The Convergence of Renewed Nationalization, Rising Commodities, and "Americanization" in International Arbitration and the Need for More Rigorous Legal and Procedural Defenses

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SUMMARY

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I. INTRODUCTION

By the end of the 20th century, international arbitration had emerged as the preeminent mechanism to resolve international commercial disputes, particularly disputes between foreign investors and sovereign nations. Indeed, in the 1990s, globalization grew exponentially with previously-closed markets—such as Latin America—opening to foreign investors for the first time in decades. Accompanied with this globalization was often the acceptance of international arbitration, as exemplified by its inclusion in dozens of bilateral investment treaties ("BITs") and regional trade pacts, such as the North American Free Trade Agreement ("NAFTA").

However, over the past decade new trends have materialized presenting challenges to international arbitration. First, a rising tide of nationalization emerged in many countries, including some of the countries that welcomed foreign investment and privatization in the 1990s. Second, many of the foreign investments made in the 1990s related to natural resources such as oil, gas, timber, copper, tin, and other minerals;[1] and the market price for these commodities, which had bottomed out for many in the 1990s, has now risen to all-time high levels. Accordingly, the monetary consequences of expropriation and breached investment contracts have grown enormously. Finally, arbitration has evolved from a primarily European institution to one reflecting some degree of American-style aggressive tactics. Thus, nations now utilize increasingly hard-line, multi-layered, and novel strategies in defending the arbitral claims they face and improving their leverage with aggrieved investors.

To maintain its position as the standard bearer for fair, cost-effective, and timely resolution of disputes, international arbitration must manage these new challenges with strategies of its own. Part I of this article outlines international arbitration and the trend of "Americanization." Part II provides a historical perspective on nationalization, from the resolution of significant early arbitral disputes to its current resurgence, along with the development of modern concession agreements. Part III sets forth the use of more sophisticated and aggressive defenses to expropriation claims, particularly substantial and multi-varied counterclaims. Finally, we address the need for procedural changes in arbitral practice—as well as the application of well-established legal principles such as prescription, laches, estoppel, and waiver—so that arbitration can fulfill its primary mission to provide justice through cooperation by focusing and resolving "the central issues of the case."[2]

1. Developed nations have largely depleted these natural resources residing within their boundaries, and multinational companies that have historically led these industries have now turned to developing countries as the source for the exploitation of these resources.

2. Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L LAW. 187, 197 (1989).

II. BURGEONING INTERNATIONAL ARBITRATION

A. Overview of International Arbitration

International commercial arbitration can generally be defined as any private adjudication of a commercial dispute with some international facet.[3] This term is sufficiently broad enough to encompass both institutional arbitrations, which are administered by organizations specializing in dispute resolution, and ad hoc arbitrations, which are conducted in a manner specified by the parties. Ideally, international commercial arbitration provides the parties with a private dispute resolution system that is faster and fairer than court proceedings.[4]

Institutional arbitrations proceed before organizations such as the International Chamber of Commerce,[5] the LCIA,[6] the International Centre for Dispute Resolution,[7] the Permanent Court of Arbitration in The Hague,[8] and the Hong Kong International Arbitration Centre.[9] Typically, an arbitral institution will have enacted procedural rules setting out the basic framework for the arbitration process, including how to determine whether an

3. *See* Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 9 n.1 (1986).

4. *See, e.g.*, ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 3 (2d ed. 1991) (describing arbitration as "two or more parties, faced with a dispute which they cannot resolve for themselves, agreeing that some private individual will resolve it for them and if the arbitration runs its full course . . . it will not be settled by a compromise, but by a decision"); W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION, iii (1997) (defining arbitration as "a contractual method of dispute resolution").

5. The International Chamber of Commerce, or the ICC, is generally regarded as the world's leading arbitral institution. The ICC's International Court of Arbitration was established in 1923 and has a membership of over 80 countries. Nearly 600 new proceedings were filed in 2006 alone. *See* INTERNATIONAL CHAMBER OF COMMERCE, ICC IN 2007: ACHIEVEMENTS, GOALS, AND LEADERSHIP 4 (2007), *available at* http://www.iccwbo.org/uploadedFiles/ICC/ICC_Home_Page/pages/ICC%202007-2-complete.pdf. *See generally* YVES DERAIN & ERIC A. SCHWARZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION (1998); International Chamber of Commerce, What Is ICC?, http://www.iccwbo.org/id93/index.html (last visited Feb. 15, 2008) (describing the ICC, its rules and procedures, and its history).

6. The LCIA, was founded in 1892 as the London Court of International Arbitration. While viewed historically as a British institution, it has become more active in the resolution of international arbitrations. However, the LCIA's rules may not be in all respects as comprehensive as the ICC's. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 15 (2d ed. 2001); Avraham Azrieli, *Improving Arbitration Under the U.S.-Israel Free Trade Agreement: A Framework for a Middle-East Free Trade Zone*, 67 ST. JOHN'S L. REV. 187, 216 (1993).

7. The American Arbitration Association established the International Centre for Dispute Resolution ("ICDR") with headquarters in various locations around the world, and claims to oversee approximately 400 international disputes annually. *See* BORN, *supra* note 6, at 16.

8. The institution was formed in 1899 to hear arbitrations exclusively involving countries, but expanded its purview in 1993 to include disputes between states and private parties and between international organizations. *See* Permanent Court of Arbitration, About Us, http://www.pca-cpa.org/showpage.asp?pag_id=1027 (last visited Mar. 25, 2008). It administered the first "investor-state" case in 1934. *Decision in the Arbitration Case between Radio Corp. of Am. v. The Republic of China*, *reprinted in* 30 AM. J. INT'L L. 535 (1936).

9. The Hong Kong International Arbitration Centre is part of the Asia Pacific Regional Arbitration Group, or APRAG, which is an umbrella group of arbitral institutions in the Far East and Pacific Rim and boasts a membership of twenty-seven nations. *See* Asia Pacific Regional Arbitration Group, Welcome to APRAG, http://www.aprag.org (last visited Mar. 25, 2008). Because of the explosive economic and population growth in East Asia and the Pacific Rim, the number and significance of arbitrations arising from this region will undoubtedly grow at a substantial pace in the near and far term. *See* Hong Kong International Arbitration Centre, Statistics, http://www.hkiac.com/HKIAC/HKIAC_English/main.html (last visited Mar. 25, 2008).

agreement to arbitrate exists, procedures for appointing arbitrators and challenging the appointment of arbitrators, determining the location of the arbitration, and even (at some institutes) scrutinizing awards.

Ad hoc arbitrations proceed without the assistance or supervision of an arbitral institution.[10] The parties either adopt a set of procedural rules from one of the arbitral institutions (or the rules of the United Nations Commission on International Trade Law)[11] or craft their own set of procedural rules. Because of the lack of supervision, administration, and structure provided by a governing body, parties must be more careful in planning an ad hoc arbitration.[12]

International commercial arbitration grew from the need to find a suitable dispute resolution system for parties in the international trade, commerce, and investment that blossomed after the conclusion of World War II.[13] International commercial arbitration allayed three distinct concerns about litigation before local judiciaries: (1) the perception that local courts would be biased in favor of a domestic party; (2) the uncertainties involved in appellate review of a foreign judgment; and (3) the inability to enforce a foreign judgment domestically or abroad.[14] If a state or state-controlled entity is a party to the transaction, these concerns are particularly acute.[15] Accordingly, the desire of each party to avoid having a dispute determined by a foreign judicial forum fueled the growth of international commercial arbitration.

To further the effectiveness of international arbitration, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, came into force in 1959.[16] The New York Convention requires both the recognition of agreements to arbitrate and reciprocity—that is, the recognition and enforcement of arbitral awards made in other contracting countries.[17] At present, 142 of the

10. *See* BORN, *supra* note 6, at 12.

11. These rules are commonly referred to as the UNCITRAL rules. *See* U.N. Comm'n on Int'l Trade Law, *UNCITRAL Arbitration Rules*, U.N. Doc. A/31/17, U.N. Sales No. E.77.V.6 (1976) [hereinafter UNCITRAL Rules].

12. *See* Adrian Winstanley, *Foreword* to THE EUROPEAN & MIDDLE EASTERN ARBITRATION REVIEW 2008, GLOBAL ARBITRATION REVIEW *available at* http://www.globalarbitrationreview.com/handbooks/3/sections/11/chapters/71/foreward (describing a number of potential pitfalls with ad hoc arbitration that are caused by the absence of established rules and of a governing body to provide structure and service to the parties).

13. *See* W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L. J. 1, 2 (1995).

14. *Id.* at 3.

15. *Id.* at 7–8. *See* Charles N. Brower, *The Global Court: The Internationalization of Commercial Adjudication and Arbitration*, 26 U. BALT. L. REV. 9, 11 (1997) ("It is not a mistrust of state power per se; rather it is the lack of faith on the part of each party that the courts of the other party's state of nationality in fact will administer justice fairly and impartially. In short, neither party wishes to be judged in the other's 'backyard.'").

16. *See* Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 12 U.S.T. 2518, 330 U.N.T.S. 38 [hereinafter the New York Convention]. The New York Convention resulted from a movement to adopt a multilateral convention that would remedy many of the defects, principally facilitating enforcement of arbitral awards, of the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards which did not gain widespread ratification. *See* Craig, *supra* note 13, at 9–10; Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 615 (2006). The United States did not ratify the New York Convention until 1970, thereby rendering it a less desirable forum for international arbitration than continental Europe, particularly France and Switzerland. *See* Craig, supra note 13, at 13–14.

17. New York Convention, *supra* note 16, art. I. Under the New York Convention, a party to the Convention may refuse to recognize and enforce an arbitral award only if the party opposing enforcement can establish one of seven enumerated defenses. *See id.* art. V.

192 United Nations member states have ratified the New York Convention.[18] Moreover, most developed nations (and many developing ones) have enacted national arbitration legislation that respects the integrity of private arbitration by, among other things, limiting judicial interference in the arbitration process, affirming the parties' capacity to agree to binding arbitration, and enforcing tribunal orders and awards.[19]

Consequent to these developments, international arbitration had become (at least since the mid-1980s), and remains today, the preferred method to resolve international commercial disputes:

> In this realm of international commercial transactions, arbitration has become the preferred method of dispute resolution. Arbitration is preferred over judicial methods of dispute resolution because the parties have considerable freedom and flexibility with regard to choice of arbitrators, location of the arbitration, procedural rules for the arbitration, and the substantive law that will govern the relationship and rights of the parties.[20]

B. Arbitral Proceedings

As noted above, one of the benefits of arbitration is that unlike litigation, particularly American litigation, arbitration affords the parties considerable freedom, flexibility, and control over the proceedings and is designed to assure that parties from different jurisdictions can have their disputes heard and resolved in an efficient and neutral fashion.[21] Arbitration allows the parties to adopt procedures that focus on the heart of the dispute, avoid expensive and time-consuming pre-hearing discovery and motions, and allow for the

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18. *See* U.N. Comm'n on Int'l Trade Law, Status - Convention on the Recognition and Enforcement of Foreign Arbitral Awards http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_ status.html (last visited on Mar. 25, 2008).

19. *See generally* BORN, *supra* note 6, at 27–34.

20. Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26 AM. BUS. L.J. 511, 512 (1988). *See* Yves Derains, *The Impact of International Political Crises on International Contracts and International Arbitration*, 1992 Revue De Droit Des Affairs Internationales 151, 151 (1992) ("[A]rbitration is recognized as the normal way of settlement of international commercial disputes."); Christoper R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 233 n.1 (2006) ("Estimates are that 90 percent of international contracts include an arbitration clause."); Pierre Lavile, *Transnational (or Truly International) Public Policy and International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 257, 293 (Pieter Sanders ed., 1987) ("By the mid-1980s, at least, it had become recognized that arbitration was the normal way of settlement of international disputes."); Winstanley, *supra* note 12, ("[A]rbitration still holds its place as the first choice for the binding resolution of commercial disputes in the widest range of contractual relationship[s] and across many jurisdictions."). Of course, arbitration's roots can be traced to the beginning of civilization and transnational commerce. *See* RENÉ DAVID, ARBITRATION IN INTERNATIONAL TRADE 84 (1985) (noting that Roman law provided for the institution by contract of arbiters and arbitrators as private judges); ABDUL HAMID EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 11–12 (2d ed. 1999) (analyzing the role of arbitration in the Middle East, including in pre-Islamic cultures); DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 203–11 (1978) (describing arbitration's role in early classical civilizations).

21. *See* BORN, *supra* note 6, at 2 (stating that international procedural rules and arbitrators are "detached from the courts, governmental institutions and cultural biases of either party"); Nelson, *supra* note 2, at 197 ("One of the cardinal features of arbitration is its flexibility."); Robert B. von Mehren, *An International Arbitrator's Point of View*, 10 AM. REV. INT'L ARB. 203, 203 (1999) ("One of the most fascinating qualities of international arbitration is its inherent flexibility.").

selection of the arbitrators (including non-lawyers) who are best equipped to resolve the dispute.[22]

International arbitration practice reflects a merging, or "harmonization," of the civil law practice of continental Europe and common law practice of England and the United States.[23] While the governing rules and procedures can be modified to suit any arbitral proceeding, international arbitration generally adopts the common law traditions of adversarial questioning and the admission of intra-company memoranda, as well as the civil law customs of limited discovery, the allowance of negative inferences based on lack of evidence, and written memorials.[24] In addition, unlike litigation before a public court, arbitration enables the parties' dispute to proceed in confidence, if they so agree. This not only protects from public disclosure any proprietary or sensitive information that may be at issue, but also guards any ongoing relationship between the parties that could be harmed by publication and grandstanding to trade groups, shareholders, or others.[25]

Arbitration, of course, is not perfect. Its potential weaknesses, including the lack of expeditious interim injunctive relief,[26] cost,[27] perceived inconsistency among arbitrators,[28] absence of meaningful review to correct irrational awards,[29] the perceived tendency of

22. *See* Nelson, *supra* note 2, at 197.

23. *See* von Mehren, *supra* note 21, at 203; *see also* Gary Born & Maxi Scherer, *Introduction* to THE EUROPEAN & MIDDLE EASTERN ARBITRATION REVIEW 2008, GLOBAL ARBITRATION REVIEW, *available at* http://www.globalarbitrationreview.com/handbooks/3/sections/11/chapters/70/introduction ("[T]oday's features of international commercial arbitration are the result of a well-balanced 'mix and match' from different legal traditions, in particular from the two major legal systems, the civil and the common law."); Craig, *supra* note 13, at 57 (concluding that "substantial convergence in modern arbitration laws with respect to the procedures to be followed in arbitration and the standards for judicial recourse" has been the course of dispute evolution). Many practitioners and commentators consider this harmonization and convergence to in fact be "Americanization"—a trend that in the eyes of some will undermine the arbitration process. *See* Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 47 (2003) ("[The] imposition of procedural rules and methods of one of the parties may denounce the sense of fairness of the entire proceeding and leave the other party (and possibly at least one arbitrator) feeling disadvantaged and disappointed."). Assuming that arbitration continues its expansion in the Middle East, east Asia, Central and South America, and the Pacific Rim, the extent to which arbitration practice will begin to reflect the legal and cultural regimes of these areas will be a significant challenge for the arbitral institutions, parties and practitioners. *Cf.*, Kutty, *supra* note 16. A perceived failure by the international arbitration practice to at a minimum consider these regimes (and attempt to incorporate and harmonize them with current practice) could, when coupled with burgeoning nationalization, reverse the harmonization and convergence trend.

24. *See* von Mehren, *supra* note 21, at 203–05 (1999). Additionally, the flexibility inherent in arbitration allows for creative and sophisticated interrogations of witnesses more akin to panel discussions or debates by experts that are not generally employed in judicial proceedings (though they are sometimes common in legislative, administrative and regulatory hearings). *Id*. at 205; Helmer, *supra* note 23, at 54 (noting that the IBA Rules of Evidence provide for such "confrontation testimony" by the same witnesses on the same topic or issues); David W. Rivkin, et al., *Current Trends in U.S. and International Arbitration, in* THE ARBITRATION REVIEW OF THE AMERICAS 2008, GLOBAL ARBITRATION REVIEW, *available at* http://www.globalarbitrationreview.com/handbooks/4/sections/7/chapters/51/current-trends-us-international-arbitration ("Confrontation testimony—simultaneous questioning of two or more witnesses on the same issues—has been used by some arbitrators with great success.").

25. *See* Nelson, *supra* note 2, at 198–99.

26. *See id. at* 201–02.

27. *See id. at* 203. While the narrower scope of discovery in arbitration results in reduced discovery expenses, the sometimes voluminous and repetitive submissions and memorials, as well as the administrative expense and arbitrators' fees, may balance the purported cost-savings cited by many arbitration proponents. *See* Rivkin, *supra* note 24 ("Unfortunately, as disputes have grown more complex and have involved larger sums, too often international arbitration proceedings have become longer and more costly."); Winstanley, *supra* note 12 ("The most vociferous and sustained criticism of commercial arbitration is leveled at cost and delay.").

28. *See* Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 AM. U. INT'L L. REV. 657, 727 (1999).

29. Von Mehren, *supra* note 21, at 207.

arbitrators to "split the baby,"[30] and limited discovery[31] have been exhaustively examined by numerous commentators.[32] Nonetheless, international arbitration continues to expand globally and is a well-settled feature in many bilateral trade agreements and international contracts.[33] However, there are concerns that the increasing "Americanizing" of arbitration has the potential to undermine its goals, expansion, and acceptance.

C. "Americanization" of International Arbitration

To appreciate the concerns surrounding the perceived "Americanization" of arbitration, it must first be emphasized that modern international arbitration practice has its roots in the 20th century civil law tradition of sitting arbitral panels and institutions in continental Europe.[34] When crafting arbitration agreements in the early- to mid-20th century, commercial parties and their respective counsel focused on two fundamental issues: (1) the neutrality of the arbitration seat and (2) the seat's local laws affecting arbitral proceedings.[35] Tensions during the Cold War between East and West and distrust between developed and developing countries created incentives for parties from these various groups to arbitrate in countries not clearly identified with either faction. Because of the need to

30. Von Mehren, *supra* note 21, at 208.

31. *See* Nelson, *supra* note 2, at 203 (noting that narrower discovery in arbitration, while viewed as an advantage from a cost perspective, can "hinder fact development and lead to unjustified results") (citing Peter D. Ehrenhaft, *Effective International Commercial Arbitration*, 9 LAW & POL'Y INT'L BUS. 1191, 1207 (1977)).

32. *See id.* at 200 (examining structural problems with arbitration as compared to traditional litigation). *Cf.* Robert von Mehren and P. Nicholas Kourides, *International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476, 476–509, 545–52 (1981) (analyzing the three arbitrations that resulted from Libya's nationalization of its oil industry, including the inconsistencies among the three tribunals' decisions).

33. *See, e.g.*, Brower, *supra* note 15, at 13 ("The fact that this 'global court' works, and works well, is proven by its consistent triumph over adversity."); Craig, *supra* note 13, at 8 ("[T]he very fact that international arbitration clauses and arbitration have become routine—a development Yves Derains terms the 'banalisation of arbitration'—leads to the result that the most intractable disputes, involving the most complicated fact and law situations, no longer are resolved in court proceedings, but in arbitration.") (citing Michael J. Mustill, *Arbitration: History and Background*, 6 J. INT'L ARB. 43, 55 (1989)). Indeed, under U.S. law, arbitrators may now even resolve disputes, such as antitrust, securities and RICO, that typically were of a public nature and could only be heard by judicial bodies. *See* von Mehren, *supra* note 21, at 208.

34. It is equally important to understand that "Americanization" can have both positive and negative aspects, often times depending on the legal roots of the individual perceiving "Americanization." For Continental Europeans, "'Americanization' or an 'American' approach . . . is often a code word for an unbridled and ungentlemanly aggressivity and excess in arbitration. It can involve a strategy of 'total warfare' . . . ." Nicholas C. Ulmer, *A Comment on "The 'Americanization' of International Arbitration?"* 16 MEALEY'S INT'L ARB. REP. 24, 24 (2001). *See* Susan L. Karamanian, *Overstating the "Americanization" of International Arbitration: Lessons from ICSID*, 19 OHIO ST. J. ON DISP. RESOL. 5, 5–6 (2003) ("[I]t means 'unbridled and ungentlemanly' conduct or a strategy of 'total warfare.'"). *But see* Susan L. Karamanian, *supra* at 34 ("These American aspects, which tend to promote the full development of the facts within an orderly environment, benefit the process and promote the truth."); Mary Ellen O'Connell, *Introduction to the Symposium Issue on the Americanization of International Dispute Resolution*, 19 OHIO ST. J. ON DISP. RESOL. 1, 3 (2003) (arguing that the potential for American-style litigation has led to better negotiation to avoid potential claims and that "American lawyers are energetic, competitive, creative and trained in problem solving . . . attributes [that will] advance IDR"); Casare P.R. Romano, *The Americanization of International Litigation*, 19 OHIO ST. J. ON DISP. RESOL. 89, 105 (2003) ("The 'American way of law' is not only about over-litigation and crafty lawyers; it is also about openness, participation, and access to justice.").

35. *See* Craig, supra note 13, at 11–12. The United States was historically not a popular site for international arbitration for a number of reasons, including its failure to ratify the New York Convention until 1970, its percieved status as a biased site, and the fear that U.S. courts might interfere with the arbitral process. *See id*. at 13.

identify a neutral site that provided the best local conditions for arbitration to flourish, Switzerland and France were selected as the best alternatives.[36] Accordingly, these two civil law jurisdictions became hubs for international arbitration.[37]

While it cannot be disputed that common law (including American) aspects have become part of international arbitration practice, the relevant inquiry requires an analysis of precisely what "Americanization" is, to what degree it has occurred, and to what extent it has affected the goals of arbitration and the parties' expectations of the process. As a result, numerous articles,[38] texts,[39] and symposia have been devoted to the topic.[40]

Unfortunately, because of the confidential nature of international arbitration, a detailed study on changes in process and outcomes is difficult to perform. Accordingly, claims of the "Americanization" of international arbitration—loosely defined as employing adversarial and legalistic methods—tend to be based largely on anecdotal evidence.[41] Most

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36. *Id.* at 12–14.

37. *See* Eric Bergsten, *The Americanization of International Arbitration*, 18 PACE INT'L L. REV. 289, 300 (2006) ("[I]nternational commercial arbitration developed essentially as an adaptation of the civil law rules of procedure, and not those of the common law in the United States and England."); Karamanian, *supra* note 34, at 10 ("International arbitration has been traditionally based on the European civil law practice, which shuns cross-examination, discovery, and witness testimony from a party or its representatives."); Lucy Reed & Jonathan Sutcliffe, *The 'Americanization' of International Arbitration?*, 16 MEALEY'S INT'L ARB. REP. 37, 37 (2001) (stating that international arbitration was "originally a European/civil law phenomenon"). The civil law tradition differs from the common law tradition of the United States and Great Britain in several important respects. Fundamentally, under the civil law, adjudication begins with abstract rules applied to specific cases, which judges must then apply to the various cases before them, while the common law draws abstract rules from specific cases. Accordingly, civil law jurisdictions tend to focus on the positive law enacted by the governing legislative bodies, while common law jurisdictions rely heavily on the body of published case law. Great differences are also evident in the procedural aspects of the two legal regimes with civil law tradition places greater reliance and emphasis on the evidence and arguments submitted in written form, while common law practitioners operating under the jury system expect to present their case orally and to challenge the opposing party's case and witnesses through cross-examination directed by counsel. *See* Born and Scherer, *supra* note 23.

38. *See, e.g.*, *Efficient Organization of International Arbitrations*, 8 WORLD ARB. & MEDIATION REP. 61 (1997).

39. *See* Mark W. Friedman et al., *International Legal Development in Review: 2003 Business Transaction and Dispute*, 38 INT'L LAW. 265, 274–75 (2004) (discussing recent changes in U.S. domestic arbitrations). *See generally, e.g.*, WILLIAM W. PARK, AMERICANIZATION OF INTERNATIONAL ARBITRATION AND VICE VERSA ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE (Oxford Press 2006). In addition to analyzing America's influence on international arbitration, Professor Park also discussed the evolution of domestic U.S. arbitrations and its incorporation of many of the traditional features of international arbitration such as the increase in written testimony and submissions, greater independence of party-appointed arbitrators and more detailed awards by U.S. tribunals. .

40. *See, e.g.*, Romano, *supra* note 34. Despite the United States' delay in ratifying the New York Convention (and concomitant lack of influence in its drafting and early development), arbitral practice in the United States was practically born out of America's Revolutionary War with Great Britain. In fact, the modern era of arbitration finds its genesis in the 1794 Jay Treaty between the United States and Great Britain. With a potential war brewing with Great Britain over the United States and its citizens' failure to compensate British creditors for their lost investments in the United States, President George Washington instructed U.S. Supreme Court Chief Justice John Jay to negotiate a compromise that culminated in the Jay Treaty, which obligated the United States to pay full compensation and adjudicate British creditors' claims before a five-member panel (two appointed by each country and the fifth by unanimous choice). *See* Treaty of Amity, Commerce, and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, arts. V, VIII, 8 Stat. 116, 119–20, 122. Although Jay and Washington were greatly maligned at the time, today the Jay Treaty is highly lauded as the beginning of the modern era of international arbitration. *See* Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 COLUM. J. TRANSNAT'L L. 65, 68 (1997) ("The Jay Treaty of 1794 marked the beginning of modern international arbitrations, which have continued to the present."); Drahozal, *supra* note 20, at 242 ("The Treaty was extremely unpopular at the time, but is enjoying a renaissance among modern arbitration scholars . . ."); Barton Legum, *Investment Disputed and NAFTA Chapter Eleven*, 95 AM. SOC'Y INT'L L. PROC. 196, 204 (2001).

41. *See* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTITUTION OF A TRANSNATIONAL LEGAL ORDER 9 (1996) (relying largely on

claims of Americanization focus on the procedural aspects of arbitration—large teams of lawyers, procedural disputes, extensive motion practice, jurisdictional objections, evidentiary objections, broadening discovery, aggressive cross examination, and witness preparation[42]—rather than the award or decision making of the arbitral tribunal (although arbitral awards now appear to be citing previous arbitral decisions, at least as persuasive authority, which is more akin to U.S. litigation than civil law practice).[43] Based on the anecdotal data and Professor Susan Karamanian's review of eighteen awards by the International Centre for Settlement of Investment Disputes ("ICSID"), American-style litigation has had a substantial impact on arbitral practice demonstrated by the use of extensive cross examination, production of documents, and presentation of party witnesses.[44]

At least two separate events and two major trends may help explain the increased American-style activity in international arbitration: (1) the three Libyan nationalization arbitrations brought by U.S. oil companies who were represented by U.S. lawyers;[45] (2) the Iran-United States Claims Tribunal created by the Algiers Declaration[46] involving claims by U.S. citizens represented typically by U.S. lawyers against Iran for losses caused by the 1979 Iranian revolution;[47] (3) the transition by U.S. businesses to view arbitration as a preferred way of resolving international disputes;[48] and (4) the ascendancy of modern

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interviews of "leading members of international arbitration community and the representatives of the leading institutions," attendance at conferences, and reviews of "the massive literature on this subject"); Ulmer, *supra* note 34, at 24–25 (considering the claim of "Americanization" based on the author's experience as a lawyer trained in the United States practicing in the international arbitration field and on comments made by others practicing in the field); *Drafting Effective Dispute Resolution Clauses*, 8 WORLD ARB. & MEDIATION REP. 274, 278 (1997) (recounting one lawyer's experience in which a Swiss chairman ordered discovery in accordance with the U.S. Federal Rules of Civil Procedure).

42. *See* Drahozal, *supra* note 20, at 246 (noting that some aspects of U.S. trial procedures, such as pre-trial discovery and cross-examination, have become routine in international arbitration); Helmer, *supra* note 23, at 45–46 ("Not surprisingly, arbitral procedure is the single element of international arbitration that is said to be the most 'Americanized.'"); PARK, *supra* note, 39, at 8 ("In particular, one frequently hears complaints about the 'Americanization' of arbitration, usually related to aggressive litigation tactics that include hefty boxes of unmanageable exhibits, costly pre-trial discovery, and disruptive objections to evidence.").

In sum, Americanized litigation is often equated with over-litigation that can result in arms-race type tactics by opposing parties within an arbitral hearing and to the repetition of such tactics by the same parties in subsequent arbitrations. *See* Romano, *supra* note 34, at 95–96.

In contrast to the perceived ruthlessness and crassness of American lawyers, "European arbitrators tended to be the 'Grand Old Men' of the European legal community." Bergsten, *supra* note 37, at 295. *See* O'Connell, *supra* note 34, at 2 ("[U.S. legal tactics] contrast with the more cooperative, polite, diplomatic style of the past."). While perhaps an overly-broad generalization, some differences between Americans and Continental Europeans practicing in international arbitrators do exist. For example, American practitioners tend to be engaged in private law practice at large, international law firms, while their Continental European counterparts have historically drawn from the diplomatic, governmental and academic fields and therefore came to arbitration from different professional (as well as legal) backgrounds. *See* Romano, *supra* note 34, at 113.

43. *See* Karamanian, *supra* note 34, at 19–20, 32–33.

44. *See id.* at 20–33; Helmer, *supra* note 23, at 35, 48–55.

45. *See* Bergsten, *supra* note 37, at 293–95.

46. *See* Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration) (Jan. 19, 1981), *available at* http://www.iusct.org/general-declaration.pdf.

47. *See* Bergsten, *supra* note 37, at 298–300 ("Following this exposure, American lawyers gained an appreciation for international commercial arbitration, viewing it as a way of settling not only ordinary commercial disputes, but also highly contentious disputes with commercial elements."). These arbitrations also resulted in "[t]he most important body of international arbitration jurisprudence" with a distinctly American flavor. *See* Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 86 (2003).

48. Because of the confidential nature of many international arbitrations (treaty disputes being one obvious

international U.S. law firms, of American lawyers as counsel and arbitrators, and of English as the predominant language of international arbitration.[49] Because the first two of these precipitators are a matter of historical fact, their mark on international arbitration has already been established. The third and fourth reasons reflect the evolution of U.S. involvement in the global economy and the global legal market over a number of decades—an evolution that appears unlikely to be reversed in the near term. "Just as the United States has been and will be the dominant force in economic globalization, [American] law firms will be the dominant force in international arbitration."[50]

Of these four precipitators, it is the involvement of U.S. legal practitioners that carries the most potential for Americanizing international arbitration practice. Some U.S.-based law firms have established international commercial arbitration departments and practice groups, while others provide arbitration services from within their traditional litigation departments.[51] In fact, eight of the twelve most active law firms in international arbitration were based in the United States.[52] As a simple matter of human nature and training, American lawyers and American-trained foreign lawyers who practice international arbitration will continue to use American litigation techniques and tactics.[53] Therefore, as

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and important exception), it is difficult to precisely estimate what percentage of international arbitral disputes involve American parties and American counsel. However, the American Lawyer has attempted to glean some information to create an arbitration survey and "scorecard." According to the American Lawyer, of the 130 largest international contract and treaty disputes in 2005, 37 (or nearly 30 percent) involved a U.S. party. *See* Michael D. Goldhaber, *Arbitration Scorecard*, AMERICAN LAWYER: FOCUS EUROPE (2005), *available at* http://www.americanlawyer.com/focuseurope/scorecard0605.html; *see also* Bergsten, *supra* note 37, at 300 (noting that one-fourth of the cases before the ICC in 2005 involved an American party); Drahozal, *supra* note 20, at 244 ("Americans have been the nationality most frequently involved in ICC arbitrations for every year since 1998."); O'Connell, *supra* note 34, at 2 ("The United States is involved in more cases at the International Court of Justice and the World Trade Organization than any other state. More American businesses are involved in international commercial arbitration than any other nationality.").

49. *See* Romano, *supra* note 34, at 113; *see also Efficient Organization of International Arbitrations*, *supra* note 38, at 63 ("American arbitrators, of course, are more likely than others to order wide document production."); O'Connell, *supra* note 34, at 2 ("Eight out of the ten 'mega'-firms, firms with 2,000 lawyers or more, are American."). Because an increasing number of the lawyers and parties to international arbitration come from the United States, it is not surprising that an increasing number of arbitrations are now sited in the United States and that an increasing number of the arbitrators come from the United States. *See* Drahozal, *supra* note 20, at 245 (calculating that, according to ICC statistics, the frequency of the United States as the arbitration venue has doubled in the past twenty years from 4.9 percent to 10.0 percent and that the percentage of American arbitrators has risen from 6.6 percent in the 1980s to 11.5 percent in the early 21st century). While this growth trend exists, U.S.-seated arbitrations remain a distinct minority, and "[i]t has been noted that the most significant arbitrations, the ones involving the largest amounts of money and high political stakes, still take place outside the United States." Helmer, *supra* note 23, at 42.

50. Alford, *supra* note 47, at 80.

51. Helmer, *supra* note 23, at 41. U.S. lawyers are commonly selected as counsel by foreign states and by foreign companies involved in arbitral proceedings. *See* Goldhaber, *supra* note 48; *see also* John Flood, *Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions*, 14 IND. J. GLOBAL LEGAL STUD. 35 (2007) (analyzing the role of large law firms (particularly U.S. mega-firms) in the international arena).

52. *See* Goldhaber, *supra* note 48*; see also* Romano, *supra* note 34, at 115 ("Nowadays, the field is dominated by a handful of large American and British law firms . . ."). In contrast to the dominance of American firms as party counsel, only two of the top ten arbitrators were American. Goldhaber, *supra* note 48. However, as American lawyers gain experience and recognition in the arbitral community, the Euro-dominance of the arbitrator ranks could possibly erode, particularly among party-appointees.

53. *See* Bergsten, *supra* note 37, at 294 ("American lawyers participating in international commercial arbitration brought and used American litigation skills."); Born & Scherer, *supra* note 23 ("[T]he parties or the arbitrators tend to follow their 'legal instinct' and rely on familiar practices used in their own legal system."); Helmer, *supra* note 23, at 47 ("It is natural for lawyers to use the skills and methods they are trained in and accustomed to whenever they are called on to provide their professional services."). Indeed, the flexibility inherent in arbitration coupled with the prevalence of American counsel may likely result in the parties agreeing to using many U.S.-style litigation techniques, such as interrogatories, depositions, and motion practice, in

American and American-trained lawyers become active in the governing bodies for international arbitration, it is likely that their experiences, training, and skills will shape the systems and rules that govern arbitral institutions.[54] Barring an unforeseen disruption of this trend, American influence on international arbitration will likely expand and further the "Americanization" bemoaned by many.

So long as commercial parties to international transactions believe that American firms give them the best chance for a favorable outcome, Americanization—including aggressive pre-trial discovery, aggressive cross-examination, and presentation of novel and strategic claims—may very well continue and gain increasing acceptance.

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arbitrations. Again, this presents a significant tension for international arbitration as party autonomy remains its hallmark, but that autonomy could lead to its becoming more like adjudication. *See* Helmer, *supra* note 23, at 66 ("If arbitration turns into U.S.-style 'off-shore litigation,' the incentive to arbitrate international disputes will diminish or even go away.").

Assuming that international arbitration continues to become—and is perceived to become—"off-shore U.S. litigation," what effect will this continued evolution have on international arbitration and on the acceptance of it as the preferred mechanism for dispute resolution? These authors predict little to none. First, and most importantly, international arbitration will continue as the preeminent method as long as it remains the most effective means for enforcement. Obviously, if an international treaty on the recognition of domestic judgments came about and was widely accepted, or if a number of nations abrogated the New York Convention, international arbitration's status as the preferred dispute resolution system would be in jeopardy. But, at present, both of these possibilities appear to be remote.

Second, for Americanization to be stemmed or reversed, the parties to arbitration would need to hire non-American lawyers or insist that Americanized tactics not be employed. Again, these seem unlikely. As outlined above, American law firms have increased their role in the arbitration realm over the past twenty years, representing not only American parties, but also non-American corporations, foreign individuals, and foreign governments who have consciously selected American counsel. For example, of the top ten monetary awards issued in 2005, American firms represented six of the ten winning parties, and five of those six were non-American entities. *See* Goldhaber, *supra* note 48. The burgeoning American international arbitration practice has the potential to build upon itself and become a self-fulfilling prophecy—if talented law students, young lawyers and more experienced practitioners perceive that American firms will provide the best opportunities, then the already-growing practices at American firms will continue to draw the individuals best-suited for and most-motivated in this field. If corporations, individuals, and governments continue to conclude that American firms and American lawyers will provide the best service in this field, then those firms and those lawyers will be called upon more frequently as international trade disputes arise, particularly with increasing globalization, increasing complexity, and increasing monetary amounts at stake.

54. Americans significantly influenced the creation of the International Bar Association Rules of Evidence ("IBA Rules"). Examples include Article 3, which governs discovery of document production and was adopted to require parties to produce documents in its possession pursuant to a tribunal's order and Article 4, which sanctions witness preparation by counsel—a practice common in the U.S. but anathema to many European practitioners. *See* Alford, *supra* note 47, at 84; IBA Rules, arts. 3, 4. In addition, three of the ICC's secretary generals during the 1990s were from the U.S. *See* Helmer, *supra* note 23, at 41. Many commentators maintain that America is overrepresented in many major arbitral institutions. *See* Alford, *supra* note 47, at 87 (stating that Americans make up a disproportionate number of personnel at the major arbitral institutions including the Permanent Court of Arbitration, WTO, and ICSID).

To resolve some of the differences between civil law and common law practitioners and to ensure a level playing field with all counsel and parties playing by the same rules, some commentators advocate an independent code of ethics for lawyers engaged in international arbitration. *See, e.g.*, Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L L. 1 (2003); Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341 (2002). Even if arbitral institutions embarked on setting such standards and established enforcement mechanisms, the "Americanization" issue remains as a significant source of inputs into establishing any such attorney regulation system.

III. CONCESSION AGREEMENTS, NATIONALIZATION, AND ITS RESURGENCE

A. From Concessions to Contracts: The Birth and Development of Production Sharing Agreements and National Oil Companies

The evolution of international contracts for the exploitation of natural resources (e.g., timber, fossil fuels, minerals, etc.) and its reflection of the economic, political, cultural, and diplomatic changes that occurred throughout the 20th century, is a topic that has been exhaustively examined by numerous authors.[55] In the 19th and early 20th centuries those contracts took the form of "concessions" in which the sovereign transferred actual title to the natural resources over a large area (perhaps even as large as the entire country) for as many as six to seven decades in exchange for a signature bonus and a royalty.[56] Under the terms of the concessions the contractor held complete autonomy over operations and could even choose not to undertake efforts to exploit the resource without any consequence.[57]

However, shifts in world politics following the end of colonialism, coupled with the rise of nationalism and oil wealth, enhanced the bargaining power of nations rich in natural resources and led to more favorable terms to the state or sovereign in such agreements. Whether labeled a "modern concession," "production sharing agreement," or "participation agreement," more recent versions of these international agreements reflect substantial changes from the early 20th century concessions in the resource-bearing nations' favor. Depending on the circumstances, such changes include: (1) the host nation retaining title and ownership over the resource; (2) the term of the agreement spanning a far shorter period of time (20–40 years); (3) the grant covering smaller territorial areas; (4) specific monetary commitments being made for exploration and development during early operations with all costs carried by the contractor; (5) a state-owned oil company or ministry being assigned to oversee, or participate in operations with, the contractor; and (6) more generous compensation being paid to the host-country through bonuses, graduated royalty and share levels, and taxes on the contractor's income.[58]

As part of these negotiations, and in response to rising nationalization, renegotiation requests, and the substantial capital risks involved in these ventures, drafters for the contractors balanced these new, less favorable economic terms with protections for the foreign investor, including choice-of-law clauses to ensure the application of western or international legal principles, mandatory international arbitration clauses before an established arbitral institution such as the ICC, and stabilization clauses.[59] In conjunction

55. *See generally* KEITH W. BLINN ET AL., INTERNATIONAL PETROLEUM EXPLORATION AND EXPLOITATION AGREEMENTS: LEGAL, ECONOMIC, AND POLICY ASPECTS (1986); Ernest E. Smith & John S. Dzienkowski, *A Fifty-Year Perspective on World Petroleum Arrangements*, 24 TEX. INT'L L. J. 13 (1989).

56. Smith & Dzienkowski, *supra* note 55, at 17–18. For example, the Abu Dhabi and Kuwait oil concessions covered their entire countries and were for 75-year terms. *See* BLINN ET AL., *supra* note 55, at 56; Atef Suleiman, *The Oil Experience of the Middle East Emirates*, 6 J. ENERGY NAT. RESOURCES & ENVTL. L. 1, 3 (1988).

57. *See* Ernest E. Smith, *From Concessions to Service Contracts*, 27 TULSA L. J. 493, 496 (1992). Most of these early concession agreements did not endure unscathed for their entire term—many were the subject of nationalization (*e.g.*, Iran, Venezuela and Mexico) while others were modified over time (*e.g.*, Kuwait and Saudi Arabia).

58. *See id.* at 523–24; Smith & Dzienkowski, *supra* note 55, at 36–40. The summaries listed above, of course, are broad generalizations. We have not attempted to detail the differences among categories of agreements which can vary depending on the country, contractor, industry, time period, and particulars of the resource and area.

59. A stabilization clause is defined as "contract language which freezes the provisions of a national system of law chosen as the law of the contract as of the date of the contract, in order to prevent the application to the

with the principles set forth in the Libyan arbitrations and the growing number of countries ratifying the New York Convention, these provisions served as a means to mitigate the economic and political risks inherent in such projects. In addition, they served as strong defenses to attempts to renegotiate or terminate contracts through threats of seizure, regulation, taxes, or claims of environmental damage or mismanagement.

By the mid-1970s, the majority of the world's oil producing countries had established government agencies or ministries and national oil companies[60] to manage and operate fields themselves, to implement government energy policies, and to oversee operations by contracting multinational companies.[61] This evolution in the sophistication of policy implementation in producing countries has proven critical to defending against claims of environmental damage or mismanagement. These ministries and national oil companies which have gained expertise in the oil industry play an important role under the modern production sharing agreement ("PSA"), farm-out agreements, and service contracts. These agreements generally provide that the relevant national agency or company shall retain oversight of the operations, shall receive reports and work programs and budgets, shall be entitled to inspect any operation or facility, shall receive a copy of all data resulting from the operations, and shall assist and consult with the contractor about operations.[62] For example, Turkmenistan's model production sharing agreement provides, in part, as follows:

> 11.1 So long as the Exploration Licence and any Production Licences issued to Contractor hereunder remain in force, at least ninety (90) days prior to the beginning of each Calendar Year, Contractor shall prepare and submit to the Management Committee for its review and approval, pursuant to Article 9, a detailed annual Work Programme and Budget, setting forth the Petroleum Operations which Contractor proposes to carry out in the ensuing Calendar Year, and the estimated costs thereof. . . .
>
> . . .
>
> 11.3 Each proposed annual Work Programme and Budget shall include, as a minimum, the following:
>
> (a) a detailed description of the work to be performed during the following Calendar Year, proposals as to subcontractors and suppliers necessary for the implementation of such work and a time schedule for performing it; and

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contract of any future alterations of this systems." Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 239 (1987). *See generally* Margarita T.B. Coale, *Stabilization Clauses in International Petroleum Transactions*, 30 DENV. J. INT'L L. & POL'Y 217 (2002); F.V. Garcia-Amador, *State Responsibility in Case of "Stabilization" Clauses*, 2 J. TRANSNAT'L L. & POL'Y 23 (1993).

60. Some concerns remain about national companies who control approximately 90 percent of the world's oil reserves, particularly their ability to manage natural resources and ensure maximum exploitation, because many of those companies receive government pressure to subsidize the state, meet certain social targets, provide non-energy related services and acquiesce to political demands and interests. *See* VALERIE MARCEL & JOHN V. MITCHELL, OIL TITANS: NATIONAL OIL COMPANIES IN THE MIDDLE EAST 22, 25–36 (2006); Tina Rosenberg, *The Perils of Petrocracy*, N.Y. TIMES MAGAZINE, Nov. 4, 2007, at 42; *Really Big Oil*, THE ECONOMIST (Aug. 10, 2006), *available at* http://www.economist.com/ opinion/displaystory.cfm?story_id=7276986.

61. For example, Nigeria's ministry of energy states that its mission is "[t]o formulate and monitor policies, regulations, standards and codes for the orderly, safe, peaceful and lawful development of the nation's energy resources so as to secure maximum value for the resources and render best services to the nation, while maintaining international relations that promote Nigeria's sovereign interest in the energy industry." Mission Statement, Nigerian Ministry of Energy, http://www.nigeria.gov.ng/NR/exeres/ 59A5C619-8C6D-433A-9857-438A88F84C89.htm (last visited Mar. 25, 2008).

62. *See* Smith, *supra* note 57, at 515–17.

(b) a detailed estimate of the expenditure to be incurred in performing the proposed annual Work Programme and a time schedule for the incurrence of such expenditures.

. . .

11.6 Contractor shall conduct quarterly reviews of the annual Work Programme and Budget. . . .

. . .

ARTICLE 12 DISCOVERY, DEVELOPMENT AND PRODUCTION

12.1 . . . As soon as practicable after the completion of the well-testing program (or where no well-testing is to be undertaken), Contractor shall notify Competent Body of its views as to whether: (i) the Discovery is a Commercial Discovery; or (ii) Appraisal is necessary to determine if the Discovery is a Commercial Discovery; or (iii) the Discovery is not a Commercial Discovery and Appraisal is not warranted; or (iv) the Discovery may, together with any other Discovery within the Contract Area, be capable of constituting a Commercial Discovery.

12.2 (a) In the case of paragraph 12.1(ii), Contractor shall, promptly after the technical evaluation of the test results relating to such Discovery has been completed, prepare and submit for review and approval by the Management Committee an Appraisal Work Programme and Budget relevant to such Discovery. . . .

12.3 Within ninety (90) days following completion of an Appraisal Programme, Contractor shall prepare and submit to the Management Committee a detailed Appraisal report on the conduct of the Appraisal Programme and the detailed data of its results, including, but not limited to, the delineation of the areal extent of the Petroleum Reservoir to which the Discovery relates in terms of thickness, lateral extent, estimate of the quantity of recoverable Petroleum therein, along with the conclusion as to whether, in Contractor's opinion, the Discovery is a Commercial Discovery.

12.4 Within one hundred and eighty (180) days following the notification under paragraph 12.1(i) or following the submission of the Appraisal report under paragraph 12.3 indicating that the Discovery is a Commercial Discovery, Contractor shall prepare and submit to the Management Committee, for review and approval, pursuant to paragraph 9.4, a Development Plan and Budget on the basis of sound engineering and economic principles, in accordance with international good oil-field practice. Such Development Plan shall comprise, but shall not be limited to:

(a) designation of the Development Area;

(b) proposals on spacing, drilling and completion of wells;

(c) proposals for production, storage, transportation and delivery facilities;

(d) proposals for necessary infrastructure developments;

(e) proposals for the employment of citizens of Turkmenistan and use of local material and services, in each case, consistent with the requirements of Articles 21 and 20;

> (f) an estimate of the reserves together with wells productivity and production forecasts based on the Maximum Efficient Rate principle;
>
> (g) an estimate of the expenditures necessary to implement the Development Plan; and
>
> (h) an estimate of the time required to complete each phase of the Development Plan.
>
> . . .
>
> 12.7 Not less than ninety (90) days prior to the beginning of each Calendar Year following the Date of Commencement of Commercial Production, Contractor shall prepare and furnish to the Management Committee for its review and approval a forecast statement setting forth, by Calendar Quarter, the total quantity of Crude Oil (by quality, grade and gravity) and Natural Gas that Contractor estimates can be produced, saved and transported hereunder from any and all Development Areas during such Calendar Year in accordance with international good oil-field practices. Contractor shall endeavour to produce in each Calendar Year the forecast quantity.[63]

In sum, both as a matter of national law and as a matter of contract, either the government ministry, the national oil company, or both, may supervise and stand beside the operating company during exploration, development, and production. This legal and contractual arrangement may prove important to defending claims related to the PSA or concession contract brought by the host nation in response to the contractors breach of contract or expropriation claim.

B. Historical Nationalization

Despite some Western perceptions, "nationalization" is not an aberration from a supposed universal move towards capitalism and privatization, but rather it is part of a privatization-nationalization cycle found in many places throughout the world,[64] if not the global trend.[65] Nationalization of numerous industries became a fixture in the Middle East

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63. Model Production Sharing Agreement for Petroleum Exploration and Production in Turkmenistan, *available at* http://energylaws-tm.sitecity.ru/ltext_2302160238.phtml?p_ident=ltext_2302160238.p_1003135826. *See also* Model Production Sharing Agreement Between Tanzania and Tanzania Petroleum Develop Corp. and ABC Oil Co., *available at* http://www.tpdc-tz.com/psa1995.pdf.

64. Nationalization, of course, is not always permanent. "[W]ith few exceptions, the countries of [Latin America and Southeast Asia]—despite all the differences among them—have been cycling back and forth between privatization and nationalization for as long as they have been independent." Amy L. Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223, 225 (1995). *See generally* NATHAN M. JENSEN, NATION-STATES AND THE MULTI-NATIONAL CORPORATION: A POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT (2006). When nations believe that free markets and private ownership and entrepreneurship can bring a higher standard of living, privatization commences; conversely, when privatization fails to bring about the hoped-for prosperity, calls for nationalization rise.

65. Rosenberg, *supra* note 60. Some argue that the apex of nationalization theory occurred when the Charter of Economic Rights and Duties of States—which proclaimed that states held the sovereign right to nationalize—was adopted by the United Nations General Assembly in 1974. *See* Detlev F. Vagts, *International Economic Law and the American Journal of International Law*, 100 AM. J. INT'L L. 769 (2006). Article 2 of this charter provides that "every State has and shall freely exercise full and permanent sovereignty, including possession, use and disposal, over all of its wealth, natural resources and economic activities." Charter of Economic Rights & Duties of States, G.A. Res. 3281, at 49, U.N. GAOR, Supp. No. 31, U.N. Doc. A/9631 (1974). Such provisions,

and Latin America decades ago when many vestiges of colonialism, including long-term concessions to Western European and North American companies, were cast aside, thereby leading to a flurry of international disputes. The reasons underlying nationalization trends and individual expropriations vary widely and include political ideology, foreign relations, decapitalization of the host country, a desire for increased control and independence, market domination, culture, and even religion.[66]

In the early part of the 20th century, in response to the growing role of fossil fuels in energy production, large international oil companies were founded which then expanded to meet the need for exploration, development, production, refining, transportation, and marketing services.[67] Established in the United States, the United Kingdom, and the Netherlands, these companies mirrored the economic, political, and market power of their home countries.[68] Major international oil companies began to operate in the Middle East in the 1920s, and by the early 1930s, three European and five American companies controlled most of the oil production in the Middle East.[69] According to concessions made during those pre-World War II decades, the producing-country governments could not participate in the development of their oil resources, much less play a role in determining which companies would operate in their territory.[70] The governments did not begin to challenge the international oil companies' control until after World War II.[71]

Although nationalization in Russia and Mexico actually preceded nationalization in the Middle East, the expropriation of oil field operations in the Middle East represents the first time an entire region moved to nationalize a sector of its economy. As time passed and colonialism ended,[72] oil-producing countries began to take the first steps toward nationalization by renegotiating their concessions with multinational oil companies. First, the governments of producing countries bargained for a greater share of profits.[73] Next, they moved to increase their roles in the management of the oil companies' ventures.[74] Iran was the first Middle Eastern state to challenge the major oil companies. In what started with a dispute over a greater share of revenues, Iran nationalized the assets of British Petroleum, its sole concessionaire, in 1951.[75] Others, such as Kuwait, Saudi Arabia, Libya, and Iraq later followed.

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however, have been found to be subordinate to U.N. Assembly Resolution 1803 on good faith by and between States. *Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, 53 I.L.R. 389 (1979).

66. *See* GEORGE M. INGRAM, EXPROPRIATION OF U.S. PROPERTY IN SOUTH AMERICA: NATIONALIZATION OF OIL AND COPPER COMPANIES IN PERU, BOLIVIA, AND CHILE 2–13 (1974).

67. OFFICE OF INTERNATIONAL AFFAIRS, U.S. DEPT. OF ENERGY, THE ROLE OF FOREIGN GOVERNMENTS IN THE ENERGY INDUSTRIES 11 (1977).

68. *See id*.

69. *Id*. at 12.

70. *Id.*

71. *Id.*

72. Although the British Empire once spanned the globe to include territories in Africa, the Middle East, Asia, Australia, and the Americas, its end as a global empire came in a relatively short period of time. Between 1947 and 1957, Britain (as well as France and the Netherlands) lost control over a large number of colonies including Britain's substantial holdings in the Middle East (such as Iraq and the Suez Canal). *See* MARCEL & MITCHELL, *supra* note 60, at 23–24.

73. *See id.* at 4.

74. *Id.* (noting that governments "set the rules").

75. *Id.* at 20–21. In step with these developments, the producing country governments gradually began to collaborate. In response to a price reduction by the oil companies in 1959, a conference of the Middle Eastern oil producing countries and Venezuela was held in Cairo. MARCEL & MITCHELL, *supra* note 60, at 22. In response to a second cut in crude oil prices, the states met again in Baghdad in 1960 and formed the Organization of Petroleum Exporting Countries, or OPEC. *Id.*

1. A Brief Overview of Early Arbitrations Involving Nationalization

i. Libyan Nationalization Cases

Libya's nationalization of foreign oil concessions in the early 1970s led to three significant arbitrations: BP Exploration Company (Libya) Ltd. v. Government of Libyan Arab Republic,[76] Texaco Overseas Oil Petroleum Co./California Asiatic Oil Co. (TOPCO) v. Government of the Libyan Arab Republic,[77] and Libyan American Oil Co. (LIAMCO) v. Government of the Libyan Arab Republic.[78] At the time, "[a]rbitrations between private foreign investors and governments [we]re not common events,"[79] and the nationalization movement among developing countries, particularly former colonies, had been gaining strength.[80] In fact, fueled by its desire to legitimize its nationalization (without compensating foreign investors) and its "reject[ion] of international arbitration as a 'Western' (and hence unfair) system," Libya refused to take part in the BP arbitration, the TOPCO arbitration and the LIAMCO arbitration.[81] The Libyan arbitrations, nevertheless, recognized the sanctity of contracts between foreign investors and governments and applied the contractual arbitration clause in the concession agreement to permit the aggrieved investor to seek recourse through international commercial arbitration. Indeed, if one of Libya's intentions was to weaken arbitration's role in compensating for expropriation, then its non-participation strategy backfired.

While there are some differences among the arbitral decisions and reasoning in the three Libyan cases (and some criticisms, particularly in the remedies awarded), collectively they established several important legal principles that remain valid today and that have encouraged wider acceptance of arbitration clauses in international relations. First, in each of the three arbitrations, the arbitrator confirmed that he had jurisdiction to decide issues related to Libya's repudiation of the concession contract.[82] Second, the TOPCO and LIAMCO arbitrators analyzed the concession agreement at issue and concluded that it was international in character and thus international legal principles applied to the contract, including the doctrine of *pacta sunt servanda*:

> The state as a sovereign entity possesses the power to grant rights and bind itself to agreed terms. To permit a state to use its sovereignty to disregard

76. 53 I.L.R. 297 (1979).

77. 53 I.L.R. 389 (1979).

78. 20 I.L.M. 1 (1981).

79. Von Mehren & Kourides, *supra* note 32, at 549.

80. *See, e.g.*, Vagts, *supra* note 65, at 780 (noting that developing countries believed that the balance of power had shifted from industrialized countries to the developing world).

81. *See generally BP Exploration Co.*, 53 I.L.R. at 297; *TOPCO*, 53 I.L.R. at 389; *LIAMCO*, 20 I.L.M. at 1. *Cf.* Maniruzzaman, *supra* note 28, at 718 (describing efforts of Western arbitrators and jurists for the development and application of general principles of law as a means to protect Western investment in developing countries and to preserve economic and political power of the West). Each of the arbitrations resulted in awards in favor of the foreign oil companies: BP was awarded $41 million, and LIAMCO was awarded $80 million, while TOPCO received an award for specific performance. Libya ultimately settled these disputes with monetary payments to all of the claimants. *See* von Mehren & Kourides, *supra* note 32, at 545–48.

82. *See* von Mehren & Kourides, *supra* note 32, at 500–04. In the TOPCO arbitration, Libya had submitted a memorandum objecting to the arbitrator's appointment. This constituted Libya's only involvement in the three arbitral proceedings. The arbitrator considered the arguments made in Libya's memorandum (and other possible arguments not raised) and rejected Libya's objections, concluding that he held jurisdiction over the dispute. *See TOPCO*, 53 I.L.R. at 408–19.

> commitments that it freely undertook through the exercise of that very sovereignty would be anomalous. Such a result would undermine and destroy the legal framework of the international order.[83]

Accordingly, each arbitrator concluded that Libya had illegally breached its obligations under the concession contracts and rejected the potential arguments justifying such a breach, including sovereignty concepts, administrative contract theory, and the theory of changed circumstances.[84]

Understanding the context of the Libyan awards is critical to recognizing their importance. In the 1970s, developing nations had been seeking ways to loosen the rules on expropriation, culminating in the UN General Assembly's adoption of the Charter of Economic Rights and Duties of States.[85] Among other provisions, Article 2 of this charter provides that "every State has and shall freely exercise full and permanent sovereignty, including possession, use and disposal, over all of its wealth, natural resources and economic activities."[86] Indeed, some at the time believed that the adoption of this charter would revive the "Calvo" doctrine, under which the expropriating nation sets the level of compensation for the aggrieved investor.[87] Developed countries whose corporate citizens invested in developing countries responded to this threat by taking several steps to safeguard those investments. For example, they sought to conclude bilateral investment treaties requiring international arbitration, they provided guarantees for their citizens' investments abroad, and they threatened retaliation against expropriating countries.[88] In this context, the Libyan arbitration awards can be correctly viewed as another response to the threat to international commerce and investment caused by the nationalization trend.

The response by the developed countries (along with the threat of diminished economic investment) was so strong and so powerful that it led some in the developing world to accept international arbitration with more countries, to ratify the New York Convention, to enact national arbitration laws, and to establish arbitration centers as alternatives to those in developed states.[89]

ii. Iran-United States Claims Tribunal

The Iran-United States Claims Tribunal stands as a landmark arbitral and diplomatic achievement, as well as one of the gateways for American and Islamic acceptance of international arbitration in the wake of an international crisis.[90] In 1979, revolution erupted in Iran, resulting in the overthrow of the Shah of Iran, Mohammad Reza Pahlavi, and in the

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83. Von Mehren & Kourides, *supra* note 32, at 518–19.

84. *See id.* at 513–33.

85. Charter of Economic Rights & Duties of States, G.A. Res. 3281, at 49, U.N. GAOR, Supp. No. 31, U.N. Doc. A/9631 (1974). Overwhelmingly supported by developing nations, the resolution passed 120–6, with 10 abstentions. *See* Charles N. Brower & John B. Tepe, Jr., *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?*, 9 INT'L LAW. 295, 295 (1975).

86. Charter of Economic Rights & Duties of States, G.A. Res. 3281, at 49, U.N. GAOR, Supp. No. 31, U.N. Doc. A/9631 (1974).

87. *See* Richard Lillich, *The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack*, 69 AM. J. INT'L L. 359, 361 (1975).

88. *See, e.g.*, Vagts, *supra* note 65, at 780.

89. *See* Charles N. Brower & Jeremy K. Sharpe, *International Arbitration and the Islamic World: The Third Phase*, 97 AM. J. INT'L L. 643, 646–47 (2003).

90. *See* THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981–1983 vii (R. Lillich ed., 1984) (characterizing the institution as "the most significant arbitral body in history").

Iran Hostage Crisis, in which the United States Embassy in Tehran was seized and 66 embassy employees were held hostage for 444 days. In response, the United States employed diplomatic strategies, military means, and economic sanctions (including the freezing of $8 billion in Iranian funds on deposit in the United States) to pressure the Iranian government to return the hostages.

The Iran Hostage Crisis ended when Iran and the United States agreed to the Algiers Declarations, with arbitration as a key component to the accord.[91] Under the Algiers Declarations, all legal proceedings in United States courts against Iran would be terminated and all future litigation prohibited in lieu of binding arbitration. The Iran-United States Claims Tribunal became, as the parties intended, a self-contained, internal process to resolve disputes arising from Iran's revolution.[92] The Tribunal's first meeting was held in the Peace Palace in The Hague on July 1, 1981, later moving to its own facility in The Hague in April 1982. It began conducting arbitrations in accordance with the UNCITRAL Arbitration Rules, subject to some modifications.[93] Over the past 26 years, the Iran-United States Claims Tribunal has issued 600 awards, including 83 interlocutory and interim awards, published 133 decisions, and resolved approximately 4,000 claims.[94]

The Iran-United States Claims Tribunal's impact on international arbitration practice is significant. First, it reinforced arbitration's role in the resolution of an international crisis and in creating a forum to decide investor-state and international commercial arbitration claims. Second, the Iran-United States Claims Tribunal's publication of its awards has provided an invaluable resource for the arbitration community, especially in the investor-state arena. Numerous articles[95] and texts[96] have been written on the tribunal's work, and its decisions have become useful authority for international arbitration.[97] Finally, it has served

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91. *See* Background Information: Iran-United States Claims Tribunal, http://www.iusct.org/ background-english.html (last visited Mar. 25, 2008). Both the United States and Iran enjoyed good diplomatic relations with Algeria, and Algeria served as the intermediary in reaching an accord. The Algiers Declarations consists of two declarations executed on January 19, 1981: the "General Declaration" which brought about the release of the hostages and restored Iran to its financial position as of November 14, 1979, when the asset freeze order was issued in the United States, and the "Claims Settlement Declaration" which established the Iran-United States Claims Tribunal as the exclusive forum to resolve disputes related to the revolution. *See id*. The Tribunal's jurisdiction encompasses claims by U.S. nationals against Iran and by Iranian nationals against the U.S. arising out of debts, contracts, expropriations, and other property rights, "official claims" between the two governments arising from the purchase and sale of goods and services, and claims between Iranian and United States banking institutions. *See id.* One of the unique features of this tribunal is that it calls for state-to-state arbitration for any dispute concerning the interpretation of the Algiers Declarations and also that private claims for less than $250,000 were to be presented by the claimant's government. Bergsten, *supra* note 37, at 299–300.

92. Under the Algiers Declarations, the Tribunal's expenses are borne equally by the two countries, and the Tribunal consists of nine members—three appointed by Iran, three appointed by the United States and three (third-country) members appointed by the six government-appointed members. *See* Background Information: Iran-United States Claims Tribunal, http://www.iusct.org/background-english.html (last visited Mar. 25, 2008).

93. *See id.*

94. *See* Quarterly Communique of the Iran-United States Claims Tribunal (July 11, 2007), http://www.iusct.org/communique-english.pdf. Awards totaling over $2 billion have been issued in favor of U.S. nationals against Iran with payments made out of a security account established by Iran and administered by the Algerian government.

95. On its website, the Iran-United States Claims Tribunal maintains list of publications on the Tribunal through 2001 which totals over 250 articles and comments. *See* List of Publications on the Tribunal, http://www.iusct.org/publications.pdf (last visited Mar. 25, 2008).

96. *See generally, e.g.*, CHRISTOPHER DRAHOZAL AND CHRISTOPHER GIBSON, THE IRAN-U.S. CLAIMS TRIBUNAL AT 25: THE CASES EVERYONE NEEDS TO KNOW FOR INVESTOR-STATE AND INTERNATIONAL ARBITRATION (2007); GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL: AN ANALYSIS OF THE DECISIONS OF THE TRIBUNAL (1996).

97. Other recent arbitral bodies including proceedings brought under ICSID and NAFTA make public their

as a means for American and Iranian parties and counsel to substantially participate in and gain expertise in arbitral practice (in contrast to the Libyans, who refused to participate in arbitration less than a decade before the Iran Hostage Crisis).

Despite the growth of international investment and the adoption of many trade and investment agreements, as well as further acceptance of international accords on arbitration during the 1990s, the dramatic rise in commodity prices since the turn of the millennium has provided renewed vigor for nationalization—both as a purely economic matter and as a political device.[98] Nationalization can take many different forms.[99] On one extreme lies outright seizure by the state of a private venture or asset; on the other lies "creeping" or indirect expropriation in which the state uses its authority to regulate via taxes, access, and changes in the law to effect an ultimate relinquishment in favor of the state.[100] Indeed, unlike the disputes in the 1970s and 1980s which focused on direct expropriation and the standard of compensation,[101] current international investment disputes are expected to turn on whether a state's regulation constitutes expropriation or a bona fide, nondiscriminatory exercise of sovereign rights.[102] This renewed wave of nationalization—following the explosion of international investment during the 1990s—has thus far been led by Latin American countries.

awards, thereby adding to the growing body of literature available. *See, e.g.*, ICSID, List of Concluded Cases, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal= ListConcluded (last visited Mar. 25, 2008).

98. *See* Kerry A. Dolan, *Chavistas in Quito*, FORBES, Jan. 7, 2008, at 68; Rob Gillies, *Governments Look at Oil Money and Drool*, HOUS. CHRON., Oct. 25, 2007, at D6; Rosenberg, *supra* note 60, at 42; Irwin M. Stezler, *Petropower*, THE WEEKLY STANDARD, Jan. 6, 2006.

99. In general, the term "nationalization" applies to large-scale takings on the basis of an executive or legislative act for the purpose of transferring property or interests to the public, while expropriation involves individual measures for a public purpose.

100. *See, e.g.*, Rudolph Dolzer, *Indirect Expropriations of Alien Property*, 1 ICSID REV. FOREIGN INV. L.J. 41, 41–59 (1986); Generation Ukraine, Inc. v. Ukraine, ICSID ARB/00/9, para. 20.26 (Sept. 16, 2003), *reprinted in* 44 I.L.M. 404, 458–59 (2005) (rejecting Generation Ukraine's claim of "creeping" expropriation); Pope & Talbot, Inc. v. Canada, Interim Award, NAFTA Arb. Trib. (Jun. 26, 2000), paras. 99–104 (concluding that the term "expropriation" in NAFTA covered both direct and indirect takings).

101. In the battles over the standard for compensation, developed countries advocated the adoption and application of the Hull formula, so named after former U.S. Secretary of State Cordell Hull's dealings with Mexican expropriations of American property in 1938. *See generally* Property Rights, 3 DIGEST OF INT'L L. 653–61 (Green Haywood Hackworth, ed., 1942). The Hull formula called for "prompt, adequate and effective payment" by the expropriating country, while developing countries proposed that only "appropriate" compensation be made. *See id*. at 657–59; *see also* Pamela B. Gann, *Compensation Standard for Expropriation*, 23 COLUM. J. TRANSNAT'L. L. 615, 616 (1985); M.H. Mendelson, *What Price Expropriation?: Compensation for Expropriation: The Case Law*, 79 AM. J. INT'L L. 414 (1985); G.A. Res. 1803 (XVII), para. 4, U.N. Doc. A/5217 (Dec. 14, 1962); G.A. Res. 3171 (XXVIII), para. 3, U.N. Doc. A/9400 (Dec. 17, 1973).

102. *See* Rudolph Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVT'L L.J. 64 (2002). The criteria considered when deciding whether an indirect expropriation occurred include the economic impact of the government action, the extent to which the government action interferes with legitimate expectations, and the character of the government action; *see, e.g.*, PSEG Global Inc. v. Turkey, ICSID ARB/02/5, paras. 276–79 (Jan. 19, 2007); Starrett Housing Corp. v. Iran, 4 Iran-United States Cl, Trib. Rep. 122, 152–57 (1984); Sea-Land Service Inc. v. Iran, 6 Iran-U.S. Cl. Trib. Rep. 149, 164–68 (1984); *see* Barry Appleton, *Regulatory Takings: The International Law Perspective*, 11 N.Y.U. ENVT'L. L.J. 35 (2002); *see also* U.S. State Dept., U.S. Model Bilateral Treaty (2004), http://www.state.gov/ documents/organization/38710.pdf; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 712 cmt. G (1987); H. Seddigh, *What level of Host State Interference Amounts to a Taking Under Contemporary International Law?*, 2 J. WORLD INV., 631, at 646 (2001).

C. Nationalization in Latin America[103]

Today, nationalization is the trend in Latin America, where the presidents of Venezuela, Bolivia, and Ecuador have championed it as a potential economic boon and a cultural prerogative.[104] Buoyed by rising oil prices,[105] Venezuela's President, Hugo Chavez, has led Latin America's nationalization movement. In the 1990s, Venezuela opened its oil industry to private investment, resulting in the creation of thirty-two operating service agreements with twenty-two foreign oil companies. Under these contracts, foreign companies managed the oil fields while the state-owned oil company, PDVSA, purchased the produced oil at a price fixed to market rates. PDVSA also had the option to purchase minority stakes in projects and held shares in four "strategic associations" that produced heavy crude oil from the Orinoco Belt.[106]

When the rise in oil prices began in 2004, Venezuela began to take action against foreign investors. In what proved to be the first of many steps in this direction, Venezuela initially raised royalties on the four heavy crude oil ventures from 1 to 16 percent. In 2005, Venezuela's tax agency notified twenty-two companies that significant back taxes were owed, forcing some companies to pay millions of dollars to settle those tax claims. Moreover, beginning in 2005, Venezuela issued decrees imposing majority state control over its oil fields,[107] thus requiring that companies with operating contracts grant PDVSA a majority stake in their projects.[108] Many companies, such as Chevron, Total, BP, and Statoil, acquiesced to the demand; others (including ExxonMobil and ConocoPhillips) refused.[109] Finally, in 2006, Venezuela announced that additional "extraction" taxes would be levied on foreign oil companies and placed some properties under government control.[110]

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103. Although the current wave of nationalization has its epicenter in Latin America, the nationalization of Mexico's oil industry occurred during the first half of the 20th century. A looming strike by oil workers resulted in expropriation of all private oil company assets in 1938 when the companies declined to implement a government arbitration award. *See* GEORGE PHILIP, STATE OIL COMPANIES AND THE REVERSAL OF NATIONAL DEVELOPMENTALISM: THE CASE OF MEXICO AND VENEZUELA 3 (1997). Although the foreign oil companies took with them many top technicians and managers in a belief that the Mexican government would be unable to operate the oilfields without these professionals, the government allowed the oil workers union to essentially take on the management roles that were left vacant when the oil companies left. *Id*. Pemex, Mexico's state-owned oil company, was created in 1938 to run the country's recently expropriated oilfields. Eventually, Pemex secured a complete monopoly over extraction and refining of oil and other hydrocarbons. *Id.*

104. Rosenberg, *supra* note 60.

105. Venezuela is the fifth largest producer of oil in the world, possesses 77.2 billion barrels in proven oil reserves, and is the only member of OPEC from the Western hemisphere. Venezuelan oil production began in 1912 with international oil companies soon flooding the country for the boon that followed. Over the next six decades, private enterprises remained in Venezuela subject to periodic reforms to increase state revenues. However, with the Middle East oil Embargo in 1973 and quadrupling of oil prices, Venezuela's oil industry became fully nationalized in 1976 with the creation of the state-owned oil company Petroleus de Venezuela (PDVSA). Despite record-high oil prices and political upheaval in other oil-exporting countries, according to OPEC, PDVSA is producing a third less oil today then it did a decade ago. Rosenberg, *supra* note 60. Some believe this is because as more and more of the company's profits are spent on social programs, not enough capital is being put back into exploration and development. *Id*.

106. According to current estimates, the Orinoco Belt contains as much as 1.8 trillion barrels of heavy crude oil, making it the world's largest petroleum reserve. *See* U.S. Geological Survey, http://energy.cr.usgs.gov/WEcont/regions/reg6/p6/tps/AU/au609814.pdf (last visited Apr., 19, 2008); Richard F. Meyer & Emil D. Attanasi, *Heavy Oil and Natural Bitumen—Strategic Petroleum Reserves*, U.S. Geological Survey, Fact Sheet 70-03, *available at* http://pubs.usgs.gov/fs/fs070-03/fs070-03.html (last visited Apr. 19, 2008).

107. In 2007, Venezuela also threatened nationalization of the telecommunications, electricity, banking and steel industries. Simon Romero, *Chavez Moves to Nationalize Two Industries*, N.Y. TIMES, Jan. 9, 2007, at A3.

108. Rosenberg, *supra* note 60.

109. *Id.* ExxonMobil and ConocoPhillips both instituted ICSID arbitral proceedings against Venezuela in

The surge of nationalization and resistance to foreign investment spread beyond Venezuela's borders to other Latin American countries. On May 1, 2006, Bolivian President Evo Morales carried out one of his campaign promises on the 100th day of his new administration when he announced the nationalization of Bolivian hydrocarbon assets,[111] thereby effectively seizing the interests of twenty-six foreign oil and gas companies that held contracts with Bolivia. President Morales issued an order giving foreign oil and gas companies six months to comply with all governmental demands (e.g., all foreign energy-firms were required to sign new contracts giving majority ownership to the state-owned company, Yacimientos Petroliferos Fiscales Bolvianos, to agree to higher taxes, and to dedicate as much as 82 percent of revenues to the state) or face eviction by force.[112] Finally, on May 2, 2007, Bolivia cemented the perception that nationalization had taken control when it announced its denunciation of ICSID, which became effective on November 3, 2007.[113]

Also in May 2006, the same month as the nationalization of Bolivia's hydrocarbon assets, Ecuador terminated its contract with Occidental Petroleum Company for the operation of Block 15's oil and gas fields, and the state oil company seized control of the fields.[114] This move came only two months after the Ecuadorian legislature amended the Hydrocarbon Laws to require foreign oil companies to pay the country 50 percent of all revenues from production above a benchmarked price—unilaterally changing the economic terms of the contracts to give the government a larger profit (and reducing the contracting companies' benefit by approximately half)—and after a new leftist leader, Rafael Correa, was elected, having pledged to renegotiate contracts with foreign investors to ensure that Ecuador obtains a greater share of energy revenues.[115]

In late 2007, an ICSID tribunal ordered Ecuador to cease all domestic legal actions, including criminal proceedings, against City Oriente (a Panamanian oil company) regarding

late 2007. *See* Mobil Corp. et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27; Conoco Phillips Co. et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30. In their place, national oil companies from Russia, China, Brazil, and Iran have begun operations in Venezuela. Rosenberg, *supra* note 60.

110. *See* Simon Romero, *A Tangle in Caracas for Exxon*, N.Y. TIMES, Apr. 1, 2006, at C1.

111. Bolivia's chief asset is its 55 trillion cubic feet of natural gas, not crude oil. Just prior to issuing this decree, President Morales met with Hugo Chavez and Fidel Castro in Havana, Cuba to sign a socialist trade agreement. *See* Pablo Velasco, *The Mineral Industry of Bolivia, in* U.S. GEOLOGICAL SURVEY MINERALS YEARBOOK (2001); Carin Zissis, *Bolivia's Nationalization of Oil and Gas*, Council on Foreign Relations, http://www.cfr.og/publication/10682 (last visited Apr. 19, 2008).

112. *See* Paulo Prada, *Bolivia Nationalizes the Oil and Gas Sector*, N.Y. TIMES, May 2, 2006, at A1. Since the early 1990s when Bolivia reopened its energy sector to foreign investment, these companies had invested a cumulative $4 billion and acceded to Bolivia's demands.

113. ICSID Annual Report 4 (2007), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports&year=2007_Eng.

114. *See Ecuador Cancels an Oil Deal with Occidental Petroleum*, N.Y. TIMES, May 17, 2006, at C12. At the time, Occidental was Ecuador's largest investor, and Block 15 produced 100,000 barrels of oil per day (about 20 percent of Ecuador's total production). *Id.* Two days after Ecuador terminated the contract and took possession of Block 15, Occidental filed for arbitration pursuant to the Ecuador-U.S. bilateral investment treaty before ICSID and seeks in excess of $1 billion in restitution. According to Occidental, Ecuador began a campaign against Occidental's interests in Block 15 after Occidental received an award of $75 million in an earlier tax dispute arbitration in July 2004. In the arbitration, Occidental sought provisional relief from the tribunal, which denied that request on August 17, 2007. *See* Occidental Petroleum Exploration and Prod. Co. v. Ecuador, ICSID Case No. ARB/06/11, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC661_En&caseId=C80. In another unusual twist, the IMF recommended that Ecuador establish a reserve to pay a potential award in favor of Occidental—a recommendation that Ecuador rejected. *See Ecuador Rejects IMF Recommendations in Occidental Petroleum Suit*, A.P., Oct. 7, 2006.

115. *See New Broom, Sweeping Reforms*, ECONOMIST INTELLIGENCE UNIT Dec. 14, 2006, *available at* http://www.economist.com/agenda/displaystory.cfm?story_id=8434219.

a disputed $28 million in royalties.[116] Following Bolivia's example, Ecuador notified ICSID that, pursuant to Article 25(4) of the ICSID Convention, Ecuador was withdrawing its consent to ICSID arbitration of disputes pertaining to foreign investments in natural resources, including oil, gas, and minerals.[117]

The debate on whether aggressive resource nationalization will spread beyond Venezuela, Bolivia, and Ecuador continues, although President Chavez's socialist vision appears to be spreading to other countries and other leaders in the region including Argentina, Brazil, and Chile.[118]

IV. NEW CHALLENGES IN INTERNATIONAL ARBITRATIONS: MORE SOPHISTICATED AND AGGRESSIVE DEFENSES TO INVESTOR CLAIMS AND THE NEED FOR A MORE RIGOROUS USE OF LEGAL DEFENSES AND PROCEDURAL SAFEGUARDS

Regardless of whether this latest round of nationalization will continue to spread and lead to increasing contract modifications and expropriations, its effect on international arbitral practice thus far is undeniable.

The stakes in arbitrations involving natural resources could not be higher, both from an economic standpoint and from the perspective of maintaining international economic order and ensuring legitimate expectations by investors. Commodity prices have risen dramatically in recent years. Oil and natural gas prices have risen more than 500 percent since 2002 and have been highly publicized.[119] However, commodity increases extend far beyond energy, including minerals used heavily in manufacturing, such as copper, tin, zinc, aluminum, nickel, and lead, as well as agricultural products such as corn, cotton, and sugar.[120] Indeed, the monetary values at issue in arbitration today represent sums greater than the gross domestic product of many countries. According to data collected by the American Lawyer, thirty-seven pending arbitrations involve sums in dispute in excess of $1 billion, with the highest dollar value totaling $28 billion.[121] Simply put, claims of nationalization have created more disputes, and the disputes involve unprecedented monetary amounts.

For example, ICSID reports that it is currently administering a record 130 arbitrations.[122] This amounts to over half of the total number registered with ICSID since its

116. *See* Damon Vis-Dunbar and Luke Eric Peterson, *Tribunal Orders Ecuador to Cease Legal Action Against Foreign Oil Company*, INVESTMENT TREATY NEWS Dec. 14, 2007.

117. Posting of Jacob Katz Cogan, *Ecuador's Notification Pursuant to Article 25(4) of the ISCID Convention*, International Law Reporter (Dec. 16, 2007), http://ilreports.blogspot.com/2007/12/ ecuadors-notification-pursuant-to.html (last visited Apr. 19, 2008). Venezuela and Nicaragua have also threatened to take similar steps, and Ecuador has also indicated that it may revise a number of bilateral trade agreements as well. *Id*.; Vis-Dunbar & Peterson, *supra* note 116.

118. Forced contract revisions and expropriations are, of course, not limited to Latin America. *See, e.g.*, Clair Soares, *Chad Eyes Bigger Share of Its Oil Profits*, CHRISTIAN SCI. MONITOR Sept. 5, 2006.

119. *See e.g.*, David Goldman, Oil Crosses $110 Despite Supply Rise, CNNMoney.com, Mar. 12, 2008, http://money.cnn.com/2008/03/12/markets/oil_eia (last visited Apr. 19, 2008).

120. *See* Barbara Hagenbaugh, *Commodity Prices on a Roll as Demand Rises*, USA TODAY, Mar. 30, 2006, *available at* http://www.usatoday.com/money/economy/inflation/2006-03-30-commodity-prices_ x.htm.

121. *See* Arbitration Scorecard 2007: Top 50 Contract Disputes, AM. LAW., June 13, 2007, *available at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1181639139062.

122. *See* ICSID Annual Report, *supra* note 113, at 4.

inception.[123] Additionally, half of the 130 arbitral disputes involve countries from Latin and Central America. Argentina alone received dozens of requests for arbitration stemming from its 2001 economic crisis that led to its defaulting on foreign debt and the devaluation of the peso. In the midst of its financial problems, Argentina issued an emergency decree in January 2002 that converted all contracts—including those with foreign investors in the public utilities, energy, and telecommunications industries—from dollars to devalued pesos. This decree prompted a flood of arbitral filings.

Argentina responded with a multi-layer legal defense strategy: it challenged ICSID's jurisdiction to hear the disputes and argued that bilateral treaties do not supersede Argentina's constitution, which requires claims to be brought before Argentine courts;[124] it proceeded to defend the claims on their merits and asserted the doctrine of sovereign rights and the national emergency clause in its BITs to justify its monetary policies; it scrutinized the compliance with contractual obligations by each contractor since the beginning of the contract and threatened termination; and it challenged the validity and enforceability of awards, including expanded review by the Federal Supreme Court of Argentina.[125] Argentina's aggressive tactics may bode poorly for international arbitration and its place as the preferred mechanism for resolving international disputes.

As noted above, Argentina's defense, though not always asserted in the ICSID proceeding, includes claiming alleged contractual violations by the foreign investor—a tactic that appears to have become commonplace. Of the fifty largest arbitrations pending in 2007, ten involved counterclaims ranging in value from hundreds of millions of dollars to $9 billion[126] With more nationalization and rising commodity prices, the use of counterclaims as a defensive strategy to claims of expropriation and breach of contract will likely become a standard practice. As a result, arbitrations will become more complicated, more costly, and less efficient—a trend already noted by many commentators and practitioners caused by the Americanization of arbitral practice. As one commentator has noted:

> The tendency to over-litigate cases is a worrisome feature of adversarial legalism. It is obviously a concern because it tends to tax the scarce resources (human, financial, and time) of international courts and tribunals, and because it makes litigation costs skyrocket. Moreover, to the extent that litigation through international courts and tribunals is considered a means to peacefully settle disputes, the end result of the process might perversely be a deterioration of

123. *Id.*

124. Such jurisdictional challenges have proven unsuccessful. *See, e.g.*, Enron Corp. and Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/3 (Aug. 2, 2004) (refusing to dismiss claims brought by minority or indirect shareholders of foreign investor on jurisdictional grounds).

125. *See* Carlos E. Alfaro, *Argentina: ICSID Arbitration and BITS Challenged by the Argentine Government* (Dec. 21, 2004), http://www.mondaq.com/article.asp?article_id=30151&print=1 (last visited Apr. 19, 2008). To date, however, claimants against Argentina have received over $750 million in ICSID awards against Argentina with Tribunals rejecting Argentina's economic necessity defense. *See, e.g.*, CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, (May 11, 2005) (awarding CMS $133 million in damages); Sempra Energy Int'l v. Argentina, ICSID Case No. ARB/02/16 (May 5, 2003) (finding that Argentina's actions were wrongful and resulted in $172 million in losses to Sempra). Over thirty claims have yet to be resolved, and Argentina faces the potential for billions of dollars in awards being issued against it. Disillusioned with the arbitral process and ICSID, Argentina now appears to be advocating the re-adoption of the Calvo and Drago doctrines, attacking the BITs and ICSID's arbitration system, and seeking a diplomatic solution to its mounting liability by engaging foreign governments in a dialogue to amend their treaties to prevent rulings on the emergency economic defense, which would result in the denial of claims against Argentina. *See* Shane Romig, Interview: Argentina Seeks Diplomatic Exit from ICSID Suits, DOW JONES (Oct. 12, 2007), http://www.bilaterals.org/article.php3?id_article=9950 (last visited Apr. 19, 2008).

126. *See* Arbitration Scorecard 2007, *supra* note 121.

> relations between the litigants even outside the framework of the immediate object of the dispute.
>
> Since the early 1990s, the idea that more-is-good seems to have taken hold of the litigation strategy of several countries, and this fuels a perverse vicious cycle. This applies both to the number of lawyers pleading before the courts, and to the amount of evidence presented, as well as to the procedural wrangling.[127]

We expect an increasing number of counterclaims—including environmental and resource management claims—to be brought against contractors. These claims can run the gamut on both the environmental—including claims of air pollution, crop damage, deforestation, wildlife habitat destruction, groundwater depletion, groundwater and soil contamination—and the resource side—including claims of gas flaring, energy inefficiency, temporary reservoir or resource damage, and permanent reservoir or resource damage.

Three reasons underlie the potential increase of these types of counterclaims. First, they follow historical claims and perceptions of developing nations and critics of multinational companies that international investors are poor caretakers of another nation's natural resources, in that they harm or destroy the environment by focusing on short-term production at the expense of long-term maximization of the resource. Second, because environmental damage allegations can be massive and given rising commodity prices, these counterclaims result in staggering monetary amounts that can be perceived as potential offsets and allow for "splitting the baby" (from a monetary, public relations, and negotiation perspective) against large expropriation and breach of contract claims (which, too, are driven by rising commodity prices). And, third, along with more aggressive and litigation-like strategies from lawyers and parties that have developed in arbitral practice, the growth of the expert witness "cottage industry"[128] to support these claims enables them to be asserted with greater ease and with greater effect.

Not only will such claims likely involve substantial quanta (potentially tens of millions to billions of dollars), but the foreign investor who has been expropriated will also face substantial challenges in defending such claims. First, the foreign investor will no longer have access to (or control of) the area to conduct its own investigation into such allegations. Second, the expropriating state will likely have taken control of the foreign investor's operations and offices, including its files, computers, data, and many of the employees who may provide evidence in support of their new employer (the state). Third, many of the allegations may involve alleged activities or omissions from many years ago, making the availability of expatriate employees who can provide witness statements uncertain as many might now be retired, employed with another company, or deceased. These trends and strategies stand in the way of international arbitration fulfilling its mission to provide a fast and fair resolution.

A response by the arbitral bodies and tribunals is needed if international arbitration is to fulfill that mission. First, the legal doctrines of prescription, laches, estoppel, and waiver should be clearly defined and codified in model laws that reflect parts of general

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127. Romano, *supra* note 34, at 95–96.

128. The expert witness "cottage industry" leads to lawyers hunting for the next superstar expert who can combine the right education and experience with good communication skills—all for a price. Indeed, lawyers regularly receive books listing experts in various fields and can call on expert witness brokers who serve as an employment agency matching expert witnesses and cases. By any measure, expert testimony is "big business," and many disputes indeed devolve into "battles of the experts." *See generally* Douglas R. Richmond, *Regulating Expert Testimony*, 62 MO. L. REV. 485 (1997); Richard H. Underwood, *"X-Spurt" Witnesses*, 19 AM. J. TRIAL ADVOC. 343 (1995).

international legal principles. Applied more rigorously, application of these doctrines would resolve many of the claims involving practices and actions from many years ago and which were monitored by the contracting nation, one of its ministries, or a national company. Second, new procedural approaches should be employed to allow parties and their counsel to obtain necessary information about the counterclaims and party-appointed expert witnesses.

A. Legal Responses: More Rigorous Use of Legal Defenses and Early Resolution of Claims Subject to Them

There can be little disagreement that international arbitration has given birth to a system of legal rules or principles governing contracts as part of "transnational law" or the "*lex mercatoria*."[129] The application of international principles to contracts gained renewed momentum in the second half of the twentieth century after its adoption in nationalization arbitrations such as *TOPCO v. Libya.*[130] The obvious benefits of such rules and principles include the establishment of predictable standards, known expectations, and reliable outcomes for contracting parties. While unresolved issues remain regarding the contours of the *lex mercatoria*,[131] the United Nation's Convention on Contracts for the International Sale of Goods, UNIDROIT Principles of International Commercial Contracts, and the Principles of European Contract Law provide sources for international contractual principles.

The application of these general legal principles when a contract expressly selects a particular legal regime is inappropriate as it would undermine the parties' contractual agreement (unless that express choice is the *lex mercatoria*).[132] However, some international contracts do not expressly provide for a single legal regime to govern the transaction; instead, they require the application of legal principles common to the contractor's legal regime and to the host nation's legal regime, and, in the absence of commonality, the application of the principles of law normally recognized or applied in international trade.[133] The *lex mercatoria* therefore serves an important function—first, as a resource for principles that are common to the two regimes, and second, as substantive law when commonality is not present.

Indeed, as international arbitration has expanded and the body of its work proliferated, a "common law" of international contracts has emerged, including the obligations of good

129. The term "lex mercatoria" which first arose in medieval times has been defined as "a set of general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law." BETHOLD GOLDMAN, THE APPLICABLE LAW: GENERAL PRINCIPLES OF LAW: THE LEX MERCATORIA, IN CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 113, 116 (Julian D.M. Lew ed., 1986). For a thorough review of the theory and development of lex mercatoria, see Maniruzzaman, *supra* note 28.

130. *See* LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT (Thomas E. Charbonneau ed., rev. ed. 1998); Maurizio Brunetti, *The Lex Mercatoria in Practice: The Experience of the Iran-United States Claims Tribunal*, 18 ARB. INT'L 355 (2002); Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747 (1985); *TOPCO*, 53 I.L.R. at 447–48 ("[C]ontracts between States and private persons can, under certain conditions, come within the ambit of a particular and new branch of international law: the international law of contracts.").

131. Indeed, "[p]erhaps the chief challenge facing . . . proponents of lex mercatoria is to define the very concept they seek to foster." Steven C. Bennett, Book Review, 10 AM. REV. INT'L ARB. 159, 161 (1999).

132. *See* Maniruzzaman, *supra* note 28, at 678–80.

133. *See, e.g.*, *BP Exploration Co.*, 53 I.L.R. at 327–29; Texaco Overseas Petroleum Co. and Cal. Asiatic Oil Co. (TOPCO) v. Libya, 17 I.L.M. 1, 13 (1978); Sapphire Int'l Petroleums Ltd. v. Nat'l Iranian Oil Co., 35 I.L.R. 136, 175–76 (1963).

faith, a duty to mitigate damages, and *pacta sunt servanda*.[134] Included in these principles are the doctrines of prescription, laches, estoppel, and waiver—all of which provide a tool for arbitral panels to decide complicated claims in an efficient and well-supported manner. While these principles have generally been recognized, their application has been uneven and almost never at an early enough stage in the proceeding to resolve purely strategic claims and avoid unnecessary expense and delay.

For these defenses to become more effective in resolving claims expeditiously, they should be codified in the model laws on international contracts and should be specifically referenced in arbitral rules as grounds for early resolution of claims. Accordingly, we explain each of these doctrines below and set forth proposed language for their inclusion in model laws governing international contracts and for revisions to arbitral rules that touch on preliminary rulings.

1. Prescription

Prescription, also called statute of limitations in common law regimes, sets forth a specific period of time in which a party must file a claim, or it will be barred. Prescription is a "widely recognized principle of law constituting part of international law and has been accepted and applied by arbitral tribunals."[135] Generally enacted by a legislative body and, therefore, unlike the other defenses of estoppel, acquiescence, and laches discussed herein, prescriptive periods provide for certainty and predictability by requiring aggrieved parties to bring their claims in a reasonable period of time, while at the same time allowing parties sufficient time to investigate a claim and negotiate a possible settlement without having to file a legal claim.[136] Prescriptive periods begin to run from the time when the party knows or should have known of the claim or right, commonly known as the point of accrual. Unlike laches, which involves an equitable balancing of the neglect by the party asserting a claim against the hardships that neglect has caused the defending party, prescription simply requires a determination of when the claim accrued and when it was asserted.[137] If the claim was asserted outside the prescriptive period, then it is barred without regard to any hardship on the defending party from the late assertion of the claim. The success of a prescription defense will generally hinge on determining the point of accrual, and may involve allegations that the offending party concealed the effects of its alleged wrongdoing in an attempt to prevent discovery by the other party.

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134. *See* LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT *supra* note 130, at 89.

135. Grand River Enterprises Six Nations, Ltd. v. United States, NAFTA/UNCITRAL Arb. 20060720, para. 33 (July 20, 2006). *See* Gentini Case, 10 REP. INT'L ARB. AWARDS 551, 554, 556 (1960) ("Nations have conceded also that a State is subject to prescription the same as an individual. . . . [Prescription is] a principle well recognized in international law."). With respect to prescription, the UNIDROIT Working Group stated: "All legal systems know the influence of passage of time on rights. There are two basic systems. Under one system, passage of time extinguishes rights and actions. Under the other system passage of time operates only as a defence to an action in court." UNIDROIT Working Group for the Preparation of Principles of International Commercial Contracts 2003, Study L – Doc. 91 art. 1, cmt. 1, *available at* http://www.unidroit.org/english/documents/2003/study50/s-50-091-e.pdf.

136. *See generally* U.N. Convention on the Limitation Period in the International Sale of Goods, June 14, 1974, FRITZ ENDERLEIN & DEITRICH MASKOW, INTERNATIONAL SALES LAW 411 (Oceana Publications 1992).

137. Tribunals sometimes appear to have grafted such a balancing test when considering prescription. *See, e.g.*, Wena Hotels v. Egypt, ICSID Case No. ARB/98/4, paras. 104–10 (Dec. 8, 2000); Iran Nat'l Airlines Co. v. United States, 17 Iran-U.S. Cl. Trib. Rep. 238, paras. 11–14 (Nov. 30, 1987).

Because many environmental and mismanagement claims will involve decisions made several years before their assertion, the state must establish that it did not know and could not have known of such claims until a time close to their assertion in the arbitration process. This will generally be no easy task. Virtually every country has established ministries or agencies overseeing PSAs and concession agreements, and many have state-owned companies as part of the operating consortium.[138] In addition, almost every PSA and concession agreement requires the contractor to submit reports, programs, and analyses, and to obtain government approval or permits before commencing any project. Under such a regime, the state will receive a substantial amount of information about the project, the concession, and operations—information that will place the state on notice if any breach of the contract or industry standards occurs. As the *Aminoil* Tribunal concluded: "[i]f the various obligations to report, which were incumbent on the Company under the contracts of Concession, are taken into account, as well as the supervisory powers available to the concessionary Authority, it has to be concluded that the latter was in possession of all the means of being perfectly well informed."[139] The state's failure to assert claims within the prescriptive period bars such claims, and tribunals should identify early in the proceeding the potential for such bars to arise and allow for prescriptive defenses to be heard and resolved early in the process, before the parties submit substantial evidence on the merits of what may be grossly untimely claims.

As in any cross-nation transaction, determining which law is of great significance and results in substantial argument between the parties. The choice-of-law analysis as it relates to prescription, however, is a relatively simple process. Choice-of-law clauses in some international transactions provide that common principles between two jurisdictions apply and, in the absence of commonality, then general international principles apply. In the event that one jurisdiction has not adopted a statute of limitations or refuses to apply the statute to the sovereign, then the tribunal should apply general principles of law in determining whether a claim is time-barred under the doctrine of prescription.[140]

In applying "general principles of law," the tribunal of course is left with the task of determining those principles. Numerous sources exist to assist the tribunal. One such source is Chapter 10 of the UNIDROIT Principles of International Commercial Contracts.[141] Chapter 10 can be outlined as follows:

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138. *See, e.g.*, Saudi Arabia v. Arabian American Oil Co., 27 I.L.R. 117, 159 (1958) ("The State keeps a special right of supervision—which is juxtaposed to police supervision—as regards the organization and operation of the conceded enterprise, in order to watch over the execution of the concessionaire's obligations.").

139. Kuwait v. Amer. Indep. Oil Co. (Aminoil), 21 I.L.M. 976, para. 125 (1982).

140. *See BP Exploration Co.*, 53 I.L.R. at 328 ("If one system imposes automatic, obligatory limitation after the lapse of a given period, but the other does not, again the general principles of law will be resorted to for the purpose of determining whether a claim is barred by the lapse of time."). By way of example, classic Shari'a law does not accept the notion of prescription (although most Arabic countries have adopted some form of the doctrine). *See* SAYED HASSAN AMIN, ISLAMIC LAW IN THE CONTEMPORARY WORLD 71, 86 (1985). In the event that the Tribunal concludes that prescription should not apply because of the lack of international consensus on the issue, then laches may provide an alternative ground for early dismissal of stale claims.

141. The Preamble to the Unidroit Principles states:

> These Principles set forth general rules for international commercial contracts.
>
> They shall be applied when the parties have agreed that their contract be governed by them.
>
> They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.
>
> They may be applied when the parties have not chosen any law to govern their contract.
>
> They may be used to interpret or supplement international uniform law instruments.

- Article 10.2. The prescriptive period is "three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee's right can be exercised" with a maximum prescriptive period of ten years.[142]

- Articles 10.3 and 10.4. Parties may modify the prescriptive period within certain limitations.[143]

- Articles 10.5 through 10.8. Running of the prescriptive period is suspended by the filing of judicial or arbitral proceedings, by the initiation of conciliation and other dispute resolution methods, and by force majeur, death, or incapacity.[144]

- Articles 10.9 and 10.10. Prescription must be asserted as a defence to a claim and a right may still be exercised as a defence and set-off even though it cannot be asserted because of prescription.[145]

Undoubtedly, these articles represent a balancing of competing interests and legal regimes; however, two primary defects exist under UNIDROIT's rules.[146] First, although Article 10.9(2) states that prescription must be asserted as a defense by the responding party,[147] Chapter 10 is silent on the burdens of proof for various aspects of prescription including: (1) which party bears the burden of establishing the point of accrual; (2) which party bears the burden of any allegations of fraud, concealment, or inherent undiscoverability of a claim; and (3) which party bears the burden regarding questions of a suspension of the prescriptive period.[148]

Because these issues are critical for applying the doctrine of prescription, parties and tribunals alike would benefit from Chapter 10 being amended to clarify the burdens of proof. We propose that the following text be added to Chapter 10 of the UNIDROIT Principles to set forth clear burdens of proof when prescription is asserted as a defense to a claim:

> Under Article 10.9(2) the obligor must assert the limitations period as a defense for it to be effective. The obligor bears the burden of proof regarding the applicable limitations period under Article 10.2(1), or under the parties'

They may be used to interpret or supplement domestic law.

They may serve as a model for national and international legislators.

Preamble to UNIDROIT Principles of International Commercial Contracts (1994).

142. UNIDROIT Principles of International Commercial Contracts art. 10.2. *See also* United Nations Convention on the Limitation Period in the International Sale of Goods, *supra* note 136, at 411 (noting that a period of between 3 and 5 years was deemed appropriate based on responses to a questionnaire addressed to governments and interested international organizations).

143. UNIDROIT Principles of International Commercial Contracts arts. 10.3, 10.4.

144. UNIDROIT Principles of International Commercial Contracts arts. 10.5–10.8.

145. UNIDROIT Principles of International Commercial Contracts arts. 10.9, 10.10.

146. These problems go beyond UNIDROIT's principles. For example, the United Nations Convention on the Limitation Period in the International Sale of Goods contains similar weaknesses. *See* United Nations Convention on the Limitation Period in the International Sale of Goods, *supra* note 136, arts. 24 and 25 (failing to clarify on which party carries the burden of proof and allowing for expired claims to be raised "as a defense or for the purposes of set-off against a claim").

147. "For the expiration of the limitation period to have effect, the obligor must assert it as a defence." UNIDROIT Principles of International Commercial Contracts art. 10.9(2).

148. For an example of the kind of confusion that can arise from the lack of clear rules, *see* Grand River Enterprises Six Nations, Ltd. v. United States of America, NAFTA/UNCITRAL Arb. 20060720, para. 37 (July 20, 2006) (noting that the parties disagree on which party held the burden of proof with respect to prescription).

> agreement to modify such period under Article 10.3, by establishing the date the obligee knew or should have known the facts giving rise to the obligee's claim.
>
> If the obligee asserts that a new limitation period arose under Article 10.4 or that the limitations period was suspended under Articles 10.5, 10.6, 10.7, and 10.8, the obligee bears the burden of proof of establishing the application of those articles' provision(s).

The second criticism of the UNIDROIT Principles lies in Article 10.9(3),[149] which allows an expired right to be resurrected in defending a claim asserted by the other party to the contract, concession, or PSA. Comment 3 to Article 10.9 states, "[u]nder these principles expiration of period of limitations does not extinguish the right but gives only a defence that must be invoked by the obligor. It follows that the obligor's right still exists, although a claim for its performance may be barred by the obligor's invocation of the expiration of the limitation period. It can, therefore, be used as a defence, e.g., as a ground for retention of performance owed by the obligee."[150] While this rule may ameliorate the harsh result of prescription, it does not promote the purposes of prescription and invites the assertion of strategic counterclaims that complicate proceedings.

As noted above, prescription serves an important purpose:

> [T]he overriding commandment that peace under the law must be restored by finally cutting off the threat of litigation, [and] the more practical consideration that by passing of time matters become obfuscated and the outcome of any litigation hazardous, because witnesses might have died, memories faded, documents destroyed etc. This, i.e., hazardous results of litigations, may in turn engender the reputation and dignity of the judicial system in its entirety.[151]

Article 10.9(3) undermines these purposes. It neither encourages parties to timely assert claims nor to negotiate an extension of the prescription period. Instead, it encourages respondents to comb through the claimant's entire history of performance under the life of the contract for potential defenses, thereby requiring the claimant to respond to stale claims it believed to have been extinguished years ago and the Tribunal to resolve claims in which documents, witnesses, and memories may no longer be available to present the facts in the proceeding. Article 10.9(3) simply cannot be justified when its costs and disadvantages are taken into consideration.

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149. "A right may still be relied on as a defence even though the expiration of the limitation period for that right has been asserted." UNIDROIT Principles of International Commercial Contracts art. 10.9(3).

150. UNIDROIT Working Group for the Preparation of Principles of International Commercial Contracts 2003, *supra* note 135, art. 9, cmt. 3. The Illustration provided in the comment states:

> A leases a printing press to B for ten years. Under the contract A is obliged to maintain the press in working condition and to undertake repairs, unless a defect is caused by B's negligence in operating the machine. The machine breaks down, but A refuses to do the necessary repairs. B, after futile requests and negotiations with A, has the repair done by another firm and asks A to pay the necessary costs. A does not react, and B does not pursue the matter. Five years later, at the end of the lease, B again requests payment of the cost of repair. A refuses to pay and invokes Article 2(1), requesting return of the printing press. B is entitled to damages for breach of contract and to withhold delivery of the press.

151. UNIDROIT Working Group for the Preparation of Principles of International Commercial Contracts 1999, Study L – Doc. 58, Preliminary Remarks.

Prescription provides an important tool for tribunals to resolve claims and counterclaims in an efficient, cost-effective, and reasoned manner. For the doctrine's full effect to be realized, however, clarity in the burdens of proof must be established and stale claims should not be allowed into the proceeding.

2. Laches

The doctrine of laches (or extinctive prescription) is an equitable principle that bars a stale claim due to the passage of time.[152] The elements of laches are (1) a negligent lapse of time in the assertion of a right or claim, and (2) prejudice to the defending party as a result of the undue delay.[153] Like prescription, laches is intended to preclude the assertion of untimely claims. However, unlike prescription which is created by statute and does not require any showing of harm to the defending party, laches is an equitable doctrine and mandates consideration of the prejudice, if any, to the defending party. Such prejudice, resulting from the passage of time, generally involves the death or unavailability of witnesses or documents needed to respond to the claim.

Despite laches first emerging in international arbitration in the 19th century and continuing to be a viable rule of international law into the 20th century, it remains less established than prescription, estoppel, and acquiescence.[154] Indeed, laches is rarely invoked in arbitrations and is even more rarely the basis for a decision.[155] The invocation of laches by a defending party represents a double-edged sword: on the one hand, if the defense is successful, the claim is dismissed; on the other hand, if the defense is unsuccessful, the defending party has acknowledged that it is somehow impaired in its ability to fully and adequately respond to the claim. This raises the question of whether the doctrine of laches is necessary or even viable in light of the acceptance and codification of prescriptive periods. The answer is yes for at least two reasons.

First, in the event of a difficult choice-of-law analysis for a prescriptive period, or a difficult analysis on the point of accrual for purposes of prescription, laches—which does not include a specific time period—will provide the parties and the tribunal a related doctrine in considering the effect of the delay in bringing a claim. Second, justice might not be served in requiring a party to defend the merits of some delayed claims even though the prescriptive period has not run.

The formalization of laches as part of the international rules governing contracts could renew its acceptance by parties and tribunals, particularly if a preliminary determination of

152. *See* Ashraf Ray Ibrahim, Note, *The Doctrine of Laches in International Law*, 83 VA. L. REV. 647, 651 (1997) ("Although variations of the doctrine exist, the underlying concept remains constant: Undue delay in the presentation of an action before an international tribunal will vitiate the merits of the claim and work inequity between the litigating parties."). As Mr. Ibrahim states, the laches doctrine is not without its critics who contend that it (1) impairs sovereign state rights, (2) impairs the supremacy of international law over domestic law, and (3) is inherently vague because it lacks a specified time limit. *See id*. at 671–76.

153. *Id*. at 691.

154. *See id*. at 652 ("[E]ven the most rudimentary definitions of the laches doctrine overlap with other related, and perhaps better established, legal doctrines—namely the equitable principles of acquiescence and estoppel.").

155. A limited search of reported arbitral decisions since Mr. Ibrahim published his note on laches in 1997 revealed only three awards even mentioning the doctrine—all without success. *See* Int'l Thunderbird v. Mexico, NAFTA (Jan. 26, 2006); Canfor Corp. v. United States, NAFTA (Sept. 7, 2005); Petrobart v. Kyrgyzstan, Stockholm Chamber of Commerce Case No. 126/2003 (Mar. 29, 2005).

the defense was encouraged.[156] Recognizing the absence of a fixed time period in this doctrine and the necessity for a broad consideration of the potential prejudice that can arise from the delay in bringing a claim, we propose the following rule governing the laches doctrine:

> Regardless of the application or non-application of prescription, a party asserting a claim may be barred from asserting a claim or right due to the delay in its assertion under the doctrine of laches. Under this doctrine, the tribunal shall consider and balance the fairness of allowing the claim to be asserted, taking into consideration the following factors and any others that may apply to the particular case:
>
> (1) the amount of time that has elapsed between the accrual of the claim or right and its assertion;
>
> (2) any neglect by the party in the delay of the assertion of the claim or right; and
>
> (3) any prejudice to the responding party caused by the delay in the assertion of the claim or right, including, but not limited to, a significant increase in the potential damages at issue and the unavailability of evidence or witnesses.

3. Estoppel by Representation

Estoppel arose from common law equity and encompasses a number of different principles used in many different circumstances. The doctrine is well-established in international law.[157] However, it has been formulated and applied in so many ways that, in the eyes of some, it has become almost meaningless and is merely a catchall to justify an argument couched in, or a decision premised on, perceived fairness. As one author concludes,

> [t]he imprecision that is the hallmark of estoppel theory in international practice, through troubling, is easy to explain. In the absence of clearly developed procedural rules, a codified and uniform body of doctrine, or anything resembling evidentiary standards, international lawyers and judges are forced to improvise. When they do, estoppel is a convenient term to offer since it can

156. *See* Ibrahim, *supra* note 152, at 691–92 ("International courts and arbitration tribunals must recognize the doctrine's utility in preserving their own limited judicial resources without passing judgment on the underlying merits of a stale claim. As international litigation increases in popularity, both in U.S. courts and various international fora, the doctrine of laches necessarily becomes an efficient mechanism to prevent the adjudication of stale claims.").

157. *See* IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 641 (1990); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 140–41 (1987) ("It is a principle of good faith that 'a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another . . . Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel,' or by any other name, it is one which courts of law in modern times most usefully adopted."); Amco Asia Corp. v. Indonesia, ICSID Case No. ARB/81/1, para. 47 (Sept. 25, 1983) ("This concept is derived from the common law. However, it is based on the fundamental requirement of good faith, which is found in all systems of law, national as well as international.").

> serve as an emblem for any of a number of notions fundamental to any system of law: common sense, justice, consistency, fair play, or good faith.[158]

In his comprehensive treatment on estoppel, Brown delineates the various applications of the term "estoppel"—estoppel by representation, estoppel by record, estoppel by deed, and estoppel by silence.[159] In the context of defending environmental and mismanagement claims related to PSAs and concessions, we will focus on estoppel by representation.

Estoppel by representation derives from general principles of good faith and fair dealing which are set forth in virtually every set of model laws governing international relations and contracts.[160] While some model rules include additional provisions regarding inconsistent behavior, typically such provisions focus on whether an agreement has been reached or modified.[161] For the doctrine to become an effective tool,[162] it must be more narrowly crafted than as a mere outshoot of "good faith and fair dealing" to prevent a party, including a state,[163] from asserting a claim or right in contradiction to its prior conduct and statements.

In the context of claims against a contractor relating to a concession or PSA, the state, through an agency, ministry, or state-owned company, will be heavily involved in the oversight and implementation of operational decisions. These decisions typically include what exploitation strategies will be undertaken, what practices will apply to those

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158. Christopher Brown, *A Comparative and Critical Assessment of Estoppel in International Law*, 50 U. MIAMI L. REV. 369, 411 (1996). *See, e.g.*, Pan Amer. Energy LLC v. Argentina, ICSID Case No. ARB/03/13, para. 159 (July 27, 2006) ("Estoppel is a recognised principle of international law that has been applied by many international tribunals."); Phillips Petroleum Co. Iran v. Iran and the Nat'l Iranian Oil Co., 21 Ir.-U.S. Cl. Tr. 154 para. 197 (June 29, 1989) ("[T]he Tribunal is in no doubt that the doctrine of preclusion, whether based upon concepts of acquiescence, estoppel, or waiver, is available as a general principle of law . . . ."); Case Concerning the Temple of Vihear, 1962 ICJ Rep. 6, 40 (June 15, 1962) (separate opinion of Vice President Alvaro) ("Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible.").

159. *See* Brown, *supra* note 158, at 371–78.

160. *See, e.g.*, UNIDROIT Principles of International Commercial Contracts art 1.7(1) ("Each party must act in accordance with good faith and fair dealing in international trade."); Commission on European Contract Law, Principles of European Contract Law art. 1.201 ("Each party must act in accordance with good faith and fair dealing.").

161. *See* UNIDROIT Principles of International Commercial Contracts art. 1.8 ("A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment."); UNIDROIT Working Group for the Preparation of Principles of International Commercial Contracts 2003, *supra* note 135, art. 1.8; Michael E. Dickstein, *Revitalizing the International Law Governing Concession Agreements*, 6 INT'L L. TAX & BUS. LAW 54, 81–83 (1988); Framatone v. Atomic Energy Organization of Iran, I.C.C. Case No. 3896, 103–04, 110, 111 (1984) (noting that partial performance by the parties was a "decisive and independent reason which prevents the defendant from now contesting the validity of the Contract").

162. Indeed, despite estoppel being well-established, tribunals often times avoid deciding issues on the basis of the doctrine. *See, e.g.*, Occidental Petroleum Exploration and Prod. Co. v. Ecuador, ICSID Case No. ARB/06/11, paras. 193–97 (July 1, 2004); Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, paras. 144–45 (May 31, 1990).

163. There is now little debate that a state can be and will be bound under estoppel theories. *See* CHENG, *supra* note 157, at 148 ("Thus it has been held that a State cannot be heard to repudiate liability for a collision after its authorities on the spot had at the time admitted liability and sought throughout to make the most advantageous arrangements for the Government under the circumstances . . . As regards admissions in general, it may be said that they must have been made by responsible agents of the State acting in their official capacity, on behalf of the State."); Case Concerning the Temple of Vihear, 1962 ICJ Rep. 6, 39 (June 15, 1962) (separate opinion of Vice President Alfaro) ("This principle, as I understand it, is that a State party to an international litigation is bound by its previous acts or attitudes when they are in contradiction with its claim in the litigation.").

operations, and which wells or areas will be prioritized over others. Thus, the state will suggest various courses of action which may or may not comport with the contractor's judgment. If they agree, these decisions become the joint work of all parties. If they are not in full agreement initially, compromises usually result, reflecting the natural give-and-take of all contracting partners.

To allow a state to later complain of those operational judgments after having accepted any benefits from such decision-making would strike even the most casual observer as unjust and unreasonable. To require the contractor to later defend such judgments years after the fact—judgments that will be assaulted with the hindsight knowledge of commodity price movements, advances in technology, and actual results from those business decisions—results in another injustice. Such claims could be (and should be) resolved through preliminary rulings on defenses such as estoppel by representation, saving the tribunal and the parties time and money. The inclusion of a narrowly-defined estoppel by representation doctrine in model laws governing international contractual relations would facilitate such rulings:

> A party is precluded from asserting a fact, right, or claim against another party if:
>
> (1) the party acted or made a clear and unambiguous statement regarding that fact, right, or claim that contradicts its arbitration position;
>
> (2) the act or statement was voluntary, unconditional, and authorized; and
>
> (3) the act or statement was relied upon in good faith either to the detriment of the other party or to the advantage of the party making the statement or performing the act.

4. Acquiescence

Tribunals have sometimes collapsed the doctrine of estoppel by representation together with the doctrine of acquiescence.[164] However, they remain distinct doctrines with different legal underpinnings and merit separate recognition. Specifically, unlike estoppel by representation which requires affirmative conduct or an affirmative statement, acquiescence derives from the notion of consent and applies when a party remains silent with full knowledge of another party's conduct, thereby tacitly encouraging the party to continue its allegedly harmful conduct.

A robust use of acquiescence would incentivize the host state (who is subject to waiving claims by acquiescence[165]) to become a more vocal participant in the PSAs and

164. *See* Brown, *supra* note 158, at 401–02 (describing treatment of acquiescence by international tribunals and that "international law appears to draw no distinction between estoppel and acquiescence"); *see also* GEORGE SPENCER BOWER, THE LAW RELATING TO ESTOPPEL BY REPRESENTATION 4 (3d ed. 1977) ("Where one person has made a representation to another person in words or by acts or conduct or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive) and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representator in any litigation which may afterwards take place between him and the representee, is estopped as against the representee . . . ."); ARNOLD DUNCAN MCNAIR, THE LAW OF TREATIES, BRITISH PRACTICE AND OPINIONS 261 (1938) ("In our opinion the English Government has waived its right to the increased Egyptian tribute, and the action, or rather abstinence of action, by the English Government in 1891 is an instance of that consent on the part of at least one of the Guaranteeing Powers, which estops that Power from claiming, under the Convention, the additional tribute money as part of the security.").

165. *See, e.g.*, The Boeing Co. v. Iran, 6 Iran-U.S. Cl. Trib. Rep. 43, 50 (May 25, 1984) ("It is established

concessions, and, if necessary, for the host state to assert rights and bring claims in an immediate fashion or risk such claims and rights being lost. If the doctrine of acquiescence is diluted, the host state has an incentive to silently permit performance by the contractor, accept the benefits from such performance, and later claim breaches related to the performance with full hindsight knowledge after the contractor can no longer alter its course of conduct. In the words of the Iran-United States Claims Tribunal when faced with the silence of a host nation juxtaposed against its subsequent claim for damages from alleged mismanagement:

> As for whether Philips was prejudiced by NIOC's failure to object, that seems manifest. Presumably, each of the Parties to the JSA relied on their partners to object in a timely manner to any proposed activity which affected the productivity or profitability of IMINOCO [the operating company established by the parties to the JSA]. A failure to object evidenced acquiescence to the continued policies of the joint venture**.** Without some expression of objection at the time, other parties had no opportunity to consider their validity and, if appropriate, to propose alternative policies. Indeed, because NIOC was the only party which held a blocking share of votes on the Board of Directors, it was especially incumbent upon NIOC to make timely objections to any activities carried out**.** The prejudice flowing from that failure to object is now evident. The Claimant is in no position to attempt to cure or remedy any of the defects in the production policies or activities that are now objected to. Indeed, the Tribunal notes that the Claimant's ability to execute such a cure would have been substantially limited since it had only a minority interest in the joint venture. Nevertheless, the fact that no opposition was made at the time evidenced NIOC's acquiescence, and indeed complicity, in the practices to which it now objects. Consequently, the Tribunal holds, as a matter of law, that NIOC is now precluded from bringing this counterclaim.[166]

Consistent with these recognized principles, we propose that the following definition of acquiescence be adopted and applied in rules governing international commerce and law:

> A party is precluded from asserting a fact, right, or claim against another party if:
>
> (1) the party knew of another party's acts and their potential for resulting harm; and
>
> (2) the party stood by in silence, accepting or permitting such acts to occur without protesting such acts.

that a State may waive its rights or be estopped from asserting them.").

166. Phillips Petroleum Co. Iran v. Iran and the Nat'l Iranian Oil Co. 21 Iran-U.S. Cl. Trib. Rep. 285, para. 207; *see also* ADC Affiliate Ltd. v. Hungary, ICSID Case No. ARB/03/16, paras. 275–78 (Oct. 2, 2006); Kuwait v. Amer. Indep. Oil Co. (Aminoil), 21 I.L.M. 976, para. 125 (1982).

B. Procedural Safeguards

1. Arbitral Rules Regarding Preliminary Decisions

As arbitration practice becomes more complex and aggressive, mechanisms for early resolution of some claims should be considered to keep arbitration as a cost effective and efficient means to resolve disputes. Consistent with the flexibility and lack of established rules in arbitral practice, arbitral rules presently neither exclude a summary disposition of claims because of a legal defense (such as prescription, laches, estoppel, or acquiescence) nor do they expressly recognize or encourage such a practice. For example, the IBA Rules on the Taking of Evidence in International Commercial Arbitration provide, "[e]ach Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, the issues that it may regard as relevant to the outcome of the case, including issues where a preliminary determination may be appropriate."[167] The ICC's Rules of Arbitration and the UNCITRAL Notes on Organizing Arbitration are similar.[168]

The lack of such a mechanism in arbitration rules (or its infrequent use) represents one disadvantage from traditional litigation:

> International arbitrations generally do not contemplate the scope of motion practice that exists in American litigation. One disadvantage of international arbitration is that issues that may be dispositive of a case and appropriate for a motion to dismiss or summary judgment in court litigation may often be considered by arbitrators only after a full evidentiary hearing on all of the issues. In such cases, international arbitration may in fact take longer than domestic US litigation that could potentially be concluded on a summary basis.[169]

Motion practice of course is not unheard of in international arbitration. Indeed, motion practice has actually become a more frequently utilized arrow in the quiver of parties to arbitration, particularly in ICSID proceedings.[170]

Such motions, however, have tended to be limited to jurisdictional issues, not legal defenses that, if sustained, can streamline the proceedings by avoiding evidentiary submissions and hearings on the merits of stale, estopped, or acquiesced claims. However, in the jurisdictional context, prescription arises, particularly in treaty disputes where a party argues that the tribunal is without jurisdiction because of a prescriptive bar, thus establishing

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167. IBA RULES OF ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION 2 (1999).

168. *See* Int'l Chamber of Commerce, ICC Rules of Arbitration art. 4–5 (Jan. 1, 1998); UNCITRAL Notes on Organizing Arbitral Proceedings, art. 11(b), U.N. GAOR, 29th Sess., Supp. No. 17, U.N. Doc. A/51/17 (1996), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf.

169. Rivkin, *supra* note 24.

170. ICSID's website (available at http://icsid.worldbank.org/ICSID/FrontServlet) lists 188 published decisions from 73 proceedings. Of those 73 proceedings, jurisdictional challenges were made in 32 of them, requiring a preliminary determination before the parties submitted arguments and evidence on and the tribunal considered the merits of the dispute. *See, e.g.*, Enron Corp. and Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/03 (Jan. 14, 2004); Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12 (Dec. 8, 2003); CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8 (July 17, 2003); Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12 (Dec. 8, 2003); Marvin Roy Feldman Karpa v. Mexico, ICSID Case No. ARB(AF)/99/1 (Dec. 6, 2000); Eudoro A. Olguin v. Paraguay, ICSID Case No. ARB/98/5 (Aug. 8, 2000); Amco Asia Corp. et al. v. Indonesia, ICSID Case No. ARB/81/1 (Sept. 25, 1983); Societe Ouest Africaine des Betons Industriels v. Senegal, ICSID Case No. ARB/82/1 (Aug. 1, 1984).

that legal defenses are appropriate for early determination by the tribunals.[171] The established practice of preliminary decisions on jurisdiction, challenges to the tribunal's composition, and requests that a party post security should be considered for formal extension to legal defenses.

While the use of motion practice in international arbitration should not become the norm, it does have an appropriate place in resolving some claims expeditiously and in a cost-effective manner. Arbitral rules and terms of reference[172] to date have generally not accounted for these benefits—benefits that will increase as parties assert claims relating to practices and activities arising from long-standing contracts and relationships. Indeed, formally recognizing legal defenses as a basis for preliminary rulings, which can be decided based on written memorials by the parties, harmonizes the common law tradition of summary resolution of issues with the civil law tradition of resolution of issues based on the written submissions of the parties. International arbitration institutions preparing procedural rules and parties drafting arbitration clauses should consider including express language for such preliminary determinations, thereby reducing costs, resolving issues faster, and more narrowly focusing disputes.

2. Disclosures by Party-Appointed Experts

Some disparity exists between the treatment and perception of expert witnesses in the common law system and the civil law system. Under common law regimes, parties interview, hire, and present their own experts who are "specialized form[s] of witnesses."[173] In contrast, continental European courts and tribunals generally hire and appoint experts who are considered neutral guides and resources for the court or tribunal.[174] Harmonizing these two traditions, international arbitration practice sometimes involves both party-appointed and tribunal-appointed experts and authorizes the tribunal to require experts to meet and confer in an attempt to find common ground and clarify points in contention.[175] However, the effectiveness of this harmonization remains speculative at best, particularly taking into account the "cottage industry" of expert witnesses, the unwillingness of experts on opposing sides of a dispute to reach any meaningful consensus in many cases,[176] the additional costs to the parties in the appointment of a tribunal-appointed expert, and the lack of established procedures for the discovery of experts' work and methodology.

Given the self-selected information provided by the experts and parties in current arbitration practice, opposing parties and tribunals face great obstacles in eliciting meaningful testimony from experts and in evaluating the competing claims from experts qualified in the same field. Because of the increasing use of party-appointed experts, their

171. *See, e.g.*, Bayview Irrigation District v. Mexico, ICSID Case No. ARB(AF)/05/1, paras. 34–36 (June 19, 2007); Grand River Enterprises Six Nations, NAFTA/UNCITRAL Arb. 20060720, para. 33 (July 20, 2006).

172. Strict compliance with terms of reference would be another mechanism to bring certainty and predictability to arbitral proceedings, preventing parties from adding new claims and new theories as the arbitral proceeding progressed.

173. Helmer, *supra* note 23, at 54.

174. *Id*.

175. *See* IBA RULES OF ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION *supra* note 167, at 9–12, art. 5–6.

176. One potential mechanism to foster a more meaningful conference by opposing experts is to appoint a neutral moderator, either a tribunal-appointed expert or special master, to coordinate and attend the meeting and assist in the drafting of the joint report to the tribunal. The benefits of such an appointment must be balanced against the cost to the parties for such an expert.

lack of neutrality (whether real or perceived) and the specialization and complexity of the issues, new disclosure procedures specific to expert witnesses may be helpful additions to arbitral procedures, enshrined either in the institution's rules or in the terms of reference established early in the proceedings.

While current rules requiring that an expert submit a report setting forth his conclusions and analysis and his curriculum vitae provide a starting point,[177] additional mandatory disclosures would promote greater neutrality, transparency, and objectivity as well as allow the parties and arbitrators to better prepare for the experts' meetings and cross-examinations. Those additional mandatory disclosures, which would be established early in the arbitration process, should include:

- the expert's entire file including draft reports, correspondence, data, documents, and notes used in the evaluation of the issues within his or her expertise;

- a list of proceedings and cases in which the expert has provided testimony in the previous five years; and

- if the expert's work includes any sampling or testing, then the expert and party must take duplicative samples and timely provide them to the opposing party and submit the results of all samples and tests.

These disclosure requirements would ensure even-handedness between parties in evaluating and presenting the technical issues in the proceeding, without imposing any substantial burden on the parties. Indeed, they would foster greater harmonization of the common law and civil law legal regimes because the transparency in the experts' work would prevent self-selection by the parties and their experts, requiring a more neutral and complete disclosure similar to the civil law expert model.

V. CONCLUSION

Globalization's boom in the 1990s, including the exponential growth of transnational investment and the entry of numerous investment treaties that contain arbitration provisions, set the stage for arbitration to resolve more disputes than ever before. Additionally, the rise in commodity prices and the renewed wave of nationalization of the early 21st century has led to higher arbitral stakes than ever before. The trends of Americanization and nationalization, if left unchecked, may result in more complex, more expensive, and more aggressive arbitration tactics, particularly with regard to claims of poor environmental stewardship and poor resource management. To ensure that arbitration continues to offer a

177. Under Article 5 of the IBA Rules, every party-appointed expert is required to submit an expert report that contains:

> (a) the full name and address of the Party-Appointed Expert, his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience;
>
> (b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
>
> (c) his or her expert opinions and conclusions, including a description of the method, evidence and information used in arriving at the conclusions;
>
> (d) an affirmation of the truth of the Expert Report; and
>
> (e) the signature of the Party-Appointed Expert and its date and place.

IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION *supra* note 167, at 9, art. 5.

fair and cost effective means to resolve disputes, arbitral institutions and practitioners should consider developing mechanisms to efficiently resolve claims that would be barred by well-established legal principles. Otherwise, parties and arbitrators will be required to expend precious resources on legally deficient claims instead of focusing on the heart of the dispute. Accordingly, arbitral institutions and tribunals should formalize legal defenses such as prescription, laches, estoppel, and acquiescence, clearly recognize the resolution of those defenses in a preliminary summary fashion, and require more expansive disclosures by expert witnesses.