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## Toward a Theory of Precedent in Arbitration

W. Mark C. Weidemaier

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## TOWARD A THEORY OF PRECEDENT IN ARBITRATION

W. MARK C. WEIDEMAIER\*

### ABSTRACT

*Do arbitrators create precedent? The claim that they do not recurs throughout much of the arbitration literature. Instead, arbitration often is viewed as an ad hoc forum in which arbitrators do justice (at best) within the confines of particular cases. As an empirical matter, however, it is increasingly clear that, in some arbitration systems, arbitrators often cite to other arbitrators, claim to rely on past awards, and promote adjudicatory consistency as an important system norm. Much like courts, then, arbitrators can (but do not always) create precedent that guides future behavior and provides a language in which disputants, lawyers, and adjudicators can express and resolve grievances.*

*This Article provides a theoretical foundation for understanding the conditions under which precedent will (or will not) arise in arbitration. It identifies three considerations that may account for the development of precedent across a range of arbitration systems: (1) whether the system is structurally conducive to the creation of precedent; (2) whether arbitral precedent benefits the parties by filling gaps in (or displacing) state-supplied law; and (3) whether arbitrators are likely to be viewed as legitimate producers of law within the relevant context. After explaining the relevance of these considerations, the Article explores how they might apply in different arbitration contexts and sets forth a research agenda capable of*

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*shedding light on arbitration not only as a mechanism for resolving disputes, but also as a mechanism for generating robust systems of privately made law.*

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## INTRODUCTION

Do arbitrators create precedent? The claim that they do not recurs throughout the arbitration literature. Yet this claim conflicts with a small but growing body of evidence that, in some arbitration systems, arbitrators frequently cite to other arbitrators, claim to rely on past awards, and promote adjudicatory consistency as an important system goal. Thus, although not every system of arbitration generates precedent, some clearly do.

Both theoretically and empirically, however, arbitral precedent remains a poorly understood phenomenon. As a result, assessments of arbitration's lawmaking potential vary significantly. At one end of the spectrum, some associate arbitration with confidentiality and secrecy and assert a conflict between these characteristics and the production of law. Thus, "[w]hatever else arbitration may be, it is not 'law'—the kind of findable, studiable, arguable, appealable, *Restateable* kind of *law*" that courts produce.<sup>1</sup> By contrast, other conceptions of arbitration's lawmaking capacity are expansive, even raising the possibility that some systems of arbitration inevitably yield "substantive results that have a systemic character."<sup>2</sup> If so, the question becomes whether "modern-day arbitrators fashion a commercial, antitrust, employment, maritime, securities, and contract law?"<sup>3</sup>

There are at least two reasons why such disparate conceptions of arbitration persist. First, despite long-standing interest in the topic, little effort has been made to identify the conditions under which arbitral precedent might arise. Too often, arbitration is portrayed as a unitary phenomenon—one that either is or is not capable of generating precedent. By failing to accommodate the diverse array of arbitration practices, the literature fails to yield testable hypotheses concerning the creation and use of precedent in arbitration. Second, even if there were well-articulated theoretical reasons to believe that some arbitration systems generate precedent, the

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1. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 766 (2002).

2. Thomas E. Carbonneau, *Arbitral Law-Making*, 25 *MICH. J. INT'L L.* 1183, 1205 (2004).

3. *Id.* at 1202.

limited empirical evidence makes it difficult to compare arbitrator behavior across systems.

This Article begins the process of filling these gaps. It provides a theoretical foundation for understanding the conditions under which precedent is (or is not) likely to evolve in arbitration. I use the term “evolve” because few if any systems of arbitration are designed with the intent to create a body of precedent. To the contrary, arbitral precedent typically arises, if at all, in systems intended “merely” to resolve disputes.

By referring to arbitral precedent I do not mean that past awards determine the outcome of future disputes. They do not. Nor do I argue that awards necessarily constrain the discretion of future arbitrators. As I will explain, there *are* cases in which, for very pragmatic reasons, an arbitrator may have little choice but to follow past awards.<sup>4</sup> There undoubtedly are other cases in which past awards play a less substantial but still material constraining role. But arbitral awards need not serve this constraining function to constitute precedent. The extent to which judicial precedent constrains judges is itself a matter of debate.<sup>5</sup> Yet judicial precedent remains an important legal and social phenomenon, shaping the arguments lawyers make, the explanations adjudicators provide, and serving as a focal point around which parties can order their

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4. See *infra* text accompanying notes 73-75 and Part II.A.3.

5. See, e.g., MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 67-77 (2008) (summarizing and critiquing attitudinal and rational choice models of precedent as applied to Supreme Court cases). Judges, of course, are often formally bound by the decisions of courts superior in the hierarchy. Because arbitration typically lacks an appellate mechanism, this form of vertical precedent does not exist. Yet it is questionable whether vertical precedent serves as a material constraint on case outcomes. Among other reasons for skepticism is the fact that, although decision rules announced by superior courts are binding on inferior courts, most disputes will potentially implicate a host of competing decision rules, each of which may be binding within its sphere. See Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1440-43 (2000) (discussing indeterminacy of legal rules); see also LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 83-87, 115-19 (1997) (summarizing empirical evidence with respect to lower courts). The lack of vertical precedent, moreover, does not necessarily mean that arbitration systems will produce a conflicting body of precedents. Arbitrators, unlike judges, are subject to market constraints and will apply consistent rules if that is what the parties want. See Christopher J. Bruce, *The Adjudication of Labor Disputes as a Private Good*, 8 INT'L REV. L. & ECON. 3, 8 (1988).

affairs.<sup>6</sup> Where it exists, the same can be said about arbitral precedent.<sup>7</sup>

Note that this definition means that I am primarily interested in precedent as an *observable* phenomenon, even though precedent may sometimes operate in ways that cannot readily be observed. As an example, consider a system in which arbitrators decide cases but do not provide any explanation for their decisions and do not make their awards available to anyone but the parties.<sup>8</sup> Within the system, of course, arbitrators are familiar with their own past decisions and may strive to maintain consistency across cases. Moreover, when arbitrators sit in panels of three, they may share information about previous decisions. In each scenario, knowledge of past decisions may shape a decision made today. We might therefore describe the arbitration system as “precedential” even if it produces awards that obscure the operation of precedent and even if the disputants themselves are unaware that precedent exists.

Such unobservable forms of precedent, however, are not the focus of this Article. As I use the term, arbitration generates precedent if awards have some observable relevance to the future conduct of system participants.<sup>9</sup> For example, parties might order their affairs,

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6. See, e.g., Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 967-69 (2005) (describing precedent’s role as a modality of argumentation); Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1089-92, 1113-18 (arguing that adjudication serves an expressive function that influences future behavior and that public adjudicators are superior in this regard to private adjudicators like arbitrators).

7. This is not to say that arbitral precedent serves these functions as well as judicial precedent, see McAdams, *supra* note 6, at 1116-17, only that it is worthy of study, regardless of its constraining effect on future arbitrators.

8. This model approximates the use of arbitration to resolve disputes among members of the New York Diamond Dealers Club. See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 124-26 (1992). DDC arbitration may or may not be precedential in the sense described in the text. See *id.* at 154 (noting that past decisions are poor predictors of future decisions). The point, rather, is that a system structured in the manner of the DDC might be precedential, in some meaningful sense, even if the awards it produces yield no evidence of this.

9. At times throughout this Article, I will use the term “system users” to refer to the parties and their lawyers, each of whom can reasonably be viewed as consumers of arbitration services, yet also as discrete actors who may use the arbitration process to pursue their own agendas. I use the term “system participants” to refer collectively to actors that play a relatively direct role in shaping the arbitration process: parties, lawyers, arbitrators, and arbitral institutions like the American Arbitration Association or the International Chamber of Commerce.



and lawyers might structure their arguments, around rules announced in past awards. Likewise, arbitrators may justify their decisions, at least in part, by invoking past awards or principles deducible from past awards. Indeed, I focus in particular on how arbitrators justify their decisions, for the practice of citing to and engaging with past awards suggests that system participants invest those awards with “normative authority” and that arbitrators view themselves as engaged in a lawmaking enterprise.<sup>10</sup>

I adopt this definition for two reasons. First, although the existing literature often does not define the term, the definition approximates the one implicitly used by most authors. Second, the definition emphasizes precedent’s important functional qualities, including the possibility that precedent facilitates private ordering by articulating rules that parties expect future arbitrators to follow. As another example of these functional qualities, consider the possibility that precedent may legitimize the result of the arbitration for the losing party, perhaps by suggesting that the result is justified by some normative criterion—say, the belief that similarly situated litigants should receive equal treatment—that the losing party is likely to accept. If it is to serve these and other important functions, arbitral precedent must be observable to the relevant constituency. To use an obvious example, third parties cannot easily structure their behavior around a rule of arbitral precedent if they do not know that the rule exists.

Part I of this Article briefly recounts the existing debate over arbitration’s capacity to generate precedent. To frame the discussion that follows, Part I also offers several examples of systems in which arbitrators’ awards appear to have precedential force. Although fundamentally different in design and purpose, these diverse systems of arbitration illustrate the wide range of contexts in which precedent may evolve and provide clues into how an arbitration system’s characteristics may shape this process.

Part II then suggests that, notwithstanding the diverse range of arbitration contexts, a core set of considerations may help explain whether arbitral precedent is likely to evolve. Part II identifies three such considerations: (1) whether the arbitration system is

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10. GERHARDT, *supra* note 5, at 3.

structurally conducive to the creation of precedent, (2) whether arbitral precedent functions to fill gaps in (or displace) state-supplied law, and (3) whether arbitrators are likely to be viewed as legitimate producers of law in the relevant context. Drawing on this general theoretical discussion, Part III then formulates more specific hypotheses about arbitral precedent<sup>11</sup> and offers tentative answers to the question posed at the outset of this Article: “Do modern-day arbitrators fashion a commercial, antitrust, employment, maritime, securities, and contract law?”<sup>12</sup>

# I. ARBITRATION AS CAPABLE OF GENERATING PRECEDENT

## A. A Traditional View (with Caveats): Arbitration as Particularized, Ad Hoc Decision Making

A number of arguments support the claim that arbitration does not generate precedent. For one thing, participants in private dispute resolution systems may lack sufficient lawmaking incentives.<sup>13</sup> Judges and litigants generally do not obtain, and in any event would have difficulty enforcing, property rights in precedent.<sup>14</sup> The production of law thus confers an uncompensated benefit on third parties, and “[w]hy would litigants who engage the services of a rent-a-judge want to pay extra for a reasoned opinion enunciating a rule that benefits only future litigants?”<sup>15</sup>

The claim that arbitration does not generate precedent also is based on certain structural characteristics that are commonly—though perhaps too readily—associated with arbitration. For example, it is often said that arbitrators need not follow the law and may instead resolve disputes in whatever fashion they deem just.<sup>16</sup>

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11. In other ongoing work, I am exploring some of these hypotheses in several domestic arbitration systems within the United States.

12. Carbonneau, *supra* note 2, at 1202.

13. For the classic version of this argument, see William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238-39 (1979). For more recent articulations, see David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622-23 (1995); McAdams, *supra* note 6, at 1113-15.

14. William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 271-72 (1976).

15. Luban, *supra* note 13, at 2622.

16. Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 85 (1992);

Arbitrators need not issue reasoned awards explaining the basis of their decisions.<sup>17</sup> Many arbitration proceedings and awards are kept private, denying the public and future disputants information about past decisions.<sup>18</sup> Arbitration also lacks formal legal mechanisms for ensuring that arbitrators reach consistent decisions, such as a doctrine of stare decisis<sup>19</sup> or an appellate mechanism.<sup>20</sup> And finally, parties to arbitration agreements may exercise control over the system's capacity to generate precedent. Their contracts may limit the precedential value of past awards<sup>21</sup> or require each party to keep arbitration results confidential.<sup>22</sup>

For those who attribute these characteristics to the institution of arbitration generally, the resulting picture naturally is one of particularized, ad hoc decision making. In this picture, arbitrators do justice (at best) within the unique confines of individual cases; they do not apply, much less create, legal rules.<sup>23</sup> Unlike courts, which "are bound by precedent" and, even when not bound, "should give serious consideration" to other judicial opinions,<sup>24</sup> arbitrators

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Rex R. Perschbacher & Debra Lynn Basset, *The End of Law*, 84 B.U. L. REV. 1, 29-30 (2004). A separate though related point is that existing standards for judicial review may effectively permit arbitrators to disregard or misapply mandatory legal rules. See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 711-12 (1999).

17. *E.g.*, Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 512-14 (2005).

18. Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. AM. ARB. 1, 11 (2003); Perschbacher & Basset, *supra* note 16, at 30.

19. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1009 (2005) (noting that the doctrine of stare decisis, which is absent in arbitration, "extricate[s] trial judges] from an arbitration-type regime in which they resolve disputes but do not make law"); see also Alderman, *supra* note 18, at 11; Peter B. Rutledge *Toward a Contractual Approach for Arbitral Immunity*, 39 GA. L. REV. 151, 167 (2004); Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling To Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 704 (2004).

20. Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 208 (2006) (noting that lack of an appellate mechanism means that "conflicting awards may persist"); Landes & Posner, *supra* note 14, at 239.

21. See, e.g., Verizon Wireless Customer Agreement, <http://www.verizonwireless.com/b2c/index.html> (follow "Customer Agreement" hyperlink) (last visited Feb. 18, 2010) [hereinafter Verizon Agreement] ("An arbitration award and any judgment confirming it apply only to that specific case; it can't be used in any other case except to enforce the award itself.").

22. See, e.g., ITT Educ. Servs., Inc. v. Arce, 533 F.3d 342, 348 (5th Cir. 2008).

23. Alderman, *supra* note 18, at 11-12; Perschbacher & Basset, *supra* note 16, at 29-30.

24. Alderman, *supra* note 18, at 4.

are presumed unwilling or unable to situate the disputes over which they preside within a wider body of similar disputes. As a result, past awards do not inform, much less control, future arbitrators.<sup>25</sup> It follows, too, that arbitrators cannot *change* existing law; they cannot announce new legal rules to guide future behavior.<sup>26</sup>

Though accurate to a degree, the foregoing picture of arbitration is quite stylized. It proffers a vision of “folklore arbitration”<sup>27</sup> that primarily reflects assumptions about domestic arbitration practices within the United States. Even within that sphere, it corresponds imperfectly to a market reality in which arbitrators and arbitral institutions offer a diverse range of arbitration products.<sup>28</sup> For example, parties often do pay arbitrators to produce reasoned awards,<sup>29</sup> and these awards are often made available to the public.<sup>30</sup> Future parties may seek to use these awards as “persuasive evidence” of the appropriate outcome to their dispute.<sup>31</sup> They may even require arbitrators to follow prior arbitration awards, potentially yielding, over time, a “sophisticated, comprehensive,” and entirely private system of laws.<sup>32</sup> Given the resulting diversity of arbitration

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25. Knapp, *supra* note 1, at 785.

26. Alderman, *supra* note 18, at 12; *see also* Knapp, *supra* note 1, at 785.

27. Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 42-45 (1999).

28. *See* Rutledge, *supra* note 19, at 161-65; W. Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 660-63 (2007).

29. For example, contracts frequently incorporate arbitration service provider rules that instruct arbitrators to provide at least a brief explanation for their awards unless the parties agree otherwise. *See, e.g.*, EMPLOYMENT ARBITRATION RULES AND PROCEDURES R. 39C (Am. Arbitration Ass’n 2009), <http://www.adr.org/sp.asp?id=32904#39>; JAMS EMPLOYMENT ARBITRATION RULES AND PROCEDURES R. 24(h) (Judicial Arbitration & Mediation Servs., Inc. 2009), <http://www.jamsadr.com/rules-employment-arbitration/>; *see also* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1085 (2000) (noting benefits to parties and arbitrators of reasoned awards).

30. *See, e.g.*, CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES R. 12904(h) (Fin. Indus. Regulatory Auth. 2010), <http://www.finra.org/ArbitrationMediation/Rules/CodeofArbitrationProcedure> (follow “Customer Code” hyperlink) (providing that securities arbitration awards—most of which are unreasoned—are to be made publicly available); EMPLOYMENT ARBITRATION RULES AND PROCEDURES R. 39B (Am. Arbitration Ass’n 2009), <http://www.adr.org/sp.asp?id=32904#39> (providing that AAA employment awards are to be available to the public on a cost basis).

31. Reuben, *supra* note 29, at 1085.

32. Ware, *supra* note 16, at 746-47.

practices, some arbitration scholars have recognized that arbitration systems have the capacity to generate precedent.<sup>33</sup> Evidence from a number of arbitration systems, both international and within the United States, supports this view.<sup>34</sup>

The following Section describes the evidence relevant to three such systems: international investment arbitration conducted by the International Centre for Settlement of Investment Disputes (ICSID), international commercial arbitration, and labor arbitration within the United States. In many respects, these three systems of arbitration have little in common. Thus, I do not offer them as examples of “arbitration” writ large, or to suggest an equivalence among them. To the contrary, their differences help to illustrate an important fact: that each system of arbitration represents a unique institutional context, the particulars of which undoubtedly will influence how (and whether) arbitral precedent evolves. Despite the differences among these systems of arbitration, however, I hope to show that a core set of considerations can shed light on the role arbitral precedent plays in each.

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33. See, e.g., Bruce, *supra* note 5, at 8; Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459, 1489 (1996); Carbonneau, *supra* note 2, at 1205; Drahozal, *supra* note 20, at 213; Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1613 (2005); Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 535 (1997); Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 683 (2008); Ware, *supra* note 16, at 746-47.

34. See Bruce, *supra* note 5, at 9; Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129 (2007); Christopher R. Drahozal, *The Iran-US Claims Tribunal and Investment Arbitration: A Citation Analysis*, TRANSNAT'L DISP. MGMT., at 3, May 2008 (on file with author; also available with subscription at <http://www.transnational-dispute-management.com>); Christopher S. Gibson & Christopher R. Drahozal, *Iran-United States Claims Tribunal Precedent in Investor-State Arbitration*, 23 J. INT'L ARB. 521 (2006); see also Carbonneau, *supra* note 2, at 1204-05 (referring to the precedential value of awards of the Court of Sports Arbitration and the International Chamber of Commerce); Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L. L.J. 1014, 1016 (2007) (“[T]here is an informal, but powerful, system of precedent that constrains arbitrators to account for prior published awards and to stabilize international investment law.”); Drahozal, *supra* note 20, at 213 (summarizing evidence); Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 999-1000 (2005) (noting that even though confidential and lacking a doctrine of stare decisis, international arbitrations “generate procedural rules and practices, and to a lesser extent substantive rules,” and giving examples).

*B. The Creation of Arbitral Precedent: Three Case Studies**1. ICSID as an Evolved System of International Investment Law*

The use of arbitration to resolve disputes between states and foreign investors has a lengthy history.<sup>35</sup> Most early investment arbitrations were conducted pursuant to bilateral treaties that created tribunals empowered to adjudicate existing disputes involving foreign nationals.<sup>36</sup> But absent such a treaty between the investor's home state and the host or borrower state, disappointed investors often had little recourse.<sup>37</sup>

ICSID's major innovation was to create a formal mechanism for resolving investment disputes, one in which foreign investors assert claims directly against states.<sup>38</sup> Although there is probably no such thing as a "typical" investment dispute, consider claims asserted by a foreign oil company arising out of a sovereign state's cancellation of the company's contract to extract oil from the sovereign's territory.<sup>39</sup> The ICSID Convention itself does not create an obligation to arbitrate such disputes.<sup>40</sup> States must consent to arbitration, either in particular contracts or by consenting generally to arbitration in a statute or treaty.<sup>41</sup> In our example dispute, ICSID jurisdiction might be founded on an arbitration clause in a bilateral investment treaty between the investor's home state and the host country.<sup>42</sup>

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35. On this history, see GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 18 & n.36 (2007).

36. See FRANCIS ANTHONY BOYLE, *FOUNDATIONS OF WORLD ORDER* 25-26 (1999); VAN HARTEN, *supra* note 35, at 18 & n.36.

37. EDWIN BORCHARD, 1 *STATE INSOLVENCY AND FOREIGN BONDHOLDERS* 171 (1951).

38. See Sir Elihu Lauterpacht, *Foreword* to CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY*, at xi (2001); VAN HARTEN, *supra* note 35, at 6; Franck, *supra* note 33, at 1529.

39. See *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures ¶¶ 6-19 (Aug. 17, 2007), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (scroll down to number 49; then follow "Decision on Provision Measures" hyperlink).

40. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, pmbl., opened for signature Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

41. See VAN HARTEN, *supra* note 35, at 24.

42. See *Occidental Petroleum Corp.*, ICSID Case No. ARB/06/11, ¶ 2. Unlike the historic

Such arbitrations are “typically governed by international law, whether that law takes the form of treaty terms or customary international law as incorporated by the treaty.”<sup>43</sup>

At least from the perspective of capital-exporting states, ICSID was a pragmatic, procedural solution to a long-standing concern: the failure to reach multilateral agreement on substantive standards of investor protection.<sup>44</sup> But ICSID was not consciously designed to create a body of investment law precedent. There is no doctrine of *stare decisis* in investment or any other kind of arbitration.<sup>45</sup> Yet despite the formally nonbinding nature of past awards, ICSID tribunals frequently cite to and engage with awards issued by investment or other international tribunals. In an analysis of ICSID awards issued between 1990 and 2006, Jeffery Commission found that tribunals cited to awards rendered by other ICSID panels nearly 80 percent of the time.<sup>46</sup> Commission also found that, over that time period, ICSID panels grew increasingly likely to cite prior awards and that the number of such citations per award increased.<sup>47</sup> Through this engagement with past awards, ICSID tribunals have gradually fashioned what has been called an investment treaty “case law or jurisprudence.”<sup>48</sup>

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treaties referenced above, modern bilateral investment treaties often include the sovereign's general submission to arbitration of *future* disputes.

43. Andrea K. Bjorklund, *Mandatory Rules of Law and Investment Arbitration*, 18 AM. REV. INT'L ARB. 175, 175 (2007).

44. See Lauterpacht, *supra* note 38, at xi; VAN HARTEN, *supra* note 35, at 6.

45. See, e.g., *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction ¶ 39 (Apr. 27, 2006), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (scroll down to number 13; then follow “Decision on Jurisdiction” hyperlink); Rogers, *supra* note 34, at 999. Indeed, Article 53(1) of the Convention provides that awards “shall be binding on the parties,” perhaps implicitly suggesting that awards are *not* binding on those who are not parties, or even on the same parties when future disputes arise. ICSID Convention, *supra* note 40, art. 53(1), 17 U.S.T. at 1291, 575 U.N.T.S. at 194; see also SCHREUER, *supra* note 38, at 1082; Christoph H. Schreuer & Matthew Weiniger, *Conversations Across Cases—Is There a Doctrine of Precedent in Investment Arbitration?*, TRANSNAT'L DISP. MGMT., May 2008 (on file with author; also available with subscription at <http://www.transnational-dispute-management.com>).

46. Commission, *supra* note 34, at 149-50 & tbls.3, 4 & 5 (reporting that 77.7 percent of tribunals cited to at least one other case).

47. *Id.*; see also Gibson & Drahozal, *supra* note 34, at 538-44 (finding that ICSID awards frequently cite to precedents of the Iran-United States Claims Tribunal examining citation practices).

48. Commission, *supra* note 34, at 130. This development has attracted a great deal of attention from scholars, lawyers, and arbitrators involved in international arbitration. See

## 2. *International Commercial Arbitration's Weaker System of Precedent*

Unlike international investment arbitration, which involves disputes between states and foreign investors, international commercial arbitration generally refers to “nonspecialized arbitration between private parties involved in international commercial transactions.”<sup>49</sup> As an example, consider a dispute between a U.S. importer and its purchasing agent in Hong Kong arising out of the importer’s refusal to pay sales commissions.<sup>50</sup> Although parties may contract for the application of transnational commercial law, the limited empirical evidence suggests that national law governs most commercial arbitrations.<sup>51</sup>

As with investment arbitration, international commercial arbitration awards sometimes cite to and engage with other awards.<sup>52</sup> Yet the existing evidence, although quite limited, suggests that international commercial arbitration features a much less robust system of arbitral precedent than investment arbitration. For example, in a survey of awards interpreting the United Nations Convention on Contracts for the International Sale of Goods,

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Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265 (Colin B. Picker et al. eds., 2008); Commission, *supra* note 34, at 149-50; *see also* Cheng, *supra* note 34, at 1030-44 (reviewing use of precedent in investment arbitration); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 ARB. INT’L 357, 368-73 (2007). *See generally* Special Issue, *Precedent in Investment Arbitration*, TRANSNAT’L DISP. MGMT., May 2008, <http://www.transnational-dispute-management.com.samples/toc.asp?key=24>.

Other studies of the citation practices of international arbitration tribunals have echoed these findings. For example, in a previous study focusing on citation by ICSID panels to awards rendered by the Iran-United States Claims Tribunal, Professors Christopher Gibson and Christopher Drahozal found that nearly 45 percent of merits awards rendered between 1986 and 2006 cited to Tribunal awards. Gibson & Drahozal, *supra* note 34, at 539-40; *see also* Drahozal, *supra* note 20, at 6. Likewise, in a survey of awards published by the Court of Arbitration for Sports, Professor Gabrielle Kaufmann-Kohler found a “strong evolution towards reliance on other sports law cases,” with citations becoming increasingly frequent over time. Kaufmann-Kohler, *supra* at 365; *see also* Carbonneau, *supra* note 2, at 1204-05 (referencing sports arbitration precedent).

49. Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 530 (2005).

50. *See Kahn Lucas Lancaster, Inc. v. Lark Int’l Ltd.*, 186 F.3d 210, 213 (2d Cir. 1999).

51. *See* Drahozal, *supra* note 49, at 536-45.

52. *See, e.g., Dow Chemical v. Isover Saint Gobain*, 9 Y.B. Com. Arb. 131, 136-37 (Int’l Ct. of Arb. 1984).



Professor Gabrielle Kaufmann-Kohler found that only 6 of 100 awards cited to other awards.<sup>53</sup> A separate survey of International Chamber of Commerce awards found that about 15 percent cited past awards, mostly on questions of jurisdiction and procedure.<sup>54</sup>

### *3. An Example from the United States: Labor Arbitration*

Labor arbitrators, of course, adjudicate disputes between an employer and the union representing its employees. The arbitrator's authority derives from the arbitration clause contained in the collective bargaining agreement (CBA) between the union and the employer.<sup>55</sup> Most CBAs require "cause" or "just cause" for any disciplinary action,<sup>56</sup> and most labor arbitrations feature an employee challenging the employer's action under that standard. These are contract disputes,<sup>57</sup> but of a somewhat unique sort. In most contracts, but for the arbitration clause, claims for breach of contract would be litigated in court.<sup>58</sup> In that sense, arbitration serves as a substitute for litigation.<sup>59</sup> By contrast, the traditional understanding of labor arbitration is that the CBA represents a bargain in which the union limits its right to strike in exchange for the employer's agreement to replace its traditional discretion over discipline and discharge decisions with arbitration under a "just cause" standard.<sup>60</sup> Because the CBA grants unionized employees protection from discipline and discharge not enjoyed by most nonunionized employees, this bargain—"no strikes in exchange for arbitration of grievances"<sup>61</sup>—means that most grievance arbitrations "involve[] claims

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53. Kaufmann-Kohler, *supra* note 48, at 362.

54. *Id.* For an explanation of why such a difference might exist between international commercial and investment arbitration, see *id.* at 368-73.

55. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974).

56. BUREAU OF NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 7-12 (14th ed. 1995).

57. See ELKOURI & ELKOURI, HOW ARBITRATION WORKS 106 (Alan Miles Ruben ed., 6th ed. 2003).

58. See STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION 108 (2001).

59. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

60. See *id.* at 578 (noting that, in the union context, arbitration is not a substitute for litigation, but a "substitute for industrial strife"); WARE, *supra* note 58, at 107-09.

61. WARE, *supra* note 58, at 108.

that would not have been asserted in litigation had the parties not agreed to arbitrate.”<sup>62</sup>

Although labor arbitration otherwise has little in common with international investment arbitration, each system appears to have produced a fairly robust system of arbitral precedent. Labor arbitration scholars and industry professionals widely believe that labor arbitrators treat past awards as legitimate sources of authority<sup>63</sup> and as building blocks in a “common law of the workplace.”<sup>64</sup> Surveys of labor arbitrators,<sup>65</sup> reports of cases in which arbitrators have relied on prior awards,<sup>66</sup> and a modest body of empirical evidence all support this belief.<sup>67</sup>

#### 4. *Precedent’s Role Across Different Systems of Arbitration*

ICSID, international commercial, and labor arbitration are not the only arbitration systems in which some form of precedent has evolved.<sup>68</sup> Some maritime arbitrators, for example, take prior awards into consideration,<sup>69</sup> and it appears that the same is true in

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62. *Id.* at 109. Some empirical support for this comes from the fact that most CBAs require both arbitration and “cause” or “just cause” for discipline or discharge decisions. See BUREAU OF NAT’L AFFAIRS, *supra* note 56, at 7-12; ELKOURI & ELKOURI, *supra* note 57, at 931-32.

63. See generally ELKOURI & ELKOURI, *supra* note 57, at 567-603; ARNOLD M. ZACK & RICHARD I. BLOCH, LABOR AGREEMENT IN NEGOTIATION AND ARBITRATION 61 (2d ed. 1995).

64. See generally THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS (Theodore J. St. Antoine ed., 2d ed. 2005).

65. See Edgar L. Warren & Irving Bernstein, *A Profile of Labor Arbitration*, 4 INDUS. & LAB. REL. REV. 200, 216 (1951).

66. See ELKOURI & ELKOURI, *supra* note 57, at 589 & n. 84.

67. See, e.g., Bruce, *supra* note 5, at 9-10; Phillip Harris, *The Use of Precedent in Labor Arbitration*, 32 ARB. J. 26, 28-34 (1977); Ken Jennings & Cindy Martin, *The Role of Prior Arbitration Awards in Arbitral Decisions*, 29 LAB. L.J. 95 (1978).

68. It bears repeating that the practice of citing past awards does not provide the only evidence of arbitral precedent. As mentioned earlier, a system might be precedential if knowledge of past decisions influence arbitrators’ rulings, or if parties structure their behavior around rules announced in past awards. The existing evidence, however, focuses primarily on citation practices.

69. See, e.g., Robert Force & Anthony J. Mavronicolas, *Two Models of Maritime Dispute Resolution: Litigation and Arbitration*, 65 TUL. L. REV. 1461, 1503 (1991) (providing some evidence); Society of Maritime Arbitrators, Publications, <http://www.smany.org/sma/sma-pubs.html> (last visited Feb. 19, 2010) (noting that although not bound by precedent, New York arbitrators take prior awards into consideration).

class arbitration.<sup>70</sup> At one level, it should be no surprise that such a diverse array of arbitration systems have generated some form of precedent. Assume, for example, that members of a trade association want to have disputes resolved according to a set of trade rules rather than state-supplied law.<sup>71</sup> Because arbitrators can be chosen for their diligence, acumen, or industry expertise, association members might prefer arbitration to litigation.<sup>72</sup> Assume further that members want their arbitration system to produce rulings that bind future arbitrators, perhaps because they believe this will lend certainty to future transactions and facilitate dispute settlement. To accomplish these goals, the arbitration contract might require arbitrators to set forth the reasoning underlying their awards and even to follow precedent established in prior arbitrations.<sup>73</sup> Structured in this manner, an arbitration system might produce “a sophisticated, comprehensive [and private] legal system.”<sup>74</sup>

But most users of arbitration do not consciously seek to create a system of private legal rules.<sup>75</sup> Certainly that is true of ICSID, international commercial, and labor arbitration.<sup>76</sup> Nevertheless, past awards receive precedential weight in each system. Indeed, at first glance, this appears to be one of the few things the three systems

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70. See Stacie I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1, 20 (2008); W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 103-04 (2007).

71. See Ware, *supra* note 16, at 745-46.

72. See *id.* For examples involving the cotton and diamond industries, see Bernstein, *supra* note 8; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 LAW & SOC. INQUIRY 383 (2006).

73. Ware, *supra* note 16, at 746-47.

74. *Id.* at 747. For a general discussion of the relative merits of privately versus publicly produced corporate law, see Gillian Hadfield & Eric Talley, *On Public Versus Private Provision of Corporate Law*, 22 J.L. ECON. & ORG. 414 (2006).

75. This is true even of trade groups that expect arbitrators to resolve disputes according to trade custom and usage. See, e.g., Bernstein, *supra* note 8, at 124-27 (describing DDC proceedings, which are kept secret and generally do not produce reasoned awards).

76. It is perhaps inaccurate to refer to ICSID as a system that generates “private” legal rules. Although founded on the private model of international commercial arbitration, ICSID tribunals resolve disputes that raise important regulatory questions that some believe are better entrusted to courts and other public actors. See, e.g., VAN HARTEN, *supra* note 35, at 50-71. Precisely because it is modeled on international commercial arbitration, however, ICSID offers instructive lessons on the evolution of arbitration precedent in more truly “private” disputing systems.

have in common. International investment disputes in particular are distinct because these involve claims by private parties challenging a sovereign state's use of its regulatory authority, disputes more quintessentially "public" in nature than those typically heard in the other systems.

I do not mean to overstate the difference between "public" international tribunals—or quasi-public tribunals like ICSID—and "private" commercial tribunals.<sup>77</sup> But as a general proposition, investment disputes differ from international commercial disputes (and, for that matter, labor disputes) in at least two ways. First, investment disputes are more likely to implicate state regulatory interests in a fairly direct fashion.<sup>78</sup> Second, because one of the disputants is a sovereign state, investors are less able to rely on formal legal enforcement tools and must rely more on extralegal means of enforcement.<sup>79</sup> By and large, states comply with ICSID awards not because they are compelled to do so but to avoid the reputational or other extralegal costs associated with noncompliance.<sup>80</sup>

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77. For example, there is substantial overlap in the claims, structure, and experiences of various international tribunals. *See generally* W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR* 11 (1992).

78. *See* VAN HARTEN, *supra* note 35, at vii.

79. *See* Bjorklund, *supra* note 48, at 277. On the difficulty of enforcing judgments against sovereign states, see, for example, Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguard?: The Role of Litigation in Sovereign Debt Restructuring*, 53 EMORY L.J. 1043, 1086 (2004). It is true that formal law facilitates the enforcement of international arbitration awards, including those rendered by ICSID tribunals; in some contexts, however, it is doubtful this law has much practical significance. *Compare* Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 AM. REV. INT'L ARB. 335, 358-65 (2006) (explaining ICSID's benefits and suggesting that these benefits are substantial in the context of defaulted sovereign debt), *with* W. Mark C. Weidemaier, *Disputing Boilerplate*, 82 TEMPLE L. REV. 1, 20-23 (2009) (disputing the practical significance of these enforcement benefits in the sovereign debt context). Despite arbitration's formal enforcement advantages, *see* 28 U.S.C. § 1610(a)(6) (2006) (eliminating the requirement in § 1610(a)(2) of a nexus between the sovereign's commercial property located in the United States and the "commercial activity upon which the claim was based," but only in cases of arbitration), it remains difficult to find and seize sovereign assets that are not immune from execution, for "defaulting sovereigns try their best not to leave valuables lying around." William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 VAND. L. REV. 1, 11 (2004) (referring to the sovereign debt context).

80. To a degree, of course, this is true in international commercial and labor disputes as well. But given the difficulty of obtaining and enforcing a judgment against a sovereign state, compliance is less likely to be driven by fear of coercive enforcement.

That each of these very different systems of arbitration has generated some form of precedent illustrates the wide range of contexts in which arbitral precedent may evolve. Moreover, despite their differences, each system illustrates a broader consideration relevant to the evolution of precedent in arbitration. The following discussion explores three such considerations, beginning with the question whether the arbitration system is structurally conducive to the creation of precedent.

## II. CONSIDERATIONS RELEVANT TO THE EVOLUTION OF ARBITRAL PRECEDENT

### *A. Structural Characteristics as Necessary (Even Sufficient?) Conditions of Precedent*

Many arbitration systems are structurally incompatible with the creation of precedent. For example, many do not require that arbitrators write reasoned awards—that is, those that offer an explanation for the result reached.<sup>81</sup> Nor are these awards accessible to the public or even to system users other than the disputants and their lawyers.<sup>82</sup> Participants in such systems are unlikely to learn of relevant past awards and will find any they do encounter inscrutable. Unreasoned awards do not find facts, state conclusions of law, offer reasons, or provide any information relevant to future disputes beyond certain basic facts: a dispute happened, it involved parties A and B, and party A won. It is hard to imagine how such an award could guide future conduct, shape lawyers' arguments, or provide a justification for a future award.<sup>83</sup>

ICSID and labor arbitration depart radically from this model, and international commercial arbitration departs to a lesser degree. ICSID tribunals issue reasoned awards that explain the result

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81. See, e.g., Reuben, *supra* note 29, at 1082-83. As I noted previously, some form of precedent is possible notwithstanding the lack of reasoned awards. See *supra* text accompanying note 8. Because I am interested in observable manifestations of precedent, however, reasoned awards play a more important role.

82. Alderman, *supra* note 18, at 11; Perschbacher & Basset, *supra* note 16, at 30.

83. See *Koruga v. Ming Wang*, Case No. 98-04276, 2000 WL 33534559 (N.A.S.D.) at \*11-12 (2001) (Meyer, Jones & Dunnington, Arbs.) (discounting the precedential value of prior awards "in which no significant legal precedent is discussed or reasoning given").

reached and the tribunal's reasoning in great detail.<sup>84</sup> Most of these awards are published.<sup>85</sup> The public can access them free of charge on ICSID's website,<sup>86</sup> and ICSID Reports also compiles and digests many more awards. Likewise, labor arbitrators often issue reasoned awards,<sup>87</sup> and these are of great interest to unions, employers, and their lawyers. Legal publishers like the Bureau of National Affairs have selectively published labor arbitration awards for many decades,<sup>88</sup> and reference texts attempt to distill the rulings of labor arbitrators into a coherent set of principles to guide future disputes.<sup>89</sup> By contrast, although international commercial arbitrations commonly result in a reasoned award,<sup>90</sup> relatively few of these are published.<sup>91</sup> Thus, a simplistic (if partial) explanation for the apparently weaker body of international commercial arbitration precedent might emphasize the relatively low rate of award publication.

This explanation squares well with the existing literature on arbitral precedent, which draws a direct link between reasoned, published awards and arbitral precedent. Indeed, the literature suggests that the use of reasoned, published awards is a necessary, and perhaps even a sufficient, condition for arbitral precedent to evolve.<sup>92</sup> Yet this common understanding requires both elaboration

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84. See ICSID Convention, *supra* note 40, art. 52(1)(e), 17 U.S.T. at 1290, 575 U.N.T.S. at 192.

85. Although ICSID itself does not publish awards without consent, parties frequently grant consent, and even when that does not happen one party may unilaterally publish the award. See *id.* art. 48(5), 17 U.S.T. at 1288, 575 U.N.T.S. at 188; RUDOLF DOLZERT & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 261-62 (2008); Cheng, *supra* note 34, at 1015.

86. International Centre for Settlement of Investment Disputes, <http://icsid.worldbank.org/ICSID/Index.jsp> (follow "Cases" hyperlink) (last visited Feb. 19, 2010).

87. See Joseph L. Daly, *Arbitration: The Basics*, 5 J. AM. ARB. 1, 58-59 (2006).

88. The Bureau of National Affairs began publishing labor arbitration awards in 1942. See 120 LAB. ARB. REP. (BNA), at vii (2008).

89. See generally COMMON LAW OF THE WORKPLACE, *supra* note 64.

90. See William W. Park, *Income Tax Treaty Arbitration*, 10 GEO. MASON L. REV. 803, 823 (2002).

91. See Drahozal, *supra* note 34, at 542.

92. See, e.g., Drahozal, *supra* note 20, at 214 ("[T]he available evidence suggests that some system of precedent is likely to develop when arbitration awards are published."); Fabien Gélinas, *Investment Tribunals and the Commercial Arbitration Model: Mixed Procedures and Creeping Institutionalisation*, in SUSTAINABLE DEVELOPMENTS IN WORLD TRADE LAW 577, 585 (Markus W. Gehring & Marie-Claire Cordonier Segger eds., 2005) (asserting that the "only

and qualification. In the following discussion, I first identify the functions served by reasoned awards and explain why they are much more common features of arbitration than is often supposed. I then explain why arbitral precedent is likely to depend on award *accessibility*, rather than award *publication*. Finally, I flesh out the argument—implicit in some of the arbitration literature<sup>93</sup>—that the use of reasoned, accessible awards necessarily will result in a system of arbitral precedent. Although I view this argument as plausible, it is no more than that. As I will explain later, whether arbitrators generate precedent likely depends on other considerations as well.

### 1. *The Surprisingly Common Use of Reasoned Awards*

Although not all arbitration systems require reasoned awards, many do. At first glance, this is a bit puzzling. After all, arbitrators must be paid to write them, and parties may not wish to bear the cost, especially because any resulting precedent confers an uncompensated benefit on other parties.<sup>94</sup> The puzzle disappears, however, when we recognize that reasoned awards serve important functions

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conceivable way of preventing a body of case law from developing in investment arbitration would have involved a total ban on publication"). On the importance of reasoned, published awards, the link between such awards, and the creation of arbitral precedent, see, for example, Edward Brunet & Jennifer J. Johnson, *Substantive Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 459, 473 (2008); Brunet, *supra* note 33, at 1489; Thomas E. Carbonneau, *Rendering Arbitral Awards with Reasons: the Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579, 605 (1985); Cheng, *supra* note 34, at 1025; Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes—Adaptation, Adoption, and NAFTA Leadership*, 54 U. KAN. L. REV. 1339, 1356 (2006); Martin A. Frey, *Does ADR Offer Second Class Justice?*, 36 TULSA L.J. 727, 762 (2001); Llewellyn Joseph Gibbons, *Private Law, Public "Justice": Another Look at Privacy, Arbitration and Global E-Commerce*, 15 OHIO ST. J. ON DISP. RESOL. 769, 772-73 (2000); William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1267-68 (2003); W. Michael Reisman, *Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 849, 854-56 & n.3 (van den Berg ed., 2007); Jacob H. Zamansky, *A "Reasoned" Arbitration Decision?: Be Careful What You Ask For*, in 2 SECURITIES ARBITRATION 2005: TELLING YOUR STORY 335, 341 (PLI Corp. Law & Practice, Course Handbook Series No. B-1503, 2005).

93. See *supra* note 92.

94. See Landes & Posner, *supra* note 14, at 238-39; Luban, *supra* note 13, at 2622.

and that parties often are willing to pay for them for reasons having nothing to do with the desire to establish a system of precedent.

Reasoned decisions, whether issued by judges or arbitrators, provide benefits to three groups: disputants, adjudicators, and third parties. For disputants, reasoned decisions provide an explanation that can be used to guide future conduct and a sense, perhaps especially important to the losing party, that the adjudicatory process was a deliberate and fair one.<sup>95</sup> Reasoned awards also may facilitate judicial review of the award; despite the limited statutory grounds for vacatur, a petition to vacate the award would be virtually impossible without a reasoned award.<sup>96</sup> Adjudicators also may benefit from their production of reasoned decisions, for these may confer prestige with lawyers, future disputants, other adjudicators, and the public at large.<sup>97</sup> Finally, reasoned decisions may benefit a wide range of third parties, including potential future disputants, legislators, voters, and others. Reasoned decisions serve multiple functions for these important constituencies—facilitating private ordering,<sup>98</sup> guiding future lawmaking efforts,<sup>99</sup> and providing some assurance that the dispute resolution system meets externally imposed standards of legitimacy.<sup>100</sup>

The legitimizing function of reasoned awards bears special mention in arbitration. Above all else, the arbitrator must produce

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95. See, e.g., Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 402 (1995); Robert A. Lefflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 814 (1961); Richard Mittenthal & Howard S. Block, *The Ever-Present Role of Arbitral Discretion*, in LABOR ARBITRATION UNDER FIRE 231, 251-52 (James L. Stern & Joyce M. Najita eds., 1997); Rau, *supra* note 33, at 531; Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 658 (1995).

96. On the relationship between judicial standards for vacatur and reasoned awards, see Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443 (1998).

97. See Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 129 (1983); Anthony D'Amato, *Judicial Legislation*, 1 CARDOZO L. REV. 63, 67 (1979); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2029 (1994); Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1397 (2000).

98. See Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1202 (2000).

99. See Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1716 (1998).

100. See Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 973-74 (2000); Dorf, *supra* note 97, at 2029.



an award that is enforceable; the parties are hardly likely to appreciate financing a dispute resolution process that does not, in fact, resolve their dispute. One benefit of reasoned awards is that losing parties may be more inclined to view them as legitimate and thus to comply voluntarily. To that end, a “careful demonstration that the decisionmaker has listened and responded to” the losing party’s arguments may enhance the prospects of voluntary compliance.<sup>101</sup>

When voluntary compliance is not forthcoming, the winning party may seek to enforce the award through formal legal means. In arbitration, this means asking a judge to “confirm” the award—that is, convert it into a court judgment.<sup>102</sup> Although judges do not review awards on the merits, the stringency of the review is likely to depend, in part, on whether the judge believes that the award resulted from a fair process.<sup>103</sup> Here, a reasoned award may signal that the arbitrator made the decision and conducted the arbitration itself in a deliberate, unbiased way.

In some cases, of course, it may be difficult or impossible to enforce an award through formal legal means. International investment disputes fall into this category given the difficulty of enforcing judgments against sovereign states.<sup>104</sup> As noted previously, states comply with ICSID awards primarily to avoid the reputational and other costs associated with noncompliance.<sup>105</sup> For example, a state might pay an award to preserve its reputation as a reliable transaction partner with future investors. Whether the reputational costs of noncompliance provide a substantial inducement to pay depends in part on whether parties in a position to impose these costs—perhaps including investors, international financial institutions, and even the borrower’s own citizens—perceive the award and the

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101. Rau, *supra* note 33, at 535.

102. See 9 U.S.C. §§ 9, 207 (2006); GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 1126-27 (4th ed. 2007) (explaining process for enforcing arbitral award when the losing party does not comply).

103. Standards of review differ across domestic and international contexts. To the extent there is a common principle (especially in the United States), it is that judicial review seeks to ensure that “the arbitrator did not exceed the scope of his agency and was not biased in some way.” Paul F. Kirgis, *The Contractarian Model of Arbitration and Its Implications for Judicial Review of Arbitration Awards*, 85 OR. L. REV. 1, 7 (2006).

104. See *supra* note 79 and accompanying text.

105. See *supra* text accompanying note 80.

arbitration process that produced it as legitimate.<sup>106</sup> In this context, then, one function of a reasoned award is to legitimize the arbitration process in the eyes of these diverse external constituents.

Finally, it bears repeating that arbitrators often operate in a competitive market in which future purchasers will choose an arbitrator based on perceptions about the arbitrator's diligence, expertise, and impartiality.<sup>107</sup> Reasoned awards can communicate that the arbitrator possesses these qualities and therefore enhance the arbitrator's legitimacy to future purchasers of arbitration services.<sup>108</sup> Thus, a central feature of reasoned awards is that they serve to legitimize both the arbitrator (in general) and the arbitration (in particular) in the eyes of a number of important constituencies: the disputants themselves, external actors who may play a role in enforcing the award, and future purchasers of the arbitrator's services.

From the foregoing discussion, it should be clear that reasoned awards will be a relatively common, if not ubiquitous, feature of arbitration.<sup>109</sup> For arbitrators, reasoned awards may serve as a form of advertising; an award that demonstrates competence, neutrality, or expertise may enhance the value of the arbitrator's services.<sup>110</sup> Parties might fund this practice because it generates information

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106. See, e.g., THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 26 (1995) (noting link between perceived legitimacy and voluntary compliance); Cheng, *supra* note 34, at 1026 (noting that investment arbitration's long-term viability depends on the extent to which "investors, States, observers, scholars, and lawyers" perceive it to be legitimate).

107. See Rutledge, *supra* note 19, at 164-65, 170. In some contexts, of course, arbitrators may seek to develop a reputation as "friendly" to a particular class of litigant. See *id.* at 165 & 170 n.77.

108. See Landes & Posner, *supra* note 14, at 239; Rau, *supra* note 33, at 532-33; Schmitz, *supra* note 33, at 683. Public judges may have similar communicative objectives, though to a lesser degree, when they draft opinions and take other official acts. See, e.g., LYNN M. LOPUCKI, *COURTING FAILURE* 15-24 (2005) (arguing that competition for large cases altered bankruptcy court practices); Cooter, *supra* note 97, at 129 (noting that life-tenured federal judges may seek prestige "by acting in such a way that they would be chosen to decide cases by litigants and their lawyers if choice were allowed").

109. There are, of course, reasons *not* to have a reasoned award. Parties who wish to minimize the cost of arbitration or to avoid judicial scrutiny, for example, may elect to forego a reasoned award.

110. See Bruce, *supra* note 5, at 7-8; Landes & Posner, *supra* note 14, at 239; Peter Seitz, *The Citation of Authority and Precedent in Arbitration (Its Use and Abuse)*, *ARB. J.*, Dec. 1983, at 58, 60.

about the arbitrator that can be used to improve future selection decisions. Parties might also pay for reasoned awards because they believe that arbitrators who must provide a written explanation are less likely to make careless or biased decisions.<sup>111</sup> Or they might pay for reasoned awards because they believe such awards enable judicial review or increase the likelihood of voluntary compliance, the effectiveness of formal enforcement, or both.

Finally, and perhaps counterintuitively, parties may pay arbitrators to produce reasoned awards even when they do not want them. This is because public actors sometimes mandate the use of reasoned awards. For instance, in cases involving statutory rights, some U.S. courts will not enforce an arbitration agreement that does not provide for a reasoned award.<sup>112</sup> Parties may, of course, elect not to use arbitration in such cases. Yet they may continue to use it if arbitration offers net benefits relative to other dispute resolution options.<sup>113</sup> For all of these reasons, arbitration systems both within and outside of the United States commonly feature reasoned awards.<sup>114</sup>

## 2. Accessibility, Not Publication

Of course, no system of precedent is likely to arise unless arbitrators become aware of relevant past awards, either through their own research or, more commonly, because the litigants cite past awards as authority.<sup>115</sup> This explains the arbitration literature's

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111. See, e.g., Rau, *supra* note 33, at 530-32 (doubting the efficacy of the requirement); Schauer, *supra* note 95, at 657.

112. See, e.g., Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482-83 (D.C. Cir. 1997); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 685 (Cal. 2000).

113. See Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application To Franchise Contracts*, 32 J. LEGAL STUD. 549, 551-54 (2003).

114. See, e.g., *supra* text accompanying notes 84-87 (ICSID), 87-89 (labor), 90-91 (international commercial arbitration); see also EMPLOYMENT ARBITRATION RULES AND PROCEDURES R. 39C (Am. Arbitration Ass'n 2009), <http://www.adr.org/sp.asp?id=32904#39>; SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS R. 10 (Am. Arbitration Ass'n 2009), <http://www.adr.org/sp.asp?id=21936>; JAMS EMPLOYMENT ARBITRATION RULES AND PROCEDURES R. 24(h) (Judicial Arbitration and Mediation Servs., Inc. 2009), <http://www.jamsadr.com/rules-employment-arbitration/>.

115. In some contexts, it may be controversial for the arbitrator to conduct independent legal research, especially when the claim is not based on mandatory law. See, e.g., CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES § 2(G),

emphasis on the importance of award publication.<sup>116</sup> The practice of publishing awards—often in searchable form—significantly reduces the cost to litigants of such research, making it feasible even in relatively low-stakes disputes.

As I have noted, however, the focus on award publication may be misguided. One benefit of publication is that published awards are accessible to third parties with limited (or no) familiarity with the system. For example, because awards issued pursuant to the American Arbitration Association's (AAA) employment rules are available in searchable form on LexisNexis, a lawyer who has not previously arbitrated a case before an AAA arbitrator, but who has access to LexisNexis, can quickly search for relevant past awards, including those issued by prospective arbitrators.<sup>117</sup> Without publication, such relative outsiders are unlikely to locate relevant awards.

For reasons that should be fairly obvious, this does not mean that arbitral precedent depends on award publication. What matters is that system participants have *access* to past awards and assign value to them as precedent. Even when awards are not published, for example, arbitrators are often repeat players and may be well aware of how they and other arbitrators have resolved similar disputes.<sup>118</sup> This suggests that arbitral precedent may evolve more readily in systems in which relatively few arbitrators capture a large share of the arbitration business. Repeat player litigants and law firms likewise accumulate knowledge of prior disputes and may invoke past awards that favor their current positions.<sup>119</sup>

For these reasons, it also follows that publication alone does not ensure that awards will be accessible to all system users. In some contexts, for example, awards may be published in dispersed, specialized reporters and databases that will be unfamiliar to less

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cmt. a (Nat'l Acad. of Arbitrators, as amended Sept. 2007), <http://www.naarb.org/code.html> (stating that the propriety of such research depends "primarily on the policies of the parties").

116. See *supra* note 92.

117. The AAA does, however, redact the names of parties and witnesses from these awards, somewhat limiting the utility of publication.

118. See Gélinas, *supra* note 92, at 585 n.24.

119. See Carbonneau, *supra* note 92, at 607-08; Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1319 (2006).

experienced parties and lawyers.<sup>120</sup> In others, newcomers may be unaware of system norms concerning how legal arguments should be presented, including such basic knowledge as what constitutes “authority” within the system.<sup>121</sup> These knowledge gaps have obvious and important implications for the substance of arbitral precedent, for information asymmetries between disputants may shape the content of privately made law.<sup>122</sup> Because I am concerned in this Article with the existence of arbitral precedent and not its content, I do not dwell on this point further.

Thus refined to emphasize accessibility rather than publication, the existing literature on arbitral precedent comfortably accommodates the empirical evidence from international investment, labor, and international commercial arbitration. Each system features reasoned awards. ICSID and labor arbitration awards are often published and many are available in searchable form through online databases.<sup>123</sup> More importantly, these awards are readily accessible to system participants. This is especially so in international investment arbitration, in which a relative handful of international arbitrators and lawyers—already an elite group—may capture a significant percentage of the arbitration business.<sup>124</sup>

By contrast, the lower rate of award citation in international commercial arbitration may be due, at least in part, to the fact that

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120. See, e.g., Stacie I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT'L ARB. (forthcoming 2010) (manuscript at 4-5, 11-12, on file with author).

121. See *id.* (manuscript at 4-6) (discussing this issue in the context of international commercial arbitration).

122. See Gibbons, *supra* note 92, at 772-73.

123. Westlaw's ICSID-AWARDS database contains ICSID awards published in International Legal Materials from 1982. The LRR-LA database contains labor arbitration awards published in BNA's Labor Arbitration Reports. LA-UNP contains awards submitted to BNA but not published in Labor Arbitration Reports.

124. See Commission, *supra* note 34, at 138-39 (finding that 21.3 percent of the arbitrators accounted for 49 percent of the possible appointments in concluded ICSID, and that 23.4 percent of the arbitrators accounted for 54 percent of the appointments in pending cases). Given such concentration, arbitrators are likely to be familiar with past awards (and, of course, may have rendered many awards themselves). See Rogers, *supra* note 34, at 1000-01. For evidence on the lesser degree of concentration in the market for labor arbitrators' services, see Charles J. Coleman, *The Arbitrator's Cases: Number, Sources, Issues, and Implications*, in LABOR ARBITRATION IN AMERICA: THE PROFESSION AND PRACTICE 88-90 & tbl.5.2, fig.5.1 (Mario F. Bognanno & Charles J. Coleman eds., 1992) [hereinafter LABOR ARBITRATION IN AMERICA].

many system participants have limited access to past awards. Relatively few commercial arbitration awards are published, and those that are sometimes appear only in specialized sources.<sup>125</sup> This may not have mattered much when the market for international commercial arbitrators and lawyers was highly concentrated. At least until recently, international commercial arbitration was dominated by an elite, relatively homogenous group of lawyers and arbitrators.<sup>126</sup> These repeat players accumulated knowledge of past arbitrations and “knew how to research and present arguments” in accordance with governing norms.<sup>127</sup> Gradually, however, the market for international arbitration and legal services has expanded (along with arbitration caseloads) to the point that many participants will be unaware of the vast majority of potentially relevant awards. Under such circumstances, the lack of widespread award publication may hinder the development of precedent.

### *3. Might Reasoned, Accessible Awards Be Enough?*

It is easy to see how a system of arbitral precedent might require the use of reasoned, accessible awards.<sup>128</sup> At times, however, the arbitration literature goes further, suggesting that arbitration systems featuring these attributes necessarily will produce some form of precedent.<sup>129</sup> As I have mentioned, I am skeptical of this possibility.<sup>130</sup> For now, however, I defer this skepticism and devote the following discussion to the possibility that arbitration systems featuring reasoned, accessible awards intrinsically generate precedent.

It may help to begin with an example. Consider an investment arbitration in which the relevant bilateral treaty requires the host government to treat foreign investments in a “fair and equitable”

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125. See Strong, *supra* note 120 (manuscript at 4-5).

126. See generally YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE* 18-29, 34-62 (1996) (describing characteristics and evolution of the market for international commercial arbitration services); Alan S. Rau, *The Arbitrator and “Mandatory Rules of Law,”* 18 AM. REV. INT’L ARB. 51, 88 (2007) (noting that the elite lawyer or law professor is “the typical member of an international arbitral tribunal”).

127. Strong, *supra* note 120 (manuscript at 4-5).

128. See *supra* text accompanying notes 81-83.

129. See *supra* note 92.

130. See *supra* text accompanying note 93.

manner.<sup>131</sup> Assume that an earlier panel of arbitrators has defined this fair and equitable treatment standard to forbid conduct amounting to “wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.”<sup>132</sup> Because ICSID awards are readily accessible to system participants, it is likely that the arbitrators in the present dispute will be familiar with this definition and that one party or the other will ask them to adopt it. Under what circumstances are the arbitrators likely to do so?

One possibility is that the arbitrators will adopt the first panel’s definition because the parties to the present dispute instruct them to do so.<sup>133</sup> But since disputants are unlikely to agree on the definition *ex post*, these cases are likely to be rare. A second possibility—to which I have already alluded<sup>134</sup>—is that the arbitrators will adopt the prior panel’s definition because they believe most system users prefer it to other possible definitions. When such a preference exists, arbitrators who refuse to honor it will, all else equal, soon find themselves out of work.<sup>135</sup> We might expect, therefore, that arbitrators will tend to follow widely adopted rules or rules announced by especially prominent arbitrators, viewing these as proxies for the general preferences of system users.<sup>136</sup>

In many cases, however, system users will have divergent preferences, or arbitrators will lack the information necessary to

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131. See, e.g., *CMS Gas Transmission Co. v. Argentine Republic*, 44 I.L.M. 1205, 1234 (2005). Most investment treaties are thought to contain a similar invocation of the fair and equitable treatment standard, which, “broadly speaking, obliges host States to treat foreign investments in an even-handed manner.” Cheng, *supra* note 34, at 1031.

132. See *Genin v. Estonia*, ICSID Case No. ARB/99/2, Award ¶ 367 (June 25, 2001), available at <http://icsid.worldbank.org/Index.jsp> (search “Genin”; then follow “ICSID Case No. ARB/99/2” hyperlink; then follow “Decisions & Awards” tab; then follow “Award of the Tribunal” hyperlink).

133. Parties are generally free to choose the law applicable to their dispute. See, e.g., ICSID CONVENTION, *supra* note 40, art. 42(1), 17 U.S.T. at 1286, 575 U.N.T.S. at 186.

134. See *supra* text accompanying notes 73-74.

135. See Bruce, *supra* note 5, at 8.

136. This corresponds to the belief that awards issued by prominent, “highly respected” arbitrators are more worthy of publication. See Seitz, *supra* note 110, at 60. This belief may be stated as a preference for quality; perhaps only the most “skilled, insightful, and percipient” arbitrators become well known and respected. *Id.* But to the extent prominence derives from an arbitrator’s frequent selection, it also serves as a proxy for system users’ satisfaction with the substance of the arbitrator’s awards.

determine the relevant preference. Thus, the arbitrators in our example dispute may have a fair amount of discretion to define the obligation of “fair and equitable treatment.” Notwithstanding that discretion, there are a number of reasons why the arbitrators might adopt the prior panel’s definition.

One possibility, commonly invoked in the arbitration literature, is that arbitrators will adopt those awards they believe to have been correctly decided.<sup>137</sup> For example, if the panelists believe the fair and equitable treatment standard should work to ensure a stable and predictable investment environment,<sup>138</sup> they might reject the earlier panel’s definition in favor of one they deem better suited to that purpose.<sup>139</sup> The implication is that a coherent, consistent body of precedent will arise over time as arbitrators reach consensus as to the best, most “persuasive” definition.<sup>140</sup> In this sense, reasoned, accessible awards may yield a system of arbitral precedent by provoking a process of reflection, deliberation, and consensus building among arbitrators.

Note that this vision of arbitral precedent is a limited one. At least as the term is understood by most lawyers, precedent constrains the discretion of future decision makers to some meaningful degree.<sup>141</sup> Yet if arbitrators follow only those awards they deem correct, prior awards may not serve as any constraint at all.<sup>142</sup> As I have already noted, however, I do not view constraint as a necessary

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137. See, e.g., Commission, *supra* note 34, at 155-56; Seitz, *supra* note 110, at 59.

138. CMS Gas Transmission Co. v. Argentine Republic, 44 I.L.M. 1205, 1235 (2005).

139. See *id.* at 1236 (interpreting the fair and equitable treatment standard as “an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question”).

140. Gélinas, *supra* note 92, at 583; Thomas W. Wälde, *The Specific Nature of Investment Arbitration*, in NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 43, 47 (Philippe Kahn & Thomas W. Wälde eds., 2007).

141. See Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 4 (1989-1990); Gibson & Drahozal, *supra* note 34, at 525; Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575-76 (1987). Many political scientists, of course, would dispute that precedent serves to constrain judicial decision making. See *supra* note 5.

142. This is not to say past awards have no relevance to future disputes. For example, an award that adopts rule X may increase the salience of that rule and thus increase the likelihood that a future arbitrator will adopt it over a potentially competing rule. Relatedly, a panel’s adoption of rule X may provide a focal point around which system users (and future arbitrators) can structure legal arguments and future behavior. On the ability of adjudication to serve this function generally, see McAdams, *supra* note 6, at 1059-64.



feature of arbitral (or for that matter judicial) precedent.<sup>143</sup> Whether or not awards constrain future arbitrators, we can plausibly refer to a system of arbitral precedent if awards shape the manner in which lawyers frame their arguments, the language in which arbitrators justify their decisions, and the behavior of system users.

It is at least possible, however, that awards may constrain future arbitrators in some meaningful sense.<sup>144</sup> To take an example from labor arbitration, consider the “work first, grieve later” rule, under which employees may be disciplined for refusing to follow direct orders notwithstanding a legitimate dispute as to whether the order is permitted under the CBA.<sup>145</sup> Although the rule is hardly certain in its application, many arbitrators have come to view it as a fixture of labor arbitration law.<sup>146</sup> One reason for this, no doubt, is widespread agreement that the rule serves an important purpose: “If an employee is permitted to willfully disregard a direct order it would result in chaos in the work place.”<sup>147</sup> Yet arbitrators may also adhere to the rule because they believe that doing so is necessary to afford equal treatment to similarly situated litigants.<sup>148</sup> Or they might adhere to the rule in the belief that employers have justifiably relied on the rule in making disciplinary decisions, so that applying a different rule would upset settled expectations.<sup>149</sup>

This does not mean that all arbitrators follow the rule or that the rule is predictable in its application.<sup>150</sup> To the contrary, the

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143. See *supra* notes 4-7 and accompanying text.

144. Once again, I assume for now that system users do not share a rule preference; if that assumption is relaxed, arbitrators are constrained in obvious and potent ways. See *supra* text accompanying note 135.

145. For an example, see *City of Marshall v. Int'l Ass'n of Fire Fighters*, 96 Lab. Arb. (BNA) 984, 988 (1991) (Allen, Arb.).

146. See, e.g., *In re Adjutant Gen.'s Dep't Tex. Air Nat'l Guard*, 115 Lab. Arb. (BNA) 249, 250-51 (2000) (Moore, Arb.) (“Since 1944, there has been the widely accepted general rule of ‘work now, grieve later’ recognized in labor relations.”).

147. *Id.* at 252.

148. Cf. Alexander, *supra* note 141, at 5-8 (describing these rationales supporting the natural model of precedent); Schauer, *supra* note 141, at 595-97 (describing the virtues of precedential constraint).

149. Aerial Incident of 3 July 1988 (*Iran v. U.S.*), 1989 I.C.J. 132, 158 (Dec. 13) (separate opinion of Judge Shahabuddeen) (suggesting that even prior incorrect awards should be followed unless the costs of the incorrect rule “decisively outweigh the injustice created by disturbing settled expectations”).

150. For a description of varying approaches when the employee is disciplined for refusing to work overtime, see *In re Keystone Steel & Wire*, 94 Lab. Arb. (BNA) 423, 427 (1990).

arbitrator's decision may be influenced by a number of considerations, including the arbitrator's own preference as to the correct rule. Nevertheless, the desire to afford equal treatment and to honor settled expectations will likely influence the decision, perhaps significantly so.<sup>151</sup> After all, even if system users have divergent preferences as to substantive rules, they may all value equality of treatment and adjudicatory consistency, both as worthwhile normative goals and because these attributes enable planning and private dispute resolution.<sup>152</sup> The point is simple: even without a doctrine of *stare decisis*, the mere existence of a relevant past award might provide an independent reason to reach a similar result now.<sup>153</sup>

From the foregoing discussion, we can see why an arbitration system that features reasoned, accessible awards might intrinsically generate precedent. In such a system, past awards offer parties and their lawyers a language in which to frame their arguments. Past awards may provoke deliberation and debate among arbitrators. And past awards invite arguments couched in normative terms—like the need to ensure equality of treatment—that enjoy widespread support among system users notwithstanding their divergent preferences on matters of substance.

### *B. Filling Gaps in, or Displacing, State-Supplied Law*

As the foregoing Section has explained, a system of arbitral precedent may require the use of reasoned, accessible awards. I have also attempted to flesh out the arbitration literature's

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(Goldstein, Arb.).

151. Cf. Alexander, *supra* note 141, at 8-9 (noting that these equality and reliance values might influence the decision maker's assessment of the morally correct result).

152. One early survey, for example, found that 73 percent of management representatives and 78 percent of union representatives would assign at least "some weight" to prior arbitration awards interpreting different CBAs. Seven percent of management respondents and 19 percent of union respondents indicated that arbitrators should assign "decisive weight." Warren & Bernstein, *supra* note 65, at 216; *see also* Seitz, *supra* note 110, at 59 ("[S]tability and uniformity in interpretation ... is a desideratum.").

153. Put differently, arbitrators may come to believe that while "[i]t may be debatable whether arbitrators have a *legal* obligation to follow precedents—probably not—but it seems well settled that they have a *moral* obligation to follow precedents so as to foster a normative environment that is predictable." Kaufmann-Kohler, *supra* note 48, at 374.

(implicit) argument that arbitral precedent will always arise in such cases. On reflection, however, this claim is somewhat dubious. As this Section explains, a robust body of arbitral precedent is likely to arise only when it serves some function beneficial to the parties who use and pay for the system. Parties who do not derive such benefits will be less willing to make the investments—such as paying lawyers to research and build arguments around past awards and paying arbitrators to consider these authorities—necessary to create a truly robust system of precedent.

The following discussion explores two possible functions that arbitral precedent may serve. First, precedent may fill gaps in the law governing the parties' dispute. Because most disputes will be governed by state-supplied law, this gap-filling function will be most relevant when that law is "thin." Second, parties who wish to avoid state-supplied law may grant arbitrators the power to develop an alternative set of legal rules. For these parties, one benefit of arbitration is that it provides an institutional context in which such rules may evolve.

### *1. Arbitral Precedent as Gap-Filler*

Many, and perhaps most, arbitrated disputes are governed by state-supplied law—that is, the law supplied by public actors like courts and legislatures.<sup>154</sup> If there is a "thick" body of such law, the dispute can be resolved by looking to sources external to the system of arbitration: statutes, administrative regulations, judicial opinions, etc. In such cases, there will be little need to consider prior awards.<sup>155</sup> When there is only a thin body of state-supplied law, however, arbitral precedent may serve an important gap-filling

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154. See, e.g., Gibson & Drahozal, *supra* note 34, at 536-44 (presenting evidence suggesting that international commercial arbitrations typically are governed by national law); Rau, *supra* note 126, at 88 (noting that parties will often want their "conduct judged by external legal standards").

155. See Mark R. Lee, *Antitrust and Commercial Arbitration: An Economic Analysis*, 62 ST. JOHN'S L. REV. 1, 25-26 (1987) (noting that, even if arbitrators were not obliged to apply antitrust law, they would likely do so rather than incur the cost of "developing an alternative set of principles and acceptable modes of reasoning").

function. In effect, arbitral precedent may supply default rules when the state has failed to do so.<sup>156</sup>

Parties might find such gap-filling valuable in a variety of contexts. For example, parties to underspecified, long-term contracts may rely on arbitrators to supply open terms or otherwise to guide their ongoing relationship.<sup>157</sup> Thus, employers and unions rely on labor arbitrators to clarify the meaning of CBA terms,<sup>158</sup> a practice that relieves the parties of the need to address every possible contingency in the CBA itself.<sup>159</sup> Likewise, firms that implement large numbers of transactions through standardized contracts may value consistent interpretation of contract language.<sup>160</sup> When there are no judicial opinions interpreting the relevant contract, arbitrators may look to past awards to fill the void. Conversely, in disputes that turn on unique facts or rarely invoked contract provisions, there will be less need for a system of precedent.<sup>161</sup>

The foregoing discussion sheds further light on the apparently greater reliance on arbitral precedent by ICSID and labor arbitrators relative to arbitrators in international commercial disputes. ICSID jurisdiction is often based on a general consent to arbitration in a bilateral investment treaty (BIT) between the host state and the investor's home state. Because state action rarely impacts "one

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156. At least in theory, arbitrators cannot create mandatory rules. The arbitrator's authority is limited by the parties' contract, and the parties can always specify a different law or contract out of arbitration altogether. It is at least possible, however, that the decisions reached by arbitrators might inform a court's view of what mandatory law should be. In some cases, moreover, the cost of contracting around arbitral precedent might be high enough to leave a party "stuck" with precedent it would prefer to avoid. This concern may explain the reluctance of some ICSID users to create an appellate mechanism for investment disputes. See *infra* note 222.

157. Rau, *supra* note 33, at 536 (noting arbitration's gap-filling function when parties are in a continuing relationship).

158. See Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 920 (1979).

159. Cf. Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 856-57 (2006) (noting that more cost-effective enforcement mechanisms reduce the need for up-front investments in contract specificity). Relatedly, arbitrators might be superior to courts at detecting substandard performance. See Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 5-6 (1995).

160. See Rau, *supra* note 33, at 536.

161. See Kaufmann-Kohler, *supra* note 48, at 375-76 (suggesting this as an explanation for lower award citation rates in international commercial arbitration).

foreign investor in isolation,”<sup>162</sup> a large number of similarly situated investors may assert claims under the treaty.<sup>163</sup> In such cases, both states and investors may value consistent interpretation of the BIT. Moreover, thousands of investment treaties have been concluded worldwide.<sup>164</sup> To the extent treaty provisions are standardized within or across states, system users may value consistent interpretation.<sup>165</sup>

Similar benefits may accrue from labor arbitration precedent. Labor disputes involve repeat players with ongoing relationships governed by contracts that apply broadly within particular workplaces and that may be standardized across them. Moreover, because courts typically do not hear disputes arising under these contracts, labor arbitrators are the only adjudicators able to ensure consistent interpretation of these terms. By contrast, it is possible that commercial contracts are less standardized and that disputes arising out of these contracts will more often turn on unique facts or contract language.<sup>166</sup> Additionally, despite intense and long-

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162. MARIEL DIMSEY, *THE RESOLUTION OF INTERNATIONAL INVESTMENT DISPUTES: CHALLENGES AND SOLUTIONS* 42 (2008).

163. *See id.* at 91-96.

164. *See* VAN HARTEN, *supra* note 35, at 26 (indicating that during and after the 1990s, “roughly 2,000 bilateral investment treaties were concluded of about 2,400 now signed”).

165. *See* Suez, Sociedad General de Aguas de Barcelona S.A. & InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction ¶¶ 50-51 (May 16, 2006), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListPending> (scroll down to number 14; then follow “Decision on Jurisdiction” hyperlink) (noting the “growing jurisprudence of arbitral decisions interpreting treaty provisions” and citing past awards supporting the tribunal’s interpretation); Pierre Duprey, *Do Arbitral Awards Constitute Precedents?*, in INT’L ARB. INST., *TOWARDS A UNIFORM INTERNATIONAL ARBITRATION LAW?* 276-77 (Emmanuel Gaillard ed., 2005) (noting similarity across treaties and the resulting concern with uniform interpretation); Antonio R. Parra, *Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties*, 16 ICSID REV.—FOREIGN INV. L.J. 20, 21 (2001) (noting similarity in substantive BIT provisions). I do not mean to suggest that BIT terms are virtually identical; there may be important differences. *See, e.g.*, DIMSEY, *supra* note 162, at 14 (noting that “[t]here are no ‘typical features’ of BITs” and that controversy revolves around the precedential value of awards interpreting similar BITs); Jeswald W. Salacuse, *Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain*, in ARBITRATING FOREIGN INVESTMENT DISPUTES 61 (Norbert Horn & Steton Kröll eds., 2004) (noting that BIT provisions are not uniform but address similar issues). The point is only that BITs sometimes adopt terms that are similar or identical to those appearing in other BITs, and that states and investors may value uniform interpretation of those terms. *See* Duprey, *supra*, at 277.

166. *See* Kaufmann-Kohler, *supra* note 48, at 375-76.

standing interest in *lex mercatoria*,<sup>167</sup> the evidence suggests that most international commercial disputes are governed by national law,<sup>168</sup> which in many cases may be “sufficiently developed to be predictable.”<sup>169</sup> If that is so, parties to commercial disputes may have less need of arbitral precedent, except perhaps to address procedural questions specific to arbitration.<sup>170</sup> The existing research, although limited, is consistent with this prediction: arbitrators in international commercial disputes appear to cite past awards only rarely, and primarily on questions of procedure and jurisdiction.<sup>171</sup>

In addition to filling gaps in state-supplied law, arbitral precedent may supply answers to questions that arise only in arbitration. Thus, we might expect arbitrators to consult past awards on questions of arbitration procedure, for courts rarely will have occasion to address such questions.<sup>172</sup> Indeed, even with respect to questions of substantive law, arbitration may become so widely used in some contexts that courts have few opportunities to address novel but recurring issues. To take an example from somewhat further afield, the AAA promulgates rules governing arbitrations conducted as class actions.<sup>173</sup> These disputes may be arbitrated only if the parties’ contract permits class arbitration.<sup>174</sup> As it turns out, most of the relevant contracts say nothing whatsoever about class arbitration; they simply incorporate AAA rules that permit the procedure. Yet some of these contracts also include explicit terms

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167. See generally KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF LEX MERCATORIA* (1999); *LEX MERCATORIA AND ARBITRATION* (Thomas E. Carbonneau ed., rev. ed. 1998).

168. See Drahozal, *supra* note 49, at 536-44 (finding little empirical support for the claim that parties to international commercial arbitrations contract out of national law).

169. Kaufmann-Kohler, *supra* note 48, at 375.

170. See *id.* at 375-76; see also *infra* text accompanying note 172. The fact that most international commercial contracts contain choice-of-law clauses selecting national law is further evidence that national law is sufficiently well developed to lend certainty to international transactions. See Drahozal, *supra* note 34, at 533-34.

171. See Kaufmann-Kohler, *supra* note 48, at 362.

172. See Strong, *supra* note 120 (manuscript at 12-13) (noting that courts do not often address questions of procedure or conflict of interest that may arise in international commercial arbitration).

173. The AAA class action docket is available online at Searchable Class Arbitration Docket, <http://www.adr.org/sp.asp?id=25562> (last visited Feb. 21, 2010).

174. This consent to class arbitration may be implicit, although the Supreme Court is currently considering whether parties who have not explicitly consented to the procedure may be required to participate in class arbitration. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 129 S. Ct. 2793 (2009).

that seem to conflict with the AAA rules, such as terms requiring the arbitration to be conducted in private.<sup>175</sup> When such a conflict exists, should the contract be interpreted to permit class arbitration?

This is a straightforward question of contract interpretation, but it will rarely be answered by a court. Unless the parties agree otherwise, “the question—whether the agreement forbids class arbitration—is for the arbitrator to decide.”<sup>176</sup> Because few courts will address this precise question,<sup>177</sup> and because the question recurs with some frequency, we might expect arbitrators to treat prior awards as precedent. And indeed, that appears to be the practice in these arbitrations.<sup>178</sup>

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175. See, e.g., *Dub Herring Ford v. Dealer Computer Servs., Inc.*, AAA Case No. 11 181 01119 06, Clause Construction Award at 15-17 (Nov. 27, 2006), available at <http://www.adr.org/si.asp?id=4542>. For AAA rules, compare SUPPLEMENTARY RULES FOR CLASS ARBITRATION R. 9(a) (Am. Arbitration Ass’n 2009), <http://www.adr.org/sp.asp?id=21936>, with COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R. 23 (Am. Arbitration Ass’n 2009), <http://www.adr.org/sp.asp?id=22440#R23>.

176. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451-52 (2003). This is a default rule; the contract may provide otherwise. *Bazzle* is also a plurality opinion, although Justice Stevens, in his concurring opinion, appears to agree with the plurality’s allocation of decision-making authority. See *id.* at 455 (Stevens, J., concurring).

177. A party who objects to the arbitrator’s ruling on this question may ask a court to vacate the award. But because judicial review of arbitral awards is limited, especially on questions of contract interpretation, courts are unlikely to review the merits of the arbitrator’s decision, see *Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85 (2d Cir. 2008), cert. granted, 129 S. Ct. 2793 (2009), or so one would have thought before the Supreme Court granted certiorari in *Stolt-Nielson*, a case in which the arbitration tribunal ruled that a class arbitration could proceed in the face of contractual silence on the question.

178. See, e.g., *Fox Valley Ford v. Dealer Computer Servs., Inc.*, AAA Case No. 11 117 01929 06, Clause Construction Award and Order on Motion to Stay on Grounds of Dominant Jurisdiction at 8-9 (Nov. 9, 2007), available at <http://www.adr.org/si.asp?id=5134>; *Hausner v. United Healthcare*, AAA Case No. 11 193 Y 00447 07, Partial Final Clause Construction Award at 11-12 (Oct. 19, 2007), available at <http://www.adr.org/si.asp?id=5058>; *Dub Herring Ford*, AAA Case No. 11 181 01119 06, Clause Construction Award at 17; *Terrapin Express, Inc. v. Airborne Express, Inc.*, AAA Case No. 11 199 01536 05, Clause Construction Award at 4-8 (May 9, 2006), available at <http://www.adr.org/sp.asp?id=29386> (follow “clause construction award” hyperlink).

## *2. Arbitral Precedent as a Tool for Displacing State-Supplied Law*

The foregoing examples have assumed that the parties are content to have state-supplied law govern their disputes, at least on questions of substance. In some cases, of course, parties may wish to have their conduct governed by a different set of legal rules.<sup>179</sup> One benefit of arbitration is that it provides an institutional context in which such rules can evolve.<sup>180</sup>

As noted previously, for example, members of a trade association might empower arbitrators to create binding legal rules by adopting contract terms requiring arbitrators to follow past awards.<sup>181</sup> More commonly, industry members might specify the applicable rules in advance, leaving arbitrators to apply these rules and, once again, to fill any gaps left by the parties.<sup>182</sup> In such a system, it is plausible to assume that arbitrators will assign precedential value to past awards. In this way, as Professor Steven Ware has noted, arbitration may produce “privatized law in the fullest sense.”<sup>183</sup>

When the relevant state-supplied law consists of default rules, using arbitration for this purpose may be relatively unprob-

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179. On the benefits of such rules, see Ware, *supra* note 16, at 744-47.

180. See *id.* at 744-47; Weidemaier, *supra* note 28, at 661.

181. See *supra* text accompanying notes 71-74. I suspect that few arbitration systems operate in this fashion, in part because many parties will be reluctant to confer such power on arbitrators. To be sure, the parties may ultimately control the content, and indeed the existence, of precedent by specifying the applicable rules in their contracts, refusing to employ arbitrators who do not follow the preferred rules, or explicitly limiting the precedential value of past awards. But these forms of control are costly to exercise, and at times might be high enough to leave a party “stuck” with precedent it would prefer to avoid. For example, in the ICSID context, a state party to bilateral investment treaties that contain its general consent to arbitration might have to renegotiate these treaties to opt out of the existing system of ICSID precedent. (Some states might also attempt to “withdraw” from ICSID despite giving prior consent to arbitration, see *infra* note 251, although this strategy may entail significant reputational cost.) Indeed, concern over the “stickiness” of arbitral precedent may explain opposition to proposals for an ICSID appellate review mechanism. See *infra* note 222.

182. In most examples of trade industry association, the governing rules are specified by industry members, for example in written bylaws. See, e.g., Bernstein, *supra* note 8, at 126 (noting that New York Diamond Dealers Club arbitrators resolve disputes based on trade customs and usages set forth in the DDC bylaws); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1805 n.134 (1996) (listing examples of associations with written trade rules).

183. Ware, *supra* note 16, at 747.



lematic.<sup>184</sup> But it may also be cause for concern, as when parties seek to use arbitration to circumvent supposedly mandatory law,<sup>185</sup> possibly replacing this law with rules that offer greater private benefits.<sup>186</sup> Again, however, my concern in this Article is not with the content of arbitral law. Rather, the point is that arbitration cannot confer these benefits if arbitrators feel at liberty to disregard past awards.

*C. Attitudes Concerning Arbitrators' Legitimacy as Producers of Law*

Thus far, we have seen that arbitral precedent is more likely to arise when the relevant system of arbitration is structurally conducive to precedent creation and when arbitral precedent fills gaps in state-supplied law or assists the parties in creating alternative legal rules. But even in arbitration systems that meet this description, arbitrators may not immediately enjoy unquestioned legitimacy as producers of law. The following discussion explores the process by which arbitrators might gain such legitimacy and suggests that this process may be important to the development of precedent.

*1. Precedent's Uncertain Place in a System of Arbitration*

Consider the position of an arbitrator faced with an argument from precedent in a system in which there are no clear norms governing the use of past awards. In our previous example, one

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184. See *id.* at 744-47.

185. This concern underlies arguments that arbitration effectively allows parties to contract out of mandatory rules. *E.g., id.* at 710-12; see also Paul D. Carrington, *Unconscionable Lawyers*, 3 NEV. L.J. 259, 267 (2002) (referring to predispute arbitration clauses in consumer and employment relationships as "self-deregulation," though emphasizing the supposed unfairness of arbitration rather than its potential to replace public with private legal rules).

186. Cf. Cooter, *supra* note 97, at 107-08 (noting similarities between income-maximizing private judges and prestige-maximizing public judges, but also that desire for prestige with nonlitigants may lead public judges to "give weight to third parties" in situations where a private judge would not); Landes & Posner, *supra* note 14, at 239 (noting that, whatever the socially optimal rule, private judges must apply rules that offer private benefits to system users).

party to an investment arbitration urged the tribunal to adopt a prior award's definition of the host state's obligation to provide "fair and equitable" treatment.<sup>187</sup> This form of argument—in which a past decision is proffered as an independent reason for reaching a desired result—is surely commonplace in any system in which litigants are aware of past decisions. One possible judicial analog involves a litigant citing one federal district judge's opinion to another district judge. To be sure, the prior decision does not bind the present judge.<sup>188</sup> Yet it would not be surprising if the judge acknowledged the decision's relevance and engaged in detail with its reasoning.<sup>189</sup> Perhaps more tellingly, the judge might safely—that is, without serious reputational or other cost—label the decision "persuasive" and adopt its result without additional explanation.<sup>190</sup>

For arbitrators, however, appearing to rely heavily on past awards might sometimes entail risk.<sup>191</sup> U.S. law, for example, conceives of the arbitrator as the parties' agent, charged with resolving disputes in accordance with their agreement.<sup>192</sup> Arbitrators who do not discharge this obligation to the parties' satisfaction risk losing future business. Given that constraint, the award serves an impor-

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187. See *supra* text accompanying notes 131-32.

188. 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.02[1][d] (3d ed. 2009).

189. See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1169-70 (9th Cir. 2001); *Mich. Elec. Employees Pension Fund v. Encompass Elec. & Data, Inc.*, 556 F. Supp. 2d 746, 761-62 (W.D. Mich. 2008).

190. E.g., *Johnson v. Hill*, 619 F. Supp. 2d 537, 545 (N.D. Ill. 2008); *Gilyard v. Northlake Foods, Inc.*, 367 F. Supp. 2d 1008, 1014 (E.D. Va. 2005).

191. In addition to the reasons discussed in the text, ICSID arguably forbids a tribunal to resolve an issue merely by citing to a prior tribunal's resolution. Article 52(1)(e) permits annulment if "the award has failed to state the reasons on which it is based." ICSID Convention, *supra* note 40, 17 U.S.T. at 1290, 575 U.N.T.S. at 192. Under this provision, "an application for annulment that alleges an excess of powers or a failure to state reasons because the tribunal simply relied on earlier decisions without making an independent decision or developing its own reasons is entirely possible." Schreuer & Weiniger, *supra* note 45, at 8.

192. *EEOC v. Ind. Bell Tel. Co.*, 256 F.3d 516, 522-23 (7th Cir. 2001); Kirgis, *supra* note 103, at 6-7, 32-33. To a degree, this principal-agent model breaks down in the context of international arbitration, perhaps especially investment arbitration. See Ernst-Ulrich Petersmann, *Judging Judges: From 'Principal-Agent Theory' to 'Constitutional Justice' in Multilevel 'Judicial Governance' of Economic Cooperation Among Citizens*, 11 J. INT'L ECON. L. 827, 880-81 (2008) (arguing that international judges and arbitrators must depart from this principal-agent model to take third party interests into account). As ICSID demonstrates, however, arbitrators may still be uncertain, at least initially, about the precedential value of past awards. See *infra* text accompanying notes 205-07.

tant communicative function: signaling competence, judgment, and impartiality.<sup>193</sup> In some cases, citations to past awards may serve a similar function by suggesting that “prestigious authority exists to support the decision made.”<sup>194</sup> Put somewhat differently, citations can provide cover by communicating that the arbitrator is within the mainstream and therefore should be viewed by future disputants as an acceptable choice.<sup>195</sup>

Yet awards may also communicate negative information. Most relevant here, arbitrators may wish to avoid the appearance of giving excessive weight to other arbitrators’ decisions. Most will quite correctly “perceive that they have been chosen to serve because of *their* judgment”<sup>196</sup>—chosen, that is, to render a decision that is sensitive to the particularities of the parties’ relationship.<sup>197</sup> Heavy reliance on past awards, no matter how “persuasive,” potentially smacks of abdication of this duty.<sup>198</sup> Moreover, without any clear norms governing their use, reliance on past awards raises

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193. See *supra* note 108.

194. Seitz, *supra* note 110, at 59. One function of a reasoned award is to confer legitimacy on the arbitrator’s decision, especially in the eyes of the losing party. See Richard Mittenthal & Howard S. Block, *The Ever-Present Role of Arbitral Discretion*, in *LABOR ARBITRATION UNDER FIRE* 251-52 (James L. Stern & Joyce M. Najita eds., 1997); Rau, *supra* note 33, at 531. Though presumably parties are more attentive to *reasons* than to citations, see Mittenthal & Block, *supra*, at 251, citations may serve some legitimizing function as well.

195. Given complete information, and assuming litigants are concerned primarily with the distributional consequences of their choice of arbitrator, “[a]rbitrators who have taken extreme positions relative to their colleagues” are likely to be eliminated from consideration in future disputes. Orley Ashenfelter, *Arbitrator Behavior*, 77 AM. ECON. REV. 342, 343 (1987). Because litigants are not likely to have complete information about potential arbitrators, they are likely to base their selection decisions on proxies. I do not suggest that litigants choose an arbitrator based on the number of citations in the arbitrator’s past awards. Surely they do not. But litigants are likely to read past awards issued by arbitrators who are under serious consideration. Roger I. Abrams et al., *Arbitral Therapy*, 46 RUTGERS L. REV. 1751, 1766 (1994); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 477 (1996). And they may be more willing to overlook an apparently unfavorable award that manages to convey—perhaps by citing similar awards—that other arbitrators would have produced the same outcome.

196. Seitz, *supra* note 110, at 60 (noting dangers of relying on past awards, especially those issued by “unproven” arbitrators).

197. See Kirgis, *supra* note 103, at 29-34.

198. Cf. CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES § 2(G) (Nat’l Acad. of Arbitrators, as amended Sept. 2007) (recognizing that arbitrators may assign weight to past awards but emphasizing that arbitrators bear “full personal responsibility” for their decisions).

a number of fundamental questions: Without a doctrine of stare decisis, why is the award entitled to any weight at all in the arbitrator's decision? How *much* weight should it receive? What considerations are even relevant to this question of weight? How will system users perceive extensive engagement with past awards—as evidence of diligence and expertise, or as evidence that the arbitrator has merely “augment[ed] the cost” of arbitration by play-acting like a judge?<sup>199</sup>

Arbitrators rightly may suspect that system users have diverse preferences on these matters. Recall that few arbitration systems are intentionally designed to create precedent. Thus, system users are not likely to have given much thought to the status of past awards and, once the question becomes salient, there is no guarantee they will agree on the answer. When system users have divergent preferences, it will sometimes be easy for each user to implement its own preferred regime. For example, a business that employs a standard arbitration clause in form contracts might revise the clause to prevent the use of past awards as authority.<sup>200</sup> But in an arbitration system like ICSID, in which arbitration clauses most frequently appear in bilateral treaties, and where neither the multilateral ICSID treaty nor the default set of institutional arbitration rules clearly address the subject of arbitral precedent,<sup>201</sup> the costs involved in reaching and implementing an agreement as to the precedential value of past awards may be prohibitive.<sup>202</sup>

The upshot of all this is that questions concerning the value of past awards often will have to be resolved in contested normative space. Yet they must be resolved if a truly robust system of precedent is to arise—if, that is, arbitrators are to feel an “obligation to strive for consistency and predictability”<sup>203</sup> and to engage in “an

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199. Seitz, *supra* note 110, at 60.

200. See, e.g., Verizon Agreement, *supra* note 21 (“An arbitration award and any judgment confirming it only applies to the arbitration in which it was awarded and can’t be used in any other case except to enforce the award itself.”).

201. See *supra* note 45 and accompanying text.

202. See Wälde, *supra* note 140, at 46 (“Once set into motion, judicial law-making is not easy to stop or interrupt as the political capital investment necessary for legislation by treaty, in particular multilateral treaties, is hard to mobilize.”).

203. Kaufmann-Kohler, *supra* note 48, at 374.

overt and system-wide discussion of applicable decisional predicates.”<sup>204</sup> Once again, ICSID and labor arbitration illustrate how this process may (or may not) unfold.

## *2. Evolving Attitudes in ICSID and Labor Arbitration*

Participants in ICSID and labor arbitrations did not always view awards as legitimate sources of authority and arbitrators as legitimate producers of law. As noted previously, ICSID was not intentionally designed to generate precedent.<sup>205</sup> Perhaps for this reason, system participants did not immediately recognize past awards as entitled to any weight at all.<sup>206</sup> As Jeffery Commission has recounted, early ICSID tribunals rarely discussed the value of past awards.<sup>207</sup> No doubt this pattern derived, in part, from the fact that relatively few potentially precedential awards had been issued. Yet early tribunals did have opportunities to address prior awards and equivocated about their relevance.<sup>208</sup>

This early equivocation is unsurprising; there has long been debate over the precedential value of awards issued by international tribunals.<sup>209</sup> The debate spans a range of topics, from disputes over

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204. Carboneau, *supra* note 2, at 1205.

205. See *supra* notes 75-76 and accompanying text. The negotiations that preceded the Convention included discussion of the proper default rule concerning award publication. See 2 Int'l Ctr. for Settlement of Inv. Disputes [ICSID], *Documents Concerning the Origin and Formulation of the Convention*, Part 2, at 817, SID/LC/SR/16 (Dec. 30, 1964). Delegates rejected a proposal to require publication unless the parties objected in favor of a rule requiring consent to publish. *Id.* In fact, during the relevant discussions in December 1964, one of the delegates explicitly asked whether “the decisions of the arbitral tribunals would become precedents in other cases, even if they were not published.” *Id.* The response, credited to Aron Broches, was noncommittal at best: that many awards were likely to become public, for example during court proceedings when the award “would become a matter of public knowledge as part of the documents of that case.” *Id.* at 818. The specific question concerning the precedential value of past awards does not appear to have been addressed.

206. See *Amco v. Indonesia*, Decision on Jurisdiction, 23 I.L.M. 351, 371 (ICSID Arb. Trib. 1984) (discussing parties’ citation to prior award and distinguishing the award “to the extent to which it is a precedent”).

207. See Commission, *supra* note 34, at 144-45.

208. See *Amco*, 23 I.L.M. at 371 (responding to both parties’ citations to a prior award by noting that the tribunal’s result was not “contrary to that precedent (to the extent to which it is a precedent)”).

209. CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-U.S. CLAIMS TRIBUNAL* 651-55 (1998) (summarizing and evaluating criticisms of Iran-U.S. Claims Tribunal precedent). For a discussion of the views expressed by ICSID tribunals about the precedential value of prior

whether awards merit any precedential weight,<sup>210</sup> to efforts to articulate factors that might assist arbitrators in assigning precedential weight to past awards.<sup>211</sup> Increasingly, however, these debates take for granted the existence and legitimacy of arbitral precedent. For example, one such debate—implicating the familiar tradeoff between finality and consistency<sup>212</sup>—concerns the need for a mechanism to ensure consistency in the awards rendered by different tribunals.<sup>213</sup> Importantly, arbitrators have actively participated in these debates and used awards as vehicles for expressing their views. It is not uncommon for awards to analyze the relevance of arbitral precedent<sup>214</sup> or to offer extended discussion of the conditions under which arbitrators should follow or reject this precedent.<sup>215</sup> In these discussions, arbitrators often envision

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awards, see Commission, *supra* note 34, at 144-48.

210. *E.g.*, BROWER & BRUESCHKE, *supra* note 209, at 651-55 (discussing Iran-U.S. Claims Tribunal).

211. *See, e.g.*, Gibson & Drahozal, *supra* note 34, at 525-37; Matti Pellonpää, Remarks at the Second Joint Conference (July 22, 1993), in AM. SOC'Y OF INT'L LAW, CONTEMPORARY INTERNATIONAL LAW ISSUES: OPPORTUNITIES AT A TIME OF MOMENTOUS CHANGE (1994).

212. ELIHU LAUTERPACHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 110-12 (1991); Ian Laird & Rebecca Askew, *Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System?*, 7 J. APP. PRAC. & PROCESS 285 (2005).

213. *See, e.g.*, DIMSEY, *supra* note 162, at 40-43 (critiquing lack of consistency in investment arbitration awards); Bjorklund, *supra* note 48, at 270-80 (discussing ways to maximize predictability and legitimacy of arbitral awards); Cheng, *supra* note 34, at 1044-46 (arguing that strong internal controls may compensate for the lack of an appellate mechanism in investment arbitration, though noting pressure caused by increasing diversity among arbitrators); Franck, *supra* note 33, at 1606-10 (proposing the establishment of an appellate body to review investment arbitration awards); Laird & Askew, *supra* note 212, at 299 (evaluating the need for an appellate mechanism in investor-state arbitration).

214. *See* Commission, *supra* note 34, at 144-48 (tracking evolution in the views concerning arbitral precedent expressed in ICSID awards).

215. *See, e.g.*, Aerial Incident of 3 July 1988 (Islamic Rep. of Iran v. United States), 1989 I.C.J. 132, 158 (Dec. 13) (separate opinion of Judge Shahabuddeen); *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures ¶ 67 (Mar. 21, 2007), available at <http://icsid.worldbank.org/ICSID/Index.jsp> (search "Saipem"); then follow "ICSID Case No. ARB/05/7" hyperlink; then follow "Decisions & Awards" tab; then follow "Decision on Jurisdiction" hyperlink; *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction ¶¶ 17-33 (April 26, 2005), available at [http://ita.law.uvic.ca/documents/AES-Argentina-Jurisdiction\\_000.pdf](http://ita.law.uvic.ca/documents/AES-Argentina-Jurisdiction_000.pdf); *see also* *Int'l Thunderbird Gaming Corp. v. United Mexican States*, 6 ASPER REV. OF INT'L BUS. & TRADE LAW 419, 572 (Jan. 26, 2006) (opinion of Professor Thomas Wälde in NAFTA arbitration).

themselves as engaged in developing a consistent body of investment law.<sup>216</sup>

Through this discussion and debate, participants and observers have actively shaped system norms that treat arbitrators as legitimate producers of law. To the extent there were initial doubts about the precedential value of past awards, these have been largely, though perhaps not completely, resolved.<sup>217</sup> Lawyers commonly cite awards in support of their clients' positions.<sup>218</sup> Arbitrators routinely explain their decisions by reference to past awards<sup>219</sup> and promote consistency as an important system value.<sup>220</sup> This does not mean that investment tribunals always issue

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216. As one ICSID tribunal stated:

The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.

*Saipem*, ICSID Case No. ARB/05/07, ¶ 67; *see also* *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 2007 WL 5366469, ¶ 87 (Nov. 19, 2007); Kaufmann-Kohler, *supra* note 48, at 376-78.

217. *Compare* *Amco v. Indonesia*, Decision on Jurisdiction, 23 I.L.M. 351, 371 (ICSID Arb. Trib. 1984) (discussing parties' citation to prior award and distinguishing the award "to the extent to which it is a precedent"), *with* *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction ¶ 39 (Apr. 27, 2006), *available at* <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (scroll down to number 13; then follow "Decisions on Jurisdiction" hyperlink) (noting that it is "a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by ... other international tribunals").

218. *See* David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 708 (2004) (discussing party submissions in NAFTA arbitrations); Gibson & Drahozal, *supra* note 34, at 541-44 (same).

219. *See* Commission, *supra* note 34, at 129-32; Drahozal, *supra* note 34, at 1, 8; Gibson & Drahozal, *supra* note 34, at 522-24.

220. *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures ¶ 67 (Mar. 21, 2007), *available at* <http://icsid.worldbank.org/ICSID/Index.jsp> (then search "Saipem"; then follow "ICSID Case No. ARB/05/77" hyperlink; then follow "Decisions & Awards" tab; then follow "Decision on Jurisdiction" hyperlink).

consistent awards.<sup>221</sup> It does, however, demonstrate the existence of strong, initially contested norms that legitimize reliance on arbitral precedent and emphasize the virtues of consistent decision making.<sup>222</sup>

Labor arbitration followed a similar pattern. The initial decision to publicize labor awards provoked controversy.<sup>223</sup> Over time, however, that controversy has abated, and there is widespread acceptance of the fact that, although arbitrators bear “full personal responsibility” for their decisions,<sup>224</sup> they may legitimately assign precedential weight to past awards.<sup>225</sup> Interest among arbitrators, lawyers, and management and union representatives is such that *The Common Law of the Workplace*, a standard reference in labor arbitration, attempts to distill the decisions of labor arbitrators into a coherent set of principles to guide future disputes.<sup>226</sup> This effort has, in turn, sparked scholarly interest into whether these distilla-

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221. See DIMSEY, *supra* note 162, at 40-43 (criticizing inconsistency in investment treaty arbitration awards and offering solutions); Franck, *supra* note 33, at 1606-10 (same). For a somewhat more skeptical view, see Laird & Askew, *supra* note 212, at 299.

222. This does not mean that arbitral precedent is viewed as an unqualified good in investment arbitration. See, e.g., Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L.J. 1550, 1610 (2009) [hereinafter Yackee, *Pacta Sunt Servanda*] (objecting to investment arbitration's “universalistic claims and pretensions”). Indeed, reluctance to empower arbitrators to create truly “sticky” rules of international investment law—rules that can be changed only by amending BITs or withdrawing from the ICSID Convention—may explain the reluctance of some states to create an ICSID appellate mechanism. See José E. Alvarez, Book Review, 102 AM. J. INT'L L. 909, 915 (2008); see also Jason Webb Yackee, *Toward a Minimalist System of International Investment Law?*, 32 SUFFOLK TRANSNAT'L L. REV. 303, 317-19 (2009) [hereinafter Yackee, *Minimalist System*] (“[T]here is an obvious danger that establishing an appellate mechanism would ... mak[e] it more likely that politically incorrect interpretations or applications would become reified as ‘the law’ with even fewer opportunities for political correction than currently exist.”).

223. See, e.g., Leo Cherne, *Should Arbitration Awards Be Published?*, 1 ARB. J. (n.s.) 75, 75-76 (1946); Jennings & Martin, *supra* note 67, at 96-98 (summarizing conflicting views as to the value of prior awards as precedent); Aaron Levenstein, *Some Obstacles to Reporting Labor Arbitration*, 1 ARB. J. (n.s.) 425, 425-28 (1946); William H. McPherson, *Should Labor Arbitrators Play Follow-the-Leader?*, 4 ARB. J. (n.s.) 163, 164-68 (1949).

224. CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES § 2(G) (Nat'l Acad. of Arbitrators, as amended Sept. 2007).

225. For example, in one early survey, a large majority of responding arbitrators, management representatives, and union representatives indicated that prior awards should receive at least “some weight” even when they involve *different* CBAs. See *supra* note 152.

226. COMMON LAW OF THE WORKPLACE, *supra* note 64.



tions accurately capture the content of labor arbitrators' discipline and discharge decisions.<sup>227</sup>

### 3. *Shaping Conceptions of the Arbitrator's Role*

Both ICSID and labor arbitration, then, suggest that in truly robust systems of arbitral precedent, participants come to view arbitrators as legitimate producers of law. What determines whether this will happen? The answer begins, of course, with the parties and their lawyers. In each system, party submissions to the arbitrators commonly include citations to past awards.<sup>228</sup> If widely followed, this practice communicates that past awards merit weight as precedent and that system users value adjudicatory consistency.<sup>229</sup> But the experience in each system—and especially in ICSID—also suggests a more complicated story, one in which arbitrators meaningfully shape system participants' attitudes about arbitral precedent.

One way they may do this is by citing to past awards, implicitly signaling that these have value as precedent. But arbitrators' efforts may be much more explicit. In ICSID, those efforts have involved making two intellectual moves. First, both in their awards and in their scholarly writings, arbitrators have promoted consistency and predictability as important values in investment transactions.<sup>230</sup>

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227. *E.g.*, Laura J. Cooper, Mario F. Bognanno & Stephen F. Befort, *How and Why Labor Arbitrators Decide Discipline and Discharge Cases: An Empirical Examination*, in NAT'L ACAD. OF ARBITRATORS, *ARBITRATION 2007: WORKPLACE JUSTICE FOR A CHANGING ENVIRONMENT* 42 (Stephen F. Befort & Patrick Halter eds., 2008).

228. *See, e.g.*, *In re Atl. Auto. Components*, 122 Lab. Arb. Rep. (BNA) 630, 636-37 & nn.18-21 (2006) (Brotsky, Arb.) (labor arbitration award discussing authorities cited by parties); Gantz, *supra* note 218, at 708 (presenting evidence from NAFTA arbitrations); Gibson & Drahozal, *supra* note 34, at 541-44 (same).

229. *See, e.g.*, *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction ¶ 39 (Apr. 27, 2006), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (scroll down to number 13; then follow "Decision in Jurisdiction" hyperlink) (stating that the tribunal would take account of prior awards "especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent").

230. *See, e.g.*, *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 2007 WL 5366469, ¶ 87 (Nov. 19, 2007); *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures ¶ 67 (Mar. 21, 2007), available at <http://icsid.worldbank.org/ICSID/Index.jsp> (search "Saipem"; then follow "ICSID Case No. ARB/05/7" hyperlink; then follow

Second, arbitrators have argued that they bear primary responsibility for promoting these values. Thus, after repeating the usual platitudes about the formally nonbinding nature of past awards, one ICSID tribunal noted:

At the same time, [the tribunal] is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.<sup>231</sup>

These calls for consistency, however, do not meaningfully distinguish international investment from other arbitrators. Indeed, arbitrators not infrequently issue calls for “consistency,” or urge the benefits of a system of arbitral precedent, without any apparent impact on system participants’ behavior.<sup>232</sup> That arbitrators would issue such calls is hardly surprising. In an arbitration system

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“Decisions & Awards” tab; then follow “Decision on Jurisdiction” hyperlink); Kaufmann-Kohler, *supra* note 48, at 376-78.

231. *Saipem*, ICSID Case No. ARB/05/07, ¶ 67 (citations omitted); *see also City Oriente Ltd.*, ICSID Case No. ARB/06/21, 2007 WL 5366469, ¶ 87; Kaufmann-Kohler, *supra* note 48, at 376-78.

232. For example, one securities arbitration panel, after noting that each side had cited unreasoned awards in support of its case, complained of the widespread use of unreasoned awards in securities arbitration and explained its own decision to issue a reasoned award:

We hope our willingness to take on this task will encourage future NASD panels to be more forthcoming, so that a body of meaningful precedents, interpreting the securities laws of the various states, may become available, absent the ability of the various state courts to develop their respective state laws. After all, NASD panels are charged not only with making findings of fact, but also to interpret laws and apply them to those facts, even though they are not required to articulate their reasoning.... [W]e hope more panels will explain their decisions, including the legal bases therefore. Only in this manner, will NASD decisions themselves become meaningful precedent.

*Koruga v. Ming Wang*, NASD Case No. 98-04276, 2000 WL 33534559, at \*11-12 (Oct. 5, 2001). Yet unreasoned awards remain the norm in securities arbitration. *See* Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123, 144-45 (2005).

featuring a specialized body of precedent, parties and their lawyers will expect arbitrators to be familiar with past awards<sup>233</sup> and will treat familiarity with precedent as one “measure [of] an arbitrator’s professional sophistication and competence.”<sup>234</sup> For that reason, arbitrators can capture status and prestige by demonstrating familiarity with, or making substantial contributions to, a specialized body of arbitral precedent.<sup>235</sup>

If this is true across a variety of arbitration contexts, what makes investment arbitration so unique? The following discussion suggests two answers to that question. First, the system of ICSID precedent can be understood as a response by arbitrators to external critics whose objections threatened ICSID’s viability as a forum for resolving investment disputes. Thus, much as reasoned awards can confer legitimacy on the process of arbitration,<sup>236</sup> ICSID demonstrates that arbitral precedent sometimes may serve a similar function. Second, ICSID arbitrators are remarkably well positioned to foster norms concerning their role as producers of law. Although these two factors render ICSID somewhat unique, they yield broader insights—explored in Part III—into the development of precedent in other systems of arbitration.

*a. Arbitral Precedent as Legitimacy-Seeking Strategy*

As I have noted, one function of a reasoned award is to confer legitimacy on the arbitration with disputants, external actors, or both.<sup>237</sup> ICSID suggests that arbitral *precedent* sometimes may serve a similar function. To understand why, recall that, at an absolute minimum, a system of arbitration must produce an award that the losing party will comply with voluntarily or that can be enforced in

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233. See Bjorklund, *supra* note 48, at 277 (noting that clients might expect arbitrators to be familiar with past awards).

234. Rogers, *supra* note 34, at 1000-01 (referring to international commercial arbitration).

235. See DEZALAY & GARTH, *supra* note 126, at 89; Filip De Ly, *Lex Mercatoria (New Law Merchant): Globalisation and International Self-Regulation*, in RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS 159, 180 (Richard P. Appelbaum, William L.F. Felstiner & Volkmar Gessner eds., 2001); Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447, 448 (2007). For a general discussion of arbitrators’ tendency to engage in reputation-enhancing activities, see Rutledge, *supra* note 19, at 164-65.

236. See *supra* text accompanying notes 100-06.

237. See *supra* text accompanying notes 100-06.

the absence of voluntary compliance.<sup>238</sup> Recall, too, that formal legal enforcement tools are of limited use in investment disputes.<sup>239</sup> Instead, states comply with investment arbitration awards primarily because the reputational costs of noncompliance exceed the benefits of disregarding the award. For this reason, ICSID tribunals must be sensitive to how their awards will be perceived not only by the disputants themselves, but also by the wide variety of external actors positioned to impose reputational sanctions.<sup>240</sup>

Yet ICSID faces serious challenges to its legitimacy, some of which fundamentally threaten its very existence as a tool for resolving investment disputes. For example, some critics object that a system modeled on private commercial arbitration cannot legitimately resolve “regulatory disputes between investors and the state.”<sup>241</sup> ICSID arbitrators, critics argue, operate “in a one-sided system of state liability, in which only investors bring the claims and only states pay damages” and thus “may reasonably be perceived as having a financial stake in interpreting investment treaties so as to expand the system’s compensatory promise for investors.”<sup>242</sup> Other less fundamental objections are directed to ICSID’s lack of transparency<sup>243</sup> and asserted proinvestor bias.<sup>244</sup> Still other objections are directed to problems allegedly caused by inconsistencies among the rulings of various ICSID tribunals.<sup>245</sup>

These objections, which cast ICSID as an ad hoc, inconsistent, and investor friendly forum, deeply threaten the system’s long-term

238. See FRANCK, *supra* note 106, at 26 (noting that the perceived legitimacy of international institutions facilitates voluntary compliance).

239. See *supra* notes 79-80 and accompanying text and text accompanying notes 104-05.

240. See *supra* text accompanying notes 102-06; see also Cheng, *supra* note 34, at 1026 (noting that investment arbitration’s “continued growth and existence depends on the global community believing that it is legitimate”).

241. See VAN HARTEN, *supra* note 35, at 4-6; see also Franck, *supra* note 33, at 1582-87 (summarizing concerns about the legitimacy of investment arbitration).

242. VAN HARTEN, *supra* note 35, at 5-6.

243. See Franck, *supra* note 33, at 1586; Statement by the OECD Investment Committee, in OECD, TRANSPARENCY AND THIRD PARTY PARTICIPATION IN INVESTOR-STATE DISPUTE SETTLEMENT PROCEDURES 1, 1-2 (OECD, Working Papers on International Investment, No. 2005/1, 2005), available at [www.oecd.org/dataoecd/25/3/34786913.pdf](http://www.oecd.org/dataoecd/25/3/34786913.pdf).

244. See VAN HARTEN, *supra* note 35, at 5-6; see also Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 48-52 (2007) (summarizing criticism and presenting evidence of win rates in ICSID arbitration).

245. See *supra* notes 211-12.

viability.<sup>246</sup> As an institution, ICSID has attempted to respond in a number of ways. For example, in response to concerns about lack of transparency, ICSID rules now permit the tribunal to allow third parties to attend hearings unless one of the parties objects.<sup>247</sup> ICSID has also expressed support for the creation of an appellate mechanism, although so far no such tribunal has been established.<sup>248</sup>

Although these institutional efforts may have done little to satisfy critics, arbitrators are no doubt aware of the criticism levied against investment arbitration and may conduct the arbitration, or write the award, with the criticism in mind. For example, arbitrators may respond to concerns about lack of transparency by encouraging parties to open the hearings to the public.<sup>249</sup> Most relevant here, arbitrators may also use the award to communicate information designed to appease ICSID's many critics. For example, the award may discuss past awards explicitly and in depth, carefully situating the tribunal's decision within the broader network of decisions rendered by other investment tribunals. This kind of direct engagement signals that the decision resulted from a deliberative, systematic process, rather than from an ad hoc balancing of the equities in a particular case. Likewise, tribunals that explicitly affirm the value of adjudicatory consistency and take pains to explain any disagreement with past awards signal their commitment to predictability as an important system value.<sup>250</sup>

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246. For a discussion of criticism directed at ICSID and proposed solutions, see Franck, *supra* note 33, at 1582-610.

247. RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS R. 32(2) (ICSID), in ICSID, ICSID CONVENTION, REGULATIONS AND RULES, ICSID Doc. ICSID/15/Rev.1 (2003), available at <http://icsid.worldbank.org/ICSID/ICSID/DocumentsMain.jsp> (then follow "ICSID Convention, Regulations and Rules" hyperlink).

248. See Yackee, *Minimalist System*, *supra* note 222, at 317-18; Alvarez, *supra* note 222, at 915.

249. In a few recent cases, the parties did in fact open the hearings to the public. See Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 812 (2008).

250. See *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures ¶ 67 (Mar. 21, 2007), available at <http://icsid.worldbank.org/ICSID/Index.jsp> (search "Saipem"; then follow "ICSID Case No. ARB/05/7" hyperlink; then follow "Decisions & Awards" tab; then follow "Decision on Jurisdiction" hyperlink); see also *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 2007 WL 5366469, ¶ 87 (Nov. 19, 2007).

At least in part, then, the existing system of investment law precedent can be understood as the product of arbitrators' disaggregated efforts to respond to fundamental challenges to ICSID's legitimacy and, more importantly, its viability. This does not mean that ICSID is universally perceived as legitimate. Recent withdrawals from the ICSID Convention suggest to the contrary.<sup>251</sup> Instead, the point is that arbitrators' engagement with past awards, and their professed fealty to adjudicatory consistency, can be understood as a reaction to the very public criticisms of investment arbitration and as an attempt to enhance the perceived legitimacy of the process.

*b. A Counterexample: Employment Arbitration in the United States*

If I am correct that arbitral precedent serves to legitimize investment arbitration, then ICSID may be relatively unique. Indeed, developing a system of precedent will often be a poor strategy for arbitrators seeking to attain legitimacy with external actors. Here, employment arbitration within the United States is especially instructive, particularly when compared to labor arbitration. The comparison yields the insight that arbitrators will often lose legitimacy as producers of law when they compete with adjudicators who enjoy greater perceived lawmaking legitimacy.

Recall that labor arbitration, as traditionally understood, does not substitute for litigation in court.<sup>252</sup> Most labor disputes involve challenges based on a contractually determined "just cause" standard that applies only to employees covered by the relevant CBA. In this sense, the CBA "calls into being a new common law—the common law of a particular industry or ... plant."<sup>253</sup> What this means is that, to the extent labor arbitrators engage in lawmaking activity, they do not compete with courts or other public actors who enjoy greater perceived legitimacy. It follows, too, that labor arbitrators who invest their energies in creating a system of

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251. See, e.g., News Release, ICSID, Ecuador's Notification Under Article 25(4) of the ICSID Convention (Dec. 5, 2007), <http://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp> (follow "Ecuador's Notification under Article 25(4) of the ICSID Convention").

252. See *supra* text accompanying notes 58-62.

253. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960).

precedent are not likely to encounter serious resistance. After all, both employers and unions are likely to derive at least some value from a system of precedent.<sup>254</sup> And although courts asked to confirm or vacate labor arbitration awards do serve some review function, the extent of their review is limited both formally<sup>255</sup> and, less formally but more powerfully, by their sense of “the primacy and exclusivity of arbitration within its proper sphere of contract interpretation.”<sup>256</sup>

In employment arbitration, by contrast, efforts to create a system of arbitral precedent would more likely encounter skepticism or hostility, especially in substantive domains widely believed to be within the exclusive domain of public adjudicators. Statutory discrimination claims are a prime example. Although judicial review in such cases is formally limited,<sup>257</sup> courts are likely to take particular interest in how arbitrators apply antidiscrimination law.<sup>258</sup> Perhaps more importantly, skepticism about the value of arbitral precedent may emanate from actors of even more immediate significance to arbitrators: parties and their lawyers. After all, courts remain active in interpreting the statutes that govern employment relationships, and they regularly produce the contract and tort law that underlies nonstatutory employment disputes.<sup>259</sup>

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254. See *supra* text accompanying notes 157-60.

255. For a discussion of formal review standards, see ELKOURI & ELKOURI, *supra* note 57, at 53-77.

256. Dennis R. Nolan & Roger I. Abrams, *The Future of Labor Arbitration*, 37 LAB. L.J. 437, 438-39 (1986).

257. See 9 U.S.C. § 10 (2006); Ware, *supra* note 16, at 711.

258. For example, courts that require reasoned awards in arbitrations involving federal statutory rights justify the requirement as necessary to judicial review. See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1486-87 (D.C. Cir. 1997). This justification is somewhat fanciful given the limited nature of judicial review of arbitration awards. See, e.g., Ware, *supra* note 16, at 724-25. Nevertheless, the signal to arbitrators—that the relevant law derives from public rather than private sources—is clear.

259. Though a common objection is that arbitration impedes the development of law, the extent to which it does so (if at all) depends on a number of factors. In employment cases, for example, these factors include the prevalence of arbitration clauses; the extent to which employers who arbitrate differ from those who do not (and, thus, the extent to which the disputes remaining in court are likely to produce “skewed” law); the extent to which arbitrators themselves produce law; and the extent to which any arbitral law is consistent with the purposes of employment law generally. Drahozal, *supra* note 20, at 190, 207-14 (discussing several of these points). Moreover, even if over time courts have encountered fewer meaningful opportunities to produce employment law, this may have less to do with arbitration than with employers’ successful use of informal workplace structures to resolve

Because of this, system users are likely to look primarily to these public actors for relevant law and might even view it as usurpative for an arbitrator to base a decision on the authority of past awards, at least when relevant judicial precedent also exists.

Sometimes, of course, parties may choose arbitration precisely *because* they wish to have their conduct judged according to a set of alternate legal rules.<sup>260</sup> In these cases, the arbitrator's lawmaking legitimacy derives *precisely* from the fact that the arbitrator need not follow state-supplied law. When parties choose arbitration for this purpose, it is fair to assume that conflict with judicial precedent will be irrelevant to the arbitrator's decision. Often, however, parties will expect "to have their conduct judged by external legal standards,"<sup>261</sup> and in such cases arbitrators are likely to base their decisions on external authority whenever possible.<sup>262</sup>

*c. The Arbitrator's Role in Fashioning Norms Concerning Arbitral Precedent*

As the example of employment arbitration illustrates, ICSID may be relatively unique in that reliance on arbitral precedent enhances, rather than detracts from, the perceived legitimacy of the process. This Section briefly describes a second attribute that may distinguish ICSID from many other systems of arbitration: investment arbitrators are well positioned to create and diffuse norms about arbitral lawmaking.

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disputes (and, in employment discrimination cases, the deference these structures receive from courts). As I have argued elsewhere, the current preoccupation with arbitration obscures what is perhaps a more important development: the internalization of dispute resolution within the workplace. See W. Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J.L. REFORM 843, 849 (2008).

260. See *supra* text accompanying notes 71-74.

261. Rau, *supra* note 126, at 88.

262. Cf. Lee, *supra* note 155, at 25-26 (suggesting that cost would deter arbitrators from fashioning an alternative antitrust law even if they were allowed to do so). This is a slightly different point from the one I am making. To be sure, parties who do not wish to contract around antitrust law are not likely to fund the creation of an entirely different legal regime. Still, they might derive some value from consistent application of arbitral awards in areas where judicial authority was lacking. Given sufficiently strong norms against arbitral lawmaking, however, even such weak forms of arbitral precedent might not arise.



Multiple actors constitute the world of investment arbitration, including states, multinational corporations and law firms, elite international lawyers, arbitrators, academics, and nongovernmental organizations with investment-related agendas, to name just a few. Though these actors have discrete agendas and incentives, the boundaries between them are permeable, especially to arbitrators. Already an elite group, ICSID arbitrators not only preside over investment arbitrations; many are also prominent academics, lawyers who represent clients in investment disputes, or both.<sup>263</sup> This places arbitrators in an ideal position from which to foster a vision of ICSID as a system for promoting “the harmonious development of investment law.”<sup>264</sup> In this vision, although “[i]t may be debatable whether arbitrators have a *legal* obligation to follow precedents ... they have a *moral* obligation to follow precedents so as to foster a normative environment that is predictable.”<sup>265</sup>

As a rule, of course, arbitrators become arbitrators after achieving some degree of professional success as an attorney, an academic, or in some other relevant field. These and other experiences and attributes facilitate entry into the profession and influence marketability. In this sense, arbitration creates a market in “symbolic capital” in which an arbitrator’s professional and other characteristics confer legitimacy and authority with other system participants.<sup>266</sup> Prominent academics, lawyers, and former politicians and judges, to name just a few, may possess more symbolic capital and be more highly sought as arbitrators.<sup>267</sup>

To a degree, this is true of all arbitration systems, including international commercial arbitration.<sup>268</sup> But it is especially true of

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263. See Craig Forcece, *Does the Sky Fall?: NAFTA Chapter 11 Dispute Settlement and Democratic Accountability*, 14 MICH. ST. J. INT’L L. 315, 329 (2006); Franck, *supra* note 33, at 1597-98; Judith Levine, *Dealing with Arbitrator “Issue Conflicts” in International Arbitration*, DISP. RESOL. J., Feb.-Apr. 2006, at 60, 62; Jan Paulsson, *ICSID’s Achievements and Prospects*, 6 ICSID REV.—FOREIGN INV. L.J. 380, 395 (1991).

264. *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures ¶ 67 (Mar. 21, 2007), *available at* <http://icsid.worldbank.org/ICSID/Index.jsp> (search “Saipem”; then follow “ICSID Case No. ARB/05/7” hyperlink; then follow “Decisions & Awards” tab; then follow “Decision on Jurisdiction” hyperlink).

265. Kaufmann-Kohler, *supra* note 48, at 374.

266. DEZALAY & GARTH, *supra* note 126, at 18-19.

267. *Id.* (describing international commercial arbitrators).

268. *See id.*

investment arbitration, in which private parties assert claims against sovereign states.<sup>269</sup> As I have noted, these disputes place a premium on voluntary compliance and on extralegal means of enforcement.<sup>270</sup> Because of this, successful arbitrators must have a great deal of symbolic capital, for system users will favor those who “have clout with other arbitrators and with the parties who must obey the decision.”<sup>271</sup> Thus, as extremely prominent figures in the world of investment arbitration, ICSID arbitrators are not merely adjudicators, though of course that is part of their function. They occupy multiple spaces within that world, effectively collapsing the barriers between ICSID’s various actors.<sup>272</sup> This enables arbitrators to play a constitutive role somewhat at odds with the “arbitrator as agent” model that underlies arbitration law in the United States.<sup>273</sup> And they have used that role, in part, to foster system norms that legitimize the use of arbitral precedent.<sup>274</sup>

### III. MORE SPECIFIC HYPOTHESES ABOUT THE OPERATION OF ARBITRAL PRECEDENT

The discussion to this point has been, of necessity, somewhat abstract. I have attempted to demonstrate that we can profitably analyze the role of precedent in a diverse group of arbitration systems by invoking a limited number of considerations. This final Part moves from the abstract to the concrete. Drawing on the general discussion thus far, it offers some specific hypotheses about the ways in which arbitrators are likely to use precedent and suggests a preliminary answer to the question posed earlier:

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269. See VAN HARTEN, *supra* note 35, at 58-59.

270. See *supra* text accompanying notes 79-80, 102-04.

271. DEZALAY & GARTH, *supra* note 126, at 18 (referring to arbitrators in international commercial disputes).

272. Thus, many of the most frequently selected ICSID arbitrators also hold prominent academic appointments. See Commission, *supra* note 34, at 140 tbl.2; see also Franck, *supra* note 33, at 1597-98 (noting that investment arbitrators “are of the highest international order and are distinguished former judges, respected scholars and practitioners, as well as former government officials or others who have worked with international organizations”).

273. See *supra* text accompanying note 192.

274. See also Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 GEO. WASH. INT’L L. REV. 685, 724-25 (2007); Tai-Heng Cheng, *Power, Authority, and International Investment Law*, 20 AM. U. INT’L L. REV. 465, 518-20 (2005).

whether “modern-day arbitrators fashion a commercial, antitrust, employment, maritime, securities, and contract law?”<sup>275</sup>

Consider first the prediction that some form of arbitral precedent will arise in any system featuring reasoned, accessible awards. At times, the arbitration literature comes close to suggesting this possibility,<sup>276</sup> and, as I argued above, it is not entirely implausible.<sup>277</sup> But my reasons for doubting this prediction—at least when offered as a general prediction applicable to all systems of arbitration—should now be clear. One reason for doubt is that parties may, and sometimes do, enter arbitration contracts that effectively forbid arbitrators to develop precedent. Though the arbitration literature is largely silent on this possibility, I do not take it to deny that parties may prevent the creation of arbitral precedent in this manner.

But even refined to predict that reasoned, accessible awards will yield a system of precedent *as long as the relevant contract does not say otherwise*, the hypothesis is difficult to defend. For one thing, when disputes are governed by a thick body of state-supplied law, arbitral precedent will serve little function. In such cases, parties are not likely to research past awards themselves or to appreciate arbitrators who invoke such awards in the face of ample judicial or other authority. Moreover, participants in some arbitration systems may view public rather than private actors as the primary, and perhaps the only, legitimate producers of law. For example, I have suggested that employment arbitrators in the United States are not likely to produce a system of precedent because, in this context, arbitrators will lack lawmaking legitimacy.<sup>278</sup>

Nevertheless, the role of reasoned, accessible awards merits further exploration. As employment arbitration illustrates, there are unsettling implications to the hypothesis that these structural features might be sufficient to produce a system of arbitral precedent. For example, some courts require arbitrators to issue reasoned awards in cases involving statutory rights, justifying this mandate as necessary to facilitate judicial review.<sup>279</sup> But if reasoned,

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275. Carbonneau, *supra* note 2, at 1202.

276. *See supra* note 92.

277. *See supra* notes 131-53 and accompanying text.

278. *See supra* Part II.C.3.b.

279. *See Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1486-87 (D.C. Cir. 1997). As noted

accessible awards are sufficient to produce some form of arbitral precedent, these mandates applicable to “public law” cases may have the (surely unintended) effect of facilitating the creation of *private* legal rules.

Another set of hypotheses relates to the role of arbitrators and other system participants in generating precedent. For example, we might learn something about the function served by precedent through exploring its use by repeat-play arbitrators. One possibility is that repeat-play arbitrators will be more familiar with past awards and thus more likely to cite them. Alternatively, established arbitrators may be *less* likely to cite prior awards, perhaps because they feel secure in the market for arbitration services; they are being paid for their judgment, not for their knowledge of what other arbitrators have done. Note that these divergent hypotheses reflect very different views of the function served by arbitral precedent. The first hypothesis suggests that precedent serves as a vehicle for capturing and signaling professional status and prestige.<sup>280</sup> The second suggests quite the contrary—past awards provide a form of cover, and invoking them is, in a sense, a low-status act.<sup>281</sup>

Other research might explore the role of disputants and their lawyers in shaping the *content* of any arbitral precedent. Here, information asymmetries between the disputants (or between their lawyers) become especially relevant. Privately made law, of course, is likely to differ from publicly made law, most obviously because private parties are not likely to fund the production of law that seriously disadvantages them.<sup>282</sup> This fact—already problematic in disputes calling for application of mandatory law—becomes especially so when users have unequal access to information about arbitrators’ past awards.<sup>283</sup> Future research might explore the impact of these asymmetries on the law that is created and applied in arbitration, as well as the extent to which arbitrators, or the institutions that identify and train them, might prove a moderating influence.

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previously, this justification is somewhat fanciful given the limited nature of judicial review of arbitration awards. *See supra* note 177.

280. On this point, see *supra* text accompanying notes 233-35.

281. *See supra* text accompanying notes 196-98.

282. *See* Landes & Posner, *supra* note 14, at 239.

283. *See, e.g.,* Gibbons, *supra* note 92, at 772-73.

Still other hypotheses relate to the potentially legitimizing function of precedent. Recall that the existing system of ICSID precedent may have resulted from arbitrators' efforts to attain legitimacy in the eyes of a wide range of external actors.<sup>284</sup> That strategy is a rational response to criticisms levied against ICSID, especially the criticism that tribunals rendered ad hoc, inconsistent decisions.<sup>285</sup> But it would be a mistake to suppose that arbitrators will seek to create precedent whenever critics object to the arbitration system's supposedly ad hoc nature. As a strategy for attaining legitimacy, precedent creation makes sense only within the relatively unique confines of ICSID. As I have noted, because most investment-related disputes are resolved in arbitration, arbitrators bear the primary responsibility for lending certainty and predictability to investment transactions.<sup>286</sup> Without a more "legitimate" body of law to profess fealty to, arbitrators can deflect some of the criticism by fashioning a body of arbitral precedent.

But we should expect rather different legitimacy-seeking strategies when arbitrators preside over disputes that also appear in court, especially when courts are perceived to be more legitimate producers of law. Once again, consider employment arbitration as an example. At least when conducted pursuant to predispute arbitration agreements, employment arbitration has long provoked controversy.<sup>287</sup> Moreover, because the prevailing party in an employment arbitration is likely to require judicial assistance to enforce the award, arbitrators can be expected to draft awards that courts will perceive as legitimate. In such cases, not only will arbitrators *not* rely on arbitral precedent, they may quite explicitly signal their reliance on, and fidelity to, state-created law by citing and purporting to follow judicial precedent.<sup>288</sup>

The foregoing discussion suggests an answer to the question: whether "modern-day arbitrators fashion a commercial, antitrust, employment, maritime, securities, and contract law."<sup>289</sup> At least

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284. See *supra* Part II.C.3.a.

285. See *supra* text accompanying notes 241-46.

286. See *supra* text accompanying notes 230-31.

287. See Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 379 (2006).

288. By contrast, in less controversial forms of arbitration, we might expect that arbitrators will often decide cases without citing any precedent at all.

289. Carbonneau, *supra* note 2, at 1202.

with respect to antitrust, employment, and securities law, the answer is likely to be “no,” at least not yet. Indeed, there is reason to doubt that arbitral precedent will evolve in any U.S. arbitration systems involving federal statutory rights, at least as long as courts continue to preside over comparable cases and continue to view arbitration with hostility.<sup>290</sup> In antitrust and employment disputes, for example, arbitration substitutes for litigation before national courts.<sup>291</sup> Because courts view arbitration with some suspicion and are frequently involved in enforcing arbitration agreements and awards, the need to attain legitimacy with these external actors may lead arbitrators to produce awards that emphasize their fidelity to state-supplied law.<sup>292</sup> Moreover, because courts continue to preside over employment and antitrust litigation, system users are not likely to derive great benefits from a system of arbitral precedent. Indeed, any effort to create a robust system of precedent might encounter skepticism or outright resistance.<sup>293</sup>

The explanation is somewhat different for securities disputes. Although securities arbitration often involves nonwaivable statutory rights,<sup>294</sup> arbitration is thought to be the principal method of resolving disputes involving broker-dealers.<sup>295</sup> Securities arbitration thus bears some weak resemblance to investment arbitration; in each case, arbitrators preside over disputes that might otherwise be heard in national courts (or, in the case of ICSID, before some more publicly accountable international tribunal). But because virtually all disputes are resolved in arbitration, the responsibility to generate substantive legal rules falls by default to arbitrators. Thus, it

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290. See Michael H. LeRoy, *Misguided Fairness? Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality*, 83 NOTRE DAME L. REV. 551, 556 (2008) (noting that “there is now a measurable degree of judicial hostility to arbitration in state courts”).

291. See John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219, 227-28 (1986) (noting that the Federal Arbitration Act of 1925 requires federal courts to stay litigation on any issue that is within the scope of a valid arbitration clause).

292. See *supra* text accompanying note 288.

293. See *supra* text accompanying notes 258-59.

294. See Brunet & Johnson, *supra* note 92, at 489.

295. See THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* § 15.1, at 638-41 (2009); Jennifer J. Johnson & Edward Brunet, *Critiquing Arbitration of Shareholder Claims*, 36 SEC. REG. L.J. 181, 182 (2008); Johnson, *supra* note 232, at 124.

is possible that securities arbitration, like investment arbitration, might evolve system norms that support arbitral lawmaking.<sup>296</sup>

The fundamental problem, however, is that securities arbitration is structurally inconsistent with the creation of precedent. Securities arbitration awards are published, and securities arbitrators may, and sometimes do, issue reasoned awards.<sup>297</sup> But historically, norms in securities arbitration have disfavored reasoned awards,<sup>298</sup> and the available evidence suggests that securities arbitrators do not often issue them. For example, in an examination of customer cases closed by NASD arbitrators in 2003 and 2004, Professor Jennifer Johnson found that fewer than 5 percent of the awards provided even a brief explanation for the result, and fewer than half of these included anything “that would be deemed an opinion by any stretch of the definition.”<sup>299</sup> Because most securities awards are unreasoned, it is unlikely that arbitrators will view them as having any value as precedent.<sup>300</sup>

Note one important implication of this discussion: none of these arbitration systems is *incapable* of producing precedent. As I have argued elsewhere, arbitration systems may generate precedent even in disputes raising federal statutory questions.<sup>301</sup> In securities arbitration, the problem is largely structural: the lack of reasoned

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296. See *supra* note 222.

297. For cases filed before April 16, 2007, NASD rules require a written award that identifies the parties and their lawyers, summarizes the issues in dispute, the relief requested, the damages or other relief awarded, other issues resolved, and other basic information. See NASD, CODE OF ARBITRATION R. 10330 (Nat’l Ass’n Sec. Dealers 2009), <http://www.finra.org/ArbitrationMediation/Rules/CodeOfArbitrationProcedure/> (then follow “Code of Arbitration Procedure” hyperlink). In cases filed after that date, the rules are similar but add that the award “may contain a rationale underlying the award.” CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES R. 12904(f) (Fin. Indus. Regulatory Auth. 2009), <http://www.finra.org/ArbitrationMediation/Rules/CodeofArbitrationProcedure/> (then follow “Customer Code” hyperlink); see also *id.* at R. 13802(e).

298. See, e.g., Brunet, *supra* note 33, at 1484 (noting that securities arbitration awards did not provide written findings or opinions and that recent changes by NASD had merely required awards to “state the issues covered”).

299. Johnson, *supra* note 232, at 144-45.

300. See *Koruga v. Ming Wang*, NASD No. 98-04276, 2000 WL 33534559, at \*11-12 (2001) (Meyer, Arb.) (noting that the parties had collectively cited twenty prior arbitrations in support of their respective positions but that none of the cited awards “purport[ed] to explain why the clearing broker, under the facts of the specific case, is either legally insulated from liability or, on the other hand, is liable to customers for the fraud of their correspondents”).

301. See W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 103-06 (2007).

awards. In antitrust and employment arbitration, the explanation lies in the fact that courts continue to produce relevant law, continue to view arbitration with hostility, or both. Together, these factors reduce system users' demand for arbitral precedent, the incentives for arbitrators to produce it, and the perceived legitimacy of arbitrators as producers of law. Yet these conditions may change and, if they do, we may yet see arbitrators develop antitrust, employment, and securities law.

Much of the preceding discussion highlights the relevance of attitudes concerning arbitrators as producers of law. Thus, I close with a final hypothesis: such attitudes may be "sticky." That is, it is possible that norms concerning the propriety of arbitral lawmaking—whether permissive or restrictive—may be *too* strong. For example, arbitrated statutory rights disputes may also raise a host of recurring issues that public actors may overlook, never consider, or lack power to change. These include routine procedural questions that arise in arbitration,<sup>302</sup> as well as contract interpretation questions when all disputes under the relevant contract—say, an employee handbook—are referred to arbitration. On questions like these, system users might plausibly derive some benefit from a system of arbitral precedent. Yet if I am correct that participants in employment arbitration systems generally do not view awards as legitimate sources of authority, a system of precedent may not arise. That is, the general norm against treating past awards as precedent might crowd out some legitimate and possibly beneficial lawmaking opportunities.

Conversely, in systems featuring strong norms legitimizing reliance on past awards, that general norm might lead arbitrators to rely on past awards even when adjudicating claims invoking statutory rights. Labor arbitrators, for example, frequently adjudicate claims that include allegations of discrimination, although these are typically contract-based, rather than statutory claims.<sup>303</sup>

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302. Cf. Bjorklund, *supra* note 48, at 190-94 (noting that investment treaties are unlikely to address procedural matters and that the development of arbitral precedent seems inevitable).

303. Labor arbitrators encounter at least two such claims. First, an employee may be disciplined or discharged for violating company policies designed to prevent or remedy workplace discrimination. See, e.g., *In re Allied Tube & Conduit Corp.*, 118 Lab. Arb. Rep. (BNA) 555, 561 (2003) (Salkovitz Kohn, Arb.) (concluding that the employer lacked just cause to discipline employee for failing to report alleged sexual harassment as required by company policy). Second, an employee may claim that the employer has acted in a discriminatory



After *14 Penn Plaza LLC v. Pyett*, however, labor arbitrators may more frequently encounter statutory discrimination claims.<sup>304</sup> To what extent will labor arbitrators' permissive views regarding the use of arbitral precedent affect their handling of these disputes? These questions follow from the recognition that different arbitration systems feature varying attitudes towards arbitrators as producers of law.

### CONCLUSION

Few of the questions I have asked bear on the *content* of arbitral precedent. Such questions are important, of course, and worthy of further inquiry. But they are logically secondary to questions concerning whether and when arbitrators generate precedent at all. As investment and labor arbitration clearly demonstrate, the "whether" question cannot seriously be debated. At a minimum, then, the arbitration literature should acknowledge that fact.

Much remains unknown about the "when" question, and this Article has offered only a modest beginning. Yet arbitration is not a unitary phenomenon. Arbitration systems may differ in a variety of ways, including their award-writing and publication practices; the parties, lawyers, and arbitrators involved; the applicable substantive law; the incentives under which arbitrators operate; the extent to which arbitration substitutes for litigation in court; the perceived legitimacy of arbitrators as lawmakers; and countless other differences that likely impact each system's operation and capacity to create precedent. The goal of this Article has been to provide an analytical framework for taking these differences into account. By doing so, future research can shed valuable light on arbitration, not only as a dispute resolution mechanism, but also as a method for generating robust systems of private law.

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manner in violation of a nondiscrimination provision in the CBA. *See, e.g.*, *In re Akzo Noble Coatings, Inc.*, 115 Lab. Arb. Rep. (BNA) 1093, 1096-97, 1100 (2001) (Fullmer, Arb.) (finding that employer's failure to qualify employee for job vacancy did not violate nondiscrimination provision in CBA). It bears repeating that, in such cases, the arbitrator's task is to interpret and apply the CBA.

304. 129 S. Ct. 1456, 1474 (2009) (holding that federal law requires enforcement of provision in collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims under the Age Discrimination in Employment Act).