

**THE STATE OF INTERNATIONAL
INVESTMENT ARBITRATION: THE POSSIBILITY OF
ESTABLISHING AN APPEAL MECHANISM**

Nicolette Butler

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The candidate confirms that the work submitted is her own and that appropriate credit has been given where reference has been made to the work of others.

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Abstract

Currently most international investment disputes are settled through investment arbitration. Investment arbitration is not carried out by a single omnipotent body or court; rather, it is carried out by a number of different bodies (including permanent arbitral institutions as well as ad hoc tribunals). These different institutions and tribunals often produce diametrically opposing decisions (which are final and binding), in cases where similar or even the same facts are at stake. This is possible because binding precedent and stare decisis do not operate in international investment arbitration. The conflicting decisions that are being made are causing a crisis of consistency and uniformity in international investment arbitration.

In order to address this crisis and reduce the capacity for inconsistent decisions to occur, commentators have suggested various reforms to the system of international investment arbitration. One suggestion that has been put forward is the introduction of an appeal mechanism. The primary objective of this thesis is to examine this proposal in detail. The thesis explores the debate around the possible establishment of an appeals facility, analysing the basis of the call for, as well as the potential advantages and disadvantages of an appellate mechanism. It is submitted that the basis of the call has been established and that the benefits would outweigh any demerits. Accordingly, the thesis moves on to explore how an appeals facility might best be introduced. A few suggestions have been made in this regard in the past, including the creation of a centralised world investment court. This and indeed others will be closely examined in this work. Finally, the thesis will consider whether any existing international or regional dispute settlement mechanisms could serve as inspiration for any future reforms to the system of international investment arbitration.

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Abbreviations

AISCC	Arbitration Institute of the Stockholm Chamber of Commerce
ASEAN	Association of South East Asian Nations
BIT	Bilateral Investment Treaty
CPR	Centre for Public Resources
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
ECJ	European Court of Justice
EU	European Union
FDI	Foreign Direct Investment
FTC	Free Trade Commission
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HKIAC	Hong Kong International Arbitration Centre
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IEO	International Economic Order
IFCAI	International Federation of Commercial Arbitration Institutions
ILC	International Law Commission
IMF	International Monetary Fund
ITO	International Trade Organisation
MAI	Multilateral Agreement on Investment

MERCOSUR	Southern Common Market
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organisation
NIEO	New International Economic Order
OAS	Organisation of American States
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PICJ	Permanent International Court of Justice
PRC	Permanent Review Court
SEOM	Senior Economic Officials Meeting
TRIMS	Agreement on Trade Related Measures
TRIPS	Agreement on Trade Related Aspects of Intellectual Property
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US/ USA	United States/ United States of America
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

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CHAPTER I: INTRODUCTION

1.1 General background

Throughout the history of modern civilisation, trading and investment has not been restricted to within national borders. Gradually, the international law of foreign investment evolved in order to regulate such activity. Accordingly, the international law of foreign investment is one of the oldest divisions of international law. Notwithstanding its maturity, foreign investment law was until relatively recently, a comparatively underdeveloped area of international law. More recently, however, the area has witnessed a period of rapid expansion, and it is now regarded as one of the fastest growing areas of international law.¹ Jackson crystallised the difficulties posed by these recent developments when he said,

that any attempt to follow the developments of international economic law “is like trying to describe a landscape while looking out of the window of a moving train- events tend to move faster than one can describe them”.²

The investment statistics are testament to this rapid growth; in the early 1980's the amount of foreign direct investment (FDI) was around \$50 billion per year.³ In little over 20 years this figure had risen to \$1.9 trillion per year, as recorded in 2007.⁴ Undoubtedly due to the global economic crisis, this figure dropped to \$1.18 trillion per year in 2009.⁵ In 2010, the latest year for which statistics are available, the value of worldwide FDI was \$1.25 trillion.⁶ This recent increase suggests that the drop in FDI was temporary and due to the general instability of the economic climate. As the global economic climate

¹ See S Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008) 7 for an in depth explanation of the evolution of foreign investment.

² See J Jackson, *Legal Problems of International Economic Relations* (3rd Edition, West Publishing 1999) as cited in C Tietje et al, 'Once and forever? The legal effects of a denunciation of ICSID' (2008) <<http://www.wirtschaftsrecht.uni-halle.de/sites/default/files/altbestand/Heft74.pdf>> accessed 31 January 2012.

³ See the latest statistics available on foreign direct investment 'UNCTAD: FDI Statistics' <<http://unctadstat.unctad.org/TableView/tableView.aspx?ReportId=88>> accessed 9 March 2012.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

improves, it is expected that FDI levels will continue to increase.⁷

Despite the slight (probably temporary) drop in FDI, investment has skyrocketed, particularly within the last two decades. This rapid expansion in international investment caused the law that regulates the area to develop in an awkward manner, merging traditional customary international law principles and rules developed in investment treaties in a clumsy way. International investment agreements can take many forms⁸, one of the most common are bilateral investment treaties (BITs).

BITs are agreements between states which establish the terms and conditions for investment by nationals and companies of one state in the other state. Foreign investment has long been seen as an important vehicle for economic development; this explains why all countries seek to attract FDI. In order to attract FDI, countries create BITs which are thought to promote and protect foreign investment.⁹ By the end of 2011, around 6,100 international investment agreements had been concluded, 2,800 of which took the form of BITs.¹⁰ Of course, with the increase in FDI and in the number of international investment agreements, the number of investment related disputes has also risen significantly. From less than 5 cases being recorded annually in the late 1980's and early 1990's, to around 40 to 45 cases being recorded annually in

⁷ This sentiment is echoed in the 'UNCTAD World Investment Report 2011' <<http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf>> accessed 9 March 2012 at 2, which states that FDI rose by 5% in 2010, but remain 15% below pre financial crisis levels. Nonetheless, UNCTAD expects FDI to have recovered to its pre-crisis levels by 2013.

⁸ For a discussion of different types of international investment agreements see K Vandeveld, 'A brief history of international investment agreements' (2005) 12 *University of California Davis Journal of International Law and Policy* 157.

⁹ Recently there has been some debate as to whether or not BITs do actually promote and attract FDI. See K Sauvart and L Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP USA 2009), J Salacuse and N Sullivan, 'Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain' (2005) 46 *Harvard Journal of International Law* 67, E Neumayer and L Spess, 'Do bilateral investment treaties increase foreign direct investment to developing countries?' (2005) 33 *World Development* 1567 and P Egger and M Pfaffermayr, 'The impact of bilateral investment treaties on foreign direct investment' (2004) 32 *Journal of Comparative Economics* 788.

¹⁰ See 'UNCTAD World Investment Report 2011' (n 7) 100 for in depth discussion of the number of international investment agreements and bilateral investment treaties in operation.

the years 2003-2005.¹¹ The number of recorded cases has dropped slightly in the last few years, with 25-35 new disputes having been recorded annually in 2006-2010. This small decrease is in correlation to the slight dip in FDI as a result of the global economic crisis.¹²

One way in which international investment agreements (more specifically BITs) promote and protect investment is through the provision of guidance on the settlement of any disputes which may arise during the course of investment.¹³ Investors are keen to ensure that in the event that a dispute may arise with the host country, they will be able to resolve the dispute fairly and without excessive delay. In this way then, the existence of an effective dispute settlement mechanism greatly contributes to a favourable investment climate in the host country.¹⁴ Generally, BITs provide for any disputes to be settled through arbitration.

That the settlement of the majority of international investment disputes relies heavily on arbitration is not in itself especially problematic; in fact, there is much evidence that arbitration is an efficient and effective means of settling disputes.¹⁵ The central problem is with the operation of the system of investment arbitration. Disputes are settled by a number of different arbitral bodies; there is no single, authoritative institution which is solely responsible for hearing investment disputes. Rather, numerous arbitral bodies, including both ad hoc and permanent institutions are settling investment disputes, and in many cases are reaching diverging conclusions on even the most basic of investment

¹¹ See K Sauvart, 'The rise of international investment, investment agreement and investment disputes' in K Sauvart (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 12 for recent investment dispute statistics.

¹² See 'UNCTAD World Investment Report 2011' (n 7) 101 for discussion of the number of international investment disputes registered.

¹³ S Subedi (n 1) 96-98. It is thought that BITs provide assurance to foreign investors that their investment will be safe because the host state would not risk potentially costly arbitral proceedings.

¹⁴ 'UNCTAD Investor- state disputes arising from investment treaties: a review' <http://www.unctad.org/en/docs/iteit20054_en.pdf> accessed 13 January 2010.

¹⁵ S Franck, 'Development and outcomes of investment treaty arbitration' (2009) 50 *Harvard International Law Review* 435 discusses the efficacy and integrity of investment arbitration, concluding that the system is working relatively well and provides a fair method of settling disputes. Furthermore, the relatively high number of cases brought to arbitration (see 'UNCTAD World Investment Report 2011' (n 7) 101) could be seen as testament to the popularity and success of international investment arbitration.

principles¹⁶. This divergence of decisions is hindering the development of a single, coherent body of law built up through the consistent jurisprudence. As a result of this, most international investment disputes are being decided on an individualistic basis. Consequently, international investment law is unclear, incoherent and unpredictable; this unpredictability is contrary to the fundamental rule of law.¹⁷

1.2 Central research questions

This research will analyse the system of international investment law arbitration, discussing its present state and investigating the possibilities for its future development. More specifically, it will examine the proposed creation of an appeal mechanism. The central question which the research seeks to address is whether the creation of such an appeal mechanism is actually necessary? In order to fully answer this question, a number of secondary questions will undoubtedly arise. The first of these ancillary questions is whether the current system of international investment arbitration functions adequately and effectively. This then begets the question whether any suggestions for improvement would be beneficial to the system, particularly the proposed establishment of an appeal mechanism. Finally, alternative dispute settlement mechanisms, already in existence will be examined to establish whether they could be effective models for international investment arbitration.¹⁸

¹⁶ For discussion of the operation of the system of international investment arbitration see M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven International Publishing 2008) 5-10.

¹⁷ See S Franck, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions' (2005) 73 *Fordham Law Review* 1521 for discussion of how inconsistent decisions in international investment arbitration have a destabilising effect on the entire framework of the law of foreign investment. See C L de Secondat (Montesquieu), *Defense de l'Esprit des Loix* [in English: *The Spirit of the Law*] (1748, reprinted by CUP 1989) and A Dicey, *Introduction to the Study of the Law of the Constitution* (1915, reprinted by Liberty Fund Publishers 1982) and T Bingham, *The Rule of Law* (Allen Lane Publishing 2010) for discussion of the rule of law; discussion of the concept that reasoned decisions are based on legal principles, as opposed to arbitrary solutions and that everyone is equal before the law. Inconsistency and unpredictability in international investment arbitration are therefore unacceptable and contravene the rule of law.

¹⁸ See for example B Legum, 'Options to establish an appeal mechanism for investment disputes' in K Sauvart (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008), A Qureshi, 'An appellate system in international investment arbitration?' in P Muchlinski et al (eds), *The Oxford Handbook of International*

Some literature has been generated which touches on part of the central research question of this study. Various academics have offered opinions on whether an appeal mechanism is necessary in international investment arbitration. Much of this literature has focused on whether the need for an appeal mechanism has arisen. The debate surrounding this question centres largely on the alleged crisis of consistency in international investment arbitration. A number of experts have argued that inconsistency has become a feature of international investment arbitration and that it is damaging to the system itself. Inconsistency is thought to be damaging as it leads to unpredictability, incoherence and a general lack of faith in the system.¹⁹ Others argue that inconsistency has not become a feature of the system and is grossly exaggerated. Some experts go on to say that even if the system of international investment arbitration did suffer inconsistency in the future, it in itself should not be feared or avoided, as it is a natural phenomenon that will remedy itself when one judicial solution is found to be favoured over another over the course of time.²⁰ The debate surrounding inconsistency in international investment arbitration and the establishment of an appeal mechanism as a response to such inconsistency will be explored in greater depth in the thesis.

Other literature has focused on the purported advantages and disadvantages of the introduction of an appeal mechanism. The most often cited advantage of the introduction of an appeal mechanism is greater

Investment Law (OUP 2008) and M Goldhaber, 'Wanted: a world investment court' (2004) 3 *Transnational Dispute Management* 26.

¹⁹ See Franck, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions' (n 17), Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 16) 36-42, M Sornarajah, 'A coming crisis: expansionary trends in investment treaty arbitration' in K Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (n 11) 73 and A Reinisch, 'The proliferation of international dispute settlement mechanisms: the threat of fragmentation vs. the promise of a more effective system? Some reflections from the perspective of investment arbitration' in J Crawford et al (eds), *International Law Between Universalism and Fragmentation* (Brill Publishing 2008) 107.

²⁰ See J Paulsson, 'Avoiding unintended consequences' in Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (n 11) 241-265, Legum, 'Options to establish an appellate mechanism for investment disputes' (n 18) 231-240 and J Gill, 'Inconsistent decisions: an issue to be addressed or a fact of life?' in F Ortino et al (eds), *Investment Treaty Law Current Issues: Volume 1* (British Institute of International and Comparative Law 2006) 23.

consistency and coherence of the system overall.²¹ Other purported advantages include the creation of a more sustainable system²² and enhanced objectivity²³. Opponents of an appellate mechanism argue that it would reduce the flexibility of the system²⁴, damage the principle of finality²⁵ and there is a risk that the system would be re-politicised²⁶. These and indeed other purported advantages and disadvantages of an appeal mechanism will be explored later in this work. A detailed examination of the proposition to create an appeal mechanism will provide some answers to the central and secondary research questions described above and will underpin the thesis as a whole.

Some commentators have gone beyond examining the need for an appeals facility and commented on how an appellate mechanism should be introduced. Suggestions that have been put forward in this regard include introducing an appeal mechanism under the auspices of ICSID²⁷, creating an additional layer of arbitration in existing dispute settlement mechanisms²⁸ and

²¹ See K Yannaca-Small, 'Improving the system of investor-state dispute settlement: an overview' (2006) <<http://www.oecd.org/dataoecd/3/59/36052284.pdf>> accessed 16 July 2009 192.

²² See D Bishop, 'The case for an appellate panel and its scope for review' in F Ortino et al (eds), *Investment Treaty Law Current Issues: Volume 1* (n 20) for a discussion of issues surrounding the sustainability of the system of international investment arbitration.

²³ A Qureshi, 'An appellate system in international investment arbitration?' (n 18) 1157.

²⁴ At present, the parties involved in investment arbitration are able to exercise a high degree of control over very flexible proceedings. It is thought that this control and flexibility might be compromised if an appeals facility is introduced.

²⁵ See J Clapham, 'Finality of investor-state arbitral awards: has the tide turned and is there a need for reform?' (2009) 26 *Journal of International Arbitration* 437 for a thorough treatment of the principle of finality in investment arbitration and also Yannaca-Small, 'Improving the system of investor-state dispute settlement: an overview' (n 21) 194.

²⁶ De-politicisation of dispute settlement is thought to be one of the greatest achievements of the system of international investment arbitration; disputes no longer escalate to harm international relations and threaten world peace. It is thought that establishing an appeals facility might have the indirect effect of re-politicising dispute settlement. See Yannaca-Small, 'Improving the system of investor-state dispute settlement: an overview' (n 21) 195.

²⁷ See for example C Tams, 'Is there a need for an ICSID appellate structure?' (2004) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341268> accessed 18 January 2011 and C Tams, 'An appealing option? The debate about an ICSID appellate structure' in C Tietje et al (eds), *Essays in Transnational Economic Law* <<http://www.wirtschaftsrecht.uni-halle.de/Heft57.pdf>> accessed 26 January 2010.

²⁸ See A Qureshi, 'An appellate system in international investment arbitration?' (n 18) 1160.

the establishment of a world investment court²⁹ to name but a few. These and indeed other proposals will be considered in later chapters.

This study will summarise the state of international investment arbitration, analysing the literature that has been produced on the topic and seek to identify whether the system of international investment arbitration, as it currently stands, provides an adequate and effective means of settling international investment disputes. The work will then go on to investigate whether the system would benefit from reform, most specifically from the establishment of an appeal mechanism. Finally, the thesis will examine how an appellate mechanism might best be introduced into the system of international investment arbitration.

1.3 Originality and significance of the research

A thorough discussion of the proposal to establish an international investment appellate body will be of significant academic value; a study analysing this proposition exclusively and in such depth has yet to be undertaken. Thus, there is scope for valuable original contribution to the topic, and this thesis will undoubtedly advance the debate on this subject and further knowledge in this field.

Whilst there is much generalist writing on the field on international investment, only a small number of articles discuss the establishment of a bespoke appeals mechanism³⁰. The sum total of this literature is relatively modest when compared with other aspects of international investment law that have attracted a substantial amount of research and literature. The possible establishment of an appeal mechanism has been discussed in a number of books and articles, however there is no single comprehensive analysis of current state of international investment arbitration and the debate surrounding the establishment of an appeal mechanism. This study will therefore provide a comprehensive analysis of the current state of international investment

²⁹ See M Goldhaber, 'Wanted: a world investment court' (n 18).

³⁰ See for example M Goldhaber *ibid*, M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 16), F Ortino et al (eds), *Investment Treat Law: Current Issues Volume I* (n 20) C Rogers and R Alford (eds), *The Future of Investment Arbitration* (OUP 2009), K Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (n 11) and M Waibel et al (eds), *The Backlash Against Investment Treaty Arbitration: Perceptions and Reality* (Kluwer 2010).

arbitration and the debate surrounding the establishment of an appeal mechanism.

None of the literature analyses in as much depth whether or not the establishment of an appeal mechanism is necessary or desirable, let alone suggest how the establishment of an appellate investment body might be achieved. This study will provide the detailed analysis of the different means by which an appeal mechanism might be introduced which is missing from the current literature on the subject. The lack of literature on this subject is especially surprising, considering its potential contribution to the field. It is intended that this thesis will fill the gap in the current literature. This work will therefore be of considerable value in terms of its contribution to academia and the ongoing debate concerning the establishment of an appeal mechanism.

Furthermore, this work may also have an important practical value, should an appeal mechanism be introduced in the future. It may provide a springboard for discussions as to the practicalities of introducing such a mechanism. International investment experts have put forward numerous suggestions as to how an appeal mechanism could and should be introduced, however few ideas have been considered seriously and in any great depth before. This study analyses the most prominent suggestions such as incorporating appeal into the ICSID mechanism as well as creating an independent world investment court in detail, outlining the potential advantages and disadvantages of each proposal.

This topic is also of great significance given that total worldwide FDI accounts for trillions of dollars each and every year; this amount of international investment is incomprehensible to most people. Any legal framework governing transactions involving such huge sums of money must ensure that it operates in the most optimal manner in order to best serve its users. Furthermore, this topic is of increased importance given the need to stimulate FDI given the economic difficulties that so many countries are currently experiencing

Additionally, a large number of disputes arise from FDI; such disputes often involve huge sums of money being at stake, as well as important issues such as human rights, environmental protection and the rights of states to regulate their internal affairs which overlap with other areas of international law. Accordingly, international investment arbitration must ensure that it is operating

within the broader framework of public international law and be fully accountable, complying with the rule of law.

1.4 Methodology and overview of the thesis

This thesis is the product of extensive legal research in the field of international investment law, more specifically investment arbitration and the possibilities for its future development. The legal approach adopted combines the positivist approach (describing what the law is and how it operates currently) and the normative approach (proposing what the law ought to be and how it ought to operate).

The research is based on an extensive survey of the relevant literature in this field. Every endeavour has been made to ensure that the research highlights all of the most recent and most relevant literature on the subject of the state of the system of international investment arbitration and the creation of an appeal mechanism. Thus, the thesis is a comprehensive guide to the dispute settlement system in international law as it currently stands, and as to how it may develop in the future. The research was carried out by consulting a variety of different sources of literature including, but not limited to: books; journal articles; the decisions of tribunals; discussion papers and websites.

In order to answer the central research question, and indeed the secondary questions which will be raised, the thesis is divided into eight chapters. The present chapter provides a general introduction to the subject, including background information, introduces the central and the secondary research questions, discusses the importance of the research and describes the methodology employed and presents an overview of the structure of the thesis. Chapters two, three and four provide a brief history and overview of the system of international investment law and the settlement of investment disputes. The chapters will show that arbitration has become the preferred method for the settlement of investment disputes, before going on to evaluate the system of investment arbitration and highlight its strengths and weaknesses. Chapters five and six will discuss how the current system of international investment arbitration might be improved upon, focusing on the proposal to create an appellate mechanism. In light of this, chapter seven will investigate whether any

existing international and regional dispute settlement mechanisms might serve as a model for international investment arbitration and inspiration for reform. Chapter eight will provide a conclusion to the discussion and answer the central and secondary research questions.

CHAPTER II: HISTORY OF INTERNATIONAL INVESTMENT LAW AND DISPUTE SETTLEMENT

2.1 Introduction

The law of foreign investment evolved in order to regulate the activities of those doing business abroad.¹ Accordingly, international investment law has a lengthy, interesting history. The roots of the law of foreign investment can be traced back to customary international law principles; they provided the international minimum standard of protection which foreign investors can expect when investing abroad. However, since then, several distinct attempts have been made to formalise the regulation of the international law of foreign investment. In the 1950's, the framework of international investment law was permanently changed by the proliferation of BITs. The customary international law roots, the attempts to formalise international investment law regulation and the phenomenon of BITs will be discussed in the first section of this chapter.

The next section will move on to examine the history of international dispute settlement. The chapter will examine various dispute settlement mechanisms that are traditionally used to settle general international disputes, from diplomatic methods of dispute settlement such as negotiation, mediation and conciliation to judicial settlement of disputes through courts and arbitration.

The chapter will then consider the means by which international investment disputes may be settled. Traditionally, two methods of dispute settlement were frequently used in investment cases; allowing the national courts of the investment host state to settle the dispute, and diplomatic protection.² Both of these will be examined before going on to consider why these methods of dispute settlement fell out of favour and were ultimately replaced by international investment arbitration.

The chapter will examine the origins of arbitration and the reasons for its popularity, before going on to discuss international investment arbitration specifically. The system of international investment arbitration is rather

¹ S Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008) 7.

² *Ibid* 12-16.

complicated; it does not operate in a manner which is comparable to domestic legal systems. Arbitration is not carried out by a single, authoritative court-like body. Rather, arbitration is undertaken by numerous different tribunals, recourse to which is set out in the BIT under which the investment dispute arises. Furthermore, these tribunals are both first and last instance; generally there is no possibility of appeal.³ Two different types of tribunal hear investment disputes; ad hoc tribunals that are appointed to settle one single dispute, and permanent arbitral bodies that hear more than one case. Both ad hoc and permanent tribunals will be discussed in this chapter.

The central aim of this chapter is to provide a general overview of the system of international investment law and the means by which general international disputes, as well as international investment disputes were traditionally settled, as well as how they are settled today.

2.2 The history of international investment law

2.2.1 Treatment of aliens and state responsibility in public international law

Vattel once stated that ‘an injury to a citizen is an injury to the state’.⁴ The relationship between an individual and state gives rise to two important principles:

- i) The state is responsible for the acts of its citizens of which its agents knew or ought to know and which cause harm to the legal interests of another state.
- ii) The state has a legal interest in its citizens and in protecting this interest the State may call to account those harming its citizens.⁵

In the *Mavrommatis*⁶ case, the PCIJ declared that a state is entitled to protect its citizens when another state commits an act contrary to international

³See M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven International Publishing 2008) 160.

⁴ E de Vattel, *Les Droits des Gens* [English Translation: *The Law of Nations*] (1758, reprinted by Natural Law and Enlightenment Classics 2008) as cited in I Brownlie, *Principles of Public International Law* (7th Edition, OUP 2008) 519.

⁵ A Kaczorowska, *Public International Law* (4th Edition, Routledge 2010) 443

⁶ *Mavrommatis Palestine Concessions (Greece v UK)* [1924] PCIJ Rep Ser A No 2, 12, ‘it is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state,

law which injures that citizen, where they have been unable to seek redress through ordinary channels. If a state chooses to take up the case on behalf of its citizen through diplomatic protection, in reality it is asserting its own right to ensure respect for the rules of international law. The defendant state's duties are not owed to the injured alien, but rather to the alien's state.

The national standard of treatment is the standard of treatment preferred by newer, less economically developed nations. This standard affords aliens the same standard of treatment as nationals of the state in question. This standard does not apply universally; some issues, such as participation in public and political life are exempted.⁷

The international standard of treatment of aliens, which is generally supported by older and more economically developed nations, is based solely on international law. The law is not concerned with equality of treatment between host state nationals and aliens; rather, it ensures a common international standard of treatment of aliens. This is the standard that is favoured by a large number of international courts and tribunals.⁸

The conflict between the national and international standard of treatment is largely due to political and economic differences between states. In its debate on the Second Report on State Responsibility in 1957⁹, the International Law Commission (ILC) attempted to move away from the conflict by linking the question of the treatment of aliens to the protection of human rights. The ILC Rapporteur proposed that,

The state is under a duty to ensure to aliens the enjoyment of the same civil rights, and to make available to them the same individual guarantees as are enjoyed by nationals [the national standard]. These rights and guarantees shall not, however, in any case be less than the 'fundamental human rights' recognised and defined in contemporary international instruments [the

from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right – its right to ensure, in the person of its subjects, respect for the rules of international law'.

⁷ See A Kaczorowska, *Public International Law* (n 5) 445.

⁸ *Ibid.*

⁹ In 1955, the ILC appointed Garcia-Amador as a special rapporteur. Between 1956 to 1961 he submitted six different reports on the subject of state responsibility for injuries to aliens.

international minimum standard]. In consequence, in case of violation...with respect to aliens, international responsibility will be involved only if internationally recognised 'fundamental human rights' are affected.¹⁰

With the rapid growth in the area of human rights since 1957, it is generally accepted that the ILC Rapporteur's view is correct. Accordingly, the standard of treatment to be afforded to aliens is that established by the international law of human rights. Traditionally this standard ensured that aliens were not directly wronged, for example by being tortured or killed in the host state. Furthermore, it ensured that if they were mistreated, they would have access to justice. However, more recently, these traditional areas involving state responsibility and diplomatic protection have become less important. New, so-called 'indirect' wrongs have emerged, including issues such as the protection of the property of aliens (such as their foreign investments).¹¹

In the early 1960's, the ILC worked towards the codification of rules concerning state responsibility. Progress was slow and steady, and in August 2001, the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts¹² were adopted. The Draft Articles represent one of the ILC's longest running and most complicated works. On 12 December 2001, the UN General Assembly adopted Resolution 56/83 which 'commended [the articles] to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.'¹³ The articles form the basis of the international law on state responsibility and the treatment of aliens.

2.2.2 Customary international law roots of the law of foreign investment

Formal regulation was not a prominent feature of the law of foreign investment during its earliest days. Instead, customary international law

¹⁰ F Garcia-Amador, Second Report on State Responsibility, UN Doc.A/CN.4/106 (1957) <http://untreaty.un.org/ilc/documentation/english/a_cn4_106.pdf> accessed 27 August 2012 as cited in A Kaczorowska, Public International Law (n 5) 446.

¹¹ Ibid A Kaczorowska.

¹² International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) Supplement No.10 (A/56/10), chp.IV.E.1, available at <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> accessed 8 August 2012.

¹³ UN General Assembly Resolution 56/83, UN Doc.A/RES/56/83 12 December 2001, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/477/97/PDF/N0147797.pdf?OpenElement>> accessed 27 August 2012.

principles were central to the governance of international investment activities.¹⁴ The key challenge in regulating foreign investment activities is determining which nation's laws should govern foreign investment.¹⁵ Early scholars such as Grotius¹⁶ and Vattel¹⁷ were of the opinion that the law of the investment host state (local law) should not be applied to foreign investors, as they were already subject to the law of their home state. The consequence of this was that investors' assets could not be expropriated by the host government enacting legislation. Many early investment treaties provided for this home state rule.¹⁸ Consequently, under the early international investment law regime, it was largely accepted that host states could not nationalise the assets of foreign investors. The origins of international investment law clearly display the intention that it should strive to protect aliens investing abroad.¹⁹

When colonies began to gain independence, they also began to reject the idea that home state law should apply (because it basically affords foreign investors greater protection than nationals of the host state²⁰). Relying on the doctrine of state sovereignty and sovereign equality, they asserted that the law of the host state should reign supreme. By definition, sovereignty implies that the host state is supreme within its own territory and therefore its laws are also supreme therein. Consequently, they asserted that foreign investors' assets could in fact be expropriated by the host state government, provided that the investor was properly compensated. However, advocates of host state rule did concede that if the local law was considered to be below minimum standards of justice and equity, the international minimum standard should be applied to investors. In order to ascertain the standard of minimum treatment, one would need to examine the sources of international law. In the absence of internationally agreed treaties, other sources, such as customary international law would be taken into consideration. Essentially, this meant relying on the

¹⁴ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 1) 7.

¹⁵ Home versus host state rule was a highly contentious issue during the early days of the law of foreign investment.

¹⁶ H Grotius, *De Jure Belli ac Pacis Tres* (1625), translated *On the Law of War and Peace*, and reprinted (Kessinger Publishing 2010).

¹⁷ E de Vattel, *Les Droits des Gens* (n 4).

¹⁸ See S Sutton, 'Emilio Augustin Maffezini v Kingdom of Spain and the ICSID Secretary General's Screening Power' (2005) 21 *Arbitration International* 119.

¹⁹ S Subedi (n 1) 8.

²⁰ E Borchard, 'The minimum international standard in the protection of aliens' (1939) 33 *American Society of International Law Proceedings*.

standards of the investor's home state because the commentary and case law on foreign investment tended to originate from investor home states.²¹

Once the idea that the international minimum standard should be applied to foreign investment (rather than host state law) gained impetus, attention began to turn to the definition of that minimum standard. It was accepted that the traditional principles of fairness, justice, equality and the practice of states should be taken into consideration. However, it was also submitted that human rights principles should also be taken into account, particularly in view of the fact that it is widely understood that they encompass property rights. In effect, the inclusion of international human rights law in the international minimum standard extends the application of the investor states' national property laws to foreign investors. This means that property belonging to state nationals or foreign investors alike could not be expropriated without the provision of compensation. Thus, state sovereignty and states' rights to regulate foreign investment had to be balanced with international human rights principles.²²

Turning back to the central issue of tension between home versus host state regulation, any discussion of the matter cannot overlook the views of Argentine jurist Carlos Calvo. He led a great movement of opposition to the submission that home state rule (poorly disguised as the international minimum standard) should prevail. He, and indeed many others, believed it unfair to accord a higher standard of treatment to foreign investors than to local investors (as was the case under the international minimum standard). Instead, Calvo campaigned for equality of treatment for national and foreign investors. Calvo and his supporters were concerned that newly independent colonies and lesser economically and juridically developed states could offer foreign investors a higher standard of treatment that it would be able to provide to its own nationals. The Calvo doctrine supported the assertion that foreign investors should be treated in the same manner as national investors. Another central element of the Calvo doctrine provided that in the event that a dispute arose, local remedies should be exhausted before resorting to international arbitration.²³

²¹ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 1) 10.

²² See A Newcombe and L Paradell, *Law and Practice of Investment Treaties* (Kluwer 2009) 13.

²³ *Ibid.*

The Calvo doctrine was particularly popular in Latin America, with essential aspects of the doctrine being incorporated into many Latin American state constitutions and investment treaties. After both the Mexican and Russian revolutions in the early twentieth century, the respective governments asserted their ownership of all the land and many foreign investors' assets were expropriated without payment of appropriate compensation. These actions were rationalised with reference to the Calvo doctrine. However, many other (particularly Western states) saw the expropriations as Calvo doctrine extremism. Mexico did agree to provide some compensation, though it was not necessarily prompt, adequate or effective. A claims commission between the USA and Mexico was established in order to hear the claims of American investors whose assets had been expropriated by the Mexican government. In spite of this, the Commission did not hear a single claim, and after almost ten years, the USA increased its efforts to seek justice. What resulted was a series of diplomatic exchanges between US Secretary of State Cordell Hull and the Mexican government.²⁴

Hull articulated his position on the matter, which subsequently became known as the Hull formula. Hull asserted that;

The taking of property without compensation is not expropriation. It is confiscation...The whole structure of friendly intercourse, of international trade and commerce, and many other vital and mutually desirable relations between nations indispensable to their progress rest upon the single and hitherto solid foundation of respect on the part of the governments and of peoples for each other's rights under international justice. The right of prompt and just compensation for expropriated property is a part of this structure.²⁵

The Mexican Foreign Minister of course disagreed, replying;

No rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred

²⁴ For a detailed discussion of the diplomatic exchanges between the USA and Mexican governments, see A Lowenfeld, *International Economic Law* (OUP 2008) 475-481.

²⁵ Excerpt from G Hackworth, *Digest of International Law*, Vol III (US Department of State 1942) 655-661. The complete USA-Mexican exchange of correspondence in English and Spanish was published in Department of State Publishing 1288 'Compensation for American-owned lands expropriated in Mexico' (1939) *Inter American Series* 16 as cited in Lowenfeld, *ibid*.

compensation, for expropriations of a general and impersonal character like those which Mexico has carried out.²⁶

Basically, in his communication, Hull expressed his support for compensation for expropriated assets as contained in the international minimum standard of treatment for foreign investors (essentially favouring the notion that home state rule should prevail in foreign investment).

The matter between the Mexican and American government was eventually resolved by means of an accord which compensated US investors whose assets had been expropriated.²⁷

By this time, it was the end of the 1940's and the conditions in which expropriation could take place had been clarified through state practice and also through the emergence of customary principles. Foreign investment law was beginning to find its place as a distinct discipline. The Hull formula was popular, sweeping aside the opposing Calvo doctrine. It was generally accepted that prompt, adequate and effective compensation was to be provided should expropriation occur.²⁸

2.2.3 Attempts to formalise the regulation of international investment law

- Havana Charter

Up until the 1940's the regulation of foreign investment activities had largely relied upon the development of customary law principles. Attempts to formalise international investment rules were made once the Second World War had ended. The end of the war signalled the establishment of the United Nations (UN), the new world order, and attempts to regulate international foreign investment by newly established international economic institutions. The newly created UN held a conference on Trade and Employment between 21 November 1947 and 24 March 1948 in Havana, Cuba. The outcome of the conference was the draft Havana Charter which laid the foundations for the International Trade Organization (ITO). However, the Havana Charter and the

²⁶ *Ibid.*

²⁷ A Lowenfeld, *ibid* 480-481.

²⁸ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 1) 18.

ITO never did come into existence, partly due to repeated rejection by US Congress.²⁹

- **Abs- Shawcross Convention**

In 1959, some of the major capital-exporting states attempted to introduce an international treaty on foreign investment which was known as the Abs-Shawcross Convention³⁰. Being the brainchild of the capital-exporting countries, it mainly served to protect the interests of foreign investors. Unsurprisingly, the convention attracted strong opposition from the capital-importing countries who would effectively pay the price of having to honour higher investor protection provisions. Consequently, the convention was not adopted. An attempt to revive many of the provisions of the convention was seen in the OECD's Draft Convention on the Protection of Foreign Property. However, this too was never adopted.³¹

- **Declaration on Permanent Sovereignty Over Natural Resources**

The UN's work in the field of international investment continued through various initiatives, such as the Declaration on Permanent Sovereignty Over Natural Resources.³² The sovereignty and sovereign equality of states is an important principle of the UN. A critical aspect of the principle involves each state having sovereignty over its territory and natural resources. However, newly independent states often found themselves inheriting old agreements

²⁹ A Lowenfeld, *International Economic Law* (n 24) 482.

³⁰ The Draft Convention on Investments Abroad 1959 9 *Emory Journal* 115 (1960) was created by a committee led by Dr. Abs, director of the German Deutsche Bundesbank and Lord Shawcross of the United Kingdom. For more information about the agreement see N Schrijver, 'A multilateral investment agreement from a north-south perspective' in E Nieuwenhuys (ed), *Multilateral Regulation of Investment* (Kluwer 2001) 22.

³¹ See S Picotto, 'Linkages in international investment regulations: the anatomies of the Draft Multilateral Agreement on Investment' 19 *University of Pennsylvania Journal of International Economic Law* 731 for further information on the OECD's Draft Convention on the Protection of Foreign Property.

³² 'Declaration on Permanent Sovereignty Over Natural Resources 1962', UN General Assembly Resolution 1803 (XVII), 14 December 1962 UN Doc. A/5217 full text available at <http://unispal.un.org/UNISPAL.NSF/0/9D85892AC6D7287E8525636800596092> accessed 27 August 2012. See A Lowenfeld, *International Economic Law* (n 24) 486, also see N Schrijver, *Sovereignty Over Natural Resources – Balancing Rights and Duties* (CUP 2008) 399-401.

whereby their natural resources were controlled and exploited by foreign investors/companies. These newly independent states therefore sought to rely on the doctrine of sovereignty in order to find a way out of the old agreements and regain control of their own natural resources. In order to achieve this, the UN Declaration affirms the principle that sovereign states have the right to expropriate foreign investor's assets in certain circumstances (which included providing payment of appropriate compensation). The Declaration is often seen as successfully providing a delicate balance of developing nations' concerns about retaining sovereignty, and investors' concerns about the safety of their investments.³³ The Declaration became the first international instrument to gain almost universal support for the concept that states did have the right to expropriate the assets of foreign investors under certain conditions (including the payment of compensation). The Declaration is therefore seen as '[meeting] the aspiration of the developing countries...[and embracing] part of the Hull formula preferred by developed countries.'³⁴ Accordingly, it remains one of the most widely accepted international investment instruments and is seen as representing the customary international law principles on the matter.³⁵

- **Declaration on the Establishment of a New International Economic Order**

The UN also instigated the Declaration on the Establishment of a New International Economic Order (NIEO), a revision of the Bretton Woods regime. It was thought that the original Bretton Woods regime was not well balanced and that it unfairly favoured the interests of the developed nations that created it. The NIEO was introduced to remedy this bias, aiming to promote the interests of developing countries and improve their trading conditions. An important item on the NIEO agenda was the reform of investment regulation, in order that it be organised in a manner that would be more favourable to lesser developed nations. For example, developing nations were particularly concerned about the powers of large multinational corporations who could relatively easily intervene in the governance of developing nations. The UN Declaration on the

³³ *Ibid*, A Lowenfeld 486.

³⁴ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 1) 23.

³⁵ *Ibid*.

Establishment of a New Economic Order attempted to tackle this and other important issues.³⁶

- Charter of Economic Rights and Duties

Approximately six months after the NIEO was introduced, the UN General Assembly adopted the Charter of Economic Rights and Duties.³⁷ The Charter is not a binding legal instrument. Nonetheless it is a comprehensive, far reaching document. In terms of the regulation of foreign investment, Article 2 of the Charter sets out its position, reaffirming individual states' right to permanent sovereignty (including over its own natural resources). It also confirms a state's right to regulate foreign investment in accordance with its own policies and aims. Furthermore, it asserts the right of states to regulate the activities of transnational corporations within their own jurisdictions. Lastly, Article 2 highlights a state's right to expropriate the assets of foreign investors, subject to the satisfaction of certain conditions. The NIEO also required the implementation of two codes of conduct; one on the subject of technology transfer and one on the regulation of transnational corporations.³⁸ Interestingly, the NIEO and the Charter are often seen as part of customary international law, reiterating the general principles that have come to be accepted in international investment law.³⁹

- International Bank for Reconstruction and Development / World Bank

Another institution that had a vested interest in foreign investment (specifically its promotion) is the World Bank (also known as the International Bank for Reconstruction and Development or IBRD). It is generally accepted

³⁶ 'UN Declaration on the Establishment of a New International Economic Order 1974', established by UN General Assembly Resolution 3201, UN Doc.A/RES/S-6/3201 1 May 1974, <<http://www.un-documents.net/s6r3201.htm>> accessed 27 August 2012. See also A Lowenfeld, *International Economic Law* (n 24) 489.

³⁷ *Ibid*, A Lowenfeld 492.

³⁸ Charter of Economic Rights and Duties of States 1974, established by UN General Assembly Resolution 3281, UN Doc.A/RES/3281(XXIX) 12 December 1974, <<http://www.un-documents.net/a29r3281.htm>> accessed 27 August 2012. See also A Lowenfeld *ibid* 492. See also A Newcombe and L Paradell, *Law and Practice of Investment Treaties* (n 22) 31.

³⁹ See C Joyner (ed), *The United Nations and International Law* (CUP 1999) 263.

that foreign investment is associated with increased economic development and prosperity within the investment host state. Given that most investment host states are less economically developed nations, it is easy to see why the World Bank is keen to promote foreign investment. In order to do so, the Bank has taken part in a number of promotional initiatives.⁴⁰

- **International Convention for the Settlement of Investment Disputes**

Arguably the most important of the foreign investment promoting initiatives undertaken by the World Bank is the International Convention for the Settlement of Investment Disputes, concluded in 1965. The aim of the Convention is to provide a credible mechanism for the settlement of international investment disputes. It is thought that foreign investors will be more likely to invest if they are certain that a fair, independent and reliable dispute settlement mechanism will be available to them should any problems occur during the course of the investment.⁴¹ The Convention and the dispute settlement mechanism which it created (the International Centre for the Settlement of Investment Disputes) will be discussed in more depth later.

- **Multilateral Investment Guarantee Agency**

Aside from ICSID, the World Bank has associated itself with a number of other foreign investment promoting activities. One such initiative is the Multilateral Investment Guarantee Agency (MIGA). Potential foreign investors are keen to ensure that their investment attracts additional guarantees in terms of non-commercial risks, especially when they are investing in poorer, lesser developed nations. Although protection may already be in place through existing national, regional and private insurance investment guarantee initiatives, an additional guarantee was thought to be desirable. Hence, the Convention Establishing the Multilateral Investment Guarantee Agency was created in

⁴⁰ For a more detailed discussion of the role of the World Bank, see I Shihata, *The World Bank in a Changing World: Selected essays* (Martinus Nijhoff 1991) as cited in S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 1) 30.

⁴¹ *Ibid*, S Subedi.

1985⁴². The main objective of MIGA is to encourage the flow of international investments throughout member states, with a particular emphasis on encouraging investment in less economically developed nations. The Convention highlights which risks are covered by the guarantee; examples include problems with currency, expropriation, and war/civil unrest.⁴³

- **Guidelines on the Treatment of Foreign Direct Investment**

Another initiative to which the World Bank was party, was the Guidelines on the Treatment of Foreign Direct Investment. Jointly, the World Bank and the International Monetary Fund (IMF) requested that MIGA prepare a legal framework to promote foreign direct investment. Thus in 1992, the Guidelines on the Treatment of Foreign Direct Investment were created. The Guidelines do not form a binding international instrument; however their value should not be underestimated. Emanating from some of the major international financial institutions, the guidelines do have significant influence. The text was supposedly created with a view to promoting foreign direct investment. However, a closer inspection of the Guidelines seems to suggest that the real aim was to protect foreign investment rather than merely promote it. It has been suggested that, 'the Guidelines address the conduct of states vis-à-vis foreign investors, but not the conduct of foreign investors.'⁴⁴ Many of the Guideline's provisions appear to go beyond the accepted principles of international investment law, extending protections to foreign investors in many respects, and in others seemingly creating new ones.⁴⁵

⁴² Convention Establishing the Multilateral Investment Guarantee Agency was submitted to the IBRD Board of Governors on 11 October 1985 and came into effect on 12 April 1988. The Convention was amended on 14 November 2010, full text <http://www.miga.org/documents/miga_convention_november_2010.pdf> accessed 27 August 2012.

⁴³ For an in depth discussion of MIGA, including the background, origin and operation see I Shihata, *MIGA and Foreign Investment: Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency* (Martinus Nijhoff 1988).

⁴⁴ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 1) 35.

⁴⁵ See A Newcombe and L Paradell, *Law and Practice of Investment Treaties* (n 22) 49, I Shihata, *Legal Treatment of Foreign Investment: The World Bank Guidelines* (The World Bank 1993) and C Wendrich, 'The World Bank Guidelines as a foundation for a global investment treaty: a problem oriented approach' (2005) 5 *Transnational Dispute Management* for thorough treatment of the Guidelines.

- **WTO Agreement on Trade-Related Investment Measures**

Efforts to regulate foreign investment have also been made under the auspices of the World Trade Organisation (WTO). Foreign investment was introduced to the WTO agenda during the Uruguay round of negotiations on multilateral trade. The end of that particular round of negotiations saw the creation of the Agreement on Trade-Related Investment Measures (TRIMS), which focuses on the regulation of trade-related aspects of foreign investment. The Agreement was created in order to improve economic efficiency; it prohibits WTO member states from applying any trade-related investment measure that is inconsistent with the principle of national treatment and from making quantitative restrictions. It is thought that the Agreement promotes trade by removing trade-related barriers to investment. However, it is important to note that the TRIMS Agreement may only be applied in certain, rather limited situations. Not all WTO member states supported the establishment of the TRIMS Agreement. The United States for example were very much against its creation, arguing that it was too restrictive and actually serves to operate as a barrier to trade. Developing nations too were sceptical about the Agreement, asserting that the WTO was not an appropriate forum to discuss investment matters.⁴⁶

- **Other WTO documents**

A number of other WTO documents also contain provisions relating to foreign investment. For example, the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) contain provisions on foreign investment. Though, obviously such provisions are of extremely limited scope, being applied only in relation to their specific fields.⁴⁷

⁴⁶ For a detailed discussion of the TRIMs agreement see C Correa and N Kumar, *Protecting Foreign Investment: Implications of a WTO Regime and Policy Options* (Zed Press 2003) chapter 2 and A Newcombe and L Paradell, *Law and Practice of Investment Treaties* (n 22) 419-421.

⁴⁷ General Agreement on Trade in Services and The Agreement on Trade-Related Aspects of Intellectual Property were negotiated during the Uruguay round in 1986-1994, signed at the Marrakesh ministerial meeting in April 1994 and entered into force in January 1995. The full GATS text is available at <http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm> accessed 9 August

- **OECD's Draft Convention on the Protection of Foreign Property, the Declaration on International Investment and Multinational Enterprises and the Guidelines for Multinational Enterprises**

The Organisation for Economic Co-operation and Development (OECD) has also involved itself in the regulation of international investment. The OECD has spearheaded negotiations for several investment agreements and investment related guidelines. One of the first initiatives it became involved with in the 1950s, was what became known as the Draft Convention on the Protection of Foreign Property⁴⁸. The Draft remained just that after it failed to gain the approval of many states and was not ratified. The states that were against the text had concerns about a number of provisions, including those relating to the level of compensation that should be awarded to foreign investors in the event that their property was expropriated by the investment host state. Some years later, the OECD attempted to revive the idea, however this too failed. The OECD undeterred by its failure, made another attempt in 1976 to involve itself in the regulation of international investment. This time, discussions resulted in the establishment of the Declaration on International Investment and Multinational Enterprises and the Guidelines for Multinational Enterprises; both texts are voluntary codes of conduct.⁴⁹

- **Multilateral Agreement on Investment**

The OECD, wishing to move into the realm of mandatory investment rules, and encouraged by the 1992 World Bank Guidelines, endeavoured to conclude a multilateral investment agreement. Between 1995 and 1998, the draft Multilateral Agreement on Investment (MAI) was negotiated. The OECD believed that a multilateral agreement was necessary in order to 'respond to the dramatic growth and transformation of FDI which has been spurred by

2012, and the full TRIPS agreement is available at

<http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm> accessed 9 August 2012.

⁴⁸ Draft Convention on the Protection of Foreign Property 1967 available at <<http://www.oecd.org/dataoecd/35/4/39286571.pdf>> accessed 9 August 2012, approved by OECD Council Resolution 12 October 1967 (1968) 7 ILM 117.

⁴⁹ For more information on the Draft Convention see A Newcombe and L Paradell, *Law and Practice of Investment Treaties* (n 22) 30-31 and R Dolzer and M Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff 1995) 1-2.

widespread liberalization and increasing competition for investment capital.⁵⁰ The provisions contained in the MAI were heavily weighted in favour of the foreign investor, offering a higher standard of protection than was contained in the World Bank Guidelines. Moreover, the MAI contained very few provisions regulating the conduct of foreign investors, and consequently the text was met with fervent criticism. Experts asserted that the document gave too many rights to foreign investors, which in turn placed many obligations on the foreign investment host government. Accordingly, the draft MAI was abandoned, and the OECD was forced to produce a much diluted set of Guidelines on multinational enterprises, which formed a soft law instrument. The newer Guidelines were more balanced than the MAI, and included provisions which promoted sustainable development as well as greater human rights and environmental protection.⁵¹

- **Other voluntary schemes**

A number of other voluntary schemes containing provisions on foreign investment have also been established. Many of these schemes are primarily concerned with human rights, labour standards and protection of the environment. However, certain of their provisions also concern foreign investment.⁵²

- **Multilateral investment agreement back on the WTO agenda**

With the turn of the century, efforts to regulate foreign investment were somewhat renewed, and the issue made its way onto the WTO agenda at the Doha Ministerial Conference in 2001. At the Conference, it was decided that completely fresh negotiations should be entered into regarding the establishment of a multilateral investment treaty. However, there were a number of existing problems which inevitably reappeared in the supposedly 'fresh' negotiations. The differences between the views of developing and developed

⁵⁰ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 1) 39.

⁵¹ *Ibid* and also see the new OECD Guidelines for Multinational Enterprises (2000) available at <www.oecd.org/daf/investment/guidelines/mnetext.htm> accessed 19 December 2012, and the old printed OECD Guidelines for Multinational Enterprises (1997) (OECD 1997).

⁵² *Ibid* 42.

nations were particularly problematic; the two groups unable to agree on even the most basic concepts. Unsurprisingly, the negotiations were abandoned when the WTO member states met in July 2004 and the negotiation of a multilateral investment treaty was removed from the WTO agenda altogether.⁵³

- **UN Commission and Council on Human Rights**

The UN Commission and Council on Human Rights have also been working in the area of multinational corporations (which has foreign investment related aspects). Similarly, a number of anti-corruption conventions have been established which contain investment related provisions.⁵⁴

2.2.4 Bilateral investment treaties (BITs)

BITs are agreements between two states which regulate the investment relationship between the states who are party to the agreement. The first BIT was concluded in 1959 between Germany and Pakistan.⁵⁵ Since 1959, thousands of BITs have been negotiated between hundreds of different state parties. In fact, today there are around 2,800 BITs in force.⁵⁶ As has been discussed in the preceding sections of this chapter, the earliest regulation of international foreign investment came from customary international law principles. In more recent times, attempts to formalise that regulation have been witnessed, particularly since the end of the Second World War, and it is fair to say that progress in this regard was not particularly rapid or revolutionary. BITs therefore developed in order to provide a more structured and certain framework under which states could operate foreign investment relationships with each other. Due to the fact that foreign investors usually come from developed states, and the states in which they invest are usually of a

⁵³ *Ibid* 52.

⁵⁴ *Ibid* 48-49.

⁵⁵ See A Lowenfeld, *International Economic Law* (n 24) 554.

⁵⁶ The latest available statistics on the number of international investment agreements are available in the 'UNCTAD World Investment Report 2011' <<http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf>> accessed 9 March 2012.

developing status, BITs are typically concluded between developing and developed nations (though this is by no means always the case).⁵⁷

The main purpose of BITs is to regulate international investment relationships between states. However, it is generally accepted that BITs do have secondary aims. For example, BITs are thought to promote and attract foreign investment, at least in part, by providing a stable environment for investment, where investors feel confident that their investment will be safe. Furthermore, the provision of direct access to international arbitration, which is thought to be a reliable, impartial means of settling any dispute that may arise during the course of the investment, is also thought to promote and attract foreign investment. Although, it is interesting to note that the assertion that BITs do actually increase the amount of foreign investment that a state attracts is increasingly being criticised.⁵⁸

BITs are very much individual agreements between the parties that conclude them, and as such provide a high degree of flexibility which allows them to be specifically tailored to regulate the parties' particular investment relationship. Nevertheless, BITs usually contain similar provisions and possess similar basic characteristics. Generally, BITs are concerned with five main aspects of investment. First and foremost, they usually provide definitions of basic terms including 'investment' and 'investor', so that these are very clear from the outset. BITs also usually deal with issues surrounding the admission of foreign investors. Issues such as the fair and equitable treatment of investors are also dealt with and clarified. Importantly, they also discuss exactly what compensation should be payable to the investor, should the investment host government attempt to expropriate the assets of the foreign investor. Finally, BITs clarify how any disputes arising during the course of foreign investment will be dealt with. Habitually, BITs provide for recourse to international arbitration in

⁵⁷ See 'OECD Foreign direct investment for development: maximising benefits, minimising costs' <<http://www.oecd.org/dataoecd/47/51/1959815.pdf>> accessed 15 February 2012.

⁵⁸ See E Neumayer and L Spess, 'Do bilateral investment treaties increase foreign direct investment to developing countries?' (2005) 33 *World Development* 1567, H Mann and K von Moltke, 'A southern agenda on investment? Promoting development with balanced rights and obligations for investors, host states and home states' (2005) IISD and K Sauvart and L Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP USA 2009).

the event that a dispute should arise. This means that the private foreign investor can bypass the national courts of the host state and any domestic remedies that may be available, thus giving foreign investors direct access to international arbitration.⁵⁹

2.3 Dispute Settlement

2.3.1 Methods of settling general international disputes

According to Merrills,

a dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another. In the broadest sense, an international dispute involves governments, institutions, juristic persons (corporations) or private individuals in different parts of the world.⁶⁰

Disputes are accepted as an inevitable part of international relations.⁶¹ This subsection will consider a number of different means of settling general international disputes, including consensual and adjudicative means.

- Consultation

Not strictly a form of dispute settlement, consultation affords the opportunity to avoid a dispute altogether. If the government of one state anticipates that a decision of proposed action might harm another state, consultations through discussion may enable a dispute to be avoided in the first place. Through discussions, the government planning the action may make modifications to its original plans, thereby altogether avoiding a problem.⁶²

⁵⁹ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 1) 83-86. Also see A Newcombe and L Paradell, *Law and Practice of Investment Treaties* (n 22) 41-49, R Dolzer and M Stevens, *Bilateral Investment Treaties* (n 48), K Vandeveld, *Bilateral Investment Treaties* (OUP 2010) and M Sornarajah, *The International Law on Foreign Investment* (3rd Edition, CUP 2010) 180-210 for a thorough discussion of the history and purpose of BITs.

⁶⁰ J Merrills, *International Dispute Settlement* (5th Edition, CUP 2011) 1.

⁶¹ *Ibid.*

⁶² *Ibid* 2-3. See also I Zartman (ed), *Preventative Negotiation: Avoiding Conflict Escalation* (Rowman & Littlefield Publishers 2000) and M O'Connell, *International Dispute Settlement* (Ashgate Publishers 2003) 41.

- Negotiation

Negotiation is one of the most basic methods of dispute settlement. Inter-state negotiations, 'are usually conducted through normal diplomatic channels...[such as] respective foreign offices, or by diplomatic representatives...[or] competent authorities.'⁶³ Occasionally, in case of an ongoing problem, states often institutionalise negotiations through the creation of a commission which will monitor the situation. If negotiation through these conventional means fails, summits may be held between heads of state or foreign ministers in the hope of moving forward.⁶⁴

In order to have the highest chances of success, each party must enter the negotiations with the belief that the advantages of reaching an agreement outweigh the disadvantages. Several substantive negotiating techniques may be employed by the negotiating parties including agreeing on a procedural solution and splitting the issue at the heart of the dispute to satisfy all involved parties. Negotiations may either take place within the public sphere or, in the case of sensitive disputes, in private.⁶⁵

Negotiation is often used as a precursor to other means of dispute settlement (particularly adjudicative processes). Negotiation as a procedure enables the parties to retain the highest degree of control over the dispute, whereas adjudication erodes much of the control (particularly as regards the court/tribunal's final decision). Thus, the point of transition from negotiation to adjudication, and establishing the relationship between the two methods of dispute settlement are matters which have attracted the attention of states and international institutions. This issue is particularly important where the jurisdiction of a court or tribunal over a dispute hinges on the exhaustion of attempts to settle a dispute by negotiation. Often, showing that negotiations have been exhausted involves evidencing the fact that negotiations have taken place. Where one party refuses to negotiate, the absence of negotiation proceedings will not provide an obstacle to the jurisdiction of an international court or tribunal.⁶⁶

⁶³ J Merrills, *International Dispute Settlement* (n 60) 8.

⁶⁴ *Ibid* 9.

⁶⁵ *Ibid* 10-11.

⁶⁶ *Ibid* 16-18.

The main benefit of negotiation is that it enables the parties to retain the highest degree of control over their dispute. Nonetheless, there are a number of important limitations of negotiation. Negotiation is obviously impossible where the parties flatly refuse to engage with each other. In cases where this has occurred in the past, serious disputes have led to a severance of diplomatic relations and have even escalated to physical violence, as with the Falklands war. Negotiations will also be limited if the parties' positions are too far apart and they have no common goal or interest. Power struggles also come into play in negotiations; the more powerful party may try to pressure the weaker party into accepting their preferred solution.⁶⁷

- Mediation

Where negotiations between states have proven unsuccessful, the intervention of a neutral third party may provide a breakthrough. Such intervention can take many forms, from simply encouraging the parties to resume negotiations, to providing them with an additional means of communication. Mediation is one form of intervention; it involves the mediator being an active participant in the resolution of the dispute. The mediator is expected to 'advance fresh proposals and to interpret, as well as to transmit, each party's proposals to the other.'⁶⁸ The mediator generally offers suggestions informally and based on information supplied by the parties rather than through independent investigation.

Mediation may be requested by the parties, or offered by independent third parties. It provides the possibility of a solution without a commitment to adopt the mediator's proposal from the outset. A great advantage of mediation is that it does enable the parties to retain a high degree of control over their dispute. Furthermore, parties may feel more ready to make concessions through mediation than direct negotiation, avoiding embarrassment due to the perception of having backed down.⁶⁹

⁶⁷ *Ibid* 21-25. See also M O'Connell, *International Dispute Settlement* (n 62) and D Goodwin, *Negotiation in International Conflict* (Routledge 2001).

⁶⁸ J Merrills, *International Dispute Resolution* (n 60) 26.

⁶⁹ *Ibid* 27.

For mediation to be carried out, an acceptable mediator must be appointed. International organisations, states or even independent individuals may be appointed as mediators. Additionally, parties must give their consent to mediation; no party can be forced into mediation. Parties must also give their blessing as regards to the choice of mediator.⁷⁰ In a significant number of disputes, mediation will not be a credible option because no mediator is able or willing to act. Acting as a mediator is a difficult task at best. In some situations, shuttling between the parties to an international dispute is not easy, often requiring long distances to be travelled. For example, mediation was used between the UK and Argentina during the Falklands crisis in the 1980s: the mediator was required to travel back and forth between the two countries. Moreover, the mediator must sacrifice his or her freedom of action with no guarantee of a successful outcome.⁷¹

Additionally, mediation does suffer some serious limitations; like negotiation, mediation will probably only be as effective as the parties want it to be. Issues such as consent to mediation and selection of an acceptable mediator may be difficult to resolve. Moreover, it does not offer a binding solution; after settlement through mediation, neither party can be assured that the other will perform as agreed through mediation.⁷²

- Inquiry / International Claims Commissions

Where attempts to resolve a dispute by other means such as negotiation and mediation have resulted in stalemate, bringing a neutral third party into the dispute so that they can provide an objective assessment can revive progress in terms of the settlement of said dispute. Inquiry can be a specific institutional arrangement, and the parties may select it in preference to adjudicative forms of dispute settlement.

The commission of inquiry as a form of dispute settlement was introduced by the 1794 Treaty of Amity, Commerce and Navigation between Great Britain and

⁷⁰ *Ibid.*

⁷¹ *Ibid* 29.

⁷² For an in-depth discussion of mediation as a means of settling international disputes see J Bercovitch (ed), *Resolving International Conflicts: The Theory and Practice of Mediation* (Lynne Rienner Publishing 1996).

the US⁷³. However, it was the Hague Convention of 1899⁷⁴ that cemented inquiry commissions as a credible form of dispute settlement after the US battleship 'Maine' (anchored in Havana harbour) was destroyed by an explosion which killed 259 on board. The US-Spanish relationship was already strained, and the Americans assumed that the Spanish were responsible for the explosion. The Spanish denied responsibility for the incident, and a commission of inquiry found the explosion resulted from internal causes. However, a rival commission held that the vessel was destroyed by a Spanish submarine mine. The delegates of the Hague Peace Conference were so impressed by the work of the commission of inquiry that they decided to discuss the possibility of including a fact finding process within the Convention itself. The basis of the proposal was that national commissions (such as the one which refuted Spanish responsibility for the 'Maine' incident) were unsatisfactory, and that the need for independent effective commissions was greater than ever. Some smaller states feared that the new international claims commissions would be 'used as a cloak for foreign intervention'⁷⁵. In light of this, the delegates of the Hague Convention decided that claims commissions were desirable, subject to a number of conditions. Therefore, it was agreed that the commission should only be used for disputes 'involving neither honour nor essential interests'⁷⁶, questions of fact and not law, and finally that the request for a commission inquiry and its findings should not be mandatory.⁷⁷ With these conditions in mind, Article 6 of the Convention outlined the provisions for the creation and operation of commissions of inquiry. The Hague Convention was revised in 1907, though the inquiry commission provisions remained largely unaffected. The commission was utilised in a number of inquiries and provided a flexible means of settling disputes. The UN's specialist agencies and regional organisations also conduct similar inquiries in certain situations.

⁷³ The Treaty of Amity, Commerce and Navigation is also known as the Jay Treaty (after John Jay, the US Secretary for Foreign Affairs at the time it was signed). It was ratified on 29 February 1796 between the USA and Great Britain with the intention of relieving post-war tensions between the two nations <<http://www-rohan.sdsu.edu/dept/polsciwb/brianl/docs/1794JayTreaty.pdf>> accessed 27 August 2012.

⁷⁴ The Hague Convention for the Pacific Settlement of International Disputes 1899 <www.pca-cpa.org/showfile.asp?fil_id=192> accessed 27 August 2012.

⁷⁵ J Merrills, *International Dispute Settlement* (n 60) 42.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

Conducting inquiries is useful for fact finding in particular disputes, and again enables the parties to retain a relatively high degree of control over the dispute. However, the findings of the inquiries are not mandatorily enforced, thus they are of limited utility, especially if states are unwilling to adhere to the outcomes.

International commissions of inquiry have proved invaluable since their establishment in 1794. Between 1840 and 1940 states established a total number of over sixty commissions in order to deal with disputes arising from the injury of foreign nationals.⁷⁸ Additionally, various ad hoc commissions were created during this time to deal with specific one-off claims. These claims commissions, hearing claims for individual loss and thus designed to protect individual rights relied heavily on a form of diplomatic protection (as it was the states who were party to the proceedings). After the First World War it became common practice for agreements to provide that individual claimants could make direct claims, rather than go through their state government.⁷⁹ It is the decisions of these commissions, as well as state practice that formed the basis of the jurisprudence on state responsibility for injury to foreign nationals.⁸⁰

- Conciliation

The term 'conciliation' has been defined as,

A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the Parties, with a view to its settlement, such aid as they may have requested.⁸¹

⁷⁸ I Brownlie, *Principles of Public International Law* (n 4) 500.

⁷⁹ A Newcombe and L Paradell, *Law and Practice of Investment Treaties* (n 22) 7.

⁸⁰ *Ibid.*

⁸¹ J Merrills (n 60) 58, which quotes Article 1 of the Regulations on the Procedure of International Conciliation adopted by the Institute of International Law in 1961 <http://www.idi-iil.org/idiE/resolutionsE/1961_salz_02_en.pdf> accessed 27 August 2012.

In effect, conciliation goes one step beyond the services offered by mediation, involving third party intervention, but in a more formalised and institutionalised manner.⁸²

The first treaty to provide for conciliation was concluded between Sweden and Chile in 1920. The treaty actually emphasised inquiry, however one article provided for conciliation procedure. Many other treaties at that time dealt with conciliation in a similar manner, though some placed more emphasis on the procedure. The situation changed in 1925 for two reasons; a treaty between France and Switzerland defined in more precise terms the functions of conciliation commissions for the first time, and four of the seven Locarno treaties were concluded in which Germany bilaterally agreed with Belgium, France, Czechoslovakia and Poland that all disputes should be settled through conciliation unless there had been a specific prior agreement that the particular dispute should be settled judicially.⁸³

The mandate of conciliation commissions is to investigate the dispute at hand, and to put forward suggestions as to how it should be settled. To this end, conciliation commissions may perform various tasks including hearing the parties' accounts, hearing witnesses and so forth. Conciliation is sometimes viewed as institutionalised negotiation; the commission's task is to encourage and structure the parties' exchanges, whilst providing the assistance they require in order that the dispute is concluded in an acceptable manner.⁸⁴

Around 20 cases of conciliation have been recorded in the ninety years in which it has been in existence⁸⁵. This number is not particularly high, but it is worth noting that conciliation enjoys a relatively high rate of success; this is probably due to the degree of control which the parties have over the dispute. The nature of conciliation means that the outcome of the dispute is dictated by the parties' dialogue. As such, the end result is never a surprise. Furthermore, the conciliation commission's suggestions can be rejected by the parties as they are not binding.⁸⁶

⁸² *Ibid*, see also P Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 2011) 273-277.

⁸³ *Ibid* J Merrills, *International Dispute Settlement* (n 60) 59 and M O'Connell, *International Dispute Settlement* (n 62).

⁸⁴ *Ibid* J Merrills 59.

⁸⁵ *Ibid* 79.

⁸⁶ *Ibid* 81.

Since the end of the Second World War, the place of conciliation in dispute settlement has changed somewhat. Conciliation appears to have fallen out of favour in bilateral treaty practice, but its role has increased within multilateral treaty practice.⁸⁷

- Arbitration

The other means of settling general international disputes that have been considered thus far in this subsection have been consensual or diplomatic means of dispute settlement; arbitration is more of an adjudicative process. Arbitration is utilised when what is desired is a decision based on international law and is binding on the parties.⁸⁸

Public international and private international arbitration may take place, depending on the identities of the parties and what issues are at stake within the dispute. Public international arbitration takes place in inter-state disputes, whereas private international arbitration allows individuals and corporations to be involved as parties. Arbitration can be arranged on an ad hoc basis or through a permanent arbitral institution. The earliest forms of arbitration were ad hoc in nature and involved setting up a panel of an equal number of arbitrators selected by the parties and a neutral arbitrator to whom the case is referred if the national members continually disagree. Alternatively, a dispute could be referred to a foreign head of state or government to make a decision. Later, a third possibility was introduced; referring the dispute to a permanent specially qualified individual. In modern arbitration, the most commonly constituted tribunal consists of three or five arbitrators whose decision is based on majority vote.⁸⁹

The selection of arbitrators is often a decision for the parties to make. In a typical three person arbitration panel, each party will customarily appoint one arbitrator and the third will be selected by mutual agreement. Merrills notes that,

⁸⁷ *Ibid* 69-70.

⁸⁸ *Ibid* 83. For an in depth discussion of all aspects of arbitration, including history, origins, and requisite advantages and disadvantages see M Rubino-Sammartano, *International Arbitration Law and Practice* (2nd Edition, Kluwer 2001) and P Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice: A Comparative Study* (Kluwer 1999).

⁸⁹ *Ibid*, J Merrills, *International Dispute Resolution* (n 57) 86.

for obvious reasons, the result of a collegiate arbitration often turns on the decision of the neutral member or members. Deciding who they shall be is therefore extremely important to the governments concerned, which may sometimes find it difficult to agree on suitable candidates.⁹⁰

Equally as important as arbitrator selection, are the terms of reference; that is, the determination of how the proceedings are to be conducted and the question that will need to be answered by the tribunal. It is ultimately for the parties to decide on the procedural arrangements. Many permanent tribunals have their own procedural rules which may be engaged, though the parties are free to create their own rules. The definition of the issue at stake is important because it defines the scope of the arbitrator's jurisdiction; arbitrators only have the authority to answer the questions they have been set. This is often a difficult issue to agree on because of its overall importance in the dispute.⁹¹

The basis of the tribunal's decision is another important issue. Frequently, in international disputes, the tribunal is requested to base the decision on the relevant aspects of international law. The parties may request that the decision be based on other principles, if appropriate, for example domestic law. Alternatively, the arbitrators may be given more freedom and be instructed to settle the dispute taking into account what is fair and reasonable.⁹²

Another issue which needs to be addressed in any discussion of arbitration is the effect of the award that has been rendered. An arbitral award is said to be binding on the parties, however it may not be final. This means that the decision may be appealed or reviewed subject to express grant of this right by the parties. Without such express grant, there is no general power to review or revise an award. The parties may choose to expressly provide such power if they think it could be of use. However, it is important to note that where there has been some error or abuse of process, there may be a right to correct this without express grant.⁹³

Arbitration has many advantages; it enables the parties to retain a high degree of control over the dispute right down to the selection of those persons who will settle the dispute, as well as the terms of reference and whether the

⁹⁰ *Ibid* 87. See also S Bennett, *Arbitration: Essential Concepts* (ALM Publishing 2002).

⁹¹ *Ibid* J Merrills, *International Dispute Resolution* (n 60) 89- 94.

⁹² *Ibid* 94-100.

⁹³ *Ibid* 100-106.

decision will ultimately be subject to review. This high degree of control will allow the parties to have confidence in the dispute settlement process. Another advantage is that it can be used to produce a solution to a specific problem on an agreed basis. Furthermore, arbitration produces a binding decision. For these reasons, arbitration has become extremely popular in the last 200 years.⁹⁴

Despite its advantages, arbitration does suffer a number of limitations. With the possibility of an unpredictable outcome, parties may be reluctant to submit their dispute to tribunals. Enforcement of decisions can also be problematic in arbitration. Although the tribunal produces a binding decision, there is no guarantee that the parties will recognise and carry out the award.⁹⁵

Arbitration in relation to international investment disputes will be examined in more depth later in this chapter.

- International Court

The international court provides a form of judicial settlement which involves referring matters to a permanent tribunal which formulates a legally binding decision. This form of dispute settlement developed from the practice of arbitration, which explains why the two can be so similar. The term 'international court' is used to refer to two institutions; the Permanent Court of International Justice (PCIJ) which was originally created in 1919 as part of the peace process after the First World War, and its successor, the International Court of Justice (ICJ) which was founded in 1945 after the Second World War.⁹⁶

The international court has jurisdiction over contentious proceedings and is dependent upon obtaining the consent of the requisite parties to the dispute. Many international treaties provide advance consent for the court's jurisdiction, so that consent need not be obtained from the parties in each individual dispute that may arise. The court may be called upon to deliver binding judgments as well as advisory opinions. The court is composed of fifteen judges who are each

⁹⁴ *Ibid* 111-112. See also M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 3) 2.

⁹⁵ *Ibid* J Merrills 112-115.

⁹⁶ 'International Court of Justice: History of the Court' <<http://www.icj-cij.org/court/index.php?p1=1&p2=1>> accessed 15 October 2011.

elected for a renewable term of nine years by the Security Council and General Assembly of the UN. Judges are selected for their in-depth knowledge of international law as well as their outstanding moral character. Cases may be heard by the full court or smaller chambers of fewer judges. The court is responsible for establishing the facts of the dispute, identifying the relevant law to be applied and producing binding judgements or advisory opinions as required.⁹⁷

The practice of the ICJ will be examined in greater depth later in the thesis, with special reference to the ICJ's role in the settlement of international investment disputes.

- Specialised bodies: trade disputes (From GATT to WTO)

A number of international specialised bodies have been created in order to settle disputes specific to their field. In relation to trade, the GATT⁹⁸ (General Agreement on Tariffs and Trade) was created (it would later be succeeded by the WTO). After the Second World War, a number of institutions were created in order to provide the framework which would be necessitated by greater economic interdependence. The GATT was created in order to regulate trade and trade liberalisation. It was envisaged that the GATT would establish the International Trade Organisation (ITO), however this never materialised. In order to fill the void left by the failure to create the ITO, in 1994 the World Trade Organisation was established.⁹⁹ The WTO is responsible for overseeing most, if not all aspects of world trade.¹⁰⁰ For the WTO rules based system to be

⁹⁷ 'International Court of Justice: How the Court Works' <<http://www.icj-cij.org/court/index.php?p1=1&p2=6>> accessed 15 October 2011. See also T Gill (ed), *The World Court: What it is and How it Works* (6th Edition, Brill Publishing 2003).

⁹⁸ The General Agreement on Tariffs and Trade was negotiated in 1947 and came into force on 1 January 1948. The primary objective of the GATT was to regulate world trade and aid economic recovery after the Second World War. It was hoped that greater worldwide economic co-operation and integration might contribute to the keeping of world peace in the future. Full text of the original agreement can be found at <http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm> accessed 25 August 2012.

⁹⁹ 'Understanding the WTO: who are we?' <http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm> accessed 9 August 2012.

¹⁰⁰ 'Understanding the WTO: what we do' <http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm> accessed 9 August 2012.

effective, it was thought that a mechanism had to be put into place which would deal with any trade related disputes that arose. This led to the creation of the Dispute Settlement Understanding (DSU)¹⁰¹ which contained provisions for the settlement of such disputes. The DSU encourages states to resolve disputes amicably, perhaps through consultation, conciliation and mediation where possible. Where this is not possible, the DSU provides for panel proceedings during which the panel makes an objective assessment of the law and facts relevant to the dispute which will assist the Dispute Settlement Body (DSB) in its function. The DSB will hear the case and provide a report to the parties. If one party believes there is a problem with a panel report, it may be appealed (though appeal is restricted to points of law). The work of the WTO, DSB and appellate body will be discussed in more detail in subsequent chapters.¹⁰²

- United Nations

Three of the United Nations' organs play principal roles in the settlement of disputes; the Security Council, the General Assembly and the Secretariat. The Security Council is able to make recommendations with a view to the pacific settlement of any dispute at the request of the parties' themselves. The competence of the Security Council is limited to matters concerning international peace and security. The General Assembly has powers of discussion and recommendation on most issues, except those that fall within the domestic jurisdiction of the member state. The Secretariat is able to participate in dispute settlement through delegated powers from the Security Council and General Assembly, under requests from interested parties and lastly under the Secretariat's own initiative. The involvement of the Security Council, General Assembly and the Secretariat represent attempts to settle disputes politically rather than legally. The primary legal organ of the United

¹⁰¹ The WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (full text) is available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm accessed 9 August 2012. The Understanding was negotiated as part of the Uruguay round of trade negotiations, signed in Marrakesh in 1994 and entered into force in January 1995.

¹⁰² J Merrills, *International Dispute Settlement* (n 60) 194-218.

Nations that is responsible for the settlement of disputes is the ICJ (as discussed earlier).¹⁰³

- Regional organisations

The precise role which a particular regional organisation plays in the settlement of disputes obviously depends on the characteristics of the particular organisation concerned. Europe provides an interesting example of a regional organisation which contributes to dispute settlement. The Council of Europe was founded in 1949 in order to facilitate the discussion of issues of common interest and to protect human rights. The Council's biggest achievement to date has been the creation of the European Convention on Human Rights (ECHR) which is designed to protect human rights in Europe. If a human rights dispute was to arise, the Convention requires that the case be heard by the European Court of Human Rights (ECtHR).

Additionally the European Community (EC) was established through a series of treaties which led to the creation of the European Court of Justice (ECJ), the primary dispute settlement organ of what is now known as the European Union (EU). Outside Europe, the Organisation of American States (OAS) was founded in 1948 in order to formalise plans for inter-American co-operation. Within the OAS, the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, and the Secretariat all have roles to play in the settlement of arising disputes.¹⁰⁴

2.3.2 Methods of dispute resolution in international investment law

- Traditional methods

Historically, international dispute resolution was only available in inter-state disputes. This meant that in cases where foreign investors had a problem with the investment host state government, they were unable to initiate dispute resolution proceedings directly. This is because 'under public international law,

¹⁰³ *Ibid* 219-256. For more in depth discussion of all aspects of the UN approach to dispute settlement see K Raman (ed), *Dispute Settlement through the United Nations* (UN 1977), C Peck, *The United Nations as a Dispute Settlement System* (Springer 1996), and N White, *The United Nations System* (Boulder 2002).

¹⁰⁴ *Ibid* J Merrills 255-283.

private parties had virtually no rights to bring a claim against a state through a dispute settlement mechanism administered by a third party.¹⁰⁵ If a dispute arose, investors typically had two courses of action; making use of the national courts of the investment host state and diplomatic protection. It is fair to say that neither of these two courses of action was particularly effective.

i) National courts

One of the traditional means of settling international investment disputes was referring the case to be heard by the national courts of the host state. From the host state's viewpoint, this method of dispute settlement could be very positive. First and foremost, it is relatively inexpensive and, in terms of outcome, could be advantageous for reasons that will be discussed below. From the investor's perspective, the involvement of the national courts of the investment host state is not a particularly attractive proposition. Investors worry that host state judges will not be impartial in disputes where their own countries' government is being pursued. This is often a legitimate concern, as an unbiased judiciary cannot be taken for granted, especially in the lesser economically developed investment host states. Traditionally, foreign investors hail from developed, wealthier countries, and the states that they invest in are less developed, poorer nations. Therefore, it is the courts of the less developed states that are more likely to be settling the disputes in which their government is facing the claim. The judges may feel obliged to show loyalty and therefore bias towards their own state. This is especially likely to influence the outcome of the dispute where large sums of money are at stake, with the host state government being unlikely to be able to afford such a loss. Moreover, in some states, the law may obligate the judges to apply local rules rather than international law or treaty provisions, where sometimes these do not form part of the domestic legal order. Finally, the judges of the ordinary courts of the land are unlikely to possess the expertise required to deal with what will usually be

¹⁰⁵ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 1) 5.

complex technical aspects of the highly specialised field of international investment law.¹⁰⁶

ii) Diplomatic protection

Once it had been accepted that foreign investors had the right to expect a minimum standard of protection under international law, the foreign investor's home state was able to invoke said law against the offending host state, thus protecting their citizen and his/her rights and seek a remedy on their behalf. This is known as diplomatic protection.¹⁰⁷ The protecting state intervenes on behalf of their citizen in order to demand protection and compensation for the citizen whose rights had been violated under the international minimum standard of protection. The concept of diplomatic protection can be traced back as far as the eighteenth century, with jurists such as Vattel asserting that,

anyone who mistreats a citizen directly offends the state. The sovereign of that State must avenge its injury, and if it can, force the aggressor to make full repatriation or punish him, since otherwise the citizen would simply not attain the goal of civil association, namely security.¹⁰⁸

Other scholars have expressed similar ideas.¹⁰⁹ Indeed, the PCIJ explained the concept in the *Mavrommatis Palestine Concessions*¹¹⁰ case:

It is an elementary principle of international law that a State is entitled to protect its subject, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality

¹⁰⁶ R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP 2008) 214 see also C Schreuer (ed), *The ICSID Convention: A Commentary* (2nd edition, CUP 2009) 8.

¹⁰⁷ N Horn (ed), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Kluwer 2004) 22.

¹⁰⁸ E de Vattel, *Les Droits des Gens* (n 4) as cited in Subedi, *International Investment Law: Reconciling Policy and Principle* (n 1) 12.

¹⁰⁹ E Bouchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (Banks Law Publishing 1915).

¹¹⁰ *Mavrommatis Palestine Concessions (Greece v UK)* (n 6), as cited in R Dolzer and C Schreuer, *Principles of International Investment Law* (n 106) 211.

asserting its own rights- its right to ensure, in the person of its subjects, respect for the rules of international law.¹¹¹

This ruling has been reiterated in numerous other cases that have come before the PICJ and its successor, the ICJ.¹¹²

In practice, diplomatic protection requires investors attempting to pressurise their own home state government into taking the case to an international court on their behalf, thus generating a more traditional inter-state case. The availability of diplomatic protection depends on a number of factors. Firstly, the investor (individual or company) must be a national of the state that will be offering its protection. Although this seems simple enough, it is a surprisingly contentious issue, because some believe that the investor must have been a national at the time of the injury up until the time when the claim is presented. Others believe that the investor must continue to be a national of that state until the claim is settled. An additional requirement that the investor must have exhausted the local remedies in the host state must also be met.¹¹³

Diplomatic protection is of limited utility to investors for a number of reasons. At the outset, the investor has to persuade his government to espouse the case on his behalf, which can actually be very difficult to achieve. The investor's lack of an absolute right to diplomatic protection means that whether or not the government chooses to undertake the case is completely at its own discretion. Even if the government is persuaded by the investor to take up the claim, the government may choose to end the protection at any time, or accept a reduced settlement. In other words, the investor retains very little control over the case once the government becomes involved.¹¹⁴

Diplomatic protection can also be disadvantageous for the protecting state. For example, undertaking the dispute may have serious repercussions for the international relations of the state concerned. Developing states do not enjoy being pressurised by developed nations, and the relationship between the two can be irreparably damaged when diplomatic protection is employed. Additionally, diplomatic protection will invariably involve financial detriment to

¹¹¹ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 3) 5.

¹¹² S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 1) 13.

¹¹³ R Dolzer and C Schreuer *Principles of International Investment Law* (n 106) 211.

¹¹⁴ *Ibid* 211-212.

the states involved. The primary means of resolving a dispute under diplomatic protection is negotiation. However, if negotiations fail, disputes can be resolved through adjudicative procedures, such as those provided under the auspices of the ICJ.¹¹⁵

In practice, diplomatic protection is almost insignificant nowadays; all well drafted BITs provide for the settlement of arising disputes through judicial means instead (usually through international arbitration). Nonetheless, diplomatic protection is always available to aggrieved investors, even if the protection it provides is only the equivalent of the international minimum standard that is available to investors. The international minimum standard should be viewed as the foundation of the law of foreign investment that has its roots in the principles of customary international law. Though more often than not, investors will benefit from a wider scope of protection through BITs and international arbitration.¹¹⁶

- **Modern investment dispute settlement: arbitration**

The traditional dispute settlement methods discussed in the preceding section remained the only two means of resolving investment disputes until the 1980's. The 1980's saw what can only be described as a boom in foreign investment. In 1980 around \$50 billion of foreign investment was recorded worldwide.¹¹⁷ By the end of the decade, in 1989, this figure had skyrocketed to \$197 billion.¹¹⁸ This rapid increase in the amount of worldwide foreign investment in turn prompted a re-evaluation of the available dispute settlement mechanisms and provided an incentive to improve and expand the possibilities in this regard.¹¹⁹ The desire to avoid the problems associated with the traditional means of settling investment disputes, and the need to meet the demands of

¹¹⁵ *Ibid.*

¹¹⁶ See S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 1) 139 and S Subedi, 'The challenge of reconciling competing principles within the law of foreign investment with special reference to the recent trend in the interpretation of the term "expropriation"' (2006) 40 *The International Lawyer* 121

¹¹⁷ 'UNCTAD: FDI Statistics'

<<http://unctadstat.unctad.org/TableViewer/tableView.aspx?ReportId=88>> accessed 9 March 2012.

¹¹⁸ *Ibid.*

¹¹⁹ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 3) 6.

the ever-expanding markets for foreign investment, a new dispute settlement mechanism was desperately required.¹²⁰ Writing in 1996, foreign investment expert Salacuse states, 'for foreign investors and their governments, one of the great deficiencies of customary international law has been its lack of effective and binding mechanism for the resolution of investment disputes.'¹²¹

The importance of having an effective dispute settlement mechanism should not be underestimated. Foreign investors value a reliable, unbiased mechanism in order to protect their investment, and there is evidence to suggest that an effective dispute resolution process will encourage foreign investment.¹²² States typically try to entice foreign investment because it is often linked to the enhancement of economic development; states therefore also have an obvious interest in a strong dispute settlement process.¹²³

International arbitration represents an ideal manner in which international investment disputes may be resolved because it allows the interests of both investors and host state governments to be harmonised. Arbitration can be defined as, 'a private court based on party autonomy comprising one or more arbitrators, to whom, by means of private agreement, the resolution of legal disputes is transferred instead of the domestic courts.'¹²⁴

Traditionally, arbitration was understood to take place between states. Indeed the First Hague Peace Conference in 1899 declared that 'international arbitration has as its object the settlement of disputes between states.'¹²⁵ Arbitration is the oldest means of peacefully settling disputes between states through intervention by a third party. Arbitration has been used in the past by many regions of the world for many years. However, the different regions made use of different forms of this method of dispute settlement. As a consequence, arbitration procedures can vary greatly.

¹²⁰ *Ibid.*

¹²¹ *Ibid* 7.

¹²² See E Neumayer and L Spess, 'Do bilateral investment treaties increase foreign direct investment to developing countries?' (n 58), H Mann and K von Moltke, 'A southern agenda on investment? Promoting development with balanced rights and obligations for investors, host states and home states' (n 58) and K Sauvart and L Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (n 58).

¹²³ *Ibid.*

¹²⁴ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 3) 7.

¹²⁵ M Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer 2000) 151.

Modern arbitration is thought to have begun with the Jay Treaty¹²⁶, concluded in 1794 between the USA and Great Britain. The Jay Treaty is credited with marking the transition of international arbitration from a diplomatic procedure to a juridical process. The Treaty itself provides for the settlement of arising disputes by impartial international arbitration and indicates the standards that the arbitrators should apply when settling the dispute. Other states began to follow suit; the practice of including provisions providing recourse to international arbitration in new treaties became commonplace. In fact, 'by the end of the nineteenth century, over a hundred treaties contained reference to settlement of disputes by arbitration.'¹²⁷ The trend towards dispute settlement through arbitration was encouraged by the Conventions for the Pacific Settlement of International Disputes of 1899 and 1907 which enabled the establishment of the Permanent Court of Arbitration (PCA).¹²⁸ As the popularity of international arbitration increased, other arbitral institutions were founded in order to meet rising demand for such services.

It was thought that the survival of international arbitration might be threatened by the advent of the PCIJ. Experts worried that the PCA and the PCIJ were too similar and were performing broadly the same function. Many believed that arbitration would no longer be required 'after the commencement of institutionalised judicial settlement through the World Court [PCIJ].'¹²⁹ This concern did not materialise, and international arbitration continued to flourish; arbitration was distinct enough from the World Court to survive. Important differences exist between arbitration and the World Court enabling them to coexist. Perhaps one of the most important of these differences is that of process. The PCIJ (and now the ICJ) has a fixed procedure for settling disputes, whereas arbitration is relatively flexible in nature and can be tailored to the parties' exact needs and wishes. For example, in arbitration, the parties are often free to choose the forum, the arbitrators, where the procedure will take place and the overall time in which the process should be completed. Another important difference is access to the forum: the PCIJ (and now the ICJ) only grant access to states, whereas modern arbitration is available to states as well

¹²⁶ Treaty of Amity, Commerce and Navigation (Jay Treaty) 1794 (n 73).

¹²⁷ M Sornarajah, *The Settlement of Foreign Investment Disputes* (n 125) 152.

¹²⁸ The PCA's establishment and role in international arbitration will be discussed more thoroughly later in this chapter.

¹²⁹ M Sornarajah, *The Settlement of Foreign Investment Disputes* (n 125) 152.

as multinational corporations and individuals. This is particularly relevant in the field of international investment where disputes usually arise between individual investors/investing multinational corporations and the government of the investment host state.¹³⁰

As briefly discussed above, traditionally it was thought that arbitration was only available in inter-state disputes. Disputes arising between states and aliens (like international investment disputes), were not thought to involve an international dispute which should be settled through an international process. This view resulted from the long established understanding that international law is law between sovereign states, and that private individuals and multinational corporations lack the necessary status to have recourse to international remedies such as international tribunals. What is more, states lacked the incentive to develop the notion that international law could apply to private parties. In the event that a significant number of disputes involving private parties did arise, specially constituted claims tribunals were established to remedy the disputes, as recourse to international arbitration was not recognised.¹³¹

The tide began to turn after the Second World War. Arbitration, which had been synonymous with the settlement of inter-state disputes, developed to regulate new situations. This period saw the emergence of international commercial arbitration, that is, arbitration between private individuals. Gradually, there were calls for a hybrid form of arbitration which could settle disputes not only between state parties or private individuals, but in situations where the parties were mixed; in other words, disputes involving both private and state parties.¹³²

International investment arbitration is an example of this new, hybrid form of arbitration; one party to the dispute is usually a state (often the investment host state), whilst the other is a private individual or company (the investor). In the 1980's, the settlement of international investment disputes through arbitration became very popular. The popularity of arbitration is largely due to the

¹³⁰ *Ibid* 153.

¹³¹ *Ibid*.

¹³² *Ibid*.

proliferation of BITs which often include provisions designating recourse to international arbitration in case of a dispute arising.

International investment arbitration is not executed by a single body or tribunal; it is carried out by various institutions. There are two types of arbitral institution; ad hoc tribunals and permanent bodies.

2.4 Ad hoc arbitration

Ad hoc arbitration is not administered by an institution. Rather, individual tribunals are assembled on a case by case basis, resolving the one dispute which it was created to hear, and no other. Ad hoc arbitration provides a great deal of procedural flexibility and the parties to the dispute retain a great amount of control over the dispute itself. For example, the parties may choose to conduct their arbitration under existing rules such as UNCITRAL Arbitration Rules (which are widely used in ad hoc investment arbitration), under rules agreed by the parties, or under rules established by the tribunal in consultation with the parties.¹³³ The parties themselves are often highly involved in the selection of arbitrators; it is common practice in a panel of three arbitrators for each party to choose one person and jointly select the third.¹³⁴

A number of important advantages are associated with ad hoc arbitration. Obviously, the degree of control which the parties retain is the most obvious advantage. Also, ad hoc arbitration is particularly useful where states are reluctant to submit themselves to foreign institutions in order that a dispute may be settled. Furthermore, ad hoc arbitration can be significantly cheaper than institutionalised arbitration; the parties do not have to pay a substantial fee to any institution, and are able to stipulate that the arbitration take place in a convenient location, saving what could amount to considerable travel costs (depending on the length of the proceedings).¹³⁵

However, ad hoc arbitration is not without its disadvantages. The major drawback, 'lies in situations in which the parties lack the wide professional and

¹³³ P Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 711.

¹³⁴ J Merrills, *International Dispute Settlement* (n 60) 86.

¹³⁵ G Blanke, 'Institutional versus ad hoc arbitration: a European perspective' (2008) <http://62.128.128.68/Contents/Publications/pdf/140/Institutional%20versus%20Ad%20Hoc%20Arbitration_A%20European%20Perspective.pdf> accessed 15 February 2012.

legal knowledge necessary for the formulation of a detail system of rules that can regulate all the various aspects of the arbitration proceedings.¹³⁶ Linked to this, where the parties are responsible for the selection of the arbitrators, the parties' choices may be biased. Arbitrators may be chosen on the basis that they will be most likely to settle the case in favour of the party that appoints them. In reality this means that a three person arbitrator panel is reduced to the decision of the arbitrator that has been jointly selected, as he or she is the most likely to be impartial and unbiased. Moreover, this means that arbitrators are not being chosen for their merit and expertise in the field. This is despite the fact that they are expected to decide complex legal disputes of which their knowledge may not be adequate. This is particularly disturbing where large sums of money are at stake, as is often the case in international investment disputes.

2.5 Institutionalised arbitration

A number of permanent institutions are also routinely called upon to hear international investment disputes. Several of these permanent institutions merit discussion in the next chapter.

2.6 Conclusion

International investment law has a long and complex history. The earliest forms of regulation of international investment activities were firmly rooted in customary principles which were developed according to state practice. It was only after the end of the Second World War that attempts were made to formalise the rules of international investment law. The new international institutions such as the UN became very interested in the realm of foreign investment. Numerous treaties, conventions, declarations, codes of conduct and guidelines were negotiated during this period, many of which were directly related to the regulation of foreign investment. However, many of these agreements never went beyond drafting stages, with negotiations failing frequently. Even the agreements that were finally concluded often fell short of

¹³⁶ See M Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Kluwer 1993) 11.

what had originally been planned for them. This resulted in the establishment of nothing more than voluntary schemes and soft law instruments rather than the binding hard law instruments that many hoped they would turn out to be. Efforts to establish a multilateral investment treaty were particularly ineffective, with negotiations in this regard failing on a number of occasions.

The real phenomenon in the history of international investment law must surely be BITs. With thousands of BITs having been concluded between so many different states, their impact upon the regulation of foreign investment has been profound. What is particularly interesting in terms of this work is the way in which BITs have transformed the settlement of international investment disputes. Traditionally, disputes that arose between foreign investors and the states in which they invest were settled either by the national courts of the state receiving the investment or through diplomatic protection. For reasons discussed earlier in this chapter, both of these means of settling investment disputes were largely ineffective. BITs revolutionised the settlement of international investment disputes by providing clauses allowing investors to bypass national courts/local remedies and making direct recourse to international arbitration available.

International arbitration as we know it today is very different from its earliest form. It was traditionally accepted that international arbitration should only take place between state parties. This view was based on the positivist approach to international law which sees international law as law between sovereign states. Following this approach logically, international arbitration, a distinctly international remedy should only be available between state parties. The introduction of international commercial arbitration brought about a re-evaluation of the notion that international arbitration should only take place between state parties. International commercial arbitration involves the settlement of international disputes between two private parties. What evolved was a new, hybrid form of international arbitration between a state party and a private party. This new hybrid form of international arbitration was perfect for use in the settlement of international investment disputes which typically include a state party (the investment host government) and a private party (the investor).

The precise mechanics of international investment arbitration are a little more complicated than one might expect. The system of international

investment arbitration does not operate in the same manner as a domestic or national judicial process. Domestic disputes are usually submitted to a single, authoritative body whose eventual decision may be appealed through a designated appellate mechanism. International investment arbitration does not function in this way. Rather, international investment disputes are submitted to the parties' tribunal of choice (which is usually specified in the BIT between the disputing state party and the state of which the disputing investor is a national). There are a multitude of fora which may be referred to in BITs. The forum of choice may be a specially constituted ad hoc tribunal that is established to hear the one, single case at hand, or one of the many established permanent arbitral bodies that habitually settle international investment disputes. Many of the most prominent permanent arbitral institutions will be discussed in the next chapter, including ICSID and the PCA. Interestingly, whatever forum is used to settle the investment dispute, whether ad hoc or permanent, the tribunal to which the dispute is submitted is usually of first and last instance; there is no possibility of appeal in international investment arbitration.

CHAPTER III: ADEQUACY AND EFFECTIVENESS OF THE CURRENT SYSTEM OF SETTLING INTERNATIONAL INVESTMENT DISPUTES

3.1 Introduction

The aim of the present chapter is to evaluate whether the system of international investment arbitration (as the primary means of settling international investment disputes and as described in the previous chapter) provides an adequate and effective means of settling international investment disputes. In order to achieve this aim, the chapter is divided into several sections. The first part of the chapter will consider the requisite strengths and weaknesses associated with both ad hoc tribunals and permanent arbitral bodies. The next part of the chapter will consider the advantages and disadvantages of several specific arbitral institutions. The third and final part of the chapter will examine the advantages and disadvantages of the system of international investment arbitration as a whole.

The chapter will show that there are a number of important strengths associated with both ad hoc and permanent tribunals, and indeed that individual permanent arbitral bodies have significant advantages. In fact, the system of international investment arbitration as a whole has many strengths. However, ad hoc, permanent tribunals, individual institutions and indeed the system as a whole do also have critical weaknesses.¹

Any discussion of the system of international investment arbitration must examine both ad hoc and institutional forms because they are both commonly used in international investment arbitration. Furthermore, the chapter analyses the most prominent permanent arbitral institutions because they are the tribunals that are regularly settling international investment disputes. Of the institutions that will be discussed in this chapter, ICSID will be examined in the

¹ For in depth discussion of arbitration generally, including ad hoc and institutionalised, see M Rubino-Sammartano, *International Arbitration Law and Practice* (Kluwer 2001), P Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice: A Comparative Study* (Kluwer 1999), A Alibekova and R Carrow (eds), *International Arbitration and Mediation From the Professional's Perspective* (Lulu Publishing 2007) and M McIlwrath and J Savage, *International Arbitration and Mediation: A Practical Guide* (Wolters Kluwer 2010).

greatest depth due to the fact that it is the most popular of all institutions in the settlement of international investment disputes.²

3.2 Ad hoc arbitration

Ad hoc arbitration is not administered by a permanent institution according to any particular set of formalised rules or procedures. Rather, individual tribunals are created in order to resolve the single dispute at hand. There are two different forms of ad hoc arbitration; it may be carried out in accordance with specially formulated procedural rules, such as the UNCITRAL rules of arbitration³, or it may be completely ad hoc, not being carried out in accordance with such procedural rules. Both forms will be considered under the general term 'ad hoc arbitration' in this section.

3.2.1 Advantages of ad hoc arbitration

Ad hoc arbitration has many advantages, although many commentators would probably agree that the most important of them is the flexibility which it can offer the parties involved in the dispute. The ad hoc arbitration process can be shaped to meet the requirements of both the parties, as well as the particularities of the individual case. It is for the parties themselves to agree on every aspect of the arbitration, from choosing the seat of arbitration to the procedural rules which will be followed. Moreover, by mutual agreement, the parties are able to select which arbitrators will hear the case. Research has shown that in cases where the parties have been actively involved in the resolution of the dispute (for example where the parties have exercised a high degree of control over the proceedings), the parties are much more likely to uphold and implement the decision of the tribunal.⁴

² ICSID's popularity is evidenced by its 158 member states and the centre's high caseload. See 'About ICSID' <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home> accessed 21 September 2010.

³ The UNCITRAL Arbitration Rules of 1976 and amended in 2010 (full text) are available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html> accessed 10 August 2012.

⁴ M Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Kluwer 1993) 9.

Non-institutionalised arbitration is also useful in disputes where the parties are unable to come to an agreement regarding the use of an arbitral institution, and in situations where parties do not wish to submit themselves to foreign institutions (for a multitude of different reasons state parties in particular are often unwilling to do so). Such states are usually much more comfortable settling their disputes using ad hoc arbitration where they are able to retain a high degree of control over the process.⁵

Ad hoc arbitration also allows disputes to be settled very quickly and economically. It provides one of the fastest forms of arbitration; disputes may be settled extremely quickly in this manner. Ad hoc arbitration may be carried out as quickly as the parties wish; it is not delayed by institutionally imposed deadlines and institutional bureaucracy. Such arbitration also provides one of the least expensive options for arbitration. Most permanent arbitral institutions charge relatively high administration fees, which parties can and often do choose to avoid through the use of ad hoc arbitration. Additionally, parties will have to pay to travel to the institution when using institutional arbitration. Obviously the associated travel costs will vary depending on how far away the seat is. Parties might avoid over inflated travel costs in ad hoc arbitration by selecting a mutually convenient venue for the arbitration to take place.⁶

3.2.2 Disadvantages of ad hoc arbitration

In some ways, the greatest strength of ad hoc arbitration (flexibility) is also its greatest downfall. It is generally accepted that ad hoc arbitration is procedurally much more hazardous than institutional arbitration, owing to its flexible nature.⁷

Another problematic aspect of ad hoc arbitration is the degree of control which the parties can exert over the dispute on many matters. In this form of arbitration, the parties may have control over where the dispute should be settled, which law should be applied, and even which arbitrators should hear the

⁵ G Asken, 'Ad hoc versus institutional arbitration' (1991) 2 ICC International Court of Arbitration Bulletin 8.

⁶ *Ibid.*

⁷ G Blanke, 'Institutional versus ad hoc arbitration: a European perspective' (2008) <http://62.128.128.68/Contents/Publications/pdf/140/Institutional%20versus%20Ad%20Hoc%20Arbitration_A%20European%20Perspective.pdf> accessed 15 February 2012.

case. The difficulty with the parties having such a high degree of choice and control is that they may not be the best people to make such important decisions. For example, the parties may be too close to the dispute to exercise impartiality, or may simply lack the relevant expertise and knowledge to know what would be best for the dispute.⁸

One particular aspect of ad hoc arbitration where the parties' control, and extensive involvement in the procedure is particularly troublesome, is the parties' right to select the panel of arbitrators who will settle the dispute. It is common for three arbitrators to be chosen to form the arbitration panel; each party chooses one person, and the third arbitrator is chosen by way of mutual agreement. It would be too optimistic, and indeed unrealistic to believe that the parties will make impartial choices in this regard. Simply put, the parties will each choose an arbitrator whom they believe is likely to be most sympathetic to their own point of view. As for the third arbitrator, chosen in agreement, again, the parties will put forward persons who they believe will favour them, in the hope that the other party might by chance agree to the selection. Of the three arbitrators then, only one is likely to be at all unbiased and impartial.⁹ Even if this is perhaps too harsh an opinion, and the parties do attempt to select arbitrators in an unbiased manner, there is also an issue of competency. The parties may not be experts in the particular field of the dispute, and may therefore lack the expertise to be able to select appropriate arbitrators.¹⁰ If the parties cannot agree on the selection of the third arbitrator, the decision may be deferred to a disinterested third party.¹¹

A final weakness of the ad hoc form of arbitration is related to the speed with which the dispute may be resolved. One of the purported benefits of ad hoc arbitration (namely the speed at which disputes are able to be resolved) is only advantageous where the parties dedicate themselves to adhering to the strict deadlines that they have set. Thus, the dispute will only be resolved as fast as the parties themselves permit.¹²

⁸ C Harris, 'Arbitrator challenges in international arbitration' (2008) 4 *Transnational Dispute Management*.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ J Merrills, *International Dispute Settlement* (5th edition, CUP 2011) 87.

¹² G Asken, 'Ad hoc versus institutional arbitration' (n 5).

3.3 Institutionalised arbitration

The general strengths and weaknesses of institutional arbitration will be considered, before moving on to briefly highlight the requisite strengths and weaknesses of several individual institutions themselves.

3.3.1 Advantages of institutionalised arbitration

The most obvious advantage of institutionalised arbitration is that the institution provides a rigid procedural framework and process for the arbitral proceedings which has already been put to the test in prior disputes. The institution is able to provide extensive supervision of the proceedings and ensure that the administration is straight forward and efficient.¹³

A great advantage of institutionalised arbitration is that the institution is able to impose tight deadlines and time limits. Often, at each stage of the proceedings, parties will be given deadlines; for example for the submission of documents and required responses. Often, if either of the parties defaults in this regard, sanctions are applied.¹⁴

Arbitral institutions also usually continuously compile vast databases of experts who may be appointed to settle disputes. The advantage of this is that the parties will have a large pool of potential experts at their disposal. The parties usually either select the arbitrators themselves or they can ask the institution to appoint arbitrators to resolve the dispute on their behalves. The latter may be advantageous, as the institution will have greater experience and be more knowledgeable in this regard.¹⁵

Another important advantage of institutional arbitration is that it does provide the physical facilities which are required for arbitration. This means that an appropriate venue and associated facilities are readily available for the arbitration. The convenience of these facilities may sometimes be underestimated.¹⁶

¹³ *Ibid.*

¹⁴ G Blanke, 'Institutional versus ad hoc arbitration: a European perspective' (n 7).

¹⁵ G Asken, 'Ad hoc versus institutional arbitration' (n 5).

¹⁶ *Ibid.*

A final advantage of institutionalised arbitration is neutrality. There is a perception that arbitral institutions provide more of a neutral dispute settlement mechanism than other means of dispute settlement might. For example, use of a state's national courts might lead to bias towards the interests of the state; whereas an arbitral institution has no interest in the dispute and is thus able to provide a completely neutral forum.

3.3.2 Disadvantages of institutionalised arbitration

One of the major disadvantages of institutionalised arbitration is cost. Institutions often charge relatively high administrative fees. Often fees are calculated using a base fee plus a proportion of the amount in dispute. This means that if a large amount of money is in dispute, the fees may be very high indeed. However, even if there is only a relatively small amount in dispute, the base fee could be proportionally higher than that amount. Both situations could lead to high costs.¹⁷

Another important disadvantage of institutionalised arbitration is the fixed process which must be adhered to. Frequently, the institution's bureaucracy can lead to excessive delay. Such delay may in turn also contribute to higher costs, since the dispute is ongoing for a longer period of time.¹⁸

Additionally, a feature of institutionalised arbitration that in some instances may be advantageous, can in other instances be disadvantageous; the strict deadlines imposed by the institution. Such strict deadlines are desirable in one respect, as they contribute to the settlement of disputes in a timely fashion. Deadlines are imposed at almost all stages of the dispute, giving the parties a strict timeframe in which to submit any documents or responses. However, the drawback of having to adhere to such rigid deadlines is that the parties may not have enough time to fully prepare their submissions.¹⁹

3.3.3 Specific arbitral bodies

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ 'International arbitration' <<http://www.osec.doc.gov/ogc/occic/arb-98.html>> accessed 20 February 2012.

-International Centre for the Settlement of Investment Disputes

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States²⁰ was adopted on 18 March 1965 in Washington. It entered into force the following year on 14 October 1966. At present, there are 158 signatory states to the Convention.²¹ The Convention was supported by the World Bank, which has an obvious interest in encouraging economic development²² (which the Convention is thought to advance). As detailed in its preamble, the objective of the Convention 'is to promote economic development through the creation of a favourable investment climate.'²³

The main manner in which the Convention is thought to encourage investment is through the provision of a 'credible mechanism for settling disputes'.²⁴ The Convention established the International Centre for Settlement of Investment Disputes (more commonly referred to as ICSID). Completely unique, the Centre is the only forum dedicated exclusively to the settlement of international investment disputes. It is thought that investors will feel secure in the knowledge that should a dispute arise, there will be a fair, reliable and expeditious mechanism for resolving that dispute. It is thought that investors will therefore be more confident in their investments, thus they will invest increased sums more frequently.

Despite its grand designs, it is fair to say that ICSID had modest beginnings:

The convention entered into force in 1966 but the first case was not registered before 1972. The 1970s and 1980s saw steady but only intermittent action. One or two cases per year were typical for that period. Since the mid-1990s, there has been a dramatic increase in activity. In 1995 there were four ICSID

²⁰ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf> accessed 27 August 2012.

²¹ 'ICSID Member States'

<http://icsid.worldbank.org/ICSID/Servlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home> accessed 18 August 2010.

²² S Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing) 30.

²³ R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP 2008) 223.

²⁴ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 22) 30.

arbitrations pending. In early 2007 more than 100 were pending. On average about two new cases are registered every month.²⁵

Despite its fairly understated start, ICSID has become one of, if not the most important, forum for international investment dispute settlement;

As evidenced by its large membership, considerable caseload, and by the numerous references to its arbitration facilities in investment treaties and laws, ICSID plays an important role in the field of international investment and economic development. Today, ICSID is considered to be the leading international arbitration institution devoted to investor-State dispute settlement.²⁶

ICSID has a relatively simple organisational structure, consisting of an Administrative Council and its Secretariat. The Administrative council forms ICSID's governing body. It is comprised of one representative from each ICSID Convention member state; each representative has equal voting powers. The President of the World Bank is also the Chairman of the Administrative Council (though he/she has no right to vote). The Council convenes annually at the same time as the annual World Bank and International Monetary Fund meetings take place. The Secretariat is comprised of the Secretary General, Deputy Secretary General and Staff. The Secretary General is the head of the Secretariat, its legal representative and acts as the registrar. The Deputy Secretary General is responsible for the general day-to-day running of the Secretariat which itself performs a number of important functions, including,

providing institutional support for the initiation and conduct of ICSID proceedings; assistance in the constitution of conciliation commissions, arbitral tribunals and ad hoc committees and supporting their operations; and administering the proceedings and finances of each case. The Secretariat also provides support to the Administrative Council and ensures the functioning of ICSID as an international institution and a centre for publication of information and scholarship.²⁷

²⁵ R Dolzer and C Schreuer, *Principles of International Investment Law* (n 23) 224.

²⁶ 'About ICSID' (n 2).

²⁷ 'Organizational Structure of ICSID'

<<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=Rig htFrame&FromPage=Organization and Structure&pageName=Organization>> accessed 21 September 2010.

The Secretariat also maintains the ICSID panels of conciliators and arbitrators. Each member state may allocate four persons and the Chairman of the Administrative Council may allocate ten people to the panels. The panels provide a pool of arbitrators from which the parties to ICSID proceedings may select the conciliators and arbitrators to act in an individual case. In the event that the Chairman of the Administrative Council is asked to appoint conciliators or arbitrators in ICSID proceedings, the appointees must be drawn from the panels.²⁸

The costs of administering ICSID are borne by the World Bank, and the costs of individual proceedings are incurred by the parties to the dispute. ICSID itself does not conciliate or arbitrate disputes; rather it provides the institutional and procedural framework for tribunals which are constituted on a case by case basis. ICSID actually provides two sets of procedural rules: the ICSID Convention, Regulation and Rules and the ICSID Additional Facility Rules. The former were the original Rules established to deal with international investment disputes. The Rules provide a system of dispute settlement that uniquely specialises in the settlement of international investment disputes. It offers standard clauses which the parties may use, specific rules of procedure and institutional support. Institutional support includes assistance with the selection of arbitrators and the conduct of the proceedings, which may involve providing a venue for arbitration to take place and assisting with the financial arrangements surrounding the arbitration.²⁹

Today, the 158³⁰ member states and the many hundreds, if not thousands of bilateral and multilateral investment treaties grant ICSID jurisdiction in case disputes arise during the course of investment. By becoming a signatory to the ICSID Convention, states give consent for aggrieved foreign investors to take their dispute to the Centre for settlement. In this way, foreign investors feel safe in the knowledge that should a dispute arise, there is a credible dispute settlement mechanism available to them. Ratification of the ICSID Convention is seen as a sort of guarantee or insurance against host states acting in a negative manner towards foreign investors and their

²⁸ *Ibid.*

²⁹ R Dolzer and C Schreuer, *Principles of International Investment Law* (n 23) 223.

³⁰ 'ICSID Member States' (n 21).

investments (for example in case the host state attempts to expropriate their assets). This 'insurance' enables foreign investors to feel more confident in their investment in the host state, which in turn the host state hopes will attract more foreign investment.³¹ Foreign investment is seen as desirable as it is thought to increase the state's wealth, infrastructure and enhance development.³²

Article 25(1) of the ICSID Convention defines the Centre's jurisdiction,

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.³³

Article 26 Provides,

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.³⁴

This means that once the parties consent to arbitration under ICSID, no other remedy can be sought, and thus other remedies should be exhausted before commencing ICSID arbitration.

If one party refuses to co-operate, proceedings are not thwarted. For example, if a party refuses to choose an arbitrator, ICSID will appoint one on their behalf. Furthermore, the tribunal will decide on matters of jurisdiction, and non-submission of materials and non-appearance will not halt proceedings.³⁵

Article 42(1) stipulates the law that is applicable to a dispute that is submitted to ICSID arbitration,

³¹ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 22) 31.

³² For a discussion of the relationship between investment and development, see D te Velde, 'Foreign direct investment and development: an historical perspective' (2006) <<http://www.odi.org.uk/resources/docs/850.pdf> accessed> accessed 16 February 2012.

³³ Article 25(1) ICSID Convention (n 20).

³⁴ Article 26 ICSID Convention (n 20).

³⁵ R Dolzer and C Schreuer, *Principles of International Investment Law* (n 23) 224.

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rule on the conflict of laws) and such rules of international law as may be applicable.³⁶

Interestingly, at the time it was created, Article 42(1) went against the prevailing view of developing nations that disputes which arose due to expropriation or nationalisation should be settled by the application of the national laws and remedies of the investment host states.³⁷ Over time developing nations have probably come to accept ICSID and its arbitration because they view it as necessary to attract foreign investment; investors favour states that are party to the ICSID Convention because they feel assured having a credible dispute settlement mechanism available to them should a dispute arise in the course of their investment.³⁸

All awards made by tribunals under the ICSID Convention are fully binding, final and not subject to review (except in the limited conditions set out by Articles 49-52 of the Convention itself). Parties may seek review of a final award in a number of circumstances. The limited situations in which an award may be reviewed centre around procedural issues such as: the tribunal being improperly constituted; the tribunal manifestly exceeding its powers; one or more members of the tribunal was corrupt; there was a serious departure from one or more fundamental rules of procedure; the award failed to state the reasons on which it is based.³⁹ If an award is reviewed, there are three possible outcomes; interpretation, revision and annulment. Annulment falls short of appeal in a significant manner. If an award is annulled, it simply nullifies the decision, without replacing or substituting it for a new one. Annulment will be discussed in greater depth in chapter six of the thesis.

If a party refuses to comply with the award that has been rendered, it will be treated as a breach of the Convention and lead to the revival of the right of diplomatic protection by the investor's home state government. Generally, the Convention provides an effective system of enforcement of awards, which are

³⁶ Article 42(1) ICSID Convention (n 20)

³⁷ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 22) 31.

³⁸ *Ibid.*

³⁹ L Reed et al, *Guide to ICSID Arbitration* (Kluwer 2004) 97.

binding in every state which is party to the convention.⁴⁰ ICSID arbitration proceedings are fully self-contained, independent of any outside bodies. This means that domestic courts do not have the power to intervene in proceedings, review or set aside any awards rendered.⁴¹

The Additional Facility Rules were created in 1978 by the Administrative Council. The Additional Facility was created in order to open up ICSID arbitration to include cases that would normally fall outside of its jurisdiction. This means that ICSID may now be used to settle disputes where only one disputing party is a member of the ICSID Convention, or a national of a state party to the ICSID convention. The Additional Facility also enables ICSID to hear cases that do not arise directly from an investment, and also fact-finding cases.⁴²

The Additional Facility has been very important in disputes arising from the North American Free Trade Agreement (NAFTA) where only the United States has ratified the ICSID Convention, whilst its contracting partners Mexico and Canada have not. Article 1120 of NAFTA permits arbitration under the ICSID Additional Facility, as well as under the UNCITRAL Rules. Practically, many of the disputes that do arise through NAFTA are settled under ICSID's Additional Facility (this is largely due to the availability of institutional support through ICSID).⁴³

Arbitration under the Additional Facility is not regulated by the ICSID Convention, but rather by the Additional Facility Rules. The consequence of this is that the ICSID Convention's provisions on the recognition and enforcement of arbitral awards do not apply; instead the New York Convention⁴⁴ governs these issues. Furthermore, unlike under the traditional ICSID Convention, under the

⁴⁰ R Dolzer and C Schreuer, *Principles of International Investment Law* (n 23) 224.

⁴¹ *Ibid* 223.

⁴² *Ibid* 224.

⁴³ *Ibid* 225.

⁴⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 (full text) available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf> accessed 10 August 2012.

Additional Facility, awards rendered are not exempt from the scrutiny and setting aside by national courts possessing the relevant authority.⁴⁵

With the explosion in ICSID Convention membership numbers, the caseload of the centre has also increased rapidly. To date, 249⁴⁶ cases have been concluded altogether, and 150⁴⁷ cases are currently pending. On average, the centre now sees at least one new case each month.⁴⁸ In 2008, of the 318 investment cases commenced, 202 were filed with ICSID, 83 under the UNCITRAL Rules and a further 27 with other institutions and/or under other rules.⁴⁹ If ICSID's caseload is considered to be a measure of its achievement, the centre would undoubtedly be deemed a roaring success. Indeed, ICSID considers itself to be 'the leading international arbitration institution devoted to investor-state dispute settlement.'⁵⁰ Whilst a large caseload is testament to the success of an arbitration institution, it should not be the only indicator. The opinions of experts on the subject and users of the institution should be taken into account.

i) Advantages

A huge benefit of ICSID as an arbitration institution is that it provides a neutral and completely self-contained mechanism for resolving disputes. Often, in international arbitration, the parties may select the place of arbitration, or it may be specified in the arbitration rules which are to be applied to the dispute. The place chosen will determine the procedural law which is to govern the case, and the local courts may be able to intervene, for example to designate the

⁴⁵ R Dolzer and C Schreuer, *Principles of International Investment Law* (n 23) 225.

⁴⁶ For an up to date list of concluded ICSID cases see 'Concluded ICSID cases' <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListConcluded>> accessed 25 August 2012.

⁴⁷ For an up to date list of pending ICSID cases see 'Pending ICSID cases' <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListPending>> accessed 25 August 2012.

⁴⁸ E Obadia, 'ICSID, Investment treaties and arbitration: current and emerging issues' (2001) <<http://www.dundee.ac.uk/cepmip/gateway/index.php?news=28177>> accessed 17 January 2011, as cited in M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven International Publishing 2008) 11.

⁴⁹ U Onwuamaegbu, 'International dispute settlement mechanisms- choosing between institutionally supported and ad hoc; and between institutions' in K Yannaca-Small (ed), *Arbitration Under International Investment Agreements* (OUP 2010) 65.

⁵⁰ 'About ICSID' (n 2).

tribunal or grant interim measures.⁵¹ However, in ICSID arbitration, the convention explicitly states that the place of the arbitration shall have no impact upon the proceedings. ICSID provides an entirely self-contained dispute resolution process that is completely de-localised. ICSID also oversees the appointment of the arbitrators, who in turn oversee all aspects of the proceedings. Any awards that are issued are final and binding on the parties involved, and are not subject to review (except in the extremely limited circumstances where annulment may be permitted).⁵²

ICSID is also praised for its clear and reasonable approach to the costs involved in arbitration. Like all major arbitral institutions, ICSID provides a clearly defined, transparent structure for calculating the likely costs of arbitration. Uniquely though, the cost structure provides a fixed rate fee to arbitrators. The fee is around \$2000 per day, a figure which is quite low, particularly when compared with the fees which other arbitrators typically charge. Furthermore, when compared with other arbitration institutions, ICSID's administrative fees are also comparatively low.⁵³

Another advantage of ICSID is that it provides privacy and transparency at the same time; the two concepts are traditionally thought to be mutually exclusive. In most international arbitration, at least some degree of privacy and confidentiality is observed. In ICSID arbitration, any submissions are confidential, and oral hearings take place in private. However, unlike in other international arbitration, ICSID maintains public registers of dispute resolution proceedings and frequently publishes awards with parties' consent. Additionally, many parties choose to publish awards unilaterally. This means that in practice, almost all ICSID awards are published and easily accessible to the public. This relatively high level of transparency has positive side effects;

because many states want to be considered investment-friendly, the prospect of being named- publicly- in an ICSID arbitration may intimidate host states more than the threat of other international arbitration proceedings and provide investors with more leverage in early negotiations.⁵⁴

⁵¹ L Reed et al, *Guide to ICSID Arbitration* (n 39) 8.

⁵² *Ibid.*

⁵³ *Ibid* 9.

⁵⁴ *Ibid.*

ICSID's settlement and enforcement rates may indicate a great advantage over other forms of international arbitration. What has been termed by some experts as 'the world bank factor' may have contributed to this. There is a perception that failure to settle, or respect the ICSID award may have indirectly negative political consequences, such as lack of credibility with the World Bank. In reality, this may or may not be the case, however it is thought that the perception itself, even if unfounded, may be enough to actively encourage respect for the award.⁵⁵

ii) Disadvantages

Although ICSID has a number of important advantages, and has become extremely popular, it has certainly not escaped criticism. Many experts argue that 'as ICSID booms, cracks have surfaced.'⁵⁶

One of the most serious criticisms that ICSID has faced is that it lacks legitimacy. One author has suggested that ICSID's lack of legitimacy is manifested in three ways; 'a lack of legal security due to inconsistencies in jurisprudence, opacity of the process, and lack of a mechanism to mediate conflicts of interests between arbitrators.'⁵⁷

In terms of inconsistent decisions, *Lauder*⁵⁸ and *SGS*⁵⁹ illustrate the capacity of different tribunals to reach inconsistent, and sometimes manifestly conflicting decisions. The author goes on to suggest that those decisions, 'may have jeopardised the elements of legal security and predictability so essential to the international investment regime.'⁶⁰ These cases will be discussed in more depth later in the thesis.

⁵⁵ *Ibid.*

⁵⁶ I Penusliski, 'A dispute systems design diagnosis of ICSID' in M Waibel et al (eds), *The Backlash Against Investment Arbitration: perceptions and Reality* (Kluwer 2010) 520.

⁵⁷ *Ibid* 522.

⁵⁸ *CME Czech Republic B.V. v Czech Republic*, Ad hoc – UNCITRAL Arbitration Rules, Partial Award of 13 September 2001 and IIC 62 (2003), Final Award of 14 March 2003 and *Lauder v Czech Republic*, Final Award, 3 September 2001 (Ad hoc- UNCITRAL Arbitration Rules).

⁵⁹ *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* ICSID Case No. ARB/01/13 (2003) 42 ILM 1290 and *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* ICSID Case No. ARB/02/6 (2004).

⁶⁰ I Penusliski, 'A dispute systems design diagnosis of ICSID' (n 56) 522.

Other authors have reached the same conclusion.⁶¹ The accusation that ICSID proceedings are too opaque, especially when public matters are at stake also contributes to the alleged lack of legitimacy. Meetings are often held in secret, with members being unknown, and awards are not necessarily always fully disclosed. The thorny issue with transparency though, is how it may be reconciled with the concept of confidentiality, which is traditionally thought to be one of the major advantages of the current system of international arbitration.⁶² Furthermore, ICSID's legitimacy may be impaired by the lack of mechanisms that are available 'to tackle conflicts of interests amongst arbitrators.'⁶³ The ability of the parties to select the arbitrators may allow for the selection of biased arbitrators.⁶⁴

Some experts have also criticised ICSID's cost structure, and the length of proceedings. Although the costs are clearly defined before the arbitration even begins, some commentators believe that the costs are too high. This is a particularly problematic issue for developing nations who do not have unlimited resources at their disposal to fund legal defence if an investor wishes to take a dispute to arbitration. This is particularly worrying, given that statistically most

⁶¹ G Egli, 'Don't get BIT: addressing ICSID's inconsistent application of most-favoured-nation clauses to dispute resolution provisions' (2007) 34 *Pepperdine Law Review* 1045, as cited in K Supnik, 'Making amends: amending the ICSID Convention to reconcile competing interests in international investment law' (2009) 59 *Duke Law Journal* 343. Also see C Tams, 'Is there a need for an ICSID appellate structure?' accessed through <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341268> on 18 January 2011, and S Franck, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions' (2005) 73 *Fordham Law Review* 1521.

⁶² I Penusliski, 'A dispute systems design diagnosis of ICSID' (n 56) 523-524.

⁶³ *Ibid* 524.

⁶⁴ For a more detailed treatment of possible arbitrator bias in international investment arbitration, see W Park, 'Arbitrator integrity' in M Waibel et al (eds), *The Backlash Against Investment Arbitration: perceptions and Reality* (Kluwer 2010) 189, N Peter and C Lemarie, 'Is there a different yardstick for arbitrator bias in investment treaty arbitration?' (2008) 4 *Transnational Dispute Management* and C Mouawad, 'Issue conflicts in investment treaty arbitration' (2008) 4 *Transnational Dispute Management*. For arbitrator bias in general arbitration see A Redfern and M Hunter et al (eds), *Law and Practice of International Commercial Arbitration* (4th Edition, Sweet & Maxwell 2004) 186-220, C Harris, 'Arbitrator challenges in international arbitration' (n 8), J Marshall et al, 'Six degrees of separation: arbitrator independence in international arbitration' (2008) 4 *Transnational Dispute Management*, H Raeschke-Kessler, 'Impartiality and independence of arbitrators- a problem of transnational law' (2008) 4 *Transnational Dispute Management*, and R Akenhead, 'Bias in international arbitration' (2008) 4 *Transnational Dispute Management*.

investment arbitration cases are brought against developing states.⁶⁵ Moreover, the average length of time it takes for a dispute to be completely resolved from start to finish with ICSID is several years. The process is not as quick and easy as we may have been led to believe.⁶⁶

The significance of the disadvantages and indeed their effects should not be underestimated. A survey completed in 2004 found that over a third of ICSID clients are dissatisfied with the quality of ICSID's arbitral awards.⁶⁷ In fact, recently, a number of states have completely withdrawn or seriously limited their ICSID Convention membership. Bolivia fully withdrew its membership in 2007⁶⁸, asserting that ICSID had become a mechanism for foreign investors to threaten arbitration when faced with policy decisions and legislation from host state governments that adversely affected them. Bolivia also suggested that within ICSID there is a bias towards investors and their corporations and against states. Bolivia also cited the lack of an appeal mechanism and confidentiality of ICSID proceedings as further justification for its denunciation.⁶⁹ Ecuador followed in Bolivia's footsteps and denounced from the ICSID Convention in 2009 citing similar reasons for the departure as Bolivia did in 2007, namely an alleged bias within ICSID towards the protection of investors at the expense of the host state.⁷⁰

-United Nations Commission on International Trade Law

Resolution 2205(XXI) of the United Nations' General Assembly established the United Nations Commission on International Trade Law

⁶⁵ E Gottwald, 'Levelling the playing field: is it time for a legal assistance center for developing nations in investment treaty arbitration?' (2006) <<http://law.bepress.com/expresso/eps/1804/>> accessed 18 January 2011, and I Penusliski, 'A dispute systems design diagnosis of ICSID' (n 56) 526.

⁶⁶ *Ibid* I Penusliski.

⁶⁷ 'ICSID Stakeholder Survey' (2004) <<http://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp>> accessed 18 January 2011, as cited in I Penusliski *ibid* 507.

⁶⁸ K Supnik, 'Making amends: amending the ICSID Convention to reconcile competing interests in international investment law' (n 61)

⁶⁹ C Tietje et al, 'Once and forever? The legal effects of a denunciation of ICSID' (2008) <<http://www.wirtschaftsrecht.uni-halle.de/sites/default/files/altbestand/Heft74.pdf>> accessed 31 January 2012.

⁷⁰ N Grossman, 'Legitimacy and international adjudicative bodies' (2010) <<http://docs.law.gwu.edu/stdg/gwilr/PDFs/41-1/41-1-grossman.pdf>> accessed 31 January 2012.

(UNCITRAL) on 17th December 1966. The General Assembly recognised that often member states have different trade laws, and that legal disparities between different state trade laws may act as barriers to international trade. The Commission was created in order that it should attempt to reduce or entirely eradicate such barriers to trade by ‘further[ing] the progressive harmonization and unification of international trade’.⁷¹

The Commission itself is comprised of 60 member states who are elected by the UN General Assembly. Membership is carefully structured in order that it should ‘be representative of the world’s various geographic regions and its principal economic and legal systems.’⁷² Members are elected for six year terms, with half the membership expiring every three years.⁷³

The Commission is not a judicial body and therefore does not hear cases. Rather, disputes are settled in accordance with the UNCITRAL Arbitration Rules.⁷⁴ The Rules were adopted by the Commission on 28th April 1976. They, provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitration and the conduct of arbitral proceedings and establishing rules in relation to the form, effect and interpretation of the award.⁷⁵

Around 20-30% of publicised investment arbitration cases are settled under UNCITRAL arbitration rules.⁷⁶ By 2007, of the 290 international investment disputes that had been settled, 80 had been resolved under the UNCITRAL Rules of Arbitration.⁷⁷ The other disputes were settled in

⁷¹ ‘Origin, Mandate and Composition of UNCITRAL’

<<http://www.uncitral.org/uncitral/en/about/origin.html> accessed 9 July 2009.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ See ‘UNCITRAL Texts & Status: International Commercial Arbitration & Conciliation’ <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html> accessed 17 September 2010.

⁷⁶ N Horn, ‘Current use of the UNCITRAL arbitration rules in the context of investment arbitration’ (2008) 24 *Arbitration International* 587.

⁷⁷ ‘UNCTAD Latest Developments in Investor-State Dispute Settlement’ (2009) <http://unctad.org/en/docs/webdiaeia20096_en.pdf> accessed 25 August 2012, as cited in S Jagusch et al, ‘A comparison of ICSID and UNCITRAL arbitration: areas of

accordance with ICSID procedure. The choice of procedural rules seems to amount largely to a choice between the two.⁷⁸ A number of famous cases have been settled under the UNCITRAL rules, for example the Iran claims tribunal. The UNCITRAL rules are often the rules of choice for arbitration under NAFTA and in ad hoc arbitration.⁷⁹

i) Advantages

One of the advantages of settling disputes in accordance with the UNCITRAL Rules is that the 'Rules are characterized by...[a high] level of confidentiality.'⁸⁰ This high degree of confidentiality is possible because UNCITRAL proceedings are governed by the local law of the seat of the arbitration. The local law may (and often does) impose a duty of confidentiality. It is thought that the high degree of confidentiality is one of the main reasons that parties choose to arbitrate their dispute under the UNCITRAL Rules. The main advantage of the arbitration taking place 'in a completely closed environment...[is that] all sensitive information and documents remain private and confidential.'⁸¹ The Rules themselves make reference to the privacy and confidentiality of the hearings and the awards, but not the proceedings themselves.⁸² There is talk of revising the Rules in the future, in order that they should reflect a more transparent (and less confidential) approach to dispute settlement. The Rules have already been revised once, in 2006; those revisions became effective as of August 2010. However, the revised Rules did not touch on the issue of confidentiality and transparency, though it is expected that the Working Group will commence work on this area in the near future. Thus, the current advantage of a high degree of confidentiality under the UNCITRAL Arbitration Rules may soon cease to exist.⁸³

divergence and concern' in M Waibel et al, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010) 79.

⁷⁸ *Ibid* S Jagusch et al 80.

⁷⁹ D Caron and L Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd Edition, OUP 2011) 93.

⁸⁰ *Ibid* 94.

⁸¹ D Caron and L Caplan (n 79) as cited in S Jagusch et al (n 77) 95.

⁸² Article 25 of the UNCITRAL Arbitration Rules 1976, as revised in 2010 (n 3).

⁸³ See 'Discussion of revised UNCITRAL Arbitration Rules'

<<http://www.unis.unvienna.org/unis/pressrels/2010/unisl139.html>> accessed 20 January 2011.

ii) Disadvantages

One major disadvantage of the UNCITRAL Rules is the lack of a review mechanism for awards. As noted above, the ICSID Convention does provide some (albeit very limited) scope for the review of awards through its Article 52 Annulment Procedure.⁸⁴ The UNCITRAL Arbitration Rules do not provide for any form review, either by means of annulment or appeal of decisions. This is disadvantageous because neither party can seek redress if they feel that the award is unjust, or if there has been some abuse of process. It must be noted that the parties may have an indirect right to review of the award, but only if the local law of the seat of arbitration allows this. This is not an ideal situation though, as it may significantly lengthen the dispute. In turn, this may cause the parties to incur greater costs and suffer more general inconvenience. The review of decisions by domestic courts is also quite undesirable, at least in part, because it defeats the object of taking the dispute to international arbitration from the outset. The advantages of impartiality and neutrality of international arbitration are effectively destroyed if the dispute is to ultimately be reviewed by domestic courts. Parties will also be dubious about this review practice, particularly if the seat of arbitration is not thought to have a completely independent and capable judiciary. Thus, the lack of review mechanism in the UNCITRAL Rules is a potentially enormous downfall; it may frequently lead to parties in need of dispute settlement facilities overlooking the UNCITRAL Rules, in favour of dispute settlement under the ICSID Convention. ICSID might be preferable because it does provide some self-contained form of review, and does not involve deferral to domestic courts.⁸⁵

-Permanent Court of Arbitration

The PCA was established by the Hague Convention for the Pacific Settlement of Disputes of 1899. The Convention was subsequently amended in 1907. The PCA is rather curiously named; it is not a court or a judicial body,

⁸⁴ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (n 20).

⁸⁵ S Jagusch (n 77) 102-104.

in the conventional understanding of that term, but an administrative organization with the object of having permanent and readily available means to serve as the registry for purposes of international arbitration and other related procedures, including commissions of enquiry and conciliation.⁸⁶

Each member state has the right to nominate four persons to the list from which arbitrators are chosen. Additionally, the PCA offers registry services and support to ad hoc tribunals. The PCA often administers arbitration under the UNCITRAL Rules.⁸⁷ The Court typically deals with disputes on the matters of territory and human rights, as well as commercial and investment disputes which may arise under bilateral and multilateral treaties.⁸⁸

Originally, the PCA was intended to be an institution for the settlement of inter-state disputes; this is reflected in the wording of its founding conventions. However, today the court enjoys a wide jurisdiction. The PCA is capable of hearing disputes between 'states and international organizations or private persons, between international organizations and between international organizations and private persons.'⁸⁹ The Court's mandate was broadened in 1935, when it heard the case of *Radio Corporation of America (RCA) v China*⁹⁰. This was the first case between a state party and an individual to be heard by the PCA. *RCA v China* set the precedent for the Court's mandate and future activities. It is now particularly common for the PCA to facilitate the settlement of disputes between governments and private individuals where the latter has invested in the former's territory and where problems have arisen during the course of the investment.⁹¹

⁸⁶ R Shabtai, *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents* (TMC Asser Press 2001) 21.

⁸⁷ *Ibid.*

⁸⁸ 'Permanent Court of Arbitration: about us' <http://www.pca-cpa.org/showpage.asp?pag_id=1027> accessed 7 August 2009.

⁸⁹ P Hamilton et al (eds), *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution. Summaries of Awards, Settlement Agreements and Reports* (Kluwer 1999) 11.

⁹⁰ *Radio Corporation of America v China*, Award, Ad Hoc Rules of Procedure, ICGJ 389 (PCA 1935) as cited in 'Permanent Court of Arbitration 106th Annual Report' (2006) <<http://www.pca-cpa.org/upload/files/03%202006%20Summary%20Report%20FINAL%20en.pdf>> accessed 17 September 2010.

⁹¹ P Hamilton, *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution. Summaries of Awards, Settlement Agreements and Reports* (n 89).

The Court has interesting links with other international arbitral institutions. In 1968, the PCA entered into an agreement with ICSID which provided for the 'use of staff and facilities in connection with proceedings conducted at the headquarters of one institution but under the auspices of the other.'⁹² A similar agreement was concluded in 1990 with MIGA.⁹³ Other comparable agreements have been entered into, for example those with the International Council for Commercial Arbitration (ICCA) and the International Federation of Commercial Arbitration Institutions (IFCAI).⁹⁴

The PCA's relationship with the ICJ is rather intriguing as both institutions sit at the Peace Palace in The Hague. Perhaps even more interestingly, 'many members of the International Court of Justice, past and present, were or are members of the Permanent Court.'⁹⁵ Furthermore, the flexibility of the PCA's facilities enable it to assume a role which the ICJ cannot emulate (due to limitations of jurisdiction and due to the ICJ's adjudicatory nature). For these reasons then, the two institutions have had and continue to have a close relationship, but do have important differences.

From the early years of its establishment, around 1910 to the 1990's, the PCA heard on average around 20 to 30 cases annually. Since the 1990's that figure has increased dramatically to around 65 cases per year in the early 2000's.⁹⁶ Many of the above cases will have involved investment related matters, and the PCA's contribution to settling international investment disputes and development of foreign investment law as a discipline cannot be overlooked.

i) Advantages

One of the advantages of the PCA is the flexibility which it can provide. Although the Court itself is situated at the Peace Palace in The Hague, proceedings can either take place on site, or anywhere else that the parties agree that they should take place. This allows parties to the dispute to take

⁹² 'Permanent Court of Arbitration 106th Annual Report' (2006) (n 90).

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ P Hamilton, *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution. Summaries of Awards, Settlement Agreements and Reports* (n 89) 12.

⁹⁶ 'Permanent Court of Arbitration 106th Annual Report' (2006) (n 90).

advantage of the physical facilities that the Court has to offer, or if it is more convenient, they can choose to find their own venue.⁹⁷

Another advantage of the PCA is that generally, proceedings take place in camera (unless the parties specify otherwise). This means that PCA arbitrations generally provide a high degree of confidentiality, which is often a top priority for the parties involved.⁹⁸

ii) Disadvantages

One of the disadvantages of having the PCA resolve disputes is the lack of a rigid cost structure. The administrative costs are clearly defined from the outset. However, the fees payable to the arbitrators are variable, and therefore cannot be known before entering into the dispute resolution process. Arbitrator fees are determined by the mutual agreement of the parties and the arbitrator. The problem with the lack of a set arbitrator fee is that arbitrators can command varying amounts in remuneration for their services.⁹⁹

-International Court of Justice

According to Article 92 of the Charter of the United Nations, the ICJ is the 'principal judicial organ of the United Nations'¹⁰⁰. The Court is charged with the task of settling the disputes submitted to it by UN member states in accordance with international law. Additionally, the Court is also often called upon to give advisory opinions. The ICJ is limited to hearing disputes between states, as it operates under the traditional view that international law is applicable to conduct between state parties.¹⁰¹ It is for this reason that the Court's role in international investment dispute settlement has been modest; investment related disputes are usually between states and investors. However, if an investor can persuade their home state to take up the case on their behalf,

⁹⁷ Article 18 UNCITRAL Rules 1976, as revised in 2010 (n 3).

⁹⁸ 'UNCTAD Dispute Settlement: Permanent Court of Arbitration (2003) <http://www.unctad.org/en/docs/edmmisc.232add26_en.pdf> accessed 9 February 2012.

⁹⁹ 'Permanent Court of Arbitration: Arbitration Services' <http://www.pca-cpa.org/showpage.asp?pag_id=1048> accessed 16 February 2012.

¹⁰⁰ Article 92 of the Charter of the United Nations, signed 26 June 1945. Full text available at <<http://www.un.org/en/documents/charter/>> accessed 11 August 2012.

¹⁰¹ A Lowenfeld, *International Economic Law* (OUP 2008) 511.

the Court may be called upon to hear the dispute. In this way, the ICJ has been called upon to hear international investment disputes on a small number of occasions.¹⁰²

Only three investment disputes have come before the ICJ in the post-war period: *The Anglo-Iranian Case*¹⁰³; *Barcelona Traction*¹⁰⁴ and *ELSI*¹⁰⁵. The *Anglo-Iranian Case* concerned a UK oil company, which had a concession in Iran dating from 1933. In 1951 the Iranian parliament nationalised the oil industry. The company invoked an arbitration clause which was rejected by Iran. The UK government then took up the case, and so it was referred to the ICJ. The Court held that the UK could not invoke the treaties with Iran on which it sought to rely, as they were concluded before the ratification of a 1930 Declaration which accepted the jurisdiction of the ICJ. Accordingly, the Court held that it did not have jurisdiction to hear the case.¹⁰⁶

The *Barcelona Traction* case involved a holding company in Canada which was to develop a system for producing and distributing electricity in Spain. Shares in the company were predominantly held by Belgian nationals. The company was declared bankrupt and lost any rights over its property. New shares were issued, and these were sold to a Spanish company. Belgium initiated proceedings, claiming reparation for the shares. Belgium claimed jurisdiction on the basis of a 1927 treaty with Spain. Spain refuted this, claiming that Belgium did not have the required standing to initiate proceedings. The Court held that Belgium did in fact lack standing. Lowenfeld commented that,

special arrangements could provide substantive protections or avenues for dispute settlement. But customary law would not be built from these arrangements, or at least had not been built. Like the United States Supreme Court six years earlier, the International Court of Justice saw an 'intense conflict of systems and interests' and decided to get out of the way.¹⁰⁷

The third and final case to be heard by the ICJ on the subject of foreign investment is the *ELSI* case. The case concerned an Italian electronic

¹⁰² *Ibid.*

¹⁰³ *Anglo-Iranian Oil Company (Iran v UK)* [1952] ICJ Rep 93.

¹⁰⁴ *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* [1970] ICJ Rep 3

¹⁰⁵ *Elettronica Sicula SPA (ELSI) (USA v Italy)* [1989] ICJ Rep 15

¹⁰⁶ A Lowenfeld (n 101) 512.

¹⁰⁷ *Ibid* 515.

manufacturing company (ELSI), which was owned by a larger American company. ELSI relied heavily on patents, licences and assistance from its parent company. ELSI was not a success, and never became economically self-sufficient. As a result of this, the American company decided not to invest any more capital in its Italian subsidiary. ELSI made plans to shut down production. The local authorities obtained a requisition order, and ELSI then declared itself bankrupt. The authorities publicly announced that they intended to take over ELSI's assets through a subsidiary. Discussions about the takeover (which was to include settlement of ELSI's debts) were held. Discussions did not come to fruition, and therefore auctions of ELSI's assets were scheduled to be held. The authorities did not participate in the auctions to take over the company, as had been discussed. Other bidders did not bid, as the authorities' takeover plan had been well publicised. The authorities' subsidiary company did purchase some of ELSI's assets eventually. The original requisition order was then annulled, due to lack of legality. This annulment caused financial injury to ELSI's American parent company; its costs were significantly higher than they would have been had the company been allowed to go ahead with the original planned liquidation. The American government therefore took the case to the ICJ. The Court held that the case was admissible, but that the Italian government had not breached its treaty of friendship between the parties. In doing so, the ICJ rejected the USA's claim for reparation. It has been noted that, 'the Judgment of the Chamber does not include any substantial contribution to the clarification or even the evolution of customary international law.'¹⁰⁸

The diminutive number of cases that have been heard by the ICJ on foreign investment illustrate that the court's impact on the field of international investment law and its development has been, and continues to be relatively minimal. In those cases that have been settled by the ICJ, the court has largely tended to avoid engaging in the contentious issues, instead either casting jurisdictional doubts or making general statements.¹⁰⁹

Having settled so few disputes involving investment, it is difficult to evaluate the strengths and weaknesses of the ICJ in this regard. Other

¹⁰⁸ D Bishop et al, *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer 2005) 470.

¹⁰⁹ See M Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer 2000) 318.

institutions, such as ICSID have eclipsed the ICJ, hearing many more economic/investment related disputes. Undoubtedly one of the reasons why the ICJ has been involved in so few investment disputes is because the ICJ is limited to hearing inter-state disputes; the majority of international investment disputes involving state and non-state parties. Due to the limited participation in settling investment disputes which the ICJ has had in the past, some commentators are sceptical about whether the court could assume a more active role in the future.¹¹⁰ Although, according to one study by Wellens, this pessimism may not be warranted. Wellens found that the common assumption that the court is incapable and/or unwilling to deal with disputes of an economic nature is completely unfounded. Wellens' study also dismisses the accusation that the court does not provide suitable judicial remedies for economic disputes.¹¹¹

At first glance, the aforementioned pessimism regarding the future role of the ICJ in settling economic disputes does seem to be inconsistent with Wellens' research. However, this is simply not the case. The pessimism expressed by some commentators does not suggest that the ICJ is indeed incapable of settling such disputes; rather, that the likelihood that the court will be called upon to settle economic disputes is low.¹¹²

Nonetheless, it has been suggested that the future role of the ICJ in settling economic disputes will be greater than it has in the past (albeit in a slightly different manner). Qureshi¹¹³ indicates that the court will have an important constitutional role to play in the future; the author believes that this constitutional role will gradually become more important in an increasingly fragmented legal framework. The constitutional role of which he talks, will involve safeguarding the fundamental pillars 'upon which international economic relations rest...and which are founded...upon general international law.'¹¹⁴

¹¹⁰ See E Petersmann, 'Dispute settlement in international economic law: lessons for strengthening international dispute settlement in non-economic areas' (1999) 2 *Journal of International Economic Law* 189.

¹¹¹ K Wellens, *Economic Conflicts and Disputes Before the World Court (1922-1995), Studies and Materials on the Settlement of International Disputes Volume 2* (Springer 1996) 253-254 as cited in A Qureshi (ed), *Perspectives in International Economic Law* (Kluwer 2002) 22.

¹¹² *Ibid* A Qureshi.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

Qureshi gives the example of the court guaranteeing the basic freedoms, without which international investment would be impossible, as well as clarifying the limits of state sovereignty which is also significant for international investment law. Another aspect of the constitutional role which Qureshi describes is the court's status as one of the most important judicial organs of the international economic order, as well as of the UN itself. As such, 'the court services many international economic treaties, which refer to it in the event of the need for conflict resolution; as well as IEOs for advisory opinion.'¹¹⁵ The court may also have an important future role in adjudicating disputes involving conflicts arising from the different sources of the various obligations.¹¹⁶

Qureshi illustrates that although the ICJ's adjudicatory role in international economic disputes, including international investment disputes may be characterised as fairly minimal in the past, the court's future role could be very different and indeed much more significant.¹¹⁷

- Regional arbitration centres

Throughout the world there are a number of regional arbitration centres, the Arbitration Institute of the Stockholm Chamber of Commerce (AISCC) and the Hong Kong International Arbitration Centre (HKIAC) provide examples of such institutions. The AISCC does not decide disputes; rather, it administers disputes in accordance with the rules of the Stockholm Chamber of Commerce or any other procedural rules (e.g. UNCITRAL) and provides information on arbitration and mediation.¹¹⁸ The HKIAC works in a similar fashion¹¹⁹. Indeed there are hundreds of similar regional arbitration centres around the world. The great advantage of regional organisations such as these is that they may be much closer to the place where the dispute has arisen. This means that the time and costs involved in resolving the dispute may be much lower. For parties based in America or Asia, travelling to Europe for arbitration does not make sense. On the other hand, if parties live in different regions, regional arbitration

¹¹⁵ *Ibid* 23-24.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid*.

¹¹⁸ 'Arbitration Institute of the Stockholm Chamber of Commerce: SCC Arbitration' <<http://www.sccinstitute.com/skiljeforfarande-2.aspx>> accessed 31 January 2012.

¹¹⁹ See 'Hong Kong International Arbitration Centre' <<http://www.hkiac.org/>> accessed 31 January 2012.

centres are less useful as one party may still have to travel a significant distance.¹²⁰

3.4 System of International investment arbitration as a whole

3.4.1 Strengths

-Organised dispute settlement

Perhaps the most important advantage of the system of international investment arbitration is that it provides a mechanism for resolving disputes in an organised and civilised manner.¹²¹ As the previous chapter outlined, prior to the settlement of investment disputes through arbitration, diplomatic protection and allowing the investment host state national courts to settle arising disputes was commonplace. If diplomatic protection was unsuccessful, disputes often arose to physical conflict and so called gunboat diplomacy. Gunboat diplomacy involved individuals persuading their national governments to take up their case, with the government stationing a number of warships off the coast of the offending state (if possible) and threatening attack in the event that the investment dispute was not resolved. In this manner, many investment disputes escalated into physical conflicts.¹²² Similarly, using the national courts of the host state to settle disputes did not yield much success.

International investment arbitration has provided a mechanism through which arising disputes are able to be dealt with in a timely, cost effective manner. The system of international investment arbitration has therefore undoubtedly contributed to the promotion of peaceful international relations.

Organised dispute settlement through arbitration has also enabled the de-politicisation of disputes, allowing them to be settled without recourse to violence or physical conflict. Furthermore, smaller and lesser economically developed states are able to bring a dispute involving an investor from a larger, more economically developed nation. This was much more difficult before

¹²⁰ For more information on the advantages and disadvantages of regional arbitration centres, especially on costs and convenience see L Trakman, 'Arbitration options: turning a morass into a panacea' 31 *University of New South Wales Law Journal* 292

¹²¹ P Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 2011) 273.

¹²² S Subedi, *International Investment Disputes: Reconciling Policy and Principle* (n 22) 97.

arbitration became popular. Additionally, arbitration allows investors to take a case to a neutral tribunal, this means that they can bypass their home state governments. Furthermore, international arbitration enables investors to bypass international adjudicative bodies such as the ICJ, thus 'avoiding the possibility of being caught up in other geopolitical dialogues.'¹²³

-International recognition and effective enforcement of arbitral awards

It is generally accepted that international law suffers from a lack of effective enforcement mechanisms; this means that judgments and decisions of international courts and tribunals are often not complied with.¹²⁴ In stark contrast, international investment arbitration enjoys a relatively high level of enforceability.¹²⁵ Decisions and awards of permanent arbitral bodies, as well as those of ad hoc tribunals are treated as foreign arbitral awards (as defined by the New York Convention)¹²⁶ and are therefore enforceable under the Convention itself. The Convention was adopted during a United Nations diplomatic conference on 10 June 1958, and came into force on 7 June 1959. Article III of the Convention provides that,

Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applied than are imposed on the recognition of domestic arbitral awards.¹²⁷

-Privacy and confidentiality

¹²³ 'UNCTAD Series on International Investment Policies for Development' <<http://www.unctad.org/templates/webflyer.asp?docid=13762&intItemID=2340&lang=1&mode=downloads>> accessed 28 January 2011.

¹²⁴ A Guzman and T Meyer, 'International soft law' <https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=ALEA2010&paper_id=168> accessed 16 February 2012.

¹²⁵ 'UNCTAD Series on International Investment Policies for Development' (n 123).

¹²⁶ New York Convention 1958 (n 44).

¹²⁷ *Ibid* article III.

The principle of confidentiality is one of the fundamental principles of arbitration; it is set out in many domestic laws concerning arbitration, as well as in countless other institutional and procedural rules.¹²⁸ Confidentiality is thought to apply to 'the proceedings themselves, the associated documents and the final arbitral award'¹²⁹.

Confidentiality is widely regarded as one of the primary advantages of arbitration.¹³⁰ As regards investment arbitration, confidentiality is often of particular importance due to the sensitive issues that often form the subject of investment disputes. Sensitive issues are often at stake due to the nature of investment arbitration; namely the fact that investment arbitration typically takes place between a state party and a private individual or company. Disputes often concern the manner in which the state is regulating foreign investment or indeed any other aspect of its regulatory authority, which may have an adverse effect on the foreign investment.

-Neutrality of proceedings

Neutrality of proceedings is an often cited benefit of international investment arbitration. In fact, it is one of the main reasons why investment arbitration came to be so popular. One of the traditional means of resolving disputes that arise during the course of international investment is making use of the domestic court system of the investment host state, as advocated by Argentine jurist Carlos Calvo.¹³¹ Unsurprisingly, state parties generally support the idea of allowing their national courts to hear the dispute, in the hope that they be treated more favourably by their own judiciary. It would be too idealistic to believe that such bias would not occur on the basis that judges are thought to be well-respected individuals possessing the ability to distance themselves from

¹²⁸ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 48) 36. See also Article 25 of the UNCITRAL Rules (n 3) and Article 21 of the International Chamber of Commerce Rules of Arbitration 2012 full text available at <<http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/>> accessed 11 August 2012.

¹²⁹ *Ibid* M Dimsey 37.

¹³⁰ 'Advantages of Arbitration, International Court of Arbitration' <<http://www.iccwbo.org/court/arbitration/id4089/langtype1033/index.html>> accessed 2 December 2010.

¹³¹ See previous chapter for in depth discussion of the Calvo doctrine. Also see A Lowenfeld (n 101) 475-481.

the case and achieve impartiality. This would be naive, especially when we take into account which states, and therefore which judges would become embroiled in international investment dispute settlement. In traditional international investment relationships, foreign investors originate from richer, developed nations, and the states that they invest in are poorer and less developed. Thus, if a dispute did arise, it would be courts of the less developed nation that would handle the settlement of said dispute. Corruption and bias (from which judges are not immune) is more likely to be a problem in less developed nations. Even if we concede that corruption may be too strong an accusation, lesser bias may still be significant; it would be particularly difficult for judges to rule against their state government where it simply cannot afford to lose. Investment disputes often involve huge sums of money, with the losing party having to pay substantial damages and costs. Poorer, lesser developed nations may literally not be able to afford to lose. Furthermore, even if the judiciary remains impartial, some states require judges to apply more favourable local law, as opposed to international legal norms which may not form part of the domestic legal order.¹³²

For the reasons discussed above, the settlement of international investment disputes by the courts of the investment host state is thought to be hazardous. It was for these same reasons that arbitration was introduced and gained popularity; it is thought to be a much fairer, less biased means of settling international investment disputes. Neutral arbitrators, who may possess a different nationality to each of the parties, and who are experts in the field are able to be selected to preside over the case. Moreover, the arbitration can take place in a neutral location, in a state other than the home states of the parties involved.¹³³

-Finality, speed and economy

¹³² See S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 22) 218-219 for a discussion of some of the problems associated with allowing the national courts of the investment host state to intervene in international investment disputes. See also 'UNCTAD Series on International Investment Policies for Development' (n 123) 14.

¹³³ *Ibid* UNCTAD.

Three of the most often cited advantages of the current system of international investment arbitration are finality, speed and economy.¹³⁴ Finality is concerned with final and binding nature of the award; essentially it means that no further appeal should be possible. Traditionally, finality of investment awards has been valued because it leads to greater speed and economy. It is obvious that allowing further appeal will cause a dispute to go on longer, which will in turn cost the parties more.

However, there is evidence to suggest that these purported advantages are being overstated. Finality has traditionally been an important principle in international investment arbitration, sought by investors and states alike. Nonetheless, there is evidence to suggest that the tide is now turning and that parties are valuing justice and correctness over finality.¹³⁵

In terms of the speed with which international investment arbitration is carried out, the average length of time taken to settle a dispute through ICSID is thought to be around two years.¹³⁶ If strict time limits are imposed on the process, the amount of time it would take to go through an extra layer of arbitration (i.e. appeal) would surely appear negligible, due to the fact that the parties are already waiting a relatively lengthy amount of time for the original award.

Finally, as regards to the economy that is traditionally thought to have been achieved in international arbitration, there is evidence that this is no longer the case. More recently, the costs involved in investor-state arbitration have 'sky-rocketed'¹³⁷. The increased costs being referred to not only include the damages that the losing party will be ordered to pay the winner, but also the costs involved in conducting arbitration procedures. Legal fees associated with the proceedings have increased dramatically in recent years, with these costs amounting to as much as 60% of the total costs of the case.¹³⁸

¹³⁴ *Ibid.*

¹³⁵ J Clapham, 'Finality of investor-state arbitral awards: has the tide turned and is there a need for reform?' (2009) 26 *Journal of International Arbitration* 437.

¹³⁶ C Peinhardt and T Allee, 'The International Centre for Settlement of Investment Disputes: a Multilateral Organization Enhancing a Bilateral Treaty Regime' (2006) <<http://www.utdallas.edu/~cwp052000/mpsa.peinhardt-allee.pdf>> accessed 31 January 2012.

¹³⁷ 'UNCTAD Series on International Investment Policies for Development' (n 123) 16-18.

¹³⁸ *Ibid.*

3.4.2 Weaknesses

-Parallel proceedings

Parallel proceedings are becoming increasingly problematic and common in international investment law dispute resolution. Parallel proceedings are, for the purposes of this work, defined as the situation occurring where the same parties initiate the same proceedings in more than one forum.¹³⁹ The phenomenon of parallel proceedings in international investment arbitration is possible due to the ever expanding network of investment treaties, agreements and contracts which include dispute settlement provisions. Investors seeking to pursue claims often have a choice of fora available to them, and may choose to pursue multiple claims (as this is often not expressly forbidden). Parallel proceedings are problematic for a variety of reasons, but especially because they can lead to conflicting awards being rendered.¹⁴⁰

In the investment sphere, parallel proceedings may result from three different situations:

- (i) where, because of the wide definition of investor to include direct and indirect shareholders, investors are able to claim breaches of different BITs and to seek relief through different arbitration proceedings under each of the invoked treaties in respect of a single investment and regarding the same facts;
- (ii) where an investor may have both treaty and contract claims based on the same facts against the same host government; and
- (iii) where there is a jurisdictional overlap, that is where the same international dispute might be subject to adjudication by more than one international judicial body.¹⁴¹

In instances where parallel proceedings occur, there are two jurisdictional regulating rules which may be applied; *res judicata* and *lis pendens*. It should be noted that the effects of both are limited in terms of time

¹³⁹ K Yannaca-Small, 'Parallel proceedings' in P Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1009. See also R Kreindler, 'Parallel proceedings: a practitioner's perspective' in M Waibel, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010) 127-150 and M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 48) 140.

¹⁴⁰ *Ibid* Yannaca-Small.

¹⁴¹ *Ibid* 1010.

and substance. The res judicata rule 'serves as a bar against adjudication only after the first proceedings are concluded and a valid judgment issued'¹⁴², whereas lis pendens 'bars a second litigation only during the pendency of another set of proceedings.'¹⁴³ Res judicata and lis pendens are commonly recognised principles in domestic legal systems, where they are frequently applied. Their application in international litigation is certainly less clear: they are not contained in arbitration institution rules or in international investment agreements, and they are not frequently referred to in investment disputes.¹⁴⁴

Parallel proceedings may also be regulated through treaty-based methods, such as provisions requiring the exhaustion of local remedies, fork-in-the-road provisions, waiver and umbrella clauses. Provisions requiring the exhaustion of local remedies essentially require disgruntled investors to bring the case to the investment host state tribunals or courts before the case can be taken to international arbitration (therefore limiting the risk of parallel proceedings occurring). The utility of these types of provisions is somewhat limited, due to the fact that they have, as yet, not been widely used. Fork-in-the-road provisions also attempt to limit the possibility of parallel proceedings occurring by forcing the investor to make an irrevocable choice as to the forum in which the claim will be pursued, effectively banning parallel proceedings. Given the complexities of these clauses, they have never really been strictly implemented and enforced.¹⁴⁵ Waiver provisions require investors, in certain circumstances to waive their right to initiate proceedings against the allegedly breaching party except for injunctive or declaratory proceedings. Umbrella clauses create international law obligations that a host state will observe any commitments it has entered into with respect to any investment. They are also more general in nature, supporting existing, more specific clauses, and giving investors additional protection. Such clauses can help to avoid parallel

¹⁴² *Ibid* 1013.

¹⁴³ *Ibid* 1014.

¹⁴⁴ *Ibid* 1012-1025. See also A Reinisch, 'Parallel proceedings and conflicting awards' in M Waibel, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010) 123.

¹⁴⁵ For more discussion of fork in the road provisions see M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 48) 81 and A Redfern and M Hunter et al (eds), *Law and Practice of International Commercial Arbitration* (n 64) 486.

proceedings by allowing investors to bring contract claims and proceedings for treaty violations to the same tribunal.¹⁴⁶

A final way in which parallel proceedings may be avoided is through the consolidation of claims. Consolidation of claims involves combining two or more claims to form a single procedure. This obviously helps to avoid multiplicity of claims and proceedings. In investment arbitration, consolidation may occur 'when there are multiple arbitration proceedings filed with common questions of law or fact which raise the possibility of inconsistent or even conflicting awards.'¹⁴⁷ The concept of consolidation of claims is fairly new to investment arbitration. However, it has been widely used in the context of commercial arbitration. The UNCITRAL Rules and the ICSID Convention do not provide for the consolidation of claims at the present time. However, the concept was included in the draft MAI. The first multilateral agreement in force which provided for the consolidation of claims was NAFTA. Other BITs have also included a consolidation provision, such as the Mexico-Japan BIT, and indeed the new US Model BIT.¹⁴⁸ However, consolidation of claims has not yet become standard practice.¹⁴⁹

Parallel proceedings in international investment law significantly increase the risk of inconsistent and conflicting decisions. Although it may be argued that such divergent decisions do not occur frequently, one cannot ignore the possibility that they may occur. Furthermore, the possibility of them occurring is ever-increasing, due to the multitude of investment agreements that are now in force, and many more which are currently being negotiated. In international investment disputes, where important public interest issues are often at stake, the outcome of such inconsistent decisions may be very serious indeed. Whilst there are a number of devices in existence which may limit the possibility of

¹⁴⁶ K Yannaca-Small, 'Parallel proceedings' (n 139) 1025-1031. For more discussion of umbrella clauses, see K Yannaca-Small, 'Interpretation of the Umbrella Clause in Investment Agreements' (2006) Working Paper on International Investment, available at <<http://www.oecd.org/investment/internationalinvestmentagreements/37579220.pdf>> accessed 19 December 2012.

¹⁴⁷ *Ibid* 1033.

¹⁴⁸ *Ibid* 1034-1035.

¹⁴⁹ For an in-depth discussion of the consolidation of claims in investment treaty arbitration see OECD, *International Investment Perspectives* (OECD Publishing 2006) 226-239).

parallel proceedings, such devices are not mandatory, and as such multiple proceedings can and do sometimes occur.¹⁵⁰

-Inconsistent decisions, disjointed and a lack of binding precedent

As the previous chapter highlighted, the current system of international investment arbitration is extremely disjointed. Disputes are resolved by numerous permanent and ad hoc tribunals; there is currently no single, permanent, authoritative body that is solely responsible for settling investment disputes. As a result of this disjointed system, the decisions of different investment tribunals are often inconsistent. Such inconsistent decisions frequently arise due to tribunals' overly creative interpretations of relevant treaty provisions and customary international law principles.

There are also a number of cases in which different tribunals have reached 'diametrically opposed or conflicting decisions'¹⁵¹. Perhaps the most spectacular example of conflicting decisions can be seen in the *Lauder*¹⁵² cases.

- Lauder

The cases concerned 'the same set of facts, almost identical parties, and nearly identical legal norms'¹⁵³, yet came to dramatically different conclusions. The cases concerned Mr. Lauder (an American investor) and his (Dutch) company's creation of the first private television station in the Czech Republic. After the station had been in operation for three years, the regulatory authorities began to make life increasingly difficult for Mr Lauder and his company. As a result, Mr Lauder initiated two proceedings against the Czech Republic, alleging breach of its obligations under the Netherlands-Czech and the US-Czech bilateral investment treaties respectively. The Netherlands-Czech BIT was considered by a Stockholm tribunal, whilst the US-Czech Bit was considered by

¹⁵⁰ K Yannaca-Small, 'Parallel proceedings' (n 139) 1045.

¹⁵¹ C Tams, 'An appealing option? The debate about an ICSID appellate structure' in C Tietje et al (eds), *Essays in Transnational Economic Law* <<http://www.wirtschaftsrecht.uni-halle.de/Heft57.pdf>> accessed 26 January 2010 19.

¹⁵² *Lauder v Czech Republic* (n 58) and *CME Czech Republic B.V. v Czech Republic* (n 58).

¹⁵³ Tams, 'An appealing option? The debate about an ICSID appellate structure' (n 149).

a London tribunal. Although both treaties offered the opportunity to consolidate the two proceedings, the Czech Republic objected to the same tribunal hearing both disputes.¹⁵⁴

One of the only issues on which the two tribunals were in agreement was that Mr Lauder and his company had indeed been the victim of discrimination at the hands of the Czech government. Beyond this issue however, there was little consensus between the two tribunals.¹⁵⁵ The Stockholm tribunal found that the Czech Republic had committed an illegal expropriation, as prohibited by Article 5 of the Netherlands-Czech BIT, which provides that,

neither country shall take any measures depriving, directly or indirectly, investors of..their investments unless the following conditions are complied with:
 (a) the measures are taken in the public interest and under due process of law;
 (b) the measures are not discriminatory; (c) the measures are accompanied by just compensation.¹⁵⁶

As a result of this, the Czech Republic was ordered to pay Mr Lauder's company \$355 million.¹⁵⁷

However, rather interestingly, the London tribunal held that the Czech Republic's actions did not amount to expropriation, as prohibited under Article III of the US-Czech BIT¹⁵⁸. The tribunal's decision was based on the fact that there had been no direct interference by Czech authorities, and Mr Lauder's property rights had been fully maintained. Furthermore, the tribunal thought it relevant that the measure did not benefit the Czech government. Accordingly, Mr Lauder was not awarded any damages.

It is beyond the scope of this work to determine which tribunal arrived at the correct result. However, what is certain, and widely accepted amongst experts, is that the effect of the contradictory awards is to undermine the system of investment arbitration. One widely-cited commentator pertinently states that

¹⁵⁴ *Ibid* and Franck, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions' (n 61).

¹⁵⁵ *Ibid* Franck.

¹⁵⁶ Article 5 Netherlands-Czech Republic BIT (1991) full text available at <http://unctad.org/sections/dite/ia/docs/bits/czech_netherlands.pdf> accessed 11 August 2012.

¹⁵⁷ *Lauder v Czech Republic* (n 58).

¹⁵⁸ Article 3 US-Czech Republic BIT, signed 2 October 1991 and entered into force 19 December 1992. Full text available at <http://unctad.org/sections/dite/ia/docs/bits/czech_us.pdf> accessed 11 August 2012.

the incongruous results in the *Lauder* cases 'brings the law into disrepute, it brings arbitration into disrepute- the whole thing is highly regrettable.'¹⁵⁹

- SGS

As well as the *Lauder* cases, the *SGS*¹⁶⁰ cases are often cited when discussing inconsistent decisions in international investment arbitration. The *SGS* cases concerned the conflicting interpretations by differently constituted ICSID tribunals, 'of a similar legal rule enshrined in different treaties, and applicable in similar cases between different parties.'¹⁶¹ *SGS*, a Swiss company agreed to provide pre-shipment inspection services on behalf of the Pakistani government with respect to goods to be exported from certain countries to Pakistan. Both parties became increasingly unhappy with the other's performance under the contract and Pakistan notified *SGS* that it wished to terminate the arrangement. *SGS* alleged that the Pakistani government had breached its obligations under their contract and the Swiss-Pakistan BIT. *SGS* asserted that breaching the contract amounted to breach of the BIT under the umbrella clause contained within the BIT itself. According to *SGS*, the umbrella clause had the effect of elevating the violation of the pre-shipment agreement contract into a treaty claim under the BIT. The ICSID tribunal interpreted the umbrella clause narrowly, holding that an umbrella clause 'cannot transform a failure to pay fees under a concession contract into a treaty breach.'¹⁶² As such, *SGS*'s claim was unsuccessful.¹⁶³

SGS also sued the Philippines before a different ICSID tribunal. *SGS* and the government of the Philippines concluded a comprehensive import

¹⁵⁹ M Rushton, 'Clifford Chance Entangled in Bitter *Lauder* Arbitrations' (2001) *Legal Business* at 108 as cited in Franck, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions' (n 61) and Tams, 'An appealing option? The debate about an ICSID appellate structure' (n 151).

¹⁶⁰ *SGS Société Générale de Surveillance S.A. v Pakistan* (n 59) and *SGS Société Générale de Surveillance S.A. v Philippines* (n 59).

¹⁶¹ Tams, 'An appealing option? The debate about an ICSID appellate structure' (n 151).

¹⁶² *Ibid.*

¹⁶³ 'International Investment Law and Sustainable Development: Key Cases from 2000-2010' <http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf> accessed 22 June 2012 see also Switzerland-Pakistan BIT (French) <http://unctad.org/sections/dite/ia/docs/bits/switzerland_pakistan_fr.pdf> accessed 11 August 2012.

supervision agreement, under which SGS was to improve the customs clearance and control processes in the Philippines. At the end of the initial three year contract period, the contract was extended three times. The government of the Philippines then decided to discontinue the services, at which time SGS submitted a claim for unpaid sums under the contract of \$140 million, plus interest. SGS alleged that the Philippines has violated several aspects of the Swiss-Philippine BIT, including a breach of the umbrella clause which required the host state to observe commitments made to specific investments. The facts of the case were very similar to the *SGS v Pakistan* case considered above. Whilst the ICSID tribunal in *SGS v Pakistan* took a restrictive view of the umbrella clause, the tribunal in *SGS v Philippines* took a much broader view of the clause. The tribunal effectively found that the umbrella clause had the effect of elevating a contractual claim to a treaty claim under the Swiss-Philippine BIT. These two SGS cases provide a striking example of ICSID tribunals taking divergent views in cases where the facts are the same or very similar and consequently creating inconsistent jurisprudence.¹⁶⁴

- NAFTA Cases

A final set of inconsistent cases have arisen under NAFTA¹⁶⁵. In *S.D. Myers v Canada*¹⁶⁶, *Metalclad v Mexico*¹⁶⁷ and *Pope & Talbot v Canada*¹⁶⁸, three tribunals provided three radically different interpretations of the same NAFTA 'fair and equitable treatment' clause.

i) S.D. Myers

S.D. Myers, a US company which was engaged in the treatment of an environmentally hazardous chemical established an investment in Canadian

¹⁶⁴ *Ibid* 'International Investment Law and Sustainable Development: Key Cases from 2000-2010' and see Switzerland-Philippines BIT (French) <http://unctad.org/sections/dite/ia/docs/bits/switzerland_philippines_fr.pdf> accessed 11 August 2012.

¹⁶⁵ North American Free Trade Agreement (NAFTA) signed by the USA, Canada and Mexico which entered into force on 1 January 1994. Full text available at <<http://www.nafta-sec-alena.org/en/view.aspx?conID=590>> accessed 11 August 2012.

¹⁶⁶ *S.D. Myers v Canada* (2000) ILM 1408 (NAFTA Arb)

¹⁶⁷ *Metalclad Corporation v United Mexican States* (2000), ICSID Case No ARB(AF)/97/1 (2000)

¹⁶⁸ *Pope & Talbot Inc. V Government of Canada* (2002) ILR 293

territory. The investment was a plant which was set to obtain hazardous chemicals in Canada for treatment by the company in its US treatment facility. In 1980, the US closed the border for the movement of the hazardous chemical. However, in 1995 S.D. Myers was given permission to import the chemical from Canada. Shortly after, the Canadian government passed regulations prohibiting the transportation of the chemical to the US; this obviously adversely affected the investment of S.D. Myers, precluding them from carrying out their business. The Canadian government prohibition was in effect for 16 months and S.D. Myers brought a claim under NAFTA Chapter 11, alleging that the Canadian government had breached several of its NAFTA obligations: Article 1102 (national treatment); Article 1105 (minimum standard of treatment); Article 1106 (performance requirements); and Article 1110 (expropriation).¹⁶⁹

As regards Article 1102, the tribunal found that Canada's issuance of the order prohibiting the transport of the chemical was not driven by environmental concerns (as the Canadian government alleged). Rather, it was issued in order to protect the Canadian chemical disposal industry, which amounted to favouring nationals over foreigners. Thus, the prohibitive order was found to breach Article 1102. The tribunal also found that the Canadian government had breached Article 1105 which provides for the minimum standard of treatment for foreign investors. NAFTA Article 1105(1) requires that foreign investments are treated 'in accordance with international law, including fair and equitable treatment and full protection and security'¹⁷⁰. It was found that the prohibitive order breached the international minimum standard of treatment and the fair and equitable treatment standard which should be expected by foreign investors. In its award, the tribunal focused on the principle of discrimination, holding that where, 'an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective'¹⁷¹ and, 'as discrimination amounts to such treatment, it violates obligations to fair and equitable treatment.'¹⁷² The tribunal went on to say that the term 'fair and equitable treatment' should be read in conjunction with the

¹⁶⁹ *S.D. Myers v Canada* (n 166).

¹⁷⁰ Article 1105 NAFTA (n 165).

¹⁷¹ *S.D. Myers v Canada* (n 166) as cited in Franck 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions' (n 61).

¹⁷² *Ibid.*

introductory phrase, ‘treatment in accordance with international law’¹⁷³. The tribunal recognised the need for governments to be able to regulate their internal affairs, but that whether the measures would violate the principle of fair and equitable treatment will ultimately be a matter for international law to decide. In the present case, the tribunal found that the Canadian government’s obvious protectionist approach and discriminatory intent did indeed violate the principle of fair and equitable treatment.¹⁷⁴

The tribunal dismissed S.D. Myer’s claims regarding Articles 1106 (performance requirements) and 1110 (expropriation). Accordingly, the tribunal awarded damages of CAN\$6 million. Canada attempted to set aside the award through its federal courts, however the application for judicial review was dismissed.¹⁷⁵

ii) Metalclad

Metalclad was a US corporation operating under a Mexican subsidiary. Metalclad obtained permission from the Mexican federal government to construct a toxic waste disposal site in Guadalcazar, Mexico. Mexican federal government officials assured the company that no other permissions would be required. Five months after construction began, Metalclad received a notice from the municipality of Guadalcazar that it was operating unlawfully, without a municipal construction permit. The company applied for the construction permit and in the meantime completed the building works. The municipality refused the permit application, which effectively meant that Metalclad could not operate its newly built site. Additionally, the site of the toxic waste disposal was declared to be an ecological reserve, and consequently the site would have to be permanently closed. Metalclad commenced ICSID proceedings against the Mexican government, alleging breach of Articles 1105 (fair and equitable treatment) and 1110 (expropriation) of the NAFTA agreement.¹⁷⁶

The tribunal held that the Mexican government had breached the fair and equitable treatment standard, as provided by NAFTA Article 1105. The tribunal found that the municipal government had no authority to refuse permission on environmental grounds and that the absence of clear rules regarding the

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Metalclad Corporation v United Mexican States* (n 167).

construction permit contravened the NAFTA standard for ensuring transparency. Interestingly, NAFTA Article 1105(1) requires that foreign investments are treated 'in accordance with international law, including fair and equitable treatment and full protection and security'¹⁷⁷. It seems that the tribunal interpreted this provision in light of the Vienna Convention on the Interpretation of International Treaties, moving away from the wording of the NAFTA text. The tribunal interpreted NAFTA Article 1105 as requiring the transparency of all the relevant legal requirements at all stages of the investment. The lack of a clear rule as to the requirement of a municipal government construction permit and no clear, established procedure for the procurement of such a permit, as well as the representations of federal government officials that no further permissions would be required, amounted to a failure to ensure transparency on the part of the Mexican government.¹⁷⁸

The tribunal also found that some of the local government's actions in denying the permit and the lack of clear procedure for obtaining the permit as well as the representations of the federal government that no further permissions would be required amounted to indirect expropriation, as prohibited by NAFTA Article 1110. The tribunal went on to say that declaring the site to be an ecological reserve (which would effectively forever bar the operation of the completed site) was also tantamount to expropriation in its own right.¹⁷⁹

In consequence, it was deemed that Metalclad had completely lost its investment and compensation should be awarded according to the estimated market value of the investment. Accordingly, damages of \$16.7 million were awarded to Metalclad. The tribunal's award was subsequently reviewed by the British Columbia Supreme Court which set aside some of the tribunal's findings on both Articles 1105 and 1110. However, the Supreme Court did hold that the declaration of the site to be an ecological reserve did amount to expropriation, and therefore the damages awarded to Metalclad were only slightly reduced.¹⁸⁰

iii) Pope & Talbot

¹⁷⁷ Article 1105 NAFTA (n 165).

¹⁷⁸ *Metalclad Corporation v United Mexican States* (n 167).

¹⁷⁹ *Ibid.*

¹⁸⁰ 'BIICL Case Summary: Metalclad'

<http://www.biicl.org/files/3929_2000_metalclad_v_mexico.pdf> accessed 28 June 2012.

Pope & Talbot concerned claims relating to the verification process under the US-Canadian Softwood Lumber Agreement. Pope & Talbot was a US company with a Canadian subsidiary that operated softwood lumber mills in British Columbia, Canada. The investor company claimed under the UNCITRAL Rules that Canada's implementation of the US-Canadian Softwood Lumber Agreement violated several NAFTA provisions: Article 1102 (national treatment); Article 1105 (minimum standard of treatment); Article 1106 (performance requirements); and Article 1110 (expropriation). Under the Softwood Lumber Agreement, Canada agreed to charge a fee on certain exports of softwood lumber. Pope & Talbot alleged that the fee schedule was unfair and inequitable and sued for damages. The tribunal dismissed the investor's claims under Articles 1102, 1106 and 1110. In its' interpretation of Article 1105, the tribunal took a very broad approach, holding that the regulatory approach of the Canadian government did indeed violate its obligation to provide fair and equitable treatment,

put simply, *Pope & Talbot* concluded that the 'fair and equitable treatment' standard in article 1105 was not a concept subsumed within a Sovereign's obligations to provide minimum standards of treatment under international law; rather, it was an 'additive' standard in addition to minimum guarantees under international law.¹⁸¹

The tribunal found that Canada had breached Article 1105, and awarded damages to the investor company.¹⁸²

The Free Trade Commission (FTC) interpretation of 'fair and equitable treatment'

After a number of confusing cases involving Article 1105, the FTC issued an interpretative statement, which basically narrowed the scope of 'fair and equitable treatment' to what is provided by customary international law.¹⁸³ Presumably the interpretative statement was released in order to avoid confusion in future cases about the standard of treatment which could be expected by investors and reduce the occurrence of conflicting decisions.

¹⁸¹ *Pope & Talbot Inc. V Government of Canada* (n 168)

¹⁸² *Ibid.*

¹⁸³ L Zarsky (ed), *International Investment for Sustainable Development: Balancing Rights and Rewards* (Routledge 2004) 163.

However, subsequent cases such as *Methanex*¹⁸⁴ and *Loewen*¹⁸⁵ have struggled with the same issues, so arguably the interpretative statement did not ameliorate the situation. The statement has been criticised for introducing 'back door' amendments to the NAFTA text without going through the usual member state constitutional approval.¹⁸⁶

- Maffezini

The *Maffezini*¹⁸⁷ case provides another example of inconsistency. Mr Maffezini, an Argentinean national, brought a claim to international arbitration under the Spain-Argentina BIT¹⁸⁸. Mr Maffezini had invested in a Spanish chemical production and distribution company. The dispute resolution clause in the Spain-Argentina BIT required that the dispute must be referred in the first instance to the courts of the host state (in this case Spain) before international arbitration could be commenced. The Spanish government therefore contested the tribunal's jurisdiction, on the basis that Mr Maffezini had bypassed the Spanish courts, thereby contravening the BIT. Mr Maffezini argued that he was entitled to bypass the Spanish courts due to the operation of the most favoured nation (MFN) clause in the BIT which enabled him to resort straight to international arbitration. The Spain-Argentina BIT provided a standard MFN clause, which meant that both contracting nations must not treat investors from the other state any less favourably than it treats an investor from a third party state. Based on this provision, Mr Maffezini argued that he should be able to rely on the more favourable provision in the Spain-Chile BIT, because it did not have contain a requirement that local remedies must be exhausted before resort to international arbitration. The tribunal recognised its own jurisdiction, accepting Mr Maffezini's MFN argument. Effectively, the tribunal took a wide interpretation of the MFN clause, asserting that they could apply not only to

¹⁸⁴ *Methanex Corporation v USA*, Final Award on Jurisdiction and Merits, 3 August 2005 (Ad hoc-UNCITRAL Arbitration Rules) (2005) 44 ILM 1345.

¹⁸⁵ *Loewen Group Inc. v USA* (2003) 42 ILM 811.

¹⁸⁶ L Zarsky (ed), *International Investment for Sustainable Development: Balancing Rights and Rewards* (n 183).

¹⁸⁷ *Emilio Agustín Maffezini v Kingdom of Spain* ICSID Case No. ARB/97/7 (2000).

¹⁸⁸ Spain-Argentina BIT (Spanish) full text available at <http://unctad.org/sections/dite/ia/docs/bits/argentina_spain_sp.pdf> accessed 11 August 2012, cf. Spain-Chile BIT (Spanish) <http://unctad.org/sections/dite/ia/docs/bits/chile_spain_sp.pdf> accessed 11 August 2012.

substantive provisions (as had been generally accepted) but also to dispute resolution provisions as well. Accordingly, Spain was found liable for breach of the Spain-Argentina BIT. The tribunal's decision was the first to address the scope of the operation of the MFN clause in BITs, and it triggered a debate about this type of clause. Other tribunals in subsequent similar cases (*Siemens v Argentina*¹⁸⁹) have followed Maffezini in this regard and adopted similarly broad interpretations of the MFN clause, others have taken a narrower view, holding that MFN clauses do not cover procedural and dispute settlement issues.¹⁹⁰

Why such inconsistency in international investment arbitration?

Having identified that inconsistency is a feature of international investment arbitration, it is interesting to reflect upon the possible reasons for such inconsistencies arising. It is generally accepted that intrinsically linked with the issue of inconsistent decisions, is the lack of binding precedent in international investment arbitration. The common law notion of *stare decisis*¹⁹¹ does not operate in international investment arbitration or arbitration generally. Awards are therefore binding between the two parties to the dispute, but have no effect on third parties.¹⁹² This is hardly surprising, given that arbitration was originally created in order to 'fulfil the desire of two parties to have their dispute resolved privately through alternative means.'¹⁹³ Such alternative means were intended to be used in isolated situations and in private; hence there would have been no need for the concept of binding precedent.¹⁹⁴

Until recently, the lack of binding precedent in investment arbitration was considered a key advantage. The lack of precedent enabled arbitrators to maintain a high degree of flexibility and provide a tailored solution for the parties, taking into consideration all the peculiarities of the particular case at hand.¹⁹⁵ However, the lack of binding precedent in investment arbitration is increasingly

¹⁸⁹ *Siemens v The Argentine Republic* ICSID Case No. ARB/02/8 (2007)

¹⁹⁰ *Emilio Augustin Maffezini v Kingdom of Spain* (n 187).

¹⁹¹ This literally means "to stand by that which has been decided".

¹⁹² C Tams, 'An appealing option? The debate about an ICSID appellate structure' (n 151).

¹⁹³ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 48) 41.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

being criticised. Investment arbitration has witnessed rapid growth in recent years, and with many arbitrations arising from international conventions, a uniform approach to interpretation is desirable. Furthermore, in the context of international investment arbitration, in which cases often concern whether state regulatory measures amount to an expropriation of the investor's assets, the outcome of the case can and often does affect third parties, and are thus no longer 'case specific'.¹⁹⁶

For various reasons then, the need to establish the principle of binding precedent in international investment arbitration is growing stronger. In order to establish greater coherence and consistency, the concept that arbitral awards should have no binding effect on third parties is in need of urgent reconsideration.¹⁹⁷

-Confidentiality

In order to consider why adherence to the principle of confidentiality is considered a weakness of the system of international investment arbitration, it is first necessary to highlight the rationale behind the application of the concept. The main justification for the principle of confidentiality, particularly in investment arbitration is due to the type of dispute that arises: investment arbitration typically involves investor-state arbitration, where the tribunal is considering 'the lawfulness of regulatory and administrative actions of a state that could potentially have wide-reaching economic and political consequences.'¹⁹⁸ Sensitive issues are often at stake in such arbitration, which is why confidentiality is believed to be advantageous.

Although the principle of confidentiality has long been regarded as a definite advantage¹⁹⁹ of the system of international investment arbitration (and indeed one of the very reasons that many parties elect it as their preferred method of dispute resolution), its application 'is the cause of continually

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid* 38.

¹⁹⁹ M Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (n 4) 9.

increasing problems and criticism in investor-state arbitration.²⁰⁰ There is no absolute, unqualified right to confidentiality in international arbitration; rather, it is a discretionary right, and the extent to which it operates is for the parties themselves to decide.²⁰¹ In terms of international investment arbitration, respect for the principle of confidentiality has led to the evolution of a dispute settlement mechanism that is not transparent.²⁰² This lack of transparency has recently been the subject of much criticism.²⁰³

The lack of transparency of the investment arbitration process leads to a lack of legal certainty and a lack of uniformity. Furthermore, confidentiality leads to a decline in confidence in the arbitration process on the whole.²⁰⁴

In investment arbitration, the principles of confidentiality and transparency are particularly disturbing because of the nature of the dispute; typically, investment disputes involve a state party. For this reason, it is arguable that arbitral awards should be published in the public interest. A number of initiatives designed to increase transparency, yet at the same time respect the principle of confidentiality (at least to a certain extent), have been considered.²⁰⁵ One such transparency-enhancing proposal is the anonymous publication of investment arbitral awards.²⁰⁶

The principle of confidentiality may also be exacerbating another problem associated with the current system of investment arbitration; that of inconsistent decisions. This issue has been discussed more fully above, and therefore does not warrant significant examination here. Nevertheless, it is necessary to highlight the fact that the problem of inconsistent decisions has only recently come to light due to the publication of those decisions. It stands to reason that inconsistent decisions would not be identifiable unless those decisions were

²⁰⁰ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 48) 36-37 and also see J Paulsson and N Rawding, 'The trouble with confidentiality' (1995) 11 *Arbitration International* 303

²⁰¹ *Ibid* M Dimsey 36-37.

²⁰² *Ibid*.

²⁰³ *Ibid*.

²⁰⁴ *Ibid* 39.

²⁰⁵ See sections 'Transparency initiatives to date' and 'Specific initiatives' in M Kinnear, 'Transparency and third party participation in investor-state dispute settlement symposium on making the most of investment agreements: a common agenda' (2005) <<http://www.oecd.org/dataoecd/6/25/36979626.pdf>> accessed 2 December 2010

²⁰⁶ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 48) 40.

made available for public scrutiny. In order to achieve greater consistency of decisions, it will therefore be necessary to publish all decisions.²⁰⁷

-Encourages treaty, forum and nationality shopping

The current system of international investment arbitration is encouraging foreign investors to cherry pick the rules, tribunals and nationalities which benefit them most at any particular time.²⁰⁸

So called 'treaty shopping' occurs because foreign investors increasingly elect to regulate their investments under certain BITs. This is due to the fact that they typically have more advantageous terms, and the investor therefore expects to receive better protection under said BIT than under other forms of regulation, such as national legislation for example.²⁰⁹ One of the major advantages of BITs is that they usually include dispute settlement provisions which allow any quarrels or conflicts which may arise during the course of investment direct access to international arbitration.

Forum selection is not new in investment arbitration; most investment agreements (BITs or investment contracts) offer a 'fork-in-the-road' provision. Such provisions provide for the settlement of any arising disputes either by the national courts of the investment host state or by international arbitration. It is for the parties themselves to select the forum they would prefer. For many reasons, not least that they are dubious about the neutrality of national courts (so called 'home court advantage'), investors usually favour the selection of international arbitration.

Nationality shopping has also increased in recent years. Nationality shopping involves investors relocating their homes and businesses in order that they are able to acquire a certain desired nationality. Having a particular nationality will in turn allow foreign investors to take advantage of a specific BIT which may have the most favourable terms for them. One example of nationality shopping can be seen in the case of *Aguas del Tunari SA v Republic of*

²⁰⁷ *Ibid* 39-40.

²⁰⁸ K Yannaca-Small, 'Improving the system of investor-state dispute settlement: an overview' (2006) <<http://www.oecd.org/dataoecd/3/59/36052284.pdf>> accessed 16 July 2009.

²⁰⁹ *Ibid*.

*Bolivia*²¹⁰ where a company transferred its registration from the Cayman Islands (which did not have a BIT with Bolivia) to the Netherlands (which did have a BIT with Bolivia) in order to bring a claim under the Dutch-Bolivian BIT. More recently, two Egyptian nationals were alleged to have acquired Italian nationality in order to file a claim under the Italian-Egyptian BIT.²¹¹ Nationality shopping occurs because foreign investors are usually treated more favourably than domestic investors. This is nonsensical, especially as the cornerstone of the law of foreign investment is the principle of non-discrimination. The rationale behind the law of foreign investment is that foreigners should not be discriminated against when carrying out their business in overseas territories. It seems that the tables have turned, and that ironically the issue of reverse discrimination is more pertinent at present; it is now domestic investors that face discrimination, being treated much less favourably than foreign investors. This reverse discrimination is a direct result of the emerging wider trend, which is arguably transforming the law of foreign investment into the law of the protection of foreign investors.²¹²

-Lack of appeal mechanism

Under the present system of international investment arbitration, all decisions and awards are final; there is no possibility of appeal. This finality of decision is traditionally thought to be one of the advantages of the current system of international investment arbitration. Dolzer sums up the rationale behind the principle of finality perfectly, stating that it '[serves] the purpose of efficiency in terms of an expeditious and economical settlement of disputes.'²¹³ This finality has to be balanced against another legitimate goal; that of

²¹⁰ *Agua del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3 2005 see also Netherlands-Bolivia BIT <http://unctad.org/sections/dite/ia/docs/bits/netherlands_bolivia.pdf> accessed 11 August 2012.

²¹¹ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 22) 18, which refers to the International Institute for Sustainable Development, *Investment Treaty News*, 27 May 2007 <http://www.iisd.org/itn/wp-content/uploads/2010/10/itn_may27_2007.pdf> accessed 3 December 2010. See also Italy-Egypt BIT <http://unctad.org/sections/dite/ia/docs/bits/egypt_italy.pdf> accessed 11 August 2012.

²¹² S Subedi notes the trend towards extensive protection for investors, *ibid* Subedi 139.

²¹³ R Dolzer and C Schreuer, *Principles of International Investment Law* (n 23) 277.

correctness of the decision. According to Dolzer, this is, 'an elusive goal that takes time and effort and may involve several layers of control, a phenomenon that is well known from appeals in domestic court procedure.'²¹⁴ Perhaps less controversially, Dolzer goes on to state that in international investment arbitration at least, 'the principle of finality is typically given more weight than the principle of correctness.'²¹⁵

Whilst there is no possibility of appeal in international investment arbitration, in arbitrations that are settled under the auspices of ICSID, there is a very limited review facility. Under Article 52 of the ICSID Convention, parties may request annulment of an award. There are in fact just five grounds on which annulment may be requested. The grounds for annulment under Article 52 and the annulment procedure will be discussed more thoroughly in chapters six and seven. Suffice it to say at this point that the grounds for annulment are rather limited.

So although there is some possibility of reviewing decisions in international investment arbitration, it must be noted that this is only possible where decisions have been issued in ICSID arbitration, and even then, the scope for review is extremely limited indeed. Furthermore, it is important to highlight that there are a number of significant differences between annulment and appeal. Annulment is concerned purely with the legitimacy of the process, and can only result at most in the removal of the decision. Appeal, on the other hand is not only concerned with the legitimacy of the process, but also the correctness of the decision. Moreover, the effects of appeal are more substantial; successful appeal not only removes the original decision, but also replaces it with a new one.²¹⁶ This issue will be discussed more thoroughly later in the thesis.

ICSID itself has considered introducing an appeal mechanism into its procedure. A 2004 Discussion Paper²¹⁷ issued by the ICSID Secretariat provided the forum for the debate of the issue. The decision not to integrate an appeal mechanism was taken in response to the reactions of ICSID's member

²¹⁴ *Ibid* 278.

²¹⁵ *Ibid*.

²¹⁶ *Ibid*.

²¹⁷ 'Possible improvements of the framework for ICSID arbitration' (2004)
<<http://www.worldbank.org/icsid/highlights/improve-arb.htm>> accessed 20 July 2009.

states, who were largely against the proposal. The contents of the Paper and indeed member state's reactions to it will be discussed in a later chapter.²¹⁸

There has been an ongoing general debate about whether the system of international investment arbitration would benefit from the establishment of an appeal mechanism. The OECD issued a Working Paper on investment in 2006, outlining the benefits of the possible introduction of an appeal mechanism. The paper states that an appeal mechanism could contribute to greater consistency in international investment arbitration, and that 'consistency and coherence of jurisprudence create predictability and enhance the legitimacy of the system of international investment arbitration.'²¹⁹ The Working Paper also states that an appeal mechanism would be a useful mechanism to rectify legal and factual errors in arbitral proceedings, as well as allowing decisions to be reviewed by a neutral and impartial organisation.²²⁰

Many commentators also believe that an appellate mechanism would be a welcome addition to the system of international investment arbitration, and that it may remedy many problems that are currently associated with the system. Scholars have asserted that an appeal mechanism would remedy the problem of inconsistency and incoherence²²¹ within international investment arbitration as well as act as a corrective mechanism²²² and enhance objectivity.²²³

Conversely, many other experts are of the opinion that an appeal mechanism should not be introduced. Some experts worry that the highly-regarded principle of finality would be destroyed by an appellate mechanism.²²⁴ Other alleged disadvantages of introducing an appeal mechanism are the potential increase in the number of cases²²⁵ and the re-politicisation of the

²¹⁸ C Tams, 'Is there a need for an ICSID appellate structure?' (n 61).

²¹⁹ K Yannaca-Small, 'Improving the system of investor-state dispute settlement: an overview' (n 208).

²²⁰ *Ibid.*

²²¹ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 48) 36 and see K Yannaca-Small, *ibid* 192.

²²² *Ibid* K Yannaca-Small 193.

²²³ A Qureshi, 'An appellate system in international investment arbitration?' in P Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1157.

²²⁴ J Clapham, 'Finality of investor-state arbitral awards: has the tide turned and is there a need for reform?' (n 135).

²²⁵ *Ibid.*

system of investment arbitration.²²⁶ Currently, the system is praised for its lack of political nature.²²⁷ There is a danger that the introduction of an appeal mechanism may politicise the system; the expectation being that losing states would automatically appeal every case, and choose biased appellate panel members. Although there is a chance that the system could be politicised, the situation could be avoided with the establishment of several procedural safeguards. An example of a possible procedural safeguard that might be introduced is the requirement of depositing a bond when applying for leave to appeal; this would discourage automatic appeal. Additionally, if both parties have equal input in selecting appellate body members, the risk of bias will be minimal.²²⁸

The most often cited justification for the establishment of an appeal mechanism is that it would reduce the risk of conflicting and incoherent decisions.²²⁹ Some commentators believe that consistency is an unattainable goal; that inconsistency is simply an unavoidable fact of life²³⁰. Assuming that consistency is possible to achieve (and that it is desirable goal) some experts have suggested that in order to achieve consistency, the best course of action would be to adopt a laissez-faire policy. By doing nothing, it is thought that consistency and predictability will be naturally achieved as tribunals gradually begin to favour one solution over another, causing custom to evolve.²³¹

Another issue which continues to arise when the possibility of establishing an appellate mechanism is discussed is the standpoint of developing nations. Traditionally, less economically developed states have been reluctant to lend their support to various innovations of international investment law policies that have been proposed. Such states have, for example, been less than enthusiastic about the possibility of creating a global

²²⁶ *Ibid.*

²²⁷ M Paparinskis, 'The limits of depoliticisation in contemporary investor-state arbitration' (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1716833> accessed 17 January 2011.

²²⁸ *Ibid.*

²²⁹ See 'Possible improvements to the framework for ICISD arbitration' (n 217) for example.

²³⁰ J Gill, 'Inconsistent decisions: an issue to be addressed or a fact of life' in F Ortino et al (eds), *Investment Treaty Law: Current Issues Volume 1* (British Institute of International and Comparative Law 2006).

²³¹ J Paulsson, 'Avoiding unintended consequences' in K Sauvart (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008).

multilateral investment treaty, as well as an appeal mechanism. It is believed to be the case that developing nations are reluctant to enter into negotiations creating a multilateral treaty or an appeal mechanism due to their perceived lack of bargaining power. In previous international trade negotiations under the GATT²³², richer, more developed states have been accused of hijacking proceedings and, to a certain extent, bullying poorer, lesser developed nations. These less economically developed nations believe that the same bulldozing effect may occur in the field of investment.

As this section has briefly highlighted, there are a number of purported advantages and disadvantages associated with the creation of an appeal mechanism; the issue has been and continues to be hotly debated by experts in the field. This section is not intended to be an exhaustive treatment of all the issues surrounding the possible introduction of an appeal mechanism in international investment arbitration. A number of important aspects concerning the possible establishment of an appeal mechanism will be discussed more fully in subsequent chapters.

3.5 Conclusion

This chapter has examined the functioning of the current system of international investment arbitration in great depth. A detailed analysis has revealed a haphazard system with multiple fora available for the settlement of international investment disputes. Numerous institutions as well as ad hoc tribunals are called upon to settle international investment disputes. An analysis of both forms of arbitration revealed strengths and weaknesses of both types of arbitration. The chapter also considered the advantages and disadvantages of a number of permanent arbitral institutions which are called upon to settle investment disputes. Again, these institutions have their own requisite strengths and weaknesses. Finally, the chapter went on to consider the functioning of the system of international investment arbitration as a whole. Although the system does have its advantages, it is fair to say that it also has serious deficiencies. The haphazard system of international investment arbitration, with the availability of multiple fora has lead to serious problems within the system itself.

²³² The General Agreement on Tariffs and Trade (GATT) is often referred to as 'the rich man's club'.

The main problem is a distinct lack of consistency of decision in the jurisprudence. Various examples of cases have been identified where different tribunals have reached very different decisions where the same or similar facts have been at issue.

The next chapter will examine in greater depth the central problem with the system of international investment arbitration; inconsistency and incoherence. The chapter will also consider whether the establishment of an appeal mechanism, as one proposed solution, could remedy the problem of inconsistency in international investment arbitration.

CHAPTER IV: THE CRISIS OF CONSISTENCY IN INTERNATIONAL INVESTMENT ARBITRATION AND THE PROPOSAL TO CREATE AN APPEAL MECHANISM

4.1 Introduction

The first part of this chapter will provide an in-depth analysis of the central problem with the chaotic system of international investment arbitration; the so called 'crisis of consistency'¹. Currently, international investment disputes are resolved by hundreds of different tribunals, as opposed to a single authoritative body. As there is no principle of binding precedent², each tribunal is free to deliver any decision it sees fit. This has resulted in tribunals reaching diametrically opposing decisions in cases³ where the facts are similar or even the same. Thus, there is no coherent body of law emerging from the case law.

The second part of the chapter will focus on one of the proposed remedies to the problem of inconsistency and incoherence; the establishment of an appeal mechanism.⁴ The aim of this chapter then is twofold; firstly, to clearly

¹ This term has been used by many commentators in relation to international investment arbitration recently. See for example M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven International Publishing 2008) 35.

² For further discussion on the doctrine of precedent and its applicability to international investment arbitration see C Schreuer and M Weiniger, 'Conversations across cases: is there a doctrine of precedent in investment arbitration?' (2008) 3 *Transnational Dispute Management*, S Nappert, "'By writ or fortune led": thoughts on a role for precedent in international commercial arbitration' (2008) 3 *Transnational Dispute Management*, M Rodgers, 'Bilateral investment treaties and arbitration: an argument and a proposal for the ICSID's implementation of a system of binding precedent' (2008) 3 *Transnational Dispute Management* and L Reed, 'The de facto precedent regime in investment arbitration: a case for proactive case management' (2010) 25 *ICSID Review* 47.

³ See previous chapter for detailed discussion of such cases, including *CME Czech Republic B.V. v Czech Republic*, Ad hoc – UNCITRAL Arbitration Rules, Partial Award of 13 September 2001 and IIC 62 (2003), Final Award of 14 March 2003, *Lauder v Czech Republic*, Final Award, 3 September 2001 (Ad hoc- UNCITRAL Arbitration Rules), *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* ICSID Case No. ARB/01/13 (2003) 42 ILM 1290, *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* ICSID Case No. ARB/02/6 (2004), *Pope & Talbot Inc. V Government of Canada* (2002) ILR 293, *S.D. Myers v Canada* (2000) ILM 1408 (NAFTA Arb), *Metalclad Corporation v United Mexican States* (2000), ICSID Case No ARB(AF)/97/1 (2000) and *Emilio Augustín Maffezini v Kingdom of Spain* ICSID Case No. ARB/97/7 (2000).

⁴ For discussion of the proposal to establish an appeal mechanism see for example M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 1) 157-184, K Sauvart (ed), *Appeals Mechanism in International*

identify the central problem with international investment law dispute settlement, and secondly, to ascertain the desirability and feasibility of the introduction of an appellate mechanism in response to that problem. This dual aim is to be accomplished through the completion of a comprehensive survey of the existing relevant literature in this area. This literature review will demonstrate the nature of this complex problem as well as one possible solution. Relevant jurisprudence and treaty law will also be considered.

4.2 The crisis of consistency in international investment arbitration

4.2.1 Evidence of a crisis

In recent years, many foreign investment experts have alleged that international investment arbitration is suffering at the hands of a so called 'crisis of consistency'. Sornarajah states that 'investment arbitration is in crisis'⁵, and refers specifically to a 'crisis of legitimacy'⁶ which is being created by the sheer number of cases. Moreover, he notes a trend towards the creative interpretation of the treaties by the tribunals; this means that key BIT provisions are often being interpreted in a manner that was not contemplated by the parties to the agreement. This is particularly worrying because these cases are often settled by ad hoc tribunals, and there are no mechanisms in place to control the interpretative discretion which these tribunals are exercising.⁷

Dimsey also refers to a 'crisis of consistency'⁸ which she alleges has been aggravated by the principle of confidentiality. Confidentiality has long been hailed as a strength of the current system of international investment arbitration. However, Dimsey suggests that within the sphere of investment arbitration, confidentiality is the root of many problems. The main problem with confidentiality is that it has led to a process of dispute resolution which may be criticised for its lack of transparency. This in turn may be said to undermine

Investment Disputes (OUP 2008) and F Ortino et al (eds), *Investment Treaty Law: Current Issues Volume 1* (British Institute of International and Comparative Legal Studies 2006).

⁵ M Sornarajah, 'A coming crisis: expansionary trends in investment treaty arbitration' in K Sauvant *ibid* 73.

⁶ *Ibid*.

⁷ *Ibid* 41.

⁸ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 1) 36.

legal certainty, which often leads to inconsistency, and moreover, an overall decrease in general confidence in the dispute resolution process.⁹

Linked inherently to the issue of confidentiality in international investment law arbitration, is the lack of binding precedent. There is no 'overarching'¹⁰ tribunal which has sole responsibility for hearing all investor-state disputes. Instead there is a myriad of dispute resolution options, with countless individual tribunals each settling investment disputes. As a result of this chaotic state of affairs (which is exacerbated by the absence of the common law doctrines of precedent and stare decisis), investment arbitration is plagued by inconsistent decisions and general incoherency.

The traditional justification for the lack of binding precedence is the original purpose of arbitration itself; '[to] fulfil the desire of two parties to have their dispute resolved privately through alternative means.'¹¹ In other words, precedent and stare decisis were never intended to operate, because each case was supposed to be considered in isolation. However, the investment arbitration landscape has changed dramatically over the years. With an increasing number of investment disputes arising and a fundamental change in the nature of disputes, this lack of binding precedent is increasingly being challenged. It is for these reasons that Dimsey believes that, 'the long-held principle that arbitral awards have no binding effect on subsequent cases is in desperate need of re-evaluation, especially within the scope of investor-state arbitration.'¹²

A related issue is that of competing jurisdictions within international investment arbitration, which is, 'perhaps the greatest general cause of the current problems with investor-state arbitration.'¹³ The main problem is that there is a multitude of fora available to the parties involved in international

⁹ *Ibid.* See also A Belohlavek, 'Confidentiality and publicity in investment arbitration, public interest and scope of powers vested in arbitral tribunals' (2011) 2 *Czech Yearbook of International Law* 23 and A Menaker, 'Piercing the veil of confidentiality: the recent trend towards greater public participation and transparency in investor-state arbitration' in K Yannaca-Small, *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP 2010).

¹⁰ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 1) 40.

¹¹ *Ibid* 41.

¹² *Ibid* 42.

¹³ *Ibid* 74.

investment disputes, yet there is no mechanism to determine when two separate claims are identical and bar the second claim.¹⁴

The crisis of consistency is further exacerbated by the trend towards increased treaty, forum and nationality shopping. This involves investors cherry picking legal rules, tribunals and nationalities which offer the most advantageous conditions for them. In terms of forum shopping, in most cases, investors will prefer to have recourse to ad hoc tribunals. This is because they are able to retain more control over the proceedings, usually by being involved in choosing the arbitrators. Additionally, ad hoc tribunals notoriously provide wider interpretations of investment provisions.¹⁵

Reinisch echoes these concerns, asserting that the proliferation of international investment arbitration 'bears its own risks'¹⁶ such as the multiplication of proceedings, including parallel proceedings, re-litigation of already settled cases, and forum shopping. These problems can 'contribute to the fragmentation of international law and weaken both...[its] coherence and credibility.'¹⁷ Furthermore, these risks may have already materialised; a number of cases highlight inconsistency in international investment arbitration.

The SGS¹⁸ cases provide evidence for the existence of inconsistency. The SGS cases involved two different ICSID proceedings being initiated against Pakistan and the Philippines. The two tribunals came to different decisions on the crucial meaning of umbrella clauses. The *Lauder/CME*¹⁹ cases also highlight inconsistencies. In the *Lauder*²⁰ case, it was held that even though the Czech Republic had breached its obligations under the US-Czech BIT, no

¹⁴ *Ibid.* See also R Kreindler, 'Parallel proceedings: a practitioner's perspective' in M Waibel (ed), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010) 131

¹⁵ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 1) 71-73.

¹⁶ A Reinisch, 'The proliferation of international dispute settlement mechanisms: the threat of fragmentation vs. the promise of a more effective system? Some reflections from the perspective of investment arbitration' in J Crawford et al (eds), *International Law Between Universalism and Fragmentation* (Brill Publishing 2008) 114.

¹⁷ *Ibid.*

¹⁸ *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (n 3) and *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (n 3).

¹⁹ *Lauder v The Czech Republic* (2002) (n 3) *CME Czech Republic BV v The Czech Republic* (2001) (n 3).

²⁰ *Lauder v The Czech Republic* (n 3).

liability had arisen. A short while after, in the *CME*²¹ case, the tribunal came to the opposite decision on similar facts. Finally, the *Argentina*²² cases provide more evidence of inconsistency in international investment arbitration. The cases considered whether the Argentinean economic crisis at the beginning of the 21st century constituted a state of necessity, as defined by Article 25 of the ILC Articles on State Responsibility²³. One tribunal found that it did, whilst another found that it did not.²⁴ The *NAFTA*²⁵ cases also demonstrate significant inconsistency in international investment arbitration.

Franck²⁶ also refers to a crisis of consistency in international investment arbitration. She remarks that investor-state treaty arbitration has expanded quickly in recent years, and consequently,

decisions about public issues with economic and political consequences are resolved in private before different sets of individuals who can and do come to conflicting decisions on the same points of law- and no single body has the capacity to resolve these inconsistencies.²⁷

There are a number of limited options for the review of investment awards; in ICSID arbitration, the only method of reviewing decisions is the annulment procedure.²⁸ In non-ICSID arbitration, decisions may sometimes be challenged in the national courts of the place of arbitration, or alternatively one

²¹ *CME Czech Republic BV v The Czech Republic* (n 3).

²² *CMS Gas Transmission Co. v The Argentine Republic*, ICSID Case No. ARB/01/08 (2003)

²³ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) Supplement No.10 (A/56/10), chp.IV.E.1, available at <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> accessed 8 August 2012.

²⁴ *CMS Gas Transmission Co. v The Argentine Republic* (n 22) cf. *LG&E v The Argentine Republic*, ICSID Case No. ARB/02/01 (2007) 16 ILM 36.

²⁵ North American Free Trade Agreement (NAFTA) signed by the USA, Canada and Mexico which entered into force on 1 January 1994. Full text available at <<http://www.nafta-sec-alena.org/en/view.aspx?conID=590>> accessed 11 August 2012. The NAFTA cases are *Pope & Talbot Inc. V Government of Canada* (n 3), *S.D. Myers v Canada* (n 3), and *Metalclad Corporation v United Mexican States* (n 3).

²⁶ S Franck, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions' (2005) 73 *Fordham Law Review* 1521.

²⁷ *Ibid.*

²⁸ This will be discussed in greater depth later in the thesis. See Article 52 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf> accessed 27 August 2012.

may attempt to block the enforcement of the decision. As a result of this lack of a mechanism for review, inconsistencies have occurred in the case law.²⁹

The author believes that inconsistency is damaging to investment arbitration because,

Inconsistency creates uncertainty and damages the legitimate expectations of investors and Sovereigns. Investors that have structured their investments in a manner to take advantage of coverage afforded by investment treaties suddenly discover they will not receive those benefits. Likewise, Sovereigns find themselves in an untenable position of explaining to taxpayers why they are subject to damage awards for hundreds of millions of U.S. dollars in one case but not another.³⁰

4.2.2 Rebutting the claim of a crisis

Paulsson³¹ believes that the quest for coherence and consistency is futile, branding it 'impossible'³² to achieve. The author asserts that inconsistent decisions are actually much rarer than we are led to believe in any case and, furthermore that we should not be alarmed by inconsistency.

Legum³³ also seems to support this view, claiming that the excessively cited criticisms of inconsistency and incoherence are simply not compelling enough.

Gill also weighs in on the matter. The author notes the variations in outcomes in both the *Czech Republic* cases³⁴ and the *SGS*³⁵ cases. Gill concedes that 'these cases show that differently-constituted tribunals do, on

²⁹ S Franck, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions' (n 26) examines the *Lauder* and *SGS* cases, as well as *Metalclad, S.D. Myers*, and *Pope & Talbot*. These will be discussed in more detail later.

³⁰ *Ibid.*

³¹ J Paulsson, 'Avoiding unintended consequences' in K Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 241-265.

³² *Ibid* 245.

³³ B Legum, 'Options to establish an appellate mechanism for investment disputes' in K Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008).

³⁴ *CME Czech Republic BV v The Czech Republic* (n 3) and *Lauder v The Czech Republic* (n 3).

³⁵ *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (n 3) and *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (n 3).

occasion reach conclusions which are difficult to reconcile.³⁶ However, Gill does point out that we are only aware that inconsistent decisions exist because those decisions are made available to the public. This is in contrast to most forms of commercial arbitration, where decisions are confidential. It is suggested that three issues often arise in the debate about consistency of decisions; predictability, reputation and appointment of the tribunal. Predictability is desirable in dispute resolution for the parties to the dispute as well as their advisers. It is important to know the chances of receiving a successful outcome before embarking upon costly legal proceedings. Usually one would review previous cases involving similar facts in order to determine the chances of success. Gill does note that there is no system of binding precedent in international investment dispute resolution, however she does acknowledge the soft precedential value of previous decisions. Linked to the issue of predictability, is the reputation of the system. The system will not enjoy a good reputation and be popular if it is perceived to be a lottery, rather than a system based on a fair, clear procedure. Finally, one of the important aspects of the appointment of the tribunal is the fact that each party to the arbitration is usually able to nominate an arbitrator. It is a widely known fact that parties often nominate arbitrators that they perceive will be sympathetic to their situation. This is viewed by most people as an unsatisfactory part of the dispute resolution process, as it is not an objective means of choosing arbitrators.³⁷

Having conceded that inconsistency is a feature of the current system of investment arbitration and analysed the reasons why this is so, Gill goes on to consider whether such inconsistency can and should be avoided. For the author, such inconsistency is a fact of life; inconsistent decisions are not and have never been a contentious issue elsewhere, only in international investment arbitration have they been so hotly debated. Inconsistency in decision making can be seen in other fields, yet it does not provoke the same level of interest and comment as in international investment arbitration.³⁸

4.3 Possible introduction of an appeal mechanism

³⁶ J Gill, 'Inconsistent decisions: an issue to be addressed or a fact of life?' in F Ortino et al (eds), *Investment Treaty Law: Current Issues Volume I* (n 4) 24.

³⁷ *Ibid.*

³⁸ *Ibid.*

The preceding segment has highlighted the main problem associated with international investment law arbitration; significant inconsistency and incoherence in the case law. Although its existence has been contested by some, the jurisprudence speaks for itself; there are clear and obvious examples of inconsistent decision making in international investment arbitration. This inconsistency is a direct result of the lack of a permanent arbitral body; the hundreds of arbitral tribunals settling investment disputes can and often do, reach opposing decisions. The lack of a system of binding precedent in international investment arbitration serves to compound the problem. The problem is evident; what is less clear though, is how it may be solved. A number of different solutions have been proposed in this regard. One of the most hotly debated of these solutions is the possible creation of an investment appellate mechanism. In recent years there has been much debate about the desirability and feasibility of the introduction of an appellate mechanism in international investment law.

4.3.1 Support for an appeal mechanism

Numerous academics have declared their support for the creation of an appeal mechanism. Dimsey is of the opinion that an appeal mechanism could be beneficial. She examines the full range of legal review mechanisms already in operation, and comes to the conclusion that the existence of the, 'various and diverse review mechanisms available under domestic legal systems...certainly give reason to examine the viability of a central appellate mechanism in investment dispute resolution.'³⁹

Dimsey believes that,

An abridged and much more concise version of the current review possibilities in state courts could be the development of an appellate body specifically intended to deal with investment arbitration appeals. This would certainly do much to prevent the inconsistencies in decision-making and avoid the haphazard domestic frameworks that currently come into play in investment arbitration practice.⁴⁰

³⁹ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 1) 177.

⁴⁰ *Ibid.*

The author then goes on to consider the approaches of two organisations that have already successfully⁴¹ established appellate mechanisms; the London Commodities Associations and the WTO. Dimsey proposes that elements of each of the two appeal mechanisms could be imported into the proposed international investment law appeal mechanism.⁴² Similar to the appeal mechanism of the London Commodities Association, Dimsey proposes the assembly of a pool of international investment experts/specialists who would serve as appellate body members.⁴³ Turning her attention to the WTO, Dimsey observes that the appellate mechanism of the WTO is widely regarded as a resounding success, and is often marketed as the perfect model for an appeal mechanism in international investment law. However, the author is keen to stress that no matter how highly regarded the system is, it is less than perfect. Whilst Dimsey recognises that the WTO's mechanism could be an important source of inspiration, she is also keen to ensure that any mistakes made by the WTO in the creation of its appeal mechanism should not be repeated in the field of international investment.⁴⁴

Dimsey also considers the need for a centralised appeal mechanism. She believes that simply allowing each of the existing tribunals to simply develop its own appeal mechanism will do nothing to remedy the problems of inconsistent decisions. In order that consistency, coherence and clarity of decisions may be achieved, Dimsey believes that what is required is the development of one centralised appeal mechanism.⁴⁵

Subedi also considered 'allow[ing] for an appeal against certain decisions of arbitral awards under narrowly defined conditions.'⁴⁶ The author notes that an appeals facility could be implemented through existing arbitral mechanisms, such as ICSID or the UNCITRAL rules. The author highlights the discussion surrounding the possibility of extending ICSID arbitration to include appeals, as this has received the most attention.⁴⁷ Two papers⁴⁸ issued by the ICSID

⁴¹ *Ibid.* Dimsey is of the opinion that the two appeal mechanisms she discusses are successful at least.

⁴² *Ibid* 178-180.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid* 180-184.

⁴⁶ S Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008) 205.

⁴⁷ *Ibid.*

secretariat are mentioned, both of which will be examined in greater detail later in this chapter.

Subedi seems to be of the opinion that an appeals facility would be a welcome addition to international investment arbitration, setting out the positive aspects of such a mechanism. He acknowledges that ‘the notion of appeal against arbitral awards is not new as it is the case already in many maritime and commodity arbitration systems.’⁴⁹ Furthermore, provisions containing reference to an appeal mechanism are becoming increasingly common in investment treaties. An appeal mechanism was also discussed during the infamous MAI negotiations, and challenge of arbitral awards is currently available in many domestic legal systems. Moreover, the ICSID annulment procedure could be seen as a quasi-appeal mechanism. So it would seem that the possibility of an appeal mechanism is not novel or radical in any way. The author goes on to point out that an appeal mechanism could help harmonise interpretations of investment treaty provisions, therefore reducing the scope for inconsistent decisions to arise. Subedi asserts that, ‘an appeal mechanism...would bring about more cohesion and more legal certainty to this body of law.’⁵⁰

The author goes on to point out that an appeal mechanism could help harmonise interpretations of investment treaty provisions, therefore reducing the scope for inconsistent decisions to arise.⁵¹

Yannaca-Small has set out a number of potential advantages of the creation of an appeal mechanism in international investment arbitration. Of course the biggest advantage would be ‘consistency and coherence of jurisprudence...[which would] create predictability and enhance the legitimacy of the system of investment arbitration.’⁵² An appeal mechanism would also

⁴⁸ See ‘Possible improvements to the framework for ICSID arbitration’ (22 October 2004) <<http://www.worldbank.org/icsid/highlights/improve-arb.htm>> accessed 20 July 2009 and ‘Suggested changes to the ICSID rules and regulations’ (12 May 2005) <http://icsid.worldbank.org/ICSID/Servlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement22> accessed 27 May 2011.

⁴⁹ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 46) 205-206.

⁵⁰ *Ibid* 207.

⁵¹ *Ibid*.

⁵² K Yannaca-Small, ‘Improving the system of investor-state dispute settlement: an overview’ (2006) <<http://www.oecd.org/china/36052284.pdf>> para 38, accessed 16 July 2009.

enable legal errors and serious errors of fact to be rectified, and review would be confined to a neutral tribunal as opposed to national courts which are often thought to be biased and unreliable. Furthermore, the creation of an appeal mechanism could contribute to more effective enforcement of awards. The author expressed concern at the thought of the introduction of more than one appeal mechanism, stating that multiple or ad hoc appeal mechanisms would not remedy the problem of inconsistency in international investment arbitration.⁵³

Bjorklund⁵⁴ has also written on the subject of appeal, from the viewpoint of two particular cases; *Amco Asia*⁵⁵ and *CME*⁵⁶. The author asserts that 'both... [cases] raised concerns in the arbitral community; their outcomes seemed to threaten the legitimacy of investor-state arbitration.'⁵⁷ *Amco* seemed to be concerned that annulment proceedings may too easily lead to full review through appeal, whereas in *CME* the unavailability of appeal appeared to cause concern. Bjorklund asserts that,

given these concerns, it is not surprising that calls for a standing 'appellate body' for arbitration are gaining both in volume and in vigour...[and that] the time may well be ripe to establish a single appellate mechanism.⁵⁸

The author is keen to stress that an appellate mechanism should not be hastily established; instead time should be taken to ensure that the eventual facility is the best it could possibly be. Bjorklund warns that an appeal mechanism may not cure all the ills of arbitration, and perhaps we should re-think using annulment, as opposed to appeal. Moreover, she suggests that appeal would increase costs and lengthen dispute resolution proceedings. The author also encourages reflection of Kaufmann-Kohler's proposal to establish a consultative body, to which tribunals can refer troublesome questions. This process could enhance consistency, 'without the drawbacks of a fully-fledged

⁵³ *Ibid.*

⁵⁴ A Bjorklund, 'The continuing appeal of annulment: lessons from *Amco Asia* and *CME* in T Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005 471-521).

⁵⁵ *Amco Asia Corp v Republic of Indonesia* (Amco Asia) ICSID Case No. ARB/81/1

⁵⁶ *CME Czech Republic BV v The Czech Republic* (n 3).

⁵⁷ A Bjorklund, 'The continuing appeal of annulment: lessons from *Amco Asia* and *CME* (n 55).

⁵⁸ *Ibid.*

appellate procedure.⁵⁹ Nonetheless, Bjorklund does recognise that an appeal mechanism could enhance the reputation of investor-state arbitration by providing better integrity of process, encourage better reasoned decisions at first instance, and encourage correctness of decision.⁶⁰

In terms of the creation of an appellate mechanism, Franck states that in light of recent inconsistencies in decisions, the call for such a body has been increased. Indeed, the US already refers to the creation of such a mechanism at some stage in the future in several of its most recently negotiated investment treaties. The author asserts that the goal of the appellate body would be to, 'provide a public forum for the review of public disputes and create a determinate and coherent jurisprudence.'⁶¹ Franck explains that the precise structure and mandate of the body would need careful consideration. The author outlines three different suggestions in this regard: inviting national court judges to preside over appeals; using ad hoc tribunals to provide appellate review; and establishing a new, permanent single body to administer appeals. The author suggests that the first proposition is not desirable, as national court judges are often accused of bias, as well as being already too busy. The second suggestion would only marginally enhance legitimacy, and different appeal tribunals could come to conflicting decisions, as is already the case at first instance, therefore the real problem of coherence and consistency in international investment arbitration would not be resolved. Franck is of the opinion that the third option, creating an independent, permanent appeal body would be most desirable, as it would enhance legitimacy and theoretically solve the problem of inconsistent decisions. Franck also suggests that formal, binding precedent in international investment law arbitration, increased transparency through publication of decisions, and a single investment treaty as part of a related network would be desirable. Although the author recognises that an independent, single appellate tribunal would be a welcome addition to international investment arbitration, she does concede that its implementation

⁵⁹ G Kaufmann-Kohler, 'Annulment of ICSID awards in contract and treaty arbitrations: are there differences?' in E Gaillard et al (eds), *Annulment of ICSID awards* (Juris 2004) 189-222.

⁶⁰ A Bjorklund, 'The continuing appeal of annulment: lessons from *Amco Asia* and *CME*' (n 55).

⁶¹ S Franck, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions' (n 26).

would be 'a challenging undertaking'.⁶² Nevertheless, she postulates that 'the ultimate utility of the system...will not be fully realized until an appellate court is created which permits the correction of legal errors.'⁶³

Knull and Robins' article⁶⁴ focuses on the issue of finality. The authors note that finality is repeatedly referred to as the major advantage of arbitration;

According to this position, one of the primary advantages of arbitration lies in the knowledge that once an award has been rendered, the parties' conflict is essentially at an end, simultaneously cutting off the flow of expenses and allowing the parties to resume commercial relations if they so choose, efficiently calculating the risks of subsequent projects without the shadow of some far-off reversal of the result.⁶⁵

The authors go on to explain that whilst finality is regarded as an advantage of international arbitration, the system does boast other advantages (such as confidentiality, enforceability et cetera), which they suggest are even more significant than finality. Knull and Robins intimate that other concerns not only eclipse finality, but that 'in many cases, finality in and of itself may appear to be a liability, rather than an asset, discouraging contracting parties from selecting arbitration.'⁶⁶ In other words, finality is only an advantage, when the party is confident that there is little to no risk of losing the case.

The article proceeds on the assumption that finality is still desirable, despite its presentation of evidence to the contrary, and asserts that the lack of an appeal mechanism does not automatically ensure finality of awards. This is because even after an award has been decided, a whole other host of litigation may ensue, including for example, enforcement litigation or national challenges to the award.⁶⁷

The authors go on to examine the avenues for the review of awards that are already in existence. Firstly, the losing party may try to petition the original tribunal for review. However this is highly unlikely to occur, and even if it does, the tribunal is even less likely to change its decision. The losing party may

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ W Knull and N Robins, 'Betting the farm on international arbitration: is it time to offer an appeal option?' (2000) 11 *The American Review of International Arbitration* 531.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

sometimes, under the terms of the New York Convention try to have the award set aside, though this is subject to numerous restrictions. Also subject to stringent limitations, is the possibility of reconsideration by means of judicial review through contractual provisions.⁶⁸

Knull and Robins effectively conclude that there is currently no appropriate means of reviewing arbitral decisions. They go on to criticise what they call this 'one-size-fits-all'⁶⁹ approach to arbitration. They believe an appellate mechanism would give existing clients wider choice, and attract new clients who are reluctant to use arbitration currently because of the risk involved in its strict adherence to the principle of finality.⁷⁰

The article goes on to explore the existing internal review possibilities of some prominent arbitral institutions. ICSID for example provides a limited scope for review, as set out in Article 52 of the ICSID Convention.⁷¹ The grounds for review are very narrow, and centre on abuse of procedure, rather than being concerned with the correctness of the decision or justice generally. The Centre for Public Resources (CPR) institute for dispute settlement is examined next. The CPR's appeal procedure establishes six rather broad grounds for appeal, including errors of law and fact. The appeal tribunal is able to annul the original award and replace it with a new, binding decision. The CPR also incorporates two important provisions that are intended to discourage frivolous, costly appeal,

first, where the appeal tribunal affirms the original award, the appellant is obliged...to reimburse the appellee for attorneys' fees and other out-of-pocket expenses related to the appeal...second, parties to the appeal procedure undertake to reimburse opponents for costs associated with any unsuccessful subsequent court actions aimed at challenging the original or appellate award.⁷²

The authors conclude by offering a number of observations about the nature of a possible future investment appeal mechanism, suggesting that there should be an option to appeal, at the parties' own discretion, rather than appeal being automatic or mandatory. They also suggest that any appeal procedure

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ See Article 52 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (n 28).

⁷² W Knull and N Robins, 'Betting the farm on international arbitration: is it time to offer an appeal option?' (n 64).

should be detailed enough to be predictable and clear, but also that the procedure should retain a degree of flexibility. An expedited procedure is also desirable, as parties will not want to increase the time it takes to resolve a dispute or increase the costs involved in doing so. Knull and Robins suggest the inclusion of fast-track mechanisms, such as time limits on submission of documents and on the length of oral hearings for example. The authors also recommend a flexible approach to the scope and standards of review available, suggesting that this should be at the discretion of the parties, rather than being fixed. In this way then, procedures can be tailored to the disputes at hand, again increasing the parties' choice and control over their own disputes. They also advocate that a minimum threshold of money should be at stake in the dispute in order that appeal be triggered. This would prevent flippant appeals and prohibit appeal where the costs of pursuit would outweigh what is at stake. This monetary threshold would of course be subject to negotiation by the parties. Another proposal to reduce frivolous appeals, and therefore the keep the caseload of the new appeal body relatively low is cost shifting; that is, requiring the unsuccessful appellant to pay their opponent's fees. A deposit as security could also be taken for this eventuality. The right of appeal should also be in lieu of other judicial proceedings, and the parties should attest to this at the beginning of proceedings, waiving recourse to judicial remedies. Knull and Robins then turn to the important question of a permanent investment body versus ad hoc tribunals. The authors recognise the advantages and disadvantages of both types of body. They ultimately conclude that the optimal solution would be to incorporate the best parts of both types of tribunal. They therefore suggest that international arbitral institutions should maintain a shared list of approved investment appeal panellists who would be available to preside for a fee, if the parties have chosen leave to appeal. They go on to suggest that the appeal tribunal should be able to remove the original decision, replace it or simply reform it.⁷³

Qureshi also outlines several arguments in favour of the creation of an appeal mechanism. Firstly, he suggests that an appeals facility could act as a corrective mechanism in the event that a case is wrongly decided. Furthermore, an appeals mechanism would remedy the growing problem of inconsistent

⁷³ *Ibid.*

decisions in international investment arbitration. In addition, the perceived success of the appellate body of the WTO's dispute settlement mechanism could be replicated in the investment sphere. Also, the author notes that in certain sectors of investment, appeals procedures are already in place, thus a general appeals mechanism will reduce the risk of distortions in investment flows and forum shopping.⁷⁴

Qureshi proceeds by analysing the different options available for the establishment of an appellate mechanism. The author quite rightly believes that 'the discourse for an appellate process is not unconnected with the kind of appellate process and its locus.'⁷⁵ Consequently, the author goes on to consider the different options available in this regard. Firstly, he considers 'an appellate process added to existing adjudicative systems in the investment sphere ring-fenced from other systems'.⁷⁶ This type of appeal mechanism would promote transparency, fairness and a rules-based system of adjudication. The main advantage of this type of appeal mechanism would be simplicity; it adds to existing dispute settlement procedures, and the individual parties would be able to choose whether to include recourse to appeal in their own particular dispute. Despite its benefits, there are significant drawbacks, which is probably why support for the suggestion has been fairly muted. A major limitation of the proposal is that '[it] seems to run counter to the objectives of coherence and consistency for different appeal mechanisms to be set up under each treaty concerned.'⁷⁷

He then goes on to discuss the possibility of a single appeal mechanism to be set up under the auspices of ICSID, suggesting that this may be a serious option for consideration.⁷⁸

Another option which he goes on to consider is the possibility of extending the WTO's existing appellate mechanism to the investment sector. This very question has been considered by the WTO's Working Group before, who suggested that this could be achieved without the need to make significant

⁷⁴ A Qureshi, 'An appellate system in international investment arbitration?' in P Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1157.

⁷⁵ *Ibid.*

⁷⁶ *Ibid* 1160.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

changes.⁷⁹ Although it should be noted that this was with a view to the introduction of a multilateral investment agreement, under which the WTO's dispute settlement body (including its appellate mechanism) would operate. Many countries supported this proposition, including Japan, the EU and Canada. Despite widespread support for the idea, many other states (particularly developing nations) were less than enthusiastic about the idea. Nevertheless, if the WTO's dispute settlement body were to become the go-to tribunal in investment disputes, Qureshi points out that a number of important questions would need to be answered. Questions such as whether investors would be granted standing, whether existing WTO sanctions such as compensation and suspension of concessions will operate in the investment sphere, the relationship the dispute settlement body would have with existing bilateral and regional agreements and so on.⁸⁰

The final option Qureshi discusses is the creation of what he refers to as 'a supreme investment court'⁸¹ which could be established in isolation, or as a chamber of the ICJ. The author analyses the ICJ proposal in greater depth. Firstly, he states that the investment chamber of the ICJ could serve a constitutional function, safeguarding the most important investment principles and procedural pillars. Additionally, the investment chamber would be the principal judicial organ for investment, facilitating the resolution of conflicts between different investment regimes and the application of general international law. The chamber could also play an important role in confirming fundamental principles of investment, but also international economic law more generally. Qureshi speculates⁸² that 'arguably there may...be a case for a supreme investment type of court.'

After having briefly discussed each of the available options for the establishment of an appeal mechanism in international investment arbitration,

⁷⁹ See 'Report of the Working Group on the Relationship between Trade and Investment to the General Council of the WTO' WT/WGTI/6 (2002) <http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28%28+%40meta%5FSymbol+%28WT%FCWGTI%FC%2A%29+and+not+%28W+or+M%29%29+and+%28%40meta%5FTypes+Report%29%29+&doc=D%3A%2FDDFD%20DOCUMENTS%2FT%2FWT%2FWGTI%2F6%2EDOC%2EHTM&curdoc=6&popTitle=WT%2FWGTI%2F6> accessed 9 February 2012.

⁸⁰ A Qureshi, 'An appellate system in international investment arbitration?' (n 74) 1165.

⁸¹ *Ibid* 1165.

⁸² *Ibid* 1166-1167.

Qureshi concludes that 'the main focus amongst the investment fraternity appears to be on ICSID, as a logical extension point in the arbitral process it offers in the investment sphere.'⁸³

Qureshi and Khan set out the basis for the call for an appeal process, observing that, 'there is evidence of a growing consensus amongst investment practitioners and academics that there is a need for an appellate system in the investment sphere.'⁸⁴ The authors remark that this need may be attributed to the desire to establish 'coherence in the interpretation of investment provisions'⁸⁵. In other words, the authors believe that the problem of inconsistency and incoherence in investment arbitration could be remedied by the introduction of an appeals process. An appellate mechanism could contribute to improved consistency and coherence in several ways. Firstly, it could act as a corrective procedure in the case of wrongly decided cases. Furthermore, the authors allege that an appeal mechanism could address the sustainability issues associated with investment arbitration. With the number of disputes on the increase, the risk of inconsistent decisions has never been greater. The authors also make reference to the accomplishments of the WTO's appellate mechanism, suggesting that its success could be repeated in the investment sphere, especially in light of the fact that 'international trade and investment regimes operate in each other's shadows.'⁸⁶ The article also points out that the notion of appeal is not entirely new to investment; certain sectors already enjoy dispute settlement procedures which incorporate an appellate mechanism. Finally, the article highlights the fact that a number of treaties that envisage the eventual establishment of an appellate mechanism have already been concluded, with many more expected in the near future.⁸⁷

The article proceeds on the basis that we accept that the creation of an appellate mechanism is a desirable goal.⁸⁸ The article concludes by considering

⁸³ *Ibid* 1166-1167.

⁸⁴ A Qureshi and S Khan, 'Implications of an appellate body for investment disputes from a developing country point of view' in K Sauvart (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 269.

⁸⁵ *Ibid*.

⁸⁶ *Ibid* 270.

⁸⁷ *Ibid*.

⁸⁸ Some commentators have cast doubt on this assertion. See for example J Paulsson, 'Avoiding unintended consequences' (n 31), B Legum, 'Options to establish an

how such a mechanism could, and indeed should be established, with particular emphasis on the potential consequences for developing nations. The authors consider several of the available options, including: the creation of appeal mechanisms into existing BITs; an appeal facility incorporated into the ICSID framework; an investment appeal mechanism integrated into the WTO dispute settlement structure; and the creation of a new, supreme investment court with its own specific appeals procedure.⁸⁹

The authors seem to be of the opinion that ICSID would be the best option, at least from a developing country perspective. Consequently, they provide a detailed analysis of the ICSID proposal.⁹⁰ The ICSID appeal mechanism would of course require amendment to the ICSID Convention. It is intended that the ICSID appeals facility would be an alternative to the individual appeals mechanisms envisaged in individual investment treaties. A number of key features of the proposed ICSID appeals facility are noted. Firstly, the availability of appeal would depend on the individual parties' consent. Thus, it will be possible for the parties to exclude the possibility of appeal from the outset. Also, it is proposed that an appeals panel would be established, consisting of fifteen experts in international investment law, each from a different country. This appeals panel set up would be very similar to the WTO's own appellate panel body (though the WTO panel is actually smaller). It is also proposed that each appeal tribunal would consist of three of the fifteen panel members. The grounds for appeal would be limited to circumstances in which there has been a 'clear error of law'⁹¹ or 'any of the five grounds for annulment set out in Article 52 of the ICSID convention.'⁹² The tribunal would be able to uphold, modify, reverse or annul the award that it considers. Lastly, access to the appeals facility would require the approval of ICSID's Secretary-General.⁹³

Qureshi and Khan go on to evaluate the proposed ICSID appeals facility, taking into consideration a number of important points. They criticise the

appellate mechanism for investment disputes' (n 33) and J Gill, 'Inconsistent decisions: an issue to be addressed or a fact of life?' (n 36).

⁸⁹ A Qureshi and S Khan, 'Implications of an appellate body for investment disputes from a developing country point of view' (n 84) 273.

⁹⁰ *Ibid* 274.

⁹¹ 'Possible improvements to the framework for ICSID arbitration' (22 October 2004) (n 48) Discussion Paper, as discussed in A Qureshi and S Khan *ibid*.

⁹² *Ibid*.

⁹³ *Ibid*.

appointment of panel judges at the sole discretion of the Secretary-General, as well as the lack of reference to the geographical distribution, level of development and investor home/host status of the countries from which the judges will originate. They also criticise the consent requirement, the fact that states may prefer to breach their obligations if they deem it more efficient than compliance (it may for example be cheaper to breach their obligations and pay damages than comply⁹⁴), as well as what appears to simply be an extension of the existing review process, rather than a carefully considered opportunity for reform.⁹⁵

The authors are keen to ensure that the interests of developing nations do not get overlooked in the establishment of an investment appeal procedure. In this regard, the article does highlight several concerns that developing countries may have, including the fact that the development objective must be maintained throughout the process of establishing any appeal mechanism. In addition, the appeals process must be transparent and fair in all aspects, guaranteeing the contribution of developing countries in the appellate judicial forum. Qureshi and Khan are also at pains to ensure that the position of multinational corporations is not indirectly strengthened through the possibility of abuse of the appeals process, and that the legislating abilities of developing countries are not infringed by an appellate mechanism. Finally, the authors are concerned that the introduction of an appeals facility should not indirectly multilateralise the bilateral agreements that have been legitimately negotiated, thus compromising the flexibility of the current bilateral system.⁹⁶

Walde highlights an interesting point regarding the creation of an appeal mechanism. The author casts his mind back to the time when ICSID was created. He recalls that the institution was not popular when it was first created, then, over time, it became increasingly so. The author asserts that this is often the case when new infrastructures are developed; they come to be used when the time is right. Walde postulates that this could be the case with an appeal mechanism; once created, users will either choose to use it or not. Walde

⁹⁴ For more on efficient breach, see F Marrella and I Marboe, 'Efficient breach and economic analysis of international investment law' (2007) 4 *Transnational Dispute Management* 6.

⁹⁵ 'Possible improvements to the framework for ICSID arbitration' (22 October 2004) (n 48) Discussion Paper, as discussed in A Qureshi and S Khan 275.

⁹⁶ *Ibid* 276-278.

suggests that the best way to establish an appeals facility would be through the existing ICSID framework, as an extension to the annulment procedure.

Walde⁹⁷ then goes on to consider the impact of an appeals facility on those people that will be using the system, that is the parties themselves (with particular reference to the position of investors). The author is of the opinion that, 'a well crafted appeals facility- not a very complicated one, not a very time consuming one- can help to enhance the quality and therefore the longer-term acceptance and force of investment arbitration.'⁹⁸ In this way then, an appeals facility might enhance the legitimacy of investment arbitration, providing a greater sense of permanence, continuity and familiarity. The author goes on to warn that an appeal mechanism would also carry risks. For example, an appeals facility might increase the disequilibrium that investors already face with strong litigating governments as their opposition. From an investor perspective, the appeals facility should be reasonable, practical and cost effective. In terms of the hugely important question of the constitution of the panel, Walde suggests a standing appeal body, much like that of the WTO appellate body would be preferable.⁹⁹

Blackaby¹⁰⁰ investigates the creation of an appeal mechanism from the point of view of one particular state; Argentina. The state of Argentina has been the defendant party to a record breaking number of cases (since 2002 almost half of new ICSID registered cases have named Argentina as the defendant).¹⁰¹ In the 1980's, Argentina suffered from hyperinflation and instability of its economy. In order to fuel development and income, the government enacted a number of policies designed to attract foreign investment. These policies were highly successful, attracting billions of dollars into the Argentine economy. Then in January of 2002, following a prolonged recession the government enacted a new emergency law which effectively cancelled its previous investment policies,

⁹⁷ T Walde, 'Alternatives for obtaining greater consistency in investment arbitration: an appellate institution after the WTO, authoritative treaty arbitration or mandatory consolidation?' in F Ortino et al (eds), *Investment Treaty Law Current Issues: Volume 1* (n 4) 135-144.

⁹⁸ *Ibid* 138-139.

⁹⁹ *Ibid* 141-142.

¹⁰⁰ N Blackaby, 'Testing the procedural limits of the treaty system: the Argentinean experience' in F Ortino et al (eds), *Investment Treaty Law Current Issues: Volume 1* (n 4) 29-36.

¹⁰¹ *Ibid* 30.

leading to huge losses of profit for foreign investors. This chain of events led to the 'single largest phenomenon in the history of treaty arbitration.'¹⁰² This significant increase in caseload led to a huge strain on ICSID arbitration. As a result of this, one issue that came to the forefront was the constitution of the tribunal. The main problem was finding qualified arbitrators; the skills needed were quite diverse. For example, finding experienced arbitrators who are foreign investment experts and who have a good enough grasp of Spanish, as well as knowledge of public international law generally was no mean feat. Moreover, arbitrators are not able to be acting on behalf of, perhaps as counsel, for any of the investors that are bringing the claim. Another important concern in the Argentine cases, and indeed in international investment arbitration generally is consistency and coherency of decisions. Each of the thirty cases revolved around whether expropriation had occurred, whether there had been a breach of fair and equitable treatment or whether the defence of necessity could be raised. There was therefore clearly potential for thirty different decisions on the same, fundamentally important issues. For the most part, the decisions rendered were consistent. This concern over consistency is problematic though, because if two conflicting and inconsistent decisions are rendered, they both possess the same legal status. Therefore, 'for the moment it appears that one must be prepared to accept the lawful status of two or more inconsistent decisions.'¹⁰³

The author proposes two solutions to remedy this situation. Firstly, it is proposed that arbitrators should be allowed to sit on more than one tribunal. A second proposal would see agreements to constitute an identical tribunal in cases where similar issues arise. Whilst both of these solutions would enable a degree of consistency to be achieved, 'they remain very much ad hoc solutions.'¹⁰⁴ This particular weakness could be addressed in several different ways, including the establishment of an appeal mechanism. This would of course be broader than the current system of annulment, and would hopefully

¹⁰² *Ibid* 31. For more information on the Argentine cases see W Burke-White, 'The Argentine financial crisis: state liability under BITs and the legitimacy of the ICSID system' (2008) 3 *Asian Journal of WTO and International Health Law and Policy* 199.

¹⁰³ *Ibid* N Blackaby, 33.

¹⁰⁴ *Ibid*.

achieve greater consistency of decision, and be instituted in a more permanent manner than the ad hoc solutions examined above.¹⁰⁵

An article by Goldhaber¹⁰⁶ contemplates the possible establishment of an investment appeal mechanism. The author highlights the *Czech*¹⁰⁷ and *SGS*¹⁰⁸ cases and suggests that they are one example of the crisis of legitimacy that has emerged in international investment law arbitration. Goldhaber cites eminent practitioner Blackaby;

An appeal mechanism is critical for the long-term survival of the investment arbitration system. Any system where diametrically opposed decisions can legally coexist cannot last long. It shocks the sense of rule of law or fairness. Ultimately there must be a right answer.¹⁰⁹

Goldhaber notes that whilst investment has overtaken trade in economic importance, it does not have any dedicated international institution, such as the WTO does for trade. When there is contention over trade issues and cases, parties can turn to the WTO's dispute settlement body for answers. However, there is no equivalent action in investment disputes. The author suggests that radical action is required, namely the creation of a supreme investment tribunal, a world investment court of sorts. Goldhaber recognises that such a body may be 'politically unfashionable, perhaps to the point of being unfeasible.'¹¹⁰ All the more reason it should be discussed fully, according to the author.¹¹¹

The arguments in favour of an appeals process are then set out by the author. He believes that an appeals mechanism would promote accuracy and uniformity of the law in this area, vesting the power of review in dedicated, permanent arbitrators, allowing review on broad grounds of errors of fact and of law. Accuracy in investor-state arbitration is important due to the public nature of the proceedings; decisions are published in the public interest due to the involvement of the state parties. The stakes are often high in investor-state

¹⁰⁵ *Ibid.*

¹⁰⁶ M Goldhaber, 'Wanted: a world investment court' (2004) 3 *Transnational Dispute Management* 26.

¹⁰⁷ *CME Czech Republic BV v The Czech Republic* (n 3) and *Lauder v The Czech Republic* (n 3).

¹⁰⁸ *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (n 3). *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (n 3).

¹⁰⁹ N Blackaby as cited in M Goldhaber, 'Wanted: a world investment court' (n 106).

¹¹⁰ *Ibid* M Goldhaber.

¹¹¹ *Ibid.*

arbitration, both in terms of monetary value and public interest. Consistency and accuracy of decisions promotes justice and enhances the legitimacy of the system generally. Furthermore, a stable and robust dispute resolution system will promote foreign investment and economic growth more generally.¹¹²

Goldhaber then turns to the main objections to the establishment of an appeal mechanism in international investment arbitration. The central concern is that such a process will undermine the speed and finality of the dispute resolution system, two much revered benefits of the present appeal-less system. The creation of an appeals process will undoubtedly undermine speed and finality. However, Goldhaber points out that, 'the preeminent goal of international arbitration is not finality...[rather, it is to] remove decision making from the hands of untrusted domestic courts.'¹¹³ This primary goal would be achieved by the creation of an appeals process. The author goes on to deal with the issue of speed and finality, stating that whilst these are desirable goals, when the stakes are high (as they often are in international investment arbitration) the parties will often willingly sacrifice finality for accuracy and justice. Moreover, the notion of finality is illusory, as the losing party often pressures domestic courts to intrude on the matter. In this way then, a dedicated investment appeal court could remove the opportunity for domestic judicial interference, and indirectly promote finality.¹¹⁴

Goldhaber goes on to examine the existing forms of review of decisions in international investment arbitration, which he refers to as 'meagre'¹¹⁵. He highlights the possibility of annulment in ICSID cases, as well as the opportunities for review in non-ICSID proceedings. Such opportunities include the involvement of domestic courts. The author notes that existing means of review are largely only available on procedural, and not substantive grounds, and are therefore very narrow indeed.¹¹⁶

The author purports that the ideal solution to the problems that have been discussed above would be to establish a world investment court. The institution would be similar to the dispute settlement body of the WTO. The

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

court would have to be created by signing an international multilateral treaty or by adding a protocol to existing treaties. This would be the ideal scenario, however it is not easy to envisage it materialising. Negotiations for such a treaty have failed miserably in the past, and the prospects for the future are not exactly promising. This is largely due to the fact that multilateralism may have a 'sinister ring'¹¹⁷ to it. In light of this, experts agree that a world investment court is 'not...politically viable'¹¹⁸ at this moment in time. However, the idea has merit and could come into fruition at some point in the future. The author muses that a large enough shock to the investment system could trigger the negotiations for a world investment court.¹¹⁹

4.3.2 Opposition of the proposal to establish an appellate facility

Whilst an overwhelming number of commentators have expressed their support for the creation of an appeals facility, and even considered how such a mechanism might best be established, a number of particular concerns about the proposition and are against the establishment of such a facility have also been articulated.

Dimsey, an undoubted proponent of the establishment of an appeal mechanism does recognise a number of potential downfalls of the idea. Dimsey intimates that the introduction of an appeal mechanism could be damaging to investment arbitration, stripping the first instance hearing of any significance or value, since it will be appealable. Furthermore, finality of the award, the often cited strength of the investment arbitration system as it currently stands, will be eroded.¹²⁰

Paulsson¹²¹ muses that the proposed solution, in this case the establishment of an investment appeal mechanism, could be worse than the purported problem of inconsistency of decisions. Paulsson recommends a more laissez-faire strategy, asserting that any problems will naturally sort themselves

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 1) 184-185.

¹²¹ J Paulsson, 'Avoiding unintended consequences' (n 31).

out without any un-necessary intervention, a process which he refers to as 'natural correction'.¹²²

Gill suggests that the utility of an appeal mechanism will very much depend on who will hear the appeal. The pool of arbitrators hearing investment cases are of a very high calibre. Despite this, experienced arbitrators sometimes do come to differing conclusions, as we have seen in the past. Furthermore, the system of appointing arbitrators will need to be addressed; should we continue to allow the parties to appoint the arbitrators themselves? There is much which will need to be clarified in this regard.¹²³ Instead of establishing an appeals facility, Gill advocates the employment of a laissez-fair policy will allow for natural selection of the most appropriate approach to any given problem. She believes that, 'the inconsistent decisions themselves will give rise to one approach being generally regarded as more preferable than another and so it will be adopted more frequently thereafter.'¹²⁴

Legum¹²⁵ also expressed doubt about the establishment of an appeal mechanism. In 2006, he highlighted several potential problems which would need to be overcome in order to successfully integrate an appeal mechanism in international investment law. Legum concentrates particularly on four issues: the relationship between the new appeal mechanism and national courts; the enforcement of awards pending appeal; the composition of the tribunal; questions of standard appellate review and precedential effects of appellate decisions.¹²⁶ Legum deals with each of these topics in turn.

With regard to the relationship between the appeal mechanism and the national courts, Legum points out that traditionally, outside of the context of ICSID arbitration,

awards in investor-state arbitration are subject to set-aside and enforcement proceedings in national courts. Typically several levels of national court review are available. A court of first instance decides whether to set aside or enforce

¹²² *Ibid* 253.

¹²³ J Gill, 'Inconsistent decisions: an issue to be addressed or a fact of life?' (n 36) 24.

¹²⁴ *Ibid* 27.

¹²⁵ B Legum, 'Visualizing an appellate system' in F Ortino et al (eds), *Investment Treaty Law: Current Issues Volume 1* (n 4) 121-130.

¹²⁶ *Ibid* 121.

the award. An appeal is generally available to an intermediate appellate court. In many systems, a final appeal is then available to the highest court.¹²⁷

Going through the several layers of national court review as detailed above is time consuming and expensive. It may be possible to add an additional layer to this procedure, namely leave of appeal to an international appeal body. However, this is probably not a desirable option, adding further delay and cost to the resolution of a dispute. It may be more efficient to constitute an international appeal mechanism that operates in a similar manner to the ICSID approach to review. ICSID annulment procedures effectively displace national court review of arbitral awards. In this way, awards issued under ICSID arbitration are not subject to review by national courts. Review of ICSID decisions is therefore only possible through the limited ICSID annulment procedure. A similar approach could be adopted for the proposed international investment appeal mechanism, making investor-state awards subject to one single level of review.¹²⁸

The author goes on to state that, 'another important topic that any appellate system must address is the question of enforcement of awards while an appeal is pending.'¹²⁹ Should there be a presumption that the award may be enforced pending appeal, or instead should there be a stay of enforcement? Legum muses that,

while a presumptive stay may be desirable for...reasons of procedure, as a matter of fairness it may also be desirable to require that the appellant presumptively post security against the eventuality that the appeal will be unsuccessful.¹³⁰

This has become the standard practice in ICSID annulment proceedings, though it is not a formal requirement. The posting of security would also provide substantial assurance that an appealed award would be paid, thus ensuring enforcement of said award. This is significant because it is notoriously difficult to enforce awards against foreign states.

Legum then moves on to examine what he believes to be the most important consideration for a future appellate mechanism; the composition of

¹²⁷ *Ibid* 122.

¹²⁸ *Ibid*.

¹²⁹ *Ibid* 123.

¹³⁰ *Ibid* 124.

the appeals tribunal. Equally, it may also be the most difficult consideration. According to Legum, the expectation would be to establish what he refers to as a 'standing tribunal'¹³¹ made up of a limited number of serving individuals. This would be expected because it has been the approach which has been taken by the most recently established public international legal institutions, such as the WTO, the ICJ and the International Tribunal on the Law of the Sea. The perceived advantage of having a small number of sitting members enables the tribunal to build up a relatively consistent and coherent body of jurisprudence. However, Legum asserts that there are, 'important differences between the circumstances that gave birth to these international courts and those that exist today for the establishment of an appellate system for investment treaty disputes.'¹³²

The first important difference being that the aforementioned previously created courts were established through negotiation of an existing multilateral agreement with very broad state membership. In contrast, there is no multilateral investment agreement; there are instead thousands of bilaterally negotiated treaties. This lack of multilateralism makes it very difficult to establish a single appellate mechanism. Another important difference is that the courts that are already in existence decide appeals which emanate from the agreement that was negotiated at the time they were established. For example, the WTO appellate body hears cases arising from the WTO agreements. An investment appeal tribunal would not have a single agreement or set of agreements to interpret; rather it would have to interpret the thousands of BITs negotiated at different times, by different states, each with different provisions. Furthermore, states themselves will not be concerned about the interpretation of treaties to which they do not have membership. Indeed, they may actively seek to negotiate treaties that are substantively different. Whilst states may desire consistency in investment arbitration decisions, they certainly do not desire harmonisation of treaty provisions.¹³³

As an alternative to the standing tribunal, Legum offers a roster style model for the constitution of the tribunal, similar in some ways to the ICSID annulment committees. Each state would have the right to appoint its own

¹³¹ *Ibid.*

¹³² *Ibid* 124-125.

¹³³ *Ibid.*

members, providing assurance to states that they can expect consistent interpretations. A roster system would also be suitable for a mechanism that would originally be established by a certain number of member states, with the facility for other states to accede in the future.¹³⁴

A final consideration for the future appeal mechanism is the standard of review which it will provide and the precedential value of its decisions. Legum suggests that it is desirable to enable review on the traditional grounds of annulment (as detailed by Article 52 of the ICSID Convention¹³⁵) as well as on grounds beyond the scope of annulment. The question is how far beyond this should the scope of review extend? Should it for example extend to encompass both errors of law and of fact? According to Article 17 of the Dispute Settlement Understanding¹³⁶, the WTO appellate body's scope of review is limited to legal errors. Though, in one of its decisions¹³⁷, the appellate body has stated that, '[w]hether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is...a legal question which, if properly raised on appeal, would fall within the scope of appellate review.'¹³⁸ Therefore, it seems the appellate body can in some limited circumstances offer a very narrow form of factual review. It may be argued that only errors of law should be reviewable, in order to minimise the amount of appeals sought. This will keep the caseload of the tribunal low and provide for efficient resolution of appealed disputes. On the other hand, it could be argued that a more flexible approach, with some capacity to correct errors of fact (as demonstrated by the WTO appellate body) should be taken.¹³⁹

The author then turns to the issue of the precedential value of the decisions of the future tribunal. Legum doubts that a system of formal precedent

¹³⁴ *Ibid.*

¹³⁵ Article 52 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (n 28).

¹³⁶ Article 17 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes 1994 (full text) is available at <http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> accessed 9 August 2012. The Understanding was negotiated as part of the Uruguay round of trade negotiations, signed in Marrakesh in 1994 and entered into force in January 1995.

¹³⁷ *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB (WTO App. Body 16 Jan 1998).

¹³⁸ *Ibid* as cited in B Legum, 'Visualizing an appellate system' (n 125) 127.

¹³⁹ *Ibid* B Legum.

or stare decisis would be 'necessary or desirable'¹⁴⁰. It would not be necessary because international tribunals tend to give substantial weight to previous decisions, even though this is strictly not necessary in the absence of a formal requirement of stare decisis. Moreover, binding precedent may not be desirable in international investment arbitration because of the sheer number of treaties in existence; states will be unwilling to be bound by an interpretation of a provision of a treaty to which they are not party, even if there may be a similar provision in a treaty to which they are party.

Legum concludes that the establishment of an appellate mechanism in international investment arbitration will not be an easy feat. Many challenges, including the four he has dealt with in the chapter will need to be considered and overcome in order to do so.¹⁴¹

In 2008, Legum¹⁴² considered the issue of introducing an appeal mechanism in international investment arbitration yet again. Legum notes that discussion about the introduction of an appeal mechanism was brought to the forefront in 2002, which was the year that saw a US Trade Promotion Act identify as one of its objectives the negotiation of an appellate body in investment arbitration. Other subsequent acts followed suit. Legum then goes on to review where efforts to establish an appeal mechanism currently stand. The author remarks that the creation of such a mechanism under the ICSID framework is not probable, and that there are no other negotiations taking place. Hence, the author asserts that there are no options for establishing an appeal mechanism.

The second part of Legum's article continues by examining why this is the case. Legum believes that there are three main reasons for the lack of options for the creation of an appeal mechanism. Firstly, he is of the opinion that the current system of international investment arbitration is ill-suited to appeals. He goes on to explain that this is largely due to the fact that there is currently no multilateral investment agreement. Secondly, Legum thinks that the need for an appeals mechanism has yet to be properly established. For him, the excessively cited criticisms of inconsistency and incoherence are simply not compelling enough. Lastly, Legum, like Paulsson is afraid that 'the cure...could be far worse

¹⁴⁰ *Ibid* 128.

¹⁴¹ *Ibid*.

¹⁴² B Legum, 'Options to establish an appellate mechanism for investment disputes' (n 33).

than the disease.’¹⁴³ He rationalises that the hasty introduction of an appeal mechanism could ‘do a tremendous amount of damage.’¹⁴⁴

The OECD has also highlighted a number of potential disadvantages of an appeal mechanism in international investment law in its 2006 paper¹⁴⁵. The OECD notes that the very concept of appeal is contrary to the principle of finality, which is itself believed to be the greatest benefit of investor-state arbitration. Thus, it is thought that an appeal mechanism will increase the costs associated with, and the time it takes to resolve investment disputes. Moreover, there is a danger that an appeals mechanism would lead to an increase in the caseload of investment arbitration, with challenges being automatically sought by the losing party. Additionally, there is a ‘concern that the de-politicisation of investor-to-state arbitration, could be undermined.’¹⁴⁶ This may be a legitimate concern due to the fact that governments who are eager to please their constituencies will appeal on every occasion that they lose at first instance.¹⁴⁷

Brower is also rather sceptical about the establishment of an appeals facility;

One should... recall the cold reception given to preliminary discussions within the OECD and ICSID regarding the establishment of a single appellate body for investment treaty arbitration... Given their historical and continuing role in promoting discord and fierce controversy in international relations, investment disputes simply may not involve the sort of technical matters that lend themselves to the top-down solution contemplated by permanent international courts.¹⁴⁸

Brower is of the opinion that a top-down solution such as an appeal mechanism would not work in international investment arbitration. Rather, he advocates a bottom-up solution, such as co-ordinating the work of the various tribunals involved in settling international investment disputes and strengthening the roles of those involved in settling disputes so that they are more aware of the context within which their decisions will sit.¹⁴⁹

¹⁴³ *Ibid* 238.

¹⁴⁴ *Ibid*.

¹⁴⁵ K Yannaca-Small, ‘Improving the system of investor-state dispute settlement: an overview’ (n 52) 194-195.

¹⁴⁶ *Ibid* 195.

¹⁴⁷ *Ibid*.

¹⁴⁸ C Brower, ‘Confronting the truth: sources and magnitude of decentralization in investment treaty arbitration’ in C Rogers and R Alford (eds), *The Future of Investment Arbitration* (OUP 2009) 339.

¹⁴⁹ *Ibid*.

The author recognises that one of the main justifications put forward for the establishment of an appellate mechanism is to increase consistency in international investment law arbitration. Addressing this, Brower suggests that the degree of coherence required is not only over-exaggerated, but also unattainable, given the sheer number of bilateral investment treaties from which disputes arise. Brower suggests that the system of international investment dispute settlement is unsuited to heterogeneous outcomes, not only because of the number of treaties under which disputes are settled, but also because there is no centralised, permanent body to supervise the field generally (such as the WTO does for trade-related matters). Moreover, investors are able to pursue claims in numerous fora, under the different treaties which they may apply.¹⁵⁰

Sornarajah¹⁵¹ interestingly notes a significant downfall of the proposition. He believes that developing nations will be reluctant to commit to submitting themselves to an appeal mechanism, as this will simply increase the costs associated with investment arbitration. This will be unattractive to developing states, who obviously do not have as much money to spend on arbitration.¹⁵²

Deputy Secretary-General at the Permanent Court of Arbitration, Shifman¹⁵³ highlights some of the challenges of administering an appellate system for investment disputes. Shifman briefly introduces the PCA and highlights some of its central features. She then goes on to consider the challenges which will need to be faced in order to successfully establish and administer an appellate system for investment disputes. The author points out that the first of these challenges will be funding; who will fund the new appellate mechanism and how? Shifman states that the PCA is funded by member states which seems logical, under the 'user pays' principle, however this can be somewhat problematic. For example, developing countries may struggle to pay the fee. She goes on to point out that the new appellate body will require highly qualified and experienced multilingual staff. Such highly qualified persons may command a high price. In order to promote transparency and avoid

¹⁵⁰ *Ibid.*

¹⁵¹ M Sornarajah, 'A coming crisis: expansionary trends in investment treaty arbitration' (n 5)

¹⁵² *Ibid.*

¹⁵³ B Shiffman, 'The challenges of administering an appellate system for investment disputes' in F Ortino et al (eds), *Investment Treaty Law: Current Issues Volume 1* (n 4) 113-120.

inconsistency, the body will also require funding for the publication and dissemination of its decisions. She then goes on to consider how appeal panels should be constituted. There are a number of options in this regard. Shifman seems to favour the idea of having a pool of potential arbitrators from which the panel should be constituted. Procedural rules will of course have to be created governing the appointment of arbitrators in each particular case.¹⁵⁴

The author goes on to examine the other challenges that will need to be faced in establishing an appeal mechanism, once funding has been put into place, competent staff have been hired and procedural rules for the constitution of the panel are put into place. According to Shifman, this very much depends on the structure of the envisaged appellate system and the scope of its review. Other general issues which will need to be addressed include what will happen to the original decision/award until the appeal is decided; should it be suspended? Should interim measures be allowed? There are many issues to consider before an appeal mechanism could be introduced.¹⁵⁵

Tawil¹⁵⁶ also examines the debate about the issues of consistency and predictability, the often cited would-be benefits of the appeal mechanism. He quickly moves on to highlight the fact that in the context of ICSID, appeal was never contemplated. He goes on to stress (albeit with particular reference to ICSID), that the system is working well overall. Disputes are resolved in a timely fashion, with minimal cost to the parties involved. Tawil is concerned that the introduction of an appeal system will result in increased delays and augmented costs. The author recognises that the present system is not perfect; there has been a slight increase in the time it takes to resolve a dispute, as well as some problems with the nomination of arbitrators. However, the author feels that the biggest problem is the enforcement of awards, or lack thereof. He suggests that efforts should be concentrated on resolving this issue rather than on establishing an appeal mechanism.¹⁵⁷

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid* 118-119.

¹⁵⁶ G Tawil, 'An international appellate system: progress or pitfall?' in F Ortino et al (eds), *Investment Treaty Law: Current Issues Volume 1* (n 4) 131-134.

¹⁵⁷ *Ibid* 133-134.

Qureshi and Khan¹⁵⁸ also set out a number of arguments against the creation of an appeal mechanism. The authors assert that inconsistencies in decisions have not been identified as occurring regularly, and moreover, that the creation of an appeal mechanism might actually increase fragmentation and inconsistency. Additionally, an appeal mechanism would detract from the finality of the award, and lead to further, costly, time consuming litigation.¹⁵⁹

Qureshi¹⁶⁰ also highlights the arguments against the establishment of an appeal mechanism in international investment arbitration. The author reminds us of the main basis of the call for an appeal mechanism; to increase consistency and coherence in international investment law arbitration. He then goes on to state that this may not actually be a valid basis after all, because the alleged inconsistencies have not materialised, noting that, 'significant inconsistencies have not to date been a general feature of the jurisprudence of ICSID.'¹⁶¹ He goes on to state that the establishment of an appeals mechanism may actually increase inconsistency and encourage fragmentation more than the current system, as well as detract from the finality of awards. Qureshi goes a little further than many other commentators, stating that the debate about the desirability of an appeals facility may be somewhat redundant, as it may not even be possible to establish an effective appeal mechanism within the current framework of international investment law (which relies on bilateral investment agreements between states). Qureshi asserts that an appeal mechanism may only be effectively introduced as part of a multilateral system. Although, he goes on to highlight that previous attempts to negotiate a global, multilateral investment agreement have failed miserably. He states that, 'in short, advocacy of an appellate system can indirectly partake of the call for a multilateral investment agreement.'¹⁶² Additionally, he states that,

the case for an appellate facility must be set against the objectives and purposes of the provision of dispute settlement in the international investment sphere...consistency and coherence in dispute settlement may be significant reasons for institutional reform for both states and investors- but there are other

¹⁵⁸ A Qureshi and S Khan, 'Implications of an appellate body for investment disputes from a developing country point of view' (n 84) 269.

¹⁵⁹ *Ibid.*

¹⁶⁰ A Qureshi, 'An appellate system in international investment arbitration?' (n 74).

¹⁶¹ *Ibid* 1158.

¹⁶² *Ibid* 1159.

concerns which may seek to trump these considerations- for example, human rights, environment, and of course the development objectives of the host state.¹⁶³

As mentioned in the previous chapter, the ICSID Secretariat has also investigated integrating an appeal mechanism into its own framework for dispute settlement. In its 2004 Discussion Paper, the Secretariat discussed the requisite advantages and disadvantages of the proposal. However, an appeal mechanism was never introduced. This will be discussed in greater depth in chapter six.

4.4 Conclusion

Although some experts continue to deny the existence of the crisis of consistency in international investment arbitration, most eminent practitioners and academics specialising in the field do recognise that there is a problem. Interestingly, recognition of the problem is where agreement seems to end; there is no general consensus as to how the problem may be solved. Many different solutions have been proposed in an attempt to remedy incoherency and inconsistency in international investment arbitration, including increasing the role of national courts, allowing the WTO's dispute settlement body to hear investment cases, and introducing an appellate mechanism.

The present chapter has concentrated on reviewing this latter proposal, the creation of an appellate mechanism. As this chapter shows, this proposition has generated much debate. The discourse has centred around the desirability of the proposed appeals facility, with much of the literature focusing on the various advantages and disadvantages of such a mechanism. It is accepted by many experts that an appeal mechanism could increase the legitimacy of international investment arbitration by providing consistent decisions, leading to the creation of a coherent body of jurisprudence. Perceived disadvantages of an appeal mechanism include damage to the principle of finality of decisions, increased costs associated with investment arbitration, delays in resolving disputes, and an increased caseload.

¹⁶³ *Ibid.*

Nonetheless, it is important to note that the debate has gone beyond issues of desirability of such a facility; it also extends to issues of feasibility. Even those commentators who accept that an appellate mechanism would be of considerable benefit to the system of international investment arbitration recognise that the establishment of such a facility will not be easy to achieve. There is also much debate surrounding the structure and mandate of the eventual appeal body. Several suggestions have been put forward in this regard, including, but not limited to suggestions such as constituting ad hoc appeal tribunals on a case by case basis, integrating the appeals facility into the existing ICSID framework, and establishing a single, independent, permanent investment appeal court. Reviewing the literature, it would seem that the proposals to integrate appeal into ICSID and creating a separate, single investment appeal court have received the most support. The ICSID secretariat itself has considered the possibility of integrating an appeals facility, having issued two publications on the matter. The secretariat essentially decided that at the present time at least, it would be unable to pursue the establishment of an appeals facility under the ICSID convention. This therefore leaves only one viable option; the creation of a single, independent, permanent appeal tribunal.

CHAPTER V: POSSIBLE IMPROVEMENTS TO THE FRAMEWORK OF INTERNATIONAL INVESTMENT ARBITRATION

5.1 Introduction

Having come to the conclusion in the previous chapters that the system of investment arbitration is not currently providing an adequate and effective means of settling investment disputes, it is necessary to examine how the situation might be ameliorated. Therefore, the objective of this present chapter is to discuss how the current system of international investment arbitration might be improved upon. A number of possible improvements have been proposed by various foreign investment experts in this regard. It would be impossible to compile an exhaustive list of such proposed improvements and discuss each thoroughly in turn. Such an extensive treatment of the subject is beyond this scope of this work. However, this chapter will serve to highlight some of the more prominent and interesting suggestions that have been put forward in recent years.

This chapter will examine the proposal to allow the World Trade Organisation's Dispute Settlement Body to take over the settlement of international investment dispute as well as the possible creation of interpretative guidelines on international investment arbitration. Another suggestion which will be considered is the possibility of strengthening the role of the national courts in the settlement of international investment disputes. The possible negotiation of a multilateral treaty will also be discussed, as will the potential creation of an appellate mechanism.

5.2 Increasing the role of the World Trade Organisation's Dispute Settlement Body

Before considering the proposal to increase the role of the WTO's DSB in international investment arbitration, it is important to think about the relationship between trade and investment.¹ The two fields have always been, and will

¹ For discussion of the relationship between international trade and foreign investment see for example L Fontagné, 'Foreign direct investment and international trade: complements or substitutes ?' (1999) *OECD Science, Technology and Industry*

continue to be intertwined in a complex manner. The WTO recognised this necessarily close relationship from the outset, with many trade related issues spilling over into the sphere of investment. Thus, in 1996 the WTO established a Working Group on Trade and Investment.² The Working Group seeks to analyse the relationship between trade and investment, meeting regularly and outlining its findings in its trade and investment reports.³ The WTO has also incorporated the TRIMs agreement into its legal framework;

[TRIMS] recognises that certain investment measures restrict and distort trade. It provides that no contracting party shall apply TRIM [trade related investment measure] inconsistent with Articles III (national treatment) and XI (prohibition of quantitative restrictions) of the GATT.⁴

Any non conforming TRIMs must be notified to the WTO and removed within either three or five years. The TRIMs Committee was established in order to monitor TRIMs matters.⁵ Investment is also addressed by the WTO through the GATS agreement.⁶

With this necessarily close relationship between trade and investment in mind, it has been suggested that the WTO's DSB could play a greater role within the settlement of investment disputes. It is thought that increasing the role of the WTO DSB might remedy some of the problems associated with the current system of international investment arbitration, most notably inconsistency and incoherence. At present, the DSB hears investment related trade disputes (as the tribunal is limited to hearing cases which arise under the WTO agreements). Therefore, in order for the WTO DSB to hear purely investment disputes, it would need to be given the authority to do so. This could be achieved by inserting provisions to this effect in the relevant investment

Working Papers, <<http://www.oecd-ilibrary.org/docserver/download/fulltext/5lgsjhvj7n0r.pdf?expires=1345112495&id=id&acname=guest&checksum=36627C1E138A115EE22FE196F50BA7FE>> accessed 15 August 2012.

² 'WTO Trade and Investment' <http://www.wto.org/english/tratop_e/invest_e/invest_e.htm> accessed 3 February 2012.

³ *Ibid.*

⁴ 'WTO Legal Texts' <http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#eAgreement> accessed 3 February 2012.

⁵ *Ibid.*

⁶ 'WTO Trade and Investment' (n 2)

agreements that are already in existence or by the negotiation of a separate WTO treaty dealing with the settlement of international investment disputes. The idea of establishing a WTO multilateral treaty on the subject of investment dispute settlement might be met with cynicism, with a natural comparison being made to the failed efforts to negotiate a general comprehensive multilateral investment treaty. However, such comparisons would not be justified, as it would presumably be much easier to conclude a treaty dealing exclusively with dispute settlement, rather than an all-encompassing multilateral agreement on international investment.⁷

5.2.1 Advantages of increasing the role of the WTO DSB

The idea of allowing the WTO's own DSB to settle international investment disputes is not novel. Such a possibility has already been considered by the WTO Working Group on the Relationship between Trade and Investment in its 2002 report.⁸ The report was largely positive, welcoming the integration of an investment framework into the WTO and its dispute settlement system. Through consultation with member states, the WTO found that the possibility of anchoring a 'prospective investment agreement... in the existing WTO procedures, rules and structures of the WTO dispute settlement'⁹ system was well received. It was thought that the objective of securing a 'transparent, stable and predictable framework for investment'¹⁰ would be best achieved through the employment of the existing WTO system for the settlement of disputes. Additionally, with many of the existing WTO agreements containing investment related provisions, the integration of an investment framework into the existing dispute settlement system would increase coherence.¹¹

⁷ S Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008) 209.

⁸ 'Report of the Working Group on the Relationship between Trade and Investment to the General Council of the WTO' WT/WGTI/6 (2002)
<http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28%28+%40meta%5FSymbol+%28WT%FCWGTI%FC%2A%29+and+not+%28W+or+M%29%29+and+%28%40meta%5FTypes+Report%29%29+&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FWGTI%2F6%2EDOC%2EHTM&curdoc=6&popTitle=WT%2FWGTI%2F6> accessed 9 February 2012.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

The report goes further, stating that ‘the possibility of employing the existing WTO dispute settlement mechanism was one of the main reasons for adopting a multilateral approach to investment rules.’¹² It could therefore be argued that the settlement of investment disputes by the WTO DSB is a desirable alternative to the settlement of foreign investment disputes by ad hoc arbitration.

5.2.2 Disadvantages of increasing the role of the WTO DSB

Although there is undoubtedly some merit to the idea of entrusting the WTO DSB with the settlement of investment disputes, the Working Group did suggest some areas which would need to be given careful consideration. For instance, there would need to be strengthened consultation mechanisms on dispute settlement in the investment sphere, in order to ensure that the interests of both investor home states and investment host states could be effectively served.¹³ A number of other concerns, such as the level of compensation which should be awarded, were also discussed.¹⁴ The Working Group did not treat such concerns as arguments against the settlement of investment disputes by the WTO DSB, but rather as issues which would need to be carefully considered and accommodated.¹⁵

Despite the generally positive approach of the Working Group, some international investment experts have voiced concerns about whether the WTO DSB has the capacity to handle the high number of international investment disputes at present. Subedi notes that ‘the current legal, institutional and physical infrastructure of the DSB may not be able to cope with the possible flood of investment disputes.’¹⁶ It is anticipated that a massive influx of cases would occur, due to the fact that the number of investment disputes is rather high and does continue to rise.¹⁷

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 7) 210.

¹⁷ Statistics show that the number of investment cases has risen rapidly, though there has been a slight decrease in recent years, undoubtedly due to the global financial crisis. For more information see K Sauvart, ‘The rise of international investment, investment agreements and investment disputes’ in K Sauvart (ed), *Appeals*

Furthermore, allowing the WTO DSB to settle investment disputes would mean allowing private investors standing before the WTO DSB. The significance of this fact should not be underestimated; at present, the WTO DSB is only able to settle trade disputes between two state parties. In addition to the problem of increasing the caseload of the WTO DSB, enabling private investors to bring investment disputes before the WTO DSB may have another important effect. If private investors are permitted to bring investment cases before the DSB, they would certainly demand such access in trade disputes.¹⁸ When this occurs (as it unquestionably would) it would be difficult for the WTO to justifiably deny such access. Consequently, the DSB would need to be significantly expanded. Such mammoth expansion would of course require a significant increase in the DSB's budget, which ultimately the WTO member states would have to fund. This would be particularly problematic for less economically developed WTO member states. This possible budgetary problem could of course be resolved by requiring private investors to pay the costs associated with DSB dispute resolution (as they are already required to pay the costs of international arbitration at present). However, this would not remedy the problem of increased costs of litigation for member states though, who would undoubtedly have to defend themselves in more disputes. Subedi does state that the potential cost problems could be resolved through the creation of an international fund which could be accessed by lesser developed states and that even at present, states have to defend themselves against private investors taking disputes to international investment tribunals under BITs. For these reasons, the issue of cost may be less significant than may have been anticipated at the outset.¹⁹

Another potential problem with increasing the role of the WTO DSB is the restricted membership of the WTO. At present, WTO membership consists of

Mechanism in International Investment Disputes (OUP 2008), 'UNCTAD Latest developments in investor-state dispute settlement' (2009) <http://www.unctad.org/en/docs/webdiaeia20096_en.pdf>, 'UNCTAD: World Investment Report 2011' <<http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf>> accessed 9 March 2012 and 'UNCTAD: FDI Statistics' <<http://unctadstat.unctad.org/TableViewer/tableView.aspx?ReportId=88>> accessed 9 March 2012.

¹⁸ For an in-depth discussion of state-state and private individual-state dispute settlement, see W Choi, 'The present and future of the investor-state dispute settlement paradigm' (2007) 10 *Journal of International Economic Law* 725.

¹⁹ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 7) 210.

157²⁰ states from all corners of the globe. However, there are up to 196²¹ sovereign states in the world; thus, approximately 40 states are not members of the WTO. At present, in order for a case to be heard by the WTO's DSB, both parties to the dispute must be members of the WTO.²² If the WTO's DSB were to become the central or only body hearing international investment cases, the situation might arise where one WTO member state or an individual from a WTO member state wishes to take action against another state or individual of a state who is not a WTO member. This jurisdictional issue would need to be remedied.

Geographical issues may also be an obstacle to increasing the role of the WTO's DSB. The WTO DSB sits at the WTO headquarters in Geneva, Switzerland²³. At present, the parties to investment disputes may usually choose the seat of the tribunal which will hear the case. The parties will presumably choose a location which is easy and inexpensive for them to travel to. If the WTO DSB became the default investment arbitration hearing body, all disputes would be heard in Geneva, which may be far away from the parties' location. Thus, the travel costs involved in arbitration might increase dramatically. Increasing costs contradicts one of the rationales behind the use of arbitration as a form of dispute settlement; that it is a relatively low cost option.

²⁰ As of 10 May 2012 there are 157 WTO member states. For a full list of members see 'Understanding the WTO: The Organisation, Members and Observers' <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 25 August 2012.

²¹ The exact number of states is not a settled issue. There are 193 state members of the United Nations ('Member states of the United Nations' <<http://www.un.org/en/members/>> accessed 20 February 2012), whilst the US government recognises 195 independent states ('US Department of State, Recognised Independent States' <<http://www.state.gov/s/inr/rls/4250.htm>> accessed 20 February 2012), however some reports suggest the inclusion of Taiwan would mean there are 196 nations ('BBC, Taiwan Country Profile' <http://news.bbc.co.uk/1/hi/world/americas/country_profiles/1285915.stm> accessed 20 February 2012).

²² The WTO Understanding on Rules and Procedures Governing the Settlement of Disputes 1994 (full text) is available at <http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> accessed 9 August 2012. The Understanding was negotiated as part of the Uruguay round of trade negotiations, signed in Marrakesh in 1994 and entered into force in January 1995.

²³ 'Understanding the WTO: who are we' <http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm> accessed 28 September 2011.

5.3 Establishment of guidelines for international investment arbitration

Interestingly, there are guidelines already in operation on the treatment of foreign direct investment. In 1991, the World Bank, MIGA and the IMF joined forces through a Development Committee in order to create a legal framework for the promotion of FDI. In 1992, the Committee adopted the Guidelines on the Treatment of Foreign Direct Investment²⁴. These three institutions do not have the authority to adopt a legally binding instrument; accordingly, the guidelines are voluntary. Nonetheless, the guidelines do carry a certain amount of weight due to the fact that they were established under the auspices of three of the most important global financial institutions. However, the guidelines have been criticised for being too protectionist towards foreign investors, and providing little assistance for investment host states.²⁵

It is possible that similar guidelines on the subject of international investment arbitration could be introduced in order to remedy some of the fundamental problems associated with the system of international investment arbitration and the framework of international investment law. The introduction of investment arbitration guidelines would provide tribunals with assistance when interpreting key investment law principles. This would in turn, hopefully lead to more consistent interpretations of key terms and therefore remedy one of the central problems associated with international investment arbitration as it currently stands; inconsistency and incoherence. This is an interesting proposal for many different reasons, not least because it would not require a radical overhaul of international investment law. The future guidelines would clarify the existing law, rather than replace it. This is therefore one of the simplest of all the proposed possible improvements to the system to introduce. All that would be required would be a basic document which outlines and defines all the key principles of investment law; a much less radical undertaking than some of the other suggestions which will be discussed in this chapter. Subedi summarises the aspects of international investment law which could be covered in the guidelines as,

²⁴ World Bank Guidelines on the Treatment of Foreign Direct Investment 1992 found in 'World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment' (1992) 31 *ILM* 1363.

²⁵ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 7) 34-35.

(i) the definition, meaning and scope of the principle of 'fair and equitable treatment'; (ii) the definition of 'indirect expropriation'; (iii) the nature and scope of both 'legitimate regulatory' powers or the 'police powers' of states; and (iv) the 'umbrella clause' as these are becoming more controversial and complex issues both in the literature and in the jurisprudence of international courts and tribunals.²⁶

Similar guidelines have successfully been produced in other areas of international law. In 2001, the International Law Commission (ILC) created the Draft Articles on Responsibility of States for Internationally Wrongful Acts²⁷. Until 2001, the law of state responsibility was somewhat unclear and underdeveloped. The ILC used the Draft Articles as a vehicle to codify existing rules and move progress in the area forward. The Draft Articles on State Responsibility have generally been very well received²⁸, and have even been referred to by the ICJ.²⁹ Other examples of the successful establishment of guidelines come in the form of the 1978 ILC Draft Articles on the Most Favoured Nation Clauses³⁰ which set out the extremely important investment most favoured nation principle, and the 2006 ILC Draft Articles on Diplomatic Protection³¹.

²⁶ *Ibid* 199.

²⁷ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) Supplement No.10 (A/56/10), chp.IV.E.1, available at <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> accessed 8 August 2012.

²⁸ For discussion of the process of drafting the articles (including government responses to the drafting process and final text) see J Crawford, J Peel and S Olleson, 'The ILC's Articles on the Responsibility of States for Internationally Wrongful Acts: completion of the secondary reading' (2001) 12 *European Journal of International Law* 963. For more information on the Draft Articles and the international law of state responsibility see J Crawford, A Pellett and S Olleson (eds), *The Law of International Responsibility* (OUP 2010).

²⁹ The ICJ cited an early draft of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* in the case of *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 as cited in S Schwebel, *Justice in International Law: Further Selected Writings* (CUP 2011) 85.

³⁰ International Law Commission, *Draft Articles on the Most Favoured Nation Clauses* (1978) full text available at <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_3_1978.pdf> accessed 11 June 2012.

³¹ International Law Commission, *Draft Articles on Diplomatic Protection* (2006) full text available at <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf> accessed 16 August 2012.

5.3.1 Possible advantages

The ILC issued guidelines are not hard law³², and as such are not legally binding documents. Rather, they are soft law³³ instruments. At first glance, the lack of binding force of such documents might appear to be problematic and represent a weakness or shortcoming. However, a closer inspection might reveal that a soft law approach to governance might yield important benefits at a lesser cost.³⁴ One of the major advantages of soft law instruments is that they are easier to negotiate and therefore, the costs involved in their negotiation are much lower. Furthermore, the costs associated with post-agreement, including managing and enforcing commitments are also much lower. The main reason for the relative ease of negotiation and lower costs involved in soft law instruments is that states do not feel obliged to exercise as much caution when agreeing non-binding agreements, and moreover that the costs of violation are naturally much lower.³⁵ Another advantage of soft law governance is that states suffer less in terms of cost to their sovereignty. When states accept legally binding obligations, they commit to a loss of sovereignty of varying degree (depending on the particular obligation). Soft, non-binding instruments do not involve such a significant loss of authority on the part of the committing state.³⁶ Furthermore, soft law instruments are much more easily renegotiated and withdrawn from than hard law agreements, thus they are more attractive to states.³⁷ Another advantage of soft law agreements is that can provide a compromise at a particular point in time and serve as a stepping stone to the conclusion of a binding multilateral agreement at some later stage. Abbott and Snidal eloquently explain this point;

Soft law can ease bargaining problems among states even as it opens up opportunities for achieving mutually preferred compromises. Negotiating a hard, highly elaborated agreement among heterogeneous states is a costly and protracted process. It is often more practical to negotiate a softer agreement that establishes general goals but with less precision and perhaps with limited

³² The term 'hard law' refers to binding legal instruments.

³³ The term 'soft law' refers to quasi-legal instruments that may not have legally binding force.

³⁴ K Abbott and D Snidal, 'Hard and soft law in international governance' (2000) 54 *International Organization* 421

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

delegation. Soft legalization allows states to adapt their commitments to their particular situations rather than trying to accommodate divergent national circumstances within a single text.³⁸

Soft law agreements also provide a compromise between states in a weaker bargaining position and those in a stronger bargaining position.³⁹ This unequal bargaining power is often said to be one of the main reasons why attempts to negotiate a global, comprehensive multilateral investment treaty have failed in the past.

5.3.2 Possible drawbacks

As has been touched on above, there are a number of perceived drawbacks to the creation of international investment guidelines or a draft interpretative statement. Most obviously, such a document would be of a non-binding nature, thus states are not bound to comply with the definitions or obligations which may be set out. Breaches of the guidelines might occur frequently, and when such breaches do occur, there may be very little that can be done about them (due to the lack of effective enforcement mechanisms being available).⁴⁰

In order to encourage states to volunteer themselves to be bound by them, soft law instruments can often be vague in terms of the exact scope of the obligations that they create. This can be problematic, as it might be difficult to ascertain whether or not a state is indeed acting in accordance with its commitments, thus creating greater opportunity for states to avoid responsibility.⁴¹

Furthermore, the guidelines might be criticised for lacking legitimacy, having been issued by a single body consisting of unelected members. The International Law Commission for example, which has issued several important draft articles on various aspects of international law, actually consists of 34

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ G Shaffer and M Pollack, 'How hard and soft law interact in international regulatory governance: alternatives, complements and antagonists' (2008) Society of International Economic Law Working Paper No. 45, <<http://www.ssrn.com/link/SIEL-Inaugural-Conference.html>> accessed 9 May 2011.

⁴¹ *Ibid.*

members chosen by the United Nations General Assembly. The committee members supposedly act on an individual basis, and as such are not chosen to represent their respective states. However, there may be issues of bias, with some members consciously or subconsciously acting in the best interests of their home state.⁴²

5.4 Increasing the role of national courts

In order to address some⁴³ of the problems associated with the current system of international investment dispute settlement that were discussed in the previous chapters, it has been suggested that the role of national courts could be strengthened. This could mean that foreign investors may be required to submit disputes which arise during the course of foreign investment to the investment host state's national courts in the first instance, rather than being able to go straight to international tribunals. This would essentially mean a revival of central aspects of the Calvo doctrine (namely the doctrine of the exhaustion of local remedies).⁴⁴

5.4.1 Benefits of increasing the role of the national courts

There are several important advantages of increasing the role of the national courts in international investment dispute settlement. Subedi summarises them well, stating that,

resort to national courts in the first place for the settlement of such [investment] disputes would address some of the deficiency of legitimacy, transparency, and accountability that exists in the systems such as those under ICSID or UNCITRAL.⁴⁵

Subedi acknowledges that some states do not (at least at present) have well enough functioning judiciaries to be able to handle investment disputes. Nevertheless, he asserts that such states could enact laws establishing

⁴² *Ibid.*

⁴³ G Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 175.

⁴⁴ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 7) 218-219.

⁴⁵ *Ibid.*

separate investment courts which could deal exclusively with investment disputes. Subedi believes that this should be the,

long-term aim of the international community in this age of globalisation of values, ideas and principles. Since it is widely acknowledged that international law has a role as a gentle civiliser of states, its aim should be to encourage states to develop legal systems that conform to international standards.⁴⁶

Encouraging such states to develop their legal regimes in order to cope with the demands of settling international investment disputes, will also enable them to free themselves from the (sometimes arbitrary) rulings of international investment tribunals, which often award huge amounts of compensation to foreign investors which the state has to pay.⁴⁷

Other commentators have advanced similar theories. For example, Ginsburg asserts that widespread use of international investment arbitration has discouraged domestic courts from seeking to improve, and that 'allow[ing] powerful actors to avoid local judicial institutions'⁴⁸ can lead to a reduction in the 'local institution quality.'⁴⁹ In turn, ICJ Judge Sepulveda Amor concludes that investment arbitration 'diminishes the value of...[the mexican] juridical order.'⁵⁰

Another possible advantage of strengthening the role of national courts in international investment dispute settlement is the reduction of forum shopping. Under the present system of international investment arbitration, parties to a dispute have at their disposal the services of a number of different tribunals. Parties are therefore often able to cherry-pick the tribunal with which they feel (for whatever reason) that they might have a greater chance of being successful. This cherry-picking is possible, due to the multitude of international investment agreements in existence under which they can bring a case. The phenomenon of forum shopping could be completely alleviated if national courts are mandatorily called upon to settle any disputes that arise from an investment in their territories. If cases are obligatorily heard by the investment host state national court, the choice of forums will be completely removed. This would also

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ D Ginsburg, 'International substitutes for domestic institutions' (2005) 25 *International Review of Law and Economics* 107.

⁴⁹ *Ibid.*

⁵⁰ B Sepulveda Amor, 'International law and national sovereignty: the NAFTA and the claims of Mexican jurisdiction' (1997) 19 *Houston Journal of International Law* 565

solve the problem of multiple and parallel proceedings; since the case would have to be heard in national courts, parties could not initiate proceedings elsewhere.

Furthermore, if disputes are necessarily brought to the investment host state national court, the court will be able to formulate its own body of jurisprudence on investment matters, which may lead to more consistent and coherent decisions in investment disputes. Currently, international investment arbitration is often criticised for its toleration of inconsistent and incoherent decisions, with different (and sometimes the same tribunals) issuing diametrically opposing decisions in cases where similar or the same facts are at issue.

Another advantage of strengthening the role of national courts in settling international investment disputes is that local judges are better placed to understand national law and policy than for example international tribunals. Such an in-depth local knowledge might enable judges to make more enlightened, fairer judgements.

Enabling the national courts of the investment host state to settle international investment disputes may also reduce the costs associated with investment arbitration. Obviously, there would be little or no cost involved in the parties having to travel to the seat of arbitration. Furthermore, the institutional costs of arbitration might be significantly lowered, because there would be no fee payable to an external arbitral institution such as ICSID for example, and there would be no inflated expert arbitrator's fees (as the national judges would be hearing the case). This reduction in costs would be desirable to both parties, especially in the difficult economic climate.

One final advantage of increasing the role of national courts in international investment dispute settlement is that it would be a popular move with developing nations. Developing states are the usual defendants in international investment disputes, and are often landed with huge compensation payments by international tribunals (who can seemingly sometimes act in an arbitrary manner). If investment disputes were to be settled by their own national courts, developing nations may feel that their interests are being represented in a fairer manner. This will also enable developing nations to take

on an increasingly important role and a give them a greater voice on the world stage.

5.4.2 Potential problems with increasing the role of the national courts

The main problem with this proposal is that traditionally, foreign investors have been opposed to the settlement of investment disputes by the investment host state's national courts. It is easy to see why foreign investors are less than keen on the idea of increasing the role of the host state national courts; seeing as investors typically hail from richer, developed nations, and the states that they invest in are usually poorer, less developed nations. Poorer, less developed nations often have lesser developed legal frameworks and judiciaries. Their judges are often less well educated, and sometimes corruption is rife within the domestic legal system. Foreign investors have legitimate concerns that their dispute may not be handled in a fair and appropriate manner. Accordingly, requiring the submission of disputes to national courts can only happen if the domestic legal systems of investment host states can provide a credible, efficient and unbiased alternative to international arbitration in practice, and not just simply in theory.⁵¹

To combat this problem, Subedi believes that the international community should encourage nations with substandard domestic legal systems to act to strengthen their systems, perhaps through the enactment of new laws. Alternatively, such nations could work to establish separate investment courts and tribunals with efficient, unbiased procedures and personnel. This would almost certainly give investors greater confidence in settling their investment disputes through the courts of the investment host state.⁵² The author believes this should be the ultimate aim of the international community; to encourage the development of better legal systems that conform to international minimum standards all around the world.⁵³

Another potential drawback to increasing the role of national courts in the settlement of international investment disputes is a loss of flexibility in dispute

⁵¹ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 7) 218-219.

⁵² *Ibid.*

⁵³ *Ibid.*

settlement proceedings. With arbitration, comes a great deal of choice for the parties to the dispute. Parties can choose institutional or ad hoc arbitration, the location where the arbitration should take place, as well as the arbitrators themselves et cetera. If national courts are called upon to settle international investment disputes, the parties will lose this flexibility.

A further potential disadvantage of strengthening the role of national courts is the potential loss of privacy and confidentiality. Although national laws and rules of arbitration can vary greatly in the amount of privacy and confidentiality they accord, there is general consensus that arbitration rules offer greater privacy and confidentiality.⁵⁴ In arbitration, the parties can usually choose to have private, closed oral hearings and choose whether they wish to publish the award rendered.⁵⁵ Such a high level of privacy and confidentiality is not necessarily to be expected if a case is settled in the national courts of the investment host state.

A final important disadvantage of allowing the national courts to settle investment disputes is that the award rendered by the national court might be open to appeal through the domestic court structure. This might be disadvantageous as it would obviously negatively impact the principle of finality⁵⁶. Finality of decision is of course one of the central values of the system of international investment arbitration; it would not be a stretch to assert that finality might be seen as one of the pillars upon which the system is indeed founded.

5.5 Creation of a global multilateral investment treaty

⁵⁴ See 'Privacy and Confidentiality' section of 'Arbitration and Mediation – The Basics' of the London Court of Arbitration's website <http://www.lcia.org/Dispute_Resolution_Services/Arbitration_and_Mediation_The_Basics.aspx> accessed 17 August 2012. See also G Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3rd Edition, Kluwer 2010) 11.

⁵⁵ For information on the publication of awards rendered under ICSID see E Gaillard and J Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer, 1999) 151 and for awards rendered under the UNCITRAL Rules see S Jagusch and J Sullivan, 'A comparison of ICSID and UNCITRAL Arbitration: areas of divergence and concern' in M Waibel, *The Backlash Against Investment Treaty Arbitration: Perceptions and Reality* (Kluwer 2010) 95.

⁵⁶ See J Clapham, 'Finality of investor-state arbitral awards: has the tide turned and is there a need for reform?' (2009) 26 *Journal of International Arbitration* 437.

The concept of negotiating a global multilateral investment treaty is not revolutionary. There have in fact already been several attempts to establish such a treaty⁵⁷. All said attempts to negotiate have been unsuccessful, and thus a multilateral investment treaty has never come to fruition. Before examining the possibility of creating a multilateral investment treaty in the future, it is necessary to analyse why previous negotiation attempts failed, and determine whether any valuable lessons can be learned from these failures.

5.5.1 Previous attempts to negotiate a multilateral investment treaty

The very first attempt to introduce multilateral investment rules came immediately after the Second World War in 1948 with the creation of the Havana Charter.⁵⁸ It was intended that the Charter would establish the International Trade Organisation (ITO), the international body that would regulate world trade. Interestingly, the Charter did contain investment provisions which were quite far reaching and would give member states relatively wide authority to regulate foreign investment. The Charter was signed on the 24th of March 1948 by 53 countries, though it never entered into force.⁵⁹ This was largely because it was repeatedly rejected by US Congress which felt that it extended beyond the realms of international trade and into domestic policy, and furthermore that its provisions were too vague and unclear.⁶⁰ Additionally, at the time, the Cold War was emerging, which dampened the negotiating efforts somewhat.

After the failure of the Havana Charter, came waves of expropriations that affected foreign investors in many socialist, communist and newly independent states. Consequently, foreign investors became increasingly preoccupied with the risk of expropriation and they continued to press for firm rules on the protection of foreign investment. Developing nations, on the other

⁵⁷ For in depth discussion of the previous attempts to establish a global multilateral investment treaty see E Nieuwenhuys and M Brus (eds), *Multilateral Regulation of Investment* (Springer 2001) and R Dattu. 'A journey from Havana to Paris: the fifty year quest for the elusive multilateral agreement on investment' (2000) 24 *Fordham Law Review* 275.

⁵⁸ Havana Charter 1948 (full text) <<http://www.worldtradelaw.net/misc/havana.pdf>> accessed 11 August 2012.

⁵⁹ J Karl, 'On the way to multilateral investment rules- some recent policy issues' (2002) 17 *ICSID Review: Foreign Investment Law Journal* 293.

⁶⁰ *Ibid.*

hand relished their newly acquired power to expropriate and their political independence, and as such had no desire to limit their authority in any way.⁶¹

In response to the wave of expropriations, a number of proposals for the establishment of a multilateral investment treaty emerged in the 1950's. Such proposals were mainly at the request of the business community, who wished to have greater protection and security for their foreign investments. One such proposal took the form of the Draft Convention on Investments Abroad⁶² (also known as the Abs-Shawcross Draft). The Draft Convention 'proposed a regime that aimed at the comprehensive protection of foreign investment'⁶³. Although it was never implemented, it heavily influenced another draft multilateral agreement, the 1967 OECD Draft Convention on the Protection of Foreign property⁶⁴. It too contained a relatively high level of protection for foreign investors. Consequently, it failed to garner enough support from OECD members, and also failed to be implemented. The developing and developed countries could not agree about the level of protection which should be afforded to foreign investors.⁶⁵

The 1960's and 1970's provided a fairly hostile climate for the negotiation of a multilateral investment treaty: two UN General Assembly Resolutions⁶⁶ aimed to put an end to the requirement that governments should compensate for expropriating the assets of foreign investors.⁶⁷ During the same era, BITs became increasingly popular. Gradually, BITs encouraged a change in attitude towards the protection of foreign investment. With the end of the Cold War and the decline of socialism, 'market ideology became the prevailing model for organising the economy.'⁶⁸ Additionally, it became a widely recognised fact that foreign investment stimulated economic development. Accordingly, the global community as a whole became much more interested in the protection of

⁶¹ S Schill, *The Multilateralization of International Investment Law* (CUP 2009) 34-35.

⁶² J Karl, 'On the way to multilateral investment rules- some recent policy issues' (n 59)

⁶³ S Schill, *The Multilateralization of International Investment Law* (n 61) 36.

⁶⁴ Draft Convention on the Protection of Foreign Property 1967 available at <<http://www.oecd.org/dataoecd/35/4/39286571.pdf>> accessed 9 August 2012, approved by OECD Council Resolution 12 October 1967 (1968) 7 ILM 117

⁶⁵ S Schill, *The Multilateralization of International Investment Law* (n 61) 36.

⁶⁶ Declaration on Permanent Sovereignty Over Natural Resources 1962, UN General Assembly Resolution 1803, 14 December 1962 UN Doc. A/5217 and UN Declaration on the Establishment of a New International Economic Order 1974, established by UN General Assembly Resolution 3201, 1 May 1974 UN Doc. A/RES/S-6/3201.

⁶⁷ S Schill, *The Multilateralization of International Investment Law* (n 61) 37.

⁶⁸ *Ibid* 43.

foreign investment and open to the possibility of the creation of a multilateral investment treaty.⁶⁹

The Convention on the Settlement of International Disputes⁷⁰ was concluded in the mid 1960's. Although, the Convention created a multilateral framework for resolving international investment disputes, rather than a general comprehensive multilateral agreement on investment.

In 1985, the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA)⁷¹ was concluded; its primary aim was to provide a multilateral insurance framework for foreign investment projects. The successful conclusion of these agreements demonstrates that consensus between developing and developed nations on foreign investment issues can be reached, and that states are indeed willing to commit to multilateral investment instruments.⁷²

The United States took it upon itself to bring the subject of a multilateral investment agreement to the forefront of the GATT / WTO system. The USA did achieve some limited success, with some investment related provisions in certain GATT / WTO agreements being implemented. However, the rules were very limited indeed, and it was hoped that more far-reaching provisions would come to fruition in the future (preferably in an investment-dedicated multilateral agreement). Accordingly, the issue of negotiating a multilateral investment agreement was kept on the WTO agenda during the 1990's. Although, at the First Ministerial Meeting in Singapore in 1996, a Working Group to examine the relationship between trade and investment was established, no mention was made of conducting negotiations for the establishment of a multilateral agreement.⁷³

⁶⁹ *Ibid.*

⁷⁰ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf> accessed 27 August 2012.

⁷¹ Convention Establishing the Multilateral Investment Guarantee Agency, signed 11 October 1985 and entered into force 12 April 1988, full text available at <http://www.miga.org/documents/miga_convention_november_2010.pdf> accessed 27 August 2012.

⁷² S Schill, *The Multilateralization of International Investment Law* (n 61) 44-45.

⁷³ *Ibid* 53.

With hope of negotiating a multilateral investment agreement under the auspices of the WTO fading fast, and also encouraged to some extent by the successes of ICSID, MIGA, and the GATT/WTO, efforts to negotiate an overarching multilateral investment agreement were revitalised in 1995. OECD member states agreed to initiate negotiations on a comprehensive Multilateral Agreement on Investment (MAI). Initially, the objective was simply to multilateralise the bilateral investment treaty model. However, a more ambitious goal soon arose; 'to establish a comprehensive legal framework for the process of globalisation'⁷⁴. It was thought that in order to achieve this ambitious goal, the agreement could not be limited to 'traditional' investment protection, but that it should contain 'new' international investment related issues, such as environmental protection, human rights and sustainable development. As such, the MAI would have far-reaching effects and go beyond the scope of what model BITs envisaged.⁷⁵

A draft MAI text was completed in 1997 and accidentally leaked to the public. The text attracted fierce criticism from non-governmental organisations (NGOs), citizen's groups and a number of governments of developing countries, and it was therefore never implemented. Schill believes that the MAI negotiations failed for a number of different reasons.⁷⁶ The fact that France withdrew from the negotiations was significant. However, one of the main reasons that the MAI ultimately failed was the fact that OECD member states were unable to reach consensus on several important contentious issues. Secondly, the negotiations were criticised for failing to allow developing nations the chance to participate in a meaningful, useful manner. As a direct result of this lack of voice, several developing nations, such as India opposed the MAI. Thirdly, the MAI suffered criticism from many third parties, including NGOs who were concerned about the impact that high standard of investment protection would have on other issues, such as environmental protection and human rights standards. Finally, the negotiations became increasingly complicated, and consequently MAI negotiations were suspended for a period of six months from

⁷⁴ J Karl, 'On the way to multilateral investment rules- some recent policy issues' (n 59).

⁷⁵ *Ibid.*

⁷⁶ S Schill, *The Multilateralization of International Investment Law* (n 61) 34-35.

April 1998. However, in December 1998, the OECD announced that further MAI negotiations would not be taking place.⁷⁷

After the failure of the MAI negotiations, all was quiet on the multilateral investment treaty front for a number of years, until the WTO took it upon itself to re-initiate negotiations on the subject. The 2001 WTO Ministerial Conference in Doha,

recognised the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area.⁷⁸

Based on the declaration, it was 'agreed that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision taken, by explicit consensus, at that session on modalities of negotiations.'⁷⁹

However, the following year in 2004, these negotiations were terminated after the failure of the negotiating states to agree on almost all issues, including the basic definition of investment. It is thought that the negotiations failed due to the clashing of opposing opinions of developing and developed nations. The primary concern of the developing nations is alleged not to have been the scope of investment protection, as it had been in the 1970's, but rather a concern for the sustainability and comprehensiveness of the development perspective in international trade relations. As a result of the failure of these most recent negotiations, the negotiation of a multilateral investment treaty has now been removed from the WTO's agenda. As such, the scope for the negotiation of such a treaty in the near future, under the auspices of the WTO at least, does seem bleak.⁸⁰

⁷⁷ 'OECD: Mai negotiations'

<http://www.oecd.org/document/51/0,3746,en_21571361_44315115_2065331_1_1_1_1,00.html> accessed 11 June 2012.

⁷⁸ 'Ministerial Declaration of the World Trade Organisation, 14th November 2001'

<http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> accessed 20 February 2012, as cited in S Schill, *The Multilateralization of International Investment Law* (n 61) 58.

⁷⁹ *Ibid.*

⁸⁰ J Kurtz, 'A general investment agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD multilateral agreement on investment'

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=384260> accessed 21 July 2009.

As has been seen, there have been several different attempts by different organisations to negotiate a multilateral investment treaty. Each of these previous attempts has failed. It is frequently suggested, (though has never been particularly well articulated in any great amount of detail),⁸¹ that the main reason that all previous negotiations failed is the fact that they did not fully take into account the needs of developing nations.⁸² For example, the WTO is widely regarded as a 'rich man's club', that is, predominantly operated and controlled by wealthy, developed nations who seek to serve their own agendas.⁸³ Additionally, it is thought that states may be reluctant to disregard BITs in favour of a multilateral agreement. BITs are negotiated between two nations and remain valid for a period of typically 10 to 20 years. After that time, the BIT can be renewed or renegotiated according to the current needs of the parties to the agreement. Furthermore, it is relatively easy for states to denounce or withdraw from bilateral agreements. This system provides a great deal of flexibility⁸⁴ for states. States may therefore be reluctant to disregard BITs and the flexibility which they provide, and submit themselves to a multilateral agreement which will, once ratified, presumably remain in force indefinitely, and be much more difficult to repudiate. This will be especially true if the multilateral investment agreement is negotiated under the auspices of the WTO, which does not allow members to cherry pick which agreements they will sign up to and which they will not. If a member state does wish to withdraw from any single WTO agreement it cannot do so; it must withdraw its membership from the WTO itself. Finally, internationally concluded treaties, such as the possible future multilateral investment agreement, are regarded as general international law which would be binding on all. Once the treaty had been agreed and ratified, it would be extremely difficult to renegotiate or renounce.⁸⁵

It would probably be easier to admit defeat and accept that a multilateral investment treaty will never come to fruition, as it is simply too difficult to reach

⁸¹ P Sauvé, 'Multilateral rules on investment: is forward movement possible?' (2006) 9 *Journal of International Economic Law* 325.

⁸² J Kurtz 'A general investment agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD multilateral agreement on investment' (n 80).

⁸³ *Ibid.*

⁸⁴ See 'UNCTAD: International investment agreements: flexibility for development' available at <<http://unctad.org/en/docs/psiteiitd18.en.pdf>> accessed 17 August 2012 and L Peterson, *Bilateral investment treaties and development policy making* (International Institute for Sustainable Development 2004).

⁸⁵ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 7) 195.

any general consensus about the content of any future agreement and delicately balance the needs of both developed and developing nations in terms of foreign investment. Whilst this may indeed be easier, refusing to act will not ameliorate the situation in any way, and will not diminish the basis of the call for a multilateral investment treaty.

5.5.2 The basis of the call for a multilateral investment agreement

Many experts are of the opinion that there is a legitimate call or need for a global investment treaty and that the negotiation of such a treaty could have important benefits.⁸⁶ As discussed previously in this thesis, the international law of foreign investment has developed in a chaotic manner, representing an awkward blend of customary international law rules and bilateral investment treaty based rules. Numerous commentators have argued, and continue to argue, that it would be beneficial to abandon the chaotic system of investment law which is currently regulated by customary international law and individual BITs and strive towards the creation of a single, global overarching investment treaty.⁸⁷

Subedi states that ‘an ideal solution to address many of the problems in foreign investment law would, of course, be to have a comprehensive global investment treaty.’⁸⁸ He goes on to say that a global treaty would enable the harmonisation of investment rules, ensuring a greater level of consistency and coherence. Eliminating the need for bilateral investment treaties would also contribute to combating the recent trends in foreign investment law towards treaty, forum and nationality shopping.⁸⁹

The author goes on to note that inconsistencies are arising in the interpretation of even very basic concepts in foreign investment law, due to the absence of ‘both a global treaty and a hierarchy of international tribunals

⁸⁶ See Z Drabek, ‘A multilateral agreement on investment: convincing the sceptics’ (1998) WTO Working Paper, full text available at <www.wto.org/english/res_e/reser_e/pera9805.doc> accessed 17 August 2012.

⁸⁷ S Subedi, ‘The challenge of reconciling the competing principles within the law of foreign investment with special reference to the recent trend in the interpretation of the term “expropriation”’ (2006) 40 *The International Lawyer* 121

⁸⁸ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 7) 196.

⁸⁹ *Ibid.*

required to follow precedent.⁹⁰ As a result, the various tribunals are free to interpret the law in any manner they wish, which often leads to liberal interpretations, to say the very least. Furthermore, it seems that the law of foreign investment is rapidly becoming the law of the protection of foreign investors, with tribunals extending the protections available to foreign investors, with little or no regard for the interests and regulatory authority of the state parties. Consequently, the legitimate concerns of state parties, such as environmental protection and the protection of human rights are frequently being disregarded.⁹¹ In response to the concerns that developing nations have expressed during the past attempts to negotiate a multilateral treaty, Subedi asserts that,

Many developing countries that have opposed the adoption of an international treaty on investment within the WTO have been forced through the decisions of ICSID and other investment tribunals to accept pro-investment standards. It is better for developing countries to have an internationally negotiated treaty than for them to accept the often unbalanced and controversial dicta of such tribunals.⁹²

Kennedy⁹³ summarises the arguments for the establishment of a multilateral agreement on investment. He believes that a multilateral agreement is an important developmental tool, as it will attract foreign direct investment, which will in turn increase competitiveness and promote the transfer of technology from the investor's home state to the investment host state. Secondly, a multilateral agreement will increase the transparency, predictability and legal security of the foreign investment process. Additionally, he asserts that national investment legislation does not regulate foreign investment adequately. This is certainly true from the point of view of the foreign investor. A multilateral investment agreement will give the foreign investor greater confidence that the investment host nation's laws and policies (which may have a detrimental effect on the foreign investment) will not be changed at will or on a whim. Kennedy goes on to say that a multilateral agreement will bring coherence to the 'spaghetti bowl' of investment treaties that currently govern the

⁹⁰ *Ibid.*

⁹¹ *Ibid* 196-197.

⁹² *Ibid* 197-198.

⁹³ K Kennedy, 'A WTO agreement on investment: a solution in search of a problem?' (2003) 24 *University of Pennsylvania Journal of International Economic Law* 77.

area. Furthermore, a multilateral investment agreement will benefit those countries that, at present, are not party to bilateral or regional investment treaties, as they will not be marginalised. Also, a multilateral agreement will put an end to investment incentives which aim to attract foreign investment; the playing field will be much more level. Moreover, states that are party to a multilateral agreement will increase their credibility and become known as territories that are hospitable to foreign investment.

Karl⁹⁴ also suggests that there a number of reasons why a multilateral investment agreement might be justified. He states that global issues (for example international foreign investment) should be addressed globally; this will enable links to be formed into other important investment related issues such as environmental protection and human rights. He believes that separate BITs and other international agreements on issues such as the environment and human rights cannot regulate the field and its crossovers adequately. Furthermore, Karl states that 'BITs cannot satisfactorily reflect the increasing multilateralization of investors (participation of investors from several countries) and the trend to establish global linkages.'⁹⁵ Finally, Karl suggests that aside from establishing a global legal investment framework, a multilateral treaty might also provide an international political forum for the discussion of investment related issues. Such a forum cannot exist through the network of individual BITs that is currently in existence.⁹⁶

Amarasinha and Kokott⁹⁷ state that a multilateral investment agreement could 'help overcome the deficiencies of the current patchwork of bilateral, regional, sectoral and few multilateral rules of investment by establishing a framework of transparent, stable, and predictable rules.'⁹⁸ This would be of significant benefit to not only investors, but also investment host countries as it would undoubtedly result in an increase in foreign investment. Foreign investment is seen as desirable as it results in capital inflow as well as technology transfer, creation of jobs, competition and innovation. Host states

⁹⁴ J Karl, 'On the way to multilateral investment rules- some recent policy issues' (n 59).

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ A Amarasinha and J Kokott, 'Multilateral investment rules revisited' (2008) taken from P Muchlinski et al (eds), *Oxford Handbook of International Investment Law* (OUP 2008).

⁹⁸ *Ibid.*

may also benefit from positive changes to their institutions through increased efficiency and transparency. The authors also assert that another possible advantage of multilateral investment rules is that they would allow closer scrutiny of investment matters by the general public, including NGOs and civil society. This, in turn may have an important impact on the negotiating process and the final draft of future rules. This would increase the legitimacy of a multilateral agreement and it would be more favourable in this regard than a privately negotiated BIT between two states. A related issue is that of the bargaining power of different nations; in the one-to-one negotiations of BITs, negotiations tend to be dominated by the richer, more developed nations.⁹⁹ This lack of equal bargaining power would probably not occur in the negotiations for a multilateral treaty because weaker, poorer or less developed nations could form alliances with each other to ensure that a more balanced agreement which takes into account the interests of these lesser developed states is negotiated.¹⁰⁰

Qureshi and Ziegler's work¹⁰¹ also discusses the potential benefits of a multilateral framework for the regulation of international investment. They argue that multilateralism is beneficial because all states have an interest and that 'a multilateral framework would facilitate binding commitments on the admission of investment.'¹⁰² They goes on to say that a multilateral agreement would strengthen the power of governments in relation to protectionist forces, and that multilateralism will assist with policy coherence.¹⁰³

Other commentators, most notably Schill¹⁰⁴ argue that international investment law is being multilateralised, despite the obvious lack of a multilateral instrument. He asserts that,

even though multilateralism usually emerges on the basis of multilateral treaties, it can also develop on the basis of bilateral treaties...[and that] even though direct and open multilateralism has failed in the context of foreign investment

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ A Qureshi and A Ziegler, *International Economic Law* (3rd Edition, Thomson Reuters 2011) 380-391.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ S Schill, *The Multilateralization of International Investment Law* (n 61).

protection, bilateral treaties have filled the remaining gap by serving as a substitute for genuine multilateralism in the field.¹⁰⁵

Schill essentially argues that bilateral investment treaties are often similar, if not identical 'in structure, content, and objective.'¹⁰⁶ Taken together, Schill believes that the BITs 'establish a largely uniform regime for the protection of foreign investment that is based on identical principles independent from the specific bilateral treaty relationship in question.'¹⁰⁷ Whilst this is an interesting argument, it does have several important flaws. Firstly, each individual bilateral investment treaty contains its own unique provisions. Whilst some treaties may appear to be very similar, there may be subtle differences in the wording of certain provisions, which may alter the meaning. It is therefore not possible to make sweeping generalisations and allege that similar provisions create a general principle. Furthermore, it is not possible to try to establish a multilateral framework based on the many BITs in existence because states have never negotiated the provisions by which they would, in theory, be bound. States are sovereign entities that should not be bound by rules to which they have not agreed. Multilateral investment provisions should come to fruition through fair, reasoned negotiations to ensure the maximum fairness for all states.

5.5.3 Arguments against the negotiation of a multilateral investment agreement

A number of experts have stated that a multilateral investment treaty should not be negotiated. Kennedy¹⁰⁸ summarises the arguments against the creation of a multilateral investment treaty well. He questions whether the need for such an agreement has actually been established. He believes that private investors have not yet complained that there is a lack of access to foreign markets for their investments, due to overly restrictive foreign investment laws. Kennedy argues that if private investors had been denied access, they would have been urging their governments to negotiate a multilateral investment treaty. The author suggests that the lack of interest in a multilateral agreement by the

¹⁰⁵ *Ibid* 363.

¹⁰⁶ *Ibid* 364.

¹⁰⁷ *Ibid*.

¹⁰⁸ K Kennedy, 'A WTO agreement on investment: a solution in search of a problem?' (n 93).

investment community shows that the current framework for regulating international investment, through customary international law and individually negotiated bilateral or regional investment treaties, is not broken. The foreign investment statistics lend some support for this view; despite the lack of a multilateral investment agreement, international foreign investment has flourished. Kennedy also asserts that,

while the rule of law does provide transparency, stability, and predictability, the fact does not necessarily mean that the proper legal instrument for encouraging and promoting such transparency, stability, and predictability in the context of foreign investment has to be international in scope.¹⁰⁹

He goes on to argue that the network of bilateral and regional investment treaties is an adequate means of regulating foreign investment. The author also states that developing nations have legitimate concerns about the impact a multilateral investment agreement would have on their national sovereignty and their ability to effectively regulate the activities of foreign investors. Furthermore, the author notes that previous attempts to establish a multilateral investment agreement have failed, and that the reasons why such attempts have failed will need to be addressed before progress can be made in this regard. He suggests that the traditionally contentious issues have yet to be resolved, and as such any further attempt to establish a multilateral agreement is almost doomed to fail. Finally, Kennedy reflects on whether international trade in goods and services should be integrated with foreign direct investment through a WTO investment agreement. He asserts that there is a strong case for such an integration; namely that national laws which discriminate against foreign investment distort international trade in the same way that tariffs, quotas and other barriers to trade do. Kennedy does concede though that such discriminatory laws may not be such a problem, with states being more likely to enact laws which are hospitable to foreign investment in order to attract it. Moreover, countries that do have various restrictions on investment are often amongst the most popular destinations for foreign investors, as illustrated by the case of China.¹¹⁰

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

Karl¹¹¹ suggests that there is no need to establish a multilateral investment treaty for two important reasons. Firstly, that the global network of BITs that is now in existence provides sufficient means for investors to protect their interest and investments. Secondly, Karl makes reference to the old adage 'if it isn't broken, don't fix it', arguing that foreign investment statistics show that the amount of investment has risen dramatically over recent years, despite the fact that a multilateral treaty has not been in operation. In his view, this provides proof of the fact that a global multilateral treaty is not required.¹¹² This is not a convincing argument; perhaps the increased growth of foreign investment in recent years demonstrates that the need for a multilateral agreement is growing. Previous attempts to negotiate a multilateral treaty may have failed because the level of investment was not significant enough to warrant it, but the trend towards increasing FDI provide evidence for the fact that a multilateral agreement needs to be established in the future in order to support stratospheric levels of worldwide foreign investment.

Amarasinha and Kokott¹¹³ state that the current system of regulating foreign investment through individual investment agreements provides the legal framework for international investment to take place, yet at the same time allows investment host states a certain degree of flexibility. They argue that this flexibility is necessary in order to regulate investment, and at the same time achieve their domestic regulatory objectives which may include the furtherance of development. Many (developing) nations fear that multilateral rules would in effect, limit the scope for host state government intervention, restricting the ability of governments to react to crises and pursue their individual national interests. Sceptical states also question the fact that multilateral rules would lead to greater in-flows of investment, asserting that this may not necessarily be the case.¹¹⁴ Again, these arguments are not convincing; flexibility may be desirable from the host state perspective, but it also leads to uncertainty. Investors are keen to know that the climate in the host state is not likely to change once they have invested for reasons of security. Furthermore, it is not possible to state with any level of certainty what may or may not happen to the

¹¹¹ J Karl, 'On the way to multilateral investment rules- some recent policy issues' (n 59).

¹¹² *Ibid.*

¹¹³ A Amarasinha and J Kokott, 'Multilateral investment rules revisited' (n 97).

¹¹⁴ *Ibid.*

level of FDI if a multilateral treaty is established. Therefore, it seems unreasonable to cite concerns about the potential lack of increase in the amount of investment as a reason not to strive towards the negotiation of a multilateral treaty.

5.6 Creation of an appeal mechanism

The final proposed solution to remedy the problems associated with the system of international investment arbitration which will be considered in this chapter, is the possible establishment of an appellate mechanism.

5.6.1 The current situation

At present, in international investment arbitration, all decisions and awards are final. This means that if the losing party feels that the tribunal settling the dispute has come to the wrong decision, they have no recourse or right of appeal. This principle of finality has traditionally been a highly regarded feature of the system of international investment arbitration, enabling arising disputes to be settled in the quickest, most economical manner. However, most recently, some experts have questioned its prominence, suggesting that the principle of correctness of decision is or should be more important, and that the parties to the case would much rather the tribunals reach the correct decision than save time and money.¹¹⁵

At this stage it is perhaps helpful to draw a preliminary distinction between annulment and appeal. Both are forms of reviewing decisions, however they certainly do not have the same effects. Annulment of a decision simply means nullifying a decision, usually due to some kind of abuse of process, whereas appeal involves evaluating the substantive correctness of the decision and may result in the replacement of the original decision with a new one.¹¹⁶ Currently in international investment arbitration, there is some scope for

¹¹⁵ J Clapham 'Finality of investor-state arbitral awards: has the tide turned and is there a need for reform?' (n 56).

¹¹⁶ For discussion of the difference between annulment and appeal see D Caron, 'Reputation and reality in the ICSID annulment process: understanding the distinction between annulment and appeal' (1992) 7 *ICSID Foreign Investment Law Journal* 21 and C Schreuer, *The ICSID Convention: A Commentary* (CUP 2001) 891.

the review of decisions, albeit very limited indeed. The forms of review available will be touched on in the present chapter, and discussed at length later in the thesis.

i) ICSID Convention Arbitration

In ICSID arbitration, the award may be annulled if it can be shown that there are grounds for annulment. Article 52¹¹⁷ of the ICSID Convention sets out five very limited grounds for annulment which are based upon abuse of process and concerns about the legitimacy of the procedure. The grounds for annulment will be discussed thoroughly in chapter six and seven.

As mentioned above, ICSID itself did contemplate incorporating an appellate mechanism into its framework for arbitration. Its 2004 Discussion Paper¹¹⁸ set out some of the possible advantages and disadvantages of establishing an appellate mechanism. Following the Discussion Paper, many ICSID members expressed their views on the possible introduction of an appeal mechanism. Many member states were largely negative about the possibility, and as a result, the proposal was abandoned.¹¹⁹ This will be discussed in greater depth in Chapter six.

ii) Non-ICSID Convention Arbitration

In cases where arbitration is not administered under the ICSID Convention, awards or their enforcement may be challenged under national law, the New York Convention¹²⁰, and various other treaties. The national law of the seat of arbitration will be the relevant national law in such an instance. National laws on the review of awards and decisions obviously vary greatly from state to state. Generally, most national laws on the matter provide very limited grounds on

¹¹⁷ Article 52, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (n 70).

¹¹⁸ 'Possible improvements of the framework for ICSID arbitration' (2004) <<http://www.worldbank.org/icsid/highlights/improve-arb.htm>> accessed 20 July 2009.

¹¹⁹ C Tams, 'Is there a need for an ICSID appellate structure?' (2004) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341268> accessed 18 January 2011.

¹²⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 (full text) available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf> accessed 10 August 2012.

which awards may be challenged, or defer to the UNCITRAL Rules¹²¹. Incidentally, the UNCITRAL Rules themselves defer to the New York Convention¹²². Article 5 of the New York Convention provides the following grounds for the review of awards,

“1) incapacity of the parties to enter into the arbitration agreement or invalidity of the arbitration agreement; 2) lack of proper notice to a party or incapacity to present its case; 3) inclusion in the award of matters outside the scope of submission; 4) irregularities in the composition of the tribunal or the arbitral procedure; 5) non-arbitrability of the subject matter and 6) violation of domestic public policy.”¹²³

As can be seen, the grounds for review in this regard are again rather limited.

5.6.2 Purported benefits of an appellate mechanism

Many experts believe that the introduction of an appellate mechanism in international investment arbitration would solve many, if not all, of the problems associated with investment arbitration currently. This section will highlight the main purported benefits of the introduction of an appeal mechanism.

In 2004 the British Institute of International and Comparative Law held its inaugural annual conference which centred on a discussion of the proposal to create an appeal mechanism in international investment arbitration. Several of the speakers discussed the potential advantages of the possible creation of an appeal mechanism, including: greater consistency of decisions; increased predictability of the law; increased objectivity in decision making; and greater sensitivity to legitimate governmental concerns.¹²⁴

Indeed, the most often cited benefit of an appeal mechanism is that it is thought that it will improve coherence and consistency. As has been discussed in the previous chapter, the main problem in international investment arbitration

¹²¹ The UNCITRAL Arbitration Rules of 1976 and amended in 2010 (full text) are available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html > accessed 10 August 2012.

¹²² New York Convention (n 120).

¹²³ Article 5, New York Convention *ibid*.

¹²⁴ The conference papers were published in F Ortino et al (eds), *Investment Treaty Law: Current Issues Volume 1* (British Institute of International and Comparative Legal Studies 2006).

is inconsistency of decisions. Often, diametrically opposing decisions are given in cases where the facts are very similar, if not identical.¹²⁵ A 2006 OECD Working Paper¹²⁶ discusses the benefits of achieving greater consistency in international investment arbitration, stating that, 'consistency and coherence of jurisprudence create predictability and enhance the legitimacy of the system of investment arbitration'¹²⁷. Finally, on the topic of consistency, the Working Paper asserts that 'an appellate mechanism could provide a more uniform and coherent means for challenging awards if traditional bases for annulment were incorporated and it became the exclusive means to challenge an award.'¹²⁸

Other authors, including Dimsey, have articulated support for the establishment of an appellate mechanism on the basis that it would 'prevent the inconsistencies in decision-making and avoid the haphazard domestic frameworks that currently come into play in investment arbitration practice.'¹²⁹ Subedi also asserts that, 'if there was an appeal mechanism, it would bring about more cohesion and more legal certainty to this body of law.'¹³⁰

The 2006 OECD Working Paper also states that an appeal mechanism would contribute to the rectification of legal errors and serious errors of fact. The Paper asserts that this could also encourage public support for investor-state arbitration by allaying fears that decisions affecting important aspects of public policy may be enforced despite serious error. The significance of this should not be underestimated, especially at a time when the number of investment cases continues to increase rapidly.¹³¹

Furthermore, an appellate body would enable decisions to be reviewed by a neutral body, which would reinforce the biggest benefit of international arbitration: neutrality and impartiality from national courts. Additionally, the establishment of an appeal mechanism in international investment arbitration

¹²⁵ For examples of conflicting decisions, see previous chapter detailing the problems associated with international investment arbitration at present.

¹²⁶ K Yannaca-Small, 'Improving the system of investor-state dispute settlement: an overview' (2006) <<http://www.oecd.org/china/36052284.pdf>> accessed 16 July 2009.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven International Publishing 2008) 177

¹³⁰ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 7) 207.

¹³¹ K Yannaca-Small, 'Improving the system of investor-state dispute settlement: an overview' (n 126).

could also serve to enhance the enforcement of awards, which is often a problem in international investment arbitration.¹³²

Qureshi also sets out the basis of the call for an appellate process.¹³³ He believes most importantly, that an appellate system would operate as a corrective mechanism in case an arbitral award was made wrongly. Secondly, the dramatic increase in the number of cases, particularly under the ICSID framework, has marked an increase in the potential risk for inconsistent decisions. Thus, an appeal mechanism might help address issues of sustainability of the system of international investment arbitration. Furthermore, an appeal mechanism would enable a greater level of coherency and consistence to be achieved in investment arbitration, as well as enhance the predictability, objectivity and sensitivity of judicial decisions. Finally, certain sectors within the trade and investment regime already allow appeals; this leads some commentators to question why there is no general appeal mechanism already in operation. Moreover, the lack of a general appeal mechanism leaves the system open to distortion by investors engaging in forum shopping. An appeal mechanism could ensure greater consistency in the investment regulation regime and exclude the possibility of forum shopping.¹³⁴

5.6.3 Alleged disadvantages of an appeal mechanism

This section will consider some of the most prominent alleged disadvantages of the possible establishment of an appeal mechanism in international investment arbitration that have been put forward by experts in the field.

In the 2004 British Institute of International and Comparative Law's Investment Treaty Forum, some of the speakers highlighted potential disadvantages of said proposal. Alleged disadvantages of the proposed introduction of an appeal mechanism include: inconsistent decisions being an unavoidable fact of life; the argument that the problem of unpredictability will remedy itself naturally as tribunals begin to favour one interpretation over the

¹³² *Ibid.*

¹³³ A Qureshi 'An appellate system in international investment arbitration?' in P Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008).

¹³⁴ *Ibid.*

other and consequently customary international law will evolve; and a lack of enthusiasm from developing nations and developmental concerns.¹³⁵

The OECD's 2006 Paper on Investment¹³⁶ also set out a number of disadvantages which may be associated with the creation of an appeal mechanism in international investment arbitration. The first such disadvantage is that a right to appeal would naturally have negative consequences for the principle of finality. As has been discussed in previous chapters of this work, the principle of finality has long celebrated as one of the most important advantages of the system of international investment arbitration as it currently stands. An appeal mechanism would extend the currently limited grounds of the reviewability of investment awards, thus compromising the finality of the award. Although this is true, recent debate on this issue has centred on whether as much emphasis should be placed on finality of decision in investment arbitration, as opposed to correctness of decision. This is probably a very legitimate argument (given that investment arbitration typically involves important issues of public policy), and the risk of flawed decisions cannot be justified with arguments regarding finality of decision.¹³⁷

Another alleged disadvantage of establishing an appeal mechanism in international investment arbitration is that the period of time it takes to settle cases will naturally increase, and this in turn may cause the costs of arbitration to increase. However, it has been argued that the rules for reviewing investment awards that operate at present (ICSID annulment and review by national courts for example) do already cause considerable delays in arbitration, with review often taking years to be completed.¹³⁸ Thus, a centralised appeal mechanism may actually speed up the process, rather than slow it down as alleged. Moreover, the problem of additional delay could be remedied by imposing strict time limits for the new appellate process. As regards to the issue of increased costs, recent data¹³⁹ suggests that the costs of investment arbitration have skyrocketed in recent years, and that the additional costs incurred in appeal

¹³⁵ F Ortino et al (eds), *Investment Treaty Law: Current Issues Volume 1* (n 124).

¹³⁶ K Yannaca-Small, 'Improving the system of investor-state dispute settlement: an overview' (n 126).

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ 'UNCTAD Investor- state disputes: prevention and alternatives to arbitration' <http://www.unctad.org/en/docs/diaeia200911_en.pdf> accessed 20 February 2012.

may not be as significant overall as it might first have been thought. Additionally, the costs associated with the process of a proposed appellate mechanism may actually be much cheaper than the cost of review under the current system, for example through ICSID or through the national courts of the seat of arbitration.¹⁴⁰

A further alleged disadvantage of the establishment of an appeal mechanism is the increase in caseload that it would cause. It follows that increasing the grounds on which review of cases may be undertaken, a higher rate of cases being challenged would be expected. There has been concern that the losing party of every case would challenge the decision through the new appellate mechanism. This may lead to a decrease in confidence in the overall system of international investment arbitration, calling into question respect for first instance decisions and their arbitrators. In response to this problem, it might be necessary to consider creating disincentives to appeal every case, perhaps by requiring the deposit of a bond to secure the award or the costs of appeal would discourage routine appeal.¹⁴¹

A final purported disadvantage of an appeal mechanism discussed in the OECD Working Paper, concerns the re-politicisation of the system of investment arbitration. The de-politicisation of the system is regarded as one of the greatest achievements of investment arbitration, which could in turn be undermined by the introduction of an appeal mechanism. There is concern that host state governments are likely to appeal every case lost at first instance, in order to gain favour with their constituents. As such, governments may stand to benefit the most from the establishment of an appeal mechanism, with bias therefore being against investors. Experts have responded to this with counter-arguments, stating that investors could also benefit greatly from an appellate mechanism. Firstly, statistics do not demonstrate a significant difference in the number of cases won and lost by states and individual investors respectively, therefore investors would have the same opportunities to appeal. Secondly, the posting of a bond before appeal takes place would provide investors with greater security in the appeal process.¹⁴²

¹⁴⁰ K Yannaca-Small, 'Improving the system of investor-state dispute settlement: an overview (n 126).

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

After discussing the various purported advantages and disadvantages of the possible creation of an appellate mechanism in international investment arbitration, the OECD's Working Paper on Investment concludes that it is,

[too] premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues raised. The ICSID Secretariat, will continue however to study such issues to assist member countries when and if it is decided to proceed towards the establishment of an ICSID appeal mechanism.¹⁴³

More recent publications have also discussed the possibility of establishing an appeal mechanism. Dimsey¹⁴⁴ asserts that the introduction of an appellate mechanism might be damaging to international investment arbitration, stripping the hearing at first instance of any inherent value, since it will be appealable, and destroying the principle of finality at the same time.¹⁴⁵

Brower¹⁴⁶ is also sceptical about the possibility of success, stating that 'investment disputes simply...[do not] lend themselves to the top-down solution.'¹⁴⁷ He goes on to say that one of the main justifications of an appeal mechanism (to achieve consistency in international investment arbitration) is over exaggerated and that consistency is actually unattainable anyway.¹⁴⁸

An interesting article was written by Clapham¹⁴⁹ on the subject of a possible appeal mechanism. Clapham does not frame his argument against the creation of an appeal mechanism in terms of the alleged disadvantages of such a mechanism. Instead, he argues that there is no need to establish such a mechanism because the parties to investment disputes have always, and will always continue to favour the principle of finality of award over the principle of

¹⁴³ *Ibid* and see also 'Suggested changes to the ICSID Rules and Regulations', Working Paper of the ICSID Secretariat, May 12 2005

<<http://www.worldbank.org/icsid/052405-sgmanual.pdf>> accessed 27 May 2011.

¹⁴⁴ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 129) 178-180.

¹⁴⁵ *Ibid*.

¹⁴⁶ C Brower, 'Confronting the truth: sources and magnitude of decentralization in investment treaty arbitration' in C Rogers and R Alford (eds), *The Future of Investment Arbitration* (OUP 2009) 339.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid*.

¹⁴⁹ J Clapham, 'Finality of investor-state arbitral awards: has the tide turned and is there a need for reform?' (n 56).

correctness. Thus, in order to maintain the attraction to arbitration, the finality of awards must not be opened up to challenge.¹⁵⁰

5.7 Conclusion

This chapter has briefly explored a number of the suggestions that have been proposed in the past, in order to improve the system of international investment arbitration. The solutions that have been discussed do not represent an exhaustive list of each and every possible proposal that has ever been put forward in this regard; such a comprehensive discussion is beyond the scope of this work. Rather, the proposals discussed are some of the more prominent suggestions. Each of the proposals has its requisite advantages and disadvantages, and ranges from entailing relatively minor tweaks to the current system to somewhat of a radical overhaul of said system.

It is arguable that the problems associated with the system of international investment arbitration that have been discussed in previous chapters are too serious to be fixed with minor reforms. International investment experts have been making reference to a 'crisis of consistency' in investment arbitration. The deliberate use of the word 'crisis' implies deep rooted issues within the system of investment arbitration and indeed within the broader framework of international investment law generally. Such deep rooted problems will require a radical remedy.

One of the more radical proposals which has been most hotly debated is the possible establishment of an appeal mechanism. The present chapter has briefly highlighted some of the main arguments which have been put forward for the creation of an appeal mechanism, such as increased consistency and coherence in investment arbitration. However, the chapter has also highlighted a number of disadvantages associated with the establishment of an appeal mechanism, such as for example, the possible increase in the time it takes and the costs associated with the settlement of investment disputes. The next chapter will explore the proposal to establish an appeal mechanism in greater depth.

¹⁵⁰ *Ibid.*

CHAPTER VI: THE PROPOSAL TO ESTABLISH AN APPEAL MECHANISM

6.1 Introduction

The idea of establishing an appellate mechanism in international investment arbitration is not novel. The issue has been debated by leading international investment experts in the recent past.¹ Some experts believe that an appeals facility would be a welcome addition to the system of international investment arbitration. They believe it may go a long way to resolving many, if not all of the problems currently associated with the field.² Other scholars disagree, being of the opinion that the basis of the call for such an appeal mechanism has yet to be established³, or that it would not remedy any existing problems.⁴ Some experts have even gone so far as to suggest that an appeal mechanism might create problems in international investment arbitration, rather than resolve them.⁵

One of the main criticisms of the proposed appeal mechanism is that it would dramatically reduce the flexibility of the system of arbitration. Flexibility has long been heralded as one of the strengths of commercial arbitration, and one of the main reasons it became a popular alternative to the resolution of disputes through domestic courts. However, it can be argued that the nature of the disputes that arise has changed in recent years. Commercial disputes traditionally involved the examination of rather technical aspects of the law which had little effect outside of the particular dispute within which they had

¹ Discussion of an appeals facility can be traced back as far as the early 1990s, see E Lauterpacht, *Aspects of the administration of international justice* (Grotius Publications 1991) and S Schwebel, 'The creation and operation of an international court of arbitral awards', taken from M Hunter et al (eds), *The Internationalisation of International Arbitration* (Graham & Trotman 1994).

² See chapters three and four of this thesis for in-depth discussion of problems associated with international investment arbitration, and see for example M Goldhaber, 'Wanted: a world investment court' (2004) 3 *Transnational Dispute Management* for analysis of how an appeal mechanism might benefit international investment arbitration and solve some of its problems.

³ B Legum, 'Options to establish an appellate mechanism for investment disputes' in K Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 231-240 and J Paulsson, 'Avoiding unintended consequences' in K Sauvant *ibid*, 267-280.

⁴ J Gill, 'Inconsistent decisions: an issue to be addressed or a fact of life?' in F Ortino et al (eds), *Investment Treaty Law: Current Issues Volume 1* (British Institute of International and Comparative Law 2006) 27.

⁵ B Legum (n 3) 231-240.

arisen. This is no longer the case; today, commercial disputes can, and often do involve broader issues of public policy, such as human rights or environmental protection for example. In light of this change in the nature of disputes, a high degree of flexibility in arbitration is perhaps no longer justifiable. This idea will be examined in greater depth throughout this chapter.

This chapter will explore the possibility of establishing an appeal mechanism in international investment law. The chapter will begin by evaluating the current options for the review of investment awards that are available in both ICSID and non-ICSID arbitration. As shall be seen, the current options for the review of investment awards are in theory extremely limited. The chapter will go on to explore the discourse that has emerged from the debate surrounding the creation of an appellate mechanism in international investment arbitration. Firstly, the chapter will investigate whether there is a need for an appeal mechanism, as well as examining the potential advantages and disadvantages of an appeals facility.

Even if it can be shown that the introduction of an appeal mechanism would be beneficial for the system of international investment arbitration, this would only settle one half of the debate. If it is accepted that an appeals facility is desirable, questions naturally arise regarding the practicalities of the creation of such a mechanism; how might such a mechanism be best introduced? Several suggestions have been put forward in this regard, including the incorporation of an appeals facility into the ICSID framework⁶, as well as the creation of a world investment court⁷. The final section will investigate these and the several other suggestions regarding how an appeal mechanism might best be established in international investment arbitration.

6.2 Existing review procedures in international investment arbitration

⁶ This possibility has been considered by the ICSID Secretariat itself in a series of Discussion and Working Papers. See 'Possible improvements to the framework for ICSID arbitration' (22 October 2004) <<http://www.worldbank.org/icsid/highlights/improve-arb.htm>> accessed 20 July 2009 and 'Suggested changes to the ICSID rules and regulations' (12 May 2005) <http://icsid.worldbank.org/ICSID/Servlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement22> accessed 27 May 2011.

⁷ See M Goldhaber, 'Wanted: a world investment court' (n 2).

As briefly discussed in the preceding chapter, awards in international investment arbitration are considered to be final; this means that decisions are not subject to an appeal procedure.⁸ The finality of awards has been a long standing feature of international investment arbitration, and it is widely regarded as one of the most important of its principles.⁹ Finality is thought to be beneficial in a number of important ways: perhaps the most significant advantage of finality is that it enables international investment disputes to be settled as quickly and as cheaply as possible.¹⁰ However, finality does conflict with other important principles, such as correctness and justice. A balance between these two competing principles needs to be struck in any form of dispute settlement, and any such balance will always represent a compromise. Currently in international investment arbitration at least, 'the principle of finality is typically given more weight than the principle of correctness.'¹¹

Although investment awards cannot be appealed, there is, at least some scope for their review. The exact nature of the review is dependent upon the forum within which the case has been heard. The ICSID Convention¹² provides for the review of awards that have been rendered under it, whilst non-ICSID awards may be reviewed under the law of the national court of the seat of arbitration, under the New York Convention¹³, or under some other international treaty.

6.2.1 ICSID Convention arbitration

⁸ R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP 2008) 277.

⁹ Clapham argues that both investors and states hold the principle of finality in the highest regard. See J Clapham, 'Finality of investor-state arbitral awards: has the tide turned and is there a need for reform?' (2009) 26 *Journal of International Arbitration* 437.

¹⁰ 'UNCTAD Series on International Investment Policies for Development' <<http://www.unctad.org/templates/webflyer.asp?docid=13762&intItemID=2340&lang=1&mode=downloads>> accessed 28 January 2011.

¹¹ R Dolzer and C Schreuer (n 8) 277.

¹² Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf> accessed 27 August 2012.

¹³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 (full text) available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf> accessed 10 August 2012.

The ICSID Convention does provide some scope for the review of decisions. Article 52 of the ICSID Convention states that,

(1) 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: (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.¹⁴

The application for annulment made under Article 52 must be submitted within 120 days of the award being rendered, or within 120 days of corruption being discovered if that is the ground upon which annulment is being requested. On receipt of the request, the Chairman will appoint an ad hoc committee of three arbitrators to examine the case. The members of the ad hoc committee must not have been members of the original tribunal which gave the first award or be a national of the same state of any of the members of the original tribunal. Additionally, the members of the ad hoc committee must not have the same nationalities as either of the parties to the dispute, they must not have been designated to the original panel of arbitrators by either of the parties, or have acted as a conciliator to the parties throughout the case. The ad hoc committee has the power to annul all, or any part of the original award. The committee also has the power to temporarily stay the enforcement of the award, pending its final decision. If the committee does choose to annul the award, the parties may request that the dispute be submitted to a newly constituted tribunal which will re-hear the case.¹⁵

Of the five possible grounds for review, only three have been known to be used in practice as the basis for the annulment of an award: manifest excess of powers; failure to state reasons; and serious departure from a fundamental rule of procedure. It is unknown whether the other two grounds for review (improper constitution and corruption) have ever been invoked.¹⁶ In the last ten

¹⁴ Article 52 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (n 12).

¹⁵ *Ibid.* See also C Schreuer, *The ICSID Convention: A Commentary* (CUP 2001) 881-1075.

¹⁶ K Yannaca-Small, 'Annulment of ICSID awards: limited scope but is there potential?' in K Yannaca-Small (ed), *Arbitration Under International Investment Agreements* (OUP 2010).

years, 30% of ICSID annulment applications have led to eventual annulment of the award.¹⁷

An analysis of the review of awards under Article 52 of the ICSID Convention demonstrates that it provides a very narrow scope for the review of decisions in both theory and practice. The exhaustive list of the five grounds for review that is provided in Article 52 is extremely limited indeed. The grounds are simply concerned with the legitimacy of the process of arbitration, and not at all with the substantive correctness of the decision. Moreover, of the applications for annulment, a relatively low figure of 30% is successful.¹⁸

Interestingly, some academics have argued that the Article 52 annulment procedure is actually being used as a de facto appeal mechanism. It has been submitted that a number of cases demonstrate that ICSID tribunals do not know where to draw the line between annulment and appeal. In both *Klöckner v Cameroon*¹⁹ and *Amco v Indonesia*²⁰, 'each annulled a tribunal's award based on an arguable re-examination of the merits of the award'²¹. In *Klöckner*, a foreign investor concluded several contracts with the Cameroon government in order to establish a fertiliser factory in Cameroon as a joint venture. After operating at a loss for some time, the government eventually closed the factory. The investor filed for ICSID arbitration, claiming the balance of the price of the factory. The government counterclaimed for damages for the losses it had sustained due to the project. The tribunal found in favour of the investor, but the annulment committee found that the original tribunal had failed to apply the proper law and had therefore manifestly exceeded its powers and that it had failed to state the reasons upon which its decision was based. The committee stated that, '[o]n the basis of the Award's own citations, [its] conclusion does not necessarily follow, nor does it conform to the understanding of the [annulment] committee may have of this area of law.'²² This statement makes it clear that the annulment committee disagreed with the reasons on which the original

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Klöckner Industrie-Analagen v Republic of Cameroon* (Klöckner I) ICSID Case No. ARB/81/2, Decision on annulment (3 May 1985), 2 ICSID Rep 95 (1994).

²⁰ *Amco Asia Corp v Republic of Indonesia* (Amco Asia) ICSID Case No. ARB/81/1 Decision on annulment (16 May 1986), 1 ICSID Rep 509 (1993).

²¹ D Kim, 'The annulment committee's role in multiplying inconsistency in ICSID arbitration: the need to move away from an annulment based system' (2010) 86 *NYU Law Review* 242.

²² *Klöckner Industrie-Analagen v Republic of Cameroon* (Klöckner I) (n 19).

tribunal had based its decision; thus, the committee actually reviewed the decision on its merits.

The case of *Amco* had a similar outcome. The case concerned a dispute involving agreements between a foreign investor (*Amco*) and the Indonesian government, which detailed that the two parties would jointly develop and manage a hotel and office block in Indonesia. *Amco* agreed to invest at least \$3 million. Whilst the hotel was in operation, *Amco* became involved in a dispute with its local partner company, which led the partner to take control of the hotel with the help of the Indonesian armed forces. The government also revoked *Amco*'s investment license, claiming that *Amco* had not upheld its side of the bargain. *Amco* therefore submitted a request for ICSID arbitration. The tribunal found in favour of the investor, stating that under Indonesian law and the applicable international law rules, the government was not justified in revoking the investment license without due process. The annulment committee annulled the decision, asserting that the original tribunal had manifestly exceeded its powers in failing to apply the correct law to the contract. However, the tribunal had in fact undertaken a detailed analysis of Indonesian law to determine the amount of investment, thus the annulment committee's reasoning could be called into question. Through its decision to annul, the committee had eliminated any distinction between non-application of proper law (which constitutes grounds for manifest excess of powers) and erroneous application of proper law (which actually constitutes review of the merits of the decision).²³

Other more recent annulment decisions such as *Mitchell v Congo*²⁴, *CMS v Argentina*²⁵, *MHS v Malaysia*²⁶, *Sempra v Argentina*²⁷ and *Enron v Argentina*²⁸ could also be said to have exercised de facto appeal under the guise of annulment. The fact that annulment committees are going beyond annulment of

²³ *Ibid*, as cited in D Kim, 'The annulment committee's role in multiplying inconsistency in ICSID arbitration: the need to move away from an annulment based system' (n 21).

²⁴ *Mitchell v Democratic Republic of the Congo* ICSID Case No. ARB/99/7, Decision on annulment (1 November 2006).

²⁵ *CMS v Argentine Republic* ICSID Case No. ARB/01/8, Decision on annulment (25 September 2007).

²⁶ *MHS v Malaysia* ICSID Case No. ARB/05/10, Decision on annulment (16 April 2009).

²⁷ *Sempra Energy International v Argentine Republic* ICSID Case No. ARB02/16, Decision on annulment (29 June 2010).

²⁸ *Enron and Ponderosa v Argentine Republic* ICSID Case No. ARB01/3, Decision on annulment (30 July 2010).

decisions and into appeal territory provides further evidence of the need for the establishment of a fully-fledged appeal mechanism.

6.2.2 Relevant provisions under other conventions

There is some scope for the review of decisions provided in the relevant provisions under a number of other conventions. Awards rendered in non-ICSID arbitration may be challenged by a variety of different means: under national law; under the New York Convention²⁹; and under various other international treaties.

i) National law

The courts of the country in which the tribunal had its seat, or the courts of the country tasked with enforcing the award may have the power to review non-ICSID investment awards. Any comprehensive evaluation of the applicable national laws is practically impossible (at least in the present work) because, 'in order to map this field correctly, one would have to deal with some 200 national legislations.'³⁰ It is therefore very difficult indeed to authoritatively draw any general conclusions on the scope of review of investment awards under national law.

Tams³¹ attempts to generalise the review procedures under national law, though he does recognise that accurate generalisation is not possible;

At the risk of over-simplification, national laws tend to circumscribe the grounds for vacating awards rather narrowly. In some countries (including Switzerland, France and South Africa), awards can only be set aside if they suffer from serious procedural defaults. Other national laws permit a limited review of the merits of an award, often by providing for some form of public policy exception. However, notwithstanding occasional attempts, by national courts, to use public policy arguments in order to enter into a substantive review of awards, the general

²⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 (n 13).

³⁰ V Balaš, 'Review of awards' in P Muchlinski et al (eds), *Oxford Handbook of International Investment Law* (OUP 2008).

³¹ C Tams, 'An appealing option? The debate about an ICSID appellate structure' in C Tietje et al (eds), *Essays in Transnational Economic Law* <<http://www.wirtschaftsrecht.uni-halle.de/Heft57.pdf>> accessed 26 January 2010.

tendency is for national courts to set aside investment awards in highly exceptional circumstances only.³²

The relevant national law of a limited number of states will be briefly examined in order to compare and contrast the relevant provisions of different states. In the United Kingdom, the Arbitration Act of 1996 is the governing statute in this field; Sections 45 and 69 of the Act contain the relevant provisions.³³ Section 45 enables English courts to determine a question of law which arises out of arbitral proceedings. Section 69 states that, 'unless otherwise agreed by the parties, a party to arbitral proceedings may...appeal to the court on a question of law arising out of an award made in the proceedings.'³⁴ Section 69 goes on to state that the court may choose to confirm the award, vary the award, remit the award in whole or in part to the tribunal for reconsideration, or set the award aside in whole or in part.³⁵ Franck points out that the relevant sections of the UK Arbitration Act 1996 permit the parties to the arbitration to ask English courts to rule on substantive issues.³⁶

In the United States, the governing Federal Arbitration Act³⁷ permits review on substantive points where there has been a 'manifest disregard of the law'³⁸. Where this is found to be the case, the court is empowered to strike down the decision. The American Act is very similar to the English Act in this regard.

The Italian national law on the challenge of awards rendered through international arbitration is contained in Article 829 of the Italian Civil Code³⁹. Article 829 provides for challenge of awards where: the arbitration clause is void; the tribunal was improperly constituted; the reasons for the award are not given; the award was rendered after the deadline for the award had passed; procedural rules have not been complied with; the award conflicts with another

³² *Ibid.*

³³ S.69 Arbitration Act 1996 <<http://www.legislation.gov.uk/ukpga/1996/23/section/69>> accessed 9 June 2011 and S Franck, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions' (2005) 73 *Fordham Law Review* 1521.

³⁴ *Ibid.*, Arbitration Act 1996.

³⁵ *Ibid.*

³⁶ S Franck (n 33).

³⁷ US Federal Arbitration Act 1925 <http://www.law.cornell.edu/uscode/html/uscode09/usc_sup_01_9.html> accessed 9 June 2011.

³⁸ S Franck (n 33).

³⁹ Article 829 of the Italian Civil Code in S Beltramo, *The Italian Civil Code and Complementary Legislation* (West 2012).

award rendered in the same dispute; or due process was not complied with.⁴⁰ The grounds for review provided by the Italian Civil Code bear remarkable resemblance to the grounds for review provided in the New York Convention.

A brief examination of the national laws of a handful of states highlights the lack of a common approach in this area. Some states permit review in cases of abuse of process, whilst others allow review on substantive issues⁴¹; it is therefore practically impossible to generalise findings. It should also be noted that many states do not have their own national laws on the subject, having instead chosen to adopt a relatively uniform approach to the review of awards by deferring to the UNCITRAL Model Law⁴² rules on the matter. Incidentally, the UNCITRAL rules themselves make reference to the grounds for review of awards that are found in the New York Convention.⁴³ With many states making reference to the UNCITRAL Rules, which themselves refer to the New York Convention, the role of national law in the review of awards is often rather limited.

The role of national law in the review of international investment awards is also somewhat limited in practical terms for two important reasons. Firstly because most international investment disputes fall within the scope of the ICSID Convention, and their review is therefore confined to the limits contained in the Convention itself. Furthermore, the handful of cases that are left, which do not fall under the ICSID Convention would only affect a select number of states.⁴⁴

ii) **New York Convention**

The New York Convention, which has over 130 signatories from around the globe, sets out the grounds for review of non-ICSID awards. Article 5 of the

⁴⁰ *Ibid.*

⁴¹ For discussion of the national laws of some states and an attempt to generalise findings see C Tams, 'An appealing option? The debate about an ICSID appellate structure' (n 31).

⁴² UNCITRAL Model Law on International Commercial Arbitration (2006 amended version)

<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.htm
I> accessed 27 May 2011.

⁴³ V Balas, 'Review of awards' (n 30) 1137.

⁴⁴ *Ibid.*

New York Convention provides the following seven grounds for the review of awards,

1) incapacity of the parties to enter into the arbitration agreement or invalidity of the arbitration agreement; 2) lack of proper notice to a party or incapacity to present its case; 3) inclusion in the award of matters outside the scope of submission; 4) irregularities in the composition of the tribunal or the arbitral procedure; 5) non-arbitrability of the subject matter; 6) violation of domestic public policy; and 7) recognition would be contrary to the public policy of the country of enforcement.⁴⁵

The list of grounds set out in Article 5 is completely exhaustive. As can be seen, the grounds for review provided by Article 5 are rather limited. Review can only be requested where there is a potential complaint concerning the legitimacy of the process of arbitration, rather than on any substantive issues or concerns about the correctness of the decision. The New York Convention does not allow for annulment or appeal of the award, even where one of the seven grounds listed in Article 5 is present, it simply means that the award may not be enforced.⁴⁶

iii) Other treaties

The UNCITRAL Model Law also provides opportunity for the review of non-ICSID arbitral awards. Interestingly on the matter of the review of awards, Articles 34 and 36 of the UNCITRAL Rules provide a limited number of grounds for the review of awards. Incidentally, Articles 34 and 36 of the UNCITRAL Model Law⁴⁷ are actually based on the grounds for the review of awards contained in Article 5 of the New York Convention⁴⁸.

6.2.3 Annulment vs. appeal

As has been seen, awards rendered in international investment arbitration disputes are not appealable (at least in theory). Nevertheless, there is scope for the review of such awards in both ICSID and non-ICSID arbitration.

⁴⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 (n 13).

⁴⁶ S Franck, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law with inconsistent decisions' (n 33).

⁴⁷ Articles 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration (n 42).

⁴⁸ Article 5 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 (n 13).

In ICSID, the type of review that is available is annulment. It must be stressed that annulment is very different from appeal. Annulment is issued where there has been some problem with the legitimacy of the process of decision and not with the substantive correctness itself. On the other hand, appeal is concerned with both the process and the correctness of the decision. The consequences of appeal and annulment are also very different. Successful appeal may result in the replacement of the decision by a new one, whereas annulment only serves to remove the original decision.⁴⁹

Yannaca-Small explains eloquently that,

review of the process is a narrow standard of evaluation which allows the limited sacrifice of finality for a greater integrity and fairness in the decision-making process. Review of the substantive correctness entails a higher level of scrutiny to obtain greater accuracy in the legal reasoning.⁵⁰

Yannaca-Small highlights the fact that annulment, as a form of review of awards, places more emphasis on the importance of finality of decision, rather than concerns with correctness or justice. Annulment favours the finality of awards because an annulment tribunal may only set aside an award on very limited grounds which generally concern some abuse of process. Moreover, an annulment tribunal is not (in theory) able to review the award on the merits of the decision or to replace the original decision with its own views on the matter.⁵¹

The fact that the current system of international arbitration explicitly incorporates an extremely limited scope for the review of decisions through annulment serves to highlight the fact that at present, the system of international investment arbitration is weighted more towards the principle of finality, and less towards the principles of correctness and justice.⁵²

In the present day (and in light of the fact that ICSID could be said to be operating a de facto appeal mechanism), perhaps the balance between finality and correctness in international investment arbitration should be re-evaluated

⁴⁹ R Dolzer and C Schreuer, *Principles of International Investment Law* (n 8).

⁵⁰ K Yannaca-Small, 'Annulment of ICSID awards: limited scope but is there potential?' (n 16).

⁵¹ *Ibid.*

⁵² See J Clapham, 'Finality of investor-state arbitral awards: has the tide turned and is there a need for reform?' (n 9).

and it is time to institute a de jure appeal mechanism. International investment disputes often involve huge sums of money being contested, as well as important issues of public policy⁵³. With the stakes becoming increasingly high, it might be time to prioritise the correctness of the decision over the principle of finality in international investment disputes. Introducing an appeals facility in international investment law would in fact elevate correctness of decision over finality once and for all. The following section will evaluate the potential advantages and disadvantages of creating an appeal mechanism in international investment law.

6.3 A cost- benefit analysis of the proposal to establish an appellate mechanism

The previous chapter has already briefly examined some of the potential advantages and disadvantages of the creation of an appeal mechanism in international investment law. The aim of this section is to go beyond what has already been discussed, exploring in greater depth the basis of the call for such an appeals facility. It will consider whether an appeal mechanism is actually necessary; whether the basis for the call has legitimately been established. The section will also explore the potential advantages and disadvantages of an appeal mechanism in greater depth, executing a cost-benefit analysis of the proposal. Academics have been debating these issues for a number of years now, and as such, much relevant literature has been generated; this literature will form the basis of the discussion.⁵⁴

⁵³ For more on public policy issues in international investment law and arbitration see for example C Brower and S Schill, 'Is arbitration a threat or a boon to the legitimacy of international investment law?' (2008) 9 *Chinese Journal of International Law* 471 and M Footer, 'BITs and pieces: social and environmental protection in the regulation of foreign investment' (2009) 18 *Michigan State Journal of International Law* 33.

⁵⁴ See for example M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven International Publishing 2008), F Ortino et al (eds), *Investment Treaty Law: Current Issues Volume 1* (British Institute of International and Comparative Legal Studies 2006), K Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008), A Qureshi, 'An appellate system in international investment arbitration?' in P Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008), W Choi, 'The present and future of the investor-state dispute settlement paradigm' (2007) 10 *Journal of International Economic Law* 725, and W Knull and N Rubins, 'Betting the farm on international arbitration: is it time to offer an appeal option?' (2000) 11 *American Review of International Arbitration* 531.

6.3.1 The basis of the call for an appeals facility and its potential advantages

i) The basis of the call

Many international investment experts attribute the basis of the call for an appeals facility to the incoherence and inconsistency of the present system. A number of high profile recent cases have highlighted the real and potential risk of inconsistent arbitral decisions. As the *Lauder*⁵⁵, *SGS*⁵⁶, *NAFTA*⁵⁷ and *Maffezini*⁵⁸ cases (discussed in chapter three) show, inconsistent decisions are a reality in international investment arbitration. Inconsistency is damaging to the system of international investment arbitration for a number of different reasons; it leads to unfairness and injustice, is damaging to the rule of law, causes unpredictability, and ultimately leads to concerns regarding the sustainability of the system of international investment arbitration as a whole.⁵⁹

ii) Potential advantages of an appeals facility

- Greater consistency and coherence

Enhancing consistency and coherence is undoubtedly the most cited potential advantage of establishing an appeal mechanism in international investment arbitration. This chapter has highlighted several high profile cases (which have been thoroughly discussed in chapter three) in which inconsistent decisions were rendered, exemplifying the problem. Moreover, the ever increasing number of international investment disputes means that the potential for inconsistencies to arise is also increasing.⁶⁰ According to the OECD,

⁵⁵ *CME Czech Republic B.V. v Czech Republic*, Ad hoc – UNCITRAL Arbitration Rules, Partial Award of 13 September 2001 and IIC 62 (2003), Final Award of 14 March 2003 and *Lauder v Czech Republic*, Final Award, 3 September 2001 (Ad hoc- UNCITRAL Arbitration Rules).

⁵⁶ *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* ICSID Case No. ARB/01/13 (2003) 42 ILM 1290 and *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* ICSID Case No. ARB/02/6 (2004).

⁵⁷ *S.D. Myers v Canada* (2000) ILM 1408 (NAFTA Arb), *Metalclad Corporation v United Mexican States* (2000), ICSID Case No ARB(AF)/97/1 (2000) and *Pope & Talbot Inc. v Government of Canada* (2002) ILR 293.

⁵⁸ *Emilio Agustín Maffezini v Kingdom of Spain* ICSID Case No. ARB/97/7 (2000).

⁵⁹ See chapter three of this thesis for a more thorough discussion of the disadvantages of inconsistency in international investment arbitration.

⁶⁰ See M Goldhaber, 'Wanted: a world investment court' (n 2).

one of the main advantages for the creation of an appellate mechanism advanced by its proponents is consistency. Consistency and coherence of jurisprudence create predictability and enhance the legitimacy of the system of investment arbitration.⁶¹

The OECD Working Paper goes on to highlight a number of inconsistent decisions which have been reached on the same or broadly similar facts which have received widespread attention. The Working Paper asserts that such inconsistencies might have indeed been avoided if an appeals facility had been operational at that time. The OECD asserts that the,

notion of consistency has been viewed to go beyond the situation when two panels constituted under different agreements deal with the same set of facts and give conflicting opinions or reach a different conclusion. It might also encompass coherence of interpretation of basic principles which may underlie differently worded provisions in particular agreements and therefore might enhance the development of a more consistent international investment law.⁶²

Numerous academics have echoed the points made in the OECD's 2006 Working Paper regarding the potential positive effects on consistency and coherence of international investment jurisprudence of establishing an appeal mechanism in investment arbitration.⁶³

- Corrective mechanism

Tribunals of first instance are obviously not infallible; sometimes they may make the wrong decision. An appeals mechanism would enable legal errors and serious errors of fact to be rectified.⁶⁴ This means that the 'correct' decision is more likely to be reached. This is hugely important, as it should arguably be the main objective of any dispute settlement mechanism. Reaching

⁶¹ K Yannaca-Small, 'Improving the system of investor-state dispute settlement: an overview' (2006) <<http://www.oecd.org/dataoecd/3/59/36052284.pdf>> accessed 16 July 2009.

⁶² *Ibid.*

⁶³ For example M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (n 54), G Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) and S Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008).

⁶⁴ K Yannaca-Small, 'Improving the system of investor-state dispute settlement: an overview' (n 61) and A Qureshi, 'An appellate system in international investment arbitration' (n 54) 1157.

the correct decision is also important because of what may be at risk for the parties; international investment arbitration often involves huge sums of money and critical issues of public policy. With such critical issues being at stake, it is also important that the correct decision is reached so that the decision can be reconciled with the broader framework of public international law.

Traditionally in international investment arbitration, concerns about the correctness of the decision have been overshadowed by concerns about finality⁶⁵, speed and economy.⁶⁶ Thus, flawed decisions which can and often do have a significant impact upon important aspects of public policy, and the costs of which may run into millions or billions of pounds are potentially being enforced. An appeal mechanism could rectify these errors from the outset, which could in turn enhance public support for international investment arbitration at a time when it is witnessing an ever-increasing caseload.⁶⁷

- Creation of a more sustainable system

Some authors, including Bishop⁶⁸ have expressed concern regarding the sustainability of the current system of international investment arbitration. Speaking at the British Institute of International and Comparative Law's inaugural Investment Treaty Forum Conference in May 2006, which focused on the debate surrounding the establishment of an appellate mechanism in international investment arbitration, Bishop stated, 'what I think we are seeing today [the call for an appeals facility] is some concern, some lack of confidence...in the sustainability of the system [of international investment arbitration] itself.'⁶⁹

Franck explains that concerns about the sustainability of the system stem from concerns about legitimacy;

⁶⁵ J Clapham, 'Finality of investor-state arbitral awards: has the tide turned and is there a need for reform?' (n 9).

⁶⁶ 'UNCTAD Series on International Investment Policies for Development' (n 10).

⁶⁷ K Yannaca-Small, 'Improving the system of investor-state dispute settlement: an overview' (n 61)

⁶⁸ D Bishop, 'The case for an appellate panel and its scope for review' in F Ortino et al (eds), *Investment Treaty Law: Current Issues Volume 1* (n 54) as cited in Qureshi, 'An appellate system in international investment arbitration' (n 54) 1157.

⁶⁹ *Ibid.*

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. Legitimacy depends in large part upon factors such as determinacy and coherence, which can in turn beget predictability and reliability.⁷⁰

Simply put, the inconsistent and incoherent decisions being reached in international investment arbitration are leading to the questioning of the legitimacy of the system itself. Ultimately the future and sustainability are also being brought into question.

Bishop believes that issues surrounding the sustainability of the system of international investment arbitration might be remedied by the establishment of an appeals facility; 'an appellate body can reduce the risk of inconsistent decisions...[and] help legitimize and institutionalize the process of investor state dispute settlement and aid in making the system more sustainable.'⁷¹

- Sensitivity

An appellate mechanism could provide greater sensitivity to the legitimate concerns of investment host state governments.⁷² There has been concern in the past that investor-state investment arbitration is not sensitive enough to such governmental concerns.⁷³ When investment host state government policy makers have attempted to justify their actions (which may have inadvertently negatively impacted the investments of foreign investors) by arguing that the policy is intended to address a legitimate public policy concern, investment tribunals have been accused of being insensitive to such concerns. Investment tribunals often brandish the state's action as amounting to expropriation and requiring compensation to be paid to the investor. It is often issues involving human rights or environmental concerns that are contested.⁷⁴

⁷⁰ S Franck, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions' (n 33).

⁷¹ D Bishop, 'The case for an appellate panel and its scope for review' (n 68) 17 and A Qureshi (n 54) 1157.

⁷² *Ibid*, A Qureshi.

⁷³ *Ibid*.

⁷⁴ A comprehensive treatment of the topic in relation to environmental concerns at least can be found in K Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (CUP 2009) and for

For example, a host state government may enact new environmental laws in order to improve environmental standards in its territory. However, the new law could negatively impact a foreign investor's investment by making their business (at the very extreme) illegal, or (at the very least) much more costly to carry out, thus affecting the profitability of the business. The investor will then seek compensation through arbitration, and they are in fact very often successful. It is in this way then, that international investment arbitration could be accused of being insensitive to legitimate concerns of the host state government. It is thought that an appeals facility may provide more sensitivity in this regard, especially if there is a single, permanent appeals tribunal which is less influenced by the parties to the dispute. Such a committee would probably provide a more objective and independent decision.

- Objectivity

The establishment of an appellate mechanism might serve to enhance the objectivity of the system of international investment arbitration.⁷⁵ Although one might assume that investment arbitration already provides an objective process for the settlement of investment disputes, this may not always be the case. With ad hoc disputes in particular, there may be legitimate concerns about the objectivity of the dispute settlement process.⁷⁶ In ad hoc arbitration it is very often the parties themselves who are very heavily involved in, if not solely responsible for the selection of arbitrators. For a typical three-arbitrator tribunal panel, two of the three arbitrators are selected by the respective parties, meaning each party has full control over the selection of one arbitrator. The third arbitrator is often selected by the mutual agreement of both parties.⁷⁷ Allowing the parties to the dispute so much freedom in the selection of arbitrators can be dangerous, as each party is likely to select arbitrators whom they feel will be most sympathetic to their own position and are more likely to settle the dispute in their favour.⁷⁸

discussion of environmental protection and human rights see S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 63) 165-170.

⁷⁵ A Qureshi, 'An appellate system in international investment arbitration?' (n 54) 1157.

⁷⁶ C Harris, 'Arbitrator challenges in international arbitration' (2008) 4 *Transnational Dispute Management*.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

An appeal mechanism would have the potential to enhance objectivity in investor-state arbitration greatly. However, the precise extent to which objectivity may be enhanced does depend on the way in which the appeals facility is established and how it functions. For instance, if appeals are introduced, but are handled on an ad hoc basis (with tribunals being convened when necessary) the scope for enhancing objectivity is limited, especially if the parties are responsible for or have an influence on the choice of appellate arbitrators. If this type of appeals mechanism were to be introduced, the same problems which can occur at first instance concerning objectivity would be present at the appellate stage of proceedings. Alternatively, if appeals are handled by a single, permanent, dedicated and authoritative body, over which the parties have no influence (especially in the selection of appellate arbitrators) then the scope for the enhancement of objectivity is extremely significant.

- Predictability

Inconsistency and incoherence in international investment arbitration leads to unpredictability of the law. If cases involving the same or similar facts are decided in different ways, the outcomes of future cases will be unpredictable. This lack of legal certainty undermines the rule of law.⁷⁹ As has been seen above, a number of broadly similar cases⁸⁰ have been decided in different ways, and consequently the law in these areas is unclear. A fully functioning appellate process could have provided a final and ultimate 'correct' interpretation of the law in these cases, thus clearing any confusion and clarifying the law for future reference. With the emergence of one clear and authoritative interpretation, the outcome of future cases would have been easier to predict. Predictability of the law is important for several reasons. As this work is focused on international investment law, the importance of the predictability of international investment law will be considered. Predictability of international

⁷⁹ L Yves Fortier, 'Investment protection and the rule of law: change or decline?' (2009) <http://www.arbitration-icca.org/media/0/12392785460140/0732_001.pdf> accessed 27 February 2012.

⁸⁰ Inconsistent decisions have been reached in a number of high profile cases; these have been discussed at length in previous chapters. See for example *CME Czech Republic B.V. v Czech Republic* (n 55) and *Lauder v Czech Republic* (n 55). See also *SGS Société Générale de Surveillance S.A. v Pakistan* (n 56) and *SGS Société Générale de Surveillance S.A. v Philippines* (n 56).

investment law is important, firstly so that investors and states know what action is and is not permissible in the course of their dealings. Secondly, it is important in case a dispute arises; being able to predict which party might be successful in arbitration will have a bearing on the decision to pursue arbitration (taking into account considerations of costs and delay involved and chances of success). Thirdly, predictability of the law is important for the stability and sustainability of the legal framework.

The issue of predictability cannot be discussed without also considering the issue of precedent, or rather lack thereof (at least in terms of formal precedent⁸¹) in international investment arbitration. A system of formal precedent would obviously go a long way to enhancing the predictability of the law in international investment. However, the current 'spaghetti bowl' system of international investment law is not particularly well suited to binding precedent. With the myriad of different international investment agreements, BITs, and different fora available, a system of binding precedent, would inevitably be impossible to achieve. The creation of an appeal mechanism in international investment arbitration may facilitate the introduction of a system of binding precedent in international investment arbitration, depending of course on how the appeals facility is going to be introduced. If for example the appeal mechanism is introduced in such a way as to drastically reduce the number of tribunals hearing investment, cases, or indeed become the central tribunal, precedent may be able to be established, and consequently the predictability of the law will be enhanced.

- Harmonisation

An appeal mechanism would obviously harmonise the different trends which are emerging in the interpretation of various international investment law rules and the seemingly diverging opinions of different investment tribunals.⁸²

⁸¹ Tribunals have consistently pointed out that they are not bound by previous decisions. Despite the lack of formal precedent in international investment arbitration, it has been suggested by several authors that there is a *de facto* form of precedent; see C Schreuer and M Weiniger, 'A doctrine of precedent?' in P Muchlinski et al (eds), *Oxford Handbook of International Investment Law* (OUP 2008) 1189-1196, and A Qureshi, 'An appellate system in international investment arbitration?' (n 54)1157.

⁸² W Knull and N Rubins, 'Betting the farm on international investment arbitration: is it time to offer an appeal option?' (n 54).

However, the capacity for an appellate facility to harmonise would extend beyond this.

It is interesting to note that certain sectors of international investment arbitration already make use of dispute settlement mechanisms which include appellate procedures⁸³. For example, ASEAN (Association of South East Asian Nations) permits the appeal of decisions. The 1992 Framework Agreement on Enhancing ASEAN Economic Co-operation⁸⁴ established the basis for economic co-operation in several important sectors (including investment) by ASEAN member nations. Recognising that an integral aspect of that economic co-operation would require an outlet for the settlement of any disputes which might arise during the course of that co-operation, a dispute settlement mechanism was established in 1996. The dispute settlement mechanism is patterned on the WTO's dispute settlement mechanism. Firstly, an attempt is made to settle the dispute through consultation with the parties. If consultation is unsuccessful, the dispute can be referred to the Senior Economic Officials Meeting which may choose to establish a panel which will be charged with hearing the dispute and formulating a report. The panel's report is considered by the Senior Economic Officials which will rule on the dispute. The ruling of the Senior Economic Officials may be appealed within 30 days of the ruling being given.⁸⁵ As has been seen, certain sectors of international investment arbitration already incorporate an appeal mechanism into their dispute settlement procedures. The establishment of a general appellate mechanism would therefore harmonise investment arbitration as a whole.

As briefly discussed earlier in this chapter, the nature of commercial disputes has changed dramatically recently. Commercial disputes traditionally involved the settlement of private disputes often involving the clarification of technical aspects of law between two parties which were very much only applicable in the single case within which they arose. However nowadays,

⁸³ For example, the dispute settlement mechanism of the ASEAN allows appeal of trade and investment related decisions.

⁸⁴ 'Framework Agreements on Enhancing ASEAN Economic Cooperation, Singapore, 28 January 1992' full text available at <<http://www.aseansec.org/12374.htm>> accessed 24 August 2012.

⁸⁵ UNCTAD, 'Dispute Settlement: Regional Approaches 6.3 ASEAN' (2003) <www.unctad.org/en/docs/edmmisc232add29_en.pdf> accessed 16 September 2011. For more information on 'ASEAN' (including dispute settlement procedures see <<http://www.aseansec.org/index2008.html>> accessed 24 August 2012.

international investment disputes often involve issues of public policy. This usually occurs because a state has introduced new legislation or policy intended to safeguard human rights or the environment. However, in doing so, the state may have inadvertently devalued the investment of a foreign investor, thus giving that investor recourse to dispute settlement. In this way then, international investment tribunals have to pronounce on matters of public policy and public interest. This means that international investment tribunals now have to fulfil a role which includes public purpose. In light of this public purpose role, it is asserted that investment tribunals should therefore be obliged to operate within a public international law framework. A centralised appeal mechanism could help to ensure that international investment arbitration is compliant with general public international law principles, carrying out its new public purpose role with due diligence.

-Prevent distortion

The current system of international investment arbitration allows, and some might say even encourages distortion in its functioning. At present, investors are able to cherry pick the nationalities, investment agreements and forums for arbitration which they believe will afford them the greatest benefits and chances of success in case of a dispute.⁸⁶ The establishment of an appellate mechanism might prevent such distortion through forum shopping by providing a central, single authoritative body which would have the final say on the dispute. Furthermore, depending on how the appellate mechanism is established, it may contribute to the prevention of distortion through nationality and investment agreement selection: for example if the appellate mechanism is introduced as part of a wider reform (perhaps including the negotiation of a multilateral investment treaty), then the need for the thousands of BITs and nationality selection in order to take advantage of the most favourable of those BITs would be effectively eradicated.

⁸⁶ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 63) 179-182.

6.3.2 The alleged lack of necessity and the possible drawbacks of establishing an appeal mechanism

i) Lack of necessity

The preceding section highlighted the fact that for many scholars, the basis of the call for an appellate mechanism in international investment arbitration is based on alleged inconsistencies and incoherence within the system. However, some experts have disagreed, contending that this is not a valid argument. Prominent academics have argued that inconsistency and incoherence have to date, not been a significant feature of international investment arbitration.⁸⁷ As regards to the creation of an ICSID appeals facility specifically, the ICSID Secretariat itself noted that, 'significant inconsistencies have not to date been a general feature of the jurisprudence of ICSID.'⁸⁸

Some experts go beyond stating that real inconsistencies have yet to occur, suggesting that even if inconsistencies and incoherence do occur in the future, there is no cause for concern, as inconsistencies should simply be viewed as an unavoidable fact of life.⁸⁹ Gill also believes that we must accept inconsistency as inevitable; inconsistencies are not unique to international investment arbitration. Many domestic courts and international tribunals reach inconsistent conclusions on a regular basis, yet they are not attacked for it like international investment tribunals are.⁹⁰

Other academics have suggested that if inconsistencies do occur in the future, and we accept that they are undesirable, there is no need to worry, as the inconsistency will correct itself naturally over time when one solution is favoured over the other, meaning that the one solution will be applied more consistently. Paulsson for example, believes that there is no need for appellate intervention, and that any inconsistencies will remedy themselves in due course.⁹¹ Gill also favours this 'laissez-faire' solution, asserting that;

over time the position in relation to many of the issues that are currently being debated will become more settled...inconsistent decisions themselves will give

⁸⁷ B Legum, 'Options to establish an appellate mechanism for investment disputes' (n 3) 231-240 and J Paulsson, 'Avoiding unintended consequences' (n 3) 267-280.

⁸⁸ 'Possible improvements of the framework for ICSID arbitration' (n 6).

⁸⁹ J Paulsson, 'Avoiding unintended consequences' (n 3) 267-280.

⁹⁰ J Gill, 'Inconsistent decisions: an issue to be addressed or a fact of life?' (n 4) 27.

⁹¹ J Paulsson, 'Avoiding unintended consequences' (n 3) 267-280.

rise to one approach being generally regarded as more preferable than another and so it will be adopted more frequently thereafter.⁹²

There has also been some discussion about the suitability of an appeal mechanism within the current framework of international investment arbitration. Legum argues that the current system of international investment law is ill-adapted to appeals, largely due to the lack of a multilateral investment agreement.⁹³

ii) Potential disadvantages

- Absence of flexibility

As described previously⁹⁴, international investment arbitration is administered through either permanent arbitration institutions or ad hoc tribunals. Both institutionalised and (especially) ad hoc arbitration provide a great deal of flexibility to the parties to the dispute. More often than not, the disputing parties can choose exactly how their dispute should be settled, including (but not limited to) where the arbitration should take place and who should pronounce on the matter. Indeed the parties are able to exercise an extremely high degree of control over the entire process of the settlement of the dispute. Arbitration thus provides one of the most flexible means of settling disputes; this high degree of flexibility is widely regarded as one of the greatest advantages of settling disputes through arbitration. This high degree of flexibility and control was ideal for the settlement of commercial disputes (including international investment disputes) which traditionally involved the settlement of a specific technical aspect of the law which was applicable in that single case.

However, times have changed and today commercial disputes have taken on a completely different nature. For example, international investment disputes usually involve private investors (either individuals or companies) in dispute with the governments of the states within which they have invested. Often investors complain that the value of their investment has fallen due to

⁹² J Gill, 'Inconsistent decisions: an issue to be addressed or a fact of life?' (n 4) 27.

⁹³ B Legum, 'Options to establish an appellate mechanism for investment disputes' (n 3).

⁹⁴ See chapter two for in depth discussion of the mechanics of international investment arbitration.

some new policy or regulatory measure put in place by the investment host state, alleging that this is tantamount to expropriation. These new policies often concern issues of broader public policy such as environmental or human rights protection. With such issues at stake in commercial disputes, such a high degree of flexibility is no longer justifiable. Therefore, perhaps the purported disadvantage of losing flexibility as a result of establishing an appeal mechanism is not a valid concern. Perhaps it would be better to sacrifice flexibility for greater certainty where important matters of public policy are at stake.

- Fragmentation

It has been suggested that an appeals facility might actually cause significant fragmentation in international investment arbitration. Concern has particularly been expressed regarding the creation of an appeals facility under the auspices of ICSID. Some experts fear that fragmentation could occur if some ICSID awards are subject to appeal and others are not.⁹⁵

- Damaging to the principle of finality

Finality simply means that 'the decision of the tribunal is the final word on the facts and law of the case before it'⁹⁶, meaning that there is necessarily a 'lack of appeal on the merits of the dispute.'⁹⁷ Finality of decision is often thought to be one of the most important aspects of the current system of international arbitration; it is often said that finality of decision is one of the greatest advantages of the current system of international investment arbitration.⁹⁸ The establishment of an appeals facility would obviously destroy the principle of finality in international investment arbitration, making awards subject to appeal on the merits. A number of scholars have suggested that the tide may be turning regarding the traditional favouring of finality, with more

⁹⁵ See 'Possible improvements of the framework for ICSID arbitration' (n 6).

⁹⁶ J Clapham, 'Finality of investor-state arbitral awards: has the tide turned and is there a need for reform?' (n 9).

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

emphasis being placed upon the correctness of the decision and justice.⁹⁹ An appeals mechanism in international investment arbitration would undoubtedly ensure that the correct decision is reached in each individual dispute, providing an opportunity to remedy any incorrect decisions that have been made at first instance. The movement towards the favouring of correctness and justice is supported by the fact that international investment disputes often involve issues of public interest and public policy which therefore 'make the acceptance of the risk of flawed or erroneous decisions less justifiable in the name of finality than it may be in traditional commercial arbitration.'¹⁰⁰

- Increased delay and costs of arbitration

One of the many reasons why international investment arbitration became so popular is that it provided means of settling disputes in the quickest and most economical manner. However, it has been noted that the cost of investment arbitration has 'sky-rocketed'¹⁰¹ in recent years due to increased costs in conducting arbitration procedures and the high level of damages that are frequently awarded in international investment cases. It is thought that the introduction of an appellate mechanism, which would essentially mean the addition of an extra layer of arbitration, will further increase the delay and costs involved in international investment arbitration. It should be noted however that,

there are already considerable delays in the set aside proceedings under the national court systems which given the existence of different layers of appeal (first instance, appeal court, supreme courts), could take years before a final decision is rendered.¹⁰²

The addition of an extra layer of arbitration through appeal does not have to necessarily equate to massive increases in delay and costs. If the appellate procedure is established and managed in an appropriate manner, there is no reason why there would be a significant increase in delay and cost. If strict deadlines are enforced from start to finish of the appeals process, the appeal

⁹⁹ *Ibid.*

¹⁰⁰ K Yannaca-Small, 'Improving the system of investor-state dispute settlement: an overview' (n 61).

¹⁰¹ UNCTAD, Series on International Investment Policies for Development (n 10).

¹⁰² K Yannaca-Small, 'Improving the system of investor-state dispute settlement: an overview' (n 61).

could be dealt with in a matter of weeks or months. This means that any additional delay caused by appeal would be minimal, and might be much shorter than applying for the setting aside of the decision through national courts. Additional arbitration would result in some cost increase. However, if the length of the appeals process is minimised, costs should not massively increase, and will be relative to the amount already spent on the dispute. Furthermore, if the appeal is a success, it could save the client money in damages.

- Increase in caseload

It is alleged that introducing an appeals facility will cause a marked increase in the number of cases.¹⁰³ This assumption is probably correct; there is a risk that it might become standard practice for the party that loses the case at first instance to automatically appeal the decision. Of course, this would lead to a significant increase in the number of cases. There might be several important implications, for example, the creation of a de facto two tier system of arbitration based on automatic appeal.¹⁰⁴ Automatic appeal will also call into question the value and respect for first instance decisions and the arbitrators who render them.¹⁰⁵

The risk of automatic appeal and the loss of respect and authority of first instance decisions are significant potential disadvantages of the establishment of an appeal mechanism. Although, it must be pointed out that automatic appeal and the creation of a two tier system could be discouraged through the creation of disincentives to appeal every case. For example requiring the deposit of a bond might be one way of resolving this potential problem.

- Re-politicisation of the system of international investment arbitration

The de-politicisation of the system is regarded as one of the greatest achievements of the system of international investment arbitration, which was

¹⁰³ *Ibid.*

¹⁰⁴ I Penusliski, 'A dispute systems design diagnosis of ICSID' in M Waibel et al (eds), *The Backlash Against Investment Arbitration: perceptions and Reality* (Kluwer 2010) 530.

¹⁰⁵ *Ibid.*

largely facilitated by organised dispute settlement.¹⁰⁶ Before the advent of arbitration, international disputes that arose often escalated to physical conflicts which became political in nature, and ultimately harmed international relations.¹⁰⁷ International investment arbitration also contributed to the de-politicisation of dispute settlement by providing means for investors to bypass often biased home state courts and allowing access to neutral, independent international tribunals.¹⁰⁸ It is alleged that the establishment of an appellate mechanism might re-politicise the system by encouraging states that are unsuccessful at first instance to automatically appeal the award. It is expected that losing states will always attempt an appeal in order to gain popularity with their citizens.¹⁰⁹ If this were to happen, it would be states that would stand to gain the most from the introduction of an appeal mechanism potentially weighted in their favour. However, it must be noted that experts have responded to this criticism, arguing that statistics do not show any difference the number of cases won and lost by states and investors respectively.¹¹⁰ Thus, the assertion that states would have more opportunity to appeal is not substantiated by the relevant statistics. Furthermore, automatic appeal could be discouraged through a number of disincentives, such as the requiring of a deposit of a security bond towards the cost of the appeal before initiation of the appeal.

- The solution could be worse than the problem

A few scholars have suggested that the establishment of an appellate mechanism could do more harm than good.¹¹¹ For example, Legum muses that, 'the cure...could be far worse than the disease'¹¹², and that introducing the

¹⁰⁶ K Yannaca-Small, 'Improving the system of investor-state dispute settlement: an overview' (n 61).

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ S Franck, 'International investment arbitration: winning, losing and why' (2009) <<http://www.vcc.columbia.edu/content/international-investment-arbitration-winning-losing-and-why>> accessed 27 February 2012.

¹¹¹ See for example B Legum, 'Options to establish an appellate mechanism for investment arbitration' (n 3) 231-240 and J Paulsson, 'Avoiding unintended consequences' (n 3) 267-280.

¹¹² *Ibid.*, B Legum.

wrong sort of appellate mechanism could 'do a tremendous amount of damage'¹¹³. Paulsson¹¹⁴ is of a similar opinion to Legum.

6.4 Practicalities of establishing an appeal mechanism

Having carefully considered the various advantages and disadvantages of establishing an appeal mechanism in international investment arbitration, it seems that the benefits would outweigh the burdens. Having concluded that the creation of an appellate mechanism would be beneficial to international investment arbitration for several important reasons, the next logical step is to consider how such a mechanism might best be established. A number of suggestions have been made in this regard, the most prominent of which will be discussed below.

6.4.1 An appeal mechanism incorporated into the ICSID framework

The possible incorporation of an appeals facility into the ICSID Convention has arguably been the most seriously debated of all the suggestions. As has been discussed earlier in this chapter, the ICSID Secretariat itself considered the possibility of creating an ICSID appeals facility. In its 2004 Discussion Paper¹¹⁵ which focused on possible improvements to the ICSID framework for arbitration, the possibility of creating an ICSID appeals facility was discussed. The Discussion Paper acknowledges the fact that much interest has been shown in the possible creation of an ICSID appeals facility, with several treaties having been concluded by ICSID member states which include provisions making reference to such a mechanism.¹¹⁶ The Paper notes that the one of the central arguments in favour of the creation of an appeals facility is that it would 'be intended to foster coherence and consistency in the case law emerging under investment treaties.'¹¹⁷ However, the Secretariat feels that, 'significant inconsistencies have not to date been a general feature of the

¹¹³ *Ibid.*

¹¹⁴ J Paulsson, 'Avoiding unintended consequences' (n 3) 267-280.

¹¹⁵ 'Possible Improvements of the Framework for ICSID Arbitration' (n 6).

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

jurisprudence of ICSID.¹¹⁸ The Paper goes on to warn that an appeals facility could be detrimental to the ICSID framework, causing fragmentation in the ICSID arbitral regimes (where for example some arbitrations would be subject to the mechanism, and others would not). The Paper goes on to state that another detrimental effect would be the detracting from the finality of the award and causing delays in enforcement.¹¹⁹

However, the Secretariat does recognise that although inconsistencies have not been a problem as of yet, there is certainly scope for inconsistencies in the case law to develop in the future. This is especially the case given the increased caseload and the fact that disputes may be submitted to different ICSID and non-ICSID forms of arbitration. The Secretariat also notes that as regards to fragmentation, this may already be a problem as there are already multiple forms of ICSID arbitration. The Secretariat points out that the creation of an appeals facility would extend a further dispute settlement option to interested parties; this might enhance the acceptability and legitimacy of investor-state arbitration.¹²⁰

The Discussion Paper goes on to highlight an interesting problem; the potential for the multiplicity of appeals facilities. If a number of different appeal mechanisms are created, this would seem to run counter to the achievement of the objectives of consistency and coherence. The Secretariat suggests that the achievement of said objectives might be better served by the establishment of a single appeal mechanism under the auspices of ICSID, and it would be 'on this assumption that the Centre might pursue the creation of such an...appeals facility at this stage.'¹²¹

The Discussion Paper seems largely positive about the creation of an ICSID appeals facility; though several years later it is yet to be established. In 2005, a follow-up Working Paper¹²² was issued by the ICSID Secretariat which might explain why the establishment of an ICSID appeals facility has to date, not been pursued. The Working Paper represented a summary of the comments submitted to the Secretariat in response to the original 2004

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² 'Suggested Changes to the ICSID Rules and Regulations' (n 6).

Discussion Paper. The Working Paper agrees that if an appeals facility is to be created, it would be best achieved through a single mechanism. It then goes on to say that, 'most [member states who submitted comments]... considered that it would be premature to attempt to establish such an ICSID mechanism at this stage, particular in view of the difficult technical and policy issues raised in the Discussion Paper.'¹²³ The Working Paper concludes that, 'the secretariat will continue to study such issues to assist member countries when and if it is decided to proceed towards the establishment of an ICSID appeal mechanism.'¹²⁴ The Working Paper comments showed support for the notion of introducing an appeal mechanism under the auspices of ICSID, with many commentators agreeing that an appeals facility would be best established through ICSID, as opposed to different means. Nevertheless, general consensus also appeared to show hesitancy towards the creation of an appeal mechanism at that time, due to the cost concerns of many developing nations.¹²⁵ Accordingly, the proposal was promptly abandoned.¹²⁶ Consequently, there are no current plans to introduce an appeal mechanism into the ICSID Convention.

In recent months there has been some discussion of a background paper being prepared by the ICSID Secretariat. The paper will focus on reviewing the ICSID annulment procedure, with a view to introducing reforms to the process depending on the findings of the analysis.¹²⁷

Many commentators have offered their opinions on the subject of a possible appeals facility being incorporated into the ICSID framework; opinion appears to be quite divided on the issue. Many experts have asserted that an ICSID appellate mechanism would be beneficial; arguing that having a permanent body of experts in the field of international investment might remedy the problems of consistency in investment jurisprudence, which would in turn

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ C Tams, 'Is there a need for an ICSID appellate structure?' (2004)

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341268> accessed 18 January 2011.

¹²⁷ 'Investment Arbitration Reporter: ICSID to prepare background paper on annulment process, following request by Philippines; German investor criticises efforts b Philippines <http://www.iareporter.com/articles/20111005_1> accessed 3 February 2012.

enhance the level of predictability in ICSID arbitration.¹²⁸ Additionally, 'perhaps more importantly, an appellate body might be able to perform a systematic function by observing the developments in international investment law and policy and analysing the underlying issues that threaten the system.'¹²⁹

Tams also asserts that the introduction of a second tier of dispute settlement within ICSID will ensure that the 'correct' decision is reached, thus enhancing the accuracy of decisions.¹³⁰ Additionally, setting up an ICSID appeals facility might increase the authority of international investment awards.¹³¹

Despite the potential advantages of an ICSID appeals facility, some scholars have raised concerns about the possibility. Subjecting awards to appeal will undoubtedly involve lengthening the process of ICSID arbitration; 'the more steps there are in ICSID arbitration, the longer and more expensive the process will be, and thus fewer stakeholders would be able to appear before the appellate body.'¹³² An ICSID appeals facility would also have negative consequences on the finality of the award, and there is a risk of creating a permanent two-tier system. Losing parties might launch appeals as a matter of routine, thus diminishing the value of the award at first instance.¹³³ Some experts have argued that the need for an appeal mechanism in international investment law has not been established. Paulsson believes that there is no problem with the consistency and coherence of decisions, and that inconsistent decisions occur less frequently than we might have been led to believe. Paulsson goes on to say that even if inconsistencies did occur, we should not be alarmed by this, as inconsistencies will naturally disappear as one solution is routinely favoured over another.¹³⁴ Tams also points out that it may not be politically feasible to introduce an appeals facility into the ICSID framework and that non-consenting member states could halt the proposal from the outset.¹³⁵

¹²⁸ I Penusliski, 'A dispute systems design diagnosis of ICSID' (n 104) 530 and C Tams, 'Is there a need for an ICSID appellate structure?' (n 126).

¹²⁹ I Penusliski, 'A dispute systems design diagnosis of ICSID' (n 104) 530.

¹³⁰ C Tams, 'Is there a need for an ICSID appellate structure?' (n 126).

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ I Penusliski, 'A dispute systems design diagnosis of ICSID' (n 104) 531.

¹³⁴ J Paulsson, 'Avoiding unintended consequences' (n 3) 241-266.

¹³⁵ C Tams, 'Is there a need for an ICSID appellate structure?' (n 126).

With a lack of consensus regarding the possibility of establishing an ICSID appeals facility, things seem to be at an impasse. In order for progress to be made in this regard, Penusliski¹³⁶ suggests that a move to create a future ICSID appeals body must take into account the considerations set out above. The appellate body must be creatively integrated into the ICSID framework in order that it improves the overall system. In order to address some of the concerns that have been voiced, appeal could be limited to a certain number of grounds, the appellant could be asked to provide collateral for the costs of the appeal, and decisions of the appellate body could be mandatorily published.¹³⁷

6.4.2 Making use of the World Trade Organisation's Appellate Body

The idea of increasing the role of the WTO's dispute settlement body in the settlement of international investment disputes more generally was examined thoroughly in the previous chapter (as one of the suggested improvements to the system of international investment arbitration). A number of advantages of increasing the WTO's role in the settlement of international investment disputes were identified, such as the potential to create a 'transparent, stable and predictable framework for investment.'¹³⁸ However, a number of potential disadvantages or concerns were also highlighted, including the bodies' lack of capacity to cope with the undoubted influx of investment disputes at present. Although this could be relatively easily remedied with the provision of extra resources, a more valid concern might be the implications of allowing private individuals (investors) standing before the WTO DSB. At present, in trade-related disputes, the WTO DSB is able to examine cases between two state parties only. By nature, investment disputes usually involve a state party and a private investor, thus enabling the WTO DSB to settle investment disputes would mean giving private individuals standing. The implications of this should not be underestimated; before long private individuals

¹³⁶ I Penusliski, 'A dispute systems design diagnosis of ICSID' (n 104) 530.

¹³⁷ *Ibid.*

¹³⁸ See 'Report of the Working Group on the Relationship between Trade and Investment to the General Council of the WTO' WT/WGTI/6 (2002) <http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28%28+%40meta%5FSymbol+%28WT%FCWGTI%FC%2A%29+and+not+%28W+or+M%29%29+and+%28%40meta%5FTypes+Report%29%29+&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FWGTI%2F6%2EDOC%2EHTM&curdoc=6&popTitle=WT%2FWGTI%2F6> accessed 9 February 2012.

would surely demand locus standi in all matters, including trade disputes. It would be difficult for the WTO to deny such access to the DSB in trade disputes if private investors were to be granted access in investment disputes. This would undoubtedly cause a huge increase in the WTO DSB's caseload, which would require significant budgetary expansion. Considering the cost of the WTO DSB is borne by the member states, requests for additional funds are likely to be met with a negative response (especially in such economically difficult times), and particularly from developing nations with less funds at their disposal.¹³⁹

An alternative to increasing the role of the WTO DSB to such a large extent so as to include access to all its facilities in international investment disputes, could be to allow access to the appeals facility only. To present knowledge, this possibility has never been examined. As such, it is very difficult to comment on how simply granting appeal to the WTO DSB appellate panel might work. Perhaps the appellate body could review awards rendered by the many different international investment tribunals in existence and provide a central, overarching interpretative mechanism, or perhaps it might function as one of many different options for appeal. In any case, simply granting access to the WTO appellate mechanism might not be the most appropriate method of integrating an appeals facility; it would do little to simplify the already over-complicated system of international investment arbitration, perhaps only serving to add a further layer of confusion. This proposition would therefore require serious consideration from a practical point of view. Furthermore, appeal of investment decisions to the WTO appellate body would obviously lead to a significant increase in the workload of the body. This could have huge resource and funding implications.

6.4.3 An appeals facility added to existing international investment arbitral mechanisms which would be ring-fenced from other systems

It could be the case that the introduction of an appeal in international investment arbitration could be driven by the insertion of new or revised clauses

¹³⁹ For discussion of the possibility of the WTO DSB settling international investment disputes see S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 63) 209-211.

to that effect into existing or newly negotiated BITs and other investment agreements. For example, Article 28(1) of the US model BIT of 2004 required parties to 'strive to reach an agreement'¹⁴⁰ for appellate review in the event that a multilateral investment treaty was negotiated. However, the US model BIT of 2012¹⁴¹ states that the parties to the BIT should 'consider'¹⁴² whether arbitral awards rendered under the BIT should be subject to any such new appeal mechanism that may be created in the future. The newer BIT is noticeably less committed to the creation of an appeal mechanism than its predecessor.

Nonetheless, the establishment of an appeal mechanism could be driven by the insertion of such clauses into new and existing BITS. If this is the case, appeal would not operate under a multilateral investment framework, therefore it is unlikely that one single appellate body would be created. Instead, an extra appellate layer of arbitration to existing arbitral mechanisms under each of the different treaties concerned. Qureshi explains that such a system would provide greater transparency, equity and facilitate a move towards a rules-orientated system of adjudication.¹⁴³ Qureshi asserts that there has been general support for the introduction of such an appeal mechanism, with UNCTAD canvassing support for it.¹⁴⁴ Perhaps the biggest advantage of this proposal is simplicity; it would simply require the augmentation of dispute settlement procedures and practices that are already in existence, rather than requiring the creation of new ones. An additional benefit is that it would leave the parties to existing individual investment agreements to decide whether to incorporate into them the appellate procedure. Such a mechanism would achieve the goal of instituting appeal and correcting mistakes that may have been made at first instance. Moreover, a similar approach has been suggested in other fields; in double taxation agreements for example, the OECD proposed the introduction of an appellate mechanism be added on to the Mutual Agreement Procedure. Qureshi does concede that there are drawbacks to the suggestion which he summarises well;

¹⁴⁰ US Model BIT 2004 <<http://www.state.gov/documents/organization/117601.pdf>> accessed 12 January 2013

¹⁴¹ US Model BIT 2012
<<http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>> accessed 12 January 2013

¹⁴² *Ibid*

¹⁴³ A Qureshi, 'An appellate system in international investment arbitration' (n 54) 1160.

¹⁴⁴ UNCTAD *World Investment Report* (United Nations 2003) as cited in Qureshi, *ibid*.

It would...seem to run counter to the objectives of coherence and consistency for different appeal mechanisms to be set up under each treaty concerned. Efficiency and economy, as well as coherence and consistency, might best be served by ICSID offering a single appeal mechanism as an alternative to multiple mechanisms.¹⁴⁵

Thus, the establishment of an appeal mechanism in this way would have several likely consequences. On a positive note, it is probably the simplest method of establishing an appeal mechanism as it would not require a new world investment organisation, nor would it require the negotiation of a multilateral framework. Furthermore, it would enable incorrect first instance decisions to be corrected. However, an appeal mechanism established in this way would not lead to greater consistency and coherence in international investment arbitration (as each appeal tribunal would be free to reach whatever decision it sees fit). The problem of multiplicity of fora and forum shopping would not be solved. In fact, establishing appeal in international investment arbitration in this way could actually lead to greater fragmentation.

6.4.4 A world investment court

Some commentators believe that the existing institutions (for example ICSID or UNCITRAL) do not have the capacity to, nor are capable of incorporating an appeal mechanism. Subedi asserts that, 'the new developments within foreign investment law...call for a balancing act on the part of dispute settlement mechanisms in order to reconcile the competing interests and principles.'¹⁴⁶ Subedi casts doubts over the capability of existing institutions of rising to such a huge challenge. Mann and Moltke agree that existing dispute settlement institutions 'were not designed to address complex issues of public policy that now routinely come into play in investor-state disputes.'¹⁴⁷ It has also been suggested that the ICJ could be called upon to settle investment disputes. However, this is a dubious proposition because the ICJ's mandate allows it to settle state-state disputes currently. Investment disputes typically involve one

¹⁴⁵ *Ibid.*

¹⁴⁶ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 63) 208.

¹⁴⁷ H Mann and K von Moltke, 'A southern agenda on investment? Promoting development with balanced rights and obligations for investors, host states and home states' (2005) IISD as cited in Subedi, *ibid.*

state party and one private party, thus this would be impossible for the ICJ at present.

So, if existing dispute settlement institutions are incapable of implementing a successful appeals mechanism, what may be required is a completely new institution; a quasi-judicial body akin to a world investment court.

The question is then, how can this world investment court be established? There is no simple answer. Different authors have put forward different proposals as to how a world investment court could be established and how it should function. Van Harten has articulated his views on the matter in great detail.¹⁴⁸ He believes that the way forward is to encourage states 'to support a multilateral code that would establish an international court with comprehensive jurisdiction over the adjudication of investor claims.'¹⁴⁹ He goes on to state that the newly created world investment court he envisages would ideally have obligatory jurisdiction over all claims filed by investors in the first instance, where the states involved were members to the multilateral code. According to Van Harten, a less desirable option would be to give the world investment court only appellate jurisdiction over the awards rendered by the numerous different tribunals already in existence. Turning his attention to the staffing of the court, the author asserts that twelve or fifteen judges would be required, and that they should be appointed by states for 'a set term based on the model of other international courts.'¹⁵⁰ Being staffed in this way would enable the court to ensure the independence of its judges, and the number of judges would allow several three-judge panels to sit simultaneously in order to keep up with the increased demand which has been witnessed in investment arbitration. The judges would be selected to hear cases on a rotating basis by the court's president or by random assignment. If the impartiality of a judge is challenged, the other members of the court will pronounce on the matter. As with other international courts, the judges of the world investment court would be prohibited from taking part in activities that might be deemed incompatible with their professional duties and which may compromise their independence. Van Harten then turns to discussing matters of procedure. The author states that the

¹⁴⁸ G Van Harten, *Investment Treaty Arbitration and Public Law* (n 63) 179.

¹⁴⁹ *Ibid* 180.

¹⁵⁰ *Ibid*.

court's first instance decision would be appealable to a 'special assembly of the court, representing a majority of its members.'¹⁵¹

He does go on to say that the world investment court's awards should be enforceable under the ICSID Convention¹⁵² as well as the New York Convention¹⁵³. This would mean that awards would be subject to review by national courts. Practically speaking, there would be no need to designate a seat of arbitration for each claim because the court would be an international court rather than an ad hoc tribunal, though it would not be problematic to have to do so,

considering that domestic courts have thus far deferred to investment treaty tribunals and that the courts in the place of enforcement could enforce an award even if it was set aside in the seat of arbitration. Above all, the decision where to locate claims for purposes of domestic court review would be made by an independent judicial body.¹⁵⁴

The final section of Van Harten's discussion focuses on the prospects for the future of his proposal, essentially, the likelihood of its chances of success. The author believes that capital-importing countries would benefit from an international court in which they would have real influence in the process of the appointment of arbitrators, as opposed 'to a system of private arbitration, biased against host governments, in which they have little say at all.'¹⁵⁵ For the major capital-exporting states, the proposal 'asks them to sacrifice little in exchange for an international judicial body that is more likely to have political staying power than the current system.'¹⁵⁶ Van Harten does recognise one potential criticism of his proposal; multiplication of international courts. The author responds by pointing out that the creation of a world investment court would consolidate hundreds of tribunals, even if it stops short of becoming the only investment tribunal in the world. He believes that such a world investment court would be open, accountable, consistent and independent, and for those reasons it is worthy of state support. Ultimately though, the court can only be created if the key state players in international investment law prioritise the

¹⁵¹ *Ibid* 181.

¹⁵² Convention for the Settlement of International Investment Disputes (n 12).

¹⁵³ New York Convention (n 13).

¹⁵⁴ G Van Harten, *Investment Treaty Arbitration and Public Law* (n 63) 180.

¹⁵⁵ *Ibid* 183.

¹⁵⁶ *Ibid*.

reform of the system, 'not so much because it fits their particular interests...but because they wish to defend long-cherished principles of judging in public law.'¹⁵⁷

Qureshi examines the possibility of establishing a supreme investment court, suggesting that such a court could either be set up as an independent institution, or as a chamber of the ICJ. The ICJ suggestion would be a non-starter due to the reasons of its mandate as discussed above.¹⁵⁸

As has been seen, several international investment experts have articulated their views about the creation of a world investment court. Suggestions range from (relatively) modest plans to incorporate a world investment court that might function within the current framework of the system of international investment law, to more drastic proposals which would involve a radical overhaul of the entire system of international investment law. A detailed analysis of the current system of international investment arbitration (in earlier chapters) has revealed a number of fundamental flaws. The evidence suggests that the time for minor changes and tweaks to the system has passed; international investment law is at a crossroads. In order to create an optimally functioning overall system, what is required is the creation of a new international organisation which supervises and facilitates international investment; the investment equivalent of the WTO which carries out the same duties in respect of international trade. This new institution could then initiate the negotiation of a multilateral investment treaty. The multilateral treaty could replace the current law which consists of an awkward blend of customary international law rules and bilateral investment treaties. Having a global investment treaty would mean that all the investment rules would be found in one place, making them much more accessible and clearer. The multilateral treaty would also incorporate a dispute settlement mechanism, consisting of a single tribunal which would be solely responsible for the settlement of all international investment related disputes. The single investment tribunal would replace the numerous tribunals in existence which currently deal with investment disputes. Having one forum for the settlement of investment disputes will alleviate many of the problems associated with the current system of international investment arbitration, such

¹⁵⁷ *Ibid* 184.

¹⁵⁸ A Qureshi, 'An appellate system in international investment arbitration?' (n 54) 1165.

as inconsistency, incoherence, and a lack of legitimacy. The single dispute settlement body could also incorporate a dedicated appeals facility. This vision of the future of international investment arbitration would seem to be supported by Van Harten.¹⁵⁹

The creation of a world investment court with an appellate mechanism, as detailed in the preceding paragraph would be no mean feat. It would involve the creation of a new global institution as well a multilateral treaty. Legitimate concerns about the feasibility of successfully undertaking such an endeavour would inevitably be raised. Indeed, such concerns have been raised in the past, with global institutions being branded 'politically unfashionable, perhaps to the point of being unfeasible.'¹⁶⁰

6.5 Conclusion

This chapter has examined in great detail the possibility of establishing an appeal mechanism in international investment arbitration. As has been seen, there is already some scope for the review of international investment law awards through a number of different means, depending on whether the award has been rendered through ICSID or non-ICSID arbitration. The ICSID convention does itself provide for the annulment of awards, but only if there has been some procedural deficiency. In non-ICSID arbitration, awards made in international investment disputes can be challenged under the national law of the seat of the arbitration, under the New York Convention or under some other international treaties. Again, the opportunity for review is often limited to situations where there has been some abuse of process, rather than providing substantive review of decisions on their merits. In short, the opportunities available to parties to seek review in international investment arbitration are rather limited. The lack of substantive review in international investment arbitration is in large part due to the prominence of the principle of finality which has long been regarded as one its fundamental pillars. Finality is thought to promote efficient, cost effective investment dispute settlement. In international investment dispute settlement, finality has traditionally been favoured over the principle of correctness and justice. However, this traditional balance of favour might have run its course; perhaps it is time to give greater emphasis to

¹⁵⁹ G Van Harten, *Investment Treaty Arbitration and Public Law* (n 63) 180-183.

¹⁶⁰ M Goldhaber, 'Wanted: a world investment court' (n 2).

correctness and justice at the expense of the principle of finality. Ensuring justice, as well as greater consistency and coherence would be some of the greatest potential advantages of the establishment of an appeal mechanism in international investment arbitration. This chapter has discussed these potential advantages and indeed others in great depth, highlighting that the establishment of an appellate mechanism could remedy many of the problems associated with the system of international investment law (as discussed in previous chapters) and furthermore, significantly improve the system. The chapter has also emphasised that there is considerable support for the suggestion to introduce an appeal facility in international investment arbitration from many experts in the field of international investment law.

Despite the numerous purported benefits of the establishment of an appeals mechanism and the amount of support for such a mechanism from prominent international investment law experts, others have questioned the basis of the call for such an appeals facility, and contended that there might be important disadvantages to its establishment. Concerns about fragmentation, increase in caseload, politicisation of the system et cetera have been raised. In my opinion, such concerns might be legitimate, however, many of the alleged potential disadvantages or problems associated with the establishment of an appeals mechanism could be minimised or completely avoided by carefully considering how the appellate facility might best be introduced. The appeals facility would need to be carefully crafted in order that it should bring about all the purported benefits, but also avoid the potential disadvantages about which concerns have been raised. For example, fragmentation could be avoided by making all international investment awards potentially subject to review by the appeals facility. Costs and delay can be kept to a minimum by ensuring strict deadlines are adhered to as part of a streamlined, efficient appeals process. Finally, the anticipated increase in caseload and automatic appeal of every case could be avoided by requiring the deposit of a bond as security for the appeal.

What is clear then is that the establishment of an appellate mechanism in international investment arbitration would need to be carefully considered. The manner in which the appeals process is introduced and how it would function are central to the success of the future appellate facility. Several different methods of establishing an appeal mechanism in international investment law

have been identified and discussed to varying lengths. Undoubtedly the most publicised of these methods is the introduction of appeal mechanism in international investment arbitration under the auspices of ICSID. There has been much debate about this possibility from international investment experts, academics and even the ICSID Secretariat itself. Ultimately, ICSID determined that instituting an appeals process under its framework for arbitration might be a positive future step, but that this would only be considered if an ICSID appeal mechanism would be the only appeals facility in international investment arbitration.¹⁶¹ The ICSID Secretariat felt that an ICSID appeals facility amongst several other investment arbitration appeals facilities would not remedy the current problems associated with international investment arbitration, in particular the often cited problem of inconsistency and incoherence. The operation of several appeal mechanisms would only result in more inconsistency and incoherence.

Other methods of introducing an appeal mechanism into international investment arbitration have also been discussed. For example, making use of the WTO's dispute settlement appellate body has been suggested. Though ultimately, this would probably be unfeasible due to complications involving access to the tribunal and problems regarding the locus standi of private individuals as investors. Another appellate possibility which has been discussed is simply adding an extra layer to the numerous already existing arbitral procedures. This would undoubtedly be the simplest of all the methods to introduce, as it would simply require the augmentation of existing dispute settlement facilities. However, the introduction of several different appeal mechanisms would do little to resolve the issues of inconsistency and incoherence in international investment arbitration.

A final suggestion which has been put forward is to introduce a supreme international investment 'world court'. This general concept has been advocated by several prominent international investment law experts, whom have each provided ideas about how such a court could be introduced and how it might function. However the court would be established, its creation would require a significant overhaul of the system of international investment law and arbitration. For this reason, some commentators have branded the creation of such a court

¹⁶¹ 'Possible improvements to the framework of ICSID arbitration' (n 6).

as unfeasible. The establishment of a world investment court would certainly not be easy to achieve, however it is certainly not impossible to accomplish. The starting point for the establishment of such a court would have to be the negotiation of a multilateral investment treaty which would provide a clear, coherent and detailed framework for international investment law, which up to present has been lacking due to the existence of the thousands upon thousands of bilateral investment treaties and agreements. It must be acknowledged that previous attempts to negotiate multilateral investment treaties have failed. The reasons for these failures would obviously need to be addressed before any further negotiations may take place. One of the main reasons for the failure of multilateral negotiations was developing nations' concerns about being pressurised into agreeing to potentially detrimental obligations (with developing nations typically being the capital importing investment host state in international investment). Developing nations were concerned that any future multilateral investment agreement should not become a vehicle for the protection of investment and investors to their detriment. Another concern of developing nations was the forum for the negotiation of the multilateral agreement, with the WTO for example being perceived as biased towards richer nations. It will therefore be necessary to create a completely new institution, a WTO for the investment sphere perhaps, in order to initiate the negotiations for a multilateral investment agreement. The newly negotiated agreement would contain provisions for the creation of a world investment court, which functions in a way similar to the WTO's dispute settlement body, and which of course would integrate an appellate process.

CHAPTER VII: COULD ANY EXISTING DISPUTE SETTLEMENT MECHANISMS ACT AS A MODEL FOR INTERNATIONAL INVESTMENT ARBITRATION?

7.1 Introduction

The previous chapter examined the proposal to establish an appeal mechanism in international investment arbitration in great depth. Having concluded that the introduction of an appellate process would be a positive step for international investment law, the chapter proceeded to consider how such a process might best be integrated into investment arbitration. Numerous suggestions were examined in this regard, including the possibility of establishing an appeal mechanism under the auspices of the ICSID framework, incorporating an appeal process into the various existing tribunals, and creating a world investment court. It is clear that the establishment of an appellate mechanism will not be easily accomplished, and there are many important considerations which will need to be taken into account. Bearing this in mind, it may be easier and quicker to model reforms of the system of international investment arbitration on an existing dispute settlement mechanism.

In the past, a handful of experts have suggested that the dispute settlement system of the WTO could serve as a model for international investment arbitration. Although this has been proposed by some academics, there is relatively little literature on the proposition itself.¹ This chapter seeks to explore this suggestion in greater depth, examining the WTO's DSB and indeed several other international and regional dispute settlement mechanisms and institutions, considering whether any of these could serve as a model for international investment arbitration.

The chapter will consider the dispute settlement mechanisms of the WTO, ICSID, WIPO, the International Tribunal for the Law of the Sea, the ICJ, PCA, ASEAN, Mercosur, NAFTA, and the EU. A brief overview of the functioning of

¹ See for example A Qureshi, 'Perspectives on the establishment of an appellate process' in F Ortino et al (eds), *Investment Treaty Law: Current Issues Volume 1* (British Institute of International and Comparative Legal Studies 2006) and S Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008) 208.

each of the dispute settlement mechanisms will be given, followed by an evaluation of each of them. Having given a brief overview and evaluation of each institution, the final section of this chapter will reflect on whether any of the international or regional dispute settlement institutions that have been discussed could act as a model for international investment arbitration.

7.2 International dispute settlement mechanisms

7.2.1 World Trade Organisation Dispute Settlement Body

i) Overview

Before the WTO came into existence, the General Agreement on Tariffs and Trade (GATT)² regulated certain aspects of trade. The old GATT agreement also provided a primitive dispute settlement process which was called upon to settle trade disputes. However, the dispute settlement system itself was of limited utility because of the length of the process; cases could, and often did drag on for a number of years. Furthermore, the losing state could easily block an unfavourable ruling, making the dispute settlement process entirely redundant. It is fair to say that the GATT dispute settlement process was ineffective and inefficient.³

Following the eighth round of negotiations of the GATT (known as the Uruguay round), the WTO came into being. The WTO was formally established on 1st January 1995⁴, and at present has 157 member states⁵. The WTO is responsible for the supervision and liberalisation of world trade.⁶ In order to carry out its mandate, the WTO performs many functions; from administering

² General Agreement on Tariffs and Trade 1947 (full text) available at <http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm> accessed 25 August 2012.

³ See W Davey, 'Dispute settlement in GATT' (1987) 11 *Fordham International Law Journal* 51 and R Read, 'Dispute settlement, compensation and retaliation under the WTO' in W Kerr and J Gaisford (eds), *Handbook on International Trade Policy* (Edward Elgar Publishing 2007) 497.

⁴ 'Understanding the WTO: who we are' <http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm> accessed 28 September 2011.

⁵ 'Understanding the WTO: the organization, members and observers' <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 15 August 2012.

⁶ 'Uruguay Round' <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm> accessed 28 July 2009.

WTO agreements, providing a forum for trade negotiations, monitoring national trade policies, providing technical assistance to lesser developed nations, co-operating with other international organisations and handling any trade disputes that may arise.⁷ The settlement of trade disputes is seen as an essential aspect of the WTO's work in order to ensure the proper functioning of the system as a whole, and is often referred to as the 'central pillar of the multilateral trading system'⁸. Trade disputes arise when one member state alleges that another has breached its WTO obligations.⁹ Dispute settlement is required in order to make sure that the WTO rules and obligations are enforced, because if the rules were not enforced the whole system would be rendered useless.¹⁰

The WTO dispute settlement mechanism strives to ensure that the settlement of any disputes that arise is equitable, fast, effective and mutually acceptable.¹¹ Disputes typically arise out of broken promises or breaches of obligations. WTO member states agreed that if they believe a fellow member state has violated the trade rules under the WTO agreements, they will take action through the dispute settlement system (rather than act unilaterally outside of the WTO). This means that members agree to follow designated dispute settlement procedures and abide by any decisions made during that process.¹²

Settling trade disputes is the responsibility of the dispute settlement body (DSB, basically the General Council), which consists of all 157 WTO members. It is the dispute settlement body which has the sole authority to establish panels of experts to consider the case and it is the DSB which must either accept or reject the panel's findings or the result of the appeal. The DSB must also monitor the implementation and enforcement of decisions and it has the power to authorise retaliation in cases of non-compliance with the decision.¹³

⁷ 'Understanding the WTO: who we are' (n 4).

⁸ 'Understanding the WTO settling disputes: a unique contribution' <http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed 28 July 2009.

⁹ 'WTO: dispute settlement' <http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm> accessed 25 August 2012.

¹⁰ 'Understanding the WTO settling disputes: a unique contribution' (n 8)

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

The first formal stage of the dispute settlement procedure is consultation. A process which may take up to 60 days, consultation requires the two disputing parties to engage in dialogue in order to try to sort the dispute out between themselves. The complaining state must notify the responding member and also the WTO DSB if it wishes to start consultations. If the responding state does not reply, the complaining member has direct access to panel proceedings. If consultation takes place but the discussions fail, the parties are entitled to ask the WTO Director-General to mediate or help in any other constructive way.¹⁴

If consultation and mediation is unsuccessful, the second stage of formal procedure is the panel stage. The complaining state must ask for a panel to be appointed, which must be completed within a 45 day period. The defendant country is able to block the constitution of the panel once, but the second constitution is undisputable. Panels usually consist of three (sometimes five) experts who are appointed to examine evidence and decide which party is right and which party is wrong. Panellists are chosen from a pool of experts usually nominated by WTO members. Panellists are not affiliated with any government; they are appointed to serve in their individual capacity. Panellists must be impartial and knowledgeable. The panel collectively produces a report which is then passed onto the DSB, which can either accept the report or reject it by consensus. The preparation of the panel's report is based on written submissions by the parties and oral hearings. The panel officially assists the DSB in settling the dispute, however, the requirement of consensus means that panel decisions are practically very difficult to overturn. The panel's report is usually completed and delivered to the parties within 6 months (though in some cases, such as with perishable goods, this deadline is reduced to 3 months). The report is then circulated to all member states. If the report finds that the WTO rules have been broken, it recommends that measures are taken to ensure compatibility and sometimes the panel may make suggestions as to how this may be achieved. The report automatically becomes the ruling of the DSB within 60 days, unless it is rejected by consensus.¹⁵

The final stage of the WTO dispute settlement process is appeal. The original panel's report may be appealed by one or both parties. Appeals must

¹⁴ *Ibid.*

¹⁵ *Ibid.*

be based on points of law only; existing evidence or new issues cannot be examined. The appeal is heard by three members of an appellate body which consists of seven permanent members. The seven members are chosen so that they broadly represent the range of WTO membership and each serve four year terms. The seven members have to be veritable experts in the fields of international trade and law and they must not be affiliated with any government. The three members of the appellate panel can choose to uphold, modify or reverse the findings and conclusions of the original panel. Appeals must normally be fully completed within 60 days, though they may exceptionally take up to a maximum of 90 days. Once the appeal report is completed, the DSB has 30 days to accept or reject the decision, and once again, rejection is only possible by consensus.¹⁶

After the dispute settlement process has been completed and the case has been concluded, if the defendant state is found to be at fault, it must remedy the situation by ensuring that the measure or measures in question are adapted or removed so that the state is not in breach of its WTO obligations. If the state does not immediately remedy the problem and continues to breach WTO obligations, it should offer compensation or suffer some other suitable penalty (such as trade sanctions). Compensation normally takes the form of tariff reductions and is voluntary (as the suspension of concessions is the usual punishment). The state is usually given a reasonable amount of time to remedy the situation before compensation is due or trade sanctions are applied. The DSB will monitor the implementation of its rulings in order to ensure that they are complied with. An outstanding case will remain on the DSB agenda until the issue is resolved.¹⁷

ii) Evaluation

The approach of the 10th anniversary of the establishment of the WTO brought about a period of reflection and evaluation of what the organisation had achieved and its general functioning. In 2003, Peter Sutherland chaired a committee which was established to generate a report on the operation of the

¹⁶ *Ibid.*

¹⁷ *Ibid.*

WTO in its first ten years. The Sutherland report¹⁸, as it became informally known, devoted an entire section to the functioning of the DSB. The report praised the DSB for its unique contribution to the WTO recognising the security and predictability that it fosters. Nevertheless, the report then went on to suggest that the DSB may be at a crossroads, and some reforms might be required improve on the work it had already done. The report suggested several areas which may need to be reformed, including the strengthening of the implementation procedures for DSB awards and the use of monetary compensation. A number of other reforms were also suggested.¹⁹

- Advantages

The Sutherland report, and indeed the tenth anniversary of its creation encouraged academics and other experts to weigh in on the achievements of the WTO DSB. In fact, Zimmermann²⁰ notes that the 'WTO dispute settlement system has attracted a remarkable amount of academic attention.'²¹ He goes on to say that, 'in this literature, the system received a particularly warm, if not enthusiastic welcome.'²² The DSB has been hailed as the 'crown jewel' or 'linchpin' of the multilateral trading system.²³

Accordingly, the dispute settlement mechanism is widely regarded as one of the WTO's biggest successes. During the first ten years of its existence, the WTO dispute settlement body (DSB) dealt with some 332 cases.²⁴ The high caseload is viewed as a sign of the dispute settlement mechanism's success,

There are strong grounds for arguing that the increasing number of disputes is simply the result of expanding world trade and the stricter rules negotiated in the

¹⁸ P Sutherland et al (Consultative Board of the WTO), 'The Future of the WTO: addressing institutional challenges in the new millennium' (2004) full text available at <http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf> accessed 25 August 2012.

¹⁹ *Ibid.*

²⁰ T Zimmermann, 'WTO Dispute Settlement at Ten: Evolution, Experiences and Evaluation' (2005) 60 *The Swiss Review of International Economic Relations* 27.

²¹ *Ibid.*

²² *Ibid.*

²³ R Bhala, 'The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)' (1999) 14 *American University International Law Review* 845, as cited in T Zimmermann (n 20).

²⁴ 'Understanding the WTO settling disputes: a unique contribution' (n 8).

Uruguay Round; and that the fact that more are coming to the WTO reflects a growing faith in the system.²⁵

Although the WTO dispute settlement system as a whole is highly praised by academics, a number of specific aspects of the system are particularly commended. Zimmermann cites the introduction of precise time limits throughout the dispute settlement process as one such aspect. Under the old GATT dispute settlement system, such precise time limits were not imposed, and accordingly disputes often dragged on for years. Additionally, the establishment of a permanent appellate body composed of highly-qualified lawyers was seen as an important contribution to 'improved legal quality of decisions and as a further step towards the rule of law in trade matters.'²⁶ Furthermore, Zimmermann states that the appellate mechanism was hailed as an ideal potential model for dispute settlement procedures in other areas of public international law.²⁷

Zimmerman's praise of the WTO appellate body has been echoed by many other commentators. It has generally been accepted that the appeal mechanism is one of the major successes of the WTO dispute settlement system. Ehlermann (a member of the WTO appellate body) believes that the appeal mechanism,

seems to me still today an extraordinary achievement that comes close to a miracle. It seems to be to be wise not to take its existence for granted, and to be guaranteed forever, but to contribute to its consolidation and further development in pursuing with circumspection and caution, but also with courage and in total independence , the road which has been taken, and which has proved so far to be a notable success.²⁸

Ehlermann is not the only proponent for the success of the appellate mechanism. Lockhart and Voon are of the opinion that 'appellate review in the WTO is working well,'²⁹ and that 'commentators have remarked on its

²⁵ *Ibid.*

²⁶ T Zimmermann, 'WTO Dispute Settlement at Ten: Evolution, Experiences and Evaluation' (n 20).

²⁷ *Ibid.*

²⁸ C Ehlermann, 'Reflections on the appellate body of the WTO' (2003) 6 *Journal of International Economic Law* 695.

²⁹ J Lockhart and T Voon, 'Review of the appellate review in the WTO dispute settlement system' (2005)

effectiveness and efficiency, and have complimented its contribution to the development of international trade law.³⁰

Similarly, Yanovich and Voon believe that the WTO dispute settlement system and the appellate body are generally regarded as having worked well over the last ten years.³¹

- Disadvantages

Zimmermann does however recognise that the WTO dispute settlement system is not perfect, and goes on to explain a number of its downfalls. He believes that the rate of compliance with DSB decisions is not 100%. The stringent compliance procedures imposed by the DSB do not guarantee its success rate. States will sometimes default from the decision, and tough enforcement procedures will never be enough to stop this. The biggest influence on states to comply under GATT was political pressure, and this will undoubtedly continue to be so under the WTO. This was highlighted by a number of high profile early cases such as the *EC - Bananas*³² and *EC - Hormones*³³ cases respectively.³⁴ Other problems cited include lack of respect for the deadlines imposed by the process itself, the lack of a remand procedure (which would enable the appellate body to return certain issues back to the panels for clarification), and a number of problems associated with developing countries wishing to play a more active role within the system.³⁵

Yanovich and Voon have also stated that there is one problem with the functioning of the appellate body at present; the practice of limiting appeals to issues of law. The authors argue that allowing the appellate body to consider

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931318> accessed 16 August 2009.

³⁰ *Ibid.*

³¹ A Yanovich and T Voon, 'Completing the analysis in WTO appeals: the practice and its limitations' (2006) 9 *Journal of International Economic Law* 933.

³² European Communities – Regime for the importation, sale and distribution of bananas (brought by Ecuador, Guatemala, Honduras, Mexico, and the U.S.) WT/DS27 as cited in T Zimmermann, 'WTO Dispute Settlement at Ten: Evolution, Experiences and Evaluation' (n 20).

³³ European Communities – Measures concerning meat and meat products (hormones) (brought by the U.S.) WT/DS26 as cited in T Zimmermann, *ibid* (n 20).

³⁴ *Ibid* T Zimmermann (n 20).

³⁵ *Ibid.*

both issues of law and fact, and introducing the possibility of remand might further enhance the WTO appeal process.³⁶

- Could the WTO serve as a model for international investment arbitration?

The WTO dispute settlement system is widely celebrated as one of the great successes of the multilateral trading system. The success of the WTO dispute settlement system has some experts wondering whether the system could serve as a model for international investment arbitration. Some academics have argued that the WTO framework of international trade law is similar enough to the framework of international investment law for a dispute settlement system such as that of the WTO to be successfully employed in international investment arbitration. For example, Subedi believes that the creation of a quasi-judicial body which would be responsible for the settlement of international investment disputes, and which would take on a role broadly similar in nature to the WTO's role in the settlement of international trade disputes, could be a positive step towards remedying some of the problems associated with international investment law and arbitration at present.³⁷ Dimsey is also an advocate for the idea that the WTO dispute settlement system could serve as a model for international investment arbitration. She asserts that the WTO dispute settlement system could provide an important source of inspiration for international investment arbitration.³⁸

Although the idea that the WTO system could serve as a model for international investment arbitration does have merit and is supported by a number of academics, other experts have expressed concern in this regard. For example, Qureshi believes that the WTO's dispute settlement system should not be viewed as a 'guiding star'³⁹ because doing so would mean 'presupposing that the investment field and trade field are the same'⁴⁰. For Qureshi, this presupposition would be incorrect; he views the investment sphere and trade

³⁶ A Yanovich and T Voon, 'Completing the analysis in WTO appeals: the practice and its limitations' (n 31).

³⁷ S Subedi, *International Investment Law: Reconciling Policy and Principle* (n 1) 208.

³⁸ M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven International Publishing 2008) 179-180.

³⁹ A Qureshi, 'Perspectives on the establishment of an appellate process' (n 1)

⁴⁰ *Ibid.*

sphere as too different, and that different considerations should be applied to the investment field.⁴¹

The central problem with the idea that the WTO dispute settlement system could serve as a model for international investment arbitration is that the framework of WTO law is highly centralised through the network of WTO multilateral agreements. International investment law on the other hand is highly decentralised, operating through thousands of individual BITs. For this reason, the WTO dispute settlement system might not be able to serve as a model for international investment arbitration; perhaps the multilateralism is key to the success of WTO dispute settlement system. In order for the WTO model to work in the field of international investment law, its framework may need to become more centralised like the WTO's. Essentially, a multilateral investment agreement would be required in order to utilise a dispute settlement mechanism modelled on the WTO's dispute settlement system.

7.2.2 International Centre for Settlement of Investment Disputes

i) Overview

Disputes being heard under the auspices of ICSID often take place at ICSID's headquarters in Washington D.C.⁴² However, the parties may agree to hold the proceedings at any other place, subject to certain conditions. ICSID has individual arrangements with a number of other arbitration institutions, including (but not limited to) the Permanent Court of Arbitration in the Hague, the Australian Commercial Disputes Centre in Sydney, the Singapore International Arbitration Centre, the German Institution of Arbitration, and the Hong Kong International Arbitration Centre.⁴³ As of August 2012, there are 158⁴⁴ member state signatories to the Convention. ICSID is completely unique, being

⁴¹ *Ibid.*

⁴² 'ICSID Institutional Arrangements'

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Co-operation%20agreements&pageName=Coop_with_Oth_Inst> accessed 9 November 2011.

⁴³ *Ibid.*

⁴⁴ 'ICSID Member States'

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home> accessed 18 August 2010.

the only forum which is completely dedicated to the settlement of international investment disputes.

ICSID itself does not arbitrate or conciliate in international investment disputes; rather it provides the institutional and procedural framework for ad hoc tribunals which are constituted on a case by case basis.⁴⁵ ICSID has two sets of procedural rules which may be used in arbitration: the ICSID Convention, Regulations and Rules⁴⁶ and the ICSID Additional Facility Rules.⁴⁷

The original Regulations and Rules govern disputes arising between member states and investors who are nationals of other member states. The Rules basically provide for conciliation and arbitration in cases concerning international investment.⁴⁸

Conciliation proceedings begin when a member state submits a request for conciliation to the Secretary-General, who will duly send a copy of the request to the other state party involved, and who will then register the conciliatory proceedings. A conciliation commission will then be constituted. The commission may consist of a sole conciliator, or an uneven number (as agreed by the parties). If the parties fail to agree, a three conciliator commission will be constituted. One conciliator is to be chosen by each of the parties, and the third conciliator who will be the president of the commission is chosen by mutual agreement of the parties. If the commission is not constituted within 90 days of the Secretary-General being notified of the request for conciliation, the chairman shall appoint the commission. It is the commission's responsibility to clarify the issues in dispute and bring about a mutually acceptable agreement between the parties. In order to achieve this aim, the commission may make recommendations as to the terms of the settlement of the dispute. If agreement

⁴⁵ 'ICSID Dispute Settlement Facilities'

<http://icsid.worldbank.org/ICSID/Servlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Dispute%20Settlement%20Facilities&pageName=Disp_settl_facilities> accessed 25 August 2012.

⁴⁶ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159. 'ICSID Convention, Rules and Regulations' (full text) also available at <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf> accessed 25 August 2012.

⁴⁷ ICSID Additional Facility Rules (2003 full text) available at <http://icsid.worldbank.org/ICSID/StaticFiles/facility-archive/ICSID_Addl_English.pdf> accessed 25 August 2012.

⁴⁸ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (n 46).

is reached, the commission will draw up a report stating the issues in dispute and the agreement reached. If a mutually acceptable agreement is not reached, the commission is to close proceedings and prepare a report stating the issues in dispute and recording the failure to reach agreement.⁴⁹ It is interesting to note that ICSID sees very few conciliatory proceedings each year; only around 2% of proceedings take the form of conciliation.⁵⁰

Arbitration proceedings may be initiated under the original convention Regulations and Rules by the submission of a request for arbitration by any member state or a national of any member state made to the Secretary-General. The Secretary-General will send a copy of the request to the other party and register the dispute with the Centre. The arbitral tribunal is then appointed; it may consist of a sole arbitrator or an uneven number of arbitrators, as agreed by the parties. If the parties fail to agree, three arbitrators will be appointed. One arbitrator will be chosen by each party, and the third (who will be the president of the tribunal) will be chosen by mutual agreement of the parties. If the tribunal has not been appointed within 90 days of the Secretary-General receiving the request for arbitration, the Chairman of the Administrative Council will appoint the arbitrators. The majority of the arbitrators should be nationals of other states than those who are party to the dispute. The tribunal must first be the judge of its own competence and decide if it has jurisdiction in the case. If the tribunal does decide it has jurisdiction and that the case may have merit, it will go on to consider the merits. It is the tribunal's responsibility to decide the dispute in accordance with the rules of law that have been agreed by the parties. Unless the parties agree otherwise, the tribunal may, at any stage of the proceedings, call upon the parties to produce documentary evidence and visit the scene connected with the dispute and conduct appropriate enquiries. Unless the parties agree otherwise, the tribunal is able to recommend some provisional or interim measures, pending its final decision. The tribunal decides any questions submitted to it by majority vote. The final award of the tribunal must be in writing, recording how each member of the tribunal voted. Individual opinions of the

⁴⁹ Articles 28-35 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (n 46).

⁵⁰ 'ICSID Caseload- Statistics (2012) available at <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English32>> accessed 21 December 2012.

arbitrators may be attached to the award. The award will not be published without the consent of both parties. The Secretary-General must distribute copies of the award to the parties. The award is deemed to have been rendered on the date which they were dispatched. There is no possibility of appeal of the final award; however there may be some scope for review under the ICSID annulment procedure provided for by Article 52 of the ICSID Convention.⁵¹

Although there is no possibility for the appeal of decisions under the ICSID Convention, there is some scope for the review of decisions under Article 52⁵² which provides an annulment procedure. As we have seen in the previous chapter, the grounds for annulment under Article 52 are based upon abuse of process or some problem with the legitimacy of the procedure. The grounds for annulment do not cover doubts as to the substantive correctness of the decision.

The application for annulment must be submitted within 120 days of the award being rendered, or within 120 days of the corruption being discovered (if that is the ground upon which annulment is being requested). Once the application for annulment has been received, the Chairman will appoint an ad hoc committee of three arbitrators who will examine the request. The committee members must not have sat on the original tribunal panel which rendered the award, nor must they be a national of the same state as the original arbitrators. Furthermore, they must not be nationals of the same state as either of the parties and they must not have acted in a conciliatory capacity throughout the original case. The ad hoc committee has the power to annul all, or any part of the original award. The committee may also temporarily stay the enforcement of the original award, pending its own decision. If the committee does choose to annul the award, the parties may request that the case be submitted to a newly constituted tribunal which will completely re-hear the case.⁵³

In 1978, the Centre adopted its Additional Facility Rules⁵⁴ which enable ICSID to administer proceedings between states and individuals which fall outside the scope of the original Convention and the Regulations and Rules. The Additional Facility Rules come into play when an investment dispute arises

⁵¹ Articles 36-49 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (n 46).

⁵² Article 52 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (n 46).

⁵³ *Ibid.*

⁵⁴ ICSID Additional Facility Rules (n 47).

where either the state party or foreign investor is not an ICSID member state. The Additional Facility Rules enable the Centre to administer conciliation and arbitration proceedings as well as fact finding proceedings. In order for Additional Facility proceedings to be initiated, the Secretary-General must approve the proceedings. The parties may apply for such approval by submitting to the Secretary-General the document in which the parties agree to settle their dispute using the ICSID Additional Facility, together with any other documents requested by the Secretary-General. If The Secretary-General grants approval, the parties are notified and the approval is registered with the Centre. Conciliation, arbitration and fact-finding proceedings are administered in accordance with the requisite rules set out in Schedule A, B or C.⁵⁵

Fact-finding proceedings are initiated by the request of one or both of the parties to the Secretariat. If the request is approved by the Secretary-General, the proceedings are registered on the fact-finding register. Any objections to the request by the other party must also be sent to the Secretary-General. An attempt to resolve the objections by agreement is made. If this is unsuccessful, a special commissioner is appointed to rule on the objections. If the special commissioner rules that the proceedings should continue, a commission is established by agreement of the parties. It is customary for a one person committee or a committee of an uneven number to be appointed. In the absence of agreement, a three person commission is established by the chairman. The committee shall meet as and when required to conduct investigations. Meetings are closed to the public in order to ensure confidentiality. The committee's decision is usually undertaken by majority vote. After all investigations have been conducted, the committee draws up its final report and closes the proceedings. The report is not binding on the parties.⁵⁶

Conciliation proceedings under the Additional Facility rules are governed by Schedule B of the Additional Facility Rules. Conciliation proceedings under

⁵⁵ *Ibid.*

⁵⁶ 'Schedule A, Additional Facility Rules' <http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf> accessed 9 November 2011.

the Additional Facility Rules are identical to the conciliation proceedings under the original Convention and Regulations and Rules.⁵⁷

Arbitration proceedings are provided for by Schedule C of the Additional Facility Rules. Arbitration proceedings under the Additional Facility Rules are broadly similar to those under the original Convention. Parties wishing to initiate such proceedings must send a written request to the Secretary-General who will register it. A tribunal is then constituted by the agreement of the parties. If the parties fail to reach agreement on the method of constituting the tribunal, three arbitrators should be appointed. One arbitrator should be chosen by each party, and the third should be chosen by mutual agreement of the parties. Arbitration proceedings must be held in states recognised by the UN; the venue will be determined by the tribunal in consultation with the parties. The tribunal will meet as and when necessary, and all parties will be notified of meetings within good time. The tribunal may hold written and oral stages in the proceedings. Once all evidence has been seen and heard, the tribunal shall deliberate in private and any awards must be made by majority vote. Once the decision has been communicated to the parties, the proceedings shall be declared closed. The final award is considered binding on all parties.⁵⁸

ii) Evaluation

- Advantages

There are 158⁵⁹ signatories to the ICSID Convention, with some 249⁶⁰ cases having been settled under the auspices of the Centre, and 150⁶¹ cases are currently pending. If ICSID's membership and caseload are to be considered the main measure of the Centre's success, it would undoubtedly be

⁵⁷ 'Schedule B, Additional Facility Rules'
<http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf> accessed 9 November 2011.

⁵⁸ 'Schedule C, Additional Facility Rules'
<http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf> accessed 9 November 2011.

⁵⁹ 'ICSID Member States' (n 44).

⁶⁰ 'Concluded ICSID Cases'
<<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>> accessed 25 August 2012.

⁶¹ 'Pending ICSID Cases'
<<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending>> accessed 25 August 2012.

hailed as a huge triumph. Whilst the Centre's membership and caseload is indeed a measure of its success, other factors such as the opinions of experts should also be considered.

ICSID has been praised by experts in the past for a number of reasons. Firstly, it represents a completely self-contained mechanism for the settlement of disputes.⁶² Also, it offers a clear and reasonable approach to the costs involved in arbitration.⁶³ Another advantage of ICSID is that it provides privacy and transparency simultaneously; party submissions and oral hearings are private and confidential, but ICSID maintains a public register of proceedings and publishes final awards (with the parties' consent).⁶⁴ Furthermore, ICSID's settlement and enforcement rates are relatively high compared with other dispute settlement institutions.⁶⁵ ICSID may also be praised for its review process; access to annulment provides at least some form of reviewing decisions. The addition of the Additional Facility Rules may also be praised as it enables ICSID to settle disputes that would otherwise have fallen beyond the scope of its jurisdiction.

- Disadvantages

Despite offering such advantages, ICSID has been criticised for a lack of legitimacy, lack of consistency of jurisprudence and for having a complicated cost structure and long average length of proceedings.⁶⁶ ICSID has also been criticised by some academics who feel that the annulment process falls short of the appeal procedure they would prefer to see.⁶⁷

7.2.3 World Intellectual Property Organisation Dispute Settlement Body

⁶² L Reed et al, *Guide to ICSID Arbitration* (Kluwer 2006) 8.

⁶³ *Ibid.*

⁶⁴ *Ibid* 9.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ For a discussion of annulment vs appeal see previous chapter of this thesis. See also R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP 2008) and K Yannaca-Small, 'Annulment of ICSID awards: limited scope but is there potential?' in K Yannaca-Small (ed), *Arbitration Under International Investment Agreements* (OUP 2010).

i) Overview

The World Intellectual Property Organisation (WIPO) is one of sixteen specialised UN agencies. WIPO was established by the 1967 Convention Establishing the World Intellectual Property Organisation.⁶⁸ It was designed ‘to encourage creative activity [and] to promote the protection of intellectual property throughout the world.’⁶⁹ WIPO’s mandate is to develop and maintain a balanced and accessible system of intellectual property which ‘rewards creativity, stimulates innovation and contributes to economic development whilst safeguarding the public interest’.⁷⁰ In order to carry out its mandate effectively, in 1994 WIPO established its Arbitration and Mediation Centre. The centre is based in Geneva, Switzerland, and offers alternative dispute resolution options (including arbitration and mediation) in case of international commercial disputes between private parties involving intellectual property issues. Since its establishment in 1994, the centre has administered over 280 cases, with the last five years witnessing a particular increase in the centre’s caseload.⁷¹

This analysis of the WIPO dispute settlement mechanism in this chapter will focus exclusively on the arbitration procedures offered by the Arbitration and Mediation Centre. The centre offers two forms of arbitration; expedited and normal arbitration. Normal arbitration is initiated by filing a request for arbitration within 30 days. Following an answer to that request, arbitrators are selected within another 30 day period. 30 days is then permitted for the submission of a statement of claim, followed by 30 days for a statement of defence to be submitted by the defendant. Further written and witness statements are then submitted, and a hearing will take place. The proceedings are closed within three months, and the award becomes final. It is the aim that normal arbitration proceedings be completely concluded within 12 months. Expedited arbitration follows a similar, albeit slimmed down procedure with tighter deadlines which

⁶⁸ Convention Establishing the World Intellectual Property Organisation 1967’ <http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html> accessed 14 October 2011.

⁶⁹ Preamble, *ibid.*

⁷⁰ ‘What is WIPO?’ <<http://www.wipo.int/about-wipo/en/faq.html>> accessed 25 August 2012.

⁷¹ ‘WIPO caseload summary’ <<http://www.wipo.int/amc/en/center/caseload.html>> accessed 25 August 2012.

should normally be completely concluded within 6 months. Under both processes, the final award is binding and there is no possibility of appeal.⁷²

ii) Evaluation

- Advantages

One unique aspect of WIPO dispute resolution is that it offers the parties the choice between mediation and arbitration. The parties may opt for mediation initially, in order to resolve the dispute more quickly and economically. If mediation is unsuccessful, the parties may move towards arbitration procedure.

The fact that WIPO offers two versions of its arbitration procedure (normal and expedited) could be considered an important advantage. An expedited process may be extremely desirable to the parties involved in a commercial dispute, as they often wish to settle any arising disputes as quickly as possible and in the cheapest manner possible. Offering an expedited process allows parties to settle their dispute in an average of 6 months, half of the average 12 months it takes to settle a dispute using the normal process. Moreover, it offers the parties increased control over the dispute, enabling them to make the choice of which procedure to use, and tailoring it to their individual dispute.

Once a decision has been made by the arbitrators it is binding on the parties. As such, there is no possibility for the review of that decision. This may be seen as an advantage because the parties can move on from the dispute quickly and limit the costs incurred.

It is standard practice in WIPO arbitration to ensure the confidentiality of the parties and the dispute itself. This may be advantageous for the parties, especially in intellectual property disputes, as it could prevent the revealing of trade secrets and loss of commercial advantage.

- Disadvantages

⁷² 'WIPO principal steps in WIPO arbitration and expedited arbitration'
<<http://www.wipo.int/amc/en/arbitration/expedited-rules/principal-steps.html>> accessed 14 October 2011.

The WIPO dispute settlement system may be praised for its relative simplicity; it offers a fast and inexpensive means for settling disputes. However, its main advantage may also be its downfall: the WIPO dispute settlement procedure is final and binding, leaving no scope for the review of awards. An annulment or appeals facility might be a welcome addition to the WIPO dispute settlement system, as it would provide a means of reviewing decisions. At present, if there was some abuse of process, or if the parties feel that the wrong decision was made, they have no form of recourse.

7.2.4 International Tribunal for the Law of the Sea

i) Overview

The international Tribunal for the Law of the Sea was established by the 1982 United Nations Convention on the Law of the Sea⁷³. The tribunal's role is to adjudicate disputes arising under the Convention, including all matters of interpretation and application of the Convention itself. Part XV of the Convention sets out the manner in which disputes are to be dealt with by the Tribunal. In the first instance, the Convention signatories are required to try and resolve any disputes that may arise regarding the law of the sea by peaceful means. If the states cannot reach a peaceful agreement, they are required to submit themselves to the compulsory dispute settlement process described in the Convention. The Convention actually provides four alternative means of settling disputes; the International Tribunal for the Law of the Sea, the ICJ, an arbitral tribunal constituted in accordance with Annex VII to the Convention, and a special tribunal constituted in accordance with Annex VIII to the Convention. A member state is free to choose which of the four dispute settlement processes they wish to take part in by notifying the Secretary-General of the UN in writing.⁷⁴

This section will focus on the process by which the dispute is settled by the International Tribunal for the Law of the Sea. The first case was submitted in

⁷³ United Nations Convention on the Law of the Sea 1982 (full text)
<http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf>
accessed 25 August 2012.

⁷⁴ 'International Tribunal for the Law of the Sea: The tribunal'
<<http://www.itlos.org/index.php?id=15&L=0>> accessed 14 October 2011.

1997, and to date, nineteen cases have been submitted to the tribunal in total.⁷⁵ The tribunal is composed of twenty one independent elected experts; members are selected for their reputation for fairness and integrity and outstanding expertise in the field of the Law of the Sea.⁷⁶ The judges are elected by state parties who are signatories to the Convention for a renewable term of nine years. The elected members must fairly represent the legal systems of the world, ensuring that the nationalities of judges represent an equitable distribution. A party to a dispute may request for a particular person to sit as an ad hoc judge if the tribunal does not include a judge of the same nationality as that party.⁷⁷ The tribunal is divided into five different chambers, each with particular expertise and competency in a particular area of the wide field of the Law of the Sea. There is a Seabed Chamber, Chamber of Summary Procedure, Chamber for Fisheries Disputes, Chamber for Marine Environment Disputes and the Chamber for Maritime Delimitation Disputes. Additionally, parties may request the composition of an ad hoc chamber for a particular dispute.⁷⁸

Parties to the establishing UN Convention may submit a dispute unilaterally, or by special agreement between the two disputing parties. The tribunal may be called upon to give an advisory opinion, or make a binding decision through the procedure of arbitration. Arbitral proceedings before the tribunal have two distinct phases; written and oral. Proceedings are completed without unnecessary delay and cost. The parties themselves may, by mutual agreement decide to make modifications or additions to the process itself. The disputing parties must each bear their own arbitration costs, unless the tribunal specifically decides otherwise. The tribunal is based in Hamburg, Germany, and has physical facilities there for the oral procedure to take place.⁷⁹

The dispute is submitted to the tribunal by one or more of the parties or through compulsory jurisdiction. This is followed by the written stage of the process, where the tribunal collects written evidence from both parties as well

⁷⁵ 'International Tribunal for the Law of the Sea: Cases'
<<http://www.itlos.org/index.php?id=10&L=0>> accessed 14 October 2011.

⁷⁶ 'International Tribunal for the Law of the Sea: The tribunal' (n 74)

⁷⁷ 'International Tribunal for the Law of the Sea: a guide to proceedings before the International Tribunal for the Law of the Sea'

<http://www.itlos.org/fileadmin/itlos/documents/guide/guide_eng_2009.pdf> accessed 15 October 2011.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

as third parties. This stage should normally be completed within 6 months, however extra time may be granted by the tribunal upon receipt of the requisite request for an extension. Before the oral proceedings begin, the tribunal will meet in order to exchange views on the evidence presented at the written stage of the process. Following these initial deliberations, an oral hearing is scheduled to take place usually within a 6 month period of the close of written proceedings. Hearings are normally open to the public, unless the tribunal takes the decision that the oral stage should take place in private. Oral proceedings usually consist of oral statements from both the disputing parties and oral statements given by witnesses and experts. After this, the judges will deliberate and produce a judgment which is read at a public sitting of the tribunal. The decision is binding on the parties from the date of the public reading, and there is no formal right of appeal of the decision. However, a party may ask for a judgment to be revised if there is some discovery of a fact which may have proven a decisive factor in the decision making process, provided that the fact was undiscovered at the time of the judgment and that this lack of discovery was not due to negligence. A request for review must be submitted within 6 months of the discovery of the new fact, and before the tenth anniversary of the date of the original judgment.⁸⁰

ii) Evaluation

- Advantages

A strong advantage of the dispute settlement process of the Tribunal for the Law of the Sea is that the parties to the dispute are authorised to make any changes that they see fit to the dispute settlement procedure by mutual agreement. This enables the parties to retain control, and for the dispute settlement procedure to be flexible. This is advantageous to the parties because it allows them to tailor the dispute settlement procedure to the specifics of their dispute.

Another positive aspect of this dispute settlement process of the Tribunal for the Law of the Sea is that the tribunal has various different chambers which hear different types of disputes within the broad field of the Law of the Sea. This

⁸⁰ *Ibid.*

presumably allows the judges in each chamber to become highly specialised in the aspect of the subject which they must deliver judgments.

- **Disadvantages**

One negative aspect of the procedure of the tribunal is the limited scope available for the review of decisions. Awards are binding unless some fact is discovered which was not discoverable at the time and which may have been a decisive factor in the decision making process. There is no right of appeal available to the parties once the tribunal has rendered its decision. Thus, if there has been some abuse of process or mistake made, there is no opportunity available to right the wrong.

7.2.5 International Court of Justice

i) Overview

The ICJ was established after the Second World War in June 1945, and began its work in April of the following year as the principal judicial organ of the UN.⁸¹ The Court is the only one of the six main UN Organs which is not based in New York; rather it is seated in the Peace Palace, The Hague, in The Netherlands. The Court performs a dual function; not only does it settle international legal disputes in accordance with international law, it can also be called upon to provide advisory opinions on legal issues which may be referred by other UN organs or authorised agencies.⁸² The Court consists of fifteen judges, each of which is elected for a period of nine years by the UN General Assembly and Security Council.⁸³

As briefly mentioned above, the ICJ has a dual functionality; settling contentious cases and giving advisory opinions when called to do so. Obviously different procedures are followed depending on what type of case the Court is considering. This section will first consider the procedure in contentious cases, then go on to explore the procedure in advisory opinion cases.

⁸¹ 'International Court of Justice: The Court' <<http://www.icj-cij.org/court/index.php?p1=1>> accessed 15 October 2011.

⁸² *Ibid.*

⁸³ *Ibid.*

- Contentious cases

Only states may be parties to a contentious case before the ICJ. States do not have any permanent representation at the ICJ, and as such communication with the Court normally takes place through the state's foreign minister. Where a state is to be a party in a contentious case, they are usually represented by a (government appointed) agent who plays the same role as a solicitor in domestic legal cases. The agent is responsible for communications between the Court and the state party in matters concerning the case. In public open hearings, the agent is also responsible for submitting the opening argument of the state which he/she represents. Agents may be assisted by co-agents, deputies or assistants in preparing oral arguments and pleadings.⁸⁴

Contentious cases may be instituted bilaterally (if both parties agree that there is a dispute) through the notification of a special agreement, or unilaterally (where one party alleges that the other party has breached its international obligations) by means of an application. The date that the registrar receives the special agreement or the application marks the official start of the proceedings. Contentious proceedings consist of two distinct phases; the written stage and the oral stage. During the written stage, the 'parties file and exchange pleadings containing a detailed statement of the points of fact and law on which each party relies.'⁸⁵ After the written phase is completed, the oral stage takes place. During the oral stage public hearings take place, during which the parties' agents and counsel address the court. The two official languages of the Court are English and French, so all communication (written and oral) in one language is then translated into the other. The written communications are kept private until the commencement of the public hearings, and are only then released to the public (provided that the parties have no objections). After completion of the oral stage, the judges sit in private to deliberate and then the judgment is delivered in a public sitting. The judgment is final, meaning that it is not open to appeal, and it is binding on the parties. The parties, being signatories to the UN Charter, must adhere to any judgment of the Court to which they are party. If

⁸⁴ 'International Court of Justice: How the Court works' <<http://www.icj-cij.org/court/index.php?p1=1>> accessed 15 October 2011.

⁸⁵ *Ibid.*

one party believes that the other has failed to implement the decision of the Court, the state may refer the matter to the Security Council. The Council has the power to recommend or decide on measures which must be taken in order to ensure compliance with the decision of the Court.⁸⁶

The preceding paragraph describes the normal procedure of the Court in the majority of disputes. However, in some cases the Court may deviate from the process. The most common deviation arises when one party raises preliminary objections preventing the Court from delivering its judgment on the merits of the case. This may occur when the state alleges that the Court does not have the necessary jurisdiction. The Court itself will make a decision on this before going on to consider the actual merits of the case. Another deviation from the ordinary procedure described above may occur when one state requests provisional measures. If the applicant state believes its rights are in immediate danger of being violated, the state may request that the Court implements provisional measures as a sort of interim before the final judgment is delivered. A third deviation from the usual procedure might occur if the Court finds that two or more disputes against the same defendant state involve very similar or the same facts, pleadings and arguments. In this case, the Court may order the joining of the separate proceedings into one.⁸⁷

- **Advisory opinions**

Five UN organs and sixteen specialised agencies of the UN may call upon the ICJ to give advice.⁸⁸ The UN General Assembly and the Security Council may call upon the ICJ for advisory opinions on any legal question whatsoever. The other authorised organs and agencies are only permitted to request an advisory opinion from the ICJ on legal questions concerning the scope of their own activities. When the ICJ receives a request for an advisory opinion, it may require written and oral proceedings (similar to those which take place in a contentious case) to take place in order that it can deliver its opinion in full possession of all relevant facts. In theory, the Court is not obliged to hold any

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ For information about which organs/agencies can request an advisory opinion from the ICJ see 'Questions and answers about the advisory procedure' <http://www.icj-cij.org/presscom/en/kos_faq_en.pdf> accessed 11 August 2012.

formal proceedings, however it usually does so. After the initial request for advice is received, the ICJ will create a list of states and organisations which can provide information on the matter to the Court. The states who become involved in advisory proceedings are not bound by the decision of the Court, unlike in contentious cases. However, it must be noted that it is rare for the ICJ to allow international organisations (other than the one having filed the request for the advice) to participate in the advisory proceedings. The written and oral proceedings generally take the same format as they do in a contentious case; however, they are generally much shorter. After the written and oral stages (should they take place) the Court will deliver its advisory opinion during a public sitting. The opinion has no binding effect, and as such the party requesting the opinion is free to give effect to it or to ignore it. In practice, the requesting party usually adheres to the opinion, because of the prestige of the Court with the view being that the decision has been ‘sanctioned in international law.’⁸⁹

ii) Evaluation

- Advantages

The ICJ’s high caseload could be considered testament to the Court’s success.⁹⁰ One advantage of the ICJ as a dispute settlement mechanism is that it provides advisory opinions, as well as judgments in contentious cases. This means that a state can ask for advice on the legality of a matter before it is brought before the court. This may save a significant amount of time and money because court proceedings will not become necessary.

- Disadvantages

The procedure of dispute settlement provided by the ICJ has been criticised. One criticism that the ICJ has suffered is that it takes too long to settle

⁸⁹ *Ibid.*

⁹⁰ ‘International Court of Justice: Cases’ <<http://www.icj-cij.org/docket/index.php?p1=3>> accessed 20 November 2011.

a case. The delay involved in ICJ cases may be due to its heavy caseload; the court has settled 152 cases since its post-war establishment in 1947.⁹¹

7.2.6 Permanent Court of Arbitration

i) Overview

As briefly mentioned in an earlier chapter, the PCA is based in The Peace Palace, The Hague, in The Netherlands. It was established in 1899 by the Convention for the Pacific Settlement of International Disputes⁹², in order to facilitate peaceful dispute settlement between states. The Convention establishing the PCA has over one hundred member state signatories and has evolved into a modern arbitral institution.⁹³ The PCA settles different types of disputes involving states, state entities, intergovernmental organisations and private parties on matters not limited to, but including territorial issues, human rights, and commercial and investment disputes.⁹⁴ The PCA administers fact finding, conciliation and arbitration. In order to establish whether the PCA could serve as a model for international investment arbitration, the present section will focus exclusively on the role of the PCA in its administration of arbitration. The PCA founding convention contains information regarding basic rules of procedure, however parties are free to choose (by mutual agreement) their own rules, or indeed adhere to the PCA's model rules which are based on the UNCITRAL Rules of Arbitration.⁹⁵ Due to the fact that the PCA offers disputing parties a high degree of flexibility and a choice of several detailed procedural rules (and indeed the opportunity to choose their own), it is very difficult to describe the typical process for the settlement of a dispute under the auspices of the PCA. Each set of procedural rules may have similar, but slightly different procedures and deadlines for each stage of the process. As such, it is difficult to

⁹¹ *Ibid.*

⁹² Convention for the Pacific Settlement of International Disputes 1899 (full text) available at <www.pca-cpa.org/showfile.asp?fil_id=192> accessed 25 August 2012. This convention was revised in 1907 (full text) available at <www.pca-cpa.org/showfile.asp?fil_id=193> accessed 25 August 2012.

⁹³ 'Permanent Court of Arbitration: about us' <http://www.pca-cpa.org/showpage.asp?pag_id=1027> accessed 15 October 2011.

⁹⁴ *Ibid.*

⁹⁵ 'Permanent Court of Arbitration 106th Annual Report' (2006) <<http://www.pca-cpa.org/upload/files/03%202006%20Summary%20Report%20FINAL%20en.pdf>> accessed 17 September 2010.

describe the 'usual' procedure of the Court, as it will depend on which procedural rules are employed in the case. The PCA appears to be taking on an increasing role in investment arbitration; of the 69 pending PCA cases in 2011, 40 were investor-state arbitrations.⁹⁶

ii) Evaluation

- Advantages

The dispute settlement mechanism provided by the PCA enables disputes to be settled using a number of different procedural rules, the choice of which can be made by the parties. This enables the parties themselves to retain a high degree of control over the dispute and provides flexibility which may be attractive to the parties.

- Disadvantages

In the case of the PCA, its greatest advantage may also be its biggest downfall: the parties to PCA arbitration have a huge amount of control over their dispute, which may not always be a positive thing. For example, enabling the parties to select arbitrators may lead to the selection of arbitrators who parties may feel will be more sympathetic to their argument thus making them more likely to win, rather than objectively based on the experience and knowledge of the person. Additionally, parties may not have enough detailed knowledge on the matter at hand to be able to make the best decisions regarding the resolution of the dispute because they are not experts. Furthermore, the parties may choose to keep their arbitration completely confidential, which ultimately has a negative impact upon the creation of a consistent body of jurisprudence.

7.3 Regional dispute settlement mechanisms

A number of regional dispute settlement mechanisms have been put into place. This section will examine whether any of these regional mechanisms

⁹⁶ 'PCA Annual Report' (2011) <http://www.pca-cpa.org/showpage.asp?pag_id=1069> accessed 21 September 2012. For more information on the investment arbitration activities of the PCA, see 'Parsing the PCA's latest case numbers' <<http://kluwerarbitrationblog.com/blog/2012/08/01/parsing-the-pcas-latest-case-numbers/>> accessed 21 December 2012.

could serve as a model for international investment arbitration. The dispute settlement mechanisms of the ASEAN, Mercosur, the NAFTA and the EU will be examined in this section.

7.3.1 Association of Southeast Asian Nations

i) Overview

ASEAN was established on 8th August 1967 by the ASEAN Declaration.⁹⁷ The Declaration states that the primary aims and objectives of the Association were to accelerate economic growth, social progress and cultural development of its members. Other objectives were to promote peace and stability, and promote collaboration and assistance. The Association was strengthened by the entry into force of the ASEAN Charter in 2008, which established a new legal framework for the Association and created a number of new ASEAN organs. The Charter is a legally binding agreement which established a more rules-based system, similar to that of the WTO. In order to ensure compliance to the agreed rules and obligations, the ASEAN Charter established a dispute settlement mechanism.⁹⁸

The dispute settlement mechanism provides for the resolution of disputes in a number of different ways. The advisory stage enables disputes to be resolved 'on a legally non-binding basis within a relatively short period through the ASEAN Consultation to Solve Trade and Investment Issues'.⁹⁹ The Consultation is an internet based instrument which has been adapted for use in ASEAN dispute settlement from the European Union SOLVIT mechanism. Alternatively, ASEAN member states may request that the Agreements and Compliance Unit of the ASEAN Secretariat make non-binding legal interpretations and offer advice on potential disputes.¹⁰⁰

⁹⁷ ASEAN Declaration (Bangkok Declaration), 8 August 1967 (full text) available at <<http://www.aseansec.org/1212.htm>> accessed 25 August 2012.

⁹⁸ 'About ASEAN' <http://www.aseansec.org/about_ASEAN.html> accessed 28 October 2011.

⁹⁹ 'ASEAN Dispute Settlement System: Factsheet' <<http://www.asean.org/Fact%20Sheet/AEC/2009-AEC-017.pdf>> accessed October 2011.

¹⁰⁰ *Ibid.*

The consultative stage enables the ASEAN Compliance Body to make use of peer adjudication, and imposes a 90 day deadline for the resolution of disputes in this manner between member states. Although this adjudication is not legally binding, ASEAN Compliance Body findings can be submitted to the more formal dispute settlement body. Interestingly, the Compliance Body is based on the WTO's Textiles Monitoring Body. Also, the consultative stage allows member states to resolve their differences either through conciliation or arbitration at any time, as long as there is mutual agreement to do so by the parties to the dispute. Article 23 of the ASEAN Charter advises that the Secretary-General may act in an ex-officio capacity to provide 'good offices, conciliation or mediation.'¹⁰¹

The adjudicatory stage provides a formal process, with a strict timetable for the judicial settlement of disputes. The first stage of the process is pre-adjudicatory consultation and mediation, which can last for up to 60 days. If this is unsuccessful, within a 45 day period, a dispute settlement panel is convened by the Senior Economic Officials Meeting (SEOM), and panellists are appointed. Within 60-70 days, the panel produces a report which consists of legally binding findings and recommendations which is submitted to SEOM. Within 30 days, the SEOM can decide to either adopt the report, or initiate appeal proceedings. If appeal is initiated, within 60- 90 days, the Appellate Body reviews the case and submits a report on its findings to the SEOM. The SEOM then has 30 days to decide whether to adopt the report of the Appellate Body. The member states who are party to the dispute have 30 days (or longer in some cases, if it has been agreed that the timeframe for compliance should be lengthened) from the adoption of either the first panel's report or the Appellate Body's report to comply with the findings and recommendations.¹⁰²

ii) Evaluation

- Advantages

Several aspects of the ASEAN dispute settlement mechanism could be considered advantageous. Firstly, the fact that the dispute settlement process

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

involves three distinct stages (advisory, consultative and adjudicatory) is positive as it enables disputes to be solved wherever possible through negotiation and conciliation. This means that the parties can try to form an agreement before the dispute reaches the arbitration stage. This has a number of advantages, not least that it will almost definitely be more cost effective and less time consuming than arbitration.

If the parties are unable to agree on how to settle the dispute, it may be submitted to arbitration. ASEAN arbitration imposes strict deadlines at each stage of the process, allowing the dispute at hand to be settled in the quickest possible manner.

Another positive aspect of the ASEAN dispute settlement mechanism is that it incorporates an appeals facility. Thus, any errors that may have been made at first instance may be rectified.

- **Disadvantages**

The ASEAN dispute settlement mechanism may be criticised for its lack of effective enforcement procedures. After a decision has been delivered, there is no incentive to comply with the decision because the enforcement measures are so poor. It has been suggested that the ASEAN dispute settlement mechanism would benefit from introducing suspension of privileges or sanctions on states that are refusing to comply with a ruling.¹⁰³

7.3.2 Mercosur

i) Overview

On 26th March 1991, Argentina, Brazil, Paraguay and Uruguay signed the Treaty of Asuncion which created the Southern Common Market (Mercosur)¹⁰⁴. Mercosur's primary aim is to accelerate economic growth and

¹⁰³ T Koh, R Manalo and W Woon (eds), *The Making of the ASEAN Charter* (World Scientific Publishing 2009) 18.

¹⁰⁴ Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (Treaty of Asuncion) signed 26 March 1991, entered into force 29 November 1991. Full text available at <<http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp>> accessed 15 August 2012.

social equity through the creation of a single, common market.¹⁰⁵ Pursuant to this objective, the original agreement contained provisions establishing a dispute settlement mechanism. Under Annex III of the Treaty of Asuncion, and later the Brazilian Protocol, ten disputes were resolved. The innovative Olivos Protocol¹⁰⁶ was signed on 18th February 2002, and entered into force on 1st January 2004. The Olivos Protocol currently governs the dispute settlement procedure under Mercosur.¹⁰⁷

When a dispute between member states arises, it may be submitted to the dispute settlement procedure contained within the Olivos Protocol. However, the agreement does allow a member state that is party to another relevant dispute settlement agreement to submit the case to the other dispute settlement procedure. However, if proceedings are initiated under the dispute settlement procedure established in the Olivos Protocol, they cannot be withdrawn and submitted elsewhere.¹⁰⁸

The Mercosur dispute settlement process established by the Olivos Protocol begins with compulsory negotiation between the two disputing parties. Article 4 of the Protocol states that the parties to the dispute must try and resolve their differences through direct negotiations. The member states are obliged to inform the Mercosur Secretariat when they enter into such negotiations, and of the eventual outcome of the process. If the negotiations are unsuccessful, the parties may utilise an optional conciliation stage under Article 6 of the Olivos Protocol. Under Article 6, the Common Market Group organ of Mercosur will analyse the arguments of the parties and make non-binding recommendations on the matter. If the parties are unhappy with the outcome of the conciliation, or wish to bypass the conciliation stage, they can submit the dispute directly to arbitration. An ad hoc committee is constituted to hear the dispute at first instance. The committee comprises three arbitrators, two of

¹⁰⁵ 'Mercosur: about Mercosur' (Google translation)

<<http://translate.google.co.uk/translate?hl=en&sl=es&u=http://www.mercosur.int/&ei=0UmuTujcMpLC8QP11e2UCw&sa=X&oi=translate&ct=result&resnum=3&sqi=2&ved=0CDsQ7gEwAg&prev=/search%3Fq%3Dmercursosur%26hl%3Den%26biw%3D1280%26bih%3D820%26prmd%3Dimvns>> accessed 31 October 2011.

¹⁰⁶ Olivos Protocol, signed 18 February 2002 and entered into force 1 January 2004 (Google translation)

<http://www.sice.oas.org/Trade/MRCSR/olivos/polivosText_s.asp#CAPI> accessed 31 October 2011.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

which are selected individually by each party, and the third, selected by the parties by mutual agreement. The arbitrators are selected from an accepted list of experts. The ad hoc committee will hear the dispute and make a decision on the matter. Either of the parties may request provisional or interim measures (if the matter is sufficiently serious or may cause irreparable damage) by the committee. The parties may request that the eventual decision rendered by the committee be clarified. If one or both of the parties are still unhappy with the decision, they can initiate an appeal to the Permanent Review Court. If no appeal is lodged, the decision will be final and binding on both parties.¹⁰⁹

The Permanent Review Court (PRC) was established by the Olivos Protocol, and is situated in Asuncion, Paraguay. The PRC carries out three important functions; it hears cases that have been appealed from the ad hoc tribunals and it may also be called upon to hear urgent and exceptional cases at first instance by mutual agreement of the parties. Furthermore, it may be called upon to act as a consultative organ.¹¹⁰

The court may act in its appellate function under Article 17 of the Olivos Protocol. Article 17 provides that either (or indeed both) of the parties to the dispute may request the appellate review of the decision of the ad hoc tribunal. However, the review of ad hoc decisions is limited to questions of law. Once the PRC has made a decision on the matters referred, its decision replaces that of the ad hoc tribunal and it is binding and final.¹¹¹

Very occasionally, the PRC may be called upon to act in the first instance. Through the common agreement of the parties to the dispute, and if the nature of the dispute is such that it is highly exceptional or urgent, the parties can bypass the ad hoc requirement, and present the case directly to the PRC. In this case, the decision of the PRC will be final and binding, with no possibility of appeal. The final decision on the dispute (be it at first instance if no appeal is lodged, or the decision of the PRC in appellate cases) must then be implemented by the member states involved.¹¹²

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

The third function of the PRC involves it acting in a consultative capacity. The Court may be called upon by any of the member states, any of the Mercosur executive organs, and the highest courts of the member states to provide advisory opinions about the interpretation of any aspect of Mercosur law. These opinions are not binding authority; simply representing the Court's interpretation of the relevant legal questions.¹¹³

ii) Evaluation

- Advantages

The Mercosur dispute settlement mechanism relies heavily upon diplomatic solutions; parties are encouraged to settle any arising disputes through conciliation and negotiation before committing to arbitration. This means that the highest number of disputes is solved before reaching arbitration, which is advantageous to the parties involved as it allows them to settle their differences in the quickest and most economical manner possible.

If arbitration is necessary, the decision reached by the arbitrators may be appealed which enables parties who feel that the tribunal reached the wrong decision at first instance have some recourse. This means that the likelihood of reaching the correct and just decision is increased.

The Permanent Review Court may also act in a consultative capacity, providing advisory opinions on legal questions posed by the Mercosur member states. This is advantageous because it enables states to clarify the relevant law, perhaps before it is contravened and a potential dispute may be avoided altogether.

- Disadvantages

The parties to the dispute have the choice of where to submit their dispute, thus they are not bound by the Mercosur convention to utilise the Mercosur dispute settlement mechanism. In effect, this is perpetuating one of the great problems of arbitration: multiplicity of fora which can and often does lead to forum shopping. Forum shopping usually involves the parties submitting

¹¹³ *Ibid.*

their dispute to the forum which has the most lenient rules, or allows them to retain the highest degree of control over the dispute, or simply the forum which they believe will afford them the highest chances of winning.

7.3.3 North American Free Trade Agreement

i) Overview

NAFTA¹¹⁴ is a trilateral agreement, signed by the governments of the United States, Canada and Mexico. The agreement came into force on 1st January 1994. The main objective of the agreement was to remove barriers (tariff and non-tariff) to trade between the USA, Canada and Mexico¹¹⁵. In order to ensure compliance with the agreement, NAFTA also established a dispute settlement mechanism.¹¹⁶

NAFTA actually includes three dispute settlement mechanisms under chapters 11, 19 and 20. Chapter 11 establishes a mechanism for the settlement of disputes arising between a party and an investor of another party to the agreement. The investor who alleges that the host government has breached its NAFTA obligations may, under chapter 11, have recourse to ICSID, ICSID Additional Facility and the UNCITRAL Rules. Alternatively, the investor may choose to take the dispute to the domestic courts of the host state.¹¹⁷

Under Article 1904 (chapter 19), an alternative to judicial review by domestic courts of final determinations in antidumping and countervailing duty cases is established, through the use of bi-national panels. A request for panel review must be submitted to the NAFTA Secretariat by an industry asking for review of an investigating authority's decision regarding imports from a NAFTA member. Each NAFTA member state has its own national investigating authority, whose decisions are reviewable in this way. The decision of the panel is considered binding, however, a government may initiate the review of the panel decision in extraordinary circumstances. The Extraordinary Challenge

¹¹⁴ North American Free Trade Agreement (NAFTA) signed by the USA, Canada and Mexico which entered into force on 1 January 1994. Full text available at <<http://www.nafta-sec-alena.org/en/view.aspx?conID=590>> accessed 11 August 2012.

¹¹⁵ Article 102 NAFTA, *ibid*.

¹¹⁶ 'NAFTA: dispute settlement' <<http://www.nafta-sec-alena.org/en/view.aspx?x=225>> accessed 1 November 2011.

¹¹⁷ *ibid*.

Committee can review decisions in certain situations where there may have been an abuse of procedure. Either government may invoke an extraordinary review by a three person committee. Extraordinary Challenge Committee decisions are binding. Article 1905 provides a mechanism for the safeguarding of panel review procedures, stating that a three person special committee may be established to review one party's allegations that the other party's domestic law has interfered with the proper operation of the panel system.¹¹⁸

Chapter 20 contains dispute settlement provisions that are applicable to all disputes concerning the interpretation and application of NAFTA. The first stage of the process is negotiation; the governments of the two parties are encouraged to consult with each other to remedy the dispute amicably. If the dispute remains unresolved after the consultations, one party (or indeed both parties) may request a meeting of the NAFTA Free Trade Commission (which is comprised of the Trade Ministers of the parties). If the Commission is unable to resolve the dispute, the parties may call for the establishment of a five person arbitral committee. Arbitrators are selected from a roster of pre-approved persons. Each member state may appoint two panellists, and the fifth is chosen by the common agreement of the parties. The arbitral panel is established using a reverse selection process by which each party is required to select its two arbitrators of choice, but they must be nationals of the other member state that is party to the dispute. The fifth arbitrator, the chair of the panel can be a citizen of any state. Chapter 20 also provides for scientific review boards to be established which may be called upon to give expert opinions in disputes, should they be required.¹¹⁹

Disputes have different (yet arguably similar) procedures depending on whether they are filed under chapter 19 or chapter 20 of NAFTA. Both chapter 19 and 20 procedures impose strict deadlines: chapter 19 decisions must be rendered within 315 days of the filing of the report requesting a panel, whilst chapter 20 decisions are awarded within 5 months of the filing of the report. Proceedings under both chapter 19 and 20 have two distinct stages; written and

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

oral. The parties to the dispute normally submit written documents, such as pleadings and arguments, before an oral hearing takes place.¹²⁰

The decision of the panel under chapter 19 is binding. In its decision, the panel may either uphold the findings of the investigating authority, or it may send it back for reconsideration. If the panel does the latter, the panel may later issue a second decision on the investigating authorities' second findings. The arbitral panel's decision under chapter 20 is essentially a presentation of the findings of fact, determining whether the contested measure is or would be inconsistent with the parties' obligations under NAFTA. The decision will also present the panel's recommendations as to how the dispute might be resolved.¹²¹

ii) Evaluation

- Advantages

One aspect of the NAFTA dispute settlement mechanism is that it affords the parties the opportunity to settle the dispute under the ICSID framework, the UNCITRAL Rules, the domestic courts of the host state, or under the mechanism provided in NAFTA itself. This choice enables the parties to retain a high level of control over the dispute and allows flexibility so that the dispute settlement process can be tailored to the particular dispute at hand.

NAFTA awards are also enforceable through domestic courts and under the New York Convention.¹²² This is hugely advantageous because winning a dispute is rendered meaningless if the other party chooses not to comply with the award and they cannot be forced to do so. NAFTA is often praised for offering a regional dispute settlement procedure that is complemented by international mechanisms.¹²³

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 (full text) available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf> accessed 10 August 2012.

¹²³ J Merrills, *International Dispute Settlement* (5th Edition, CUP 2011) 108.

- Disadvantages

The choice of rules and fora available to the disputing parties may also be a downfall of the NAFTA dispute settlement mechanism. This choice encourages the 'cherry picking' of rules and fora; the disputing parties may choose to settle their dispute in the way in which they believe will afford them the highest chances of success.

7.3.4 The Court of Justice of the European Union

i) Overview

After the Second World War ended in 1945, attention turned to creating a peaceful Europe. It was envisaged that peace might be achieved and maintained through the establishment of economic, social and political co-operation.¹²⁴ Accordingly, in 1950, six founding member states (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) set up the European Coal and Steel Community¹²⁵. Co-operation continued to flourish, and in 1957, the European Economic Community (EEC), which created the common market, was established by the Treaty of Rome¹²⁶. In the 1970's, the EEC was expanded when the UK, Ireland and Denmark acceded to the Treaty of Rome. European co-operation continued, and in 1993 the single market was completed with the establishment of the four fundamental freedoms (movement of goods, services, people and money). The Treaty of Maastricht¹²⁷ and the Treaty of

¹²⁴ 'EU History' <http://europa.eu/about-eu/eu-history/index_en.htm> accessed 9 November 2011.

¹²⁵ *Ibid*, and see the Treaty Establishing the European Coal and Steel Community (ECSC Treaty/ Treaty of Paris), signed 18 April 1951 (full text) available at <http://www.proyectos.cchs.csic.es/euroconstitution/library/historic%20documents/Paris/TRAITES_1951_CECA.pdf> accessed 26 August 2012. For more on the treaty see 'Treaty of Paris' <http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm> accessed 26 August 2012.

¹²⁶ Treaty Establishing the European Economic Community (EEC Treaty/Treaty of Rome), signed 25 March 1957 (full text) available at <http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf> accessed 26 August 2012. For more information on the treaty see 'Treaty of Rome Guide' <http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm> accessed 26 August 2012.

¹²⁷ Treaty on the European Union (Treaty of Maastricht), signed 7 February 1992 (full text) available at <<http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html>> accessed 26 August 2012.

Amsterdam¹²⁸ formalised the European Union.¹²⁹ More states later acceded to the European Union, which today has 27 members.¹³⁰

Disputes which arise concerning the interpretation and application of EU law are referred to the self-contained EU dispute settlement institution, the European Court of Justice, since its establishment in 1952.¹³¹ As part of its mandate, the Court 'reviews the legality of the acts of the institutions of the European Union, ensures that member states comply with obligations under the treaties, and interprets European Union law at the request of the national courts and tribunals.'¹³² Reflecting the diverse membership of the EU, the Court is a multilingual institution. Cases may be heard in any of the member states' official languages. The Court is seated in Luxembourg, and actually consists of three courts; the Court of Justice, the General Court, and the Civil Service Tribunal. This section will focus on the procedure of the Court of Justice (ECJ). The ECJ is composed of 27 judges (one from each EU member state) and 8 Advocate General. The judges and Advocate Generals of the Court are appointed by consultation with the member state's governments for a renewable term of office of 6 years. They are chosen because their impartiality and competence is assured, and they are often the most highly qualified judges in their respective nations. The judges elect the president from amongst themselves for a renewable term of 3 years. The president directs the Court and presides over hearings taking place in the Grand Chamber. The Advocate Generals assist the Court by presenting an opinion on the case at hand. The Court may sit as a full court, a Grand Chamber of 13 judges, or in chambers of 3 or 5 judges, often depending on the complexity of the case at hand.¹³³

¹²⁸ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts (Treaty of Amsterdam), signed 2 October 1997 (full text) available at <<http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html>> accessed 26 August 2012. For more information on this treaty see 'Treaty of Amsterdam Comprehensive Guide' <http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/index_en.htm> accessed 26 August 2012.

¹²⁹ 'EU History' (n 124).

¹³⁰ 'EU Countries' <http://europa.eu/about-eu/countries/index_en.htm> accessed 9 November 2011.

¹³¹ 'Court of Justice of the European Union: general information' <http://curia.europa.eu/jcms/jcms/Jo2_6999/> accessed 9 November 2011

¹³² *Ibid.*

¹³³ *Ibid.*

The ECJ administers several different types of proceedings which fall under two distinct categories: preliminary reference proceedings and direct action proceedings. The domestic courts of the EU member states may call upon the ECJ to clarify the interpretation of a point of EU law in order that the state may ascertain whether some aspect of domestic legislation is in compliance with EU obligations. This procedure is known as preliminary reference. The decision rendered by the ECJ is not merely an opinion; rather, it is a binding interpretation of the law, to which the state must adhere. The decision also binds other member states where the same issue arises.¹³⁴ Preliminary reference procedures are initiated by member states' submission of a question to the Court, which generally takes the form of a domestic court judicial decision. Once the submission is received, it is registered and communicated to the parties involved in the national proceedings, as well as all the EU member states and EU institutions. Written observations from the parties, states and EU institutions are submitted.¹³⁵

Direct action cases can take many forms: actions for the failure of a member state to fulfil EU obligations; actions for the annulment of a measure adopted by an organ of the EU; actions for the failure of the EU institutions to act; appeal on points of law of decisions of the general court; actions for the review of decisions of the general court on appeals against the decisions of the EU Civil Service Tribunal may exceptionally be brought to the ECJ.¹³⁶ Direct actions commence with the submission of an application to the registry. The application is registered and the party being sued is notified. The defendant party has one month to lodge its defence.¹³⁷

In both preliminary reference proceedings and direct action proceedings once the above written documents have been submitted, the Judge-Rapporteur draws up a preliminary report, and there is a meeting of the judges and Advocate General that have been assigned to the case. Then, a date is fixed for a hearing, should it be required by the parties. This marks the beginning of the second stage of dispute resolution, the oral stage. At the hearing, the judges and Advocate General listen to the arguments of the parties and have the

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

opportunity to pose questions. Once the hearing has taken place, a report summarising the hearing is produced which is made available to the public. The Advocate General assigned to the case then gives his opinion should it be required by the judges. Following this, the judges deliberate. Decisions are made by majority vote. Following the vote, a judgment is rendered in an open court.¹³⁸

In some cases, special or exceptional procedures are required. If in a preliminary reference procedure, the same legal question is posed that has already been considered in a previous case, a simplified procedure takes place. Usually, the Advocate General refers the parties to the previous judgment, and the case does not reach the Court. Furthermore, in extremely urgent cases, the ECJ procedure can be expedited through the reduction of deadlines for submissions so that particularly urgent disputes are settled without excessive delay. Finally, the procedure may be altered in order to accommodate an application for interim or provisional measures. Such measures are implemented in cases where there may be a threat of serious and irreparable damage to one of the parties.¹³⁹

ii) Evaluation

- Advantages

An advantage of the ECJ process is that it offers a normal speed procedure as well as an expedited one which allows urgent cases to be settled without excessive delay. Furthermore, due to the framework of European law in place, enforcement of ECJ decisions is usually not problematic, which is a distinct advantage of the system; decisions and judgments are only valuable if they are implemented and effectively enforced.

- Disadvantages

If a decision merits the hearing of a case by the grand chamber of all thirteen judges and the case is to be decided on a majority basis, seven judges could vote one way and the remaining six the other way, which effectively

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

means that the decision rests on just one judge and could mean that six judges are actually against the decision. Though, this is the nature of majority decisions; trying to work on a consensual basis will be practically impossible.

7.4 Conclusion

The central aim of this chapter is to assess whether any existing international or regional dispute settlement mechanisms could serve as a model for international investment arbitration. In order to attempt to answer this complex question, the chapter has given a brief overview of the dispute settlement procedures of a selection of international and regional institutions. Each of these institutions has its own distinct dispute settlement process that is unique in itself. Although aspects of the different procedures might share some similarities, there are obviously a number of marked differences. Each of the dispute settlement mechanisms that have been discussed has its own advantages and disadvantages, and it is clear that none of the mechanisms are completely perfect. In terms of whether any of them could serve as a model for international investment arbitration, the answer must surely be no. The framework of international investment law and international investment arbitration is completely unique, and it would therefore be extremely difficult, and probably wholly undesirable to try and fit it into the mould of existing mechanisms. International investment law is completely unique because it is based upon thousands of BITs between different nations. Each treaty may contain similar provisions, however subtle differences may be present, making it virtually impossible and undesirable to harmonise interpretations of key international investment law principles. Thus it is practically impossible to create a body of jurisprudence based on the jurisprudence, which is what would need to happen if one arbitral institution was to attempt to take over the hearing of all international investment related disputes. Thus, it may not be possible to create a permanent institutional which would have the sole responsibility for settling all international investment disputes until such a time as a multilateral investment treaty can be established.

Despite this, examining the dispute settlement mechanisms of existing international and regional institutions is not a futile task. Even if the mechanisms discussed in this chapter cannot realistically serve as a complete model for

international investment arbitration, they can at least serve as inspiration. International investment arbitration could do a lot worse than to import certain characteristics of these bodies in the future. Examining these existing international and regional arbitral institutions has revealed that many of the institutions that have been discussed in this chapter have common features. For example, most of the institutions make use of a two-stage dispute settlement procedure which includes both a written and oral phase. Furthermore, all of the bodies provide for the settlement of disputes in a wide range of languages and make use of strict deadlines at each stage of the procedures. These common features are undoubtedly very general; however, they could be incorporated into international investment arbitration in the future. It is also interesting to note that many of the international and regional arbitral institutions discussed in this chapter make use of general procedural rules; international investment arbitration could also do this. For example a number of arbitral institutions make use of the UNCITRAL Arbitration Rules of Procedure rather than having their own specific rules. The UNCITRAL Rules could be used in international investment arbitration in the future. The advantage of using rules such as UNCITRAL is that they are already well known in international arbitration which means that states and parties will be more familiar with them, and perhaps more likely to want to settle their disputes in accordance with them. This would also save time and effort drafting a completely unique set of procedural rules. Also, this chapter highlights the fact that many arbitral institutions seem to incorporate different types of procedures, such as contentious/direct procedures as well as a procedure for preliminary reference/advisory opinions. International investment arbitration could do the same. It would seem that this is a particularly good thing because then parties can ask for advice before they act if they are concerned about the legality of proposed measures, therefore checking legality before it arises in a dispute; prevention is better than cure. This would also save valuable time and money.

As we have seen in the preceding paragraph, many of the general features common to the dispute settlement institutions could be incorporated into international investment arbitration in the future. However, it is not only the general features which could be imported; some of the unique features of the institutions discussed in this chapter could also be adapted and imported into

international investment arbitration. For example, the International Tribunal for Law of the Sea has several special chambers, each of which deals with a particular type of dispute connected with the law of the sea. A similar idea could be imported into international investment arbitration; a number of chambers could be set up, each of which could deal with a particular type of international investment dispute. The major advantage of this is that the judges/arbitrators of each chamber can become real experts in the field in which they are to settle disputes.

To conclude, this chapter has established that none of the international and regional dispute settlement mechanisms that are already in existence could serve as an outright model for international investment arbitration. The framework of international investment law and its particularities prevent this possibility. However, it is possible, and probably advantageous to try to incorporate different aspects of these institutions into international investment arbitration in the future. Thus, rather than providing a perfect model, these existing arbitral institutions could serve as inspiration for international investment arbitration. This would be particularly important if, as suggested in the preceding chapter, attempts are to be made to create a world investment court. The creation of such an institution would not be an easy task, therefore being able to take inspiration from other arbitral institutions throughout the process would be a great help to those charged with the task and undoubtedly save a lot of time and effort.

CHAPTER VIII: CONCLUSION

8.1 Answering the central research questions

8.1.1 Summary of findings

The introductory chapter of this thesis defined the central question which the research sought to address; examining whether the creation of an appeal mechanism in international investment arbitration is actually necessary. This primary question inherently raised other important issues such as the adequacy (or rather inadequacy) of the current system of international investment arbitration, and whether any alternative suggestions (other than the establishment of an appeal mechanism) for the improvement of the system might address some or all of the deficiencies within the current system.

The system of international investment arbitration suffers a number of important limitations, the most important of which being the alleged crisis of consistency. In recent years, a number of high profile investment disputes involving similar or the same facts have produced diametrically opposing outcomes.¹ This inconsistency is possible due to the number of different fora available to parties in dispute; there are literally hundreds of tribunals and organisations to which parties may turn to settle their dispute. In order to remedy the problem of inconsistency, a number of suggestions have been put forward. One such suggestion is the establishment of an appeal mechanism. The suggestion has been and continues to be hotly debated; experts have failed to agree on basic issues such as the need for and desirability of such a mechanism.

¹ See *CME Czech Republic B.V. v Czech Republic*, Ad hoc – UNCITRAL Arbitration Rules, Partial Award of 13 September 2001 and IIC 62 (2003), Final Award of 14 March 2003, *Lauder v Czech Republic*, Final Award, 3 September 2001 (Ad hoc-UNCITRAL Arbitration Rules), *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* ICSID Case No. ARB/01/13 (2003) 42 ILM 1290, *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* ICSID Case No. ARB/02/6 (2004), *Emilio Augustín Maffezini v Kingdom of Spain* ICSID Case No. ARB/97/7 (2000), *S.D. Myers v Canada* (2000) ILM 1408 (NAFTA Arb), *Metalclad Corporation v United Mexican States* (2000), ICSID Case No ARB(AF)/97/1 (2000) and *Pope & Talbot Inc. v Government of Canada* (2002) ILR 293 for examples of inconsistent decisions in international investment arbitration. See also discussion of these cases in this thesis in chapter three.

8.1.2 Conclusions

The findings of the research which have been discussed in previous chapters support a number of specific conclusions:

- i) The basis of the call for an appeal mechanism has been established and the benefits of such a mechanism would greatly outweigh any potential costs

It is widely accepted that the basis of the call for an appeals facility in international investment law is attributed to the alleged crisis of consistency in international investment arbitration.²

Nonetheless, a number of international investment experts argue that the supposed crisis of consistency is yet to occur. Legum³ and Paulsson⁴ are both of the opinion that international investment arbitration has not suffered from inconsistency and incoherence as yet. In relation to its own jurisprudence, even ICSID asserts that significant inconsistencies have not featured.⁵

However, a string of infamous investment awards have been rendered in recent years which provide evidence of the existence of significant inconsistencies in international investment arbitration. The *Lauder*⁶, *SGS*⁷ and *NAFTA*⁸ sets of cases⁹ involved similar or the same facts, yet different tribunals reached diametrically opposing decisions about how they should be settled. Thus, it would seem that inconsistencies are occurring in international investment arbitration, meaning that the need for an appeal mechanism has

² See for example M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven International Publishing 2008) 35 and M Sornarajah, 'A coming crisis: expansionary trends in investment treaty arbitration' in K Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 73.

³ B Legum, 'Options to establish an appellate mechanism for investment disputes' in K Sauvant, *ibid.*

⁴ J Paulsson, 'Avoiding unintended consequences' in K Sauvant, *ibid.*

⁵ 'Possible improvements of the framework for ICSID arbitration' (2004)

<<http://www.worldbank.org/icsid/highlights/improve-arb.htm>> accessed 20 July 2009.

⁶ *CME Czech Republic B.V. v Czech Republic* (n 1) and *Lauder v Czech Republic* (n 1).

⁷ *SGS Société Générale de Surveillance S.A. v Pakistan* (n 1) and *SGS Société Générale de Surveillance S.A. v Philippines* (n 1).

⁸ *S.D. Myers v Canada* (n 1), *Metalclad v Mexico* (n 1) and *Pope & Talbot v Canada* (n 1).

⁹ See chapter three of this thesis for in-depth discussion of these cases.

been established, contrary to other opinion. Furthermore, due to the ever increasing number of international investment disputes, there is even greater potential for more inconsistencies to occur in the future. Statistics show that the number of international investment disputes has risen massively over the last thirty years. In the late 1980's and early 1990's, approximately 5 international investment disputes were recorded annually.¹⁰ Fast forward to the early 2000's and that figure had risen to 40 – 45 cases being recorded annually.¹¹ The number of cases being recorded has fallen slightly in the last couple of years¹², though this is probably due to the global economic crisis. It is expected that the number of cases will continue to rise once the effects of the global financial crisis subside.

The establishment of an appeal mechanism would undoubtedly promote greater consistency in international investment arbitration. An appeals facility could ensure that the trend towards creative interpretation¹³ of key principles of international investment law is reversed, ensuring the consistent interpretation of such principles and thus avoiding conflicting outcomes in cases with similar/the same facts.¹⁴ As well as addressing the issue of inconsistency, an appeal mechanism could have other important benefits. For example, it would act as a corrective mechanism in cases where the tribunal of first instance may have made a mistake.¹⁵ Additionally, an appeals facility could enhance the sustainability of the system of international investment arbitration¹⁶ as well as provide greater sensitivity to legitimate governmental concerns¹⁷. Finally, an

¹⁰ K Sauvart, 'The rise of international investment, investment agreements and investment disputes' in K Sauvart (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 8-9.

¹¹ *Ibid.*

¹² 'UNCTAD: FDI Statistics'

<<http://unctadstat.unctad.org/TableView/tableView.aspx?ReportId=88>> accessed 9 March 2012.

¹³ For discussion of the trend toward creative interpretation see S Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008) 135.

¹⁴ K Yannaca- Small, 'Improving the system of investor-state dispute settlement an overview' (2006) <<http://www.oecd.org/dataoecd/3/59/36052284.pdf>> accessed 16 July 2009.

¹⁵ *Ibid.*

¹⁶ D Bishop, 'The case for an appellate panel and its scope for review' in F Ortino et al (eds), *Investment Treaty Law: Current Issues Volume 1* (British Institute of International and Comparative Legal Studies 2006).

¹⁷ A Qureshi, 'An appellate system in international investment arbitration?' in P Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008).

appellate facility could enhance the objectivity¹⁸ and predictability¹⁹ of the system of international investment arbitration and prevent distortion²⁰ through treaty, nationality and forum shopping.²¹

Even if we do accept that inconsistency is prevalent in international investment arbitration, critics of the proposed appeal mechanism have asserted that the establishment of an appeals facility is not the answer. Paulsson²² states that inconsistency is a mere fact of life, not a cause for great concern and should simply be ignored. Gill²³ is of a similar opinion, asserting that inconsistency is inevitable and it is important to remember that it is not unique to international investment arbitration, though inconsistency in international investment arbitration does seem to receive much more publicity. Paulsson and Gill do concede that inconsistency may be viewed by some as undesirable, but suggest that doing nothing is the best course of action. They both advocate a laissez-fair policy, claiming that over time, naturally one solution will be preferred over the other by tribunals and thus the inconsistency will remedy itself in due course. Paulsson goes on to stress specifically that the establishment of an appeal mechanism is not necessary to combat inconsistency.²⁴

Additionally, critics of an appeal mechanism have been quick to point out a number of purported disadvantages of creating such a facility. One of the major arguments of investment experts against the creation of an appeal mechanism is that it would cause a loss of flexibility in international investment arbitration. Flexibility is heralded as one of the main pillars of investment arbitration; particularly with ad hoc arbitration where the disputing parties have a great deal of flexibility to determine how their dispute should be settled. For example, they are free to choose the arbitrators who will settle the dispute, choose where the arbitration will take place as well as which law or rules should be applied in the case. This high degree of flexibility was ideal for the settlement of traditional

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid* see also S Subedi (n 13) 179-182.

²² J Paulsson (n 4).

²³ J Gill, 'Inconsistent decisions: an issue to be addressed or a fact of life?' in F Ortino et al (eds), *Investment Treaty Law Current Issues: Volume 1* (British Institute of International and Comparative Law 2006) 23.

²⁴ J Paulsson (n 4).

commercial disputes. However, nowadays international investment arbitration can involve the tribunal's pronouncement on complex issues of public international law such as human rights. Therefore, one could argue that a high degree of flexibility is no longer desirable in international investment arbitration due to the nature of disputes which are now arising.²⁵

Other purported disadvantages of the establishment of an appeal mechanism include fragmentation of international investment law²⁶, particularly if some awards are subject to appeal whilst others are not. Additionally, the creation of an appeal mechanism would destroy the principle of finality²⁷ which is based upon the idea of resolving disputes in the quickest, most economical manner possible. Moreover, it is feared that an appellate mechanism could cause a huge increase in caseload²⁸ due to automatic appeals by the losing party in each case, and also the risk of re-politicising²⁹ the system of international investment arbitration.

On balance, it would seem that the existence of the cases discussed earlier in this section provides indisputable evidence that inconsistencies have occurred in international investment arbitration in the past and the potential for further inconsistencies in the future is real, especially given the ever increasing number of investment disputes. Thus, it would seem that the basis of the call for an appeal mechanism has been established in international investment arbitration. The arguments of certain authors that inconsistency is not problematic and should simply be ignored do not carry much weight. Inconsistency can and has led to injustice in the past and leads to lack of respect for the rule of law.

Inconsistency can be remedied by the establishment of an appeal mechanism, and such a facility could have several important benefits. It must be acknowledged that there are a number of potential drawbacks to an appeal mechanism as well. However, most if not all of the potential downfalls of an

²⁵ See chapter six of this thesis for more in depth discussion of issues of public policy and international investment arbitration.

²⁶ 'Possible improvements to the framework of ICSID arbitration' (n 5).

²⁷ J Clapham, 'Finality of investor-state arbitral awards: has the tide turned and is there a need for reform?' (2009) 26 *Journal of International Arbitration* 437.

²⁸ I Penusliski, 'A dispute system design diagnosis of ICSID' in M Waibel et al (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010) 530.

²⁹ K Yannaca- Small (n 14).

appeal mechanism can be avoided if careful thought and consideration is applied to the mechanics of establishing the appellate body.

- ii) The best way to establish an appeal mechanism appears to be through the creation of a world investment court

Having established that there is a need for the introduction of an appeal mechanism and that the potential benefits of such a mechanism would greatly outweigh any purported costs, the thesis went on to examine how an appeal mechanism could and should be created.

Chapter six considered the wide ranging suggestions that have been put forward by international investment experts in this regard. Accordingly, the chapter went on to examine such suggestions as utilising the appellate body of the WTO, adding an extra layer of arbitration on to each of the dispute settlement mechanisms already in existence and several others. In the past, one of the suggestions that has attracted much discussion is the implementation of an appeals facility within the ICSID framework.

International investment experts appear to be somewhat divided on the issue of an ICSID appeals facility. Supporters of the idea have asserted that an ICSID appeal mechanism would address the crisis of consistency in international investment arbitration³⁰, ensure the correct decisions are reached,³¹ enhance predictability of the law³², create a more sustainable system of investment arbitration³³ as well as increase the authority of international investment awards³⁴.

Despite the purported advantages of an ICSID appellate mechanism, critics have argued that an additional layer of ICSID arbitration will have a negative impact. Concerns have been raised about unnecessarily lengthening the ICSID dispute settlement procedure by eroding finality and subjecting awards to

³⁰ C Tams, 'An appealing option? The debate about an ICSID appellate structure?' (2004) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341268> accessed 18 January 2011.

³¹ *Ibid.*

³² I Penusliski (n 28) 530.

³³ *Ibid.*

³⁴ C Tams (n 30).

appeal.³⁵ Experts worry that the losing party will always pursue an appeal, thereby lowering the value of decisions of first instance.³⁶ There is also concern that regardless of the desirability of an appeal mechanism, the idea is actually unfeasible. There is concern that ICSID member states will withdraw from the ICSID Convention at even the slightest hint of the introduction of an appeals facility.³⁷

Whichever side of the debate individual opinion falls as regards to the creation of an ICSID appeals facility, it cannot be denied that in reality, the establishment of appeal through ICSID seems to have been the only seriously credible option for the creation of an appeals facility in international investment law in the past. This is purely because it has, to date, been the only suggestion to have moved beyond being merely that; it went further than simply being debated by experts in international investment law. ICSID itself weighed in on the debate surrounding the possible addition of an appeals facility.³⁸ For ICSID to discuss the possibility as an institution serves to emphasise the credibility of the suggestion.

In its discussion, ICSID did highlight a number of problems with the establishment of an appeals facility within its own framework. In its 2004 Discussion Paper, ICSID stated that the creation of an ICSID appeals facility would be useless if other appeals facilities were also to be established; multiple appellate mechanisms would potentially cause greater inconsistency and incoherence in international investment arbitration rather than ameliorate the situation.³⁹ For this and other reasons, the creation of an appeal mechanism under the auspices of ICSID is no longer on the agenda of the ICSID Secretariat. Accordingly, any hopes of an ICSID appeals facility appear to have been quashed.

So with the most credible option for the establishment of an appeal mechanism having been indefinitely abandoned, the alternative suggestions must be considered. The other possible methods of introducing an appeals

³⁵ *Ibid.*

³⁶ I Penusliski (n 28) 530.

³⁷ C Tams (n 30).

³⁸ 'Possible improvements to the framework of ICSID arbitration' (n 5).

³⁹ *Ibid.* See also 'Suggested changes to the ICSID Rules and Regulations', Working Paper of the ICSID Secretariat, May 12 2005 <<http://www.worldbank.org/icsid/052405-sgmanual.pdf>> accessed 27 May 2011.

facility in international investment arbitration were examined in great depth in chapter six of this thesis. As such, a lengthy discussion of the merits and shortcomings of each is not valuable here. Suffice it to say that some of the options discussed in chapter six have too many downfalls to be serious contenders in this regard.

Making use of the World Trade Organisation's Appellate Body would raise important questions within the WTO about the locus standi of private individuals in trade disputes (seeing as they would necessarily need to be granted access in investment disputes). Furthermore, budgetary concerns would not be easy to allay, due to the fact that the WTO is entirely funded by the contributions of member states. The issue of who should bear the costs of arbitration would be complicated to resolve.

Creating an additional layer of arbitration to existing dispute settlement mechanisms would also generate problems. The basis of the call for an appeal mechanism is largely based on concerns surrounding the inconsistency and incoherence associated with the current system of international investment arbitration. Simply creating an additional layer of arbitration to the tens, if not hundreds of arbitral processes in existence will do little to promote greater consistency and coherence in the system. Thus, it is not a credible option for the establishment of appeal in international investment law.

With the creation of an appeal mechanism off ICSID's agenda, and the numerous problems associated with the other options for the establishment of an appeal mechanism, there is only one final option to consider; the creation of a world investment court. The establishment of a world investment court would enable all the international investment disputes to be handled by one single authoritative body, delivering fair and consistent judgments. The court will undoubtedly harmonise the law of foreign investment by providing consistent interpretations of key investment terms, ultimately creating a coherent body of jurisprudence in the field.

Numerous international investment experts have expressed their support for the proposal to create a world investment court. Van Harten⁴⁰ asserts that states should 'support a multilateral code that would establish an international

⁴⁰ G Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 179-180.

court with comprehensive jurisdiction over the adjudication of investor claims.⁴¹ He believes that the new investment court should have mandatory jurisdiction over all claims filed by foreign investors whose national governments are signatories of the multilateral agreement.⁴² Qureshi⁴³ and Goldhaber⁴⁴ are supportive of the view articulated by Van Harten.

- iii) A world investment court will probably only work if it is established as part of wider reforms

Legum argues that the current system of international investment law is ill-adapted to appeals due to the lack of a comprehensive multilateral treaty.⁴⁵ This is a valid argument; asking an appellate body to interpret the similar, yet slightly differently worded thousands of BITs and investment agreements will do little to achieve the as yet elusive goal of consistency within international investment. Furthermore, the current system of international investment arbitration is ill-adapted to appeals due to the number of different fora available for the settlement of investment disputes. There are tens, if not hundreds of tribunals and organisations offering to settle arising disputes. Encouraging each of them to offer an extra layer of appeal will also do little to improve consistency in international investment arbitration. Appeal for the sake of it will not ameliorate the current situation at all. It is therefore crucial that the system of international investment law is adapted so that it is better suited and better equipped to enable appeals.⁴⁶

Firstly, in order to make international investment arbitration more appeal friendly, as Legum suggested, a multilateral treaty must be put into place which will replace the thousands of BITs and investment agreements that are currently in operation. Negotiations for such a multilateral treaty have taken place several times before and have all failed. In order to be successful where there has been failure in the past, it is necessary to understand the reasons for the previous

⁴¹ *Ibid* 180.

⁴² *Ibid*.

⁴³ A Qureshi, 'An appellate system in international investment arbitration?' (n 17) 1157.

⁴⁴ M Goldhaber, 'Wanted: a world investment court' 3 *Transnational Dispute Management* 26.

⁴⁵ B Legum, 'Options to establish an appellate mechanism for investment disputes' (n 3) 231-240.

⁴⁶ *Ibid*.

lack of success. It is often claimed that the previous negotiations stalled for the same reason; failing to take into account the needs and desires of developing nations.⁴⁷ Perhaps the forum for the negotiations is in part responsible for this bias against developing nations. The WTO for example, which has hosted past negotiation attempts, is often criticised for being predisposed to prioritising the needs and desires of developed nations who have more control over its operation. In order to overcome this problem, future multilateral treaty negotiations will need to be initiated by an entirely new institution which will be free of any prejudice and injustice. The new organisation could become the WTO of the investment world. Ensuring that there is a place for the developed and developing nations to speak and be heard might just be what is needed in order to succeed.

Once the new international investment organisation has been established, attention can be turned to the negotiation of a multilateral investment agreement. The agreement could define key international investment law terms, from the relatively simple 'investor' and 'investment' to more complicated expressions such as 'expropriation'. The current myriad of BITs, each with similar but perhaps slightly different wording precludes the consistent interpretation of such key terms which is desperately needed in order to achieve the greater consistency that is required in investment arbitration. Of course the new multilateral agreement would provide a dispute settlement procedure, as all investment agreements should. The new dispute settlement mechanism could create a dispute settlement body, akin to that of the WTO DSB. Like the DSB of the WTO, the international investment dispute settlement body could incorporate an appellate body. This structure has been successful in the past in the field of trade law with the creation of the WTO system itself, and it could be imitated for international investment.

- iv) The needs and wishes of developing nations must not be overlooked

This issue has been briefly mentioned above, though it does merit more thorough treatment. Developing countries are extremely important in international investment law, not least due to the fact that they are more often

⁴⁷ P Sauv , 'Multilateral rules on investment: is forward movement possible?' (2006) 9 *Journal of International Economic Law* 325.

than not the states in receipt of foreign investment. This is because foreign investors typically hail from developed states, and the states that they invest in are frequently lesser developed (where there is often a greater potential for profit). The inflow of investment is seen as desirable to lesser developed nations as it has traditionally been thought to contribute to speeding up the development process and lead to an increase in the general wealth of the receiving nation.⁴⁸

Although developing nations have an important role to play within international investment, their needs and wishes are often overlooked. This is particularly important in terms of dispute settlement, because, typically being the recipients of international investment, their governments frequently find themselves as the defendants in cases of dispute. A fair system of international investment arbitration would obviously be a priority for developing nations, as they will want to avoid paying what can often amount to huge sums of compensation if the tribunal finds in favour of the investor. An appeal mechanism would probably be attractive to developing nations, because as defendants in disputes, if they feel that the decision is unfair, there is currently very little they can do about it. As this thesis has demonstrated, the scope for the review of investment awards is very limited. Usually, cases are only reviewable where there has been some alleged abuse of process, rather than on substantive issues. An appeal mechanism offering the review of awards on the merits of the decision will be desirable to lesser developed nations, and would ultimately lead to the creation of a fairer system of international investment arbitration.

International investment host states need to be able to regulate their internal affairs without the fear of the threat of arbitration every time they act in a way which is not beneficial to foreign investors. If a multilateral investment treaty is

⁴⁸ There is a widespread belief that FDI increases development in the investment host country, though this has been debated in recent years. For a more in-depth discussion of this see K Sauvart and L Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP USA 2009), J Salacuse and N Sullivan, 'Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain' (2005) 46 *Harvard Journal of International Law* 67, E Neumayer and L Spess, 'Do bilateral investment treaties increase foreign direct investment to developing countries?' (2005) 33 *World Development* 1567 and P Egger and M Pfaffermayr, 'The impact of bilateral investment treaties on foreign direct investment' (2004) 32 *Journal of Comparative Economics* 788.

produced, it will need to be more balanced than existing treaties. BITs are often thought to be biased in favour of protecting the investor at the expense of the investment host state, because the developed nations have more power in the bargaining process. As such, the negotiations for any multilateral agreement on investment will need to enable developed and developing nations to negotiate on an equal footing.

- v) International investment law will have to strengthen its place in the broader framework of international law

This research has highlighted the fact that the nature of international investment disputes has changed over recent years. Disputes traditionally involved the examination of narrow points of law that were very technical in nature and seldom had effect outside of the particular context within which they were brought up, that is, the single dispute that had arisen. This is no longer true of international investment disputes. International investment disputes typically arise when the investment host state government enacts legislation or brings in new policies which adversely affect the foreign investor's investment. Often, environmental protection and human rights legislation can affect the investor's investment, perhaps making it (at the very least) more costly for the investor to carry out his or her business. At the very extreme, such legislation can render the investor's business or investment illegal, prohibiting them from carrying out their commercial activities altogether. The investor will then bring a dispute, often alleging that the host state government's actions are prohibited by an investment agreement, more often than not, a BIT between the host state and the investor's home state. Such investment agreements usually provide for the settlement of the dispute through arbitration.

In such arbitration, the arbitrators have to consider the reasons why the state government enacted the new legislation which is subject to challenge, delving into issues of public policy. Sometimes a state may have been forced to enact the new legislation in order to comply with its obligations under international treaties. It is therefore becoming increasingly important for international investment law and arbitration to strengthen its position within the broader framework of public international law. With such important issues

coming into play in international investment disputes, it is imperative that they are settled in accordance with the principles of public international law.

The issue of how international investment law and arbitration can and should fit into the broader framework of public international law brings us back to the consideration of the amount of flexibility within the system of international investment arbitration. Traditionally, flexibility of the system has been widely recognised as one of the strengths of the system. However, such wide flexibility is surely no longer justifiable, given the important issues which are now at stake in international investment disputes, and the apparent overlap into public international law.

Furthermore, the fact that issues involving public international law are being pronounced on in international investment arbitration by arbitrators is worrying. Arbitrators are often chosen at the will of the parties to the investment dispute, and selected based on how likely they are to agree with the choosing parties' arguments. Yet these people are often deciding disputes involving important aspects of public interest. The question of whether they are qualified and should be able to do so in any case must be answered. Perhaps the way forward is to institutionalise international investment arbitration through the establishment of a single court-like body. A world investment court will enable a permanent pool of arbitrators (akin to traditional judges) to be assembled, thereby providing less choice to the parties to the dispute regarding who should be appointed to preside over the case. In this way, we can be sure that the most qualified people are hearing the dispute, and should the case involve public international law principles, suitable arbitrators may be selected.

8.2 Further research

This work has focused on the debate surrounding whether the need for an appeal mechanism has been established. Indeed, the research findings suggest that such a need is present, and that the creation of an appeal mechanism would be a positive move for the system of international investment arbitration. The work did move on to examine how an appellate mechanism might best be introduced. Specifically, chapters six and seven investigated a number of the most prominent suggestions that have been put forward in the

past. Accordingly, chapter six investigated suggestions such as introducing an appeal mechanism under the auspices of ICSID, making use of the WTO's appellate body, creating an appeals facility added to existing international investment arbitral mechanisms which would be ring-fenced from other systems as well as creating a world investment court. Chapter seven examined whether any existing dispute settlement mechanisms could serve as a model or inspiration for international investment arbitration.

A preliminary analysis of the proposals suggested that the creation of a world investment court might provide the best means of establishing an appeals facility in international investment arbitration. However, much more research will need to be undertaken in order to make an informed decision about how an appeals mechanism should be established. Even if a more detailed analysis does provide support for the creation of a world investment court, many more questions will need to be answered before such an organisation could be established. Intensive research will need to be carried out into how a world investment court should function, its processes, its seat et cetera. There is still a great amount of work which will need to be completed before a world investment court can come to fruition. The present research suggested that the current framework of international investment law might not be particularly well suited to the creation of a world investment court; perhaps more fundamental reforms to the system will need to be effected before a court-like body can be introduced. The research suggested that the current network of thousands of bilateral investment treaties might need to be replaced with an overarching global multilateral treaty, and a dedicated international investment organisation (akin to the WTO) might need to be in place for this to happen. The creation of a world investment organisation and a multilateral treaty could take years to negotiate and establish, and would be no mean feat. Thus, it would appear that there may be a lot of work to do in the field of international investment before the creation of a world investment court.

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