

RE-INVENTING ARBITRATION: HOW EXPANDING THE SCOPE OF ARBITRATION IS RE-SHAPING ITS FORM AND BLURRING THE LINE BETWEEN PRIVATE AND PUBLIC ADJUDICATION

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Contemporary academic research and scholarship are highly specialized. Legal scholarship on arbitration reflects this trend. There is extensive literature on domestic arbitration jurisprudence, on international commercial arbitration practice, and on investor-state arbitration procedure, and there are debates about the appropriate use of arbitration within all of these domains. But few of the participants in these debates are attentive to developments outside their own domains, and there are few examples of scholarship surveying trends across the three domains. Undertaking that analysis reveals important similarities in the challenges facing arbitration in each domain and in the responses to these challenges. Looking across all three domains—domestic arbitration within the United States, international commercial arbitration, and investor-state arbitration—we observe an expanding application of arbitration beyond purely private disputes to disputes with significant public policy dimensions. In response, there is increasing pressure in all three domains to incorporate in arbitration measures traditionally associated with public courts, including due process protections, public appointment of adjudicators, and process and outcome transparency. The result is a new form of dispute resolution, neither wholly private nor fully public, and satisfying neither those who promote the virtues of private dispute resolution nor those who insist that public courts are the proper locus for disputes with important public policy implications. We argue that re-inventing arbitration to adhere to public justice norms risks undermining its value for private actors with private disputes, while at the same time undermining courts as institutions for public contest over public policy issues. Rather than adding the trappings of public adjudication to arbitration, we should re-think the scope of arbitration in domestic and international spheres.

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INTRODUCTION

Contemporary academic research and scholarship are highly specialized. Legal scholarship on arbitration reflects this trend. There is extensive literature on domestic arbitration jurisprudence, on international commercial arbitration practice, and on investor-state arbitration procedure, but few examples of scholarship surveying trends across domains.¹ Law schools offer separate

¹ Recent dispute resolution scholarship has begun to cross national boundaries but not the three arbitration domains that are the subject of this article. See, e.g., Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2930–31 (2015) (focusing mainly on U.S. developments but incorporating references to EU law and policy). Some authors caution against inferring anything about developments in one domain from observations of developments in another. See, e.g., Rémy Gerbay, *Is the End Nigh Again? An Empirical Assessment of the “Judicialization” of International Arbitration*, 25 AM. REV. INT’L ARB. 223 n.3 (2014) (arguing that “there are different dynamics at play internationally and domestically, which render domestic and international arbitration difficult to compare.”).

courses on arbitration in domestic and international spheres, and casebooks for instructional use reflect this divide.²

Within each of these arbitration domains—domestic, international commercial, and international investment—there are disputes about arbitration policy and practice. Recent U.S. Supreme Court decisions upholding the use of mandatory arbitration clauses to preclude class actions³ have evoked a storm of controversy⁴ and led to legislative and regulatory efforts to outlaw such claus-

² See, e.g., THOMAS E. CARBONNEAU, *ARBITRATION IN A NUTSHELL* (3d ed. 2012) (summary of U.S. law with a section on international commercial arbitration); THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* (7th ed. 2015) (focusing on U.S. law with particular attention to recent U.S. Supreme Court jurisprudence but including a section on international commercial arbitration); CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS* (3d ed. 2013) (focusing on U.S. domestic arbitration but including two chapters on enforcing international arbitration agreements and international arbitration awards); PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* (2013) (U.S. constitutional framework for arbitration); KATHERINE V.W. STONE ET AL., *ARBITRATION LAW* (3d ed. 2015) (focusing on U.S. law regarding arbitration with additional material on court-connected non-binding arbitration). For discussion on the international use of arbitration, see, for example, GARY B. BORN, *INTERNATIONAL ARBITRATION: CASE AND MATERIALS* (2d ed. 2015) (focusing on international arbitration, but including a section on “supportive” national law in the United States, England, France and Switzerland and selected materials on investor-state arbitration); GARY B. BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* (2d ed. 2016) (summary of material covered in casebook, including a chapter on investor-state arbitration); GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* (2d ed. 2014) (This three-volume set is widely regarded as the leading reference on international commercial arbitration. As described by its author, “[t]he treatise’s focus is expressly international, focusing on how both developed and other jurisdictions around the world give effect to . . . [international agreements]. . . . Every effort is made to avoid adopting purely national solutions, without consideration of international and comparative perspectives.”) *Id.* at 5. Born’s treatment of international commercial arbitration is openly celebrated. See generally *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* (Christopher R. Drahozal & Richard W. Naimark eds., 2005). As the use of investor-state arbitration has grown, specialized volumes on that form of arbitration have also emerged. See, e.g., CAMPBELL MCLACHLAN ET AL., *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2d ed. 2017); NOAH RUBINS & BEN LOVE, *PROVISIONAL MEASURES IN INVESTMENT ARBITRATION* (forthcoming June 2018); J. ROMESH WEERAMANTRY, *TREATY INTERPRETATION IN INVESTMENT ARBITRATION* (2012). *But see* THOMAS HALE, *BETWEEN INTERESTS AND LAW: THE POLITICS OF TRANSNATIONAL COMMERCIAL DISPUTES* (2015) (placing the evolution of arbitration law in the framework of international politics and governance).

³ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (upholding consumer contract clause precluding subscribers from proceeding against the defendant in collective form); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013) (upholding commercial contract precluding small business from proceeding against the defendant in collective form notwithstanding likelihood that this will deny vindication of rights).

⁴ See, e.g., Einer Elhauge, *How Italian Colors Guts Private Antitrust Enforcement by Replacing it with Ineffective Forms of Arbitration*, 38 *FORDHAM INT’L L.J.* 771, 771 (2015); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 *YALE L.J.* 3052, 3091–92 (2015).

es.⁵ Earlier U.S. Supreme Court decisions extending arbitration to statutory claims, including civil rights claims,⁶ were similarly controversial.⁷

Controversy in the international commercial arbitration domain focuses on practice rather than on jurisprudence. Early critics of business-to-business commercial arbitration targeted outcomes more than process, as business disputants and their lawyers complained that arbitrators often “split the baby”—i.e. delivered compromise awards—rather than applying decisional rules based on law or industry norms.⁸ But recent criticism focuses on the increasing time and expense of arbitration (both in domestic and international domains) as parties have imported American-style discovery, including voluminous document exchange, interrogatories, and depositions⁹ into what was traditionally envisioned

⁵ See Sylvan Lane, *House Votes to Repeal Consumer Arbitration Rule*, HILL (July 25, 2017, 5:09 PM), <http://thehill.com/policy/finance/343652-house-votes-to-repeal-consumer-financial-protection-bureau-rule> [https://perma.cc/SD2D-YFUT] A companion Senate measure was briefly derailed by controversy over a massive security breach at Equifax. See Afda Chávez et al., *After Equifax Breach, GOP Senators Don't Yet Have Votes to Overturn Critical Rule That Protects Consumers*, INTERCEPT (Sept. 28, 2017, 1:58 PM), <https://theintercept.com/2017/09/28/republicans-equifax-consumer-protection-rule/> [https://perma.cc/98EL-3D2S]. On Nov. 1, 2017, the President signed a joint resolution passed by Congress disapproving the Arbitration Agreements Rule under the Congressional Review Act (CRA). Pursuant to the joint resolution, the Arbitration Agreements Rule no longer has force or effect. On Nov. 22, 2017, the Bureau published a notice removing the Arbitration Agreements Rule from the Code of Federal Regulations. The materials relating to the Arbitration Agreements Rule on the Bureau's website are for reference only.

⁶ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630–31 (1985) (holding that the defendant's antitrust claims were arbitrable); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (holding that claims under RICO and the Securities and Exchange Act of 1934 can be arbitrated); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that claims under the Age Discrimination in Employment Act of 1967 are arbitrable).

⁷ See, e.g., Jean R. Sternlight, *Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. KAN. L. REV. 273, 281 (1999); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1632 (2005) [hereinafter Sternlight, *Creeping Mandatory Arbitration*]; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1022 (1996).

⁸ See, e.g., Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not “Split the Baby”*: *Empirical Evidence from International Business Arbitrations*, 18 J. INT'L ARB. 573 (2001) (citing assertions that such behavior exists and presenting empirical evidence from a small sample of international commercial arbitration awards that contravenes the perception); DOUGLAS SHONTZ ET AL., RAND INST. FOR CIVIL JUSTICE, *BUSINESS-TO-BUSINESS ARBITRATION IN THE UNITED STATES: PERCEPTIONS OF CORPORATE COUNSEL* 11 (2011), https://www.rand.org/pubs/technical_reports/TR781.html [https://perma.cc/5KRT-M49V].

⁹ As discussed *infra* Sections II.C, III.B, parties and lawyers often describe the process of arbitration with extensive discovery and more formalized procedures as the “judicialization” of arbitration. See, e.g., Gerbay, *supra* note 1, at 224. Note, however, that Gerbay finds that empirical evidence does not support the claim of “judicialization” of international commercial arbitration. See discussion *infra* Section II.C.

as a streamlined presentation of evidence followed by swift decision-making.¹⁰ Available data suggest that the increase in procedural complexity can be linked to an increase in the fraction of disputes referred to arbitration that are complex: disputes involving more than two parties, high financial stakes, and complicated facts and law.¹¹ Whereas disputes resulting from routine cross-border trading were once the staples of international commercial arbitration, now many arbitrated disputes arise out of activities in heavily regulated industries, including energy, telecommunications, and information technology,¹² involving additional layers of complexity.

Like the controversies that have arisen over the past several decades regarding domestic arbitration in the United States, controversy regarding investor-state arbitration is chiefly about policy. As discussed *infra*, investor-state arbitration was designed to provide an alternative for foreign investors to bring suit against a sovereign nation in that nation's domestic courts when the sovereign entity allegedly breached a contract.¹³ However, critics argue that increasingly multi-national corporations are using the procedure to challenge democratically-adopted health, safety, and environmental protection regulations.¹⁴ Procedure is central to the debate over investor-state arbitration not because of concern about time and expense (as with regard to international commercial arbitration), but rather because critics view it as illegitimate for public policy disputes to be decided behind closed doors by private individuals who are privately paid.¹⁵ Controversy over investor-state arbitration heated up in the past several years as national trade representatives were negotiating multilateral trade agreements (e.g. the Trans-Pacific Partnership Agreement (TPP) and the Trans-Atlantic Investment and Partnership Agreement) that included clauses

¹⁰ See, e.g., Karen Willcutts, *Arbitration: Still an Effective Method of Resolving Business Disputes?*, DALL. B. ASS'N (Mar. 3, 2016, 4:37 PM), <http://www.dallasbar.org/book-page/arbitration-still-effective-method-resolving-business-disputes> [https://perma.cc/TC5N-L72F] (advising arbitration counsel to negotiate with in-house counsel to adapt arbitration clauses intended for simple transactions in order to meet the needs of complex disputes for scheduling orders, agreements regarding production of documents, limits on dispositive orders and sophisticated briefing).

¹¹ Gerbay, *supra* note 1, at 241–44. Gerbay's analysis relies on two decades of caseload data from the International Chamber of Commerce, a leading provider of international commercial arbitration.

¹² *Id.* at 240 n.83.

¹³ See *infra* Section III.A.

¹⁴ LISE JOHNSON ET AL., COLUMBIA CTR. ON SUSTAINABLE INV., INVESTOR-STATE DISPUTE SETTLEMENT, PUBLIC INTEREST AND U.S. DOMESTIC LAW 1 (2015), <http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf> [https://perma.cc/L78Y-UQR7].

¹⁵ *Id.* at 3. "ISDS provides significant substantive and procedural rights to individuals and corporations based solely on their foreign nationality, and outsources development and interpretation of law to private arbitrators insulated from crucial checks and balances. Through this grant of rights and transfer of lawmaking power, ISDS threatens to undermine legal systems and policymaking at the domestic level." *Id.* "ISDS" is a catch-all phrase used to refer collectively to different investor-state arbitration protocols and procedures:

mandating that disputes that arose under the treaties would be resolved via investor-state arbitration.¹⁶

Controversies within each of the three domains reflect different historical circumstances and political dynamics. However, a common cause of controversy is the expansion of the scope of arbitration in each domain to disputes for which the procedure arguably was not originally intended, particularly disputes with significant public policy dimensions. The most frequent response to criticism of this expansion in each domain has been to adapt arbitration procedures to resemble more closely public adjudicative procedures: to strengthen due process by relying more heavily on documentary evidence and live witness testimony and by requiring reasoned decisions, and to de-privatize the process by publishing arbitration awards, and (in the case of investor-state arbitration) to open up the process to third-parties, including inviting amicus briefs.¹⁷

In the United States, to shore up the legitimacy of arbitrations that result from form contracts (i.e. “contracts of adhesion”), some arbitration providers have voluntarily incorporated due process protections into their procedures and enhanced transparency with regard to process and outcomes.¹⁸ In international commercial arbitration, pressure to make the arbitration process more court-like has come from users themselves, even though they complain about the effects on time to disposition and expense.¹⁹ Pressure to reject arbitration altogether is strongest in the investment domain, where non-governmental organizations (NGO)—sometimes with the support of public officials—have led a movement to substitute a new, publicly administered and publicly funded adjudicative mechanism, with public access to process and outcomes, for investor-state arbitration as currently designed and operated.

Re-inventing a procedure designed for resolving private disputes to decide instead disputes with significant public policy dimensions risks diminishing the value of private dispute resolution for truly private disputes without fully satisfying the need for public dispute resolution for public disputes. We argue that it is time to more carefully analyze what disputes are most appropriately assigned to private and public procedures, rather than further blurring the line between private and public dispute resolution, lest we destroy what is valuable in both public and private procedures.

The goal of this article is to assist in that analysis by presenting, side-by-side, brief histories of the establishment and evolution of arbitration in domestic, international commercial, and investor-state domains, and by highlighting the similarities among the challenges arbitration has encountered recently in

¹⁶ For detailed discussion, see *infra* Section III.B.

¹⁷ See *infra* Section II.C.

¹⁸ See *infra* Section I.C, for discussion on the due process and transparency procedures incorporated in consumer and employment arbitration.

¹⁹ In the past few years, major international arbitral institutions responded to the concerns about time and cost by adopting special expedited procedures for smaller, less complex disputes or based on the parties’ agreement. See discussion *infra* Section I.D.

each domain and among the responses to these challenges. Part II describes the evolution of arbitration in the United States, focusing on recent controversies. Part III discusses the parallel evolution of international commercial arbitration. Part IV discusses the historical background of investor-state arbitration, the public law framework that authorizes its use, and controversies about its use that have erupted in the past several years. The last Part concludes.

In recent years, some commentators have incorporated arbitration in general treatments of “alternative dispute resolution (ADR),” without distinguishing carefully among different procedures.²⁰ The discussion that follows adopts a traditional definition of arbitration: a binding adjudication of a dispute by private decision-makers outside a public court system.²¹ We occasionally mention other dispute resolution procedures that may be used instead of or in addition to arbitration, such as mediation or other forms of conciliation or court-annexed non-binding arbitration.

Arbitration is used in a wide variety of circumstances, including to assist in the resolution of state-to-state disputes. This article focuses narrowly on arbitration, not ADR generally, and on the resolution of private disputes.

In opting for breadth, we necessarily give up depth. As described above, there is rich literature in each of the three domains this article discusses. None of our accounts does justice to the research and analyses that have been conducted by scholars and practitioners within each of these domains. We hope that introducing readers from one domain to developments in parallel domains will stimulate new thinking about appropriate and inappropriate uses of arbitration and potential reforms in arbitration law, rules, and practice.²²

I. PRIVATIZING THE PUBLIC IN U.S. DOMESTIC ARBITRATION

A. *Early Evolution of U.S. Federal Arbitration Law*

While the “alternative dispute resolution (ADR)” movement arose in the late twentieth century, arbitration dates back to colonial times in the United

²⁰ For a critique of this trend, see Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term “ADR” Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97, 97–98 (2000).

²¹ *Id.* at 99–100.

²² Labor arbitration conducted under collective bargaining agreements constitutes a fourth important domain of arbitration law and practice. We follow traditional arbitration jurisprudence in distinguishing labor arbitration from commercial arbitration. For a discussion of this traditional distinction and argument that the distinction has become inappropriate since the U.S. Supreme Court has embraced an expansive view of the Federal Arbitration Act, see Stephen L. Hayford, *The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration*, 21 BERKELEY J. EMPL. & LAB. L. 521 (2000). Comparative analysis of trends in labor arbitration was beyond the scope of our present effort.

States.²³ American colonialists carried with them from Europe the belief that merchants within various business communities should be free to resolve their disagreements outside of court, in private, and according to rules that they designed rather than dealing with the technicalities and uncertainties of common law.²⁴ Merchants doing business together agreed to refer their disputes to arbitrators selected from their own industry, who would decide the disputes in accord with that industry's norms and without much attention to procedural technicalities.²⁵ Arbitration took place outside of public view and the outcomes were confidential. Merchants preferred arbitration because they believed it was quicker and cheaper than litigation and because they believed specialist arbitrators understood the nature of commercial transactions better than generalist judges; they also appreciated its confidentiality.²⁶

However, from time to time, one of the parties to such an agreement would try to wriggle out of arbitration by asking a court to void the contract's arbitration provision or to deny enforcement of an arbitration judgment. Before the 20th century, many judges were responsive to these requests.²⁷ Unhappy with this state of affairs, the business community pressed for substantive legal reform to ensure the enforceability of arbitration agreements and awards,²⁸ and in 1920, New York passed an Arbitration Act compelling state court judges to enforce arbitration agreements.²⁹ Five years later, in response to business lobbying, Congress enacted the United States Arbitration Act—later retitled the Federal Arbitration Act (FAA)³⁰—modeled after the New York arbitration statute.³¹ The FAA's stated purpose was to put arbitration agreements on "equal footing" with other contracts and overcome "judicial hostility to arbitration."³²

²³ KYRIAKI NOUSSIA, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS OF THE POSITION UNDER ENGLISH, GERMAN, AND FRENCH LAW 13 (2010).

²⁴ JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 32 (1983); *see also* discussion *infra* Part III.

²⁵ IMRE STEPHEN SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 20 (2013).

²⁶ AUERBACH, *supra* note 24, at 32–33.

²⁷ Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 98–99 (2012) (citing KATHERINE V.W. STONE & RICHARD A. BALES, ARBITRATION LAW 22 (2d ed. 2010)); *see also* Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROBS. 207, 208–09 (2004).

²⁸ AUERBACH, *supra* note 24, at 102–03 (discussing the efforts of various merchant communities, including the New York Stock Exchange, the Chicago Board of Trade, and the fur, silk, cotton, and other industries to expand and legalize arbitration).

²⁹ Wilson, *supra* note 27, at 99.

³⁰ 9 U.S.C. § 1 (1925). The Federal Arbitration Act (FAA) does not apply to arbitration agreements under collective bargaining agreements. *Wright v. Universal Maritime Service Corp.* 525 U.S. 70, 82 (1998).

³¹ Wilson, *supra* note 27, at 99–100.

³² *Id.* at 93 & n.9 (citing H.R. REP. NO. 68-96, at 1–2 (1924); S. REP. NO. 68-536, at 2 (1924)).

Arbitration was perceived and promoted as an inexpensive, speedy, efficient, and final means of resolving commercial disputes.³³ Finality was assured by incorporating in the FAA a provision strictly limiting the grounds for appeal, essentially to actual corruption or fraud.³⁴

In its early case law interpreting the applicability of the FAA, the U.S. Supreme Court recognized arbitration's limitations on due process: no right to a jury trial where such would be available in a public court, lack of reasoned opinions, relaxed evidentiary standards, no formal right to discovery, and only very limited appellate review.³⁵ The Court acknowledged that these limitations could have a substantial impact on the outcomes of disputants' substantive claims and that some tribunals, by their very nature, are more suitable for certain types of disputes than others.³⁶ The Court's jurisprudence supporting arbitration notwithstanding these limitations rested on three key assumptions: (1) that parties should be free to choose their preferred mode of dispute resolution; (2) that arbitration provisions, freely contracted for, represented the parties' judgments that the benefits of agreeing to arbitrate disputes that might arise in the course of their business transaction outweighed the costs; and (3) that once parties had chosen arbitration, they should be held to their choice (as would be true with regard to any other contractual provision). In U.S. federal jurisprudence, arbitration gained "same footing" with court adjudication as a mechanism for resolving disputes arising out of contract law.³⁷

B. *The Expansion of Arbitration to Disputes Involving Public Policy Doctrines*

By the 1970s, American courts had begun to embrace alternative dispute resolution, which judges perceived as a more efficient and more satisfactory way of resolving civil disputes and—perhaps, not inconsequentially—a means of relieving trial court workloads.³⁸ In the preceding decade, the U.S. Supreme

³³ Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 595–96 (1928).

³⁴ 9 U.S.C. § 10(a) (2002).

³⁵ See, e.g., *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 202–03 (1956); *Wilko v. Swan*, 346 U.S. 427, 435–37 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989).

³⁶ *Bernhardt*, 350 U.S. at 203 (“The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action.”).

³⁷ See *Wilson*, *supra* note 27, at 93.

³⁸ Harry T. Edwards, Commentary, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 668–70 (1986); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 165, 178 (2003). The inception of the ADR movement is normally traced to Prof. Frank Sander's address to the Pound Conference on Causes of Public Dissatisfaction with the Administration of Justice, convened by then U.S. Supreme Court Chief Justice Warren Burger. See Frank E.A. Sander, *Varieties of Dispute Processing*, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), in 70 F.R.D. 79, 111 (1976). On the notion that the U.S. Supreme

Court had begun to shift from the “equal footing” doctrine to a policy favoring arbitration.³⁹ In 1983, the Court made this policy explicit in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, declaring that section two of the FAA reflected “a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”⁴⁰ Although, after 1925, many states had adopted statutes modeled after the FAA, in the 1980s, some states limited the use of arbitration in some circumstances. In 1985, the U.S. Supreme Court held that under the Commerce Clause of the U.S. Constitution, the FAA preempted state arbitration law, including such limitations.⁴¹ Henceforth, it was the U.S. Supreme Court that determined the reach of arbitration doctrine.⁴²

Having positioned itself as the sole interpreter of the scope of the FAA, the U.S. Supreme Court embarked on a process of authorizing the use of arbitration for a wide range of disputes, including those arising out of statutory and constitutional law—arguably far beyond the remit intended by the U.S. Congress in the 1920s.⁴³ In essence, the Court held that whenever parties agree to a contract incorporating an arbitration clause, they are bound to arbitrate any dispute that arises between them that can be construed as falling within the scope of the contract, without regard to the substantive legal basis of the claim.⁴⁴ The Court

Court’s arbitration jurisprudence has been shaped at least in part by perceptions of court overload, see, for example, G. Richard Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on Shearson/American Express, Inc. v. McMahon*, 26 AM. BUS. L.J. 397, 397–98 (1988).

³⁹ E.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967); see also *Wilson*, *supra* note 27, at 102; *Resnik*, *supra* note 1, at 2804.

⁴⁰ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

⁴¹ *Southland Corp. v. Keating*, 465 U.S. 1 (1984). Justice Sandra Day O’Connor dissented from this opinion but subsequently joined the majority in supporting the broad scope of the FAA on *stare decisis* grounds. Today, only Justice Clarence Thomas (who joined the court long after *Southland* was decided) dissents from the majority’s view that the FAA preempts state arbitration law.

⁴² Examples of state laws that attempted to limit the use of arbitration based on public policy concerns, and that were preempted by the FAA, include state laws that require litigation of wage disputes, *Perry v. Thomas*, 482 U.S. 483, 491 (1987); laws prohibiting arbitral awards with punitive damages, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54, 56 (1995); laws that lodge primary jurisdiction of certain types of labor disputes with the state’s commissioner, *Preston v. Ferrer*, 552 U.S. 346, 356 (2008); or general public policy prohibition against agreements to arbitrate personal injury or wrongful death claims against nursing homes, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012).

⁴³ See, e.g., *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923) (statement of W.H.H. Piatt) (testifying that the FAA was not intended to “be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.”); see also *Wilson*, *supra* note 27, at 98–99.

⁴⁴ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630–31 (1985) (holding that the defendant’s antitrust claims were arbitrable); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 221 (1987) (holding that claims under RICO and the Securities and Exchange Act of 1934 can be arbitrated); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S.

also overturned state legislative efforts to warn parties that by agreeing to arbitrate they are giving up their rights to go to court.⁴⁵ Over time, most state supreme courts adopted the U.S. Supreme Court's strict interpretation of the enforceability of arbitration clauses regardless of the substantive legal basis of a claim.⁴⁶

Recognizing the opportunity to keep consumers' and workers' claims out of court—and away from jury trial and possibly punitive damage awards⁴⁷—corporate counsel soon began to include arbitration clauses in a wide range of contracts of adhesion (i.e. form contracts).⁴⁸ Consumer and worker advocates attacked such contracts on grounds of unconscionability, but without success.⁴⁹ Attempts to evade arbitration on procedural grounds—for example, arguments that arbitration providers' fees frequently exceeded court filing fees⁵⁰—also went nowhere. In fairly short order, consumers (including insurance subscribers and medical patients) and employees found that they were barred from taking their claims to court.⁵¹

As U.S. Supreme Court jurisprudence was becoming more protective of consumer and employment contracts forcing individual plaintiffs to arbitrate claims rather than take them to court, consumer class actions appeared to be on

20, 35 (1991) (holding claims under the Age Discrimination in Employment Act are arbitrable); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (holding employment claims generally are arbitrable) (*abrogating* *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1998) (interpreting the FAA as inapplicable to any labor or employment contracts, citing Sec. 1 of the Act)). Justices Stevens and Souter (with whom Justices Ginsburg and Breyer joined) observed that the FAA's well-documented legislative history makes it clear that it was not intended to apply to any labor or employment disputes. *Id.* at 127–28, 136 (Stevens, J., dissenting).

⁴⁵ *Doctor's Assoc. Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (striking down a Montana statute and holding that requiring warning language in special large format treated arbitration contracts differently than other contracts, thereby violating the purpose of the FAA).

⁴⁶ KATHERINE V.W. STONE, *PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION* 542–45, 594–97 (2000).

⁴⁷ Although some states historically prohibited waivers of punitive damages in arbitration, e.g., *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 797 (N.Y. 1976), contemporary decisions hold that parties may include prohibitions on punitive damages in arbitration contracts. Absent such explicit prohibitions, arbitrators may award punitive damages. *See, e.g.*, *Stark v. Sandberg, Phoenix & Von Gontard, P.C.*, 381 F.3d 793 (8th Cir. 2004).

⁴⁸ FAA's legislative history suggests that the drafters of the Act did not intend it to apply to "take it or leave it" standard contracts between parties of unequal bargaining power reasoning that such contracts are "not really voluntary contracts, in a strict sense." SZALAI, *supra* note 25, at 195 (referring to Senator Walsh's concerns during *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 10 (1923)).

⁴⁹ STONE, *supra* note 46, at 594–97.

⁵⁰ *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) (rejecting challenge to arbitration based on potential expense).

⁵¹ Mandatory pre-dispute arbitration in consumer and employment contexts is a uniquely American phenomenon, distinguishing U.S. arbitration from domestic arbitration in other countries. *See* Sternlight, *Creeping Mandatory Arbitration*, *supra* note 7, at 1646.

the rise.⁵² For corporations, class actions posed much more financial risk than individual actions, whether litigated or arbitrated. Recognizing yet another opportunity, corporate counsel began including bars to class actions in mandatory pre-dispute arbitration clauses.⁵³ Initial judicial response to these clauses varied, with some courts allowing arbitrators to decide whether a clause contemplated class *arbitration* and other courts severing and voiding bars against class actions included in arbitration clauses on grounds of unconscionability, while allowing the clauses to remain enforceable with regard to individual claims.⁵⁴

In 2011, the U.S. Supreme Court, in *AT&T Mobility v. Concepcion*,⁵⁵ ended all questioning about the enforceability of mandatory pre-dispute arbitration clauses barring claimants from pursuing their claims in collective proceedings, whether in litigation or arbitration, reversing the Ninth Circuit's prior decision voiding the provision on grounds of unconscionability. Two years later, the enforceability of class action waivers in mandatory arbitration clauses came before the Court again, this time in anti-trust litigation by small businesses against American Express. In *American Express Co. v. Italian Colors Restaurant*,⁵⁶ the businesses challenging the bar to proceeding collectively harkened back to the widely cited dictum in the Court's 1985 opinion in *Mitsubishi Motors v. Soler Chrysler Plymouth, Inc.*, in which the majority noted that an arbitration agreement might be deemed unenforceable on public policy grounds if it prevented "effective vindication" of a "right to pursue statutory remedies."⁵⁷ The putative class representative in *Italian Colors* argued that only a class (or other group) can effectively pursue complex and expensive anti-trust litigation.⁵⁸ Writing for the majority, Justice Antonin Scalia opined that the fact that it might be too expensive to pursue a statutory claim in individual arbitration was not equivalent to eliminating the right to pursue the remedy, and therefore was not contrary to the Court's *Mitsubishi* dictum.⁵⁹ Ironically, having embraced a public policy favoring arbitration in part based on the perception that labor arbitration in the collective bargaining context had produced industrial peace, the Court preclud-

⁵² DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 51–68 (2000).

⁵³ See generally Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55 (2004). In the early 2000s, Hensler was at a corporate counsel meeting at which including bars to class actions in mandatory arbitration clauses was recommended as a strategy to combat consumer class actions.

⁵⁴ See, e.g., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855 (9th Cir. 2009); *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995); *Brennan v. Ace INA Holdings, Inc.*, No. 00-2730, 2002 WL 1804918 (E.D. Pa. 2002); *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

⁵⁵ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

⁵⁶ *Am. Express Co. v. Italian Colors Rest. (Italian Colors)*, 133 S. Ct. 2304 (2013).

⁵⁷ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

⁵⁸ *Italian Colors*, 133 S. Ct. at 2308–09.

⁵⁹ *Id.* at 2310–11.

ed the collective pursuit of remedies for collective harm in arbitration under the Federal Arbitration Act.⁶⁰

C. *Responses to the Expansion of the Scope of Domestic Arbitration in the United States*

By expanding the substantive scope of arbitration, the U.S. Supreme Court's arbitration jurisprudence swept into arbitration's embrace both a wider variety of disputants and a different type of relationship between disputants. In addition to disputes between commercial partners over contract terms and performance, arbitration now could be applied to disputes: between investors and brokers over disclosure; between employees and employers about wrongful termination and discrimination in hiring, promotion, and wages; between consumers and service providers over service and fees; and between patients and health care providers over malpractice. As a consequence, arbitration was no longer applied solely to relatively evenly-matched commercial partners, but also to wildly *unequal* employees and employers, consumers and corporations, and patients and health care providers.⁶¹

The Court's decisions evoked critical commentary by legal academicians and practitioners and sometimes political opposition. More importantly for this discussion, they led to significant changes in arbitration rules and practice. Over time, domestic arbitration in the United States morphed from a private, informal, streamlined dispute resolution process, subject to little external scrutiny, to a much more formal and quite a bit more public—and arguably more expensive and time-consuming—procedure that increasingly resembles litigation.

1. *Securities Arbitration*

Arbitration was well established within the securities industry before the Court's 1987 decision in *Shearson/Am. Express Inc. v. McMahon*.⁶² Various

⁶⁰ For commentary arguing that starting in the 1980s, the Court imported its positive labor arbitration jurisprudence into its FAA jurisprudence, see Jonathan R. Nelson, *Judge-Made Law and the Presumption of Arbitrability: David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 58 BROOK. L. REV. 279 (1992) and Allison Anderson, Note, *Labor and Commercial Arbitration: The Court's Misguided Merger*, 54 B.C. L. REV. 1237 (2013).

⁶¹ See, e.g., SZALAI, *supra* note 25, at 11 (examining archival sources from the early 1900s, including several hundred pages of memoranda and correspondence from the drafters of U.S. arbitration laws and arguing that the Supreme Court “has grossly misinterpreted these laws to support a system that is significantly more expansive than was originally intended”).

⁶² *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 238–42 (1987) (holding that claims under RICO and the Securities and Exchange Act of 1934 can be arbitrated). On the early establishment of arbitration forums for disputes among brokers, see Kenneth Durr & Robert Cooly, *The Institution of Experience: Self-Regulatory Organizations in the Securities Industry, 1792–2010*, SEC. AND EXCHANGE COMMISSION HIST. SOC'Y (Dec. 1, 2010), <http://www.sechistorical.org/museum/galleries/sro/sro02d.php> [<https://perma.cc/M8TR-CYT4>].

industry self-regulatory associations administered arbitrations under diverse rules. In 1976, the Securities and Exchange Commission (SEC) led an effort to develop a uniform arbitration code for arbitrating investors' claims, which was subsequently adopted voluntarily by industry associations.⁶³ By 1987, thousands of claims had been adjudicated under this code.⁶⁴ The decision in *McMahon*, placing investors' contracts fully within the FAA's scope, led to increased attention to securities arbitration's procedures and outcomes.⁶⁵ Shortly after the decision was handed down, the SEC issued recommendations to the industry's leading trade associations for new procedural requirements, including pre-hearing discovery, transcripts of hearings, and closer assessment of arbitrators' qualifications.⁶⁶ Within five years, some industry associations were also recommending that arbitrators follow the Federal Rules of Evidence and some practitioners reported that it had become increasingly common for lawyers representing parties in securities arbitration to file briefs on relevant law.⁶⁷ Some securities arbitration forums published awards along with parties' and arbitrators' names and case summaries, including damages requested.⁶⁸

Notwithstanding these changes, in the two decades following *McMahon*, there was unceasing criticism of the securities arbitration paradigm: self-regulating industry organizations administering arbitrations between unhappy investors and employees of the organizations' own industry. A raft of reforms promulgated by the SEC, which arguably had the effect of making arbitration even more like litigation, did little to quell the controversy.⁶⁹

Securities arbitrations are currently governed by an "Industry Code" issued in 2007 by FINRA, the Financial Industry Regulatory Authority.⁷⁰ The Code includes rules for filing claims, location of hearings (required to be in the inves-

⁶³ Constantine N. Katsoris, *Securities Arbitration After McMahon*, 16 FORDHAM URB. L.J. 361, 363 (1987) (citing Uniform Code of Arbitration (as amended), reprinted in FOURTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION TO THE SECURITIES AND EXCHANGE COMMISSION Exhibit C (Nov. 1984)).

⁶⁴ Constantine, *supra* note 63, at 364.

⁶⁵ *Id.* at 361.

⁶⁶ *Id.* at 369–70. Commenting presciently, Katsoris wrote: "The dangers in the post-*McMahon* era are efforts to recast arbitration as a clone to court litigation." *Id.* at 370; see also Norman S. Poser, *When ADR Eclipses Litigation: The Brave New World of Securities Arbitration*, 59 BROOK. L. REV. 1095, 1105 (1993) (analogizing reactions post *McMahon* to Prof. Higgins song in *My Fair Lady*, "Why Can't a Woman Be More Like a Man," substituting the words "Why Can't Arbitration Be More Like Litigation?").

⁶⁷ Poser, *supra* note 66, at 1106–07.

⁶⁸ *Id.* at 1107.

⁶⁹ Jill I. Gross, *McMahon Turns Twenty: The Regulation of Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 493, 497, 516–19 (2008) (describing the controversy and arguing that investors are adequately protected by SEC oversight of arbitration forums and that any disadvantages experienced by investors are consequences of unfavorable substantive law, not arbitration procedures).

⁷⁰ *Section 1300 Code of Arbitration Procedure for Industry Disputes*, FINRA, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4193 [https://perma.cc/D7Z5-9CRL] (last visited Dec. 22, 2017).

tor's location), selecting arbitrators, discovery and admissibility of evidence (e.g. document production, depositions and expert witness testimony), hearings, and awards. Hearings are recorded and awards must be written. Arbitration awards, along with case summaries and parties and arbitrators' names, must be made publicly available.⁷¹

2. Employment Arbitration

After the U.S. Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.*⁷² that the reach of the FAA extended to employment discrimination claims,⁷³ labor arbitrators—who represent employees and management in disputes that arise under collective bargaining agreements—became concerned that the perception that non-unionized employees were being unfairly forced into arbitration might undermine the credibility of labor arbitration as well. Between 1994 and 1995, the National Academy of Arbitrators convened a task force comprising representatives from various organizations, including the American Bar Association (ABA), American Civil Liberties Union (ACLU), and National Employment Lawyers Association, to adopt principles for a “Due Process Protocol” for arbitrating statutory employment claims. Later described by Arnold Zack, the President of the National Academy of Arbitrators who chaired the effort, as “a rather modest undertaking to protect the credibility of labor management arbitration and to provide guidance to NAA arbitrators who might be undertaking such [employment arbitration] work,”⁷⁴ the protocol provides that employees should have a right to representation of their own choosing in arbitration, that employees should have access to “all information reasonably relevant to their claims” both before and during the hearing, including pre-hearing depositions (i.e. at least minimal discovery), and that arbitrators should issue written opinions and awards.⁷⁵ The American Arbitration Associa-

⁷¹ *Id.* For a contemporary practitioner's view of security arbitration, see Mark Astarita, *Overview of the Securities Arbitration Process*, SEC LAW.COM, <http://www.seclaw.com/overview-securities-arbitration-process/> [<https://perma.cc/P8FJ-XA68>] (last visited Dec. 23, 2017).

⁷² *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

⁷³ Notably, legislative history of the FAA shows that it was not intended to cover labor and employment disputes. See SZALAI, *supra* note 25, at 152–53, 191–92 (referring, *inter alia*, to testimony during *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 10 (1923) that the Act will have nothing to do with “labor disputes, at all.” “It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.”).

⁷⁴ LEE HORNBERGER, THE IMPACT OF THE DUE PROCESS PROTOCOL PRINCIPLES ON ARBITRATION OF STATUTORY EMPLOYMENT DISPUTES IN MICHIGAN 1 (2007) (quoting Arnold M. Zack, *The Due Process Protocol: Getting There and Getting Over It*, 11 EMP. RTS. & EMP. POL'Y J. 257, 257 (2007)), http://www.leehornberger.com/index.php?page=Lee_Hornberger_Articles [<https://perma.cc/3GY4-TZQ4>].

⁷⁵ *Id.* at 4.

tion (AAA), the oldest non-profit arbitration provider in the United States and JAMS, the leading for-profit provider of mediation and arbitration, as well as other organizations, have adopted versions of this protocol,⁷⁶ and some courts have referred to it in assessing the fairness of arbitration contracts that are challenged.⁷⁷ Some aspects of the protocol—e.g. regarding the selection of neutral arbitrators and the holding of fair hearings—are simply restatements of FAA provisions. However, the provisions regarding exchange of evidence are more reflective of litigation norms than traditional arbitration procedures. While not setting requirements regarding responsibility for paying arbitrators' fees, the protocol also goes beyond the U.S. Supreme Court's summary dismissal of this concern in *Green Tree*, by suggesting that at least in arbitrations involving "lower paid employees," employers should consider partially subsidizing fees.⁷⁸ The protocol explicitly declines to advise employers on the propriety of pre-dispute arbitration clauses. But the AAA currently advises potential clients that it may decline to administer arbitrations if the client's dispute resolution program "substantially and materially deviates from [its] minimum due process standards."⁷⁹

3. Consumer Arbitration

In 1997, as controversy over the enforcement of pre-dispute mandatory arbitration clauses in consumer contracts mounted, the American Arbitration Association established a National Consumer Disputes Advisory Committee.⁸⁰ The Committee formulated a Due Process Protocol for mediation and arbitration of consumer disputes, which is intended to provide guidance for resolving a broad range of consumer disputes outside the court system.⁸¹ Like the Due Process Protocol for Employment Arbitration that the AAA had endorsed, the Due Process Protocol for consumer disputes restates the provisions of the FAA. But, it also includes a recommended "notice of arbitration agreement" that clearly indicates that a dispute under the relevant contract will not be subject to court resolution.⁸² Ironically, the suggested notice goes way beyond the notice proposed by the Montana state legislature that the U.S. Supreme Court struck

⁷⁶ *Id.* at 5–7.

⁷⁷ *See, e.g.,* *Cole v. Burns Int'l Sec. Servs., Inc.*, 105 F.3d 1465, 1488–91 (D.C. Cir. 1997); HORNBERGER, *supra* note 75, at 8–11.

⁷⁸ HORNBERGER, *supra* note 74, at 2; *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

⁷⁹ AM. ARBITRATION ASSOC., EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES 9 (2009) [hereinafter EMPLOYMENT ARBITRATION], <https://www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTG-o04362> [<https://perma.cc/GSN3-PVWA>].

⁸⁰ AM. ARBITRATION ASSOC., CONSUMER DUE PROCESS PROTOCOL: STATEMENT OF PRINCIPLES OF THE NATIONAL CONSUMER DISPUTES ADVISORY COMMITTEE 4 (1998) [hereinafter CONSUMER DUE PROCESS], [https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20\(1\).pd](https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pd) [<https://perma.cc/7LUA-N6HS>].

⁸¹ *Id.* at 5.

⁸² *Id.* at 26–27.

down in *Doctor's Associates*.⁸³ Whereas the principles incorporated in the due process protocol for employment arbitration are described quite tersely, the Consumer Due Process Protocol is discursive, and formatted quite similarly to the Federal Rules of Civil Procedure, with each statement of a principle followed by extensive "Reporter's Comments" that cite relevant academic literature and case law.⁸⁴ For example, Principle 13, "Access to Information," lays out competing views of the trade-offs associated with incorporating discovery in arbitration and includes discussion of issues such as privilege.⁸⁵ Arguably, under the AAA Due Process principles, a consumer arbitration of a high-value complex dispute could take a very similar course as it would in litigation.

While federal and state rules of civil procedure are binding on civil disputants, AAA's rules have no formal legal bite. However, in 2014, the AAA issued new supplementary rules for consumer arbitration requiring, *inter alia*, that any company wishing AAA to administer its disputes with consumers, register its arbitration clause(s) with the AAA for its review and approval.⁸⁶ If the AAA decides that the clause deviates from its stated guidelines, it will ask the business to either revise or delete the offending clause.⁸⁷ Notably, the Consumer Due Process Protocol states "the arbitrator's award should be final and binding, but subject to review in accordance with applicable statutes" and in the Reporter's comments recommends that a brief written explanation of the award should be provided if requested by either party.⁸⁸ In 2016, the AAA updated their consumer arbitration rules setting a cap of \$200 for filing fees charged to the consumer-plaintiff, with all remaining expenses including arbitrators' fees to be paid by the company-defendant.⁸⁹

⁸³ *Doctor's Assoc. Inc. v. Casarotto*, 517 U.S. 681 (1996). The AAA recommended notice includes the following phrases:

You thus GIVE UP YOUR RIGHT TO GO TO COURT to assert or defend your rights under this contract. . . . Your rights will be determined by a NEUTRAL ARBITRATOR and NOT a judge or a jury. You are entitled to a FAIR HEARING, BUT the arbitration procedures are SIMPLER AND MORE LIMITED THAN RULES APPLICABLE IN COURT. Arbitrator decisions are as enforceable as any court order and are subject to VERY LIMITED REVIEW BY A COURT.

CONSUMER DUE PROCESS, *supra* note 80, at 27. The AAA recommends that the notice be placed in a prominent "notice box" and be included in any online version. CAPS appear in the original. *Id.*

⁸⁴ See CONSUMER DUE PROCESS, *supra* note 80, at 9–10.

⁸⁵ *Id.* at 29–31.

⁸⁶ AM. ARBITRATION ASSOC., CONSUMER ARBITRATION RULES 16 (2014) [hereinafter ARBITRATION RULES], <https://www.adr.org/sites/default/files/Consumer%20Rules.pdf> [<https://perma.cc/GGA7-5T43>].

⁸⁷ Michael L. Mallow & Christine Reilly, *New AAA Consumer Arbitrations Rules Go into Effect September 1*, LEXOLOGY (Aug. 25, 2014), <https://www.lexology.com/library/detail.aspx?g=b69810c8-c5b9-488d-8c85-821222164768> [<https://perma.cc/QNE9-9YWV>].

⁸⁸ See CONSUMER DUE PROCESS, *supra* note 80, at 30–31.

⁸⁹ See ARBITRATION RULES, *supra* note 86, at 33.

While arbitration providers have focused on procedural reform, other entities have responded to controversy over consumer arbitration by demanding transparency about process and outcomes. In the wake of the revelation that Kaiser Permanente's mandatory arbitration program in practice systematically disadvantaged its patient-subscribers,⁹⁰ the health maintenance organization established a Blue Ribbon Panel to recommend reforms in its mandatory arbitration system.⁹¹ To assure that Kaiser's arbitration system met its stated goals of providing fair, efficient, and timely resolution of medical malpractice disputes against its providers, the Panel recommended that the health maintenance organization appoint an independent monitor to regularly audit and report process performance and outcomes.⁹² An outside lawyer who neither arbitrates disputes nor represents parties in arbitration was appointed to implement this recommendation.⁹³ The Independent Administrator issues annual reports on the program, including number of filings, mode of disposition, outcomes (including settlement and monetary awards), and fees.⁹⁴

In 2002, California lawmakers adopted legislation that requires all private arbitration providers that offer consumer arbitration in California to publish information about their consumer arbitration cases, including: the nature of the dispute, name of the non-consumer party, name of the arbitrators, the total fees charged by the arbitrators, the mode of disposition, and the outcome.⁹⁵ However, in contrast to Kaiser's arbitration system, compliance with California's statutory reporting requirements has been poor;⁹⁶ a fact that is likely explained by

⁹⁰ *Engalla v. Kaiser Permanente Med. Grp., Inc.*, 938 P.2d 903, 918 (Cal. 1997) (holding that a court may decline to compel arbitration when the arbitration process is infected with fraud. The court found that as operated, Kaiser Permanente's arbitration program was biased against patient claimants). Kaiser Permanente is the largest health maintenance organization in California, serving some 8 million families. In recent years, it has expanded its services to other states. *Fast Facts About Kaiser Permanente*, KAISER PERMANENTE, <https://share.kaiserpermanente.org/article/fast-facts-about-kaiser-permanente/> [https://perma.cc/GYG7-DZD5] (last visited Dec. 22, 2017).

⁹¹ EUGENE F. LYNCH ET AL., *THE BLUE RIBBON ADVISORY PANEL ON KAISER PERMANENTE ARBITRATION, THE KAISER PERMANENTE ARBITRATION SYSTEM: A REVIEW AND RECOMMENDATIONS FOR IMPROVEMENT I* (1998), <http://www.oia-kaiserarb.com/pdfs/BRP-Report.pdf> [https://perma.cc/6NA5-FNBW].

⁹² *Id.* at 28–30.

⁹³ OFFICE OF THE INDEP. ADM'R, *STATUS OF THE BLUE RIBBON PANEL RECOMMENDATIONS* (2017), <http://www.oia-kaiserarb.com/pdfs/BRP-Status-Report.pdf> [https://perma.cc/2K73-3Q54].

⁹⁴ OFFICE OF THE INDEP. ADM'R, *ANNUAL REPORT* (2016), <http://www.oia-kaiserarb.com/pdfs/2016-Annual-Report.pdf> [https://perma.cc/ND2X-7XFZ]. All of the annual reports since the inception of the program are available on the Office of the Independent Administrator's website.

⁹⁵ CAL. CIV. PROC. CODE § 1281.96 (West 2015) (originally enacted in 2002).

⁹⁶ *See* DAVID J. JUNG ET AL., PUB. LAW RESEARCH INST., *REPORTING CONSUMER ARBITRATION DATA IN CALIFORNIA: AN ANALYSIS OF COMPLIANCE WITH CALIFORNIA CODE OF CIVIL PROCEDURE § 1281.96* (2013), <http://gov.uchastings.edu/docs/arbitration-report/2014-arbitration-update> [https://perma.cc/ZW6H-GCWJ].

the absence in California of an office charged with enforcing these requirements.

D. Trends in Domestic Commercial Arbitration Generally

Traditional business-to-business arbitration, the “bread and butter” of commercial arbitration providers, has not proved immune to the changes described above. Whether as a result of the evolution of arbitration in the securities, employment, and consumer spheres or for separate reasons, commercial arbitration in the United States has also become more like litigation in recent years.⁹⁷ Extensive discovery, including substantial document production and witness depositions, leading to longer proceedings and higher costs is said to have become the norm, replacing the streamlined and less expensive approach of the past.⁹⁸ Much like judges, arbitrators often decide summary judgment motions and motions to compel or sanction.⁹⁹ Some observers claim that appeals of arbitration awards have also become more common.¹⁰⁰ In response to changes such as these, in 2007, the construction industry—long a stalwart user of arbitration—deleted an arbitration clause from its standard form contract,¹⁰¹ leaving litigation as the default option. In place of arbitration, the industry recommended alternatives viewed as more expeditious and less expensive, such as structured negotiations, evaluative mediation, and non-binding mini-trials.¹⁰²

Notwithstanding the similarities in trends among different domestic arbitration domains, two features distinguish business-to-business arbitration on the one hand and securities, employment, and consumer arbitration on the other. Business-to-business arbitration remains truly voluntary. Meanwhile, investors, employees, and consumers are forced to sign contracts including pre-dispute arbitration clauses as a condition of employment or transacting.¹⁰³ And while

⁹⁷ Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 895 (2004); Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58 DISP. RESOL. J. 37, 38 (Feb. 2003–Apr. 2003).

⁹⁸ W. Alexander Moseley, *What Do You Mean I Can’t Get That? Discovery in Arbitration Proceedings*, CONSTR. LAW. 18, 24 (Fall 2006).

⁹⁹ Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 11–12 (2010).

¹⁰⁰ Katherine A. Helm, *The Expanding Scope of Judicial Review or Arbitration Awards: Where Does the Buck Stop?*, 61 DISP. RESOL. J. 16, 25 (Nov. 2006–Jan. 2007) (arguing that finality, one of the touted features of arbitration has been diminished as the grounds for appealing arbitrators’ decisions have expanded in recent years).

¹⁰¹ 7 PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., BRUNER & O’CONNOR ON CONSTRUCTION LAW § 21:3 (2014).

¹⁰² *Id.* § 21:3 & n.9. (citing John Hinchey & Laurence Schor, *The Quest for the Right Questions in the Construction Industry*, 57 DISP. RESOL. J. 8, 8 (Aug. 2002–Oct. 2002)).

¹⁰³ Exceptions to this general observation exist: Some business parties, such as franchisees, may be forced to arbitrate disputes under the terms of franchise agreements and some high-level employees in large corporations may be permitted to decide voluntarily whether to arbitrate or litigate disputes with employers. E-mail from Jean R. Sternlight, Dir., Saltman Ctr.

many of the due process protocols that have been adopted for securities, employment, and consumer arbitration include transparency requirements, business-to-business arbitration remains strictly confidential.

II. RESPONDING TO PRIVATE NEEDS IN INTERNATIONAL COMMERCIAL ARBITRATION

A. *From Early History to Institutionalization*

While arbitration's history in the United States goes back several hundred years, the roots of arbitration outside the United States stretch back much further. Dispute resolution mechanisms comparable to modern-day arbitration were popular in ancient China, Egypt, and India thousands of years before the Christian era.¹⁰⁴ Ancient Greek and Roman laws provided a framework for private parties to agree to arbitrate contractual disputes.¹⁰⁵ In medieval Europe, associations of merchants in different trades established arbitration tribunals to resolve commercial disputes among their members.¹⁰⁶ In England, the first act that formalized arbitration by members of trade guilds dates back to 1698.¹⁰⁷ Even after national courts were established and took jurisdiction over other forms of civil disputes, domestic arbitration persisted, in some instances, alongside the courts and in others, in the form of specialized commercial courts.¹⁰⁸

Eventually, arbitration became the dispute resolution mechanism of choice for international traders as well as domestic business.¹⁰⁹ Merchants who traded across national borders—early global entrepreneurs—did not want to be hauled into a local court outside their home territory; they also did not want their disputes to be decided by judges who lacked understanding of mercantile mat-

for Conflict Resolution, Saltman Professor, UNLV Boyd Sch. of Law, to author (July 20, 2017, 7:41 PM) (on file with author).

¹⁰⁴ SIMON GREENBERG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE 3–4 (2011) (noting that arbitration can be traced back to about 2100–1600 BC).

¹⁰⁵ *Id.* at 4; see also DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 203–11 (1978).

¹⁰⁶ Lynden Macassey, *International Commercial Arbitration,—Its Origin, Development and Importance*, 24 A.B.A. J. 518 (1938). The paper was read before the Grotius Society of London in Gary's Inn Hall, Apr. 26, 1938. *Id.*

¹⁰⁷ LORD CROSS OF CHELSEA & G. J. HAND, RADCLIFFE AND CROSS: THE ENGLISH LEGAL SYSTEM 250–51 (5th ed. 1971). However, using arbitration was not without criticism and problems with enforceability. A leading decision by Lord Coke in 1609 allowed that a party might revoke its agreement to arbitrate once a dispute arose although it would thereby forfeit its performance bond. See Ernest Lorenzen, *Commercial Arbitration- International and Interstate Aspects*, 43 YALE L.J. 716, 716 (1934). Consistent with this decision the English Arbitration Act of 1698 allowed either party to withdraw its consent to arbitrate up until the arbitral award was rendered. GREENBERG ET AL., *supra* note 104, at 5.

¹⁰⁸ W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 50 TEX. INT'L L.J. 699, 704 (2016) (discussing development of pie-powder courts in England and commercial courts in continental Europe with judges that were elected by business communities).

¹⁰⁹ RENÉ DAVID, ARBITRATION IN INTERNATIONAL TRADE 14 (1985).

ters.¹¹⁰ The response to both concerns was to establish private arbitration tribunals in which judges chosen by the parties applied specialized trans-national customary law dubbed “*lex mercatoria*.”¹¹¹ In 1883, the city council of London asked a committee to draft a proposal to establish an arbitration tribunal for domestic “and, in particular . . . trans-national commercial disputes” arising within the city.¹¹²

International commercial arbitration responded to many of the same urges that led businessmen to choose arbitration rather than courts for domestic disputes. The author of an article celebrating the 1892 inauguration of the London commercial arbitration tribunal wrote,

This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife.¹¹³

The institutionalization of arbitration was also encouraged by the increased number of disputes following the Industrial Revolution, the resulting increased economic specialization, and development of new trade and industry associations.¹¹⁴

The public policy argument for international commercial arbitration was similar to the argument in favor of domestic commercial arbitration: the arbitrators were deciding *private* disputes between *private* parties and although these disputes might have important consequences for the *parties*, they were unlikely to have much public impact. But, there was an additional argument for national governments to favor international commercial arbitration, which came over time to be the most important argument of all: international trade was regarded as the primary engine of national economic growth and domestic welfare, and arbitration was regarded as essential to international trade.¹¹⁵ Early

¹¹⁰ *Id.*

¹¹¹ *Id.* Contemporary *lex mercatoria* incorporates a web of “soft law” deriving from the UNIDROIT Principles of International Commercial Contracts, UNCITRAL conventions on trade that bind signatory nations and harmonized national contract law. In practice, parties specify what national law they intend to govern arbitration of their international commercial disputes. See ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY 35 (2017).

¹¹² *History*, LCIA, <http://www.lcia.org/LCIA/history.aspx> [https://perma.cc/LR78-GC24] (last visited Dec. 22, 2017) (the City of London Chamber of Arbitration was established in 1892, after the passage of the English arbitration statute that guaranteed enforcement of arbitration decisions. It was renamed the London Court of Arbitration in 1903 and subsequently renamed the London Court of *International* Arbitration).

¹¹³ Edward Manson, *The City of London Chamber of Arbitration*, 9 LAW Q. REV. 86 (1893). Manson also noted that businessmen wanted their disputes to be resolved by people in their line of business, and according to their values, as had been true in England in the medieval era. *Id.* See also *History*, *supra* note 112.

¹¹⁴ Craig, *supra* note 108, at 704.

¹¹⁵ Macassey, *supra* note 106, at 518.

“Present day schools of political philosophy may differ as to the ideal system of national organization: they may even contest the basis of international relationships. But on one point they are all agreed. Every nation, whatever school of political ideology it may exemplify, is convinced

recognition of these two principles—the importance of international trade and the importance of international commercial arbitration to international trade—was reflected in the inclusion of arbitration provisions in bilateral trade treaties dating back to at least 1899.¹¹⁶ In 1919, a group of international entrepreneurs who called themselves “the Merchants of Peace” established the International Chamber of Commerce (ICC) in Paris, which, in 1923, created the International Court of Arbitration to resolve disputes “of an international character.”¹¹⁷

How this belief in the criticality of arbitration to international trade developed is a long and somewhat complicated story. Arbitration had been endorsed as the best vehicle for resolving disputes between *nations* at the Hague Peace Conference in 1899, which established the Permanent Court of Arbitration in the Hague.¹¹⁸ In the wake of World War I, establishing peaceful methods of resolving international trade disputes came to be seen as critical to preserving global stability. The war had wreaked havoc on many nations, destroying, or severely injuring their economic and social fabric. After World War I, the major European commercial nations adopted arbitration as the model for resolving disputes between businesses engaged in trans-border trade. Over time, the idea that a private scheme for resolving international business disputes, outside of public view and without public input, was good for national welfare, became

that all foreign industrialists and merchants should be encouraged to import into their countries as much of its raw materials and manufactured products as they can by any inducement be prevailed on to buy.”

More recently, then U.S. Secretary of State, John Kerry was quoted as articulating the same view while praising the proposed Trans-Pacific Partnership at an appearance in Hawaii: “In the 21st century, a nation’s interests and the wellbeing of its people are advanced not just by troops or diplomats, but they’re advanced by entrepreneurs, by chief executives of companies, by the businesses that are good corporate citizens.” See *ISDS: The Devil in the Trade Deal*, ABC RADIO NAT’L (Sept. 14, 2014, 8:05 AM), <http://www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/5734490> [<https://perma.cc/L7D9-ALXY>].

¹¹⁶ Macassey, *supra* note 106, at 522 (citing, *inter alia*, the Franco-Belgian Convention of 1899).

¹¹⁷ *Id.* at 523. The International Chamber of Commerce was one of a number of international organizations that were established after World War I to promote international trade and the peaceful resolution of disputes between nations and between private citizens of different nations.

The world had few working international structures in the immediate aftermath of the first of the 20th century’s global conflicts. There was no world system of rules to govern trade, investment, finance or commercial relations. That the private sector should start filling the gap without waiting for governments was ground-breaking. It was an idea that took hold.

History: The Merchants of Peace, ICC ALB., <http://icc-albania.org.al/history/> [<https://perma.cc/S74G-MSBN>] (last visited Dec. 22, 2017); see also *Who We Are: History*, ICC, <https://iccwbo.org/about-us/who-we-are/history/> [<https://perma.cc/ESZ4-CFH6>] (last visited Dec. 22, 2017).

¹¹⁸ *History*, PERMANENT COURT OF ARB., <https://pca-cpa.org/en/about/introduction/history/> [<https://perma.cc/PM8B-ZDK5>] (last visited Dec. 22, 2017). Today, the Permanent Court of Arbitration is a major forum for assisting businesses to resolve international disputes with national governments and other state entities, either by administering arbitration procedures or appointing arbitrators to “ad hoc” tribunals. *Id.*

deeply embedded within international trade and economic policy. Economic growth and trade in the aftermath of World War II further propelled development of international commercial arbitration.¹¹⁹

B. *Towards a Harmonized System of International Commercial Arbitration*

Most international arbitral awards are satisfied voluntarily, without the need for judicial enforcement.¹²⁰ In fact, the ICC Arbitration Rules of 1923 provided that the parties were “honor bound” to comply with the arbitral awards.¹²¹ However, as the international commercial community expanded and arbitration became wide-spread, a more formal system for the enforcement of arbitral awards was needed.¹²²

Early attempts to create a system for recognition and enforcement of arbitral awards initiated by the ICC—the Geneva Protocol on Arbitration Clauses¹²³ that helped ensure respect for arbitration clauses and the Geneva Convention on the Execution of Foreign Arbitral Awards¹²⁴—had little support outside of Europe.¹²⁵ However, after World War II, these efforts came to fruition with the adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹²⁶ The New York Convention, which was ultimately ratified by more than 150 countries, requires the member states both to recognize agreements to arbitrate and to recognize and enforce resulting

¹¹⁹ GREENBERG ET AL., *supra* note 104, at 9 (referencing to the establishment of the International Bank for Reconstruction and Development, one of the World Bank Group organizations, International Monetary Fund (IMF) and the General Agreement on Tariffs and Trade).

¹²⁰ Craig, *supra* note 108, at 705 (referencing, as an example, the fact that more than ninety percent of ICC’s awards are satisfied voluntarily).

¹²¹ *Id.*

¹²² *Id.* at 706–07.

¹²³ Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 158 (1924).

¹²⁴ See generally Convention for the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 302 (1929).

¹²⁵ The Geneva Protocol was ratified by twenty-four European states and only a few countries outside of Europe (Brazil, Japan, India, Israel, Iraq, Thailand, and New Zealand). For the text of the Geneva Protocol and list of the ratifications, see *History 1923–1958*, N.Y. ARB. CONVENTION,

<http://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958>

[<https://perma.cc/TM4N-A85S>] (last visited Dec. 22, 2017). The Geneva Convention was open to any country that signed the Protocol but was ratified by fewer states, including only two non-European states. See *League of Nation Treaties*, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=548&chapter=30&clang=en#2> [<https://perma.cc/P24A-CGC7>] (last visited Dec. 22, 2017).

¹²⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38. As of Dec. 20, 2017, there are 157 contracting states. See *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [<https://perma.cc/WSW6-BBEY>] (last visited Dec. 20, 2017).

arbitral awards.¹²⁷ The United States ratified the New York Convention in 1970, and incorporated it into its national arbitration law, the FAA.¹²⁸

Ratification of the New York Convention augmented the reputation and popularity of international arbitration. Businesses engaged in global commerce demanded protection against lawsuits brought in the courts of their foreign counter-parties, where logically those parties might have an advantage. At the same time, companies doing business across borders wanted to be confident that once a dispute was resolved, the decision of the adjudicator would be enforceable in every country's courts. As major commercial nations continued to be unable to agree on a system of mutual recognition of each other's *court judgments*—a situation that prevails to this day—arbitration was the only means to achieve this confidence.¹²⁹

In 1966, amid the climate of expanding international trade, the General Assembly of the United Nations established the UN Commission on International Trade Law (UNCITRAL)¹³⁰—an organization that has since played a key role in the development of international commercial arbitration. The UNCITRAL Arbitration Rules, adopted in 1976, were incorporated in the procedural rules of many private arbitral institutions. The rules cover all aspects of the arbitral process and contain a model arbitration clause that has been used in numerous *ad hoc* international commercial arbitration proceedings.¹³¹

In 1985, to support the structure of international commercial arbitration and to harmonize national arbitration laws UNCITRAL promulgated a Model

¹²⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 126 art I.

¹²⁸ 9 U.S.C. § 201(1970).

¹²⁹ Notwithstanding years of efforts, and apart from regional instruments, such as the Brussels regime in the European Union, there is still no international convention on the enforcement of court judgments. The 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters is presently only ratified by Albania, Cyprus, Netherlands and Portugal. *See Status Table: Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=78>

[<https://perma.cc/T93Q-ADJV>] (last updated Nov. 10, 2010). Notably, there is no bilateral or multilateral treaty on enforcement of foreign judgments that includes the United States, arguably because other states are generally reluctant to enforce U.S. judgments involving multiple or punitive damages and object to the U.S. courts' assertion of extraterritorial jurisdiction. *See* U.S. Dep't of State, *Enforcement of Judgments*, TRAVEL.ST.GOV., <https://travel.state.gov/content/travel/en/legal-considerations/judicial/enforcement-of-judgments.html> [<https://perma.cc/M6HB-5ZM5>] (last visited Dec. 4, 2017).

¹³⁰ G.A. Res. 2205 (XXI), at 99 (Dec. 17, 1966).

¹³¹ *See* G.A. Res. 31/98, at 182 (Dec. 15, 1976); UNCITRAL, UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR STATE ARBITRATION 31 (2014) [hereinafter UNCITRAL RULES ON TRANSPARENCY], <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf> [<https://perma.cc/9YQN-BQQV>]. UNCITRAL rules were amended in 2010 and again in 2013. G.A. Res. 65/22 (Dec. 6, 2010); G.A. Res. 68/109 (Dec. 16, 2013).

Law on International Commercial Arbitration¹³² National legislation based on the Model Law, often *verbatim*, has been adopted by seventy-five countries.¹³³ The common characteristic of all these laws is that they impose a much looser degree of control over international arbitration than pertains to purely domestic arbitration within those countries.¹³⁴ The Model Law allows parties to agree to procedural and decisional rules that may not fully accord with a nation's domestic law, arguably eliminating differences among domestic law that might favor a disputant of one nationality over another,¹³⁵ but perhaps also freeing corporations engaged in international trade to avoid legal restrictions that they view as unfavorable.

Today, multinational corporations have many arbitration organizations to choose from, including traditional arbitration forums established almost a hundred years ago, such as the ICC,¹³⁶ the London Court of International Arbitration (LCIA),¹³⁷ the American Arbitration Association International Center for Dispute Resolution (ICDR),¹³⁸ as well as relatively younger regional arbitration tribunals such as the Singapore International Arbitration Center (SIAC),¹³⁹ the Dubai International Arbitration Center (DIAC)¹⁴⁰ and the Hong

¹³² G.A. Res. 40/72, at vii (Dec. 11, 1985); UNCITRAL, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (2008), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [<https://perma.cc/X3W6-VF83>]. The Model Law was amended in 2006. G.A. Res. 61/33, at viii (Dec. 4, 2006).

¹³³ See Status: *UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html [<https://perma.cc/N7D6-AE5T>] (last visited Dec. 22, 2017). Counting provincial as well as national governments, a total of 106 jurisdictions have adopted the Model Law. *Id.*

¹³⁴ Craig, *supra* note 108, at 727 (the rationale for the difference is that states arguably have a stronger interest in the disposition of disputes that arise within their borders and involve exclusively domestic actors; also, they may have a greater ability to impose their will on domestic actors).

¹³⁵ See *Id.* at 756 (In particular, nations with developing economies have been perceived to be biased against more developed nations).

¹³⁶ ICC was founded in 1919 and its International Court of Arbitration was created in 1923. *Who We Are: History*, *supra* note 117.

¹³⁷ The LCIA was formally inaugurated in 1892. See *History*, *supra* note 112. The Law Quarterly Review wrote about the inauguration: "This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife." Manson, *supra* note 113, at 86.

¹³⁸ The AAA was founded in 1926, but the ICDR was established in 1996. See *About the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR)*, INT'L CTR. FOR DISP. RESOL., <https://www.icdr.org> (follow "about" hyperlink) [<https://perma.cc/S8MR-JPKR>] (last visited Dec. 22, 2017); *AAA Mission and Principles*, AM. ARB. ASS'N, <https://www.adr.org/MissionPrinciples> [<https://perma.cc/XF6J-ZSST>] (last visited Dec. 22, 2017).

¹³⁹ Established in 1991. *About Us*, SIAC, <http://www.siac.org.sg/2014-11-03-13-33-43/about-us> [<https://perma.cc/FPQ6-79TK>] (last visited Dec. 22, 2017).

¹⁴⁰ Established in 1994. *About DIAC*, DUBAI INT'L ARB. CTR., <http://www.diac.ae/idias/about-us/> [<https://perma.cc/W585-89TF>] (last visited Dec. 22, 2017).

Kong International Arbitration Center (HKIAC).¹⁴¹ The number of international arbitration institutions has increased dramatically,¹⁴² and their respective caseloads continue to increase significantly.¹⁴³ In 2015, the total value of pending claims at just one tribunal, the ICC, was said to be more than \$286 billion.¹⁴⁴ National governments in developing economies have supported the establishment of new arbitration centers not just because they are perceived to create a favorable aura for international investment, but because arbitration generates revenue for its national seat, in the form of payments for real estate, ancillary services (e.g. for legal assistance, information technology, etc.), lodging, food, transportation, and other needs.¹⁴⁵ Arbitrators compete with each other for appointments and key positions within arbitration institutions.¹⁴⁶ In short, international commercial arbitration not only *supports* international commerce, it has *become a business* in itself.

C. From Streamlined Dispute Resolution to Formal Adjudication

Were the celebrant of the 1892 inauguration of the London Chamber of Arbitration—the predecessor of the London Court of International Arbitration—to observe its proceedings and those of its sister organizations in other parts of the world today, by all reports he would be deeply disappointed. Where

¹⁴¹ “[E]stablished in 1985 by a group of leading businesspeople and professionals in an effort to meet the growing need for dispute resolution services in Asia.” *At A Glance: About HKIAC*, HKIAC, <http://www.hkiac.org/about-us> [<https://perma.cc/WE7F-UC3Z>] (last visited Dec. 22, 2017).

¹⁴² The American Bar Association lists eleven international arbitration institutions on its website. See *Arbitration Resources*, AM. BAR ASS’N, <http://apps.americanbar.org/dch/com+add.cfm?com=IC730000&pg=1> [<https://perma.cc/U7M6-HYB2>] (last visited Dec. 22, 2017).

¹⁴³ See, e.g., *Reports*, LIAC, <http://www.lcia.org/LCIA/reports.aspx> [<https://perma.cc/2KZM-BLEK>] (last visited Dec. 22, 2017) (reports dated 2000–2016 show a consistent increase in the cases referred each year); see also Markus Altenkirch & Nicolas Gremminger, *Parties’ Preferences in International Arbitration: The Latest Statistics of the Leading Arbitral Institutions*, GLOBAL ARB. NEWS (Aug. 5, 2015), <https://globalarbitrationnews.com/parties-preferences-in-international-arbitration-the-latest-statistics-of-the-leading-arbitral-institutions-20150805/> [<https://perma.cc/8M4P-FLG>] (Among top five international tribunals with the highest annual number of new cases are China International Economic and Trade Arbitration Commission (CIETAC), AAA ICDR, ICC, LCIA and HKIAC); Caroline Simson, *ICC Stats Show Record Number of Arbitrations in 2016*, LAW360 (Jan. 18, 2017, 7:09 PM), <https://www.law360.com/articles/881958/icc-stats-show-record-number-of-arbitrations-in-2016> [<https://perma.cc/W4CV-5HWE>].

¹⁴⁴ SWEET & GRISEL, *supra* note 111, at 45 n.38.

¹⁴⁵ On the notion that arbitration generates revenue, see, for example, Cedric C. Chao & Steven L. Smith, *Becoming a Global Center for Arbitration*, L.A. DAILY J. (Sept. 20, 2013), <http://files.dlapiper.com/files/Uploads/Documents/DLA-Piper-9-20-13-Daily-Journal.pdf> [<https://perma.cc/5ZP2-D956>] (arguing the California should take steps to make it a more attractive venue for international arbitration and referring to an estimate that a ten to twenty percent increase in arbitration in New York would generate an increase of \$200–\$400 million in revenues for that city).

¹⁴⁶ SWEET & GRISEL, *supra* note 111, at 72.

arbitration was to be “expeditious where the law is slow, cheap where the law is costly, [and] simple where the law is technical,”¹⁴⁷ international commercial arbitration is widely perceived to have become time-consuming, expensive, and procedurally rigid.¹⁴⁸ Hearings are lengthy and frequently feature live testimony. Document production may be extensive. Although parties draft their arbitration clauses once they have chosen an arbitration tribunal, that tribunal imposes its own procedural rules, which may be quite “technical.” For example, the ICC, which until recently had the largest caseload of international arbitration institutions, incorporates a mandatory review of arbitration awards by a panel of arbitration lawyers and ICC staff in its arbitral procedures.¹⁴⁹ In short, arbitration looks a lot like litigation and adjudication in the United States,¹⁵⁰ albeit with private judges in private settings delivering confidential awards.¹⁵¹

Objective empirical evidence to support the perception of increasing “judicialization” of international commercial arbitration¹⁵² is lacking, in large part because arbitration institutions—although they report numbers of cases filed and sometimes information about awards—report little about procedures in

¹⁴⁷ Manson, *supra* note 113, at 86 (describing the “virtues” of the London Chamber of Arbitration that later became the London Court of International Arbitration).

¹⁴⁸ Giorgio Bernini, *The Future of Arbitration: Flexibility or Rigidity?* in ARBITRATION INSIGHTS: TWENTY YEARS OF THE ANNUAL LECTURE OF THE SCHOOL OF INTERNATIONAL ARBITRATION 48 (Julian D.M. Lew & Loukas A. Mistelis eds., 2007); *see also* Jean-Claude Najar, *Inside Out: A User’s Perspective on Challenges in International Arbitration*, 25 *ARB. INT’L* 515, 515 (2009) (arguing that “[a]rbitration has evolved into a process as costly and as time-consuming as traditional litigation.”).

¹⁴⁹ SWEET & GRISEL, *supra* note 111, at 101–07.

¹⁵⁰ *See* Elena V. Helmer, *International Commercial Arbitration: Americanized, “Civilized,” or Harmonized?* 19 *OHIO ST. J. ON DISP. RESOL.* 35, 36 (2003).

¹⁵¹ In response to criticism of the growing inefficiency and expense of arbitration proceedings, many providers have created “expedited procedures” that attempt to return to the streamlined model of the past, at least for smaller value claims. Instead of panels of three arbitrators, cases may be heard and decided by a sole arbitrator, and there are strict time limits for issuing procedural orders and awards. Discovery is strongly discouraged. Disputes are to be decided on written submissions. Where immediate relief is sought, a temporary arbitrator may be appointed before the formal constitution of a panel. Some providers apply expedited rules automatically to smaller claims, but parties with larger claims are free to agree to proceed in an expedited fashion. *See* Peter Morton, *Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?*, 26 *ARB. INT’L* 103, 103–04 (2010). For examples of expedited procedures, *see*, generally, *INT’L CTR. FOR DISPUTE RESOLUTION, INT’L DISP. RESOL. PROC.’S*, 7 (2014), https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf [<https://perma.cc/CD2N-TSTK>]; *Arbitration Rules*, ICC, at art. 30 (Mar. 30, 2017), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_30new [<https://perma.cc/HNW3-HXV3>] (expedited procedures). Notably, in the international commercial arbitration context “small claims” are denoted in hundreds of thousands or millions of dollars. For example, the ICDR expedited procedures apply to disputes where no claim exceeds \$250,000. *INT’L CTR. FOR DISPUTE RESOLUTION, supra* note 151, at 7. The ICC expedited procedure apply to disputes where claims do not exceed \$250,000, exclusive of interest and the costs of arbitration. *Arbitration Rules, supra* note 151, at art. 1.

¹⁵² Gerbay, *supra* note 1, at 224 & n.4 (citing surveys of users reporting dissatisfaction with the cost and duration of international arbitration).

practice. Using indirect measures of complexification of rules and contention between arbitral parties, Gerbay found little evidence of such a shift over the last two decades.¹⁵³ What has changed is the complexity of trans-national trade disputes and the amounts of money at stake in arbitration: garden variety “trad[e] disputes” account for a smaller fraction of international arbitration caseloads, having been replaced by intellectual property disputes, disputes arising out of mergers and acquisitions, and disputes associated with regulated industries, such as oil, electric power, and telecommunications. A larger fraction of disputes involves more than two parties and multiple contracts.¹⁵⁴ In sum, if international commercial arbitration is no longer the informal streamlined process that was once envisaged, it likely is because international commercial disputes are no longer the relatively simple disputes that process was designed to resolve. Moreover, contemporary disputes are more likely to involve public policies that are implicit in copyright and patent law and associated with regulated industries.

The fact that international commercial arbitration processes have mutated in response to changes in the character of disputes is not in itself surprising. What is more notable—particularly in an age that celebrates informal and conciliatory forms of dispute resolution, such as mediation—is that the direction of change has been towards adjudicative models. Two signs of a preference for formal adjudication have been the requirement to publish reasoned awards¹⁵⁵ and the move to publish awards, albeit in redacted form (i.e. omitting names of arbitrators, parties, and key facts that might identify disputants), and only if the parties agree¹⁵⁶ or in circumscribed circumstances.¹⁵⁷ While requirements for reasoned awards have been justified as a means of enhancing the probability of enforceability, the publication of awards facilitates the development of a commercial arbitration jurisprudence, wherein arbitrators can look to awards in previously decided similar cases as precedents.¹⁵⁸ A jurisprudence promulgated by private individuals selected by private corporations and under no obligation to follow national laws and judicial decisions may concern independent observers, but it may give comfort to parties seeking predictable outcomes in a system where appellate rights are limited.

¹⁵³ *Id.* at 236–38. It is possible of course that change set in more than two decades ago.

¹⁵⁴ *Id.* at 240–44.

¹⁵⁵ SWEET & GRISEL, *supra* note 111, at 101–02.

¹⁵⁶ INT’L CTR. FOR DISPUTE RESOLUTION, *supra* note 151, at 28. (redacted awards will be published unless parties agree otherwise).

¹⁵⁷ London Court of Arbitration rules, requiring publication of awards when arbitrators are challenged. See Thomas W. Walsh & Ruth Teitelbaum, *The LCIA Court Decisions on Challenges to Arbitrators: An Introduction*, 27 ARB. INT’L 283, 283 (2011).

¹⁵⁸ Arbitration rules have also been amended to strengthen disclosure requirements for arbitrators. Some commentators have suggested that this is a product of the entry of new arbitral institutions (without a track record) into the market and new arbitration customers with less knowledge of the clubby world of elite arbitrators. See Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 KAN. L. REV. 1301, 1314–17, 1319–20 (2006).

III. PROTECTING PUBLIC INTEREST IN INVESTOR-STATE ARBITRATION

A. *The Emergence of Investment Arbitration*

As international trade expanded, sometimes even the traditional international commercial arbitration regime was not enough to create the kind of confidence in dispute resolution that businesses demand. When an American multinational corporation does business in Germany, it faces a real choice between litigation in court and arbitration. However, large multi-national corporations do not operate solely in countries that adhere to the “rule of law.” Many of the most lucrative business opportunities in the world involve investment in countries without independent judiciaries and countries that are politically unstable. Many of these countries are anxious to attract foreign direct investment, to extract oil, gas, and other valuable resources, develop national electric power grids, or create modern telecommunication systems, but do not have a well-developed “rule of law.”

After World War II, U.S., British, and Western European corporations suffered substantial losses when the leaders of newly independent and developing nations in Africa and Latin America abruptly canceled projects, seized foreign-owned properties, and nationalized enterprises built with foreign money.¹⁵⁹ Traditional international commercial arbitration had been designed for business-to-business trade disputes, not for the disputes between corporations and national governments that followed. Not having a reliable dispute resolution mechanism to obtain compensation when investments were hijacked by national governments discouraged corporate investment in countries with developing economies.¹⁶⁰

Eventually, new leaders who were more favorable towards foreign investors emerged in these countries. Together, rich and poor countries looked for a way of both attracting investment to countries that needed it and guaranteeing that corporations in rich countries would be willing to make such investments. Bilateral investment treaties (BITs) between—on the one hand—wealthy nations that were home to corporations looking for places to invest their money and—on the other hand—poorer nations that wanted that money to build their economies, emerged as the means of creating a more certain financial climate.¹⁶¹ BITs were (and still are) intended to protect foreign corporations from unfair actions by the government of the country they have invested in, particu-

¹⁵⁹ See Kenneth J. Vandavelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 167 (2005).

¹⁶⁰ The developing and socialist countries using their numeric majority at the U.N. General Assembly adopted an international framework that allowed for expropriation without compensation. See G.A. Res. 3201(S-VI), *Declaration on the Establishment of a New Economic Order*, ¶ 3(e) (May 1, 1974).

¹⁶¹ During the post-World War II period, multi-lateral treaties became the favored instruments for regulating trade among nations. But, by design, these treaties excluded transnational investments. Vandavelde, *supra* note 159 at 162, 170.

larly expropriation of the investors' property.¹⁶² The first BITs were negotiated in the 1950s, but the use of bilateral treaties to govern foreign investment did not take off until the 1990s.¹⁶³ By 2015, about 3000 BITs had been negotiated by 180 countries.¹⁶⁴

Lack of effective avenues to pursue compensation under international law beyond espousal (i.e. when a national government prosecutes a claim on behalf of its national) posed a special problem for foreign investors, as national governments typically do not allow a private party (much less a foreign private party) to sue them for their discretionary decisions and investors' own governments were often unwilling to sue another nation. Consequently, in 1966, the World Bank established a new dispute resolution system—the International Centre for the Settlement of Investment Disputes (ICSID)—to permit foreign investors to bring claims against host governments if a government took adverse actions against the investors' interests.¹⁶⁵ ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”) with the hope that it would facilitate the settlement of investment disputes between governments and foreign investors and promote investment in development projects.¹⁶⁶ Most of the 3000 or so BITs negotiated to date contain a dispute resolution clause that refers any disputes that arise between a private investor from one of the countries and the government of the other country to either the ICSID¹⁶⁷ or to an “ad hoc” private arbitration process operating under the UNCITRAL Arbitration Rules.¹⁶⁸

¹⁶² The United States' goal in negotiating and promoting bilateral investment treaties has been to guarantee “prompt, adequate and effective” compensation in the event of expropriation of U.S. corporate investors' properties in foreign countries. *See Id.* at 171.

¹⁶³ *Id.* at 157–58, 169.

¹⁶⁴ *See Database of Bilateral Investment Treaties*, ICSID, <https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx> [<https://perma.cc/YW7C-UDLA>] (last visited Dec. 5, 2017).

¹⁶⁵ *See About ICSID*, INT'L CTR. FOR SETTLEMENT INV. DISP., <https://icsid.worldbank.org/en/Pages/about/default.aspx> [<https://perma.cc/3JVX-HYNR>] (last visited Dec. 22, 2017). Generally, ICSID rules can only be applied to disputes arising out of “investments” as defined in the ICSID rules. Resorting to a forum for resolving investor-state disputes does not preclude pursuing the same underlying dispute in a WTO forum or under the provisions of a Regional Trade Agreement. *See also* Sergio Puig, *The Merging of International Trade and Investment Law*, 33 BERKELEY J. INT'L L. 1, 4–5 (2015).

¹⁶⁶ Andrew P. Tuck, *Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules*, 13 LAW & BUS. REV. AM. 885, 889 (2007).

¹⁶⁷ *Id.* at 886.

¹⁶⁸ *See* UNCITRAL RULES ON TRANSPARENCY, *supra* note 131, at 31. Whereas the ICSID Convention was adopted specifically to apply to investor-state disputes, UNCITRAL Arbitration Rules were originally adopted to apply to international commercial arbitration generally, and only later came to be applied to investor-state disputes as well. *See* Norbert Horn, *UNCITRAL Transparency Rules 2013 for Investment Arbitration*, in *A REVOLUTION IN THE INTERNATIONAL RULES OF LAW: ESSAYS IN HONOR OF DON WALLACE, JR.* 332–34 (Borzu Sabahi et al. eds., 2014); *see also* Ian A. Laird, *Transparency in Investor-State Arbitration*, in

The ICSID dispute resolution system applies “to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State.”¹⁶⁹ As of the date of this paper, there are 161 “contracting states.”¹⁷⁰ Six countries have signed but have not ratified the ICSID Convention, and three former members (Bolivia, Ecuador, and Venezuela) withdrew in 2007, 2009, and 2012.¹⁷¹ Among countries with large economies, Brazil, Mexico, India, and South Africa have never been ICSID members.¹⁷² The United States has been a member of the ICSID Convention since its inception.¹⁷³ Most of the approximately 650 investor-state arbitrations that had taken place through 2013 were conducted either by ICSID or under UNCITRAL rules.¹⁷⁴

B. *The Judicialization of Investor-State Arbitration*

Originally, the rules for investor-state arbitration were similar to those of ordinary international and domestic commercial arbitration. The arbitrators (usually three) were selected by the disputing parties from a list provided by the organization administering the process (e.g. the World Bank’s Centre), the arbitrators’ fees were paid by the parties, oral proceedings took place behind closed doors with limited disclosure of documents (i.e. discovery), and arbitrators’ awards were confidential and therefore had no precedential authority. And then something curious happened—at least when viewed from a historical perspective: from a private procedure along the lines of traditional domestic and international commercial arbitration, investor-state arbitration began to morph into a semi-public process.

A REVOLUTION IN THE INTERNATIONAL RULES OF LAW: ESSAYS IN HONOR OF DON WALLACE, JR., *supra* note 168, at 352.

¹⁶⁹ INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 18 (2009) (2006), <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf> [<https://perma.cc/RG3J-7DW6>].

¹⁷⁰ *Database of ICSID Member States*, ICSID, <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> [<https://perma.cc/JN47-N45M>] (last visited Dec. 22, 2017).

¹⁷¹ See, e.g., *id.*; see also Nicolas Boeglin, *ICSID and Latin America: Criticism, Withdrawals and Regional Alternatives*, BILATERALS.ORG (June 25, 2013), <http://www.bilaterals.org/?icsid-and-latin-america-criticisms#nh9> [<https://perma.cc/BJ3F-J2TA>].

¹⁷² See *Database of ICSID Member States*, *supra* note 170.

¹⁷³ See, e.g., *id.*

¹⁷⁴ Through 2013, 450 investor-state arbitrations had been held in the ICSID forum and 158 under UNCITRAL rules; less than one-hundred had been concluded in other forums or under other rules. See Matthew Coleman et al., *Choosing an Arbitral Forum for Investor-State Arbitration*, STEPTOE (Jan. 27, 2015), <http://www.steptoec.com/publications-10156.html> [<https://perma.cc/9EWP-LJUP>]. Other arbitral tribunals commonly referenced in BITs are: the Arbitration Institute of the Stockholm Chamber of Commerce and the ICC. *Id.*

In 2006, the ICSID amended its rules to include provisions related to “transparency.”¹⁷⁵ *If there is no objection by a party*, representatives of the public may attend the oral hearings, neutral third-parties may submit statements for the arbitrators to consider (i.e. as amici curiae), and arbitrators’ awards may be published.¹⁷⁶ Four years later, in 2010, UNCITRAL—the other major provider of investor-state arbitration rules—adopted similar rules entitled Transparency in Treaty-Based Investor-State Arbitration (“the Transparency Rules”).¹⁷⁷ The Transparency Rules were slightly revised in 2013, and became effective on April 1, 2014, for treaties negotiated thereafter.¹⁷⁸ Most documents relevant to an arbitration conducted under UNCITRAL rules must be made public, oral hearings must be open to the public, and the arbitrators’ awards must be published.¹⁷⁹ The UNCITRAL Transparency Rules apply *automatically* to all investor-state arbitrations conducted under all treaties negotiated or renegotiated after April 2014, with dispute resolution clauses referencing UNCITRAL Arbitration Rules, unless the parties explicitly excluded future disputes under these treaties from the transparency requirements.¹⁸⁰ In contrast, under ICSID rules there is a presumption in favor of keeping outcomes confidential but parties may agree to waive this in favor of public access.¹⁸¹

In addition, in 2014, UNCITRAL promulgated the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (“the Mauritius Convention on Transparency”), which applies the UNCITRAL transparency

¹⁷⁵ See Ignacio Torterola, *The Transparency Requirement in the New UNCITRAL Arbitration Rules: A Premonitory View*, INV. TREATY NEWS (Sep. 23, 2010), www.iisd.org/itn/2010/09/23/the-transparency-requirement-in-the-new-uncitral-arbitration-rules-a-premonitory-view/.

¹⁷⁶ See *Id.* ICSID Rule 32 (open hearings); Rule 37(2) on amicus curiae; Rule 48 (publication of arbitration awards). The ICSID transparency rules were first applied in 2007.

¹⁷⁷ See *UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html [<https://perma.cc/35HF-VQ6C>] (last visited Dec. 22, 2017).

¹⁷⁸ *Id.*

¹⁷⁹ The 2014 adoption of the new UNCITRAL transparency rules followed years of debate and controversy. A prime argument in favor of transparency was that, in many countries, proceedings involving the national government were by law open to the public. Also, special international tribunals established to resolve certain disputes, such as the Iran-US Claims Tribunal, operated in a transparent fashion. See, e.g., Torterola, *supra* note 175. Torterola notes that historically some 19th century arbitration tribunals, as well as the International Court of Justice and its predecessor, the Permanent Court of International Justice, provided for public access when arbitrators were deciding matters related to states acting within their sovereign powers. *Id.*

¹⁸⁰ In effect, only the states that negotiate the treaties, not a corporate investor bringing a claim against the state under the dispute resolution clause, may set aside the transparency requirements. *Id.*

¹⁸¹ According to Adam Raviv, a majority of ICSID decisions are published. Adam Raviv, *Achieving a Faster ICSID*, in 4 RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 657 n.10 (Jean Kalicki & Anna Joubin-Bret eds., 2015).

rules to treaties negotiated *before* April 2014.¹⁸² As of October 2017, the Convention had been signed by twenty-two countries, including the United States, but has entered into force for Switzerland, Canada, and Mauritius.¹⁸³ The European Commission is providing financial support to the Registry established by the Convention to publish awards.¹⁸⁴

A number of arguments have been put forth for increased transparency in investment arbitration. As the number of disputes between investors and national governments multiplied, representatives of some nations began to argue that because the defendants were *national governments*, national laws requiring open access to court proceedings and trial outcomes applied.¹⁸⁵ Additionally, many investor-state disputes concern foreign investments in public services, development of natural resources and public utilities—sectors in which the public has a strong interest and which may affect significantly the host country's economy.¹⁸⁶ Thirdly, it is not uncommon that investor-state disputes involve allegations of corruption and bribery by governmental officials—an area that is appropriately of great public concern.¹⁸⁷

Arguments favoring transparency gained force when some countries were told by investment arbitration tribunals that they had to pay large sums of taxpayers' money to compensate private corporations for violations of investment agreements.¹⁸⁸ To some citizens of these countries, the fact that the decisions were being made by private arbitrators, including privately-paid arbitrators se-

¹⁸² See UNCTAD, IIA ISSUES NOTE: TAKING STOCK OF IIA REFORM 1, 11 (2016) [hereinafter IIA ISSUES NOTE], <http://investmentpolicyhub.unctad.org/Publications/Details/142> [<https://perma.cc/RR83-K6FX>] (the Convention has not yet entered into force).

¹⁸³ See *Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014_Transparency_Convention_status.html [<https://perma.cc/E4M4-898V>] (last visited Sept. 13, 2017).

¹⁸⁴ See *European Commission to Continue its Support of the Operation of UNCITRAL Transparency Registry for a Further Three Years*, UNIS (Dec. 14, 2016), <http://www.unis.unvienna.org/unis/en/pressrels/2016/unisl240.html> [<https://perma.cc/Y7ZM-499E>].

¹⁸⁵ Torterola, *supra* note 175.

¹⁸⁶ See, e.g., MEG KINNEAR, INT'L CTR. FOR SETTLEMENT OF INV. DISP., 2016 ANNUAL REPORT 34 (2016), https://icsid.worldbank.org/en/Documents/resources/ICSID_AR16_English_CRA_b12_lhh_spreads.pdf [<https://perma.cc/N7T6-MUGK>] (showing that thirty-five percent of cases involved electric power and other energy, twenty percent of cases involved oil and gas concessions, and the remaining cases included telecommunication; transportation, construction; agriculture, fishing and forestry, etc.).

¹⁸⁷ James D. Fry & Odysseas G. Repousis, *Towards a New World for Investor-State Arbitration Through Transparency*, 48 N.Y.U.J. INT'L L. & POL. 795, 805 (2016) (citing *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Oct. 4, 2006, Award, ¶¶ 129, 167–88 (involving a bribe paid to the Kenyan President)).

¹⁸⁸ *Id.* at 805–06. For example, in 2012, an ICSID arbitration panel ordered Ecuador to pay Occidental Petroleum \$2.3 billion in a dispute over expropriation of oil drilling rights. Jonathan Weisman, *Trans-Pacific Partnership Seen as Door for Foreign Suits Against U.S.*, N.Y. TIMES, (Mar. 25, 2015) https://www.nytimes.com/2015/03/26/business/trans-pacific-partnership-seen-as-door-for-foreign-suits-against-us.html?_r=0 [<https://perma.cc/96XB-NMH3>].

lected by the plaintiff-corporation, raised concerns about bias towards corporate parties, and made the decisions illegitimate, even though under investor-state arbitration rules the country itself had also selected one of the arbitrators.¹⁸⁹ The fact that the proceedings took place behind closed doors did not help to dispel these perceptions of illegitimacy.¹⁹⁰

Unease with investor-state arbitration grew when multinational corporations adopted a new strategy of using the procedure to challenge legislative mandates that were intended to improve public health and safety or protect the environment. Perhaps the most notorious of these corporate efforts was Philip Morris International's challenge to Australia's "plain packaging" tobacco legislation.¹⁹¹ After Australia's parliament enacted a law prohibiting tobacco companies from decorating cigarette packages with their company's logo, Philip Morris, along with other tobacco companies challenged the law, claiming that it deprived the company of the value of their trademark.¹⁹² The companies took the case all the way up to Australia's High Court, where they suffered a resounding defeat.¹⁹³ But that did not end the tobacco companies' attack on Australia's legislation. Taking advantage of a previously negotiated BIT between Hong Kong and Australia, Philip Morris's Hong Kong subsidiary brought an arbitration claim against Australia arguing, essentially, that Australia's plain packaging regulations constituted an "expropriation" under the treaty.¹⁹⁴ Although investor-state arbitration is usually invoked by corporations to obtain

¹⁸⁹ Typically, in arbitration, each party chooses an arbitrator who is supposed to be neutral, but nonetheless is presumed to have that party's interest in mind, and then the two party-selected arbitrators choose a third arbitrator to chair the panel (and break any tie between the party-selected arbitrators). See, e.g., UNCITRAL RULES ON TRANSPARENCY, *supra* note 131, at 11 (referencing Article 9).

¹⁹⁰ Fry & Repousis, *supra* note 187, at 806–07.

¹⁹¹ The original challenge to Australia's statute was brought by British Tobacco and JT International. See Philip Morris Asia Ltd. (Hong Kong) v. Australia (*Tobacco Plain Packaging Case*), PCA Case Repository No. 2012-12, Award, at 1–3 (Dec. 17, 2015), <https://www.pca-ases.com/web/sendAttach/1711> [<https://perma.cc/DQ6K-C92U>]. Philip Morris was an intervening party in support of BT. See British Am. Tobacco Australasia Ltd. v. Commonwealth [2012] HCA 43 (Austl.); JT Int'l SA v. Commonwealth [2012] HCA 43 (Austl.).

¹⁹² *Tobacco Plain Packaging Case*, ¶¶ 6–7.

¹⁹³ For the separate opinions and conclusions reached by each High Court's Justice, see *British Am. Tobacco Australasia Ltd.*, ¶ 45; *JT Int'l SA*, ¶¶ 159–60, 189–91, 242–43, 306–07, 373–74.

¹⁹⁴ See *Tobacco Plain Packaging Case*. There were several unusual aspects of Philip Morris' action. First, it filed its ICSID claim in anticipation of the Australian legislation (which Philip Morris had lobbied against unsuccessfully). Second, it asked for an injunction against the legislation, whereas the normal remedy in investor-state arbitration is compensation. Moreover, Australia argued that Philip Morris Asia (the Hong Kong subsidiary) had purchased an interest in Philip Morris Australia only shortly before the passage of the legislation, and for the purpose of being able to bring a claim in investor-state arbitration. See also Puig, *supra* note 165, at 34–35. Australia's investment treaty with Hong Kong was one of only twenty-eight treaties Australia had ratified with ISDS provisions. The TPP would have been the first agreement between Australia and the United States with an ISDS provision. *ISDS: The Devil in the Trade Deal*, *supra* note 115.

monetary compensation for an alleged violation of an investment agreement, Philip Morris requested that the arbitrators *enjoin* Australia from implementing its regulations, in essence asking the private arbitrators to put themselves in the position of Australia's high court justices. Ultimately, Australia prevailed in the arbitration when the arbitrators ruled that they did not have jurisdiction over Philip Morris's claim because it did not come within the treaty language on what constituted an expropriation.¹⁹⁵ Australia later announced that it would not include investor-state arbitration clauses in its future treaties.¹⁹⁶

Although Philip Morris's attempt to use investor-state arbitration to preempt anti-smoking regulations attracted the widest attention, Philip Morris is not the only corporation to attempt to leverage investor-state arbitration against national substantive law. Corporations have brought investor-state arbitration claims against the United States and Canada seeking relief from stricter environmental regulation, against Germany for deciding to phase out nuclear power plants in the wake of the nuclear reactor disaster in Fukushima, against Canada challenging a Canadian (trial) court's interpretation of the scope of patent protection for a pharmaceutical product (upheld by that country's federal Court of Appeals), and against Guatemala for setting electric utility customers' fees lower than the corporation had anticipated at the time of its investment.¹⁹⁷

¹⁹⁵ Kavaljit Singh, *ISDS Arbitration Upholds Australia's Plain Packaging Laws*, E. ASIA F. (Jan. 15, 2016), <http://www.eastasiaforum.org/2016/01/15/isds-arbitration-upholds-australias-plain-packaging-laws/> [<https://perma.cc/93MS-NSPD>].

¹⁹⁶ Puig, *supra* note 165, at 35. See Leon E Trakman, *Choosing Domestic Courts Over Investor-State Arbitration: Australia's Repudiation of the Status Quo*, 35 U. N.S.W. L.J. 979, 985–87 (2012). A similar attempt by Philip Morris to use investor-state arbitration to preempt Uruguay's anti-smoking regulation also failed. However, critics of investor-state arbitration pointed out that Philip Morris' aggressive use of arbitration to contest anti-smoking regulation imposed hefty legal costs on the countries it claimed against, and had the potential (perhaps intentional) to chill anti-smoking regulation, particularly by smaller and less wealthy countries that would not have the resources of an Australia to defend their legislative mandates. Perhaps in response to growing opposition to Philip Morris's strategy, the US Trade Representative proposed in 2014 that the Trans-Pacific Partnership Agreement (TPP)—a treaty that President Trump recently set aside, as discussed *infra*—have a so-called “carve out” for anti-smoking regulation. The tobacco industry was joined by other industry representatives in lobbying fiercely *against* this idea, suggesting that at least some corporate lobbyists were looking forward to the possibility of using investor-state arbitration as a shield against product safety regulation. Puig, *supra* note 165, at 35 n.168 (citing Michael Bloomberg, *Op-Ed: Why is Obama Caving on Tobacco?* N.Y. TIMES (Aug. 22, 2013), <http://www.nytimes.com/2013/08/23/opinion/why-is-obama-caving-on-tobacco.html>).

¹⁹⁷ JOHNSON ET AL., *supra* note 14, at 2–3. Johnson's co-author, Prof. Jeffrey Sachs, is a noted American economist and expert on international development. See James Billingsley, *Eli Lilly and Company v. The Government of Canada and the Perils of Investor-State Arbitration*, APPEAL, 2015, at 27 (discussing investor-state arbitration claims against Canadian courts' interpretation of patent protection for pharmaceutical products); see also Caroline Simson, *Teco Brings Electricity Row with Guatemala to D.C. Court*, LAW360 (Jan. 17, 2017, 5:01 PM), <https://www.law360.com/articles/881490/teco-brings-electricity-row-with-guatemala-to-dc-court> [<https://perma.cc/YK3G-MFXV>] (reporting on investor-state arbitration claims against Guatemala's electricity pricing decision).

Some of these corporations prevailed in arbitration, and some did not.¹⁹⁸ When corporations prevailed, they asked courts to confirm the arbitrators' award, just as would happen if a business won an award against another business in a domestic arbitration case. In other words, while private arbitrators made the decisions that determined the outcomes of these claims, publicly-appointed judges were brought into play to enforce the decisions (whether or not the judges might have made those decisions themselves). Although under the New York Convention we expect courts to enforce arbitration awards, expecting a court to enforce an arbitration decision that overturned a court judgment seems incongruous when there is no hint that the original court decision was a consequence of extra-legal forces.

As the number of investors' claims challenging governments' public policy decisions mounted, there were cries for countries to abandon the investor-state arbitration provisions of treaties they had previously ratified. Opposition came from international economics and law scholars,¹⁹⁹ NGOs, and even from some international arbitration practitioners.²⁰⁰ Critics argued that national substantive and procedural law were being pushed aside without open and reasoned debate,²⁰¹ and that the threat of multi-million-dollar arbitration awards would cause legislators to back away from regulating global corporations' behavior, and judges to be wary of interpreting domestic law in a fashion that might lead to costly investor claims.²⁰² Investor-state arbitration was invented to protect corporations and investors from governments that operated outside the "rule of

¹⁹⁸ JOHNSON ET AL., *supra* note 14, at 16–17.

¹⁹⁹ *Id.* at 1; *ISDS: The Devil in the Trade Deal*, *supra* note 115. "If you think that all this discussion of ISDS is scare-mongering, just have a look at what's happened to Canada under the North American Free Trade Agreement (NAFTA) with the United States. It's all there ready and waiting to happen to us [Australia]." Professor of Law Thomas Faunce, Australian National University. According to ABCNet, the Canadian case Prof. Faunce referred to was a claim brought under NAFTA by Ethyl, an American chemical company, against Canada, for banning MMT, a fuel additive. Canada agreed to settle the claim by paying Ethyl \$13 million, rescinding the ban, and publishing a statement declaring that MMT is safe.

²⁰⁰ *ISDS: The Devil in the Trade Deal*, *supra* note 115.

'What has happened, in my view, is an expansion of the field well beyond the contemplation of those who originally designed it,' says Toby Landau, a leading arbitration lawyer who works with ISDS. 'The kinds of cases are expanding in terms of scope. They are covering all forms of governmental activity wherever that activity might have an adverse impact on a foreign investment, for example cigarette packaging, regulation of carbon emissions, nuclear policy and taxation.'

Id.

²⁰¹ JOHNSON ET AL., *supra* note 14, at 3.

ISDS provides significant substantive and procedural rights to individuals and corporations based solely on their foreign nationality, and outsources development and interpretation of law to private arbitrators insulated from crucial checks and balances. Through this grant of rights and transfer of lawmaking power, ISDS threatens to undermine legal systems and policymaking at the domestic level.

Id.

²⁰² Billingsley, *supra* note 197, at 39–40.

law”; now it was being turned into a weapon for corporations to undermine laws properly adopted by democratic governments, critics charged.²⁰³

The addition of “transparency” provisions to the ICSID Rules and the UNCITRAL Transparency Rules did not stem the flow of criticism: those Rules were too easily waived, the critics said.²⁰⁴ Moreover, “transparency” did nothing to mitigate the facts that investor-state disputes were being resolved by a small group of “elite” corporate lawyers perceived to be biased in favor of multinational corporations²⁰⁵ and that ambiguous BIT language was allowing

²⁰³ Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.668f8581dede [<https://perma.cc/ZV2U-BUX6>].

Why create these rigged, pseudo-courts at all? What’s so wrong with the U.S. judicial system? Nothing, actually. But after World War II, some investors worried about plunking down their money in developing countries, where the legal systems were not as dependable. They were concerned that a corporation might build a plant one day only to watch a dictator confiscate it the next. To encourage foreign investment in countries with weak legal systems, the United States and other nations began to include ISDS in trade agreements. Those justifications don’t make sense anymore, if they ever did. Countries in the TPP are hardly emerging economies with weak legal systems. Australia and Japan have well-developed, well-respected legal systems, and multinational corporations navigate those systems every day, but ISDS would preempt their courts too. And to the extent there are countries that are riskier politically, market competition can solve the problem. Countries that respect property rights and the rule of law—such as the United States—should be more competitive, and if a company wants to invest in a country with a weak legal system, then it should buy political-risk insurance.

See also *The Arbitration Game: Investor-State Dispute Settlement*, ECONOMIST (Oct. 11, 2014), <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration> [<https://perma.cc/BQQ2-BP2F>].

²⁰⁴ JONATHAN BONNITCHA ET AL., *THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME* 233 (2017).

²⁰⁵ See Stanislaw Soltysinski, *The Dispute About the Legitimacy of Investment Arbitration: Is the Principle of Equality of Parties an Outdated Concept?*, in *A REVOLUTION IN THE INTERNATIONAL RULES OF LAW: ESSAYS IN HONOR OF DON WALLACE, JR.*, *supra* note 168, at 315, 320–21 (citing data from a study by Pia Eberhardt & Cecilia Olivet showing that fifteen arbitrators decided fifty-five percent of investor-state disputes in 2011, but disputing “critical opinions that ‘elite’ arbitrators have formed a ‘mafia’ and many of them have not even demonstrated expertise in international law.”); see also Robert Howse, *India Should Not Let Europe Undermine Its New BIT and TRIPs Flexibilities for Medicines*, SUNDAY GUARDIAN LIVE (Feb. 25, 2017), <http://www.sundayguardianlive.com/opinion/8516-india-should-not-let-europe-undermine-its-new-bit-and-trips-flexibilities-medicines> [<https://perma.cc/8YZZXAPY>] (“The arbitrators constitute a small elite of lawyers dominated by West European males, who also act as counsel in cases on related matters, an egregious conflict of interest uncontrolled by arbitration rules. . . . It is a challenge to rein in . . . expansion of [substantive] jurisdiction by arbitrator creativity, since arbitrators are judges for hire, and when they grant jurisdiction they get paid handsomely to hear the case. . . . Impartial judges well qualified in public law and compensated mostly through a fixed salary would be a big improvement over commercial lawyers and entrepreneurial academics who engage in arbitration as a route to personal wealth.”).

these decision-makers to favor corporations seeking to undermine national policies.²⁰⁶

Ultimately, opposition to investor-state arbitration provisions became an important factor in controversy over newly proposed treaties intended to regulate trade and investment between certain nations: the Trans-Pacific Partnership agreement (TPP)²⁰⁷ and the Trans-Atlantic Trade and Investment Partnership agreement (TTIP).²⁰⁸ Since taking office, the Trump administration has begun re-negotiating the North American Trade Agreement (NAFTA), which he has loudly opposed as not being fair to the United States.²⁰⁹ Among the treaty chap-

²⁰⁶ Soltysinski, *supra* note 205, at 321–25. *But see* Susan D. Franck, *Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes*, 55 VA. J. INT'L. L. 13, 65 (2014) (presenting empirical evidence disputing these claims, and showing “(1) states won in equal or greater proportions than investors; (2) measures of central tendency indicated that investors won less than US\$20 million on average overall; and (3) in those cases where investors were successful, investors’ relative success was roughly 30% of the amount claimed.”).

²⁰⁷ The proposed signatories to the multi-lateral TPP were Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. On his first day in office, President Donald Trump, who during his campaign referred to the treaty as a “horrible deal,” withdrew the U.S. from the agreement. *TPP: What Is It and Why Does It Matter*, BBC NEWS (Jan. 23, 2017), <http://www.bbc.com/news/business-32498715> [<https://perma.cc/3QE3-D6TJ>]; *see also* *Trans-Pacific Partnership (TPP)*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership> (last visited Dec. 22, 2017) [<https://perma.cc/QX3T-55FX>]. Subsequently, the other proposed signatories re-started negotiations. *See* Motoko Rich, *TPP, the Trade Deal Trump Killed, is Back in Talks Without U.S.*, N.Y. TIMES (Jul. 14, 2017), <https://www.nytimes.com/2017/07/14/business/trans-pacific-partnership-trade-japan-china-globalization.html> [<https://perma.cc/E3MB-ZRZ6>]. In November 2017, eleven Pacific Rim countries agreed to move ahead with the agreement with the goal of obtaining signatures in early 2018. *See* Shawn Donnan, *Long Live the TPP – Pacific Trade Pact Survives Largely Intact*, FIN. TIMES, Nov. 3, 2017, <https://www.ft.com/content/c5cdd3aa-c82d-11e7-ab18-7a9fb7d6163e> [<https://perma.cc/9V4S-DU5A>]. ISDS clause remains in the renegotiated agreement, but its scope is restricted. *Id.* The long running controversy over the ISDS provision of the TPP was not helped by the fact that its text was kept from the public. According to New York Times reporter Jonathan Weisman, the ISDS clause in the TPP was to be classified for four years after the agreement became effective or negotiations definitely failed; the Times said it had obtained the provision from WikiLeaks. Ironically, the classified TPP ISDS clause was reported to include transparency requirements. *See* Weisman, *supra* note 188.

²⁰⁸ The TTIP proposed to regulate a wide range of trade and investment between the United States and the European Union. *See U.S.-EU Joint Report on Progress to Date*, OFF. U.S. TRADE REPRESENTATIVE (Jan. 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/us-eu-joint-report-t-tip-progress-0> [<https://perma.cc/C4ZE-XSKE>]. The proposed TTIP was a subject of controversy in both the U.S. and the EU, for a variety of reasons including the investor-state dispute resolution provisions. *See, e.g.*, Stuart Jeffries, *What Is TTIP and Why Should We Be Angry About It?*, GUARDIAN (Aug. 3, 2015, 1:15 PM), <https://www.theguardian.com/business/2015/aug/03/ttip-what-why-angry-transatlantic-trade-investment-partnership-guide> [<https://perma.cc/MH4J-EUTL>].

²⁰⁹ Ana Swanson, *Trump’s Tough Talk on NAFTA Raises Prospects of Pact’s Demise*, N.Y. TIMES (Oct. 11, 2017), https://www.nytimes.com/2017/10/11/business/economy/nafta-trump.html?_r=0 [<https://perma.cc/6PTF-8J48>]. Both the TPP and NAFTA (the North American Trade Agreement between the U.S., Canada and Mexico, ratified by the U.S. in 1994) are

ters proposed for reform or elimination are provisions on state-state and investor-state dispute settlement.²¹⁰ Meanwhile, a number of other countries have announced their intentions to drop investor-state arbitration clauses from future bilateral investment treaties or withdraw from current treaties with investor-state arbitration clauses.²¹¹

With concern rising that the framework of international investment is coming apart, there are multiple moves afoot to amend the substantive provisions of bilateral and multilateral investment treaties: to safeguard countries' rights to regulate in the areas of health and safety, environmental protection, and labor standards, to better balance national and investor obligations, and to strengthen procedural fairness of investor-state arbitration.²¹² In their recently negotiated trade and investment treaty (CETA), the European Union and Canada turned their backs on investor-state arbitration in favor of a bilateral investment court that is explicitly intended to lay the basis for a future multilateral investment court that would resolve disputes between EU member nations and their trading parties.²¹³ The Canada-EU investment court would be a permanent body with judges appointed and paid for by the two countries, operating under UNCITRAL transparency rules.²¹⁴ It remains to be seen whether the new

examples of what Puig terms regional trade agreements (RTAs), different from agreements negotiated by the World Trade Organization in its exclusive application to a relatively small number of countries. Puig has termed the emergence of RTAs "mini-lateralism." RTAs complicate an already complicated international dispute resolution framework providing nations with strategic opportunities to re-litigate issues under a different treaty's provisions when they have failed to prevail under another treaty's dispute resolution clause. *See* Puig, *supra* note 165, at 3; *see also* Patrick Gillespie, *NAFTA: What It Is and Why Trump Hates It*, CNN: CNN MONEY (Nov. 15, 2016, 5:17 PM), <http://money.cnn.com/2016/11/15/news/economy/trump-what-is-nafta/index.html> [<https://perma.cc/7NUA-84K5>] (stating that the North-American Free Trade Agreement (NAFTA), signed into law by the U.S. in 1994, is an example of a regional trade agreement that the U.S. ratified).

²¹⁰ *See* Tonda Maccharles, *Agreeing on How to Disagree Is One of the Biggest NAFTA Debates*, STAR.COM, (Aug. 16, 2017), <https://www.thestar.com/news/canada/2017/08/16/agreeing-on-how-to-disagree-is-one-of-the-biggest-nafta-debates.html> [<https://perma.cc/4QYD-EJ72>]. *See also* Ioannis Glinavos, *The Big Challenge of the NAFTA Negotiations: Dispute Settlement*, CONVERSATION (Aug. 14, 2017, 6:56 AM) <https://theconversation.com/the-big-challenge-of-the-nafta-renegotiations-dispute-settlement-82394> [<https://perma.cc/MZ75-FDYE>].

²¹¹ Among these (in addition to Australia) are Argentina, Bolivia, Ecuador, India, Indonesia, South Africa, South Korea, and Venezuela. Brazil is reported to have steadily declined to negotiate treaties with investor-state arbitration clauses. Soltysinski, *supra* note 205, at 324; *The Arbitration Game*, *supra* note 203.

²¹² *See* IIA ISSUES NOTE, *supra* note 182, at 9 (presenting examples of recent substantive reforms that include specifying criteria arbitrators should consider when deciding whether a country's decision qualifies as an "indirect expropriation" (i.e. akin to Philip Morris' claim regarding Australia's plain packaging law) and identifying "public policy exceptions" that exclude certain national decisions from review by arbitrators).

²¹³ *A Future Multilateral Investment Court*, EUR. COMMISSION (Dec. 13, 2016), http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm [<https://perma.cc/4BZ5-XNH5>].

²¹⁴ Each country will appoint five members, and an additional five "neutrals" will be chosen collaboratively. All will serve for initial terms of five years, renewable for another five

CETA investment court system will survive scrutiny by the European Court of Justice and be deemed compatible with EU laws.²¹⁵ However, the EU parliament is pushing forward with consultation on establishing a multi-lateral investment court, drawing in part on the CETA model and in part on agreements recently negotiated between the EU and Vietnam and the EU and Singapore.²¹⁶ The issues highlighted in current analyses and debate are appointment and remuneration of adjudicators, transparency of process and outcomes, costs and cost allocation, remedies, and appellate rights.²¹⁷

IV. RE-INVENTING ARBITRATION

For many years, domestic arbitration in the United States, international commercial arbitration, and investor-state arbitration have evolved on parallel but separate tracks, each responding to different political, economic, and social circumstances. Their evolution, however, has had (at least) two features in common:

- (1) an expansion in substantive scope, from a relatively narrow and homogeneous set of private nature disputes, to a more broad and diverse set of disputes with significant public policy implications; and
- (2) in response, the transformation of the procedure itself from an informal, streamlined, and highly private process, to a process resembling a public adjudicative forum, with formal rules, time consuming (and increasingly expensive) due process protections, precedential decision-making, and—at least in certain instances—public access to process and outcomes.

years. The judges may not serve as private arbitrators, party experts, or legal counsel in any investment dispute during their term on the court. A panel of three will be chosen from this bench at random to hear each dispute. Parties may appeal the awards to a separate appeal tribunal for legal error or manifest errors of fact. The details of the tribunal selection are yet to be decided. The final awards will be enforceable in the courts of Canada and EU member states. However, enforceability elsewhere is uncertain as the “court” arguably is not covered by the New York Convention. Mark Mangan, Commentary, *The EU Succeeds in Establishing a Permanent Investment Court in Its Trade Treaties with Canada and Vietnam*, MEALEY’S INT’L ARB. REP., May 2016, at 2–4; see also Hogan Lovells, *CETA Paves the Way for Investment Court System*, LEXOLOGY (Dec. 6, 2016), <http://www.lexology.com/library/detail.aspx?g=cddc2b70-9425-418f-bcf1-512cb8483100> [https://perma.cc/N82G-VZ9V] (explaining, moreover, that the viability of the Court itself is in question: Belgium has challenged it on the basis of inconsistency with EU law).

²¹⁵ *EU Court to Judge Controversial Investment Rules in Canada Trade Deal*, CLIENTEARTH (Sept. 6, 2017), <https://www.clientearth.org/eu-court-to-judge-controversial-investment-rules-in-canada-trade-deal/Nonet> [https://perma.cc/P7XX-GMEL].

²¹⁶ See STEFFEN HINDELANG & TEOMAN M. HAGEMeyer, EUROPEAN PARLIAMENT’S COMMENT ON INT’L TRADE, IN PURSUIT OF AN INTERNATIONAL INVESTMENT COURT: RECENTLY NEGOTIATED INVESTMENT CHAPTERS IN EU COMPREHENSIVE FREE TRADE AGREEMENTS IN COMPARATIVE PERSPECTIVE 1 (2017), [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603844/EXPO_STU\(2017\)603844_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603844/EXPO_STU(2017)603844_EN.pdf) [https://perma.cc/LN2Z-MR67].

²¹⁷ *Id.* at 15–21.

The result has been a new form of dispute resolution that is neither fully private nor fully public, eschewing, in an increasing variety of circumstances, the advantages that arbitration's early business person proponents hoped to achieve by substituting arbitration for court dispute resolution, without guaranteeing in these or other circumstances the protections public adjudication can offer for less powerful disputants and the public interest.

There is no evidence that this transformation of domestic and international commercial arbitration was intended by the justices who built the doctrinal edifice that supports arbitration in the United States today.²¹⁸ Indeed, it is uncertain whether these justices understand how far arbitration in the commercial arena has strayed from the vision of quick and inexpensive dispute resolution that the Court has long cited as the basis for a public policy favoring arbitration.²¹⁹ Nor is it clear that international treaty negotiators understood, until recently, the growing public antipathy to using private arbitral processes to resolve conflicts between multinational corporate investors and democratically-elected and appointed public officials and the threat that this antipathy poses to international trade and investment treaty-making in the future.²²⁰

A. *Domestic Arbitration in the United States*

As commercial arbitration has become more formal, procedurally complex, time-consuming, and expensive, the commercial dispute resolution market has

²¹⁸ See *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) ("the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.").

²¹⁹ See e.g. *AT&T Mobility*, 563 U.S. at 344–45 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute . . . the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." (internal citations omitted)). See also *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting) ("The effective-vindication rule has thus operated year in and year out without undermining, much less "destroy[ing]," the prospect of speedy dispute resolution that arbitration secures.").

²²⁰ Although discussions leading up to the formal launch of negotiations of the TTIP began in 2011, opposition to the proposed dispute resolution provisions does not seem to have attracted high level government attention until 2015. See Vicki L. Birchfield, *Negotiating the Transatlantic Trade and Investment Partnership: Comparing U.S. and EU Motivations, Oppositions and Public Opinion* 1 (Ga. Tech Ctr for European and Transatlantic Studies, Working Paper No. GTJMCE-2015-2, 2015). Hensler attended a session of the U.K. Law Society's February 2015 "Global Law Summit" at which a speaker described trade negotiators as surprised that the investor-state dispute settlement clause in the proposed TTIP proved to be a significant stumbling-block in securing support for the treaty; seasoned trade negotiators, he said, were focused on the substantive aspects of the proposed agreement.

shifted towards mediation,²²¹ and some industries that once were pillars of the arbitration market now advise their members to consider using other dispute resolution methods before adopting arbitration.²²² Many business decision-makers, however, continue to choose arbitration for their business-to-business disputes, notwithstanding their complaints about costs and delay. By inference, these decision-makers increasingly choose arbitration for their wholly domestic disputes not because they perceive it to be quick or inexpensive but rather—despite the transaction costs—because it allows them to resolve their differences in private, with no public record. Whether “public policy” should support such a choice is worthy of more public debate than has been accorded to the question to date.

The principle that transacting parties should both be *permitted* to voluntarily agree to an extrajudicial dispute resolution process and, having once chosen such, *held* to such agreements is key to U.S. courts’ arbitration jurisprudence. However, in extending enforcement of arbitration agreements to employment and consumer contracts of adhesion that *require* arbitration, the U.S. Supreme Court has honored the principle in word only. To protect their integrity (and to their credit) leading arbitration providers have created “due process protocols” that extend some of the protections of public adjudication to employees and consumers and attempt to create a more level playing field between the latter and the more powerful institutions that employ them and sell them products and services.²²³ The success of such protocols in protecting employees and consumers is far from clear, and available evidence suggests that consumers have little understanding of the differences between arbitration—whatever its form—and litigation.²²⁴ Moreover, as a result of confidentiality provisions, employment and consumer arbitration continue to offer powerful individuals and corporations the ability to hide egregious behavior from public view.²²⁵

Having endorsed the use of arbitration in the employment and consumer domain, the U.S. Supreme Court opened a door to corporations wishing to use arbitration as a means of denying their employees and customers collective

²²¹ Deborah R. Hensler, *The Private in Public, The Public in Private: The Blurring Boundary Between Public and Private Dispute Resolution*, in *FORMALISATION AND FLEXIBILISATION IN DISPUTE RESOLUTION* 45, (Joachim Zekoll et al. eds., 2014) (discussing the emergence of mediation as a preferred dispute resolution procedure for business disputants).

²²² See generally BRUNER & O’CONNOR *supra* note 101.

²²³ See discussion *supra* Sections I.C.2–3.

²²⁴ CONSUMER FIN. PROT. BUREAU, *ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A)* 11 (2015).

²²⁵ Recent revelations of allegations of sexual harassment of employees have provoked questioning of the appropriateness of mandatory pre-dispute arbitration agreements, at least as pertain to these sorts of charges. See Gretchen Carlson, *How to Encourage More Women to Report Sexual Harassment*, N.Y. TIMES (Oct. 10, 2017) https://www.nytimes.com/2017/10/10/opinion/women-reporting-sexual-harassment.html?_r=0 [https://perma.cc/7QU2-P5YS]. However, the prevalence of confidential settlement agreements in litigated cases dilutes the power of this critique.

pursuit of remedies for collective harm. Ironically, defendants' efforts to preclude class actions by imposing arbitration on employees and consumers brought the differences between public courts and private arbitration into sharper focus for some justices than evinced in the Court's prior decisions on arbitration.²²⁶ Forced to consider the differences in capacity to manage collective claiming between courts and private arbitration providers, the U.S. Supreme Court concluded that it would be a mistake to grant the latter the authority granted to federal and state judges to determine when it is appropriate to permit claimants to proceed in class form and to protect class members against the agency costs inherent in representative collective proceedings. Rather than concluding that collective legal claims properly belong in public courts, however, the Court acceded to corporations' desires to deny such claims altogether.²²⁷

It would be quixotic to propose that the U.S. Supreme Court reverse the past several decades of its arbitration jurisprudence.²²⁸ Its decisions, however, rest on statutory interpretation. The U.S. Congress could reverse the Court's policies with regard to employment and consumer arbitration with new legislation. By returning domestic commercial arbitration to the purely commercial sphere, Congress could re-define the boundary between private arbitration and public adjudication and preserve each for its most appropriate uses. While it is wildly wishful thinking to expect such action in the near future, as we have seen recently, elections can bring sharp shifts in legislative decision-making.

B. *International Commercial Arbitration*

Although international commercial arbitration has been subject to the same complexification as domestic commercial arbitration, absent an international convention on the enforcement of judgments or an international commercial court, arbitration remains the best available option for trans-national business disputes. The proliferation of international commercial arbitration tribunals offers a potential for innovative dispute system design and the possibility that market competition will result over time in the emergence of optimal procedures. Increased transparency with regard to process and outcomes would enable such competition, which might in turn lead to a greater appetite for transparency among entrepreneurial arbitration providers eager to prove their superiority to others.

The increasingly globalized business environment will likely produce an increasing number of trans-national disputes requiring an international com-

²²⁶ AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348–51 (2011).

²²⁷ *Id.*

²²⁸ Just ten years after *Southland*, Justice O'Connor felt compelled to concur in the decision in *Allied-Bruce Terminix* on the grounds of *stare decisis*, notwithstanding dissenters' argument that a wrongly-determined case should not be accorded such deference. *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

mercial arbitration forum, which may in turn lead to growth in the number of expert arbitrators and perhaps in their diversity as well. While in the domestic sphere, there is room for robust debate about the appropriateness of substituting private dispute resolution for public adjudication and an argument for preserving the distinctiveness of each, in the international commercial arbitration arena, there is currently no obvious alternative to private dispute resolution. As a result, what is needed in the international commercial arbitration domain is independent debate about procedural design, empirical analysis to support that debate, and objective consideration of the benefits and limitations of arbitral decision-making. Unfortunately, the fact that those with the most expertise in international commercial arbitration may stand to lose financially as a result of changes in current rules and practices poses an obstacle to such consideration.

C. Investor-State Arbitration

The situation with regard to investor-state arbitration is more vexed than the situation of traditional international commercial arbitration. As with international commercial arbitration, there is currently no obvious alternative to arbitration. The issues presented in investor-state arbitration, however, are more likely to have direct consequences for the public than the issues in ordinary international commercial arbitration. Moreover, its historical provenance is much more recent; although investor-state arbitration dates back to the 1960s, the dramatic increase in investor-state disputes occurred much more recently. As a result, investor-state arbitration is arguably less entrenched than international commercial arbitration and more amenable to regime change.

Proposals to establish an international investment court offer promise of protecting important public values in disputes that implicate important national interests, such as public health, environmental protection, and product safety. In particular, proposals to establish a public process for appointing judges to decide investor-state disputes and to pay these judges and subsidize court operations from public funds, address concerns about bias in investor-state arbitration. Heightened transparency standards (by comparison with ISID and UNCITRAL rules) would provide objective evidence of the consequences of the new court's decision-making, as well as offer the possibility for third-parties to observe and participate in hearings.

A few bi-lateral investment treaties have already substituted an investment court paradigm for traditional investor-state arbitration in their dispute settlement clauses. Extending the concept to multi-lateral treaties will be challenging, but there appears to be agreement in the EU that working towards this goal is desirable. If international investment courts were to proliferate through the re-negotiation of BITS, pressure might mount for even those countries, such as the United States, which have traditionally been hostile to the idea of international courts, to substitute a more publicly-oriented court paradigm for traditional investor state arbitration in its bi-lateral trade agreements. Ultimately, an

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international investment court also could provide an attractive alternative to arbitration for trans-national commercial disputes.

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