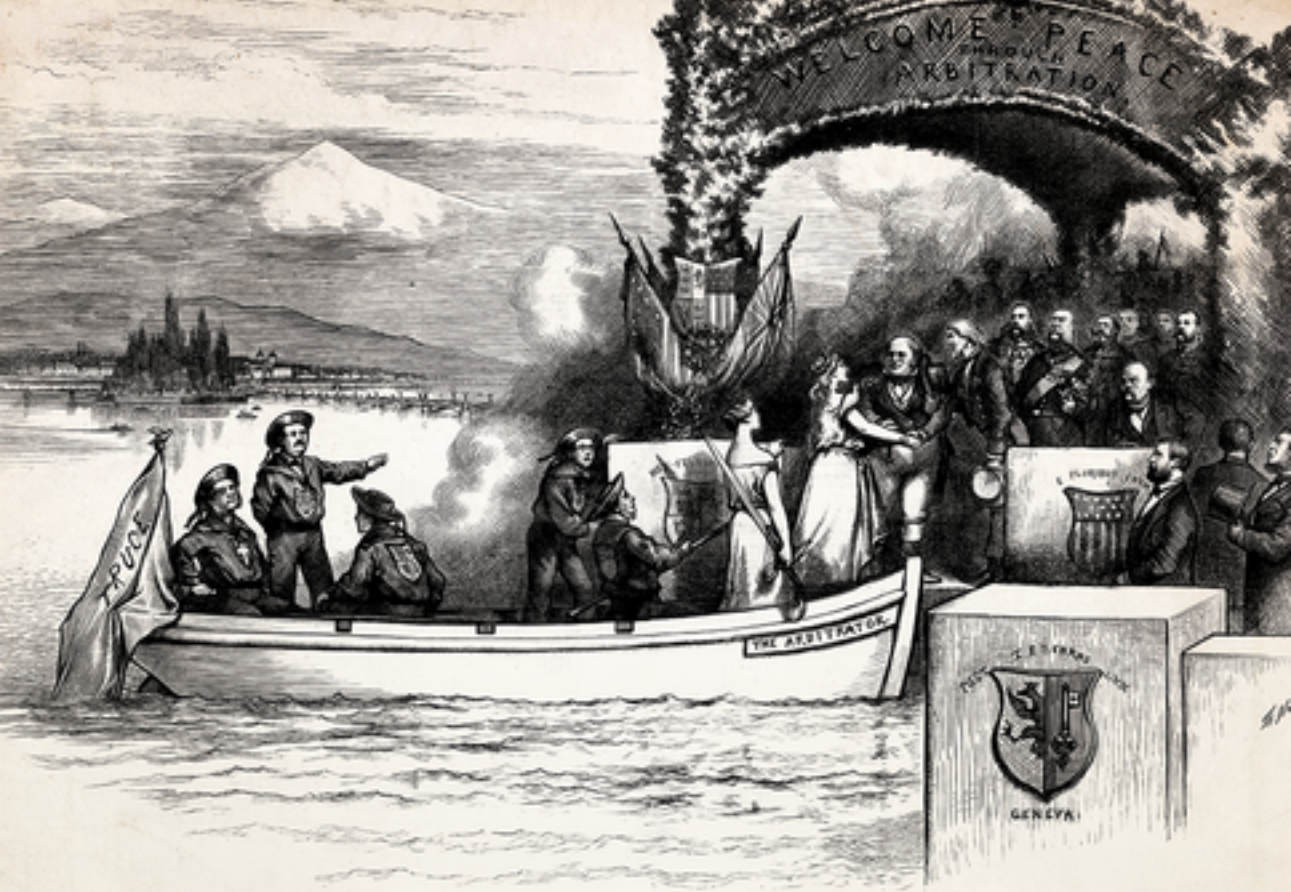

PRACTISING VIRTUE

Inside International Arbitration

Edited by David D. Caron, Stephan W. Schill,
Abby Cohen Smutny, Epaminontas E. Triantafilou

OXFORD

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Preface

This book is dedicated to The Honorable Charles Nelson Brower in celebration of his 80th birthday. It assembles essays written as a token of friendship on various aspects of international arbitration, the field on which Charles' bold, original, and insightful reasoning and writing has had a profound influence over the past decades. The book is a tribute both to an exceptional international lawyer and to an extraordinary human being who, as mentor, friend, and colleague, leads by example and inspires peers and generations of younger lawyers in their commitment to advance the conduct of international affairs on the basis of the international rule of law.

Today, Charles N Brower is perhaps best known as one of the world's leading, most in-demand, international arbitrators. Yet, his contributions to international law and practice are much richer and varied, encompassing the public and private spheres, practice and academia. In private practice, as an associate and then partner of the law firm of White & Case, Charles N Brower became an accomplished advocate, based first in New York, handling federal and state court litigation throughout the United States, and later as a founding member of the firm's Washington, DC office, where he specialized in handling disputes involving states and state entities. Increasingly, his practice focused on international arbitration, investor-state disputes, and specifically ICSID arbitration, serving as counsel in numerous precedent-setting cases in the field of international investment law. He also appeared in several cases before the International Court of Justice and other international bodies, such as the United Nations Compensation Commission.

In public service, Charles N Brower has held several high positions within the US State Department, as Assistant Legal Adviser for European Affairs, as Deputy Legal Adviser and then as Acting Legal Adviser, the chief lawyer of the Department and principal international lawyer for the US Government. During his tenure at the State Department, among other things, he presided over the signing of the Quadripartite Agreement on Berlin and worked on the conclusion of several important trade agreements between the United States and the Soviet Union. He also served as Deputy Special Counsellor to the President of the United States during the Reagan Administration, as Judge ad hoc on the Inter-American Court of Human Rights, and most recently as Judge ad hoc on the International Court of Justice.

In 1983, Charles N Brower was first appointed to the Iran-United States Claims Tribunal, where he continues to serve to this day. Over his many years on the Tribunal, Judge Brower has had a deep impact on the development of international investment law and on the clarification of the rules relating to the expropriation of alien property in particular. His clear and incisive decisions, particularly in regard to issues relating to compensation and the valuation of property, are recognized as some of the most important in the field.

Charles N Brower also has been a leader in the legal community, making contributions to numerous international institutions, including by serving as President of the American Society of International Law, Chairman of the Institute for Transnational

Arbitration, member of the Executive Council of the International Law Association, Chair of the International Law Section of the American Bar Association, as well as member of the American Bar Association's House of Delegates and Board of Governors.

Last but not least, Charles N Brower has long been a thought-leader in the field of international dispute resolution. He is the author of dozens of scholarly works, including the leading book on the jurisprudence of the Iran-United States Claims Tribunal, which was awarded the Certificate of Merit of the American Society of International Law. He has been a Visiting Fellow at Cambridge University (Jesus College and the Lauterpacht Research Centre for International Law), and was selected as John A Ewald, Jr Distinguished Visiting Professor at the University of Virginia School of Law. He also lectured at The Hague Academy of International Law; the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg; the Rheinische Friedrich-Wilhelms-Universität Bonn; Yale Law School; Duke University School of Law; City University, Hong Kong; Leiden University; Harvard Law School; University of Mississippi School of Law and the Croft Institute for International Studies, University of Mississippi; University of Baltimore School of Law; the Fletcher School of Law and Diplomacy; Florida State University College of Law; George Washington University School of Law; and Villanova University School of Law.

As a consequence of his unwavering involvement in international law and dispute resolution, the American Society of International Law, in 2009, awarded Charles N Brower, as one of the few practitioners ever, the Manley O Hudson Medal for outstanding contributions to scholarship and achievement in international law. Since then, he has received numerous further awards, including the Pat Murphy Award for exceptional civic contributions and extraordinary professional achievements in international arbitration by the Institute for Transnational Arbitration of the Center for American and International Law, a Lifetime Achievement Award bestowed by the Section of International Law of the American Bar Association, and the Stefan A Riesenfeld Memorial Award in recognition of outstanding achievements and contributions in the field of international law presented by the University of California Berkeley School of Law and the Berkeley Journal of International Law.

But beyond all formal merits, for the editors of this volume, and for the many others who have had the pleasure of working with him, Charles N Brower has been first and foremost a mentor, teacher, and friend, constantly fostering and inspiring commitment to the highest standards of scholarship and professionalism in the service of the rule of law. We hope that this work lives up to these standards and serves both as a lasting tribute to Charles N Brower's impact on international arbitration and a heartfelt hurrah to celebrate his birthday.

David D Caron
Stephan W Schill
Abby Cohen Smutny
Epaminontas E Triantafilou

London, Amsterdam/Heidelberg, Washington, DC
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Practising Virtue

An Introduction

David D Caron, Stephan W Schill, Abby Cohen Smutny, and Epaminontas E Triantafilou

Moving Inside International Arbitration

This book is about what international arbitrators do, and what they ought to do. It aims at providing a deeper understanding of the functioning of, and challenges facing, international arbitration. It does so by inviting eminent international arbitrators to reflect on how they view the practice of international arbitration from the inside, rather than by providing an account of the governing national and international legal frameworks. This is timely given the increasing relevance of international arbitration and the surging interest in the system that has emerged from the application of legal principles by arbitral tribunals to disputes that span the globe.

In fact, international arbitration has become one of the principal mechanisms to settle cross-border disputes arising from a variety of legal relationships, including between States, between private commercial actors, and between private and public entities.[1] Its growth is due to the steep increase in international trade, commerce, and investment, coupled with the lack of judicial institutions, either at the national or the international levels, that could provide a neutral and effective mechanism for the settlement of emerging disputes. From this functional rationale, international arbitration has developed into a global system of adjudication that operates to a large extent according to its own procedural rules and dynamics, independently of domestic and international law. Structurally, international arbitration therefore may be better understood as part of a transnational justice system that cannot be grasped entirely through the conventional categories of national and international, private and public law.[2]

[1] The International Chamber of Commerce in Paris alone, one among now numerous arbitral institutions between New York and Singapore, São Paulo, and Stockholm, has been administering, in the past fifteen years, more than 700 proceedings per year. See International Chamber of Commerce, 'ICC in 2014—Programme of Action 2014' (2014) 6 <http://www.iccwbo.org/news/brochures> accessed 18 January 2014. The Permanent Court of Arbitration currently lists ninety-one pending cases, out of which six are inter-State and eighty-five are investor-State cases. See <http://www.pca-cpa.org/showpage.asp?pag_id=1029> accessed 18 January 2014. Investment treaty-based arbitrations have grown to over 568 disputes by the end of 2013. See UNCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDS)', IIA Issue Note No. 1, 1 (April 2014) <http://unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf> accessed 18 January 2014.

[2] The notion of transnational law used in this context draws on Philip Jessup, *Transnational Law* (Yale University Press 1956) 2: 'Nevertheless I shall use, instead of "international law", the term "transnational law" to include all law which regulates actions or events that transcend national frontiers. Both public

The increasing importance of international arbitration as part of a transnational justice system is reflected in both the tectonic changes taking place in the practice of international arbitration and the increasing attention it has attracted from all major players in the field of law—private parties, including corporations, governments, non-governmental organizations, domestic courts, and academia. In response to its growing importance and use by disputing parties, international arbitration has become increasingly institutionalized, professionalized, and judicialized. At the same time, it has gained significance beyond specific disputes or disputing parties. International arbitration has become an institution that contributes to the shaping of law. International arbitration, in other words, does not function simply as a Montesquieuan *bouche de la loi*, passively applying pre-existing legal rules to the facts of the cases. Rather, it contributes significantly to making the rules and principles governing international economic transactions, both private and public.[3] International arbitrators are therefore not only transnational adjudicators, but they also contribute to the progressive development of transnational law. This, in turn, has given rise to concerns over the legitimacy of international arbitration.

While practitioners and scholars of international arbitration have begun to reflect on arbitration's increased importance,[4] so far this has had little influence on the scholarship addressing international adjudication generally.[5] The relatively modest footprint of international arbitration in international legal theory can be traced to two main causes. First, international arbitration historically has not been readily accessible for those who do not practise or study it closely. For those 'outside' (so to speak) international

and private international law are included, as are other rules which do not wholly fit into such standard categories.' Under this perspective, Jessup invited a perspective on all laws, whether public or private, national or international, that concern the regulation of matters transcending national frontiers.

[3] Walter Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration' (2011) 55 International Organization 919; A Claire Cutler, *Private Power and Global Authority: Transnational Law Merchant in the Global Political Economy* (Cambridge University Press 2003); Alec Stone Sweet, 'The New Lex Mercatoria and Transnational Governance' (2006) 13 Journal of European Public Policy 627; Benedict Kingsbury and Stephan W Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law' in Albert J van den Berg (ed), *50 Years of the New York Convention*, ICCA Congress Series No. 14 (2009) 5; Christopher A Whytock, 'Private-Public Interaction in Global Governance: The Case of Transnational Arbitration' (2010) 12(3) Business and Politics, Article 10; UC Irvine School of Law Research Paper No. 2012–18 <http://ssrn.com/abstract=2034561> accessed 18 January 2014; Walter Mattli and Thomas Dietz, *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press 2014).

[4] See inter alia Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010); Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013).

[5] International arbitration plays, if at all, only a minor role in the burgeoning literature on international courts and tribunals. See, eg, Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press 2014); Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press 2014); Cesare Romano, Karen Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014); Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014). Notable exceptions are Gary Born, 'A New Generation of International Adjudication' (2012) 61 Duke LJ 775, who argues that international arbitration is attributed too little attention in constructing a theory on international adjudication, and David D Caron, 'The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution' (1990) 84 American Journal of International Law 104, who argues that disputes have migrated between the dockets of interstate adjudication and international commercial and investment arbitration.

arbitration, the functioning of the arbitral process appears opaque. This is largely due to the confidential nature of most international arbitrations, with the possible exception of inter-State and investor-State proceedings, where arbitral awards tend to be public. Second, international arbitration scholarship, historically, has not extensively addressed the influential role played by international arbitrators in contributing to an emergent body of procedural and substantive law accepted transnationally. Arbitration literature still mostly treats international arbitration as an object of national and international regulation, not as a source of transnational legality.[6]

The present book looks at international arbitration from the 'inside', with an emphasis on its transnational character. Instead of concentrating on the national and international law governing international arbitration, it focuses on those practising international arbitration, in order to understand how international arbitration actually works, what its sources of authority are, and what legitimacy demands it must meet. Putting those who practise arbitration—in line with Luhmann's systems theory of law—into the centre of the system of international arbitration also allows us to appreciate the way in which they contribute to the development of the law they apply.[7]

The importance of those inside international arbitration is connected to the powers arbitrators have. These encompass both the competence of arbitral tribunals to determine their own jurisdiction, that is, whether the disputing parties have concluded a valid agreement to arbitrate, and their power to decide on the parties' mutual rights and obligations. Domestic courts, in turn, typically have a limited role in reviewing arbitration proceedings, which is largely directed towards ensuring due process and the enforcement of the parties' rights during and after the arbitration proceedings, usually without reviewing the outcome on the merits. In addition, the practice of international arbitration has adopted and continues to evolve cultural and communicative practices that translate into a distinct international arbitration culture; this culture also influences how arbitrators apply and further contribute to the development of the applicable law,[8] thus vesting international arbitration with further autonomy from other legal systems.

Focusing on the practice of international arbitration, instead of on the governing legal rules and principles, may come as a surprise. This perspective is not unprecedented, however. Almost twenty years ago, in 'Dealing in Virtue', their ground-breaking sociological study of international arbitration, Yves Dezalay and Bryant Garth emphasized the central role of arbitrators by showing that a small elite group of lawyers engaged in the practice of international dispute resolution was actively building a transnational legal order that was largely independent from specific national legal practices. The present book relies on the insights of 'Dealing in Virtue', but takes them a step further. While Dezalay and Garth, when describing international arbitration from a sociological perspective, focused on the fact that arbitrators are remunerated

[6] In this sense Thomas Schultz, *Transnational Legality—Stateless Law and International Arbitration* (Oxford University Press 2014).

[7] Cf Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1988) 320–5.

[8] See Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford University Press 2013).

in return for their 'virtue' in judgment, neutrality, and expertise,[9] this volume invites eminent arbitrators to reflect on the actual practice of international arbitration, and its contribution to the transnational justice system. Rather than being about 'dealing in virtue', this book is about 'practising virtue' in international arbitration.

In pursuing this idea, the book does not propose a comprehensive framework to analyse the structure and nature of international arbitration. Instead, it offers a platform for reflection on the foundations of international arbitration, its functioning and challenges to more than forty authors, who are themselves core actors—as arbitrators, counsel, and scholars—in international commercial and investment arbitration. Providing a platform for views from within international arbitration reflects the conviction that consideration of those insights is a necessary component to understanding what it means to 'practise virtue' in international arbitration.

International Arbitration as Part of the Transnational Justice System

The contributions in this book are grouped around specific themes. *Part I* contains contributions that analyse international arbitration as an institution that forms part of the transnational justice system. This system both serves to protect rights in settling cross-border disputes and contributes to the development of global legal standards.

Sundaresh Menon lays out an understanding of international arbitration as part of a transnational system providing access to justice. As he shows, access to justice in international arbitration has the advantage of concentrating dispute settlement in a single arbitral forum, avoiding multiple, and potentially conflicting, decisions in domestic courts. Moreover, this concentration creates an opportunity for arbitral tribunals to develop global legal standards governing transborder economic relations. At the same time, understanding international arbitration as part of a transnational justice system has a normative sting. It requires, as Menon shows, that the system itself lives up to the highest demands for administering justice. This allows criticism of delays, high costs, and the lack of ethical standards in international arbitration, as well as unpredictability in court overview of arbitration and enforcement of arbitral awards.

The idea that international arbitration forms part of a justice system is also reflected in *Alan Redfern*'s contribution on the development of international arbitration over time. In his view, one of the most characteristic features of this development has been the professionalization of international arbitration. This professionalization can be seen in legal education, with international arbitration now being taught in various universities, in the way law firms organize themselves in international arbitration groups, in the practice of international arbitration institutions, and in the increasing activity of professional organizations. This development not only leads to an increasing institutionalization, but also has the effect that arbitration increasingly resembles the judicial process to which we are accustomed from the domestic context.

[9] Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996) 8.

Piero Bernardini's contribution reflects on whether international arbitration can be analysed as part of one overarching framework or is better seen in a more differentiated fashion. Addressing the basic procedural features of international commercial and investment treaty arbitration, including the agreement to arbitrate, applicable law and procedure, confidentiality versus transparency, cost allocation, and dissenting opinions, he points out commonalities between both forms of international arbitration, but also cautions that differences should not be overlooked. This calls for a differentiated analysis of international arbitration depending on the dispute involved, but at the same time underlines the need for overarching and cross-cutting analysis.

Eduardo Zuleta then highlights that international dispute resolution not only has the function to settle individual disputes, but also has governance effects. These effects emerge because, even though there is no doctrine of precedent in international law and arbitration, international dispute settlement bodies often embed their decision-making in an extensive and thorough analysis of decisions previously rendered within the same regime or by other international bodies addressing the same or related points of law. International dispute settlement bodies therefore incrementally construe and develop norms for both private–private and private–public relations. Analysing investment treaty arbitration, human rights jurisprudence and disputes under state contracts, Zuleta identifies several of these rules and principles, such as the concept of the rule of law and due process.

James H Carter turns to the question of legitimacy of international arbitration. Responding to Jan Paulsson's suggestion that all arbitrators should be appointed by an institution, not the parties, he stresses the fundamental importance of the party-appointment of arbitrators for the parties' trust in the system. Furthermore, Carter points to the moderating effect the community of arbitrators has on individual arbitrators and arbitral tribunals. After all, it is this peer group in which arbitrators have to build and maintain a reputation for their virtue: judgment, neutrality, and expertise.

Stephan W Schill, finally, undertakes a closer analysis of the concept of legitimacy as it is used in the international arbitration context. He points out that, while the concept of legitimacy has become the prevailing standard against which the acceptability of international arbitration is measured—arguably also because there is no single source of law that authoritatively determines the criteria under which international arbitration is legal—different actors, such as the parties to proceedings, actual and potential users of arbitration as a group, the population of a specific country, and the international community as a whole have different conceptions of what legitimacy means and what implications it has for when and how international arbitration should be conducted. He calls for a more nuanced use of the concept of legitimacy to analyse international arbitration as part of the transnational justice system.

History and Sociology of International Arbitration

Part II contains contributions that analyse international arbitration through the lens of interdisciplinary methodology, dealing with the history of international arbitration and sociological approaches to international dispute resolution. These contributions

show both the openness of actors inside international arbitration to make use of interdisciplinary methods and the usefulness of such methods for a better understanding of international arbitration.

The section opens with a detailed analysis by *V V Veeder* of the *Alabama Claims* arbitration that took place in 1872 between the United States and Great Britain. Veeder's account of this arbitration, which concerned the claim that Great Britain violated its duty of neutrality during the American Civil War and constituted the basic model for international arbitration today, is not only a historical contribution; instead, Veeder uses the historical scenery to respond to modern debates. In tracing meticulously how the United States and Great Britain reached agreement to arbitrate and how the proceedings developed on a day-to-day basis, Veeder argues that party-appointment of arbitrators is crucial for the parties to have trust in the decision-making process. This chapter shows that historical analysis can serve for the purposes of doctrinal argument and for helping to legitimize the existing system.

Antonio R Parra discusses more recent historical events, namely the involvement of the World Bank as an institution and of Eugene Black, its President from 1949 to 1962, in his personal capacity, in the mediation of foreign investment disputes in the late 1950s. This experience is significant as it prompted Aron Broches to start thinking about creating the International Centre for Settlement of Investment Disputes (ICSID). Parra's account stresses the importance of both institutions and individuals in bringing international arbitration to fruition. While not legitimizing ICSID as such, his use of history illustrates that much of international arbitration reacted to the practical needs to resolve concrete disputes that could otherwise not be satisfactorily resolved.

Stephen M Schwebel continues the theme of the importance of individuals in shaping the system of international dispute settlement. He discusses the little remembered 'Provisional Report on the Revision of the Statute' prepared by Hersch Lauterpacht shortly after he took office at the International Court of Justice in 1955. In it, Lauterpacht discussed possible changes and revisions of the Court's Statute in order for it to better achieve its mission to administer international justice. He addressed, inter alia, possible changes to the composition of the Court and its jurisdiction, and extending access to private parties to the Court. Although the Provisional Report was never followed by a final version, its spirit has continued to influence reform efforts in international dispute resolution.

As a close of the historical contributions, *Oscar M Garibaldi* recalls that history must always be examined critically. This also applies to assessing the value of earlier decisions, in particular in a system where such decisions have persuasive value for later tribunals. To make this point, Garibaldi concentrates on what he calls 'structural errors' relating to the determination of jurisdiction by arbitral tribunals. He focuses on the *North American Dredging* case in which the United States-Mexico General Claims Commissions, in Garibaldi's view incorrectly, declined jurisdiction in an inter-State proceeding because the contract between the respondent and the affected company excluded the latter from seeking diplomatic protection. Whether or not one agrees with Garibaldi, he makes a forceful argument that arbitral tribunals should resolve a dispute on the basis of an independent assessment of the applicable law and not uncritically follow earlier precedent.

Following these historical excursions, the next three contributions deal with the sociology of international arbitration. *Emmanuel Gaillard* takes a structural approach. He analyses international arbitration as a social field that is structured by social actors and their rituals. He structures the social actors in international arbitration into essential actors, such as the parties and arbitrators, arbitration service providers, such as arbitration institutions and counsel, and value providers, such as States passing arbitration legislation, international organizations, non-governmental organizations, and arbitration scholars. Rituals that structure the interaction of these actors are, in Gaillard's view, inter alia, arbitral hearings, arbitration conferences, and prizes given as symbols of professional recognition. Finally, Gaillard points out how a sociological analysis helps to illustrate how international arbitration has changed during the past decades from a 'solidaristic' to a more 'polarized' field, in which different roles in the arbitral process are allocated to different actors and where arbitration becomes subject to intense outside scrutiny.

Giorgio Sacerdoti presents an autobiographical perspective reflecting on his experience on transitioning from being a scholar of international law to being an international judge and arbitrator. For him, competence and connections, but also reputation for independence and impartiality, are important for making this transition. Musing on the qualities that make good arbitrators, Sacerdoti stresses the ability to work as part of a collective international peer group and the need for leadership and authoritativeness. At the same time, he argues for distinguishing between arbitration and dispute settlement in permanent international courts. While a 'systemic perspective', in his view, is crucial in international courts, it has less importance in international arbitration which, for him, is essentially a service to the parties.

Finally, *Donald Francis Donovan* turns to the role and function of advocates in international arbitration. Drawing on his own experience, he stresses that legal practice today is no longer separated into different national boxes, which are, in turn, separated from international law. Instead, advocates today operate increasingly within a transnational legal space. This can be seen in the practice of litigators in domestic courts, for whom foreign laws and international law have become part of their everyday practice. At the same time, the character of international law itself is changing as it is increasingly applied like national law in a judicial forum. Advocates, in this context, are more than representative of their clients' interests: they are actors who shape the future of the transnational space in which they operate and should bear responsibility for it.

Authority of International Arbitral Tribunals and Its Limits

Following these interdisciplinary perspectives, *Part III* turns to a doctrinal analysis of the authority of international arbitral tribunals and its limits. The prevailing perspective, as outlined before, is that from the inside of international arbitration, from the perspective of the international arbitral process itself, rather than from an outside regulatory perspective.

It starts with an in-depth analysis by *Gary Born* and *Marija Šćekić* on pre-arbitration procedural requirements in international arbitration agreements and investment

treaties. Paradoxically, while aiming to increase the efficiency and effectiveness of the arbitration process, these requirements often lead to additional disputes, with courts and tribunals having presented inconsistent interpretations. Born and Šćekić therefore suggest interpreting such requirements restrictively. Requirements to negotiate or conciliate, to the extent they are valid and enforceable, should be treated as non-mandatory and aspirational; mandatory pre-arbitration requirements should only be seen as affecting the admissibility of claims, rather than constituting bars to arbitral jurisdiction. The restrictive reading proposed would enhance the authority of arbitral tribunals and make arbitration into a more effective mechanism for administering transnational justice.

Christoph Schreuer then deals with inter-temporal questions concerning jurisdiction in international dispute settlement. Drawing on the practice of the International Court of Justice (ICJ), the Permanent Court of International Justice (PCIJ), and investment treaty tribunals, he posits that the basic rule is for jurisdiction to exist when the proceedings are initiated. This creates legal certainty as subsequent developments, including acts by the respondent, cannot defeat jurisdiction. This does not mean, however, that subsequent developments are irrelevant. On the contrary, if certain jurisdictional requirements are only met at a later point, this will usually provide the court or tribunal with jurisdiction. In appropriate cases, proceedings should therefore be suspended so that jurisdictional requirements can be met. Particularly striking to see is how Schreuer analyses ICJ and PCIJ jurisprudence alongside investment treaty jurisprudence as part of one overarching system of international dispute settlement.

Rudolf Dolzer turns to the specific role of local remedies and their relation to international arbitration. In his case survey to determine the role of local law in investment treaty arbitrations, he addresses four distinct issues: the exclusion of diplomatic protection under the ICSID Convention; the requirement to follow the traditional rule on the exhaustion of local remedies; the rule that ordinary commercial matters do not fall under the jurisdiction of ICSID; and the relevance of the rules of denial of justice. Dolzer finds that although ICSID tribunals rightly eschew diplomatic protection, some of them erroneously have introduced requirements to resort to, and even exhaust, local remedies when neither is required under the ICSID Convention or the relevant investment treaty. International tribunals should therefore not shy away from reinforcing their authority in relation to local courts.

Similarly, *L Yves Fortier* analyses the relationship between investor-State tribunals and national courts. He emphasizes that the harmonious relationship between both which involves 'respect for one's own and each other's existence' in the administration of transnational justice may be threatened when arbitrators under investment treaties scrutinize decisions of national courts. In Fortier's view, the fine line investment tribunals have to navigate is between the legitimate review of whether national courts as State organs respect the State's investment treaty obligations and the problematic review of national courts' substantive application of national law, a task that is properly within the jurisdiction of national courts.

The relationship of arbitral tribunals to domestic courts is also addressed by *Horacio A Grigera Naón* who asks whether arbitrators have the power to declare a law unconstitutional. He shows that this depends, inter alia, on the applicable

lex arbitri. While some countries, such as Argentina, grant arbitrators wide-ranging powers and others, such as the United States, are more restrictive, a key consideration, in Grigera Naón's view, for arbitral tribunals in deciding this question is the idea of comity, that is whether it is 'proper and prudent' for arbitrators to reject the effects of a law, even though it has not been declared unconstitutional within the domestic legal order by the constitutional or other competent court.

Joseph E Neuhaus then deals with the enforceability of legislative stabilization clauses through international arbitration. Typically, these clauses are undertakings by governments in their national legislation not to alter benefits accorded to foreign investors for a specific period of time. Neuhaus compares legislative stabilization clauses with contractual stabilization provisions and concludes that the reasons for the enforceability of the latter support, mutatis mutandis, the enforceability of the former. Neuhaus identifies four reasons in support of this analogy: first, a stabilization promise creates a vested right that is entitled to protection as a matter of international law; second, agreements must be honoured; third, a stabilization clause creates a reliance interest on the part of the investor; and fourth, public policy requires that a state is able to bind itself in order to realize its aims.

Neil Kaplan turns to the problem of non-payment of cost advances by the respondent in an international arbitration proceeding. In case the claimant chooses to pay the respondent's advance on costs as well, the question arises how he or she can possibly recover that sum. Arbitral tribunals have developed two different reactions: either making use of provisional measures against the respondent, or making an award enforcing the contractual obligation of the respondent to make an advance on costs. For both solutions they assume their own jurisdiction. This shows how instrumental tribunals are in creating a level playing field for both parties in order to make arbitration into an effective dispute settlement mechanism.

The last two contributions deal with questions of legal ethics. The scope of legal privilege to defend against requests for document protection is the topic of *Julian D M Lew*'s contribution. Unlike in the context of domestic court proceedings, the main problem Lew points to is the absence of clear rules on this issue in international arbitration. Similarly, which of several involved domestic rules could potentially apply to govern legal privilege is a source of uncertainty. This creates insecurity for attorney–client relations. In Lew's view, the best solution would consist in entrusting arbitral tribunals not only to make decisions on these issues, but also to develop the necessary rules independently from specific domestic legal orders.

David A R Williams and *Anna Kirk*, in turn, focus on the ethical standards applicable in international arbitration to the treatment of witnesses and the power of arbitral tribunals to enforce them. Similarly to the issue of legal privilege, it is unclear which of potentially different national standards could apply. This notwithstanding, Williams and Kirk show that an international consensus is starting to develop, for example, on the question of how witnesses of the opposing party in cross-examinations should be treated. They stress that the principles of fairness in cross-examination and of respect for the opposing witness constitute the applicable standard. These standards not only bind counsel, but also require and entitle arbitral tribunals to enforce them.

Reasoning and Decision-Making in the Arbitral Process

Part IV focuses on legal argument in the various stages of the arbitral process. It groups together contributions on how counsel develop their arguments, how arbitrators interpret the applicable law, how they deliberate, and how arbitral awards and dissenting opinions are and should be reasoned to promote both the rule of law within the transnational arbitral system as well as enforceability in one or more domestic legal orders.

The section opens with a contribution by *David D Caron*, which rethinks the role of transparency in international arbitration. Instead of viewing transparency only as an end, Caron considers it as part of the regulatory toolbox available for the optimization of the arbitral process and the issuance of well-reasoned and authoritative awards. Focusing on the 'opacity' of confidential tribunal deliberations, Caron argues that although such confidentiality serves important purposes, there are ways to regulate and indeed to guide the tribunal's deliberative process—examples include specifying who decides, delineating what materials may form the basis of decision, requiring that written reasons are required, and, in extreme cases, piercing the opaque shield of deliberations to uncover injustice.

An important aspect of the decision-making process in international arbitration is explored in *Judith A E Gill*'s analysis on the current state of legal argument in international arbitration. After surveying the different approaches taken due to variations in the backgrounds of both advocates and arbitrators, Gill observes that legal arguments are usually expounded in written submissions and subsequently presented briefly during oral hearings with the tribunal not engaging directly with such arguments at any point. Combined with the diminishing use of legal experts, which is partially due to the increasing collaboration of advocates across jurisdictions, the role of legal argument is at risk of appearing subsidiary even in cases where it plays a central role—a development against which both parties and tribunals should remain vigilant.

Subsequently, the book features four contributions on interpretation as a key aspect of legal reasoning. Focusing on the interpretation of international treaties, *Mahnoush H Arsanjani* and *W Michael Reisman* explore the varied interpretive approaches of international courts and tribunals when faced with different language versions of treaties that are amenable to different, and often conflicting, interpretations. Focusing on the recent investment treaty decision in *Kiliç v Turkmenistan*, Arsanjani and Reisman analyse the errors committed by the tribunal in its interpretation of apparently incompatible translations of the Turkey-Turkmenistan Bilateral Investment Treaty, thus violating Article 33 of the Vienna Convention of the Law of Treaties (VCLT).

The importance of the VCLT is also stressed in *Kaj Hobér*'s contribution. His case study based on the investment treaty arbitration *Millicom v Senegal* offers insights into treaty interpretation from the perspective of the arbitrator. Hobér, who served on the *Millicom* tribunal, vividly reflects on the interpretive dilemmas faced by that tribunal due to an ambiguously worded investment treaty, in particular with regard to a jurisdictional clause that appeared to require an additional act of consent by the host State. Hobér's analysis shows how the tribunal dealt with each of those dilemmas, and arrived at a consensus judgment by applying the VCLT.

The appropriate application of the VCLT also lies at the heart of *Stanimir A Alexandrov*'s chapter, which discusses cases dealing with the proper interpretation of most-favoured-nation (MFN) clauses, and the poignant dissents filed by Charles N Brower in those cases. Alexandrov analyses in particular *Austrian Airlines v The Slovak Republic, Daimler Financial Services AG v The Argentine Republic*, and *Renta 4 et al v The Russian Federation*. By noting in each case the manner in which Judge Brower emphasized the primacy of the treaty's text, avoided applying either a permissive or a restrictive interpretation, and exercised care in the use of supplementary materials, Alexandrov concludes that Judge Brower consistently applies the Vienna Convention rules of treaty interpretation.

Epaminontas E Triantafilou's chapter traces the origins of contemporaneity, an approach towards treaty interpretation that has been introduced relatively recently into investment treaty arbitration. Triantafilou identifies contemporaneity as the enquiry into the ordinary meaning of treaty terms at the time the treaty was concluded, and distinguishes the different types of cases where contemporaneity has been historically applied. Triantafilou argues that contemporaneity is not a general rule of treaty interpretation, although it may be employed subject to certain conditions, at an arbitral tribunal's discretion and consistent with the VCLT. In light of this argument, Triantafilou concludes that in nearly all recent instances in which tribunals have relied on contemporaneity, they have misapplied it.

Richard M Mosk further complements the presentation of the tribunal's reasoning process by shedding light on a highly confidential and pivotal aspect of that process: tribunal deliberations. The deliberative process is arguably the most sacrosanct part of arbitral decision-making, and glimpses into its inner workings are rare. Drawing on his experience as Judge of the Iran-United States Claims Tribunal, Mosk provides a step-by-step commentary on the deliberative process, while highlighting several important issues, including arbitrator misconduct, drawn-out deliberations, evidence and arguments not raised by the parties, and dissenting opinions, and offering, where possible, concise, practical solutions.

The subject of dissenting opinions, which have been appearing with increasing frequency in investment treaty arbitration, is explored by *Albert Jan van den Berg*. Whatever their advantages and disadvantages, dissenting opinions are significant because, when read together with the award, they offer additional insight into the tribunal's deliberative process. Van den Berg's contribution adds to a prior exchange of views with Judge Brower on the appropriateness of dissenting opinions in international arbitration. Van den Berg observes, among other things, that such dissents are invariably filed by the party-appointed arbitrator of the party that lost the case. According to van den Berg, this fact points to the partisan character of dissents and does not promote neutrality and collegiality, while also undermining the authority of arbitral awards.

Although arbitrators increasingly reason by relying on principles developed on a transnational level, the awards they issue must be enforceable by domestic courts that have jurisdiction over assets of the losing party. The authority and enforceability of arbitral awards comprise the subject matter of the chapter by *Michael Hwang* and *Joshua Lim*. Hwang and Lim identify the common elements of 'pathological' arbitral awards,

and the manner in which such awards may be challenged under the United Nations Commission of International Trade Law (UNCITRAL) Model Law on Commercial Arbitration. Hwang and Lim's choice of the Model Law reflects the fact that the Law has served as the basis of the great majority of national arbitration legislations passed since 1985, when the Model Law was adopted. The authors identify several issues under the broad 'pathologies' of lack of reasoning and breach of natural justice, and suggest remedies for such defects that would protect an award from challenge.

Studies in Investment Treaty Arbitration

To conclude, *Part V* contains contributions on specific issues in investment treaty arbitration. While dealing with a large number of seemingly different issues, the main theme running through all contributions in this part is the central role attributed to arbitral tribunals as law-makers in the field of investment law. They do not merely interpret and apply investment treaties, but actively make the meaning of investment treaties by interpreting and applying them.

O Thomas Johnson starts out with an evaluation of whether the expectations of developed and developing countries in signing bilateral investment treaties (BITs) have materialized, in particular whether BITs have delivered on the promise to promote foreign investment. While acknowledging that the jury is still out on the economic effects of BITs, he stresses that BITs have managed to create, by introducing investor-State arbitration, a dispute settlement mechanism that Johnson considers far superior to available alternatives, such as diplomatic protection and dispute settlement in domestic courts. The principal contribution of investment treaties, in Johnson's view, therefore lies in their contribution to international dispute settlement.

Christopher Greenwood addresses MFN clauses, whose competing interpretations have created a seemingly lasting rift in investment treaty jurisprudence. Greenwood's presentation covers many contours of MFN clauses, including their history, function, and proper application and interpretation. Greenwood dispels the confusion created by the interpretation of an MFN clause as a means of additional provisions being 'written into' the treaty, and treats thorny issues such as whether an MFN clause may serve as an independent source of jurisdiction, thereby potentially expanding the scope of the dispute resolution clause.

Loretta Malintoppi and *Hussein Haeri* deal with the role of the non-disputing State party in the various stages of an investment treaty relationship, ranging from making the applicable law and participating in an actual arbitration, to enforcing resulting awards. As Malintoppi and Haeri show, the non-disputing party can play an important role in contributing to the effective settlement of investment disputes and ensuring that arbitral tribunals fulfil their mandate in the interests of all contracting parties. Yet, Malintoppi and Haeri also argue that the involvement of non-disputing parties should not be without limits. It should respect, in particular, due process rights of investors in ongoing proceedings in order not to prejudice them through the non-disputing party's intervention.

Francisco Orrego Vicuña's chapter offers insight into the often complicated impact of time on jurisdictional and substantive requirements under investment treaties.

Issues of temporal jurisdiction as well as the temporal scope of substantive provisions continue to divide and at times confuse the reasoning of investment treaty tribunals. Orrego Vicuña's case survey confirms that the principle of non-retroactivity remains sacrosanct, with the exception of composite acts that begin before the effective date of a treaty and conclude after that date. Orrego Vicuña also comments on certain special scenarios, such as the provisional application of the Energy Charter Treaty, the timing of investments for purposes of jurisdiction, and composite acts arising under both customary international law and the *lex specialis* represented by the treaty.

One condition for the authority of international arbitrators is their independence and impartiality. These principles are addressed by *James Crawford*, who focuses particularly on arbitrator challenges in ICSID arbitrations. Analysing the text of the ICSID Convention and the practice of ICSID tribunals, he points out that the threshold under ICSID for 'manifest lack of independence' is higher than the standard for 'reasonable doubt' under UNCITRAL Arbitration Rules. Yet, the precise content of either standard is not sufficiently clear. Crawford therefore considers that the test under the ICSID Convention for a lack of arbitrator independence or impartiality is in need of greater conceptual clarity.

Gavan Griffith and *Daniel Kalderimis* tackle one of the most controversial issues relating to the independence and impartiality of arbitrators in investment treaty arbitration. They address 'issue conflicts' that may arise out of the arbitrator's relationship with the subject matter, not the parties, of the case. Such conflicts can arise where the arbitrator is involved as counsel in another case involving the same legal issue, where the arbitrator has expressed opinions on the issues at stake in academic writing, or more generally is challenged on the basis of a commitment or ideas he or she holds in relation to the case. Griffith and Kalderimis stress that commitments to an understanding of what the arbitrator in question considers to be the correct interpretation of the law cannot result in a successful challenge, whereas care needs to be taken where what looks like a commitment to the law obscures a lack of openness vis-à-vis one of the parties.

Abby Cohen Smutny then tackles the complex subject of compensation for unlawful takings under customary international law and international investment treaties. Her treatment of the issue, including a close examination of the famous *Chorzów Factory* case, leads Smutny to conclude that the methodology of determining the compensation due, including the date at which the taken property must be valued, depends on the specific undertakings of the expropriating State, the nature of the State's wrongful behaviour, and the available evidence of loss suffered. Smutny's incisive analysis serves to dispel any lingering confusion over lawful versus unlawful expropriations and the remedies associated therewith.

Another fertile field of debate in investment treaty arbitration is offered by theories of compensation, which seek to link treaty standards with economically sound approaches to calculating loss. The appropriate measure of compensation for the breach of international treaties figures prominently in the chapter by *Hans van Houtte* and *Bridie McAsey*. They focus specifically on damages based on future income, whether from earnings of an enterprise or guaranteed tariffs under an investment contract. Their analysis encompasses not only the 'reasonable certainty' standard

employed frequently by tribunals requested to determine damages based on future income, but also innovative suggestions for tackling scenarios where the evidence may not support reasonable certainty. Such suggestions include postponing the damages phase until sufficient evidence emerges, issuing an award subject to conditions allowing its future amendment in respect of the amount of damages, or issuing a partial award, with the final award to follow once damages can be appropriately determined.

Complementing the chapters on remedies, *Arthur W Rovine*'s chapter provides an overview of the state of jurisprudence on the allocation of costs in investment treaty arbitration. Rovine diagnoses an upward trend in the number of awards awarding the prevailing party at least a portion of its costs or, most frequently, allowing the parties to bear their own costs. In either scenario, Rovine finds that the rationale for doing so can vary widely. In some instances, tribunals provide no rationale at all. Rovine concludes that precise and thorough reasoning should underlie every decision on costs, so that a consistent jurisprudence and predictability can emerge in this unsettled area of arbitral decision-making.

Rounding up the contributions on investment treaty arbitration, *Carolyn B Lamm*, *Eckhard R Hellbeck*, and *David P Riesenberg* re-examine closely the annulment decisions in the *Amco Asia* case, which were pivotal to the establishment of the appropriate annulment standard in ICSID arbitration. They highlight the often-overlooked fact that the first annulment decision (*Amco Asia I*) established a lower bar than the one usually applied today for the challenge of ICSID awards based on an ICSID tribunal's 'manifest excess of powers'. It was the innovative (and more stringent) standard adopted by the second annulment committee (*Amco Asia II*) that is typically adopted to this day under Article 52 of the ICSID Convention. The authors conclude by juxtaposing *Amco Asia II*'s standard for annulment based on manifest excess of powers with national legislative regimes, noting that those systems usually do not turn at all on the distinct standard introduced by *Amco Asia II*.

Finally, *Pierre-Marie Dupuy* and *Julie Maupin* provide an astute summary of the resolution of the Institut de droit international (IDI) in respect of perceived weaknesses in the functioning of the international treaty regime governing foreign direct investment. The issues discussed by the IDI, resulting in a subsequent Resolution, included: the relationship between BITs and customary international law; the issue of the parties' consent and the prerequisites of the selected arbitration mechanism; the interaction between international and domestic law under investment treaties; and new actors and problems in investment arbitration.

PART I

INTERNATIONAL ARBITRATION AS PART OF THE TRANSNATIONAL JUSTICE SYSTEM

1

The Transnational Protection of Private Rights

Issues, Challenges, and Possible Solutions

*Sundaresh Menon**

I. Introduction

In the wake of the two World Wars that rocked the international order in the twentieth century, the right of nations to self-determination was enshrined in Article 1 of the Charter of the United Nations.[1] Among the most important developments of the post-war era has been the disintegration of the colonial empires and a consequent massive increase in the number of states and polities.[2] With this came a proliferation of borders that each contained different sovereign legal systems and laws.

At the same time, the rebuilding and reconstruction of the post-war world created both the impetus and the opportunity to focus on development and economic growth.[3] So even as the number of *discrete* states and polities increased, the world witnessed a rapid increase in the *connectedness* of its economies and cultures. Thomas Friedman observed in his international bestseller, *The World is Flat*,[4] what might now be accepted as conventional wisdom: that increased connectivity has resulted in the accelerated flattening of the world, facilitating the phenomenon of globalization. But globalization occasions the need for a more homogenous and harmonized legal framework that can accommodate the vast increase in economic relationships which cross borders that might not previously have existed or been quite so firm.

With the fragmentation of the colonial empires and the 'birth of scores of new states in the so-called Third World',[5] developed and developing countries found themselves separated by massive gulfs in terms of their relative states of social, economic, and

* This chapter is adapted from the Charles N Brower Lecture delivered on 10 April 2014. The views and ideas contained here are personal. I am deeply grateful to my colleague, Justin Yeo, Assistant Registrar of the Supreme Court, for the considerable assistance he gave me in the research and preparation of this lecture and for his valuable contributions to the ideas which are contained herein.

[1] Chapter I, Article 1, Part 2 of the UN Charter states that the purposes of the United Nations are, inter alia, '[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'. See Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, <http://www.un.org/en/documents/charter/chapter1.shtml> accessed 22 July 2014.

[2] Malcolm Shaw, *International Law* (6th edn, Cambridge University Press 2008) 38.

[3] The post-Second World War economic expansion is widely recognized as a period of economic prosperity which occurred in the mid-twentieth century following the end of the Second World War in 1945.

[4] Thomas L Friedman, *The World Is Flat: A Brief History of the Twenty-First Century* (Farrar, Straus and Giroux 2005).

[5] Shaw (n 2) 38.

political development. In these circumstances, there were always going to be difficulties in attaining transnational harmonization in law, policy, and practice pertaining to commercial transactions.

At the dawn of a new millennium, we face the challenge of dealing, on a global scale, with movements in opposite directions. On the one hand, the emphasis on decolonization and self-determination in the post-war era has seen a movement *towards* building barriers and fixing legal and political boundaries between jurisdictions. On the other hand, globalization sees a movement to break economic barriers and transcend boundaries. While the first movement sees growth in the number of individual systems of law, the second calls for laws and legal systems that are not so tightly constrained by jurisdictional boundaries so that they can more effectively support the immense growth in transnational trade and commerce.

My focus today is on the legal protection of private economic rights in the transnational arena. The term 'international economic law' has been adopted as a shorthand reference for regulation in this immense field.[6] For conceptual and analytical clarity, I propose to approach my subject by considering the regulation of transnational economic relationships at three different levels:

(i) first, where a party's rights are not regulated or governed by any contract, but where there is nonetheless a need to protect one's interests or rights in commercial property;

(ii) second, where there is a contract between the parties, by which they look to protect their rights as between themselves; and

(iii) third, where a foreign investor looks to protect its investment against unlawful interference by a host state.

These are not exhaustive of the range of regulatory mechanisms that affect transnational economic relationships. For instance, even though 'international trade law' (or 'world trade law')[7] relates to international rules and conventions that seek to manage trade relations between states, these do impact directly on individual actors. While this is certainly important in international commerce, I do not discuss it as a discrete category given the constraints of time, and instead focus on the three levels, which relate to private actors being *directly* involved in protecting their private economic rights.

[6] See, eg, the terminology adopted by the Legal Information Institute of the Cornell University Law School, Legal Information Institute, 'International Economic Law', <http://www.law.cornell.edu/wex/international_economic_law> accessed 22 July 2014.

[7] The terminology 'international trade law' is adopted, inter alia, by the Legal Information Institute of the Cornell University Law School, <http://www.law.cornell.edu/wex/international_economic_law> and <http://www.law.cornell.edu/wex/International_trade> accessed 22 July 2014. The terminology 'world trade law' is adopted, inter alia, in text books, eg, Simon Lester, Bryan Mercurio, and Arwel Davies, *World Trade Law* (2nd edn, Hart Publishing 2012); Henrik Horn and Petros Mavroidis, *Legal and Economic Principles of World Trade Law* (Cambridge University Press 2013); in commentaries, eg, Peter-Tobias Stoll, *Max Planck Commentaries on World Trade Law* (Brill 2005); and by universities, eg, The National University of Singapore, Course Listing, <http://www.law.nus.edu.sg/student_matters/course_listing/courses_desc.asp?MC=LL4060B&Sem=1> accessed 22 July 2014 (offering a course on 'World Trade Law').

I begin with a brief overview of the existing legal order at each of the three levels, focusing my observations and analyses on selected fields of law. I look to identify some of the key issues and thereafter close with a section where I share some thoughts on what might lie ahead.

II. Issues and Challenges

A. Level One: The Protection of Commercial Interests in the Absence of a Contractual Relationship

Contracts are the lifeblood of commerce. Yet, there are many instances where there is a need to protect commercial property in the absence of any contractual arrangements. This can arise in many discrete areas of law, including, for instance, the wide range of economic torts, such as conspiracy, trade libel, conversion, and so on.

I focus today on the transnational protection of intellectual property (IP) rights. IP is essentially a jurisdiction-bound area of law and the drawbacks that exist in this area are clearly exposed in an increasingly transnational marketplace.[8]

1. Snapshot of the International IP Regime

IP rights are traditionally 'territorial' in nature.[9] They are conferred by individual jurisdictions for rights owners to reap, within that jurisdiction, the economic benefits of their protected subject matter. They had their genesis in a world that was vastly different from ours today, and may be traced at the very least to legislation in the seventeenth and eighteenth centuries,[10] when there was hardly any need for the protection of IP rights to be robust across national borders. IP was mainly exploited within a limited geography and there was little scope for the extra-territorial infringement of IP rights. In these circumstances, the territorial nature of the regime did not pose much difficulty.

The incidence of cross-border IP interests has grown significantly in recent years.[11] There are numerous actors,[12] including the World Trade Organization (WTO) and

[8] See William Cornish, David Llewelyn, and Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (8th edn, Sweet & Maxwell/Thomson Reuters 2013) para 1-31, where the learned authors suggest that IP law has wider associations with territoriality than other civil rights of action in general.

[9] Daniel Lifschitz, 'The ACTA Boondoggle: When IP Harmonization Bites Off More Than It Can Chew' (2011) 34 Loy LA Int'l & Comp L Rev 197, 201. It has been observed that the territorial nature of IP rights has several potential ramifications. For instance, the scope and validity of an IP right in a particular country may be determined by that country's law independently of equivalent rights over the same subject matter in other countries; the IP right may only affect activities pursued within a particular geographical territory; the IP right may only be asserted by a particular country's nationals and other persons as the national law permits; or the IP right may be asserted only in the courts of the country for which it is granted, ibid.

[10] Susanna H S Leong, *Intellectual Property Law of Singapore* (Academy Publishing 2013) paras 01.001 and 01.025.

[11] Benedatta Ubertazzi, *Exclusive Jurisdiction in Intellectual Property* (Mohr Siebeck 2012) 4; see also Marketa Trimble, 'When Foreigners Infringe Patents: An Empirical Look at the Involvement of Foreign Defendants in Patent Litigation in the US' (2011) 27 Santa Clara Computer & High Tech L J 499, 544, where the author notes that in the US Federal District courts, the number of IP cases involving at least one defendant from a foreign jurisdiction increased by 20% from 2004 to 2009.

[12] Graeme B Dinwoodie, 'The International Intellectual Property Law System: New Actors, New Institutions, New Sources' (2007) 10(2) Marq Intell Prop L Rev 205, 210.

the World Intellectual Property Organization (WIPO), as well as state governments, national judiciaries, and national regulatory boards. There are also many new sources of law, including free trade agreements (FTAs), bilateral investment treaties (BITs),[13] and the jurisprudence of national courts. With so many different actors and sources of law, the need for harmonization of the international IP framework has been the subject of discussion for some time.

Developments in the technology patents industry provide a sign of our times. In the massive Apple-Samsung patent dispute, the late Steve Jobs memorably declared that he was willing to 'go to thermonuclear war', 'spend[ing] [his] last dying breath' and 'every penny' in Apple's vast reserves to 'right [Android's] wrong'.[14] Apple commenced patent litigation against Samsung in April 2011, and by July 2012, the 'thermonuclear war' had reached the shores of the United States, South Korea, Japan, Germany, the United Kingdom, France, Italy, the Netherlands, and Australia.[15] At the last count, the two technology giants were involved in more than fifty lawsuits globally over claims for damages that ran into billions of dollars.

We should not be surprised if more such disputes follow. In fact, a whole new patent licensing industry has already emerged, with certain technology companies reverse-engineering new devices for the purpose of helping patent owners to prove that the devices of others infringe their patents.[16]

2. Some Difficulties with the International IP Framework

Not only do these massive international IP disputes involve huge amounts of money, they also have to be fought in a multitude of jurisdictions, with potentially different standards being applied and different outcomes being reached.

(a) Lack of Common Standards

While broad frameworks for the protection of IP rights are being harmonized to a growing extent arising from efforts to comply with the obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), there remains an essential lack of common standards. In part, this is because the application of the law by national courts has varied tremendously within those frameworks. How a particular state chooses to protect IP rights—which in essence are artificial monopolies—can depend heavily on its relative stage of economic

[13] Which typically impose TRIPS-plus standards, and which ratchets up the global standard through the TRIPS 'Most-Favoured-Nation Treatment' principle.

[14] Walter Isaacson, *Steve Jobs* (Simon & Schuster 2011) 512; see also 'Steve Jobs Vowed to "Destroy" Android' *BBC News* (21 October 2011), <http://www.bbc.co.uk/news/technology-15400984> accessed 22 July 2014.

[15] Godfrey Lam, 'Staging the Mobile Phone Wars', 4th Judicial Seminar on Commercial Litigation (Singapore) (17 May 2013) para 6 (article on file with author).

[16] Kate Porter, 'Ottawa Home to Robust, Controversial Patent Licensing Industry' *CBC News* (26 November 2013), <http://www.cbc.ca/news/canada/ottawa/ottawa-home-to-robust-controversial-patent-licensing-industry-1.2440034> accessed 22 July 2014.

development and indeed even on its moral or other values. As has been observed, while IP is largely a legal construct, it is not just about law and economics; it is often also about politics.[17]

In designing the international IP system, the balance sought is that 'between universal norms and the national autonomy necessary to legislate a substantive balance appropriate to each nation-state'.[18] However, it is extremely difficult to attain meaningful international consensus on how that precise balance should be struck. This is unsurprising, given that the national strategic interests of the various states will often not be aligned. For instance, while the United States and the European Union have tried to encourage other countries to adopt higher IP enforcement standards through the Anti-Counterfeiting Trade Agreement (ACTA), the increasingly powerful developing countries such as China, India, and Brazil have 'shown no urgent desire' to join such a system.[19] A particular example draws from the experience in the pharmaceutical industry. States economically dependent on pharmaceutical companies tend towards applying IP laws to protect those interests, while states facing increasing healthcare costs tend towards laws which keep healthcare affordable. The recent decision by the Indian Supreme Court, rejecting Novartis' attempt to seek the evergreening of a pharmaceutical patent, illustrates the point.[20]

In researching this chapter, I did come across an example of the successful harmonization of IP standards in the Andean region.[21] It seems implausible that this can extend across a wide geography. Indeed, such harmonization was largely premised on factors that are far more likely to obtain in a regional rather than in an international context.[22] The Andean states were in similar states of development and therefore had similar interests in relation to IP policy. They were thus able to agree to a common set of laws which were clear, detailed, and precise. They were also able to agree on common adjudicatory mechanisms. As a check on the system, private actors were also allowed to file complaints against a member state's alleged non-compliance. This confluence of factors which accounts for the extensive degree of agreement that was achieved in that instance is unlikely to occur in the international context in the foreseeable future.

(b) Multiplicity of Proceedings

Second, as illustrated by the Apple-Samsung dispute, the multiplicity of proceedings across different jurisdictions is largely unavoidable with major transnational IP disputes. This arises because where there has been an alleged infringement of IP

[17] Peter K Yu, 'ACTA and Its Complex Politics' (2011) 3 WIPO J 1, 16.
[18] Dinwoodie (n 12) 206. [19] Yu (n 17).
[20] *Novartis AG v Union of India & Others*, Civil Appeal No 2706-2716 of 2013 (Supreme Court of India) (1 April 2013), <http://supremecourtofindia.nic.in/outtoday/patent.pdf> accessed 10 September 2014.
[21] Laurence R Helfer, Karen J Alter, and Florencia Guerzovich, 'Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community' (2009) 103(1) Am J Int'l L 1.
[22] Ibid.

rights in more than one jurisdiction, the doctrine of *res judicata* does not always or necessarily apply.

Nor, as a matter of law, can there be *cause of action estoppel*. A French patent registration is a different juridical and legal creature from its English counterpart. A French judgment on the infringement of a French patent cannot give rise to cause of action estoppel between the same proprietor of the equivalent English rights and the same defendant who is performing equivalent acts in England because the basis of the cause of action is different in each case.[23] While there might arguably be *issue estoppel* where the same legal issue arises for determination and the same legal principle applies in both jurisdictions, this question remains largely unexplored in the case law.[24]

The multiplicity of proceedings gives rise to at least three major problems:

(i) First, there is an immense strain on the resources of the parties. The cost of the Apple-Samsung wars is not known to the public, but one can be certain that the figures will be staggering. The same can safely be said about the pharmaceutical patent wars. While lawyers might not be complaining, one wonders if these vast amounts of money would not be better spent on innovation, research, and development.

(ii) Second, the need to sustain or defend multiple proceedings potentially engenders injustice in view of economic inequalities between different commercial parties. Deep-pocketed multinational corporations might well be able to simultaneously finance large-scale litigation across numerous jurisdictions, but smaller enterprises might not be able to afford the cost involved in protecting their own IP in this way.[25]

(iii) Third, national court systems are often called on to bear an immense cost to resolve such disputes.[26] The Australian leg of the Apple-Samsung dispute was so large that it necessitated an 'unprecedented' assignment of two federal court judges to hear the case at first instance.[27] The matter commenced in 2011, and the hearings before these two judges had an estimated end date in April 2014.[28] It might be anticipated that one or both parties could lodge an appeal as has

[23] Cornish et al (n 8) para 2-70.

[24] Ibid; although the learned authors cited *Bristol Myers v Beecham* [1978] FSR 553, which assumes the possibility of issue estoppel arising pursuant to a foreign judgment.

[25] Ubertazzi (n 11) 3.

[26] Litigation has numerous externalities, and the immense costs incurred by legal systems cannot be ignored. Steven Shavell notes that litigation involves two externalities: the litigant neither takes into account the legal costs that he causes others to incur, nor recognizes the associated effects on deterrence and other social benefits. Between 1960 and 1992, legal expenditures in the United States as a percentage of GDP grew from 0.523% to 1.47%: see Steven Shavell, 'The Fundamental Divergence between the Private and the Social Motive to use the Legal System' (1997) 26 J Legal Stud 575.

[27] The case filed in the Federal Court of Australia involved Apple claiming that Samsung infringed 19 of its patents on a total of 120 grounds, in nine smartphones and two tablets produced by Samsung. Samsung has claimed that Apple infringed several of its patents in some iPhone and iPad models: see James Hutchinson, 'Legal Twist in Apple, Samsung Case' *Financial Review* (25 February 2013), <http://www.afr.com/p/technology/apple_samsung_patent_hearing_unprecedented_5ubyczd0dP9yFHfzmlsiqM> accessed 22 July 2014.

[28] Mark Summerfield, 'What's up Down Under with Apple and Samsung?' (18 November 2013), <http://blog.patentology.com.au/2013/11/whats-up-down-under-with-apple-and.html> accessed 22 July 2014.

been done throughout the interlocutory stages of the matter. Will a jurisdiction less wealthy than Australia be able to devote such judicial resources to settle a battle between deep-pocketed multinational corporations? And in any case, should taxpayers be financing judicial systems that are deployed to resolve these wars? This is an important question because national courts generally do not recover the full costs of running their operations.

All this must also be seen in light of the fact that commercial realities may impose immense time pressure on the parties and the courts to resolve their multi-billion-dollar law suits within a relatively short period of time.[29]

3. Brief Conclusion

It has been said that the ability to enforce IP rights on a transnational basis is crucial for their effective protection.[30] However, there remains a conspicuous lack of harmonization on the important issues of jurisdiction and applicable law, as well as the recognition and enforcement of judgments in the context of IP rights.[31]

In light of the modern reality that invention, innovation, and originality are increasingly realized on a far more international and collaborative basis, the lack of harmonization in the international IP regime and the jurisdiction-bound framework for the protection of IP rights stand as drawbacks or shortcomings in the supportive machinery for this aspect of transnational commerce.

B. Level Two: The Protection of Commercial Interests through Contracts

I move to the second level of the transnational protection of private rights, where the parties look to protect their commercial interests through contracts. In this area, certainly in the post-war era and especially in the last three decades or so, international commercial arbitration has become the mechanism of choice.[32] In some cases, these contracts might instead provide for disputes to be resolved through the courts. Where this is so, as the situation now stands, many of the issues raised in the previous section will arise and I do not repeat those observations here.

1. Snapshot of International Commercial Arbitration

The rise in transnational contractual arrangements inevitably spawned a corresponding increase in disputes between parties from different jurisdictions and this gave

[29] Lam (n 15) para 50. [30] Ubertazzi (n 11) 3. [31] Ibid 1–2.

[32] In this regard, it was observed in the 1980 edition of the American Bar Association's journal that: '[f]ostered by the demands of an expanding international commerce, by the businessman's traditional distrust of foreign adjudication, and by numerous court decisions upholding its awards, international arbitration is distinctly in vogue'; see Francis J Higgins, William G Brown, and Patrick J Roach, 'Pitfalls in International Commercial Arbitration' (1980) 35 The Business Lawyer 1035; see also Richard M Mosk, 'Trends in International Arbitration' (2011) 18 SW J Int'l L 103, 105.

rise to calls for a dispute resolution system that had at least two primary characteristics. First, there had to be a neutral forum for the resolution of disputes, so as to minimise the concern that disputes would be resolved in the unfamiliar judicial and legal terrain of a foreign land.[33] Second, decisions had to be clothed with cross-border enforceability.

The latter provided the impetus that led to the emergence of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and with it, international arbitration became a viable system of international commercial dispute resolution. In contrast to perceptions concerning litigation in national courts, arbitration promises neutrality, international enforceability of awards, flexibility, and confidentiality.[34] It also held the promise (at least initially) of a faster and less expensive form of dispute resolution, as well as the avoidance of some of the complexity and excessive legalism and formality of traditional judicial proceedings.[35]

Parties began to turn to international arbitral tribunals for relief, with national courts serving as supplemental aids to support those arbitral proceedings.[36] By the turn of the millennium, arbitration had become a commonplace mode of dispute resolution provided for in an immense range of commercial arrangements,[37] and by the end of the first decade of the new millennium, arbitration perhaps had become 'the preferred method of resolving international commercial disputes'.[38] There is empirical evidence to support this in the impressive statistics put forward by arbitral institutes.

2. Some Difficulties with International Commercial Arbitration

But even as international commercial arbitration might be seen as the preferred mechanism for resolving cross-border transactional disputes, a targeted survey of corporate counsel published in 2013 by the School of International Arbitration at Queen Mary, University of London, bears noting. The report indicates that corporate counsel

[33] See, eg, Steven Seidenberg, 'International Arbitration Loses Its Grip' (April 2010) American Bar Association Journal, <http://www.abajournal.com/magazine/article/international_arbitration_loses_its_grip/> accessed 22 July 2014, where the author notes that arbitration 'offers parties a neutral forum, where neither side has the "home court" advantage of litigating in its nation's courts'; see also 'International Arbitration: Corporate Attitudes and Practices' Queen Mary, University of London (School of International Arbitration) (2006) 5, <http://www.pwc.be/en_BE/be/publications/ia-study-pwc-06.pdf> accessed 22 July 2014, which states: 'So why do nine out of ten corporations seek to avoid transnational litigation? The most common explanation is anxiety about litigating under a foreign law before a court far from home, with a lack of familiarity with local court procedures and language.'

[34] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (2nd edn, Sweet & Maxwell 1991) paras 1-42, 1-43, 1-44, and 1-53.

[35] Higgins et al (n 32) 1036.

[36] See, eg, Art 9 of the UNCITRAL Model Law on International Commercial Arbitration (1985).

[37] Sundaresh Menon, 'Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence', Keynote Address at the 26th LAWASIA Conference and the 15th Biennial Conference of Chief Justices of Asia and the Pacific (27–30 October 2013) para 23.

[38] Seidenberg (n 33). Commentators have gone so far as to state that international arbitration has become the established method of determining international commercial disputes: see, eg, Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) para 1-01, where it was pointed out that the International Chamber of Commerce recorded 344 requests for arbitration in 1986 and 580 requests in 2003; Susan D Franck, 'The Role of International Arbitrators' (2005–06) 12 ILSA J Int'l & Comp L 499.

refers 47% of their international disputes to arbitration and this is the same proportion that is referred to litigation.[39] Even allowing for the fact that arbitration might not be an option for the parties in many of these cases due to the absence of arbitral agreements, or because the subject matter is not arbitrable, and so on,[40] the statistic does seem surprising.

Certainly, in the course of the last couple of years, there has been a chorus, perhaps a cacophony of voices, suggesting that this might be due to a number of issues that threaten the continuing vitality of international commercial arbitration. I briefly touch on four areas.

(a) Judicialization, Delay, Laboriousness, and Rising Costs

Among the more frequently raised concerns is the contention that international commercial arbitration has lost its edge in avoiding the delays, contentiousness, and costliness of judicial trials. The flexibility and relative informality of arbitration was once its key advantage.[41] Ironically, that flexibility might allow the practitioners of arbitration to create highly litigious and legalistic proceedings that increasingly simulate or even surpass litigation in terms of the amount of time required to complete the dispute resolution process and with it, the amount it will ultimately cost. Arbitration is increasingly 'formal, costly, time-consuming, and subject to hardball advocacy'.[42] Litigation seems to have percolated into the groundwater of arbitration, resulting in a marriage of convenience that some have called 'arbigation'[43] or 'off-shore litigation'.[44]

What is perhaps surprising is that the criticism levelled at arbitration on the ground that it is characterized to an increasing degree by 'judicialization'[45] or 'legalisation'[46] is not a wholly new development. A quarter of a century ago in 1989, Lord Mustill observed that commercial arbitration was developing into a process with 'all the elephantine laboriousness of an action in court, without the saving grace of the exasperated judge's power to bang together the heads of recalcitrant parties'.[47]

[39] 2013 International Arbitration Survey conducted by the School of International Arbitration at Queen Mary, University of London, 'Corporate Choices in International Arbitration: Industry Perspectives' (2013) 7, <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf> accessed 22 July 2014.

[40] Ibid, which notes that: 'Several interviewees commented that, for certain cases, the use of litigation is unavoidable. This is because arbitration is sometimes unavailable by operation of law—for example, in non-contractual claims like breach of patent rights, as well as in potentially non-arbitrable disputes (eg in employment).'

[41] See, eg, ibid.

[42] This statement was made in Thomas J Stipanowich, 'Arbitration: The "New Litigation"' (2010) U Ill L Rev 1, 8, in the context of American business arbitration, but it applies similarly to international commercial arbitration. This view is also supported by ibid, 5, 21–2; see also Higgins et al (n 32) 1042 (recognizing that whether arbitration is more or less costly than court adjudication may depend on the precise ambit of discovery obligations and procedures).

[43] L Tyrone Holt, 'Whither Arbitration? What Can Be Done to Improve Arbitration and Keep Out Litigation's Ill Effects' (2009) 7 DePaul Bus & Comp L J 455 (citing Jeffrey W Stempel, 'Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution through Adjudication' (2003) 3 Nev L J 305, 314).

[44] Elena V Helmer, 'International Commercial Arbitration: Americanized, "Civilized", or Harmonized?' (2003) 19(1) Ohio St J Disp Resol 35, 46.

[45] Stipanowich (n 42) 8; Helmer (n 44) 36.

[46] Helmer (n 44) 36.

[47] Stipanowich (n 42) 23 (citing Michael John Mustill, 'Arbitration: History and Background' (1989) 6 J Int'l Arb 43, 56).

How did this come to pass? There are a number of reasons for this, and I venture three:

(i) First, the adversarial influence of Anglo-American legal practice has perhaps contributed to the transplantation of legalistic litigation methods, practices, and strategies into international commercial arbitration.[48]

(ii) Second, the increasing formality of arbitration today probably has much to do with the reality of the commercial world. Large commercial transactions featuring multiple parties and contracts have become far more common today[49] and the disputed amounts are now 'regularly in the hundreds of millions or even billions'.[50] With the stakes going up, winning has become all-important and all-consuming.

(iii) Third, much delay and laboriousness might arise out of the absence of appellate mechanisms. The lack of an avenue for appeal is traditionally justified on the ground that finality is achieved more quickly. But as the practice of arbitration evolved, the absence of appeals has encouraged parties to approach the process as a 'one shot' contest in which the winner takes all, and parties pour extensive resources into the battle. One might question the efficiency of such a process as compared to the traditional mechanisms where issues are distilled as they progress through the appellate ladder with greater focus and precision at each rung. The absence of appeals has also diverted more attention towards the setting aside of arbitral awards. Setting aside an award is a limited opening that offers possible recourse for a disgruntled party, but the success of an application to set aside an award depends in large measure on the supervisory court's approach towards arbitration in general and how it interprets the circumstances of each case in particular.[51] Arbitrators are generally keen to avoid even tenuous grounds for the setting aside of an award, and so as to 'bullet-proof' the award, there is sometimes a tendency to be more liberal in admitting evidence, allowing more extensive document production processes, and granting extended hearing time.[52]

(b) Lack of Ethical Standards

A second area of concern pertains to whether there is a need for a widely accepted set of ethical standards or guidelines in the context of international commercial arbitration. In the past, arbitration was a small industry that could be effectively governed by implied understandings among actors in the industry. But the internationalization of

[48] Ibid; George M von Mehren and Alana C Jochum, 'Is International Arbitration Becoming Too American?' (2011) 2 Global Business Law Review 47, 49–50; Roger P Alford, 'The American Influence on International Arbitration' (2003) 19(1) Ohio St J Disp Resol 69; Helmer (n 44) 46.

[49] S I Strong, 'Increasing Legalism in International Commercial Arbitration: A New Theory of Causes, a New Approach to Cures' (2013) 7(2) World Arbitration & Mediation Review 117, 119.

[50] Seidenberg (n 33). The author was citing the view of Joseph R Profaizer, of counsel to Paul, Hastings, Janofsky & Walker in Washington, DC.

[51] Toby Landau QC, 'Opening Keynote Address at the Singapore International Arbitration Forum' (2 December 2013).

[52] Stipanowich (n 42) 13, 15.

arbitration has resulted in an exponential increase in the number of arbitral institutions, cases, and practitioners. It is impossible for the industry to continue to depend on implied norms, understandings, peer standards, and shared values when these might no longer exist. The absence of widely accepted standards must enhance the risk of unpredictability in how this great diversity of practitioners might conduct themselves.

(c) Unpredictability in Enforcement Due to Ad Hoc Nature of Courts' Oversight

A third area of concern is the ad hoc nature of national courts' oversight of arbitration, the inherent consequence of which is that from time to time there will be inconsistent and even conflicting results in enforcement. The *Dallah* cases[53] provide a good illustration of this point, where the English and French apex courts were separately called upon to decide the issue of whether the Government of Pakistan was bound by the arbitration agreement, notwithstanding that it was not, in terms, a party to the contract. On identical legal issues and identical facts, the apex courts in these two countries came to diametrically opposed conclusions on the enforceability of the award.

As we in the Singapore Court of Appeal recently observed, while the New York Convention sets out a common framework with a common set of grounds for the enforceability of awards, the enforceability of a particular award ultimately depends on the interpretation that is placed on those grounds by national courts.[54]

(d) Unpredictability in Arbitral Decisions Due to Lack of Jurisprudence

I mention a final area of concern, namely the lack of consistency and predictability that might sometimes stem from the lack of publicly available jurisprudence.

It is true that there is a growing body of *lex arbitralis materialis* containing transnational substantive rules which arbitrators can draw upon or refer to in deciding disputes.[55] International commercial arbitral tribunals increasingly refer to and rely on other awards as precedents in their decision-making processes.[56]

But the coherence of jurisprudence emanating from tribunals remains challenged by the confidentiality of arbitral proceedings, as well as the absence of appeal and error-correction mechanisms. As an increasing number of major and complex commercial cases are heard by arbitral tribunals rather than by municipal appellate courts,[57] this threatens to hinder the development of a coherent freestanding body of substantive international commercial law, and over time, this must add to the cost of transnational trade.

[53] See *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763.

[54] *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372, 75.

[55] Menon (n 37) para 29 (citing Loukas Mistelis, 'Unidroit Principles Applied as "Most Appropriate Rules of Law" in a Swedish Arbitral Award' (2003) III(3) Uniform L Rev 631).

[56] Ibid (citing Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 802).

[57] Mosk (n 32) 107.