the public.

For Stevens J, this is so, because the First Amendment not only guarantees the free flow of information between two individuals, but it also serves the essential societal function of preserving popular self-determination.³⁵ This societal function of preserving popular

³³ *Richmond Newspapers* 448 US 555, at 576 (plurality opinion).

³⁴ *ibid* (quoting *Kleindienst v Mandel* 408 US 753, 92 S Ct 2576, 2581 (1972)).

³⁵ *Richmond Newspapers* 448 US 555, at 584 (Stevens J, concurring) (referencing *Houchins v KQED, Inc.* 438 US 1, at 30-38, 98 S Ct 2588, at 2605-2609). See *Houchins v KQED, Inc.* 438 US 1, at 31 (referencing

self-determination is what Brennan J refers to as the *structural role* of the First Amendment. Implicit in this structural role “is not only ‘the principle that debate on public issues should be uninhibited, robust, and wide open,’³⁶ but also the antecedent assumption that valuable public debate – as well as other civic behaviour – must be informed.”³⁷ In other words, if citizens are to judge their government on its ability to govern and elect their government accordingly, they must be informed about what it is that the government is doing. In other words, self-government and popular information are interdependent. In the words of James Madison:

A Popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.³⁸

Self-government, therefore, requires access to governmental information. *Self-government* is only possible, if the citizenry who is represented by their government, is informed of the goings-on of their government, including the judicial branch. If a citizenry has no means to acquire information about their government, it is not the citizenry that is governing itself, which is what Madison described as “a Prologue to a Farce or a Tragedy; or, perhaps both.”³⁹ The flipside of public access to governmental

and quoting *Saxbe v Washington Post Co.* 417 US 843, 862-863, 94 S Ct 2811, 2821 (Powell J, dissenting)). See also *Richmond Newspapers* 448 US 555, at 587 (Brennan J, concurring in judgment) (with further references). Cf William J. Brennan, ‘Address’ (1979) 32 *Rutgers Law Review* 173, at 176 (“[T]he First Amendment protects the structure of communications necessary for the existence of our democracy.”).

³⁶ *New York Times Co. v Sullivan* 376 US 254, 270, 84 S Ct 710, 721 (1964).

³⁷ *Richmond Newspapers* 448 US 555, at 587 (Brennan J, concurring in judgment).

³⁸ G. Hunt (ed), *Writings of James Madison* (1910) 103.

³⁹ *ibid.*

information is the control of the government by the public, which is equally imperative in a representative democracy.⁴⁰ In the words of Jeremy Bentham:

Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.⁴¹

The rationale for a right of public access to government proceedings, therefore, is that, in a system of self-government, the populace has a right to gather information and to control the actions of their government, including the judicial branch. Information and control are but one side of the coin, however. Ideally, both trigger public confidence. It is the openness of court proceedings itself that helps to “[maintain] public confidence in the administration of justice.”⁴² By publicly demonstrating the fairness of the law and its application,⁴³ judges foster public confidence in the administration of justice, which is an important rationale for open justice in the first place. “Secrecy,” writes Brennan J in *Richmond Newspapers*, “is profoundly inimical to this demonstrative purpose.”⁴⁴ Public confidence in the judiciary, in turn, is important because judges are “lawmakers – a coordinate branch of *government*.”⁴⁵ Since judges, by making law, impact society at large and the rules that apply within that society, “the conduct of the trial is pre-eminently a

⁴⁰ cf *Richmond Newspapers* 448 US 555, at 596 (Brennan J, concurring in judgment) (“[P]ublic access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government.”), with references to *In re Oliver* 333 US 257, 270, 271, 68 S Ct 499, 506; Jeremy Bentham, *Rationale of Judicial Evidence*, Vol.1 (Hunt and Clarke 1827) 524.

⁴¹ Jeremy Bentham, *Rationale of Judicial Evidence*, Vol. 1 (Hunt and Clarke 1827) 524, quoted in *Richmond Newspapers, Inc. v Virginia* 448 US 555, at 570 (plurality opinion).

⁴² *Richmond Newspapers* 448 US 555, at 595 (Brennan J, concurring in judgment).

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ *ibid* 595 (with references in n 20) and 596 (Brennan J, concurring in judgment) (describing the trial as “a genuine governmental proceeding”).

matter of public interest.”⁴⁶ If a right of public access to trials did not exist, it would be impossible for members of the public to gain first-hand knowledge of how judges applied, interpreted and developed the law.⁴⁷ Knowledge of the law is imperative knowledge for a law-abiding citizen and the possibility to observe judicial law-makers is an important educative function of a court.⁴⁸ As Thore Neumann and Bruno Simma point out:

(Listening to) the verbal repetition of (legal and factual) arguments in concise presentation as well as the (possible) questioning of parties by the court enables both observers and participants to (re-)acquaint themselves with the process matter through an alternative, i.e. audio-visual, mode of communication.⁴⁹

What is more, if a right of public access to trials did not exist, it would be impossible for the public to control the judiciary. The publication of written judgments, when available and if well-reasoned and well-written, admittedly also contributes to the education of the public about the law. Yet, the publication of written judgments does not enable the public to check whether what is written in the judgment concurs with what happened during the

⁴⁶ *Richmond Newspapers* 448 US 555, at 596 (Brennan J, concurring in judgment) (with further references).

⁴⁷ cf *Richmond Newspapers* 448 US 555, at 597 (Brennan J, concurring in judgment) (noting that “[t]rial access [...] assumes structural importance in our ‘government of laws,’ *Marbury v Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803)”).

⁴⁸ Jeremy Bentham, *Rationale of Judicial Evidence*, Vol. 1 (Hunt and Clarke 1827) 525:

Another advantage [...] is, that, by publicity, the temple of justice adds to its other functions that of a school [...]. Without effort on their own parts, without effort and without merit on the part of their respective governments, they learn the chief part of what little they are permitted to learn [...], of the state of the laws on which their fate depends.

See also Barry Sullivan and Megan Canty, ‘Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958-60 and 2010-12’ (2015) 2015(5) *Utah Law Review* 1005-1082, at 1011 (noting that “[o]ral argument has been thought important [...] to provide the public with an understanding not only of what is at stake in a particular case, but also of the process by which the case law that binds us all is made”).

⁴⁹ Thore Neumann and Bruno Simma, ‘Transparency in International Adjudication’ in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013) 436-476, at 447.

trial.⁵⁰ It is this control function of the public that is at the heart of the First Amendment right of public access to adjudicative government proceedings.

(ii) Conclusion and Outlook

In sum, the rationale for the First Amendment right of public access to adjudicative government proceedings is the idea of *self-government*. In the United States, this right of public access or this right to gather information is rooted in the right to free speech, informed public debate being a hallmark of a system of self-government in the first place. In a system of self-government, the populace has a right to gather information and to control the actions of the government, including the judicial branch. Judges, after all, are “law-makers – a coordinate branch of *government*.”⁵¹ It is because judges are making law then applicable within the relevant society that court proceedings must be presumptively open to the public. This distinguishes court proceedings from the process of private dispute resolution that is traditional arbitration. If the disputing parties opt for arbitration, they typically take their dispute out of the public legal machinery. Arbitrators, as a rule, are not law-makers. The outcome of the arbitration, as a rule, does not impact society at large either. It follows that the public, as a rule, does not have a right of access to arbitration. The judicial finding that the Delaware Business Arbitration Programme must be open to the public seems counter-intuitive therefore and will be examined next.

⁵⁰ cf Jeremy Bentham, *Rationale of Judicial Evidence*, Vol. 1 (Hunt and Clarke 1827) 525-526 (noting that without permitting all persons, without restriction, to take notes of the evidence, as presented during the trial, “there would be no effectual, no sufficient check at least, against even wilful misrepresentation on the part of an unrighteous judge”).

⁵¹ *Richmond Newspapers* 448 US 555, at 595-596 (Brennan J, concurring in judgment).

B. Delaware Coalition for Open Government v Strine

(i) The Delaware Business Arbitration Programme

The Delaware Business Arbitration Programme or Delaware Arbitration was a statute-based type of arbitration of a voluntary nature; it was based on Title 10, Section 349 of the Delaware Code and the Court of Chancery Rules 96-98. If disputing parties wanted to avail of Delaware Arbitration, they could opt to do so, if their matter was eligible under the statute. However, they could also opt to resolve their dispute in court instead. This voluntary nature distinguished the Delaware Business Arbitration Programme from court-annexed mandatory arbitration.⁵² Delaware Arbitration was set in motion when the parties submitted a petition for arbitration to the Register in Chancery (Rule 97(a)(1)). Upon receipt of an eligible petition,⁵³ the Chancellor of the Court appointed a member of the Court of Chancery, i.e., a judge or master sitting permanently in the Court, as an arbitrator (Rules 96(d)(2) and 97(b)). The parties were free to change the applicable Rules 96-98 or to adopt additional rules with the consent of the arbitrator (Rule 96(c)), who had the power to grant an arbitral award. What was unusual about Delaware Arbitration was that the arbitrator also had the power to enter a final judgment or decree in conformity with the arbitral award. The disputing parties therefore received two identical decisions: an award enforceable under the Federal Arbitration Act (Section 349(c)) and a judgment or decree enforceable as any other judgment or decree (Rule 98(f)(3)). The Delaware Coalition for Open Government disagreed with the rule that Delaware Arbitrations were closed to the public unless all parties agree otherwise (Rule 98 (b)). The plaintiff argued that the First

⁵² On nonbinding, mandatory court-annexed arbitration, see Amy J. Schmitz, ‘Nonconsensual + Nonbinding = Nonsensical? Reconsidering Court-Connected Arbitration Programs’ (2009) 10 *Cardozo Journal of Conflict Resolution* 587-625.

⁵³ See Rule 96(b) of the Delaware Court of Chancery Rules: In the case of business disputes involving solely a claim for monetary damages, a matter will be eligible for arbitration only if the amount in controversy exceeds one million dollars.

Amendment qualified right of public access must apply. Both the District Court for the District of Delaware and the Court of Appeals for the Third Circuit agreed with the plaintiff. Their judgments will be examined next.

(ii) The United States District Court for the District of Delaware

The District Court, following the Supreme Court jurisprudence, examined whether the Delaware Business Arbitration Programme was a *type* of proceeding that had historically been open to the public. It specifically examined whether Delaware Arbitration was a type of civil trial, a question the District Court answered in the affirmative. In its analysis of Delaware Arbitration, the District Court focused on the fact that Chancery Court judges, in their capacity as public officials, were acting as arbitrators, exacting state power, rendering formal judgments and relying on public resources, e.g., their regular salary and Chancery Court staff.

The District Court did not discuss the fact that the disputing parties voluntarily submitted their dispute to a judge who would exercise public authority. The District Court did not discuss either whether the arbitrator's authority can be truly coercive, if the arbitrator derives his or her authority from the disputing parties. Yet, disputing parties, in any case, can only grant arbitrators the authority they possess. *Private* disputing parties cannot grant a judge the power to render *public* judgments.⁵⁴ Judges, who are acting in their capacity as public officials, already possess that power qua their public office. Judicial power, in turn, is the flipside of a First Amendment right of public access. It is the exercise

⁵⁴ By the same token, disputing parties in investor-state arbitration cannot grant tribunals the power to make law. Nor do international investment treaties grant tribunals the power to make law. Investor-state arbitral tribunals, however act as if they had the power to make law, which is a governmental power that warrants public control. This thesis argues that, since arbitral tribunals are leaning out of the window, they should feel the wind; the window being the legal framework in which they operate, the wind being the norms that should apply to the type of proceeding that is investor-state arbitration in practice.

of governmental power that warrants public control. Since Delaware Arbitration, in this and other respects, was “sufficiently like a trial,” the District Court held that it must be open to the public.⁵⁵

The District Court thereby treated the similarity between civil trials and Delaware Arbitrations as a threshold question.⁵⁶ By doing so, the District Court shortened its application of the logic and experience test. If a proceeding is deemed to be sufficiently like a civil trial, to which a First Amendment right of public access already applies, the application of the experience prong is foreordained to lead to the result that the other proceeding (*here*: Delaware Arbitration) has also been historically open to the public, because the relevant reference point for the application of the experience prong is then that of the civil trial. If a proceeding is determined to be a *type* of civil trial, the ordinary next step would have been to examine whether civil trials have historically been open to the public. Since that question had already been answered by several Court of Appeals, the District Court chose not to dwell on it.⁵⁷

In their unsuccessful petition to the United States Supreme Court, the Chancery Court judges subsequently criticised the practice of categorising one proceeding as a *type* of another proceeding for the purposes of the historical analysis required for the logic and experience test. They argued that “[a]n ‘analogous proceedings’ standard introduces a substantial degree of subjectivity and uncertainty into the historical inquiry. If the question is simply whether a proceeding has some similarities to a civil trial, virtually all

⁵⁵ *Delaware Coalition for Open Government v Strine* 894 F Supp 2d 493, at 500-503 (2012) (quoting *El Vocero de Puerto Rico v Puerto Rico* 508 US 147, 149–50, 113 S Ct 2004 (1993)).

⁵⁶ *Delaware Coalition for Open Government v Strine* 894 F Supp 2d 493, at 500.

⁵⁷ *ibid* 503-504.

adjudicative proceedings would trigger the right – a nonsensical result”⁵⁸ in their opinion. However, the ‘analogous proceedings’ standard is not as broad as envisaged by the Chancery Court judges. It is true that, if all adjudicative proceedings did trigger the First Amendment right of public access, all arbitrations would have to be open to the public. Arbitration, after all, is an adjudicative dispute resolution mechanism in the sense that it is a “legal process of resolving a dispute.”⁵⁹ This would have indeed been a nonsensical result as this would have declared all private arbitration to be unconstitutional as such. The question is not, however, whether a proceeding has *some* similarities to a civil trial but whether it has *relevant* similarities to a civil trial. What is relevant is whether a proceeding is a governmental proceeding that affects the populace at large – as do civil trials. The type of proceeding is a governmental one that affects the populace at large, if the decision-maker exacts coercive authority, e.g., by making law, by rendering *public judgments* or by rendering decisions that have the force of law. If, as in Delaware Arbitration, a decision-maker is exacting public authority by rendering public judgments, the proceeding is a governmental one that affects the populace at large and, for that reason, triggers the First Amendment right of public access. If the Chancery Court judges, in their unsuccessful petition to the Supreme Court, used the phrase “adjudicative” to refer to “the process of judicially deciding a case,”⁶⁰ their argument would have carried even less force. There is nothing nonsensical about requiring all *judicial* proceedings to be presumptively open the public. *Judicial*, in this context, means “of, relating to, or by

⁵⁸ Leo E. Strine, Jr., *Chancellor, Delaware Court of Chancery, et al. v Delaware Coalition for Open Government, Inc.*, Petition for a Writ of Certiorari, p. 28.

⁵⁹ Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 50. Legal, here, means “[o]f, relating to, or involving law generally”. See Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 1029.

⁶⁰ Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 50.

the court or a judge.”⁶¹ It is the very nature of a judicial proceeding as a government proceeding that triggers the First Amendment right of public access.

(iii) The United States Court of Appeals for the Third Circuit⁶²

On appeal, the United States Court of Appeals for the Third Circuit upheld the order of the District Court that the First Amendment right of public access applies to Delaware Arbitration. In its analysis, the Court of Appeals applied the logic and experience test as developed by the United States Supreme Court. In *Press-Enterprise II*, the United States Supreme Court had held that a First Amendment right of public access to a government proceeding exists, if “there has been a tradition of accessibility”⁶³ to that *type* of proceeding (experience prong), and if “access plays a significant positive role in the functioning of the particular process in question”⁶⁴ (logic prong). The Court of Appeals therefore asked whether Delaware Arbitration was a *type* of proceeding that “ha[d] historically been open to the [...] public”⁶⁵ and whether public access played a significant positive role in the functioning of Delaware Arbitration.⁶⁶ This section examines the application of the logic and experience test by the Court of Appeals in *Delaware Coalition for Open Government v Strine*.

In its analysis of the logic prong, the Court of Appeals reiterated the benefits of openness it had listed in *PG Publishing Co. v Aichele*⁶⁷ and applied these to Delaware Arbitration.⁶⁸

⁶¹ Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 974.

⁶² *Delaware Coalition for Open Government v Strine* 733 F 3d 510 (3d Cir. 2013).

⁶³ *Press-Enterprise II* 478 US 1, at 10, 106 S Ct 2735, at 2741.

⁶⁴ *Press-Enterprise II* 478 US 1, at 8, 106 S Ct 2735, at 2740.

⁶⁵ *ibid.*

⁶⁶ *cf Press-Enterprise II* 478 US 1, at 8, 106 S Ct 2735, at 2740.

⁶⁷ *PG Publishing Co. v Aichele* 705 F 3d 91.

⁶⁸ See *Delaware Coalition for Open Government v Strine* 733 F 3d 510, at 519 (quoting *PG Publishing Co. v Aichele* 705 F 3d 91, at 110-111 (quoting *United States v Simone* 14 F 3d 833, at 839):

We have recognized that public access to judicial proceedings provides many benefits, including [1] promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the [proceeding]; [2] promotion of the public perception of fairness which

It held that opening Delaware Arbitration to the public would allow the public to better understand the state dispute resolution mechanism, allay the public's concerns, expose all actors involved to public scrutiny and discourage perjury.⁶⁹ The Court of Appeals subsequently balanced these benefits against counter-arguments such as that public access to Delaware Arbitration would expose confidential information, that the disputing parties might suffer "loss of prestige and goodwill,"⁷⁰ or that public proceedings would be less conciliatory than private proceedings.⁷¹ The Court of Appeals was not persuaded by these arguments. It noted that Delaware Arbitration would only be presumptively open to the public and could be closed under Chancery Court Rule 5.1(b)(2) if the protection of confidential information so requires. Regarding the disputing parties' potential loss of prestige and goodwill, the Court of Appeals held that unpleasantness for the disputing parties did not "hinder the functioning of the proceeding, nor impair the public good."⁷² Similarly, the Court of Appeals did not consider a possible reduction in conciliation caused by public access to be a weighty factor in its analysis, citing "informality, not privacy"⁷³ as "the primary cause of the relative collegiality of arbitrations."⁷⁴

In its application of the experience prong, the Court of Appeals for the Third Circuit differed in its approach from the District Court. In contrast to the District Court, the Court of Appeals did not examine whether Delaware Arbitration was sufficiently like a civil trial; it believed that such an approach would beg the question whether Delaware

can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by exposing the [proceeding] to public scrutiny; [5] enhancement of the performance of all involved; and [6] discouragement of [fraud].).

⁶⁹ *Delaware Coalition for Open Government v Strine* 733 F 3d 510, at 519.

⁷⁰ *ibid.*

⁷¹ *ibid* 519-520.

⁷² *ibid* 519.

⁷³ *ibid* 520.

⁷⁴ *ibid.*

Arbitration must be open to the public.⁷⁵ Nor did the Court of Appeals, by its own admission, accept the label *arbitration* at face value. Instead, it took it upon itself to define the type of proceedings to which the components of Delaware Arbitration were most similar to and to enquire into the historical openness of these components. The Court of Appeals thereby relied on *Press-Enterprise II*,⁷⁶ where the Supreme Court had held that “the First Amendment question cannot be resolved solely on the label we give the event, i.e., ‘trial’ or otherwise.”⁷⁷ Agreeing, the Court of Appeals noted that, if the First Amendment right of public access could be circumvented by the government naming the proceeding *sivel trials*, the right “would be meaningless.”⁷⁸ This echoes the judgment in the case of *Detroit Free Press v Ashcroft*,⁷⁹ where the Court of Appeals for the Sixth Circuit had noted that it would be counterproductive to distinguish between different types of proceedings based on their label, for it “would allow the legislature to artfully craft information out of the public eye.”⁸⁰ This section examines how successfully the Court of Appeals for the Third Circuit defined the components of the Delaware Business Arbitration Programme and how successfully it enquired into the historical openness of these components.

Because Delaware Arbitration, by design, features components otherwise found in civil trials (a sitting judge acting as an adjudicator; a formal judgment) *and* components otherwise found in arbitration (informality; limited review of decisions; arbitral awards),

⁷⁵ *Delaware Coalition for Open Government v Strine* 733 F 3d 510, at 515.

⁷⁶ *Press-Enterprise II* 478 US 1, at 7, 106 S Ct 2735.

⁷⁷ *Delaware Coalition for Open Government v Strine* 733 F 3d 510, at 515 (quoting *Press-Enterprise II* 478 US 1, at 7, 106 S Ct 2735, at 2740).

⁷⁸ *Delaware Coalition for Open Government v Strine* 733 F 3d 510, at 515.

⁷⁹ *Detroit Free Press v Ashcroft* 303 F 3d 681 (6th Cir. 2002).

⁸⁰ *ibid* 696. See also *New York Civil Liberties Union v New York City Transit Authority* 684 F 3d 286, at 301 (2d Cir. 2012) (noting that “[t]he government cannot simply dress up a criminal trial in the guise of an administrative hearing and thereby evade the well-established requirement that criminal proceedings be open to the public”).

the Court of Appeals said that it would conduct a historical enquiry into both the openness of civil trials and the openness of arbitral proceedings. It fell short of its own test, however. What the Court of Appeals did was compare the arbitral components of Delaware Arbitration with *binding arbitration before a judge that takes place in a courtroom*.⁸¹ Its subsequent enquiry led the Court of Appeals to conclude that both civil trials and binding arbitrations before a judge that take place in a courtroom have long been open to the public. Even though the Court of Appeals did not consider a showing of openness at common law to be necessary for the constitutional right of public access to apply,⁸² it held that the components of Delaware Arbitration, in any case, have historically been open to the public even at common law. It compared the historical openness of both civil trials and binding arbitrations before a judge that take place in a courtroom to the historical openness of criminal trials, finding all three to be comparable.⁸³

The irony of this enquiry is that the Court of Appeals started out with the declared aim not to take the labels of proceedings at face value, only to take the labels of proceedings at face value when conducting its enquiry. The Court of Appeals relied on historical accounts of *binding arbitration before a judge that takes place in a courtroom* without examining whether the historic event was properly labelled arbitration. If arbitration is defined as an alternative to the public legal machinery,⁸⁴ “a substitute for a proceeding at law,”⁸⁵ then a proceeding that makes use of the public legal machinery cannot be properly labelled arbitration. The fact that a judge is sitting as an arbitrator, on the other hand, does not automatically turn a proceeding into a government proceeding either. What is relevant

⁸¹ *Delaware Coalition for Open Government v Strine* 733 F 3d 510, at 518.

⁸² *ibid* 515 (quoting *PG Publishing Co. v Aichele* 705 F 3d 91, at 108 (quoting *North Jersey Media Group v Ashcroft* 308 F 3d 198, at 213)).

⁸³ *Delaware Coalition for Open Government v Strine* 733 F 3d 510, at 518.

⁸⁴ Earl S. Wolaver, ‘The Historical Background of Commercial Arbitration’ (1934) 83 *University of Pennsylvania Law Review* 132-146, at 132.

⁸⁵ *ibid*.

is whether the judge is acting in his or her official capacity. Even though both the locality (courtroom⁸⁶) and the openness of the proceedings indicate that the historic examples relied upon by the Court of Appeals in *Delaware Coalition for Open Government v Strine* were government proceedings, it would not be sufficient to simply assume this. The openness could have been granted by the disputing parties. By the same token, the historic label ‘court’ might have referred to an arbitral tribunal – not to an actual court. Whether historic definitions of ‘arbitral tribunals’ and ‘courts’ are synonymous with contemporary definitions of these terms is another question. What is more, what resembles an arbitral tribunal today may have been referred to as a court in the past and vice versa. The imprecision of labels, when used without a clear definition of those labels, is in any case what contributes to controversies over the proper label of historic dispute resolution mechanisms. Wolaver considers the Gild Merchants in England to have had their own court, for example, whereas Carter describes their dispute resolution mechanism as arbitration.⁸⁷ The debates over the proper label of historic dispute resolution mechanisms, if nothing else, demonstrates that labels can be misleading.

Therefore, what the Court of Appeals did in *Strine* was to compare the arbitral components of Delaware Arbitration with proceedings that may or may not have been examples of arbitration. If the historical examples were examples of civil trials that were

⁸⁶ For a definition of *courtroom*, see *Delaware Coalition for Open Government v Strine* 733 F 3d 510, at 516 (quoting Norman W. Spaulding, ‘The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial’ (2012) 24 *Yale Journal of Law and the Humanities* 311, at 332 (defining the courtroom as “a public state – a familiar, indeed immediately recognizable enclosure, in which the process of rights definition was made public.”)).

⁸⁷ For the opposing definitions of the Gild Merchant, see Albert Thomas Carter, *A History of English Legal Institutions* (Butterworth 1902) 258 (noting that the Gild Merchant “seemingly was an association to the purpose amongst others of mutual arbitration”); Earl S. Wolaver, ‘The Historical Background of Commercial Arbitration’ (1934) 83 *University of Pennsylvania Law Review* 132-146, at 135:

The opinion of Carter that the “morning speeches” of the Gild Brethren were only a “taking of council” and arbitration and settlement of disputes among the members does not appear sound. That they were actual courts which heard and tried cases in accord with well-established rules of law and in accord with a fixed procedure seems more in accord with the facts.

mislabeled *arbitration*, then the Court's comparison was misleading. If arbitration and *binding arbitration before a judge that takes place in a courtroom* are not the same type of proceeding, it does not matter for the former whether the latter has historically been open to the public. More importantly, the Court's underlying assumption – that it is possible for the private dispute resolution mechanism that is arbitration to have historically been a government proceeding that is presumptively open to the public – reveals the weakness of its argument. It is impossible for a single proceeding to have been both. Either a proceeding is a government proceeding or it is not. If arbitration is defined as a private dispute resolution mechanism, which it usually is, then the same proceeding, by definition, cannot also be a government proceeding. Instead of relying on the label *arbitration*, the Court of Appeals should have asked whether the historical example of *binding arbitration before a judge that takes place in a courtroom* was an example of a civil trial or an example of arbitration. It should have examined whether the historic event was open to the public because it was a public government proceeding or whether it was the disputing parties who opened the proceeding to the public. Failing an examination into the nature of the historic event, the Court's comparison did not add anything to the analysis whether Delaware Arbitration should be open to the public. What is more, the Court of Appeals obscured the rationale for the First Amendment right of public access. The question is not whether any type of proceeding has historically been open to the public but whether it was a government proceeding that has historically been open to the public. 'Open to the public' in the context of the experience prong of the logic and experience test already implies that what is meant is a public *government* proceeding – as opposed to openness at the grace of the disputing parties.

The Court of Appeals for the Third Circuit gave itself away when it stated that it did not consider Delaware Arbitration to be private arbitration,⁸⁸ implying that it thought of Delaware Arbitration as a public government proceeding called public arbitration. Yet, *public arbitration*, strictly speaking, is a misnomer in the first place⁸⁹ – all *arbitration* in the sense that it is traditionally understood is private.⁹⁰ The fact that the Court of Appeals considered the historic openness of civil trials and of *public arbitration* relevant to its historical enquiry reveals that the Court of Appeals considered Delaware Arbitration to be a government proceeding in the first place, a part of the public legal machinery, not a substitute for a proceeding at law. It follows that the division of Delaware Arbitration into arbitral components and components of civil trials was misleading. The Court of Appeals did not examine whether arbitration, properly defined as a private dispute resolution mechanism, has historically been open to the public, which has not been the case. Instead, it examined whether Delaware Arbitration, in part, was comparable to a proceeding that has historically been open to the public and coincidentally was also labelled arbitration, irrespective of whether the historic event was properly so labelled. Despite itself,⁹¹ the Court of Appeals therefore begged the question whether Delaware Arbitration has

⁸⁸ *Delaware Coalition for Open Government v Strine* 733 F 3d 510, at 518 (stating that “[a]lthough Delaware’s government-sponsored arbitrations share characteristics such as informality, flexibility, and limited review with private arbitrations, they differ fundamentally from other arbitrations because they are conducted before active judges in a courthouse, because they result in a binding order of the Chancery Court, and because they allow only a limited right of appeal), and at footnote 2 (noting that “the closure of private arbitrations is only of questionable relevance”).

⁸⁹ For another misnomer of this kind, see Douglas M. MacDowell, *The Law in Classical Athens* (Thames and Hudson 1978) 207-211 (describing what he calls ‘public arbitration’ in classical Athens but which appears to have been a compulsory court-connected dispute resolution mechanism that featured amateur judges giving judgments which could be appealed to a jury).

⁹⁰ Arbitration, as it is traditionally understood, is private because it occurs outside the public legal system or because it is not equivalent to a public legal system. Investor-state arbitration is different from arbitration as it is traditionally understood. Since arbitration, as it is traditionally understood, is defined by its lack of lawmaking, investor-state *arbitration* is mislabelled.

⁹¹ cf *Delaware Coalition for Open Government v Strine* 733 F 3d 510, at 515 (“Defining Delaware’s proceeding as a civil trial at the outset would beg the question at issue here, and elide the differences between Delaware’s arbitration proceeding and other civil proceedings.”).

historically been open to the public. The better approach is to not rely on the label of a proceeding – neither when defining the type of proceeding in question, nor when examining whether that particular type of proceeding, or its components, have historically been open to the public. The question the Court of Appeals for the Third Circuit did not ask but should have asked is whether Delaware Arbitration *functions* as a type of government proceeding that has historically been open to the public. Such government proceedings encompass criminal trials, civil trials but also administrative proceedings, if those are of an adjudicative nature and replace criminal or civil trials.⁹²

Sloviter J, writing the opinion of the Court, regrettably stopped short of characterising the Delaware Business Arbitration Programme as a *government* proceeding, despite noting “the difference between adjudication and arbitration, i.e., that a judge in a judicial proceeding derives her authority from the coercive power of the state, while a judge serving as an arbitrator derives her authority from the consent of the parties.”⁹³ Sloviter J only went so far as to state that Delaware Arbitration derives “a great deal of legitimacy and authority from the state,”⁹⁴ referring to the fact that sitting judges act as arbitrators, that proceedings take place in the Chancery Court house during regular court hours, and that they result in judgments. Yet, Sloviter J did not link the applicability of the constitutional right of public access to Delaware Arbitration to the latter’s “association with the state.”⁹⁵ It was instead Fuentes J, concurring in the judgment, who noted that

⁹² See *New York Civil Liberties Union v New York City Transit Authority* 684 F 3d 286, at 301 (2d Cir. 2012) (noting that “[t]he government cannot simply dress up a criminal trial in the guise of an administrative hearing and thereby evade the well-established requirement that criminal proceedings be open to the public”).

⁹³ *Delaware Coalition for Open Government v Strine* 733 F 3d 510, at 520 (quoting Judge Roth’s dissent) (internal quotation marks omitted).

⁹⁴ *Delaware Coalition for Open Government v Strine* 733 F 3d 510, at 520.

⁹⁵ *ibid* (drawing the conclusion that “the interests of the state and the public in openness must be given weight, not just the interests of rich businesspersons in confidentiality”).

Delaware Arbitration did not pass constitutional muster because of its “air of [an] official State-run proceeding.”⁹⁶

(iv) Conclusion

In sum, the Court of Appeals’ enquiry into the historical openness of civil trials and *arbitrations before a judge that take place in a courtroom*,⁹⁷ remained formalistic in its acceptance of the historic labels of proceedings at face value. *Delaware Coalition for Open Government v Strine* is thus also an example of the limits of a formalistic approach to the First Amendment right of public access. If the enquiry as to the historical openness of proceedings remains formalistic, the rationale for a First Amendment right of public access remains obscure. To link the openness of one type of proceeding (here: Delaware Arbitration) to the fact that another event incidentally is also labelled arbitration and has historically been open to the public obscures the fact that the First Amendment right of public access attaches to *government proceedings* that have historically been open to the public. Because arbitration typically takes place outside the public legal machinery, an explanation of why the historic event was a government proceeding would have been desirable. By the same token, the Court of Appeals failed to explain why the historic event, if it was an example of a government proceeding, was relevant to the openness of the *arbitral* components of the proceedings known as Delaware Arbitration. Arbitration, in the sense that it is typically understood, is a private dispute resolution mechanism. Because of these shortcomings, the Court of Appeals’ division of Delaware Arbitration into two components – arbitral components and components typical for civil trials – was misleading. Not only was it misleading, it was also an unnecessary distraction. It would have been better to define Delaware Arbitration as a government proceeding that is

⁹⁶ *Delaware Coalition for Open Government v Strine* 733 F 3d 510, at 522.

⁹⁷ *ibid* 518.

sufficiently like a trial for the First Amendment right of public access to apply. The Court’s analysis is thus less strong than it could have been considering the facts of the case. The next section examines the lessons that *Delaware Coalition for Open Government v Strine* holds in store for the quest for a right of public access to investor-state arbitration.

C. Lessons for a Right of Public Access to Investor-State Arbitration

(i) It Must be a *Government Proceeding*

If a First Amendment right of public access attaches to a government proceeding, if “there has been a tradition of accessibility”⁹⁸ to that *type* of proceeding, and if “access plays a significant positive role in the functioning of [that] process,”⁹⁹ then the first requirement that a proceeding must fulfil for the right of public access to apply is that the proceeding must be a *government* proceeding. The District Court for the District of Delaware recognised this when defining the Delaware Business Arbitration Programme to be “sufficiently like a trial.”¹⁰⁰ The Court of Appeals for the Third Circuit, however, was not as clear in its analysis. Its analysis was rooted instead in the understanding that Delaware Arbitration featured components of civil trials and *arbitration*. Yet, by defining the relevant comparator as *public arbitration*¹⁰¹ the Court of Appeals for the Third Circuit, despite itself, begged the question whether Delaware Arbitration must be open to the public. The term *public arbitration* is contradictory in the first place because all arbitration, as it is typically understood, is private. The judgment of the Court of Appeals would have benefitted from an explanation why it considered Delaware Arbitration to be

⁹⁸ *Press-Enterprise II* 478 US 1, at 10, 106 S Ct 2735, at 2741.

⁹⁹ *Press-Enterprise II* 478 US 1, at 8, 106 S Ct 2735, at 2740.

¹⁰⁰ *Delaware Coalition for Open Government v Strine* 894 F Supp 2d 493, at 500-503 (2012) (quoting *El Vocero de Puerto Rico v Puerto Rico* 508 US 147, 149–50, 113 S Ct 2004 (1993)).

¹⁰¹ *cf Delaware Coalition for Open Government v Strine* 733 F 3d 510, at 518, and fn 2.

part of the public legal machinery. The facts of the case lent itself to such an analysis. Delaware Arbitration was a process in which judges, acting in their official capacity, sat as arbitrators, exercising their public power by rendering public judgments. The Court of Appeals did not address the issue whether Delaware Arbitration and the historic example of *binding arbitrations before a judge that take place in a courtroom*¹⁰² were properly labelled arbitration. The analysis of the Court of Appeals, in turn, suffered from this ambiguity. It follows that the examination whether investor-state arbitration must be open to the public must look beyond the label *arbitration*. It must ask what *type* of proceeding investor-state arbitration is. Most importantly, it must ask whether investor-state arbitration is a *government* proceeding.

(ii) There Must Be a Right of Public Access under International Law

In contrast to Delaware Arbitration, investor-state arbitration, as understood in this thesis, is not statute-based but treaty-based. It follows that investor-state arbitration does not operate *within* a national legal system but on the international plane. It follows that, for there to be a right of public access to investor-state arbitration under international law, there must be a relevant right of public access under international law in the first place – comparable to the First Amendment right of public access. This comparable right of public access under international law must be applicable to investor-state arbitration. It is applicable, if investor-state arbitration is a *government* proceeding that is sufficiently like a civil trial within a national legal system, i.e., if arbitral tribunals are making law for all states participating in the ‘system’ of investor-state arbitration.

¹⁰² *Delaware Coalition for Open Government v Strine* 733 F 3d 510, at 518.

IV. Open Justice as a General Principle of Law

*Democracies die behind closed doors.*¹⁰³

Whether private persons have a right of public access to investor-state arbitration depends on the existence of a general principle of open justice and its application to investor-state arbitration. After a brief introduction to the classical roots of open justice, this section examines whether there is a general principle of open justice under contemporary international law. The classical roots of open justice are relevant because they illustrate not only the original *public* nature but also the original *participatory* nature of court proceedings. The original participatory nature of court proceedings exemplifies the original extent of *self*-rule, which is still the core rationale for open justice. The less participatory a proceeding is in which laws are interpreted and made, the more important it is that members of the public can observe that proceeding.

A. The Classical Roots of Open Justice

For a euro-centric, the classical roots of open justice are to be found in the *pólis* or city-state of ancient Athens¹⁰⁴ – the cradle of democracy (*dēmokratía*) – where court proceedings took place in public.¹⁰⁵ This section introduces the Athenian understanding of *self*-rule; it also examines how the Athenian understanding of *self*-rule pertains to the principle of open justice. In addition, this section offers literary evidence indicating that the trial of Socrates was a public spectacle.

¹⁰³ *Detroit Free Press v Ashcroft* 303 F 3d 681, at 683 (6th Cir. 2002).

¹⁰⁴ On the influence of Athenian law on English practice, see Susan N. Herman, *The Right to a Speedy and Public Trial: A Reference Guide to the United States Constitution* (Praeger 2006) 3 (noting that “there is little evidence that Athenian law directly influenced English practice” but adding that “the image of a theatrical public trial, especially when trial involved some form of jury, recurs like an archetype in cultures the English admired”).

¹⁰⁵ On the Athenian legal system, see generally Adriaan Lanni, ‘Precedent and Legal Reasoning in Classical Athenian Courts: A Noble Lie?’ (1999) 43 *American Journal of Legal History* 27-51, at 29-31.

(i) The Athenian Concept of *Self-rule*

Athenian democracy was based on the concept of free discussion or *parrhesia* (free speech), which was so central to Athenian self-government that it was a basic right for male citizens of age “to speak back to the state, to criticize its actions in the assembly, the courts, the theater, or conversation.”¹⁰⁶ To this day, the concepts of self-rule and free speech are two concepts that are interdependent and the concept of open justice is rooted in both. In Athens, however, *self-rule* was taken much more literally than it is today. In Athens, the sovereign authority (*kratos*) of the citizen body,¹⁰⁷ or the *self-rule* (*kratein*) by the citizen body (*demos*),¹⁰⁸ meant that self-rule was participatory rather than purely representative.¹⁰⁹ That was particularly true for the administration of justice which saw disputes publicly adjudicated by hundreds of amateur jurors.¹¹⁰ The amateurism of the Athenian legal system was its most distinctive feature.¹¹¹ It ensured that an Athenian judgment was a better approximate for a ‘judgment of the people’¹¹² than its modern

¹⁰⁶ Isidor F. Stone, *The Trial of Socrates* (Little, Brown and Company 1988) 223, 225.

¹⁰⁷ Stephen C. Todd, *The Shape of Athenian Law* (Clarendon Press 1993) 3 (noting that “the idea that the *demos* or citizen body, however defined, should exercise *kratos* (sovereign authority), was the revolutionary tenet of [...] democratic Athens”).

¹⁰⁸ Günter Frankenberg, ‘Democracy’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 250.

¹⁰⁹ Adriaan Lanni, ‘Publicity and the Courts of Classic Athens’ (2012) 24(1) *Yale Journal of Law & the Humanities* 119-135, at 119-120 (clarifying at p120 that the Athenian legal system “was open, accessible, and participatory for the privileged group of male citizens”).

¹¹⁰ Adriaan Lanni, ‘Publicity and the Courts of Classical Athens’ (2012) 24 *Yale Journal of Law & the Humanities* 119-135, at 119-120. See also Adriaan Lanni, ‘Precedent and Legal Reasoning in Classical Athenian Courts: A Noble Lie?’ (1999) 43 *American Journal of Legal History* 27-51, at 31 (noting “the Athenian hostility toward professionalism” in the legal sphere).

¹¹¹ Adriaan Lanni, ‘Publicity and the Courts of Classical Athens’ (2012) 24 *Yale Journal of Law & the Humanities* 119-135, at 120. See also Adriaan Lanni, ‘Precedent and Legal Reasoning in Classical Athenian Courts: A Noble Lie?’ (1999) 43 *American Journal of Legal History* 27-51, at 29 (noting that “Classical Athens was a participatory democracy run primarily by amateurs”).

¹¹² Adriaan Lanni, ‘Precedent and Legal Reasoning in Classical Athenian Courts: A Noble Lie?’ (1999) 43 *American Journal of Legal History* 27-51, at 31 (emphasis added); Douglas M. MacDowell, *The Law in Classical Athens* (Thames and Hudson 1978) 34 (describing the idea behind popular juries in ancient Athens: “[The idea] was to regard a limited number of ordinary citizens as representing all the citizens: a part of the community stood for the whole, and the decisions of the part counted as decisions of the whole.”). See also Adriaan Lanni, ‘Publicity and the Courts of Classical Athens’ (2012) 24 *Yale Journal of Law & the Humanities* 119-135, at 120 (“[I]n Athen’s wholly amateur, highly participatory system, the *popular*

counterparts. The next section illustrates the Athenian principle of open justice by offering literary evidence indicating that Socrates was convicted by amateur jurors in a public trial.

(ii) The Trial of Socrates 399 B.C.

Socrates' trial took place in the spring of 399 B.C.¹¹³ Socrates was accused of corrupting the youth, of believing in new spiritual beings and of disbelieving in the gods of the state.¹¹⁴ Since his case involved a religious matter, it came under the jurisdiction of King Archon and was tried before the heliastic court.¹¹⁵ The heliastic court consisted of six thousand amateur jurors who, once a year, were chosen by lot from a pool of eligible volunteers.¹¹⁶ The heliastic court usually did not sit as a single court.¹¹⁷ Instead, it was usually divided into smaller courts;¹¹⁸ namely, "Athens' bewildering variety of courts."¹¹⁹

jury itself fulfilled some of the functions of the modern public, while at the same time being subject to scrutiny from court spectators.") (emphasis added).

¹¹³ See 'Introduction to the Apology' in Plato, *Euthyphro, Apology, Crito, Phaedo, Phaedrus* (Translated by Harold North Fowler, Harvard University Press 1914) 63.

¹¹⁴ Plato, 'Apology' in Plato, *Euthyphro, Apology, Crito, Phaedo, Phaedrus* (Translated by Harold North Fowler, Harvard University Press 1914) 91 (24b8-c1). For the precise wording of the indictment, see Thomas C. Brickhouse and Nicholas D. Smith, *Socrates on Trial* (Oxford University Press 1989) 30 (referring to the indictment per Diogenes Laertius).

¹¹⁵ 'Introduction to the Apology' in Plato, *Euthyphro, Apology, Crito, Phaedo, Phaedrus* (Translated by Harold North Fowler, Harvard University Press 1914) 64.

¹¹⁶ Thomas C. Brickhouse and Nicholas D. Smith, *Socrates on Trial* (Oxford University Press 1989) 26; Douglas M. MacDowell, *The Law in Classical Athens* (Thames and Hudson 1978) 34. Cf Adriaan Lanni, 'Precedent and Legal Reasoning in Classical Athenian Courts: A Noble Lie?' (1999) 43 *American Journal of Legal History* 27-51, at 29 (noting that "the vast majority of state officials, including those with judicial responsibilities, were selected by lot to serve one year terms").

¹¹⁷ 'Introduction to the Apology' in Plato, *Euthyphro, Apology, Crito, Phaedo, Phaedrus* (Translated by Harold North Fowler, Harvard University Press 1914) 64. But see Mogens Herman Hansen, *The Athenian Democracy in the Age of Demosthenes: Structure, Principles and Ideology* (Blackwell Publishing 1991) 187 (elaborating on the number of jurors in specific categories of cases and noting that, "the first known example of a *graphe paranomon* [an important political case] was actually judged by all the jurors at once (i.e. all those who had turned up on the day concerned)").

¹¹⁸ Mogens Herman Hansen, *The Athenian Democracy in the Age of Demosthenes: Structure, Principles and Ideology* (Blackwell Publishing 1991) 187 (elaborating on the number of jurors in specific categories of cases in Aristotle's time which could be 201, 401, 501 or "several panels of 500 put together" with "examples of panels of 1001, 1501, 2001 and 2501") (references omitted).

¹¹⁹ Thomas C. Brickhouse and Nicholas D. Smith, *Socrates on Trial* (Oxford University Press 1989) 26.

It was before one of these subdivisions that Socrates was tried. The exact number of jurors at the trial of Socrates remains unknown. It is believed, however, that 500 jurors would have been a typical number of jurors for cases of this kind.¹²⁰ A majority vote by secret ballot¹²¹ determined the outcome of the trial as was the rule for all cases tried in the heliastic court.¹²² That the amateur jurors may have convicted Socrates by a vote of 280 to 220¹²³ finds support in the *apologia* (defence) in which Socrates, according to Plato, notes, “if only thirty votes had been cast the other way, I should have been acquitted.”¹²⁴

That not only jurors but also spectators, i.e., members of the public, were present at the trial follows from Socrates’ reference in his defence to listeners after already having referred to the jurors.¹²⁵ Translations variably refer to *these listeners*¹²⁶ or *the listeners here*. If Socrates refers to the listeners in addition to the jurors, the listeners must have been members of the public. Another indication of the public nature of the trial is that Socrates points out several individuals he recognises in court. When suggesting that any youth or former youth corrupted by his speech ought to come forward, or if they did not wish to do it themselves, their relatives ought to come forward on their behalf, Socrates

¹²⁰ Thomas C. Brickhouse and Nicholas D. Smith, *Socrates on Trial* (Oxford University Press 1989) 26 (with further references). Cf ‘Introduction to the Apology’ in Plato, *Euthyphro, Apology, Crito, Phaedo, Phaedrus* (Translated by Harold North Fowler, Harvard University Press 1914) 64.

¹²¹ Stephen C. Todd, *The Shape of Athenian Law* (Clarendon Press 1993) 132-133 (noting that “votes in the lawcourt were always by ballot (*psephos*, ‘pebble’)” and that “[e]laborate precautions were taken to try to ensure that his vote was genuinely secret”).

¹²² Adriaan Lanni, ‘Precedent and Legal Reasoning in Classical Athenian Courts: A Noble Lie? (1999) 43 *American Journal of Legal History* 27-51, at 31.

¹²³ Stephen C. Todd, *The Shape of Athenian Law* (Clarendon Press 1993) 134 n 12 (“The precise numbers are unknown, but if we assume a court of 500 *dikastai*, and a plausible interpretation of a clear error in Diogenes Laertios [...], we arrive at approximately 280 to 220 votes for conviction (which fits the indications given by Plato *Apology* 36a), and then 360 to 140 for death).

¹²⁴ Plato, ‘Apology’ in Plato, *Euthyphro, Apology, Crito, Phaedo, Phaedrus* (Translated by Harold North Fowler, Harvard University Press 1914) 127 (36a).

¹²⁵ *ibid* 93 (24e10). See Thomas C. Brickhouse and Nicholas D. Smith, *Socrates on Trial* (Oxford University Press 1989) 25 fn 79.

¹²⁶ Plato, ‘Apology’ in Plato, *Euthyphro, Apology, Crito, Phaedo, Phaedrus* (Translated by Harold North Fowler, Harvard University Press 1914) 93 (24e10).

points out individuals he recognises by name.¹²⁷ These individuals, coincidentally, could have all been jurors, but if not, and that is more likely, their presence may also be an indicator for the openness of the trial.¹²⁸ Socrates further distinguishes between voluntary errors that are to be adjudged in court and involuntary errors that are to be adjudged in private,¹²⁹ thereby implying the inherent public nature of court proceedings.¹³⁰ In sum, the evidence indicates that the public nature of the trial of Socrates was characteristic for Athenian *self*-rule. It was the rule in ancient Athens that hundreds of jurors adjudicated disputes in public. This participatory nature of the administration of justice is what distinguishes Athenian *self*-rule from modern understandings of democracy. What this means for the modern principle of open justice is examined in the next section.

(iii) Some Lessons for Modern Times

In the city-state of ancient Athens hundreds of amateur jurors adjudicated on disputes in public and new jurors were appointed every year by lot from a pool of volunteers. This Athenian understanding of *self*-rule ensured that a great number of ever-changing individuals could participate directly in the administration of justice. Courts today are neither run by volunteer amateurs¹³¹ nor are there masses of ever-changing benchers adjudicating on a single dispute. In other words, modern trials are not *popular* trials within the Athenian meaning of that word. The disconnect between the exercise of government power, wielded by judges, and the people is therefore greater today than it was in ancient

¹²⁷ Plato, 'Apology' in Plato, *Euthyphro, Apology, Crito, Phaedo, Phaedrus* (Translated by Harold North Fowler, Harvard University Press 1914) 121 (33d8-34a).

¹²⁸ Thomas C. Brickhouse and Nicholas D. Smith, *Socrates on Trial* (Oxford University Press 1989) 25 fn 79.

¹²⁹ Plato, 'Apology' in Plato, *Euthyphro, Apology, Crito, Phaedo, Phaedrus* (Translated by Harold North Fowler, Harvard University Press 1914) 97 (26a).

¹³⁰ On the public nature of court proceedings in classical Athens, see also Adriaan Lanni, 'Publicity and the Courts of Classic Athens;' (2012) 24(1) *Yale Journal of Law & the Humanities* 119-135.

¹³¹ Adriaan Lanni, 'Publicity and the Courts of Classical Athens' (2012) 24 *Yale Journal of Law & the Humanities* 119-135, at 134 (noting that "[c]ourts today are run by a cloistered lawyer-elite").

Athens.¹³² The non-participatory nature of modern trials, in turn, renders public access to trials an issue of greater importance. The greater the number of ever-changing judges, the greater the number of people who are governing directly which reduces the number of people who are merely governed. The less participatory the administration of justice, on the other hand, the greater the number of people who are governed.¹³³ The greater the number of people who are governed, the more forceful the argument for open justice as the governed must be able to control their governors. The governed must also be able to gather information about the rules that govern them – judge-made or otherwise – and their creation, as was the case in the city-state of ancient Athens. Whether the principle of open justice exists under contemporary international law is the topic of the next section.

B. Open Justice as a Contemporary Principle of International Law

This section examines whether there is a general principle of open justice under contemporary international law. Article 38(1) of the Statute of the International Court of Justice¹³⁴ (ICJ Statute) formally recognises four sources of international law:

- (a) international conventions,
- (b) international custom, as evidence of general practice accepted as law,
- (c) the general principles of law recognized by civilized nations, and
- (d) subject to the provisions of Article 59 of the ICJ Statute, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

¹³² cf Adriaan Lanni, 'Publicity and the Courts of Classical Athens' (2012) 24 *Yale Journal of Law & the Humanities* 119-135, at 120.

¹³³ cf Immanuel Kant, *To Perpetual Piece: A Philosophical Sketch* (Ted Humphrey tr, Hackett Publishing Company 2003) 11 (noting that "the smaller the number of persons who exercise the power of the nation (the number of rulers), the more they represent").

¹³⁴ Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 59 Stat 1055, UKTS 67 (1946).

International conventions, to be precise, are not sources of international law, but sources of obligations under law;¹³⁵ they express in writing what states agreed to uphold. Since agreements are to be kept (*pacta sunt servanda*) and this rule itself is a general principle of law,¹³⁶ states, by signing and ratifying a treaty, create a source of obligation for themselves, to uphold the provisions of the treaty. Whether treaties create justiciable rights for private persons, to be enforced by domestic courts, depends on whether the treaty is deemed to be self-executing by the respective state, and, if not, whether it has been implemented. The status of treaties varies in municipal law; treaties may be inferior or superior to, or stand on an equal footing with municipal law. Because the aim is to identify the best possible general principle of open justice under international law within the meaning of Article 38(1)(c) of the ICJ Statute, the examination proceeds from the top down, starting with an examination of constitutions¹³⁷ and continuing with the examination of a common law right of public access to trials, before examining a right of public access to trials under international treaties, the municipal status of which may be inferior to constitutional law.¹³⁸ At the same time, the approach is a bottom-up-approach, because a universal right of public access to trials under domestic law, as per Article 38(1)(c) of the ICJ Statute, would amount to a general principle of open justice under international law.¹³⁹ If it exists, this general principle of open justice could potentially be

¹³⁵ James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 20.

¹³⁶ *Pacta sunt servanda* is a rule that is logically necessary and because of its logical necessity is a general principle of law. See Robert Kolb, *Theory of International Law* (Hart Publishing 2016) 135.

¹³⁷ This section examines foremost the text of constitutions or what David Law calls “large-c” constitutions, i.e., “de jure, written, codified, or formal constitutions,” either in the form of a legal document or a set of legal documents, as opposed to “small-c” constitutions, i.e., “de facto, unwritten, uncoded, or informal constitutions.” See David S. Law, ‘Constitutions’ in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Research* (Oxford University Press 2010) 376-398, at 377.

¹³⁸ cf Robert Kolb, *Theory of International Law* (Hart Publishing 2016) 135-136 (listing, *inter alia*, “constitutional principles,” “principles inherent in every legal order in some way or the other,” and “some low-profile common legal rules” as examples of general principles of law).

¹³⁹ On the intended rationale of Art 38(1)(c) of the ICJ Statute, see James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 20 (noting that the drafters of the

implemented by arbitrators and enforced by domestic courts, subject to the applicability of the principle of open justice to investment treaty arbitration in the first place.

(i) Domestic Guarantees of Open Justice

(a) Open Justice as an Explicit Constitutional Guarantee

This section examines open justice as an explicit constitutional guarantee. Out of the 195 states surveyed, 122 states have included an explicit guarantee of open justice in their national constitutions. These states have done so, either directly in the texts of their constitutions, or by reference to specific regional or international human rights instruments. Those states that have included an explicit guarantee of open justice in the texts of their constitutions have generally chosen one out of the following solutions: states either guarantee the right to a public trial or that trials shall be held in public or both.¹⁴⁰ It is the exception that constitutions refer to a *principle* of open justice instead.¹⁴¹ It is also the exception that constitutions explicitly refer to the right of the public to attend trials, though some constitutions include such a reference.¹⁴² Out of the 122 states that have included an explicit guarantee of open justice in their constitutions, most states have opted for a general provision, guaranteeing that *trials shall be open*.¹⁴³ Those states

provision intended ‘the general principles of law recognised by civilised nations’ to mean the “rules accepted in the domestic law of all civilized states”). On individuals as subjects of international law, see Hermann Mosler, *The International Society as a Legal Community* (Sijthoff & Noordhoff 1980) 63 (finding it not “too bold and premature to say that mankind is not only the object of all law, including international law, but that individuals are also entitled to rights with regard to States and other international subjects”).

¹⁴⁰ Three states guarantee both. See Maldives Const., 2008, Art 42; Nigeria Const., 1999 (as amended to 2010), Arts 36(1), 36(3) and 36(4); Swaziland Const., 2005, Arts 21(1) and 21(11).

¹⁴¹ For the exceptions, see Bolivia Const., 2009, Art 178(I); Myanmar Const., 2008, Art 19; Peru Const., 1993 (as amended to 2005), Art 139; Ukraine Const., 1996 (as amended to 2014), Art 129(3).

¹⁴² For the exceptions, see Afghanistan Const., 2004, Art 128(1) (“In the courts in Afghanistan, trials shall be held openly and every individual shall have the right to attend in accordance with the law.”); Iran Const., 1979 (as amended to 1989), Art 165; Sri Lanka Const., 1978 (as amended to 2015), Art 106(1).

¹⁴³ Afghanistan Const., 2004, Art 128; Federal Constitutional Law of the Republic of Austria, 1920 (as amended to 2004), Art 90(1); Azerbaijan Const., 1995 (as amended to 2009), Art 127(V); Barbados Const., 1966 (as amended to 1996), Art 18(9); Belarus Const., 1996, Art 114; Belgium Const., 1994 (as amended to 2008), Art 148(1); Belize Const., 1981 (as amended to 2011), Art 6(8); Botswana Const., 1966 (as amended to 2006), Art 10(10); Brazil Const., 1988 (as amended to 2012), Art 5(LX); Bulgaria Const., 1991

guaranteeing the *right* to a public trial in their national constitutions¹⁴⁴ have adopted the same wording as can be found in Article 10 of the Universal Declaration of Human Rights

(as amended to 2007), Art 121(3); Burkina Faso Const., 1991 (as amended to 2002), Art 136(1); Burundi Const., 2005, Art 206; Cape Verde Const., 1992, Art 226; China Const., 1982 (as amended to 2004), Art 125(1); Colombia Const., 1991 (as amended to 2011), Arts 228(1), 228(2), and 228(3); Democratic Republic of Congo Const., 2005, Art 20(1); Croatia Const., 1990 (as amended to 2001), Art 119(1); Czech Republic Const., 1992 (as amended to 2002), Art 96(2); Denmark Const., 1953, Art 65(1); Dominica Const., 1978 (as amended to 1984), Art 8(10); East Timor Const., 2002, Art 131; Ecuador Const., 2008 (as amended to 2011), Art 76(7)(d); Egypt Const., 2014, Art 187; Fundamental Law of Equatorial Guinea, 1991, Art 89; Estonia Const., 1992 (as amended to 2005), Art 24(3); Fiji Const., 2013, Art 15(4); The Gambia Const., 1996, Art 24(2); Georgia Const., 1995 (as amended to 2010), Art 85(1); Ghana Const., 1992 (as amended to 1996), Art 126(3); Hellenic Republic Const., 1975 (as amended to 2008), Art 93(2); Grenada Const., 1973, Art 8(9); Guyana Const., 1980 (as amended to 2007), Art 144(9); Haiti Const., 1987 (as amended to 2012), Art 180; Iran Const., 1979 (as amended to 1989), Art 165; Iraq Const., 2005, Art 19(7); Ireland Const., 1937 (as amended to 2015), Art 34.1; Israeli Basic Law: The Judiciary, 1984, Art 3; Jamaican Fundamental Rights (Additional Provisions) Interim Act 1999, Art 16(3); Japan Const., 1947, Art 82; Hashemite Kingdom of Jordan Const., 1952 (as amended to 2011), Art 101(3); Kiribati Const., 1979, Art 10(9); Republic of Korea Const., 1948 (as amended to 1987), Art 109; Democratic People's Republic of Korea Const., 1972 (as amended to 1998), Art 158(1); Kuwait Const., Art 165; Kyrgyz Republic Const., 2010, Art 99(1); Laos Const., 1991 (as amended to 2003), Art 83(1); Lesotho Const., 1993, Art 12(9); Lithuania Const., 1992 (as amended to 2006), Art 117(1); Grand Duchy of Luxembourg Const., 1868 (as amended to 2009), Art 88; Macedonia Const., 1991 (as amended to 2011), Art 102; Malta Const., 1964 (as amended to 2007), Art 39(3); Mauritius Const., 1968, Art 10(9); Mexico Const., 1917 (as amended to 2010), Art 20(A)(IV); Moldova Const., 1994 (as amended to 2003), Art 117; Mongolia Const., 1992 (as amended to 2000), Art 54; Morocco Const., 2011, Art 123; Nauru Const., 1968, Art 10(10); Netherlands Const., 2008, Art 121; Nicaragua Const., 1986 (as amended to 2014), Art 34(2); Norway Const., 1814 (as amended to 2014), Art 95(1); Basic Statute of the State (Sultanate of Oman) 1996, Art 63; Papua New Guinea Const., 1975 (as amended to 2009), Art 37(12); Paraguay Const., 1992 (as amended to 2011), Art 256(1); Portugal Const., 1976 (as amended to 2004), Art 206; Qatar Const., Art 133; Romania Const., 1991 (as amended to 2003), Art 127; Russian Federation Const., 1993 (as amended to 2014), Art 123(1); Rwanda Const., 2003 (as amended to 2010), Art 141(1); Saint Kitts and Nevis (formerly, Saint Christopher and Nevis) Const., 1983, Art 10(10); St. Lucia Const., 1978, Art 8(10); St. Vincent Const., 1979, Art 8(10); Declaration of Citizens' Rights and of the Fundamental Principles of the Legal Order of San Marino, 1974 (as amended to 2005), Art 15(3); Sao Tomé and Príncipe Const., 1990 (as amended to 2003), Art 123; Seychelles Const., 1993 (as amended to 2011), Art 19(8); Sierra Leone Const., 1991, Art 23(3); Slovenia Const., 2003, Art 24; Solomon Islands Const., 2001, Art 10(9); Sri Lanka Const., 1978 (as amended to 2015), Art 106(1); Instrument of Government of the Kingdom of Sweden, 1975 (as amended to 2010), Art 11(2); Swiss Const., 1998, Art 30(3); Tajikistan Const., 1994 (as amended to 2003), Art 88(3); Tunisia Const., 2014, Art 108(3); Turkey Const., 1982 (as amended to 2010), Art 141(1); Turkmenistan Const., 1992 (as amended to 2003), Art 103; Tuvalu Const., 1986, Art 22(12); Uzbekistan Const., 1992, Art 113; Viet Nam Const., 2013, Art 103(3); Yemen Const., 1994, Art 152; Zambia Const., 1991 (as amended by the Constitution of Zambia (Amendment) Act, 2016), Art 119(3).

¹⁴⁴ Armenia Const., 1995 (as amended to 2005), Art 19(1); Dominican Republic Const., 2010, Art 69 No 4; Hungary Const., 2011 (as amended to 2013), Art XXVIII(1); Kenya Const., 2010, Art 50(1); Kosovo, Const., 2008, Art 31(2); Montenegro Const., 2007, Art 32; Namibia Const., 1990 (as amended to 1998), Art 12(1)(a); Poland Const., 1997, Art 45; Samoa Const., 1960 (as amended to 2005), Art 9(1); Serbia Const., 2006, Art 32(1); Slovak Republic Const., 1992 (as amended to 2006), Art 48(2); Somalia Provisional Const., 2012, Art 34(2); South Africa Const., 1996 (as amended to 2013), Art 34; Sudan Interim National Const., 2005, Art 34(3); South Sudan Transitional Const., 2011, Art 19(3); Suriname Const., 1987,

(UDHR),¹⁴⁵ Article 14(1)(2) of the International Covenant on Civil and Political Rights (ICCPR)¹⁴⁶ and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹⁴⁷ These human rights instruments all guarantee the personal right to a public hearing by an independent and impartial tribunal in the determination of civil rights and obligations or of any criminal charge.¹⁴⁸ The UDHR is not legally binding, but it has legal force where it has been integrated into national constitutions by an explicit reference.¹⁴⁹ Even when states formulate the constitutional guarantee of open justice as a personal right to a public trial, this does not mean that the accused or the disputing parties also have an absolute right to a private trial; as a rule, it is the prerogative of courts to determine whether an exception from the rule of open justice is warranted and trials are to be held *in camera*. Yet, as a rule and as several constitutions emphasise – “[e]xcept with the agreement of all the parties” – courts may not close hearings against the wishes of the disputing parties.¹⁵⁰ It is only Article 165

Art 10; Uganda Const., 1995 (as amended to 2005), Art 28(1); Human Rights Act 1998 of the United Kingdom, Arts 1(1) and 1(2); Zimbabwe Const., 2013, Arts 69(1) and 69(2).

¹⁴⁵ United Nations General Assembly, *Resolution 217A (III): The Universal Declaration of Human Rights*, 183rd Plenary Meeting, UN Doc A/810 at 71 (10 December 1948).

¹⁴⁶ International Covenant on Civil and Political Rights, 16 December 1966, 999 *United Nations Treaty Series* 171, entered into force 23 March 1976.

¹⁴⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, 4 November 1950, 213 *United Nations Treaty Series* 222.

¹⁴⁸ It is only the European Convention on Human Rights that refers to *civil* rights and obligations. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights refer more broadly to rights and obligations (Art 10 UDHR), or rights and obligation in a suit at law (Art 14(1)(2) ICCPR).

¹⁴⁹ Andorra Const., 1993, Art 5; Djibouti Const., 1992 (as amended to 2010), Preamble(1) (“provisions shall be an integral part of this Constitution”); Guinea-Bissau Const., 1984 (as amended to 1996), Art 29(2) (“Constitutional and legal precepts related to fundamental rights must be interpreted in accordance with the Universal Declaration of Human Rights.”); Lebanon Const., 1926 (as amended to 2004), Preamble(B); Togo Const., Art 50 (“The rights and duties, stated in the Universal Declaration of Human Rights and in international instruments relating to Human Rights, ratified by Togo, shall be an integral part of this Constitution.”).

¹⁵⁰ Barbados Const., 1966 (as amended to 1996), Art 18(9); Belize Const., 1981 (as amended to 2011), Art 6(8); Botswana Const., 1966 (as amended to 2006), Art 10(10); Dominica Const., 1978 (as amended to 1984), Art 8(10); Grenada Const., 1973, Art 8(9); Guyana Const., 1980 (as amended to 2007), Art 144(9); Kiribati Const., 1979, Art 10(9); Lesotho Const., 1993, Art 12(9); Malta Const., 1964 (as amended to 2007) Art 39(3); Mauritius Const., 1968, Art 10(9); Nauru Const., 1968, Art 10(10); Papua New Guinea Const.,

of the Constitution of the Islamic Republic of Iran that allows disputing parties to decide on the closure of hearings themselves – and only in case of private disputes.¹⁵¹ Interpreted literally, this provision partially eliminates the prerogative of the court to determine whether trials are to be held *in camera*.¹⁵² It also renders the right of public access to private disputes dependent on the approval of the disputing parties, which is reminiscent of the existing rule in arbitration. If Article 165 of the Constitution of the Islamic Republic of Iran was the norm, there could not be a general right of public access to court proceedings. Article 165 is not the norm but the exception, however. It is also the case that all trials are presumptively open in Iran – also those in private disputes. This means that there is at least a *presumption* of open justice in all 122 states whose constitutions include an explicit guarantee of open justice. In 121 out of these 122 states, this presumption can only be overcome by the determination of a competent court. The next section examines open justice as an implicit constitutional guarantee.

(b) Open Justice as an Implicit Constitutional Guarantee

Whether open justice is implied in national constitutions is the topic of this section. Out of the 195 states surveyed, 73 states have *not* included an explicit guarantee of open justice in their national constitutions. This does not necessarily mean, however, that the principle of open justice does not enjoy constitutional protection in these states. The

1975 (as amended to 2009), Art 37(12); Saint Kitts and Nevis (formerly, Saint Christopher and Nevis) Const., 1983, Art 10(10); St. Lucia Const., 1978, Art 8(10); St. Vincent Const., 1979, Art 8(10); Solomon Islands Const., 2001, Art 10(9); Tuvalu Const., 1986, Art 22(12).

¹⁵¹ Iran Const., 1979 (as amended to 1989) Art 165 (“Trials shall be held openly and members of the public may attend without any restrictions; unless the court determines that an open trial would be detrimental to public morality or discipline, or if in case of private disputes, both the parties request not to hold open hearing.”).

¹⁵² cf Thore Neumann and Bruno Simma, ‘Transparency in International Adjudication’ in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013) 436-476, at 449 (interpreting similar rules applicable before the International Court of Justice and the International Tribunal for the Law of the Sea and finding that “the parties, at least theoretically, retain considerable influence on the question whether hearings are open to the public or not”).

guarantee of open justice could be implicit in the principle of democracy, or it could arise from such constitutional guarantees as the freedom of speech, the freedom of information and the fairness of trials. The following paragraphs will briefly examine these avenues, beginning with the argument from the principle of democracy.

(1) The Argument from the Principle of Democracy

In 2001, the German Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*) held that a constitutional right of public access to court proceedings is implicit in the constitutional principle of democracy.¹⁵³ This argument from the principle of democracy is rooted in the very meaning of the term *democracy*, which derives from the Greek *dēmokratía* and translates to the power (*kratos*) of the people or the rule (*kratein*) by the people (*demos*).¹⁵⁴ Self-government means that it is the people who are governing themselves. It was in the city-state of ancient Athens that the philosophical concept of democracy as self-rule was developed and where democracy was first practiced.¹⁵⁵ Self-government in the city-state of ancient Athens included elements of participatory and collective decision-making procedures in the popular assembly and the heliastic court (direct democracy). Today, representative models of self-rule prevail, some of which include elements of direct popular participation; self-rule in this context means the transfer of power to elected representatives and to government officials appointed by

¹⁵³ *BVerfG*, Judgment of 24 January 2001 (1 BvR 2623/95) para 70 (recognising that a constitutional right of public access to trials is implicit in the principle of the rule of law and in the principle of democracy). See also *BVerfG*, Decision of 13 September 2001 (1 BvR 2069/00) para 6 (confirming that a constitutional right of public access to trials is implicit in the principle of the rule of law and in the principle of democracy).

¹⁵⁴ Günter Frankenberg, ‘Democracy’ in Michel Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 250.

¹⁵⁵ But see Günter Frankenberg, ‘Democracy’ in Michel Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 250 (noting pre-classical proto-democracies in India and Sumerian city-states).

them.¹⁵⁶ In both scenarios, the public has a legitimate interest in the observance of court proceedings based on both its duty and its right to know the law and its interpretation.¹⁵⁷ In a representative democracy, the openness of trials carries more weight than in the *pólis* where hundreds of amateur popular jurors would render justice in any one case, making up a larger share of the citizenry.¹⁵⁸ The disconnect between the judiciary and the people in a representative democracy requires to a greater degree the education of the public about the law and its interpretation. Bentham emphasised the educative function of courts in a democratic society and the Constitution of the Republic of Mozambique echoes that sentiment.¹⁵⁹ Because judges derive their power from the people, the people also enjoy the right to hold judges accountable.¹⁶⁰ The benefit of this interdependency between the principles of democracy and open justice is that open justice improves the administration of justice. In the words of Bentham: “Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.”¹⁶¹ Though the degree of “control that is supplied by the publicity of an open court is [...] a matter for conjecture,”¹⁶² it is certain that the principle of open

¹⁵⁶ Günter Frankenberg, ‘Democracy’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 252.

¹⁵⁷ On the judiciary’s role to interpret the law, see *State of Washington v Trump*, United States Court of Appeals for the Ninth Circuit, Per Curiam Order on the Motion for Stay of an Order of the United States District Court for the Western District of Washington (9 February 2017) p 14.

¹⁵⁸ cf Adriaan Lanni, ‘Publicity and the Courts of Classic Athens’ (2012) 24(1) *Yale Journal of Law & the Humanities* 119-135, at 120 (noting that, in contrast to the Athenian legal system, in modern courts, there is “a disconnect between government power, which is wielded by expert judges, and the people – a gap that publicity helps to bridge”).

¹⁵⁹ See Mozambique Const., 1990, Art 161 No 2 (“The courts shall educate citizens in the voluntary and conscious observance of laws, thus establishing a just and harmonious social community.”)

¹⁶⁰ cf *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5 (High Court of Australia) para 44 (French CJ, Hayne, Kiefel, Bell and Keane JJ) (noting that “[t]he rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny”); William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 289 (“The *raison d’être* for the public nature of the hearing, the Grand Chamber has explained, is its protection of litigants against the administration of justice without public scrutiny.”)

¹⁶¹ *Scott v Scott* [1913] AC 417, at 477 (quoting Jeremy Bentham).

¹⁶² Jacob Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002) 39.

justice is the flipside of the transmission of government power in the first place. Any degree of control that is supplied by the publicity of an open court realises the ideal of self-rule to some extent.

(2) Freedom of Speech and Freedom of Information

The argument for open justice based on freedom of speech and freedom of information, though building on the argument from the principle of democracy, focuses on an informed citizenry and free discourse as prerequisites for a system of intelligent self-government. Freedom of information is an implicit component of freedom of speech in this scenario,¹⁶³ though a right of public access to court proceedings may equally arise where constitutions in democratic societies expressly guarantee a right to receive information as a separate guarantee or as an express component of the freedom of expression.¹⁶⁴ As James Madison wrote, self-rule and popular information are interdependent.¹⁶⁵ The idea of informed public debate as a prerequisite for intelligent self-government is not only rooted in “the principle that debate on public issues should be uninhibited, robust, and wide open, but also [in] the antecedent assumption that valuable public debate – as well as other civic

¹⁶³ *Richmond Newspapers* 448 US 555, at 585 (Brennan J, concurring in judgment).

¹⁶⁴ See Angola Const., 2010, Art 40(3); Antigua and Barbuda Const., 1981, Arts 12(1) and 12(2); Bhutan Const., 2008, Art 7(3); Cambodia Const., 1993 (as amended to 2008), Art 41(1); Republic of Congo Const., 2015, Art 25(3); Ethiopia Const., 1995, Art 29(2); Guatemala Const., 1985 (as amended by Legislative Accord No 18-93 of 17 November 1993), Art 35(5); Indonesia Const., 1945 (as amended to 2002), Art 28F; Kazakhstan Const., 1995 (as amended to 2007), Arts 18(3) and 20(2); Kosovo Const., 2008, Art 40(1); Macedonia Const., 1991 (as amended to 2011), Arts 16(2) and 16(3); Madagascar Const., 1998, Arts 11(1) and 11(2); Malawi Const., 1994 (as amended to 2010), Art 37; Mozambique Const., 1990, Art 74; New Zealand Bill of Rights Act 1990, Art 14; Nigeria Const., 1999 (as amended to 2010) Art 39(1); Pakistan Const., 1973 (as amended to 2015), Art 19A; Paraguay Const., 1992 (as amended to 2011), Arts 28(1) and 28(2); Philippines Const., 1987, Art III, Section 7; Rwanda Const., 2003 (as amended to 2010), Art 34(1); Senegal Const., 2001 (as amended to 2008), Art 8; Kingdom of Thailand Draft Const., 2016, Section 59; Tunisia Const., 2014, Art 32; Uzbekistan Const., 1992, Art 29(1).

¹⁶⁵ Gaillard Hunt (ed), *Writings of James Madison* (1910) 103:

A Popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

behaviour – must be informed.”¹⁶⁶ Brennan J acknowledges in *Richmond Newspapers*¹⁶⁷ that this idea has been foreshadowed in *Saxbe v Washington Post Co.*¹⁶⁸ What is at the heart of the argument from freedom of speech and freedom of information is that the right to government information, whether implicit or explicit, contains a right of public access to government proceedings such as court proceedings.¹⁶⁹

(3) The Argument from the Fairness of Trials

The guarantee of open justice could also be implicit in constitutional guarantees of the fairness of trials. *Fairness* means that judges must be impartial, free of bias or prejudice.¹⁷⁰ Open justice is thought to contribute to a trial being fair.¹⁷¹ More generally, it is thought “to enhance the integrity and quality of what takes place.”¹⁷² Open justice serves two functions in this context. It *renders* proceedings fair by “[discouraging] perjury, the misconduct of participants, and decisions based on secret bias or

¹⁶⁶ *Richmond Newspapers* 448 US 555, at 587 (Brennan J, concurring in judgment) (quoting *New York Times Co. v Sullivan* 376 US 254, 270, 84 S Ct 710, 721 (1964) (internal quotation marks omitted).

¹⁶⁷ *Richmond Newspapers* 448 US 555.

¹⁶⁸ *ibid* 587 n 3 (Brennan J, concurring in judgment) (quoting *Saxbe v Washington Post Co.* 417 US 843, at 862-863, 94 S Ct 2811, at 2821 (Powell J, dissenting):

What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny [...]. ‘[T]he First Amendment is one of the vital bulwarks of our national commitment to intelligent self-government.’ [...] It embodies our Nation’s commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression.) (Internal reference omitted).

¹⁶⁹ On the interdependency between freedom of speech, freedom of information and a right of public access to specific government proceedings, see also Eugene Volokh, *The First Amendment and Related Statutes: Problems, Cases and Policy Arguments* (4th edn, Foundation Press 2011) 542:

Limiting people’s ability to gather information about certain subjects interferes with their ability to speak about those subjects, and interferes with listener’s ability to hear about those subjects. If no-one can attend a criminal trial, reporters will find it much harder to accurately report what happened at the trial.

¹⁷⁰ On *fairness*, see Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 715.

¹⁷¹ *Case of Madaus v Germany*, ECHR Judgment of 9 June 2016, para 22.

¹⁷² *Richmond Newspapers* 448 US 555, at 578 (plurality opinion).

partiality.”¹⁷³ In addition, it *assures* onlookers and participants that the proceedings are fair.¹⁷⁴ The confidence in the administration of justice stems from its openness in this scenario;¹⁷⁵ secrecy seeds scepticism and mistrust.¹⁷⁶ In the decision of the High Court of Australia in *Russell v Russell*, Gibbs J emphasises this gain of public confidence through open justice. He writes:

“[T]he public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for ‘publicity is the authentic hall-mark of judicial as distinct from administrative procedure’.¹⁷⁷

For Gibbs J, the nature of the court is that of an open court. If a court and its proceedings were not presumptively open to the public, the institution would not be worthy of its name.¹⁷⁸ The argument from the fairness of trials is an argument from perception in part. It ties in with the argument from the principle of democracy with a difference in emphasis. Where the argument from democracy states that trials must be open *so that* public scrutiny

¹⁷³ *Richmond Newspapers* 448 US 555, at 569 (plurality opinion). See also *In re Oliver* 333 US, at 270 (“The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”).

¹⁷⁴ *Richmond Newspapers* 448 US 555, at 569 (plurality opinion).

¹⁷⁵ *Hogan v Hinch* [2011] HCA 4 (High Court of Australia) para 20 (French CJ) (“[The open-court principle] is [...] critical to the maintenance of public confidence in the courts. Under the Constitution courts capable of exercising the judicial power of the Commonwealth must at all times be and appear to be independent and impartial tribunals. The open-court principle serves to maintain that standard.”); William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 289.

¹⁷⁶ *cf* *Richmond Newspapers* 448 US 555, at 571 (“A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system has failed and at worst has been corrupted.”) and at 572 (“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”)

¹⁷⁷ *Russell v Russell* (1976) 134 CLR 495 (High Court of Australia) para 520 (Gibbs J) (reference omitted).

¹⁷⁸ *ibid* (“To require a court invariable to sit in closed court is to alter the nature of the court.”).

can occur, the argument from the fairness of trials states that trials must be open so that the benefits from public scrutiny can flow.¹⁷⁹ Procedural and substantive fairness as well as the perception of fairness are thought to be benefits that flow from public scrutiny in a democracy.

(c) Open Justice as a Common-Law Principle

The common-law principle of open justice¹⁸⁰ as it is understood here means the principle as it was originally developed in England and as it was subsequently adopted in other common-law jurisdictions. It is not known for certain when the principle of open justice was first iterated as a rule. Patrick Devlin’s remark – “[w]here the common law governs, the judge, in what is now the forgotten past, decided the case in accordance with morality and custom and later judges followed his decision”¹⁸¹ – is therefore true to the extent that the precise instance in which the common-law principle of open justice was born is now forgotten.¹⁸² Edward Coke argued that the principle of open justice existed as early as 1267 when the Statute of Marlborough was passed by King Henry III of England. Coke interprets the Statute of Marlborough as indicating that trials before the Kings Courts were presumptively open to the public.¹⁸³ Whether open justice was practised in England

¹⁷⁹ cf *Hogan v Hinch* [2011] HCA 4 (High Court of Australia) para 20 (French CJ) (“[The open court principle] is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny.” (Internal reference omitted)).

¹⁸⁰ See generally Jason Bosland and Jonathan Gill, ‘The Principle of Open Justice and the Judicial Duty to Give Public Reasons’ (2014) 38 *Melbourne University Law Review* 482-524.

¹⁸¹ Patrick Devlin, *The Judge* (Oxford University Press 1979) 177.

¹⁸² For a historical account of the origins of the right to a public trial in England (“so far as documentation exists”), see Susan N. Herman, *The Right to a Speedy and Public Trial: A Reference Guide to the United States Constitution* (Praeger 2006) 6-15.

¹⁸³ Edward Coke, *The Second Part of the Institutes of the Laws of England containing The Exposition of many ancient, and other Statutes; Whereof you may see the Particulars in a Table following* (3rd edn, with an Alphabetical Table, Printed for A. Crooke and others, Booksellers in Fleet Street, Chancery Lane, and Holborn 1669) 103-104:

These words [*In curia domini Regis*] are of great importance, for all Causes ought to be heard, ordered and determined before the Judges of the Kings Courts openly in the Kings Courts, whither all persons may resort; and in no chambers, or other private places: for the Judges are not Judges of chambers, but of Courts, and therefore in open Court, where the parties Council [*sic*] and Attorneys attend, ought

without interruption from time immemorial is unclear. The Star Chamber may¹⁸⁴ or may not¹⁸⁵ have been an exception to the rule that all court proceedings must be open to the public. If Pollock is to be believed, however, the ‘rule of publicity’ in England “persisted through all changes.”¹⁸⁶ Irrespective of the relative obscurity surrounding its historical birth and practice, the common-law principle of open justice is now firmly established; it is now an “*inveterate* rule [...] that justice shall be administered in open Court.”¹⁸⁷ Similarly, in *R v Sussex Justices*,¹⁸⁸ Lord Hewart CJ notes that “justice should not only be done, but should manifestly and undoubtedly be seen to be done”¹⁸⁹ – which is an oft cited manifestation of the contemporary common-law principle of open justice. Like other guarantees of open justice, the common-law principle of open justice only protects the presumptive openness of trials, subject to a contrary determination by a competent court.

orders, rules, awards, and judgements to be made and given, and not in chambers or other private places, where a man may lose his cause, or receive great prejudice or delay in his absence for want of defence. Nay, that Judge that ordereth or ruleth a Cause in his chamber, though his order or rule be just, yet offendeth be the Law (as here it appeareth) because he doth it not in Court.

¹⁸⁴ Edward Jenks, *The Book of English Law* (6th edn, John Murray Publishers 1967) 74 (“Only in rare instances, of which the notorious Court of Star Chamber is the most conspicuous, has the rule [that all judicial trials are held in open court] been violated; and the unpopularity of such exceptions is the best proof of the value attached by the nation to the general rule.”).

¹⁸⁵ Leonard W. Levy, *The Palladium of Justice: Origins of Trial by Jury* (Ivan R. Dee 1999) 45 (noting that “the trial itself, even before the Star Chamber, remained public”); Sir William Holdsworth, *A History of English Law*, Vol. V (Sweet & Maxwell 2003, Reprint) 184-185 (distinguishing between the ordinary procedure in the Star Chamber which required public trials but allowed the “secrecy of the examination of both defendant and witnesses” and the extraordinary procedure, a euphemism for the “disregard not only [for] the ordinary rules of procedure, but also the ordinary rules of law”).

¹⁸⁶ Frederick Pollock, *The Expansion of the Common Law* (Little, Brown, and Company 1904) 32. See also Edward Jenks, *The Book of English Law* (6th edn, John Murray Publishers 1967) 73-74 (“[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, [...] appears to have been the rule in England from time immemorial [...].”).

¹⁸⁷ *Scott v Scott* [1913] AC 417, at 445 (Earl Loreburn) (emphasis added).

¹⁸⁸ *R v Sussex; Ex parte McCarthy* [1924] 1 KB 256.

¹⁸⁹ *ibid* 259 (Lord Hewart CJ).

(d) Conclusion

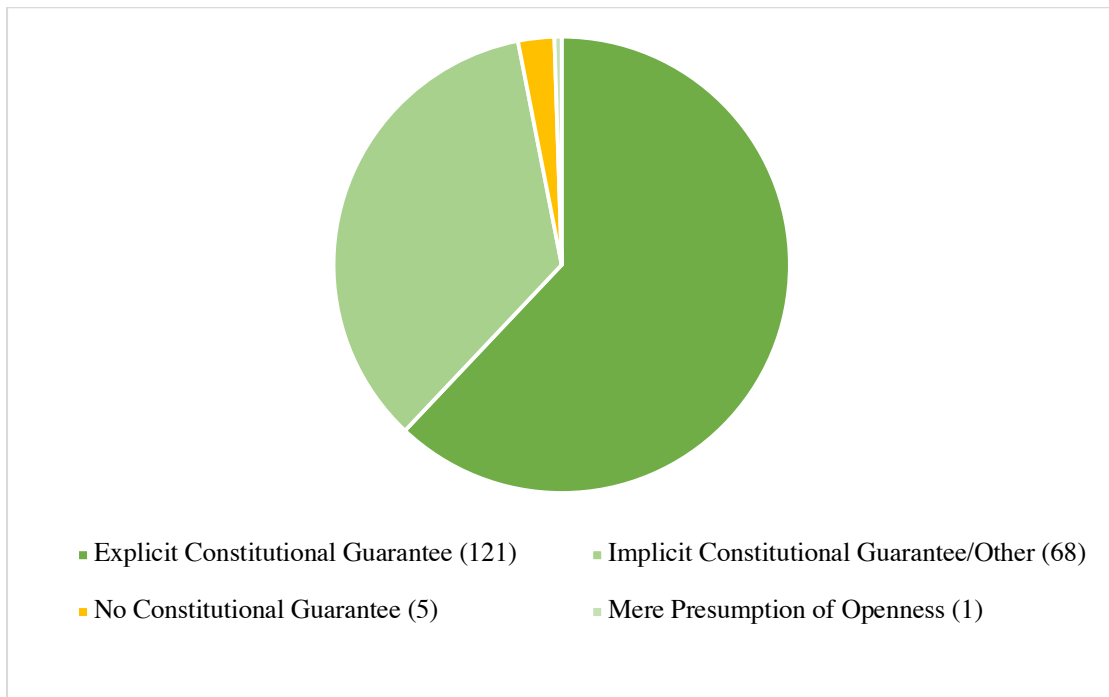
Even where the principle of open justice has not found explicit protection in the text of constitutions across the globe, it can be said to be implicit in constitutional guarantees of democratic self-government, in constitutional guarantees of freedom of speech and freedom of information and in fair trial guarantees. The guarantee of open justice is widespread: most contemporary constitutions contain either an explicit guarantee of open justice or guarantees in which the principle of open justice could be implicit. The principle of open justice is also recognised at common law. The survey in this section has shown that 122 constitutions contain an explicit guarantee of open justice. Under 121 of these constitutions, the presumption of open justice can only be overcome by the determination of a competent court. In 68 of the remaining states, i.e., those states whose constitutions do not contain an explicit guarantee of open justice, the principle of open justice is arguably implicit in other constitutional guarantees or is protected at common law.

In the Islamic Republic of Iran, private disputes are held *in camera* at the request of the disputing parties, which means that the public does not have a right of public access to those. According to the Iranian constitution, however, even private disputes are presumptively open to the public unless closed to the public at the request of the disputing parties. This means that there is at least a general presumption of open justice in the Islamic Republic of Iran. In Brunei Darussalam, the Principality of Monaco, the Kingdom of Saudi Arabia, the Kingdom of Tonga and the United Arab Emirates, there does not exist a constitutional guarantee, neither explicit nor implicit, that court proceedings must be presumptively open to the public. The principle of open justice may very well exist in these states, however, and find protection in ordinary legislation.¹⁹⁰ Despite the principle

¹⁹⁰ For an example of ordinary legislation protecting the principle of open justice, see Section 28 of the Open Courts Act 2013 (Victoria):

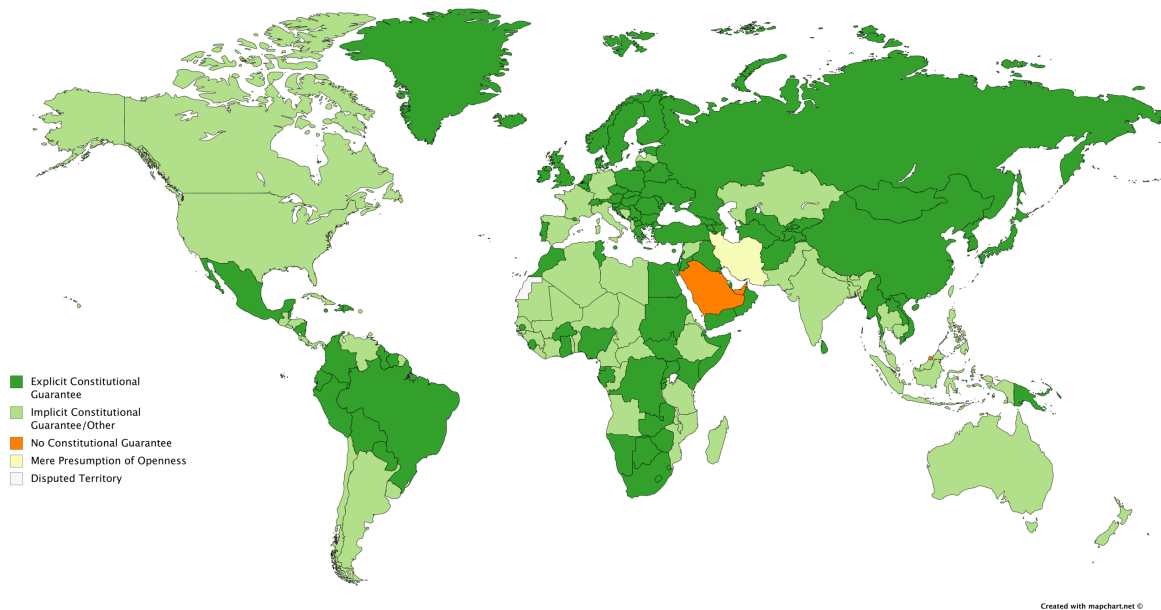
of open justice not enjoying constitutional protection in all states, its protection in 189 states out of 195 states surveyed shows that open justice is a general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice. The figures below visualise the findings of this section.

Figure 5: Domestic Guarantees of Open Justice in Numbers



To strengthen and promote the principle of open justice, there is a presumption in favour of hearing a proceeding in open court to which a court or tribunal must have regard in determining whether to make any order, including an order under this Part – (a) that the whole or any part of a proceeding be heard in closed court; or (b) that only specified persons or classes of persons may be present during the whole of any part of a proceeding.

Figure 6: A Map of Domestic Guarantees of Open Justice¹⁹¹



(ii) The Principle of Open Justice under International Human Rights Instruments

This section examines whether the principle of open justice finds additional protection under international human rights instruments. Article 14(1)(2) of the ICCPR and Article 6(1) of the ECHR indeed provide additional layers of protection for individuals in states that have ratified these human rights instruments.¹⁹² Both provisions speak of the personal right “to a fair and public hearing”. Both provisions imply that it is the prerogative of the court to determine whether the press and the public may be excluded from all or part of a

¹⁹¹ This figure was created by the author with mapchart.net on 7 May 2018. The constitutions were studied in most cases as they appear in the loose-leaf A.P. Blaustein and G.H. Flanz (eds), *Constitutions of the Countries of the World: A Series of Updated Texts, Constitutional Chronologies and Annotated Bibliographies* (Oceana, 1971-) or, where applicable, in a more updated version. Implicit constitutional guarantees of the principle of open justice rest on the principle of democracy, freedom of speech and freedom of information and the fairness of trials.

¹⁹² The ICCPR only provides an additional layer of protection in states where international treaties are deemed to be self-executing. If the ICCPR is not deemed to be self-executing and needs implementation to be effective, that implementing legislation is national legislation and does not provide protection *in addition* to national legislation. On the place of international law in the domestic legal systems of Australia, Austria, Bangladesh, Canada, China, the Czech Republic, France, Germany, Greece, Hungary, Israel, Italy, Japan, Luxembourg, Netherlands, New Zealand, Nigeria, Poland, Portugal, Russia, Serbia, Slovakia, South Africa, Uganda, United Kingdom, United States, Venezuela, see Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011).

trial.¹⁹³ Both provisions list the following reasons that would allow a court to hold a hearing *in camera*: morals, public order or national security, and the interests of the private life of the parties. What is more, both the ICCPR and the ECHR grant a court the residual power to exclude the public for other reasons; namely, “to the extent strictly necessary in the opinion of the court.” Judges are to use this power restrictively and only “in special circumstances where publicity would prejudice the interests of justice.”¹⁹⁴ The existence of this residual power implies that it is the prerogative of judges to determine whether the press and the public may be excluded from all or part of the trial. What makes the ECHR so successful – more successful generally than the ICCPR – is that Articles 34 and 35 of the ECHR allow individuals, once they have exhausted national remedies, to sue states directly for treaty breach before the European Court of Human Rights.¹⁹⁵ In sum, the principle of open justice finds protection under international human rights instruments.

(iii) The Practice of Open Justice in International Courts and Tribunals

That states have agreed to hold judicial proceedings in other international fora in public lends further credence to open justice as a general principle of international law.¹⁹⁶ The International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the European Court of Justice, the European Court of Human Rights, the Inter-

¹⁹³ In the context of Art 6(1) ECHR, see also William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 289-290 (“A litigant may waive the right to a public hearing as long as it is done in an unequivocal manner and does not run counter to an important public interest.”) (references omitted).

¹⁹⁴ The wording of Art 14(1)(2) of the International Covenant on Civil and Political Rights and the wording of Art 6(1) of the European Convention on Human Rights are identical in this respect.

¹⁹⁵ Stefan Lorenzmeier, ‘The Right of a Fair Trial in Europe? – Procedural Guarantees under the European Convention on Human Rights’ (2007) 7 *Journal of the Institute of Justice and International Studies* 40-49, at 40.

¹⁹⁶ cf Thore Neumann and Bruno Simma, ‘Transparency in International Adjudication’ in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013) 436-476, at 476 (noting “the general openness of hearings (for the majority of courts)” as an example for a pan-institutional uniformity).

American Court of Human Rights and the African Court on Human and Peoples' Rights all have in common that proceedings before them are presumptively open to the public.¹⁹⁷ This presumption of open justice does not automatically translate to a formal right of public access, however. Both Article 46 of the ICJ Statute and Article 26(2) of the ITLOS Statute allow the disputing state parties to exclude the press and the public at any time for the whole or part of a hearing, which Neumann and Simma interpret as the disputing parties retaining "considerable influence on the question whether hearings are open to the public or not."¹⁹⁸ Therefore, even though the principle of open justice exists under international human rights instruments and relevant rules of procedure, it does not override formal party autonomy before the International Court of Justice and the Tribunal for the Law of the Sea, i.e., as per the applicable rules of procedure which are arguably contrary to the general principle of open justice under international law.

(iv) Conclusion

This section has argued that the principle of open justice, as it was practised in ancient Athens, finds express or implicit constitutional protection in the overwhelming majority of states today. The interdependency between the principle of open justice and self-rule, then and now, means that all arguments for the constitutional protection of open justice, absent its express protection, flow from the principle of democracy. It is the exercise of sovereign authority by the public that requires public access to proceedings in which the law for the community is applied and made. For how could the public otherwise exercise control over and improve the judicial law-making process, if not through the presence of

¹⁹⁷ See ICJ Statute, Art 46; ICJ Rules, Rule 59; ITLOS Statute, Art 26(2); ITLOS Rules, Art 74; ECJ Statute, Art 31; ECHR, Art 40(1); ECtHR Rules, Rule 63(1); IACtHR Statute, Art 24(1); IACtHR Rules of Procedure, Rule 15(1); ACHPR Rules of Court, Rule 43(1).

¹⁹⁸ Thore Neumann and Bruno Simma, 'Transparency in International Adjudication' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013) 436-476, at 449.

the public in the courtroom¹⁹⁹ and advocacy outside the court room, best based on first-hand knowledge, should judges misapply the law or develop the law into an unwanted direction.²⁰⁰ This section has shown that where judges find the principle of open justice in constitutional guarantees of freedom of speech, freedom of information or the fairness of trials, they presuppose that the society is a democratic one. The principle of democracy is thus at the core of the principle of open justice. The guarantee of open justice in the overwhelming majority of national constitutions and, in addition, at common law, renders the principle of open justice a *general principle of law recognized by civilized nations* within the meaning of Article 38(1)(c) of the ICJ Statute. The principle of open justice is thus a principle of international law which is one of the requirements for its applicability to investment treaty arbitration. That the principle of open justice finds protection under international human rights instruments, namely, the ICCPR and the ECHR further bolsters its importance. The same is true for the practice of open justice in international courts and tribunals. The next section explores whether arbitrators are law-makers.

V. Arbitrators as Lawmakers

A. Introduction

This section argues that investment arbitrators are making law, i.e., rules that bind states participating in the system of investor-state arbitration. This section inches towards this conclusion by first juxta-positioning arbitration as it is historically understood with investment treaty arbitration and court proceedings. Secondly, this section defines the terminology that is relevant to the study of arbitrator-made law: precedent, stare decisis,

¹⁹⁹ On this disciplinary rationale of open justice, see *Scott v Scott* [1913] AC 417, at 449 (Earl Loreburn) (“There does, indeed, remain a danger that a Court may not be so jealous to do right when its proceedings are not subject to full public criticism”).

²⁰⁰ Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002) 35 (noting that “[p]ublic opinion may go to either of the two issues: that the law has been misapplied in a particular case; or that the law, as correctly determined, stands in need of reform”).

jurisprudence constante and the concept of law. Thirdly, this section explains the lack of strictly binding precedent in investor-state arbitration, before examining the theory and practice of persuasive precedent. It should not be surprising, that, absent a hierarchy of arbitral tribunals, there is no system of vertical stare decisis in investor-state arbitration.²⁰¹ Tribunals, to varying degrees, nonetheless follow prior arbitral decisions. Ironically, it is the adherence to precedent that generates the precedent.²⁰² If arbitrators did not rely on the ratio decidendi of prior awards, those awards would not have precedential value. In the apt words of Landes and Posner: “It is the practice of deciding in accordance with precedent that makes decisions operate as precedents.”²⁰³ Having established that arbitrators rely on arbitral decisions of their own volition – absent express authorisation to do so, this chapter examines whether, by relying on prior decisions, arbitrators are making law.

The specific question examined in this section is whether tribunals, over time, make law by interpreting the phrase ‘fair and equitable treatment’ in investment treaties. It is suggested that arbitrators are making law by specifying the meaning of ‘fair and equitable treatment’ and following a flexible doctrine of stare decisis. This section considers two counter-arguments to the idea of arbitral law-making: the argument from the inconsistency of arbitral decisions and the argument from the absence of a system of

²⁰¹ cf Campbell McLachlan, ‘Investment Treaty Arbitration: The Legal Framework’ in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009) 95-145, at 118 (noting that, in the investment treatment treaty arbitration system, “tribunals stand in a horizontal, and not a vertical relationship to one another”).

²⁰² For an acknowledgement of arbitrators as the creators of precedent in the investment treaty arbitration system, see Brooks W. Daly and Fedelma Claire Smith, ‘Comment on the Differing Legal Frameworks of Investment Treaty Arbitration and Commercial Arbitration as Seen Through Precedent, Annulment, and Procedural Rules’ in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009) 151-164, at 163 (acknowledging “the de facto precedent-making role of investment treaty arbitrators”).

²⁰³ William M. Landes and Richard A. Posner, ‘Legal Precedent: A Theoretical and Empirical Analysis’ (1976) 19 *Journal of Law and Economics* 249-307, at 273.

binding precedent. This section agrees that a system of *strictly* binding precedent is indeed missing from investor-state arbitration but that what, in this context, is otherwise referred to as persuasive precedent, properly labelled, is indeed binding precedent with conditional authority, which is sufficient for the creation of law. Last but not least, this section comments on whether investor-state arbitration is a legal system and whether the existence of a legal system is a requirement for the existence of arbitral law-making in the first place.

B. Arbitration, Investor-State Arbitration and Court Proceedings

Historically, arbitration is a private dispute resolution mechanism that takes place outside the public legal machinery. The defining characteristic of arbitration is that it places a premium on the autonomy of the disputing parties. In arbitration, it is generally the disputing parties who choose the adjudicators of their dispute, the applicable law and whether any proceedings and awards should be accessible to the public. This contrasts with court proceedings which are, by definition, presumptively open to the public and to which third parties have a qualified right of public access. If disputing parties take their case to a national court, a judge will be assigned to them who will apply the national law to any dispute bar any choice of law clauses.

Historically, confidentiality is a key benefit of arbitration. As a general rule and in compliance with the wishes of the disputing parties, arbitral hearings are often conducted *in camera* and arbitral awards are seldom published. If, however, arbitral proceedings are conducted *in camera* and awards are seldom published, this means that tribunals are not able to rely on prior awards, instead adjudicating each case before them on an ad hoc basis. Confidentiality thus hinders the development of case law in arbitration on which investor-state arbitration is based. It is because of the inherent confidentiality of the

arbitral process that arbitral tribunals, historically, were neither designed nor known for having developed rules that bind individuals other than the disputing parties.²⁰⁴ What is more, arbitrators derive their authority from the parties; their authority is thus limited to resolving disputes between the parties and typically does not extend to developing rules with a general validity and force. The public availability of law reports on court proceedings, by contrast, enabled the development of case law; the development of the English common law thus goes hand in hand with the emergence of law reports. It is the development of case *law* that typically distinguishes court proceedings from arbitration.

The judicial development of the law through court decisions²⁰⁵ is not a prerogative of the courts in common-law jurisdictions. Judges in civil law jurisdictions also specify the content of vague provisions over time by developing a *jurisprudence constante*. Grüneberg points out that *Rechtsprechung* and *Lehre*²⁰⁶ not only derived a general good faith principle from Section 242²⁰⁷ of the German Civil Code.²⁰⁸ *Rechtsprechung* and *Lehre* also specified the content of this provision by defining its functions and carving out relevant categories of cases to which Section 242 applies.²⁰⁹ More importantly, according to Grüneberg, these specifications amount to principles of law and any

²⁰⁴ cf William M. Landes and Richard A. Posner, ‘Legal Precedent: A Theoretical and Empirical Analysis’ (1976) 19 *Journal of Law and Economics* 249-307, at 273 (noting that “private arbitration [does] not involve the production of precedents”).

²⁰⁵ *Eli Lilly and Company v Canada*, Case No UNCT/14/2, Final Award, 16 March 2017, para 310 (noting that “evolution of the law through court decisions is natural”).

²⁰⁶ In this context, *Rechtsprechung* and *Lehre* stand for ‘jurisprudence’ and ‘teachings’ – two expressions that are reminiscent of Article 38 of the Statute of the International Court of Justice, which classifies judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.

²⁰⁷ German Civil Code, Section 242: “Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.”

²⁰⁸ Palandt/Grüneberg, *Bürgerliches Gesetzbuch* (76th edn, C.H. Beck 2017) Section 242(1) (“Rspr u Lehre haben aus § 242 den das gesamte Rechtsleben beherrschenden Grundsatz abgeleitet, dass jedermann in Ausübung seiner Rechte u Erf seiner Pfl nach Treu u Glauben zu handeln hat (BGH 85, 48, BAG NJW 05, 775)”) (emphasis removed).

²⁰⁹ Palandt/Grüneberg, *Bürgerliches Gesetzbuch* (76th edn, C.H. Beck 2017) Section 242(2) (“Rspr u Lehre haben [...] den Inhalt des § 242 dch Herausarbeitung von Funktionskreisen u Fallgruppen präzisiert.”).

application of Section 242 and any further development of Section 242 must be aligned with these principles.²¹⁰ It follows that judges in Germany, over time, also develop the law, not dissimilar from judges in common-law jurisdictions. The same holds true for judges in other civil law jurisdictions. It is therefore incorrect to assume, as Schreuer and Weiniger do, that it is only judges in common law systems who are “inching step by step towards a current exposition of the law.”²¹¹ By the same token, it is incorrect to assume that, in civil law systems, “the law is set out, *in a fully developed form*, for all to know in advance.”²¹²

To the extent that the adherence to precedents, i.e., prior judicial decisions,²¹³ differs in civil and common-law jurisdictions, if at all,²¹⁴ these differences are not relevant here. What is relevant is that the courts in both types of legal systems develop the content of general provisions over time. Court decisions interpreting and applying statutes then, to the extent that they specify and develop the law, are themselves “sources of the specific rules of law.”²¹⁵ Courts may be able to resolve the meaning of a highly specific provision in a single decision. Yet, the more general the provision, the more cases may be required

²¹⁰ Palandt/Grüneberg, *Bürgerliches Gesetzbuch* (76th edn, C.H. Beck 2017) Section 242(2) (“An diesen RGrds haben sich Anwendg u Weiterentwicklg des § 242 zu orientieren.”).

²¹¹ Christoph Schreuer and Matthew Weiniger, ‘A Doctrine of Precedent?’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1188-1206, at 1189.

²¹² *ibid* (emphasis added).

²¹³ Gary B. Born, *International Commercial Arbitration, Volume III: International Arbitral Awards* (Kluwer Law International 2014) 3810 (defining precedent as “prior judicial decisions” and noting:

The extent to which arbitral awards may serve as precedent, in other arbitral proceedings and in judicial proceedings, and the role of judicial precedent in arbitral proceedings, raise important, but infrequently discussed, questions.).

²¹⁴ cf Gary B. Born, *International Commercial Arbitration, Volume III: International Arbitral Awards* (Kluwer Law International 2014) 3811 (being doubtful as to whether the role of precedent and *stare decisis* differ in civil and common law jurisdictions: “[o]n closer consideration, it is unclear whether orthodox characterizations of the role of precedent and *stare decisis* in civil and common law jurisdictions are sufficiently nuanced”).

²¹⁵ William M. Landes and Richard A. Posner, ‘Legal Precedent: A Theoretical and Empirical Analysis’ (1976) 19 *Journal of Law and Economics* 249-307, at 249.

until a specific rule of law can be inferred. It is this specification of provisions over time and *erga omnes* that historically distinguishes both civil and common-law courts from arbitral tribunals. In general, arbitral tribunals neither have the authority to develop rules *erga omnes*, their jurisdiction deriving from the disputing parties, nor the possibility to do so, awards being predominantly kept confidential by the disputing parties.

Investor-state arbitration differs from other types of arbitration to the extent that many²¹⁶ awards are public.²¹⁷ This enables investor-state arbitral tribunals to rely on prior awards across the borders of investment treaties and to create rules *erga omnes*. The paradox is that if tribunals in investor-state arbitration are relying on prior awards, thereby creating rules *erga omnes*, tribunals, effectively, function as courts because that is the function of courts in a society: to interpret and develop the law *erga omnes*. In lieu of courts, tribunals in investor-state arbitration are doing exactly that: interpreting and developing the meaning of investment treaty norms over time and across the borders of investment treaties and therefore *erga omnes*. This development moves investor-state arbitration away from the historical design of arbitration as a private dispute resolution mechanism

²¹⁶ See UNCTAD, *Investment Dispute Settlement Navigator* <<http://investmentpolicyhub.unctad.org/ISDS>> accessed 25 October 2018 (listing 548 known concluded treaty-based investor-state arbitrations for which data as to the outcome of the arbitration or an arbitral award is available). The number of unknown awards is unknown. See also Julie A. Maupin, 'Transparency in International Investment Law: The Good, the Bad, and the Murky' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (2nd edn, Cambridge University Press 2013) 142-171, at 171 (noting that "many corners of the IIL regime remain shrouded in darkness" and mentioning unpublished treaties and unpublished awards as examples).

²¹⁷ Even though the publication of arbitral awards is relatively common in investor-state arbitration it is not guaranteed. In general, a tribunal may not publish an award without the consent of the disputing parties. See, e.g., ICSID Arbitration Rules, Rule 48(4) ("The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal."); ICSID Administrative and Financial Regulations, Regulation 22(2)(b) ("If both parties to a proceeding consent to the publication of arbitral awards, the Secretary-General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments."); UNCITRAL Arbitration Rules as adopted in 2013, Art 34(5) ("An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.").

without ramifications for third parties and towards the historical design of courts as the source of judge-made law. The next section defines the terminology that is relevant to the study of arbitrator-made law: precedent, stare decisis, *jurisprudence constante* and the concept of law.

C. Terminology

(i) Precedent and Stare Decisis

The English expression “precedent” derives from the Latin verb *praecedere*, which means “to go before, precede”.²¹⁸ In general, the expression “precedent” refers to a past act or a decision that serves as a guide or justification for future acts or decisions that are similar or analogous. In a legal context, precedent describes the phenomenon that an earlier decision “provides a reason for deciding a subsequent similar case the same way.”²¹⁹ Reliance on precedent then is a method of reasoning and is to be distinguished from the mere citation of a previous decision. Judges and arbitrators may cite previous decisions for a variety of reasons; they may wish to repeat what has been argued before them to signal to the parties that they were heard, for example. Yet reliance on precedent amounts to more than a mere citation of a case.²²⁰ Reliance on precedent means that a court draws²²¹ a principle or rule of law from a prior decision, the *ratio decidendi*, and that it leans on that principle or rule of law for guidance when deciding a subsequent case

²¹⁸ William Smith (ed), *A Latin-English Dictionary: With Tables of the Roman Calendar, Measures, Weights, and Money, and a Dictionary of Proper Names* (19th edn, London: John Murray, Albemarle Street 1888) 852; D.P. Simpson, *Cassell's New Latin-English English Latin Dictionary* (5th edn, 6th impression, Cassell London 1977) 461.

²¹⁹ William M. Landes and Richard A. Posner, ‘Legal Precedent: A Theoretical and Empirical Analysis’ (1976) 19 *Journal of Law and Economics* 249-307, at 250.

²²⁰ cf William M. Landes and Richard A. Posner, ‘Legal Precedent: A Theoretical and Empirical Analysis’ (1976) 19 *Journal of Law and Economics* 249-307, at 251 (noting “that a case citation is not the same thing as a precedent”).

²²¹ On the choice that judges have in drawing these principles or rules of law, see Julius Stone, ‘The Ratio of the Ratio Decidendi’ (1959) 22(6) *Modern Law Review* 597-620, at 615-620.

that is similar on the facts or revolves around a similar question of law.²²² Precedent exists in civil-law and common-law jurisdictions.²²³ Its binding character is a matter of degree and depends on various factors, e.g., the status of the court generating the precedent relative to the status of the court considering the precedent, the number of decisions applying the precedent and the frequency of those decisions.²²⁴ If a judgment of a higher court within any given common-law jurisdiction creates a rule, a lower court within the same jurisdiction will generally be bound by that rule.²²⁵ Not all precedent is binding, however, for there is also the concept of persuasive precedent which is defined as precedent that is not binding on a court but which nonetheless deserves careful consideration.²²⁶ For example, a single judgment from a neighbouring jurisdiction may contain a non-binding precedent.²²⁷ Precedents from the same court²²⁸ or a co-ordinate

²²² cf Adriaan Lanni, 'Arguing from 'Precedent': Modern Perspectives on Athenian Practice' in Edward M. Harris and Lene Rubinstein (eds), *The Law and the Courts in Ancient Greece* (Duckworth 2004) 159-171, at 160 ("In the contemporary common law, judges attempt to isolate the *ratio decidendi* of a previous verdict and apply it by analogy to the current case.").

²²³ Gary B. Born, *International Commercial Arbitration, Volume III: International Arbitral Awards* (2nd edn, Kluwer Law International 2014) 3815 ("Despite contrary suggestions, civil law systems treat previous judicial precedents in ways that are broadly similar to those in common law jurisdictions."); Michael Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014) 1555 ("Precedent has [...] has always been the lifeblood of legal systems. It is, of course, particularly prominent in the common law, but barely less so in the modern civil law.").

²²⁴ Gary B. Born, *International Commercial Arbitration, Volume III: International Arbitral Awards* (2nd edn, Kluwer Law International 2014) 3815.

²²⁵ It is equally possible that lower courts, in a line of consistent cases, create a rule that binds a higher court. For commentary, as to the bindingness of lower court decision on the House of Lords, the former court of last resort within the United Kingdom, see Lord Wright, 'Precedents' (1943) 8 *Cambridge Law Journal* 118-145, at 137 ("[T]here may be established rules of law not affirmed by the House but treated for many decades as axiomatic in the ordinary dealings of men and upheld by the Courts other than the House of Lords, which even if not thought the best rule would not be upset by the House.").

²²⁶ Bryan A. Garner (ed), *Black's Law Dictionary* (10th edn, Thomson Reuters 2014) 1367.

²²⁷ *ibid.*

²²⁸ William M. Landes and Richard A. Posner, 'Legal Precedent: A Theoretical and Empirical Analysis' (1976) 19 *Journal of Law and Economics* 249-307, at 250 (noting that "judge-made rules [...] declared in the earlier decisions of the same court [...] have persuasive force, but are not binding"). Not all courts always adopted this approach. In 1898, the House of Lords held that it was bound by previous decisions of its own on a point of law. See *London Street Tramways Co. Ltd. v London County Council* [1898] AC 375 (Earl of Halsbury LC), at 381 (finding "that a decision of this House upon a question of law is conclusive, and that nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House"). This practice continued until well into the 20th century. Cf Lord Denning, *The Discipline of*

court,²²⁹ as a rule, are not binding either, if ‘binding’ is understood as meaning ‘strictly binding’. The idea that a rule developed by a court does not bind the same court was already expressed in *Bright v Hutton*,²³⁰ where Lord Saint Leonards LC,²³¹ addressing the House of Lords, distinguished between the decision in a particular case and a judge-made rule of law:

[A]lthough you are bound by your own decisions as much as any Court would be bound, so that you could not reverse your own decision in a particular case, [...] you are not bound by a rule of law which you may lay down, if upon subsequent occasion you should find reason to differ from that rule; that is, this House, like every court of justice, possesses an inherent power to correct an error into which it may have fallen.²³²

If not all precedents possess the quality of being binding, it follows that there is no such thing as the bindingness of precedent.²³³ Stare decisis then must mean something other than ‘the bindingness of precedent’. Stare decisis derives from the Latin expression *stare decisis et non quieta movere* – “to stand by things decided, and not to disturb settled points.”²³⁴ It is an expression of the rule that once “a point or principle of law has been

Law (Butterworth 1979) 287, 291 and 296 (noting that, in his time in the House of Lords – from 1957 to 1962 and contrary to early historical practice – “the House held itself to be absolutely bound by the doctrine of *stare decisis*”).

²²⁹ Robert Noonan, ‘Stare decisis, overruling, and judicial law-making: the paradox of the JC case’ (2017) 57 *Irish Jurist* 119-143, at 122 (“Generally, the rule is that courts of co-ordinate jurisdiction need only take their own precedents as persuasive, whereas a court of lesser jurisdiction must take the precedent of a higher court as binding.”).

²³⁰ *Henry Smith Bright v James Hutton (Bright v Hutton)* (1852) 3 House of Lords Cases 341.

²³¹ Edward Burtenshaw Sugden, 1st Baron Saint Leonards, then Lord Chancellor of Great Britain.

²³² *Bright v Hutton* (1852) 3 House of Lords Cases 341, at 388 (Saint Leonards LC). To the same effect, *Wilson v Wilson* (1854) 5 House of Lords Cases 57 (Lord Saint Leonards) and *Scott v Maxwell* (1854) 1 Macq. 791 (Lord Saint Leonards) (arguing that the House of Lords was not bound to persevere in a demonstrable error).

²³³ Robert Noonan, ‘Stare decisis, overruling, and judicial law-making: the paradox of the JC case’ (2017) 57 *Irish Jurist* 119-143, at 119 (defining stare decisis as the “bindingness of precedent”).

²³⁴ Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 1626.

[...] officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases.”²³⁵ Stare decisis therefore is a *rule of adherence to precedent*.²³⁶ That stare decisis is a rule should not be read as that rule being a rule of law. Stare decisis is a policy judgment,²³⁷ not a “universal inexorable command.”²³⁸ Being a rule of adherence, stare decisis does not describe the quality of precedent as being binding but the obligation to adhere to precedent – whether that precedent is binding or not.²³⁹ Stare decisis thus defined embodies varying degrees of obligation. If a precedent is strictly binding, stare decisis requires a court to strictly follow that precedent.²⁴⁰ If a precedent is merely persuasive, stare decisis may require a

²³⁵ Cooley & Charles Lesley Ames (eds), *Brief Making and the Use of Law Books by William M. Lile, Henry S. Redfield, Eugene Wambaugh, Edson R. Sunderland, Alfred F. Mason, and Roger W. Cooley* (3rd edn, West 1914) 321 (noting, in addition: “When a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same; and this it does for the stability and certainty of the law.”).

²³⁶ Cooley & Charles Lesley Ames (eds), *Brief Making and the Use of Law Books by William M. Lile, Henry S. Redfield, Eugene Wambaugh, Edson R. Sunderland, Alfred F. Mason, and Roger W. Cooley* (3rd edn, West 1914) 321.

²³⁷ Frederick G. Kempin, “Precedent and Stare Decisis: The Critical Years, 1800 to 1850” (1959) 3 *American Journal of Legal History* 28-54, at 28 (“The modern doctrine of stare decisis as applied in the United States is a general policy of all courts to adhere to the ratio decidendi by the highest court in a given jurisdiction, as long as the principle derived therefrom is one that is still consonant with reason, was necessary to the decision of the prior case, and was brought to the attention of the prior court by argument.”) (footnote omitted); *Agostini v Felton* 521 US 203, 235-236 (1997).

²³⁸ *Burnet v Coronado Oil & Gas Co.* 285 US 393, 405 (1932) (Brandeis J, dissenting).

²³⁹ This definition will be used throughout this thesis in contrast to others who define stare decisis as binding precedent. For the latter definition, see Charles N. Brower, Michael Ottolenghi and Peter Prows, ‘The Saga of CMS: Res Judicata, Precedent, and the Legitimacy of ICSID Arbitration’ in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 843-864, at 845. The benefit of not defining stare decisis as binding precedent is clarity. If stare decisis meant binding precedent, there would be no room for the expression super stare decisis, a theory according to which “courts must follow earlier court decisions without considering whether those decisions were correct.” See Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 1626 (defining super stare decisis).

²⁴⁰ On the binding nature of higher court decisions on lower courts, see Frederick G. Kempin, “Precedent and Stare Decisis: The Critical Years, 1800 to 1850” (1959) 3 *American Journal of Legal History* 28-54, at 29 (“As applied to lower courts in each jurisdiction, the policy of stare decisis is buttressed by the fact

court to carefully consider that precedent without being bound by it. What it means to be obliged to carefully consider a precedent, in turn, depends on the source of that precedent. If a precedent originates in the highest court of a jurisdiction and that court is reconsidering its own precedent, it will have to be more cautious²⁴¹ in overruling its own precedent than a court that is considering a precedent from a neighbouring jurisdiction. It is common in this context to speak of a precedent being stronger or weaker. It is not unheard of either to speak of the greater or lesser pull of a precedent²⁴² or to characterise the varying degrees of “bindingness” of precedent. To admit to varying degrees of “bindingness” of precedent renders the distinction between binding and non-binding precedent futile but perhaps more accurately reflects the varying degrees to which courts adhere to precedent. If stare decisis is a rule of adherence to precedent, irrespective of whether that precedent is binding or not, every precedent, in theory, including non-binding precedent, exerts some pull on judges. Precedents from the same court, despite their non-binding character, for example, exert a greater pull on judges than precedents from a court in a neighbouring jurisdiction, which are not strictly binding either.

The reconsideration of a precedent is a delicate matter in general because to overrule a precedent means to disturb a settled point. To disturb a settled point, in turn, would be contrary to the policy judgment that lies at the heart of the doctrine of stare decisis; namely, that “in most matters it is more important that the applicable rule of law be settled than that it be settled right.”²⁴³ Predictability of the law and consistency and uniformity

that these courts, being subject to reversal, must necessarily heed the voice of their superior courts and follow such guidance as is given them.”).

²⁴¹ cf *State Oil Co. v Khan* 522 US 3, 20 (1997) (“We approach the reconsideration of decisions of this Court with the utmost caution.”).

²⁴² The author learned this expression from Oran Doyle at a workshop of the Irish Jurisprudence Society on 12 April 2018.

²⁴³ *Burnet v Coronado Oil & Gas Co.* 285 US 393, 406 (1932) (Brandeis J, dissenting) (“Stare decisis is usually the wise policy, because, in most matters, it is more important that the applicable rule of law be settled than that it be settled right.”).

of decisions are some of the rationales for the doctrine of stare decisis in the first place.²⁴⁴ Yet stare decisis is not a rule that is inflexible either;²⁴⁵ it also allows a court to depart from a precedent when it deems the prior decision to be erroneous.²⁴⁶ Brandeis J freely admits that the United States Supreme Court “bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.”²⁴⁷ Lord Denning would seem to agree with Brandeis J that stare decisis is a rule that is not an inflexible one. If judges too strictly adhere to precedents, Lord Denning warns that “[t]he common law will cease to grow. Like a coral reef, it will become a structure of fossils.”²⁴⁸ Lord Denning also approves of Lord Gardiner’s statement in the House of Lords that “too *rigid* adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.”²⁴⁹ What is important at this point is that stare decisis is a rule of adherence to precedent – similar to the doctrine of *jurisprudence constante*.

²⁴⁴ cf *Burnet v Coronado Oil & Gas Co.* 285 US 393, 405-406 (1932) (Brandeis J, dissenting).

²⁴⁵ *Burnet v Coronado Oil & Gas Co.* 285 US 393, 405-406 (1932) (Brandeis J, dissenting).

²⁴⁶ Most of the supreme courts in the world hold themselves at liberty to overrule a previous decision of themselves or their predecessors if they consider that decision to be *erroneous*. See Lord Denning, *The Discipline of Law* (Butterworths 1979) 294. For an example of the United States Supreme Court using the language of error, see *Burnet v Coronado Oil & Gas Co.* 285 US 393, 410 (1932) (Brandeis J, dissenting). For references that Irish, Canadian and Australian courts also use the language of error or wrongness when it comes to overruling prior decisions, see Robert Noonan, ‘Stare decisis, overruling, and judicial law-making: the paradox of the JC case’ (2017) 57 *Irish Jurist* 119-143, at 126.

²⁴⁷ *Burnet v Coronado Oil & Gas Co.* 285 US 393, 407-408 (1932) (Brandeis J, dissenting). The world of science also features in Lord Denning’s argument for a non-strict rule of stare decisis. See Lord Denning, *The Discipline of Law* (Butterworth 1979) 292:

Just the scientist seeks for truth so the lawyer should seek for justice. Just as the scientist takes his instances and from them builds up his general propositions, so the lawyer should take his precedents and from them build up general principles. Just as the propositions of the scientist fall to be modified when shown to be in error, so the principles of the lawyer should be modified when found to be unsuited to the times and discarded when found to work injustice.

²⁴⁸ Lord Denning, *The Discipline of Law* (Butterworth 1979) 292 (footnote omitted). Lord Denning borrowed the expression ‘structure of fossils’ from Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of Crisis in American Power Politics*, p 295.

²⁴⁹ Lord Denning, *The Discipline of Law* (Butterworth 1979) 296-297 (citing Lord Gardiner’s Practice Statement (Judicial Precedent) in the House of Lords on 26 July 1966) (quotation marks omitted).

(ii) Differences between Stare Decisis and *Jurisprudence Constante*

The difference between the doctrines of stare decisis and *jurisprudence constante* is that stare decisis may “command strict adherence to a legal principle applied on one occasion in the past”²⁵⁰ whereas *jurisprudence constante* requires a long line of consistent cases before exerting its full force. The latter, to be precise, is “[t]he doctrine that a court should give great weight to a rule of law that is accepted and applied in a long line of cases, and should not overrule or modify its own decisions unless clear error is shown and injustice will arise from continuation of a particular rule of law.”²⁵¹ *Jurisprudence constante*, therefore, is also a rule of adherence; it describes the duty to comply with a rule that is accepted and applied in a long line of consistent cases.

The expression ‘stare decisis’ is generally used to describe the courts’ adherence to precedents in common-law jurisdictions, whereas *jurisprudence constante* dominates the debate on precedent in civil-law jurisdictions. This distinction between stare decisis and *jurisprudence constante* along the civil and common-law divide is incorrect in its generality, however. A single decision by a higher court in a civil-law jurisdiction may have the force of law within that jurisdiction. By the same token, the idea of a *jurisprudence constante* is not unknown to common-law jurisdictions either. Landes and Posner point out that while a common-law court may create a rule of law in a single decision, that rule “will [...] tend to be extremely narrow in scope.”²⁵² For a broader rule to develop “a string of holdings [is generally required] – for it is only from a series of decisions, each determining the legal significance of a slightly different set of facts, that

²⁵⁰ cf Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 985 (noting “that *jurisprudence constante* does not command strict adherence to a legal principle applied on one occasion in the past” as does stare decisis).

²⁵¹ Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 985.

²⁵² William M. Landes and Richard A. Posner, ‘Legal Precedent: A Theoretical and Empirical Analysis’ (1976) 19 *Journal of Law and Economics* 249-307, at 250.

a rule applicable to a situation common or general enough to be likely to recur in the future can be inferred.”²⁵³ The long line of consistent decisions that turns a precedent into a superprecedent²⁵⁴ can also be characterised as a *jurisprudence constante*. This section will examine the questions of (strictly) binding precedent, *jurisprudence constante* and *stare decisis* in investor-state arbitration. The next sub-section defines the concept of law as arbitral law-making is one of the requirements for the applicability of the principle of open justice to investor-state arbitration.

(iii) The Concept of Law

This section defines the concept of law and how it relates to other terms such as *stare decisis*, binding precedent, persuasive precedent and authoritative precedent. Law is a social construct;²⁵⁵ laws are rules that are binding within any given group. If a rule is not “a rule of the group”²⁵⁶ it does not exert any social pressure on the members of the group.²⁵⁷ In other words, “[a]ll law is the law of a group of individuals or of groups made up of individuals.”²⁵⁸ There must be rules, therefore, and these must be binding. Further, there must be a relevant group of individuals which is bound by these rules. Whether rules are binding is a question that is distinct from the question whether a court is bound by prior decisions. These two questions are linked, however. These two questions are linked

²⁵³ William M. Landes and Richard A. Posner, ‘Legal Precedent: A Theoretical and Empirical Analysis’ (1976) 19 *Journal of Law and Economics* 249-307, at 250 (noting, in addition: “Where [...] the rule has been [...] solidified in a long line of decisions, the authority of the rule is enhanced. The rule then represents the accumulated experience of many judges responding to the arguments and evidence of many lawyers and it therefore more likely to be followed in subsequent cases.”).

²⁵⁴ Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 1367 (defining superprecedent as “[a] precedent that has become so well established in the law by a long line of reaffirmations that it is very difficult to overturn it; specif., a precedent that has been reaffirmed many times and whose rationale has been extended to cover cases in which the facts are dissimilar, even wholly unrelated, to those of the precedent”).

²⁵⁵ On the assumption of the primacy of the social, see Joseph Raz, ‘The Institutional Nature of Law’ (1975) 38(5) *Modern Law Review* 489-503, at 489-490.

²⁵⁶ H.L.A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 94.

²⁵⁷ cf H.L.A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 94.

²⁵⁸ Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (1987) 33.

because binding rules or laws do not exist in the absence of principles that render rules binding. The binding nature of a rule is therefore not intrinsic to the rule itself but ascribed to it. In the words of Freeman:

Statutes and prior decisions are the main sources of rules but judges are only required to apply these because of the principles of legislative supremacy and stare decisis. It is these principles that make rules binding. Thus, a system of rules that judges have a duty to apply “the law” is not possible unless principles also bind the judges.²⁵⁹

Thus, for arbitrators to be making law, a principle must exist that renders rules binding. If prior decisions are a source of rules, and if it is the principle of stare decisis that renders the rules developed in prior decisions binding, the existence of the principle of stare decisis in investor-state arbitration is a prerequisite for categorising the arbitral activity of specifying the meaning of treaty norms over time as law-making. It is useful to reiterate the meaning of stare decisis at this point. Stare decisis is a rule of adherence to precedent; it can lead to a court being strictly bound by prior decisions (binding precedent). Binding precedents are those which a court must follow.²⁶⁰ Within common-law jurisdictions lower courts must follow applicable holdings of a higher court, whereas the same court is not strictly bound by its own prior decisions. Yet, binding precedent is but one example of the implementation of the principle of stare decisis. It is by no means its only possible implementation. The principle of stare decisis – “to stand by things decided”²⁶¹ – may also find its implementation in the principle that a court, without being strictly bound by prior decisions, must still heed to prior decisions unless it finds that the point of law

²⁵⁹ Michael Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014) 329.

²⁶⁰ cf Bryan A. Garner (ed), *Black's Law Dictionary* (10th edn, Thomson Reuters) 1366.

²⁶¹ Bryan A. Garner (ed), *Black's Law Dictionary* (10th edn, Thomson Reuters) 1626.

decided in these decisions shows signs of clear error. The United States Supreme Court follows this more flexible doctrine of stare decisis,²⁶² as does the Supreme Court of the United Kingdom and as is befitting for the highest court in any common-law jurisdiction.²⁶³ It is befitting for “[n]o legal system could endure stagnation.”²⁶⁴

If then the doctrine of stare decisis can find expression in both an inflexible and a flexible implementation, strictly binding precedent is not required in order to categorise a judicial activity as law-making. The United States Supreme Court is not strictly bound by its own prior decisions. Yet, this does not mean that the Supreme Court is not making law. On the contrary. By specifying the meaning of constitutional provisions over time, adhering to a flexible doctrine of stare decisis, the Supreme Court is making law; it is creating rules that are binding on lower courts and, to some extent, also on itself. The First Amendment right of public access to adjudicative government proceedings is the result of such a judicial law-making process. Even though the definition of the First Amendment right of public access, as defined by the Supreme Court, does not strictly bind the Court, its prior decisions exert a great degree of pull on the Court which will not derogate from its own definition of the First Amendment right of public access unless clear error is shown.

A system of strictly binding precedent is therefore not required to define a judicial activity as law-making; as long as there is a doctrine of stare decisis, even if only a flexible one,

²⁶² *Burnet v Coronado Oil & Gas Co.* 285 US 393 (1932) 407-408 (Brandeis J, dissenting) (noting that the United States Supreme Court “bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function”).

²⁶³ Most supreme courts in the world hold themselves at liberty to overrule a prior decision of themselves or their predecessors if they consider that decision to be *erroneous*. See Lord Denning, *The Discipline of Law* (Butterworths 1979) 294.

²⁶⁴ *Merrill & Ring Forestry v Canada*, UNCITRAL Award (31 March 2010) para 193.

judges can be deemed to be making law. Since there is no doctrine of super stare decisis²⁶⁵ in investor-state arbitration, which would bind later tribunals strictly to earlier decisions, the remaining two options are a simple or flexible doctrine of stare decisis and the lack of a doctrine of stare decisis in investor-state arbitration. If arbitrators adhere to a flexible doctrine of stare decisis that requires them to follow prior decisions unless clear error is shown, arbitrators would be making law, in the same fashion that the United States Supreme Court is making law. If arbitral tribunals acted as if they were a single court that is bound by a flexible doctrine of stare decisis, they would be making law – as a Supreme Court within a single jurisdiction would. Whether other arbitral decisions exert such a great amount of pull is yet to be determined in this section. The other option is that there is no doctrine of stare decisis in the system of investor-state arbitration, which would mean that arbitrators are not making law. If there is no principle that binds arbitrators, investor-state arbitration would not be a system of rules in which arbitrators have a duty to apply ‘the law’ as such a system would be impossible.²⁶⁶ The next section examines how these two options fit in with the term *persuasive precedent*.

If arbitrators conceive of prior arbitral decisions as persuasive precedents originating in neighbouring jurisdictions, i.e., without there being a rule requiring arbitrators to adhere to these persuasive precedents, then arbitrators would not be making law. In general, there is no rule that would require judges to adhere to precedents originating in neighbouring jurisdictions. *Ergo*, persuasive precedents from neighbouring jurisdictions are not sources of law. The phrase ‘persuasive precedents’ is misleading in its generality, however. What is misleading is that it creates the impression that persuasive precedents cannot be sources

²⁶⁵ Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters) 1626 (noting that the theory of super stare decisis requires courts to “follow earlier court decisions without considering whether those decisions were correct”).

²⁶⁶ cf Michael Freeman, *Lloyd’s Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014) 329.

of law. While persuasive precedents from neighbouring jurisdictions, absent a principle of stare decisis transcending jurisdictional boundaries, are not sources of law, this does not mean that persuasive precedents can never be sources of law. The phrase persuasive precedent in itself does not reveal whether a court, by following a persuasive precedent, is making law. In order to be able to define a judicial activity as law-making, there must be a principle binding the judges. What matters is not whether a court is strictly bound by a specific precedent but whether there is a principle that requires a court to adhere to that precedent, whether that precedent is strictly binding or not.²⁶⁷ The doctrine of stare decisis is such a principle. The doctrine of stare decisis requires the United States Supreme Court to follow its own prior decisions, except when clear error is shown, and despite the fact that its decisions, to the United States Supreme Court itself, are merely persuasive. In sum, if the term persuasive precedent is used to refer to precedents originating in the same court,²⁶⁸ it could be overlooked that these persuasive precedents are sources of law – at least in a system of stare decisis.

To better distinguish between the different categories of persuasive precedent, it is useful to first distinguish, as John William Salmond does, between two classes of precedents: those that are authoritative and those that are merely persuasive.²⁶⁹ Salmond, as others do, refers to precedents from neighbouring jurisdictions as ‘persuasive precedents.’²⁷⁰ Yet, what is otherwise known as persuasive precedents originating in the same court, Salmond refers to as ‘binding precedents with conditional authority.’ In order for a binding precedent to exert conditional authority, the court, while generally being bound

²⁶⁷ cf Michael Freeman, *Lloyd’s Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014) 329.

²⁶⁸ William M. Landes and Richard A. Posner, ‘Legal Precedent: A Theoretical and Empirical Analysis’ (1976) 19 *Journal of Law and Economics* 249-307, at 250 (noting that “judge-made rules [...] declared in the earlier decisions of the same court [...] have persuasive force, but are not binding”).

²⁶⁹ John William Salmond, *Jurisprudence* (7th edn, Sweet & Maxwell 1924) 191.

²⁷⁰ *ibid.*

by that precedent, must “possess a certain limited power of disregarding it.”²⁷¹ More specifically, if a precedent is binding but for its clear and serious erroneousness, “either in law or in reason,”²⁷² the precedent is binding with conditional authority.²⁷³ If, on the other hand, a precedent is binding, even if it is unreasonable or erroneous, that precedent, according to Salmond, is a ‘binding precedent with absolute authority.’²⁷⁴ In short, what Landes and Posner refer to as persuasive precedent; namely, non-binding precedent originating in the same court under a flexible doctrine of stare decisis,²⁷⁵ Salmond refers to as binding precedent with conditional authority. He thereby acknowledges the paradox that a non-binding precedent can be somewhat binding by creating the category of precedents that are usually binding, unless in the limited category of cases in which they are not.

The paradox that a precedent can be binding without being strictly binding was also recognised by Joseph Raz. Raz points out that it is quite impossible to state “that the courts are bound to follow laws which they are at liberty to disregard.”²⁷⁶ It is impossible because for there to be law, there must be principles binding the judges.²⁷⁷ The principle binding the judges in a system of non-binding precedent is the limited category of cases in which precedents are non-binding. Raz clarified that courts in common-law jurisdictions are not at liberty to disregard binding common-law rules “whenever they consider that on the balance of reasons it would be better to do so.”²⁷⁸ Instead, in the

²⁷¹ John William Salmond, *Jurisprudence* (7th edn, Sweet & Maxwell 1924) 192.

²⁷² *ibid* 196.

²⁷³ *ibid* 192.

²⁷⁴ *ibid*.

²⁷⁵ William M. Landes and Richard A. Posner, ‘Legal Precedent: A Theoretical and Empirical Analysis’ (1976) 19 *Journal of Law and Economics* 249-307, at 250.

²⁷⁶ Joseph Raz, ‘The Institutional Nature of Law’ (1975) 38(5) *Modern Law Review* 489-503, at 498 (adding that “[a] rule which the courts have complete liberty to disregard or change is not binding on them and is not part of the legal system”).

²⁷⁷ Michael Freeman, *Lloyd’s Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014) 329.

²⁷⁸ Joseph Raz, ‘The Institutional Nature of Law’ (1975) 38(5) *Modern Law Review* 489-503, at 498.

words of Raz, courts in common-law jurisdictions may overrule established precedent²⁷⁹ and “repeal laws and replace them with rules which they judge to be better than the old ones”²⁸⁰ only for certain kinds of reasons, included in the permissible list.²⁸¹ The limitation of permissible reasons is a feature of the bindingness of the rule itself. In the words of Raz:

[T]he fact that one is under an obligation is consistent with being at liberty to disregard it under certain conditions, provided that one is not at liberty to disregard it any time one finds that on the balance of reasons, it would be best to do so.²⁸²

In sum, the paradox of a precedent which may be overruled in limited circumstances but is nonetheless binding is adequately described as a ‘binding precedent with conditional authority.’ Because the term persuasive precedent does not evoke the bindingness of such a precedent, this thesis adopts the terminology as introduced by Salmond; the latter better reflects the authoritative nature of what is otherwise known as persuasive precedents originating in the same court under a flexible doctrine of stare decisis – in contrast to persuasive precedents originating in other jurisdictions, which are not authoritative.

The recognition of the authoritative nature of persuasive precedents originating in the same court is a prerequisite for characterising these precedents as sources of law. For Salmond, “authoritative precedents are *legal* sources of law, while persuasive precedents are merely *historical*.”²⁸³ For Salmond, authoritative precedents “establish law in pursuance of a definite rule of law which confers upon them that effect, while the latter,

²⁷⁹ Joseph Raz, ‘The Institutional Nature of Law’ (1975) 38(5) *Modern Law Review* 489-503, at 498.

²⁸⁰ *ibid.*

²⁸¹ *ibid.* (noting that courts may change binding common-law rules only, “for example, for being unjust, for iniquitous discrimination, for being out of step with the court’s conception of the purpose of the body of laws to which they belong”).

²⁸² *ibid.*

²⁸³ John William Salmond, *Jurisprudence* (7th edn, Sweet & Maxwell 1924) 191.

if they succeed in establishing law at all, do so indirectly, through serving as the historical ground of some later authoritative precedent. In themselves they have no legal force or effect.”²⁸⁴ In other words, Salmond believes in a rule that confers upon precedents their binding effect (*stare decisis*). That rule confers either absolute or conditional authority on authoritative precedents. It must be remembered, however, that courts create these rules themselves and that their power to do so derives from laws of the very same legal system they form part of. If a higher court deems itself strictly bound by its own prior decisions, the self-proclaimed rule is that the court is strictly bound (*super stare decisis*) until it changes the secondary rule conferring that effect on its own prior decisions.

If brought to its logical conclusion, Salmond’s argument entails the lesson that for judges to be making law, there must be a rule, created by judges, that is conferring authority on precedents, thereby binding judges. That authority can either be conditional or absolute, but it must exist for in the absence of such a conferral of authority, a precedent is not a source of law. *Stare decisis* is such a rule or principle. It renders precedents binding, to varying degrees, depending on the specific doctrine of *stare decisis* adopted. *Stare decisis* binds judges as per the judges themselves. The question then is whether arbitrators have created a flexible doctrine of *stare decisis* in the investment treaty arbitration system, rendering precedents authoritative as opposed to merely persuasive. The remainder of this chapter explores this avenue, examining whether what is widely known as persuasive precedents in investor-state arbitration are actually binding precedents with conditional authority – similar to precedents originating in the same court within a single jurisdiction under a flexible doctrine of *stare decisis*. The next section proceeds by first explaining the lack of strictly binding precedent in the investment treaty arbitration system.

²⁸⁴ John William Salmond, *Jurisprudence* (7th edn, Sweet & Maxwell 1924) 191.

D. Rationales for the Lack of Strictly Binding Precedent in Investor-State Arbitration and their Merit

It might not be a truth universally acknowledged but it is accurate that there is no such thing as strictly binding precedent in the investment treaty arbitration system.²⁸⁵ Strictly binding precedent means “a precedent that a court *must follow*”²⁸⁶ just as a lower court in a common-law jurisdiction “is bound by an applicable holding of a higher court in the same jurisdiction.”²⁸⁷ This definition of strictly binding precedent overlaps with but does not consume the definition of *stare decisis*, a rule of adherence to precedent, which describes a court’s obligation to adhere to precedents. *Stare decisis* includes the obligation to follow binding precedents but also the obligation to consider persuasive precedents. The obligation to consider persuasive precedents may exert considerable force, depending on the varying degrees of persuasive precedent. This section explains the lack of strictly binding precedent in the investment treaty arbitration system. This section considers three proposed rationales for the lack of strictly binding precedent: a potential codification of a prohibition of strictly binding precedent, the alleged fact-specificity of investment disputes and the arbitral tribunals’ singularity of jurisdiction.

²⁸⁵ For an expression of this view, see *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction (Ancillary Claim), 2 August 2004, para 25; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID ARB/03/16, Award, 2 October 2006, para 293 (“It is true that arbitral awards do not constitute binding precedent.”); *Grand River Enterprises Six Nations, LTD., et al. v United States of America*, UNCITRAL Award, 12 January 2011, para 61 (noting that “NAFTA arbitral awards are not binding precedents” and erroneously quoting NAFTA Article 1136(1) in support of their opinion); *Apotex Holdings Inc. and Apotex Inc. v United States of America*, ARB(AF)/12/1, Award, 25 August 2014, para 9.37 (“These [decisions] [referring to the decision by other NAFTA and international tribunals] are of course not binding on this Tribunal, which must make its own determinations regarding the facts and the law relevant to this case.”); *Hochtief AG v Argentine Republic*, ICSID Case ARB/07/31, Decision on Liability, 29 December 2014, para 219 (“The Treaty does not define the FET standard, and the decisions of other tribunals (to which both Parties referred) are not in themselves binding sources of international law.”); Christoph Schreuer and Matthew Weiniger, ‘A Doctrine of Precedent?’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1188-1206, at 1189.

²⁸⁶ Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 1366.

²⁸⁷ *ibid.*

(i) The Inconclusiveness of Codified Rules

It might be the case that international investment agreements, including arbitration rules or conventions they reference, prohibit a system of strictly binding precedent. Article 1136(1) of the North American Free Trade Agreement (NAFTA)²⁸⁸ provides that “[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.” This wording can also be found in other international investment agreements.²⁸⁹ It is common for these provisions to be preceded by a heading that reads ‘Finality and Enforcement of an Award’. Other investment agreements state positively, in varying degrees of specificity, that an award shall be final and binding on the disputing parties with respect to the particular case.²⁹⁰ Such an expression can also be found in institutional arbitration rules²⁹¹ and in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Article 53(1)(1) of the ICSID Convention states, for example, that “[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”

²⁸⁸ The North American Free Trade Agreement 1992 (1993) 32 *International Legal Materials* 289, 605 (NAFTA).

²⁸⁹ According to the *International Investments Agreements Navigator*, fifty-one investment agreements contain this phrase. See, for example, US-Uruguay BIT of 4 November 2005 (entered into force on 31 October 2006), Art 34(4); Canada-China BIT of 9 September 2012 (entered into force on 1 October 2014), Art 32; Canada-Cameroon BIT of 3 March 2014 (entered into force on 16 December 2016), Art 35(1). Jeswald W. Salacuse was therefore hasty to conclude that no investment agreement other than NAFTA contains a provision as specific as NAFTA Art 1136(1). Cf Jeswald W. Salacuse, *The Law of Investment Treaties* (2nd edn, Oxford University Press 2015) 170-171.

²⁹⁰ See, for example, US-Argentine Republic BIT of 14 November 1991 (entered into force on 20 October 1994), Art VII(6); Thailand-Argentine Republic BIT of 18 February 2000 (entered into force on 7 March 2002), Art 9(8); Australia-Mexico BIT of 23 August 2005 (entered into force on 21 July 2007), Art 19(3); Russian Federation-China BIT of 9 November 2006 (entered into force on 1 May 2009), Art 8(6); Germany-Jordan BIT of 13 November 2007 (entered into force on 28 August 2010), Art 11(3); UK-Colombia BIT of 17 March 2010 (entered into force on 10 October 2014), Art IX(10).

²⁹¹ See, for example, UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as revised in 2013), Art 34(2): “All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.” See also SCC Arbitration Rules 2010, Art 40; ICC Arbitration Rules 2012, Art 34(6); LCIA Arbitration Rules 2014, Art 26.8.

It is the NAFTA provision on the binding nature of an award that the tribunal in *Grand River v The United States of America* takes to refer to the lack of binding precedent in investor-state arbitration.²⁹² The tribunal is in good company: Christoph Schreuer and Matthew Weiniger argue that the reference to the bindingness of an arbitral award in Article 53(1)(1) of the ICSID Convention “may be read as excluding the applicability of the principle of binding precedent to successive ICSID cases.”²⁹³ They come to the same conclusion regarding Article 59 of the Statute of the International Court of Justice²⁹⁴ (ICJ Statute) and, unsurprisingly, regarding NAFTA Article 1136(1)²⁹⁵ which emulates Article 59 of the ICJ Statute.²⁹⁶ The only argument Schreuer and Weiniger advance in support of their argument is that nothing in the *travaux préparatoires* of the ICSID Convention suggests that a system of binding precedent should exist in ICSID arbitration.²⁹⁷ Yet, this does not, by itself, exclude a system of binding precedent. The *travaux préparatoires* do not suggest either that a system of binding precedent should not exist in ICSID arbitration. The *travaux préparatoires* are simply silent on this issue, which should not be taken as a sign for or against binding precedent. Schreuer and Weiniger do not advance any persuasive argument either why NAFTA or the ICJ Statute should exclude a system of binding precedent. They merely state that the ICJ Statute is more *explicit* in its exclusion

²⁹² *Grand River Enterprises Six Nations, Ltd., et al. v United States of America*, UNCITRAL Award, 12 January 2011, para 61.

²⁹³ Christoph Schreuer and Matthew Weiniger, ‘A Doctrine of Precedent?’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1188-1206, at 1190.

²⁹⁴ *ibid.*

²⁹⁵ *ibid.* 1190 fn 7 (interpreting NAFTA Art 1136(1) as “stating that a decision from one panel has no precedent effect on any other panel”). NAFTA Art 1136(1): “An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.”

²⁹⁶ Jeswald W. Salacuse also interprets the wording of Article 59 of the ICJ Statute and NAFTA Article 1136(1) to mean that previous decisions “do not constitute binding precedent for the future.” See Jeswald W. Salacuse, *The Law of Investment Treaties* (2nd edn, Oxford University Press 2015) 170.

²⁹⁷ Christoph Schreuer and Matthew Weiniger, ‘A Doctrine of Precedent?’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1188-1206, at 1190.

of binding precedent than the ICSID Convention. Yet, Article 59 of the ICJ Statute, much like NAFTA Article 1136(1), only states that “[t]he decision of the court has no binding force except between the parties and in respect of that particular case.” While it is not impossible to interpret Article 59 of the ICJ Statute broadly to exclude the binding nature of a decision in its entirety, i.e., including the bindingness of general principles developed in the decision, Article 59 of the ICJ Statute is better understood as a provision on *res judicata*.²⁹⁸

*Res judicata*²⁹⁹ – Latin for “a thing adjudicated”³⁰⁰ stands for the rule that an issue, once definitely settled between disputing parties, is precluded from being raised anew before a court or tribunal (issue preclusion).³⁰¹ In addition, *res judicata* stands for the rule that a claim which should have been advanced in a specific proceeding because it arose from the same transaction or series of transactions as the claim that was raised is precluded from being raised at all (claim preclusion).³⁰² *Res judicata*, in other words, means that the disputing parties – and only the disputing parties (and their privy) are bound by a final decision on a specific matter. Article 59 of the ICJ Statute and NAFTA Article 1136(1) are therefore, to the extent that they confirm the doctrine of *res judicata*, merely declaratory in character. The wording of these provisions confirms this interpretation.

²⁹⁸ See Andrés Rigo Sureda, ‘Precedent in Investment Treaty Arbitration’ in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 830-842, at 832; Gary B. Born, *International Commercial Arbitration, Volume III: International Arbitral Awards* (2nd edn, Kluwer Law International 2014) 3818 (“Article 59 is properly understood as directed towards the preclusive effects of a particular decision, which are limited to the parties and the case in question, and not towards the precedential effects of a decision, which are not limited to the parties.”).

²⁹⁹ On the differences between the treatment of the doctrine of *res judicata* in several civil-law jurisdictions and the United States of America, see Pedro J. Martinez-Fraga and Harout Jack Samra, ‘The Role of Precedent in Defining *Res Judicata* in Investor-State Arbitration’ (2012) 32(3) *Northwestern Journal of International Law & Business* 419-450.

³⁰⁰ Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 1504.

³⁰¹ *ibid.*

³⁰² *ibid.* See also Allan D. Vestal, ‘Rationale of Preclusion’ (1964) 9 *St. Louis University Law Journal* 29-55, at 30 (distinguishing claim preclusion and issue preclusion).

Both provisions note the bindingness of a *decision* – uncoupled from any precedential value of the rules developed in that decision. Even in a system of binding precedent, it is not the concrete *decision* that is binding on lower courts, but the rules or general principles developed in that decision.³⁰³ In addition, where provisions such as NAFTA Article 1136(1) are titled ‘Finality and Enforcement of an Award’, the context makes sufficiently clear that the provision must relate to *res judicata* – not the prohibition of binding precedent. Codified rules therefore do not prohibit a system of binding precedent in investor-state arbitration.

(ii) The Fact-Specificity of Disputes

It might be the case, however, that the fact-specificity of disputes hinders the development of a system of binding precedent. The tribunal in *Grand River*³⁰⁴ points to the fact-specificity of awards as a reason for awards not being binding precedents.³⁰⁵ This argument suggests that the fact-specificity of a dispute prevents the binding character of precedents. If the facts of a dispute were unique, however, then previous decisions would not be relevant precedents in the first place, least of all binding precedents. Irrelevant precedents are never binding – not even in a system of binding precedent. If the facts of a case can be ‘distinguished’³⁰⁶ from the facts in a previous decision, then a court is not bound by the *ratio decidendi* in that previous decision.³⁰⁷ It follows that fact-specificity

³⁰³ See Glanville L. Williams (ed), *Jurisprudence* (10th edn, Sweet & Maxwell 1947) 191:

A precedent [...] is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi*. The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large.

³⁰⁴ *Grand River Enterprises Six Nations, Ltd., et al. v United States of America*, UNCITRAL Award, 12 January 2011.

³⁰⁵ *ibid* para 61 (“Being rooted in their specific facts, NAFTA arbitral awards are not binding precedents (Article 1136(1) of NAFTA).”).

³⁰⁶ ‘Distinguishing’ a previous decision means “finding some distinction on the facts or on the law”. See Lord Denning, *The Discipline of the Law* (Butterworth 1979) 297.

³⁰⁷ Lord Denning, *The Discipline of the Law* (Butterworth 1979) 297.

cannot explain the lack of a system of binding precedent. If true, it merely explains the lack of reliance on previous decisions, not, however, whether the ratio decidendi of previous decisions, as a matter of principle, are binding on future arbitral tribunals that are confronted with the same or similar facts. The argument from the fact-specificity of investment disputes is therefore unpersuasive in its generality.

(iii) The Lack of a Hierarchy among Tribunals

This leaves us with the argument from the tribunal's singularity of jurisdiction in investor-state arbitration. This argument rests on the definition of precedent within national jurisdictions. The premise of this argument is that, as a rule, it is only lower courts that are strictly "bound" by a rule established by a higher court within a common-law jurisdiction (strictly binding precedent).³⁰⁸ In the words of Frederick G. Kempin, lower courts, "being subject to reversal, *must* necessarily heed the voice of their superior courts and follow such guidance as is given them."³⁰⁹

If that is true, and we assume that it is, then, absent a hierarchy of tribunals, there cannot be a system of strictly binding precedent in investor-state arbitration. In investor-state arbitration, every tribunal is an ad hoc tribunal; it is constituted upon agreement by the disputing parties for the resolution of a single dispute only. The ad hoc nature of these tribunals precludes the formation of any hierarchy among them. If every tribunal exists only for the duration of a single dispute and then disbands, it is impossible for one tribunal

³⁰⁸ In this context, see also Catherine Kessedjian, 'To Give or Not to Give Precedential Value to Investment Arbitration Awards?' in Catherine A. Rogers and Roger P. Alford (eds), *The Future of Investment Arbitration* (Oxford University Press 2009) 43-68, at 47 and 63 (identifying "a kind of hierarchy between the courts or bodies who are called upon to resolve cases" as a requisite for a system of binding precedent).

³⁰⁹ Frederick G. Kempin, 'Precedent and Stare Decisis: The Critical Years, 1800 to 1850' (1959) 3 *American Journal of Legal History* 28-54, at 29 (emphasis added).

to assume a higher position than another. The tribunals are not interdependent. There is no appeal mechanism. Every award is final.³¹⁰

Even if some sort of hypothetical permanency was assumed for tribunals constituted under a single investment treaty, this would not mean that there was a hierarchy among these tribunals. Instead, it would mean that these tribunals, albeit imperfectly,³¹¹ would be reincarnations or duplicates of the same court, albeit, most likely, with different personnel. Likewise, there cannot be a firm doctrine of stare decisis in investor-state arbitration either, for a hierarchy of courts within a single jurisdiction is a prerequisite for such a doctrine of stare decisis to exist also.³¹² The expression “firm doctrine of stare decisis”, as it is used here, means vertical stare decisis which in turn refers to the rule that a lower court must strictly follow the rules developed by superior courts within the same jurisdiction.³¹³ It is to be distinguished from the concept of super stare decisis which

³¹⁰ On the finality of awards, see Art 53(1) of the ICSID Convention; *Desert Line Projects LLC v Republic of Yemen*, ARB/05/17, Award, 6 February 2008, para 177:

As a matter of essence, arbitral proceedings have a final and binding character. Both parties chose arbitrators whom they trust. In consequence, they waive the right to challenge the arbitral tribunal’s decision, except for extraordinary circumstances. It is therefore contrary to the spirit of arbitration to constrain a party to negotiate in order to obtain a reduction of the amount effectively owed, when an arbitral tribunal has issued a definite award.

³¹¹ The image is imperfect because arbitral tribunals, unlike courts, derive their authority to adjudicate a dispute from the disputing parties. It follows that, even if two separate sets of disputing parties agree to have their dispute arbitrated under the same investment treaty, this does not mean that the source of the tribunal’s jurisdiction is the same in both cases. The source of the tribunals’ jurisdiction is the respective arbitration agreement which includes the provisions of the international investment treaty but is not identical to it. The tribunal constituted to resolve a dispute in investor-state arbitration is thus never the *same* as another tribunal; both tribunals derive their authority from different sources. Since both tribunals apply the same provisions, however, one could be forgiven to imagine these tribunals to be different versions of the same court, albeit each version being based on its own jurisdiction. Imagine the foundation of a civilisation on a specific constitution. When that civilisation dies and another people in a different geographical area subsequently, independently of the first civilisation, adopts the same constitution, they form a different jurisdiction despite the text of the constitutions being identical in both jurisdictions; a court in one jurisdiction would be a duplicate of the “same” court in the other jurisdiction.

³¹² Frederick G. Kempin, ‘Precedent and Stare Decisis: The Critical Years, 1800 to 1850’ (1959) 3 *American Journal of Legal History* 28-54, at 36.

³¹³ Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 1626.

requires all courts, not only lower courts, to strictly follow previous decisions within the same jurisdiction irrespective of the merit of those decisions.³¹⁴

The elephant in the room is the requirement that for a system of strictly binding precedent and vertical stare decisis to exist there must be unity of jurisdiction before it even matters whether there is a hierarchy of courts *within* that jurisdiction. As we have seen, prior decisions from neighbouring jurisdictions do not constitute binding precedents in the first place.³¹⁵ That is so because the development of national law is a national enterprise. The question then is whether there is unity of jurisdiction in investor-state arbitration. There is unity of jurisdiction, if all arbitral tribunals derive their authority to adjudicate from the same source – as national courts do.³¹⁶ The answer must be in the negative as arbitral tribunals derive their authority from the disputing parties.³¹⁷ The disputing parties must consent to an arbitral tribunal resolving their dispute under a specific treaty. It follows that an arbitral tribunal's jurisdiction is limited to the resolution of a single dispute. It follows also that there is no unity of jurisdiction in investor-state arbitration. Just as tribunals exist ephemerally,³¹⁸ so their jurisdiction is ephemeral – limited to the duration of the resolution of a dispute between specific disputing parties. Courts within a single

³¹⁴ Bryan A. Garner (ed), *Black's Law Dictionary* (10th edn, Thomson Reuters 2014) 1626.

³¹⁵ *ibid.*

³¹⁶ cf Christoph Schreuer and Matthew Weiniger, 'A Doctrine of Precedent?' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1188-1206, at 1189 ("The system, if it can even be called a system, of investment treaty arbitration is not unitary in the sense of each tribunal sitting under the same source of jurisdiction.").

³¹⁷ Christoph Schreuer, 'Consent to Arbitration' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 830-867, at 831 ("Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction. Participation in treaties plays an important role in the jurisdiction of tribunals, but cannot, by itself, establish jurisdiction. Both parties must have expressed their consent."); Sadie Blanchard, 'State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances into International Investment Arbitration' (2011) 10(3) *Washington University Global Studies Law Review* 419-476, at 421.

³¹⁸ Jan Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law' (2006) 5 *Transnational Dispute Management* [1]-[13], at [1] <www.transnational-dispute-management.com/article.asp?key=883> accessed 25 October 2018.

jurisdiction, on the other hand, derive their authority to adjudicate from the same source – the constitution and statute. Their authority is more permanent.

If one were to visualise the area in which a tribunal in investor-state arbitration exercises its jurisdiction geographically, one could think of that area as an island nation; the island nation would be born when the disputing parties granted an arbitral tribunal the jurisdiction to resolve their dispute. One could think of the arbitration agreement as the nation's constitution. In investor-state arbitration, the arbitration agreement contains the provisions of the investment treaty and it comes to fruition when the foreign investor accepts the host state's offer to arbitrate which is contained in the treaty. The island nation would die once the tribunal issues the award. The island would not need to physically submerge³¹⁹ into the ocean once it has issued its award but this image is a useful one. Alternatively, one could imagine there to be light on the island nation for the duration of the resolution of the dispute and the light of the nation going out once the dispute is resolved. This simplistic image of investor-state arbitration, tending towards the fantastical, is not inaccurate. It serves to illustrate a tribunal's singularity of jurisdiction. The image also serves to illustrate the lack of strictly binding precedent in investor-state arbitration. If each tribunal is exercising its authority to adjudicate on a dispute within its own jurisdiction and if it is only exercising it once, it follows that the ensuing award is as little binding on other tribunals as German precedents are binding on Swiss courts.

³¹⁹ The most prominent story of the submergence of an island nation is the one Plato told of Atlantis. See Plato, *Timaeus* and *Critias* in Plato, *Timaeus. Critias. Cleitophon, Menexenus. Epistles* (translated by R. G. Bury, Harvard University Press 1929) (referring to “a story derived from ancient tradition” (at 27) about “an island which was larger than Libya and Asia together” (at 41) and noting that “[after Athens waging war against Atlantis in defence] there occurred portentous earthquakes and floods, and one grievous day and night befell them, when the whole body of your [Athenian] warriors was swallowed up by the earth, and the island of Atlantis in like manner was swallowed up by the sea and vanished”).

In sum, the jurisdictions of investor-state tribunals do not overlap; tribunals operate within “neighbouring” jurisdictions – not the same jurisdiction. As tribunals exercise their jurisdiction only once and each tribunal is its own island, entire of itself in terms of jurisdiction,³²⁰ and assuming that a system of strictly binding precedent requires a hierarchy of tribunals within a single jurisdiction, strictly binding precedent does not exist in investor-state arbitration.

(iv) The Lack of an Agreement as to Strictly Binding Precedent

Yet, there could be an overarching treaty in which all states participating in the system of investor-state arbitration agree to the strictly binding character of precedents, even though arbitral tribunals, technically, do not operate within a single jurisdiction and despite the lack of a hierarchy among these tribunals. Such an overarching treaty does not exist, however. Not only does such an agreement not exist, states seem also actively opposed to the adoption of strictly binding precedent in international investment law. In the words of Jan Paulsson: “[S]overeign states are averse to any suggestion that compacts other than those to which they have consented may be invoked against them.”³²¹ A doctrine of strictly binding precedent across individual investment treaties would bring with it that the rules developed under investment treaties other than the ones states consented to would be invoked against these states. This is not in the interest of states. It is not in the interest of states that rules to which they did not specifically consent are invoked against

³²⁰ For the inspiration for this phrase, see John Donne, *Devotions upon Emergent Occasions, and several steps in my Sickness* (Printed by A.M. for Thomas Iones 1624) 415-416:

No Man is an *Iland*, intire of itselfe; every man is a peece of the *Continent*, a part of the *maine*. If a *Clod* bee washed away by the *Sea*, *Europe* is the lesse, as well as if a *Promontorie* were, as well as if a *Mannor* of thy *friends* or of *thine owne* were; Any Mans *death* diminishes *me*, because I am involved in *Mankinde*; And therefore never send to know for whom the *bell* tolls; It tolls for *thee*. (Emphasis in the original).

³²¹ Jan Paulsson, ‘International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law’ (2006) 5 *Transnational Dispute Management* [1]-[13], at [2] <www.transnational-dispute-management.com/article.asp?key=883> accessed 25 October 2018.

them.³²² Yet, this is exactly what is happening in investment treaty arbitration, albeit not under a system of strictly binding precedent but under a system of flexible stare decisis.

(v) Conclusion and Outlook

Neither is the fact-specificity of a dispute a convincing rationale for the lack of strictly binding precedent. Nor do international investment agreements, including institutional arbitration rules and conventions they reference, prohibit a system of strictly binding precedent in investor-state arbitration. The most persuasive argument against strictly binding precedent in investor-state arbitration is the tribunals' singularity of jurisdiction. Since every arbitral tribunal exercises its jurisdiction only once, a hierarchy of tribunals is impossible. Absent a hierarchy of tribunals, there cannot be a system of strictly binding precedent. There is no international agreement either that would cure this definitional lack of strictly binding precedent by declaring arbitral precedents to be binding on subsequent tribunals regardless. The next section considers the related issue whether tribunals may consider and follow prior arbitral awards (or 'arbitrational precedents'³²³) as arbitral precedent; namely, whether they have been granted the authority to do so – either directly or indirectly. Subsequently, this chapter examines the extent to which arbitrators consider prior awards even absent a provision granting them the authority to do so. In what follows, this chapter examines whether arbitrators, through their reliance on arbitral precedents, are creating rules through “a perceptible modification and development of previous

³²² On state consent in international law, see Jenny S. Martinez, 'Towards an International Judicial System' (2003) 56 *Stanford Law Review* 429-529, at 482 (“Since consent is the foundation of classic public international law, the notion is that a state cannot be bound by a court’s decision in a case in which it did not participate or agree to be bound.”).

³²³ The expression ‘arbitrational precedents’ was coined by Peter Owen at the 1992 Calgary University arbitration conference and has since been adopted by Charles N. Brower, Michael Ottolenghi and Peter Prows. See Charles N. Brower, Michael Ottolenghi and Peter Prows, ‘The Saga of CMS: Res Judicata, Precedent, and the Legitimacy of ICSID Arbitration’ in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century* (Oxford University Press 2009) 843-864, at 845 fn 17 and 857.

conceptions.”³²⁴ The mere reliance on a prior decision would not amount to the creation of rules. If every tribunal was only to repeat what a previous tribunal had uttered, and the first tribunal did nothing but repeat what was written in a treaty, and if the rules in all treaties were identical, the content and scope of rules would not change, much less expand. Finding that arbitrators make rules, this chapter examines whether the arbitrator-made rules amount to law – a question that is answered in the affirmative. Last but not least, this chapter comments on whether investor-state arbitration is a legal system and whether the existence of a legal system is a requirement for arbitral law-making.

E. Arbitral Precedent in Investor-State Arbitration: The Issue of Authorisation

This section examines the theory of arbitral precedent in investor-state arbitration; it examines whether tribunals have been granted the authority to consider and follow the *ratio decidendi* of previous arbitral awards – either directly or indirectly.

(i) The Lack of an Agreement as to Arbitral Precedent

Whether tribunals have been directly granted the authority to rely on prior arbitral awards and to thereby create rules in investor-state arbitration is the topic of this section. One option is that international investment agreements, or the arbitration rules and conventions they reference, contain a provision like Article 38(1)(d) of the ICJ Statute. Article 38(1)(d) of the ICJ Statute³²⁵ codifies the principle that the International Court of Justice is at liberty to follow its own previous decisions, without being bound by them.³²⁶

³²⁴ ‘The Length of the Chancellor’s Foot’ (1933) 45 *The Juridical Review* 145-150, at 146.

³²⁵ Statute of the International Court of Justice, Art 38(1)(d):

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply, subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determinations of the rules of law.

³²⁶ cf *Land and Maritime Boundary Between Cameroon and Nigeria, Preliminary Objections Judgment* [1998] ICJ Reports 275, para 28:

Article 38(1)(d) of the ICJ Statute explicitly grants the International Court of Justice the authority to rely on judicial decisions as a subsidiary means for the determination of rules of law. That judicial decisions, according to Article 38(1)(d) of the ICJ Statute, are not sources of law³²⁷ but a “subsidiary means for the determination of rules of law” is reminiscent of the age-old distinction³²⁸ between judicial decisions as sources of law and judicial decisions as evidence of the law.³²⁹ This distinction is not of as little importance as Lauterpacht suggests³³⁰ for the former acknowledges the role of judges as law-makers whereas the latter obscures that process.³³¹ It is more precise to say, as Lauterpacht does, that judgments contain rules that a court “considers to be the law.”³³² To the extent that a

It is not a question of holding [the parties] to decisions reached by the Court in previous cases. The real question is whether in this case, there is cause not to follow the reasoning and conclusion of earlier cases.”)

³²⁷ Contra Gary B. Born, *International Commercial Arbitration, Volume III: International Arbitral Awards* (2nd edn, Kluwer Law International 2014) 3818 (interpreting judicial decisions as a source of law under Article 38(1)(d) of the ICJ Statute).

³²⁸ On the age-old distinction between judgment as sources of law and judgments as evidence of law, see generally Frederick G. Kempin, ‘Precedent and Stare Decisis: The Critical Years, 1800 to 1850’ (1959) 3 *American Journal of Legal History* 28-54, at 54 (“[W]hile our predecessors appeared clearly to adopt one of these two alternatives, present thinking chooses not to use those terms, and, to that extent, to leave the issue undecided.”); Michael Zander, *The Law-Making Process* (7th edn, Hart Publishing 2015) 287-290.

³²⁹ On judicial decisions as evidence of the law under Art 38(1)(d) of the ICJ Statute, see Catherine Kessedjian, ‘To Give or Not to Give Precedential Value to Investment Arbitration Awards?’ in Catherine A. Rogers and Roger P. Alford (eds), *The Future of Investment Arbitration* (Oxford University Press 2009) 43-68, at 49 fn 28 (noting that “the expression ‘determination’ of the rule of law [...] does not denote a creation of the rule but simply the discovery of a pre-existing rule”); Andrés Rigo Suredo, ‘Precedent in Investment Treaty Arbitration’ in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 830-842, at 832.

³³⁰ Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) 21:

The imperceptible process in which the judicial decision ceases to be an application of existing law and becomes a source of law for the future is almost a religious mystery into which it is unseemly to pry. [...] It is of little import whether the pronouncements of the Court are in the nature of evidence or of a source of international law so long as it is clear that in so far as they show what are the rules of international law they are largely identical with it.

³³¹ cf John William Salmond, *Jurisprudence* (7th edn, Sweet & Maxwell 1924) 187:

Orthodox legal theory, indeed, long professed to regard the common law as customary law, and judicial decisions as merely evidence of custom and of the law derived therefrom. This, however, was never much better than an admitted fiction. In practice, if not in theory, the common law of England has been created by the decisions of English judges.

³³² Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) 22.

court considers a rule to be the law, that rule is the law for all intents and purposes. It matters then that there is no provision in international investment agreements, including the rules and conventions they reference, that is equivalent to Article 38(1)(d) of the ICJ Statute. Nor is there a separate arbitration treaty or convention that contains such a provision. It follows that states do not expressly grant tribunals the authority to rely on prior arbitral awards rendered within the ‘system’ of investor-state arbitration.

(ii) Possible Indirect Authorisation: Precedent as a Means of Treaty Interpretation

It is possible, however, that arbitral reliance on arbitral precedent is a means of treaty interpretation within the meaning of Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT). If the reliance on precedent is a means of treaty interpretation within the meaning of the VCLT, states, by ratifying the VCLT, would have indirectly granted arbitral tribunals the authority to adhere to precedents in investor-state arbitration. This section examines the rules of treaty interpretation under the VCLT, in particular whether reliance on arbitral precedent is a general means of treaty interpretation, whether reliance on arbitral precedent amounts to a supplementary means of interpretation and whether arbitral decisions are sources of international law.

(a) General Means of Treaty Interpretation

Article 31(1) of the VCLT defines a general rule of interpretation; namely, that treaties must 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. Article 31(2) of the VCLT defines the relevant context as the text of the treaty, including its preamble and annexes, and any agreement related to the treaty the contracting parties may have made at the time of the conclusion of the treaty or any instrument the contracting parties may have accepted as an instrument related to the treaty. Articles 31(3)(a) and

31(3)(b) of the VCLT expand the scope of relevant documents to subsequent agreements between the parties regarding the interpretation of the treaty or the application of its provisions and to any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation. Article 31(4) of the VCLT confirms that a special meaning shall be given to a term if it is established that the contracting parties so intended. Article 31 of the VCLT thus repeatedly refers to the *common understanding of the contracting parties* regarding the meaning of treaty provisions as being the relevant reference point for interpreting treaty provisions. Since arbitral decisions neither constitute an agreement between the contracting parties, nor reflect an agreement between the contracting parties regarding the interpretation of the underlying investment treaty, arbitrators cannot base their reliance on arbitral precedent on Articles 31(1), 31(2), 31(3)(a), 31(3)(b) and 31(4) of the VCLT.

(b) Reliance on Precedent as a Supplementary Means of Interpretation

Article 32 of the VCLT, on the other hand, allows for recourse to supplementary means of interpretation, a phrase that some may interpret as an open-ended invitation to consider any supplementary means of interpretation, including prior arbitral awards. The arbitral tribunal in *Canadian Cattlemen v The United States of America*,³³³ in fact, interpreted Article 32 of the VCLT as a gateway for the reliance on prior arbitral awards. The tribunal took the view that the reference in Article 32 of the VCLT to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of conclusion, “permits as supplementary means of interpretation not only *preparatory work* and *circumstances of conclusion* of the treaty, but indicates by the word *including* that, beyond these two means expressly mentioned, other supplementary means may be

³³³ *Canadian Cattlemen for Fair Trade v United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008.

applied.”³³⁴ The tribunal in *Canadian Cattlemen* then went on to erroneously merge the ICJ Statute and the VCLT by misinterpreting Article 32 of the VCLT.³³⁵ The tribunal stated that, according to Article 38(1)(d) of the ICJ Statute, “judicial decisions are applicable for the interpretation of public international law as subsidiary means”³³⁶ and that “they must [therefore] be understood to be also *supplementary means of interpretation* in the sense of Article 32 VCLT.”³³⁷ Recourse to the wording of these two provisions and their context demonstrates that this interpretative medley is unpersuasive.³³⁸ Article 38(1)(d) of the ICJ Statute, read in full, states that the ICJ, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply, subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law. Article 38(1)(d) of the ICJ Statute therefore identifies judicial decisions as a subsidiary source of international law,³³⁹ not as a supplementary means of treaty interpretation within the meaning of Article 32 of the

³³⁴ *Canadian Cattlemen for Fair Trade v United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008, para 50 (emphasis in the original) (internal quotation marks omitted).

³³⁵ On the misinterpretation of Art 32 by the arbitral tribunal in *Canadian Cattlemen v. United States*, see also Makane Moïse Mbengue, ‘Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)’ (2016) 31(2) *ICSID Review* 388-412, at 398.

³³⁶ *Canadian Cattlemen for Fair Trade v United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008, para 50 (internal quotation marks omitted).

³³⁷ *ibid* (emphasis in the original). See also *Softwood Lumber Case (United States of America v. Canada)*, LCIA Case No 7941, Award on Liability, 3 March 2008, para 50 (equally merging Art 38(1)(d) of the ICJ Statute with Art 32 of the Vienna Convention on the Law of Treaties).

³³⁸ See also Makane Moïse Mbengue, ‘Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)’ (2016) 31(2) *ICSID Review* 388-412, at 398; *United States of America v Canada*, LCIA Case No 81010, Opinion of Michael Reisman with Respect to Selected International Legal Problems in LCIA Case No 7941, 1 May 2009, para 16 (critiquing the decision of the arbitral tribunal in the *Softwood Lumber Case* to merge ICJ Statute Art 38(1)(d) (subsidiary sources of international law) with VCLT Art 32 (supplementary means of treaty interpretation): “By jumping from “supplementary” to “subsidiary” [...], the Tribunal grafts something onto the VCLT’s canon of rules for interpretation which is not – and should not – be there.”).

³³⁹ See also *United States of America v Canada*, LCIA Case No 81010, Opinion of Michael Reisman with Respect to Selected International Legal Problems in LCIA Case No 7941, 1 May 2009, para 16 (stating that “ICJ Statute Article 38 is a choice-of-law clause for an international tribunal”).

VCLT. This follows from the distinction between international law, applicable to all states, and international conventions, a source of obligation under international law for the respective contracting parties. International law and international treaties are two distinct concepts; a rule of international law is not equivalent to an obligation arising under a treaty. Even though a treaty may give rise to an international custom,³⁴⁰ as evidence of a general practice accepted as law, and recourse to judicial decisions may then be helpful to determine the content of that international custom,³⁴¹ Article 38(1)(d) of the ICJ Statute does not envisage the International Court of Justice to consider judicial decisions when interpreting the text of treaties.

Article 32 of the VCLT, in contrast, provides a mechanism for the interpretation of treaties. Even though Article 32 of the VCLT allows recourse to a seemingly non-exhaustive enumeration of supplementary means of interpretation, this phrase must be read in the context of Articles 31 and 33 of the VCLT. Pursuant to Articles 31 and 33 of the VCLT, the primary means of treaty interpretation are the ordinary meaning of the treaty provisions, their context, the object and purpose of the treaty,³⁴² and any agreement between the contracting parties regarding the interpretation of the treaty, whether explicit or implicit.³⁴³ The repeated references under the VCLT to a common accord between the parties shines a light on the importance of the will of the parties in the interpretation of

³⁴⁰ cf Robert Kolb, *Theory of International Law* (Hart Publishing 2016) 128 (noting “the normative generalisation of multilateral treaties” as an example of customary international law).

³⁴¹ *United States of America v Canada*, LCIA Case No 81010, Opinion of Michael Reisman with Respect to Selected International Legal Problems in LCIA Case No 7941, 1 May 2009, para 16; Makane Moïse Mbengue, ‘Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)’ (2016) 31(2) *ICSID Review* 388-412, at 398.

³⁴² See VCLT, Art 31(1).

³⁴³ See VCLT, Arts 31(2)(a) (any agreement in connexion with the conclusion of the treaty), 31(2)(b) (any instrument in connexion with the conclusion of the treaty accepted by the other parties), 31(3)(a) (any subsequent agreement); 31(3)(b) (subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation); 31(4) (intention of the parties regarding special meaning of a term); 33(1) (text equally authoritative in each language unless treaty provides or parties agree otherwise); 33(2) (non-authenticated text only authentic if the text so provides or the parties to agree).

treaties, and rightly so: treaties are acts of will; they embody the shared and common intentions of the parties.³⁴⁴ Given this immediate context, it would be inconsistent, if Article 32 of the VCLT were to allow recourse to materials that establish anything but the agreement of the disputing parties regarding the interpretation of treaties. In *EC—Chicken Cuts*,³⁴⁵ the WTO Appellate Body consequently limited the non-exhaustive list of supplementary means of interpretation in Article 32 of the VCLT to means that “assist in ascertaining the common intention of the parties.”³⁴⁶

(c) Arbitral Decisions as Sources of International Law

This does not mean that the VCLT excludes the reliance on arbitral precedent. In fact, Article 31(3)(c) of the VCLT might yet contain a loophole for the reliance on arbitral precedent. It provides that interpreters of treaties must consider “[a]ny relevant rules of international law applicable in the relations between the parties.” Therefore, if arbitral precedent is a source of international law within the meaning of Article 38(1) of the ICJ Statute, it follows that it must be considered when interpreting an international investment agreement. This section considers whether arbitral awards qualify as ‘judicial decisions’ within the meaning of Article 38(1)(d) of the ICJ Statute, whether a general principle of justice requires a doctrine of precedent in investor-state arbitration (Art 38(1)(c) of the ICJ Statute) and whether a doctrine of arbitral precedent could be based on an international custom (Art 38(1)(b) of the ICJ Statute).

³⁴⁴ Makane Moïse Mbengue, ‘Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)’ (2016) 31(2) *ICSID Review* 388-412, at 396.

³⁴⁵ WTO, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts* – Report of the Appellate Body (2005) WT/DS286/AB/R (*EC—Chicken Cuts*).

³⁴⁶ *ibid* para 283.

(1) Arbitral Decisions as Judicial Decisions

Article 38(1)(d) of the ICJ Statute states that the International Court of Justice, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply, subject to the provisions of Article 59 of the same statute, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Article 38(1)(d) of the ICJ Statute, admittedly, seems to be an elegant avenue for the introduction of precedent in investor-state arbitration. The arbitral tribunal in *Suez v Argentina*³⁴⁷ certainly believed that arbitral precedent constitutes “a subsidiary means for the determination of the rules of [international] law” within the meaning of Article 38(1)(d) of the ICJ Statute.³⁴⁸ Its applicability is less than straightforward, however.

Its applicability to investor-state arbitration is already questionable because of its reference to *judicial decisions*, which is a term used for prior decisions rendered by courts. Pedro Nikken consequently points out that “it cannot be assumed that [the International Court of Justice] will accept as such the investment arbitral jurisprudence.”³⁴⁹ The arbitral tribunal in *Suez v Argentina* simply assumes that arbitral awards fall under the category of judicial decisions without further consideration. This assumption is telling because the arbitral tribunal’s reliance on Article 38(1)(d) of the ICJ Statute reveals that it assumes that investment arbitral tribunals act as if they were courts. Even if the observation that tribunals act as if they were courts is correct – which it is – this does not mean that Article 38(1)(d) of the ICJ Statute supports such a development. Or, in other words, even though

³⁴⁷ *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010.

³⁴⁸ *ibid* para 189 and fn 141.

³⁴⁹ *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010, para 24.

tribunals generate and follow precedents and thereby create legal rules in investor-state arbitration as if they were courts, this does not mean that tribunals can legitimise their approach with the broad interpretation of a norm that only allows the International Court of Justice to consider judicial decisions as a subsidiary means for the determination of rules of international law. As Jörg Kammerhofer points out, “[A]rticle 38 is only the ICJ’s *lex arbitri* – the applicable law for procedures before one specific (if very important) international tribunal and no more.”³⁵⁰ The underlying argument of the tribunal in *Suez v Argentina* is that arbitral tribunals are creating legal rules, which is why they must be allowed to generate and follow precedents to determine (more) rules of law. Such an argument is circular. The tribunal’s reliance in *Suez v Argentina* on Article 38(1)(d) of the ICJ Statute is therefore rather a symptom of the tribunal’s understanding of its own function as a lawmaker than an argument *for* its function as a lawmaker.

(2) Reliance on Precedent as a General Principle of Justice

Yet, perhaps there exists a general principle of law that requires the interpretation of investment treaties in light of arbitral precedent. Article 38(1)(c) of the ICJ Statute defines the general principles of law recognized by civilized nations as a source of international law.³⁵¹ The doctrine of precedent could be a component of the general principle of basic justice.

³⁵⁰ Jörg Kammerhofer, ‘Lawmaking by scholars’ in Catherine Brölmann and Yannick Radi (eds), *Theory and Practice of International Lawmaking* (Edward Elgar Publishing 2016) 305-325, at 308. See also Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford University Press 2012) 259 (“Article 38 is a treaty rule, binding only on the states parties thereto, and cannot establish the sources of international law as a whole.”).

³⁵¹ For a comprehensive account of the various possible meanings of the term general principles, see Oscar Schachter, *International Law in Theory and Practice* (Kluwer 1991) 50-55. For the parallel debate in international criminal law, see Neha Jain, ‘Judicial Lawmaking and General Principles of Law in International Criminal Law’ (2016) 57(1) *Harvard International Law Journal* 111-150).

The tribunal in *Suez v Argentina* argues that “considerations of basic justice would lead arbitral tribunals to be guided by the basic judicial principle that ‘like cases should be decided alike,’ unless a strong reason exists to distinguish the current case from previous ones.”³⁵² The tribunal adds that “a recognized goal of international investment law is to establish a predictable, stable legal framework for investments, a factor that justifies tribunals in giving due regard to previous decisions on similar issues. Thus, absent compelling reasons to the contrary, a tribunal should always consider heavily solutions established in a series of consistent cases.”³⁵³ This argument for precedent in investor-state arbitration is rooted at least in part in Gabrielle Kaufmann-Kohler’s understanding of arbitrators as law-makers. Kaufmann-Kohler, one of two majority arbitrators in *Suez v Argentina*, suggests that “[w]hen making law, decision-makers have a moral obligation to strive for consistency and predictability, and thus to follow precedents.”³⁵⁴ She thereby relies on Lon Fuller’s notion of the ‘inner (or internal) morality of law,’ which includes the notion that legal rules must be consistent and predictable.³⁵⁵ Kaufmann-Kohler concludes that “[i]t may be debatable whether arbitrators have a legal obligation to follow precedents [...] but it seems well settled that they have a *moral* obligation to follow precedents so as to foster a normative environment that is predictable.”³⁵⁶ She explains this conclusion in terms of the need for consistency and predictability in investor-state

³⁵² *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, para 189. See also Brett M. Kavanagh, ‘Fixing Statutory Interpretation’ (2016) 129(8) *Harvard Law Review* 2118-2163, at 2120 (“Like cases should be treated alike by judges of all ideological and philosophical stripes, regardless of the subject matter and regardless of the identity of the parties to the case.”).

³⁵³ *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, para 189.

³⁵⁴ Gabrielle Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?’ (2007) 23(3) *Arbitration International* 357-378, at 374.

³⁵⁵ *ibid* (“The creation of rules that are consistent and predictable is part of what Fuller calls the ‘inner (or internal) morality of law.’”) (referencing Lon L. Fuller, ‘The Morality that Makes Law Possible’ in Lon L. Fuller, *The Morality of Law* (Yale University Press 1969) 46).

³⁵⁶ Gabrielle Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?’ (2007) 23(3) *Arbitration International* 357-378, at 374.

arbitration and the nascent stage investor-state arbitration is at, its body of rules not being sufficiently developed and therefore requiring arbitrators to create legal rules.³⁵⁷ Yet, Kaufmann-Kohler's argument is circular. She bases her argument for a doctrine of precedent in investor-state arbitration on the assumption that tribunals are indeed law-makers, and that there is a single body of international investment *law* as opposed to some three thousand distinct international investment treaties. This perception of arbitral tribunals as law-makers, or as creators of a predictable normative environment, contrasts with the historical function of arbitration. As Earl S. Wolaver points out:

The history of arbitration, unlike the history of law, is not an account of the growth and development of principles and doctrines that have come, through a long use, to have a general validity and force. While arbitration probably antedates all the former legal systems, it has not developed any code of substantive principles, but is, with very few exceptions, a matter of free decision, each case being viewed in the light of practical expediency and decided in accord with the ethical or economic norms of some particular group. One case is not authority for another since the decisions are in terms of persons and practices and not in accord with prescribed rules and doctrines.³⁵⁸

Wolaver contrasts the history of arbitration with the history of law, describing both institutions as being distinct and different. His account of arbitration is rooted in the understanding that law-making in a community is the prerogative of the state.³⁵⁹ Even

³⁵⁷ Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23(3) *Arbitration International* 357-378, at 374-375.

³⁵⁸ Earl S. Wolaver, 'The Historical Background of Commercial Arbitration' (1934) *University of Pennsylvania Law Review* 132-146, at 132. For an even stricter understanding of arbitration, see Catharine Titi, 'The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration' (2013) 14(5) *Journal of World Investment and Trade* 829-851, at 830 (noting that "arbitration is not intended to establish rules that reach beyond the dispute at hand").

³⁵⁹ See also John William Salmond, *Jurisprudence* (Stevens & Haynes 1902) 11 ("The law may be defined

though arbitral tribunals do not only decide cases *ex aequo et bono* but also in accordance with applicable rules of law in accordance with the wishes of the disputing parties, the root of arbitration is to be found outside the public legal machinery. It is this position outside the public legal machinery and the arbitral tribunals' dependency on the disputing parties, which militate against the development of law, i.e., norms with a general validity and force, by arbitral tribunals. Even though, historically, arbitral tribunals are not known for having developed *law*, Kaufmann-Kohler borrows terminology from legal theory – the ‘inner (or internal) morality of law’ – to describe the creation of a normative environment for investments by arbitral tribunals.

The tribunal in *Suez v Argentina*, perhaps involuntarily, summarises the contradictory nature of such an approach when it states that “a recognized goal of international investment law is to establish a predictable, stable legal framework for investments.”³⁶⁰ The specificity of the framework (investments) is reminiscent of what Wolaver called ethical or economic norms of a group. If arbitral tribunals considered the applicable norms in this framework to be specific to a group, the framework might not be a legal framework for lack of the general application of its norms. In other words, the *legal* framework might be improperly so called; its norms being laws only by way of analogy. If, on the other hand, arbitral tribunals considered the applicable norms in this framework for investments to be laws, i.e., norms with a general validity and force, arbitral tribunals would be overstepping their historical mandate which positions them outside the public legal machinery.

as the body of principles recognized and applied by the State in the administration of justice.”).

³⁶⁰ *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, para 189.

The crux with investor-state arbitration is that tribunals *are* making law (or rules they deem to be law), i.e., norms with a general validity and force. Some tribunals might explain a system of precedent in investor-state arbitration with the creation of norms for a sub-group (foreign investors and host states). These tribunals might thus consider themselves to be acting within their confined historical mandate of creating norms for a sub-group. While that may technically be true, the sub-group of states participating in the system of investor-state arbitration is not a sub-group at all. If tribunals follow a system of precedent across the borders of investment treaties, as they do, they are thereby creating a single body of international investment law whose development impacts future disputing parties, investors, states and their citizens alike; a greater group is almost not imaginable. Kaufmann-Kohler is after all right in her assumption that arbitral tribunals are law-makers, even though her argument for precedent in investor-state arbitration is unpersuasive. The doctrine of precedent may be a component of the general principle of justice, but its application to investor-state arbitration cannot reasonably be justified with the argument that tribunals are law-makers. Such an argument is circular; it states that the doctrine of precedent must apply to investor-state arbitration because arbitral tribunals generate and follow precedents. In sum, Article 38(1)(c) of the ICJ Statute, properly interpreted narrowly as granting the International Court of Justice the authority to rely on prior judicial decisions, does not grant arbitral tribunals the authority either to rely on arbitral precedent when interpreting investment treaties.

(3) Arbitral Decisions as Sources of Customary International Law

In the absence of a general principle of law requiring a doctrine of precedent in investor-state arbitration and considering the inapplicability of Article 38(1)(d) of the ICJ Statute to investor-state arbitration, the last norm that could authorise arbitral tribunals to create arbitral precedent is Article 38(1)(b) of the ICJ Statute, which defines international

custom as a source of international law and international custom as a general state practice accepted as law.³⁶¹ We have therefore come full circle, for the last resort for a justification for precedent in investor-state arbitration is state acquiescence in its existence, state acquiescence being the cornerstone of treaty interpretation under the VCLT in the first place.

In 2013, the arbitral tribunal in *Micula v Romania*³⁶² stated that the fair and equitable treatment standard “must be disciplined by being based upon state practice and judicial or arbitral case law or *other* sources of customary or general international law.”³⁶³ The tribunal in *Micula* thereby elevates arbitral awards to sources of customary international law, which warrants special attention because customary international law or international custom, as defined in Article of the 38(1)(b) of the ICJ Statute, is evidence of a general state practice accepted as law. Both factors – the general practice of states³⁶⁴ *and* the acceptance of a general practice as law by states – must be fulfilled for a practice to amount to an international custom. The tribunal in *Micula* does not elaborate on its assumption that arbitral awards are examples of the general practice of states and accepted

³⁶¹ On the definition of international custom, see James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 23-30 (defining the relevant components as a general state practice that is generally accepted as international law).

³⁶² *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania* (hereafter *Micula v Romania*), ICSID Case No ARB/05/20, Award, 11 December 2013.

³⁶³ *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013 para 507 (quoting Claimants' Statement of Claim, 9 March 2007, para 193, which cites *ADF Group*, para 184) (emphasis added). But see *Hochtief v Argentina*, ICSID Case No ARB/07/31, Decision on Liability, 29 December 2014, para 219 and fn 201 (noting that “the decisions of other tribunals [...] are not in themselves binding sources of international law” but “only ‘subsidiary means for the determination of rules of law’”).

³⁶⁴ On the required generality of state practice, see James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 24 (noting that “[c]omplete uniformity of practice is not required, but substantial uniformity is”). See also *North Sea Continental Shelf Case* [1969] ICJ Reports 43, para 74:

State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

as law by states. Instead, the tribunal quotes from *Saluka*,³⁶⁵ where the tribunal contrasted decision-making *ex aequo et bono* with decision-making based on law, including arbitral precedent. The tribunal in *Saluka*, relying on *S.D. Meyers*,³⁶⁶ held that the promise of fair and equitable treatment does not grant tribunals “an open-ended mandate to second-guess government decision-making.”³⁶⁷ The tribunal in *Saluka* concluded that the standards formulated in Article 3 of the BIT between the Netherlands and the Czech and Slovak Federal Republic³⁶⁸ – *fair and equitable treatment* and *full protection and security* – “vague as they may be, are susceptible of specification through judicial practice and do in fact have sufficient legal content to allow the case to be decided on the basis of law.”³⁶⁹ In addition, the tribunal in *Saluka* noted that, “[o]ver the years, a number of awards have dealt with such standards yielding a fair amount of practice that sheds light on their legal meaning.”³⁷⁰

The approaches in *Micula* and *Saluka* differ in nuances. The arbitral tribunal in *Saluka* mentions the arbitral practice of specifying the meaning of fair and equitable treatment through judicial practice but it does not equate that practice with customary international law. Instead, its reference to judicial practice could also be read as a reference to Article 38(1)(d) of the ICJ Statute, which recognises judicial decisions as a subsidiary means for the determination of rules of law. Such a reference to Article 38(1)(d) of the ICJ Statute, as we have seen, would be misguided, as the reference is rather a symptom of a tribunal’s understanding of its own function as a lawmaker than an argument *for* its function as a

³⁶⁵ *Saluka Investments BV (The Netherlands) v Czech Republic* (hereafter *Saluka*), UNCITRAL Partial Award, 17 March 2006, para 284.

³⁶⁶ *S.D. Meyers, Inc. v Canada*, UNCITRAL Partial Award, 13 November 2000.

³⁶⁷ *Saluka v Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para 284 (quoting *S.D. Meyers, Inc. v Canada*, UNCITRAL Partial Award, 13 November 2000, para 261).

³⁶⁸ Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic, signed on 29 April 1991.

³⁶⁹ *Saluka v Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para 284.

³⁷⁰ *ibid.*

lawmaker. The tribunal in *Micula*, on the other hand, goes a step further than the tribunal in *Saluka* by considering arbitral awards to be a source of customary international law.

The following paragraphs examine to what extent arbitral awards might be a source of customary international law. As awards, i.e., decisions rendered by “private” arbitral tribunals, by definition, do not constitute state practice,³⁷¹ the only way for awards to become sources of customary international law is for states to delegate the power to create customary international law to tribunals. If there is a general state practice to delegate that power to arbitral tribunals and if states accept that practice as binding (*opinio juris*), awards may be a source of customary international law. In such a scenario, states accept as binding that arbitral awards do not only impact the disputing parties but also future disputing parties and third states participating in the ‘system’ of investor-state arbitration.

The delegation of the power to create customary international law could be explicit in the text of international investment agreements or implied in a general state practice. Nothing in the text of international investment agreements states that awards are a source of customary international law. One could argue, however, that states, by relying on arbitral precedent in their submissions to arbitral tribunals, implicitly acquiesce in the fact that tribunals are creating customary international law. The underlying argument is that a state’s reliance on arbitral precedents equals its implicit acceptance that tribunals are developing rules that are binding under customary international law. Put differently, one could argue that if states did not believe that the rules developed by tribunals were sources

³⁷¹ cf *Eli Lilly and Company v Canada*, Case No UNCT/14/2, Final Award, 16 March 2017 (NAFTA) para 203 (“Mexico does not consider decisions of international tribunals, particularly those which interpret autonomous standalone fair and equitable treatment, to constitute State practice.”); *Merrill & Ring Forestry L.P. v Canada*, UNCT/07/1, Award, 31 March 2010 (NAFTA) para 195 (noting Canada’s “contention that arbitral awards do not form part of customary international law”).

of customary international law, there would be no reason for states to rely on arbitral precedents in their submissions.

Such an argument would be too simplistic for two reasons. First, it presupposes that the sole reason for a state's reliance on arbitral precedents in its submissions to a tribunal is the state's supposedly genuine belief that the rules developed by arbitral tribunals are binding on the state under customary international law. State submissions do not support such an interpretation. Even if a state submission is silent on the legal value of arbitral precedents while citing precedents, it cannot be inferred that the state considers arbitral precedents to be sources of customary international law. That is so, because even if a state did not consider arbitral awards to be sources of customary international law, it would cite prior awards in support of its argument. Tribunals, after all, tend to follow arbitral precedents.³⁷² Whether it was a disputing party or an arbitral tribunal which triggered this development – the reliance on arbitral precedent – is beside the point. It does not matter whether it was a tribunal who wanted to rely on the ratio decidendi in a previous award and put these ratio decidendi to the disputing parties first or whether it was a disputing party who relied on a prior award in its submission first.³⁷³ The development has either way taken flight and is now established practice in investment treaty arbitration.³⁷⁴ That reliance on precedent is established practice does not mean, however, that states accept

³⁷² Campbell McLachlan, 'Investment Treaty Arbitration: The Legal Framework' in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009) 95-145, at 118 (noting that "evidence to date indicates that most tribunals do make a conscious effort to consider prior awards, and to develop what [the *Mondev*] tribunal suggestively called 'a body of concordant practice'").

³⁷³ But see Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 134 (noting that the reliance on arbitral precedent "emerged in an explicit form in the early 2000s, not least, in response to heavy reliance on past awards by parties in their submissions") (internal reference omitted).

³⁷⁴ Christoph Schreuer and Matthew Weiniger, 'A Doctrine of Precedent?' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1188-1206, at 1189 ("[T]ribunals in investment disputes, including ICSID tribunals, rely on previous decisions of other tribunals whenever they can.").

arbitral precedent as a source of customary international law. What is perhaps more accurate is that states cite prior awards as persuasive precedents without intending all arbitral awards to have some special interpretative force, least of all those awards with which they disagree. In sum, elevating awards to sources of customary international law based on mere reliance on arbitral awards by states in their submissions to tribunals would infer too much from too little. Second, it would convert what is a method of reasoning in investor-state arbitration (persuasive precedent)³⁷⁵ into the *raison d'être* for a rule of customary international law. It is highly doubtful that states would delegate the power to create customary international law to tribunals as this would encroach on their own sovereignty.

Having said that, tribunals may interpret silence on this issue as acquiescence³⁷⁶ which means that states would have to hinder arbitral tribunals from *treating* arbitral awards as a source of customary international law if they disagreed with such treatment.³⁷⁷ Whether state abstention from protest amounts to tolerance and whether tolerance amounts to the

³⁷⁵ On precedent as a method of reasoning, see William M. Landes and Richard A. Posner, 'Legal Precedent: A Theoretical and Empirical Analysis' (1976) 19 *Journal of Law and Economics* 249-307, at 250:

The distinctive attributes of decisional rules are captured in the term that the legal system used to describe such rules: "precedents." In ordinary language, a precedent is something done in the past that is appealed to as a reason for doing the same thing again. It is much the same in law. The earlier decision provides a reason for deciding a subsequent similar case the same way, and a series of related precedents may crystallize a rule having almost the same force as a statutory rule. Accordingly, legal precedents are more accurately described as inputs into the production of judge-made rules of law than as the rules themselves.

³⁷⁶ cf *Micula*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 507 (noting the abstention of protest from Romania, the respondent state, on whether the content of the fair and equitable treatment standard "must be disciplined by being based upon state practice and judicial or arbitral case law or other sources of customary or general international law") (internal quotation marks omitted). But see James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 25 (noting that "[s]ilence may denote either tacit agreement or a simple lack of interest in the issue").

³⁷⁷ cf Thomas Schultz, 'Secondary Rules of Recognition and Relative Legality in Transnational Regimes' (2011) 56 *American Journal of Jurisprudence* 59-88, at 71 (noting that "arbitrators could be requested [...] not to make reference to prior cases").

acceptance of this arbitral practice as *law (opinio juris)* is questionable.³⁷⁸ It seems that the delegation of law-making power³⁷⁹ from all states participating in the ‘system’ of investor-state arbitration to arbitral tribunals would require a collective action that amounts to more than a widespread absence of protest. In sum, absent a general state practice to treat awards as a source of customary international law, the reliance on arbitral precedent is not a rule of treaty interpretation within the meaning of Article 38(1)(b) of the ICJ Statute. Be that as it may, this technicality may not matter in the end. Even if awards are technically not a source of customary international law, arbitrators elevate awards nominally to sources of customary international law, which is applicable among all states. Once arbitral tribunals declare awards to be a source of customary international law, even if only nominally, arbitral precedent may indeed take on a life of its own since arbitral tribunals, by pretending to be applying international law, are creating a body of rules which not only arbitral tribunals but also others, including states, may over time, consider to be the *law*. This process has already begun. Arbitral tribunals are creating rules. To the extent that tribunals consider themselves bound by these rules, these rules are binding on third states unconnected to the line of cases in which the rules were first developed. In other words, the rules developed by arbitral tribunals become the applicable law. This is so even though the rules are not sources of international law, legally speaking, in the conventional sense of that word. The rules are not to be found in treaties (though they specify the content of treaties); they are not sources of customary international law either nor do they necessarily reflect general principles of law as they are recognised by civilised nations. Rather, the rules developed by arbitral tribunals reflect the principles as

³⁷⁸ cf James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 25 (noting that “often the real problem is to distinguish mere abstention from protest by a number of states in face of a practice followed by others”).

³⁷⁹ Law-making power, in this context, refers to the power of arbitrators to make law – not unlike judges make law in national courts, i.e., here, by specifying the meaning of vague provisions over time.

they are recognised by those tribunals. The greater the number of actors who treat the rules developed by arbitral tribunals as the law, the more authoritative those rules become.

(iii) Conclusion

States have not explicitly granted arbitrators the authority to rely on previous awards and to thereby create rules. The reliance on precedent is not a rule of treaty interpretation within the Vienna Convention on the Law of Treaties either. This does not prevent arbitral tribunals from relying on arbitral precedents and thereby creating rules and – in the long term – law. The next section examines the practice of relying on arbitral precedent. It examines how arbitrators rationalise their reliance on arbitral precedent and how they develop the meaning of ‘fair and equitable treatment’ in reliance on arbitral precedent.

F. Arbitral Precedent in Investor-State Arbitration in Practice

(i) Rationalisation of the Arbitral Reliance on Arbitral Precedent

This section examines how arbitrators rationalise their reliance on arbitral precedent. The principle of arbitral precedent is widely accepted as the following examples illustrate. In *Rompetrol v Romania*, the arbitral tribunal acknowledged its reliance on prior awards, stating that “the Tribunal will [...] draw on the accumulated experience of other tribunals for help and guidance when it finds that they have dealt with issues of the same kind as confront the present Tribunal.”³⁸⁰ Similarly, in *Crystallex v Venezuela*, the tribunal, when interpreting the FET standard, found prior awards “to be instructive as they evidence what is nowadays considered to be the core of the ‘fair and equitable treatment’ standard.”³⁸¹

³⁸⁰ *Rompetrol v Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, para 182. See also *Bilcon v Canada*, PCA Case No 2009-4, Award on Jurisdiction and Liability, 17 March 2015 (NAFTA) para 427:

NAFTA Article 1105 has by now been the subject of considerable analysis and interpretation by numerous arbitral tribunals. The Tribunal in the present case is guided by these earlier cases, particularly the formulation of the international minimum standard by the *Waste Management Tribunal*.

³⁸¹ *Crystallex v Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, para 539. It would have been more precise to state that prior awards evidence what arbitral tribunals consider to be the core FET

In *Garanti Koza v Turkmenistan*,³⁸² the tribunal relied on a prior award when stating its reasons for relying on precedents. It stated that, despite not being bound by prior decisions, it “cites to the decisions of other tribunals in other investment treaty cases where such decisions help to explain a point, to clarify a concept of international law, or to illustrate how similar issues have been resolved in other cases.”³⁸³ The tribunal in *Garanti Koza* thereby relied on *Bayindir v Pakistan*.³⁸⁴ The tribunal in *Bayindir v Pakistan*, in turn, agreed with the tribunal in *AES Corporation v Argentina* that, despite the lack of binding precedent in investor-state arbitration, it would “certainly carefully consider [previous] decisions whenever appropriate”³⁸⁵. Tribunals, notably, often rely on prior awards rendered under treaties other than the treaty they are interpreting.³⁸⁶ This reflects their understanding of international investment law as a single body of *law* instead of an amalgam of some three thousand international investment agreements. In the words of the tribunal in *ADC v Hungary*:

standard. Cf Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) 22.

³⁸² *Garanti Koza v Turkmenistan*, ICSID Case No ARB/11/20, Award, 19 December 2016.

³⁸³ *ibid* para 149.

³⁸⁴ *ibid* para 149 fn 229 (relying on *Bayindir v Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, para 76).

³⁸⁵ *Bayindir v Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, para 76 (relying on *AES Corporation v Argentina*, ICSID Case No ARB/02/17, Decision on Jurisdiction, 26 April 2005, paras 30-32). In the words of the tribunal in *AES Corporation v Argentina*:

[30.] [...] Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.

[31.] One may even find situations in which, although seized on the basis of another BIT as combined with the pertinent provisions of the ICSID Convention, a tribunal has set a point of *law* which, in essence, is or will be met in other cases whatever the specificities of each dispute may be. Such precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration. (emphasis added).

³⁸⁶ Campbell McLachlan, ‘Investment Treaty Arbitration: The Legal Framework’ in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009) 95-145, at 121 (“[T]ribunals have regularly borrowed reasoning and interpretations adopted by tribunals hearing cases under different treaties, but with similar language”).

It is true that arbitral awards do not constitute binding precedent. It is also true that a number of cases are fact-driven and that the findings in those cases cannot be transposed in and of themselves to other cases. It is further true that a number of cases are based on treaties that differ from the present BIT in certain respects. However, cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of *law*, which in turn may serve predictability in the interest of both investors and host States.³⁸⁷

The tribunal in *ADC v Hungary*, guided by its understanding of international investment law as *law* is willing to look beyond the differences between investment treaties. Its recognition that reliance on arbitral precedent advances the body of law is perhaps only one step short of admitting that by generating and following arbitral precedent across the borders of individual treaties, tribunals are creating law in the first place. This reference in the passive voice to ‘principles developed’ by arbitral tribunals is not uncommon among arbitral tribunals. Instead of stating that it is arbitral tribunals which are developing the principles, tribunals tend to downplay their role in that process.³⁸⁸ This is not to say that a single arbitral award will create “a rule of legal obligation applicable to like

³⁸⁷ *ADC v Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006, para 293. See also *Teinver S.A. v Argentine Republic*, ICSID Case No ARB/09/1, Award, 21 July 2017, para 663:

While the expression of this obligation [referring to the obligation to provide fair and equitable treatment] is general and somewhat vague, the Tribunal is assisted in interpreting the content of this obligation by both the context of the Treaty itself and the decisions of other tribunals who have developed the content of this obligation by interpreting this particular Treaty, as well as numerous other treaties with similar provisions in different factual scenarios.

³⁸⁸ See *Bogdanov v Moldova I*, Arbitral Award, 22 September 2005, para 4.2.4.4. (“various criteria have been developed in international law to define the fair and equitable standard”); *Frontier Petroleum v Czech Republic*, UNCITRAL Final Award, 12 November 2010, para 288 (mentioning “the notion of legitimate expectations as developed in the context of the fair and equitable treatment standard”); *Mamidoil v Albania*, ICSID Case No ARB/11/24, Award, 30 March 2015, para 599 (“The classes of cases [in which the fair and equitable treatment standard can be breached] have developed in reaction to the fact that the terms ‘fair’ and ‘equitable’ are generic and vague.”). But see *Ascom v Kazakhstan*, SCC Arbitration V (116/2010), Award, 19 December 2013, para 943 (acknowledging that tribunals have created “a considerable body of case law that has added specific meaning and content to the [FET] standard”).

circumstances.”³⁸⁹ Absent a hierarchy among arbitral tribunals that could bind lower tribunals to the rules created by higher tribunals, precedents in investor-state arbitration are not strictly binding. The longer the line of decisions consolidating a rule, however, the greater the authority of that rule, even in a system of persuasive precedent.³⁹⁰ The solidification of a rule does not simply happen either but is the result of multiple tribunals further specifying a rule in a line of consistent cases. If tribunals did not follow precedents in a line of consistent cases, the authority of the rule would not increase. Tribunals therefore play an active role in the creation and solidification of rules. It is helpful to keep this in mind when arbitral tribunals refer to the emergence of rules,³⁹¹ to an emerging consensus,³⁹² or to “an emerging standard of fair and equitable treatment.”³⁹³ But for the reliance on precedent in a long line of consistent cases, no rule, consensus or standard would ever develop.³⁹⁴ This inclination, shared among arbitral tribunals,³⁹⁵ to elevate awards to *precedent* or *jurisprudence* can be rationalised as the result of the tribunals’

³⁸⁹ William M. Landes and Richard A. Posner, ‘Legal Precedent: A Theoretical and Empirical Analysis’ (1976) 19 *Journal of Law and Economics* 249-307, at 249.

³⁹⁰ *ibid.*

³⁹¹ *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016, para 426 (noting that “[i]t clearly emerges from the analysis of the FET standard by investment tribunals that legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment”).

³⁹² *Bilcon v Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (NAFTA) para 440 (noting that “[m]any NAFTA tribunals have shared the emerging consensus that the *Neer* standard of indisputably outrageous misconduct is no longer applicable”).

³⁹³ *LG&E Energy & Argentina*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, para 125 (referring to arbitral precedent and “noting that it “considers [the stability of the legal and business framework] to be an emerging standard of fair and equitable treatment in international law”). Other arbitral tribunals relied on this passage. See *Enron v Argentina*, ICSID Case No ARB/01/1, Award, 22 May 2007, para 260; *Duke Energy v Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008, para 339; *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 528 fn 101.

³⁹⁴ See also H.W. Arthurs, *‘Without the Law’: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press 1985) 1 (“Nothing just happens. Legal institutions and ideas do not simply emerge, evolve, reshape themselves, deteriorate, or disappear of their own accord.”)

³⁹⁵ Bernard Hanotiau, ‘Investment Treaty Arbitration and Commercial Arbitration: Are They Different Ball Games? The Legal Regime/Framework’ in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009) 146-150, at 148 (noting that “investment tribunals concur on the need to take earlier cases into account”).

urge and duty to render reasoned awards. Reliance on previous awards gives credence and support to an arbitral tribunal that is faced with the complex task of having to interpret vague treaty provisions. The obligation to treat foreign investors fairly and equitably is such a vague treaty provision that is specified by arbitrators over time and across treaties. The next section illustrates the arbitral development of the meaning of ‘fair and equitable treatment’.

(ii) Arbitral Development of ‘Fair and Equitable Treatment’

This section first introduces the different categories of the FET obligation, before examining how arbitrators develop the meaning of ‘fair and equitable treatment’ over time and in reliance on arbitral precedent. This creative development occurs irrespective of whether arbitrators claim to be interpreting an autonomous FET standard or the customary international law minimum standard of treatment. This section also shows that the reliance on arbitral precedent leads to convergence between the two standards.

(a) The Different Categories of the FET Obligation

Most international investment treaties use the term ‘fair and equitable treatment’ (FET) but even where treaties refer to ‘just and equitable treatment’ instead, tribunals interpret that to mean nothing other than what is widely referred to as ‘the FET standard’. A typical example of an FET clause is Article 3(1) of the Austria-Guatemala BIT³⁹⁶ which reads: “Each Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and full protection and security.”

While most investment treaties contain a clause that is similar, if not identical, to Article 3(1) of the Austria-Guatemala BIT, other treaties contain different clauses. FET

³⁹⁶ Agreement between the Republic of Austria and the Republic of Guatemala for the Promotion and Protection of Investments of 16 January 2006 (entered into force on 1 December 2012).

obligations differ in their wording and in their link to the customary international law minimum standard of treatment of aliens. This section gives an overview of the different categories of FET obligations: the qualified and unqualified FET obligations and the independent and dependent FET obligations. An FET standard is qualified if it contains a reference to (the principles of) international law, customary international law or to the minimum standard of treatment, or if the treaty includes an exhaustive or indicative lists of FET elements. An FET standard is unqualified, on the other hand, if it does not contain any such references. An FET obligation is independent, free-standing or autonomous, if it is not linked to the minimum standard. An FET obligation is dependent, if it is linked to the minimum standard. As will be shown, an FET obligation can be both qualified and dependent, if the text of a treaty expressly links the obligation to the minimum standard.

According to the International Investment Agreements (IIA) Mapping Project,³⁹⁷ 1988 out of 2572 mapped treaties contain an unqualified FET clause, whereas 453 treaties contain a qualified FET clause. 126 treaties do not contain an FET clause, whereas 5 treaties are inconclusive as to the type of FET clause used. 348 out of 2575 treaties contain a reference to (the principles of) international law.³⁹⁸ An example in this category is Article II(2)(a) of the Canada-Panama BIT³⁹⁹ which requires that each Party accord investments of the other Party *fair and equitable treatment in accordance with the principles of international law*. In general, arbitral tribunals do not elicit additional meaning from such a general reference to the principles of international law.⁴⁰⁰ That is

³⁹⁷ UNCTAD, *International Investment Agreements Mapping Project* <<http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu>> accessed 20 August 2018.

³⁹⁸ See UNCTAD, *International Investment Agreements Mapping Project* <<http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu>> accessed 20 August 2018.

³⁹⁹ Treaty between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments of 12 September 1996 (entered into force on 13 February 1998).

⁴⁰⁰ But see *Flughafen Zürich A.G. and Gestión Ingeniería S.A v The Bolivarian Republic of Venezuela (Flughafen Zürich)*, ICSID Case No ARB/10/19, Award, 18 November 2014, para 573 (noting that the requirement to define the FET standard in accordance with international law “necesariamente incorpora

not surprising given that Article 31(3)(c) of the VCLT⁴⁰¹ requires arbitral tribunals to consider any relevant rules of international law applicable in the relations between the parties when interpreting a specific treaty. It is therefore immaterial whether an investment treaty reiterates that obligation.

The real question is whether tribunals interpret ‘fair and equitable treatment’ as an autonomous treaty obligation or as an element of the international minimum standard of treatment. In the absence of an explicit reference, arbitral tribunals, in general, refuse to link the obligation to provide ‘fair and equitable treatment’ to the minimum standard. The terminology is so different, they argue, that states must have intended ‘fair and equitable treatment’ – with or without a reference to international law – to mean something else than the minimum standard for otherwise states would have simply referred to the minimum standard instead. In the oft-cited words of Christoph Schreuer:

[I]t is inherently implausible that a treaty would use an expression such as ‘fair and equitable treatment’ to denote a well-known concept such as the ‘minimum standard of treatment in customary international law’. If the parties to a treaty want

una referencia al nivel de protección que el Derecho internacional otorga a los extranjeros, es decir a lo que se conoce como estándar mínimo consuetudinario” [necessarily incorporates a reference to the level of protection that international law grants to foreigners, that is to say what is known as the customary minimum standard]). But see *Rusoro Mining Limited v The Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/12/5, Award, 22 August 2016, para 520 (relying on *Flughafen Zürich*):

The Tribunal shares Respondent’s interpretation that when Art. II.1 of the BIT qualifies Venezuela’s commitment to accord FET (and FPS) treatment ‘in accordance with the principles of international law’, the rule is referring to the CIM Standard. But the incorporation of the CIM Standard into the definition of the FET does not provoke a major disruption in the level of protection: the CIS Standard has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter. The whole discussion of whether Art. II.2 of the BIT incorporates or fails to incorporate the CIS Standard when defining FET has become dogmatic; there is no substantive difference in the level of protection afforded by both standards. (Internal reference omitted).

⁴⁰¹ Vienna Convention on the Law of Treaties, 22 May 1969, 1155 *United Nations Treaty Series* 331.

to refer to customary international law, it must be presumed that they will refer to it as such rather than using a different expression.⁴⁰²

Tribunals often remain unpersuaded by any argument to the contrary. Even when states point out “that the expression ‘fair and equitable treatment’ [...] refers to the minimum standard under customary international law,”⁴⁰³ tribunals rarely forego the opportunity to interpret ‘fair and equitable treatment’ as an autonomous standard, albeit an autonomous standard across a multitude of treaties, instead of an element of the minimum standard.⁴⁰⁴ The benefit of interpreting ‘fair and equitable treatment’ as an autonomous standard is the leeway this gives tribunals in interpreting it. That states disagree and continue to disagree with this interpretation is reflected in the North American Free Trade Agreement⁴⁰⁵ (NAFTA) Notes of Interpretation and numerous second-generation treaties that link ‘fair and equitable treatment’ to the minimum standard.

Under NAFTA, the contracting parties, by referring to ‘fair and equitable treatment’, meant to refer to the customary international law minimum standard of treatment of aliens. NAFTA Article 1105(1), which contains the FET standard is ambiguous in this regard, however. It subjugates ‘fair and equitable treatment’ to international law⁴⁰⁶ but other than the provision’s title, which refers to the content of NAFTA Article 1105 as the

⁴⁰² Christoph Schreuer, ‘Fair and Equitable Treatment in Arbitral Practice’ (2005) 6 *Journal of World Investment and Trade* 357-386, at 360.

⁴⁰³ *Teinver S.A. v Argentine Republic*, ICSID Case No ARB/09/1, Award, 21 July 2017 (Argentina-Spain BIT 1991) para 494. Article IV(1) of the Argentina-Spain BIT 1991 provides that “[e]ach Party shall guarantee in its territory fair and equitable treatment of investments made by investors of the other Party.”

⁴⁰⁴ *cf. Teinver S.A. v Argentine Republic*, ICSID Case No ARB/09/1, Award, 21 July 2017 (Argentina-Spain BIT 1991) para 666 (“In terms of the content, the Tribunal is of the view that fair and equitable treatment is *not only* the minimum standard of treatment at international law, as that term is not used in the Treaty.”) (emphasis added).

⁴⁰⁵ North American Free Trade Agreement between Canada, the United States of America and Mexico, signed 17 December 1992, entry into force 1 January 1994.

⁴⁰⁶ NAFTA Article 1105(1): “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

‘Minimum Standard of Treatment’, the text of NAFTA does not state whether the obligation to provide ‘fair and equitable treatment’ refers to the customary international law minimum standard of treatment of aliens or to *another* minimum standard of treatment under international law. This uncertainty led the NAFTA Free Trade Commission to issue a Note of Interpretation in 2001⁴⁰⁷ in which it clarified that NAFTA Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens and that ‘fair and equitable treatment’ does not require treatment in addition to or beyond that which is required by that customary international law minimum standard.⁴⁰⁸

Several states have since followed the NAFTA example and have expressly linked ‘fair and equitable treatment’ to the minimum standard of treatment of aliens. According to the IIA Mapping Project, 80 out of 2575 mapped treaties contain an express reference to the minimum standard.⁴⁰⁹ These treaties define ‘fair and equitable treatment’ as an element of the international minimum standard of treatment of aliens (the minimum standard). All investment treaties that link ‘fair and equitable treatment’ to the minimum standard are second-generation treaties. Not all second-generation treaties link ‘fair and equitable treatment’ to the minimum standard but all treaties that do are second-generation treaties. A second-generation treaty is a treaty that was signed in the year 2002 or since. The Mexico-China BIT⁴¹⁰ is an example of a second-generation treaty that links ‘fair and equitable treatment’ to the minimum standard. Article 5(1) of the Mexico-China BIT provides that each contracting party shall accord to investments of investors of the

⁴⁰⁷ NAFTA Free Trade Commission, *NAFTA Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001).

⁴⁰⁸ See NAFTA Free Trade Commission, *NAFTA Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001) Sections B(1) and B(2).

⁴⁰⁹ See UNCTAD, *International Investment Agreements Mapping Project* <<http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu>> accessed 20 August 2018.

⁴¹⁰ Mexico-China BIT of 11 July 2008 (entered into force on 6 June 2009).

other contracting party *treatment in accordance with international law, including fair and equitable treatment* and full protection and security. Article 5(2) of the Mexico-China BIT – much like the NAFTA Notes of Interpretation in relation to NAFTA Article 1105(1) – clarifies that Article 5(1) prescribes the international law minimum standard of treatment of aliens and that ‘fair and equitable treatment’ does not require treatment in addition to or beyond that which is required by that minimum standard.⁴¹¹ The Czech-Republic-Mexico BIT⁴¹² is even more succinct. In its protocol, which forms an integral part of the agreement, the contracting parties note that the term *fair and equitable treatment* in Article 2(3) of the BIT prescribes the customary international law minimum standard of treatment of aliens.⁴¹³

Other states have opted for expressly defining ‘fair and equitable treatment’ as an element of the minimum standard instead. Article 11.5(1) of the Free Trade Agreement between Australia and the Republic of Korea,⁴¹⁴ for example, requires each contracting party to accord covered investments *treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment* and

⁴¹¹ See also Agreement between Japan and the Lao People’s Democratic Republic for the Liberalisation, Promotion and Protection of Investment of 16 January 2008, Art 5(1); Agreement between Japan and Mongolia for an Economic Partnership of 10 February 2015 (entered into force on 7 June 2016), Art 10.5(1); Agreement between Japan and the Republic of the Philippines for an Economic Partnership of 9 September 2006 (entered into force on 11 December 2008), Art 91; Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership of 17 September 2004 (entered into force on 1 April 2005), Art 60; Mexico-Iceland BIT of 24 June 2005 (entered into force on 28 April 2006), Art 3(1) and Protocol; Comprehensive Economic Partnership Agreement between Japan and the Republic of India of 16 February 2011 (entered into force on 1 August 2011), Art 87(1); Agreement between Japan and Mongolia for an Economic Partnership of 10 February 2015 (entered into force on 7 June 2016), Art 10.5(1).

⁴¹² Czech Republic-Mexico BIT of 4 April 2002 (entered into force on 13 March 2004).

⁴¹³ See also Mauritius-Egypt BIT of 25 June 2014 (entered into force on 17 October 2014), Art 4; Comprehensive Economic Partnership Agreement between India and the Republic of Korea of 7 August 2008 (entered into force on 1 January 2010), Art 10.4(1); Comprehensive Economic Cooperation Agreement between the Government of Malaysia and the Government of the Republic of India of 18 February 2011 (entered into force on 1 July 2011), Art 10.5; Mexico-India BIT of 21 May 2007 (entered into force on 23 February 2008), Art 5; Japan-Iran BIT of 5 February 2016, Art 5.

⁴¹⁴ Australia-Korea FTA of 8 April 2014 (entered into force on 12 December 2014).

full protection and security.⁴¹⁵ For greater clarity, some investment treaties of this type also state that ‘fair and equitable treatment’ does not require treatment in addition to or

⁴¹⁵ See also Australia-Malaysia FTA of 22 May 2012 (entered into force on 1 January 2013), Art 12.7; Azerbaijan-Syria BIT of 8 July 2009 (entered into force on 4 January 2010), 2(2); Canada-Benin BIT of 9 January 2013 (entered into force on 12 May 2014), Art 7(1); Canada-Burkina Faso BIT of 20 April 2015, Art 6(1); Canada-Cameroon BIT of 3 March 2014 (entered into force on 16 December 2016), Art 6(1); Turkey- Cameroon BIT of 24 April 2012, Art 3(2); Canada-Cote d’Ivoire BIT of 30 November 2014 (entered into force on 14 December 2015), Art 6(1); Canada-Czech Republic BIT of 6 May 2009 (entered into force on 22 January 2012), Art III(1)(a); Canada-Guinea BIT of 27 May 2015, Art 6(1); Canada-Honduras FTA of 5 November 2013 (entered into force on 1 October 2014), Art 10.6(1); Agreement between the Government of Canada and the Government of the Hong Special Administrative Region of the People’s Republic of China for the Promotion and Protection of Investments of 10 February 2016 (entered into force on 6 September 2016), Art 6(1); Canada-Jordan BIT of 28 June 2009 (entered into force on 14 December 2009), Art 5(1); Canada-Kuwait BIT of 26 September 2011 (entered into force on 19 February 2014), Art 6(1); Canada-Latvia BIT of 5 May 2009 (entered into force on 24 November 2011), Art II(2)(a); Canada-Mali BIT of 28 November 2014 (entered into force on 8 June 2016), Art 6(1); Canada-Mongolia BIT of 8 September 2016 (entered into force on 24 February 2017), Art 6(1); Canada-Nigeria BIT of 6 May 2014, Art 6(1); Canada-Peru BIT of 14 November 2006 (entered into force on 20 June 2007), Art 5(1); Romania-Canada BIT of 8 May 2009 (entered into force on 23 November 2011), Art II(2)(a); Canada-Senegal BIT of 27 November 2014 (entered into force on 5 August 2016), Art 6(1); Canada-Serbia BIT of 1 September 2014 (entered into force on 27 April 2015), Art 6(1); Canada-Slovak Republic BIT of 20 July 2010 (entered) into force on 14 March 2012, Art III(1)(a); Canada-Tanzania BIT of 17 May 2013 (entered into force on 9 December 2013), Art 6(1); Investment Agreement between the Government of the Hong Kong Special Administrative Region of the People’s Republic of China and the Government of the Republic of Chile of 18 November 2016, Art 6(1) (noting in fn 5 that “[t]he customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights of aliens”); Turkey-Gabon BIT of 18 July 2012, Art 3(2); Turkey-Gambia BIT of 12 March 2013, Art 3(2); Japan-Peru BIT of 21 November 2008 (entered into force on 10 December 2009), Art 5(1); New Zealand-Republic of Korea FTA of 23 March 2015 (entered into force on 20 December 2015), Art 10.7(1) and Annex 10-A; Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation of 10 July 2013 (entered into force on 1 December 2013), Chapter 12, Art 10(1); Nigeria-Singapore BIT of 4 November 2016, Art 3 (noting in para 4, that, “[i]n applying this article, Parties understand that they have different forms of administrative, legislative, and judicial systems and are at different levels of development and may not achieve the same standard at the same time”); Turkey-Pakistan BIT of 22 May 2012, Art 3(2); Turkey-Bangladesh BIT of 12 April 2012, Art 2(2); Turkey-Azerbaijan BIT of 25 October 2011 (entered into force on 2 May 2013), Art 2(2); Rwanda-Turkey BIT of 3 November 2016, Art 3(2); Turkey-Tanzania BIT of 11 March 2011, Art 2(2).

See also Australia-Japan EPA of 8 July 2015 (entered into force on 15 January 2015), Art 14.5 (requiring *treatment in accordance with customary international law, including fair and equitable treatment*, and clarifying that this requirement prescribes the customary international law minimum standard of treatment of aliens); Bahrain-Mexico BIT of 29 November 2012 (entered into force on 30 July 2014), Art 4; Agreement between the Belgium-Luxembourg Economic Union and the Republic of Colombia on the Reciprocal Promotion and Protection of Investments, signed 4 February 2009, Art III(2); Canada-Korea FTA of 22 September 2014 (entered into force on 1 January 2015), Art 8.5; Colombia-China BIT of 22 November 2008 (entered into force on 2 July 2013), Art 2; China-Korea FTA of 1 June 2015 (entered into force on 20 December 2015), Art 12.5 and Annex 12-A; Japan-Colombia BIT of 12 September 2011 (entered into force on 11 September 2015), Art 4; Colombia-Korea FTA of 21 February 2013 (entered into force on 15 July 2016), Art 8.5 and annex 8-A; Korea-Colombia BIT of 6 July 2010, Art 2(2) and 2(3); Japan-Kenya BIT of 28 August 2016, Art 5(1); Japan-Uruguay BIT of January 2015, Art 5; Korea-

beyond that which is required by the customary international law minimum standard.⁴¹⁶ For even greater clarity, treaties of this type also often exclude the applicability of the Most-Favoured-Nation (MFN) clause to an FET obligation that protects the minimum standard of treatment of aliens. A MFN clause obliges a state to treat investors under one treaty not less favourably than it treats investors under any other treaty. Therefore, if a state entered a more favourable FET obligation under another investment treaty, investors, but for the exclusion, could rely on the more favourable FET obligation under the other treaty. In sum, when incorporating the obligation to provide ‘fair and equitable treatment’ in their investment treaties, states usually opt for one of the following. They either promise to provide

- a. Fair and equitable treatment;
- b. Fair and equitable treatment in accordance with the principles of international law;
- c. Treatment in accordance with international law, including fair and equitable treatment;
- d. Treatment in accordance with customary international law, including fair and equitable treatment; or
- e. Treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment.

Myanmar BIT of 5 June 2014, Art 2(2) and 2(3); Korea-Rwanda BIT of 29 May 2009 (entered into force on 16 February 2013), Art 2(2) and 2(3); Agreement on Investment under the Framework Agreement Establishing a Free Trade Area between the Republic of Korea and the Republic of Turkey, signed 26 February 2015, Art 1.6 and Annex A; Mexico-Kuwait BIT of 22 February 2013 (entered into force on 28 April 2016), Art 4; Mexico-Slovak Republic BIT of 26 October 2007 (entered into force on 8 April 2009), Art 5; United Arab Emirates-Mexico BIT of 19 January 2016, Art 4; UK-Mexico BIT of 12 May 2006 (entered into force on 25 July 2007), Art 3; Morocco-Nigeria BIT of 3 December 2016, Art 7; US-Rwanda BIT of 19 February 2008 (entered into force on 1 January 2012), Art 5 and Annex A; TPP of 4 February 2016, Art 9.6 and Annex 9-A; US-Uruguay BIT of 4 November 2005 (entered into force on 31 October 2006), Art 5 and Annex A.

⁴¹⁶ See, for example, Canada-Benin BIT of 9 January 2013 (entered into force on 12 May 2014), Art 7(2); Canada-Burkina Faso BIT of 20 April 2015, Art 6(2).

Most international investment agreements contain an unqualified FET obligation (a), requiring states to provide ‘fair and equitable treatment’ to investments of foreign investors. Tribunals interpret such a requirement as a free-standing FET obligation, i.e., an obligation that is not an element of the minimum standard. Express references to the customary international law minimum standard of treatment exist only in second-generation treaties. Instead of using phrase (e) in second-generation treaties, some states use either phrase (a), (c) or (d) instead and combine that phrase with a clarification that it prescribes the minimum standard. Even though it may seem implausible to Christoph Schreuer “that a treaty would use an expression such as ‘fair and equitable treatment’ to denote a well-known concept such as the ‘minimum standard of treatment in customary international law’”⁴¹⁷, this state practice continues and is reinforced by express clarifications in the text of treaties that phrases (a), (c) or (d) all prescribe the minimum standard without using the phrase ‘minimum standard’.

The more express the reference to the minimum standard, the higher the likelihood that tribunals will interpret ‘fair and equitable treatment’ as an element of the minimum standard. As tribunals tend to interpret ‘fair and equitable treatment’ absent a clarification as a free-standing treaty obligation, states, following the example of the NAFTA Free Trade Commission, have begun to expressly link ‘fair and equitable treatment’ to the minimum standard in the texts of newer investment treaties. The minimum standard, to the extent that it is different from a free-standing FET obligation, may require a higher threshold for a breach which is more beneficial from the perspectives of states. Tribunals, in theory, also have less leeway over the definition of the minimum standard than over the definition of a free-standing FET obligation, which states may also find attractive.

⁴¹⁷ Christoph Schreuer, ‘Fair and Equitable Treatment in Arbitral Practice’ (2005) 6 *Journal of World Investment and Trade* 357-386, at 360.

The minimum standard, after all, is a standard under customary international law and therefore an international custom whose content depends on the existence of a general state practice accepted as law.⁴¹⁸ To the extent that states have turned to expressly defining ‘fair and equitable treatment’ as an element of the minimum standard to regain control of the interpretation of the FET obligation, their efforts were inspired by the idea that it is states that define what constitutes an international custom. Several investment treaties define international custom to this extent, reiterating its meaning and emphasising that both of its two components must be fulfilled for a legally binding custom to arise: there must be “a general and consistent practice of States that they follow from a sense of legal obligation”⁴¹⁹ (*opinio juris*). Therefore, even if all states defined the minimum standard in a specific way, that would not be sufficient for all states to be bound by that definition. Only if states also felt legally bound by that definition would it amount to an international custom. The Latin phrase *opinio juris sive necessitatis* (“opinion that an act is necessary by rule of law”⁴²⁰) circumscribes the second element necessary to establish a legally binding custom. *Opinio juris* is a subjective element that is difficult to prove in practice given that a state’s sense of legal obligation does not follow from a state’s performance, even if that performance is frequent or habitual.⁴²¹ In an ideal scenario, then,

⁴¹⁸ See ICJ Statute, Art 38(1)(b): “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply international custom, as evidence of a general practice accepted as law.”

⁴¹⁹ New Zealand-Republic of Korea FTA of 23 March 2015 (entered into force on 20 December 2015), Annex 10-A; China-Korea FTA of 1 June 2015 (entered into force on 20 December 2015), Annex 12-A; Colombia-Republic of Korea FTA of 21 February 2013 (entered into force on 15 July 2016), Annex 8-A; Agreement on Investment under the Framework Agreement Establishing a Free Trade Area between the Republic of Korea and the Republic of Turkey of 26 February 2015, Annex A; US-Rwanda BIT of 19 February 2008 (entered into force on 1 January 2012), Annex A; TPP of 4 February 2016, Annex 9-A; US-Uruguay BIT of 4 November 2005 (entered into force on 31 October 2006), Annex A. See also Mexico-China BIT of 11 July 2008 (entered into force on 6 June 2009), Art 5(2).

⁴²⁰ Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 1265.

⁴²¹ *North Sea Continental Shelf (Federal Republic of Germany v Denmark and Federal Republic of Germany v Netherlands) (Merits)* Judgment of 20 February 1969, [1969] ICJ Rep 4, para 77 (noting that acts only constitute the *opinio juris*, if two conditions are fulfilled:

all states, over time, would agree on the content of the minimum standard, including fair and equitable treatment, and would express that they felt legally bound to follow that standard and its definition. Only then would the content of the minimum standard be clear under customary international law. This has not happened yet. Nor have all states codified the minimum standard of treatment and its content in a single treaty, thereby elevating the minimum standard from an implicit law⁴²² to an explicit obligation under international law. It is not surprising then that the states' efforts to regain control of the interpretation of the FET obligation has been thwarted by the tendency of arbitral tribunals to define the minimum standard by reference to earlier awards. Instead of asking whether there is a general and consistent state practice on how to define 'fair and equitable treatment' and whether states accept this practice as law, tribunals seek inspiration from those awards that have defined the minimum standard in the past. Absent a general and consistent state practice on how to define 'fair and equitable treatment', this makes sense because, after all, the minimum standard is not less elusive a concept than 'fair and equitable treatment' if defined as a free-standing treaty obligation. But this also means that any express link to the minimum standard under investment treaties only introduces the fiction that tribunals, when interpreting the minimum standard, are applying international custom.

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. [...] The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.).

⁴²² cf Lon L. Fuller, *Anatomy of the Law* (Praeger 1968) 71 (contrasting statute with custom:

In contrast with the statute, customary law may be said to exemplify implicit law. Let us, therefore, describe customary law in terms that will reveal to the maximum this quality of implicitness. A custom is not declared or enacted, but grows or develops through time. The date when it first came into full effect can usually be assigned only within broad limits. Though we may be able to describe in general the class of persons among whom the custom has come to prevail as a standard of conduct, it has no definite author; there is no person or defined human agency we can praise or blame for its being good or bad. There is no authoritative verbal declaration of the terms of the custom; it expresses itself not in a succession of words, but in a course of conduct.).

What tribunals are doing instead is treating prior awards interpreting international custom as evidence of that international custom, which they are not, if a corresponding general state practice accepted as law is lacking.

This leaves tribunals with at least two categories of awards to draw from when relying on precedents: one category of awards interpreting free-standing FET obligations and another category of awards interpreting ‘fair and equitable treatment’ as an element of the minimum standard. These two categories overlap with but are not identical to the unqualified FET standard and the qualified FET standard. The obligation to provide fair and equitable treatment may be qualified with a reference to international law but tribunals may nonetheless interpret that obligation as a free-standing treaty obligation. For the avoidance of doubt, this thesis does not use the expressions qualified and unqualified FET standard but refers to the autonomous FET standard on the one hand and the minimum standard on the other hand. A third category of awards finds that the autonomous FET standard and the minimum standard are identical or have converged over time. Such a convergence, if any, is the result of the cross-fertilisation between the awards of the first two categories. The next section analyses how arbitral tribunals have developed the content of the FET standard(s) and to what extent, if any, the autonomous FET standard and the minimum standard of treatment of aliens have converged over time.

(b) The Reliance on Arbitral Precedent in Numbers

The above examples do not convey how the phenomenon of precedent developed in investor-state arbitration or how widespread it is today. Looking back, it was only in 2005 that the tribunal in *AES Corporation v Argentina* noted that “[t]here is so far no rule of precedent in general international law; nor is there any within the specific ICSID system for the settlement of disputes between one State party to the Convention and the National

[sic] of another State Party [sic].”⁴²³ The alleged lack of a rule of precedent, however, does not hinder arbitral tribunals from generating and following arbitral precedents.⁴²⁴

This section examines the phenomenon of arbitral precedent in investor-state arbitration in numbers.

The original study presented in this section covers 125 arbitral decisions in which arbitral tribunals relied 895 times in total on arbitral precedent. The decisions studied date from 1999 to mid-2017 and cover thus almost 20 years of arbitral jurisprudence. It is useful to point out the limitations of this study at the outset: the analysis in this section is restricted to decisions that define ‘fair and equitable treatment’ and to those parts of the chosen decisions that are devoted to the definition and application of the obligation to treat foreign investments fairly and equitably. This section does not examine the role of arbitral precedent in judicial proceedings, if any. Nor does it examine the role of judicial precedent in investor-state arbitration, except in comparison to the role of arbitral precedent.⁴²⁵ ‘Arbitral precedent’ in this context refers to prior arbitral decisions relied on by arbitral tribunals in proceedings under international investment agreements – including those decisions rendered by ad hoc Annulment Committees within the ICSID system. ‘Reliance’ in this context means that a tribunal not only mentions a previous case,

⁴²³ *AES Corporation v Argentina*, ICSID Case No ARB/02/17, Decision on Jurisdiction, 26 April 2005, para 23.

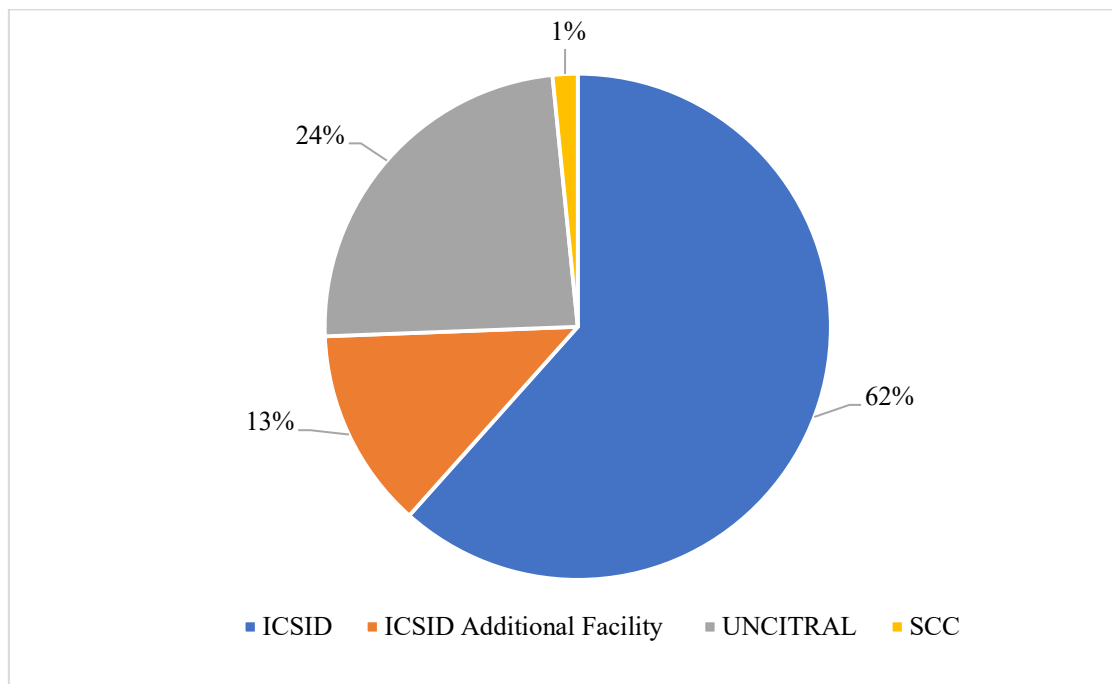
⁴²⁴ On a possible social convention to follow previous awards in investor-state arbitration, see Thomas Schultz, ‘Secondary Rules of Recognition and Relative Legality in Transnational Regimes’ (2011) 56 *American Journal of Jurisprudence* 59-88, at 67-68:

One might venture to say that [...] a social convention has developed or is developing, according to which an arbitrator should at least show to have researched prior similar cases. There is no legal obligation to follow prior arbitration cases and no award can be set aside or refused enforcement for being in contradiction with the yet elusive notion of arbitral jurisprudence. Yet, prior awards are increasingly frequently followed, leading to what is sometimes called a *de facto* doctrine of *stare decisis*.

⁴²⁵ But see Gary B. Born, *International Commercial Arbitration, Volume III: International Arbitral Awards* (2nd edn, Kluwer Law International 2014) 3810 (“The extent to which arbitral awards may serve as precedent, in other arbitral proceedings and in judicial proceedings, and the role of judicial precedent in arbitral proceedings, raise important, but infrequently discussed, questions.”).

but draws some meaning from the previous case and leans on that meaning for guidance or support. ‘Reliance’ in this context does not include instances where the arbitral tribunal considers a previous case irrelevant, or where it quotes from a previous case without making the content of a quote its own. The study in this section therefore does not include decisions that were mentioned by a tribunal without the tribunal relying on the decision, either explicitly or implicitly. Since the line between the mention of a case and the implicit reliance on a case can be difficult to draw, the following study may seem incomplete to those who would draw the line elsewhere.⁴²⁶

Figure 7: Case Study on Arbitral Precedent: The Applicable Arbitration Rules in the Sample of Decisions⁴²⁷



The decisions studied in this section stem from proceedings under four different sets of arbitration rules: the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) which includes the ICSID Rules of

⁴²⁶ For a less restrictive citation analysis, see Damien Charlotin, ‘The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis’ (2017) 20(2) *Journal of International Economic Law* 279-299, at 287 fn 49 (counting all citations “as soon as the tribunal discussed them, however minimally” and even if the tribunal “swiftly dismissed [them] as irrelevant”).

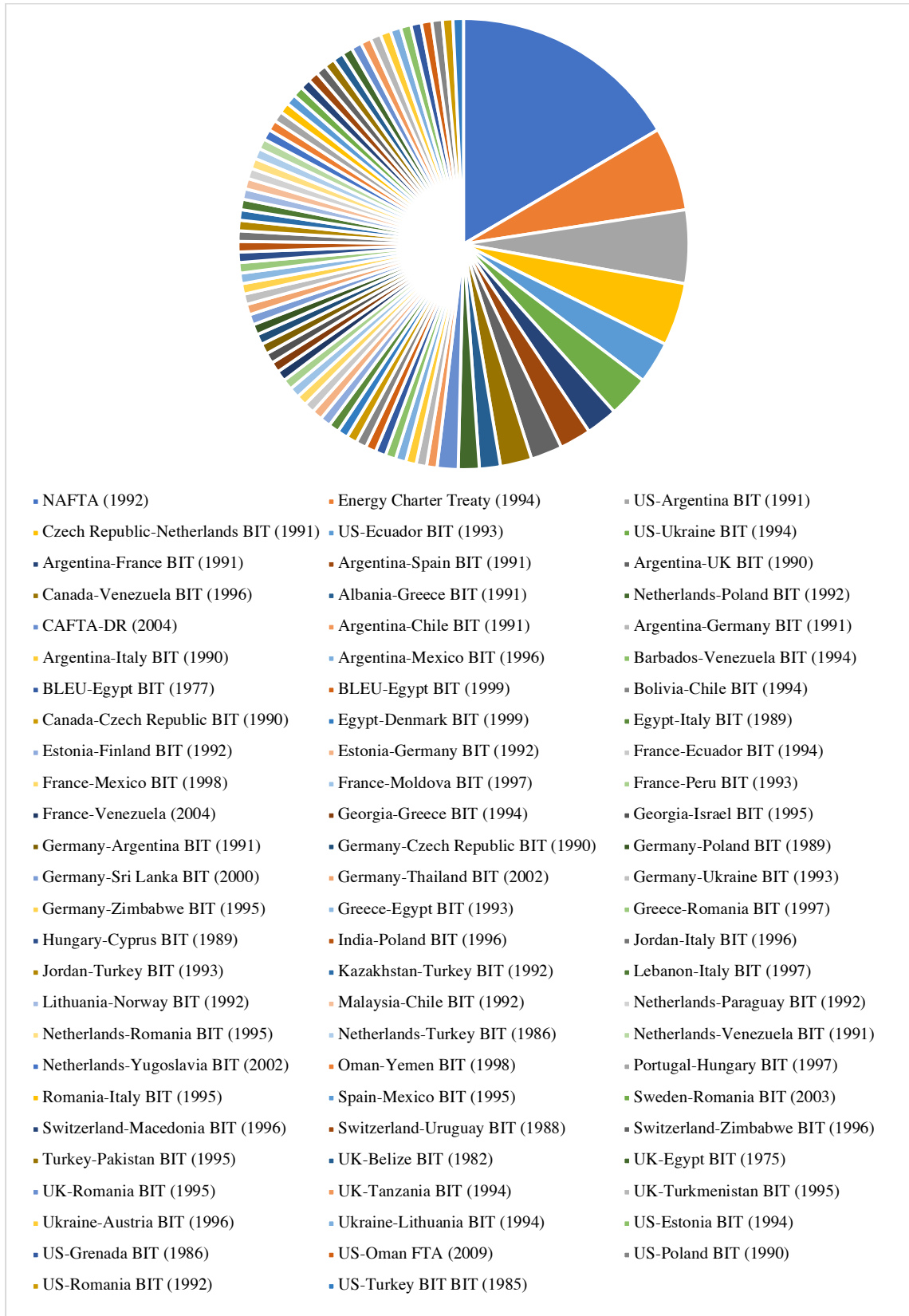
⁴²⁷ This figure is the author’s.

Procedure for Arbitration Proceedings; the ICSID Additional Facility Rules; the UNCITRAL Arbitration Rules and the Stockholm Chamber of Commerce (SCC) Arbitration Rules. It is common for the investor to be able to choose the applicable rules among those on offer under the applicable international investment agreement. One of the most important differences between the arbitral rules is their provision for the enforcement of awards. ICSID awards may be annulled by an ad hoc Annulment Committee based on limited grounds and, if not annulled, are enforceable in member states of the ICSID Convention as if they were a final judgment of a court in that state. Non-ICSID awards, on the other hand, are enforceable under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),⁴²⁸ which offers national courts greater leeway in refusing to enforce an arbitral award. It is then no coincidence that a greater number of investors, if offered the opportunity, opt for arbitration within the ICSID system with its self-contained annulment procedure.⁴²⁹ Figure 7 above shows that 62 per cent of all proceedings studied were conducted under the ICSID Rules. Figure 8 shows the seventy-seven investment agreements under which the awards contained in this study were rendered and how many awards were rendered under which treaty. NAFTA has been invoked twenty-two times within the confines of this study, followed by eight awards rendered under the Energy Charter Treaty. Within the confines of this study, the majority of investment treaties has been invoked only once.

⁴²⁸ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 10 June 1958, 330 *United Nations Treaty Series* 38.

⁴²⁹ According to the *Investment Dispute Settlement Navigator*, 521 out of 855 (ca 61 per cent) known treaty-based investor state arbitrations, to date, have been conducted under ICSID rules of procedure, i.e., either the ICSID Rules of Procedure for Arbitration Proceedings or the ICSID Additional Facility Rules. See UNCTAD, *Investment Dispute Settlement Navigator* <<http://investmentpolicyhub.unctad.org/ISDS>> accessed 18 August 2018. This percentage is lower in comparison to the percentage in my own study in which 75 per cent of disputes were resolved within the ICSID system.

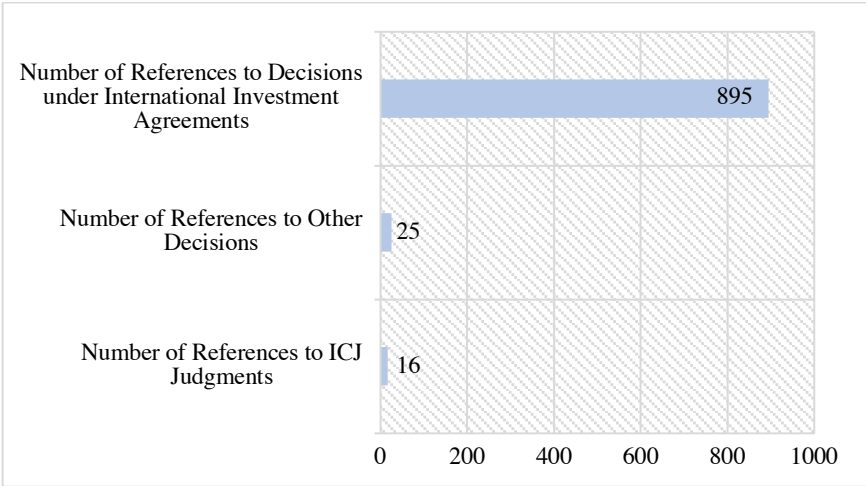
Figure 8: Case Study on Arbitral Precedent: The Applicable International Investment Agreements in the Sample of Decisions⁴³⁰



⁴³⁰ This figure is the author's.

Figure 9 below shows the practice of relying predominantly on other treaty-based arbitral decisions when defining the meaning of ‘fair and equitable treatment’ under international investment agreements. The numbers in figure 9 refer to the total number of references to prior decisions, not to the total number of decisions relied upon which is lower.

Figure 9: Case Study on Arbitral Precedent: The Practice of Relying Predominantly on Investment Arbitration Decisions⁴³¹



On average, every arbitral tribunal, within the study conducted for this chapter, relied approximately seven times on other arbitral decisions in its analysis of what it means to provide fair and equitable treatment.⁴³² Figure 10 below shows that the phenomenon of precedent in investor-state arbitration is not limited to the ICSID system. Even when proceedings are conducted under the UNCITRAL arbitration rules, tribunals refer to previous arbitral decisions.

⁴³¹ This figure is the author’s.

⁴³² For a less restrictive citation analysis, see Damien Charlotin, ‘The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis’ (2017) 20(2) *Journal of International Economic Law* 279-299, at 287 fn 49, 288 Table 1. Number of citations per citing *fora* (stating the average number of citations per award as **14.1**). Charlotin counts all citations, not only those relied upon in the context of what it means to provide fair and equitable treatment. Nor does he restrict his analysis to citations on which tribunals rely on in support of their findings. Rather, Charlotin counts all citations “as soon as the tribunal discussed them, however minimally” and even if the tribunal “swiftly dismissed [them] as irrelevant.”

Figure 10: The Average Number of References to Investment Arbitration Decisions per Decision Depending on the Applicable Arbitration Rules⁴³³

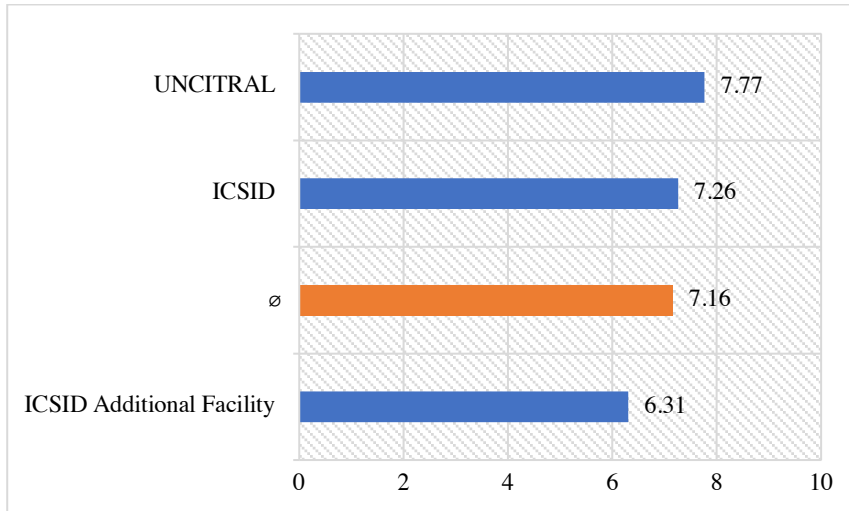


Figure 11 *below* shows the number of references in all 125 arbitral decisions studied. The number on the x-axis indicates the number of the decisions studied, number one⁴³⁴ being the first decision in time and number 125⁴³⁵ being the last decision in time.⁴³⁶ The number on the y-axis indicates the number of references to prior investor-state arbitral decisions. Each dot represents how often the respective decision relied on prior decisions. Decision no 80,⁴³⁷ for example, relied 40 times on prior arbitral decisions. This figure indicates the total number of relevant *references* to prior decisions. It does not demonstrate how many different decisions each decision relies upon. Figure 12 and Figure 13 *below* show the total number of decisions relied upon by each decision and the total number of source treaties of these arbitral decisions that were relied upon. Figure 14 *below* shows that, on average, the number of relevant references is on the rise, as is the number of decisions relied upon. Figure 14 *below* also indicates that the relied-upon decisions were rendered under an ever-growing number of different international investment agreements. The data

⁴³³ This figure is the author's.

⁴³⁴ *Azinian v The United Mexican States*, ICSID Case No ARB(AF)/92/2, Award, 1 November 1999.

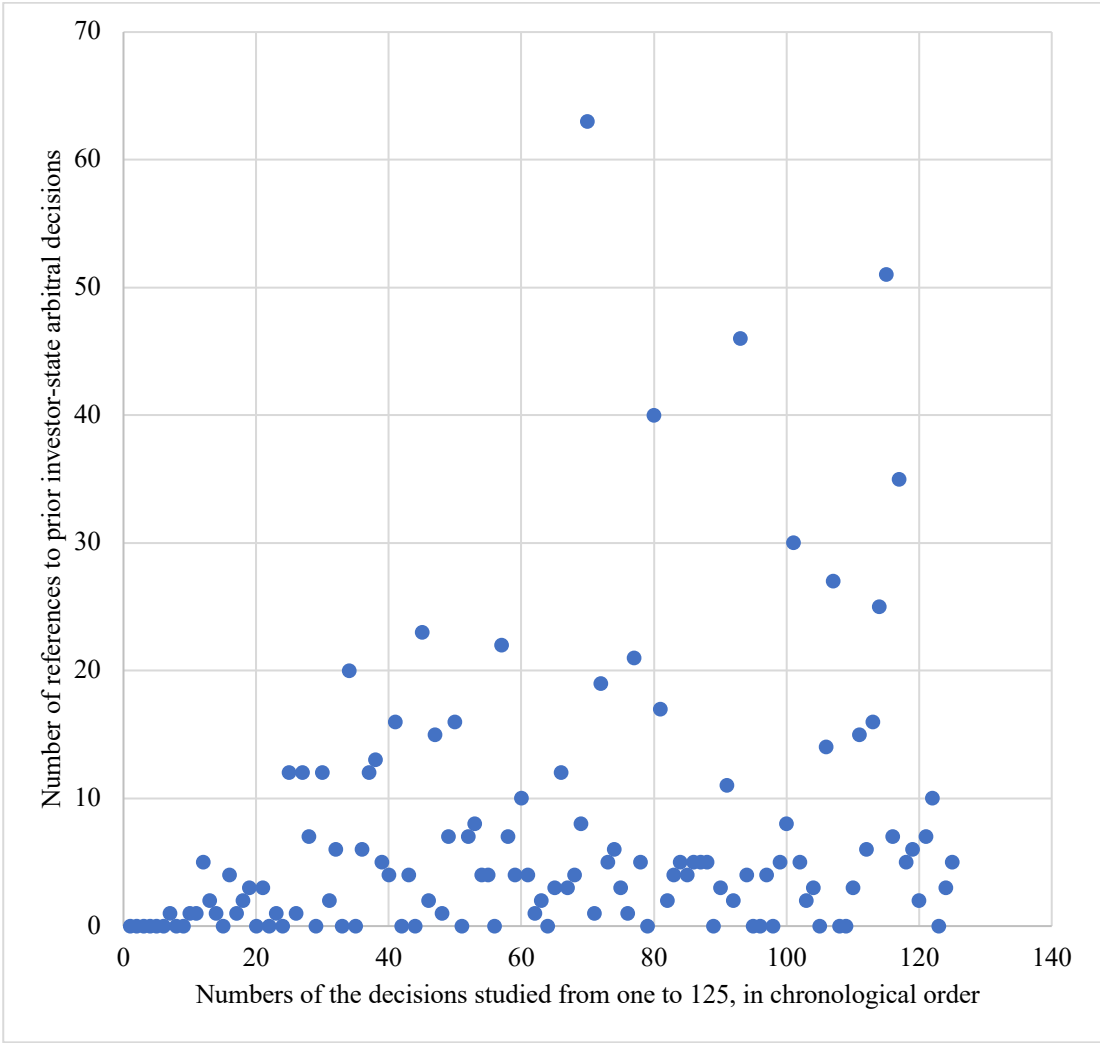
⁴³⁵ *Teinver S.A. v The Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017.

⁴³⁶ For a list of all 125 arbitral decisions in chronological order, see *Appendix B*.

⁴³⁷ *Oostergetel v The Slovak Republic*, UNCITRAL Final Award, 23 April 2012.

accumulated and examined for this study is available in *Appendix B* which lists all 125 decisions studied, all 895 individual references to prior decisions, the individual decisions relied upon, the source treaties of all decisions and in which context a tribunal relied on a prior decision.

Figure 11: Case Study on Arbitral Precedent: The Number of References to Investment Arbitration Decisions per Decision 1999-2017⁴³⁸



⁴³⁸ This figure is the author's.

Figure 12: Case Study on Arbitral Precedent: The Number of Investment Arbitration Decisions Relied upon per Decision 1999-2017⁴³⁹

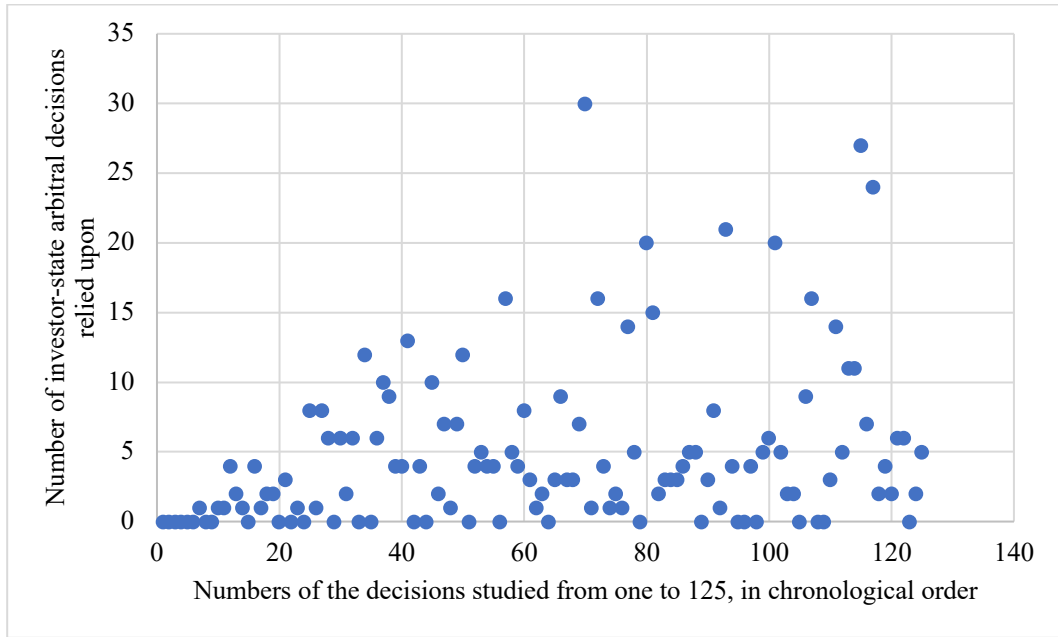
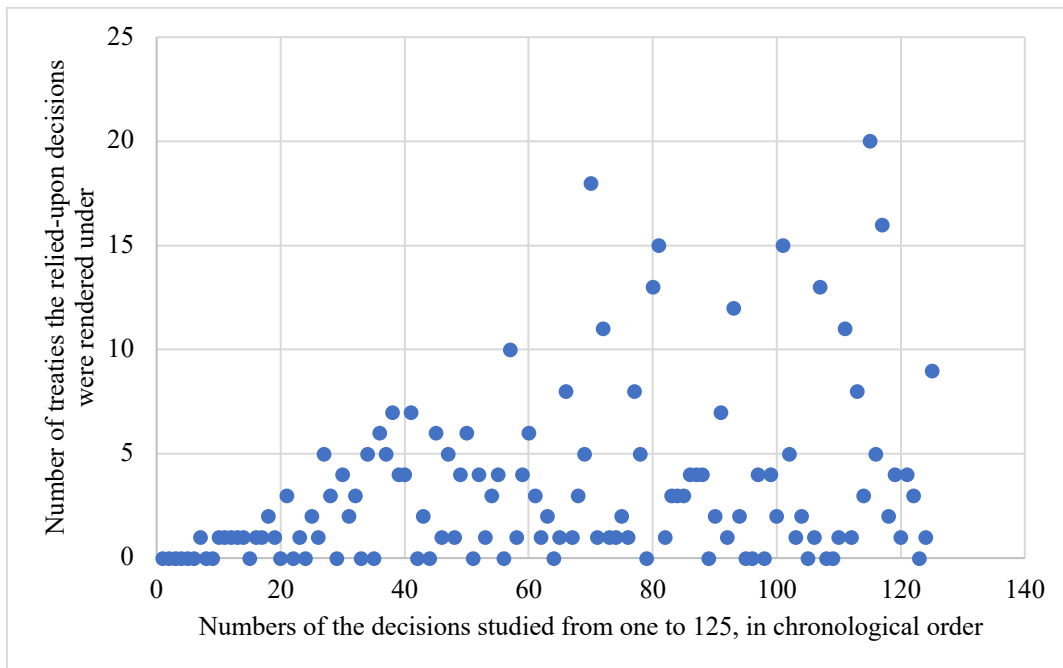


Figure 13: Case Study on Arbitral Precedent: The Number of Source Treaties of the Relied-upon Decisions 1999-2017⁴⁴⁰



⁴³⁹ This figure is the author's.

⁴⁴⁰ This figure is the author's.

Figure 14: Case Study on Arbitral Precedent: The Increase in the Reliance on Arbitral Precedent 1999-2017⁴⁴¹

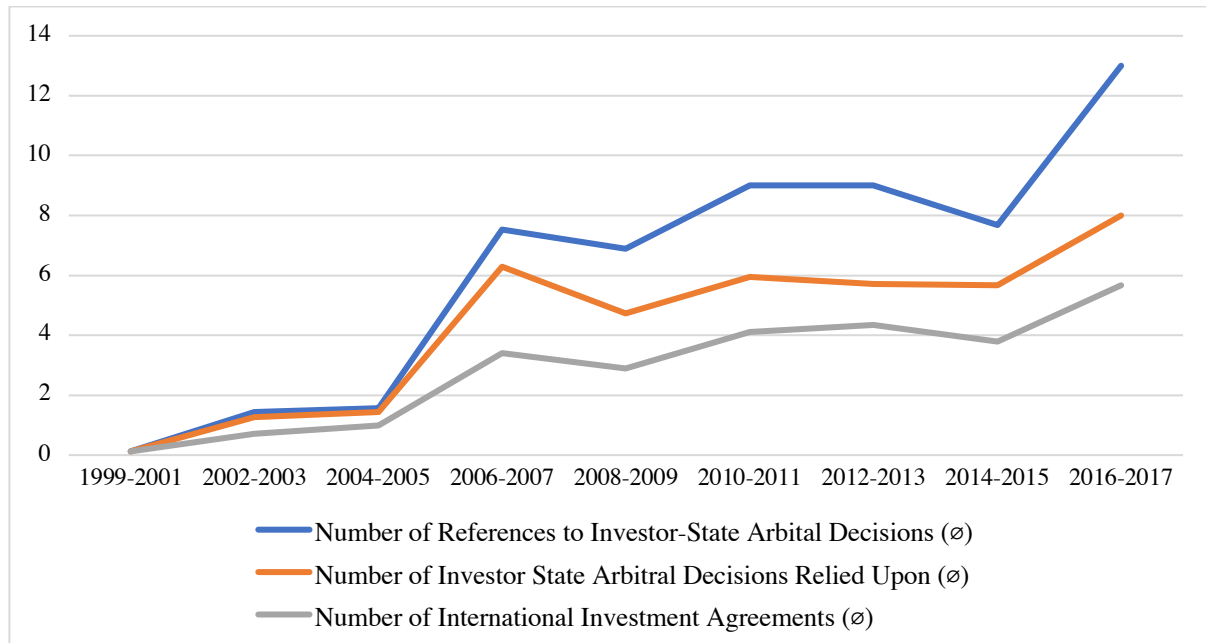


Figure 14 demonstrates that arbitrators increasingly rely on prior arbitral decisions.⁴⁴²

Whereas the practice of relying on prior arbitral decisions was relatively uncommon from 1999 to 2001, it is more widespread today, with fewer tribunals not relying on arbitral decisions at all and more tribunals relying on an ever-greater number of arbitral decisions when defining the meaning of ‘fair and equitable treatment’.⁴⁴³ Not only has the average number of references per decision risen over time but so has the average number of other decisions relied upon in any single decision. As a rule, the greater the number of decisions relied upon, the greater also the number of investment agreements under which these decisions were rendered. In general, this means that the web of precedents is ever

⁴⁴¹ This figure is the author’s.

⁴⁴² See also Jeffery P. Commission, ‘Precedent in Investment Treaty Arbitration: The Empirical Backing’ (2007) 4(5) *Transnational Dispute Management* [1]-[7], at [6] <www.transnational-dispute-management.com/article.asp?key=1064> accessed 25 October 2018 (noting for the period from 2002 to 2006 that “the frequency of citation to ICSID case-law has increased exponentially”).

⁴⁴³ For a more general description of this phenomenon, see Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) para 1.85 (noting “the extensive application of precedent in the recent treaty jurisprudence”).

expanding across a greater number of investment agreements. The number of prior arbitral decisions relied upon, in this context, does not speak to the motivation of tribunals to create and follow precedents. The figures particularly do not indicate the degree to which arbitral tribunals feel bound by prior arbitral decisions.⁴⁴⁴ The figures are mere demonstrations of existing arbitral practice.

The increase in the reliance on precedent can in part be explained with the greater number of prior decisions being available. In other words, the availability of a greater number of prior decisions makes it easier for tribunals to rely on an ever-greater number of prior decisions, irrespective of whether a tribunal feels bound by prior decisions. If a tribunal of course realised that it operated within a system of precedent and if it wanted to contribute to that system, it would be reasonable for that tribunal to decide according to precedent,⁴⁴⁵ for otherwise “the practice of decision according to precedent [...] would be undermined and the precedential significance of [its] own decisions thereby reduced.”⁴⁴⁶ Conversely, if a tribunal did not want to contribute to a system of precedent, it would be reasonable for that tribunal not to join the practice of deciding in accordance with precedent, for “[i]t is the practice of deciding in accordance with precedent that makes the decisions operate as precedents”⁴⁴⁷ in the first place. Figure 11 *above* shows that, over time, fewer tribunals opted not to rely on any precedents at all. Instead, the reliance on

⁴⁴⁴ But see Florian Grisel, ‘Precedent in Investment Arbitration: The Case of Compound Interest’ (2014) 2 *Peking University Transnational Law Review* 217-227, at 223 (arguing that, if tribunals feel bound by prior decisions, “an increasing number of investment tribunals should rely on prior awards”). Florian Grisel contrasted this with a competing hypothetical scenario, in which tribunals did not feel bound by prior arbitral decisions and in which the proportion of tribunals that relies on prior decisions should remain stable.

⁴⁴⁵ cf Florian Grisel, ‘Precedent in Investment Arbitration: The Case of Compound Interest’ (2014) 2 *Peking University Transnational Law Review* 217-227, at 223 (noting that “[i]t is indeed reasonable to assume that tribunals increasingly refer to prior awards or decisions in a system where there are precedential mechanisms” but without acknowledging the reciprocity between the existence of a system of precedent and the practice of deciding in accordance with precedents).

⁴⁴⁶ William M. Landes and Richard A. Posner, ‘Legal Precedent: A Theoretical and Empirical Analysis’ (1976) 19 *Journal of Law and Economics* 249-307, at 273.

⁴⁴⁷ *ibid.*

precedent increased over time and prospered. Precedent in investment arbitration is therefore alive and well nowadays. The increase in the reliance on precedent, as evident from the above figures, fits in with the development of long lines of consistent decisions by tribunals. The increase in the reliance on precedent in a system in which tribunals create ever-longer lines of consistent decisions is self-perpetuating. The longer the line of consistent decisions, the more authoritative the rule created in those decisions. The more authoritative the rule, the more likely it is that subsequent tribunals follow that rule. In the words of Landes and Posner:

Where [...] [a] rule has been, as it were, solidified in a long line of decisions, the authority of the rule is enhanced. The rule then represents the accumulated experience of many judges responding to the arguments and evidence of many lawyers and is therefore more likely to be followed in subsequent cases.⁴⁴⁸

The figures do not show this development of long lines of consistent cases directly, and we will return to this issue later, but the increase in the reliance of precedent is at least symptomatic of that development. The next figure demonstrates the divergence between the practice of tribunals that interpret the minimum standard of treatment and those that do not. It transpires that tribunals that interpret the minimum standard, on average, rely fewer times on prior arbitral decisions when defining the meaning of fair and equitable treatment. One of the reasons for this phenomenon is that the total number of decisions interpreting the minimum standard is lower than the total number of decisions interpreting an autonomous FET standard.

⁴⁴⁸ William M. Landes and Richard A. Posner, 'Legal Precedent: A Theoretical and Empirical Analysis' (1976) 19 *Journal of Law and Economics* 249-307, at 250.

Figure 15: The Average Number of References to Investment Arbitration Decisions per Decision Depending on the Applicable FET Standard⁴⁴⁹

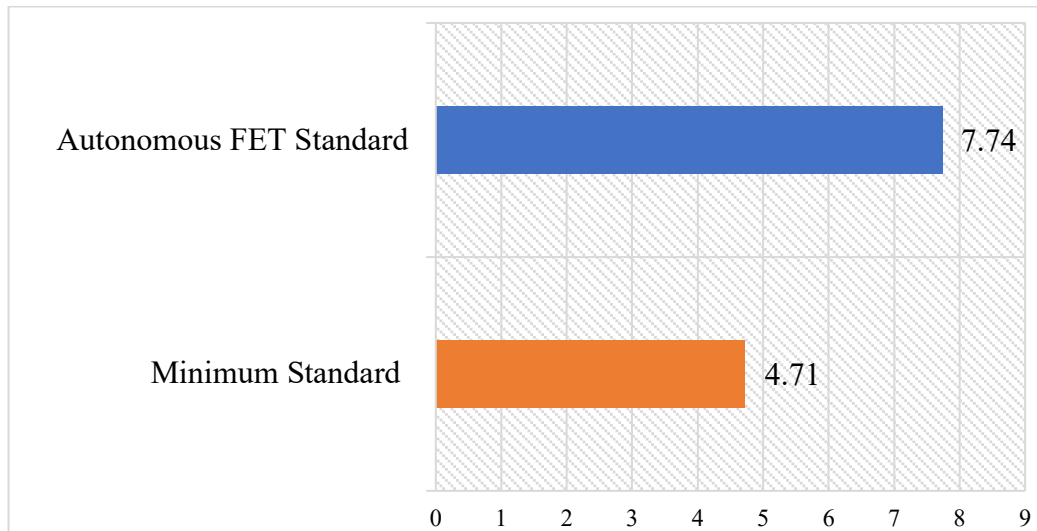


Figure 15 demonstrates the result of grouping all arbitral decisions into two categories: (a) those arbitral decisions that interpret fair and equitable treatment (FET) as a component of the customary international law minimum standard of treatment of aliens (minimum standard) and (b) those arbitral decisions that do not limit their interpretation of fair and equitable treatment by linking fair and equitable treatment exclusively to the minimum standard. The label ‘autonomous FET standard’ is defined here as the opposite of a pure minimum standard. It describes all those definitions in which arbitrators define the FET standard as being autonomous from the minimum standard⁴⁵⁰ with the autonomous FET standard granting investments greater protection than the minimum standard.⁴⁵¹ The label ‘autonomous FET standard’ here also describes those definitions

⁴⁴⁹ This figure is the author’s.

⁴⁵⁰ See, for example, *Oko Pankki Oyi v Estonia*, ICSID Case No ARB/04/6, Award, 19 November 2007, para 230 (noting “that the FET standard in the Estonia-Germany BIT bears an autonomous meaning and that it is not to be assimilated to the lesser minimum standard of treatment under customary international law”); *Vivendi v Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, para 7.4.7-8; *Total S.A. v Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, para 127; *Perenco Ecuador v Ecuador*, ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, para 557 (noting that “[t]his particular formulation of the FET standard [fair and equitable treatment in accordance with the principles of international law] is not tethered to the international minimum standard of treatment under customary international law”).

⁴⁵¹ See, for example, *Vivendi v Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, para 7.4.8; *Oko Pankki Oyi v Estonia*, ICSID Case No ARB/04/6, Award, 19 November 2007, para 230.

in which arbitrators do not consider the autonomous FET standard to be materially different from the minimum standard.⁴⁵² In general, ‘autonomous FET standard’ is used in this section to describe those definitions in which arbitrators, irrespective of the label of the applicable FET standard, define the standard by relying on a wide range of prior arbitral decisions – both those applying the minimum standard and those applying an autonomous FET standard, thereby widening the web of applicable precedents. For the purposes of this section, arbitrators purporting to apply the minimum standard while not limiting their reliance on prior decisions to those that define the minimum standard⁴⁵³ are understood to be applying an autonomous FET standard.

⁴⁵² *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005, para 284 (“[T]he Treaty standard of fair and equitable treatment [...] is not different from the international law minimum standard and its evolution under customary law.”); *Saluka Investments v Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para 291 (“Whatever the merits of this controversy between the parties may be, it appears that the difference between the Treaty standard [...] and the customary minimum standard, when applied to the specific facts of the case, may well be more apparent than real.”); *Azurix Corp. v Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006, para 361 (“The content of the FET standard “is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.”) and para 364 (“The question whether fair and equitable treatment is or is not additional to the minimum treatment requirement under international law is a question about the substantive content of fair and equitable treatment and, whichever side of the argument one takes, the answer to the question may in substance be the same.”); *Biwater Gauff (Tanzania) Ltd. v Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, para 592 (noting “that the actual content of the treaty standard fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law”); *Rumeli Telekom A.S. v Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008, para 611; *Duke Energy v Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008, para 337 (finding that the FET standard under the treaty and the FET standard under customary international “are essentially the same”); *Deutsche Bank AG v Sri Lanka*, ICSID Case No ARB/09/02, Award, 31 October 2012, para 419; *Rusoro Mining Limited v Venezuela*, ICSID Case No ARB(AF)/12/5, Award, 22 August 2016, para 520 (noting that “there is no substantive difference in the level of protection afforded by both standards”).

⁴⁵³ See *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italy (Blusun)*, ICSID Case No ARB/14/3, Award, 27 December 2016, para 319 (noting that the treaty obligation “to accord *at all times* to Investments of Investors of other Contracting Parties fair and equitable treatment [...] incorporates the fair and equitable treatment standard under customary international law and as applied by tribunals”). When defining fair and equitable treatment, the arbitral tribunal in *Blusun* relied on prior arbitral decisions under the Energy Charter Treaty, under the Argentina-US BIT 1991 and the Switzerland-Uruguay BIT 1988. See *Blusun*, paras 315, 317, 363 and 368-369. None of these treaties contain a FET clause that is qualified with a reference to the minimum standard. The applicable standard under these treaties is therefore an autonomous treaty standard. See also Christoph H. Schreuer, ‘Selected Standards of Treatment Available under the Energy Charter Treaty’ in Graham Coop and Clarisse Ribeiro (eds), *Investment Protection and the Energy Charter Treaty* (JurisNet 2008) 63-100, at 65 (“There is no doubt that [‘the FET standard’] is an autonomous standard of protection that has given rise to numerous successful claims.”).

On average, arbitral tribunals interpreting an autonomous FET standard rely 7.74 times on prior arbitral decisions when defining what it means to treat foreign investments fairly and equitably. In contrast, arbitral tribunals interpreting the minimum standard reference prior arbitral decisions on average only 4.71 times when specifying the meaning of fair and equitable treatment. This divergence can be explained with the greater number of disputes under investment agreements that contain an FET obligation that is not linked to the minimum standard. Out of the 125 decisions studied, 101 were rendered under investment agreements containing an autonomous FET standard. The remaining 24 decisions were rendered under investment agreements that define ‘fair and equitable treatment’ as a component of the minimum standard. These 24 decisions were rendered under the North American Free Trade Agreement (NAFTA),⁴⁵⁴ the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR)⁴⁵⁵ and the Free Trade Agreement between the United States and Oman.⁴⁵⁶ When interpreting fair and equitable treatment as a component of the minimum standard, tribunals, as a rule, rely on prior decisions that

⁴⁵⁴ North American Free Trade Agreement between Canada, The United States and Mexico (NAFTA), signed 17 December 1992, entry into force 1 January 1994. NAFTA Article 1105(1) provides: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.” In addition, see NAFTA Free Trade Commission, *North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001) B1:

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

⁴⁵⁵ FTA between Central America, the Dominican Republic and the United States of America (CAFTA-DR), signed 5 August 2004, entry into force 1 January 2009. Its Articles 10.5(1) and 10.5(2) provide:

- (1) Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
- (2) For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. [...]

⁴⁵⁶ Oman-US FTA of 19 January 2016 (entered into force on 1 January 2009). Its Articles 10.5(1) and 10.5(2) equal Articles 10.5(1) and 10.5(2) of the CAFTA-DR.

interpret the minimum standard – not on prior decisions that interpret an autonomous standard. This practice limits the pool of potential precedents and explains the on average lower number of references to prior arbitral decisions. Tribunals interpreting investment agreements that contain an autonomous FET standard, on the other hand, do not restrict themselves to prior decisions interpreting an autonomous FET standard. Instead, these tribunals also rely on prior decisions that were rendered in application of the minimum standard. This cross-fertilisation informs the meaning of the autonomous FET standard.⁴⁵⁷ The next section sheds some light on the meaning of both FET standards and how arbitral tribunals have developed their meaning over time.

(c) The Arbitral Practice of Specifying the FET Obligation

Over time, tribunals have added several elements to the FET standard(s). In defining what it means to treat foreign investors fairly and equitably, tribunals have held that states must act transparently and in good faith, that states must provide procedural propriety and due process, that a denial of justice violates the FET standard as does a breach of the investor's legitimate expectations. Tribunals have also held that bad faith is not required,⁴⁵⁸ though

⁴⁵⁷ cf Christoph H. Schreuer, 'Selected Standards of Treatment Available under the Energy Charter Treaty' in Graham Coop and Clarisse Ribeiro (eds), *Investment Protection and the Energy Charter Treaty* (JurisNet 2008) 63-100, at 66 (noting that the FET standard interacts with other standards of protection, among them "treatment required by (customary) international law":

Sometimes this interaction is so close that the different standards become indistinguishable. At other times a violation of another standard may lead to a violation of FET or, conversely, a violation of FET triggers a violation of the other standard.).

⁴⁵⁸ Decisions interpreting the minimum standard are marked with an asterisk in this footnote: **Mondev v USA*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, para 116; *Tecmed v Mexico*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, para 153; **Loewen v USA*, ICSID Case No ARB(AF)/98/3, Award, 26 June 2003, para 132; **Waste Management v Mexico*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 93; *Occidental v Ecuador*, UNCITRAL Final Award, 1 July 2004, para 186; *CMS v Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005, para 280; *Azurix v Argentina*, ICSID Case No ARB/01/12, Award, 14 July 2006, paras 368-372; *LG&E Energy v Argentina*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, para 129; *PSEG Global v Turkey*, ICSID Case No ARB/02/5, Award, 19 January 2007, para 246; *Siemens v Argentina*, ICSID Case No ARB/02/8, Award, 6 February 2007, paras 295-299; *Enron v Argentina*, ICSID Case No ARB/01/3, Award, 22 May 2007, para 263; *Vivendi v Argentina*, ICSID Case No ARB/97/3, Award, 20 August 2007, para 7.4.12; *BG Group v Argentina*, UNCITRAL Final Award, 24 December 2007, para 301; *Biwater Gauff (Tanzania) v Tanzania*,

“its presence certainly will be determinative of a violation.”⁴⁵⁹ (Gross) arbitrariness, (evident) discrimination and a (manifest) lack of reasons have also been held to violate the FET standard(s) as do breaches of contract if a breach of contract occurs in a state’s exercise of sovereign authority. The stability of the legal and business framework is another element of the FET standard(s), an element that is closely linked to the foreign investor’s legitimate expectations. When expectations can be said to be legitimate is a matter of debate as is the definition of all elements of the FET standard(s). The stability of the legal and business framework is not an absolute guarantee but generally balanced by tribunals against the host state’s right to regulate in the public interest. Some tribunals have introduced and applied the principle of proportionality when balancing legitimate expectations and a state’s regulatory interests. The development of the content of the FET standard(s) over time is relevant because it exemplifies how tribunals give meaning to vague provisions over time and how this process impacts not only the disputing parties but also future disputing parties and states participating in the system of investor-state arbitration.

ICSID Case No ARB/05/22, Award, 24 July 2008, para 602; *Duke Energy v Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008, para 341; *Jan de Nul v Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 185; **Glamis Gold v USA*, UNCITRAL Award, 8 June 2009, para 627; *Invesmart v Czech Republic*, UNCITRAL Award, 26 June 2009, paras 420-421; *Walter Bau AG v Thailand*, UNCITRAL Award, 1 July 2009, para 11.5; *Bayindir v Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 181; **Cargill v Mexico*, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009, para 296; *Frontier Petroleum v Czech Republic*, UNCITRAL Final Award, 12 November 2010, para 301; *Grynberg v Grenada*, ICSID Case No ARB/10/6, Award, 10 December 2010, para 7.2.24; *Total S.A. v Argentina*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, para 110; *El Paso v Argentina*, ICSID Case No ARB/03/15, Award, 31 October 2011, para 357; *Oostergetel v Slovak Republic*, UNCITRAL Final Award, 23 April 2012, para 227; *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, paras 508 and 524; **Bilcon v Canada*, PCA Case No 2009-04, UNCITRAL Award on Jurisdiction and Liability, 17 March 2015, para 435; *Quiborax v Bolivia*, ICSID Case No ARB/06/2, Award, 16 September 2015, para 247; *Crystallex v Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, para 543; *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016, para 318.

⁴⁵⁹ *Glamis Gold v USA*, UNCITRAL Award, 8 June 2009, para 627.

(1) Arbitral Development of the Autonomous FET Standard

This section gives an overview of how arbitral tribunals have developed the autonomous FET standard over time. For if tribunals did not develop the autonomous FET standard by adding meaning to it, they would not be making but merely applying the law. The aim of this section is not to give a comprehensive overview of all facets of that standard as developed by arbitrators.⁴⁶⁰ Instead, the aim of this section is to demonstrate by example that arbitrators have created long lines of consistent arbitral decisions, specifying the meaning of ‘fair and equitable treatment’. The example chosen is the protection of the investor’s legitimate expectations as a component of the autonomous FET standard. Despite this requirement not being explicit in the wording of investment agreements, arbitrators have introduced the requirement of legitimate expectations and, over time, come to regard it as a manifestation of the FET standard.⁴⁶¹ That the requirement of legitimate expectations, as developed by arbitrators, is recognised as a manifestation of

⁴⁶⁰ On the impossibility to definitively define fair and equitable treatment, see *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 517 fn 90 (noting that the FET standard defies abstract definition).

⁴⁶¹ *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2019, para 422:

It is common ground in the decisions of more recent investment tribunals that the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State’s rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.

Citing the following decisions in support of that statement: *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, paras 327-28; *BG Group v Argentina*, UNCITRAL, Final Award, 24 December 2007, paras 292-310; *Plama v Bulgaria*, Award, 27 August 2008, para 219; *Continental Casualty v Argentina*, ICSID Case No ARB/03/9, Award, 5 September 2008, paras 258-61; *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 219; *AES v Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010, paras 9.3.27-9.3.35; *Total v Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, paras 123 and 164; *Paushok v Mongolia*, UNCITRAL, Award, 28 April 2011, para 302; *Impregilo v Argentina*, ICSID Case No ARB/07/17, Award, 21 June 2011, paras 290-291; *El Paso v Energy International Co. v Argentine Republic*, ICSID Case No ARB/03/15, Award, 31 October 2011, paras 344-352 and 365-367.

the FET standard, also by states, is reflected in the codification of this requirement in newer treaties. Article 2.4(3) of the EU-Singapore FTA⁴⁶² states, for example:⁴⁶³

In determining whether the fair and equitable treatment obligation [...] has been breached, a Tribunal may take into account, where applicable, whether a Party made specific or unambiguous representations to an investor as to induce the investment, that created legitimate expectations of a covered investor and which were reasonably relied upon by the covered investor, but that the Party subsequently frustrated”⁴⁶⁴ (internal references omitted).

The root of such and similar provisions is arbitral jurisprudence. This section illustrates the arbitral reliance on prior arbitral decisions when defining legitimate expectations as a component of the autonomous FET standard. Out of the 125 arbitral decisions studied 50 decisions⁴⁶⁵ rely on specific prior arbitral decisions when defining the protection of basic

⁴⁶² See European Commission, *Memorandum: EU-Singapore trade and investment agreements* (authentic texts as of April 2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> accessed 6 June 2018.

⁴⁶³ See also CETA, Art 8.10(4):

When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

⁴⁶⁴ EU-Singapore FTA (authentic text as of April 2018), Art 2.4(3) fn 10-11:

For greater certainty, representations made so as to induce the investments include the representations made in order to convince the investor to continue with, not to liquidate or to make subsequent investments.

For greater certainty, the frustration of legitimate expectations as described in this paragraph does not, by itself, amount to a breach of paragraph 2, and such frustration of legitimate expectations must arise out of the same events or circumstances that give rise to the breach of paragraph 2.

⁴⁶⁵ *MTD Equity v Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004; *CMS v Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005; *Eureko v Poland*, Partial Award, 19 August 2005; *Saluka v Czech Republic*, UNCITRAL Partial Award, 17 March 2006; *LG&E Energy v Argentina*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006; *PSEG Global v Turkey*, ICSID Case No ARB/02/5, Award, 19 January 2007; *Enron v Argentina*, ICSID Case No ARB/01/3, Award, 22 May 2007; *MCI Power Group v Ecuador*, ICSID Case No ARB/03/6, Award, 31 July 2007; *Parkerings-Compagniet v Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007; *Sempra Energy v Argentina*, ICSID Case No ARB/02/16, Award, 28 September 2007; *BG Group v Argentina*, UNCITRAL Final Award, 24 December 2007; *Metalpar v Argentina*, ICSID Case No ARB/03/5, Award on the Merits, 6 June 2008; *Biwater Gauff (Tanzania) v Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008; *Duke Energy v Ecuador*, ICSID

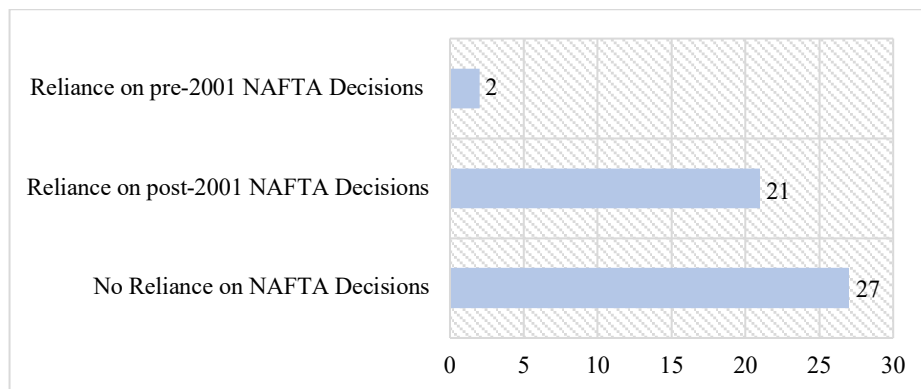
or legitimate expectations as a component of the FET standard.⁴⁶⁶ It is those 50 decisions that form the basis of this section. Figure 17 *below* illustrates how these 50 decisions rely on prior arbitral decisions when defining basic or legitimate expectations as a component of the FET standard. The total number of decisions in figure 17 is 81 because the arbitral decisions studied also rely on decisions not within the original data set. All decisions in figure 17 are listed in chronological order with the first decision being the first in time. The lines in between the decisions illustrate the reliance by a later decision on an earlier decision. If the line between two arbitral decisions is blue, this means that the arbitral

Case No ARB/04/19, Award, 18 August 2008; *National Grid v Argentina*, UNCITRAL Award, 3 November 2008; *Jan de Nul v Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008; *Vecchi v Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009; *Invesmart v Czech Republic*, UNCITRAL Award, 26 June 2009; *Walter Bau v Thailand*, UNCITRAL Award, 1 July 2009; *Bayindir v Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009; *EDF (Services) v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009; *Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010; *Kardassopoulos and Fuchs v Georgia*, ICSID Case Nos ARB/05/18 and ARB/07/15, Award, 3 March 2010; *Suez v Argentina*, ICSID Case No ARB/03/19, UNCITRAL Decision on Liability, 30 July 2010; *AES v Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010; *Alpha Projektholding v Ukraine*, ICSID Case No ARB/07/16, Award, 8 November 2010; *Frontier Petroleum v Czech Republic*, UNCITRAL Final Award, 12 November 2010; *Total v Argentina*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010; *Lemire*, Award, 28 March 2011; *Impregilo v Argentina*, ICSID Case No ARB/07/17, Award, 21 June 2011; *El Paso Energy v Argentina*, ICSID Case No ARB/03/15, Award, 31 October 2011; *Roussalis v Romania*, ICSID Case No ARB/06/1, Award, 7 December 2011; *Oostergetel v Slovak Republic*, UNCITRAL Final Award, 23 April 2012; *Toto v Lebanon*, ICSID Case No ARB/07/12, Award, 7 June 2012; *Bosh International v Ukraine*, ICSID Case No ARB/08/11, Award, 25 October 2012; *Electrabel v Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012; *Arif v Moldova*, ICSID Case No ARB/11/23, Award, 8 April 2013; *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013; *Perenco v Ecuador*, ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014; *Venezuela Holdings v Venezuela*, ICSID Case No ARB/07/27, Award, 9 October 2014; *Mamidoil Jetoil v Albania*, ICSID Case No ARB/11/24, Award, 30 March 2015; *Quiborax v Bolivia*, ICSID Case No ARB/06/2, Award, 16 September 2015; *Electrabel*, Award, 25 November 2015; *Crystallex v Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016; *MNSS v Montenegro*, ICSID Case No ARB(AF)/12/8, Award, 4 May 2016; *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016; *Flemingo DutyFree Shop v Poland*, UNCITRAL Award, 12 August 2016; *Rusoro Mining v Venezuela*, ICSID Case No ARB(AF)/12/5, Award, 22 August 2016; *Blusun v Italy*, ICSID Case No ARB/14/3, Award, 27 December 2016; *Teinver v Argentina*, ICSID Case No ARB/09/1, Award, 21 July 2017.

⁴⁶⁶ This does not mean that not more decisions from the original data set recognise legitimate expectations as a component of the autonomous FET standard. Two more decisions do so without relying specifically on prior arbitral decisions: *Rompetrol v Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, para 197 (referring to “other tribunals” when defining the elements of the FET standard); *Pezold v Zimbabwe*, ICSID Case No ARB/10/15, Award, 28 July 2015, para 546 (referring to “jurisprudence” when defining the elements of the FET standard).

tribunal interpreted the autonomous FET standard. If the line between two decisions is red, this means that the tribunal interpreted the minimum standard of treatment of aliens. The red lines are included in the figure to demonstrate that the lines of decisions are sometimes mixed, which means that they do not only consist of decisions interpreting the autonomous FET standard. That the lines of decisions are mixed is also visible from the colour code at the outer rim of the circle. Both pre- and post-interpretation NAFTA decisions are marked red whereas decisions interpreting the autonomous FET standard are marked blue. The FET standard applicable under NAFTA is the international law minimum standard of treatment of aliens – as clarified by a Note of Interpretation in 2001.⁴⁶⁷ 23 out of the 50 decisions studied rely on a NAFTA decision when interpreting the autonomous FET standard. 21 of these rely on post-interpretation NAFTA decisions and 2 on pre-interpretation NAFTA decisions.

Figure 16: Case Study on Arbitral Precedent: Reliance on NAFTA Decisions When Interpreting the Autonomous FET Standard⁴⁶⁸



The relatively high reliance on NAFTA decisions demonstrates the extent to which the interpretation of the autonomous FET standard is influenced by the interpretation of the

⁴⁶⁷ NAFTA Free Trade Commission, *NAFTA Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001) Provision B(1):

Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

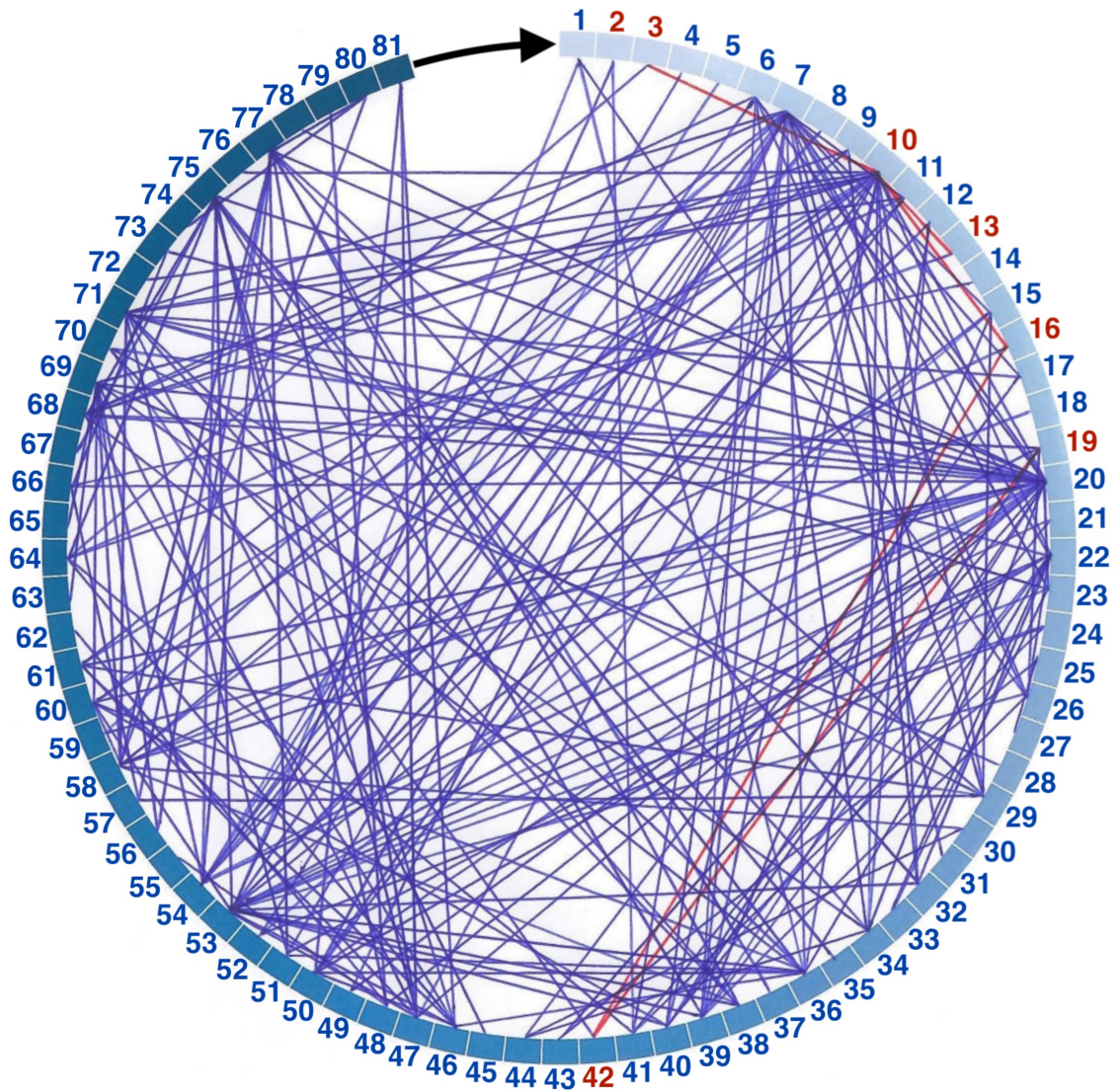
⁴⁶⁸ This figure is the author's.

minimum standard in NAFTA decisions.⁴⁶⁹ This is a phenomenon that this thesis will return to. What is noteworthy is the inter-connectedness of the decisions in figure 17. It is observable in figure 17 that arbitrators form long lines of consistent arbitral decisions, each recognising legitimate expectations as an element of the autonomous FET standard. The more decisions recognise legitimate expectations as an element of the autonomous FET standard, the more authoritative that rule becomes. The darkening of the circle rim symbolises this gain in authority. The circle is not closed because the process of relying on prior arbitral decisions has not ended. As long as tribunals continue to rely on prior arbitral decisions when defining legitimate expectations as an element of the autonomous FET standard, the circle will continue to grow. The circle itself symbolises that investor-state arbitration, in its reliance on prior decisions, resembles a single law-making system.

⁴⁶⁹ For an example of this phenomenon, see *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013 (Sweden-Romania BIT 2003) para 522 fn 96:

The Tribunal notes that, strictly speaking, [*Waste Management II*] refers to the minimum standard of treatment contained in NAFTA Article 1105. However, both Parties have relied on this definition in their submissions in this case, so the Tribunal understands that they accept that it is relevant for the fair and equitable treatment standard under the BIT.

Figure 17: Reliance on Arbitral Precedent When Interpreting Legitimate Expectations as an Element of the Autonomous FET Standard⁴⁷⁰



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⁴⁷⁰ This figure is the author's.

⁴⁷¹ [1] *SPP v Egypt*, ICSID Case No ARB/84/3, Award, 20 May 1992; [2] *Metalclad v Mexico*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000 (NAFTA); [3] *S.D. Myers v Canada*, UNCITRAL Partial Award, 13 November 2000 (NAFTA); [4] *Wena Hotels v Egypt*, ICSID Case No ARB/98/4, Award, 8 December 2000 (UK-Egypt BIT 1975); [5] *Genin v Estonia*, ICSID Case No ARB/99/2, Award, 25 June 2001 (Estonia-US BIT 1994); [6] *CME v Czech Republic*, UNCITRAL Partial Award, 13 September 2001 (Czech Republic-Netherlands BIT 1991); [7] *Tecmed v Mexico*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003 (Spain-Mexico BIT 1995); [8] *CMS v Argentina*, ICSID Case No ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003 (Argentina-US BIT 1991); [9] *Generation Ukraine v Ukraine*, ICSID Case No ARB/00/9, Award, 16 September 2003 (Ukraine-US BIT 1994); [10] *Waste Management v Mexico*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004 (NAFTA); [11] *MTD Equity v Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004 (Malaysia-Chile BIT 1992); [12] *Occidental Exploration and Production Company v Ecuador*, LCIA Case No UN3467, Final Award, 1 July 2004 (Ecuador-US BIT 1993); [13] *GAMI Investments v Mexico*, UNCITRAL Final Award, 15 November 2004 (NAFTA); [14] *Impregilo v Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005 (Pakistan-Italy

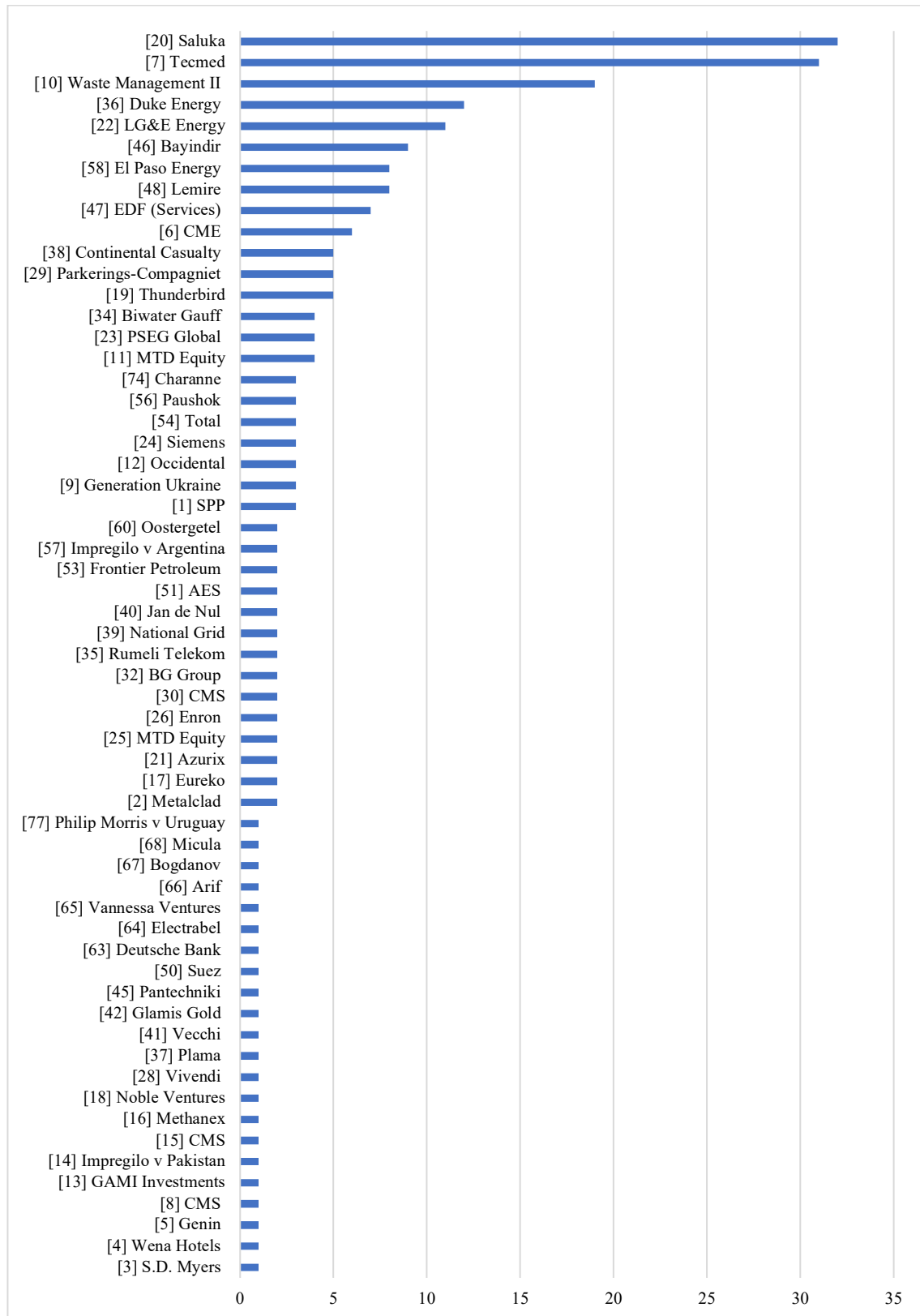
BIT 1997); [15] *CMS*, Award, 12 May 2005; [16] *Methanex v USA*, UNCITRAL Final Award on Jurisdiction and Merits, 3 August 2005 (NAFTA); [17] *Eureko v Poland*, Partial Award, 19 August 2005 (Netherlands-Poland BIT 1992); [18] *Noble Ventures v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005 (Romania-US BIT 1992); [19] *Thunderbird v Mexico*, UNCITRAL Award, 26 January 2006 (NAFTA); [20] *Saluka v Czech Republic*, UNCITRAL Partial Award, 17 March 2006 (Czech Republic-Netherlands BIT 1991); [21] *Azurix v Argentina*, ICSID Case No ARB/01/12, Award, 14 July 2006 (Argentina-US BIT 1991); [22] *LG&E Energy v Argentina*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006 (Argentina-US BIT 1991); [23] *PSEG Global v Turkey*, ICSID Case No ARB/02/5, Award, 19 January 2007 (Turkey-US BIT 1985); [24] *Siemens v Argentina*, ICSID Case No ARB/02/8, Award, 6 February 2007 (Argentina-Germany BIT 1991); [25] *MTD Equity*, Decision on Annulment, 21 March 2007; [26] *Enron v Argentina*, ICSID Case No ARB/01/3, Award, 22 May 2007 (Argentina-US BIT 1991); [27] *MCI Power Group v Ecuador*, ICSID Case No ARB/03/6, Award, 31 July 2007 (Ecuador-US BIT 1993); [28] *Vivendi v Argentina*, ICSID Case No ARB/97/3, Award, 20 August 2007 (Argentina-France BIT 1991); [29] *Parkerings-Compagniet v Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007 (Lithuania-Norway BIT 1992); [30] *CMS*, Decision on Annulment, 25 September 2007; [31] *Sempra Energy v Argentina*, ICSID Case No ARB/02/16, Award, 28 September 2007 (Argentina-US BIT 1991); [32] *BG Group v Argentina*, UNCITRAL Final Award, 24 December 2007 (Argentina-United Kingdom BIT 1990); [33] *Metalpar v Argentina*, ICSID Case No ARB/03/5, Award on the Merits, 6 June 2008 (Argentina-Chile BIT 1991); [34] *Biwater Gauff (Tanzania) v Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008 (Tanzania-United Kingdom BIT 1994); [35] *Rumeli Telekom v Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008 (Kazakhstan-Turkey BIT 1992); [36] *Duke Energy v Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008 (Ecuador-US BIT 1993); [37] *Plama v Bulgaria*, ICSID Case No ARB/03/24, Award, 27 August 2008 (Energy Charter Treaty); [38] *Continental Casualty v Argentina*, ICSID Case No ARB/03/9, Award, 5 September 2008 (Argentina-US BIT 1991); [39] *National Grid v Argentina*, UNCITRAL Award, 3 November 2008 (Argentina-United Kingdom BIT 1990); [40] *Jan de Nul v Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008 (BIT between the Belgium-Luxembourg Economic Union and Egypt 1977 and 1999); [41] *Vecchi v Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009 (Italy-Egypt BIT 1989); [42] *Glamis Gold v USA*, UNCITRAL Award, 8 June 2009 (NAFTA); [43] *Invesmart v Czech Republic*, UNCITRAL Award, 26 June 2009 (Czech Republic-Netherlands BIT 1991); [44] *Walter Bau v Thailand*, UNCITRAL Award, 1 July 2009 (Germany-Thailand BIT 2002); [45] *Pantechniki v Albania*, ICSID Case No ARB/07/21, Award, 30 July 2009 (Albania-Greece BIT 1991); [46] *Bayindir v Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009 (Turkey-Pakistan BIT 1995); [47] *EDF (Services) v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009 (UK-Romania BIT 1995); [48] *Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (US-Ukraine BIT 1996); [49] *Kardassopoulos and Fuchs v Georgia*, ICSID Case Nos ARB/05/18 and ARB/07/15, Award, 3 March 2010 (Georgia-Greece BIT 1994 and Energy Charter Treaty 1994, and Georgia-Israel BIT 1995); [50] *Suez v Argentina*, ICSID Case No ARB/03/19, UNCITRAL Decision on Liability, 30 July 2010 (Argentina-France BIT 1991, Argentina-Spain BIT 1991 and Argentina-UK BIT 1990); [51] *AES v Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010 (Energy Charter Treaty); [52] *Alpha Projektholding v Ukraine*, ICSID Case No ARB/07/16, Award, 8 November 2010 (Ukraine-Austria BIT 1996); [53] *Frontier Petroleum v Czech Republic*, UNCITRAL Final Award, 12 November 2010 (Canada-Czech Republic BIT 1990); [54] *Total v Argentina*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010 (France-Argentina BIT 1991); [55] *Lemire*, Award, 28 March 2011; [56] *Paushok v Mongolia*, UNCITRAL Award on Jurisdiction and Liability, 28 April 2011 (Mongolia-Russian Federation BIT 1995); [57] *Impregilo v Argentina*, ICSID Case No ARB/07/17, Award, 21 June 2011 (Argentina-Italy BIT 1990); [58] *El Paso Energy v Argentina*, ICSID Case No ARB/03/15, Award, 31 October 2011 (Argentina-US BIT 1991); [59] *Roussalis v Romania*, ICSID Case No ARB/06/1, Award, 7 December 2011 (Greece-Romania BIT 1997); [60] *Oostergetel v Slovak Republic*, UNCITRAL Final Award, 23 April 2012 (Czech Republic-Netherlands BIT 1991); [61] *Toto v Lebanon*, ICSID Case No ARB/07/12, Award, 7 June 2012 (Lebanon-Italy BIT 1997); [62] *Bosh International v Ukraine*, ICSID Case No ARB/08/11, Award, 25

That legitimate expectations are recognised as a component of the obligation to provide fair and equitable treatment is itself an example of arbitral law-making. The meaning of fairness and equity, if looked up in the dictionary, does not equate specifically to the protection of legitimate expectations. In their ordinary meaning, the terms ‘fair’ and ‘equitable’ mean ‘just’, ‘even-handed’, ‘unbiased’ and ‘legitimate’⁴⁷² – themselves vague terms. If then the protection of legitimate expectations is not intrinsic to the meaning of the terms fair and equitable, the attribution of legitimate expectations to the meaning of fair and equitable treatment must have a different source. That source is arbitral decisions. Figure 18 shows which decisions were relied on most often by arbitrators when defining basic or legitimate expectations as a component of the autonomous FET standard.

October 2012 (Ukraine-US BIT 1994); [63] *Deutsche Bank v Sri Lanka*, ICSID Case No ARB/09/2, Award, 31 October 2012 (Germany-Sri Lanka BIT 2000); [64] *Electrabel v Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (Energy Charter Treaty); [65] *Vannessa Ventures v Venezuela*, ICSID Case No ARB(AF)/04/6, Award, 16 January 2013 (Canada-Venezuela BIT 1996); [66] *Arif v Moldova*, ICSID Case No ARB/11/23, Award, 8 April 2013 (France-Moldova BIT 1997); [67] *Bogdanov v Moldova*, SCC Case No V091/2012, Final Award, 16 April 2013 (Moldova-Russian Federation BIT 1998); [68] *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013 (Sweden-Romania BIT 2003); [69] *Perenco v Ecuador*, ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014 (France-Ecuador BIT 1994); [70] *Venezuela Holdings v Venezuela*, ICSID Case No ARB/07/27, Award, 9 October 2014 (Netherlands-Venezuela BIT 1991); [71] *Mamidoil Jetoil v Albania*, ICSID Case No ARB/11/24, Award, 30 March 2015 (Greece-Albania BIT 1991); [72] *Quiborax v Bolivia*, ICSID Case No ARB/06/2, Award, 16 September 2015 (Bolivia-Chile BIT 1994); [73] *Electrabel*, Award, 25 November 2015; [74] *Charanne v Spain*, SCC Case No V 062/2012, Final Award, 21 January 2016 (Energy Charter Treaty); [75] *Crystallex v Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016 (Canada-Venezuela BIT 1996); [76] *MNSS v Montenegro*, ICSID Case No ARB(AF)/12/8, Award, 4 May 2016 (Netherlands-Yugoslavia BIT 2002); [77] *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016 (Switzerland-Uruguay BIT 1988); [78] *Flemingo DutyFree Shop v Poland*, UNCITRAL Award, 12 August 2016 (India-Poland BIT 1996); [79] *Rusoro Mining v Venezuela*, ICSID Case No ARB(AF)/12/5, Award, 22 August 2016 (Canada-Venezuela BIT 1996); [80] *Blusun v Italy*, ICSID Case No ARB/14/3, Award, 27 December 2016 (Energy Charter Treaty); [81] *Teinver v Argentina*, ICSID Case No ARB/09/1, Award, 21 July 2017 (Argentina-Spain BIT 1991).

⁴⁷² Maurice Waite (ed), *Oxford Paperback Thesaurus* (4th edn, Oxford University Press 2012) 268 and 290. For arbitral references to *Oxford English Dictionary* definitions of the terms fair and equitable, see *MTD Equity v Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, para 113; *Azurix v Argentina*, ICSID Case No ARB/01/12, Award, 14 July 2006, para 360; *Siemens v Argentina*, ICSID Case No ARB/02/8, Award, 6 February 2007, para 290.

Figure 18: The Decisions Relied-upon Most Often When Interpreting Legitimate Expectations as an Element of the Autonomous FET Standard⁴⁷³



⁴⁷³ This figure is the author's.

The decisions relied upon most often by tribunals when defining legitimate expectations as a component of the autonomous FET standard are the arbitral awards in *Saluka v Czech Republic*,⁴⁷⁴ *Tecmed v Mexico*⁴⁷⁵ and *Waste Management v Mexico*.⁴⁷⁶ *Saluka* has been relied on 32 times, *Tecmed* 31 times and *Waste Management* 19 times. This is a count of the number of references to these decisions within the original data set in the context of arbitral tribunals defining legitimate expectations as a component of the autonomous FET standard. The number of decisions relying upon these three decisions is slightly lower. Having said that, these three awards sit at the top as being relied on most often – irrespective of whether the number of references to these awards are counted or whether the number of decisions relying on these awards are decisive.

The core element of the protection of legitimate expectations is that host states are bound by their promises, assurances or representations towards the foreign investor that were reasonably relied on by the investor when making the investment. In *Tecmed*, the arbitral tribunal, relying on the good faith principle established by international law,⁴⁷⁷ recognised “the [protection of] basic expectations”⁴⁷⁸ as a component of fair and equitable treatment. It then went on to list expectations it deemed protected such as the expectation that the host state act consistently, “i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.”⁴⁷⁹

⁴⁷⁴ *Saluka v Czech Republic*, UNCITRAL Partial Award, 17 March 2006 (Czech Republic-Netherlands BIT 1991).

⁴⁷⁵ *Tecmed v Mexico*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003 (Spain-Mexico BIT 1995).

⁴⁷⁶ *Waste Management v Mexico*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004 (NAFTA).

⁴⁷⁷ *Tecmed v Mexico*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, para 154.

⁴⁷⁸ *ibid.*

⁴⁷⁹ *ibid.*

Similarly, albeit defining the international law minimum standard of treatment of aliens, the tribunal in *Waste Management*, held that, “[i]n applying [the minimum] standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”⁴⁸⁰ The tribunal in *Saluka* relied on *Tecmed* and *Waste Management*⁴⁸¹ and cautioned that “the scope of the [...] protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors’ subjective motivations and considerations.”⁴⁸² In addition, it held that an investor’s legitimate expectations must be weighed against the host states legitimate regulatory interests.⁴⁸³ Further details were specified over time, such as that the relevant time for the formation of the foreign investor’s legitimate expectations is the moment of the investment⁴⁸⁴ and that “[p]rovisions of general legislation applicable to a plurality of

⁴⁸⁰ *Waste Management v Mexico*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 98.

⁴⁸¹ *Saluka v Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para 302.

⁴⁸² *ibid* para 304.

⁴⁸³ *ibid* para 306.

⁴⁸⁴ See, for example, *Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para 264 (relying on *Saluka v Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para 302); *AES v Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010, paras 9.3.8-9.3.11 (relying on *Duke Energy v Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008, para 340; *LG&E Energy v Argentina*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006; *Tecmed v Mexico*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, para 154); *Frontier Petroleum v Czech Republic*, UNCITRAL Final Award, 12 November 2010, para 287 (relying on *Azurix v Argentina*, ICSID Case No ARB/01/12, Award, 14 July 2006, para 372; *Bayindir v Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, paras 190-191; *BG Group v Argentina*, UNCITRAL Final Award, 24 December 2007, paras 297-298; *Duke Energy v Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008, paras 340 and 365; *EDF (Services) v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 219; *Enron v Argentina*, ICSID Case No ARB/01/3, Award, 22 May 2007, para 262; *Jan de Nul v Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 265; *LG&E Energy v Argentina*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006) para 130; *National Grid v Argentina*, UNCITRAL Award, 3 November 2008, para 173; *PSEG Global v Turkey*, ICSID Case No ARB/02/5, Award, 19 January 2007, para 255; *Saluka v Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para 329; *Siemens v Argentina*, ICSID Case No ARB/02/8, Award, 6 February 2007, para 299; *SPP v Egypt*, ICSID Case No ARB/84/3, Award, 20 May 1992, paras 82-83; *Tecmed v Mexico*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, para 154); *Oostergetel v Slovak Republic*, UNCITRAL Final Award, 23 April 2012, para 233 (noting “that it is generally considered that expectations must be assessed at the time of the investment”); *Toto v Lebanon*, ICSID Case No ARB/07/12, Award, 7 June 2012, para 158 (relying on *Parkerings-Compagniet v Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, paras 331-333); *Electrabel v Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 7.76 (noting that “it is common ground in ‘investment jurisprudence’

persons or of a category of persons, do not create legitimate expectations that there will be no change in the law.”⁴⁸⁵ In other words, absent a specific commitment to the contrary, the obligation to provide fair and equitable treatment does not amount to a stabilisation clause.⁴⁸⁶ That being said, the stability of the legal and business framework *is* an element of the FET standard,⁴⁸⁷ an element that is linked to the protection of legitimate

[...] that the assessment must refer to the time at which the investment is made”); *Mamidoil Jetoil v Albania*, ICSID Case No ARB/11/24, Award, 30 March 2015, para 696 (relying on *AES v Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010, para 9.3.8; *Duke Energy v Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008, para 340; *LG&E Energy v Argentina*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, para 127; *Tecmed v Mexico*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, para 157); *Crystallex v Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, para 557 (relying on *Bayindir v Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, paras 190-191; *Duke Energy v Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008, para 340; *Frontier Petroleum v Czech Republic*, UNCITRAL Final Award, 12 November 2010, para 287; *Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para 264; *National Grid v Argentina*, UNCITRAL Award, 3 November 2008, para 173).

⁴⁸⁵ *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016, para 426.

⁴⁸⁶ See, for example, *PSEG Global v Turkey*, ICSID Case No ARB/02/5, Award, 19 January 2007, para 255 (relying on *Saluka v Czech Republic (Saluka)*, UNCITRAL Partial Award, 17 March 2006, paras 301 and 305); *Impregilo v Argentina*, ICSID Case No ARB/07/17, Award, 21 June 2011, para 290 (relying on *Parkerings-Compagniet v Lithuania (Parkerings-Compagniet)*, ICSID Case No ARB/05/8, Award, 11 September 2007, para 332); *Roussalis v Romania*, ICSID Case No ARB/06/1, Award, 7 December 2011, para 317 (relying on *Saluka*, para 305); *Oostergetel v Slovak Republic (Oostergetel)*, UNCITRAL Final Award, 23 April 2012, para 223 (relying on *El Paso Energy v Argentina (El Paso)*, ICSID Case No ARB/03/15, Award, 31 October 2011, paras 348, 350-352); *Toto v Lebanon*, ICSID Case No ARB/07/12, Award, 7 June 2012, para 156 (relying on *EDF (Services) v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 217); *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, paras 666 and 673 (relying on *Saluka*, para 305); *Perenco v Ecuador*, ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, paras 586 and 593 (relying on *El Paso*, paras 352, 365-368; *Oostergetel*, para 224; *Paushok v Mongolia (Paushok)*, UNCITRAL Award on Jurisdiction and Liability, 28 April 2011, para 305; *Saluka*, para 304; *Total v Argentina*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, para 117); *Mamidoil Jetoil v Albania*, ICSID Case No ARB/11/24, Award, 30 March 2015, para 619 (relying on *Saluka*, para 305); *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016, para 422 (relying on *AES v Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010, paras 9.3.27-9.3.35; *BG Group v Argentina*, UNCITRAL Final Award, 24 December 2007, paras 292-310; *Continental Casualty v Argentina*, ICSID Case No ARB/03/9, Award, 5 September 2008, paras 258-261; *EDF (Services) v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 219; *El Paso*, paras 344-352 and 365-367; *Impregilo v Argentina*, ICSID Case No ARB/07/17, Award, 21 June 2011, paras 290-291; *Parkerings-Compagniet*, paras 327-328; *Paushok*, para 302; *Plama v Bulgaria*, ICSID Case No ARB/03/24, Award, 27 August 2008, para 219; *Total v Argentina*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, paras 123 and 164); *Blusun v Italy*, ICSID Case No ARB/14/3, Award, 27 December 2016, paras 317 and 367-369 (relying on *Charanne v Spain*, SCC Case No V 062/2012, Final Award, 21 January 2016, para 510; *El Paso*, para 372; *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016, para 426).

⁴⁸⁷ See, for example, *Occidental v Ecuador (Occidental)*, LCIA Case No UN3467, Final Award, 1 July 2004, para 185 (relying on *Metalclad v Mexico (Metalclad)*, ICSID Case No ARB(AF)/97/1, Award, 30

expectations.⁴⁸⁸ Yet, what foreign investors, absent a specific commitment to the contrary, *cannot* reasonably expect is the freezing of the legal framework that exists at the time when they make their investment; absent a specific commitment to the contrary, a host state retains its “right to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.”⁴⁸⁹ Yet, even in the absence of a stabilisation

August 2000; *Tecmed v Mexico (Tecmed)*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, para 154); *CMS v Argentina (CMS)*, ICSID Case No ARB/01/8, Award, 12 May 2005, para 276 and 278 (relying on *Genin v Estonia*, ICSID Case No ARB/99/2, Award, 25 June 2001; *Metalclad*); *Saluka v Czech Republic (Saluka)*, UNCITRAL Partial Award, 17 March 2006, para 303 (relying on *Occidental*); *LG&E Energy v Argentina (LG&E Energy)*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, para 125 (relying on *CMS*, Award, 12 May 2005, para 274; *Metalclad*, para 99; *Occidental*, para 183); *Enron v Argentina*, ICSID Case No ARB/01/3, Award, 22 May 2007, para 260 (relying on *CMS*, Award, 12 May 2005, paras 274-276; *LG&E Energy*, paras 124-125; *Occidental*, paras 190-191); *Sempra Energy v Argentina*, ICSID Case No ARB/02/16, Award, 28 September 2007, para 303 (relying on *LG&E Energy*, paras 124-125); *Duke Energy v Ecuador (Duke Energy)*, ICSID Case No ARB/04/19, Award, 18 August 2008, paras 339 (relying on *CMS*, Award, 12 May 2005; *LG&E Energy*, para 125; *Occidental*; *Tecmed*); *Suez v Argentina*, ICSID Case No ARB/03/19, UNCITRAL Decision on Liability, 30 July 2010, para 230 (relying on *Duke Energy*, para 340); *Alpha Projektholding v Ukraine*, ICSID Case No ARB/07/16, Award, 8 November 2010, para 420 (relying on *CMS*, Award, 12 May 2005, para 277; *LG&E Energy*, para 125); *El Paso Energy v Argentina (El Paso)*, ICSID Case No ARB/03/15, Award, 31 October 2011, paras 365 and 370-372 (relying on *CMS*, Award, 12 May 2005, para 277; *Continental Casualty v Argentina (Continental Casualty)*, ICSID Case No ARB/03/9, Award, 5 September 2008, paras 254 and 258; *Enron v Argentina*, ICSID Case No ARB/01/3, Award, 22 May 2007, para 261; *Saluka*, para 304); *Oostergetel v Slovak Republic (Oostergetel)*, UNCITRAL Final Award, 23 April 2012, para 223 (relying on *El Paso*, para 364); *Toto v Lebanon*, ICSID Case No ARB/07/12, Award, 7 June 2012, para 154 (relying on *LG&E Energy*, para 125); *Micula v Romania*, ICSID Case No ARB/05/20, Award, 7 June 2012, para 528 (relying on *LG&E Energy*, para 125); *Mamidoil Jetoil v Albania*, ICSID Case No ARB/11/24, Award, 30 March 2015, para 619 (relying on *Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para 285); *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016, para 422 (relying on *Continental Casualty*, paras 258-261; *EDF (Services) v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para 219; *El Paso*, paras 344-352 and 365-367; *Parkerings-Compagniet v Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, paras 327-328; *Paushok v Mongolia*, UNCITRAL Award, 28 April 2011, para 302; *Plama v Bulgaria (Plama)*, ICSID Case No ARB/03/24, Award, 27 August 2008, para 219; *Total v Argentina*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, paras 123 and 164); *Rusoro Mining v Venezuela*, ICSID Case No ARB(AF)/12/5, Award, 22 August 2016, para 524 (relying on *Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para 284); *Blusun v Italy*, ICSID Case No ARB/14/3, Award, 27 December 2016, paras 315 (relying on *Electrabel v Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 7.73; *Plama*, para 172).

⁴⁸⁸ *Impregilo v Argentina*, ICSID Case No ARB/07/17, Award, 21 June 2011, para 290; *Oostergetel v Slovak Republic*, UNCITRAL Final Award, 23 April 2012, para 222; *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 537.

⁴⁸⁹ *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016, para 422. See also *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 666 and 673.

clause or other specific commitment promising regulatory stability, foreign investors *can* reasonably expect that host states “avoid arbitrarily changing the rules of the game.”⁴⁹⁰ What amounts to a non-arbitrary change of the rules is likewise defined by arbitral tribunals. When examining whether changes to the legal framework post-investment are arbitrary, arbitrators consider “the reasonableness of the normative changes and their appropriateness in the light of the criterion of proportionality.”⁴⁹¹ The term *reasonable*, in this context, means related to some rational policy.⁴⁹² The rational policy can be of an “economic, social or other nature.”⁴⁹³ The criterion of proportionality is satisfied “as long as the changes are not capricious or unnecessary and do not amount to suddenly and unpredictably eliminat[ing] the essential characteristics of the existing regulatory framework.”⁴⁹⁴ When changing its legal or business framework, the host state must not act contrary to the public interest either.⁴⁹⁵ Nor must the host state discriminate against foreign investors, i.e., base its conduct towards investors “on unjustifiable distinctions.”⁴⁹⁶ All of these elements and more specify what foreign investors can reasonably expect and, therefore, also what it means to treat foreign investors fairly and equitably.⁴⁹⁷ These elements of the autonomous FET standard share the common feature that arbitrators define them with reference to prior arbitral decisions.

⁴⁹⁰ *Alpha v Ukraine*, ICSID Case No ARB/07/16, Award, 8 November 2010, para 420.

⁴⁹¹ *Total v Argentina*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, para 123.

⁴⁹² *Electrabel v Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 179; *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016, para 322.

⁴⁹³ *Blusun v Italy*, ICSID Case No ARB/14/3, Award, 27 December 2016, para 368.

⁴⁹⁴ *ibid* para 317.

⁴⁹⁵ *Charanne v Spain*, SCC Case No V 062/2012, Final Award, 21 January 2016, para 514.

⁴⁹⁶ *Walter Bau v Thailand*, UNCITRAL Award, 1 July 2009, para 11.5; *Philip Morris v Uruguay*, ICSID case No ARB/10/7, Award, 8 July 2016, para 322.

⁴⁹⁷ For a more comprehensive definition of fair and equitable treatment, see Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) paras 7.102-7.239 (ascribing different functions to the sub-categories of fair and equitable treatment: the judicial function (denial of justice); the legislative function (scope of regulatory ability post-investment); the executive function (review of administrative action) – which contains the three doctrines of legitimate expectations, due process and substantive fairness).

An example of the application of the “doctrine of legitimate expectations”⁴⁹⁸ is the award in *Micula v Romania*,⁴⁹⁹ an award under the intra-EU Sweden-Romania BIT 2002.⁵⁰⁰ The issue in this case was that Romania had introduced and subsequently revoked⁵⁰¹ “certain economic incentives for the development of disfavoured regions of Romania.”⁵⁰² As Romania put it, the revocation was “an essential precondition for [Romania’s] accession to the EU.”⁵⁰³ The revocation in and of itself was not the issue, however. Rather, the issue was that Romania had promised the continuance of the economic incentives for a ten-year-period and that it had subsequently revoked the economic incentives prematurely. The reason for the premature revocation was that it was only after Romania had made that promise that it became apparent for Romania that the incentives would have to be revoked eventually, as they would constitute illegal state aid under EU law.⁵⁰⁴ When Romania did revoke all but one of the economic incentives prematurely,⁵⁰⁵ the claimants in *Micula*, in reliance on the promised ten-year-provision of the economic incentives,⁵⁰⁶ had already invested in a disfavoured region in Romania: the Şeti-Nucet-Drăgăneşti region.⁵⁰⁷

⁴⁹⁸ *Crystalex v Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, para 546.

⁴⁹⁹ *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013.

⁵⁰⁰ Sweden-Romania BIT of 29 May 2002 (entered into force on 1 April 2003).

⁵⁰¹ *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 682 (noting that “the incentives were virtually eliminated rather than simply modified or amended”).

⁵⁰² *Micula v Romania*, Civil Action No 17-CV-2332, Petition to Confirm ICSID Arbitration Award and Enter Judgment, 6 November 2017 (United States District Court for the District of Columbia) para 14.

⁵⁰³ *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 494.

⁵⁰⁴ In 1995, the Europe Agreement between the European Community and Romania entered into force, requiring Romania to eventually adopt the European rules on state aid. See *Micula v Romania*, Case No CL-2014-000251, Decision of the UK High Court of Justice on Romania’s Request to Set Aside the Registration of the ICSID Award, 20 January 2017, para 20.

⁵⁰⁵ *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 682.

⁵⁰⁶ See Emergency Government Ordinance No 24/1998 (establishing the investment incentive scheme).

⁵⁰⁷ *Micula v Romania*, Case No CL-2014-000251, Decision of the UK High Court of Justice on Romania’s Request to Set Aside the Registration of the ICSID Award, 20 January 2017, para 25.

In the ensuing arbitral proceedings initiated by the Micula brothers and others (the claimants) against Romania, the claimants argued that their legitimate expectations had been disappointed and that, therefore, Romania had breached its obligation to provide fair and equitable treatment. The tribunal agreed. The arbitral tribunal, by majority, held that the totality of Romania's actions amounted to a specific promise of regulatory stability⁵⁰⁸ that instilled in the claimants a legitimate expectation that the scheme of economic incentives would be maintained in substantially the same form for the promised ten-year period.⁵⁰⁹ The tribunal also held that these expectations reasonably led the claimants to invest in the scale and manner in which they did.⁵¹⁰ In conclusion, the tribunal, by majority, ordered Romania to pay RON 367,433,229 as damages for disappointing the claimants' legitimate expectations⁵¹¹ and thereby failing to treat the claimants fairly and equitably.⁵¹² In addition, Romania was ordered to pay interest until full payment of the award.⁵¹³

Micula shows that the doctrine of legitimate expectations is independent of a host state's other obligations. Even though Romania was required to partially revoke the incentives to fulfil a precondition for Romania's accession to the EU, this did not render Romania's promise of regulatory stability void. Nor did the conflict between Romania's promise of

⁵⁰⁸ *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 674 (describing the creation of "a general scheme of incentives available to investors who fulfilled certain requirements, which were later *granted* to qualifying investors through a specific administrative act," thereby turning the general entitlement into "specified entitlement with respect to specified investors").

⁵⁰⁹ *ibid* paras 677 and 686 (noting that "Romania created the appearance of a ten-year tax holiday for investors who decided to invest in the disadvantaged area (and this appearance conformed to what Romania did in fact wish to enact)").

⁵¹⁰ On the reasonableness of the claimants' reliance on their legitimate expectations, see *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 724 (noting "that the Claimants' expectation that the [investment incentive regime] would be in place for 10 years was objectively reasonable").

⁵¹¹ On the violation of the claimants' legitimate expectations regarding the availability of the economic incentives, see *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 725.

⁵¹² *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 1329.

⁵¹³ *ibid*.

regulatory stability and the requirement under EU law to revoke that promise provide a reason to annul the award.⁵¹⁴ What mattered was that Romania had breached its obligation to provide fair and equitable treatment under the Sweden-Romania BIT by going back on its promise of regulatory stability. Even though any damages paid in fulfilment of the award may constitute new unlawful state aid under EU law, a position that the European Commission has taken,⁵¹⁵ this does not relieve Romania of its international obligation to comply with the arbitral award against it. The enforceability of the arbitral award is a different issue and one that this thesis will return to. Within the EU, the award in *Micula* may be unenforceable, in light of the recent judgment of the European Court of Justice in *Slowakische Republik (Slovak Republic) v Achmea BV*.⁵¹⁶

Without defining legitimate expectations in definite detail, this section has demonstrated the arbitral practice of relying on prior awards when defining legitimate expectations as an element of the autonomous FET standard. What renders foreign investors' expectations legitimate is equally defined by arbitral tribunals with reference to prior arbitral decisions. It can therefore be said that the meaning of fair and equitable treatment

⁵¹⁴ See *Micula v Romania*, ICSID Case No ARB/05/20, Decision on Annulment, 26 February 2016.

⁵¹⁵ European Commission, C(2014) 6848 final, *Letter to Romania on State Aid Investigation* (1 October 2014) para 71 (noting that “any execution of the Award of 11 December 2013 would amount to the granting of incompatible “new aid”, subject to the State aid rules contained in the Treaty”); European Commission, *Commission Decision (EU) 2015/1470 on State aid SA.38517* (30 March 2015) Article 1 (“The payment of the compensation awarded by the arbitral tribunal established under the auspices of the International Center for Settlement of Investment Disputes (ICSID) by award of 11 December 2013 in Case No ARB/05/20 *Micula a.o. v Romania* [...] constitutes State aid within the meaning of Article 107(1) of the Treaty which is incompatible with the internal market.”).

⁵¹⁶ *Slowakische Republik (Slovak Republic) v Achmea*, Case C-284/16, Judgment of the European Court of Justice (Grand Chamber) (6 March 2018) para 59 (noting on the incompatibility of intra-EU BITs with EU law):

Articles 267 and 344 TFEU must be interpreted as precluding the provision in an international agreement concluded between Member States, such as Article 8 of the [Netherlands-Czech and Slovak Republic BIT 1991], under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

is specified by tribunals so as to include the protection of legitimate expectations as defined by tribunals. The fact that a specification of vague treaty provisions occurs⁵¹⁷ is a prerequisite for defining the activity of arbitrators as law-making. The next section examines whether arbitrators develop the meaning of the minimum standard of treatment of aliens in a similar fashion.

(2) Arbitral Development of the Minimum Standard

This section examines how arbitrators develop the meaning of the customary international law minimum standard of treatment of aliens, a synonym for fair and equitable treatment under those investment treaties that link FET to the minimum standard. It is a peculiarity of investment treaty arbitration, that arbitral tribunals develop the content of the minimum standard which is an example of international custom, despite the conflict this creates to the theory of international custom. In theory, international custom is “evidence of a general practice accepted as law,”⁵¹⁸ that practice being state practice accepted by all states as law. In the words of Carlo Focarelli, customary international law is “*unwritten* law created by the generality of states (not necessarily the totality thereof), binding on all states, regardless of the attitude of individual dissenting states.”⁵¹⁹ Customary

⁵¹⁷ On arbitral specification of treaty norms, see *Saluka v Czech Republic*, UNCITRAL Partial Award (17 March 2006) para 284 (internal reference omitted):

The standards formulated in Article 3 of the Treaty, vague as they may be, are susceptible of specification through judicial practice and do in fact have sufficient legal content to allow the case to be decided on the basis of law. Over the last few years, a number of awards have dealt with such standards yielding a fair amount of practice that sheds light on their legal meaning.

⁵¹⁸ ICJ Statute, Art 38(1)(b). See also *Merrill & Ring Forestry L.P. v Canada*, UNCT/07/1, Award (31 March 2010) para 193 (noting the evolution of customary international law, adding that “State practice and *opinio juris* will be the guiding beacons of this evolution”).

⁵¹⁹ Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford University Press 2012) 260. On the binding character of international custom, see also *North Sea Continental Shelf (Federal Republic of Germany v Denmark and Federal Republic of Germany v Netherlands)* (*Merits*) Judgment of 20 February 1969, [1969] ICJ Rep 4, para 63:

[I]t is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; – whereas this cannot be so in the case of general or customary law rules and obligations, which, by their very

international law, in short and in theory, is created by the generality of states.⁵²⁰ It exists “when it is supported by a generalized, uniform, and constant state practice (*usus*) accompanied by a sense of legal obligation or of necessity (*opinio juris sive necessitatis*).”⁵²¹

In practice, what is referred to as ‘customary international law’ is *also* created by international courts and tribunals, entities that are not states. By specifying the content of norms of ‘customary international law’, international courts and tribunals are creating specific rules of what they deem to be ‘customary international law’.⁵²² Even though these specific rules of law, when created by courts and tribunals, cannot be properly understood as authoritatively defining customary international law until the definitions are accepted as authoritative by the generality of states,⁵²³ it would be misguided to conclude that the rules created are not rules of law. That is not the case. If the specification of customary international law is not customary international law for lack of (subsequent) state *usus* and *opinio juris*, then what international courts and tribunals define as customary international law is law that is mislabelled – not law that is non-existent. The specific rules of law as created by international courts and tribunals may not amount to customary

nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.

⁵²⁰ Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford University Press 2012) 263 (noting that customary international law “can emerge only if the generality of states participate in its formation”).

⁵²¹ *ibid* 261.

⁵²² cf William M. Landes and Richard A. Posner, ‘Legal Precedent: A Theoretical and Empirical Analysis’ (1976) 19 *Journal of Law and Economics* 249-307, at 249:

When the parties to a legal dispute are unable to agree on the meaning of the governing statute as applied to their dispute, litigation may ensue in which that meaning will be an issue for the court to resolve. The court's resolution will define the specific requirements of the statute in the circumstances presented by the case and thus create [...] a specific rule of legal obligation applicable to like circumstances.

⁵²³ Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford University Press 2012) 267 (noting that customary international law as defined by judges and scholars “cannot be understood as stating the law until it is accepted by the generality of states”).

international law. But the fact that judges and arbitrators regard their specifications as rules of customary international law even if only erroneously renders these specifications the law in the eyes of judges and arbitrators which they are bound to apply. This means that, when judges and arbitrators specify the meaning of norms of customary international law, they create law, even if that law does not amount to customary international law for lack of (subsequent) state *usus* and *opinio juris*. This alleged specification of customary international law norms binds international courts⁵²⁴ and tribunals going forward. It is the binding character of judge-made and arbitrator-made norms that renders the proper label of these norms of secondary importance.

The minimum standard is a relevant example for the secondary importance of proper labelling. Its arbitral definition is *the law*, even if the definition does not amount to customary international law. Several investment treaties link the obligation to provide fair and equitable treatment to the minimum standard which requires arbitrators to define that minimum standard. Yet, its definition by arbitrators only forms part of customary international law if the definition is accepted as such by the generality of states. This paradoxical scenario runs counter to Hart's proposition that, "if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are."⁵²⁵ In investor-state arbitration, arbitrators are empowered to make authoritative determinations of the

⁵²⁴ On the bindingness of settled ICJ jurisprudence on the ICJ, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Jurisdiction) [2008] ICJ Rep 412, para 53 ("To the extent that the [previous] decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so."); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Preliminary Objections) (Judgment) [1998] ICJ Rep 275 para 28 ("It is true that, in accordance with Article 59 [of the ICJ Statute], the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases.").

⁵²⁵ H.L.A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 97.

fact that the minimum standard has been broken. Yet, these determinations, in the absence of a corresponding general state *usus* and *opinio juris*, cannot be taken as authoritative determinations of what the content of the minimum standard is. It is only if and when the generality of states accepts the content of the minimum standard as defined by arbitrators as legally binding under customary international law, as reflected in state practice,⁵²⁶ that the arbitral definition will become customary international law.⁵²⁷ Until such time, arbitrators when applying their definition of the minimum standard are not applying customary international law but their rendition of it which they are bound to apply. The arbitral rendition of customary international law, if it lacks corresponding state *usus* and *opinio juris*, is nonetheless law. Yet, the arbitral rendition is only customary international law *propre* if a corresponding general state *usus* and *opinio juris* exists at the time it is rendered. If that is not the case, the arbitral rendition of customary international law may become customary international law *propre*, once corresponding state *usus* and *opinio juris* develop.

Be that as it may, the correct label of the law developed by arbitrators is of secondary importance. Arbitrators apply their definition of the minimum standard, even in the absence of a corresponding general state practice accepted as law. In other words, the arbitral definition of the minimum standard is not inductive in practice. Arbitrators do not empirically examine how the generality of states defines the minimum standard of

⁵²⁶ *North Sea Continental Shelf Case (Federal Republic of Germany v Netherlands)* (Judgment) [1969] ICJ Rep 3, para 44 (noting that state practice “must [...] be such or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it”).

⁵²⁷ Thus defined, the customary international law minimum standard of treatment of aliens is notoriously difficult to determine. Cf Omri Sender and Michael Wood, ‘The Emergence of Customary International Law: Between Theory and Practice’ in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing 2016) 133-159, at 140 (noting “the ever-present difficulties of ascertaining the exact content of a given rule, and of identifying the moment when a critical mass of State practice and *opinio juris* had accumulated and a rule of customary international law thus came into being”).

treatment of aliens.⁵²⁸ Instead, arbitrators apply what they perceive the minimum standard to be. Whether or not the definitions developed by arbitrators are part and parcel of customary international law is a topic beyond the scope of this thesis.⁵²⁹ It is beyond the scope of this thesis to empirically ascertain whether the minimum standard as defined by arbitrators is indeed properly labelled.⁵³⁰ It would be properly labelled if, coincidentally, there was a general state practice accepted as law that corresponded with an arbitral definition of the minimum standard. What is relevant for this section is that arbitrators define the content of what they perceive the ‘customary international law minimum standard’ to be⁵³¹ – whether that standard is mislabelled or not. This section thus proceeds with the arbitral definition of the minimum standard, demonstrating by example how

⁵²⁸ cf Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford University Press 2012) 263 (noting that “[c]ourts often abstain from attempting any systematic inquiry into international practice”); Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 1.83 (noting that “the modern understanding of the content of the customary right is being elaborated primarily through treaty jurisprudence”).

⁵²⁹ For the proposition that arbitrators develop international custom, see Edwin Borchard, ‘The ‘Minimum Standard’ of the Treatment of Aliens’ (1940) 38(4) *Michigan Law Review* 445-461, at 448 (“Like the common law, it has grown interstitially from case to case. Thus, [...] the body of international law developed by diplomatic practice and arbitral decisions, indefinite as it may be, represents the minimum which each state must accord the alien whom it admits. Whether called the fundamental, natural, or inherent rights of humanity or of man or of the alien, this minimum has acquired a permanent place in the protective ambit of international forums.”). For the proposition that arbitrators do not develop international custom, see *Mesa Power Group v Canada*, PCA Case No 2012-17, Award (24 March 2016) para 492 (noting that, in the opinion of the United States, the burden “to establish the existence, applicability, and violation of a relevant obligation under customary international law [...] cannot be discharged by relying on arbitral decisions as these decisions do not constitute evidence of state practice and *opinio juris*.”).

⁵³⁰ From the perspective of arbitrators, the minimum standard of treatment as defined by arbitrators is properly labelled, as arbitrators put forward their interpretation of what the minimum standard *is*. Campbell McLachlan, Laurence Shore and Matthew Weiniger are thus correct in concluding that, given the adoption of investment treaty standards based on customary international law, “the modern *understanding* of the content of customary right is being elaborated primarily through the treaty jurisprudence.” See Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) para 1.83.

⁵³¹ On this point, see Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) para 7.09 (noting that the adoption of a FET standard that is synonymous with the minimum standard “converts the tribunal’s enquiry from one of treaty interpretation to ascertainment of the content of custom”).

arbitrators incrementally specify the content of the minimum standard as they understand it,⁵³² thereby relying on prior arbitral decisions.

Most, if not all, contemporary arbitral examinations of the minimum standard take as their point of departure the definition of that standard in *Neer*,⁵³³ a 1926 arbitral award, issued by the Mexico-United States Claims Commission under the 1923 Convention between Mexico and the United States.⁵³⁴ In this case, the United States presented a claim on behalf of the widow and daughter of Paul Neer, an American citizen, who was killed in Mexico, when he and his wife were on their way home, on horseback. The United States alleged that “the Mexican authorities showed an unwarrantable lack of intelligent investigation in prosecuting the culprits.”⁵³⁵ The Commission, while agreeing that the Mexican authorities “might have acted in a more vigorous and effective way than they did,”⁵³⁶ did not find “that the Mexican authorities [had] shown such lack of diligence or such lack of intelligent investigation in apprehending and punishing the culprits as would render Mexico liable before [the] Commission.”⁵³⁷ What would have rendered Mexico liable before the Commission would have been a breach of international standards, which the Commission deemed not the case. The Commission held

(first) that the propriety of governmental acts should be put to the test of international standards, (second) that the treatment of an alien, in order to constitute

⁵³² cf *Enron Corporation Ponderosa Assets v Argentine Republic*, ICSID Case No ARB/01/3, Award (22 May 2007) para 257 (“The evolution [of the fair and equitable treatment standard] that has taken place is for the most part the outcome of a case by case determination by courts and tribunals [...]. This explains that, like with the international minimum standard, there is a fragmentary and gradual development.”).

⁵³³ *L.F.H. Neer and Pauline Neer (United States of America) v United Mexican States* (1926) 4 Reports of International Arbitral Awards 60.

⁵³⁴ See Stephen M. Schwebel, ‘Is Neer Far from Fair and Equitable?’ *International Arbitration Club* (London, 5 May 2011) 1.

⁵³⁵ *L.F.H. Neer and Pauline Neer (United States of America) v United Mexican States* (1926) 4 Reports of International Arbitral Awards 60, at 61 para 1.

⁵³⁶ *ibid* 61 para 3.

⁵³⁷ *ibid* 62 para 5.

an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.⁵³⁸

It is ironic that this *Neer* standard was created by a Claims Commission without an examination of whether there existed a corresponding general state practice accompanied by a sense of legal obligation.⁵³⁹ By today's standards of proof (state practice and *opinio juris*), the customary international law minimum standard of treatment of aliens began as a fiction of international law, much like contemporary renditions of the same standard. That there should be a minimum standard that went beyond protections offered to nationals under national law was indeed initially contested by several states,⁵⁴⁰ which is a sign of the creative function of the Claims Commission. The Claims Commission did not recognise a pre-existing international minimum standard but contributed to its creation by affirming its existence when its existence was not clear. From the perspective of arbitrators, the creative function of the Claims Commissions did not hinder the weaving of the *Neer* standard into the fabric of international law.

⁵³⁸ *L.F.H. Neer and Pauline Neer (United States of America) v United Mexican States* (1926) 4 Reports of International Arbitral Awards 60, at 61-62 para 4.

⁵³⁹ *Railroad Development Corporation v Guatemala*, ICSID Case No ARB/07/23, Award (29 June 2012) [Andrés Rigo Sureda, Stuart E. Eizenstat, James Crawford] para 216:

It is ironic that the decision considered reflecting the expression of the minimum standard of treatment in customary international law is based on the opinions of commentators and, on its own admission, went further than their views without an analysis of State practice followed because of a sense of obligation. By the strict standards of proof of customary international law applied in *Glamis Gold*, *Neer* would fail to prove its famous statement [...] to be an expression of customary international law.

⁵⁴⁰ See Edwin Borchard, 'The 'Minimum Standard' of the Treatment of Aliens' (1940) 38(4) *Michigan Law Review* 445-461, at 445-446, 450-451 (noting that the states of Latin America then denied aliens a privileged position vis-à-vis nationals, relying on the doctrine of equality, and that China, supported by seventeen countries, "mainly the lesser states," and opposed by twenty-one, "including all the great powers represented," advanced the same argument at the 1930 League of Nations Codification Conference).

Today, many investment tribunals take the *Neer* minimum standard of treatment of aliens as their point of departure when defining what they deem the contemporary customary international law minimum standard of treatment to be,⁵⁴¹ with most tribunals finding that the minimum standard has evolved since *Neer*.⁵⁴² The minimum standard has not evolved magically, however. The evolution of the ‘minimum standard’ is the outcome of arbitral reliance on precedent and arbitral law-making. Most tribunals assume that government misconduct must not amount to an outrage anymore for the government misconduct to breach the minimum standard,⁵⁴³ though the required severity of the misconduct remains high.⁵⁴⁴ Tribunals have also clarified that bad faith is not required for a breach of the

⁵⁴¹ *Mondev v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, paras 114-117; *ADF v United States of America*, ICSID Case No ARB(AF)/00/1, Award, 9 January 2003, paras 179-181; *Waste Management v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 93; *GAMI v United Mexican States*, UNCITRAL Final Award, 15 November 2004, para 95; *Thunderbird v United Mexican States*, UNCITRAL Award, 26 January 2006, para 194; *Glamis Gold v United States of America*, UNCITRAL Award, 8 June 2009, para 21; *Cargill v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009, para 272; *Merrill & Ring Forestry v Canada*, UNCITRAL Award, 31 March 2010, paras 196-201; *Railroad Development Corporation v Guatemala*, ICSID Case No ARB/07/23, Award, 29 June 2012, para 216-217; *Bilcon v Canada*, UNCITRAL Award on Jurisdiction and Liability, 17 March 2015, para 434; *Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33, Award, 3 November 2015, para 383; *Mesa Power Group v Canada*, PCA Case No 2012-17, Award, 24 March 2016, para 496.

⁵⁴² *Mondev v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, para 116 (“To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”); *ADF v United States of America*, ICSID Case No ARB(AF)/00/1, Award, 9 January 2003, para 179; *Waste Management v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 92; *GAMI v United Mexican States*, UNCITRAL Final Award, 15 November 2004, para 95; *Thunderbird v United Mexican States*, UNCITRAL Award, 26 January 2006, para 194; *Merrill & Ring Forestry v Canada*, UNCITRAL Award, 31 March 2010, para 213 (noting that, “except for cases of safety and due process, today’s minimum standard is broader than that defined in the *Neer* case and its progeny”); *Railroad Development Corporation v Guatemala*, ICSID Case No ARB/07/23, Award, 29 June 2012, para 218; *Bilcon v Canada*, UNCITRAL Award on Jurisdiction and Liability, 17 March 2015, para 48. But see *Glamis Gold v United States of America*, UNCITRAL Award, 8 June 2009, paras 612-616 (noting that the minimum standard of treatment has *not* moved beyond what it was in 1926 – a strict standard – but that what the international community views as “outrageous” may change over time”); *Cargill v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009, para 284 (noting as key that “the required severity of the conduct as held in *Neer* is maintained”).

⁵⁴³ *Bilcon v Canada*, PCA Case No 2009-04, UNCITRAL Award on Jurisdiction and Liability, 17 March 2015, para 440 (noting that “[m]any NAFTA tribunals have shared the emerging consensus that the *Neer* standard of indisputably outrageous misconduct is no longer applicable”).

⁵⁴⁴ *ibid* paras 442-444 (finding “that here is a high threshold for the conduct of a host state to rise to the level of a NAFTA Article 1105 breach, but that there is no requirement in all cases that the challenged

standard,⁵⁴⁵ though “its presence certainly will be determinative of a violation.”⁵⁴⁶ Without definitively defining the minimum standard, the remaining part of this section examines how arbitrators specify the content of the ‘minimum standard’. It is the case that arbitrators rely primarily on prior arbitral decisions when specifying the standard, instead of relying on general state practice and *opinio juris*.⁵⁴⁷ Two of the arbitral decisions most often relied upon by arbitral tribunals when defining the minimum standard are *S.D. Myers*⁵⁴⁸ and *Waste Management*.⁵⁴⁹ The formulation in *S.D. Myers*, even though it occurred before the FTC interpretation, is closest to the *Neer* standard, if the latter is stripped off the three requirements of outrage, bad faith and wilful neglect of duty. What is left is the required “insufficiency of government action so far short of international standards that every reasonable and impartial man would recognize its insufficiency,”⁵⁵⁰ a requirement that the tribunal in *S.D. Myers* expresses as treatment “in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.”⁵⁵¹ In *Waste Management*, the arbitrators were more

conduct reaches the level of shocking or outrageous behaviour [required under the *Neer* standard]”); *Mesa Power Group v Canada*, PCA Case No 2012-17, Award, 24 March 2016, paras 501 and 504.

⁵⁴⁵ *Mondev v USA*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, para 116; *Loewen v USA*, ICSID Case No ARB(AF)/98/3, Award, 26 June 2003, para 132; *Waste Management v Mexico*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 93; *Glamis Gold v USA*, UNCITRAL Award, 8 June 2009, para 627; *Cargill v Mexico*, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009, para 296; *Bilcon v Canada*, PCA Case No 2009-04, UNCITRAL Award on Jurisdiction and Liability, 17 March 2015, para 435.

⁵⁴⁶ *Glamis Gold v USA*, UNCITRAL Award, 8 June 2009, para 627.

⁵⁴⁷ For an argument in favour of this approach, see *Windstream Energy v Canada*, UNCITRAL Award, 27 September 2016, paras 351 and 358 (noting that neither disputing party has presented evidence as to state practice and *opinio juris* on the content of the customary international minimum standard, concluding that the arbitral tribunal, therefore, must take “into account the indirect evidence of the content of the customary international law minimum standard of treatment as evidenced in the decisions of other NAFTA tribunals”).

⁵⁴⁸ *S.D. Myers, Inc. v Canada*, UNCITRAL Partial Award, 13 November 2000.

⁵⁴⁹ *Waste Management, Inc. v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004.

⁵⁵⁰ *L.F.H. Neer and Pauline Neer (United States of America) v United Mexican States* (1926) 4 Reports of International Arbitral Awards 60, at 62.

⁵⁵¹ *S.D. Myers, Inc. v Canada*, UNCITRAL Partial Award (13 November 2000) para 263.

specific; they based their definition of the minimum standard on their review of four prior cases, concluding:

Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.⁵⁵²

A reliance on state practice and *opinio juris* is missing in *Waste Management*. Since state practice and *opinio juris* are constitutive factors of customary international law, the lack of arbitral reliance on them calls into question whether the above passage is reflective of the customary international law minimum standard of treatment. It cannot be assumed either that because the tribunals in *S.D. Myers*, *Mondev*, *ADF* and *Loewen* are purporting to apply the minimum standard that their decisions are indirect evidence of that minimum standard. The decisions in *S.D. Myers*, *Mondev*, *ADF* and *Loewen* neither refer to state practice nor to *opinio juris* when defining the content of the minimum standard. On the contrary, *ADF* even refers to arbitral jurisprudence as a source of customary international

⁵⁵² *Waste Management, Inc. v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para 98.

law.⁵⁵³ This self-referential approach is illogical. If customary international law depends on a near-uniform state practice and *opinio juris*, then decisions that define customary international law without relying on state practice and *opinio juris* are not reflective of customary international law. The illogic of deeming decisions that are not based on state practice and *opinio juris* reflective of the minimum standard has already been identified by the tribunal in *Windstream v Canada*,⁵⁵⁴ albeit only as a reason not to rely on the *Neer* decision when determining the content of the minimum standard. What the tribunal in *Windstream v Canada* did was to deem the *Neer* decision unreflective of the content of the minimum standard, reasoning that “the *Neer* tribunal itself did not have any direct evidence relating to State practice before it.”⁵⁵⁵ The tribunal in *Windstream v Canada*, however, stopped short of applying the same logic to NAFTA decisions which it considered to be “indirect evidence of the content of the customary international law minimum standard of treatment.”⁵⁵⁶ This inconsistency is inexplicable. NAFTA decisions that are not based on state practice and *opinio juris* are not evidence of state practice and *opinio juris* either – neither direct nor indirect evidence.

Given that neither the *Waste Management* tribunal nor the decisions it relied on when defining the content of the minimum standard are based on state practice and *opinio juris*, it is unlikely that the *Waste Management* definition of the ‘minimum standard’ is reflective of the minimum standard as it stood then. What is more likely is that the *Waste*

⁵⁵³ *ADF Group Inc v United States of America*, ICSID Case No ARB(AF)/00/1, Award, 9 January 2003, para 184 (“We understand *Mondev* [at para 119] to be saying – and we would respectfully agree with it – that any general requirement to accord ‘fair and equitable treatment’ and ‘full protection and security’ must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law.”) See *Mondev International Ltd. v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, para 119 (noting that “the United States stressed, [that] the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals”).

⁵⁵⁴ *Windstream Energy v Canada*, UNCITRAL Award, 27 September 2016.

⁵⁵⁵ *ibid* para 352.

⁵⁵⁶ *ibid* para 358.

Management tribunal contributed to a non-customary international law definition of the ‘minimum standard’ as evidenced in prior arbitral decisions, yet going beyond those also. The tribunal in *Waste Management* indeed added an element to the examination of the minimum standard of treatment – without checking whether there is a corresponding state practice and *opinio juris*: the doctrine of legitimate expectations. None of the arbitral decisions the *Waste Management* tribunal relied on mentioned the protection of investors’ legitimate expectations. This creative side to adjudication in investor-state arbitration also comes to the fore when arbitrators must determine whether a state practice exists in the first place.

That tribunals have a creative function in determining whether a state practice exists and what that means for the content of the minimum standard can be seen when comparing the two cases of *Mondev*⁵⁵⁷ and *Glamis Gold*.⁵⁵⁸ In *Glamis Gold*, the tribunal derived the non-evolution in custom from “the absence of sufficient evidence to establish a change in the custom,”⁵⁵⁹ finding that the strictness of the minimum standard is the same as it was under *Neer*.⁵⁶⁰ In *Mondev*, on the other hand, the arbitral tribunal reached the opposite

⁵⁵⁷ *Mondev International Ltd. v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002.

⁵⁵⁸ *Glamis Gold, Ltd. v United States of America*, UNCITRAL Award, 8 June 2009.

⁵⁵⁹ *ibid* para 22.

⁵⁶⁰ *ibid*:

In the instant case, the Tribunal finds that Glamis fails to establish the evolution in custom it asserts to have occurred. It thus appears that, although situations presented to tribunals are more varied and complicated today than in the 1920s, the level of scrutiny required under *Neer* is the same. Given the absence of sufficient evidence to establish a change in the custom, the fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105(1). Such a breach may be exhibited by a ‘gross denial of justice or manifest arbitrariness falling below acceptable international standards;’ or the creation by the State of objective expectations *in order to induce* investment and the subsequent repudiation of those expectations. The Tribunal emphasizes that, although bad faith may often be present in such determination and its presence will certainly be determinative of a violation, a finding of bad faith is not a requirement for a breach of Article 1105(1). The Tribunal further finds that

conclusion. In *Mondev*, the tribunal derived the evolution in custom from the absence of sufficient evidence to confirm a preservation of that custom. It held that “there is insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA, while incorporating the *Neer* principle [...], are confined to the *Neer* standard of outrageous treatment where the issue is the treatment of foreign investment by the State itself.”⁵⁶¹ The tribunal in *Mondev* consequently found that “what is unfair or inequitable need not equate with the outrageous or the egregious.”⁵⁶²

The tribunals in *Mondev* and *Glamis Gold* hold opposing views. For the tribunal in *Glamis Gold*, there must be evidence of a change in custom for the custom to have changed, while for the arbitral tribunal in *Mondev* the opposite is the case. Neither tribunal examined general state practice and *opinio juris* regarding the strictness of the minimum standard. Instead, both tribunals based their decisions on the alleged absence of opposing evidence which neither arbitral tribunal made an effort to unearth in the first place. Since international custom, being based on general state practice and *opinio juris*, is notoriously difficult to define, it is convenient to base arbitral findings on the absence of custom to the contrary. Given this arbitral power – namely, inferring a result from the alleged absence of a custom to the contrary – it is not surprising that arbitral definitions of international custom differ. The definitional difference is rooted in the arbitral ability to choose different starting points for their definition. If a tribunal wishes the *Neer* standard to be applicable, it elevates that standard to an international custom, at the same time noting the lack of state practice to the contrary (*Glamis Gold*). If a tribunal wishes a

although the standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under *Neer*, it is entirely possible that, as an international community, we may be shocked by State actions now that did not offend us previously. (Internal references omitted).

⁵⁶¹ *Mondev International Ltd. v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, para 115.

⁵⁶² *ibid* para 116.

standard other than the *Neer* standard to be applicable, it elevates that other standard to an international custom, at the same time noting the lack of state practice to the contrary (*Mondev*).⁵⁶³ The peculiarity is that tribunals do not put forward any evidence that the respective standard chosen is based on state practice and *opinio juris*.

This is all the more peculiar since there can be only one correct answer to the question whether the minimum standard is identical to the *Neer* standard as it stood in 1926. The minimum standard, by definition, either refers to the *Neer* standard as it stood in 1926 or it does not. Since customary international law derives from a general state practice accepted as law it is near-uniform by definition. This means that one out of two definitions of international custom must be factually incorrect, if one definition purports the applicability of the *Neer* standard as it stood in 1926 and the other definition purports its inapplicability. There cannot co-exist a near-uniform state practice to define the minimum standard as the *Neer* standard of 1926 *and*, at the same time, a near-uniform state practice to the contrary. If arbitrators were to examine general state practice accepted as law, they would find that either the *Glamis Gold* formulation or the *Mondev* formulation of the minimum standard is correct, or neither – but not both.

While this section does not provide a definitive definition of the minimum standard, it demonstrates the arbitral creativity in the definition of the minimum standard. The arbitral creativity is rooted in the absence of a general state practice as to the content of the minimum standard.⁵⁶⁴ If there is no general state practice as to the content of the minimum

⁵⁶³ See also *Merrill & Ring Forestry L.P. v Canada*, ICSID Case No UNCT/07/1, Award, 31 March 2010, para 204:

State practice was even less supportive of the standard referred to in the *Neer* case. And in the absence of a widespread and consistent state practice in support of a rule of customary international law there is no *opinio juris* either. No general rule of customary international law can thus be found which applied the *Neer* standard, beyond the strict confines of personal safety, denial of justice and due process.

⁵⁶⁴ cf Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) para 7.08 (noting that “the appearance of

standard, arbitral creativity as to the content⁵⁶⁵ is understandable. The quasi-evolution of the minimum standard is the outcome of this arbitral creativity. It is only a quasi-evolution of the minimum standard because arbitral decisions do not qualify as state practice, and decisions taken without reliance on state practice – as is the norm in investor-state arbitration – are not evidence of state practice either. The minimum standard as defined by arbitrators, if not accepted as law by the generality of states *ex post*, is thus not a norm of customary international law for lack of its mandatory roots: state practice and *opinio juris*. Even if the generality of states wished to accept arbitral definitions of the minimum standard as law after the fact, this would at times be a matter of impossibility. The impossibility is due to opposing arbitral definitions of the minimum standard: the co-existence of directly opposing, contradictory customs is impossible.

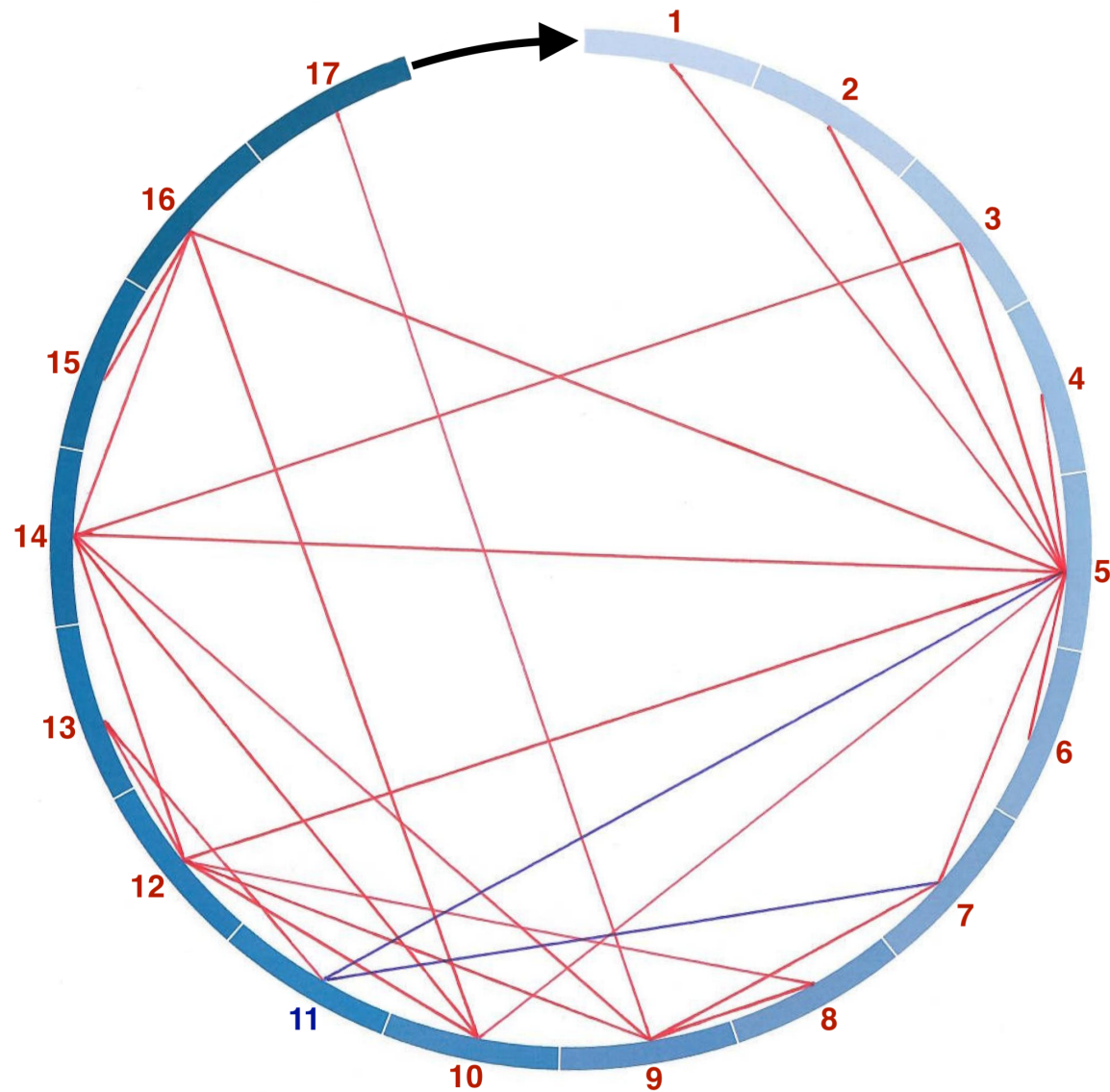
This practical incompatibility of opposing arbitral definitions of the customary international law minimum standard with general state practice supports the view that the content of the ‘minimum standard’ is more an arbitral creation than a true creature of customary international law. Figure 19 *below* demonstrates this creative process by example. It shows how arbitrators rely on prior arbitral definitions of the minimum standard when specifying the meaning of the minimum standard, instead of relying on state practice and *opinio juris*. By following prior arbitral definitions, arbitrators solidify those definitions. Figure 19 *below* demonstrates how arbitrators, either directly or indirectly, rely on the *Waste Management* doctrine of legitimate expectations as an

virtual unanimity in State practice, which is gleaned from a comparison of the language of the multitude of treaties, masks an absence of settled agreement over content”).

⁵⁶⁵ Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) para 7.05 (“noting that “arbitral tribunals have had to determine for themselves the content of the concept [of ‘fair and equitable treatment’] and its application to the many and various contexts of the State regulation of the modern globalised economy”).

element of the minimum standard, thereby consolidating the existence of that element. The more tribunals follow this definition, the more authoritative that definition becomes.

Figure 19: Reliance on Arbitral Precedent When Interpreting Legitimate Expectations as an Element of the Minimum Standard⁵⁶⁶



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⁵⁶⁶ This figure is the author's.

⁵⁶⁷ [1] *S.D. Myers v Canada*, UNCITRAL Partial Award, 13 November 2000 (NAFTA); [2] *Mondev v USA*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002 (NAFTA); [3] *ADF Group v USA*, ICSID Case No ARB(AF)/00/1, Award, 9 January 2003 (NAFTA); [4] *Loewen v USA*, ICSID Case No ARB(AF)/98/3, Award, 26 June 2003 (NAFTA); [5] *Waste Management v Mexico*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004 (NAFTA); [6] *GAMI Investments v Mexico*, UNCITRAL Final Award, 15 November 2004 (NAFTA); [7] *Methanex v USA*, UNCITRAL Final Award on Jurisdiction and Merits, 3 August 2005 (NAFTA); [8] *Thunderbird v Mexico*, UNCITRAL Award, 26 January 2006 (NAFTA); [9] *Glamis Gold v USA*, UNCITRAL Award, 8 June 2009 (NAFTA); [10] *Cargill v Mexico*,

Figure 19 follows the same principle as figure 17. The connecting lines demonstrate the reliance of a tribunal on prior decisions. The numbering is in chronological order. If a line is in red, this means that a tribunal interpreted a treaty provision that incorporates the customary international law minimum standard. If a line is in blue, this means that a tribunal interpreted a treaty provision that either does not point to the applicability of the minimum standard or does not do so unambiguously. The colour of the outer rim of the figure symbolises the solidification of a rule. The more decisions rely on the *Waste Management* doctrine of legitimate expectations, the greater the solidification of that doctrine and the darker the colour of the outer rim. The more tribunals rely on the *Waste Management* definition of the minimum standard, the more authoritative that definition becomes. Despite the rule to solely rely on arbitral decisions that interpret the minimum standard if the standard to be applied is the minimum standard, that rule is weakened in *Teco Guatemala*.⁵⁶⁸ In *Teco Guatemala*, the applicable investment treaty is the Free Trade Agreement between the Dominican Republic, the United States of America and Central America (CAFTA-DR)⁵⁶⁹ and it is the minimum standard that is incorporated in its Article 10.5(1).⁵⁷⁰ Yet, when interpreting CAFTA-DR Article 10.5(1), the tribunal in *Teco Guatemala* also relied on *El Paso Energy*,⁵⁷¹ which is a decision that applies Article

ICSID Case No ARB(AF)/05/2, Award, 18 September 2009; [11] *El Paso Energy v Argentina*, ICSID Case No ARB/03/15, Award, 31 October 2011 (Argentina-US BIT 1991); [12] *Mobil Investments Canada v Canada*, ICSID Case No ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012 (NAFTA); [13] *Teco Guatemala v Guatemala*, ICSID Case No ARB/10/7, Award, 19 December 2013 (CAFTA-DR); [14] *Bilcon v Canada*, UNCITRAL Award on Jurisdiction and Liability, 17 March 2015 (NAFTA); [15] *Tamimi v Oman*, ICSID Case No ARB/11/33, Award, 3 November 2015 (US-Oman FTA 2009); [16] *Mesa Power Group v Canada*, UNCITRAL Award, 24 March 2016 (NAFTA); [17] *Eli Lilly and Company v Canada*, Case No UNCT/14/2, Final Award, 16 March 2017 (NAFTA).

⁵⁶⁸ *Teco Guatemala v Guatemala*, ICSID Case No ARB/10/7, Award, 19 December 2013.

⁵⁶⁹ *ibid* para 12.

⁵⁷⁰ CAFTA-DR of 5 August 2004 (entered into force on 1 January 2009), Art 10.5(1) [Minimum Standard of Treatment]: “Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”

⁵⁷¹ *Teco Guatemala v Guatemala*, ICSID Case No ARB/10/7, Award, 19 December 2013, para 629 fn 518.

II(2)(a) of the US-Argentina BIT.⁵⁷² Article II(2)(a) of the US-Argentina BIT,⁵⁷³ in turn, does not unambiguously point to the applicability of the international minimum standard. Even though *El Paso* interpreted Article II(2)(a) of the US-Argentina BIT as incorporating the minimum standard,⁵⁷⁴ the tribunal in *El Paso* also relied on a prior decision that interpreted an autonomous FET standard when defining the minimum standard.⁵⁷⁵ Even though it purported to be applying the minimum standard, what the tribunal in *El Paso* was doing was equating the minimum standard with an autonomous FET standard.⁵⁷⁶ Such an approach incorporates principles developed in the interpretation of the autonomous FET standard into the interpretation of the minimum standard. It is a minimum standard infused with principles developed in the interpretation of the autonomous FET standard that the *El Paso* tribunal was applying. It follows that this infusion of the minimum standard with principles developed in the interpretation of the autonomous FET standard extends to the decision in *Teco Guatemala*, since the tribunal in *Teco Guatemala* was relying on the understanding of the minimum standard in *El Paso*.

⁵⁷² *El Paso Energy v Argentina*, ICSID Case No ARB/03/15, Award, 31 October 2011, paras 3 and 326.

⁵⁷³ US-Argentina BIT of 14 November 1991 (entered into force on 20 October 1994), Art II(2)(a): “Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.”

⁵⁷⁴ *El Paso Energy v Argentina*, ICSID Case No ARB/03/15, Award, 31 October 2011, para 337 (“The Tribunal [...] considers that the FET of the BIT is the international minimum standard required by international law, regardless of the protection afforded by the national legal orders.”).

⁵⁷⁵ *ibid* paras 336, 348, 358 and 365 (relying on *Saluka*). *Saluka* applies an autonomous FET standard. See *Saluka v Czech Republic*, UNCITRAL Partial Award, 17 March 2006 (Czech Republic-Netherlands BIT) para 294 (noting that Art 3.1 of the Czech Republic-Netherlands BIT “omits any express reference to the customary minimum standard” and concluding that “[t]his clearly points to the autonomous character of a ‘fair and equitable treatment’ standard”).

⁵⁷⁶ *El Paso Energy v Argentina*, ICSID Case No ARB/03/15, Award, 31 October 2011, para 336:

[I]t is the view of the Tribunal that the position according to which FET is equivalent to the international minimum standard is more in line with the evolution of investment law and international law and with the identical role assigned to FET and to the international minimum standard. (Internal references omitted).

(3) Convergence of the Two Types of FET Standards

Given that arbitrators interpreting FET – either as an autonomous FET standard or the minimum standard – rely on prior decisions interpreting the respective other standard, either directly or indirectly, the question as to the convergence of the standards arises. Indeed, the contemporary content of both standards is very similar, if not identical.⁵⁷⁷ The content of the autonomous FET standard and the minimum standard of treatment is so similar that it led the tribunal in *Saluka*⁵⁷⁸ to speculate that any difference between them, “when applied to the specific facts of a case, may well be more apparent than real.”⁵⁷⁹ What is more, the different degrees of strictness, if they exist, are subjective criteria in the first place and do not lend themselves to facilitating a hard and fast distinction between both standards. What one tribunal may consider unfair, another tribunal may consider grossly unfair. If different tribunals apply different standards with different

⁵⁷⁷ *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005 (Argentina-US BIT 1991) para 284 (“[T]he Treaty standard of fair and equitable treatment [...] is not different from the international law minimum standard and its evolution under customary law.”); *Azurix Corp. v Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006 (Argentina-US BIT 1991) paras 361 (“The content of the FET standard “is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.”) and 364 (“The question whether fair and equitable treatment is or is not additional to the minimum treatment requirement under international law is a question about the substantive content of fair and equitable treatment and, whichever side of the argument one takes, the answer to the question may in substance be the same.”); *Biwater Gauff (Tanzania) Ltd. v Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008 (Tanzania-United Kingdom BIT 1994) para 592 (noting “that the actual content of the treaty standard fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law”); *Rumeli Telekom A.S. v Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008 (Kazakhstan-Turkey BIT 1992) para 611; *Duke Energy v Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008 (Ecuador-US BIT 1993) para 337 (finding that the FET standard under the treaty and the FET standard under customary international “are essentially the same”); *Merrill & Ring Forestry L.P. v Canada*, UNCT/07/1, Award, 31 March 2010 (NAFTA) para 210 (arguing that the fair and equitable treatment standard has become part of customary international law, finding that, “[i]n the end, the name assigned to the standard does not really matter.”); *Deutsche Bank AG v Sri Lanka*, ICSID Case No ARB/09/02, Award, 31 October 2012 (Germany-Sri Lanka BIT 2000) para 419; *Rusoro Mining Limited v Venezuela*, ICSID Case No ARB(AF)/12/5, Award, 22 August 2016 (Canada-Venezuela BIT 1996) para 520 (noting that “there is no substantive difference in the level of protection afforded by both standards”).

⁵⁷⁸ *Saluka v The Czech Republic*, UNCITRAL Partial Award, 17 March 2006.

⁵⁷⁹ *ibid* para 291.

subjective thresholds for a breach, the substantive result may well be the same.⁵⁸⁰ That is equally true for the application of different definitions of the minimum standard. What one tribunal may consider state misconduct that is outrageous and therefore in breach of a stricter minimum standard, another tribunal may consider simply sufficiently unfair for the breach of a lower minimum standard. The substantive outcome may well be the same even if different definitions of the minimum standard are applied. Of greater relevance than the strictness of the standards is the substantive convergence of the autonomous FET standard and the minimum standard(s). In theory, it may be true that any convergence of these standards is due to arbitrators interpreting both types of standards with reference to the same “general principles of international law common to civilized nations.”⁵⁸¹ Yet, given the lack of a sufficiently common consensus among civilised nations as to the content of ‘fair and equitable treatment’ irrespective of its incarnation,⁵⁸² any such convergence is also driven by arbitrators who decide which general principles of international law (a) exist and (b) are incorporated in the respective FET standard.⁵⁸³ In practice, it is realistic to assume that the convergence of the two types of FET standards is driven at least in part by the phenomenon that arbitrators also rely on decisions that

⁵⁸⁰ cf *Saluka v The Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para 291:

To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied.

⁵⁸¹ ICJ Statute, Art 38(1)(c).

⁵⁸² cf Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) para 7.08 (noting that “the appearance of virtual unanimity in State practice, which is gleaned from a comparison of the language of the multitude of treaties, masks an absence of settled agreement over content”).

⁵⁸³ Contra Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) paras 7.08 and 7.19 who – despite acknowledging the absence of settled agreement among states over the content of ‘fair and equitable treatment’ – suggest that such consensus can be *located* in “‘general principles of law common to civilized nations’ as the third basic source of international law”. This theorisation is unpersuasive. Either a sufficiently common consensus among states exists as to the content of ‘fair and equitable treatment’ or it does not. In the absence of such a consensus, arbitrators are not miraculously *locating* that consensus but are *creating* the specific content of ‘fair and equitable treatment’.

interpret the respective other standard when interpreting either standard. So far, this cross-reliance is lopsided, with more tribunals relying on decisions interpreting the minimum standard when interpreting the autonomous FET standard than vice versa. Yet, even a lopsided cross-reliance leads to the convergence of both types of standards over time.

(iii) Conclusion and Outlook

This section examined how arbitrators themselves rationalise their reliance on arbitral precedent, finding that its occurrence can best be rationalised as resulting from the arbitral tribunals' urge and duty to render reasoned arbitral decisions. Reliance on prior arbitral decisions gives credence and support to an arbitral tribunal that is faced with the complex task of having to interpret vague treaty provisions such as fair and equitable treatment. This section also examined the arbitral reliance on arbitral precedent. It was demonstrated that arbitrators develop the meaning of fair and equitable treatment over time and across individual investment treaties. In fact, arbitrators specify the meaning of fair and equitable treatment in reliance on prior arbitral decisions. This arbitral creativity occurs irrespective of whether FET is interpreted as an autonomous FET standard or as an element of the customary international law minimum standard of treatment.

This section confirmed that the two standards are similar if not identical and that they are likely to converge further over time should there still be a difference between them. The likelihood of further convergence is rooted in the lopsided arbitral practice of relying on prior decisions that interpret the respective other standard. This practice is lopsided because it is more common for tribunals interpreting the autonomous FET standard to be relying on arbitral awards that interpret the minimum standard than vice versa. The convergence of the two standards is not a prerequisite for defining the arbitral activity as law-making, however. Even if the two standards are not identical, this does not hinder the

conceptualisation of the arbitral activity as law-making. Even if there were two distinct FET standards that were defined separately in long lines of consistent decisions each (*jurisprudence constante*) and if these two FET standards operated in two systems instead of one, this would only give rise to the question whether the arbitral activity within the respective system resembled law-making. This thesis does not answer the question whether there is a single FET standard or indeed two FET standards but instead focuses on whether the arbitral activity of defining both standards, respectively, can be defined as law-making. For ease of reference, the remainder of this section refers to *the* system of investor-state arbitration. Notwithstanding this simplification, the findings in this section apply irrespectively of whether there is a single system of investor-state arbitration or indeed two overlapping systems.

G. Stare Decisis and Binding Precedent in Investor-State Arbitration

If arbitrators are developing the meaning of treaty norms over time and across individual investment treaties, the question remains whether, by doing so, arbitrators are making law. This section explores to what extent, if any, the rules developed by arbitrators are rules of law. The rules developed by arbitrators are rules of law if arbitrators follow a flexible doctrine of stare decisis in the creation of these rules. In other words, if arbitral awards are binding precedents with conditional authority – in the same manner that judgments originating in the same court are binding precedents with conditional authority – then these awards are sources of law.

(i) Stare Decisis in Investor-State Arbitration: Theory

This section addresses the question whether there is a flexible doctrine of stare decisis in investor-state arbitration; namely, whether there is a rule that requires arbitrators, without being strictly bound by prior arbitral decisions, to follow prior arbitral decisions unless

clear error is shown. It is true that there is neither a strict doctrine of stare decisis nor a system of super stare decisis in investor-state arbitration; precedents are not binding with absolute authority in investor-state arbitration. Yet, if prior arbitral decisions, despite being widely referred to as persuasive precedents in investor-state arbitration, are binding precedents with conditional authority, arbitral decisions would be sources of “law”. The idea that there might be a rule of adherence such as stare decisis in investor-state arbitration is not novel. The arbitral practice of relying on prior decisions has already led Thomas Schultz to wrap the widespread phenomenon in the language of Hart’s secondary rule of recognition. Schultz writes:

A secondary rule of recognition seems indeed to have developed that mandates arbitrators, in certain areas of arbitration at least, to consider prior cases as reasons for their decisions. In these areas, prior cases, have come within the purview of the regimes’ secondary rules of recognition and have become sources of law, regardless of the fact that no formal legal rule compels arbitrators to do so, regardless of the fact that these precedents are not precedents, legally speaking.⁵⁸⁴

Schultz argues that arbitral awards become sources of law as a social convention develops that mandates arbitrators to consider prior arbitral decisions.⁵⁸⁵ Yet Schultz’s argument, while helpful because similar to the one advanced in this section, falls short of it. Schultz cannot explain the gap between the language of consideration and the characterisation of prior decisions as sources of law. For awards to become sources of law, they must develop the meaning of treaty norms (or rules) and those rules must be binding. The rules are only binding if there is a rule that binds arbitrators in their discretion such as a flexible doctrine

⁵⁸⁴ Thomas Schultz, ‘Secondary Rules of Recognition and Relative Legality in Transnational Regimes’ (2011) 56 *American Journal of Jurisprudence* 58-88, at 68.

⁵⁸⁵ *ibid* 60-68.

of stare decisis, for example. A flexible doctrine of stare decisis would require arbitrators to follow prior arbitral decisions unless those prior decisions are clearly erroneous. The phrase *mandated consideration* that is used by Schultz neither expresses that arbitrators must follow prior decisions, nor does it express that arbitrators, when they do consider prior decisions, must give them any weight at all when deciding the case. It is even conceivable that arbitrators, upon considering prior decisions, subsequently disregard them without giving reasons for doing so. Even if arbitrators, in their process of consideration, did, coincidentally, specify the meaning of norms such as FET, thereby relying on prior arbitral decisions, these specifications would only become the law, if arbitral tribunals considered these specifications to be authoritative. If Schultz meant that a rule that *mandated* the consideration of prior arbitral decisions is sufficient to turn these prior decisions into sources of law, then his emphasis is misplaced. The requirement of ‘consideration’ is fulfilled, if arbitral tribunals, without being bound by prior decisions, consider these decisions, i.e., evaluate their reasoning. If tribunals, however, are not bound by the applicable ratio decidendi of prior decisions, they are not sources of law.

In sum, the requirement that the consideration of prior decisions be mandatory does not limit the arbitrators’ discretion not to follow prior decisions, which is what is required of a principle that binds arbitrators in their duty to apply the law. It is not sufficient that a principle restricts the freedom of arbitrators at all. Arbitrators must be restricted in their freedom to depart from prior decisions. The next section examines whether there is such a principle in investor-state arbitration that restricts arbitrators in their freedom to depart from prior decisions.

(ii) Stare Decisis in Investor-State Arbitration: Practice

This section examines whether there is a doctrine of flexible stare decisis in investor-state arbitration, instituted by tribunals, that requires tribunals to follow prior arbitral decisions bar in cases of clear error or unreasonableness (flexible doctrine of stare decisis). The wording of the award in *Bayindir v Pakistan*⁵⁸⁶ supports the existence of such a rule. In that case, the tribunal described the rule that binds arbitrators as follows:

The Tribunal is [...] of the view that, unless there are compelling reasons to the contrary, it *ought* to follow solutions established in a series of consistent cases, comparable to the case at hand, but subject of course to the specifics of a given treaty and of the circumstances of the actual case. By doing so, it will meet its duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.⁵⁸⁷

The tribunal in *Bosh International v Ukraine*,⁵⁸⁸ quoting from this passage in *Bayindir v Pakistan*,⁵⁸⁹ adopted the same approach.⁵⁹⁰ In *Chemtura v Canada*,⁵⁹¹ the tribunal adopted the same approach also, adopting the same wording as in *Bayindir v Pakistan*,⁵⁹² albeit

⁵⁸⁶ *Bayindir v Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009.

⁵⁸⁷ *ibid* para 145 (emphasis added). See also *Suez v Argentina*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010 (Jeswald W. Salacuse, Gabrielle Kaufmann-Kohler, Pedro Nikken (dissenting), Arbitrators) para 189:

[C]onsiderations of basic justice would lead arbitral tribunals to be guided by the basic judicial principle that ‘like cases should be decided alike,’ unless a strong reason exists to distinguish the current case from the previous ones. In addition, a recognized goal of international investment law is to establish a predictable, stable legal framework for investments, a factor that justifies tribunals in giving due regard to previous decisions on similar issues. Thus, absent compelling reasons to the contrary, a tribunal should always consider heavily solutions established in a series of consistent cases.

⁵⁸⁸ *Bosh International v Ukraine*, ICSID Case No ARB/08/11, Award, 25 October 2012.

⁵⁸⁹ *ibid* para 211.

⁵⁹⁰ *ibid*.

⁵⁹¹ *Chemtura v Canada*, UNCITRAL Award, 2 August 2010.

⁵⁹² *ibid* para 109:

without including a reference to the prior decision or to any other source. The tribunals in these three cases followed a self-proclaimed flexible rule of stare decisis; namely, a non-strict rule of adherence to prior arbitral decisions. By using the verb ‘ought’ the tribunal in *Bayindir v Pakistan* indicated its duty to follow the solutions established in a series of consistent cases,⁵⁹³ unless there are compelling reasons to the contrary.⁵⁹⁴ The arbitral tribunal’s duty to follow the solutions established in a series of consistent cases is the flipside of the duty to contribute to the harmonious development of investment law. In the absence of some duty binding arbitrators, there would be no investment law the harmonious development of which arbitrators could seek to contribute to. If it is an arbitral tribunal’s self-proclaimed duty to contribute to the harmonious development of investment law, it must be assumed that that tribunal also adheres to a doctrine of stare decisis for otherwise the tribunal would not be bound by prior arbitral decisions which is a requirement for arbitrator-made law to exist in the first place.

That the tribunal in *Bayindir v Pakistan* deemed itself bound to follow solutions established in a series of consistent cases,⁵⁹⁵ and not, at least not specifically, to solutions established in individual prior cases, is not a reason to reject the principle of stare decisis in investor-state arbitration either. The principle of stare decisis – “to stand by things decided”⁵⁹⁶ – means to stand by points of law “decided or settled by the ruling of a

The Tribunal is [...] of the view that, unless there are compelling reasons to the contrary, it ought to follow solutions established in a serious of consistent cases, comparable to the case at hand, but subject of course to the specifics of a given treaty and of the circumstances of the actual case.

⁵⁹³ cf Harry Beran, ‘Ought, obligation and duty’ (1972) 50(3) *Australasian Journal of Philosophy* 207-221, at 220: So very often we ought to do something because we have an obligation to do it or because it is our duty. It will then be quite natural to express the judgment that A ought to do X as ‘A has an obligation (It is A’s duty) to do X’ thus indicating what we ought to do and why we ought to do it.

⁵⁹⁴ *Bayindir v Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 145.

⁵⁹⁵ *ibid.*

⁵⁹⁶ Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters) 1626.

competent court”⁵⁹⁷ or tribunal, irrespective of whether the points of law were decided in a single prior case or in a series of consistent cases. When a point of law has been decided in a single case, a later tribunal, in a system of flexible stare decisis, is bound to follow the point of law as decided in that prior case, unless clear error is shown. Similarly, when a point of law has been established in a series of consistent cases, a later tribunal is bound by the point of law as established in that series of consistent cases, unless there are compelling reasons to the contrary. That the tribunal in *Bayindir v Pakistan* focused on the bindingness of solutions established in a series of consistent cases is merely a recognition of the fact that for a broader rule of law to develop a series of consistent cases is required. In the words of Landes and Posner:

The rule created by a single decision will [...] tend to be extremely narrow in scope; a broader rule will generally require a series of judicial decisions – a string of holdings – for it is only from a series of decisions, each determining the legal significance of a slightly different set of facts, that a rule applicable to a situation common or general enough to be likely to recur in the future can be inferred.⁵⁹⁸

It is also the case that the authority of a rule established in a prior case is enhanced the more judges or arbitrators follow that rule.⁵⁹⁹ The nature of both judicial and arbitral law-

⁵⁹⁷ William M. Lile, Henry S. Redfield, Eugene Wambaugh, Edson R. Sunderland, Alfred F. Mason, and Roger W. Cooley, *Brief Making and the Use of Law Books* (3rd edn, West Publishing Company 1914) 321: The rule of adherence to judicial precedents finds its expression in the doctrine of stare decisis. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases.

⁵⁹⁸ William M. Landes and Richard A. Posner, ‘Legal Precedent: A Theoretical and Empirical Analysis’ (1976) 19 *Journal of Law and Economics* 249-307, at 250.

⁵⁹⁹ cf William M. Landes and Richard A. Posner, ‘Legal Precedent: A Theoretical and Empirical Analysis’ (1976) 19 *Journal of Law and Economics* 249-307, at 250:

Where [...] the rule has been, as it were, solidified in a long line of consistent decisions, the authority of the rule is enhanced. The rule then represents the accumulated experience of many judges

making is self-perpetuating in this regard.⁶⁰⁰ That the authority of a rule is enhanced the more judges or arbitrators follow that rule does not mean, however, that the rule established in a single decision is not authoritative. The opposite is the case. For an authoritative string of holdings to develop, each individual decision within that string must be authoritative also. A series of consistent cases does not become a source of law in the absence of a rule that binds arbitrators in the creation of that series. It is because arbitrators are bound to follow prior authoritative decisions that authoritative strings of holdings develop in the first place. When the arbitral tribunal in *Bayindir v Pakistan* noted therefore that “it *ought* to follow solutions established in a series of consistent cases,”⁶⁰¹ it was, albeit indirectly, acknowledging its duty to stand by things decided, whether they be decided in a single prior decision or a series of consistent cases. The doctrine of stare decisis therefore binds arbitrators in investor-state arbitration, as per the arbitrators in *Bayindir v Pakistan*.

The *Bayindir v Pakistan* articulation of stare decisis in investor-state arbitration is not the only articulation of its kind, however. The tribunal in *Micula v Romania*⁶⁰² (*Micula*) similarly held that “the content of the fair and equitable treatment standard does not depend on a tribunal’s idiosyncratic interpretation of the standard but ‘*must* be disciplined by being based upon state practice and judicial or arbitral case law or other sources of customary or general international law.’”⁶⁰³ This expression of a rule that restricts arbitrators in their freedom to depart from prior decisions originated in *ADF Group v*

responding to the arguments and evidence of many lawyers and is therefore more likely to be followed in subsequent cases.

⁶⁰⁰ cf Sonja Heppner, ‘The Self-Perpetuating Nature of Arbitral Law-making in Investor-State Arbitration’ (2018) 73(1) *Dispute Resolution Journal* 105-130.

⁶⁰¹ *Bayindir v Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 145.

⁶⁰² *Micula v Romania*, ICSID Case No ARB/05/20, 11 December 2013.

⁶⁰³ *ibid* para 507 (emphasis added) (quoting the Claimants’ of Claim dated 9 March 2007 which cites *ADF Group v United States of America*, ICSID Case No ARB(AF)/00/1, Award (9 January 2003) para 184).

USA,⁶⁰⁴ a case in which the tribunal relied on *Mondev v USA*⁶⁰⁵ (*Mondev*).⁶⁰⁶ In *Mondev*, the tribunal held:

Article 1105(1) did not give a NAFTA tribunal an unfettered discretion to decide for itself, on a subjective basis, what was ‘fair’ or ‘equitable’ in the circumstances of each particular case. While possessing a power of appreciation, the United States stressed, the Tribunal is *bound* by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals. It may not simply adopt its own idiosyncratic standard of what is ‘fair’ or ‘equitable’, without reference to established sources of law.⁶⁰⁷

That the *Micula* articulation of stare decisis in investor-state arbitration rests on *Mondev* is noteworthy because the applicable FET obligation in the former case is a free-standing FET obligation⁶⁰⁸ – contrary to NAFTA Article 1105(1)⁶⁰⁹ which refers to the minimum standard of treatment of aliens under customary international law. Even if it is correct that arbitral jurisprudence is an established source of law for the determination of the minimum

⁶⁰⁴ *ADF Group v United States of America*, ICSID Case No ARB(AF)/00/1, Award, 9 January 2003.

⁶⁰⁵ *Mondev v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002.

⁶⁰⁶ *ADF Group v United States of America*, ICSID Case No ARB(AF)/00/1, Award, 9 January 2003, para 184 (relied upon in *Total v Argentina*, ICSID Case ARB/04/1, Decision on Liability, 27 December 2010 para 107):

We understand *Mondev* to be saying – and we would respectfully agree with it – that any general requirement to accord ‘fair and equitable treatment’ and ‘full protection and security’ must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law.

⁶⁰⁷ *Mondev v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, para 119.

⁶⁰⁸ Sweden-Romania BIT of 29 May 2002 (entered into force on 1 April 2003), Art 2(3):

Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof, as well as the acquisition of goods and services or the sale of their production, through unreasonable or discriminatory measures.

⁶⁰⁹ NAFTA Article 1105(1) [Minimum Standard of Treatment]: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

standard of treatment, as the United States had put it in *Mondev*,⁶¹⁰ only to subsequently state the opposite,⁶¹¹ it does not automatically follow that jurisprudence is also an established source of law for the determination of the free-standing FET obligation. This jump from the determination of the minimum standard to the determination of the free-standing FET obligation aside, it is noteworthy that the language of law is used in the context of determining both standards.⁶¹² If the language of law is used in the context of determining both standards, there must be a principle binding the arbitrators for it is impossible for law to exist in the absence of such a principle. In *Micula*, *ADF Group* and *Mondev*, that principle is the duty to determine the content of a rule – be it the minimum standard or the free-standing FET obligation – by basing that determination on the jurisprudence of prior arbitral tribunals. The duty to ‘discipline’ these standards with reference to prior decisions is an articulation of a flexible doctrine of stare decisis. It expresses the duty to stand by things decided. In sum, there is a flexible doctrine of stare decisis in investor-state arbitration. To the extent that arbitral tribunals adhere to this doctrine, they are developing international investment *law*.

⁶¹⁰ *Mondev v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, para 119.

⁶¹¹ *Mesa Power Group v Canada*, PCA Case No 2012-17, Award, 24 March 2016, para 492:

[The United States] submits that the burden is on the Claimant to establish the existence, applicability, and violation of a relevant obligation under customary international law. This burden cannot be discharged by relying on arbitral decisions as these decisions do not constitute evidence of state practice and *opinio juris*.

⁶¹² For other examples, see *ADC v Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006, para 293 (“[C]autious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States.”); *Mesa Power Group v Canada*, PCA Case No 2012-17, Award, 24 March 2016, para 222:

The Tribunal is not bound by the decisions of other arbitral tribunals. At the same time however, the Tribunal does believe that it should pay due respect to such decisions. Unless there are reasons to the contrary, the Tribunal will adopt the approaches established in a series of consistent cases comparable to the case at hand, subject, of course, to the specifics of the NAFTA and to the circumstances of the actual case. By doing so, the Tribunal believes it will meet its duty to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards legal certainty and the rule of law.

(iii) Stare Decisis and the Issue of Inconsistent Decisions

The conclusion that there is a flexible doctrine of stare decisis in investor-state arbitration does not run counter to potential divergences in arbitral practice.⁶¹³ There can be conflicting legal rules despite a flexible doctrine of stare decisis. The purpose of this section is to outline one view of stare decisis and divergence in arbitral practice – concerning their harmony in principle. This section first examines whether conflicting rules can be legal rules, before examining the role of stare decisis in a system of diverging rules.

The thesis of this section is that if there were two conflicting rules, established in two conflicting lines of jurisprudence, a line of jurisprudence interpreting FET as protecting all expectations of foreign investors (rule A) and another line of jurisprudence interpreting FET as protecting only legitimate expectations of foreign investors (rule B), for example, both rules would be legal rules. In the words of Raz, it is not only the case that “[non-legal] rules may sometimes conflict”⁶¹⁴ but it is also the case that “legal rules may conflict.”⁶¹⁵ Raz and Dworkin differ on the point whether two conflicting rules can

⁶¹³ Divergences are not pervasive in the investment treaty arbitration system in the first place. See Christoph H. Schreuer, ‘Diversity and Harmonization of Treaty Interpretation in Investment Treaty Arbitration’ in M. Fitzmaurice, O. Elias and P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Brill 2010) 129-151, at 145-146:

Fortunately, the problem of inconsistency is not pervasive. Most tribunals carefully examine earlier decisions and accept these as authority most of the time. But sometimes they disagree with them and make their disagreement known. In addition, the growing number of simultaneous cases makes it increasingly likely that tribunals may reach conflicting results without realizing it.

⁶¹⁴ Joseph Raz, ‘Legal Principles and the Limits of Law’ (1972) 81(5) *Yale Law Journal* 823-854, at 829: Sometimes one can keep one’s promise only by telling a lie. We do not normally think that such conflicts are merely apparent and that each rule in fact includes qualifications such as “keep your promise unless this entails telling a lie.” We believe that sometimes we should lie rather than break a promise and sometimes we should break a promise rather than tell a lie, and although what we should do depends on general considerations there is no way of setting all of them down beforehand. We can attend to many problems only when they arise; we are unable to decide what to do solely on the basis of previously accepted rules. We are on the whole reconciled to the fact that rules may conflict and that they impose obligations which may be overridden in particular cases by contrary considerations.

⁶¹⁵ *ibid* 830.

be *valid* legal rules. Contrary to Raz, Dworkin answers this question in the negative.⁶¹⁶

The question of validity aside, it is the case that conflict among legal rules does not alter the characterisation of those rules as legal rules. It follows that the existence of conflicting lines of jurisprudence in investor-state arbitration does not hinder the characterisation of rules established in these conflicting lines of jurisprudence as legal rules.

The remainder of this section examines how it is possible that a flexible doctrine of *stare decisis* binds arbitrators when there are two conflicting rules that arbitrators must adhere to. Since it is impossible to follow two rules that conflict, arbitral tribunals cannot adhere to two conflicting rules. Instead, arbitrators would have to choose between the two conflicting rules.⁶¹⁷ That arbitrators would have a choice between two conflicting rules does not negate the existence of a flexible doctrine of *stare decisis*, however. *Stare decisis* requires adjudicators to stand by things decided. If there are two conflicting rules that are equally authoritative, arbitrators may choose to stand by either rule. Hypothetically, the rule chosen would then bind the tribunal, if there was a similar case to be decided by the same tribunal – a scenario which is impossible in investor-state arbitration where each tribunal exists for the duration of a single case only. This scenario of a rule hypothetically binding a tribunal going forward is not dissimilar to a scenario in which a court overrules an established precedent, replacing the established precedent, i.e., a normally binding rule, with a new rule which binds the same court going forward. What is different is that

⁶¹⁶ Contra Ronald Dworkin, ‘The Model of Rules’ (1967) 35 *University of Chicago Law Review* 14-46, at 27 (“If two rules conflict, one of them cannot be a valid rule.”).

⁶¹⁷ On the need for courts to choose between conflicting rules, see H.L.A. Hart, ‘Problems of the Philosophy of Law’ in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 88-119, at 107: [J]udges marshal in support of their decisions a plurality of [...] considerations which they regard as jointly sufficient to support their decision, although each separately would not be. Frequently these considerations conflict, and courts are forced to balance or weigh them and to determine priorities among them. The same considerations (and the same need for weighing them when they conflict) enter into the use of precedents when courts must choose between alternative rules which can be extracted from them, or when courts consider whether a present case sufficiently resembles a past case in relevant respects.

in the latter scenario, a court must overrule a normally binding rule, if it wants to follow a new, conflicting rule. Raz speaks of two classes of *standards*⁶¹⁸ that are in principle distinguishable⁶¹⁹ in this context – “the standards courts are bound to follow”⁶²⁰ and the “standards which they may on occasion be entitled to follow.”⁶²¹ If rule A is the rule that courts are normally bound to follow, then they may on occasion be entitled to overrule rule A and follow rule B instead. If a court overrules rule A and follows rule B, the latter binds the same court going forward. If there are two equally authoritative rules that conflict, a court must not overrule one rule to follow the other; the court can simply follow the rule it regards as best.

In conclusion, the similarity between a court overruling an established precedent and two conflicting equally authoritative lines of jurisprudence is the existence of two conflicting rules. Yet, in a scenario in which two equally authoritative rules conflict, a court, when deciding to follow one rule over the other, is not replacing a normally binding rule with another rule, as is the case when a court overrules an established precedent. Instead, in a scenario of two equally authoritative rules that conflict, a court simply decides which rule of the equally authoritative rules to follow, which will also be the rule the court regards as best. When the scenario of two equally authoritative legal rules arises in investor-state arbitration, it is up to arbitrators to decide which rule to follow. In such a scenario it would be difficult to know in advance what the applicable law is because to arbitrators all rules established in jurisprudence are equally authoritative, which grants arbitrators a choice as to which rule out of two conflicting rules to apply.

⁶¹⁸ On Raz’ hierarchy of terms, see Joseph Raz, ‘Legal Principles and the Limits of Law’ (1972) 81(5) *Yale Law Journal* 823-854, at 824 fn 4 (defining legal rules as a subcategory of general legal norms which is a subcategory of legal norms which is a sub-category of legal standards which is a subcategory of standards).

⁶¹⁹ Joseph Raz, ‘The Institutional Nature of Law’ (1975) 38(5) *Modern Law Review* 489-503, at 499.

⁶²⁰ *ibid.*

⁶²¹ *ibid.*

Yet, this difficulty does not translate to the absence of law as arbitrators are still bound by a flexible doctrine of stare decisis. That arbitrators have a choice between two legal rules that conflict does not mean that they have absolute discretion. The phenomenon of judge-made legal rules that conflict is not new; as Raz put it, “conflicting judicial opinions can easily be found,”⁶²² as can be seen in the diverging judicial opinions of two United States Circuit Courts on a right of public access to deportation hearings.⁶²³ The conflict of these judge-made rules does not render them anything else but legal rules, even when they conflict,⁶²⁴ and also in a system of stare decisis which does not require strict adherence to precedents originating in co-ordinate courts in the first place. In the case of two conflicting lines of jurisprudence, the two lines resemble the jurisprudence of two co-ordinate courts in the same jurisdiction. The choice as to which line of jurisprudence to follow lies with the arbitrators. In the absence of conflicting lines of jurisprudence, the jurisprudence resembles the jurisprudence of a single court.

(iv) Conclusion

This section argued that, if there is a flexible doctrine of stare decisis in investor-state arbitration, then there is a principle that binds arbitrators in their decision-making process. If there is a principle that binds arbitrators in their decision-making process, the arbitrator-made rules are rules of law. The absence of a hierarchy among arbitral tribunals and the lack of strictly binding precedent do not preclude the fact that arbitrators are making law. If arbitral tribunals act as if they were a single court that is normally bound by its own

⁶²² Joseph Raz, ‘Legal Principles and the Limits of Law’ (1972) 81(5) *Yale Law Journal* 823-854, at 829.

⁶²³ See *Detroit Free Press v Ashcroft* 303 F 3d 681 (6th Cir. 2002) (recognising a First Amendment right of public access to deportation hearings); *North Jersey Media Group, Inc. v Ashcroft* 308 F 3d 198 (3d Cir. 2002) (denying a First Amendment right of public access to “special interest” deportation hearings).

⁶²⁴ On this point, see also Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford University Press 2012) 262-263:

Even domestic courts disagree with one another on this or that point of national law and several issues remain ‘open’ despite their hierarchization, but to conclude from this that the disputed law is no law at all or should be discarded would be an obvious exaggeration.

precedents, as a single court would be, then these tribunals adhere to a flexible doctrine of stare decisis which binds them in their decision-making process. All signs point in this direction, even if arbitrators note that arbitral precedents are merely persuasive. The label ‘persuasive precedent’ is misleading insofar as it disguises the binding character of precedents originating in the same court in a system of flexible stare decisis. Salmond therefore called these types of persuasive precedents ‘binding precedents with conditional authority’ which better reflects their role in the judicial law-making process. The existence of long lines of consistent decisions on the elements of ‘fair and equitable treatment’ supports the argument that arbitrators more often than not act as if they were a single court which is normally bound by the ratio decidendi of its own prior decisions. Since arbitrators follow a flexible doctrine of stare decisis, they are making law.

This section presented decisions in which arbitrators explicitly follow a flexible doctrine of stare decisis. In addition, it suggested that the long lines of consistent decisions in investor-state arbitration can best be explained by arbitrators implicitly following a flexible doctrine of stare decisis, should arbitrators not do so explicitly. *Ergo*, arbitrators are making law for all participants in the system of investor-state arbitration which are bound by the arbitral determinations of the rules in that system. The participants in the system of investor-state arbitration are all states participating in the system of investor-state arbitration and, by extension, their citizens. If a state ratified an investment treaty that provides for investor-state arbitration, it is a participant in the system, bound by arbitral determinations of near-universal treaty provisions such as fair and equitable treatment. Even if two lines of jurisprudence were to conflict, this would not hinder the characterisation of the rules developed in these lines of jurisprudence as legal rules either; which of the legal rules would be valid is a different question. The next section examines

whether investor-state arbitration, beyond being a system in which law is made for all its participants, is also a legal system.

H. Lawmaking without a Legal System

This section explores whether the system of investor-state arbitration is a legal system and whether the label ‘legal system’ is a requirement for the applicability of the principle of open justice in the first place. As the central case of a legal system is a municipal legal system, the latter will serve as a point of departure and comparison in this section. This part chiefly relies on the Razian identifying features of municipal legal systems to examine whether the system of investor-state arbitration has similarities to a municipal legal system. The various commonalities between municipal legal systems and investor-state arbitration⁶²⁵ warrant such an approach.

(i) The Identifying Features of Municipal Legal Systems

Both Dworkin and Raz suggest that a legal system includes some means of resolving conflicts among laws. According to Raz, “these means usually determine which one of any two conflicting laws prevails, and the same law always prevails when the two conflict.”⁶²⁶ The question whether there is a means of resolving conflicts among laws in investor-state arbitration is partly answered in the affirmative in chapter 4 *below*. The

⁶²⁵ cf H.L.A. Hart, ‘Problems of the Philosophy of Law’ in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 88-119, at 89 (noting “the realization that although there are central clear instances to which the expressions ‘law’ and ‘legal system’ have undisputed application, there are also cases, such as international law and primitive law, which have certain features of the central case but lack others”).

⁶²⁶ Joseph Raz, ‘Legal Principles and the Limits of Law’ (1972) 81(5) *Yale Law Journal* 823-854, at 832. See also Ronald Dworkin, ‘The Model of Rules’ (1967) 35 *University of Chicago Law Review* 14-46, at 27:

The decision as to which is valid, and which must be abandoned or recast, must be made by appealing to considerations beyond the rules themselves. A legal system might regulate such conflicts by other rules, which prefer the rule enacted by the higher authority, or the rule enacted later, or the more specific rule, or something of that sort. A legal system may also prefer the rule supported by the more important principles.

ICSID Annulment Committee has indeed the power to resolve conflicts among laws and this is demonstrated. Yet, the ICSID annulment mechanism is not available to those disputing parties that choose to have their dispute arbitrated under arbitration rules other than the ICSID Arbitration Rules. It is therefore an imperfect example of a means of resolving conflicts among laws in the system of investor-state arbitration as a whole. The issue of a means of resolving conflicts among laws aside, this section examines the similarities and dissimilarities between municipal legal systems and investor-state arbitration. This section first lists the remaining Razian identifying features of municipal legal systems before examining whether investor-state arbitration possesses any of these features.

Raz suggests that “[a] legal system exists if and only if it is in force [in a society]”⁶²⁷ and that it must possess certain primary norm-applying organs such as courts or tribunals,⁶²⁸ “which are concerned with the authoritative determination of normative situations in accordance with pre-existing norms.”⁶²⁹ In other words, primary norm-applying organs “are institutions with power to determine the normative situation of specified individuals, which are required to exercise these powers by applying pre-existing norms, but whose decisions are binding even when wrong.”⁶³⁰ Raz then refines this definition of a primary norm-applying organ to allow for the possibility of appeal and re-trial.⁶³¹ If then, in his view, appeal and re-trial do not require the re-classification of courts of first instance as primary norm-applying organs,⁶³² this means that the decisions of primary norm-applying organs must not be binding even when wrong. This leads to the necessary modification

⁶²⁷ Joseph Raz, ‘The Institutional Nature of Law’ (1975) 38(5) *Modern Law Review* 489-503, at 489-490.

⁶²⁸ *ibid* 491.

⁶²⁹ *ibid* 493.

⁶³⁰ *ibid* 494.

⁶³¹ *ibid* 495.

⁶³² *ibid*.

that decisions are binding even when wrong, unless deemed wrong by a competent organ. Raz further notes that there must be norms establishing the primary institutions,⁶³³ i.e., “centralised bodies concentrating in their hands the authority to make binding applicative determinations.”⁶³⁴ He defines applicative determinations as “determinations of the rights or duties of individuals in concrete situations.”⁶³⁵ In addition, Raz notes that municipal legal systems “contain laws determining the rights and duties of individuals.”⁶³⁶ These laws the courts *must* apply when settling disputes and it is because of this mandatory application that they provide guidance to individuals.⁶³⁷ Raz further notes that “legal systems contain, indeed consist of, laws which the courts are bound to apply and are not at liberty to disregard whenever they find their application undesirable, all things considered.”⁶³⁸ Last but not least, all municipal legal systems, according to Raz, are comprehensive⁶³⁹ and open⁶⁴⁰ systems that claim to be supreme.⁶⁴¹

Investor-state arbitration, when compared to a municipal legal system as defined by Raz, has several problematic credentials but also clear similarities and dissimilarities. Before examining these, it may be useful to reiterate an underlying assumption; namely, that all states participating in the system of investor-state arbitration (participant states) form a single group, not dissimilar to a society – a society of participant states and their members. If the system of investor-state arbitration is a legal system, it would be in force in that society of participant states and their members.

⁶³³ Joseph Raz, ‘The Institutional Nature of Law’ (1975) 38(5) *Modern Law Review* 489-503, at 492 (“Norm-applying institutions are first and foremost normative institutions established by norms and it is to these we must turn for a clue to their identity.”).

⁶³⁴ *ibid* 495.

⁶³⁵ *ibid*.

⁶³⁶ *ibid* 496.

⁶³⁷ *ibid* 496-497.

⁶³⁸ *ibid* 497.

⁶³⁹ *ibid* 500-501.

⁶⁴⁰ *ibid* 502-503.

⁶⁴¹ *ibid* 501-502.

(ii) Similarities between Municipal Legal Systems and Investor-State Arbitration

One of the similarities between municipal legal systems and investor-state arbitration is that arbitral tribunals are norm-applying organs that are concerned with the authoritative determination of normative situations in accordance with pre-existing norms. The norms that pre-exist are to be found in investment treaties and customary international law. The decisions of arbitral tribunals are authoritative, i.e., binding on the disputing parties⁶⁴² even when wrong, unless deemed wrong by a competent organ. The organs that are competent to deem arbitral decisions ‘wrong’ are national courts in the enforcing state and, in the ICSID system, also ICSID Annulment Committees.⁶⁴³ The power of national courts to review awards, while it exists, is very limited and a matter of degree, depending on whether awards are to be enforced under the ICSID Convention⁶⁴⁴ or the New York Convention.⁶⁴⁵ The power of Annulment Committees to review awards is limited as well but at least Annulment Committees have the power to annul awards if the tribunal made a manifest error of law which is a power national courts do not have. That there are laws which arbitrators are bound to apply when settling disputes is a further similarity between investor-state arbitration and municipal legal systems. Similar to judges, arbitrators are bound to apply the law. Similar to judges, arbitrators adhere to a doctrine of stare decisis that binds them.

(iii) Problematic Credentials of Investor-State Arbitration

Yet, there are also some credentials of investor-state arbitration that may be problematic. If, in a legal system, primary organs are established by norms, this may not be replicated

⁶⁴² On the binding nature of arbitral awards, see ICSID Convention, Art 53(1)(1) (“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except for those provided for in this Convention.”); New York Convention, Art III(1) (noting that “[e]ach Contracting State shall recognize arbitral awards as binding”).

⁶⁴³ See ICSID Convention, Art 52 (grounds for annulment)

⁶⁴⁴ See ICSID Convention, Art 54(1) (treatment as if it was a final judgment of a court).

⁶⁴⁵ See New York Convention, Article V (grounds for refusal of recognition and enforcement).

in investor-state arbitration. If ‘established by norms’ means that there must be norms instituting the primary organs and if this means that these organs must exist irrespective of the will of the disputing parties, then arbitral tribunals are not established by norms. The establishment of arbitral tribunals depends on disputing parties agreeing on their establishment for the duration of the resolution of their dispute. It is true that investment treaties provide for investor-state arbitration and that they contain the states’ offer to arbitrate but, absent a foreign investor consenting to arbitration in a specific case, no arbitral tribunal is established. If, on the other hand, ‘instituted by norms’ means that norms provide for the mere possibility of the institution of primary organs, then arbitral tribunals are instituted by norms.⁶⁴⁶ Investment treaties do provide for the mere possibility of the establishment of arbitral tribunals. Be that as it may, it is not the purpose of this section to answer the question whether investment treaties contain norms establishing arbitral tribunals. It is merely the purpose of this section to point out that this is a point that is problematic.

Secondly, it may be problematic that, in a legal system, there must be *centralised* bodies concentrating in their hands the authority to make binding applicative determinations. If the centrality of a body requires its permanence or some special standing within the system which signifies its importance, then arbitral tribunals may not be such centralised bodies. The ad hoc nature of arbitral tribunals defies their individual acquisition of any permanence or of any special standing within the system of investor-state arbitration. Yet, if seen as an abstract group, arbitral tribunals do concentrate in their hands the authority

⁶⁴⁶ This view seems to be the view of the CJEU. See Case C-284/16 *Slowakische Republik (Slovak Republic) v Achmea* [2018] para 55:

[A]rbitration proceedings such as those referred to in Article 8 of the BIT [between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic] are different from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their courts [...] disputes which may concern the application or interpretation of EU law.

to make binding determinations of the rights and duties of individuals in concrete situations – the rights and duties of foreign investors and states. This may be sufficient to regard arbitral tribunals as centralised bodies.

Thirdly, that “legal systems must include laws, some of which are addressed to the general population,”⁶⁴⁷ providing “guidance to individuals as to how to behave in order to be entitled to a decision in their favour, should a dispute arise,”⁶⁴⁸ may be problematic as well. That there must be law is not the problematic part. There is law in the system of investor-state arbitration,⁶⁴⁹ law that provides guidance to foreign investors and states as to how to behave in order to be entitled to a favourable decision. The problematic part is the proper addressee for that law. In a municipal legal system, some laws determine the rights and duties of individuals.⁶⁵⁰ The law in investor-state arbitration is addressed to foreign investors and states – neither directly to the general population of those states, nor to the members of these populations individually, except in their capacity as potential foreign investors. States represent their populations, however, and it can therefore be said that international investment law is indirectly addressed to the citizens of states participating in the system of investor-state arbitration qua their status as citizens of said states. In the words of A.A. Cançado Trindade, the individual human being is the “final addressee of all legal norms, of national as well as international origin.”⁶⁵¹ What is more, citizens, in their capacity as potential foreign investors, are also direct addressees of

⁶⁴⁷ Joseph Raz, ‘The Institutional Nature of Law’ (1975) 38(5) *Modern Law Review* 489-503, at 497.

⁶⁴⁸ *ibid* 496.

⁶⁴⁹ It would be more accurate to speak of the system of international investment law that is in force in the group of states that participate in treaty-based investor-state arbitration. But this refinement will be ignored in this thesis to simplify the exposition. That investor-state arbitration is characterised by the set of rules applicable to it and that a set of rules forms a ‘system’ is assumed in this thesis. On this assumption, see Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford University Press 2012) 256 (himself “[a]ssuming that a set of rules forms a ‘system’, as many affirm and others deny”).

⁶⁵⁰ Joseph Raz, ‘The Institutional Nature of Law’ (1975) 38(5) *Modern Law Review* 489-503, at 496.

⁶⁵¹ Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press 2011) 16.

international investment law as interpreted by arbitrators. The problem of defining the proper addressees of international investment law is therefore not insurmountable.

(iv) Dissimilarities between Municipal Legal Systems and Investor-State Arbitration

The similarities and problematic credentials of investor-state arbitration aside, clear dissimilarities also exist between municipal legal systems and investor-state arbitration. Investor-state arbitration is neither a system that is comprehensive, nor is it a system that claims to be supreme. Legal systems are *comprehensive*⁶⁵² which, according to Raz, means “that they claim authority to regulate any type of behaviour.”⁶⁵³ This does not apply to the system of investor-state arbitration. The purpose of investment treaties is not to regulate any type of behaviour; their purpose is to regulate the behaviour of host states towards foreign investors. Manifold investment treaties state that their purpose is the encouragement and reciprocal protection of investments. The Germany-China BIT 2003 is representative in this regard. Its preamble further elaborates that the Contracting Parties “[intend] to create favourable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party, [recognising] that the encouragement, promotion and protection of such investment will be conducive to stimulating business initiative of the investors and will increase prosperity in both States.”⁶⁵⁴ These goals, while far-reaching, are limited in their purpose. The sphere of regulated behaviour does not encompass all state behaviour. State behaviour that does not affect foreign investments is neither regulated by investment treaties, nor do these treaties claim to regulate any type of behaviour.

⁶⁵² Joseph Raz, ‘The Institutional Nature of Law’ (1975) 38(5) *Modern Law Review* 489-503, at 500-501.

⁶⁵³ *ibid* 500.

⁶⁵⁴ Agreement between the People’s Republic of China and the Federal Republic Germany on the Encouragement and Reciprocal Protection of Investments, signed 1 December 2003 (entry into force 11 November 2005), Preamble.

Raz further suggests that legal systems are systems that *claim to be supreme with respect to their subject community*;⁶⁵⁵ the claim to be supreme with respect to their subject community is an aspect of the comprehensive nature of legal systems.⁶⁵⁶ If investor-state arbitration is not a system that is comprehensive, it is not a system that claims to be supreme either. Systems that claim to be supreme cannot “acknowledge any claim to supremacy over the same community which may be made by another legal system.”⁶⁵⁷ The claim to supremacy is materialised if a legal system “claims authority to prohibit, permit or impose conditions on the institution and operation of all the normative organisations to which members of its subject-community belong.”⁶⁵⁸ Legal systems claim authority to impose conditions on the institution and operation of sports associations, cultural organisations and political parties, for example, all of which are normative institutions within the legal system. The system of investor-state arbitration does not claim such similar authority to impose conditions on the institution and operation of normative organisations to which members of its subject-community belong. Normative organisations to which members of its subject-community belong include municipal legal systems which do not derive their authority from the system of investor-state arbitration. The system of investor-state arbitration does not claim to be supreme with respect to its subject-community which distinguishes it from a municipal legal system. The next section examines whether the label ‘legal system’ is a prerequisite for the applicability of the principle of open justice to investor-state arbitration in the first place.

⁶⁵⁵ Joseph Raz, ‘The Institutional Nature of Law’ (1975) 38(5) *Modern Law Review* 489-503, at 502.

⁶⁵⁶ *ibid* 501.

⁶⁵⁷ *ibid* 502.

⁶⁵⁸ *ibid* 501.

(v) The Requirement of a Legal System for the Applicability of the Principle of Open Justice

This section examines whether the label ‘legal system’ is a prerequisite for the applicability of the principle of open justice to investor-state arbitration. The general principle of open justice under international law derives from its constitutional protection in municipal legal systems. Yet, this does not mean that the existence of a legal system is a prerequisite for the principle of open justice to be applicable. The origin of the principle of open justice is the principle of self-government. In a system of self-government, court proceedings must be presumptively open to the public for the public must be able to know what the law is and how it is interpreted. In the absence of access to government information, which includes laws, the public is not able to govern itself. The principle of open justice existed long before modern municipal legal systems came into being, in classical Athens. It is not because modern states are deemed ‘municipal legal systems’ that there is a right of public access to court proceedings. It is rather because modern states deem themselves to be self-governing that the principle of open justice applies. The principle of open justice follows the principle of democracy. It follows that its protection is independent of whether the system in which it is protected is a ‘legal system’. The only requirements are that it must be a system in which laws are made and that it must be a system of self-government.

(vi) Conclusion

Investor-state arbitration has similarities and dissimilarities to municipal legal system as defined by Raz and some problematic credentials. Similar to national courts in municipal legal systems, arbitral tribunals in investor-state arbitration are norm-applying institutions whose applicative determinations are binding. The greatest similarity between the two types of systems – municipal legal systems and investor-state arbitration – is the existence

of law in both systems. Treaty norms and customary international law are the equivalent to statutes in municipal legal systems. Treaty norms and customary international law, as authoritatively defined by arbitrators, are the law in investor-state arbitration. In both systems, the principle of *stare decisis* binds adjudicators which is a prerequisite for there to be law in the first place. That there is a limited means of resolving conflicts among laws under the ICSID Convention but not under other arbitration rules sets the ICSID Convention apart as a facilitator for a system that more closely resembles a legal system. Yet, investor-state arbitration, even arbitration under the ICSID Arbitration Rules, is not sufficiently similar to a municipal legal system for it to be a borderline case. Investor-state arbitration is not a system that claims to be supreme, nor is it a comprehensive system. This does not prevent the existence of law within that non-legal system and the applicability of the principle of open justice to the proceedings in which law is made, assuming that it is a system of self-government. The next section examines whether investor-state arbitration is a system of self-government, at the same time summarising the findings of chapter 2. The next section serves as the conclusion to chapter 2, as it examines and affirms the applicability of the principle of open justice to investor-state arbitration, before reconciling this finding with ECtHR caselaw.

VI. Conclusion

A. The Applicability of the Principle of Open Justice to Investor-State Arbitration

It is convenient at this point to reiterate the hypothesis underlying the argument in chapter 2. The hypothesis is that, if there is a general principle of open justice under international law that derives from the principle of democracy and if arbitrators are making law for all states participating in the system of investor-state arbitration, including their citizens, thereby governing in a system of self-government, arbitral hearings must be presumptively open to the public. Chapter 2 provides some evidence for the existence of

a general principle of open justice under international law that derives from the principle of democracy. In what follows, this section summarises other relevant findings of chapter 2, before examining whether investor-state arbitration is a system of self-government.

(i) Arbitrators Are Making Law

Chapter 2 argues that arbitrators are making law.⁶⁵⁹ Even though precedent is not strictly binding in investor-state arbitration, arbitrators adhere to a flexible doctrine of stare decisis. Chapter 2 argues that what is otherwise referred to as persuasive precedent in investor-state arbitration is mislabelled. The degree of adherence to arbitral precedents suggests that arbitrators treat arbitral precedents as if they emanated from a single tribunal in a single jurisdiction and as if they themselves belonged to that tribunal. Salmond, more aptly, defines this category of precedent originating in the same court as binding precedent with conditional authority. That arbitrators are treating prior awards as binding precedents with conditional authority is another way of stating that arbitrators adhere to a flexible doctrine of stare decisis. Chapter 2 presents some decisions in which arbitrators admit to their adherence to such a doctrine of stare decisis. In addition, it is suggested that the existence of long lines of consistent decisions regarding the meaning of ‘fair and equitable treatment’ can best be explained with arbitrators adhering to a flexible doctrine of stare decisis. It is because arbitrators are bound by a flexible doctrine of stare decisis, that they are making law. Once it is established that investor-state arbitration is a system in which arbitrators are making law, a system with rules of adjudication such as the doctrine of stare decisis, arbitral law-making can also be described in the words of Hart:

⁶⁵⁹ On arbitral law-making in investor-state arbitration, see also Gary B. Born and Ethan G. Shenkman, ‘Confidentiality and Transparency in Commercial and Investor-State International Arbitration’ in Catherine A. Rogers and Roger P. Alford (eds), *The Future in Investment Arbitration* (OUP 2009) 5-42, at 39:

[T]o the extent investor-state tribunals are, in effect, making *law* (their decisions being treated by other tribunals as highly persuasive authority), transparency in tribunal decisions helps the *law* develop in a coherent fashion and enables investors and governments alike to conform their conduct to evolving legal standards. (Emphasis added).

Indeed, a system which has rules of adjudication is necessarily also committed to a rule of recognition of an elementary and imperfect sort. This is so because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are. So the rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of the courts and these judgments will become a ‘source’ of law.⁶⁶⁰

Replace ‘courts’ with ‘arbitral tribunals’ and Hart’s exploration of the link between a rule of adjudication and a rule of recognition equally applies to investor-state arbitration: *if arbitrators are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are.* Arbitrators are empowered to make authoritative determinations of the fact that a rule has been broken. *Ergo*, these authoritative determinations cannot avoid being taken as authoritative determinations of what the rules are. Arbitrators are empowered, for example, to authoritatively determine whether a state violated its obligation to treat foreign investments fairly and equitably. That determination cannot avoid being taken as an authoritative determination of what the FET obligation entails. It follows that the rules developed by arbitrators are authoritative and bind all participant states in the system of investor-state arbitration. It follows that arbitrators are making law.

(ii) Arbitrators Govern

This section examines whether arbitrators – since they are making law – can be said to govern. By authoritatively specifying⁶⁶¹ the meaning of vague investment treaty norms

⁶⁶⁰ H.L.A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 97.

⁶⁶¹ cf Campbell McLachlan, ‘Investment Treaty Arbitration: The Legal Framework’ in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law

and ‘customary international law’ in a system of flexible stare decisis, arbitrators provide guidance to states and foreign investors, determining their rights and duties. It is because arbitrators are bound to apply the law, that the law provides an indication to states and foreign investors as to their rights and duties before arbitral tribunals.⁶⁶²

Yet, the guidance provided by arbitrators extends beyond the arbitration proceeding. The law, as developed by arbitrators, guides states and investors in their relationship with each other. It regulates state behaviour inasmuch as it prescribes what states can and cannot do without being sanctioned by arbitral tribunals, through awards enforceable against states. The doctrine of legitimate expectations, as developed by arbitral tribunals, prescribes, for example, that host states must not disappoint a foreign investor’s expectations, if these expectations were induced by the host state and reasonably relied on by the investor when making the investment. If a state makes a promise, a promise of regulatory stability, for example, to induce the investment, then the state must not go back on its promise, if that promise was reasonably relied on by the investor when making the investment. Since states will be judged against the doctrine of legitimate expectations, if a dispute arises, the doctrine of legitimate expectations, to the extent that it is known by host states and investors, influences their behaviour *ex ante*.⁶⁶³ If host states wish to avoid violating their obligations under investment treaties, they will let international investment law as

International 2009) 95-145, at 119 (noting that arbitrators in the investment treaty system arbitration system do not simply apply the law but elucidate it in ways “which assist the work of subsequent tribunals”).

⁶⁶² cf Joseph Raz, ‘The Institutional Nature of Law’ (1975) 38(5) *Modern Law Review* 489-503, at 496-497 (“These are laws which the courts are bound to apply in settling disputes and it is because of this that they also provide an indication to individuals as to their rights and duties in litigation before the court.”).

⁶⁶³ Similarly, see Benedict Kingsbury and Stephan Schill, ‘Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law’ in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009) 5-68, at 6 (noting that “decisions made *ex post* by tribunals [...] may influence what later tribunals will do, and may influence *ex ante* the behaviour of States and investors”).

developed by arbitrators guide them in their interactions with investors. That guidance is best described as global governance.⁶⁶⁴

(iii) Investor-State Arbitration is a System of *Self*-government

Recapitulating what has been established so far, it can be said that there is arbitrator-made law in the system of investor-state arbitration and that the latter is a system of global governance. Arbitrators govern through the guidance that arbitrator-made law offers participant states and foreign investors. If that system is a system of self-government, the principle of open justice applies to the proceedings in which the law applicable in the system is made. It is only in a system of self-government that arbitral tribunals must open their doors to all who care to observe. Stating that investor-state arbitration is a system of self-government is perhaps merely stating the obvious, also in light of the alternative. If investor-state arbitration was not a system of self-government, states would have facilitated the establishment of an external entity, the abstract aggregate of arbitral tribunals, and allowed that external entity to regulate state behaviour through law-making without any possibility to abolish that entity afterwards, once established, or without any possibility to alter the law developed against their will. What is more plausible is that sovereign states, as a group, wish to govern themselves in the context of the promotion and protection of foreign investment. It is more plausible that investor-state arbitration, given its regulatory aims of promoting and protecting foreign investment, is a system of self-government.⁶⁶⁵ That states, including their citizens, wish to govern themselves is not

⁶⁶⁴ Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International 2009) 5-68, at 5 ("Investor-State arbitration, and in particular arbitration based on international investment treaties is not simply dispute resolution. It is also a structure of global governance.") (Internal reference omitted).

⁶⁶⁵ This intuition does not run counter to the possible existence of other obligations, outside of international investment law, binding upon states even without or against their will. Cf Wouter G. Werner, 'State consent

only more plausible but also visible in their efforts to reform investor-state arbitration. The new UNCITRAL Arbitration Rules, the UNCITRAL Rules on Transparency, the Mauritius Convention, the European Commission's proposal of an investment court, the NAFTA Notes of Interpretation of Certain Chapter 11 Provisions, last but not least, the act of terminating investment treaties,⁶⁶⁶ all illustrate the fact that states see themselves as the masters of investor-state arbitration. In conclusion, there is a general principle of open justice under international law that derives from the principle of democracy. Secondly, arbitrators are making law for all states participating in the system of investor-state arbitration, including their citizens, thereby governing in a system of self-government. It follows that arbitral hearings must be presumptively open to the public.

B. The Reconciliation of the Conclusion with ECtHR Jurisprudence

Whether a right of public access to investment arbitration hearings can be reconciled with existing case law is the topic of this section. The European Court of Human Rights (ECtHR) has held that arbitral proceedings do not have to be open to the public. This section explores this finding and its applicability to investor-state arbitration. It first sets out the legal framework under the European Convention on Human Rights (ECHR).

(i) The Principle of Open Justice under the ECHR

The ECHR presumes rather than specifies that there is a right of public access to trials. Article 6(1) of the ECHR lays out the personal right to a fair and public hearing and mandates judgments to be announced in public session. What is missing is a positive

as foundational myth' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing 2016) 13-31, at 30-31.

⁶⁶⁶ International investment agreements terminated in recent times: Ecuador-Germany BIT of 21 March 1996 (entered into force on 12 February 1999; unilaterally denounced on 18 May 2018); Germany-India BIT of 10 July 1995 (entered into force on 13 July 1998; unilaterally denounced on 3 June 2017); Germany-Indonesia BIT of 14 May 2003 (entered into force on 2 June 2007; unilaterally denounced on 1 June 2018).

statement of a right of public access to trials. That there is a right of public access to trials under the ECHR follows from the exceptions listed in Article 6(1) of the ECHR, the second sentence of which reads:

[T]he press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Because the ECtHR has the authority to convene hearings *in camera* in exceptional circumstances, there must be a presumption of open justice under the ECHR. If there was no presumption of open justice under the ECHR, the authority to convene hearings *in camera* would not be formulated as an exception to a general, albeit unwritten, rule. It is important at this point to distinguish between the personal right to a fair and public hearing, which is a right the disputing parties can waive,⁶⁶⁷ and the public's right of access to trials, which the ECHR can restrict in exceptional circumstances. These two rights exist separately. Even if the parties waive their right to a public hearing, this does not necessarily mean that a hearing will take place *in camera*. If the hearing forms part of a trial or other proceeding to which the right of public access applies, a court will determine whether the hearing will take place *in camera*. In making that determination, a court weighs the parties' interest in privacy against the public interest in attending trials.

The right to a court, on the other hand, is a right that exists separately from the personal right to a public hearing and the public's right of access and it is a right that can be waived

⁶⁶⁷ *Case of Deweer v Belgium* [1980] ECHR 1.

by the parties also,⁶⁶⁸ albeit not for every dispute. If parties lawfully waive their right to a court, e.g., by agreeing to resolve their dispute through arbitration as it is traditionally understood, they remove their dispute from the public legal machinery. This means that, if the parties waive their right to a court, they do not only waive their right to a public hearing but they also, as a rule, remove their dispute from a forum to which there is a qualified right of public access. The next sub-sections introduce the case of *Affaire Suda v The Czech Republic (Affaire Suda)*,⁶⁶⁹ before examining how it can be reconciled with a right of public access to investor-state arbitration.

(ii) *Affaire Suda v The Czech Republic*

In *Affaire Suda*, the ECtHR resolved a dispute concerning the obligation to submit a dispute to arbitration as a result of a clause agreed by third parties.⁶⁷⁰ The ECtHR held that “Article 6 does not preclude the creation of arbitral tribunals for adjudicating certain disputes of a pecuniary nature between disputing parties”⁶⁷¹ adding that “nothing prevents individuals from waiving their right to a court in favour of arbitration, provided that such a waiver is free, lawful and unequivocal.”⁶⁷² If arbitration is forced, however, the procedure of that ‘forced arbitration’ must conform to the guarantees under Article 6(1) of the ECHR.⁶⁷³ In *Affaire Suda*, the contract, including the applicable arbitration clause, was concluded by third parties; namely, the limited liability company of which Mr Suda

⁶⁶⁸ *Affaire Suda v The Czech Republic* [ECHR] V 1643/06 (2010).

⁶⁶⁹ *ibid.*

⁶⁷⁰ ECtHR, *Information Note on the Court’s Case-Law No 134* (October 2010) 9.

⁶⁷¹ *Affaire Suda v The Czech Republic* [ECHR] V 1643/06 (2010) para 48 (“L’article 6 ne s’oppose donc pas à la création de tribunaux arbitraux afin de juger certains différends de nature patrimoniale opposant des particuliers.”).

⁶⁷² *ibid.* (“Rien n’empêche les justiciables de renoncer à leur droit à un tribunal en faveur d’un arbitrage, à condition qu’une telle renonciation soit libre, licite et sans équivoque.”).

⁶⁷³ *ibid.* para 49 (“[S]’il s’agit d’un arbitrage forcé, en ce sens que l’arbitrage est imposé par la loi, les parties n’ont aucune possibilité de soustraire leur litige à la décision d’un tribunal arbitral. Celui-ci doit alors offrir les garanties prévues par l’article 6 § 1 de la Convention.”).

was a minority shareholder (C) and the main shareholder (E).⁶⁷⁴ The contract determined the repurchase value of the shares held by minority shareholders upon the closure of C without liquidation and repossession of its assets by E. In addition, the contract mandated that the dispute resolution mechanism be arbitration, should a dispute arise under the contract,⁶⁷⁵ a clause ordinary courts in the Czech Republic held to have been validly contracted, despite it being contracted by third parties. The ECtHR held that, as Mr Suda had neither personally waived his right to a court nor his right to a public hearing, Article 6(1) of the ECHR had been violated.⁶⁷⁶

The decision in *Affaire Suda* seems to be at odds with a right of public access to investor-state arbitration. Investor-state arbitration is neither imposed on foreign investors by law, nor is it imposed on foreign investors by third parties. On the contrary, investors are free to voluntarily accept a host state's offer to arbitrate under an investment treaty. In fact, the arbitration agreement between a host state and a foreign investor only comes into existence once the foreign investor initiates arbitral proceedings against the host state under an investment treaty and thereby accepts the host state's offer to arbitrate. It follows that if investor-state arbitration is not 'forced' and if the consent to arbitration is otherwise lawful and unequivocal, this could imply that Article 6(1) of the ECHR does not apply to investor-state arbitration. This would require taking the statement that 'forced arbitration' must conform to the guarantees under Article 6(1) of the ECHR and concluding, *a contrario*, that voluntary arbitration must not conform to the guarantees under Article 6(1) of the ECHR. Yet, this conclusion, in its generality, goes beyond what was decided

⁶⁷⁴ *Affaire Suda v Czech Republic* [ECHR] V 1643/06 (2010) para 6.

⁶⁷⁵ *ibid.*

⁶⁷⁶ *ibid* para 55.

in *Affaire Suda* in which the ECtHR did not find that none of the guarantees under Article 6(1) of the ECHR are ever applicable to arbitration.

A closer look at the terminology in *Affaire Suda* is instructive at this point. The ECtHR contrasted arbitration that is freely agreed with arbitration that is ‘forced’ even though arbitration, by definition, is a voluntary dispute resolution mechanism. What the ECtHR was expressing therewith was the following: if a legal system forces parties to arbitrate, the disputing parties, for lack of a valid agreement to leave the public legal machinery, are staying within its confines. Since they are staying within its confines, the rules applicable to the public legal machinery also apply to the ‘forced arbitration’ mechanism. Court-ordered arbitration and court-annexed arbitration are examples for such ‘forced arbitration’. It is tempting to conclude that the opposite must be true also. If it is the disputing parties’ intention to leave the public legal machinery when freely agreeing to arbitrate their dispute under an investment treaty, one could argue that the rules applicable to public legal machineries cease to apply. That, in its generality, is not correct, however. Some rules found in national legal systems do apply to arbitrations and are enforced by national courts at the enforcement stage of these arbitrations. It is thus not a binary matter of distinguishing between a public legal machinery and arbitration but rather a matter of finding out which rules of the former apply to the latter. What is more, if disputing parties leave one public legal machinery to resolve their dispute in a legal machinery that has all relevant characteristics of a public legal machinery, then the rules applicable to public legal machineries should apply irrespective of the label of the proceedings. The remainder of this section examines this thesis further with a view to qualifying *Affaire Suda* and its applicability to investor-state arbitration.

(iii) The Qualification of *Affaire Suda v The Czech Republic*

Affaire Suda should be qualified. The statement that “nothing prevents individuals from waiving their right to a court in favour of arbitration, provided that such a waiver is free, lawful and unequivocal”⁶⁷⁷ does not necessarily mean that the waiver does not come with strings attached. If the disputing parties freely, lawfully and unequivocally agree to remove their dispute from a public legal machinery to which the principle of open justice applies, only to submit their dispute for resolution to another legal machinery that has all relevant characteristics of a public legal machinery, then the principle of open justice should apply equally to the latter. This section demonstrates by comparison to a hypothetical example how disputing parties in investor-state arbitration remove their dispute from one public legal machinery (a national legal system) and submit it to another public legal machinery (treaty-based investor-state arbitration) – all the while never leaving the realm of the applicability of the principle of open justice. The hypothetical example is a treaty that regulates the treatment of and the resolution of disputes over garden gnomes (the Garden Gnome Treaty).

Let us imagine there to be a single treaty in existence between all individuals worldwide. That treaty contains the offer of all people to all other people that disputes over garden gnomes may be resolved by arbitration. The treaty also contains several guarantees, one of them being that no one shall damage the garden gnome of another person. If one person damages the garden gnome of another person, the latter is entitled to initiate arbitral proceedings against the other person and to seek damages. The treaty leaves the definition of the term ‘garden gnome’ to arbitral tribunals which, over time, come up with an ever

⁶⁷⁷ *Affaire Suda v The Czech Republic* [ECHR] V 1643/06 (2010) para 48 (“Rien n’empêche les justiciables de renoncer à leur droit à un tribunal en faveur d’un arbitrage, à condition qu’une telle renonciation soit libre, licite et sans équivoque.”).

more elaborate definition: at first, tribunals define a ‘garden gnome’ narrowly as a small humanoid lawn ornament depicting a male who is wearing a red pointy hat but they soon decide that the colour of the pointy hat is immaterial and that the sex of the small humanoid lawn ornament does not matter either. The decisions of the tribunals are publicly available and both claimants and defendants rely on them when presenting their cases to the tribunals which also rely on previous awards to support their findings. The tribunals’ definition of the term ‘garden gnome’ is the law; their definition is binding on all individuals and tribunals are bound by the principle of stare decisis.

In this scenario, the integrity of the garden gnome is also protected under national laws. National legislatures and courts have developed their own definitions of what constitutes a garden gnome and if individuals prefer, they may opt to sue the perpetrator under national law instead. What is then perhaps peculiar is that everyone always must abide by two sets of rules which exist in parallel to each other. The interaction between the two systems is limited; national courts do not review the merits of arbitral awards rendered under the Garden Gnome Treaty. The main difference between the systems is the available forum for dispute resolution: national courts on the one hand and arbitral tribunals on the other hand. While there is a near-universal right of public access to trials, there is no such explicit right of public access to arbitral proceedings under the Garden Gnome Treaty. It would, however, be at odds with the rationale and spirit of the right of public access to trials, if it did not also extend to arbitral proceedings under the Garden Gnome Treaty. The Treaty regulates how garden gnomes are to be treated and these rules are enforced by means of arbitration. That awards must be enforced by national courts does not change the fact that it is arbitrators who are making the law under the Treaty. It is therefore suggested that, if disputing parties agree to arbitrate their dispute under the

Garden Gnome Treaty, they, in effect, leave one public legal machinery⁶⁷⁸ (the national court system) for another (treaty-based arbitration). The public nature of the legal machinery follows the law-making authority of the arbitrators. It is because of the law-making function of arbitrators under the Garden Gnome Treaty, that arbitral hearings must be presumptively open to the public – to the same extent that court proceedings must be open to the public.

Admittedly, a right of public access to arbitration under the Garden Gnome Treaty seems at odds with the importance of party autonomy in arbitration. Yet, the parties' autonomy is constrained by the fact that tribunals do not only resolve cases but also develop the law under the Garden Gnome Treaty. If tribunals under the Garden Gnome Treaty did not develop the law, the disputing parties could close the proceedings to the public. As it is not within the power of the individual disputing parties to delegate law-making authority to arbitrators, that power must derive from a different source. The only source that law-making authority can derive from is the people, or in the hypothetical scenario, the Treaty. It is thus convenient to assume that all signatories in this hypothetical scenario agreed to grant arbitrators law-making authority and, thereby, at least implicitly, the public a right of access to proceedings under the Treaty, for not doing so would have circumvented the right of public access to court proceedings by creating a system of private justice.

The Garden Gnome Treaty and investment treaties have much in common. Both allow arbitrators to make law for relevant communities whose behaviour they regulate, though the delegation of law-making authority to arbitrators in investor-state arbitration is not as straightforward as in the hypothetical scenario and may well be non-existent. The

⁶⁷⁸ In broad terms, the term public legal machinery describes a system in which adjudicators or arbitrators are making law for the members of a community which governs itself.

difference between both is that the Garden Gnome Treaty is designed as a single hypothetical agreement between all individuals worldwide at any given time. It is in that sense a multilateral agreement of fantastical proportions. Investor-state arbitration, on the other hand, is not based on a single treaty, though virtually all investment treaties contain a guarantee of 'fair and equitable treatment' which tribunals treat as a single standard across a multitude of treaties. This difference in the number of source treaties may render the general validity and force of the rules developed under the Garden Gnome Treaty seeming more tangible than the general validity and force of rules developed in investor-state arbitration. In the hypothetical scenario, the world community recognises the Garden Gnome Treaty, which is enforced by the imposition of penalties (damages), as regulating the actions of its members. The Treaty is the law and arbitrators are developing that law.

In investor-state arbitration, on the other hand, the general validity and force of the tribunals' findings could be called into question. One could argue, for example, that the states participating in the system of investor-state arbitration do not form a single community in the first place and that absent a single community there can be no law applicable to that community. Such an argument would emphasise the fact that there are more than three thousand investment treaties in total and that, given such fragmentation, there is not a single community which could be bound by the rules developed by tribunals. The fragmentation is illusory, however, since arbitrators treat multiple investment treaties as if they were a single treaty (the hypothetical master treaty). If, however, arbitrators treat multiple investment treaties as if they were a single treaty, the states participating in the system of investor-state arbitration form a community whose actions are regulated by that hypothetical master treaty, the protections of which are enforced by the imposition of penalties (damages). In sum, one cannot have it both ways. One cannot accept the illusion that there is a single master investment treaty, as arbitrators do, and at the same

time deny that there is a single community of states to which the law developed by arbitrators applies.

Affaire Suda, if qualified, still allows individuals to waive “their right to a court in favour of arbitration, provided that such a waiver is free, lawful and unequivocal.”⁶⁷⁹ Yet, if qualified, it requires those proceedings to be presumptively open to the public in which arbitrators are making law, even if the disputing parties have waived their right to a court. The lawful waiver of the personal right to a court does not necessarily include a waiver of the public’s right of access to the ensuing ‘arbitration proceedings’ and this thesis suggests that it does not, if arbitrators are making law in these proceedings and the near-universal principle of open justice is otherwise intact. In *Affaire Suda*, which was not an example of investment treaty arbitration, the ECtHR did not have the opportunity to develop such a qualification.⁶⁸⁰ It is submitted that the ECtHR ought to do so, should the opportunity arise. A missed opportunity in this regard are the proceedings before the Swiss Federal Court in *Claudia Pechstein v International Skating Union*.⁶⁸¹ In that case, the claimant sought the annulment of a sports arbitration award rendered against her on the grounds of open justice, among other things, and the referral of the matter back to arbitration.⁶⁸² The Swiss Federal Court determined that the claimant incorrectly relied on Article 6(1) of the ECHR when claiming a violation of her right to a public hearing, reasoning that Article 6(1) of the ECHR is not applicable to voluntary arbitration such as

⁶⁷⁹ *Affaire Suda v The Czech Republic* [ECHR] V 1643/06 (2010) para 48 (“Rien n’empêche les justiciables de renoncer à leur droit à un tribunal en faveur d’un arbitrage, à condition qu’une telle renonciation soit libre, licite et sans équivoque.”).

⁶⁸⁰ cf *Affaire Suda v The Czech Republic* [ECHR] V 1643/06 (2010) para 51 (noting the limited scope of the decision: “La Cour n’est pas en l’espèce appelée à confronter aux exigences de l’article 6 § 1 le système général de l’arbitrage en droit tchèque mais une situation déterminée qui obligeait le requérant à recourir à l’arbitrage en vertu d’une clause qu’il n’avait pas contractée.”).

⁶⁸¹ *Claudia Pechstein v International Skating Union*, Judgment of 10 February 2010 (4A_612/2009).

⁶⁸² *ibid* pp 6 and 13-14.

sports arbitration.⁶⁸³ Yet, what the Swiss Federal Court failed to consider is “the existence of a true *stare decisis* doctrine within the fields of sports arbitration.”⁶⁸⁴ If there is indeed a *lex sportiva* being developed by arbitrators on the Court of Arbitration for Sports (CAS), as some suggest,⁶⁸⁵ then it would have been worth considering whether the sports community is a self-regulated community, and if so, whether the general principle of open justice applies. It is beyond the scope of the thesis to answer these questions; yet all signs tentatively point towards the applicability of the principle of open justice to sports arbitration, the sports community being a self-regulated community⁶⁸⁶ that is bound by arbitrator-made law.

(iv) Conclusion

This section examined the case of *Affaire Suda* and its applicability to investment treaty arbitration. In *Affaire Suda*, the dispute arose out of a contract-based arbitration clause and as such was so different from investment treaty arbitration, that its applicability to the latter should not be assumed. Indeed, the ECtHR still has room to qualify its ruling in *Affaire Suda* on the inapplicability of Article 6(1) of the ECHR to voluntary arbitration.

⁶⁸³ *Claudia Pechstein v International Skating Union*, Judgment of 10 February 2010 (4A_612/2009) p 14 (adding, obiter dictum:

[In] view of the outstanding significance of the CAS in the field of sport, it would be desirable for a public hearing to be held on request by the athlete concerned with a view to the trust in the independence and fairness of the decision making process.).

⁶⁸⁴ Gabrielle Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity of Excuse?’ (2007) 23(3) *Arbitration International* 357-378, at 366.

⁶⁸⁵ Antoine Duval, ‘Lex Sportiva: A Playground for Transnational Law’ (2013) 19(6) *European Law Journal* 822-842, at 842 (noting that *lex sportiva* “reveals the transcending quality of many coordinating legal devices incrementally developed by Courts”); Richard Parrish, ‘Lex Sportiva and EU Sports Law’ (2012) *European Law Review* 716-733, at 733 (“*Lex sportiva* refers to the body of sports law generated by the sports movement and applied globally by the Court of Arbitration for Sport.”); Gabrielle Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity of Excuse?’ (2007) 23(3) *Arbitration International* 357-378, at 365 (“The fact is that a coherent corpus of law, some call it *lex sportiva*, is being built.”) (with further references).

⁶⁸⁶ cf Alfonso Valero, ‘In search of a working notion of *lex sportiva*’ (2014) 14 *International Sports Law Journal* 3-11, at 10 (“The definition of *lex sportiva* proposed in this article, “general principles of the regulations of sport shared by the sports community” has in common a respect for self-regulation and respect for mandatory law applicable in a case-by-case basis.”).

It is suggested that disputing parties cannot opt out of the principle of open justice, not even voluntarily, and that the ECtHR ought to recognise this exception to party autonomy as a qualification of its ruling in *Affaire Suda*. In *Affaire Suda*, the ECtHR held that arbitration that takes place *in camera* does not violate Article 6(1) of the ECHR, provided that the disputing parties freely, lawfully, and unequivocally opt for arbitration. Yet, the ECtHR established this rule only for commercial arbitration. In commercial arbitration, arbitrators, as a general rule, do not make law. It is thus not objectionable for commercial arbitration to take place *in camera*. Yet, the same rationale does not apply to investment treaty arbitration, a system in which arbitrators are making law, thereby regulating the behaviour of participant states and their citizens.

Given the ramifications of investor-state arbitration on future disputing parties, third states and the citizens of those states, it is warranted that the ECtHR qualifies its existing jurisprudence to better regulate investor-state arbitration, should the opportunity arise. In any case, the ECtHR jurisprudence is best understood to be limited to commercial arbitration. If so understood, it does not preclude a right of public access to investment arbitration and other types of arbitration in which arbitrators are making law. Such a right would be qualified; the presumption of open justice could be overcome in exceptional circumstances upon such determination by arbitrators in line with recognised exceptions to the principle of open justice. The implementation of the principle of open justice, including its exceptions, is examined next in chapter 3.

Chapter 3

The Implementation of a Right of Public Access to Investor-State Arbitration

I. Introduction

If there is a right of public access to investor-state arbitration, the question remains how such a right is to be implemented. Chapter 3 answers this question; it first comments on the power of courts under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) to trigger the openness of arbitral hearings. Secondly, it analyses the power of arbitral tribunals to open arbitral hearings to the public. If courts were to refuse the enforcement of awards that are based on proceedings that were wrongly closed to the public, disputing parties might think twice before opting for *in camera* proceedings. If national courts were championing a right of public access to investor-state arbitration, disputing parties would have every reason to pre-empt the potential non-enforcement of awards by agreeing to the presumptive openness of arbitral hearings. What is in the disputing parties' interest – an enforceable award – is in the interest of arbitrators also; arbitrators have a duty to render enforceable awards. Given the power of courts not to enforce awards based on hearings that were wrongly closed to the public, it would be a violation of their duty, if arbitrators failed to encourage the presumptive openness of arbitral hearings.

II. The New York Convention as a Tool for Implementing a Right of Public Access

This section examines the role of national courts in implementing a right of public access to investor-state arbitration under the New York Convention. The New York Convention provides a method for obtaining recognition and enforcement of foreign arbitral awards and of arbitration agreements.¹ It applies to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought² and thus, in general,³ to awards reached under international investment treaties, as the latter are not domestic awards within the meaning of that term. Article 1(3) of the New York Convention⁴ specifies two possible reservations that states are allowed to make, the reciprocity reservation and the commercial reservation.⁵ Both reservations limit the applicability of the New York Convention. The map below demonstrates its wide geographical reach and the reservations made upon ratification, accession or succession.⁶ There are 159 contracting states to the New York Convention to date,⁷ making it “the single most important pillar on which the edifice of international arbitration rests.”⁸

¹ Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 617-618.

² New York Convention, Art I(1)(2).

³ The New York Convention does not apply to ICSID arbitral awards. The role of national courts under the ICSID Convention will be examined in the following section.

⁴ New York Convention, Art I(3):

When signing, ratifying or acceding to the Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

⁵ Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 618.

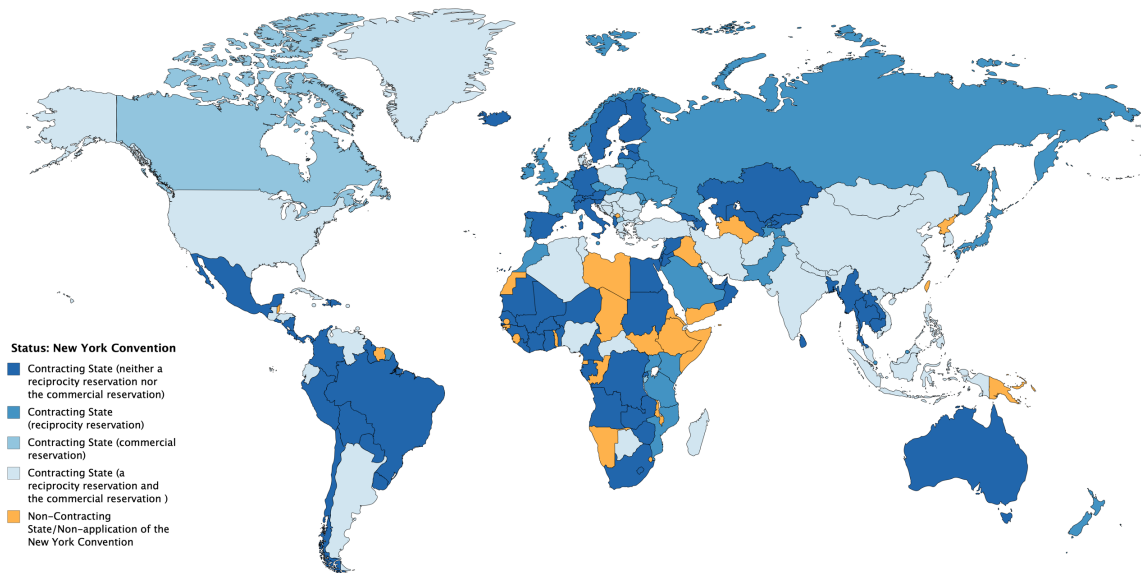
⁶ For the declarations and reservations made by the contracting states to the New York Convention, see New York Arbitration Convention, *Contracting States* <<http://www.newyorkconvention.org/countries>> accessed 23 March 2018.

⁷ UNCITRAL, *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 26 October 2018.

⁸ J. Gillis Wetter, ‘The Present Status of the International Court of Arbitration of the ICC: An Appraisal’ (1990) 1 *American Review of International Arbitration* 91-107, at 93.

International arbitration includes not only international commercial arbitration but also its spin-off: treaty-based investor-state arbitration.

Figure 20: The Geographical Reach of the New York Convention⁹



A. The Power of National Courts to Refuse Recognition and Enforcement of Arbitral Awards

This section argues that national courts could refuse recognition and enforcement of awards based on proceedings that were wrongly closed to the public. It is true that there is a presumption in favour of recognition and enforcement of arbitral awards under the New York Convention. This follows from the inclusion of an exhaustive list of grounds for refusal of recognition and enforcement.¹⁰ Yet, one of these exceptions is the public policy exception under Article V(2)(b) of the New York Convention, which courts may consider *ex officio*. It allows a court to refuse the recognition and enforcement of an award, if it finds that the recognition or enforcement of the award would be contrary to

⁹ This map was created by the author with mapchart.net on 26 October 2018, using the data available at UNCITRAL, *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> .

¹⁰ New York Convention, Art V.

the public policy of the enforcing state.¹¹ Article V(2)(b) thus functions as the guardian of “the forum state’s most basic notions of morality and justice.”¹² Even if the principle of open justice enjoys constitutional protection in most jurisdictions around the world, the question remains whether open justice is such a basic notion of morality and justice so as to trigger the non-recognition and non-enforcement of awards, if it is violated.

In the past, courts construed ‘public policy’ narrowly, denying the enforcement of awards on the grounds of public policy only in the narrowest of circumstances.¹³ This section gives an overview of the definition of public policy in select jurisdictions and argues that the principle of open justice is a component of public policy, however defined.¹⁴ It shows that courts can protect the principle of open justice by refusing to enforce those awards the enforcement of which would perpetuate the erosion of the principle of open justice. The principle of open justice applies to investor-state arbitration in the first place because arbitrators are making law for all participants in the system of investor-state arbitration – over time and across individual treaties. It is the law-making function of arbitrators that mandates the applicability of the general principle of open justice. Since the principle of

¹¹ For an overview of the different sub-categories of ‘public policy’, with further references, see Albert van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law 1981) 360-361 (noting the distinction between domestic and international public policy, and between international public policy and truly international public policy). *BGH* judgments on the distinction between domestic and international public policy: *BGH* Judgment of 15 May 1986; *BGH* Judgment of 18 January 1990 (III ZR 269/88); *BGH* Judgment of 26 February 1991 (XI ZR 349/89); *BGH* Judgment of 26 April 1990, *BGH* Judgment of 1 February 2001 (III ZR 332/99).

¹² *Parsons Whittemore Overseas Co Inc v Société Générale de l’Industrie du Papier (RAKTA)* 508 F 2d 969 (2nd Cir 1974) para 974. See also Julian D.M. Lew, *Applicable Law in International Commercial Arbitration* (Oceana, Dobbs Ferry 1978) para 403; Nigel Blackaby and Constantine Partasides (with Alan Redfern and Martin Hunter), *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 658.

¹³ See, for example, *BGH* Judgment of 28 January 2014 (III ZB 40/13) para 2.

¹⁴ For courts’ definitions of public policy as a ground for refusal under the New York Convention, see International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, *Report on the Public Policy Exception in the New York Convention* (October 2015) 6-10 (reporting definitions adopted in Argentina, Australia, Austria, Belgium, Brazil, Canada (Ontario), China, Egypt, England, Finland, Germany, Greece, Indonesia, India, Israel, Italy, Japan, Kenya, Mexico, Nigeria, Pakistan, Peru, Poland, Portugal, Singapore, Switzerland, Turkey, Uruguay, USA).

open justice is of elementary importance for “the legal and value system that is in place in a constitutional democracy,”¹⁵ it is an element of public policy in all jurisdictions aspiring to be constitutional democracies. What is more, its near-universal protection in the constitutions of the world elevates the principle of open justice to a general principle of international law. It follows that domestic courts should be able to protect the principle of open justice if its protection fails on the international plane.¹⁶ In the context of investor-state arbitration, the protection of the principle of open justice on the international plane fails as most investment treaties allow disputing parties to close arbitral hearings to the public. The public policy exception in the New York Convention provides an elegant avenue for courts to trigger the openness of arbitral hearings.

In fact, courts should make use of the public policy exception under Article V(2)(b) of the New York Convention to trigger the openness of arbitral hearings. If courts were to refuse the enforcement of awards on the grounds of open justice, or even if courts merely contemplated this possibility, disputing parties might open arbitral hearings to the public in the future or in the re-hearing of their original dispute. Cases in which national courts considered the public policy exception in the past do not only include substantive matters (e.g., the enforcement of an award arising out of an illegal contract¹⁷) but also procedural

¹⁵ *Swiss Tribunal Fédéral* Judgment of 13 April 2010 (BGE 136 III 345, at 347-348).

¹⁶ cf Ernst-Ulrich Petersmann, ‘Constitutional Theories of International Economic Adjudication and Investor-State Arbitration’ in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 137-194, at 191:

[A]s long as international economic courts are perceived to neglect general citizen interests as protected by human rights and other constitutional rules, governments and domestic courts may legitimately refuse domestic implementation of international judicial decisions (for example, of WTO and NAFTA dispute settlement panels and investor-state arbitration).

¹⁷ *Soleimany v Soleimany* [1999] QB 785. For commentary, see Nigel Blackaby and Constantine Partasides (with Alan Redfern and Martin Hunter), *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009) 656.

matters. The recognition of the principle of open justice as a component of public policy would thus neatly fit into pre-existing categories of public policy.

The recognition of the principle of open justice as a component of public policy would also conform with the *IBA Report on the Public Policy Exception in the New York Convention* which found that in the majority of jurisdictions, “a violation of public policy implies a violation of fundamental or basic principles.”¹⁸ The report found that the sole difference between civil law and common law jurisdictions, if any, is the judicial approach taken in defining public policy. Judges in civil law jurisdictions tend to define public policy by reference to broad “basic principles or values upon which the foundation of society rests,”¹⁹ whereas judges in common law jurisdictions tend to define public policy by reference to specific principles, however vague, such as justice, fairness or morality.”²⁰ The reason for this difference in emphasis is that judges in civil law jurisdictions are more willing to reason from broad principles, whereas courts in common law jurisdictions are reluctant to do so. Judges in common law jurisdictions prefer to arrive at broad principles, instead of starting from them. This difference in emphasis, however, does not have an impact on the core content of public policy. Morality and justice are basic principles upon which the foundation of a constitutional democracy rests. If then open justice is inherent in the principles of morality and justice, open justice is inherent in a broader principle of which the former principles form part. If public policy however defined in detail, contains at its core the principle of open justice, courts worldwide could refuse to recognise and enforce awards based on hearings in which law is systematically made in secret. Such an interpretation of public policy would not run

¹⁸ International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, *Report on the Public Policy Exception in the New York Convention* (October 2015) 6.

¹⁹ *ibid.*

²⁰ *ibid.*

counter either to Gary Born's theory of public policy being an internationally-neutral ground for the refusal of recognition and enforcement.²¹ 'Internationally-neutral', in this context means non-idiosyncratic or non-specific to a single jurisdiction. The principle of open justice, as a general principle under international law, is internationally-neutral.²²

B. Definitions of Public Policy

This section examines definitions of public policy in select jurisdictions and whether the definitions can be interpreted to encompass the principle of open justice.

(i) Germany²³

Germany originally suggested including a public policy defence to the recognition and enforcement of arbitral awards under the New York Convention²⁴ and was later joined by France and the Netherlands in its request.²⁵ The request was met with approval and

²¹ Gary B. Born, *International Commercial Arbitration*, Vol. 2 (2nd edn, Wolters Kluwer 2014) 2161.

²² But see Gary B. Born, *International Commercial Arbitration*, Vol. 2 (2nd edn, Wolters Kluwer 2014) 2156 (regarding Article II of the New York Convention):

Article II would not permit a Contracting State ... to refuse to recognize agreements on confidentiality (for example, by requiring that all arbitrations be open to the public) ... All of these requirements would be idiosyncratic or discriminatory rules of local law, rather than generally-applicable, internationally-neutral guarantees of procedural fairness, which the Convention would not give effect to.

²³ German judgments in relation to procedural public policy (non-exhaustive list): *BGH* Judgment of 6 March 1969 (bias of the arbitrator); *BGH* Judgment of 15 May 1986 (III ZR 192/84) (bias of the arbitrator); *BGH* Judgment of 14 April 1988 (irregularities in the arbitral procedure); *BGH* Judgment of 12 July 1990 (III ZR 218/89) (bias of the arbitrator); *BGH* Judgment of 1 February 2001 (III ZR 332/99) (bias of the arbitrator and irregularities in the arbitral procedure); *BGH* Judgment of 28 March 2012 (III ZB 63/10) (bias of the arbitrator); *BGH* Judgment of 28 January 2014 (III ZB 40/13).

²⁴ United Nations Economic and Social Council, *United Nations Conference on International Commercial Arbitration: Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Item 4 of the Agenda): Federal Republic of Germany: amendments to articles III to V of the draft Convention*, E/CONF.26/L.34 (28 May 1958) 2-3:

Insert the following articles: [...] Enforcement shall nevertheless be refused if the award is contrary to the public policy of the State in which the enforcement is requested or if under the law of that State the subject matter of the award is not capable of settlement of arbitration (Article V(2) quater).

²⁵ United Nations Economic and Social Council, *United Nations Conference on International Commercial Arbitration: Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Item 4 of the Agenda): France, Federal Republic of Germany and Netherlands: working paper on articles III, IV and V of the draft convention*, E/CONF.26/L.40 (2 June 1958) 2.

Germany was subsequently among the first states²⁶ to sign the New York Convention on 10 June 1958.²⁷ The German Federal Court of Justice [*Bundesgerichtshof*, ‘BGH’] recognises procedural public policy as a sub-category of public policy:

From the viewpoint of German procedural public policy, the recognition of a foreign arbitral award can be denied if the arbitral procedure suffers from a grave defect that affects the foundations of public and economic life.²⁸

Not every discrepancy between arbitral procedure and the German Code of Civil Procedure violates procedural public policy, however. German procedural public policy is only violated, in the view of the German Federal Court of Justice, if the arbitral procedure differs to such a great extent from the basic notions of German Procedure Law that the arbitral award cannot be considered to be the result of a procedure that, according to the German legal system, is in accordance with the rule of law.²⁹ Open justice, rooted in the principle of democracy, is a foundation of public life *par excellence*. Members of a given society must be able to know the law and how it is developed for a system of self-

²⁶ Among the first countries to sign the New York Convention on 10 June 1958 were also Belgium, Costa Rica, El Salvador, India, Israel, Jordan, The Netherlands, Philippines and Poland.

²⁷ The New York Convention was signed by the Federal Republic of Germany on 10 June 1958 (see *Federal Law Gazette* [Bundesgesetzblatt, ‘BGBI.’] Volume II (1961) 121), ratified on 30 June 1961 and came into effect in Germany on 28 September 1961 (see *Federal Law Gazette*, Volume II (1962) 102). See also Section 1061(1) of the German Code of Civil Procedure.

²⁸ Translated by the author. For the original, see *BGH* Judgment of 15 May 1986 (III ZR 192/84) para 13, BGHZ 98, 70-77:

[E]inem ausländischen Schiedsspruch [kann] unter dem Gesichtspunkt des deutschen verfahrensrechtlichen ordre public [...] die Anerkennung versagt werden, wenn das schiedsgerichtliche Verfahren an einem schwerwiegenden, die Grundlagen des staatlichen und wirtschaftlichen Lebens berührenden Mangel leidet.

²⁹ *BGH* Judgment of 15 May 1986 (III ZR 192/84) para 12 (relying on *BGH* Judgment of 18 October 1967 (BGHZ 48, 327, 331); likewise, *BGH* Judgment of 19 September 1977 (VIII ZR 120/75) *NJW* 1978, 1114, 1115):

[D]er deutsche verfahrensrechtliche ordre public international [ist] nur dann verletzt, wenn die Entscheidung des ausländischen Gerichts aufgrund eines Verfahrens ergangen [ist], das von den Grundprinzipien des deutschen Verfahrensrechts in einem solchen Maße abweiche, daß sie nach der deutschen Rechtsordnung nicht als in einem geordneten rechtsstaatlichen Verfahren ergangen angesehen werden könne.

rule to exist. The principle of open justice is therefore a component of public policy in Germany.

(ii) Canada³⁰

Canada acceded to the New York Convention on 12 May 1986³¹ and the Convention entered into force in Canada in the same year.³² The United Nations Foreign Arbitral Awards Convention Act³³ implements the New York Convention at the federal level in Canada,³⁴ which is the level at which disputes between private investors and the state of Canada are resolved. The Convention has been implemented in Canada not only federally, but also separately at the provincial level and in each territory. So has the UNCITRAL Model Law on International Commercial Arbitration³⁵ which equally allows for the non-recognition or non-enforcement of an arbitral award on the grounds of public policy (Art 36(1)(b)(ii) of the Model Law). Since the wording of the public policy defence under the New York Convention³⁶ and the wording of the public policy defence under the Model Law³⁷ are almost identical, courts in Canada consider case law on both Article

³⁰ Canadian judgments in relation to the public policy exception under the New York Convention (non-exhaustive list): *Karaha Boda Company, L.L.C. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 2004 ABQB 918 (distinction domestic-international public policy; Alberta public policy); *Yugraneft Corporation v Rexx Management Corporation* 2007 ABQB 450, (distinction domestic-international public policy; irregularities in the arbitral procedure); *Domotique Secant, Inc. v Smart Systems Technologies, Inc.* 2008 QCCA 444 (distinction domestic-international public policy); *Bad Ass Coffee Company of Hawaii Inc. v Bad Ass Enterprises Inc.* 2008 ABQB 404 (distinction domestic-international public policy).

³¹ <www.newyorkconvention.org/contracting-states/list-of-contracting-states> accessed 25 October 2018.

³² The New York Convention entered into force in Canada on 10 August 1986. On the implementation of the New York Convention in Canada, see generally Henry C. Alvarez, 'The Implementation of the New York Convention in Canada' (2008) 25 *Journal of International Arbitration* 669-679.

³³ United Nations Foreign Arbitral Awards Convention Act, R.S.C. 1985, c. 16 (2nd Supp.).

³⁴ United Nations Foreign Arbitral Awards Convention Act, R.S.C. 1985, c. 16 (2nd Supp.) Section 3.

³⁵ Federal Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.), am. R.S.C. 1985, c. 1 (4th Supp.).

³⁶ New York Convention, Art V(2)(b):

Recognition and enforcement of an arbitral award may [...] be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country Art V(2)(b) of the New York Convention.

³⁷ Model Law, Art 36(1)(b)(ii):

V(2)(b) of the New York Convention and Article 36(1)(b)(ii) of the Model Law when interpreting either.³⁸

In *Schreter v Gasmac Inc.*,³⁹ Feldman J considered a commentary on the Model Law⁴⁰ and a judgment by the United States Court of Appeals for the Second Circuit on the interpretation of the term ‘public policy’ under the New York Convention,⁴¹ when interpreting the term ‘Ontario public policy’ under the Ontario International Commercial Arbitration Act, which implements the Model Law. Feldman J emphasised that an award must “[offend] our local principles of justice and fairness in a fundamental way”⁴² in order to be considered contrary to public policy. He noted that the legal merits should not be revisited under the guise of public policy. ‘Misconduct’, however, could be contrary to public policy and thus lead to the non-enforcement of an award.⁴³ *Schreter* has been cited seventeen times,⁴⁴ most recently by the Ontario Superior Court of Justice in *Depo*

Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only if the court finds that the recognition or enforcement of the award would be contrary to the public policy of this State.

³⁸ cf Henry C. Alvarez, ‘The Implementation of the New York Convention in Canada’ (2008) 25 *Journal of International Arbitration* 669, at 671 (“Given the similarity of these provisions in each of the Convention and the Model Law, parties often have recourse to both, and the developing case law is generally relevant to the interpretation of both.”).

³⁹ *Schreter v Gasmac Inc.* 1992 CanLII 7671 (ONSC) (Ontario public policy; application and interpretation of the Ontario International Commercial Arbitration Act, which implements the Model Law).

⁴⁰ Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, 3-21 June 1985, published in the Canada Gazette, Part I, Vol. 120, No 40, 4 October 1986, Supplement, pp 3 and 63:

297. [...] It was understood that the term ‘public policy’, which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording “the award is in conflict with the public policy of this State” was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.

⁴¹ *Waterside Ocean Navigation Co. v International Navigation Ltd.* 737 F 2d 150 (1984) 152:

[T]his court has unequivocally stated that the public policy defense should be construed narrowly. It should apply only where enforcement would violate our ‘most basic notions of morality and justice.’

⁴² *Schreter v Gasmac Inc.* 1992 CanLII 7671 (ONSC) para 47.

⁴³ *ibid* para 49.

⁴⁴ *Automatic Systems Inc. v Bracknell Corp.* 1993 CanLII 5569 (ONSC); *Food Services Of America, Inc. v Pan Pacific Specialties Ltd.* 1997 CanLII 3604 (BCSC); *Corporation Transnacional de Inversiones, S.A.*

*Traffic v Vikeda International*⁴⁵ which confirmed that *Schreter* reflects the prevailing view of public policy in Canada.⁴⁶ Open justice is a local principle of justice and its systematic violation in the system of investor-state arbitration is so fundamental so as to warrant the non-enforcement of awards. If the presumption of secrecy, i.e., the opposite of the principle of open justice, does not offend the principle of open justice in a fundamental way, nothing else will.

(iii) England and Ireland

The United Kingdom of Great Britain and Northern Ireland acceded to the New York Convention on 24 September 1975.⁴⁷ Sections 100-104 of the Arbitration Act 1996 deal with the recognition and enforcement of New York Convention awards defined by Section 100(1) as awards made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention. Section 103(3) of the Arbitration Act 1996 implements Article V(2)(b) of the New York Convention, stating that recognition or enforcement of the award may be refused if it would be contrary to public policy to recognise or enforce the award. English courts are reluctant to allow the public policy defence. In the words of the Court of Appeal in

de C.V. v STET International S.p.A. 1999 CanLII 14819 (ONSC); *Corporacion Transnacional de Inversiones v Stet International* 2000 CanLII 16840 (ONCA); *United Mexican States v Feldman Karpa*, 2005 CanLII 249 (ONCA); *Domotique Secant Inc. v Smart Systems Technologies Inc.* 2005 CanLII 36874 (QCCS); *Yugraneft Corporation v Rexx Management Corporation* 2007 ABQB 450; *Smart Systems Technologies Inc. v Domotique Secant Inc.* 2008 QCCA 444; *Bayview Irrigation District #11 v United Mexican States*, 2008 CanLII 22120 (ON SC); *Holding Tusculum, b. v c. Louis Dreyfus, s.a.s.* (SA Louis Dreyfus & Cie), 2008 QCCS 5904; *Abener Energia, S.A. v Sunopta Inc.*, 2009 CanLII 30678 (ON SC); *Subway Franchise Systems of Canada Ltd v Laich*, 2011 SKQB 249; *Activ Financial Systems, Inc. v Orbixa Management Services Inc.*, 2011 ONSC 7286; *N.Y.S.E. v Orbixa* 2013 ONSC 5521; *CE International Resources Holdings LLC v Yeap Soon Sit* 2013 BCSC 1804; *Assam Company India Limited v Canoro Resources Ltd.* 2014 BCSC 370; *Depo Traffic v Vikeda International* 2015 ONSC 999.

⁴⁵ *Depo Traffic v Vikeda International*, 2015 ONSC 999.

⁴⁶ *ibid* para 47.

⁴⁷ <www.newyorkconvention.org/contracting-states/list-of-contracting-states> accessed 25 October 2018.

Deutsche Schachtbau- und Tiefbohrgesellschaft GmbH v Ras Al Khaimah Nat'l Oil Co.,
citing *Richardson v Mellish*:⁴⁸

‘[Public policy] is never argued at all, but when other points fail.’ It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinarily reasonable and informed member of the public.⁴⁹

This definition is also prevalent in Ireland. Ireland acceded to the New York Convention on 12 May 1981⁵⁰ and has since implemented it by reference, last in Section 24(1)(a) of the Arbitration Act 2010.⁵¹ *Brostrom Tankers AB v Factorias Vulcano SA*⁵² is the only case to date in which an Irish court has considered the notion of public policy in the context of the enforcement of a foreign arbitral award. In that case, Kelly J gave the notion of ‘public policy’ a narrow scope.⁵³ He held that he could only refuse enforcement on the grounds of public policy “if there was ‘[s]ome element of illegality, or [if] the enforcement of the award would be clearly injurious to the public good, or [if the] enforcement would be wholly offensive to the ordinary responsible and fully informed member of the public.’”⁵⁴ Enforcing awards that result from proceedings in which law is wrongly made in secret would be clearly injurious to the public good of open justice. If arbitral hearings predominantly take place behind closed doors, members of the public

⁴⁸ *Richardson v Mellish* (1824) 2 Bing. 229, 252.

⁴⁹ *Deutsche Schachtbau- und Tiefbohrgesellschaft GmbH v Ras Al Khaimah Nat'l Oil Co.* [1987] 2 All E.R. 769, at 779, [1987] 3 W.L.R. 1023, at 1035 (Ct. App. 1987).

⁵⁰ See *Irish Treaty Series*, No 6 of 1981.

⁵¹ Irish Arbitration Act 2010, No 1 of 2010 (came into effect on 8 June 2010).

⁵² *Brostrom Tankers AB v Factorias Vulcano SA* [2004] IEHC 198 (unreported).

⁵³ *ibid* (with further references).

⁵⁴ *ibid* (quoting Peter North and J.J. Fawcett, *Cheshire and North's Private International Law* (13th edn, Butterworths 1999)).

are not fully informed about how arbitrators are developing the law against which they judge state conduct. Open justice is thus also a component of public policy in England and Ireland.

(iv) Switzerland⁵⁵

Switzerland signed the New York Convention on 29 December 1958 and ratified it on 1 June 1965.⁵⁶ Article 194 of the Federal Statute on Private International Law states that the recognition and enforcement of a foreign arbitral award is governed by the New York Convention.⁵⁷ In addition, Article 190(2)(e) of the Federal Statute on Private International Law allows for the vacation of an international award on the grounds of public policy (*'ordre public'*). Since Swiss courts find it immaterial to distinguish between 'public policy' under the New York Convention and *'ordre public'* under the Federal Statute on Private International Law, this section will use both terms interchangeably. Swiss law, as German law, recognises procedural public policy (*'verfahrensrechtlicher ordre public'*) as a subcategory of public policy (*'ordre public'*).⁵⁸ In 2010, the Federal Supreme Court

⁵⁵ Swiss judgments in relation to procedural public policy (non-exhaustive list): *Tribunal Fédéral* Judgment of 3 May 1967 (bias of arbitrator); *Obergericht Basel* Judgment of 3 June 1971 (bias of the arbitrator and irregularities in the arbitral procedure); *Cour de Justice*, First Section, Canton Geneva, Judgment of 17 September 1976 (irregularities in the arbitral procedure); *Tribunal Fédéral* Judgment of 26 February 1982 (irregularities in the arbitral procedure); *Tribunal Fédéral* Judgment of 12 January 1989 (bias of arbitrator); *Camera di Esecuzione e Fallimenti*, Canton Tessin, Judgment of 19 June 1990 (bias of the arbitrator and irregularities in the arbitral procedure); *Bezirksgericht Zurich* Judgment of 14 February 2003 and *Obergericht Zurich* Judgment of 17 July 2003 (irregularities in the arbitral procedure); *Tribunal Fédéral* Judgment of 28 July 2010 (bias of arbitrator).

⁵⁶ <www.newyorkconvention.org/contracting-states/list-of-contracting-states> accessed 25 October 2018.

⁵⁷ Swiss Federal Statute on Private International Law (*Bundesgesetz über das Internationale Privatrecht*, 'IPRG') (AS 1988 1776) passed on 18 December 1987, entered into force on 1 January 1989, up to date as of 1 July 2014.

⁵⁸ *Tribunal Fédéral* Judgment of 21 August 1990 (BGE 116 II 373); *Tribunal Fédéral* Judgment of 28 April 2000 (BGE 126 III 249); *Tribunal Fédéral* Judgment of 10 September 2001 (BGE 127 III 576, at 577) (defining 'due process' as a subcategory of procedural public policy in the context of the recognition and enforcement of a foreign arbitral award: the principle of due process grants parties certain participatory and other rights in relation to proceedings; 'due process' has the same meaning in Swiss law on international arbitration as it does in Swiss constitutional law (see due process guarantee in Article 29(2) of the Federal Constitution) with the exception that arbitral tribunals, under Swiss procedural public policy, are not required to issue reasons with their award); *Tribunal Fédéral* Judgment of 3 April 2002 (BGE 128 III 191);

of Switzerland (*Tribunal Fédéral*) defined a violation of procedural public policy as follows:

There is a violation of procedural public policy if there is a violation of fundamental and generally recognised principles of procedure law whose non-observance is in intolerable contrast to the general sense of justice so as to render the decision utterly incompatible with the legal and value system that is in place in a constitutional democracy.⁵⁹

Open justice is a fundamental and generally recognised principle of procedure law the systematic non-observance of which is in intolerable contrast to the general sense of justice so as to render the decision utterly incompatible with the legal and value system that is in place in a constitutional democracy. If the principle of open justice is systematically ignored, which it is in investor-state arbitration, a system in which arbitrators are making law in secret, then the resulting decisions also violate the principle of democracy. Self-rule requires that law-making procedures are open to the public.

Tribunal Fédéral Judgment of 27 May 2003 (BGE 129 III 445); *Tribunal Fédéral* Judgment of 13 April 2010 (BGE 136 III 345); *Tribunal Fédéral* Judgment of 27 May 2014 (BGE 140 III 278).

⁵⁹ Translated by the author. For the original, see *Tribunal Fédéral* Judgment of 13 April 2010 (BGE 136 III 345, at 347-348):

Ein Verstoß gegen den verfahrensrechtlichen Ordre public [*sic*] liegt vor bei einer Verletzung von fundamentalen und allgemein anerkannten Verfahrensgrundsätzen, deren Nichtbeachtung zum Rechtsempfinden in einem unerträglichen Widerspruch steht, so dass die Entscheidung als mit der in einem Rechtsstaat geltenden Rechts- und Wertordnung schlechterdings unvereinbar erscheint.

The *Tribunal Fédéral* in its Judgment of 28 April 2000 (BGE 126 III 249, at 253) uses almost exactly the same wording and additionally emphasises the procedural public policy exception's character as a defence to the recognition and enforcement of a foreign arbitral award. Procedural public policy must not be interpreted, so the *Tribunal Fédéral*, as a 'code de procédure arbitrale' to which the arbitral procedure chosen by the parties must conform:

[E]ine extensive Auslegung [darf] nicht dazu führen, dass aus dem verfahrensrechtlichen Ordre public ein eigentlicher 'code de procédure arbitrale' abgeleitet wird, welchem das von den Parteien frei gewählte Verfahren genügen müsste.

C. Conclusion

The existing enforcement mechanisms under the New York Convention, as already implemented and interpreted in various jurisdictions, allow for a reform of the international investment law regime from within. Domestic courts interpret the public policy exception to the recognition and enforcement of arbitral awards to include a review of the arbitral procedure. The degree to which the arbitral procedure is reviewed varies; factors considered are invariably factors that render the arbitration unfair or unjust to the disputing parties. Yet, arguably, nothing prevents courts from extending their review of the arbitral procedure to factors that render the arbitration unfair or unjust to the public. A reform of the international investment law regime neatly fits within the boundaries of existing review standards; no “stricter type of public policy review”⁶⁰ is necessary.

III. The ICSID Convention as a Tool for Implementing a Right of Public Access

Whether the implementation of a right of public access is an option under the ICSID Convention⁶¹ is a trickier question than whether courts can implement such a right under the New York Convention. The latter contains an explicit public policy exception which allows courts to refuse the recognition and enforcement of an award if the recognition or enforcement would be contrary to public policy.⁶² What is meant here by *public policy* is

⁶⁰ Julie A. Maupin, ‘Public and Private in International Investment Law: An Integrated Systems Approach’ (2014) 54 *Virginia Journal of International Law* 368-435, 429 (suggesting a “stricter type of public policy review” in investor state arbitration). Maupin seems to suggest a judicial review on the merits in investor-state arbitration. Cf Julie A. Maupin, ‘Public and Private in International Investment Law: An Integrated Systems Approach’ (2014) 54 *Virginia Journal of International Law* 368-435, n 252:

The basic idea here is that domestic courts in enforcing states should review the awards of investor-state tribunals more closely, on public policy grounds, whenever there is reason to doubt that the institutional process underlying the award will guarantee that the tribunal took sufficient account of the respondent’s state competing obligations to non-investors.

⁶¹ There are currently 162 signatories to the ICSID Convention of which 153 have ratified the Convention. For an overview of all signatories of and Contracting Parties to the ICSID Convention, including a world map illustrating the geographical reach of the Convention, see ICSID, *2018 Annual Report* (6 September 2018) 14-21 <<https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf>> accessed 24 October 2018.

⁶² New York Convention, Art V(2)(b).

national public policy⁶³ – or, as Article V(2)(b) of the New York Convention states, “the public policy of that country” where recognition and enforcement is sought. The scope of the applicable public policy defence, whether narrow or broad, even though a matter of some debate and variation,⁶⁴ is irrelevant in the context of the enforcement of a right of public access to investor-state arbitration. Even if a national court opted for the strictest possible standard, defining public policy narrowly, that definition would contain the presumption of open justice. Public policy, however defined at the fringes and irrespective of definitional nuances, amounts at its core to a state’s “most basic notions of morality and justice.”⁶⁵ The presumption of open justice is at least one of the most basic notions of justice, if not its most basic one. To the extent that tribunals are administering justice in investor-state arbitration, i.e., to the extent that they are making law, the presumption of open justice applies. If, therefore, a tribunal errs in closing arbitral hearings to the public, a court may refuse the recognition and enforcement of an award under Article V(2)(b) of the New York Convention – a ground for refusal national courts may consider *ex officio*. This presupposes, however, that the New York Convention is applicable to the recognition and enforcement of the original award. That is not the case, if the original award is an ICSID award that imposes a pecuniary obligation. If the original award is an ICSID award that imposes a pecuniary obligation, parties must avail of the enforcement mechanism available under the ICSID Convention.⁶⁶ In contrast to the New

⁶³ Gary B. Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012) 402.

⁶⁴ Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 643-647. Cf Gary B. Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012) 403 (noting that “[i]t is well settled that a narrower concept of public policy *should* apply to foreign awards than to domestic awards” but not noting whether that is the case in all jurisdictions). Emphasis added.

⁶⁵ *Parsons Whittemore Overseas Co Inc v Société Générale de l’Industrie du Papier* (RAKTA) 508 F2d 969 (2nd Cir 1974) para 974.

⁶⁶ See ICSID Convention, Arts 53(1)(1) and 54(1)(1). If the ICSID award imposes a non-pecuniary obligation, parties may avail of the New York Convention to seek enforcement of the award. Cf Christoph H. Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 1138-1139 (noting that “a party to an ICSID

York Convention, the ICSID Convention does not contain an explicit public policy exception. This makes the quest for an avenue to enforce a right of public access more difficult.

This section first examines the role of national courts in enforcing ICSID awards and their ability to enforce a right of public access within the power that they are given under the ICSID Convention. It is argued that the enforcement mechanism under the ICSID Convention is not as automatic as it may seem. Secondly, this section analyses the willingness of national courts to judge ICSID arbitral awards by their compliance with public policy. It is argued that a court's willingness to engage in such an examination, contrary to what some allege to be the spirit of the ICSID Convention, is the last and necessary bulwark against violations of the most basic notions of morality and justice. If international investment treaties, including actors acting upon them, violate the principle of open justice,⁶⁷ national courts must be able to rectify that situation – especially if no other legal remedy against the violation exists. It is not argued that all individual states participating in the system of investor-state arbitration knowingly created a single, coherent system in which arbitral tribunals are making law in secret across the boundaries of individual investment treaties.⁶⁸ Yet, the organic evolution of such a system, however

arbitration may find it useful to rely on the New York Convention where Art. 54 of the ICSID Convention is of no avail because the award imposes a non-pecuniary obligation”).

⁶⁷ cf Edward Baldwin, Mark Kantor and Michal Nolan, ‘Limit to Enforcement of ICSID Awards’ (2006) 23(1) *Journal of International Arbitration* 1-24, at 21 (noting that “proceedings held before an ICSID tribunal may fall below international standards of justice”).

⁶⁸ To assume the contrary would be to assume that all states foresaw that arbitral tribunals would create a common law of investor-state arbitration across the borders of individual investment treaties. If that was the case, then it would have to be examined whether states knowingly acted in violation of the principle of open justice when signing international investment agreements – or meant to abolish it. It is of course within the power of democratic states to contribute to the demise of democracy – but nothing suggests that all participant states *wanted* to create a system in which law was made but in which it was made in secret. Nor is it likely that states were aware that such a system would be contrary to the principle of open justice. The likelier turn of events is that arbitrators and disputing parties began to treat prior arbitral awards as precedents and precedents they became, which is an uncharacteristic development insofar as it happened across treaties. See Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration:*

haphazard,⁶⁹ cannot be denied. It is in the hands of national courts to remind the participants of investor-state arbitration that law-making within a community comes at a price. That price is the presumptive openness of arbitral hearings.

A. The Power of National Courts to Review ICSID Awards

This section examines the role of national courts in enforcing ICSID awards and their ability to enforce a right of public access to investor-state arbitration within the power that they are given under the ICSID Convention. Article 53(1) of the ICSID Convention states that “[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.” The framework-internal post-award procedures (remedies)⁷⁰ that are available under the ICSID Convention are the addition to and the correction of the award (Art 49), the interpretation of the award (Art 50), the revision of the award (Art 51) and the annulment of the award under the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state

Judicialization, Governance, Legitimacy (Oxford University Press 2017) 132 (noting that it “was in no way preordained” that investor-state arbitration would “[develop] more or less as the common law does, if without mechanisms of coordination associated with appeal”). But see ‘Statement of Andreas F. Lowenfeld, Deputy Legal Adviser, Department of State, on the US Act Implementing the ICSID Convention’ (1966) 5 *International Legal Materials* 821-826, at 822:

[I]t is anticipated that decisions through the convention’s mechanism will create a significant new body of international law. Thus international law in this area can be expected to grow through this convention, without the restrictions of the traditional principle that only states and not private parties are the subject of international law, and without requiring an advance consensus on the legal principles involved.

⁶⁹ On the haphazard evolution of investor-state arbitration, see Joost Pauwelyn, ‘Rational Design or Accidental Evolution? The Emergence of International Investment Law’ in Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds), *Foundations of International Investment Law* (Oxford University Press 2014) 11-43.

⁷⁰ *Maritime International Nominees Establishment (MINE) v Government of Guinea*, ICSID Case ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988 (14 December 1989) para 4.02.

the reasons on which it is based.⁷¹ Neither is public policy an explicit ground for the annulment of an award nor is it courts undertaking the review. Instead, the review for annulment is undertaken by an ad hoc Committee under the auspices of the ICSID Convention.⁷²

What has often been described as a “self-contained system for limited review of an ICSID award”⁷³ is not as self-contained as it may seem.⁷⁴ Even though disputing parties are obliged to “abide by and comply with the terms of the award”⁷⁵ – this treaty obligation does not translate into the automatic enforcement of the award. The award must still be recognised and enforced by national authorities. To say that ICSID awards are “self-executing”⁷⁶ or that the ICSID Convention “excludes any attack on the award in the national courts”⁷⁷ is to ignore the text of the Convention. The Convention does not exclude otherwise applicable provisions of constitutional or national civil procedure law either.⁷⁸ What the Convention does is to oblige each contracting state to recognise an

⁷¹ ICSID Convention, Art 52(1).

⁷² Where possible, the other framework-internal remedies are undertaken by the tribunal that rendered the award.

⁷³ Edward Baldwin, Mark Kantor and Michael Nolan, ‘Limits to Enforcement of ICSID Award’ (2006) 23(1) *Journal of International Arbitration* 1-24, at 3. On the intended design of the ICSID framework as a self-contained system, see also ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II, Part 1, Documents 1-43* (Washington, D.C., 1968) 427.

⁷⁴ Edward Baldwin, Mark Kantor and Michael Nolan, ‘Limits to Enforcement of ICSID Award’ (2006) 23(1) *Journal of International Arbitration* 1-24, at 2 (listing potential defences to the enforcement of an award).

⁷⁵ ICSID Convention, Art 53(1)(2).

⁷⁶ Stanimir A. Alexandrov, ‘Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention’ in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 322-337, at 325.

⁷⁷ *Maritime International Nominees Establishment (MINE) v Government of Guinea*, ICSID Case ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, 14 December 1989, para 4.02.

⁷⁸ But see Christoph H. Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 1139:

The system of review under the Convention is self-contained and does not permit any external review. This principle also extends to the stage of recognition and enforcement of ICSID awards. A domestic

award and enforce the pecuniary obligations imposed by the award within its territories *as if it were a final judgment of a court in that state*.⁷⁹ If the contracting state is a state with a federal constitution (such as the United States), it may enforce an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.⁸⁰ Nothing is said therewith about the exclusion of otherwise applicable defences to the enforcement of a final judgment. These defences remain intact,⁸¹ at least in part, as the text of the Convention and its drafting history reveal. Opponents of this view refer to the Convention's internal structure and – also – to its drafting history. Both counter-arguments will be engaged with in turn. What transpires is that those scholars who advocate against the applicability of defences otherwise applicable to the enforcement of a final judgment replace the *text* of the Convention with their *ideal* of the Convention. It is true that the goal was to create a truly self-contained system for limited review of ICSID awards. But this high-reaching ideal was not achieved; a careful look at the Convention's drafting history shows that even

court or authority before which recognition and enforcement is sought is restricted to ascertaining the award's authenticity. It may not re-examine the ICSID tribunal's jurisdiction. It may not re-examine the awards on the merits. Nor may it examine the fairness and propriety of the proceedings before the ICSID tribunal. This is in contrast to non-ICSID awards, including Additional Facility awards, which may be reviewed under domestic law and applicable treaties.

⁷⁹ ICSID Convention, Art 54(1)(1).

⁸⁰ ICSID Convention, Art 54(1)(2).

⁸¹ Edward Baldwin, Mark Kantor and Michael Nolan, 'Limits to Enforcement of ICSID Awards' (2006) 23(1) *Journal of International Arbitration* 1-24, at 2 and 9-14.

Aron Broches,⁸² a fervent advocate for a self-contained system for limited review,⁸³ understood that the ICSID Convention does not exclude all remedies against the enforcement of an award on the national plane. Post-negotiation, this understanding was soon forgotten or neglected; it became *en vogue* to portray ICSID awards as being immune from challenges in national courts. The aim of this section is to shed light on the intent of the treaty drafters and to un-idealise the Convention – focussing less on ideals but instead on what has been achieved. This section also reacts to arguments against the power of national courts to review ICSID awards.

⁸² Aron Broches was General Counsel of the World Bank when the ICSID Convention was negotiated and as such in charge of the World Bank staff work on the Convention. He also chaired Regional Consultative Meetings on the Convention and the Legal Committee advising the Executive Directors. For this and more information, see Aron Broches, ‘Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution’ (1987) 2 *ICSID Review – Foreign Investment Law Journal* 287-334, at 287 fn 1:

The preparatory work on the ICSID Convention included four Regional Consultative Meetings of Legal Experts, who discussed a preliminary draft of the Convention prepared by World Bank staff. Experts from 86 countries participated in these meetings, which were held in Addis Ababa, Santiago de Chile, Geneva and Bangkok between December 1963 and May 1964. In the light of these meetings, the Executive Directors of the World Bank asked for and received instructions from the World Bank Board of Governors in September 1964 to formulate a Convention and to submit it to member governments of the World Bank with such recommendations as the Executive Directors might deem appropriate. To assist the Executive Directors in their task, member governments were invited to send representatives to a Legal Committee which met in Washington, D.C. during November and December of 1964. Representatives of 61 countries attended the meetings of the Committee at which agreement was reached on most points. The Legal Committee’s draft of the ICSID Convention was then submitted to the Executive Directors, who finalized the Convention in the early months of 1965. On March 18, 1965, the Executive Directors submitted the ICSID Convention to member governments of the World Bank “for consideration with a view to signature and ratification, acceptance or approval.”

⁸³ The phrase self-contained system refers to the understanding that *review* of ICSID awards only happens within the ICSID system despite the role of national courts at the enforcement stage of arbitral proceedings. The ICSID system, according to one view, is self-contained insofar as national courts do not *review* awards when recognising and enforcing them. See Christoph H. Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 1139.

(i) Counter-Arguments to the Power of National Courts to Review ICSID Awards

(a) The Argument from the Convention's Text and Internal Structure

That proponents of a self-contained system for limited review idealise the content of the ICSID Convention is visible in their argument based on the Convention's text and internal structure. The argument is that the Convention does not allow domestic authorities to review ICSID awards because to do so would itself violate the Convention. This section will unwrap that argument. It is a truism that a treaty should be interpreted harmoniously – norms within a single treaty should not contradict one another. Yet, it is a different issue to decide how to resolve a conflict between two provisions. The Convention contains a potential contradiction. Article 53(1)(2) states that “[e]ach party shall abide by and comply with the terms of the award”. Article 54(1)(1), on the other hand, states that an award is to be treated “as if it were a final judgment”. Since final judgments are open to challenge, the finality of awards, while envisaged in the former provision is not guaranteed by the latter. Therein lies the potential conflict.

The potential solution is twofold. The first option is to ignore the ‘final judgment’ language and assume that awards are to be enforced as is – without being subject to review in courts. Such an interpretation would be harmonious because it would render a state’s compliance with its obligation to comply with the award automatic. Such an interpretation does not have an explanation for the ‘final judgment’ language, however, and cannot explain its existence. At first sight, Broches seems to be a proponent of this view. In his opinion, the obligation to abide by and comply with the terms of an award means that a state *must* “give effect [...] to the binding and obligatory force of an award.”⁸⁴ Because

⁸⁴ Aron Broches, ‘Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution’ (1987) 2 *ICSID Review – Foreign Investment Law Journal* 287-334, at 317.

Article 53(1) decrees the binding nature of the award, subject only to those (internal) remedies provided for in the Convention, Article 54 cannot be interpreted so as to provide additional, external remedies. Broches alludes to this argument when he states that any limitations on the obligation to comply with the award would have had to be incorporated in both Articles 53 and 54 (which, in his opinion, they were not). In his opinion, no external limitations have been incorporated – review by courts is excluded.⁸⁵

To have done otherwise would have created *an unacceptable conflict between Articles 53 and 54*: while the former would have imposed an obligation to comply with the award, enforcement of that award in domestic courts could have been successfully resisted by resort to the defenses permitted by the latter.⁸⁶

The flaw in Broches' argument is that he cannot reconcile the 'final judgment' language with his view. Final judgments *are* open to review. Enforcement of an award *can* be successfully resisted in a domestic court. Broches' argument would at least be consistent if he defined a final judgment as a judgment that is not open to review. That is not the case, however. Broches defines a final judgment as a judgment "against which no ordinary remedies are available,"⁸⁷ acknowledging that "treating awards in the same way as judgments of original courts implicate[s] that exceptional grounds [can] be invoked to prevent recognition and enforcement."⁸⁸ Broches is now caught between a rock and a hard place; he insists on an irresolvable contradiction – that review by national courts is excluded and that review by national courts is implied. In his view, review by national

⁸⁵ Aron Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' (1987) 2 *ICSID Review – Foreign Investment Law Journal* 287-334, at 318.

⁸⁶ *ibid* 317 (emphasis added).

⁸⁷ *ibid* 318.

⁸⁸ ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II, Part 2, Documents 44-146* (Washington, D.C., 1968) 888.

courts (external review) must be excluded because the binding nature of an arbitral award is subject to remedies provided for in the Convention only, which external remedies, he insists, are not. To add to the confusion, he concedes that the Convention *does* provide for review by national courts, however limited, yet without acknowledging his own realisation. Broches does not alter his understanding of the interplay between Articles 53 and 54. The logical conclusion would have been to define limited review by national courts as a remedy provided for in the Convention; namely, in Article 53(1). This is then also the second, better option of how to resolve the potential conflict between Articles 53 and 54. If Article 54(1) implies that national courts can treat awards as if they were final judgments, then the review of an award as if it was a final judgment is a remedy that is provided for in the Convention. If review by national courts is a remedy that is provided for in the Convention, then there is no conflict between Articles 53 and 54. Both provisions complement each other in this scenario.⁸⁹

To infer the exclusion of review by national courts from a state's obligation to "abide by and comply with the terms of the award"⁹⁰ – as Broches does – would be to ignore the qualification that awards are to be treated as if they were final judgments. The obligation to abide by and comply with the terms of the award is subject to the remedies provided for in the ICSID Convention. The Convention not only provides for framework-internal remedies but also for national courts reviewing awards as if they were final judgments. The interplay between Articles 53 and 54 of the Convention is therefore not an argument *against* the judicial review of awards but *for*. In sum, national courts reviewing ICSID

⁸⁹ See also Letter from Argentina (Procuración del Tesoro de la Nación) to Ms Claudia Frutos-Peterson, Secretary of the Ad Hoc Committee (*Siemens*), 2 June 2008 <<https://www.italaw.com/documents/Siemens-ArentinaArt.53-54.pdf>> accessed 10 February 2018 ("Articles 53 and 54 of the ICSID Convention complement each other. While the latter applies to all Contracting States, as the regards the State party to the arbitration proceeding, both articles constitute the bundle of obligations that arise for such State as of the adoption of the award.").

⁹⁰ ICSID Convention, Art 53(1)(2).

awards is not an act that violates the Convention; it is a remedy that is provided for in the Convention.

(b) The Argument from the Convention's Drafting History

Since review of awards by national courts is a remedy provided for in the Convention, it should not come as a surprise that several courts⁹¹ have decided to review ICSID awards. Nonetheless, some scholarly reactions to this occurrence border on incredulity. Christoph Schreuer remarks on this topic that “[t]he French courts do not seem to have been fully aware of their lack of power to review ICSID awards.”⁹² This statement is emblematic of the popular stance that ignores a court's power to review ICSID awards, a stance which is neither founded in the text of the Convention nor in its drafting history. This does not hinder Schreuer from relying on both.⁹³ With respect to the drafting history, he writes:

The Convention's drafting history shows that the domestic authorities charged with the recognition and enforcement have no discretion to review the award once its authenticity has been established. Not even the *ordre public* (public policy) of the forum may furnish a ground for refusal.⁹⁴

⁹¹ *Benvenuti & Bonfant v Congo*, Tribunal de Grande Instance (Paris), Order of 23 December 1980 (reviewing an ICSID award and ordering its execution because it neither contrasts with the law nor public policy: “[a]ttendu que ladite décision ne contient rien de contraire aux lois et à l'ordre public, disons que ladite décision sera exécutée selon ses formes et teneur [...]”); *Société Ouest Africaine des Bétons Industriels (SOABI) et al. v Senegal*, Cour d'Appel (Paris), 5 December 1989; *CCI – Compañía de Concesiones de Infraestructura S.A. pedido de quiebra por República de Perú*, Cámara Nacional de Apelaciones en lo Comercial de la Capital Federal [Argentine National Court of Commercial Appeals of the Federal Capital] (18 August 2015). For a summary in English, see Leandro Javier Caputo and Ignacio J. Minorini Lima, ‘First Argentine Court Judgment on the Recognition of an ICSID Award’ (*Kluwer Arbitration Blog*, 15 March 2016) <<http://kluwer-arbitrationblog.com/2016/03/15/first-argentine-court-judgment-on-the-recognition-of-an-icsid-award/>> accessed 25 October 2018.

⁹² Christoph Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 1141.

⁹³ *ibid* 1139-1141.

⁹⁴ *ibid* 1140-1141 (internal references omitted).

Having already engaged with the argument based on the Convention's text and internal structure, this section examines the Convention's drafting history. What will become apparent is that at least some of the treaty drafters were well aware of the fact that the 'final judgment' language in Article 54 was a loophole that would offer national courts an avenue to review ICSID awards. It is therefore surprising that anyone should wish to rely on the *travaux préparatoires* to negate the power of courts to review ICSID awards – even more so, considering that treaty negotiations on what was to become Article 54 were, at least according to Aron Broches, “characterized by great fluidity, sometimes bordering on confusion.”⁹⁵ The confusion persists – it is on the part of those who believe that their ideal of a truly self-contained system for limited review has been realised under the ICSID Convention. This section briefly presents the subsequent incarnations of what was to become Article 54, focussing on the understanding – *during the treaty negotiations* – of a court's residual power to review awards. In a second step, this section outlines the lessons for the interpretation of Article 54.

(1) The Drafting Process

In chronological order, Article 54⁹⁶ went through the following stages. It was first envisaged that contracting states would grant ICSID arbitral awards the most favourable treatment they grant to foreign awards – whether under their domestic law or pursuant to the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards or the New

⁹⁵ Aron Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' (1987) 2 *ICSID Review – Foreign Investment Law Journal* 287-334, at 322.

⁹⁶ ICSID Convention, Art 54:

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state. [...]

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

York Convention.⁹⁷ The Preliminary Draft replaced this formulation and introduced the idea that awards are to be enforced as if they were final judgments of the enforcing state.⁹⁸ This formulation remained intact in the First Draft,⁹⁹ which also specified in the provision which was later to become Article 54(3) that the *writ of execution* shall be issued “without other review than verification of the authenticity of the award.”¹⁰⁰ The limitation that courts, when issuing a writ of execution, were restricted to verifying the authenticity of the award was subsequently deleted, however, and did not appear in the Revised Draft. According to Aron Broches, the then General Counsel of the World Bank and the Chair of the Regional Consultative Meetings on the ICSID Convention and the Legal Committee, the limitation was “regarded as unnecessary because of the other portions of [the] Article which [...] were sufficiently explicit as to the unconditional enforceability of the award.”¹⁰¹ The other portions of the Article stated, however, that arbitral awards were to be treated as if they were final judgments of the enforcing state. That being the case, it was by no means explicit that the enforcement of awards would be automatic, subject only to national courts verifying their authenticity. The Austrian delegate to the treaty negotiations, aware of the loophole in the treaty draft, thus “suggested that the terms ‘as if it were a final judgment of a court in that State’ be deleted since there were several possibilities for annulling judgments even after they had been declared final.”¹⁰² This suggestion was not implemented, however. Broches, paraphrasing his initial response,

⁹⁷ ICSID, *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume I* (Washington, D.C., 1970) 246.

⁹⁸ *ibid.*

⁹⁹ *ibid.* 248.

¹⁰⁰ *ibid.* 252.

¹⁰¹ Aron Broches, ‘Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution’ (1987) 2 *ICSID Review – Foreign Investment Law Journal* 287-334, at 314.

¹⁰² ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II, Part 2, Documents 44-146* (Washington, D.C., 1968) 901.

later noted that, in his opinion, “by making an award the equivalent of a final judgment one had reached the maximum obtainable.”¹⁰³ Yet, what exactly had been obtained seems to have meant different things to different people. What it did mean to different scholars and different delegates to the treaty negotiation and what it could mean is examined next – also regarding the availability of a public policy defence.

(2) The Scope of Permissible Review

This section examines what it means to make an ICSID award the equivalent of a final judgment for the purposes of enforcing the award. The spectrum of possible opinions is broad – reaching from the non-reviewability of awards to allowing a full-fledged review.

First, equating an award with a final judgment could be interpreted as excluding *any review* by national courts. In this first scenario, the review of arbitral awards is within the sole power of arbitral tribunals and ad hoc Annulment Committees. Remedies that can be invoked are the framework-internal remedies only. Christoph Schreuer is a proponent of this view.¹⁰⁴ The argument for this narrow reading of the ‘final judgment’ language is that the efficiency of the ICSID Convention and of dispute resolution under it would be increased if awards are not subject to double review. The difficulty with this view is that it cannot explain the meaning of the reference to treating arbitral awards as if they were ‘final judgments’ of the enforcing state. Since the delegates to the treaty negotiations were aware that this reference presented a loophole for domestic remedies against the

¹⁰³ Aron Broches, ‘Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution’ (1987) 2 *ICSID Review – Foreign Investment Law Journal* 287-334, at 314. For the wording of his initial reply, see ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II, Part 2, Documents 44-146* (Washington, D.C., 1968) 901 (noting “that in his opinion, by making an award the equivalent of a final judgment, one would have reached the limits one could hope to reach”).

¹⁰⁴ Christoph Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 1139-1141.

enforcement of awards, its unqualified existence in the treaty text does not lend itself to being interpreted as excluding any review by national courts.

Secondly, equating an award with a final judgment could be interpreted as excluding *an ordinary review* by national courts. In this second scenario, the ordinary review of awards is still within the sole power of arbitral tribunals and ad hoc Annulment Committees but national courts may review arbitral awards in extraordinary circumstances. Broches is a proponent of this second view.¹⁰⁵ For Broches, equating awards with final judgments “imply[s] that exceptional grounds [can] be invoked to prevent recognition and enforcement.”¹⁰⁶ Broches does not specify, however, which grounds may be classified as exceptional grounds. Since the ICSID Convention is designed as a self-contained system for limited review,¹⁰⁷ his position is that “any reasonable interpretation would be to the effect that there should not be a double set of the same remedies.”¹⁰⁸ In addition, Broches disallows courts from reviewing awards on the grounds provided for in the New York Convention. Nor does he allow national courts to examine whether awards are compatible with the public policy of the enforcing state. Broches’ argument is that these grounds for review were considered during the treaty negotiations but ultimately not included in the Convention. *Ergo*, national courts cannot rely on them. In the words of Broches, equating awards with final judgments “survived the *onslaught* [...] by representatives who wanted

¹⁰⁵ Broches denies the existence of framework-external remedies in general but acknowledges that national courts may review ICSID awards in extraordinary circumstances. Broches’ solution is to define the phrase ‘extraordinary circumstances’ so narrowly that courts are basically never in a position to review ICSID awards in practice, even though, theoretically, they retain a residual power to review them.

¹⁰⁶ ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II, Part 2, Documents 44-146* (Washington, D.C., 1968) 888.

¹⁰⁷ *ibid* 989:

[Aron Broches]: The proposed Convention provided remedies for attacking an award but once those remedies had been exhausted there ought to be an end to litigation, the parties should be under an obligation to carry out the award and the courts of the Contracting States should be under an obligation to enforce the award.

¹⁰⁸ *ibid* 902.

the Convention to permit refusal of enforcement either on all the grounds on which such refusal may be based under the 1958 New York Convention or, as a minimum, on the ground of conflict with the public policy of the forum.”¹⁰⁹ Broches’ argument is overly broad, however. For there not to be a double set of the same remedies, it is not necessary to exclude remedies that are not duplicates of the framework-internal remedies available under the Convention, provided that they are otherwise available to national courts when reviewing final judgments. In other words, even if public policy was not explicitly included as a defence to the enforcement of awards under the Convention, there is no reason why courts should not have a residual right to examine whether awards are compatible with the public policy of the enforcing state if that defence is otherwise applicable to the enforcement of final judgments.

Thirdly, equating arbitral awards with final judgments could amount to the exclusion of *a duplicate review* by national courts. This scenario is based on the idea that the ‘self-contained’ system for limited review under the ICSID Convention exists but is imperfect. It is true that the creation of a self-contained system for limited review was an ideal that many delegates to the treaty negotiations hoped to achieve. Even so, the reality of a self-contained system for limited review was not realised in the text of the Convention. The text of the ICSID Convention provides for limited framework-internal remedies and the theoretically unlimited external remedy of courts treating awards as if they were final judgments. However, taking the intent expressed in the *travaux préparatoires* into account, it would make sense to limit the review power of national courts to unique remedies, i.e., remedies not offered within the ‘self-contained’ system for limited review.

¹⁰⁹ Aron Broches, ‘Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution’ (1987) 2 *ICSID Review – Foreign Investment Law Journal* 287-334, 316-317 (emphasis added).

The Convention does not provide for ad hoc Committees to examine whether arbitral awards are compatible with public policy. Because that remedy is not provided for in the Convention, it is not excluded, at least to the extent that a public policy defence to the enforcement of final judgments contains elements unavailable to the disputing parties when seeking the annulment of an award within the ICSID framework. Article 52(1)(d) of the ICSID Convention allows a party to request the annulment of an award, for example, if there has been a serious departure from a fundamental rule of procedure. The right to be heard and the equal opportunity to present one's case are both considered to be fundamental rules of procedure for the purposes of Article 52(1)(d).¹¹⁰ If a duplicate review is to be avoided, national courts could therefore not refuse to enforce an arbitral award based on a violation of the right to be heard and the equal opportunity to present one's case, not even under the guise of public policy.¹¹¹

The real question is whether Article 52 would allow an ad hoc Annulment Committee to annul an award based on the violation of the principle of open justice. If so, and if a duplicate review is to be avoided, domestic courts could not examine whether arbitral

¹¹⁰ *Wena Hotels Limited v Egypt*, ICSID Case No ARB/98/4, Decision on Annulment (5 February 2002) para 57:

[Article 52(1)(d)] refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other.

¹¹¹ A different view is possible here. An ad hoc Annulment Committee applies fundamental rules of procedure as a matter of international law whereas national courts apply fundamental rules of procedure as a matter of national public policy. Standards may differ in the individual case. What meets the test of an ad hoc Annulment Committee may not meet the test of a national court. One could argue, for example, that the *international* right to be heard is different from the *national* right to be heard. If both rights are substantially different, it would not be a duplicate review. Yet, if it was the intent to create a self-contained system for limited review, that intent must have included the intention to exclude national remedies to the greatest extent possible. This means that the intention must have been to give disputing parties the opportunity to raise 'the right to be heard' once – before an ad hoc Annulment Committee and as a matter of international law. The exclusion of duplicate review therefore does not only exclude raising *identical* remedies in different fora but also excludes raising *corresponding* remedies in different fora.

hearings were wrongly closed to the public and whether the enforcement of an award must therefore be refused. The answer must be in the negative. The framework-internal annulment process under the ICSID Convention is aimed at examining “whether the manner in which the Tribunal carried out its functions met the requirements of the ICSID Convention.”¹¹² It is thus not within the purview of Annulment Committees to pass judgment on the propriety of the Convention itself.

Article 44 of the ICSID Convention states that any proceeding shall be conducted in accordance with the Arbitration Rules except as the parties otherwise agree. Rule 32(2), in turn, grants each disputing party the power to block the openness of arbitral hearings.¹¹³ The requirements of the Convention are thus met, even if hearings are held *in camera* in violation of the principle of open justice. It is a limitation of the ICSID Convention that the grounds listed in Article 52(1) are exhaustive – contrary to the elements of domestic public policy which are by definition indefinite¹¹⁴ – and that the framework-internal review process is not designed for passing judgment on the propriety of the Convention itself. This *lacuna* allows domestic courts to refuse to enforce ICSID awards for violation of the principle of open justice without duplicating the review undertaken by ad hoc Annulment Committees.

¹¹² *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v Peru*, ICSID Case No ARB/03/4, Decision on Annulment, 5 September 2007, para 97.

¹¹³ ICSID Arbitration Rules, Rule 32(2):

Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

¹¹⁴ Kent Murphy, ‘The Traditional View of Public Policy and *Ordre Public* in Private International Law’ (1981) 11(3) *Georgia Journal of International & Comparative Law* 591-615, at 592 (noting that “public policy is defined by the use courts find for it”).

Fourthly, equating an award with a final judgment could allow national courts to review ICSID awards based on all grounds otherwise applicable to the review of final judgments.¹¹⁵ The text of the ICSID Convention does not limit the extent to which national courts may equate awards with final judgments. The delegate representing the United Kingdom at the treaty negotiations understood the reference to ‘treating awards in the same way as judgments’ as allowing a *broader review* than a reference to public policy which, in his opinion, did not cover cases of fraud – in contrast to the ‘final judgment’ language – which did.¹¹⁶ If equating awards with judgments allows a broader review than a reference to public policy, it must be assumed that the former includes the latter. While this fourth view conforms with the text of the Convention, it does not take the expressed intent into account to create a self-contained system for limited review.

There is no straightforward resolution of the conflict between the expressed intent to create a self-contained system for limited review and the text of the ICSID Convention which does not limit a national court’s power to review awards as if they were final judgments of the enforcing state. Yet, since it was known – *during the treaty negotiations* – that equating awards with final judgments would render the self-contained system for limited review imperfect, it is to be assumed that the imperfection cannot be undone in retrospect by ignoring its existence. In hindsight, it would have been preferable to specify the extent to which domestic courts can review arbitral awards, as their power is unlimited under the text of the Convention – contrary to the intent to create a self-contained system

¹¹⁵ Edward Baldwin, Mark Kantor and Michael Nolan subscribe to this view. See Baldwin, Kantor and Nolan, ‘Limits to the Enforcement of ICSID Awards’ (2006) 23(1) *Journal of International Arbitration* 1-24, at 13.

¹¹⁶ ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II, Part 2, Documents 44-146* (Washington, D.C., 1968) 888.

for limited review. Absent such a specification, the most harmonious interpretation assumes that courts are barred from conducting a duplicate review.

The benefit of this compromise solution is that the dispute resolution process between investors and states is still as efficient as possible without limiting a court's power to protect residual elements of national public policy, i.e., those elements of national public policy that lack a corresponding ground for annulment in the Convention. Yet, even this compromise solution must be subject to certain exceptions. Some notions of morality and justice are so basic that a national court is unlikely to forego its power to review an arbitral award, even if an ad hoc Annulment Committee has the power to annul the award on the same ground, and neither should courts forego that power. It is perhaps an inconvenient realisation that it is up to national courts to resolve the conflict between the intent to create a self-contained system for limited review and the text of the Convention which does not limit a court's power to review awards. The best guidance that can be given is that courts *should* omit to undertake a duplicate review where possible to safeguard the efficiency of investor-state dispute resolution and to realise, even if imperfectly, the idea of creating a self-contained system for limited review. Which notions of morality and justice are so basic to warrant a duplicate review by a court is again a matter for a court to decide. It is to be assumed, however, that the grounds expressly listed in the ICSID Convention do not fall within this category.

(ii) The Usefulness and Necessity of a Residual Public Policy Exception

What can be said with certainty is that courts are free to make use of a public policy exception to the enforcement of arbitral awards, if that public policy exception exists in relation to the enforcement of final judgments of the enforcing state. That courts have the power to examine whether awards conform with national public policy is neither a luxury

nor an accidental result of the treaty negotiations – it is a necessity; national courts must be able to protect the most basic notions of morality and justice of the constitutional order of which they form part. That is their inherent constitutional mandate. That Broches could not imagine a scenario in which the enforcement of an arbitral award could violate national public policy¹¹⁷ does not mean that it is impossible for such a scenario to occur. This section introduces two scenarios in which a national court, in fidelity to the text and *travaux préparatoires* of the ICSID Convention, could refuse to enforce an ICSID award on the ground of public policy: (a) if the arbitration violates the principle of open justice and (b) if the award imposes pecuniary obligations out of an illegal contract.

(a) Open Justice as a Component of Public Policy

It is conceivable for an award to be the result of an arbitral proceeding that violated the principle of open justice. Since the principle of open justice is part and parcel of the most basic notions of morality and justice ('public policy') in almost all jurisdictions, the enforcement of such an award would violate national public policy in those jurisdictions. The ICSID Rules link the openness of hearings to the will of the disputing parties; public hearings against the will of either disputing party are not envisaged.¹¹⁸ If arbitral hearings, upon request by one or both disputing parties, take place *in camera* and if those hearings would have had to be open to the public had they been conducted in the enforcing state, then the principle of open justice is violated. Since the principle of open justice applies

¹¹⁷ ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II, Part 2, Documents 44-146* (Washington, D.C., 1968) 989:

[Aron Broches:] The whole notion of *ordre public* is meaningful in fields of law which had nothing to do with investments, such as the law dealing with the status of persons, marriage and divorce, adoption, nationality, the coming of age etc. In those fields[,] it is normal for a State to retain the right to refuse to recognize the law of another country or acts done in another country if they would violate its *ordre public*. In the case of investments, however, he [Broches] could not imagine how a decision that a party owed to the other party a certain sum of money could have anything to do with *ordre public*.

¹¹⁸ Arbitration Rules, Rule 32(2).

to all proceedings in which law is made, irrespective of their label, investment treaty arbitration – as a law-making forum – attracts the applicability of the principle of open justice. This follows from the principle of democracy for the populace needs to know the law and how it is made in order to retain some control over law-makers. It does not matter thereby that the system of investor-state arbitration is not congruent with the legal order of the enforcing state. This incongruence must not hinder domestic courts from protecting the principle of open justice. It is rather their constitutional mandate to protect the principle of open justice wherever the opportunity presents itself. Proceedings in which a disputing party seeks the enforcement of an ICSID award before a national court are such an opportunity to protect the principle of open justice. Nor is this opportunity precluded on the ground that it would amount to a duplicate review, which the ICSID Convention, interpreted favourably, is designed to prevent. The ICSID Convention, within its own system of review, does not enable ad hoc Committees to annul awards for violation of the general principle of open justice. *Ergo*, courts would not be conducting a duplicate review when examining whether arbitral hearings were wrongly closed to the public. Since the examination whether arbitral hearings were wrongly closed to the public would not be an example of a duplicate review, the review by national courts would be in fidelity to the text and the *travaux préparatoires* of the ICSID Convention.

That the legal order of the enforcing state and the system of investor-state arbitration are not congruent does not mean either that the latter does not have an impact on the former. The law made by arbitrators (international investment law) binds all participant states to the system of investor-state arbitration. Participant states are states that are contracting parties to one or more investment treaties. If tribunals consistently interpret norm X – prevalent in investment treaties – to mean XYZ, this interpretation is binding on all

participant states to the system of investor-state arbitration¹¹⁹ unless participant states amend their treaties to reflect a different interpretation or issue a note of interpretation deviating from the prevalent interpretation. The latter options, although they exist, do not abolish the law-making power of tribunals either, for it is again tribunals who are interpreting the amended treaty text and any notes of interpretation. This means that the actions (or omissions) of participant states are generally judged by arbitrators against international investment law as developed by arbitrators. Given the self-perpetuating nature of arbitral law-making, its impact on states and its remoteness from any national legal order, the presumptive openness of arbitral hearings is all the more important.

Refusing the enforcement of ICSID awards for violating the general principle of open justice would be a solution to the problem of arbitral law-making in secret; refusing the enforcement of ICSID awards for violation of the principle of open justice would – where appropriate – trigger the openness of investor-state arbitration. If an award rendered in violation of the principle of open justice is unenforceable *per se* (in all jurisdictions), the openness of arbitral hearings would ensue. That is so because it would be in the interest of the disputing parties to open arbitral hearings to the public if what they wish is an enforceable award. Since arbitration is a “creature of consent,”¹²⁰ it is within the power of the disputing parties to agree to arbitrate their dispute in public. In sum, the enforcement of ICSID awards in violation of the principle of open justice would be

¹¹⁹ For another description of this phenomenon, see Zachary Douglas, ‘The Plea of Illegality in Investment Treaty Arbitration’ (2014) 29(1) *ICSID Review* 155-186, at 172 (describing how the interpretation of a specific provision was relied upon by other tribunals, leading to a *jurisprudence constante*, which now binds tribunals:

No authority was cited for this interpretation; nor did the Tribunal attempt to justify it by reference to first principles. This interpretation was then adopted, without further analysis, in a series of awards such that it now holds a virtual monopoly over the interpretative space granted to tribunals. (Internal reference omitted.)

¹²⁰ Zachary Douglas, ‘The Plea of Illegality in Investment Treaty Arbitration’ (2014) 29(1) *ICSID Review* 155-186, at 158.

contrary to national public policy in most jurisdictions. Refusing the enforcement of ICSID awards for violation of the principle of open justice, on the other hand, is a unique opportunity for national courts to trigger the openness of investor-state arbitration.

(b) Protection against the Abuse of the Judicial Process

The principle of open justice is not the only component of national public policy, however. Public policy also protects the integrity of the judicial process.¹²¹ Courts, in an effort to protect the integrity of the judicial process, can therefore refuse to recognise a benefit accruing to a criminal from his crime in application of the public policy exception to enforcement. That “the Courts will not recognise a benefit accruing to a criminal from his crime”¹²² is an idea that finds universal acceptance.¹²³ It is to be assumed, therefore, that national courts, if asked to enforce ICSID awards imposing pecuniary obligations out of a contract for the division of the proceeds of crime would find a way not to do so. This section starts out with looking at *Soleimany v Soleimany*,¹²⁴ a case in which a court refused to enforce an arbitral award for illegality and as a matter of public policy, before examining the relevance of illegality to the question of the enforcement of ICSID awards.

In *Soleimany v Soleimany*,¹²⁵ an English court refused to enforce an award imposing pecuniary obligations out of a contract for the division of the proceeds of crime.

¹²¹ *Soleimany v Soleimany* [1999] QB 785, at 800. See also *London Export Corporation Ltd. v Jubilee Coffee Roasting Co. Ltd.* [1958] 1 WLR 271, at 277-278 (Diplock J):

When the arbitration agreement has been construed and no breach of the agreed procedure found there may nevertheless arise a second and quite separate question: that is, whether, as a matter of public policy, a particular award, made pursuant to that agreed procedure, ought not to be enforced and ought, therefore, to be set aside; for an arbitrator’s award, unless set aside, entitles the beneficiary to call upon the executive power of the state to enforce it, and it is the *function of the court to see that executive power is not abused.* (Emphasis added.)

¹²² *Beresford v Royal Insurance Company Ltd.* [1938] AC 586, at 599.

¹²³ Zachary Douglas, ‘The Plea of Illegality in Investment Treaty Arbitration’ (2014) 29(1) *ICSID Review* 155-186, at 166.

¹²⁴ *Soleimany v Soleimany* [1999] QB 785.

¹²⁵ *ibid.*

Soleimany v Soleimany is not an example of an investment arbitration but an example of a religious arbitration between father and son – Sion Soleimany and Abner Soleimany. The illicit joint enterprise was the illegal smuggling of Persian carpets out of Iran in breach of Iranian revenue controls and export controls.¹²⁶ A dispute arose as to whether Abner Soleimany, the son, “had received what he claimed was due to him from the proceeds of sale of the carpets”¹²⁷ and father and son – being Iranian Jews by origin – agreed to have their dispute arbitrated by the *Beth Din*, the Court of the Chief Rabbi in London.¹²⁸ As a matter of the applicable Jewish law,¹²⁹ the illegal purpose of the agreement, despite it being the common intention of the parties to commit an illegal act,¹³⁰ had no effect on the rights of the parties¹³¹ and the *Beth Din* awarded the plaintiff £576,574 and his costs.¹³² As a matter of public policy, the English court declined to enforce the award.¹³³ Having reviewed relevant case law, it held that a foreign judgment recognising an agreement that is entered into with the object of committing an illegal act “is the very type of judgment which the English court would not recognise on the grounds of public policy.”¹³⁴ It concluded that the same must be true for arbitral awards – whether domestic or foreign:

¹²⁶ *Soleimany v Soleimany* [1999] QB 785, at 790 and 794.

¹²⁷ *ibid* 789.

¹²⁸ *ibid*.

¹²⁹ Jewish law is known as *halakhah* and is grounded in scripture, the written scripture (*Torah shebikh'tav*) and an “Oral Torah” (*Torah sheb'al-peh*). See Lee Ann Bambach, ‘The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the *Beth Din* Precedent’ (2010) 25 *Journal of Law & Religion* 379-414, at 382 fn 12.

¹³⁰ *Soleimany v Soleimany* [1999] QB 785, at 797.

¹³¹ *ibid* 794.

¹³² *ibid* 791.

¹³³ For other cases, in which a court refused to enforce a *Beth Din* decision on grounds of public policy, see Lee Ann Bambach, ‘The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the *Beth Din* Precedent’ (2010) 25 *Journal of Law & Religion* 379-414, at 399-400 (noting non-arbitrability, a party’s deprivation of his or her constitutional rights and the usurpation of the state’s prerogative in criminal matters as public policy grounds for the refusal to enforce a *Beth Din* decision).

¹³⁴ *Soleimany v Soleimany* [1999] QB 785, at 797.

The court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it.¹³⁵

This being the general position in English law on the enforceability of arbitral awards imposing pecuniary obligations out of a contract for the division of the proceeds of crime, the question is whether the court would have come to the identical conclusion had it been asked to enforce an ICSID award imposing similar obligations. In line with the case in *Soleimany v Soleimany*, this section is limited to analysing a hypothetical scenario in which an investment was procured for an illicit purpose.¹³⁶ The investment in the scenario is not only procured for an illicit purpose but also in violation of international public policy, including peremptory norms of international law such as the prohibition of slavery and torture.

Let us assume that a foreign investor and a host state enter into an investment agreement, *in conformity with the law of the host state*, for the purpose of facilitating slavery and torture and for the purpose of producing and trafficking cocaine.¹³⁷ The agreement entails that the investor is to build cocaine manufactories. It also entails that the investor is to

¹³⁵ *Soleimany v Soleimany* [1999] QB 785, at 800.

¹³⁶ For an overview of all possible scenarios for a plea of illegality see Zachary Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (2014) 29(1) *ICSID Review* 155-186, at 177-186 (noting that a plea of illegality goes to the tribunal's jurisdiction only if the asset is not recognized by the laws of the host State – for lack of an investment – or if the investment failed to comply with registration requirements in the treaty).

¹³⁷ For the source of inspiration for this hypothesis, see Zachary Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (2014) 29(1) *ICSID Review* 155-186, at 173 (using the example of "an investment using slave labour" and calling it "at the extreme end of the plausibility curve"), 180 ("slavery or torture"), 181 ("trafficking of illicit drugs"), 184 (noting, exemplarily, the acquisition of "a pharmaceutical plant [...] for the purpose of producing illicit drugs").

build an arena to be called the ‘Colosseum’ where slaves are to fight each other in violent matches for the entertainment of the general public. If slaves hesitate to enter the arena, they are to be whipped until they do so. Surplus drugs – cocaine not administered to slaves before their fights – are to be distributed for sale. The investment agreement stipulates that the state and the investor are to split all profits equally. The inevitable comes to pass. The host state, not wanting to share the vast profits from the successful scheme, nationalises the cocaine manufactories, the ‘Colosseum’, including its training camp for slaves, and the slaves themselves, without compensating the foreign investor, who, in turn, files a notice of ICSID arbitration, thereby accepting the state’s unilateral offer to arbitrate disputes arising under investment treaty X.¹³⁸ The investor seeks compensation for the nationalisation of its investment as promised in investment treaty X which prohibits the nationalisation of investments without prompt, adequate and effective compensation.¹³⁹ Against all odds, the tribunal does not reject the investor’s claim as inadmissible for violating international public policy¹⁴⁰ but orders the state to pay the investor USD 955,500,500 as compensation for the expropriation of its investment. The foreign investor subsequently seeks recognition and enforcement of the ICSID award in

¹³⁸ cf Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 35 (“Upon the claimant’s filing of a notice of arbitration, the claimant investor perfects the host state’s unilateral offer to arbitrate, and the two parties thus enter into a direct legal relationship in the form of an arbitration agreement.”).

¹³⁹ For an exemplary provision of this kind see Indonesia-Denmark BIT 2007, Art 5(a):

Investments of investors of each Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for expropriations made in the public interest, on a basis of non-discrimination, carried out under due process of law, and against prompt, adequate and effective compensation.

¹⁴⁰ On the inadmissibility of claims that are contrary to international public policy, see Zachary Douglas, ‘The Plea of Illegality in Investment Treaty Arbitration’ (2014) 29(1) *ICSID Review* 155-186, at 180:

[T]here appears to be sufficient consensus that no legal effect can be given to a transaction involving the transgression of a peremptory norm of international law. Thus [*sic*] a transaction that contemplated or facilitated slavery or torture, for instance, would be void for international public policy. Certain other international norms that do not have the same status of *jus cogens* but that nonetheless have widespread endorsement in multilateral instruments such as those addressing [...] the trafficking of illicit drugs [...] would also qualify as grounds of international public policy.

a court in a contracting state of the ICSID Convention. The court can either enforce or refuse to enforce the award. If the court truly has no discretion to review the award, once its authenticity has been established, it would have to enforce the award.

If national courts were restricted to conducting a non-duplicate review of ICSID awards, their review power would turn on the power of ICSID Annulment Committees. Even though not stated in the ICSID Convention, an award may be annulled if it contravenes international public policy. The argument is that a tribunal that imposed obligations out of a contract that contravenes international public policy would exceed its powers because it would fail to apply the proper law (international public policy). This result is not dependent on whether the disputing parties agreed on the applicability of international public policy; international public policy cannot be abrogated from by agreement.¹⁴¹ International public policy is therefore the line that is drawn – it represents the limit to party autonomy in investor-state arbitration. If then, an award may be annulled if it contravenes international public policy, and if courts are estopped from conducting a duplicate review, this would bind the hands of courts confronted with awards that impose pecuniary obligations out of a contract that violates international public policy – as the agreement regarding the ‘Colosseum’ does. This result cannot be right. In the unlikely event that courts are asked to enforce awards imposing pecuniary obligations out of contracts that violate international public policy, they must be able to refuse enforcement. Otherwise the protection of international public policy hinges on the respondent state requesting the annulment of the award and on the ICSID framework-internal review mechanism. All things considered, international public policy and peremptory norms of

¹⁴¹ On the problem of imposing norms on non-consenting states, see Dinah Shelton, ‘Sherlock Holmes and the Mystery of *Jus Cogens*’ in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015 – Jus Cogens: Quo Vadis?* (2015) 23-50, at 47.

international law are too important to fall victim to disregard suffered at the hands of either states or arbitrators who are ignorant of international public policy or wilful in their disregard.

(iii) Conclusion and Outlook

The ICSID Convention's drafting history shows that the delegates negotiating the treaty considered but rejected granting national courts the power to review awards on the same grounds applicable under the New York Convention. The Convention's drafting history also shows that the delegates considered¹⁴² but rejected the inclusion of an explicit public policy exception in the text of the ICSID Convention.¹⁴³ This does not mean that national courts must rubberstamp all ICSID awards no matter their content and no matter their provenance. Article 53(1) of the Convention states that "[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." It matters then what remedies the ICSID Convention provides for. In addition to the framework-internal remedies (Arts 49-52), the ICSID Convention also provides for courts reviewing awards as if they were final judgments of the enforcing state (Art 54). In principle, this means that all defences to the enforcement of final judgments are available to the enforcement of ICSID awards. Where public policy is a defence to the enforcement of final judgments, courts may review ICSID awards on public policy grounds. Because the ICSID framework was intended as a self-contained

¹⁴² See ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II, Part 1, Documents 1-43* (Washington, D.C., 1968) 346 (noting that Jamaica suggested a public policy exception), 346 (referring to the discussion on recognition and enforcement of awards and the issues that had arisen in relation thereto: "[...] whether the rule of enforceability should be subject to some exceptions based on public policy"), 427 (noting that Norway suggested a public policy exception), 521 (noting that India would accept a public policy exception to the enforcement of an award), 575 (noting that "[s]ome delegations were willing to accept that awards would not be enforceable if they violated the public policy of the country where enforcement was sought").

¹⁴³ Edward Baldwin, Mark Kantor and Michael Nolan, 'Limits to Enforcement of ICSID Award' (2006) 23(1) *Journal of International Arbitration* 1-24, at 5.

system for limited review, national courts, however, should, where possible, refrain from conducting a duplicate review. If an element of public policy is not only a defence to the enforcement of a final judgment but also a ground for annulment under the Convention such as, for example, the right to be heard, courts should refrain from reviewing awards on the ‘same’ ground. If, however, peremptory norms of international law are at stake, national courts are well advised to make an exception to the non-duplicity rule of review, given the importance of the value protected by *ius cogens*: human dignity.

While it may be difficult for national courts to define the boundaries of their own review power given the possible infinite nature of public policy and the difficulty of defining peremptory norms of international law, it is up to national courts to decide which elements of public policy are so important so as to warrant double protection. Be that as it may, national courts, in any event, would not be conducting a duplicate review, when reviewing whether arbitral hearings were wrongly closed to the public. That is so because the principle of open justice is not protected under the ICSID Convention. The ICSID Arbitration Rules even grant each disputing party the power to preclude the openness of arbitral hearings. What is more, Annulment Committees lack the power to review awards on the ground of a violation of the principle of open justice; their review power is limited to reviewing whether proceedings were conducted in conformity with the Convention. It is this framework-internal limitation that allows courts to examine whether hearings were wrongly closed to the public, even assuming that a duplicate review is generally to be avoided. The view that courts lack any review power is to be rejected for lack of fidelity to the text of the Convention and to its drafting history – properly interpreted.

Having interpreted the ICSID Convention and the review power of national courts in theory, this section turns to judicial practice. If the example of the United States is

illustrative, national courts can refuse to enforce final judgments of domestic courts on the grounds of public policy. Since ICSID awards are to be treated as if they were final judgments of the enforcing state and assuming that a duplicate review is to be avoided where possible, national courts can refuse to enforce ICSID awards on those grounds of public policy not protected under the ICSID Convention – such as the principle of open justice. Judicial practice in Argentina shows that courts are aware of the public policy exception to the recognition and enforcement of ICSID awards. This section first illustrates that public policy is a defence to the enforcement of final judgments in the United States and how it applies to ICSID awards. In a second step, this section introduces proceedings in which courts have reviewed ICSID awards. The lesson of this section is that the necessary mechanisms are already in place for national courts to refuse to enforce arbitral awards based on proceedings that were wrongly closed to the public. Whereas the previous section was about the content of the ICSID Convention as agreed upon by the contracting states of the ICSID Convention, this section is about the subsequent implementation of the Convention on a national level and its interpretation by courts.

B. Limits to the Enforcement of ICSID Awards in the United States

(i) Implementing Legislation Opens Door for Full Faith and Credit Challenges

In the US, the implementation of the ICSID Convention is facilitated by the Convention on the Settlement of Investment Disputes Act of 1966 (the Act).¹⁴⁴ Section 3 of that Act¹⁴⁵ reads:

- (a) An award of an arbitral tribunal rendered pursuant to chapter IV of the convention shall create a right arising under a treaty of the United States. The

¹⁴⁴ United States: Act Implementing I.B.R.D. Convention on Settlement of Investment Disputes (Enforcement of Arbitral Awards), reproduced in 5 *International Legal Materials* 820 (1966).

¹⁴⁵ Section 3 of that Act corresponds to 22 U.S.C. § 1650a (1966).

pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.

(b) The district courts of the United States (including the courts enumerated in title 28, United States Code, section 460) shall have exclusive jurisdiction over actions and proceedings under paragraph (a) of this section, regardless of the amount in controversy.

This section implements¹⁴⁶ Article 54(1) of the ICSID Convention.¹⁴⁷ It sets out that ICSID awards are enforced in the federal district courts and that the pecuniary obligations imposed by an award shall be given the same full faith and credit as if the award was a final sister-state judgment.¹⁴⁸ Awards are therefore to be treated as if they were final sister-state judgments, also for the purpose of permitting full faith and credit challenges to enforcement.

In parallel to arguments advanced against the ICSID Convention permitting courts to review arbitral awards, some argue that Section 3 of the Convention on the Settlement of Investment Disputes Act prohibits full faith and credit challenges.¹⁴⁹ Such an argument

¹⁴⁶ *Mobil Cerro Negro Ltd. et al. v Bolivarian Republic of Venezuela* 87 F Supp 3d 573 (SDNY 2015) 597.

¹⁴⁷ ICSID Convention, Art 54(1):

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

¹⁴⁸ Abby Cohen Smutny, Anne D. Smith and McCoy Pitt, 'Enforcement of ICSID Convention Arbitral Awards in U.S. Courts' (2016) 43 *Pepperdine Law Review* 649-678, at 657 and 666.

¹⁴⁹ *ibid* 670; *Mobil Cerro Negro Ltd. et al. v Bolivarian Republic of Venezuela* 87 F Supp 3d 573 (SDNY 2015) 597 (noting that the full faith and credit provision of the Constitution "makes final the determination

is unpersuasive as it unduly emphasises the obligation to enforce arbitral awards in the implementing legislation. If awards were not meant to be open to full faith and credit challenges, the reference to the Full Faith and Credit Clause in the Act would not only be superfluous but also misleading. It cannot be assumed that the reference was meant to be either. The specification that the pecuniary obligations of an ICSID award “shall be given” the same full faith and credit as if the award were a final state court judgment does not suggest either that no exceptions to the enforcement of awards are to be permitted.¹⁵⁰ That specification only mandates courts to treat awards as if they were final state court judgments – no more and no less. If courts were not to engage in a full faith and credit analysis when reviewing ICSID awards, it would have made no sense to equate awards with final state court judgments for the purposes of enforcement. The Act states that arbitral awards and final state court judgments are to be treated “the same.”¹⁵¹ A full faith and credit analysis at the enforcement stage of awards is therefore permitted – subject to the general restraint not to be conducting a duplicate review, if possible, which does not flow from the Act but the drafting history of the ICSID Convention and its purpose.

This result also conforms with the Supreme Court’s understanding of its own rule within the legal order that is the United States. The United States Supreme Court held that it is within its own purview to authoritatively define the exceptions to the iron rule of full faith

of sister states, such that, *subject to exceptions inapplicable here*, no attack can be made outside a state on a judgment rendered therein”) (emphasis added) and at 600 (noting that there are no grounds for challenging ICSID awards in the contracting state).

¹⁵⁰ But see Abby Cohen Smutny, Anne D. Smith and McCoy Pitt, ‘Enforcement of ICSID Convention Arbitral Awards in U.S. Courts’ (2016) 43 *Pepperdine Law Review* 649-678, at 670; *Mobil Cerro Negro Ltd. et al. v Bolivarian Republic of Venezuela* 87 F Supp 3d 573 (SDNY 2015) 597.

¹⁵¹ Roger P. Alford, ‘Federal Courts, International Tribunals, and the Continuum of Deference’ (2003) 43 *Virginia Journal of International Law* 675-796, at 688-690. See also United States: Act Implementing I.B.R.D Convention on Settlement of Investment Disputes (Enforcement of Arbitral Awards): Department of State Statement (1966) 5 *International Legal Materials* 821-826, at 825:

[T]he primary object of sub-section 3(a) of the draft bill is to make an arbitral award rendered pursuant to the convention entitled to the *same* full faith and credit in a Federal court of the United States as that given a final judgment of a State court. (Emphasis added).

and credit.¹⁵² As this is the case, it does not matter whether the contracting states to the ICSID Convention agreed that awards were to be self-executing – which they did not. But even if they had agreed that awards were to be self-executing, i.e., not subject to review by domestic courts, the United States Supreme Court would have been free to exercise its authority to declare otherwise, given the reference to the full faith and credit doctrine in the implementing legislation. If the Supreme Court is the final arbiter over the definition of what it means to grant judgments full faith and credit, it is also the final arbiter over the exceptions to that rule which are inherent in the rule itself. Granting arbitral awards full faith and credit as if they were final judgments from sister states opens the door to the applicability of the full faith and credit doctrine and its exceptions.

(ii) Limits to the Enforcement of Final Judgments under the Full Faith and Credit Doctrine

The question then is what a full faith and credit analysis entails. The phrase ‘full faith and credit’ in the Convention on the Settlement of Investment Disputes Act refers to the Full Faith and Credit Clause contained in Article IV of the United States Constitution¹⁵³ which requires states to give full faith and credit “to the public acts, records, and judicial proceedings of every other state.”¹⁵⁴ Even though the “faith and credit [to be] given is not

¹⁵² *Magnolia Petroleum Co. v Hunt* 320 US 430, at 438 (1943) (“Even though we assume for present purposes that the command of the Constitution and the statute is not all-embracing, and that there may be exceptional cases in which the judgment of one state may not override the laws and policy of another, this Court is the final arbiter of the extent of the exceptions.”) (Internal quotation mark omitted); *Adar v Smith II* 639 F 3d 146, at 151 (2011) (“The forum’s failure properly to accord full faith and credit is subject to ultimate review by the Supreme Court of the United States.”).

¹⁵³ Sophie Davin, ‘Enforcement of ICSID Awards in the United States: Should the ICSID Convention Be Read as Allowing a Second Bite at the Apple’ (2016) 48 *NYU Journal of International Law & Politics* 1255-1292, at 1265.

¹⁵⁴ United States Constitution, Art IV, Section 1:

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

to be niggardly but generous, full”¹⁵⁵ and the rule demands rigorous obedience,¹⁵⁶ it is nonetheless subject to certain exceptions. In what follows, this section first presents the rule before exploring an important exception to the rule. The iron rule¹⁵⁷ is that final judgments rendered in one state are to be given full faith and credit in any other state, granted that the court rendering the judgment had personal and subject matter jurisdiction¹⁵⁸ and even if a court in the enforcing state “would not be required to entertain the suit on which the judgment was founded”¹⁵⁹ as a matter of law or public policy.¹⁶⁰ Yet, there are exceptions to this iron rule.¹⁶¹ Even though the command to recognise a judgment, giving it *res judicata* effect, is absolute,¹⁶² a court may, in extraordinary circumstances, refuse to enforce a judgment if it deems the judgment to be contrary to its

¹⁵⁵ *Johnson v Muehlberger* 340 US 581, at 585 (1951).

¹⁵⁶ *Fauntleroy v Lum* 210 US 230, at 237 (1908).

¹⁵⁷ cf William L. Reynolds, ‘The Iron Law of Full Faith and Credit’ (1994) 53(2) *Maryland Law Review* 412-449, at 413 (describing the “Iron Law of Full Faith and Credit”).

¹⁵⁸ *Fauntleroy v Lum* 210 US 230, at 237 (1908).

¹⁵⁹ *Milwaukee County v M.E. White Co.* 296 US 268, at 277 (1935).

¹⁶⁰ *ibid* (“In numerous cases this court has held [...] that considerations of policy of the forum which would defeat a suit upon the original cause of action are not involved in a suit upon the judgment and are insufficient to defeat it.”); *Magnolia Petroleum Co. v Hunt* 320 US 430, at 439 (1943).

¹⁶¹ See William L. Reynolds, ‘The Iron Law of Full Faith and Credit’ (1994) 53(2) *Maryland Law Review* 412-449 (exploring the basic rule of sister-state enforcement and its potential exceptions: judgments not on the merits, lack of finality, fraud in obtaining the judgment, lack of jurisdiction, the land taboo, the lack of a competent court, penal judgments, public policy).

¹⁶² *Magnolia Petroleum Co. v Hunt* 320 US 430, at 438 (1943) (“From the beginning this Court has held that these provisions [of full faith and credit] have made that which has been adjudicated in one state *res judicata* to the same extent in every other.”), 440 (“Because there is a full faith and credit clause a defendant may not a second time challenge the validity of the plaintiff’s right which has ripened into a judgment and a plaintiff may not for his single cause of action secure a second or a greater recovery.”); *Baker v General Motors Corporation* 522 US 222, at 233 (1998) (“Regarding judgments [...] the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering state gains nationwide force.”) (Internal reference omitted).

own laws or public policy.¹⁶³ Such an exception of last resort was always reserved by the Supreme Court which stated in *Magnolia Petroleum Co. v Hunt*:¹⁶⁴

[T]he command of the Constitution and the [Act of Congress implementing the Full Faith and Credit Clause] is not all-embracing, and there may be exceptional cases in which the judgment of one state may not override the laws and policy of another.¹⁶⁵

*Adar v Smith*¹⁶⁶ is an example on point. In this case, the Fifth Circuit Court of Appeals held that a Louisiana State Registrar's refusal to enforce a New York judicial adoption decree did not violate the Full Faith and Credit Clause. In what follows, this section will present the facts of the case and its relevance for the enforceability of ICSID awards.

(a) *Adar v Smith*

In 2005, Mickey Smith and Oren Adar adopted Louisiana-born Infant J in New York pursuant to New York state law that permits joint adoptions by unmarried, same-sex couples.¹⁶⁷ Upon obtaining the New York adoption decree, Smith and Adar sought to

¹⁶³ cf *McElmoyle ex rel. Bailey v Cohen* 38 US 312, at 324 (1839), quoted in *Lynde v Lynde* 181 US 183, at 187 (1901) (“[T]he judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its laws may permit.”); *Baker v General Motors Corporation* 522 US 222, at 235 (1998) (“Full faith and credit [...] does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law.”).

¹⁶⁴ *Magnolia Petroleum Co. v Hunt* 320 US 430 (1943).

¹⁶⁵ *ibid* 438. See also *Converse v Hamilton* 224 US 243, at 260 (1912) (“True, the full faith and credit clause of the Constitution is not without well-recognized exceptions [...] but the laws and proceedings relied upon here come within the general rule which that clause establishes, and not within any exception.”); *Broderick v Rosner* 294 US 629, at 642 (1935) (“It is true [...] that the full faith and credit clause does not require the enforcement of every right which has ripened into a judgment of another state or has been conferred by its statutes. [...] But the room left for the play of conflicting policies is a narrow one.”).

¹⁶⁶ *Adar v Smith I* 597 F 3d 697 (5th Cir. 2010), reviewed, *Adar v Smith II* 639 F 3d 146 (5th Cir. 2011) (en banc).

¹⁶⁷ *Adar v Smith I* 597 F 3d 697, at 701.

have Infant J's birth certificate amended in Louisiana so as to include both of their names as adoptive parents.¹⁶⁸ The Louisiana State Registrar, Darlene W. Smith, refused this request, reasoning that Louisiana does not permit the joint adoption by unmarried couples – a scenario deemed to be contrary to public policy.¹⁶⁹ Instead, the Registrar offered to issue a birth certificate with one of the adoptive fathers' names as Louisiana permits single-parent adoption. Unsatisfied, Smith and Adar sued the Registrar, asserting that she denied full faith and credit to the New York adoption decree.

The Court of Appeals for the Fifth Circuit disagreed. The Court held that the Full Faith and Credit Clause imposes an obligation on courts¹⁷⁰ to afford judgments *res judicata* effect,¹⁷¹ an effect that was recognised by the State Registrar, an executive officer. The State Registrar was aware of the fact that the parental relationship of Smith and Adar with Infant J could not be relitigated in Louisiana courts.¹⁷² The recognition of the adoption decree (the judicial grant of *res judicata* effect) was not at issue, however.¹⁷³ What was at issue was the non-issuance of the requested birth certificate – a measure which would have amounted to the enforcement of the New York adoption decree in Louisiana.¹⁷⁴ Even though the Court held that the Full Faith and Credit Clause did not require an executive

¹⁶⁸ *Adar v Smith I* 597 F 3d 697, at 701.

¹⁶⁹ *ibid* 701-702. See also *Adar v Smith II* 639 F 3d 146, at 151 (“The Registrar declined [...] to enforce the New York decree by altering Infant J’s official birth records in a way that is inconsistent with Louisiana law governing reissuance.”).

¹⁷⁰ *Adar v Smith II* 639 F 3d 146, at 155 (“That the obligation to afford judgments full faith and credit falls on courts is implicit from the fact that rules of *res judicata* provide the standard for determining whether a judgment is entitled to full faith and credit in the first place.”).

¹⁷¹ *ibid* 151 (“[T]he clause and its enabling statute created a rule of decision to govern the preclusive effect of final, binding adjudications from one state court or tribunal when litigation in pursued in another state or federal court. No more, no less. Because the clause guides rulings in courts, the “right” it confers on a litigant is to have a sister state judgment recognized in courts of the subsequent forum state.”).

¹⁷² *ibid* 152 and 159.

¹⁷³ *ibid* 159.

¹⁷⁴ *ibid* 157 and 160 (“Obtaining a birth certificate falls in the heartland of enforcement, and therefore outside the full faith and credit obligation of recognition.”).

officer to enforce a sister-state judgment without the intermediary of a state court,¹⁷⁵ it held that even if it was otherwise, the refusal to enforce the New York adoption decree did not amount to a violation of the Full Faith and Credit Clause. That was so because the Court deemed the obligation to recognise a sister-state judgment to be exacting¹⁷⁶ but not the corresponding full faith and credit obligation to enforce such a judgment.¹⁷⁷ Instead, it held that “enforcement of judgments is ‘subject to the evenhanded control of forum law,’”¹⁷⁸ which meant that the Registrar was free to enforce the New York adoption decree in a manner that conformed with Louisiana law.¹⁷⁹ Since Louisiana does not permit unmarried couples to adopt a child and since Smith and Adar were unmarried, the Registrar was not obliged to issue a birth certificate with both adoptive parents’ names on it. In the words of the Court of Appeals, “the full faith and credit clause does not oblige Louisiana to confer particular benefits on unmarried adoptive parents contrary to its law.”¹⁸⁰ A Petition for Writ of Certiorari was filed in the United States Supreme Court, a petition that was denied by the Supreme Court in 2011.¹⁸¹ The Supreme Court thus left intact the ruling on the public policy exception to the Full Faith and Credit Clause.

¹⁷⁵ *Adar v Smith II* 639 F3d 146, at 158.

¹⁷⁶ *ibid* 158-159 (quoting *Baker v General Motors Corp.* 522 US 222, at 233: “With regard to judgments, the [Supreme] Court has described the full faith and credit obligation as exacting.”) (Internal quotation marks omitted).

¹⁷⁷ *Adar v Smith II* 639 F3d 146, at 159 (quoting *Baker v General Motors Corporation* 522 US 222, at 235: “The states’ duty to ‘recognize’ sister state judgments, however, does not compel states to ‘adopt the practices of other States regarding the time, manner, and mechanism for enforcing judgments.’”).

¹⁷⁸ *Adar v Smith II* 639 F3d 146, at 159 (quoting *Baker v General Motors Corporation* 522 US 222, at 235).

¹⁷⁹ *ibid* 160 (quoting *McElmoyle ex rel. Bailey v Cohen* 38 US 312, at 324).

¹⁸⁰ *ibid* 161. See also *Rosin v Monken* 599 F 3d 574, at 577 (7th Cir. 2010):

The Full Faith and Credit Clause was enacted to preclude the same matters’ being relitigated in different states as recalcitrant parties evade unfavourable judgments by moving elsewhere. It was never intended to allow one state to dictate the manner in which another state protects its populace.”).

¹⁸¹ *Adar v Smith II* 565 US 942, 132 S Ct 400 (2011).

(b) Lessons for the Enforceability of ICSID Awards in the United States

Adar v Smith casts doubt on the enforceability of ICSID awards in the United States. According to the United States Court of Appeals for the Fifth Circuit, which was relying in pertinent part on Supreme Court jurisprudence, a state court is obliged to recognise a sister-state judgment, granting it *res judicata* effect, but it may refuse to enforce the judgment if it deems the judgment to be conferring benefits that are contrary to state law or public policy. This jurisprudence applies to the enforcement of ICSID awards per the Convention on the Settlement of Investment Disputes Act which requires awards to be given the same full faith and credit as if the awards were sister-state judgments. This means that courts in the United States must recognise ICSID awards, granting them *res judicata* effect.¹⁸² Despite the equation of awards with judgments for the purposes of recognition and enforcement, this does not mean, however, that awards are automatically elevated to enforceable judgments. In other words, the fiction that awards are to be treated *as if* they were judgments does not extend to the enforceability of the former. Rather, awards – as sister-state judgments – are to be enforced as a matter of full faith and credit to the extent that they confer benefits in conformity with state law and public policy. Just as a New York adoption decree cannot compel a Louisiana authority to disregard Louisiana law and public policy, so is it impossible for an award to compel a court to disregard state law and public policy. It follows that, if awards are conferring benefits that are contrary to state law or public policy, courts, in extraordinary circumstances, may refuse to enforce them, in compliance with the Full Faith and Credit Clause.

¹⁸² See also Aron Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’ (1972-II) 136 *Hague Recueil des Cours* 331-410, at 400 (“Article 54 affirms its external finality, i.e., *vis-à-vis* domestic courts. The award is *res judicata* in each and every Contracting State.”).

In *Adar v Smith*, the requested benefit – a birth certificate with the unmarried adoptive parents’ names – did not exist under the law of the forum state and therefore did not have to be granted. In investor-state arbitration, the requested benefit is the enforcement of pecuniary obligations imposed by awards that are based on predominantly secret hearings in which arbitrators are making law. Such a secret law-making system is contrary to the First Amendment which requires all fora in which law is made to be presumptively open to the public. Since a law-making system that operates behind closed doors is also contrary to the most basic notions of morality and justice, all benefits that flow from such a system are unenforceable as a matter of public policy. It follows that the refusal to enforce an award resulting from a secret system of justice does not contradict the Full Faith and Credit Clause.

This result also follows from the impossibility of this question ever reaching a forum court outside the narrow confines of investor-state arbitration. In other words, if awards are to be treated as if they were final sister-state judgments, it suffices to examine the enforceability of final sister-state judgments based on hearings systematically closed to the public. The difficulty lies in imagining a situation that is entirely hypothetical – as long as the principle of open justice is intact in the United States, a forum court would never be faced with enforcing a sister-state judgment that is based on a hearing the secrecy of which is symptomatic of the greater system from which it originates; open justice has always been the norm in the United States as a whole. *Ergo*, the enforcement of a sister-state judgment that shared the same attributes as an ICSID award but for its origin is a matter of impossibility. Since such a judgment does not exist and never could have existed, it would never have been enforced either. Put differently, the United States Constitution prohibits the existence of a law-making system that operates in secret. That being the case, no enforcement mechanism for judgments based on secret law-making

proceedings exists in the United States. Since no such enforcement mechanism exists, it cannot be invented qua the operation of the Full Faith and Credit Clause in the Convention on the Settlement of Investment Disputes Act. In other words, awards do not enjoy the luxury of being enforceable outside of the legal machinery in which enforcement is sought – they cannot escape the reach of the law of the land. The United States Constitution mandates law-making fora to be presumptively open to the public. The flipside of the coin is that courts are not obliged, as a matter of full faith and credit, to enforce awards that are based on proceedings in which law is made in secret.

One could argue, however, that the enforcement of ICSID awards does not necessitate the invention of a new enforcement mechanism. As these awards impose pecuniary obligations and every state has procedures for the enforcement of pecuniary obligations imposed by judgments, one could argue that existing enforcement mechanisms are sufficient.¹⁸³ Yet, such an argument would cut the full faith and credit analysis short. The enforcement of awards is only due where the court finds that the process in which the original award was rendered lived up to the most basic notions of morality and justice. The underlying process matters, as was recognised by the Supreme Court in *Durfee v Duke*.¹⁸⁴ In that case, the Supreme Court clarified that a judgment is not entitled to full faith and credit unless the forum court finds that the questions at issue “have been fully and fairly litigated and finally decided in the court which rendered the original judgment.”¹⁸⁵ If the questions at issue have been unfairly litigated, it is within the

¹⁸³ cf Christoph Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICISD Convention – A Commentary* (2nd edn, Cambridge University Press 2009) 1149:

A State is under no obligation to create new execution procedures for ICSID awards. But the restriction to the enforcement of pecuniary obligations [...] should make this problem rather theoretical. It can be assumed that every State has procedures for the execution of pecuniary obligations imposed by judgments. (Internal reference omitted).

¹⁸⁴ *Durfee v Duke* 375 US 106.

¹⁸⁵ *ibid* 111.

prerogative of domestic courts to refuse enforcement, despite the availability of otherwise applicable enforcement mechanisms. Fairness requires the administration of justice in public. If the questions at issue have been wrongly litigated in secret, in violation of the principle of open justice, it is within the prerogative of courts to declare otherwise applicable enforcement mechanisms inapplicable. As the enforcement of final sister-state judgments, as a matter of constitutional law and public policy, is tied to the requirement that the underlying proceeding must have not eroded the principle of open justice, the Full Faith and Credit Clause does not require a court to extend enforcement mechanisms to judgments based on proceedings that *have* eroded the principle of open justice. Nor must courts invent enforcement mechanisms for such judgments; the Full Faith and Credit Clause does not oblige states to confer particular benefits contrary to their law.¹⁸⁶

In sum, whichever way one looks at the Full Faith and Credit doctrine, the right of courts to review sister-state judgments and ICSID awards and, in extraordinary circumstances, to refuse their enforcement in cases of conflict with the law or public policy of the forum exists. This exception is limited to instances in which the requested benefit does not exist under the law of the forum because of conflicting law or public policy, or alternatively, to instances in which the matter was not fully and fairly litigated or arbitrated.

(iii) Conclusion

The Convention on the Settlement of Investment Disputes Act requires courts to treat ICSID awards as if they were final sister-state judgments. This requirement leaves the door open for full faith and credit challenges, including the non-enforcement of ICSID awards in case of conflict with the law and public policy of the forum, if it is the requested benefit that conflicts with the law and public policy of the forum. The enforcement of a

¹⁸⁶ cf *Adar v Smith II* 639 F 3d 146, at 161.

final judgment or award is a benefit in itself. Public policy, in turn, includes the principle of open justice. If the non-erosion of the principle of open justice is a requirement for the enforcement of final sister-state judgments, then courts can apply this requirement also to ICSID awards. Since law-making in secret erodes the principle of open justice, courts may legitimately refuse to enforce those ICSID awards that are based on arbitral hearings that were closed to the public in their entirety. *In camera* hearings are the norm in ICSID arbitration, a system in which arbitrators are making law. It is the law-making function of arbitrators that brings with it the applicability of the principle of open justice to investment arbitration in the first place.¹⁸⁷ While the non-enforcement of final judgments and awards may seem a sweeping measure, it is a measure of last resort that courts may revert to. The non-enforcement of final judgments and awards if need be is indeed the last and necessary bulwark against the erosion of the principle of open justice.

C. Limits to the Enforcement of ICSID Awards in Argentina

That public policy is a bar to the enforcement of ICSID awards is not an idea confined to the realm of the United States. This section presents a case from Argentina as evidence for the judicial recognition of public policy as a bar to the enforcement of ICSID awards.

(i) *Compañía de Concesiones de Infraestructura*¹⁸⁸

A useful recent judgment on the enforcement of ICSID awards is the second instance Argentine judgment in *CCI – Compañía de Concesiones de Infraestructura S.A. pedido*

¹⁸⁷ cf Levan Alexidze, 'Legal Nature of *Jus Cogens* in Contemporary International Law' (1981) 172 *Hague Recueil des Cours* 219-270, at 233 ("Since international law is a system of law, though specific and independent from domestic law – it should be considered from the standpoint of general notions inherent in every system of law which is a particular phenomenon among other rules of social conduct."). Since the 'system' of investor-state arbitration produces arbitral law – it should be considered from a standpoint of general notions applicable to other law-making *fora* such as the general principle of open justice.

¹⁸⁸ *CCI – Compañía de Concesiones de Infraestructura S.A. pedido de quiebra por República de Perú*, Chamber A of the Buenos Aires Commercial Court of Appeals, Judgment (18 August 2015), published in the Argentine Law Journal *La Ley* on 30 December 2015 and in *DIPr Argentina* on 28 June 2016.

de quiebra por República de Perú. The case originated in arbitral proceedings initiated by Argentine investors against the Republic of Peru.¹⁸⁹ The case revolved around a concession agreement to build and operate a toll highway in Peru which the Argentine investors claimed a Peruvian municipal government had terminated in violation of the 1994 Bilateral Investment Treaty between Argentina and Peru.¹⁹⁰ The ensuing proceedings resulted in an award in favour of Peru. The tribunal not only held that each and every one of the treaty violations alleged by the claimants was unfounded.¹⁹¹ The tribunal also ordered the claimant investors to pay Peru's arbitration costs in the amount of USD 2,117,489.27.¹⁹² Since payment was not forthcoming Peru sought the enforcement of the cost award in Argentine courts. Absent an *exequatur* procedure,¹⁹³ the Court of First Instance denied the request,¹⁹⁴ an error that was corrected by the Commercial Court of Appeals.¹⁹⁵ The Court of Appeals held that ICSID awards need not

¹⁸⁹ *Convial Callao S.A. v CCI – Compañía de Concesiones de Infraestructura S.A. v Republic of Peru*, ICSID Award No ARB/10/2, Final Award (21 May 2013).

¹⁹⁰ Convenio entre el Gobierno de la República del Perú y el Gobierno de la República Argentina sobre Promoción y Protección Recíproca de Inversiones, signed 10 November 1994, entry into force 24 October 1996.

¹⁹¹ *Convial Callao S.A. v CCI – Compañía de Concesiones de Infraestructura S.A. v Republic of Peru*, ICSID Award No ARB/10/2, Final Award, 21 May 2013, para 681:

Por las razones ya expuestas, el Tribunal resuelve [...] Declarar sin fundamento todas y cada una de las alegadas violaciones al Tratado presentadas por las Demandantes contra la República del Perú y rechazar todas sus Demandas basadas en tales violaciones.

¹⁹² *Convial Callao S.A. v CCI – Compañía de Concesiones de Infraestructura S.A. v Republic of Peru*, ICSID Award No ARB/10/2, Final Award, 21 May 2013, para 681.

¹⁹³ *Exequatur* is the subjunctive third person singular of the Latin verb *exequi*, which means to execute. Cf Rita Hau, *PONS Wörterbuch Lateinisch – Deutsch* (2nd edn, Ernst Klett Verlag 1986, reprint 2000) 369. In *exequatur* proceedings, a court usually examines whether to grant leave for a foreign award or judgment to be enforced in the forum. *Exequatur* proceedings are not enforcement proceedings but determine the enforceability of the foreign award or judgment. See Paul Beaumont and Emma Johnston, 'Can *Exequatur* Be Abolished in Brussels I Whilst Retaining a Public Policy Defence?' (2010) 6(2) *Journal of Private International Law* 249-279, at 249 (defining *exequatur* as the declaration of enforceability).

¹⁹⁴ *CCI – Compañía de Concesiones de Infraestructura S.A. pedido de quiebra por República de Perú*, First Instance National Court in Commercial Matters, Judgment (23 April 2015).

¹⁹⁵ See also Leandro Javier Caputo and Ignacio J. Minorini Lima, 'First Argentine Court Judgment on the Recognition of an ICSID Award' (*Kluwer Arbitration Blog*, 15 March 2016) <<http://arbitrationblog.kluwerarbitration.com/2016/03/15/first-argentine-court-judgment-on-the-recognition-of-an-icsid-award/>> accessed 25 October 2018.

undergo an *exequatur* procedure but can instead be enforced as if they were final Argentine judgments. This finding was without prejudice to the power and duty of judges to examine whether the enforcement of awards is contrary to public policy – a power the Court of Appeals upheld obiter dictum.¹⁹⁶ The benefit of such an approach is that public policy would be upheld by the non-enforcement of awards that violate public policy.

That judges retain a residual power to review awards, irrespective of any agreements to the contrary,¹⁹⁷ is a special feature of Argentine law. Article 1656(3) of the Argentine Civil and Commercial Code¹⁹⁸ reflects this understanding. It declares that the parties to an arbitration agreement cannot waive the judicial challenge of a final award which is contrary to the legal system.¹⁹⁹ As public policy is defined as the most basic notions of morality and justice within a legal system, a violation of public policy amounts to a conflict with the legal system by definition. That being the case, Article 1656(3) of the Argentine Civil and Commercial Code grants courts the power to review an award's compatibility with public policy *ex officio*, irrespective of any agreement to the contrary, even if the agreement to the contrary has its source in an international treaty. That judges

¹⁹⁶ *CCI – Compañía de Concesiones de Infraestructura S.A. pedido de quiebra por República de Perú*, Chamber A of the Buenos Aires Commercial Court of Appeals, Judgment (18 August 2015) (“Ello, sin perjuicio de la facultad que tiene el juez de ejercer prudentemente sus atribuciones, efectuando incluso, un control de la posible afectación de principios de orden público.” [Author’s translation: “This is without prejudice to the ability of the judge to exercise his powers prudently, which includes the power to control possible effects on the principle of public policy.”]).

¹⁹⁷ On the reviewability of ICSID awards, see also *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 1 September 2006, para 46 (noting the opinion of Argentine officials, stated on several occasions, that “[a]ny adverse ICSID award would be subject to a Supreme Court review”).

¹⁹⁸ The Argentine Civil and Commercial Code (*Código Civil y Comercial de la Nación* – Law 26.994) entered into force on 1 August 2015 and is published in the Boletín Oficial de la República Argentina, Primera Sección: Legislación y Avisos Oficiales, Suplemento (Buenos Aires, Año CXXII, Numero 32.985) 1-87.

¹⁹⁹ Argentine Civil and Commercial Code, Art 1656(3): “[...] En el contrato de arbitraje no se puede renunciar a la impugnación judicial del laudo definitivo que fuera contrario al ordenamiento jurídico.” [Author’s translation: “The arbitration agreement cannot waive the judicial challenge of the final award that is contrary to the legal system.”].

retain a residual power to review arbitral awards is thus firmly established in Argentine legislation and jurisprudence.

Even so, it would have been better if the Argentine Commercial Court of Appeals had made the conformity of its finding with the ICSID Convention more explicit when reviewing the cost award in favour of Peru against the Argentinean *Compañía de Concesiones de Infraestructura*. Unfortunately, the Court did not root its finding that national courts may review arbitral awards in the text of the ICSID Convention as firmly as it could have. To pre-empt any critique, the Court should have emphasised that it would enforce the pecuniary obligations by the cost award against the Argentine investors as if it were a final judgment of an Argentine court (cf Article 54(1) of the ICSID Convention). Instead of defining which review is due final judgments and then applying that scope of review to ICSID awards, the court held that the fact that awards are to be enforced as if they were final judgments “is without prejudice to the ability of the judge to exercise his powers prudently which includes the power to control possible effects on the principle of public policy.”²⁰⁰ This obiter dictum either implies that national courts may review whether final judgments are compatible with public policy and that courts may refuse to enforce ICSID awards on the same ground. Or, alternatively, the obiter dictum implies that, irrespective of the review due final judgments, judges may review whether the enforcement of arbitral awards is compatible with public policy. Because of its compatibility with the ICSID Convention, the former interpretation is to be preferred.²⁰¹

The former interpretation also conforms with the view expressed by Argentina that

²⁰⁰ Translated by the author. For the original, see *CCI – Compañía de Concesiones de Infraestructura S.A. pedido de quiebra por República de Perú*, Chamber A of the Buenos Aires Commercial Court of Appeals, Judgment (18 August 2015) (“Ello, sin perjuicio de la facultad que tiene el juez de ejercer prudentemente sus atribuciones, efectuando incluso, un control de la posible afectación de principios de orden público.”).

²⁰¹ ICSID Convention, Art 54(1) Sentence 1: “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories *as if it were a final judgment of a court in that State.*” (Emphasis added).

respondent states in ICSID arbitrations may “subject compliance with ICSID awards to *the same or substantially the same* procedures that are applicable to compliance with final judgments of local courts against the State.”²⁰²

(ii) Conclusion

The Argentine case demonstrates the fine line between the availability of a public policy defence to the enforcement of arbitral awards under national law and the availability of a public policy defence to the enforcement of arbitral awards under national law that is compatible with the ICSID Convention. National law may allow courts to review *all* arbitral awards for their compatibility with public policy – as does Article 1656(3) of the Argentine Civil and Commercial Code – and this may rightfully inform a court’s understanding of its power to review arbitral awards under national law. Yet, if a court wishes to avoid a finding that the state in which the court is situated has failed to abide by and comply with the ICSID Convention, then the court must tread carefully. It does not suffice to rely on a residual power to review arbitral awards under national law. National courts must reason that they are treating ICSID awards as if they were final judgments, which brings with it the applicability of defences to enforcement otherwise applicable to the enforcement of final judgments. This is what the Argentine Commercial Court of Appeals may have meant. It would have been better, if it had made this more explicit.

²⁰² Letter from Argentina (Procuración del Tesoro de la Nación) to Ms Claudia Frutos-Peterson, Secretary of the Ad Hoc Committee (*Siemens*), 2 June 2008, 4-6 <<https://www.italaw.com/documents/Siemens-ArentinaArt.53-54.pdf>> accessed 10 February 2018 (adding “that subjecting ICSID awards to treatment less favourable than the one applicable to final judgments of local courts would be contrary to the ICSID Convention” and “that Contracting States did not intend to accord creditors of ICSID award a better treatment than the one accorded to other private creditors of final local decisions”).

D. Limits to the Enforcement of ICSID Awards in the United Kingdom

A court that has made the limits to the enforcement of ICSID awards explicit is the UK High Court. In *Micula v Romania*,²⁰³ the UK High Court stayed the enforcement of the arbitration award against Romania until, if at all, the General Court of the European Union (GCEU) annuls the Commission Decision of 30 March 2015 (Final Decision).²⁰⁴ By that Final Decision, the European Commission found that the payment of the compensation awarded by the tribunal in *Micula v Romania*²⁰⁵ would constitute state aid incompatible with the internal market within the meaning of Article 107(1) of TFEU.²⁰⁶ This Decision follows the Commission's assessment of the Romanian investment incentive scheme which, according to the Commission, amounted to state aid that was incompatible with the internal market.²⁰⁷ If the original Romanian investment incentive scheme constituted state aid that was incompatible with the internal market, any order to pay compensation on foot of its revocation was equally tainted in the view of the European Commission.²⁰⁸ This incompatibility of the scheme with EU law and the effect this incompatibility may have on the enforcement of the award did not matter to the tribunal in the arbitration proceedings against Romania.²⁰⁹ Since Romania had made a specific promise to the

²⁰³ *Viorel Micula, Ioan Micula, S.C. European Food S.A., S.C. Starmill S.R.L., S.C. Multipack S.R.L. v Romania (Micula v Romania)* [2017] EWHC 31 (Comm).

²⁰⁴ Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517.

²⁰⁵ *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013.

²⁰⁶ Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517, Art 1.

²⁰⁷ *ibid* paras 19 and 24.

²⁰⁸ *ibid* paras 25 (quoting its *amicus curiae* submission to the arbitral tribunal: “[a]ny ruling reinstating the privileges abolished by Romania or compensating the claimants for the loss of these privileges, would lead to the granting of new aid which would not be compatible with the EC Treaty”), 125 and 153. But see *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 338 (summarising the claimants’ position that an award of damages could not be equated with the granting of state aid, “since the payment of damages would result from the Tribunals’ determination that Romania breached the BIT”).

²⁰⁹ See *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 340:

The Tribunal finds that it is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters. It is thus inappropriate for the Tribunal to base its decisions in this case on matters of EU law that may come to apply after the Award has been rendered. It will thus not address the Parties’ and the Commission’s arguments on enforceability of the Award.

claimants that the investment incentive scheme would continue to exist for a ten-year period, the premature revocation of the scheme, even if realised in order to comply with EU law, amounted to a breach of Romania's obligation to provide foreign investments fair and equitable treatment under the applicable BIT²¹⁰ – so the arbitral tribunal.²¹¹

The difficulty before the UK High Court was whether or not to enforce the arbitration award against Romania. The Court held that it could not enforce the arbitral award as long as the European Commission's Final Decision prohibited Romania from paying the award.²¹² The Final Decision prohibited Romania from paying the award, because the European Commission found that the payment of compensation awarded by the tribunal would constitute new incompatible state aid.²¹³ In the view of the UK High Court, "the principle of sincere cooperation in Art. 4(3) TEU as interpreted both in European and in English case law precludes national courts from taking decisions which conflict with a decision of the Commission."²¹⁴ The Court therefore stayed the enforcement of the award until such time, if any, as the Final Decision was annulled. The claimants' proceedings in the GCEU seeking the annulment of the Commission's Final Decision are currently pending.²¹⁵ What is relevant in the context of the enforcement of ICSID awards is that the UK High Court opined that its decision to stay the enforcement of the ICSID award "does not create a conflict with the duties of the UK under the ICSID Convention, because

²¹⁰ The applicable BIT was the Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments, signed 29 May 2002 (entry into force 1 April 2003) [Sweden-Romania BIT].

²¹¹ *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 928 (noting that "all of the violations of the BIT alleged by the Claimants arise from the same fact: the premature revocation of the incentives or in direct connection with that premature revocation") and para 1329(b).

²¹² *Micula v Romania* [2017] EWHC 31 (Comm) para 203(3).

²¹³ Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517, Art 1.

²¹⁴ *Micula v Romania* [2017] EWHC 31 (Comm) para 203(3) (internal quotation marks omitted).

²¹⁵ *European Food and Others v Commission*, Action brought on 6 November 2015 (Case T-624/15); *Ioan Micula v Commission*, Action brought on 30 November 2015 (Case T-694/15); *Viorel Micula and Others v Commission*, Action brought on 28 November 2015 (Case T-704/15).

by registration under the Arbitration (International Investment Disputes) Act 1966 which implements the Convention, an ICSID award is equated to a final domestic judgment for enforcement purposes, and a purely domestic judgment would be subject to the same principle.”²¹⁶ The applicable principle is the principle of sincere cooperation in Article 4(3) of TEU which, according to the UK High Court, serves as an exception to the enforcement of final domestic judgments, should the European Commission deem their enforcement to be contrary to EU law.²¹⁷

In sum, the enforcement of ICSID awards is far from automatic in the United Kingdom. The enforcement of the award in *Micula v Romania* is currently pending until such time as the GCEU annuls the Commission’s Final Decision prohibiting Romania to satisfy the award. Should the GCEU decide not to annul the European Commission’s Final Decision, the UK High Court, rightly or wrongly, would deem the ICSID award in *Micula v Romania* unenforceable in the UK.²¹⁸

²¹⁶ *Micula v Romania* [2017] EWHC 31 (Comm) para 203(4).

²¹⁷ cf *Micula v Romania* [2017] EWHC 31 (Comm) para 69 (quoting *Air Canada v Emerald Supplies* [2015] EWCA Civ 1024 at [70]):

The general principle of legal certainty, which underpins the duty of sincere cooperation, requires [all authorities of the] Member States to avoid making decisions that could conflict with a decision contemplated by the Commission.

²¹⁸ The *Achmea* decision may lead to the unenforceability of (some) investment arbitration awards in the EU in general. In *Achmea*, the ECJ held that investor-state arbitration under intra-EU investment treaties is incompatible with EU law. It remains to be seen whether courts will refuse to enforce awards in light of that perceived incompatibility. For the operative part of the ruling, see Case C-284/16 *Slowakische Republik (Slovak Republic) v Achmea BV* [2018] para 62:

Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

E. General Limits to the Enforcement of ICSID Awards

The examples of the fate of ICSID awards in the United States, Argentina and the United Kingdom aside, there is a case to be made for the existence of a universal exception to the enforcement of ICSID awards derived from the near-universal principle of open justice itself. Public policy sceptics may find this proposed universal exception preferable in light of its limited application. The proposed exception is based on the hypothesis that the non-violation of the principle of open justice is a requirement for the enforcement of final judgments. It allows domestic courts to refuse to enforce a final judgment within the same jurisdiction on the grounds that the judgment is the result of a process that violated the principle of open justice.

Indicative for the existence of such an exception in member states of the ECHR is the fact that an action for a retrial of a case may be brought where the ECtHR has established that the ECHR has been violated and where the judgment is based on that violation.²¹⁹ Where a final judgment is the result of proceedings that violated the principle of open justice protected by Article 6 of the ECHR, a court in a member state of the ECHR is estopped from enforcing that judgment, as to do so would violate its obligations under the ECHR. A general open justice exception to the enforcement of final judgments need not depend on an additional layer of protection as the ECHR provides. It could equally be located in constitutional provisions guaranteeing open justice. Suppose that the principle of open justice enjoys constitutional protection within jurisdiction X. Suppose further that a group of first instance and appellate judges conduct all court proceedings in private, in violation of the constitutional principle of open justice. The Supreme Court in jurisdiction X

²¹⁹ See, for example, German Code of Civil Procedure, Section 580(8) [English translation]:

An action for a retrial of a case may be brought where the European Court of Human Rights has established that the European Convention for the Protection of Human Rights and Fundamental Freedoms or its protocols have been violated, and where the judgment is based on this violation.

regularly finds that these private court proceedings are unconstitutional. Yet, the judges who conduct them do not alter their practice; an exchange of personnel does not eradicate the practice either. It is in this scenario that the principle of open justice is under threat. In this scenario, it is imaginable that judges, other than those involved in the initial court proceedings,²²⁰ if called upon to enforce the final judgments, refuse to enforce the final judgments so reached in order to protect the constitutional principle of open justice.

Should the non-violation of the principle of open justice be an implicit requirement for the enforcement of domestic judgments, it would equally apply to ICSID awards *qua* Article 54(1) of the ICSID Convention which requires awards to be treated as if they were final judgments of the enforcing state or of a constituent state of the enforcing state. In investment arbitration, the violation of the principle of open justice is general practice.²²¹ It is general practice because it follows from the application of treaty norms and the arbitration rules they reference. Under most investment treaties and arbitration rules they reference, arbitral hearings cannot be opened to the public without the consent of both disputing parties. Usually, that consent is not given. The principle of open justice is thus usually not adhered to in investment arbitration, a system in which arbitrators are making law. It follows that national courts could refuse to enforce those awards that perpetuate the violation of the principle of open justice – in application of the suggested universal exception to the enforcement of final judgments. This exception, if implicit in the

²²⁰ It is imaginable that judges other than the judges who initially heard the case will be called upon to enforce the final judgment. It is even imaginable that courts other than the courts who initially heard the case will be called upon to enforce the final judgment. The judgment debtor may have changed address, for example (*OLG München*, Decision of 23 June 2010 (31 AR 34/10) para 5). On the jurisdiction of the execution court in Germany, see Code 828(2) of the German Code of Civil Procedure: [English translation:]

The execution court shall be that local court (Amtsgericht) with which the debtor has his general venue in Germany, and in all other cases the local court with which an action may be filed against the debtor pursuant to section 23.

²²¹ In investor-state arbitration, hearings are usually held in private. For ICSID arbitration, see Christoph H. Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICISD Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 699.

constitutional principle of open justice, exists in those jurisdictions in which the principle enjoys constitutional protection, which is in most jurisdictions of the world.

F. Conclusion

Irrespective of the label given to a specific exception to enforcement, national courts could refuse to enforce awards, if the proceedings they are based on violated the principle of open justice. The principle of open justice is a component of public policy. If public policy is an explicit exception to the enforcement of arbitral awards, national courts have a comparatively uncontroversial avenue for protecting the principle of open justice. Public policy protects the fundamental notions of morality and justice. That law-making fora must be presumptively open to the public is such a fundamental notion of morality and justice. It would be against public policy or “clearly injurious to the public good”²²² if courts were to enforce judgments that are based on hearings in which law is made in secret. In a legal system that deems itself to be founded upon self-rule, members must be able to know the law and how it is developed by judges. By the same token, in the system of investor-state arbitration, members must be able to know the law and how it is developed by arbitrators. Irrespective of the scale of a system, self-rule brings with it that the process of law-making must be transparent. By refusing to enforce awards based on hearings in which law is made in secret, courts could uphold public policy in the form of the general principle of open justice.

The public policy defence is inbuilt in Article V(2)(b) of the New York Convention which grants courts the power to refuse recognition or enforcement of awards if either would be contrary to the public policy of the forum in which recognition or enforcement is sought.

²²² *Deutsche Schachtbau- und Tiefbohrergesellschaft GmbH v Ras Al Khaimah Nat'l Oil Co.* [1987] 2 All ER 769, at 779, [1987] 3 WLR 1023, at 1035 (Ct App 1987).

The ICSID Convention does not contain such a public policy exception. Yet, Article 54(1) of the ICSID Convention allows courts to treat awards as if they were final judgments of a court in the forum state or as if they were final judgments of the courts of a constituent state of the forum state. This opens the door to the applicability of defences otherwise applicable to the enforcement of final judgments. These defences may include defences such as the limited public policy exception to the enforcement of final sister-state judgments in the United States. Such an exception, however, may not be found in states without a federal structure, and even if it exists in states with a federal structure, it may not be accepted as a proper review mechanism for ICSID awards. In a view perhaps first held by Aron Broches,²²³ courts may not review ICSID awards on the ground of public policy, even if a public policy exception existed in relation to the enforcement of domestic judgments. That is so, according to this view, because an explicit public policy exception was considered but ultimately not included in the ICSID Convention. The non-inclusion of an explicit public policy exception in the text of the Convention supposedly amounts to a preclusion of public policy exceptions otherwise applicable to the enforcement of final judgments. Even if that was correct, and arguments were presented why it might be wrong, the protection of the principle of open justice does neither depend on the existence nor on the applicability of a public policy defence to the enforcement of final judgments. National courts could choose to rely on the constitutional principle of open justice instead when refusing to enforce ICSID awards. National courts are in a unique position to protect the principle of open justice which finds constitutional protection in almost all states. Since it is the courts' duty to protect the constitutional order of which they form part, national courts can refuse to enforce those final judgments that are based on proceedings

²²³ cf Aron Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' (1987) 2 *ICSID Review – Foreign Investment Law Journal* 287-334, at 316-317.

that, in violation the principle of open justice, were wrongly closed to the public. It is this residual judicial power to uphold the principle of open justice that national courts may rely on when reviewing ICSID awards. If arbitral hearings were wrongfully closed to the public, then courts may refuse to enforce those awards that result from these proceedings. By refusing to enforce such awards, courts would uphold the principle of open justice and might trigger the openness of investor-state arbitration.

IV. The Role of Arbitrators in Implementing a Right of Public Access

If courts refused to enforce awards unless the arbitral hearings from which these awards result comply with the principle of open justice, or even if courts merely contemplated this possibility, this could motivate disputing parties and arbitrators to open hearings to the public – to pre-empt the possible non-enforcement of awards. This section examines the role of arbitrators in implementing a right of public access to arbitral hearings. It examines whether the possible non-enforcement of awards triggers more than a mere motivation to open hearings to the public on the part of arbitrators and whether arbitrators, in their efforts to render enforceable awards, are authorised to open hearings to the public – also against the wishes of the disputing parties. More precisely, this section examines whether arbitrators are authorised to open arbitral hearings to the public, or whether it is merely their duty to inform the disputing parties about the potential ramifications of confidential hearings.

A. The Course of the Argument

Arbitrators derive their power from the disputing parties²²⁴ which makes the implementation of any changes against the wishes of the disputing parties difficult, if not

²²⁴ Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 306:

impossible. Rather than accepting this truism at face value, this section analyses whether there is any residual loophole that might authorise arbitrators to open hearings to the public against the wishes of the disputing parties. Such a loophole may be found in Article 44 of the ICSID Convention the second sentence of which authorises arbitrators to decide all questions of procedure that are not covered by the ICSID Convention or the ICSID Arbitration Rules or any rules agreed by the parties. This means that *if* the question whether arbitral hearings are to be open or closed to the public is neither covered by Section 3 of the ICSID Convention, the ICSID Arbitration Rules nor any rules agreed by the disputing parties, arbitrators are authorised to decide that question and to open arbitral hearings to the public. This may be equally true for arbitrations under other arbitration rules. The first sub-section thus examines whether investment treaties and arbitration rules regulate the openness of *arbitral* hearings which they do. Most investment treaties and most arbitration rules require the consent of both disputing parties if hearings are to be open to the public. It would seem, therefore, that no loophole exists that could authorise arbitrators to open hearings to the public against the wishes of the disputing parties.

Yet, the provisions authorising each disputing party to preclude the openness of arbitral hearings could be invalid under international law which is the topic of the second sub-section. If such provisions were invalid, this would allow arbitrators to open hearings to the public, in compliance with the principle of open justice. Invalid provisions do not validly regulate a specific issue, a consequence of which is that arbitrators can fill the lacuna with their own interpretation of the applicable law which is international law. The provisions authorising each disputing party to preclude the openness of hearings are not

The powers of an arbitral tribunal are those conferred upon it by the parties within the limits allowed by the applicable law, together with any additional powers that may be conferred automatically by operation of law. (Internal reference omitted).

invalid under international law, however. This brings us to the third sub-section which examines whether the principle of open justice is an implied term in investment treaties. This third sub-section argues that what investment treaties and the arbitration rules they reference explicitly regulate is the openness of *arbitration*, a dispute resolution mechanism defined by its lack of law-making. What neither investment treaties nor arbitration rules explicitly regulate is the openness of investment treaty arbitration as it has become, i.e., a system in which arbitrators act as law-makers (ARB-NEW).

The lack of an explicit regulation must not mean, however, that no regulation exists. The principle of open justice could be an implicit term in investment treaties that requires arbitrators to conduct arbitral hearings presumptively open to the public. The principle of open justice, as it derives from its near-universal protection in the constitutions of the world is a “general principle of law recognised by civilised nations”²²⁵ and therefore a principle of international law. Since state compliance with international law is to be assumed, it could be argued that the general principle of open justice is an implied term in all international agreements that lead to judicial or arbitral law-making for the participants of a system as a whole. It could be argued that if states wanted to derogate from the principle of open justice, they would have to make that explicit in their treaties. Since investment treaties do not specify that rules regulating *arbitration* also apply to ARB-NEW, even in violation of the principle of open justice, it could be argued that the rules regulating arbitration do not apply to ARB-NEW. Instead, it is the implied principle of open justice that governs whether ARB-NEW hearings are open to the public. While this third approach has aesthetic benefits due to its inherent logic, its greatest weakness lies in its stark contrast to the explicit arbitration rules as agreed upon by the disputing

²²⁵ ICJ Statute, Art 38(1)(c).

parties. It would be difficult to persuade disputing parties that the explicit arbitration rules they agreed upon are not applicable to ARB-NEW hearings. If disputing parties insisted that the explicit arbitration rules they agreed upon *are* applicable²²⁶ and if the arbitrators clearly disregarded the wishes of a disputing party or both disputing parties by opening arbitral hearings to the public, the arbitrators would have to resign.²²⁷ It is not within the power of arbitrators who have resigned to open arbitral hearings to the public.

This leaves the duties of arbitrators as a last resort for the implementation of a right of public access to investor-state arbitration. Since enforceable awards are the *raison d'être* for the arbitration process and their rendition is the utmost duty of arbitrators, arbitrators must at least inform disputing parties that awards based on secret hearings may not be enforced. It is this best-efforts duty that requires arbitrators to inform disputing parties that it is in their – the disputing parties' – own best interest if hearings were presumptively open to the public. Yet, the best-efforts duty to render enforceable awards does not authorise arbitrators to open hearings to the public against the wishes of a disputing party. This section demonstrates that, if that authorisation exists at all, it derives from the principle of open justice. This section proceeds in four parts. It covers the existing terms

²²⁶ The disputing parties could argue, for example, that arbitrators are not making law. Alternatively, disputing parties could argue that, even if arbitrators are making law, those explicit provisions that grant the disputing parties the power to close hearings to the public are still applicable, their violation of the general principle of open justice notwithstanding. The disputing parties could argue that states foresaw that arbitrators would be making law and that they concluded investment agreements in clear and wanton disregard of the general principle of open justice. The latter may be difficult to prove but even if proven might haunt the disputing parties later, at the enforcement stage, when national courts examine whether the arbitral procedure conformed with national public policy, which it did not, if it violated the general principle of open justice.

²²⁷ cf Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 320:

[I]n a dispute arising out of a construction project in a warzone, the parties may decide in the course of the arbitration that they wish the arbitral tribunal to inspect the construction site. The proposal for such a site inspection would usually be discussed with, and agreed by, the arbitral tribunal – but if a particular arbitrator were unwilling to accept the proposal and the parties were to insist upon it, that arbitrator would have to resign.

of international investment agreements, the non-invalidity of treaty norms, open justice as an implied term in investment agreements and arbitral duties.

B. The Provisions of International Investment Agreements

According to the orthodox view, it is the provisions of investment agreements and the provisions of applicable arbitration rules – and those provisions only – that determine whether arbitral hearings are presumptively open to the public and whose decision it is to open or close them. That is not to say that investor-state arbitration is not based on consent and that states dictate arbitration rules to claimant investors. On the contrary, when accepting a state's offer to arbitrate which is typically contained in investment treaties, investors opt for a specific set of arbitration rules of which there usually is a choice under investment agreements. Article 9(3) of the US-Bahrain BIT 1999²²⁸ is a typical example of such a provision that allows claimant investors to choose between differing listed arbitration rules.²²⁹ Article 9(3)(4) of the US-Bahrain BIT 1999, alternatively, allows the disputing parties to agree on the application of any non-listed arbitration rules. As the study of investment treaties and arbitration rules in chapter 1 has shown, a presumption of secrecy prevails in investor-state arbitration. Under most investment treaties and most arbitration rules, arbitral hearings are presumptively closed to the public. What is more, most of these instruments grant each disputing party the power to preclude the openness

²²⁸ US-Bahrain BIT of 29 September 1999 (entered into force on 30 May 2001).

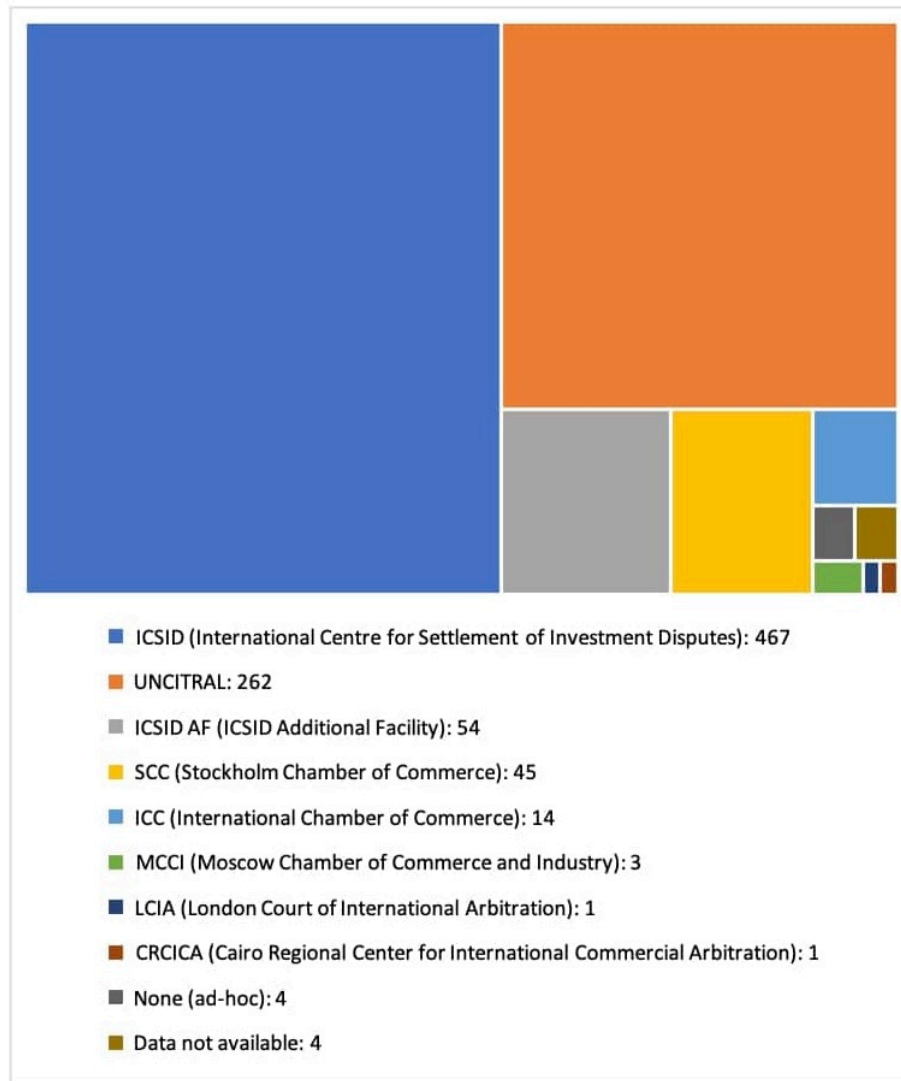
²²⁹ US-Bahrain BIT 1999, Art 9(3):

Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) [to courts or administrative tribunals of the respondent state] or (b) [in accordance with any applicable, previously agreed dispute settlement procedure], and that ninety days have elapsed from the date on which the dispute arose, the national or company concerned may submit the dispute for settlement by binding arbitration:

- (1) to the [International Centre for Settlement of Investment Disputes Established by the ICSID Convention (Centre)], if the Centre is available; or
- (2) to the Additional Facility of the Centre, if the Centre is not available; or
- (3) in accordance with the UNCITRAL Arbitration Rules; or
- (4) if agreed by both parties to the dispute, to any other arbitration institution or in accordance with any other arbitration rules.

of arbitral hearings. Before this section summarises the status quo, figure 21 gives an overview over the usage of all arbitration rules in known investor-state arbitrations.

Figure 21: Applicable Arbitration Rules in Known Investor-State Arbitrations²³⁰



The ICSID Arbitration Rules, the UNCITRAL Arbitration Rules and the ICSID Arbitration (Additional Facility) Rules are the three sets of rules most often chosen by the parties; together, they were chosen in 750 out of 817 known investor-state arbitrations. Under all rules, with the exception of the UNCITRAL Rules on Transparency, hearings

²³⁰ The numbers are up to date as of 19 August 2018. They have been sourced from UNCTAD, *Investment Dispute Settlement Navigator* <<http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution>> accessed 19 August 2018.

are presumptively closed to the public and cannot be opened against the wishes of either disputing party. Rule 32(2) of the ICSID Arbitration Rules provides, for example, that it is the prerogative of arbitral tribunals to allow third parties to attend or observe all or part of the hearings but not if either disputing party objects.²³¹ Similarly, Article 28(3)(1) of the UNCITRAL Arbitration Rules²³² provides that hearings shall be held *in camera* unless the parties agree otherwise. In theory, the UNCITRAL Arbitration Rules contain a higher threshold for the openness of arbitral hearings; they require a consensus between the parties. The ICSID Arbitration Rules, on the other hand, authorise tribunals to open hearings to the public – also in the absence of such a consensus but not if either party objects. The ICSID framework is an anomaly in this regard; all other arbitration rules require an agreement of the parties or at least party approval for hearings to be open to the public.²³³ In practice, the difference in the wording is immaterial and arbitral hearings are not open to the public without the consent of both disputing parties; a presumption of secrecy prevails. Under most investment treaties and arbitration rules they reference, arbitral hearings are presumptively closed to the public and cannot be opened to the public without the consent of both parties.²³⁴ It is a result of this presumption of secrecy and the requirement of party approval that tribunals do not open hearings to the public without

²³¹ See also ICSID Arbitration (Additional Facility) Rules, Art 39(2)(1):

Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements.

²³² The UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013).

²³³ See also SCC Rules 2017, Art 32(3) (“Unless otherwise agreed by the parties, hearings will be held in private.”); ICC Rules 2017, Art 26(3)(2) (“Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted.”); LCIA Rules 2014, Art 19.4 (“All hearings shall be held in private, unless the parties agree otherwise in writing.”); MARC Rules 2012, Art 44(4)(1) (“Unless the parties have agreed otherwise, the arbitral tribunal shall resolve a dispute in closed session.”); CRCICA Rules 2011, Art 28(3)(1) (“Hearings shall be held in camera unless the parties agree otherwise.”).

²³⁴ But see the UNCITRAL Rules on Transparency and the Mauritius Convention. Both instruments are examples for the efforts to introduce a presumption of openness to investor-state arbitration and to rid the disputing parties of their power to have the final say over whether to open arbitral hearings to the public.

the consent of both parties. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v The Argentine Republic*²³⁵ is an illustrative example in this context. The case illustrates the limits of arbitrators if they adhere to the rules agreed upon by the disputing parties that grant each disputing party the power to preclude the openness of hearings. The case is also a suitable example for the rationale for open justice other than arbitral law-making. *Suez v The Argentine Republic* is a case on water distribution and waste water treatment services that had a direct effect on the general public.

Suez v The Argentine Republic is one of the many investment arbitrations against Argentina.²³⁶ Like many other investment arbitrations against Argentina,²³⁷ the dispute arose out of the 2001 Argentine economic and political crisis. To cope with the crisis, the Argentine government undertook a series of emergency measures, including the uncoupling of the Argentine peso from the US dollar.²³⁸ By ending the fixed exchange rate of one US dollar to one Argentine peso and by subsequently allowing a free-floating exchange rate, the Argentine government contributed to the devaluation of the Argentine peso to a third of its previous value. This posed a problem for Aguas Argentinas, a company formed by a consortium of foreign investors for operating a concession for water distribution and waste water treatment services in the city of Buenos Aires and

²³⁵ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic* (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v The Argentine Republic*), ICSID Case No ARB/03/19, Award, 9 April 2015.

²³⁶ For a list of all known investor-state arbitrations against Argentina as a respondent state, see UNCTAD, *Investment Dispute Settlement Navigator* <<http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>> accessed 25 October 2018.

²³⁷ According to José E. Alvarez and Kathryn Khamsi, claimant investors filed over forty investment treaty claims in the wake of the 2001 Argentine crisis. See José E. Alvarez and Kathryn Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime' in Karl P. Sauvant (ed), *The Yearbook on International Investment Law and Policy 2008/2009* (Oxford University Press 2009) 379-478, at 379 ("Actions taken by the Argentine government in response to its 2001 economic and political crisis have resulted in the greatest wave of claims by foreign investors against a single host country in recent history.").

²³⁸ *Suez v The Argentine Republic*, ICSID Case No ARB/03/19, Award, 9 April 2015, para 3.

some surrounding municipalities. The concession contract between Aguas Argentinas and the Argentine government and the applicable regulatory framework specified that the claimants were to invest in the water distribution and waste water system.²³⁹ In return and by way of compensation, the claimant investors were to receive the fees and tariffs paid by consumers to Aguas Argentinas.²⁴⁰ The fees and tariffs were payable in Argentine peso.

As the Argentine peso depreciated and the Argentine government refused to increase the allowable tariffs and fees to be charged by Aguas Argentinas in accordance with the legal framework and the concession contract,²⁴¹ the company failed under the pressure to hold up its end of the bargain. Aguas Argentinas was neither able to continue to make the investments it was obliged to make under the concession contract, nor was it able to continue to service its debts – due in USD – to three multilateral lending institutions.²⁴² The Argentine government subsequently imposed fines for Aguas Argentinas’ non-compliance with the concession contract and sought to force its renegotiation. In turn, the investors initiated arbitral proceedings against Argentina under three different investment treaties, a dispute which was ultimately decided in favour of the claimants; the tribunal held that Argentina had breached its obligation of fair and equitable treatment.²⁴³ Before the arbitral proceedings had come to an end, five non-governmental organisations filed a Petition for Transparency and Participation as Amicus Curiae with ICSID, requesting:

- to allow Petitioners access to the hearings;

²³⁹ *Suez v The Argentine Republic*, ICSID Case No ARB/03/19, Award, 9 April 2015, para 2.

²⁴⁰ *ibid.*

²⁴¹ The concession contract, in its Article 11.11.5, provided for possible extraordinary revisions of tariffs in case of specified events, one of them being “legal changes in the currency parity fixed by the Convertibility Law” which pegged the Argentine peso to the US dollar. See *Suez v Argentina Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, para 110.

²⁴² *Suez v The Argentina Republic*, ICSID Case No ARB/03/19, Award, 9 April 2015, para 3.

²⁴³ *Suez v The Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010.

- to allow Petitioners opportunity to present legal arguments as *amicus curiae*;
and
- to allow Petitioners timely, sufficient, and unrestricted access to all the documents in the case.²⁴⁴

The Petitioners argued that the case involved matters of public interest and fundamental rights. The tribunal agreed, finding that international legal responsibility of the Argentine Republic was a matter of public interest.²⁴⁵ In addition, the Tribunal deemed the topic of the dispute – a dispute around water distribution and waste water treatment services in the metropolitan area of Buenos Aires – to be of *particular public interest*.²⁴⁶ It found that “[t]hose systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations.”²⁴⁷ Even so, the Tribunal only allowed the Petitioners to present legal arguments as *amicus curiae*²⁴⁸ in writing²⁴⁹ and rejected their remaining requests. The dispute, even if it did touch upon the human right to water, was still to be governed by the procedural rules agreed upon by the disputing parties, i.e., the ICSID Arbitration Rules 2003. The Tribunal applied these rules, noting that hearings were not to be public against the wishes of the disputing parties. Applying Rule 32(2) of the ICSID Arbitration

²⁴⁴ *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v The Argentine Republic* (hereafter *Aguas Argentinas*), ICSID Case No ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005, para 1.

²⁴⁵ *ibid* para 19.

²⁴⁶ *ibid*.

²⁴⁷ *ibid*.

²⁴⁸ *ibid* para 23 (deeming the case “an appropriate one in which suitable non-parties may usefully make *amicus curiae* submissions” subject to the receipt of leave to submit such a brief); *Suez v Argentine Republic*, ICSID Case No ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an *Amicus Curiae* Submission, 12 February 2007 (granting permission).

²⁴⁹ The Petitioners may also have requested to make oral presentations to the tribunal. If so, that request was denied. See *Aguas Argentinas v The Argentine Republic*, ICSID Case No ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005, paras 4-7.

Rules 2003,²⁵⁰ the Tribunal held that the parties must “affirmatively agree”²⁵¹ if arbitral hearings are to be opened to persons other than the parties, their agents, counsel and advocates and witnesses and experts during their testimony.²⁵² As the claimants had expressed their dissent to the attendance by the Petitioners at the hearings,²⁵³ the Tribunal did not grant the Petitioners access to the same.²⁵⁴ What is more, the Tribunal considered itself bound by the arbitration rules agreed upon by the disputing parties. Petitioners had argued that the Tribunal had an inherent power with respect to arbitral procedure.²⁵⁵ Yet, the Tribunal was of the view that “it has no authority to exercise such power in opposition to a clear directive in the Arbitration Rules [agreed upon by the disputing parties].”²⁵⁶ The Tribunal hence stayed within the limits of the ICSID framework.

Article 44 of the ICSID Convention provides that tribunals have a residual power to decide questions of procedure, i.e., tribunals may decide a question of procedure, if the question that arises is not covered by Section 3 of the ICSID Convention, the ICSID

²⁵⁰ ICSID Arbitration Rules 2003, Art 32(2):

The tribunal shall decide, *with the consent of the parties*, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings. (Emphasis added).

²⁵¹ *Suez v The Argentine Republic*, ICSID Case No ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005, para 6.

²⁵² See also *Aguas del Tunari v Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, para 17 (quoting the Tribunal’s response to a non-governmental organisation who had requested that the Tribunal open all arbitral hearings to the public, among other things:

The Tribunal’s unanimous opinion [is] that your core requests are beyond the power or the authority of the Tribunal to grant. The interplay of the two treaties involved [the ICSID Convention and the 1992 Netherlands-Bolivia BIT] and the consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal. In particular, it is manifestly clear to the Tribunal that it does not, absent agreement of the Parties, have the power to join a non-party to the proceedings; to provide access to hearings to non-parties and, *fortiori*, to the public generally; or to make the documents of the proceedings public.).

²⁵³ *Suez v The Argentine Republic*, ICSID Case No ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (19 May 2005) para 6 (noting that “[t]he crucial element of consent by both parties to the dispute is absent in this case”).

²⁵⁴ *ibid* para 7.

²⁵⁵ *ibid* para 6.

²⁵⁶ *ibid*.

Arbitration Rules or any rules agreed by the disputing parties.²⁵⁷ This means, *a contrario*, that tribunals do not have the power to decide questions of procedure, if the question that arises is covered by Section 3 of the ICSID Convention, the ICSID Arbitration Rules or any rules agreed by the parties. Article 44 of the ICSID Convention reflects the general principle of party autonomy which is rooted in the freedom of contract. The parties in investor-state arbitration are generally free to agree on any arbitration rules, subject only to contrary stipulations in investment treaties. In *Suez v The Argentine Republic*, the parties had agreed on the applicability of the ICSID framework which subjects the tribunal's decision on the openness of arbitral hearings to the parties' consent. Applying the ICSID framework with its emphasis on party autonomy in procedural matters, the Tribunal deemed itself bound by the claimants' objection to the openness of arbitral hearings. Yet, as party autonomy is not without its limits, the Tribunal did the Petitioners a disservice by not at least questioning whether Rule 32(2) of the ICSID Arbitration Rules 2003 was compatible with international law. If there was a peremptory norm that mandated investor-state arbitration to be presumptively open to the public subject only to a closure order by an arbitral tribunal or a court, disputing parties would not be able to derogate from this norm by agreement.²⁵⁸ If disputing parties did derogate from such a norm, their agreement would be invalid with respect to the derogation from the norm. That it is states that, in their investment treaties, authorise parties to choose arbitration

²⁵⁷ See also ICSID Arbitration (Additional Facility) Rules, Art 35 ("If any question of procedure arises which is not covered by these Rules or any rules agreed by the parties, the Tribunal shall decide the question."); ICC Rules 2017, Art 19 ("The proceedings before the arbitral tribunal shall be governed by these Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."); SCC Rules 2017, Art 23(1) ("The Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, subject to these Rules and any agreement between the parties."); MARC Rules 2012, Art 25(2) ("In respect of the issues not agreed upon by the parties and not governed by these Rules and federal laws, the rules of arbitral proceedings shall be established by the arbitral tribunal and prior to formation of the arbitral tribunal – by the Presidium of the Arbitration.").

²⁵⁸ cf Art 3(3) of the Rome Convention on the Law Applicable to Contractual Obligations of 1980 (defining mandatory rules as those that "cannot be derogated from by contract").

rules that enable each party to preclude the openness of hearings, would not change this result. Peremptory norms as to the presumptive openness of investor-state arbitration, should they exist, would equally limit the states' ability to derogate from those rules.

Peremptory norms and their ambit will be explored in the next section. This section presented the orthodox view of procedural transparency in investor-state arbitration; namely, that it is the terms of investment treaties and the terms of applicable arbitration rules that determine whether arbitral hearings are presumptively open to the public and whose decision it is to open or close them. *Suez v The Argentine Republic* served as an illustration of a tribunal's limits if it deems itself bound by the arbitration rules agreed upon by the disputing parties.

C. The Non-Invalidation of Treaty Norms

This section explores peremptory norms and their ambit; namely, whether there is a peremptory norm that mandates arbitral hearings to be presumptively open to the public and, if so, whether that norm grants arbitral tribunals, not disputing parties, the authority to close arbitral hearings to the public. If such a norm existed, neither disputing parties nor states could derogate from that norm by agreement. This section examines the consequences of a peremptory norm in more detail, before examining its existence.

According to Article 53 of the Vienna Convention on the Law of Treaties (VCLT), “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.” If then, hypothetically, there was a peremptory norm of general international law (*ius cogens*)²⁵⁹ that mandated investor-state arbitration to be presumptively open to

²⁵⁹ James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 594 (defining peremptory norms as “overriding norms of international law”).

the public, states could not derogate from that norm by including contrary provisions in their investment treaties with other states. Norms that are contrary to a peremptory norm are invalid *per se*.²⁶⁰ The disputing parties could not derogate from a peremptory norm either. The point of a peremptory norm is that no derogation from it is permitted. Before examining whether states derogate from a peremptory norm, this section sets out what it is that states agree upon in their investment treaties regarding public access to hearings.

Most investment treaties allow the investor to choose from among a list of arbitration rules or, alternatively, to choose from among any other arbitration rules upon agreement with the respondent state. Most arbitration rules contain a presumption of secrecy which means that hearings are presumptively closed to the public. In addition, most arbitration rules link the openness of hearings either to the consent of the disputing parties or their lack of dissent. If, then, there was a peremptory norm that mandated investor-state arbitration to be presumptively open to the public and that granted tribunals, not disputing parties, the authority to close arbitral hearings to the public (peremptory norm X), contrary provisions in investment treaties and in treaty-based arbitration agreements would be invalid. In other words, by allowing disputing parties to consent to arbitration rules that contain a presumption of secrecy, states would be violating peremptory norm X. By allowing the disputing parties to consent to arbitration rules that link the openness of hearings to the consent of the disputing parties or their lack of dissent, states would be overstepping the limits of peremptory norm X also.

²⁶⁰ See Vienna Convention on the Law of Treaties, Arts 69 and 71. On the difference between relative and absolute invalidity of treaties, see James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 387 (defining relative invalidity as “a treaty [being] voidable if a party establishes certain grounds” and absolute invalidity as a “treaty [being] void *per se*”).

The consequence of a state thus acting *ultra vires* is that norms that are contrary to peremptory norm X are invalid. If peremptory norm X existed, Rule 32(2) of the ICSID Arbitration Rules – and the provisions in investment treaties allowing parties to opt for the ICSID Arbitration Rules – would be invalid to the extent that Rule 32(2) grants each disputing party the power to preclude the openness of arbitral hearings. If Rule 32(2) and such similar arbitration rules were invalid, tribunals would not be bound by the disputing parties’ choice as to the openness of hearings. If a norm empowering the disputing parties was invalid, tribunals would be free to replace the parties’ determinations as to the openness of hearings with their own determinations. When applying peremptory norm X, tribunals could, where appropriate, open hearings to the public – also against the wishes of either disputing party²⁶¹ and contrary to contrary provisions in investment treaties.

Peremptory norms override any agreements to the contrary, whether the agreement is contained in investment treaties or in treaty-based arbitration agreements, unless the agreement to the contrary amounts to “a subsequent [peremptory] norm of general international law.”²⁶² If, for example, there was a peremptory norm of general international law that required trials to be presumptively open to the public and that granted courts the power to decide on the closure of hearings, then a subsequent norm to the contrary but having the same character would modify the first peremptory norm. Before pondering whether states, by concluding investment treaties, modified peremptory norm X, the existence or non-existence of this peremptory norm must be established. If peremptory norm X exists, states either derogated from that norm by concluding

²⁶¹ On the limits to party autonomy in commercial arbitration, see Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009) 205 (noting the parties’ freedom to imprint their idea as to the applicable law and the applicable rules on the international commercial arbitration agreement and the “limits to that freedom”); Andrew Barraclough and Jeff Waincymer, ‘Mandatory Rules of Law in International Commercial Arbitration’ (2005) 6 *Melbourne Journal of International Law* 205-244.

²⁶² Vienna Convention on the Law of Treaties, Art 53.

investment treaties that contain norms to the contrary – or, alternatively, states modified that norm by concluding investment treaties that contain norms to the contrary. The difference matters because a norm is not violated, if it is modified. If there is no violation of a peremptory norm, treaty norms and arbitration rules are not invalidated. If treaty norms and arbitration norms are not invalidated, tribunals cannot replace the wishes of the disputing parties as to the openness of hearings based on the invalidation of a norm empowering the disputing parties to conduct hearings *in camera*.

Several elements are now engaged, foremost whether there is a norm that mandates arbitral hearings to be presumptively open to the public and that grants arbitrators the authority to close hearings to the public. There is no general principle of open *arbitration* but there is a general principle of open *justice* that applies to investor-state arbitration to the extent that arbitrators are making law. If the general principle of open justice translates to *ius cogens*, that *ius cogens* is a peremptory norm X. A norm is peremptory, if “the international community of States as a whole [accepts and recognises a norm] as a norm from which no derogation is permitted.”²⁶³ This is true for norms prohibiting aggression, genocide and crimes against humanity, including slavery and the slave trade, torture and racial discrimination. The right to the self-determination of peoples is equally deemed to be a peremptory norm of general international law.²⁶⁴

²⁶³ Vienna Convention on the Law of Treaties, Art 53.

²⁶⁴ James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 595-596 (with further references). International Law Commission, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, A/CN.4/L.702 (18 July 2006), para 33:

The content of jus cogens: The most frequently cited examples of *ius cogens* norms are the prohibition of aggression, slavery and slave trade, genocide, racial discrimination apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination. Also other rules may have a *ius cogens* character inasmuch as they are accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted. (Internal quotation mark omitted).

Even though open justice is a general principle of international law, there is no evidence to suggest that the international community of states as a whole accepts and recognises that no derogation from the principle of open justice is permitted. It is rather the case that the international community of states as a whole accepts and recognises that derogation from the principle of open justice *is* permitted, albeit only in exceptional circumstances. The general principle of open justice does not require court proceedings to be open to the public under all circumstances. On the contrary, the general principle of open justice only requires court proceedings to be presumptively open to the public. Yet, the presumption of openness generally is a strong²⁶⁵ one: court proceedings may be closed to the public only in exceptional circumstances and the decision to close proceeding lies with the court. If the international community of states as a whole accepted and recognised the principle of open justice as a peremptory norm, derogation from that norm would not be permitted. Several constitutions, however, list several exceptions to the principle of open justice. These exceptions permit courts to close court proceedings to the public in the interests of

²⁶⁵ For a weaker presumption of openness that may be overcome upon request by the disputing parties, see the Iranian Constitution, Art 165:

Trials shall be held openly and members of the public may attend without any restriction; unless the court determines that an open trial would be detrimental to public morality or discipline, or if in case of private disputes, both the parties request not to hold an open hearing.

decency²⁶⁶ or public morals.²⁶⁷ The interests of public safety,²⁶⁸ public order,²⁶⁹ national security²⁷⁰ and defence²⁷¹ may equally permit courts to close proceedings to the public.

²⁶⁶ Guyana Const., 1980 (as amended to 2007), Art 144(10); Kiribati Const., 1979, Art 10(10); Solomon Islands Const. (as amended to 2001), Art 10(10)(a); Tuvalu Const., 1986, Art 22(13)(a)(iii)(A).

²⁶⁷ Armenia Const., 1995 (as amended to 2005), Art 19(2); Belgium Const., 1994 (as amended to 2008), Art 148(1); Belize Const., 1981 (as amended to 2011), Art 6(9); Burundi Const., 2005, Art 206; Democratic Republic of Congo Const., 2005, Art 20(1); Dominica Const., 1978 (as amended to 1984), Art 8(11); East Timor Const., 2002, Art 131; Egypt Const., 2014, Art 187; Estonia Const., 1992 (as amended to 2005), Art 24(3); Fiji Const., 2013, Art 15(5); The Gambia Const., 1996, Art 24(2); Ghana Const., 1992 (as amended to 1996), Art 126(3); Grenada Const., 1973, Art 8(10); Guyana Const., 1980 (as amended to 2007), Art 144(10); Haiti Const., 1987 (as amended to 2012), Art 180; Iceland Const., 1944 (as amended to 1995), Art 70(1); Iran Const., 1979 (as amended to 1989), Art 165; Jamaican Fundamental Rights (Additional Provisions) Interim Act 1999, Art 16(4); Japan Const., 1947, Art 82 (exception not applicable to trials of political offenses, offenses involving the press or cases wherein the right of people as guaranteed in Chapter III are in question); Hashemite Kingdom of Jordan Const., 1952 (as amended to 2011), Art 101(3); Kenya Const., 2010, Art 50(8); Kiribati Const., 1979, Art 10(10); Republic of Korea Const., 1948 (as amended to 1987), Art 109; Lesotho Const., 1993, Art 12(10); Grand Duchy of Luxembourg Const., 1868 (as amended to 2009), Art 88; Maldives Const., 2008, Art 42; Mauritius Const., 1968, Art 10(10); Namibia Const., 1990 (as amended to 24 December 1998), Art 12(1)(a); Nicaragua Const., 1986 (as amended to 2014), Art 34(2); Basic Statute of the State (Sultanate of Oman) 1996, Art 63; Poland Const., 1997, Art 45; Portugal Const., 1976 (as amended to 2004), Art 206; Qatar Const., Art 133; Rwanda Const., 2003 (as amended to 2010), Art 141(1) (protection against moral embarrassment); Samoa Const., 1960 (as amended to 2005), Art 9(1); Sao Tomé and Príncipe Const., 1990 (as amended to 2003), Art 123; Serbia Const., 2006, Art 32(2); Seychelles Const., 1993 (as amended to 2011), Art 19(9)(a); Sierra Leone Const., 1991, Art 23(3); Solomon Islands Const. (as amended to 2001), Art 10(10)(a); Swaziland Const., 2005, Art 21(12); Turkey Const., 1982 (as amended to 12 September 2010), Art 141(1); Tuvalu Const., 1986, Art 22(13)(a)(iii)(B); Uganda Const., 1995 (as amended to 2005), Art 28(2); Human Rights Act 1998 of the United Kingdom, Schedule 1, Art 6(1); Yemen Const., 1994, Art 152; Zimbabwe Const., 2013, Art 86(2).

²⁶⁸ Belize Const., 1981 (as amended to 2011), Art 6(9); Dominica Const., 1978 (as amended to 1984), Art 8(11); Fiji Const., 2013, Art 15(5); The Gambia Const., 1996, Art 24(2); Ghana Const., 1992 (as amended to 1996), Art 126(3); Grenada Const., 1973, Art 8(10); Guyana Const., 1980 (as amended to 2007), Art 144(10); Jamaican Fundamental Rights (Additional Provisions) Interim Act 1999, Art 16(4); Kiribati Const., 1979, Art 10(10); Republic of Korea Const., 1948 (as amended to 1987), Art 109; Lesotho Const., 1993, Art 12(10); Mauritius Const., 1968, Art 10(10); Seychelles Const., 1993 (as amended to 2011), Art 19(9)(b); Sierra Leone Const., 1991, Art 23(3); Solomon Islands Const. (as amended to 2001), Art 10(10)(b); Sri Lanka Const., 1978 (as amended to 2015), Art 106(2)(c); Swaziland Const., 2005, Art 21(12); Tuvalu Const., 1986, Art 22(13)(b)(ii); Zimbabwe Const., 2013, Art 86(2).

²⁶⁹ Armenia Const., 1995 (as amended to 2005), Art 19(2); Belgium Const., 1994 (as amended to 2008), Art 148(1); Belize Const., 1981 (as amended to 2011), Art 6(9); Burundi Const., 2005, Art 206; Democratic Republic of Congo Const., 2005, Art 20(1); Dominica Const., 1978 (as amended to 1984), Art 8(11); Egypt Const., 2014, Art 187; Fiji Const., 2013, Art 15(5); The Gambia Const., 1996, Art 24(2); Ghana Const., 1992 (as amended to 1996), Art 126(3); Grenada Const., 1973, Art 8(10); Guyana Const., 1980 (as amended to 2007), Art 144(10); Haiti Const., 1987 (as amended to 2012), Art 180; Iceland Const., 1944 (as amended to 1995), Art 70(1); Jamaican Fundamental Rights (Additional Provisions) Interim Act 1999, Art 16(4); Japan Const., 1947, Art 82 (exception not applicable to trials of political offenses, offenses involving the press or cases wherein the right of people as guaranteed in Chapter III are in question); Hashemite Kingdom of Jordan Const., 1952 (as amended to 2011), Art 101(3); Kenya Const., 2010, Art 50(8); Kiribati Const., 1979, Art 10(10); Republic of Korea Const., 1948 (as amended to 1987), Art 109; Kosovo Const., 2008, Art 31(3); Lesotho Const., 1993, Art 12(10); Grand Duchy of Luxembourg Const., 1868 (as amended to

The need to safeguard state, professional or business secrets²⁷² may be another reason for the closure of trials. In addition, closure is permitted if closure is required to protect the dignity²⁷³ or privacy²⁷⁴ of persons concerned in the proceedings or if closure is required

2009), Art 88; Maldives Const., 2008, Art 42; Mauritius Const., 1968, Art 10(10); Namibia Const., 1990 (as amended to 24 December 1998), Art 12(1)(a); Nicaragua Const., 1986 (as amended to 2014), Art 34(2); Basic Statute of the State (Sultanate of Oman) 1996, Art 63, Poland Const., 1997, Art 45; Qatar Const., Art 133; Rwanda Const., 2003 (as amended to 2010), Art 141(1); Samoa Const., 1960 (as amended to 2005), Art 9(1); Serbia Const., 2006, Art 32(2); Seychelles Const., Art 19(9)(b); Sierra Leone Const., 1991, Art 23(3); Solomon Islands Const. (as amended to 2001), Art 10(10)(b); Sri Lanka Const., 1978 (as amended to 2015), Art 106(2)(d) (order and security within the precincts of the court); Swaziland Const., 2005, Art 21(12); Tuvalu Const., 1986, Art 22(13)(b)(iii); Uganda Const., 1995 (as amended to 2005), Art 28(2); Human Rights Act 1998 of the United Kingdom, Schedule 1, Art 6(1); Yemen Const., 1994, Art 152; Zimbabwe Const., 2013, Art 86(2).

²⁷⁰ Armenia Const., 1995 (as amended to 2005), Art 19(2); East Timor Const., 2002, Art 131; Fiji Const., 2013, Art 15(5); Iceland Const., 1944 (as amended to 1995), Art 70(1); Kenya Const., 2010, Art 50(8); Republic of Korea Const., 1948 (as amended to 1987), Art 109; Kosovo Const., 2008, Art 31(3); Maldives Const., 2008, Art 42; Namibia Const., 1990 (as amended to 24 December 1998), Art 12(1)(a), Poland Const., 1997, Art 45; Samoa Const., 1960 (as amended to 2005), Art 9(1); Serbia Const., 2006, Art 32(2); Sri Lanka Const., 1978 (as amended to 2015), Art 106(2)(c); Turkey Const., 1982 (as amended to 12 September 2010), Art 141(1) (public security); Uganda Const., 1995 (as amended to 2005), Art 28(2); Human Rights Act 1998 of the United Kingdom, Schedule 1, Art 6(1).

²⁷¹ Belize Const., 1981 (as amended to 2011), Art 6(9); Dominica Const., 1978 (as amended to 1984), Art 8(11); The Gambia Const., 1996, Art 24(2); Grenada Const., 1973, Art 8(10); Guyana Const., 1980 (as amended to 2007), Art 144(10); Jamaican Fundamental Rights (Additional Provisions) Interim Act 1999, Art 16(4); Kiribati Const., 1979, Art 10(10); Lesotho Const., 1993, Art 12(10); Mauritius Const., 1968, Art 10(10); Seychelles Const., 1993 (as amended to 2011), Art 19(9)(b); Sierra Leone Const., 1991, Art 23(3); Solomon Islands Const. (as amended to 2001), Art 10(10)(b); Swaziland Const., 1991, Art 21(12); Tuvalu Const., 1986, Art 22(13)(b)(i); Zimbabwe Const., 2013, Art 86(2).

²⁷² Estonia Const., 1992 (as amended to 2005), Art 24(3) (state or business secrets); Lithuania Const., 1992 (as amended to 2006), Art 117(1) (state, professional or commercial secrets); Viet Nam Const., 2013, Art 103(3) (state secrets).

²⁷³ Cape Verde Const., 1992, Art 226; East Timor Const., 2002, Art 131; Portugal Const., 1976 (as amended to 2004), Art 206; Sao Tomé and Príncipe Const., 1990 (as amended to 2003), Art 123.

²⁷⁴ Armenia Const., 1995 (as amended to 2005), Art 19(2); Belize Const., 1981 (as amended to 2011), Art 6(9); Brazil Const., 1988 (as amended to 2012), Art 5(LX); Cape Verde Const., 1992, Art 226; Dominica Const., 1978 (as amended to 1984), Art 8(11); Estonia Const., 1992 (as amended to 2005), Art 24(3); Fiji Const., 2013, Art 15(5); The Gambia Const., 1996, Art 24(2); Hellenic Republic Const., 1975 (as amended to 2008), Art 93(2); Grenada Const., 1973, Art 8(10); Iceland Const., 1944 (as amended to 1995), Art 70(1); Jamaican Fundamental Rights (Additional Provisions) Interim Act 1999, Art 16(4); Kiribati Const., 1979, Art 10(10); Kosovo Const., 2008, Art 31(3); Lesotho Const., 1993, Art 12(10); Lithuania Const., 1992 (as amended to 2006), Art 117(1); Mauritius Const., 1968, Art 10(10); Norway Const., 1814 (as amended to 2014), Art 95(1); Poland Const., 1997, Art 45 (permitting closure also for other important private interests); Samoa Const., 1960 (as amended to 2005), Art 9(1); Serbia Const., 2006, Art 32(2); Seychelles Const., 1993 (as amended to 2011), Art 19(9)(a); Sierra Leone Const., 1991, Art 23(3); Solomon Islands Const. (as amended to 2001), Art 10(10)(a); Swaziland Const., 2005, Art 21(12); Tuvalu Const., 1986, Art 22(13)(a)(iii)(D); Human Rights Act 1998 of the United Kingdom, Schedule 1, Art 6(1); Viet Nam Const., 2013, Art 103(3).

to protect the interests of victims,²⁷⁵ witnesses²⁷⁶ or juveniles.²⁷⁷ Exceptions to the principle of open justice are also permitted in proceedings relating to sexual matters²⁷⁸ and to family or domestic disputes.²⁷⁹ Other exceptions permit the closure of proceedings in the interests of justice²⁸⁰ or if the administration of justice²⁸¹ or weighty and significant public interests²⁸² so require. If constitutions do not list exceptions to the principle of open justice in their text, they often state that exceptions are determined by law.

It is not the case, therefore, that the international community of states as a whole accepts and recognises the principle of open justice as a peremptory norm. Several constitutions provide evidence to the contrary. It follows that the principle of open justice, despite it

²⁷⁵ Estonia Const., 1992 (as amended to 2005), Art 24(3); Maldives Const., 2008, Art 42.

²⁷⁶ Kenya Const., 2010, Art 50(8).

²⁷⁷ Belize Const., 1981 (as amended to 2011), Art 6(9); Dominica Const., 1978 (as amended to 1984), Art 8(11); Estonia Const., 1992 (as amended to 2005), Art 24(3); Fiji Const., 2013, Art 15(5); The Gambia Const., 1996, Art 24(2); Grenada Const., 1973, Art 8(10); Guyana Const., 1980 (as amended to 2007), Art 144(10); Jamaican Fundamental Rights (Additional Provisions) Interim Act 1999, Art 16(4); Kiribati Const., 1979, Art 10(10); Kosovo Const., 2008, Art 31(3); Lesotho Const., 1993, Art 12(10); Maldives Const., 2008, Art 42; Mauritius Const., 1968, Art 10(10); Samoa Const., 1960 (as amended to 2005), Art 9(1); Serbia Const., 2006, Art 32(2); Seychelles Const., 1993 (as amended to 2011), Art 19(9)(a); Sierra Leone Const., 1991, Art 23(3); Solomon Islands Const. (as amended to 2001), Art 10(10)(a); Swaziland Const., 2005, Art 21(12); Tuvalu Const., 1986, Art 22(13)(a)(iii)(C); Human Rights Act 1998 of the United Kingdom, Schedule 1, Art 6(1); Viet Nam Const., 2013, Art 103(3). See also Kenya Const., 2010, Art 50(8) (permitting the exclusion of the public if the exclusion is necessary to protect vulnerable persons).

²⁷⁸ Sri Lanka Const., Art 106(2)(b).

²⁷⁹ Fiji Const., 2013, Art 15(5) (family or domestic disputes); Sri Lanka Const., 1978 (as amended to 2015), Art 106(2)(a) (family disputes).

²⁸⁰ Belize Const., 1981 (as amended to 2011), Art 6(9); Dominica Const., 1978 (as amended to 1984), Art 8(11); Estonia Const., 1992 (as amended to 2005), Art 24(3); Fiji Const., 2013, Arts 15(4) and Art 15(5); The Gambia Const., 1996, Art 24(2); Grenada Const., 1973, Art 8(10); Guyana Const., 1980 (as amended to 2007), Art 144(10); Jamaican Fundamental Rights (Additional Provisions) Interim Act 1999, Art 16(4); Kiribati Const., 1979, Art 10(10); Lesotho Const., 1993, Art 12(10); Maldives Const., 2008, Art 42; Mauritius Const., 1968, Art 10(10); Samoa Const., 1960 (as amended to 2005), Art 9(1); Seychelles Const., 1993 (as amended to 2011), Art 19(9)(a); Sierra Leone Const., 1991, Art 23(3); Solomon Islands Const. (as amended to 2001), Art 10(10)(a); Swaziland Const., 2005, Art 21(12); Tuvalu Const., 1986, Art 22(13)(a)(i).

²⁸¹ Armenia Const., 1995 (as amended to 2005), Art 19(2); Cape Verde Const., 1992, Art 226; East Timor Const., 2002, Art 131; Portugal Const., 1976 (as amended to 2004), Art 206; Sao Tomé and Príncipe Const., 1990 (as amended to 2003), Art 123.

²⁸² Norway Const., 1814 (as amended to 2014), Art 95(1); Zimbabwe Const., 2013, Art 86(2) (general public interest). See also Brazil Const., 1988 (as amended to 2012), Art 5(LX) (permitting the closure of procedural acts if required to defend social interests).

being a general principle of law, does not amount to a peremptory norm of general international law. It is general in a sense that almost all states protect the principle of open justice in their national constitutions but not peremptory in the sense that the international community of states as a whole accepts and recognises that no derogation is permitted. Absent peremptory norm X, it does not matter whether investment treaties would have amounted to a derogation from that norm or whether these treaties would have modified it.²⁸³ Absent peremptory norm X, the presumption of secrecy under investment treaties and the arbitration rules they reference is not invalid under Article 53 of the VCLT.

D. Open Justice as an Implied Term in Investment Agreements

If the presumption of secrecy is not invalidated under Article 53 of the Vienna Convention on the Law of Treaties, this does not necessarily mean that tribunals must apply the presumption of secrecy to investor-state arbitration as it has become ('ARB-NEW')²⁸⁴ and must heed the wishes of the disputing parties regarding the openness of hearings.

Open justice could be an implied term in investment treaties. International law implies a covenant of state compliance with international law. In other words, it is to be assumed that states, by concluding treaties, do not intend to violate international law. It follows that investment treaties – as all other treaties – must be interpreted in compliance with

²⁸³ Assuming, *arguendo*, that peremptory norm X exists, investment agreements do not modify it – they derogate from it. Modification requires a conscious choice of acceptance and recognition. States must want to modify the existing norm. In the case of the openness of investor-state arbitration, states would have had to be aware (1) that, absent modification, the principle of open justice applies to investor-state arbitration and (2) that they do not want the principle of open justice to apply to these proceedings. Neither is likely given the haphazard evolution investor-state arbitration and the general unawareness that the general principle of open justice applies to investor-state arbitration to the extent that tribunals are making law. On the haphazard evolution of investor-state arbitration, see Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds), *Foundations of International Investment Law* (Oxford University Press 2014) 11-43.

²⁸⁴ This section proceeds under the assumption that ARB-NEW is different from investor-state arbitration as it was envisaged ('ARB-VIS').

international law. This already follows from Article 31(3)(c) of the VCLT, which states that, when interpreting a treaty, any relevant rules of international law applicable in the relations between the parties shall be taken into account. The principle of open justice is such a relevant rule of international law.²⁸⁵ It entails a strong presumption that justice is to be administered in public. In addition, it prescribes that it is within the power of courts – not within the power of the disputing parties – to close hearings to the public, and only in exceptional circumstances. This general principle of open justice applies to investor-state arbitration to the extent that arbitral tribunals are making law. It follows that, according to the general principle of open justice, investor-state arbitration as it has become (ARB-NEW) must be presumptively open to the public and it is within the power of tribunals – not within the power of the disputing parties – to close hearings to the public. This result is seemingly contrary to explicit terms in investment treaties that authorise the disputing parties to opt for arbitration rules according to which each disputing party has the power to preclude the openness of arbitral hearings. This section examines whether investment treaties can be interpreted in compliance with the principle of open justice. The case *ReliaStar Life Insurance Company of New York v EMC National Life Company*²⁸⁶ serves to illustrate how the law governing an arbitration agreement may inform its interpretation, “despite seemingly contradictory terms in the agreement.”²⁸⁷

Even though the disputing parties in *ReliaStar Life* had agreed in their arbitration agreement that they would each bear the fees of their own arbitrator and their own attorneys and would “jointly and equally bear [...] the expenses of the third arbitrator,”²⁸⁸

²⁸⁵ cf Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002) v (referring to “the near universal rule of open justice”).

²⁸⁶ *ReliaStar Life Insurance Company of New York v EMC National Life Company* 564 F 3d 81 (2nd Cir. 2009).

²⁸⁷ Martin Flumenbaum and Brad S. Karp, ‘Sanctions Award in Arbitration Proceedings’ (2009) 241 *New York Law Journal*.

²⁸⁸ *ReliaStar Life Insurance Company of New York v EMC National Life Company* 564 F 3d 81, at 84.

the United States Court of Appeals for the Second Circuit found no fault with the imposition of fees as sanctions for bad faith conduct by the tribunal. The Court held that the parties' agreement as to costs was based on the premise that both would arbitrate in good faith.²⁸⁹ This requirement of good faith was not explicit in the arbitration agreement. The Court based its reading of the arbitration agreement on applicable New York law, according to which “‘a covenant of good faith and fair dealing’ is implicit in every contract.”²⁹⁰ It held that, if parties wished to limit the scope of an arbitrator's authority to exclude the imposition of fees as sanctions for bad faith conduct, they must “explicitly and clearly state that intent as part of their agreement to arbitrate.”²⁹¹ For the Court, the arbitrator's authority to impose fees as sanctions for bad faith conduct was inherent in the arbitration agreement to the extent that it was not explicitly excluded.²⁹²

Instead of interpreting the arbitration agreement as explicitly excluding the imposition of fees as sanctions for bad faith contact, the Court in *ReliaStar Life* chose to conclude the opposite, based on a norm that, according to the *lex arbitri*, was implicit in the arbitration agreement. Transplanting this line of reasoning to investor-state arbitration, it is worth considering whether arbitration agreements in investor-state arbitration are not what they seem at first sight either. Even though investment treaties, and the arbitration rules they reference, explicitly authorise each disputing party to preclude the openness of hearings, this authority may have become inoperative in light of changing arbitral practice and the general principle of open justice. The general principle of open justice could be a term that, according to international law, is implicit in all international treaties that establish a

²⁸⁹ *ReliaStar Life Insurance Company of New York v EMC National Life Company* 564 F 3d 81, at 88.

²⁹⁰ *ibid* (quoting *Thyroff v Nationwide Mut. Ins. Co.* 460 F 3d 400, 407 (2d Cir. 2006)).

²⁹¹ *ReliaStar Life Insurance Company of New York v EMC National Life Company* 564 F 3d 81, at 89.

²⁹² But see Martin Flumenbaum and Brad S. Karp, ‘Sanctions Awards in Arbitration Proceedings’ (2009) 241 *New York Law Journal* (interpreting the judgment in *ReliaStar Life* as “[expanding] the scope of an arbitrator's authority to impose sanctions”).

law-making procedure – also investment treaties. Unless states explicitly state that they wish to derogate from the general principle of open justice, it must be assumed that states intend to comply with international law on this matter. It follows that if a scenario is not covered by the presumption of secrecy otherwise applicable under investment treaties and if states do not derogate from the implied default rule of open justice, the implied default rule applies. In *ReliaStar Life*, the implicit default rule was that arbitrators retain their authority to impose fees as sanctions for bad faith conduct unless the disputing parties include a provision to the contrary in their arbitration agreement. In investor-state arbitration, the implicit default rule is the general principle of open justice, which authorises ‘arbitrators’ to open hearings in which law is made to the public, also without the consent of both disputing parties, unless states include an explicit provision to the contrary in their investment treaties.

It matters then what states agree on. States generally agree on investor-state arbitration – both under investment treaties and the arbitration rules they reference. Investor-state arbitration, as a rule, is to take place *in camera*; its hearings cannot be opened to the public without the consent of both disputing parties. Suppose that by arbitration, states, in fact, meant *arbitration* – which is a consensual dispute resolution mechanism defined by its lack of law-making.²⁹³ This means that what is regulated under investment treaties and the arbitration rules they reference is *arbitration*. What is missing in investment treaties is a declaration by states that they wish to derogate from the principle of open justice, even if investor-state arbitration turns out to be ARB-NEW, a dispute resolution mechanism defined by its law-making function which resembles that of courts. If ARB-NEW is not regulated, however, the general principle of open justice as the implicit

²⁹³ Earl S. Wolaver, ‘The Historical Background of Commercial Arbitration’ (1934) *University of Pennsylvania Law Review* 132-146, at 132.

default rule applies. This result also follows from the assumption that states intend to comply with international law. Because state compliance with international law is assumed, states would have had to specify in their investment treaties that they wished to allow law-making in secret, in amendment of the existing principle of open justice. Unless investment treaties state that arbitrators may make law in secret, subject only to contrary agreements by the disputing parties, the norms on presumptive secrecy do not extend to investor-state arbitration as it has become (ARB-NEW) but only to investor-state arbitration as it was envisaged (ARB-VIS); namely, as *arbitration* in the traditional sense. Open justice is therefore, even if only theoretically, an implied term in investment treaties. Its enforcement depends on the cooperation of the parties on whose shoulders investor-state arbitration rests. If arbitrators suggest that they have an inherent power under international law to open arbitral hearings to the public and that this power is implied in investment treaties, disputing parties are still free to disagree. If arbitrators do not heed the wishes of the disputing parties, disputing parties are free to request that arbitrators resign. Resigned arbitrators, being excluded from the arbitral process, do not have any power to open arbitral hearings to the public.

E. The Duties of Arbitrators

(i) The Duty to Protect Citizen Rights

If arbitrators are making law and if states, perhaps inadvertently,²⁹⁴ delegated law-making powers to arbitrators,²⁹⁵ the relationship between states and arbitrators in investor-state

²⁹⁴ cf Joost Pauwelyn, ‘Rational Design or Accidental Evolution? The Emergence of International Investment Law’ in Zachary Douglas, Joost Pauwelyn, and Jorge E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) 11-43, at 42 (“There is no single creator, plan, or deliberate design.”).

²⁹⁵ For an example of a not so inadvertently delegation of law-making power to arbitral tribunals, see *Mondev International Ltd. v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, para 119 (noting that “the United States stressed, [that] the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals” and adding that the Tribunal “may not simply adopt its own idiosyncratic standard of what is fair or equitable, without reference

arbitration could be described as one of principals and agents²⁹⁶ – a relationship Alec Stone Sweet and Florian Grisel define as follows:

Principals are those actors who create *agents*, through a formal act in which the former confers upon the latter some authority to govern, that is, to take authoritative, legally binding decisions. The agent governs to the extent that this authority is exercised in ways that impact upon the distribution of values and resources in the relevant domain of the agent's competence.²⁹⁷

This description acknowledges the governance function of arbitrators regarding all states participating in the system of investor-state arbitration.²⁹⁸ If states – and by extension their citizens – granted arbitrators law-making powers by allowing arbitrators to interpret and give meaning to vague investment treaty provisions over time and across the borders of investment treaties, this entrustment would bring with it that, in a system of self-government, all citizens in participating states would be the *democratic principals*²⁹⁹ of these arbitrators. In return for their entrustment with law-making powers arbitrators would have to protect what Ernst-Ulrich Petersmann calls citizen rights across national

to established sources of law”) (internal quotation marks omitted) (emphasis added). The United States of America therewith acknowledged that arbitral tribunals contribute to the development of the customary international minimum standard of treatment of aliens.

²⁹⁶ For an application of the principals-agent framework in the context of investment arbitration, see Alec Stone Sweet and Florian Grisel, ‘Transnational Investment Arbitration: From Delegation to Constitutionalization?’ in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 118-136.

²⁹⁷ *ibid* 119.

²⁹⁸ cf Alec Stone Sweet and Florian Grisel, ‘Transnational Investment Arbitration: From Delegation to Constitutionalization?’ in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 118-136, at 126 (noting that they believe that the conceptualisation of investor-state arbitration as *inter partes* commercial arbitration “is doomed, to the extent that the judicialization process proceeds.”).

²⁹⁹ Ernst-Ulrich Petersmann, ‘Constitutional Theories of International Economic Adjudication and Investor-State Arbitration’ in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 137-194, at 137.

borders.³⁰⁰ These citizen rights across national borders are an amalgam of human rights guarantees, principles of justice and other principles that states participating in the system of investor-state arbitration have in common. The requirement of the commonality of rights reduces the pool of applicable rights. The reductionist Rawls speaks in this context of the requirement of an overlapping consensus.³⁰¹ The general principle of open justice is the result of such an overlapping consensus, which, assuming its applicability to investor-state arbitration, would have to be protected by arbitrators. One could argue of course that the act of entrustment is indeed missing and that arbitrators are making law without being authorised to do so by states.³⁰² Yet, such a lack of authority would not render the arbitral duty to protect the principle of open justice non-existent. If arbitrators were making law without being authorised to do so,³⁰³ there would be all the more reason for requiring arbitral hearings to be open to the public. The act of law-making is sufficient

³⁰⁰ Ernst-Ulrich Petersmann, 'Constitutional Theories of International Economic Adjudication and Investor-State Arbitration' in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 137-194, at 137.

³⁰¹ John Rawls, *Political Liberalism* (Columbia University Press 1993) 133-172 (at 150 noting that "we seek an agreed basis of public justification in matters of justice, and since no political agreement on those disputed questions can reasonably be expected, we turn instead to the fundamental ideas we seem to share through the public political culture").

³⁰² The arbitral power to make law is not implicit in the power to render awards. The latter does not require the former. Arbitrators can have the power to decide disputes without having the power to make law. If arbitrators were not bound in their interpretation of vague treaty norms such as fair and equitable treatment, if they had absolute discretion in how to interpret fair and equitable treatment, their awards would still be binding on the disputing parties. Yet, in such a system, in which arbitrators are unbound, untamed, undisciplined, arbitrators would not be making *law*. Such a system would be characterised by the absence of arbitrator-made law. If arbitral law-making is authorised at all, it can potentially be traced to the existence of vague investment treaty provisions. It is conceivable that the provisions' vagueness itself implies that arbitrators, if they are to give reasoned decisions, must be authorised to specify vague treaty norms over time. The specification over time is best achieved with the adherence to a doctrine of *stare decisis*.

³⁰³ On the paradox of international law-making beyond state consent, see Wouter G. Werner, 'State consent as foundational myth' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing 2016) 13-31, at 30 (noting that "sticking to state consent as the ultimate basis of international law (further) detaches theoretical reflection from actual developments in international life").

reason in a system of self-government for imposing upon arbitrators the duty to implement the principle of open justice.

(ii) The Duty to Render Enforceable Awards

The duty of arbitrators to implement the principle of open justice might also derive from their duty to render enforceable awards.³⁰⁴ If awards rendered in violation of the principle of open justice were unenforceable, arbitrators would have an interest in opening arbitral hearings to the public. In the words of Julian Lew, “the award is the *raison d’être* of every arbitration; if the award is unenforceable the whole arbitration proceeding will have been a waste of time and energy. If an arbitrator’s award is not enforceable [...] the arbitrator will have failed the responsibility vested in him.”³⁰⁵ In other words, the rendition of an enforceable award is the ultimate purpose of an arbitral tribunal.³⁰⁶ This purpose does not translate into an absolute duty to render enforceable awards, however. Rather, the duty is a *reasonable efforts* duty.³⁰⁷ Several arbitration rules confirm this. Article 2(2) of the SCC Rules provides, for example, that “the Arbitral Tribunal [...] shall make every reasonable effort to ensure that any award is legally enforceable.”³⁰⁸ The ICC Rules and the LCIA

³⁰⁴ On the duty to render enforceable awards, see Andrew Barraclough and Jeff Waincymer, ‘Mandatory Rules of Law in International Commercial Arbitration’ (2005) 6 *Melbourne Journal of International Law* 205-244, at 244; Martin Platte, ‘An Arbitrator’s Duty to Render Enforceable Awards’ (2003) 20(3) *Journal of International Arbitration* 307-313; Günther J. Horvath, ‘The Duty of the Tribunal to Render an Enforceable Award’ (2001) 18(2) *Journal of International Arbitration* 135-158.

³⁰⁵ Julian D.M. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Oceana Publications 1978) 537.

³⁰⁶ Julian D.M. Lew, ‘The Law Applicable to the Form and Substance of the Arbitration Clause’ in Albert van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International 1999) 114-145, at 144 (defining “the ultimate purpose of the arbitration process” as “the rendering by the arbitration tribunal of an award enforceable by national courts, which explains the propensity of arbitration tribunals to abide by the minimum requirements set out by national courts”); Martin Platte, ‘An Arbitrator’s Duty to Render Enforceable Awards’ (2003) 20(3) *Journal of International Arbitration* 307-313, at 312-313 (noting that “[a]n enforceable award is the *raison d’être*, the ultimate purpose, of an arbitration”).

³⁰⁷ cf Martin Platte, ‘An Arbitrator’s Duty to Render Enforceable Awards’ (2003) 20(3) *Journal of International Arbitration* 307-313, at 313 (describing the arbitrator’s duty as a “best efforts commitment”).

³⁰⁸ SCC Rules 2017, Art 2(2).

Rules contain almost identical provisions.³⁰⁹ These rules have in common that the duty to render enforceable awards is expressed in relation to matters not expressly provided for in these rules. Article 42 of the ICC Rules states, for example, that it is “[i]n all matters not expressly provided for in these Rules, [that] the arbitral tribunal [...] shall make every effort to make sure that the award is enforceable at law.” This does not mean, however, that the reverse is not equally true. It would be misguided to assume that the duty to render enforceable awards is limited to circumstances in which the applicable rules do not provide for a solution. Instead, the duty is a general *reasonable efforts* duty – applicable irrespective of whether it is codified or not. That the duty to render enforceable awards³¹⁰ is codified only in some arbitration rules and in those rules only in relation to matters not expressly provided for in these rules is rooted in the understanding that the rules themselves, if and when followed, lead to enforceable awards. This must not be true, however. In investor-state arbitration, where the majority of arbitration rules grant each disputing party the power to preclude the openness of arbitral hearings, the application of the rules may lead to awards that are unenforceable. As arbitrators are making law and the presumptive openness of law-making *fora* is a matter of constitutional law and public policy in almost all jurisdictions, arbitral hearings must be presumptively open to the public for the ensuing award to be enforceable. It is in the interest of arbitrators, and their duty, to inform the disputing parties that secret arbitral hearings may hinder the

³⁰⁹ ICC Rules 2017, Art 42 (“In all matters not expressly provided for in these Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.”); LCIA Rules 2014, Art 32.2 (“For all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat.”).

³¹⁰ *Vattenfall AB, Vattenfall GmbH, Vattenfall Europe Nuclear Energy GmbH, Kernkraftwerk Krümmel GmbH & Co. oHG, Kernkraftwerk Brunsbüttel GmbH & Co oHG v Federal Republic of Germany*, ICSID Case No ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018 (Albert Jan van den Berg, Charles N. Brower, Vaughan Lowe, Arbitrators – Energy Charter Treaty) para 230.

enforceability of the award. As the duty to render an enforceable award is not an absolute duty but a *reasonable efforts* duty, arbitrators, however, must not implement the principle of open justice against the wishes of the disputing parties, which may be impossible in the first place, given that most arbitration rules require the consent of both disputing parties for hearings to be open to the public. The arbitrator's *reasonable efforts* duty is fulfilled, if arbitrators inform the disputing parties that any arbitral award rendered in the violation of the principle of open justice may be unenforceable.

F. Practical Implications: Exceptions to the Principle of Open Justice

The practical implications for arbitrators are the topic of this section. If arbitrators are tasked by the disputing parties to conduct proceedings in conformity with the principle of open justice, with an eye on the enforceability of the award, arbitrators are advised to implement the rules on open justice applicable in the potential enforcing state(s), for lack of uniform exceptions to the principle of open justice. This section first comments on the recognition of this lack of uniform exceptions to the principle of open justice, suggests the UNCITRAL Rules on Transparency as a point of departure and cautions that the Rules on Transparency may vary from domestic exceptions to the principle of open justice.

(i) The Lack of Uniform Exceptions to the Principle of Open Justice

While the principle of open justice is general; its exceptions are not. Article 7 of the Rules on Transparency is in line with this understanding of the general principle of open justice. It specifies the exceptions to transparency under the Rules on Transparency. Article 7(1) specifies that confidential or protected information, as defined in its paragraph 2 shall not be made available to the public. Where there is a need to protect confidential information, the arbitral tribunal shall make arrangements to hold in private that part of the hearing

requiring such protection.³¹¹ Confidential or protected information, according to Article 7(2) of the Rules on Transparency, is:

- (a) Confidential business information;
- (b) Information that is protected against being made available to the public under the treaty;
- (c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or
- (d) Information the disclosure of which would impede law enforcement.

If there were uniform exceptions to the principle of open justice, Article 7(2)(c) of the Rules on Transparency would be unnecessary. If the exceptions were uniform, arbitrators would not have to revert specifically to the law of the respondent state when determining whether information of the respondent state is protected against being made available to the public. Arbitrators could apply the uniform exceptions instead. Absent such uniform exceptions, the reliance on domestic exceptions to the principle of open justice is necessary. That the drafters of the Rules on Transparency, who hailed from 60 different member states of the United Nations,³¹² considered the reliance on domestic norms

³¹¹ UNCITRAL Rules on Transparency, Art 6(2).

³¹² The Rules on Transparency were drafted by the United Nations Commission on International Trade Law (UNCITRAL), a body made up of 60 Member States of the United Nations representing different legal traditions, different geographic regions and different levels of economic development. Observer states and international organisations contributed to the drafting process. The Rules on Transparency are thus the result of a truly multilateral effort at regulating public access to investor-state arbitration. See UNCITRAL, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law* (2013) paras 3-4; UNCITRAL Working Group II, *Settlement of Commercial Disputes: Transparency in Treaty-based Investor-State Arbitration – Compilation of Comments by Governments*, 53rd session, UN doc A/CN.9/WG.II/WP.159 including its Addenda 1-3 (4 August 2010); UNCITRAL Working Group II, *Settlement of Commercial Disputes: Transparency in Treaty-based Investor-State Arbitration – Compilation of Comments by Governments*, 53rd session, UN doc A/CN.9/WG.II/WP.159/Add.4 (16 September 2010); UNCITRAL Working Group II, *Settlement of Commercial Disputes: Transparency in Treaty-based Investor-State Arbitration – Proposals by Governments and International Organizations*,

necessary indicates the absence of uniform exceptions to the general principle of open justice. Article 20(2)(1) of the Mexico-United Arab Emirates BIT³¹³ contains a provision similar to Article 7(2)(c) of the UNCITRAL Rules on Transparency, providing that the arbitral tribunal shall conduct hearings open to the public “[t]o the extent permitted by the domestic law.” Domestic law thus remains relevant when it comes to the exceptions to the principle of open justice.

(ii) The UNCITRAL Rules on Transparency as a Point of Departure

When arbitrators are determining whether arbitral hearings should be closed to the public temporarily, arbitrators can use the Rules on Transparency as a point of departure for their analysis. Since the drafters of these Rules hailed from 60 different member states of the United Nations, representing different legal traditions, different geographic regions and different levels of economic development,³¹⁴ it can be assumed that these Rules reflect a minimum consensus among these states. It is then the task of arbitrators to ascertain whether similar such rules exist in the potential enforcing state(s) and to apply the rules applicable in the potential enforcing state(s), as domestic courts, when reviewing the adequacy of the arbitral process regarding its openness, would apply domestic exceptions to the principle of open justice. Arbitrators should be aware that the Rules on Transparency may vary from domestic exceptions to the principle of open justice. This

54th session, UN doc A/CN.9/WG.II/WP.164 (20 December 2010); UNCITRAL Working Group II, *Settlement of Commercial Disputes: Transparency in Treaty-based Investor-State Arbitration – Comments by the International Centre for Settlement of Investment Disputes (ICSID)*, 55th session, UN doc A/CN.9/WG.II/WP.167 (8 August 2011); UNCITRAL Working Group II, *Settlement of Commercial Disputes: Preparation of a Legal Standard on Transparency in Treaty-based Investor-State Arbitration – Proposal by Governments of Argentina, Australia, Canada, Mexico, Norway, South Africa, and the United States of America*, 57th session, UN doc A/CN.9/WG.II/WP.174 (2 August 2012).

³¹³ Agreement between the Government of the United Arab Emirates and the Government of the United Mexican State on the Promotion and Reciprocal Protection of Investments of 19 June 2016.

³¹⁴ cf UNCITRAL, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law* (2013) paras 3-4.

section examines the similarities between the Rules on Transparency and domestic exceptions to the principle of open justice, before pointing out one likely dissimilarity.

(a) Similarities between the UNCITRAL Rules on Transparency and Domestic Exceptions to the Principle of Open Justice

The Rules on Transparency prescribe the presumptive openness of arbitral hearings³¹⁵ subject to the need to protect confidential information and the integrity of the arbitral process.³¹⁶ What may jeopardise the integrity of the arbitral process is defined in Article 7(7) of the Rules on Transparency. It states that the integrity of the arbitral process may be jeopardised if the publication of information could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties or members of the arbitral tribunal, or in comparably exceptional circumstances. These principles – the need to protect confidential information and the need to protect the integrity of the process – find expression also in domestic rules on the exceptions to the principle of open justice, though the definition of what constitutes confidential information and what is to be understood as the integrity of the process may of course differ from jurisdiction to jurisdiction. In some jurisdictions, state, professional or business secrets enjoy explicit constitutional protection, discussion of which may merit the closure of hearings.³¹⁷ The ‘integrity of the judicial process’ is not a phrase to be found in domestic constitutions but several constitutions protect the integrity of the process by allowing the closure of hearings in the interests of decency³¹⁸ or public morals,³¹⁹ in the

³¹⁵ UNCITRAL Rules on Transparency, Art 6(1).

³¹⁶ UNCITRAL Rules on Transparency, Art 6(2).

³¹⁷ Estonia Const., 1992 (as amended to 2005), Art 24(3) (state or business secrets); Lithuania Const., 1992 (as amended to 2006), Art 117(1) (state, professional or commercial secrets); Viet Nam Const., 2013, Art 103(3) (state secrets).

³¹⁸ Guyana Const., 1980 (as amended to 2007), Art 144(10); Kiribati Const., 1979, Art 10(10); Solomon Islands Const. (as amended to 2001), Art 10(10)(a); Tuvalu Const., 1986, Art 22(13)(a)(iii)(A).

³¹⁹ Armenia Const., 1995 (as amended to 2005), Art 19(2); Belgium Const., 1994 (as amended to 2008), Art 148(1); Belize Const., 1981 (as amended to 2011), Art 6(9); Burundi Const., 2005, Art 206; Democratic Republic of Congo Const., 2005, Art 20(1); Dominica Const., 1978 (as amended to 1984), Art 8(11); East

interests of justice³²⁰ or if the administration of justice so requires.³²¹ Other constitutions specifically allow the closure of court hearings in order to protect witnesses³²² or to serve weighty and significant public interests.³²³ The protection of the integrity of the judicial process, a significant public interest, is thus secured, even if phrased differently. The need to protect confidential information is often also recognised by law. Section 172 No 2 of the German Constitution of Courts Act (*Gerichtsverfassungsgesetz – GVG*), for example, permits a court to exclude the public from a hearing or a part thereof, if an important

Timor Const., 2002, Art 131; Egypt Const., 2014, Art 187; Estonia Const., 1992 (as amended to 2005), Art 24(3); Fiji Const., 2013, Art 15(5); The Gambia Const., 1996, Art 24(2); Ghana Const., 1992 (as amended to 1996), Art 126(3); Grenada Const., 1973, Art 8(10); Guyana Const., 1980 (as amended to 2007), Art 144(10); Haiti Const., 1987 (as amended to 2012), Art 180; Iceland Const., 1944 (as amended to 1995), Art 70(1); Iran Const., 1979 (as amended to 1989), Art 165; Jamaican Fundamental Rights (Additional Provisions) Interim Act 1999, Art 16(4); Japan Const., 1947, Art 82 (exception not applicable to trials of political offenses, offenses involving the press or cases wherein the right of people as guaranteed in Chapter III are in question); Hashemite Kingdom of Jordan Const., 1952 (as amended to 2011), Art 101(3); Kenya Const., 2010, Art 50(8); Kiribati Const., 1979, Art 10(10); Republic of Korea Const., 1948 (as amended to 1987), Art 109; Lesotho Const., 1993, Art 12(10); Grand Duchy of Luxembourg Const., 1868 (as amended to 2009), Art 88; Maldives Const., 2008, Art 42; Mauritius Const., 1968, Art 10(10); Namibia Const., 1990 (as amended to 24 December 1998), Art 12(1)(a); Nicaragua Const., 1986 (as amended to 2014), Art 34(2); Basic Statute of the State (Sultanate of Oman) 1996, Art 63; Poland Const., 1997, Art 45; Portugal Const., 1976 (as amended to 2004), Art 206; Qatar Const., Art 133; Rwanda Const., 2003 (as amended to 2010), Art 141(1) (protection against moral embarrassment); Samoa Const., 1960 (as amended to 2005), Art 9(1); Sao Tomé and Príncipe Const., 1990 (as amended to 2003), Art 123; Serbia Const., 2006, Art 32(2); Seychelles Const., 1993 (as amended to 2011), Art 19(9)(a); Sierra Leone Const., 1991, Art 23(3); Solomon Islands Const. (as amended to 2001), Art 10(10)(a); Swaziland Const., 2005, Art 21(12); Turkey Const., 1982 (as amended to 12 September 2010), Art 141(1); Tuvalu Const., 1986, Art 22(13)(a)(iii)(B); Uganda Const., 1995 (as amended to 2005), Art 28(2); Human Rights Act 1998 of the United Kingdom, Schedule 1, Art 6(1); Yemen Const., 1994, Art 152; Zimbabwe Const., 2013, Art 86(2).

³²⁰ Belize Const., 1981 (as amended to 2011), Art 6(9); Dominica Const., 1978 (as amended to 1984), Art 8(11); Estonia Const., 1992 (as amended to 2005), Art 24(3); Fiji Const., 2013, Arts 15(4) and Art 15(5); The Gambia Const., 1996, Art 24(2); Grenada Const., 1973, Art 8(10); Guyana Const., 1980 (as amended to 2007), Art 144(10); Jamaican Fundamental Rights (Additional Provisions) Interim Act 1999, Art 16(4); Kiribati Const., 1979, Art 10(10); Lesotho Const., 1993, Art 12(10); Maldives Const., 2008, Art 42; Mauritius Const., 1968, Art 10(10); Samoa Const., 1960 (as amended to 2005), Art 9(1); Seychelles Const., 1993 (as amended to 2011), Art 19(9)(a); Sierra Leone Const., 1991, Art 23(3); Solomon Islands Const. (as amended to 2001), Art 10(10)(a); Swaziland Const., 2005, Art 21(12); Tuvalu Const., 1986, Art 22(13)(a)(i).

³²¹ Armenia Const., 1995 (as amended to 2005), Art 19(2); Cape Verde Const., 1992, Art 226; East Timor Const., 2002, Art 131; Portugal Const., 1976 (as amended to 2004), Art 206; Sao Tomé and Príncipe Const., 1990 (as amended to 2003), Art 123. See also Open Courts Act 2013 (Victoria), Section 30(2)(a).

³²² Kenya Const., 2010, Art 50(8).

³²³ Norway Const., 1814 (as amended to 2014), Art 95(1); Zimbabwe Const., 2013, Art 86(2) (general public interest). See also Brazil Const., 1988 (as amended to 2012), Art 5(LX) (permitting the closure of procedural acts if required to defend social interests).

business, trade, invention or tax secret is mentioned the public discussion of which would violate overriding interests meriting protection.³²⁴ Similarly, in the United Kingdom, the Civil Procedure Rules 1998 and the Administration of Justice Act 1960 permit private hearings if what is discussed is confidential information. Rule 39.2(3)(c) of the Civil Procedure Rules permits private hearings, if hearing involve confidential information and publicity would damage that confidentiality. Section 12(1)(d) of the Administration of Justice Act affirms that courts may sit in private if what is discussed is a secret process, discovery or invention. Section 12(1)(d) of the Act declares punishable as a contempt of court the publication of information relating to proceedings before any court sitting in private if what is discussed is a secret process, discovery or invention. If these examples are representative, the Rules on Transparency do not diverge from domestic provisions on the need to protect confidential information and the integrity of the judicial process.

(b) Differences between the UNCITRAL Rules on Transparency and Domestic Exceptions to the Principle of Open Justice

This section examines the differences between the Rules on Transparency and domestic exceptions to the principle of open justice. Article 6(3) of the Rules on Transparency allows an arbitral tribunal, after consultation with the disputing parties, to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible. Such a broad exception to domestic principles of open justice does not exist. The exceptions listed in the text of constitutions do not mention the possible exclusion of the public from a court hearing for logistical reasons. Nor is such an exception implicit in the text of constitutions or other domestic norms. The domestic presumptions of open

³²⁴ See Kathleen Müller-Rostin's translation of Section 172 No GVG <https://www.gesetze-im-internet.de/englisch_gvg/index.html> accessed 25 October 2018.

justice are generally so strong that they cannot be overcome for logistical reasons of any nature. What is permitted is the exclusion of some members of the public, if a room is too small to hold everyone who wants to attend a trial.³²⁵ Yet, logistical reasons are not a reason to exclude all members of the public. In the words of the Iowa Supreme Court in *State v Jones*,³²⁶ “[t]he test [...] is not whether the courtroom is large enough to seat everyone who wants to attend but whether the public has freedom of access to it.”³²⁷

This general rule is brought to the test when a trial is partially taking place in a private building to which the public, according to Joseph Jaconelli, does not have a presumptive right of access.³²⁸ Because investment arbitration hearings often take place in private buildings, it is necessary to examine the relevance of location in some detail. While the first part of this section dealt with the physical capacity of venues (*de facto* logistical reasons), this second part examines to what extent private ownership or occupation is a legal obstacle to public access to court hearings (logistical reasons of a legal nature). It is examined whether the sanctity of the home and the sanctity of places of work and business premises amounts to a legal obstacle to public access. If, for example, a judge hears testimony in a private bedroom, after “neighbors were told to leave the tiny bedroom in order to make space for the court officials,”³²⁹ this could be an example of the sanctity of the home trumping the right of public access to trials. Yet, the United States Court of

³²⁵ cf Susan N. Herman, *The Right to a Speedy and Public Trial: A Reference Guide to the United States Constitution* (Praeger 2006) 94 (noting that “[t]he fact that a courtroom cannot hold all members of the public who want to attend a trial has generally been held not to violate the Sixth Amendment right, as long as some significant number of spectators and representatives of the press are able to be present”).

³²⁶ *State v Jones* 281 NW 2d 13 (1979). See also Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002) 22 (noting that “the public must be granted the opportunity of being present at the trial”).

³²⁷ *State v Jones* 281 NW 2d 13, at 17.

³²⁸ cf Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002) 53 (noting that neither the press nor the public enjoys a presumptive right to attend arbitral hearings, “[s]ince the location of the arbitration hearing is likely to be a private building”).

³²⁹ *Lewis v Peyton, Superintendent of the Virginia State Penitentiary* 352 F 2d 791 (1965).

Appeals for the Fourth Circuit in *Lewis v Peyton*,³³⁰ stopped short of such a judgment. It merely held that the venue for the taking of the deposition, while in the discretion of the court, must be based on a court order of record with the usual formalities which was lacking.³³¹

The German Federal Court of Justice (*Bundesgerichtshof* – BGH), in comparison, was more specific, when confronted with a similar case.³³² In the case before the BGH, the petitioners complained that the trial court had closed the judicial taking of visual evidence on site to the public without formally deciding on the exclusion of the public.³³³ The taking of evidence on private property had taken place in private, a circumstance the trial court had announced in a public notice, without having issued a court order in the matter.³³⁴ The BGH held that, because a legal obstacle stood in the way of public attendance, a formal decision on the exclusion of the public was unnecessary.³³⁵ The legal obstacle was the sanctity of the home. In the opinion of the BGH, the exercise of private property rights trumps the public’s right to be present during the judicial taking of visual evidence. Since the owner or occupier of the private premises in question did not allow spectators to enter, the trial court had to take the visual evidence in private.³³⁶ In sum, in Germany, the right to undisturbed possession allows the temporary exclusion of the

³³⁰ *Lewis v Peyton, Superintendent of the Virginia State Penitentiary* 352 F 2d 791 (1965).

³³¹ *ibid.*

³³² BGH Judgment of 10 November 1999 (3 StR 331/99) NStZ-RR 2000, 366-367.

³³³ *ibid* 366.

³³⁴ *ibid.*

³³⁵ *ibid*:

Da die Inhaberin des Hausrechts bei der Durchführung des Ortsaugenscheins im Tatanwesen Zuhörern den Zutritt nicht gestattete, durfte und musste das Gericht diesen Teil der Beweisaufnahme ohne die Öffentlichkeit durchführen, wobei es eines Gerichtsbeschlusses über den Ausschluss der Öffentlichkeit nicht bedurfte, weil der Anwesenheit der Öffentlichkeit ein von dem Gericht nicht zu beseitigendes rechtliches Hindernis entgegenstand [...].

³³⁶ *ibid.*

public from a trial which renders a court order on the exclusion of the public unnecessary, if the right to undisturbed possession is exercised to the detriment of the public.

What the sanctity of the home and business premises³³⁷ means for the openness of arbitral hearings is examined in this section. It is argued that the right to undisturbed possession does not flow from private ownership or occupation as such but from the private function of the premises which may flow from private ownership or occupation. The reverse is also true: a right of public access exists if the premises to which access is sought serve a public function such as the administration of justice. It is thus possible to qualify Jaconelli's finding that the public does not have a presumptive right of access to private buildings.³³⁸ If private premises serve the administration of justice, then it follows that the public has a presumptive right of access to these premises for the duration of their public function. The nature of the ownership and the function may coincide but that is not necessarily so. If a court proceeding takes place in a public venue, the public nature of the venue coincides with the use of the venue for a public function. Yet, even if a court temporarily sets up a 'courtroom' in a private venue,³³⁹ that venue then temporarily serves a public function and must therefore be presumptively open to the public for the duration of its public function.³⁴⁰ Likewise, if arbitral tribunals act as if they were courts, as in the

³³⁷ *BGH* Judgment of 14 June 1994 (1 StR 40/94) NJW 1994, 2773-2774, NStZ 1994, 498-499 (extending the sanctity of the home within the meaning of Article 13(1) GG to places of work and business premises).

³³⁸ cf *Joseph Jaconelli, Open Justice: A Critique of the Public Trial* (Oxford University Press 2002) 53 (noting that neither the press nor the public enjoys a presumptive right to attend arbitral hearings, "[s]ince the location of the arbitration hearing is likely to be a private building").

³³⁹ For an example of a judge conducting a hearing in his private home, see *Children's University Hospital, Temple Street v CD and EF* [2011] IEHC 1, para 1.

³⁴⁰ See *Via v Peyton* 284 F Supp 961, at 964 (WD Va. 1968) (finding that the requirement of freedom of public access to a trial in the judge's chambers, an otherwise private venue, was fulfilled because "the door to the judge's chambers remained open at all times" during the trial) (internal quotation marks omitted); *Jones v Peyton* 158 SE 2d 179, at 181 (1967) (finding that a trial in the judge's chambers that took place "behind closed doors and [that] was not open to the free observance of members of the community" did not amount to a public trial).

investment treaty arbitration system, then the public has a right to attend these arbitral hearings, irrespective of where they take place.

The balance between property rights and the public nature of trials can be achieved by examining which usage amounts to the dominant usage. If a property is primarily used as a home and a judge takes evidence there for the purposes of a trial that otherwise takes place in a courtroom that is presumptively open to the public, then the public does not have a presumptive right of public access to the private home. The private home primarily fulfils a private function. If, however, ‘courtrooms’ are set up in what otherwise serve as private homes or business premises,³⁴¹ these homes or premises must be presumptively open to the public to the extent that they serve the public function of the administration of justice.³⁴² The same is true for arbitral hearings in the investment treaty arbitration system. These specific type of arbitral hearings must be presumptively open to the public regardless of the location of the hearings. The BGH recognised this tension between property rights and the right of public access to trials. It emphasised that the judicial taking of evidence in private is compatible with a right of public access to trials, since the

³⁴¹ In 1815 and 1816, the United States Supreme Court met in private homes and taverns after the British had set fire to the Capitol, the Court’s prior home, during the War of 1812. See Catherine Hetos Skefos, ‘The Supreme Court Gets a Home’ (1976) *Supreme Court Historical Society Yearbook* 25-36, at 28-29; United States Supreme Court Historical Society, ‘Homes of the Court’ <<http://supremecourthistory.org/history-of-the-court/home-of-the-court/>> accessed 25 October 2018 (mentioning private homes and taverns).

³⁴² Even though, in 1815 and 1816, the United States Supreme Court temporarily met in private homes and taverns, its proceedings were still presumptively open to the public. See George Ticknor, *Life, Letters, and Journals of George Ticknor*, Vol. I (Boston: James R. Osgood and Company 1876) 38-39:

The room in which the judges are compelled temporarily to sit is, like everything else that is official, uncomfortable, and unfit for the purposes for which it is used. They sat – I thought inconveniently – at the upper end; but, as they were all dressed in flowing black robes, and were fully powdered, they looked dignified. Judge Marshall is such as I described him to you in Richmond; Judge Washington is a little, sharp-faced gentleman, with only one eye, and a profusion of snuff distributed all over his face; and judge Duval very like the late Vice-President. The Court was *opened* at half past eleven, and Judge Livingston and Judge Marshall read written opinions on two causes. (Emphasis added).

evidence is generally deliberated upon in subsequent hearings in open court.³⁴³ The small portion of the trial that is private – the judicial taking of evidence – is thus still subject to public scrutiny, even if only indirectly and after the fact. There is thus a presumption, at least in Germany, that logistical reasons of a legal nature only allow for a temporary exclusion of the public from an otherwise open trial. Let us assume that this result is representative for otherwise the principle of open justice would be a very weak one.

Conclusion

This section examined the differences between the Rules on Transparency and domestic exceptions to the principle of open justice. Since the principle of open justice is applicable to investment treaty arbitration, its exceptions are applicable also. The main difference between the Rules on Transparency and domestic exceptions to the principle of open justice is that court hearings usually cannot be closed for logistical reasons in their entirety – contrary to what Article 6(3) of the Rules on Transparency prescribes for arbitral hearings. Neither *de facto* logistical reasons nor logistical reasons of a legal nature allow the closure of all trials to all members of the public. Some members of the public may be excluded for a lack of physical capacity to accommodate all. In addition, the public may be excluded if the judge is taking evidence on private premises and the owner or occupier of these premises is exercising their right to undisturbed possession to the detriment of the public. Private ownership of the premises, however, is not a legal obstacle to a right of public access as such. Just as entire ‘courtrooms’ set up on otherwise private premises must be presumptively open to the public, so do investment treaty arbitrations. Many

³⁴³ *BGH* Judgment of 14 June 1994 (1 StR 40/94) *NJW* 1994, 2773-2774, at 2774 (“Weiter ist darauf hinzuweisen, daß das bei der Ortsbesichtigung gewonnene Beweisergebnis, soweit es bedeutsam ist, in der Regel bei der nachfolgenden Verhandlung im Gerichtssaal öffentlich erörtert wird.”).

constitutions affirm the strong presumption of open justice by requiring judgments to be announced in public session,³⁴⁴ even if the hearings were closed to the public.

Given this strong presumption of open justice, the infeasibility of arranging public access is not an exception to the principle of open justice usually found in domestic jurisdictions. If at all, it exists only in life-or-death situations, for example, in a situation, in which a judge is called upon to conduct a hearing in the early hours of the morning in his private residence on whether the administration of a life-saving blood transfusion to a desperately ill child³⁴⁵ should be sanctioned against the wishes of the child's parents or in comparably exceptional circumstances. Such circumstances of extreme urgency are unlikely to be present in investment arbitrations. It follows that the arrangement of public access is unlikely to be infeasible in investment arbitrations. Mere impracticability does not pass the test of infeasibility. In addition, under domestic principles of open justice, a judgment

³⁴⁴ Afghanistan Const., 2004, Art 128; Albania Const., 1998 (as amended to 2012), Art 146(2); Algeria Const., 1996 (as amended to 2008), Art 144; Andorra Const., Art 86(2); Barbados Const., 1966 (as amended to 1995), Art 18(9); Botswana, 1966 (as amended to 2006), Art 10(10); Cyprus Const., 1960 (as amended to 1996), Art 30(2); Czech Republic Const., 1992 (as amended to 2002), Art 96(2); Estonia Const., 1992 (as amended to 2005), Art 24(4); Georgia, 1995 (as amended to 2010), Art 85(1); Hellenic Republic Const., 1975 (as amended to 2008), Art 93(3)(1); Haiti Const., 1987 (as amended to 2012), Art 181; India Const., 1950 (as amended to 13 January 2012), Art 145(4) (judgments of the Supreme Court announced in public session); Japan Const., 1947, Art 82; Hashemite Kingdom of Jordan, 1952 (as amended to 2011), Art 101(3); Grand Duchy of Luxembourg Const., 1868 (as amended to 2009), Art 89; Macedonia Const., 1991 (as amended to 2011), Art 102(1); Maldives Const., 2008, Art 42(d); Mauritius Const., 1968, Art 10(10); Mexico Const., 1917 (as amended to 2010), Art 17(5); Netherlands Const., 2008, Art 121; Nigeria Const., 1999 (as amended to 2010), Art 36(3); Basic Statute of the State (Sultanate of Oman), 1996, Art 63; Papua New Guinea Const., 1975 (as amended to 2009), Art 37(12); Poland Const., 1997, Art 45; Qatar Const., Art 133; Rwanda Const., 2003 (as amended to 2010), Art 141(2); Saint Kitts and Nevis Const., 1983, Art 10(10); St. Lucia Const., 1978, Art 8(10); St Vincent Const., 1979, Art 8(10); Samoa Const., 1960 (as amended to 2005), Art 9(1); Seychelles Const., 1993 (as amended to 2011), Arts 19(8) and 19(9); Slovenia Const. (as amended to 2003), Art 24; Solomon Islands Const. (as amended to 2001), Art 10(9); Swiss Const., 1998, Art 30(3); Tunisia Const., 2014, Art 108(3); Tuvalu Const., 1986, Art 22(12); Human Rights Act 1998 of the United Kingdom, Art 1 in combination with Sch 1, Art 6(1); Yemen Const., 1994, Art 152.

³⁴⁵ Such were the circumstances of the hearing in *Children's University Hospital, Temple Street v CD and EF* [2011] IEHC 1 (Hogan J) para 1:

In the early hours of the morning of 27th December 2010, following a hearing in my house I made an order sanctioning the administration of a blood transfusion to a three month old baby who was desperately ill and who, I was told, urgently required that transfusion within a matter of hours. [...] [A] public hearing was perforce impossible in the circumstances.

is still pronounced in public, even if the hearing on which the judgment is based was closed to the public,³⁴⁶ a scenario not contemplated by the Rules on Transparency which fall short of the requirements of open justice in this regard. If all else fails, arbitrators may wish to suggest that arbitral hearings be live-streamed online.³⁴⁷ If sufficient public notice is given, such an arrangement might mitigate the effect that no physical access is granted; a live-stream of arbitral hearings would also fit in with the practice of some courts to live-stream hearings or provide access to videos of past proceedings online.³⁴⁸

G. Conclusion

This section examined whether a right of public access to arbitral hearings, as it derives from the principle of open justice, could be implemented by arbitrators without the consent of the disputing parties. Arbitrators could be authorised to open hearings to the public, if investment treaty arbitration is recognised as being conceptually different from arbitration. While the latter, historically and by design, is a private dispute resolution mechanism, characterised by its lack of law-making, the former has developed into a system in which arbitrators are making law by defining treaty norms over time and across treaties (ARB-NEW). It is ARB-NEW to which the principle of open justice applies. It is

³⁴⁶ See, e.g., *Children's University Hospital, Temple Street v CD and EF* [2011] IEHC 1 (Hogan J) para 1: The purpose of this judgment [...] is not only to give reasons for my decision, but also to fulfil insofar as it is possible to do so, the requirement of Article 34.1 of the Constitution that justice be administered in public "save in such special and limited circumstances as may be prescribed by law." While it was not possible to hold the hearing in open court, the delivery of this judgment will perhaps mitigate the effect of this somewhat by providing a record of what transpired.

³⁴⁷ Sporadically, investment treaty arbitral hearings are live-streamed already. The hearing on jurisdiction and liability in *Bilcon of Delaware v Government of Canada* was live-streamed on the website of the Permanent Court of Arbitration (PCA), for example. See PCA Press Release, *Bilcon of Delaware et al. v. Government Canada (PCA Case No. 2009-04): Live Streaming of Hearing on Jurisdiction and Liability* (The Hague/Toronto, 15 October 2013).

³⁴⁸ The Supreme Court of England and Wales, the Supreme Court of Canada, the High Court of Australia and other levels of court, as well as some courts in China live-stream court proceedings or provide access to videos of past proceedings online. See Colin Trehearne, 'Transparency, Legitimacy, and Investor-State Dispute Settlement: What Can We Learn from the Streaming of Hearings?' (*Kluwer Arbitration Blog*, 9 June 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/06/09/transparency-legitimacy-investor-state-dispute-settlement-can-learn-streaming-hearings/>> accessed 25 October 2018.

the principle of open justice, in turn, which authorises arbitrators to open to the public ARB-NEW hearings, i.e., hearings in which law is made for all participants in the investment arbitration system. Yet, that authorisation, as it exists under international law, does not curtail the power of the disputing parties to replace their own arbitrators.

What this section demonstrated is that “[t]he powers of an arbitral tribunal are those conferred upon it by the parties within the limits allowed by the applicable law.”³⁴⁹ In general, the parties confer upon arbitrators the power to resolve their dispute, subject to applicable arbitration rules most of which grant each party the power to preclude the openness of arbitral hearings. Such provisions are not invalid under international law, since the principle of open justice, despite being a principle of international law, is not a peremptory norm of international law. States thus would have been able to validly conclude investment treaties that authorise each disputing party to preclude the openness of ARB-NEW hearings. In what followed, the preceding section then examined if that is what states have done and found that it was not. States, in existing investment treaties, inspired by international commercial arbitration, did not regulate ARB-NEW – but arbitration, i.e., a private dispute resolution mechanism characterised by its lack of law-making. That states envisaged the dispute resolution mechanism between investors and states to be arbitration as it is traditionally understood already follows from the wording of investment treaties. They regulate *arbitration*, providing that *arbitration* hearings cannot be opened to the public without the consent of both disputing parties. If it is to be assumed that states comply with international law, this regulation is to be interpreted

³⁴⁹ Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 306 (“The powers of an arbitral tribunal are those conferred upon it by the parties within the limits allowed by the applicable law, together with any additional powers that may be conferred automatically by operation of law.”) (Internal reference omitted).

literally. It is only if arbitration is interpreted as a private dispute resolution mechanism defined by its lack of law-making that the presumption of secret hearings, to be overcome only with the consent of both disputing parties, does not violate the principle of open justice. Since the principle of open justice does not require *arbitration* to be open to the public, investment treaties, as written and if taken literally, do not violate international law in that respect.

Because of the presumption of state compliance with existing international law, it cannot be assumed, absent evidence to the contrary, that all states participating in the system of investor-state arbitration predicted that investor-state *arbitration* would turn into ARB-NEW and that states nonetheless opted to authorise each disputing party to preclude the openness of ARB-NEW hearings, thereby creating an exception to the general principle of open justice. Investment treaties do not state that their provisions create an exception to the principle of open justice should arbitrators begin to make law. Absent such a clarification, it cannot be assumed that investment treaty provisions applicable to *arbitration* apply to ARB-NEW. The amendment of the general principle of open justice requires more than an implicit assumption that states must have meant the principle of open justice to be inapplicable to arbitration, even if arbitrators begin to make law. In a next step, this section examined whether the principle of open justice is a term that is implicit in investment treaties and concluded that it is.

Yet, even though the principle of open justice, implicit as it is in investment treaties, authorises arbitrators to open ARB-NEW hearings to the public, arbitrators may nonetheless be hindered in exercising this authority in practice – by the disputing parties. Just as disputing parties confer on arbitrators the power to adjudicate upon their dispute, parties can request arbitrators to resign, should arbitrators refuse to conduct the

proceedings in accordance with the rules agreed upon by the parties. Because most investment treaties and the arbitration rules they reference authorise each disputing party to preclude the openness of arbitral hearings, disputing parties might argue that these rules did not cease to apply as soon as arbitrators began to make law. If disputing parties disagree with the findings of this section – that ARB-NEW differs conceptually from arbitration, that ARB-NEW is not regulated under investment treaties, unless the principle of open justice is recognised as an implicit term therein – then arbitrators cannot open hearings to the public, especially not without the consent of both disputing parties. In fact, opening hearings to the public without the consent of both disputing parties could result in a party requesting arbitrators to resign. Rather than taking that risk, arbitrators may prefer to limit themselves to informing the disputing parties that secret hearings may lead to the unenforceability of the ensuing award. The provision of that information, however, is the duty of arbitrators whose duty it is to render enforceable awards.

V. Conclusion

Chapter 3 explored the implementation of a right of public access to arbitral hearings in the investment arbitration system, in particular the role courts and arbitrators could play in that process. Between the two of them, courts are in a stronger position than arbitrators to trigger the openness of ARB-NEW hearings, i.e., hearings in the investment arbitration system that is characterised by arbitrators making law. National courts, if and when called upon to enforce awards, can refuse to enforce those awards that are based on proceedings that were wrongly closed to the public. Even if national courts only contemplated this possibility, this could trigger the presumptive openness of ARB NEW hearings, as parties have an interest in the enforceability of their awards.

Arbitrators, even though it is their duty to render enforceable awards, are limited to advising the disputing parties that proceedings should be conducted in conformity with the principle of open justice. In practice, arbitrators cannot open hearings to the public without the consent of both disputing parties if the applicable arbitration rules require that consent, which most of them do. Even though these rules, arguably, are limited in their applicability to *arbitration* and do not apply to ARB-NEW because their application to ARB-NEW would violate the general principle of open justice, absent state clarification, it is the disputing parties who have the final say over the interpretation of these rules during the treaty-based proceedings.

The premise of most arbitration rules is that arbitrators are not making law. In theory, these rules become inapplicable once arbitrators begin making law, as state compliance with the principle of open justice is to be assumed. The principle of open justice could even be said to be an implicit term in investment treaties. Yet, disputing parties could reason that arbitrators are not making law and that the principle of open justice is not applicable to the hearings. Alternatively, disputing parties could reason that even if arbitrators are making law, private hearings do not violate the principle of open justice as states introduced an exception to the general principle in their investment treaties. The latter argument rests on the unlikely assumption, unsupported by evidence, that all states participating in the system of investor-state arbitration foresaw that arbitrators would be making law and that states agreed to the private nature of any type of hearings regardless. The better and more realistic view is that states did not contemplate the possibility that arbitrators would be making law when concluding investment treaties. It follows that states did not agree to an exception to the principle of open justice in their investment treaties. States, in any case, would have had to make any derogation from a recognised principle of international law explicit in their treaties, which they did not. It follows that

the rules governing arbitration, if applied to ARB-NEW hearings, violate the principle of open justice if these rules grant each disputing party the power to preclude the openness of hearings, which most of them do. These arguments notwithstanding, a disputing party can request arbitrators to resign if arbitrators open ARB-NEW hearings to the public – in conformity with the general principle of open justice but in seeming contrast to arbitration rules that allow *arbitral* hearings to remain closed to the public at the behest of a disputing party. It is this dependency on the continued appointment by the disputing parties that makes arbitrators less powerful than judges when it comes to the implementation of a right of public access to arbitral hearings.

Judges are more powerful than arbitrators, because judges can refuse to enforce awards if the hearings on which the awards are based were wrongly closed to the public. That is true, irrespective of whether the proceedings at the enforcement stage are governed by the New York Convention or the ICSID Convention and their respective implementing legislation. The reasoning required to refuse the enforcement of an ICSID award is more elaborate, however, than the reasoning required to refuse the enforcement of a non-ICSID award.

Under the **New York Convention** and its implementing legislation courts can consider national public policy as a ground for refusal *ex officio*. If national public policy was interpreted as containing the principle of open justice, courts could argue that awards are not to be enforced unless the underlying proceedings did not violate the principle of open justice. The principle of open justice requires that proceedings in which law is made are presumptively open to the public, that proceedings are to be closed at the behest of the adjudicating authority (not at the behest of a disputing party) and that proceedings are only to be closed in exceptional circumstances. Logic dictates that arbitral law-making

renders the principle of open justice applicable to arbitral hearings. It follows that, if arbitral hearings are presumptively closed to the public, if they remain closed to the public at the behest of a disputing party – or both disputing parties – and if the closure extends to the hearings in their entirety, the principle of open justice is violated. It follows that courts may refuse the enforcement of the ensuing award on the grounds of public policy.

The **ICSID Convention** does not contain a public policy exception. Yet, Article 54(1) of the Convention allows courts to treat awards as if they were final judgments of a court in the forum state or as if they were final judgments of the courts of a constituent state of the forum state. This opens the door to the applicability of defences otherwise applicable to the enforcement of final judgments. Which explicit defences are available will depend on the particular jurisdiction. This chapter presented defences available in the United States, Argentina and the United Kingdom. This chapter also argued that there is a defence that is implicit in the constitutional principle of open justice itself. National courts, if faced with final judgments based on proceedings that were wrongly closed to the public, could protect the principle of open justice by refusing to enforce these final judgments. If, for example, courts systematically ignored the principle of open justice, and the enforcement of the ensuing final judgments was sought before other courts within the same jurisdiction, these other courts, hypothetically, could refuse to enforce the final judgments so reached, if no other remedy was available or effective. In other words, the non-violation of the principle of open justice can be thought of as a requirement for the enforcement of final judgments derived from the principle of open justice itself. If then ICSID awards are to be treated as if they were final judgments,³⁵⁰ the requirement that the underlying proceedings must have not violated the principle of open justice for the

³⁵⁰ ICSID Convention, Art 54(1).

judgments to be enforceable also applies to ICSID awards. In investment arbitration, the violation of the principle of open justice amounts to a general practice.³⁵¹ This general practice is a result of the standard application of treaty norms regulating *arbitration* to ARB-NEW. National courts may therefore refuse to enforce those awards that perpetuate the violation of the principle of open justice. This line of argument is not inconsistent with the *travaux préparatoires* of the ICSID Convention either. Aron Broches, the then General Counsel of the World Bank, always recognised that equating ICSID awards with final judgments “imply[s] that exceptional grounds [can] be invoked to prevent recognition and enforcement.”³⁵² The principle of open justice is such an exceptional ground. Considering that there is no other avenue available to protect the principle of open justice, as it exists under international law, derived from its protection in the constitutions of the world, and considering that states did not introduce an exception to the principle when concluding investment treaties, its protection by national courts at the enforcement stage of investor-state arbitration is even more pertinent. As Ernst-Ulrich Petersmann notes:

[A]s long as international economic courts are perceived to neglect general citizen interests as protected by human rights and other constitutional rules, governments and domestic courts may legitimately refuse domestic implementation of international judicial decisions (for example, of WTO and NAFTA dispute settlement panels and investor-state arbitration).³⁵³

³⁵¹ In investor-state arbitration, hearings are usually held in private. For ICSID arbitration, see Christoph H. Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICISD Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 699.

³⁵² ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II, Part 2, Documents 44-146* (Washington, D.C., 1968) 888.

³⁵³ Ernst-Ulrich Petersmann, ‘Constitutional Theories of International Economic Adjudication and Investor-State Arbitration’ in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann

Investment treaties are not only perceived to neglect the general principle of open justice. Rather, most investment treaties, if interpreted to apply to ARB-NEW hearings, *violate* the general principle of open justice, since ARB-NEW hearings are to be presumptively closed to the public and not to be opened to the public without the approval of both disputing parties. The curiosity that treaties, if interpreted to apply to ARB-NEW hearings, contain provisions that violate international law, can be explained with the static caused by the friction between the original design of investor-state arbitration and its subsequent practice. Investor-state arbitration is based on international commercial arbitration and therefore designed as a dispute resolution mechanism characterised by its lack of law-making. If arbitrators do not make law, the general principle of open justice does not apply to arbitration. Interpreted literally, investment treaties thus do not violate international law to the extent that they are interpreted to regulate *arbitration*, i.e., a process typically characterised by its lack of law-making, only.

Yet, arbitrators left their designated realm by beginning to make law for all participants in the system of investor-state arbitration – over time and across individual treaties. This development moved investor-state arbitration away from *arbitration* as it is historically understood and into the realm of proceedings to which the principle of open justice applies. Irrespective of how haphazard this development may have been, the reality is that the principle of open justice applies to what investor-state arbitration has become and that most existing treaties and the arbitration rules they reference are unfit to properly protect the principle of open justice. Most existing treaties and the arbitration rules they reference grant each disputing party the power to preclude the openness of hearings and to challenge arbitrators if the latter open hearings to the public without the consent of both disputing

(eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 137-194, at 191.

parties. Change must therefore be sought outside the investment treaty arbitration system. Courts are predisposed for triggering that change. The exceptions to the enforcement of arbitral awards under the New York Convention and the ICSID Convention, and their implementing legislation, allow courts to refuse the enforcement of those awards that are based on proceedings that violated the principle of open justice.

Chapter 4

The Promises of Multilateral Mechanisms

I. Introduction

This chapter compares proposals for an open¹ World Investment Court and Appellate Body with the introduction of a right of public access to arbitral hearings. This chapter is inspired by the European Commission's proposal to introduce a multilateral investment court and appellate body,² though the European Commission's proposal is not the first in time. The idea of a World Investment Court, or at least an Appellate Body,³ has been discussed time and time again. In 2010, Katia Yannaca-Small asked how utopian a World Investment Court is, concluding that it would be "hard to conceive how one World Investment Court would be set up to adjudicate over the approximately 2700 investment protection treaties [then] in force."⁴ The number of investment treaties has risen by more than 600 over the past eight years and the realisation of a World Investment Court is

¹ "Open" here means that the public has a qualified right to be admitted. Cf *R v Governor of Lewes Prison, ex p Doyle* [1917] 2 KB 254, at 271 (noting that "the words 'in open court' mean in a Court to which the public have a right to be admitted").

² European Commission, *The Multilateral Investment Court Project* (Brussels, 21 December 2016, last update on 10 October 2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>> accessed 25 October 2018.

³ See Ian Laird and Rebecca Askew, 'Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System' (2005) 7(2) *Journal of Appellate Practice and Process* 285-302; Karl P. Sauvant with Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008); Irene M. Ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 *NYU Journal of International Law and Politics* 1109-1204; Barry Appleton, 'The Song is Over: Why It's Time to Stop Talking about an International Investment Arbitration Appellate Body' (2013) 107 *American Society of International Law Proceedings* 23-26; Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 135-136 (with further references).

⁴ Katia Yannaca-Small, 'Annulment of ICSID Awards: Limited Scope But is There Potential?' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 603-634, at 633.

arguably as unlikely as it was in 2010. Yet, given that the idea has now gripped the European Commission, the EU and Canada, it seems only fitting to analyse the merits of a World Investment Court and Appellate Body anew – in comparison to the introduction of a right of public access to arbitral hearings. This chapter is limited to the examination of two questions: whether the introduction of a World Appellate Body for investor-state disputes would lead to decisions that are more consistent and predictable than arbitral awards are to date and whether the establishment of a World Investment Court would offer greater government control over investor-state dispute resolution. Centralised bodies, according to the oft-advanced argument, are more likely than ad hoc tribunals to render decisions that are consistent and predictable, with an Appellate Body contributing to the consistency and predictability of these decisions.⁵ The underlying assumption is that centralised permanent bodies follow their own decisions with a higher degree of certainty than ad hoc arbitral tribunals would. This chapter shows that the introduction of a World Appellate Body could indeed enhance the consistency of decisions. Yet, it also shows that government control over centralised adjudicative bodies would be lower than the degree of government control in the current system. Given that governments would have to give up some of their control they currently enjoy in exchange for a potential increase in the consistency and predictability of decisions, the realisation of a World

⁵ On consistency as an advantage of a single appellate body in the investment treaty arbitration system, see Howard Mann, ‘Transparency and Consistency in International Investment Law: Can the Problems Be Fixed by Tinkering?’ in Karl P. Sauvant with Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008) 213-221, at 220 (“Introducing an appellate level would [...] have the impact of imposing consistency, and thus greater clarity, for both host countries and investors.”); Katia Yannaca-Small K, ‘Annulment of ICSID Awards: Limited Scope But is There Potential?’ in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 603-634, at 629; Anne van Aaken, ‘Control Mechanisms in International Investment Law’ in Zachary Douglas, Joost Pauwelyn and Jorge E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory Into Practice* (Oxford University Press 2014) 410-435, at 428 (noting that “[a]n appellate body would surely contribute to coherence of the jurisprudence, making it more predictable for states and investors alike and permit states to have a clearer focal point on where the law stands; a great help for enabling control of the substantive law written in the treaties”).

Investment Court and Appellate Body is unlikely – a result which renders the introduction of a right of public access to arbitral hearings even more pertinent.

II. A World Appellate Body’s Promise of Greater Predictability

This section examines whether the introduction of a World Appellate Body would lead to decisions that are more consistent and predictable than arbitral awards are to date. That would be the case if only a World Appellate Body could resolve conflicts among laws in the system as a whole. Means of resolving conflicts among laws, according to Raz, “usually determine which one of any two conflicting laws prevails, and the same law always prevails when the two conflict.”⁶ If there were two conflicting laws in the investment arbitration system, absent a means of resolving conflicts among laws, these two conflicting laws, theoretically, could continue to co-exist, leading to decisions that are inconsistent and unpredictable. This section first examines whether the ICSID Annulment Mechanism is a means of resolving conflicts among laws. Second, it compares the ICSID Annulment Mechanism to the potential of a World Appellate Body.

A. The ICSID Annulment Mechanism as a Means of Resolving Conflicts among Laws

This section examines the power of ICSID Annulment Committees, demonstrating how the latter recognise specific arbitral determinations as authoritative, thereby if necessary

⁶ Joseph Raz, ‘Legal Principles and the Limits of Law’ (1972) 81(5) *Yale Law Journal* 823-854, at 832. See also Ronald Dworkin, ‘The Model of Rules’ (1967) 35 *University of Chicago Law Review* 14-46, at 27:

The decision as to which is valid, and which must be abandoned or recast, must be made by appealing to considerations beyond the rules themselves. A legal system might regulate such conflicts by other rules, which prefer the rule enacted by the higher authority, or the rule enacted later, or the more specific rule, or something of that sort. A legal system may also prefer the rule supported by the more important principles.

resolving conflicts among laws.⁷ The power of ICSID Annulment Committees are set out in general first, before this section examines the annulment proceedings in *MTD Equity*.⁸

(i) The Powers of the ICSID Annulment Committee

It is a particularity of the ICSID Convention that either party may request the annulment of an award by an ad hoc Committee.⁹ In case of such a request, the Chairman of the ICSID Administrative Council appoints three arbitrators to form the Committee. These arbitrators must be members of the ICSID Panel of Arbitrators¹⁰ who have not previously acted as arbitrators or conciliators in the same dispute. In addition, the members of the Annulment Committee may not be of the same nationality as any member of the tribunal which rendered the award. Nor may the members of the Annulment Committee be a national of the state party to the dispute or of the state whose national is a party to the dispute.¹¹ Article 52(3) of the ICSID Convention further specifies that the members of the Annulment Committee must not have been designated to the Panel of Arbitrators by either of those states. What is important is that “an annulment proceeding is not an appeal, still less a retrial;”¹² an award may only be annulled on one of the following grounds: .

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;

⁷ cf H.L.A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 95 (“[I]n the simple operation of identifying a given rule as possessing the required feature of being an item on an authoritative list of rules we have the germ of the idea of legal validity.”).

⁸ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Chile*, ICSID Case No ARB/01/7, Decision on Annulment (hereafter *MTD Equity*, Decision on Annulment), 21 March 2007.

⁹ See ICSID Convention, Art 52.

¹⁰ The ICSID Panel of Arbitrators consists of designees of the ICSID Contracting States who may but need not be nationals of the respective Contracting State and of designees of the Chairman of the Administrative Council. Each Contracting State may designate up to four persons and the Chairman may designate up to ten persons to the Panel of Arbitrators. See ICSID Convention, Art 13. For a database of the persons so designated, see ICSID, *Database of ICSID Panels* <<https://icsid.worldbank.org/en/Pages/about/Database-of-Panel-Members.aspx#a5>> accessed 25 October 2018.

¹¹ ICSID Convention, Art 52(3).

¹² *MTD Equity*, Decision on Annulment, 21 March 2007, para 31.

- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.¹³

If the award is annulled, the parties may choose to have a new tribunal adjudicate on their dispute. In principle, there is no review on the merits.¹⁴ This principle is eroded in the context of Article 52(1)(b) of the ICSID Convention, however. When examining whether tribunals have manifestly exceeded their powers, Annulment Committees come close to a review on the merits.¹⁵ That is so because the failure to apply the proper law can constitute a manifest excess of powers,¹⁶ at least where the error is manifest.¹⁷ If an Annulment Committee is to examine whether a tribunal applied the proper substantive law, it also examines what the proper substantive law is. That is not a question of procedure but goes to the merits of a dispute. More specifically, if an Annulment Committee finds no annulable error in a tribunal's formulation of a rule, it acknowledges that the tribunal's formulation of the rule is the correct one, or at least that it is not manifestly wrong. If a Committee must determine which rule out of two conflicting rules is the correct one, the rule that is deemed to be not manifestly wrong prevails and the

¹³ ICSID Convention, Art 52(1).

¹⁴ cf *MTD Equity*, Decision on Annulment, 21 March 2007, para 54 (noting that “[i]t cannot substitute its determination on the merits for that of the tribunal”).

¹⁵ cf Gary B. Born, *International Commercial Arbitration, Volume III: International Arbitral Awards* (2nd edn, Kluwer Law International 2014) 3341 (noting that “courts [...] may sometimes come close to, or engage in, a form of judicial review of the merits of the arbitrator's award in the context of a public policy or excess of authority analysis” but adding that “this review is usually highly circumscribed and available only to correct egregious errors of law”).

¹⁶ *MTD Equity*, Decision on Annulment, 21 March 2007, para 44; *Venezuela Holdings, B.V., and others v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Annulment, 9 March 2017, para 189 (“The Tribunal exceeded its powers by failing to apply the proper law, and the ‘manifest’ nature of this failure is shown by the inadequacies in the Tribunal's reasoning for the choice of applicable law, in both its positive (the law chosen) and negative (the law rejected) aspects.”); Vladimír Balas, ‘Review of Awards’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1125-1153, at 1138 (noting “the failure to apply the proper law” as an example of manifest excess of powers).

¹⁷ *MTD Equity*, Decision on Annulment, 21 March 2007, para 47.

conflict is resolved. It is thus the application of Article 52(1)(b) of the ICSID Convention that may lead to the resolution of conflicts among laws.

(ii) *MTD Equity v Chile*

The following paragraphs demonstrate this by way of example, the example being the proceedings in *MTD Equity v Chile*.¹⁸ This section sets out the facts of the dispute before examining how the tribunal articulated the applicable FET standard, the question that was before the Annulment Committee, which test was applied by the Annulment Committee to examine whether the arbitral tribunal had manifestly exceeded its powers in articulating the FET standard and the legacy of *MTD Equity*.

(a) The Facts of the Case

The dispute between MTD Equity, MTD Chile (collectively ‘MTD’) and Chile arose in the context of the former’s investment in Chile. MTD Equity, a Malaysian company, was eager to develop a township of 600 hectares in Pirque, south of Santiago, through its wholly owned subsidiary, MTD Chile, a Chilean company. The township would have consisted of “houses, apartments for diverse socioeconomic strata, schools, hospitals, universities, supermarkets, commerce of all sorts, services, and all other components necessary for self-sufficiency.”¹⁹ The site for the project was zoned for agricultural use;²⁰ rezoning was therefore required before the project could proceed. MTD was aware of this obstacle but assumed that rezoning was a possibility when the Chilean Foreign Investment Commission approved of the project and, on behalf of Chile, signed the Foreign Investment Contract between Chile and MTD on 18 March 1997. The rezoning

¹⁸ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004 (hereafter *MTD Equity*, Award); *MTD Equity*, Decision on Annulment, 21 March 2007.

¹⁹ See *MTD Equity*, Award, 25 May 2004, para 51 (quoting from MTD’s application with the Foreign Investment Commission in Chile).

²⁰ *MTD Equity*, Award, 25 May 2004, para 42.

of the site was not forthcoming, however, and it was not until 16 April 1998 that MTD was informed of the Government policy not to encourage development of Santiago towards the South. By that time, MTD had already invested in the project. Shortly afterwards, the Chilean Minister for Housing and Urban Development formally rejected the project.²¹ MTD Equity and MTD Chile subsequently initiated proceedings against Chile under the 1992 Malaysia-Chile BIT. MTD claimed, among other things, that Chile had violated its treaty obligation to treat foreign investments fairly and equitably.

(b) The Findings of the Arbitral Tribunal

The tribunal agreed, noting that it would apply the *Tecmed* test to the facts of the case.²² Following the award in *Tecmed*, the tribunal in *MTD Equity* interpreted the obligation to act consistently as a basic expectation protected under the FET standard.²³ It was this obligation that led the tribunal to conclude that the FET standard had been violated. The tribunal held that it was inconsistent for a state to enter into a Foreign Investment Contract that specified the site and nature of a project and required the investor to seek approval if

²¹ *MTD Equity*, Award, 25 May 2004, para 80.

²² *ibid* paras 114-115. According to the *Tecmed* test, the concept of fair and equitable treatment means the following:

[...] to provide international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a *consistent manner, free from ambiguity and totally transparently* in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act *consistently*, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the state to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. See *Técnicas Medioambientales TECMED S.A. v Mexico*, ICSID Case No ARB(AF)00/2, Award, 29 May 2003, para 154 (emphasis added).

²³ See *MTD Equity*, Award, 25 May 2004, paras 165-166 (noting at para 165 that “Chile has an obligation to act coherently and apply its policies consistently, independently of how diligent an investor is”).

it wanted to change the site of the project while, at the same time, knowing (and not telling the investor) that it would never rezone the specified site and allow the investor to go forward.²⁴ The tribunal held that the acts of approving the project – the development of a township to the South of Santiago – and of signing the Foreign Investment Contract, contrary to specific Government policy not to encourage development of Santiago to the South, were inconsistent in the first place.

(c) Chile’s Request for the Annulment of the Award

Chile requested the annulment of the subsequent award against it, arguing, among other things, that the tribunal had manifestly exceeded its powers by failing to apply the correct fair and equitable treatment standard.²⁵ Chile argued that the tribunal had applied the FET standard as defined by the *Tecmed* tribunal and that this standard was not the FET standard under the 1992 Malaysia-Chile BIT. For Chile, there was a conflict between the FET standard applied (law A) and the FET standard under the Malaysia-Chile BIT (law B). It was then the task of the Annulment Committee to determine which law prevailed. The next section examines the test applied by the *MTD* Committee when examining

²⁴ See *MTD Equity*, Award, 25 May 2004, para 163 (“inconsistency of action between two arms of the same Government vis-à-vis the same investor even when the legal framework of the country provides for a mechanism to coordinate”), para 166 (noting “that approval of an investment by the [Foreign Investment Commission] for a project that is against the urban policy of the Government is a breach of the obligation to treat an investor fairly and equitably”); para 188 (finding “that Chile treated unfairly and inequitably the Claimants by authorizing an investment that could not take place for reasons of its urban policy”); para 189 (“[W]hat is unacceptable for the Tribunal is that an investment would be approved for a particular location specified in the application and the subsequent contract when the objective of the investment is against the policy of the Government. Even accepting the limited significance of the Foreign Investment Contracts for purposes of other permits and approvals that may be required, they should be at least in themselves an indication that, from the Government’s point of view, the Project is not against Government policy.”); para 214 (noting that “it was unfair to admit the investment in the country in the first place”).

²⁵ *MTD Equity*, Decision on Annulment, 21 March 2007, para 63 (noting Chile’s criticism “that [the tribunal] misapprehended the standard of fair and equitable treatment under the BIT, applying a standard expressed in a dictum of the *TECMED* tribunal which in no way represents international law and which cannot be derived from arts 2(2) and 3(1) of the BIT by any process of interpretation”).

whether the tribunal had manifestly exceeded its powers when defining the applicable FET standard, also in comparison to the approach proposed by Arthur Watts.

(d) The Test Applied by the Annulment Committee

The *MTD* Committee held that “a complete failure to apply the law to which a Tribunal is directed by Article 42(1) of the ICSID Convention can constitute a manifest excess of powers.”²⁶ *Non-application* is what is meant by the complete failure to apply the law. This non-application, which will be very rare should it ever occur, is distinguished by the *MTD* Committee from the erroneous application of the law, which it does not consider to be a ground for annulment. In this regard, the *MTD* Committee follows the *MINE* case,²⁷ which held that the erroneous application of the law, “even if manifestly unwarranted, furnishes no ground for annulment.”²⁸

The rationale for this distinction is that Annulment Committees do not hear appeals for error of law.²⁹ Instead, Committees examine whether arbitral tribunals have applied the law agreed upon by the disputing parties. If disputing parties direct a tribunal to apply a specific law, and the tribunal does apply that law, albeit erroneously, the tribunal acts within the terms of reference within which it is authorised to function. The disputing parties, therefore, do not have a guarantee under the ICSID Convention that their chosen tribunal will get the correct law right. The line between the non-application of a correct law and its erroneous application is arbitrary to some extent, however, and depends on what is defined as the *correct law*, what as an *error* and what as a *non-application*. If disputing parties agree that English law is applicable and a tribunal applies German law,

²⁶ *MTD Equity*, Decision on Annulment, 21 March 2007, para 44.

²⁷ *MINE* (1989) 4 ICSID Reports 79.

²⁸ *ibid* 87 para 5.04, quoted in *MTD Equity*, Decision on Annulment, 21 March 2007, para 45.

²⁹ *cf MTD Equity*, Decision on Annulment, 21 March 2007, para 47.

the tribunal will have exceeded its powers, because, in this specific scenario, the correct law undoubtedly is English law. If a tribunal, in the same scenario, applies English law but does so erroneously, it will not have exceeded its powers because it applied the correct law. The case is not so clear-cut, however, when it comes to the application of the obligation to treat foreign investors fairly and equitably.

If it is unclear what ‘fair and equitable’ means, i.e., if it is unclear what the meaning of that law is, the distinction between the non-application of the obligation to treat investors fairly and equitably and the erroneous application of that provision is very difficult. It is exactly this uncertainty as to the meaning of ‘fair and equitable’ that makes it difficult to determine whether arbitral tribunals exceed their powers when defining ‘fair and equitable treatment’ in the first place. This difficulty is compounded by the fact that the non-application of a correct rule can also be understood as its erroneous application and vice versa. Assuming for a moment that ‘fair and equitable’ means X and a tribunal, in purporting to apply the provision that obligates host states to treat foreign investments fairly and equitably, interprets ‘fair and equitable’ to mean Y, one could argue two things. On the one hand, one could argue that the tribunal, subjectively speaking, did indeed apply the provision but did so erroneously. After all, the tribunal did endeavour to give meaning to the expression ‘fair and equitable’, albeit, in this scenario, an incorrect one.³⁰ On the other hand, one could argue that the tribunal, while *purporting* to apply the provision, in fact, objectively speaking, disregarded the provision and applied a different standard (not X but Y). Neither the first nor the second argument seems more persuasive than the respective other. The answer to the question whether a tribunal failed to apply

³⁰ For an expression of this idea, see *CDC Group* (2005) 11 ICSID Reports 237, at 252 para 45 (“Regardless of our opinion of the correctness of the Tribunal’s legal analysis [...] our enquiry is limited to a determination of whether or not the Tribunal endeavoured to apply English law.”).

the correct law or whether it applied the correct law erroneously depends indeed on whether the application of a rule is defined subjectively or objectively. What is clear is that, if ‘fair and equitable’, objectively, were to mean X, any deviation from X would be deemed to be a non-application rather than an erroneous application of the rule.

This is illustrated by the following example: if one were to exchange the expression ‘fair and equitable treatment’ with ‘English law’ and a tribunal were to interpret ‘English law’ not to mean ‘English law’ (X) but ‘German law’ (Y), it would be apparent to anyone that the arbitral tribunal failed to apply the law agreed upon by the parties. That is because the meaning of the expression ‘English law’ is clear. Even if a tribunal, hypothetically, was genuinely mistaken about the meaning of the expression ‘English law’, one would not speak of the erroneous application of the provision but its non-application.³¹ It is then a matter of general acceptance as to the meaning of a specific expression or rule of law that determines whether a tribunal has failed to apply that rule of law.³² In the absence of a meaning of ‘fair and equitable treatment’ that is generally accepted as correct, it seems unnecessarily restrictive at first sight to adopt the test proposed in the *MINE* case and to distinguish strictly between the non-application of the correct law and its erroneous application. If the meaning of ‘fair and equitable treatment’ is uncertain, arguably there should be greater room for Annulment Committees to examine not only whether the

³¹ cf *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/0, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para 91 (“[I]t will amount to a non-application of the applicable law for a tribunal to apply, for instance, the law of State X to determine a dispute when the applicable law is in fact the law of State Y or public international law.”)

³² This explains why the Committee in *MTD Equity* referred to the ‘acceptance’ of legitimate expectations as a component of fair and equitable treatment. If ‘fair and equitable treatment’ is generally understood to contain the requirement to adhere to the investor’s legitimate expectations, the analysis of legitimate expectations cannot be a case of the non-application of the obligation to treat foreign investors ‘fairly and equitably’. Cf *MTD Equity*, Decision on Annulment, 21 March 2007, para 69:

[L]egitimate expectations generated as a result of the investor’s dealings with the competent authorities of the host State may be relevant to the application of the guarantees contained in an investment treaty. This is expressly accepted by the Respondent and in the case-law.

correct law ('fair and equitable treatment') was applied by tribunals but also whether it was applied correctly. Watts then also criticises the strict distinction between the non-application of the correct law (which is a ground for annulment) and its erroneous application (which is not a ground for annulment). He argues:

There comes a stage ... at which a tribunal, in purportedly applying a rule of law, gets it so wrong that it must be regarded as having disregarded the rule and not really having applied it at all. The purported application of the rule must be so inadequate, and suffused with such fundamental error, that it transcends the mere commission of an error in applying the law and becomes instead a veritable case of its non-application.³³

If one were to follow Watts, the erroneous application of 'fair and equitable treatment' – in case of a fundamental error – amounts to the non-application of that provision. His analysis is an attempt to elevate the fundamental misapplication of a rule to its non-application. The *MTD* Committee rejected this formulation of a manifest excess of powers because "it goes far down the slippery slope of appeal for error of law – error of law combined with adjectives perhaps, but error of law nonetheless."³⁴ The *MTD* Committee, instead, clarified that it is in favour of a strict distinction between the non-application of the correct law and its erroneous application. It accepts, however, that there is some room for manoeuvre: if a tribunal is purporting to apply the correct law but objectively or "actually applies another, quite different law"³⁵ the award may be annulled. It is then for the Committee to determine which law was applied by the tribunal and

³³ Sir Arthur Watts, Opinion of 20 January 2006 annexed to the Respondent's Annulment Reply in *MTD Equity*, para 27, quoted in *MTD Equity*, Decision on Annulment, 21 March 2007, para 46.

³⁴ *MTD Equity*, Decision on Annulment, 21 March 2007, para 47.

³⁵ *ibid.*

whether that was the correct one. The *MTD* Committee clarifies that “in such a case the error must be *manifest*, not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough.”³⁶ Several Annulment Committees, before and since, have pondered over the question whether a *manifest* excess of powers is an excess of powers that is obvious³⁷ or whether it must also be serious.³⁸ As it is debatable what qualifies as an obvious excess of powers – whether the excess must “leap out of the page on a first reading of the Award”³⁹ – and which error is serious enough to qualify as an annulable error, the element of the *MTD* test that is most helpful is the juxtaposition of the words *manifest* and *arguable*. If reasonable minds differ as to whether

³⁶ *MTD Equity*, Decision on Annulment, 21 March 2007, para 47 (emphasis added) (internal quotation marks omitted), quoted in *Azurix Corp. v Argentine Republic*, ICSID Case No ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, para 48; *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/0, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para 87.

³⁷ *Wena Hotels Ltd v Republic of Egypt*, ICSID Case No ARB/98/4, Decision on Annulment, 5 February 2002, para 25; *Repsol YPF Ecuador S.A. v Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/01/10, Decision on Annulment, 8 January 2007, para 36; *Azurix Corp. v Argentine Republic*, ICSID Case No ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, para 68 fn 48 (relying on the *Repsol* Annulment Decision); *Caratube International Oli Company LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12, Decision on Annulment, 21 February 2014, para 84; *Alaplí Elektrik B.V. v Republic of Turkey*, ICSID Case No ARB/08/13, Decision on Annulment, 10 July 2014, para 230; *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Decision on Annulment, 7 January 2015; *Total S.A. v Argentine Republic*, ICSID Case No ARB/04/01, Decision on Annulment, 1 February 2016, para 185; *EDF International S.A., Saur International S.A. and Leon Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No ARB/03/23 (Annulment Proceeding), Decision, 5 February 2016, para 192; *Ioan Micula, Viorel Micula and Others v Romania*, ICSID Case No ARB/05/20, Decision on Annulment, 26 February 2016, para 123 (with further references); *TECO Guatemala Holdings LLC v Republic of Guatemala*, ICSID Case No ARB/10/23, Decision on Annulment, 5 April 2016, para 77. See also Schreuer, Malintoppi, Reinisch and Sinclair, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) Art 52 para 135:

In accordance with its dictionary meaning, *manifest* may mean *plain, clear, obvious, evident* and easily understood or recognized by the mind. Therefore, the manifest nature of an excess of powers is not necessarily an indication of its gravity. Rather, it relates to the ease with which it is perceived. [...] An excess of powers is manifest if it can be discerned with little effort and without deeper analysis. (emphasis added) (international quotation marks omitted).

³⁸ *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case No ARB/02/7, Decision on Annulment, 5 June 2007, paras 38-40 (noting that “the excess of power should at once be textually obvious and substantially serious”).

³⁹ *EDF International S.A., Saur International S.A. and Leon Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No ARB/03/23 (Annulment Proceeding), Decision, 5 February 2016, para 193.

a tribunal has identified the correct rule,⁴⁰ a tribunal's error, if any, is arguable but not manifest.⁴¹

If a misapprehension as to the content of a rule or a misinterpretation of a rule is not enough, this leaves the Committee with examining whether a tribunal applied the correct rule. It matters then what is defined as the correct rule. If 'fair and equitable treatment' is the correct rule and a tribunal applies that rule to the facts of a case, that tribunal cannot be deemed to have exceeded its powers. If, on the other hand, 'fair and equitable treatment including its proper components' is the correct rule, tribunals that are manifestly mistaken about a component of fair and equitable treatment, can be deemed to have exceeded their powers. It is not entirely clear how the *MTD* Committee defined the correct rule. Since it did examine whether the components of 'fair and equitable treatment' applied by the arbitral tribunal were defensible,⁴² however, the *MTD* Committee must have considered itself competent to determine which components of 'fair and equitable treatment' are defensible. Such an approach makes sense only if the Annulment Committee deemed a

⁴⁰ cf *Azurix Corp. v Argentine Republic*, ICSID Case No ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, para 68.

⁴¹ On the juxtaposition of manifest and arguable, see *CDC Group v Republic of the Seychelles*, ICSID Case No ARB/02/14, Decision on Annulment, 29 June 2005, para 41; *Azurix Corp. v Argentine Republic*, ICSID Case No ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, para 69; *Duke Energy International Peru Investments No 1 Ltd. v Republic of Peru*, ICSID Case No ARB/03/28, Decision on Annulment, 1 March 2011, para 99; *Total S.A. v Argentine Republic*, ICSID Case No ARB/04/01, Decision on Annulment, 1 February 2016, para 185 (relying on the *CDC Group* Annulment Decision).

⁴² *MTD Equity*, Decision on Annulment, 21 March 2007, para 71:

[A] standard formulated in the terms of paragraph 113 is defensible. No doubt the extent to which a State is obliged under the fair and equitable treatment standard to be pro-active is open to debate, but that is more a question of application of the standard than it is of formulation. In any event the emphasis in the Tribunal's formulation is on 'treatment in an even-handed and just manner.' In particular the Tribunal does not express the obligation in such a way so as to eliminate the distinction between acts and omissions or to avoid all elements of risk for the investor. That is sufficient for the purposes of Article 52(1)(b) of the ICSID Convention. In short, in articulating this standard there is no indication that the Tribunal committed any excess of power, let alone that it did so manifestly.

misinterpretation of ‘fair and equitable treatment’ that is manifestly wrong to be an excess of powers, which it did. The *MTD* test can therefore be summed up as follows:

An excess of powers may occur where an arbitral tribunal completely fails to apply the correct law. Whether a specific law is ‘correct’ is open to review by an Annulment Committee. That includes the correct interpretation of the correct law. An interpretation is incorrect and leads to the annulment of an award if the interpretation of the correct law is indefensible or otherwise manifestly wrong.

This result is noteworthy for two reasons. First, the *MTD* test does not contrast with the postulation by the *MINE* Committee that the “erroneous application of [...] rules, *even if manifestly unwarranted*, furnishes no ground for annulment.”⁴³ If the postulation by the *MINE* Committee is to be taken literally, that would mean that any application of the obligation to provide fair and equitable treatment furnishes no ground for annulment. That presupposes that a tribunal *applied* the obligation to provide fair and equitable treatment, i.e., put the rule to use to a set of facts.⁴⁴ Every application of a rule necessarily includes the interpretation of that rule. If there is a sign that a tribunal, in fact, correctly defined the meaning of ‘fair and equitable’ and therefore applied the correct rule, an Annulment Committee would have to defer to the decision by a tribunal as to the meaning of fair and equitable treatment. But the decision whether a tribunal, in fact, correctly defined the meaning of ‘fair and equitable’ lies with the Annulment Committee, which is another way of saying that the Committee determines whether a tribunal correctly defined the correct rule. The *MTD* Committee then also distinguished between the correct formulation⁴⁵ or

⁴³ *MINE* (1989) 4 ICSID Reports 79, at 87 para 5.04 (emphasis added), quoted in *MTD Equity*, Decision on Annulment, 21 March 2007, para 45.

⁴⁴ Bryan A. Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson Reuters 2014) 121.

⁴⁵ *MTD Equity*, Decision on Annulment, 21 March 2007, para 71.

articulation⁴⁶ of the fair and equitable treatment standard and its application, with the formulation being correct if it is not deemed indefensible or otherwise manifestly wrong.

Secondly, the test applied by the *MTD* Committee, despite some differences in emphasis, can also be reconciled with the approach suggested by Arthur Watts. Watts introduces the expression of the ‘purported application of a rule’. He imagines a scenario in which a tribunal commits an error in the application of a rule that is so fundamental as to amount to the non-application of the rule. The *MTD* Committee rejected his approach because it deemed his proposal to be too close to an appeal for error of law. Yet if a tribunal purports to be applying rule X, while it is in fact applying rule Y which it mistakes for rule X, there is no difference between the approaches of Watts and the *MTD* Committee. Watts would argue that the tribunal, “in purportedly applying [rule X], [got] it so wrong that it must be regarded as having disregarded the rule and not having applied it at all.”⁴⁷ The *MTD* Committee would argue that the tribunal, “while purporting to apply the relevant law actually [applied] another, quite different law.”⁴⁸ This scenario must be distinguished from the scenario in which a tribunal has identified the correct rule and has made no annulable error in the formulation of that rule. If a tribunal is purporting to apply rule X and is, in fact, applying rule X to a particular set of facts, the tribunal does not commit an excess of powers, even if the tribunal errs in the application of that rule. If a tribunal errs in the application of a rule, that presupposes that the tribunal did indeed apply that rule, albeit erroneously. If it did apply the rule, albeit erroneously, the tribunal acted within the terms of reference within which it is authorised to function.

⁴⁶ *MTD Equity*, Decision on Annulment, 21 March 2007, para 71.

⁴⁷ Sir Arthur Watts, Opinion of 20 January 2006 annexed to the Respondent’s Annulment Reply in *MTD Equity*, para 27, quoted in *MTD Equity*, Decision on Annulment, 21 March 2007, para 46.

⁴⁸ cf *MTD Equity*, Decision on Annulment, 21 March 2007, para 47.

(e) The Result and Legacy of *MTD Equity v Chile*

In its decision, the *MTD* Committee held that the tribunal did not manifestly exceed its powers. It held that the articulation of the obligation to treat foreign investments fairly and equitably applied by the arbitral tribunal was defensible.⁴⁹ What is noteworthy is that the *MTD* Committee considered the *Tecmed* formulation, which includes the protection of basic expectations, to be a specification of the more general FET standard. More specifically, the *MTD* Committee considered the *Tecmed* formulation to be “in support” of the more general standard it considered defensible.⁵⁰ This means that the *MTD* Committee understood the award to be an authoritative determination of what the content of ‘fair and equitable treatment’ is. By not annulling the award based on the *Tecmed* formulation of the FET standard, the *MTD* Committee consolidated the rule that the obligation to treat foreign investments fairly and equitably includes the obligation to protect the basic expectations of investors. In other words, it determined that rule A (the *Tecmed* formulation of the FET standard) is the rule which prevails, to the detriment of rule B (the conflicting formulation of the FET standard proposed by Chile).

Despite this principled result, the *MTD* Committee failed to predict the legacy of its own decision. The Committee believed that the tribunal in *MTD Equity* reached its decision “on a rather narrow and specific ground, without systematic implications for controversial issues of the law of investment protection.”⁵¹ The strong arbitral reliance on the *Tecmed* dictum⁵² at least casts doubt on this analysis. The systematic implication of the decision

⁴⁹ *MTD Equity*, Decision on Annulment, 21 March 2007, para 71.

⁵⁰ *ibid* para 70.

⁵¹ *ibid* para 54.

⁵² The following awards rely on *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, ICISD Case No ARB(AF)/00/2, Award, 29 May 2003, para 154 when defining the protection of legitimate expectations as a component of fair and equitable treatment: *MTD Equity v Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, para 114; *CMS v Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005, para 279; *Eureko v Poland*, Partial Award, 19 August 2005; *Saluka v Czech Republic*, Partial Award, 17 March 2006, para 302; *LG&E Energy v Argentine Republic*, ICSID Case No ARB/02/1,

in *MTD Equity* is that basic expectations are an element of the FET standard, a rule that was consolidated by the *MTD* Committee. Had the *MTD* Committee decided that the tribunal had exceeded its powers when following the *Tecmed* dictum, the element of ‘basic expectations’ might have never gathered the force it has today. The legacy of the *MTD* decision on annulment is that it consolidated basic expectations as an element of the FET standard, both vis-à-vis future tribunals and future Annulment Committees. The *Enron* Annulment Committee⁵³ describes the force of prior annulment decisions as follows:

It is in the Committee’s view to be expected that the ad hoc committee will have regard to relevant previous ICSID awards and decisions, including other annulment decisions, as well as to other relevant persuasive authorities. [...] [T]he Committee considers that in the longer term there should develop a *jurisprudence constante* in relation to annulment proceedings.⁵⁴

Decision on Liability, 3 October 2006, para 127; *Global v Turkey*, ICSID Case No ARB/02/5, Award, 19 January 2007, para 240; *Enron v Argentine Republic*, ICSID Case No ARB/01/3, Award, 22 May 2007, para 262; *Parkerings-Compagniet Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, para 330 fn 80; *Sempra Energy v Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007, para 298; *Duke Energy v Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008, para 340 fn 34-35; *National Grid v Argentine Republic*, Award, 3 November 2008, para 173 fn 60; *Jan de Nul v Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008, para 186 fn 25; *Vecchi v Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009, para 450 fn 643; *Kardassopoulos and Fuchs v Georgia*, ICSID Case Nos ARB/05/18 and ARB/07/15, Award, 3 March 2010, para 440 fn 452; *Suez and AWG Group v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, para 224; *AES Summit v Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010, paras 9.3.8 and 9.3.10; *Alpha v Ukraine*, ICSID Case No ARB/07/16, Award, 8 November 2010, para 420 fn 588 and fn 592; *Frontier Petroleum v Czech Republic*, UNCITRAL Final Award, 12 November 2010, para 287 fn 336; *Total S.A. v Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, para 117 fn 116; *Roussalis v Romania*, ICSID Case No ARB/06/1, Award, 7 December 2011, para 316; *Oostergetel v Slovak Republic*, UNCITRAL Final Award, 23 April 2012, para 222 fn 112; *Toto v Lebanon*, ICSID Case No ARB/07/12, Award, 7 June 2012, para 152 fn 113; *Micula v Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para 534 fn 107 and para 667 fn 133.

⁵³ *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010.

⁵⁴ *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para 66.

The Annulment Committee in *Tidewater*⁵⁵ indeed acknowledged the existence of such a *jurisprudence constante*; it recognised a rule developed by Annulment Committees “that both the non-application of the proper law and the application of a law that is not proper”⁵⁶ would constitute an excess of powers within the meaning of Article 52(1)(b) of the ICSID Convention. It is not inconceivable either that Annulment Committees also develop a *jurisprudence constante* regarding the meaning of fair and equitable treatment. That Annulment Committees, despite their decisions not being strictly binding on arbitral tribunals,⁵⁷ influence the development of the FET standard can already be learned from the arbitral reliance on decisions on annulment. In its obiter dictum, the *MTD* Committee clarified that a subjective interpretation of the investor’s ‘basic expectations’, detached from the applicable provisions of the treaty, may be an interpretation of the FET standard that is manifestly wrong,⁵⁸ which is a passage later tribunals, also non-ICSID tribunals, refer to when defining basic expectations as an objective element of the FET standard.⁵⁹

Contra *M.C.I Power Group L.C. and New Turbine Inc. v Republic of Ecuador*, ICSID Case No ARB/03/6, Decision on Annulment, 19 October 2009, para 24:

The annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law. The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals. They are assisted in their task by the development of a common legal opinion and the progressive emergence of ‘une jurisprudence constante’.

⁵⁵ *Bolivarian Republic of Venezuela v Tidewater Investment SRL and Tidewater Caribe, C.A. (Tidewater)*, ICSID Case No ARB/10/5, Decision on Annulment, 27 December 2016.

⁵⁶ *ibid* para 126.

⁵⁷ *MTD Equity*, Decision on Annulment, 21 March 2007, para 54 fn 63.

⁵⁸ See *MTD Equity*, Decision on Annulment, 21 March 2007, para 67:

[T]he TECMED Tribunal’s apparent reliance on the foreign investor’s expectations as the source of the host State’s obligations [...] is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material, might do so manifestly.

⁵⁹ See *MCI Power Group v Republic of Ecuador*, ICSID Case No ARB/03/6, Award, 31 July 2007, para 278 n40; *Biwater Gauff (Tanzania) v Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, para 600 n252; *Invesmart v Czech Republic*, UNCITRAL Award, 26 June 2009, para 256 n170; *Mamidoil v Albania*, ICSID Case ARB/11/24, Award, 30 March 2015, para 607 n471. For other instances of arbitral reliance on annulment decisions, see *MCI Power Group v Republic of Ecuador*, ICSID Case No ARB/03/6, Award, 31 July 2007, para 352 n48 (relying on *CMS Gas Transmission Company v Argentine Republic*,

(iii) Conclusion

In sum, the ICSID annulment mechanism provides a means for resolving conflicts among laws. If two rules conflict and one is deemed manifestly wrong by an Annulment Committee, it is the other rule that generally prevails, despite arbitral tribunals and other Annulment Committees not being strictly bound by the ratio decidendi of prior annulment decisions. As with arbitral precedent in general, later arbitral tribunals, irrespective of the applicable arbitration rules, and later Annulment Committees tend to follow the ratio decidendi of annulment decisions without being strictly bound by them. This practice renders the applicable law consistent and predictable over time, not only within the ICSID system but within the system of investment treaty arbitration as a whole.

B. The ICSID Annulment Mechanism and a World Appellate Body Compared

A World Appellate Body, as understood here, would have jurisdiction to hear appeals on issues of law and on allegations that there has been a manifest error in the appreciation of the facts in all investor-state disputes under all investment treaties. This means that a World Appellate Body would provide a universal means for resolving conflicts among laws. This contrasts with the ICSID Annulment Mechanism which can only resolve

ICSID Case No ARB/01/8, Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 1 September 2006, para 49); *Walter Bau AG v Thailand*, UNCITRAL Award, 1 July 2009, para 11.11 n49 (relying on *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Decision on Annulment, 25 September 2007); *El Paso v Argentina*, ICSID Case No ARB/03/15, Award, 31 October 2011, para 356 (relying on *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Decision on Annulment, 25 September 2007, para 89); *Tulip v Turkey*, ICSID Case No ARB/11/28, Award, 10 March 2014, para 355 n380 (relying on *Vivendi v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, para 113); *Mamidoil v Albania*, ICSID Case ARB/11/24, Award, 30 March 2015, para 601 n467 (relying on *MTD Equity*, Decision on Annulment, 21 March 2007, para 108); *Quiborax v Bolivia*, ICSID Case No ARB/06/2, Award, 16 September 2015, para 92 n68 (relying on *Daimler Financial Services v Argentina*, ICSID Case No ARB/05/1, Decision on Annulment, 7 January 2015, para 295); *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016, para 557 n803 (relying on *Wena Hotels Ltd. v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision on Annulment, 5 February 2002, paras 101 and 105); *Garanti Koza v Turkmenistan*, ICSID Case No ARB/11/20, Award 19 December 2016, para 332 n482 (relying on *Vivendi v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, para 96).

conflicts among laws that arise in arbitrations under the ICSID Arbitration Rules. There is no review mechanisms available for awards rendered under other arbitration rules. Domestic courts do not review arbitral awards on the merits either. In short, the benefit of a World Appellate Body would lie in its wider reach.

In theory, conflicting laws can continue to co-exist in the existing system. In theory, later tribunals, even within the ICSID system, are not strictly bound by the ratio decidendi of prior annulment decisions. Nor do annulment decisions strictly bind later Annulment Committees. In theory, future tribunals could reject basic expectations as an element of the FET standard or they could define the meaning of ‘basic expectations’ differently from prior tribunals, accepting subjective expectations as a valid element of the FET standard, for example. Annulment Committees could diverge on the interpretation of the FET standard as well. These are all possibilities – but often not more.⁶⁰ To infer the need for an appellate body from the mere possibility of inconsistency in the current system – absent “a statistically significant data set”⁶¹ on inconsistency – would be a weak argument. Such an argument would overlook the high degree of consistency as to the applicable law in the existing investment treaty arbitration system.⁶² The flexible doctrine of stare decisis, followed by arbitrators, and the reliance on prior decisions across treaties and across applicable arbitration rules leads to that high degree of consistency as to the

⁶⁰ On the irregularity of the inconsistencies in the investment arbitration system, see Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 1.79-1.81 (noting two examples of inconsistencies on issues of law in that “seriously divide tribunals” but also noting that inconsistencies are not regularly found among awards).

⁶¹ Barton Legum, ‘Options to Establish an Appellate Mechanism for Investment Disputes’ in Karl P. Sauvant with Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008) 231-239, at 237 (“The empirical case for a need for greater consistency and coherence lacks a statistically significant data set.”).

⁶² For a prediction on this development, see Irene M. Ten Cate, ‘International Arbitration and the Ends of Appellate Review’ (2012) 44 *NYU Journal of International Law and Politics* 1109-1204, at 1193:

[I]t is conceivable that horizontal coordination could develop in investment arbitration without the looming threat of reversal by a higher-ranked adjudicator. While “soft” precedent does not necessarily result in consistent awards, a growing consensus may arise on many issues. (Internal references omitted).

applicable law.⁶³ It is thus wrong to say, as the European Commission does, that “[i]t is very difficult to point to a key decision taken by a tribunal and be able to honestly say that one knows that that particular decision will, with a high degree of certainty, be followed.”⁶⁴ One must only study arbitral practice to make such a prediction. Figure 18 *above* shows the awards relied on most often by arbitrators when defining legitimate expectations as an element of the FET standard. The decisions in *Saluka*,⁶⁵ *Tecmed*⁶⁶ and *Waste Management II*,⁶⁷ already relied on so often,⁶⁸ will, with a high degree of certainty, also be followed in the future.

In sum, the high degree of consistency of decisions as to the applicable law in the existing system, driven by the arbitral urge to render consistent decisions, lessens the necessity of a World Appellate Tribunal. What is more, ICSID Annulment Committees already act as if they were a single court, by following their own prior decisions with a high degree of certainty, which renders the idea of creating an Appellate Body that would follow its own prior decisions with a high degree of certainty less ground-breaking. The only benefit of an Appellate Body would be its universal reach across all arbitration rules. Should non-

⁶³ See already Ian Laird and Rebecca Askew, ‘Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System’ (2005) 7(2) *Journal of Appellate Practice and Process* 285-302, at 299:

Soft precedent in some form or another already exists in investor-state arbitration, whereby decisions are widely available, and arbitral panels closely consider and sometimes adopt the reasoning of other tribunals. For those who are concerned about consistency, there appears to a good argument that such consistency is already developing in investor-state arbitration. (Internal reference omitted).

⁶⁴ European Commission, *The European Union’s Approach to Investment Dispute Settlement* (22 June 2018) 5 <http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157112.pdf> accessed 25 October 2018.

⁶⁵ *Saluka Investments BV (The Netherlands) v The Czech Republic*, UNCITRAL Partial Award, 17 March 2006 (Sir Arthur Watts, L. Yves Fortier, Peter Behrens, Arbitrators – Czech Republic-Netherlands BIT 1991).

⁶⁶ *Técnicas Medioambientales Tecmed S.A. v The United Mexican States*, ICISD Case No ARB(AF)/00/2, Award, 29 May 2003 (Horacio A. Grigera Naon, José Carlos Fernández Rozaz, Carlos Bernal Vera, Arbitrators – Spain-Mexico BIT 1995).

⁶⁷ *Waste Management, Inc. v United Mexican States (II)*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004 (James Crawford, Benjamin R. Civiletti, Eduardo Magallón Gómez, Arbitrators – NAFTA).

⁶⁸ Figure 18 shows that within the study on arbitral precedent conducted for this thesis, arbitral tribunals relied 32 times on the Partial Award in *Saluka*, 31 times on the Award in *Tecmed* and 19 times on the Award in *Waste Management II* when defining legitimate expectations as an element of the FET standard.

ICSID arbitrators interpret norms differently from ICSID arbitrators, a World Appellate Body would have the power to resolve that conflict, which is a power ICSID Annulment Committees do not have. Greater predictability and consistency in theory would thus be the potential benefit of an Appellate Tribunal. It should be kept in mind, however, that the degree of consistency as to the applicable law is already high in the existing system.⁶⁹ The high degree of consistency can be explained with the arbitral practice of relying on prior decisions across treaties and applicable arbitration rules, a practice that is driven by the aim to define norms consistently and to an ever-increasing degree of specification.⁷⁰

⁶⁹ See Jan Paulsson, 'Avoiding Unintended Consequences' in Karl P. Sauvant with Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008) 241-265, at 241 ("What issues of coherence? [...] Irreconcilable differences in *rationes decidendi* have been far rarer than supposed. From a practitioner's viewpoint, there is no crisis of unpredictability.").

⁷⁰ cf Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 1.81:

[W]hile the risk of inconsistency remains, there is degree of convergence in the case law around common principles. To some extent, this is to be expected after what has now been two generation of modern investment awards. This process is akin to that which may be expected in the development of any category of delictual liability. It is only once the principles have been tested in the litigation process against a sufficient number of fact patterns that it becomes possible to discern the detailed working out of the rule and its exceptions.

III. A World Investment Court's Promise of Greater Government Control

This section examines whether government control over a World Investment Court would be greater than in the system of investment treaty arbitration. With the European Union already pursuing the introduction of a World Investment Court,⁷¹ it is high time to reflect on the desirability of institutionalised investor-state dispute resolution in the first place.⁷²

A. CETA as a Point of Comparison

Since the 'investment court system' proposed under the Comprehensive Economic and Trade Agreement between the EU, including its Member States, and Canada (CETA)⁷³ could serve as a template for a World Investment Court, the present section first examines the proposed CETA investment court – also in comparison to traditional investor-state arbitration. In particular, it examines the nature of the CETA investment court, the role of the CETA Joint Committee and the nature of its decisions and the issue of shared

⁷¹ See CETA, Art 8.29:

The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.

See also European Commission, *Concept Paper: Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court* <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 6 July 2017; Council of the European Union, *Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States* (Brussels, 27 October 2016) (Document No 13541/16) Section 6(i):

[CETA] lays the basis for a multilateral effort to further develop this new approach to investment dispute resolution into a Multilateral Investment Court. The EU and Canada will work expeditiously towards the creation of the Multilateral Investment Court. It should be set up once a minimum critical mass of participants is established, and immediately replace bilateral systems such as the one under CETA, and be fully open to accession by any country that subscribes to the principles underlying the Court.

⁷² For sceptical views on institutionalisation, see Barton Legum, 'Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-U.S. FTA?' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2015) 437-442; JJ Saulino and Josh Kallmer, 'The Emperor Has No Clothes: A Critique of the Debate Over Reform of the ISDS System' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2015) 560-568.

⁷³ See Section F of CETA (Resolution of investment disputes between investors and states).

competence. That the competence between the European Union and its Member States over the conclusion of CETA is shared impacts the envisaged government control mechanism, the Joint Committee. The Committee, if established, would have to base some of its decisions on a consensus among the EU, its Member States and Canada. This section argues that this unintended complication would ultimately stifle government control, a result that would be contrary to the proclaimed aim of introducing greater government control over the interpretation of treaty norms.⁷⁴ This prediction, if true, foreshadows the difficulties governments would face in their effort to steer a World Investment Court on its course of norm interpretation and norm generation.

(i) The Nature of the Proposed CETA Investment Court

This section examines the nature of the proposed investment court under CETA. The text of CETA defines the proposed investment court as consisting of a Tribunal⁷⁵ and an Appellate Tribunal.⁷⁶ Neither the Tribunal nor the Appellate Tribunal are designed as permanent institutions or courts. Articles 8.41(5) and 8.41(6) of CETA even characterise their decisions as *arbitral awards* for the purposes of the New York Convention⁷⁷ and the ICSID Convention⁷⁸ and no permanent secretariat is created. What makes the Tribunal a semi-permanent body is that its Members – initially fifteen – are appointed by the Joint

⁷⁴ European Commission, *CETA – Summary of the final negotiating result* (February 2016) p 12 (‘[giving] the Parties to CETA more control over the manner in which the treaty is interpreted’) <https://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf> accessed 25 October 2018.

⁷⁵ See CETA, Art 8.27(1).

⁷⁶ See CETA, Art 8.28.

⁷⁷ See CETA, Art 8.41(5):

A final award issued pursuant to this Section is an arbitral award that is deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.

⁷⁸ See CETA, Art 8.41(6):

For greater certainty, if a claim has been submitted pursuant to Article 8.23.2(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the ICSID Convention.

Committee for a term of five to six years,⁷⁹ renewable once. The text of CETA does not envisage the Members of the Tribunal working full-time in fulfilment of their functions. Instead, Article 8.27(12) of CETA envisages the payment of a monthly retainer fee to Members of the Tribunal to ensure their availability. Article 8.27(6) of CETA captures the understanding that all fifteen Members are collectively referred to as the Tribunal but that individual cases are heard by a sub-division thereof. This sub-division may consist of three Members of the Tribunal or a single Member.⁸⁰ Article 8.27(7) of CETA clarifies that it is the responsibility of the President of the Tribunal to appoint Members to cases “on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members of the Tribunal to serve.” Should the circumstances require a more permanent solution, Article 8.27(15) of CETA allows the Joint Committee to transform the retainer fee and other fees and expenses into a regular salary. The core innovation proposed under CETA is thus the appointment of arbitrators by the Joint Committee and the quasi-tenure of these arbitrators, as opposed to the appointment of arbitrators by the disputing parties on a case-by-case basis.

(ii) The Role of the Envisaged CETA Joint Committee

The current text of CETA clarifies that the envisaged control over arbitrators is the control exercised by the Joint Committee established under Article 26.1 of CETA. Article 26.1(1) of CETA states that the Joint Committee, if established, would comprise representatives of the European Union and representatives of Canada only. The Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or

⁷⁹ See CETA, Art 8.27(5) which states that the regular term of office is five years. The terms of seven of the fifteen persons appointed immediately after the entry into force of the Agreement, to be determined by lot, shall extend to six years, however.

⁸⁰ See CETA, Arts 8.27(6) and 8.27(9).

their respective designees, would co-chair the Joint Committee.⁸¹ Since the European Commission intended Member States to be Contracting Parties (Parties) to CETA only *qua* their membership in the European Union, not directly, the European Commission deemed it appropriate to represent the Member States in the central body of CETA. As the central body of CETA, the Joint Committee has the power to appoint the Members of the Tribunal and the Appellate Tribunal and to appoint subsequent additions, successors, or replacements to the Tribunal and the Appellate Tribunal.⁸² The Joint Committee also has the power to adopt interpretations of the agreement.⁸³ In addition, the Joint Committee has the power to agree on amendments of the agreement as provided in the agreement itself.⁸⁴ Article 8.1 of CETA provides, for example, that the Joint Committee may enlarge the group of intellectual property rights protected under CETA.⁸⁵

(iii) The Nature of the Joint Committee’s Decisions

Whether the decisions by the CETA Joint Committee are binding on the Parties is unclear. Article 26.3(2) of the agreement provides that “[t]he decisions made by the CETA Joint Committee shall be binding on the Parties, subject to the completion of any necessary internal requirements and procedures.” The German Federal Government interprets this

⁸¹ The CETA Joint Committee, in its aim, is reminiscent of the NAFTA Free Trade Commission, which comprises ministerial-level representatives from Canada, the United States, and Mexico, the Parties to the North American Free Trade Agreement (NAFTA). The NAFTA Free Trade Commission, established under NAFTA Article 2001(1), is the central, supervisory body of the NAFTA. NAFTA Article 2001(2) provides, among other things, that the Commission supervises the implementation of the Free Trade Agreement, and the work of all committees and working groups, that it oversees the further elaboration of the agreement, and that it resolves disputes regarding the interpretation or application of the agreement.

⁸² See CETA, Arts 8.27(3)(1), 8.28(3), 8.28(7) and 8.30(4).

⁸³ See CETA, Arts 8.31(3)(2), 26.1(5)(e) and 29.2.

⁸⁴ CETA, Art 26.1(5)(c).

⁸⁵ See the entry on ‘intellectual property rights’ under CETA, Art 8.1:

For the purposes of this Chapter [...] intellectual property rights means copyright and related rights, trademark rights, right in geographical indications, rights in industrial designs, patent rights, rights in layout designs of integrated circuits, rights in relation to protection of undisclosed information, and plant breeders’ rights; and, if such rights are provided by a Party’s law, utility model rights. The CETA Joint Committee may, by decision, add other categories of intellectual property to this definition.

provision to mean that the Contracting Parties have an explicit right to veto decisions by the CETA Joint Committee.⁸⁶ Yet, the wording of Article 26.3(2) of CETA does not unambiguously support such an interpretation.⁸⁷ Article 26.3(2) does not mention that Party approval is required, nor does the phrase *completion of any necessary internal requirements and procedures* allude to a right of the Contracting Parties to veto decisions by the Joint Committee. If anything, the addendum in Article 26.3(2) that the Contracting Parties *shall implement* the decisions made by the Joint Committee indicates that the Parties do not have a right to veto these decisions.⁸⁸ Given the wording of Article 26.3(2), it is more likely that the treaty drafters modelled the CETA Joint Committee on the NAFTA Free Trade Commission,⁸⁹ intending its decisions regarding the amendment and interpretation of the agreement to be binding.

Article 8.44 of CETA supports this interpretation. Article 8.44 describes the functions of the Committee on Services and Investment, which is established under article 26.2(1)(b) of CETA. As a specialised committee, the Committee on Services and Investment may propose draft decisions for adoptions by the Joint Committee, or take decisions when the

⁸⁶ See *Bundesverfassungsgericht (BVerfG)* [German Federal Constitutional Court], Judgment of 13 October 2016 (2 BvR 1368/16) para 30.

⁸⁷ cf *BVerfG*, Judgment of 13 October 2016 (2 BvR 1368/16) para 61 (finding the similarly worded Articles 30.2(2)(2) and 30.2(2)(3) of CETA to be too imprecise to preclude that the Joint Committee's decision to amend the protocols and annexes of CETA does not require Party approval:

Es kann [...] in Anbetracht der unklaren Regelung des Art. 30.2 Abs. 2 Satz 2 und 3 CETA-E nicht ausgeschlossen werden, dass solche Beschlüsse des Gemischten CETA-Ausschusses keiner Zustimmung durch die Vertragsparteien bedürfen.).

⁸⁸ See CETA, Art 26.3(2).

The decisions made by the CETA Joint Committee shall be binding on the Parties, subject to the completion of any necessary internal requirements and procedures, and the Parties shall implement them. The CETA Joint Committee may also make appropriate recommendations.

⁸⁹ On the powers of the NAFTA Free Trade Commission, see NAFTA Art 2001(2) which provides that the Commission shall (a) supervise the implementation of the agreement, (b) oversee its further elaboration, (c) resolve disputes that may arise regarding its interpretation or application, (d) supervise the work of all committees and working groups established under the agreement, referred to in Annex 2001.2; and (e) consider any other matter that may affect the operation of the agreement. See also NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001).

agreement so provides.⁹⁰ Article 8.44(3) of CETA provides, *inter alia*, that the Committee on Services and Investment may, on agreement of the Contracting Parties, and after completion of their respective internal requirements and procedures:

- recommend to the CETA Joint Committee the adoption of interpretations of the agreement pursuant to Article 8.31(3) of CETA⁹¹ (Art 8.44(3)(a) of CETA),
- recommend to the CETA Joint Committee the adoption of any further elements of the fair and equitable treatment obligation pursuant to Article 8.10(3) of CETA⁹² (Art 8.44(3)(d) of CETA), and
- make recommendations to the CETA Joint Committee on the functioning of the Appellate Tribunal pursuant to Article 8.28(8) of CETA⁹³ (Art 8.44(3)(e) of CETA).

These provisions show that the Committee on Services and Investment may recommend specific changes to the Joint Committee but that it is the Joint Committee which makes the decision whether to adopt a specific change. Article 26.1 of CETA underlines the role of the Joint Committee as a decision-making forum and a supervisory body. Article 26.1(3) states that the Joint Committee is responsible for all questions concerning trade

⁹⁰ See CETA, Art 26.2(4).

⁹¹ CETA, Art 8.31(3):

Where serious concern arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on a Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.

⁹² Article 8.44(3)(d) CETA, in fact, refers erroneously to Article 8.10(4). The relevant provision, however, is Article 8.10(3) CETA, which states:

The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2(1)(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.

⁹³ CETA, Art 8.28(8):

The Committee on Services and Investment shall periodically review the functioning of the Appellate Tribunal and may make recommendations to the CETA Joint Committee. The CETA Joint Committee may revise the decision referred to in paragraph 7 [regarding the functioning of the Appellate Tribunal], if necessary.

and investment between the Parties and the implementation and application of the agreement and that the Parties may refer any issues in this regard to the Joint Committee. Article 26.1(4)(a) of CETA adds that the Joint Committee shall supervise and facilitate the implementation and application of the agreement. This supervisory role of the Joint Committee matches the proviso in Article 26.3(1) of CETA that the decisions by the Joint Committee shall be binding on the Contracting Parties. If the decisions were not binding on the Contracting Parties, their added value would be minimal. If the Parties were free not to implement the decisions by the Joint Committee, the function of the Committee would merely be an advisory one – not a supervisory one.

The wording of CETA thus allows the conclusion that the decisions made by the Joint Committee regarding the interpretation and amendment of the agreement are binding on the Contracting Parties. Article 26.1(5)(e) of CETA supports this conclusion. Article 26.1(5)(e) states that the Joint Committee may adopt interpretations of the provisions of the agreement which shall be binding on the Tribunal, the Appellate Tribunal and tribunals established under Chapter Twenty-Nine of the agreement.⁹⁴ If an interpretation is binding on a tribunal, the interpretation also binds the disputing parties, of which one is a Contracting Party, at least indirectly. If the Joint Committee adopted a new element of the fair and equitable treatment obligation, for example, and a tribunal applied that new element to the facts of a case, finding against the respondent state, the respondent state

⁹⁴ See also CETA, Art 8.31(3)(2): ‘An interpretation adopted by the CETA Joint Committee shall be binding on a Tribunal established under this Section [=Section F: Resolution of investment disputes between investors and states].’ See also European Council, *Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States* (Brussels, 27 October 2016) (Document No 13541/16) Section 6(e):

In order to ensure that Tribunals in all circumstances respect the intent of the Parties as set out in the Agreement, CETA includes provisions that allow Parties to issue *binding notes of interpretation*. Canada and the European Union and its Member States are committed to using these provisions to avoid and correct any misinterpretation of CETA by Tribunals. (Emphasis added).

would be bound by the award adopting the new interpretation.⁹⁵ The binding nature of the decisions adopted by the Joint Committee raises the question whether the EU can validly consent to all decisions within the competence of the Joint Committee. If the EU did not have the competence to decide all matters in the Joint Committee on behalf of its Member States, a scenario could arise in which the EU and Canada jointly adopted a treaty interpretation that is binding on the Contracting Parties, yet to which the Member States did not consent, nor were validly represented in their views by the European Union. The next section examines this issue of competence in some more detail.

(iv) The Competence Split between the EU and its Member States

If the EU had the exclusive competence to conclude CETA (scenario A), it would follow that the interests of the Member States were sufficiently represented by the EU. Since no decision in the CETA Joint Committee would be taken against the wishes of the EU,⁹⁶ any interpretation adopted by the Joint Committee would carry the EU's seal of approval. The phenomenon that a Member State of the EU would have been held liable according to an interpretation of CETA to which it did not consent, would have not arisen in this scenario A, since the Member States were neither required nor in a position to give their specific consent. In scenario A, the European Union enjoyed exclusive competence to conclude CETA and to validly agree to its proper interpretation on behalf of its Member States. If the EU consented to a specific interpretation of the treaty in the Joint Committee, it validly did so on behalf of all Member States. That was the idea that informed the opinion of the European Commission and the treaty negotiations.

⁹⁵ See CETA, Art 8.41.

⁹⁶ See CETA, Art 26.3(3): "The CETA Joint Committee shall make its decisions and recommendations by mutual consent."

Yet, as it turned out, in reality, the EU is not endowed with exclusive competence to conclude CETA (scenario B) – for two reasons. First, CETA also provides guarantees regarding non-direct foreign investment (portfolio investments, i.e., investments made “without any intention to influence the management and control of the undertaking”⁹⁷). The conclusion of an investment agreement regulating non-direct foreign investment is neither provided for in a legislative act of the Union nor is it necessary to enable the Union to exercise its internal competences,⁹⁸ nor is the conclusion of such an agreement capable of affecting common rules or altering their scope,⁹⁹ requirements,¹⁰⁰ if present, would have endowed the EU with exclusive competence to conclude such a treaty. As EU law currently stands, the competence to conclude an investment agreement regulating non-direct foreign investment is shared between the EU and its Member States. Secondly, CETA establishes what the European Commission refers to as an investment court system. The competence to establish a new dispute resolution mechanism that removes disputes from the jurisdiction of courts of the Member States is also shared between the EU and its Member States, as the Court of Justice of the European Union confirmed¹⁰¹ and the German Federal Constitutional Court had suspected.¹⁰²

⁹⁷ CJEU, Opinion 2/15 *Competence to conclude EU-Singapore Free Trade Agreement* [2017] para 227.

⁹⁸ *ibid* paras 236-238.

⁹⁹ CJEU, *Press Release No 52/17: The free trade agreement with Singapore cannot, in its current form, be concluded by the EU alone* (Luxembourg, 16 May 2017) 2.

¹⁰⁰ TFEU, Art 3(2):

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

¹⁰¹ *cf* CJEU, Opinion 2/15 *Competence to conclude EU-Singapore Free Trade Agreement* [2017] paras 238, 292-293.

¹⁰² *BVerfG*, Judgment of 13 October 2016 (2 BvR 1368/16) paras 52 and 58.

It follows that, under CETA, if concluded,¹⁰³ Member States of the European Union could have been held liable according to an interpretation of CETA to which they did not consent; namely, in matters of shared competence. In matters of shared competence, the specific consent of Member States is required but not envisaged under CETA. It is thus possible, in theory, that, under the current text of CETA, representatives of the EU and Canada, in their capacity as constituting the Joint Committee, adopt an interpretation of non-direct foreign investment, a matter which falls within a competence that is shared between the EU and its Member States, without the required consent of all the Member States or even against the wishes of individual Member States. The only option to exert influence on decisions taken in the Joint Committee, under the system as designed under CETA, would be for Member States to establish the positions to be adopted on the EU's behalf in the Council of the European Union according to Article 218(9) of TFEU.¹⁰⁴ Yet, that influence would not hinder the Council from establishing a position against the wishes of a minority of the Member States. The default mechanism of reaching a decision in the Council is by qualified majority.¹⁰⁵ If then, a qualified majority¹⁰⁶ establishes a position to be adopted on the EU's behalf in the CETA Joint Committee, the position of the minority would not be represented. Any ensuing interpretation adopted by the Joint Committee would be binding on all Member States of the European Union and Member

¹⁰³ CETA's compatibility with the EU legal order has not been determined yet. Belgium asked the CJEU for an opinion in this regard. See CJEU, *Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Opinion 1/17)* [2017] OJ C369/2 (asking whether the investment court system proposed under CETA is "compatible with the Treaties, including with fundamental rights").

¹⁰⁴ *BVerfG*, Judgment of 13 October 2016 (2 BvR 1368/16) para 64.

¹⁰⁵ TEU, Art 16(3) ("The Council shall act by a qualified majority except where the Treaties provide otherwise."); TFEU, Art 218(8) at the beginning.

¹⁰⁶ For the definition of the term 'qualified majority', see TEU, Art 16(4):

As from 1 November 2014, a qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union.

States could be held liable under CETA according to the adopted interpretation which is binding on tribunals.

The power of the CETA Joint Committee to authoritatively interpret matters within the Member States' competence and the Member States' lack of direct representation in the Joint Committee presented a dilemma, a dilemma of democratic deficiency¹⁰⁷ the very existence of which was long denied by the European Commission. Eventually, a solution was found and adopted: an interinstitutional agreement between the European Union and its Member States.¹⁰⁸ The European Council and the Member States of the European Union issued a joint statement, noting that the Joint Committee's decisions relevant to matters within the Member States' competence must be based on mutual consent between the European Council and its Member States.¹⁰⁹ It is questionable, however, whether this adopted solution will achieve its aim of introducing greater government control over the interpretation of treaty norms and over the dispute resolution process in general. The next section discusses this question, with emphasis on whether government control would be greater under CETA than it is in traditional investment arbitration.

¹⁰⁷ cf *BVerfG*, Judgment of 13 October 2016 (2 BvR 1368/16) para 65 (noting that the democratic legitimacy and control of decisions by the CETA Joint Committee seems tenuous: "Die demokratische Legitimation und Kontrolle derartiger Beschlüsse erscheint mit Blick auf Art. 20 Abs. 1 und 2 GG prekär [...]").

¹⁰⁸ See European Council, *Interinstitutional Files: 2016/0205 (NLE) 2016/0206 (NLE) 2016/0220 (NLE)* (27 October 2016) (Document No 13463/1/16 REV 1).

¹⁰⁹ *Statement from the Council and the Member States* in European Council, *Interinstitutional Files: 2016/0205 (NLE) 2016/0206 (NLE) 2016/0220 (NLE)* (27 October 2016) (Document No 13463/1/16 REV 1) p 14:

The Council and the Member States recall that where a decision of the CETA Joint Committee falls within the competence of the Member States the position to be taken by the Union and its Member States within the CETA Joint Committee shall be adopted by common accord.

See also *Statement by the Kingdom of Belgium on the conditions attached to full powers, on the part of the Federal State and the federated entities, for the signing of CETA* (27 October 2016) in European Council, *Interinstitutional Files: 2016/0205 (NLE) 2016/0206 (NLE) 2016/0220 (NLE)* (27 October 2016) (Document No 13463/1/16 REV 1) 29:

The statement from the Council and the Member States regarding decisions of the CETA Joint Committee regarding regulatory cooperation in areas falling within the competence of Member States confirms that such decisions must be taken by common accord by the Council and the Member States.

B. Traditional Investment Arbitration and the CETA Investment Court Compared

This section compares traditional investment arbitration with the CETA investment court with a view to establishing over which dispute resolution mechanism governments can exert more control. The selection, appointment and removal of arbitrators are analysed under each system as are the possibilities to issue binding notes of interpretation.

In traditional investor-state arbitration, the disputing parties select and appoint their own arbitrators, subject to any rules the underlying investment treaty may stipulate.¹¹⁰ Unless the disputing parties agree to appoint a sole arbitrator, tribunals usually consist of three arbitrators, one arbitrator appointed by each disputing party and the presiding arbitrator appointed by agreement of the disputing parties.¹¹¹ There are two options for disputing parties to control arbitrators. First, disputing parties may choose to challenge arbitrators. Under the ICSID framework,¹¹² parties may propose the disqualification of an arbitrator, *inter alia*, on account of any fact indicating a manifest lack of independence. Similarly, under Article 12(1) of the UNCITRAL Arbitration Rules, a party may challenge an arbitrator, if circumstances exist that give rise to justifiable doubts as to the arbitrator's

¹¹⁰ See, for example, Australia-China FTA 2015, Art 9.15(8):

All arbitrators appointed pursuant to this Section shall have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements. They shall be independent, serve in their individual capacities and not take instructions from any organisation or government with regard to matters related to the dispute, or be affiliated with the government of either Party or any disputing party, and shall comply with Annex 9-A. Arbitrators who serve on the list established pursuant to paragraph 5 shall not, for that reason alone, be deemed to be affiliated with the government of either Party.

¹¹¹ See, for example, ICSID Convention, Art 37(2)(b) which provides that the default number of arbitrators is three, "one arbitrator appointed by each party and the third, who shall be president of the Tribunal, appointed by agreement of the parties." See also ICSID Rules, Rules 2 and 3. The default number of arbitrators is also three under Article 7(1) of the UNCITRAL Arbitration Rules. Even though Article 9(1) of the UNCITRAL Arbitration Rules provides that the two party-appointed arbitrators "shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal", the party-appointed arbitrators will not do so without the parties' consent.

¹¹² See ICSID Convention, Arts 14(1), 40(2), and 57; ICSID Rules, Rule 9.

impartiality or independence.¹¹³ Secondly, disputing parties may choose not to reappoint arbitrators in future disputes. This ad hoc system of dispute resolution is dynamic because it is designed as a constant feedback loop; disputing parties choose to appoint or reappoint arbitrators based on their prior performances within and without the system of investor-state arbitration. In comparison, the Members of the Tribunal would be appointed for a duration of five to six years under CETA,¹¹⁴ and it is the responsibility of the President of the Tribunal to appoint the Members of the Tribunal to arbitrate disputes on a random rotation basis.¹¹⁵ Indeed, some of the proclaimed benefits of the CETA investment court are “permanency, [the] appeal possibility, and [the] random allocation of cases.”¹¹⁶ The random allocation of cases is meant to ensure the impartiality of arbitrators. Yet, the random composition of tribunals also eliminates the opportunity for the disputing parties to create a truly party-neutral tribunal.¹¹⁷ The random composition of tribunals does not guarantee that the tribunal is equally neutral towards investors and states,¹¹⁸ as is the case in traditional investor-state arbitration where each party has influence over the choice of two out of three arbitrators in every case. There is less control under CETA. Even if each Party were able to choose one Member of the quasi-permanent Tribunal, i.e., the pool of

¹¹³ See also SCC Rules 2010, Art 15(1); LCIA Rules 2014, Art 10.1; ICC Rules 2012, Art 14(1).

¹¹⁴ See CETA, Art 8.27(5).

¹¹⁵ See CETA, Art 8.27(7).

¹¹⁶ European Commission, *Fact Sheet: A Future Multilateral Investment Court* (13 December 2016) (noting that “[t]hese core principles would also feature in the discussions on a multilateral court”) <http://europa.eu/rapid/press-release_MEMO-16-4350_en.pdf> accessed 25 October 2018.

¹¹⁷ cf European Commission, *CETA – Summary of the final negotiating result* (February 2016) p 12 (noting that “under CETA, cases will be heard by a permanent tribunal, with members of the tribunal no longer being appointed ad hoc by the investor and the state involved in a dispute but in advance by the Parties to the agreement”) <https://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf> accessed 25 October 2018.

¹¹⁸ The investment court system might, however, help to overcome a potential structural bias in investor-state arbitration. On structural bias, see Gus Van Harten, ‘Perceived Bias in Investment Treaty Arbitration’ in Michael Waibel *et al* (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) 433-453.

potential arbitrators,¹¹⁹ there is no government control over the allocation of arbitrators to specific disputes under CETA. That allocation is random. Individual governments thus enjoy less control under CETA than in traditional investor-state arbitration.

In addition, even if an agreement is reached among the EU, its Member States and Canada as to who should be included in the pool of potential arbitrators collectively referred to as the Tribunal, nothing is said therewith about government control over arbitrators after their appointment. While, under CETA, as in traditional investor-state arbitration, parties may challenge and remove arbitrators from a specific tribunal, the removal of arbitrators from the pool of quasi-tenured arbitrators, i.e., the Tribunal itself, might be more difficult. Article 8.30(4) of CETA provides that the Parties, by decision of the Joint Committee, may remove Members from the Tribunal where their behaviour is inconsistent with their obligations and incompatible with their continued membership of the Tribunal. Since the creation of the Tribunal falls within a competence shared between the EU and its Member States,¹²⁰ the decision to remove Members from the Tribunal requires a consensus among the European Union, its Member States and Canada, which is something that might be difficult to reach in a short time in practice. The requirement of a consensus in matters of shared competence between the EU and its Member States might also stifle the issuance of binding interpretations by the Joint Committee. The European Commission suggests

¹¹⁹ The process of selecting Members of the Tribunal is not set in stone yet. Cf *Statement by the Commission and the Council on investment protection and the Investment Court System (ICS)* in European Council, *Interinstitutional Files: 2016/0205 (NLE) 2016/0206 (NLE) 2016/0220 (NLE)* (27 October 2016) (Document No 13463/1/16 REV 1) 26:

There will be a rigorous process for selecting all judges of the Tribunal and the Appellate Tribunal, under the control of the European Union institutions and the Member States, with the aim of guaranteeing the judges' independence and impartiality, as well as the highest degree of competence.

¹²⁰ cf CJEU, *Opinion 2/15 Competence to conclude EU-Singapore Free Trade Agreement* [2017] paras 292-293.

that the Joint Committee can adopt binding interpretations regarding ongoing cases.¹²¹ It seems altogether aspirational that the EU and its Member States could reach a consensus on controversial aspects of non-direct foreign investment, a matter of shared competence, within the timeframe of an ongoing case. The possibility of issuing binding interpretations is in any case not an idea that is unique to CETA. Contracting states to every investment treaty can issue notes of interpretation which must be taken into account by arbitrators, as Article 31(3)(a) of the VCLT¹²² stipulates. It is simply the greater number of actors required for such an interpretation on issues of shared competence within the EU that makes it more difficult to reach in practice, an argument against the multilateralisation of investor-state dispute resolution, not against the issuance of notes of interpretation.

Conclusion

The fact that Members of the Tribunal are to be appointed for a duration of five to six years, that both their removal from the Tribunal and the interpretation by the CETA Joint Committee of ‘non-direct foreign investment’ requires a consensus among the European Union, its Member States and Canada, and that the Members of the Tribunal are appointed at random to resolve investor-state disputes, makes governments seem *less* powerful under CETA than in traditional investor-state arbitration, where respondent governments have control over the appointment of two out of three arbitrators on a case-by-case basis, where the challenge of arbitrators may lead to their disqualification for good, and where the disputing parties may exert control over arbitrators by not reappointing them in future disputes. The requirement to take decisions in the Joint Committee regarding matters

¹²¹ European Commission, *Concept Paper: Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court* p 2 <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 25 October 2018.

¹²² VCLT, Art 31(3)(a): “There shall be taken into account, together with the context any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”

within the Member States' competence by agreement among the EU, its Member States and Canada, if realised, might haunt all actors involved for years to come. Once the Tribunal and Appellate Tribunal are established, it is unlikely that the EU, its Member States and Canada, will be in a strong position to supervise them, where that supervision requires mutual consent.¹²³ This might lead to the investment court system under CETA growing ever more independent in the absence of effective government control.

C. Lessons for a World Investment Court

The example of CETA foreshadows the difficulties individual governments would face in their effort to steer a World Investment Court on its course of norm interpretation and norm generation. The more actors are involved in issuing interpretations of norms to be followed by arbitrators, the more fraught with difficulty that exercise becomes. The *International Investment Agreements Navigator* lists 213 economies that are Parties to one or more BITs or treaties with investment provisions.¹²⁴ In the ideal scenario of a World Investment Court, assuming that such a court would be tasked with interpreting the 'same' norms uniformly across existing treaties, these 213 economies could exercise control by issuing collective notes of interpretation. Yet, collective notes of interpretation as to the meaning of applicable norms require a consensus. It requires, for example, that 213 economies unanimously determine what the phrase 'fair and equitable treatment' means, on its own, and whether the autonomous FET standard is equivalent to the customary international law minimum standard of treatment. Such a consensus seems so difficult to reach in practice that the control 213 economies could exercise over a World

¹²³ cf *BVerfG*, Judgment of 13 October 2016 (2 BvR 1368/16) para 70 (noting its understanding that the German Federal Government considers the dispute resolution mechanism under CETA to fall within the Member States' competence).

¹²⁴ UNCTAD, *International Investment Agreements Navigator* <<http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu>> accessed 25 October 2018 (under "IIAs by economy" listing member states of the United Nations, dependencies of states that have signed investment treaties and non-member states of the United Nations that possess full treaty-making capacity such as The Cook Islands and Niue).

Investment Court would be likely to be minimal. As Alec Stone Sweet and Florian Grisel note, albeit regarding the introduction of an appellate court for the regime as a whole:

The collective action problems facing reform [...] are formidable, perhaps irresolvable. Revising the ICSID Convention, or creating an appellate court for the regime as a whole, would depend upon the forging of state consensus on design details; indeed, unanimity would be required. Moreover, such efforts would inevitably pose the question of formalizing substantive investment law.¹²⁵

To Stone Sweet and Grisel, the collective action problems render the realisation of an appellate court currently unlikely.¹²⁶ Yet, the collective action problems with the creation of a multilateral court are only one issue. The far bigger issue is the control of that court post-creation. It seems implausible that 213 economies could reach a timely consensus on the interpretation of applicable norms so as to impact the decision-making process of a World Investment Court. It is far less plausible than two states issuing a binding note of interpretation and thereby impacting the decision-making processes of tribunals in the existing system. It is this likely relative loss of control over norm interpretation that is likely to dissuade states from signing up for a World Investment Court. In addition, states might be reluctant to give up their power to appoint their own arbitrators in return for an institution the benefit of which is uncertain. The degree of consistency of decisions is already high in the existing, decentralised system of dispute resolution: arbitrators, rightly or wrongly, create uniform interpretations of different treaty norms based on the identical or similar wording of these norms, absent an authoritative note of interpretation to the contrary. If transparency is the goal of reform, the argument for the necessity of a World

¹²⁵ Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 136.

¹²⁶ *ibid.*

Investment Court is even less persuasive. The recognition of a right of public access to arbitral hearings, indirectly enforceable by national courts, would equally, and in a more timely fashion, ensure that arbitral hearings are presumptively open to the public.

IV. Conclusion

In sum, if realised, a World Investment Court would not increase government control. On the contrary, a World Investment Court would grow ever more independent in the absence of effective government control. If a World Investment Court, including an Appellate Body, however, were to replace the existing system, awards might exhibit an even greater degree of consistency. Yet, there is currently little prospect that a World Investment Court will actually be created; the idea is not championed by many states at present¹²⁷ – perhaps for the reasons suggested in this chapter: the high cost of a relative loss of government control and the not very compelling case for greater consistency in a system that, in the words of Stephen M. Schwebel, “on any objective analysis works reasonably well”¹²⁸ and, one might add, could be improved so easily through granting public access.

¹²⁷ Anthea Roberts, ‘Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration’ (2018) 112 *American Journal of International Law* [1]-[24], at [12]-[13].

¹²⁸ Stephen M. Schwebel, ‘The Proposals of the European Commission for Investment Protection and an Investment Court System’ 9 <<http://isdsblog.com/wp-content/uploads/sites/2/2016/05/THEPROPOSALS OFTHEEUROPEANCOMMISSION.pdf>> accessed 16 October 2018.

Chapter 5

Conclusion

I. Introduction

That public access to arbitral hearings should be facilitated is an opinion that is *en vogue* as illustrated by the following reform efforts: the UNCITRAL Rules on Transparency, the Mauritius Convention and the idea of an open World Investment Court. The weakness of these projects is their dependency on positive political action, on states including the Rules on Transparency in their new investment treaties, on states ratifying the Mauritius Convention or on states signing up for a World Investment Court. It is the slowness with which these projects are being propelled forward that inspired the analysis of a rights-based approach to greater procedural transparency in investor-state arbitration.

II. The Limits of Existing Reform Efforts

Irrespective of whether or not there really is a backlash against investor-state arbitration,¹ the confidentiality of arbitral hearings continues to inspire great public distrust in the system of investor-state arbitration as a whole² and is at the heart of many reform efforts.

¹ Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer 2010) xxxvii (noting that “[c]ommentators increasingly see signs of such a backlash against the foreign investment regime”) (with further references). But see Alec Stone Sweet, Michael Yunsuck Chung, Adam Saltzman, ‘Arbitral Lawmaking and State Power: An Empirical Analysis of Investor-State Arbitration’ (2017) 8(4) *Journal of International Dispute Settlement* 597-609 (finding that “the regime has not generated strong ‘backlash’ in any systematic sense,” reasoning that “States continue to sign investment treaties; [that] the mix of protections on offer has remained remarkably stable; and [that] new treaties have largely consolidated the case law that the most influential tribunals have already developed”).

² Anthony Depalma, ‘Nafta’s Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say’ (11 March 2001) *The New York Times* <<https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html>> accessed 25 October 2018; Roland Reuss, ‘Freihandelsabkommen: Geheim geht gar nicht’ (19 February 2015) *Frankfurter Allgemeine Zeitung* <www.faz.net/aktuell/politik/staat-und-recht/freihandelsabkommen-ttip-geheime-verhandlungen-unstatthaft-13436237.html> accessed 25 October 2018.

The Rules on Transparency, if applicable, render arbitral hearings presumptively open to the public, subject to the protection of confidential information and the feasibility of facilitating open access. The Mauritius Convention, if ratified without reservations, will extend the application of the Rules on Transparency to investment treaties signed before 1 April 2014 and to non-UNCITRAL arbitral hearings. Yet, the reach of these instruments is minimal to date, as chapter 1 demonstrates. In addition, chapter 4 explains why it is unlikely that a World Investment Court will ever replace the investment treaty arbitration system: individual governments enjoy a greater degree of control over the interpretation of norms and the appointment of arbitrators in the current system than they would have under a World Investment Court. The European Commission's theory that the existence of a court system would lead to a greater degree of government control over arbitral norm interpretation³ is illusory. It is perhaps for this reason that the United States is "reportedly uninterested"⁴ in institutionalising investor-state dispute resolution. Given the extraordinary limits of existing approaches to greater procedural transparency, it is worth considering a rights-based approach: the introduction of a right of public access to arbitral hearings based on the principle of open justice.

III. Arbitrators as Lawmakers

Since the principle of open justice is irrevocably linked to the activity of judicial law-making, chapter 2 analyses whether arbitrators are making law. It is argued that, if arbitrators are making law for all participant states in the investment treaty arbitration

³ European Commission, *CETA – Summary of the final negotiating result* (February 2016) p 12 ('[giving] the Parties to CETA more control over the manner in which the treaty is interpreted') <https://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf> accessed 25 October 2018.

⁴ Julien Chaisse and Matteo Vaccaro-Incisa, 'The EU investment court: challenges on the path ahead' *Columbia FDI Perspectives*, No 219 (12 February 2018) 2 (hypothesising, in addition, that "China may hardly be interested in institutionalizing a (semi-)permanent neutral international form that would facilitate foreign investors' claims against it").

system, the principle of open justice should be applicable to arbitral hearings. Even though it is not unheard of among scholars that arbitrators are making law,⁵ the issue of arbitral law-making still warranted special attention given the existence of divergent views on this issue. It was only in 2009 that James Crawford deemed ad hoc tribunals in the field of investment arbitration to “have produced an erratic pattern of decisions, with reasoning often impressionistic.”⁶ Chapter 2 shows that, at least regarding the definition of ‘fair and equitable treatment’, the pattern of decisions is far from erratic. On the contrary, the pattern of 125 sample decisions studied⁷ suggests that arbitrators are creating arbitral precedent and long lines of consistent decisions on the meaning of ‘fair and equitable treatment’. What is more, the empirical research suggests that arbitrators typically follow a flexible doctrine of stare decisis, i.e., a rule that requires arbitrators to follow the ratio decidendi of prior arbitral decisions unless in exceptional circumstances and for pertinent reasons. If arbitrators follow a flexible doctrine of stare decisis when interpreting and specifying norms over time, it follows that they are making law – just as a highest court in a domestic

⁵ On law-making in investor-state arbitration, see Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 151-168; Catharine Titi, ‘The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration’ (2013) 14(5) *Journal of World Investment and Trade* 829-851; Gary Born and Ethan Shenkman, ‘Confidentiality and Transparency in Commercial and Investor-State International Arbitration’ in Catherine A. Rogers and Roger P. Alford (eds), *The Future of Investment Arbitration* (Oxford University Press 2009) 5-42, at 39:

[T]o the extent investor-state tribunals are, in effect, making law (their decisions being treated by other tribunals as highly persuasive authority), transparency in tribunal decisions helps the law develop in a coherent fashion and enables investors and governments alike to conform their conduct to evolving legal standards

⁶ James Crawford, ‘Foreword’ in Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) xxi. See also Louis T. Wells, ‘Backlash to Investment Arbitration: Three Causes’ in Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer 2010) 341-352, at 341 (noting the inconsistency of decisions rendered by arbitral tribunals as one of at least three reasons for the “current backlash against the regime”).

⁷ *Appendix B* contains an overview of all those instances in which arbitrators relied on prior decisions in the 125 decisions studied. The reliance on arbitral decisions was most relevant but the overview also shows which other decisions were relied upon when defining ‘fair and equitable treatment’. In addition, *Appendix B* includes those instances in which tribunals relied on the jurisprudence of “prior tribunals” or a “common ground.” The reliance on these and similar such generalities suggests that arbitrators acknowledge their jurisgenerative function. See pp 469-601 below.

jurisdiction is making law when specifying vague statutory provisions. The empirical research suggests that arbitral tribunals, despite their ad hoc nature, typically act as if they were bound by the ratio decidendi of prior arbitral decisions, just as a highest court in a single jurisdiction is typically bound by the ratio decidendi of its own decisions without being strictly bound by them. John William Salmond coined the term ‘binding precedent with conditional authority’ for this type of binding precedent.⁸

In addition to providing evidence for arbitral law-making, which was the original purpose of the comprehensive analysis of 125 arbitral decisions, the analysis also sheds light on the disconnect between arbitral theory (what arbitrators say they are doing) and arbitral practice (what arbitrators are actually doing). Even though arbitrators typically follow prior decisions as if they were binding with conditional authority, arbitrators, in the same breath, typically emphasise the non-binding nature of these decisions. This mechanical emphasis on the non-binding nature of prior arbitral decisions disguises the degree to which arbitrators are actually bound by the ratio decidendi of these prior decisions.

It would be beneficial for the discussion of future reforms if the gap between arbitral theory and arbitral practice narrowed, particularly, if it was recognised that prior decisions have a substantial amount of pull on later arbitral tribunals. The recognition that arbitral tribunals do not operate in an ad hoc manner when interpreting applicable norms could put those minds at ease that fear erratic decision-making by arbitrators. At the very least, such an evidence-based approach would lead to better reform proposals. Among the reform proposals by the *UNCITRAL Working Group on Investor-State Dispute Settlement Reform*

⁸ John William Salmond, *Jurisprudence* (7th edn, Sweet & Maxwell 1924) 192.

is the introduction of a system of binding precedent,⁹ a feature that already exists in investor-state arbitration in the form of binding precedent with conditional authority.

The reason why arbitrators are ambivalent about the binding nature of arbitral decisions could be the delicacy of their self-ascribed task of interpreting treaty norms consistently across treaties¹⁰ and their task of interpreting norms of customary international law. The task of interpreting treaty norms consistently across treaties is delicate because “[t]here is [...] no obvious reason why thousands of specific treaties should be bundled together and interpreted in the aggregate.”¹¹ What is more, the fact that arbitrators, over time, interpret and specify norms of customary international law clashes with the definition of customary international law as a general state practice accepted as law.¹² The arbitral practice of specifying norms does not amount to state practice but states can accept an arbitral specification of a norm as the correct expression of the law after the fact. In practice, it is arbitrators who are developing customary international law,¹³ even absent a general state practice of accepting arbitral specifications of norms as law. More precisely, the development of customary international law is in the hands of arbitrators, even though, technically, the development of norms of customary international law is not open to them.

No solution to this dilemma seems evident. In particular, there is no equivalent to Article 38(1)(d) of the ICJ Statute in the investment treaty arbitration system that would allow

⁹ UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), *Possible Reform of Investor-State Dispute Settlement (ISDS) – Note by the Secretariat*, 36th session, UN doc A/CN.9/WG.III/WP.149 (5 September 2018) paras 36-38.

¹⁰ Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 133 (noting that “[s]ome tribunals must see it in their interest to develop the law, in ways that will serve to coordinate across treaty instruments, tribunals, and time”).

¹¹ *ibid* 132.

¹² ICJ Statute, Art 38(1)(b).

¹³ Catharine Titi, ‘The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration’ (2013) 14(5) *Journal of World Investment and Trade* 829-851, at 850 (noting that the ‘jurisgenerative’ powers of arbitrators also span over “the interpretation of relevant rules of customary international law”).

arbitrators to rely on prior arbitral decisions as a subsidiary means for the determination of rules of law. Yet, there is a limited solution to differences in opinion as to the correct interpretation of norms. If states disagree with the arbitral interpretations of norms, they can amend their investment treaties or issue notes of interpretation, stating their preferred interpretation.¹⁴ The re-definition of treaty norms requires an agreement between the contracting parties to the treaty. The re-definition of norms of customary international law requires a general state practice accepted as law to that extent, which is more difficult to establish.¹⁵ It is this difficulty of re-defining norms of customary international law that renders arbitrators so powerful vis-à-vis states.¹⁶ To the extent that arbitrators, “through their lawmaking, displace states as the ‘masters’ of the regime’s evolution,”¹⁷ they are well advised not to appear too powerful, as a powerful appearance could trigger adverse reactions from states such as a retreat from the system.¹⁸ It is this balancing act between making law without admitting to making law¹⁹ that might explain the arbitrators’

¹⁴ On this point, see also Catharine Titi, ‘The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration’ (2013) 14(5) *Journal of World Investment and Trade* 829-851, at 850-851:

Treaty texts elaborated in greater detail, clarifications and interpretative statements, including subsequent authoritative interpretations, and treaty renegotiations are some means available to states to counteract the quasi-legislative power of the arbitrator and ensure that arbitral interpretation better reflects the will of the negotiating parties.

¹⁵ See also Claire Provost and Matt Kennard, ‘The Obscure Legal System that Lets Corporations Sue Countries’ (10 June 2015) *The Guardian* <<https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid>> accessed 23 October 2018 (quoting Luis Parada with saying “it would take ‘a broad consensus of determined states’ in order to truly rein in [the investment treaty arbitration system]” and with saying that he has ““not seen a critical mass of states with the political will [to do this]...much less a broad consensus””).

¹⁶ See also Catharine Titi, ‘The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration’ (2013) 14(5) *Journal of World Investment and Trade* 829-851, at 830 (noting that arbitrators in investment arbitration are “a powerful normative force”).

¹⁷ Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 133.

¹⁸ cf Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 134 (suggesting the more arbitrators make the law they apply the more likely it is that “some state officials will contemplate reform and exit options”).

¹⁹ On the unwillingness to admit to judicial law-making, see already John Chipman Gray, *The Nature and Sources of the Law* (2nd edn, The Macmillan Company 1921) 99-100:

That reason [for the struggle to maintain the pre-existence of the Law] is the unwillingness to recognize the fact that the courts, with the consent of the State, have been constantly in the practice of applying in

ambivalence about the binding nature of prior arbitral decisions – more specifically, the binding nature of the ratio decidendi of these prior decisions.

IV. Open Justice as a General Principle of Law

In any event, the arbitral power to define the meaning of treaty norms and norms of customary international law warrants public scrutiny. It is suggested that the public has a presumptive right to be present at arbitral hearings so that the public can see how arbitrators are developing the law by which they judge state conduct. This suggested right of public access to hearings in investment arbitration, a child of international law, presupposes that there is a general principle of open justice in the first place. In an attempt to locate such a general principle of open justice within the meaning of Article 38(1)(c) of the ICJ Statute the constitutions of the world were analysed, in addition to the jurisprudence in select jurisdictions. The result of the constitutional prong of this analysis is contained in *Appendix A: Constitutional Guarantees of Open Justice*.²⁰ The majority of domestic constitutions (n=121²¹) explicitly guarantee that justice shall be administered in public. In the vast majority of the remaining jurisdictions (n=68), the principle of open justice finds implicit constitutional protection or is protected at common law. The idea of implicit guarantees of open justice, as it is developed in chapter 2, is based on arguments by the German Federal Constitutional Court, the United States Supreme Court, the High Court of Australia and the European Court of Human Rights. These courts, respectively, view the principle of open

the decision of controversies, rules which were not in existence and were, therefore, not knowable by the parties when the causes of controversies occurred. It is the unwillingness to face the certain fact that courts are constantly making *ex post facto* Law. The unwillingness is natural, particularly on the part of the courts, who do not desire to call attention to the fact that they are exercising a power which bears so unpopular a name [...].

²⁰ See pp 443-468 below.

²¹ 122 constitutions provide that court hearings shall be presumptively open to the public. If constitutions are taken into account that require the announcement of judgments in public session, the total number of explicit constitutional guarantees of open justice is 127.

justice as being implicit in the principles of democracy, freedom of speech and freedom of information or the fairness of trials. If the understanding of these four courts, exemplary guardians of open justice, is illustrative, open justice is implicit in all constitutions that guarantee one or more of these principles.

V. The Implementation of the Principle of Open Justice

Assuming that a general principle of open justice exists and assuming that it is applicable to investor-state arbitration, the big question is how such a principle of international law could be implemented. In this thesis, the focus is on scenarios in which the disputing parties would not initially agree to the openness of arbitral hearings though, obviously, it would be preferable if they did. Chapter 3 identifies the New York Convention and the ICSID Convention as tools for the indirect implementation of a right of public access to arbitral hearings. If asked to enforce awards under either of these instruments, national courts, on their own initiative, could refuse to enforce those awards that are based on hearings that violated the principle of open justice.

A. The Implementation of the Principle of Open Justice under the New York Convention

The approach under the New York Convention is comparatively straightforward. Article V(2)(b) of the New York Convention allows the non-enforcement of awards on the grounds of public policy which could be interpreted as protecting the principle of open justice. The definitions of public policy in the United States, Germany, Canada, England, Ireland and Switzerland allow for such an expansive interpretation, as chapter 3 demonstrates. In practice, France could be a particularly suitable jurisdiction for testing the idea that the enforcement of non-ICSID awards can be refused on the grounds of open justice. In France,

international law norms are directly relevant for the review of arbitral awards.²² Article 1514 of the French Code of Civil Procedure²³ states that arbitral awards rendered abroad or in matters of international arbitration are recognised or enforced in France where the party who relies upon it has established their existence and if such recognition or enforcement is not manifestly contrary to international public policy.²⁴ ‘International public policy’ is a specific conception of the French legal order and refers to the values and principles that France cannot ignore – not even in an international context.²⁵ The following example illustrates this. In *MK Group v Onix*,²⁶ the Paris Court of Appeal interpreted international public policy as encompassing the right of states to make the exploitation of natural resources situated on their territory subject to prior authorisation and to subject foreign investment in this area to their control. The Court of Appeal inferred this element of international public policy from a 1962 resolution of the United Nations General Assembly regarding state sovereignty over natural resources. It stated that this resolution expressed an international consensus²⁷ and is therefore (*donc*) an element of international public policy.²⁸ If international public policy encompasses an international consensus

²² cf *Republic of Kirghizstan v Belokon*, Cour d’Appel de Paris, No 15/01650, 21 February 2017 (discussing the international consensus regarding the fight against money laundering, as inferred from the 2003 United Nations Convention against Corruption, when examining French international public policy).

²³ *Code de procédure civile* (as modified on 1 January 2018).

²⁴ French Code of Civil Procedure, Art 1514:

Les sentences arbitrales sont reconnues ou exécutées en France si leur existence est établie par celui qui s'en prévaut et si cette reconnaissance ou cette exécution n'est pas manifestement contraire à l'ordre public international.

²⁵ *Société MK Group v S.A.R.L. Onix et Société Financier Initiative*, Cour d’Appel de Paris, No 15/21703, 16 January 2018:

[L]’ordre public international au regard duquel s’effectue le contrôle du juge de l’annulation s’entend de la conception qu’en a l’ordre juridique français, c’est-à-dire des valeurs et des principes dont celui-ci ne saurait souffrir la méconnaissance même dans un contexte international.

²⁶ *Société MK Group v S.A.R.L. Onix et Société Financier Initiative*, Cour d’Appel de Paris, No 15/21703, 16 January 2018.

²⁷ *ibid*:

[C]ette résolution exprime un consensus international sur le droit des États de subordonner à une autorisation préalable l’exploitation des ressources naturelles situées sur leur territoire et de soumettre à leur contrôle les investissements étrangers dans ce domaine.

²⁸ *ibid*.

regarding state sovereignty over natural resources, it may also encompass an international consensus regarding the principle of open justice.²⁹ It is because of this direct relevance of international law norms for the definition of international public policy that France could be a particularly suitable jurisdiction for testing the idea that the enforcement of non-ICSID awards can be refused on the grounds of open justice – open justice being a principle of international law in the first place.

B. The Implementation of the Principle of Open Justice under the ICSID Convention

The approach under the ICSID Convention, in comparison, requires heavier lifting. Article 54(1) of the ICSID Convention requires courts to treat awards as if they were final judgments. While this may sound as if the enforcement of arbitral awards under the ICSID Convention is automatic, it is entirely possible – both legally and intellectually – to think of barriers to the enforcement of final judgments, a circumstance which was anticipated by the drafters of the ICSID Convention.³⁰ If, for example, the non-violation of the constitutional principle of open justice was recognised as a requirement for the enforcement of final judgments, courts could refuse to enforce those final judgments that are based on hearings that violated the principle of open justice. This exception to the enforcement of

²⁹ Andrew McDougall, Sylvain Bollée, Fiona Candy and Julien Huet argue in light of the jurisprudence of the Paris Court of Appeal that “public international law is bound to become a greater source of norms that are protected as a matter of international public policy”. See Andrew McDougall, Sylvain Bollée, Fiona Candy and Julien Huet, ‘The Paris Court of Appeal Weighs In On International Public Policy’ (January 2018) <www.whitecase.com/publications/alert/paris-court-appeal-weighs-international-public-policy> accessed 25 October 2018.

³⁰ ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II, Part 2, Documents 44-146* (Washington, D.C., 1968) 888 (containing Aron Broches’ recognition that “treating awards in the same way as judgments of original courts implie[s] that exceptional grounds [can] be invoked to prevent recognition and enforcement”) and 901 (containing the suggestion of the Austrian delegate “that the terms ‘as if it were a final judgment of a court in that State’ be deleted since there were several possibilities for annulling judgments even after they had been declared final”).

final judgments would equally apply to arbitral awards qua Article 54(1) of the ICSID Convention. Chapter 3 illustrates the willingness of courts to review ICSID awards.

C. Exceptions to the Principle of Open Justice

Compliance with the principle of open justice does not mean either that arbitral hearings must be absolutely open to the public at all times. The principle of open justice requires a presumption of openness and that hearings, if at all, are only closed upon determination by a competent court or tribunal, rather than upon request by the parties. Since arbitrators have a duty to render enforceable awards and in the absence of universal exceptions to the general principle of open justice, arbitrators are well advised to encourage the openness of hearings to the extent permitted by the domestic law of the potential enforcing states or by regional human rights instruments should such instruments be applicable.

The Rules on Transparency (the Rules) can serve as a starting point for the determination of what constitutes a typical exception to the principle of open justice. The Rules contain typical exceptions such as the need to protect confidential information. They do not mirror domestic exceptions to the principle of open justice in all respects, however. Article 6(3) of the Rules – which allows private hearings “when the circumstances render any original arrangement for public access to a hearing infeasible” – is not mirrored by domestic exceptions to the principle of open justice. Typically, the infeasibility of facilitating public access is not a justification for conducting court hearings in private, though logistical reasons may permit the temporary closure of hearings or the exclusion of some members of the public. It is true that the effort of organising and facilitating public arbitral hearings may be onerous but that is a price the disputing parties should be willing to pay for the enforceability of their award.

VI. Strengths and Weaknesses of the Suggested Rights-based Solution

The greatest strength of the argument for a rights-based approach to greater procedural transparency is its potential force. Every court in every jurisdiction that recognises the principle of open justice, could refuse to enforce arbitral awards *ex officio*, if the hearings on which the awards are based violated the principle of open justice. Given the near-universal existence of norms that at least *could* be interpreted as protecting the principle of open justice, both in civil and common law jurisdictions, the indirect implementation of a right of public access to arbitral hearings by courts at least has huge potential. The implementation would be indirect because the non-enforcement of an award would not render the proceeding on which it is based retrospectively open to the public. At best, the non-enforcement of an award on the grounds of open justice could trigger the openness of other arbitral hearings in the future.

What is the argument's greatest strength is also its greatest weakness: the potential force of the principle of open justice. If courts refused to enforce an award on the grounds of open justice and if the parties wished their dispute to be resolved through arbitration, the claimant would have to initiate a second investment arbitration against the host state, this time ideally in compliance with the principle of open justice, and the process would start anew. That the process would start anew also means that the host state, hypothetically, could also block the openness of the second arbitration, sending the parties down a never-ending spiral of arbitrations the results of which are unenforceable. The possibility of a never-ending spiral of arbitrations must be soul-crushing for a claimant, if even a simple resubmission of a dispute "is a daunting prospect for even the most resilient claimant."³¹ Judges might be reluctant to send disputing parties down that road as it would either lead to a delay of

³¹ Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) para 10.91.

justice (best-case scenario) or a denial of justice (worst-case scenario), generating incalculable costs for the disputing parties. Yet, all must not seem bleak. Even though states, under most treaties and under most arbitrations rule can block the openness of the second set of arbitral hearings by refusing to give their consent to public access, this does not mean that states would succumb to such an act of sabotage. In the investment treaty system of reciprocal promises, given by each state to the investors of the respective other state, the sabotage of an arbitration would be ill-advised. The better, more hopeful view is that states would comply with the general principle of open justice in the second set of arbitral hearings, even if only not to cut the protection of their own investors short.

There are no legal barriers for the parties to have their dispute arbitrated anew in such a scenario. Even though one of the defining features of arbitral awards is their external finality, i.e., vis-à-vis domestic courts,³² subject to challenge before a competent court if the award is open to such challenge,³³ awards that are nullified³⁴ or near-universally barred from enforcement do not operate as *res judicata* in subsequent arbitrations. If an award that is nullified does not operate as *res judicata* in any subsequent proceedings, whether before courts or arbitral tribunals, an award that is near-universally barred from enforcement arguably does not operate as *res judicata* either, at least not in subsequent arbitrations. It is

³² For an expression of this view regarding ICSID awards, see Aron Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’ (1972-II) 136 *Hague Recueil des Cours* 331-410, at 400 (“Article 54 affirms its external finality, i.e., vis-à-vis domestic courts. The award is *res judicata* in each and every Contracting State.”).

³³ It is only non-ICSID awards that can be ‘challenged’. For a distinction between actions to challenge, or set aside, an award and those opposing the enforcement of an award, see Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) para 10.05:

A challenge to an award (usually) takes place in the courts of the seat of the arbitration and it is an attempt by the losing party to invalidate the award on the basis of the statutory grounds available under the law of the seat. In contrast, actions opposing enforcement [...] may take place in any jurisdiction in which the winning party seeks to enforce an award.

³⁴ *ibid* para 9.177 (“[I]f the award is deemed invalid and is set aside by a court of competent jurisdiction, the nullified award does not operate as *res judicata* in any subsequent proceedings.”).

suggested that non-enforcement on the grounds of open justice operates as a *de facto* remand to the system of investor-state arbitration, subject to the wishes of the parties. Instead of having their dispute arbitrated anew, in compliance with the principle of open justice, “parties [could] also settle [their] dispute by voluntarily agreeing to vary the terms of the award”³⁵ or, indeed, the award debtor could voluntarily comply with the first award before the start of the second arbitration. These options remain open.

In sum, apart from the disputing parties voluntarily granting the public physical access or making hearings open to the public via webcast and video link,³⁶ the best hope for opening arbitral hearings to the public is the recognition of a general principle of open justice and the application of that principle to the system of investment treaty arbitration. Greater procedural transparency could be achieved if courts recognised their power not to enforce awards on the grounds of open justice. Even if only a single court contemplated the non-enforcement of a single award on the grounds of open justice, this could send a ripple through the investment arbitration system and motivate disputing parties to have their dispute arbitrated in public. It is essential that courts see themselves as the guardians of the principle of open justice vis-à-vis the citizenry of states participating in the investment treaty arbitration system in this scenario or at least vis-à-vis the citizenry in their own jurisdiction. Courts could consider the non-enforcement of awards on the grounds of open justice *ex officio*, absent a request by a party and even if the parties agreed to conduct hearings *in camera*, as is usual in investor-state arbitration. Indeed, it is a disputing party’s consent to private hearings, if given, that would block that party’s efforts to seek the non-

³⁵ Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) para 9.198.

³⁶ In *BSGR v Guinea*, the hearing on the merits and the hearing on forensic expert evidence were made open to the public via webcast. In addition, a video of the hearings was made available on ICSID’s YouTube channel in English and French. See *BSGR v Guinea*, ICSID Case No ARB/14/22, Procedural Order No 2 on Transparency, 17 September 2015, para 14.

enforcement of an arbitral award on the grounds of open justice. It is not the disputing parties' personal right to a public trial that this thesis seeks to address but the public's right of access to a trial. The distinction is exemplarily illustrated by the enforcement of Article 6(1) of the ECHR.

VII. The Personal Right to a Public Hearing and the Public's Right of Access: A Distinction

Article 6(1) of the ECHR guarantees that everyone is entitled to a fair and public hearing in the determination of his civil rights and obligations or of any criminal charge against him. If this guarantee of open justice is applicable to investor-state arbitration by virtue of the fact that arbitrators are law-makers and operate within a system of self-government that resembles a public legal machinery for which Article 6(1) of the ECHR was designed, then Article 6(1) of the ECHR could have an indirect effect. This potential indirect effect was recognised by Matscher J in *Drozd and Janousek v France and Spain*:³⁷

According to the court's case-law, certain provisions of the Convention do have what one might call an indirect effect, even where they are not directly applicable. Thus, for example, a state may violate articles 3 and/or 6 of the Convention by ordering a person to be extradited or deported to a country, whether or not a member state of the Convention, where he runs a real risk of suffering treatment contrary to those provisions of the Convention [...]; other hypothetical cases of an indirect effect of certain provisions of the Convention are also quite conceivable. The same argument applies in reverse, so to speak; a contracting state may incur responsibility by reason of assisting in the enforcement of a foreign judgment, originating from a contracting or a non-contracting state, which has been obtained in conditions which constitute a

³⁷ *Drozd and Janousek v France and Spain* [1992] ECHR 52.

breach of article 6, whether it is a civil or criminal judgment, and in the latter case whether it imposes a fine or a sentence of imprisonment.³⁸

If a foreign judgment has been obtained in violation of the principle of open justice, a contracting state of the ECHR may incur responsibility on the grounds of assisting in the enforcement of that foreign judgment. Lord Carswell in *Government of The United States of America v Montgomery (No 2)*³⁹ – agreeing with Matscher J – had no difficulty in accepting the correctness of that ruling but pointed to the exceptional nature of such responsibility.⁴⁰ The applicability of the ECHR is not limited to the enforcement of foreign judgments, however. It is equally true that a state may incur responsibility by reason of assisting in the enforcement of a domestic judgment which has been obtained in conditions which constitute a breach of Article 6 of the ECHR. A contracting state could thus also incur responsibility by reason of assisting in the enforcement of an ICSID award which has been obtained in conditions which constitute a breach of Article 6, since ICSID awards are to be treated as if they were final judgments of the enforcing state.

If proceedings terminated by a final judgment may be reopened by an action for a retrial in a contracting state of the ECHR where the ECtHR has established that the ECHR has been violated and where the judgment is based on this violation,⁴¹ then the same rule should also apply to investment arbitrations. It is at least conceivable that the proceedings terminated by an ICSID arbitral award, which is to be treated as a final judgment, may be reopened by

³⁸ *Drozd and Janousek v France and Spain* [1992] ECHR 52, p 32 (Matscher J).

³⁹ *Government of The United States of America v Montgomery (No 2)* [2004] 1 WLR 2241.

⁴⁰ *ibid* 2251.

⁴¹ See, for example, German Code of Civil Procedure, Section 580(8) [English translation]:

An action for a retrial of a case may be brought where the European Court of Human Rights has established that the European Convention for the Protection of Human Rights and Fundamental Freedoms or its protocols have been violated, and where the judgment is based on this violation.

an action for a new arbitration where the ECtHR has established that the ECHR has been violated and where the award is based on this violation.

Such a thought experiment quickly reaches its limits, however. An action for a retrial may only admissibly be brought by a disputing party if the party, through no fault of its own, was unable to assert the cause for a retrial of the case in the earlier proceedings.⁴² It is usually only the host state, if in the role of award debtor, that could have an interest in a retrial. Yet, that road is closed. Where a host state permits foreign investors to choose arbitration rules that require the consent of both parties for arbitral hearings to be open to the public, the host state cannot admissibly bring an action for a retrial, if the investor then chooses these rules and refuses to give its consent to public hearings. In such a scenario, a state cannot reasonably assert that it was unable to assert the principle of open justice through no fault of its own in the earlier proceedings. It is the fault of the contracting states if investment treaties and the arbitration rules they reference require the consent of both parties for arbitral hearings to be open to the public. The host state is not the victim but a facilitator of a violation of the principle of open justice in such a scenario.

That host states are barred from using the violation of their personal right to a public trial as a defence to the enforcement of awards that were rendered against them already follows from the principle *venire contra factum proprium* which means that no one may set himself in contradiction to his own previous conduct. Even though states enjoy a personal right to a public trial under Article 6(1) of the ECHR – as well as under all other guarantees of open justice – they are prevented from relying on that right as a defence to the enforcement of arbitral awards because such reliance would set themselves in contradiction to their prior conduct – the conclusion of investment treaties that allow for private hearings at the behest

⁴² See, for example, German Code of Civil Procedure, Section 582.

of a disputing party, whatever the function of those hearings. The principle of *venire contra factum proprium* in this sense also protects against the abuse of the dispute resolution mechanism offered under investment treaties. If states could escape the enforcement of arbitral awards obtained in conditions which constitute a breach of their ‘personal’ right to a public trial despite their self-inflicted violation of that principle, that would be absurd.

A different matter is the public’s right of access which a judge could choose to protect⁴³ by the non-enforcement of awards rendered in violation of the principle of open justice. In addition, the public could assert their right of access to arbitral hearings before the ECtHR directly, similar to the action taken by the Delaware Coalition for Open Government⁴⁴ against the private nature of the former Delaware Business Arbitration Programme.⁴⁵ Members of the public, individually or as a group, or in the form of a state, could initiate proceedings against a contracting state of the ECHR before the ECtHR, if a court of that state enforced an award that was based on a private investment treaty arbitration. Article 34 of the ECHR deems applications eligible from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the ECHR.

⁴³ On the judicial power to refuse the enforcement of foreign judgments if enforcement would be contrary to the ECHR, see Lord Collins of Mapesbury and Others (eds), *Dicey, Morris and Collins on the Conflict of Laws*, Vol. 1 (15th edn, Sweet & Maxwell 2012) paras 14-159 and 14-160.

⁴⁴ For more information, see *Delaware Coalition for Open Government* <<http://delcog.org/about/>> accessed 30 October 2018:

The Delaware Coalition for Open Government is one of 42 affiliates of the National Freedom of Information Coalition (NFOIC), headquartered at the University of Missouri. [They] are a coalition of journalists, lawyers, elected officials, news organizations, business owners, government employees, civic associations and private citizens who believe that government of the people, by the people and for the people, should be open TO the people.

⁴⁵ *Delaware Coalition for Open Government, Inc. v Strine and Others* 894 F Supp 2d 493 (2012) (United States District Court for the District of Delaware); *Delaware Coalition for Open Government, Inc. v Strine and Others* 733 F 3d 510 (3d Cir. 2013).

The private nature of arbitral hearings makes victims out of all states participating in the investment treaty arbitration system, including their citizens, that do not have a right of access to hearings as a third party.⁴⁶ If a court within the reach of the ECHR enforced an award that was based on a hearing that had been wrongfully closed to the public, the enforcement of the award would violate the principle of open justice. It is against the enforcement of the award that a group action would have to be directed. Judges in domestic jurisdictions could of course also pre-empt any adverse findings by the ECtHR by *ex officio* reviewing whether arbitrations conformed with the principle of open justice and by refusing to enforce awards where need be. This would ensure the protection of the principle of open justice and just might render investment arbitrations more accessible to the public in the process.

VIII. Conclusion

The benefit of greater procedural transparency would be that it would render investment arbitration more legitimate.⁴⁷ It is hoped that this thesis contributes to this end, not least because the investment arbitration system is likely to persist – despite the proposal to create an open World Investment Court that would eventually replace the existing system. There is little prospect that such a court will actually be created.⁴⁸ Indeed, it is so unlikely that a

⁴⁶ For a state to be a ‘third party’ within the meaning of the term as it is used here, it cannot be a contracting state to the investment treaty under which the arbitration takes place.

⁴⁷ cf Barry Sullivan and Megan Canty, ‘Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958-60 and 2010-12’ (2015) 2015(5) *Utah Law Review* 1005-1082, at 1012 (noting that transparency “might be thought indispensable to the Court’s legitimacy, given the vast, unreviewable power that this unelected body exercises in our democratic society”).

⁴⁸ On the collective action problems facing large-scale reform, see Anthea Roberts, ‘Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration’ (2018) 112 *American Journal of International Law* [1]-[24], at [4] (noting that “larger-scale reforms are less likely to be widely adopted and thus ultimately less likely to be effective”). On the creation of a general appellate court, the realisation of which poses similar problems, see Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 136 (finding that “there is there is currently little prospect that a general appellate court will actually be created”):

World Investment Court will ever replace the system of investor-state arbitration that the introduction of a right of public access to arbitral hearings is even more pertinent. Since no replacement of the system is forthcoming, it should be reformed from within.

The collective action problems facing reform [...] are formidable, perhaps irresolvable. Revising the ICSID Convention, or creating an appellate court for the regime as a whole, would depend on the forging of state consensus on design details; indeed, unanimity would be required.

APPENDIX A: CONSTITUTIONAL GUARANTEES OF OPEN JUSTICE

	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Islamic Republic of Afghanistan, 2004	Art 128	Art 128				
Constitution of the Republic of Albania, 1998 (as amended to 2012)		Art 146(2)				
Constitution of the People's Republic of Algeria, 1996 (as amended to 2008)		Art 144		Arts 1, 6, 7(1), 11 and 14(1)		Art 41 (freedom of expression)
Constitution of Andorra	Art 5 in combination with Art 10 <i>Universal Declaration of Human Rights</i>	Art 86(2)			Art 5 in combination with art 10 <i>Universal Declaration of Human Rights</i>	
Constitution of the Republic of Angola, 2010			Art 174(1)	Arts 1 and 2(1)	Art 72	Art 40(1) (freedom of expression; right to information)
Constitution of Antigua and Barbuda, 1981				Art1(1)		Arts 12(1) (freedom of expression) and 12(2) (freedom to receive information)
Constitution of the Argentine Nation, 1994				SS 1 and 33		

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Republic of Armenia, 1995 (as amended to 2005)	Art19(1)			Art 1		
Federal Constitutional Law of the Republic of Austria, 1920 (as amended to 2004)	Art 90(1)			Art 1(1)		
Constitution of the Republic of Azerbaijan, 1995 (as amended to 2009)	Art 127(V)					
Constitution of the Commonwealth of The Bahamas (as amended through The Bahamas Constitution (Amendment) (No 5) Act 2002)				Art 1		
Constitution of the Kingdom of Bahrain, 2002				Art 1(d)(1)		Art 23 (freedom of expression)
Constitution of the People's Republic of Bangladesh, 1972 (as amended to 2011)				Arts 7(1), 8(1) and 11		Art 39(2) (freedom of speech; freedom of expression)
Constitution of Barbados, 1966 (as amended to 1995)	Art 18(9)	Art 18(9)				
Constitution of Belarus, 1996	Art 114					

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Coordinated Constitution of the Kingdom of Belgium, 1994 (as amended to 2008)	Art 148(1)					
Constitution of Belize, 1981 (as amended to 2011)	Art 6(8)			Art 1(1)		
Constitution of the Republic of Bénin, 1990				Arts 2(1), 2(2) and 3(1)(1)		Art 23(1) (freedom of expression)
Constitution of the Kingdom of Bhutan, 2008				Arts 1(1) and 1(2)	Art 21(1)	Arts 7(2) (freedom of speech; freedom of expression) and 7(3) (right to information)
Constitution of the Plurinational State of Bolivia, 2009	Art 178(I)					
The Constitution of Bosnia and Herzegovina, 1995	Art VI(2)(b)(2) (Constitutional Court)			Art I(2)		
Constitution of the Republic of Botswana, 1966 (as amended to 2006)	Art 10(10)	Art 10(10)				
Constitution of the Federal Republic of Brazil, 1988 (as amended to 2012)	Art 5(LX)					

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of Brunei Darussalam, 1959 (as amended to 2006)	<i>n/a</i>	<i>n/a</i>	<i>n/a</i>	<i>n/a</i>	<i>n/a</i>	<i>n/a</i>
Constitution of the Republic of Bulgaria, 1991 (as amended to 2007)	Art 121(3)					
Constitution of Burkina Faso, 1991 (as amended to 2002)	Art 136(1)					
Constitution of the Republic of Burundi, 2005	Art 206					
Constitution of Cambodia, 1993 (as amended to 2008)			Art 129-New(1)	Art 51-New		Art 41(1) (freedom of expression; freedom of information)
Constitution of the Republic of Cameroon, 1972 (as amended to 2008)			Art 37(1)	Art 1(2); Art 2(1)	Preamble (10)	
Constitution Act 1982 (Schedule B to the Canada Act 1982)				Art 1		Art 2 (freedom of expression)
Constitution of the Republic of Cape Verde, 1992	Art 226					
Constitution of the Central African Republic, 1994				Art18		

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Republic of Chad, 1996 (as amended to 2005)			Art 145	Art 1(1)		
Political Constitution of the Republic of Chile, 1980 (as amended to 2005)				Art 4	Art 3(4)	
Constitution of the People's Republic of China, 1982 (as amended to 2004)	Art 125(1)					
Political Constitution of Colombia, 1991 (as amended to 2011)	Art 228					
Constitution of the Union of Comoros, 2001 (as amended to 2009)				Preamble		Preamble (freedom of expression)
Constitution of the Republic of Congo, 2015				Arts 1(1) and 2		Arts 25(1) (freedom of expression), 25(2) (freedom of information) and 25(3) (access to information)
Constitution of the Democratic Republic of Congo, 2005	Art 20(1)					
Constitution of the Republic of Costa Rica, 1949 (as amended to 2003)				Arts 1 and 9(1)		

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Republic of Cote d'Ivoire, 2000 (as amended to 2004)				Art 30(1)		Preamble (democratic value of transparency in the conduct of public affairs)
Constitution of the Republic of Croatia, 1990 (as amended to 2001)	Art 119(1)					
Constitution of the Republic of Cuba, 1976 (as amended to 2012)				Art 1		
Constitution of the Republic of Cyprus, 1960 (as amended to 1996)	Art 30(2)	Art 30(2)			Art 30(2)	
Proposed Comprehensive Settlement of the Cyprus Problem, 2004	Attachment 5, Art 5(1)				Attachment 5, Art 5(1)	
Proposed Constitution of the Greek Cypriot State, 2004	Art 18(2)				Art 18(2)	
Proposed Constitution of the Turkish Cypriot State, 2004	Art 20(2)				Art 20(2)	
Constitution of the Czech Republic, 1992 (as amended to 2002)	Art 96(2)	Art 96(2)				
Constitutional Act of Denmark, 1953	Art 65(1)					

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Republic of Djibouti, 1992 (as amended to 2010)	Preamble(1) in combination with Art 10 <i>Universal Declaration of Human Rights</i>			Arts 1(2) and 1(5)	Preamble(1) in combination with Art 10 <i>Universal Declaration of Human Rights</i>	
Constitution of Dominica, 1978 (as amended to 1984)	Art 8(10)					
Constitution of the Dominican Republic, 2010	Art 69 No 4					
Constitution of the Democratic Republic of East Timor, 2002	Art 131					
Constitution of the Republic of Ecuador, 2008 (as amended to 2011)	Arts 8(3)(1) and 76(7)(d)					
Constitution of the Arab Republic of Egypt, 2014	Art 187					
Constitution of the Republic of El Salvador, 1983 (as amended to 2009)				Art 85(1)		
Fundamental Law of Equatorial Guinea, 1991	Art89					
Constitution of Eritrea, 1997				Art 1(1)		

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of Estonia, 1992 (as amended to 2005)	Art 24(3)	Art 24(4)				
Constitution of the Federal Democratic Republic of Ethiopia, 1995				Art 1		Arts 2(1) (transparent conduct of government affairs), 29(2) (freedom of expression; freedom to receive information) 9(3) (freedom of the press; access to information of public interest) and 9(4) (free flow of information guaranteed)
Constitution of the Republic of Fiji, 2013	Art 15(4)					
Constitution of the Republic of Finland, 2000 (as amended to 2007)	s 21(2)			ss 2(1) and 2(2)	s 21(2)	
Constitution of the French Republic, 1958 (as amended to 2008)				Art 1(1)		
Constitution of the Gabonese Republic, 1991	Preamble(2) in combination with Art 10 <i>Universal Declaration of Human Rights</i>		Art 67	Art 2(1)(1)	Preamble(2) in combination with Art 10 <i>Universal Declaration of Human Rights</i>	
Constitution for The Gambia, 1996	Art 24(2)					

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of Georgia, 1995 (as amended to 2010)	Art 85(1)	Art 85(1)				
Basic Law of the Federal Republic of Germany, 1949 (as amended to 2009)				Art 20(1)		
Constitution of the Republic of Ghana, 1992 (as amended to 1996)	Art 126(3)					
Constitution of the Hellenic Republic, 1975 (as amended to 2008)	Art 93(2)	Art 93(3)(1)				
Constitution of Grenada, 1973	Art 8(9)					
Political Constitution of the Republic of Guatemala, 1985 (as amended on 17 November 1993)				Arts 140 and 141		Arts 35(1) (freedom of expression) and 35(5) (access to sources of information)
Constitution of the Republic of Guinea, 2010				Art 1(1)		
Constitution of the Republic of Guinea-Bissau, 1984 (as amended to 1996)				Arts 1, 2(1) and 3		Arts 51(1) (freedom of expression; right to inform and be informed) 91(2) (administration of justice <i>on the basis of ample popular administration</i>) and 94 (creation of popular courts)

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Co-operative Republic of Guyana, 1980 (as amended to 2007)	Art 144(9)					
Constitution of the Republic of Haiti, 1987 (as amended to 2012)	Art180	Art 181				
Constitution of the Republic of Honduras, 1982 (as amended to 1991)				Arts 1, 2(1) and 5(1)		Art 72 (freedom of expression)
Constitution of the Republic of Hungary, 2011 (as amended to 2013)	Art XXVIII(1)				Art XXVIII(1)	
Constitution of the Republic of Iceland, 1944 (as amended to 1995)	Art 70(1)				Art 70(1)	
Constitution of the Republic of India, 1950 (as amended to 13 January 2012)		Art 145(4) (Supreme Court)		Preamble		Art 19(1) (freedom of speech and expression)
Constitution of the Republic of Indonesia, 1945 (as amended to 2002)				Arts 1(2) and 28I(5)		Arts 28 (freedom of expression) and 28F (right to obtain information)
Constitution of the Islamic Republic of Iran, 1979 (as amended to 1989)	Art 165					

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Republic of Iraq, 2005	Art 19(7)					
Constitution of Ireland, 1937 (as amended to 2015)	Art 34.1					
Israeli Basic Law: The Judiciary, 1984	Art 3					
Constitution of the Italian Republic, 1947 (as amended to 2012)			Art 101(1)	Art 1(1)	Art 111(1)	
Jamaican Fundamental Rights (Additional Provisions) Interim Act, 1999	Art 16(3)					
Constitution of Japan, 1947	Art 82	Art 82				
Constitution of the Hashemite Kingdom of Jordan, 1952 (as amended to 2011)	Art 101(3)	Art 101(3)				
Constitution of the Republic of Kazakhstan, 1995 (as amended to 2007)				Arts 1(1) and 3(1)		Arts 18(3) (access to sources of information guaranteed), 20(1) (freedom of speech) and 20(2) (freedom to receive information)
Constitution of the Republic of Kenya, 2010	Art 50(1)			Art 50(8)	Art 50(1)	
Constitution of Kiribati, 1979	Art 10(9)					

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Republic of Korea, 1948 (as amended to 1987)	Art 109					
Constitution of the Democratic People's Republic of Korea, 1972 (as amended to 1998)	Art 158(1)					
Constitution of the Republic of Kosovo, 2008	Art 22 in combination with Art 10 <i>Universal Declaration of Human Rights</i> ; Arts 31(2) and 31(3)			Arts 1(1), 1(2), 2(1), 3(1), 3(2) and 4(1)	Art 22 in combination with Art 10 <i>Universal Declaration of Human Rights</i> ; Art 31(2)	Arts 40(1) (freedom of expression; right to receive information), 41(1) (right of access to public documents) and 41(2) (definition of public documents)
Constitution of the State of Kuwait	Art 165					
Constitution of the Kyrgyz Republic, 2010	Art 99(1)					
Constitution of the Lao People's Democratic Republic, 1991 (as amended to 2003)	Art 83(1)					
Constitution of the Republic of Latvia, 1922 (as amended to 2005)				Art 1	Art 92(1)	

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Lebanese Republic, 1926 (as amended to 2004)	Preamble(B) in combination with Art 10 <i>UDHR</i>		Art 20(4)	Preamble(C)	Preamble(B) in combination with Art 10 <i>UDHR</i>	
Constitution of Lesotho, 1993	Art 12(9)					
Constitution of the Republic of Liberia, 1983	Art 21(h)(1) (criminal trials)			Art 1(1)		Art 15(c) (freedom of expression; public right to be informed about the government)
Constitutional Declaration of Libya, 2011				Art1(1)	Art31(2)	
Constitution of the Principality of Liechtenstein, 1921 (as amended to 2003)			Art 95(1)	Art 2		
Constitution of the Republic of Lithuania, 1992 (as amended to 2006)	Arts 31(2) (criminal trials) and 117(1)		Art 109(4)	Art 1		
Constitution of the Grand Duchy of Luxembourg, 1868 (as amended to 2009)	Art 88	Art 89		Art 1		
Constitution of the Republic of Macedonia, 1991 (as amended to 2011)	Art 102(1)	Art 102(1)		Arts 1(1) and 2(1)		Arts 16(2) (freedom of speech; guarantee of public information), 16(3) (freedom of information; free access to information) and 23 (right to take part in the performance of public affairs)

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Republic of Madagascar, 8 April 1998			Art 97	Art 1(3)(1)		Arts 10 (freedom of expression); 11(1) (right to information) and 11(2) (freedom of information)
Constitution of the Republic of Malawi, 1994 (as amended to 2010)	Art 42(2)(f)(i) (criminal trials)			Art 6	Art 42(2)(f)	Arts 35 (freedom of expression) and 37 (right of access to information held by the State or any of its organs)
Constitution of Malaysia, 31 August 1957 (as amended to 1994)						Art 10(1) (freedom of speech; freedom of expression)
Constitution of the Republic of Maldives, 2008	Art 42	Art 42(d)		Art 2(1)		
Republic of Mali, Decree No. 92-073/P-CTSP Concerning Promulgation of the Constitution				Arts 25(1) and 25(2)		Art 4 (freedom of expression)
Constitution of the Republic of Malta, 1964 (as amended to 2007)	Art 39(3)			Art 1(1)	Arts 39(1) and 39(2)	
Constitution of the Republic of the Marshall Islands, 1979 (as amended to 1995)	Art II, s 4(4) (criminal trials)			Art I, s 3(2)		Art II, s 1(1) (freedom of speech)
Constitution of the Islamic Republic of Mauritania, 12 July 1991				Arts 1(1), 2(1) and 2(2)		Art 10 (freedom of expression)

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of Mauritius, 12 March 1968	Art 10(9)	Art 10(10)		Art 1	Arts10(1) and 10(8)	
Political Constitution of the United Mexican States, 1917 (as amended to 2010)	Arts 20(A)(IV) (criminal trials) and 20(B)(V)(1) (criminal trials)	Art 17(5)		Arts 39 and 40		
Constitution of the Federated States of Micronesia, 12 July 1978 (as amended to 1990)	Art IV, s 6 (criminal trials)			Art II, s 1		Art IV, s 1 (freedom of expression)
Constitution of the Republic of Moldova, 29 July 1994 (as amended to 2003)	Arts 21 (criminal trials) and 117			Arts 1(3) and 2(1)		
Constitution of the Principality of Monaco, 17 December 1962 (as amended to 2 April 2002)	n/a	n/a	n/a	n/a	n/a	n/a
Constitution of Mongolia, 1992 (as amended to 2000)	Art 54			Art 1(2)		
Constitution of the Republic of Montenegro, 2007	Art 32			Arts 1(2), 2(1) and 2(2)	Art 32	
Constitution of the Kingdom of Morocco, 2011	Art 123			Arts 1(1), 1(2) and 1(3)	Arts 23(4) and 120(1)	

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Republic of Mozambique, 2 November 1990				Arts 1 and 2(1)		Arts 73 (right and duty to participate in the process of extending and consolidating democracy), 74 (freedom of expression; right to information) and 161 (judicial duty to educate citizens in the voluntary and conscious observance of laws)
Constitution of the Republic of the Union of Myanmar, 2008	Art19			Art 4		
Constitution of the Republic of Namibia, 1990 (as amended to 24 December 2998)	Art 12(1)(a)-(c)			Arts 1(1) and 1(2)		
Constitution of the Republic of Nauru, 1968 (as amended to May 1968)	Art 10(10)				Arts 10(2) and 10(9)	
Constitution of the Federal Democratic Republic of Nepal 20 September 2015				Arts 2(1) and 4(1)	Art 20(9)	Art17(2) (freedom of expression)
Constitution of the Kingdom of the Netherlands, 2008	Art 121, sentence 1	Art 121, sentence 2				
New Zealand Bill of Rights Act 1990	Art 25(a) (criminal trials)					Art 14 (freedom of expression; freedom to seek, receive, and impart information)

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Political Constitution of the Republic of Nicaragua, 1986 (as amended to 2014)	Art 34(2)			Arts 1(1) and 2(1)	Art 34(1)	
Constitution of Niger, 18 July 1999	Art 17(1) (criminal trials)		Art 99(1)	Arts 4 and 5(1)		Art 23(1) (freedom of expression)
Constitution of the Federal Republic of Nigeria, 1999 (as amended to 2010)	Arts 36(3) and 36(4)	Art 36(3); see also Art 36(7)		Art 14(1)	Arts 36(1) and 36(4)	Art 39(1) (freedom of expression)
Constitution of the Kingdom of Norway, 1814 (as amended to 2014)	Art 95(1)			Art 2		
Basic Statute of the State (Sultanate of Oman), Promulgated by Sultani Decree No. (101/96), 6 November 1996	Art 63, sentence 1	Art 63, sentence 2				
Constitution of the Islamic Republic of Pakistan, 1973					Art 10A	Arts 19 (freedom of speech and expression) and 19A (access to information in all matters of public importance)

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Republic of Palau, 1 January 1981 (as amended to 4 November 1992)	Art IV, s 7(1) (criminal trials)			Preamble		Art IV, s 2 (freedom of expression)
Political Constitution of the Republic of Panama, 1972 (as amended to 2004)	Art 22(2) (criminal trials)			Art 1		Art 37 (freedom of expression)
Constitution of the Independent State of Papua New Guinea, 1975 (as amended to 2009)	Art 37(12)	Art 37(12)			Arts 37(3) and 37(11)	
Constitution of the Republic of Paraguay, 1992 (as amended to 2011)	Arts 17 (criminal trials) and 256(1)			Art 1(2)		Arts 28(1) (right to receive true, responsible, and equitable information) and 28(2) (right to free access to public source of information)
Political Constitution of the Republic of Peru, 1993 (as amended to 2005)	Art 139					Art 3 (protection of unenumerated rights premised on the principles of popular sovereignty)
Constitution of the Republic of the Philippines, 1987	Art III, s 14(2) (criminal trials)			Art II, s 1		Art III, s 4 (freedom of speech; freedom of expression) and art III, s 7 (right to information on matters of public concern)

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Republic of Poland, 2 April 1997	Art 45	Art 45		Art 2		
Constitution of the Portuguese Republic, 1976 (as amended to 2004)	Art 206		Art 202(1)	Art 2	Art 20(4)	
Permanent Constitution of the State of Qatar	Art 133	Art 133		Art 1		
Constitution of Romania, 1991 (as amended to 2003)	Art 127			Art 1(3)	Art 21(3)	
Constitution of the Russian Federation, 1993 (as amended to 2014)	Art 123(1)			Art 1(1)		Art 32(4) (right to participate in administering justice)
Constitution of the Republic of Rwanda, 2003 (as amended to 2010)	Arts 19(1) (criminal trials) and 141(1)	Art 141(2)	Art 140(4)	Arts 1 and 2(1)		Art 34(1) (freedom of information)
Constitution of Saint Kitts and Nevis (formerly, Saint Christopher and Nevis), 1983	Art 10(10)	Art 10(10)		Art 1(1)		
Constitution of St. Lucia, 1978	Art 8(10)	Art 8(10)				
Constitution of St. Vincent, 1979	Art 8(10)	Art 8(10)				

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Independent State of Samoa, 1960 (as amended to 2005)	Art 9(1)	Art 9(1)				
Declaration of Citizens' Rights and of the Fundamental Principles of the Legal Order of San Marino, 1974 (as amended to 2005)	Art 15(3)			Art 2(1)		
Constitution of the Democratic Republic of Sao Tomé and Príncipe (Law No. 1/2003), 1990 (as amended to 2003)	Art 123					
Basic Law of Governance of the Kingdom of Saudi Arabia, 1 March 1992	<i>n/a</i>	<i>n/a</i>	<i>n/a</i>	<i>n/a</i>	<i>n/a</i>	<i>n/a</i>
Constitution of the Republic of Senegal, 2001 (as amended to 2008)				Art 1(1)		Art 8 (right to information from a plurality of sources)
Constitution of the Republic of Serbia, 30 September 2006	Arts 32(1) and 32(3)			Arts 1 and 2(1)		
Constitution of the Republic of Seychelles (S.I. 38 of 1993), 21 June 1993 (as amended to 2011)	Arts 19(8) and 19(9)	Arts 19(8) and 19(9)		Art 1		

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of Sierra Leone, 1991	Art 23(3)			Arts 5(1) and 5(2)(a)		
Constitution of the Republic of Singapore, 1965				Art 3		Art 14(1) (freedom of speech; freedom of expression)
Constitution of the Slovak Republic, 1992 (as amended to 2006)	Art 48(2)			Arts 1(1) and 2(1)		
Constitution of the Republic of Slovenia (as amended to 2003)	Art 24	Art 24		Arts 1 and 3(2)		
Constitution of Solomon Islands (as amended to 2001)	Art 10(9)	Art 10(9)		Art 1(1)		
Provisional Constitution of the Federal Republic of Somalia, 1 August 2012	Art 34(2)			Art 1(1)	Art 34(2)	
Constitution of the Republic of South Africa, 1996 (as amended to 2013)	Art 34			Arts 1 and 1(d) (ensurance of accountability, responsiveness and openness)	Art 34	
Constitution of the Kingdom of Spain, 1978 (as amended to 2011)	Art 24(2)(1)			Arts 1(1) and 1(2)		
Constitution of the Democratic Socialist Republic	Art 106(1)			Arts 1 and 3		Art 24(5) (Court = any court or tribunal created and established for

of Sri Lanka, 1978 (as amended to 2015)						the administration of justice including the adjudication and settlement of industrial and other disputes, or any other tribunal or institution exercising judicial or quasi-judicial functions or any tribunal or institution created and established for the conciliation and settlement of disputes)
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<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Interim National Constitution of the Republic of Sudan, 2005	Art 34(3)			Art 1(1)	Art 34(3)	
Transitional Constitution of the Republic of South Sudan, 2011	Art 19(3)			Arts 1(4) and 2	Art 19(3)	
Constitution of Suriname, 1987	Art 10			Art 1(1)		
Constitution of the Kingdom of Swaziland, 2005	Arts 21(1) and 21(11)			Art 1(1)	Art 21(1)	
Instrument of Government of the Kingdom of Sweden, 1 January 1975 (as amended to 7 December 2010)	Art 11(2)			Arts 1(1) and 1(2)	Art 11(2)	Art 1(2) (free formation of opinion)
Constitution of the Swiss Federation, 18 December 1998	Art 30(3)	Art 30(3)				

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Syrian Arab Republic, 1973 (as amended to 2012)			Art 134 (sentences)	Arts 1(1) and 2(2)		Art 38 (freedom of expression)
Constitution of the Republic of China (Taiwan), 1947 (as amended to 2005)				Arts 1 and 2		
Constitution of Tajikistan, 6 November 1994 (as amended to 22 June 2003)	Art 88(3)			Arts 1(1) and 6(1)		
Constitution of the United Republic of Tanzania, 1977 (as amended to 1995)				Arts 3(1) and 8(1)	Art 13(6)	
Interim Constitution of the Kingdom of Thailand, 22 July 2014				Arts 2(1) and 3		
Draft Constitution of the Kingdom of Thailand, 2016				ss 2 and 3(1)	s 68(1)	ss 59 (public access to public information), 68(1) (public access to convenient, speedy, and low cost justice process) and 77(1) (facilitation of public access to and public understanding of the laws)
Constitution of Togo	Art 50 in combination with Art 10 <i>UDHR</i>		Art 112	Arts 1 and 2(3)	Art 50 in combination with Art 10 <i>UDHR</i>	

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Kingdom of Tonga, 4 November 1875 (as amended to 14 January 2011)	<i>n/a</i>	<i>n/a</i>	<i>n/a</i>	<i>n/a</i>	<i>n/a</i>	<i>n/a</i>
Constitution of the Republic of Trinidad and Tobago Act, 1976 (as amended and integrated to 2000)	s 5(2) (criminal trials)			s 1(1)	s 5(2)	
Constitution of the Tunisian Republic, 26 January 2014	Art 108(3)	Art 108(3)	Art 111	Art 3	Art 27 (criminal trials)	Art 32 (right to information)
Constitution of the Republic of Turkey, 7 November 1982 (as amended to 12 September 2010)	Art 141(1)			Art 2	Art 36(1)	
Constitutional Law of Turkmenistan, 1992 (as amended to 2003)	Art 103			Art 1(1) and 2(1)		
Constitution of Tuvalu, 1986	Art 22(12)	Art 22(12)		Art 1		
Constitution of the Republic of Uganda, 1995 (as amended to 2005)	Art 28(1)			Arts 1(1), 1(2) and 1(3)	Art 28(1)	
Constitution of the Ukraine, 28 June 1996 (as amended to 21 February 2014)	Art 129(3)			Arts 1 and 5(2)		

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the United Arab Emirates, 18 July 1971 (as amended to 2004)	<i>n/a</i>	<i>n/a</i>	<i>n/a</i>	<i>n/a</i>	Art 28(1) (legal and just criminal trials)	Art 30 (freedom of expression)
Human Rights Act 1998 of the United Kingdom	Art 1 in combination with Sch 1, Art 6(1)	Art 1 in combination with Sch 1, Art 6(1)			Art 1 in combination with Sch 1, Art 6(1)	
Constitution of the United States, adopted 17 September 1787 (ratification completed June 21, 1788) (as amended)				Preamble		Amendment I (freedom of speech)
Constitution of the Oriental Republic of Uruguay, 27 November 1966 (as amended to 2004)	Art 22 (criminal trials)			Arts 1 and 72		Art 29 (freedom of expression)
Constitution of the Republic of Uzbekistan, 8 December 1992	Arts 26(1) (criminal trials) and 113			Arts 1, 2, 7, 13(1) and 13(2)		Art 29(1) (freedom of speech; right to seek, obtain and disseminate information)
Constitution of the Republic of Vanuatu, 30 July 1980 (as amended to Act 20 of 1983)				Arts 1 and 4(1)		Art 5(1)(g) (freedom of expression)
Constitution of the Republic of Venezuela				Arts 3 and 4		

<i>(cont.)</i>	Presumptive Openness of Trials	Judgments Announced in Public Session	Judgments Announced/ Justice Administered in the Name of the People	Principle of Democracy	Right to a Fair Trial	Other Relevant Provisions
Constitution of the Socialist Republic of Viet Nam, 28 November 2013	Arts 31(2) (criminal trials) and 103(3)	Art 32(1) (criminal trials)		Arts 2(1) and 2(2)		
Constitution of the Republic of Yemen, 1994	Art 6 in combination with Art 10 <i>Universal Declaration of Human Rights</i> ; art 152	Art 152		Art 4	Art 6 in combination with Art 10 <i>Universal Declaration of Human Rights</i>	
Constitution of the Republic of Zambia, Act No 1 of 1991 (as amended by the Constitution of Zambia (Amendment) Act 2016)	Art 119(3)					
Constitution of the Republic of Zimbabwe, 2013	Arts 69(1) (criminal trials) and 69(2) (civil trials)			Arts 1 and 86(2) (democratic society based on openness)	Arts 69(1) (criminal trials), 69(2) (civil trials) and 86(3)(e)	

APPENDIX B: ARBITRAL RELIANCE ON PRIOR DECISIONS 1999-2017

The data in this table was used to create figures nos 7 to 19 on arbitral precedent. 125 arbitral decisions were studied in detail for this exercise. The first research question was how often arbitrators rely on prior decisions when defining ‘fair and equitable treatment.’ The second research question was *which* decisions were relied upon by arbitrators when defining ‘fair and equitable treatment’ and under which treaties these decisions were rendered. *Appendix B* demonstrates the practice of relying mostly on arbitral decisions when defining ‘fair and equitable treatment’. Secondly, *Appendix B* demonstrates that arbitrators often rely on prior arbitral decisions rendered under treaties other than the treaty they are interpreting. The phenomenon of cross-treaty reliance contributes to the development of a single body of international investment law. ‘Reliance’ in this context means that a tribunal not only mentions a prior decision, but draws some meaning from the prior decisions and leans on that meaning for guidance or support. ‘Reliance’ does not include instances where tribunals consider a decision irrelevant or where they quote from a decision without making the content of the quote their own. The following table thus does not include decisions that were mentioned by a tribunal without relying on it, either explicitly or impliedly. Since the line between the mention of a case and the implied reliance on a case can be difficult to draw, the following table may seem incomplete to those who would draw the line elsewhere. Last but not least, the following table also includes instances where tribunals relied on the jurisprudence of “prior tribunals” or a “common ground” in general. The reliance on such generalities suggests that arbitrators acknowledge their jurisgenerative function.

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
1	<i>Azinian v Mexico</i> , ICSID Case No ARB(AF)/97/2, Award, 1 Nov 1999	NAFTA	n/a	n/a	n/a	n/a	n/a
2	<i>Metalclad v Mexico</i> , ICSID Case No ARB(AF)/97/1, Award, 30 Aug 2000	NAFTA	n/a	n/a	n/a	n/a	n/a
3	<i>Maffezini v Spain</i> , ICSID Case No ARB/97/7, Award, 13 Nov 2000	Argentina-Spain BIT 1991	n/a	n/a	n/a	n/a	n/a
4	<i>S.D. Myers v Canada</i> , UNCITRAL Partial Award, 13 Nov 2000	NAFTA	n/a	n/a	n/a	n/a	n/a

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
5	<i>Wena Hotels v Egypt</i> , ICSID Case No ARB/98/4, Award, 8 Dec 2000	Egypt-UK BIT 1975	n/a	n/a	n/a	n/a	n/a
6	<i>Pope & Talbot v Canada</i> , UNCITRAL Awards on the Merits of Phase 2, 10 Apr 2001	NAFTA	n/a	n/a	n/a	n/a	n/a
7	<i>Genin v Estonia</i> , ICSID Case ARB/99/2, Award, 25 Jun 2001	Estonia-US BIT 1994	<i>AMT v Congo</i> , ICSID Case No ARB/93/1, Award, 21 Feb 1997	n/a	US-Zaire BIT 1984	FET requirement = “a basic and general standard which is detached from the host State’s domestic law”	367 n91
8	<i>CME v Czech Republic</i> , UNCITRAL Partial Award, 13 Sep 2001	Czech Republic-Netherlands BIT 1991	n/a	n/a	n/a	n/a	n/a
9	<i>Middle East Cement v Egypt</i> , ICSID Case No ARB/99/6, Award, 12 Apr 2002	Greece-Egypt BIT 1993	n/a	n/a	n/a	n/a	n/a
10	<i>Mondev v USA</i> , ICSID Case No ARB(AF)/99/2, Award, 11 Oct 2002	NAFTA	<i>Azinian</i> , Award, 1 Nov 1999	n/a	NAFTA	Applicable standard of denial of justice	126
			<i>ELSI (USA v Italy)</i> , Judgment, ICJ Reports 1989, p 15	n/a	ICJ	Definition of ‘arbitrary conduct’	127

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
11	<i>Feldman v Mexico</i> , ICSID Case ARB(AF)/99/1, Award, 16 Dec 2002	NAFTA	<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	n/a	NAFTA	Article 1105 – Article 1110(1)(c)	141
12	<i>ADF Group v USA</i> , ICSID Case No ARB(AF)/00/1, Award, 9 Jan 2003	NAFTA	<i>Mondev</i> , Award, 11 Oct 2002	119	NAFTA	Arbitral case law = source of law	184
			<i>Mondev</i> Award, 11 Oct 2002	136	NAFTA	No appellate jurisdiction	190 n182
			<i>Azinian</i> , Award, 1 Nov 1999	99			
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	261			
			<i>Feldman</i> , Interim Decision on Jurisdiction	61			
			<i>ELSI (USA v Italy)</i> , Judgment, ICJ Reports 1989, p 15	124	ICJ	<i>Ultra Vires</i> act not enough	190 n183
13	<i>Tecmed v Mexico</i> , ICSID Case No ARB(AF)/00/2, Award, 29 May 2003	Mexico-Spain BIT 1995	<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	134	NAFTA	FET = part of the <i>bona fide</i> principle	153 n189
			<i>Mondev</i> , Award, 11 Oct 2002	116	NAFTA	Bad faith not an essential element	153 n190
			<i>Neer Case</i> , Decision, 15 Oct 1926	n/a	<i>US-Mexico Claims Commission</i>	Definition of ‘arbitrary conduct’	154 n191

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
13	<i>Tecmed v Mexico</i> , ICSID Case No ARB(AF)/00/2, Award, 29 May 2003 (<i>cont.</i>)	Mexico-Spain BIT 1995	<i>ELSI (USA v Italy)</i> , Judgment, ICJ Reports 1989, p 15	128	ICJ	Definition of 'arbitrary conduct'	154 n192
14	<i>Loewen v USA</i> , ICSID Case No ARB(AF)/98/3, Award, 26 Jun 2003	NAFTA	<i>Mondev</i> , Award, 11 Oct 2002	n/a	NAFTA	Generally accepted standards of the administration of justice	133
15	<i>Generation Ukraine v Ukraine</i> , ICSID Case ARB/00/9, Award, 16 Sep 2003	Ukraine-US BIT 1994	n/a	n/a	n/a	n/a	n/a
16	<i>Waste Management v Mexico II</i> , ICSID Case No ARB(AF)/00/3, Final Award, 30 Apr 2004	NAFTA	<i>ADF Group</i> , Award, 9 Jan 2003	n/a	NAFTA	Emergence of a general standard (synthesis)	98
			<i>Loewen</i> , Award, 26 Jun 2003	n/a			
			<i>Mondev</i> , Award, 11 Oct 2002	n/a			
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	n/a			
17	<i>MTD Equity v Chile</i> , ICSID Case No ARB/01/7, Award, 25 May 2004	Malaysia-Chile BIT 1992	<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995	Basic expectations	114

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
18	<i>Occidental v Ecuador I</i> , LCIA Case No UN 3467, UNCITRAL Final Award, 1 Jul 2004	Ecuador-US BIT 1993	<i>Metalclad</i> , Award, 30 Aug 2000	99	NAFTA	Stability of the legal and business framework	185
			<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995		
19	<i>GAMI v Mexico</i> , UNCITRAL Final Award, 15 Nov 2004	NAFTA	<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	261	NAFTA	No open-ended mandate to second-guess government decision-making	93
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	n/a	NAFTA	Four implications	97
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	115	NAFTA	“Outright and unjustified repudiation”	100, 101 n24; 102 103
20	<i>Petrobart v Kyrgyz Republic</i> , SCC Case No 126/2003, Arbitral Award, 29 Mar 2005	Energy Charter Treaty	n/a	n/a	n/a	n/a	n/a
21	<i>CMS v Argentina</i> , ICSID Case No ARB/01/8, Award, 12 May 2005	Argentina-US BIT 1991	<i>Genin</i> , Award, 25 Jun 2001	n/a	Estonia-US BIT 1994	Stability of the legal and business framework	276 n139
			<i>Metalclad</i> , Award, 30 Aug 2000	99	NAFTA	Predictable framework for investment	278 n140

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
21	<i>CMS v Argentina</i> , ICSID Case No ARB/01/8, Award, 12 May 2005 (<i>cont.</i>)	Argentina-US BIT 1991	<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995	Basic expectations	279, n141
22	<i>Methanex v USA</i> , UNICTRAL Final Award, 3 Aug 2005	NAFTA	n/a	n/a	n/a	n/a	n/a
23	<i>Eureko v Poland</i> , UNCITRAL Partial Award, 19 Aug 2005	Netherlands-Poland BIT 1992	<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995	Basic expectations	235 n29
24	<i>Noble Ventures v Romania</i> , ICSID Case No ARB/01/11, Award, 12 Oct 2005	Romania-US BIT 1992	<i>ELSI (USA v Italy)</i> , Judgment, ICJ Reports 1989, p 15	128	ICJ	Definition of 'arbitrary conduct'	176
25	<i>Thunderbird v Mexico</i> , UNCITRAL Award, 26 Jan 2006	NAFTA	<i>Mondev</i> , Award, 11 Oct 2002	n/a	NAFTA	Evolution of international customary law	194 n11
			<i>ADF Group</i> , Award, 9 Jan 2003	n/a			
			<i>Waste Management v Mexico I</i> , ICSID Case No ARB(AF)/98/2, Award, 2 Jun 2000	n/a			

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
25	<i>Thunderbird v Mexico</i> , UNCITRAL Award, 26 Jan 2006 (cont.)	NAFTA	<i>Waste Management II</i> , Final Award, 30 Apr 2004	n/a	NAFTA	Evolution of international customary law	194 n11
			<i>Genin</i> , Award, 25 Jun 2001	n/a	Estonia-US BIT 1994	High threshold for violation	194 n13
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	n/a	NAFTA	High threshold for violation	194 n13
			<i>Genin</i> , Award, 25 Jun 2001	n/a	Estonia-US BIT 1994	Gross denial of justice; manifest arbitrariness	194 n14
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	n/a	NAFTA	Gross denial of justice; manifest arbitrariness	194 n14
			<i>Mondev</i> , Award, 11 Oct 2002	n/a			
			<i>ADF Group</i> , Award, 9 Jan 2003	n/a			
			<i>Azinian</i> , Award, 1 Nov 1999	n/a			
			<i>Loewen</i> , Award, 26 Jun 2003	n/a			
<i>ELSI (USA v Italy)</i> , Judgment, ICJ Reports 1989, p 15	n/a	ICJ	Gross denial of justice; manifest arbitrariness	194 n14			
26	<i>Salini v Jordan</i> , ICSID Case No ARB/02/12, Award, 31 Jan 2006	Italy-Jordan BIT 1996	<i>Joy Mining v Egypt</i> , ICSID Case No ARB/03/11, Award on Jurisdiction, 6 Aug 2004	72; 82	Egypt-UK BIT 1975	Lack of jurisdiction in the absence of state interference	156

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
27	<i>Saluka v Czech Republic</i> , UNCITRAL Partial Award, 17 Mar 2006	Czech Republic-Netherlands BIT 1991	<i>Pope & Talbot</i> , Award on the Merits of Phase 2, 10 Apr 2001	155	NAFTA	No open-ended mandate to second-guess government decision-making	284 n16
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	261	NAFTA	No open-ended mandate to second-guess government decision-making	284 n17
			<i>Mondev</i> , Award, 11 Oct 2002	118	NAFTA	Importance of the facts of the particular case	285 n19
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	n/a	NAFTA		
			<i>MTD Equity</i> , Award, 25 May 2004	n/a	Malaysia-Chile BIT 1992		
			<i>MTD Equity</i> , Award, 25 May 2004	113	Malaysia-Chile BIT 1992	Ordinary meaning of fair and equitable	297 n32
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	263	NAFTA	Ordinary meaning of fair and equitable	297 n33
			<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995	Legitimate expectations	302 n35
			<i>CME</i> , Partial Award, 13 Sep 2001	155	Czech Republic-Netherlands BIT 1991	Legitimate expectations	302 n36

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
27	<i>Saluka v Czech Republic</i> , UNCITRAL Partial Award, 17 Mar 2006 (cont.)	Czech Republic-Netherlands BIT 1991	<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Legitimate expectations	302 n37
			<i>Occidental I</i> , Final Award, 1 Jul 2004	183	Ecuador-US BIT 1993	Stability of the legal and business framework	303 n39
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	263	NAFTA	Deference to the right of domestic authorities to regulate	305 n40
28	<i>Azurix v Argentina</i> , ICSID Case No ARB/01/12, Award, 14 Jul 2006	Argentina-US BIT 1991	<i>Tecmed</i> , Award, 29 May 2003	155	Mexico-Spain BIT 1995	Type of standard not of material significance	361 n300
			<i>Mondev</i> , Award, 11 Oct 2002	123-125, 116	NAFTA	Evolution of international customary law; bad faith or malicious intent not an essential element	368 n305-308
			<i>ADF Group</i> , Award, 9 Jan 2003	179	NAFTA	Evolution of international customary law; bad faith or malicious intent not an essential element	368 n308
			<i>Loewen</i> , Award, 26 Jun 2003	132	NAFTA	Evolution of international customary law; bad faith or malicious intent not an essential element	369 n309
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Evolution of international customary law; bad faith or malicious intent not an essential element	370 n310
			<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995	Evolution of international customary law; bad faith or malicious intent not an essential element	371 n311
			<i>CMS</i> , Award, 12 May 2005	280	Argentina-US BIT 1991	Objective Standard; Bad Faith or Malicious Intent not an Essential Element	372 n312

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
29	<i>ADC v Hungary</i> , ICSID Case No ARB/03/16, Award, 2 Oct 2006	Hungary-Cyprus BIT 1989	n/a	n/a	n/a	n/a	n/a
30	<i>LG&E Energy v Argentina</i> , ICSID Case No ARB/02/1, Decision on Liability, 3 Oct 2006	Argentina-US BIT 1991	<i>CMS</i> , Award, 12 May 2005	274	Argentina-US BIT 1991	Stability of the legal and business framework	125 n31
			<i>Occidental I</i> , Final Award, 1 Jul 2004	183	Ecuador-US BIT 1993	Stability of the legal and business framework	125 n31
			<i>Metalclad</i> , Award, 30 Aug 2000	99	NAFTA		
			<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995	Expectations	127
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Expectations	128
			<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995	Transparency	128 n35
			<i>CMS</i> , Award, 12 May 2005	278-279	Argentina-US BIT 1991	Transparency	128 n35
			<i>Occidental I</i> , Final Award, 1 Jul 2004	185	Ecuador-US BIT 1993	Transparency	128 n35
			<i>Mondev</i> , Award, 11 Oct 2002	116	NAFTA	Bad faith not an essential element	129 n38

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
30	<i>LG&E Energy v Argentina</i> , ICSID Case No ARB/02/1, Decision on Liability, 3 Oct 2006 (<i>cont.</i>)	Argentina-US BIT 1991	<i>Occidental I</i> , Final Award, 1 Jul 2004	63	Ecuador-US BIT 1993	Objective requirement; bad faith not an essential element	129 n38
			<i>Tecmed</i> , Award, 29 May 2003 (relying on <i>Mondev</i>)	153	Mexico-Spain BIT 1995	Bad faith not an essential element	129 n38
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	93	NAFTA		
31	<i>PSEG Global v Turkey</i> , ICSID Case No ARB/02/5, Award, 19 Jan 2007	Turkey-US BIT 1985	<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995	Legitimate expectations	240
			<i>J</i> Decision No 349 (2006)	n/a	<i>World Bank Admin. Tribunal</i>	Legitimate expectations	240 n118
			<i>Saluka</i> , Partial Award, 17 Mar 2006	301; 305	Czech Republic-Netherlands BIT 1991	Legitimate expectations; stability ≠ standstill	255
32	<i>Siemens v Argentina</i> , ICSID Case No ARB/02/8, Award, 6 Feb 2007	Argentina-Germany BIT 1991	<i>Mondev</i> , Award, 11 Oct 2002	123-125, 116	NAFTA	Evolution of international customary law; bad faith or malicious intent not an essential element	295; 299
			<i>ADF Group</i> , Award, 9 Jan 2003	109	NAFTA	Evolution of international customary law	295 n109
			<i>Loewen</i> , Award, 26 Jun 2003	132	NAFTA	Evolution of international customary law; bad faith or malicious intent not an essential element	296; 299

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
32	<i>Siemens v Argentina</i> , ICSID Case No ARB/02/8, Award, 6 Feb 2007 (cont.)	Argentina-Germany BIT 1991	<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Evolution of international customary law; bad faith or malicious intent not an essential element	297; 299
			<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995	Evolution of international customary law; bad faith or malicious intent not an essential element	298-299
			<i>CMS</i> , Award, 12 May 2005	280	Argentina-US BIT 1991	Objective requirement; bad faith not an essential element	299
33	<i>Eastern Sugar v Czech Republic</i> , SCC Case No 088/2004, UNCITRAL Partial Award, 27 Mar 2007	Netherlands-Czech Republic BIT 1991	n/a	n/a	n/a	n/a	n/a
34	<i>Enron v Argentina</i> , ICSID Case No ARB/01/3, Award, 22 May 2007	Argentina-US BIT 1991	<i>Tecmed</i> , Award, 29 May 2003	n/a	Mexico-Spain BIT 1995	Evidence of the gradual evolution of the FET standard	257
			<i>Occidental I</i> , Final Award, 1 Jul 2004	n/a	Ecuador-US BIT 1993		
			<i>Pope & Talbot</i> , Award on the Merits of Phase 2, 10 Apr 2001	n/a	NAFTA		
			<i>ADF Group</i> , Award, 9 Jan 2003	124	NAFTA	Purpose of the gradual formulation of the FET standard	257
			<i>Occidental I</i> , Final Award, 1 Jul 2004	190-191	Ecuador-US BIT 1993	Stability of the legal and business framework	260

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
34	<i>Enron v Argentina</i> , ICSID Case No ARB/01/3, Award, 22 May 2007 (cont.)	Argentina-US BIT 1991	<i>CMS</i> , Award, 12 May 2005	274-276	Argentina-US BIT 1991	Stability of the legal and business framework	260
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	124	Argentina-US BIT 1991	Stability of the legal and business framework	260
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	125	Argentina-US BIT 1991	Stability of the legal and business framework = emerging standard	260
			<i>CMS</i> , Award, 12 May 2005	277	Argentina-US BIT 1991	Stability ≠ standstill	261
			<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995	Expectations	262
			<i>Thunderbird</i> , Award, 26 Jan 2006	147	NAFTA	Expectations	262
			<i>SPP v Egypt</i> , ICSID Case No ARB/84/3, Award on the Merits, 20 May 1992	82	Foreign Investment Law	Expectations	262
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	127	Argentina-US BIT 1991	Expectations	262
			<i>CME</i> , Partial Award, 13 Sep 2001	611	Czech Republic-Netherlands BIT 1991	Expectations	262

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
34	<i>Enron v Argentina</i> , ICSID Case No ARB/01/3, Award, 22 May 2007 (cont.)	Argentina-US BIT 1991	<i>Mondev</i> , Award, 11 Oct 2002	116	NAFTA	Principle of good faith not an essential element of the FET standard	263 n68
			<i>Loewen</i> , Award, 26 Jun 2003	32	NAFTA		
			<i>Occidental I</i> , Final Award, 1 Jul 2004	186	Ecuador-US BIT 1993		
			<i>Tecmed</i> , Award, 29 May 2003	153	Mexico-Spain BIT 1995		
			<i>Waste Management v Mexico I</i> , ICSID Case No ARB(AF)/98/2, Award, 2 June 2000	93	NAFTA	Principle of good faith not an essential element of the FET standard	263 n68
			<i>CMS</i> , Award, 12 May 2005	280	Argentina-US BIT 1991		
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	129			
35	<i>Tokios Tokeles v Ukraine</i> , ICSID Case No ARB/02/18, Award, 26 Jul 2007	Ukraine-Lithuania BIT 1994	n/a	n/a	n/a	n/a	n/a
36	<i>MCI Power Group v Ecuador</i> , ICSID Case No ARB/03/6, Award, 31 Jul 2007	Ecuador-US BIT 1993	<i>MTD Equity</i> , Annulment Decision, 21 Mar 2007	67	Malaysia-Chile BIT 1992	Legitimate expectations	278 n40
			“general international law”	n/a	n/a	Requirement of an arbitration agreement	323

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
36	<i>MCI Power Group v Ecuador</i> , ICSID Case No ARB/03/6, Award, 31 Jul 2007 (<i>cont.</i>)	Ecuador-US BIT 1993	<i>Salini</i> , Award, 31 Jan 2006	70	Jordan-Italy BIT 1996	Burden of proof	323 n42
			<i>Joy Mining v Egypt</i> , ICSID Case No ARB/03/11, Award on Jurisdiction, 6 Aug 2004	95	Egypt-UK BIT 1975	Statements of parties in arbitration proceedings as recognition of a pre-existing obligation; statements of parties may create new obligation	352 n47
			<i>CMS</i> , Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 1 Sep 2006	49	Argentina-US BIT 1991	Statements of parties in arbitration proceedings as recognition of a pre-existing obligation; statements of parties may create new obligation	352 n48
			<i>Tecmed</i> , Award, 29 May 2003	102	Spain-Mexico BIT 1995	Inequitable or unfair treatment = an act contrary to (customary international) law	369 n51
			<i>Mondev</i> , Award, 11 Oct 2002	119	NAFTA	Arbitral tribunals are "bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals."	370 n52
37	<i>Vivendi v Argentina</i> , ICSID Case No ARB/97/3, Award, 20 Aug 2007	Argentina-France BIT 1991	<i>Methanex</i> , Final Award, 3 Aug 2005	n/a	NAFTA	Interpretation of Article 31(1) of the Vienna Convention	7.4.3.
			<i>MOX Plant Case (Ireland v UK)</i> , Order on Provisional Measures, 3 Dec 2001, 41 ILM 405 (2002)	413	ITLOS	Interpretation of Article 31(1) of the Vienna Convention: different contexts, objects and purposes may yield different results	7.4.3.

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
37	<i>Vivendi v Argentina</i> , ICSID Case No ARB/97/3, Award, 20 Aug 2007 (cont.)	Argentina-France BIT 1991	<i>Access to Information under Article 9 of the OSPAR Convention (Ireland v UK)</i> 42 ILM 1118 (2003) (quoting <i>The MOX Plant Case</i>)	1144	OSPAR Convention	Interpretation of Article 31(1) of the Vienna Convention: different contexts, objects and purposes may yield different results	7.4.3.
			<i>American Manufacturing</i> , Award, 21 Feb 1997	n/a	DR Congo-US BIT 1984	Conformity with principles of international law; floor-not-a-ceiling principle	7.4.7. n324
			<i>Genin</i> , Award, 25 Jun 2001	367	Estonia-US BIT 1994		
			<i>Azurix</i> , Award, 14 Jul 2006	361	Argentina-US BIT 1991		
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	n/a	NAFTA	Evolution of the minimum standard/ international customary law	7.4.7. n325
			<i>Pope & Talbot</i> , Award on the Merits of Phase 2, 10 Apr 2001	n/a			
			<i>ADF Group</i> , Award, 9 Jan 2003	179			
			<i>Mondev</i> , Award, 11 Oct 2002	116			
			<i>CMS</i> , Award, 12 May 2005	284	Argentina-US BIT 1991	FET > minimum standard	7.4.8.
<i>Azurix</i> , Award, 14 Jul 2006	361						

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
37	<i>Vivendi v Argentina</i> , ICSID Case No ARB/97/3, Award, 20 Aug 2007 (<i>cont.</i>)	Argentina-France BIT 1991	<i>Tecmed</i> , Award, 29 May 2003	n/a	Spain-Mexico BIT 1995	FET > minimum standard	7.4.8.
			<i>CMS</i> , Award, 12 May 2005	280	Argentina-US BIT 1991	Objective standard; bad faith not an essential element	7.4.12.
38	<i>Parkerings-Compagniet v Lithuania</i> , ICSID Case No ARB/05/8, Award, 11 Sep 2007	Lithuania-Norway BIT 1992	<i>CMS</i> , Award, 12 May 2005	290	Argentina-US BIT 1991	Non-discrimination = sub-category of FET	287
			<i>Goetz v Burundi</i> , ICSID Case No ARB/95/3, Award, 10 Feb 1999	121	BLEU-Burundi BIT 1989	Determination of discrimination	288
			<i>MTD Equity</i> , Award, 25 May 2004	167	Malaysia-Chile BIT 1992	Limits of state responsibility	308
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	n/a	NAFTA	International law point of view	315
			<i>Saluka</i> , Partial Award, 17 Mar 2006	442-443	Czech Republic-Netherlands BIT 1991	Simple illegality or lack of authority under domestic law not sufficient	315
			<i>Azurix</i> , Award, 14 Jul 2006	n/a	Argentina-US BIT 1991		
			<i>Generation Ukraine</i> , Award, 16 Sep 2003	p. 91	Ukraine-US BIT 1994	Breach of contract as a treaty violation; preliminary determination by competent court	316 n60

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
38	<i>Parkerings-Compagniet v Lithuania</i> , ICSID Case No ARB/05/8, Award, 11 Sep 2007 (cont.)	Lithuania-Norway BIT 1992	<i>Waste Management II</i> , Final Award, 30 Apr 2004	114-115	NAFTA	Breach of contract as a treaty violation; preliminary determination by competent court	316 n60
			<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995	Legitimate expectations	330 n80
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	n/a	NAFTA	Legitimate expectations; lack of assurance or representation	331 n81
			<i>Tecmed</i> , Award, 29 May 2003	152 et seq.	Mexico-Spain BIT 1995		
			<i>CMS</i> , Award, 12 May 2005	n/a	Argentina-US BIT 1991		
			<i>Saluka</i> , Partial Award, 17 Mar 2006	442	Czech Republic-Netherlands BIT 1991	Limits of state responsibility under the treaty	344
39	<i>Sempra Energy v Argentina</i> , ICSID Case No ARB/02/16, Award, 28 Sep 2007	Argentina-US BIT 1991	<i>Tecmed</i> , Award, 29 May 2003	n/a	Mexico-Spain BIT 1995	Evidence of the gradual evolution of FET standard	297
			<i>Occidental I</i> , Final Award, 1 Jul 2004	n/a	Ecuador-US BIT 1993		
			<i>Pope & Talbot</i> , Award on the Merits of Phase 2, 10 Apr 2001	n/a	NAFTA		

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
39	<i>Sempra Energy v Argentina</i> , ICSID Case No ARB/02/16, Award, 28 Sep 2007 (<i>cont.</i>)	Argentina-US BIT 1991	<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995	Basic expectations	298
			<i>Embassy Limousines</i> , Judgment, 17 Dec 1998	8	<i>General Court</i> (EU)	Basic expectations based on assurances and representations	298
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	124; 125	Argentina-US BIT 1991	Stability of the legal and business framework	303
40	<i>Oko Pankki v Estonia</i> , ICSID Case No ARB/04/6, Award, 19 Nov 2007	Estonia-Finland BIT 1992; Estonia-Germany BIT 1992	<i>Saluka</i> , Partial Award, 17 Mar 2006	294	Czech Republic-Netherlands BIT 1991	Autonomous standard; FET Standard > minimum standard	226
			<i>Azurix</i> , Award, 14 Jul 2006	361	Argentina-US BIT 1991	Autonomous standard; FET Standard > minimum standard	227
			<i>Occidental I</i> , Final Award, 1 Jul 2004	192	Ecuador-US BIT 1993	Autonomous standard; FET Standard > minimum standard	228
			<i>Mondev</i> , Award, 11 Oct 2002	118	NAFTA	Importance of the facts of the particular case	238
41	<i>BG Group v Argentina</i> , UNCITRAL Final Award, 24 Dec 2007	Argentina-UK BIT 1990	<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Articulation of the FET standard (drawn from <i>SD Myers</i> , <i>Mondev</i> , <i>ADF</i> and <i>Loewen</i>)	292
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	n/a	NAFTA	Relevance of representations by the state to the investor	294

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
41	<i>BG Group v Argentina</i> , UNCITRAL Final Award, 24 Dec 2007 (cont.)	Argentina-UK BIT 1990	<i>Generation Ukraine</i> , Award, 16 Sep 2003	20.37	Ukraine-US BIT 1994	Legitimate expectations	295
			<i>Revere Copper and Brass Inc. v Overseas Private Investment Corporation (OPIC)</i> , Award, 24 Aug 1978	56 ILR 258, at 1331	Contract	Importance of assurances to investors predates the BIT generation	296
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	130	Argentina-US BIT 1991	Nature of the investor's expectations	297
			<i>Saluka</i> , Partial Award, 17 Mar 2006	304	Czech Republic-Netherlands BIT 1991	Host state's right to regulate	298 n241
			<i>Feldman</i> , Award, 16 Dec 2002	112	NAFTA		
			<i>CMS</i> , Award, 12 May 2005	277	Argentina-US BIT 1991	Evolution of the domestic legal framework	299
			<i>Mondev</i> , Award, 11 Oct 2002	116	NAFTA	Bad faith not an essential element of the FET standard	301 n246
			<i>Loewen</i> , Award, 26 Jun 2003	132	NAFTA		
			<i>Occidental I</i> , Final Award, 1 Jul 2004	186	Ecuador-US BIT 1993		
			<i>Tecmed</i> , Award, 29 May 2003	153	Mexico-Spain BIT 1995		

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
41	<i>BG Group v Argentina</i> , UNCITRAL Final Award, 24 Dec 2007 (cont.)	Argentina-UK BIT 1990	<i>CMS</i> , Award, 12 May 2005	280	Argentina-US BIT 1991	Bad faith not an essential element of the FET standard	301 n246
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	129			
			<i>Azurix</i> , Award, 14 Jul 2006	372			
			<i>Siemens</i> , Decision on Jurisdiction, 3 Aug 2004	293-300	Argentina-Germany BIT 1991		
			<i>Thunderbird</i> , Award, 26 Jan 2006	194	NAFTA		
42	<i>Desert Line v Yemen</i> , ICSID Case No ARB/05/17, Award, 6 Feb 2008	Oman-Yemen BIT 1998	<i>Différend Industrie Vicentine Elettro-Mecchaniche</i> , Decision No 125, 1 March 1952, 13 Reports of International Arbitral Awards 325 (1964)	p [325]	<i>Franco-Italian Conciliation Commission</i>	Transactions where governments have created intolerable pressures to conclude transactions	172
			<i>Différend Wagon-Citernes</i> , Decision No 60, 20 May 1950, 13 Reports of International Arbitral Awards 212 (1964)	p 212			

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
42	<i>Desert Line v Yemen</i> , ICSID Case No ARB/05/17, Award, 6 Feb 2008 (<i>cont.</i>)	Oman-Yemen BIT 1998	<i>Case of Gowen & Copeland</i> 4 John B. Moore, History and Digest of International Arbitrations to Which the United States Has Been a Party 3354 (1898)	pp 3354-3359	<i>US-Venezuela Claims Commission</i>	Forced sale as a breach of the minimum standard	173
			<i>Jacob Idler v Venezuela</i> 4 John B. Moore, History and Digest of International Arbitrations to Which the United States Has Been a Party 3491 (1898)	p 3491	<i>US-Venezuela Claims Commission</i>	Finality of arbitral awards	180
43	<i>Metalpar v Argentina</i> , ICSID Case No ARB/03/5, Award on the Merits, 6 Jun 2008	Argentina-Chile BIT 1991	<i>CMS</i> , Award, 12 May 2005	293	Argentina-US BIT 1991	Discrimination	162 n1
			<i>Sempra Energy</i> , Award, 28 Sep 2007	319	Argentina-US BIT 1991	Discrimination	163 n2
			<i>PSEG Global</i> , Award, 19 Jan 2007	239-241	Turkey-US BIT 1985	Legitimate expectations	183 n4
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	131	Argentina-US BIT 1991	Legitimate expectations	184 n5

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
44	<i>Helnan v Egypt</i> , ICSID Case No ARB/05/19, Award, 3 Jul 2008	Egypt-Denmark BIT 1999	n/a	n/a	n/a	n/a	n/a
45	<i>Biwater Gauff (Tanzania) v Tanzania</i> , ICSID Case No ARB/05/22, Award, 24 Jul 2008	Tanzania-UK BIT 1994	<i>Saluka</i> , Partial Award, 17 Mar 2006	291	Czech Republic-Netherlands BIT 1991	Content of the FET Standard Not Materially Different from the Content of the Minimum Standard	592 n244
			<i>Azurix</i> , Award, 14 Jul 2006	361	Argentina-US BIT 1991		
			<i>CMS</i> , Award, 12 May 2005	282-284	Argentina-US BIT 1991		
			<i>Occidental I</i> , Final Award, 1 Jul 2004	190	Ecuador-US BIT 1993		
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Relevant Threshold for Violation of the FET Standard; High Threshold	597
			<i>Thunderbird</i> , Award, 26 Jan 2006	194	NAFTA	Relevant Threshold for Violation of the FET Standard; High Threshold	598
			<i>CME</i> , Partial Award, 13 Sep 2001	611	Czech Republic-Netherlands BIT 1991	Legitimate Expectations	602 n254

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
45	<i>Biwater Gauff (Tanzania) v Tanzania</i> , ICSID Case No ARB/05/22, Award, 24 Jul 2008 (cont.)	Tanzania-UK BIT 1994	<i>Waste Management II</i> , Final Award, 30 Apr 2004	98, 305	NAFTA	Legitimate expectations	602 n254-256
			<i>Saluka</i> , Partial Award, 17 Mar 2006	63, 164	Czech Republic-Netherlands BIT 1991	Legitimate expectations	602 n254
			<i>Occidental I</i> , Final Award, 1 Jul 2004	12 <i>ICSID Rep.</i> 54	Ecuador-US BIT 1993	Legitimate expectations	602 n254
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	n/a	NAFTA	Principle of good faith; bad faith not required	602 n257
			<i>Middle East Cement</i> , Award, 12 Apr 2002	143	Egypt-Greece BIT 1993	Principle of good faith; bad faith not required	602 n257
			<i>Saluka</i> , Partial Award, 17 Mar 2006	303	Czech Republic-Netherlands BIT 1991	Principle of good faith; bad faith not required	602 n257
			<i>Saluka</i> , Partial Award, 17 Mar 2006	164		Transparency	602 n258
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Transparency	602 n258
			<i>CME</i> , Partial Award, 13 Sep 2001	611	Czech Republic-Netherlands BIT 1991	Transparency	602 n258

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
45	<i>Biwater Gauff (Tanzania) v Tanzania</i> , ICSID Case No ARB/05/22, Award, 24 Jul 2008 (cont.)	Tanzania-UK BIT 1994	<i>Maffezini</i> , Award, 13 Nov 2000	83	Argentina-Spain BIT 1991	Transparency	602 n258
			<i>Metalclad</i> , Award, 30 Aug 2000	n/a	NAFTA		
			<i>Saluka</i> , Partial Award, 17 Mar 2006	164	Czech Republic-Netherlands BIT 1991	Consistency	602 n259
			<i>CME</i> , Partial Award, 13 Sep 2001	611			
			<i>Saluka</i> , Partial Award, 17 Mar 2006	164	Czech Republic-Netherlands BIT 1991	Non-discrimination = not based on unjustifiable distinctions or arbitrary	602 n260
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA		
			<i>CME</i> , Partial Award, 13 Sep 2001	611	Czech Republic-Netherlands BIT 1991		
46	<i>Rumeli Telekom v Kazakhstan</i> , ICSID Case No ARB/05/16, Award, 29 Jul 2008	Kazakhstan-Turkey BIT 1992	<i>Azurix</i> , Award, 14 Jul 2006	361	Argentina-US BIT 1991	Treaty FET standard not materially different from the minimum standard	611

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
46	<i>Rumeli Telekom v Kazakhstan</i> , ICSID Case No ARB/05/16, Award, 29 Jul 2008 (<i>cont.</i>)	Kazakhstan-Turkey BIT 1992	<i>CMS</i> , Award, 12 May 2005	284	Argentina-US BIT 1991	Treaty FET standard not materially different from the minimum standard	611
47	<i>Duke Energy v Ecuador</i> , ICSID Case No ARB/04/19, Award, 18 Aug 2008	Ecuador-US BIT 1993	<i>Azurix</i> , Award, 14 Jul 2006	361; 364	Argentina-US BIT 1991	Floor-not-a-ceiling principle; treaty FET standard not materially different from the minimum standard	335-337
			<i>CMS</i> , Award, 12 May 2005	284	Argentina-US BIT 1991	Treaty FET standard not materially different from the minimum standard	337
			<i>CMS</i> , Award, 12 May 2005	n/a	Argentina-US BIT 1991	Stable and predictable legal and business framework = essential element of the FET standard	339
			<i>Tecmed</i> , Award, 29 May 2003	n/a	Mexico-Spain BIT 1995	Stable and predictable legal and business framework = essential element of the FET standard	339
			<i>Occidental I</i> , Final Award, 1 Jul 2004	n/a	Ecuador-US BIT 1993	Stable and predictable legal and business framework = essential element of the FET standard	339
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	125	Argentina-US BIT 1991	Stability of the legal and business framework = emerging standard of fair and equitable treatment	339
			<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995	Legitimate and reasonable expectations	340 n34
			<i>Occidental I</i> , Final Award, 1 Jul 2004	185	Ecuador-US BIT 1993	Legitimate and reasonable expectations	340 n34

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
47	<i>Duke Energy v Ecuador</i> , ICSID Case No ARB/04/19, Award, 18 Aug 2008 (<i>cont.</i>)	Ecuador-US BIT 1993	<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	127	Argentina-US BIT 1991	Legitimate and reasonable expectations	340 n34
			<i>SPP v Egypt</i> , ICSID Case No ARB/84/3, Award on the Merits, 20 May 1992	82	Foreign Investment Law	Relevance of representations by the state to the investor; reliance on representations	340 n35
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	127-130	Argentina-US BIT 1991		
			<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995		
			<i>CMS</i> , Award, 12 May 2005	280	Argentina-US BIT 1991	Bad faith not required for a violation of fair and equitable treatment	341 n36
			<i>Azurix</i> , Award, 14 Jul 2006 (referring to <i>Mondev</i> , <i>Loewen</i> , <i>Waste Management II</i> , <i>Tecmed</i>)	372			
			<i>RFCC v Morocco</i> , ICSID Case No ARB/00/6, Award, 22 Dec 2003	51	Italy-Morocco BIT 1990	Breach of contract as a violation of fair and equitable treatment; violation must occur in the exercise of sovereign power	343
			<i>Impregilo v Pakistan</i> , ICSID Case No ARB/03/03, Decision on Jurisdiction, 22 Apr 2005	268	Italy-Pakistan BIT 1997	Breach of contract as a violation of fair and equitable treatment; violation must occur in the exercise of sovereign power	344

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
48	<i>Continental Casualty v Argentina</i> , ICSID Case No ARB/03/9, Award, 5 Sep 2008	Argentina-US BIT 1991	<i>Noble Ventures</i> , Award, 12 Oct 2005	181	Romania-US BIT 1992	Content of the FET obligation varies depending on factual circumstances	255 n387
49	<i>National Grid v Argentina</i> , UNCITRAL Award, 3 Nov 2008	Argentina-UK BIT 1990	<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995	Reasonable expectations	173 n60
			<i>CME</i> , Partial Award, 13 Sep 2001	155	Czech Republic-Netherlands BIT 1991	Reasonable expectations	173 n61
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Reasonable expectations	173 n62
			<i>CMS</i> , Award, 12 May 2005	277	Argentina-US BIT 1991	Reasonable expectations	173 n63
			<i>Enron</i> , Award, 22 May 2007	262	Argentina-US BIT 1991	Reasonable expectations	174 n64
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	130	Argentina-US BIT 1991	Ordinary business risk as limit to reasonable expectations	175 n65
			<i>Saluka</i> , Partial Award, 17 Mar 2006	304; 305	Czech Republic-Netherlands BIT 1991	Expectations must be reasonable and legitimate in light of the circumstances	175 n66-67

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
50	<i>Jan de Nul v Egypt</i> , ICSID Case No ARB/04/13, Award, 6 Nov 2008	BLEU-Egypt BIT 1977; BLEU-Egypt BIT 1999	<i>Waste Management II</i> , Final Award, 30 Apr 2004	99	NAFTA	FET = “a flexible and somewhat vague concept”	185 n22
			<i>PSEG Global</i> , Award, 19 Jan 2007	239	Turkey-US BIT 1985		
			<i>Enron</i> , Award, 22 May 2007	256	Argentina-US BIT 1991		
			<i>Mondev</i> , Award, 11 Oct 2002	118	NAFTA	Importance of the facts of the case	185 n23
			<i>CMS</i> , Award, 12 May 2005	280	Argentina-US BIT 1991	Bad faith not required for a breach of fair and equitable treatment	185 n24
			<i>Azurix</i> , Award, 14 Jul 2006 (referring to <i>Mondev</i> , <i>Loewen</i> , <i>Waste Management</i> , <i>Tecmed</i>)	372			
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	129			
			<i>Tecmed</i> , Award, 29 May 2003	154	Mexico-Spain BIT 1995	Reasonable and legitimate expectations	186 n25
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA		
<i>Thunderbird</i> , Award, 26 Jan 2006	147	NAFTA					

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
50	<i>Jan de Nul v Egypt</i> , ICSID Case No ARB/04/13, Award, 6 Nov 2008 (cont.)	BLEU-Egypt BIT 1977; BLEU-Egypt BIT 1999	<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	127	Argentina-US BIT 1991	Reasonable and legitimate expectations	186 n25
			<i>Saluka</i> , Partial Award, 17 Mar 2006	302	Czech Republic-Netherlands BIT 1991	Reasonable and legitimate expectations	186 n26
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Procedural propriety; due process	187 n27
			<i>Vivendi</i> , Award, 20 Aug 2007	7.4.11.	Argentina-France BIT 1991	Denial of justice as a breach of fair and equitable treatment	188 n28
			<i>Loewen</i> , Award, 26 Jun 2003	132	NAFTA	Definition of 'denial of justice'	192 n29
			<i>Mondev</i> , Award, 11 Oct 2002 (relying on <i>ELSI</i>)	127	NAFTA	<i>ELSI</i> test: conduct that shocks a sense of judicial propriety	193
51	<i>Nordzucker AG v Poland</i> , UNCITRAL Second Partial Award, 28 Jan 2009	Germany-Poland BIT 1989	n/a	n/a	n/a	n/a	n/a
52	<i>Vecchi v Egypt</i> , ICSID Case No ARB/05/15, Award, 1 Jun 2009	Italy-Egypt BIT 1989	<i>Azurix</i> , Award, 14 Jul 2006	n/a	Argentina-US BIT 1991	Good faith principle	450 n642
			<i>Siemens</i> , Award, 6 Feb 2007	n/a	Argentina-Germany BIT 1991		

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52	<i>Vecchi v Egypt</i> , ICSID Case No ARB/05/15, Award, 1 Jun 2009 (cont.)	Italy-Egypt BIT 1989	<i>Tecmed</i> , Award, 29 May 2003	n/a	Spain-Mexico BIT 1995	Good faith principle	450 n642
			<i>Azurix</i> , Award, 14 Jul 2006	n/a	Argentina-US BIT 1991	Duty to respect legitimate expectations derives from duty to act in good faith	450 n643
			<i>Metalclad</i> , Award, 30 Aug 2000	n/a	NAFTA		
			<i>Siemens</i> , Award, 6 Feb 2007	n/a	Argentina-Germany BIT 1991		
			<i>Tecmed</i> , Award, 29 May 2003	n/a	Spain-Mexico BIT 1995		
53	<i>Glamis Gold v USA</i> , UNCITRAL Award, 8 Jun 2009	NAFTA	<i>Neer Case</i> , Decision, 15 Oct 1926	4-5	<i>US-Mexico Claims Commission</i>	NAFTA state parties, at a minimum, agree on <i>Neer</i> standard	612
			<i>Mondev</i> , Award, 11 Oct 2002	116	NAFTA	Change in the international view of what is shocking and outrageous	613
			<i>Mondev</i> , Award, 11 Oct 2002	127	NAFTA	No move beyond what the minimum standard of treatment was in 1926; evidence of a strict standard (<i>shock</i> or <i>surprise</i>)	614
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	263	NAFTA	No move beyond what the minimum standard of treatment was in 1926; evidence of a strict standard: treatment “in such an unjust or arbitrary manner”	614

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
53	<i>Glamis Gold v USA</i> , UNCITRAL Award, 8 Jun 2009 (cont.)	NAFTA	<i>Thunderbird</i> , Award, 26 Jan 2006	194	NAFTA	No move beyond what the minimum standard of treatment was in 1926; evidence of a strict standard: <i>gross</i> denial of justice; <i>manifest</i> arbitrariness	614
			“general agreement”	n/a	n/a	Bad faith not required for a violation of fair and equitable treatment	616
			<i>Neer Case</i> , Decision, 15 Oct 1926	n/a	<i>US-Mexico Claims Commission</i>	Fundamentals of the <i>Neer</i> standard still apply today: “to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking - a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons - so as to fall below accepted international standards and constitute a breach of Article 1105(1)”	616
			<i>Azinian</i> , Award, 1 Nov 1999	87	NAFTA	Protection of legitimate expectations; “mere contract breach, without something further such as denial of justice or discrimination, normally will not suffice to establish a breach of Article 1105”	620
			<i>Methanex</i> , Final Award, 3 Aug 2005	7	NAFTA	Protection of legitimate expectations; “Article 1105(1) requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations”	620

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53	<i>Glamis Gold v USA</i> , UNCITRAL Award, 8 Jun 2009 (cont.)	NAFTA	<i>Thunderbird</i> , Award, 26 Jan 2006	147	NAFTA	Protection of legitimate expectations; “a State may be tied to the objective expectations that it creates <i>in order to induce</i> investment”	621
			<i>ELSI (USA v Italy)</i> , Judgment, ICJ Reports 1989, p 15	128	ICJ	Protection from arbitrary measures; “arbitrariness that contravenes <i>the</i> rule of law, rather than a rule of law, would occasion surprise not only from investors, but also from tribunals”	625
			<i>Thunderbird</i> , Award, 26 Jan 2006	194	NAFTA	Level of required arbitrariness for treaty breach: level that amounts to a “gross denial of justice or manifest arbitrariness falling below acceptable international standards”	625; 627
54	<i>Invesmart v Czech Republic</i> , UNCITRAL Award, 26 Jun 2009	Czech Republic-Netherlands BIT 1991	<i>Saluka</i> , Partial Award, 17 Mar 2006	304	Czech Republic-Netherlands BIT 1991	Subjective expectations not a definitive source of the host state’s obligations	255 n169
			<i>MTD Equity</i> , Decision on Annulment, 21 Mar 2007 (cited with approval by <i>Biwater Gauff (Tanzania)</i> at para 600)	67	Malaysia-Chile BIT 1992	“The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from those expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.”	256 n170

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
54	<i>Invesmart v Czech Republic</i> , UNCITRAL Award, 26 Jun 2009 (cont.)	Czech Republic-Netherlands BIT 1991	<i>Mondev</i> , Award, 11 Oct 2002	16	NAFTA	Bad faith not required for a breach of fair and equitable treatment; threshold for breach (“To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”)	420 n310
			<i>Loewen</i> , Award, 26 Jun 2003	185	NAFTA	Bad faith not an essential element of the FET standard (“Neither state practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment.”)	421 n311
55	<i>Walter Bau AG v Thailand</i> , UNCITRAL Award, 1 Jul 2009	Germany-Thailand BIT 2002	<i>Biwater Gauff (Tanzania)</i> , Award, 24 Jul 2008	602	Tanzania-UK BIT 1994	Elements of the FET standard (as “elaborated and developed in previous arbitrations”): protection of legitimate expectations including reliance on these expectations; good faith – bad faith not required; transparency, consistency, non-discrimination: state conduct must not be “based on unjustifiable distinctions or arbitrary”	11.5 n48
			<i>CMS</i> , Decision on Annulment, 25 Sep 2007	n/a	Argentina-US BIT 1991	Legitimate expectations; protection of “substantive expectations of investors where particular promises have been made”	11.11 n49
			<i>Eureko</i> , Partial Award, 19 Aug 2005	n/a	Netherlands-Poland BIT 1992	Legitimate expectations; protection of “substantive expectations of investors where particular promises have been made”	11.11

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
55	<i>Walter Bau AG v Thailand</i> , UNCITRAL Award, 1 Jul 2009 (cont.)	Germany-Thailand BIT 2002	<i>Société Générale v Dominican Republic</i> , LCIA Case No UN 7927, UNCITRAL Award on Preliminary Objections to Jurisdiction, 19 Sep 2008	91	Dominican Republic-France BIT 1999	State responsibility for omissions	12.36; 12.37
56	<i>Pantechniki v Albania</i> , ICSID Case No ARB/07/21, Award, 30 Jul 2009	Albania-Greece BIT 1991	“a general rule”	n/a	n/a	Denial of justice; error in interpretation	94 n6
57	<i>Bayindir v Pakistan</i> , ICSID Case No ARB/03/29, Award, 27 Aug 2009	Turkey-Pakistan BIT 1995	<i>AES v Argentina</i> , ICSID Case No ARB/02/17, Decision on Jurisdiction, 26 Apr 2005	30	Argentina-US BIT 1991	“The Tribunal is not bound by previous decisions of ICSID tribunals.”	145
			<i>MTD Equity</i> , Award, 25 May 2004	104	Malaysia-Chile BIT 1992	Application of MFN to import an FET obligation	158
			<i>Duke Energy</i> , Award, 18 Aug 2008	340	Ecuador-US BIT 1993	Reasonable expectations; FET standard includes the obligation to refrain “from frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment”	178
			<i>Metalclad</i> , Award, 30 Aug 2000	76	NAFTA	Transparency and due process; FET standard includes “the obligation to act transparently and grant due process”	178
			<i>Lauder v Czech Republic</i> , UNCITRAL Final Award, 3 Sep 2001	292	Czech Republic-US BIT 1991	Arbitrary and discriminatory measures; FET standard includes the obligation “to refrain from taking arbitrary or discriminatory measures”	178

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
57	<i>Bayindir v Pakistan</i> , ICSID Case No ARB/03/29, Award, 27 Aug 2009 (<i>cont.</i>)	Turkey-Pakistan BIT 1995	<i>Saluka</i> , Partial Award, 17 Mar 2006	308	Czech Republic-Netherlands-BIT 1991	Coercion; FET standard includes the obligation to refrain “from exercising coercion”	178
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Arbitrary and discriminatory measures; FET standard includes the obligation “to refrain from taking arbitrary or discriminatory measures”	178
			<i>Duke Energy</i> , Award, 18 Aug 2008 (relying in part on <i>Tecmed</i>)	339-340	Ecuador-US BIT 1993	Investor’s expectations = an important element of FET	179
			<i>Siemens</i> , Award, 6 Feb 2007	298-299	Argentina-Germany BIT 1991	Reliance on <i>Tecmed</i>	179
			<i>Tecmed</i> , Award, 29 May 2003	n/a	Spain-Mexico BIT 1995	Broad conception of the FET standard	179
			<i>Thunderbird</i> , Separate Opinion of Thomas Wälde, 1 Dec 2005	30	NAFTA	<i>Tecmed</i> decision = <i>authoritative</i> precedent	179
			<i>Duke Energy</i> , Award, 18 Aug 2008	345	Ecuador-US BIT 1993	Simple contract violation not sufficient; state must commit treaty breach in the exercise of its sovereign power	180
			<i>Impregilo v Pakistan</i> , ICSID Case No ARB/03/03, Decision on Jurisdiction, 22 Apr 2005	266-270	Italy-Pakistan BIT 1997		
			<i>RFCC v Morocco</i> , ICSID Case No ARB/00/6, Award, 22 Dec 2003	33-34	Italy-Morocco BIT 1990		

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57	<i>Bayindir v Pakistan</i> , ICSID Case No ARB/03/29, Award, 27 Aug 2009 (<i>cont.</i>)	Turkey-Pakistan BIT 1995	<i>Waste Management II</i> , Final Award, 30 Apr 2004	115	NAFTA	Simple contract violation not sufficient; state must commit treaty breach in the exercise of its sovereign power	180
			<i>Azurix</i> , Award, 14 Jul 2006 (referring to <i>CMS</i>)	372	Argentina-US BIT 1991	Bad faith not required for a breach of fair and equitable treatment	181
			<i>CMS</i> , Award, 12 May 2005	280	Argentina-US BIT 1991		
			<i>Loewen</i> , Award, 26 Jun 2003	132	NAFTA		
			<i>Tecmed</i> , Award, 29 May 2003	n/a	Spain-Mexico BIT 1995		
			<i>Waste Management II</i> , Final Award, 30 Apr 2004 (referring to <i>Mondev</i> and <i>ADF</i>)	93	NAFTA		
			<i>Mondev</i> , Award, 11 Oct 2002	118	NAFTA	Importance of the facts of the particular case	182
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	99	NAFTA		
58	<i>Cargill v Mexico</i> , ICSID Case No ARB(AF)/05/2, Award, 18 Sep 2009	NAFTA	“all previous NAFTA tribunals”	n/a	NAFTA	NAFTA Article 1105(1) = minimum standard	268
			<i>ADF Group</i> , Award, 9 Jan 2003	178	NAFTA	NAFTA Article 1105(1) = codification of the customary international law minimum standard of treatment	268 n40

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
58	<i>Cargill v Mexico</i> , ICSID Case No ARB(AF)/05/2, Award, 18 Sep 2009 (<i>cont.</i>)	NAFTA	<i>Mondev</i> , Award, 11 Oct 2002	121	NAFTA	NAFTA Article 1105(1) = codification of the customary international law minimum standard of treatment	268
			<i>ADF Group</i> , Award, 9 Jan 2003	179	NAFTA	Evolution of the minimum standard	281
			<i>Mondev</i> , Award, 11 Oct 2002	116	NAFTA		
			“NAFTA tribunals”	n/a	NAFTA		
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Emerging interpretation of FET (“In reviewing the awards cited and, as importantly, the evidence of custom analyzed in those proceedings, this Tribunal agrees in part with the assessment [in <i>Waste Management II</i>].	283
			“previous NAFTA awards”	n/a	NAFTA	High threshold for breach (<i>gross / manifest / complete</i>)	285
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Violation of NAFTA Article 1105(1) (+) in cases of discrimination, denial of justice, unfair outcome or if there is a lack of due process or transparency	285
			<i>Neer Case</i> , Decision, 15 Oct 1926	n/a	<i>US-Mexico Claims Commission</i>	Bad faith or wilful neglect of duty as a violation	286
			<i>GAMI</i> , Final Award, 15 Nov 2004	97	NAFTA	Four implications	287
<i>ELSI (USA v Italy)</i> , Judgment, ICJ Reports 1989, p 15	128	NAFTA	Definition of arbitrariness	291			

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58	<i>Cargill v Mexico</i> , ICSID Case No ARB(AF)/05/2, Award, 18 Sep 2009 (cont.)	NAFTA	<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	261	NAFTA	Arbitrariness	292
			“other NAFTA tribunals”	n/a	NAFTA	Bad faith or wilful neglect of duty not required	296
59	<i>EDF (Services) Limited v Romania</i> , ICSID Case No ARB/05/13, Award, 8 Oct 2009	UK-Romania BIT 1995	“other tribunals”	n/a	n/a	Legitimate and reasonable expectations with regard to the investment as a major element of the FET standard	216
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Legitimate expectations; treatment must be “in breach of representations made by the host state which were reasonable relied on by the claimant”	216
			<i>Continental Casualty</i> , Award, 5 Sep 2008	254	Argentina-US BIT 1991	Host government must have good reasons to hamper with normal law-abiding conduct of the business activity of the foreign investor	218
			<i>Parkerings-Compagniet</i> , Award, 11 Sep 2007	332	Lithuania-Norway BIT 1992	FET ≠ stabilisation clause	218
			<i>Saluka</i> , Partial Award, 17 Mar 2006	307	Czech Republic-Netherlands BIT 1991	Legitimate expectation: bona fide implementation of governmental policies, i.e., by conduct that is “reasonably justifiable by public policies and that [...] does not violate the requirements of consistency, transparency[,], even-handedness and non-discrimination”	219

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
60	<i>Lemire v Ukraine</i> , ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 Jan 2010	US-Ukraine BIT 1996	<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	162	Argentina-US BIT 1991	Conduct must not be discriminatory or arbitrary to breach the FET standard	259
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	147		Measure must “[target] Claimant’s investments specifically as foreign investments”	261 n79
			<i>Saluka</i> , Partial Award, 17 Mar 2006	313	Czech Republic-Netherlands BIT 1991	Discrimination = different treatment without justification	261 n77
			<i>Waste Management II</i> , Final Award, 30 Apr 2004 (confirmed in <i>Methanex</i> at para 274)	98	NAFTA	Violation of the FET standard (+), if the measure is “discriminatory and [exposes] the claimant to sectional or racial prejudice”	261 n78
			<i>EDF (Services) Limited</i> , Award, 8 Oct 2009	303	UK-Romania BIT 1995	Definition of arbitrariness	262 n84
			<i>Loewen</i> , Award, 26 Jun 2003	131	NAFTA	Arbitrariness = “wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety”	262 n82
			<i>Lauder v Czech Republic</i> , UNCITRAL Final Award, 3 Sep 2001	221	Czech Republic-US BIT 1991	Arbitrariness = “founded on prejudice or preference rather than reason or fact”	262 n80
			<i>Saluka</i> , Partial Award, 17 Mar 2006	307	Czech Republic-Netherlands BIT 1991	Arbitrariness = conduct which “manifestly [violates] the requirements of consistency, transparency, even-handedness and non-discrimination”	262 n83

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
60	<i>Lemire v Ukraine</i> , ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 Jan 2010 (<i>cont.</i>)	US-Ukraine BIT 1996	<i>Tecmed</i> , Award, 29 May 2003	154	Spain-Mexico BIT 1995	Arbitrariness = “contrary to the law because [it] shocks, or at least surprises, a sense of judicial propriety”	262 n81
			<i>Saluka</i> , Partial Award, 17 Mar 2006 (quoting <i>Tecmed</i> and <i>Waste Management</i>)	302	Czech Republic-Netherlands BIT 1991	Violation of the FET standard = frustration of legitimate and reasonable expectations on which the investor relied at the time when he made the investment	264 n85
61	<i>Kardassopoulos and Fuchs v Georgia</i> , ICSID Cases No ARB/05/18 and ARB/07/15, Award, 3 Mar 2010	Georgia-Greece BIT 1994; ECT / Georgia-Israel BIT 1995	<i>Saluka</i> , Partial Award, 17 Mar 2006	301	Czech Republic-Netherlands BIT 1991	Basis for an investor’s decision to invest = “assessment of the state of the law and the totality of the business environment at the time of the investment as well as [...] the investor’s expectation that the conduct of the host State subsequent to the investment will be fair and equitable”	433; 452
			<i>Saluka</i> , Partial Award, 17 Mar 2006	n/a	Czech Republic-Netherlands BIT 1991	Legitimate expectation: bona fide implementation of governmental policies, i.e., by conduct that is “reasonably justifiable by public policies and that [...] does not manifestly violate the requirements of consistency, transparency[,] even-handedness and non-discrimination”	438; 452
			<i>Sempra Energy</i> , Award, 28 Sep 2007	124-125	Argentina-US BIT 1991	Business certainty and stability	440; 452

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
61	<i>Kardassopoulos and Fuchs v Georgia</i> , ICSID Cases No ARB/05/18 and ARB/07/15, Award, 3 Mar 2010 (<i>cont.</i>)	Georgia-Greece BIT 1994; ECT / Georgia-Israel BIT 1995	<i>Tecmed</i> , Award, 29 May 2003	154	Spain-Mexico BIT 1995	FET = “treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment”	440; 452
62	<i>Merrill & Ring Forestry v Canada</i> , Case No UNCT/07/1, Award, 31 Mar 2010	NAFTA	“a shared view”	n/a	n/a	Evolution of customary international law	193
			<i>Loewen</i> , Award, 26 Jun 2003	n/a	NAFTA	FET = part of customary international law	211
63	<i>ATA Construction v Jordan</i> , ICSID Case No ARB/08/2, Award, 18 May 2010	Jordan-Turkey BIT 1993	<i>Asian Agricultural Products v Sri Lanka</i> , ICSID Case No ARB/87/3, Award and Dissenting Opinion, 21 Jun 1990 and 15 Jun 1990	21	Sri Lanka-UK BIT 1980	BIT ≠ self-contained closed legal system; integration of rules from other sources “through implied incorporation methods or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature”	121 n14
			“general rule”	n/a	n/a	“[A] State cannot invoke its internal laws to evade obligations imposed by a given treaty or generally by public international law.”	122
			<i>Desert Line</i> , Award, 6 Feb 2008	n/a	Oman-Yemen BIT 1998	“State authorities are estopped from undertaking any act that contradicts what they previously accepted as obligations incumbent upon them in a given context.”	122

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
64	<i>Gemplus and Talsud v Mexico</i> , ICSID Cases No ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 Jun 2010	France-Mexico BIT 1998; Argentina-Mexico BIT 1996	n/a	n/a	n/a	n/a	n/a
65	<i>Liman Caspian Oil v Kazakhstan</i> , ARB/07/14, Award, 22 Jun 2010	Energy Charter Treaty	<i>Mondev</i> , Award, 11 Oct 2002 (relying on <i>ELSI</i>)	127	NAFTA	Judicial propriety; unfair and inequitable treatment (+) if “the impugned decision was clearly improper and discreditable”	276
			<i>Loewen</i> , Award, 26 Jun 2003	132	NAFTA	“Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough.”	278
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	“Taken together, the <i>S.D. Myers</i> , <i>Mondev</i> , <i>ADF</i> and <i>Loewen</i> cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.”	285

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
66	<i>Suez v Argentina</i> , ICSID Case No ARB/03/19, Decision on Liability, 30 Jul 2010	Argentina-France BIT 1991; Argentina-Spain BIT 1991; Argentina-UK BIT 1990	<i>Mondev</i> , Award, 11 Oct 2002	118	NAFTA	Importance of the facts of the particular case	188 n137
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	99	NAFTA	Importance of the circumstances of each case	188 n138
			<i>Saluka</i> , Partial Award, 17 Mar 2006 (quoting <i>MTD Equity</i> and <i>S.D. Myers</i>)	297	Czech Republic-Netherlands BIT 1991	Ordinary meaning of fair and equitable	213 n155
			“arbitral tribunals”	n/a	n/a	Legitimate expectations	222-223
			<i>Saluka</i> , Partial Award, 17 Mar 2006	301-302	Czech Republic-Netherlands BIT 1991	Legitimate expectations	223
			<i>Tecmed</i> , Award, 29 May 2003 (cited by <i>LG&E</i> , para 127, <i>MTD Equity</i> , para 114, <i>Occidental I</i> , para 185, <i>CMS</i> , para 279)	n/a	Spain-Mexico BIT 1995	Good faith principle; basic expectations	224
			<i>MTD Equity</i> , Award, 25 May 2004	69	Malaysia-Chile BIT 1992	Legitimate expectations	224 n161
			<i>Bayindir</i> , Award, 27 Aug 2009	178	Turkey-Pakistan BIT 1995	Reasonable expectations	225 n163

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
66	<i>Suez v Argentina</i> , ICSID Case No ARB/03/19, Decision on Liability, 30 Jul 2010 (<i>cont.</i>)	Argentina-France BIT 1991; Argentina-Spain BIT 1991; Argentina-UK BIT 1990	<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	130	Argentina-US BIT 1991	Fair expectations; characteristics of fair expectations	229 n164
			<i>Duke Energy</i> , Award, 18 Aug 2008	340	Ecuador-US BIT 1993	Legitimate and reasonable expectations; stability of the legal and business environment	230 n165
			<i>Saluka</i> , Partial Award, 17 Mar 2006	306	Czech Republic-Netherlands BIT 1991	Balancing of legitimate expectations and regulatory interests	236 n168
			<i>BG Group</i> , Final Award, 24 Dec 2007	309	Argentina-UK BIT 1990	Imposed renegotiation of government agreements with public service providers as a FET violation	243 n176
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	136-139	Argentina-US BIT 1991	Imposed renegotiation of government agreements with public service providers as a FET violation	243 n176
67	<i>Chemtura v Canada</i> , UNCITRAL Award, 2 Aug 2010	NAFTA	<i>Mondev</i> , Award, 11 Oct 2002	116-117; 125	NAFTA	Evolution of customary international law; impact of BITs on this evolution	121-122
			<i>Waste Management II</i> , Final Award, 30 Apr 2004 (with reference to <i>Mondev</i> and <i>ADF</i>)	93	NAFTA	Violation must not be outrageous	215 n15
			<i>GAMI</i> , Final Award, 15 Nov 2004	97	NAFTA	Four implications	215 n16

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
68	<i>AES Summit v Hungary</i> , ICSID Case No ARB/07/22, Award, 23 Sep 2010	Energy Charter Treaty	<i>Duke Energy</i> , Award, 18 Aug 2008	340	Ecuador-US BIT 1993	Legitimate expectations can only be created at the moment of the investment	9.3.8-9.3.9
			<i>Tecmed</i> , Award, 29 May 2003	154	Spain-Mexico BIT 1995	Legitimate expectations can only be created at the moment of the investment	9.3.8; 9.3.10
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	n/a	Argentina-US BIT 1991	Legitimate expectations can only be created at the moment of the investment	9.3.8; 9.3.11
			<i>Tecmed</i> , Award, 29 May 2003	154	Spain-Mexico BIT 1996	Threshold of breach; manifest unfairness or unreasonableness that “would shock, or at least surprise a sense of judicial propriety”	9.3.40
69	<i>Alpha v Ukraine</i> , ICSID Case No ARB/07/16, Award, 8 Nov 2010	Ukraine-Austria BIT 1996	<i>Siemens</i> , Award, 6 Feb 2007	299	Argentina-Germany BIT 1991	Legitimate expectations	420 n588
			<i>Tecmed</i> , Award, 29 May 2003	154	Spain-Mexico BIT 1995		
			<i>Azurix</i> , Award, 14 Jul 2006 (citing the Oxford English Dictionary)	360	Argentina-US BIT 1991	Obligation to avoid arbitrary government action; ordinary meaning of ‘fair’ and ‘equitable’ = ‘just’, ‘even-handed’, ‘unbiased’, ‘legitimate’	420 n589
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	125	Argentina-US BIT 1991	Obligation to avoid arbitrary government action; stability of the legal and business framework	420 n589

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
69	<i>Alpha v Ukraine</i> , ICSID Case No ARB/07/16, Award, 8 Nov 2010 (<i>cont.</i>)	Ukraine-Austria BIT 1996	<i>Mondev</i> , Award, 11 Oct 2002	127	NAFTA	Obligation to avoid arbitrary government action; violation (+), if government action “clearly improper and discreditable”	420 n589
			<i>Vivendi</i> , Award, 20 Aug 2007 (citing <i>CMS</i> at para 280)	7.4.12	Argentina-France BIT 1991	FET standard = objective standard	420 n590
			<i>CMS</i> , Award, 12 May 2005	277	Argentina-US BIT 1991	Obligation to “avoid arbitrarily changing the rules of the game in a manner that undermines the legitimate expectations of, or the representations made to, an investor”	420 n592
			<i>Tecmed</i> , Award, 29 May 2003	154	Spain-Mexico BIT 1995		
70	<i>Frontier Petroleum v Czech Republic</i> , UNCITRAL Final Award, 12 Nov 2010	Canada-Czech Republic BIT 1990	<i>Metalclad</i> , Award, 30 Aug 2000	89	NAFTA	Example of the protection of legitimate expectations in investment cases	286 n333-334
			<i>CMS</i> , Award, 12 May 2005	274-276	Argentina-US BIT 1991	Example of the protection of legitimate expectations in investment cases	286 n334
			<i>MTD Equity</i> , Award, 25 May 2004	113; 163	Malaysia-Chile BIT 1992	Example of the protection of legitimate expectations in investment cases	286 n334
			<i>Occidental I</i> , Final Award, 1 Jul 2004	184	US-Ecuador BIT 1993	Example of the protection of legitimate expectations in investment cases	286 n334

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
70	<i>Frontier Petroleum v Czech Republic</i> , UNCITRAL Final Award, 12 Nov 2010 (<i>cont.</i>)	Canada-Czech Republic BIT 1990	<i>PSEG Global</i> , Award, 19 Jan 2007	238-256	Turkey-US BIT 1985	Example of the protection of legitimate expectations in investment cases	286 n334
			<i>Azurix</i> , Award, 14 Jul 2006	372	Argentina-US BIT 1991	“[P]rotected expectations must rest on the conditions as they exist at the time of the investment.”	287 n335
			<i>EDF (Services) Limited</i> , Award, 8 Oct 2009	219	UK-Romania BIT 1995		
			<i>Jan de Nul</i> , Award, 6 Nov 2008	265	BLEU-Egypt BITs 1977 and 1999		
			<i>PSEG Global</i> , Award, 19 Jan 2007	255	Turkey-US BIT 1985		
			<i>Saluka</i> , Partial Award, 17 Mar 2006	329	Czech Republic-Netherlands BIT 1991		
			<i>Siemens</i> , Award, 6 Feb 2007	299	Argentina-Germany BIT 1991		

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70	<i>Frontier Petroleum v Czech Republic</i> , UNCITRAL Final Award, 12 Nov 2010 (<i>cont.</i>)	Canada-Czech Republic BIT 1990	<i>SPP v Egypt</i> , ICSID Case No ARB/84/3, Award on the Merits, 20 May 1992	82-83	Foreign Investment Law	“[P]rotected expectations must rest on the conditions as they exist at the time of the investment.”	287 n335
			<i>Tecmed</i> , Award, 29 May 2003	154	Spain-Mexico BIT 1995	“[I]nvestor must have relied on his expectations when making the investment.”	287 n336
			<i>Bayindir</i> , Award, 27 Aug 2009	190-191	Turkey-Pakistan BIT 1995	“[I]nvestor must have relied on his expectations when making the investment.”	287 n337
			<i>BG Group</i> , Final Award, 24 Dec 2007	297-298	Argentina-UK BIT 1990	“[I]nvestor must have relied on his expectations when making the investment.”	287 n337
			<i>Enron</i> , Award, 22 May 2007	262	Argentina-US BIT 1991	Legitimate expectations must have “existed at the time of the investment”.	287 n337
			<i>GAMI</i> , Final Award, 15 Nov 2004	93-94	NAFTA	Tribunal’s “mandate was to assess how the legal regime in place at the time of the investment had been applied to the investor and not whether it was the proper legal regime.”	287 n337
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	130	Argentina-US BIT 1991	“[I]nvestor’s fair expectations are based on the conditions offered by the host state at the time of the investment.”	287 n337
			<i>National Grid</i> , Award, 3 Nov 2008	173	Argentina-United Kingdom BIT 1990	“[I]nvestor must have relied on his expectations when making the investment.”	287 n337

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70	<i>Frontier Petroleum v Czech Republic</i> , UNCITRAL Final Award, 12 Nov 2010 (<i>cont.</i>)	Canada-Czech Republic BIT 1990	<i>Duke Energy</i> , Award, 18 Aug 2008	340; 365	Ecuador-US BIT 1993	“[E]xpectations that may have arisen from an agreement that had been entered into two years after the relevant investment” are not relevant.	287 n338-339
			<i>Continental Casualty</i> , Award, 5 Sep 2008	259	Argentina-US BIT 1991	Lack of legitimate expectations if “investor had entered the host state before [legislative] assurances were made”	287 n340
			<i>Loewen</i> , Award, 26 Jun 2003	136-137	NAFTA	Procedural propriety and due process: “trial court permitted the jury to be influenced by persistent appeal to local favouritism against the foreign claimant” = breach of NAFTA Article 1105; “the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment”	289 n342
			<i>Metalclad</i> , Award, 30 Aug 2000	91	NAFTA	Procedural propriety and due process: failure to hear the investor = breach of NAFTA Article 1105	289 n342
			<i>Middle East Cement</i> , Award, 12 Apr 2002	143	Egypt-Greece BIT 1993	Procedural propriety and due process: absence of a direct notification = breach of the FET standard	289 n342
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Procedural propriety and due process: formulation of the FET standard in <i>Waste Management</i> : “[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct [...] involves a lack of due process leading to an	290 n343

						outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.”	
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No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
70	<i>Frontier Petroleum v Czech Republic</i> , UNCITRAL Final Award, 12 Nov 2010 (<i>cont.</i>)	Canada-Czech Republic BIT 1990	<i>Petrobart</i> , Arbitral Award, 29 Mar 2005	82	Energy Charter Treaty	Procedural propriety and due process: “interference by the state in court proceedings” = breach of the FET standard	291 n344
			<i>Parkerings-Compagniet</i> , Award, 11 Sep 2007	317-320	Lithuania-Norway BIT 1992	Procedural propriety and due process: “decisive whether the investor was denied access to domestic courts and whether such a lack of remedies had consequences on the investment”	292 n345
			<i>Thunderbird</i> , Award, 26 Jan 2006	197-201	NAFTA	Procedural propriety and due process: standards “applicable in administrative proceedings are lower than in a judicial process”	292 n345
			<i>PSEG Global</i> , Award, 19 Jan 2007	246	Turkey-US BIT 1985	Procedural propriety and due process: “serious administrative negligence and inconsistency” = breach of FET standard	292 n346
			<i>Siemens</i> , Award, 6 Feb 2007	308	Argentina-Germany BIT 1991	Procedural propriety and due Process: “denial of access to a file in an administrative appeals process” = breach of the FET standard	292 n347
			<i>Rumeli Telekom</i> , Award, 29 Jul 2008	651-53; 657	Kazakhstan-Turkey BIT 1992	Procedural propriety and due process: “where a court decision is so patently arbitrary, unjust or idiosyncratic that it demonstrates bad faith, the fair and equitable treatment standard can be breached”	292 n348

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
70	<i>Frontier Petroleum v Czech Republic</i> , UNCITRAL Final Award, 12 Nov 2010 (<i>cont.</i>)	Canada-Czech Republic BIT 1990	<i>Jan de Nul</i> , Award, 6 Nov 2008	187-88, 191, 204, 255-61	BLEU-Egypt BITs 1977 and 1999	Procedural propriety and due process: FET standard “encompasses the notion of a denial of justice which, in turn, implies the requirement exhaust local remedies”	293 n349-350
			<i>Jan de Nul</i> , Award, 6 Nov 2008	211	BLEU-Egypt BITs 1977 and 1999	Procedural propriety and due process: substantive denial of justice (+), if there is an “indication of any discrimination, bias or malicious application of the law based on sectional prejudice”	294 n351
			<i>Toto</i> , Decision on Jurisdiction, 11 Sep 2009	163; 165	Lebanon-Italy BIT 1997	Procedural propriety and due process: relevant factors when assessing a denial of justice claim: “the complexity of the matter, the need for celerity of decision and the diligence of claimant in prosecuting its case”	295 n354
			<i>Genin</i> , Award, 25 Jun 2001	367	US-Estonia BIT	Good faith = inherent in the FET standard; subjective bad faith = breach of the FET standard	297 n355
			<i>Tecmed</i> , Award, 29 May 2003	153	Spain-Mexico BIT 1995		
			<i>Saluka</i> , Partial Award, 17 Mar 2006	307	Czech Republic-Netherlands BIT 1991	<i>Bona fide</i> conduct = “conduct that is, as far as it affects the investors’ investment, reasonably justifiable by public policies and that [...] does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination”	298 n356

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
70	<i>Frontier Petroleum v Czech Republic</i> , UNCITRAL Final Award, 12 Nov 2010 (<i>cont.</i>)	Canada-Czech Republic BIT 1990	<i>PSEG Global</i> , Award, 19 Jan 2007	245-47; 251-55	Turkey-US BIT 1985	Good faith; requirement to negotiate in good faith	299 n357
			<i>Saluka</i> , Partial Award, 17 Mar 2006	361-416	Czech Republic-Netherlands BIT 1991		
			<i>Sempra Energy</i> , Award, 28 Sep 2007	297-299	Argentina-US BIT 1991		
			<i>Siemens</i> , Award, 6 Feb 2007	308	Argentina-Germany BIT 1991		
		<i>Waste Management II</i> , Final Award, 30 Apr 2004	n/a	NAFTA	Bad faith action by the host state includes “a conspiracy by state organs to inflict damage upon or defeat the investment, and the termination of the investment for reasons other than the one put forth by the government”	300 n358	
		<i>Bayindir</i> , Decision on Jurisdiction, 14 Nov 2005	pp 242-252	Turkey-Pakistan BIT 1995	Bad faith action by the host state includes “expulsion of an investment based on local favouritism”	300 n359	
		<i>Azurix</i> , Award, 14 Jul 2006	372	Argentina-US BIT 1991	Bad faith not required for a breach of the FET standard	301 n360	
		<i>CMS</i> , Award, 12 May 2005	280	Argentina-US BIT 1991			

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70	<i>Frontier Petroleum v Czech Republic</i> , UNCITRAL Final Award, 12 Nov 2010 (<i>cont.</i>)	Canada-Czech Republic BIT 1990	<i>Enron</i> , Award, 22 May 2007	263	Argentina-US BIT 1991	Bad faith not required for a breach of the FET standard	301 n360
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	129	Argentina-US BIT 1991		
			<i>Loewen</i> , Award, 26 Jun 2003	132	NAFTA		
			<i>Mondev</i> , Award, 11 Oct 2002	116	NAFTA		
			<i>Occidental I</i> , Final Award, 1 Jul 2004	186	US-Ecuador BIT 1993		
			<i>PSEG Global</i> , Award, 19 Jan 2007	245-246	Turkey-US BIT 1985		
			<i>Siemens</i> , Award, 6 Feb 2007	299	Argentina-Germany BIT 1991		
			<i>Tecmed</i> , Award, 29 May 2003	153	Spain-Mexico BIT 1996		
			<i>Loewen</i> , Award, 26 Jun 2003	136-137	NAFTA		
			<i>Metalclad</i> , Award, 30 Aug 2000	91	NAFTA		

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
70	<i>Frontier Petroleum v Czech Republic</i> , UNCITRAL Final Award, 12 Nov 2010 (<i>cont.</i>)	Canada-Czech Republic BIT 1990	<i>Middle East Cement</i> , Award, 12 Apr 2002	n/a	Egypt-Greece BIT 1993	Procedural propriety and due process = “well-established principles under the standard of fair and equitable treatment”	328 n408
			<i>Petrobart</i> , Arbitral Award, 29 Mar 2005	82	ECT		
			<i>Tecmed</i> , Award, 29 May 2003	162	Spain-Mexico BIT 1995		
			<i>Thunderbird</i> , Award, 26 Jan 2006	197-201	NAFTA		
			<i>Toto</i> , Decision on Jurisdiction, 11 Sep 2009	160	Lebanon-Italy BIT 1997		
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98; 130	NAFTA		
			<i>Toto</i> , Decision on Jurisdiction, 11 Sep 2009	160	Lebanon-Italy BIT 1997		
			<i>Jan de Nul</i> , Award, 6 Nov 2008	204	BLEU-Egypt BITs 1977 and 1999	Court delay of ten years not a breach of the FET standard	334 n416

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70	<i>Frontier Petroleum v Czech Republic</i> , UNCITRAL Final Award, 12 Nov 2010 (<i>cont.</i>)	Canada-Czech Republic BIT 1990	<i>Toto</i> , Decision on Jurisdiction, 11 Sep 2009	160	Lebanon-Italy BIT 1997	Court delay of six years not a breach of the FET standard	334 n417
71	<i>Grynberg and RSM v Grenada</i> , ICSID Case No ARB/10/6, Award, 10 Dec 2010	Grenada-US BIT 1986	“multiple ICSID Tribunals”	n/a	n/a	Content of the FET standard (left unspecified)	7.2.22
			<i>CMS</i> , Award, 12 May 2005	208	Argentina-US BIT 1991	FET = objective standard; deliberate intention or bad faith not required	7.2.24
72	<i>Total S.A. v Argentina</i> , ICSID Case No ARB/04/1, Decision on Liability, 27 Dec 2010	France-Argentina BIT 1991	<i>ADF Group</i> , Award, 9 Jan 2003	184	NAFTA	Arbitral tribunals “must take into account relevant State practice and judicial or arbitral case law as well as the text of the BIT and other sources of customary or general international law.”	107
			<i>Oil Platforms (Iran v US)</i> , Preliminary Objection, Judgment, ICJ Reports 1996, p 803	p 803	ICJ	FET = “legal terms of art well known in the field of overseas investment protection”	108
			<i>Oil Platforms (Iran v US)</i> , Preliminary Objection, Separate Opinion of Judge Higgins, ICJ Reports 1996, p 847	p 858	ICJ		
			<i>Mondev</i> , Award, 11 Oct 2002	116	NAFTA	Bad faith not required for a breach of fair and equitable treatment	110

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
72	<i>Total S.A. v Argentina</i> , ICSID Case No ARB/04/1, Decision on Liability, 27 Dec 2010 (<i>cont.</i>)	France-Argentina BIT 1991	<i>Siemens</i> , Award, 6 Feb 2007	299	Argentina-Germany BIT 1991	Bad faith not required for a breach of fair and equitable treatment	110
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	263	NAFTA	States retain regulatory powers; “international law generally extends [a high measure of deference] to the right of domestic authorities to regulate matters within their own border”	115 n109
			<i>CME</i> , Partial Award, 13 Sep 2001	611	Czech Republic-Netherlands BIT 1991	Legitimate expectation (+), “if the host State has explicitly assumed a specific legal obligation”	117 n116
			<i>Tecmed</i> , Award, 29 May 2003	154	Spain-Mexico BIT 1995		
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA		
			<i>Wena Hotels</i> , Award, 8 Dec 2000	59 et seq.	UK-Egypt BIT 1975	Legitimate expectation (+), if the host State “[has] made the private investor believe that such an obligation existed through conduct or by a declaration”	118 n117
			<i>Thunderbird</i> , Award, 26 Jan 2006	147	NAFTA	Legitimate expectation; “a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA party to honour those expectations could cause the investor (or investment) to suffer damages”	118 n119

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
72	<i>Total S.A. v Argentina</i> , ICSID Case No ARB/04/1, Decision on Liability, 27 Dec 2010 (<i>cont.</i>)	France-Argentina BIT 1991	<i>CMS</i> , Decision on Jurisdiction, 17 Jul 2003	27	Argentina-US BIT 1991	Specific commitments “limit the right of the host State to adapt the legal framework to changing circumstances”	119 n120
			<i>Thunderbird</i> , Award, 26 Jan 2006	147	NAFTA	Specific commitments “limit the right of the host State to adapt the legal framework to changing circumstances”	119 n121
			<i>Saluka</i> , Partial Award, 17 Mar 2006	304	Czech Republic-Netherlands BIT 1991	“[T]he expectation of the foreign investor may ‘rise to the level of legitimacy and reasonableness in light of the circumstances.’”	121 n124
			<i>Feldman</i> , Award, 16 Dec 2002	112	NAFTA	Relevance of “the host State’s right to regulate domestic matters in the public interest”	123 n126
			<i>Saluka</i> , Partial Award, 17 Mar 2006	305-306	Czech Republic-Netherlands BIT 1991		
			<i>Saluka</i> , Partial Award, 17 Mar 2006	305-306	Czech Republic-Netherlands BIT 1991	Balancing of legitimate expectations and regulatory interests	123 n127
			<i>Genin</i> , Award, 25 Jun 2001	348	US-Estonia BIT 1994	Legitimate expectations; relevance of “[t]he context of the evolution of the host economy, the reasonableness of the normative changes challenged and their appropriateness in the light of a criterion of proportionality”	123 n128
			<i>Maffezini</i> , Award, 13 Nov 2000	64	Argentina-Spain BIT 1991	Duty of the investor “to investigate the host State’s applicable law”; BITs ≠ “insurance policies against bad business judgments”	124 n129

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
72	<i>Total S.A. v Argentina</i> , ICSID Case No ARB/04/1, Decision on Liability, 27 Dec 2010 (cont.)	France-Argentina BIT 1991	<i>MTD Equity</i> , Award, 25 May 2004	178	Malaysia-Chile BIT 1992	Duty of the investor “to investigate the host State's applicable law”; BITs ≠ “insurance policies against bad business judgments”	124 n129
			<i>Vivendi</i> , Award, 20 Aug 2007	7.4.6-7.4.7	Argentina-France BIT 1991	Reference to principles of international law ≠ reference to the minimum standard; principles of international law > minimum standard	127 n134
73	<i>Grand River v USA</i> , UNCITRAL Award, 12 Jan 2011	NAFTA	<i>Canadian Cattlemen v USA</i> , UNCITRAL Award on Jurisdiction, 28 Jan 2008	45	NAFTA	NAFTA “to be construed in accordance with the rules of interpretation reflected in the Vienna Convention on the Law of Treaties”	64 n7
			<i>Biloune and Marine Drive Complex Ltd. v Ghana Investments Centre and Government of Ghana</i> , UNCITRAL Award, 27 Oct 1989, 95 ILR 184 (1994)	p 203	Investment Contract	“International law establishes the minimum standard of treatment and fundamental human rights. However, ‘it does not follow that ... this Tribunal is authorized to deal with allegations of violations of fundamental human rights.’”	71 n8
			<i>Methanex</i> , Final Award, 3 Aug 2005 (quoting <i>Access to Information under Article 9 of the OSPAR Convention (Ireland v UK)</i> 42 ILM 1118 (2003) at para 85)	5 of Part II, Ch B	NAFTA	Jurisdiction limited to claims under Section A of Chapter 11	71 n8
			<i>Methanex</i> , Final Award, 3 Aug 2005	14-15 of Part IV, Ch C	NAFTA	Interpretation of NAFTA Article 1105; differentiation between nationals and aliens permitted; <i>inclusio unius est exclusio alterius</i> ; Article 1105(3) “makes clear that the exception in paragraph 2 [=prohibition of discrimination] is, indeed, an exception”	208 n54

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
73	<i>Grand River v USA</i> , UNCITRAL Award, 12 Jan 2011 (<i>cont.</i>)	NAFTA	<i>Glamis Gold</i> , Award, 8 Jun 2009	615	NAFTA	Minimum standard; floor-not-a-ceiling principle; circumstances relevant but “the standard is not meant to vary from state to state or investor to investor”	214 n57
			<i>Mondev</i> , Award, 11 Oct 2002	96	NAFTA	Denial of justice; standard “applicable to decisions of the host State’s courts or tribunals”	225 n65
74	<i>Lemire v Ukraine</i> , ICSID Case No ARB/06/18, Award, 28 Mar 2011	US-Ukraine BIT 1996	<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	385	US-Ukraine BIT 1996	“[N]ot every violation of domestic law necessarily translates into an arbitrary or discriminatory measure under international law and a violation of the FET Standard.”	43 n18
			<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	385	US-Ukraine BIT 1996	Violation (+) if “the State incurs in ‘a blatant disregard of applicable tender rules, distorting fair competition among tender participants’”	43 n19
			<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	419-422; 484-485	US-Ukraine BIT 1996	“blatant disregard of applicable tender rules”	43 n20
			<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	257	US-Ukraine BIT 1996	“[L]egitimate expectations play a subsidiary role as a normative criterion.”	68 n36
			<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	267	US-Ukraine BIT 1996	Legitimate expectations “that the Ukrainian regulatory system for the broadcasting industry would be consistent, transparent, fair, reasonable, and enforces without arbitrary or discriminatory decisions”	69 n37

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
74	<i>Lemire v Ukraine</i> , ICSID Case No ARB/06/18, Award, 28 Mar 2011 (<i>cont.</i>)	US-Ukraine BIT 1996	<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	268	US-Ukraine BIT 1996	Legitimate expectations	69 n38
75	<i>Impregilo v Argentina</i> , ICSID Case No ARB/07/17, Award, 21 Jun 2011	Argentina-Italy BIT 1990	<i>Parkerings-Compagniet</i> , Award, 11 Sep 2007	332	Lithuania-Norway BIT 1992	FET ≠ stabilisation clause but “linked to the legitimate expectations of the investors”	290 n79
			<i>Parkerings-Compagniet</i> , Award, 11 Sep 2007	344	Lithuania-Norway BIT 1992	“[T]he existence of legitimate expectations and the existence of contractual rights are two separate issues.”	292 n80
			<i>Bayindir</i> , Award, 27 Aug 2009	377	Turkey-Pakistan BIT 1995	Conduct in the exercise of sovereign powers required for treaty breach	294 n82
76	<i>Voecklinghaus v Czech Republic</i> , UNCITRAL Final Award, 19 Sep 2011	Germany-Czech and Slovak Republic BIT 1990	<i>Saluka</i> , Partial Award, 17 Mar 2006	n/a	Czech Republic-Netherlands BIT 1991	Legitimate expectations; public policy as a justification; consistency; transparency; even-handedness; non-discrimination	201 n241
77	<i>El Paso v Argentina</i> , ICSID Case No ARB/03/15, Award, 31 Oct 2011	Argentina-US BIT 1991	<i>Genin</i> , Award, 25 Jun 2001	367	US-Estonia BIT 1994	FET standard/minimum standard = basic standard detached from domestic law	336
			<i>Saluka</i> , Partial Award, 17 Mar 2006	295	Czech Republic-Netherlands BIT 1991		

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
77	<i>El Paso v Argentina</i> , ICSID Case No ARB/03/15, Award, 31 Oct 2011 (<i>cont.</i>)	Argentina-US BIT 1991	<i>Saluka</i> , Partial Award, 17 Mar 2006	302	Czech Republic-Netherlands BIT 1991	Legitimate expectations = element of the FET standard	348
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA		
			<i>CMS</i> , Decision on Annulment, 25 Sep 2007	89	Argentina-US BIT 1991	Legitimate expectations ≠ legal obligations; objective concept	356
			<i>CMS</i> , Award, 12 May 2005	280	Argentina-US BIT 1991	Subjective bad faith of the state not required	357
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	129	Argentina-US BIT 1991	Subjective bad faith of the state not required	357
			<i>Loewen</i> , Award, 26 Jun 2003	132	NAFTA	Subjective bad faith of the state not required	357
			<i>Saluka</i> , Partial Award, 17 Mar 2006	305; 307	Czech Republic-Netherlands BIT 1991	Necessary equilibrium between legitimate expectations and right to regulate (balancing test)	358
			<i>Noble Ventures</i> , Award, 12 Oct 2005	181	Romania-US BIT 1992	Legitimate expectations necessarily vary with the circumstances [quote refers generally to the “circumstances of each case”]	359
			<i>Generation Ukraine</i> , Award, 16 Sep 2003	20.37	Ukraine-US BIT 1994	Legitimate expectations necessarily vary with the circumstances; legitimate expectations might differ between an economy in transition and a more developed one	360

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
77	<i>El Paso v Argentina</i> , ICSID Case No ARB/03/15, Award, 31 Oct 2011 (<i>cont.</i>)	Argentina-US BIT 1991	<i>Methanex</i> , Final Award, 3 Aug 2005	9 of Part IV, Ch D	NAFTA	Legitimate expectations necessarily vary with the circumstances; expectation of stability of environmental regulations not legitimate in a State such as California where concern for the protection of the environment and of sustainable development are high	361
			<i>Continental Casualty</i> , Award, 5 Sep 2008	255	Argentina-US BIT 1991	Relevance of the particular circumstances; “keeping justice in variable factual contexts”	362
			<i>Starrett Housing Corp. v Iran</i> , Interlocutory Award, 19 Dec 1983, 4 Iran-US Claims Tribunal Report 122 (1983)	156	<i>Iran-US Claims Tribunal</i>	Reasonable expectation that change in circumstances leads to changes in the law; investors “have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of the economic and political system and even revolution”	363
			<i>Saluka</i> , Partial Award, 17 Mar 2006	304	Czech Republic-Netherlands BIT 1991	FET implies that there is no unreasonable or unjustified modification of the legal framework; stability of the legal and business framework ≠ standstill	365
			<i>Oscar Chinn (United Kingdom v Belgium)</i> , Judgment, 12 Dec 1934, 1934 PCIJ Report, Series A/B, No 63	p 88	<i>Permanent Court of International Justice</i>	Economic stability ≠ legitimate expectation	366
			<i>Parkerings-Compagniet</i> , Award, 11 Sep 2007	332	Lithuania-Norway BIT 1992	FET ≠ stabilisation clause	368

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
77	<i>El Paso v Argentina</i> , ICSID Case No ARB/03/15, Award, 31 Oct 2011 (<i>cont.</i>)	Argentina-US BIT 1991	<i>Continental Casualty</i> , Award, 5 Sep 2008	254	Argentina-US BIT 1991	FET implies that there is no unreasonable modification of the legal framework	370
			<i>CMS</i> , Award, 12 May 2005	277	Argentina-US BIT 1991	FET ≠ stabilisation clause; FET implies that there is no unreasonable modification of the legal framework	371
			<i>Enron</i> , Award, 22 May 2007	261	Argentina-US BIT 1991	Stabilisation requirement ≠ freezing of the legal system	371
			<i>Continental Casualty</i> , Award, 5 Sep 2008	258	Argentina-US BIT 1991	FET implies that there is no change without justification of an economic, social or other nature; unreasonable to rely on freezing of the legal order	372
			<i>PSEG Global</i> , Award, 19 Jan 2007	239	Turkey-US BIT 1985	FET = guarantee of justice to foreign investors	373
			<i>Continental Casualty</i> , Award, 5 Sep 2008	261	Argentina-US BIT 1991	Required degree of specificity of the commitment made to the investor	378
78	<i>Roussalis v Romania</i> , ICSID Case No ARB/06/1, Award, 7 Dec 2011	Greece-Romania BIT 1997	<i>Rumeli Telekom</i> , Award, 29 Jul 2008	605	Kazakhstan-Turkey BIT 1992	Elements of the FET standard: transparency; procedural propriety; due process; good faith; non-arbitrariness; state conduct ≠ grossly unfair, unjust, idiosyncratic or discriminatory	314
			<i>Azinian</i> , Award, 1 Nov 1999	102-103	NAFTA	Denial of justice (+), “if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way” or in cases of “[a] clear and malicious application of the law”	315

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
78	<i>Roussalis v Romania</i> , ICSID Case No ARB/06/1, Award, 7 Dec 2011 (cont.)	Greece-Romania BIT 1997	<i>Parkerings-Compagniet</i> , Award, 11 Sep 2007	317	Lithuania-Norway BIT 1992	Erroneous judgment = no treaty violation in the absence of a denial of justice/violation of the due process principle	315
			<i>Tecmed</i> , Award, 29 May 2003 (cited, e.g., in <i>LG&E</i> , Decision on Liability, para 127, <i>CMS</i> , Award, para 279; <i>Occidental I</i> , Final Award, para 185, <i>MTD Equity</i> , Award, para 114)	154	Spain-Mexico BIT 1995	Reasonable and legitimate expectations; good faith principle	316
			<i>Saluka</i> , Partial Award, 17 Mar 2006 (relying on <i>S.D. Myers</i> at para 263)	305	Czech Republic-Netherlands BIT 1991	No reasonable expectation that circumstances remain unchanged; right to regulate domestic matters	317
79	<i>Inmaris v Ukraine</i> , ICSID Case No ARB/08/8, Excerpts of Award, 1 Mar 2012	Germany-Ukraine BIT 1993	n/a	n/a	n/a	n/a	n/a
80	<i>Oostergetel v Slovak Republic</i> , UNCITRAL Final Award, 23 Apr 2012	Czech Republic-Netherlands BIT 1991	<i>Bayindir</i> , Award, 27 Aug 2009	178	Turkey-Pakistan BIT 1995	“A number of factors have been repeatedly identified as forming part of the FET standard.”	221 n106
			<i>Metalclad</i> , Award, 30 Aug 2000	76	NAFTA	Obligation to act transparently and grant due process	221 n107
			<i>Lauder v Czech Republic</i> , UNCITRAL Final Award, 3 Sep 2001	292	Czech Republic-US BIT 1991	Obligation to refrain from taking arbitrary or discriminatory measures	221 n108

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
80	<i>Oostergetel v Slovak Republic</i> , UNCITRAL Final Award, 23 Apr 2012 (cont.)	Czech Republic-Netherlands BIT 1991	<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Obligation to refrain from taking arbitrary or discriminatory measures	221 n108
			<i>Saluka</i> , Partial Award, 17 Mar 2006	308	Czech Republic-Netherlands BIT 1991	Obligation to refrain from exercising coercion	221 n109
			<i>Duke Energy</i> , Award, 18 Aug 2008	340; 342	Ecuador-US BIT 1993	Obligation to refrain “from frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment”	221 n110
			<i>Jan de Nul</i> , Award, 6 Nov 2008	186	BLEU-Egypt BITs 1977 and 1999	Obligation to refrain “from frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment”	221 n110
			<i>Jan de Nul</i> , Award, 6 Nov 2008	185		Importance of the specific circumstances of each case	221 n111
			<i>Mondev</i> , Award, 11 Oct 2002	118	NAFTA	Importance of the specific circumstances of each case	221 n111
			<i>Tecmed</i> , Award, 29 May 2003	154	Spain-Mexico BIT 1995	Legitimate expectations; basic expectations	222 n112
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA		
			<i>Frontier Petroleum</i> , Final Award, 12 Nov 2010	285	Canada-Czech Republic BIT 1990	Notion of legitimate expectations closely related to stability	222 n113

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
80	<i>Oostergetel v Slovak Republic</i> , UNCITRAL Final Award, 23 Apr 2012 (cont.)	Czech Republic-Netherlands BIT 1991	<i>CMS</i> , Award, 12 May 2005	277	Argentina-US BIT 1991	FET ≠ stabilisation clause	223 n114
			<i>Continental Casualty</i> , Award, 5 Sep 2008	258	Argentina-US BIT 1991		
			<i>El Paso</i> , Award, 31 Oct 2011	348, 350-352	Argentina-US BIT 1991		
			<i>El Paso</i> , Award, 31 Oct 2011	364	Argentina-US BIT 1991	No unreasonable modification of the legal framework; no modification contrary to a specific commitment	223 n115
			<i>El Paso</i> , Award, 31 Oct 2011	356	Argentina-US BIT 1991	Balancing of interests and rights; relevance of context	224 n116
			<i>Saluka</i> , Partial Award, 17 Mar 2006	304	Czech Republic-Netherlands BIT 1991	Scope of FET standard "cannot exclusively be determined by foreign investor's subjective motivations and considerations"	224 n117
			<i>Duke Energy</i> , Award, 18 Aug 2008	340	Ecuador-US BIT 1993	"[T]he assessment of the reasonableness or legitimacy must take into account all circumstances."	224 n118
			<i>Metalclad</i> , Award, 30 Aug 2000	91	NAFTA	Denial of justice; "absence of a fair procedure"	225 n119
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Denial of justice; "lack of due process leading to an outcome which offends judicial propriety, as may be the case with a manifest failure of natural justice in judicial proceedings"	225 n120

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80	<i>Oostergetel v Slovak Republic</i> , UNCITRAL Final Award, 23 Apr 2012 (<i>cont.</i>)	Czech Republic-Netherlands BIT 1991	<i>Jan de Nul</i> , Award, 6 Nov 2008	187-88; 191; 255-61	BLEU-Egypt BITs 1977 and 1999	Denial of justice; “failure of a national legal system as a whole to satisfy minimum standards for a fair procedure, or resulting in an egregious misapplication of the law”	225 n121		
			<i>Azurix</i> , Award, 14 Jul 2006	372	Argentina-US BIT 1991	Bad faith not required for a breach of fair and equitable treatment	227 n125		
			<i>CMS</i> , Award, 12 May 2005	280					
			<i>Loewen</i> , Award, 26 Jun 2003	132	NAFTA				
			<i>Mondev</i> , Award, 11 Oct 2002	116	NAFTA				
			<i>Siemens</i> , Award, 6 Feb 2007	299	Argentina-Germany BIT 1991				
			<i>Tecmed</i> , Award, 29 May 2003	153	Spain-Mexico BIT 1995				
			“it is generally considered”	n/a	n/a			“[E]xpectations must be assessed at the time of the investment.”	233
			<i>Frontier Petroleum</i> , Final Award, 12 Nov 2010	293	Canada-Czech Republic BIT 1990			Denial of justice comprised in the FET standard	272 n138
<i>Jan de Nul</i> , Award, 6 Nov 2008	188	BLEU-Egypt BITs 1977 and 1999							

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
80	<i>Oostergetel v Slovak Republic</i> , UNCITRAL Final Award, 23 Apr 2012 (<i>cont.</i>)	Czech Republic-Netherlands BIT 1991	<i>Vivendi</i> , Award, 20 Aug 2007	7.4.11	Argentina-France BIT 1991	Denial of justice comprised in the FET standard	272 n138
			<i>Jan de Nul</i> , Award, 6 Nov 2008	209	BLEU-Egypt BITs 1977 and 1999	“A denial of justice implies the failure of a national system as a whole to satisfy minimum standards.”	273 n139
			<i>Azinian</i> , Award, 1 Nov 1999	102-103	NAFTA	Denial of justice = “refusing to entertain a suit, subjecting it to undue delay, administering justice in a seriously inadequate way, or by an arbitrary or malicious misapplication of the law”	274 n140
			<i>Jan de Nul</i> , Award, 6 Nov 2008	209	BLEU-Egypt BITs 1977 and 1999	Denial of justice = “refusing to entertain a suit, subjecting it to undue delay, administering justice in a seriously inadequate way, or by an arbitrary or malicious misapplication of the law”	274 n140
			<i>Jan de Nul</i> , Award, 6 Nov 2008	195		Procedural denial of justice	275 n141
			<i>Chevron v Ecuador</i> , Partial UNCITRAL Award on the Merits, 30 Mar 2010	250	US-Ecuador BIT 1993	Undue delay as a denial of justice; factors to be considered: “the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake, and the behaviour of the courts themselves”	290 n145

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80	<i>Oostergetel v Slovak Republic</i> , UNCITRAL Final Award, 23 Apr 2012 (cont.)	Czech Republic-Netherlands BIT 1991	“common ground”	n/a	n/a	High threshold for breach; “the role of an investment tribunal is not to serve as a court of appeal for national courts”	291
			<i>Jan de Nul</i> , Award, 6 Nov 2008	209	BLEU-Egypt BITs 1977 and 1999	Substantive denial of justice (+), “if the outcome of the [...] proceedings is discreditable and offensive to judicial propriety”	291 n146
			<i>Azinian</i> , Award, 1 Nov 1999	99	NAFTA	High threshold for breach; “the role of an investment tribunal is not to serve as a court of appeal for national courts”	291 n147
			<i>Mondev</i> , Award, 11 Oct 2002	126	NAFTA		
			<i>Rumeli Telekom</i> , Award, 29 Jul 2008	709	Kazakhstan-Turkey BIT 1992	“Corruption can also be proven by circumstantial evidence”; an allegation of conspiracy “must, it is to be supported only by circumstantial evidence, be proved by evidence which leads clearly and convincingly to the inference that a conspiracy has occurred”	303 n149
81	<i>Toto v Lebanon</i> , ICSID Case No ARB/07/12, Award, 7 Jun 2012	Lebanon-Italy BIT 1997	<i>Tecmed</i> , Award, 29 May 2003	154	Spain-Mexico BIT 1995	Good faith principle; basic expectations	152 n113
			<i>EDF (Services) Limited</i> , Award, 8 Oct 2009	216	UK-Romania BIT 1995	Good faith principle; basic expectations	152 n114
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	n/a	NAFTA	Good faith principle; basic expectations	152 n115

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
81	<i>Toto v Lebanon</i> , ICSID Case No ARB/07/12, Award, 7 Jun 2012 (cont.)	Lebanon-Italy BIT 1997	<i>Saluka</i> , Partial Award, 17 Mar 2006	301	Czech Republic-Netherlands BIT 1991	Expectation that the conduct of the host state will be fair and equitable	153 n117
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	125	Argentina-US BIT 1991	Stability of the legal and business framework	154 n118
			<i>Bayindir</i> , Award, 27 Aug 2009	178	Turkey-Pakistan BIT 1995	Obligation to refrain from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment	154 n119
			<i>Biwater Gauff (Tanzania)</i> , Award, 24 Jul 2008	597	Tanzania-UK BIT 1994	Threshold for finding a violation is high	155 n120
			<i>EDF (Services) Limited</i> , Award, 8 Oct 2009	217	UK-Romania BIT 1995	FET/principle of legitimate expectations ≠ stabilisation clause	156 n121
			<i>Parkerings-Compagniet</i> , Award, 11 Sep 2007	331-333	Lithuania-Norway BIT 1992	Legitimate expectation (+), "if the investor received an explicit promise or guarantee from the host-State, or if implicitly, the host-State made assurance or representation that the investor took into account in making the investment." If the "host-State [has] made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate. In order to determine the legitimate expectation of the investor, it is also necessary to analyse the conduct of the State at the time of the investment."	158 n122

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
81	<i>Toto v Lebanon</i> , ICSID Case No ARB/07/12, Award, 7 Jun 2012 (<i>cont.</i>)	Lebanon-Italy BIT 1997	<i>Impregilo v Pakistan</i> , ICSID Case No ARB/03/03, Decision on Jurisdiction, 22 Apr 2005	260	Italy-Pakistan BIT 1997	Breach of contract as a violation of fair and equitable treatment; violation must occur in the exercise of sovereign authority (<i>puissance publique</i>)	161 n124
			<i>RFCC v Morocco</i> , ICSID Case No ARB/00/6, Award, 22 Dec 2003	51	Italy-Morocco BIT 1990	Breach of contract as a violation of fair and equitable treatment; state must act as sovereign authority, not merely as a contracting partner	162 n152
			<i>Duke Energy</i> , Award, 18 Aug 2008	345	Ecuador-US BIT 1993		
			<i>Joy Mining v Egypt</i> , ICSID Case No ARB/03/11, Award on Jurisdiction, 6 Aug 2004	78-79	Egypt-UK BIT 1975		
			<i>Parkerings-Compagniet</i> , Award, 11 Sep 2007	319-320	Lithuania-Norway BIT 1992	“If the treaty requires recourse to domestic courts, it is not the existence of the contractual breach as such, but the ‘treatment’ that the alleged breach of contract has received in the domestic context that may determine whether the treaty obligation of fair and equitable treatment has been breached.”	163 n126
			<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	506	US-Ukraine BIT 1996	Relevance of “a comparative analysis of what is considered generally fair and unfair conduct by domestic public authorities in respect to private investors and firms in domestic law”	166 n129
			<i>Noble Ventures</i> , Award, 12 Oct 2005	177-178	Romania-US BIT 1992	Relevance of “a comparative analysis of what is considered generally fair and unfair conduct by domestic public authorities in respect to private investors and firms in domestic law”	166 n129

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81	<i>Toto v Lebanon</i> , ICSID Case No ARB/07/12, Award, 7 Jun 2012 (<i>cont.</i>)	Lebanon-Italy BIT 1997	<i>Total S.A.</i> , Decision on Liability, 27 Dec 2010	111	France-Argentina BIT 1991	Relevance of “a comparative analysis of what is considered generally fair and unfair conduct by domestic public authorities in respect to private investors and firms in domestic law”	166 n129
82	<i>Railroad Development v Guatemala</i> , ICSID Case No ARB/07/23, Award, 29 Jun 2012	CAFTA	<i>ADF Group</i> , Award, 9 Jan 2003 (relying on <i>Mondev</i>)	179	NAFTA	Evolution of customary international law	218
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Violation of the minimum standard (+), if state conduct “is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process”; relevance of legitimate expectations	219
83	<i>Swisslion v Macedonia</i> , ICSID Case No ARB/09/16, Award, 6 Jul 2012	Switzerland-Macedonia BIT 1996	<i>El Paso</i> , Award, 31 Oct 2011	373	Argentina-US BIT 1991	FET = just treatment, with due regard to all surrounding circumstances; FET = guarantee of justice to foreign investors	273 n339
			<i>PSEG Global</i> , Award, 19 Jan 2007	239	Turkey-US BIT 1985		

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
83	<i>Swisslion v Macedonia</i> , ICSID Case No ARB/09/16, Award, 6 Jul 2012 (<i>cont.</i>)	Switzerland-Macedonia BIT 1996	<i>Société Générale v Dominican Republic</i> , LCIA Case No UN 7927, UNCITRAL Award on Preliminary Objections to Jurisdiction, 19 Sep 2008 (cited with approval in <i>El Paso</i> at para 516).	91	Dominican Republic-France BIT 1999	FET breach as the end of a process of aggregation; composite act including a series of measure that collectively amount to a breach	275 n340
84	<i>Occidental v Ecuador II</i> , ICSID Case No ARB/06/11, Award, 5 Oct 2012	Ecuador-US BIT 1993	<i>MTD Equity</i> , Award, 25 May 2004	109	Malaysia-Chile BIT 1992	FET imports an obligation of proportionality	405
			<i>Tecmed</i> , Award, 29 May 2003	122	Spain-Mexico BIT 1995	FET imports an obligation of proportionality	406
			<i>Tecmed</i> , Award, 29 May 2003	149		FET imports an obligation of proportionality	407
			<i>Tecmed</i> , Award, 29 May 2003	n/a		Proportionality; ECtHR jurisprudence applicable “to the actions of the State in its capacity as administrator, and not only in its capacity as legislator”	408
			<i>Azurix</i> , Award, 14 Jul 2006	n/a	Argentina-US BIT 1991	Proportionality; measures taken for a public purpose; need for proportionality between the means employed and the aim sought to be realised	409
85	<i>BIVAC v Paraguay</i> , ICSID Case No ARB/07/9, Further Decision on Objections to Jurisdiction, 9 Oct 2012	Netherlands-Paraguay BIT 1992	<i>Impregilo v Pakistan</i> , ICSID Case No ARB/03/03, Decision on Jurisdiction, 22 Apr 2005	n/a	Italy-Pakistan BIT 1997	Interplay between treaty claims and contractual claims; exercise of sovereign authority (<i>‘puissance publique’</i>) as a prerequisite for a breach of the obligations assumed under the BIT	211
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	n/a	NAFTA	Persistent non-payment of debts <u>not</u> a breach of NAFTA Article 1105	272

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
85	<i>BIVAC v Paraguay</i> , ICSID Case No ARB/07/9, Further Decision on Objections to Jurisdiction, 9 Oct 2012 (<i>cont.</i>)	Netherlands-Paraguay BIT 1992	<i>Parkerings-Compagniet</i> , Award, 11 Sep 2007	316-317	Lithuania-Norway BIT 1992	Interplay between treaty claims and contractual claims; substantial breach of contract as a treaty breach; “as a general rule, a tribunal whose jurisdiction is based solely on a BIT will decide over the ‘treatment’ that the alleged breach of contract has received in the domestic context, rather than over the existence of a breach as such”	274
			<i>Impregilo v Pakistan</i> , ICSID Case No ARB/03/03, Decision on Jurisdiction, 22 Apr 2005	268	Italy-Pakistan BIT 1997	Implementation of the contract versus exercise of <i>puissance publique</i> by the State	276
86	<i>Bosh International v Ukraine</i> , ICSID Case No ARB/08/11, Award, 25 Oct 2012	US-Ukraine BIT 1994	<i>Asian Agricultural Products v Sri Lanka</i> , ICSID Case No ARB/87/3, Award and Dissenting Opinion, 21 Jun 1990 and 15 Jun 1990	21	Sri Lanka-UK BIT 1980	BIT ≠ self-contained closed legal system	113 n125
			<i>Bayindir</i> , Award, 27 Aug 2009	145	Turkey-Pakistan BIT 1995	Stare decisis in investment treaty arbitration	211 n259
			<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	284	US-Ukraine BIT 1994	Breach of FET “requires an action or omission by the State which violates a certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm”	212 n260
			<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	284	US-Ukraine BIT 1994	Relevant factors = specific representations to the investor; due process; non-discrimination; consistency; transparency in the legal procedure	212 n261

						or in the actions of the State; existence of harassment, coercion, abuse of power or other bad faith conduct; arbitrariness	
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No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
86	<i>Bosh International v Ukraine</i> , ICSID Case No ARB/08/11, Award, 25 Oct 2012 (<i>cont.</i>)	US-Ukraine BIT 1994	<i>Loewen</i> , Award, 26 Jun 2003	132	NAFTA	Judicial propriety	280 n374

87	<i>Deutsche Bank v Sri Lanka</i> , ICSID Case No ARB/09/02, Award, 31 Oct 2012	Germany-Sri Lanka BIT 2000	<i>Azurix</i> , Award, 14 Jul 2006	361	Argentina-US BIT 1991	“Treaty standard of fair and equitable treatment [...] not materially different from the content of the minimum standard of treatment in customary international law”	419 n295
			<i>CMS</i> , Award, 12 May 2005	282-284			
			<i>Occidental I</i> , Final Award, 1 Jul 2004	190	US-Ecuador BIT		
			<i>Saluka</i> , Partial Award, 17 Mar 2006	291	Czech Republic-Netherlands BIT 1991		
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	283	NAFTA		

88	<i>Electrabel v Hungary</i> , ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 Nov 2012	Energy Charter Treaty	<i>Bayindir</i> , Award, 27 Aug 2009	178	Turkey-Pakistan BIT 1995	FET obligation = “an obligation to act transparently and with due process; and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor's	7.74
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						reasonable expectations with respect to the legal framework adversely affecting its investment”	
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No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
88	<i>Electrabel v Hungary</i> , ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 Nov 2012 (<i>cont.</i>)	Energy Charter Treaty	<i>Vecchi</i> , Award, 1 Jun 2009	150	Italy-Egypt BIT 1989	FET obligation = “an obligation to act transparently and with due process; and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor's reasonable expectations with respect to the legal framework adversely affecting its investment”	7.74
			“widely accepted”	n/a	n/a	Protection of investor’s reasonable and legitimate expectations = most important function of the FET standard	7.75
			“common ground in ‘investment jurisprudence’ and between the Parties”	n/a	n/a	Relevant point in time for the assessment of legitimate and reasonable expectations = “time at which the investment is made”; “expectations must be based on more than subjective beliefs”	7.76
			“well-established”	n/a	n/a	Regulatory flexibility; “the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest.”	7.77
			<i>GAMI</i> , Final Award, 15 Nov 2004	n/a	NAFTA	Legitimate expectations; specific assurances are “not always indispensable”	7.78
			<i>MTD Equity</i> , Award, 25 May 2004	n/a	Malaysia-Chile BIT 1992		
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	n/a	NAFTA		

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
89	<i>Achmea v Slovak Republic</i> , PCA Case No 2008-13, UNCITRAL Final Award, 7 Dec 2012	Netherlands-Czech and Slovak Republic BIT 1991	n/a	n/a	n/a	n/a	n/a
90	<i>Vannessa Ventures v Venezuela</i> , ICSID Case No ARB(AF)/04/6, Award, 16 Jan 2013	Canada-Venezuela BIT 1996	<i>Genin</i> , Award, 25 Jun 2001	371	US-Estonia BIT 1994	High threshold for violation of FET standard	227 n227
			<i>Loewen</i> , Award, 26 Jun 2003	132	NAFTA	High threshold for violation of FET standard	227 n227
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	High threshold for violation of FET standard; due process; “a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice”	227 n227
91	<i>Arif v Moldova</i> , ICSID Case No ARB/11/23, Award, 8 Apr 2013	France-Moldova BIT 1997	<i>Loewen</i> , Award, 26 Jun 2003	242	NAFTA	Denial of justice as an element of the FET standard; distinction between a local error and an international wrong	440 n180
			<i>Jan de Nul</i> , Award, 6 Nov 2008	258-260	BLEU-Egypt BITs 1977 and 1999	Denial of justice as an element of the FET standard; unjust judgment of a lower court does not constitute unfair and inequitable treatment as such “at least when there is no claim that the appellate proceedings are in any manner dysfunctional”	444 n183

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
91	<i>Arif v Moldova</i> , ICSID Case No ARB/11/23, Award, 8 Apr 2013 (cont.)	France-Moldova BIT 1997	<i>Pope & Talbot</i> , Award on the Merits of Phase 2, 10 Apr 2001	116	NAFTA	FET standard; ‘hospitable climate’ for investment	530 n243
			<i>Saluka</i> , Partial Award, 17 Mar 2006	286	Czech Republic-Netherlands BIT 1991	FET standard; ‘hospitable climate’ for investment	530 n243
			<i>Saluka</i> , Partial Award, 17 Mar 2006	304		Legitimate expectations; legitimacy and reasonableness in light of the circumstances	532 n244
			<i>Impregilo v Argentina</i> , ICSID Case No ARB/07/17, Award, 21 Jun 2011	284-331	Argentina-Italy BIT 1990	Legitimate expectations; non-performance under an investment contract outside the scope of the FET standard in the absence of aggravating factors such as an element of <i>puissance publique</i> or exercise of sovereign authority	536 n246
			<i>Impregilo v Pakistan</i> , ICSID Case No ARB/03/03, Decision on Jurisdiction, 22 Apr 2005	260	Italy-Pakistan BIT 1997	Legitimate expectations; non-performance under an investment contract outside the scope of the FET standard in the absence of aggravating factors such as an element of <i>puissance publique</i> or exercise of sovereign authority	536 n246
			<i>Saluka</i> , Partial Award, 17 Mar 2006	305	Czech Republic-Netherlands BIT 1991	Balancing exercise; state’s right to regulate matters in the public interest	537 n247
			<i>Tecmed</i> , Award, 29 May 2003	(2004) 43 ILM 133	Spain-Mexico BIT 1995	Transparency; consistency; freedom from ambiguity; “proper exercise of powers”	538 n248

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
91	<i>Arif v Moldova</i> , ICSID Case No ARB/11/23, Award, 8 Apr 2013 (<i>cont.</i>)	France-Moldova BIT 1997	<i>MTD Equity</i> , Award, 25 May 2004	(2005) 44 ILM 91	Malaysia-Chile BIT 1992	<i>MTD Equity</i> as an example for the inconsistent treatment of an investment	538 n249
			<i>SPP v Egypt</i> , ICSID Case No ARB/84/3, Award on the Merits, 20 May 1992	83 and 85	Foreign Investment Law	“The international responsibility of a State is not determined by the legality of an act under domestic law, but by the principle of attribution in international law.”	539 n250
			<i>MTD Equity</i> , Award, 25 May 2004	(2005) 44 ILM 91	Malaysia-Chile BIT 1992	Direct inconsistency between the attitudes of different state organs to the investment = breach of FET standard	547 n254
92	<i>Rompetrol v Romania</i> , ICISD Case No ARB/06/3, Award, 6 May 2013	Netherlands-Romania BIT 1995	“other arbitral tribunals”	n/a	n/a	Ordinary meaning of fair and equitable treatment	197
			“other tribunals”	n/a	n/a	Legitimate expectations	197
			<i>Rosinvest Co UK Ltd v Russia</i> , SCC Case No V079/2005, Final Award, 12 Sep 2010	599	Russia-UK BIT 1989	Cumulative effect of impugned actions by the host state as a failure to accord fair and equitable treatment	271 n432; 273; 278
			<i>Rosinvest Co UK Ltd v Russia</i> , SCC Case No V079/2005, Final Award, 12 Sep 2010	621	Russia-UK BIT 1989	Cumulative state action (referring to “relentless and inflexible attacks”) “under a common denominator in a pattern to destroy [the investment]” as a treaty breach	271 n433; 273; 278
93	<i>Micula v Romania</i> , ICSID Case No ARB/05/20, Award, 11 Dec 2013	Sweden-Romania BIT 2003	<i>MTD Equity</i> , Award, 25 May 2004	113	Malaysia-Chile BIT 1992	Ordinary meaning of fair and equitable = just, even-handed, unbiased, legitimate	504 n79

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
93	<i>Micula v Romania</i> , ICSID Case No ARB/05/20, Award, 11 Dec 2013 (<i>cont.</i>)	Sweden-Romania BIT 2003	<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	263	NAFTA	Ordinary meaning of unfair and inequitable = “treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective”	504 n80
			<i>Saluka</i> , Partial Award, 17 Mar 2006	297	Czech Republic-Netherlands BIT 1991	Limits of the ordinary meaning of fair and equitable	504 n81
			<i>MCI Power Group</i> , Award, 31 Jul 2007	370	US-Ecuador BIT 1993	Importance of the facts of the particular case	505 n82
			<i>Mondev</i> , Award, 11 Oct 2002	118	NAFTA	Importance of the facts of the particular case	505 n82
			<i>Saluka</i> , Partial Award, 17 Mar 2006 (echoes <i>Waste Management II</i>)	n/a	Czech Republic-Netherlands BIT 1991	FET “standard to some extent a flexible one which must be adapted to the circumstances of each case”	506
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	99	NAFTA	FET “standard to some extent a flexible one which must be adapted to the circumstances of each case”	506 n83
			<i>Lauder v Czech Republic</i> , UNCITRAL Final Award, 3 Sep 2001 (echoes <i>Waste Management II</i>)	n/a	Czech Republic-US BIT 1991	FET “standard to some extent a flexible one which must be adapted to the circumstances of each case”	506 n84
			<i>Noble Ventures</i> , Award, 12 Oct 2005 (echoes <i>Waste Management II</i>)	n/a	Romania-US BIT 1992	FET “standard to some extent a flexible one which must be adapted to the circumstances of each case”	506 n85

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
93	<i>Micula v Romania</i> , ICSID Case No ARB/05/20, Award, 11 Dec 2013 (<i>cont.</i>)	Sweden-Romania BIT 2003	<i>Saluka</i> , Partial Award, 17 Mar 2006 (relying on <i>S.D. Myers</i> at para 263)	284	Czech Republic-Netherlands BIT 1991	Content of the FET standard “must be disciplined by being based upon state practice and judicial or arbitral case law or other sources of customary or general international law”; decision-making <i>ex aequo et bono</i> versus decision-making on the basis of the law	507 n86
			<i>ADF Group</i> , Award, 9 Jan 2003	n/a	NAFTA	State’s conduct needs not be egregious/outrageous; bad faith not required	508; 524
			<i>Mondev</i> , Award, 11 Oct 2002	116	NAFTA	State’s conduct needs not be egregious/outrageous; bad faith not required	508; 524 n98
			<i>Waste Management II</i> , Final Award, 30 Apr 2004 (cited by <i>Chemtura</i> , Award, 2 Aug 2010, at para 215 and “many different tribunals”)	93	NAFTA	State’s conduct needs not be egregious/outrageous; bad faith not required	508; 524 n99
			<i>Saluka</i> , Partial Award, 17 Mar 2006	298	Czech Republic-Netherlands BIT 1991	FET standard to be interpreted in the light of the object and purpose of the BIT as reflected in its Preamble	509 n87
			<i>Saluka</i> , Partial Award, 17 Mar 2006	304-309	Czech Republic-Netherlands BIT 1991	FET = non-deterrence of foreign capital/not providing disincentives to foreign investors	516 n88
			<i>Total S.A.</i> , Decision on Liability, 27 Dec 2010	107	France-Argentina BIT 1991	FET defies abstract definition	517 n90
			<i>Total S.A.</i> , Decision on Liability, 27 Dec 2010	109	France-Argentina BIT 1991	Typical obligations; “tribunals have endeavoured to pinpoint some typical obligations that may be included in the standard, as well as types of conduct that would breach the standard, in order to be guided in their analysis of the issue before them”	518 n92

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
93	<i>Micula v Romania</i> , ICSID Case No ARB/05/20, Award, 11 Dec 2013 (<i>cont.</i>)	Sweden-Romania BIT 2003	<i>Bayindir</i> , Award, 27 Aug 2009	178	Turkey-Pakistan BIT 1995	Typical obligations; “different factors which emerge from decisions of investment tribunals”: “obligation to act transparently and grant due process [<i>Metalclad v Mexico</i>], to refrain from taking arbitrary or discriminatory measures [<i>Waste Management v Mexico II</i> , <i>Lauder v Czech Republic</i>], from exercising coercion [<i>Saluka v Czech Republic</i>] or from frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment [<i>Duke Energy v Ecuador</i>]”	519 n94
			<i>Total S.A.</i> , Decision on Liability, 27 Dec 2010	109	France-Argentina BIT 1991	Typical obligations; breach of the FET standard (+) in cases of “‘arbitrariness’ [<i>ELSI</i> case][,] a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith’ [<i>Genin v Estonia</i>]”; requirement of “‘treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment’ [<i>MTD v Chile</i>]”; breach (+) if state conduct is “‘arbitrary, grossly unfair, unjust or idiosyncratic or [...] ‘involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in administrative process’ [<i>Waste Management v Mexico II</i>]”; breach (+) “‘in cases of discrimination against foreigners and ‘improper	519 n95

						and discreditable’ or ‘unreasonable’ conduct [Saluka v. Czech Republic]”; bad faith not required [Mondev v USA]	
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No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
93	<i>Micula v Romania</i> , ICSID Case No ARB/05/20, Award, 11 Dec 2013 (<i>cont.</i>)	Sweden-Romania BIT 2003	<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Conduct that is substantively improper; breach of the minimum standard (+), if “conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process”; “relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant”	522 n96
			<i>Saluka</i> , Partial Award, 17 Mar 2006	307	Czech Republic-Netherlands BIT 1991	Conduct that is substantively improper; good faith; legitimate expectation that the State “implements its policies bona fide by conduct that is, as far as it affects the investors’ investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination”; “any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and	523 n97

						must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment”	
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No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
93	<i>Micula v Romania</i> , ICSID Case No ARB/05/20, Award, 11 Dec 2013 (<i>cont.</i>)	Sweden-Romania BIT 2003	<i>AES Summit</i> , Award, 23 Sep 2010	10.3.7	Energy Charter Treaty	Substantively improper conduct; conduct is reasonable, if there is a rational policy and the act of the state in relation to the policy is reasonable”	525
			<i>AES Summit</i> , Award, 23 Sep 2010	10.3.8	Energy Charter Treaty	Rational policy (+), if the state adopts the policy “following a logical (good sense) explanation and with the aim of addressing a public interest matter”	525
			<i>AES Summit</i> , Award, 23 Sep 2010	10.3.9	Energy Charter Treaty	Reasonable action (+), if there is “an appropriate correlation between the state’s public policy objective and the measure adopted to achieve it”	525
			<i>Saluka</i> , Partial Award, 17 Mar 2006	309; 460	Czech Republic-Netherlands BIT 1991	Substantively improper conduct; reasonable conduct (+), if it “bear[s] a reasonable relationship to rational policies”	525 n100
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	125	Argentina-US BIT 1991	Stability of the legal and business framework as an essential element of the FET standard; emerging standard	528 n101
			<i>Metalclad</i> , Award, 30 Aug 2000	76	NAFTA	Transparency; certainty; clarity	531 n104

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
93	<i>Micula v Romania</i> , ICSID Case No ARB/05/20, Award, 11 Dec 2013 (cont.)	Sweden-Romania BIT 2003	<i>Tecmed</i> , Award, 29 May 2003	154	Spain-Mexico BIT 1995	Transparency; consistency	532 n105
			<i>Saluka</i> , Partial Award, 17 Mar 2006	304	Czech Republic-Netherlands BIT 1991	Transparency must not be taken too literally; full disclosure not required	533 n106
			<i>Tecmed</i> , Award, 29 May 2003	154	Spain-Mexico BIT 1995	Consistency; legitimate expectations; “[t]he foreign investor [...] expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities”	534 n107
			<i>Tecmed</i> , Award, 29 May 2003	167	Spain-Mexico BIT 1995	Legitimate expectation “that the government’s actions would be free from any ambiguity”	534 n108
			<i>Tecmed</i> , Award, 29 May 2003	172-73		Legitimate expectations frustrated by contradiction and uncertainty in State conduct	534 n109
			<i>Duke Energy</i> , Award, 18 Aug 2008	340	Ecuador-US BIT 1993	Link between “[t]he stability of the legal and business environment” and the investor's justified expectations	537 n110
			<i>CME</i> , Partial Award, 13 Sep 2001	611	Czech Republic-Netherlands BIT 1991	Protection of legitimate expectations; reliance on legitimate expectations	667 n133
			<i>Saluka</i> , Partial Award, 17 Mar 2006	302			
			<i>Tecmed</i> , Award, 29 May 2003	154			

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
93	<i>Micula v Romania</i> , ICSID Case No ARB/05/20, Award, 11 Dec 2013 (cont.)	Sweden-Romania BIT 2003	<i>Thunderbird</i> , Award, 26 Jan 2006	147	NAFTA	Protection of legitimate expectations; reliance on legitimate expectations	667 n133
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA		
			<i>Duke Energy</i> , Award, 18 Aug 2008 (citing <i>Tecmed</i> at para 154; <i>Occidental I</i> at para. 185; <i>LG&E</i> at paras 127-130; <i>SPP v Egypt</i> at para 82; quoted in <i>Bayindir</i> at para 179)	340	Ecuador-US BIT 1993	Legitimate expectations and their limitations	670 n137
			<i>Generation Ukraine</i> , Award, 16 Sep 2003	20.37	Ukraine-US BIT 1994	Legitimate expectations and their limitations (“vicissitudes of the economy”)	670 n137
			<i>Saluka</i> , Partial Award, 17 Mar 2006	304	Czech Republic-Netherlands BIT 1991	Expectations must have been objectively reasonable/reasonable in light of the circumstances	671 n138
			<i>Saluka</i> , Partial Award, 17 Mar 2006	305		State’s right to subsequently regulate matters in the public interest; FET ≠ stability clause “absent an assurance to the contrary”	673 n139
			<i>Europe Cement v Turkey</i> , ICSID Case No ARB(AF)/07/2, Award, 13 August 2009 (citing <i>Amco Asia v Indonesia</i> , ICSID Case No ARB/81/1, Award, 20 Nov 1984; <i>Plama v Bulgaria</i> , ICSID Case No ARB/03/24, Award, 27 Aug 2008; <i>Inceysa Vallisoletana v El Salvador</i> , ICSID Case No	171	ECT	Good faith as a principle of international law applicable to the interpretation and application of obligations under investment treaties	833 n148

			ARB/03/26, Award, 2 Aug 2006; <i>Phoenix Action v Czech Republic</i> , ICSID Case No ARB/06/5, Award, 15 Apr 2009)				
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No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
93	<i>Micula v Romania</i> , ICSID Case No ARB/05/20, Award, 11 Dec 2013 (<i>cont.</i>)	Sweden-Romania BIT 2003	<i>Canfor v USA</i> and <i>Terminal Forest Products v USA</i> (Consolidated Arbitration), UNCITRAL Decision on Preliminary Question, 6 Jun 2006	n/a	NAFTA	Performance of treaty obligations in good faith; bad faith = intentionally taking steps to undermine performance of treaty obligations	834 n150
<i>Waste Management II</i> , Final Award, 30 Apr 2004			138	NAFTA	Bad faith = deliberate destruction or frustration of an investment by improper means	834 n151	
<i>Metalclad</i> , Award, 30 Aug 2000			76	NAFTA	Transparency; duty of the State to inform investors; “[o]nce the [relevant authorities] become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws”	866 n154	

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
94	<i>Teco Guatemala v Guatemala</i> , ICSID Case No ARB/10/17, Award, 19 Dec 2013	CAFTA-DR	<i>Glamis Gold</i> , Award, 8 Jun 2009	627	NAFTA	Minimum standard of treatment “is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety.”	454-455
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA		
			<i>El Paso</i> , Award, 31 Oct 2011	364	Argentina-US BIT 1991	“In the absence of a stabilization clause, it is perfectly acceptable that the State amends the relevant laws and regulations as appropriate.”	629 n518
			<i>Mobil Investments v Canada</i> , ICSID Case No ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012	153	NAFTA		
95	<i>Ascom v Kazakhstan</i> , SCC Arbitration V (116/2010), Award, 19 Dec 2013	Energy Charter Treaty	n/a	n/a	n/a	n/a	n/a
96	<i>Levy de Levi v Peru</i> , ICSID Case No ARB/10/17, Award, 26 Feb 2014	France-Peru BIT 1993	n/a	n/a	n/a	n/a	n/a

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
97	<i>Tulip v Turkey</i> , ICSID Case No ARB/11/28, Award, 10 Mar 2014	Netherlands-Turkey BIT 1986	<i>Impregilo v Pakistan</i> , ICSID Case No ARB/03/03, Decision on Jurisdiction, 22 Apr 2005	260	Italy-Pakistan BIT 1997	“In order to amount to a treaty, claim the conduct said to amount to a BIT violation must be capable of characterisation as sovereign conduct, involving the invocation of <i>puissance publique</i> .”	354 n379
			<i>Vivendi</i> , Decision on Annulment, 3 Jul 2002	113	Argentina-France BIT 1991	Contract versus treaty claims	355 n380
			<i>Bayindir</i> , Award, 27 Aug 2009	180	Turkey-Pakistan BIT 1995	Contract versus treaty claims; exercise of sovereign power required for treaty breach	356 n381
			<i>Saluka</i> , Partial Award, 17 Mar 2006	297	Czech Republic-Netherlands BIT 1991	Ordinary meaning of fair and equitable; threshold for breach	401 n436
98	<i>ENKEV v Poland</i> , PCA Case No 2013-01, UNCITRAL First Partial Award, 29 Apr 2014	Netherlands-Poland BIT 1992	n/a	n/a	n/a	n/a	n/a
99	<i>Minnotte and Lewis v Poland</i> , ICSID Case No ARB(AF)/10/1, Award, 16 May 2014	US-Poland BIT 1990	<i>Lauder v Czech Republic</i> , UNCITRAL Final Award, 3 Sep 2001	n/a	Czech Republic-US BIT 1991	State must be shown to have acted delinquently	198 n244
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	134	NAFTA		

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
99	<i>Minnotte and Lewis v Poland</i> , ICSID Case No ARB(AF)/10/1, Award, 16 May 2014 (<i>cont.</i>)	US-Poland BIT 1990	<i>Saluka</i> , Partial Award, 17 Mar 2006	298; 309	Czech Republic-Netherlands BIT 1991	State must be shown to have acted delinquently	198 n244
			<i>Tecmed</i> , Award, 29 May 2003	154	Spain-Mexico BIT 1995		
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA		
100	<i>Apotex v USA</i> , ICSID Case No ARB(AF)/12/1, Award, 25 Aug 2014	NAFTA	<i>Thunderbird</i> , Award, 26 Jan 2006	127	NAFTA	Regulatory ‘space’ for regulation; regulatory space to protect public morals (<i>Thunderbird</i>)/public health (<i>Apotex</i>)	9.38 n36
			<i>Chemtura</i> , Award, 2 Aug 2010	134	NAFTA	Role “of a Chapter 11 Tribunal is not to second-guess the correctness of a science-based decision-making of highly specialised national regulatory agencies”	9.39 n37
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	261	NAFTA	No open-ended mandate to second-guess government decision-making	9.39 n38
			<i>Glamis Gold</i> , Award, 8 Jun 2009	22	NAFTA	High threshold of severity and gravity required for breach of FET standard	9.43; 9.47
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	High threshold of severity and gravity required for breach of FET standard	9.44; 9.47
			<i>Genin</i> , Award, 25 Jun 2001	357	US-Estonia BIT 1994	Denial of due process as an aspect of denial of justice	9.45 n47
			<i>Thunderbird</i> , Award, 26 Jan 2006	85; 197; 200	NAFTA	High threshold of severity and gravity required for breach of FET standard	9.45; 9.47

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
100	<i>Apotex v USA</i> , ICSID Case No ARB(AF)/12/1, Award, 25 Aug 2014 (<i>cont.</i>)	NAFTA	<i>Chemtura</i> , Award, 2 Aug 2010	123; 145; 236	NAFTA	High threshold of severity and gravity required for breach of FET standard	9.46-9.47
			“prior international tribunals”	n/a	n/a	“[W]hatever process may be due depends on the particular context of circumstances of the claim.”	9.48
			<i>Diallo (Guinea v Democratic Republic of Congo)</i> , Preliminary Objections, Judgment, ICJ Reports 2007, p 582	p 582, para 47	ICJ	“[A]dministrative remedies must be pursued for purposes of the exhaustion of remedies rule ‘if they are aimed at vindicating a right and not a obtaining a favour.’”	9.56
			<i>Diallo (Guinea v Democratic Republic of Congo)</i> , Preliminary Objections, Judgment, ICJ Reports 2007, p 582	p 582, para 44	ICJ	Burden of proof (applicant): “to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person [...] of the obligation to exhaust local remedies”; burden of proof (respondent): “to convince the Court that there were effective remedies in its domestic legal system that were not exhausted”	9.57
101	<i>Perenco v Ecuador</i> , ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 Sep 2014	France-Ecuador BIT 1994	<i>AWG Group v Argentina</i> , UNCITRAL Decision on Liability, 30 Jul 2010	184	Argentina-UK BIT 1990	Reference to principles of international law ≠ reference to the minimum standard	557 n877
			<i>Biwater Gauff (Tanzania)</i> , Award, 24 Jul 2008	597	Tanzania-UK BIT 1994	Reliance on <i>Waste Management II</i> ; application of the <i>Waste Management</i> formulation of the FET standard	558 n878

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
101	<i>Perenco v Ecuador</i> , ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 Sep 2014 (<i>cont.</i>)	France-Ecuador BIT 1994	<i>Deutsche Bank</i> , Award, 31 Oct 2012	420	Germany-Sri Lanka BIT 2000	Reliance on <i>Waste Management II</i> ; application of the <i>Waste Management</i> formulation of the FET standard	558 n878
			<i>Vannessa Ventures</i> , Award, 16 Jan 2013	227	Canada-Venezuela BIT 1996	Reliance on <i>Waste Management II</i> ; application of the <i>Waste Management</i> formulation of the FET standard	558 n878
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Elements of the FET standard and threshold for a breach	558 n878
			<i>EDF (Services) Limited</i> , Award, 8 Oct 2009	216	UK-Romania BIT 1995	Protection of the “investor’s reasonable expectations as to the future treatment of its investment by the host State” as a central aspect of the fair and equitable treatment obligation	560 n879
			<i>El Paso</i> , Award, 31 Oct 2011	339	Argentina-US BIT 1991		560 n879
			<i>EDF (Services) Limited</i> , Award, 8 Oct 2009	219	UK-Romania BIT 1995	Necessity “to make an objective determination of such expectations having regard to all relevant circumstances”	560 n880
			<i>El Paso</i> , Award, 31 Oct 2011	356	Argentina-US BIT 1991	Necessity “to make an objective determination of such expectations having regard to all relevant circumstances”	560 n880
			<i>Oostergetel</i> , Final Award, 23 Apr 2012	224	Czech Republic-Netherlands BIT 1991	Necessity “to make an objective determination of such expectations having regard to all relevant circumstances”	560 n880
			<i>Saluka</i> , Partial Award, 17 Mar 2006	304		Necessity “to make an objective determination of such expectations having regard to all relevant circumstances”	560 n880

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
101	<i>Perenco v Ecuador</i> , ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 Sep 2014 (cont.)	France-Ecuador BIT 1994	<i>Saluka</i> , Partial Award, 17 Mar 2006	304	Czech Republic-Netherlands BIT 1991	Statements of prior tribunals are not to be taken too literally, for otherwise “the would impose ‘obligations which would be inappropriate and unrealistic’ on the host State.”	560 n881
			<i>White Industries Australia Limited v India</i> , UNCITRAL Final Award, 30 Nov 2011	10.3.5-10.3.6	Australia-India BIT 1999		
			<i>Total S.A.</i> , Decision on Liability, 27 Dec 2010	101	France-Argentina BIT 1991	Stabilisation clause = freezing of a State’s legal framework	562 n882
			<i>Vivendi</i> , Award, 20 Aug 2007	7.4.39	Argentina-France BIT 1991	Required consistency of State and governmental action towards investors	564 n885
			<i>Arif</i> , Award, 8 Apr 2013	441	France-Moldova BIT 1997	Jurisdictional limit: “in applying international law, the Tribunal does not act as a court of appeal on questions of [national] law”	583 n915
			<i>Azinian</i> , Award, 1 Nov 1999	99	NAFTA		
			<i>Helnan</i> , Award, 3 Jul 2008	106-107	Egypt-Denmark 1999		
			<i>Mondev</i> , Award, 11 Oct 2002	126	NAFTA		
			<i>Oostergetel</i> , Final Award, 23 Apr 2012	299	Czech Republic-Netherlands BIT 1991		
			<i>Rompetrol</i> , Award, 6 May 2013	238	Netherlands-Romania BIT 1995		

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
101	<i>Perenco v Ecuador</i> , ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 Sep 2014 (<i>cont.</i>)	France-Ecuador BIT 1994	<i>Azinian</i> , Award, 1 Nov 1999	98	NAFTA	Conformity with international law not tethered to conformity with national law	583 n917
			<i>Inceysa Vallisoletana S.L. v El Salvador</i> , ICSID Case No ARB/03/26, Award, 2 Aug 2006	212-14	El Salvador-Spain BIT 1995		
			<i>SGS Société Générale v Pakistan</i> , ICSID Case No ARB/01/13, Procedural Order No 2, 16 Oct 2002	28	Pakistan-Switzerland BIT 1995		
			“well recognised in investment treaty arbitration”	n/a	n/a	“States retain flexibility to respond to changing circumstances unless they have stabilised their relationship with an investor.”	586
			<i>Paushok v Mongolia</i> , UNCITRAL Award on Jurisdiction and Liability, 28 Apr 2011	305	Mongolia-Russian Federation BIT 1995	“States retain flexibility to respond to changing circumstances unless they have stabilised their relationship with an investor.”	586 n922
			<i>Paushok v Mongolia</i> , UNCITRAL Award on Jurisdiction and Liability, 28 Apr 2011	n/a	Mongolia-Russian Federation BIT 1995	“[C]onsideration of legitimate expectations should include a consideration of industry practices and expectations.”	588
			<i>El Paso</i> , Award, 31 Oct 2011	352; 365-68	Argentina-US BIT 1991	“[A] fully stabilised contract that [does] not admit of any future legislative or other change cannot be changed unilaterally”.	593 n926

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
101	<i>Perenco v Ecuador</i> , ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 Sep 2014 (<i>cont.</i>)	France-Ecuador BIT 1994	<i>Oostergetel</i> , Final Award, 23 Apr 2012	224	Czech Republic-Netherlands BIT 1991	“[A] fully stabilised contract that [does] not admit of any future legislative or other change cannot be changed unilaterally”	593 n926
			<i>Saluka</i> , Partial Award, 17 Mar 2006	304			
			<i>Total S.A.</i> , Decision on Liability, 27 Dec 2010	117	France-Argentina BIT 1991		
102	<i>Venezuela Holdings v Venezuela</i> , ICSID Case No ARB/07/27, Award, 9 Oct 2014	Netherlands-Venezuela BIT 1991	<i>ConocoPhilips v Venezuela</i> , ICSID Case No ARB/07/30, Decision on Jurisdiction and the Merits, 3 Sep 2013	297-317	Netherlands-Venezuela BIT 1991	Fiscal measures “carved out of Article 3(1) [of the BIT], which contains the obligation to provide fair and equitable treatment”	247 n320
			<i>Continental Casualty</i> , Award, 5 Sep 2008	n/a	Argentina-US BIT 1991	Protection of Legitimate Expectations; “[l]egitimate expectations may result from specific formal assurances given by the host state in order to induce investment”	256 n330
			<i>Glamis Gold</i> , Award, 8 Jun 2009	n/a	NAFTA		
			<i>Parkerings-Compagniet</i> , Award, 11 Sep 2007	n/a	Lithuania-Norway BIT 1992		
			<i>Saluka</i> , Partial Award, 17 Mar 2006	n/a	Czech Republic-Netherlands BIT 1991		

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
103	<i>British Caribbean Bank v Belize</i> , PCA Case No 2010-18, UNCITRAL Award, 19 Dec 2014	UK-Belize BIT 1982	<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	263	NAFTA	Unfair and inequitable = arbitrary; idiosyncratic; discriminatory	282 n321
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA		
104	<i>Hochtief v Argentina</i> , ICSID Case No ARB/07/31, Decision on Liability, 29 Dec 2014	Germany-Argentina BIT 1991	<i>Total S.A.</i> , Decision on Liability, 27 Dec 2010	160; 163	France-Argentina BIT 1991	Argentinean crisis; interpretation of facts; unsustainability of peso-dollar parity; no freedom of choice in determining the exchange-rate policy	243 n216
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	116	NAFTA	NAFTA not a resort for debt collections and analogous purposes	218 n200; 219
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	115	NAFTA	Persistent non-payment of contractual debts not a breach of NAFTA Article 1105, “provided that some remedy is open to the creditor to address the problem”	218 n199; 219
105	<i>Tidewater v Venezuela</i> , ICSID Case No ARB/10/5, Award, 13 Mar 2015	Barbados-Venezuela BIT 1994	n/a	n/a	n/a	n/a	n/a
106	<i>Bilcon v Canada</i> , PCA Case No 2009-04, UNCITRAL Award on Jurisdiction and Liability, 17 Mar 2015	NAFTA	<i>Pope & Talbot</i> , Award on the Merits of Phase 2, 10 Apr 2001	110 et seq.	NAFTA	FET = minimum standard; not an autonomous treaty norm in the context of NAFTA	432 n628
			<i>ADF Group</i> , Award, 9 Jan 2003	113	NAFTA	Evolution of the international minimum standard	435 n631

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
106	<i>Bilcon v Canada</i> , PCA Case No 2009-04, UNCITRAL Award on Jurisdiction and Liability, 17 Mar 2015 (<i>cont.</i>)	NAFTA	<i>ADF Group</i> , Award, 9 Jan 2003	179	NAFTA	Evolution of the international minimum standard	435 n632
			<i>Cargill</i> , Award, 18 Sep 2009	281	NAFTA		
			<i>Merrill & Ring Forestry</i> , Award, 31 Mar 2010	207-208, 210; 213	NAFTA	Evolution of the international minimum standard (“trend towards liberalization”); conduct that is “unjust, arbitrary, unfair, discriminatory or in violation of due process” constitutes a breach of the FET standard, “even in the absence of bad faith or malicious intention”; FET standard = <i>opinio juris</i> ; “except for cases of safety and due process, today’s minimum standard is broader than that defined in the <i>Neer</i> case and its progeny”	435 n632
			<i>Mondev</i> , Award, 11 Oct 2002	116	NAFTA	Evolution of the international minimum standard	435 n632
			“all authorities”	n/a	n/a	“[T]he mere breach of domestic law or any kind of unfairness does not violate the international minimum standard.”	436
			“emerging consensus”	n/a	n/a	“[T]he <i>Neer</i> standard of indisputably outrageous misconduct is no longer applicable.”	440
			<i>Thunderbird</i> , Award, 26 Jan 2006	194; 197	NAFTA	High threshold for a violation of NAFTA Article 1105	441 n634
			<i>Cargill</i> , Award, 18 Sep 2009	282	NAFTA	Reliance on <i>Waste Management II</i> ; application of the <i>Waste Management</i> formulation of the FET standard	442 n635

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
106	<i>Bilcon v Canada</i> , PCA Case No 2009-04, UNCITRAL Award on Jurisdiction and Liability, 17 Mar 2015 (<i>cont.</i>)	NAFTA	<i>Mobil Investments v Canada</i> , ICSID Case No ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012	141	NAFTA	Reliance on <i>Waste Management II</i> ; application of the <i>Waste Management</i> formulation of the FET standard	442 n635
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98-99	NAFTA	Definition of the minimum standard of treatment; synthesis of <i>S.D. Myers</i> , <i>Mondev</i> , <i>ADF</i> and <i>Loewen</i>	442 n635; 443
			<i>ADF Group</i> , Award, 9 Jan 2003	189	NAFTA	Legitimate expectations; representations must be made by authorised officials	445 n637
			<i>Glamis Gold</i> , Award, 8 Jun 2009	22	NAFTA	Legitimate expectations; causal link between representations and investment decision	445 n636
			<i>Mobil Investments v Canada</i> , ICSID Case No ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012	n/a	NAFTA	Investor expectations versus state authority to revise the law or policy; cautious approach	572 n785
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	n/a	NAFTA	Investor expectations versus state authority to revise the law or policy; cautious approach	572 n786
107	<i>Mamidoil v Albania</i> , ICSID Case No ARB/11/24, Award, 30 Mar 2015	Greece-Albania BIT 1991	<i>MTD Equity</i> , Decision on Annulment, 21 Mar 2007	108	Malaysia-Chile BIT 1992	“[T]he vagueness inherent in such treaty standards such as ‘fair and equitable treatment’ [should not] allow international tribunals to second-guess.”	601 n467
			<i>MTD Equity</i> , Award, 25 May 2004	113	Malaysia-Chile BIT 1992	FET= treatment that is just, even-handed, unbiased, legitimate, and not idiosyncratic, treatment that does neither amount to a manifest failure of natural justice in judicial proceedings	604-605 n468

						nor to a disregard of procedural propriety [recognising the limitations of this concretisation]	
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No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
107	<i>Mamidoil v Albania</i> , ICSID Case No ARB/11/24, Award, 30 Mar 2015 (<i>cont.</i>)	Greece- Albania BIT 1991	<i>Saluka</i> , Partial Award, 17 Mar 2006	303- 308	Czech Republic- Netherlands BIT 1991	FET= treatment that is just, even-handed, unbiased, legitimate, and not idiosyncratic, treatment that does neither amount to a manifest failure of natural justice in judicial proceedings nor to a disregard of procedural propriety [recognising the limitations of this concretisation]	604-605 n468
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	FET= treatment that is just, even-handed, unbiased, legitimate, and not idiosyncratic, treatment that does neither amount to a manifest failure of natural justice in judicial proceedings nor to a disregard of procedural propriety [recognising the limitations of this concretisation]	604-605 n468
			[<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010]	285	US-Ukraine BIT 1996	“The evaluation of the State’s action cannot be performed in the abstract.”	605 n469
			<i>Saluka</i> , Partial Award, 17 Mar 2006	300- 301	Czech Republic- Netherlands BIT 1991	“An exclusive focus on the protection of foreign investment would entail the dangers [...] that States would be dissuaded from protecting foreign investment and, at the same time, access to public goods and services would be impeded.”	609 n473; 614

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
107	<i>Mamidoil v Albania</i> , ICSID Case No ARB/11/24, Award, 30 Mar 2015 (<i>cont.</i>)	Greece-Albania BIT 1991	<i>AES Summit</i> , Award, 23 Sep 2010	9.3.29-31; 9.3.34	Energy Charter Treaty	FET ≠ stability clause	618 n474
			<i>Parkerings-Compagniet</i> , Award, 11 Sep 2007	331-332	Lithuania-Norway BIT 1992	FET ≠ stability clause	618 n474
			[<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010]	285	US-Ukraine BIT 1996	State's obligation to offer a stable and predictable legal framework must be balanced against "the State's sovereign right to pass legislation and to adopt decisions for the protection of its public interests, especially if they do not provoke a disproportionate impact on foreign investors"	619 n475
			<i>Saluka</i> , Partial Award, 17 Mar 2006	305	Czech Republic-Netherlands BIT 1991	Legitimate expectations; inherent volatility of the legal system; State's legitimate right to regulate matters in the public interest	619 n476
			<i>PSEG Global</i> , Award, 19 Jan 2007	250	Turkey-US BIT 1985	Legislative changes "must not have the character of a continuous oscillation and unpredictability"	621 n478
			<i>Pantechniki</i> , Award, 30 Jul 2009	81-82	Greece-Albania BIT 1991	Reasonableness of expectations in light of the circumstances	629 n482
			<i>Saluka</i> , Partial Award, 17 Mar 2006	304	Czech Republic-Netherlands BIT 1991	Reasonableness of expectations in light of the circumstances	629 n482

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
107	<i>Mamidoil v Albania</i> , ICSID Case No ARB/11/24, Award, 30 Mar 2015 (cont.)	Greece-Albania BIT 1991	<i>Waste Management II</i> , Final Award, 30 Apr 2004	99	NAFTA	Reasonableness of expectations in light of the circumstances	629 n482
			<i>Biwater Gauff (Tanzania)</i> , Award, 24 Jul 2008	601	Tanzania-UK BIT 1994	Relevance of claimant's conduct; prior due diligence; subsequent conduct	631; 634 n483
			[<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010]	285	US-Ukraine BIT 1996	Relevance of claimant's conduct; prior due diligence; subsequent conduct in the host state	631; 634 n483
			<i>MTD Equity</i> , Award, 25 May 2004	167; 178	Malaysia-Chile BIT 1992	BITs ≠ insurance against business risk	631; 634 n483
			<i>Continental Casualty</i> , Award, 5 Sep 2008	261	Argentina-US BIT 1991	"Political statements [...] create no legal expectations."	643 n493
			<i>El Paso</i> , Award, 31 Oct 2011	378			
			<i>AES Summit</i> , Award, 23 Sep 2010	9.3.8	Energy Charter Treaty	"This rule that legitimate expectations can only be created at the moment of the investment, has been supported by several ICSID tribunals."	696 n517
			<i>Duke Energy</i> , Award, 18 Aug 2008	340	Ecuador-US BIT 1993	"[I]nvestor's expectations must be legitimate and reasonable at the time when the investor makes the investment."	696 n518
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	127	Argentina-US BIT 1991	Legitimate expectations; "investor's expectations when making its investment in reliance on the protections to be granted by the host state"	696 n519
			<i>Tecmed</i> , Award, 29 May 2003	157	Spain-Mexico BIT 1995	Legitimate expectations; expectations "[u]pon making its investment"	696 n520

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
107	<i>Mamidoil v Albania</i> , ICSID Case No ARB/11/24, Award, 30 Mar 2015 (<i>cont.</i>)	Greece-Albania BIT 1991	<i>Tecmed</i> , Award, 29 May 2003	120-121	Spain-Mexico BIT 1995	Revocation of license as a breach of the FET obligation/frustration of legitimate expectations “even if national law authorized the State to revoke a license”	726 n529
			<i>Eureko</i> , Partial Award, 19 Aug 2005	231-234	Netherlands-Poland BIT	Withdrawal of a consent to invest further as a breach of the FET obligation/frustration of legitimate expectations	726 n530
			<i>MTD Equity</i> , Award, 25 May 2004	165-166	Malaysia-Chile BIT 1992	Revocation of an approval to invest as a breach of the FET obligation/frustration of legitimate expectations	726 n531
			“generally accepted”	n/a	n/a	Legitimate expectations; general conditions and circumstances as a source of legitimate expectations; more required “than the [investor’s] subjective hope that nothing will change for the worse”	731
			<i>PSEG Global</i> , Award, 19 Jan 2007	241	Turkey-US BIT 1985	“Legitimate expectations by definition require a promise of the administration on which Claimants rely to assert a right that needs to be observed.”	731 n532
			“generally accepted jurisprudence and doctrine”	n/a	n/a	Claim for denial of justice ≠ an appeal against decisions of the national judiciary	764
108	<i>Gavazzi v Romania</i> , ICSID Case No ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 Apr 2015	Italy-Romania BIT 1995	n/a	n/a	n/a	n/a	n/a

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
109	<i>Pezold v Zimbabwe</i> , ICSID Case No ARB/10/15, Award, 28 Jul 2015	Zimbabwe-Germany BIT 1995; Zimbabwe-Switzerland BIT 1996	“jurisprudence”	n/a	n/a	Breach (+), if State actions are “‘arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, expose the investor to sectional or racial prejudice, coerce or harass the investor, or lack due process’ and/or [...] breach [...] specific representations made to the investor (legitimate expectations).”	546
110	<i>Dan Cake v Hungary</i> , ICSID Case No ARB/12/9, Decision on Jurisdiction and Liability, 24 Aug 2015	Portugal-Hungary BIT 1997	<i>Azinian</i> , Award, 1 Nov 1999	102	NAFTA	Denial of justice = “administering justice in a seriously inadequate way”	146 n17
			<i>ELSI (USA v Italy)</i> , Judgment, ICJ Reports 1989, p 15	128	ICJ	Denial of justice = “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety”	146 n20
			<i>Loewen</i> , Award, 26 Jun 2003	132	NAFTA	Denial of justice = “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety”	146 n19
			<i>Mondev</i> , Award, 11 Oct 2002	127	NAFTA	Denial of justice (+), if a decision is “clearly improper and discreditable”	146 n18
111	<i>Quiborax v Bolivia</i> , ICSID Case No ARB/06/2, Award, 16 Sep 2015	Bolivia-Chile BIT 1994	<i>Burlington Resources v Ecuador</i> , ICSID Case No ARB/08/5, Decision on Liability, 14 Dec 2012	179	Ecuador-US BIT 1993	Interpretation of Article 42(1)(2) of the ICSID Convention; choice of law	91 n67

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
111	<i>Quiborax v Bolivia</i> , ICSID Case No ARB/06/2, Award, 16 Sep 2015 (<i>cont.</i>)	Bolivia-Chile BIT 1994	<i>Daimler Financial Services v Argentina</i> , ICSID Case No ARB/05/1, Decision on Annulment, 7 Jan 2015	295	Argentina-Germany BIT 1991	An arbitral tribunal “can <i>sua sponte</i> , rely on [...] publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it”.	92 n68
			<i>Fisheries Jurisdiction (Germany v Iceland)</i> , Merits, Judgment, ICJ Reports 1974, p 175	18	ICJ	“It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court.”	92 n68
			<i>Metal-Tech v Uzbekistan</i> , ICSID Case No ARB/10/3, Award, 4 Oct 2013	287	Israel-Uzbekistan BIT 1994	Principle of <i>iura novit arbiter</i> “allows the Tribunal to form its own opinion of the meaning of the law, provided that it does not surprise the Parties with a legal theory that was not subject to debate and that the Parties could not anticipate.”	92 n68
			<i>Oostergetel</i> , Final Award, 23 Apr 2012	141	Czech Republic-Netherlands BIT 1991		
<i>Champion Trading v Egypt</i> , ICSID Case No. ARB/02/9, Award, 27 Oct 2006	130	Egypt-US BIT 1986	Discrimination; application of a standard similar to the <i>Saluka</i> standard; “[t]he national treatment obligation does not generally prohibit a State from adopting measures that constitute a difference in treatment. The obligation only prohibits a State from taking measures resulting in different treatment in like circumstances.”	247 n272			

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
111	<i>Quiborax v Bolivia</i> , ICSID Case No ARB/06/2, Award, 16 Sep 2015 (cont.)	Bolivia-Chile BIT 1994	<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	261	US-Ukraine BIT 1996	Discrimination; application of a standard similar to the <i>Saluka</i> standard; “[d]iscrimination, in the words of pertinent precedents, requires more than different treatment”; discrimination (+), if a case is “treated differently from similar cases without justification”, a claimant is exposed “to sectional or racial prejudice” or a “measure [targets] Claimant’s investments specifically as foreign investments”	247 n272
			<i>Saluka</i> , Partial Award, 17 Mar 2006	313	Czech Republic-Netherlands BIT 1991	Discrimination (+) if similar cases are treated differently without reasonable justification	247 n272
			<i>Total S.A.</i> , Decision on Liability, 27 Dec 2010	344	France-Argentina BIT 1991	Discrimination; application of a standard similar to the <i>Saluka</i> standard: “The purpose is to ascertain whether the protected investments have been treated worse without any justification, specifically because of their foreign nationality. The similarity of the investments compared and of their operations is a precondition for a fruitful comparison.”	247 n272
			<i>Parkerings-Compagniet</i> , Award, 11 Sep 2007	368	Lithuania-Norway BIT 1992	Discrimination; “[d]iscrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances.”; bad faith or malicious intent not required; “discrimination must be unreasonable or lacking proportionality, for	247 n273

						instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State”; “objective justification may justify differentiated treatments of similar cases”	
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No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
111	<i>Quiborax v Bolivia</i> , ICSID Case No ARB/06/2, Award, 16 Sep 2015 (<i>cont.</i>)	Bolivia-Chile BIT 1994	<i>Corn Products v Mexico</i> , ICSID Case No ARB(AF)/04/1, Decision on Responsibility, 15 Jan 2008	142	NAFTA	“Discrimination does not cease to be discrimination, nor to attract the international liability stemming therefrom, because it is undertaken to achieve a laudable goal or because the achievement of that goal can be described as necessary.”	253 n286
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Elements of the minimum standard of treatment of FET	291 n321
			<i>CMS</i> , Award, 12 May 2005	290	Argentina-US BIT 1991	Discrimination as a breach of the FET standard	292 n322
			<i>Saluka</i> , Partial Award, 17 Mar 2006	307	Czech Republic-Netherlands BIT 1991		
			<i>Victor Pey Casado v Chile</i> , ICSID Case No ARB/98/2, Award, 8 May 2008	670	Chile-Spain BIT 1991		
			<i>Mondev</i> , Award, 11 Oct 2002	80-81	NAFTA	“[O]nce an investment exists, it remains protected by NAFTA even after the enterprise in question may have failed. [...] Issues of orderly liquidation and the settlement of claims may still arise and require ‘fair and equitable	297 n325; 298

						treatment,' 'full protection and security' and the avoidance of invidious discrimination."	
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No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
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112	<i>Tamimi v Oman</i> , ICSID Case No ARB/11/33, Award, 3 Nov 2015	US-Oman FTA 2009	"broadly accepted"	n/a	n/a	Minimum standard imposes relatively high bar for breach	382
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	263	NAFTA		
			<i>Glamis Gold</i> , Award, 8 Jun 2009 (invoking <i>Neer</i>)	21-22; 60 et seq.	NAFTA	Minimum standard imposes relatively high bar for breach; <i>minimum</i> standard; floor-not-a-ceiling principle	383
			"other tribunals"	n/a	n/a	Minimum standard imposes relatively high bar for breach; stringency of the standard (<i>gross / manifest</i>)	384
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	n/a	NAFTA		
			<i>Thunderbird</i> , Award, 26 Jan 2006	n/a	NAFTA	Threshold for finding a violation remains high	385
			<i>Cargill</i> , Award, 18 Sep 2009	n/a	NAFTA	Minimum standard imposes a higher threshold for breach than autonomous FET standard	386 n773
<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	n/a	NAFTA	No open-ended mandate to second-guess government decision-making	389 n779			

113	<i>Electrabel v Hungary</i> , ICSID Case No ARB/07/19, Award, 25 Nov 2015	Energy Charter Treaty	<i>Arif</i> , Award, 8 Apr 2013	n/a	France-Moldova BIT 1997	Application of FET standard may involve a balancing or weighing exercise; legitimate expectations versus right to regulate	165
			<i>Saluka</i> , Partial Award, 17 Mar 2006 (relying on <i>S.D. Myers</i>)	304-308	Czech Republic-Netherlands BIT 1991		

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
113	<i>Electrabel v Hungary</i> , ICSID Case No ARB/07/19, Award, 25 Nov 2015 (<i>cont.</i>)	Energy Charter Treaty	<i>AES Summit</i> , Award, 23 Sep 2010	9.3.34; 10.3.23	Energy Charter Treaty	Knowledge of reasonably informed business persons or investors of the possibility of the evolution of laws over time	178 n136
			<i>Saluka</i> , Partial Award, 17 Mar 2006	307	Czech Republic-Netherlands BIT 1991	Standard for arbitrariness; measure not arbitrary if reasonably related to a rational policy	179 n137
			<i>AES Summit</i> , Award, 23 Sep 2010	10.3.7-10.3.9	Energy Charter Treaty	Standard for arbitrariness; measure not arbitrary if reasonably related to a rational policy	179 n138
			<i>Micula</i> , Award, 11 Dec 2013	525	Sweden-Romania BIT 2003	Standard for arbitrariness; measure not arbitrary if reasonably related to a rational policy	179 n139
			<i>AES Summit</i> , Award, 23 Sep 2010	10.3.7-10.3.9	Energy Charter Treaty	Existence of a rational policy; reasonableness of the act of the state in relation to the policy; rational policy = a policy “taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter”; reasonableness = an appropriate correlation between the state's public policy objective and the measure adopted to achieve it”	179 n140
			<i>Azurix</i> , Award, 14 Jul 2006	311-312	Argentina-US BIT 1991	Proportionality; impact of the measure on the investor must be proportional to the policy objective sought	179 n141
			<i>Continental Casualty</i> , Award, 5 Sep 2008	232			
			<i>EDF (Services) Limited</i> , Award, 8 Oct 2009	293	UK-Romania-BIT 1995		

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
113	<i>Electrabel v Hungary</i> , ICSID Case No ARB/07/19, Award, 25 Nov 2015 (<i>cont.</i>)	Energy Charter Treaty	<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	195	Argentina-US BIT 1991	Proportionality; impact of the measure on the investor must be proportional to the policy objective sought	179 n141
			<i>MTD Equity</i> , Award, 25 May 2004	109	Malaysia-Chile BIT 1992		
			<i>Tecmed</i> , Award, 29 May 2003	122	Spain-Mexico BIT 1995		
			<i>Case of James and Others</i> Judgment, 21 Feb 1986	50; 63	<i>ECtHR</i>	Relevance of the proportionality of the measure	179 n142
			<i>EDF (Services) Limited</i> , Award, 8 Oct 2009	293	UK-Romania BIT 1995	Requirement of “a balancing or weighing exercise so as to ensure that the effects of the intended measure remain proportionate in regard to the affected rights and interests”	180 n144
			<i>MTD Equity</i> , Award, 25 May 2004	109	Malaysia-Chile BIT 1992		
			<i>Occidental I</i> , Final Award, 1 Jul 2004	404-409; 427	US-Ecuador BIT 1993		

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114	<i>Mesa Power Group v Canada</i> , PCA Case No 2012-17, UNCITRAL Award, 24 Mar 2016	NAFTA	<i>Methanex</i> , Final Award, 3 Aug 2005	20 of Part IV; Ch C	NAFTA	Interpretation of NAFTA Article 1105; binding character of the FTC Notes of Interpretation of Certain Chapter 11 Provisions	479 n201
			<i>ADF Group</i> , Award, 9 Jan 2003	177	NAFTA	Interpretation of NAFTA Article 1105: Tribunal has no authority to “determine for itself whether a document submitted to it as an interpretation by the Parties acting through the FTC is in fact an ‘amendment’ which presumably may be disregarded until ratified by all the Parties under their respective internal law.”	479 n202
			<i>Bilcon</i> , Award on Jurisdiction and Liability 17 Mar 2015	430	NAFTA	Interpretation of NAFTA Article 1105: FTC Note is an “authentic interpretation by the States parties to the Agreement”, which is “binding and conclusive.”	480 n203
			<i>Bilcon</i> , Award on Jurisdiction and Liability 17 Mar 2015	432	NAFTA	Interpretation of NAFTA Article 1105: “[T]he FTC Note [...] requires the Tribunal to refer to customary international law, and not to other sources of law.”	482 n204
			<i>Pope & Talbot</i> , Award on the Merits of Phase 2, 10 Apr 2001	110 et seq.	NAFTA		
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	259	NAFTA		
			<i>Bilcon</i> , Award on Jurisdiction and Liability 17 Mar 2015	441	NAFTA	Interpretation of NAFTA Article 1105: “[W]hile it cannot refer to other sources of international law, the Tribunal may certainly be guided by the decisions of other NAFTA Chapter 11 tribunals applying Article 1105 and the FTC Note.”	482 n205

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
114	<i>Mesa Power Group v Canada</i> , PCA Case No 2012-17, UNCITRAL Award, 24 Mar 2016 (cont.)	NAFTA	<i>Waste Management II</i> , Final Award, 30 Apr 2004 (quoted in <i>Bilcon, Mobil, Cargill</i>)	n/a	NAFTA	Scope and content of the minimum standard; breach (+), “if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process”; “relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant”; flexibility of the standard	501
			<i>Bilcon</i> , Award on Jurisdiction and Liability 17 Mar 2015 (quoting <i>Waste Management II</i>)	442-444	NAFTA	Scope and content of the “customary international law minimum standard of treatment found in Article 1105”	501 n230
			<i>Tamimi</i> , Award, 3 Nov 2015	390	US-Oman FTA 2009	Scope and content of the minimum standard; “a breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor’s basic rights and expectations”	502 n231
			<i>Cargill</i> , Award, 18 Sep 2009	296	NAFTA	Failure to respect an investor’s legitimate expectations “in and of itself does not constitute a breach of Article 1105 but is an element to take into account when assessing whether other components of the standard are breached.”	502 n232
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	96	NAFTA		

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114	<i>Mesa Power Group v Canada</i> , PCA Case No 2012-17, UNCITRAL Award, 24 Mar 2016 (cont.)	NAFTA	<i>Bilcon</i> , Award on Jurisdiction and Liability, 17 Mar 2015 (referring to <i>Pope & Talbot</i> at paras 110 et seq.)	432	NAFTA	“[N]o scope for autonomous standards to impose additional requirements on the NAFTA Parties.”	503 n233
			<i>Bilcon</i> , Award on Jurisdiction and Liability 17 Mar 2015	441	NAFTA	High threshold for a violation of NAFTA Article 1105	504 n235
			<i>Thunderbird</i> , Award, 26 Jan 2006	194; 197	NAFTA		
			<i>Bilcon</i> , Award on Jurisdiction and Liability 17 Mar 2015	437; 440	NAFTA	“[I]nternational law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs.”	505 n236
			<i>Chemtura</i> , Award, 2 Aug 2010	153	NAFTA	“[I]nternational law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs”; “it is not for the Tribunal to judge the correctness or adequacy of the scientific results”	505 n236
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	263	NAFTA	“[I]nternational law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs.”	505 n236
			<i>Thunderbird</i> , Award, 26 Jan 2006	127	NAFTA		
			<i>ADF Group</i> , Award, 9 Jan 2003	196	NAFTA	MFN clause; NAFTA “Article 1108(7)(a) excludes the application of Article 1103 in cases of procurement”	507 n240
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	261	NAFTA	No open-ended mandate to second-guess government decision-making	553 n297
<i>Bilcon</i> , Award on Jurisdiction and Liability 17 Mar 2015	437; 440	NAFTA	“The imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard.”	553 n298			

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114	<i>Mesa Power Group v Canada</i> , PCA Case No 2012-17, UNCITRAL Award, 24 Mar 2016 (<i>cont.</i>)	NAFTA	<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	263	NAFTA	“[I]nternational law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs.”	553 n298
			<i>Thunderbird</i> , Award, 26 Jan 2006	127	NAFTA		
			<i>Paushok v Mongolia</i> , UNCITRAL, Award on Jurisdiction and Liability, 28 Apr 2011	316	Mongolia-Russian Federation BIT 1995	“It is not the role of the Tribunal to weigh wisdom of legislation, but merely to assess whether such legislation breaches the Treaty”; breach (+), if it was an abusive or irrational decision	579 n328
115	<i>Crystallex v Venezuela</i> , ICSID Case No ARB(AF)/11/2, Award, 4 Apr 2016	Canada-Venezuela BIT 1996	<i>Vivendi</i> , Award, 20 Aug 2007	7.4.6-7.4.7	Argentina-France BIT 1991	FET standard ≠ minimum standard; floor-not-a-ceiling-principle	532 n749-750
			<i>Suez</i> , Decision on Liability, 30 Jul 2010	185	Argentina-France BIT ‘91; Argentina-Spain BIT 1991; Argentina-UK BIT 1990	FET standard ≠ minimum standard; floor-not-a-ceiling-principle	532 n750
			<i>Total S.A.</i> , Decision on Liability, 27 Dec 2010	125-127	France-Argentina BIT 1991	FET standard ≠ minimum standard; floor-not-a-ceiling-principle	532 n750
			<i>Arif</i> , Award, 8 Apr 2013	529	France-Moldova BIT 1997	FET standard = autonomous standard; “the rapidly expanding practice on FET clauses in treaties accelerates the development of customary international law”	533 n751

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115	<i>Crystallex v Venezuela</i> , ICSID Case No ARB(AF)/11/2, Award, 4 Apr 2016 (<i>cont.</i>)	Canada-Venezuela BIT 1996	<i>SAUR v Argentina</i> , ICSID Case No ARB/04/4, Decision on Jurisdiction and Liability, 6 Jun 2012	491	Argentina-France BIT 1991	“[T]he discussion as to whether the BIT’s fair and equitable treatment in accordance with the principles of international law should be equated with the customary international law minimum standard of treatment is ‘rather dogmatic and conceptual.’”	534 n752
			<i>Gold Reserve v Venezuela</i> , ICSID Case No ARB(AF)/09/1, Award, 22 Sep 2014	567	Canada-Venezuela BIT 1996	Development of what is considered ‘fair and equitable’	534 n753
			<i>ADF Group</i> , Award, 9 Jan 2003	179	NAFTA	“[B]oth customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process development.”	535 n754
			<i>Railroad Development</i> , Award, 29 Jun 2012	218	DR-CAFTA	Adoption of the <i>ADF</i> reasoning; finding that the minimum standard of treatment is “constantly in a process of development”	536 n755
			<i>MTD Equity</i> , Award, 25 May 2004	113	Malaysia-Chile BIT 1992	Plain meaning of the terms ‘fair’ and ‘equitable’: “just, even-handed, unbiased, legitimate” (internal quotation marks omitted)	538 n758
			<i>S.D. Myers</i> , Partial Award, 13 Nov 2000	263	NAFTA	Unfair and inequitable treatment = “treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective”	538 n759
			<i>Micula</i> , Award, 11 Dec 2013	504	Sweden-Romania BIT 2003	Elusive character of the FET standard	538 n760

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115	<i>Crystallex v Venezuela</i> , ICSID Case No ARB(AF)/11/2, Award, 4 Apr 2016 (<i>cont.</i>)	Canada-Venezuela BIT 1996	<i>Saluka</i> , Partial Award, 17 Mar 2006	297	Czech Republic-Netherlands BIT 1991	“This is probably as far as one can get by looking at the ordinary meaning of the terms of Article 3.1 of the Treaty.”	538 n760
			<i>Rumeli Telekom</i> , Award, 29 Jul 2008	609	Kazakhstan-Turkey BIT 1992	Elements of the FET standard: transparency, good faith, procedural propriety and due process; reasonable and legitimate expectations; State conduct ≠ arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory	540 n761
			<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010 (cited with approval in <i>Bosh International</i> , Award, 25 Oct 2012, para 212)	284	US-Ukraine BIT 1996	Elements of the FET standard: stable and predictable legal framework; protection of legitimate expectations based on specific representations to the investor; due process; transparency in the legal procedure or in the actions of the State; freedom of harassment, coercion, abuse of power or other bad faith conduct by the host State; State conduct ≠ arbitrary, discriminatory or inconsistent”	541 n762
			<i>Bayindir</i> , Award, 27 Aug 2009	178	Turkey-Pakistan BIT 1995	Elements of the FET standard: “the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment”	542 n763
			<i>Biwater Gauff (Tanzania)</i> , Award, 24 Jul 2008	602	Tanzania-UK BIT 1994		

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115	<i>Crystallex v Venezuela</i> , ICSID Case No ARB(AF)/11/2, Award, 4 Apr 2016 (<i>cont.</i>)	Canada-Venezuela BIT 1996	<i>Mondev</i> , Award, 11 Oct 2002	116	NAFTA	“To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a state may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”	543 n764
			<i>Mondev</i> , Award, 11 Oct 2002	118	NAFTA	Relevance of the facts of the particular case	544 n765
			<i>Bayindir</i> , Award, 27 Aug 2009	178	Turkey-Pakistan BIT 1995	Legitimate expectations = element of the FET standard	546 n766
			<i>Biwater Gauff (Tanzania)</i> , Award, 24 Jul 2008	602	Tanzania-UK BIT ‘94		
			<i>EDF (Services) Limited</i> , Award, 8 Oct 2009	216	UK-Romania BIT 1995	Legitimate expectations = element of the FET standard (“one of the major components”)	546 n766
			<i>Electrabel</i> , Decision on Jurisdiction, Applicable Law and Liability, 30 Nov 2012	7.75	Energy Charter Treaty	Legitimate expectations = element of the FET standard (“the most important function”)	546 n766
			<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	284	US-Ukraine BIT 1996	Legitimate expectations = element of the FET standard	546 n766
			<i>Rumeli Telekom</i> , Award, 29 Jul 2008	609	Kazakhstan-Turkey BIT 1992		
			<i>Saluka</i> , Partial Award, 17 March 2006	302	Czech Republic-Netherlands BIT 1991	Legitimate expectations = “dominant element” of the FET standard	546 n766

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115	<i>Crystallex v Venezuela</i> , ICSID Case No ARB(AF)/11/2, Award, 4 Apr 2016 (<i>cont.</i>)	Canada-Venezuela BIT 1996	<i>Micula</i> , Award, 11 Dec 2013	667	Sweden-Romania BIT 2003	Doctrine of legitimate expectations “firmly rooted in arbitral practice”	546 n767
			<i>Bogdanov v Moldova</i> , SCC Case No V091/2012, Final Award, 16 Apr 2013	183	Moldova-Russian Federation BIT 1998		
			<i>Total S.A.</i> , Decision on Liability, 27 Dec 2010	128	France-Argentina BIT 1991	Doctrine of legitimate expectations “has its origins in principles of domestic administrative law in various legal systems, and finds increasing recognition both in civil and common law countries”	546 n768
			<i>Arif</i> , Award, 8 Apr 2013	535	France-Moldova BIT 1997	Necessity to exactly identify the origin of the expectation alleged, “so that its scope can be formulated with precision”	547 n770
			<i>Bayindir</i> , Award, 27 Aug 2009	190-191	Turkey-Pakistan BIT 1995	Legitimate expectation “is normally said to arise ‘at the time of making the investment’”	557 n783
			<i>Duke Energy</i> , Award, 18 Aug 2008	340	Ecuador-US BIT 1993		
			<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	264	US-Ukraine BIT 1996		
			<i>National Grid</i> , Award, 3 Nov 2008	173	Argentina-United Kingdom BIT 1990		

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115	<i>Crystallex v Venezuela</i> , ICSID Case No ARB(AF)/11/2, Award, 4 Apr 2016 (<i>cont.</i>)	Canada-Venezuela BIT 1996	<i>Frontier Petroleum</i> , Final Award, 12 Nov 2010	287	Canada-Czech Republic BIT 1990	If “investments are made through several steps, spread over a period of time”, “legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganisation of the investment.”	557 n784-785
			<i>Bayindir</i> , Award, 27 Aug 2009	178	Turkey-Pakistan BIT 1995	“[C]onduct that is arbitrary is contrary to FET.”	577 n808
			<i>Biwater Gauff (Tanzania)</i> , Award, 24 Jul 2008	602	Tanzania-UK BIT 1994		
			<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	284	US-Ukraine BIT 1996		
			<i>Rumeli Telekom</i> , Award, 29 Jul 2008	609	Kazakhstan-Turkey BIT 1992		
			<i>CMS</i> , Award, 12 May 2005	290	Argentina-US BIT 1991	Prohibition of arbitrary conduct inherent in FET standard, irrespective “whether or not a separate provision on prohibition of ‘arbitrary treatment’ is present in the treaty.”	577 n809
			<i>ELSI (USA v Italy)</i> , Judgment, ICJ Reports 1989, p 15	128	ICJ	“[A]uthoritative definition of arbitrariness”: “Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. [...] It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”	577 n810

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115	<i>Crystallex v Venezuela</i> , ICSID Case No ARB(AF)/11/2, Award, 4 Apr 2016 (<i>cont.</i>)	Canada-Venezuela BIT 1996	<i>EDF (Services) Limited</i> , Award, 8 Oct 2009	303	UK-Romania BIT 1995	“[A] measure is arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker.”	578 n811
			<i>Gold Reserve v Venezuela</i> , ICSID Case No ARB(AF)/09/1, Award, 22 Sep 2014	570	Canada-Venezuela BIT 1996	FET “requires that any regulation of an investment be done in a transparent manner”.	579 n812
			<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010 (cited with approval in <i>Bosh International</i> , Award, 25 Oct 2012, at para 212)	284	US-Ukraine BIT 1996	FET “requires that any regulation of an investment be done in a transparent manner”; “transparency in the legal procedure or in the actions of the State”	579 n812
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	128	Argentina-US BIT 1991	FET “requires that any regulation of an investment be done in a transparent manner”.	579 n812
			<i>Saluka</i> , Partial Award, 17 Mar 2006	307-309	Czech Republic-Netherlands BIT 1991		
			<i>EnCana Corporation v Ecuador</i> , LCIA Case No UN3481, UNCITRAL Award, 3 Feb 2006	158	Canada-Ecuador BIT 1996	“Linked to the notion of transparency is the concept of consistency, which requires that ‘[o]ne arm of the State cannot [...] affirm what another arm denies to the detriment of a foreign investor’.”	579 n814

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115	<i>Crystallex v Venezuela</i> , ICSID Case No ARB(AF)/11/2, Award, 4 Apr 2016 (<i>cont.</i>)	Canada-Venezuela BIT 1996	<i>Unглаube v Costa Rica</i> , ICSID Case Nos ARB/08/1 and ARB/09/20, Award, 16 May 2012	247	Costa Rica-Germany BIT 1994	Limits of deference to state authority; “[e]ven if such measures are taken for an important public purpose, governments are required to use due diligence in the protection of foreigners and will not be excused from liability if their action has been arbitrary or discriminatory”	584 n816
			<i>Bayindir</i> , Award, 27 Aug 2009	178	Turkey-Pakistan BIT 1995	Non-discrimination and due process = “central components of FET”	615 n843
			<i>Biwater Gauff (Tanzania)</i> , Award, 24 Jul 2008	602	Tanzania-UK BIT 1994		
			<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	284	US-Ukraine BIT 1996		
			<i>Rumeli Telekom</i> , Award, 29 Jul 2008	609	Kazakhstan-Turkey BIT 1992		
			<i>Saluka</i> , Partial Award, 17 Mar 2006	313	Czech Republic-Netherlands BIT 1991	Discrimination = “[subjection] to different treatment in similar circumstances without reasonable justification”	616 n844
116	<i>MNSS v Montenegro</i> , ICSID Case No ARB(AF)/12/8, Award, 4 May 2016	Netherlands-Yugoslavia BIT 2002	<i>Oostergetel</i> , Final Award, 23 Apr 2012	157	Czech Republic-Netherlands BIT 1991	Bankruptcy administrator = representative of the debtor, not an official of the State	314 n161

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116	<i>MNSS v Montenegro</i> , ICSID Case No ARB(AF)/12/8, Award, 4 May 2016 (<i>cont.</i>)	Netherlands-Yugoslavia BIT 2002	<i>Plama v Bulgaria</i> , ICSID Case No ARB/03/24, Award, 27 Aug 2008	253	Energy Charter Treaty	Bankruptcy administrator = representative of the debtor, not an official of the State	314 n161
			<i>Yukos Universal Limited (Isle of Man) v Russian Federation</i> , PCA Case No AA 227, UNCITRAL Final Award, 18 Jul 2014	n/a	Energy Charter Treaty		314 n162
			<i>El Paso</i> , Award, 31 Oct 2011	335	Argentina-US BIT 1991	Futility of the discussion as to whether the treaty FET standard is identical to the minimum standard	326 n166
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA	Components of the FET standard	326 n167; 327
			<i>Noble Ventures</i> , Award, 12 Oct 2005	53	Romania-US BIT 1992	“[It is a] well established rule of general international law that in normal circumstances <i>per se</i> a breach of contract by the State does not give rise to direct international responsibility on the part of the State.”	328 n168
			<i>Saluka</i> , Partial Award, 17 March 2006	460	Czech Republic-Netherlands BIT 1991	Standard of reasonableness; reasonable relationship to some rational policy	338 n183
117	<i>Philip Morris v Uruguay</i> , ICSID Case No ARB/10/7, Award, 8 Jul 2016	Switzerland-Uruguay BIT 1988	<i>Chemtura</i> , Award, 2 Aug 2010 (relying on <i>Mondev</i>)	121	NAFTA	Evolution of customary international law; impact of BITs on this evolution	318

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117	<i>Philip Morris v Uruguay</i> , ICSID Case No ARB/10/7, Award, 8 Jul 2016 (<i>cont.</i>)	Switzerland-Uruguay BIT 1988	<i>Mondev</i> , Award, 11 Oct 2002	n/a	NAFTA	Evolution of customary international law; “[t]o the modern eye, what is unfair or inequitable need no equate with the outrageous or the egregious. In particular, a State may treat foreign unfairly and inequitably without necessarily acting in bad faith [...]”	318
			<i>Mondev</i> , Award, 11 Oct 2002	118	NAFTA	Relevance of the circumstances of the particular case	320
			<i>Saluka</i> , Partial Award, 17 Mar 2006	285	Czech Republic-Netherlands BIT 1991		
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	99	NAFTA		
			<i>Genin</i> , Award, 25 Jun 2001	395	US-Estonia BIT 1994	Conduct in breach of the FET standard includes “acts showing wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith”	321
			<i>Saluka</i> , Partial Award, 17 Mar 2006	309	Czech Republic-Netherlands BIT 1991	Legitimate expectations; “[a] foreign investor whose interests are protected under the Treaty is entitled to expect that the [host State] will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions)”	322

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
117	<i>Philip Morris v Uruguay</i> , ICSID Case No ARB/10/7, Award, 8 Jul 2016 (<i>cont.</i>)	Switzerland-Uruguay BIT 1988	<i>Biwater Gauff (Tanzania)</i> , Award, 24 Jul 2008	597	Tanzania-UK BIT '94	Breach of the FET standard = conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice"	323 n434
			<i>Hochtief</i> , Decision on Liability, 29 Dec 2014	219	Germany-Argentina BIT 1991		
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	98	NAFTA		
			<i>ELSI (USA v Italy)</i> , Judgment, ICJ Reports 1989, p 15	128	ICJ	Arbitrariness = "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety"; "the <i>ELSI</i> judgment is most commonly referred to by investment tribunals' decisions as the standard definition of 'arbitrariness' under international law"	390 n549
			<i>Electrabel</i> , Decision on Jurisdiction, Applicability and Liability, 30 Nov 2012	8.35	Energy Charter Treaty	Public health; "deference to governmental judgments of national needs"; "discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith"	399 n567
			<i>Frontier Petroleum</i> , Final Award, 12 Nov 2010	527	Canada-Czech Republic BIT 1990		
			<i>Saluka</i> , Partial Award, 17 Mar 2006	272-273	Czech Republic-Netherlands BIT 1991		
<i>Chemtura</i> , Award, 2 Aug 2010	123	NAFTA	Assessment <i>in concreto</i> whether treatment was in conformity with the FET standard	400-401			

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117	<i>Philip Morris v Uruguay</i> , ICSID Case No ARB/10/7, Award, 8 Jul 2016 (cont.)	Switzerland-Uruguay BIT 1988	<i>AES Summit</i> , Award, 23 Sep 2010	9.3.27-9.3.35	Energy Charter Treaty	Legitimate expectations and legal stability = manifestations of the FET standard; they “do not affect the State’s rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances”	422 n607
			<i>BG Group</i> , Final Award, 24 Dec 2007	292-310	Argentina-UK BIT ‘90		
			<i>Continental Casualty</i> , Award, 5 Sep 2008	258-61	Argentina-US BIT ‘91		
			<i>EDF (Services) Limited</i> , Award, 8 Oct 2009	219	UK-Romania BIT 1995		
			<i>El Paso</i> , Award, 31 Oct 2011	344-52; 365-67	Argentina-US BIT ‘91		
			<i>Impregilo v Argentina</i> , ICSID Case No ARB/07/17, Award, 21 Jun 2011	290-91	Argentina-Italy BIT 1990		
			<i>Parkerings-Compagniet</i> , Award, 11 Sep 2007	327-328	Lithuania-Norway BIT 1992		
			<i>Paushok v Mongolia</i> , UNCITRAL, Award 28 Apr 2011	302	Mongolia-Russian Federation BIT 1995		
			<i>Plama v Bulgaria</i> , ICSID Case No ARB/03/24, Award, 27 Aug 2008	219	Energy Charter Treaty		
			<i>Total S.A.</i> , Decision on Liability, 27 Dec 2010	123; 164	France-Argentina BIT 1991		

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
117	<i>Philip Morris v Uruguay</i> , ICSID Case No ARB/10/7, Award, 8 Jul 2016 (<i>cont.</i>)	Switzerland-Uruguay BIT 1988	<i>EDF (Services) Limited</i> , Award, 8 Oct 2009	219	UK-Romania BIT 1995	FET ≠ stabilisation clause	424 n609
			<i>El Paso</i> , Award, 31 Oct 2011	372; 374	Argentina-US BIT 1991	FET ≠ stabilisation clause	425 n610-611
			<i>Oostergetel</i> , Final Award, 23 Apr 2012	273	Czech Republic-Netherlands BIT 1991	Denial of justice; “[a] denial of justice implies the failure of a national system as a whole to satisfy minimum standards”	499 n701
			<i>Mondev</i> , Award, 11 Oct 2002	126	NAFTA	Denial of justice; “not enough to have an erroneous decision or an incompetent judicial procedure, arbitral tribunals not being courts of appeal”	500 n702
			<i>Oostergetel</i> , Final Award, 23 Apr 2012	n/a	Czech Republic-Netherlands BIT 1991	Denial of justice (+), if “systemic injustice”	500 n704
			<i>Mondev</i> , Award, 11 Oct 2002	273	NAFTA	Denial of justice (+), if “the impugned decision was clearly improper and discreditable”	500 n705
			<i>Claim of Finnish Shipowners against Great Britain (Finland v Great Britain)</i> , Award, 9 May 1934	127	UK-Finland Agreement of 30 Sep 1932	Burden of proof of the exhaustion of local remedies; “[i]t is for the Claimants to show that this condition has been met or that no remedy was available giving ‘an effective and sufficient means or redress’ or that, if available, it was ‘obviously futile’” (obviously-futile-test)	503 n713
			<i>Mondev</i> , Award, 11 Oct 2002	126	NAFTA	Arbitral tribunals ≠ courts of appeal	528 n753

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
117	<i>Philip Morris v Uruguay</i> , ICSID Case No ARB/10/7, Award, 8 Jul 2016 (<i>cont.</i>)	Switzerland-Uruguay BIT 1988	<i>Antoine Fabiani Case</i> (No 1), (<i>France v Venezuela</i>), Award (1898) V Moore Intl ARB 4878, 15 Dec 1896	n/a	France-Venezuela Treaty of 24 Feb 1891	Denial of justice (+), if courts refuse to address a claim	557 n802
			<i>Azinian</i> , Award, 1 Nov 1999	n/a	NAFTA		
			<i>Wena Hotels</i> , Decision on Annulment, 5 Feb 2002	101; 105	UK-Egypt BIT 1975	Not incumbent on courts to deal with every argument presented	557 n803
			<i>Thunderbird</i> , Award, 26 Jan 2006	197; 200	NAFTA	High threshold for a denial of justice	569 n829-830
			<i>Tokios Tokeles</i> , Award, 26 Jul 2007	133	Ukraine-Lithuania BIT 1994		570 n831
			<i>B.E. Chattin (USA) v Mexico</i> , Award, 23 Jul 1927	n/a	<i>US-Mexico Claims Commission</i>	“A procedural impropriety can occur notwithstanding that the court could (and probably would) still have reached the same result absent the impropriety.”	575 n838
			<i>Harry Roberts (USA) v Mexico</i> , Award, 2 Nov 1926	n/a			
118	<i>Flemingo v Poland</i> , UNCITRAL Award, 12 Aug 2016	India-Poland BIT 1996	“investment treaty tribunals”	n/a	n/a	FET covers “many values other than predictability”	534
			“so many tribunals”	n/a	n/a	FET covers “many values other than predictability”, e.g., “[d]enial of justice, deficient review of administrative actions and the frustration of legitimate expectations”	534
			<i>Saluka</i> , Partial Award, 17 Mar 2006	297; 306	Czech Republic-Netherlands BIT 1991	Ordinary meaning of FET = treatment that ‘just’, ‘even-handed’, ‘unbiased’, ‘legitimate’”	535 n743

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
118	<i>Flemingo v Poland</i> , UNCITRAL Award, 12 Aug 2016 (cont.)	India-Poland BIT 1996	<i>Saluka</i> , Partial Award, 17 Mar 2006	297; 306	Czech Republic-Netherlands BIT 1991	FET assessment requires “a weighing of the [investor’s] legitimate and reasonable expectations on the one hand and the [host State’s] legitimate regulatory interests on the other”	535 n743
			<i>Saluka</i> , Partial Award, 17 Mar 2006	297; 306		Threshold for finding a violation; “level that is unacceptable from the international perspective”	535 n743
			<i>El Paso</i> , Award, 31 Oct 2011	n/a	Argentina-US BIT 1991	“[A] succession of acts – whether or not individually significant – can build up to unfair and inequitable treatment.”	536
			<i>Himpurna California Energy v Perusahaan Listrik Negara</i> , UNCITRAL Award, 4 May 1999	n/a	Investment Contract	Exercise of the contractual right to terminate a contract, under international law, should not go “beyond tolerable norms”.	550 n748
			<i>Saluka</i> , Partial Award, 17 Mar 2006	297; 306	Czech Republic-Netherlands BIT 1991	FET assessment requires “a weighing of the [investor’s] legitimate and reasonable expectations on the one hand and the [host State’s] legitimate regulatory interests on the other”	551 n749
			“standards of international law”	n/a	n/a	Abuse of contractual rights as a breach of the FET obligation	555
119	<i>Rusoro Mining v Venezuela</i> , ICSID Case No ARB(AF)/12/5, Award, 22 Aug 2016	Canada-Venezuela BIT 1996	<i>Ol European B.V. v Venezuela</i> , ICSID Case No ARB/11/25, Award, 10 Mar 2015	489	Netherlands-Venezuela BIT 1991	Development of the customary international minimum standard	519 n418

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
119	<i>Rusoro Mining v Venezuela</i> , ICSID Case No ARB(AF)/12/5, Award, 22 Aug 2016 (<i>cont.</i>)	Canada-Venezuela BIT 1996	<i>Flughafen Zürich v Venezuela</i> , ICSID Case No ARB/10/19, Award, 18 Nov 2014	573	Switzerland-Venezuela BIT 1993	Reference to principles of international law = reference to the minimum standard	520 n419
			<i>Glamis Gold</i> , Award, 8 Jun 2009	616	NAFTA	Breach of the minimum standard/FET standard (+), “if actions (or in certain circumstances omissions) occur, for which the State must assume responsibility, and which violate certain thresholds of propriety or contravene basic requirements of the rule of law, causing harm to the investor”	523 n421
			<i>Ol European B.V. v Venezuela</i> , ICSID Case No ARB/11/25, Award, 10 Mar 2015	491	Netherlands-Venezuela BIT 1991		
			<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	284	US-Ukraine BIT 1996	Factors to be considered: “harassment, coercion, abuse of power or other bad faith conduct by the host State”; “specific representations to the investor, prior to the investment”; arbitrariness; discrimination; inconsistency; due process; transparency; stability and predictability of the legal framework; legitimate expectations	524 n422
			<i>Lemire</i> , Decision on Jurisdiction and Liability, 14 Jan 2010	285	US-Ukraine BIT 1996	Obligation of investors: “an appropriate pre-investment due diligence review and [...] proper conduct both before and during the investment”	525 n423

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
120	<i>Windstream Energy v Canada</i> , PCA Case No 2013-22, Award, 27 Sep 2016	NAFTA	<i>Pope & Talbot</i> , Interim Award, 26 Jun 2000	p 26	NAFTA	FET = part of the minimum standard	359 n744
			<i>Mondev</i> , Award, 11 Oct 2002	118; 122	NAFTA	Relevance of the facts of the particular case; NAFTA Article 1105(1) = minimum standard – with the caveat that the phrase ‘fair and equitable treatment’ adds to the meaning of NAFTA Article 1105(1)	360 n745; 361
121	<i>Garanti Koza v Turkmenistan</i> , ICSID Case No ARB/11/20, Award, 19 Dec 2016	UK-Turkmenistan BIT 1995	<i>Bayindir</i> , Decision on Jurisdiction, 14 Nov 2005	76	Turkey-Pakistan BIT 1995	Rationales for reliance on arbitral precedent: “decisions help to explain a point, to clarify a concept of international law, or to illustrate how similar issues have been resolved in other cases”; arbitral precedent not binding	149 n229
			<i>Vivendi</i> , Decision on Annulment, 3 Jul 2002	96	Argentina-France BIT 1991	Contract claims versus treaty claims	332 n482
			<i>Mondev</i> , Award, 11 Oct 2002	118	NAFTA	Relevance of the facts of the particular case	379 n544
			<i>Waste Management II</i> , Final Award, 30 Apr 2004	99	NAFTA	FET standard = “to some extent a flexible one which must be adapted to the circumstances of each case”	379 n544
			<i>Mondev</i> , Award, 11 Oct 2002	127	NAFTA	Judicial propriety	381 n547
			<i>ELSI (USA v Italy)</i> , Judgment, ICJ Reports 1989, p 15	p 15	ICJ	Judicial propriety and due process	381 n548

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
121	<i>Garanti Koza v Turkmenistan</i> , ICSID Case No ARB/11/20, Award, 19 Dec 2016 (<i>cont.</i>)	UK-Turkmenistan BIT 1995	<i>Pope & Talbot</i> , Award on the Merits of Phase 2, 10 Apr 2001	105-118	NAFTA	Judicial propriety and due process	381 n548
			<i>MTD Equity</i> , Award, 25 May 2004	163	Malaysia-Chile BIT 1992	Inconsistency of state action	381 n549
122	<i>Blusun v Italy</i> , ICSID Case No ARB/14/3, Award, 27 Dec 2016	ECT	“various tribunals”	n/a	n/a	Stability of the legal and business framework	315
			<i>Electrabel</i> , Decision on Jurisdiction, Applicability and Liability, 30 Nov 2012	7.73	ECT	Stability of the legal and business framework	315
			<i>Plama v Bulgaria</i> , ICSID Case No ARB/03/24, Award, 27 Aug 2008	172	ECT		
			<i>Charanne v Spain</i> , SCC Case No V 062/2012, Award, 21 Jan 2016	510	ECT	No legitimate expectation that a regulatory framework will not be modified, unless a specific commitment toward stability exists	317
			<i>Charanne v Spain</i> , SCC Case No V 062/2012, Award, 21 Jan 2016	513; 517	ECT	Obligation to not act unreasonably, disproportionately or contrary to the public interest when modifying the existing framework; proportional = not capricious or unnecessary; no sudden and unpredictable elimination of the essential characteristics of the existing regulatory framework	317
			<i>Plama v Bulgaria</i> , ICSID Case No ARB/03/24, Award, 27 Aug 2008	161-173	ECT	FET standard under the ECT = minimum standard as applied by tribunals	319

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
122	<i>Blusun v Italy</i> , ICSID Case No ARB/14/3, Award, 27 Dec 2016 (cont.)	ECT	<i>El Paso</i> , Award, 31 Oct 2011	517	Argentina-US BIT 1991	High threshold for violation of the FET standard: requirement of a “total alteration of the entire legal setup for foreign investments”	363
			<i>LG&E Energy</i> , Decision on Liability, 3 Oct 2006	139	Argentina-US BIT 1991	High threshold for violation of the FET standard: “completely dismantling the very legal framework constructed to attract investors”	363
			<i>Charanne v Spain</i> , SCC Case No V 062/2012, Award, 21 Jan 2016	510	ECT	Laws ≠ promises	367 n622
			<i>El Paso</i> , Award, 31 Oct 2011	372	Argentina-US BIT 1991	Laws ≠ promises; no change of rules without justification of an economic, social or other nature	368 n623
			<i>Philip Morris v Uruguay</i> , Award, 8 Jul 2016	426	Switzerland-Uruguay BIT 1988	Laws ≠ promises; “legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment”	369 n624
123	<i>Performance Plastics v Venezuela</i> , ICSID Case No ARB/12/13, Decision on Liability and the Principles of Quantum, 30 Dec 2016	France-Venezuela BIT 2004	n/a	n/a	n/a	n/a	n/a
124	<i>Eli Lilly and Company v Canada</i> , Case No UNCT/14/2, Final Award, 16 Mar 2017	NAFTA	<i>Glamis Gold</i> , Award, 8 Jun 2009	627	NAFTA	Content of the minimum standard	222 n241; 223
			<i>Mondev</i> , Award, 11 Oct 2002	n/a	NAFTA	Judicial conduct other than a denial of justice as a potential violation of NAFTA Article 1105	223

No	Source Case	Treaty (Source Case)	Reliance on	para(s)	Treaty or Tribunal	Context	para(s) (Source Case)
124	<i>Eli Lilly and Company v Canada</i> , Case No UNCT/14/2, Final Award, 16 Mar 2017 (cont.)	NAFTA	<i>Mondev</i> , Award, 11 Oct 2002	n/a	NAFTA	“new law” or “departures from precedent are to be expected”	310
125	<i>Teinver v Argentina</i> , ICSID Case No ARB/09/1, Award, 21 Jul 2017	Argentina-Spain BIT 1991	<i>Duke Energy</i> , Award, 18 Aug 2008	340	Ecuador-US BIT 1993	Legitimate expectations as an element of the FET standard	667 n781
			<i>Suez</i> , Decision on Liability, 30 Jul 2010	228	Argentina-France BIT '91; Argentina-Spain BIT 1991; Argentina-UK BIT 19990	Legitimate expectations; objective and reasonable point of view	667 n782
			<i>Saluka</i> , Partial Award, 17 Mar 2006	n/a	Czech Republic-Netherlands BIT 1991	Legitimate exercise of regulatory authority ≠ violation of the FET standard	668
			<i>Bayindir</i> , Award, 27 Aug 2009	141	Turkey-Pakistan BIT 1995	Elements of legitimate expectations	679 n796
			<i>Kardassopoulos and Fuchs</i> , Award, 3 Mar 2010	n/a	Georgia-Greece BIT 1994/ECT; Georgia-Israel BIT 1995	State “entitled to a measure of deference in determining whether a measure was in the public interest”	688 n804

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