Mass Procedures as a Form of "Regulatory Arbitration" - Abaclat v. Argentine Republic and the International Investment Regime

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I. INTRODUCTION

Although final determination of the merits of the dispute is still several years in the making, *Abaclat v. Argentine Republic* has already been declared one of the most

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1. At this point, the tribunal has rendered only preliminary jurisdictional and dissenting awards. See Abaclat (formerly Beccara) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), available at http://italaw.com/sites/default/files/case-documents/ita0236.pdf;
controversial arbitrations to arise in recent years.\(^2\) The proceedings address several noteworthy items as a matter of first impression, including the question of whether sovereign bonds constitute an “investment”\(^3\) under the relevant treaties.\(^4\) However, much of *Abaclat*’s notoriety is due to the unusually large number of claimants in this case, 60,000 Italian bondholders who were seeking to join their claims together in a single proceeding.\(^5\) While both the claimants and a majority of the arbitrators were quick to note that the arbitration was not brought on a classwide basis,\(^6\) the framing of the procedure as involving “mass” rather than class claims has done little to diminish concerns that U.S. litigation techniques, most particularly the dreaded class action, are currently making their way into international investment law.\(^7\)

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\(^3\) The members of the Oil-Gas-Energy-Mining-Infrastructure Dispute Management (OGEMID) listserve named the majority’s preliminary award in *Abaclat* the leading arbitration decision of 2011 as well as the most controversial or surprising decision of the year, with the dissenting award being named runner-up in both categories. See OGEMID Awards 2011, TRANSNAT’L DISP. MGMT., http://www.transnational-dispute-management.com/ogemidawards/ (last visited Dec. 11, 2012) (listing the winners of the OGEMID Awards).


\(^5\) See *Abaclat*, ICSID Case No. ARB/07/5, ¶ 35 (Abi-Saab, dissenting) (stating that this was the first dispute of this nature in an ICSID arbitration); see also Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention] (describing the settlement of international investment disputes); Agreement Between the Republic of Argentina and the Republic of Italy on the Promotion and Reciprocal Protection of Investments, May 22, 1990 [hereinafter Argentina–Italy BIT], available at http://unctad.org/sections/dite/iaa/docs/bits/italy_argentina_it.pdf.

\(^6\) See *Abaclat*, ICSID Case No. ARB/07/5, ¶¶ 295, 488 (stating that *Abaclat* is the first ICSID case where “mass claims” have been brought).

\(^7\) See *id.* ¶¶ 104, 294 (stating that case is not a “class action”).
Although Abaclat marks the first time that an investment tribunal has accepted jurisdiction over a proceeding of this nature,\(^8\) it is not the first time that a large-scale claim has been brought in the context of treaty-based arbitration,\(^9\) nor is it likely to be the last. Two other group claims against Argentina are currently pending,\(^10\) and commentators have speculated about opportunities for mass investment arbitrations in other contexts.\(^11\)

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\(^8\) See Abaclat, ICSID Case No. ARB/07/5, ¶ 295, 488. Other large multiparty proceedings have been filed with the International Centre for Settlement of Investment Disputes (ICSID) in the past, including those with over 100 claimants. See Anderson v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, ¶ 3 (May 10, 2011), available at http://italaw.com/documents/AndersonvCostaRicaAward19May2010.pdf (involving 137 claimants proceedings under the ICSID Additional Facility); Funnekotter v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award (Apr. 7, 2009), available at http://italaw.com/documents/ZimbabweAward.pdf (involving 13 named claimants with over 1500 other potential participants waiting in the wings); AgricAfrica Ltd. Newsletter No. 32, ZIMBABWE LIFESTYLE BLOG ¶ 2 (Jan. 5, 2010), http://zimbabwefood.blogspot.com/2010/01/this-should-be-of-interest-to-everyone.html (noting existence of other potential claimants in Funnekotter). However, Abaclat is unique in the international investment arena in terms of the scope, scale, and nature of claims brought. See Abaclat, ICSID Case No. ARB/07/5, ¶ 171 (Arias-Saab, dissenting) (discussing novelty of mass claims in investment context); S.I. Strong, Mass Procedures in Abaclat v. Argentine Republic: Are They Consistent with the International Investment Regime?, 3 Y.B. INT’L ARB. (forthcoming 2013) [hereinafter Strong, Abaclat].


While there is still a long way to go before the jurisdictional awards rendered in *Abaclat* can be considered final,\(^{12}\) the majority and dissenting awards will doubtless prove groundbreaking on a number of important issues. Certainly there will be extensive analysis regarding the arbitrability of sovereign debt concerns, the interpretation of silence in an investment treaty, and a variety of related matters.\(^{13}\) However, this Article focuses on perhaps the most challenging and controversial issue, namely the question of the propriety of mass procedures from an international regulatory law perspective.

The idea of investment law as a form of international regulation is not new.\(^{14}\) Indeed, a growing number of commentators have framed the international investment regime as reflecting a type of “global administrative law”\(^ {15}\) or “global governance.”\(^ {16}\)

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\(^{12}\) It is very likely that Argentina will seek to annul the award after the conclusion of the proceedings on the merits, not only because of the novelty of the issues at stake, but because Argentina has brought annulment proceedings every time a final award has been rendered against it. See Karen Halverson Cross, *Investment Arbitration Panel Upholds Jurisdiction to Hear Mass Bondholder Claims Against Argentina*, 15 AM. SOC’Y OF INT’L L. INSIGHTS (Nov. 21, 2011), www.asil.org/pdfs/insights/insight111121.pdf (discussing likelihood of annulment proceedings in *Abaclat*); Steven Smith et al., *International Commercial Dispute Resolution*, 44 INT’L L. 113, 127 (2010) (discussing annulment proceedings previously brought by Argentina in ICSID disputes). Therefore, it will be years before the jurisdictional determinations outlined in the recent awards can be considered final.

\(^{13}\) Debate about these issues has already begun. See supra note 3 (surveying different opinions on these issues).

\(^{14}\) “There is no consensus in policy or academic circles as to what exactly is connoted by the term regulation.” Colin Scott, *Privatization and Regulatory Regimes*, in *OXFORD HANDBOOK OF PUBLIC POLICY*, 651, 653 (Michael Moran et al. eds., 2006). One classic definition states that regulation involves “sustained and focused control exercised by a public agency over activities that are socially valued,” although modern critics have expanded the scope of application to include regulatory activity undertaken by private actors and other decentralized entities. *Id.* (quoting Phillip Selznick, *Focusing Organizational Research on Regulation*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 363, 363–67 (Roger G. Noll ed., 1985)).


However, most of the analysis has centered on the way in which the various treaties and international agreements are said to constitute a type of “international legislation.”

While there is a continuing need to consider the ways in which international investment law constitutes a form of traditional regulation, this Article brings a new critical perspective—that of new governance theory—to bear on the question of mass procedures in investment arbitration.

New governance analysis reflects “a widespread movement away from a top-down approach in public governance to an increasingly hybrid interaction of public and private actors.” One area of inquiry involves the concept of regulatory litigation, which arises when a “diffuse set of regulators,” including “private citizens, public regulatory bodies, nongovernmental organizations, and private market agents[,] ... regulate social harm” by “us[ing] litigation and the courts to achieve and apply regulatory outcomes to entire industries.” For years, regulatory litigation has been considered primarily a U.S. phenomenon, given the widespread reliance in the United States on private attorneys general to enforce various public laws in an otherwise highly deregulated market environment. However, other legal systems have also begun to consider the potential usefulness of this sort of regulatory device, and it may be that *Abaclat* has brought regulatory litigation techniques into the world of investment arbitration.
One of the best-known forms of regulatory litigation is the U.S. class action, which uses large-scale representative relief, often combined with punitive or treble damages, to achieve a variety of goals, including those of a regulatory nature. However, the correlation between large-scale relief and regulation is not exact. For example, while a number of common and civil law jurisdictions have adopted procedures roughly similar to U.S.-style class actions, these jurisdictions “are not in unanimous agreement as to whether” regulatory goals “should form an overarching principle of class litigation.”

This raises the interesting question of whether the use of large-scale litigation techniques in *Abaclat* constitutes an international form of “regulatory arbitration” that is similar in nature to domestic or international forms of regulatory litigation. This is a novel issue, for although the concept of regulatory litigation, including transnational legislative and administrative enactments that deny both the need and opportunity for any sort of “private” regulation through litigation, that characterization may no longer be true. See Coffee, supra note 22, at 345 (discussing potential transition in Europe towards class actions). Jurisdictions other than the United States may be in the process of adopting their own forms of regulatory litigation as the principle of “adversarial legalism” takes root around the world. See Robert A. Kagan, *Adversarial Legalism: The American Way of Law* 3 (2001) (defining adversarial legalism as policymaking by means of litigation); Francesca Bignami, *Cooperative Legalism and the Non-Americanization of European Regulatory Styles: The Case of Data Privacy*, 59 AM. J. COMP. L. 411, 412 (2011) (considering European regulatory model); R. Daniel Kelemen, *Suing for Europe: Adversarial Legalism and European Governance*, 39 COMP. POL. STUD. 101, 102 (2006) (arguing that a shift towards U.S. legal style is emerging in the European Union); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 51 (2009) (discussing the emergence in Europe of procedures for aggregate litigation); Adam Samuel, *Consumer Financial Services in Britain: New Approaches to Dispute Resolution and Avoidance*, 3 EUR. BUS. ORG. L. REV. 649, 653–54, 656–62 (2002) (discussing European alternatives to various forms of regulation); Scott, supra note 14, at 656, 659 (discussing the formalization of norms within regulatory regimes and the transition to the regulatory state).

24. The three best-known rationales for class actions are regulation, compensation, and efficiency, although class suits can provide additional benefits such as information sharing, accountability, and transparency rationales. See Hensler et al., supra note 7, at 68–72 (discussing class actions as a tool for regulation); Mulheron, supra note 7, at 47–66 (discussing rationales for class relief outside the United States); Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63, 92–111 (2008) (discussing positive externalities of securities class actions).


27. The term “regulatory arbitration” was first coined by Marc Blessing to describe arbitral proceedings taken in connection with antitrust or competition law claims. See Assimakis P. Korninos, *Assistance by the European Commission and Member States Authorities in Arbitration*, in *EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS* 727, 740 (Gordon Blanke & Phillip Landolt eds., 2011) (discussing regulatory arbitration and Blessing’s use of the term). Blessing believed that

the combination of the outsourced regulatory task and the judicial tasks, accomplished by a competent arbitrator . . . will be the most efficient tool to review and, if need be, sanction anticompetitive behaviour arising out of a concentration, and to install in business practice the objectives which the Commission aims to achieve through its merger control.

Marc Blessing, *Arbitrating Antitrust and Merger Control Issues*, 14 SWISS COMM. L. SER. 197 (2003). Although Blessing’s version of regulatory arbitration is in many ways consistent with the principles described in this Article, the current discussion uses the term more broadly than Blessing.

28. See Glover, supra note 20, at 1140 (discussing *ex post* law enforcement resulting from private suits);
regulatory litigation. has been considered at various points in the past, there is little or no existing analysis regarding the concept of "regulatory arbitration," even though several observers have suggested arbitration as a possible solution to certain problems associated with transnational regulation.

The concept of regulatory arbitration in Abaclat is particularly intriguing given recent suggestions that investment law constitutes a type of international regulation. If the investment regime constitutes an internally stable, relatively closed legal system, then it may be possible to consider whether the use of techniques commonly found in large-scale regulatory litigation is consistent with or perhaps even necessary to fulfill the objectives of the purported regulatory regime as a matter of institutional design. This type of inquiry is particularly useful because it appears unlikely that standard treaty analyses will result in a universally acceptable determination about the propriety of mass procedures in investment arbitration. The hypothesis to be tested here is that if the use of large-scale litigation techniques in Abaclat constitutes a form of regulatory arbitration and if regulatory arbitration falls within the institutional design parameters of the investment regime, then the use of mass procedures in Abaclat can be legitimated without

Luff, supra note 21, at 75 (noting regulatory litigation arose out of a desire to expand regulatory capacity); Strong, Regulatory Litigation, supra note 25 (manuscript at 4) (discussing different forms of regulatory litigation).


30. See Deborah Hensler, How Economic Globalisation Is Helping to Construct a Private Transnational Legal Order, in THE LAW OF THE FUTURE AND THE FUTURE OF THE LAW 249, 256–59 (Sam Muller et al. eds., 2011) [hereinafter Hensler, FUTURE] (suggesting arbitration can overcome certain problems associated with international litigation); Nagareda, supra note 23, at 10 (suggesting arbitration can resolve certain problems associated with large-scale international suits); S.I. Strong, Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared, 37 N.C. J. INT’L L. & COM. REG. 921, 969–80 (2012) [hereinafter Strong, Canada] (describing how class arbitration can overcome problems with national and international class actions in the United States and Canada).

31. See supra notes 16–17 and accompanying text (noting that a number of commentators have characterized investment law as a type of global administrative law).

32. See infra notes 276–79 and accompanying text (explaining the “liberal internationalist” perspective on investment law).

33. See infra note 284 and accompanying text (acknowledging the “deeper uncertainties” involving the purpose of international investment law).
having to rely on difficult questions of treaty interpretation.  

The structure of the Article is as follows. First, Part II introduces the basic facts and analytical framework of Abaclat so as to set further analysis in context. Next, Part III describes the parameters of regulatory litigation and analyzes the way in which regulatory litigation operates in an international legal environment. Part IV puts the concepts of regulatory litigation and transnational regulatory litigation into the arbitral context so as to develop the notion of regulatory arbitration. In so doing, the discussion draws on recent developments involving class and collective arbitration in the United States and elsewhere, so as to put Abaclat into global context. Next, Part V uses the principles developed in Part III and IV to determine whether Abaclat constitutes a form of regulatory arbitration and whether that mechanism is consistent with the investment regime. Finally, Part VI concludes the discussion with some closing observations about how regulatory issues and mass claims procedures can and should be considered under international investment law.

II. ABACLAT V. ARGENTINE REPUBLIC

Abaclat v. Argentine Republic arose as a result of Argentina's default on approximately $100 billion worth of sovereign debt in 2001, a move that made the investments of thousands of Italian bondholders worthless. In September 2002, eight major Italian banks formed an associazione non riconosciuta under the name l'Associazione per la Tutela degli Investitori in titoli Argentini, or "Task Force Argentina" (TFA). The purpose of TFA was to "represent the interests of the Italian bondholders in pursuing a negotiated settlement with Argentina." After several years of negotiations and other proceedings, TFA concluded that further efforts to resolve the matter with Argentina were futile, leading TFA to seek and obtain a new mandate from individual and institutional bondholders allowing TFA to file an arbitration with ICSID. The so-called Mandate Package was initially accepted by over 180,000 bondholders, although the number of claimants subsequently dropped to


35. The dispute is extremely complex, both as a matter of fact and as a matter of law, and the two awards are quite long. See generally Abaclat, ICSID Case No. ARB/07/5 (measuring over 280 pages in length); Abaclat, ICSID Case No. ARB/07/5 (Abi-Saab, dissenting) (measuring 105 pages in length). Therefore, this Part only raises those matters that are relevant to the current Article.

36. See Abaclat, ICSID Case No. ARB/07/5, ¶ 58.

37. Id. ¶ 65.

38. Id. ¶ 66.

60,000. After the tribunal was duly appointed, the parties and the tribunal agreed to bifurcate proceedings into a jurisdictional phase and a merits phase. At the time of writing, only the jurisdictional issues have been addressed in the majority and dissenting award.

One important issue involves the way in which the tribunal defined and justified the use of mass procedures. Rather than characterizing the arbitration as either class or collective in nature, the majority framed the dispute as involving a “mass proceeding” that used a “hybrid” of two different types of group litigation techniques, namely aggregate relief and representative relief.

There are several benefits to the majority’s analytical approach. First, it allowed the majority to set aside certain potentially problematic case law from the United States concerning class arbitration. While it is always difficult to identify the extent to which investment tribunals can refer to principles of national law, existing analyses tend to focus on issues of substantive law rather than procedural law. However, the ability to transfer regulatory litigation techniques from one legal system to another is somewhat questionable, since the use of litigation as a regulatory mechanism gives rise to complicated and politically sensitive issues relating to institutional and dispute system design. Therefore, the persuasive power of U.S. decisions on class arbitration is highly questionable in the investment context.

Second, and perhaps more importantly, the majority’s analytical method allowed the arbitrators to unbundle the various issues at stake and consider questions of consent and
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admissibility separately.\textsuperscript{48} Although the award outlined some significant differences between representative and aggregate proceedings, which are the two primary forms of large-scale dispute resolution, the majority recognized that both share a common "raison d'être": Collective proceedings emerge\[...\] where they constitute\[...\] the only way to ensure an effective remedy in protection of a substantive right provided by contract or law; in other words, collective proceedings \[a\]re seen as necessary, where the absence of such mechanism would \textit{de facto} \ldots result\[...\] in depriving the claimants of their substantive rights due to the lack of appropriate mechanism.\textsuperscript{49}

This concept of "an effective remedy" plays an important role in regulatory litigation and arbitration, particularly with respect to issues relating to institutional design and regulatory intent or effect, since the idea of an effective remedy focuses on whether there is a need to adopt a particular procedural device such as those involving class or collective relief.\textsuperscript{50} Thus, some courts "have concluded that legal systems lacking" claim aggregation "do not afford a meaningful remedy to class action plaintiffs, and on that basis have held foreign fora to be inadequate" in class suits.\textsuperscript{51} Questions about whether bilateral proceedings are sufficient to provide an effective remedy could also be important in determining whether the courts of the host state provide for fair and equitable treatment of investors.\textsuperscript{52}

Rather than characterizing the claims in \textit{Abaclat} as either representative or aggregative in nature, the majority took the view that elements of both types of proceedings were present, "in the sense that \ldots [the arbitration] starts as aggregate proceedings, but then continues with features similar to representative proceedings due to the high number of Claimants involved."\textsuperscript{53} Aggregative elements were found in the

\textsuperscript{48} The \textit{Abaclat} majority award considered "the concept of jurisdiction under the [ICSID] Convention" to cover "issues which may usually be regarded as issues of 'admissibility'" as well as jurisdiction per se. \textit{Abaclat} ICSID Case No. ARB/07/5, ¶ 245. Lack of jurisdiction means that the "claim cannot at all be brought in front of the body called upon" whereas "a lack of admissibility means that the claim was neither fit nor mature for judicial treatment." \textit{Id.} ¶ 247(i). \textit{Abaclat} also defined admissibility as relating to "the question whether ordering the parties to proceed collectively is within the scope of the Tribunal's discretion and authority." \textit{Id.} ¶ 485.

\textsuperscript{49} \textit{Id.} ¶ 484 (quoting Strong, \textit{De-Americanization}, supra note 43). The dissent denied that failure to allow the claims to proceed en masse would deprive the claimants of their substantive rights. \textit{See Abaclat}, ICSID Case No. ARB/07/5, ¶¶ 254–57 (Abi-Saab, dissenting).

\textsuperscript{50} \textit{See infra} note 78 and accompanying text (discussing need for regulatory litigation).


\textsuperscript{52} \textit{See McLACHLAN ET AL., supra} note 10, at 226–47 (discussing fair and equitable treatment standard). The fact that Argentina did not provide for collective redress mechanisms in its national courts was relevant to the majority's decision. \textit{See Abaclat}, ICSID Case No. ARB/07/5, ¶¶ 484, 587 (noting Argentina's legal system does not provide for mass claims).

\textsuperscript{53} \textit{Abaclat}, ICSID Case No. ARB/07/5, ¶ 488 (discussing how both types of collective proceedings share common traits). Although the majority did not raise this possibility, the proceedings in \textit{Abaclat} could also be framed as an opt-in representative proceeding, wherein the parties must affirmatively signal their assent to the mass proceedings but thereafter cede control of the conduct of the dispute to the lead claimant or other qualified representative, who acts as an agent for the passive members of the group. \textit{See Deborah R. Hensler, The Globalization of Class Actions: An Overview, in THE ANNALS, supra} note 26, at 7, 15–17 (discussing class and
claimants' "individual and conscious choice of participating in the arbitration" while representative features were evident in the fact that claimants' "participation is thereafter limited to a passive participation in the sense that a third party, TFA, represents their interests and makes on their behalf all the decisions relating to the conduct of the proceedings." Representative elements could also be seen in the fact that "[t]he high number of Claimants... makes it impossible for the representative [of the Claimants] to take into account individual interests of individual Claimants, and rather limits the proceedings to the defense of interests common to the entire group of Claimants." The distinction between aggregative and representative procedures could be important to the question of whether Abaclat acts as a form of regulatory arbitration, since the best-known type of regulatory procedures—the U.S.-style class action—is representative in nature. However, non-representative forms of collective redress also exist, both in the United States and elsewhere, and may constitute a form of regulatory litigation or arbitration. The dissent disagreed with the characterization of the proceedings in a variety of ways. For example, the dissent believed the arbitration did not involve aggregated relief because aggregated proceedings do not involve a "change or alteration of the procedure followed to handle these claims other than as normal individual claims." Instead, claims in aggregated proceedings are consolidated only during the pre-trial period and are subsequently separated for individual hearings. Representative proceedings, on the
in the final analysis, only one claim, albeit with many, or even a mass of claims. The tribunal deals thus with one claim and can examine every aspect of it specifically, through adversarial debate and scrutiny that guarantees to the parties, particularly the respondent, all their due process rights.61

The dissent disputed whether the claims acquired any characteristics typical of representative relief because the dissent believed that the claims were not homogenous in nature.62 This was an issue of contention between the majority and the dissent, since the majority found that the claims were sufficiently homogenous by distinguishing treaty claims from contract claims, holding that the former—which were the claims at issue in the arbitration—to be the same or substantially the same for all claimants.63

The issue of homogeneity is not only important to the determination of whether the claims were aggregative or representative, it may also be relevant to the question of whether the majority’s decision to allow the claims to go forward jointly was based solely on the grounds of efficiency.64 Certainly the majority enunciated a number of efficiency-oriented concerns in its award. For example, the majority stated that forcing Argentina “to face 60,000 proceedings would be a much bigger challenge to Argentina’s effective defense rights than a mere limitation of its right to individual treatment of homogenous claims in the present proceedings.”65 The majority also indicated that

not only would it be cost prohibitive for many Claimants to file individual claims but it would also be practically impossible for ICSID to deal separately with 60,000 individual arbitrations. Thus, the rejection of the admissibility of the present claims may equal a denial of justice. This would be shocking given that the investment at stake is protected under the BIT, which expressly

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61. Abaclat, ICSID Case No. ARB/07/5, ¶ 134–35 (Abi-Saab, dissenting); see also Hensler, supra note 53, at 14 (discussing procedure for representative class actions).
62. See Abaclat, ICSID Case No. ARB/07/5, ¶ 139–45 (Abi-Saab, dissenting) (discussing non-homogeneity of claims). Thus the dissent stated that

the majority award sets aside all the specificities of the claims concerning the security entitlements (price, date of purchase, place of purchase, in which currency, applicable law, chosen forum, etc.) as characteristics relevant only to the contractual rights of their holders, i.e., to contract claims; while what counts here, according to the majority award, are the treaty claims, which are homogenous . . . . But . . . how can the Tribunal for example evaluate a treaty claim for compensating damages caused to an asset, without knowing (or while making abstraction of) the time the asset was acquired, the price paid for it and the currency of denomination?

Id. ¶¶ 142–44.
64. The extent to which the award reflects efficiency and other non-regulatory concerns is discussed by the author elsewhere. See Strong, Abaclat, supra note 8 (manuscript at 9–15) (discussing rationales supporting large-scale arbitration).
65. Abaclat, ICSID Case No. ARB/07/5, ¶ 545.
provides for ICSID jurisdiction and arbitration.66

As a result of these factors, the large number of claimants "makes it de facto impossible to deal with all them seriatim," thus requiring mass proceedings in the minds of the majority.67

Although "procedural efficiency has been increasingly advocated by scholarly writers and taken into account in practice by arbitral tribunals and courts" on the grounds that parties intend their arbitration to proceed in a manner that is efficient, there is still no presumption in arbitration that parties have agreed to create the single most efficient procedure possible.68 Therefore, efficiency, standing alone, would not be sufficient to justify the use of large-scale litigation techniques in Abaclat. However, class and collective redress can be used not only as a means of promoting efficiency but also as a means of promoting certain regulatory ends.69 Thus, it is necessary to identify the constituent elements of regulatory litigation and arbitration so as to determine whether Abaclat falls within any sort of permissible regulatory paradigm.

II. REGULATORY LITIGATION

A. Regulatory Litigation Defined

The author has recently analyzed regulatory litigation in depth in a companion article, so the current discussion will move swiftly through the basic parameters of the device rather than rehearsing the entirety of the debate about the propriety of the device as a general proposition.70 Although several different types of regulatory litigation exist,71 the version that is at issue here involves situations where private individuals fill certain gaps in the relevant regulatory regime by using a "legal remedy or the settlement equivalent in order to influence future, risk-producing behaviors."72 While some question exists as to whether class relief, standing alone, qualifies as a remedy sufficient to satisfy this standard, the combination of large-scale legal relief with other elements typical of

66. Id. ¶ 537; see also Ilija Mitrev Penusliski, A Dispute Systems Design Diagnosis of ICSID, in THE BACKLASH AGAINST INVESTMENT ARBITRATION 507, 524–26 (Michael Waibel et al. eds., 2010) (outlining average costs of an ICSID arbitration).
67. Abaclat, ICSID Case No. ARB/07/5, ¶ 665.
69. See MULHERON, supra note 7, at 63–66 (distinguishing regulatory from non-regulatory class relief); Strong, Regulatory Litigation, supra note 25 (manuscript at 59) (discussing various rationales supporting the use of regulatory litigation).
70. See generally Strong, Regulatory Litigation, supra note 25 (setting forth a detailed analysis of regulatory litigation).
71. See Buxbaum, Securities, supra note 29, at 41–67 (discussing transnational regulatory litigation in the securities field); Hannah L. Buxbaum, Transnational Regulatory Litigation, 46 VA. J. INT’L L. 251, 257–72 (2006) [hereinafter Buxbaum, Transnational] (discussing transnational regulatory litigation in various economic contexts); Bayer, supra note 22 (discussing regulatory litigation involving public actors); Luff, supra note 21, at 113–14 (distinguishing top-down from bottom-up regulatory litigation); Meyer, supra note 22 (discussing regulatory litigation involving public actors).
72. Luff, supra note 21, at 113; see also Buxbaum, Securities, supra note 29, at 75.
U.S. class actions and the traditional types of legal remedies (damages, injunctive relief, and declaratory relief) satisfies the requirement of a legal remedy under this test.73

Private forms of regulatory litigation are admittedly controversial, both inside and outside the United States,74 since they fly in the face of the “received tradition” that “the lawsuit is a vehicle for settling disputes between private parties about private rights.”75 Regulatory litigation also challenges the notion that “regulatory gaps” constitute “policy decisions on the part of agencies and the legislature” and that “decisions on the appropriate scope of regulatory protection” should “be left to these politically accountable actors.”76

Although these concerns have considerable support within the legal community, proponents of regulatory litigation take the view that private forms of regulation are necessary as a means of addressing risks that cannot be anticipated in advance and that therefore cannot be addressed legislatively or administratively.77 Thus, it has been said that “[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.”78

Regulatory litigation does not attempt to replace or contradict more formal means of regulation.79 Instead, regulatory litigation supplements traditional forms of regulation in certain limited circumstances as a function of need.80 Therefore, when determining

73. See DAN B. DOBBs, LAW OF REMEDIES 337–41 (2d ed. 1993) (discussing class relief); Strong, Regulatory Litigation, supra note 25 (manuscript at 28) (analyzing use of class procedures as a remedial measure); Nagareda, supra note 23, at 2–3 (discussing how background principles of U.S. law increase regulatory effect of class actions).
74. See Luff, supra note 21, at 113 (noting that bottom-up regulatory litigation is especially controversial).
76. Luff, supra note 21, at 113.
77. See id. at 75 (noting regulatory litigation focuses on “latent social risk”). The problems of unanticipated regulatory issues are readily apparent in the context of the recent financial crisis. For example, as one commentator noted in a discussion about the propriety of creating more federal agencies to regulate the financial sector:

Identifying unanticipated risk is hard and there is no reason to think that the same busy federal officials, who apparently overlooked these risks in 2006 and 2007, will become more prescient simply because they serve together on an elite Council. The presence of the one independent expert is helpful, but there was no lack of experts in the late 2000s who warned of an impending financial collapse. There were also some savvy investors and economists who anticipated the collapse, but the financial regulators and the US intelligence community apparently took no notice of that.

78. Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 339 (1980) (noting also that “[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device”).
79. See Glover, supra note 20, at 1137 (stating that private regulatory litigation and the mechanisms that enable it are not fundamentally at odds with a public law regime).
80. See id. (explaining that private litigation is an integral part of the modern administrative state); Strong, De-Americanization, supra note 43, at 502 (noting that states may allow large-scale, potentially
whether regulatory litigation is appropriate in any particular circumstance, commentators specifically consider issues such as the availability of other methods of behavior modification, the likelihood of industry regulation, and the effect a class suit is likely to have on actual or potential defendants.\(^8\)

Framing regulatory litigation as a risk regulator allows use of a three-prong test to ascertain whether a particular remedy (including remedies involving large-scale litigation techniques or the settlement equivalent)\(^8\) behaves in a regulatory manner.\(^8\) This test requires the presence of: (1) intent, meaning “not only the desire to influence behavior as the conscious object of the one who would regulate, but also the desire to prevent some future, risk-producing behavior;” (2) a pre-existing substantive norm which is to be enforced by “the litigant, the judge, or the two acting in concert,” who “intend to produce some action on the part of the target of regulation because of the risk (and the litigant’s or judge’s apprehension of the risk) that the target actor’s future behavior will fall short of the relevant norm;” and (3) a rule, typically in the form of a remedy, “that expresses the norm to the world and attempts to limit the threats (risk) to that norm.”\(^8\)

Each of these elements is subject to further definition and debate.\(^8\) One key area of disagreement relates to whether a conscious intent to regulate is necessary or whether a regulatory effect is sufficient.\(^8\) Other differences of opinion arise over the necessary extent of the regulatory effect, with some commentators suggesting that the effect must be felt by an entire industry while others believe that only the individual defendant needs to be affected.\(^8\) Some of these issues can become quite important in cases where regulatory litigation techniques are brought into the arbitral realm.\(^8\)

B. Transnational Regulatory Litigation

U.S.-trained lawyers tend to accept the principles of regulatory litigation more readily than lawyers from other jurisdictions, since the concept of litigation-as-regulation regulatory claims to be brought only in limited subject matter areas); Strong, Regulatory Litigation, supra note 25 (explaining that litigation is a necessary form of regulation in certain legal systems). “Need” was specifically mentioned as a rationale for mass proceedings in Abaclat. See Abaclat (formerly Beccara) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 484 (Aug. 4, 2011), available at http://italaw.com/sites/default/files/case-documents/ita0236.pdf (citing “need” as a rationale for mass proceedings).

81. These queries help determine whether the regulatory gap is intentional or unintentional. See MULHERON, supra note 7, at 248–52 (discussing the possibility of unintended regulatory effects). Other criteria can also be used, though they are not discussed herein. See Glover, supra note 20, at 1153–55 (discussing other circumstances where regulatory litigation might be appropriate); Strong, Regulatory Litigation, supra note 25 (manuscript at 54) (discussing various instances where regulatory litigation might be necessary).

82. See Hensler, supra note 53, at 19–20 (noting that most large-scale disputes settle, regardless of whether they are brought as a representative or aggregative action).

83. See Luff, supra note 21, at 113–14.

84. Id.

85. See Strong, Regulatory Litigation, supra note 25 (manuscript at 28).

86. See id. (defining intent as the desire to prevent or influence future behavior); see also infra notes 288–324 and accompanying text (discussing the definition of regulatory intent).

87. See Luff, supra note 21 (discussing scope of regulatory effect); see also MULHERON, supra note 7, at 64; Strong, Canada, supra note 30, at 967–70; Strong, Regulatory Litigation, supra note 25.

88. See infra notes 288–324 and accompanying text (discussing intent in arbitral context).
is so deeply embedded in the American legal psyche. However, even those who are comfortable with the use of regulatory litigation in domestic legal systems recognize the significant problems that can arise when the mechanism is brought into the international arena.

Debates about the propriety of regulatory litigation in the domestic context focus on issues of institutional design within a single, closed legal system. While questions may exist about the “efficiency and appropriateness” of regulatory litigation and “whether it is sensible to combine compensation with regulation,” the analysis is limited to the roles, duties, and intentions of a single judiciary, legislature, and executive who work together to provide a sensible and cohesive regulatory regime.

Transnational regulatory litigation, on the other hand, exists in an environment where “no formal political state has authority of a scope commensurate with modern global business.” While traditional means of regulation do exist in the international realm, enacting authorities typically operate only on a sectoral basis and do not (or cannot) always provide an efficient, predictable, and legally enforceable means of regulating the relevant behavior. Furthermore, “[g]lobal regulation typically does not operate on two distinct, vertically separated levels, international and domestic. Rather, it functions through a web of interactions and influences, horizontal, vertical, and diagonal, among a diverse multiplicity of different regimes and actors, resembling nothing so much as a Jackson Pollock painting.”

The absence of a single regulatory body with worldwide authority can lead to a variety of problems in cases involving cross-border harm. For example, lack of coordination between different national systems can result in regulatory gaps (which leads to under-deterrence of the harmful behavior), regulatory duplication (which leads to over-deterrence of what could include socially beneficial behavior), and regulatory inconsistency (which leads to parties being made subject to different obligations under multiple applicable standards). Public regulators can also find it difficult to respond

89. See Luff, supra note 21, at 81 (discussing the prominence of regulatory lawsuits in the U.S.); see also Regulation Through Litigation 22–51 (W. Kip Viscusi ed., 2002) (discussing regulation through litigation using case studies regarding tobacco); ANDREW P. MORRISS ET AL., REGULATION BY LITIGATION 16–35 (2009) (noting the “regulator’s dilemma”).

90. See Strong, Regulatory Litigation, supra note 25 (manuscript at 77) (discussing the combination of public and private regulation in the United States).

91. See Stewart, supra note 15, at 699–703 (describing “the vast increase in” nature of transnational regulation).


93. See Strong, supra note 25, at 699–703 (discussing “the vast increase in” nature of transnational regulation).

94. Id. at 703; see also Kingsbury & Schill, supra note 15, at 10–11 (discussing complexities of global administrative law).

95. This scenario may be most readily seen in the context of antitrust or competition law, in that developing countries without robust antitrust or competition law regimes “may leave anti-competitive conduct entirely unregulated,” thus requiring other countries to step in so as to “ensure better regulation of markets everywhere.” Buxbaum, Transnational, supra note 71, at 261. However, problems with comparative under-regulation can also arise in other fields, such as those involving securities, pharmaceuticals, or the environment. See id. at 261, 263, 310 (explaining problems with under-regulation in various contexts).

96. See id. at 261 (discussing problems with regulatory inconsistency in the international context); Alan Devlin, Antitrust Divergence and the Limits of Economics, 104 NW. U. L. REV. 253, 267–68 (2010) (discussing
rapidly to threats of international legal harm, even though the pace and integrated nature of modern globalized society means that developments in one jurisdiction can have a nearly instantaneous knock-on effect elsewhere in the world.97 Thus, "international regulations, if any, may not come as quickly as the urgency of problems would demand."98 These factors suggest that there may be an even higher need for regulatory litigation in the transnational context than in the national one.99 However, the device still must be properly defined and delimited, a task which can be quite difficult given that international disputes do not arise in a closed legal system governed by a single judicial, legislative, and executive authority.

The structural dissimilarities between the national and international legal orders suggest that it may be inappropriate or impossible to transfer the kind of institutional design analysis that is used in cases involving domestic disputes to issues arising in the international realm.100 However, it is likely that some of the concerns about regulatory litigation that have been enunciated at the national level will be made at the international level as well. For example, questions will doubtless arise as to whether private litigation constitutes an appropriate means of addressing public concerns101 and whether regulatory silence should be construed as an unintended gap or a conscious policy decision on the part of the relevant political actors.102 These matters are discussed elsewhere and will not be addressed herein.103 Instead, the focus of this analysis is on those issues that relate directly to transnational regulatory litigation.104
Some concerns relate to economic matters. Thus, for example, some commentators have suggested that “where the economic markets for particular products are not separable along geographic lines, regulatory efforts too must be directed as a more broadly defined market.”105 Indeed, the failure to coordinate regulatory activity across national boundaries can lead to significant economic ramifications for both individuals and society as a whole.106

Other problems arise as a matter of civil procedure.107 Numerous issues can arise in this regard, including those related to locating a court with jurisdiction over all interested persons, obtaining extraterritorial application of domestic laws, and/or achieving international enforcement of judgments.108 While these difficulties exist in any type of international litigation, they are exacerbated in regulatory litigation given the potential for cross-border regulatory mismatches concerning the propriety of regulatory litigation as a matter of institutional design.109

Cases involving class or collective relief are particularly tricky, since there is often a procedural mismatch in addition to a regulatory one.110 Thus, for example, parties seeking to assert global class actions in U.S. courts have experienced significant problems as a result of U.S. courts’ standard use of opt-out mechanisms, since some countries view opt-out procedures as constitutionally suspect and will not enforce a

105. Buxbaum, Transnational, supra note 71, at 260; see id. at 297-305; see also Nagareda, supra note 23, at 13 (explaining that the global economy creates difficulties in dealing with global disputes using domestic courts).


107. Interestingly, this appears to be the most common analytical paradigm for issues relating to transnational regulatory litigation. See supra note 29 (listing sources using this analytical approach).

108. See Buxbaum, Securities, supra note 29, at 18–67 (discussing jurisdictional issues in multinational class actions); Buxbaum, Transnational, supra note 71, at 272–93 (discussing “the application of jurisdictional rules in transnational regulatory cases”); Jodie A. Kirschner, Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritorialism, Sovereignty, and the Alien Tort Statute, 30 BERKELEY J. INT’L L. 259, 260 (2012) (noting the United States is moving away from a broad acceptance of extraterritorial jurisdiction); Nagareda, supra note 23, at 19–41 (discussing these issues in regard to international class actions); Strong, Mass Torts, supra note 39 (discussing jurisdictional issues in the field of mass torts); Marco Ventoruzzo, Like Moths to a Flame? International Securities Litigation After Morrison: Correcting the Supreme Court’s “Transactional Test”, 52 VA. J. INT’T L. 405, 443 (2012) (discussing the current system of international securities litigation and problems that can arise in determining the governing law in international disputes).

109. See Nagareda, supra note 23, at 13 (discussing regulatory mismatches); see also Buxbaum, Transnational, supra note 71, at 297–305 (discussing conflict of laws concerns in transnational regulatory litigation).

110. The increasing availability of class and collective relief in domestic legal systems has increased the likelihood of procedural discrepancies between the way different national systems handle large-scale litigation. See supra note 57 (describing the wide range of approaches to large-scale litigation in different national courts); see also EXTRATERRITORIALITY AND COLLECTIVE REDRESS (Duncan Fairgrieve & Eva Lein eds., 2012).
judgment if a plaintiff did not affirmatively opt into the lawsuit.\textsuperscript{111} Other difficulties arise simply as a matter of size, as when the sheer number of parties makes it impossible to identify a court with jurisdiction over all interested individuals.\textsuperscript{112}

However, the biggest challenges facing transnational regulatory litigation arise as a matter of regulatory law and policy. This is because courts have traditionally "consider[ed] markets separately, and view[ed] their role as protecting conditions only within" their own jurisdiction.\textsuperscript{113} While this approach may be consistent with longstanding jurisprudential principles about the power of the territorial state,\textsuperscript{114} it is problematic in a contemporary legal environment involving highly integrated global markets and internationally fluid societies.\textsuperscript{115}

Some states have shown an increased willingness to consider transnational regulatory litigation so as to avoid problems associated with a rigidly isolationist approach.\textsuperscript{116} However, these efforts create their own unique set of concerns.\textsuperscript{117}

\begin{footnotesize}
\textsuperscript{111} See In re Vivendi Universal, No. 02 Civ. 5571, 2009 WL 855799, at *3 (S.D.N.Y. Mar. 31, 2009) (explaining that France currently does not have class-action litigation or an opt-in policy, and noting concerns about the constitutionality of these procedures); Rachael Mulheron, The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis, 15 COLUM. J. EUR. L. 409, 426-27 (2009) (explaining that "while the opt-out approach is not common in Europe, it has existed in some version for over a decade, and has been adopted with some recent momentum"); Monestier, supra note 29, at 44-45 (discussing Europe's general aversion to U.S.-style class actions); Wasserman, supra note 29, at 332-69 (discussing the preclusive effect of group litigation in European jurisdictions). Although concerns regarding the international enforceability of a class award may seem to relate only to the tail end of a dispute, the issue actually arises very early on, since many U.S. judges take future enforceability into account during certification proceedings and will not allow an international class to go forward if the defendant cannot be assured that any resulting judgment will be given preclusive effect in other jurisdictions. See Monestier, supra note 29, at 7, 10-13, 31 (discussing how issues relating to international enforcement arise); Wasserman, supra note 29, at 379-80 (describing concerns about the res judicata effect of U.S. class judgments outside the United States).

\textsuperscript{112} See Buxbaum, Securities, supra note 29, at 37, 62 (discussing procedural difficulties associated with global class actions); Buxbaum, Transnational, supra note 71, at 268 (discussing issues relating to global class actions).

\textsuperscript{113} Buxbaum, Transnational, supra note 71, at 282; see also Nagareda, supra note 23, at 37 (discussing need for international remedies to global injuries); Stewart, supra note 15, at 697 (discussing issues relating to global regulation). As the Second Circuit stated recently:

\begin{quote}
[F]oreign companies are creatures of other states. They are subject to corporate governance and government regulation at home. They are often engines of their national economies, sustaining employees, pensioners and creditors—and paying taxes . . . . American courts and lawyers [do not] have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them—and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees.
\end{quote}

\textsuperscript{114} See Anne Orford, Jurisdiction Without Territory: From Holy Roman Empire to the Responsibility to Protect, 30 MICH. J. INT'L L. 981, 981-82, 1013 (2009) (noting these views arose in the 16th and 17th centuries).

\textsuperscript{115} See Hensler, Future, supra note 30, at 250-55 (discussing the jurisdictional questions that may arise as global markets more closely integrate); see supra notes 95-96 and accompanying text (referring to the negative consequences and potential issues that may arise if there is a lack of cooperation among different national systems).

\textsuperscript{116} These problems include regulatory gaps, regulatory duplication, and regulatory inconsistency. See Nagareda, supra note 23, at 13 (defining regulatory mismatches); see also infra notes 127-28 and
\end{footnotesize}
For example, national courts attempting to address a global regulatory injury can experience difficulties with respect to the substantive law used to resolve the dispute. In contrast to “[t]ransnational public law litigation[, which] takes place in the domestic courts of a particular country,” and applies “international law norms,” transnational regulatory litigation typically involves domestic courts applying domestic regulatory law “for the benefit of the international community.” This can create considerable tension on the foreign relations front, since the laws in question often involve politically sensitive issues such as those relating to economic policy.

Other problems relate to jurisdiction. For example, some state courts are loathe to relinquish jurisdiction over their own citizens in cases where “the mandatory and regulatory nature” of certain laws give rise to a “particularly strong” national interest in enforcing those laws domestically. Not only will some courts refuse to relinquish jurisdiction over their own nationals, some judges may decline jurisdiction over foreign nationals as an exercise of comity. Although it is technically possible for courts to address issues relating to substantive law by applying different national laws to different subgroups of parties, that process can become so complicated as to destroy the superiority of the class mechanism over other means of resolving the dispute.

accompanying text (discussing problems with transnational regulatory litigation).

117. See Buxbaum, Securities, supra note 29, at 16–18 (referring to the various problems that can arise in international regulatory litigation); Buxbaum, Transnational, supra note 71, at 253–56 (providing an overview of the goals of transnational regulatory litigation); Nagareda, supra note 23, at 2–10 (discussing problems such as “regulatory mismatches”); Strong, Regulatory Litigation, supra note 25 (discussing the possible ramifications of regulatory mismatches).

118. Buxbaum, Transnational, supra note 71, at 257; see id. at 254–55 (discussing the consequences of international regulatory litigation).

119. Id. at 255.

120. See Buxbaum, Securities, supra note 29, at 62 (discussing foreign policy implications of transnational regulatory litigation); Buxbaum, Transnational, supra note 71, at 268–70 (discussing potential problems relating to transnational regulatory litigation).

121. See Buxbaum, Transnational, supra note 71, at 255 (citing examples under U.S. antitrust law, securities law, and the Racketeering Influenced and Corrupt Organizations Act (RICO)). This is assuming that the forum state can find a means of applying national law extraterritorially. National legislatures typically do not intend their laws to have extraterritorial effect, particularly in the politically sensitive realm of regulatory law. See id. at 272, 296–97 (discussing limitations placed on the use of domestic law in international disputes); see also Luft, supra note 21, at 113–14 (discussing the extraterritorial effect of global class actions); Venturuzzo, supra note 108, at 436 (discussing Congress’ creation of the Foreign Trade Antitrust Improvements Act of 1982, which gives U.S. courts jurisdiction over certain conduct affecting domestic markets).

122. Buxbaum, Securities, supra note 29, at 37 (discussing the U.S. interest in enforcing its securities laws); see also Kirschen, supra note 108 (discussing interest in extraterritorial application of domestic law); Stefan Michael Kröll, The “Arbitrability” of Disputes Arising from Commercial Representation, in Arbitrability: International and Comparative Perspectives 317, ¶¶ 16-57 to 16-65 (Loukas A. Mistelis & Stavros L. Breoulakis eds., 2009) (suggesting courts are less inclined to enforce foreign forum arbitration clauses than arbitration agreements because of concerns about the application of mandatory rules of law). For example, U.S. courts may be disinclined to decline jurisdiction on grounds of forum non conveniens in cases where “the claims of U.S. nationals . . . strongly implicate local regulatory interests.” Buxbaum, Securities, supra note 29, at 37–38.

123. See George A. Bermann, U.S. Class Actions and the “Global Class”, 19 KAN. J.L. & PUB. POL’Y 91, 94 (2009) (discussing U.S. courts’ ability to exercise jurisdiction over foreign parties); Monestier, supra note 29, at 71 (discussing European courts’ reluctance to adopt U.S.-style class actions).

124. See FED. R. CIV. P. 23(b)(3) (only permitting class actions if they are superior to other available
Up until this point, most of the practical and academic debate regarding transnational regulatory litigation has focused on problems associated with global class actions filed in U.S. courts. However, the world of large-scale litigation has expanded dramatically in the last ten years, with numerous nations having adopted their own domestic forms of class and collective relief. Some of these jurisdictions appear amenable to taking on the challenges associated with transnational regulatory litigation, particularly after the U.S. Supreme Court curtailed plaintiffs’ ability to bring “foreign-cubed” securities actions in the United States in *Morrison v. National Australia Bank Ltd.* Thus, for example, the Canadian case of *Silver v. Imax Corp.* has been heralded as making “Ontario a new haven for secondary market class actions” involving shareholders from around the world. The Netherlands has also been touted as being capable of addressing “f-cubed” securities actions as well as other global regulatory concerns, based on the Dutch Act on Collective Settlements of 2005, which allows the creation of worldwide classes on an opt-out basis, albeit for settlement purposes only.

methods of adjudication); Buxbaum, *Securities, supra* note 29, at 66–67 (discussing the difficulties that might be present when creating global classes, such as conflicting domestic and foreign laws).

125. See Bermann, *supra* note 123, at 93–101 (outlining various unresolved problems with global class actions); Buxbaum, *Securities, supra* note 29, at 35 (describing concerns regarding global class actions in U.S. courts); Nagareda, *supra* note 23, at 11–12 (discussing regulatory mismatches); Choi & Silberman, *supra* note 29, at 465 (analyzing extraterritoriality issues in global securities class action lawsuits); Dixon, *supra* note 29, at 134 (discussing extraterritorial application of U.S. class action judgments); Monestier, *supra* note 29 (comparing aggregate litigation mechanisms in Europe and the U.S.); Mulheron, Vivendi, *supra* note 29, at 181–82 (discussing issues regarding the extraterritorial application of U.S. class action judgments); Wasserman, *supra* note 29, at 332–69 (providing a comparison of different large-scale litigation techniques and doctrines).

126. See THE ANNALS, *supra* note 26, at 10–11 (discussing 30 different national regimes); see also *supra* note 57 and accompanying text (discussing different forms of large-scale litigation outside the United States).

127. See Morrison v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869, 2888 (2010) (discussing foreign-cubed securities actions). An “f-cubed” (or “foreign-cubed”) action involves “actions in which ‘(1) foreign plaintiffs [are] suing (2) a foreign issuer in an American court for violations of American securities laws based on securities transactions in (3) foreign countries.” *Id.* at 2895 n.11 (Breyer, J., concurring) (citations and emphasis omitted). Commentators have suggested that the United States, which once led the world in policing the worldwide actions of multinational corporations, has retreated from that position in recent years. See Kirschner, *supra* note 108, at 259–263 (noting European jurisdictions are primed to take the lead in policing large-scale international abuses of human rights); Ventoruzzo, *supra* note 108, at 405 (discussing the limitations on extraterritorial application of U.S. law after *Morrison*).


As the number and type of mechanisms capable of providing class and collective redress increase, so too do the difficulties associated with coordinating these various actions internationally. Although public and private actors have both undertaken efforts recently to deal with the difficulties of cross-border coordination, many of the proposed solutions focus more on procedural issues (such as notice and the sharing of evidence) than on regulatory concerns and are, in any event, persuasive rather than binding.

Although there are now a large and ever-increasing number of jurisdictions that are willing and able to address transnational regulatory issues through judicial means, commentators are still concerned about "the role of individual legal regimes in regulating global activity: to cast it in broad terms, concerns that an expansive assertion of jurisdiction by . . . [one nation's] courts plays in other countries as an instrument of regulatory hegemony." This has led some experts to recognize that, "[u]nless and until some mechanism is developed that assures the full participation of other countries in crafting solutions to global economic [and other] misconduct, an aggressive extraterritorial approach to . . . [transnational regulatory concerns] remains problematic."
Because the “variance among state laws governing class procedures and among state substantive laws often . . . renders the class device unable to effectuate private regulation of widespread wrongdoing” across jurisdictional lines,\textsuperscript{135} observers have called for “the creation of new mechanisms, or the modification of existing mechanisms” so as to “sufficiently regulate widespread harm, while also constraining the reach of such mechanisms so as to prevent the exportation of aberrant law.”\textsuperscript{136} A variety of potential solutions have been proposed.

Some experts, particularly those favoring new governance theory, suggest private means of regulation (such as ombudsman schemes, third-party verification, and self-regulation) that would eliminate the need for a single transnational regulator.\textsuperscript{137} While useful in some regards, the various proposals do not provide a comprehensive solution to the problem because they typically need to work in tandem with other regulatory procedures.\textsuperscript{138}

Other commentators focus on state consent as a means of overcoming the procedural and regulatory problems associated with global class or collective actions.\textsuperscript{139} Although this approach can involve litigation in the national courts of one or the other of the parties,\textsuperscript{140} state consent can also result in arbitration, such as that proceeding under the auspices of the Permanent Court of Arbitration (PCA).\textsuperscript{141} Indeed, the PCA already administers a number of mass claims processes that were established through state consent.\textsuperscript{142} Although existing mass claims processes do not resolve all disputes at a
single time, in a single forum, as do the procedures discussed in this Article, parties to a
PCA arbitration can agree to whatever dispute resolution format they choose and
therefore could create new class, mass or collective mechanisms similar to those under
discussion here.\footnote{143} Abaclat can also be seen as constituting a form of large-scale, state-
approved arbitration, although the dissent strongly objected to the notion that Argentina
had consented to any type of mass procedures.\footnote{144}

A third possibility involves proceedings based on the consent of the parties.\footnote{145}
While the consent in question could relate to mediation (leading perhaps to a global
settlement under the Dutch Act on Collective Settlements),\footnote{146} the more common form of
large-scale consent-based dispute resolution is arbitration.\footnote{147}

IV. REGULATORY ARBITRATION

A. Class, Mass, and Collective Arbitration

Arbitration has long been used to resolve a wide variety of large-scale disputes,
including those of a regulatory nature.\textsuperscript{148} While most large-scale arbitrations involve domestic disputes, the procedures are equally suitable for use in international matters.\textsuperscript{149}

There are three types of large-scale arbitrations currently in use. The first arose in the early 1980s in the United States and is known alternatively as “class arbitration,” “class action arbitration,” or “classwide arbitration.”\textsuperscript{150} Although class arbitration has suffered certain setbacks in the United States in the last few years as a result of several recent U.S. Supreme Court decisions, the device remains a viable means of resolving certain types of large-scale disputes, with a number of class arbitrations known to have been filed even after the Supreme Court rulings.\textsuperscript{151} Several other countries, including Canada and Colombia, have contemplated the adoption of class arbitration in domestic disputes.\textsuperscript{152} Over 300 known class arbitrations have been filed since 2003 with one

\textsuperscript{148} Class arbitrations in the United States have resolved claims involving consumer, employment, healthcare, franchising, financial services, commercial, maritime, and antitrust law since the early 1980s. See Keating v. Superior Court, 645 P.2d 1192, 1208–09 (Cal. 1982) (holding that courts had the authority to order classwide arbitration), rev’d on other grounds sub nom., Southland Corp. v. Keating, 465 U.S. 1 (1984); Brief of American Arbitration Association (AAA) as Amicus Curiae in Support of Neither Party at 22–24, Stolt–Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758 (2010) (No. 08-1198) (noting 37% of all class arbitrations administered by the AAA since 2003 involved consumer actions, 34% involved employment actions, 7% involved franchising, 7% involved healthcare, 3% involved financial services, and 11% involved other business-to-business concerns); Class Arbitration Case Docket, supra note 147 (listing class arbitrations since 2003); Carole J. Buckner, Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption, 82 DENV. U. L. REV. 301, 301 (2004) (noting that arbitration is used in various contexts); Edward F. Sherman, Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions, 52 DEPAUL L. REV. 401, 407 (2002) (discussing the use of class actions in different contexts); Strong, De-Americanization, supra note 43, at 525 (noting that class arbitration can be used in a number of subject matter areas).


\textsuperscript{150} See Keating, 645 P.2d at 1209–10 (holding class arbitration an acceptable means of resolving large-scale disputes); Gary Born & Claudio Salas, The United States Supreme Court and Class Arbitration: A Tragedy of Errors, 2012 J. Disp. Resol. 21, 21 (2012) (discussing history of U.S. class arbitration).


\textsuperscript{152} See MANITOBA LAW REFORM COMM’N, MANDATORY ARBITRATION CLAUSES AND CONSUMER CLASS PROCEEDINGS 3–4, 22–23 (April 2008); Valencia v. Bancolombia (Colom. v. Colom.), (Bogotá Chamber of Comm. 2003), digest by Jaramillo for Institute for Transnational Arbitration (ITA), available at kluwerarbitration.com; Kuck & Litt, supra note 9, at 720–23 (discussing Colombia’s use of class arbitration); Strong, Canada, supra note 30, at 961–64 (discussing possible development of class arbitration in Canada);
arbital institution alone, with other disputes being heard ad hoc or under the auspices of other arbitral organizations.\textsuperscript{153}

Procedurally, class arbitration reflects a strong bias toward U.S. conceptions of collective justice, since the device adopts procedures that are largely reminiscent of those used in judicial class actions.\textsuperscript{154} Although judicial and arbitral forms of class relief are not identical,\textsuperscript{155} class arbitration appears to include a regulatory element similar to that found in judicial class actions.\textsuperscript{156} Interestingly, recent efforts by corporate parties to limit or eliminate the class remedy in both litigation and arbitration through the use of arbitration agreements and a concomitant waiver of class relief\textsuperscript{157} may be destined to fail

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\textsuperscript{153} See Class Arbitration Case Docket, supra note 147.

\textsuperscript{154} A few adjustments have been made to take certain arbitration-related concerns into account. See Fed. R. Civ. P. 23 (governing class actions in federal court). See generally Am. Arbitration Ass’n, Supplementary Rules for Class Arbitrations (2003), available at www.adr.org/sp.asp?id=21936 (select “search rules” under “rules & procedures” tab and search for “supplementing rules for class arbitrations”) [hereinafter AAA Supplementary Rules]; JAMS, JAMS Class Action Procedures (2009), available at http://www.jamsadr.com/rules-class-action-procedures/; Strong, De-Americanization, supra note 43, at 494. The similarities between the class arbitration rules and Rule 23 of the Federal Rules of Civil Procedure were intentional, since the drafters of the class rules wanted to provide courts and arbitrators with the opportunity of relying on existing judicial precedents when construing the arbitral rules. See Meredith W. Nissen, Class Action Arbitrations: AAA vs. JAMS: Different Approaches to a New Concept, 11 Disp. Resol. Mag. 19, 19–21 (2005) (discussing the adoption of AAA and JAMS rules on class arbitration). It is unclear whether and to what extent non-rule-based forms of class arbitration (the so-called “hybrid” form of class arbitration, a term that predates Abacha) are still available in the United States. See Buckner, supra note 148 (claiming the hybrid model has been “swept away”).

\textsuperscript{155} Interestingly, class arbitration offers some unique benefits that suggest parties (particularly respondents) should prefer class arbitration to class litigation. A full discussion of these benefits is beyond the scope of this Article, but further reading is available. See Dana H. Freyer & Gregory A. Litt, Desirability of International Class Arbitration, in Contemporary Issues in International Commercial Arbitration and Mediation: The Fordham Papers 171, 171–81 (Arthur W. Rovine ed., 2008) (discussing pros and cons of class arbitration); Hans Smit, Class Actions and Their Waiver in Arbitration, 15 Am. Rev. Int’l’l Arb. 199, 210–12 (2004) (critiquing class arbitration); Strong, Mass Torts, supra note 39 (discussing the benefits of class arbitration); Strong, PCA, supra note 141, at 115–33 (comparing large-scale litigation and arbitration).

\textsuperscript{156} See Strong, Canada, supra note 30, at 969–71 (suggesting that regulatory issues should be considered in the context of class arbitration).

\textsuperscript{157} The conventional wisdom is that corporate parties are routinely using class waivers found in arbitration agreements as a means of eliminating all forms of class relief, although this assertion does not appear to be substantiated by empirical evidence. See Christopher R. Drahozal & Peter B. Rutledge, Contract and Procedure, 94 Marq. L. Rev. 1103, 1139 (2011) (noting many arbitration agreements are silent as to class claims). While the extent to which these waivers are used may be subject to debate, what appears clear is that they are not universally successful, since judges occasionally refuse to enforce the waiver and return the dispute to the courts for possible class proceedings. See In re Am. Express Merchs. Litig., 667 F.3d 204, 218 (2012) (striking class waiver and holding arbitration agreement unenforceable); see also Seidel v. Telus Commun’cns, Inc., [2011] 1 S.C.R. 531 ¶¶ 37, 39 (Binnie, J.) (Can.) (enforcing arbitration only as between parties). Should the enforceability of class waivers become too unpredictable, corporate respondents may wish to make a choice between class litigation and class arbitration. Given the various advantages of class arbitration over class litigation, corporate respondents may decide to insert a provision into the arbitration agreement requiring class claims to be brought in arbitration, as opposed to litigation. See supra note 155 (referencing articles discussing class arbitration and the relative benefits). Corporate respondents could also seek class arbitration through a compromis in cases where a class waiver has led to a potentially debilitating number of individual arbitrations being brought. See Strong, Mass Torts, supra note 39; see also AT&T Mobility LLC v. Concepcion, 131 S. Ct. 154.
in the long run as a result of certain regulatory concerns.\footnote{158}

Class arbitration is not the only type of large-scale arbitral device currently available. In the last few years, a second mechanism has developed: collective arbitration, which involves either aggregative or opt-in representative procedures rather than representative opt-out procedures, as are used in class arbitration.\footnote{159} Collective arbitrations are found in the United States on a trans-substantive basis,\footnote{160} in Spain in consumer actions,\footnote{161} and in Germany in shareholder actions.\footnote{162} Other forms of collective

\begin{footnote}
1740 (2011) (regarding use of class waivers); \textit{AT&T Sues Customers Seeking to Block T-Mobile Deal}, REUTERS, Aug. 17, 2011, http://www.reuters.com/article/2011/08/17/us-tmobile-att-lawsuits-idUSTRE77G59020110817 (discussing AT&T’s surprise when approximately 1000 individual arbitration requests were filed by customers after the U.S. Supreme Court upheld the waiver of class proceedings in their arbitration agreements). Although the concept of a \textit{compromis} at one time seemed impossible because of concerns about the practical feasibility of obtaining a post-dispute agreement to arbitrate on a classwide basis, such agreements now appear possible. \textit{Compare} Carolyn B. Lamm & Jocelyn A. Aqua, \textit{Defining the Party--Who Is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions}, 34 \textit{GEO. WASH. INT’L L. REV.} 711, 717–18 (2002–03) (suggesting post-dispute arbitration agreements are impossible in class disputes), with \textit{Strong, Mass Torts, supra} note 39 (suggesting post-dispute arbitration agreements are possible in class disputes).

158. \textit{See infra} notes 253–62 and accompanying text (discussing regulatory issues in class arbitration).

159. Some courts have allowed collective arbitration of Fair Labor Standards Act (FLSA) claims despite a prohibition of class arbitration under Financial Industry Regulatory Authority (FINRA) Arbitration Rules on the grounds that

\[\text{Although collective and class actions have much in common, there is a critically important difference: collective actions are opt-in actions, i.e., each member of the class must take steps to opt in to the action in order to participate in it, whereas class actions are opt-out actions, i.e., class members automatically participate in a class action unless they take affirmative steps to opt out of the class action. Collective actions bind only similarly situated plaintiffs who have affirmatively consented to join the action.} \]

\textit{Velez v. Perrin Holder & Davenport Capital Corp.}, 769 F. Supp. 2d 445, 446–47 (S.D.N.Y. 2011). Other courts have differentiated between class and collective arbitration on the grounds that

\[\text{[c]lass arbitration and the collective proceeding that the pilots have demanded here are so fundamentally different that} \textit{Stolt-Nielsen} \text{does not dictate the result. In the collective arbitration sought here, unlike in a class arbitration, all of the affected pilots are actual parties. Further, in a class proceeding, common issues need only “predominate” over issues that are unique to individual members; identity of issues is not required. Here, there is only one straightforward question that needs to be answered by the arbitration panel, and its disposition will equally affect each and every pilot. Thus, because the type of proceeding demanded by the pilots is not, like a class proceeding, so fundamentally different from an ordinary arbitration, we cannot, unlike the Supreme Court in} \textit{Stolt-Nielsen}, \text{definitively say that the parties did not agree to it.} \]


160. \textit{See Velez}, 769 F. Supp. 2d at 446–47 (allowing collective arbitration for labor and compensation disputes); \textit{JetBlue Airways Corp.}, 88 A.D.3d at 573–74 (allowing collective arbitration for statutory claims); Hensler, \textit{supra} note 53, at 16 (describing the U.S. class action design features: “standing for private actors to represent a class, trans-substantive application of the procedure, availability of money damages, and an opt-out rather than an opt-in procedure for money damage class actions . . . ”).

161. \textit{See} Real Decreto-ley de 15 de febrero arts. 56–62 (B.O.E. 2008, 231); \textit{see also} Laura Carballo Piñeiro, \textit{Speech at The Hague Institute for the Internationalisation of Law and Netherlands Institute for Advanced Study in the Humanities and Social Sciences Conference on Collective Redress in the Cross-Border}
Finally, a third type of large-scale arbitral proceedings—the “mass” arbitration—appears to be developing in the international investment arena as a result of Abaclat v. Argentine Republic. Although the majority award on jurisdiction indicated that it was too early to determine the precise procedures to be used during the merits phase of the proceeding, the panelists did set forth certain broad guidelines to assist the parties in preparing for the next stage of the arbitration.

For example, the majority noted that “adaptions to hear the present case collectively would concern not that much the object of the examination, but rather (i) the way the Tribunal will conduct such examination, and/or (ii) the way Claimants are represented.” Thus, with regard to the first factor, “the Tribunal would need to implement mechanisms allowing a simplified verification of evidentiary material.”

This simplified process might concern either the depth of examination of a document (e.g., accepting a scanned copy of an ID document instead of an original), or the number of evidentiary documents to be examined, and if so their selection process (i.e., random selection of samples instead of a serial examination of each document).

The second procedural adjustment contemplated by the majority involved the method by which claimants would be represented. Although the power granted by the bondholders to TFA went “beyond the power granted to a normal agent under Rule 18 ICSID Arbitration Rules,” that grant of authority had been “consciously accepted by Claimants in order to benefit from the collective treatment of their claims before an ICSID Tribunal.” Because the claimants had been sufficiently well-informed about the
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consequences of their decision to waive their individual procedural rights, the majority held that there was no difficulty in allowing TFA to act as claimants' representative, at least as a matter of principle.\textsuperscript{171}

Of course, these sorts of procedural changes cannot be made without considering the potential ramifications. In this case, the implications were twofold. First, the majority recognized that it would "not be possible to treat each Claimant as if he/she was alone and certain issues ... will have to be examined collectively, i.e., as a group."\textsuperscript{172} Second, the new mass examination procedures will likely limit certain of Claimants' and Argentina's procedural rights to the extent that Claimants have to waive individual interests in favor of common interests of the entire group of Claimants, while Argentina will not be able to bring arguments in full length and detail concerning the individual situation of each of the Claimants.\textsuperscript{173}

Normally, the parties' procedural rights could not be infringed upon in this way. However, the majority considered the extent and type of limitations on the parties' procedural rights in the context of the dispute as a whole and concluded that in these particular circumstances not only would it be cost prohibitive for many Claimants to file individual claims but it would also be practically impossible for ICSID to deal separately with 60,000 individual arbitrations. Thus, the rejection of the admissibility of the present claims may equal a denial of justice. This would be shocking given that the investment at stake is protected under the BIT, which expressly provides for ICSID jurisdiction and arbitration.\textsuperscript{174}

The majority stated that the only time a group method of examination such as this would be even remotely possible is when "claims raised by a multitude of claimants are to be considered identical or at least sufficiently homogeneous."\textsuperscript{175} The standard contemplated in \textit{Abaclat} is quite high, in that there must be "homogeneous rights of compensation for a homogeneous damage caused to them by potential homogeneous breaches by Argentina of homogeneous obligations provided for in the BIT."\textsuperscript{176}

When it came to specific procedures to be used in the merits hearing, the \textit{Abaclat} majority remained relatively vague, stating that it needed to know more about the facts of

\begin{itemize}
\item at 14 (discussing the different parties who may have legal standing to bring representative litigation); Strong, \textit{De-Americanization}, supra note 43, at 503–04 (noting various jurisdictions permit or require a representative entity to pursue large-scale claims); see also supra note 89 and accompanying text.
\item 171. See \textit{Abaclat}, ICSID Case No. ARB/07/5, ¶ 546; S.I. Strong, \textit{Cross-Border Collective Redress and Individual Participatory Rights: Quo Vadis?} (forthcoming 2013) [hereinafter Strong, \textit{Individual Participatory Rights}] (describing individual participatory rights). The majority noted, however, that Argentina could present arguments about whether informed consent was in fact obtained from various individual claimants during the merits phase of the proceedings. See \textit{Abaclat}, ICSID Case No. ARB/07/5, ¶ 466 (noting the debate about the legitimacy of consent in some individual cases).
\item 172. See \textit{Abaclat}, ICSID Case No. ARB/07/5, ¶ 536.
\item 173. \textit{Id}.
\item 174. \textit{Id}., ¶ 537.
\item 175. \textit{Id}., ¶ 540.
\item 176. \textit{Id}., ¶ 541.
\end{itemize}
the case before it could decide how best to proceed. Therefore, although the award discussed the possibility of a “sampling procedure,” also known as a “bell weather proceeding” or “pilot case procedure,” it is unclear whether such mechanisms will ultimately be used.

What is clear is that the merits hearing will be split into two phases. The tribunal will begin by establishing issues that go to the core of the case and the conditions that need to be met to resolve the claims. This first phase therefore has to identify which issues or conditions are (1) general to all claimants, with the result that such issues or conditions can be established once with regard to all claimants; (2) general to all claimants, but including certain elements that might require the creation of subgroups of claimants, with the result that those elements can perhaps be established through a sampling procedure; and (3) specific to individual claimants, with the result that individual case-by-case analysis will be necessary.

After the tribunal has determined the proper categories of issues or conditions raised by the parties, it will then proceed to the second phase of the merits hearing. This stage will require additional procedural decisions as the tribunal determines how best to address each of the various matters.

B. Regulatory Arbitration in Practice

Given the number of large-scale arbitral proceedings that are now available for use in domestic and international disputes, the question is whether and to what extent any or all of these proceedings constitute a form of “regulatory arbitration.” In disputes properly construed as regulatory, the arbitral process would serve the same purpose as regulatory litigation, acting not as “an ad hoc supplement to public law” but instead as an essential element of a comprehensive regulatory regime.

The idea of regulatory arbitration is not entirely new, since Richard Nagareda suggested as early as 2009 that arbitration might provide “a degree of de facto global governance in civil justice, though conceivably of a less transparent sort” than litigation. However, the idea of arbitration as a means of transnational regulation has only been raised intermittently in the intervening years. This reticence may be due to a number of factors, such as concern about the viability of class arbitration (which has been the primary form of large-scale arbitration up until quite recently) in domestic disputes

177. Id. ¶ 667 (stating that the tribunal should obtain an overview of the merits of the dispute before deciding procedural issues).
178. See id. ¶ 666 (stating the tribunal contemplated the “possibility” of using such proceedings).
179. See id. ¶ 668.
180. See id. (describing procedure to be adopted).
181. See id. ¶ 669 (describing procedure to be adopted).
182. Id. ¶ 668 (stating the second phase is dependent on the result of the first phase).
183. Id.
184. Glover, supra note 20, at 1137; see also Luff, supra note 21, at 113 (noting regulatory litigation fills regulatory gaps).
186. See Hensler, FUTURE, supra note 30 (discussing trends in resolution of large-scale disputes); Strong, Canada, supra note 30, at 978–80 (discussing possible use of arbitration to resolve cross-border class claims).
187. The U.S. Supreme Court issued two key decisions on class arbitration shortly after Nagareda’s article was published. See generally AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (discussing waivers
or the applicability of large-scale arbitral procedures to international matters.\textsuperscript{188} Furthermore, the significant amount of controversy surrounding regulatory litigation in both national and transnational contexts could give parties pause, since it suggests a similar amount of difficulty will arise in situations involving regulatory arbitration.\textsuperscript{189}

In fact, it is highly likely that many of the objections raised in cases involving regulatory litigation will also be brought in cases involving regulatory arbitration.\textsuperscript{190} Those concerns, which focus primarily on issues of institutional design, are addressed by the author in detail elsewhere and above, and will not be repeated herein.\textsuperscript{191} Instead, the focus in this section is on particular problems associated with the use of arbitration as a regulatory device. While the discussion is comprehensive in its scope and includes references to certain matters relating to contract-based arbitration, most of the issues relate to contract- and treaty-based arbitration in equal measure. Some matters unique to investment arbitration are also raised.

1. Concerns Relating to Arbitrability

The first and perhaps most obvious concern is whether the kinds of issues at stake in regulatory arbitration are even arbitrable.\textsuperscript{192} Although most states have become increasingly amenable to arbitration over the last few decades, there are still some public

\textsuperscript{188} Most commentators believe that class and collective arbitration are suitable for international disputes, although there are some contrary views. See \textit{Gary B. Born, International Commercial Arbitration} 1232 (2009) (stating class arbitration appears appropriate in international disputes); Alexander Blumrosen, \textit{The Globalization of American Class Actions: International Enforcement of Class Action Arbitral Awards, in Multiple Party Actions in International Arbitration: Consent, Procedure and Enforcement} 355, 362 (Belinda Macmahon ed., 2009) (suggesting class arbitration is not appropriate in international disputes); Kuck & Litt, \textit{supra} note 9, at 728–36 (discussing the problem of international recognition and enforcement of class arbitrations); Strong, \textit{Canada, supra} note 30, at 941–43 (discussing the possibilities of class arbitration in international disputes); Strong, \textit{De-Americanization, supra} note 43, at 494 (discussing possible spread of class arbitration outside the U.S.); Strong, \textit{Sounds of Silence, supra} note 151, at 1083–91 (discussing international enforceability of class awards).

\textsuperscript{189} See \textit{Luff, supra} note 21, at 113 (discussing difficulties with regulatory litigation in the United States); Scott, \textit{supra note 14}, at 664 (noting that significant questions arise as to the propriety of allowing states to delegate regulatory authority to other actors, including non-state and supranational bodies).

\textsuperscript{190} Such concerns will revolve around issues such as the propriety of allowing private litigants to engage in regulatory behavior through the bringing of legal claims. See generally \textit{Strong, Regulatory Litigation, supra} note 25 (discussing contemporary issues in regulatory litigation); \textit{supra} notes 89–146 (discussing various regulatory concerns in the transnational context).

\textsuperscript{191} \textit{See \textit{Strong, Regulatory Litigation, supra} note 25 (discussing institutional design issues); see also \textit{Luff, supra} note 21, at 101 (discussing regulatory litigation in the larger institutional context); \textit{Glover, supra} note 20, 1141–43 (discussing regulatory litigation design issues); Filippo Valguarnera, \textit{Legal Tradition as an Obstacle: Europe’s Difficult Journey to Class Action}, 10 Global Jurist} 1, 19 (2010) (discussing regulatory issues in the U.S. and European Union).

\textsuperscript{192} This Article uses the terms “arbitrable” and “arbitrability” in their international sense to describe which disputes can be heard in arbitration and which are reserved to the exclusive purview of the courts. See \textit{Krell, supra} note 122, § 16–7 (distinguishing two forms of arbitrability); see also United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, arts. II(1), V(2)(a) (discussing arbitrability in international proceedings).
policy issues that are considered so sensitive that they may only be considered by national courts.193

Traditionally, arbitrability determinations have focused on the subject matter of the dispute.194 In this regard, regulation-by-arbitration should give rise to few, if any, problems, since most areas of law that are subject to regulation have long been considered arbitrable.195 Thus, for example, the quintessential regulatory concern—antitrust or competition law—has been arbitrable for years in both the United States and the European Union, as well as in numerous other jurisdictions.196 Securities disputes, which involve another highly regulated field, are also arbitrable in a number of countries.197 Investment disputes are subject to arbitration pursuant to the terms of numerous investment treaties, agreements, and laws.

However, recent developments in the United States suggest that class, mass, or collective arbitration might be subject to a number of objections based on what could be termed “procedural non-arbitrability.”198 The principle of procedural non-arbitrability would hold that certain procedures—as opposed to certain subject matter areas—are deemed to be only appropriate in litigation, not arbitration.199 The notion of procedural non-arbitrability has not been raised outside the context of class, mass, or collective arbitration because all of the seminal cases on arbitrability arose in the context of bilateral or traditional multiparty disputes and therefore focused exclusively on issues of substantive law.200

The first objection based on procedural non-arbitrability focuses on the parties to the

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193. See LEW ET AL., supra note 68, ¶ 9-2 (referring to “objective arbitrability”).
194. See id.
195. Gary Born has noted that “it is difficult to see what ... non-arbitrability objections could be raised to class arbitrations” in the international context. BORN, supra note 188, at 1232 n.442.
196. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636–37 (1985) (allowing antitrust matter to proceed in arbitration); Case C-126/97, Eco Swiss China Time Ltd. v. Benetton Int’l NV, 1999 E.R. L-3055 (allowing competition law matter to proceed in arbitration); In re Am. Express Merchs. Litig., 667 F.3d 204, 214–15 (2d Cir. 2012) (allowing antitrust claims to be brought in arbitration); BORN, supra note 188, at 781–85 (discussing various regulatory concerns that are amenable to arbitration in the United States and Europe); LEW ET AL., supra note 68, ¶¶ 9-19 to 9-26, 9-42 to 9-47 (discussing arbitrability of regulatory concerns).
197. See BORN, supra note 188, at 799–802 (discussing arbitrability of securities disputes in the United States and Germany).
198. Not all class, mass, or collective proceedings are regulatory. See MULHERON, supra note 7, at 63–66 (distinguishing regulatory class actions from non-regulatory class actions).
199. Up until this point, the principle of arbitrability has been defined as relating solely to subject matter concerns. See LEW ET AL., supra note 68, ¶ 9-2 (discussing “objective arbitrability”). Notably, none of the U.S. Supreme Court cases on class arbitration have raised the issue of arbitrability, possibly because a determination that a particular procedure is non-arbitrable would mean that the issue should be returned to the courts, and the class remedy is not a procedure that the Court wishes to protect. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (discussing use of waivers in class arbitration); Stolt–Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1767 (2010) (discussing arbitration agreements that were silent or ambiguous as to class treatment); Strong, First Principles, supra note 151, at 265 (stating that the Supreme Court intentionally avoided mentioning arbitrability in Stolt–Nielsen because the dispute would have to be returned to court).
200. See LEW ET AL., supra note 68, ¶¶ 9-1 to 9-98 (explaining what types of issues are arbitrable); Strong, First Principles, supra note 151, at 212 (defining traditional multiparty proceedings as involving three to five parties).
dispute. Arbitration is a creature of contract,201 and some commentators have construed regulatory litigation and arbitration as either permitting or requiring an industry-wide deterrent effect that could extend beyond the parties present in the arbitration.202 Under standard principles of arbitral law, arbitral tribunals cannot adjudicate the rights of non-signatories to the arbitration agreement in question.203

This issue was explicitly considered by the U.S. Supreme Court early on in Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.204 The dispute there focused on the argument that claims sounding in antitrust law were not arbitrable for a variety of reasons, including the fact that the disposition of such claims could affect hundreds of thousands, perhaps even millions, of third parties who had not signed the arbitration agreement.205 Although the dissent would have found such an argument persuasive, the majority did not, thus allowing arbitration to be used in a variety of regulatory contexts.206 Similar arguments could be and have been raised in the investment context, although they have been found to be equally availing. This suggests that some states will not experience difficulties regarding regulatory arbitration’s effect on non-signatories, even in cases involving large-scale litigation techniques.

This outcome is not assured in all jurisdictions or with respect to all types of regulatory relief. For example, the Supreme Court of Canada recently considered whether an arbitral tribunal was capable of entering an injunction in an arbitration where that injunction might have an effect on third parties due to the class-oriented nature of the claims in question.207 While the Supreme Court of Canada denied the arbitrability of the injunctive relief in that case based on a narrow interpretation of the statutes in question, courts appear split about whether and to what extent an arbitral tribunal can order injunctive relief in situations involving third party or public rights.208


202. See supra note 87 and accompanying text (defining regulatory effects).

203. See Lew et al., supra note 68, ¶ 7-36 to 7-57 (discussing non-signatories in arbitration).


205. See id. at 636–37 (holding that antitrust claims are arbitrable); id. at 655 (Stevens, J., dissenting) (noting that antitrust claims can affect thousands, perhaps even millions, of people).

206. See id. at 636–37 (allowing antitrust claims to proceed in arbitration).

207. See Seidel v. Telus Commc'n's Inc., [2011] 1 S.C.R. 531, ¶¶ 55, 66, 85, 142, 146 (Can.) (considering the effect of class-type claims in the face of an arbitration agreement); Strong, Canada, supra note 30, at 951–52, 979–80 (discussing possibility of class arbitration in Canada). Injunctions are a key form of regulation, given their forward-looking qualities. See Luff, supra note 21, at 113 (discussing criteria for regulatory litigation); Strong, Regulatory Litigation, supra note 25 (manuscript at 31) (discussing how injunctive relief qualifies as regulatory litigation).

208. See Seidel, 1 S.C.R. 531, ¶¶ 55, 66, 85, 142, 146 (denying arbitrability of injunctive relief in arbitration under specific legislation); Strong, Canada, supra note 30, at 951–52, 979–80 (discussing possibility of class arbitration in Canada). At one point, California had prohibited the arbitration of issues relating to public injunctive relief, but that provision has not survived AT&T Mobility. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (discussing waivers in the context of class arbitration); Kilgore v. Keybank, Nat'l Ass'n, 673 F.3d 947, 963 (9th Cir. 2012) (abrogating the Broughton–Cruz rule), reh'g granted, 697 F.3d 1191 (9th Cir. 2012). This suggests that arbitrators in California now have an expanded ability to engage in regulatory arbitration involving injunctive relief. Notably, investment tribunals have the power to order non-pecuniary relief, including injunctions, although they seldom do so. See Mclachlan et al., supra note 10, at 349.
A second potential problem relating to procedural non-arbitrability arises out of concerns that class, mass, or collective arbitration somehow “changes the nature of arbitration,” either because of the size of the dispute or the complexity of the procedures used to resolve the matter. While every procedure must be analyzed on its own terms, it would appear that this sort of argument is unavailing in the context of U.S. class arbitrations, since the only aspects of class arbitration that are distinguishable from bilateral or traditional multilateral arbitration are (1) the provision of relief on an opt-out representative basis (a situation that will not arise in cases involving mass or collective arbitration) and (2) the underlying policy considerations, which include a heightened regard for access to justice for parties with low-value claims and the creation of a financial disincentive for corporations to engage in risky or socially unacceptable behavior. The second of these policy rationales—creation of a financial disincentive—is obviously deterrent and therefore regulatory. However, neither of these issues appears sufficient to bring class arbitration out of the definition of arbitration per se. Therefore, it cannot be said that the class form of regulatory arbitration “changes the nature of arbitration.”

A third problem relating to procedural non-arbitrability involves questions of consent. There has been a great deal of debate in the United States as to whether class arbitration requires the parties’ express consent to class proceedings or whether implicit consent is sufficient. A similar issue appears to be developing in the investment arena, based on certain statements in and about Abaclat. Setting aside the fact that no other

209. Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1775 (2010); see also AT&T Mobility, 131 S. Ct. at 1751 (citing Stolt-Nielsen); Strong, First Principles, supra note 151, at 201–71 (analyzing whether class arbitration constitutes a type of arbitration).

210. There are significant differences between class, mass, and collective arbitration. See S.I. STRONG, CLASS, MASS AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW (forthcoming 2013); see also supra notes 147–82 and accompanying text.

211. See supra notes 159–160 and accompanying text (explaining that collective arbitrations involve opt-in procedures and class arbitrations involve opt-out procedures).

212. See Strong, First Principles, supra note 151, at 235–41 (discussing policy considerations in class arbitration and traditional multiparty arbitration).

213. Access to justice is often considered to be related more to efficiency concerns than regulatory concerns, although there is some debate on that issue. See Strong, Regulatory Litigation, supra note 25 (manuscript at 9) (analyzing the extent to which large-scale litigation in Europe can be considered regulatory).

214. See Strong, First Principles, supra note 151, at 246–68 (analyzing whether class arbitration constitutes a form of arbitration).


216. The Supreme Court has not reached that question. See Stolt-Nielsen, 130 S. Ct. at 1776 n.10 (“We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration.”); see also Jock v. Sterling Jewelers Inc., 646 F.3d 113, 121 (2d Cir. 2011) (citing Stolt-Nielsen), cert. denied, 132 S. Ct. 1742 (2012); Strong, First Principles, supra note 151, at 253 (noting Supreme Court did not reach this issue).

arbitral procedure requires the parties to demonstrate explicit consent to the procedure,\textsuperscript{218} the important issue from an arbitrability perspective is that a particular matter—or in this case, a procedure—must be considered arbitrable if the parties are capable of expressly consenting to it.\textsuperscript{219} This conclusion derives from the known proposition that issues that are non-arbitrable may not be heard in arbitration, even if the parties expressly consent to such procedures.\textsuperscript{220}

For the last 30 years, every U.S. Supreme Court decision concerning class arbitration has implicitly recognized that class arbitration is entirely permissible in cases of express consent,\textsuperscript{221} which suggests that class arbitration cannot be procedurally non-arbitrable in the United States.\textsuperscript{222} While other legal systems may come to different conclusions about large-scale proceedings under their own national laws,\textsuperscript{223}

\textit{ICC Rules, 2012 SPAIN ARB. REV.—REVISTA DEL CLUB ESPAÑOL DEL ARBITRAJE} 23, 30 (2012) (summarizing the Abaclat decision). It is unclear whether and to what extent decisions such as \textit{Stolt-Nielsen} and \textit{AT&T} can be considered in the investment realm. See \textit{AT&T Mobility LLC v. Concepcion}, 131 S. Ct. 1740, 1755 (2011) (discussing use of waivers of class arbitration); \textit{Stolt-Nielsen}, 130 S. Ct. at 1776 (discussing contractual silence or ambiguity regarding class treatment). Indeed, the majority in Abaclat specifically stated that questions of consent under Article 25 ICSID Convention are subject to principles of international law, and not pursuant to any particular national law. This applies not only with regard to the material content of the consent, i.e., to its substantive validity, but also with regard to its form, i.e., to its formal validity.

\textit{Abaclat}, ICSID Case No. ARB/07/5, ¶ 430 (internal citation omitted). This suggests that private law precedents are irrelevant to the Abaclar analysis of consent, although the dissent discussed both cases. See \textit{Abaclat}, ICSID Case No. ARB/07/5, ¶ 148–53 (Abi-Saab, dissenting) (discussing \textit{Stolt-Nielsen} and \textit{AT&T Mobility}).

\textsuperscript{218} See \textit{Strong, First Principles}, supra note 151, at 247–50 (discussing the dangers of "quasi-arbitration"); it is unclear why such a requirement would exist, unless there was something about class, mass, or collective arbitration that was inherently different than other forms of arbitration, an allegation that does not appear to be true. See \textit{id.} at 269–71 (concluding that class arbitration is not inherently different than other forms of arbitration); see also supra notes 209–14 and accompanying text (discussing charges that class arbitration is fundamentally different than other forms of arbitration).

\textsuperscript{219} See \textit{Strong, First Principles}, supra note 151, at 264–66 (discussing arbitrability in class arbitration).

\textsuperscript{220} This is because arbitrability is an issue of state concern, not party concern. See \textit{LEW ET AL.}, supra note 68, ¶ 9–2 (noting arbitrability affects state interests).

\textsuperscript{221} See \textit{AT&T Mobility}, 131 S. Ct. at 1751–52 (questioning use of representative relief but not restricting it); \textit{Stolt-Nielsen}, 130 S. Ct. at 1763 (explaining that class arbitration is appropriate if a party agreed to do it); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451 (2003) (Breyer, J.) (noting that the claimants had consented to arbitration); Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982) (leaving the issue to the arbitrator), \textit{rev'd on other grounds sub nom.}, Southland Corp. v. Keating, 465 U.S. 1 (1984); \textit{BORN}, supra note 188, at 1232 n.442 (stating that "[i]t is difficult to see what . . . non-arbitrability objections could be raised to class arbitrations"); \textit{Strong, First Principles}, supra note 151, at 250 (noting that the Supreme Court has implicitly held that class arbitration is proper if express consent is present).

\textsuperscript{222} The basis for this conclusion dates back to \textit{Mitsubishi Motors Corp.}, which held that courts agree to allow certain complex claims to go to arbitration pursuant to the parties’ express agreement cannot later claim that those matters are “inherently insusceptible to resolution by arbitration.” \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.}, 473 U.S. 614, 633 (1985); see \textit{Strong, First Principles}, supra note 151, at 250 ("[T]he Supreme Court clearly took the view that class arbitration would be entirely proper if the parties had demonstrated express consent to such procedures.").

\textsuperscript{223} No such suggestion appears to have been made in Canada, Colombia, Germany, or Spain, which are the four countries known to have considered class or collective arbitration. See supra notes 151, 160–61 and accompanying text (noting, however, that collective arbitration in Spain and Germany are limited to certain subject matters). In fact, the German Federal Court of Justice has expressly held that shareholder disputes are arbitrable on a collective basis, if sufficient procedural safeguards exist. See Bundesgerichtshof [BGH] [Federal
there has been no suggestion that parties to an international investment arbitration cannot expressly consent to mass procedures. To the contrary, all signs so far point to the conclusion that express consent would be sufficient to allow mass proceedings in the investment realm.\(^{224}\)

Therefore, it would appear that no problems regarding procedural non-arbitrability exist in the investment arena. Indeed, at least one commentator has suggested that there is nothing about class or collective proceedings in the abstract that suggests they could not be applied to investment disputes.\(^{225}\)

2. Concerns Relating to Party Autonomy

One of the primary problems with transnational regulatory litigation involves the inability to identify a court with jurisdiction over all parties.\(^{226}\) Arbitration provides a useful alternative in this regard because arbitration, as a consent-based mechanism,\(^{227}\) is not bound by national laws regarding jurisdiction.\(^{228}\) The consensual nature of arbitration also allows the parties to exercise a significant amount of autonomy in the way they structure their proceedings.\(^{229}\) This sort of procedural flexibility exists in both contract-based and treaty-based arbitration.\(^{230}\) While these attributes are often painted in a positive light, too much autonomy can create problems in cases where arbitration is being used as a form of regulation.\(^{231}\)

Perhaps the most important autonomy-related concern involves choice of law.

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\(^{224}\) See Cremades, supra note 217, at 31 (suggesting mass procedures would be proper if the parties agreed to them); see also Abaclat (formerly Beccara) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 174–75, 185, 189–90 (Oct. 28, 2011) (Abi-Saab, dissenting), available at http://italaw.com/sites/default/files/case-documents/ita0237.pdf (suggesting mass procedures would be proper if express consent existed).

\(^{225}\) See DIMSEY, supra note 11, at 230 (suggesting that class arbitration could be used in investment disputes).

\(^{226}\) See supra notes 108, 112 and accompanying text (discussing jurisdictional issues in transnational regulatory litigation).

\(^{227}\) See Craig, supra note 201 (noting arbitration is a creature of contract); Stipanowich, supra note 201, at 475 (noting intent is key in arbitration). Consent to large-scale arbitration can be obtained pre-dispute or post-dispute. See Strong, Mass Torts, supra note 39 (manuscript at 41) (discussing post-dispute arbitration agreements). Consent may also be obtained on either an opt-in or opt-out basis, and may be either explicit or implicit. See Strong, De-Americanization, supra note 43, at 537–39 (describing various forms of collective redress); Strong, Sounds of Silence, supra note 151, at 1055–83 (discussing use of implicit consent in class arbitration).

\(^{228}\) See Nagareda, supra note 23, at 32–41 (discussing problems with jurisdiction in transnational regulation); Geneviève Saumier, USA–Canada Class Actions: Trading in Procedural Fairness, 5 GLOBAL JURIST ADVANCES 1, 41–42 (2005) (discussing problems in multi-jurisdictional class actions in Canada); Strong, Mass Torts, supra note 39 (manuscript at 7) (discussing how arbitration can overcome jurisdictional problems).


\(^{230}\) See id. (discussing extent of party autonomy in various types of arbitration).

\(^{231}\) See id. at 873–75 (discussing ramifications of party autonomy).
Arbitration agreements often include substantive choice of law provisions that eliminate or at least minimize problems associated with the extraterritorial application of domestic law and conflict of laws analyses. However, choice of law provisions can also allow parties with greater bargaining power to choose one-sided legal provisions that provide certain benefits to the stronger party as a matter of substance or procedure. While this issue has arisen most frequently in the context of private arbitrations dealing with contracts of adhesion, some commentators have suggested that bilateral investment treaties (BITs) and foreign trade agreements are analogous to contracts of adhesion.

This type of practice is of course highly problematic from a regulatory perspective, since unfettered use of arbitration, combined with a choice of self-serving national law, could allow potential wrongdoers to evade application of certain mandatory principles of law. Thus, a number of commentators have advocated the implementation of mechanisms that would prevent those with "superior economic power" from taking "unilateral control over designing a dispute system for conflicts to which it is a party" and exporting "aberrant law" through the transnational regulatory process. However, other observers take the view that arbitration is already sufficiently well-equipped to handle these types of threats by virtue of the second look doctrine enunciated by the U.S. Supreme Court in Mitsubishi.

While private forms of arbitration clearly benefit from the second look doctrine, the situation is somewhat more complicated in investment arbitration, given the wide variety of investment vehicles currently in place and the complex interaction between parties with greater bargaining power to choose one-sided legal provisions that provide certain benefits to the stronger party as a matter of substance or procedure. While this issue has arisen most frequently in the context of private arbitrations dealing with contracts of adhesion, some commentators have suggested that bilateral investment treaties (BITs) and foreign trade agreements are analogous to contracts of adhesion.

232. See Nagareda, supra note 23, at 50–51 (discussing use of choice of law provisions); Strong, Mass Torts, supra note 39 (manuscript at 40) (discussing how arbitration can avoid certain problems associated with choice of law concerns).

233. See Glover, supra note 20, at 1211 (noting that party autonomy can lead to abuse); Nagareda, supra note 23, at 50–51 (discussing potential problems associated with party autonomy).


235. See Alvarez, supra note 17, at 26–27 (comparing various treaties to contracts of adhesion).

236. See Andrea K. Bjorklund, Mandatory Rules of Law and Investment Arbitration, 18 AM. REV. INT’L ARB. 175, 177 (2007) (discussing mandatory law in the context of investment arbitration); Kröll, supra note 122, ¶ 16-10 to 16-14, 16-18 to 16-20 (discussing use of mandatory law to protect commercial agents).


238. Glover, supra note 20, at 1211.

239. See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985) (defining the second look doctrine); Kröll, supra note 122, ¶ 16-10 to 16-14, 16-18 to 16-20. In fact, some commentators take the view that arbitration handles issues relating to choice of law concerns better than litigation because arbitral tribunals are often able to apply the mandatory laws of a state other than that chosen by the party to govern the dispute. See id.; see also BORN, supra note 188, at 796–97 (discussing the second look doctrine). These experts suggest that courts are less likely to enforce foreign forum-selection clauses because foreign courts are often perceived as less able or less inclined to apply mandatory principles of substantive law other than that of the forum court. See Kröll, supra note 122, ¶ 16-57 to 16-65 (noting relative enforcement of arbitration agreements and forum selection clauses).
international and domestic norms. In some cases, the parties can choose to have national law (most likely that of the respondent state) or general principles of law apply, while in other cases the substantive law will be reflected in the governing treaty.

While there are times when an award arising out of an investment arbitration will be subject to enforcement proceedings in a national court (and thus made subject to the second look doctrine), there are other times when an investment award will only be subject to treaty-based annulment proceedings. While this issue is not fatal to the development of regulatory arbitration in the investment arena, it is a matter that bears further consideration as a policy matter. A second, equally important issue relating to personal autonomy involves whether and to what extent private parties can limit or eliminate the availability of class, mass, or collective procedures through contractual or treaty-based mechanisms requiring bilateral arbitration. This is something of a novel issue, since parties have never attempted to affect the ability to proceed as a class or collective in private law matters outside the context of arbitration and the issue has never been raised in the public international sphere.

Up until this point, most of the analysis regarding class waivers has been formulated

240. See Bjorklund, supra note 236, at 176 (discussing availability of second look doctrine in investment arbitration); see also infra note 271 (discussing the number of bilateral and multilateral investment treaties currently in place).

241. See LEW ET AL., supra note 68, ¶¶ 28-81 to 28-84 (discussing choice of law issues in international arbitration); see also McLACHLAN ET AL., supra note 10, at 66 (discussing the rules of treaty interpretation).

242. See LEW ET AL., supra note 68, ¶¶ 28-92 to 28-97 (discussing enforcement in investment arbitration); Bjorklund, supra note 236 (noting some, but not all, investment awards will be subject to enforcement in domestic courts).

243. Detailed analysis of this issue is beyond the scope of this Article, though related matters are discussed elsewhere. See Bjorklund, supra note 236, at 203 (noting that choice of law provisions in international treaties involve domestic and international norms with “little direction as to how the two interact”).

244. Limitations to the availability of large-scale arbitration can arise as a matter of contract interpretation, as would occur if express consent were said to be required in cases of class arbitration. However, the U.S. Supreme Court has not yet reached that question. See Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1776 n.10 (2010) (“We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration.”); see also Jock v. Sterling Jewelers Inc., 646 F.3d 113, 121 (2d Cir. 2011), cert. denied, 132 S. Ct. 1742 (2012) (noting Supreme Court has not reached that question); Strong, First Principles, supra note 151, at 253 (noting Supreme Court has not addressed this issue).

245. AT&T upheld a contractual waiver of class procedures. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747–53 (2011) (discussing use of waivers of class treatment). However, other courts have struck class waivers on other grounds, such as public policy or procedural unconscionability. See Coneff v. AT&T Corp., 673 F.3d 1155, 1161–62 (9th Cir. 2012) (striking waiver of class treatment); In re Am. Express Merchs. Litig., 634 F.3d 187 (2d Cir. 2011), denying reh’g en banc, 667 F.3d 204, 214, 218 (2012) (stating “what Stolt-Nielsen and Concepcion do not do is require that all class-action waivers be deemed per se enforceable” and holding that “as the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable”).

246. See Smit, supra note 155, at 203 (noting waivers of class treatment have only been discussed in the context of arbitration). As a general rule, remedy-stripping provisions are strongly disfavored as a matter of public policy, even if they are embedded within an arbitration agreement. See David S. Schwartz, Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles, 38 U.S.F. L. REV. 49, 53–56 (2003) (discussing exculpatory clauses). However, other regulatory devices—such as the right to punitive damages—can be waived without regard to their effect on regulatory principles. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 58 (1995) (noting arbitrators are empowered to award or withhold punitive damages, according to the contract); see also Strong, Regulatory Litigation, supra note 25 (manuscript at 31–32) (discussing role of punitive and treble damages in regulatory litigation).
in the United States in individualistic terms that mirror the kind of analysis used to consider the waiver of matters such as trial by jury, judicial discovery, or judicial appeal.\textsuperscript{247} No one disputes the fact that private individuals are entitled to waive these sorts of individual procedural rights in both arbitration and litigation.\textsuperscript{248} However, regulatory litigation and arbitration could be seen as involving certain public rights and benefits that may not be amenable to waiver by a single person acting alone,\textsuperscript{249} and framing the discussion in individualistic terms could obscure certain important public benefits associated with class, mass, and collective relief.\textsuperscript{250} This can be highly problematic, since some of these public benefits may be important from a regulatory perspective.\textsuperscript{251} A full analysis of whether and to what extent individuals can or should be allowed to waive the ability to proceed as a class or collective as a matter of private contract or public international law is beyond the scope of this Article.\textsuperscript{252} Nevertheless, it is possible to identify the potential ramifications associated with restrictions on the ability to engage in regulatory litigation or arbitration.

First, the widespread elimination of the right to proceed as a class or collective\textsuperscript{253}
could lead to public actors being required to increase the amount of public enforcement of various laws at a rate equal to the amount of private enforcement that has been lost through elimination of private means of enforcement of public laws. This alternative comes with a potentially significant financial cost, since public entities that engage in regulatory litigation will need more resources to keep pace with higher levels of expected performance.\textsuperscript{254} If class proceedings are analyzed on an individual, case-by-case basis, this additional burden on public agencies may seem insignificant. If, however, the use of class waivers becomes routine, either generally or within a specific industry, then the cost of replacing private enforcement with public enforcement could be substantial.\textsuperscript{255} Furthermore, because public actors may not be as effective as private actors in regulating some types of behavior, additional expenditures may be needed in order to bring public entities up to the necessary standard of competence.\textsuperscript{256}

Second, eliminating the ability to proceed as a class or collective could lead to public actors being expected to fill the gap left by the departure of private regulators, but without any additional resources being provided to the relevant agencies. This scenario would likely lead to under-deterrence, since public bodies cannot be expected to achieve more results with the same resources they had previously.\textsuperscript{257} Although public agencies in both the United States\textsuperscript{258} and Europe\textsuperscript{259} have often had to make do with very little in the way of resources, shortages in public funding may increase as the global economy works its way out of the recent financial crisis.
Third, eliminating the ability to proceed as a class or collective could lead to legislative or administrative bodies increasing regulation ex ante so as to eliminate the need for regulatory litigation ex post. 260 While the regulations in question could simply reflect more and more detailed provisions of the same types that are now in place, the changes could also be different in kind. 261 Thus, for example, private regulatory remedies relating to mass torts could be replaced by criminal liability for individual and corporate tortfeasors. 262 Alternatively, private damages for mass torts could be replaced with a social insurance scheme that eliminates the need for wrongdoers to pay compensatory damages. 263

Fourth, eliminating the right to proceed as a class or collective could inspire legislators to act to reinstate private forms of relief, effectively superseding any judicial decisions permitting private waiver of class or other types of regulatory remedies. 264 This kind of iterative process wherein the legislature and judiciary mutually monitor each other’s actions is quite common in cases involving regulatory litigation, and similar behavior can be expected in the realm of regulatory arbitration as well. 265 Indeed, legislative efforts have already been proposed in the United States in the wake of the

260. See Burch, supra note 24, at 70–77, 128 (discussing differences between ex ante and ex post regulation); Luff, supra note 21, at 113–14 (discussing how regulatory litigation acts as ex post regulation).

261. See Burch, supra note 24, at 70–77, 128 (discussing how elimination of class actions could lead to new types of regulation ex post); Strong, Canada, supra note 30, at 980 (discussing consequences of elimination of class relief).

262. See Richard A. Nagareda, Outrageous Fortune and the Criminalization of Mass Torts, 96 MICH. L. REV. 1121, 1197–98 (1998) (noting one way to address product liability concerns would be to criminalize illegal behavior); Frank J. Vandall, The Criminalization of Products Liability: An Invitation to Political Abuse, Preemption, and Non-Enforcement, 57 CATH. U. L. REV. 341, 342 (2008) (discussing a proposal to criminalize some product liability torts); Byron G. Stier, PIP Breast Implants and Mass Torts in Europe, MASS TORT LITIG. BLOG (Jan. 30, 2012), http://lawprofessors.typepad.com/mass_tort_litigation/2012/01/PIP-breast-implants-and-mass-torts-in-europe.html (describing the traditional European approach as “more reliant on criminal law than tort for deterrence, compensatory damages are limited because of the comparatively extensive governmental social insurance, punitive damages are unavailable, and class actions are traditionally not embraced”).

263. This approach is common not only in Europe, but also in New Zealand. See Burch, supra note 24, at 70–77, 128 (noting elimination of regulatory litigation requires a replacement mechanism); Jules L. Coleman, Mistakes, Misunderstandings, and Misalignments, 121 YALE L.J. ONLINE 541, 564 (2012), available at http://yalelawjournal.org/the-yale-law-journal-pocket-part/tort-law/mistakes-misunderstandings-and-misalignments/ (discussing New Zealand’s approach to tort law); Stier, supra note 262 (discussing European approach to various types of wrongdoing).

264. See Greenberg, supra note 75, at 585–86 (discussing legislative and judicial give-and-take regarding class relief); Strong, Regulatory Litigation, supra note 25 (manuscript at 39) (discussing legislative overrides when the political branches “believe courts have overstepped” their bounds); Ventoruzzo, supra note 108, at 439 (discussing legislative responses to judicial decisions).

265. See Greenberg, supra note 75, at 585–86 (discussing legislative and judicial give-and-take concerning class relief); Strong, Regulatory Litigation, supra note 25 (manuscript at 39) (discussing how elected branches of government can override courts even on procedural matters); Ventoruzzo, supra note 108, at 439 (discussing legislative reversal of various Supreme Court decisions).

266. While some commentators believe that it is more likely that legislatures will act to limit the breadth of class or collective relief, there have been situations where legislative actors have stepped in to correct situations where the courts have improperly restricted the availability or use of regulatory litigation. See Greenberg, supra note 75, at 585–86 (citing employment discrimination cases); Strong, Regulatory Litigation, supra note 25 (manuscript at 36) (discussing situations where the legislature has re-established broad relief in the courts following judicial curtailment).
Supreme Court decision in *AT&T Mobility LLC v. Concepcion*.267

Given these potentially undesirable alternatives, potential respondents may find regulatory litigation and arbitration to be more palatable than they might initially have thought.268 Indeed, these kinds of analyses demonstrate the importance of considering regulatory litigation and arbitration as matter of institutional design rather than simply evaluating such mechanisms on an individualistic procedural level.269

V. REGULATORY ARBITRATION IN THE INVESTMENT CONTEXT

Before considering the extent to which *Abaclat v. Argentine Republic* constitutes a form of regulatory arbitration, it is necessary to describe briefly the current debate regarding the extent to which the international investment regime constitutes a form of global regulation.270 Differences of opinion appear to exist at both the practical and theoretical levels.

Practically speaking, there seems to be some disagreement about the extent to which international investment agreements are substantively similar. While commentators universally agree that there is a significant number of instruments concerning international investment,271 people frame the content of these instruments differently. For example, some observers claim that the various treaties share “a surprising pattern of common features,” suggesting that “a common law of investment protection” is in the process of developing.272 Other experts believe that “there is so much divergence in the

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268. See Burch, supra note 24, at 70–77, 128 (naming elimination of class relief may lead to increased regulation through other means); Strong, Canada, supra note 30, at 980 (discussing the potential ramifications of a widespread limitation on class relief).


271. Most commentators put the number of bilateral and multilateral agreements between 2600 and 3000. See Alvarez, supra note 17, at 17 (estimating numbers of investment treaties); Born, supra note 229, at 844 (discussing scope of investment treaties); see also McLachlan et al., supra note 10, at 5 (describing the field of international investment arbitration as a “patchwork quilt of interlocking but separate bilateral treaties”); Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. FOREIGN INVESTMENT L.J. 232, 236 (1995) (putting the number of investment treaties at 5000). In addition to bilateral investment treaties (BITs), investment arbitration involves multilateral investment treaties (MITs), investment protection agreements (IPAs), foreign investment laws, and free trade agreements (FTAs). See McLachlan et al., supra note 10, at 25–43 (discussing various instruments prevalent in investment realm). See generally Lucy Reed et al., *Guide to ICSID Arbitration* (2010) (detailing the investment regime); Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001) (outlining the international investment regime).

272. McLachlan et al., supra note 10, at 5, 18; see also Alvarez, supra note 17, at 41–45 (discussing similarities of investment treaties); Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto
standards in bilateral investment treaties that it is premature to conclude that they give rise to any significant rule of international law." While this Article does not focus on issues of substantive concern and therefore will not delve further into this debate, the amount of similarity between the various treaties and international agreements is relevant to this discussion to the extent that such similarities affect (1) determinations about the extent to which international investment law constitutes an independent regulatory regime and (2) considerations regarding the viability of multinational class, mass, or collective proceedings.

Differences of opinion also exist at a theoretical level. Some commentators espouse what has been called the "liberal internationalist" view of investment law, which holds that "investment arbitration should be treated as a unique, internationally-organized strand of the administrative law systems of states" because "[t]he subject matter of investment arbitration is a regulatory dispute arising between the state (acting in a public capacity) and an individual who is subject to the exercise of public authority by the state." This conclusion appears to be supported by the fact that "the regime of investment arbitration [is] established by a sovereign act of the state" as well as by the fact that investment arbitration is "designed to resolve disputes arising from the exercise of public authority." Under the liberal internationalist view, the underlying purpose of international investment law is... to provide a global regulatory environment favourable to investors—that "the system of international investment arbitration... has been set up as one of the major new tools in improving good governance in the global economy." From this


274. Compare Chalamish, supra note 272 (suggesting most BITs reflect "an international consensus on dispute settlement norms, ... and attempt[ ] to create an international jurisprudence for international investment law, notwithstanding that such jurisprudence is developed by numerous ad hoc international tribunals. This analysis reinforces the view that the substance of the treaties, along with their lack of differentiation and competitiveness, strengthens BITs' role as an investment regulatory regime on a multilateral, not just a bilateral, level" (citation omitted)), with Leon E. Trakman, Foreign Direct Investment: Hazard or Opportunity?, 41 GEO. WASH. INT'L L. REV. 1, 22 (2009) (noting various differences between BITs and free trade agreements (FTAs), both with respect to substantive and dispute resolution).

275. Commentators who see a high degree of substantive or procedural similarity between the various investment treaties may perceive few problems in constructing multinational classes or collectives in investment arbitration. See DIMSEY, supra note 11, at 207 (noting similarities in investment treaties could support multinational classes in large-scale investment arbitration). The principle is the same as in private arbitration, in that multiparty procedures may be considered appropriate if the underlying arbitration agreements are sufficiently similar as a procedural matter and implicit consent to such treatment exists. See Strong, First Principles, supra note 151, at 251–54 (discussing consent in class arbitration); Strong, Sounds of Silence, supra note 151, at 1062–63 (discussing method of identifying implicit consent in class arbitration). While Abacat did not address this issue, since all members of the claimant group were of the same nationality, these sorts of concerns may be important in future cases involving mass investment arbitration. See Abacat, ICSID Case No. ARB/07/5, ¶ 513 (suggesting "claims are proper and manageable" in part because "[c]laimants are from a single jurisdiction").


277. Id.
international investment law may be characterized as public law, serving private interests. It is a development of international public law, because it is a universal regime focused on regulating the exercise of state powers. But it serves private interests, because its principal goal is to liberate investors from state regulatory control, and maximize the freedom of global capital movements.\(^{278}\)

The fact that “most regulatory disputes are adjudicated by domestic courts in accordance with domestic law, or by a specialized domestic tribunal subject to supervision by domestic courts,” is not problematic for those adhering to the liberal internationalist perspective because “the general consent authorizes the adjudication of regulatory disputes by an international tribunal.”\(^{279}\) Thus, people adopting this view say that the investment regime requires (or shortly will require) “a system of compulsory arbitration against States for all matters relating to international investments, at the initiative of the private actors of international economic relations.”\(^{280}\)

This approach to investment arbitration is fiercely opposed by persons espousing the “sovereigntist” perspective, which “doubt[s] the inherent desirability of free global markets and internationalized regulation” and instead emphasizes “the values of nationalism, state sovereignty, and the need to protect the internal domain of states, their domestic policies and culture.”\(^{281}\) Proponents of this position consider the existence of an international regulatory regime as much more doubtful and, to the extent such a regime exists, much more limited in scope, given that the investment arbitration regime is not meant to protect every type of economic transaction that could possibly arise.\(^{282}\)

Detailed analysis of the two theoretical views of investment arbitration is beyond the scope of this Article.\(^{283}\) However, it is useful to note that it may be impossible to determine which approach is ultimately “correct” as a matter of treaty interpretation because the debate reflects “deeper uncertainties underlying international investment law” and, as such, may not be “susceptible to technical or doctrinal solutions” alone.\(^{284}\) Therefore, other sorts of analyses—such as the one in this Article—may be necessary to provide alternative perspectives on various issues, including questions relating to the propriety of mass procedures.

These theoretical concerns are not just fodder for academic debate. Instead, the two views of investment arbitration have practical ramifications and are in fact reflected in the jurisdictional awards rendered in \textit{Abaclat}, with the majority siding with the liberal internationalists and the dissent aligning itself with the sovereigntists.\(^{285}\) This is both

\(^{278}\) Mills, \textit{supra} note 15, at 501 (citations omitted).


\(^{280}\) \textit{Schreuer}, \textit{supra} note 271, at xii (citing research conducted by Brigitte Stern in 2000). This use of private actors to enforce public laws is entirely consistent with the definition of regulatory litigation. \textit{See} Luff, \textit{supra} note 21, at 113 (describing regulatory litigation); \textit{see also} \textit{supra} notes 20–21 and accompanying text (explaining how the use of private actors is consistent with achieving regulatory objectives).


\(^{283}\) For further reading, see Mills, \textit{supra} note 15, at 469.

\(^{284}\) \textit{Id.} at 503; \textit{see also} Strong, \textit{Abaclat}, \textit{supra} note 8 (discussing rationales supporting mass claims in investment arbitration).

\(^{285}\) \textit{See} \textit{Abaclat} (formerly Beccara) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on
intriguing and important, since it suggests future cases involving mass investment claims could be subject to the same kind of ideological divisions.

Having put Abaclat in its proper context, it is time to consider whether and to what extent the mass procedures proposed in Abaclat constitute a form of regulatory arbitration independent of any regulatory aims that might or might not be associated with investment law as a general proposition. The analysis considers each of the three elements necessary to establish regulatory litigation and regulatory arbitration separately: intent, a pre-existing substantive norm, and a rule or remedy that provides a forward-looking effect.

A. Intent

The first aspect of the test for regulatory litigation and arbitration, intent, requires “not only the desire to influence behavior as the conscious object of the one who would regulate, but also the desire to prevent some future, risk-producing behavior.” This element could be problematic for those attempting to frame Abaclat as a form of regulatory arbitration, at least to the extent that the focus is on the intent of the arbitrators. On the one hand, the majority clearly indicated that “[c]ollective proceedings are . . . consistent with the purpose and object of the BIT.” While this statement is in many ways helpful, it does not express an intent to regulate or deter. In fact, the majority appeared to downplay the forward-looking (i.e., regulatory) effect of its award, stating explicitly that its decision regarding the use of mass proceedings was not intended to act as a form of procedural precedent and denying that it had taken any policy considerations into account when determining the various issues, indicating instead that the outcome was based on a strict reading of the BIT itself.

286. See generally Abaclat, ICSID Case No. ARB/07/5.
287. See Luff, supra note 21, at 113–14 (explaining three-prong test for regulatory litigation); see also supra notes 82–84 and accompanying text (discussing regulatory litigation as a risk regulator).
288. Luff, supra note 21, at 113.
289. Abaclat, ICSID Case No. ARB/07/5, ¶ 513.
290. See id. ¶¶ 227, 523–27 (explaining that the tribunal’s decision does not have precedential value).
291. Interestingly, the policy arguments appear to have been raised primarily by Argentina rather than the claimants. The tribunal responded to these arguments by stating that

[p]olicy reasons are for States to take into account when negotiating BITs and consenting to ICSID jurisdiction in general, not for the Tribunal to take into account in order to repair an inappropriately negotiated or drafted BIT. The present BIT is clear, it includes bonds and security entitlements . . . . Whether or not ICSID is the best way to deal with a dispute relating to these bonds and security entitlements in the context of foreign debt restructuring is irrelevant. The Parties chose ICSID arbitration for this kind of dispute. They, as well as the Tribunal, are bound by such choice and cannot evade it based on controversial policy reasons.

Id. ¶ 550. The dissent took the view that the majority had relied on improper policy considerations. See Abaclat (formerly Beccara) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 265 (Oct. 28, 2011) (Abi-Saab, dissenting), available at http://italaw.com/sites/default/files/case-documents/ita0237.pdf (claiming that the majority relied on policy issues).
In many ways, the absence of any visible regulatory intent in the Abaclat majority award is not surprising. While it is possible that an arbitral tribunal could indicate an intent to regulate certain behavior, it is more likely that arbitrators will disguise or deny any regulatory aims in large-scale arbitration, given the U.S. Supreme Court’s recent criticism of policy-driven awards in the context of an international class arbitration. While arbitrators in investment proceedings are not bound by U.S. precedent, panelists who are concerned about protecting their awards are unlikely to include controversial elements that may result in an annulment.

However, regulatory intent does not rely solely on the mentality of the court or tribunal. Instead, the necessary intent can be provided by the litigants. All that is necessary is that the actor providing the requisite intent “intend[s] to produce some action on the part of the target of regulation because of the risk (and the litigant’s or judge’s apprehension of the risk) that the target actor’s future behavior will fall short of the relevant norm.”

Taking the burden of regulatory intent off the arbitrators opens the door to some interesting analysis. For example, a state respondent could be said to have provided the necessary regulatory intent to the extent investment arbitration can be framed as a regulatory mechanism. This approach would take any general regulatory intent that already exists in investment arbitration and carry it over to disputes involving class, mass, or collective claims, thus eliminating the need to show any additional specific intent to use large-scale litigation procedures in a regulatory manner.

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292. See generally Abaclat, ICSID Case No. ARB/07/5 (discussing the propriety of mass proceedings).
293. See Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1769 (2010) (noting “[t]he conclusion is inescapable that the panel simply imposed its own conception of sound policy”). But see id. at 1780 (Ginsburg, J., dissenting) (describing the majority’s characterization as “hardly fair”); Strong, First Principles, supra note 151, at 239 (discussing Supreme Court’s allegation).
294. See supra note 217 and accompanying text (discussing the law applicable in investment arbitration).
295. See Luff, supra note 21, at 113 (describing necessary intent in regulatory litigation).
296. See id. (discussing intent in regulatory litigation).
297. Id. at 114.
298. See Mills, supra note 15 (discussing investment law’s regulatory potential); Van Harten & Loughlin, supra note 15, at 148 (discussing how investment law can be considered to be a strand of administrative law). Respondents in private arbitration would likely not be seen as having a regulatory intent, since they have been put in a defensive posture. However, respondents in treaty-based arbitration often come to the arbitral process as a result of certain bilateral or multilateral agreements, and it could be said that the state parties have consented to mutually regulate each other’s behavior through investment arbitration. Therefore, it is appropriate to at least consider the possibility that a state respondent in treaty arbitration could have a regulatory intent.
299. While critics could argue that this approach is reminiscent of the argument criticized by the U.S. Supreme Court in Stolt-Nielsen (i.e., that an agreement to arbitration, without more, cannot constitute an agreement to class proceedings), the situation is slightly different. See Stolt-Nielsen, 130 S. Ct. at 1775 (discussing contractual silence or ambiguity in context of class arbitration). Here, the hypothesis is that a pre-existing general intent to allow investment arbitration to act as an international regulatory agent can provide the necessary specific intent to allow additional mechanisms meant to make the pre-established regulatory regime more effective.
not recommended for general use, since it triggers the potentially irreconcilable division between the liberal internationalist and sovereigntist views of investment arbitration, it does provide food for thought. 300

Another, more likely possibility is that the claimants in an investment proceeding have supplied the necessary intent. 301 As it turns out, the bondholders in Abaclat appear to have had a type of regulatory intent in mind when they filed their arbitration, based on their statements that “[t]he major threat to the efficiency of foreign debt restructuring [is] rogue debtors, such as Argentina. Consequently, opening the door to ICSID arbitration would create a supplementary leverage against such rogue debtors and therefore be beneficial to the efficiency of foreign debt restructuring.” 302 While the dissent disagreed with the propriety of the claimants' use of investment arbitration as a means of creating “leverage over sovereign debtors,” the dissent did not dispute that that was the claimants' aim. 303 Therefore, it would likely appear that the necessary regulatory intent existed in Abaclat.

Although Abaclat meets the first element of the test for regulatory arbitration, the analysis may not be as clear-cut in future investment disputes. In those cases, it may be useful to recall that some commentators believe that specific intent on the part of the parties, judge, or arbitral tribunal need not be established so long as there is a regulatory effect. 304

Interestingly, analyses that rely solely on regulatory effects can be reframed as involving intent, although in these cases the intent would not be that of the litigants, judge, or tribunal, but instead that of the legislature in private disputes or the state parties to the relevant investment agreements in investment disputes. This analysis essentially comes down to a question of institutional design, based on the notion that the legislature in domestic disputes or the states parties in investment disputes have intended litigation or arbitration to act as a regulatory device within the legal system in question. 305 Although this process may appear to be largely a matter of semantics, reframing the issue as one of intent can provide a helpful response to certain questions relating to privity.

Regulatory litigation arises out of the notion that private parties and judges can


301. Any analysis of claimants' intent cannot be conducted in the abstract, since the inquiry must focus on the precise submissions and facts at issue in any particular dispute. Analysis of the regulatory intent of state respondents is somewhat different, since the relevant instruments (treaties and other international agreements) exhibiting state consent to arbitration exist prior to the filings in the particular dispute at issue. 302. Abaclat, ICSID Case No. ARB/07/5, ¶ 514. The dissent urged against an expansive reading of the ability of international investment arbitration to reach claims of this nature. See Abaclat, ICSID Case No. ARB/07/5, ¶¶ 157, 258, 265–74 (Abi-Saab, dissenting) (supporting a narrower interpretation of the relevant treaties).

303. Abaclat, ICSID Case No. ARB/07/5, ¶ 265 (Abi-Saab, dissenting).

304. See supra notes 85–86 and accompanying text (discussing regulatory intent).

305. See Luff, supra note 21, at 113–14 (discussing issues relating to institutional design). In this context, the investment regime can be considered a stand-alone legal system.
"use litigation and the courts to achieve and apply regulatory outcomes to entire industries." However, some people, such as the dissenting panelist in Abaclat, may take the view that it is inappropriate to look to party or arbitrator intent when considering the propriety of regulatory arbitration in the investment arena because private individuals and arbitral tribunals are not themselves parties to the international agreements underlying the arbitral proceeding in question, nor do these persons stand in privity with one of the state signatories to the agreement. Under this analysis, arbitrators’ and litigants’ desire to use the agreements as the basis for regulatory litigation and arbitration would be irrelevant, since it is the states’ intent at the time the documents were drafted that controls.

Issues relating to privity in investment arbitration have been raised before, with the most well-known response coming from Jan Paulsson, who took the view that requiring a strict rule of privity in investment arbitration would be “unworkable” and that the regime was therefore based on the concept of “direct action,” which “allows the true complainant to face the true defendant.” Given contemporary interpretations of the purposes and practice of investment arbitration, strict application of the concept of privity to questions of regulatory intent would appear equally inappropriate.

Strict application of the concept of privity is often related to the debate about the “original intent” of treaties and other international agreements. While some people, including the dissent in Abaclat, take the view that the original intent of the state parties should govern the interpretation of the treaties in all future cases, other interpretive techniques also exist. For example, José Alvarez takes the view that

[the “original intent” behind the signing of BITs is, as time passes, increasingly irrelevant—as subsequent events and actions triggered by the ratification of BITs and FTAs, including changes in local law, occur, and as other opportunities for states to demonstrate their views and to react arise. It is these, not the original intention of BITs, which are relevant to determinations of state practice and opinio juris.]

This more flexible approach to treaty interpretation is quite useful for proponents of regulatory arbitration. If investment arbitration is seen as incorporating a certain amount of flexibility so as to be able to respond to certain types of unanticipated risk, then the

306. Id at 96.
307. See LEW ET AL., supra note 68, ¶ 28-11, 28-21 (discussing privity in investment arbitration); Paulsson, supra note 271, at 256 (describing the principle of direct action, which results in arbitration without privity).
308. See Abaclat, ICSID Case No. ARB/07/5, ¶ 16, 164–67 (Abi-Saab, dissenting) (discussing the intent to arbitrate demonstrated by the states parties).
309. Paulsson, supra note 271, at 255–56; see also Born, supra note 229, at 833 (disputing the characterization of investment arbitration as being without privity).
310. See Born, supra note 229, at 838 (noting that “investment arbitration regimes are effectively mandatory for many states”); Schill, Legitimacy, supra note 15, at 77 (discussing privity in investment arbitration).
311. See Abaclat, ICSID Case No. ARB/07/5, ¶ 16, 164–67 (Abi-Saab, dissenting) (discussing foreseeability of collective actions at the time of drafting).
312. Alvarez, supra note 17, at 44; see also Strik, supra note 3, at 189–90 (discussing the consequences of not considering sovereign debt instruments to constitute an “investment”).
313. See Luff, supra note 21, at 74 (discussing regulatory litigation as a risk regulator). Not everyone
use of regulatory litigation techniques such as class, mass, and collective procedures can be seen as consistent with investment law's institutional design.\footnote{314}

The concept of legislative intent could also be useful in overcoming other difficulties involving regulatory arbitration in the investment arena. For example, some disagreement exists as to whether the requisite regulatory effect needs to be felt only by the individual respondent or whether the effect must be experienced on an industry-wide level.\footnote{315} Requiring a broad regulatory effect could be problematic for arbitration, since that effect is typically generated through publicity associated with a negative determination on the merits (or the threat thereof)\footnote{316} and arbitration is commonly considered to be a private and confidential process.\footnote{317} While the perceived "right" to privacy and confidentiality is often overstated,\footnote{318} parties may nevertheless argue that their expectation was that the process would be private and confidential rather than public.\footnote{319}

Contract-based forms of arbitration have addressed this concern in a variety of ways, either by judicial recognition of a public policy exception to the concept of arbitral privacy in certain limited circumstances\footnote{320} or by explicitly requiring all awards relating to class arbitration to be made publicly available.\footnote{321} However, similar problems do not arise in the investment context, since many investment awards are already made public as

views the investment regime as reflecting a high degree of flexibility. \footnote[314]{See Trakman, \textit{supra} note 274, at 3 (noting dangers of excessive flexibility and rigidity).}

\footnote[315]{Of course, discussions about the appropriate amount of flexibility in the investment realm are in ways reminiscent of the debate about liberal internationalism and sovereignty. \textit{See supra} notes 276–82 and accompanying text.}

\footnote[316]{\textit{See} Luff, \textit{supra} note 21, at 113–14 (discussing scope of regulatory effect); \textit{see also supra} notes 86–87 and accompanying text (discussing regulatory effect).}

\footnote[317]{\textit{See} BORN, \textit{supra} note 188, at 1765 (discussing privacy and confidentiality in arbitration); GAILLARD & SAVAGE, \textit{supra} note 68, \textit{\S} 7 (discussing privacy and confidentiality in arbitration).

\footnote[318]{Although privacy and confidentiality are hallmarks of arbitration, neither is required for the process to be considered arbitration per se. Indeed, most national and international laws do not provide for privacy or confidentiality in arbitration. \textit{See} BORN, \textit{supra} note 188, at 1765 (discussing absence of any laws regarding privacy or confidentiality in arbitration); GAILLARD & SAVAGE, \textit{supra} note 68, \textit{\S} 7 (noting absence of national provisions regarding privacy or confidentiality in arbitration); Strong, \textit{First Principles}, \textit{supra} note 151, at 206 (noting arbitration does not require privacy or confidentiality). Instead, parties must specifically adopt provisions regarding privacy and confidentiality, either in their arbitration agreement or through the use of arbitral rules with the desired level of protection. \textit{See} BORN, \textit{supra} note 188, at 2249–50, 2253 (suggesting parties draft agreements to provide the desired level of privacy and confidentiality).


\footnote[320]{\textit{See} Strong, \textit{Sounds of Silence}, \textit{supra} note 151, at 1086–89 (discussing how public policy might affect determinations about privacy and confidentiality in arbitration).}

\footnote[321]{\textit{See} Class Arbitration Case Docket, \textit{supra} note 147 (publishing awards); AAA \textit{Supplementary Rules}, \textit{supra} note 154, R. 9(1) (describing derogation of the principles of privacy and confidentiality). Some class arbitration rules do not provide for publication of awards, which could limit or eliminate any regulatory effect involving third parties. \textit{See JAMS CLASS ACTION PROCEDURES}, \textit{supra} note 154 (failing to indicate any means of publishing class awards).}
a matter of course. This suggests that class, mass, or collective awards can be published (and thus can provide industry-wide regulatory effects) in the investment realm without any change to current procedures.

It is also possible to view the routine publication of arbitral awards in investment arbitration as a form of legislative intent to regulate the field of international investment. Indeed, the increasing reliance on precedent in investment arbitration could be taken as supporting the notion that a form of regulatory litigation is in the process of developing, since precedent identifies the parameters of acceptable behavior on a going-forward basis and thus deters (or regulates) socially undesirable behavior.

Therefore, intent does not appear to be a problem in Abaclat or for most investment arbitrations. As such, one element of the three-prong test for regulatory arbitration is satisfied.

B. A Substantive Norm

The second part of the test for regulatory litigation and arbitration involves the existence of a pre-established substantive norm. In some ways, this requirement may seem strange, since parties in all forms of litigation and arbitration need to base their claims on some sort of pre-existing substantive law. However, regulatory litigation and arbitration use these substantive norms in a special, forward-looking manner so as “to produce some action on the part of the target of regulation” that will reduce “the risk (and the litigant’s or judge’s apprehension of the risk) that the target actor’s future behavior will fall short of the relevant norm.”

The means by which this forward-looking objective is achieved is described in Part V.C. However, the existence of this second element—a substantive norm—is easily met in investment arbitration, since the treaties and agreements that create the international investment regime contain a variety of substantive rules that are to be enforced through arbitral proceedings. This is true even in cases such as Abaclat, which involves a number of novel substantive claims. Although the parties may

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322. See McLachlan et al., supra note 10, at 57 (noting that “it is routine for the basic details of the arbitration to be in the public domain” and that “parties are usually encouraged to allow the award to be published”); see also Dimsey, supra note 11, at 223–24 (discussing publication of awards in investment realm).


325. See Luff, supra note 21, at 113 (noting that “some authors have suggested that all litigation is regulatory”).

326. Id. at 113–14.

327. See infra notes 331–412 and accompanying text (discussing how this forward-looking objective is achieved in regulatory arbitration).

328. See McLachlan et al., supra note 10, at 66 (noting “the substantive law applied in a treaty arbitration is the treaty itself.”). Investment arbitration is notable in the realm of public international law for its application of “comparatively specific legal rules, rather than indeterminate standards.” Born, supra note 229, at 872 n.388.

disagree about the precise nature of the relevant norms and the extent to which they apply to the dispute in question, it is clear that the requisite rules exist and can be enforced through the arbitral proceedings. 330 Therefore, the second element of the test for regulatory arbitration is satisfied as well, both in Abaclat and in investment arbitration more generally.

C. A Rule or Remedy

The third part of the test for regulatory litigation and arbitration involves the existence of a rule, typically in the form of a remedy, “that expresses the [substantive] norm to the world and attempts to limit the threats (risk) to that norm.” 331 This requirement may be the most difficult for Abaclat to meet, given the novelty of mass procedures in investment arbitration 332 and the relative silence of the various treaties in question. 333 Each of these concerns is addressed separately below.

1. Issues Relating to Novelty

a. Procedural Inquiries

Issues relating to the novelty of class, mass, or collective procedures in investment arbitration can be analyzed in several different ways. One line of inquiry focuses on whether these types of large-scale procedures are really all that different from what the respondent might otherwise have expected. While much has been made of the fact that Abaclat constitutes the first time a mass claim has been brought in investment arbitration, 334 some commentators see very few “differences between the workings of the class action or class arbitration system and that of investment arbitration,” since “[b]oth are characterized by . . . multiple claimants against one respondent, be it a tobacco company in the case of class actions, or a state in investment arbitration.” 335

The multiplicity of potential claimants in investment arbitration arises as a result of “the ‘standing offer’ consent mechanism in BITs, which provides no indication of the number, scope and type of claims that the state is likely to face.” 336 This allows multiple

330. See id. (noting areas of substantive dispute); see also ICSID Convention, supra note 4 (describing substantive standards by which investment disputes are resolved); Argentina–Italy BIT, supra note 4 (allowing user to search for BITs by country).
331. Luff, supra note 21, at 113–14.
332. See Cross, supra note 12, at 1 (noting that Abaclat was “unprecedented”).
334. See Abaclat, ICSID Case No. ARB/07/5, ¶ 295, 488 (noting the novelty of this type of mass claim); Cross, supra note 12, at 1 (noting novelty of Abaclat).
335. DIMSEY, supra note 11, at 204.
336. Id. at 210; see also Abaclat, ICSID Case No. ARB/07/5, ¶ 513 (stating “[c]ollective proceedings are . . . consistent with the purpose and object of the BIT, since the high number of Claimants is inherent to the nature of the investments protected by the BIT”).
investors “to bring their respective claims how and when they see fit” and leaves the respondent state open to multiple claims from an unknown number of parties.\textsuperscript{337} Therefore, the identity of the various claimants cannot be problematic, since all of these individuals could have brought their claims in bilateral proceedings.\textsuperscript{338}

Although the common understanding of investment arbitration as constituting an offer to arbitrate\textsuperscript{339} resolves one potential problem (the question of “with whom” respondents are required to arbitrate), difficulties might also arise with respect to the types of claims at issue (the question of “what” respondents are required to arbitrate) and the procedures to be used (the question of “how” claims are to be resolved).\textsuperscript{340} Interestingly, there may be sufficient similarities between certain types of class, mass, or collective arbitrations on the one hand, and bilateral arbitrations on the other, so as to avoid allegations that the respondent could not anticipate the rule or remedy at issue.\textsuperscript{341}

For example, the question of “what” is being arbitrated is largely unproblematic in situations involving homogenous claims, since those cases present the respondent with what is effectively a single substantive claim.\textsuperscript{342} While certain adjustments might need to be made in cases where some claims or defenses apply to one group of claimants but not another, that type of situation can often be resolved through the use of subclasses, as suggested by the \textit{Abaclat} majority.\textsuperscript{343} Therefore, “[a]ssuming that the Tribunal has jurisdiction over the claims of several individual Claimants, it is difficult to conceive why and how the Tribunal could loose [sic] such jurisdiction where the number of Claimants outgrows a certain threshold.”\textsuperscript{344}

\begin{itemize}
\item 337. DIMSEY, supra note 11, at 210. The downside to the standing offer mechanism is that multiple claims can be brought “without having any regard to the similarity of claims amongst them, nor to any notions of binding effect with respect to completed awards.” \textit{Id.}; see also infra notes 376–81 and accompanying text (discussing the effects of inconsistent awards).
\item 338. Of course, the possibility of Argentina having to face 60,000 individual arbitrations is relatively low, since it would be highly unlikely for individual bondholders to bring separate claims, given the cost of ICSID proceedings. See \textit{Abaclat}, ICSID Case No. ARB/07/5, ¶ 537 (explaining cost prohibitive nature of individual filings for small disputes); Penusliski, supra note 66, at 524–26 (outlining the average cost of an ICSID arbitration); see also Strong, First Principles, supra note 151, at 238 (noting non-certification of a class, mass, or collective often sounds the “death knell” to such proceedings).
\item 339. See MCLACHLAN ET AL., supra note 10, at 52–54 (concluding the concept of investment arbitration as constituting an offer to arbitrate “is no longer controversial”); see also SCHREUER, supra note 271, at xii (noting longstanding acceptance of the offer to arbitrate principle); Paulsson, supra note 271, at 240–41 (discussing the concept of an offer to arbitrate).
\item 340. The question “with whom am I required to arbitrate?” was said to be central in the U.S. Supreme Court case of \textit{Stolt-Nielsen}. See Stolt–Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1774 (2010) (framing the issue as one of consent); Strong, First Principles, supra note 151, at 252 (discussing the concept of secondary consent).
\item 341. Argentina noted that “[a]t the time of the conclusion of ICSID Convention and BIT, collective claims were allowed neither in Italy nor in Argentina, and could therefore not have been envisaged by Argentina.” \textit{Abaclat}, ICSID Case No. ARB/07/5, ¶ 471(ii).
\item 342. See id. ¶¶ 237, 540 (discussing homogeneity of claims at issue); see also \textit{Abaclat} (formerly Beccara) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 154–75 (Oct. 28, 2011) (Abi-Saab, dissenting), available at http://italaw.com/sites/default/files/case-documents/ita0237.pdf (discussing how class arbitration involves what is at essence a single claim).
\item 343. See \textit{Abaclat}, ICSID Case No. ARB/07/5, ¶¶ 666–69 (contemplating the possibility of subclasses). For example, the respondent in \textit{Abaclat} wanted to assert certain defenses that would only be availing against legal persons, not natural persons. See id. ¶¶ 1–4, 401–02 (discussing differentiation of various defenses).
\item 344. \textit{Id.} ¶ 490.
\end{itemize}
The most difficult question involves how mass claims are to be resolved. As the majority in Abaclat recognized, mass claims can require certain alterations to the arbitral procedures. While no decisions have yet been made as to which, if any, of the various options discussed in the jurisdictional award in Abaclat will ultimately be adopted, the dissent took the view that all of the proposed procedures were entirely novel in the investment arena and therefore inappropriate.

Detailed analysis of whether and to what extent mass procedures in Abaclat change how investment claims are heard will have to wait until the tribunal makes a final determination about the procedures to be used. Nevertheless, some prospective arguments can be anticipated and addressed even at this early stage.

For example, opponents to large-scale litigation techniques often argue that mass procedures “change the nature” of investment arbitration in some way, based on certain expectations about what arbitration is supposed to be. Indeed, such assertions have been made in Abaclat and will likely arise in other investment disputes. However, such allegations must be considered pursuant to the objective legal standards governing the arbitral proceedings in question rather than by reference to the parties’ subjective expectations, unless those subjective understandings have been reflected in the governing legal instruments.

Furthermore, some of the ways in which large-scale arbitration may be said to “change the nature of arbitration” are unavailing in the investment context. For example, the argument that arbitration is supposed to reflect a certain amount of procedural informality is unlikely to be raised in investment arbitration, which is itself quite formal. Similarly, parties in mass arbitrations such as Abaclat will be unable to argue that the procedures in question are unexpected because of their representative

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345. See supra notes 164–82 and accompanying text (analyzing the need to alter procedures to address mass claims).

346. See Abaclat, ICSID Case No. ARB/07/5, ¶ 194 (Abi-Saab, dissenting) (noting that the tribunal does not have the authority to adopt its own rules of procedure).

347. See supra notes 164–82 and accompanying text (explaining the procedural decisions that have been made to date).

348. These arguments have been raised in class arbitration in the United States. See Stolt–Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1775 (2010) (claiming class arbitration “changes the nature” of arbitration); see also AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 (2011) (suggesting class arbitration is in some way different than other forms of arbitration); Strong, First Principles, supra note 151, at 201–71 (discussing whether and to what extent class arbitration can be said to differ from other forms of arbitration).

349. See Abaclat, ICSID Case No. ARB/07/5, ¶ 171–72 (Abi-Saab, dissenting) (characterizing mass procedures as a “quantum leap” from other types of arbitration).

350. See Strong, First Principles, supra note 151, at 226 (explaining parties are bound by the objective intent reflected in the contract); see also Strik, supra note 3, at 189–90 (discussing how the requirement of an “investment” cannot be diluted by the will of the parties).

351. AT&T Mobility LLC, 131 S. Ct. at 1751 (discussing size and complexity of class arbitration); Stolt–Nielsen S.A., 130 S. Ct. at 1775 (discussing size and complexity of class arbitration); Strong, First Principles, supra note 151, at 212–41 (considering ways in which class arbitration might differ from other forms of arbitration).

352. See AT&T Mobility, 131 S. Ct. at 1751; Stolt–Nielsen, 130 S. Ct. at 1775–76; Schill, Legitimacy, supra note 15, at 72–73.

353. See Strong, First Principles, supra note 151, at 212–13 (discussing size of class arbitrations).
nature, since the claims in question have been asserted on an aggregative basis.\(^\text{354}\) Furthermore, claims that arbitration is “supposed to be” bilateral in nature\(^\text{355}\) can be answered with references to the various multiparty proceedings that have been filed in the investment arena in the past.\(^\text{356}\)

Although the parties in *Abaclat* can argue that mass proceedings were unexpected in their case, it will be increasingly difficult for parties to make that claim going forward, since the investment community is now on notice that large-scale claims may be brought under an investment treaty.\(^\text{357}\) It is possible that arguments regarding novelty or surprise may be made for some years to come, since some state respondents may take the view that they are not able to conclude an agreement to exclude large-scale arbitral proceedings in the short term.\(^\text{358}\) However, a number of commentators have noted the ability of states to respond to changing circumstances and to make appropriate changes in their investment laws and agreements, so allegations about the difficulty of amending international agreements must be considered with a degree of caution.\(^\text{359}\)

Another way to analyze the novelty issue would be to consider whether the procedures proposed for use in *Abaclat* and similar proceedings are well known in other types of litigation or arbitration, even if the procedures in question have not yet been used in the investment context. For example, a number of means of facilitating the presentation of evidence that were discussed in *Abaclat* have been used in other class, mass, and collective proceedings.\(^\text{360}\) Other time-saving devices have been used in

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355. See *AT&T Mobility*, 131 S. Ct. at 1751 (assuming arbitration is bilateral in nature); *Stolt-Nielsen*, 130 S. Ct. at 1775 (assuming arbitration is bilateral in nature); Strong, *De-Americanization*, supra note 43, at 529 (stating “arbitration is traditionally viewed as a bilateral process”); Strong, *First Principles*, supra note 151, at 203–04 (noting assumption of bilateralism).


357. See *Alvarez*, supra note 17, at 44 (noting state parties are able to react and respond to events relating to investment treaties); *Strik*, supra note 3, at 190–91 (“There are many examples of investors that only discovered the existence of BITs long after they had made their investment and after they had encountered unlawful actions of the host states for which BITs offered protection.”); Strong, *De-Americanization*, supra note 43, at 529 (regarding lack of surprise).

358. See *DIMSEY*, supra note 11, at 211 (noting that changing treaties can be quite difficult).

359. See *Born*, supra note 229, at 844 (noting states may change treaties to account for changes in circumstance); *Alvarez*, supra note 17, at 44 (discussing flexibility of treaties); *Strik*, supra note 3, at 189–90 (explaining how contracting states can agree to deviate from general treaty principles). Of course, the failure to do so could be read as reflecting state consent to such proceedings. See *supra* notes 264–66 and accompanying text (discussing give-and-take between legislative and judicial branches in regulatory litigation).

complex bilateral litigation and arbitration. Therefore, determinations about the novelty of certain mechanisms may turn on what judicial or arbitral procedures are chosen as comparators.

At this point in the analysis, Abaclat appears to pass muster, since the proposed procedures do not yet appear so novel as to be entirely unexpected. However, it is possible that the arbitral tribunal could adopt procedures that are entirely unanticipated. In that case, it may be necessary to consider the issue of novelty from a different angle.

b. Risk-Related Issues

The preceding discussion focuses on questions of novelty from a procedural perspective. However, novelty can also be analyzed as a function of risk. In many ways, this may be the more appropriate inquiry, given that regulatory litigation has been framed herein as a means of protecting individual citizens from unanticipated risk.

The concept of "unanticipated risk" can be considered from a substantive or procedural perspective. Normally, it would appear as if an unanticipated risk could not arise as a substantive matter, since the second prong of the test for regulatory litigation and arbitration requires the existence of a pre-established substantive norm. However, an exception to this general rule may arise in the context of investment arbitration.

Abaclat provides an excellent example of this phenomenon. One of the issues raised in the dispute involved the extent to which the relevant treaties applied to sovereign bonds. The assertion of this claim as a matter of first impression was justified by the claimants on the grounds that "opening the door to ICSID arbitration would create a supplementary leverage against ... rogue debtors and therefore be beneficial to the efficiency of foreign debt restructuring."

The dissent opposed this approach, stating that

[i]n order to create ... leverage over sovereign debtors, which the ICSID Convention did not foresee and which financial markets did not contemplate, then or now, the majority award fashions an unprecedented procedure for adjudicating the present claim of more than 60,000 [sic] holders of Argentinean

361. For example, the Abaclat majority noted the possible use of scanned documents as opposed to originals, a practice that has long been used in complex commercial arbitration and litigation. See Abaclat, ICSID Case No. ARB/07/5, ¶ 531; Strong, Mass Torts, supra note 39. It is also common for parties in complex bilateral proceedings to stipulate to the introduction of a single representative document in situations involving multiple identical (or functionally identical) copies. See Abaclat, ICSID Case No. ARB/07/5, ¶ 531 (noting possible use of limits on evidentiary material).

362. The issue of proper comparators was raised in the context of U.S. class arbitrations, when the majority in AT&T decided to compare the length of class arbitration to the length of bilateral arbitration. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 (2011). The dissent argued that the comparison should more properly be made between class arbitration and class actions. See id. at 1750 (Breyer, J., dissenting).

363. See Luff, supra note 21, at 75–76 (discussing how regulatory litigation arose as a necessary means of addressing "latent social risks").

364. See id. at 113; see also supra notes 81–83 and accompanying text (explaining the three-pronged test of regulatory litigation as a risk regulator).


366. Abaclat, ICSID Case No. ARB/07/5, ¶ 514.
debt, out of ... the tribunal’s gap-filling powers under article 44 of the ICSID Convention. Driven in part by controversial policy considerations, hidden behind references to the spirit of the ICSID Convention and the purpose of the BIT, the majority award ... adopt[s] the Claimant’s policy arguments over the Respondent’s.367

Although observers will come to different conclusions as to whether the majority’s decision was proper under the relevant treaties, the important issue for the current discussion is the way in which the dissent appears to characterize the majority award as using procedural mechanisms in conjunction with a pre-existing substantive norm as a means of addressing an unanticipated risk of harm.368 This neatly encapsulates both the method and purpose of regulatory litigation and arbitration369 and thereby suggests that investment arbitration may be capable of addressing unanticipated substantive risks through techniques associated with regulatory arbitration.370

The second type of risk analysis is more common. Here, the unanticipated risk refers not to the type of injury (as was the case with the preceding example), but instead to either the scope of injury (such as an unanticipated volume of harm) or the nature of the injury (such as an unexpectedly low value of each individual claim).371 In these situations, the state anticipated a particular type of harm (described in the relevant substantive norm) but did not anticipate the possibility that the method of addressing the harm (i.e., standard bilateral litigation or arbitration) would be incapable of sufficiently deterring the behavior in question. This scenario can be described as involving an unanticipated procedural risk, since certain unexpected aspects of the injury lead to the need to use a particular procedural mechanism (i.e., class, mass, or collective techniques) to provide an adequate legal response.372

Allowing regulatory litigation techniques in situations like these provides flexibility in regulatory matters, in that the state enacting the relevant national law or adopting the relevant investment treaty only needs to identify a particular type of unlawful behavior and not all of the various ways in which that behavior may cause harm.373 The Abaclat majority appears to accept this notion, based on statements indicating that

367. Abaclat, ICSID Case No. ARB/07/5, ¶ 265 (Abi-Saab, dissenting).
368. See id. (discussing procedural approach adopted by the claimants and majority).
369. See supra notes 82–84 and accompanying text (discussing three-pronged test for regulatory litigation).
370. Here, the argument—though disputed—is that treaty law should be used "to provide a global regulatory environment favourable to investors." Mills, supra note 15, at 501.
371. See Abaclat, ICSID Case No. ARB/07/5, ¶ 484 (discussing the need for various forms of collective redress); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) (discussing need in the context of U.S. class actions); Strong, De-Americanization, supra note 43, at 502 (discussing need as the driving force for new forms of class or collective arbitration); Strong, Regulatory Litigation, supra note 25 (manuscript at 1) (discussing need for regulatory litigation in the European Union).
372. See Abaclat, ICSID Case No. ARB/07/5, ¶ 484 (discussing need as the underlying factor for the development of collective proceedings); Deposit Guar. Nat'l Bank, 445 U.S. at 339 (discussing need in the context of U.S. class actions); Strong, De-Americanization, supra note 43, at 502 (discussing need as the driving force for the development of new forms of class or collective arbitration); Strong, Regulatory Litigation, supra note 25 (manuscript at 46) (discussing need as a function of an effective remedy).
373. See Strong, Regulatory Litigation, supra note 25 (manuscript at 45–46) (discussing the flexibility of regulatory litigation); see also supra notes 312-13 and accompanying text (discussing flexibility in treaty interpretation).
Mass Procedures as a Form of "Regulatory Arbitration"

[the need for certain adaptations to the standard ICSID arbitration procedure merely derives from the impossibility to anticipate all kinds of possible investments and disputes, and is certainly not a sufficient motive to simply close the door of ICSID arbitration to investors who are not "standard investors" having made "standard investments." 374]

Flexibility may be particularly appropriate or necessary in international investment arbitration, given the practical difficulties associated with amending multilateral agreements once they are in place. 375 However, flexibility needs to be tempered with predictability if the investment regime is to operate efficiently. 376 While it is always difficult to balance these two principles, parties and arbitrators should not be excessively fearful of exercising an appropriate degree of flexibility, since political actors always have the last word regarding regulatory litigation and arbitration. 377

A second type of procedural risk involves the possibility of inconsistent awards. 378 Some commentators in the investment arena have noted that "the individual adjudication of investment disputes can lead, and has led, to 'inconsistent . . . adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.'" 379 Indeed, "[o]ne need look no further than the Lauder and CME cases to put to rest all doubts that this 'risk' has indeed become a reality in investment arbitration, and [that class, mass, or collective proceedings] would
do much to provide the legislative groundwork to prevent this from occurring again."380 This has led some commentators to ask whether a class model of investment arbitration could constitute "a potential solution to the current problem of multiplicity of proceedings and general incoherency in international investment dispute resolution."381

Class and collective actions have long been used in the judicial realm as a means of avoiding inconsistent judgments, although these procedures appear to be justified primarily as a matter of efficiency rather than pursuant to any sort of regulatory rationale.382 However, framing the analysis as a function of risk could provide an interesting means of addressing concerns about the novelty of mass procedures in investment arbitration, since it would provide a principled reason for allowing large-scale litigation techniques to be used in situations such as that presented in Abaclat.383

Framing the issue as one of unanticipated risk resolves many of the problems associated with the claim that the procedures proposed in Abaclat are too novel to qualify as the sort of rule or remedy contemplated by the third prong of the three-part test for regulatory litigation and arbitration. This sort of analysis may also be useful in overcoming issues in future mass claims arbitrations. However, it is still necessary to address issues relating to silence.

2. Issues Relating to Silence

The second major problem with respect to class, mass, or collective proceedings in the investment context involves the silence of the governing instruments regarding large-scale dispute resolution devices.384 This is a potentially fatal concern under the third element of the test relating to regulatory litigation and arbitration, which requires a rule, typically in the form of a remedy, "that expresses the [substantive] norm to the world and attempts to limit the threats (risk) to that norm."385

380. Id. at 205. In CME and Lauder, the Czech Republic's refusal to consolidate two different arbitrations led to two contradictory awards. See id. at 206 (citing CME Czech Republic B.V. (The Netherlands) v. Czech Republic (UNCITRAL) and Ronald S. Lauder v. the Czech Republic (UNCITRAL)) (discussing contradicting awards in CME and Lauder).

381. Id. at 185.

382. See FED. R. CIV. P. 23(b)(1) (noting efficiency rationale behind class actions).


384. In Abaclat, the key question was whether the silence in the treaties and procedural rules constituted a procedural gap or a "qualified silence" that could be filled by the arbitrators. Abaclat (formerly Beccara) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 297, 517 (Oct. 28, 2011) (Abi-Saab, dissenting), available at http://italaw.com/sites/default/files/case-documents/ita0237.pdf. Issues relating to the interpretation of statutory or contractual silence can be extremely difficult. See Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (stating that the treaty shall be interpreted in good faith in accordance with its object and purpose); McLACHLAN ET AL., supra note 10, at 66; see also Strong, Sounds of Silence, supra note 151, at 1055–83 (discussing interpretation of silence or ambiguity regarding class treatment in the context of international commercial arbitration).

385. Luff, supra note 21, at 114. Some question exists as to whether class relief constitutes the relevant
In the quintessential form of regulatory litigation, the U.S. class action, the regulatory remedy is embodied in judicial rules of procedure and is therefore known prior to the initiation of any individual action. This would suggest that any legal system (including the international investment regime) that does not explicitly provide in advance for class, mass, or collective mechanisms cannot adopt a form of regulatory litigation or arbitration that relies on one of these sorts of large-scale litigation techniques.

However, the historical development of class arbitration in the United States suggests an alternative means of analyzing the issue. While contemporary forms of class arbitration rely largely on certain pre-existing arbitral rules that function in a manner somewhat similar to that of judicial rules of procedure, class arbitration was available in the United States for approximately 20 years prior to the adoption of the first set of procedural rules. In those early cases, class arbitration was not based on any specific legislative or procedural authority but instead constituted a particular type of remedy responding to a unique and previously unanticipated legal scenario (i.e., the existence of an arbitration agreement in a situation where a class claim could be and had been asserted). In those situations, class arbitration was sometimes considered to be the best option available, since "an order for classwide arbitration . . . would call for considerably less intrusion upon the contractual aspects of the relationship."

The historical evolution of class arbitration in the United States therefore suggests that a form of regulatory arbitration could develop in the investment context even in the absence of specific legislative or procedural authority. The key is to determine whether the class procedure simply facilitates the provision of a more traditional type of remedy (i.e., damages, injunctive relief, or declaratory judgment). See Strong, Regulatory Litigation, supra note 25 (manuscript at 42-50) (describing how the combination of traditional remedies with large-scale litigation techniques can help meet the requirements for bottom-up regulatory litigation); see also supra note 72. For ease of discussion, this Article frames the argument as if class, mass, or collective relief constitutes the relevant rule or remedy.

386. See Fed. R. Civ. P. 23 (providing a trans-substantive rule of procedure allowing class relief). Individual U.S. states have their own rules of procedure governing class suits. Other jurisdictions, including Australia and most Canadian provinces and territories, place the class action remedy in legislation rather than rules of procedure. See Mulheron, supra note 7, at 38-42, 63-66 (discussing class action legislation).

387. Claimants in Abaclat cited the common law development of class arbitrations in the United States to support their argument that the tribunal in Abaclat could follow a similar path. See Mulheron, supra note 7, at 38-42, 63-66 (discussing class action legislation).

388. See AAA Supplementary Rules, supra note 154, R. 1(a) (noting the adoption of any of the AAA rules of arbitration can lead to the use of the class arbitration rules in cases where a class claim has been made, but indicating that class procedures will not be deemed appropriate until the arbitral tribunal has so decided after briefing from the parties); JAMS Class Action Procedures, supra note 154, R. 1(b) (stating that class action procedures apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the JAMS rules where a party submits a dispute to arbitration on behalf of or against a class or purported class).

389. See Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982) (indicating class arbitration was a proper dispute resolution mechanism), rev'd on other grounds sub nom., Southland Corp. v. Keating, 465 U.S. 1 (1984); Strong, First Principles, supra note 151, at 206 (discussing evolution of class arbitration in the United States).

390. See Keating, 645 P.2d at 1209 (holding class arbitration is a legitimate means of resolving disputes); Born & Salas, supra note 150, at 25-30 (exploring the history of class arbitration in the United States prior to 2003).

391. Keating, 645 P.2d at 1209.
absence of any specific provisions in the relevant treaties or procedural rules discussing class, mass, or collective procedures. Critics will likely oppose this proposal, arguing that the development of class arbitration in the United States was possible only because the United States: (1) explicitly embraced the concept of large-scale litigation prior to the development of class arbitration, 392 (2) had a longstanding familiarity with class proceedings in the judicial context and thus had created a social and legal environment where class proceedings were not unexpected, 393 and (3) is a common law jurisdiction that permits incremental change through judicial action. 394 Because parties to most (though not all) international investment arbitrations will not (1) have a commonly agreed regulatory mechanism already in place in their national judicial systems, let alone in their investment treaties, (2) share similar views as to the propriety or shape of regulatory litigation, let alone regulatory arbitration, 395 and (3) follow the common law legal method, allowing a form of regulatory arbitration to develop informally in investment disputes is inappropriate in the absence of explicit legislative or state action. 396

There are a variety of ways of responding to these concerns. 397 For example, it could be said that widespread international consensus regarding the availability, shape, or use of large-scale litigation techniques is unnecessary and that the only countries whose views should be considered are those that are parties to the international agreements underlying the proceeding. 398 However, even this sort of limitation could lead to a


393. Although this argument will likely be raised, it is somewhat incorrect as a factual matter, given that corporate respondents believed that the use of arbitration agreements would eliminate the class remedy in both litigation and arbitration and were therefore surprised by the development of class arbitration. See Strong, First Principles, supra note 151, at 226 (explaining how many corporate respondents created arbitration agreements to avoid the possibility of judicial class actions).

394. Notably, this argument ignores the fact that non-common law jurisdictions such as Colombia, Germany, and Spain have contemplated the development of class or collective arbitration. See supra notes 151, 161–65 and accompanying text (discussing development of large-scale arbitration outside the United States). In two of those three examples—Colombia and Germany—the impetus came from the judiciary as opposed to the legislature. See Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 6, 2009, II ZR 255/08 (Ger.); Kuck & Litt, supra note 9, at 720–23 (discussing the single instance of class arbitration in Colombia); Borris, supra note 162; Strong, DIS, supra note 162, at 47.

395. While a growing number of legal systems allow for some form of collective redress, there is no consensus as to the appropriate shape of those proceedings or whether those mechanisms serve a regulatory end. See supra note 57 (describing various forms of collective redress internationally).

396. See DIMSEY, supra note 11, at 205 (discussing jurisdictions that use large-scale litigation as a regulatory device).

397. Two of these responses arise as a factual matter. See supra note 57 (describing various forms of collective redress internationally).

398. Although Abacatl only involved two countries, it is theoretically possible for mass investment arbitrations to include parties from more than two nations. See DIMSEY, supra note 11, at 212 (noting similarities of bilateral investment treaties may lead to multinational claimant groups in investment arbitration); see also Abacatl (formerly Beccara) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 513 (Aug. 4, 2011), available at http://italaw.com/sites/default/files/casedocuments/ita0236.pdf (suggesting "claims are proper and manageable" in part because "[c]laimants are from a single jurisdiction"); supra note 275 (discussing viability of multinational claimant groups in investment arbitration).
situation where, as in Abaclat, one or more of the states at issue do not provide for collective redress for the type of injury in question.399

Some people may believe, along with the dissent in Abaclat, that the absence of any large-scale mechanism in national courts is irrelevant so long as a bilateral remedy is available as a matter of national law.400 However, other people may see the absence of a class, mass, or collective remedy as violating the duty to provide fair and equitable treatment pursuant to the terms of the relevant investment treaty401 or alternatively as breaching the right to an effective remedy as a matter of natural justice.402 Given that some commentators believe that “[t]he protection offered to investors by the dispute resolution provisions of treaties is sufficiently important to rise to the level of a substantive principle in its own right,”403 the failure to provide some sort of realistic remedy would be highly problematic.404

In such cases, the question would ultimately turn on a factual determination of whether a class, mass, or collective action was the only way to provide an effective remedy, even in the absence of a specific treaty or procedural provision specifically discussing such a procedure.405 In Abaclat, the majority suggested that “the rejection of

399. See Abaclat, ICSID Case No. ARB/07/5, ¶ 484, 587 (noting Argentina did not provide for collective redress in its national courts); see also Héctor A. Mairal, Argentinia, in THE ANNALS, supra note 26, at 54, 54–62 (discussing the current status of group, class, or collective rights in Argentina). Italy does not provide for “any form of group litigation as a general procedural tool for the protection and the enforcement of rights and interests shared by a group of individuals equally affected by the same mass wrong or harm,” although some select rights of collective action exist. Elisabetta Silvestri, Italy, in THE ANNALS, supra note 26, at 138 (discussing availability of large-scale judicial relief in Italy). Notably, the lack of a collective remedy at national law was one reason why the claimants found it necessary to file a mass claim under the relevant investment treaty. See Abaclat, ICSID Case. No. ARB/07/5, ¶ 484, 587 (noting no collective remedy existed in Argentina’s national courts).


401. See McLACHLAN ET AL., supra note 10, at 227–33 (discussing breaches leading to a denial of justice in the national courts); see also Nagareda, supra note 23, at 36 (suggesting “a class action might well be all the more ‘superior’ to available procedural alternatives when the home country of a given shareholder affords her no avenue for recourse on an aggregate basis”).

402. The right to an effective remedy is gaining increasing importance as a matter of national, international, and regional law. See European Convention on Human Rights, as amended by protocols nos. 11 and 14, art. 13 (entered into force June 1, 2010), available at www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf (requiring an effective remedy for anyone “whose rights and freedoms are violated in this Convention are violated”); Charter of Fundamental Rights of the European Union, 2000/C 364/1, art. 47, Dec. 28, 2000, available at www.europarl.europa.eu/ charter/pdf/text_en.pdf (requiring an effective remedy for anyone whose “rights and freedoms guaranteed by the law of the Union are violated”); Abaclat, ICSID Case No. ARB/07/5, ¶¶ 484, 587 (recognizing the importance of an effective remedy); Andrew Le Sueur, Access to Justice Rights in the United Kingdom, 5 EUR. HUM. RTS. L. REV. 457, 457–58 (2000) (describing availability of the right to an effective remedy as a matter of national, international, and regional law); Strong, Regulatory Litigation, supra note 25 (manuscript at 45–46) (discussing the recognition of an effective remedy nationally, internationally, and regionally).

403. McLACHLAN ET AL., supra note 10, at 45.

404. See Abaclat, ICSID Case No. ARB/07/5, ¶ 484 (discussing whether an effective remedy existed).

405. The majority in Abaclat took the view that
remedy in protection of a substantive right provided by contract or law; in other words, collective proceedings are seen as necessary, where the absence of such mechanism would de facto . . . result[ ] in depriving the claimants of their substantive rights due to the lack of appropriate mechanism.

Id. ¶ 484 (citing Strong, De-Americanization, supra note 43, at 238–39). The dissent denied that failure to allow the claims to proceed en masse would deprive the claimants of their substantive rights. See Abaclat, ICSID Case No. ARB/07/5, ¶¶ 254–57 (Abi-Saab, dissenting) (claiming bilateral process was sufficient).

406. Abaclat, ICSID Case No. ARB/07/5, ¶ 537.

407. See Buxbaum, Securities, supra note 29, at 32–34 (discussing constitutional objections to large-scale litigation); Monestier, supra note 29, at 38–39 (discussing constitutional concerns relating to global class actions); Strong, Individual Participatory Rights, supra note 171 (discussing how some may not view individual participatory rights as constitutional in nature, as they “are a species of procedural rights”). Interestingly, the Abaclat majority suggested it was protecting the effective exercise of these rights when it ordered mass arbitration, given that having to face thousands of individual arbitral “proceedings would be a much bigger challenge to Argentina’s effective defense rights than a mere limitation of its right to individual treatment of homogenous claims in the present proceedings.” Abaclat, ICSID Case No. ARB/07/5, ¶ 545.

408. See Bignami, supra note 23 (discussing European resistance to U.S.-style analysis of regulatory litigation); Buxbaum, Transnational, supra note 71, at 295–96 (discussing the continued importance of domestic principles of law in transnational litigation); Strong, Regulatory Litigation, supra note 25 (manuscript at 4–6) (discussing constitutional concerns regarding large-scale litigation).

409. See In re Vivendi Universal, No. 02 Civ. 5571, 2009 WL 855799, at ¶ 3 (S.D.N.Y. Mar. 31, 2009) (discussing constitutional concerns about opt-out representative relief in global class actions); Buxbaum, Securities, supra note 29, at 32–34 (discussing constitutional concerns regarding large-scale international litigation); Monestier, supra note 29, at 38–39 (discussing different countries’ approach to large-scale litigation); Strong, Individual Participatory Rights, supra note 171 (discussing the constitutional concerns of individual participatory rights).

410. See Abaclat, ICSID Case No. ARB/07/5, ¶¶ 487–88 (acknowledging that collective relief can affect the ability to mount an individualized defense); Abaclat, ICSID Case No. ARB/07/5, ¶¶ 139–45, 239–44 (Abi-Saab, dissenting) (objecting to use of mass procedures in cases involving non-homogenous claims); Strong, Mass Torts, supra note 39 (explaining how “Abaclat provides a useful recognition of the various types of class and collective relief now available in arbitration”); Strong, Individual Participatory Rights, supra note 171 (discussing how “individual victims should remain free not to pursue the opt-in collective action but instead to seek redress individually”). However, courts, commentators, and arbitrators have found that if the claims are sufficiently homogenous, then the right to mount an individualized defense is not affected in any way. See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011) (analyzing the issue as a matter of commonality);
issue does not appear to be problematic in Abaclat, given the homogeneity of the claims at issue and the presence of specific individual consent on an opt-in rather than opt-out basis, the matter bears further analysis.411

Therefore, although issues relating to novelty and silence create a number of significant concerns under the third prong of the test for regulatory litigation and arbitration, Abaclat appears to fulfill the necessary requirements.412 This determination is based on, among other things, the vital importance of the right to an effective dispute resolution mechanism in the investment context413 and the virtual inability of claimants to seek recovery through other means.414 The conclusion is further bolstered by the rapid increase over the last ten years in the number and diversity of mechanisms for collective redress in judicial and arbitral fora around the world.415 Given these developments, it is difficult to argue that a similar mechanism could not have been expected to arise in the investment arena. Indeed, the fact that class, mass, and collective redress has become so prevalent in such a short amount of time strongly suggests that society is currently undergoing something of a quantum shift with respect to the type of legal injuries that are being experienced domestically and internationally. As the types of harm evolve, so, too, must the legal responses, both as a matter of public and private law.

VI. CONCLUSION

The jurisdictional award in Abaclat v. Argentine Republic is, with the dissenting opinion, one of the most important decisions to arise in the investment arena in decades. Although Argentina will likely seek annulment of the award after the conclusion of the merits phase,416 the effect of the award is already being felt throughout the international community. Regardless of the future outcome of Abaclat itself, most commentators would agree that the door has been opened to mass claims in the investment context, with

Abaclat, ICSID Case No. ARB/07/5, ¶ 540 (noting that large-scale relief is acceptable when claims are homogeneous); Strong, Individual Participatory Rights, supra note 171 (discussing how in some jurisdictions a defendant's interest in mounting their own individualized defense is protected as a matter of public policy, while in other jurisdictions it exists as a fundamental constitutional right).

411. Detailed evaluation of this issue is outside the scope of this Article, although the author has conducted related research elsewhere. See Strong, Individual Participatory Rights, supra note 171 (considering individual participatory rights in cases involving cross-border collective redress).

412. The requirement for a rule or remedy appears to focus on the need to establish “that the remedy logically follows from the wrong, rather than being fashioned on ad hoc and flexible grounds.” Luff, supra note 21, at 109.

413. See McLachlan et al., supra note 10, at 45 (noting the critical nature of the dispute resolution mechanisms found in investment treaties).

414. The extent to which a remedy is necessary under investment law is disputed by the parties, but was sufficient to win the approval of two of the three panelists. See Abaclat, ICSID Case No. ARB/07/5, ¶ 484 (noting no other viable method of providing a legal remedy); Abaclat, ICSID Case No. ARB/07/5, ¶¶ 254–57 (Abi-Saab, dissenting) (disputing whether other means of legal relief were available). Furthermore, developing a large-scale litigation mechanism in the investment context as a function of need is consistent with the way in which class and collective relief has grown in other contexts. See supra notes 77–79 and accompanying text (discussing development of class and collective redress).

415. See supra notes 125, 147–63 and accompanying text (discussing the context and increase of collective redress in various countries).

416. See Cross, supra note 12 (discussing likelihood of annulment action); Smith et al., supra note 12 (discussing Argentina's history of seeking annulment).
the only question being when, not whether, the next mass claim will be filed.\footnote{417}{See supra note 11 and accompanying text (discussing the impact Abaclat will have on mass filings in investment arbitration).}

Individual states can attempt to forestall any future claims by amending their investment laws and agreements to prohibit the bringing of mass claims. However, that process will likely take some time, since the international investment regime has no equivalent of a national supreme court that can make a single sweeping judgment to stem the tide of mass claim arbitration. Furthermore, it is unclear whether it is either necessary or wise for states to take this type of defensive action.

The fear of many states, of course, is that the adoption of large-scale litigation techniques in investment arbitration is going to open the floodgates to the kind of abusive litigation culture commonly associated with U.S. class actions.\footnote{418}{See Resolution of the European Parliament, supra note 131, ¶ 2 (noting the “frivolous litigation and abuse of the U.S. class action system”).} However, empirical research shows that not all forms of collective redress are the same.\footnote{419}{See generally THE ANNALS, supra note 26 (discussing 30 different national regimes).} Numerous jurisdictions have adopted national forms of class or collective relief that have not led to widespread or abusive use of large-scale litigation.\footnote{420}{See Resolution of the European Parliament, supra note 131 (noting possible adoption of a European form of cross-border collective redress); Directorate General, supra note 57, at 48 (noting low participation rates in European models of collective redress); Strong, Regulatory Litigation, supra note 25 (manuscript at 5–8) (discussing potential changes in European attitudes toward collective redress).} Although there may be a multitude of reasons why the incidence of class and collective redress varies so widely around the world, the primary rationale appears to relate to the relatively high number of incentives present in the U.S. legal system encouraging the use of large-scale litigation as both a compensatory and regulatory device.\footnote{421}{See Hensler, supra note 53, at 15–25 (discussing range of collective redress mechanisms around the world); Strong, Regulatory Litigation, supra note 25 (manuscript at 20) (discussing effect of background principles of U.S. law on regulatory litigation).} However, none of these features—i.e., opt-out rather than opt-in or aggregative relief, punitive damages, contingency fees, and broad judicial discovery—are present in the international investment context.\footnote{422}{See Hensler, supra note 53, at 15–25 (distinguishing U.S. class actions from other forms of large-scale litigation); Nagareda, supra note 23, at 2 (noting impact of background principles of U.S. civil procedure on class actions); Strong, Regulatory Litigation, supra note 25 (manuscript at 32) (discussing regulatory features in U.S. large-scale litigation). Funding is one of the primary roadblocks to large-scale litigation in national systems and will also be an issue in the investment context. In Abaclat, TFA (and thus, by extension, the eight banks that comprised TFA) paid for claimants’ attorneys and arbitration fees, a factor that the dissent found disturbing and a potential conflict of interest. See Abaclat (formerly Beccara) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 65, 425, 428, 682–85 (Aug. 4, 2011), available at http://italaw.com/sites/default/files/case-documents/ita0236.pdf (discussing potential conflicts of interest). While certain funding issues could be resolved through the use of third-party litigation funders, the significant costs involved in an investment proceeding suggests that third-party funders will not become involved unless they are virtually assured of a recovery. See Penusiński, supra note 66 (outlining average costs of an ICSID arbitration); Maya Steinitz, Whose Claim Is This Anyway? Third-Party Litigation Funding, 95 MINN. L. REV. 1268, 1308 (2011) (noting sovereigns already use such funding mechanisms in investment proceedings). Whether this scenario is positive or negative remains to be seen.} Given the problems, uncertainties, and costs associated with large-scale investment arbitration, it appears highly unlikely that parties would choose to bring such actions as a matter of first resort, since no rational party would want to undertake an international
investment arbitration if a cheaper, faster, and more predictable alternative were available elsewhere. Instead, mass investment arbitration will likely only arise as a last resort, when other methods of recourse are actually or effectively unavailable. 423 This, of course, is consistent with the expectation and experience outside the investment context, namely that class and collective proceedings only arise when they are necessary. 424

Although regulatory litigation and arbitration may be triggered by a particular type of need, 425 need alone is not enough for a particular proceeding to be considered regulatory. Instead, there must be a regulatory intent, a relevant substantive norm, and a rule or remedy that provides for a forward-looking regulatory effect. 426 These requirements are necessary to ensure that private litigants, acting in conjunction with judicial authorities or arbitral bodies, do not improperly infringe on the rightful responsibilities of legislative and administrative actors.

Some people consider any form of regulatory litigation or arbitration to be an impermissible incursion into public concerns that are best and most appropriately left to politically accountable actors. 427 However, this traditional top-down, command and control model of regulation is under fire from a variety of critics, including new governance theorists who see the challenges of modern society as requiring a new regulatory model built on shared public and private competencies. 428 Indeed, the rising interest in regulatory litigation and arbitration as both an academic and practical matter suggests that this shift away from conventional perspectives of regulation is well underway.

The need to understand and develop new regulatory models is particularly pressing in the international arena. Although the dissent in Abaclat would promote the use of domestic courts to address the kind of large-scale injuries at stake here, there are significant problems with that kind of national approach. These difficulties can be analyzed from a variety of perspectives, including investment law, 429 civil procedure, 430

423. There also must be an appropriate factual scenario to support a mass claim, which may prove to be far more difficult under investment law than under domestic law. See supra note 11 (discussing likelihood that mass procedures will be used in other investment arbitrations).

424. See supra notes 77–80 and accompanying text (discussing need as a trigger for class, mass, or collective relief).

425. That need can often be framed as a need to address unanticipated risk. See Luff, supra note 21, at 75, 113 (discussing regulatory litigation as a risk regulator); see also supra notes 361–70 and accompanying text (discussing what constitutes an unanticipated risk).

426. See Luff, supra note 21, at 113 (discussing the three-prong test for regulatory litigation).

427. See id.; Strong, Regulatory Litigation, supra note 25 (manuscript at 4) (discussing various views of the propriety of regulatory litigation).

428. See supra note 18 and accompanying text (discussing changing views of regulation as a practical and theoretical matter).

429. For example, questions could arise as to whether Argentinian courts could and would provide the same kind of neutral, non-political adjudication that is assumed to be at the heart of investment arbitration. See Born, supra note 229, at 828 (discussing nature of investment arbitration).

430. For example, Argentina did not allow collective redress in its national courts, which led to one set of practical problems for the Italian bondholders. See Abaclat (formerly Beccara) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 484, 587 (Aug. 4, 2011), available at http://italaw.com/sites/default/files/case-documents/ita0236.pdf (discussing availability of collective redress in Argentina). However, even if the national court in question does have a class or collective mechanism in place, there is no guarantee that such a device will be procedurally consistent with the regulatory or procedural regimes in other relevant countries. See supra note 109, 116 and accompanying text (discussing regulatory problems).
This Article has focused primarily on the regulatory perspective but has highlighted issues from these other fields of inquiry so as to provide a more comprehensive context for analysis.

When considering the propriety of *Abaclat* and the availability of large-scale litigation techniques in investment arbitration, it is useful to consider the other alternatives. As it turns out, numerous problems exist with all of the other available options. Formal methods of international regulation are difficult to enact and slow to respond to changes in the legal or social environment. Transnational regulatory litigation is unpredictable and subject to the regulatory choices made by the forum state. National forms of regulation and regulatory litigation are unable to address the increasing number of cross-border legal harms in an effective manner. As a result, allowing a form of regulatory arbitration to develop in investment arbitration appears to be the best way of decreasing unpredictability and inconsistency in the international investment regime.

The use of mass procedures in investment arbitration is a complex topic, and this Article is certainly not the last word on the subject. However, by considering whether and to what extent *Abaclat* can be considered a form of regulatory arbitration, this Article has attempted to put the dispute in a context that encourages broader questions about institutional design, both within investment law and in transnational regulation more generally. In so doing, this discussion hopefully provides a useful perspective on what is doubtless one of the more intriguing and controversial decisions of our time.

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431. For example, national courts often find it difficult or impossible to effectuate transnational regulation efficiently and effectively. See supra notes 89–147 and accompanying text (discussing regulatory litigation in the transnational context).


433. See supra notes 88–147 and accompanying text (discussing regulatory litigation in the transnational context).

434. See supra notes 376–81 and accompanying text (discussing concerns about inconsistent awards in arbitration).