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The Status of the Limitations Period Doctrine in Public International Law: Devising a Functional Analytical Framework for Investors and Host-States

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Le droit coutumier international est apparemment irréconciliablement en contradiction en ce qui concerne la question fondamentale de savoir s'il reconnaît une loi international équivalente aux lois de prescriptions nationales. Â titre d'exemple, seulement 132 des 3000 traités bilatéraux et multilatéraux de protection des investissements en vigueur possèdent un délai de prescription. L'équilibre devrait théoriquement permettre de déposer des réclamations périmées en perpétuité ou bien ajouter des délais de prescription aléatoires de manière ad hoc. Ainsi, le manque d'uniformité et de standard gouverneur a créé de l'incertitude et de l'insécurité : ce que la doctrine des délais de prescription tente d'éradiquer. Les auteurs avancent que le statut fragmenté du droit international public concernant la doctrine des délais de prescription est attribuable à (i) l'importation en gros des lois de prescription nationales au droit international public sans avoir considéré les politiques et les aspirations du droit international, et (ii) les agendas économiques des État industrialisés à l'exclusion des intérêts des pays en développement et des économies en transition. Une méthodologie descriptive et prescriptive est appliquée dans le développement de cette proposition.

Customary international law is seemingly irreconcilably conflicted on the fundamental issue of whether it recognizes an international law equivalent to national-domestic statutes of limitations. By way of example, only 132 of the approximately 3000 bilateral and multilateral investment protection treaties in force have a limitations or prescription period. The balance would theoretically allow for the filing of stale claims in perpetuity or otherwise engraft random limitations periods on an ad hoc basis. Thus, the lack of uniformity and governing standard has given rise to uncertainty and insecurity: the very policy objectives that the limitations period doctrine itself seeks to eradicate. The authors argue that the fragmented status of public international law with respect to the limitations period doctrine is attributable to (i) the wholesale importation of national-domestic law on limitations into public international law without having considered the policies and aspirations of international law, and (ii) the economic agendas of industrialized states to the exclusion of the interests of developing states and economies in transition. A descriptive and prescriptive methodology is applied in the development of this proposition.

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"Any map of the world that does not include Utopia is not even worth glancing at."

Oscar Wilde, The Soul of Man Under Socialism

I. INTRODUCTION

Only 132 of the approximately 3000 bilateral and multilateral investment protection treaties in force have a limitations period.[1] The balance would theoretically allow for the filing of stale claims in perpetuity or otherwise engraft random limitations periods on an ad hoc basis. This lack of uniformity and governing standard has given rise to uncertainty and insecurity, the very policy objectives that the limitations period doctrine (LPD) itself seeks to eradicate.

We argue that the fragmented status of public international law with respect to the LPD is attributable to (i) the wholesale importation of national-domestic law on limitations into public international law without having considered the policies and aspirations of international law, and (ii) the economic agendas of industrialized states to the exclusion of the interests of developing states and economies in transition. The present article applies a descriptive and prescriptive methodology to develop this proposition.

We develop our framework through four sections that examine different normative sources material to the development of the LPD in public international law generally and have a consequential effect on the international law of investment protection in particular. The first section analyzes LPD in customary international law through the lenses of two emblematic cases, the Gentini case and the Williams case, as well as the Claims Tribunals' more general legacy regarding the treatment of LPD in customary international law. The second section undertakes a brief analysis concerning the need for uniformity and a standard policy derived from treaty-based awards. We explain the extent to which policies governing the LPD in public international law compel shedding recourse to principles historically arising from national-domestic frameworks. Here we maintain that national-domestic legal principles concerning limitations periods find no place in the international law of investment protection and merely serve to wrest uniformity and predictive value from the theoretical and practical workings of the LPD. The third section examines the manner in which arbitral tribunals in investor-State arbitrations have attempted to mitigate the consequences of the application of a national-domestic law, i.e. enlarging relevant timeframes beyond the prescription period, devising a continuing damage theory to prolong an otherwise inadequate limitations term, and fashioning a "reasonableness" standard. Finally, we propose a paradigm shift. This reconceptualization of the LPD within the framework of the international law of investment protection is fundamentally premised on (i) understanding limitations periods in international law as completely severed from the principles and doctrines of its national-domestic counterpart, (ii) a recognition of the duality (a hybrid of both, substantive and procedural precepts) of the LPD, (iii) suggested methodologies for engrafting uniformity and thereby promoting certainty and security, and (iv) analysis of fifteen non-exhaustive propositions premised on the policies and objectives of international investment protection law that may best serve to harmonize the competing interests of capital-exporting and capital-importing States. This final section suggests a rebuttable presumption as part of the effort to use the LPD to level the playing field between such States.

[1] The terms "limitations period" and "prescription period" will be used interchangeably in this Article, as each refers to the same legal concept as characterized in common law and civil law jurisdictions, respectively.

II. THE STATUS OF THE LIMITATIONS PERIOD DOCTRINE IN CUSTOMARY INTERNATIONAL LAW

Non-treaty pronouncements in the form of (i) judicial decisions, (ii) arbitral awards, and (iii) the ruling of Claims Tribunals, constitute a non-exclusive but significant understanding of the normative elements of customary international law.[2] The theoretical constitution and practical application of the LPD in public international law that has influenced the doctrine's role in the international law of investment protection can be gleaned from a handful of landmark pronouncements on the issue,[3] all of which took place during a twenty-year timeframe between 1885 and 1905. This jurisprudence offers a unique perspective because its treatment of the LPD is not based on a limitations period contained in a treaty. Therefore, they represent copacetic paradigms of Claims Tribunals addressing the issue of limitations free from the conceptual shackles of any single treaty

A. The *Gentini* Case

The *Gentini* case, a story that has been told many times, does not compel a lengthy factual recitation.[4] Suffice it to say that the case concerned claims against Venezuela on the part of the Italian government on behalf of an Italian citizen alleging payment of a debt that had accrued thirty years earlier.[5] The case was filed with the Permanent Court of Arbitration (PCA) pursuant to the Italian-Venezuelan Mixed Claims Commission constituted on May 7, 1903. The case is particularly rich because in canvassing the arguments of the Commissioners for the parties (counsel presenting the respective cases) the Umpire reviews a fairly comprehensive spectrum of the writings of commentators and "precedent" purporting to address the role, if any, of the LPD in international law. The Umpire denies the claim as stale, but not before articulating his own exegesis as to four separate but equally binding sources that, in his opinion, invite the claim's dismissal.

First, the Umpire sought to distinguish Venezuela's defense in *Gentini* from that of Mexico's in the Pious Fund case, which also was earlier decided by the PCA.[6] Counsel for Italy had relied on Pious Fund

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[2] See H.E. Gilbert Guillaume, "Can Arbitral Awards Constitute a Source of International Law under Article 38 of the ICJ Statute?" in Yas Banifatime & Emmanuel Gaillard eds, *Precedent in International Arbitration* (New York, Juris Publishing Inc. 2008) 105 (the scholarly commentary is divided as to whether arbitral awards should be "read into" Art. 38 of the ICJ Statute, the most authoritative source for determining customary international law); see also Pedro J. Martinez-Fraga, "A Defense of Dissents in Investment Arbitration" (2012) 43 U Miami Inter-Am L Rev 445 at 465-66 (the *ad hoc* nature of investor-State arbitral tribunals is partially responsible for their unclear role with respect to customary international law; in fact, arbitral awards only constitute persuasive authority with respect to subsequent tribunals processing the same or similar legal issues).

[3] *John H Williams v Venezuela*, Decision on Award (1885) UN [*Williams*]; *Ann Eulogia García Cadiz (Loretta G Barberie) v Venezuela,* Decision on Award (1885) UN; *Gentini Case (of a general nature),* Decision on Award (1903) UN [*GentiniI*]; *Spader et al. Case,* Decision on Award (1903-1905) UN; *Irene Roberts Case,* Decision on Award (1903-1905) UN; and *The Pious Fund Case (United States of America v Mexico),* Decision on Award (1902) UN.

[4] See Bing Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge,UK: Cambridge University Press, 2006) at 378—79; see also Jackson H. Ralston, "Prescription" (2010) 4:1 Am J Intl L 133; see also *Wena Hotels Ltd. v Arab Republic of Egypt,* Decision on Award (2002) at paras 106—107, ICSID,Case No ARB/98/4.

[5] *Gentini*, *supra* note 2 at 554.

[6] *Ibid* at 553.

for the proposition that the absence of an international law doctrine of limitations concerning a claim against a State renders it conceptually impossible for a claimant to present a claim.[7] The Umpire distinguished Pious Fund by emphasizing that the tribunal in that case was addressing domestic rules and not principles of law such that in Pious Fund, so the argument said, "[t]he Permanent Court of Arbitration... never denied the principle of prescription, a principle well recognized in international law, and it is fair to believe that it would never do so".[8] The Umpire added that "[s]uch denial tends to upset all government, since power over fixed areas depends upon possession sanctified by prescription, although the circumstances of its origin and the time it must run may vary with every case."[9]

This very formal argument, which cherry-picked a single sentence from the totality of the Pious Fund opinion in an effort to reach a diametrically opposed holding, was understandably buttressed by extensive reliance on the works of publicists dating back to Grotius and Vico.[10] The Umpire struggled between articulating the proposition that somehow the LPD had a cognizable space in international law, and the application of that principle, particularly in the wake of the Pious Fund ruling. Second, the dismissals of the defenses premised on "precedent" where Claims Tribunals had dismissed stale claims. Notably, none of the authorities on which the Umpire premised his findings sought to distinguish between the application of the doctrine under international law and its workings in a national-domestic law setting.[11] To the contrary, the Umpire, citing to *Barberie v Venezuela*, the authority most extensively relied upon in the opinion, selects language from that ruling that emphasizes that national-domestic law should serve as a guidepost in the application of the doctrine in an international context:

> *A stale claim does not become any less so because it happens to be an international one*, and this tribunal, in dealing with it, cannot escape the obligation of a universally recognized principle simply because there happens to be no code of positive rules by which its action is to be governed.[12]

This proposition stands in sharp relief to the arguments that counsel for Italy earlier had advanced on claimants' behalf in *Gentini*. Specifically, counsel argued that the limitations doctrine in an international context should be modified and distinguished from its national-domestic counterpart on grounds that are legitimately compelling:

> But when the debtor is a government, and moreover, when the demand of the individual may be the subject of the claim, the reasons which may induce a creditor to postpone his action may be many and of varied nature; as, for instance, [i] the interruption of diplomatic relations between the Governments concerned, [ii] the lack of political influence of the creditor, [iii] the unfavorable financial conditions of the debtor government, [iv] the want of faith of the creditor in the impartiality of magistrates, who, unprotected by the feeling of permanency, might against their better judgment become pliant tools of a party, and many

[7] *Ibid*.

[8] *Ibid* at 556 [emphasis added] (the argument was constructed on a strict linguistic analysis that, while technically correct, defies the spirit of the *Pious Fund* opinion).

[9] *Ibid*.

[10] See *Ibid* (the Umpire's reliance on the authority of publicists certainly comports with Article 38 of the ICJ statute.More importantly, however, it underscored a perceived need to supplement the analytical deficit endemic to any effort to try to distinguish its case from the *Pious Fund* framework. This analysis, however, also was formal, i.e. a mere recitation of names, and not a canvassing of doctrinal principles on the subject)

[11] *Ibid* at 559-561.

[12] *Ibid* at 560 [emphasis added].

> other similar motives.[13]

Nonetheless, the Umpire's use of *Barberie* further weakens Pious Fund's gravitational pull on *Gentini*.

Third, the Umpire finds national-domestic law, even that of non-party jurisdictions, helpful to its cause. Citing to the courts of equity in England and the United States, in particular to *Boubier,* the Umpire references the following:

> Courts of equity, though not within the terms of the statute, have nevertheless uniformly conformed to its spirit, and have, as a general rule, been governed by its provisions, unless especial circumstances of fraud or the like require in the interest of justice that they should be disregarded. (12 Pet., 56; 130 U.S., 43, etc.) Courts of equity will apply the statute by analogy, and in cases of concurrent jurisdiction they are bound by the statutes which govern actions at law. (149 U.S., 436; 169 U.S., 189). Some claims, not barred by the statute, a court of equity will not enforce because of public policy and the difficulty of doing full justice when the transaction is obscured by lapse of time and loss of evidence. This is termed the doctrine of laches.[14]

This third source, national courts applying equity, is closely related to, but still distinct from, the four premises upon which the dismissal of the claim rests: an equity based argument derived from a very particular understanding of justice and the ethics attaching to the LPD. By way of example, the Umpire mentions how "[i]t thus appears that courts of equity, even when not bound by the statute recognizing its essential justice had followed it [application of the LPD] in spirit."[15] In fact, beyond a perceived practical necessity, the opinion characterizes the LPD as "laws of universal application [that] were not the arbitrary acts of power, but... were the outgrowth of a general feeling that equity demanded their enactment".[16]

Accordingly, *Gentini* provides historical evidence that, at least Claims Tribunals under the auspices of the ICJ's predecessor, the PCA in 1903, identify that the applicability of a prescription period in international law arguably had its normative foundations in (i) the writings of publicists, (ii) precedent in the form of Claims Tribunals awards issued in conjunction with the PCA, (iii) the national-domestic practice of equity courts in England and the United States, and, (iv) more general "natural law like" propositions arising from specific conceptions of justice, equity, and a purportedly "shared understanding." To this extent, *Gentini's* contribution to the development of the LPD in international law can be seen as one that contributes to the modern understanding of the doctrine as based on (i) national law (a sense that finality is proper), (ii) a general proposition that finality is necessary, and (iii) the ethical-moral precept that it is somehow wrong or negligent for a claim not to be asserted within an unspecified, and perhaps undefinable period of time.

The *Gentini* analysis paints the perfect portrait of the legacy LPD identified in this writing that is pervasive in the modern international law of investment protection. It is a paradigm of the doctrine premised on national-domestic law principles, with intuitive components that are purely visceral, that overemphasize the policy of certainty and finality to the detriment of other considerations endemic to international law. Also, the analysis describes a doctrine that is materially influenced by the economic

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13 *Ibid* at 553.

14 *Ibid* at 558.

15 *Ibid.*

16 *Ibid* at 557.

agendas of capital-exporting States. By omission, the reasoning and holding in Gentini is eloquent as to the general issues that should underlie any consideration of the application of the doctrine in an international law context: most notably, the policies incident to any particular branch of international law. For the sake of completeness, it deserves noting that despite the Umpire's categorical reasoning and conclusion that the doctrine finds a place in international law even where the applicable treaty is silent on the issue, the award thus, albeit timidly, qualifies the finding in one instance by asserting that as to the limitations period to be applied, "the circumstances of its origin and the time it must run may vary with every case."[17]

Interestingly, the losing arguments of counsel for Italy in *Gentini* were more progressive, clairvoyant, and relevant with respect to the development and application of a LPD in an international law context. Counsel for Italy argued that policies underlying the application of the LPD in national-domestic cases were not transferable to the international law sphere.[18] Even though counsel framed these arguments within the terms of the substantive dispute at issue in *Gentini,* the overarching principle in his contention is foundationally the need to have different LPD analyses, attaching to national and international law rubrics, respectively. The Umpire never addressed these premises.

B. The *Williams* Case

In *Williams v Venezuela*,[19] as in *Gentini,* a sovereign, in this instance the United States, brought a claim on behalf of a U.S. citizen against Venezuela alleging monies owed. The action was filed with the American-Venezuelan Commission[20], also as in Gentini, under the auspices of the PCA. The uncontested record established that "the claim was not brought to the attention of the Venezuelan Government, until twenty-six years after its inception."[21] The issue before the Claims Commission was framed in two sentences. Whether "[b]y lapse of time the means of defense have been impaired, and there is total want of excuse for the long delay by claimant. Under such circumstances what does the law require at our hands?"[22] In doing so the Claim Tribunal observed that "[b]eyond the requirement that its decisions must be accorded to justice, *the treaty furnishes no guide* to the commission respecting the operation of the lapse of time in extinguishing obligations. *It is left to the direction of international law on the subject*. Does it recognize the doctrine of such extinguishment as between States in controversies like this?"[23]

The Claims Commission answered this second query in the affirmative. It therefore follows with respect to the previous question that dismissal of the claim was warranted. The *Williams* case finds that international law provides for a limitations period even in the absence of a treaty containing any limitations qualification, based on two sources: (i) the writings of commentators, and (ii) largely the domestic common law of the United States. In fact, virtually the entire body of Commissioner Little's award is comprised by single paragraph summaries of the writings of jurists on the subject of the LPD tracing the contours of four centuries of writings on the issue. After synthesizing these writings, the Commissioner concludes that

17 *Ibid* at 556 [emphasis added].
18 *Ibid* at 553.
19 *Williams*, *supra* note 3.
20 Claims Commission established under the Convention concluded between the United States of America and Venezuela on December 5, 1885.
21 *Williams,* supra note 3 at 280 [emphasis added].
22 *Ibid*.
23 *Ibid* [emphasis added].

"[o]n careful consideration of the authorities on the subject, much of whose discussion is only remotely applicable to the question as it is presented to us, we are of the opinion that by their decided weight -*we might said by very necessity- prescription has a place in the international system and it is to be regarded in these adjudications.*"[24]

Quite remarkably, the Claims Commission further qualifies its conclusion by noting that the principles recognized in the writings "are general" and therefore, at least presumably at first glance, not applicable "to individual claims or to debts by one state on account of transactions with citizens of another state."[25] Although aware of this basic conceptual challenge, the Commissioner reconciles it for purposes of the award and disavows the claim on the ground that limitations are grounded in natural law, a formulation that pervades the writings of virtually all of the jurists cited in the award.[26]

The *Williams* award served as a conceptual foundation for the Gentini analysis and holding. Foundationally, the two import domestic and natural law into the international law analysis of the LPD. In either case, did the Commissioner or the Umpire seek to look to international law itself for a response to its fundamental query? Does international law recognize the LPD in circumstances where the treaty at issue contains no such qualification? Instead, the analyses focused on national law and commentaries premised mostly on a natural law conceptualization of the doctrine. Other Claims Tribunal cases during this period (1885-1905) applied the identical methodology.[27]

C. The Paradox and Legacy of the Claims Tribunal Cases

Gentini and *Williams* can be construed as standing for the proposition that international law, without specifying a particular field of international law, recognizes and encourages the application of the LPD even where the treaty at issue does not prescribe a limitations period. The contribution to the workings of the LPD in international law arising from these cases influenced the lack of uniformity currently configuring the status of a LPD in public international law generally and with respect to the international law of investment protection in particular. Closer reflection is necessary.

The Claims Tribunal cases extracted from the writing of jurists that the LPD is virtually sacrosanct because it makes possible *security* and *certainty* through finality. The argument was expanded to say that this security and certainty also would avoid territorial disputes among nations, as well as contribute to the stability of commercial transactions. With respect to this latter point it was argued that only chaos would ensue were all contracts subject to challenge notwithstanding the passage of time, let alone capable of being rescinded. Thus, the principle of *security* was enshrined and accorded dispositive weight in any calculus considering the doctrine's application.

The Claims Tribunal cases, however, paradoxically undermined and disavowed the very principles of security and certainty that it sought to foster pursuant to the LPD. By relying on natural law, without more, the Claims Tribunal awards contributed to a fragmented international law "jurisprudence" on the very basic question of whether the LPD at all applies to customary international law or to conventional international law in instances in which a treaty is silent on the issue.

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24 *Ibid* at 290 [emphasis added].

25 *Ibid*.

26 See e.g. *ibid* at 281—82.

27 *Gentini*, *supra* note 2 at 559-61.

The jurisprudence based on natural law made possible the leap from national-domestic to international law but only in general terms that failed to set limits. Consequently, the Claims Tribunal awards create an open-ended limitations period in international law. It prescribes the application of the LPD but omits to set an actual limitations time frame.

In fact, the very authority and specific citation that the Commissioner in *Williams* relied upon demonstrates the implicit shortcomings of the strict natural law analysis that was observed:

> Hence the law of prescription—a necessary and just law—by means of which society stops, through certain limitations, all inquisitions of ancient rights. Most reasonable is, therefore, the law of prescription in the natural order, *although nature itself does not overtly establish its strict necessity nor fix its proper limitations.* This is to be performed by society as it grows more and more perfect; and it is as much the more its office as it is therefrom and therein that the social complaint requiring such a remedy takes its rise.[28]

The omission is likely attributable to two factors. First, from a practical perspective, resolving claims that contained undisputed records of the passage of more than two decades did not require the tribunal to go further and articulate an applicable prescription period having an actual limit. The Claims Tribunals were not asked to make such a pronouncement, and they understandably did not *sua sponte* do so.

Second, were the Claims Tribunals to formulate a rule that would set a limit to the applicable limitations period found to apply to the case as a matter of "settled international law", under its existing legacy methodology it would have to turn to national-domestic law for analytical assistance. In fact, the Claims Tribunals did rely on national-domestic law for analytical help only to arrive at the unqualified proposition that international law recognizes the LPD. Using national-domestic law to fashion a limitations rule having an actual term of years more precipitously would have led to the lack of uniformity and want of conceptual coherence now present in international law on the subject.

Recourse to national-domestic law for purposes of formulating a term of years to be applied to a presumably international law rule of limitations would lead to the creation of different rules depending on the domestic national law of the State being sued in a particular dispute. Thus, taken to its logical consequence, only out of mere statistical happenstance would a consistent limitations rule emerge. Mere statistical coincidence would thus constitute the normative foundation for uniformity.

The analysis necessary for engendering a uniform system was never undertaken. It would require a *turning away* from a national-domestic law paradigm. Such analysis would invite consideration of issues germane to the policies of international law, which are separate and distinct from those of national-domestic law and only intercept on general matters that would be considered under any rubric.

The Claims Tribunal cases do leave us with the *rule of law* stating that customary international law recognizes the LPD as applying to disputes concerning treaties that omit *any* reference to that doctrine. No alternative construction of this authority is possible. This proposition, however, directly and explicitly conflicts with contemporary authority in the form of arbitral awards arising from investor-State arbitrations. These arbitral awards hold that customary international law does not recognize the LPD, and further state

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28 *Williams*, *supra* note 3 at 282 [emphasis added].

that such a doctrine only forms part of conventional international law in instances in which the treaty at issue contains a limitations period clause.

III. INTERNAL INCONSISTENCY IN CUSTOMARY INTERNATIONAL LAW AND THE LIMITATIONS PERIOD DOCTRINE: THE NEED FOR UNIFORMITY AND POLICY

From a purely descriptive perspective, the current status of the LPD in customary international law is uncertain. This uncertainty arises from a demonstrable conflict between the work of publicists[29] and the Claims Tribunal cases representing a very specific line of authority, and the holding contained in arbitral awards arising from treaty based investor-State arbitrations. The Claims Tribunal cases uniformly stated that customary international law recognizes and applies the LPD in instances concerning treaty-based disputes where the treaty at issue lacks any reference to a limitations period. The arbitral awards state that conventional international law recognizes and applies the LPD in instances concerning treaty-based arbitrations where the treaty at issue contains a limitations period. It further asserts that customary international law does not recognize the LPD.

It should be noted that the conceptual void and undue contamination with national law that gives rise to uncertainty with respect to the essential configuration and application of the LPD is more than of mere academic interest. By way of example, the Tribunal in the case of *Salini Impregilo S.p.A. Argentina* (ICSID Case No. ARB/15/36) decided on February 23, 2018, identified this vacuum and sought to address the limitations defense by reaching out and importing into a private claim against a state the venerable chestnut state-to-state doctrine of *extinctive prescription.*[30] The paucity of doctrinal writings on the LPD was such that the Tribunal drew upon Crawford on State Responsibility in an effort to circumvent LPD altogether and attempt to ferret the actual elements of extinctive prescription. It observed that the decisive factor is "not the length elapsed time itself, but whether the respondent has suffered prejudice because it could reasonably have expected that the claim would no longer be pursued."[31] Armed with this rubric, the limitations-based jurisdictional challenge was rightfully denied, but for the wrong reasons. State-to-state remedies, while a helpful step in the right direction, should not be viscerally engrafted upon the investor-state configuration of the public international law of investment protection.[32]

The conflicts outlined above can perhaps be reconciled by drawing one distinction and adding that the arbitral awards concern the public international law of investment protection, while the writings of publicists and the Claims Tribunal cases make no such qualification. In fact, it may be asserted, that the Claims Tribunal cases address mostly either territorial disputes or conflicts arising from commercially based transactions that do not at all address investment protection standards. Despite its surface appeal, this explanation is belied by the very arbitral awards themselves. These awards hold that it is customary international law generally and not with respect to any singular particular field, that the LPD finds no

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29 See *supra* note 10.

30 An unpublished decision as of the date of this writing.

31 See Luke Eric Peterson, "In A New Ruling, A Tribunal Chaired By James Crawford Weighs In On Prescription, 18 Month Local Remedies Requirement, And Doctrine Of Forum Non Conveniens" *IA Reporter* (Feb 27, 2018), online: <https://www.iareporter.com/articles/in-a-new-ruling-a-tribunal-chaired-by-james-crawdford-weighs-in-on-prescription-18-month-local-remedies-requirement-and-doctrine-of-forum-non-conveniens/>.

32 *Ibid*.

space.[33] The arbitral awards addressing the LPD do not draw a distinction between customary international law, international law, and the international law of investment protection.[34] Therefore, the arbitral awards cannot be distinguished from the Claims Tribunal cases on that basis. The problem is more complex. So too is the solution.

A. According to Treaty-based Awards There is No Public International Law Equivalent to a Statute of Limitations Other Than a Limitations Period Contained in a Treaty

In a claim arising under the Lithuania-Italy BIT the Tribunal rejected respondent's limitations defense observing that "[c]ontrary to the Respondent's assertion, the claimant's claim is not subject to the Lithuanian statute of limitations. In accordance with the agreement, the Tribunal applies international law, not Lithuanian domestic law, to these proceedings and there is no deadline prescribed by the Agreement, Rules or *general principles of international law."*[35] Moreover, in that case the Tribunal held that it was reasonable for claimant to have waited to initiate any arbitration until litigation before the courts of Lithuania concerning the privatization at issue in the arbitration was concluded. The award did not discuss the extent to which the judicial proceeding included the *identica*l parties, causes of action, subject matter, and prayer for relief. The Tribunal specifically noted, however, that "[t]he Claimant notified the respondent of his intention to commence arbitration as early as 2007 when litigation in the Lithuanian courts relating to the Alita privatization was on-going. It was unreasonable, in the Tribunal's view, to wait for those decisions to be rendered for undertaking a separate proceeding in an international setting."[36] Thus, the Tribunal concluded that "the Claimant's claim [was] admissible."[37]

Similarly, the Tribunal in *Gavazzi v. Romania*, ICSID Case No. ARB/12/25 (Decision on Jurisdiction, Admissibility and Liability) (2015) rejected respondent's limitations defense and stated that "arbitration proceedings [are] governed by international law, only international law- and no domestic law – can introduce time-bars. Neither the ICSID Convention, nor the BIT, *nor international law in general contain any statute of limitations in relation to treaty claims.* Without such clear legal provisions, no time-bar can operate to bar an ICSID arbitration."[38]

This authority restates the proposition that there is no equivalent to a limitations period in public international law or within the ICSID Convention's framework, except where present in a treaty. Also, because international law governs treaty-based proceedings, a respondent is foreclosed from relying on national-domestic limitations periods to limit the prosecution of such claims. Because of the absence of an international counterpart to a domestic prescription period within the rubric of customary international law, treaty-based claims are governed by the prescription period contained in the particular treaty at issue.

This line of authority simply cannot be reconciled with the Claims Tribunal cases. Therefore, the current status of the LPD within the framework of public international law could not be any more

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33 *Energoalians TOB v Modolova*, Decision on Award (23 October 2013) UNCITRAL [*Energoalians*].

34 See *Luigiterzo Bosca v. The Republic of Lithuania,* Decision on Award (17 May 2013) at para 120, PCA Case No. 2011-05 [*Bosca*]; and *Marco Gavazzi and Stefano Gavazzi v. Romania,* Decision on Award (21 April 2015) ICSID, Case No. ARB/12/25 [*Gavazzi*].

35 *Bosca*, *supra* note 28. [emphasis added].

36 *Ibid*.

37 *Ibid* at para 121.

38 *Gavazzi, supra* note 28 at para 147 [citation omitted; emphasis added].

conceptually uncertain. One line of authority, the Claims Tribunal cases together with *some* publicists, holds that customary international law recognizes and applies the LPD in disputes based on a treaty where the treaty is silent as to a limitations period.[39] A second line of equally normative authority holds that customary international law does not recognize the LPD in disputes based on a treaty where the treaty is silent as to a limitations period.[40] The fragmented configuration and absence of sound doctrinal underpinnings beyond reliance on national-domestic law and the policies favoring the interests of capital-exporting States, have led tribunals to grope for makeshift formulas. The following describes the three most notable examples of these formulas.

IV. ARBITRAL TRIBUNALS IN INVESTOR-STATE ARBITRATIONS ATTEMPTED TO MITIGATE THE CONSEQUENCES OF A NATIONAL-LAW BASED LIMITATIONS ANALYSIS

First, a number of arbitral awards have held that in cases where in fact the treaty at issue contains a limitations period, facts beyond the term of such a period can be considered.[41] This seeming, but not actual, expansion of the limitations term to incorporate facts beyond the term to contextualize factual premises within the limitations period is an admission that a national-domestic based limitations period in a treaty simply is inadequate. Second, tribunals have adopted a "continuing damage" theory akin to the U.S. common law "continuing tort doctrine", which expands the limitations period far beyond the three-year term representing the average limitations term in post 1994 second generation BITs. Third, tribunals have sought recourse in a "reasonableness analysis" to go beyond the constraints imposed by the importation of national-domestic law limitations period analysis.[42]

B. Facts Beyond the Limitations Period Considered

At least one tribunal has found that the unique factual configuration attaching to a Denial of Justice treaty claim commands a more flexible statute of limitations period, *Eli Lilly and Company v. The Government of Canada*.[43] There the Tribunal in addressing the relevant dates for the commencement of a limitations period in an action in which the judicial invalidation of patents was at issue observed that "claimant did not suffer, and could not have suffered, the loss of which it complains here (i.e., invalidation of the Zyprexa and Strattera Patents) before those patents were invalidated."[44] Accordingly, the Tribunal concluded that the events following the date on which the Supreme Court denied claimant's leave to

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39 *Gentini*, *supra* note 2 at 556.

40 See *Nagal v Czech Republic,* Decision on Award (9 September 2003) at para 334, Arbitration Institute of the Stockholm Chamber of Commerce, Case No 049/2002 ("[t]he Arbitral Tribunal finds that in respect of a claim arising from an international treaty the limitation rules of domestic law are not directly relevant and that international standards would have to be applied"); see also *Energoalians*, s*upra* note 27 at para 122 ("the tribunal finds that when it comes to statutes of limitations relating to claims under investment treaties, domestic statutes of limitations of either party do not apply; instead, international law applies to determining the relevant statutes of limitations, and there is no such statute under international law that would apply to claims under the Energy Charter Treaty").

41 See *Grand River Enterprises Six Nations, Ltd, et al v United States of America*, Decision on Jurisdiction (20 July 2006) at para 86, UNCITRAL.

42 *Wena*, *supra* note 3.

43 *Eli Lilly and Company v the Government of Canada* (2017), Case No UNCT/14/2 (UNCITRAL).

44 *Ibid* at para 168.

appeal, the invalidation of the Strattera Patent and the Zyprexa Patent, fell within the three-year limitations period set forth in NAFTA Articles 1116(2) and 1117(2).[45]

It is also worth noting that the Tribunal in *Eli Lilly and Company* acknowledged that public international law rejects a continuing tort theory.This position was not fully developed, nor is there any authority supporting the suggestion. To the contrary, a number of tribunals have identified different permutations of this theory. The Eli Lilly Tribunal's exact language merits review:

> The Tribunal notes submissions of Respondent, Mexico, and the United States stating that the limitation period under Articles 1116(2) and 1117(2) is not subject to suspension, prolongation or other qualification, *and that in particular, a continuing course of State conduct cannot stop or renew the time-bar clock*. In the present case, Claimant has not advanced a theory of continued breach or otherwise advocated the suspension or extension of the limitation period. Nor does the Tribunal adopt any such approach in reaching its decision. This case is simpler: the alleged breach for each investment—the invalidation of the patent—occurred at a single point in time within the three-year period.[46]

The *Eli Lilly* award also bolsters the proposition that, at least within the framework of NAFTA tribunals, claimants may rely on predicate facts beyond the limitations period as part of a viable claim:

> In this context, many previous NAFTA tribunals that have found it appropriate to consider earlier events that provide the factual background to a timely claim. As stated by the tribunal in *Glamis Gold v United States*, a claimant is permitted to cite 'factual predicates' occurring outside the limitations period, even though they are not necessarily the legal basis for its claim. [Citation omitted][47]

The need to go beyond a three-year limitations period in an international dispute is driven by many factors,[48] not the least of which is the very nature of international investments themselves. A salient feature of an international investment triggering treaty-based protection standards is longevity.[49] Many, if not most, such investments have micro and even macro-economic effects. Therefore, the analyses in *Eli Lilly, Mondev,* and *Feldman* are understandable but remain less than comprehensive in addressing the inadequacies arising from a national-domestic law legacy analysis.

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45 *Ibid* at para 170.

46 *Ibid* at para 159.

47 *Ibid* at para 172.

48 See also *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc v Government of Canada*, Award on Jurisdiction and Liability (March 17, 2015) at para 282, UNCITRAL, PCA Case No. 2009-04 ("[w]hile Article 1116(2) bars breaches in respect of events that took place more than three year before the claim was made, events prior to the three-year bar, however, are by no means irrelevant. They can provide necessary background on context for determining whether breaches occurred during the time-eligible period").

49 See e.g. *Salini v Morocco*, Decision on Jurisdiction (2001) at para 52-54, ICSID, Case No ARB/00/4 (Schreuer observes that there are five "features" that are "typical" to "most of the operations" that have been the subject of ICSID proceedings: (i) "a certain duration" of the enterprise, (ii) "a certain regularity of profit and return," (iii) an "assumption of risk," (iv) a "substantial" commitment by the investor, and (v) some "significance for the host State's development").

B. Continuing Damage Analysis

Notwithstanding the *Eli Lilly* Tribunal's *dicta* in a footnote from which it may be inferred that a "continuing tort theory" finds no space in public international law, that proposition is in direct and explicit conflict with more sustained analyses on the subject.

Perhaps the most relevant "case law" examination on the issue of timeliness in the NAFTA context is found in the *United Parcel Service of America Inc. (UPS) v. Government of Canada,* UNCITRAL Arbitration Rules, Award on Merits, May 24, 2007. That case concerned the maintenance of the Canada Post's monopoly with respect to small parcel deliveries, which was based on a statute that in effect foreclosed the investor from conducting business in that jurisdiction. A remarkable aspect of the factual narrative underlying that cause as it relates to the issue of the preclusive effect of the relevant statute of limitations is that the statutory framework predated the filing of the investor's claim by three years. The Tribunal in *UPS* qualified the extent to which a continuing course of conduct may constitute new and recurring breaches that renew the limitations period. It specifically held that, where a continuing breach is present, the claimant is limited to securing compensation accruing only within the three-year time frame (in the NAFTA context) prior to the filing of the claim:

> Although we find that there is no time bar to the claims, the limitation period does have a particular application to a *continuing course of conduct*. If a violation of NAFTA is established with respect to any particular claim, any obligation associated with losses arising with respect to that claim can be based only on losses incurred within three years of the date when the claim was filed. *A continuing course of conduct might generate losses of a different dimension at different times.* It is incumbent on claimants to establish the damages associated with asserted breaches, and for continuing conduct that must include a showing of damages not from the inception of the course of conduct but only from the conduct occurring within the period allowed by article 1116(2). This is not, however, a matter we need to address further at this point apart from the specific claims.[50]

While the UPS tribunal ultimately dismissed the NAFTA claims on the merits, the award serves as foundational authority for a *continuing course of conduct* or "*continuing tort*" approach.[51] The U.S. common law has long recognized a continuing tort doctrine that tolls application of domestic statutes of limitations.

As with tribunals that seek to expand the limitations period in order to understand more comprehensively the actual facts purportedly governed by the limitations term, a continuing damages analysis underscores a rudimentary need for a longer limitations period or a limitations period that is sufficiently flexible so as to expand its terms where circumstances may so warrant. The configuration of an investment, the regulatory act or acts at issue, the nature of the damages alleged, particular circumstances

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[50] *UPS v Canada*, Award on the Merits (May 24, 2007) at para 30, ICSID, Case No. UNCT/02/1 [emphasis added].

[51] See e.g., *National Railroad Passenger Corp. v Morgan*, 536 US 101 (2002); *United Airlines v Evans*, 431 US 553 (1977); and *Hilao v Estate of Marcos,* 103 F (3d) 767, 773 (9th Cir 1996); see also Elad Peled, "Rethinking The Continuing Violation Doctrine: The Application Of Statutes Of Limitations To Continuing Tort Claims," (2015) 41 Ohio NUL Rev 343.

configuring a case, and the standard or standards of protection allegedly breached, all may suggest that application of a three-year limitations period having its origins in the importation of national-domestic law into a treaty simply is inadequate. Instead of addressing the conceptual cause of a pragmatic deficit, ad hoc tribunals charged only with processing a single set of claims pertaining exclusively to one dispute

cannot but limit themselves to addressing the symptom and not the underlying disease. A continuing damages approach merely mitigates the systemic effects of a conceptual shortcoming.

C. A *Reasonableness* Standard can be Discerned Concerning Limitations Periods in Public International Law

There is no authority setting forth a customary international law equivalent to a limitations or prescription period. Similarly, public international law does not identify an operative standard that may apply to limitations period issues or analyses. Scrutiny of the corpus of treaty-based arbitral awards addressing the limitations period issue, however, reveals the recurring application of a "*reasonableness*" standard. This standard has been applied without reference to national law and in instances where the treaty at issue lacks a limitations period.

The analysis in *Wena Hotels Limited v. Arab Republic of Egypt,* Case No. ARB/98/4, ICSID is helpful. There, claimant asserted a claim under the U.K.-Egypt BIT concerning the seizure of two properties in 1991 in the hospitality sector, the Luxor and Nile hotels. Respondent argued that the claim

commanded immediate dismissal because Article 172(1) of the Egyptian Civil Code specifically provided that "[a] case filed for damages claimed for an illegal act shall fall by prescription by lapse of three years from the day the wronged person learns of the damages taking place and of the person who is responsible for it, in all events the case shall fall within the lapse of 15 years from the day the illegal act takes place."[52]

Moreover, respondent further argued that even if the Tribunal were to refrain from applying Egypt's domestic statute of limitations, the Tribunal would "still have the discretion to determine whether there has been unreasonable delay in the submission of this claimant's claims to ICSID."[53] In *Wena*, the request for arbitration was registered in 1998, seven years after the subject seizures of the Luxor and Nile hotels had occurred. The Tribunal did not apply the statute of limitations defense and in so proceeding determined that under the specific facts of that case a seven-year timeframe separating the maturation of claims and the actual registration of an ICSID arbitration request was eminently reasonable. It engaged in a two-prong analysis that (i) traced the development of the general principle that there is no statute of limitations in international law, and (ii) analyzed the reasonableness in delaying the filing of the claim for seven years, but did so within an equity framework.[54]

First, the Tribunal sought analytical support from *Alan Craig v Ministry of Energy of Iran*, Chamber Three of the Iran-U.S. Claims Tribunal, where despite the applicability of Iranian law the Tribunal declined to apply an Iranian statute of limitations and noted that "[m]unicipal statutes of limitation have not been considered as binding on claims before an international tribunal, although such periods may be taken into

52 *Wena, supra* note 3 at para 102.
53 *Ibid.*
54 See *Wena, supra* note 3 at para 102—09.

account by such a tribunal when determining the effect of an unreasonable delay in pursuing a claim."[55] In addition, the Tribunal recognized that this principle was a long-standing one based on the venerable *Gentini* case where, as previously stated, the Mixed Claims Commission noted that international tribunals are free to consider equitable principles of limitations in evaluating stale claims.[56]

The *Wena* Tribunal first borrowed from the Italy-Venezuela Mixed Claims Commission and engaged in a two-part reasonableness analysis within an equity framework. Two propositions were identified as relevant. First, was the notion of "repose" violated? Specifically, respondent Egypt "*reasonably* believe[d] that a dispute has been abandoned or laid to rest long ago [such that Egypt] should not be surprised by [the dispute's] subsequent resurrection."[57]

Second, the Tribunal queried whether the extent to which the seven-year hiatus between the accruing of the claim and the registration of the arbitration request caused any harm. It answered both questions in the negative.[58]

V. A PARADIGM SHIFT BASED ON THE POLICIES OF THE PUBLIC INTERNATIONAL LAW OF INVESTMENT PROTECTION

The current status of the LPD within the framework of the public international law of investment protection is unworkable. Indeed, the deficits in the theoretical and practical approach to the doctrine are such that the modern regime governing the doctrine in the international law of investment protection actually gives rise to *insecurity* and *uncertainty*. Yet, the jurisprudence and writings concerning the workings of the LPD in international law generally state in unison that the very two primordial objectives of the limitations doctrine are *security* and *certainty*.

Four fundamental factors account for the uncertainty and insecurity that characterizes the contemporary doctrine's regime. First, the LPD in the international law of investment protection is based upon the wholesale importation of national-domestic law. Specifically, the (i) economic interest of capital-exporting States, (ii) the national-domestic rules of property law, (iii) national-domestic principles of contract law, and (iv) the national-domestic law of negligence, all underlie the modern limitations period regime.

Second, the contemporary doctrine's framework in the international law of investment protection simply was fashioned without consideration of the multiple direct and collateral policy objectives that comprise this area of law. This shortcoming is of a foundational nature.

Third, the current doctrine's rubric within the international law of investment protection is fragmented. First generation BITs, defined here as those signed and entered into force between 1959 and 1993, *do not have any* limitations period. Thus, disputes arising from approximately 563 BITs have no pole star with respect to (i) the possible preservation of claims in perpetuity, (ii) the incorporation of limitations period terms haphazardly arising from national-domestic law, or (iii) a limitations term introduced into

[55] *Ibid* at para 106 citing to *Alan Craig v Ministry of Energy of Iran* (1984), 280 [Annex W155] (Iran-US Claims Tribunal); George Aldrich, *The Jurisprudence of the Iran-United State Claims Tribunal* (Oxford, UK: Clarendon Press, 1996) at 480-82 [emphasis added].

[56] *Ibid* at para 106.

[57] *Ibid* at para 105 [emphasis added].

[58] *Ibid* at para 106.

the proceeding based upon arbitral discretion. All three possibilities are fundamentally flawed. Second generation BITs (modern BITs), defined here as those signed between 1994 and 2017, reflect that only one hundred and six (106) out a total of one thousand four hundred and ninety-eight (1,498) BITs, or7.08%[59] have a limitations period.[60] Moreover, the 7.08% having a limitations period contained limitations terms ranging between two (2) and five (5) years attaching to identical standards of foreign investment protection. Both the length of these terms and the different terms attaching to the same protection standards are practically and conceptually problematic.

Within the modern BITs we also find that the placement of the limitations period in the various treaties differs. At times the limitations period is referenced together with the relevant standard of protection to which it attaches.[61] In these cases the limitations period should be construed as *substantive*, i.e. forming part of the actual investment protection standard. In other modern BITs the limitations period is placed together with procedural jurisdictional predicates and procedural rights.[62] In such cases, the limitations period must be construed as *procedural*. We thus find that the LPD within the international law of investment protection can be construed as both substantive and procedural under the current "legacy approach", although it is not recognized as such. The non-disclosure and conceptual categorization of this duality under the existing regime is insufficient because it also creates *uncertainty* and *insecurity* with most favored nation (MFN) treaty practice.

Fourth, two conflicting lines of authority on so rudimentary an issue as whether customary international law recognizes the LPD *at all* clouds customary international law with respect to this fundamental tenet. The negative effects of these four features of the current LPD regime in the international law of investment protection are compounded and made worse because of the nature of the *ad hoc*-based tribunal framework in international investor-State arbitration. These tribunals struggle to engraft relativity and flexibility on to what essentially is a static and inflexible paradigm that leaves little room for policy consideration or the reformulation of normative paradigms. The tribunals are charged with the practical workings of "problem solving" and not "policy making."

These uncertainties compel a comprehensive review and revision of the LPD within the international law of investment protection.

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59 Once we add to the BITs the total number of TIPS containing a limitations period, the figures change to a total of 1,524, where 132 contain limitations terms, namely 8.66%. Between 1994 and 2017, 1524 BITs and TIPs entered into force UNCTAD's International Investment Agreements Navigator, online: <http://investmentpolicyhub.unctad.org/IIA>.

60 See Appendix A.

61 See e.g., Colombia-US Trade Promotion Agreement, November 22, 2006 (entered into force May 12, 2012), (Chapter Twelve, concerning "Financial Services" in Art. 12.1.2(b) states that "[s]ection B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter solely for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and Information Requirements), as incorporated into this Chapter." Art. 12.1.2(b) does not mention the limitations period; in that vein, there is no limitations period applicable to the financial services chapter).

62 See e.g., *Colombia-UK Bilateral Agreement for Promotion and Protection of Investments*, March 10, 2010, (October 10, 2014) (the limitations period is found in article IX, titled "Settlement of Disputes between one Contracting Party and an Investor of the other Contracting Party", listing procedural and not substantive rights).

A. A Prescriptive Approach

Set forth below is a non-exhaustive list of propositions that should form part of any LPD analysis. This catalogue of premises is based on the assumption that doctrinal developments in any field of law generally, but certainly in the international law of investment protection, require the doctrinal precept at issue to have a rational relationship with respect to the subject matter and objectives of the particular legal regime at issue. The following fifteen propositions purport to meet this threshold standard:

> 1. An investor shall be accorded a rebuttable presumption that a claim has been timely filed. Conversely, a claim brought beyond the terms set forth in the applicable treaty shall not give rise to a *prima facie* presumption of negligence on the investor's part for failing to bring the claim any earlier.
>
> 2. The LPD within the international law of investment protection needs to bespeak uniformity. This uniformity must be attendant to (i) any conceptual standard concerning application of a prescription period, as well as to (ii) the specific substantive protection standards.
>
> 3. The LPD should not be *exclusively* based upon national-domestic rules adopted from property, contract, and tort law. These legal principles were not developed to apply to claims arising from an alleged violation of a treaty-based protection standard caused by the excessive or illicit exercise of a State's regulatory sovereignty; hence the theoretical and practical incongruity of the LPD's ability to foster certainty and security.
>
> 4. Where appropriate, the LPD should be analyzed within the context of the international law *proportionality doctrine*. An "all or nothing" approach to the application of the LPD to dismiss a claim without the benefits of having undertaken a comprehensive approach to the consideration of relevant factors germane to this field of law (investment protection) can only foster uncertainty and insecurity.
>
> 5. Any analysis of the application of the LPD must consider the extent to which recourse to a non-domestic tribunal was at all possible during the time frame at issue. In this regard, the Tribunal should be particularly flexible in favor of allowing claims to proceed, particularly where a Denial of Justice claim is being prosecuted.
>
> 6. The specific universe of foreseeable economic or in-kind consequences stemming from an alleged violation of a protection standard at issue must be weighed against dismissal of a claim on limitations ground. Policy considerations pertaining to (i) the particular industry sector at issue, (ii) the investor's contribution to that sector, and (iii) the extent to which the nature of the investment would render the investment most vulnerable to excessive or illicit exercise of regulatory sovereignty, all need to be considered.

7. The unique nature of investments generally must be considered in applying a limitations analysis. For example, greater flexibility in the application of the doctrine in favor of an investor should ensue in instances where the investment is particularly dependent upon the regulatory protection of the host-State.

8. Circumstances attaching to a claimant's ability to bring claims, including economic, political, social, and other duress, as well as the ability to collect against the host-State, should be considered. This analysis also must evaluate a claimant's subjective, but reasonably-based, perception that the filing of a claim before an international tribunal would likely cause the State to retaliate against the claimant or claimant's affiliates.

9. The effects of asymmetrical disparities and resources between the claimant-investor and the host-State, where relevant, needs to be considered. The investor-host-State relationship cannot be assumed to be an arm's length relative position of power.

10. The formulation or application of the LPD should consider the investment's macro-economic contributions were the investment to be withdrawn or the chilling effect that dismissal may have on future investors, particularly with respect to the industry sector at issue.

11. The formulation or application of the LPD should consider the investment's micro-economic contributions were the investment to be withdrawn or the chilling effect that dismissal may have on future investors, particularly with respect to the industry sector at issue.

12. Treaty-based arbitration should be governed by a policy favouring liberal access to a dispute resolution methodology. There should always be a presumption in favor of access to a neutral international venue. Procedural rights in treaties are frustrated in instances providing for a limitations term that would be akin to the national-domestic law equivalent in the fields of contract, property, negligence or tort law. Thus, the formulation and application of the LPD requires consideration of the alleged regulatory act's consequences on foreign direct investment with respect to the host-State and other developing economies. Application of the LPD should be abated in cases where the alleged regulatory act caused or continues to cause claimant damages on a recurring basis.

13. From an analytical perspective, the LPD should not be conceptualized, classified, and applied as either substantive or procedural. Instead, the LPD, much like the wave-particle duality attaching to the physical phenomenon of the nature of light, should be viewed as having a dual characteristic depending on the placement of the limitations period in a particular treaty. It is only proper to allow for the conceptual flexibility that renders it possible for the LPD to be treated as

either procedural or substantive. This transparency of nature and purpose fosters security and certainty.

14. The current two to five-year regime found in second generation BITs having its genesis in national-domestic law is simply too abbreviated a time frame to serve as a limitations term. This calculus generally may work in the context of arm's-length transactions between private entities or individuals. It cannot be assumed that the same limitations term would equally apply and yield similar efficiencies in the context of the asymmetries that pervade the unique and disparate relationship between a private actor and a State. More generous and qualified limitations terms shall contribute to leveling the playing field.

15. Finally, in determining the application of a limitations period that would cause a claim's dismissal, the tribunal should consider any evidence tending to demonstrate that a capable claimant intentionally withheld the filing of a claim in order to benefit from the disappearance or lessening of evidence potentially adverse to the prosecution of a claim based upon breach of a treaty standard of protection. The tribunal also shall consider whether the delayed filing of the claim caused or would cause respondent damages or prejudice.

VI. CONCLUSION

A uniform standard for the LPD in international arbitration is imperative. Of the approximately three thousand BITs signed, only one hundred and six have a limitations or prescription period. This configuration means that in every case having to do with approximately 96.5% of all BITs, tribunals are free to fashion a limitations period without the benefit of any standard. Alternatively, the tribunals are placed in the untenable position of not applying any limitations period. Neither option is viable because both foster uncertainty and insecurity.

Reform is necessary. A revision of the theoretical and practical underpinnings of the LPD, however, cannot revert to the legacy model that looks to national-domestic law for analytical support. Similarly, a paradigm based on the aspirations of capital exporting States alone is not functional.

The international law of investment protection must look to *international law,* particularly in the wake of economic globalization and transnational integration. The elements of the LPD must draw on the policies and aspirations of investment protection law itself. Otherwise, the relative positions of power between the parties, and access to resources cannot be harmonized in an equipoise that best reconciles the seemingly incompatible obligations (i) to protect foreign investments, and (ii) to engage in regulatory sovereignty. The abandonment of legacy analyses is difficult and fraught with challenges. But at this stage in the development of global commerce and the integration of 193 States into a singular and purportedly uniform transnational economy, there is no other recourse. The LPD's promise to foster certainty and security is only thus redeemable.

Appendix A
Treaties in Force Containing Limitations Periods[63]

(Order by date of signature)

	Bilateral Investment Treaties (BITs)	Term (in years)	Year
1.	Canada - Ukraine	3	1994
2.	Mexico - Switzerland	3	1995
3.	Canada - Trinidad and Tobago	3	1995
4.	Canada - Philippines	3	1995
5.	Canada - Ecuador	3	1996
6.	Barbados - Canada	3	1996
7.	Canada - Venezuela	3	1996
8.	Canada - Panama	3	1996
9.	Canada - Egypt	3	1996
10.	Argentina - Mexico	4	1996
11.	Canada - Thailand	3	1997
12.	Canada - Croatia	3	1997
13.	Canada - Lebanon	3	1997
14.	Armenia - Canada	3	1997
15.	Canada - Uruguay	3	1997
16.	Canada - Costa Rica	3	1998
17.	Mexico - Netherlands	3	1998
18.	Austria - Mexico	4	1998
19.	Germany - Mexico	4	1998
20.	Belgium-Luxembourg Economic Union- Mexico	3	1998
21.	France - Mexico	4	1998
22.	Finland - Mexico	4	1999
23.	Mexico - Uruguay	3	1999
24.	Mexico - Portugal	3	1999

[63] We used the UNCTAD treaty database (online: <http://investmentpolicyhub.unctad.org/IIA>) to compile the treaties, but a substantial amount of independent research was necessary to filter out "false positives" generated from the website. Specifically, the "limitation period for submission of claims" category is over-inclusive, such that toggling "yes" includes not only treaties with limitations/prescription periods, but also treaties with other temporal clauses such as "cooling off" periods. A significant number of treaties in the raw search results are false positives, e.g. they contain a cooling off clause, but no limitations/prescription period for bringing claims.

25. Austria - Cuba	5	2000
26. Austria - Uzbekistan	5	2000
27. Austria - Azerbaijan	5	2000
28. Austria - Bosnia and Herzegovina	5	2000
29. Mexico - Sweden	4	2000
30. Republic of Korea - Mexico	3	2000
31. Austria - Bangladesh	5	2000
32. Austria - Iran	5	2001
33. Cuba - Mexico	3	2001
34. Austria - Belice	5	2001
35. Austria - Georgia	5	2001
36. Czech Republic - Mexico	3	2002
37. Austria - Malta	5	2002
38. Austria - Namibia	5	2003
39. Austria - Yemen	5	2003
40. Republic of Korea - Viet Nam	3	2003
41. Austria - Ethiopia	5	2004
42. Colombia - Spain	3	2005
43. Iceland - Mexico	3	2005
44. Australia - Mexico	4	2005
45. Belgium-Luxembourg Economic Union - Peru	3	2005
46. United States of America - Uruguay	3	2005
47. Austria - Guatemala	5	2006
48. Mexico - United Kingdom	3	2006
49. Colombia - Switzerland	5	2006
50. Mexico - Trinidad and Tobago	3	2006
51. Mexico - Spain	3	2006
52. Canada - Peru	3	2006
53. Belgium-Luxembourg Economic Union- R. of Korea	5	2006
54. Azerbaijan - Hungary	3	2007
55. India - Mexico	3	2007
56. Cambodia - Japan	3	2007
57. China - Republic of Korea	3	2007

58. Colombia - Peru	39 months[64]	2007
59. Japan - Lao’s Peoples Democratic Republic	3	2008
60. Rwanda - United States of America	3	2008
61. China - Mexico	3	2008
62. Belarus - Mexico	3	2008
63. Japan - Peru	3	2008
64. China - Colombia	3	2008
65. Canada - Latvia	3	2009
66. Canada - Czech Republic	3	2009
67. Canada - Romania	3	2009
68. Uruguay - Viet Nam	2[65]	2009
69. Republic of Korea - Rwanda	3	2009
70. Canada - Jordan	3	2009
71. Republic of Korea - Uruguay	3	2009
72. Colombia - India	3	2009
73. Mexico - Singapore	3	2009
74. St. Vincent and the Grenadines - Taiwan	3	2009
75. Austria - Kazakhstan	5	2010
76. Colombia - United Kingdom	5	2010
77. Chile - Uruguay	3	2010
78. Egypt - Switzerland	5	2010
79. Austria - Tajikistan	5	2010
80. China - Uzbekistan	3	2011
81. Japan - Papua New Guinea	5	2011
82. Colombia - Japan	3	2011
83. Canada - Kuwait	3	2011
84. Japan - Kuwait	5	2012
85. Iraq - Japan	5	2012
86. Switzerland - Tunisia	5	2012
87. Bahrain - Mexico	3	2012
88. Benin - Canada	3	2013

64 The Colombia-Perú BIT is the only treaty with a term of three years and three months.
65 The Uruguay-Viet Nam BIT is the treaty with the shortest limitations period: two years.

		Term (in years)	Year
89.	Kuwait - Mexico	3	2013
90.	Japan - Saudi Arabia	5	2013
91.	Canada - Tanzania	3	2013
92.	Japan - Mozambique	3	2013
93.	Guatemala - Trinidad and Tobago	3	2013
94.	India - United Arab Emirates	5	2013
95.	Japan - Myanmar	3	2013
96.	Cameroon - Canada	3	2014
97.	Georgia - Switzerland	5	2014
98.	Egypt - Mauritius	3	2014
99.	Canada - Serbia	3	2014
100.	Japan - Kazakhstan	3	2014
101.	Canada - Senegal	3	2014
102.	Canada - Mali	3	2014
103.	Canada - Cote d'Ivoire	3	2014
104.	Japan - Ukraine	3	2015
105.	Canada - Hong Kong China SAR	3	2016
106.	Canada - Mongolia	3	2016

	Treaties with Investment Provisions (TIPs)	Term (in years)	Year
1.	NAFTA	3	1994
2.	Singapore - United States of America FTA	3	2003
3.	Chile - United States of America FTA	3	2003
4.	Morocco - United States of America FTA	3	2004
5.	DR-CAFTA	3	2004
6.	Oman - United States of America FTA	3	2006
7.	Peru - United States of America FTA	3	2006
8.	Colombia - United Sates of America	3	2006
9.	Panama - United States of America FTA	3	2007
10.	India - Korea CEPA	3	2009
11.	India - Malaysia FTA	3	2011
12.	China, Japan, Korea, Trilateral Invest. Agree.	3	2012

13. Colombia - Republic of Korea FTA	3 and 6 mth.[66]	2013
14. Colombia - Costa Rica FTA	3	2013
15. New Zealand - Taiwan ECA	3	2013
16. Canada - Honduras FTA	3	2013
17. Pacific Alliance Additional Protocol	3	2014
18. Mexico - Panama FTA	3	2014
19. Australia - Republic of Korea FTA	3	2014
20. Canada - Republic of Korea FTA	3	2014
21. Japan - Mongolia EPA	4	2015
22. Republic of Korea - New Zealand FTA	3 and 6 mth.	2015
23. Republic of Korea - Viet Nam FTA	3	2015
24. Eurasian Economic Union - Viet Nam FTA	3	2015
25. China - Republic of Korea	3	2015
26. Australia - China FTA	3 or 4[67]	2015

[66] The Colombia-Republic of Korea FTA contains a limitations period of three years and six months, as does the Republic of Korea -New Zealand FTA.

[67] The Australia-China FTA clearly specifies that "[n]o claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 9.12.2... for claims brought under Article 9.12.2(a)...."And a four (4) year term for claims brought under Article 9.12.2(b) during which the claimant will file a claim on behalf of an enterprise that he owns or controls directly or indirectly.