

Defining New Institutional Options for Investor-State Dispute Settlement

Fiona Marshall

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1.0 Introduction

It is now more than two decades since the first arbitration brought by an investor against a host state under an investment treaty was filed.¹ The past decade in particular has seen an exponential growth in such arbitrations, with a total of 317 known investor-state arbitrations by the end of 2008, up from less than 80 at the end of 1998.²

Criticisms of the investor-state arbitration process, in particular, regarding the secrecy and lack of accountability with which such arbitrations are typically conducted, have been voiced for almost as long. However, with the exception of some limited amendments to one set of arbitration rules, there has still been no systematic attempt to address these criticisms.

Now in its third decade, and with an estimated 28 to 48 new cases each year,³ investment treaty arbitration is emerging as the major source of international investment law. In turn, international investment law is becoming an important source of law for our globalized economic system, in which foreign direct investment is frequently touted as the panacea to all ills—be it improving the fortunes of developing countries, meeting energy needs or addressing climate change.

Investment treaties are treaties between states primarily intended to protect and promote foreign investment. They may be in the form of bilateral investment treaties between two states (BITs), multilateral treaties between a number of states in a given region⁴ or as part of a bilateral or regional trade agreement.⁵ The majority of investment treaties to date have been entered into between developed and developing countries, though there are an increasing number concluded between developing countries only.

While the exact wording of their provisions may vary, investment treaties generally bind each contracting state to guarantee certain standards of treatment to investors from the other contracting state. These standards typically include, though are not necessarily limited to:

¹ The first known investment treaty arbitration was *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/87/3) registered July 20, 1987.

² United Nations Conference on Trade and Development (UNCTAD), Latest Developments in Investor– State Dispute Settlement, IIA Monitor No. 1 (2009), UNCTAD/WEB/DIAE/IIA/2009/6, p.2.

³ Ibid.

⁴ E.g., the Energy Charter Treaty, whose Parties primarily consist of eastern and western European states and many of the Newly Independent States formerly part of the Soviet Union., see http://www.encharter.org/fileadmin/user_upload/document/EN.pdf

⁵ E.g., the North American Free Trade Agreement (NAFTA), Chapter Eleven of which deals with investment, see <http://www.sice.oas.org/trade/nafta/chap-111.asp#Chap.XI>.

- a) **National treatment** – an obligation to accord the foreign investor treatment no less favourable than that it accords to its own investors;
- b) **Most favoured nation treatment** – an obligation to accord the foreign investor treatment no less favourable than that it accords to investors from any other state;
- c) **Fair and equitable treatment** – an obligation to treat the investor fairly and equitably;
- d) **Expropriation** – a commitment not to expropriate investments except for a public purpose and upon prompt and adequate compensation.

Most importantly, the vast majority of investment treaties contain a provision entitling investors to have their disputes with host states resolved through international arbitration rather than through the host state's domestic courts.

According to the United Nations Conference on Trade and Development (UNCTAD), by the end of 2008 at least 78 governments had faced an investment treaty arbitration. This included 48 developing countries, 17 developed countries, and 13 countries with economies in transition.⁶ However, since the World Bank's International Centre for Settlement of Investment Disputes (ICSID) is the only arbitration facility to maintain a public registry of claims, the total number of actual treaty-based cases is likely to be higher. The majority of claimants have been investors from developed countries. Of the 109 known cases concluded at the end of 2008, 51 had been decided in favour of the State, and 48 in favour of the investor, although 4 of these cases are still pending before an ICSID annulment committee.⁷

According to UNCTAD figures, total damages awarded in the known cases decided against host states to date amount to US\$2.8 billion. Of this, Argentina has been found liable for the highest amount in total (\$1.05 billion), followed by Slovakia, with US\$800 million. UNCTAD reports the average damages award in an investor state dispute is US\$68 million.⁸

Of the total 317 known disputes as at the end of 2008, 64 per cent were filed with ICSID (or the ICSID Additional Facility), 26 per cent under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), 5 per cent at the Stockholm Chamber of Commerce (SCC) and 2 per cent with the International Chamber of Commerce (ICC). The remaining 3 per cent were spread elsewhere.⁹

Of these four most commonly used arbitration facilities—UNCITRAL, ICSID, the SCC and the ICC—only ICSID has rules specifically designed for investor-state disputes. The other three

⁶ United Nations Conference on Trade and Development, Latest Developments in Investor– State Dispute Settlement, IIA Monitor No. 1 (2009), UNCTAD/WEB/DIAE/IIA/2009/6, p.2.

⁷ Ibid, p.2.

⁸ Ibid, p.9.

⁹ Ibid, p.2.

arbitration institutions are primarily designed to cater to private commercial disputes and designed to ensure the confidentiality of the dispute and autonomy of the disputing parties.

One commentator has observed:

It may have been convenient, in the negotiation of investment treaties, to rely on the existing structure of international commercial arbitration to provide a framework for investor-state arbitration rather than to confront the sensitivities that surround the creation of new international courts. But an implication of doing so is that the profound consequences of a few lines in a treaty are obscured from wider scrutiny.¹⁰

Investor-state arbitrations differ from commercial arbitrations between only private parties because the former involve the public interest in ways the latter do not. Six somewhat overlapping public interest concerns can be identified.¹¹

First, investor-state disputes often arise in public service sectors such as water, electricity, oil and gas, waste disposal, transport and telecommunications. Nationals of the host state clearly have an interest in seeing that disputes in these critical sectors are resolved in a way that ensures their rights to these public services are not impaired.

Second, the very presence of a state as a party to the arbitration raises a public interest because the nationals of that state have an interest in how the government acts during the arbitration and in the arbitration's outcome. According to principles of good governance, government activities should be subject to basic requirements of transparency and public participation.

Third, investor-state arbitrations may challenge regulatory measures intended by states to protect the public welfare, if the measure directly or indirectly affects the value of the investment. Regulatory measures challenged in investment treaty arbitrations to date have included legislation directed to human rights, labour laws, health and safety, and environmental protection. The arbitration may thus have flow-on effects for the welfare of the communities where an investment is located.

Fourth, the threat of investor-state arbitration may have a “chilling effect” on states adopting public welfare regulations in the first place. Investors may use the threat of arbitration proceedings to discourage governments from pursuing regulations in their public's interest.

Fifth, every investor-state arbitration has implications for the public purse, irrespective of the sector or regulatory measure involved. Defending an international arbitration is costly and uses funds that could otherwise be used for a public purpose. Moreover, should a tribunal find against a state, the

¹⁰Gus Van Harten, 2007, p. 178.

¹¹ Marshall and Mann, 2006, pp. 2–3.

sums awarded may be significant—according to UNCTAD, the average damages award against host states is currently US\$68 million. Developing countries are especially at risk because of their reliance on foreign investment in many critical sectors for economic development. The more than forty investor arbitrations commenced against the Argentinean government following the country’s economic crisis show that developing countries recovering from such setbacks may face a further obstacle to getting back on their feet.

Lastly, there is a broader context at work. International investment law is now an important part of the international law relating to globalization. The provisions of investment treaties are usually drafted in general or vague language. This gives tribunals interpreting these provisions a pivotal role in how the law is developed. Investor-state case law is thus central to the future evolution of international investment law. While tribunal decisions are not binding on future tribunals, tribunals nevertheless refer to other tribunal’s decisions. Coupled with the significant public interests at stake, the potential contribution of each award to the evolution of investment law requires the legitimacy of the arbitration process to be assured.

As the number of investment treaty arbitrations has increased, so too have the voices calling for the institutional framework in which these arbitrations are conducted to be revised. Some commentators have referred to the current state of investor-state arbitration as a “crisis of legitimacy”.¹² Even prominent arbitrators working within the system have called on the institutional framework in which these arbitrations are conducted to be revised.

Commentators have warned that unless the problems in the current system are addressed, the future of investment treaties and arbitration as tools to protect and promote foreign investment is at grave risk. In fact, these warnings are already starting to come true. The last few years have seen several states, particularly from Latin America, denouncing investment treaties and signalling their intent to withdraw from ICSID.

As one developing country scholar has noted, developing countries:

signed treaties in the hope of facilitating flows of investment, not in the expectation that they would have to face expensive arbitration with a potential for heavy damage. The very supposition of that bargain – that a surrender of sovereignty in an investment treaty will lead to greater flows of investment – now stands challenged. Unless a balance is brought about in the system of investment arbitration, it will suffer more and more from a crisis of credibility. The ways in which this balance can be restored need to be explored.¹³

¹² Franck, 2004–2005, p. 1521.

¹³ Sornarajah, 2008, p. 73–74.

This paper posits that there are three elements needed to ensure legitimacy in the investor-state arbitration context:

- **Independence, accountability and expertise of decision-makers**

In order to ensure the legitimacy of investment arbitration, decision-makers who will be safeguarding interpretive determinacy must themselves be recognized as legitimate.¹⁴ This includes that they be independent, impartial, accountable and have appropriate legal knowledge expertise.

- **Transparency of the investor-state arbitration process**

Transparency of the arbitration process, including its outcomes, is essential for three reasons. First, so that investors and host states can know in advance what their legal rights and obligations are; second, to hold tribunals to scrutiny to ensure that justice is done; and third, so that members of the public, particularly of the host state, can know about issues and decisions that may affect them.

- **Coherence in the law, in particular the prevention of inconsistent decisions**

Eminent legal philosopher Thomas M. Franck has remarked that “[a] rule is coherent when its application treats like cases alike when the rule relates in a principled fashion to other rules in the same system. Consistency requires that a rule, whatever its content, be applied uniformly in every ‘similar’ or ‘applicable instance.’”¹⁵ Without the clarity and consistency of both the rules of law and their application, there is a detrimental impact upon those governed by the rules and their willingness and ability to adhere to such rules, which can lead to a crisis of legitimacy. When such factors are absent, individuals, companies and governments cannot anticipate how to comply with the law and plan their conduct accordingly, thereby undermining legitimacy.¹⁶

As this paper will demonstrate, each of these elements of legitimacy are currently lacking from the investor-state arbitration process.

Drawing together the writings of prominent arbitrators and legal scholars, as well as developments in other international dispute settlement mechanisms, the paper will examine practical ways to address the current problems in the institutional framework on investor-state arbitration. In doing so, it aims to propose pragmatic solutions that can reflect the needs of the international investment regime of the future.

¹⁴ Franck, 2004–2005, p. 1596.

¹⁵ Franck, 1995, p. 38.

¹⁶ Franck, 2004–2005, p. 1584.

2.0 Independence, Impartiality, Accountability and Arbitrator Expertise

2.1 Expertise in Public International Law as a Minimum Requirement

None of the four arbitration rules most used in investor-state arbitrations require arbitrators to have public international law expertise. The UNCITRAL, SCC and ICC Rules do not even require their arbitrators to have legal expertise. The ICSID Convention requires arbitrators to have recognized competence in the field of law, but despite being established specifically to deal with investor-state disputes, it still makes no requirement that its arbitrators have any public law expertise.¹⁷

This seemingly minor oversight has had a huge impact on the evolution of international investment law to date. To a significant extent, the investment arbitration field is dominated by private commercial lawyers¹⁸ and investor-state arbitration is viewed by practitioners as a specialized branch of international commercial arbitration. Given their area of expertise, it is not surprising that such arbitrators have tended to apply principles of contract law when interpreting investment treaties rather than those of public international law.

The interpretative principle of *in dubio mitius* is widely recognized in international law as a “supplementary means of interpretation.”¹⁹ It was expressed by the WTO Appellate Body in the *EC–Hormones* case in the following terms:

*The principle of in dubio mitius applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.*²⁰

In that case, the WTO Appellate Body held:

*We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation [. . .]. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the SPS Agreement would be necessary.*²¹

¹⁷ ICSID Convention, article 14(1).

¹⁸ See the tables of most frequently used arbitrators in ICSID cases in Commission (2007, pp. 139–140).

¹⁹ The Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, [WT/DS26/AB/R](#), [WT/DS48/AB/R](#), adopted 13 February 1998, DSR 1998:I, 135, footnote 154..

²⁰ Ibid.

²¹ Ibid, para 165.

The irony is that whilst the WTO panels and appellate body recognize the need to defer to state sovereignty when interpreting treaty provisions in state-state disputes, tribunals in the investor-state context, when considering the obligations that a state owes to a single foreign investor, have been much less tentative.

A survey by the author of 35 awards and 30 decisions on jurisdictions found that the *in dubio mitius* principle has been applied only once.²² The *SGS v. Pakistan* tribunal held:

*We believe [. . .] that Article 11 [the umbrella clause] of the BIT would have to be considerably more specifically worded before it can reasonably read in the extraordinarily expansive manner submitted by the Claimant. The appropriate interpretive approach is the prudential one summed up in the literature as in dubio pars mitior est sequenda, or more tersely, in dubio mitius.*²³

The only other reference to the *in dubio mitius* principle—in the *Eureko v. Poland* award—is in fact a citation of the extract from the *SGS v. Pakistan* decision.²⁴ The *Eureko* tribunal explicitly rejects the reasoning of *SGS v. Pakistan* and does not refer to the principle itself.²⁵ The *Eureko* tribunal went on to make one of the most expansive interpretations of umbrella clauses to date, holding that the requirement to observe “any obligation it may have entered into with regard to investments” meant:

not only obligations of a certain type, but ‘any’—that is to say, all obligations entered into with regards to investments of investors of the other Contracting Party.

The failure by tribunals to apply the principle of *in dubio mitius* has had a decisive effect on the way in which investment treaty provisions have been interpreted. Apart from umbrella clauses as noted above, many other treaty provisions have received the same expansionary treatment. For example, broad dispute resolution clauses have been interpreted to allow investors to bring any disputes, including purely contractual disputes that do not otherwise amount to a breach of the treaty, to international arbitration under the treaty.²⁶ Other examples of the expansionary approach tribunals have adopted towards investment treaty provisions include the exacting requirements that are now considered elements of the fair and equitable treatment standard,²⁷ the development of the concept

²² *SGS v. Pakistan*, ICSID Case No ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003, para 171.

²³ *Ibid.*

²⁴ Cited in *Eureko BV v Poland*, Ad hoc – UNCITRAL Arbitration Rules, Partial Award and Dissenting Opinion, 19 August 2005, para 253.

²⁵ *Ibid.*, para 257.

²⁶ For example, *SGS Société Générale de Surveillance v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on objection to jurisdiction, 29 January 2004.

²⁷ For example, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003.

of indirect expropriation,²⁸ and the interpretation of most favoured nation treatment to allow more investor-friendly dispute resolution clauses to be imported from other treaties.²⁹

To an outsider it would go without saying that a basic requirement for arbitrators responsible for deciding public international law claims worth hundreds of millions of dollars and with significant public interest implications for host states is that they have a high level of expertise in public international law. At this time, there is no such requirement under any of the arbitration rules. This oversight should be rectified, either in the arbitration rules or in the treaties themselves.

Notably, two recent investment treaties do refer to public law expertise. Both the 2009 ASEAN Comprehensive Investment Agreement and the 2004 Canadian model BIT require arbitrators to “have expertise or experience in public international law, international trade or international investment rules.”³⁰ As is evident from this wording, experience in international trade or international investment rules instead of public law expertise will also suffice under these treaties. While well-intentioned, these provisions thus ultimately fail to ensure that arbitrators have any knowledge of public international law at all.

2.2 An End to the Counsel/Arbitrator Duality

At present, a large number of arbitrators in investor-state arbitrations serve as counsel in other cases. A growing number of commentators assert that this dual role is inappropriate in investor-state arbitrations when public interests are at stake.³¹ The most eminent critic of this practice to date is Thomas Buergenthal, Judge of the International Court of Justice in The Hague who succinctly summarized the problems the dual role represents in a 2006 speech:

I have long believed that the practice of allowing arbitrators to serve as counsel, and counsel to serve as arbitrators, raises due process of law issues. In my view, arbitrators and counsel should be required to decide to be one or the other, and be held to the choice they have made, at least for a specific period of time. That is necessary, in my opinion, in order to ensure that an arbitrator will not be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel. ICSID is particularly vulnerable to this problem because the interpretation and application of the same or similar legal instruments—the Bilateral Investment Treaties, for example—are regularly at issue in different cases before it.

²⁸ For example, *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.

²⁹ For example, *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000. Sornarajah provides an excellent overview of the expansive interpretations tribunals have given to investment treaty provisions in his chapter in Karl Sauvant’s *Appeal Mechanism in Investment Disputes*.

³⁰ COMESA Comprehensive Investment Agreement, article 35; Canadian model BIT, article 29.

³¹ For example, Gus Van Harten, 2007; Mouawad, 2008.

[. . .] *These revolving-door problems—counsel selecting an arbitrator who, the next time around when the arbitrator is counsel, selects the previous counsel as arbitrator—should be avoided. Manus manum lavat, in other words “you scratch my back and I’ll scratch yours,” does not advance the rule of law.*³²

In recent years, respondent host states have sought to challenge such practices but in the main have met with little success.

Three recent cases serve to illustrate the problem. The first case involved a challenge by a host state upon it becoming aware that one of its arbitrators was concurrently acting as counsel in another case in which he was seeking to annul an award that the host state had put forward as precedent in its own case. The second case involved a challenge to an arbitrator after the rendering of the award upon the host state discovering that one of its arbitrators was relying on the award he had co-drafted in a concurrent arbitration in which he was counsel. The third case was related to the second case. Here, the other host state objected to the use by the investor’s counsel of the award that he had drafted when acting as arbitrator in the second case. These are discussed in more detail below.

In *Telekom Malaysia v. Ghana*,³³ Ghana became the first respondent host state to object to the dual roles played by many arbitrators. Here, Ghana challenged one of the tribunal’s arbitrators, Professor Emmanuel Gaillard. Ghana applied to the Dutch courts seeking to challenge Professor Gaillard’s appointment after it learned that the professor was concurrently acting as counsel on behalf of the investor in an application for an annulment of the award in *RCCC v. Morocco*.³⁴ Ghana had sought to rely on the award in *RCCC v. Morocco* to support its defence of Telekom Malaysia’s claim. In its October 2004 judgment, the District Court of The Hague took exception to Professor Gaillard’s “twin roles of counsel and arbitrator—so often undertaken by a growing number of international lawyers.” It held that his duty to advance his client’s position in the *RFCC* annulment proceedings was incompatible with his duty as arbitrator in the *Telekom Malaysia* case:

[A]ccount should be taken of the fact that the arbitrator in the capacity of attorney will regard it as his duty to put forward all possibly conceivable objections against the RFCC/Morocco award. This attitude is incompatible with the stance Prof. Gaillard has to take as an arbitrator in the present case, i.e. to be unbiased and open to all the merits of the RFCC/Morocco award and to be unbiased when examining these in the present case and consulting thereon in chambers with his fellow arbitrators. Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the annulment proceedings against the RFCC/Morocco award, account should in any event be taken of the appearance of his not being able to

³² Buergethal, 2006.

³³ *Republic of Ghana v Telekom Malaysia Berhard*, District Court of The Hague, 18 October 2004, Challenge No. 13/2004; Petition No. HA/RK 2004.667; and Challenge 17/2004, Petition No. HA/RK/2004/778, November 5, 2004.

³⁴ *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003.

*observe said distance. Since he has to play these two parts, it is in any case impossible for him to avoid giving the appearance of not being able to keep these two parts strictly separated.*³⁵

The court ordered Professor Gaillard to resign as counsel within ten days if he wished to remain as arbitrator in the *Telekom Malaysia* case, which he promptly did.

Considering the District Court's order giving Professor Gaillard the right to choose too lenient, Ghana filed a second challenge in the Dutch courts seeking to have Professor Gaillard removed as arbitrator. In a November 2004 decision, the second district court judge rejected Ghana's request and "dismissed any suggestion that Prof. Gaillard's (now past) role as counsel in a different case should disqualify him to serve as an arbitrator." The judge remarked that:

*After all, it is generally known that in (international) arbitrations, lawyers frequently act as arbitrators. Therefore it could easily happen in arbitrations that an arbitrator has to decide on a question pertaining to which he has previously, in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had not defended such a point of view before. Therefore, in such a situation, there is, in our opinion, no automatic appearance of partiality vis-à-vis the party that argues the opposite in the arbitration.*³⁶

Following the release of the partial award in *Eureko v. Poland* (which found Poland liable for breaching provisions of the Dutch-Polish BIT), Poland challenged the claimant's arbitrator, Judge Stephen Schwebel, in an application in the Belgian courts, on the basis of Judge Schwebel's close relationship with the law firm representing the investor in another investor-state arbitration then ongoing against Poland. The Belgian court of first instance dismissed Poland's application and Poland appealed. In its appeal, it also objected to Judge Schwebel's collaboration with the same law firm in a different ongoing investor-state arbitration, *Vivendi v. Argentina*.³⁷ In *Vivendi*, Judge Schwebel and the law firm as co-counsel had relied on the award drafted by Judge Schwebel in *Eureko v. Poland*. Poland claimed that Judge Schwebel's reliance on his own award, drafted while *Vivendi* was ongoing, demonstrated "a clear conflict of interest sufficient to raise justifiable doubts as to Judge Schwebel's impartiality in the arbitration." In its October 2007 judgment, the Belgian Court of Appeals declined to rule on the merits of Poland's second allegation on the basis that the ground had not been advanced before the court of first instance and was thus not admissible.

³⁵ District Court of The Hague, civil law section, provisional measures judge, Challenge No. 13/2004, Petition No. HA/RK 2004.667, Decision of 18 October 2004, reprinted at 23 ASA Bulletin 186, 192 (2005).

³⁶ District Court of The Hague, civil law section, provisional measures judge, Challenge No. 17/2004, Petition No. HA/RK 2004.778, Decision of 5 November 2004, reprinted at 23 ASA Bulletin 186, 192 (2005).

³⁷ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/07/3 Award 20 August 2007.

Subsequently, in *Vivendi v. Argentina*, Argentina objected to Vivendi’s counsel citing the *Eureko* award in support of its claim when that award had been co-drafted by one of Vivendi’s counsel, Judge Schwebel, “during the same period when the *Vivendi v. Argentina* arbitration was itself ongoing.” Argentina “raised concerns about the ability of an arbitrator to draft an arbitral award in one proceeding (and to make an interpretation of standard investment treaty obligations such as those on fair and equitable treatment), without giving any consideration (either consciously or unconsciously) to how that legal ruling might impact upon another case in which that same arbitrator was acting as counsel on behalf of a foreign investor and advancing a particular interpretation of investment treaty obligations such as those on fair and equitable treatment.” Argentina made a formal request to have the record stricken of any references to the *Eureko* award (it did not allege that Judge Schwebel had acted improperly when co-drafting the award).

The *Vivendi* tribunal deferred the question on the weight to be given to the *Eureko* award to a later stage of the proceedings. However, the final award does not expressly refer to Argentina’s objection and it may be implied from the fact that the *Vivendi* award cites the *Eureko* award that the *Vivendi* tribunal rejected Argentina’s position.³⁸

The three cases above nicely illustrate the problems caused by the dual role of arbitrator and counsel, even when the arbitrator concerned has no intention to act improperly. In the absence of clear rules or guidance prohibiting or at least discouraging such practices, the bodies charged with determining arbitrator challenges may feel unable to intervene.

One commentator has suggested that a way forward would be to require an arbitrator not to accept an appointment or to resign if he or she has an active—that is, concurrent—interest in another case regarding a point of law to be determined in the case to which he or she has been appointed. Whilst this is a step in the right direction, it will lead to complicated legal arguments, and potentially time-consuming challenges, over whether or not the arbitrator has a concurrent interest.³⁹

A blanket requirement that arbitrators involved in investor state disputes do not act as counsel in such disputes would be easier to apply. A strong precedent for a blanket restriction is provided by the International Court of Justice in The Hague and its rules on judges ad hoc. The Statute of the International Court of Justice entitles a state party to a case before the International Court of Justice that does not have a judge of its nationality on the bench to choose a person to sit as judge ad hoc in its case.⁴⁰ A judge ad hoc takes part in any decision concerning the case on terms of complete equality with his/her colleagues.⁴¹ The International Court of Justice takes the view that it is not in

³⁸ Ibid.

³⁹ Mouawad, 2008

⁴⁰ Statute of the International Court of Justice, Article 31(2) and (3).

⁴¹ Website of the International Court of Justice, <http://www.icj-cij.org/court/index.php?p1=1&p2=5>.

the interest of justice that a person sit as judge ad hoc in one case before the Court and act as counsel in another. It has adopted two Practice Directions to stop such goings on.⁴²

Of particular relevance, Practice Direction VII states that the court considers that it is not in the interest of the sound administration of justice that a person sit as judge ad hoc in one case who is also acting or has recently acted as counsel in another case before the court. Practice Direction VII directs parties, when choosing a judge ad hoc, to refrain from nominating persons who are acting as counsel in another case before the court or who have acted in that capacity in the last three years.

In the same vein, Practice Direction VIII states that the court considers that it is not in the interest of the sound administration of justice that a person who until recently was, inter alia, a member of the court or a judge ad hoc appear as a counsel in a case before the court. Practice Direction VIII accordingly directs parties to refrain from designating as counsel in a case before the court a person who in the last three years was, inter alia, a member of the court or a judge ad hoc.⁴³

If the International Court of Justice takes the view that a separation of roles is necessary for the administration of justice, the same should apply in the investor-state context. In fact, for several reasons, the need may be even greater in investor-state disputes. First, the reason for the creation of ICSID and the birth of investment treaty arbitration in the 1960s was to avoid the perceived partiality of host state courts. Moreover, due to the expansive interpretations some tribunals have given to various investment treaty provisions, the range of disputes over which tribunals have found jurisdiction has broaden considerably beyond what many developing country host states intended when entering the treaty.⁴⁴ In return for giving up their rights to have their disputes resolved in their own courts, host states must surely be entitled to receive independent and impartial treatment at the international level.⁴⁵

As discussed in Part 4, there is no doctrine of binding precedent in investor-state arbitration. However, tribunals frequently refer to past cases in their decisions. In this way, an informal doctrine

⁴² The Court first adopted in October 2001 Practice Directions for use by States appearing before it. They are the result of the Court's ongoing review of its working methods and are in addition to its Rules of Court. See www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0

⁴³ Practice Direction VIII states:

The Court considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court (principal legal secretary, first secretary or secretary), appear as agent, counsel or advocate in a case before the Court. Accordingly, parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court.

⁴⁴ For example, the broad interpretations tribunals have given to investment treaty clauses on dispute resolution and most favoured nation treatment, umbrella clauses and conversely, the restrictive reading tribunals have applied to fork in the road clauses and the exhaustion of local remedies requirements.

⁴⁵ See also on this issue, Mann, 2005.

of precedent or a *jurisprudence constante* appears to be developing around a number of legal issues. It must be expected that future tribunals, investors, host states and the wider public will look to past awards to understand the law. Tribunals thus have an obligation not only to the parties that appointed them, but to these other stakeholders as well, to be independent and impartial in their decisions.

The current lack of transparency in investor-state arbitrations means that an important check on the impartiality of arbitrators is lacking. Having strict rules to ensure both actual and perceived independence is thus even more important.

Provisions in line with the International Court of Justice's Practice Directions could be included in the arbitration rules used in investor-state arbitrations. Possible wording for such provisions might read:

- i. *No person may be appointed as arbitrator in an arbitration brought by a foreign investor against a state ("an investor-state dispute") if he or she has acted as counsel or advised in any capacity in an investor-state dispute in the previous three years.*
- ii. *No person shall accept instructions as counsel or advise in any capacity in an investor-state dispute while he or she is appointed as an arbitrator in an investor-state dispute and for three years after the final award in the dispute to which she or she is appointed as an arbitrator is rendered.*

A related issue is that arbitrators who are employed or are partners in law firms who act for foreign investors indirectly stand to benefit from more expansive interpretations of investment treaty provisions. First, the greater the number of investor-state disputes that tribunals hold themselves to have jurisdiction over, the greater the revenue for both counsel and arbitrators alike. Second, as investment treaty arbitration is always investor-initiated, the more attractive arbitration looks to investors (e.g. because of the expansive interpretations of investment treaty obligations in favour of investors), the more arbitrations will be filed and the more work counsel and arbitrators will get.

Thus, it is proposed that there should be an additional restriction on the appointment of arbitrators:

No person shall be appointed as arbitrator if they are employed by or are in a profit-sharing relationship with, a partnership or corporate entity that provides legal services to clients with foreign investments.

This ring-fencing will no doubt encounter strong resistance from large law firms currently acting on all sides in the investment arbitration arena. This is understandable, because they have considerable financial interests in the continuance of the current regime. However, the legitimacy of the continued use of arbitration as a forum to resolve investor-state disputes depends on it.

2.3 The Process of Deciding Arbitrator Challenges

Challenges in an ICSID arbitration are decided by the remaining unchallenged arbitrators or, if they cannot agree (or if a sole arbitrator or the majority of a tribunal is challenged), by the President of the World Bank. Challenges to arbitrators in a SCC arbitration will be decided by the SCC Board unless the other disputing party agrees to the challenge. In an ICC arbitration, the International Court of Arbitration of the ICC will decide the merits of a challenge. The arbiter of UNCITRAL challenges will be the appointing authority, whichever institution that may have been or will be designated to be.

Leaving aside UNCITRAL at the moment (as its decision-maker will vary depending on the designation of appointing authority), each of the other three institutions are potentially partial themselves. With respect to the SCC and ICC, decisions on the independence and impartiality of arbitrators are to be decided by the arbitral institutions established under the auspices of organizations expressly mandated to promote business interests.⁴⁶

Nor are ICSID's possible two possible decision-makers much more appropriate. It is difficult to expect the remaining arbitrators in a tribunal to take a hard line approach against the challenged arbitrator when they are peers at the same level. Given the close community that is the investment arbitration world, they may already have worked together in the past and will be aware of the likelihood that they will work together as arbitrators again in the future. The dual counsel/arbitrator role is relevant here too. Arbitrators have an incentive to keep good relations with one other in the hopes of receiving appointments in the future when those other arbitrators are acting as counsel. Alternatively, if the remaining arbitrators cannot agree, the challenge will be determined by the President of the World Bank as *ex officio* Chair of ICSID Administrative Council. The President of the World Bank is by custom a United States national, and whilst ICSID's Administrative Council has one vote per member state, the Bank's governance structure is heavily dominated by the major capital-exporting states.

Compounding the potential of partiality in the challenging process, none of the four most-used arbitral institutions⁴⁷ require the hearing of the challenge to be in open session nor for their

⁴⁶ For example, the website of the International Chamber of Commerce states: "ICC (International Chamber of Commerce) is the voice of world business championing the global economy as a force for economic growth, job creation and prosperity. Because national economies are now so closely interwoven, government decisions have far stronger international repercussions than in the past. ICC—the world's only truly global business organization responds by being more assertive in expressing business views" (www.iccwbo.org/id93/index.html). The homepage of the Stockholm Chamber of Commerce's website states, "The Stockholm Chamber of Commerce is a business organisation that aims to make the Counties of Stockholm and Uppsala an even better place for business [...]. Through petitions and research, the Chamber influences government decision-makers on behalf of the business community" (<http://www.chamber.se/home.aspx>).

⁴⁷ In order of use, ICSID, UNCITRAL, SCC and ICC.

reasoning to be made available to the public after their decision has been made. The ICC and SCC do not provide their reasoning in such decisions even to the parties to themselves.⁴⁸

In May 2006 the LCIA announced that it was to make somewhat of a break with this tradition.⁴⁹ Following the completion of a detailed report on LCIA challenge decisions since 1995,⁵⁰ the LCIA decided that a brief abstract of all challenge decisions to date, including the key facts, reasoning and outcome, would be published.⁵¹ More than three years later, however, the abstracts remain unpublished. There is also no agreement on whether abstracts of future decisions should be made available on a regular basis.⁵²

Those against publication of challenge decisions argue that greater awareness of challenge decisions will lead to an increase in challenges being made. The authors of the LCIA report took a different view, concluding that increased guidance may discourage vexatious challenges and that publication should not only benefit parties, but also arbitrators, who must themselves consider whether circumstances might give rise to justifiable doubts as to their independence and impartiality. Moreover, they argued that the wider arbitral community should not be denied the benefit of the guidance that publication would bring for fear that a handful might seek to exploit that guidance to abuse the process.⁵³

As noted by Sir Ninian Stephen,⁵⁴ the independence and impartiality of the judiciary is a fundamental tenet of the rule of law. A challenge regarding an arbitrator's independence and impartiality therefore must itself be dealt with all due process. In particular, it should be decided in a transparent manner, provide reasons for the decision, and be made by a truly independent and impartial body, not by the arbitrator's other tribunal members or institutions representing particular interests. It is notable that, as discussed above, the Dutch Court upheld the challenge against one of

⁴⁸ This is noted on the LCIA's website at www.lcia.org/NEWS_folder/news_archive3.htm. In fact, the ICC Rules expressly prohibit the communication of the reasoning of their decisions, see Article 7(4), ICC Rules.

⁴⁹ Both the ICC and SCC have, in the past, published some limited information about their challenge decisions. The ICC has periodically published surveys, bringing together the key themes of its challenge decisions and the Arbitration Institute of the Stockholm Chamber of Commerce has on occasion published selections of challenge decisions, though the decisions in both institutions are given without reasons. See for example: Dominique Hascher (1995, November). ICC Practice in relation to the appointment, confirmation, challenge and replacement of arbitrators. *ICC Bulletin*, 6(2); Magnusson & Larsson (2004). Recent practice from the arbitration institute of the Stockholm Chamber of Commerce: Prima facie decisions on jurisdiction and challenge of arbitrators. *Stockholm Arbitration Report*, 2. Retrieved from: www.lcia.org/NEWS_folder/news_archive3.htm.

⁵⁰ The report was prepared by Geoff Nicholas and Constantine Partasides of Freshfields Bruchaus Deringer, at the request of LCIA and included a comprehensive survey of all decisions since 1995. The report is not publicly available.

⁵¹ http://www.lcia.org/NEWS_folder/news_archive3.htm

⁵² Telephone call by the author to the LCIA secretariat, 10 September 2009.

⁵³ http://www.lcia.org/NEWS_folder/news_archive3.htm

⁵⁴ Former judge on the International Criminal Tribunal for the former Yugoslavia, member of the Appeals Court for the former Yugoslavia and for Rwanda, former Justice of the High Court and Governor-General of Australia. Sir Ninian Stephen, Ethics and the rule of law, Lecture for the St James Ethics Centre, Sydney, November 1999.

the arbitrators in *Telekom Malaysia Berhad v. Republic of Ghana*, whereas both his fellow arbitrators and the Secretary-General of the Permanent Court of Arbitration had previously dismissed the challenge as unfounded.

3.0 Transparency and Accessibility of the Investor-State Process

In the words of the great legal philosopher, Jeremy Bentham, writing in 1790:

*In the darkness of secrecy, sinister and evil in every shape shall have full swing [. . .]. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.*⁵⁵

It is widely recognized in democratic societies that transparency is required as a check and balance when private versus public interests are at stake. This contrasts with private commercial disputes where the interests at stake are generally only those of the parties themselves.

As Jeremy Bentham noted, transparency provides an accountability check on the arbitrators deciding the dispute. Moreover, without it, foreign investors are able to use an international legal process to put pressure on governments out of sight on issues of significant public interest.

The tribunal in *Methanex Corp. v. United States* recognized the importance of transparency and public participation in safeguarding the legitimacy of the investor-state arbitration process:

*There is also a broader argument, [. . .] [the] arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.*⁵⁶

3.1 Transparency

In 1924, Lord Chief Justice Gordon Hewart coined the much-quoted phrase: “Justice should not only be done, but should manifestly and undoubtedly be seen to be done”⁵⁷

The principle of justice being seen to be done has four components in the investor-state arbitration context:

- Disclosure of the existence of the proceeding

⁵⁵ Draught of a New Plan for the Organization of the Judicial Establishment in France; Proposed as a succedaneum to the draught presented, for the same purpose, by the Committee of Constitution, to the National Assembly, December 21st, 1789 (London, 1790).

⁵⁶ *Methanex Corporation v. United States*, “Decision of the Tribunal on petitions from third persons to intervene as *amici curiae*”, 15 January 2001, p. 22, para 49.

⁵⁷ *Rex v. Sussex Justices*, 1 King’s Bench Reports (1924) 256, at 259.

- Disclosure of the pleadings and other documents filed in the proceeding
- Open hearings
- Disclosure of the award

The extent to which the four most commonly used arbitration rules currently meet each of these components to ensure that “justice is seen to be done” is examined below:

3.1.1 Transparency under the arbitration rules

- **Disclosure of the existence of proceeding**

Only the ICSID Rules make this most basic of transparency requirements compulsory. Under the ICSID Convention, the ICSID Secretary-General is required to maintain a register of requests for arbitration. The register is open for inspection by any person. As soon as possible after receiving a request for arbitration and payment of the prescribed fee, the Secretary-General must register the request in the Arbitration Register.⁵⁸ She must also enter all significant data concerning the institution, conduct and disposition of each proceeding, including the membership of each tribunal.⁵⁹

Whilst the ICC Rules contain no express prohibition on the tribunal or secretariat disclosing the existence of ICC arbitrations, the workings of the International Court of Arbitration, which acts as secretariat for ICC arbitrations, are confidential and all documents submitted to, or drawn up by, it are confidential also.⁶⁰ The practical effect of this rule is that the docket of ICC proceedings is kept confidential.

In contrast to the other sets of rules, there is no designated institution that administers UNCITRAL arbitrations and acts as secretariat. In keeping with this, there is no register, public or otherwise, of arbitral proceedings commenced under the UNCITRAL Rules.

Unlike UNCITRAL, the SCC Arbitration Institute provides secretariat support to SCC arbitrations and is thus presumably aware of the cases commenced under its rules and the documents filed therein. However, the SCC Rules require both the SCC institute and the tribunal to “maintain the confidentiality of the arbitration and the award” unless otherwise agreed by the parties.⁶¹ During consultations on the draft revised rules, the revision committee circulated a second option that

⁵⁸ Unless the Secretary-General finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. See Article 36(3), ICSID Convention and Rule 6, ICSID Institution Rules.

⁵⁹ Regulation 23(1), ICSID Administrative and Financial Regulations.

⁶⁰ Article 1(3), Appendix II to the ICC Rules, Internal Rules of the International Court Of Arbitration.

⁶¹ Article 9, Appendix I, SCC Rules.

would have imposed an obligation of confidentiality on the parties as well as the SCC and the tribunal, but the less extensive option was adopted.

None of the rules prohibit a party from unilaterally disclosing the existence of the proceeding.

- **Disclosure of the pleadings and other documents filed in the proceeding**

As noted above, the ICC and SCC Rules require their secretariat (and under the SCC Rules, the tribunal also) to maintain the confidentiality of the arbitration, including documents.⁶² The ICSID and UNCITRAL Rules are silent on this point.

None of the rules contain an express provision forbidding a party from unilaterally disclosing pleadings or other documents filed in a proceeding. However, in *Bivater Gauff Ltd v. Tanzania*, the tribunal used its broad procedural power in rule 19 of the ICSID Arbitration Rules (which empowers the tribunal to make the orders required for the conduct of the proceeding) to make an order prohibiting the parties from disclosing documents or discussing the proceeding beyond what was necessary until the end of the proceeding.⁶³

The UNCITRAL and SCC Rules both contain a provision giving the tribunal a broad procedural power to conduct the arbitration as it considers appropriate.⁶⁴ The ICC Rules state that, where the Rules are silent, the arbitration shall be governed by any rules that the parties or, failing them, the tribunal may settle on.⁶⁵ It is thus possible that procedural orders similar to those handed down in *Bivater Gauff Ltd v. Tanzania* could be issued under those rules in the future.

- **Open hearings**

Although they take slightly different approaches, all four sets of rules allow a party to veto an open hearing.

Hearings under the UNCITRAL Rules are to be held in camera unless the parties agree otherwise.⁶⁶ This rule remains unchanged in the proposed revised rules. Likewise, under the ICC Rules, persons not involved in the proceedings cannot be admitted to hearings of the arbitral tribunal, save with the approval of the tribunal and the parties.⁶⁷ The 2007 SCC Rules introduced a new provision specifying that unless agreed otherwise by the parties, hearings will be in private.⁶⁸ The original rules

⁶² Article 1(3), Appendix II to the ICC Rules; article 9, Appendix I, SCC Rules.

⁶³ *Bivater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order 3, 29 September 2006.

⁶⁴ Article 15(1), UNCITRAL Rules; article 19, SCC Rules

⁶⁵ Article 15(1), ICC Rules.

⁶⁶ Article 25(4).

⁶⁷ Article 21(3), ICC Rules.

⁶⁸ Article 27(3).

contained no such provision. Although commentators have noted that this was in keeping with existing practice,⁶⁹ its express inclusion is a backward step for the legitimacy of SCC investor-state arbitrations.

Finally, the ICSID Rules at first glance might appear more positive, as the hearing is open unless one party actively objects:

*Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons [. . .] to attend or observe all or part of the hearings, subject to appropriate logistical arrangements.*⁷⁰

However, the ICSID provision in fact gives each party the right to veto open hearings just like the other rules.

- **Disclosure of the award**

The ICSID, ICC and SCC Rules prohibit the secretariat (and in the case of the SCC, also the tribunal) from publishing the award without the consent of the parties.⁷¹ They do not, however, prevent a party from unilaterally disclosing the award. In contrast, UNCITRAL requires the consent of both parties before either party can disclose the award.⁷²

The proposed revised UNCITRAL rules will also allow disclosure where and to the extent required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.⁷³

As a result of the 2006 amendments, though the ICSID secretariat still may not publish the award without the consent of the parties, it shall, however, promptly include in its publications excerpts of the legal reasoning of the tribunal.⁷⁴

3.1.2 Recent developments on transparency in investment treaties

In July 2001, NAFTA Parties acting through NAFTA's Free Trade Commission issued Notes of Interpretation, which state that nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration and nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a tribunal. In the

⁶⁹ Magnusson and Shaughnessy, 2007, p. 56

⁷⁰ Rule 32(2), ICSID Rules.

⁷¹ Article 48(5), ICSID Convention and rule 48(4), ICSID Rules; Article 1(3), Appendix II to the ICC Rules, Internal Rules of the International Court Of Arbitration; Article 9, Appendix I, SCC Rules.

⁷² Article 32(5), UNCITRAL Rules.

⁷³ Draft article 32(5), United Nations Commission on International Trade Law, Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules, A/CN.9/WG.II/WP.151/Add.1, 6 August 2008, page 13.

⁷⁴ Article 48(5), ICSID Convention and rule 48(4), ICSID Rules.

Notes of Interpretation, each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a tribunal, subject to redaction of confidential business information, information which is privileged or otherwise protected from disclosure under the Party's domestic law, and information which the Party must withhold pursuant to the relevant arbitral rules, as applied.

The 2004 Canadian model BIT requires that hearings be open to the public, except to the extent necessary to ensure protection of confidential information.⁷⁵ All awards are to be publicly available, subject to the deletion of confidential information.⁷⁶ All documents submitted to or issued by the tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information.⁷⁷ The disputing state party may make available all decisions and awards, subject to the deletion of confidential information.⁷⁸

The 2004 U.S. model BIT requires the respondent host state to make available to the public notices of intent, notice of arbitration, pleadings, memorials, briefs, written submissions, minutes and transcripts of hearings, orders, awards and decisions, subject to the redaction of information designated by either disputing party as protected.⁷⁹ It also requires open hearings, subject to appropriate arrangements for information designated by either party to be protected from disclosure.⁸⁰

The 2007 Investment Agreement for the COMESA Common Investment Area provides for publication of all documents regarding the notice of intention to arbitrate, the settlement of any dispute, the initiation of an arbitral tribunal, pleadings, evidence and decisions.⁸¹ It also requires open hearings.⁸² The tribunal may take such steps as are necessary, by exception, to protect confidential business information in written form or at oral hearings.⁸³

The 2009 ASEAN Comprehensive Investment is considerably more conservative regarding transparency of its disputes. The treaty contains no requirements for open hearings or mandatory publication of any documents submitted to or issued by the tribunal. Rather, it provides that any disputing Member State *may* (in contrast to "*must*") make awards and decisions of the tribunal

⁷⁵ Canadian model BIT, article 38(2).

⁷⁶ *Ibid*, article 38(5).

⁷⁷ *Ibid*, article 38(3).

⁷⁸ *Ibid*, article 39(1).

⁷⁹ U.S. model BIT, article 29(1).

⁸⁰ *Ibid*, article 29(2).

⁸¹ Investment Agreement for the COMESA Common Investment Area, article 28(5).

⁸² *Ibid*, article 28(6).

⁸³ *Ibid*, article 28(7).

publicly available.⁸⁴ The tribunal shall make appropriate arrangements to protect information designated by any party as confidential.⁸⁵

In 2005 the OECD Investment Committee adopted the following public statement:

There is a general understanding among the Members of the Investment Committee that additional transparency, in particular in relation to the publication of arbitral awards, subject to necessary safeguard for the protection of confidential business and governmental information, is desirable to enhance effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence. Members of the Investment Committee generally share the view that, especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participation, subject however to clear and specific guidelines.⁸⁶

However, as yet few other OECD countries outside North America have taken concrete steps to follow through on this statement. As noted by one commentator:

the positive steps of a few states on this issue do not resolve the system's ongoing failings with respect to openness. Confidentiality is still the dominant principle in the treaties of most countries. The Europeans, in particular, have failed to follow the North American lead by adjusting their model BITs and using their bargaining power to press for the reinterpretation or amendment of existing treaties.⁸⁷

3.2 The Right of Civil Society to be Heard

Historically, two basic assumptions of international law have been that international law is the domain of states only and that states at the international level adequately represent all the interests of the citizens they represent.

Investor-state arbitration has, by definition, moved beyond both these principles. By granting a direct right of standing to foreign investors at international law, investment treaties implicitly accept that states cannot always adequately represent the interests of the citizens they represent. In making this admission, fairness requires that it be recognized that other persons or entities may likewise not be adequately represented by the state.

In recent years, there has been growing recognition of the need for civil society to have a voice at the international level.⁸⁸ As a result a number of international institutions dealing with economic

⁸⁴ ASEAN Comprehensive Investment Agreement, article 39(1).

⁸⁵ Ibid, article 39(2).

⁸⁶ Cited in Yannaca-Small, 2008, p. 227

⁸⁷ Van Harten, 2007, p.164

⁸⁸ For example, Van Duzer, 2007

issues have begun to allow for members of the public to participate in their dispute resolution or compliance mechanisms. For example, the WTO Dispute Settlement Panels accept *amicus curiae* submissions and the World Bank's Inspection Panel can be triggered by members of the public.

The tribunal in *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina* recognized the value of non-disputing parties not only to help the tribunal arrive at a correct decision but also in increasing the legitimacy of the investor-state arbitration process:

Given the public interest in the subject matter of this case, it is possible that appropriate nonparties may be able to afford the Tribunal perspectives, arguments, and expertise that will help it arrive at a correct decision. Rather than to reject offers of such assistance peremptorily, the Tribunal, while taking care to preserve the procedural and substantive rights of the disputing parties and the orderly and efficient conduct of the arbitration, believes it is appropriate to consider carefully whether to accept or reject such offers.

The acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function. It is this imperative that has led to increased transparency in the arbitral processes of the World Trade Organization and the North American Free Trade Agreement. Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes.⁸⁹

Those that oppose the participation of civil society as non-disputing parties—typically investors and their representatives—claim that the participation of non-disputing parties will add to the cost and complexity of the dispute. The *Vivendi* tribunal gave short shrift to this view:

Like the Claimants in Methanex, Claimants in the present case argue that amicus submissions would place an increased burden on the parties and the Tribunal. While that result is theoretically possible, it is not inevitable. The Tribunal believes that it can exercise its powers under Article 44 in such a way as to minimize the additional burden on both the parties and the Tribunal, while giving the Tribunal the benefit of the views of suitable amici curiae in appropriate circumstances. The Tribunal in the present case finds further support for the admission of amicus submissions in international arbitral proceedings in the practices of NAFTA, the Iran-United States Claims Tribunal, and the World Trade Organization.⁹⁰

⁸⁹ *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, para 19-20.

⁹⁰ *Ibid*, para 15.

The case of *Aguas del Tunari SA v. Bolivia* illustrates the outcome that can result when neither the treaty nor the arbitration rules make express provision for receiving submissions from non-disputing parties. The President of that tribunal wrote a letter to the petitioners acknowledging their request but informing them that:

[I]t is the Tribunal's unanimous opinion that your core requests are beyond the power or the authority of the Tribunal to grant. The interplay of the two treaties involved (the Convention on the Settlement of Investment Disputes and the 1992 Bilateral Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Bolivia) and the consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal. In particular, it is manifestly clear to the Tribunal that it does not, absent the agreement of the Parties, have the power to join a non-party to the proceedings; to provide access to hearings to non-parties and, a fortiori, to the public generally; or to make the documents of the proceedings public.⁹¹

Thus, it is necessary to make express provision allowing non-party submissions either in the treaty or in the arbitration rules.

3.2.1 Provisions on non-party submissions in the arbitration rules

Only ICSID makes express provision for persons other than the parties to make written submissions in a proceeding. Under the ICSID Arbitration Rules as revised in 2006, the Tribunal, after consulting both parties, may allow a person or entity that is not a party to the dispute (in the rules, called the “non-disputing party”) to file a written submission with the tribunal regarding a matter within the scope of the dispute.⁹² In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.

The tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

⁹¹ *Aguas del Tunari SA v Bolivia, Decision on Respondent's Objections to Jurisdiction*, ICSID Case No ARB/02/3, 21 October 2005, para 17.

⁹² Rule 37(2), ICSID Arbitration Rules.

The current UNCITRAL Rules make no express provision for NGOs or members of the public to make submissions in an investor-state arbitration in which they have an interest. However, a number of UNCITRAL tribunals, including *Methanex v. United States*,⁹³ *UPS v. Canada*⁹⁴ and *Glamis Gold v. United States*⁹⁵ held that they were empowered to grant such a request under their general procedural power set out in article 15(1). Article 15(1) currently provides:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

The draft revised rules do not significantly alter this general provision, although a slight new addition is the requirement that the tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.⁹⁶

Like the UNCITRAL Rules, the SCC Rules give tribunals a broad procedural power to conduct the arbitration in such manner as it considers appropriate, subject to any agreement between the parties and the rules themselves.⁹⁷ So long as the parties have not agreed not to allow submissions from non-disputing parties, this provision might also empower a tribunal to grant members of the public or NGOs with an interest in the proceedings the right to make written submissions.

The ICC Rules grant a residual procedural power to the tribunal. Article 15 of the ICC Rules provides:

- 1) The proceedings before the Arbitral Tribunal 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.
- 2) In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.⁹⁸

⁹³ *Methanex v. United States*, UNCITRAL, Final award, 3 August 2005.

⁹⁴ *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the merits, 24 May 2007.

⁹⁵ *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final award, 8 June 2009.

⁹⁶ Draft article 15(1), United Nations Commission on International Trade Law, Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules, 6 August 2008, A/CN.9/WG.II/WP.151.

⁹⁷ Article 19, SCC Rules.

⁹⁸ Article 15, ICC Rules.

As the ICC Rules are silent on the issue of submissions from non-disputing parties, so long as the parties have not agreed not to allow such submissions, the tribunal may be able to permit them under its residual power in article 15(1).

3.2.2 Provisions on non-party submissions in investment treaties

The majority of investment treaties make no reference as to whether or not non-parties should be entitled to make submissions in an investor-state dispute.

In October 2003, NAFTA Parties acting through the NAFTA Free Trade Commission issued Notes of Interpretation stating that nothing in NAFTA limits a tribunal's discretion to accept written submissions from a person or entity that is not a disputing party.⁹⁹ The Notes of Interpretation also set out a procedure under which members of the public might seek leave to file submissions as non-disputing parties.

Subsequent to the 2003 NAFTA Notes of Interpretation, express provisions on submissions by non-disputing parties have been included in a number of investment treaties to which either the United States¹⁰⁰ or Canada¹⁰¹ is a party. The 2007 Investment Agreement for the COMESA Common Investment Area states that tribunals shall be open to *amicus curiae*.¹⁰² The draft Norwegian model BIT, which was dropped in June 2009, also included provisions on non-disputing parties.¹⁰³

3.2.3 Recommendations regarding transparency and public participation

Transparency and public participation remain seriously lacking from investor-state arbitration. States can remedy this either through the arbitration rules or through the treaties themselves. Revising the major sets of arbitration rules has the advantage of making such improvements applicable to all future arbitrations that may be filed under the revised rules, without having to amend each individual treaty. However, it has several drawbacks. First, it is likely to be politically difficult, particularly because all the rules except ICSID are primarily designed for use in private commercial arbitrations, regarding which confidentiality is generally considered a core requirement. The arbitral institutions involved will undoubtedly resist any attempts to make the rules more transparent or accessible to the public. Second, whilst the ICSID revisions adopted in 2006 apply to all arbitrations commenced after that date, some prominent practitioners take the view that any amendments to the other arbitration rules will only apply to treaties referring to those rules that are entered into after that date. The old rules would continue to apply to arbitrations brought under existing treaties unless the

⁹⁹ Statement of the NAFTA Free Trade Commission on Non-Disputing Party Participation, 7 October 2003.

¹⁰⁰ E.g. 2004 US model BIT, article 28.

¹⁰¹ E.g. 2004 Canadian model BIT, article 39.

¹⁰² Investment Agreement for the COMESA Common Investment Area, article 28 and Annex A, article 8.

¹⁰³ Draft Norwegian model BIT, article 18.

disputing parties expressly agree to use the new rules instead.¹⁰⁴ Lastly, and most significantly, the arbitration rules may always be amended by agreement of the disputing parties. Thus, it remains important that investment treaties expressly ensure that transparency and public participation must be upheld.

Turning to the treaties, greater transparency and public participation might be achieved in three ways. First, the parties to a treaty might agree to amend the treaty's dispute settlement provisions accordingly. This may result in one or more parties attempting to renegotiate other provisions as well. Less intrusive would be through a subsequent side agreement between the parties providing for transparency in the arbitration process.¹⁰⁵ Failing agreement by all parties, any party can at any time make a unilateral declaration that it interprets the dispute resolution clause in the treaty to require it to make all documents available, hold open hearings and allow for *amicus* participation in any investor-state arbitration to which it is a party.¹⁰⁶

4.0 Enhancing the Consistency and Coherence of Investor-state Awards

A prominent arbitrator has noted that “[t]he consistency or lack thereof of decisions has become a prominent issue in investment arbitration [. . .]. In addition to conflicting answers to similar questions in different cases there is the occasional problem of conflicting outcomes of parallel proceedings concerning the same dispute.”¹⁰⁷ Another arbitrator has said of this dichotomy: “Any system where diametrically opposed decisions can legally coexist cannot last long. It shocks the sense of rule of law or fairness.”¹⁰⁸ Academic commentators have also expressed concern, observing that “conflicting awards based upon identical acts and/or identically worded investment treaty

¹⁰⁴ The ICSID Arbitration Rules can only be used in arbitrations involving states that are parties to the ICSID Convention. Through the adoption of the revised rules by ICSID Administrative Council in 2006, all ICSID member states have agreed to the revised rules. In contrast, any revisions to the arbitration rules of UNCITRAL, SCC and the ICC will not necessarily be adopted by the states that refer to these rules in their investment treaties.

¹⁰⁵ Vienna Convention on the Law of Treaties, Article 31(3)(a):

There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

¹⁰⁶ An “interpretative declaration” has been defined by the International Law Commission:

Interpretative declaration means a unilateral declaration, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions.

(See Report of the Commission to the General Assembly on the work of its fiftieth session, Yearbook of the International Law Commission 1998 Volume II Part Two, A/CN.4/SER.A/1998/Add.1 (Part 2)).

¹⁰⁷ Schreuer and Weiniger, 2008, p.10, n. 45.

¹⁰⁸ Blackaby, , 2002, p. 355.

provisions will be a threat to the international legal order and the continued existence of investment treaties.”¹⁰⁹

There are many issues in international investment law where the current case law is conflicting. Some of the oft-quoted examples include:

1. Broadly worded dispute resolution clauses in investment treaties, for example, those which give investors the right to commence arbitration proceedings against the host state for “all disputes concerning investments” or “any legal dispute concerning an investment”: Some tribunals have interpreted such clauses to allow the investor to bring any dispute of any nature, to international arbitration even if no breach of the treaty is alleged.¹¹⁰ Others have taken the view that such clauses still require that an investor’s claim be based on a breach of the investment treaty provisions by the host state.¹¹¹
2. Umbrella clauses that require, for example, that the host state “observe any obligation it may have entered into with regard to investments”:¹¹² Some tribunals have interpreted such clauses to encompass all the host state’s commitments to the investment, including contractual, legislative or otherwise.¹¹³ The effect of this approach is to convert the host state’s obligations under contract or national legislation into international treaty obligations enforceable through arbitration. Some of these tribunals have even interpreted an umbrella clause to encompass contractual commitments to which the claimant investor is not party, so long as the commitment was made with respect to the investment. In contrast, some other tribunals have taken the view that it could not be that such an insignificant clause was intended to convert any host state commitment of any kind to a treaty obligation.¹¹⁴ Finally, other tribunals have opted for an approach somewhere in the middle, finding that the clause encompasses undertakings made by the host state only when acting in its sovereign capacity.¹¹⁵
3. The requirement in investment treaty dispute resolution clauses that the investor must attempt to resolve the dispute through negotiation and mediation for six months before

¹⁰⁹ Franck, 2004–2005, p. 1521, at 1583.

¹¹⁰ E.g. *SGS Société Générale de Surveillance S.A v. Pakistan*, Decision on Objections to Jurisdiction, ICSID Case No ARB/01/13 6 August 2003.

¹¹¹ E.g. *SGS Société Générale de Surveillance v. Republic of the Philippines*, Decision on Objections to Jurisdiction, ICSID Case No ARB/02/6, 29 January 2004.

¹¹² United States-Ecuador BIT, article II(3)(c).

¹¹³ E.g. *Eureko BV v. Poland*, Partial Award and Dissenting Opinion, Ad hoc—UNCITRAL Arbitration Rules, 19 August 2005.

¹¹⁴ E.g. *Joy Mining Machinery Limited v. Egypt*, Award, ICSID Case No. ARB/03/11, 6 August 2004.

¹¹⁵ E.g. *BP America Production Co. and Others v. Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006.

commencing arbitration proceedings: Some tribunals have held that the six month waiting period is a prerequisite for jurisdiction and that the investor's claim was inadmissible because it had failed to observe it.¹¹⁶ Conversely, other tribunals have held that the six month waiting period is merely procedural and the investor's failure to observe it did not affect their jurisdiction over the claim.¹¹⁷

4. Most favoured nation treatment (MFN) provisions and whether they apply to other treaties' dispute settlement provisions: Some tribunals have held that investors are entitled to use the MFN clause in an investment treaty to transplant a more favourable dispute resolution provision from another investment treaty to which the host state is party.¹¹⁸ In contrast, other tribunals have held that as it was not clear whether the ordinary meaning of the MFN provision included or excluded dispute settlement provisions from other treaties and, as agreements to arbitrate have to be clear and unambiguous, the investor was not entitled to import a more favourable dispute resolution provision from elsewhere.¹¹⁹
5. The defence of necessity and whether host states must fulfill the test for necessity under customary international law to be able to rely on the treaty defence: Some investment treaties include provisions intended to exempt the host state from liability under the treaty in certain situations. For example, Article XI of the Argentina-US BIT states:

This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Tribunals have taken different approaches as to whether this is a free-standing defence to be interpreted according to the plain and ordinary meaning of the words, or whether it is to be judged in accordance with the high threshold set down in customary international law as codified in article 25 of the International Law Commissions Draft Articles of State Responsibility.¹²⁰ Nowhere have these divergent approaches been played out more starkly

¹¹⁶ E.g. *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award 8 December 2008.

¹¹⁷ E.g. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, ICSID Case No. ARB/06/11, Decision on jurisdiction, 9 September 2008.

¹¹⁸ E.g. *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000.

¹¹⁹ E.g. *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on jurisdiction, 8 February 2005.

¹²⁰ Article 25 of the Draft Articles on State Responsibility:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

than in the many arbitrations against Argentina, challenging measures taken during its 2001–2002 financial crisis. Some tribunals have taken the plain and ordinary meaning of the necessity provision, while others have held that the host state must meet the criteria laid down in article 25 of the Draft Articles on State Responsibility to qualify for the defence. As a consequence, cases decided under the same investment treaty and regarding the same host state measures have resulted in very different outcomes. For example, in *CMS v. Argentina*, which was brought under the Argentina-United States BIT, the tribunal held that Argentina had not fulfilled the requirements for the defence of necessity under customary international law and so could not rely on the defence of necessity contained in article XI of the BIT.¹²¹ The tribunal ordered Argentina to pay CMS damages of USD\$133.2 million. In contrast, in *Continental Casualty v. Argentina*, also brought under the Argentina-United States BIT, the tribunal held that the defence of necessity in the BIT was to be interpreted in accordance with the plain and ordinary meaning of the words. It held that the defence of necessity excused Argentina for liability against all except one of the investor’s claims (which concerned a measure taken after the crisis had passed). The tribunal awarded the investor no damages for Argentina’s conduct during the crisis.¹²²

6. Whether a regulatory measure taken by the host state in the public interest and in accordance with due process, that has the effect of substantially depriving the investor of the enjoyment of its investment, amounts to an expropriation requiring compensation to be paid to the investor: Some tribunals have taken the view that the purpose of a measure depriving an investor of the benefit of its investment is irrelevant to whether or not the measure may amount to an expropriation.¹²³ Others have said that as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process, is not expropriatory and compensable unless specific commitments had been given by the regulating government to the investor contemplating investment.¹²⁴

In addition to conflicting case law, there is no mechanism by which clear errors of law or fact in awards can be corrected. The *CMS* annulment committee’s decision illustrates the problem starkly:

Throughout its consideration of the Award, the Committee has identified a series of errors and defects. The Award contained manifest errors of law. It suffered from lacunae and elisions. All this has been identified and underlined by the Committee. However the Committee is conscious that it exercises its jurisdiction under

-
- (a) the international obligation in question excludes the possibility of invoking necessity; or
 - (b) the State has contributed to the situation of necessity.

¹²¹ *CMS Gas Transmission Company v. Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005.

¹²² The tribunal awarded Continental Casualty USD\$2.8 million in relation to the measure taken after the crisis had passed. *Continental Casualty Co v. Argentina*, ICSID Case No ARB/03/9, Award, 5 September 2008.

¹²³ E.g. *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.

¹²⁴ E.g. *Methanex v. United States*, UNCITRAL, Award 3 August 2005, Part IV Chapter D Article 1110 NAFTA, para 7.

a narrow and limited mandate conferred by Article 52 of the ICSID Convention. The scope of this mandate allows annulment as an option only when certain specific conditions exist. As stated already (paragraph 136 above), in these circumstances the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal.¹²⁵

In its decision, the annulment committee pointed to two clear errors of law the tribunal had made when interpreting the defence of necessity contained in article XI of the United States-Argentina BIT.¹²⁶ The annulment committee concluded:

These two errors made by the Tribunal could have had a decisive impact on the operative part of the Award. As admitted by CMS, the Tribunal gave an erroneous interpretation to Article XI. In fact, it did not examine whether the conditions laid down by Article XI were fulfilled and whether, as a consequence, the measures taken by Argentina were capable of constituting, even prima facie, a breach of the BIT. If the Committee was acting as a court of appeal, it would have to reconsider the Award on this ground.¹²⁷

This part of the paper will examine a number of options to improve the consistency and coherence of investment treaty arbitration that have been suggested in the writings of various arbitrators and academics. It considers these options in loose ascending order regarding the degree of institutional change each would require. The seven options are:

- (i) A more interactive role for both tribunals and secretariats
- (ii) Consolidation of similar proceedings
- (iii) Introduction of a doctrine of precedent
- (iv) Use of interpretative statements by treaty parties
- (v) Introduction of preliminary rulings
- (vi) Establishment of an appellate mechanism
- (vii) Creation of a world investment court

4.1 A More Interactive Role for Both Tribunals and Secretariats

While some commentators call for the investor-state dispute settlement process to become more “court-like” or “judicial,” others, including Michael Schneider, the current Chair of UNCITRAL’s Working Group on Arbitration and Conciliation, consider that such a move, for example the introduction of an appellate mechanism, to be a mistake. Michael Schneider considers that concerns over consistency and predictability could be adequately addressed if arbitral tribunals would emulate the more interactive approach of WTO dispute settlement panels. Following the submission of

¹²⁵ *CMS Gas Transmission Company v. Argentina*, ICSID Case No ARB/01/8, Decision on application for annulment 8 September 2005, para 158.

¹²⁶ *Ibid*, para 130.

¹²⁷ *Ibid*, para 135.

written submissions, a WTO panel is required to set out their understandings of the facts and invites the parties to comment. The panel then revises its summary of facts in light of the parties' comments. After preparing its findings and conclusions, the parties are again invited to comment, albeit in a more restricted manner on specific legal points with a view to correcting any errors. Following the receipt of these comments, the report is circulated among the Member States for comment before being adopted as final.¹²⁸

There is nothing in any of the most commonly used arbitration rules or treaties that would prevent a tribunal following a more interactive approach along the lines used by WTO panels. The opportunity for the disputing parties to comment on a tribunal's summary of the facts and legal arguments may not solve the more systemic problems of inconsistency and incoherence caused by tribunals taking divergent interpretations of points of law. However, it may help to identify inadvertent errors or misunderstandings by the panel that would otherwise lead to an incorrect decision. It may also lead to a higher level of acceptance of awards by the disputing parties.

It would be possible for an institution such as ICSID to adopt a practice note (similar to the Practice Directions adopted by the International Court of Justice) directing tribunals appointed under its rules to provide to the disputing parties its summary of the facts of the dispute for their comment, and likewise, at a later stage, its summary of their legal arguments. Alternatively, parties to an investment treaty might agree between themselves that tribunals resolving disputes brought under that treaty should use such an iterative approach. This proposal could perhaps be trialled by either one of the arbitral institutions or an investment treaty subject to a number of disputes, for example, NAFTA or the Energy Charter Treaty, to gauge its usefulness in the investor-state context.

In addition, several commentators have suggested that the quality of tribunals' output would be improved if arbitral institutions were to provide legal assistance as well as (in some cases) administrative support. The WTO secretariat provides legal assistance to its panel members. As well as reducing the workload on WTO panel members, it helps to keep the timeframes within the limits set out in the WTO Dispute Settlement Understanding.¹²⁹

While the same result might be possible in the investor-state context, there are at least three difficulties that would need to be overcome. First, the arbitral institutions would require additional staffing and resources to be able to provide such services. Second, legal assistance provided by unseen civil servants would be even less transparent than the current system. Perhaps most importantly, the governance structure of three out of four of the most used arbitral rules are dominated by either representatives of capital-exporting states (ICSID) or business (ICC, SCC). The

¹²⁸ WTO Dispute Settlement Understanding, Article 15.

¹²⁹ Ibid, Annex 3.

fourth, UNCITRAL, is an ad hoc system that does not provide any secretariat support to arbitrations under its rules at all.

An expanded role for the secretariat of arbitral institutions in which they provide legal assistance to tribunals might help to reduce costs and delays for the parties and lead to greater consistency in awards issued under that institution. However, until such time as an arbitral institution that is not tied to the demands of capital is established, a role for such arbitrations in the drafting of awards would be precipitate.

4.2 Consolidation of Related or Similar Proceedings

In early 2005, there were just over 30 investment treaty arbitrations pending against Argentina arising out of measures it had taken in response to its financial crisis in 2001–2002. At the time, a lawyer formerly with Argentina’s Solicitor-General’s Office observed that:¹³⁰

- Almost all the claims then filed against Argentina were brought under just six investment treaties.¹³¹
- Argentina’s restructuring of its public utilities system was a central issue in two-thirds of the claims.
- Approximately 80 per cent of the arbitrations were indirect claims brought by shareholders alleging financial losses as a result of the decrease in the value of their shareholding.
- Tribunals constituted at that date included 29 different arbitrators.
- The total amount of the claims was in excess of USD\$16 billion, which approximately amounted to the annual budget of the Argentinean federal government.

The Argentine lawyer called for tribunals to be empowered to consolidate claims where similar facts and law are at issue. Neither the ICSID Convention nor the Argentine BITs at issue currently require tribunals to do so. Four years on, the number of investment treaty arbitrations against Argentina arising out of its financial crisis has increased to well over forty.¹³²

At least one prominent arbitrator has echoed the Argentine lawyer’s concerns.¹³³ A provision empowering tribunals to order the consolidation of related proceedings or proceedings that have

¹³⁰ Anzorena, 2005

¹³¹ United States-Argentina BIT (thirteen claims), France-Argentina BIT (seven claims), United Kingdom-Argentina BIT (four claims), Spain-Argentina BIT (two claims), Chile-Argentina BIT (two claims), Belgium-Luxembourg BIT (two claims)

¹³² Burke-White, 2008

¹³³ For example, Kaufmann-Kohler, 2005.

issues of law or fact in common might be included in either the arbitration rules or the investment treaty itself.

4.2.1 Provisions on consolidation in the arbitration rules

The ICSID Arbitration Rules provide no express powers for tribunals to consolidate proceedings. The as-yet unadopted revised UNCITRAL Rules will have a very limited scope for “consolidation.” They provide that a respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the tribunal has jurisdiction over it.¹³⁴ This will be of little assistance to enhancing consistency in situations like that currently faced by Argentina or the Czech Republic in the *Lauder* cases,¹³⁵ because these involve multiple claims by investors, rather than a claim and counter-claim.

Both the ICC Rules¹³⁶ and the revised SCC Rules¹³⁷ as adopted in 2007 provide for the consolidation of disputes. However, they also would be of little use in a situation like Argentina’s as they only allow consolidation of disputes arising between the same parties.

Thus, the most commonly used arbitration rules currently cannot be used to consolidate investor-state disputes to improve the consistency of the resulting awards.

4.2.2 Provisions on consolidation in investment treaties

The ASEAN agreement provides that when two or more claims have been submitted separately to investor-state arbitration under the agreement and the claims have a question of law or fact in common and arise out of the same or similar events or circumstances, all concerned disputing parties may agree to consolidate those claims in any manner they deem appropriate.¹³⁸ This does not give a tribunal any powers to order that disputes be consolidated—it depends on the disputing parties’ agreement, which they would be able to do even without an express provision in the treaty.

The 2004 U.S. model BIT provides that where two or more claims have been submitted separately to arbitration under the BIT and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in

¹³⁴ Revised UNCITRAL Rules, article 21(3). See United Nations Commission on International Trade Law, Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules, Working Group II (Arbitration and Conciliation) Fifty-first session Vienna, 14-18 September 2009, A/CN.9/WG.II/WP.154/Add.1, distributed 23 July 2009.

¹³⁵ *Lauder v. Czech Republic*, UNCITRAL, Final award, 3 September 2001; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final award, 14 March 2003.

¹³⁶ ICC Rules, Rule 4(6).

¹³⁷ SCC Rules, Article 11.

¹³⁸ ASEAN Comprehensive Investment Agreement, Article 37.

accordance either with the agreement of all the disputing parties sought to be covered by the order or in accordance with the terms of article 33(2)-(10).¹³⁹

There is no such provision in the 1992 United States-Argentina BIT. If there were, the provision presumably would have enabled the consolidation of the multiple disputes brought against Argentina by United States nationals under the US-Argentina BIT in respect of the 2001–2002 financial crisis.

In contrast, both NAFTA¹⁴⁰ and the 2004 Canadian model BIT¹⁴¹ equip tribunals with a more useful power of consolidation. Where a tribunal established to hear an application for consolidation is satisfied that the various claims submitted under the treaty have a question of law or fact in common, the tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, order their consolidation.¹⁴² These treaties therefore give tribunals a wider power than that bestowed under the U.S. model BIT, as the claims need not arise out of the same event or circumstances.

While a provision such as that found in NAFTA and the Canadian model BIT would be useful for achieving consistency in concurrent disputes arising under the same treaty, this would not help to achieve consistency in related claims under different treaties—for example, the *Lauder* cases against the Czech Republic¹⁴³—or claims brought at different times.

In light of the above, it would be worthwhile to include a provision on consolidation like that found in NAFTA and the Canadian model BIT in all arbitration rules and/investment treaties. However, it must be understood that this will not assist to achieve consistency for related disputes under different treaties or for disputes not going on at the same time.

4.3 The Introduction of a Doctrine of Precedent

There is no doctrine of binding precedent in investment treaty arbitration. While a doctrine of precedent or *stare decisis* is an important tool for achieving consistency in the national law of common law systems,¹⁴⁴ it is generally thought that there is no doctrine of precedent in international

¹³⁹ United States model BIT, article 33(1).

¹⁴⁰ NAFTA, Article 1126(2).

¹⁴¹ Canadian model BIT, article 32(2).

¹⁴² Canadian model BIT, article 32(2).

¹⁴³ *Lauder v. Czech Republic*, UNCITRAL, Final award, 3 September 2001; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final award, 14 March 2003.

¹⁴⁴ This is based on the Latin phrase *stare decisis et non quieta movere*, “maintain what has been decided and do not alter that which has been established.” Civil law countries do not have a doctrine of binding precedent.

law.¹⁴⁵ This view gains support from the Statute of the International Court of Justice. Article 38(1)(d) of the Statute of the International Court of Justice (ICJ) stipulates that judicial decisions are only a subsidiary means for the determination of the rules of law.¹⁴⁶ Moreover, Article 59 of the Statute of the ICJ provides that decisions of the ICJ have “no binding force except between the parties and in respect of that particular case.” Under the Statute of the ICJ, assuming that arbitral awards qualify as judicial decisions (which is not certain), previous arbitral awards are at best a subsidiary means of interpretation.

Several commentators have suggested that the introduction of a doctrine of binding precedent would assist to achieve consistency in the development of international investment law.¹⁴⁷ While it may do so, it would be problematic for a number of other reasons.

First, the majority of common law systems apply a doctrine of “vertical” *stare decisis* under which courts are bound to follow decisions of higher courts but decisions by other courts at the same level are only persuasive.¹⁴⁸ As investment arbitration is currently a one-tier system, the introduction of such a doctrine would add little, as tribunal awards at the same level would not be binding upon one another anyway. It would be necessary to adopt a “horizontal” *stare decisis* doctrine where courts on the same level must be taken into account. Currently horizontal *stare decisis* is used principally only by the United States Circuit Courts.

Second, unless all awards are routinely made public, a system of precedent would be artificial and unworkable. Without such transparency, tribunals would effectively be grappling in the dark, unable to know whether there are other decisions that might have provided a different perspective on the issues they must determine. The current lack of transparency that pervades the investor-state arbitration process means that decisions decided under the more transparent systems—NAFTA and, to a lesser extent, ICSID—already have a disproportionate precedent value as they are the only decisions available.

¹⁴⁵ See, for example, Christoph Schreuer and Matthew Weiniger, *Conversations Across Cases – Is there a Doctrine of Precedent in Investment Arbitration?* *Transnational Dispute Management* Vol 5, No 3 May 2008.

¹⁴⁶ Article 38(1) of the Statute of the International Court of Justice states that the sources of international law are:
 (a) international covenants, whether general or particular, establishing rules expressly recognized by the contesting parties;
 (b) international custom, as evidence of a general practice accepted as law;
 (c) the general principles of law recognized by civilized nations;
 (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

¹⁴⁷ See, for example, Demsey, 2008.

¹⁴⁸ In common law systems, *stare decisis* can be either vertical or horizontal *stare decisis*. Vertical *stare decisis* means that the decisions of higher courts are binding on lower courts. The English court system applies vertical *stare decisis*. In horizontal *stare decisis* both decisions of higher courts and those of other courts at the same level must be taken into account.

Third, it would lock in the more questionable legal interpretations of investment treaty provisions.

Fourth, tribunals may overlook specific differences in the drafting of treaty provisions in their efforts to comply with precedents.

Fifth, it favours the common law approach to lawmaking over that of civil law systems, which is unlikely to please countries whose legal systems are based on the latter.

In light of the above, the civil law principle of *jurisprudence constante*, sometimes called doctrine of persuasive precedent, might be a safer way to promote consistency whilst avoiding many of the problems that might result from a system of binding precedent.¹⁴⁹ In contrast to *stare decisis*, where a single previous decision is binding, the principle of *jurisprudence constante* means that courts draw guidance from the number and consistency of previous cases deciding a legal issue in a certain manner. Whilst previous awards would not be binding they would be entitled to respect and careful consideration.¹⁵⁰

In fact, it would appear that a number of tribunals are already moving to such an approach.¹⁵¹ For example, in *Noble Energy Inc. et al. v. Ecuador*, the tribunal held:

*The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must give due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it should adopt solutions established in a series of consistent cases. It also believes that, subject to the specific provisions of a given treaty, to the circumstances of the actual case and the evidence tendered, it should seek to foster the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.*¹⁵²

However, while some tribunals might adopt such an approach of their own volition, it would be preferable that the doctrine of *jurisprudence constante*, or persuasive precedent, be formally adopted as a working method of tribunals deciding investor-state disputes.

A doctrine of *jurisprudence constante* could be introduced as a working method for arbitral decision-making in either the arbitration rules or in individual treaties. A possible drafting text might read:

In its deliberations, the tribunal shall seek to achieve consistency and coherence in the interpretation of the provisions of the treaty and in the further development of international investment law, whilst taking appropriate account of differences in wording, object, purpose and context.

¹⁴⁹ Vadi, 2008, p. 2.

¹⁵⁰ Kaufman-Kohler, 2007, p. 358, n. 4.

¹⁵¹ Cheng, p.1016.

¹⁵² *Noble Energy Inc. et al. v. Ecuador et al*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, para 50.

4.4 Use of Interpretative Statements

Article 31(1) of the Vienna Convention on the Law of Treaties states:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 31(3) of the Vienna Convention states:

There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

This provides a possible vehicle by which parties to an investment treaty may enhance the consistency and predictability of the treaty provisions. For example, if it becomes clear that the wording of a particular treaty provision is vague or uncertain, or is being interpreted by tribunals in a manner contrary to the way in which the treaty parties intended, it is always open to them to enter into an agreement with each other that the provision should be interpreted in a particular way.¹⁵³ For example, in *CME v. Czech Republic*, the Netherlands and the Czech Republic issued “Agreed Minutes” containing a common position on the interpretation of the Netherlands-Czech Republic BIT, after the tribunal had issued a partial award.¹⁵⁴ The BIT provided “consultations” with a view to resolving any issue of interpretation and application of the Treaty. In its final award, the tribunal took the “Agreed Minutes” into account, holding that it supported its view.¹⁵⁵

The NAFTA parties, and particularly the United States and Canada, have gone a step further down this road. NAFTA established a Free Trade Commission consisting of cabinet-level representatives of each of the three parties,¹⁵⁶ which inter alia has the power to issue binding interpretative statements.¹⁵⁷ NAFTA Parties have used this power on several occasions, perhaps most notably in the Notes of Interpretation issued on July 31, 2001 and October 7, 2003. The July 31, 2001 Notes of Interpretation concerned the concepts of “fair and equitable treatment” and “full protection and security” in NAFTA Article 1105. Through the Notes of Interpretation, the NAFTA Parties declared that these provisions were to be understood to require no more than the minimum standard for the treatment of aliens under customary international law.

¹⁵³ Schreuer and Weiniger, 2008.

¹⁵⁴ *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final award, 14 March 2003, paras 87-93.

¹⁵⁵ *Ibid*, paras 437, 504.

¹⁵⁶ NAFTA, Article 2001(1): The Parties hereby establish the Free Trade Commission, comprising cabinet-level representatives of the Parties or their designees.

¹⁵⁷ NAFTA, Article 1131(2): An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

Subsequent NAFTA tribunals appear to have held themselves to be bound by the interpretative statements.¹⁵⁸ For example, in *Methanex v. United States*, the tribunal held:

*With respect to Article 1105, the existing interpretation is contained in the FTC's Interpretation of 31st July 2001.*¹⁵⁹

The NAFTA approach gives more weight to such statements than the Vienna Convention alone. Whereas Article 31(3)(a) of the Vienna Convention requires such statements to be “taken into account, together with the context,” NAFTA Article 1131(2) makes such statements binding.

Following the success of interpretative statements, the United States and Canada have incorporated similar provisions into their model BITs. Like NAFTA, the Canadian model BIT establishes a commission comprised of cabinet-level representatives of the parties. Article 40(2) of the model BIT provides:

An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section, and any award under this Section shall be consistent with such interpretation.

The 2004 United States model BIT does not establish a Commission but in its Article 30(3) states:

A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

Whilst NAFTA tribunals' acceptance of the interpretative statements indicate they can be highly effective, they have also met with criticism from those that believe it is inappropriate that a state should be able to wriggle out of its obligations under the treaty after the fact. Critics of the 2001 Notes of Interpretation argued that they were in fact an *ultra vires* amendment of NAFTA rather than interpretative guidance and that as the Free Trade Commission had exceeded its authority, the arbitral tribunal had the authority to reject the note.¹⁶⁰ Commentators also expressed concern at the

¹⁵⁸ *Methanex v. United States*, Award, 3 August 2005, Part II, Chapter H, para 23. See also *Glamis Gold Ltd v. United States*, Award, 8 June 2009, para 599; *Waste Management, Inc v. United Mexican States*, Award, 30 April 2004, para 90-91; *Loewen Group, Inc. and Raymond L. Loewen v. United States*, Award, 26 June 2003, para 124-128; *ADF Group, Inc v. United States*, Award, 9 January 2003, para 175-178; *United Parcel Service of America, Inc v. Canada, Award*, 22 November 2002, para 97; *Mondev International Ltd. v. United States*, Award, 11 October 2002, para 100.

¹⁵⁹ *Methanex v. United States*, Award, 3 August 2005, Part II, Chapter H, para 23.

¹⁶⁰ Charles H. Brower II, Structure, Legitimacy, and NAFTA's Investment Chapter, 36 *Vanderbilt Journal of Transnational Law* 37, 83 (2000), at 78-79; Todd Weiler, NAFTA Investment Arbitration and the Growth of International Economic Law, 36 *Can. Bus. L.J.* 405 (2002), at 429; *Pope & Talbott v. Canada*, Award on Damages 91 21, 47 (2002); *Methanex v. United States*, Second Opinion of Professor Sir Robert Jennings (2001), www.naftalaw.org (cited in The Legitimacy Crisis in Investment Treaty Arbitration – Privatizing Public International Law Through Inconsistent Decisions 73 *Fordham Law Review* 2004, p.1604, footnote 406.

lack of transparency and absence of public consultation before the Notes of Interpretation were issued.¹⁶¹

Regarding the criticism that contracting parties should not be able to wriggle out of their treaty obligations after the fact, it is submitted that such criticism should be confined to interpretative statements issued during an ongoing dispute to avoid liability. In such cases, it seems counter to principles of public policy and fair process that the contracting parties should be allowed to change the rules after arbitral proceedings have commenced. However, it would seem different if the contracting parties agree an interpretation of the treaty to apply going forward. Firstly, Article 31(3) of the Vienna Convention explicitly recognizes the rights of states to enter subsequent agreements regarding the interpretation of a treaty. The contracting parties are therefore acting within their sovereign rights in doing so. Moreover, clarification of a treaty's provisions through the issue of an interpretative statement is a quick way to improve certainty and predictability, not only for the contracting parties but for investors as well.

With respect to the criticism that the Notes of Interpretation were in fact an *ultra vires* amendment to NAFTA, Article 31(3)(a) of the Vienna Convention expressly envisages that treaty parties may enter into a subsequent agreement regarding the interpretation of the treaty. Moreover, the Free Trade Commission is explicitly empowered under Article 1131(2) to issue binding interpretative statements. It is thus difficult to understand how the statements can be *ultra vires*, so long as they do not contravene the treaty's object and purpose.

In light of the above, the incorporation of an institutional mechanism in future investment treaties stating that interpretative statements issued by the parties will be binding may be a useful tool to efficiently clarify points of uncertainty in a treaty subsequent to its adoption.

4.5 Preliminary Rulings

One prominent arbitrator has suggested that the European Community's system of preliminary rulings might be a useful tool to enhance consistency in investor-state arbitration, whilst avoiding the challenges that might be encountered with an appellate mechanism.¹⁶²

The power of the European Court of Justice to make preliminary rulings is set out in Article 234 of the Treaty establishing the European Community.¹⁶³ It has been described as a tool of seminal

¹⁶¹ Franck, 2004-2005, p. 1604.

¹⁶² Schreuer, 2008. The idea has been put forward by other commentators: see G. Kaufmann-Kohler, 2004 and 2005.

¹⁶³ Article 234 (formerly Article 177) of the Treaty establishing the European Community deals with preliminary rulings:
The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty;

importance for promoting the uniform development and application of European Community law.¹⁶⁴

Under Article 234, any national court or tribunal of a Member State may decide to refer a question with regard to the interpretation (or validity) of European community law to the European Court, when a decision on that question is necessary to enable the national court to give a judgment. Where such a question is raised before a court of last instance, the court is under an obligation to request a preliminary ruling from the European Court. Proceedings for preliminary rulings are always initiated by a national court and not by one of the parties.

Professor Christoph Schreuer, author of the Commentaries on the ICSID Convention has suggested that:

Rather than remedy the damage after it has occurred, it is more sensible to address the problem of inconsistency through preventive action. A method to secure the coherence of case law that has been remarkably successful is to allow for preliminary rulings while the original proceedings are still pending. Under such a system a tribunal would suspend proceedings and request a ruling on a question of law from a body established for that purpose. This procedure has been applied with a large measure of success in the framework of European Community law. It effectively secures the uniform application of European law by domestic courts in all member States through preliminary rulings of the Court of Justice of the European Communities (European Court).¹⁶⁵

Proponents of this option consider that, adapted to investment arbitration, a system of preliminary rulings could provide for an interim procedure whenever a tribunal is faced with an important question. Such an important question may be described as a fundamental issue of investment treaty application, a situation where the tribunal wants to depart from a “precedent” or where there are conflicting previous decisions. In such a situation the tribunal might be required to suspend proceedings and request a ruling. Once that ruling has been forthcoming, the original tribunal would resume its proceedings and reach an award on the basis of the guidance it has received through the

(b) the validity and interpretation of acts of the institutions of the Community and of the [European Central Bank];

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

¹⁶⁴ Craig and De Búrca, 2008, pp. 460–497

¹⁶⁵ Schreuer, 2008, p. 3

preliminary ruling.¹⁶⁶ Professor Schreuer believes that this method could prove a successful tool to avoid inconsistency and fragmentation. He notes that a mechanism of this kind would require the establishment of a central and permanent body that would be authorized to give preliminary rulings but states that a permanent body of this kind would be less ambitious than a permanent court for the adjudication of investment disputes.¹⁶⁷ Preliminary rulings would not conflict with Article 53 of the ICSID Convention, which requires that there be no other rights of appeal than that set out in the Convention. Nor would they affect the arbitration principle of finality. Whereas an appeals procedure might reach a measure of consistency through a costly and time consuming repair mechanism, preliminary rulings might help to prevent the development of inconsistencies in the first place.¹⁶⁸

However, even this option's main proponents admit there are a number of issues that would have to be worked out. For example, in what circumstances might a tribunal request a preliminary ruling and would it be under an obligation to do so? Would these rulings bind the tribunal or merely constitute recommendations? Furthermore, how would the body charged with giving preliminary rulings be composed?¹⁶⁹

Other questions that might remain unresolved include:

- Could either disputing party request a preliminary ruling or only the tribunal?
- Which points would need to be referred?
- What would the wider effect of the rulings be—that is, would they bind only future tribunals constituted under the same treaty or under any investment treaty containing a similar provision?
- If rulings would have wider effect, would states not party to that treaty and even other investors be entitled to make submissions in the preliminary rulings application?
- Would there be just one global preliminary rulings body or one for each arbitral institution or one for each treaty?
- Would there be a right to appeal or annul a preliminary ruling?
- Might it lead to a multiplication of remedies, causing more cost and delay?
- Even if there was just one global preliminary rulings body, would it actually result in improved consistency, particularly because not all legal points will be referred?

Moreover, the ECJ's preliminary rulings systems is itself overloaded and several reports have been commissioned by the European Commission exploring options on how to resolve the now lengthy

¹⁶⁶ Ibid, p.5.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

delays.¹⁷⁰ One of the options the European Commission has considered is moving to a two-tiered system where the Court of First Instance will provide an initial ruling with a possibility to appeal to the ECJ.¹⁷¹

Perhaps the most significant hurdle, however, is the fact that while preliminary rulings work in the EC context, with just one treaty to apply, the body deciding preliminary rulings in the investor-state context has potentially to consider approximately 3,000 investment treaties, some with similar treaty provisions, others subtly different and all adopted in different contexts.

4.6 Establishment of an Appellate Mechanism

A number of prominent arbitrators and commentators have spoken out in favour of an appellate mechanism. One arbitrator and counsel has noted:

*Arbitration is usually a process without appeal. This sits well with the exigencies of commerce but needs to be reconsidered in the field of investor-state arbitration where the policies of a state are under question and the precedential value of a particular case can become exaggerated due to the dearth of other authority.*¹⁷²

Arbitrators have noted that the goal of finality, so desired in commercial arbitration, may be less important in the investment arbitration context:

*Thus finality may be less desirable for the investor and investment arbitration than getting the answer right. For the host state, an adverse award may inflict a crippling financial blow made much less palatable if the award is made without any review of its merits. Likewise for a state, an award's reasoning may also become an important defect of precedent in future disputes under the same or similar investment law or BIT without being a legal precedent at all. Here again, finality seems to be less desirable than just getting it right.*¹⁷³

Leading international law commentators have noted the added legitimacy the WTO appellate body has brought to the WTO dispute settlement system:

*Our subject has become a live one for two main reasons. One is the comparative success of the World Trade Organization appellate system. I do not think anyone will deny that the Appellate Body has had a very significant impact both in terms of individual decisions and in terms of the general perception of the way in which the WTO dispute settlement has worked. It has unquestionably enhanced confidence in the WTO as a whole.*¹⁷⁴

¹⁷⁰ In 2006, the average time to get a preliminary ruling handed down was 20 months from the date of referral.

¹⁷¹ Craig and De Búrca, 2008, pp. 460–500.

¹⁷² Blackaby, 2002, p. 364.

¹⁷³ Veeder, 2005, p. 6.

¹⁷⁴ Crawford, 2005, p. 8.

4.6.1 Appeal rights in the arbitration rules

None of the four most commonly used arbitration rules provide for appeals on points of fact or law. The UNCITRAL and SCC Rules stipulate that the award shall be final and binding on the parties.¹⁷⁵ The ICSID Convention states that the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in that Convention.¹⁷⁶ Those remedies are restricted to annulment on procedural grounds, interpretation and revision of the award.¹⁷⁷

In October 2004, ICSID released a working paper that discussed a proposal for a new ICSID “Appeals Facility.” ICSID held a series of consultations with member states, arbitration practitioners, non-governmental organizations and others to get their views on the merits of such a facility. As a result of those consultations, the ICSID secretariat concluded in May 2005 that “it would be premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues raised” by such a mechanism.¹⁷⁸ The amendments to the ICSID Rules subsequently adopted in April 2006 contain no reference to an appeals facility.

Under the ICC Rules, every award is binding on the parties. Moreover, by submitting the dispute to arbitration under the ICC Rules, the parties undertake to carry out any award without delay and are deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.¹⁷⁹

The UNCITRAL Working Group is proposing to introduce a similarly restrictive provision into its draft revised rules. The proposed addition provides:

*Insofar as such waiver can be validly made, the parties shall be deemed to have waived their right to any form of appeal, review or recourse to any court or other competent authority. The right to apply for setting aside an award may be waived only if the parties so expressly agree.*¹⁸⁰

Thus, none of the sets of rules provide for a possibility of review on the substance even if the tribunal has made serious errors of law (as were identified by the annulment committee in *CMS v. Argentina*).

¹⁷⁵ Article 40, SCC Rules; article 32(2) UNCITRAL Rules.

¹⁷⁶ Article 53, ICSID Convention.

¹⁷⁷ ICSID Convention, articles 50 and 51.

¹⁷⁸ ICSID secretariat, Working Paper on Suggested Changes to the ICSID Rules and Regulations, 12 May 2005, p.3.

¹⁷⁹ Article 28, ICC Rules.

¹⁸⁰ Draft article 32(2) in UNCITRAL, Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules Note by the Secretariat prepared for Working Group II on Conciliation and Arbitration, 15-19 September 2008, A/CN.9/WG.II/WP.151/Add.1.

With respect to procedural defects, only the ICSID Rules contain an express provision setting out the procedural grounds under which an award can be annulled. Under the ICSID Convention, either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:¹⁸¹

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

The application must be made within 120 days after the date on which the award was rendered, or in the case of corruption, 120 days after the corruption was discovered but within three years of the rendering of the award.¹⁸² The application for annulment will be heard by an ad hoc committee of three persons appointed by the Chairman of ICSID.¹⁸³ If the award is annulled, the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with the ICSID Convention.¹⁸⁴

In contrast to ICSID, the ICC, SCC and UNCITRAL Rules make no express provision for annulment on procedural grounds. Moreover, the express waiver in the ICC Rules deems parties to have waived their right to any form of recourse, to the extent that such rights can be validly waived. The draft revised UNCITRAL Rules contain a similar waiver, although the right to apply for setting aside an award may be waived only if the parties so expressly agree.¹⁸⁵

4.6.2 Appeal rights in the investment treaties

The possibility of an appeal mechanism for investor-state disputes began to look concrete with the United States Congress's adoption of the Bipartisan Trade Promotion Authority Act in 2002. The Act stipulated that United States free trade agreements must include as a negotiating objective "providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements."

A number of the free trade agreements subsequently negotiated by the United States, including with Singapore, Chile, Morocco and others recognize the possibility of an appellate mechanism being

¹⁸¹ Article 52(1), ICSID Convention, see also Rules 50 and 52, ICSID Arbitration Rules.

¹⁸² Article 52(2), ICSID Convention.

¹⁸³ Article 52(3), ICSID Convention.

¹⁸⁴ Article 52(6), ICSID Convention.

¹⁸⁵ Draft article 32(2), UNCITRAL, Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules Note by the Secretariat prepared for Working Group II on Conciliation and Arbitration, 6 August 2008, A/CN.9/WG.II/WP.151/Add.1.

established. They state that, in the event such a mechanism is established, there is an “agreement to agree” that the mechanism shall apply to the free trade agreement. The agreements also provide that the contracting parties will “consider whether to establish a bilateral appellate body or similar mechanism” within a specified period of time after the agreement’s entry into force.¹⁸⁶

The Central American Free Trade Agreement, signed in August 2004, takes the initiative a step further. It requires the establishment of “a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals” within three months of the agreement’s entry into force. It also requires the contracting parties to “direct the Negotiating Group to provide to the Commission, within one year of establishment of the Negotiating Group, a draft amendment to the Agreement that establishes an appellate body or similar mechanism.”¹⁸⁷

As at 2008, 13 countries were party to U.S. free trade agreements or investment treatments containing provisions regarding the possibility of an appellate mechanism.¹⁸⁸ However, despite the promises in the agreements, no negotiations to establish an appellate mechanism have been announced nor negotiating text exchanged. The issue would seem to float in suspension.

4.6.3 Criticisms of proposals to establish an appellate mechanism

While some practitioners believe that an appellate mechanism is needed to enhance the legitimacy of the investment arbitration process, others take a very different view. Proposals for an appellate mechanism in investor-state arbitration have encountered criticism from commentators across the spectrum.

The United States’ introduction of the possibility of establishing an appellate mechanism into its investment treaties led to the OECD Investment Committee deciding to itself examine the merits of such a mechanism. When ICSID made its proposal to establish an appeals facility in 2004, the OECD joined with ICSID to undertake consultations with government experts and arbitration practitioners on this issue.

The OECD consultations identified both benefits and drawbacks to the establishment of an appellate mechanism. Benefits identified included greater consistency when tribunals constituted under different agreements deal with the same set of facts; the fostering of coherent interpretations of basic principles that may underlie differently worded treaty provisions; better uniformity in the challenging of awards, particularly if the traditional grounds for annulment were subsumed so that

¹⁸⁶ For example, Annex 10-F of the Central American Free Trade Agreement, 5 August 2004.

¹⁸⁷ See further Legum, 2008.

¹⁸⁸ Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Morocco, Nicaragua, Oman, Peru, Singapore and Uruguay. See Bartom Legum “Options to Establish an Appellate Mechanism for Investment Disputes” in Karl Sauvant “Appeals mechanism in Investment Disputes” Oxford University Press 2008, Chapter 15.

the mechanism became the sole vehicle through which to challenge the award; the replacement of challenges to potentially partial national courts in non-ICSID cases; the allaying of public concerns about investor-state arbitration through the ability to rectify legal errors and possibly serious errors of facts; and more expeditious and effective enforcement of awards if a host state seeking an appeal is required to post a bond in the amount of the award and if appeal decisions were excluded from domestic court review.¹⁸⁹

The drawbacks identified by the OECD consultations included that it would be against the principle of finality, traditionally seen as one of major advantages of arbitration over judicial settlement (although others took the view that the public interest issues at stake in investment arbitration might make the acceptance of the risk of flawed or erroneous decisions in this field less justifiable in the name of finality than in commercial arbitration); appeals might result in additional delays, costs and caseload—currently many “set aside” cases take years to conclude—(although this might be avoided through setting specific time limits or only looking at errors of law and not of fact); and there might be a tendency to appeal in every case, which would decrease the confidence in the main body of decisions (although it was noted that the requirement to secure awards and the cost of proceedings would be a disincentive to appeal).¹⁹⁰

Overall, except for the NAFTA governments, the majority of OECD members did not seem to consider the issue urgent enough to embark on a radical system change or were even directly concerned—perhaps because they still viewed the issue only from the home country perspective.¹⁹¹

Several prominent practitioners and arbitrators have also spoken against the introduction of an appellate mechanism.¹⁹² They consider that, in contrast to the WTO or to the European Court of Justice, both of which have one set of agreements entered between the same group of member states, the fragmented nature of current investment law is not suited to a single appellate mechanism.¹⁹³ While IIAs may have similar or identical texts, because they were negotiated at widely varying times between diverse states with various intentions, different content will be, and should be, given to that text by tribunals applying established principles of treaty interpretation. Proponents of this view cite the tribunal’s award in the OSPAR Convention case:

¹⁸⁹ Yannaca-Small, 2008, pp. 224-225.

¹⁹⁰ Ibid, pp.225-226.

¹⁹¹ Ibid, p.226.

¹⁹² See, for example, Paulsson, 2008; Legum, 2008.

¹⁹³ Legum, 2008, p. 234; Paulsson 2008, p. 259.

*The application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and travaux préparatoires.*¹⁹⁴

They say that the goal of achieving consistency and coherence across 3,000 treaties with different texts, contexts, objects and purposes is “chimerical” and is neither possible nor permissible under accepted rules of treaty interpretation.

Moreover, they take the view that the anecdotal problems identified in support of an appellate mechanism would not necessarily be solved. They note the *Lauder* and *CME* cases against the Czech Republic,¹⁹⁵ where tribunals reached different decisions based on the same facts and arguments by same counsel for the same or closely related parties, are often held out as the “poster child” in support of an appellate mechanism. However, they counter that the differing decisions in *Lauder* and *CME* stem from the two tribunals’ contrasting appreciations of the facts, not from fundamentally different understanding of the law. Under the normal tests for correction on appeal, a difference in appreciation of the facts would only be corrected if no reasonable arbitrator could have possibly understood the facts of the case in that way—which would not cover these cases.¹⁹⁶ Such practitioners argue that a certain level of inconsistency is inevitable in any system of administration of justice.¹⁹⁷ They say that this is a new area where the jurisprudence must feel its way toward consensus, and there will be some early aberrations.¹⁹⁸

Several commentators from developing countries have expressed their own concerns about an appellate mechanism. These include that the power of multinational corporations be not unduly strengthened through the abusive use of an appellate process. The commentators have stressed that an appellate system must not lead to further bias against weaker host countries, by augmenting the capacity of multilateral companies to pursue an appeal. The effective participation of developing countries in the appellate body would need to be ensured. The appellate system should not lead to specifically worded investment treaty protections being generalized into broad norms in the interests of achieving consistency. This would compromise the collective decision by developing countries not to engage in a multilateral system that is not development friendly and the flexibility of the bilateral system they have opted for. They have noted that the review process should facilitate the “development objective,” for example by contributing toward the reduction or alleviation of the

¹⁹⁴ Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (*Ireland v. U.K.*) final award 2 July 2003, para 141.

¹⁹⁵ *Lauder v. Czech Republic*, UNCITRAL, Final award, 3 September 2001; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final award, 14 March 2003.

¹⁹⁶ Legum, 2008, p. 237

¹⁹⁷ *Ibid.*

¹⁹⁸ Paulsson, 2008, p. 253.

burdens that accompany investment liberalization. They remark that a cost-benefit analysis of an appellate process should be undertaken before moving forward.¹⁹⁹

Bearing in mind the concerns expressed above, particularly by developing country commentators, the next section will consider whether it would be possible to design an appellate mechanism that would improve the consistency and coherency of investment treaty arbitration while avoiding the problems highlighted.

4.6.4 Possible elements of an appellate mechanism

4.6.4.1 Members of the appellate body

The problems with independence and impartiality with lawyers acting as both arbitrator and counsel were discussed in Part 2 of this paper. The WTO Dispute Settlement Understanding has addressed this issue in respect of its own appellate body by establishing a standing appellate body to hear appeals from WTO panel cases.²⁰⁰ A number of aspects could be adapted directly from the WTO approach. These include that the body be a permanent standing appellate body; that appellate panels consist of three persons for each case; that members serve in rotation (rather than being chosen by the disputing parties); that members serve for a fixed period; that they have appropriate legal expertise (in the case of investor-state arbitration, this should be in public international law and international trade law); that they be unaffiliated with any government (and in the case of investor-state arbitration, any private company or firm, including law firms); and that they be broadly representative of the membership of the member states of the international instrument under which the appellate mechanism is established.²⁰¹

4.6.4.2 Grounds for appeal

An appellate body might be empowered to consider appeals on various grounds. A broad mandate may entitle it to review errors of law or fact. A narrower mandate would entitle it to review errors of law only or even serious errors of law only. The WTO Dispute Settlement Understanding provides that “[a]n appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the panel.”²⁰² The WTO Appellate Body thus is formally limited to errors of law, but these need not be serious errors of law. In contrast, outside the trade context, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) can consider appeals regarding an error on a question of law invalidating the decision or an error of fact which has occasioned a miscarriage of justice.²⁰³ This mandate has been interpreted as allowing for

¹⁹⁹ Qureshi and Gulzar Khan, 2008, p. 267–278.

²⁰⁰ WTO Dispute Settlement Understanding, article 17.1.

²⁰¹ *Ibid*, article 17.

²⁰² *Ibid*, article 17.6.

²⁰³ Statute of the International Criminal Tribunal for the Former Yugoslavia, article 25.

an essentially de novo review of legal errors, subject to the qualification that harmless errors of law that do not “invalidate the decision” cannot be reviewed. Regarding errors of fact, the Appeals Chamber will only substitute the Trial Chamber’s finding for its own when no reasonable trier of fact could have made the original finding.

In the investment treaty context, given the complex facts involved and the potentially large damages awards, it could be argued that a formula similar to that used by the Appeals Chamber of the ICTY might be appropriate. Such a formulation might help to prevent frivolous appeals regarding insignificant errors, while allowing for errors that affect the outcome of the case to proceed.

In addition to the substantive grounds for review, the appellate body might also have jurisdiction over the procedural grounds for annulment under the ICSID Convention. This is to prevent the costs and delays that would result from substantive appeals and procedural annulments in different forums.

4.6.4.3 Powers of review

An appellate body’s power of review might be formulated in various ways. At the narrowest end, it might have a power to annul an award only. The ICSID Convention currently provides for annulment, albeit confined to limited procedural grounds. Under the convention, if an award is annulled either party may request that the dispute be submitted to a new tribunal.²⁰⁴

A broader power of review would allow it to modify or reverse a tribunal’s findings and replace them with its own. For example, the WTO Dispute Settlement Understanding entitles the appellate body to uphold, modify or reverse the legal findings and conclusions of the panel.²⁰⁵

The power of review of the European Court of Justice is an amalgamation of the two. Under the Treaty establishing the European Community, appeals must be made from the Court of First Instance to the Court of Justice on a point of law.²⁰⁶ If the Court of Justice finds the appeal well founded, it must quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.²⁰⁷

The most expeditious approach in the investment treaty arbitration context would seem a power of review similar to that afforded the WTO appellate body or the ECJ whereby the body can substitute its own findings for the tribunal’s without necessarily needing to refer back to the tribunal.

²⁰⁴ ICSID Convention, article 52(6).

²⁰⁵ WTO Dispute Settlement Understanding, article 17.3.

²⁰⁶ Treaty establishing the European Community (Nice consolidated version), article 225.

²⁰⁷ Statute of the Court of Justice, March 2008, article 61.

4.6.4.4 Rules of procedure for an appellate mechanism

The rules of procedure to be applicable to the tribunals in first instance might apply *mutatis mutandis* to the appellate body. Thus, the proposed rules regarding transparency and the possibility for the participation of non-disputing parties would also apply. In addition, the rules for the appellate mechanism might include strict timeframes for all stages of the appellate process. The strict timetable established under the WTO's Dispute Settlement Understanding might be instructive. The WTO Appellate Body is required to produce its report within 60–90 days of the making of the appeal.²⁰⁸

4.6.4.5 Legal assistance for developing countries

At least one commentator has suggested that developing countries should receive funding or legal assistance to help them in prepare their appeal or defence to an appeal.²⁰⁹

4.6.4.6 Institutional framework

An appellate mechanism could be established in individual investment treaties; by one or more arbitral institutions; or by a new regional or global treaty between states specifically to establish an appellate mechanism. Each of these is considered below.

Including a provision allowing recourse to appeal in each individual treaty might be the easiest to negotiate, as only the contracting parties to that treaty need to agree. Such a mechanism should help to avoid inconsistent interpretations of the same treaty. This would itself be an improvement of the status quo. NAFTA case law is no stranger to inconsistent interpretations—for example, the irreconcilable approaches taken by the *Metalclad v. Mexico*²¹⁰ and *Methanex v. United States*²¹¹ tribunals on what constitutes expropriation. Similarly, tribunals have taken contradictory interpretations of the necessity defence in the United States-Argentina BIT.²¹² However, while a treaty-by-treaty mechanism might avoid inconsistent interpretations of the provisions of each individual treaty, it would have limited benefit to increasing the consistency of international investment law at the global level. Apart from those treaties that have been frequently used to ground investor claims, such as NAFTA and (currently) the United States-Argentina BIT, most individual investment treaties do not have a sufficient caseload to warrant a permanent appellate body being established. Thus, an appellate body established on an individual treaty basis would probably need to be an *ad hoc* system, not dissimilar to the current formulation of an annulment committee under ICSID.

²⁰⁸ WTO Dispute Settlement Understanding, article 17.

²⁰⁹ Blackaby, 2002, p. 355.

²¹⁰ *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award 30 August 2000.

²¹¹ *Methanex v. United States*, UNCITRAL, Award 3 August 2005.

²¹² For example, the tribunals in *CMS Gas Transmission Company v. Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005 and *Continental Casualty Co v. Argentina*, ICSID Case No ARB/03/9, Award, 5 September 2008.

The second option would be for an appellate mechanism under the auspices of an existing arbitral facility. The rejected 2004 ICSID proposal was an attempt to do this. Of the arbitral facilities currently in existence only three have been established by governments—ICSID, UNCITRAL and the Permanent Court of Arbitration. The other institutions providing arbitration services for investment disputes, for example, the International Chamber of Commerce, the Stockholm Chamber of Commerce, the London Court of International Arbitration, were established by the private sector. For an institution that is going to be reviewing decisions taken by states in their sovereign capacities with significant public interest implications, it is essential that the governing body of the organization be states, not representatives of the business sector. Of ICSID, UNCITRAL and the Permanent Court of Arbitration, ICSID has its own difficulties. Article 53(1) of the ICSID Convention states:

The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.

As the ICSID Convention does not currently provide for appeals, other than the limited procedural grounds of annulment, the convention would need to be amended. However, the ICSID Convention is unusually difficult to amend. Many treaties provide that amendments will enter force upon ratification, accession or acceptance of three-quarters of the member states party to the convention at the time the amendment was adopted. An amendment to the ICSID Convention, however, will only enter into force when ratified by *all* member states.²¹³ This is a nigh on impossible task, particularly since, as can be seen from the report of the OECD Investment Committee discussed above, not all states are in favour of an appellate mechanism in any event.

Either UNCITRAL or the Permanent Court of Arbitration could establish the architecture for an appellate mechanism. Of the two, only the Permanent Court of Arbitration provides institutional support to arbitrations conducted under its auspices. UNCITRAL arbitrations are primarily conducted on an ad hoc basis. However, UNCITRAL's current lack of institutional support could be addressed when designing an appellate mechanism, if such support was considered necessary for the mechanism to function appropriately.

Another option would be a new treaty specifically designed to establish a global appellate mechanism for investment arbitration. Such a treaty would not be unprecedented—the ICSID Convention is a global treaty establishing an institution to resolve disputes at first instance.

²¹³ ICSID Convention, article 66(1):

If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.

Moreover, some recent investment treaties, notably those of the United States, specifically refer to the possibility of a multilateral appellate mechanism.²¹⁴ The main obstacle would be securing political will from a sufficient number of states that wish to see an appellate mechanism established.

4.6.4.7 Preventing overuse of the appellate mechanism

One of the arguments against an appellate mechanism noted above is that the losing party, including investors with claims against developing country host states, will appeal an unfavourable award as a matter of course. One possible alternative to avoid this might be to include a preliminary requirement that the party wishing to appeal has to seek leave to do so from the appellate body. This would add some time and expense to the process, although less than going through a full appeal process with an unmerited appeal. It may also be possible to make leave requests on strict timeframes, and possibly on the papers only (avoiding the need for a hearing on the question of leave).

Another alternative, proposed by the OECD Investment Committee above, is that the appealing party be required to post a bond in the sum of the award before commencing the appeal. However, this would disadvantage host states seeking to appeal, without placing investor appellants under the same constraints (as they have no award to pay even if they lose). This alternative should therefore be avoided.

In sum, it is possible to envisage how an appellate mechanism might operate. However, if one is to be established it must be designed carefully in order to avoid a system that allows investors to have multiple chances to succeed against developing country host states, leaving host states at greater risk of adverse outcomes than under the current regime.

²¹⁴ Recent United States investment treaties include a provision that envisage the establishment of a multilateral appellate mechanism. For example, article 10.19 of the United States-Morocco Free Trade Agreement states:

10. If a separate multilateral agreement enters into force between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such an appellate body review awards rendered under Article 10.25 in arbitrations commenced after the regional or multilateral agreement enters into force between the Parties.

A similar provision is contained in each of the free trade agreements signed by the United States and Oman, Chile, Singapore and Uruguay. The Dominican Republic-Central American-United States Free Trade Agreement and the trade promotion agreements between the United States and Peru and Columbia also contain such a provision.

4.7 The Creation of a World Investment Court²¹⁵

Whilst an appellate mechanism may increase consistency in international investment law overall, there are potential risks for developing country host states. In particular, the risk that well-resourced investors who lose on the original award may appeal and ultimately succeed.

Moreover, unless the problems identified in this paper are addressed at each level of the investment arbitration process, only decisions taken on appeal will have the requisite legitimacy. It is little use to put a pretty roof on a building whose walls are full of holes. Either the issues that currently undermine the investment arbitration process need to be addressed, or else, a different model of dispute resolution is needed.

One arbitrator has suggested:

A more radical solution [. . .] would be the creation of a permanent judicial body, whose members would be drawn from eminent practitioners with an equal balance of members from capital-importing and capital-exporting states [. . .]. There would be no lengthy tribunal appointment process and a panel of judges would be selected randomly upon filing of a claim (possibly respecting a balance of at least one judge from a capital-exporting country and a capital-importing country on each panel). [. . .] In this way, the overriding public interest in investor-triggered dispute resolution would be preserved but it would be insulated from much of the criticism leveled at the current process by the public and the states alike.²¹⁶

The establishment of a world investment court would provide an opportunity to address all the concerns set out in this paper. The court's rules of procedure could provide for the requisite transparency and the possibility for submissions from non-parties. A number of the options for increasing consistency and coherence discussed above could be incorporated also. For example, the court's modus operandi could include a doctrine of persuasive precedent and an interactive judicial style and secretariat support.

However, the most significant advantage of setting up a world investment court is that it would provide an opportunity to establish a permanent decision-making body that is independent, impartial and possesses appropriate expertise. Security of judicial tenure has been described as a cornerstone of the rule of law.²¹⁷ Security of tenure includes a prescribed term of office and an appropriate salary, on the basis that judges will therefore not need to rely on income from other sources.

²¹⁵ Michael Goldhaber (2004) has previously used this term when proposed a global investment appellate mechanism. Here, it refers to a court both of first instance and above.

²¹⁶ Blackaby, 2002, p. 364–365

²¹⁷ Stephen, 1999

When a state accedes to the treaty establishing the court, it might be given the right to nominate two members, not necessarily of its nationality, to the court roster. The prerequisites might be similar to that required by the Statute of the International Court of Justice. Nominees to the Court must be of “high moral character” and “possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.”²¹⁸ Each case might be decided by a panel of three judges. The arbitrator’s proposal quoted above suggests that there be one judge from a capital exporting state and one from a capital importing state. As a number of countries are both capital importers and exporters, a better alternative might be for there to be one judge from a developing country and one from a developed country in each case. Judges might be appointed to cases on a roster basis, save for the consideration that one judge be from a developed country and one from a developing country.

4.7.1 Institutional home

There are two basic alternatives as to how a world investment court could be established. Either it could be created under the auspices of an existing institution or a new free-standing court might be created. With respect to an existing institution, the same concerns that were discussed above in respect of an institutional home for an appellate mechanism are applicable. The parent institution must be an intergovernmental body viewed as independent by the international community of states. ICSID, UNCITRAL and the Permanent Court of Arbitration might in theory fulfill this criteria, however UNCITRAL does not have experience in servicing a dispute settlement body itself so would not seem suitable. ICSID clearly has experience in administering investor-state disputes, however, the ICSID Convention would require significant amendment (requiring unanimous ratification) if its arbitration model was to be replaced by a court. The Permanent Court of Arbitration may be a more suitable option. Alternatively, a free standing treaty to establish a court could be negotiated under the auspices of the United Nations.

4.7.2 Recourse to the world investment courts

Recourse to the courts may be provided in three ways. First, in respect of existing treaties, most provide recourse for investors to refer disputes to ICSID and/or UNCITRAL and/or another specified arbitral institution. In addition, some investment treaties allow for recourse to arbitration under any arbitration rules agreed upon between the disputing parties. While investment treaties that refer only to arbitration at specific arbitral institutions may not be wide enough to allow recourse to a world investment court, those that allow recourse to any arbitral rules agreed by the parties may arguably be able to provide recourse, should both disputing parties agree. Second, it would be open for Contracting Parties to either agree between themselves to amend the treaty to refer disputes to the world investment court, or less formally, to make a subsequent agreement between them that

²¹⁸ Statute of the International Court of Justice, article 2.

disputes should be so referred. Third, the proposal of a world investment court can be incorporated during the negotiation of future investment treaties.

4.7.3 An opportunity to provide balance

There are several ways that a world investment court might provide a more balanced system for the resolution of investment disputes. First, while the statute of the court could not change the intention of an investment treaty, which is a task solely for the treaty's contracting parties, the mandate of the court itself should be to resolve investment disputes with the objective of furthering sustainable development and the United Nations Charter.²¹⁹ This is in accordance with its status as being part of the United Nations system. The second way is a more radical proposal.

The rights afforded to investors under investment treaties to bring claims to binding arbitration for compensation is unparalleled in international law. The establishment of a world investment court would entrench this elite status even further. The current investment arbitration regime has been criticized by non-governmental organizations and academics as one-sided. If investors are to be afforded a further privilege by having a permanent body set up to hear their grievances, this should come with concomitant obligations.

Currently, corporations are able to use their corporate structure and the legal concept of the corporate veil to avoid the jurisdiction of host state courts in respect of claims against them. It is proposed here that the world investment court also have jurisdiction to hear claims brought by a state against a foreign corporation in respect of harms perpetrated in the host state. The investment treaty would require the investment to be approved by the host state as is currently required under some Asian investment treaties.²²⁰ Part of the approval process would be consent by the investor to accept the jurisdiction of the host state courts and the world investment court with respect to any claims that may arise against it. The same definition of investor would apply, that is all entities or shareholders that may qualify as investors protected under the investment treaty would be subject to the jurisdiction of the court with respect to claims by the host state against the investor. While such

²¹⁹ The United Nations Charter, 26 June 1945. The Preamble to the United Nations Charter states:

"We the Peoples of the United Nations Determined [...] to promote social progress and better standards of life in larger freedom [...]."

Article 1 of the United Nations Charter states:

The purposes of the United Nations are: [...] 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion [...]."

²²⁰ For example, article 2 of the 2000 India-Thailand bilateral investment treaty states: "The benefit of this Agreement shall apply to all investments made by investors of one Contracting Party in the territory of the other Contracting Party, which have been admitted in accordance with the laws and regulations and, where applicable, **specifically approved in writing by the competent authorities concerned of the other Contracting Party**, whether made before or after coming into force of this Agreement" (emphasis added).

a proposal would clearly require further thought before it might be put into effect, it serves here as a useful reminder of the special privilege that investment treaty arbitration affords investors and the need to restore balance.

5.0 Conclusion and Summary of Recommendations

This paper has considered institutional options to enhance the legitimacy of the investment treaty arbitration process. In particular, it considered options to improve the independence, impartiality and expertise of arbitrators, to improve transparency and accessibility of the arbitral process and to improve the consistency and coherence of arbitral awards.

The analysis has compared the most-used arbitration rules, recent developments in investment treaties and practices in other international dispute resolution settlement processes. As a result of this analysis, it makes the following recommendations.

5.1 Ensuring the independence, impartiality and expertise of arbitrators

Rules providing the following should be included in the rules used in investor-state arbitrations and/or investment treaties:

- i. No person may be appointed as arbitrator if they have acted as counsel or advised in any capacity in an investor-state dispute in the last three years.
- ii. No person shall accept instructions as counsel or advise in any capacity in an investor-state dispute while he or she is appointed as an arbitrator in an investor-state dispute and for 3 years after the final award in that dispute is rendered.
- iii. No person shall be appointed as arbitrator if they are an equity partner in a legal partnership that provides services to clients with foreign investments.
- iv. Any challenge regarding an arbitrator's independence and impartiality shall be decided in a transparent manner, with reasons given for the decision by an independent and impartial body. Fellow arbitrators or arbitral institutions whose parent organization represents business interests do not qualify as independent and impartial for this purpose.

5.2 Improving the transparency and accessibility of the arbitral process

Express provisions requiring the following should be included in investment treaties and in the arbitration rules used in investor-state disputes:

- i. Disclosure of the existence of the proceeding;
- ii. Disclosure of the pleadings and other documents filed in the proceeding;
- iii. Open hearings;
- iv. Disclosure of the award; and
- v. The possibility for civil society to seek leave to file submissions as a non-disputing party.

5.3 Enhancing the consistency and coherence of arbitral awards

- i. Arbitral institution such as ICSID could adopt a practice note (similar to the Practice Directions adopted by the International Court of Justice) directing tribunals appointed under its rules to follow an iterative approach in the formulation of their words along the lines used in the WTO dispute settlement panels. Alternatively, parties to an investment treaty might agree among themselves that tribunals resolving disputes brought under that treaty should use such an iterative approach.
- ii. Provisions empowering tribunals to consolidate disputes under the same treaty sharing a question of law or fact would be a useful mechanism to insert into arbitration rules and investment treaties to improve the consistency of results in concurrent disputes.
- iii. A doctrine of *jurisprudence constante* could be introduced as a working method for arbitral decision-making in either the arbitration rules or in individual treaties.
- iv. The insertion of a mechanism in future investment treaties stipulating that interpretative statements issued by the parties will have binding effect may be a useful tool to promote consistency and coherency in the interpretation of the treaty's provisions subsequent to the treaty's adoption. Such statements might be issued by parties in order to efficiently clarify points in a treaty that may have received inconsistent or incoherent treatment by tribunals in other investment disputes.
- v. The establishment of an appellate mechanism, so long as it is designed to prevent developing country host states being at risk of multiple tiers of investor claims.
- vi. The creation of a world investment court, so long as it is recognized that this further enshrines the elevated status of investors in international law and it is therefore designed to ensure an appropriate balance between investor rights and sustainable development.

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