# *Chapter 4: Arbitrators' Constraints in Arbitral Decision-Making*

382. Arbitrators' interpretations and norms (solutions) made remain individual and do not constitute general standards of conduct applicable to other future cases.

383. The solutions that adjudicators create only become applicable to like cases, through mechanisms that constrain decision-making and contribute to consistency. These constraints include formal constraints (e.g., appeal mechanisms, constitutionality controls, and the doctrine of precedent) and/or substantive constraints (e.g., the *lex fori*, general principles, the political morality of the community).

384. International arbitration is not subject to these formal or substantive mechanisms. As arbitration is autonomous, it could be argued that arbitrators are constrained only by the substantive principles or values of the communities to which they belong and their legal traditions, but there would be no constraint that applies to all arbitrators contributing to the emergence of general solutions. Notwithstanding this, the development of a professional and epistemic arbitral community and the institutionalization of arbitration have generated social constraints (§4.01) and institutional constraints (§4.02) that contribute to consistency, and to the creation of general rules that apply beyond the cases settled.

## §4.01 SOCIAL CONSTRAINTS

385. There are constraints driven by unwritten social forces that shape arbitrators' decisions. These sorts of constraints are threefold. First, international arbitrators belong to an arbitral 'profession' that is both an epistemic community with a shared culture and a competitive market (A). Second, past arbitral decisions socially constrain arbitral decision-making (B). Third, the success of international arbitration depends on its acceptance as a legitimate mode
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of dispute settlement by its users, states, and civil ▲▼society. Thus, legitimacy concerns voiced by these actors constrain arbitral decision-making (C).

### [A] The Arbitral Community

386. In the 1980s, with the explosion of international trade and foreign direct investment, international arbitrations doubled in number. (808) The expansion of arbitration marked the emergence of a specialized profession and a profitable business, (809) and allowed international arbitration to become a transnational professional 'field', (810) 'epistemic community', (811) 'social network', (812) or 'interest-based community' (813) organized around certain beliefs in an ideal of international private justice and a competitive market involving big business and mega-lawyering. (814) Both the arbitral culture (1) and the arbitral market (2) shape arbitration outcomes.

#### *[1] The Culture of International Arbitration*

387. Dezalay and Garth explain the expansion of arbitration marked the shift from an informal justice by a handful of grand academics who conceived arbitration as a 'duty, not a career', (815) to the emergence of a 'technical profession', a 'juridicized,' or legalized private justice. (816) These commentators explain that this shift was introduced by the entry of US law firms in the arbitration market that made possible to respond to a demand that exceeded the capacity of the grand masters and their artisanal mode of production. US law firms introduced themselves into the club by introducing the techniques that were at the basis of their pre-eminence. (817) The charisma of grand old arbitrators, together with the *lex mercatoria* language, on the other hand, was crucial to attract the north-south conflicts of the 1970s and 1980s. (818) As they explain:

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> The academic theorization of arbitration – developed by the French and Swiss professors largely – gave the field its *lettres de noblesse* as a sophisticated [and ▲▼neutral] legal expertise suitable for high-level practitioners. This academic pedigree has helped promote the acceptance and recognition of arbitration through much of the world. (819)

388. Grand old arbitrators adapted to the Anglo-Americans by learning English and adopting cross-examination techniques in their arbitrations. (820) US law firms, on the other hand, recognized the European variant (and in particular, the Parisian ICC) as more sophisticated than the domestic alternative, and learned to speak the *lex mercatoria* language. (821)

389. These conflicts and interactions between arbitration professionals in the 1970s and 1980s created a professional community with a unique 'culture' that defines the arbitral profession and shapes decision-making. (822) This culture is organized through a handful of core values that constitute the social rules of the international arbitration game. These values include legal technique, neutrality, internationalism, party autonomy, service of business, and efficiency.

390. Apart from the technical and neutral character of international arbitration that US law

firms and grand professors gave to international arbitration, competition among different groups has also led to the cosmopolitan character of international arbitration. Internationalism is a social concept, a state of mind, and an important symbolic capital of the arbitral profession. Internationalism allowed international arbitration to compete with other dispute settlement mechanisms by defining the international arbitral profession as specific and detached from the other legal professions in order to capture the rising market of transnational disputes where different cultures, legal traditions, and languages operate. (823) Internationalism served to distinguish international arbitration from its lay domestic equivalent as international disputes represented major complex cases. (824) Internationalism also served to distinguish international arbitration from court litigation through the delocalization of international arbitration from the procedural and private international rules of states. This delocalization was mainly achieved by the arbitral community and allowed international arbitration to have its own space.

391. Other underlying values of international arbitration include party autonomy and the service of business. Party autonomy has become so pervasive because arbitrators have dedicated themselves to expanding its scope both in substantive and in procedural matters. (825) The service of business means that 'commercial arbitration exists for one purpose only: to serve the commercial man. If it fails in this, it's unworthy of serious study'. (826)

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392. The arbitral community is dynamic, however, and conflict and complementarities between different groups may lead to new forms of symbolic capital. Schultz and Kovacs argue that case management emerged as a new symbolic capital of arbitrators. (827) This change arose in light of the judicialization of international arbitration that put in question the flexible and expeditious character of arbitration. Repeated appointments have also overloaded certain arbitrators who have to decide and manage many cases at the same time. In the last few years, law firms whose main activity is to render arbitrator's services have appeared in the market. (828) These law firms maintain large teams and the technology necessary to manage big cases efficiently. While some participants may criticize them for delegating work that in principle is not transferable, these law firms seem to have prevailed in the battle; in Schultz and Kovacs' study, 65% of participants responded that 'they did not mind if an arbitrator delegated the arbitrator's preparation for hearings, issuing procedural orders and even writing the award'. (829)

393. The arbitral culture shapes arbitral decision-making in important ways:

- The technical legal character of arbitration favours the resolution of conflicts according to pre-established legal rules and conventions. Problems will be expressed as legal problems, translating them into the language of the law and proposing a prospective evaluation of the chances for success through formal legal texts and codified legal procedures. This explains the decline of the application of *lex mercatoria* in the 1990s, as well as its resurgence after the adoption of the UNIDROIT Principles (which gave the *lex mercatoria* certainty and precision).
- The efficiency of international arbitration favours the adoption of procedural rules that promote the efficiency of arbitral proceedings, such as procedural orders seeking to prevent obstructing parties or procedural misconduct. (830)
- Internationalism favours 'a dedication to subordinating national perspectives and distinctions in favour of transnational or global ideals'. (831) From a procedural perspective, it promotes the adoption of arbitration-specific procedural practices distinct from the national court's procedural rules. One example of these practices is the use of Redfern Schedules for document discovery. (832) From a substantive perspective, arbitrators are more inclined than national courts to apply international rules such as the CISG (even if it is not applicable under its scope of application), the UNIDROIT Principles, international law, trade usages, and so forth. As discussed in §3.04, even where arbitrators apply national law to the dispute, they tend to supplement and/or adapt national law through international or transnational standards.

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- Neutrality, understood as 'cultural neutrality', (833) constrains arbitrators to adopt arbitral procedures and procedural rules that 'are generally pragmatic and seek to accommodate different procedural cultures whenever the parties come from different backgrounds'. (834) This accounts for the globalization of the arbitral procedure, which represents a unique merger of different legal traditions. (835) Neutrality also constrains the selection of the applicable law or of the private international rules to select that law, (836) as arbitrators tend to apply either international or transnational rules, or apply cumulatively rules that are common to the law of both parties. (837)
- Party autonomy socially constrains arbitrators to consider the parties' interests even in situations where they are not required to do so. For instance, when the parties do not agree on a procedural matter and the arbitrators have the power to decide it without consulting the parties, most arbitrators will try to reach an agreement with the parties as to how the arbitration should proceed. (838) Similarly, arbitrators generally consider imposing the procedural schedule on the parties without consulting them to be a 'horror story'. (839) Party autonomy also constrains arbitral decision-making in substantive matters. For instance, international commercial arbitrators identify themselves with the parties' interests as opposed to systemic legal interests. (840) This allows arbitrators to pay more attention to the equity of a dispute or the particularities of a contract than to the

applicable law. (841) A good example of this is how arbitral tribunals interpret defective arbitration agreements. (842)

- The service of business requires arbitrators to understand commercial interests in order to achieve results that are fair to the business community (such as the continuity of a business relationship) and to understand the intentions of the parties when contracting in a particular business or industry (as well as its usages and practices).

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394. The social values of international arbitration do not arise exclusively from structural social conflicts. Rather, 'a paradigm is ... an object for further articulation and specification under new or more stringent conditions'. (843) This additional articulation is made through consensual agreements that result from the dissemination of ideas, publications, consideration of past arbitral decisions, the administrative control of arbitral institutions, ICSID annulment decisions and gatherings. As is discussed in §6.03, business, academic, or international institutions – or their arbitration-specialized groups – together with arbitration institutions adopt instruments, such as codes of ethics for arbitrators, recommendations, guidelines, and rules that codify arbitrators' practices. Good examples of these instruments are those developed by the Arbitration Committee of the International Bar Association (IBA), such as the first code of ethics for international arbitrators of 1987, International Principles of the Conduct for the Legal Profession of 2011, the Guidelines on Conflict of Interests in International Arbitration of 2014 and the Rules on the Taking of Evidence in International Arbitration revised in 2010. (844) As Park explains:

In almost all cases, these guidelines will have far-reaching effects, notwithstanding that they are non-binding on their face. During heated procedural debates they will be cited *faute de mieux*, for lack of anything better. The IBA Guidelines on Conflicts of Interest – with their red, orange and green lists of illustrations indicating varying levels of arbitrator disqualification – have been contested precisely because they will in fact affect arbitrator nominations as they enter the canon of sacred writings cited when an arbitrator's independence is contested. (845)

395. Arbitrators have also developed consensual agreements through the dialectical process that arise from the consideration of past arbitral decisions.(*see* §4.01(B)).

***[2] The Market of International Arbitrators***

396. As arbitrators are selected by (the counsel of) the parties, other arbitrators, arbitral institutions, or appointing authorities, arbitrators' professional skills, and past decision-making may lead to new appointments if such skills and past decisions are valuable to the subjects appointing them. Conversely, those arbitrators acting or deciding against such needs and values would not be re-appointed. Market forces would thus constrain arbitral decision-making in structural terms through a natural selection of arbitrators.

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397. Catherine Rogers, however, suggests that the arbitration market is inefficient:

First, even with expansion, the field continues to be dominated by an elite group of insiders who are variously, though not without objection, referred to as a 'cartel', a 'club', or a 'mafia'. These individuals, both through informal processes and their effective control over arbitral institutions, exert significant influence over who gets appointed as an arbitrator. Arbitrator selection is often in the hands of members of the same 'club', who are either operating in the institutions or already appointed as party appointed arbitrators. In either situation, they are likely to favour other 'members' of their 'club'. This effect is compounded by the fact that prior service as an arbitrator is the preeminent qualification for an arbitrator-candidate. As a result, the market for international arbitrators operates as a relatively closed system that is difficult for newcomers to penetrate.

In addition to the significant barriers to entry, there are also severe information asymmetries that prevent the market for arbitrator services from being fully competitive. While there is a notable trend to change the status quo, which is described in greater detail below, most arbitration is confidential, most awards are not published, and most institutional decisions regarding challenges to arbitrators are rendered without reasoned explanation and without publication.

The combined effect of these features creates significant information asymmetries that impair parties' ability to make fully informed decisions in selecting arbitrators. (846)

398. Along the same line, a New York law firm partner interviewed by Dezalay and Garth mentioned, 'the more you see of international arbitration, the more you know the people who are involved, and they tend to be repetitively involved'. (847) Another interviewee put it in stronger terms: 'It's a mafia because people appoint one another. You always appoint your friends – people you know.' (848) This interviewee mentioned that policymaking is done at gatherings on international arbitration, such as those organized by arbitral institutions or ICCA. (849) Participation in these gatherings is how potential arbitrators get into the club. (850)

399. Participation at gatherings and publications is indeed essential for the development of arbitrators' careers given that most arbitral awards are confidential and arbitrators cannot share the quality of their work with others. (851) This is what allows arbitrators to become known as 'specialists' by other members of the club, or in Rogers' terms, it is 'a form of elite

P 151 advertising' that explains the inflation of publications and conferences in international arbitration. (852) These gatherings and publications also constitute the space where members of the club interact with each other, and act as a harmonizing force. (853) But being part of the club, having friends in the club, or participating in these gatherings and publications does not guarantee future appointments. Nor do they guarantee power or stature within the club. (854)

400. First, arbitrators are appointed by sophisticated law firms who perform intensive arbitrators' due diligence. (855) These law firms have knowledge about arbitrators' performance in past arbitrations. This knowledge allows them to make informed appointments. In White & Case and Queen Mary's survey on Choices in International Arbitration (2010), only 33% of the corporate counsel surveyed said that they were not confident that they could make an informed choice of arbitrators with the input of external counsel. (856)

401. Second, attorneys seek to appoint good and neutral arbitrators, not friends of the club. This need is enhanced because appellate review is unavailable. Appointing a biased arbitrator is difficult whether the tribunal is composed of a sole arbitrator or a plural number of arbitrators. In those cases decided by a sole arbitrator, the parties will never mutually agree on a partial or dependent arbitrator. Arbitral institutions will also favour the appointment of a neutral arbitrator, as their reputation depends on it. If the tribunal is composed by a plural number of arbitrators, appointing an arbitrator that is not neutral can jeopardize the credibility of the party-appointed arbitrator and, thus, the chances of the party who appointed him/her to win the case. (857)

402. Third, repeated appointments do not evidence the existence of a mafia. As one of Karton's interviewees expressed, the parties:

want certainty; they want people they can trust. They don't want mavericks; they want a safe pair of hands; they want dependable consistency. That's why it's a small field, because people go towards people they have total confidence in, and there's not that many people around the world. (858)

403. Arbitrators' appointments are based on symbolic capital. (859) This symbolic capital is based on legal know-how of international arbitration and buttressed by other credentials, such as a certain legal or academic position on arbitration, knowledge of English, legal education or experience in the US, publications in the most highly praised journals, and a cosmopolitan
P 152 profile. As one of the interviewees of Dezalay and Garth explained, '[y]ou've got to have a platform, such as an academic position or a partnership in a significant law firm or you can't get into the game'. (860) But not all partnerships, academic positions, or publications have the same status. As the profession is transnational, competition among these values is enhanced because it operates across states:

Operating at the intersection of national legal cultures, the practice of arbitration challenges national monopolies built in large part on a respective misrecognition. However limited, this bridge between the cultures opens up the possibility of confrontation. It can lead to an effective competition, or at least a kind of reciprocal evaluation. The different local elites learn to judge each other. As noted earlier, for example, the barrister can now be measured against the Continental professor or the senior partner of a large US law firm. (861)

404. With the emergence of investment treaty arbitration, arbitrators' symbolic capital changed. On the one hand, most investment arbitral awards are easily accessible and there are no information asymmetries that impede the parties from adopting informed decisions when appointing arbitrators. On the other hand, not only have cases become bigger and more difficult to manage, but they concern public international law and the public interest. While commercial arbitration became ordinary and grand old men were no longer necessary for the legitimacy of arbitration, the same does not hold for investment arbitration, as states and civil society frequently raise concerns about the legitimacy of international arbitration to resolve investment disputes. (862) Thus, charismatic and technical public international lawyers with links to public international law, international law institutions, or government have entered the club. These arbitrators include James Crawford, Orrego Vicuña, Brigitte Stern, Pierre-Marie Dupuy, Georges Abi-Saab, and Yves Fortier. These 'publicists', together with top commercial arbitrators who after a life of work have also become charismatic in their own field, such as Kaufmann-Kohler, Böckstiegel, Van den Berg, Hanotiau, Paulsson, and Park, define the market of investment arbitrators.

405. Despite the increased transparency in investment arbitration, repeated appointments in investment arbitration are even more frequent than in commercial arbitration. According to a study carried out by the Corporate Europe Observatory, out of 247 cases of investment arbitrations, 55% were decided by a group of 15 arbitrators. (863) These repeated appointments could result partly from the fact that investment arbitration is far from being banalized, and investment arbitrators need to be associated with the old charismatic arbitrators to legitimize investment arbitration. Repeated appointments in investment arbitration yet result from competition and informed choices.

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### [B] Deference to Past Arbitral Decisions

406. In international arbitration there is no stare decisis or *jurisprudence constante* doctrine. Arbitral tribunals are decentralized, lack permanence, and are not subject to the control

mechanisms that allow local courts to create judicial decisions that constrain the resolution of future cases. Despite the structural characteristics of international arbitration, past arbitral decisions play a role in international arbitration to varying degrees. (864) Past arbitral decisions shape pleadings and arbitral decisions; constitute a core element in teachings and scholarly works; (865) and terms such as de facto precedent, *jurisprudence constante*, *jurisprudence arbitrale*, line of consistent cases, and consistent case law are part of the arbitral community's discourse. (866)

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407. As discussed in the following pages, international arbitration has the structural characteristics that allow tribunals to consider and pay deference to past arbitral decisions (1) and past arbitral decisions operate as a social constraint in arbitral decision-making (2).

***[1] International Arbitration is Capable of Paying Deference to Past Arbitral Decisions***

408. Although arbitral tribunals are decentralized, lack permanence, and are not subject to the control mechanisms of local courts, international arbitration is capable of paying deference to past arbitral decisions.

409. Commentators often refer to a 'soft' or 'de facto' doctrine of precedent in international arbitration. (867) It has been rightly suggested that the distinction between a de jure and de facto doctrine of precedent is artificial. Douglas explains that the doctrine of precedent in British common law existed long before a doctrine of stare decisis was established, and even positivists, such as Hart, recognize that the doctrine of precedent is a social phenomenon rather than a primary rule of law. (868)

410. We prefer to avoid using the term 'precedent' altogether. Precedent is a common law term of art that is clearly distinguishable from civil law judicial lawmaking. Under the stare decisis doctrine, precedent operates as a 'source-act' meaning that the decision itself creates the general norm directly. (869) Legal submissions and awards are thus largely based on an analogical reasoning, subject to factual and legal comparison and distinction. (870) Conversely, in civil law systems, the method of judicial lawmaking is that of 'source-fact', which arises from inductive reasoning. (871) The general norm is created by the repetition and consistency of decisions, tantamount to a judicial custom. (872) This, together with the primacy of the code in civil law countries, changes the argumentative framework of pleadings and judgments. A solution established in '*jurisprudence*' is not argued through analogical reasoning, but it is invoked as an authoritative (abstract or general) interpretation of the law; the factual background of past cases being less relevant. (873)

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411. Neither the common law conception nor the civil law conception is capable of capturing the role of past arbitral decisions. It could be argued that arbitral lawmaking through arbitral awards could only be performed through a civil law method (since the first arbitral tribunal cannot have more authority than the other tribunals) and that arbitral solutions, if any, should arise from a consensus among international arbitrators. At the same time, in investment arbitration, we can see a true hybrid. On the one hand, tribunals pay a higher deference to a civil law type of '*jurisprudence constante*'; on the other hand, lawyers and arbitrators and counsel readily engage in a common law style of reasoning.

412. International arbitration is capable of paying deference to past arbitral decision because (a) there are like proceedings and/or like disputes, (b) arbitral decisions are accessible, (c) arbitral awards are reasoned, and (d) arbitrators have the power to base their decisions on past arbitral awards.

*[a] Like Proceedings and Like Disputes*

413. Although arbitral tribunals are independent from one another and lack permanence, the similarities between arbitral tribunals and between disputes make international arbitration capable of paying deference to past decisions.

414. From a procedural perspective, the similarity between arbitral tribunals arises from the harmonization of arbitration rules. This was achieved under certain international conventions, soft law instruments of harmonization, and arbitral institutions and arbitration rules. (874) These rules establish similarities in the composition, function, and mission of arbitral tribunals. These 'organic' similarities have put arbitrators in similar procedural situations; particularly, where the same arbitration rules apply.

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415. Similarities also exist with regard to the merits of arbitration cases. The disputes subject to international arbitration include a wide range of disputes, including disputes arising from international contracts (of a different nature or relating to a specific trade), state contracts, investment treaty disputes, and investment law disputes. Similarities will arise within the same type of disputes.

416. Arguably, the rules applicable to each of these disputes may vary considerably. For instance, disputes over the fundamental breach of an international sales contract may be subject to national law (of any state of the world), uniform law conventions, or the *lex mercatoria* (or the like). Similarly, a dispute over the indirect expropriation of an investment may be governed by one of the 3,000 investment treaties in force. But even where the rules are different, the solution adopted in one award may be valuable to another under certain circumstances.

417. In the case of international contractual disputes, no matter what law governs them, they may be subject to the same trade usages, and arbitrators will pay due regard to their

international character by disregarding parochial rules and giving effect to general principles of international contract law (which are construed under a wide range of sources) (*see* §3.04).

418. Likewise, many investment treaties have similarly drafted provisions. This does not mean that all treaties mean the same, and that the case law regarding one treaty is necessarily useful for interpreting another treaty. Certain treaties are more liberal than others, and investment arbitral tribunals frequently refuse to acknowledge the relevance of past arbitral awards where the treaties are different. (875) But similarities in the substantive standards are very frequent because in many cases they are drafted by reference to model treaties and terms of art, such as 'measures tantamount to expropriation', 'fair and equitable treatment', 'full protection and security'.

419. The facts would also need to be alike for paying deference to past arbitral decisions. Similar facts can arise in international commercial arbitration, where the origin of contract breaches may resemble one another to a considerable extent. In the case of investment arbitration, the same dispute with regard to a state or the same state measures may lead to parallel international arbitrations. For instance, in the *Lauder/CME* arbitrations, investors of the same group sued the Czech Republic against the same measures. But even where the disputes are not similar, a tribunal may simply pay deference to the interpretation of a treaty provision or a term of art of investment arbitration by another tribunal.

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*[b] Accessibility of Arbitral Awards*

420. Arbitral tribunals can only pay deference to past decisions if they have access to previous arbitral awards in some way. In investment arbitration, given the public interests concerned, a great number of arbitral awards are in the public domain and one can often find a copy of an award with a simple Internet search on the day that it is dispatched to the parties. Although in investment arbitration the publicity of awards depends on parties' consent, (876) the parties usually do not object to their publication (877) and they are often published by arbitration centres, (878) specialized legal journals and databases, (879) and law firms. (880) Investment arbitration awards are less technical, of greater public interest, and do not generally contain sensitive or secret information. (881) The content of those arbitral awards that remain confidential are also rendered accessible by the leaks of certain arbitration journals, such as Investment Arbitration Reporter, which includes a remarkable account of a great number of investment arbitral awards that are confidential and states in its website that its service is renowned for 'offering a window into otherwise confidential proceedings'. (882)

421. International commercial arbitral awards, on the other hand, are mostly kept confidential, and most of those which are published are 'excerpts' corresponding to arbitrations conducted under certain arbitration rules, such as the ICC, or those that become public in enforcement or set aside proceedings before domestic courts. (883) Kaufmann-Kohler argues that this lack of publicity of awards would present an obstacle to the use of arbitral precedent in commercial arbitration. (884)

422. Nevertheless, there are at least 500 excerpts of arbitral awards published. (885) This number seems to be large enough to facilitate the development of certain consistent solutions, especially given that the selection of these awards published is not random. (886) Arbitration institutions publish decisions in a number of 'hot' topics, such as the role of the *lex arbitri*, the autonomy of the arbitration agreement, the interpretation of arbitration agreements designating the arbitration institution wrongly, methods applied by arbitrators to select the applicable law, the application of general principles, and mitigation of damages, interests, public policy, and mandatory rules. This deliberate selection of the excerpts of the awards that the ICC publishes can be perceived from a perusal of the table of contents of the six-volume compendium *Collection of ICC Arbitral Awards*.

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423. The fact that the majority of the available international commercial arbitral awards correspond to arbitrations conducted under the ICC rules, on the other hand, does not hinder the development of consistent solutions across arbitrations conducted under different rules. As long as the matters that need to be resolved are similar, there is no impediment for non-ICC arbitral tribunals to take into account ICC arbitral awards. Good examples of this cross-fertilization include cases conducted under the UNCITRAL Rules, Swiss International Arbitration Rules, and the ICSID Convention that cite ICC awards on matters such as the prohibition of corruption, (887) the principle that a state is prohibited from invoking its own domestic law in order to avoid arbitration, (888) and the possibility of awarding security for costs. (889)

424. In any event, deference to past decisions does not depend on the publication of awards, but on their accessibility. Weidemaier explains:

Even when awards are not published, for example, arbitrators are often repeat players and may be well aware of how they and other arbitrators have resolved similar disputes. This suggests that arbitral precedent may evolve more readily in systems in which relatively few arbitrators capture a large share of the arbitration business. Repeat player litigants and law firms likewise accumulate knowledge of prior disputes and may invoke past awards that favour their current positions. (890)

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425. Arbitrators belong to a community and a competitive market place in which they share their experience through other means, such as publications and conferences. (891) Although these papers, articles, or presentations will be abstract and general (rather than concrete and detailed as arbitral awards are), they allow arbitrators to share past arbitral decisions as well as ways of interpreting certain rules and deciding certain issues in a wide range of matters.

426. The role of scholarly publications in determining, clarifying, and expanding the content of the solutions arising from past arbitral decisions has been discussed in ICC Case No. 14208/14236. (892) The claimant held that on the basis of past arbitral awards, the claimant was allowed to join non-signatories to the arbitration. The tribunal held that the fact that there were few available past decisions on the issue could not prevent the tribunal from deciding on the basis of these past decisions and that the principles arising from these cases would be 'completed' by doctrinal analysis:

Although arbitral awards and court decisions on joining a non-signatory are abundant, the number of published cases in which the issue of piercing the corporate veil has been raised and discussed is few. This should not however prevent us from rendering a reasoned decision on this issue. The principles enunciated in the existing case law and recommended by doctrinal writers are clear. They set forth the parameters which arbitral tribunals should take into consideration to reach their decision. (893)

427. Arbitrators also frequently rely on legal writings to establish the content of past arbitral decisions. (894) In ICC Case No. 9415, the tribunal decided to follow past decisions in order to select the law applicable to claims for contract negligence. The tribunal referred to an article of Reymond as evidencing past arbitral decisions:

In a seminal paper on torts in international arbitration, *Professor Reymond states thatarbitrators sitting in international arbitrations generally find* that claims in contractual negligence are governed by the proper law of the contract and that the proper law of the contract exerts a form of *vis attractiva* on claims resting on the law of tort that relate to a breach of the contract in dispute between the parties (see Reymond, 'Conflits de lois en matière de responsabilité délictuelle devant l'arbitre international', Travaux du Comité français de droit international privé 1988-1989 at 97-106; 107-119 (Discussion); 100; 102). The law governing the contractual aspects of the dispute is regarded as having a strong claim to be applied to claims sounding in tort when the latter claims arise out of an alleged breach of the contract. (emphasis added)

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428. As Catherine Rogers explains:

At a less dramatic and less observable level, international arbitration has also generated its own set of hybridized evidentiary procedures designed to bridge gaps between civil and common law procedural traditions. The evolution of these now well-settled procedural norms occurred less through formal exchange of published opinions than through the cross-pollenization that comes with the overlapping experiences of those in the international arbitration community. (895)

*[c] Reasoned Arbitral Awards*

429. Even if awards are accessible, they need to be reasoned (i.e., accompanied by written opinions based on law). (896)

430. The widespread practice at the beginning of the twentieth century was to render arbitral awards without explaining the reasons by which the decision was reached. This practice has its antecedents in antiquated English common law and was employed to avoid review on the merits by domestic courts. (897) Carbonneau explains that this practice was also adopted in the US. (898) Since then, there has been significant evolution. Although the 1958 New York Convention is silent on the question on whether an award needs to be reasoned, both the 1961 European Convention on International Commercial Arbitration (899) and UNCITRAL Arbitration Rules (900) establish a presumption in favour of rendering awards with reasons. The ICSID Convention also establishes the failure to state reasons as a ground for annulment of the award. (901) In the absence of provisions requiring arbitral awards to state reasons, arbitrators are still inclined to state reasons. (902) Above all, arbitrators seek the acceptance of the award by the parties and their counsel; the arbitrator will also seek to enhance the enforceability of the arbitral award. (903)

431. In investment arbitration, where the interests concerned by the arbitral award go beyond the mere interests of the parties, and the arbitral award will in all probability be accessible to a larger community, arbitrators are inclined to give thorough reasons. The importance of detailed reasons for investment arbitral awards is well illustrated in a quote from the award of the *Glaims Gold v. The United States of America* case:

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it is important that a NAFTA tribunal provide particularly detailed reasons for its decisions. All tribunals are to provide reasons for their awards and this requirement is owed to private and public authorities alike. In the Tribunal's view, however, it is particularly important that the State Parties receive reasons that are detailed and persuasive for three reasons. First, States are complex organizations composed of multiple branches of government that interact with the people of the State. An award adverse to a State requires compliance with the particular award and such compliance politically may require both governmental and public faith in the

integrity of the process of arbitration. Second, while a corporate participant in arbitration may withdraw from utilizing arbitration in the future or from doing business in a particular country, the three NAFTA State Parties have made an indefinite commitment to the deepening of their economic relations. In this sense, not only compliance with a particular award, but the long-term maintenance of this commitment requires both governmental and public faith in the integrity of the process of arbitration. Third, a minimum level of faith in the system is maintained by the mechanism for the possible annulment of awards. However, the time and expense of such annulments are to be avoided. The detailing of reasons may not avoid the initiation of an annulment procedure, but it is hoped that such reasons will aid the reviewing body in a prompt resolution of such motions. (904)

*[d] The Power of Arbitral Tribunals to Decide on the Basis of Past Arbitral Decisions*

432. Arbitrators have the power to decide on the basis of past arbitral awards. In a number of investment arbitration cases, respondents objected that following past decisions would constitute a breach of the obligations of the arbitrator, an abuse of power, or a failure to state reasons that could lead to the annulment or setting aside of the arbitral award. Arbitral tribunals and annulment committees systematically reject such arguments.

433. In *AES v. Argentina*, Argentina argued that deference to past arbitral awards regarding other treaties was contrary to the principle of consent (in which is based arbitration and international law itself) given the unique nature of each treaty as *lex specialis*. (905) The tribunal rejected the argument, stating that although arbitral tribunals should use precedents with caution, they are not precluded from considering past arbitral decisions in similar cases. (906)

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434. In *Impregilo v. Argentina* the annulment committee rejected the argument of Argentina that the tribunal had failed to render its award with reasons since the solutions adopted in prior arbitral awards or a consistent line of cases was not a valid reason to justify derivative shareholders' claims. The committee expressed:

190. The Committee points out that, contrary to the assertion made by Argentina, the Tribunal did not assume that it was bound by decisions rendered by other Arbitral Tribunals nor the preponderance of decisions in a particular way. The Committee considers that the Tribunal believed that the decided cases and the 'near unanimity' that it cited allowed it to reinforce its reasoning and findings, arrive at conclusion and settle the dispute in the manner in which it did. This line of argument of Argentina is not a ground for annulment. While decisions rendered by Arbitral Tribunals are not binding, the reasoning contained therein can indeed be used by a Tribunal as a basis for its decision. [...]

200. As noted by Argentina, arbitration case law is not binding on any Arbitral Tribunal. However, that fact does not mean that a tribunal cannot base its opinion on decisions rendered by other tribunals or uphold the decisions of other tribunals on a specific matter. The Tribunal summarized Argentina's position on the second objection that it raised, referring in that summary to *CMS v. Argentina*. It noted that the same approach had been adopted for other awards 'allowing shareholders to bring indirect claims in respect of the reduction in the value of their shares'.

201. *If the Tribunal concluded that other Tribunals have accepted indirect claims and that it found no reason to depart from that case law, this is, in the Committee's opinion, a valid reason on which to base its decision. Argentina agreed with this opinion but argued that the reference to decided cases is not a valid way to state reasons for an award. Yet, it did not explain why this is the case; why an Arbitral Tribunal cannot state the reason for its decision, indicating that other cases have been decided in a particular manner and that with respect to the case that it is considering it can find no reason to depart from that decision.* Stating that it has no ground to disagree with decisions in another case means that the Tribunal accepted the reasoning in those decisions and applied that to the specific case submitted to it. Based on the foregoing, the Committee finds that Argentina's assertion of a failure to state reasons is without merit. (907) (emphasis added)

***[2] The Authority of Past Arbitral Decisions***

435. In investment arbitration, past arbitral decisions constitute the main language and argumentative framework of the parties' pleadings. The reasoning style of arbitral awards resembles that of common law jurisdictions, considering prior arbitral awards to justify their decisions or distinguishing the case at hand with the cases previously decided. The use of arbitral precedent in arbitral awards has been studied in quantitative terms. In a study undertaken by the Jeffrey Commission, between 1990 and 2006, nearly 80% of ICSID arbitral awards cited other arbitral awards. (908) These awards contain countless citations of and discuss previous arbitral awards. Some scholars have raised concerns of the *abuse* of arbitral precedents in investment arbitration, since it would make arbitral proceedings and submissions longer, more expensive, and inefficient. (909)

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436. In commercial arbitration, citation of past arbitral decisions is less frequent, amounting to less than 15% of the arbitral awards that are accessible. (910) This led certain commentators to argue that past decisions in commercial arbitration do not play a significant role in arbitral decision-making. (911) It has also been suggested that the role of past arbitral decisions is limited to jurisdictional and procedural aspects, but not to the merits of the cases, given that

most cases are governed by domestic law and that the case-driven propensity of international commercial arbitrators to transnationalize the contract law is in contradiction with the idea of precedent. (912)

437. Arbitral tribunals may, however, take into account past arbitral decisions in ways other than citing precedents. As Weidemaier explains:

precedent may sometimes operate in ways that cannot readily be observed. As an example, consider a system in which arbitrators decide cases but do not provide any explanation for their decisions and do not make their awards available to anyone but the parties. Within the system, of course, arbitrators are familiar with their own past decisions and may strive to maintain consistency across cases. Moreover, when arbitrators sit in panels of three, they may share information about previous decisions. In each scenario, knowledge of past decisions may shape a decision made today. We might therefore describe the arbitration system as 'precedential' even if it produces awards that obscure the operation of precedent and even if the disputants themselves are unaware that precedent exists. (913)

438. The fact that commercial arbitrators do not engage in (as their investment arbitration colleagues do) a common law precedent citation style does not mean that past arbitral decisions do not play a role in international commercial arbitration. Arbitral tribunals frequently refer to the solutions adopted in past arbitral awards by referring to them as general principles of arbitration or international contract law and cite publications or the work of certain private institutions that codify the solutions of arbitral awards. (914) Clear examples include those frequent cases where the parties and the arbitrators cite a commentary of the
P 164
applicable arbitration rules, a commentary of the CISG, or a book on international contract law. (915) These books significantly base their arguments on the solutions found in arbitral awards. The same can be said of the codifications of private institutions, such as some of the UNIDROIT Principles. Arbitral tribunals may also refer to principles, rules, or practices that are 'generally admitted' without substantiating the source of those norms. (916) That is the case regarding the maxims of contract interpretation, the exceptional character of hardship, and the methods that arbitrators follow to select the applicable rules of law in the absence of choice. Although some of these principles may be exclusively based on domestic law, many of them have developed in the practice of arbitral tribunals. (917) Arbitral tribunals also refer to 'case law' in general, but do not refer to any particular case. (918) Reference to the terms 'it is generally admitted', 'case law', and the like resembles the way civil law courts refer to the solutions arising from a consistent line of cases. (919)

439. The fact that most cases are governed by domestic law does not exclude the role of past arbitral decisions in questions of the merits. As discussed in §3.04, international arbitrators transnationalize the domestic law applicable to the contract by referring to 'general principles', 'trade usages', or 'case law'. Past international commercial arbitral decisions thus play an important role in the determination of cases governed by national law.

440. This being said, it remains to be seen which motives lead arbitrators to follow past arbitral decisions and the degree of deference they pay to them. These questions relate to the authority of past arbitral decisions. (920) This concept is related to the characteristics that lead arbitrators to endorse past decisions as appropriate for the resolution of a similar dispute.

441. Commentators and arbitrators often refer to the 'persuasive' authority of past arbitral
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decisions. (921) But the authority arising from the substantive correctness of the past decision cannot explain why arbitrators consider themselves constrained to *consider* past decisions in the first place. The persuasiveness of a past decision is rather a condition to pay deference to it, and is of fundamental importance because arbitration is decentralized and the first decision is not always the best one.

442. A study of arbitral awards demonstrates that arbitrators consider past decisions for reasons including pragmatism, the need to demonstrate lack of arbitrariness, and deference to the arbitral community. These reasons represent three types of social authority of past arbitral decisions that we call (a) the *efficiency* rationale, (b) the *legitimacy* rationale, and (c) the *communitarian* rationale.

*[a] The 'Efficiency' Rationale for the Authority of Past Arbitral Decisions*

443. Deciding arbitration cases is not easy. It requires counterbalancing intricate legal arguments in a particular social and economic environment. As discussed in Chapter 3, arbitrators have no guidance in many jurisdictional, procedural, and substantive matters. Thus, every past decision becomes a highly valuable experience to other arbitrators in similar cases, and will help them to discern legal arguments more quickly. (922)

444. Investment arbitral awards that refer to past decisions invariably refer to this benefit. Arbitral tribunals often justify considering past arbitral decisions because they are instructive, (923) useful, (924) informative, (925) or illustrative, (926) they offer guidance, (927) inspiration, (928) or shed/throw 'light' on the present decision. (929)

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445. The *Ambiente Ufficio and ors. v. Argentina* award is an excellent illustration of the efficiency rationale for the authority of past arbitral decisions. The arbitral tribunal had to deal with the decision on jurisdiction of a case brought collectively by bondholders against

Argentina. The case required difficult decisions in matters of jurisdiction and procedure, since the ICSID Convention and Arbitration Rules and the investment treaty in question are not designed for collective claims. The tribunal decided to consider a prior arbitral decision dealing with the same issue, the case of *Abaclat and ors. v. Argentina*. The tribunal decided to follow this case for reasons of 'expediency', though also taking into consideration Abi-Saab's dissenting opinion. In the words of the tribunal:

The Tribunal has already stated that it will refer to the Abaclat case, whenever appropriate, and it considers this a valuable opportunity to do so for reasons of expediency, namely in order not to reduplicate an effort that has already been made by its sister Tribunal. (930)

446. The degree to which this rationale for the authority of past arbitral decisions constrains arbitrators is dealt with together with the legitimacy rationale for the authority of past arbitral decisions.

*[b] The 'Legitimacy' Rationale for the Authority of Past Arbitral Decisions*

447. International arbitrators also consider past arbitral decisions to demonstrate that they are not being arbitrary but fair. This legitimizing role of past arbitral decisions is evident where the parties themselves cite past arbitral decisions. (931) Many arbitral tribunals have held that they consider past arbitral decisions because the parties relied on them extensively
P 167 in their memorials and pleadings. (932) In certain cases, arbitral tribunals have held that arbitrators 'are bound to [be attentive to prior decisions] as part of their basic duty to consider the Parties' arguments'. (933) Consideration of past arbitral decisions is related to due process, although the failure to consider the past decision cited by the parties will not necessarily constitute a ground for setting aside or annulling the arbitral award.

448. Leaving aside those cases where the parties cite past arbitral decisions, arbitrators also follow past arbitral decisions to legitimize their decision. As a matter of equality and formal justice parties expect arbitrators to treat like cases alike. Past arbitral decisions serve to render the use of arbitrator's decision-making reasonable, because like cases have been decided in the same way in the past.

449. In commercial arbitration, reference to past arbitral awards is frequent in matters where arbitrators have to justify a choice between competing legal rules that do not have a clear hierarchy. Clear examples are where arbitrators have to decide whether the contract is contrary to public policy, (934) the dispute is inarbitrable, (935) or the law designated by the contract has to be disregarded on the basis of a transnational rule. (936) Arbitrators also have recourse to past decisions in order to justify the existence of a rule that is unclear or
P 168 indeterminate. 'Rules of law' illustrate this well. Arbitrators frequently define such rules through case law (937) or the legal writings that systematize past decisions. (938) In some cases, arbitrators resort to past arbitral decisions exclusively to demonstrate the existence of a rule. (939) In other cases, past decisions appear to be a source or reason that is added to others. (940) Arbitrators also frequently cite past arbitral decisions when deciding the law applicable to the merits in the absence of a choice by the parties. (941)

450. Deciding against what has been previously decided in a like case or matter may jeopardize arbitrators' legitimacy; the parties might argue that instead of settling disputes based on law, arbitrators are being arbitrary. For this reason, arbitrators will try to preserve the appearance of continuity and stability. (942) As opposed to commercial arbitral awards, consistency is often a frequently quoted goal in investment arbitral awards. (943) Arbitrators link the respect of consistency with the legitimate expectation of the investors and states and consider it a principle of the rule of law. (944)

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451. Other cases have linked the need for consistency to arbitrators' need to develop a law in its infancy. (945) For instance, in a frequently cited passage, the arbitral tribunal in *Austrian Airlines v. Slovakia* held:

The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. ... It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a 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. (946)

452. In these cases, arbitrators' consideration of past decisions is presented as a way of legitimizing the arbitral award vis-à-vis a larger community. Schultz argues that investment arbitrators should not see themselves as lawmakers because furthering the rule of law and pursuing predictability is not necessarily a moral positive. (947) He argues that consistent rules are not inherently preferable to inconsistent ones, especially when these rules are bad. Douglas put forward a similar argument. (948) While these concerns are valid, it should be noted that consistency operates as a weak rationale for authority in investment arbitration. It leads arbitrators to consider or discuss prior cases, but not necessarily to follow them. Otherwise arbitrators would be bound to follow every first (bad) past decision for the sake of consistency.

453. In fact, arbitrators often note that the degree of deference to past decisions depends on the persuasiveness of the past decision as well as whether it arose from a consistent line of

P 170 cases. For instance, in *Daimler v. Argentina*, after mentioning that it had to be consistent with past decisions deciding like cases, the arbitral tribunal declared:

> This latter consideration will weigh more or less heavily depending upon: a) how 'like' the prior and present cases are, having regard to all relevant considerations; b) the degree to which a clear *jurisprudence constante* has emerged in respect of a particular legal issue; and c) the Tribunal's independent estimation of the persuasiveness of prior tribunals' reasoning. (949)

454. As mentioned above, the only condition for deferring to a past arbitral decision in a similar case is its persuasiveness. Arbitrators would not pay deference to an unpersuasive decision for the mere sake of consistency. Consistency, as efficiency, socially constrains arbitrators to *consider* past decisions. But if a solution is found in a consistent line of cases or a *jurisprudence constante* the arbitrators will be required to do something more than consider the decision because consistency evidences the existence of a consensus among the arbitral community on the persuasiveness of the arbitral solution. But the rationale for the authority of the solution arising from a consistent line of cases is not based on the 'legitimacy rationale' (more specifically, on the need for consistency), but on the 'communitarian rationale'.

*[c] The 'Communitarian' Rationale for the Authority of Past Arbitral Decisions*

455. The arbitrator drafts the award as if he or she was in an auditorium filled with an audience. (950) This leads to assessing the arbitrator's views, which will be discussed by the audience. (951) Arbitral tribunals constitute this audience. The lawyers of the parties are also part of the audience, as well as a wider network of ad hoc committees, arbitral institutions, scholars, etc. As mentioned above, these subjects belong to the same interpretative community and influence the views of its members. (952)

456. Deference to colleagues may constitute a constraint to consider past arbitral awards. (953) But more importantly, the impact and persuasiveness of a decision depend to a large extent on their acceptance by the arbitral community. (954)

457. When an arbitral tribunal and other subjects consider and discuss past arbitral decisions,
P 171 they create a dialogue that builds consensus on certain arbitral solutions. This dialogue is a dialectic process through which the solutions and interpretations of past awards are criticized, modified, and accepted. (955) The general acceptance of solutions or interpretations shows that they represent an agreement of the arbitral community on their persuasiveness. (956)

458. A good example of this dialogue is the development of the rule that a bribery contract is void in international arbitration. This rule appeared in the 1960s in the famous *Lagergren* award as a procedural rule against the exercise of arbitral jurisdiction:

> The case establishing that rule was reported, elaborated on, and then incorporated into the rich literature regarding international arbitration procedure. Later, it was transformed into a substantive rule for invalidating contracts, and it thus became part of the generally accepted principles of international arbitral decision making, forming non-binding but highly persuasive rules to guide future tribunals. (957)

459. The solutions arising from past decisions that have become widely accepted among the arbitral community represent a social constraint for future tribunals not only to consider them but also not to deviate from them. As mentioned above, they become 'persuasive' within the arbitral epistemic community and that community will tend to marginalize diverging interpretations. (958)

460. A good example of the manner in which agreed solutions constrain arbitral decision-making is the way in which investment arbitral tribunals deal with the solutions arising from a line of consistent cases or a '*jurisprudence constante*'. (959) In a large number of cases, investment arbitral tribunals have held that arbitrators 'should /have the duty/ought to' follow
P 172 the solution found in a consistent line of arbitral awards unless there are 'compelling contrary grounds'. (960) One of these solutions found in a consistent line of cases is the standing of shareholders in investment arbitration to claim for damages caused by measures directed at the local companies in which they hold shares. The interpretation of investment treaties and the ICSID Convention allowing shareholders' derivative claims has been followed by about fifthly arbitral awards, and arbitral tribunals are reluctant to change the status quo of the arbitral solution no matter how convincing the counter arguments of respondent states are. (961) In *Daimler v. Argentina*, for instance, the claimant advanced this *jurisprudence constante* to support its position that as a shareholder it had the right to claim for the damages suffered by the local company. Argentina objected that there was no doctrine of *stare decisis* in international arbitration and therefore that the tribunal had to interpret the investment treaty autonomously. After considering past arbitral awards, the tribunal held:

> The present Tribunal agrees with [the Claimant's] conclusion. Indeed, some two-dozen previous investor-State tribunals have confirmed that the ICSID Convention, in concert with the definition of 'investment' offered by numerous BITs, allows shareholders to bring claims for harms to their investments in locally incorporated companies. The Respondent has not been able to point to a single case in which this objection to an investor-State tribunal's jurisdiction has been upheld. While the Tribunal is not bound to follow the example of prior tribunals, it can find no justification either in the text of the German-Argentine BIT or in general international law to depart from the overwhelming *jurisprudence constante* that has emerged around this particular legal question. (962)

461. The *Daimler v. Argentina* case demonstrates that the notion of *jurisprudence constante* has been applied as a presumption in favour of the persuasiveness of the solution found in the consistent line of arbitral awards, the reversal of which requires a high standard of substantiation by the party contesting it. Indeed, the consistent solution is not one of many permissible solutions, but appears to be the *right* one for the arbitral community. The communitarian rationale for authority is thus stronger than the efficiency and legitimacy rationales for authority because they not only constrain arbitrators to *consider* past decisions, but also curtails other possible reasons for deciding.

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### [C] Legitimacy Concerns of a Wider Public

462. The legitimacy of adjudicators has been traditionally based on either their popular election or their constitutional mandate (implied consent). (963) This source of legitimacy, however, has lost strength in the last decades, as many disputes became internationalized and '[i]t is ... impossible to find an adjudicator who is democratically legitimate in respect of both parties'. (964) It has been suggested that the source of judicial legitimacy is technocratic – that is, found in the ability of judges to decide disputes in accordance with the law. (965) But because substantive solutions in complex societies are not easily determined, Luhmann and Tyler argue that the source of the legitimacy of courts is based on the fairness of the process. (966)

463. Recourse to arbitration and states' support of arbitration demonstrate society's acceptance of arbitration as a legitimate dispute settlement mechanism. (967) States' race to the bottom regulation and overwhelming support of arbitration also evidences democratic legitimacy as most arbitration laws are voted in parliament. These elements are yet merely descriptive and cannot account for the reasons behind the perception of states and the users of arbitration on the performance of arbitration.

464. The most important source of legitimacy of arbitration is procedural. (968) In particular, arbitration provides an impartial, culturally neutral, and flexible justice. It has been suggested that arbitration offers an improved justice compared to domestic courts, particularly with regard to international disputes. Paulsson explains that a great number of reports of international organizations and NGOs studying the state of judiciaries around the world are disheartening. (969) 'Most of these studies conclude that ordinary citizens have learned to expect little from the courts, as a consequence of long delays, political influence in the courts, ignorant judges, corruption, hostility toward women and the poor, prohibitive costs, and lack of transparency.' (970) While a few jurisdictions could be considered to have a truly independent judiciary, the judiciary remains locally oriented and not well adapted for transnational disputes. (971) Arbitration allows parties to have access to a justice that is more satisfying and adapted to their needs. It is instructive to refer to an example provided by Cuniberti of a commercial litigation between a French company and a foreign company:

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> If the case is litigated in France, it will go before a French commercial court. French commercial courts are staffed by members of the business community, who serve part-time as judges. There is no requirement that they have legal training. Hearings before French commercial courts typically last less than an hour. Witnesses are virtually never heard by the court. In any case, a French rule of evidence makes evidence originating from any of the parties inadmissible, which means that no employee of any of the two companies may validly testify. If this company goes to arbitration, it will be able to appoint a prestigious jurist as an arbitrator, as most likely will its opponent. The hearing will last for several days. Witnesses will be heard, in particular employees who negotiated the contract for each company. The parties will expect the arbitrators to study carefully all the written submissions and the evidence submitted. It will cost more to the parties, but the French company will clearly see what it is getting for its money. The arbitral process will not be marginally different, the arbitral process will be essentially different. (972)

465. As for states, their interests in supporting and paying deference to international arbitration are also evident. First, it alleviates the burden on state courts. (973) Second, international arbitration promotes trade and investment. This view is enshrined in the Preamble of the UNCITRAL Model Law, which refers to the 'value of arbitration as a method of settling disputes in international commercial relations' and states that 'the establishment of a model law ... contributes to the development of harmonious international economic relations'. Similarly, the preambles of many investment treaties refer to the purpose of protecting and promoting foreign investment.

466. Although these virtues have allowed international arbitration to become the main dispute settlement mechanism of international trade and investment, the legitimacy of international arbitration is dynamic and depends on arbitrators' day-to-day performance. If arbitration performance is illegitimate, social actors may raise concerns about the legitimacy of arbitration or arbitrators' decisions. These actors include the users of arbitration (or their counsel), (974) states, (975) the EU, (976) the NAFTA Trade Commission, (977) NGOs, (978) International Organizations, (979) academia, (980) and civil society in general. (981) These actors raise concerns about arbitration and arbitrators' decisions through a wide range of means, including public statements, letters to arbitral institutions, articles, etc. (982) This control of arbitration's performance by society constitutes some sort of an informal system of checks and balances which is at the origin of policy changes. (983) Indeed, these concerns may

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result in state regulation, limitation, or even prohibition of arbitration.

467. These changes can be particularly slow, however. The amendment of laws and signing of treaties are lengthy processes that may take many years and significant domestic and/or international negotiations. But these changes do arise. Examples of these changes include a new generation of investment treaties that include transparency provisions. (984) Another good example is the 2015 UNCITRAL Convention on Transparency in Treaty-based Investor-State Arbitration, which imposes the application of the UNCITRAL Rules on Transparency to
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arbitrations based on investment treaties concluded before April 2014, conducted under either the UNCITRAL Rules or other rules. (985) More radical examples include the denunciation of the ICSID Convention and/or investment treaties by Bolivia, Ecuador, and Venezuela. (986)

468. The concerns raised by these actors also constrain arbitral decision-making and the regulation of the arbitral process by arbitral institutions. While some commentators have raised concerns about the legitimacy of commercial arbitration, (987) we limit our discussion to investment arbitration where legitimacy concerns are having a farther-reaching impact.

***[1] Concerns about the Legitimacy of Investment Arbitration***

469. Many actors, from states to NGOs to civil society, have raised concerns about the legitimacy of investment treaty arbitration and investment arbitrators' decisions. (988) These criticisms have highlighted the differences between commercial and investment disputes and the unsuitability of international arbitration to deal with public claims. The paper presented by the IISD to UNCITRAL in 2006 summarizes these concerns well:

First, the disputes often arise in public service sectors such as water, oil and gas, electricity, transport, waste disposal and telecommunications. The public clearly has an interest in seeing that disputes in these critical sectors are resolved in a way that ensures their rights to these public services are not impaired.

Second, investor-state arbitrations may challenge regulatory measures intended by states to protect the public welfare, if the measure directly or indirectly affects the value of the investment. Such measures might include legislation directed to human rights, health and safety, labour laws, or environmental protection. The arbitration may thus impact the rights and welfare of those individuals and communities where an investment is located.

Third, the threat of investor-state arbitration is now seen by many to have an informal 'chilling effect' on states adopting public welfare regulations in the first place. Like the sword of Damocles, investors have been known to use the spectre of arbitration proceedings to discourage governments from pursuing regulations in their citizens' interest. For example, the fact that in the mid-1990s the US tobacco lobby threatened to commence NAFTA arbitration proceedings against the Canadian government if it proceeded with planned restrictions on cigarette packaging is no secret. The regulations proposed were never adopted.
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[...]

Finally, there is a broader context at work. International investment law has now become an important part of the international law relating to globalization. The agreements that this law is based on – bilateral and regional investment agreements and free trade agreements with chapters on investment – are widely recognized as being often vague or general in their terms. This gives tribunals an enormously important role in how the law is developed. Investor-state case law is now central to the future direction of international investment law. While tribunal decisions are not binding on future tribunals, tribunals nevertheless refer to the decisions of their predecessors. This places a higher level of importance on the process of interpreting and applying the law in the investor-state context. As a result, the arbitration process may be as important to the development of international investment law as the negotiation of the investment agreements themselves. (989)

470. The paper concludes that investment arbitration needs to 'bring the most basic democratic principles of good governance and the rule of law to bear in the investor-state process' and that arbitration rules fail to ensure 'transparency (including public participation in the arbitral process), impartiality, accountability, and consistency'. (990) Other actors have also criticized investment arbitrators for being too investor-biased and for applying investment treaties as an insurance policy. (991) These criticisms include, *inter alia*, the use of the MFN clause to procedural standards, the sole effect doctrine for finding an expropriation, and an overly high standard of good governance with regard to the fair and equitable treatment standard. (992)

471. Although many of these concerns continue to be in vogue, they have shaped arbitrators' decisions in the last years.

***[2] Transparency, Regulatory Powers of States, and Consistency***

472. Investment arbitral tribunals are increasingly taking into account the concerns raised by many actors about the suitability of international arbitration to settle investment treaty disputes and the correctness of arbitral decisions. Good examples are: (a) the almost systematic admission of amicus briefs, (b) investment tribunals' increasing readiness to balance investor's rights with those of the state in the interpretation and application of

investment treaty provisions, and (c) investment tribunals' increasing efforts to strive for consistency.

P 178 473. First, although many arbitration rules are silent on whether non-disputing parties could participate in the arbitral procedure, investment arbitral tribunals have allowed the submission of amicus briefs in order to strive for transparency. This rationale was clearly expressed by the tribunal in the landmark decision on *amicus* briefs in the *Methanex Corp. v. United States* arbitration:

> There is also a broader argument ... [that the] arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm. (993)

474. However, the admission and status of amici curiae was uncertain in 2003 when the tribunal in *AdT v. Bolivia* rejected the petitioner's request on the basis that it had no authority to grant access to the case and that it had no need to call for any witnesses. (994) This decision led to heavy criticism:

> *The New York Times* labelled ICSID tribunals as 'Secret Trade Courts', while commentators criticized the lack of transparency of, and civil society's access to, the arbitrations. One NGO denied amicus curiae status lambasted the decision as 'profoundly undemocratic', 'inexcusable', a 'closed-door process' and an 'extreme example of excessive power granted to corporations'. Criticism prompted change. The system of investor-State arbitration began to permit greater – but not unlimited – access to amici curiae. (995)

475. Since then, the admission of amici has been enshrined in the NAFTA Free Trade Commission's statement on non-disputing party participation and the ICSID Arbitration Rules

P 179 modified in 2006, and most investment arbitral tribunals have allowed amicus submissions under different arbitration rules. (996) In some of these cases, arbitral tribunals even took the initiative to call for submissions of non-disputing parties. (997) Only a few arbitral tribunals have refused non-disputing parties submissions. (998) The reasons given by these tribunals for refusing the requests of the petitioners were that they did not express a clear public interest in the dispute, were not within the scope of the dispute, or because the parties had vetoed the briefs. (999) The admission of amicus briefs has not been able to render investment arbitrations totally transparent, since arbitral tribunals do not give non-disputing parties access to hearings (absent consent by the parties) or written submissions. (1000) But it is fair to say that arbitrators are constrained to allow amicus briefs when the request to admit them expresses a clear public interest that is within the scope of the dispute.

476. Second, arbitral tribunals have started to interpret certain investment treaty provisions more restrictively, by recognizing the need to balance investors' protection with the right of the host state to regulate. One example is the evolution of the understanding of regulatory expropriation. In the early 2000s, most arbitral awards favoured the 'sole effect' doctrine for regulatory takings. Under this doctrine, all regulatory measures that had the effect of substantially depriving the investor of its investment had to be compensated, no matter how beneficial these measures were to society. The *Metalclad* award (2000) illustrates this well. (1001) The investor had obtained the necessary federal permits to operate a waste landfill. The local municipality, however, subsequently denied a construction permit, and the facility was forced to close. Later, the state governor issued an ecological decree that had the effect of barring the operation of the facility. The tribunal held, *inter alia*, that Mexican environmental decree itself was expropriatory and that the environmental aspect of the Mexican conduct was irrelevant to its finding of expropriation. (1002)

477. The same stance can be found in other arbitral awards of the early 2000s. For instance, in

P 180 *Pope & Talbot* (2000), Canada argued that non-discriminatory regulations, such as the implementation of the five-year Softwood Lumber Agreement concluded by Canada and the US in 1996, could not be expropriatory. The tribunal disagreed with Canada and held that Article 1110 of NAFTA 'cover[s] non-discriminatory regulation that might be said to fall within an exercise of a state's so-called police powers'. (1003) It argued that a blanket exception for regulatory measures would create a 'gaping loophole in international protections against expropriation'. (1004) Likewise, in the *Santa Elena v. Costa Rica* award (2000), the tribunal held in very clear terms:

> Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains. (1005)

478. Different social actors heavily criticized these decisions, as they were objectionable from the perspective of sustainable development and environmental protection. (1006) The threat of investor-state arbitration was seen to have an informal 'chilling effect' on states adopting public welfare regulations. (1007) These criticisms resulted in a soft transition of the interpretation of expropriation with respect to regulatory measures. In the *Tecmed v. Mexico* award rendered in 2003, the tribunal considered it necessary to determine whether regulatory measures were proportionate for its determination of the existence of expropriation. (1008) The tribunal timidly built its interpretation of expropriation on past arbitral awards by

refusing to give effect to the police powers doctrine. (1009) However, it decided to apply a proportionality test between the purpose and burden of the measure, which it drew from the case law of the European Court of Human Rights (ECtHR). (1010) More radically, in 2005 the
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*Methanex* award introduced the 'police power' doctrine to investment arbitration. (1011) Methanex claimed that a Californian ban on MTBE, a fuel additive, was (among other claims) an expropriation of its methanol production business. The tribunal rejected the claim and held:

> as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios,* a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation. (1012)

479. Since then, arbitral tribunals have increasingly applied the police powers doctrine. (1013) It is difficult to find an award rendered since 2010 holding that all regulatory measures, irrespective of their character, must be compensated.

480. Third, as discussed above, arbitral awards are increasingly making an effort to strive for consistency. Statistics show that in the last few years the citation of precedents in investment arbitration has increased exponentially, and that many investment tribunals mention the need to strive for consistency (*see* §4.01[B]).

## §4.02 INSTITUTIONAL CONSTRAINTS

481. Arbitral decision-making also has institutional constraints that contribute to the convergence of the solutions made by arbitrators. These constraints are twofold: jurisdictional (A) and administrative (B).

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### [A] Jurisdictional Control

482. International arbitrations conducted under the arbitration rules of arbitral institutions may provide for control of the arbitral award by permanent or ad hoc tribunals. These mechanisms include annulment in ICSID arbitration (1) and appeal under certain arbitration rules (2).

#### *[1] ICSID Annulment Mechanism*

483. The review of ICSID awards is governed by the ICSID Convention. The Convention stipulates in Article 53(1) that 'the 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 most far-reaching remedy against an arbitral award available to the parties under ICSID is the annulment mechanism established in Article 52. According to Article 52, a so-called annulment or ad hoc committee composed of three persons appointed by the Chairman of the ICSID Secretariat, having the authority to annul the award or any part thereof, may be established at the request of a party. The exclusive grounds for annulment are specified in Article 52(1):

> (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 the reasons on which it is based.
>
> (emphasis added)

484. These grounds limit the control of the arbitral award to its integrity, and do not include control of its correctness. A manifest failure to apply the applicable law in accordance with Article 42(1) of the ICSID Convention may constitute a manifest excess of power. (1014) But the annulment mechanism neither enables ad hoc committees to review the decision arrived at by the tribunal, nor is designed to bring about consistency in the application of the ICSID Convention or international investment law. (1015) In light of this it could be argued that the constraints imposed by ICSID annulment committees would not contribute to the emergence of general rules. The practice of ICSID ad hoc committees suggests otherwise, however.

485. Ad hoc committees' decisions show that ad hoc committees have a wide perception of their functions (whether they interpret an excess of power broadly or restrictively). This has
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allowed them to annul awards for errors of law, act as supervisory educational-type committees over arbitral tribunals, and/or give their seal of approval to arbitral tribunals' interpretations.

486. First, despite the clear prevalence given to finality over correctness under the ICSID Convention, (1016) some annulment committees have annulled awards for errors of law. For instance, in *Helnan v. Egypt*, the ad hoc committee decided to annul a paragraph of the award in which the arbitral tribunal held that the failure to have recourse to the local courts precluded expropriation as a substantive requirement. (1017) The tribunal cited the argument

in the *Generation Ukraine v. Ukraine* award, that a failure to seek local redress bars an international claim. The ad hoc committee annulled the ruling because it said that it would enable a 'local remedies' requirement to be introduced through the back door and that this was against the *jurisprudence constante* of the ICSID system. Similarly, in the *Sempra* and *Enron* cases, the committees annulled the tribunals' interpretation of the non-precluded measures provision (Article XI) of the US–Argentina BIT in the light of Article 25 of the ILC Articles on State Responsibility (necessity). In *Sempra* the ad hoc committee held that the tribunal had identified the applicable system of law and the applicable rules correctly. (1018) However, it had erred in the relationship between the two laws. The ad hoc committee held that the error in the interpretation of an applicable rule with regard to the applicable system of law amounted to its non-application, and thus a manifest excess of powers. (1019) In *Enron*, on the other hand, the committee had no problem with the tribunal's reliance on Article 25 of the ILC Articles on State Responsibility to interpret Article XI of the US–Argentina BIT, but objected to
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the manner in which the tribunal had applied that provision. (1020) Specifically, the tribunal had followed the findings of an expert on the questions of whether the measures adopted by Argentina were the only way for Argentina to safeguard an essential interest and whether Argentina had contributed to the situation of necessity. (1021) The ad hoc committee decided that the tribunal had failed to apply Article 25 of the ILC Articles and hence the proper law. (1022)

487. Second, ad hoc committees frequently act as supervisory educational-type committees by criticizing or giving a seal of approval to arbitral tribunals' interpretations. For instance, the annulment committee in *CMS v. Argentina* held that the same error of law with regard to the interpretation of Article XI of the US–Argentina BIT that had led the *Sempra* ad hoc committee to annul the award did not amount to a manifest excess of powers under Article 52 of the ICSID Convention. (1023) But this fact did not prevent the ad hoc committee from criticizing the arbitral tribunal's reasoning and pointing to the different functions of Article XI of the US–Argentina BIT and necessity. The committee elaborated on this point and declared that the tribunal had committed a manifest error of law in that respect. Similarly, in *Fraport* the arbitral tribunal had interpreted the BIT on the basis of the Instrument of Ratification of the Philippines. (1024) The ad hoc committee pointed out that the tribunal's method of treaty interpretation was not in accordance with Article 31 of the VCLT. (1025) And it instructed the tribunal on how to interpret a treaty correctly. (1026) In *Vivendi II* the committee followed a similar approach. (1027) The central question was the alleged failure of an arbitrator to fully disclose her role as a director of a bank that owned shares in one of the claimants. The committee refused to annul the arbitral award because the arbitrator was unaware of the conflict and her independence was not impaired. (1028) The decision yet criticizes the arbitral tribunal and includes a discussion on arbitrators' ethics and the proper manner to handle disclosures with regard to potential conflicts of interest. (1029) These committees 'assumed the role of Supreme Court judges whose task is to give policy guidelines or of educators who dispense gratuitous advice'. (1030)

488. Where ad hoc committees agree with the decision of the tribunal they frequently confirm
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or give a seal of approval to the interpretation of arbitral tribunals or to a consistent line of cases, and expand on its reasons. A good example is the decision of the ad hoc committee in the *Azurix v. Argentina* case with regard to the right of shareholders to claim for damages indirectly suffered through measures directed at companies in which they hold shares. Different tribunals had held that shareholders have a direct right to bring a claim before an arbitral tribunal that is different from the right of the company. But the reasons given in almost 50 arbitral decisions were ambiguous and unsatisfactory. (1031) The *Azurix* committee confirmed the *jurisprudence constante* and explained the reasoning in some 20 pages of its decision by drawing an analogy between the shareholders' action to claim for indirect damages and the situation of some parties to contracts of insurance. (1032)

489. This expansive view of ad hoc committees' powers would arguably not contribute to the emergence of consistent arbitral solutions because ad hoc committees are not superior to arbitral tribunals in the same way as appeal courts are superior to first instance courts in domestic legal systems. Annulment committees are ad hoc, their members change all the time, and they are not entitled to create binding precedents or a binding *jurisprudence*. While it is true that tribunals and ad hoc committees participate in the process of building consistent solutions on an equal footing, arbitral tribunals have given precedence to the decisions of ad hoc committees where the latter have annulled the solution in question. The claimant in *Burlington v. Ecuador* argued that the decisions of ad hoc committees with regard to the protection of shareholders by an umbrella clause were no superior to those of arbitral tribunals. (1033) The *CMS* tribunal had allowed CMS, a minority shareholder in a company that had signed an agreement with the Argentinean authorities, to claim for the breach of that contract under the umbrella clause. The *CMS* ad hoc committee annulled the award because the tribunal had failed to state the reasons why a shareholder should be allowed to claim under a contract it had not signed. Burlington argued that it was allowed to claim for the contract of its subsidiary on the basis of the reasoning of the *CMS* tribunal, and disregarded the value of the decision of the ad hoc committee that had annulled that decision. The Burlington tribunal disagreed. It held that:

Although counsel for the Claimant argued that '[a]d hoc committees are not inherently superior to [a]rbitral [t]ribunals, whether in their composition or in their entitlement to create jurisprudence', one cannot disregard that the ICSID Convention entrusts ad hoc committees with the power to annul awards and that this ad hoc Committee annulled this award on this

very point. (1034)

490. But this is not necessarily the case with all decisions of ad hoc committees. Clear examples are the conflicting decisions of the ad hoc committees in the cases *Mitchell v. Congo* and *Malaysian Historical Salvors v. Malaysia* in which they annulled the arbitral awards for opposing reasons. In *Mitchell v. Congo*, the ad hoc committee annulled the award because the tribunal had not followed the so-called Salini test, whereas the ad hoc committee in *Malaysian Historical Salvors* annulled the decision of the tribunal on the grounds that the tribunal had followed the Salini test. (1035)

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491. For all these reasons, despite the absence of an appeal mechanism in ICSID, ICSID ad hoc committees intensify the dialogue among the members of the arbitral community on how to decide.

#### *[2] Appeal Mechanisms*

492. There is a growing movement among arbitral institutions to provide for the making of appeals. (1036) The Court of Arbitration for Sport (CAS) provides the best example: the CAS Appeals Division hears appeals from a range of bodies that make first instance decisions, and this accounts for approximately 90% of the CAS's caseload. (1037) The second paragraph of Rule 47 of the CAS Code provides that '[a]n appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned'. The CAS Appeals Division is entitled to review the facts and the law relating to a first instance decision, and may replace the old award by a new one or remit the matter to the original decision-maker. (1038) As it allows appeals on questions of law, the CAS appeal mechanism has contributed to the formation of a consistent case law of what has been called a *lex sportiva*. (1039) This *lex sportiva* includes 'principles of sports law, such as the concepts of strict liability (in doping cases) and fairness'. (1040)

493. Appeals mechanisms are not limited to the CAS, and since the beginning of the twenty-first century arbitration institutions have been establishing appeal procedures. In 1999 the Centre for Conflict Prevention and Resolution (CPR) issued its Rules for Arbitration Appeal Procedure, which can apply to arbitrations whether or not they are administered by the CPR. These rules contain an opt-in annulment and appeal mechanism, arranged by the CPR, for arbitral awards. The appeal/annulment procedure is limited to arbitrations conducted in the US and, as such, it is based on the grounds for annulment provided under US law and the appeal tribunal is chosen from a panel consisting of former US federal judges. (1041)

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494. Appeal mechanisms also exist in the rules of other arbitral institutions. For instance, the Rules of the Spanish Court of Arbitration as amended in 2011 include an opt-in internal appeal mechanism. (1042) The second instance tribunal consists of three arbitrators who are appointed by the Spanish Court of Arbitration. 'The scope of the appeal permits the second instance tribunal to engage in a full review of the merits, including if necessary the production of new evidence, and render an amended or new award.' (1043) Similarly, the Rules of the European Court of Arbitration (ECA) provide for an internal appeal mechanism in international arbitration. (1044) But the appeal mechanism does not work as an opt-in mechanism, since the ECA Rules provide that any award issued under its Rules will be subject to a right of appeal to an Appellate Arbitral Tribunal, unless the parties expressly agree to exclude this right. (1045) The ECA Appellate Arbitral Tribunal is also permitted to perform a full review of the merits of the first instance award. The ECA's 'mission' is to create a culture of arbitration and 'to help litigants, who look for alternative solutions, in a spirit of service to them above any other goal'. (1046)

495. Except for the CAS appeal system, these appeal mechanisms remain somewhat undeveloped. In contrast to CAS arbitrations, parties to commercial arbitrations rarely have recourse to appeal mechanisms, preferring the finality of the award to its correctness. It has been suggested that the CAS has been successful in providing an appeal mechanism that departs from the principle of finality because the contractual relationship between parties to CAS arbitrations is fundamentally different. (1047) Sport relationships are generally vertical relationships between athletes and organizations and, unlike commercial arbitration; sports arbitration is not truly consensual in nature. (1048)

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### [B] Administrative Control

496. Apart from the control mechanisms of arbitral institutions with regard to the appointment and removal of arbitrators, which were discussed in §1.02, arbitral institutions may constrain arbitral decision-making by two sorts of administrative control: first, they may exert preliminary controls on jurisdiction (1) and, second, they may carry out a prospective scrutiny of the arbitral award (2).

#### *[1] Prima Facie Decisions on the Existence of Jurisdiction*

497. Some arbitration institutions decide at a preliminary stage whether an arbitration should proceed. These decisions are administrative safeguards against putting into motion arbitral procedures when there is no jurisdictional basis. (1049) Article 36(3) of the ICSID Convention, for example, provides:

The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

498. Similarly, Article 6(4) of the 2012 ICC Rules of Arbitration provides:

In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist. In particular:

(i) where there are more than two parties to the arbitration, the arbitration shall proceed between those of the parties, including any additional parties joined pursuant to Article 7, with respect to which the Court is *prima facie* satisfied that an arbitration agreement under the Rules that binds them all may exist; and

(ii) where claims pursuant to Article 9 are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is *prima facie* satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.

The Court's decision pursuant to Article 6(4) is without prejudice to the admissibility or merits of any party's plea or pleas.

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499. Formal decisions to refuse registration of requests are not published. Schreuer explains that, for ICSID arbitrations, 'cases in which requests were not registered include lack of consent to ICSID, the absence of a legal dispute, non-ratification of the Convention by the investor's home State and the absence of an investment'. (1050) In the case of an arbitration under the ICC Rules, registration of a request may be refused if there is a pathological arbitration agreement, if a party is not a signatory or failed to consent to arbitration, or if the claim is not covered by the arbitration agreement, is covered by an incompatible arbitration agreement, or does not relate to the same economic transaction. (1051)

500. The decisions of arbitration institutions to register the request for arbitration or on the existence of prima facie jurisdiction remain administrative, and the decision allowing the arbitration to proceed does not bind the arbitral tribunal. (1052) Additionally, arbitration institutions perform a prima facie review, and it is not likely that an arbitration institution would refuse to register a request. (1053)

501. But no matter how limited the number of these cases may be, those administrative decisions that refuse to register the request act as a filter that excludes cases, claimants or claims which will not reach a jurisdictional decision by arbitrators. Article 6(5) of the ICC Rules of 2012 states this clearly: 'In all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, *except as to the parties' claims with respect to which the Court decides that the arbitration cannot proceed*, shall then be taken by the arbitral tribunal itself' (emphasis added). The only remedy for a party against whom an arbitration institution has refused to register its request for arbitration or has ordered that the arbitration should not continue is before the domestic courts. This remedy, however, is not a claim against the arbitral institution, and domestic courts rarely disagree with the decisions of arbitration institutions. (1054)

***[2] Prospective Scrutiny of the Arbitral Award***

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502. Arbitral institutions increasingly exercise control over arbitral awards, including final, partial and interim awards. (1055) The best example is the scrutiny of the draft of an arbitral award by the ICC, but this mechanism also exists in other arbitral institutions. (1056) Article 33 of the ICC Arbitration Rules of 2012 provides:

Scrutiny of the Award by the Court

Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

503. The main purpose of this control is to improve the quality of awards by identifying any defects that could be used in an attempt to set aside an award or resist its enforcement. While this control is mostly over questions of form, it also allows the ICC to draw attention to points of substance. This form of control has been criticized because of the administrative character of the Court and its independence. (1057) Domestic courts, however, have held that the control exercised by the ICC Court over arbitral awards does not affect the independence of arbitrators, nor does it change the arbitral institution's administrative function. (1058) The *Tribunal de grande instance* of Paris held in *Société Lear v. ICC* that the ICC only enjoys the power to control the form and that any point on substance does not imply the exercise of jurisdictional review by the ICC Court. (1059)

504. Notwithstanding this, Pierre Lalive has suggested that the ICC Court does much more than lay down modifications of form of arbitral awards. (1060) He argues that the distinction between form and substance is difficult to grasp and that the ICC uses this difficulty in its

favour so as to extend its control to the substance of arbitral awards. (1061) This is evidenced by the Secretariat's Guide to ICC Arbitration which states that '[s]crutiny also improves the award's general *accuracy, quality and persuasiveness*'. (1062) Although the Court may not require the arbitral tribunal to change the substance of the arbitral award, it may recommend that the arbitral tribunal modifies a substantive aspect of its decision because the Court has identified a problem such as a missing element in the decision, a weakness in the reasoning, inconsistencies, a failure to deal with certain issues or claims, or a decision on claims or issues not raised by the parties. (1063)

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505. This feature of the ICC is seen as a positive one and as one of the 'cornerstones' of ICC arbitration that is responsible for its success. (1064) Paulsson argues that:

> The ICC Court's scrutiny of awards makes it easier for parties and the Court, knowing that mistakes of ignorance may be averted, to accept arbitrators with little or no experience in international cases. There is no question but that this factor enables the ICC to increase the pool of prospective arbitrators, all the while holding true to its standards. (1065)

506. The scrutiny of the ICC is so fundamental for ICC arbitration that the parties cannot derogate from it. (1066) In one case where an arbitration agreement excluded the ICC Court's scrutiny of the award, the Court decided that the clause was incompatible with the ICC Rules and that the arbitration could not proceed. (1067) In 2010 the ICC Secretariat released a checklist for ICC arbitrators that identifies a number of formal points that arbitral tribunals should take into account before submitting their draft award for scrutiny. This checklist is sent to arbitrators with the letter transmitting the case file to the arbitral tribunal. (1068) The Secretariat's Guide to ICC Arbitration states that the list is not exhaustive and that the Court may raise other issues. (1069) Furthermore, the Guide states:

> when deliberating on or drafting an arbitral award, an arbitral tribunal will contact the Secretariat to enquire about the Court's practice on certain issues or to seek the benefit of the Court's experience (e.g. particularly on complex jurisdictional or procedural matters). Even the most experienced international arbitrators will avail themselves of this source of knowledge and practice from time to time and the Secretariat can act as a good sounding board, drawing on the experience acquired from its vast caseload. (1070)

507. The review of the arbitral award by the ICC Court is made at one of its weekly committee sessions or, if the case is complex or involves a state or state entity, at the Court's monthly plenary session. The Court may decide to approve the arbitral award, to approve it subject to formal modifications and/or a consideration of the Court's comments on substance, or not to approve it. In most cases, the Court approves arbitral awards subject to formal modifications and/or a consideration of comments on substance. (1071) While comments on substance would seem to be mere recommendations, if the arbitral tribunal does not agree with the Court it needs to explain why. 'Whether or not the Court accepts to withdraw such a comment will depend on the circumstances of the case and the nature of the arbitral tribunal's explanation. If the Court feels strongly about the comment, there may be further dialogue between the Secretariat and the arbitral tribunal.' (1072)

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508. Many other arbitration institutions do not have powers of scrutiny of the same type as the ICC Court. Nevertheless, this does not mean that these arbitration institutions do not control or somehow intervene in the drafting of the arbitral award. For instance, Article 64(e) of the WIPO Arbitration Rules provides that 'the tribunal may consult the Centre with regard to matters of form, particularly to ensure the enforceability of the award'.

509. Arbitration institutions may also exercise an informal control or influence. The additional opinion of Professor Dalhuisen in the decision of the ICSID annulment committee in the *Vivendi v. Argentina II* case is enlightening. (1073) Although the ICSID Secretariat does not have powers of scrutiny in the manner of the ICC Court, the declarations and criticisms made by Dalhuisen against the ICSID Secretariat evidence the existence of informal control mechanisms:

> 2. It is clear that the Secretariat wants to obtain for itself a greater role in the conduct of ICSID cases and in the process also wants to involve itself in the drafting of the decisions. [...]
>
> 4. As a minimum, the Secretariat is keen to do the recitals, but as the recitals in this case also show, by accommodating the Secretariat's involvement, they are becoming longer and longer. To do it properly, choices need to be made and it is hardly the task of the Secretariat to make them. What are the key facts and relevant arguments and how they should be presented in the final decision or award is for Arbitrators or ad hoc Committee Members to select and decide. [...]
>
> 9. In this case, *the ICSID Secretariat even took the view that on its own initiative it could intervene to 'streamline' the texts earlier agreed by the present ad hoc Committee and senior Secretariat members approached individual Committee Members informally with a view to amending the text*. [...]
>
> 10. It is relevant in this connection to note that a practice appears to have developed in ICSID whereby all communications, also those between the Chairman and ad hoc Committee Members (or Arbitrators as the case may be) are conducted through the Secretariat [...].
>
> 16. Another idea seems to be that the Secretariat is the voice of a *jurisprudence constante* which it is its task to advance and protect and which gives it an autonomous right of intervention. [...]. (emphasis added)

510. Dalhuisen criticized the role of the ICSID Secretariat for jeopardizing the independence of the members of the annulment committee and the privacy and secrecy of their deliberations and draft award. (1074) He further called on the ICSID Secretariat to clarify its role. (1075)

511. These controls – although to a very limited extent – also contribute to the emergence of consistent arbitral decisions.

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808) *See* Yves Dezalay & Bryant G. Garth, *Dealing in Virtue. International Commercial Arbitration and the Construction of a Transnational Legal Order* (The University of Chicago Press, 1996).
809) *Ibid.*, at 36.
810) A symbolic terrain with its own networks, hierarchies, expertise and rules of the game. Pierre Bourdieu & Loïc J.D. Wacquant, *An Invitation to Reflexive Sociology* (The University of Chicago Press, 1992), at 94–100; Dezalay & Garth, *supra*n. 808, at 16.
811) Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 IO 1, (1992).
812) *Ibid.*, at 35f.
813) Roger Cotterrell, *Law, Culture and Society. Legal Ideas in the Mirror of Social Theory* (Ashgate, 2006), at 68–70.
814) Dezalay & Garth, *supra*n. 808, at 16.
815) Interview conducted by Dezalay & Garth, *ibid.*, at 34.
816) *Ibid.*, at 36.
817) *Ibid.*, at 37–38.
818) *Ibid.*, at 64f.
819) *Ibid.*, at 42.
820) *Ibid.*, at 55.
821) *Ibid.*, at 90: 'Entering in this doctrinal debate, even if only to criticize the *lex mercatoria* places the contestants on the terrain of the grand professors in defining the rules of the game and the legitimate arms.'
822) Karton, *supra*n. 794, at 18f.
823) *Ibid.*, at 138.
824) *Ibid.*
825) *Ibid.*, at 79.
826) Mustill, *supra*n. 492, at 86.
827) Thomas Schultz & Robert B. Kovacs, *The Rise of a Third Generation of Arbitrators? – Fifteen Years after Dezalay and Garth*, AI 161, (2012).
828) *See*, e.g., the law firms Lévy and Kaufmann-Kohler; Hanotiau and Van den Berg.
829) Schultz & Kovacs, *supra*n. 827, at 171.
830) *Seesupra* §3.02.
831) Karton, *supra*n. 794, at 121–122.
832) *Ibid.*, at 132.
833) Which means that if the parties' nationalities were reversed the result would not change. William W. Park, *Neutrality, Predictability and Economic Co-operation*, 12:4 JIA 99, 103 (1995).
834) Gabrielle Kaufmann-Kohler, *Globalization of the Arbitral Procedure*, 36 Vand. J. Transnat'l L. 1313, 1325 (2003) (citations omitted).
835) Generally, *seeibid.*
836) Karton, *supra*n. 794, at 119.
837) *See supra* §3.04.
838) *Ibid.*, at 86.
839) *Ibid.*
840) *Ibid.*, 91.
841) *Ibid.*
842) *See infra* §5.01.
843) Thomas S. Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 50th Anniversary Edition, 2012), at 23.
844) All available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.
845) William W. Park, *The Procedural Soft Law of International Arbitration: Non-Governmental Instruments*, in Loukas A. Mistelis & Julian D. M. Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International, 2006), at 142. *See also* Kaufmann-Kohler, *supra*n. 834, at 14.
846) Catherine A. Rogers, *The Vocation of International Arbitrators*, 20 Am. U. J. Int'l L. 959, 967–969 (2005).
847) Dezalay & Garth, *supra*n. 808, at 10, footnote 7.
848) *Ibid.*
849) *Ibid.*, at 50.
850) *Ibid.*

851) Karton, *supra* n. 794, at 58.
852) Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U Kansas L R 1321, (2006).
853) Karton, *supra* n. 794, at 60.
854) Jan Paulsson, *Ethics, Elitism, Eligibility, Journal of International Arbitration*, 14 JIA 4, 19–20 (1997), and *The Idea of Arbitration* (OUP, 2013), at 172.
855) Paulsson, *Ethics...*, *ibid.*, at 13.
856) White & Case and Queen Mary, University of London, *Choices in International Arbitration* (2010), http://www.arbitration.qmul.ac.uk/research/2010/ (accessed 20 December 2016), at 27.
857) Karton, *supra* n. 794, at 55.
858) *Ibid.*, at 60.
859) Dezalay & Garth, *supra* n. 808, at 18.
860) *Ibid.*, at 20.
861) *Ibid.*, at 301.
862) *See infra* §4.01[C].
863) Corporate Europe Observatory, *Chapter 4: Who Guards the Guardians? The Conflicting Interests of Investment Arbitrators*, (27 November 2012): http://corporateeurope.org/trade/2012/11/chapter-4-who-guards-guardians-conflicting-interests-invest... (accessed 20 December 2016).
864) Mayer, *L'autonomie de l'arbitre international...*, *supra* n. 8; Goldman, *supra* n. 9; Christopher S. Gibson & Christopher R. Drahozal, *Iran-United States Claims Tribunal Precedent in Investor-State Arbitration*, 23:6 JDI 25, (2006); W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 Wm. & Mary L Rev 1985, (2009–2010); Yves Derains, *La jurisprudence des arbitres du commerce international en matière de détermination du droit applicable au contrat*, RDAI/IBLJ, no. 4 (1996), 514; Bernardo M. Cremades, *The Impact of International Arbitration on the Development of Business Law*, 31:3 Am. J. Comp. L. 526, (1983); Thomas E. Carbonneau, *Arbitral Law-Making*, Mich. J Int'l L 25, 1183 (2003); Piero Bernardini, *International Arbitration and A-National Rules of Law*, 15:2 ICC Bulletin 58, (2004); Clay, *supra* n. 8; Zachary Douglas, *Can a Doctrine of Precedent be Justified in Investment Treaty Arbitration?*, 25 ICSID Rev – FILJ 104, (2010); Lucy Reed, *The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management*, 25:1 ICSID Rev., 95 (2010); Catherine Kessedjian, *To Give or Not to Give Precedential Value to Investment Arbitration Awards?*, in Catherine A. Rogers & Roger P. Alford (eds), *The Future of Investment Arbitration* (OUP, 2009), 43; Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23:3 AI 357, (2007); Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in Colin B. Picker, Isabella D. Bunn & Douglas W. Arner (eds), *International Economic Law: The State and Future of the Discipline* (Hart, 2008), 265; Emmanuel Gaillard & Yves Banifatemi (eds), *Precedent in International Arbitration* (Jurisnet, 2007); Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 Fordham Int'l L. J. 1014, (2006–2007); Jeffery P. Commission, *Precedent in Investment Treaty Arbitration. A Citation Analysis of a Developing Jurisprudence*, 24:2 JIA 129, (2007); Domenico di Pietro, *The Use of Precedents in ICSID Arbitration: Regularity or Certainty?*, 3 International Arbitration Law Review 92, (2007); Jean-Michel Jacquet, *Avons-nous besoin de jurisprudence arbitrale?*, Rev. Arb. 445, (2010); Christian Larroumet, *A propos de la jurisprudence arbitrale*, Gazette du Palais 5, (2006); Jan Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics. ICCA Congress Series* (Kluwer International Law, 2007), 879; August Reinisch, *The Role of Precedent in ICSID Arbitration*, Austrian Arbitration Yearbook 495, (2008); Andrés Rigo Sureda, *Precedent in Investment Treaty Arbitration*, in Christina Binder et al. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, 2009), 830; Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge International Trade and Economic Law, 2009); Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, in Peter Muchlinski, Federico Ortino & Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP, 2008), 1189; Valentina S. Vadi, *Towards Arbitral Path Coherence & Judicial Borrowing: Persuasive Precedent in Investment Arbitration*, 5:3 TDM (2008); Nicolas Béguin, *The Rule of Precedent in International Arbitration*, no. 5 Jusletter 2, (2009); Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55:3 Southern Economic Journal 644, (1989); Klaus Peter Berger, *The International Arbitrators' Application of Precedents*, 5:3 TDM (2008); Grisel, *supra* n. 8; Georgios I. Zekos, *Precedent and Stare Decisis by Arbitrations and Courts in Globalization*, 10:3 The Journal of World Investment & Trade 475, (2009).

865) Case law takes a significant part in any treatise of international arbitration. *See*, e.g., Fouchard, Gaillard & Goldman, *supra* n. 62; Born, *supra* n. 500; Schreuer, *supra* n. 245; Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (Kluwer Law International, 2001); Alan Redfern & Martin Hunter, *On International Arbitration* (6th ed., Kluwer International Law, 2015); Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009); August Reinisch, *Standards of Investment Protection* (OUP, 2008); Douglas, *supra* n. 280; Christoph Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* (Kluwer Law International, 2008); Stefan M. Kröll et al., *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International, 2011). *See also* (*L'apport de la jurisprudence arbitrale: l'arbitrage commercial international: séminaire des 7 et 8 avril 1986* (CCI, Institut, 1986); Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (2nd ed., Kluwer Law International Law, 2010); Paulsson, *supra* n. 494; Mustill, *supra* n. 492; Filali Osman, *Les principes generaux de la lex mercatoria: Contribution à l'étude d'un ordre juridique anational* (LGDJ, 1992); Gabrielle Kaufmann-Kohler, *Is Consistency a Myth?*, in Emmanuel Gaillard & Yas Banifatemi (eds), *Precedent in International Arbitration* (Juris Publishing, 2008), 137.

866) *See* the scholarly works cited in n. 864.

867) Kaufmann-Kohler, *supra* n. 864.

868) Douglas, *supra* n. 864, at 105.

869) Josep Aguiló Regla, *Teoría general de las fuentes del derecho:(y del orden jurídico)* (Ariel, 2000), at 116–117.

870) *See*, e.g., Alec Stone Sweet, *Path Dependence, Precedent and Judicial Power*, in Michel Troper, Véronique Champeil-Desplats & Christophe Grzegorczyk (eds), *Théorie des contraintes juridiques* (LGDJ, 2005), 155; Neil Duxbury, *The Nature and Authority of Precedent* (OUP, 2008), at 67f.

871) Christophe Grzegorczyk, *Jurisprudence: phénomène judiciaire, science ou méthode*, *La jurisprudence*, 30 Archives de philosophie du droit 35, esp. 40 (1985); Aguiló Regla, *supra* n. 869, at 116–117.

872) *Ibid*.

873) Michel van de Kerchove, *Jurisprudence et rationalité juridique*, *La jurisprudence*, 30 Archives de philosophie du droit 207, esp. 224 and 228 (1985).

874) With The Hague Conferences of 1899 and 1907, the New York Convention of 1958, the ICSID Convention, as the UNCITRAL Arbitration Model Law and the UNCITRAL Arbitration rules and a series of arbitration institutions, such as the ICC and the PCA.

875) This is the case of many NAFTA provisions which are very distinct from the provisions of liberal BITs.

876) *See*, e.g., Art. 48(5) of the ICSID Convention, Art. 48(4) of the ICSID Arbitration Rules and Art. 34.5 of the 2010 UNCITRAL Arbitration rules.

877) Thomas W. Wälde, *Confidential Awards as Precedent in Arbitration. Dynamics and Implication of Award Publication*, in Emmanuel Gaillard & Yas Banifatemi (eds), *Precedent in International Arbitration* (Jurisnet, 2007), 113, esp. 123.

878) This is the case of ICSID, which publishes ICSID awards on its website (https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx (accessed 20 December 2016) and in its publications, such as the ICSID Reports.

879) For example, Investment Treaty Arbitration Law, Investor-State Law Guide, Investment Claims, ILM, ILR, TDM, and JDI.

880) *See* Wälde, *supra* n. 877, at 122.

881) *Ibid*., at 126.

882) www.iareporter.com (last visited 14 December 2016).

883) Extracts of ICC awards are published in the six-volume Collection of ICC Arbitral Awards, and also in ICC Bulletin, Collection of Procedural Decisions in ICC Arbitration, JDI, YBCA, ASA Bulletin, etc.

884) Kaufmann-Kohler, *supra* n. 864, at 376.

885) Alexis Mourre mentions that 800 awards are publicly available, *Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards*, in Emmanuel Gaillard & Yas Banifatemi (eds), *Precedent in International Arbitration* (Jurisnet, 2008), at 41. The number of ICC final and partial awards published, which represents the most significant part of published awards, amount to more than 400. Each of the six volumes of Collection of ICC Arbitral Awards series (1974–1985, 1986–1990, 1991–1995, 1996–2000, 2001–2007, 2008–2011) and the Collection of ICC Procedural Decisions 1993–1997 contain over 70 extracts of arbitral awards both in English and French. Further, there are many published awards not included in this publication which are published in journals such as the JDI, YBCA, ASA Bulletin, ICC Bulletin (also accessible through the online ICC Dispute Resolution Library), Revue de l'arbitrage and ILR (for cases regarding state contracts). *See also*: Collection of WIPO Domain Name Panel Decisions (2003) and http://www.wipo.int/amc/en/center/caseload.html (accessed 20 December 2016).

886) Rogers, *supra* n. 846, at 1001.

887) *See*, e.g., *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Separate Opinion, 1 December 2005, para. 159; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 239; *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006.

888) *See*, e.g., *Millicom International Operations B.V. & others v. Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal, 16 July 2010, para. 103; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 304.
889) *Claimants 1–2 v. Respondents 1–16*, Order No. 1, 2008, 28:1 ASA Bulletin, 47–59 (2010) (under Swiss Rules of International Arbitration).
890) Weidemaier, *supra*n. 864, at 1921.
891) Commission, *supra*n. 864, at 136.
892) ICC Case No. 14208/14236 (1998), 24:2 ICC Bulletin, 62 (2013).
893) *Ibid.*
894) *See*, e.g., ICC Case No. 12990 (2005), *Special Supplement 2013: Tackling Corruption in Arbitration* 52, (2013); ICC Case No. 9415 (1998), 13:2 ICC Bulletin, 78 (2002). *See also* ICC Case No. 4131 (1982), *Dow Chemical v. Isover Saint-Gobain*, Collection of ICC Arbitral Awards 1974–1985, 146; ICC Case No. 9873 (1999), 16:2 ICC Bulletin, 85 (2005); ICC Case No. 8223 (1995), 11:1 ICC Bulletin, 71 (2000); ICC Case No. 9517 (2000), 16:2 ICC Bulletin, 80 (2005); ICC Case No. 9669 (1998), 18:1 ICC Bulletin, 85 (2007); Interim Award, 31 July 2000, 19:2 ASA Bulletin, 276 (2001).
895) Rogers, *supra*n. 846, at 1001.
896) Thomas E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 Colum. J. Transnat'l L. 581, (1984–1985).
897) *Ibid.*, at 584.
898) *Ibid.*
899) Art. VIII of the 1961 European Convention on International Commercial Arbitration.
900) Art. 34(3) of the 2010 and 2013 UNCITRAL Arbitration Rules provides: 'The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.'
901) Art. 52(e) of the ICSID Convention provides as a ground for annulment 'that the award has failed to state the reasons on which it is based'.
902) Carbonneau, *supra*n. 896, at 581; Charles Jarrosson, *L'acceptabilité de la sentence*, Rev. arb 793, esp. 801 (2012).
903) Jarrosson, *supra*n. 902, at 802.
904) *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award, 8 June 2009, para. 8.
905) *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, paras 22–23.
906) *Ibid.* '27. Under the benefit of the foregoing observations, the Tribunal would nevertheless reject the excessive assertion which would consist in pretending that, due to the specificity of each case and the identity of each decision on jurisdiction or award, absolutely no consideration might be given to other decisions on jurisdiction or awards delivered by other tribunals in similar cases. 28. In particular, if the basis of jurisdiction for these other tribunals and/or the underlying legal dispute in analysis present either a high level of similarity or, even more, an identity with those met in the present case, this Tribunal does not consider that it is barred, as a matter of principle, from considering the position taken or the opinion expressed by these other tribunals.'
907) *See*, e.g., *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the ad hoc Committee on the Application for Annulment, 24 January 2014, paras 190 and 200–201. *See alsoSociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Decision on Annulment, 10 December 2010.
908) Commission, *supra*n. 864, at 149.
909) Reed, *supra*n. 864; Douglas, *supra*n. 864, at 107.
910) Kaufmann-Kohler, *supra*n. 864, at 362.
911) *Ibid. See also* Weidemaier, *supra*n. 864, at 1909.
912) Kaufmann-Kohler, *supra*n. 864, at 364–365.
913) Weidemaier, *supra*n. 864, at 1901.
914) *See*, e.g., ICC Case No. 10346 (2000), 12:2 ICC Bulletin 111, (2001); Award in VIAC Case No. Sch-4366 2 UNILEX, E. 199414 (1994) 331.
915) *See*, e.g., ICC Case No. 9669 (1998), 18:1 ICC Bulletin 85, (2007); ICC Case No. 10274 (1999), Collection of ICC Arbitral Awards 2001–2007, 229, at 241; ICC Case No. 9781 (2000), Collection of ICC Arbitral Awards 2001–2007, 273; ICC Case No. 11443 (2001), Collection of ICC Arbitral Awards 2001–2007, 335 at 338.
916) *See*, e.g., ICC Case No. 8908 (1998), 10:2 ICC Bulletin 83, (1999); ICC Case No. 8817 (1997), 10:2 ICC Bulletin 75, (1999).
917) *See* Ch. 5.
918) ICC Case No. 3380 (1980), *Italian enterprise v. Syrian enterprise*, Collection of ICC Arbitral Awards 1974–1985, 413.
919) *Seesupra*n. 873.
920) *See*, e.g., Eduardo Zambrano, *Social Theories of Authority*, in Neil J. Smelser & Paul B. Baltes (eds), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, 2001); Tony Cole, *Authority and Contemporary International Arbitration*, 70 Louisiana L Rev 802, esp. 808 (2010) (although the commentator analyses the authority of arbitral awards vis-à-vis the parties).

921) *See*, e.g., *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 108; *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Decision on Jurisdiction, 27 April 2006, para. 50; *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, paras 30–33; *Camuzzi International S.A. v. Argentine Republic [II]*, ICSID Case No. ARB/03/7, Decision on Objections to Jurisdiction, 11 May 2005, para. 19; *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 41; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 55; *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 293.

922) Cole, *supra* n. 920.

923) *Liberian Eastern Timber Corporation [LETCO] v. Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, 2 *ICSID Reports* 358, para. 232.

924) *Azurix Corp v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 391.

925) *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, para. 47.

926) *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Decision on Jurisdiction, 27 April 2006, para. 50.

927) *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 107; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 165.

928) *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, para. 31.

929) *See*, e.g., *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. Abr. V079/2005, Award on Jurisdiction, 1 October 2007, para. 49; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, paras 172–173; *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008, para. 51; *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v. Republic of Ecuador [I]*, PCA Case No. AA 277, Interim Award, 1 December 2008, para. 123.

930) *Ambiente Ufficio S.P.A. and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 61.

931) *See*, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 73; *Quasar de Valors SICAV S.A. et al. (Formerly Renta 4 S.V.S.A et al.) v. Russian Federation*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009, para. 16; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, para. 39; *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Decision on Jurisdiction, 27 April 2006, para. 50; *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, para. 42; *Mr. Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, 30 November 2004, para. 23; ICC Case No. 3380 (1980), Collection of ICC Arbitral Awards 1974–1985, 413.

932) *See*, e.g., *Mr. Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, 30 November 2004, para. 23; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, para. 39; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 178; *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, para. 42.

933) *Quasar de Valors SICAV S.A. et al. (Formerly Renta 4 S.V.S.A et al.) v. Russian Federation*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009, para. 16.

934) *See*, e.g., ICC Case No. 9333 (1998), Collection of ICC Arbitral Awards 2001–2007, 575 at 577; ICC Case No. 12990 (2005), *Special Supplement 2013: Tackling Corruption in Arbitration* 52, (2013) (citing the Lagergren award and ICC No. 3916); ICC Case No. 13914 (2008), *Special Supplement 2013: Tackling Corruption in Arbitration*, 77 (2013); ICC Case No. 761 (1951) cited by Fouchard, *supra* n. 6, at 400; ICC Case No. 1110 (1963), (*Lagergren*), Collection of ICC Arbitral Awards 1996–2000, 1; ICC Case No. 3267 (1979), VII YBCA 96, (1982); ICC Case No. 2730 (1982), Collection of ICC Arbitral Awards 1974–1985, 490; ICC Case No. 3916 (1982), Loewe, Collection of ICC Arbitral Awards 1974–1985, 507; ICC Case No. 3913 (1981), Collection of ICC Arbitral Awards 1974–1985, 497; ICC Case No. 5622 (1988), *Hilmarton v. OTV*, Collection of ICC Arbitral Awards 1991–1995, 220; ICC Case No. 6248 (1990), XIX YBCA 124, (1994); ICC Case No. 7293 (1993), ASA Bulletin 373, (1993), and 210, (1998); ICC Case No. 8891 (1998), Collection of ICC Arbitral Awards 1996–2000, 561; ICC Case No. 10114 (2000), 12:2 ICC Bulletin 100, (2001). Likewise, arbitral tribunals have refused to disregard the *lex contractus* in favour of a public policy rule which does not reflect an international consensus. *See* ICC Case 6320 (1992), 6:1 ICC Bulletin 59, (1995); ICC Case No. 6379 (1990), VII YBCA 212, (1992); ICC Case No. 12193 (2004), Collection of ICC Arbitral Awards 2001–2007, 795, and ICC Case No. 8606 cited therein; ICC Case No. 9479 (1999), 12:2 ICC Bulletin 67, (2001).

935) *See*, e.g., ICC No. 10623 (2001), 21:1 ASA Bulletin, (2003).

936) *See*, e.g., ICC Case No. 10671, Decision on Jurisdiction, 31 July 2000, JDI 1417, (2006); ICC Case No. 5514 (1990), Collection of ICC Arbitral Awards 1991–1995, 459. *See also* ICC Case No. 3344 of 1981, Collection of ICC Arbitral Awards 1974–1985, 440; ICC Case No. 8385 (1995), Collection of ICC Arbitral Awards 1996–2000, 474; ICC Case No. 1717 (1972), Collection of ICC Arbitral Awards 1974–1985, 191.

937) *See*, e.g., ICC Case No. 11426, Collection of ICC Arbitral Awards 2001–2007, 751, esp. 758; ICC Case No. 7331 (1994), Collection of ICC Arbitral Awards 1991–1995, 592; ICC Case No. 4761 (1984), Collection of ICC Arbitral Awards 1986–1990, 298; ICC Case No. 5953 (1989), Collection of ICC Arbitral Awards 1974–1985, 302, esp. 306 (the tribunal equated the notion of *lex mercatoria* to arbitral case law); ICC Case No. 3540 (1980), Collection of ICC Arbitral Awards 1974–1985, 105; ICC Case No. 7331 (1994), Collection of ICC Arbitral Awards 1991–1995, 592; ICC Case No. 10422 (2001), Collection of ICC Arbitral Awards 2001–2007, 609.

938) *See*, e.g., ICC Case No. 3327 (1981), Collection of ICC Arbitral Awards 1974–1985, 433, esp. 435; ICC Case No. 2291 (1975), Collection of ICC Arbitral Awards 1974–1985, 274; ICC Case No. 5904 (1989), Collection of ICC Arbitral Awards 1974–1985, 387, esp. 390.

939) ICC Case No. 5953 (1989), Collection of ICC Arbitral Awards 1974–1985, 302, esp. 306 (the tribunal equated the *lex mercatoria* to arbitral case law).

940) *See*, e.g., ICC Case No. 10346 (2000), 12:2 ICC Bulletin 111, (2001); ICC Case No. 9759 (1999), 12:2 ICC Bulletin 84, (2001).

941) *See*, e.g., ICC Case No. 9415 (1998), 13:2 ICC Bulletin 78, (2002) (citing ICC Award No. 6320 of 1992), ICC Case No. 12193 (2004), Collection of ICC Arbitral Awards 2001–2007, 795; ICC Case No. 8817 (1997), Collection of ICC Arbitral Awards 1996–2000, 415.

942) Richard A. Posner, *How Judges Think* (Harvard University Press, 2008), at 39.

943) *See*, e.g., *Crompton (Chemtura) Corp. v. Government of Canada*, Award, 2 August 2010, para. 109; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 293; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, para. 897; *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 119; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdiction, 29 May 2009, para. 58; *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 42; *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006, para. 172; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 113.

944) *See*, e.g., *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group v. The Argentine Republic* (UNCITRAL) (jointly decided), Decision on Liability, 30 July 2010, para. 189; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, para. 897; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 100; *Austrian Airlines v. Slovak Republic*, UNCITRAL, Award, 20 October 2009, para. 84; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 73; *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/07; Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 67; *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, para. 211.

945) *See*, e.g., *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 55; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 293; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdiction, 29 May 2009, para. 58; *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 42; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 100; *Austrian Airlines v. Slovak Republic*, UNCITRAL, Award, 20 October 2009, para. 84; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 73; *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/07; Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 67; *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, para. 211; *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006, para. 172.

946) *Austrian Airlines v. Slovak Republic*, UNCITRAL, Award, 20 October 2009, para. 84.

947) Thomas Schultz, *Against Consistency in Investment Arbitration*, in Zachary Douglas, Joost Pauwelyn & Jorge E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP, 2014), Ch. 10.

948) Douglas, *supra* n. 864, at 109–110.

949) *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 52. *See also* cases cited *infra* n. 960.
950) Chaïm Perelman & Lucie Obrechts-Tyteca, *La nouvelle rhétorique. Traité de l'argumentation* (Éditions de l'Université de Bruxelles, 1992).
951) Julie Allard, *Le dialogue des juges dans la mondialisation*, in *Le dialogue des juges* (Bruylant, 2008), at 86–87.
952) *See* §4.02[A].
953) This is so because the names of the arbitrators are public. However, the publicly available commercial awards rarely include the names of the arbitrators. It is difficult to see a social constraint on considering arbitral awards based on the fact that they have been written by an anonymous member of the same community.
954) Jacquet, *supra* n. 864, at 457.
955) François Ost & Michel van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (Facultés universitaires Saint-Louis, 2002), at 430.
956) Stanley Fish, *Is There a Text in This Class? The Authority of Interpretative Communities* (Harvard University Press, 1980), at 338f.
957) Rogers, *supra* n. 846, at 1000. In this sense *see* ICC Case No. 3916 (1982), JDI, 930 (1984); ICC Case No. 4145 (1984), *Establishment of Middle East country X v. South Asian construction company, first interim award*, Collection of ICC Arbitral Awards 1986–1990, 53; ICC Case No. 9333 (1998), Collection of ICC Arbitral Awards 2001–2007, 575; ICC Case No. 3913 (1981), Collection of ICC Arbitral Awards 1974–1985, 497; ICC Case No. 5622 (1988), *Hilmarton v. OTV*, Collection of ICC Arbitral Awards 1991–1995, 220; ICC Case No. 8891 (1998), Collection of ICC Awards 1996–2000, 561. *See also* cases published in the recent ICC publication, *ICC Special Supplement 2013: Tackling Corruption in Arbitration*.
958) Fish, *supra* n. 956; Stanley Fish, *Doing What Comes Naturally. Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press, 1989), at 98f.
959) For examples of consistent arbitral solutions *see* Ch. 5.
960) *See*, e.g., *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 100; *Austrian Airlines v. Slovak Republic*, UNCITRAL, Award, 20 October 2009, para. 84; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005; para. 73; *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/07; Decision on Jurisdiction and Recommendation on provisional measures, 21 March 2007, 2007, at 67; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, para. 90; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 117; *Noble Energy Inc. and MachalaPower Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, para. 50; *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, para. 211; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.15; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para. 147; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 116; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 83.
961) *See*, e.g., Bentolila, *supra* n. 325, at 87.
962) *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 91.
963) This source of legitimacy is stronger in common law jurisdictions, where judges are typically appointed by elected officials, and more specifically in the United States, which is the sole jurisdiction where judges are commonly elected. *See*, e.g., Randy E. Barnett, *Constitutional Legitimacy*, 103 Columb. L. Rev. 111, 112 (2003).
964) Gilles Cuniberti, *Beyond Contract – The Case for Default Arbitration in International Commercial Disputes*, 32 Fordham Int'l L. J. 442, (2008).
965) Max Weber, *From Max Weber: Essays in Sociology* (OUP, 1946); Canivet, *supra* n. 963; Pierre Bouretz, *Entre la puissance de la loi et la puissance de l'interprétation: L'énigmatique légitimité du juge*, 74 Pouvoirs 71, (1995). In its most radical form: Charles de Secondat Montesquieu, *De l'esprit des lois*, Book XI (1748), at 52.
966) *Ibid.*; Niklas Luhmann, *La légitimation par la procédure* (translated by Lukas K. Sosoe & Stéphane Bouchard, Cerf, 2001).
967) Cuniberti, *supra* n. 964, at 439.
968) *Ibid. See also* Paulsson, *The Idea...*, *supra* n. 854, at 185.
969) *Ibid.*

970) *Ibid.*
971) Cuniberti, *supra* n. 964, at 425.
972) *Ibid.* (citations omitted).
973) Petsche, *supra* n. 8, at 21ff.
974) *See*, e.g., Kyriaki Karadelis, *Counsel to India rails against 'misuse' of BITs*, 19 October 2012, http://globalarbitrationreview.com/news/article/30910/counsel-india-rails-against-misuse-bits/ (accessed 20 December 2016).

975) *See*, e.g., the announcement of Australia that it would no longer pursue investor-state arbitration provisions in future international economic agreements with developing countries. Luke Eric Peterson, *In policy switch, Australia disavows need for investor-state arbitration provisions in trade and investment agreements*, 14 April 2011, http://www.iareporter.com/articles/20110414 (accessed 20 December 2016). Similarly, Argentina announced it was in the process of withdrawing from the ICSID Convention: *Argentina in the process of quitting from World Bank investment disputes centre*, 31 January 2013, http://en.mercopress.com/2013/01/31/argentina-in-the-process-of-quitting-from-world-bank-investment-... (accessed 20 December 2016).

976) In a factsheet published on 26 November 2013 the European Commission outlines a number of proposals to clarify investment protection rules and improve how the investor-state dispute settlement system operates. Douglas Thomson, 'EU promises reforms to investment protection', http://globalarbitrationreview.com/news/article/32095/eu-promises-reforms-investment-protection/ (accessed 20 December 2016).

977) In 2001, the NAFTA Free Trade Commission clarified in a Note of Interpretation that written pleadings and decisions issued by NAFTA Ch. 11 tribunals were required to be made public.

978) *See*, e.g., the papers on transparency presented by IISD and CIEL before UNCITRAL, *infra*n. 983.

979) *See*, e.g., UNCTAD, *Investment Policy Framework for Sustainable Development* (2012) and *Recent Developments in Investor–State Dispute Settlement (ISDS)*, No. 1 (May 2013).

980) *See*, e.g., Susan D. Frank, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521, (2005); Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP, 2007); *Public Statement on the International Investment Regime*, 31 August 2010: http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/ (accessed 20 December 2016); Michael Waibel et al. (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010); Resolution of the Institut de Droit International, *Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties*, 18th Commission, Tokyo, September 2013.

981) For instance, a Mexican newspaper *Reforma* lodged a request in late April 2013 under Mexico's Federal Law on Transparency seeking a copy of the Waste Management ICSID award, Luke Eric Peterson, *Scope of Mexico's latest loss in waste management case comes into view, as BIT arbitral award is pursued via law on transparency*, 11 June 2013, http://www.iareporter.com/articles/20130611 (accessed 20 December 2016).

982) *See**supra*nn. 974–981.

983) *See*, e.g., the UNCITRAL Rules on Transparency in Treaty-Based Investment Arbitration and the subsequent draft convention were originated at the initiative of the Centre for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD) as observers in the process of revision of the UNCITRAL Model Rules. *NGOs seek investor-specific UNCITRAL rules*, 4 September 2007, http://globalarbitrationreview.com/news/article/14034/ngos-seek-investor-specific-uncitral-rules/ (accessed 20 December 2016). For a complete chronology *see*http://www.iisd.org/investment/dispute/arbitration_rules.aspx.

984) *See*, e.g., the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA) of 2004 contains provisions on transparency. Similarly, Canada and the US included detailed provisions on transparency in their Model BITs. The 2004 US Model BIT, for example, mandated public access to hearings, written pleadings, minutes of hearings and transcripts of orders, awards and other decisions issued by tribunals. It also authorized tribunals to accept pleadings from *amici curiae*. Benjamin Aronson & Sonia Farber, *Treaty Arbitration: UNCITRAL's Transparency Efforts*, 10 April 2013, Global Artbitration Review.

985) United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, opened for signature on 17 March 2015.

986) Sergey Ripinski, *Venezuela's Withdrawal from ICSID: What it Does and Does Not Achieve*, 13 April 2012, http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achiev... (accessed 20 December 2016).

987) For instance, concerns about arbitrators' ethics, transparency of arbitral institutions and the capacity of arbitrators to decide on public policy issues, Cuniberti, *supra*n. 964; Paulsson, *The Idea...*, *supra*n. 854; Rogers, *supra*n. 846. These concerns shape arbitral decision-making, as well. A good example is the increasing willingness of international arbitrators to consider mandatory rules. *See supra* §3.03.

988) *See**supra*nn. 974–981.

989) IISD, *Revision of the UNCITRAL Rules. Good Governance and the Rule of Law: Express Rules for Investor-State Arbitrations Required* (September 2006), at 3.

990) *Ibid.*, at 4–5.

991) *See*, e.g., *Public Statement on the International Investment Regime* (31 August 2010), http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/ (accessed 20 December 2016); Waibel et al, *supra*n. 980.

992) *Ibid.*

993) *Methanex Corporation v. United States*, Decision of the Tribunal on petitions from third persons to intervene as *amici curiae*, 15 January 2001, para. 49. *See alsoUnited Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, paras 59–65.

994) *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Letter from President of Tribunal Responding to Petition, 29 January 2003, paras 3–5.

995) Lucas Bastin, *Amici Curiae in Investor-State Arbitration: Eight Recent Trends*, AI 125, 137 (2014) (citations omitted).

996) *See*, e.g., *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award, 8 June 2009, para. 268; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Order in response to a Petition for Participation as Amicus Curiae, 17 March 2006, para. 38; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 on amicus curiae, 2 February 2007, para. 50; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to Amicus Petition, 12 February 2007, para. 27; *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Letter Regarding Non-Disputing Parties, 5 October 2009, para. 2; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 3.22; *Eureko B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 154; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.89; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 27; *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Procedural Order No. 3, 17 February 2015, para. 22.

997) *See*, e.g., in the *Eureko v. Slovak Republic* case, following consultations with the parties, the tribunal wrote to the Director General of the Legal Service of the European Commission and the Netherlands Ministry of Economic Affairs inviting them to submit observations on jurisdictional questions relating to EU law, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, paras 31–32 and 154.

998) *See*, e.g., *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [II]*, PCA Case No. 2009-23, Procedural Order No. 8, 18 April 2011, para. 20; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012, paras 62–64; *Apotex Inc. v. United States*, Procedural Order No. 2, 11 October 2011, para. 36.

999) *Ibid.*

1000) The only case where non-disputing parties were given access to the case file was *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Letter Regarding Non-Disputing Parties, 5 October 2009.

1001) *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras 111f.

1002) *Ibid.*, para. 111.

1003) *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, para. 96.

1004) *Ibid.*, para. 99.

1005) *Compañía del Desarrollo de Santa Elena, SA v. the Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000.

1006) *See*, e.g., OECD, *Indirect Expropriation and the Right to Regulate in International Investment Law*, OECD Working Papers on International Investment, 10, (2004); Lucien H. Dhooge, *The North American Free Trade Agreement and Environment: The Lessons of Metalclad Corporation v. United Mexican States*, 10 Minn. J Global Trade 209, at 214, 263, 267 and 276 (2001); Howard Mann, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights*, at 32–33, available at: IISD, www.iisd.org/pdf/trade_citizensguide.pdf.

1007) IISD, *supra*n. 989.

1008) *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paras 116f.

1009) *Ibid.*, paras 121ff.

1010) *Ibid.*, para. 122. A few tribunals followed the approach of the *Tecmed* award. Some of these cases however, link proportionality to the police powers doctrine. *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras 195f; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 197; *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award (Redacted), 14 February 2012, para. 569.

1011) *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, 3 August 2005, Part IV, Ch. D.

1012) *Ibid.*, Part IV, Ch. D, para. 7.

1013) *See*, e.g., *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras 254–261; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, para. 169; *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, para. 475; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 180; *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007, para. 268; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paras 236–241; *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, paras 396–402; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, paras 492–493; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.5.22; *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, paras 139–140; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, para. 387; *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, paras 454f; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, paras 145–148; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, paras 523–534; *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, paras 202–207; *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, para. 741; *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 287.

1014) Schreuer, *supra* n. 245, at 938f.

1015) *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.

1016) *See*, e.g., *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Decision of the Ad Hoc Committee on the Application for Annulment, 29 June 2012; *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the Ad Hoc Committee on the Application for Annulment, 24 January 2014; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the Ad Hoc Committee, 25 March 2010; *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014; *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; *Occidental v. Ecuador (Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador)*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, 1 February 2016, paras 196–199; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016, para. 122.

1017) *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the Annulment Committee, 14 June 2010.

1018) *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010.

1019) *Ibid.*, para. 164.

1020) *Enron Creditors Recovery Corporation (formerly Enron Corporation) and 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.

1021) *Ibid.*, at paras 377 and 392–393.

1022) *Ibid.*

1023) *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, paras 128–136.

1024) *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, at paras 337–343.

1025) *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, at paras 98–99 and 107.

1026) Christoph Schreuer, *From ICSID Annulment to Appeal Half Way Down the Slippery Slope*, 10 The Law and Practice of International Courts and Tribunals 211, 224 (2011).

1027) *Compañía de Aguas del Aconquija S.A., Vivendi Universal v. Republic of Argentina*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award, 10 August 2010.

1028) *Ibid.*, paras 233–242.

1029) *Ibid.*, paras 218–232.

1030) Schreuer, *supra* n. 1026, at 223.

1031) *See* Bentolila, *supra* n. 325, at 102.

1032) *Azurix Corp v. Republic of Argentina*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment, 1 September 2009, paras 107–109.
1033) *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012.
1034) *Ibid.*, para. 230.
1035) *See*, e.g., *Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, at paras 74 and 80; *Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006.
1036) Erin E. Gleason, *International Arbitral Appeals: What Are We So Afraid of?*, 7 Pepp. Dis. Res. J., 290–291 (2007).
1037) William McAuliffe & Antonio Rigozzi, *Sports Arbitration*, in The European & Middle Eastern Arbitration Review (Global Arb. Rev., 2012).
1038) CAS Code, R57 ('The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.'). *See also Floyd Landis v. United States Anti-Doping Agency*, CAS 2007/1/1394 (30 June 2008), para. 21.
1039) Richard McLaren, *CAS Doping Jurisprudence: What Can We Learn*, Intl. Sports L. Rev. 4, (2006).
1040) *Norwegian Olympic Committee & Confederation of Sports, Thomas Alsgaard, Frode Estil & Kristen Skjeldal v. IOC*, CAS 2002/O/372, at 19.
1041) Art. 1 of the CPR Rules for Arbitration Appeal Procedure reads: 'The grounds for appeal or annulment are provided under Article 8.2. If the Tribunal hears the Appeal, it may issue an Appellate Award modifying or setting aside the Original Award, but only on the following grounds: a. That the Original Award (i) contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis, or (ii) is based upon factual findings clearly unsupported by the record; or b. That the Original Award is subject to one or more of the grounds set forth in Section 10 of the Federal Arbitration Act for vacating an award. The Tribunal does not have the power to remand the award.'
1042) Art. 39 of the Spanish Arbitration Rules.
1043) Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?*, 30:5 JDI 531, esp. 550 (2013). *See* Arts 39.4 and 39.5 of the Spanish Arbitration Rules.
1044) Available at www.cour-europe-arbitrage.org/index.php (accessed 20 December 2016).
1045) Art. 28.1 of the ECA Rules.
1046) www.cour-europe-arbitrage.org/content.php?lang=en&delegation=1&id=8 (accessed 20 December 2016).
1047) Platt, *supra* n. 1043, at 557.
1048) *Ibid.*
1049) W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of CommerceArbitration* (2nd ed., Oceana, 1990), at 156.
1050) Schreuer, *supra* n. 245, at 471.
1051) Fry, Greenberg & Mazza, *supra* n. 704, at 75ff.
1052) *See* Art. 6(5) of the 2012 ICC Rules ('In all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, except as to the parties claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the arbitral tribunal itself'). Fry, Greenberg & Mazza, *supra* n. 704, at 86–87; Craig, Park & Paulsson, *supra* n. 1049, at 155.
1053) Craig, Park & Paulsson, *supra* n. 1049, at 159.
1054) *See* case law discussed in Craig, Park & Paulsson, *supra* n. 1049, at 160; Fry, Greenberg & Mazza, *supra* n. 704, at 89.
1055) Eric Loquin, *La sentence arbitrale: L'examen du projet de sentence par l'institution et la sentence au deuxième degré – Réflexions sur la nature et la validité de l'intervention de l'institution arbitrale sur la sentence*, Rev. Arb. 427, (1990); Jan Paulsson, *Vicarious Hypochondria and Institutional Arbitration*, Yearbook of the Arbitration Institute of Stockholm Chamber of Commerce 99, (1990).
1056) *See*, e.g., Art. 29 of the Rules of the Jerusalem Arbitration Centre; Art. 24 of the Arbitration Rules of the Danish Institute of Arbitration; Arbitral Rules of the Indian Institute of Arbitration of 2005; Mexico Rules of Arbitration of 2009; Rules 46 and 59 of the CAS Code of 1 March 2013; Art. 15(4) of the CPR Administered Arbitration Rules; and Art. 2(2) of the Arbitration Rules of the Organization for the Harmonization of African Business Law (OHADA). However, in this last case the Court can only propose formal modifications.
1057) Antoine Kassis, *Réflexions sur le Règlement d'arbitrage de la Chambre de Commerce Internationale* (LGDJ, 1988).
1058) Cass. Civ. 1ère, 20 February 2001, *Société Cubic Defense Systems Inc. v. Chambre de commerce internationale*, Rev. arb. 511, (2001) (Note Clay); Cass. Civ. 2ème, 23 January 1974, *Société Schutte Lanz v. Veuve Gallais*.
1059) TGI Paris, 22 May 2002, *Société Lear v. Chambre de commerce internationale*, Rev. arb. 785, (2002). *See also* cases cited by Craig, Park & Paulsson, *supra* n. 1049, at 381.
1060) CA Paris, 15 September 1998, *Cubic Defense Systems, Inc. v. Chambre de commerce internationale*, Rev. arb. 118, (1999) (Note Lalive).
1061) *Ibid.* at 115.
1062) Fry, Greenberg & Mazza, *supra* n. 704, at 327 (emphasis added).
1063) *Ibid.* at 335.

1064) Craig, Park & Paulsson, *supra* n. 1049, at 377; Samuel G. Goekjian, *ICC Arbitration from a Practitioner's Perspective*, 14 Journal of International Law and Economics 407, 433 (1980); Ottoarndt Glossner, *The Influence of the International Chamber of Commerce upon Modern Arbitration*, in *60 Years of ICC Arbitration: A Look at the Future* (ICC, 1984), at 403; Grisel, *supra* n. 8, at 249.
1065) Paulsson, *supra* n. 1055.
1066) Fry, Greenberg & Mazza, *supra* n. 704, at 328.
1067) *Ibid.*
1068) *Ibid.*, at 331.
1069) *Ibid.*
1070) *Ibid.*, at 332.
1071) *Ibid.*, at 334.
1072) *Ibid.*, at 336.
1073) *Compañía de Aguas del Aconquija S.A., Vivendi Universal v. Republic of Argentina*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award and Additional Opinion of Prof. Dalhuisen, 10 August 2010.
1074) *Ibid.*, at para. 24 of the Additional Opinion of Prof. Dalhuisen.
1075) *Ibid.*