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DOES THE LACK OF BINDING PRECEDENT IN INTERNATIONAL ARBITRATION AFFECT TRANSPARENCY IN ARBITRAL PROCEEDINGS?

*Emily F. Ariz**

ABSTRACT

This note explores how the lack of binding precedent in both international commercial and investment arbitration affects transparency in arbitral proceedings. As arbitration increases in popularity, its deficiencies have become more apparent. The lack of binding precedent in arbitration is convenient in some ways, but problematic as it leaves arbitrators an immense amount of discretion when deciding cases. With many decisions unpublished to maintain confidentiality and those decisions that are published sometimes lack reasoning to support the award, transparency in arbitral proceedings is practically nonexistent. In recent years, there is a trend toward more transparency in certain types of arbitral disputes. In this Note, I argue that while the lack of binding precedent in international arbitration encourages arbitrators to decide cases too freely, which contributes to the lack of transparency in arbitration, there are also many other factors that contribute to this problematic feature of international arbitration.

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1. INTRODUCTION

Arbitration is a helpful tool for parties that want autonomy in resolving their disputes. Parties can agree on procedural rules, choice of law, location, and arbitrators among many other specifics when it comes to arbitration.[1] While arbitral proceedings are desirable for their speedy and confidential nature, there is growing concern regarding transparency in international arbitration.

The United States judicial system follows the legal doctrine of *stare decisis*, which means that "a court must follow earlier judicial decisions when the same points arise again in litigation."[2] Arbitral awards do not have this same binding quality, meaning that arbitrators do not have to follow prior arbitral awards when deciding

[1] *See* Cindy G. Buys, *The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration*, 79 ST. JOHN'S L. REV. 59, 59 (2005).
[2] *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

cases and that the award is only binding on the parties in that case.[3] In international commercial arbitration, arbitrators have controls in place, mostly by way of the New York Convention, but have a lot of freedom when issuing awards, as there is no clear practice for following past awards in this field.[4] The confidential nature of arbitral awards means that many awards do not get published, leaving the public to wonder on what grounds the award was issued. This is especially significant because many commercial arbitration awards will have an effect on public policy. This lack of transparency contributes to the common characterization of international arbitration as being "lawless."[5]

In international commercial arbitration between private parties, transparency of arbitral proceedings may seem irrelevant as long as the dispute is resolved, but awards in international commercial arbitration can be impactful on international public policy.[6] For example, governments will often take commonly arbitrated issues into consideration when drafting free trade agreements or bilateral investment treaties to protect domestic companies that have international ventures, thus shaping their international economic policies. Furthermore, arbitrators are selected by the parties to serve the parties and have little incentive to consider third parties, like the general public, in their decisions. [7] While there is a push in the international arbitration community to make certain types of arbitral proceedings, such as investor-state dispute settlement, more transparent by publishing all awards, the lack of binding precedent still limits transparency, as arbitrators are not obligated to give well-supported legal reasoning in their awards.[8]

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[3] *See* Gabrielle Kaufman-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 24 ARB. INT'L 357, 357, 361 (2007).
[4] *Id.* at 362.
[5] *See* Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. OF L.A. L. REV. 187, 191 (2006).
[6] William P. Graham, *International Commercial Arbitration and International Public Policy*, *in* 81 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 372, 372 (Cambridge Univ. Press, 1987).
[7] *See* Drahozal, *supra* note 5 at 192.
[8] *See* U.S. Dep't of State, *2012 U.S. Model Bilateral Investment Treaty* § B, at 32 (2012) [hereinafter *2012 Model U.S. BIT*] (stating that documents relating to arbitral

I. DEFINING THE SCOPE OF TRANSPARENCY

Transparency has become a "buzzword" when discussing international investment and arbitration law.[9] There is a general consensus that transparency is a good thing, necessary for social, economic, international, and domestic systems to function in a democratic way.[10] In the context of international investment law and international arbitration, questions of who is owed transparency and in what respects become relevant. This largely depends on the type of arbitration at hand. For example, in investor-state dispute settlement (ISDS), transparency with respect to award amounts and the reasoning for the award should be publicly available to citizens of the country involved in the dispute and for other companies looking to invest in that host-state to learn from the mistakes of the investor.[11] In international commercial arbitration, transparency means that the reasoning of awards should be available to provide predictability to parties that regularly conduct international transactions subject to arbitration.[12]

Even with a push for creating more transparency in international arbitration, there is some information that should always be confidential, which the public has no right to know. For example, "trade secrets, confidential business information, state secrets, and information protected by professional or other legal privilege" should remain confidential as sensitive information.[13] On the other hand, there is plenty of information in which the public should know, or at least have easily accessible, that is not. Some investment awards are not publicly published, which infringes on the public's right to know how their government's regulatory powers are affected.[14] Furthermore, the general public, investors, and states all have interest in knowing how arbitral tribunals interpret broadly applicable

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proceedings must be made public); *see also* Int'l Ctr. for Settlement of Inv. Disps., ICSID Convention, Regulations and Rules pt. C, ch. 4, reg. 22 (2006).

[9] Andrea Bianchi, *Transparency in International Law* 142 (Andrea Bianchi & Anne Peters eds., Cambridge Uni. Press 2013).

[10] *Id.*

[11] *Id.* at 160.

[12] *Id.* at 161.

[13] *Id.* at 159.

[14] *Id.* at 160.

investment treaties.[15] From access to justice and public accountability viewpoints, it is difficult to rationalize why arbitration proceedings in most contexts are kept confidential.[16] There is also a category of information that is purposefully withheld for the advantage of the party with that knowledge.[17] An example of this would be large international arbitration firms with extensive knowledge of individual arbitrators gleaned from years of practice.[18] Having knowledge of which arbitrators are likely to persuade their co-arbitrators, which arbitrators keep the cases moving quickly, and so on can provide those large firms, and thus the parties they represent, a competitive advantage when choosing arbitrators to adjudicate a dispute.[19] While some of this knowledge partially comes from experience, it also comes from having a wealth of unpublished arbitral awards.[20]

The following sections will discuss the differences between civil law system and common law systems in these respects, specifically focusing on the role of precedent and prior case law in those systems. This is to show how arbitration functions more similarly to the civil law system in terms of binding precedent and how the lack of binding case law can affect the transparency of a court or tribunal's decision.

II. CIVIL LAW SYSTEM VERSUS COMMON LAW SYSTEM

A brief discussion of the differences between the civil law system and the common law system will provide some historical context and reasoning behind the lack of binding precedent in international arbitration. The common law and civil law systems vary in what is the "basis" for the law. Understanding the differences between common law systems and civil law systems starts with an understanding of *stare decisis* and *jurisprudence constante*.

Stare decisis is the rule, used in most common law systems, that prior judicial decisions are binding law and must be applied to future,

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[15] *Id.*
[16] *Id.*
[17] *Id.* at 165.
[18] *Id.*
[19] *Id.*
[20] *Id.*

similarly situated cases. *Jurisprudence constante*, on the other hand, is "defined as a series of adjudicated cases that establishes a consistent and uniform application of a certain rule."[21] The key difference between the two is the function of case law: under *stare decisis*, judicial opinions are binding, whereas under *jurisprudence constante*, judicial opinions are merely persuasive.[22] Many argue that *jurisprudence constante* informally exists in international arbitration, yet international arbitration is still very *ad hoc* by nature; just because arbitrators sometimes cite to precedent in their awards does not mean it is a common practice or has been widely accepted. Tribunals "still have complete discretion on how to interpret treaty provisions" and other applicable law and "disregard the decisions of other tribunals."[23]

Civil law is based on legislation, as opposed to common law, which is based on judicial decisions. Of course, common law countries also have legislation, but instead of being "formulated as general principles" as civil law legislation is, common law legislation "consist[s] rather of particular rules intended to control certain fact situations specified with considerable detail."[24] This forces common law systems to rely on judicial interpretation of legislation as a basis of law.[25] Civil law systems rely on legislation that is intentionally drafted to be broadly applicable.[26] This is not to say that civil law systems do not take previous cases into account, but the degree of persuasiveness is different depending on how many cases have been decided in a uniform way.[27] Single decisions do not bind courts in civil law systems.[28] As uniformity among cases increases overtime on a specific

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[21] Dumitru Filip, *The Role of Legitimate Expectations in Establishing a Jurisprudence Constante in International Investment Law*, 5 MANCHESTER REV. L. CRIME & ETHICS 28, 30 (2016).
[22] *Id.*
[23] *Id.* at 28.
[24] Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 425 (1967).
[25] *Id.* at 424.
[26] *Id.*
[27] Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, George Mason University School of Law, Law and Economics Research Paper No. 04-15 1, 6 (2004).
[28] *Id.*

issue, the more persuasive the case law becomes.[29] Furthermore, civil law systems give more deference to the legislative history of the laws, taking legislators' discussions and comments into account when interpreting the law.[30]

These differences lay the basis for differentiating between binding precedent and non-binding precedent. Arbitration very much follows the civil law tradition where "courts are not bound to follow previous judicial decisions."[31] Like civil law courts, arbitrators adjudicate cases based on the general principles of the applicable law, rather than looking at how prior, similar disputes were decided like the common law system would provide for.[32] The question then becomes: is it fair and equitable, as arbitration usually places emphasis on, for common law to be adjudicated in a forum where decisions are made in the way of a civil law system? Using an example to state it more clearly: should laws of the United States, which may be the applicable law of arbitration, be decided on its "general principles" in arbitration, when the laws were not designed to be adjudicated in that way? This is just another issue that affects the transparency of arbitration.

A few questions that arise when contemplating how the common law and civil law systems compare and fit into arbitration include how civil law systems maintain transparency and consistency without binding precedent and whether the common law system is really "transparent." The following sections will discuss these questions in depth.

a. How Do Civil Law Countries Maintain Transparency without Binding Precedent?

Countries with civil law systems maintain a degree of transparency in their judicial proceedings without following precedent in several ways, some of which are attainable for arbitral tribunals. Some ways that civil law systems preserve transparency are through the judicial appointment process, judicial financial

[29] *Id.*
[30] Dainow, *supra* note 20, at 424.
[31] *Id.* at 426.
[32] *Id.*

disclosures, and public access to judicial decisions.[33] The judicial selection and appointment process varies widely across different legal systems, but despite the exact mechanics of this process, the standards for judges are typically consistent.[34] Some factors and principles considered include objective, merit-based appointments, looking at professional standing, the experience level, and necessary legal skills of the individual candidates.[35] Having an open process can discourage the influence of external forces or other branches of government.[36] Similar standards should be utilized by arbitrators.[37] The ability of arbitrators is rarely called into question, but when it is, the entire award may be thrown out, forcing the parties to start from scratch. Thoroughly vetting arbitrators is a crucial step in arbitration that allows the parties to secure a level of stability and transparency in the proceedings.

Judicial financial disclosures refers to the requiring public officials, like judges, filing an asset and income disclosure statement.[38] This creates a sense of trust in public administration by being open about any potential conflicts of interest or any bribery.[39] Applying this principle to arbitration would be more difficult, as there is already a duty to disclose conflicts of interest imposed upon arbitrators. Because the public accountability factor is minimized with arbitrators, this requirement is not as essential, but requiring arbitrators to continue to disclose any conflicts of interest clearly still is.[40]

Publishing judicial decisions is "a vital element in preventing perceptions of secrecy and lack of accountability, which can in turn generate distrust and confusion amongst the public."[41]As discussed at length, availability and accessibility of judicial decisions allows

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[33] Clifton Johnson, *The Development of the Court Administration: Directions and Model*, INTERNATIONAL SCIENTIFIC CONFERENCE (Jun. 14, 2018), https://www.idlo.int/news/speeches-and-advocacy/enhancing-judicial-transparency-and-promoting-public-trust.
[34] *See id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *See id.*
[41] *Id.*

judiciaries to provide clarity and consistency within their legal system.[42] Applying the same principle to arbitration is simple. Publishing awards will foster consistency, even if *stare decisis* is not the presiding rule.

> These are just a few ways that international arbitration can become more transparent as it already mirrors the civil system more closely than it does the common law system.

b. Is the Common Law System Really Transparent?

While the common law approach uses *stare decisis* to provides stability and predictability, the transparency of decisions may be questioned.[43] Judicial decisions continuously building upon each other and being able to find case law on almost any issue provides a certain foundation and stability that enables the common law systems to function.[44] Yet, the common law system may not be as transparent as it boasts.

Another issue with some common law jurisdictions, specifically the United States, is that not all judges are selected and appointed through a transparent process. While some judges in the United States are voted in, federal judges and Supreme Court judges are appointed by the president. This clearly give another branch of the government, the executive branch, power and influence over the judiciary.

Judges in common law systems simply follow whatever prior case law says, unless there is good reason, like outdated cases, to overrule the previously established law. There is the argument that judges do not thoroughly think through their decisions under this model as they feel an obligation to stick with precedent.[45] Furthermore, when the case law is already established, there is less of a need to reason and explain why a case comes out a certain way.[46] While this

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[42] *Id.*
[43] *See* Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012).
[44] *See id.*
[45] *See generally id.*
[46] *See generally id.*

may offer stability and predictability in the legal system, it makes it very difficult to change any settled case law. This inflexibility of the system can allow for injustice for years until a case makes it to a higher court to be overturned.

The following sections will discuss two types of arbitration and how the lack of binding precedent has negatively affected the transparency of arbitral outcomes. Specifically, this section focuses on the role of the fair and equitable treatment standard, a legal standard commonly used in investment arbitration, in arbitrator's decisions and that has not been fully developed as a result of a lack of binding precedent. As demonstrated below, this underdevelopment has led to awards that have not been thoroughly reasoned and lack transparency.

III. TYPES OF ARBITRATION

There are several different types of arbitration, and usually the level of transparency is determined by the type of arbitration. For example, investor-state dispute settlement (ISDS) is typical more transparent than commercial arbitration because almost every opinion is published. But even if the opinion is published, does not mean that the arbitrator necessarily explain the reasoning behind their decisions. This following section will focus on the ISDS system and how the inconsistency of interpretation of law and the freedom given to arbitrators in deciding their awards can have disproportionate and unrationalized consequences that negatively affect states and their citizens.

a. What is ISDS?

Investor-state dispute settlement (ISDS) is a critical part of foreign investment. The ISDS system promotes foreign investment by providing investors with the confidence that their investments will be protected, and any associated disputes will be fairly resolved. Without an agreement on how to settle disputes between a host state and foreign private investor, the dispute would normally be handled by a

domestic court of the host country.[47] Foreign investors find this disadvantageous as those courts are typically bound by domestic law, which may not protect the investor's rights under international law.[48] Additionally, investors often believe that the host state's courts will not be impartial when settling the dispute. Submitting to arbitration is also beneficial for the host state as it can "protect itself against other forums for foreign or international litigation."[49] Arbitration is typically more efficient that traditional litigation, benefitting both the host state and investor who seek a speedy resolution. Finally, "[e]quating the private investment interests with those of the entire nation could ultimately lead to tensions that threaten the peace in the modern world."[50] One of the most important benefits of ISDS is that it depoliticizes the dispute and "reduces unnecessary diplomatic friction in the area of investment . . . by broadening the legal context into a wider arena of global economic interest, not merely the particular two national entities involved in a given case."[51]

i. The Role of International Treaties in ISDS

International treaties are how countries agree to ISDS. These include free trade agreements (FTAs) and bilateral investment treaties (BITs) which include provisions that enable an aggrieved investor with an investment in territory of a foreign host government to bring a claim against that government for breach of an investment agreement before an international arbitration panel.

A free trade agreement is "an agreement between two or more countries where the countries agree on certain obligations that affect trade in goods and services, and protections for investors and intellectual property rights."[52] The goal of FTAs is to reduce or

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[47] Won-Mog Choi, The Present and Future of the Investor-State Dispute Settlement Paradigm, 10 J. OF INT'L ECON. L. 725, 734 (2007).
[48] *Id.* at 735.
[49] *Id.*
[50] *Id.* at 736.
[51] *Id.*
[52] International Trade Administration (Department of Commerce), *Free Trade Agreement Overview*, https://www.trade.gov/free-trade-agreement-overview.

eliminate trade barriers, which in turn encourages international trade.[53]

Bilateral investment treaties (BITs) are agreements that lay out the terms for private investment in foreign countries. Typically, BITs are drafted to protect private investors rather than the host countries, in an effort to encourage more private investment in foreign countries.[54] Under most United States BITs, and FTAs, protected property includes moveable and immoveable property, tangible and intangible assets, and intellectual property. The purpose of these investment agreements is to protect investments from expropriation, political risk such as a change in government, or revocation of permits, among other risks that come with foreign investment.

ii. Fair and Equitable Treatment in International Investment Law

The fair and equitable treatment standard (FET) is the basis for many ISDS claims. The standard has its origins in the *1948 Havana Charter for an International Trade Organization*.[55] The standard is meant to protect investors from instances of "arbitrary, discriminatory, or abusive content by host states."[56] However, the standard is often critiqued for being too vague and does not provide enough guidance to arbitrators, thus giving arbitrators too much discretion in their decision making.[57] This uncertainty in application and interpretation of the standard leads to concern when the FET standard is used in the context of ISDS because it can "restrict host-country administrative

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[53] *Id.*

[54] *Bilateral Investment Treaties*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE https://ustr.gov/trade-agreements/bilateral-investment-treaties.

[55] Directorate for Financial And Enterprise Affairs, *Fair and Equitable Treatment Standard in International Investment Law*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 1, 3 (2004), https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf.

[56] United Nations Conference on Trade and Development, *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II*, UNITED NATIONS 1, 1 (2012), https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf.

[57] Directorate for Financial and Enterprise Affairs, *supra* note 51 at 2-3.

and governmental action to a degree that threatens the policymaking autonomy of that country."[58]

The general rule for the FET standard that has developed over the years is that the host-state must provide stability and predictability consistent with customary international law. There are clear instances where State conduct would constitute a violation of the standard including: (1) defeating investors' legitimate expectations (in balance with the host State's right to regulate in public interest); (2) denial of justice and due process; (3) manifest arbitrariness in decision-making; (4) discrimination; and (5) outright abusive treatment.[59]

These key elements of the FET standard have been identified and developed by arbitral tribunals. The first is the protections of investors' legitimate expectations, which is closely tied to changes that effect the investment.[60] As foreign investment typically involves projects with long durations, changes to the business environment, how the host-state is involved in those changes, and what the host-state will do to safeguard the investment in the event of a change is crucial to investor's expectations.[61] The second element is denial of justice and due process. While it is nearly impossible to define all instances that would constitute denial of justice and due process, the tribunal will likely consider the following in its determination: (1) denial of access to justice and the refusal of courts to decide; (2) unreasonable delay in proceedings; (3) lack of a court's independence from the legislative and the executive branches of the State; (4) failure to execute final judgments or arbitral awards; (5) corruption of a judge; (6) discrimination against the foreign litigant; (7) breach of fundamental due process guarantees.[62] The next element is manifest arbitrariness, which focuses on the motivations and objective behind the conduct at issue in arbitration.[63] The fourth element is discrimination, which is straightforward as it "prohibits discrimination against foreign investors and their investments."[64] The

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[58] United Nations Conference on Trade and Development, *supra* note 52 at 1.
[59] *Id.* at 62.
[60] *Id.* at 63.
[61] *See Id.*
[62] *Id.* at 80.
[63] United Nations Conference on Trade and Development, *supra* n. 2 at 78.
[64] *Id.* at 81-82 (footnote omitted).

final elements is abusive treatment, which includes conduct constituting "coercion, duress and harassment that involve unwarranted and improper pressure, abuse of power, persecution, threats, intimidation and use of force."[65] Because the FET standard is essentially a catch-all for any host-states' conduct that would jeopardize stability and predictability, it is one of the most common allegations to trigger ISDS proceedings.

iii. Expropriation in International Investment Law

Expropriation is the taking of aliens' property without adequate compensation, regardless of whether the property was taken for a public purpose or not.[66] While direct expropriation through nationalization was common in the 1970s and 1980s, now investors are threatened by indirect expropriation.[67] Indirect expropriation most commonly occurs when host-states' domestic policies interfere with foreign investment, which includes regulatory schemes aimed at protecting the environment, public health, or other public welfare interests.[68] With the nature of ISDS that allows for investors to bring such expropriation claims under the FET standard, this in concerning as increasingly, investors' rights are put before public interest.

iv. Public Interest Policies' Effect on ISDS

As previously mentioned, FTAs and BITs are increasingly being interpreted to prioritize investors' rights in protecting their investments in foreign states. Although ISDS is a useful tool for solving disputes that arise between states and investors, the system "fundamentally shifts the balance of power among investors, States, and the general public" while diminishing the "rights of governments to regulate."[69] This balance of power is shifted because ISDS elevates

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[65] *Id.* at 82.
[66] *See* Organisation for Economic Co-operation and Development, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, OECD WORKING PAPERS ON INT'L INV. 1, 3 (2004).
[67] *Id.* at 2.
[68] *Id.*
[69] Public Citizen, *Case Studies: Investor-State Attacks on Public Interest Policies*, 1, 1 (2015).

investors to the same status as sovereign governments and allows them to "privately enforce a public treaty."[70] It may be assumed that states involved in ISDS proceedings represent the interests of its citizens, but the interests of the general public and states' governments are not always aligned, leaving individuals that would be greatly affected by ISDS awards without representation in the dispute. The following section will detail several ISDS cases from recent years to demonstrate that investors typically win these cases due to the vague and low threshold of the FET standard.

v. ISDS Attacks on Public Interest Policies

The first case is *Metalclad v. Mexico*. This case related to toxic waste and ended in an investor win where the investor was awarded $16.2 million.[71] These proceedings occurred while NAFTA was still effective, which included a FET clause.[72] Here, the Metalclad was denied permits for expansion of its toxic waste facility by a Mexican municipality government which cited concerns of water contamination and environmental and health hazards as the reasons for denial.[73] Denial of these permits was deemed expropriation under the FET standard, even though the municipal government denied the same permits to the Mexican company from which Metalclad acquired the facility.[74] Mexico had to pay Metalclad for the diminution in value of its investment without proper compensation.[75]

The next case deals with an oil concession contract in *Occidental Petroleum v. Ecuador*. This case is particularly shocking as the arbitral tribunal imposed a standard that was not included in the BIT regarding the FET standard.[76] Here, Occidental "illegally sold 40 percent of its production rights of its another firm without government approval," which not only violated the contract between the parties, but also violated Ecuador's hydrocarbon laws.[77] The tribunal

[70] *Id.*
[71] *Id.* at 8.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* at 5–6.
[77] *Id.* at 5.

acknowledges that Occidental broke the law, but stated that the Ecuadorian government did not respond proportionally to the breach of contract by terminating the agreement.[78] This disproportionate reaction was deemed a violation of the FET standard and the tribunal awarded Occidental with $2.3 billion.[79] This amount was later reduced to $1.4 billion, "reducing the damages that had been based on the 40 percent share that had been sold," which still left a sizable hole Ecuador's pockets.[80]

Abengoa v. Mexico is another toxic waste case, but actually involves the public demanding protection from environmental harms.[81] This dispute fell under the Spain-Mexico BIT and the claim was filed by the Company alleging that it could not operate its waste management facility in Mexico because the local community strongly opposed it.[82] The waste management facility would put the already contaminated area at further risk for environmental harm.[83] The local government revoked Abengoa's land use permit as a result of the public opposition, but the matter continued to escalate.[84] Finally, the city council fully shut down the site and explained that it "did not comply with public policy."[85] The arbitral tribunal found that the revocation of the license amounted to indirect expropriation and therefore "ordered Mexico to pay Abengoa more than $40 million, plus interest, as compensation for its expected future profits from the waste plant and to cover half of the corporation's own tribunal and legal costs."[86]

The final case discussed is *Azurix v. Argentina*, which falls under the U.S.-Argentina BIT.[87] Azurix made a 30-year deal with Argentina to provide water and sewage treatment to 2.5 million people.[88] Within months, the local governments advised citizens not to

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[78] *Id.* at 6.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 9.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 13.
[88] *Id.*

drink or pay for the water services, which led to civil unrest.[89] The government and Azurix tried to blame each other for the algae contamination causing the unclean water, yet more problems arose.[90] Azurix over-billed citizens and was responsible for several water outages. After withdrawing from the deal, Azurix filed a claim stating that it did not receive fair and equitable treatment because the government did not allow it to raise rates and did not invest enough money into the water infrastructure.[91] The tribunal considered "whether legitimate public interest policies could constitute BIT violations," but ultimately found that Argentina's conduct violated the FET standard.[92] Azurix walked away with $165 million, plus interest, and covered most of the tribunal's costs.[93]

These cases are just a microcosm of the ISDS cases in which investors are awarded millions, or even billions, of dollars due to the vagueness and seemingly low threshold of what fair and equitable means under the FET standard. If the FET standard was more thoroughly developed, the application of the standard would be more uniform and predictable. This would occur if arbitrators had to follow previous interpretations of the standard and build upon those the interpretations to create a clearer guideline for how the standard applies to each case. Taxpayers in mostly poor countries end up paying the cost of these awards, even when the public clearly opposes some of the "investments." While investors' rights are important, equally important is the incentive to implement policies in favor of public interest, especially with respect to public international and domestic policy.

vi. The Future of ISDS

ISDS has become an integral part of international investment law, however there may be more limits on ISDS in future agreements. Moving toward a dispute resolution system that allows host-states to control public interest policies while maintaining investors' rights will

[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*

take time, as many of the agreements that prop up ISDS will likely not be revised or replaced anytime soon. But small shifts toward eliminating ISDS are already happening in the international investment world. For example, NAFTA's replacement agreement, USMCA, between the United States, Mexico, and Canada that establishes a free trade area that limits the use of ISDS.[94] No American investors can initiate ISDS proceedings against Canada and the availability of ISDS between the United States and Mexico is limited to certain sectors.[95] As a new agreement among powerful states in the western hemisphere, USMCA may set precedent in moving away from ISDS and finding or creating a dispute resolution system that takes public interest into account during decision making.

b. International Commercial Arbitration

Another common type of arbitration is international commercial arbitration. International commercial arbitration has been a preferred method of dispute resolution in the "cross-border context" for many decades, as it offers a way for parties to customize the way in which disputes are resolved—as was previously discussed towards the beginning of this paper—by having choice of law provisions, choice of procedure and rules governing arbitration provisions, and being able to choose the arbitrators and location of arbitration.[96] Finally, the most attractive draw for large companies is the privacy of arbitration.

As discussed earlier, most international commercial arbitral awards are kept confidential, so those awards cannot be analyzed in the same way that ISDS awards are. Additionally, the confidentiality of international commercial arbitral awards means that those awards have less of an impact on public policy. Nonetheless, international commercial arbitration is relevant to the topic of lack of precedent, as these arbitral awards are not always based in precedent. Again, this

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[94] Agreement Between the United States of America, United Mexican States, and Canada ("USMCA"), July 1, 2020, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

[95] *Id.*

[96] S. I. Strong, *Beyond International Commercial Arbitration - The Promise of International Commercial Mediation*, 45 WASH. U. J. L. & POL'Y 10 (2014).

lack of set precedent in international commercial arbitration contributes to decreased transparency in the system. The following section will discuss how the lack of binding precedent may be necessary in the context of international commercial arbitration.

IV. IS THIS LACK OF BINDING PRECEDENT NECESSARY OR PROBLEMATIC?

This is undoubtedly a loaded question, dependent on many factors. It is well-known that arbitrators often do not apply the law. Many arbitral decisions are "based on principles of equity and fairness, rather than legal obligation."[97] An arbitrator's authority comes from a contract between the parties, so assuming the contract is valid, the parties assent to comply with the arbitrator's decision whether or not the arbitrator applies the law.[98] Thus because the arbitrator works directly for the parties, there is more incentive to reach a decision that may be preferred by the parties rather than one that strictly follows the law.[99] Some argue that in an effort to have an award "be enforceable in all jurisdictions where review is likely," arbitrators try to conform with the rule of law as a vacated award would put the parties back where there started with the dispute.[100] However, arbitral decisions are typically reviewed on procedural, not substantive, grounds making the arbitrator's incentive to avoid a vacated award weak.[101]

It may seem backward that arbitrators do not always apply law, but this is exactly why the parties agreed to arbitrate in the first place. In international arbitration, the law applicable to case may be uncertain if it is not agreed upon in advance through a contract. Furthermore, designating a party's domestic law as the applicable law in arbitral proceedings beforehand may disadvantage the other party because the parties come from different countries with different legal systems.[102] The arbitrator is there to settle the dispute as quickly and

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[97] Drahozal, *supra* note 5, at 189–90.
[98] Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 726 (1999).
[99] Drahozal, *supra* note 5, at 192.
[100] *Id.* at 193.
[101] *Id.* at 192.
[102] Carlo Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*, 16 INT'L L. 613, 617 (1982).

amicably as possible, so getting caught up in the specifics of applicable law or conflicts of law issues goes against the goals of arbitration.

The lack of binding precedent in international arbitration not only affects transparency but also negatively impacts the development of law. When parties decide to arbitrate, "they remove the case from the public court system," which means that no court will decide the issue, there will most likely not be a published opinion, and it will not serve as binding precedent for similarly situated litigants in the future.[103] In addition to being unpublished, arbitral awards may not provide reasoning as to how the arbitrator reached the decision, further justifying why arbitral awards cannot be a substitute for binding precedent.[104] Finally, the lack of binding precedent means that there are likely conflicting awards which causes inconsistency and confusion.[105] Attorneys preparing for arbitration may find it difficult to formulate arguments based on past cases because there may be several similar cases with different outcomes. This allows parties to walk blindly into arbitration without any certainty in the strength of their arguments. As international arbitration does not allow the public judicial system to adjudicate novel legal issues, this impedes national judicial systems from further developing their own jurisprudence.

A less critical view is one that finds this lack of binding precedent necessary. Because each issue adjudicated in international arbitration is so different, binding precedent could lead to injustice in cases that turn on fact-specific inquiries.[106] In international commercial arbitration specifically, disputes are so fact- and contract-driven that the need for developing consistent rules is nonexistent.[107] In contrast, international sports arbitration requires "the development of consistent rules through arbitral awards" because there is an incentive for equal treatment of every player as the sports arbitration normally deals with recurrent issues.[108] Additionally, international sports arbitration has governing bodies, the international federations, that can substantively review arbitral awards, creating a meaningful check

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[103] Drahozal, *supra* note 5, at 207.
[104] *Id*. at 207–08.
[105] *See id.*
[106] *See* Kaufmann-Kohler, *supra* note 3, at 376.
[107] *Id.*
[108] *Id.*

on the arbitrator's power.[109] With independent tribunals dealing with various types of arbitral matters and no designated supervisory institution, it seems the lack of binding precedent is a necessity, as instituting a system for binding precedent would shake the core of the system.[110]

V. HOW DOES THIS LACK OF BINDING PRECEDENT AFFECT TRANSPARENCY?

As previously mentioned, arbitrators do not have to provide any reasoning for their decisions. A perfect example is *Occidental Petroleum v. Ecuador*. The arbitral tribunal imposed a standard that was not included in the bilateral investment treaty, without reason.[111] The tribunal's ability to seemingly concoct rules and arguments from thin air makes arbitration unpredictable. If there were binding precedent, or at the very least recognized *jurisprudence constante*, the arbitrators would at least have to distinguish or analogize the case in front of them with precedent to explain why they are or are not following precedent. This is an example of how even with published decisions, arbitral proceedings cannot achieve complete transparency because the reasoning of a published award may not have any grounding in law. Published decisions are just one step to increasing transparency. Without providing reasoning, interested parties such as states, investors, and the general public have no guidance on how a tribunal came to its decision on the award.

Furthermore, there are limited to no checks on the arbitrators' power in arbitral proceedings. The arbitrators' award is law. While the arbitral tribunal must follow the procedural rules chosen by the parties, almost every other part of conducting the proceedings may be at the discretion of the tribunal. Arbitration awards are typically only reviewed on procedural, not substantive grounds.[112] For example,

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[109] *See id.*
[110] *Id.* at 377.
[111] Public Citizen's Global Trade Watch, *Case Studies: Investor-State Attacks on Public Interest Policies*, PUB. CITIZEN 1, 5 (Mar. 6, 2015), https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/egregious-investor-state-attacks-case-studies_4-1.pdf.
[112] Drahozal, *supra* note 5, at 192.

most arbitral awards are only subject to review in the event that an arbitrator is deemed unable to make an unbiased decision. If there were binding precedent, arbitrators would have to follow previous law in their decisions, which arguably makes the decision more objective. This again goes back to imposing a duty upon arbitral tribunals to provide reasoning for their awards to increase transparency.

VI. SHOULD THERE BE MORE TRANSPARENCY IN INTERNATIONAL ARBITRATION?

Privacy of proceedings is one reason why international arbitration is so popular, especially with large corporations and governments through ISDS. Arbitral awards are not typically published, and the parties typically sign a non-disclosure agreement, so the awards are not made public.

The process of seeking enforcement of awards in a country's judicial system does not necessarily aid in increasing transparency, because arbitral awards are usually only evaluated on a procedural, not substantive basis.[113] So even if a party seeks enforcement, the state's court will likely not review the award because it will only have the resources and jurisdiction to enforce it. One way to encourage transparency may be through the creation of an appeals process, allowing other arbitrators to review decisions on a substantive basis.

Finally, one way to encourage transparency without completely compromising confidentiality may be to allow more third-party intervention in proceedings. If a third-party can prove the decision would directly affect it, the third party would be allowed to participate in the proceedings.[114] The allowance of amicus curiae briefs, briefs submitted by non-parties to other more information or expertise on a specific issue, are increasingly popular and important in international arbitration proceedings as the push for transparency

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[113] *Id.*

[114] Anibal Sabater, *Towards Transparency in Arbitration (A Cautious Approach)*, 5 BERKELEY J. INT'L L. PUBLICIST 47 (2010).

becomes more urgent.[115] While *amici curiae* remain crucial, the actual intervention of interested parties would be more influential. Of course, there would have to be an established standard as to who is considered an interested party, but this may be a powerful tool for interested non-parties to meaningfully participate in arbitral proceedings.

VII. CONCLUSION

As the international arbitration community continues to recognize the increasing need for transparency in arbitration proceedings, there are several options to consider in the potential reform of international arbitration.[116] While establishing binding precedent may contribute to transparency more quickly there are several other innovative ways to encourage transparency in international arbitration including publishing awards, having established *jurisprudence constante*, allowing for third-party interventions, and creating an appeals process. As long-standing investment treaties are being re-thought, re-worked, and re-negotiated by world leaders, the principle of transparency and the many ways to inspire it need to be front of mind.

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[115] *See* Katia Fach Gomez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 FORDHAM INT'L L. REV. 509, 523–24 (2012).

[116] *United Parcel Serv. v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, ¶70 (NAFTA Arb. 2001) (stating "[t]he emphasis placed on the value of greater transparency for proceedings such as these [investor-state disputes]. Such proceedings are not now, if they ever were, to be equated to the standard run of international commercial arbitration between private parties").