The Institutional Evolution of the Investor-State Arbitration Regime: Judicialization and Governance

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[NOTE: the text is a first report on a research project on Investor-State Arbitration. I apologize for the fact that we were unable to make more progress on a real paper. We have just completed the first phase of collecting information for a new database, and report some of the basic descriptive statistics. Sheng Li (2L) has been the master of the data; Meng Jia Yang (1L) drafted the FET section; and I will send you a short draft of the necessity section on Wednesday for those interested. We would be grateful for your comments and advice on the project. Please do not circulate or cite – we will be happy to send you the first draft of a paper, when completed, upon request. -- Alec Stone Sweet]

1. Introduction

This paper charts the development of the Investor-State Arbitration Regime [ISAR], focusing on the impact of arbitral awards on the construction of arbitral institutions. By institutions, we mean the corpus of norms – law, customs, standards, procedures, and so on – that enables and constrains arbitral authority.1 Our primary aim is to assess how and the extent to which investor-state arbitration [ISA] is evolving capacity to govern, through the arbitral process itself.

As a theoretical matter, we approach this research in two linked ways (Part I). The first is through the theory of judicialization.2 The theory focuses on the conditions under which the move to third-party dispute resolution, if sustained, will induce institutional change, and produce governance. By governance, we refer to the mechanisms through which the institutions that govern any given community or activity are adapted to the experiences of those who live under them. The second is through delegation theory, also known as Principal-Agent [P-A] theory. Arbitral power is, famously, delegated power. The standard model of international arbitration emphasizes the virtues of freedom of contract, notably, the contracting parties’ autonomy to choose their own substantive law, procedures, and judges. In this account, the analyst typically scripts arbitrators as agents of the contracting parties, creatures of a discrete contract from which arbitrators derive their authority and legitimacy. The model no longer comfortably fits ISA, if it ever did. Our theory holds that, to the extent that judicialization proceeds, each arbitral tribunal will be placed under increasing pressure to take into account interests beyond those of the parties, strictly considered. These interests may include those of future parties to investor-state disputes, the ISAR, the “public good” as articulated by states or non-governmental organizations, and even the dictates of (an ever evolving) international economic law. Thus, empirically, we

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1 According to the now standard distinctions of institutionalist research in the social sciences, we distinguish “institutions” (normative structures, including rule systems, customs, and paradigms, ) from “organizations” (a social unit organized to pursue collective purposes). See Hall and Taylor (1996); North (1990: ch. 1).
are interested in tracing and explaining the extent to which arbitrators become agents not only of the parties, but also of the regime and an increasingly diverse group of stakeholders. Given that the formal structure of authority in the ISAR remains relatively non-hierarchical, arbitrators can only generate, and enhance over time, their capacity to govern through coordination (persuasion), not command and control.

Our concerns are directly relevant to the “real-world” significance of our topic. The ISAR is in the midst of a crucial period in its evolution. Over the past decade, the salience of investor-state arbitration [ISA] to treaty-making, transnational market arrangements, the activities of the arbitral bar, and the concerns of legal scholarship, has skyrocketed. At the same time, the regime is widely regarded as being in the throes of a legitimacy crisis. Some states have formally refused to comply with major awards that have gone against them; others, citing systemic bias against capital-importing states, have made good on threats to exit the regime altogether; and investors and their lawyers worry about the specter of declining protections for investments. Tribunals, the arbitral bar, and scholarly commentators once worked in relative obscurity. Today states, international bodies, non-governmental organizations, and the media closely monitor awards and debate reform proposals. While few would deny that arbitrators help to govern in the international investment field, there is a great deal of controversy about how they are, and should be, governing.

Scholarship, too, is undergoing rapid change. The literature on ISA has long been dominated by actors who use and run the system: arbitrators (who are often law professors as well), counsel to the parties, and so on. Once rare, research projects that self-consciously adopt “external” perspectives to research on the ISAR are proliferating. In the most important of these projects, scholars deploy theoretical materials and styles of analysis developed outside the study of arbitration to describe and assess how the system operates. They also commonly lament the absence of theoretically-guided, explanatory empirical analyses of arbitral behavior. In fact, to date, only a handful of studies testing hypotheses against data have been produced. We hope to contribute to this emerging scholarship, not least, in providing a macro-institutional account of the evolution of the ISAR as a legal system.

The paper proceeds as follows. In Part 2, we introduce the theoretical ideas that guide the research, describe the data we have compiled, and discuss how these data will be used in our analysis. We have collected basic information on all known, available ISA awards on the merits rendered under the auspices of the International Center for the Settlement of Investment Disputes [ICSID], and/or pursuant to the North American Free Trade Agreement [NAFTA]. We also collected data on all available awards rendered by an ICSID annulment committee. In Part 3, we present the aggregate data, focusing on what they can tell us about the structure of authority within the ISAR. In Part 4, we use the data set to organize qualitative research – process tracing – on the judicialization of the ISAR.

2. Theory, Data, Methods

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4 Bolivia, Ecuador, Venezuela.

5 We will also be compiling information on ISA awards pursuant to ad hoc agreements, which may take place under rules recognized by various arbitration houses.
This section provides an overview of the project. We begin with a brief discussion of the theory of judicialization as it relates to three models of arbitral governance: the “contractual model,” the “judicial model,” and the “constitutional model.” We then describe the main features of the data base, and how we make use of these data in Parts 3 and 4.

A. Theoretical Issues

The theory of judicialization predicts that third-party dispute resolution [TDR], if sustained over time, will develop as a mechanism of institutional change and governance. The model is based on specific causal relationships that evolve, under specified conditions, between three factors: (1) social exchange – contracting; (2) the decisions of third-party dispute resolvers – lawmaking; and (3) normative structure – institutions as they evolve. Judicialization proceeds only to the extent that these three factors develop in interdependent ways, through the resolution of contractual disputes.

Judicial lawmaking is the crucial mechanism of institutional change. As judicialization proceeds, two basic forms of lawmaking will become inseparable from one another. The first type is particular and retrospective: the triadic figure settles an existing dispute between two parties about the terms of one dyadic contract. The settlement applies strictly to the parties. The second form is provoked if the dispute resolver justifies her decision normatively. In telling us, for example, why a given act should or should not be permitted, or how to resolve tensions between two norms or interests that have come into conflict in a case, she may make law of a general and prospective nature. This is so to the extent that her decision clarifies, alters, or creates elements that comprise the institutional structure in ways that future disputants and dispute resolvers will credit.

Given two conditions, judicial lawmaking will generate governance. First, contractants must perceive that they are better off in a world with TDR then without it, and they must evaluate their relationships in light of the latter’s decisions. Second, dispute resolvers must understand their decisions as having some prospective, pedagogical authority on future dispute resolution. Skipping a number of steps in the argument, the model predicts that the more TDR is activated – if the flow of cases is steady or rising over time – then judicial lawmaking will inexorably become a mechanism of institutional evolution, and contracting within the “system” will gradually but inevitably be placed in the shadow of triadic rule making. As decisions accumulate, the normative structure steadily deepens and expands, becoming more elaborate and differentiated, which will then help to organize future interactions, conflict, dispute resolution, and institutional change.

The basic insights of the judicialization theory can be blended with P-A analysis to produce three distinct models of ISA. The models are both descriptive (depicting the nature or

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6 We are aware that “judicial lawmaking” is a contested concept. We use the term in a generic sense to mean any decision that supplements the corpus of normative materials that can be used in future episode of TDR.
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8 The theory of judicialization was originally developed without relationship to arbitration.
arbitration and arbitral authority) and prescriptive (providing alternative notions of how legitimate arbitral power should be exercised). The contractual model is built upon the classic assumptions of freedom of contract. The judicial model adds to the contractual model, by considering the conditions under which the arbitrator becomes, at least in part, an Agent of the ISAR, which itself is comprised of investors and counsel, arbitration houses such as ICSID, and other third-party stakeholders. Movement from the first to the second model implies a change in our underlying notions of appropriate, legitimate behavior on the part of arbitrators. We will also observe more triadic lawmaking, and the imposition of interests and norms beyond those found in any specific bilateral investment treaty [BIT] or investor-state dispute. The constitutional model supplements the judicial model, embedding it within an external legal structure that arbitrators interpret, apply, and help to build over time.

The Contractual Model

A P-A relationship is constituted when two contracting parties (states as Principals) confer upon arbitrators (Agents) the authority to resolve disputes arising under a contract. States constituted the ISAR primarily through BITs and regional treaties, contracts between sovereigns that are taken to be the unique source of arbitral authority. These agreements are formal commitment devices that states have developed to help them resolve the various collective action problems associated with international investment.9 States use BITs as a signaling and commitment device, in order to better compete for investment ex ante, given that investors need to protect the integrity and profitability of their investments ex post.

The legitimacy of arbitral power in the ISAR is not initially problematic in the contractual model, to the extent that it is based on an act of delegation to which states have freely consented. In the event of a dispute, arbitral authority is strictly limited by the terms of the treaty, and the rules governing the arbitration of the dispute at hand. Arbitrators are expected to interpret and apply treaty provisions in light of the will of the parties, the context of the dispute, with reference to the 1969 Vienna Convention on the Law of Treaties, when appropriate. Law made is retrospective and particular, in that it applies only to a discrete investment dispute under a specific BIT. These points made, the contractual model cannot completely insulate itself from dynamics associated with judicialization, in particular, lawmaking.

With arbitral power come obligations, which we will call fiduciary duties. In the contractual model, the arbitrator owes duties to the contracting states and the disputing parties. At a minimum, the arbitrator must not behave in a fraudulent or corrupt manner; she must resolve the dispute in conformity with the parties’ will; she must use fair procedures to ensure adequate due process; and she must strive to produce an accurate award, giving reasons for her decision. These duties are also fiduciary in that they serve the central purpose of arbitration more generally: to render an enforceable, final award

In fulfilling these obligations, arbitrators will make law. Guaranteeing due process entails building proper procedures, which the arbitrator may at times have to impose upon a recalcitrant party. In fact, ISA procedures have steadily become more complex. Reason-giving has been subject to similar dynamics. Arbitrators must justify their awards with reasons. But is

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9 Aaken 2009.
it enough that tribunals merely give a reason? Or should they worry about giving “good reasons,” or even the “best reasons”?\(^\text{10}\) Thus, although the contractual model is based on assumptions of constrained arbitral power, judicialization may well proceed to the extent that the development of procedural guarantees and reason-giving produce richer cumulative and prospective effects.

The Judicial Model

The second model rejects the notion that the arbitrator is merely the agent of contracting states and the disputing parties. The judicial model adds layers of institutional complexity in order to explain and assess why arbitrators are and should be acting as agents of an evolving ISAR. Put somewhat differently, in the contractual model, each BIT is conceptualized as a meaningfully autonomous legal system, to which the arbitrator owes fiduciary duties. In contrast, a precept of the judicial model is that the nearly 3,200\(^\text{11}\) international investment agreements now in force “form a network”\(^\text{12}\) whose integrative effects generate a legal system: the ISAR. The “good arbitrator” in the judicial model fulfills the fiduciary duties just listed, but in the service of the regime as well as of the parties. Further, elements of hierarchy exist in the system, which can facilitate judicialization and the achievement of higher levels of systemic coherence. The major arbitration house in the area, ICSID, for example, lays down mandatory and default procedures, supervises awards, helps the parties to appoint arbitrators, and appoints annulment committees.

Two implications of the judicial model – the notion that arbitrators are Agents of, and owe fiduciary duties to, the regime – deserve emphasis. First, arbitrators will be led to treat common elements of BITs as norms to be developed in synergy, rather than isolation with one another. The vast majority of the more than 2,800 BITs in force today resemble each other in important ways. They typically contain terse provisions that announce relatively general, incomplete norms. Examples include the most-favored nation principle, the under-defined rule prohibiting indirect expropriation, the nebulous fair and equitable treatment standard, and so on. To the extent that judicialization proceeds, arbitrators will gradually “complete” these incomplete norms, thereby giving content and dynamism to the regime’s institutional structure.

Second, fulfilling arbitral fiduciary duties serves a systemic purpose beyond that of producing an enforceable award, namely, to help to secure the social legitimacy and survival of the legal system itself. The arbitrator is a professional with a personal interest in enhancing the social legitimacy of the ISAR, not least, as a means of promoting his own survival. But his survival is dependent on the future viability of the regime. In P-A terms, the arbitrator serves multiple principals, including third-parties – states, the investment community, the arbitral house, and other stakeholders in the regime – which have diverse interests and goals. To do their jobs effectively, arbitrators will be led to strike a balance among these considerations, which entails acting in ways that would be viewed as illegitimate under the contractual model.

\(^\text{10}\) On the relationship between the expansion of judicial power and giving better reasons, see Shapiro (2003).
\(^\text{11}\)
\(^\text{12}\)
Third, and partly in consequence of the last point, the judicial model rejects distinctions between “private” and “public” law as artificial or irrelevant to ISA, thus also casting suspicion on an implicit assumption of the contractual model. No investor-state dispute is strictly private; typically the state’s public acts are what are “on trial,” and the arbitrator has little choice but to delve deeply into the workings of national law in order to properly resolve disputes. As has been extensively analyzed, ISA is a hybrid form of TDR, when consider in light of what state courts do. ISA is not adjudication in certain obvious ways: the parties appoint arbitrators to ad hoc tribunals, for example, and their awards do not bind subsequent tribunals. Nonetheless, arbitrators engage in the scrutiny state acts, a function akin to administrative or constitutional judicial review. Other aspects of arbitral authority, including the remedy (compensation to the investor for harms attributable to the state) can give ISA a more “private,” less “public,” complexion. One aspect of hybrid TDR is that arbitrators often govern through coordinating what would be considered to be “private” and “public” law values in national legal systems.

The Constitutional Model

A nascent – but far more controversial – model conceives the arbitrator as an Agent of a wider international legal order, at least in some circumstances.

As a matter of institutional structure, the model rests on the view that the ISAR is a component of an emerging international economic law that is being developed by courts outside of the regime. The good arbitrator has a duty to take into consideration the relevant jurisprudence of the courts of the International Court of Justice, the World Trade Organization, the European Union, the European Convention on Human Rights, and others. A supplementary purpose of arbitration, therefore, is to build a stable interface between the ISAR and other international economic regimes. If we presuppose that an international economic constitution is gradually being constructed, then this activity is a necessary condition.

A more robust form of the constitutional model presupposes a substantive body of “higher law” norms that are binding on all international judges, including arbitrators. The most commonly invoked elements are jus cogens norms, basic human rights (including property rights), and procedural guarantees associated with due process and access to justice. Recent scholarship has emphasized the “constitutional” quality of these norms, as stable secondary rules governing transnational arbitration. The international arbitrator – as much as any judge – is under an obligation to give special regard to fundamental rights when they are material to the resolution of the dispute at hand. The duty, Petersmann argues, is reinforced by other overarching international norms, including those found in the 1969 Vienna Convention on the Law of Treaties.

Article 31.1 of the Vienna Convention states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The third clause of Art. 31, however, also requires the

14 Cites.
16 Renner 2009; Petersmann et al.,
interpreter to take into account “any relevant rules of international law applicable in the relations between the parties.” Further, the Preamble to the Vienna Convention states that disputes “should be settled … in conformity with the principles of justice and international law.” In this account, arbitrators can be said to be under a fiduciary obligation to apply fundamental rights, to engage relevant sources of international law, and to pursue “justice” in other ways. Thus, the ICSID arbitrator, whose authority is based on a BIT, would be simultaneously an Agent of the disputing parties (the contractual model), an Agent of the greater investment community (the judicial model) and, at least at times, an Agent of a higher-law, global order (the constitutional model).

In sum, as we move from the first to the third models, one finds arbitrators operating in an increasingly elaborate legal system which will lead them to conceptualize their roles differently. Consider the notion of “justice,” the provision of which is causally linked to judicialization. In the contractual model, the arbitrator supplies justice by settling a dyadic dispute under defensible procedures and reasons, and an “unjust” arbitral award is merely another aspect of a business deal gone bad, with no affect beyond the disputing parties – who are the main beneficiaries. In the judicial model, rendering justice entails enhancing systemic coherence and legitimacy for a wider group of beneficiaries that includes future disputants, as well as third-party stake holders. In the constitutional model, justice is denied when the arbitrator fails to uphold, or adequately take into consideration, the higher law norms of international law that ground the legitimacy of all international lawmaking and dispute resolution. As we move from the contractual, to the judicial, to the constitutional model, arbitral power is exercised in an increasingly complex and fragmented “system,” in deliberation with a growing number of stakeholders. As judicialization proceeds, TDR cannot be separated from governance.

B. Data

[As Section 3 documents, we compiled information on all known, publicly available ICSID and NAFTA ISA awards. We intend to add to this database awards rendered under other auspices (UNCITRAL, ICC, and so on).]

As of this writing, investors have registered 420 cases before ICSID tribunals. Of these, 251 have been resolved and 169 remain open. ICSID arbitral tribunals have issued 147 awards; other concluded cases have been discontinued or have been resolved via settlement. This paper narrows the scope of inquiry to awards in which the tribunal resolved the case on the merits. We have identified 84 publically available awards on the merits. This set includes 13 NAFTA Chapter 11 investment disputes that were resolved through ICSID facilities. We also included merit-based NAFTA Chapter 11 ISA awards resolved under UNCITRAL rules. From the 93 ISA cases examined, this paper identifies a total of 1,158 citations to prior awards.

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18 Icsid.worldbank.org;
19 Id.
20 Id.
21 These include: Tecmed, Anzian, etc…
22 These include: Methanex, Pope, SD Myers, etc…
23 Explain what precedent is.
In addition to tribunal awards, we also compiled information of ICSID *ad hoc* Annulment Committees (Article 52 of the Convention). Ad hoc committees have issued decisions on 30 applications for annulment. A further 12 applications have been discontinued, and 9 remain pending. We have full information on 26 of the 30 decisions by *ad hoc* committees, including all full and partial annulments. From this group of decisions, Annulment Committees cited to 495 prior awards and judicial decisions.

C. Empirical Issues and Methods

Our goal is to describe and assess the evolution of the ISAR in light of our theoretical orientations, focusing on specific indicators of judicialization.

The first indicator is the development of arbitral jurisprudence – the case law issuing from prior awards – that can serve as the basis for precedent-based discourse. There is no formal doctrine of precedent, let alone a rule of *stare decisis*, in the ISAR. Our units of analysis are “argumentation frameworks”: the doctrinal structures forged by materials produced in prior awards that organize how lawyers plead cases, and how arbitrators justify their decisions. We seek to track the emergence of such frameworks, and to assess their impact on subsequent lawmaker and institutional change.

The second indicator is the demand for supervision of awards. As a technical matter, there is no substantive appellate review of awards in the ISAR, although a disgruntled party can request the formation of an *ad hoc* annulment committee under ICSID rules. We are interested in the extent to which annulment committees provide interpretive guidance despite the fact that the rules clearly prohibit annulment on the grounds of “errors in law.” And we are interested in how this guidance, if generated, impacts on subsequent tribunal decision-making, if at all.

The first two indicators are directly associated with arbitral lawmaking, and the development of the ISAR as a relatively autonomous legal “system” (the judicial model). Our third indicator is the reference to international law and the citation to courts of other international regimes in the decision-making of tribunals in ISA. In tracking such practices we can assess the relationship between the ISAR and other international regimes (the constitutional model).

Arbitrators are the major actors in this research. They produce the data that we have collected and will analyze, and their decision-making behavior can be assessed with reference to the three models we have elaborated. Whatever judicialization is registered in the regime is due to the persuasive effects of arbitral jurisprudence. Given the relatively decentralized, non-hierarchical structure of authority within the ISAR, we assume that some arbitrators will exercise more influence on future decision-making in the system than others. Our data will allow us to identify these people.

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24 ICSID Convention, Art. 52.
26 Id.
27 English translations of the remaining four annulment decisions remain unavailable. These are *Viera v. Chile, Contorium RFCC v. Morocco, CECFT v. Gabon and Togo Electric v. Togo.*
[Section on the market for arbitrators. Some arbitrators, we assume, are engage in “skilled social action.” Skilled social actors – other scholars sometimes refer to “norm entrepreneurs” in similar ways – are those who develop and deploy their professional skills to build institutions in the face of endemic cooperation and coordination problems. They are rational actors who strive to produce collective goods, but not just for personal gain. Further, we have reason to think that presidents of tribunals, and members of annulment committees, may be more likely to be concerned with building arbitral institutions and responding to legitimacy concerns compared to other arbitrators. To put it crudely, if arbitrators want to be appointed most often by claimants (or by states), they may not feel as free to develop the law as tribunal presidents do.]

In the next section, we present a descriptive overview of the data as it relates to some of themes raised to this point. (As we have just begun, the data has yet to be analyzed in sophisticated statistical ways, but the reader should be able to see where we are going with this.)

We also used the database to organize our qualitative research into the judicialization of ISA. We will adapt the method of “process-tracing” to our topic. Process tracing involves detailed case study structured by explicit theoretical expectations and patterns in the aggregate data. Its purpose is to trace outcomes in specific domains over time, generating a more fine-grained understanding of how the system works than can be achieved by analysis of aggregate data on its own. As we will show, today the accumulated mass of case law comprises a formidable corpus of materials available for the field’s further development.

3. Aggregate Data Analysis

We collected data from 93 ISA tribunal awards, which include 71 non-NAFTA ICSID awards, 12 NAFTA-based ICSID awards, and 9 UNCITRAL NAFTA awards. The database contains all known publically available ISA decisions awarded on the merits. We also analyze 26 out of the 30 ICSID annulment committee decisions, which include all annulment decisions for which English translations have been made publically available.

Figure 1 tracks the registration of ICSID (non-NAFTA) cases from 1972 to 2012. A total of 389 non-NAFTA cases have been registered with ICSID, including 230 concluded and 159 pending cases.

----- Figure 1 here -----

Figure 2 plots the annual registration rate of NAFTA ISA disputes under ICSID Additional Facility and UNCTIRAL rules from 1997 to 2012.

----- Figure 2 here -----

30 On process tracing generally, see Alexander and George (2005). The method is particularly suited to analysis of the development of the case law of a legal system and its impact on non-judicial actors (see Stone Sweet 2004).
31 Incomplete as it does not include some non-NAFTA UNCITRAL ISA disputes.
Figure 3 charts the 93 known, publically available, final awards on the merits by date of decision between 1977 and 2012. These include 21 NAFTA and 72 non-NAFTA awards rendered by ICISD tribunals.

----- Figure 3 here -----

We track citation to prior cases in the data set, information gathered to help us analyze the development of ISA doctrine. Figure 4 displays the average number of citations per award for NAFTA and non-NAFTA ICSID decisions in the dataset, over four periods of time. Citation rates in non-NAFTA ICSID awards on the merits rose dramatically between the 2001-2004 and the 2005-2008 periods. Citation rates in NAFTA cases rose between the pre-2001 and the 2001-2004 periods.

----- Figure 4 here -----

In order to get a more fine-grained sense of the use of prior awards, we coded each citation by the legal domain or issue area in which it was used. Table 1 displays the most frequently cited cases in publically available awards. It displays the total number of times each award has been cited, the number of times each award has been cited by domain area, and the total number of citations to prior law for domain areas.

----- Table 1 here -----

Table 1 shows that analysis of the “fair and equitable treatment” (FET) dominates all other categories in terms of citation frequency. Over 300 of the 1158 citations counted (25.9%) occurred in the FET area. Tribunals invoked parts of another 200 prior awards in their analyses of arbitrary and discriminatory treatment, national treatment, denial of justice, and full protection and security obligations, which, along with some expropriation analysis, are increasingly being folded into FET analysis by some tribunals. The leading FET cases are **Tecmed v. Mexico** along with early NAFTA ISA disputes that include **S.D. Myers v. Canada, Waste Management v. Canada, and Mondev v. United State**. NAFTA cases are also among the most cited for analysis of expropriation and national treatment. These foundational NAFTA ISA awards have been cited not only by subsequent NAFTA tribunals, but also by tribunals convened under ICSID to analyze other investment treaties that feature similar standardized provisions.

Table 1 also presents some of our data on arbitrators, listing the presidents of the tribunals that have rendered the most frequently cited awards. Because presidents are normally the primary authors of awards decisions, this list offers insight into the arbitrators who have most heavily influenced the development of ISA jurisprudence. Table 2 names arbitrators who have been appointed to the most number of ISA tribunals. Typically, ISA tribunals are three-person panels in which each party appoints one member and a president is appointed by mutual consent. The Table provides information as to arbitrators’ career experience, number of appointments, and the number of times they have acted as president, investor-appointed arbitrator, and state-appointed arbitrator in publically available awards.

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32 UNCTD
33 ICSID Convention, Art. 6(1)
Certain arbitrators appear to favor particular roles. Brigitte Stern, for example, is appointed primarily by state parties, while Charles N. Brower and Marc Lalonde are most often appointed by investors. Of her 37 appointments, Stern has served as president three times and as a state-appointed arbitrator on at least 28 occasions; only two of her appointments were made by investors. On the other side, Charles N. Brower has been appointed 20 out of 22 times by the investor party. A third type of arbitrator appears to be those who are categorically favored by neither states nor investors, but often serve as tribunal president. A comparison between most frequently cited arbitrators from Table 1 and most frequently appointed arbitrators from Table 2 shows arbitrators who fall under both categories are those who are frequently appointed as tribunal president, but comparatively rarely appointed by a party to the dispute.

We also collected data on dissenting and concurring opinions. In ISA, tribunals seek to reach decisions through consensus, and the award reflects the conclusions of the panel as a whole. Concurring and dissenting opinions are relatively rare. In NAFTA, only one concurrence was registered in the years, 2002, 2007 and 2008, while in ICSID, one concurrence appeared in 2000 and 2010, and two in 2008. There have only been 3 dissents in NAFTA cases, 2 in 2002 and 1 in 2006, and 22 dissents in ICSID, including 6 in 2008. To attract future appointments and curate a certain reputation, arbitrators may be careful to accurately signal their stance on controversial interpretations.

As noted, the ICSID permits application from the parties for annulment. Such applications have kept pace with the growth of ICSID case registration and awards decisions. Figure 6 charts the growth of annulment applications over time.

Between 1984 and 2012, dissatisfied parties have filed 62 applications for annulment, 20 of which remain pending. Approximately one third of tribunal final awards have been subject to annulment proceedings. Table 3 summarizes the outcomes in the 42 concluded annulment decisions over four time periods.

34 Data compiled by the authors from the ICSID website (icisd.worldbank.org); A full accounting of appointments is not possible because, where no public decisions is available, it is not possible to discern which party appointed which arbitrator.
35 Data compiled by the authors from the ICSID website (icisd.worldbank.org)
39 Annulment Report.
40 Annulment Report
Of the 30 decisions that annulment committees have rendered, 19 rejected the application and 11 granted full or partial annulment. State applicants have received 3 full and 2 partial annulments, while investor applicants have received 3 full and 3 partial annulments.41

Figure 6 shows the average number of citations per annulment decisions over time.

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Citations rates remain low until the mid-2000s and then climbed precipitously. Whereas ICSID tribunals have cited to prior awards an average of 11 times per decision, ad hoc Committees have done so nearly 20 times per decision. The higher rate of citation found in annulment decisions implies that ad hoc Committees are more engaged in giving prospective guidance to the ISA community. Table 4 displays the most frequently cited cases in annulment decisions. It displays the total number of times each decision has been cited by subsequent ad hoc Committee, the number of times each case has been cited by subject, and the total number of citations to prior law for each issue-area listed.

----- Table 4 here -----

The most frequent question for which annulment committees invoke citations are those related to “manifest excess of powers” under Article 52(1)(b) and “failure to state a reason” for which the tribunal is based under Article 52(1)(e). Early cases that frame analysis of Article 52(1)(b) and Article 52(1)(e), including Mine and Vivendi I, are the most popularly cited cases in annulment decisions.

Table 4 provides information on the chair of the committees rendering decisions. Ad hoc Committee members are appointed by the Chairman of the ICSID Administrative Counsel, without need to consult parties.42 Sompong Sucharitkul was president for three of the most cited decisions identified in Table 4. Each of these follow on the heels of the Amco I and Klockner I annulment decisions, which were criticized for engaging in error review.43 ICSID leadership responded to criticism by appointing ad hoc Committees members in the next three cases who would end the tendency of annulment by review. Prof. Sucharitkul lead these committees to reject applications for annulment in MINE, Amco II and Klockner II, and our citation analysis indicates that his approach continues to shape annulment decisions. Prof. Sucharitkul’s triple appointment is an early example of how the ICSID organization exercises its appointment power to shape investment law jurisprudence. As the case studies show, however, Annulment Committees continue to engage in de facto error review, which the ICSID management appears to encourage, at least at times.

41 Data compiled by the authors from the ICSID website (icisd.worldbank.org)
42 Art. 52(2).
Table 5 lists those arbitrators appointed most frequently to *ad hoc* Committees. The table includes information on their academic or judicial experience, total number of appointments, and appointments as either president or member of *ad hoc* Committees.

Comparing Table 5 and Table 2 reveals little overlap. Peter Tomka and Dominique Hascher, the two arbitrators who have been appointed to the most number of *ad hoc* Committees, have never been appointed to an arbitral tribunal. Conversely, the top four most appointed tribunal members have been appointed over 100 times to tribunals, but have only served on only five *ad hoc* Committees, and never as chairman. The data support the view that the pool of arbitrators preferred by the disputing parties is different from the pool or people the ICSID Administrative Chairman appoints.

In order to assess the degree to which public international law informs ISA jurisprudence, we also gathered data on citations to international courts and tribunals – including the ICJ, WTO and the ECHR – over time. Figures 7 and 8 chart the proportion of NAFTA and non-NAFTA ISA awards citing to rulings of international courts. We do not include prior periods since such citation was virtually non-existent before 2001. After 2001, ICSID (non-NAFTA) tribunals began citing to ICJ cases with increasing frequency and, in more recent years, to WTO and ECHR cases. Citation patterns in NAFTA cases display an opposing trend. Early NAFTA cases cited to ECHR and WTO decisions, less so in later years. Nonetheless, the NAFTA tribunals citing WTO and ECHR decisions, including *S.D. Myers, Pope and Talbot, Feldman and Monde*, themselves became some of the most frequently cited decisions within and outside of the NAFTA context.

Figure 9 charts the proportion of Annulment Committee decisions to international courts. The frequency of citation frequency to ICJ cases remain constant for annulment decisions decided between 2001 and 2008, while citation to WTO and ECHR cases is non-existent. Citation rates to ICJ jump in the recent years, while citation to WTO case law remains virtually non-existent (the *ad hoc* Committee noted (not unfavorably) the tribunal’s use of the WTO proportionality framework in *Continental Casualty*, to reach a conclusion on Argentina’s necessity defense). The president of *Continental Casualty* annulment proceeding, Gavan Griffith, also authored a decision that cited to an ECHR cases while examining the issue of shareholder standing.

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44 Data compiled by the authors from the ICSID website (icisd.worldbank.org)
45 Only cited for general principles of international law, see Amco Asia II citing ICJ cases to support *Pacta Sun Servanda* (1990).
46 Continental Casualty, paras 133-135.
47 Azurix, para 128, fn 84.
4. Process Tracing: Lawmaking and Authority

A. Definition of Investment / MFN

To be written.

B. Fair and Equitable Treatment

This section will examine the doctrinal evolution of the FET standard [FET], highlighting key indicators of judicialization: the development of persuasive authority in ISA and the principal-agent interactions between treaty parties and tribunals. The FET provides the ideal illustration of doctrinal evolution in a decentralized, non-hierarchical system. In most BIT’s, the FET was defined as scarcely more than a requirement of “fair and equitable treatment” towards investors. Therefore, arbitrators, not treaty drafters, have constructed the FET through application. Tribunals treat FET as a uniform norm across BIT’s despite considerable variation in FET language, which allows a common doctrine to emerge.

Stages of Doctrinal Development

Since there is no doctrine of precedent in ISA, each tribunal is free to define the FET independently, without reference to other cases. Alternatively, arbitrators can refrain from general definitions and apply the FET in light of the facts as if the interpretation were obvious. Between 1999 and 2001, the earliest FET cases took the latter approach: the tribunals cited the FET language, reviewed the facts, and declared the outcome with very little reasoning, treating the FET as a binary standard. Almost none of these cases contained citations: each tribunal struggled to clarify the vague standard de novo.

Tecmed (2003) and Waste Management (2004) were critical turning points in the development of FET doctrine in the BIT and NAFTA contexts respectively. Both cases were the first to clearly and comprehensively define the FET. Tecmed specified a surprisingly detailed set of obligations under the FET, drawing from only three cases (Neer, ELSI and Mondev) and the vague principle of good faith. Referencing nearly every NAFTA case that dealt with the FET,

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51 Técnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Case No ARB (AF)/00/2 (Mexico-Spain BIT), Award, 29 May 2003, 43 ILM 133 (2004), para 153: “The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into
Waste Management synthesized earlier interpretations into a detailed definition of the MST-based FET. The tribunal framed its approach as a mere summary of extant case law, but its interpretation significantly enhanced investor protections. These cases mark the beginning of general, prospective lawmaking under the FET.

As the doctrine developed, arbitrators interpreted the FET to serve a gap-filling function. By leaving the FET undefined, the treaty parties implicitly delegated wide discretion to arbitrators to develop the standard in light of changing and unanticipated circumstances. Investors and arbitrators have increasingly relied on the FET. In particular, tribunals tend to read issues that would have formerly fallen under the non-expropriation clause, such as indirect or creeping expropriation, into the FET. Left without interpretive guidelines, the FET offers arbitrators more leeway in tough decisions and lower risk of annulment. As the PSEG v. Turkey (2007) tribunal explains:

“The standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate. This is particularly the case when the facts of the dispute do not clearly support the claim for direct expropriation, but when there are notwithstanding events that need to be assessed under a different standard to provide redress in the event that the rights of the investor have been breached.”

account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.” (emphasis added)

Azinian, S.D. Myers Inc. v. Canada, UNCITRAL Rules (NAFTA), First Partial Award, 13 November 2000, 40 ILM 1408 (2001); Mondev International Ltd v. United States; ICSID Case No. ARB(AF)/99/2 (NAFTA), Award; 11 October 2002, ADF Group Inc v. United States, ICSID Case No ARB(AF)/00/1 (NAFTA), Award, 9 January 2003., Loewen Group, Inc. and Raymond L. Loewen v. United States, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award, 26 June 2003, 42 ILM 811 (2003). A notable exception is Metalclad, though the FET portion of that decision was largely overturned by the Supreme Court of British Columbia. (Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1 (NAFTA), Review by British Columbia Supreme Court)

Waste Management v. Mexico, ICSID Case No ARB(AF)/00/3 (NAFTA), Award, 30 April 2004, 43 ILM 967 (2004), para 97: “Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.”

Sempra Energy International v. Argentina, ICSID Case No.ARB/02/16 (Argentina-United States BIT), Award, 28 September 2007., para 297 (“It follows that it would be wrong to believe that fair and equitable treatment is a kind of peripheral requirement. To the contrary, it ensures that even where there is no clear justification for making a finding of expropriation, as in the present case, there is still a standard which serves the purpose of justice and can of itself redress damage that is unlawful and that would otherwise pass unattended.”)

PSEG v. Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007, para 238
Tribunals have read so many issues into the FET that it has gone from an undefined, binary standard to a catch-all umbrella clause for ISA. The standard now covers due process, denial of justice, transparency, good faith, legitimate expectations, reasonableness, consistency, non-discrimination and non-arbitrariness, as well as obligations on investors such as due diligence.57

Beginning in approximately 2004, a critical shift in FET doctrine was the move towards balancing through proportionality analysis. As states raised public or regulatory interests as a defense, tribunals began to import the language of balancing and proportionality into the FET to weigh investor protection against state interests.58 The Total v. Argentina (2006) case then established a framework or methodology for proportionality analysis under the FET, citing domestic, WTO and ECJ case law.59 The tribunal conducted a necessity or least restrictive means test that evaluated possible alternative measures in light of Argentina’s regulatory aims and economic crisis.60

The pending cases involving cigarette packaging may force arbitrators to further expand proportionality into a general balancing framework that can account for third-party interests.61 Both Philip Morris and the host states have incorporated some balancing and proportionality language into their initial arguments under the FET.62 The positive feedback between tribunals

57 .g. MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7 (Chile-Malaysia BIT), Award, 25 May 2004, 44 ILM 91 (2005)., para 178 (“Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen. Their choice of partner, the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the issuance of the required development permits, are risks that the Claimants took irrespective of Chile’s actions.”); Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8 (Lithuania-Norway BIT), Award, 11 September 2007, paras 333-7 (Investor has to anticipate changes in circumstances and the legal environment given the state of political and economic transition in Lithuania at the time); see generally Muchlinksy, Peter. "‘Caveat Investor’? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard.” International and Comparative Law Quarterly 55 (2006): 527-58. Print. (International and Comparative Law Quarterly, 2008)

58 MTD Equity v. Chile, para 109 (The FET is a “broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, nondiscrimination, and proportionality.”); EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Romania, ICSID Case No. ARB/05/13 (Argentina-Belgium and Luxembourg Economic Union BIT and Argentina-France BIT), Award, 8 October 2009., para 286 (The tribunal treated proportionality as a component of the FET along with good faith and transparency.) El Paso v. Argentina, para 373 (Proportionality is a related to the reasonableness component under the FET); Sempra v. Argentina, para 299 (Proportionality and reasonableness are core elements to legitimate expectations.); Vivendi v. Argentina II, ICSID Case No. ARB/97/3, Award, 20 August 2007, para 26 (Because the officials knew that the investor’s water services did not pose a health risk, their call for political leaders to refuse to pay for the services was “irresponsible, unreasonable, disproportionate.”); Saluka Investments BV (The Netherlands) v. Czech Republic. UNCITRAL Rules (Czech Republic-Netherlands BIT), Partial Award, 17 March 2006, para 306 (“The determination of a breach of Article 3.1 by the Czech Republic therefore requires a weighing of the Claimant’s legitimate and reasonable expectations on the one hand and the Respondent’s legitimate regulatory interests on the other.”)

59 Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01 (France/Argentina BIT)., para 123, 128-134

60 See e.g., Total v. Argentina, para 160-4


62 Philip Morris Asia Limited v. Australia, Notice of Arbitration, para 7.7 (The measures fail the balancing test because they have not shown “demonstrable utility to improve public health.”); FTR Holding S.A. v. Uruguay, Notice of Arbitration, para 84 (The specific packaging requirements mandated by Uruguay are “excessive.”); Philip
and lawyers could entrench proportionality as the dominant approach for FET analysis. Proportionality forces arbitrators to consider both parties’ interests and maintain a consistent but flexible framework. The heightened procedural determinacy and predictability would reduce the agency costs of delegating power to arbitrators through the vague FET standard.

**Principal-Agent Dynamics**

The above doctrinal evolution exposes the dynamics of judicialization in ISA. From the controversy over the NAFTA FET’s relationship with the minimum standard of treatment (hereafter MST) in customary international law, we observe the principle-agent interactions that typically occur between national courts and legislatures. The NAFTA FET, Article 1105, was relatively undefined. Before 2004, the US and Canada’s BIT’s had FET language similar to Article 1105.” Until 2001, NAFTA tribunals interpreted the standard as extending beyond the MST, covering protections such as transparency” and national treatment. The *Pope and Talbot* panel noted that fairness elements under the FET were “additive” to the minimum standard.

In the second merits phase of *Pope and Talbot* (2000), the US filed a submission as a non-party under NAFTA Article 1128. In its submission, the US tried to rein in the tribunal’s interpretation of the FET, explicitly tying the standard to the MST. Mexico submitted the same interpretation. In 2001, the NAFTA Free Trade Commission (FTC) issued a Note of Interpretation stating that Article 1105 is equal to the MST using language very similar to that in the US submission in *Pope and Talbot*. Looking at the language in Article 1105, however, it is not clear that the US and Canada initially intended to tie the FET to the MST. Though they argue that Article 1105 always referred to the MST, the NAFTA states essentially amended the FET *ex post facto* through their Article 1128 submissions and later through the FTC’s Note. Thus, they

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Morris Asia Limited v. Australia, Response to Notice of Arbitration, para 49 (available at [http://italaw.com/documents/PhilipMorrisAsiaLimited_v_Australia_Response_to_NOA_21Dec2011.pdf](http://italaw.com/documents/PhilipMorrisAsiaLimited_v_Australia_Response_to_NOA_21Dec2011.pdf)), (Australia argues that measures were a “reasonable regulatory response which has been adopted by the Australian government in good faith to address a severe, pervasive and long-standing threat to public health.”)

63 “Minimum Standard of Treatment: Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

64 US-Sri Lanka BIT, Article II (1991) “Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.” Canada-Hungary BIT, Article III (1991) “Investments or returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.”

65 *Metalclad v. Mexico*

66 SD Myers. The tribunal equated a violation of national treatment, a conventional international law rule, with a violation of the MST, a customary international law rule.

67 *Pope and Talbot v. Canada*, UNCITRAL rules (NAFTA), Award on the Merits of Phase 2, 10 April 2001.

68 NAFTA Article 1128: “On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.”


70 [http://naftaclaims.com/Disputes/Canada/Pope/PopeMexicoArticle1128SubSecondPhaseMeritsIssues.pdf](http://naftaclaims.com/Disputes/Canada/Pope/PopeMexicoArticle1128SubSecondPhaseMeritsIssues.pdf)

71 NAFTA FTC Notes of Interpretation of Certain Chapter 11 Provisions (“1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”)
simultaneously reduced their liability to investors and the scope of arbitral discretion to review state regulation. This is a classic case of the principal constraining the agent’s delegated power.

Likewise in the BIT context, the US and Canada wanted to protect their regulatory regimes from arbitral scrutiny even at the expense of greater protection for their investors abroad. Both states brought their FET clauses in line with Article 1105 in their 2004 Model BIT’s using more precise language modeled after the FTC Note. The US BIT states that the FET does “not create additional substantive rights” and for the first time partially defines the FET, outlining procedural but not substantive protections. The Canadian Model BIT from 2004 copied the FTC Note almost verbatim. Since BIT’s are easier to modify than NAFTA, it makes sense that the US and Canada chose to modify the BIT language directly rather than indirectly through a note on interpretation. These moves by the US and Canada to constrain the FET strongly suggest that tribunals were exercising a governance function in interpreting the FET and reviewing state regulatory actions to an extent that surprised and deeply concerned the states.

NAFTA tribunals have responded to the FTC Note. Some decided that, though the FET is tied to the MST, it has evolved beyond the 1920 Neer baseline, while others have pushed against this evolutionary standard. Since tribunals have the power to decide how much the standard has evolved, this evolutionary theory is one way for arbitrators as agents to regain discretion under the more restrictive FET. The iterative principal-agent dynamics between states and tribunals shape the scope of the arbitrators’ governance function.

**Persuasive Authority in ISA**

The FET’s doctrinal evolution can serve as a preliminary model for the development of precedent or persuasive authority in ISA. The nascent literature on precedent in ISA suggests that it performs the same functions as in national courts, namely disciplining judges and providing consistency. However, there is no vertical hierarchy of binding precedent in ISA. In a way, NAFTA’s FTC Note acted like binding precedent: it overturned earlier cases, and every subsequent NAFTA decision cited and followed the Note. These tribunals interpreted Article 1105 as having a much lower threshold of protection and narrower scope than the BIT FET,

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72 US Model BIT (2004): “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.” The newest 2012 US Model BIT has kept this language.

73 Mondev; ADF Group Inc v. United States

74 See generally, Methanex v. United States, UNICTRAL (NAFTA) Final Award on Jurisdiction and Merits, 3 August 2005, GAMI Investments, Inc. v. Mexico, UNICTRAL Rules (NAFTA), Final Award, 15 November 2004.; Glamis Gold v. United States, UNICTRAL Rules (NAFTA), Award, 8 June 2009.


creating a two-tiered FET doctrine in ISA. Some tribunals also rejected BIT cases as irrelevant authority. This rejection shows an effort to curate a body of NAFTA-specific authority and deprive BIT awards of precedential impact. Conversely, BIT cases continue to cite NAFTA decisions. Arbitrators are informally abiding by a norm of precedent: cases decided under a stricter standard can govern those under a looser standard but not vice versa.

Leaving binding precedent aside, we model persuasive authority in ISA as a coordination device. Coordination through case law is particularly useful in a decentralized system of ad hoc tribunals parallel to each other in the ISA hierarchy. For example, as argumentation frameworks, the FET definitions in Tecmed and Waste Management became focal points. By synthesizing earlier, idiosyncratic definitions, they coordinated the FET interpretation of later tribunals. Unsurprisingly, these are two of the three most cited decisions for FET: 56% of later decisions cite Tecmed, while eight out of nine subsequent NAFTA decisions cite Waste Management. Some tribunals simply downloaded the definitions from these two cases without modification (nearly all the Argentina awards follow Tecmed’s pro-investor approach to the FET), while others explicitly expand or constrain particular elements.

77 Glamis Gold, para 608; Cargill, para 278
78 See e.g., Azurix v. Argentina, ICSID Case No. ARB/01/12 (Argentina-United States BIT), Award, 14 July 2006, paras 368-9 (citing Mondev, Loewn, Waste Management), Saluka, paras 297, 305 (citing SD Myers), paras 302-3 (citing Waste Management); Siemens AG v. Argentina, ICSID Case No ARB/02/8 (Argentina-Germany BIT), Award on Jurisdiction, 3 August 2004, 44 ILM 138 (2005), paras 296-7 (citing Mondev, Waste Management, Loewn); LG&E v. Argentina, ICSID Case No. ARB/02/1 (Argentina-United States BIT), Decision on Liability, 3 October 2006, para 124 (citing Metalclad); Enron Corporation and Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/3 (Argentina-United States BIT), Award, 22 May 2007, paras 256-7 (citing Pope & Talbot), Parkerings, para 315 (citing SD Myers); Sempra, para 297 (citing Pope & Talbot); BG Group Plc v. Argentina, UNCITRAL (UK/Argentina BIT), Award, December 2007, para 294 (citing Waste Management); Biwater Gauff (Tanzania) Ltd v. Tanzania, ICSID Case No ARB/05/22 (Tanzania-UK BIT), Award and Concurring and Dissenting Opinion, 24 July 2008, paras 596-8 (citing Mondev, Waste Management, Thunderbird), 602 (citing Metalclad); National Grid plc v The Argentine Republic, UNCITRAL (UK/Argentina BIT), Award June 2006, paras 172-3 (Waste Management); Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş v. Pakistan, ICSID Case No ARB/03/29 (Pakistan-Turkey BIT), Award, 27 August 2009., para 176 (citing Metalclad, Waste Management); EDF v. Romania, paras 216-7 (citing Waste Management); Total paras 107-111 (citing Waste Management, Mondev, SD Myers), para 119 (citing Thunderbird, GAMI); El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15 (US/Argentina BIT), para 361 (citing Methanex)
79 Shapiro, Martin and Stone Sweet, Alec, On Law, Politics and Judicialization, Ch. 2 and 3
80 Eureko v. Poland, Partial Award, 19 August 2005, para 235; Siemens AG v. Argentina, para 299; Vivendi v. Argentina II, para 7.4.8-10; Enron v. Argentina, para 262; Sempra v. Argentina, para 298; BG Group Plc v. Argentina, para 294 (This case cites Waste Management’s definition of the FET because it considered the standard equal to the MST, though this made little practical difference in application); National Grid plc v The Argentine Republic, para 174-9
81 E.g., MTD v. Chile (explores notion of consistency in state conduct and reasonable level of investor responsibility, e.g. due diligence); GAMI v. Mexico (draws four implications from Waste Management to qualify the theoretical threshold defined in that case, para 97); Saluka (calls for balanced approach that takes into account the circumstances of the state and public interests); Continental Casualty Company v. Argentina, ICSID Case No ARB/03/9 (Argentina-United States BIT), Award, 5 September 2008, outlining specific components of the legitimate expectations doctrine, qualifying the stringent language of Tecmed); Biwater Gauff Ltd v. Tanzania, notes that threshold under FET remains high and cites six components under the FET); Total S.A. v. The Argentine Republic, (lays out in detail the balancing and weighing tribunals should conduct under the FET and introduces the proportionality framework)
Given the vagueness of the FET, there is no “correct” interpretation. Rather than striving for accuracy, one would expect tribunals to prefer consistency or at least to avoid being outliers. After Tecmed and Waste Management, the first movers in the FET field, the low-cost and low-risk route for subsequent tribunals was to follow their definitions. Other examples of first movers are cases that shift the FET in a new direction, e.g. Mondev (2002) in expressing the evolutionary theory of the MST-based FET, Saluka (2006) in pushing back on Tecmed’s pro-investor approach, Genin (2001) in equating a BIT FET with the MST. Mondev, the third most cited case for FET, and Saluka, the ninth most cited, became focal points for their qualifications of the doctrine. In contrast, BIT tribunals repeatedly distinguished Genin as irrelevant authority by criticizing its methodology or recharacterizing its interpretation. Thus, Genin may be a kind of negative focal point, showing that rejection of aberrant approaches is also critical to maintaining consistency.

Repeat appointments among arbitrators are a unique mechanism for consistency in ISA. The consolidation among arbitrators is significant: in the 54 FET claims studied in this section, eight arbitrators sat on panels for four or more cases. The tribunals in CMS (2005), Enron (2007) and Sempra (2007), all chaired by Francisco Orrego Vicuña, all used the exact same approach to FET. Giorgio Sacerdoti, a former chairman of the WTO Appellate Body, transplanted his proportionality analysis under the necessity clause in Continental Casualty (2008) into his FET analysis in Total, relying on WTO Article XX jurisprudence in both cases. In contrast, the presidents of the Tecmed and Waste Management tribunals have enjoyed repeat appointments but have had little opportunity to extend their FET interpretations. Nonetheless, Waste Management’s chair, James Crawford, did adopt the Waste Management definition in one later case. In that case, he also rejected the Glamis Gold (2009) approach of basing the MST-

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82 Cases that cite Mondev for the evolutionary theory: ADF Group, Loewen, Waste Management, Methanex, Thunderbird, Glamis Gold, Cargill, Merrill Ring, Chemtura. Cases that cite Saluka for the idea of balancing: Parkerings, para 315, 344; PSEG, para 255; Biwater Gauff, para 592, 602; National Grid, para 175; Bayindir, 176; Total, paras 110, 123; El Paso, paras 337, 348, 358; Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1 (Greece/Romania BIT)., paras 316-7

83 Azurix, 366-371 (Even though they tied the FET to the MST, the Genin arbitrators still expressed reservations about the Bank of Estonia’s actions); Siemens, 294 (The Genin tribunal did not properly analyze the text of the FET clause in the US-Estonia FET); LG&E, 129 (Though Genin mentions bad faith as a dispositive factor for a violation of the FET, it did not decide that bad faith was required)


85 CMS, para 274-280; Enron, paras 258-266; Sempra, 303-4: The tribunals find a requirement of stability under the FET based on the BIT’s preamble and summarily conclude that Argentina’s measures destroyed this stability.

86 Compare Continental Casualty, paras 192-5 and Total, paras 160-4

87 Horacio Grigera Naon, the chair in Tecmed, has been appointed to 7 other panels, but did not have another opportunity to interpret the FET. See, Murphy v. Ecuador (dismissed for lack of jurisdiction), Russian Resources v. DR Congo (discontinued), S&T v. Romania (discontinued), Respol v. Ecuador (discontinued), Hotel Loutrel v. Serbia (discontinued), Quantum Resources v. DR Congo (discontinued), City Oriente v. Ecuador (settled). Since Waste Management, James Crawford has been appointed to 5 tribunals. See, Liman Caspian v. Kazakhstan (not published), Railroad Dev. v. Guatemala (decision for investor), SGS v. Philippines (settled), Jacob Gibb v. Jordan (settled), Trans-GLOBAL v. Jordan (settled)
Based FET entirely on *Neer*. Therefore, there is at least some evidence that arbitrators treat their own prior decisions as binding precedent and will attempt to prune contrary interpretations from the case law.

Based on the above preliminary case study, a system of persuasive authority has begun to emerge organically in ISA and is becoming a powerful coordination device for horizontal dialogue among arbitrators, treaty parties and lawyers.

C. Necessity

To be written.

5. Conclusion

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88 Railroad Dev. v. Guatemala, paras 216, 219
Figure 1: Annual Number of ICSID (Non-NAFTA) Cases Registered, 1972-2012

Note: N=389 (230 Concluded, 159 Pending)

The breakdown of registered cases by means of state consent is as follows: BIT (63%), multilateral treaty (11%), contract with investor (20%), domestic law of host state (6%).

Source: Compiled by the authors from the ICSID website (icsid.worldbank.org).
Figure 2: Annual Number of NAFTA Cases Registered, 1997-2012

Note: N=51 (21 under ICSID (Additional Facility), 30 under UNCITRAL)

Source: Compiled by the authors from the NAFTA claims website (naftaclaims.com).
Figure 3: Annual Number of Known Publicly Available Final Awards on the Merits, 1977-2012

Note: N=93 (71 non-NAFTA, 22 NAFTA)

Source: S. Li, MJ Yang and A. Stone Sweet Database on Investor-State Arbitration
Figure 4: Average Number of Citations per Award by Period

Source: S. Li, MJ Yang and A. Stone Sweet Database on Investor-State Arbitration
Table 1: Most Frequently Cited Prior Awards and Judicial Decisions in Known Publicly Available Awards on the Merits, by Legal Domain

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<td>SGS v. Pakistan (2003)</td>
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</tbody>
</table>

*Cases not included in LYSS Database

Note: Table includes information on awards and judicial decisions cited 10 or more times by awards in the S. Li, MJ Yang, A. Stone Sweet Database on Investor-State Arbitration.

Key to Legal Domains:
- FET = “Fair and Equitable Treatment”
- EX = “Expropriation”
- AD = “Arbitration & Discriminatory Treatment”
- NAT = “National Treatment”
- DJ = “Denial of Justice”
- PS = “Full Protection & Security”
- UM = “Umbrella Clause”
- DM = “Damages”
- INT = “Interest Rate”
- O = “Other”

Source: S. Li, MJ Yang and A. Stone Sweet Database on Investor-State Arbitration.
Table 2: Most Frequently Appointed Arbitrators to ISA Tribunals

<table>
<thead>
<tr>
<th>ARBITRATOR</th>
<th>Exp.</th>
<th>Appt</th>
<th>P</th>
<th>I</th>
<th>S</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brigitte Stern (French)</td>
<td>A</td>
<td>37</td>
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<tr>
<td>Gabrielle Kaufmann-Kohler (Swiss)</td>
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<td>27</td>
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</tr>
<tr>
<td>Francisco Orrego Vicuña (Chilean)</td>
<td>A</td>
<td>26</td>
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<tr>
<td>Bernardo M. Cremades (Spanish)</td>
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<tr>
<td>Piero Bernardini (Italian)</td>
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</tr>
<tr>
<td>L. Yves Fortier (Canadian)</td>
<td>J</td>
<td>25</td>
<td>5</td>
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</tr>
<tr>
<td>Charles N. Brower (American)</td>
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<td>Marc Lalonde (Canadian)</td>
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<tr>
<td>Albert Jan Van Den Berg (Dutch)</td>
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<td>19</td>
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<tr>
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<tr>
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<tr>
<td>Bernard Hanotiau (Belgian)</td>
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<tr>
<td>V.V. Veeder (UK)</td>
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<td>David A.R. Williams (New Zealand)</td>
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<td>Gilbert Guillaume (French)</td>
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Note: Table lists arbitrators who have been appointed to more than 10 tribunals.

Key:
- Exp. = Academic or judicial experience (A = academic, J = judicial).
- Appt = Tribunals to which the arbitrator has been appointed, including all concluded and pending cases.
- P = President of the tribunal in awards included in the LYSS Database.
- I = Appointed by the investor in awards included in the LYSS Database.
- S = Appointed by the state in awards included in the LYSS Database.

Source: S. Li, MJ Yang and A. Stone Sweet Database on Investor-State Arbitration, data compiled by the authors from the ICSID website (icisd.worldbank.org)
Figure 5: Annual Number of Applications for Annulment, ICSID, 1984-2012

Note: N=62 (42 concluded; 20 pending)

Source: Data compiled by authors from the ICSID website (icsid.worldbank.org).
Table 3: Outcome of Annulment Application by Period

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<th>Period</th>
<th>Concluded Applications</th>
<th>Discontinued</th>
<th>Reject Annulment</th>
<th>Full or Partial Annulment</th>
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<td>2005-2008</td>
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<td>2008-2010</td>
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<td>TOTAL</td>
<td>42</td>
<td>12</td>
<td>19</td>
<td>11</td>
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Note: As of January 1st, 2013, there are 20 applications pending.

Source: S. Li, MJ Yang and A. Stone Sweet Database on Investor-State Arbitration
Figure 6: Average Number of Citations per Annulment Decision by Period

Source: S. Li, MJ Yang and A. Stone Sweet Database on Investor-State Arbitration.
<table>
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<th>Cited Case</th>
<th>President</th>
<th>Cites</th>
<th>AS</th>
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<th>MEP(J)</th>
<th>MEP(A)</th>
<th>FR</th>
<th>IR</th>
<th>FAQ</th>
<th>DP</th>
<th>Cost</th>
<th>O</th>
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Note: Table includes information on annulment decisions cited 10 or more times by awards in the LYSS Database.

Key:
- **AS** = Scope of annulment authority of *ad hoc* Committees,
- **MEP (G)** = Manifest excess of powers under Art. 52(1)(b): general scope of application and standards.
- **MEP (J)** = Manifest excess of powers under Art. 52(1)(b): as applied to the issue of excess jurisdiction or failure to exercise jurisdiction.
- **MEP (A)** = Manifest excess of powers under Art. 52(1)(b): as applied to the issue of failure to apply the proper law.
- **NR** = Failure to state a reason upon which the tribunal’s decision is based under Art. 52(1)(e).
- **IR** = Inadequate or insufficient reason under Art. 52(1)(e).
- **FAQ** = Failure to address an issue raised by the parties.
- **DP** = Fundamental departure from procedure under Art 52(1)(d).
- **Cost** = Allocation of costs and fees to parties.
- **O** = Other issues.

*Source: S. Li, MJ Yang and A. Stone Sweet Database on Investor-State Arbitration*
Table 5: Most Frequently Appointed Arbitrators to ICSID Annulment Committees

<table>
<thead>
<tr>
<th>Arbitrator</th>
<th>Exp</th>
<th>P</th>
<th>M</th>
<th>Appt</th>
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</thead>
<tbody>
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<td>Dominique Hascher (French)</td>
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<td>Peter Tomka (Slovak)</td>
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<td>Ahmed El-Kosheri (Egyptian)</td>
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<tr>
<td>Campbell McLachlan (New Zealand)</td>
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<td>Cecil Abraham (Malaysia)</td>
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<td>Stephen Schwebel (USA)</td>
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<td>Piero Bernardini (Italian)</td>
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<td>Azzedine Kettani (Moroccan)</td>
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<tr>
<td>L. Yves Fortier (Canadian)</td>
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Note: Table lists arbitrators who have been appointed to more than 3 annulment committees.

Key:
- Exp. = Academic or judicial experience (A = academic, J = judicial).
- Appt = Annulment committees to which the arbitrator has been appointed, including all concluded and pending cases.
- P = President of the annulment committee in awards included in the LYSS Database.
- M = Member of annulment committee in awards included in the LYSS Database.

Source: S. Li, MJ Yang and A. Stone Sweet Database on Investor-State Arbitration data compiled by the authors from the ICSID website (icisd.worldbank.org).
Figure 7: Proportion of Known Publicly Available NAFTA Awards Citing to International Courts, by Period

Source: S. Li, MJ Yang and A. Stone Sweet Database on Investor-State Arbitration
Figure 8: Proportion of Known Publicly Available Non-NAFTA Awards Citing to International Courts, by Period

Source: S. Li, MJ Yang and A. Stone Sweet Database on Investor-State Arbitration
Figure 9: Proportion of Known Publicly Available ICSID Annulment Decisions Citing to International Courts, by Period

Source: S. Li, MJ Yang and A. Stone Sweet Database on Investor-State Arbitration