

HOW INSTITUTIONS MATTER: ON THE JUDICIAL REASONING OF INVESTMENT TREATY ARBITRATION AWARDS

*Suha Jubran-Ballan**

ABSTRACT

Comparison among different courts or tribunals usually involves different political regimes, legal standards, or legal expertise. However, investment treaty arbitration tribunals offer us a rare opportunity to isolate the institutional background and facilitate our understanding of the interplay between the institution and the individual: investment treaty arbitration tribunals are established in different institutional backgrounds but involve the same legal community, the same field of law, and a similar set of legal standards. This comparison shows that despite the relatively high control that tribunals have in drafting awards, institutional backgrounds play a significant role in shaping the judicial reasoning used by tribunals. This paper suggests that institutional arrangements and practices define the audiences addressed by the tribunals and shape judicial reasoning accordingly. Hence, this paper calls for devoting more attention to the institutional backgrounds of investment treaty tribunals, and judicial institutions in general, by acknowledging that those backgrounds may produce different outcomes.

* Suha Jubran-Ballan is a postdoctoral fellow at the Division of Government and Political Theory, School of Political Sciences, University of Haifa. This article is based on a PhD dissertation supervised by Professor Eyal Benvenisti at Tel Aviv University, the Buchmann Faculty of Law.

I.	INTRODUCTION	59
II.	BACKGROUND: THE PROCESS OF JUDICIALIZATION AND THE INSTITUTIONAL PERSPECTIVE	62
III.	INSTITUTIONS AND THEIR AUDIENCES.....	68
	A. <i>Historical Institutionalism in Political Science and Law</i>	68
	B. <i>Institutions and Audiences</i>	70
	C. <i>Summary</i>	72
IV.	INVESTMENT TREATY ARBITRATION AND INSTITUTIONS....	74
	A. <i>ICSID Tribunals</i>	76
	B. <i>New York Convention Group Tribunals</i>	78
	C. <i>NAFTA Arbitration Tribunals</i>	81
	D. <i>Summary: How Appointment Patterns and Review Mechanisms Produce Different Legitimacy Concerns</i>	85
V.	THE JUDICIAL REASONING OF INVESTMENT TREATY ARBITRATION TRIBUNALS	87
	A. <i>Case Law Reference</i>	89
	B. <i>Explicit Policy Considerations</i>	92
	C. <i>Summary: How Judicial Reasoning Varies Among Institutions</i>	98
VI.	SUMMARY AND CONCLUSION	100
	A. <i>Uniformity of Institutions</i>	100
	B. <i>The Centrality of Institutional Arrangements in the Moment of Change</i>	101
	C. <i>Public Law, Public International Law, and Private Law</i>	102
	D. <i>National Courts and Informal Mechanisms for Change</i>	103
	E. <i>A Concluding Remark</i>	105

I. INTRODUCTION

This paper examines how the judicial reasoning of investment treaty arbitration changes according to the institutional background of each tribunal. In this paper, institutions are defined by considering formal arrangements in their larger political and social context and the informal norms of behavior that may have been established in light of those contexts.¹ This paper shows the use of case law and of balancing changes according to the institutional background. This paper suggests that institutional arrangements and practices define the audiences addressed by the tribunals and shape judicial reasoning accordingly. Hence, this paper contributes to three strands of research: the literature on judicial behavior; the literature on institutional behavior; and the normative debates on the appropriate dispute settlement mechanism for investment treaty arbitration.

First, this paper shows that despite the relatively high influence of arbitrators on shaping the judicial reasoning of their awards, institutional arrangements still play a significant role in determining their choices. An analysis of judicial behavior that focuses on individual judicial actors is limited if the institutional background is not considered. This paper focuses on institutional arrangements such as appointment patterns and the review mechanisms for awards—the two main practices that define the dominant audiences from which arbitrators seek legitimacy. Usually, individual and institutional behaviors are intertwined, and isolating the institutional component from the behavior of judicial actors is unachievable due to methodological challenges; comparison among different courts or tribunals usually involves different political regimes, legal standards, or legal expertise.² However, comparison among different institutional backgrounds in investment treaty arbitration involves the same legal community, the same field of law, and a similar set of legal

1. See THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS 4 (Cornell Clayton & Howard Gillman eds., 1999).

2. See Alessandro Romano, *Micro-Meso-Macro Comparative Law: An Essay on the Methodology of Comparative Law*, 17 CHI.-KENT J. INT'L & COMP. L. 1, 2 (2016).

standards.³ Thus, this rare opportunity to isolate the institutional background illuminates and facilitates our understanding of the interplay between the institution and the individual.

Second, this paper captures investment treaty arbitration in a moment of change due to considerable legitimacy concerns, often described as a legitimacy crisis.⁴ As such, it sheds light on the interaction between the judicial institution and its external audiences—the environment in which it operates—in moments of change; institutional behavior is neither a reflection of its environment nor isolated from its environment. In particular, this paper suggests that the interfaces between the judicial institution and its environment should be identified to understand how institutions respond to external pressure and adapt accordingly. Most significant is the understanding that these interfaces are shaped by institutional arrangements and may dictate how the institution reacts to its environment and related demands. For example, in the context of investment treaty arbitration, the change in institutions is not directly subject to the demands of the international community of states, the global judicial community, or the general public within states. Rather, the change in institutional behavior is mediated through at least two institutional variables: formal and informal arrangements that dictate the review mechanisms as well as the appointment patterns of arbitrators.⁵ Since different institutional backgrounds have different review mechanisms and appointment patterns, they behave differently despite the common assumption that they share the same legitimacy concerns.

3. See Stephan W. Schill, *Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator*, 23 LEIDEN J. INT'L L. 401, 402 (2010).

4. See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1523 (2005); Charles N. Brower, *A Crisis of Legitimacy*, NAT'L L.J. B9 (2002); Charles N. Brower et al., *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT'L 415, 418 (2003).

5. See Schill, *supra* note 3, at 404–05; Stephen Jagusch & Jeffrey Sullivan, *A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 79, 83–84 (M. Waibel et al. eds., 2010); Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 818–21 (2008).

Finally, this paper shows that consideration of the institutional backgrounds from which arbitrators act is relevant to understand the manner in which investment treaty arbitration develops. There is presently a considerable amount of debate about the implications of investment treaty arbitration on states' regulatory autonomy, the accountability of arbitrators, and inconsistencies within the field.⁶ However, these debates address investment treaty arbitration as one general category—all tagged as “arbitration”—despite the different institutional arrangements of these arbitrations.⁷ Few studies, if any, address the influence of different institutional arrangements on investment treaty arbitration; this paper suggests a deep look into the institutional arrangements, their particularities, and their audiences to shape the newly evolving regime(s).

This paper provides a short preview of the normative debates of investment treaty arbitration and the process of judicialization within the field in Part II. These issues are reflected in a shift from the contractual, past-oriented, ad hoc dispute settlement mechanism to a normative, future-oriented lawmaking scheme. Then, Part III considers in its analysis two fields of literature: the neo-institutional approach in political science, known as historical institutionalism, and the literature on audiences as related to judicial behavior. Part IV provides a short overview of the different mechanisms of investment treaty arbitration. It identifies three different groups of institutional arrangements by considering both their formal and informal settings. The first group includes arbitration tribunals established according to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).⁸ The second consists of various arbitration rules that are tailored to commercial disputes but also applicable to investor-state arbitrations. Common to these arbitrations is that they are reviewed and enforced according to the normative framework

6. See Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 45–46, 56 (2013).

7. See *id.* at 47–48.

8. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 1, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

shaped by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).⁹ Several arbitration rules are available to settle commercial and investment disputes, but the most common for investment disputes are the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules¹⁰ and the arbitration rules of the Arbitration Institute of Stockholm Chamber of Commerce (SCC arbitration rules).¹¹ Finally, the third group consists of arbitrations proceeding on the basis of Chapter 11 of the North American Free Trade Agreement (NAFTA) between Canada, Mexico, and the United States.¹² While a considerable portion of NAFTA tribunals follow the UNCITRAL arbitration rules, the resulting judgments of which are enforced under the New York Convention, they are excluded from the New York Convention group for specific reasons, which are explained later. Part V examines the judicial reasoning of awards rendered in these contexts to demonstrate—in considering case law precedent and the use of explicit policy considerations—that these tribunals follow different judicial reasoning. Finally, Part VI concludes by summarizing this paper's findings and underscoring its contribution to literature in this field.

II. BACKGROUND: THE PROCESS OF JUDICIALIZATION AND THE INSTITUTIONAL PERSPECTIVE

Investment treaty tribunals, as a response to various

9. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 1, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention].

10. See U.N. GAOR, 31st Sess., 99th plen. mtg., U.N. Doc. A/31/98 (Dec. 15, 1976) [hereinafter UNCITRAL Arbitration Rules (1976)]; see also U.N. GAOR, 65th Sess., 57th plen. mtg., U.N. Doc. A/Res/65/22 (Dec. 6, 2010) [hereinafter UNCITRAL Arbitration Rules (2010)].

11. Stockholm Chamber of Com., Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Jan. 1, 2017), http://sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf [hereinafter SCC Arbitration Rules].

12. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 605, 639–49. [hereinafter NAFTA].

critiques regarding their legitimacy,¹³ started to depart from the “private” and contractual framework to a more judicial-style framework. Tribunals started to follow case law even in the absence of a binding precedent system, to accept third party submissions before formal adjustments,¹⁴ and to express policy considerations in their awards.¹⁵ Commentators noticed this process, along with formal adjustments that were made, and described it as a process of “judicialization.”¹⁶ The process of judicialization usually describes a shift in a tribunals’ behavior from *ad hoc*, *past-oriented dispute settlement* to *future-oriented lawmaking*, characterized by a broader *normative* perspective.¹⁷ Hence, this paper’s analysis captures investment treaty arbitration in a moment of change that, as it suggests, varies from one institutional context to another.

The process of change in investment treaty arbitration is often attributed to the revision of formal legal arrangements or to the behaviors adopted by arbitrators.¹⁸ The institutional

13. See Franck, *supra* note 4, at 1523; Brower et al., *supra* note 4; Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 GEO. INT’L ENV’T L. REV. 51, 52 (2004); Muthucumaraswamy Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 39, 41 (Karl P. Sauvant & Michael Chiswick-Patterson eds., 2008); Jeffery Atik, *Repenser NAFTA Chapter 11: A Catalogue of Legitimacy Critiques*, 3 ASPER REV. INT’L BUS. & TRADE L. 215, 231 (2003); Choudhury, *supra* note 5; but see Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT’L & COMP. L.Q. 371, 392 (2007).

14. See, e.g., *Methanex Corp. v. United States*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae,” paras. 1, 53 (Jan. 15, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf (accepting a similar request based on UNCITRAL arbitration rules).

15. See Benedict Kingsbury & Stephan W. Schill, *Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest—The Concept of Proportionality*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 75, 102 (Stephan Schill ed., 2010); Alec Stone Sweet, *Investor-State Arbitration: Proportionality’s New Frontier*, 4 L. & ETHICS HUM. RTS. 47, 61–62 (2010).

16. Alec Stone Sweet, *Arbitration and Judicialization*, 1 OÑATI SOCIO-LEGAL SERIES 6 (2011); Stone Sweet, *supra* note 15.

17. See *Int’l Thunderbird Gaming Corp. v. United Mexican States*, Separate Opinion of Thomas Wälde, UNCITRAL, para. 129 (Dec. 1, 2005), <https://www.italaw.com/sites/default/files/case-documents/ita0432.pdf>; Schill, *supra* note 3, at 408–09; Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT’L L. 121, 146, 149 (2006).

18. See Schill, *supra* note 3, at 404–05.

background of arbitrators is usually described through formal institutional arrangements, mostly arbitration rules.¹⁹ Such an approach toward institutions may be classified as an “old institutionalism” theory.²⁰ According to this approach, the analysis of institutions is based on formal and legal arrangements within a subject institution, notwithstanding any differences that culture, ideas, or informal practices of the institution may produce.²¹

Formal adjustments aside, some studies address the behavior of individual arbitrators as a potential source of change.²² When examining these studies, one will find assumptions that are based mostly on sociological grounds or on rational choice analysis.²³ In the sociological approach, the arbitrator is perceived as a member of the community of international arbitrators, which sets the behavior norms and practices that guide its members.²⁴ In this context, it is indicated that an arbitrator belongs to a small group of practitioners managing claims, meeting and interacting at professional events, and exchanging ideas; this, in turn, allows conventional norms of community behavior that influence

19. See, e.g., Jagusch & Sullivan, *supra* note 5.

20. See James March & Johan Olsen, *Elaborating the “New Institutionalism,”* in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 3, 5 (Sarah A. Binder et al. eds., 2006).

21. See Kathleen Thelen & Sven Steinmo, *Historical Institutionalism in Comparative Politics*, in HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS 1, 3 (S. Steinmo et al. eds., 1992).

22. See JOSH KARTON, THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW 26–27 (2013); Moshe Hirsch, *The Sociology of International Investment Law*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 143, 144–45, 147 (Z. Douglas et al. eds., 2014).

23. See KARTON, *supra* note 22.

24. See YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 18 (1996) (studying relations and interactions in the community of international commercial arbitrators and reinforcing the myth of a “closed club” in describing the community of international commercial arbitration); see also KARTON, *supra* note 22, at 19; Emmanuel Gaillard, *Sociology of International Arbitration*, 31 ARB. INT’L 1, 4 (2015); Hirsch, *supra* note 22; Catherine Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT’L L. REV. 957, 960–61 (2005).

arbitrator behavior to be shaped.²⁵ Nevertheless, different arbitration centers may prescribe different norms of behavior, and institutional constraints may cause some tribunals to be influenced by the “community” of international arbitrators more than others.²⁶ While a sociological analysis usually acknowledges the role of institutional context in shaping the behavior of actors, current literature on investment treaty arbitration barely touches such issues and presumes a similar context for arbitrators bracketed under the tag “investment treaty arbitration.”²⁷

The second approach to individual behavior, identified by rational choice theory, presents arbitrators as free rational agents and applies an economic analysis to explain their behavior.²⁸ Underlying this approach is the assumption that arbitrator actions are driven by rational behavior aimed at maximizing their own interest. Such an approach predicts that arbitrators adjust their behavior in accordance with market preferences.²⁹ These market preferences are naturally shaped by strong actors in the field—i.e., states and investors—and are signaled by indicators, mainly the repeat appointments of certain arbitrators to the tribunals.³⁰ Arbitrators who do not comply with these preferences are not expected to be reappointed.³¹ Taking such an approach seriously requires a sophisticated analysis that considers the institutional differences among various arbitration mechanisms in connection with the appointment patterns of co-arbitrators and the presiding arbitrator. Therefore, as in the case of the sociological analysis, consideration should be given to the different institutional contexts in which arbitrators operate and,

25. See Hirsch, *supra* note 22, at 144–45, 147–48; Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 *FORDHAM INT'L L.J.* 1014, 1016 (2007) (“[T]he community of international arbitrators exercises sufficient informal self-regulation and self-selection.”); Irene M. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 *COLUM. J. TRANSNAT'L L.* 418, 443 (2013) (discussing the “close-knit community” of arbitrators).

26. See Hirsch, *supra* note 22, at 147–48.

27. See KARTON, *supra* note 22; Hirsch, *supra* note 22.

28. See Susan D. Franck, *The Role of International Arbitrators*, 12 *ILSA J. INT'L & COMP. L.* 499, 516–18 (2005).

29. See Franck, *supra* note 28, at 516–17.

30. See *id.* at 516–18.

31. See *id.* at 516–17.

in particular, if such institutions follow different appointment patterns and review mechanisms.

Following a review of investment treaty arbitration, the author of this paper acknowledges having a limited foundation with respect to how the process of judicialization is developed within the different institutional backgrounds of investment treaty tribunals. Stone Sweet and Florian Grisel offer a theory to explain the process of judicialization by taking institutional design under consideration.³² Based on the delegation theory, they identify three models of arbitral governance, depending on how the hierarchical autonomy is constructed in the field³³: the contractual, in which the arbitrator is an agent of the parties to the disputes; the judicial, in which the arbitrator serves as an agent of a larger community of stakeholders within the arbitral legal order; and the pluralist-constitutional model, in which the arbitral order is conceived as a legal system, applying law from myriad sources, defending its own autonomy, and engaging with other legal regimes—even in the absence of authority possessing a final word.³⁴ As Stone Sweet and Grisel observe, whether a pluralistic system is considered “constitutional” depends on “the extent to which hierarchically organized rules structure these interactions in ways that constitute a system of otherwise autonomous legal regimes.”³⁵ In this context, it is claimed that ICSID and the New York Convention perform constitutional functions and are fundamental elements of an evolving international economic constitution.³⁶ Today, investor-state arbitrators engage with international law, routinely borrow principles from (international) courts, and develop general principles on their own.³⁷ Stone Sweet and Grisel further observe that they create an arbitral common law, which enhances the

32. ALEC STONE SWEET & FLORIAN GRISEL, *THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY* 7–8 (2017).

33. *See id.* at 22–25.

34. *Id.* at 24–25.

35. *Id.* at 30.

36. *Id.* at 30–31.

37. *Id.* at 32; *See* René Urueña, *Subsidiarity and the Public-Private Distinction in Investment Treaty Arbitration*, 79 L. & CONTEMP. PROBS. 99 (2016); Cheng, *supra* note 25, at 1026–27, 1036–37.

autonomy of the arbitral regime and, arguably, contributes to the evolution of the economic constitution. International commercial arbitration, however, is not inherently constitutional, but recognizes “only that the arbitrator is under an obligation to issue awards that do not violate higher-law norms, as well as to take account of rights and normative hierarchies in other ways.”³⁸

Stone Sweet offers a theory for the development of arbitral governance, and for that purpose, a simplified distinction between commercial arbitration and investor-state arbitration restricted to ICSID may be sufficient. Nevertheless, investor-state arbitration is not restricted to ICSID, and a significant number of investor-state tribunals operate within the New York Convention framework.³⁹ These tribunals, as this paper will illustrate, often depart from the commercial arbitration model of arbitration in terms of case law use and balancing. In order to explain this departure, this paper suggests an understanding of institutional behavior that is broader than that offered by the delegation theory.

Focusing on the different institutional contexts of investment treaty arbitration allows this paper to examine how similar legal standards specified in similar treaties are applied by tribunals operating in different institutional contexts. More specifically, such an analysis prompts the question: how does the judicial reasoning differ according to the institutional context, given that a similar field of law is applied by the same community of international arbitrators? This paper approaches this question based on the neo-institutional literature in political science, which indicates that through embedded routines and norms of behavior, institutions shape the preferences and actions of individuals.⁴⁰

38. STONE SWEET & GRISEL, *supra* note 32.

39. See Olivia Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT'L L. 953, 968 (2007) (noting that 142 countries have ratified the New York Convention to further strengthen the likelihood of enforcement of arbitral awards).

40. Thelen & Steinmo, *supra* note 21, at 8.

III. INSTITUTIONS AND THEIR AUDIENCES

Part III brings together two streams of literature, each taken from different disciplines. First, this section discusses historical institutionalism and its relevance to judicial institutions. The second stream of literature deals with judicial behavior, specifically that which focuses on the relation between judges and their audiences as well as judicial institutions and their audiences. Despite the fact that the discussion of audiences developed through focus on the individual judge, taking an institutional approach instead demands discussing courts and their audiences. This paper shows that such discourse, which already exists in literature, is not only helpful but also necessary to understand the development of judicial institutions. Moreover, this paper demonstrates the relation between the institution and its audiences is reflective. Institutional arrangements and settings define the audience to which an institution is responsive and to which it remains indifferent. In other words, the environment is not static but is identified through the institutional structure and norms.

A. *Historical Institutionalism in Political Science and Law*

New institutionalism, in general, seeks to elucidate the role that institutions play in the determination of social and political outcomes of human behavior.⁴¹ In political science, new institutionalism defines the framework within which politics takes place, shaping the beliefs and preferences of political actors.⁴² This paper follows the institutionalist approach in political science, as it presumes a limited set of theoretical assumptions,⁴³ yet retains the institutional structure as a significant mechanism of analysis.⁴⁴ Historical institutionalism defines institutions as the "formal or informal procedures, routines, norms[,] and conventions embedded in the

41. Peter Hall & Rosemary Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936, 936 (1996).

42. March & Olsen, *supra* note 20, at 8–9.

43. See Hall & Taylor, *supra* note 41, at 944, 950, 955; Thelen & Steinmo, *supra* note 21, at 2, 13.

44. Hall & Taylor, *supra* note 41, at 938.

organizational structure of the polity or political economy.”⁴⁵ Unlike rational choice analysis, which assumes political actors have pre-existing preferences exogenous to political institutions, historical institutionalism shows that these beliefs and preferences develop within political institutions and make the concept of rationality unclear and bound to the institutional framework.⁴⁶

The interaction between institutions and their environments is a reflective process.⁴⁷ Institutions can adapt to their environments; nevertheless, environments are not static and react to institutions as well.⁴⁸ In addition, institutions partially create their own environments—actions taken as a result of beliefs about an environment can, in fact, shape the environment.⁴⁹ Finally, the transformation of institutions is not necessarily an efficient process; rules are not necessarily good rules and the outcomes are not necessarily intended.⁵⁰ Moreover, historical institutionalists argue that it is difficult to control the change in an institution or to produce intended and deliberate change.⁵¹

Neo-institutional analysis has been used to explain the development of judicial institutions, specifically supreme courts.⁵² The focus on action in historical institutionalism is reflected in the study of the methods of justification and legitimization, which

45. *Id.* at 942, 947; Thelen & Steinmo, *supra* note 21, at 2.

46. Thelen & Steinmo, *supra* note 21, at 7–9.

47. *Id.*; see also Elizabeth Sanders, *Historical Institutionalism*, in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 50–51 (Sarah A. Binder et al. eds., 2008) (describing the interaction between social mobilization and institutional development as an interactive and mutually constitutive relation).

48. March & Olsen, *supra* note 20, at 7, 14.

49. *Id.*; see also Sanders, *supra* note 47, at 50–51 (discussing the interaction between social mobilization and institutional development as an interactive and mutually constitutive relation).

50. March & Olsen, *supra* note 20, at 7.

51. *Id.* at 11 (explaining that “change is a constant feature of institutions” which has “multiple, path-dependent equilibria” and is “less automatic, less continuous, and less precise than assumed by standard equilibrium models”).

52. THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS, *supra* note 1, at 2 (explaining that neo-institutionalist studies in law seriously consider the effects of judicial norms and legal traditions on judicial decisionmaking, and also attempt to frame the courts in broader political and social contexts).

are understood as the driving forces behind judicial activity.⁵³ Finally, it was indicated that the significance of judicial institutions is that judges and arbitrators have a rather limited scope of action with respect to collecting data and information about the impact of their policies.⁵⁴ Hence, courts remain much less pluralistic than other institutions and are less open to the voices of outside interest.⁵⁵ Therefore, the analysis of arbitrator behavior, whether through the application of rational choice theory or a sociological theory, should consider the institutional frameworks of different arbitrators.

As mentioned above, this paper focuses on interaction between the institution and its environment in today's period of change, which is due to considerable legitimacy concerns. When institutions face external pressures to change, they do not simply adjust to the environment and its demands, but rather change in a manner not necessarily attuned to their environment; within the institutional structure, it is important to understand how the institution and the environment interface in order to explain how change is made. These interfaces specify how institutions react to certain environments and demands, and how they remain indifferent.

B. Institutions and Audiences

From this point, this paper proceeds to consider how audiences contribute to the understanding of institutional behavior. As March and Olsen explain, the consideration of audiences at the institutional level is relevant for historical institutionalism—actors within institutions need to address their audiences to convince them that their actions and decisions are

53. *Id.* at 4.

54. See Kevin T. McGuire, *The Supreme Court Bar and Institutional Relationships*, in *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS*, *supra* note 1, at 115–16 (“[T]he nature of the judicial process works against the Court’s becoming broadly educated about the impact of its policies.”).

55. *Id.* at 117.

legitimate.⁵⁶ Thus, in the context of audiences, an institutionalist would suggest that norms and routines within institutions actually shape actors' understandings and preferences as to which audiences should be considered.

The discussion of courts and their audiences in the literature of judicial behavior is focused largely on supreme courts. This line of literature brings two main insights that are incorporated here within institutional analysis: the first insight is that we should talk about audiences instead of one monolithic "public" because some audiences are more salient than others.⁵⁷ The second insight is that judges adjust their judicial reasoning to their audiences.⁵⁸ However, most studies address only one court and no study compares different judicial institutions in the context of their interactions with their audiences. The comparison of different institutions demonstrates the extent to which institutional arrangements can shape the relationship between courts and their audiences. This relationship influences the development of a given judicial institution and, more significantly, influences the development of this field of law as applied by the judicial

56. See March & Olsen, *supra* note 20, at 3, 8 (noting and expanding upon the notion that common purposes "explain, justify, and legitimate behavioral codes" that prescribe behavior for specific actors); see also John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony Source*, 83 AM. J. SOC. 340, 346, 348 (1977) (explaining that organizations shape their institutional contexts by not only forcing their networks to adapt to their structures and relations, but also by building their goals and structures directly into societal rules).

57. See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1534 (2009) (noting that the authors implicitly consider institutional arrangements, such as appointment mechanisms, in their analysis of judges' considerations with regard to the different audiences they address); see also Nuno Garoupa & Tom Ginsburg, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 COLUM. J. TRANSNAT'L L. 451, 458, 460 (2009) (explaining that judges care about both individual and collective reputation, which are influenced by multiple contradictory and inconsistent "external and internal incentives provided by different audiences"); Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CAL. L. REV. 1619, 1625 (2007).

58. See Jean Louis Goutal, *Characteristics of Judicial Style in France, Britain and the U.S.A.*, 24 AM. J. COMP. L. 43, 71 (1976) (indicating that some studies have addressed the manner in which courts adjust their rhetoric to audiences once the decision on the outcome has been made and that the judicial style of reasoning may be an outcome of the attitude of a specific audience to the law); see also Yonatan Lupu & James H. Fowler, *Strategic Citations to Precedent on the U.S. Supreme Court*, 42 J. LEG. STUD. 151, 154–56, 162 (2013) (showing that international courts strategically use case citations to enhance the degree to which their decisions are perceived as legitimate by external audiences).

institution.

Following historical institutionalism, this paper suggests that institutions' adjustment to audiences should be understood in the institutional context as a whole, not as singular tactics that may vary from one case to another or from one judge to another. The identity of the group(s) that courts address depends on the institutional arrangements that define the audience to which an institution adapts and responds—the *interfaces*. Moreover, an institutional analysis would also suggest that, over time, routines of work and norms of behavior are developed; further, they are likely to be reinforced and guide the behavior of judges in the future.⁵⁹

C. Summary

Based on these theoretical accounts, institutional arrangements indicate which audiences are more salient and assist in comprehending how judicial reasoning of awards is shaped and why such reasoning varies from one institution to another. One should first consider: (1) the different audiences of the institutions, such as the centers of arbitration, national courts, and the general public within individual states; (2) the international community of states; (3) the global judicial community; and (4) the specific parties to the disputes as well as their lawyers. It is important to understand that these audiences are not separate and that they influence one another.⁶⁰ For example, decision makers within arbitration centers may be part of the global judicial community, or the wider public within states may be able to influence state policy with regard to investment treaty arbitration.⁶¹

This paper's discussion has focused on the *interfaces*, as part of the institutional structure, that define the relations between

59. Howard Gillman, *What's Law Got to Do with It?*, 26 L. & SOC. INQUIRY 465, 470, 474 (2001).

60. See Garoupa & Ginsburg, *supra* note 57, at 452–54 (noting that different audiences provide incentives for judges, emphasizing collective reputation).

61. See Brower et al., *supra* note 4, at 418, 429 (noting that the arbitral system, in a global judicial context, lacks control mechanisms as states intervene to influence the outcomes of cases, and that investment disputes raise important political and public policy considerations).

institutions and their audiences. By focusing on the institutional structure, this discussion does not dismiss other interfaces not embedded in the institutional structure—such as cultural or social norms—but rather focuses on those that are more salient and that have a direct influence on the behavior of actors within institutions.⁶² Two interfaces that are strongly considered in this paper are the review and appointment mechanisms of each institution. This paper shows how these interfaces define which audiences are considered to a greater degree than others and hence shape the judicial reasoning of awards.

A third interface embedded in the institutional arrangements is the participation of third parties, which provides a meeting point between the tribunals and the public with an interest in the proceedings.⁶³ However, this paper does not address this interface for two main reasons. First, the participation of third parties is still relatively new, and it is doubtful whether its influence on the behavior of tribunals at the institutional level can be currently evaluated.⁶⁴ Indeed, the number of arbitral proceedings that have incorporated third parties is still relatively low,⁶⁵ particularly in non-NAFTA contexts, and does not allow us to draw profound conclusions. Second, unlike appointment patterns and reviewing authorities, the influence of third party participation in proceedings is relatively weak as these parties are usually not

62. Hall & Taylor, *supra* note 41, at 937, 945 (explaining historical institutionalism, as distinct from other neo-institutionalist approaches, preserves the institutional structure in its analysis); see also Orfeo Fioretos, *Historical Institutionalism in International Relations*, 65 INT'L ORG. 367, 372 (2011) (noting that, on the contrary, there are rational choice institutionalists and sociological institutionalists who collapse the institutional unit into the individual unit of analysis or into culture).

63. See ICSID Convention, *supra* note 8, art. 37; see also UN Commission International Trade Law [UNCITRAL], UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration arts. 4–5 (Jan. 2014), available at <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> [hereinafter UNCITRAL Rules on Transparency].

64. Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59 INT'L & COMP. L.Q. 373, 377 (2010).

65. *Id.* at 389–91 (noting that although third party involvement in investment treaty arbitration has increased, it is not a new phenomenon and has not received full endorsement).

provided formal authority to sanction the tribunal (members).⁶⁶ Hence, this paper focuses on what it finds to be the main two interfaces with the environment—the review processes and the appointment mechanisms.

IV. INVESTMENT TREATY ARBITRATION AND INSTITUTIONS

As mentioned above, this paper follows Peter Hall's definition of institutions, which is widely accepted by political scientists.⁶⁷ According to Hall, institutions are defined as the formal or informal procedures, routines, norms, and conventions embedded in the organizational structure of the polity or political economy.⁶⁸ This definition is sufficiently loose to include informal institutional practices and arrangements, but it is still possible to confine the definition within a conceptual framework of institutional structure. Thus, in defining institutions, considerations should include formal arrangements in their larger political and social context and the informal norms of behavior that may have been established in light of those contexts.⁶⁹ It follows that the same institutional arrangement may take different shapes when different contexts are considered. As this paper's focus is on judicial reasoning as a vehicle to legitimize arbitral awards to salient audiences,⁷⁰ two relevant arrangements are considered in this context: review mechanisms and appointment patterns.

An arbitration award is final and not subject to an appellate process.⁷¹ Instead, arbitration awards are subject to a review mechanism, which intends to ensure fairness and integrity of

66. See Van Harten & Loughlin, *supra* note 17, at 137 (noting that the enforcement structure of investment arbitration allows privately-contracted arbitrators to review and sanction the regulatory conduct of states).

67. Thelen & Steinmo, *supra* note 21, at 2.

68. *Id.*

69. See THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS, *supra* note 1, at 4 ("[N]ew institutionalists tend to see doctrinal innovation as a product of more organic and structural political processes rather than as the function of formal institutional mechanisms such as the judicial selection process or political acts of noncompliance alone.").

70. See *infra* Part III(C).

71. ICSID Convention, *supra* note 8, art. 53.

procedure.⁷² Reviewing authorities, however, differ from one context to another and adhere to the prohibition of appeal on the merits to different extents.⁷³ As to the appointment of arbitrators, most investment treaty arbitration tribunals consist of three arbitrators.⁷⁴ Arbitration rules usually state that co-arbitrators are designated by the parties, with the claimant appointing one co-arbitrator and the respondent state appointing another.⁷⁵ The designation and appointment of the third arbitrator—the chairperson or the president of the tribunal—varies from one institutional arrangement to another.⁷⁶ Construing these formal arrangements narrowly would lead to the conclusion that the designating authority of the chairperson has a limited effect on the behavior of the tribunal. However, informal compliance mechanisms or the preferences of that designating authority may evolve and further reinforce the preferences and norms set by that designating authority.⁷⁷ If an arbitrator would like to be re-appointed for future cases, she may consider the preferences of the designating authority, whether a result of interest-maximizing motives or social norms shaped by dominant actors within the institution.⁷⁸ In addition, when parties appoint their own co-arbitrators, they are likely to consider the co-arbitrator's ability to communicate with the other tribunal members,

72. Thomas W. Walsh, *Substantive Review of ICSID Awards*, 24 BERKLEY J. INT'L L. 444, 447 (2006).

73. See *id.* at 447–48 (recognizing that although the general policy in international arbitration is to recognize the finality of awards, arbitral systems vary in the extent to which they choose to review only process, or both process and accuracy, depending on the respective value an arbitral system places on the finality and accuracy of awards).

74. Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 443 (2009).

75. See ICSID, ICSID Convention, Regulations and Rules art. 37, ICSID/15 (Apr. 2006), <https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf> [hereinafter ICSID Regulations and Rules]; see also UNCITRAL Rules on Transparency, *supra* note 63, art. 9(1); SCC Arbitration Rules, *supra* note 11, art. 17(4).

76. Franck, *supra* note 74, at 443.

77. See Servio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 397, 398–99 (2014) (stating that an informal suggestion to the tribunal may be enough for an arbitrator's resignation if there is reasonable doubt concerning the arbitrator's competence or impartiality).

78. See *id.* at 400 (explaining that an arbitrator's behavior may be influenced and motivated by reappointment).

specifically, the presiding arbitrator.⁷⁹ While it is difficult to assess or quantify the exact influence of the designating authority on institutional behavior, it is important to recognize that this influence goes beyond the formal authority, as informal compliance practices are likely to emerge.

Accordingly, this paper discusses three distinct institutional backgrounds that are relevant to understanding the behavior of arbitration tribunals: ICSID tribunals, New York Convention-based tribunals, and NAFTA tribunals.

A. *ICSID Tribunals*

An ICSID tribunal typically consists of three arbitrators: each party appoints one co-arbitrator, and the presiding arbitrator is appointed by agreement between the parties.⁸⁰ If the parties do not agree on the appointment of the presiding arbitrator, then the ICSID Secretary General will designate one.⁸¹ In addition, Rule 1(3) of the ICSID arbitration rules imposes restrictions on appointing an arbitrator who is a national of the respondent state or the investor's state of nationality; this caveat makes it less likely that arbitrators who are nationals of the respondent state or the investor's home state will be appointed.⁸² Indeed, among the thirty-seven cases examined in this study, no respondent state appointed one of its nationals as a co-arbitrator.⁸³

ICSID awards, once final, are enforced by national courts with no further review.⁸⁴ The ICSID Convention requires parties wishing to challenge an award to file a request for annulment, which is reviewed by an ad hoc annulment committee appointed

79. Chiara Giorgetti, *The Arbitral Tribunal: Selection and Replacement of Arbitrators*, in LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER'S GUIDE 143, 156 (2004).

80. ICSID Convention, *supra* note 8, art. 37(2)(b).

81. ICSID, Rules of Procedure for Arbitration Proceedings (Arbitration Rules) rr. 3–4, in ICSID Convention, Regulations and Rules, ICSID/15 (Apr. 2006), available at <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partf-chap01.htm> [hereinafter ICSID Arbitration Rules].

82. *Id.* r. 1(3).

83. See *infra* Part V(A) (examining the thirty-seven cases in this study).

84. ICSID Convention, *supra* note 8, art. 54(1).

by the ICSID Secretary General.⁸⁵ An ICSID annulment committee is usually comprised of international law experts who often serve as arbitrators and have a special interest in promoting the legitimacy of investment arbitration.⁸⁶ Moreover, the annulment ad hoc committee is appointed by the Chairman of the ICSID Administrative Council—the President of the World Bank.⁸⁷ As a World Bank official, the ICSID Chairman likely considers the normative implications of the awards, such as the legitimacy of ICSID and/or global economy concerns. It is not surprising, then, that an ICSID ad hoc annulment committee member once criticized the ICSID Secretariat for wanting “to obtain for itself a greater role in the conduct of ICSID cases and in the process also want[ing] to involve itself in the drafting of the decisions.”⁸⁸ Accordingly, determinations on the merits of ICSID awards are occasionally susceptible to informal or formal review by annulment committees.⁸⁹ Some ICSID annulment decisions even demonstrate a willingness to examine the merits of awards despite a contractual framework that states otherwise.⁹⁰ While those decisions remain exceptional, they indicate that ICSID tribunals, while drafting their awards, need to carefully consider the criticism and review of future annulment committees in a manner that goes beyond the formal contractual framework.

85. See *id.* art. 52(1) (indicating that the reasons for requesting annulment stated in Article 52(a)–(d) are procedural defects, and that 52(e) provides the only substantively-based reason for seeking annulment).

86. *Id.* art. 52(3).

87. Puig, *supra* note 77, at 398.

88. *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Additional Opinion of Professor JH Dalhuisen, paras. 2, 16 (Aug. 10, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0221.pdf> (implying that the ICSID Secretariat claims to be the voice of “a *jurisprudence constante*” whose task to “advance and protect” provides for an “autonomous right of intervention”).

89. ICSID Convention, *supra* note 8, art. 52(1); Dohyun Kim, *The Annulment Committee’s Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System*, 86 N.Y.U. L. REV. 242, 243 (2010).

90. *Enron Creditors Recovery Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment, para. 133 (July 30, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0299.pdf>; see also *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, para. 141 (June 29, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0776.pdf> (explaining that the Tribunal did not give reasons for its Decision on Jurisdiction, and a failure to state grounds on which decisions are based is a substantive reason for requesting annulment).

B. *New York Convention Group Tribunals*

Arbitration awards in this group are enforced according to the New York Convention,⁹¹ which also shapes their normative framework as explained in the following section. This group includes arbitrations that are conducted according to arbitration rules that are tailored to commercial disputes but are also available for settling investment disputes.⁹² Two main arbitration rules are discussed here, which together are followed by tribunals to produce the vast majority of awards in this group: the UNCITRAL arbitration rules and the SCC arbitration rules. For reasons that are discussed later, this group excludes NAFTA-based arbitrations, the awards of which are also enforced and reviewed according to the New York Convention.

The New York Convention prescribes uniform international rules that require national courts to recognize and enforce foreign arbitral awards, with a limited number of exceptions.⁹³ According to these exceptions, a national court may review only procedural defects in connection with an award, not the award's merits, as a basis for setting aside the award.⁹⁴ Awards are enforced according to the national legislation of the seat of arbitration—the state hosting the arbitration.⁹⁵ While the complexity and particularity of each national legislation are not discussed here, it is fair to say that most national legislations, similar to the normative framework of the New York Convention, focus on the fairness and integrity of the proceedings. The exceptions include the United States and England, which have a very limited scope of review for

91. New York Convention, *supra* note 9; see *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, para. 39 (Mar. 21, 2007) (implying that proceedings must be in accordance with the New York Convention as the Tribunal noted there had been a violation that was not in accordance with the Convention).

92. New York Convention, *supra* note 9, art. V.

93. New York Convention, *supra* note 9, arts. V(1)–(2).

94. *Id.* art. V(1)(b) (“The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case[.]”).

95. See 2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2366, 2371–72 (2d ed. 2009) (explaining that under Article V(1)(a) of the New York Convention, courts may review an arbitration agreement under the law of the seat of arbitration).

the substance of an award.⁹⁶ The normative framework for reviewing awards under the New York Convention is largely shaped by the contractual paradigm of the arbitral process; review is not on the merits but only on issues concerning the integrity and fairness of the process.⁹⁷ Hence, the reviewing authority is authorized to assure issues such as whether the parties' agreement was applied correctly and whether the proceedings were conducted fairly by impartial arbitrators.⁹⁸

Aside from the formal framework, it would seem very unlikely that national courts would actually consider the merits of the award. National courts—except for the national court of the respondent state—have little to no special interest in the substance of a dispute, and instead are concerned with the normative framework for enforcing international arbitration awards.⁹⁹ Acknowledging competition between different jurisdictions to host commercial and investment arbitrations, courts are also concerned with promoting their reputation as a “hospitable jurisdiction to arbitration.”¹⁰⁰ Thus, it is quite unlikely that a court in Stockholm, for example—when reviewing an award between a U.S. national and the Czech Republic—would have an interest in reviewing the reasons upon which the award was based if the tribunal and proceedings seem to have been fair, impartial, and even-handed. This may not be the case, however, for NAFTA, as elaborated on below.

As for appointment patterns, the UNCITRAL arbitration

96. See Vladimir Pavic, *Annulment of Arbitral Awards in International Commercial Arbitration*, in INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES 131, 144 (Christina Knahr et al. eds., 2010); *Wilco v. Swan*, 346 U.S. 427, 436 (1953).

97. See Jessica L. Gelandner, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80 MARQ. L. REV. 625, 628–29 (1997) (noting the potential grounds of unfairness for review, including: invalid agreement, improper notice, award not within scope of arbitration, award not in accordance with arbitration, and award not yet binding).

98. See *id.* at 628–29 (explaining that under Article V(d) of the New York Convention, review is permitted when “arbitral authority or the arbitral procedure [is] not in accordance with the agreement of the parties”).

99. See *id.* at 638–39 (explaining that the refusal of one national court to enforce an arbitration award may destabilize the order of international business transactions).

100. See THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* 1143 (2d ed. 2000).

rules and the SCC arbitration rules prescribe different methods for appointing the presiding arbitrator.¹⁰¹ The UNCITRAL arbitration rules state that the co-arbitrators have the authority to select the presiding arbitrator.¹⁰² Accordingly, the parties choose the co-arbitrators, who in turn choose the presiding arbitrator.¹⁰³ If they do not agree, the presiding arbitrator is designated by an appointing authority, usually the Secretary-General of the Permanent Court of Arbitration.¹⁰⁴ It is very rare, however, for co-arbitrators to disagree; therefore, there is no dominant actor in designating the presiding arbitrator.¹⁰⁵ As the co-arbitrators appoint the chairperson, it is likely that their practices would be influenced by the international commercial arbitration community, its norms, and its internal power relations. Under the SCC arbitration rules, the presiding arbitrator is appointed by the SCC Board, unless the parties agree otherwise.¹⁰⁶ While the parties may attempt to reach an agreement on the presiding arbitrator, the cases examined here show that presiding arbitrators are typically appointed by the

101. UNCITRAL Rules on Transparency, *supra* note 63, arts. 8–10; SCC Arbitration Rules, *supra* note 11, art. 17.

102. UNCITRAL Rules on Transparency, *supra* note 63, art. 9.

103. *Id.* arts. 6, 9.

104. *Id.* arts. 6, 8–9.

105. See *Walter Bau Ag (In Liquidation) v. Kingdom of Thailand*, UNCITRAL Award, para. 1.15 (July 1, 2009), <https://www.italaw.com/sites/default/files/case-documents/ita0067.pdf> [hereinafter *Walter Bau v. Thailand*] (indicating that the chairperson was appointed by the International Court of Arbitration under the auspices of the ICC); see also *Eastern Sugar B.V. (Netherlands) v. Czech Republic*, SCC Case No. 088/2004, Partial Award, para. 18 (Mar. 27, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf [hereinafter *Eastern Sugar v. Czech Republic*] (indicating that the chairperson was appointed by the SCC Board); *Link Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, UNCITRAL Award on Jurisdiction, para. 7 (Feb. 16, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0467_0.pdf (indicating that the chairperson was appointed by the SCC Board).

106. SCC Arbitration Rules, *supra* note 11, art. 17.

SCC board.¹⁰⁷ According to the SCC website, the SCC board includes both Swedish and non-Swedish nationals, all of whom are experts in international commercial dispute resolution.¹⁰⁸

C. NAFTA Arbitration Tribunals

NAFTA is a regional agreement between three neighboring states that covers both trade and investment.¹⁰⁹ The protection standards and dispute settlement mechanism for investor-state disputes are established in Chapter 11 of the agreement.¹¹⁰ NAFTA awards are usually enforced and reviewed by the national courts of Canada and the United States because until recently, both Canada and Mexico were not signatories to the ICSID Convention.¹¹¹ While the national court reviewing a UNCITRAL or SCC award is usually a neutral third party, the national court reviewing a NAFTA arbitration award is frequently located in a NAFTA signatory state, which, in some cases, is the same state as that of the investor or even the respondent state.¹¹²

The decisions of NAFTA tribunals are more likely to be reviewed substantially by national courts, despite the formal framework of the New York Convention that restricts review on

107. See *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award, pt. V (Mar. 29, 2005) (indicating that the chairperson was appointed by the SCC Board); see also *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V (079/2005), Award on Jurisdiction, para. 7 (Oct. 1, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0719.pdf> [hereinafter *RosInvestCo v. Russia*] (indicating that the chairperson was appointed by the SCC Board); *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, para. 6 (Sept. 2, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0023_0.pdf (indicating that the chairperson was appointed by the SCC Board).

108. See *About the SCC*, ARBITRATION INST. OF THE STOCKHOLM CHAMBER OF COM., <http://www.sccinstitute.com/about-the-scc> (last visited Aug. 8, 2018).

109. NAFTA, *supra* note 12, art. 1101.

110. *Id.* art. 1115.

111. *Database of ICSID Member States*, ICSID, <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> (last visited Sept. 1, 2018).

112. See ICSID Convention, *supra* note 8, art. 39 (stating that a majority of arbitrators must have a nationality different from that of the two states involved); see, e.g., *S.D. Myers, Inc. v. Government of Canada*, [2004] F.C. 38 (Can. Fed. Ct.), Reasons for Order, para. 16 (Jan. 13, 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0756.pdf>; see also *Loewen v. United States*, No. 04-2151 (RWR), 2005 WL 3200885 (D.D.C. Oct. 31, 2005).

the merits of an award. As previously mentioned, the neutrality of the seat of arbitration found in other institutional contexts under the New York Convention is not present in the context of NAFTA arbitrations.¹¹³ Even when the national court reviewing the award is seated in neither the respondent state nor the claimant's state of nationality, it is still not neutral or indifferent to the evolving regime in NAFTA. Because NAFTA is an inclusive regime of three neighboring states, coupled with the fact that Canada and the United States are frequently sued in the context of NAFTA, national courts are aware that the arbitration awards they uphold or enforce will also guide future cases for their own state under NAFTA.¹¹⁴

The case of *Metalclad* is a clear example. Mexico was ordered to pay compensation to an investor for losses that followed the annulment of a license to operate a hazardous waste mill, which raised concerns about the ability of states to regulate issues pertaining to protection of the environment.¹¹⁵ These concerns were raised not only in Mexico, but in the United States and Canada as well.¹¹⁶ Eventually, the award was partially annulled by the Supreme Court of British Columbia in Canada.¹¹⁷ While this court decision remains exceptional, similar scenarios are considered by all NAFTA tribunals.¹¹⁸ Hence, NAFTA tribunals

113. *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Procedural Order No. 2, para. 24 (Nov. 24, 2016) (indicating that because NAFTA restricts the potential seat of arbitration to Canada, the United States, or Mexico, the seat of arbitration is often the same state as the investor or respondent state).

114. See Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes—Adoption, Adaption, and NAFTA Leadership*, 54 KAN. L. REV. 1339, 1356–57 (2006) (explaining that although there is no formal system of precedent, “well-reasoned awards” may influence tribunals in the future); see also Arturo Borja Tamayo, *The New Federalism in Mexico and Foreign Economic Policy: An Alternative Two-Level Game Analysis of the Metalclad Case*, 43 LATIN AM. POL. & SOC’Y 67, 68–69 (2001) (noting that the *Metalclad* ruling reinforced the Canadian government’s concern regarding provisions of NAFTA’s Chapter 11).

115. Arturo Borja Tamayo, *The New Federalism in Mexico and Foreign Economic Policy: An Alternative Two-Level Game Analysis of the Metalclad Case*, 43 LATIN AM. POL. & SOC’Y 67, 68–69 (2001).

116. *Id.*

117. See *United Mexican States v. Metalclad Corp.*, 2001 BCSC 1529, Supplementary Reasons for Judgment, paras. 14, [14] (Can.).

118. See *S.D. Myers, Inc. v. Government of Canada*, [2004] F.C. 38, paras. 72–74 (Can.) (describing a hypothetical review on the merits by the Federal Court of Canada).

need to take into consideration national courts as well as public debates to which these courts are usually attentive. Such an intervention by national courts in a non-NAFTA context is hence uncommon.

Additional informal review mechanisms in NAFTA proceedings are found in Article 1128, which allows non-respondent states to file claims, and in Article 1132, which provides that an interpretation submitted by the Free Trade Commission (FTC)—a commission consisting of the three signatory states—shall be binding on the tribunal.¹¹⁹ In the case of *Pope & Talbot*, this authority was directly employed to influence ongoing proceedings through an FTC statement on the correct interpretation of Article 1105's "fair and equitable treatment" standard.¹²⁰ The FTC statement was perceived as interference in an ongoing judicial process.¹²¹ This case reflected the power relations between NAFTA Chapter 11 tribunals and signatory states, indicating that signatory states are not reluctant to use the authority granted them in Article 1132 to restrict tribunals. Similarly, when the three signatory states take a similar approach under Article 1128, tribunals naturally give such an approach due consideration to avoid an FTC intervention like what occurred in the *Pope & Talbot* case.

The NAFTA arbitration proceedings are held according to either the UNCITRAL arbitration rules or the ICSID Additional Facility (ICSID AF) rules, which are offered by ICSID for disputes inside or outside the ICSID framework.¹²² Formal appointment

119. NAFTA, *supra* note 12, arts. 1128, 1132.

120. See *Pope & Talbot v. Canada*, UNCITRAL, Interim Award on the Merits of Phase Two, at 54 (2001), <https://www.italaw.com/sites/default/files/case-documents/ita0678.pdf> (describing the FTC interpretation of "fair and equitable treatment" under NAFTA, Article 1105); see also *L. F. H. Neer v. Mexico*, 4 R.I.A.A. 60 (1926), 21 AM. J. INT'L L. 555 (1927) (finding the minimum standard was violated because the complained of conduct was "egregious, outrageous or shocking, or otherwise extraordinary").

121. See *Pope & Talbot v. Canada*, UNCITRAL, Tribunal Letter to Disputing Parties (II) (Sept. 17, 2001) ("[I]f the Commission viewed its interpretation to have retroactive effect on this case, its actions could be viewed as seeking to overturn a treaty interpretation already made by a NAFTA Chapter 11 Tribunal, Canada acting both as a disputing party and as a member of a reviewing body.").

122. See ICSID Additional Facility Rules (1978); see also ICSID Additional Facility Rules (2003), available at <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Additional-Facility-Rules.aspx>.

patterns are defined by these rules. As mentioned above, UNCITRAL arbitration rules state that the party-appointed co-arbitrators designate the presiding arbitrator.¹²³ ICSID AF rules, however, state that the presiding arbitrator shall be appointed pursuant to agreement by the parties, or if agreement is not reached, the ICSID Chairman appoints the presiding arbitrator.¹²⁴ The NAFTA tribunal arbitrators appear to be appointed in patterns similar to those of ICSID and UNCITRAL arbitrators.¹²⁵ However, a closer look at the identity of NAFTA tribunal arbitrators shows that a relatively high number of them are nationals of a NAFTA signatory state.¹²⁶ The UNCITRAL arbitration rules do not place limitations on the nationality of appointed arbitrators; this lack of limitation was also characteristic of the ICSID AF rules prior to their amendment in 2006).¹²⁷ As a result, in most NAFTA cases, at least one co-arbitrator has been a national of a NAFTA signatory state (mostly commonly Canada and the United States), while the presiding

123. UNCITRAL Arbitration Rules (2010), *supra* note 10.

124. ICSID Additional Facility Rules (2003), *supra* note 122, arts. 6(4), 10.

125. NAFTA, *supra* note 12, arts. 1123–25.

126. *See infra* note 128.

127. *See* ICSID Additional Facility Rules (1978) art. 7; *see also* ICSID Additional Facility Rules (2003), *supra* note 122 (allowing parties to appoint their own national was restricted by the 2006 ICSID AF amended rules).

arbitrator was usually not.¹²⁸ While it is beyond the breadth of this paper to explore how the composition of a tribunal influences its behavior, it is reasonable to believe that co-arbitrators who are nationals of respondent states or NAFTA member states mediate between their tribunals and the political, economic, and legal environments where the subject disputes arose. Local arbitrators, as national judges, “go home at night and read the newspapers or watch the evening news on television,”¹²⁹ which may further enhance NAFTA tribunals’ efforts to address local audiences.

D. Summary: How Appointment Patterns and Review Mechanisms Produce Different Legitimacy Concerns

As will be explained in the following section, the examination of the various review mechanisms and appointment patterns indicates that different audiences may have different levels of influence on arbitral tribunals. In the context of ICSID, the international community—of states, international organizations, and public international lawyers—may play a more dominant role than in other institutional contexts. In the New York Convention

128. See *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1 (Mar. 31, 2010); ICSID, *Members of the Panels of Conciliators and of Arbitrators* (Dec. 18, 2018), <https://icsid.worldbank.org/en/documents/icsiddocs/icsid%2010%20-%20latest.pdf> (noting that arbitrator J. William Rowley is from Canada and that the presiding arbitrator Michael C. Pryles is from Australia); *Francisco Orrego Vicuna Profile*, INT’L ARB. INST., <http://www.iaiparis.com/profile/francisco.orrego-vicuna> (noting that presiding arbitrator in *Merrill & Ring Forestry L.P. v. The Government of Canada* is from Chile) (last visited Feb. 4, 2019); *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2 (Sept. 18, 2009); Andrew Cohen, *Berkeley Law Professor Emeritus David Caron ‘83 Passes Away at 65*, BERKELEYLAW: UNIV. CAL., <https://www.law.berkeley.edu/article/berkeley-law-professor-emeritus-david-caron-83-passes-away-65/> (last visited Jan. 23, 2019) (noting that arbitrator David D. Caron is from the United States); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, *Interim Decision on Preliminary Jurisdictional Issues*, para. 4 (Dec. 6, 2000) (noting that arbitrator David A. Gantz is a national of the United States, that arbitrator Jorge Covarrubias Bravo is a national of the United Mexican States, and that presiding arbitrator Konstantinos D. Kerameus is a national of Greece); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (Oct. 11, 2002) [hereinafter *Mondev International v. USA*]; Geoffrey Robertson, *Sir Ninian Stephen Obituary*, GUARDIAN, <https://www.theguardian.com/australia-news/2017/nov/19/sir-ninian-stephen-obituary> (last visited Jan. 23, 2019) (noting that presiding arbitrator Ninian Stephen was from Australia).

129. William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986).

group, specifically with respect to UNCITRAL and the SCC, it is likely that tribunals are more influenced by the community of international commercial arbitration. Finally, in NAFTA tribunals, the local audiences—such as national courts, state decision makers, or the wider public in the signatory states—are more significant than in other institutional contexts.¹³⁰

ICSID, as the World Bank arbitration center, also has a dominant role in influencing both the review mechanisms and appointment patterns.¹³¹ Given that ICSID developed and operated within the framework of the international community, it is natural that the discourse used to justify ICSID awards is more influenced by public international law than non-ICSID awards. Moreover, ICSID's appointment rules reinforce its orientation toward the international community by minimizing the chances that ICSID arbitrators are from a state that is connected with a party to the dispute.¹³² Accordingly, states in ICSID disputes are likely to be viewed from an external perspective—that of the international community. Following historical institutionalism, these patterns of behavior appear to reinforce one another as their discourse becomes more established within the institution of ICSID.

With respect to UNCITRAL and SCC arbitrations, national courts that review awards do not constrain the tribunals with regard to the normative framework they create and apply.¹³³ These courts review the awards within the normative framework of commercial arbitration and hence only examine whether the arbitrators rendered an independent and impartial judgement with due deference to the will of the parties.¹³⁴ When considering appointment patterns, however, the SCC has a dominant role in appointing arbitrators, both formally and informally, while the UNCITRAL appointment patterns are dependent on the parties'

130. Suha Jubran-Ballan, *Investment Treaty Arbitration and Institutional Backgrounds: An Empirical Study*, 34 WIS. INT'L L. J. 31, 47–48 (2016).

131. Chiara Georgetti, *Who Decides Who Decides in International Investment Disputes*, U. PA. J. INT'L L. 431, 447 (2013).

132. *Id.* at 449–50.

133. Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality*, 24 BERKELEY J. INT'L L. 444, 451 (2006).

134. *Id.*

appointment preferences and the co-arbitrators' considerations.¹³⁵ The parties and co-arbitrators, as well as the SCC Arbitration Institute Board, all belong to the "community of international commercial arbitration," often described in literature as a close-knit community prescribing the behavioral norms of its members.¹³⁶ Hence, it is likely that the preferences of this community, in the context of the New York Convention group arbitrations, is more dominant than in other contexts.

Finally, NAFTA tribunals are expected to address local audiences in signatory states, such as national courts and policy makers who are susceptible to the public rather than the international community or the international commercial community.¹³⁷ Their awards are reviewed by these national courts and restrained by signatory states, while the arbitrators are more likely to be nationals of the signatory states than in other institutional contexts.¹³⁸

V. THE JUDICIAL REASONING OF INVESTMENT TREATY ARBITRATION TRIBUNALS

Judicial reasoning is the practice of judicial institutions persuading the relevant audience(s) that a decision is justified.¹³⁹ The centrality of judicial reasoning in judicial institutions is highlighted by the historical institutionalists' assertion that the main point of the process is the action itself, not its outcome, and that institutions need to communicate to their audiences that the decisions they make are legitimate.¹⁴⁰ Legitimacy is established by showing that the decisionmaking process was appropriate and that the decision made accomplishes the appropriate objectives.¹⁴¹

135. Compare SCC Arbitration Rules, *supra* note 11, arts. 16–17, with UNCITRAL Arbitration Rules (2010), *supra* note 10, art. 9.

136. Hirsch, *supra* note 22.

137. Jubran-Ballan, *supra* note 130, at 55–57.

138. Patrick G. Foy, *Effectiveness of NAFTA's Chapter Eleven Investor-State Arbitration Procedures*, 18 ICSID REV.: FOREIGN INV. L.J. 44, 56–57 (2003).

139. Bradley W. Weal, *Jurisprudence and Judicial Ethics*, 96 CORNELL L. FAC. PUBL'N'S 1, 23 (2007).

140. Meyer & Rowan, *supra* note 566, at 340; March & Olsen, *supra* note 200, at 4–5.

141. March & Olsen *supra* note 20, at 4–5.

Bearing in mind that the audiences a judge might face may have different preferences and concerns, this paper now questions how addressing these different groups changes the discourse, methods, and style of judicial reasoning. Accordingly, this paper assumes that tribunals must adapt their judicial reasoning to their audiences accordingly and hence that tribunals either invoke different methods of interpretation or use the same methods differently.

The awards examined herein are all awards on the merits rendered between 2001 and 2011.¹⁴² This analysis is restricted to judicial reasoning as it appears in the merits phase rather than the jurisdictional phase of a given award. Accordingly, the study only examines awards based on the merits and excludes awards that dismissed cases for lack of jurisdiction or admissibility.¹⁴³ Defining the jurisdiction of a tribunal raises questions different from those raised when determining a case on the merits by interpreting the standards of protection. As examining both is far beyond the reach of one study, this paper focuses on awards on the merits as opposed to those involving jurisdictional and admissibility issues because awards on the merits rendered from different institutions apply treaty provisions and set similar protection standards—practices not applicable to provisions regarding tribunals' jurisdiction. Following this criteria for award selection, this study has identified seventy-three ICSID awards, twenty commercial arbitration awards, and sixteen NAFTA awards.

In examining the judicial reasoning of the awards to interpret the protection standards and determine the case on the merits, this analysis focuses on two methods for legitimizing the decisions: the reference to investment treaty arbitration case law and the incorporation of explicit policy considerations such as balancing and proportionality. Fact-driven awards are those that

142. See, e.g., *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC Case No. 118/2001, Award (Dec. 16, 2003).

143. *But see* *Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003) (dismissing the case on jurisdictional grounds but examining the merits hypothetically); *see also* *White Indus. Austrl. Ltd. v. Republic of India*, UNCITRAL, Final Award (Nov. 30, 2011), <http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>.

neither refer to case law nor state explicit policy considerations in the interpretation and application of the standards of treatment. Instead, these standards are directly applied to the facts of the case. This reasoning is more typical of private commercial arbitration, where the parties are considered to be the main addressees of the awards, and the arbitrators act not as policy makers but rather as service providers settling the dispute.¹⁴⁴

A. Case Law Reference

While an international court decision is usually limited in scope to the dispute at hand, *de facto* norms of *stare decisis* and following case law still exist in the practice of international judges and arbitrators.¹⁴⁵ Tribunals that refer to case law may do so for a variety of reasons: to show a commitment to investment treaty arbitration case law, to avoid inconsistency, to comply with established social norms, or simply as a method that facilitates interpretation in line with lawyers' training.¹⁴⁶ Studies show that strategic behavior has an impact on the use of precedent in both national and international courts.¹⁴⁷ Specifically, it is often claimed that the use of precedent is employed to legitimize decisions with external audiences.¹⁴⁸ Indeed, citation to case law, which reduces inconsistency and builds jurisprudence, is repeatedly raised as one of the main methods for enhancing the legitimacy of investment treaty arbitrations.¹⁴⁹ A tribunal

144. See KARTON, *supra* note 22, at 43 (arguing that arbitrators in international commercial arbitration simply serve as providers with respect to the parties' settlement of a dispute, with the process and the award belonging to parties); see also STONE SWEET & GRISEL, *supra* note 32, at 17 (describing arbitral decisionmaking as particular or retrospective).

145. Yonatan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRIT. POL. SCI. 413, 416 (2012); Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT'L ORG. 735, 741 (2007).

146. Harlan Cohen, *Lawyers and Precedent*, 46 VAND. J. TRANSNAT'L L. 1025, 1030, 1031, 1032 (2013).

147. See, e.g., Lupu & Fowler, *supra* note 58, at 151.

148. See Lupu & Voeten, *supra* note 145, at 417 (showing that international courts also address domestic legal actors).

149. See Gabrielle Kaufmann-Kohler, *Is Consistency a Myth? Precedent in International Arbitration*, in 5 IAI SERIES INT'L ARBITRATION 137, 145 (Emanuel Gaillard & Yas Banifatemi eds., 2008).

following such an approach is likely to address audiences other than the parties themselves—such as future tribunals or the global judicial community—as parties to the dispute are typically more concerned with impartial and efficient settlement rather than the shaping of law or the level of commitment to case law.¹⁵⁰ Since arbitrators may operate in more than one institutional context, simply attributing the use of case reference to the legal training of lawyers cannot explain the differences among different institutions.¹⁵¹ An analysis of the citation practices of the examined groups shows that these practices vary both quantitatively and qualitatively. Average references to case law in these group vary and prove to be statistically significant: while ICSID awards refer to 9.97 investment awards on average, UNCITRAL and SCC awards (New York Group) and NAFTA awards refer on average to 5.29 awards and 9.25 awards, respectively.¹⁵² Also, arbitration awards in these groups do not use the same case law; NAFTA arbitration awards cite different case law than the other two groups. These differences are explained in detail below.

ICSID arbitration awards refer to a considerable number of investment treaty arbitration awards and clearly attempt to contextualize the interpretation of the merits in the wider context of investment treaty arbitration regime: nineteen awards out of thirty-seven (fifty-two percent) referred to more than ten arbitration awards,¹⁵³ only seven decisions (nineteen percent) referred to less than five investment arbitration decisions and

150. Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different Are They Today?*, 28 ARBITRATION INT'L 577, 588 (2012); Albert van den Berg, *Qualified Investment Arbitrators? A Comment on Arbitrators in Investment Arbitrations*, in THE PRACTICE OF ARBITRATION: ESSAYS IN HONOUR OF HANS VAN HOUTTE 53, 57 (Patrick Wautelet et al. eds., 2012).

151. Cf. Lupu & Voeten, *supra* note 145 (finding that citations will differ from institution to institution as each court has its own prerogative for using certain citations).

152. Suha Jubran-Ballan, *Investment Treaty Arbitration and Institutional Backgrounds: An Empirical Study*, 34 WISC. INT'L L.J. 31, 81–82 (2016) (finding indications that $T(63) = 2.318$, $Pv = 0.012$, with P referring to a one-tail test; and that applying ANOVA Test also proves significant: $Df = 2$, $F = 3.012$, $p = 0.050$, with equal variance assumed based on Levin Test of Homogeneity).

153. *See id.* (showing that amount of ICISD arbitration awards that had over ten case references; forty-one percent of all awards involve between eleven and twenty-five cases that were cited, and eleven percent of awards had over twenty-five cases referenced).

awards, and three referred to no case law at all.¹⁵⁴ Thus, the vast majority of ICSID tribunals refer to case law to support and establish decisions on merits, which indicates that this practice has become an established norm in ICSID.

The approaches in the context of UNCITRAL and SCC awards, however, are more divergent, and there is no dominant pattern for the use of investment treaty arbitration case law. While ten out of twenty arbitration awards (fifty percent) referred to fewer than five awards—five of which referred to no case law at all¹⁵⁵—seven awards (thirty-five percent) referred to case law ten times or more—five of which contained more than fifteen references.¹⁵⁶

NAFTA tribunals, similar to ICSID, refer intensively to case law, with only three awards (nineteen percent) referring to less than five awards.¹⁵⁷ Nevertheless, the practice of reference here is significant at least in one aspect: the vast majority of the case law referred to in NAFTA awards is only to other NAFTA cases

154. *Id.*

155. See *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC Case No. 118/2001, Award (Dec. 16, 2003) [hereinafter *Nykomb v. Latvia*]; *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award (Mar. 28, 2005) (referencing three cases); *Eastern Sugar v. Czech Republic*, *supra* note 105; *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Award (Mar. 9, 2001); *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, UNCITRAL, Award (Apr. 8, 2002); *CME B.V. v. The Czech Republic*, UNCITRAL, Award (Sept. 13, 2001) (referring to less than five arbitration awards); *Occidental Exploration and Production Company v. The Republic of Ecuador*, UNCITRAL, LCIA Case No. UN 3467, Award (July 1, 2004); *EnCana Corporation v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN 3481, Award (Feb. 3, 2006); *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Award (Mar. 26, 2008); *Chevron Corporation (USA) & Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award (Mar. 30, 2010) [hereinafter *Chevron v. Ecuador*].

156. See *Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V 064/2008, Partial Award on Jurisdiction and Liability (Sept. 2, 2009); *BG Group v. The Republic of Argentina*, UNCITRAL, Award (Dec. 24, 2007) [hereinafter *BG Group v. Argentina*]; *National Grid v. The Republic of Argentina*, UNCITRAL, Award (Mar. 11, 2008) [hereinafter *National Grid v. Argentina*]; *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Award (Mar. 17, 2006); *Frontier Petroleum Services LTD v. The Czech Republic*, UNCITRAL, Award (Nov. 12, 2010) [hereinafter *Frontier Petroleum v. Czech Republic*]; *Sergei Paushok v. The Government of Mongolia*, UNCITRAL, Award (Aug. 24, 2011); *Walter Bau v. Thailand*, *supra* note 105.

157. See *Jubran-Ballari*, *supra* note 152, at 81; *Mondev International v. USA*, *supra* note 128; *United Parcel Service of America Inc. v. Canada*, UNCITRAL, Award on Merits (May 24, 2007); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Final Award (Dec. 30, 2012) [hereinafter *S.D. Myers v. Canada*].

(eighty-nine percent).¹⁵⁸ The practice is employed by both tribunals and party representatives. For example, while in the parties' submission in *Gami v. Mexico* and *Thunderbird Gaming v. Mexico*¹⁵⁹ there is almost no reference to non-NAFTA tribunals, the claimants in *Loewen v. USA* and *Merrill & Ring v. Canada* refer several times to ICSID tribunals—however, these references were disregarded in the tribunal's analysis.¹⁶⁰ Moreover, when summarizing the parties' arguments, the tribunal in *Glamis Gold v. U.S.* mentioned non-NAFTA case law referenced by the parties in their pleadings.¹⁶¹ Yet later, when presenting its own findings, the tribunal did not acknowledge non-NAFTA case law cited by the parties and discussed only NAFTA case law.¹⁶²

B. Explicit Policy Considerations

Explicit policy considerations are yet another method for managing complex legitimacy concerns, whether through the application of reasonableness, balancing, or proportionality.¹⁶³ Balancing and proportionality in investment treaty arbitration have been considered and examined in the existing literature, and are considered relatively sophisticated methods for interpreting and indicating that tribunals are dealing with a more complex set

158. See Jubran-Ballan, *supra* note 152, at 82–83.

159. See *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Award (Nov. 15, 2004); *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Post-Hearing Brief of Claimant (Aug. 2, 2004).

160. See *Loewen Group, Inc. v. United States*, Joint Reply of Claimants to the Counter-Memorial of the United States, ICSID Case No. ARB(AF)/98/3 (June 8, 2001); *Merrill & Rings Forestry L.P. v. Canada*, UNCITRAL, Award (Mar. 31, 2010); *Merrill & Rings Forestry L.P. v. Canada*, UNCITRAL, Memorial of the Investor (Feb. 13, 2008).

161. See *Glamis Gold, Ltd. v. United States*, UNCITRAL, Award, para. 19 (June 8, 2009) (illustrating the tribunal's reference to non-NAFTA case law) [hereinafter *Glamis Gold v. U.S.*].

162. *Id.* at 243–44 (noting the *CMS v. Argentina* award was referenced as part of the “claimant’s contentions,” but not addressed in the tribunal’s own analysis).

163. Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 73, 75 (2008) (noting that proportionality analysis is a decisionmaking procedure or an analytical structure that judges employ to deal with tensions between two values or interests; in its full analytical structure, it involves four steps—legitimacy, suitability, necessity, and balancing—but not all courts and judges follow this methodology in its full structure).

of legitimacy concerns or audiences.¹⁶⁴ Closely examining the manner in which balancing and proportionality are employed, however, exposes the legitimacy concerns a tribunal manages. These concerns differ from one institutional context to another.¹⁶⁵

In the context of ICSID, some policy considerations are expressed through the use of reasonableness,¹⁶⁶ through balancing,¹⁶⁷ or through proportionality.¹⁶⁸ All the cases invoking policy considerations involved the state being represented through an external perspective, with the state as a single entity, and without breaking down the state's institutions, actors, or political system.¹⁶⁹ When using balancing and proportionality, for example, ICSID tribunals remain within the framework of an *investor v. state* analysis, asserting on the one hand the investor's treaty-based rights—usually property rights or legitimate expectations—and on the other the state's regulatory autonomy or sovereign right to pass legislation.

For example, when establishing that a violation of the applicable treaty had occurred, the tribunal in *Joseph Charles Lemire v. Ukraine* defined the following other “legally relevant interests” to be considered:

- the *State's sovereign right* to pass legislation and to adopt

164. Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 L. & ETHICS HUM. RTS. 48, 48 (2010) (suggesting that balancing and proportionality are indicators of arbitrators who follow a judicial behavior); Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* 9–12 (N.Y. Univ. School of L., Pub. L. & Legal Theory Research Paper Ser., Working Paper No. 09–46, 2009) (identifying balancing and proportionality in investor-state arbitration as governance, an alternative approach to the dispute settlement paradigm).

165. Kingsbury & Schill, *supra* note 164, at 9.

166. AES Summit Generation Limited & AES-Tisza Erőmű Kft v. Hungary, ICSID Case No. ARB/07/22, Award, para. 10.3.34 (Sept. 23, 2010) (assessing, through the application of reasonableness, the validity of policy objectives behind the respondent state's act).

167. See, e.g., *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, para. 285 (Mar. 28, 2001) (considering policy explicitly by stating that the investor's protected rights and other relevant interests should be balanced).

168. EDF (Services) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award, paras. 291, 293 (Oct. 8, 2009); Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, paras. 311–12 (July 14, 2006).

169. See Michele Potesta, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID REV.: FOREIGN INV. L.J. 88, 88, 90 (2013).

decisions for the protection of its public interests, especially if they do not provoke a disproportionate impact on foreign investors; and

- the *legitimate expectations of the investor*, at the time he made his investment.¹⁷⁰

In *AES Summit Generation v. Hungary*, the tribunal referred to the state's "sovereign act" and the state's "sovereign right" to exercise its powers, which includes legislative acts.¹⁷¹ Similarly, the tribunal in *Plama Consortium v. Bulgaria* referred to the state's "legitimate right to regulate."¹⁷²

The manner in which balancing or proportionality is realized, as previously explained, can be attributed to the external perspective of ICSID tribunals, one that is influenced by public international law discourse.¹⁷³ These tribunals consider the state as one entity and hence disregard the complexity of the political context in which various states' administrations or agents operate.¹⁷⁴ Frequently, the political, economic, and social background of a dispute, although significant, is presented as part of the *factual background* and rarely considered relevant to the analysis of the merits or the standard of treatment.¹⁷⁵ Even the tribunal in *Duke Energy v. Ecuador*, which at first seemed to follow an approach that integrated the state's political or

170. Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, para. 285 (Mar. 28, 2001) (emphasis added).

171. AES Summit Generation Limited & AES-Tisza Erőmű Kft v. Hungary, ICSID Case No. ARB/07/22, Award, paras. 9.3.29–.31 (Sept. 23, 2010).

172. Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, para. 177 (Aug. 27, 2008).

173. See Lupu & Voeten, *supra* note 145 (illustrating that international courts strategically use case citations to enhance the degree to which their decisions are perceived by external audiences as legitimate).

174. See Mark Feldman, *The Standing of State-Owned Entities Under Investment Treaties*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010–2011 616–37 (referring to the state as only one singular entity).

175. See Plama Consortium Ltd. v. Republic of Bulgaria, *supra* note 172 (focusing on the contractual relations between the state and the investor and not referring to the background as relevant); see also Azurix v. Argentina Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, paras. 319–20, 373–75 (July 14, 2006) (finding the social and economic background did not play any relevant role in the analysis of the merits); see also EDF v. Romania, (Services) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award, para. 291 (Oct. 8, 2009).

socioeconomic background,¹⁷⁶ eventually avoided doing so when it determined the merits of the case. When applying these guidelines to a specific case, the tribunal referred only to the state's behavior with regard to the relevant contract between the state and the claimant, as well as between the state and a previous investor, but not in a wider context or political, socioeconomic, cultural, or historical condition.¹⁷⁷

The use of policy considerations and balancing is remarkably lower in the New York Convention group.¹⁷⁸ However, explicit policy considerations were found in two cases, both in a similar pattern as the policy considerations of ICSID, i.e., within the *state v. investor* framework. The tribunal in *Saluka v. the Czech Republic* established an implied balancing, writing that a state should not be considered liable for bona fide regulatory measures even if they do eventually lead to a deprivation of property.¹⁷⁹ The tribunal, by applying reasonableness considerations, balanced treaty standards with the state's legitimate right to regulate "domestic matters in the public interest."¹⁸⁰ In *Walter Bau v. Thailand*, the tribunal invoked reasonableness in describing the state as the entity with the authority to set the tariff regime.¹⁸¹ In both cases, the tribunals referred to the state as one entity with the right to regulate, which is to be balanced against the investor's property right or legitimate expectations.¹⁸²

Finally, NAFTA tribunals have often used balancing and proportionality. In *Methanex v. USA*, the tribunal incorporated proportionality analysis in the context of indirect regulatory expropriation by stating that "as a matter of general international

176. *Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador*, ICSID Case No. ARB/04/19, Award, para. 340 (Aug. 18, 2008).

177. *See id.*

178. *See Sameer Sattar, Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?*, TRANSNAT'L DISPUTE MGMT. (2011), <https://www.transnational-dispute-management.com/article.asp?key=1759> (last visited Jan. 23, 2019).

179. *See Saluka Investments v. The Czech Republic*, Partial Award, para. 262 (Mar. 17, 2006) (setting forth bona fide regulation as protection for states also in the context of FET).

180. *Id.* para. 305.

181. *Walter Bau v. Thailand*, *supra* note 105, para. 12.3.

182. *See Saluka Investments*, *supra* note 179, paras. 300–02; *id.* paras. 13.6–7.

law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable.”¹⁸³ In *UPS v. Canada*, the tribunal examined alternatives to the contested measure before it reached the conclusion that the measure was “rationally and intrinsically” connected to the public purpose at stake—assisting the Canadian publishing industry.¹⁸⁴ Finally, in *Glamis Gold v. U.S.*, the tribunal examined the considerations behind the contested legislation, stating that California state legislators were concerned about “the potential damage to sacred sites caused by present and future open pit mines in general”¹⁸⁵ and that the legislation “was rationally related to its stated purpose and reasonably drafted to address its objectives.”¹⁸⁶

Yet, the significant use of policy considerations by NAFTA tribunals, in general, involves the practice of “lifting the state veil”: the perspective of NAFTA tribunals is that the respondent state is a political system with variant and competing players, rather than one entity represented through its sovereign authority.¹⁸⁷ Such a perspective is not restricted to the factual background, but is also incorporated in analyses of merits. This is clearly demonstrated in *Methanex v. USA* by the tribunal’s statement in its final award:

Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds Methanex appreciated that the process

183. *Methanex Corp. v. United States*, UNCITRAL, Final Award on Jurisdiction and Merits, para. 7 (Aug. 3, 2005).

184. *United Parcel Service of America Inc. v. Canada*, UNCITRAL, Award on Merits, para. 168 (May 24, 2007).

185. *Glamis Gold v. U.S.*, *supra* note 161, para. 795.

186. *Id.* para. 803.

187. Samantha Besson, *The Authority of International Law: Lifting the State Veil*, 31 SYDNEY L. REV. 343, 380 (2009).

of regulation in the United States involved wide participation of industry groups, non-governmental organizations, academics and other individuals, many of these actors deploying lobbyists.¹⁸⁸

In *S.D. Myers v. Canada*, the internal perception of the respondent state's decisionmaking is also apparent:

Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.¹⁸⁹

According to such a perspective, the tribunals perceive respondent state decisions, regulations, and legislation as the outcome of the political system and the internal competing players and interests. As stated by the tribunal in *Glamis Gold v. U.S.*:

The Tribunal agrees... that governments must compromise between the interests of competing parties and, if they were bound to please every constituent and address every harm with each piece of legislation, they would be bound and useless.¹⁹⁰

NAFTA tribunals go further to examine what actually lies behind a *state's right to regulate* by evaluating the purposes of a relevant measure; they examine the interests behind the state's regulatory conduct and whether these interests constitute a legitimate purpose *within the political context*. This was most apparent in *Methanex v. USA* when the tribunal applied a "connecting the dots" methodology in the political context of the

188. *Methanex Corp. v. United States*, UNCITRAL, Final Award on Jurisdiction and Merits, pt. VIV, para. 9 (Aug. 3, 2005).

189. *S.D. Myers v. Canada*, Partial Award, para. 261 (Nov. 13, 2000).

190. *Glamis Gold v. U.S.*, *supra* note 161, para. 804.

United States to examine whether protectionism was the real motive behind the contested measure.¹⁹¹ In doing so, the tribunal evaluated the U.S.'s legal framework with respect to regulation of campaign elections and lobbying; it then passed judgment on the political system of the United States—an analysis that is indeed uncommon in the landscape of investment treaty arbitration.¹⁹²

C. Summary: How Judicial Reasoning Varies Among Institutions

Institutional arrangements define the audiences that tribunals primarily address in their awards and shape the judicial reasoning accordingly.¹⁹³ While ICSID, a World Bank organ, plays a central role in both the appointment and the review mechanisms of ICSID tribunals, the UNCITRAL and SCC arrangements involve appointing arbitrators from the international commercial arbitration community, which consists of lawyers and arbitrators.¹⁹⁴ Finally, specific particularities of NAFTA tribunals indicate the significance of the local community in decisionmaking.¹⁹⁵

ICSID tribunals intensively consider investment arbitration case law, which indicates the tribunals' reverence for adhering to the landscape of investment treaty arbitration. The high number of awards referring to case law indicates a dominant practice of relying on case law and exercising a more complex judicial reasoning. Moreover, the practice of using fact-driven awards is marginal in ICSID and hence very few ICSID awards can indeed

191. *Methanex Corp. v. United States*, *supra* note 183, pt. III, para. 3.

192. *See id.* pt. III, paras. 17, 46 ("Legislation in democratic systems involves, by its nature, participation of a wide spectrum of private individuals and interest groups in addition to the members of the legislature and the executive, insofar as its endorsement is also necessary for a bill to become law.").

193. Lupu & Voeten, *supra* note 145.

194. UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, G.A. Res. 68/109, U.N. Doc. A/RES/68/109 (Dec. 16, 2013); SCC Arbitration Rules, *supra* note 11.

195. *See Methanex Corp. v. United States*, *supra* note 183; *United Parcel Service of America Inc. v. Canada*, UNCITRAL, Award on Merits, para. 168 (May 24, 2007); *see also Glamis Gold v. U.S.*, *supra* note 161.

be classified as such.¹⁹⁶ Finally, just as the international community views the state from an external perspective, ICSID tribunals address states as though they are singular entities—autonomous sovereigns—notwithstanding any internal conflicts or interests driving the acts of a given state.¹⁹⁷

As mentioned, the international commercial arbitration community in general is dominated by the contractual model of arbitration in which parties are the main audience of an award.¹⁹⁸ In the New York Convention group, there are a significant number of awards consistent with this pattern of using fact-driven judicial reasoning with no reference to case law or policy considerations.¹⁹⁹ Moreover, awards in this group as a whole, on average, refer to less case law than ICSID and NAFTA awards, and contain fewer explicit policy considerations.²⁰⁰ However, fact-driven reasoning cannot be considered as a dominant practice: a significant number of awards (thirty-five percent) deviate from this pattern both quantitatively (with respect to the number of case law references)²⁰¹ and qualitatively (reflected by thorough judicial analysis of arbitration standards and discussion of case law, which clearly departs from fact-driven reasoning).²⁰² With no dominant pattern of reasoning, it is fair to say that this group is clearly less cohesive than other groups.

Finally, national courts of NAFTA signatory states review NAFTA awards, and there is an established practice of appointing co-arbitrators that are nationals of those signatory states.²⁰³ Both these practices highlight the significance of the local audience in

196. See *supra* note 150 (examining several awards based on public international law or policy considerations, differentiating them from fact-driven awards).

197. Potesta, *supra* note 169.

198. KARTON, *supra* note 22, at 44.

199. See, e.g., *Eastern Sugar v. Czech Republic*, *supra* note 105; *Nykomb v. Latvia*, *supra* note 155; *RosInvestCo v. Russia*, *supra* note 107; *Chevron v. Ecuador*, *supra* note 155; *En Cana v. Ecuador*, LCIA Case No. UN 3481, Award (Mar. 2, 2006).

200. See, e.g., *Azurix v. Argentina Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006); see also *Jubran-Ballan*, *supra* note 152.

201. See *Frontier Petroleum v. Czech Republic*, *supra* note 156; *BG Group v. Argentina*, *supra* note 156; *El Bahloul v. Tajikistan*, *supra* note 156; *National Grid v. Argentina*, *supra* note 156.

202. *Id.*

203. NAFTA, *supra* note 12, art. 1123.

legitimizing awards. Accordingly, deploying NAFTA jurisprudence and disregarding other investment treaty case law reinforces legitimacy with the local audience, whether that audience includes state decision makers, the courts, or the wider public.²⁰⁴ In addition, the state is perceived from an internal perspective, as viewed by the local audience, so its acts are the product of competing interests or values within a given political system.²⁰⁵

VI. SUMMARY AND CONCLUSION

Institutional arrangements influence which audiences are more salient and, in turn, explain the judicial reasoning used by tribunals.²⁰⁶ The judicial reasoning employed by investment treaty arbitration tribunals varies in accordance with changes in the applicable institutional framework.²⁰⁷ The relations between institutional arrangements, audiences, and judicial reasoning, as demonstrated in this paper, allow for several observations on the development of law within institutions.

A. *Uniformity of Institutions*

Appointment patterns and review mechanisms serve as indicators for tribunals in connection with their legitimacy concerns. While the appointment of a tribunal takes place before an award is issued, the review takes place after the award is rendered.²⁰⁸ Ultimately, appointment patterns and review mechanisms both serve as indicators of established institutional practices for tribunals to follow. The clearer these established

204. Franck, *supra* note 4.

205. *Id.* at 1557.

206. Lupu & Voeten, *supra* note 145.

207. *See infra* Part V(C).

208. *See* ICSID Regulations and Rules, *supra* note 75, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ch. IV (explaining the appointment process in Section 2, awards in Section 4, and revision in Section 5); NAFTA, *supra* note 12 (addressing the rules governing appointments in Article 1123, the rules regarding the final award in Article 1136, and the rules pertaining to finality and enforcement of the award in Article 1136); SCC Arbitration Rules, *supra* note 11 (listing the rules for appointments, followed by rules for awards, and then rules of review); UNCITRAL Arbitration Rules (2010), *supra* note 10 (containing the rules for appointments in Section II, then the rules for the award and its review in Section IV).

practices, the more likely the actors are to behave in a uniform manner.²⁰⁹ The absence of clear indicators results in divergent behavior driven by the arbitrators' own preferences.²¹⁰

The existence of a dominant authority is likely to produce some level of uniformity in the behavior of tribunals. The tribunals, in time and through both formal and informal compliance practices, adjust their behavior to the preferences of that dominant authority. The ICSID Secretary-General—or Chairman of the Administrative Council—appoints about one-third of ICSID presiding arbitrators and all members of ICSID annulment committees, hence playing a dominant role both in appointments and the review mechanism.²¹¹ For that reason, ICSID has a relatively high level of uniformity.

Moreover, a consistent review mechanism indicates preferences and may also induce the development of a similar or uniform behavior within an institution. Since NAFTA tribunals need to consider national courts in signatory states,²¹² they are likely to develop similar practices of judicial reasoning over time by adjusting their behavior according to the preferences of these courts. In contrast, tribunals operating as part of the New York Convention group, as defined by this paper, do not have clear guidance on the preferences of national courts reviewing their awards.²¹³ Without a guiding authority with respect to the appointment mechanism as well, the behavior of these tribunals diverges and is dependent largely on the individual preferences of the arbitrators.²¹⁴

B. The Centrality of Institutional Arrangements in the Moment of Change

This paper reinforces the central role of institutional arrangements in today's time of change. Institutions do not

209. Rogers, *supra* note 24, at 987–88.

210. *Id.* at 988–89.

211. ICSID Arbitration Rules, *supra* note 81, r. 4.

212. NAFTA, *supra* note 12, at 646.

213. See Gelander, *supra* note 97, at 629–32 (showing that vacating awards based on public policy under the New York Convention creates problems as there are no clear guidelines and policies can be vague).

214. See *id.*

simply adjust to the environment and its demands, but rather play a central role in shaping that change. In the context of investment treaty arbitration, this paper has shown that change in institutional behavior is not directly subject to the demands of the international community of states, the international judicial community, or the general public within states. Rather, change is largely shaped through at least two variables—or interfaces—of investment treaty arbitration: formal and informal arrangements that dictate the review mechanisms as well as the appointment patterns of arbitrators. Since different institutional backgrounds are characterized by different review mechanisms and appointment patterns, they react and change differently. As a result, this paper demonstrates that these institutions apply different judicial reasoning and different judicial behavior.

C. *Public Law, Public International Law, and Private Law*

Modern international investment law is often analogized with public international law, public law, or private law. Its standards are based in international treaties and interpreted through the application of public international law norms. Its substance, reviewing the regulatory autonomy of states, is captured by national courts and their invocation of public law norms. Finally, it often involves contracts between states and investors subjected to private law norms.²¹⁵ Scholars who draw these analogies may realize that ICSID judicial reasoning is closer linked to public international law, NAFTA to public law, and a significant number of tribunals belonging to the New York Convention group to private law.²¹⁶ Understanding that the assimilation of one legal discipline or another is shaped by the institutional contexts in which the tribunals act may prove helpful for scholars addressing these analogies. For example, it is suggested that to enhance the legitimacy of investment treaty arbitration, tribunals should,

215. Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 45, 50 (2013); see also Schill, *supra* note 3, at 404; Alex Mills, *The Public-Private Dualities of International Investment Law and Arbitration*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 97, 99 (Chester Brown & Kate Miles eds., 2011).

216. Roberts, *supra* note 215, at 45, 50.

inter alia, incorporate certain public law rules and practices in the reasoning of their awards.²¹⁷ This paper indicates, however, that the normative choices made by tribunals are influenced by the audiences they prioritize due to certain institutional arrangements. Accordingly, public law becomes more dominant in the judicial reasoning of arbitrators if local audiences are enhanced in the process. Enhancing local audiences, such as national courts, however, contradicts the normative framework of ICSID, as the tribunals are meant to bypass national courts in settling international investment disputes.

D. National Courts and Informal Mechanisms for Change

During the past years, states have become concerned that the international investment regime unreasonably restricts their regulatory autonomy and, thus, are reconsidering their policies with regard to investor-state dispute settlement.²¹⁸ Nevertheless, different states have different views regarding the reforms needed to address this concern.²¹⁹ Considering the enormous number of bilateral investment treaties and the lack of consensus regarding the replacement of BITs with a multilateral investment treaty framework, changing the current regime through formal reforms seems out of reach in the near future. While formal reforms are difficult to achieve, informal mechanisms of change should be given due consideration. This paper highlights at least one aspect of informal change that has yet to be explored: the role that national courts are playing in their review and enforcement of awards.

This paper has shown that local audiences in the context of NAFTA, including national courts and governments, are clearly more salient compared to other contexts. Informal review of awards by national courts (including one notable annulment decision) has naturally been influential in highlighting the

217. Schill, *supra* note 3, at 424–25, 428.

218. See Anthea Roberts, *The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecideds*, EJIL: TALK! (June 15, 2017), <https://www.ejiltalk.org/the-shifting-landscape-of-investor-state-arbitration-loyalists-reformists-revolutionaries-and-undecideds/>.

219. See *id.*

importance of local audiences. Consequently, the inquiry arises: should national courts play a part in the overall checks and balances that shape the normative framework of the international investment regime?²²⁰ On one hand, such a role may not be consistent with principles of commercial arbitration that preclude review of the merits. Nevertheless, there are certain justifications for such a role that are based on the distinction between commercial arbitration and investment arbitration; by reviewing and enforcing investment awards, a national court exercises authority that has direct implications on a third state's regulatory autonomy.²²¹ Moreover, should the "public policy" of the country where the award is enforced serve as a basis for setting aside an award under the New York Convention?²²² To do so, courts should incorporate shared global interests—such as preserving environmental, health, or human rights standards—into their own states' public interest. Indeed, certain claims, such as Phillip Morris' claims against Australia and Uruguay, were long anticipated by many states other than the respondent states, as such claims reflect a global trend of regulations restricting smoking.²²³ Had these awards been supportive of Phillip Morris' claims, would a national court reviewing such an award ignore their implications on the future regulatory autonomy of its own state, such as the restriction of future regulation aimed at promoting the public health, by setting restrictions on the sales of smoking? Naturally, different legal traditions set different challenges to such an interpretation of "public interest," as some

220. See, e.g., Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241; Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59, 67, 69, 72 (2009) (arguing the importance of national courts reviewing international organizations).

221. See Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 296 (2013).

222. New York Convention, *supra* note 9, art. V(2)(b) (noting that an arbitral award may not be enforced if it would violate the public policy of the country where enforcement is sought).

223. Philip Morris Asia Ltd. v. Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015); Philip Morris Brands Sàrl v. Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016).

may be more reluctant to play an active role than others.²²⁴ Nevertheless, the main challenge remains in changing these courts' own perceptions of their roles and of their states' public interest as containing shared global interests.

E. A Concluding Remark

Looking through the institutional perspective lens reveals differences in the judicial reasoning of awards. It suggests that different institutions address different audiences, which explains the differences in judicial reasoning. Alternative suggestions—such as parties' submissions, treaty text, or the identity of arbitrators—fail to provide sufficient answers for the differences among institutions. This paper has shown in its examination of parties' submissions to NAFTA tribunals that such submissions do not explain, at least not fully, the behavior of tribunals. Treaty text, while it may vary from one case to another, also fails to explain the different uses of case law and of policy considerations in the different institutional contexts. Finally, differences in the identity of arbitrators or their legal cultures—if suggested as a possible reason behind the variances in judicial reasoning—leads right back to the institutional unit as a basis for interpretation in explaining why parties and the designating authorities appoint different arbitrators in different institutional contexts.

Naturally, many issues remain open, such as additional potential influences among different institutions, possible changes in norms within the community of international arbitrators, and the role of cultures and ideas—or paradigms—that shape the behavior of actors within an institution.²²⁵ This line of research is necessary not only to understand the field of international investment law, but also to understand the significance of institutional arrangements in shaping the behavior of judicial institutions.

224. Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 296 (2013).

225. See Olga Frishman, *Transnational Judicial Dialogue as an Organisational Field*, 19 EURO. L.J. 739, 749–51 (2013).

