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Transnational Arbitral Res Judicata

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Commercial arbitral awards are universally recognized to give rise to res judicata, but confusion reigns over what law applies to the res judicata effect of a prior arbitral award asserted before a subsequent tribunal. National res judicata laws diverge on key questions such as the availability of issue estoppel and the construction of the 'triple identity' test. Yet the normal tools used to manage divergence in potentially applicable laws – choice of law and codification – have failed to work when it comes to the res judicata effect of awards. I argue the answer is to adopt a transnational approach to res judicata in arbitration. Although this approach has support in principle, questions remain about how it would work in practice. I propose that a modified version of Gaillard's 'transnational rules method' contains the seeds of a promising answer. Specifically, tribunals could look to both other commercial tribunals' awards, as well as International Centre for Settlement of Investment Disputes (ICSID) and International Court of Justice (ICJ) case law on res judicata, to develop a sui generis transnational preclusion standard for international arbitration. This is consistent with informal practices arbitrators have developed with respect to other interstitial issues where choice of law processes do not yield satisfactory results. Finally, I evaluate the implications of taking this approach, as well as its prospects for success.

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1 ● INTRODUCTION

Every legal order recognizes the need for finality in disputes, and without res judicata, that need could never be met. (1) In short, res judicata – literally, *the thing adjudged* (2)
P 797 – dictates that matters definitively decided by a tribunal cannot be ● re-opened (preclusive effects) and must be enforced (conclusive effects). (3) In the context of international commerce – where the demands of business planning place a premium on certainty (4) and finality (5) – the salience of res judicata has long been recognized. A leading nineteenth century English jurist wrote, 'it would be impossible to carry on the business of the world if Courts refused to act upon what had been done by other Courts of competent jurisdiction'. (6) The same could be said in the twenty-first century if one simply replaced 'other Courts' with 'arbitral tribunals', because parties to international transactions typically prefer arbitration. (7)

Unsurprisingly, then, international arbitral awards are widely understood to have preclusive effects – but confusion reigns when it comes to the question of which law applies to the preclusive effect of these awards. For the 156 states parties to the New York Convention, recognition and enforcement of awards is provided for by treaty. (8) Although this likely requires that awards have *some* preclusive effect, neither this nor any other provision speaks to the choice-of-law question. National laws likewise affirm the preclusive effect of international arbitral awards, but similarly provide no guidance on choice of law. (9) Finally, the institutional rules under which arbitrations are conducted do not instruct tribunals on which law to apply when faced with a prior arbitral award from their own or a different tribunal. (10)

This article analyses one piece of the puzzle: what preclusion law should apply when a party asserts the preclusive effect of a prior commercial arbitral award in a second
P 798 international arbitration. As things stand, there is no consistent answer – a ● reflection, in part, of systemic confusion about choice-of-preclusion-law. (11) The cause for confusion becomes clear when one considers that the simplicity of res judicata stated as a principle (12) belies huge variations in its application. Key areas in which countries diverge include the following: What are the requirements for a decision to have preclusive effect? What is the scope of that effect? To whom does it apply? To grossly over-simplify, common law traditions take a more expansive view. Preclusive effects more often reach parties who did not participate in the original action, (13) and cover individual issues as opposed to just whole legal claims. (14) When preclusive effect extends to issues rather than just claims, the requirement of a 'final judgment' may be diluted somewhat. (15) By contrast, civil law jurisdictions often delineate a small set of legal relationships that result in a non-party (to the first action) being precluded, (16) and issue preclusion is effectively unknown. (17) Much has been written on preclusion confusion both domestically and internationally, (18) but here it suffices to say that uniformity at the level of principle elides deep differences in how the principle is given content.

P 799 ● Faced with this divergence and lack of legislative or treaty instruction, tribunals considering prior awards must decide which preclusion law to apply. (19) As a general choice-of-law matter, a decision-maker might look to any of the following sources for a rule: (1) the forum in which the first dispute was decided (F-1) (20) ; (2) the forum in which a party asserts or contests the preclusive effect of a prior award (F-2) (21) ; (3) the

'applicable law' of the parties' contract or the law of the arbitration agreement. (22) As discussed in section 2, decisions are all over the map. The magnitude of the mess is actually heightened by additional variations on these options: some countries follow a cumulative approach in which preclusion is limited to the shared ground between (1) and (2). (23) Nor are differences in applicable law the only consideration: an additional wrinkle is that in some jurisdictions, res judicata is a matter of public policy, meaning courts may annul, or refuse to enforce, an award because a tribunal misapplies preclusion law. (24) The end result is a preclusion regime that is not only inconsistent with core tenets of the international arbitral regime that every Convention state subscribes to, but also poses a substantial threat to litigants' interests. (25) Reinmar Wolff
P 800 ● offered a metaphor that colourfully captures these problems. He likened an award, the preclusive effects of which have yet to be asserted, to Schrödinger's Cat: until the time when the box is opened (i.e. a second tribunal considers the prior award), one cannot know whether the cat is alive or dead. (26)

Reform is in the interest of every player in the system. For parties, efficiency, autonomy, and (perhaps most importantly) the neutrality of a tribunal free from the quirks or bias of national courts rank highly among the reasons to choose arbitration. (27) From the states' perspective, the basic principle of the New York Convention is that arbitral awards should be mobile, and should be recognized as binding everywhere on similar terms. If something so fundamental as the very scope and effect of an award is unknown at the time it is rendered, then it destabilizes parties' expectations and undermines Convention values. Yet arbitrators are faced with only unsatisfying options, such as rendering an award the preclusive effect of which is unknown.

Section 2 explains why choice-of-law mechanisms, which would normally identify the law applicable to particular issues in transnational disputes, do not appropriately resolve the particular question of *which preclusion law applies.* Although others have noted problems in the preclusion regime, prior work mostly focuses on especially challenging issues such as complex multi-party relationships and disputes involving states or state-owned enterprises. (28) By contrast, section 2 shows how even in the simple context of a one-jurisdiction, private, two-party dispute, confusion over choice-of-preclusion-law may prevent litigants from knowing the effect of an F-1 award. (29) It then illustrates how disputes with more transnational elements only compound this confusion. Section 3 turns to the topic of fixing the regime. I critically assess the major effort recently undertaken by the International Law Association to develop a framework that first, codifies certain transnational rules for arbitral tribunals considering the preclusive effect of a prior award; and second, refers other matters to domestic law under a conflicts rule. I argue that this approach does not go far enough, and suggest the only workable regime for resolving inter-tribunal preclusion questions is a truly transnational one. I identify a set of 'arbitral values' and 'structural values' that support the transnational route I advocate.
P 801 Section 4 suggests an alternative way to develop transnational rules that does ● not rely on codification: the transnational rules method. (30) I briefly explore problems with the method as it is theorized by Emmanuel Gaillard, and propose adaptations to increase its feasibility and legitimacy. I argue that Gaillard, by analogizing his method to using 'general principles of law', does not consider lessons of other international tribunals that ostensibly used general principles but ultimately cut methodological corners by necessity. Instead, I suggest an adaptation that would have arbitrators look directly to other international tribunals for *transnational preclusion standards.* Relying on a blend of comparative law and US common law techniques, my proposal would result in a *sui generis* preclusion standard driven by arbitral case law, to be applied when a tribunal considers the preclusive effect of a prior arbitral award. One important benefit of this approach is to sidestep the intractable problem of choosing the preclusion law of F-1 or F-2. Although the method I describe has not yet been (openly) applied in commercial arbitration, a similar dynamic has shown promise in the context of investment arbitration, and I propose res judicata as an ideal 'test case' for it here. Finally, I consider various objections to and limitations of this approach, including lack of publication of awards, classification of res judicata as a matter of public policy in some jurisdictions, and methodological questions about how my proposal might work in practice.

2 BREAKDOWN OF PRECLUSION REGIMES IN ARBITRATION

This section analyses the uncertainty associated with the preclusive effects of arbitral awards and explores the causes of that uncertainty. I argue that the background choice-of-law rules in international arbitration cannot adequately address choice-of-preclusion-law, and in any event are often not employed by arbitrators. The examples I discuss raise only a small subset of the unanswered questions on this subject, (31) but they are sufficient illustration of how the core values meant to be advanced by res judicata are undermined by the existing preclusion regime. (32)

2.1 Single forum case: an ex ante look at preclusive effect

When a party initiates a run-of-the-mill arbitral proceeding, it can be difficult to predict
P 802 what the preclusive effect of an award will be. This point is obscured in the ● exegesis of sprawling multi-jurisdictional cases. (33) Although such cases undoubtedly illustrate the

shortcomings of the regime, their idiosyncrasies and sheer complexity make them appear exceptional. Yet the problems they expose are not exceptional at all. Moreover, considering a more quotidian case has the benefit of making it easier to distil the problem down to one of choice-of-law principles.

SCC Case 24/2002 illustrates how confusion arises over the preclusive effect of arbitral awards, even in structurally simple cases. (34) A Thai company (TC) and a Danish company (DC) contracted to have DC build a food production plant in Thailand. (35) The arbitration agreement designated Stockholm Chamber of Commerce (SCC) arbitration in Sweden, and the law of the contract was English law. (36) When a dispute arose over DC's failure to cure a construction defect, TC refused to pay the final instalment of 10% (EUR 18.9 million). (37) DC filed for arbitration to collect the payment, and in TC's reply memorandum, it asserted a counterclaim for lost profits from delay. (38) The SCC appointed an arbitrator and set the 'Advance on Costs' to be paid by the parties. (39) After TC missed payment deadlines, its counterclaims were eventually dismissed by the SCC Institute before the arbitrator commenced hearings. (40) In the final award, the arbitrator discussed the potential preclusive effect of his award on the counterclaims:

> It is not of course for this Tribunal to surmise whether … Respondent could bring fresh arbitration proceedings … to pursue its [counterclaim]; but as far as this Tribunal is concerned, this Award is not intended to operate as a legal barrier to such proceedings, whether by *res judicata*, issue estoppel, or otherwise. (41)

The arbitrator said little more on the matter, but the publication includes expert commentaries from practitioners who dissected the preclusion question. The first commentator, Mary O'Connor, raised the English doctrine 'abuse of process', under which a party may be barred from raising a claim in later proceedings where it previously had
P 803 an opportunity but failed to do so, as a ● potential bar. (42) However, Sweden has no such doctrine. As to res judicata, she observed that absent a 'final award on the merits', it was 'unlikely that *res judicata* would apply' under English or Swedish law. (43) Issue estoppel, however, she found to be a closer call. She noted that depending on the reasoning in the final award on DC's claim, the arbitrator might necessarily decide facts that would preclude – via issue estoppel – an essential element of TC's claim. (44) The arbitrator attempted to foreclose this outcome, but preclusive effect is generally determined *retrospectively* by F-2, not *prospectively* by F-1. (45) In any event, issue estoppel could only be relevant if the reference law was English: like abuse of process, this doctrine is unknown in Sweden. But given that the arbitrator did not specify which preclusion law applied, the commentator was left to infer that using the term 'issue estoppel' meant English law. (46) The second pair of commentators agreed that the award did not have 'complete preclusive effect', but analogized the holding to a default judgment under English law. (47) This reflected the view that it was appropriate to 'apply … by analogy the approach of courts'. (48) In that case, TC would have to apply to set aside the 'default judgment' before it would be able to bring a counterclaim. (49) Finally, the second commentary criticized the Arbitrator for 'bind[ing] the hands' of F-2 vis-à-vis the award's preclusive effect, implying that the dicta on this point would be effective. (50)

That so much confusion exists about so simple a case is shocking. In a single round of a two-party dispute, which never even reached a second tribunal, three experts advance a wide array of possible theories seemingly reflecting different choice-of-law methods. All told, five different theories under which the award could have preclusive effect were ●
P 804 considered. (51) As shown in Part B, the confusion is only compounded when a second tribunal enters the picture.

2.2 How preclusion is applied in practice: limits of choice of law

This section considers the problems that arise when a second tribunal determines the preclusive effect of a prior arbitral award. By definition, the preclusive effect of an award is determined by a second adjudicator looking backward to see *what was decided* (52) in the first action. (53) Before turning to illustrative cases, some background related to choice-of-preclusion-law is necessary.

Historically, res judicata was most often viewed as a procedural or evidentiary rule. (54) As such, it was part of the *lex fori* (forum law), and courts used the *lex fori* preclusion rules regardless of the law applied to the merits. (55) However, arbitrators do not have a national forum in the same way that courts do. (56) As a result, the procedural law that applies in domestic courts (the *lex fori*) does not automatically apply to all aspects of arbitration. (57) Instead, the procedural law of arbitration is primarily made up of two components: the *lex arbitri* (i.e. the national arbitration law) and the institutional rules of the arbitration. (58) These sources, however, say nothing about which preclusion law applies – even in civil law countries, where res judicata law is codified by statute. (59)
P 805 An alternative would be to classify the rule ● as substantive – and thus link it to the law governing the merits of the dispute – but the 'substantive' approach is disfavoured in both civil and common law systems. (60) Because the question does not lend itself to standard choice-of-law analysis, arbitrators often adopt a somewhat ad hoc approach. (61)

One factor that arbitrators seem to consider is the 'transnationality' of a case. (62) When the dispute appears more transnational, arbitrators appear to feel less constrained by the formal requirements of domestic law. The following passage from ICC Case 4126 is a representative analysis:

> [T]he rules of good procedural order in an important number of countries including those of the European Community do not prevent ... a party to an arbitration from availing itself, for a request that is essentially identical ... , of the successive possibilities offered by state jurisdictions ... If it is true that the Owner was not a party to [the first proceeding], it is nonetheless the case that the object of the request now advanced before the arbitral tribunal is essentially identical to that judged in that procedure. (63)

France was the seat of the arbitration, where under domestic law the 'triple identity' test would have required the same claim, the same grounds, and the same parties. (64) Indeed, scholars also support use of the triple identity test in arbitration. (65) Thus, on two levels one would expect the 'triple identity' test to apply. Yet the tribunal, citing the 'rules of good procedural order', extended a form of preclusive effect to a *non-party* – a result inconsistent with any conventional construction of the 'triple identity' test. Perhaps the deviation was driven by equitable considerations, such as abuse of process. Or perhaps it was because of the apparent 'economic reality' of the situation. (66) Any explanation is mere conjecture because, remarkably, the tribunal neither explained its
P 806 deviation from the ● triple identity test nor cited an alternative source of authority. Nonetheless, awards like that in Case 4126 garner praise for reflecting a viable *sui generis* arbitral approach to preclusion. (67)

Although I too advocate a *sui generis* approach, Case 4126 hardly helps resolve the broader problem. The first issue is that it does not articulate a method, even though it ostensibly provides reasons for its result. Reference to the domestic rules of many countries suggests a tribunal is drawing on 'general principles of law', but truly relying on general principles of preclusion law is no solution. (68) Second, even if Case 4126 gestured towards a solution, tribunals at other times *do* feel constrained to apply a given national law – in other words, to employ an entirely different choice-of-law rule.

For example, in a different France-seated International Chamber of Commerce (ICC) case the arbitral tribunal had to determine the preclusive effect of a prior award after an intervening court judgment. (69) After a tribunal awarded damages for breach of contract, the award debtor challenged the award in the Paris Court of Appeal for violation of public policy because the arbitrators failed to consider whether competition law rendered the contract a nullity. (70) Although the court rejected the challenge, it stated in dicta that because the tribunal did not consider competition law theory, the award debtor could raise the matter in subsequent proceedings. (71) The award debtor pursued this suggestion. In the second arbitration, the tribunal agreed that the contract challenge was not barred, but said that nonetheless res judicata precluded restitution or other remedies that would effectively overturn the result of the first arbitration. (72) The reasoning reflects a full embrace of the *lex fori* approach. The tribunal said the applicable preclusion law was French because the award had been 'integrated into' the French legal order. (73) It went on to note 'however attractive the autonomous or transnational method may be', and 'notwithstanding the creative views of some experts',
P 807 the award was 'part of' the French legal system. (74) Of course, an ● award being 'integrated' into a legal order is not a recognized choice-of-law method for identifying which preclusion rules apply; rather, it seems 'integration' was an ad hoc consideration that carried the day in this instance. This represents, in a sense, the opposite of Case 4126, in which the arbitrators were driven to generalize about 'rules of good procedural order' in many countries.

To make matters worse, 'transnational' vs. 'integrated' is far from the only consideration, even in single jurisdiction disputes. In some cases, tribunals have upheld the preclusive effect of a prior award simply because it was administered by the same institution. (75) In others, tribunals apply a cumulative standard that reflects the shared view of a number of relevant jurisdictions. (76) Still others simply apply a given standard without *any* choice-of-law analysis. (77) And all of the foregoing only relates to cases in which the preclusive effect of an award is assessed *in the same jurisdiction* where the award was originally rendered.

The problem is even worse at the inter-jurisdictional level. (78) The Federal Tribunal in Switzerland recently issued a notable ruling on a question of inter-arbitral tribunal res judicata where the first award was German and the second was Swiss. (79) Both disputes arose out of a deal in which an American law firm acquired a German law firm in return for annual payments to be made to the German principal. (80) Believing he had not received enough compensation in 2009 or 2010, the German lawyer filed for arbitration in Switzerland, but the parties subsequently agreed to relocate the seat to Germany. (81) The ICC tribunal dismissed the attorney's claims in 2011. (82) In 2013, the German attorney started a second arbitration in Switzerland disputing the amounts received in 2011 and
P 808 2012. The second ● tribunal granted part of the German attorney's claims, and the American law firm sought set-aside of the award before the Swiss Federal Tribunal on public policy grounds for ignoring the preclusive effect of the prior award. (83) In

rejecting the challenge, the tribunal said that Swiss law limits res judicata effect to the holding rather than the reasoning, and given the fact that the years in question were different, the arbitral tribunal was correct to find that the claim was not identical. (84) It is interesting to note that the tribunal highlighted the lack of consistent international – or freestanding transnational – standards for res judicata. (85)

As this section has shown, whether the issue is considered from the standpoint of an F-1 arbitral tribunal, an F-2 arbitral tribunal, or a court, the need for greater coherence is evident. A party planning how to manage its case cannot reliably determine at the time of the first proceeding what the effect of any resulting award will be. (86) Once the second proceeding is commenced, arbitrators may consider all sorts of criteria – transnationality, intra-institutional consistency, public policy demands, integration into a legal order, comparative/regional standards – unknowable in advance. The current system not only operates to the detriment of litigants, but also detracts from the core values of arbitration and private international law. It is to those values that I turn in the next section.

3 BUILDING A BETTER PRECLUSION REGIME

The problems with the current regime are increasingly well-known. Indeed, it seems the only point of universal agreement is that the regime needs to change in some fashion. However, there is significant disagreement about how to approach the issue. The leading proposal thus far, that of a specialist committee of the International Law Association, proposed drawing on various domestic laws and from international law to codify a set of compromise standards. Yet it left many issues to national law, which has meant the persistence of uncertainty in important areas. Perhaps partly for this reason, the standards have not been relied on in practice.

After considering the shortcomings with the codification approach, section 3 suggests
P 809 giving the matter to arbitrators for development independent of national laws. My discussion goes beyond existing proposals by linking this position to the key systemic values in the international arbitration regime. Specifically, I identify what I call 'arbitral values' and 'structural values' that support this approach. (87) The former are drawn from the New York Convention and from techniques that have developed to prevent idiosyncrasies in national law from detracting from arbitration's efficacy. The latter are drawn from background norms in related areas of private international law.

3.1 ILA and the quest to codify res judicata rules for commercial arbitration

The high-water mark of coordinated effort to fix the problem came from the International Law Association's Committee on International Commercial Arbitration (hereinafter 'the Committee'). Between 2002 and 2006, the Committee released reports and ultimately a set of Recommendations on res judicata. (88) Adopting what it called a 'mixed model', the Committee found that some issues related to res judicata were to be 'governed by transnational rules', with the remainder determined by some national law (to be chosen using an appropriate conflicts rule). (89) The Committee's key findings included that some version of the triple identity test was appropriate for arbitration, (90) and that preclusive effects should extend to issues, not just claims. (91) The report published by the Committee repeatedly emphasized that in principle, developing transnational methods was appropriate because the '*res judicata* [of] awards should not necessarily be equated to ... judgments'. (92)

Yet the Committee left far too many questions unanswered. It explicitly chose not to
P 810 address key issues a tribunal might have to resolve when considering a prior award. Unfortunately, that includes many of the issues most likely to give rise to confusion. For example, although the Recommendations embraced a general 'same parties' standard, (93) they 'do not formulate a requirement as to mutuality', nor define 'parties' given divergence about privies, group of companies doctrine, alter ago/agency law, and other borderline cases. (94) Similarly, the Committee took no position on whether it was appropriate to adopt a transactional test, under which all claims from the same transaction have to be asserted in a single proceeding. (95) Nor did the Committee do anything to mitigate uncertainty resulting from the remaining role carved out for choosing national law according to conflicts rules. For example, it did not even take a firm view on the substance vs. procedure question, (96) nor on the related issue of whether preclusion should be governed by the law of the F-1, F-2, or the law applied to the merits of the dispute. (97)

The scope of the unanswered questions only highlights the irony of the Committee's soft-spoken pivot that unresolved questions are to be 'referred to domestic law under an acceptable conflict rule'. (98) The irony lies in the fact that the failure of conflicts methods is perhaps the main reason an international effort had to be undertaken to coordinate the regime. Despite the fact that most jurisdictions regard res judicata as procedural, and despite the fact that arbitration has generally been liberated from the *lex fori*'s procedural rules, (99) courts can be aggressive in policing choice-of-preclusion-law decisions with an eye towards imposing the F-2 *lex fori* standard on arbitrators. (100) Yet as discussed *infra*, the rules for judgments are widely regarded as inappropriate for awards. (101) Thus, a procedural characterization does not get one out of the woods – and

the Committee did not even feel prepared to entirely commit to that characterization.

These are not merely theoretical problems: they render the Committee's Recommendations incapable of providing guidance even in the simple, single jurisdiction cases discussed above. The lack of third party standards means the tribunal
P 811 in ICC Case No. 4126, which ultimately cited 'rules of good procedural ● order' to bar a non-party attempting to re-open a previously resolved issue, would still have had no guidance on a transnational rule. (102) The lack of a clear stance on the transaction test and on characterization means there would still be confusion in SCC 24/2002 about the consequences of not bringing a counterclaim due to failure to pay costs. (103)

There are, of course, meaningful issues the Recommendations *would* resolve – if they were applied. For instance, the American law firm invoking preclusion before the Swiss Federal Tribunal attempted to use the Recommendations as persuasive authority. Given that the triple identity was met – and the award was capable of recognition – Recommendation 4.2 (issue estoppel) would have resolved the case. Yet the Swiss court said the International Law Association (ILA) Recommendations were irrelevant. (104) Indeed, it appears recourse to the Recommendations has largely been rejected by courts and arbitrators alike. (105)

The Recommendations' lack of impact demonstrates the futility – or at least the prematurity – of a soft law/codification approach to res judicata in arbitration. Codification is a process that is part compilation and part innovation, by which disparate norms are organized and placed in relation to one another. (106) The problem is not that arbitration is ill-suited to soft law efforts or codification generally: in fact, soft law and codification have been influential on numerous issues. The more successful of these include the International Bar Association's (IBA) Rules on the Taking of Evidence in International Arbitration (107) and the United Nations Commission on International Trade Law (UNCITRAL) Model Law. (108) Rather, unlike with evidence-taking or international arbitration laws, the conditions for codification were not right with respect to res judicata. (109) The problem stems from a combination of norm divergence, lack of experiential guidance on best practices, and the fact that no principled basis exists for selecting one
P 812 nation's rule over another. In ● the end, the proof is in the pudding: codification can hardly be called a success where it has not been taken up, as is the case with the ILA's work on res judicata. (110)

3.2 Why the ILA's national law carve-out does not reflect policy necessity

In light of the obvious problems posed by conflicts approaches, it is worth pausing to consider whether the ILA's conservatism about discarding national res judicata rules reflects countervailing considerations militating in favour of leaving certain questions to national law. Perhaps some amount of uncertainty could be justified as a trade-off for retaining a role for national law if there were important policy interests being protected by national law. As it turns out, however, to the extent national laws uniquely safeguard particular interests, those are likely not relevant in international commercial arbitration.

Domestic preclusion law reflects a policy balance struck between competing factors, but for any given question, the desirable balance is different once one moves from domestic courts to international tribunals. One example stems from the fact that a major policy consideration shaping preclusion doctrines is 'the civil justice resource economy requiring the prevention of the waste of resources'. (111) From a law and economics perspective, the goal of a res judicata regime should be to minimize the sum of 'error costs' (costs from the wrong outcome in the first adjudication becoming final) and 'direct costs' (public and private costs associated with the act of re-litigation). (112) In the domestic court context, the public costs include the time of judges and clerks and the burden on the judicial system. In arbitration, where parties pay their own costs instead of relying on publicly funded courts, the public costs side of the ledger looks very different, to the extent the concept translates at all. Thus, any balance struck under national law regarding conservation of resources would not carry over. (113)

P 813 ● The other standard policy considerations underlying res judicata enforce this view. Oft-cited factors include (1) fairness to litigants, especially finality/repose (114) ; (2) a desire not to cut truth-seeking processes short (115) ; (3) safeguarding the integrity of the legal system against, inter alia, potentially inconsistent judgments. (116) Especially with respect to truth-seeking and the integrity of the legal system, the domestic balance may not be appropriate for arbitration. In domestic litigation, there may be public interest in private parties vindicating certain rights. (117) By contrast, in international arbitration, the disputes typically concern a smaller and different range of issues – commercial problems between businesses, in which truth-seeking as a normative value may give way to other considerations. And given the fact that arbitral tribunals are not courts of the state, concern over the threat to the legitimacy of public courts from inconsistent outcomes is not as relevant. By contrast, arbitral res judicata might count among its priorities: normalizing commercial relations for the sake of resuming business (118) or ex ante predictability *vis-à-vis* the res judicata rule that will apply. (119) Of course, truth-seeking and fairness to parties undoubtedly retain value in the arbitral context. The point is simply that considerations not present in the domestic court context may also factor in, and the factors common to both regimes will likely be weighted differently. As a

result, even if national res judicata laws uniquely reflect policy concerns, it is difficult to sustain the view that it is essential to apply national res judicata law in arbitration in order to honour some domestic policy balance, because that balance is likely inapposite.

As such, there is no compelling reason why the res judicata law applied by international arbitral tribunals *inter se* should be that of a national law. This conclusion casts further doubt on the wisdom of the ILA's approach of resorting, after partial codification, to domestic res judicata rules.

In stark contrast to the uniquely domestic policies underlying specific national res judicata rules, there are policy values broadly shared amongst Convention states that militate in favour of a transnational rule. I call these 'arbitral values' and 'structural values', and it is to these that I now turn. Careful consideration of these values points towards a solution, but this solution is in the form of a *method* rather than choosing among existing *rules*. (120)

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3.3 ● Arbitral values: New York convention and controlling national law's impact

I argue that in the text of the Convention and its interpretation by courts, several arbitral values can be discerned: insulating the procedural autonomy of arbitration from disruptive application of national law; award mobility; and enforcement of agreements and awards on similar terms in any Convention state. Along with the structural values discussed in section 3.3, these values provide important support for my proposed transnational rules approach. The ILA Committee referenced the Convention, but only in passing, and did not treat it as a meaningful source of guidance. (121) Other discussions of the issue effectively omit it altogether. (122) Yet the New York Convention forms the backbone of the international arbitration system, and is the most widely ratified commercial law treaty. (123) And crucially for present purposes, its text and subsequent interpretation contains lessons for the type of preclusion regime that should govern arbitral awards.

To provide for the mobility of awards, Article III of the Convention obliges contracting states to recognize and enforce awards rendered abroad – a duty which should be understood to include giving them preclusive effect:

> Each Contracting State shall *recognize arbitral awards as binding* and enforce them in accordance with the rules of procedure of the territory where the award is relied on. (124)

Article III is of paramount importance to the Convention. One of the primary goals of the Convention was to eliminate the 'double exequatur' system, in which awards had to be confirmed by courts at the seat before they could be recognized or enforced abroad. (125) Notably, it has two distinct requirements: to 'recognize arbitral awards as binding', as well as 'enforce them'. The first requirement includes a duty to give preclusive effects to awards. (126) This duty clearly forecloses the option of denying awards *any* preclusive effect, but the key question is whether it does more.

Gary Born takes the position that it does. In his view, Article III does not prescribe
P 815 'particular rules of preclusion, but instead … provide[s] a constitutional ● statement of principles … that must be elaborated over time by national courts'. (127) In light of the Convention's purpose – to facilitate final, binding, global resolution of disputes – he further suggests that these preclusive effects should be at a minimum those of national court judgments. (128) Moreover, he embraces the 'one bite' approach of some common law jurisdictions that requires all claims to be asserted in one proceeding. (129) The remainder is left to courts for subsequent development. (130)

Although rightly emphasizing the role of the Convention, Born's approach is subject to the same critique as that of the ILA: namely, it relies on domestic law to refine towards a coherent standard. There is no reason to believe such coherence will ever emerge. Courts will continue to apply divergent domestic standards. (131) The Draft Restatement, noting that arbitral tribunals do not have a *lex fori* nor their own freestanding rules on preclusion, counsels courts to refer to domestic US law for those questions not squarely addressed by the law on recognition and enforcement. (132) Thus, although Born hints at the path out by grounding his analysis in the Convention, he ultimately refers the issue back to the very same domestic laws that produced such an unmanageable divergence in the first place.

To begin conceptualizing alternatives to Born's approach, the first thing to note is that there are key areas in which the Convention requires applying a transnational standard rather than one drawn from national law. One example is the formal requirements for an agreement to arbitrate. Article II(1) requires recognizing 'agreement[s] in writing' to submit disputes to arbitration, and Article II(2) defines written agreement as 'a clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams'. (133) As courts recognize, even if national law permits implied acceptance to form a binding contract under some circumstances, Article II's requirement to observe certain formalities in arbitration agreements trumps national contract law. (134)

Article II's formalities requirement differ from Article III in that the latter does not define the content of the res judicata standard envisioned by the phrase ● 'recognize … as
P 816 binding' – presenting a potential carve-out for national law. Yet even in situations where a Convention standard is not defined, courts and tribunals at times embrace an international standard rather than a local one. Important examples of this have emerged due to gaps in the Article II arbitrability rules, which neither elaborate substantive standards nor provide a choice-of-law rule. One such gap lies in Article II(1), which creates an exception to the general requirement of recognizing agreements to arbitrate if the dispute does not concern 'a subject matter capable of settlement by arbitration'. (135) The lack of a choice-of-law rule leads to predictable problems when parties come from two different countries and a third country's law is chosen as the law of the contract. Another such silence comes in Article II(3), which requires that courts refer parties (with a valid agreement to arbitrate) to arbitration on request, unless the agreement is 'null and void, inoperative, or incapable of being performed'. (136) As with Article II(1), the Convention neither provides standards nor a choice of law rule for what constitutes 'null and void'. At first blush, then, the standards of 'arbitrability' and 'null and void' resemble preclusion insofar as they lack both substantive treaty standards and choice-of-law direction.

Nonetheless, there is a prevalent view that national law should have a light touch here, even if that requires deviating from otherwise applicable domestic standards. For example, even when disputes under the Securities Exchange Act were non-arbitrable in *domestic* arbitration, the Supreme Court permitted sending such claims to *international* arbitration. (137) In the process, it decried the parochialism inherent in insisting that international commercial disputes be resolved by US law in US courts – even though the domestic law rule for domestic arbitration would find the dispute non-arbitrable. (138) The Court thus recognized the threat domestic standards pose to the Convention regime. And even when courts find that local law reflecting fundamental public policy trumps the desire for international standards, the default option for run-of-the-mill cases is to apply an internationally recognized rule. The coexistence of transnational considerations (for the general case) with a backdoor for public policy is illustrated in *Rhone Méditerranée v. Achille Lauro.* (139) There, the Third Circuit held the approach most consistent with the Convention's purpose is to only find an agreement null and void '(1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver … or (2)
P 817 when ● it contravenes fundamental policies of the forum state'. (140) Commentators largely support a narrow interpretation of Article II's text as consistent with the need for autonomy and uniformity of Convention interpretations. (141) In fact, some go further than merely urging a narrow construction of domestic law, and instead advocate directly applying a body of *sui generis* standards for international arbitration agreements separate from any local laws. (142) And when the matter comes before arbitrators, there is a tendency among some to refer to transnational rules resembling a freestanding *lex mercatoria.* (143)

Yet the role for domestic law and courts in Article II must not be understated, despite broad recognition of the policy factors favouring a limited role for national law and a transnational approach. For example, every national law delineates which disputes are the exclusive domain of courts and which can be referred to arbitration. (144) Moreover, the validity of the arbitration agreement is an exception to the strong form of the *compétence-compétence* principle that would otherwise direct the matter to arbitrators. (145) Generally, these 'gateway' questions entail an atypically large role for national law and courts because they reflect sensitive policy issues (146) and call into question the very consent (embodied in the arbitration agreement) necessary to legitimate recourse to arbitration. (147)

P 818 ● By contrast, determining the preclusive effect of a prior award implicates far fewer (and far less fundamental) policy interests than arbitrability or the validity of an agreement. There is no question of reserving sensitive areas to be determined only by courts, because by the time a preclusion question arises the matter has already been arbitrated once. For the same reason, any dispute that existed about consent has likely been resolved. Absent such countervailing considerations that lead national law and courts to retain a policing role, the factors that militate in favour of a transnational standard should carry the day. Indeed, courts often refer questions about whether a prior award precludes re-arbitration to the tribunal, which suggests that they do not see preclusion as being on par with the other gateway issues discussed above. (148)

The comparison of preclusion to Article II issues brings out two points: first, it shows the broad recognition of these arbitral values, even in an area that raises greater public policy concerns than res judicata. These values include insulating the procedural autonomy of arbitration from disruptive application of local law; award mobility; and a desire for enforcement of agreements and awards on similar terms. Second, it shows that preclusion questions are not complicated by the same vital policy concerns that justify deviating from a transnational approach in interpreting Article II. Indeed, the fact that even in the face of strong policy concerns associated with Article II questions, courts and legislatures nonetheless go to great lengths to facilitate efficient arbitration is a testament to the salience of the arbitral values identified in this section.

3.4 Structural values: Judgment recognition and applying F-1's preclusion law

In this section, I consider the lessons to be drawn from a related doctrinal area: the preclusive effect given a foreign country judgment when recognition is guaranteed by a legislative or treaty source. Despite relating to judgments rather than awards, the comparison is apt in important respects. As with the arbitral regime under the New York Convention, states must give preclusive effect to a judgment when recognition is provided for by law or treaty, but there is still a question as to *which* preclusion law applies. The way this question has been analysed in the judgment recognition context
P 819 supports the position that the law applied to assess the ● preclusive effect of the award should be ascertainable at the time of the first action. (149) I call this a 'structural value' because it flows from considerations unique to multi-jurisdictional dispute resolution that private interests favour determining preclusion law at the time of the F-1 action.

The Brussels Regime, which regulates jurisdiction and inter-state judgment mobility in Europe, supports establishing preclusive effect at the time of first adjudication (F-1) – regardless of where preclusion is later asserted (F-2). (150) Like the New York Convention, the Brussels Regime mandates recognition and enforcement subject to narrow and clearly delineated exceptions. (151) In an early and still influential case, the European Court of Justice (ECJ) said recognition under the Brussels Regime must 'confer[] on judgments the authority and effectiveness accorded to them *in the state in which they were given*'. (152) In support of this conclusion, it noted the policy 'to facilitate as far as possible the free movement of judgments', and it further suggested 'the Convention … should be interpreted in this spirit'. (153) Thus, once a foreign judgment is 'recognized by virtue of Article 26 [it] must in principle have the *same effects* in the State in which enforcement is sought *as it does in the State in which the judgment is given*'. (154) This is conceptualized as 'extending the effects of the judgment'. (155)

The terminology of 'extending the effects of the judgment' clarifies why referring to F-1 for preclusion law flows naturally – if not inevitably – from the goal of ensuring judgment or award mobility. The effects of a judgment/award are *altered*, rather than *extended*, if the effects change across each possible recognizing jurisdiction. (156) Even jurisdictions like
P 820 England that firmly embrace the F-2 ● approach outside the Convention context have moved towards the 'extension of effects' approach when it comes to judgments that fall under the Brussels Regime. (157)

This approach has been analogized to the US approach to sister State judgment recognition under the Full Faith and Credit Clause. (158) Although unique questions related to federalism, the *Erie* doctrine, and the constitutional/legislative overlay mean the case law is less directly comparable than that from Europe, US commentators have nonetheless developed a policy framework applicable to the arbitral context. Specifically, they recognize that there is a trade-off between the interests of litigants and those of the F-2 forum, which may want to apply its own preclusion law pursuant to notions of justice or procedural efficiency. However, it is generally understood that (1) the interests of the litigant outweigh those of F-2, and (2) the litigants' interests uniformly favour an F-1 standard. (159) The reason litigants (ex ante, as a class) will always prefer F-1 as the preclusion law reference point have been succinctly elaborated by Howard Erichson:

> As a matter of litigation policy, the applicable preclusion rules must be determinable at F1 and must not depend on where the subsequent case is filed. *At F1, practitioners and their clients make critical decisions* concerning joinder … , resource allocation, appeal, delay, settlement … and other matters. *Preclusion law affects these decisions.* At the same time, nonparties make critical decisions concerning intervention, involvement, and testimony. *Preclusion law affects these decisions as well.* These actors cannot wait until a subsequent action is filed before they know whose preclusion rules will apply. (160)

If policy considerations support applying F-1's preclusion law to sister State judgments under the Full Faith and Credit regime, arbitration should *a fortiori* favour F-1. In the judgment context, F-2's courts must weigh the 'hardship potentially cast on the party who lost the first suit' against forum interests in 'judicial economy'. (161) By contrast, when an arbitral tribunal seated in F-2 (rather than an F-2 court) considers the preclusive effect of a prior award, judicial economy concerns related to public resource use are irrelevant.

Although the Draft Restatement of International Commercial Arbitration recommends US
P 821 courts apply their own preclusion law rather than that of the ● rendering forum, the commentary reads as if this is for lack of a better option rather than due to particular policy reasons related to the forum's interest. (162) To begin, the Restatement notes that the typical approach for judgments is applying the F-1 law. (163) Yet the Restatement seems to say that when it comes to arbitration, it has *no choice* but to recommend F-2's forum law because arbitral tribunals do not have a freestanding body of preclusion law and because F-1's forum preclusion rules are not part of what the parties chose by picking that forum as the seat. (164) In fact, the only affirmative policy rationale the Restatement identifies in favour of F-2's forum law is one that has little application to the context of one arbitral tribunal considering a prior tribunal's award: that is, that the F-2 court 'has a legitimate interest in conserving judicial resources and promoting judicial economy generally'. (165) Given the Restatement's ambivalent endorsement of the F-2 approach

and the lack of strong support for it in law or policy, I suggest the Restatement commentary can be read as indirectly highlighting the need for the development of *sui generis* preclusion standards for arbitral tribunals.

As this section has shown, when compared to how the policies favouring judgment mobility in the United States and the EU have been implemented, international arbitration is an outlier. Despite having a treaty guaranteeing award mobility, arbitral awards invoked before a second tribunal enjoy no equivalent of the 'extension of effects' notion that prevails with respect to foreign country judgments in Europe. And despite the fact that tribunals are privately constituted, it appears the 'forum interest' in applying the *lex fori* carries weight, even though this should be less relevant when the tribunal is not a part of the court system. This defies the arbitral values (insulation from idiosyncratic local laws, award mobility, and recognition on similar terms) and the structural values (extension of effects and private litigation interests supporting application of F-1's law over F-2's law) discussed here. The need for a transnational rules approach is clear.

4 TRANSNATIONAL RULES METHODOLOGY

I have attempted to show that traditional tools for managing divergent laws in
P 822 transnational disputes – choice of law and codification – will fail to produce a viable ● res judicata regime. Moreover, I have sought to support the view that a transnational rules approach to res judicata is the appropriate one. Yet this provides little guidance as to how such rules would emerge, or under what authority they would be developed.

The answer to the first question is inspired by Gaillard's 'transnational rules methodology', which he elaborated in the context of ongoing debates over the 'delocalization' of arbitration. The terms of the debate need to be briefly introduced to make sense of my proposal, and underscore the fact that my approach does not rely on a wholesale embrace of Gaillard's vision. The focal point of the broader debate relates to Gaillard's claim that arbitration enjoys 'autonomy vis-à-vis each national legal order' such that there is a freestanding 'arbitral legal order'. (166) To account for the 'source of [arbitration's] juridicity' (167) outside national law, Gaillard turns to 'trends arising from the normative activity of the community of States'. (168) In his view, something supra-national has arisen from 'the convergence of all laws' on the validity and bindingness of arbitration. (169) This supra-national force provides a basis, largely independent of national law, for giving legal force to the parties' agreement to arbitrate and be bound by an award in any enforcing State.

4.1 How Gaillard provides a starting point for solving the preclusion problem

At the level of practical consequences, this perspective has at least three implications. Perhaps the most well-known aspects relate to (1) how much arbitrators must defer to supervisory court action mid-proceeding (170) ; and (2) whether at the end of the proceeding, annulment at the seat produces extraterritorial effect. (171) These aspects of his theory have generated significant pushback. (172)

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The third element – the transnational rules methodology (TRM) that inspires my proposal – features far less prominently in current debates than the other two. To the extent Gaillard spells out a vision of how TRM works in practice, it is a process that partly relies on comparative law, and partly on progressive development of the law – driven by arbitrators. As to the comparative element, he analogizes TRM to the process of identifying 'general principles' under Article 38 of the ICJ Statute. (173) Article 38 designates the 'principles of law recognized by civilized nations' as a source of law for the ICJ. (174) But Gaillard's method would falter if it truly required finding sufficient uniformity to qualify as a general principle in Article 38 terms: when countries diverged on a given issue, TRM would hit a dead end. In the face of such divergence, the progressive development (175) component kicks in. At that stage, arbitrators are to look to the collectivity of states to 'ascertain the prevailing trend within national laws'. (176) Once identified, this trend forms the basis of a result, displacing the application of an idiosyncratic national law. By way of example, Gaillard invokes England's refusal for a time to accept separability. Per Gaillard, an arbitral tribunal sitting in England should – even where a choice-of-law analysis would result in applying English law to the contract – apply the substantive transnational rule favouring separability. (177) TRM is thus distinguished from choice of law because the latter 'contemplates the conflict between various laws', whereas TRM 'takes into account the general orientation of the evolution [of state law] ... to identify the law that will prevail'. (178) Inevitably, choosing *not* to apply a national rule under such an analysis takes on a normative dimension because it necessarily implies certain national rules are outdated. (179)

With a few crucial changes, a modified version of the TRM provides a conceptual framework for resolving the preclusion problem. Specifically, I propose taking the structural elements of the method (comparative analysis and 'progressive development'), but referring to *the decisions of other international tribunals, rather than national laws*, as
P 824 grist for the mill of comparative analysis. In other words, when a ● party in arbitration asserts the preclusive effect of a prior arbitral award, the arbitrator would look to

arbitral and other relevant international tribunals (e.g. investment arbitration, the ICJ, and – especially once this has been taken up – commercial arbitration), and apply a rule consistent with past decisions yet adapted to relevant commercial realities.

As is true of Gaillard's approach, my proposal results in use of a transnational rule. Yet my version has two key advantages. First, my version of the TRM inquiry does not require flagging any national law as isolated/outdated *vis-à-vis* general trends, which takes TRM away from the problematic territory of requiring arbitrators to *sub silentio* make value judgments about national laws. Rather, it more closely resembles common law precedent-formation, in which part of adjudicating is situating the facts of the present dispute in relation to existing decisional law. Under this proposal, existing decisions of international tribunals – and those made by subsequent tribunals – would constitute the body of 'transnational law' that arbitrators drew upon and added to.

Second, insofar as TRM is 'no different' from Article 38 analysis, experience suggests TRM will neither be a practical nor a principled method. The International Criminal Tribunal for the Former Yugoslavia (ICTY) is perhaps the most prominent and widely discussed example of deploying general principles as a gap-filler. (180) Yet despite being chaired by experts in public international law and criminal law, the ICTY deployed neither a rigorous nor even a consistent method of general principles analysis. (181) Nor is confusion over how to do general principles analysis limited to the ICTY. (182) That tribunals have struggled with this method makes sense, because the comparative analysis envisioned by Article 38 is extremely resource-intensive.

Thus, experience suggests a tribunal purporting to use general principles will likely end up doing something different, and possibly less legitimate. (183) On the other hand, tribunals can – and as discussed below, already do – look to other tribunals when facing
P 825 similar issues. Thus, it is both more methodologically feasible ● and more in keeping with current practices to cabin the inquiry to other international tribunals, and conceptualize the arbitrator as contributing to a freestanding body of transnational law.

In the remainder of the article, I will argue that my suggested approach is neither so atypical, nor so infeasible, as it sounds. My case relies on four propositions: first, that my approach will help the problems discussed in section 2, and is consistent with the arbitral and structural values from section 3; second, that there is a sufficiently rich body of res judicata law in international tribunals to provide arbitrators a sound footing on which to make decisions; third, that an inter-tribunal process of precedent formation will result in convergence rather than divergence – at least on a question as narrow as the res judicata effect of prior awards; fourth, that arbitrators have authority to adopt my suggested approach, and that it neither relies on Gaillard's wholesale vision of an arbitral legal order nor on embracing a version of *lex mercatoria*.

4.2 Case for a freestanding preclusion law for arbitral tribunals

Proclaiming a freestanding preclusion law to be applied in and developed by international tribunals will create a regime consistent with the arbitral and structural values identified in section 3. Although using the preclusion law at the seat of F-1 is another possibility, the consensus view is that F-1's law for courts is inappropriate to apply to awards rendered in that territory. (184) Nonetheless, the preclusive effect must be known at the time of the first action. My proposal creates another way to fulfil that basic goal, conceptualizing international arbitration as having its own forum – what I call FA – for the purpose of determining preclusive effect. The concept of the arbitral forum (FA) is essential, because it permits the second adjudicator to refer back to the (knowable ex ante) *law of F A* , understood as the freestanding preclusion law for arbitral tribunals. For the narrow purposes of preclusion law, then, the first and second tribunal are actually part of the same 'forum'. The combination of FA and a freestanding preclusion law allows the second adjudicator to identify a cognizable body of preclusion law, identifiable at the time of the first action, without running into the complications caused by the F-1/F-2 framework in the arbitral preclusion context.

Signalling the existence of *the preclusion law of F A* will require openly 'jurisgenerative' interpretation. The notion of jurisgenerative interpretation has been discussed vis-à-vis international law by Duncan Hollis in his account of the 'existential function' of
P 826 interpretation in international law. (185) Noting that standard ● discussions of interpretation focus on the *meaning given to a rule* and the *method of arriving at that meaning*, Hollis posited an additional – but often unstated – function of interpretation in international law: identifying *what exists to be interpreted.* (186) Answering the 'what exists' question represents the existential function of interpretation.

The existential function is discharged with each act of interpretation, even if the 'what exists' question is not addressed explicitly. In that event, the interpretation is called *jurispathic*: the adjudicator presumes the existence of the evidence, the validity and content of the source, or the authority to draw on it. (187) When existential interpretation is made explicit – that is, when the adjudicator *declares* or *argues for* the existence of the authority, source, or evidence in question – that is *jurisgenerative* interpretation. (188) Jurisgenerative interpretation 'creat[es] or confirm[s] the existence of the interpreted subject' (189) – precisely what is called for here.

My proposal thus urges arbitrators to adopt a *specific* view on the question of what exists

to be interpreted, and to do so in a jurisgenerative fashion (i.e. by citing and thereby proclaiming the relevant precedents as a source). The jurisgenerative nature is key because it envisions explicitly identifying a source that thus far has not been formally recognized on a widespread basis. (190) Adopting an openly jurisgenerative interpretation is the only way an arbitrator can effectively signal the existence of *the preclusion law of F A*.

4.3 Rich international tribunal decisional law on res judicata effects

The ample case law on res judicata from international tribunals ensures this proposal would not be impractical to implement. In fact, quite the opposite: res judicata is uniquely amenable to the proposed approach because of its long pedigree as a general principle of law. Nearly 100 years ago, when the first permanent international court was being erected, res judicata was already recognized as a general principle of law. (191)

P 827 Given its status as an iconic procedural ● general principle, res judicata has generated a huge body of public international case law. (192) The principles contained in these cases regularly form the basis for decisions by public and investor-state arbitral tribunals assessing whether a claim or issue is precluded from re-assertion. (193) Perhaps even more importantly, recent investment tribunals have turned their attention to precisely the issues dodged by the ILA Committee.

For example, in *Apotex II*, a North American Free Trade Agreement (NAFTA) tribunal addressed two major questions on which the ILA Committee took no view: who qualifies as a privy and whether issue preclusion is available under international law. The tribunal determined that issue preclusion – in practice, if not in name – was indeed recognized under international law. (194) It then turned to the UNCITRAL Arbitration Rules, which governed the proceeding in the first arbitration that produced the award whose preclusive effect was being asserted. The tribunal found the Rules also supported a broad construction of the prior award's preclusive effect. (195)

Finally, the tribunal applied its preclusive effects analysis to the facts of the case. *Apotex II* concerned a claim brought by Apotex Holdings alleging, inter alia, that Abbreviated New Drug Applications (ANDAs) constituted 'intangible property' under NAFTA, Article 1139(g). (196) In a previous proceeding, another tribunal had deemed Apotex Inc. (the subsidiary of Apotex Holdings that had prepared the ANDAs) to be an exporter, not an investor. (197) That finding included a determination that expenditures associated with

P 828 filing the ANDAs simply supported its ● Canadian-based manufacturing and export operations, rather than constituting investments in their own right. (198) As such, the first tribunal had decided Apotex Inc. was not eligible to bring a claim under NAFTA's Chapter 11. (199) The *Apotex II* tribunal thus had to decide whether Apotex Holdings, which was not a party to the prior proceeding, could bring a claim that depended upon characterizing Apotex Inc.'s ANDA as an investment, where arguably that issue had been definitively resolved in the prior proceeding. In a well-reasoned award that spoke to the availability and scope of issue preclusion, as well as the privies doctrine under international law, the *Apotex II* tribunal determined that Apotex Inc. and Apotex Holdings were both precluded from advancing a claim predicated on the ANDAs as investments. (200)

The *Apotex* example is illustrative only. There are countless other questions about substantive preclusion norms that require resolution. My point is merely to underscore that thoughtful precedents exist – in investment arbitration, commercial arbitration, and public international law – to fuel a common law development process. (201) In light of these precedents, a tribunal could ask parties in arbitration wishing to assert or contest preclusion for briefing on a construction of the transnational res judicata standard. (202) Indeed, the ILA Committee has produced a valuable public informational good on relevant case law, which itself draws from a mix of public and private international tribunals. (That the Committee referred to these sources instead of just national laws is itself a testament to the fact that in principle there is no reason why national law standards are uniquely appropriate for determining preclusive effects in arbitration). (203)

Finally, a note about the scope of the source material I advocate using is in order. Reference to some public and investor-state tribunals, rather than only other commercial arbitral tribunals, is necessary for two reasons: first, guidance from existing decisions on the content of a transnational standard is needed to prevent a large initial variance in outcomes that would result if arbitrators started from scratch. Second, the limited

P 829 availability of arbitral awards necessitates at least ● partial grounding in a source other than just commercial arbitration, which is probably not viable as a 'closed system' for common law precedent building despite the convergence tendency discussed in the following section. Yet, as the next section discusses, taking this approach would not rule out all adaptation such that tribunals were bound to narrowly and mechanically apply a public international law standard – which may not be wholly appropriate for commercial arbitration. In ensuring appropriateness

4.4 Inter-tribunal dialogue: why tribunals would converge on a standard

The precedent forming component of my proposal builds on the increasingly well-recognized fact that many parts of arbitral procedure are globalizing as a result of inter-

tribunal dialogue. (204) Perhaps the best-known illustration relates to rules of evidence. Over time, arbitrators developed norms of arbitral evidence-taking that were a hybrid of civil and common law approaches. (205) This hybridization happened not by compulsion, but by virtue of private actors crafting a set of practices over time where binding sources were silent. (206) Despite the radically horizontal nature of the arbitral regime, which eliminates several mechanisms for promoting uniformity amongst first instance adjudicators, the level of consistency eventually reached a point that it permitted codification. (207) By that time, practice had cohered to such an extent that the drafters could treat it like a Restatement, merely synthesizing and generalizing best practices in the case law. (208)

Drawing on commercial community norms as expressed in prior awards is especially prevalent when it comes to interstitial procedural or quasi-procedural issues. One
P 830 empirical study noted that questions of procedure, the law applicable to ● the merits, and *methods* available to determine which law applies are particularly likely to elicit reference to prior arbitral cases. (209) Others have made similar observations from a qualitative standpoint. (210) Indeed, some suggest 'transnationalization' of applicable rules occurs even when arbitrators apply *national* law. (211)

On res judicata, it seems as if de facto transnationalization may be occurring in the shadows already, especially when tribunals make reference to 'the rules of good procedural order in an important number of countries' in identifying the applicable res judicata standard. (212) My proposal thus has the benefit of bringing an existing tendency out of the shadows and universalizing it, thereby eliminating the problems caused by making inconsistent recourse to national law.

Yet as I have mentioned, arbitrators would likely have to draw at least in part from International Court of Law (ICJ) or International Centre for Settlement of Investment Disputes (ICSID) precedents rather than simply from commercial tribunals – a wrinkle that merits elaboration. An example may help clarify. I envision a process roughly comparable to what has unfolded in the area of provisional measures in recent decades. Developments in ICJ jurisprudence beginning with *LaGrand* (213) spurred 'dialogue – and in some cases, debate' across ICJ panels as well as between ICJ and ICSID tribunals. (214) Once it was established that provisional measures were binding, the questions revolved around the criteria for tribunals to grant requests for such measures. Recent ICSID tribunals have looked to ICJ cases for guidance, but ultimately modified the criteria used by the ICJ in determining whether to grant such measures. (215) Areas of adaptation,
P 831 rather than ● mere adoption, include whether provisional measures can be granted to protect a 'self-standing' right to non-aggravation, and the standards for 'irreparable harm'. (216)

I envision such an 'adopt and adapt' process when it comes to commercial arbitral tribunals borrowing from (and as necessary, modifying) the preclusion standards employed by ICJ and ICSID tribunals. (217) Such an approach will not immediately resolve every outstanding issue, not least because the doctrine of res judicata continues to be controversial under public international law. (218) But placing tribunals in dialogue with a stable and shared set of source materials at least introduces the *possibility* that the convergence mechanisms described above will take over. This alone would represent a significant improvement over the current system, in which tribunals are pulled to different sources in a manner that is neither predictable nor consistent with choice-of-law (or any other set of) principles. Indeed, it is important to bear in mind that I do not suggest that my proposal is an *ideal* solution – nor do I suggest it would be an entirely *tidy* one. However, moving to a second- or third-best method from a baseline of incoherence and disorder would be a marked improvement.

4.5 Legitimacy concerns: on whose authority do arbitrators do this?

My proposal does not go nearly so far as Gaillard's to identify the transnational source of the arbitrators' 'power to adjudicate' on the basis of 'rules that are generally endorsed by the international community' rather than national law. (219) This is because Gaillard seeks to find in arbitration the formal criteria for constituting a legal order. (220) In light of his view that such an order exists, he can justify making recourse to transnational rules because arbitral authority does not come from national law. Given that I do not make such a claim, there is a legitimacy question. Specifically, how are arbitrators justified in
P 832 resorting to a transnational ● rule for preclusion without state (by legislation) or party (by contract) authorization?

The starting point is the norm of procedural autonomy in arbitration. The procedural autonomy norm has two layers: party control subject to mandatory rules, and (where the parties do not exercise control) residual control vested in the hands of arbitrators. Nearly every national arbitration law is consistent with this framework. The Swiss approach is representative, providing, 'The parties may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit it to a procedural law of their choice.' (221) This has consequences not just for what procedural rules are applied but also the amount of supervision courts should provide. (222) An important element of procedural autonomy is the ability to select institutional rules, which determine many elements of the procedure. (223) Institutional rules, like national laws, generally affirm

parties' procedural autonomy, within certain limits. (224) And under nearly all institutional rules, where all of the following sources are silent – the national arbitration law, the institutional rules, and the parties' agreement – the arbitrators have the authority and discretion to shape the procedure. (225)

Accepting the majority view that res judicata is at core a procedural rule supports the conclusion that arbitrators should have authority to determine the res judicata standard that applies in arbitration. National arbitration laws do not speak to it beyond saying that awards have preclusive effect. (226) Institutional rules do not designate a
P 833 specific law applicable to the question of preclusion. Nor do parties typically contract for a given preclusion standard to apply. And although there are examples of awards being set-aside when arbitrators use non-national rules without authorization, recourse to a transnational rule for the narrow question of preclusion law will likely not attract the same scrutiny. (227) Thus, pending formal acknowledgement (in institutional rules or national laws) of arbitrators' authority to utilize a transnational standard, it could be considered permissible under the framework outlined here.

Indeed, some go further to suggest that '*res judicata* is a manifestation of the arbitrators' judicial authority … based on the common intention of the parties as expressed in the arbitration agreement'. (228) Under this view, given that the tribunal has the power to determine the existence of scope of its own jurisdiction, it has necessarily been empowered to resolve questions of res judicata as well. (229) However, even without embracing this full-throated consent-based approach, a strong argument can be built from the combination of the quasi-procedural nature of res judicata, the lack of choice-of-law instruction, and the norm of procedural autonomy in arbitration.

However, where res judicata is considered a matter of public policy – as in previously discussed cases out of Switzerland and some other civil law jurisdictions – further transnationalization could introduce new problems. Prime among these would be the threat of annulment. There is admittedly no easy solution to this problem. Yet this is a challenge that my proposal shares with others that rely to an even greater extent on harmonization driven by national law, such as Born's proposal and that of the ILA. Indeed, if there were some uptake of this proposal in jurisdictions where res judicata is *not* considered public policy, one could imagine other jurisdictions relaxing their insistence that the narrow question of the preclusive effect of prior arbitral awards before a subsequent tribunal is a matter of public policy to be policed by courts.

A further caveat is that due to the legitimacy concerns incumbent in arbitrator-driven processes, it is important to note that my proposal is not meant to exclude other developments. In fact, even if tribunals used a transnational standard, in many ways it would be preferable to provide for it explicitly under institutional rules. And given that courts may vacate or refuse to enforce an award, national law (and efforts such as the
P 833 ongoing US Restatement) may say something about the permissibility and desirability of this approach, which could possibly change the analysis. (230) Yet two countervailing considerations make pursuit of this proposal warranted in the meantime despite these concerns. First, regardless of the pushback that has resulted from arbitrators driving doctrinal innovations, especially in the investor-state context, the issue of choice-of-preclusion-law is narrow and unlike those that typically trigger public policy concerns. Second, other viable solutions are not forthcoming, including in the current draft of the Restatement, and the proposal set forth in this article could contribute to moving the regime in a productive direction pending such developments.

5 CONCLUSION

The arbitral choice-of-preclusion-law regime is broken. A tentative consensus has emerged that a transnational approach is needed, but the path to that outcome remains unclear. Despite the ILA's codification effort, the resulting recommendations have yet to be widely used – likely in part because they fail to resolve key questions or insulate arbitral tribunals from idiosyncratic national laws. However, it provides an informational public good for what is ultimately a more effective and normatively desirable approach: employing the TRM to facilitate the development of *sui generis* standards through a combination of comparative and common law techniques. Yet in contrast to existing calls for employing comparative techniques, I propose a more realistic approach. Namely, relying on the rich decisional law on res judicata in international tribunals, and on the noted tendency for arbitrators to look to past decisions when faced with an interstitial question – especially one of procedure – I suggest that the comparative exercise can and should be restricted to other international tribunals. The resulting regime would permit the development of a freestanding preclusion standard for international arbitration, the preclusion law of FA. This approach will best bring the preclusion regime into line with structural and arbitral values that underpin this area of private international law.

References

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1) The universality of res judicata has long been recognized. *See* Henry Campbell Black, *A Treatise on the Law of Judgments: Including the Doctrine of Res Judicata* 759–760 (1902) ('[Res judicata] is more than a mere rule of law … It is not too much to say that this maxim is a fundamental concept in the organization of every jural society.').
2) Robert C. Casad & Kevin M. Clermont, *Res Judicata: A Handbook on Its Theory, Doctrine, and Practice* 4 (2001) ('[*R*]*es judicata* literally means the thing, or matter, adjudged.') [hereinafter 'Casad & Clermont'].
3) Following a convention used by many private international law scholars discussing laws of jurisdictions with different terminology, I use '*res judicata* effect' or 'preclusive effect' as general terms to refer to *whatever power an award has to prevent re-litigating or re-arbitrating.*
4) William W. Park, *Arbitration of International Business Disputes: Studies in Law and Practice* 494 (2d ed., 2012) ('The business community has sought to enhance neutrality and certainty in cross-border dispute resolution through mutual agreements to mandatory jurisdiction.').
5) Finality ranks high on the list of values res judicata advances. *See* Casad & Clermont, *supra* n. 2, at 31–32.
6) *Davidson's Settlement Trusts* (1873) L.R. 15 Eq. 383, 386 (James, L.J.), *reprinted in* Francis Taylor Piggot, *Foreign Judgments: Their Effects in the English Court* 28 (1879).
7) For one quantitative account, *see* Queen Mary & White & Case, *2015 International Arbitration Survey* (finding 90% of parties to international business transactions choose arbitration).
8) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, Art. III ('Each Contracting State shall *recognize arbitral awards as binding and enforce them*') (emphasis added) [hereinafter 'New York Convention']. For more on the role of the Convention in analysing choice-of-preclusion-law, *see infra* s. 3.2.
9) *See* e.g. France, Nouveau Code de Procédure Civile, Arts 1476 and 1500 ('The arbitral award has the force of *res judicata*'); Germany, Zivilprozessordnung (ZPO), Art. 1055 ('[T]he arbitration award has the effect of a final and binding judgment'); Netherlands, Code of Civil Procedure, Art. 1059 ('The award shall have [*res judicata*] force from the day on which it is made'); Switzerland, Private International Law Act, Art. 190 ('The award is final from its notification').
10) *See* e.g. International Chamber of Commerce Rules, Art. 28(6); London Court of International Arbitration Rules, Art. 26(9); UNCITRAL Model Law, Art. 35(1).
11) Silja Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* § 4.126 (2016) ('No clear choice-of-law rule has crystallized from international commercial arbitration practice … [A]rbitral tribunals have afforded the question of the proper law governing *res judicata* relatively little consideration. If the tribunal determined a particular law or rules of law to govern *res judicata*, it rarely explained the reasons behind its choice of law.') [hereinafter 'Schaffstein'].
12) *See* Restatement (Second) Judgments, Introduction ('The law of *res judicata* expresses essentially simple principles … that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so.') [hereinafter 'Judgments Restatement'].
13) In the United States and England, non-parties (to the original action) who are precluded are called privies. The United States takes a broader approach to who qualifies. For the US view, *see* Richard Shell, *Res Judicata and Collateral Estoppel Effects on Commercial Arbitration*, 35 UCLA L. Rev. 623, 640 (1988); *see* also Judgments Restatement §§ 34–62 (listing types of third parties who can be bound by res judicata). For the English view, *see* Halsbury, *Laws of England* 452–454 (4th ed. 2003) [hereinafter '*Halsbury*'].
14) In England, this is called 'issue estoppel'. *See Halsbury* , *supra* n. 13, at 434 ('[I]ssue estoppel applies whether the point involved in the earlier decision is one of fact or one of law or one of mixed fact and law.'). In the United States, it is 'issue preclusion'. *See* Judgments Restatement § 27 ('When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action').

15) *See* Casad & Clermont, *supra* n. 2, at 9–10. *See also* Judgments Restatement § 13 ('[F]or purposes of issue preclusion … "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.').

16) *See* e.g. Italian Code of Civil Procedure, Art. 39; Stavros Brekoulakis, *The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited*, 16(25) Am. Rev. Int'l Arb. 177, 186 (2005) (noting that France, Greece, and Germany primarily limit third party res judicata effects to successors and assignors) [hereinafter 'Third Parties'].

17) Christer Söderlund, *Lis Pendens, Res Judicata, and the Issue of Parallel Judicial Proceedings*, 22 J. Int'l Arb. 301, 301–302 (2005) ('There is no issue estoppel under continental legal systems.') [hereinafter 'Parallel Proceedings']; Third Parties, *supra* n. 16, at 182 ('[I]n modern civil procedural systems, the codified *res judicata* is normally confined to the claims rather than the issues determined in a judgment.'). *See* e.g. French Civil Code, Art. 1351 ('The force of *res judicata* takes place only with respect to what was the *subject matter of a judgment*.') (emphasis added).

18) *See* e.g. Alexandra Bursak, *Preclusions*, 91 N.Y.U. L. Rev. 1651 (2016); Jacob B. van de Velden, *Finality of Litigation: Preclusion and Foreign Judgments in English and Dutch Law, and a Suggested Approach* (2014).

19) This issue can arise in an array of circumstances: when a losing party seeks to re-litigate or re-arbitrate issues; when one party requests a court order compelling arbitration and the defendant counters that the matter in dispute is res judicata because of a prior award; in annulment proceedings in which one party claims the tribunal ignored the res judicata of a prior award; in recognition proceedings in which an arbitral award is inconsistent with a prior judgment of a state court; in requests for confirmation of conflicting awards; etc.

20) Audley Sheppard, *Res Judicata and Estoppel*, in *Parallel State and Arbitral Procedures in International Arbitration* 219, 230 (Bernando Cremades & Julian Lew eds, 2005) ('The place where the prior decision was made might place some constraint or limitation on the scope of *res judicata* … This should then be respected at the place of arbitration.') [hereinafter 'Sheppard'].

21) Order No. 5 in ICC Case of 2 Apr. 2002, Claimant's Request for Interim Relief, 21 ASA Bull. 810, 815 (2003) ('[I]t is settled law by now that an arbitral tribunal sitting in Switzerland must apply the same rules as would a Swiss court in matters of *res judicata*'). The F-2 approach is also favoured by the Restatement of the Law (Third), The U.S. Law of International Commercial Arbitration, Tentative Draft No. 2, § 4–9, cmt. g (16 Apr. 2012) (approved by ALI at May 2012 meeting) ('The better view … is that the law applicable to the claim preclusive effect of an international arbitral award is the law of the jurisdiction in which preclusion is sought.') [hereinafter 'Arbitration Draft Restatement']. It is also important to note that relevant sections of the Restatement may change before it becomes final.

22) Sheppard, *supra* n. 20, at 230 (discussing an ICC arbitration in Paris where 'parties agreed that the question relating to *res judicata* should be determined by New York law, which was the governing law of the parties' contract'.).

23) ICC Case No. 5901, Merits Award, discussed in Horatio Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Recueil des Cours 9, 168 (2001) (holding 'we apply French law to determine the effect … of *res judicata* and collateral estoppel of the prior Swiss arbitration award, and have *further taken into account that the provisions of French law on this issue are entirely consistent with … applicable Swiss law*') (emphasis added) [hereinafter '*Choice-of-Law Problems*'].

24) Judgment of 13 Apr. 2010, DFT 4A_490/2009, para. 2.1 (Swiss Federal Tribunal) ('The arbitral tribunal violates procedural public policy when it leaves unheeded in its award the material legal force of an earlier judgment.'). Deviating from the seat's preclusion law may also violate the right to be heard.

25) *See* Luca G. Radicati di Brozolo, *Res Judicata and International Arbitral Awards*, in Post-Award Issues ASA No. 38, 127, at 130 (Pierre Tercier ed., 2011) (discussing why this topic 'raise[s] thorny questions that might seem to fall within the purview of hard-nosed specialists of civil procedure, but actually go to the heart of the law and of the system of international arbitration'.) [hereinafter 'Post-Award Issues'].

26) *See* Jarred Pinkston, *Vienna: The Road to Predictability*, Global Arb. Rev. (4 Mar. 2016), http://globalarbitrationreview.com/journal/article/34794/vienna-road-predictability/ (accessed 18 January 2017).

27) Cf. Jan Paulsson, *International Arbitration Is Not Arbitration*, 2(1) Stockholm Int'l Arb. Rev. (2008) ('[E]ach party hearing "arbitration or courts?" thinks "*this* arbitration as opposed to what – *my* court or *their* court?" ').

28) *See* generally Post-Award Issues, *supra* n. 25; Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* ¶ 9.140 (5th ed., 2009); Third Parties, *supra* n. 16; Bernard Hanotiau, *The Res Judicata Effect of Arbitral Awards*, in *ICC Special Supplement: Complex Arbitrations: Perspectives on Their Procedural Implications* 23 (ICC Int'l Court of Arb. ed., 2003) [hereinafter 'Hanotiau'].

29) Taking this *ex ante* approach was inspired by Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945, 999 (1998) (discussing the numerous decisions that litigants and potential litigants make in light of the anticipated preclusive effect of a judgment) [hereinafter 'Erichson'].
30) The transnational rules method has been proposed by Emmanuel Gaillard. *See* Emmanuel Gaillard, *Legal Theory of International Arbitration* (2010) [hereinafter 'Gaillard']. Importantly, my proposal addresses what has been called the 'main difficulty' with the transnational method of 'determin[ing] the sources and content of transnational *res judicata* principles'. Schaffstein, *supra* n. 11, para. 5.33.
31) *See* Post-Award Issues, *supra* n. 25, at 133–134 (listing a dozen questions that are 'far from settled' about the 'relation[] between *res judicata* and arbitral awards').
32) These values include finality/repose, conservation of resources, and preventing inconsistent judgments. *See supra* ns 4–5 and accompanying text.
33) Certain cases provide sensational grist for critics of the current regime. *See* e.g. Pedro Martinez-Fraga & Harout Jack Samra, *The Role of Precedent in Defining Res Judicata in Investor-State Arbitration*, 32 Nw. J. Int'l L. & Bus. 419, 435–449 (2012); Third Parties, *supra* n. 16; Norah Gallagher, *Parallel Proceedings, Res Judicata and Lis Pendens: Problems and Possible Solutions*, in *Pervasive Problems in International Arbitration* 329–356 (Julian Lew and Loukas Mistelis eds, 2006) (same); Parallel Proceedings, *supra* n. 17.
34) Final Arbitral Award Rendered in 2003 in SCC Case 24/2002, *reprinted in* SCC Arbitral Awards 2004–2009 127 (Stephen Bond & Linn Bergman eds, 2011). [Hereinafter 'SCC Case 24/2002'].
35) *Ibid.*, at 129.
36) *Ibid.*, at 128.
37) *Ibid.*, at 128–129.
38) *Ibid.*, at 130.
39) *Ibid.*, at 129–130. This is in accordance with then-prevailing SCC Rules. *See* 1998 SCC Rules, Art. 14(1)–(2).
40) *Ibid.* The tribunal later gave TC a chance to amend its complaint to reintroduce the counterclaim on payment of costs, but TC failed to do so.
41) SCC Case 24/2002, *supra* n. 34, at 131.
42) Observations by Mary O'Connor, *Ibid.*, at 139. The doctrine stems from *Henderson v. Henderson*, (1843) 3 Hare 100 (Eng.).
43) SCC Case 24/2002, *supra* n. 34, at 140–141.
44) *Ibid.*
45) Although F-1's law may limit the preclusive effect, this is determined by an F-2 adjudicator looking to *the law of F-1*, not to the *dicta of the F-1 adjudicator. See* Sheppard, *supra* n. 20, at 230.
46) Observations by Mary O'Connor, SCC Case 24/2002, *supra* n. 34, at 139, n. 6. The fact that the arbitrator discussed res judicata without referring to a municipal law is striking in light of the divergence discussed *supra.*
47) Observations by John Gatenby & Kate Menin, SCC Case 24/2002, *supra* n. 34, at 153. Civil Procedure Rules, Eng., Pt. 12 lays out the rules for default judgment.
48) SCC Case 24/2002, *supra* n. 34, at 153.
49) The rules for set aside of default judgment are in CPR 13.2–3. Here, the word 'set aside' does not have the meaning it normally does in the arbitration context. Typically, 'set aside' proceedings refer to a court at the seat of arbitration assessing the validity of an award at the seat.
50) SCC Case 24/2002, *supra* n. 34, at 153. ('[I]t is arguably inappropriate for this Tribunal to bind the hands of a subsequent tribunal … [T]he Tribunal went too far in purporting to make the declaration it did as to the effect and extent of that decision.')
51) The theories were: res judicata; issue estoppel; abuse of process; default judgment analogy – 'incomplete' preclusion; and F-1's dicta.
52) Or, in the case of 'abuse of process' or a failure to comply with mandatory joinder, what *had* to be decided but was not, and is thus barred from being raised again.
53) I am not considering the issue of a tribunal determining the preclusive effect of a prior award or order issued by the same tribunal *within the context of a single arbitration proceeding.*
54) Filip De Ly & Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration*, 25 Arb. Int'l 35, 49 (2009) [hereinafter 'ILA Interim Report']; Judgments Restatement, Introduction ('The law of *res judicata* … is a subcategory of the law governing procedure in civil actions.'); *Carl-Zeiss Stiftung v. Rayner & Keller Ltd* [1966] 2 All E.R. 536, 564 (HL) ('the rules of estoppel by *res judicata* are rules of evidence'.). In the US context, the 'procedure vs. substance' question is a bit more complicated, but internationally the dominant view is that preclusion is procedural.
55) *See* generally Restatement (Second) of Conflict of Laws § 122 (1971).
56) Post-Award Issues, *supra* n. 25, at 133 ('[A]rbitrators do not have a *lex fori* that provides them with an obvious and paramount prism through which to assess the effects of a prior award in their arbitration.').

57) Gary Born, *International Commercial Arbitration* 3768 (2d ed., 2014) ('Just as the procedural, choice-of-law and substantive law rules of the arbitral seat do not have the same effects in international arbitrations seated within national territory as they do in national court proceedings, so the preclusion rules of the arbitral seat have a much less obvious or significant application to awards rendered there.') [hereinafter 'Born']. *See also* Arbitration Draft Restatement, *supra* n. 21, § 4–9 cmt. g ('[W]hile court judgments are rendered pursuant to laws and procedures that purport to govern their preclusive effect, arbitral awards are generally not. It would be anomalous, therefore, to subject arbitral awards to the rules of the seat regarding claim preclusion since those rules do not generally even purport to govern that issue.').
58) And of course, parties have broad power to alter the procedure by contract.
59) *See supra* ns 16–17.
60) *See* Sheppard, *supra* n. 20, at 230 ('[N]either Common Law nor Civil law systems generally regard the governing law of the parties' relationship to be relevant for applying *res judicata*'). Of course, this raises the question why English law featured so heavily in the discussion of SCC Case 24/2002. There, contractual peculiarities made it seem like the choice of English law encompassed a choice of English *procedural* law.
61) Born, *supra* n. 57, at 3775 ('[T]here has been a tendency on the part of arbitral tribunals to avoid unduly mechanical application of technical domestic rules of preclusion with regard to arbitral awards (or national court judgments.').
62) For a discussion of how transnationality affects characterization (also known as qualification or classification) in international arbitration, *see* Veijo Heiskanan, *And/Or: The Problem of Qualification in International Arbitration*, 26 Arb. Int'l 4 (2010).
63) Partial Award in ICC Case No. 4126, *reprinted in* Collection of ICC Arbitral Awards1974–1985 511, 513–514 (Sigvard Jarvin & Yves Derains eds, 1990).
64) French Civil Code, Art. 1351.
65) Filip de Ly & Audley Sheppard, *The International Law Association (ILA) International Commercial Arbitration Committee Reports on Lis Pendens and Res Judicata*, 25 Arb. Int'l 1, 2 (2009) [hereinafter 'ILA Report']. The ILA Report also provides more background on the nature of the 'triple identity' test.
66) ILA Interim Report, *supra* n. 54, at 65 ('Triple identity is often said to be a strict requirement, although a number of judges and commentators advocate a more liberal approach based on economic reality.') (internal quotations omitted).
67) Born, *supra* n. 57, at 3775–3776 (asserting it 'effectively formulat[es] *sui generis* international preclusion principles' and arguing 'these approaches are consistent with a proper analysis of preclusion as applied to arbitral awards'.).
68) *See infra* s. 4.1. It is not a sufficient answer to say that a tribunal in an arbitration seated in a civil law country may not feel compelled to give reasons on a procedural issue, because to the extent the award *does* state reasons, they introduce methodological confusion rather than clarity.
69) The awards in this case are unpublished, so description of the tribunal's reasoning is drawn from Post-Award Issues, *supra* n. 25.
70) *Thalès Air Defence v. Euromissiles*, 18 Nov. 2004, Cour d'appel de Paris, 8(2) Int'l A.L.R. 55 (2005). For a discussion of the case in relation to the transnationality of arbitration, *see* Julian D. M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22(2) Arb. Int'l 179, 202 (2006).
71) *Ibid.*
72) Post-Award Issues, *supra* n. 25, at 132.
73) *Ibid.*, at 144–146.
74) *Ibid.* Parts of the reasoning quoted in this passage only appear in di Brozolo in the original French; this represents the current author's translation.
75) Awards in ICC Case Nos. 2475 and 2762, *reprinted in* Collection of ICC Arbitral Awards 1974–1985 511, 513–514 (Sigvard Jarvin & Yves Derains eds, 1990).
76) ICC Case No. 5901, Merits Award, discussed in *Choice-of-Law Problems*, *supra* n. 23, at 168 (holding 'we apply French law to determine the effect … of *res judicata* and collateral estoppel of the prior … award, and have further taken into account that the *provisions of French law on this issue are entirely consistent with*, and do not conflict with, either applicable *Swiss law principles, or international arbitral precedents* applying both civil law and common law provisions'.) (emphasis added).
77) *See* e.g. Award in ICC Case No. 10574, discussed in *Choice-of-Law Problems*, *supra* n. 23, at 171 (discussing a tribunal seated in London that applied English law to res judicata effect of US judgment); Final Award in ICC Case No. 6363, XVII Y.B. Comm. Arb. 186, 198 (1992). *See also* Schaffstein, *supra* n. 11, para. 4.126 ('[A]rbitral tribunals have afforded the question of the proper law governing *res judicata* relatively little consideration. If the tribunal determined a particular law or rules of law to govern *res judicata*, it rarely explained the reasons behind its choice of law.').
78) Here, inter-jurisdictional is meant to capture any dispute that crosses territorial boundaries of States, whether in two arbitral proceedings, or one court and one arbitral proceeding.

79) Decision of the Swiss Federal Tribunal, 141 III 229 of 29 May 2015. For in-depth discussion, *see* Nathalie Voser & Julie Raneda, *Recent Developments on the Doctrine of Res Judicata in International Arbitration from a Swiss Perspective: A Call for a Harmonized Solution*, 33(4) ASA Bull. (Dec. 2015) [hereinafter 'Harmonized Solution'].
80) *Ibid.*, at consid. A.
81) *Ibid.*
82) *Ibid.*
83) *Ibid.*, at consids. B & C. Typically, misapplication of res judicata would not be grounds for set-aside. However, in Switzerland, res judicata has been considered 'procedural public policy' since *Fomento*. *See* Decision of the Swiss Federal Tribunal, 127 III 279 of 14 May 2001. Although part of *Fomento* was overturned by Art. 186(1)(*bis*), res judicata remains a matter of public policy. *See* Bernhard Berger & Franz Kellerhals, *International and Domestic Arbitration in Switzerland* 951d (2d ed., 2010) ('Article 186(1bis) only lifts the "barrier effect" of lis pendens, but leaves the "barrier effect" of res judicata untouched.').
84) Decision of the Swiss Federal Tribunal, 141 III 229 of 29 May 2015, consids. 3.2.3–3.2.6.
85) *Ibid.*, consid. 3.2.5.
86) *See supra* s. 2.1.
87) *See infra* s. 3.2–3.3.
88) *See* ILA Report, *supra* n. 65; Resolution No. 1/2006, Annex II, ILA Recommendations on Res Judicata and Arbitration (2006) [hereinafter 'ILA Resolution']; ILA Interim Report, *supra* n. 54. International Law Association, Final Report on Lis Pendens and Arbitration (2006) [Hereinafter 'ILA Lis Pendens Report'].
89) ILA Report, *supra* n. 65, at 73.
90) *Ibid.*, Arts 3.1–3.4.
91) *Ibid.*, Art. 4.2. Of course, under traditional versions of the triple identity test, these two approaches would be in tension with one another.
92) *See* e.g. ILA Report, *supra* n. 65, at 72. For support that a transnational approach is preferable, *see* Schaffstein, *supra* n. 11, para. 5.33 (stating 'the transnational approach would provide guidance to arbitral tribunals [and] ensure more consistent solutions'). Schaffstein's approach is not entirely inconsistent with mine, in that Schaffstein advocates for transnational rules in principle and cites certain of the same potential sources of inspiration for the content of the norm. However, Schaffstein's approach differs from mine in a fundamental way by taking up Gaillard's suggested methodology of identifying transnational rules by recourse to 'general principles' methodology. *See ibid.*, paras 5.105–5.113. I consider this approach unworkable. *See infra* ns 173–183 and accompanying text.
93) ILA Resolution, *supra* n. 88, Art. 3.4.
94) ILA Report, *supra* n. 65, at 76–77.
95) *Ibid.*
96) *Ibid.*, at 69. ('Although the recommendations primarily follow a procedural approach to questions of *res judicata*, they are not intended to bar alternative perspectives.').
97) *Ibid.*, at 73 (noting the F-1 vs. F-2 vs. law of the merits question posed a 'difficult choice').
98) *Ibid.*
99) *See* Filip de Ly, *Conflicts of Law in International Arbitration – An Overview*, in *Conflict of Laws in International Arbitration* 8 (Franco Ferrari & Stefan Kröll eds, 2010) (noting states have 'liberalized international commercial arbitration from the conflict of laws rules that prevail in the domestic courts at the place of arbitration and from domestic substantive law').
100) *See supra* s. 2.
101) The reasons for this will be explored more fully *infra* s. 3.2–3.3.
102) *See supra* n. 63 and accompanying text.
103) *See supra* n. 34 and accompanying text.
104) Decision of the Swiss Federal Tribunal, 141 III 229 of 29 May 2015, consid. 3.2.5.
105) *See* Harmonized Solution, *supra* n. 79 ('[I]t is … surprising that the ILA Recommendations have, as it seems, not been followed by arbitral tribunals, nor have they been a main source of inspiration for courts faced with the *res judicata* impact of previous arbitral awards.').
106) Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, 1 J. Int'l Disp. Settlement4 (2010). ('Codification is a process by which a collection of norms are assembled into a logical, coherent structure.'). For an account of soft law codification as done by the International Law Commission, *see* Santiago Villalpando, *Codification Light: A New Trend in the Codification of International Law at the United Nations*, 2(15) Brazilian Y.B. Int'l L. 117 (2013).
107) IBA Rules on the Taking of Evidence in International Commercial Arbitration (adopted in 1999). For discussion of these evidence rules, *see infra* s. 4.2.
108) UNCITRAL Model Law on International Commercial Arbitration (adopted 1985 with amendments as adopted in 2006).
109) *Cf. Report of the ILC on the Work of its 1st Session*, 1(1) Y.B. Int'l L. Comm'n para. 101 (1949) (citing 'divergencies [*sic*] of national laws and jurisprudence' as an impediment to codification).

110) *Cf. Soft Law in Arbitration*, *supra* n. 106, at 14. ('The ultimate test about the normativity of soft law relates to court practice. Do courts refer to soft law instruments? Do they pay deference to or enforce them?').
111) British Institute of International & Comparative Law, *The Effect in the EU of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process* 16 (2008) [hereinafter 'BIICL Study'].
112) *See* Richard Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Stud. 399, 400 and 444–445 (1973) (setting up the framework of procedural cost minimization and applying it to res judicata).
113) Of course, one could question whether there is any such precise balance being struck. I do not intend to take the view that there is necessarily such a balance. I only seek to point out that *even if there were such a balance*, it would not mean that it was appropriate for arbitration. Finally, it is possible that civil law jurisdictions have a more deliberately calibrated 'balance' than common law jurisdictions.
114) Casad & Clermont, *supra* n. 2, at 31.
115) *Ibid.*, at 34.
116) *See* e.g. *ibid.*, at 31; BIICL Study, *supra* n. 111, at 16.
117) *Ibid.*, at 14 (noting that Spanish preclusion law about constitutive judgments reflects the 'particular public interest in [those] proceedings'). Another example is the private attorneys-general model in the United States.
118) H.R. Rep. No. 97–542, at 13 (1982) ('[T]he advantages of arbitration are many: ... it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties').
119) By ex ante, here I mean at the time of initiating the first arbitration.
120) *See infra* s. 4.
121) Born, *supra* n. 57, at 3742 (remarking that the ILA 'did not proceed beyond citing Article III of the New York Convention and (correctly, but incompletely) noting that its terms do not expressly prescribe any particular rules of preclusion'.).
122) *See* e.g. Berger & Kellerhals, *supra* n. 83, paras 1498–1513; Julian Lew, Loukas Mistelis, & Stefan Kröll, *Comparative International Commercial Arbitration* paras 13–40, 24–63 (2003).
123) The New York Convention has 156 contracting parties. *See* www.newyorkconvention.org/countries.
124) New York Convention, Art. III (emphasis added).
125) Leonard Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1054 (1961).
126) Born, *supra* n. 57, at 3743 ('[Art. III] encompasses not merely the duty to give formal recognition to awards, but to give recognition of a nature that makes an award "binding" on the parties. This type of recognition would not exist if awards did not have preclusive effects in national courts.').
127) *Ibid.*, at 3744.
128) *Ibid.*, at 3755.
129) *Ibid.*, at 3746. At a minimum, this requires some form of issue estoppel is recognized.
130) *Ibid.*, at 3755 ('The precise contours of the international preclusion rules mandated by the New York Convention must be developed by national courts') (footnotes omitted).
131) *See* Decision of the Swiss Federal Tribunal, *supra* n. 79.
132) *See* Arbitration Draft Restatement, *supra* n. 21, § 4–9, cmt. g.
133) New York Convention, Art. II(1)–(2).
134) *See* e.g. *Van Walsum N.V. v. Chevalines S.A.*, 64 Schweizerische Juristen-Zeitung 56 (1968) ('[Art. 2's] expressions have introduced a new form, different from the written form required by Swiss law'). It should be noted that some jurisdictions give effect to agreements that do not satisfy traditional form requirements.
135) New York Convention, Art. II(1). This is known as 'arbitrability'.
136) *Ibid.*, Art. II(3).
137) *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).
138) *Ibid.*, at 629, 631.
139) 712 F.2d 50 (3d Cir. 1983).
140) *Ibid.*, at 53.
141) *See* e.g. Albert J. Van Den Berg, *The New York Arbitration Convention Of 1958* 155 (1981) ('[Art. II(3)] should be construed narrowly, and the invalidity of the arbitration agreement should be accepted in manifest cases only.'). *See also* Linda J. Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 Ga. J. Int'l & Comp. L. 25, 26 (2014) ('One important feature of a successful international convention is the autonomous and uniform interpretation.').
142) Lew, Kröll & Mistelis, *supra* n. 122, at 14–41 ('[A]n autonomous interpretation should prevail which excludes national idiosyncrasies.'); Born, *supra* n. 57, at 659 ('[T]he rules applicable to international arbitration agreements under the New York Convention ... are international rules').
143) *Fouchard Gaillard Goldman on International Commercial Arbitration* 246 (Emmanuel Gaillard & John Savage eds, 1999) (claiming arbitrators may employ transnational rules for assessing 'issues of capacity and power to enter into an arbitration agreement').

144) Typically, countries adopt a broad rule that disputes can go to arbitration, coupled with narrow subject-matter exceptions to arbitrability. *See* Switzerland, PILA, Art. 177; Germany, ZPO, s. 1030(1); Belgium, Judicial Code, Art. 1676(1).
145) Compétence-compétence refers to the power of arbitrators to decide on their own jurisdiction. *See* generally John J. Barcelo III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 Vand. J. Transnat'l L. 1115 (2003).
146) Loukas Mistelis, *Fundamental Observations and Applicable Law*, in *Arbitrability – International and Comparative Perspectives* 9 (Loukas Mistelis & Stavros Brekoulakis eds, 2009) (describing arbitrability as 'reflecting the political, social and economic prerogatives of the state, as well as its general attitude towards arbitration'.).
147) George A. Bermann, *The 'Gateway' Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1, 2–3 (2012) ('[A]n arbitral regime [is] legitimate … to the extent that the parties who were compelled to arbitrate rather than litigate … consented to step outside the ordinary court system in favor of an arbitral tribunal.').
148) *See* e.g. *Shell Oil Co. v. CO2 Comm., Inc.*, 589 F.3d 1105, 1109–1110 (10th Cir. 2009); *Emilio v. Sprint Spectrum, L.P.*, 315 F. App'x 322, 324 (2d Cir. 2009); *Triangle Constr. & Maint. Corp. v. Our V.I. Labor Union*, 425 F.3d 938, 947 (11th Cir. 2005); *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126 (9th Cir. 2000). *See* generally Peter Horn & Colm P. McInerney, *Res Arbitrata: The Citigroup Case and The Preclusive Effect of a Prior Arbitral Award on a Subsequent Action*, 30–33 Mealey's Int'l Arb. Rep. 27, § II (2015). However, US practice may not be globally representative. Where jurisdictions police improper application of res judicata, this proposal faces a further challenge.
149) As noted *supra* s. 2, in arbitration there is no 'forum' in a sense that would make the domestic procedural rules for courts appropriate in this context, and no country's *lex arbitri* speaks to this issue. As such, the law of the forum only exists if the recommendation of a 'transnational rules method' is followed.
150) Here, the term 'Brussels Regime' refers to whichever 'jurisdiction and judgments' conventions were in force at the time (the earliest being passed in 1968). *See* Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] O.J. L351/1 [hereinafter 'Brussels Recast']; Council Regulation (EC) 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] O.J. L12/1 [hereinafter 'Brussels Regulation']; 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (consolidated version [1998] O.J. C27/1–27, 27 Jan. 1998) [hereinafter 'Brussels Convention'].
151) *See* Brussels Recast, Arts 36–52; Brussels Regulation, Arts 33–36; Brussels Convention, Arts 26–29.
152) *Hoffman v. Krieg* (Case 146/86) [1988] E.C.R. 645, para. 10 (emphasis added).
153) *Ibid.*
154) *Ibid.*, para. 11 (emphasis added).
155) *See* Alexander Layton & Hugh Mercer, *European Civil Practice* ¶ 24.006 (2004).
156) Even the Draft Restatement, which adopts an F-2 approach, recognizes this. *See* Arbitration Draft Restatement, *supra* n. 21, § 4–9, cmt. g (noting that because the *lex fori* at F-1 does not apply to the preclusive effects of awards, the normal judgment approach of referring to F-1's preclusion rules cannot be applied to awards).
157) *See* Peter Barnett, *Res Judicata, Estoppel, and Foreign Judgments* paras 7.09–7.10 and 7.58–7.68 (2001). *But see* Adrian Briggs & Peter Rees, *Civil Jurisdiction and Judgments* para. 7.18 (expressing a contrary view).
158) *Ibid.*, paras 7.09, n. 19. *See* U.S. Const. Art. IV, § 1. *See also* 28 U.S.C. § 1738 (Federal Full Faith and Credit Statute).
159) Robert C. Casad, *Issue Preclusion and Foreign Country Judgments; Whose Law?*, 70 Iowa L. Rev. 53, 75 (1984) [hereinafter '*Whose Law?*'].
160) Erichson, *supra* n. 29, at 999 (emphasis added).
161) *Whose Law?*, *supra* n. 159, at 75 (finding that imposing this hardship would 'hardly be justified' for the sake of advancing judicial economy).
162) On one view, these sections of the Restatement are primarily aimed at courts, rather than arbitral tribunals, whereas this article concerns the preclusive effect of awards as between two tribunals. In any event, how courts view the preclusive effect of prior awards is obviously relevant, and the policies it articulates may have some salience in the context of an arbitral tribunal considering an award. *Cf.* Schaffstein, *supra* n. 11, para. 4.122 ('[I]t does not appear that arbitrators make any meaningful distinction between whether a prior decision was a judgment or an award, but seem to treat judgments and awards similarly for the purposes of *res judicata*.').
163) Arbitration Draft Restatement, *supra* n. 21, § 4–9, cmt. g.
164) *Ibid.* ('Arbitral tribunals … do not have established rules on claim preclusion.').
165) *Ibid.*
166) Gaillard, *supra* n. 30, at 39.
167) Juridicity is defined by Gaillard as 'the source of power' to render a binding decision, identify applicable law absent agreement without recourse to the forum's choice of law rules, and claim 'the legal nature of the process and the ensuing decision'. *Ibid.*, at 2.

168) *Ibid.*, at 36–37.
169) *Ibid.*, at 46.
170) In a high-profile ICC investment proceeding, a tribunal (headed by Gaillard) relocated the arbitration from Addis Ababa to Paris, in defiance of an Ethiopian court order. *See Salini Costruttori SpA v. Ethiopia*, Award regarding Suspension of the Proceedings and Jurisdiction, 7 Dec. 2001, *reprinted in* 20(3) Mealey's Int'l Arb. Rev. A1 (2005).
171) Some jurisdictions – notably France – take the view that annulment at the seat has no effect on the choice of other jurisdictions to recognize and enforce an award, but many others have opposed this approach. *See* generally Luca Radicata di Brozolo, *The Control System of Arbitral Awards: A pro-Arbitration Critique of Michael Reisman's* Normative Architecture of International Commercial Arbitration, in *Arbitration – The Next Fifty Years* (ICCA Congress Series No. 16), at 74 (2012); Jan Paulsson, *Arbitration in Three Dimensions*, LSE Law, Society and Economy Working Papers 2/2010, https://www.lse.ac.uk/collections/law/wps/WPS2010-02_Paulsson.pdf; Alan Scott Rau, *Understanding (and Misunderstanding) 'Primary Jurisdiction'*, 21 Am. Rev. Int'l Arb. 47 (2010).
172) *See* e.g. Lord Mance, *Arbitration – A Law Unto Itself?*, 32 Arb. Int'l 1 (2016); Rau, *supra* n. 171, at 83–113.
173) Gaillard, *supra* n. 30, at 48 ('[TRM] is no different than that which allows the identification of general principles of law within the meaning of Article 38.').
174) Statute of the International Court of Justice, Art. 38(1) ('The Court … shall apply: … (c) the general principles of law recognized by civilized nations.') [hereinafter 'ICJ Statute'].
175) This is my term, not his, but I suggest that it is the best way to make sense of his proposal.
176) Gaillard, *supra* n. 30, at 48.
177) *Ibid.*, at 50.
178) *Ibid.*, at 51.
179) *Ibid.* ('[TRM] favors the rule that is consistent with this general trend over that which is isolated.'). Displacing an 'isolated' rule with one consistent with 'general trend[s]' recalls the 'better law' method of resolving conflicts urged by some US commentators writing in the midst of the conflicts revolution. *See* Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 Cal. L. Rev. 1584, 1587–98 (1966).
180) *See* Fabián O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* 88–147 (2008) (finding serious methodological shortcomings after analysing the ICTY's use of 'general principles').
181) Neha Jain, *Comparative International Law at the ICTY: The General Principles Experiment*, 109 Am. J. Int'l L. 486, 486 (2015) ('At times, the Tribunal has adopted a natural law-oriented conception of general principles; on other occasions, it has relied on municipal legal systems … though with scarce mention of the appropriate methodology') [hereinafter 'General Principles Experiment'].
182) Ilias Bantekas, *Reflections on Some Sources and Methods of International Criminal and Humanitarian Law*, 6 Int'l Crim. L. Rev. 121, 126–129 (2006) (describing various ways in which use of general principles is confused or inconsistent); Neha Jain, *General Principles of Law as Gap-Fillers* (working paper), www.iilj.org/courses/documents/NehaJain_GeneralPrinciplesasGapFillersJan2014.pdf (accessed 18 January 2017).
183) General Principles Experiment, *supra* n. 181, at 496 ('[T]he failure to integrate comparative legal methodology into generating principles for international criminal law has led to unpersuasive, if not illegitimate, solutions.').
184) *See* Arbitration Draft Restatement, *supra* n. 21, § 4–9, cmt. g (16 Apr. 2012).
185) *See* Duncan Hollis, *The Existential Function of Interpretation in International Law*, in *Interpretation in International Law* (Andrea Bianchi, Daniel Peat, & Matthew Windsor eds, 2015). Of course, these are not international law tribunals *stricto sensu*. Yet my proposal relies on identifying a *transnational source of law*, making the concept of existential interpretation relevant.
186) *Ibid.*, at 108.
187) *Ibid.*, at 102 ('[H]idden existential interpretations are *jurispathic*. An interpreter who presumes a particular subject exists – whether it is authority, evidence, international law, or its source'). For the origin of the jurispathic vs. jurisgenerative distinction, *see* generally Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983). It is important to note that Hollis, in adapting Cover's framework to the international law realm, modifies it somewhat. For purposes of discussing my proposal, I hew closely to the Hollis account.
188) *Ibid.*
189) *Ibid.*
190) I say 'formally recognized' because one possible explanation for what happens in cases where the tribunal is vague about the source of the preclusion rule being applied is that it is influenced by what other tribunals do in practice, but does not rely on this openly.

191) In drafting the statute of the Permanent Court of International Justice (the ICJ's predecessor), res judicata was invoked as an illustrative example of 'general principles'. *See* Comments of Lord Phillimore, Advisory Committee of Jurists Procès-Verbaux of the Proceedings of the Committee, 16 June–24 July 1920, at 335. ('[T]he general principles referred to … were those which were accepted by all nations … , such as … the principle of *res iudicata*.'). *See also* Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 336 (1953) ('There seems little, if indeed any question as to *res judicata* being a general principle of law or as to its applicability in international judicial proceedings.').

192) The ICJ has long recognized this principle, and continues to generate new case law on it. *See* e.g. *Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)* (2016); *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, [2001] ICJ Rep. para. 303; *South West Africa Case*, [1966] ICJ Rep. 4, at 240; *Chorzow Factory Case, Interpretation of Judgments Nos 7 & 8 Concerning the Case of the Factory at Chorzow*, [1927] PCIJ (Ser. A) No. 11, at 27.

193) *See* e.g. *Apotex Holdings Inc. & Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 Aug. 2014 ('*Apotex II*'); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, 14 Mar. 2003; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Preliminary Objections, 26 June 2002; *Amco Asia Corp. v. Indonesia (Resubmission: Jurisdiction)*, ICSID, 89 I.L.R. 552, 560 (1983); *Trail Smelter (United States v. Canada)*, 3 RIAA 1905, 1950 (1941); *Pious Fund of the Californias (United States v. Mexico)*, Hague Court Rep. (Scott) 1, 5 (1902).

194) *Apotex II*, *supra* n. 193, paras 7.10–7.32.

195) *Ibid.*, paras 7.33–7.36.

196) *Ibid.*, para. 2.29.

197) *Apotex Inc v. United States of America*, ICSID Case No UNCT/10/2, Award on Jurisdiction and Admissibility, para. 244 (14 June 2013) ('*Apotex I*').

198) *Ibid.*, para. 235.

199) *Ibid.*, para. 176.

200) *Apotex II*, *supra* n. 193, paras 7.37–7.60 (rejecting narrow and formalistic constructions of the 'identity of the parties' test and embracing the availability of issue preclusion – in practice if not in name – under international law)

201) In the next section, I turn to the question of whether such a process invites chaos.

202) Cf. Jeffrey Sarles, *The Nuts and Bolts of International Arbitration*, 28 Corp. Counsel Wkly. 16 (2013) (discussing the arbitrators' involvement in the 'extensive' pre- and post-hearing briefing on legal issues in international commercial arbitration).

203) Nor is the phenomenon of looking to other types of tribunals limited to res judicata. E.g. in another codification initiative (arguably much more successful than the one on res judicata), the ILA drew significant amounts of material from the investor-state context. *See* International Law Association, *Inherent and Implied Powers: Report* (2014).

204) Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?* 23(3) Arb. Int'l 357 (2007) ('[A]rbitrators increasingly appear to refer to, discuss and rely on earlier cases.') [hereinafter 'Arbitral Precedent']; *Fouchard, Gaillard, Goldman On International Commercial Arbitration* 384 (Emmanuel Gaillard & John Savage eds, 1999) ('[O]n reading the ICC awards and their commentaries, one significant phenomenon becomes clear: the more recent awards are based on earlier decisions, and the decisions reached are generally consistent.')

205) Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 Am. U. Int'l L. Rev. 957, 1001 (2005) ('International arbitration has also generated its own set of hybridized evidentiary procedures designed to bridge gaps between civil and common law procedural traditions.')

206) Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 Vand. J. Transnat'l L. 1313, 1333 (2003) ('[P]rocedural autonomy … has allowed arbitration practice to develop a set of rules which progressively rise to the level of a standard arbitration procedure.') [hereinafter '*Globalization of Procedure*'].

207) *See* Int'l Bar Ass'n, *IBA Rules on the Taking of Evidence in International Commercial Arbitration* (1999).

208) *Globalization of Procedure*, *supra* n. 206, at 1333 ('[T]he IBA Rules primarily restate and generalize practices that were already in use in international arbitration.').

209) *Arbitral Precedent*, *supra* n. 204, at 362–364. Of course, these observations are limited to tribunals making reference to other tribunals *the rules of which provide for the same approach to choice of law.*

210) William W. Park, *Explaining Arbitration Law*, in *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* ¶ 1.12 (2015) (noting the sway of 'the lore of practice, representing expectations of the commercial community. Particularly in cross-border disputes, such norms fill gaps in national standards') (internal quotations omitted).

211) *Arbitral Precedent*, *supra* n. 204, at 364 ('[A]rbitrators have an inclination to "transnationalise" the rules they apply … the purpose of transnationalisation is to remove the dispute from the ambit of a possibly inadequate national law.').

212) *See supra* n. 63 and accompanying text.

213) *LaGrand Case (Germany v. United States)*, Judgment, [2001] I.C.J. 466 (27 June 2001).

214) Donald Francis Donovan, *Provisional Measures in the ICJ and ICSID: Further Dialogue and Development*, in *Contemporary Issues in International Arbitration: The Fordham Papers* 1 (Arthur W. Rovine ed., 2013).

215) *See Pey Casado & President Allende Found. v. Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, para. 17 (25 Sept. 2001) (stating the question can 'be considered closed, in light of … a recent decision of the International Court of Justice'.). *See also CEMEX Caracas Invs. B.V. & CEMEX Caracas II Invs. B.V. v. Venezuela*, ICSID Case No. ARB/08/15, Decision on Provisional Measures (3 Mar. 2010); *Burlington Resources, Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009); *Perenco Ecuador Ltd. v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009). *See* generally Donald Francis Donovan, *Provisional Measures in the International Court of Justice and Investment Treaty Arbitration: Dialogue and Development*, 6 ASIL Proc.(2011).

216) *See* Donald Francis Donovan, *International Law Weekend 2013 Keynote Address: The Advocate in the Transnational Justice System*, 20 ILSA J. Int'l & Comp. L. 247, 251 (2014) (describing the 'rich dialogue … between the ICJ and investor-state tribunals' and noting 'the ICJ continues to work through these issues, and, frequently referring to but not always following ICJ jurisprudence, so do investor-state tribunals').

217) *Cf.* Allain Pellet, *The Case Law of the ICJ in Investment Arbitration*, 28(2) ICSID Rev. 223 (2013) (describing areas of public international law doctrine, as developed by the ICJ, that have been adopted and adapted by investment arbitration tribunals).

218) *See* e.g. the recent ICJ decision in *Nicaragua v. Colombia*, which produced multiple dissenting opinions on the application of res judicata in that case. *Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)* (2016).

219) Gaillard, *supra* n. 30, at 37.

220) *Ibid.*, at 1–11.

221) Swiss PILA, s. 182(1). *See also* French Code of Civil Procedure, Art. 1509; English Arbitration Act 1996, ss 1(b), 33, 34; Belgian Judicial Code, Art. 1700(1); Austrian ZPO, s. 594(1).

222) Judgment of 6 Sept. 1990, 6 Ob 572/90 (Austrian Oberster Gerichtshof) ('There is a significant difference between the state courts … which are bound by strict procedural rules … and arbitral tribunals … which can proceed … in a far more flexible fashion … For that reason a challenge is possible only if there was a very substantial violation of fundamental principles of an orderly proceeding.')

223) Cf. *Reeves Bros., Inc. v. Capital-Mercury Shirt Corp.*, 962 F.Supp 408, 411 (S.D.N.Y. 1997) ('Where … the parties have adopted [institutional] rules, the parties are also obligated to abide by the [institution's] determinations under those rules.').

224) *See* UNCITRAL Model Law, Art. 1(1) (2010); LCIA Rules, Art. 14(1); AAA ICDR Rules, Art. 1(a). But *see* generally *Limits to Party Autonomy in International Commercial Arbitration* (Franco Ferrari ed., 2016).

225) *See* UNCITRAL Model Law, Art. 17(1) ('Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate … The arbitral tribunal, *in exercising its discretion*, shall conduct the proceedings to as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.') (emphasis added); ICC Rules, Art. 19 (2012) ('the proceedings before the arbitrator shall be governed by these Rules, and, where these Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration'.).

226) The caveat to this is that a jurisdiction like Switzerland, which views res judicata as a rule of procedural public policy, may set aside or refuse to recognize and enforce an award on public policy grounds for application of the wrong preclusion rule. *See supra* n. 83.

227) However, choice of law is not itself procedural, and thus implementation of this proposal could draw scrutiny as a deviation from specified choice-of-law rules. *See* e.g. the *Norsolor* case, ICC Arbitral Award Case no. 3131 of 1979, IX Y.B. Comm. Arb. 109 (1984). The award was initially set aside by the Court of Appeal in Vienna because the arbitrators used *lex mercatoria* when the ICC Rules specified using a choice of law method, but the Austrian Supreme Court reversed and reinstated the award. *Ibid.*, at 159.

228) Schaffstein, *supra* n. 11, para. 5.107 (discussing the work of Dominique Hascher).

229) *Ibid.*

230) Because the Restatement is arguably primarily directed at courts and is in any event limited to the United States, the recommended 'fix' does not focus on the Restatement. However, Switzerland's decision to consider res judicata 'procedural public policy' illustrates how particular national laws could undermine my proposal.

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