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# Investment Treaty Arbitration as a Species of Global Administrative Law

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## Abstract

*The article outlines a simple thesis: that international investment arbitration – pursuant to regional and bilateral investment treaties – offers the clearest example of global administrative law, strictly construed, yet to have emerged. We present this thesis by explicating four key features of investment treaties: they permit investor claims against the state without exhausting local remedies; they allow claims for damages; they allow investors to directly seek enforcement of awards before domestic courts; and they facilitate forum-shopping. Our argument is that, owing to this unique conjunction of features, the regulatory conduct of states is, to an unusual extent, subject to control through compulsory international adjudication. Having highlighted these features, we then claim that investment arbitration is best analogized to domestic administrative law rather than to international commercial arbitration, especially since investment arbitration engages disputes arising from the exercise of public authority by the state as opposed to private acts of the state. Further, we claim that the linkages between investment arbitration and domestic legal systems are more direct and more closely integrated than other forms of international adjudication in the public sphere. For these reasons, we argue that the emerging regime of investment arbitration is to be understood as constituting an important and powerful manifestation of global administrative law.*

The phenomenon of globalization – the term commonly employed to indicate the tendency for trade, investment, services, labour relations and patterns of migration to be increasingly organized on a global scale – has had a major impact on the governmental arrangements of nation-states. Whether or not globalization has weakened the state remains a matter of vigorous debate. There can, however, be no doubt that it has led to the formation of complex governing arrangements at domestic, regional

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and international levels. The more complicated pattern of governing arrangements that is evolving, especially given the growth of international and regional bodies equipped with a broad range of regulatory powers, has caused some scholars to argue that we are now witnessing the emergence of a new institutional configuration, which might be called 'global administrative law'.<sup>1</sup>

Presently, the defining features of this global administrative law are rather fluid, and while this remains the case many may question whether the rule-making powers or regulatory practices of international organizations possess such authority as to constitute a distinct system of administrative law in its own right. Nevertheless, the issues posed by the growing regulatory powers of international bodies remain important matters of debate and analysis, not least because of the potential for these powers to be used to control the regulatory authority of national governments. This article offers a contribution to this ongoing debate. It does so by promoting the thesis that the regime of international investment arbitration which has been rapidly developing since the 1990s provides not simply a singularly important and under-appreciated manifestation of an evolving system of global administrative law but that, owing to its unique features, it may in fact offer the only exemplar of global administrative law, strictly construed, yet to have emerged.

Since the late 1960s, and especially in the 1990s, states have consented to an international regime in which foreign investors (read, multinational enterprises) are granted the ability to make and enforce international claims against states in disputes arising from the state's regulation of investor assets. The arrangements for pursuing these claims are in certain crucial respects unusual. Four specific features should be highlighted. First, such claims are commonly not subject to customary limitations that apply to individual claims under other types of treaties, including the duty of an individual to exhaust local remedies (the principle of individualization). Secondly, under investment treaties, investors can directly bring claims for damages, awarded as a public law remedy (the damages principle). Thirdly, because investment treaties incorporate the procedural framework and enforcement structure of international commercial arbitration, investors can directly seek enforcement of the awards of arbitration tribunals before the domestic courts of a large number of countries, with limited judicial supervision by domestic courts (the principle of direct enforceability). Finally, investment treaties facilitate forum-shopping by investors, through the selective establishment of holding companies, thus expanding the reach of investment arbitration as an international mechanism of adjudicative review (the forum-shopping principle). The effect of this combination of features, uniquely present in investment arbitration, is to subject the regulatory conduct of states to control through compulsory international adjudication to an unusual extent. And it is precisely because of the potential of these internationally generated adjudicative norms and mechanisms to exert a strong disciplinary influence over domestic administrative programmes that investment arbitration should be seen to constitute a powerful species of global administrative law.

<sup>1</sup> See Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', *68 Law & Contemporary Problems* (2005) 15.

The article will proceed by analysing the four distinctive features of investment treaty arbitration (or ‘investment arbitration’) as a manifestation of global administrative law. In doing so, we will seek to demonstrate the scope and potency of this regime as a means of reviewing and controlling the exercise of public authority by the state. For this purpose it will be necessary to explain how investment arbitration is to be distinguished from international commercial arbitration, on the basis that investment arbitration engages disputes arising from the exercise of public authority by the state as opposed to private acts of the state. It will be argued not only that the arrangements for investment arbitration operate in a manner more tightly analogous to domestic judicial review than other forms of international adjudication, but also that the linkages between investment arbitration and domestic legal systems are more direct and more closely integrated than other forms of international adjudication. Our argument will be that it is, above all, the synergistic quality of the arrangement – the possession of an autonomous, internationally organized mechanism which intersects in critical ways with domestic systems – that characterizes this regime as the only comprehensive form of global administrative law.

## 1 Evolution

### *A The Emergence of Investment Arbitration*

The evolution of investment arbitration into a system of international adjudicative review follows from the conclusion of over 2,000 bilateral and regional investment treaties, most of which provide for the compulsory arbitration of investment disputes involving the state. This is a recent phenomenon. The first treaties to incorporate states’ consents to investment arbitration were a handful of bilateral investment treaties (BITs) signed in the late 1960s,<sup>2</sup> and in the 1970s and 1980s consents to investment arbitration in BITs became more common, though not universal.<sup>3</sup> It was only during the 1990s that investment arbitration clearly emerged as an international mechanism of adjudicative review. In that decade, roughly 1,500 BITs were concluded, and the inclusion of states’ consents to investment arbitration – based on broad jurisdictional concepts and liberal investment standards – became the norm.<sup>4</sup> Further, a number of ground-breaking regional investment treaties authorizing compulsory investment arbitration were concluded, including the *North American Free Trade Agreement* (NAFTA)<sup>5</sup> and the *Energy Charter*

<sup>2</sup> R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995), at 126.

<sup>3</sup> UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (1998), at 8–10; Parra, ‘ICSID and Bilateral Investment’ (2000) 17(1) *ICSID News* 7.

<sup>4</sup> UNCTAD, *Bilateral Investment Treaties – 1959–1999* (2000), at 1 and 4 (reporting that the number of BITs quintupled during the 1990s, from 385 in 1989 to 1,857 by 1999, involving 102 countries in 1989 and 173 countries in 1999). According to UNCTAD, there are now nearly 2,200 BITs in force, the bulk of which provide for compulsory investment arbitration.

<sup>5</sup> North American Free Trade Agreement, 17 Dec. 1992, 32 ILM (1993) 296 and 605 (entered into force 1 Jan. 1994) (hereinafter ‘NAFTA’), Arts 1116 and 1117.

*Treaty*.<sup>6</sup> Finally, in the 1990s, investment treaties expanded beyond conventional relationships between capital-exporting and capital-importing states to include many BITs among developing and former Soviet Bloc states.<sup>7</sup>

The reasons for this expansion, and the wider costs and benefits of investment treaties for states, have been the subject of some debate, but one that is tangential to our argument.<sup>8</sup> What is important for our present purposes is that the proliferation of investment treaties has led to an explosion of investment arbitration. The first awards emanating from the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), a leading forum for investment arbitration, that were based on the general consent of a state were made in 1988 and 1990, pursuant to a statute and a treaty respectively.<sup>9</sup> Previous ICSID arbitrations had been based on arbitration clauses in investment contracts. It is, however, only since 1996 that, in the words of one ICSID staff member, 'the floodgates ... seemed to open'.<sup>10</sup> From 1995 to 2004 ICSID registered four times as many claims as in the previous 30 years and the growth trend appears to be sustaining. By July 2005 there were 91 claims pending, more than all of the claims registered at ICSID during its entire history until 2001. The experience with respect to ICSID arbitration indicates rapid and continuing growth in investment arbitration.<sup>11</sup>

This growth suggests that multinational enterprises are increasingly prepared to use investment arbitration to resolve disputes with states, indicating that investment arbitration has become an important method for foreign investors to resist state regulation and seek compensation for the costs that flow from the exercise of public authority. Moreover, the wide geographic coverage of investment treaties and the corresponding availability of investment arbitration has taken investment arbitration beyond a mere collection of dispute settlement procedures in different treaties and established it as an international mechanism for adjudicative review in the

<sup>6</sup> Energy Charter Treaty, 17 Dec. 1994, 35 ILM (1996) 509, Art. 26.

<sup>7</sup> UNCTAD, *Trends in International Investment Agreements: An Overview*, UNCTAD Series on Issues in International Investment Agreements (1999), at 33–34. Before the 1990s, nearly all investment treaties were concluded between capital-exporting and capital-importing states, usually based on model BITs adopted by the major capital-exporting countries.

<sup>8</sup> See, e.g., Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', 38 *Va J Int'l L* (1998) 639; Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit... and They Could Bite', World Bank Policy Research Working Paper No. 3121 (2003).

<sup>9</sup> *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* (Jurisdiction) (14 Apr. 1988), 3 ICSID Rep 131 (hereinafter *SPP*); e.g. *Asian Agricultural Products Ltd (AAPL) v Sri Lanka* (Merits) (27 June 1990), 4 ICSID Rep 246, 30 ILM (1991) 577 (hereinafter *AAPL*).

<sup>10</sup> Parra, *supra* note 3.

<sup>11</sup> The growth of ICSID arbitration is only part of the explosion in investment arbitration. For one, it does not include cases in which an investor and a state have settled a dispute after the investor threatened a claim, but before the claim was registered by ICSID. More importantly, ICSID is the only international arbitration forum that is required to publicize investor claims. Other forums, such as the ICC's International Court of Arbitration or *ad hoc* tribunals established under the UNCITRAL Rules, normally presume that claims should remain confidential unless both disputing parties agree otherwise. Thus, it is not possible to assess the full extent to which the use of investment arbitration has expanded.

regulatory sphere.<sup>12</sup> Given variations under different treaties,<sup>13</sup> this mechanism can appear to be complex, fragmented, and at times incoherent. And in the absence of BITs amongst the capital-exporting states themselves, this does not yet constitute a global system. Nevertheless, there exists a well-established international regime, based primarily on investment treaties, that seeks to protect investors from certain ‘harm’ caused by the exercise of public authority, and whose key unifying feature is the use of investment arbitration as an international mechanism of adjudicative review.<sup>14</sup> This offers evidence of a rapidly emerging regime established at the international level and which, as will be shown, has the potential to form a distinct element of an administrative law system.

## B *The Transformation of International Commercial Arbitration*

Before examining investment arbitration in greater detail, it is first necessary to explain how the regime of investment arbitration incorporates the procedural framework and enforcement structure of international commercial arbitration. Beginning with the Geneva Protocol of 1923, states progressively recognized arbitration as an institution for the resolution of commercial disputes. In doing so, their main purpose was not to regulate the exercise of public authority, but to facilitate international commerce. In particular, states concluded a series of treaties and other instruments – most importantly, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)<sup>15</sup> – in which they made a commitment to recognize and enforce foreign arbitration awards, while also limiting the degree to which international arbitration could displace domestic courts’ authority to resolve regulatory disputes (i.e. disputes between the state and an individual arising from the state’s exercise of public authority within its territory).<sup>16</sup> As an essentially private or ‘alternative’ method of adjudication, arbitration could be subject to the preferences of the disputing parties, allowing for the use of adjudicative rules regarding issues such as the confidentiality of the proceedings or the professional activities of arbitrators that are anathema to the public court system.

International arbitration involving claims by private parties was thus conventionally limited to relations within the commercial sphere, and the extent to which it

<sup>12</sup> Salacuse, ‘Toward a Global Treaty on Foreign Investment: The Search for a Grand Bargain’ in N. Horn (ed.), *Arbitrating Foreign Investment Disputes* (2004), at 68–70.

<sup>13</sup> There are notable variations among investment treaties including differences in scope, the definition of investment standards, and the relevant arbitration rules and arbitration institutions: UNCTAD, *World Investment Report 2004* (2004), at 53–86.

<sup>14</sup> Schneiderman, ‘Investment Rules and the New Constitutionalism’, 25 *Law & Social Inq* (2000) 757, at 769–770 and 781.

<sup>15</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) (hereinafter ‘New York Convention’). See A.J. Van den Berg, *The New York Convention of 1958* (1981).

<sup>16</sup> A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (1999), at 137 and 449. ‘Recognition’ of an arbitration award by a court serves to bar fresh proceedings by the other disputing party; ‘enforcement’ refers to the court’s application of legal sanctions, including seizure of property and other assets, forfeit of bank accounts, or imprisonment.

could be used to resolve disputes in the public sphere was controlled by domestic courts. The jurisdiction of a commercial arbitration tribunal did not normally extend to regulatory disputes arising from the state's exercise of public authority with respect to foreign nationals, including foreign investors. A key aspect of the investment treaty arbitration is that it transplants this private adjudicative model from the commercial sphere into the realm of government, thereby giving privately-contracted arbitrators the authority to make what are in essence governmental decisions. This is achieved because investment treaties incorporate arbitration treaties in order to provide an institutional forum and procedural framework for investment arbitration. Investment treaties also rely on arbitration treaties for the enforcement of arbitration awards by domestic courts.<sup>17</sup> Thus, when it came to the drafting of investment treaties, the previously established arrangements of arbitration treaties were simply incorporated as part of the architecture of investment arbitration. In the process, the procedural framework and enforcement structure of international commercial arbitration that provided the basis for the use of a private model of adjudication was extended to resolve regulatory disputes between individuals and the state.

The first multilateral treaty in which states authorized the expansion of compulsory international arbitration to encompass regulatory disputes between states and foreign investors was the Convention on the Settlement of Investment Disputes of 1965 (the ICSID Convention).<sup>18</sup> The ICSID Convention also played an important role in promoting investment arbitration by establishing a forum – the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) – and a set of arbitration rules dedicated to investment arbitration.<sup>19</sup> Where the disputing parties do not otherwise agree, many investment treaties delegate to the ICSID Secretary General the authority to appoint presiding arbitrators of investment arbitration tribunals.<sup>20</sup> There is also an ICSID Secretariat to register and administer arbitrations, and a process for the annulment of awards which replaces domestic judicial review of investment arbitration awards.<sup>21</sup>

For ICSID to have jurisdiction over an investment dispute, *inter alia*, the state and the investor must both consent to the arbitration, whether by contract, statute or treaty.<sup>22</sup> At first, most consents by states to ICSID arbitration were contained in investment contracts between the state and a foreign investor. In such cases, the state's consent to arbitration was a private rather than a sovereign act, and the scope of ICSID arbitration remained limited to the commercial sphere. However, as states increasingly consented to ICSID arbitration in statutes and investment treaties, ICSID arbitration

<sup>17</sup> UNCTAD, *supra* note 3, at 62–64 and 97–98.

<sup>18</sup> Convention for the Settlement of Investment Disputes, 18 Mar. 1965, 4 ILM (1965) 524 (entered into force 14 Oct. 1966) (hereinafter 'ICSID Convention'). See generally C. Schreuer, *The ICSID Convention: A Commentary* (2001).

<sup>19</sup> ICSID, Rules of Procedure for Arbitration Proceedings in ICSID, revised 26 Sept. 1984 and 1 Jan. 2003 (original rules 1968), reprinted in ICSID, *Convention, Regulations and Rules* (2003), at 93 (hereinafter 'ICSID Rules').

<sup>20</sup> E.g., NAFTA, *supra* note 5, Art. 1124(1).

<sup>21</sup> P.T. Muchlinski, *Multinational Enterprises and the Law* (1999), at 551–553.

<sup>22</sup> Schreuer, *supra* note 18, at 191–224.

entered the public sphere in a way that commercial arbitration under the New York Convention never did. Unlike the New York Convention, the ICSID Convention does not limit ICSID arbitration to commercial disputes between investors and states. Rather, the ICSID Convention extends the jurisdiction of ICSID tribunals to ‘any legal dispute arising directly out of an investment’,<sup>23</sup> but without defining the term ‘investment’. As a result, the scope of ICSID arbitration is left to the contract, statute or treaty that authorizes the arbitration and in most investment treaties the term investment is defined broadly. This extends the scope of ICSID arbitration beyond commercial relations to encompass disputes within the public sphere, including regulatory disputes between investors and the state.<sup>24</sup> And this expansion into the public sphere marks the birth of investment arbitration as a manifestation of global administrative law.

The ICSID Convention played an integral role in the emergence of investment arbitration because it opened the way for states to use investment arbitration as a mechanism to control the exercise of public authority by the state. But the role of the ICSID Convention should not be overstated. ICSID arbitration does not in itself represent investment treaty arbitration: many investment arbitrations take place in forums other than ICSID,<sup>25</sup> under different arbitration rules,<sup>26</sup> and subject to other appointing authorities.<sup>27</sup> Further, the ICSID Convention did not constitute the system of investment arbitration because the treaty did not establish the all-important general consents of states to the compulsory investment arbitration. As we have seen, investment arbitration did not fully emerge until the 1990s, after a large number of investment treaties were concluded. But what can be said is that the seed of investment treaty arbitration was planted with the ICSID Convention.

## 2 The Key Features of Investment Arbitration

### A *The Authorization of Individual Claims*

The first element of investment arbitration is the authorization of international claims by foreign investors against the state in disputes arising from the state’s exercise of

<sup>23</sup> ICSID Convention, *supra* note 18, Art. 25.

<sup>24</sup> Put differently, the notion of an investment dispute under the ICSID Convention overlaps with the concept of a commercial dispute under the New York Convention: *SGS Société Générale de Surveillance v Philippines* (Jurisdiction) (29 Jan. 2004), 16(3) World Trade and Arb Mat (2004) 91, at para. 10.

<sup>25</sup> E.g., the International Court of Arbitration of the ICC or the Permanent Court of Arbitration.

<sup>26</sup> ICSID Rules, *supra* note 19; Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, revised 1 Jan. 2003 (original rules 1978), 1 ICSID Reports 213 (hereinafter ‘ICSID Additional Facility Rules’), available at [www.worldbank.org/icsid/facility-archive/1.htm](http://www.worldbank.org/icsid/facility-archive/1.htm); Arbitration Rules of the United Nations Commission on International Trade Law, UN GA Res 31/98, UN GAOR, 31st Session, Supp. No. 17, UN Doc. A/31/17, chap. V, sect. C (1976) (hereinafter ‘UNCITRAL Rules’); Rules of Arbitration of the International Chamber of Commerce, revised 1 Jan. 1998 (original rules 1922) (hereinafter ‘ICC Rules’), available at [www.iccwbo.org/court/english/arbitration/rules.asp](http://www.iccwbo.org/court/english/arbitration/rules.asp); and Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, revised 1 Apr. 1999, available at [www.sccinstitute.com/uk/Rules](http://www.sccinstitute.com/uk/Rules).

<sup>27</sup> E.g., the President of the International Court of Justice or the Secretary General of the United Nations.

public authority, and without any requirement for claims to be filtered by the investor's home state or by an international organization. Under investment treaties, states give a prospective – or *general* – consent to the arbitration of future investment disputes.<sup>28</sup> The state's consent is general because it is not limited to a specific investor, investment project, or dispute or series of disputes arising from a defined historical event. Instead, the consent authorizes the initiation of compulsory arbitration by any member of an indeterminate class of potential claimants in relation to a very wide range of disputes. This in effect endows international tribunals with general jurisdiction over disputes that may arise at some future date from the state's exercise of public authority.

A state's general consent to investment arbitration commonly entails a broad waiver of the state's customary immunity from suit before an international tribunal or before a domestic court that is called upon to enforce an international award. Customary international law adopts the presumption that the resolution of a regulatory dispute involving a foreign national is, in the first place, a matter of domestic law of the state in whose territory the dispute arose.<sup>29</sup> States are not subject to the compulsory adjudication of disputes within their territory, whether by international tribunals or foreign courts.<sup>30</sup> A dispute arising from one state's treatment of an investor of another state could conventionally trigger a claim of diplomatic protection by the investor's home state, but the investor could not make an independent claim under international law.<sup>31</sup> Moreover, a claim of diplomatic protection by the home state could only be made after the investor had exhausted local remedies, giving the host state the opportunity to address the investor's complaint before any resort to international law.<sup>32</sup> Even then, the dispute could only be referred to international adjudication with the consent of the host state. With one exception, no international tribunal – including the ICJ – has been given general jurisdiction over disputes between states and foreign nationals.<sup>33</sup> Also, the reluctance of many states to refer investment disputes to the ICJ has meant that few cases involving the regulatory relationship between states and foreign investors have come before that court.<sup>34</sup> Before the recent

<sup>28</sup> Paulsson, 'Arbitration without Privity', 10 *ICSID Rev* (1995) 232, at 232–233.

<sup>29</sup> *Case Concerning the Payment of Various Serbian Loans Issued In France (France v Serbia)* (1921), PCIJ Ser A, No. 20, para. 41. W. Peter, *Arbitration and Renegotiation of International Investment Agreements* (1995), at 167–169.

<sup>30</sup> E.g. *Status of Eastern Carelia*, Advisory Opinion (1923), PCIJ Ser B, No. 5, 27; *Ambatielos Claim (Greece v United Kingdom)* (1956), 12 RIAA 83 (hereinafter *Ambatielos*), at 103.

<sup>31</sup> *Mavrommattis Palestine Concessions (Greece v Great Britain)* (1924), PCIJ Ser A, No 2, 12; M.O. Hudson, *International Tribunals* (1944), at 67–69 and 198.

<sup>32</sup> *Ambatielos*, *supra* note 30, at 118–119; *Interhandel Case (Switzerland v United States)* [1959] ICJ Rep 6, at 26–27; C. Eagleton, *The Responsibility of States in International Law* (1928), at 70; Okowa, 'Admissibility and the Law on International Responsibility' in M.D. Evans (ed.), *International Law* (2004), at 493–494.

<sup>33</sup> The exception is the Central American Court of Justice of 1907–1918; see Hill, 'Central American Court of Justice' in R. Dolzer *et al.* (eds), *Encyclopedia of Public International Law* (1987), i, 41–42.

<sup>34</sup> M. Sornarajah, *The Settlement of Foreign Investment Disputes* (2001), at 19–20. See *Barcelona Traction, Light and Power Co (Belgium v Spain)* [1970] ICJ Rep 3, 9 ILM (1970) 227; *Elettronica Sicula SpA (United States v Italy)* [1989] ICJ Rep 14; and *Anglo-Iranian Oil Company (United Kingdom v Iran)* [1952] ICJ Rep 93.

proliferation of general consents by states to investment arbitration, investment treaties usually made provision for the resolution of international disputes that engaged the regulatory relationship between the state and investors through inter-state adjudication and diplomacy.

Investment treaties authorize individual claims and, in doing so, they go beyond conventional international adjudication involving a claim by one state against another. Moreover, because investment treaties authorize individual claims in relation to future disputes (based on the general consent of the state), they go beyond historical claims tribunals which allowed individuals to make international claims. Historically, individuals were occasionally authorized to make claims against states before claims tribunals created in the aftermath of war or revolution.<sup>35</sup> From the Jay Treaty of 1794<sup>36</sup> to the Iran–US Claims Tribunal,<sup>37</sup> states have authorized international tribunals to resolve disputes arising from one state’s treatment of the nationals of another and, in some cases, claims could be brought directly by investors. Nevertheless, historical claims tribunals did not involve *generalized* international adjudication because the authority of such tribunals was retrospective. Adjudicative authority was granted to an international tribunal only after the fact, and that authority was limited to disputes arising from a distinct period, series of events, or subject matter.<sup>38</sup>

This retrospective consent differs from an advance consent. Since the former is given after the events in question have taken place, a state is more able to anticipate the significance of its acceptance of compulsory arbitration. By giving a general consent in an investment treaty, the state exposes itself to claims by any foreign natural person or multinational enterprise with an economic interest that may be detrimentally affected by the state’s exercise of public authority. As a result, investment arbitration encompasses future disputes that involve an indeterminate class of potential claimants in relation to a broad range of governmental activity. From the investor’s point of view, to borrow a

<sup>35</sup> E.g., the Alabama Claims Arbitration established after the American Civil War, the Mixed Tribunals and Claims Commissions after World War I, the Iran–United States Claims Commission after the Islamic revolution in Iran, and the UN Compensation Commission after the Gulf War of 1990–1991; J. Collier and V. Lowe, *The Settlement of Disputes in International Law* (1999), chaps 1 and 3.

<sup>36</sup> Treaty of Amity, Commerce and Navigation between Great Britain and the United States, 19 Nov. 1794, 52 Cons TS 243 (entered into force 28 Oct. 1795). H. Neufeld, *The International Protection of Private Creditors From the Treaties of Westphalia to the Congress of Vienna* (1971), at 68–77.

<sup>37</sup> Established by the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), 19 Jan. 1981 (hereinafter ‘Algiers Declaration’), Art. II(1); R.B. Lillich and D.B. Magraw, *The Iran–United States Tribunal: Its Contribution to the Law of State Responsibility* (1998).

<sup>38</sup> Take the example of the Iran–US Claims Tribunal. In 1981, after the Islamic Revolution of 1979, Iran and the United States consented to the compulsory arbitration of claims by each other’s nationals arising out of ‘debts, contracts. . . expropriations or other measures affecting property rights’, allowing foreign nationals to make direct claims before the Tribunal if they each amounted to US\$250,000 or more, and if they were ‘outstanding’ on 19 Jan. 1981: Algiers Declaration, *supra* note 37, Art. II. Thus, the Tribunal had compulsory jurisdiction over a certain body of individual claims, limited to a roughly two-year period following the revolution.

phrase from commercial arbitration, the general consent is like ‘a blank cheque which may be cashed for an unknown amount at a future, and as yet unknown, date’.<sup>39</sup>

Investment arbitration is not only prospective; it also countenances the lodging of individual claims made in a uniquely far-reaching form. Investment treaties define the scope of the state’s consent and the jurisdiction of international tribunals in broad terms, generally apply international standards of investor protection to virtually any sovereign act of the state, and define ‘investment’ to include a very wide range of assets.<sup>40</sup> Furthermore, the standards by which governmental acts are evaluated are drafted in broad and ambiguous terms. The definition of the standards generally settles, in favour of investor protection, historical controversies about whether and how international law protects foreign business from discriminatory treatment, denials of justice, expropriation, and other forms of interference or regulation by the state.<sup>41</sup> As a result, a wide range of regulatory disputes between investors and the state has become subject to control through international arbitration at the instance of investors.

The individualization of claims is also far-reaching in that many investment treaties limit or remove the customary rule that a foreign national must exhaust local remedies before an international claim can be brought.<sup>42</sup> There are at least four rationales for this rule.<sup>43</sup> First, foreign nationals were thought to have a duty to take into account the domestic means to redress wrongs. Secondly, local courts were presumed capable of delivering justice out of respect for the equality and independence of states. Thirdly, where an injury to a foreign national was committed by a private individual or minor official, the exhaustion of local remedies was required to ensure that the wrongful act or denial of justice was the deliberate act of the host state. Fourthly, the rule provided an opportunity for the host state’s legal system to correct wrongs suffered by foreign nationals. Each of these reasons for requiring the exhaustion of local remedies has been subordinated under investment treaties in order to permit investors to bring claims, in the first instance, before an international tribunal rather than a domestic court. By limiting or removing the duty to exhaust local remedies, investment treaties establish investment arbitration as a regime that is independently available to investors, regardless of the reliability of the respondent state’s own legal system. The presumption of respect for, and deference to, local remedies is supplanted.<sup>44</sup> This makes it more likely

<sup>39</sup> Redfern and Hunter, *supra* note 16, at 21–22.

<sup>40</sup> Wälde, ‘Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation’, 12 *Arb Int’l* (1996) 429, at 434–436.

<sup>41</sup> Muchlinski, *supra* note 21, at 173, 501–514.

<sup>42</sup> E.g., *CME Republic BV v Czech Republic* (Merits) (13 Sept. 2001), 14(3) *World Trade and Arb Mat* (2002) 109 (hereinafter *CME* (Merits)), para. 410; *CME Republic BV v Czech Republic* (Damages) (14 Mar. 2003), 15(4) *World Trade and Arb Mat* 83 and 245 (hereinafter *CME* (Damages)), paras 398 and 412–413; UNCTAD, *Dispute Settlement: Investor-State*, UNCTAD Series on Issues in International Investment Agreements (2003), at 32–34; Been and Beauvais, ‘The Global Fifth Amendment: NAFTA’s Investment Protections and the Misguided Quest for an International “Regulatory Takings” Doctrine’, 78 *NYU L Rev* (2003) 30, at 83–86.

<sup>43</sup> Eagleton, *supra* note 32, at 79, 96, and 100; Okowa, *supra* note 32, at 493–494.

<sup>44</sup> Exceptions to the duty to exhaust local remedies are customarily limited to circumstances in which an effective local remedy was unavailable: *Certain Norwegian Loans (France v Norway)* [1957] ICJ Rep 9, at 39.

that disputes concerning the regulatory conduct of the state, traditionally dealt with through domestic judicial review, will be subject to international adjudication, and it also raises the prospect of multiple claims in relation to the same underlying dispute, under both an investment treaty and domestic law.<sup>45</sup>

## B *The Use of Damages as a Public Law Remedy*

In contrast to other international mechanisms, investment treaties establish an individualized regime of state liability to remedy the unlawful exercise of public authority. When making a claim under an investment treaty, an investor normally seeks damages for harm caused by a state's alleged breach of the treaty's standards of investor protection. Where an arbitration tribunal concludes that a state violated the treaty, the tribunal may award damages to the investor. Although awards are compensatory and usually do not include exemplary or punitive damages, the award of damages, by imposing a retrospective sanction, has a deterrent effect on the state. Consequently, investment treaties authorize arbitration tribunals to award damages *as a public law remedy*. This is because damages awards under investment treaties are awarded to compensate an individual and to sanction the state based on a finding that the state's exercise of public authority was unlawful.

Individualized damages claims are very rare in international law. Outside of the European Union, no international regime allows individuals to seek damages through international adjudication in response to a state's alleged violation of international law. For instance, individual claims were ruled out in the case of the World Trade Organization and non-investment chapters of NAFTA, which limit the dispute resolution process to inter-state adjudication based on the remedies of a declaration of illegality and the prospective suspension of trade concessions. In other areas of international law, such as humanitarian law and environmental law, states have eschewed adjudication (let alone damages claims by individuals) to enforce international standards or compensate those harmed by unlawful conduct.<sup>46</sup>

Damages claims by individuals are also the exception in the field of human rights.<sup>47</sup> Despite the expanded protection of human rights law since 1945, individual claims

<sup>45</sup> E.g., *CMS Gas Transmission Company v The Argentine Republic (Jurisdiction)* (17 July 2003), 42 ILM (2003) 788, paras 78 and 80; *Azurix Corp v The Argentine Republic (Jurisdiction)* (8 Dec. 2003), 16(2) World Trade and Arb Mat (2004) 111, at paras 99–100; *Siemens AG v The Argentine Republic (Jurisdiction)* (3 Aug. 2004), ICSID Case No. ARB/02/8, available at <http://ita.law.uvic.ca/documents/SiemensJurisdiction-English-3August2004.pdf>, at paras 151 and 160.

<sup>46</sup> Weiss, 'Invoking State Responsibility in the Twenty-first Century', 96 *AJIL* (2002) 798, at 811–812; Greenwood, 'The Law of War (International Humanitarian Law)' in M.D. Evans (ed.), *International Law* (2004), at 817. The United Nations Convention on the Law of the Sea (UNCLOS), 21 ILM (1982) 1261 (entered into force 16 Nov. 1994), Arts 187(c) and 188(2); Arts 5(4) and 13(15) (Annex III) permit individuals to make claims before the International Sea-Bed Disputes Chamber, but only in contractual disputes.

<sup>47</sup> E.g. International Covenant on Civil and Political Rights (ICCPR), 16 Dec. 1966, 999 UNTS 171, 61 *AJIL* (1967) 870 (entered into force 23 Mar. 1976), Art. 41 (providing for an optional system of claims by states parties) and (First) Optional Protocol (1966) (providing for an optional system of individual petitions leading to consideration and an expression of views by an international committee, but not individual claims leading to compulsory arbitration or a damages award).

for damages are authorized only under the European Convention on Human Rights<sup>48</sup> and the American Convention on Human Rights.<sup>49</sup> In both cases, the ability of individuals to claim damages is more limited than in investment arbitration. Under the European Convention, the European Court of Human Rights may afford ‘just satisfaction’ to an individual whose rights were violated where this is deemed necessary by the Court.<sup>50</sup> However, the Court has declined to award damages for various reasons, including the adequacy of non-monetary remedies and the host state’s ability to pay.<sup>51</sup> Under the Inter-American Convention, an individual can receive damages only if the Inter-American Commission on Human Rights brings the claim before the Inter-American Court, and the Commission has declined to bring claims on behalf of corporations.<sup>52</sup> Further, the Inter-American Court has adopted a cautious approach to awarding monetary compensation.<sup>53</sup> Above all, both conventions (unlike investment treaties) impose a duty on individuals to exhaust local remedies before bringing a claim,<sup>54</sup> and neither allows individuals to select the rules that govern the claim, to appoint members of the tribunal, or to directly enforce an award against state assets.

Beyond the field of human rights, the only other case in which individuals can claim damages pursuant to a treaty is under European Community (EC) law. Specifically, the *Francovich* doctrine articulated by the European Court of Justice (ECJ) established the principle that individuals are entitled to seek damages for an alleged violation of EC law by a Member State.<sup>55</sup> Outside of investment arbitration, the *Francovich* doctrine is probably the most ambitious attempt to apply treaty-based state liability in the context of economic integration.<sup>56</sup> Even so, the *Francovich* doctrine is limited by various factors. The Court has, for instance, seen fit to limit compensation

<sup>48</sup> European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 Nov. 1950, Eur TS 5, 213 UNTS 222 (entered into force 3 Sept. 1953), Art. 34.

<sup>49</sup> American Convention on Human Rights (ACHR), 1144 UNTS 123 (entered into force 18 July 1978), Art. 44.

<sup>50</sup> ECHR, *supra* note 48, Art. 41.

<sup>51</sup> Costa, ‘The Provision of Compensation Under Article 41 of the European Convention on Human Rights’ (Address to the British Institute of International and Comparative Law, 7 Dec. 2001), at 1–3 and 16–17.

<sup>52</sup> ACHR, *supra* note 49, Arts 61(1) and 63(1). E.g., *Tabacalera Boquerón SA v Paraguay* (1997), Inter-Am Comm HR, Rep. No. 47/97, *Annual Report of the Inter-American Commission on Human Rights: 1987*, OEA/Ser.L/V/II.98/Doc.7/rev. (1998) 225, at paras 25 and 36.

<sup>53</sup> D. Shelton, *Remedies in International Human Rights Law* (1999), at 221–223.

<sup>54</sup> ECHR, *supra* note 48, Art. 35; ACHR, *supra* note 49, Art. 46(1).

<sup>55</sup> More precisely, damages must be available as a remedy before the domestic courts of the Member States, subject to the overriding jurisdiction of the European Court of Justice in matters of EC law: Cases 6 and 9/90 *Francovich and Bonifaci v Republic of Italy* [1991] ECR I-5357, [1993] 2 CMLR 66 (hereinafter *Francovich*), paras 35 and 40. P. Craig and G. De Búrca, *EU Law – Text, Cases, and Materials* (3rd edn, 2003), at 257–274.

<sup>56</sup> The *Francovich* doctrine applies to legislative acts and omissions (Cases C-46 and C-48/93 *Brasserie du Pêcheur SA v Germany*; *R. v Secretary of State for Transport, ex parte Factortame Ltd. and Others* [1996] ECR I-1029, [1996] 1 CMLR 889 (hereinafter *Brasserie du Pêcheur*)), administrative decisions (Case C-5/94 *R v Ministry of Agriculture and Fisheries, ex parte Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553), judicial decisions (Case C-224/01 *Köbler v Austria* [2003] ECR I-10239, [2003] 3 CMLR 28), and acts of sub-national governments (Case C-424/97 *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123).

to cases of 'sufficiently serious' state violations of EC law.<sup>57</sup> It has stated that 'the decisive test' for the imposition of state liability is whether the state 'manifestly and gravely disregarded the limits of its discretion' under EC law.<sup>58</sup> Further, the availability of damages under the *Francovich* doctrine may be restrained by domestic rules of liability in the state responsible for the violation, subject to the minimum requirements of effectiveness and non-discrimination.<sup>59</sup> Finally, domestic courts play an important role in determining whether liability should be imposed in specific cases,<sup>60</sup> and this has allowed the courts in the United Kingdom, for instance, to refuse compensation out of a fear that claimants 'might thereby side-step limitations on liability in domestic tort law'.<sup>61</sup>

The ECJ's requirement for a 'sufficiently serious' breach by a Member State introduces a fault-based limitation on state liability, and the role of domestic courts in imposing liability law cushions the impact of state liability on governments.<sup>62</sup> Similarly, in light of the claimant's resort to domestic legal remedies, both the European Court of Human Rights and the Inter-American Court of Human Rights have declined to award damages where non-monetary remedies were deemed adequate. In investment arbitration, by contrast, these limiting factors are not present. Investment treaties do not provide for a minimum threshold of culpability on the part of the state. Also, claims for damages are brought directly before an international tribunal whose decisions are insulated from review by domestic courts pursuant to arbitration treaties like the New York Convention (discussed below). For these reasons, the ability of investors to claim damages under investment treaties is not only exceptional in the context of international law, but is also much more extensive than under other international mechanisms that allow individual claims for damages against the state.

### C *The Direct Enforceability of Awards*

Conventionally, foreign nationals have faced difficulties in having regulatory disputes involving a state adjudicated, or awards against the state enforced, in domestic courts other than those of the respondent state itself. Domestic courts commonly declined to rule on the sovereign acts of foreign states, whether for reasons of sovereign immunity,

<sup>57</sup> *Brasserie du Pêcheur*, *supra* note 56, at 990 (finding various fault-based factors relevant to the issue of whether a breach was sufficiently serious, including: the clarity and precision of the rule breached; the measure of discretion left by that rule to the national or Community authorities; whether the infringement and the damage caused were intentional or involuntary; whether any error of law was excusable or inexcusable; the fact that the position taken by a Community institution may have contributed towards the omission; and the adoption or retention of national measures or practices contrary to Community law).

<sup>58</sup> Case C-352/98 *Laboratoires Pharmaceutiques Bergederm and Goupil v Commission* [2000] ECR I-5291.

<sup>59</sup> *Francovich*, *supra* note 55, at para. 43.

<sup>60</sup> C. Harlow and R. Rawlings, *Law and Administration* (1997), at 632-633.

<sup>61</sup> M. Lunney and K. Oliphant, *Tort Law* (2000), at 524-525.

<sup>62</sup> Fairgrieve, 'The Human Rights Act 1998, Damages and Tort Law' [2001] *Pub Law* 695, at 698-699; Tridimas, 'Liability for Breach of Community Law: Growing Up and Mellowing Down?', 38 *CML Rev* (2001) 301, at 317-321 and 331-332.

act of state, or non-justiciability.<sup>63</sup> By incorporating the enforcement structure of the ICSID Convention and the New York Convention, investment treaties allow investors to overcome these restrictions and seek enforcement of an investment arbitration award against assets of the respondent state before the domestic courts of any state that is a party to these two treaties.<sup>64</sup> The coercive force of an investment arbitration award is thereby supported by the authority of a large number of states to enforce awards within their territory, based on treaties that authorize the enforcement of foreign arbitration awards.

An investor does not, of course, always need to resort to the domestic courts to enforce an investment arbitration award since in most cases states voluntarily comply. If a state refused to do so in a timely manner, it would likely face pressure from the international financial institutions, the investor's home state, other capital-exporting states, and the wider investment community.<sup>65</sup> But if a state still refused to comply with an award, the investor would have two general options for pursuing enforcement. First, investment treaties commonly require the states parties to recognize and enforce awards under the investment treaty itself. This allows an investor to seek enforcement by domestic courts in the states parties to the investment treaty, subject to the terms of the treaty and relevant domestic legislation, on the basis that the respondent state's ratification of the treaty constitutes a waiver of its sovereign immunity from enforcement. Secondly, where the investment treaty provides for enforcement under the ICSID Convention or the New York Convention, an investor can seek enforcement of an award by a domestic court in any state party to either of these treaties, based on the terms of the treaty and applicable legislation.<sup>66</sup> Given that approximately 165 states are parties to either the New York Convention or the ICSID Convention, or both, this method of enforcement is exceptionally powerful.

To illustrate, the investment chapter (Chapter 11) of NAFTA refers for purposes of enforcement to both the ICSID Convention and the New York Convention. The question of which treaty's enforcement structure applies to an arbitration award under Chapter 11 depends on the arbitration rules under which the investor files its claim. Investors may file a claim under one of three sets of arbitration rules: the ICSID Rules, the ICSID Additional Facility Rules, or the Arbitration Rules of the United Nations Commission on International Trade Law (the UNCITRAL Rules).<sup>67</sup> If an investor selects the ICSID Rules, the Chapter 11 arbitration proceeds under the ICSID Convention,

<sup>63</sup> E.g., *Blad v Bamfield* (1674), 3 Swan 604, 36 ER 992; *Duke of Brunswick v King of Hannover* (1844), [1848] 6 Beav 1; *Oetjen v Central Leather Co*, 246 US 297 (1918), at 303–304. Denza, 'The Relationship Between International and National Law' in Evans (ed.), *supra* note 46, at 415.

<sup>64</sup> Leahy, 'Enforcement of Arbitral Awards Issued by the Additional Facility of the International Centre of Settlement of Investment Disputes (ICSID)', 2 *J Int'l Arb* (1985) 15, at 15–16; Redfern and Hunter, *supra* note 16, at 474 and 481.

<sup>65</sup> Indeed, one reason for the decision to locate ICSID within the World Bank was to add weight to ICSID awards, given the World Bank's influence over host states' access to international credit: I. Delupis, *Finance and Protection of Investments in Developing Countries* (1973), at 3.

<sup>66</sup> Although enforcement and recognition under the ICSID Convention is possible only where both the host state and the investor's home state are parties to that treaty.

<sup>67</sup> *Supra* note 26.

which provides that an ICSID award has the force of a final court judgment of a state party under its domestic law and that the award cannot be reviewed by domestic courts.<sup>68</sup> Thus, an ICSID award is enforceable, independent of the New York Convention (although domestic courts might nonetheless refuse to execute<sup>69</sup> an ICSID award against state assets for reasons of sovereign immunity). If, alternatively, the investor selects the ICSID Additional Facility Rules or the UNCITRAL Rules, the Chapter 11 arbitration proceeds under the New York Convention, which provides that an award shall be recognized as binding by the states parties to the treaty and that a domestic court may review an award only on limited grounds.<sup>70</sup>

The internationalized system of award enforcement gives investment arbitration a coercive force beyond that of other forms of international adjudication in the public sphere. No human rights treaty allowing individual damages claims authorizes the enforcement of awards by domestic courts.<sup>71</sup> Even judgments of the ICJ, although binding on states that consent to the Court's jurisdiction, can be enforced only by the UN Security Council;<sup>72</sup> a successful state therefore is dependent on the support of a majority of Security Council members, including the five permanent members, to obtain enforcement. Under investment treaties, by contrast, a successful investor can seek enforcement against assets of the respondent state in the courts of as many as 165 states.

This piggybacking of investment treaties on the enforcement structure of international commercial arbitration both fragments and restricts judicial supervision of investment arbitration. Judicial supervision is fragmented because investors can pursue enforcement in any state party to the New York Convention or other relevant treaty, thus dividing supervisory responsibility among the courts of a large number of countries.<sup>73</sup> Judicial supervision is restricted because arbitration treaties limit the setting aside or non-recognition of awards by domestic courts to the grounds enumerated in the treaty and relevant legislation. To illustrate, let us examine in more detail how awards are enforced under the New York Convention.

At the outset, one must distinguish between the seat of the arbitration and the place of enforcement. The seat of the arbitration is the place in which the arbitration

<sup>68</sup> ICSID Convention, *supra* note 18, Arts 54 and 53(1). See also ICSID Additional Facility Rules, *supra* note 26, Art. 53(4).

<sup>69</sup> Once an award has been recognized and enforced by the courts of a state party to the ICSID Convention, the New York Convention, or the Inter-American Convention, the investor may seek execution of the award against the respondent state's assets in the enforcing state's territory.

<sup>70</sup> New York Convention, *supra* note 15, Arts I, III, and V. Finally, the award may also be enforced under the Inter-American Convention on International Commercial Arbitration, 30 Jan. 1975, 14 ILM (1975) 336 (hereinafter 'Inter-American Convention'), which contains provisions (Arts 1, 4, and 5) that are similar to those under the New York Convention.

<sup>71</sup> Shelton, *supra* note 53, at 90.

<sup>72</sup> Charter of the United Nations, 26 June 1945 [1945] USTS No 993, [1946] UKTS No 67, [1945] Can TS No. 7, Art. 94(2) (entered into force 24 Oct. 1945). D.J. Harris, *Cases and Materials on International Law* (5th edn, 1998), at 989.

<sup>73</sup> *Republic of Ecuador v Occidental Exploration and Production Company* [2005] EWHC 774, at paras 76 and 84 (Comm. Ct.); Brower, Brower II, and Sharpe, 'The Coming Crisis in the Global Adjudicative System', 19 *Arb Int'l* (2003) 415, at 419.

is located for purposes of domestic jurisdiction.<sup>74</sup> Under the New York Convention, an arbitration is subject to supervision by domestic courts in the seat of the arbitration, and a respondent state may apply to set aside an award only in the courts in that seat based on its domestic law. (Importantly, the seat of the arbitration is usually chosen by the arbitration tribunal itself, which allows the tribunal to have a degree of control over the level of judicial supervision to which the tribunal will be subject in the event of an application to pre-empt the arbitration or set aside an award.<sup>75</sup>) On the other hand, the place of enforcement is the jurisdiction in which an investor seeks enforcement (including execution) of the award against assets of the respondent state.

For an award to be executed under the New York Convention, it must be recognized and enforced by the courts in the place of enforcement, but not necessarily in the seat of the arbitration.<sup>76</sup> A court in the place of enforcement has the discretion to refuse to recognize and enforce an award based on the limited grounds stipulated in the New York Convention.<sup>77</sup> This arguably includes the discretion to recognize and enforce an award even if the award was set aside in the seat of the arbitration.<sup>78</sup> Consequently, an investor can seek enforcement of an award against assets of the respondent state before the courts in any state party to the New York Convention regardless of whether the courts of either the respondent state or the seat of the arbitration have upheld the award.<sup>79</sup> That said, most courts would probably be reluctant to recognize and enforce an award that had been set aside by a court in the seat of the arbitration.<sup>80</sup>

Investment arbitration awards are thus subject to review by the courts in the seat of the arbitration and in the place of enforcement,<sup>81</sup> though many states have enacted legislation implementing the New York Convention which directs domestic courts to

<sup>74</sup> Under NAFTA, Chap. 11, a tribunal must locate the seat of an arbitration in a NAFTA state that is a party to the New York Convention: NAFTA, *supra* note 5, Art. 1130. Up to June 2005, eight arbitrations under NAFTA Chap. 11 were located in Canada, seven in the United States, and none in Mexico.

<sup>75</sup> The domestic law of the seat of the arbitration may also determine other issues, such as whether the arbitration agreement was valid (in the absence of an agreement of the parties to apply another law to determine this issue); and whether the composition of the arbitration tribunal and the arbitration procedure were lawful (in the absence of an agreement of the parties on these matters). See Peter, *supra* note 29, at 284–285; W.M. Reisman, *Systems of Control in International Adjudication and Arbitration* (1992), at 127.

<sup>76</sup> New York Convention, *supra* note 15, Art. V.

<sup>77</sup> *Ibid.* See also Model Law on International Commercial Arbitration, 21 June 1985, UNCITRAL, UN Doc. A/40/17, Annex I, 24 ILM (1985) 1302 (hereinafter ‘UNCITRAL Model Law’), Arts 34 and 35.

<sup>78</sup> New York Convention, *supra* note 15, Art. V(1)(e).

<sup>79</sup> E.g., *Sonatrach v Ford Bacon & Davis Inc* (1990) 11 YB Comm'l Arb 370; *Hilmarton I* (1995) 20 YB Comm'l Arb 663; *Chromalloy Aeroservices v Arab Republic of Egypt*, 939 F Supp 907 (DDC 1996); Reisman, *supra* note 75, at 113–116.

<sup>80</sup> Redfern and Hunter, *supra* note 16, at 415, 484–485.

<sup>81</sup> ICSID Convention, *supra* note 18, Arts 53–55; New York Convention, *supra* note 15, Art. V; Inter-American Convention, *supra* note 70, Arts 4–5. E.g., UNCITRAL Model Law, *supra* note 77, Arts 34–35; *Report of the Secretary-General: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, UN Doc. A/CN.9/264 (25 Mar. 1985), 16 YB UNCITRAL (1985) 104, para. 44.

defer to foreign arbitration awards.<sup>82</sup> Furthermore, the juristic tendency, at least in North America and Europe, has been to show a high level of deference to arbitration tribunals.<sup>83</sup> For these reasons, investment tribunals are insulated from judicial review.<sup>84</sup> In international commercial arbitration, restricting judicial supervision is typically justified on the basis that the courts should not interfere with choices of private parties to resolve commercial disputes in an alternative forum of their choosing. In investment arbitration, by contrast, the use of the enforcement structure of commercial arbitration tends to disperse and insulate the ability of privately-contracted arbitrators to review and sanction the regulatory conduct of states.

In sum, investment treaties delegate adjudicative authority not only to international tribunals, but also to the courts of the seat of the arbitration and any prospective place of enforcement. Where an investment arbitration tribunal chooses the respondent state as the seat of the arbitration, the tribunal is subject to supervision by the courts of that state, subject to its domestic law. Where a foreign state is chosen as the seat of the arbitration, the arbitration is subject to supervision by foreign courts, subject to foreign domestic law. This means that the states parties to an investment treaty, by consenting to investment arbitration, have in effect delegated authority over the adjudication of regulatory disputes within their territory to the domestic courts of as many as 165 countries.

#### D *The Facilitation of Forum-shopping by Investors*

Investment treaties offer abundant opportunities for forum-shopping. They do so because they establish varying levels of legal protection for capital flows between different states – depending on whether a treaty is in place and on its terms – which in turn creates an incentive for multinational enterprises to adapt their corporate structure to maximize their legal security.<sup>85</sup> Moreover, investment treaties facilitate

<sup>82</sup> E.g., Federal Arbitration Act, 9 USC chap. 1, sect. 10 (governing actions in a US federal court to vacate awards (chap. 1, sect. 10) and to recognize and enforce awards under the New York Convention (chap. 2, sect. 207) and the Inter-American Convention (chap. 3, sect. 304)); Commercial Arbitration Act, RSC 1985, chap.17 (2nd Supp), Arts 34–36 (Schedule, Commercial Arbitration Code); *Código de Comercio*, Tit. IV, c. 1–9 (Commercial Arbitration), as amended 1989 and 1993, Arts 1415–1463. See also Mustill, 'Arbitration: History and Background', 6 *J Int'l Arb* (1989) 43, at 51–53; Kierstead, 'Referral to Arbitration Under Article 8 of the UNCITRAL Model Law: The Canadian Approach', 31 *Can Bus LJ* (1998) 98, at 100–102; Reismann, *supra* note 75, at 125–126; NAFTA Advisory Committee on Private Commercial Disputes (D. Enix-Ross and D.W. Rivkin), *Summary of U.S. Arbitration Law* (1995), at 1; Tenenbaum, 'International Arbitration of Trade Disputes in Mexico – The Arrival of the NAFTA and New Reforms to the Commercial Code', 12 *J Int'l Arb* 53, 59–60 and 73–74.

<sup>83</sup> Scodro, 'Arbitrating Novel Legal Questions: A Recommendation for Reform', 105 *Yale LJ* (1996) 1927, at 1929–1937; Raymond, 'The Channel Tunnel Case and the Law of International Arbitration', 109 *LQR* (1993) 337, at 341.

<sup>84</sup> *United Mexican States v Metalclad Corporation* (2001) 89 BCLR (3d) 359, 38 CELR 284, 13(5) World Trade and Arb Mat 219, at paras 50–56; *United Mexican States v Marvin Roy Feldman Karpa* (2003) 16(2) World Trade and Arb Mat 167, at paras 77–86 (Ont SCJ), *aff'd* 193 OAC 216, 248 DLR (4th) 443, at paras 34–43 (Ont CA); *Attorney General of Canada v S.D. Myers, Inc* [2004] 3 FCR 368, 5 CELR (3d) 166 (FCTD), at paras 42–44.

<sup>85</sup> M.-F. Houde and K. Yannaca-Small, *Relationships between International Investment Agreements*, OECD Working Paper on International Investment No. 2004/1 (2004), at 4.

forum-shopping on the part of investors, thus establishing investment arbitration as a more generalized mechanism of adjudicative review. In particular, investment treaties facilitate forum-shopping by defining the term investor to include corporations, without imposing restrictions based on the nationality of shareholders or minimum thresholds of foreign ownership and control.<sup>86</sup> As a result, a corporate investor with the nationality of a state party to an investment treaty might be ultimately owned by an investor of a non-state party<sup>87</sup> or by an investor of the host state itself.<sup>88</sup>

It is important to note that access to investment arbitration is in fact restricted to either very wealthy humans or to multinational enterprises. Under investment treaties, an ‘investor’ is a natural or legal person (i.e. a corporation, trust, etc.) who owns foreign assets.<sup>89</sup> Most natural persons, and many companies, do not own foreign assets and therefore do not satisfy this precondition. Among those that do, few own sufficient assets that enable them credibly to threaten a claim under an investment treaty. This is because investors must pay half of the cost of an investment arbitration, and the cost is prohibitive.<sup>90</sup> In the *CME* case, for example, the arbitrators’ fees were \$US1.35 million divided equally between the investor and the respondent state.<sup>91</sup> The high cost of investment arbitration practically limits access to those investors who have a significant monetary interest in the outcome of a dispute with a state. In nearly all cases, these are multinational enterprises.

To bring a claim under an investment treaty, an investor must be ‘foreign’. In other words, the claimant must establish that he or she or it is a national of a state party to the treaty other than the host state, whether as a natural or legal person. A natural person who is an investor in one state party to an investment treaty must usually show that he or she is a national of another state party based on the laws of citizenship of that other state. Likewise, an investor that is a legal person must demonstrate that it satisfies the home state’s relevant laws of incorporation or business establishment.<sup>92</sup> Thus, the question of whether an investor is foreign is determined by the rules of nationality of the investor’s home state, not those of the host state. This facilitates forum-shopping by investors where the home state has liberal domestic rules of incorporation.<sup>93</sup>

<sup>86</sup> *Waste Management Inc v United Mexican States* (Merits) (30 Apr. 2004), 43 ILM (2004) 967, 16(4) World Trade and Arb Mat (2004) (hereinafter *Waste Management No. 2*), at para. 80; *Tokios Tokelès v Ukraine* (Jurisdiction) (29 Apr. 2004), 16(4) World Trade and Arb Mat (2004) 75 (hereinafter *Tokios*), at paras 24, 28, and 36.

<sup>87</sup> *Fireman’s Fund Insurance Company v United Mexican States* (Jurisdiction) (17 July 2003), 15(6) World Trade and Arb Mat (2003) 3, at para. 5; *Mondev International Ltd v United States of America* (Merits) (11 Oct. 2002), 42 ILM (2003) 85, 15(3) World Trade and Arb Mat (2003) 273, at para. 79.

<sup>88</sup> *Wena Hotels Ltd v Egypt* (Jurisdiction) (25 May 1999), 41 ILM (2002) 881, 888; *Tokios*, *supra* note 4, at paras 21 and 38.

<sup>89</sup> Investment treaties adopt different definitions of ‘investor’, but virtually all make access to investment arbitration available to both natural and legal persons who qualify as investors.

<sup>90</sup> Peterson, ‘Bilateral Investment Treaties and Development Policy-Making’ (Report for the International Institute for Sustainable Development, Nov. 2004), at 24–26.

<sup>91</sup> *CME* (Damages), *supra* note 42, at para. 650 (summary of the decision).

<sup>92</sup> Dolzer and Stevens, *supra* note 2, at 33–36.

<sup>93</sup> *Waste Management No. 2*, *supra* note 86, at para. 80.

By establishing a holding company in one state party to an investment treaty, a multinational enterprise can acquire the nationality of that state, and thus obtain protection under the treaty for its assets in other states parties to the treaty.<sup>94</sup>

To date, under investment treaties, investment disputes have in some cases led to multiple claims by different investors under different treaties. In the *CME* case, for example, a US investor used a holding company in the Netherlands to launch parallel claims against the Czech Republic under two separate investment treaties in relation to the same dispute, and to collect \$US350 million in damages even though only one of the claims was successful.<sup>95</sup> In *Tokios*, investors in the Ukraine used a holding company in Lithuania to make a claim against their own state.<sup>96</sup> In both cases, flexible rules of nationality in bilateral investment treaties were interpreted by arbitrators in a manner that dramatically expanded the scope of investment arbitration.

As capital moves beyond the domestic sphere, so too does the regulatory relationship between investors and the state. As foreign ownership expands and fragments so too does the risk that the exercise of public authority by the state will trigger an international claim. The dynamic of forum-shopping means that investment treaties may protect more than actual flows of capital between the states parties, since actual flows do not necessarily correspond to legal arrangements for the ownership of assets.<sup>97</sup> Rather, investment arbitration emerges as a broad-ranging adjudicative regime for the control of states and the protection of investors in general. Limiting access to ‘foreign’ investors thus does not restrict investment arbitration as a generalized mechanism of adjudicative review. An investor can become foreign by establishing a holding company or by a paper transfer of assets among entities within its corporate structure, without any commitment of new capital to the host economy.

### 3 The Distinction between Investment Arbitration and Commercial Arbitration

Since investment treaties adopt an essentially private mode of adjudicating disputes, investment arbitration may appear similar to commercial arbitration. There are three main similarities. First, like commercial arbitration, investment arbitration involves a claim by a private party before a tribunal of privately-contracted arbitrators appointed by the disputing parties.<sup>98</sup> Secondly, investment arbitration proceedings are governed by rules that originate in private arbitration. Finally, as previously explained, the primary remedy is a damages award enforceable under the enforcement

<sup>94</sup> *Amco Asia Corp v Indonesia* (Jurisdiction) (25 Sept. 1983), 23 ILM (1983) 351, at para. 14; *Société Ouest-Africaine des Bétons Industriels v Senegal* (Merits) (25 Feb. 1988), 6 ICSID Rev (1991) 125, 17 YB Com Arb (1986) 42, at 48.

<sup>95</sup> *CME* (Merits), *supra* note 42, at para. 396; *CME* (Damages), *supra* note 42, at paras 432–433.

<sup>96</sup> *Tokios*, *supra* note 86, at paras 21 and 38.

<sup>97</sup> UNCTAD, *Scope and Definition*, UNCTAD Series on Issues in International Investment Agreements (1999), at 37–38.

<sup>98</sup> The presiding arbitrator is normally appointed, in the absence of agreement between the disputing parties, by a designated appointing authority.

structure of international commercial arbitration and based primarily on the *New York Convention*.

Notwithstanding these evident similarities, it would be a mistake to confuse investment arbitration, pursuant to a treaty, with commercial arbitration. Commercial arbitration originates in an agreement between private parties to arbitrate disputes between themselves in a particular manner, and its authority derives from the autonomy of individuals to order their private affairs as they wish.<sup>99</sup> Investment arbitration, by contrast, originates in the authority of the state to use adjudication to resolve disputes arising from the exercise of public authority.<sup>100</sup> Investment arbitration is constituted by a sovereign act, as opposed to a private act, of the state and this, as we will show, makes investment arbitration more closely analogous to domestic juridical review of the regulatory conduct of the state.

### A *The Nature of Commercial Arbitration*

Commercial arbitration is a private form of adjudication authorized by the will of the disputing parties.<sup>101</sup> As such, commercial arbitration is subject to principles of private law, beginning with the supremacy of party autonomy.<sup>102</sup> This principle asserts that the voluntary decisions of individuals regarding their personal affairs be upheld by the state. Honouring party autonomy means respecting the decision of individuals who, in the course of doing business with one other, agree to arbitrate any disputes that might arise between them. An ‘agreement to arbitrate’ established by mutual consent thus provides the ‘foundation stone’ of international commercial arbitration.<sup>103</sup> The authority for commercial arbitration is rooted in contract.<sup>104</sup>

Commercial arbitration arose as an alternative to the public court system.<sup>105</sup> Individuals could agree to have disputes between them resolved by private arbitrators rather than by state-appointed judges. The use of arbitration may be preferred because it is faster and cheaper than the courts, because it is governed by rules chosen by the parties, or because it can be kept confidential.<sup>106</sup> At the international

<sup>99</sup> Fuller, ‘Consideration and Form’, 41 *Colum L Rev* (1941) 799, at 806–808; Redfern and Hunter, *supra* note 16, at 135.

<sup>100</sup> Chayes, ‘The Role of the Judge in Public Law Litigation’, 89 *Harv L Rev* (1976) 1281, at 1294–1295 and 1302.

<sup>101</sup> *Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration*, UN Doc. A/CN.9/207 (14 May 1981), (1981) 12 YB UNCITRAL 77 (hereinafter *Preliminary Model Law Report*), at 78.

<sup>102</sup> Redfern and Hunter, *supra* note 16, at 7 and 247; Fortier, ‘Delimiting the Spheres of Judicial and Arbitral Power’, 80 *Can Bar Rev* (2000) 143, at 147–148.

<sup>103</sup> Redfern and Hunter, *supra* note 16, at 135.

<sup>104</sup> Rau, ‘Integrity in Private Judging’, (1997) 38 *South Texas L Rev* (1997) 455, at 486–487. But see Yu and Shore, ‘Independence, Impartiality, and Immunity of Arbitrators – U.S. and English Perspectives’, 52 *ICLQ* (2003) 935, at 965–967.

<sup>105</sup> Y. Dezaley and B.G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996), at 27–30.

<sup>106</sup> United States, Department of Commerce, Office of the Chief Counsel for International Commerce, *International Arbitration* (1998); Redfern and Hunter, *supra* note 16, at 23–25.

level, arbitration could also be used to fill gaps between legal systems and to avoid any problems that might arise in the enforcement of decisions of foreign courts.<sup>107</sup> For states, one reason to endorse commercial arbitration as an international institution was to facilitate the efficient resolution of cross-border business disputes. International commercial arbitration could be structured so as to take place in a neutral jurisdiction that did not favour a particular private party. By building confidence amongst actors from different countries in the prospect for fair, prompt and effective dispute resolution, commerce would be promoted.

The principle of party autonomy calls for the agreement to arbitrate to be respected by states and, in particular, by domestic courts.<sup>108</sup> Within the bounds of consent and basic procedural fairness, the arbitration process should be insulated from oversight by domestic courts.<sup>109</sup> Consequently, where the arbitration falls within the scope of the agreement to arbitrate, an application by the unsuccessful party to stay the arbitration or set aside an award should be dismissed. In general, no one state's conception of justice or policy should be imposed where it conflicts with the parties' agreement to arbitrate.<sup>110</sup>

Respect for this principle does not mean that the state does not exercise public authority in relation to private arbitration. Arbitration depends on the authority of the state to give force to arbitration awards.<sup>111</sup> The state may thus decide to override agreements to arbitrate for various reasons, such as to protect the interests of a weaker party, third parties, or the public in general.<sup>112</sup> But, for the purpose of facilitating commerce, most states have decided to limit their involvement with respect to private agreements to arbitrate.<sup>113</sup> By agreeing to arbitrate, note Redfern and Hunter, 'parties give up one of the basic rights of the citizens of any civilised community – that is to say, the right to go to their own courts of law'.<sup>114</sup>

This conceptual framework treats commercial arbitration as an autonomous system: so long as a dispute exists within the private sphere, as delineated by the state, individuals are permitted to select an alternative forum for the resolution of their disputes. In turn, the courts will show deference to commercial arbitration, starting with the recognition of agreements to arbitrate and ending with the execution of awards against the losing party. But this logic does not exist with respect to investment treaty arbitration. Although states incorporate certain aspects of commercial arbitration within investment treaties, the authority for investment arbitration originates in the general consents of states, acting in a sovereign capacity, to establish investment

<sup>107</sup> Redfern and Hunter, *supra* note 16, at 12–13.

<sup>108</sup> *Preliminary Model Law Report*, *supra* note 101, at 78.

<sup>109</sup> Bucher, 'Court Intervention in Arbitration' in R. Lillich and C.N. Brower (eds.), *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (1994), at 29.

<sup>110</sup> Redfern and Hunter, *supra* note 16, at 431–432 and 471–474.

<sup>111</sup> Yu and Shore, *supra* note 104, at 964.

<sup>112</sup> Fiss, 'Against Settlement', 93 *Yale LJ* (1984) 1073, at 1085–1086; Scodro, *supra* note 83, at 1947–1949.

<sup>113</sup> As demonstrated by the number of states that have ratified the New York Convention (more than 120) and passed domestic legislation based on the UNCITRAL Model Law (more than 40).

<sup>114</sup> Redfern and Hunter, *supra* note 16, at 5 and 22.

arbitration as a mechanism for the review of the regulatory conduct of the state. When consenting to the use of adjudication to constrain government and thereby protect investors, the action of the state is to be distinguished from that of upholding reciprocally consensual adjudication within the private sphere. Here the state is acting in a sovereign capacity, and disputes processed through arbitration flow directly from the exercise of public authority.

## **B *The Role of the State's Consent***

At root, the equation of investment arbitration with commercial arbitration confuses public for private authority. The confusion is highlighted by the role performed by the general consent in transforming international arbitration from that of a reciprocally consensual method of adjudication between private parties into a mechanism to review and control the exercise of public authority. A private party's consent to commercial arbitration is specific to the dispute or to the private relationship within which the dispute has arisen. A state's consent to investment arbitration, by contrast, is an agreement to the compulsory arbitration of future disputes with investors *as a group*. The function of these two forms of consent, the specific and the general, are discussed in turn.

Private arbitration originates in an agreement between private parties acting as such. This agreement can be concluded either after the dispute has arisen or in advance. Where consent is given after the dispute has arisen, the consent is specific to the dispute. Where consent is given in advance, the consent is specific to the relationship between the parties. In either case, the consent is limited either to a particular dispute or to a private relationship. The subject matter of the dispute cannot extend beyond the private relationship between the disputing parties; since neither third parties nor the state (acting in a public capacity) have consented to the arbitration, it cannot engage matters that affect the interests of either third parties or the state in the regulatory sphere.<sup>115</sup>

The state can, through its agents, specifically consent to private arbitration, just like any other private party, when the state is acting in a private capacity. Thus, a public official may conclude a contract with a company for the supply of goods or services, and agree to arbitrate disputes arising from that contract. Where the state consents to arbitration in a contract, this is a form of commercial arbitration (albeit a special form in that it involves the state acting as a private party).<sup>116</sup> The state's consent flows from the state's entry into private domain and forms part of an agreement

<sup>115</sup> In some cases a private arbitration may affect third parties or the state, although the degree to which this is the case is usually regulated by the state. Since the 1980s, the US Supreme Court has adopted a pro-arbitration stance by allowing the arbitration of disputes that engage the interests of third parties and the general public: e.g., *Mitsubishi Motors Corp. v Soler Chrysler Plymouth Inc.*, 473 US 614, at 627–637 (1985).

<sup>116</sup> Carver, 'The Strengths and Weaknesses of International Arbitration Involving a State as a Party: Practical Implications', 1 *Arb Int'l* (1985) 179, at 180; S.J. Toope, *Mixed International Arbitration – Studies in Arbitration Between States and Private Persons* (1990), at 391–400.

to arbitrate with another private party.<sup>117</sup> Likewise, the state's consent is specific either to the dispute or to the relevant private relationship.

In this manner, the state can specifically consent to investment arbitration as a form of commercial arbitration by entering into a contract with a foreign investor. Contracts between states and foreign investors – variably called investment agreements, economic development agreements, or state contracts – often include arbitration clauses. In such cases, the arbitration is a form of contract-based investment arbitration pursuant to a commercial relationship between the state and an investor, and authorized by the agreement of two parties acting in a private capacity.<sup>118</sup> In contract-based investment arbitration, the principle of party autonomy plays a pivotal role because the dispute is an investment dispute within the private sphere, even though the dispute involves the state.

However, unlike a private party, a state can also consent generally to investment arbitration, in one of two ways. First, the state can consent to investment arbitration by enacting a law that authorizes foreign investors to submit any investment dispute with the state to compulsory international arbitration.<sup>119</sup> Secondly, the state can conclude a treaty that likewise provides for the compulsory arbitration of disputes with foreign investors.<sup>120</sup> In both cases, the state's consent is general because it authorizes the compulsory arbitration of future disputes arising from the state's exercise of public authority in relation to foreign investors as a group.<sup>121</sup> The consent applies to any natural or legal person who satisfies the conditions for bringing a claim. This opens investment arbitration to a class of potential claimants whose identity is unknown to the state at the time of the state's consent. It also opens investment arbitration to a wide range of potential disputes arising from any exercise of public authority affecting the assets of a foreign investor. The general consent transforms investment arbitration from a sub-category of commercial arbitration, based on a reciprocal legal relationship between private parties, into an adjudicative mechanism to control the exercise of public authority.

In making a general consent, the state is not acting in a private capacity. Rather, it exercises public authority that the state alone possesses as an entity representing an independent political group within the international sphere.<sup>122</sup> When consenting by

<sup>117</sup> See *Bank of United States v Planter's Bank of Georgia*, 9 Wheat 904, 907 (US 1824); *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, at 557–558 (CA).

<sup>118</sup> Early ICSID arbitrations were all founded on consents recorded, in the traditional manner, by a clause in an investment contract: see, e.g., *Holiday Inns SA v Morocco* (Jurisdiction) (12 May 1974), 1 ICSID Rep 645; *Kaiser Bauxite Company v Jamaica* (Jurisdiction) (6 July 1975), 1 ICSID Rep 296; *Adriano Gardella v Côte d'Ivoire* (Merits) (29 Aug. 1979), 1 ICSID Rep 283; *AGIP SpA v People's Republic of Congo* (Merits) (30 Nov. 1979), 1 ICSID Rep 306, 21 ILM (1982) 726.

<sup>119</sup> E.g., *SPP*, *supra* note 9, at 161.

<sup>120</sup> E.g., *AAPL*, *supra* note 9, at paras 2–6.

<sup>121</sup> Paulsson, *supra* note 28, at 256; Wälde, *supra* note 40, at 434–436. When the consent is given in domestic legislation, it is subject to domestic law and can be withdrawn or amended according to domestic law: Delupis, *supra* note 65, at 27. On the other hand, when the consent is given in a treaty, it is subject to the terms of the treaty and can be withdrawn or amended only with the consent of the states parties or by abrogation of the treaty.

<sup>122</sup> W.I. Jennings, *The Law and the Constitution* (1959), at 312; Cohen and Smith, 'Entitlement and the Body Politic: Rethinking Negligence in Public Law', 64 *Can Bar Rev* (1986) 1, at 5–6.

treaty to investment arbitration, the state is acting in a sovereign capacity. Only the state can consent generally to arbitration because only the state has the authority to regulate individuals in its territory and to authorize the compulsory adjudication of disputes between the state and individuals who are subject to public authority. Where an investor consents to investment arbitration by seizing upon the opportunity afforded by the general consent, the investor takes advantage of a governing arrangement that was established by states. In this respect, investment arbitration based on the general consent is analogous not to commercial arbitration but to domestic judicial review of state conduct.<sup>123</sup>

A specific, contract-based consent by the state to the arbitration of an investment dispute could have consequences for governmental decision-making. But these are dwarfed by the implications of a general consent to investment arbitration. Contract-based investment arbitration is far more predictable and manageable than other forms of investment arbitration because its subject matter is confined to a specific dispute, investor or project, and because the contracting parties and the disputing parties are the same. The state thus has a relatively clear sense of what it has agreed to arbitrate. In contrast, the general consent potentially engages all of the state's diverse regulatory relationships with foreign investors as a group. The significance of the general consent is revealed when one considers how a state, by the vehicle of the specific consent, could commit to the same level of investor protection (and state liability) that flows from a general consent. To commit to a comparable level of protection, a state would have to conclude a separate agreement to arbitrate with each foreign investor in its territory, and with each foreign investor considering entering its territory.<sup>124</sup> Thus, for Mexico to achieve a comparable outcome to its general consent to investment arbitration under NAFTA, it would have to conclude separate contracts with every natural or legal person with US or Canadian nationality who directly or indirectly owns or controls (or who was seeking to directly or indirectly own or control) assets in Mexico. While the suggestion that Mexico might contemplate doing so is absurd, it does throw into relief the scope of the obligations that emanate from the general consent.

Some commentators distinguish investment arbitration from commercial arbitration by focusing on the consequences of investment arbitration for the general public.<sup>125</sup> Because it originates in the exercise of public authority, investment arbitration does tend to engage matters of public concern that go well beyond those arising from the state's entry into commercial relationships. Unlike reciprocally consensual adjudication between private parties, the adjudication of a regulatory dispute determines the legality of the exercise of public authority in specific cases, and often carries implications for governmental action in general. For this reason, the adjudication of a

<sup>123</sup> D. Lemieux and A. Stuhec, *Review of Administrative Action Under NAFTA* (1999), at 151–152.

<sup>124</sup> Many investment treaties include, in the definition of investor, those entities that are seeking to make an investment in the host state: e.g., NAFTA, *supra* note 5, Art. 1139 ('investor of a Party').

<sup>125</sup> Tollefson, 'Metalclad v. United Mexican States Revisited: Judicial Oversight of NAFTA's Chapter Eleven Investor-State Claim Process', 11 *Minn J Global Trade* (2002) 183, at 204–205.

regulatory dispute is more likely to engage matters of public concern. But this consequentialist justification for distinguishing investment arbitration from commercial arbitration is less than compelling. It is, for example, not always the case that the resolution of a regulatory dispute through investment arbitration will have less serious implications for the public at large than the resolution of a commercial dispute. Thus, it is questionable whether the Feldman tribunal's award under NAFTA Chapter 11 of \$US 1.7 million in damages against Mexico, flowing from Mexico's decision not to rebate taxes to cigarette exporters to a US investor,<sup>126</sup> is more significant for Mexicans than the resolution of a contractual dispute worth hundreds of millions of dollars between Mexico's state oil company and a major foreign buyer. In some cases, investment disputes in the commercial sphere will affect the public interest to a greater degree than certain investment disputes in the regulatory sphere. It is therefore more difficult to characterize an investment dispute involving a claim against the state as essentially public or private based on consequentialist reasoning, than to found the distinction on the fact that the dispute arises from the exercise of public authority and the adjudication is authorized by a sovereign act of the state.

A focus on the consequences of investment arbitration on governmental action nevertheless serves to highlight the significance of the general consent, and of the way that investment arbitration has emerged as a species of global administrative law.<sup>127</sup> It is widely acknowledged that investment arbitration engages matters of public concern that go well beyond the issues raised by the state's commercial relationships pursuant to investment contracts.<sup>128</sup> A state's decision to delegate adjudicative authority to international tribunals, and ultimately to foreign courts, is a major policy decision in its own right. By authorizing the use of investment arbitration, this special method of decision-making is incorporated into the governing apparatus of the state.

## 4 Investment Arbitration as an Administrative Review Mechanism

Once an investor provides notice of a claim under an investment treaty, a tribunal is constituted to adjudicate. The tribunal has the authority to rule on its own jurisdiction and to admit the claim; it also has authority to select the seat of the arbitration and, consequently, the domestic law under which the arbitration takes place. Upon

<sup>126</sup> *Marvin Roy Feldman Karpa v United Mexican States* (Merits) (16 Dec. 2002), 15(3) *World Trade and Arb Mat* (2003) 157.

<sup>127</sup> For a taste of the debate on the degree to which treaty-based investment arbitration constrains the state, and on the costs and benefits, see, e.g., M. Barlow and T. Clark, *MAI: The Multilateral Agreement on Investment and the Threat to Canadian Sovereignty* (1997); Schneidermann, *supra* note 14; Brower and Steven, 'Who Then Should Judge? Developing the International Rule of Law under NAFTA Chapter 11', 2 *Chicago J Int'l L* (2001) 193; Laird, 'NAFTA Chapter 11 Meets Chicken Little', 2 *Chicago J Int'l L* (2001) 223.

<sup>128</sup> Werner, 'The Trade Explosion and Some Likely Effects on International Arbitration', 14(2) *J Int'l Arb* (1997) 5, at 9–10; Cremades and Cairns, 'The Brave New World of Global Arbitration', 3 *J World Investment* (2002) 173, at 208.

finding that it has jurisdiction, the tribunal determines the facts of the dispute and applies the relevant law. If the state is found to have breached an applicable treaty standard, the tribunal may award damages to the investor. This award is binding on the investor and the respondent state and, although it does not establish binding precedent, it may have persuasive value in future cases. As discussed, the award is insulated from judicial review by domestic courts.

Investment arbitration tribunals apply standards that constrain sovereign acts of a state's legislature, judiciary and administration. The jurisdiction of tribunals is limited; an investor must, for example, establish that the relevant dispute relates to an investment. Nonetheless, by obliging states to arbitrate disputes arising from sovereign acts, investment treaties establish investment arbitration as a mechanism to control the exercise of public authority. For this reason, in particular, investment arbitration is best analogized to domestic administrative law. In domestic administrative law, the primary subject of adjudicative review is executive government. In response to an individual claim, the courts may review sovereign acts of executive government to determine whether they were lawful and, if not, to adopt an appropriate remedy. In investment arbitration, by contrast, the main subject of adjudicative review is not executive government but the state as a whole. The international principle of the unity of the state establishes state responsibility for acts of its constituent elements, regardless of how public authority is allocated under domestic public law. In effect, the state is equated to the executive branch in domestic administrative law, and is subjected to review by an international tribunal constituted as part of a bargain between states.

By exercising their adjudicative authority, arbitrators decide whether and how public authority may be used to restrict capital transfers, tax business, establish standards, control land use, establish product standards, deliver services, regulate technology use, and so on.<sup>129</sup> Under the investment provisions of NAFTA, claims have been launched against each state party in disputes arising from various governmental activities, including a ban on the export of hazardous wastes by the Canadian legislature, the creation of an ecological park by a Mexican state government, and the conduct of a jury trial by a US court.<sup>130</sup> Under bilateral investment treaties, tribunals have been established to resolve disputes arising from the issuance and operation of radio broadcasting licences in the Ukraine; from the annulment of permits to construct an industrial plant in Lima, Peru; and from the denial of value-added tax

<sup>129</sup> Schneiderman, *supra* note 14, at 771–772; Werksman, Baumert, and Dubash, 'Will International Investment Rules Obstruct Climate Protection Policies?' (Report for the World Resources Institute, Apr. 2001); Park, 'Arbitration and the Fisc: NAFTA's "Tax Veto"', 2 *Chicago J Int'l L* (2001) 231, at 236–238; Epps and Flood, 'Have We Traded Away the Opportunity for Innovative Health Care Reform? The Implications of the NAFTA for Medicare', 47 *McGill LJ* (2002) 747, at 781–787.

<sup>130</sup> *S.D. Myers, Inc v Government of Canada* (Merits) (12 Nov. 2000), 40 ILM (2001) 1408, 15(1) World Trade and Arb Mat (2003) 184; *Metalclad Corporation v United Mexican States* (Merits) (30 Aug. 2000), 40 ILM (2001) 36, 13(1) World Trade and Arb Mat (2001) 45; *The Loewen Group, Inc and Raymond L. Loewen v United States of America* (Merits) (26 June 2003), 42 ILM (2003) 811, 15(5) World Trade and Arb Mat (2003) 97.

refunds in the oil sector of Ecuador.<sup>131</sup> Perhaps most dramatically, a number of tribunals have been established to determine the legality of Argentinean legislation that responded to the country's economic crisis of 2001–2002 by ending the parity of the Argentinean peso to the US dollar and by converting dollar-denominated utility rates to pesos.<sup>132</sup> Like the members of any administrative tribunal or court, in reviewing these types of measures, arbitrators rule on the legality of state conduct, evaluate the fairness of governmental decision-making, determine the appropriate scope and content of property rights, and allocate risks and costs between business and society.<sup>133</sup> This is the stuff of administrative law.

Viewed from the perspective of administrative law, what is especially remarkable about investment treaties is that they transplant the procedural framework and enforcement structure of commercial arbitration into the public realm. Historically, international commercial arbitration was limited to disputes between private parties; this was true even when the arbitration involved a dispute between an investor and a state since the state, in agreeing to an arbitration clause in a contract, was acting in a private capacity. In these circumstances, investment arbitration was confined to the transactions of private parties within the commercial sphere. By using a private model of adjudication to resolve what are quite clearly regulatory disputes, investment treaties have radically transformed how adjudication is used to review and control public authorities.

Not surprisingly, the importation of a private adjudicative model has generated tensions in relation to investment treaty arbitration.<sup>134</sup> Of particular importance are the issues that arise from the appointment of private arbitrators. Although able to determine the legality and cost of the exercise of public authority with limited supervision by domestic courts, arbitrators are not themselves members of a tenured judiciary. In most cases, arbitrators are practising lawyers or academics who compete for

<sup>131</sup> *Joseph Charles Lemire v Ukraine* (Settlement), ICSID Case No. ARB(AF)/98/1, available at <http://ita.law.uvic.ca/documents/Lemire-Award.pdf>; *Empresas Luchetti, SA and Luchetti Peru, SA v Republic of Peru* (Jurisdiction) (7 Feb. 2005), ICSID Case No. ARB/03/4, available at <http://ita.law.uvic.ca/documents/luchetti.pdf>, at paras 18–21; *Occidental Exploration and Production Company v Republic of Ecuador* (Merits) (1 July 2004), London Court of International Arbitration Administered Case No. UN 3467, available at [http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward\\_001.pdf](http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf), at para. 32.

<sup>132</sup> E.g., *CMS Gas Transmission Company v The Argentine Republic* (Merits) (12 May 2005), ICSID Case No. ARB/01/8, available at [http://ita.law.uvic.ca/documents/CMS\\_FinalAward.pdf](http://ita.law.uvic.ca/documents/CMS_FinalAward.pdf), at paras 53–56; *Camuzzi International SA v The Argentine Republic* (Jurisdiction) (10 June 2005), ICSID Case No. ARB/03/7, available at <http://ita.law.uvic.ca/documents/camuzzijurisdiction.pdf>, at para. 10.

<sup>133</sup> Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law', 80 *Harv LRev* (1067) 1165, at 1168–1169.

<sup>134</sup> E.g., Canada, Mexico, and the United States found it necessary expressly to authorize the public release of arbitration awards and documents in investment arbitrations under NAFTA: Free Trade Commission (NAFTA), *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001), 13(6) *World Trade and Arb Mat* (2001) 139, available at [www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp](http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp). The United States Congress also modified the US Administration's trade negotiating authority under the Bipartisan Trade Promotion Authority Act of 2002 (Div. B, Title XXI, Trade Act of 2002, Pub L No. 107-210, 116 USC 933, s. 2102(3) (2002)) in response to concerns about public access and representation in investment arbitration.

appointments in a market for adjudicative services.<sup>135</sup> Unlike judges, arbitrators have a commercial interest to provide ‘an efficacious and economically valuable service for clients’, and are not barred from political or professional activities incompatible with their independence and impartiality.<sup>136</sup> It is not uncommon for a prominent figure in investment arbitration simultaneously to be sitting as an arbitrator in one case, representing an investor or state in another, and generally advising other clients on investment law.<sup>137</sup> Arbitrators are therefore more susceptible than judges to influence by concerns about their reputation and by the need to secure future business.<sup>138</sup> Simply put, the business opportunities of arbitrators are tied to the popularity of investment arbitration: the greater the utility of investment arbitration to investors, the greater the number of claims will be filed, the greater the demand for arbitrators.<sup>139</sup> Privately-appointed arbitrators are therefore more likely to favour the expansion of the scope and remedial power of investment arbitration, and will have commercial incentives to interpret the jurisdiction of investment tribunals expansively.<sup>140</sup> No matter how well arbitrators do their job, an award will always be open to an apprehension of an institutional bias against the respondent state, given that expansive treaty interpretations and the heightened prospect of state liability promote investment arbitration as a commercial venture.

## Conclusion: Investment Arbitration as Global Administrative Law

Rather than being viewed as an offshoot of commercial arbitration, investment arbitration should be treated as a unique, internationally-organized strand of the administrative law systems of states. Not only is the regime of investment arbitration established by a sovereign act of the state; it is also designed to resolve disputes arising from the exercise of public authority. The subject matter of investment arbitration is a regulatory dispute arising between the state (acting in a public capacity) and an individual who is subject to the exercise of public authority by the state. Although most

<sup>135</sup> Dezaley, ‘Between the State, Law, and the Market: The Social and Professional Stakes in the Construction and Definition of a Regulatory Arena’ in W.W. Bratton *et al.* (eds), *International Regulatory Competition and Coordination* (1996), at 84–86.

<sup>136</sup> Wai, ‘Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization’, 40 *Colum J Transnat’l L* (2002) 209, at 217.

<sup>137</sup> *Republic of Ghana v Telekom Malaysia Berhad*, DC The Hague, 18 Oct. 2004 and 5 Nov. 2004, Nos HA/RK 2004.667 and HA/RK 2004.788 (concluding that a party-nominated arbitrator in an investment arbitration under the UNCITRAL Rules could not concurrently act as counsel to an unrelated party in an ICSID annulment proceeding that raised similar legal issues). See also Cosbey *et al.*, ‘Investment and Sustainable Development’ (Report by the International Institute for Sustainable Development, 2004), at 6.

<sup>138</sup> Rau, *supra* note 104, at 488 and 521.

<sup>139</sup> Sornarajah, ‘Power and Justice in Foreign Investment Arbitration’, 14(3) *J Int’l Arb* (1997) 103, at 117.

<sup>140</sup> Maniruzzaman, ‘Internationalization of Foreign Investment Agreements – Some Fundamental Issues of International Law’, 1 *J World Investment* (2000) 293, at 311; Sornarajah, ‘The Clash of Globalisations and the International Law on Foreign Investment’ (Presentation to the Centre for Trade Policy and Law, Ottawa, 12 Sept. 2002), 15, available at <http://www.carleton.ca/ctpl/papers/sornarajah.doc>, at 18.

regulatory disputes are adjudicated by domestic courts in accordance with domestic law, or by a specialized domestic tribunal subject to supervision by domestic courts, here the general consent authorizes the adjudication of regulatory disputes by an international tribunal. Whether resolved by resort to domestic or international law, this is intrinsically a matter of public law. The regime is therefore to be distinguished from reciprocally consensual adjudication, as conventionally used to resolve international disputes between states or commercial disputes between private parties; it is not based on a reciprocal relationship between juridical equals, but engages a regulatory relationship between the state and an individual.

Viewed as a species of global administrative law, the investment arbitration tribunal must be treated as a semi-autonomous international adjudicative body that reviews and controls state conduct in the public sphere. The tribunal is semi-autonomous because its decisions are insulated from court supervision. It is international because its authority derives from a treaty. It is an administrative review agency because, but for its establishment in the international sphere, it would be performing a role similar to that of a semi-autonomous domestic tribunal charged with resolving regulatory disputes. Being constituted at the international level for the purpose of disciplining the governmental action of states, the investment arbitration tribunal forms a novel and unique extension to the conceptual architecture of administrative law.

What makes investment arbitration tribunals such a potent species of global administrative law is the fact that, owing to their international dimension, tribunals established under the law of one state are invested with authority to resolve a regulatory dispute involving another state. Thus, investment arbitration is both uniquely removed from the domestic legal system of the respondent state and uniquely integrated into the domestic enforcement structures of many other states. As a result, the capacity of investors to make and enforce international claims under investment treaties is unrivalled. Investment arbitration arguably subjects the regulatory relationship between the state and investors to control via international adjudication to a greater degree than any international adjudicative arrangement since the colonial era. For this reason, the regime of investment arbitration should be recognized as constituting an exceptionally important and powerful manifestation of global administrative law.

Indeed, if one adopts a strict definition of global administrative law – as a system akin to domestic judicial review in that it keeps public authorities within the bounds of legality and provides enforceable remedies to individuals harmed by unlawful state conduct – then investment arbitration would appear to be the *only* case of global administrative law in the world today. Simply put, no other system of international adjudication does what investment treaties do to restrain state action through individualized claims, international review mechanisms, and effective remedial arrangements. In no other case can (i) an individual bring an international claim absent the customary duty to exhaust local remedies, (ii) in relation to disputes arising from sovereign acts of the state, and (iii) obtain a precise and potent public law remedy (in this case a damages award) that is (iv) internationally enforceable across the globe against assets of the respondent state. That is, in no other case have states established

an independent adjudicative regime for the review of the regulatory conduct of the state that is backed by the coercive authority of many states, as exercised over assets of a respondent state within their territory.

Globalization is not some autonomous process that occurs as an inevitable outcome of technological change or the unfolding logic of capitalist development. States might have incentives to integrate their economies and open their markets to competition, but they also have choices. With respect to investment treaty arrangements, what remains unclear is the extent to which the established arbitration regime has been the subject of careful forethought by states that remain conscious of the implications of the arrangements they have signed up to. By examining investment treaty arbitration as an exemplar of global administrative law, it is, we believe, possible more clearly to map the disciplinary regimes that are emerging at the international level and to work through their detailed implications. But there is also an additional benefit: by approaching the subject from a perspective that is able to draw on values that are immanent within the modern practice of public law, we are also able to highlight a number of issues about the way in which this regime has emerged. These include: the manner in which the tribunals making such governmental decisions are constituted;<sup>141</sup> the justification for removing such regulatory disputes from the jurisdiction of domestic courts, and for supplanting the principle that local remedies should be exhausted before international claims can be made;<sup>142</sup> the justification for an extensive use of damages with respect to regulatory measures without regard to the qualifications devised by courts for the use of such awards in a public law context;<sup>143</sup> the ability of such tribunals effectively to determine the extent to which their own decisions will be subject to judicial supervision;<sup>144</sup> the peculiarity of being able to make parallel claims arising from a single dispute as to the legality of a sovereign act of a state;<sup>145</sup> and the degree to which the adjudicative process is able to consider and accommodate more general issues of public concern.<sup>146</sup> These issues clearly invite further inquiry. In this article, our main objectives have been to present an analysis of the investment arbitration regime as a unique species of global administrative law and, by doing so, to cast light on the ways in which governing arrangements are presently being restructured and to raise certain questions about aspects of its design.

<sup>141</sup> See *supra*, at 27–28.

<sup>142</sup> See *supra*, at 10–11.

<sup>143</sup> See *supra*, at 11–13.

<sup>144</sup> See *supra*, at 15–17.

<sup>145</sup> See *supra*, at 18–19.

<sup>146</sup> See *supra* note 134; more generally, see Chayes, *supra* note 100.