



MONASH University

A PROPOSED ALTERNATIVE TRIBRID FRAMEWORK FOR A MULTILATERAL REFORM OF THE INVESTOR–STATE DISPUTE SETTLEMENT REGIME

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ABSTRACT

The international investment arbitration regime emerged to facilitate a cross-border investment climate; however, it is currently experiencing an ongoing legitimacy crisis, particularly regarding the inaccurate and inconsistent application of standards for assessing whether States have breached the investment treaty norms, which, it may be said, is an indicator of a legitimacy deficit. This perceived illegitimacy creates unpredictability and instability in the long term. Although new-generation investment treaties tend to provide more precise definitions of core investment protections and rights to regulate exceptions, they cannot alleviate the inaccuracy and inconsistency problems. Another alternative is to improve accuracy and consistency through *jurisprudence constante*, as illustrated by the World Trade Organization jurisprudence. Accordingly, many international governmental organisations have discussed the reform of the investor–State dispute settlement regime. To date, arguments about the reform remain inconclusive.

This Thesis aims to contribute to the resolution of the current international debates regarding a multilateral reform of the investor–State dispute settlement regime. Owing to the unique characteristics of investment disputes that involve contract-based claims, treaty-based claims and hybrids thereof, this Thesis argues that the investor–State dispute settlement regime should be reformed to promote accuracy and consistency in treaty-based claims of investment disputes. Accuracy can enhance the economic wellbeing and prosperity of the international investment regime, and consistency will lead to legal certainty, predictability and the development of international investment law and dispute prevention. Accuracy and consistency would lower the social costs of the international investment regime, which will then evolve toward long-term efficiency. By contrast, a new, multilateral ISDS regime that promotes accuracy and consistency may increase the costs for disputing parties. Therefore, this thesis also argues that the new regime should be designed in a way that minimises private costs.

To develop an alternative solution to serve this policy goal, this Thesis utilises a comparative analysis of the current investor–State arbitration regime, the World Trade Organization model, and the European Union investment court proposal, focusing on drawbacks that could be avoided, successful strategies that might be adopted, and how procedures could be further improved. This evaluation has demonstrated that each model has benefits and limitations in light of the unique characteristics of investor–State disputes. Ultimately, the Thesis proposes a tribrid theory of investor–State dispute settlement regime and suggests alternatives for putting this tribrid theory into practice. It is argued that this approach serves the Thesis’ goals of contributing to the resolution of the current international debates regarding a multilateral reform of the investor–State dispute settlement regime.

DECLARATION

This thesis contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Name: Patharawan Chongchit

Date: Monday 13th May 2019

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LIST OF ABBREVIATIONS

CETA	Comprehensive Economic and Trade Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership Agreement
CRCICA	Cairo Regional Centre for International Commercial Arbitration
DSU	Dispute Settlement Understandings/Understanding on Rules & Procedures Governing the Settlement of Dispute
GATT	General Agreement on Tariffs and Trade
G20	Group of Twenty
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
<i>ICSID Convention</i>	<i>Convention on the Settlement of Investment Disputes between States and Nationals Other States</i>
ISDS	Investor–State Dispute Settlement
LCIA	London Court of International Arbitration
MCCI	Moscow Chamber of Commerce and Industry
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
TPP	Trans-Pacific Partnership Agreement
TTIP	Trans-Atlantic Trade and Investment Partnership
UNCTAD	United Nations Commission on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

INTRODUCTION

I. Rationale, Objectives, Scope and Significance of the Thesis

The theme of this Thesis is the tensions arising from a multilateral reform of the investor–State dispute settlement regime, which is presently under discussion internationally. The rationale for the study is that a multilateral reform of the investor–State dispute settlement regime represents one of the most advanced and challenging problems in the field of investor–State dispute settlement. This topic still needs further research to complement and enhance existing thought. Additionally, a future multilateral investor–State dispute settlement regime will allow States around the world to participate; therefore, an alternative solution to current reform options for a multilateral investor–State dispute settlement regime would make a substantive contribution to the international investment community as a whole.

Before detailing the objectives, scope and significance of this Thesis, it is essential to address the reasons underlying the possibility that a multilateral reform is more suited to the international investment law regime than bilateral reforms. As is discussed later (in Chapter 1, section 1.4.4), the existing reform options of the investor–State dispute settlement regime encompass bilateral or multilateral approaches. Each has its distinct advantages and disadvantages. While bilateral reforms may take less time to negotiate than a multilateral reform, in bilateral negotiations, more powerful States are likely to gain advantages over less powerful ones. Bilateral negotiations may result in unequal treatment among the States and between foreign investors from different States; they may also create inconsistency and fragments¹ in the international investment law regime.

Arguably, a multilateral reform is expected to support the globalisation of investment and generate more global prosperity than bilateral reforms.² Although a multilateral negotiation is likely to take longer than bilateral negotiations, as noted above, a multilateral reform will allow many States to participate in negotiations. Thus, a multilateral instrument is likely to provide a more neutral platform for negotiations than bilateral instruments. In addition, a uniform dispute resolution procedure under a multilateral instrument would serve as a public good³—that is, it would benefit investors, States and stakeholders in

¹ Stephen W Schill and Geraldo Vidigal, ‘Investment Dispute Settlement à la carte within a Multilateral Institution: A Part Forward for the UNCITRAL Process?’ (2019) 248 *Columbia FDI Perspective* 1 <<http://ccsi.columbia.edu/files/2018/10/No-248-Schill-and-Vidigal-FINAL.pdf>>.

² Cecilia Malmström, ‘A Multilateral Investment Court: A Contribution to the Conversation about Reform of Investment Dispute Settlement’ (Speech delivered at Brussels, 22 November 2018) (states that ‘Multilateralism creates an environment where trade and investment can prosper ... For trade and investment to support sustainable development, we need rules. Those rules need to be backed up with effective enforcement. This is why we need neutral and effective dispute settlement mechanisms.’)

³ Marc Bungenberg and August Reinisch, ‘Von bilateralen Schieds-und Investitionsgerichten zum multilateralen Investitionsgerichtshof: Optionen für die Institutionalisierung der Investor-Staat-Streitbeilegung’ (Machbarkeitsstudie, 21 August 2017) [German with English Executive Summary] x.

the international investment community, rather than specific disputing parties. Accordingly, such a uniform dispute resolution procedure is likely to promote consistency compared with various dispute settlement procedures under various bilateral instruments. In light of the unique characteristics of investment disputes that are discussed later (in Chapter 2, section 2.2), this Thesis takes the view that a multilateral reform may be likely to foster accuracy and consistency, which will then evolve into long-term efficiency in the international investment system. Thus, a multilateral reform is better suited to the international investment law regime than bilateral reforms.

The main objectives of this Thesis are to move forward the debates about a multilateral reform of the investor–State dispute settlement regime; to enhance the theoretical perspective of a multilateral investor–State dispute settlement regime; and to propose an alternative tribrid framework for a multilateral investor–State dispute settlement regime in an attempt to promote accuracy and consistency. This will lead to long-term efficiency, serving the policy goal of facilitating both a positive investment climate and legal certainty, which is a main element of the rule of law. As is noted in Chapter 1 (section 1.4), there are several related aspects to these debates. However, this Thesis focuses on procedural reform only. In addition, it acknowledges that there are political debates regarding the best way to regulate investor–State disputes, but it does not engage in those political debates—rather, it aims to provide an alternative *legal solution* to existing reform options.

Although the United Nations accepts the rule of law and legitimacy as the essential foundation of the international political system and most domestic systems,⁴ the rule of law and legitimacy are contested concepts—that is, they have no consensus definitions.⁵ There is no universal agreement on the elements of the rule of law (except for legal certainty, which is an uncontroversial element of the rule of law) to be applied within a framework of international investment law.⁶ Therefore, the use of these concepts in this Thesis is limited to analysing the role of greater accuracy and consistency in giving effect to legal certainty⁷ and to long-term efficiency in the international investment system. However, this Thesis

⁴ *Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, A Res 67/1 and 67/97, UNGAOR, 67th sess, Agenda Item 83 (30 November 2012) 2 [10]<<https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>>.

⁵ For some discussions about the definitions of the rule of law and legitimacy, see, eg, Christopher Thomas, ‘The Uses and Abuses of Legitimacy in International Law’ (2014) 34(4) *Oxford Journal of Legal Studies*, 729–58; John H Farrar, *Introduction to Legal Method* (Sweet&Maxwell, 1977) 10; Thomas M Frank, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990) 112; Nienke Grossman, ‘The Normative Legitimacy of International Courts’ (2013) 86 *Temple Law Review* 61, 103–4.

⁶ For a recent discussion (2018) about the rule of law in the context of international investment law, see, eg, International Law Association (ILA), ‘Rule of Law and International Investment Law’ (International Law Association Sydney Conference, Sydney, July 2018).

⁷ For a recent discussion on legal certainty in the context of international investment system, see *Possible Reform of Investor-State Dispute Settlement (ISDS)*, UN Doc A/CN.9/WG.III/WP.142 (12 December 2017) (Note by the Secretariat) 7 [31].

acknowledges other concepts (such as the diversity, independence and impartiality of arbitrators, and the transparency of proceedings) that are discussed or implemented in specific reform options. This Thesis may touch upon these concepts to a certain extent where relevant.

This Thesis proceeds on the assumption that accuracy, consistency and efficiency in dispute settlement are normatively desirable for treaty-based disputes. Thus, engaging with these concepts may be useful. Accuracy may refer to the notion that adjudicators should consider the policies underlying the law and determine whether the law is to be applied to a specific factual dispute to ensure a correct outcome. Several legal philosophers have reaffirmed this notion as a crucial element in maintaining the rule of law. For example, Bentham’s approach to accuracy⁸ was summarised by Galligan as ‘the correct application of the law to the facts’.⁹ According to Galligan, the accuracy maintains ‘the values inherent in the substantive law’ and ‘the value in stability through regular and consistent application of the law’.¹⁰ Likewise, Kaplow and Shavell observe that ‘the insistence on procedural fairness, which usually entails improving accuracy, will tend to serve as a proxy instrument for identifying policies that enhance individuals’ well-being’.¹¹

Closely related to but distinct from accuracy, consistency may refer to the notion that the same law should apply equally if the facts are the same.¹² Although there is no general agreement regarding the definition of consistency, the one proposed by Thomas M Frank can be considered authoritative in the context of public international law. By advancing Dworkin’s approach regarding the rule of law,¹³ Frank explains that consistency ‘requires a rule (or, as we have noted, a ritual or standard), whatever its content, be applied uniformly in every “similar” or “applicable” instance’.¹⁴ Consistency, in turn, brings about legal certainty and predictability, which are acknowledged by many international governmental organisations as having a positive effect on investment. For example, the Organisation for Economic Co-operation and Development¹⁵ (OECD) states that ‘legal certainty, predictability and businesses’ trust in justice systems helps positive investment decisions and promote competition’.¹⁶ The United Nations Commission on

⁸ See, eg, Jeremy Bentham, *A Treatise on Judicial Evidence* (M Dumont ed, JW Paget, 1825); Jeremy Bentham, *Rationale of Judicial Evidence* (Works, 1827); Jeremy Bentham, *Principle of Judicial Procedure* (Works, 1937).

⁹ D J Galligan, *Due Process and Fair Procedure: A Study of Administrative Procedures* (Clarendon Press, 1996) 9–10.

¹⁰ Ibid.

¹¹ Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press, 2002) 261–3.

¹² For some general discussions on consistency, see, eg, Lon L Fuller, *The Morality of Law* (Yale University Press, Revised ed, 1969) 33–8. Ronald Dworkin, *Law’s Empire* (Belknap Press, 1988) 176–224; Thomas M Frank, ‘Legitimacy in International System’ 82 (1998) *The American Journal of International Law* 705.

¹³ Dworkin, *Law’s Empire*, above n 12, 176–224 (pointed out that fairness, justice and integrity are three components of the rule of law).

¹⁴ Thomas M Frank, ‘Legitimacy in International System’, above n 12, 741 (citation omitted).

¹⁵ The OECD was established in 1961 with a mission ‘to promote policies that will improve the economic and social well-being of people around the world’ (see Organisation for Economic Co-operation and Development (OECD), *About* <<http://www.oecd.org/>>).

¹⁶ OECD, *Access to Justice* (2018) <<http://www.oecd.org/gov/access-to-justice.htm>>.

International Trade Law¹⁷ (UNCITRAL) correspondingly indicates that ‘predictability and correctness were said to be values that support the rule of law, enhance confidence in the stability of the investment environment, further bring legitimacy to the regime, and contribute to the development of investment law’.¹⁸ Since accuracy is distinguishable from consistency, adjudicators’ interpretation and application of legal principles can be consistently wrong. This leads to the question of whether consistency should be prioritised over accuracy. In response to this question, the UNCITRAL suggests that ‘seeking to achieve consistency should not be to the detriment of the correctness of decisions’.¹⁹

Efficiency is also an important consideration in dispute resolution design.²⁰ Efficiency is an economic term that generally refers to the use of limited resources in the most efficient manner.²¹ From the perspective of law and economics theory, any dispute resolution involves both costs and benefits.²² While the primary benefit of a dispute resolution is to end disputes, there are always social costs associated with it.²³ As explained by Cooter and Ulen, social costs are the sum of administrative costs and errors costs; administrative costs are ‘the sum of the costs to everyone involved in passing through the stages of a legal dispute’,²⁴ and errors costs are the costs of mistakes made by a dispute resolution when applying substantive law.²⁵

From the perspective of law and economics, different methods of dispute resolution offer varying degrees of efficiency. Hypothetically, it is assumed that an out-of-court settlement is likely to be more efficient than a court process because it allows a dispute to be resolved by an agreement between disputing parties rather than mandatory court procedures.²⁶ Accordingly, the administrative cost of an out-of-court settlement is likely to be lower than the cost of a court process and, in turn, this lower cost reduces social cost and boosts efficiency in resolving disputes.²⁷ However, this assumption is not without exceptions. If a court process (specifically in the court of appeal) can create a *legal* precedent that is generally accepted

¹⁷ The UNCITRAL is the core legal body of the United Nations with a key function to modernise and harmonise rules on international commercial, including international commercial arbitration and conciliation, international sale of goods, security interests, insolvency, international payments, international transport of goods, electronic commerce, procurement and infrastructure development and online dispute resolution (see United Nations Commission on International Trade Law (UNCITRAL), *About UNCITRAL* <http://www.uncitral.org/uncitral/en/about_us.html>).

¹⁸ *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session - Part II*, UN Doc A/CN.9/930/Add.1/Rev.1 (26 February 2018) 3 [11].

¹⁹ *Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters*, UN Doc A/CN.9/WG.III/JP.150 (28 August 2018) 3 [8].

²⁰ See United Nations Conference on Trade and Development (UNCTAD), ‘Investor–State Disputes: Prevention and Alternatives to Arbitration’ (Series on International Investment Policies for Development, UNCTAD Doc UNCTAD/DIAE/IA/2009/11, 31 July 2010) xvi–xvii.

²¹ Robert Cooter and Thomas Ulen, *Law and Economics* (Addison-Wesley, 6th ed, 2016) 404.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.* 400.

²⁷ *Ibid.*

by the public, its public value may outweigh the costs arising in the court process, which, in turn, evolves towards future efficiency and dispute prevention.²⁸

Based on the law and economics framework, a dispute resolution mechanism should be designed by considering such a cost-and-benefit relationship.²⁹ Depending on the types and characteristics of disputes, dispute resolution is deemed efficient if the benefits outweigh the costs.³⁰ As is discussed in greater detail in Chapter 1 (sections 1.2.2 and 1.2.3), different methods of dispute resolution offer varying degrees of efficiency and consistency. Therefore, a multilateral reform of the investor–State dispute settlement regime faces a significant challenge in relation to dealing with investor–State disputes that involve contract-based claims, treaty-based claims and hybrids thereof, which require different degrees of accuracy, consistency and efficiency in a single dispute resolution process. Therefore, the tension between accuracy, consistency and efficiency is an essential consideration in the development of a multilateral investor–State dispute settlement regime.

At present, claims are being made by some States (particularly those in the European Union³¹) and commentators that the investor–State dispute settlement regime (specifically, investor–State arbitration) is undergoing a crisis of legitimacy, especially regarding inaccurate and inconsistent decisions being rendered by arbitral tribunals. Therefore, reforming the investor–State dispute settlement regime—specifically, creating a multilateral investment court—is desirable for promoting accuracy and consistency in enforcing international investment norms, which can, in turn, bring about sustainable development.³² However, some States (such as the United States and Japan) and relevant stakeholders (usually arbitrators and counsel) are rejecting this, while others are calling for more research on both the advantages and disadvantages of the current investor–State dispute settlement regime and possible reforms. Opponents see the efficiency and benefits of the current investor–State arbitration regime function (such as specialised tribunals, neutral forums, flexible processes, confidentiality, finality and enforcement of awards), which can facilitate a cross-border investment climate. Conversely, proponents of reform have based their opinions on the disadvantages of the investor–State arbitration regime, particularly the limitations of an ad hoc arbitral tribunal, the confidentiality and finality of arbitration processes in promoting accuracy and consistency in the interpretation of investment treaty norms, and the application of standards for assessing whether States have breached those norms.

²⁸ Ibid 417.

²⁹ Felix Steffek, ‘Principled Regulation of Dispute Resolution: Taxonomy, Policy, Topics’ in Felix Steffek et al (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Hart Publishing, 2013) 33, 47.

³⁰ Ibid.

³¹ The European Union is a political and economic union, consisting of 28 European states (see Europa, *Goals and Values of the EU* <https://europa.eu/european-union/about-eu/eu-in-brief_en>).

³² See Malmström, above n 2.

The significance of this topic stems from the fact that both international investment agreements and investor–State dispute settlement regimes are essential regulatory frameworks for foreign investment protection. In terms of substantive investment protections, international investment agreements define the host State’s obligations to provide investment protection, investment liberalisation and investment promotion to foreign investors. However, the scope of investment treaty norms is uncertain, which has led to investment disputes. To resolve disputes, most international investment agreements define foreign investors’ rights to use international arbitration to claim compensation if the host State breaches these norms.³³

Unlike purely private commercial disputes and purely interstate disputes, investment disputes involve contract-based claims, treaty-based claims and hybrids³⁴ of the two.³⁵ In the public international law context, international investment law not only includes investment treaty norms, but also other sources of public international law. As stipulated in article 38 (1) (a)–(d) of the *Statute of the International Court of Justice*, the sources of public international law include treaties, customary international law, general principles of law, judicial decisions and scholarly writings³⁶ Additionally, investment treaty norms should be interpreted in light of articles 31 and 32 of the *Vienna Convention on the Law of Treaties*.³⁷ In the majority of the investment treaties, those norms are articulated as vague standards. They are usually open to debate and interpretation. As a result, they are difficult to apply consistently in disputes. Many decades

³³ See, eg, Thomas W Wälde, and Borzu Sabahi, ‘Compensation, Damages, and Valuation’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 1049.

³⁴ For discussions about a hybrid characteristic of the international investment law and investor–state arbitration, see, eg, Karl-Heinz Böckstiegel, ‘The Role of the Arbitrators in Investment Treaty Arbitration’ in Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions Series: ICCA Congress Series* 11 (Kluwer Law International, 2003) 366; Zachary Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74(1) *British Yearbook of International Law* 151; Bamali Choudhury, ‘Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?’ (2008) 41(3) *Vanderbilt Journal of International Law* 775; Alex Mills, ‘The Public–Private Dualities of International Investment Law and Arbitration’ in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 97; James Crawford, *Brownlie’s Principle of Public International Law* (Oxford University Press, 8thed, 2012) 610.

³⁵ For discussions about contractual claims and treaty claims, see, eg, Gabrielle Kaufmann-Kohler, ‘Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?’ in Emmanuel Gaillard and Yas Banifatemi (eds), *Annulment of ICSID Awards* (Juris Publishing, 2004) 22; James Crawford, ‘Treaty and Contract in Investment Arbitration’ (2008) 24 3 *Arbitration International* 351; Yuval Shany, ‘Contract Claims vs Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims’ (2005) 99 (4) *The American Journal of International Law* 835, 848; Christoph Schreuer, ‘Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered’, in T Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005) 281; Stanimir A Alexandrov and James Mendenhall, ‘Breach of Treaty Claims and Breach of Contract Claims: Simplification of International Jurisprudence’ in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014* (Brill, 2015) 24; Jean Ho, ‘Internationalisation and State Contracts: Are State Contracts the Future or the Past?’ in C L Lim (ed), *Alternative Visions of the International Law on Foreign Investment: Essay in Honour of Muthucumoraswamy Sornarajah* (Cambridge University Press, 2016) 377.

³⁶ *Statute of the International Court of Justice* art 38(1)(a)–(d) .

³⁷ *Vienna Convention on the Law of Treaties* arts 31–32.

of case law have not led to consistent jurisprudence regarding any of the standards of investment protection or other key concepts.

An added complexity is that investor–State disputes may involve assessing the compliance of domestic laws, regulatory measures and States’ administrative decisions (such as to cancel or not renew a licence or permit) with investment treaty norms.³⁸ Accordingly, investor–State disputes are concerned with conflicts of interest in interactions between the private interests of foreign investors and the public interests of the host State. Some existing investment treaties contain balancing provisions by way of defences and exceptions, but these are also vague and do not provide a consistent balance between public and private interests. As is discussed further, in terms of legal issues, ad hoc arbitral tribunals have applied various standards of review (or ‘the nature and intensity of review by a court or tribunal of decisions taken by another governmental authority or, sometimes, by a lower court or tribunal’)³⁹ to assess whether host States have breached investment treaty norms.⁴⁰ In terms of factual issues, numerous and complicated problems have arisen in investment disputes where there has been little consistency in determining what kind of factual circumstances have been used to investigate each norm or defence. More specifically, where those measures or administrative actions are the subjects of investor–State dispute arbitration, there is uncertainty regarding the relevant standard of review (or how much deference arbitral tribunals should give to the fact-finding determinations of competent host State national authorities) to arrive at factual findings.⁴¹ For these reasons, a resolution of investor–State disputes—mainly procedural and evidentiary

³⁸ Investor–State Dispute Settlement: Review of Developments in 2016’ (IIA Issue Note No 1 (2017) , UNCTAD/DIAE/PCB/2017/1, 19 May 2017) 3–4. For discussions about investor protections and state police powers defences, see, eg Thomas Wälde and Abba Kolo, ‘Environmental Regulation, Investment Protection and Regulatory Taking in International Law’ (2001) 50(4) *The International and Comparative Law Quarterly* 811; Francisco Orrego Vicuna, ‘Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society’ (2003) 5 *International Law Forum Du Droit* 188; Jacqueline Peel, ‘Precaution—A Matter of Principle, Approach or Process?’ (2004) 5(2) *Melbourne Journal of International Law* 483; Thomas W Wälde and Abba Kolo, ‘Coverage of Taxation under Modern Investment Treaties’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 308; Steven Ratner, ‘Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law’ (2008) 102(3) *American Journal of International Law* 475; Asha Kaushal, ‘Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime’ (2009) 50(2) *Harvard International Law Journal* 491, 510–4.

³⁹ Jan Bohanes and Nicolas Lockhart, ‘Standard of Review in WTO Law’ in Daniel Bethlehem, Donald McRae, Rodney Neufeld, Isabelle Van Damme (eds), *The Oxford Handbook of International Trade Law* (2009) 378, 379.

⁴⁰ For illustrative purposes, see, eg Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (29 April 1996) (‘*United States—Gasoline*’) 30 (The WTO Appellate Body states, ‘So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements’); See also John H Jackson, ‘The Case of the World Trade Organization’ in Paul F Diehl and Brian Frederick (eds), *The Politics of Global Governance: International Organizations in an Interdependent World* (Lynne Rienner, 4th ed, 2010) 239, 245.

⁴¹ Bohanes and Lockhart, ‘Standard of Review in WTO Law’, above n 39, 389.

issues—is an important mechanism.⁴² Thus, a multilateral reform of the investor–State dispute settlement regime is a topic worthy of critical analysis.

II. Thesis Statement, Rationales for Comparative Legal Studies, International Adjudication Model Selection and Research Questions

This Thesis argues that the investor–State dispute settlement regime should be reformed to promote accuracy and consistency in treaty-based disputes, but that accuracy should be prioritised over consistency. Accuracy can enhance the economic wellbeing and prosperity of the international investment regime. Additionally, consistently applying accurate legal principles will enable investors and States to predict whether a proposed future course of action is likely to be lawful; moreover, this leads to legal certainty, predictability, the uniform development of international investment law and dispute prevention. Together with accuracy, consistency will decrease the social costs of the international investment regime, which, in turn, will lead to the long-term maximisation of overall efficiency.

However, this Thesis also argues that a new, multilateral investor–State dispute settlement (ISDS) regime that promotes accuracy and consistency may increase administrative costs, thereby worsening the financial and time burden of disputing parties. Therefore, the new regime should be designed in a way that minimises administrative costs. Achieving this aim will preserve the traditional policy goal of the present investor–State arbitration regime: providing additional investment incentives to facilitate cross-border investment while promoting the rule of law, which is a central objective of the reform. Therefore, this Thesis attempts to answer the following main research question:

How may the theoretical and practical perspectives of a multilateral investor–State dispute settlement regime be advanced in resolving investor–State disputes that involve contract-based claims, treaty-based claims and hybrids thereof?

To this end, this Thesis contends that the first step towards a multilateral reform of the investor–State dispute settlement regime is to identify the advantages and limitations of the existing theories, policies and practices of the current investor–State dispute settlement system and current reform options in relation to accuracy, consistency and efficiency. Thereafter, it is necessary to reconceptualise the underlying rationale for a multilateral investor–State dispute settlement regime. As per the proposed policy rationale, the next step is to develop an alternative solution for a multilateral investor–State dispute settlement regime, which is accomplished through a comparative analysis.

⁴² Jeffrey Waincymer, 'Investor–State Arbitration: Finding the Elusive Balance between Investor Protection and State Police Powers' (2014) 17 (1) *International Trade and Business Law Review* 261, 289.

Here, it may be relevant to describe comparative legal studies in general and the reasons that this method is useful for developing an alternative solution for a multilateral investor–State dispute settlement regime. Originating in ancient Greece and Rome,⁴³ a comparative legal study is an instrument used for various scholarly purposes and encompasses the development of past legal systems (specifically, during the colonial period), the unification and harmonisation of the law (specifically in the European States) as well as various modern law reforms in several States.⁴⁴ Comparative legal studies can be conducted in several ways. As Hug (1932) suggests,

[Comparative studies] may compare foreign systems with the domestic system with a view toward ascertaining likenesses and differences or analyse objectively and systematically the solutions which the various systems offer for any given legal problem. They may investigate the causal relation between different systems of law or compare the several stages of various legal systems. In addition, those studies which endeavour to ascertain the evolution of specific legal institutions in various legal systems or to examine legal evolution generally according to periods and systems are included in the term ‘comparative law’.⁴⁵

Although the significant advantage of comparative legal studies is legal functionalism (which emphasises the practical solutions achieved by comparative studies),⁴⁶ this method is not without its weaknesses. As noted by Zweigert and Kötz, the major consideration regarding comparative studies is that the subject matter (legal systems) under examination may possess unique characteristics in relation to its historical, political, social and economic conditions⁴⁷—thus, to obtain the most out of comparative legal studies, it is crucial to consider the uniqueness of the subject matter when making recommendations for law reform.⁴⁸ The selection and number of comparators are also important considerations in comparative legal studies; however, there is no general agreement regarding the best criteria for these considerations.⁴⁹ Therefore, these considerations vary depending upon the topic and objective of a particular comparative study.

In this Thesis, the comparative method is considered useful to developing an alternative legal solution for reforming the investor–State arbitration regime. Such a method allows this Thesis to consider other

⁴³ For historical development of comparative legal studies, see, eg, Peter De Cruz, *Comparative Law in a Changing World* (Routledge-Cavendish, 2008) 11–18; Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 2nd ed, 1993).

⁴⁴ See Martin Löhnig, ‘Comparative Law and Legal History: A Few Words about Comparative Legal History’ in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law* (Hart Publishing, 2015) 113, 113.

⁴⁵ Walther Hug, ‘The History of Comparative Law’ (1932) 45 *Harvard Law Review*, 45, 1027–1070, 1027.

⁴⁶ Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Oxford University Press, 1998) 34.

⁴⁷ Ibid 63–73 (refers to the ‘style’ of legal families)

⁴⁸ Ibid 46–7.

⁴⁹ See, eg, Gerhard Danneman, ‘Comparative Law: Study of Similarities or Differences?’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 384, 411 (suggests that a ‘triangular comparison’ may be better than two because it is better to illustrate factors that determines similarities and differences between legal systems); Harold Cooke Gutteridge, *An Introduction to the Comparative Method of Legal Study & Research* (Cambridge University Press, 1946) 74 (suggests that a limited number of comparator is better than a large number because a large number may lead to ‘parallel studies’).

international adjudications as experimental scenarios indicating what may happen if the current regime were to adopt those models for the reform. Based on the rationale for comparator selection (discussed in the following paragraph), this Thesis involves assessing the lessons that can be learned from three major international adjudications: the current investor–State arbitration regime, the World Trade Organization (WTO) dispute settlement system and the European Union multilateral investment court proposal. The aim is to examine the benefits and limitations of these models in the context of investor–State disputes, focusing on drawbacks that could be avoided, successful strategies that might be adopted and how a resolution of the investor–State arbitration regime could be improved or designed differently.

As is addressed later (in Chapter 1, section 1.4.4), there are several international adjudications (at the global and regional levels) that the United Nations Conference on Trade and Development recommends as potential case studies for the reform of the investor–State arbitration regime. These include, but are not limited to the International Court of Justice, the International Criminal Court and the World Trade Organization dispute settlement system.⁵⁰ In this regard, this Thesis recognises that every international adjudication has a unique characteristic, such as those related to the theoretical foundation, historical development, underlying policy and process of dispute settlement (this is addressed in Chapter 1, section 1.2). Among existing international adjudications, this Thesis considers the World Trade Organization dispute settlement system and the European Union multilateral investment court proposal as beneficial to the further development of a multilateral investor–State dispute settlement regime for the following reasons.

First, the World Trade Organization dispute settlement system is an *international* adjudication that does not belong to a particular domestic legal system (such as common law or civil law traditions). Accordingly, the World Trade Organization system is more suited to being a model for the further development of a multilateral investor–State dispute settlement regime than for domestic adjudication, which those of local rules of procedure and evidence may be based on a particular legal tradition. Second, the World Trade Organization dispute settlement system is *multilateral*.⁵¹ Therefore, its features may be more suited to evaluation than other regional and bilateral adjudication systems that are limited to resolving the disputes between particular States or regions.

Despite some differences (indicated in Chapter 1, section 1.3), the third reason the World Trade Organization dispute settlement system is considered beneficial is that it has an *analogous function* to the

⁵⁰ UNCTAD, ‘Report on the Expert Meeting on the Transformation of International Investment Agreement Regime: The Path Ahead’ (Report, TD/B/C.II/EM 4/3, 17 April 2015) 12 [50].

⁵¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 (‘*Dispute Settlement Understandings (DSU)*’) art 3.2.

investor–State arbitration regime⁵²—that is, both systems decide treaty-based disputes that affect international economic activities. Additionally, in performing their roles, they must evaluate whether States’ domestic laws and regulatory measures comply with international trade or investment treaty norms,⁵³ which may be the core issue relating to the legitimacy of both systems. For this reason, some institutional and procedural aspects of the World Trade Organization (WTO) dispute settlement system may be useful for developing a multilateral investor–State arbitration regime.

Fourth, alongside the Appeals Chamber of the International Criminal Court, which adjudicates international criminal cases,⁵⁴ the World Trade Organization is one of the few international adjudications with an appellate mechanism, which the current investor–State dispute settlement regime lacks. Additionally, the Appellate Body of the World Trade Organization includes unique elements, such as the Appellate Body’s division and system of collegiality⁵⁵—these make the World Trade Organization among the most effective multilateral dispute resolution bodies.⁵⁶ Thus, the Appellate Body of the World Trade Organization can be used as a case study to further develop an appeal mechanism for investment disputes under a multilateral investor–State dispute settlement regime.

Finally, both the investor–State arbitration regime and World Trade Organization litigation are models that the European Union has considered for a multilateral investment court proposal, which is currently under discussion internationally.⁵⁷ Accordingly, analysing these models is timely. Taken together, the lessons that can be learned from the investor–State arbitration regime, World Trade Organization litigation and the European Union investment court proposal will benefit the further development of a multilateral investor–State dispute regime. Based on a comparative methodology and selected comparator models, this Thesis attempts to answer the following research questions:

The first set of questions involves the advantages and limitations of existing international arbitration and litigation theories, policies, practices and proposed reform options for the investor–State dispute

⁵² See, eg, Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016).

⁵³ See, eg, Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press, 2015) 14.

⁵⁴ See *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 81.

⁵⁵ See Chapter 4.

⁵⁶ See, eg, John H Jackson, ‘The Case of the World Trade Organization’, above n 40; Laurence R Helfer and Anne-Marie Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’ 107 (1997) *The Yale Law Journal* 273–392; Shoaib A Ghias, ‘International Judicial Lawmaking: A Theoretical and Political Analysis of the WTO Appellate Body’ (2006) 24 (2) *Berkeley Journal of International Law* 534; Robert E Baldwin, ‘The Case for a Multilateral Trade Organization’ in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook of World Trade Organization* (Oxford University Press, 2012) 29; Thomas Bernauer, Manfred Elsig and Joost Pauwelyn, ‘Dispute Settlement Mechanism-Analysis and Problems’ in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook of World Trade Organization* (Oxford University Press, 2012) 485.

⁵⁷ See Chapter 5.

settlement regime in relation to the degrees of accuracy, consistency and efficiency. For this purpose, the sub-questions are as follows: What are the advantages and limitations of existing international arbitration and international litigation theories in relation to the degrees of accuracy, consistency and efficiency they generally offer? In the context of international economic dispute resolutions, what are the advantages and limitations of existing international trade and investment dispute resolution policies and practices in relation to the efficiency, accuracy and consistency they intend to offer their respective dispute resolutions? What are the advantages and limitations of the current reform options in regard to the efficiency, accuracy and consistency they will be likely to offer investor–State dispute resolution?

The second set of questions involves formulating an alternative policy rationale to further develop a multilateral investor–State dispute settlement regime. To propose an alternative policy rationale, the sub-questions are as follows: What are the characteristics of investor–State disputes? Owing to the characteristics identified, what are the advantages and disadvantages of the traditional policy rationale for the current investor–State arbitration regime? On the same basis, what are the advantages and disadvantages of the contemporary policy rationale for a multilateral reform of the investor–State dispute settlement regime? How can the policy rationale of a prospective multilateral investor–State dispute settlement regime be further developed on account of the characteristics of investor–State disputes?

The third set of questions involves the extent to which the current features of the investor–State arbitration regime may be used for a multilateral reform of the investor–State dispute settlement regime to serve the proposed policy goal. To this end, the following sub-questions are proposed: How does the investor–State arbitration regime ordinarily operate to resolve investor–State disputes? What are the benefits and limitations of the investor–State arbitration regime in resolving investor–State disputes? To what extent might features of investor–State arbitration be preserved and/or improved for a multilateral reform of the investor–State dispute settlement regime?

The fourth set of questions involves the extent to which the current features of the World Trade Organization dispute settlement system may be used for a multilateral reform of the investor–State dispute settlement regime. To achieve this, the sub-questions are as follows: How does the World Trade Organization dispute settlement system ordinarily operate to promote accuracy and consistency, which evolve towards long-term efficiency in international trade jurisprudence? What are the benefits and limitations of the World Trade Organization dispute settlement system in the context of investor–State disputes? To what extent might features of the World Trade Organization

dispute settlement system be used for a multilateral reform of the investor–State dispute settlement regime?

The fifth set of questions involves the extent to which the European Union investment court proposal may be used for a multilateral reform of the investor–State dispute settlement regime. To address this, the following sub-questions are posed: How will the European Union multilateral investment court proposal operate to resolve investor–State disputes? What are the potential benefits and limitations of the European Union multilateral investment court proposal? To what extent might features of the European Union multilateral investment court proposal be used for a multilateral reform of the investor–State dispute settlement regime?

Once the positive and negative aspects of the above dispute resolution models are consolidated, this Thesis develops an alternative tribrid model for a multilateral reform of the investor–State dispute settlement regime to serve the proposed policy goal, thereby answering the main research question. The hypothesis is that the alternative tribrid model will promote accuracy and consistency; this will then lead to long-term efficiency in a multilateral investor–State dispute resolution process, thus promoting a cross-border investment climate and legal certainty, which is the main element of the rule of law.

III. Thesis Structure and Chapter Outline

To tackle the research questions, this Thesis is structured into six Chapters. The beginning of each Chapter outlines its research questions and methodology, while the end of each Chapter summarises and discusses the main points raised as well as the contribution each Chapter’s findings make to a multilateral reform of the investor–State dispute settlement regime.

Chapter 1 provides the theoretical and practical background on international dispute resolutions and describes the challenges to a multilateral reform of the investor–State dispute settlement regime. The Chapter starts by reviewing the current state and limitations of existing arbitration and litigation theories. It then discusses the current policies and practices of international trade and investment dispute resolutions. This is followed by a review of the debates on reform of investor–State dispute settlement regime up to March 2019.

Chapter 2 proposes an alternative policy rationale for a multilateral reform of the investor–State dispute settlement regime, arguing that the regime should reconcile efficiency and consistency, promoting cross-border investment and legal certainty. To establish a basis for an alternative policy proposal, the Chapter first examines the characteristics of investor–State disputes. To illuminate the reasons for the current regime, this Chapter also investigates the essential purposes of the investor–State arbitration regime and examines how the argument for reform is legitimated, accounting for both sides of the respective

arguments. Following this reassessment, Chapter 2 develops an alternative policy rationale in an attempt to reconcile efficiency and consistency, thereby facilitating both a cross-border investment climate and legal certainty, which is the main element of the rule of law. This alternative policy rationale informs the subsequent evaluation of the current investor–State arbitration regime, the World Trade Organization dispute settlement system, the European Union investment court proposal and a proposed alternative tribrid framework in subsequent Chapters.

Chapter 3 evaluates the benefits and limitations of the current investor–State arbitration regime and argues that some features of this regime may be used for the purpose of reform. To establish a basis for evaluation, this Chapter first examines the characteristics and key features of arbitral procedures. It then evaluates the advantages and limitations of the current investor–State arbitration regime in light of the dispute characteristics identified in Chapter 2. Based on the benefits and limitations identified, it is argued that the theory and practice of investor–State arbitration promote efficiency in relation to contract-based claims, but are less effective in promoting the accuracy and consistency of the treaty-based claims of investment disputes. Based on this, it is suggested that some features of the current regime should be preserved, but may incorporate some elements of public adjudication to develop a multilateral investor–State dispute settlement regime.

Chapter 4 evaluates the benefits and limitations of the World Trade Organization dispute settlement system in view of the characteristics of investor–State disputes, and argues that some features of the World Trade Organization’s litigation may be used for a multilateral reform of investor–State dispute settlement regime. To establish a basis for evaluation, this Chapter initially explores the characteristics and key features of the World Trade Organization model, including the amicable resolution, the institutional aspects of the panel and panel procedure, the institutional aspects of the Appellate Body, the appellate procedure and the enforcement mechanism. This includes how the World Trade Organization dispute settlement system promotes accuracy and consistency in the international trade system. The Chapter then discusses the potential benefits and limitations of the World Trade Organization dispute settlement system in view of the characteristics of investor–State disputes. Based on the benefits and limitations identified, it is suggested that some features of the World Trade Organization model may be usefully incorporated into the investor–State arbitration regime to improve dispute settlement capability by promoting accuracy and consistency within the international investment system.

Chapter 5 evaluates the potential benefits and concerns of the European Union multilateral investment court proposal and argues that some features of the European Union multilateral investment court proposal may be used for a multilateral reform of investor–State dispute settlement regime. To establish a basis for evaluation, this Chapter initially explores the characteristics and key features of the European Union

multilateral investment court proposal, including the amicable resolutions, the institutional aspects of the first instance tribunal and the first instance procedures, the institutional aspects of the appellate tribunal, the appellate procedure and the enforcement mechanism. It then evaluates the potential benefits and concerns of the European Union court proposal as a model for a multilateral reform of the investor–State dispute settlement regime. Based on the potential benefits and concerns identified, it is argued that some features of the European Union investment court model may be usefully incorporated into the investor–State arbitration regime to improve the dispute settlement regime’s capability to promote consistency. However, some concerns (including State-appointed tribunals, first instance procedures and the enforcement mechanism) should be further addressed in reforming the regime.

Chapter 6 presents the original contribution of the Thesis. This Chapter consolidates the findings and proposes an alternative theory and practice to support the alternative policy rationale suggested in Chapter 2. To serve that purpose, Chapter 6 first outlines a conceptual framework for a new, multilateral investor–State dispute settlement regime. It posits that a dispute settlement regime may be based on the three following premises: a tribrid tribunal; a tribrid procedure; and a tribrid review mechanism. Based on this new theoretical perspective, key procedural features of a multilateral investor–State dispute settlement regime are described. The advantages and limitations of this proposal are discussed, and study directions are recommended.

IV. Interdisciplinary Framework, Research Methods, Sources and Approaches to Legal Reasoning

Although this Thesis is submitted for the degree of Doctor of Philosophy in Law, this Thesis is interdisciplinary, since it considers the intersection between politics, economics and the law as its theoretical framework. This Thesis aims to gain an understanding of the underlying reasons for the investor–State dispute settlement regime, offering insights into the problems facing this regime, tackling the reform debates, and advancing academic viewpoints and arguments on investor–State dispute settlement. To this end, the doctrinal analysis is the research method used. Since reliable and updated sources of evidence are considered crucial elements of this method, the most thorough, meticulous and up-to-date research possible has been planned and executed. Both primary sources and secondary documentary sources are used for analysis. All sources are updated up to March 2019.

Another critical issue in this Thesis is the approach to philosophical reasoning.⁵⁸ Based on different cultural perspectives, legal scholars may use either deductive or inductive methods, or both.⁵⁹ While civil

⁵⁸ Martin Hollis, *Invitation to Philosophy* (Basil Blackwell, 1985) 20–56.

⁵⁹ John H Farrar, *Introduction to Legal Method* (Sweet&Maxwell, 1977) 49–54.

law scholars are likely to move from theory to facts (deduction), common law scholars are likely to move from facts to theory (induction). While deduction starts with a general principle and deduces that it applies to a specific case, induction takes a specific case (or cases) and induces that they can be applied to a much larger group. Each approach has strengths and weaknesses. Deduction is useful for constructing a logical proof; however, if the premise (or theory) relied upon is incorrect, the whole process of logic may be invalid.⁶⁰ By contrast, induction is effective for explaining a specific phenomenon, since it is not strictly accurate to assume that a general principle (or theory) is correct.⁶¹ Recognising strengths and weaknesses, this Thesis employs both deductive and inductive approaches to present an international perspective and the most reliable research findings possible.

This Introduction has touched on the problem this Thesis attempts to address. Subsequent Chapters will discuss particular sub-research questions. Chapter 1 provides the theoretical and practical foundations of the current investor–State dispute settlement regime and discusses some of the challenges for a multilateral reform of the investor–State dispute settlement regime. Chapter 2 assesses policy both for and against the reform and proposes an alternative policy rationale for a multilateral investor–State dispute settlement regime. Per the criteria proposed in Chapter 2, Chapters 3, 4 and 5 critically evaluate the benefits and limitations of the current investor–State arbitration regime, the World Trade Organization dispute settlement system and the European Union investment court’s proposal; they also make further suggestions for a multilateral reform of the investor–State dispute settlement regime. An alternative tribrid model proposed in Chapter 6 provides a unique perspective on the tensions between accuracy, consistency and efficiency that are inherent in this area. Together, these Chapters contribute to the current state of knowledge on investor–State dispute settlement and move forward the debate on a multilateral reform of the investor–State dispute settlement regime.

⁶⁰ Ibid 49.

⁶¹ Ibid 50.

CHAPTER 1

THEORETICAL AND PRACTICAL FOUNDATIONS OF INTERNATIONAL DISPUTE RESOLUTIONS AND CHALLENGES FOR A MULTILATERAL REFORM OF THE INVESTOR–STATE DISPUTE SETTLEMENT REGIME

1.1 Introduction

As highlighted in the Introduction, a fundamental question that remains the subject of ongoing debate regarding a multilateral reform of the investor–State dispute settlement regime is as follows: What are advantages and limitations of existing arbitration and litigation theories, policies, practices and reform options in relation to accuracy, consistency and efficiency in a resolution of investor–State disputes involving contract-based claims, treaty-based claims, and hybrids of contract-based claims and treaty-based claims? To this end, this Chapter discusses international arbitration and international litigation theories, current policies and practices, and the debates concerning investor–State dispute settlement regime reform. Further, it highlights the present state and limitations of existing theories, policies and practices, and current investor–State dispute settlement regime reform options.

This Chapter starts with a discussion of the relevant dispute resolution theories. This section highlights the different principles underlying international arbitration and international litigation processes, making particular reference to the degrees of accuracy, consistency and efficiency that arbitration and litigation hypothetically offer. The inadequacy of these theories in light of investor–State disputes that involve contract-based claims, treaty-based claims and hybrids thereof is also discussed. This Chapter then examines the methods of dispute resolution used in resolving international trade and investment disputes. Subsequently, it identifies the similarities and differences between these two systems. It also addresses the challenges that have driven reform of the investor–State dispute settlement regime. Following this, this Chapter reviews the debates on reform of the investor–State dispute settlement regime. These include concerns about inaccuracy, inconsistency and inefficiency problems in the current arbitration regime; the extent to which reforms to substantive investment protections may assist the current arbitration regime in promoting accuracy and consistency; the extent to which adopting the World Trade Organization model would improve accuracy, consistency and efficiency in a multilateral investor–State dispute settlement regime; and current reform options that the international community is considering to promote accuracy, consistency and efficiency. This section highlights the multilateral investment court proposal as the latest development in this area. The Chapter ends with some concluding observations on the theoretical and

empirical challenges for future work concerning the reform of a multilateral investor–State dispute settlement regime.

1.2 Reviews of Relevant International Dispute Resolution Theories

To provide a backdrop for evaluating the current ISDS regime, this section examines the World Trade Organization (WTO) dispute settlement system and the European Union multilateral investment court proposal, alongside their theoretical foundations. This section initially reviews the dispute resolution spectrum, followed by international arbitration and international litigation theories. It highlights the fact that arbitration aims to resolve disputes in a way that is efficient for disputing parties, while litigation aims to resolve disputes in a way that serves the goal of accurate and consistent decision-making. There is a significant challenge for both arbitration and litigation theories in relation to dealing with disputes that involve contract-based claims, treaty-based claims and hybrids thereof, which require different degrees of accuracy, consistency and efficiency in a single dispute resolution process.

1.2.1 International Dispute Resolution Spectrum

It is generally acknowledged that one of the primary functions of law is to ensure the wellbeing of society by imposing rights and obligations on individuals and States in a variety of areas.⁶² However, legal rules have uncertainty that leads to disputes. Disputes have negative effects on the disputing parties and society because once a dispute arises, the interests of the disputing parties will diverge from the rights and obligations imposed by legal rules and/or outlined in the agreements between those parties. The unresolved dispute subsequently creates costs for the disputing parties and society. In the context of investment disputes, the United Nations Commission on International Trade Law (UNCITRAL) specifically states that investment disputes ‘could increase transactional costs of investors, which may result in loss of business opportunities. A dispute may entail economic and social costs for States, including a negative impact on its foreign investment inflow’.⁶³

For this reason, the key role of dispute resolution is to end disputes.⁶⁴ In an international context, there are different methods of dispute resolution, ranging from diplomatic means (which are voluntary) to judicial

⁶² See M B E Smith, ‘The Duty to Obey the Law’ in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 2010) 457,461. See, also Joseph Raz, ‘The Functions of Law’ in Joseph Raz (ed), *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979); Jeremy Waldron, ‘Legal and Political Philosophy’ in Jules L Coleman, Kenneth Einar Himma, and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2004).

⁶³ *Possible Reform of Investor-State Dispute Settlement (ISDS)—Cost and Duration*, UN Doc A/CN.9/WG.III/WP.153 (31 August 2018) 2.

⁶⁴ Peter Malanczuk and Michael Barton Akehurst, *Akehurst’s Modern Introduction to International Law* (Routledge, 1997) 272– 305.

(legal) means (which offer a binding decision).⁶⁵ At one end of the spectrum, alternative dispute resolution approaches (such as negotiation, enquiry, mediation and conciliation) aim to find a solution that is reciprocally acceptable by disputing parties, but the decisions made during these dispute resolution processes are non-binding. On the other side of the spectrum, legal means (such as arbitration and litigation) offer a binding decision, but are based on different theories.⁶⁶ Although the *Charter of the United Nations* recognises these dispute resolutions as peaceful means for settling disputes,⁶⁷ each form of dispute resolution has advantages and disadvantages. As noted by Wood, ‘there are great variations within each category, and the advantages and disadvantages of each vary from case to case’.⁶⁸ For the purposes of this Thesis, the similarities and differences between arbitration and litigation are discussed below.

1.2.2 Fundamental Philosophy of International Arbitration

Arbitration is a consensual-based dispute resolution. The 1899 *Convention for the Pacific Settlement of International Disputes* defined arbitration as follows: ‘International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law.’⁶⁹ The United Nations elaborates: ‘Arbitration, in general, is constituted by mutual consent of the States parties to a specific dispute where such parties retain considerable control over the process through the power of appointing arbitrators of their own choice.’⁷⁰

Party autonomy is at the heart of the arbitration process, meaning that disputing parties can present arguments and evidence to an arbitral tribunal they have mutually appointed.⁷¹ Party autonomy also determines the arbitral procedure,⁷² which means that procedures and rules of evidence may be flexible. As Redfern explains: ‘Party autonomy is the guiding principle in determining the procedure to be followed in international commercial arbitration.’⁷³ To protect party autonomy, the arbitral decision is final and binds the parties without further appeals. In the context of investor–State arbitration, a relationship between party autonomy and finality is explained by the tribunal of *DLP v Yemen*: ‘Both parties chose

⁶⁵ W Sandholz and A Stone Sweet, ‘Law, Politics and International Governance’ in C Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) 238, 240.

⁶⁶ Ibid.

⁶⁷ *Charter of the United Nations* art 33.

⁶⁸ Michael Wood, ‘Choosing between Arbitration and a Permanent Court’ (2017) 32(1) *ICSID Review* 1,15.

⁶⁹ *Convention for the Pacific Settlement of International Dispute*, opened for signature 29 July 1899 (entered into force 4 September 1900) art 15.

⁷⁰ United Nations, *Handbook on Peaceful Dispute Settlement between States* (United Nations, 1992) 55 [170].

⁷¹ Kenneth S Cairton, ‘Theory of the Arbitration Process’ (1952) 17(4) *Law and Contemporary Problems* 631; Johnny Veeder, ‘The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator: from Miami to Geneva’ (2013) *American Society of International Law Proceedings*, 107, 387– 405.

⁷² Michael Pryles, ‘Limits to Party Autonomy in Arbitral Procedure’ (2007) 24 (3) *Journal of International Arbitration* 327, 327.

⁷³ Alan Redfern et al, *Law and Practice of International Arbitration* (Sweet and Maxwell, 4th ed, 2004) 135.

arbitrators whom they trust. In consequence, they waive the right to challenge the arbitral tribunal’s decision, except for extraordinary circumstances.’⁷⁴

Together, party autonomy, flexible and confidential arbitral procedure, and the final and binding character of arbitral award contribute to efficiency in the dispute resolution process.⁷⁵ Cooter and Ulen argue that ‘Compared to litigation, arbitration procedures have fewer formalities, weaker procedural rights, and tighter restrictions on appeals’.⁷⁶ As is explained below, it is not only parties to disputes who benefit from arbitration, but also society as a whole in terms of social cost minimisation—that is, if personal conflicts are settled privately, the public will save costs in dealing with individual issues.⁷⁷ As Steffek writes, if individuals are responsible for resolving their conflict in the first place (such as via alternative dispute resolution and/or arbitration), this will help minimise the dispute resolution cost for the State. If they are not responsible, disputes between individuals could create negative externalities (the cost that affects a third party) to society or the State as a whole.⁷⁸ Several commentators acknowledge these advantages of arbitration. For example, the Hon Justice Clyde Croft pointed out in a 2017 speech that ‘[t]wo advantages traditionally ascribed to arbitration are flexibility and efficiency’.⁷⁹

As is reviewed later in this Chapter, international arbitration institutions were established to provide efficient dispute resolution methods for commercial and investment disputes. These institutions include the International Centre for the Settlement of Investment Disputes (ICSID),⁸⁰ the Permanent Court of Arbitration (PCA),⁸¹ the UNCITRAL⁸² and other private arbitration institutions such as the London Court

⁷⁴ *Desert Line Projects LLC v Yemen (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/17, 6 February 2008) (‘*DLP v Yemen*’) [177].

⁷⁵ For discussions of efficiency in arbitration processes, see, eg, Veijo Heiskanen, ‘Key to Efficiency in International Arbitration’ (2015) 30(3) *ICSID Review—Foreign Investment Law Journal* 481–5; Catherine Kessedjian, ‘Keynote Address: International Arbitration – More Efficiency for Greater Credibility’ in Arthur W Rovine (ed), *International Arbitration and Mediation: The Fordham Papers 2014* 1, 3–4.

⁷⁶ Cooter and Ulen, above n 21.

⁷⁷ Steffek, above n 29.

⁷⁸ Ibid.

⁷⁹ The Hon Justice Clyde Croft, ‘Recent Developments in Arbitration: At Home and Abroad’ (Speech delivered at Resolution Institute, Melbourne, 16 October 2017) <https://www.supremecourt.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2017/10/ec/f671a35d4/Recentdevelopmentsinarbitrationathomeandabroad.pdf>.

⁸⁰ The ICSID was established by the *ICSID Convention* under the auspices of the World Bank as an ‘independent, de-politicised and effective dispute-settlement institution (see International Centre for the Settlement of Investment Dispute (ICSID), *About ICSID* <<https://icsid.worldbank.org/en/Pages/about/default.aspx>>).

⁸¹ See Permanent Court of Arbitration (PCA), *About US* <<https://pca-cpa.org/en/about/>>.

⁸² See UNCITRAL, *About UNCITRAL*, above n 17. In the context of international arbitration, the UNCITRAL provides a set of procedural rules for ad hoc arbitrations (see UNCITRAL, *UNCITRAL Arbitration Rules* <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html>).

of International Arbitration (LCIA),⁸³ the Stockholm Chamber of Commerce (SCC),⁸⁴ the International Chamber of Commerce (ICC),⁸⁵ the Cairo Regional Centre for International Commercial Arbitration (CRCICA)⁸⁶ and the Moscow Chamber of Commerce and Industry (MCCI).⁸⁷

In practice, international arbitration has been used to resolve various types of disputes under both contract law and public international law between different kinds of parties (including interstate,⁸⁸ private commercial⁸⁹ and investor–State disputes).⁹⁰ Since the principles underlying arbitration theory (the party autonomy, confidentiality and finality) apply to all types of conflicts, irrespective of their unique characteristics, arbitration theory may raise concerns about inaccuracies and inconsistencies when an ad hoc arbitral tribunal is required to apply and interpret public law or public international law.⁹¹ In the context of investor–State arbitration, the added complexity is that an investment arbitral tribunal has to apply and interpret contract law, public law and public international law. As pointed out by Merrills, the jurisdiction of an investment tribunal may derive from a contract or treaty.⁹² Given this hybrid of private and public characteristics, Waincymer observes that ‘the most significant is the ability of private and consent- based arbitral models to deal adequately with public law and public policy aspects of governmental regulation of investment practices’.⁹³

⁸³ The LCIA is a London-based international arbitration institution for commercial dispute resolution (see London Court of International Arbitration (LCIA), *Introduction* <<http://www.lcia.org/LCIA/introduction.aspx>>).

⁸⁴ The SCC is a Swedish international arbitration institution for commercial dispute resolution. According to its website, ‘the SCC is the world’s second largest institution for investment disputes’ (see Stockholm Chamber of Commerce (SCC), *About the SCC* <<http://www.sccinstitute.com/about-the-scc/>>).

⁸⁵ The ICC arbitration is administered by the ICC International Court of Arbitration which is part of the ICC founded since the end of WWI in Paris, France (see International Chamber of Commerce (ICC), *History* <<https://iccwbo.org/about-us/who-we-are/history/>>).

⁸⁶ The CRCICA is an Egypt-based independent non-profit international organization established in 1979 under the auspices of the Asian African Legal Consultative Organization (see Cairo Regional Centre for International Commercial Arbitration (CRCICA), *About Us* <<http://cricica.org/AboutUs.aspx>>).

⁸⁷ The MCCI is a non-government, non-commercial organization, established in 1991, a part of the Chamber of Commerce and Industry System of the Russian Federation (see Moscow Chamber of Commerce and Industry (MCCI), *About MCCI* <<https://mostpp.ru/about>>).

⁸⁸ For the historical development of interstates arbitration, see, eg, Jackson H Ralston, *International Arbitration from Athens to Locarno* (Stanford University Press, 1929); Christine Gray and Benedict Kingsbury, ‘Developments in Dispute Settlement: Inter–State Arbitration Since 1945’ (1993) 63 (1) *British Yearbook of International Law* 97.

⁸⁹ For the historical development of commercial arbitration, see, eg, Earl S Wolaver, ‘The Historical Background of Commercial Arbitration’ (1934) 83 (2) *University of Pennsylvania Law Review and American Law Register* 132; Frank D Emerson, ‘History of Arbitration Practice and Law’ (1970) 19 *Cleveland State Law Review* 155.

⁹⁰ For the historical development of investment arbitration, see, eg, Thomas Johnson and Jonathan Gimblett, ‘From Gunboats to BITs: The Evolution of Modern International Investment Law’ in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2010-2011* (Oxford University Press, 2012) 649.

⁹¹ United Nations, *Handbook on Peaceful Dispute Settlement between States*, above n 70, 66.

⁹² John Merrills, ‘The Means of Dispute Settlement’ in Malcolm D Evans (ed), *International Law* (Oxford University Press, 2010) 559, 559.

⁹³ Jeffrey Waincymer, ‘Balancing Property Rights and Human Rights in Expropriation’ in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 275, 307.

It may be seen that while the key benefits of arbitration are that the disputing parties will recognise a solution as efficient, the drawback is that an ad hoc tribunal resolves a dispute under flexible procedures, and the award is final and cannot be reviewed by a higher court; this, in turn, creates concerns regarding inaccuracy and inconsistency in interpreting and applying public law or public international law to similar facts and dispute outcomes. Therefore, a significant challenge for arbitration is its capability to deal with disputes involving public law or public international law, which may require a higher degree of accuracy and consistency than contract law.

1.2.3 Fundamental Philosophy of International Litigation

Conversely, litigation is the formal adjudication of disputes, which typically consists of permanent adjudicators and a uniform set of procedural laws and decisions that may be further challenged in a higher court. In the international context, the United Nations has delineated the characteristics of litigation as follows: ‘International courts and tribunals, by contrast, are pre-constituted inasmuch as they are permanent judicial organs whose composition, jurisdictional competence and procedural rules are predetermined by their constitutive treaties.’⁹⁴ Notably, the right to appeal is not uniformly seen as a necessary element of litigation. This variation has depended on historical features and does not reflect a fundamental view of the optimal format of international adjudication.⁹⁵

In theory, litigation processes are more likely to serve accuracy and consistency than other types of dispute resolution, which, in turn, brings about legal certainty (a crucial component of the rule of law).⁹⁶ Although accuracy and consistency are desirable, it is harder to maintain accuracy and consistency at the international level than at the national level because public international law is horizontal (no superior power) and decentralised (no single judicial structure is responsible for the adjudication of public international law).⁹⁷ International courts have been developed for particular types of disputes. For example, the International Court of Justice was established to resolve interstate disputes under public international law in general.⁹⁸ Specialised international procedures, such as the Tribunal for the Law of the Sea⁹⁹ and the WTO dispute settlement system,¹⁰⁰ have been developed for specific types of disputes. Although principles and appointment methods of adjudicators, procedures and practices vary, accuracy and consistency have been accepted by some international courts. In the context of the WTO, Weiler

⁹⁴ United Nations, *Handbook on Peaceful Dispute Settlement between States*, above n 70, 66 [198].

⁹⁵ See, eg, *Statue of International Court of Justice* art 60.

⁹⁶ Joseph Raz, ‘The Rule of Law and Its Virtue’ in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 210–29.

⁹⁷ Tina Kempin Reuter, ‘International Law’ in John T Ishiyama and Marijke Breuning (ed), *21st Century Political Science: A Reference Handbook* (Sage, 2011) vol 1 431, 431.

⁹⁸ International Court of Justice (ICJ), *History* <<http://www.icj-cij.org/en/history>>.

⁹⁹ International for the Law of the Sea, *The Tribunal* <<https://www.itlos.org/en/the-tribunal/>>.

¹⁰⁰ World Trade Organization (WTO), *Dispute Settlement* <https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm>.

points out: ‘Others like the quality of legal reasoning, coherence and consistency and communicativeness are not perhaps strict legal principles or rules but indispensable for the proper functioning of legitimate legal process.’¹⁰¹

As is apparent from the above discussion, litigation is likely to resolve disputes in a way that serves the rule of law, including accuracy and consistency. However, from a perspective of law and economics theory, Cooter and Ulen suggest that longer and complex litigation processes may increase dispute resolution costs, which then makes litigation less efficient than arbitration processes or out-of-court settlement; however, the consistent outcomes produced by litigation processes are likely to promote legal certainty and predictability, which potentially cut back future dispute resolution costs.¹⁰² In addition, there is an opinion that a specialised adjudication established for a particular type of dispute (such as criminal, trade, taxation or intellectual property) may promote consistency in the specific area of law and contribute to efficiency.¹⁰³ Based on this, it may be considered that litigation may best serve disputes arising from public law or public international law or disputes involving a large number of parties.

To summarise, a review of certain theories demonstrates that both arbitration and litigation provide binding decisions, but offer different degrees of accuracy, consistency and efficiency. It is observed that arbitration may be better suited to disputes that do not have a greater effect on the third party, while litigation may be better suited to disputes require the accuracy and consistency or have a greater effect on the third party. The challenge for both arbitration and litigation theories relates to dealing with hybrid disputes, including contract law and public international law. In practice, the dispute resolution framework may be driven by the historical factors and/or policy behind them. To understand the reasons behind the current investor–State arbitration regime and the WTO dispute settlement system, the next section explicitly examines the historical developments, policies and practices of both systems, as well as the challenges of the ISDS regime, that lead to debates on reform.

1.3 Reviews of Policies and Practices of International Trade and Investment Dispute Resolutions

This section examines the current policies and practices of international trade and investment dispute resolution mechanisms. The review indicates that similarities and differences between international trade and investment systems exist in terms of policy, substantive laws and dispute resolution designs. In the international trade system, trade disputes (between States) are typically resolved through WTO litigation, while private commercial disputes (between traders) are mainly resolved through international

¹⁰¹ J H H Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’ (Harvard Jean Monnet Working Paper 9/00, 2000) 10, citing M Cappelletti, *Giudici Legilatori?* (Milano, Giuffrè, 1984).

¹⁰² Cooter and Ulen, above n 21.

¹⁰³ See Markus B Zimmer, ‘Overview of Specialized Courts’ (2009) *International Journal for Court Administration* 1–15.

commercial arbitrations. By contrast, investor–State disputes are resolved in most cases through international arbitrations, similar to private commercial disputes between traders. Because investor–State disputes involve contract-based claims, treaty-based claims, and hybrids of contract-based claims and treaty-based claims, the significant challenge for such arbitration is its capability to deal with the treaty-based claims of investment disputes, as this task requires a higher degree of accuracy and consistency than contract-based claims of dispute settlement.

1.3.1 Policies and Practices International Trade Dispute Resolutions

The international trade system is a core component of the global economy, and concerns importing and exporting goods and services between different nations.¹⁰⁴ International trade law includes both public and private law. Public international trade law (such as the *WTO Agreements*) is based upon the consent of the State, while private international law (or conflict of laws) indicates the applicable domestic law that governs relationships between private parties across jurisdictions.¹⁰⁵ In terms of dispute resolutions, the jurisdiction of public and private dispute resolutions differs. While the WTO dispute settlement system has an authority to resolve interstate disputes under the *WTO Agreements*,¹⁰⁶ international commercial arbitration is mainly used by traders to solve their private commercial disputes.¹⁰⁷

In the context of public international trade law, in 1946, the Allied Nations planned to establish the International Trade Organisation to promote and regulate international trade by drafting the *Havana Charter for an International Trade Organization (Havana Charter)*,¹⁰⁸ aiming to boost global trade liberalisation by reducing barriers to international trade.¹⁰⁹ However, the plan to establish the International Trade Organisation was suspended because the United States refused to ratify the *Havana Charter*.¹¹⁰ Instead, the United States took the lead in reducing barriers to international trade through a multilateral negotiation in 1947 known as the *General Agreement on Tariffs and Trade (GATT)*,¹¹¹ which was created

¹⁰⁴ Amita Narlikar, Martin Dauntion and Robert M Stern, ‘Introduction’ in Amita Narlikar, Martin Dauntion and Robert M Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012) 3, 3.

¹⁰⁵ Reuter, above n 97.

¹⁰⁶ *DSU* art 3.2.

¹⁰⁷ See UNCITRAL, *Status* <www.uncitral.org/uncitral/en/uncitral.../arbitration/1985Model_arbitration_status.html> (Because of the private nature, there is no available data on total number of private commercial arbitrations; however, the UNCITRAL Model law on International Commercial arbitration has been adopted by 80 States.)

¹⁰⁸ *Havana Charter for an International Trade Organization* (reprinted in Interim Commission for the International Trade Organization, ‘Final Act and Related Document’ (United Nations Conference on Trade and Employment Havana, Cuba, 21 November 1947 – 24 March 1948) <https://www.wto.org/english/docs_e/legal_e/havana_e.pdf>.

¹⁰⁹ *Ibid* art I.

¹¹⁰ Richard Toye, ‘The International Trade Organization’ in Amrita Narlikar, Martin Dauntion and Robert M Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012) 85,85.

¹¹¹ See *General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 55 UNTS 187* (entered into force 29 July 1948) (‘GATT 1947’).

by 23 States as a temporary arrangement.¹¹² After 1947, several rounds of multilateral trade negotiations occurred and, at the end of the eighth round of negotiations (the Uruguay Round) in 1994,¹¹³ the WTO was established as an international organisation by the *Marrakesh Agreement*¹¹⁴ to handle international trade rules between States.¹¹⁵ At the time of writing (March 2019), the WTO consists of 164 members and 23 observers.¹¹⁶

The *WTO Agreements* (which incorporate approximately 60 agreements) oblige members not to enact measures that are inconsistent with the provisions to promote free trade.¹¹⁷ Among others, two core principles of the *WTO Agreements* are the most-favoured-nation principle (which prevents discrimination between States)¹¹⁸ and the national treatment principle (which prohibits discrimination between foreign and local businesses).¹¹⁹ However, the *WTO Agreements* provide exception clauses to balance free trade and other values,¹²⁰ which serve the WTO policy of promoting sustainable development.¹²¹ Among others, the provision of article XX of the *GATT* 1994 is considered one of systemic significance.¹²² As noted by the GATT panel of *Thailand—Restrictions on the Importation of and Internal Taxes on Cigarettes*, article XX ‘allows contracting parties to impose trade-restrictive measures inconsistent with the *GATT* to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable’.¹²³

¹¹² Thomas W Zeiler, ‘The Expanding Mandate of the GATT: The First Seven Rounds’ in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012) 102, 102–21.

¹¹³ *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, opened for signature 15 April 1994, 33 ILM 1140 [1994] and now is a part of the *WTO Agreements* (see *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘General Agreement on Tariffs and Trade (*GATT*) 1994’)). For some discussions, see, eg, Ernest H Preeg, ‘The Uruguay Round Negotiations and the Creation of the WTO’ in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook of World Trade Organization* (Oxford University Press, 2012) 122, 122–33.

¹¹⁴ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) (‘*Marrakesh Agreement*’).

¹¹⁵ WTO, *About WTO* <https://www.wto.org/english/thewto_e/thewto_e.htm>.

¹¹⁶ WTO, *Understanding the WTO: The Organization Members and Observers* (2019) <https://www.wto.org/english/thewto_e/whatif_e/tif_e/org6_e.htm>.

¹¹⁷ For the *WTO Agreements*, see WTO, *Legal Texts: the WTO Agreements* <https://www.wto.org/english/docs_e/legal_e/final_e.htm>.

¹¹⁸ *GATT* 1994 art I:1.

¹¹⁹ *Ibid* art III: 4.

¹²⁰ Exceptions under the *WTO Agreements* are, for example *GATT* 1994 art XX; *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1B (‘*GATS*’) art XIV and VI:4; *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘*SPS Agreement*’) art 2.2 and 5.6; *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 4(b) (‘*Agreement on Government Procurement*’) art 23.2. For a historical development of *GATT* exceptions, see WTO, ‘*GATT Analytical Index: Article XX General Exception*’ <https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf> 562, 563–4.

¹²¹ *Marrakesh Agreement* preamble.

¹²² WTO, *Annual Report 2016* (WTO, 2016) 114.

¹²³ GATT Panel Report, *Thailand—Restrictions on Importation and Internal Taxes on Cigarettes*, GATT Doc DS10/R–37S/200 (adopted on 7 November 1990) GATT BISD 37S/200, 73–4.

Interstate disputes under the *WTO Agreements* arise when a WTO member adopts a measure or takes an action that another WTO member considers to be a violation of the *WTO Agreements*.¹²⁴ That said, Jackson points out that ‘a crucial question throughout the operation of an international organization is the amount of deference that should be accorded to the sovereign nation-State’.¹²⁵ Based on this, the standard of review (or the intensity of review) is one of the mechanisms that is allocated decision-making power.¹²⁶ Before the WTO was established, the dispute settlement system for the *GATT 1947* was consensus-based to resolve interstate trade disputes by diplomatic mean.¹²⁷ Under the GATT consensus-based system, panels adopted an interpretation of provisions that did not take into account members’ regulatory prerogatives. This practice is in contradistinction to the WTO dispute settlement system (the WTO Appellate Body in particular),¹²⁸ which signalled quite a shift.

Conversely, the international commercial relationship between traders is governed by contract law. However, the UNCITRAL has attempted to modernise and harmonise private international commercial laws (such as the international sale of goods, international payments and international transport of goods) through model laws.¹²⁹ Private disputes (between traders) are resolved through international commercial arbitrations or other means, such as domestic courts, depending on the agreements between the parties. In the context of private international dispute resolution, the UNCITRAL provides a set of procedural rules for international commercial arbitration and conciliation to ‘unify legal framework of the various domestic system for the fair and efficient settlement of disputes arising in international commercial relations’.¹³⁰

As is evident from the review, international trade law includes both public and private international trade laws, where interstate disputes and private disputes are resolved by different methods of dispute resolution. While the WTO dispute settlement system has compulsory jurisdiction over interstate disputes arising from the *WTO Agreements*, private commercial disputes can be resolved through international arbitrations or other means. These methods differ from those used to resolve investor–State disputes.

¹²⁴ *DSU* art 3.3.

¹²⁵ John H Jackson, ‘The Case of the World Trade Organization’, above n 40, 247.

¹²⁶ Bohanes and Lockhart, ‘Standard of Review in WTO Law’, above n 39.

¹²⁷ See, eg, Kenneth Abbott, ‘GATT as a Public Institution: The Uruguay Round and Beyond’ (1992) 18 *Brooklyn Journal of International Law* 141.

¹²⁸ For the development of the WTO dispute settlement system, see, eg, PJ Kuijper, ‘The New WTO dispute Settlement System: The Impact on the European Community’ (1995) 6 (29) *Journal of World Trade* 49, 52; Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Kluwer Law International, 1997) 186; John H Jackson, ‘Dispute Settlement in the WTO: Policy and Jurisprudential Considerations’ (Discussion Paper No 419, Research Seminar in International Economics School of Public Policy, University of Michigan, 1998); Federico Ortino and Ernst-Ulrich Petersmann (eds), *The WTO Dispute Settlement System 1995-2003* (Kluwer Law International, 2004); David Valerie Hughes, ‘WTO Dispute Settlement: An Overview’ in Andrew D Mitchell, *Challenges and Prospects for the WTO* (Cameron May, 2005) 23.

¹²⁹ See UNCITRAL, *About UNCITRAL*, above n 17 and accompanying text.

¹³⁰ UNCITRAL, *UNCITRAL Arbitration Rules* <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html>.

1.3.2 Policies and Practices of International Investment Dispute Resolutions

The international investment system concerns the international transfer of ownership of financial and physical assets from one State to another.¹³¹ Similar to the international trade system, the international investment system includes both contract law and investment treaty law. However, similarities and differences exist between international trade and investment systems in terms of policy, substantive laws and dispute resolution designs.

Unlike the *WTO Agreements*, international investment law is mainly based on bilateral agreements. Though some economists believe that a multilateral framework potentially minimises foreign investors' transaction costs, attempts to reach a comprehensive multilateral agreement on investment under the *Havana Charter* (to establish the International Trade Organisation) have not been successful.¹³² Besides the *Havana Charter*, other attempts have been made to create multilateral rules on investment, such as the 1959 *Draft Convention on Investment Abroad*,¹³³ the 1967 Organisation for Economic Co-operation and Development (OECD) *Draft Convention on the Protection of Foreign Property*¹³⁴ and the 1995 *Multilateral Investment Agreement*.¹³⁵ However, these attempts were also unsuccessful. Without multilateral negotiation on investment, the United States was the first nation to conclude the *Treaties of Friendship, Commerce, and Navigation* to establish amicable commercial and investment relations with other States before shifting to a bilateral investment treaty program in the 1990s to support and protect American businesses investing in developing States.¹³⁶ To attract foreign investment, other capital-exporting and importing States have followed in concluding numerous bilateral investment treaties and treaties with investment provision. At present, the number of investment treaties is more than 3,000.¹³⁷

While the WTO has had a more clear commitment to supporting sustainable development,¹³⁸ the typical policy rationales of bilateral investment treaties are focused on investment protection against the

¹³¹ WTO, 'Trade and Foreign Direct Investment' (Press releases, Press/57, 9 October 1996 <https://www.wto.org/english/news_e/pres96_e/pr057_e.htm>.

¹³² Ibid.

¹³³ *Draft Convention on Investment Abroad* (reprinted in UNCTAD, 'International Investment Instruments: A Compendium' (No UNCTAD/ DITE/ 2, United Nations, 29 May 2000) vol V, 301 ('*Abs– Shawcross Draft Convention*')) <http://unctad.org/en/Docs/dite2vol5_en.pdf>

¹³⁴ *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention* (1967) 7 ILM 117 (reprinted in UNCTAD, 'International Investment: A Compendium' (No UNCTAD/DTCI/30 (Vol II), United Nations, 1996).

¹³⁵ *Draft Multilateral Agreement on Investment: Draft Consolidated Text* (No DAF/MAI (98)7/REV1, 22 April 1998).

¹³⁶ Louis T Wells, 'Protecting Foreign Investors in the Developing World: A Shift in US Policy in the 1990s?' in Robert Grosse (ed), *International Business and Government Relations in the 21st Century* (Cambridge University Press, 2005) 421, 444.

¹³⁷ See UNCTAD, *International Investment Agreements Navigator* (2019) <<http://investmentpolicyhub.unctad.org/IIA>> .

¹³⁸ See *Marrakesh Agreement* preamble.

interventionist policies of developing States.¹³⁹ By contrast, international investment agreements have norms that are both similar to and different from the *WTO Agreements*. The major similarity between trade disputes under the WTO and investor–State disputes is that both involve assessing the compliance of a State’s administrative decisions, domestic laws and regulatory measures as being compliant with trade or investment treaties norms. Accordingly, the core issue referring to the legitimacy of each system is the degree to which international adjudicators can review administrative decisions, domestic public policies and regulatory frameworks.

However, investor–State disputes and trade disputes under the WTO appear to have distinct characteristics. Broadly speaking, trade disputes affect the treatment of a class of goods or services originating from a WTO member, rather than the product or service of an individual or business, whereas investor–State disputes may affect particular investors (who is a party to a contract), or general foreign investors who invest in the host State. In addition, while WTO litigation resolves disputes between WTO members under the *WTO Agreements*, investor–State disputes concern private investors who are claimants and governments that are respondents. Moreover, while investor–State disputes involve contract-based claims, treaty-based claims and hybrids thereof, trade disputes under the WTO are based on the *WTO Agreements* and other sources of public international law. Finally, while the outcomes of investor–State disputes are likely to affect specific investors in regard to compensation, the results of trade disputes under the WTO usually require the losing States to modify their domestic laws, regulations and/or tariff rates for the goods or services under dispute, which is likely to affect other WTO members. Waincymer notes, ‘[W]here WTO type norms are concerned, these tend to call merely for prospective changes to the offending measure’, but ‘private party rights lead to retrospective damages for the offending behaviour in nearly all cases’.¹⁴⁰

Unlike trade disputes under the WTO, international arbitrations are the dominant methods for resolving investor–State disputes. The *Germany–Pakistan BIT* (1959)¹⁴¹ was the first BIT to provide international arbitrations for resolving investor–State disputes.¹⁴² As discussed previously (in section 1.2.2), the ICSID

¹³⁹ For the economic rationale of IIAs, see, especially Kenneth J Vandevelde, ‘The Political Economy of Bilateral Investment Treaties’ (1998) 92 (4) *The American Journal of International Law* 621; Kenneth J Vandevelde, ‘A Brief History of International Investment Agreements’ (2005) 12(1) *UC Davis Journal of International Law and Policy* 157; Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (Oxford University Press, 2010) ch 3; Kenneth J Vandevelde, ‘The Liberal Vision of the International Law on Foreign Investment’ in C L Lim (ed), *Alternative Visions of the International Law on Foreign Investment: Essay in Honour of Muthucumoraswamy Sornarajah* (Cambridge University Press, 2016) 43.

¹⁴⁰ Waincymer, ‘Balancing Property Rights and Human Rights in Expropriation’, above n 93.

¹⁴¹ *Treaty between Pakistan and Federal Republic of Germany for the Promotion and Protection of Investments (with Protocol and exchange note)*, signed 25 November 1959, 6575 UNTS 24 (entered into force 28 April 1962) (‘*Pakistan–Germany BIT*’).

¹⁴² Vandevelde, ‘The Liberal Vision of the International Law on Foreign Investment’, above n 139, 9.

and other commercial arbitrations were established to solve business and investment disputes. Based on party autonomy, confidentiality and finality principles (as noted earlier), the investor–State arbitration regime, especially the ICSID arbitration, an international organisation of the World Bank Group, has been the dominant method for resolving investor–State disputes.¹⁴³ However, a critical issue regarding investor–State disputes is that they do not only involve contract-based claims, but also a review of administrative decisions, national regulatory policies and legislation for compliance with investment treaty norms.¹⁴⁴ In this context, significant challenges lie in the ability of investor–State arbitration to promote consistent decision-making.

The international trade system and the international investment system possess both similar and different characteristics. In respect to the methods of dispute resolution, international arbitration is the dominant method for investor–State disputes. This method is in contrast to those used in the international trade system, in which interstate disputes under the *WTO Agreements* are resolved by WTO litigation and private disputes are resolved by international commercial arbitration (or other means, depending on the intention of the parties). Because investor–State disputes involve contract-based claims, treaty-based claims and hybrids thereof, the limitations of arbitration theory and of international arbitration practice in terms of promoting accuracy and consistency are a prominent issue that leads to debates about reform of the investor–State arbitration regime.

1.4 Reviews of Debates on Investor–State Dispute Settlement Regime Reform up to March 2019

This section critically reviews the debates on reform of the investor–State arbitration regime up to March 2019. As noted in the Introduction, the reform of the investor–State arbitration regime encompasses several related issues. For the purposes of this Thesis, this section focuses on debates on problems of inaccuracy, inconsistency (which are critical components of the rule of law), and costs and durations (which are significant factors that influence the efficiency of the current investor–State arbitration regime), the extent to which reforms to substantive investment protections promote accuracy and consistency, the extent to which adopting the WTO model might promote accuracy, consistency and efficiency in a new, multilateral ISDS regime, and current reform options that the international community is considering to improve the accuracy, consistency and efficiency of the regime. A review of the debates highlights that the debate on multilateral ISDS regime reform is the latest development in this area, which remains inconclusive and requires further study.

¹⁴³ For updated data, see UNCTAD, *Arbitral Rules and Administering Institution* (2018) <<http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution>>.

¹⁴⁴ UNCTAD, ‘Investor–State Dispute Settlement: Review of Developments in 2016’ (IIA Issue Note No 1 (2017), UNCTAD/DIAE/PCB/2017/1, 19 May 2017), 3–4.

1.4.1 The Debates on Problems in the Present Investor–State Arbitration Regime

Theoretically, international arbitration is an efficient method of dispute resolution, but is unlikely to promote accuracy and consistency in public law or public international law disputes (section 1.2). However, there is an argument in practice that the present investor–State arbitration regime does not show significant inaccuracies and inconsistencies, while the costs and durations of investment arbitration processes are excessive. Therefore, examining recent empirical studies on these issues is beneficial for understanding these problems in practice. Such empirical knowledge may also assist in evaluating the potential effects of the existing reform options on accuracy, consistency and efficiency (section 1.4.5) and the alternative courses of action that might be pursued in designing a new, multilateral ISDS regime (Chapter 6).

The debates on inaccuracy and inconsistency problems in investor–State disputes emerged in 2001–2002 following the Argentine financial crisis¹⁴⁵ and a series of disputes under the *North American Free Trade Agreement (NAFTA)*.¹⁴⁶ That debate centred on certain governments and critics arguing that there are problems of inaccuracy¹⁴⁷ and inconsistency¹⁴⁸ in investor–State cases. Conversely, other commentators

¹⁴⁵ In short, Argentina had experienced an economic depression between 1998 and 2002 (see International Monetary Fund (IMF), *Argentina and the IMF* (2018) <<https://www.imf.org/external/country/ARG/index.htm?type=9998>>.) Consequently, investors brought the multiple claims against Argentina, alleging that Argentine measures during economic crisis have been breached obligations under different BITs (see, eg, Carlos Ignacio Suarez Anzorena, ‘Multiplicity of Claims under BITs and the Argentine Case’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 131.)

¹⁴⁶ See, eg, Howard Mann, ‘International Investment Agreements: Building the New Colonialism? (NAFTA’s Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA) (Conflict and Coordination Across International Regimes)’ (2003) 97 *Proceedings of the Annual Meeting-American Society of International Law* 247.

¹⁴⁷ For discussions of inaccuracy problems, see, eg, Susan D Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’ (2005) 73 (4) *Fordham Law Review* 1521, 1568; Andrea K Bjorklund, ‘Emergency Exceptions: State of Necessity and Force Majeure’ in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 464; William Burke-White, ‘The Argentine Financial Crisis: State Liability under BITS and the Legitimacy of the ICSID System’ (2008) 3 *Asian World Trade Organization and International Health Law and Policy* 199; Alberto Alvarez-Jiménez, ‘The Interpretation of Necessity Clauses in Bilateral Investment Treaties After the Recent ICSID Annulment Decisions’ 94 *Revista Académica e Institucional Páginas de la UCP* 1; Jürgen Kurtz, ‘Adjudging the Exception at International Investment Law: Security, Public Order and Financial Crisis’ (2010) 59(2) *International and Comparative Law Quarterly* 325.

¹⁴⁸ For discussions of inconsistency problems, see, eg, Susan D Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’, above n 147; M Sornarajah, ‘A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration’ in Karl P Sauvant and Michael Chiswick-Patterson, *Appeals Mechanism in International Investment Disputes* (eds) (Oxford University Press, 2008); Nigel Blackaby, ‘Testing the Procedural Limits of the Treaty System: The Argentinean Experience’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 29; Christoph H Schreuer, ‘Preliminary Rulings in Investment Arbitration’ in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) 207; Gabrielle Kaufmann-Kohler, ‘Is Consistency a Myth?’ in Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in International Arbitration* (Juris Publishing, 2008) 137; Federico Ortino, ‘Non-Discriminatory Treatment in Investment Disputes’ in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 345; Michael Waibel et al, ‘The Backlash Against Investment Arbitration: Perceptions and Reality in Michael Waibel et al (eds), *The Backlash Against Investment*

argue that investor–State cases do not show major inaccuracies and inconsistencies (as noted above, these arguments often proposed by those with a vested interest in the system).¹⁴⁹ Although inaccuracies and inconsistencies exist, some commentators argue that these issues will settle over time.¹⁵⁰ Others contend that the investor–State arbitration regime is not the right institution to make international investment law consistent unless the investor–State arbitration regime can ensure accuracy.¹⁵¹ This controversy arose during the UNCITRAL 50th session meeting on 10 July 2017, leading the UNCITRAL to endorse a mandate requiring States to identify any concerns regarding the ISDS regime.¹⁵² In response to such a mandate, the Secretariat prepared a list of the concerns about ISDS regime (28 August 2018), suggesting that inaccuracy and inconsistency problems exist in the current ISDS regime in several different areas,¹⁵³ which confirms earlier research on inaccuracy and inconsistency problems in this regime.¹⁵⁴

In early 2019, the Academic Forum on ISDS released the *Concept Papers Project: Matching Concerns and Reform Options*¹⁵⁵ to complement the UNCITRAL discussion.¹⁵⁶ The concept papers provide empirical studies on inaccuracies and inconsistencies, in addition to other significant concerns, in the

Arbitration (Kluwer Law International, 2010) xxxvii; Anders Nilsson and Oscar Englesson, ‘Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?’ (2013) 30(5) *Journal of International Arbitration* 561; Michele Potestà, ‘Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept’ (2013) 28 (1) *ICSID Review - Foreign Investment Law Journal* 88; S Constain, ‘ISDS Growing Pains and Responsible Adulthood’ (2014) 1 *Transnational Dispute Management* 1; EY Park, ‘Appellate Review in Investor–State Arbitration’ (2014) 1 *Transnational Dispute Management* 1; RS French, ‘Investor–State Dispute Settlement — A Cut Above the Courts?’ (Speech delivered at Supreme and Federal Courts Judges’ Conference, Darwin, 9 July 2014).

¹⁴⁹ See, eg, Christian J Tams, ‘An Appealing Option? The Debate about and ICSID Appellate Structure’ (Essay in Transnational Economic Law No 57, Inst für Wirtschaftsrecht, 2006); Judith Gill, ‘Inconsistent Decisions: An Issue to be addressed or A Fact of Life?’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 23; Emmanuel Gaillard, ‘Comment in Panel Two’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 70; Barton Legum, ‘Visualizing an Appellate System’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 121; Guido Tawil, ‘An International Appellate System: Progress or Pitfall?’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 131; Barton Legum, ‘Options to Establish an Appellate Mechanism for Investment Dispute’ in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) 231; Jan Paulsson, ‘Avoiding Unintended Consequences’ in Karl P Sauvant and Michael Chiswick-Patterson, *Appeals Mechanism in International Investment Disputes* (eds) (Oxford University Press, 2008) 241, 258; Jason Clapham, ‘Finality of Investor–State Arbitral Awards: Has the Tide Turned and Is There a Need for Reform’ (2009) 26 (3) *Journal of International Arbitration* 437; Irene M Ten Cate, ‘International Arbitration and the Ends of Appellate Review’ (2012) 44 *New York University Journal of International Law and Politics* 1109.

¹⁵⁰ Gill, above n 149, 15.

¹⁵¹ Thomas Schultz, ‘Against Consistency in Investment Arbitration’ in Z Douglas, J Pauwelyn and JE Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014) 298.

¹⁵² Nikos Lavranos, ‘The Outcome of the UNCITRAL Meeting: The First Steps Towards a Multilateral Investment Court (MIC)’ in email from John Gaffney to OGEMID@ogeltdm.com (7 August 2017).

¹⁵³ *Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters*, UN Doc A/CN.9/WG.III/WP.150, above n 19.

¹⁵⁴ For some discussions about inconsistency problems in the ISDS regime, see above n 148.

¹⁵⁵ Academic Forum on ISDS, ‘Concept Papers Project Matching Concerns and Reform Options’ (2019) <<https://www.cids.ch/academic-forum-concept-papers>>.

¹⁵⁶ Gabrielle Kaufmann-Kohler and Michele Potestà, ‘Introduction’ (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS, 2019)

present regime. The papers, conducted by Working Group Four of the Academic Forum on ISDS, reveal that the present regime suffers from inaccuracies concerning the misidentification and misapplication of applicable law. Working Group Four further indicates that these errors cannot be corrected by the annulment mechanism.¹⁵⁷ With regard to inconsistencies, Working Group Three of the Academic Forum on ISDS shows unjustifiable inconsistency in three main substantive areas: full protection and security, the relationship between investment treaty norms and contractual terms, and the scope of the most-favoured-nation principle.¹⁵⁸ In brief, such inconsistency problems typically arise in one of two interrelated ways. The first is a problem of interpreting treaty norms, such as the meanings of the Fair and Equitable Treatment Standard, indirect expropriation, umbrella clause, the full protection and security standard, and essential security exceptions. The second concerns the methods of balancing private and public interests under the above norms and exceptions. Arbitral tribunals may ascertain the State's objectives, weigh values and interests, and draw conclusions about the effect of State's measures on foreign investment; to that end, the tribunals have employed several approaches, and these represent decisive factors that have led to different outcomes.

Concerns have also been raised about the costs and lengths of investor–State arbitration processes, which are the main factors influencing the efficiency of dispute resolution.¹⁵⁹ Both issues are currently under discussion at the UNCITRAL¹⁶⁰ and the ICSID of the World Bank.¹⁶¹ On the question of costs, the study conducted by Working Group One of the Academic Forum on ISDS¹⁶² suggests that the party and tribunal costs¹⁶³ of investor–State arbitration can be high.¹⁶⁴ However, attributable to a variety of factors that affect the costs of individual cases,¹⁶⁵ such costs cannot be concluded to be unjustified and in need of reductions.¹⁶⁶

¹⁵⁷ Academic Forum on ISDS Working Group 4, 'Incorrectness of ISDS Decisions' (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS Working Group 4, 2019)

¹⁵⁸ Julian Arato et al, 'Lack of Consistency and Coherence in the Interpretation of Legal Issues' (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS Working Group 3, 30 January 2019)

¹⁵⁹ See Cooter and Ulen, above n 21.

¹⁶⁰ See *Possible Reform of Investor-State Dispute Settlement (ISDS)—Cost and Duration*, UN Doc A/CN.9/WG.III/WP.153, above n 63, 2.

¹⁶¹ ICSID, *ICSID Rules and Regulations Amendment Process* (August 2018) <<https://icsid.worldbank.org/en/amendments>>.

¹⁶² Catherine Titi et al, 'Excessive Costs & Insufficient Recoverability of Cost Awards' (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS Working Group 1, 14 March 2019)

¹⁶³ Ibid (It should be noted that the costs under consideration of the study conducted by Working Group 1 of Academic Forum on ISDS are party costs (that cover fees and expenses of counsel, experts, and witnesses) and tribunal costs (that include fees and expenses of arbitrators, arbitral institutions as well as secretarial services.)

¹⁶⁴ Ibid.

¹⁶⁵ Ibid (According to the Working Group 1 of , the justification of these costs depends on a variety of factors, such as the importance and complexity of the matters at stake, the interests and position of each party, the standard of the service provided).

¹⁶⁶ Ibid.

The costs of investor–State arbitration are also influenced by the durations of proceedings; accordingly, the UNCITRAL recommends examining durations in conjunction with costs.¹⁶⁷ In general, process length can positively or negatively contribute to cost. Theoretically, lengthy proceedings are assumed to generate high costs.¹⁶⁸ By contrast, in practice, quick, high-quality arbitral processes may come with higher prices. Regarding the duration of present ISDS proceedings, Working Group Two of the Academic Forum on ISDS highlights that the average length of these proceedings can be considered excessive. For example, the average duration under the ICSID arbitration rules in 2015 was 39 months.¹⁶⁹ Working Group Two further suggests some possible solutions to minimise the length of these processes, including systemic solutions (reducing duration through arbitration clauses and arbitral institutions) and structural solutions (decreasing duration before or after the constitution of arbitral tribunals).¹⁷⁰

The above empirical studies show that the current regime suffers from inaccuracy, inconsistency (which are crucial aspects of the rule of law) and the excessive duration of investor–State arbitration (which is a vital element of efficiency). As for designing the new, multilateral ISDS regime, Working Group Seven of the Academic Forum on ISDS proposes that the degree of inaccuracy and inconsistency problems should be weighed against the issues of efficiency (costs and durations).¹⁷¹ If inaccuracy and inconsistency were deemed more problematic than efficiency, then attention should be focused on improving accuracy and consistency. However, as pointed out by Working Group Seven, the present empirical knowledge about the problems of inaccuracy and inconsistency is less than the practical knowledge of costs and durations; therefore, the issue of a reform design remains inconclusive.

To advance the understanding of reform design, this Thesis believes that further empirical studies (on the present regime and reform designs) should take the social costs and benefits of the international investment regime into consideration. As mentioned in the Introduction, investment disputes involve contract- and treaty-based claims and hybrids thereof. In treaty-based disputes, accuracy and consistency need not contradict efficiency. Instead, greater accuracy and consistency can improve the efficiency of the international investment regime. This is because accuracy can minimise error costs, and consistency can reduce negative externality costs. Based on this assumption, a new, multilateral ISDS regime should be

¹⁶⁷ *Possible Reform of Investor-State Dispute Settlement (ISDS)—Cost and Duration*, UN Doc A/CN.9/WG.III/WP.153, above n 63, 2.

¹⁶⁸ ISDS Academic Forum–Working Group 2, ‘Duration of ISDS Proceedings’ (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS Working Group 2, 2019) 1.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.* 25.

¹⁷¹ Malcolm Langford, Daniel Behn and Laura Létourneau-Tremblay, ‘Empirical Perspectives on Investment Arbitration: What do we know? Does it Matter?’ (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS Working Group 7, 15 March 2019)

designed to minimise social costs (a combination of private and externality costs) and promote social benefits (a combination of private and externality benefits) as much as possible.

Apart from these concerns over inaccuracy, inconsistency, high costs and excessive durations, the private and confidential nature of international arbitration (section 1.1) raises a concern about ISDS in dealing with investment disputes that involve public interests. On the contrary, concerns about transparency—specifically, the publication of awards—may be considered less problematic; a recent empirical study conducted by Ubilava (2019) indicates that awards and settlements are open to the public in most cases.¹⁷² As is explained in section 1.4.4, the UNCITRAL adopted the *Rules on Transparency* in 2013, followed by the *Mauritius Convention on Transparency* (which came into force in 2017), and both have helped improve transparency in ISDS proceedings. At present, a critical issue is party-appointed arbitral tribunals.¹⁷³ While party autonomy is deemed to be an advantage of the current arbitration system (section 1.4.1), it causes concerns regarding diversity deficit and insufficiency of arbitrators’ independence and impartiality. From the empirical perspective, the study by Working Group Five of the Academic Forum on ISDS reveals that the present ISDS regime has a diversity deficit.¹⁷⁴ Moreover, the survey conducted by Working Group Six indicates the inadequacy of arbitrators’ independence and impartiality.¹⁷⁵ Each of these issues is further explained in Chapter 3 and Chapter 6.

1.4.2 The Debates on Reforms to Substantive Investment Protections

Concerns about inaccuracy and inconsistency problems have led to reforms to international investment policy and substantive investment protections. Following the 2004 United States model BIT,¹⁷⁶ in 2010, the United Nations Commission on Trade and Development (UNCTAD) pointed to the need for reform to substantive investment protections to improve accuracy and consistency between arbitral tribunal decisions.¹⁷⁷ In 2012, the UNCTAD put forward the Investment Policy Framework for Sustainable Development,¹⁷⁸ which suggests that more precise investment treaty provisions and exception clauses are

¹⁷² Ana Ubilava, ‘Amicable Settlements in Investor–State Disputes: Empirical Analysis of Patterns and Perceived Problems’ (Sydney Law School Research Paper No. 19/17, 13 March, 2019)

¹⁷³ *Possible Reform of Investor-State Dispute Settlement (ISDS): Arbitrators and Decision Makers: Appointment Mechanisms and Related Issues*, UN Doc A/CN.9/WG.III/WP.152 (30 August 2018) (advance copy).

¹⁷⁴ Andrea K Bjorklund et al, ‘The Diversity Deficit’ (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS Working Group 5, 30 March 2019)

¹⁷⁵ Jeffrey Dunoff et al, ‘Lack of Independence and Impartiality of Arbitrators’ (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS Working Group 6, March 2019).

¹⁷⁶ In 2002, the *United States Trade Promotion Act* instructed the United States Government to include environmental and labour exceptions in the United States Model BITs and Free Trade Agreements (see Daniel M Price, ‘US Trade Promotion Legislation’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 89).

¹⁷⁷ UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* (United Nations, 2010) 82.

¹⁷⁸ See UNCTAD, *Investment Policy Framework for Sustainable Development [2012 Edition]* (Series on Investment Policy Framework for Sustainable Development, United Nations, 2012). See also UNCTAD, *World Investment Report: Investing*

needed to reconcile areas of interference to support sustainable development goals.¹⁷⁹ During the UNCITRAL 50th session of 10 July 2017, some States suggested that the focus should first be on the reform of substantive protection standards.¹⁸⁰ A new generation of international investment agreements, such as the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Agreement*¹⁸¹ (which incorporates the *Trans-Pacific Partnership (TPP) Agreement*)¹⁸² and *European Union–Canada Comprehensive Economic and Trade Agreement (CETA)*,¹⁸³ tend to provide more precise definitions of these investment protections and right to regulate exceptions. As some recent studies suggest, although new approaches to the substantive investment protection norms (such as the Fair and Equitable Treatment Standard, indirect expropriation and right to regulate exceptions) of these new international investment agreements have addressed some controversies that arose in past cases, there remains uncertainty.¹⁸⁴ Arguably, a reform to substantive investment protection to make it more precise is one legal method to increase legal certainty; however, redrafting treaty provisions alone cannot sufficiently alleviate the problems of inaccuracy and inconsistency, as it is hard to define the normative content and standard of review for each of the substantive standards of investment protection. Different investment policies and unequal bargaining power between developing and developed States in

in the SDGs: *An Action Plan* (United Nations, 2014); UNCTAD, *Investment Policy Framework for Sustainable Development [2015 Edition]* (Series on Investment Policy Framework for Sustainable Development, United Nations, 2015).

¹⁷⁹ For further discussions about international investment policy and sustainable development goals, see, eg, Andrew Newcombe, ‘Sustainable Development and Investment Treaty Law’ (2007) 8 *Journal of World Investment & Trade* 357; Suzanne A Spears, ‘Making Way for the Public Interest in International Investment Agreements’ in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 271; Suzanne A Spears, ‘The Quest for Policy Space in a New Generation of International Investment Agreements’ (2010) 13(4) *Journal of International Economic Law* 1037; Francesco Francioni, ‘Foreign Investments, Sovereignty and the Public Good’ in Benedetto Conforti et al (eds), *Italian Yearbook of International Law* 2013 (Brill Academic Publishers, 2014) vol 23, 3, 3–22; Fola Adeleke, ‘Investor–State Arbitration and the Public Interest Regulation Theory’ (Paper presented at the Fourth Biennial Global Conference, World Trade Institute University of Bern, 10–12 July 2014); A de Mestral, ‘Exceptions Clauses in the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada: A Model for Future ‘Mega-Regional’ Agreements?’ (2016) 13(1) *Transnational Dispute Management* 1.

¹⁸⁰ Nikos Lavranos, ‘The Outcome of the UNCITRAL Meeting: The First Steps Towards a Multilateral Investment Court (MIC)’ in email from John Gaffney to OGEMID@ogeltdm.com (7 August 2017).

¹⁸¹ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Agreement*, signed 8 March 2018 (not yet in force). The *CPTPP Agreement* is a mega-regional trade and investment agreement signed by 11 economies which are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam (see Department of Foreign Affairs and Trade (DFAT), Australian Government, *About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11)* (2018) <<https://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/Pages/trans-pacific-partnership-agreement-tpp.aspx>>.

¹⁸² *Trans-Pacific Partnership (TPP) Agreement*, signed 4 February 2016 (not yet in force). The *TPP Agreement* has been incorporated into the *CPTPP Agreement* (see *CPTPP Agreement* art 1). The suspensions in the Investment Chapter are: art 9.1 (Definitions of investment agreement) and investment authorisation); article 9.19.1–a(i) B and C; (b)(i) B and C, and the chausette; article 9.19.2; article 9.19.3 (b) the phrase ‘investment authorisation or investment agreement’; article 9.22.5; article 9.25.2, and annex 9-L (see *CPTPP Agreement* art 2).

¹⁸³ *European Union–Canada Comprehensive and Economic Trade Agreement (CETA)*, signed 30 October 2016 (entered into force provisionally on 21 September 2017) <<http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>>.

¹⁸⁴ See, eg, Patrick Dumberry, ‘Drafting the Fair and Equitable Treatment Standard Clause in the TPP and the RCEP Lessons Learned from the NAFTA Article 1105 Experience’ (2015) 12(1) *Transnational Dispute Management* 1, 27; Ursula Kriebaum, ‘FET and Expropriation in the Comprehensive Economic Trade Agreement between the European Union and Canada’ (2016) 13(1) *Transnational Dispute Management* 1, 23.

international investment agreement (IIA) negotiations might also present obstacles. Although several issues from past cases have been addressed, at the time of drafting, the negotiators could not anticipate all the issues that would arise in investment disputes. Also evident in the findings is the fact that, besides international investment agreements, international investment law takes place against the backdrop of public international law, such as the customary international law on a minimum standard of treatment of aliens, which has evolved over time. Importantly, investor–State disputes concern an interaction between the State’s actions and national regulatory frameworks with international obligations under international investment agreements. Thus, a multilateral ISDS regime reform would be an important mechanism for promoting accuracy and consistency to bring about legal certainty and efficiency in the international investment system.

1.4.3 The Extension of Debate on the Potentiality of the World Trade Organization Model for a Multilateral Investor–State Dispute Settlement Regime

Commentators have started discussing possible reform options, especially the idea of establishing an appeal mechanism in the international investment system,¹⁸⁵ and have moved the debate on ISDS regime reform forward creating extended arguments as to whether the WTO Appellate Body could be the model for ISDS regime reform.¹⁸⁶ One reason stated in several studies is that the WTO has been regarded as the

¹⁸⁵ For early discussions about an appellate reform in ISDS, see, eg, William Knull and Noah Rubins, ‘Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?’ (2000) 11 *American Review of International Arbitration* 531; Gabrielle Kaufmann-Kohler, ‘In Search of Transparency and Consistency: ICSID Reform Proposal’ (2005) 2 (5) *Transnational Dispute Management* 6; VV Veeder QC, ‘The Necessary Safeguards of an Appellate System’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 89) 9; Doak Bishop, ‘The Case for an Appellate Panel and its Scope of Review’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 89) 15; Thomas Johnson, ‘Factual Review’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 89) 59; Robert Volterra, ‘Conclusion’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 89) 145; Asif H Querishi, ‘An Appellate System in International Investment Arbitration?’ in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 1155; Christopher Brummer, ‘Examining the Institutional Design of International Investment Law’ in Karl P Sauvant (ed) *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) 289; Tai-Heng Cheng, ‘The Role of Justice in Annuling Investor–State Arbitration Awards’ (2013) 31 (1) *Berkeley Journal of International Law* 236; Gabriel Bottini, ‘Reform of the Investor State Arbitration Regime: The Appeal Proposal’ (2014) 1 *Transnational Dispute Management* 1

¹⁸⁶ For discussion about the WTO could be the model for ISDS reform, see, eg, Philippe Sands, ‘Searching for Balance: Concluding Remarks. Regulatory Expropriations in International Law: Colloquium Articles’ (2002–2003) 11(1) *New York University Environmental Law Journal* 198, 207; Asif Qureshi, ‘Development Perspectives on the Establishment of an Appellate Process in the Investment Sphere’ (2005) (2) *Transnational Dispute Management* 52, 52–4; James Crawford, ‘Is there a need for an appellate system’ (2005) (2) *Transnational Dispute Management* 8, 8; Michael Schneider, ‘Does the WTO Confirm the Need for a More General Appellate System in Investment Disputes?’ (2005) (2) *Transnational Dispute Management* 55, 55–7; Jacques Werner, ‘Limits of Commercial Investor–State Arbitration: The Need for Appellate Review’ in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni, *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 115, 117; Alberto Alvarez Jimenez, ‘The WTO Appellate Body’s Decision-Making Process: A Perfect Model for International Adjudication?’ (2009) 12 *Journal of International Economic Law* 289; Donald McRae, ‘The WTO Appellate Body: A Model for and ICSID Appeals Facility?’ (2010) 1(2) *Journal of International Dispute Settlement* 371.

most successful post-Cold War international economic organisation promoting the long-term interest,¹⁸⁷ democracy¹⁸⁸ and the rule of law¹⁸⁹ of the international trade community. The WTO dispute settlement system has been recognised as an effective mechanism for promoting accuracy and consistency to bring about legal certainty and efficiency in the international trade system.¹⁹⁰ Although many studies suggest that the WTO Appellate Body has created a *jurisprudence constante* in the various areas that have been the subject of dispute, and that the existence of the WTO Appellate Body has led to more consistent jurisprudence in certain critical areas,¹⁹¹ some commentators note that the international trade system is distinct from the investment system.¹⁹² Among others, Sheppard and Warner note that ‘the circumstances and priorities in trade disputes may differ significantly from those in investment disputes, a fact which casts doubt over the applicability of this model’.¹⁹³ Some commentators point out that the WTO Appellate Body has interpreted certain legal issues without clear reasoning and left certain issues undecided.¹⁹⁴ As is discussed in Chapter 4 (section 4.3.2.3), the WTO has recently been experiencing an Appellate Body crisis: the United States has blocked the appointment of new Appellate Body members.¹⁹⁵ This crisis is caused by the fact that the United States is not satisfied with WTO Appellate Body decisions, particularly those regarding the Body’s review power over municipal law (which, the United States argues, is a question of fact and not law).¹⁹⁶ According to Stoler, if this crisis remains unresolved, the WTO dispute settlement system will be prevented from operating by the end of 2019.¹⁹⁷ Accordingly, whether WTO litigation could be a model for a multilateral ISDS regime reform remains a question.

¹⁸⁷ Peter Sutherland, ‘The Politics of Trade Policy Development —The New Complexity’ in Patrick F J Macrony, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analyses* (Springer, 2005) vol I, 27, 38.

¹⁸⁸ Mike Moore, ‘The Democratic Roots of the World Trade Organization’ in Patrick F J Macrony, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analyses* (Springer, 2005) vol I, 39, 47.

¹⁸⁹ Supachai Panitchpakdi, ‘WTO After Ten Years: Global Problems and Multilateral Solutions’ (Introductory Remarks delivered at the WTO Public Symposium, Geneva, Switzerland, 20 April 2005) <https://www.wto.org/english/news_e/news05_e/remarks_chair_8july05_e.htm>.

¹⁹⁰ For discussion about legitimacy in the WTO, see, above n 56.

¹⁹¹ For some examples of substantive and procedural principles established by the WTO Appellate Body, see, eg, Mitsuo Matsushita, ‘The Dispute Settlement at the WTO: The Appellate Body-Assessment and Problems’ in Amrita Narlikar, Martin Daunton and Robert M Stern, *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012) 507, 516.

¹⁹² See, eg, Audrey Sheppard and Hugo Warner, ‘Editorial Note’ (2005) 2 (2) *Transnational Dispute Management* 4, 4–5; Stephen S Kho et al, ‘The EU TTIP Investment Court Proposal and the WTO Dispute Settlement System: Comparing Apples and Oranges?’ (2017) 32(2) *ICSID Review - Foreign Investment Law Journal* 326, 326–45.

¹⁹³ Sheppard and Warner, ‘Editorial Note’, above n 192.

¹⁹⁴ R Quick and A Blüthner, ‘Has the Appellate Body Erred? An Appraisal and Criticism of The Ruling in The WTO Hormones case’ (1999) 2 (4) *Journal of International Economic Law* 603, 603–39.

¹⁹⁵ Andrew Stoler, ‘Crisis in the WTO Appellate Body and the Need for Wider WTO Reform Negotiations’ (Institute for International Trade, University of Adelaide, 1 March 2019) 1.

¹⁹⁶ Ibid 2.

¹⁹⁷ Ibid 1.

1.4.4 The Escalation of Debates to the International Level and Current Options for Investor–State Dispute Settlement Regime Reform

Apart from academic discussions, at an international level, interest in the reform of the ISDS regime is increasing, which is evident in international governmental organisation attempts to find reform solutions. Varying reform options are currently being undertaken by different international governmental organisations or trade and investment negotiations. This section reviews the key options currently being debated, and highlights avenues for further research on multilateral ISDS regime reform to complement and enhance existing thoughts on theoretical and practical perspectives.

In 2013, the UNCTAD provided a broad summary outlining the range of options available for the proposed ISDS regime reform:

1. promoting alternative dispute resolution
2. tailoring the existing system through individual IIAs
3. limiting investor access to the ISDS
4. introducing an appeals facility
5. creating a standing investment court.¹⁹⁸

In short, the options to promote alternative dispute resolution¹⁹⁹ and limit investor access to the ISDS regime²⁰⁰ are unable to solve problems of inaccuracy and inconsistency in applying and interpreting investment treaty norms, which is a serious concern of the current regime (as noted in section 1.4.1). The third option to tailor the ISDS provisions under a single investment agreement²⁰¹ could promote accuracy and consistency under such an investment agreement, but not the whole body of international investment law. The option to establish a standalone appellate mechanism is likely to improve accuracy and consistency, but increase the cost and time of dispute resolution; it also raises several questions in relation to its practical implementation.²⁰² The option to establish an investment court with appellate review can

¹⁹⁸ UNCTAD, ‘UNCTAD Puts Forward Reform Options for Investor–State Dispute Settlement System’ (27 May 2013) <<https://unctad.org/fr/pages/newsdetails.aspx?OriginalVersionID=508>>.

¹⁹⁹ UNCTAD, ‘Reform of Investor–State Dispute Settlement: In Search of a Roadmap Special Issue for the Multilateral Dialogue on Investment’ (IIA Issues Note No 2 (2013), UNCTAD/WEB/DIAE/PCB/2013/4, 24 May 2013)5. (The ADRs option (such as conciliation and mediation) involves a neutral third party to help find a solution that would be recognised as fair by the disputing parties, but the ADR decision is non-binding.)

²⁰⁰ Ibid 7–8. (Limiting investor access to ISDS could be achieved by the following means: reducing the subject-matter scope for ISDS claims, restricting the range of investors who qualify to benefit from the treaty, introducing a requirement to exhaust local remedies before resorting to international arbitration or abandoning ISDS as a means of dispute resolution)

²⁰¹ Ibid 5–6. (Tailoring the existing system through individual IIAs could be achieved by the following means: setting time limits for bringing claims; increasing the contracting parties’ role in interpreting the treaty in order to avoid legal interpretations that go against their intentions; establishing a mechanism for consolidation of related claims, providing for more transparency in ISDS; including a mechanism for an early discharge of frivolous (unmeritorious) claims.)

²⁰² Ibid 8–9.

address the concerns about inaccuracy and inconsistency,²⁰³ but the main concern is that a longer and more complex court process may increase time and cost and place burdens on the disputing parties. Establishing an investment court also raises several questions regarding its practical implementation. In 2015, the UNCTAD recommended that more research be conducted on subjects such as an investment court’s relationship with investment arbitration and interstate procedures; its potential jurisdiction; remedies; the possibility of using enforcement mechanisms under the ICSID or the *New York Convention*; and practices and lessons learned from the WTO, the International Court of Justice, and other international and regional courts.²⁰⁴

Besides the UNCTAD, ISDS regime reform has been extensively studied by the OECD. The OECD’s work on ISDS regime reform can be traced back to 1998, when it discussed the Draft *Multilateral Investment Agreement* (as discussed in section 1.3.2). Between 2005 and 2006, the OECD issued several studies on investor–State arbitration that provided statistical surveys of ISDS provisions under bilateral investment treaties through 2012.²⁰⁵ In 2017, the OECD published *Key Issues on International Investment Agreements*, which covers the UNCTAD’s five ISDS regime reform options; however, the most appropriate reform option has not yet been indicated.²⁰⁶

Along with the UNCTAD and the OECD, the UNCITRAL has also studied how best to improve the investor–State arbitration regime. The UNCITRAL’s work concentrates on the transparency of arbitral proceedings, which is one aspect of the ISDS regime, and must be incorporated into the existing or a new investor–State arbitration regime. In 2013, the UNCITRAL adopted the UNCITRAL *Rules on Transparency*, which only apply to the UNCITRAL arbitrations²⁰⁷ and investment treaties concluded on or after 1 April 2014.²⁰⁸ In 2014, the UNCITRAL drafted the *Mauritius Convention on Transparency*,²⁰⁹ which enhances the scope of the *Rules on Transparency* to encompass investment treaties concluded before 1 April 2014.²¹⁰ Coming into force on 18 October 2017, at the time of writing (March 2019), the *Mauritius Convention on Transparency* currently has 23 signatories, but five States (Canada, Mauritius,

²⁰³ Ibid 9.

²⁰⁴ UNCTAD, ‘Report on the Expert Meeting on the Transformation of International Investment Agreement Regime: The Path Ahead’, above n 50.

²⁰⁵ See, eg, OECD, ‘Transparency and Third Party Participation in Investor–State Dispute Settlement Procedures’ (Working Paper on International Investment No 2005/1, OECD, 2005); K Yannaca-Small, ‘Improving the System of Investor–State Dispute Settlement’ (Working Papers on International Investment No 2006/01, OECD, 2006); C Paterson, ‘Investor-to-State Dispute Settlement in Infrastructure Projects’ (Working Papers on International Investment No 2006/02, OECD, 2006).

²⁰⁶ OECD, *Key Issues on International Investment Agreements* (OECD, 2017) 2–3.

²⁰⁷ UNCITRAL, *Rules on Transparency in Treaty-Based Investor-State Arbitration* (effective 1 April 2014) (‘UNCITRAL Rules on Transparency’).

²⁰⁸ Ibid art 1.

²⁰⁹ *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, opened for signature 10 October 2014 (entered into force 18 October 2017) (‘*Mauritius Convention*’).

²¹⁰ Ibid art 1.

Switzerland, Cameroon and Gambia) have ratified it.²¹¹ Kaufmann-Kohler and Potestà suggest that the *Mauritius Convention* can be incorporated into a multilateral ISDS regime reform.²¹²

As well as international governmental organisations, some States have implemented ISDS regime reform under their trade and investment treaties, but have sought to move in different directions. For example, the *TPP Agreement* (included in the *CPTPP Agreement*) maintains investor–State arbitration as a dispute resolution method, but amends the first instance procedures and includes a provision for States to consider whether they would allow arbitral awards to be reviewed by a future appellate mechanism.²¹³ Rather than international arbitrations, the European Union has sought to establish the investment court system. After failing to conclude the *Transatlantic Trade and Investment Partnership (TTIP)* with the United States,²¹⁴ the European Union has negotiated bilateral investment courts with other third countries. It has successfully incorporated the bilateral investment court in the *CETA* with Canada²¹⁵ and the *Investment Protection Agreements* with Vietnam²¹⁶ and Singapore in 2018,²¹⁷ but has not reached agreement on the investment court with Japan.²¹⁸ The other States, such as Brazil²¹⁹ and India,²²⁰ have sought to adopt different models of investor–State dispute resolution.

²¹¹ United Nations Treaty Collection (UNTC), *Status of Treaties* (2019)

<https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&lang=en>.

²¹² Gabrielle Kaufmann-Kohler and Michele Potestà, ‘Can the Mauritius Convention Serve as a Model for the Reform of Investor–State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?: Analysis and Roadmap’ (Geneva Centre for International Dispute Settlement (CIDS) Research Paper, 3 June 2016), 97.

²¹³ *TPP Agreement* (incorporated into *CPTPP Agreement*) ch 9 (Investment Chapter) (Art 9.23(11) provides that: ‘In the event that an appellate mechanism for reviewing awards rendered by investor–State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 9.29 (Awards) should be subject to that appellate mechanism.’)

²¹⁴ European Commission, ‘EU Finalizes Proposal for Investment Protection and Court System for TTIP’ (Press Release, 12 November 2015) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396>>; European Commission, *In focus: Transatlantic Trade and Investment Partnership (TTIP)* <<http://ec.europa.eu/trade/policy/in-focus/ttip/>>; European Commission, ‘Concept Paper Investment in TTIP and Beyond – the Path for Reform Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration Towards an Investment Court’ (Concept Paper, 2015) <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>; European Commission, ‘Commission Proposes New Investment Court System for TTIP and other EU Trade and Investment Negotiations’ (Press Release, IP/15/5651, 16 September 2015) <http://europa.eu/rapid/press-release_IP-15-5651_en.htm>; CNBC, *Wilbur Ross Says He’s ‘Open to Resuming’ Talks on Mega-Trade Deal with Europe* (2017) <<https://www.cnbc.com/2017/05/30/exclusive-wilbur-ross-says-hes-open-to-resuming-ttip-negotiations.html>>.

²¹⁵ *CETA* ch 8.

²¹⁶ *European Union and Vietnam Investment Protection Agreement* (not yet in force) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>> ch 3.

²¹⁷ *European Union and Singapore Investment Protection Agreement* (not yet in force) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> ch 3.

²¹⁸ *European Union and Japan Economic Partnership Agreement* (not yet in force) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684>>.

²¹⁹ See Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, ‘Comparative Commentary to Brazil’s Cooperation and Investment Facilitation Agreements (CIFAs) with Mozambique, Angola, Mexico, and Malawi’ (International Institute for Sustainable Development, September 2015) 116 (Brazil has adopted amicable solution and interstate dispute settlement).

²²⁰ See *Indian Model Bilateral Investment Treaty* (2015) <http://finmin.nic.in/the_ministry/dept_eco_affairs/investment_division/ModelBIT_Annex.pdf> ch IV.

Other recent proposals, such as the Group of Twenty (G20)²²¹ and ICSID, offer various dispute resolution methods. In February 2017, the G20 issued *Guiding Principles for Global Investment Policymaking: A Stepping Stone for Multilateral Rules on Investment*, emphasising the need for transparency and consistency in the investor–State arbitration regime.²²² However, the guiding principles do not provide any details on the reform of the investor–State arbitration regime. In October 2016, ICSID announced the amendment of the ICSID’s rules and regulations,²²³ inviting 153 member States to suggest topics for modification.²²⁴ On 3 August 2018, ICSID published the background papers and proposals for rule amendments,²²⁵ which aim to promote efficiency in arbitration processes, but do not yet make clear exactly how the new arbitral rules will alleviate the inaccuracy and inconsistency problems in the jurisprudence.

The multilateral investment court proposal under the collaboration between UNCITRAL and the European Union (2017–2020) is the latest development in this area. In UNCITRAL’s 50th session meeting on 10 July 2017, the participating States discussed the European Union’s proposal to transform international investment arbitration into a court-based system. The opinions of participating States were divided. While some States (especially those of the European Union) have advocated for ISDS regime reform, some (in particular, the United States and Japan) have disagreed with ISDS regime reform, while others have called for more work to be done on recognising the advantages and disadvantages of the current ISDS regime and possible reform options.²²⁶ At the end of the meeting, UNCITRAL endorsed the following mandate: ‘(i) to identify and consider concerns regarding ISDS; (ii) to consider whether reforms are desirable in light of the identified concerns; and (iii) if the Working Group were to conclude that reform is desirable, to develop and recommend any relevant solutions to be recommended to the Commission’.²²⁷ In March 2018, the European Council adopted a directive authorising the European Union to negotiate an international convention creating a multilateral investment court; however, its features are subject to further negotiations.²²⁸ The 37th session of Working Group III was recently held in New York from 1–5

²²¹ The G20 is an international forum for the governments and central bank governors from 20 major economies including Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, United Kingdom, United States, and the European Union (see Group of Twenty (G20), *What is the G20?* <<https://www.g20.org/en/g20/what-is-the-g20>>).

²²² Joubin-Bret, Anna and Cristian Rodriguez Chiffelle, ‘G20 Guiding Principles for Global Investment Policymaking: A Steppingstone for Multilateral Rules on Investment’ (White Paper, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, February 2017) 8–10.

²²³ ICSID, *Amendment of ICSID’s Rules and Regulations* <<https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx>>; ICSID, *The ICSID Rules Amendment Process* <<https://icsid.worldbank.org/en/documents/about/icsid%20rules%20amendment%20process-eng.pdf>>.

²²⁴ ICSID, *List of Topics for Potential ICSID Rule Amendment* (2017) <<https://icsid.worldbank.org/en/Documents/about/List%20of%20Topics%20for%20Potential%20ICSID%20Rule%20Amendment-ENG.pdf>>).

²²⁵ ICSID, *ICSID Rules and Regulations Amendment Process* (August 2018), above n 161.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Stacie I Strong, ‘EU Negotiating Mandate on Multilateral Court for Settlement of Investment Disputes’ in email from Stacie I Strong to OGEMID@ogeltdm.com (22 March 2018).

April 2019.²²⁹ Several reform options are under consideration,²³⁰ but a final decision has not yet been reached.

It is clear from the outcome of the UNCITRAL meeting that States have recognised the highly complex issues that arise from the ISDS regime. By mandating further studies, States have an opportunity to review the problems that exist in the current system comprehensively, the pros and cons of each reform option and its potential effect on stakeholders, and the international economic system before pursuing any reform. While the multilateral investment court proposal in collaboration with the UNCITRAL and European Union is the latest in a long history of ISDS regime reform consideration, the process of reform in ISDS regime continues to be a work in progress. While the debates over multilateral investment court continue,²³¹ no consensus has emerged on several crucial issues, especially the court's features and the enforcement of multilateral investment court awards.

1.5 Conclusion

This Chapter concludes that there are gaps in existing theories, policies and practices in terms of dealing with investor–State disputes that involve contract-based claims, treaty-based claims and hybrids of

²²⁹ *Possible Reform of investor-State dispute settlement (ISDS)*, UN Doc A/CN.9/WG.III/WP.148 (30 July 2018) (Annotated provisional agenda). On 18 January 2019, the European Union submitted two papers to the UNCITRAL for the 37th session in New York. (see, European Commission, 'The EU Moves Forward Efforts at UN on Multilateral Reform of ISDS' (18 January 2019) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1972>>).

²³⁰ *Possible Reform of Investor-State Dispute Settlement (ISDS)*, UN Doc A/CN.9/WG.III/WP.149A/CN.9/WG.III/WP.149 (5 September 2018) (Annex—Tabular Presentation of Framework for Discussions (draft copy). Reform options under discussion include establishing various following mechanisms: treaty interpretation, a framework for interstate preliminary consideration, guidance to arbitral tribunals, a scrutiny system for awards prior to issuance, a system of binding precedent, preliminary rulings, an appeal mechanism, and an international investment court.

²³¹ For some discussions about an investment court, see, eg, Gonzalez García, 'Making Impossible Investor–State Reform Possible,' (2014) 11 (1) *Transnational Dispute Management*; Walid Ben Hamida, 'The Development of the Arab Investment Court's Case Law: New Decisions Rendered by the Arab Investment Court' (2014) 6 *International Journal of Arab Arbitration* 12; E Zuleta, 'The Challenge of Creating a Standing International Investment Court' (2014) 11 (1) *Transnational Dispute Management*; Stephen W Schill, 'The European Commission's Proposal of an Investment Court System for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?' (2016) 20 (9) *American Society of International Law* <<https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping>>; John Gaffney, 'The EU Proposal for an Investment Court System: What Lessons Can Be Learned from the Arab Investment Court?' (2016) 181 *Columbia FDI Perspectives on Topical Foreign Direct Investment Issues* 1, 1–3; Gus Van Harten, 'Reforming the System of International Investment Dispute Settlement' in C L Lim (ed), *Alternative Visions in the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (Cambridge University Press, 2016) 103; Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards' (Geneva Center for International Dispute Settlement (CIDS) Supplement Report, 15 November 2017); Piero Bernardini, 'Reforming Investor–State Dispute Settlement: The Need to Balance Both Parties' Interests' (2017) 32 (1) *ICSID Review* 38; Stephan W Schill, 'Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework' (2017) 20(3) *Journal of International Economic Law* 649; N Jansen Calamita, 'The (In) Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) *Journal of World Investment & Trade* (Pre-Publication Draft) 1; Anthea Roberts, 'UNCITRAL and ISDS Reform: Pluralism and the Plurilateral Investment Court' on *International Economic Law and Policy Blog* (12 December 2017) <<https://www.ejiltalk.org/uncitral-and-isds-reform-pluralism-and-the-plurilateral-investment-court/>>; Marike Paulsson, 'Revisiting the Idea of ISDS Within the EU and Arbitration Court: The Effect on Party Autonomy as the Main Pillar of Arbitration and the Enforceability of Arbitral Awards' on *Kluwer Arbitration Blog* (21 May 2018)

contract-based claims and treaty-based claims. On a theoretical level, a review of relevant theories illustrates the inadequacy of arbitration and litigation theories in addressing disputes that include contract-based claims, treaty-based claims and a hybrid of the two. At a practical level, a review of current policies and practices in the investor–State arbitration regime also reveals that the current regime aims to promote efficiency rather than accuracy and consistency. An analysis of the debates on investor–State dispute settlement reform up to March 2019 further illustrates that the trends in its jurisprudence and treaty drafting will not alleviate the inaccuracy and inconsistency problems. This review also proposes that, although reform of the investor–State dispute settlement regime is desirable, there is no consensus regarding the potentiality of the World Trade Organization dispute settlement system as a model for a multilateral investor–State dispute settlement regime. Finally, although efforts have been made to reform the investor–State dispute settlement regime, it is unclear how existing options could balance accuracy and consistency with efficiency. The next Chapter reassesses the current policy rationales and suggest an alternative policy for further development of a multilateral investor–State dispute settlement regime.

<<http://arbitrationblog.kluwerarbitration.com/2018/05/21/revisiting-idea-isds-within-eu-arbitration-court-effect-party-autonomy-main-pillar-arbitration-enforceability-arbitral-awards/>>; Stephan W Schill and Geraldo Vidigal, ‘Cutting the Gordian Knot: Investment Dispute Settlement à la Carte’ (International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB), November 2018); Christoph Schreuer and A de la Brena ‘Does ISDS Need an Appeals Mechanism?’ (2018) (Provisional Issue) *Transnational Dispute Management* (This paper will also appear in the *Austrian Yearbook on International Arbitration* in 2019).

CHAPTER 2:

A PROPOSED ALTERNATIVE POLICY RATIONALE FOR THE FURTHER DEVELOPMENT OF A MULTILATERAL INVESTOR–STATE DISPUTE SETTLEMENT REGIME

2.1 Introduction

As noted in Chapter 1, it is often the case that there is no single optimal model of dispute resolution; various procedures have been developed for different types of disputes, and these may be based on different historical factors and policy rationales. The next step towards a multilateral reform of the investor–State dispute settlement regime is to reconceptualise the underlying rationale before designing a new investor–State dispute settlement procedure to serve the new policy goal. To establish a basis for an alternative policy proposal, the special characteristics of investor–State disputes must first be examined. To illuminate the reasons for investor–State dispute settlement, this Chapter investigates the essential purposes of the investor–State arbitration regime in promoting a cross-border investment climate. It examines how the argument for efficient investor–State dispute settlement regime is reasonable, and legitimates the argument for reform of the current regime to promote accuracy and consistency, taking due account of both sides of these arguments. Following that reassessment, the Chapter develops an alternative policy rationale in an attempt to reconcile efficiency and consistency, facilitating both a cross-border investment climate and legal certainty, which is one core component of the rule of law. This alternative policy rationale informs the subsequent evaluation of the current investor–State arbitration regime and comparative analysis of the World Trade Organization dispute settlement system. The proposed rationale is also used to assess the European Union investment court proposal being discussed by the international community. Ultimately, the proposed framework serves the Thesis goals of enhancing the theory and practice of investor–State dispute settlement and shaping recommendations for further development of a multilateral investor–State dispute settlement regime.

2.2 Demystifying Characteristics of Investor–State Disputes

To provide a basis for assessing the policy rationale for a multilateral investor–State dispute settlement (ISDS) regime reform, this section demystifies the characteristics of investor–State disputes. It initially highlights that cross-border investment involves private sector and public sector relationships. Based on this, disputes arising from international investment transactions differ from purely private commercial disputes and purely interstate disputes. Five special characteristics of investor–State disputes are highlighted in this section. First, investor–State disputes relate to foreign investors' claims against the host

State; second, investor–State disputes may arise from State breaches of contract, treaty or both; third, investor–State disputes are governed by multiple legal sources and involve assessing a host State regulatory power’s compliance with investment treaty norms; fourth, the remedies available to an investor for breaches of a foreign investment contract or treaty typically take the form of compensation for a specific investor rather than requiring the host State to modify domestic laws and regulations; and sixth, investor–State disputes arise in various circumstances.

The significant evolution of cross-border investment began after World War II when the Allied Nations concluded the *Bretton Woods Agreement*²³² to restore post-war economies.²³³ The *Bretton Woods Agreement* has resulted in a shift of international investment flows from currency manipulation (or bond market) to foreign direct investment.²³⁴ Unlike currency manipulation, foreign direct investment involves the transfer of ownership of financial and physical assets and is also accompanied by technology transfer and employment generation, which consequently contribute to the economic growth of the host State.²³⁵ In general, the capital is likely to migrate from economies where it is abundant (i.e., developed States and financial centres) to States where capital is scarce or where private enterprise capabilities are lacking (i.e., developing and/or less developed States). Accordingly, foreign direct investment creates private–public relationships between foreign investors and host States—that is, the private sector of home State transfers the capital²³⁶ to the public sector of a host State.²³⁷ Therefore, the legal framework that protects foreign investors from the risks associated with their investments in host States is a crucial factor for supporting cross-border investment flows.²³⁸

Unlike domestic investors, cross-border investors face higher risks.²³⁹ As Lewandowski notes, ‘foreign investment is sensitive to price and cost uncertainties, especially as a consequence of inflation and

²³² *Articles of Agreement of the International Monetary Fund and Articles of Agreement of the International Bank -For Reconstruction and Development*, opened for signature 27 December 1945, 1 UNTS 39, entered into force 27 December 1945) (‘*Bretton Wood Agreements*’).

²³³ See, eg, Margaret Garritsen de Vries, ‘The Bretton Woods Conference and the Birth of the International Monetary Fund’ in Orin Kirshner, *The Bretton Woods-GATT System: Retrospect and Prospect After Fifty Years* (M E Sharpe, 1996) 3, 3–18; Raymond F Mikesell, ‘Some Issues in the Bretton Woods Debates’ in Orin Kirshner, *The Bretton Woods-GATT System: Retrospect and Prospect After Fifty Years* (M E Sharpe, 1996) 19, 19–29.

²³⁴ John N Kallianiotis, *International Financial Transactions and Exchange Rates: Trade, Investment and Parities* (Palgrave Macmillan, 2013) xv.

²³⁵ *Ibid.*

²³⁶ Eric Rugraff, Diego Sánchez-Ancochea and Andy Summer, ‘How Have TNCs Changed in the Last 50 Years?’ in Eric Rugraff, Diego Sánchez-Ancochea and Andy Summer (eds), *Transnational Corporations and Development Policy: Critical Perspective* (Palgrave Macmillan, 2009) 9, 9–28.

²³⁷ WTO, ‘Trade and Foreign Direct Investment,’ above n 131.

²³⁸ Rugraff, Sánchez-Ancochea and Summer, above n 236.

²³⁹ See, eg, James P Lewandowski, ‘Risk and Foreign Direct Investment in Emerging Economies: Lessons from the former Soviet Union’ (1997) 30 *Middle States Geographer* 97; Imad A Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave, 2002) 131–160; Colin White and Miao Fan, *Risk and Foreign Investment* (Palgrave, 2006) 146–67.

exchange rate fluctuations’.²⁴⁰ In addition, foreign direct investment is concerned with a long-term commitment to business structures. Moreover, political risks are of primary concern to foreign investors, as observed by Schreuer—after investing, ‘the investor is exposed to a number of non-commercial risks at the hands of the host State. These include regime change, a change of general or sectoral economic policy, and economic, and economic or political emergencies in the host State (including public violence), to name just a few’.²⁴¹

There are several ways to minimise the risks associated with cross-border investment—for example, by limiting the volume and direction of foreign direct investment through hedging or internalisation strategies,²⁴² or by incorporating a stabilisation clause into investment agreements between investors and States.²⁴³ However, such strategies may not suffice to minimise systematic risks or political risks; instead, domestic public policies and regulatory frameworks may be needed to benefit all foreign investors.²⁴⁴ However, domestic policies and regulatory frameworks may not adequately minimise the risks associated with cross-border investment because they are determined by various local factors and differ across States, which may increase transaction costs and uncertainty for foreign investors. In addition, domestic policies and laws may not provide adequate protection for foreign investments, and domestic dispute resolution procedures may prove disadvantageous.²⁴⁵ For this reason, international investment policy and regulatory frameworks emerged to provide additional layers of protection for foreign investments.²⁴⁶

Given the complex nature of international investment and legal frameworks, any disputes arising from such transactions are distinct from pure interstate and private commercial disputes.²⁴⁷ A first characteristic that distinguishes investor–State disputes from pure public or private disputes is that investor–State disputes relate to foreign investors’ claims against the host State. However, it is worth noting that international investment involves other stakeholders, including the foreign investor’s home States, the host State’s population and the international community. The interests of all these stakeholders are examined below.

The first and second key players in the international investment system are foreign investors and their home States. Foreign investors are often private enterprises (or individuals) who have the initial capital,

²⁴⁰ Lewandowski, above n 239.

²⁴¹ Christoph Schreuer, ‘Do We Need Investment Arbitration?’ in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journey for the 21st Century* (TDM, Brill Nijhoff, 2015) 879.

²⁴² White and Fan, above n 239, 187–235.

²⁴³ L. Cotula, ‘Regulatory Takings, Stabilisation Clauses and Sustainable Development’ in *OECD Investment Policy Perspectives 2008* (OECD Publishing, 2008) 69.

²⁴⁴ Kallianiotis, above n 234, 149–50.

²⁴⁵ Schreuer, ‘Do We Need Investment Arbitration?’, above n 241, 883.

²⁴⁶ Ibid 880.

²⁴⁷ M Sornarajah, *The Settlement of Foreign Investment Dispute* (Kluwer Law International, 2000) 159.

expertise and other economic prerequisites for investment. In practice, this initial capital is often held by multinational corporations or transnational corporations.²⁴⁸ Economic theory generally assumes that any business aims to maximise profits.²⁴⁹ Businesses generally divide their capital into share units held by shareholders, who take a risk by investing in the business and require a return of a dividend to compensate them for that risk. In the same way, foreign investors typically seek some commercial gain from their investments. In most cases, foreign investors—usually a joint venture or consortium—invest in a host State through a target company, and their return commonly takes the form of voting dividends. The business structures of multinational corporations or transnational corporations, together with broad definitions of *investors* under international investment agreements, lead to a problem of multiple claims by shareholders over a single policy of the host State.²⁵⁰ In the process, the foreign investor’s home State would receive some portion of these investment proceeds through taxation, depending on how such proceeds are taxed.²⁵¹

The third and fourth key players are the host State and their population. The host State promotes national interests and seeks to maximise social benefits for its population. In principle, much of a State’s productive wealth lies in its resources and infrastructure, including energy, telecommunications, water, gas, electricity, highways, ports and railroads. In States that lack private enterprise capabilities, the government may need initial capital and expertise from foreign investors to build the infrastructure and utilities that will promote social development and economic growth.²⁵² This can be achieved through State-owned enterprises, privatisation, public franchises or public–private partnerships. In most cases, investor–State relationships are involved in privatisation or fiscal constraint policies. In the former case, foreign investors may enter into some form of concession contract with the host State, such as build-operate-transfer, build-transfer-operation or build-transfer-lease. In the case of public franchises, the host State may grant a licence to foreign investors.²⁵³

The final key player in the international investment system is the international community. As noted earlier, the international investment system forms part of the global economy and relates to international trade and the international monetary system. For that reason, cross-border investment not only benefits foreign investors and their home States, or host States and individuals’ incomes, but also supports the

²⁴⁸ Rugraff, Sánchez-Ancochea and Summer, above n 236, 304.

²⁴⁹ For economic theory of firms, see, eg, Ian M Ramsay, ‘Corporate Theory and Corporate Law Reform in Australia’ 1 (2) (1994) 1(2) *Agenda: A Journal of Policy Analysis and Reform* 179, 179–80.

²⁵⁰ See, eg, Patrick Dumbery, ‘The Legal Standing of Shareholders Before Arbitral Tribunals’ (2010) 18 (3) *Michigan State Journal of International Law* 353, 358.

²⁵¹ Kallianiotis, above n 234, 196–7.

²⁵² OECD, ‘Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Cost’ (OECD, 2002) 27.

²⁵³ Jeffrey Delmon, ‘Understanding Options for Public–Private Partnerships in Infrastructure’ (World Bank Policy Working Research Paper, World Bank, 2010) 5–73.

global economy at large.²⁵⁴ As noted by the World Trade Organization (WTO), ‘[t]he keen interest in FDI [foreign direct investment] is also part of a broader interest in the forces propelling the ongoing integration of the world economy, or what is popularly described as “globalization”’.²⁵⁵

A second distinguishing characteristic of investor–State disputes is that they may arise from State breaches of contract, treaty or both. Crawford argues that this characteristic has created significant controversy in investor–State disputes.²⁵⁶ In certain high-profile projects (particularly in the natural resource or infrastructure sectors), investors are typically required to enter into some form of investment or concession contract with the State. In the case of public franchises, the host State may grant a licence to the foreign investors;²⁵⁷ accordingly, most conflicts between foreign investors and host States originate from a State’s breach of contract.²⁵⁸ Treaty claims encompass contractual claims and various State actions, such as the State’s refusal to issue, renew or maintain a subsidy,²⁵⁹ changes in legal and regulatory frameworks,²⁶⁰ or violation of the State’s constitution or domestic law.²⁶¹

An added layer of complexity is the potential overlap between contractual and treaty claims. In reviewing whether a breach of an investment contract constitutes a breach of treaty standard, the views of investment tribunals are divided. A single, but striking, example of this controversy is the Fair and Equitable Treatment Standard. Investment tribunals adopt one of two approaches. The first of these is that a host State’s breach of an investment agreement might be viewed as an infringement of the Fair and Equitable Treatment Standard under the treaty—for example, in *Mondev v United States*, the tribunal holds that the protection of article 1105(1) of the *North American Free Trade Agreement (NAFTA)* extends to contract-

²⁵⁴ WTO, ‘Trade and Foreign Direct Investment’, above n 131.

²⁵⁵ Ibid.

²⁵⁶ Crawford, ‘Treaty and Contract in Investment Arbitration’, above n 35, 351.

²⁵⁷ Delmon, above n 253.

²⁵⁸ Gus Van Harten, *Sovereign Choices and Sovereign Constraints Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press, 2013); Gus Van Harten, The Boom in Parallel Claims in Investment Treaty Arbitration (Investment Treaty New, IISD, 19 January 2014) <<https://www.iisd.org/itn/2014/01/19/the-boom-in-parallel-claims-in-investment-treaty-arbitration/>>; Ho, above n 35, 377.

²⁵⁹ See, eg, *Técnicas Medioambientales Tecmed, SA v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB (AF)/00/2, 29 May 2003) (‘*Tecmed SA v Mexico*’); *Metalclad Corporation v The United Mexican States (Award)* (ICSID Arbitral Tribunal, ICSID Case No ARB (AF)/97/1, 30 August 2000) (‘*Metalclad v Mexico*’).

²⁶⁰ See, eg, *CMS Gas Transmission Company v Argentina Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/8, 12 May 2005) (‘*CMS v Argentina*’) [274]; *Enron Corporation and Ponderosa Assets, LP v Argentina Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/3, 22 May 2007) (‘*Enron v Argentina*’) [260]–[8]; *Sempra Energy International v Argentina Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/16, 28 September 2007) (‘*Sempra v Argentina*’) [303]–[4]; *Continental Casualty Company v Argentina Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008) (‘*Continental v Argentina*’) [261]–[2]; *El Paso Energy International Company v Argentina Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/15, 5 September 2011) (‘*El Paso v Argentina*’) [356]–[64].

²⁶¹ See, eg, *ADF Group Inc v United States of America (Award)* (ICSID Arbitral Tribunal, Case No ARB (AF)/00/1, 9 January 2003) (‘*ADF v United States*’) [190]; *GAMI Investments, Inc v The Government of the United Mexican States (Award)* (UNCITRAL, 15 November 2004) (‘*GAMI v Mexico*’) [91]; *PSEG Global, Inc, The North American Coal Corporation, and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v Republic of Turkey (Award)* (ICSID Arbitral Tribunal, ICSID Case No. ARB/02/5, 19 January 2007) (‘*PSEG v Turkey*’) [249].

based claims.²⁶² By contrast, the second approach argues that, under certain conditions, a simple breach of contract does not represent a Fair and Equitable Treatment Standard violation per se. For example, in *Waste Management v Mexico*, referring to article 1105 of the *NAFTA*, the tribunal ruled that ‘even the persistent non-payment of debts by a municipality is not to be equated with a violation of article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem’.²⁶³ In the case of the *Italy–Pakistan Bilateral Investment Treaty (BIT)*, the tribunal of *Impregilo v Pakistan* ruled as follows: ‘The threshold to establish that a breach of the Contracts constitutes a breach of the Treaty is a high one.’²⁶⁴

As shown above, the lines between contract and treaty claims are not clear-cut and are incredibly controversial. For example, Schreuer suggests that ‘a more relevant test for the violation of the FET [Fair and Equitable Treatment] standard with respect to the contracts would be whether the investor’s legitimate expectations regarding a secure and stable legal framework are affected’.²⁶⁵ Among other commentators, Alexandrov and Mendenhall argue that ‘[a] host State’s breach of a private contract might, depending on the nature of the State’s act, also breach of State’s treaty obligations’.²⁶⁶ Similarly, Ho notes that in ‘order for State contracts to be internationalised, their identity to treaties both in nature and in “objective force” must be justified’.²⁶⁷ The position adopted in the present is that the overlap between contract-based claims and treaty-based claims warrants special consideration, as it leads to concurring proceedings in investor–State disputes,²⁶⁸ and this issue should, therefore, be explored further.

A third special characteristic of international investment disputes is that they are governed by multiple legal sources, encompassing contract law, the (public or mandatory) domestic law of host States and public international law. The legal basis differs for contract-based and treaty-based claims. In cases where investors and States have a direct contractual relationship, contract law applies. The distinction between contract-based claims and treaty-based claims is emphasised in the *Vivendi* annulment decision:

A State may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the BIT [Bilateral Investment Treaty]. ... [W]hether there has been a breach of the BIT and

²⁶² *Mondev International Ltd v United States of America (Award)* (ICSID Arbitral Tribunal, Case No ARB (AF)/99/2, 11 October 2002) (*Mondev v United States*) [134].

²⁶³ *Waste Management Inc v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/3, 30 April 2004) (*Waste Management v Mexico*) [115] (citations omitted).

²⁶⁴ *Impregilo SpA v Islamic Republic of Pakistan (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No. ARB/03/3, 22 April 2005) (*Impregilo v Pakistan*) [267].

²⁶⁵ Christoph H Schreuer, ‘Selected Standards of Treatment available under the Energy Charter Treaty: Part I-Fair and Equitable Treatment (FET) Standards’ in Graham Coop and Clarisse Ribeiro (eds), *Investment Protection and the Energy Charter Treaty* (JurisNet, 2008) 63.

²⁶⁶ Alexandrov and Mendenhall, above n 35, 24.

²⁶⁷ Ho, above n 35, 379.

²⁶⁸ *Possible Future Work in the Field of Dispute Settlement: Concurrent Proceedings in International Arbitration*, UN DOC A/CN.9/915 (24 March 2017) (Note by the Secretariat).

whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract.²⁶⁹

Domestic contract laws vary across States—for example, some States may treat the investor–State contract like a private commercial contract, while others may classify concession contracts and licences as administrative contracts to which public law principles apply.²⁷⁰ An added complexity is that the host State’s domestic legislation may violate investment contracts or investment treaty norms. Schreuer notes that ‘where, as is often the case, an alleged violation of investor rights is a consequence of domestic legislation, domestic courts are usually powerless to provide a remedy’.²⁷¹ By contrast, the law applicable to treaty claims is public international law, which includes investment treaties, customary international law, general principles of law, judicial decisions and scholarly writings.²⁷²

As a consequence of the characteristic that the host State’s policies, domestic legislation or other actions may be claimed as violations of the contract and/or investment treaty norms, concerns have arisen about the constraints such treaties place on a host State’s ability to adopt measures concerning the public interest. Globally, investors have alleged that a range of State’s actions, policies and legislative measures (regulatory taking)²⁷³ have breached the provisions of several international investment agreements.²⁷⁴ Critical public policies in areas such as environmental regulation,²⁷⁵ taxation²⁷⁶ and public health have also been attacked. For example, in 2010, Philip Morris challenged Uruguay’s increased tobacco taxes and new rules on cigarette packaging as breaches of the Fair and Equitable Treatment Standard and indirect expropriation.²⁷⁷ Other such policies include regulation of exports, bankruptcy proceedings, water tariff regulations and anti-money-laundering measures.²⁷⁸ Consequently, the standards of review and evidence adopted by investment tribunals are crucial in determining the outcome of disputes²⁷⁹ involving

²⁶⁹ *Compañía de Aguas del Aconquija SA and Vivendi Universal SA (formerly Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux v Argentine Republic) v Argentine Republic (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/97/3, 10 August 2010) (‘*Vivendi v Argentina*’) [96].

²⁷⁰ See, eg, Liana-Teodora Pascariu, ‘The Distinction of the Administrative Contract from Other Types of Contracts’ (2010) 10 (Special Issue) *The Annals of the "Stefan cel Mare" University of Suceava. Fascicle of The Faculty of Economics and Public Administration* 408, 408–13.

²⁷¹ Schreuer, ‘Do We Need Investment Arbitration?’, above n 241, 884–5.

²⁷² *Statue of the International Court of Justice* art 38.

²⁷³ Ratner, above n 38.

²⁷⁴ UNCTAD, ‘Investor–State Dispute Settlement: Review of Developments in 2016’, above n 38, 3–4.

²⁷⁵ Wälde and Kolo, ‘Environmental Regulation, Investment Protection and Regulatory Taking in International Law’, above n 38.

²⁷⁶ Wälde and Kolo, ‘Coverage of Taxation under Modern Investment Treaties’, above n 38, 308.

²⁷⁷ *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) (‘*Philip Morris v Uruguay*’).

²⁷⁸ UNCTAD, ‘Investor–State Dispute Settlement: Review of Developments in 2016’, above n 38.

²⁷⁹ See, eg, Stephan W Schill, ‘Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review’ (2012) 3 (3) *Journal of International Dispute Settlement* 577.

issues of public interest.²⁸⁰ The interpretation and application of investment treaty norms are likely to influence other investors and States as well as the international investment community.

A fourth special characteristic of international investment disputes is that the remedies available to an investor for breaches of a foreign investment contract or treaty typically take the form of compensation to a specific investor rather than requiring the host State to modify domestic laws and regulations.²⁸¹ When the investor claims breach of a right arising from a contract, the remedy depends on applicable local law (typically, the law of the host State).²⁸² If a host State is found to have breached investment treaty norms, the remedy depends on the applicable law.²⁸³ This is particularly interesting in that the standard of compensation depends on which norms the State has breached—for example, the rule of compensation for non-expropriatory breaches may differ from the standard for expropriatory breaches. In the absence of compensation provisions in the treaty, the standard of compensation will depend on the approach adopted by the investment tribunal. If the host State does not pay compensation, the arbitral award is typically enforced through the national courts, either in the host State, in the investors’ home State or in States where the assets are located. In practice, Dolzer and Schreuer note that the decision is mainly based on the accessibility of assets.²⁸⁴

A fifth special characteristic of international investment disputes is that investor–State disputes arise in various circumstances. Claims have been filed by one foreign investor against a State under one treaty or by multinational enterprises against one or more States (e.g., *Philip Morris v Uruguay*,²⁸⁵ Australia²⁸⁶ and Thailand)²⁸⁷ under different investment treaties. Various unrelated foreign investors have also filed claims against one State under separate treaties (such as multiple claims against the Argentina Republic during the economic crisis).²⁸⁸ In some cases, complaints have been filed by several foreign investors against one or more States under the same treaty (e.g., *NAFTA*).²⁸⁹ Different investors have filed claims against different States under separate bilateral investment treaties.

²⁸⁰ Choudhury, above n 34, 779.

²⁸¹ Wälde and Sabahi, ‘Compensation, Damages, and Valuation’, above n 33, 1049.

²⁸² Ho, above n 35.

²⁸³ Waincymer, ‘Investor–State Arbitration: Finding the Elusive Balance between Investor Protection and State Police Powers’, above n 42, 289.

²⁸⁴ Rodolf Dolzer and Christopher Schreuer, *Principle of International Investment Law* (Oxford University Press, 2nd ed, 2012) 310.

²⁸⁵ *Philip Morris v Uruguay (Award)* (ICSID Arbitral Tribunal, Case No. ARB/10/7, 8 July 2016).

²⁸⁶ *Philip Morris Asia Limited v The Commonwealth of Australia* (Award on Jurisdiction and Admissibility) (UNCITRAL, PCA Case No 2012-12, 17 December 2015) (*‘Philip Morris v Australia’*)

²⁸⁷ *Philip Morris (Thailand) Limited et al. v Ministry of Public Health* (Central Administrative Court, Black Case No 1324/2556, 23 August 2013).

²⁸⁸ For a discussion on multiple claims against the Argentine government, see above n 145 and accompanying text.

²⁸⁹ For a discussion on *NAFTA* cases, see above n 146 and accompanying text.

Clearly, then, investor–State disputes differ from private commercial disputes and interstate disputes in terms of parties to the dispute, grounds for dispute, applicable laws and remedies available to foreign investors. An added complexity is that investor–State disputes may involve multiple claims based on a similar set of facts in relation to one or more States under the same or different international investment agreements. The outcomes of an investor–State dispute not only resolve the conflict between parties to the dispute, but are likely to influence other investors, States and the international investment community. It follows that how investor–State disputes are resolved is of vital concern, and this issue is examined below.

2.3 Assessing Traditional Policy Rationales for the Current Investor–State Arbitration Regime: The Case for Depoliticised, Efficient and Effective Investor–State Dispute Resolution

Following up on the discussion in Chapter 1 about the policy and practice of international investment dispute resolution, it is useful to consider the rationales for the emergence and widespread use of investor–State arbitration. Before the investor–State arbitration regime emerged, investor–State disputes were resolved by traditional methods such as military action, diplomatic protection and domestic courts.²⁹⁰ National courts can confer an advantage on State agencies, which are more familiar with their local court procedures and can use their local lawyers and language. In addition, domestic courts may not be competent at interpreting and applying public international law. These traditional methods of dispute resolution have created obstacles to a successful cross-border investment climate.²⁹¹

In 1963, the World Bank commenced the process of establishing an international forum for resolving investor–State disputes in a manner that is independent and impartial and that depoliticises interstate disputes (between the investor’s home State and the host State) to promote a positive environment for cross-border investments.²⁹² For the sake of clarity, it may be useful at this point to recapitulate the rationale of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the *ICSID Convention*), as stated in the *Report of the Executive Directors on the ICSID Convention*:

The Executive Directors believe that private capital will continue to flow to countries offering a favorable climate for attractive and sound investments, even if such countries did not become parties to the *Convention* or, having joined, did not make use of the facilities of the Centre. On the other hand, adherence to the

²⁹⁰ August Reinisch and Loretta Malintoppi, ‘Methods of Dispute Resolution’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 694, 694–719.

²⁹¹ Schreuer, ‘Do We Need Investment Arbitration?’, above n 241, 882–9.

²⁹² Aron Broches, ‘Matière préliminaire’ in Hague Academy of International Law (ed), *Collected Courses of the Hague Academy of International Law: The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (Brill, Nijhoff, Boston, 1972) vol 136, 331.

Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the *Convention*.²⁹³

As a preliminary draft for the *ICSID Convention*, the World Bank adopted the United Nations International Law Commission’s *Model Rules on Arbitral Procedure*.²⁹⁴ In 1965, the International Centre for the Settlement of Investment Disputes (ICSID) was established as an international organisation of the World Bank Group to resolve *investment* claims within the ambit of the *ICSID Convention* and international investment agreements.²⁹⁵ Since the 1990s, investor–State arbitration has been included in several international investment agreements and became the dominant mechanism for resolving investment disputes. According to the UNCTAD database (as at March 2019), there are 942 investors–State arbitration cases (602 concluded cases, 332 pending cases and eight unknown cases).²⁹⁶ States and investors have most frequently resorted to ICSID arbitration.²⁹⁷

Based on the principles of party autonomy, confidentiality and finality, together with the enforceability of awards (noted in Chapter 1, section 1.2.2), investor–State arbitration is regarded as a depoliticised, efficient and effective mechanism for resolving investment disputes.²⁹⁸ Bernardini, a past President of the Italian Arbitration Association, states: ‘It is beyond doubt that ISDS [investor–State dispute settlement] has been a major component of a system of incentives offered by host States to foreign investors in order to attract investments to their territories, assuming in that context a set of binding obligations.’²⁹⁹ As noted in Chapter 1 (section 1.2.2), party autonomy is the core tenet of arbitration that leads to efficiency. In the keynote address at the 2014 *Fordham Law School Conference on International Arbitration and Mediation*, Kessedjian suggests:

Arbitration is a process framed by party autonomy. The parties have expressed their will to trust the arbitral tribunal to solve the dispute that has arisen between them. Whatever their reason to do so, at whatever time they have expressed their will, the parties’ will is central to the process and calls for the parties to frame the process according to their needs.³⁰⁰

²⁹³ International Bank for Reconstruction and Development (IBRD), *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nations of Other States* (18, March 1965) <<http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/partB.htm>> [12].

²⁹⁴ *Report of the International Law Commission Covering the Work of its Tenth Session to General Assembly: Arbitral Procedure* 1958, A/CN.4/117, 13th sess, Agenda Item 1, Supplement No 9 (A/3859), UN Doc A/3859 (A/13/9) (28 April – 4 July 1958) (‘*Model Rule on Arbitral Procedure with a General Commentary*’) <http://legal.un.org/ilc/texts/instruments/english/commentaries/10_1_1958.pdf>.

²⁹⁵ ICSID, *About ICSID*, above n 80.

²⁹⁶ UNCTAD, *Known Treaty-Based Investor-State Arbitrations* <<https://investmentpolicyhub.unctad.org/ISDS>>.

²⁹⁷ UNCTAD, *Arbitral rules and Administering Institution*, above n 143.

²⁹⁸ August Reinisch, ‘The Future of Investment Arbitration’ in Christina Binder et al, *International Investment Law for the 21st Century Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 894, 894–902.

²⁹⁹ Bernardini, above n 231, 44.

³⁰⁰ Kessedjian, above n 75, 3–4.

According to Bernardini, ‘the parties’ right to choose their own adjudicators’ is a merit of arbitration over litigation.³⁰¹ In selecting arbitrators, Wood observes that disputing parties take several factors into consideration—for example, availability, knowledge, experience, field of vision, nationality, potential conflict of interest, language proficiency and common sense.³⁰² Besides the right to choose arbitrators, the disputing parties also have control over the arbitral process. As Kessedjian posits, ‘It seems agreed that arbitration proceedings are to be tailor-made instead of a “one-size-fits-all” mechanism’.³⁰³ Moreover, Lavive contends that parties decide to resource international arbitration because they can choose the arbitrators and procedure, ensuring confidentiality and saving time and costs in resuming their business relations.³⁰⁴

Additionally, it is believed that the finality of the arbitral award boosts the efficiency of arbitral procedures. Wood points out: ‘One of the great merits of arbitration, it is said, is speed and finality.’³⁰⁵ As Clapham notes, States and investors continue to prefer finality over consistency and correctness, and reform is needed to ensure that awards are final and are not reviewed on merit.³⁰⁶ About the potential advantage of international arbitration to cross-border investment flow, Paulsson believes that the characteristics of arbitration protect and encourage investment.³⁰⁷ As is apparent from the discussion, hypothetically, international arbitration addresses investors’ needs, which, in turn, promote a cross-border investment climate. However, as is noted in section 2.5, empirical evidence of the investor–State arbitration regime as a facilitator of foreign direct investment is controversial. There is no consensus about the likely effects of dispute resolution on foreign direct investment.

Nonetheless, the capacity of investor–State arbitration to promote accuracy and consistency may be limited, and those drafting the *ICSID Convention* recognised these limitations. As Parra notes, ‘the drafting of the *ICSID Convention* shows a full appreciation of the risk of contradictory decisions based on similar facts—a risk seen to inhere in any system of ad hoc arbitration’.³⁰⁸ Some commentators observe that investor–State arbitration has no formal system of precedent, which is the key factor for ensuring consistency.³⁰⁹ For example, Schreuer writes that ‘[t]ribunals frequently refer to and rely on earlier

³⁰¹ Bernardini, above n 231, 47.

³⁰² Wood, above n 68, 6.

³⁰³ Ibid.

³⁰⁴ Pierre Lalive, ‘Absolute Finality of Arbitral Awards?’ (2009) 1 *Revista Internacional de Arbitragem e Conciliação* 109.

³⁰⁵ Wood, above n 68, 14.

³⁰⁶ Clapham, above n 149, 437–66.

³⁰⁷ Marike Paulsson, above n 231.

³⁰⁸ Antonio R Parra, *The History of ICSID* (Oxford University Press, 2012) 42.

³⁰⁹ Christoph Schreuer, ‘Coherence and Consistency in International Investment Law’ (2014) <<http://www.univie.ac.at/intlaw/wordpress/wp-content/uploads/2014/01/Coherence-and-Consistency-in-International-Investment-Law.pdf>>. See also Rigo Sureda, ‘Precedent in Investment Treaty Arbitration’ in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University

decisions but this has not always secured consistency’.³¹⁰ This practice was reaffirmed by an empirical study by Stone Sweet and Grisel (2017), which demonstrates evidence of informal precedents in the investor–state arbitration regime in certain areas; this study also suggests that one factor contributing to this practice is that the majority of awards (up to 2015) were rendered by particular groups of arbitrators.³¹¹

Recently (2018), the United Nations Commission on International Trade Law (UNCITRAL) Working Group acknowledged the deficiency of a system of precedent in the investor–State arbitration regime, stating: ‘From a historical viewpoint, consistency and coherence are not features built into the ISDS regime. Decisions are made by arbitral tribunals established on an ad hoc basis, with no formal obligation with regard to the principle of precedent.’³¹² Notably, not all international adjudications have a system of precedent—for example, the International Court of Justice does not have a formal system of stare decisis, but, as is discussed in Chapter 4 (section 4.2.4.2), the World Trade Organization (WTO) Appellate Body decision tends to have de facto stare decisis.³¹³

Some note that the inconsistency is a feature of any adjudication system—for example, Gill asks: ‘Are the inconsistent decisions an issue to be addressed or a fact of life? ... ultimately I have come to the conclusion that they are just a fact of life.’³¹⁴ Gill also asserts that ‘the situation is by no means unique to investment arbitration; domestic courts reach inconsistent decisions on a regular basis’.³¹⁵ Again, Legum argues that ‘[a] certain level of inconsistency is inevitable in any system of administrative justice. Reasonable judges and juries can reasonably reach different results based on the same facts. And advocacy—how a case is argued and presented—really does make a difference’.³¹⁶ Some commentators assert that foreign investors may not favour a higher degree of accuracy and consistency. As Gaillard observes, ‘Some business people would say “I do not care what the decision is, but I want to know where I am”. I close my books and know where I stand, and it should take one year and not fifteen years’.³¹⁷ It has also been claimed that consistent and coherent interpretation may prove difficult to achieve because the international investment system

Press, 2009) 830; Harry T Edwards, ‘Alternative Dispute Resolution: Panacea or Anathema?’ (1986) (99) 3 *Harvard Law Review* 668, 669, 671–2; Christoph Schreuer and Matthew Weininger, ‘A Doctrine of Precedent?’ in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook on International Investment Law* (Oxford University Press, 2008) 1189, 1189–95.

³¹⁰ Schreuer, ‘Coherence and Consistency in International Investment Law’, above n 309.

³¹¹ Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (OUP, 2017).

³¹² *Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters*, UN Doc A/CN.9/WG.III/WP.150, above n 19, 14 [37].

³¹³ See Appellate Body Report, *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, WTO Doc WT/DS344/AB/R AB-2008-1(30 April 2008) (*‘United States — Stainless Steel’*) [160].

³¹⁴ Gill, above n 149, 27.

³¹⁵ Ibid.

³¹⁶ Legum, ‘Options to Establish an Appellate Mechanism for Investment Dispute’, above n 149, 237.

³¹⁷ Gaillard, above n 149, 38.

operates on bilateral investment treaties.³¹⁸ Recently, Bernardini contended that ‘ISDS has been proved to work with a reasonable level of efficiency throughout the more than 40 years of its implementation, striking progressively a balance between the interests of the disputing parties—investors on the one side and States on the other side’.³¹⁹

As examined above, from the traditional perspective of the World Bank (formerly the International Bank for Reconstruction and Development)³²⁰ and some commentators,³²¹ the role of investor–State arbitration in encouraging investment is more important than its role in promoting consistency. In light of the special characteristic of investor–State disputes identified previously (section 2.2), this Thesis contends that the traditional policy rationale of investor–State arbitration aims to promote efficiency in resolving private commercial disputes. Although some arbitral tribunals refer to earlier decisions, each arbitral tribunal has discretion in deciding which previous decision to follow, which can lead to further problems of inaccuracy and inconsistency. Thus, it may be argued that the present regime of investor–State arbitration does not sufficiently support accuracy, consistency, predictability and the long-term development of international investment law. As examined below, foreign investors, States and commentators have recently witnessed increased interest in the accuracy and consistency (and other elements of the rule of law) of the international investment system.

2.4 Assessing Contemporary Policy Rationale for Investor–State Dispute Settlement Regime Reform: The Case for the Rule of Law and Legitimacy in Investor–State Dispute Resolution

The other side of the argument is that ISDS regime reform should promote the rule of law/legitimacy in the international investment system. As reviewed in Chapter 1, the European Union advanced a bilateral investment court system under trade and investment agreements with third States and put forward the multilateral investment court proposal under the UNCITRAL.³²² The rationale for the court is set out in the following statement by European Commission Vice-President Frans Timmermans:

With our proposals for a new Investment Court System, we are breaking new ground. The new Investment Court System will be composed of fully qualified judges, proceedings will be transparent, and cases will be decided on the basis of clear rules. In addition, the Court will be subject to review by a new Appeal Tribunal.

³¹⁸ Legum, ‘Options to Establish an Appellate Mechanism for Investment Dispute’, above n 149,235; Jan Paulsson, above n 149, 259.

³¹⁹ Bernardini, above n 231, 55.

³²⁰ See IBRD, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nations of Other States*, above n 293.

³²¹ See, eg, Lalive, above n 304; Gill, above n 149; Gaillard, above n 149; Legum, ‘Options to Establish an Appellate Mechanism for Investment Dispute’, above n 149; Jan Paulsson, above n 149.

³²² Nikos Lavranos, ‘The Outcome of the UNCITRAL Meeting: The First Steps Towards a Multilateral Investment Court (MIC)’ in email from John Gaffney to OGEMID@ogeltdm.com (7 August 2017).

With this new system, we protect the governments’ right to regulate, and ensure that *investment disputes will be adjudicated in full accordance with the rule of law*.³²³

The question of why the international investment regime ought to be liable to the standard of the rule of law/legitimacy, especially regarding accuracy and consistency, has been extensively discussed. First, proponents of reform claim that investor–State cases involve issues of general public importance in which the stakes are often high and the outcomes affect the host State’s public fiscal position. For that reason, greater accuracy is expected than occurs in commercial disputes between private parties. For example, Blackaby asserts that ‘[a]rbitration as a process without appeal might sit well with the exigencies of commerce in commercial arbitration but needs to be reconsidered in the field where there are States in question and where citizens of those States will have to finance the ultimate payment of damages awards from taxation’.³²⁴

Second, proponents of reform contend that the international investment system should be accountable to the consistency that brings about legal certainty, the main component of the rule of law. As Mann argues, ‘[f]undamental to issues of both transparency and consistency—both intimately connected with regime legitimacy—is the notion that the regime itself must also be subject to the rule of law’, and ‘introducing an appellate level would, as a consequence, have the impact of imposing consistency, and thus greater clarity, for both host countries and investors’.³²⁵ According to Bishop, the WTO ‘Appellate body that we are talking about today should not be viewed as a reaction to cure problems of the present system, but simply as a phase in the evolution of a new and more sophisticated international law of investment disputes’.³²⁶ Other commentators, such as Gaukrodger, Gordon³²⁷ and Yannaca-Small,³²⁸ view consistency as a prerequisite for security and predictability as well as cost-effectiveness for parties to disputes, now and in the future. Some international governmental organisations have recognised the importance of the rule of law to economic performance—for example, the Organisation for Economic Co-operation and Development (OECD) points out that ‘the rule of law, security and justice influence economic performance, and [the] business & investment climate’.³²⁹ Likewise, the UNCITRAL Working Group III states: ‘An ISDS regime that is coherent and consistent could support the rule of law and enhance

³²³ European Commission, ‘Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations’, above n 214 (emphasis added).

³²⁴ Blackaby, ‘Testing the Procedural Limits of the Treaty System: The Argentinean Experience’, above n 148, 146.

³²⁵ Howard Mann, ‘Transparency and Consistency in International Investment Law: Can the Problems be fixed by Thinking?’ in Karl P Sauvart and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) 220.

³²⁶ Bishop, above n 185, 15.

³²⁷ D Gaukrodger and K Gordon, ‘Inter-Government Evaluation of Investor–State Dispute Settlement: Recent Work at the OECD-hosted Freedom of Investment Roundtable’ (2014) 11 *Transnational Dispute Management* 10.

³²⁸ Yannaca-Small, ‘Improving the System of Investor–State Dispute Settlement: The OECD Governments’ Perspective’, above n 205, 224.

³²⁹ OECD, *Access to Justice*, above n 16.

confidence in the stability of the investment environment. However, inconsistency and lack of coherence could negatively affect the reliability, effectiveness, and predictability of the ISDS regime and, in the long run, its credibility.³³⁰

Third, proponents of reform claim that the structure of the investor–State arbitration regime is unlikely to produce the degree of accuracy and consistency required for investor–State cases, and reforming the ISDS regime is necessary to ensure accuracy and consistency. For example, Wälde claims that party-appointed arbitration has ‘no element of permanence which makes people more familiar with its working which is the root of legitimacy’ and that ‘[a]n appeal facility might therefore help not only to increase the legal quality, but also promote a sense of more permanence, continuity and familiarity. An appeal facility has, therefore many qualities of good thing’.³³¹ Schultz asserts: ‘[I]nvestment arbitration should shift its function to promote the consistency if it can be shown that the underlying regime or rule is a good one. This would open up a whole new, and welcome, set of arguments about the good and bad investment arbitration’.³³² In Schultz’s view, consistency is desirable under the condition that the investor–State arbitration regime can produce a good decision. However, under the current investor–State arbitration regime, he argues that ‘arbitrators should not see themselves as law-makers, which manifests itself by attempts to advance the rule of law, which in turn, for example, takes the form of following prior decisions in order to consolidate rules’.³³³

From a contemporary perspective, the function of the ISDS regime to promote the rule of law—with particular regard to accuracy, consistency and transparency—is considered important. Although this may ensure that investor–State disputes are fairly adjudicated in these respects, the public adjudication model has raised several concerns. These include the view that public adjudication would affect party autonomy and finality of award, which is fundamental to the arbitration process and diminishes the advantages of current investor–State arbitration regime as a depoliticised, efficient and effective method of dispute resolution. Among others, Paulsson notes that an international investment court would affect party autonomy (the main pillar of arbitration), giving the sovereign State control of the dispute settlement process.³³⁴ Conversely, Sornarajah asserts: ‘[A]n Investment Court would not cure such illegitimacy. A Court would become a device for neoliberal rules of investment protection with even greater authority’.³³⁵

³³⁰ *Possible Reform of Investor-State Dispute Settlement (ISDS)*, UN Doc A/CN.9/WG.III/WP.142 (Note by the Secretariat), above n 7, 7 [31].

³³¹ Thomas Wälde, ‘Alternative for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative treaty Arbitration or Mandatory Consolidation?’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1 135, 139.

³³² Schultz, ‘Against Consistency in Investment Arbitration’, above n 151, 315.

³³³ *Ibid.*

³³⁴ Marike Paulsson, above n 231.

³³⁵ M Sornarajah, ‘An International Investment Court: Panacea or Purgatory?’ (2016) 180 *Columbia FDI Perspectives on Topical Foreign Direct Investment* <<http://ccsi.columbia.edu/files/2013/10/No-180-Sornarajah-FINAL.pdf>>.

Bernardini argues that ‘The analysis of the European Commission’s proposed ICS [International Court System] points to the political nature of the reform rather than a serious review of the functioning for over 40 years of traditional ISDS’.³³⁶ Bernardini also states:

Replacing ISDS with ICS [International Court System] would not only represent a drastic departure from a well-experienced method of investment dispute settlement, but it would also diminish investor’s protection without appreciable advantages with respect to ISDS’s safeguarding of State’s regulatory powers, better consistency and predictability of decisions and greater transparency of arbitral proceedings.³³⁷

Wood encapsulates the negative aspect of an international investment court:

[T]he main problem, at least from the point of view of the investors, is that the parties will lose the possibility to appoint their own arbitrators; States would have some sort of advantages. The parties would be faced with the large extra cost and delay inevitably involved in a system of appeal, which one could expect to be frequently invoked. And, depending how the case law of a permanent tribunal developed, investors might well have less confidence in the system, which could be bad for foreign investment.³³⁸

As further discussed in Chapter 5, other commentators note several potential concerns that may arise from public adjudication models (especially an appeal mechanism and an international investment court). It also remains in question whether awards rendered by the new public adjudication model (either an appeal mechanism or an international investment court) will be enforceable under the current enforcement mechanism, which is crucial in driving international trade and investment.³³⁹ In light of the special characteristics of investor–State disputes identified at the outset, it may be argued that the policy rationale promoting the accuracy and consistency that brings about legal certainty will provide several long-term benefits to investors, States and other stakeholders in the international investment community by reducing legal uncertainty and preventing future conflicts. However, such a policy rationale is attained at the expense of the current arbitration regime’s efficiency and vice versa. Therefore, as is proposed in the following section the mutually exclusive objectives of efficiency and consistency should be balanced against each other when developing a new, multilateral ISDS regime.

³³⁶ Bernardini, above n 231, 38.

³³⁷ Ibid 55–6.

³³⁸ Wood, above n 68, 14–5.

³³⁹ Kofi Annan, ‘The 1958 New York Convention as a Model for Subsequent Legislative Texts on Arbitration’ (Opening Address delivered at the New York Convention Day, 10 June 1998); Michael Mustill, ‘Arbitration: History and Background’ 6 (1989) *Journal of International Arbitration* 43.

2.5 Proposing an Alternative Policy Rationale for a Multilateral Investor–State Dispute Resolution Regime Reform: The Case for Reconciling Efficiency with Accuracy and Consistency in Investor–State Dispute Resolution

Despite the classical justification that the international arbitration regime is more likely to achieve efficiency than public adjudication, there is no consensus among economists in relation to the likely effect of the two approaches on investment flows.³⁴⁰ However, on reflection, these two apparently contradictory viewpoints can be reconciled. In this respect, the crucial issue is to find an optimal balance between efficiency and consistency. According to Meg Kinnear, Secretary-General of the ICSID:

As investment cases grow in number and complexity, and increasingly arise out of an investment treaty, the discussion on the appropriate level of review for such awards will continue. *Clearly, the task of establishing the optimal level of review between correctness and finality is a difficult one*, and it will be interesting to follow treaty negotiations as they grapple with this question.³⁴¹

This Thesis contends that the main challenge for the future lies in the characteristics of investor–State disputes that differentiate these disputes from interstate or private commercial ones. In addition, investor–State disputes involve other stakeholders within the international investment community. In this respect, Cordero-Moss states:

Investment arbitration is in a particularly challenging situation, because it is a hybrid between commercial law and public international law. The risk of encountering false friends is therefore high, since concepts and institutions from each of these areas legitimately coexist in the hybrid. Recognising the concepts and institutions that are not compatible and taking necessary measures to adjust them to the principles and interests of the receiving framework may require careful analysis and may even sometimes turn out not to be rewarding as a pragmatic approach that overlooks the differences.³⁴²

For these reasons, both the above arguments can be said to have merits and drawbacks. As investor–State disputes affect both the interests of private investors and the public interest of host States, as well as the international community, it is argued here that the dispute settlement mechanism should simultaneously

³⁴⁰ For some empirical studies on the relationship between IIAs and FDI, see, eg, UNCTAD, ‘The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014’ (IIA Issues Note Working Draft, September 2014), International Investment Agreement Issues Note (September 2014); Jonathan Bonnitcha, *Assessing the Impacts of Investment Treaties: Overview of the Evidence* (International Institute for Sustainable Development, 2017).

³⁴¹ Meg Kinnear, ‘Appeal, Review, Annulment ... What’s it all about?’ on *Stockholm Chamber of Commerce ISDS Blog* (23 October 2015) <<http://isdblog.com/2015/10/23/icsid-guest-post-appeal-review-annulment-whats-it-all-about/>> (emphasis added).

³⁴² Giuditta Cordero-Moss, ‘Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?’ in Christina Binder et al, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 782, 797.

facilitate cross-border investment and promote inaccuracy and consistency within the international investment community.

The assertion that the ISDS regime should promote foreign direct investment seems warranted because capital commonly migrates from private to public sectors, since multinational or transnational corporations often hold initial capital, expertise and other resources. Businesses interested in minimising their private costs to maximise profits and resolving investment disputes more efficiently can help to achieve this. Clearly, then, efficient international arbitration influences private sector decision-making and is likely to facilitate cross-border investment transactions. However, this argument has drawbacks. As discussed from the outset, investor–State disputes also involve public international law, where systemic interests extend beyond those of the disputing parties’ interests. In addition, the international investment system operates within the context of treaty law as well as contract law. If treaty norms are interpreted and applied inaccurately and inconsistently, this will undermine the efficiency of international investment agreements, and investment treaty norms are also likely to influence the behaviour of investors and States more generally. The interpretation of investment treaty norms and customary international law norms (and the associated legal reasoning) may prospectively affect non-parties to the disputes and generate normative expectations about how future disputes are to be resolved. An investor–State arbitration that fails to correct errors or make precedents would negatively affect efficiency in the international investment system, indirectly increasing the long-term social costs.

The argument for the rule of law also has strengths and weaknesses. As international investment law is based on public international law and is likely to influence the behaviour of investors and States more generally, accurate and consistent interpretation and application of investment treaty norms would minimise social costs in the international community, in turn creating efficiency in the long term. The main disadvantage of this recommendation is that the implementation costs associated with measures such as an appeal mechanism or an international investment court may increase the private costs to parties and negatively affect a cross-border investment environment.

As previously stated, investor–State disputes involve contract-based claims, treaty-based claims and a hybrid of contractual disputes and treaty-based claims, which seems distinct in principle. In theory, contract law affects only specified individuals or entities rather than the public as a whole; accordingly, contract law usually allows individuals to agree on their rights and obligations. Interpretation and application of contracts are generally based on the parties’ intentions once this does not affect society’s interests.³⁴³ In determining whether a contract has been breached, arbitral tribunals primarily consider the

³⁴³ Randy E Barnett, ‘Four Senses of the Public Law-Private Law Distinction, Foreword to the “Symposium on the Limits of Public Law”’ (1986) 9 *Harvard Journal of Law and Public Policy* 267– 8.

terms outlined in the contract between the disputing parties. Accordingly, the interpretation of contracts depends on the contract terms, the applicable domestic law and the intent of the contract parties, which vary from case to case.

In contrast to contractual claims, treaty claims require arbitral tribunals to interpret treaty provisions and possibly to apply other sources of public international law, such as customary international law and general principles of public international law.³⁴⁴ In addition, investment treaty provisions should be correctly interpreted in line with the treaties' interpretation rules, as per the *Vienna Convention on the Law of Treaties*.³⁴⁵ A claim under public international law is therefore likely to require a higher degree of accuracy than a contractual claim. Since investor–State disputes arise in the context of international investment treaties and other sources of public international law, the interpretation and application of such treaty law are likely to influence the behaviour of other investors and States more generally in addition to the investor and the State (who are parties to the dispute). Thus, it is argued that treaty-based claims are likely to require a higher degree of accuracy and consistency than contract-based claims.

As mentioned in the Introduction, contrary to the above policy options, this Thesis proposes that a multilateral ISDS regime should promote accuracy and consistency, but accuracy should be prioritised over consistency. The reason is that accuracy and consistency would minimise the social costs of the international investment regime, which will then evolve towards efficiency. However, such a new regime may increase the administrative costs of dispute resolution processes. Therefore, if a new, multilateral ISDS regime can promote accuracy and consistency while minimising private costs, the benefits would be distributed among stakeholders in the international investment system in both the short and long term. The proposed normative standard may challenge existing theories of international arbitration and litigation, given that private and public adjudication appear reasonably distinct in terms of philosophies and procedures.³⁴⁶

Clearly, the goal of arbitration is to end a dispute efficiently, based on disputing parties' autonomy. These parties can present their claims and evidence to an arbitral tribunal they have appointed. This can be conducted confidentially, with flexible application of procedural and evidentiary rules, and the decision may bind the parties without appeal. Given its private nature, there is no formal system of precedent under the current investor–State arbitration regime. While the key benefits of private adjudication are that the solution addresses business or private needs and is recognised as fair by the parties to the dispute, the drawback is that the adjudicators may not decide the case according to the law's objectives. Additionally,

³⁴⁴ *Statute of the International Court of Justice* art 38.

³⁴⁵ *Vienna Convention on the Law of Treaties* art 31.

³⁴⁶ C H van Rhee, 'Public Justice: Some Historical Remarks' in A Uzelac and C H van Rhee (eds), *Public and Private Justice* (Intersenti, 2007) 31, 31–54.

the award is final and cannot be reviewed by a higher court—as in the case of public adjudication—possibly causing accuracy and consistency to be abandoned. Conversely, public adjudication processes primarily serve the rule of law, especially accuracy and consistency; the drawback is that public adjudication is expensive and slow and may not address private needs.

In the final analysis, investor–State disputes are hybrids in terms of parties to the dispute, grounds of dispute (contract-based claims and treaty-based claims, which are difficult to separate), various applicable laws, varying standards of remedy and different claim scenarios. Considering the interests of investors and the State, which are the primary users of the ISDS regime, as well as the interests of the international community, which is indirectly affected by the dispute outcomes, the Thesis argues that a multilateral ISDS regime should promote accuracy and consistency. It is also expected that the overall efficiency of a multilateral ISDS regime would increase in the long term.

2.6 Conclusion

This Chapter argues that investor–State dispute settlement reform should aim to promote accuracy and consistency, facilitating both a cross-border investment climate and legal certainty. In reaching this conclusion, this Chapter first highlighted that since World War II, international flows of investment have shifted to foreign direct investment, creating direct relationships between foreign investors and host States. Consequently, investor–State disputes have complex characteristics in terms of parties, grounds, applicable laws and remedies available to foreign investors. Moreover, these claims arise in various circumstances. The traditional aim of investor–State arbitration is to ensure that investor–State disputes are adjudicated in a neutral efficient, and effective forum outside the domestic courts. However, the incompatibility of the unique characteristics of investor–State disputes and their methods of resolution has led to an alleged crisis of legitimacy (especially a problem of inaccuracy and inconsistency in the interpretation and application of investment treaty norms, the methods of balancing private and public interests, and dispute outcomes) and demands for investor–State dispute settlement reform. Although the rule of law and legitimacy are crucial to political, economic and social development, public adjudication as implemented by this policy rationale may affect the traditional policy rationale of promoting a cross-border investment climate. This analysis leads to the conclusion that a multilateral investor–State dispute settlement regime should promote accuracy and consistency in treaty-based claims in a way that minimises private costs, promoting both the investment climate and legal certainty.

CHAPTER 3:

LESSONS THAT CAN BE LEARNED FROM THE CURRENT INVESTOR–STATE ARBITRATION REGIME FOR THE FURTHER DEVELOPMENT OF A MULTILATERAL INVESTOR–STATE DISPUTE SETTLEMENT REGIME

3.1 Introduction

Chapter 2 proposed an alternative policy rationale for a multilateral reform of the investor–State dispute settlement regime in an attempt to promote accuracy and consistency in the treaty-based claims of investor–State disputes in a way that minimises private costs, facilitating both a cross-border investment climate and legal certainty, which is one crucial element of the rule of law. To develop an alternative solution to serve the proposed policy goal, this Chapter addresses the research question regarding the extent to which the current features of investor–State arbitration regime may be used for a multilateral reform of that regime. To achieve this, the following sub-questions are addressed: How does the current investor–State arbitration regime ordinarily operate to resolve investor–State disputes? What are the benefits and limitations of the current investor–State arbitration regime in terms of resolving investor–State disputes? To what extent might features of the investor–State arbitration regime be preserved and/or improved for a multilateral reform of the regime?

To begin, the general characteristics of the current investor–State arbitration regime are examined, followed by the establishment and composition of investment tribunals, including members’ nationality, qualifications, impartiality and independence, which are derived from the party autonomy principle. Next, the flexibility of the arbitral proceeding that is determined by the party autonomy principle is illustrated. Institutional and procedural aspects of the annulment system implementing the finality principle are explored, followed by the current enforcement mechanism for arbitral awards. The Chapter then analyses the advantages and limitations of the current investor–State arbitration regime in the context of investor–State disputes and goes on to identify lessons learned from the current regime, arguing that, hypothetically, the investor–State arbitration regime promotes efficiency in relation to contract-based claims, but is less effective in improving the accuracy and consistency of treaty-based claims. Because investor–State disputes involve contract-based claims, treaty-based claims and hybrids thereof, some current features of the current investor–State arbitration regime may be preserved to maintain efficiency in a multilateral investor–State dispute settlement regime. However, it may be useful to incorporate certain features of public adjudication to enhance the accuracy and consistency of the treaty-based claims of investor–State disputes.

3.2 Overview of General Characteristics and Key Features of the Current Investor–State Arbitration Regime

As noted in Chapter 1, arbitration is a dispute resolution method based on the principles of party autonomy, confidentiality and finality. These principles have been adopted and implemented by international arbitral rules under the *Model Rule on Arbitral Procedure*,³⁴⁷ which is a model of the *Convention on the Settlement of Investment Disputes between States and Nationals Other States (ICSID Convention)* and arbitral rules under commercial arbitrations. This section examines how the current investor–State arbitration regime ordinarily operates to resolve investor–State disputes with the purpose of illustrating its contribution to efficiency in resolving investor–State disputes. An examination highlights that the current investor–State arbitration regime is not uniform. There are some differences between arbitrations conducted under the International Centre for the Settlement of Investment Disputes (ICSID) and non-ICSID arbitrations. However, the common features of ICSID and non-ICSID arbitrations are that disputing parties can present claims and evidence to an arbitral tribunal appointed by them; arbitral procedures may be flexible and conducted confidentially or transparently, depending on each tribunal; and arbitral awards are binding and enforceable.

3.2.1 General Characteristics of the Current Investor–State Arbitration Regime

Unlike the World Trade Organization (WTO) dispute settlement system, which is discussed in Chapter 4, the investor–State arbitration regime is not uniform. Investor–State disputes can be resolved by ICSID arbitration or other commercial arbitrations, depending on the intention of the parties. The main differences between ICSID and non-ICSID arbitrations include international characteristics, consent requirements, jurisdictions, laws applicable to arbitral procedures and enforcement of arbitral awards.

The first difference between ICSID and non-ICSID arbitrations is international characteristics. As briefly reviewed in Chapter 1, ICSID arbitration was established by an international treaty (the *ICSID Convention*) and is administered by an international governmental organisation (the World Bank), and the ICSID arbitral proceeding is subject to the norms of public international law. Therefore, domestic arbitration law has no effect on the ICSID arbitrations proceedings. Following this, establishing an ICSID tribunal requires two steps of consent. The first step is consent between States, usually stipulated under a dispute resolution clause in the international investment agreements concluded between the host and home States. The second step is consent between host States and investors, usually stipulated under investment agreements.³⁴⁸ Unlike ICSID arbitration, the arbitral proceedings conducted under *ICSID Additional*

³⁴⁷ See *Model Rule on Arbitral Procedure with a General Commentary*.

³⁴⁸ *ICSID Convention* art 25.

*Facility Rules*³⁴⁹ and other commercial arbitrations depend on the arbitration law of the place of arbitration. Other commercial arbitrations, such as the United Nations Commission on International Trade Law (UNCITRAL) *Arbitration Rules*,³⁵⁰ the International Chamber of Commerce (ICC) *Rules of Arbitration*³⁵¹ and the Stockholm Chamber of Commerce (SCC) *Arbitration Rules*,³⁵² only require consent between States and investors, typically stipulated under an arbitration clause in the contract or investment treaty.

In addition, the jurisdictions of ICSID and non-ICSID arbitrations differ. In general, the jurisdiction of arbitral tribunals is within the confines of *investment* and *investor* provided under relevant international investment agreements and applicable arbitration rules. While ICSID arbitration is particularly used for resolving investment disputes,³⁵³ other commercial arbitrations have been used to resolve a broader range of disputes than ICSID arbitration, including private commercial disputes, interstate disputes and investment disputes. In principle, by agreeing to arbitration, parties agree to the arbitral tribunal determining the scope of its jurisdiction.

Moreover, while ICSID arbitral proceedings are governed by public international law, non-ICSID proceedings are governed by a national *lex arbitri*. Following this, the distinctive feature of ICSID proceedings is the non-frustration principle, or ICSID's ability to handle the dispute even when one party has refused to participate in the arbitral proceedings.³⁵⁴ In addition, ICSID awards are final and binding per article 53(1) of the *ICSID Convention*³⁵⁵ and may be annulled under article 52 of the *ICSID Convention*,³⁵⁶ while non-ICSID arbitral awards must be enforced through the *New York Convention* and can be reviewed by domestic courts. In the latter case, the award may be set aside or annulled by the domestic courts of the seat of the arbitration under a national *lex arbitri*, or may be denied recognition and enforced on specific grounds under article V of the *New York Convention*.³⁵⁷ However, in both cases, the power of the annulment committee or domestic court is minimal.

In sum, investor–State arbitration is not a uniform system of dispute resolution. The choice of the applicable arbitration procedure is conditional on the consent of parties to the dispute specified in an arbitration clause in the investment contract and/or investment treaty. The main differences between

³⁴⁹ The *ICSID Additional Facility Rules* apply to disputes that are beyond the scope of the *ICSID Convention*, see ICSID, *Additional Facility Rules*, Doc ICSID/11 (as amended and effective 10 April 2006).

³⁵⁰ *UNCITRAL Arbitration Rules* art 1.

³⁵¹ *ICC Rules of Arbitration* art 6 (1).

³⁵² *SCC Arbitration Rules* preamble.

³⁵³ *ICSID Convention* art 25.

³⁵⁴ *Ibid* art 45.

³⁵⁵ *Ibid* art 53 (1).

³⁵⁶ *Ibid* art 52 (1) (a)–(e).

³⁵⁷ *New York Convention* art V.

ICSID and non-ICSID arbitrations include the international characteristics, consent requirements, jurisdictions, laws applicable to arbitral procedures and enforcement of arbitral awards. Despite these differences, ICSID and non-ICSID arbitrations share some standard features, as discussed below.

3.2.2 Amicable Settlement under the Current Investor–State Arbitration Regime

Before commencing arbitration or during arbitral processes, some international investment agreements permit investors and States to settle investment disputes through alternative dispute resolution mechanisms, such as negotiation or mediation. As is reviewed in Chapter 1, although alternative dispute resolution offers many advantages, a solution is non-binding. Exceptionally, in the context of ICSID arbitration, an amicable settlement during an ICSID arbitration proceeding may be incorporated into an ICSID award.³⁵⁸ In such cases, the amicable solution would be final and binding and could be recognised and enforced in any ICSID Member State.

3.2.3 Arbitral Tribunals and Procedures

Similar to other adjudications, arbitral tribunals and procedures have a crucial role in adjudicating investment disputes. Arbitral tribunals and procedures involve a fact-finding process, and interpretation and application of the legal principles to the facts. This section examines some critical institutional aspects of arbitral tribunals and arbitral procedures. It is organised into two sub-sections. The first discusses key institutional aspects of arbitral tribunals; the second examines certain procedural issues. An examination highlights that institutional aspects of arbitral tribunals are based on party autonomy and that arbitral procedures are flexible. In principle, these flexible institutional aspects of arbitral tribunals and procedures aim to deliver efficient investment dispute resolutions.

3.2.3.1 Institutional Aspects of Arbitral Tribunals

The arbitration process begins with the constitution of a tribunal. Unlike litigation, where judges are appointed through a formal process without the involvement of parties to the dispute,³⁵⁹ the arbitral tribunal is established by the parties' agreement.³⁶⁰ As highlighted hereafter, the composition, nationality and qualification requirements of the arbitral tribunal depend on the parties' agreement. However, the arbitral tribunal must be impartial and independent.

³⁵⁸ *ICSID Arbitration Rules* r 43 (2) (provides that 'If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.')

³⁵⁹ Gus Van Harten, 'Investment Treaty Arbitration, Procedural, Fairness, and the Rule of Law' in Stephen Schill (ed) *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 640.

³⁶⁰ Cairton, above n 71, 631.

An arbitral tribunal is composed of members agreed by the parties. Without the parties' agreement, the applicable arbitral rules apply. This concept has been endorsed in ICSID arbitration and non-ICSID arbitration. In the context of ICSID arbitration, an ICSID arbitral tribunal can comprise one or more arbitrators; however, in the latter case, the number of arbitrators must always be uneven.³⁶¹ If the number of arbitrators cannot be reached through the parties' agreement, the *ICSID Convention* requires that 'the tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the tribunal, appointed by agreement of the parties'.³⁶²

In non-ICSID arbitrations, the rules of the tribunal's composition are more flexible—that is, a sole arbitrator can decide investment disputes. Article 7(1) of the *UNCITRAL Arbitration Rules* states that '[i]f the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed'.³⁶³ Similarly, article 12(1) of the *ICC Rules of Arbitration* provides: 'The disputes shall be decided by a sole arbitrator or by three arbitrators.'³⁶⁴ The *SCC Arbitration Rules* stipulate that the number of arbitrators depends on the provisions of the agreement. In the absence of agreement, 'the Board shall decide whether the Arbitral Tribunal shall consist of a sole arbitrator or three arbitrators, having regard to the complexity of the case, the amount in dispute and any other relevant circumstances'.³⁶⁵

The nationality and qualification of arbitrators also depend on each party's agreement. In the context of ICSID arbitration, the parties can appoint nationals to be their arbitrators. However, if both parties do not agree, the *ICSID Convention* requires that a predominant part of the ICSID tribunal must be 'nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute'.³⁶⁶ In non-ICSID arbitrations, the nationality requirements vary. The *UNCITRAL Arbitration Rules* do not impose nationality requirements, and the *ICC Rules of Arbitration*³⁶⁷ and the *SCC Arbitration Rules*³⁶⁸ prohibit a national of one of the disputing parties from becoming the sole arbitrator or chair.

Unlike domestic and international litigations—wherein judges are required to have competence in national law or public international law and it may be necessary for them to have particular expertise in specific

³⁶¹ *ICSID Convention* art 37(2).

³⁶² *Ibid* art 37(2)(b).

³⁶³ *UNCITRAL Arbitration Rules* art 7.

³⁶⁴ *ICC Rules of Arbitration* art 12.

³⁶⁵ *SCC Arbitration Rules* art 16(2).

³⁶⁶ *ICSID Convention* art 39.

³⁶⁷ *ICC Rules of Arbitration* art 12(5).

³⁶⁸ *SCC Arbitration Rules* art 17(6).

areas—in the context of arbitration, the qualification requirements vary, as follows. In the ICSID arbitration, article 14(1) of the *ICSID Convention* requires that

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.³⁶⁹

In practice, the ICSID also provides a panel of arbitrators with expertise in these areas,³⁷⁰ but the parties are not obliged to select arbitrators from the ICSID panel of arbitrators. Other commercial arbitrations do not impose qualification requirements.

While the composition, nationality and qualification requirements are flexible, both ICSID and non-ICSID arbitrations require that the arbitral tribunal be impartial and independent. The significance of these principles is recognised in both formal and informal justice systems.³⁷¹ Under the ICSID framework, article 14(1) of the *ICSID Convention* requires that ICSID panel members shall be ‘persons of high moral character’ and ‘may be relied upon to exercise independent judgment’.³⁷² In the context of commercial arbitrations, article 11 of the *UNCITRAL Arbitration Rules* states that ‘[w]hen a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence’.³⁷³ Other commercial arbitrations, such as the *ICC Rules of Arbitration*³⁷⁴ and the *SCC Arbitration Rules*,³⁷⁵ also require that the arbitral tribunal must be impartial and independent.

In sum, an examination of a party-appointed arbitral tribunal demonstrates that institutional aspects of such tribunals are based on party agreement. In the absence of agreement, requirements for arbitral tribunals are subject to arbitral rules chosen by the parties, and these rules are not uniform. While composition, nationality and qualification requirements are flexible, the significance of arbitrators’ impartiality and independence is recognised in the current investor–State arbitration regime. Both ICSID and non-ICSID arbitrations require that the arbitral tribunal be impartial and independent. Notably, the constitution of an arbitral tribunal and the aforementioned requirements of arbitrators are particularly

³⁶⁹ *ICSID Convention* art 14.

³⁷⁰ *ICSID, Members of the Panels of Conciliators and of Arbitrators* (ICSID/10, 18 December 2018) <<https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%2010%20-%20Latest.pdf>>.

³⁷¹ Loretta Malintoppi, ‘Independence, Impartiality, and Duty of Disclosure of Arbitrators’ in Peter Muchilinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 824.

³⁷² *ICSID Convention* art 14(1).

³⁷³ *UNCITRAL Arbitration Rules* (2013) art 11.

³⁷⁴ *ICC Rules of Arbitration* art 14(1).

³⁷⁵ *SCC Arbitration Rules* art 18.

important with regard to the validity of the arbitral award. As is discussed in section 3.2.4.2, if the arbitral tribunal is not constituted correctly, the award could be annulled under article 52(1)(a) of the *ICSID Convention*.³⁷⁶

3.2.3.2 Flexible Arbitral Procedures

This section examines some critical aspects of arbitral procedures. This examination highlights that, unlike litigation, where the procedure is uniform, arbitral procedures are determined by party autonomy. The authority of the arbitral tribunal is limited to the arbitration agreement or the applicable arbitration law. The arbitral tribunal has broad discretion to modify evidentiary decisions and the level of confidentiality or transparency for each proceeding to suit the issues at hand.

To begin, based on the party autonomy principle, arbitral tribunals only have the power to decide points that are submitted to them and to apply the governing law as prescribed by the arbitration agreement or applicable arbitration law. The power of the arbitral tribunal varies between disputes depending on the arbitration agreement and the specific arbitration rules governing the dispute. In the context of ICSID arbitration, article 41(1) of the *ICSID Convention* provides that ‘the Tribunal shall be the judge of its competence’.³⁷⁷ Based on this, the arbitral tribunal has the self-authority to determine its jurisdiction; however, the authority must be within the parties’ arbitration agreement and the *ICSID Convention* that is limited to *investment* dispute.³⁷⁸ If the investment dispute is within the competence of an ICSID arbitral tribunal, article 48(3) of the *ICSID Convention* further requires that the ICSID arbitral tribunal ‘deal[s] with every question’ submitted to them.³⁷⁹

Non-ICSID arbitral tribunals are slightly different—although they have the authority to determine their jurisdiction, their authority is not limited to *investment* disputes.³⁸⁰ In addition, non-ICSID arbitration rules do not require the tribunal to address every question submitted to them.³⁸¹ As with the constitution of an arbitral tribunal, this Thesis notes that the tribunal’s power is important with regard to the validity of the arbitral award. As is discussed in section 3.2.4.2, if the arbitral tribunal has manifestly exceeded its powers, the arbitral award could be annulled by an ad hoc annulment committee as per article 52(1)(b) of the

³⁷⁶ *ICSID Convention* art 52(1)(a).

³⁷⁷ *Ibid* art 41(1).

³⁷⁸ *Ibid* art 25.

³⁷⁹ *Ibid* art 48(3); *ICSID Arbitration Rules* r 47(1)(i). However, some ICSID cases accepted the judicial economy principle (to a certain extent), see, eg, *MCI Power Group LC and New Turbine, Inc v Republic of Ecuador (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/03/6, 19 October 2009) [67]; *Renée Rose Levy and Gremcitel SA v Republic of Peru (Award)* (ICSID Tribunal, ICSID Case No ARB/11/17, 9 January 2015)[197].

³⁸⁰ See, eg, *UNCITRAL Arbitration Rules* art 23(1).

³⁸¹ For non-ICSID cases that the tribunals have accepted the judicial economy principle, see, eg, *Eli Lilly and Company v The Government of Canada (Final Award)* (UNCITRAL, ICSID Case No. UNCT/14/2, 16 March 2017) [220]; *Aaron C Berkowitz, Brett E Berkowitz and Trevor B Berkowitz (formerly Spence International Investments and others) v Republic of Costa Rica (Interim Award)* (UNCITRAL, ICSID Case No UNCT/13/2, 25 October 2016) [296].

ICSID Convention.³⁸² In the context of non-ICSID arbitration, the tribunal's power is contained in the arbitration agreement and, if the arbitral tribunal goes beyond the scope of its power, the award could be annulled in domestic courts under the *New York Convention*.³⁸³

In addition to the power of arbitral tribunals, the burden of proof and evidence could be considered a crucial issue in arbitral proceedings, as it frequently determines the outcome of disputes.³⁸⁴ As Waincymer notes, 'When parties are not aware of the risks related to burden allocation or how much evidence the arbitral tribunal is expecting to receive on particular issues, significant problems may arise'.³⁸⁵ However, arbitration rules rarely address the issue of burden of proof, except for the *UNCITRAL Arbitration Rules*, which merely provide a general rule that 'each party shall have the burden of proving the facts relied on to support his claim or defence'.³⁸⁶ Accordingly, the practices of the burden of proof have been developed by arbitral tribunals, as noted by Brower: 'The lack of standard international rules of evidence, and the fact that international tribunals are liberal in their approach to the admission of evidence in no way goes as far as to waive the burden resting upon a claimant to prove his case'.³⁸⁷ Among other aspects of burden of proof and evidence,³⁸⁸ this section highlights some approaches to burden of proof used by arbitral tribunals in arbitral proceedings: the principle of *onus probandi actori incumbit*, the principle of cooperation and equity, adverse inference, presumption, burden of proof in relation to the applicable standards of review, and standard of proof.

Like most international adjudications, arbitral tribunals accept that the burden of proof lies with a party who makes an allegation of fact (*onus probandi actori incumbit*),³⁸⁹ although this is not always the case. Under some circumstances, the *onus probandi actori incumbit* principle may be loosened by the principle of cooperation and equity. This principle is represented in rule 34(3) of the *ICSID Arbitration Rules*, which stipulates: 'The parties shall cooperate with the Tribunal in the production of the evidence and in the other

³⁸² *ICSID Convention* art 52(1)(b).

³⁸³ *New York Convention* art V.

³⁸⁴ Susan D Frank, 'Precision and Legitimacy in International Arbitration: Empirical Insights From ICCA' on *Kluwer Arbitration Blog* (10 September 2014) <<http://arbitrationblog.kluwerarbitration.com/2014/09/10/precision-and-legitimacy-in-international-arbitration-empirical-insights-from-icca/>>.

³⁸⁵ Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) 761.

³⁸⁶ *UNCITRAL Arbitration Rules* art 24(1).

³⁸⁷ Charles N Brower, 'Evidence before International Tribunals: The Need for some Standard Rules' (1994) 28 *International Lawyer* 47, 49.

³⁸⁸ For further discussions on other evidentiary issues in investment treaty arbitration, see, eg, Audley Sheppard, 'The Approach of Investment Treaty Tribunals to Evidentiary Privileges' (2016) 31(3) *ICSID Review* 670; Nigel Blackaby and Alex Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration' (2016) 31(3) *ICSID Review* 655.

³⁸⁹ See Bin Cheng, *General Principles of Law Applied by International Courts and Tribunals* (Grotius Publications, 1987) 327. For arbitral tribunal decisions, see, eg, *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (Award) (ICSID Tribunal, Case No ARB/87/3, 27 June 1990) ('*AAPL v Sri Lanka*') [56]; *Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan* (Award) (ICSID Arbitral Tribunal, Case No ARB/02/13, 2006) ('*Salini v Jordan*') [70]; *Tokios Tokelés v Ukraine* (Award) (ICSID Tribunal, Case No ARB/02/18, 26 July 2007) ('*Tokios v Ukraine*') [121].

measures provided for in paragraph (2).³⁹⁰ Similarly, article 24(3) of the *UNCITRAL Arbitration Rules* establishes: ‘At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.’³⁹¹ Although some arbitral tribunals have accepted the cooperation and equity principle,³⁹² this Thesis notes that this is subject to the tribunal’s discretion in each case.

In addition, in particular disputes, arbitral tribunals have applied the presumption (or ‘a legal norm supposes (automatically) that certain facts are established in a given situation’).³⁹³ If the presumption is established, ‘the burden of proof is shifted to the opposite party to disprove the presumption’.³⁹⁴ As explained by Amerasinghe, the presumptions can be legal (prescribed by law) or judicial (tools of reasoning used by judges).³⁹⁵ Arbitral rules do not prescribe whether arbitral tribunals have the authority to draw presumptions. In practice, some arbitral tribunals have applied presumptions, but inconsistently.³⁹⁶

Besides the presumptions, the adverse inference (or a conclusion of facts made by deducing from the other facts, rather than evidence) has been used by some arbitral tribunals; however, their approaches with respect to adverse inferences are inconsistent.³⁹⁷ In practice, the adverse inference is used by the tribunal in a situation wherein the party refuses to produce the evidence; accordingly, Amerasinghe notes that it is ‘a weapon in the case of failure to produce evidence in a party’s possession’.³⁹⁸ Except for the International Bar Association (IBA) *Rules on the Taking of Evidence*, which is a soft law instrument,³⁹⁹

³⁹⁰ *ICSID Arbitration Rules* r 34(3).

³⁹¹ *UNCITRAL Arbitration Rules* art 24(3).

³⁹² See, eg, *Amco Asia Corporation and Others v Republic of Indonesia (Award)* (ICSID Arbitral Tribunal, Case No ARB/81/1, 20 November 1984) (*‘Amco v Indonesia’*) <https://www.biicl.org/files/3936_1990_amco_v_indonesia.pdf>; *Amco Asia Corporation and Others v Republic of Indonesia (Annulment Decision)* (ICSID Annulment Committee, Case No ARB/81/1, 16 May 1986) (*‘Amco v Indonesia’*) <https://www.biicl.org/files/3936_1990_amco_v_indonesia.pdf>.

³⁹³ Robert Kolb, ‘General Principles of Procedural Law’ in A Zimmermann, C Tomuschat and K Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2006) 793, 823.

³⁹⁴ *Ibid.*

³⁹⁵ C F Amerasinghe, ‘Presumptions and Inferences in Evidence in International Litigation’ (2004) 3(3) *The Law and Practice of International Courts and Tribunals* 395, 395.

³⁹⁶ See, eg, *SD Myers Inc v Government of Canada (First Partial Award)* (UNCITRAL, 13 November 2000) (*‘SD Myers v Canada’*) [245]– [6]; *Pope & Talbot Inc v The Government of Canada (Award on the Merits of Phase 2)* (UNCITRAL, 10 April 2001) (*‘Pope & Talbot v Canada’*) [78]; *Methanex Corporation v United States of America (Final Award on Jurisdiction and Merits)* (*‘Methanex v United States’*) (UNCITRAL, 3 August 2005) [9], [12], [37]; *International Thunderbird Gaming Corporation v The United Mexican States (Award)* (UNCITRAL (NAFTA), 26 January 2006) (*‘Thunderbird v Mexico’*) [177]; *United Parcel Service of America Inc v Government of Canada (Award)* (UNCITRAL, Case No UNCT/02/1 24 May 2007) (*‘UPS v Canada’*) [83]; *Holdings Inc, Apotex Inc v United States of America (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/12/1, 25 August 2014) (*‘Apotex v United States’*) [8.8].

³⁹⁷ See, eg, *Marvin Roy Feldman Karpa v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/99/1, 16 December 2002) (*‘Feldman v Mexico’*) [178]; *Methanex v United States (Final Award, 3 August 2005)* 14 [24] – [5]; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Kazakhstan (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/16, 29 July 2008) (*‘Rumeli v Kazakhstan’*) [444].

³⁹⁸ Amerasinghe, above n 395, 410 nn 53.

³⁹⁹ *IBA Rules on the Taking of Evidence* art 9(5)– (6). (IBA rules provide that the tribunal may draw inferences adverse to the defaulting party in case of failure to produce a piece of evidence requested by the other party and ordered by the tribunal)

arbitral rules do not precisely prescribe whether the arbitral tribunals have the authority to draw adverse inferences.⁴⁰⁰ In regard to this matter, Cordero-Moss argues that arbitral rule ‘does not usually prevent the tribunal from drawing an inference adverse to the defaulting party, if this is deemed appropriate under the circumstances’.⁴⁰¹

Besides the above circumstances, the allocation of the burden of proof may also vary according to the standards of review (or ‘the nature and intensity of review’)⁴⁰² that each tribunal applies.⁴⁰³ Moreover, arbitral tribunals have applied various standards of proof (or ‘the level or degree of conviction that an adjudicator must have to be satisfied that a burden has been met’).⁴⁰⁴ The international arbitral rules do not prescribe any standard of proof; most arbitral rules merely provide that the power to decide the admissibility of the evidence and its probative value belongs to the tribunal.⁴⁰⁵ Additionally, the *IBA Rules on the Taking of Evidence* provide that arbitrators have the discretion to weigh the evidence presented by the parties.⁴⁰⁶ As is discussed later (in section 3.2.4.2), only a severe breach of a rule of evidence that may amount to a serious violation of a fundamental rule of the procedure can cause the annulment of an arbitral award under article 52(1)(d) of the *ICSID Convention*.⁴⁰⁷

As with evidentiary decisions, arbitral tribunals can modify the level of confidentiality or transparency for each proceeding to suit the issues at hand. First, confidentiality or transparency of investor–State arbitration initiation depends on each arbitral tribunal. In general, investors do not have an obligation under international investment agreements to disclose their intention to commence an arbitration against host States. Accordingly, disclosure of investor–State arbitration depends on the parties’ agreement or the applicable arbitral rules, which may vary between ICSID and non-ICSID arbitration. While the *ICSID Arbitration Rules* require all ICSID cases to be registered, and typically publishes on the ICSID’s website,⁴⁰⁸ non-ICSID arbitrations, by contrast, do not require the publication of registered cases (except

⁴⁰⁰ *ICSID Arbitration Rules* r 34.

⁴⁰¹ Giuditta Cordero-Moss, ‘Tribunal’s Powers versus Party Autonomy’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008).

⁴⁰² Bohanes and Lockhart, ‘Standard of Review in WTO Law,’ above n 39.

⁴⁰³ See, eg, *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/02/1, 3 October 2006) (‘*LG&E v Argentina*’) 256; *Continental v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008) [192].

⁴⁰⁴ Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer Law International, 1996) 53.

⁴⁰⁵ *Model Rule on Arbitral Procedure* art 18(1); *ICSID Arbitration Rules* art 34(1); *UNCITRAL Arbitration Rules* art 27(4); *ICC Rules of Arbitration* art 25(1).

⁴⁰⁶ See *IBA Rules on the Taking of Evidence* art 9.

⁴⁰⁷ *ICSID Convention* art 52(1)(d). See also, *Tulip Real Estate and Development Netherlands BV v Republic of Turkey (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/11/28, 30 December 2015) (‘*Tulip v Turkey*’) [84]; *Impregilo SpA v Argentine Republic (Annulment Decision)* (ICSID Annulment Committee, Case No ARB/07/17, 24 January 2014) (‘*Impregilo v Argentina*’) [176].

⁴⁰⁸ *ICSID Administrative and Financial Regulations* r 22(1).

the *UNCITRAL Rules on Transparency in Treaty-Based Investor–State Arbitration*).⁴⁰⁹ As well as initiation, the ad hoc tribunal may modify the level of confidentiality or transparency for each proceeding. In general, the entire arbitration process (including documents, records, evidence, hearings and awards) is also typically confidential.⁴¹⁰ The *ICSID Convention* and *ICSID Arbitration Rules* do not contain requirements on confidentiality or transparency.⁴¹¹ The rules under non-ICSID arbitrations also vary. For example, in the case that the parties adopt the *UNCITRAL Rules on Transparency*, the arbitral proceedings may be transparent and open to the public,⁴¹² whereas other commercial arbitrations do not require transparency.

In addition, the arbitral tribunal in each case has the discretion to decide on the matters regarding the admissibility of amicus curiae briefs submitted by non-disputing parties.⁴¹³ Before 2006, no international investment instruments had explicitly authorised the submission of amicus curiae briefs. The 2005 *Methanex* tribunal could be considered the first case in which the tribunal accepted amicus curiae briefs from the third party, for the following reasons: ‘There is an undoubtedly public interest in this arbitration ... The public interest in this arbitration arises from its subject matter ... arbitral process could benefit from being perceived as more open or transparency or conversely be harmed if seen as unduly secretive.’⁴¹⁴ While the acceptance of amicus briefs clearly shows the public’s common interest and renders the award in a transparent manner, it may add cost to the arbitral proceedings, as noted by the *Methanex* tribunal: ‘There are other competing factors to consider: the acceptance of amicus submissions might add significantly to the overall cost of the arbitration and as considered above, there is a possible risk of imposing an extra burden on one or both the Disputing Parties.’⁴¹⁵ The approach established in *Methanex* has been followed by some later tribunals, such as *UPS v Canada*,⁴¹⁶ *Glamis Gold v United*

⁴⁰⁹ *UNCITRAL Rules on Transparency* art 2.

⁴¹⁰ Joachim Delaney and Danial Barstow Magraw, ‘Procedural Transparency’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 751.

⁴¹¹ ICSID, *Confidentiality and Transparency—ICSID Convention Arbitration* <<https://icsid.worldbank.org/en/Pages/process/Confidentiality-and-Transparency.aspx>>.

⁴¹² *UNCITRAL Rules on Transparency*.

⁴¹³ Delaney and Magraw, above n 410, 777.

⁴¹⁴ *Methanex Corporation v United State of America (Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae)* (UNCITRAL, 15 January 2001) [49] <https://www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf>.

⁴¹⁵ *Ibid* [50].

⁴¹⁶ *United Parcel Service of America Inc v Canada (Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae)* (UNCITRAL, Case No UNCT/02/1, 17 October 2001).

States,⁴¹⁷ *Biwater Gauff v Tanzania*⁴¹⁸ and *Suez v Argentina*.⁴¹⁹ Since 2006, some arbitral rules, such as the *ICSID Arbitration Rules*,⁴²⁰ have been amended to make explicit provision to accept amicus curiae briefs; however, whether they are accepted still depends on the discretion of each tribunal.

Lastly, the confidentiality or transparency of the arbitral awards rendered by arbitral tribunals depends on the discretion of each tribunal. As with the initiation of arbitration proceedings, most international investment agreements do not require investors to make the award public. Accordingly, public disclosure of the arbitral award depends on the arbitral rules chosen by the parties or the consent of the parties.⁴²¹ For example, article 48 of the *ICSID Convention* provides that the ICSID ‘shall not publish the award without the consent of the parties’.⁴²² In non-ICSID arbitration, the rules vary. While the *UNCITRAL Rules on Transparency* provide for publishing arbitral awards,⁴²³ other commercial arbitrations do not require the arbitral awards to be announced.

As is apparent from the above examination, the arbitral procedures are flexible. The procedures are determined by party autonomy and arbitral rules that the parties may have incorporated in their arbitration agreement. In general, the power of the arbitral tribunal is limited to the arbitration agreement or applicable arbitration law. The arbitral tribunal has broad discretion to modify evidentiary decisions (such as the principle of *onus probandi actori incumbit*, the principle of cooperation and equity, adverse inference, presumption, burden of proof and standard of proof) and the level of confidentiality or transparency for each proceeding (such as initiation of arbitration, arbitral proceeding, admissibility of amicus curiae briefs and arbitral awards) to suit the issues at hand. Thus, there is no consistent approach regarding arbitral procedures. As with the institutional aspects of arbitral tribunals discussed previously (in section 3.2.3.1), the power of the arbitral tribunal and the arbitral procedures discussed in this section are also necessary conditions for the validity of the arbitral award. If the tribunal did not comply with the parties’ agreement or applicable arbitration rules, the award could be annulled, as discussed below.

⁴¹⁷ *Glamis Gold Ltd v The United States of America* (Decision on Application and Submission by Quechan Indian Nation (UNCITRAL, 16 September 2005) (‘*Glamis Gold v United States*’)).

⁴¹⁸ *Biwater Gauff (Tanzania) Ltd v Tanzania (Procedural Order No 5)* (ICSID Arbitral Tribunal, Case No ARB/05/22, 2 February 2007) (‘*Biwater Gauff v Tanzania*’).

⁴¹⁹ *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic (Order in Response to a Petition for Transparency and Participation as Amicus Curiae in Suez)* (ICSID Arbitral Tribunal, Case No ARB/03/19, 30 July 2010) (‘*Suez et al v Argentina*’).

⁴²⁰ *ICSID Arbitration Rules* r 37(2).

⁴²¹ Delaney and Magraw, above n 410, 721–87.

⁴²² *ICSID Convention* art 48.

⁴²³ *UNCITRAL Rules on Transparency* art 3(1).

3.2.4 Annulment Committees and Procedure

Another critical feature of arbitral procedures is that the arbitral award is final, without the possibility of appeal. Unlike an appellate review, ICSID annulment committees have no power to review the *substance* of arbitral tribunal awards. As Schreuer points out, while an appellate mechanism deals with both substantive and procedural considerations, an annulment mechanism only handles a review of the arbitral process.⁴²⁴ In the context of ICSID arbitration, the annulment provision can be found in article 52(1) of the *ICSID Convention*,⁴²⁵ while domestic courts may review non-ICSID awards under the law of the arbitration forum. To illustrate how the annulment system operates, this section examines the ICSID annulment proceeding as an example of the finality principle underlying arbitration processes; it highlights that the ICSID annulment proceeding is performed by an ad hoc annulment committee, which has the power to annul arbitral awards based on five limited grounds. Because an annulment committee cannot uphold, modify or reverse arbitral awards (as an appeal mechanism), the disputing parties (investors or States) are allowed to resubmit the dispute to a new ICSID arbitral tribunal.

3.2.4.1 Institutional Aspects of Annulment Committees

To begin, an annulment is performed by an ICSID ad hoc annulment committee that is separated from the arbitral tribunal and independent from the parties to the disputes. Annulment proceeding is right—that is, either party can initiate annulment proceeding by applying for annulment to the ICSID Secretariat. Once an application for annulment is registered, the Chairman of the ICSID Administrative Council (who is also the President of the World Bank Group) will appoint an ad hoc committee for that specific case.⁴²⁶ Although the Chairman has no obligation to consult the parties, the parties reserve the right to propose a disqualification of a prospective committee member before they are appointed.⁴²⁷

Unlike the arbitral tribunal, the ad hoc committee comprises three persons who are appointed only from the ICSID panel of arbitrators.⁴²⁸ As indicated by the committee in *Vivendi v Argentina*: ‘In annulment cases, members of ICSID ad hoc committees are chosen exclusively from the panel of arbitrators, and serve at the invitation of ICSID to address this concern. Their position is, therefore, different from that of arbitrators.’⁴²⁹ In addition to the general requirements of the panel of arbitrators,⁴³⁰ members of an ad hoc committee must also meet the following specific requirements:

⁴²⁴ Christoph Schreuer, ‘ICSID Annulment Revisited’ (2003) 30 (2) *Legal Issues of Economic Integration* 103.

⁴²⁵ *ICSID Convention* art 52 (1) (a)–(e).

⁴²⁶ *Ibid* art 52(2)–(3).

⁴²⁷ *Ibid* art 57.

⁴²⁸ *Ibid* art 52(3).

⁴²⁹ *Vivendi v Argentina I (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/97/3–Resubmission, 10 August 2010)[207].

⁴³⁰ *ICSID Convention* art 14(1).

None of the members of the Committee shall have been a member of Convention the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).⁴³¹

As is evident from the above examination, the institutional aspects of the ICSID annulment committee are prescribed by the *ICSID Convention* rather than by party agreement. Unlike the flexible requirements of an arbitral tribunal, the ICSID annulment committee's composition, nationality and qualification criteria are stricter. In addition, the ICSID annulment committee's impartiality and independence requirements are of particular importance, as the committee has the power to annul arbitral award as per the grounds for annulment, as discussed in the next sub-section.

3.2.4.2 Annulment Procedure

An ad hoc annulment committee can annul ICSID awards based on five grounds. As considered below, each ground of annulment has been interpreted inconsistently by each annulment committee.

The first ground for annulment under article 52(1)(a) of the *ICSID Convention* is that 'the Tribunal was not properly constituted'.⁴³² According to the World Bank, this ground aims to cover situations such as the arbitral tribunal not being appointed as per the parties' agreement or a tribunal member not meeting requirements, as explained previously (in section 3.2.1).⁴³³ In practice, this ground has been raised in few cases,⁴³⁴ but there is an inconsistency between ad hoc committees as to their review powers under this ground for annulment. Some exemplary cases are *Azurix v Argentina*⁴³⁵ and *Vivendi v Argentina II*.⁴³⁶ In both cases, ad hoc committees did not annul the arbitral awards, albeit based on different interpretations. The ad hoc committee of *Azurix v Argentina* considered that a review of the arbitral tribunal decision on a request for disqualification of a tribunal member under article 58 of the *ICSID Convention* exceeded its power.⁴³⁷ Slightly differently, the ad hoc committee of *Vivendi v Argentina II* considered that the annulment committee could review a disqualification decision, but that such a decision could lead to

⁴³¹ Ibid art 52(3).

⁴³² Ibid art 52(1)(a).

⁴³³ ICSID, 'Updated Background Paper on Annulment for the Administrative Council of ICSID' (Background Paper, World Bank, 5 May 2016) 53 [77].

⁴³⁴ Ibid 54[79].

⁴³⁵ *Azurix Corp v Argentine Republic (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/01/12, 1 September 2009) ('*Azurix v Argentina*').

⁴³⁶ *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic Vivendi v Argentina (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/97/3–Resubmission, 5 May 2017) ('*Vivendi v Argentina II*').

⁴³⁷ *Azurix v Argentina (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/01/12, 1 September 2009) [292].

annulment only if it was ‘so plainly unreasonable that no reasonable decision-maker could have come to such a decision’.⁴³⁸

The second ground for annulment under article 52(1)(b) of the *ICSID Convention* is that ‘the Tribunal manifestly exceeded its powers’.⁴³⁹ At the policy level, this provision aims to prevent arbitral tribunals from manifestly exceeding their authority given under arbitration agreements or the *ICSID Convention*.⁴⁴⁰ In most instances, it is accepted that this ground for annulment encompasses situations such as an arbitral tribunal lacking jurisdiction⁴⁴¹ or not applying the proper law.⁴⁴² However, an *incorrect* application of the applicable law is not a ground for annulment.⁴⁴³ Kaufmann-Kohler supports this approach, stating that ‘even assuming an error in the application of the law, there is no manifest excess within the meaning of Article 52 of the *ICSID Convention*’.⁴⁴⁴

The controversial issue that arises in practice is a difference between *non-application* of the applicable law and *misapplication* of the applicable law, which is a line that may not always be easy to draw. Some committees consider that a *misapplication* of the applicable law would not constitute annulment.⁴⁴⁵ One example of this is *Helnan v Egypt*. In this arbitral proceeding, the tribunal applied Egyptian law instead of international law; in the annulment proceeding, the ad hoc committee held that such misapplication of the law is a matter of substance, which is beyond the review power of an annulment committee.⁴⁴⁶ An annulment committee for *Micula v Romania* supported this approach by holding that ‘misinterpretation or

⁴³⁸ *Vivendi v Argentina II (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/97/3–Resubmission, 5 May 2017 [94] (emphasis in original).

⁴³⁹ *ICSID Convention* art 52(1)(b).

⁴⁴⁰ ICSID, ‘Background Paper on Annulment for the Administrative Council of ICSID’, above n 433, 54 [81].

⁴⁴¹ See, eg, *Patrick Mitchell v Democratic Republic of the Congo (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/99/7, 1 November 2006) [67]; *TECO Guatemala Holdings, LLC v Republic of Guatemala*, ICSID Case No ARB/10/23, 5 April 2016) (*‘TECO v Guatemala’*) [77].

⁴⁴² See, eg, *Total SA v The Argentine Republic (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/04/01, 1 February 2016) (*‘Total v Argentina’*) [195]; *Loan Micula, Viorel Micula and Others v Romania (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/05/20, 26 February 2016) (*‘Micula v Romania’*) [137]; *TECO Guatemala Holdings, LLC v Republic of Guatemala*, ICSID Case No ARB/10/23, 5 April 2016) (*‘TECO v Guatemala’*) [283].

⁴⁴³ See, eg, *CMS Gas Transmission Company v Argentine Republic (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/01/8, 25 September 25, 2007) (*‘CMS v Argentina’*) [136] (The ad hoc committee states: ‘Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers’).

⁴⁴⁴ Kaufmann-Kohler, ‘Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?’, above n 35, 23.

⁴⁴⁵ See, eg, *Amco Asia Corporation and Others v Republic of Indonesia (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/81/1, 17 December 1992) (*‘Amco v Indonesia II’*) [7.19] (The committee stated, ‘At the same time, the incorrect application of national law, its misapplication or incorrect interpretation does not normally provide a proper ground for annulment.’); *Helnan International Hotels A/S v Arab Republic of Egypt (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/05/19, 14 June 2010) (*‘Helnan v Egypt’*); *Micula v Romania (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/05/20, 26 February 2016) [130].

⁴⁴⁶ *Helnan v Egypt (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/05/19, 14 June 2010) [71].

misapplication of the applicable law to be applied to the merits, even if serious, does not justify annulment’.⁴⁴⁷

Conversely, some ad hoc committees consider that misapplication of the law might amount to a failure to apply the proper law, which can lead to annulment.⁴⁴⁸ In *Soufraki v UAE*, the ad hoc annulment committee held that ‘Misinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply the proper law’.⁴⁴⁹ Another example is *Sempra v Argentina*. In this arbitral proceeding, the tribunal applied customary international law on the state of necessity (*lex generalis*), instead of article XI of the *United States–Argentina Bilateral Investment Treaty* (*lex specialis*).⁴⁵⁰ In the annulment proceedings, the committee concluded that by failing to apply article XI, the tribunal committed a manifest excess of powers.⁴⁵¹ This approach is criticised by some commentators—for example, Schreuer considers that it is a re-examination of the substance of arbitral awards, which is close to an appellate review and, in turn, undermines the finality principle underlying the arbitration regime.⁴⁵²

The third ground for annulment under article 52(1)(c) of the *ICSID Convention* is that ‘there was corruption on the part of a member of the tribunal’.⁴⁵³ According to the World Bank,⁴⁵⁴ the rationale underlying this ground for annulment is to prevent an arbitrator from violating the declaration (concerning compensation) required by the *ICSID Arbitration Rules*.⁴⁵⁵ According to the available data published in the 2016 *ICSID Updated Background Paper*,⁴⁵⁶ there is no annulment decision related to this provision; therefore, none of any ad hoc committee has interpreted it.

⁴⁴⁷ *Micula v Romania (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/05/20, 26 February 2016) [130].

⁴⁴⁸ See, eg, *Hussein Nuaman Soufraki v United Arab Emirates (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/02/7, 5 June 2007) (‘*Soufraki v UAE*’) [86]; *MCI v Ecuador (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/03/6, 19 October 2009) [43]; *Sempra Energy International v Argentine Republic (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/02/16, 29 June 2010) (‘*Sempra v Argentina*’) [164].

⁴⁴⁹ *Soufraki v UAE (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/02/7, 5 June 2007) [86].

⁴⁵⁰ In the arbitral proceeding, the tribunal distinguished article XI of the *United States–Argentina BIT* (*lex specialis*) from the CIL on state of necessity (*lex generalis*). The reason for applying the CIL on state of necessity was that the tribunal saw that article XI does not set out different conditions for the legal elements necessary from the CIL on state of necessity (see *Sempra v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/16, 28 September 2007) [378]).

⁴⁵¹ *Sempra v Argentina (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/02/16, 29 June 2010) [159].

⁴⁵² Christoph Schreuer, ‘Three Generation of ICSID Annulment Proceedings’ in Emmanuel Gaillard and Yas Banifatemi (eds), *Annulment of ICSID Awards* (Juris Publishing, 2004) <<http://www.univie.ac.at/intlaw/wordpress/pdf/69.pdf>>.
ICSID Convention art 52(1)(c).

⁴⁵⁴ ICSID, ‘Updated Background Paper on Annulment for the Administrative Council of ICSID’, above n 433, 58 [95].

⁴⁵⁵ *ICSID Arbitration Rules* r 6[2].

⁴⁵⁶ ICSID, ‘Updated Background Paper on Annulment for the Administrative Council of ICSID’, above n 433, 59 [98].

The fourth ground for annulment under article 52(1)(d) of the *ICSID Convention* is that ‘there has been a serious departure from a fundamental rule of procedure’.⁴⁵⁷ According to the World Bank, the rationale of this ground for annulment is to protect the principles of natural justice in the arbitral process; however, the World Bank does not define ‘a fundamental rule of procedure’ that applies to international arbitral proceedings.⁴⁵⁸ In this regard, the ad hoc annulment committee for *Wena Hotels v Egypt* clarified that ‘a fundamental rule of procedure’ refers to ‘a set of minimal standards of procedure to be respected as a matter of international law’.⁴⁵⁹ In light of the annulment decisions, the fundamental rule of procedures includes ‘equal treatment of the parties’,⁴⁶⁰ ‘the right to be heard’,⁴⁶¹ ‘the tribunal’s independence and impartiality’,⁴⁶² ‘the treatment of evidence and burden of proof’⁴⁶³ and ‘deliberations among tribunal members’.⁴⁶⁴

Controversy often arises as to the threshold for setting this ground for annulment. In *MINE v Guinea*, the annulment committee set out criteria that ‘the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide’.⁴⁶⁵ Some ad hoc committees have added that the outcome of the award must be affected by such departure in a significant way.⁴⁶⁶ For

⁴⁵⁷ *ICSID Convention* art 52(1)(d).

⁴⁵⁸ ICSID, ‘Updated Background Paper on Annulment for the Administrative Council of ICSID’, above n 433, 60[102].

⁴⁵⁹ *Wena Hotels Limited v Arab Republic of Egypt (Decision on Annulment)* (ICSID Annulment Committee, ARB/98/4, 5 February 2002) (‘*Wena Hotels v Egypt*’) [57].

⁴⁶⁰ See, eg, *Malicorp Limited v The Arab Republic of Egypt (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/08/18, 3 July 2013) (‘*Malicorp v Egypt*’) [36]; *Tulip Real Estate and Development Netherlands BV v Republic of Turkey (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/11/28, 30 December 2015) (‘*Tulip v Turkey*’) [72]; *Total SA v The Argentine Republic (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/04/01, 1 February 2016) (‘*Total v Argentina*’) [314].

⁴⁶¹ See, eg, *CDC Group plc v Republic of Seychelles (Decision on Annulment)* (ICSID Annulment Committee, ARB/02/14, 29 June 2005) (‘*CDC v Seychelles*’) [49]; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/03/25, 23 December 2010) (‘*Fraport v Philippines*’) [198]; *TECO Guatemala Holdings, LLC v Republic of Guatemala*, ICSID Case No ARB/10/23, 5 April 2016) (‘*TECO v Guatemala*’) [184].

⁴⁶² See, eg, *CDC v Seychelles (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/02/14, 29 June 2005) [51]–[5]; *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic (Annulment Decision)* (ICSID Annulment Committee, Case No ARB/03/23, 5 February 2016) (‘*EDF v Argentina*’) [123]; *Total v Argentina (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/04/01, 1 February 2016) [314].

⁴⁶³ See, eg, *Wena Hotels v Egypt (Decision on Annulment)* (ICSID Annulment Committee, ARB/98/4, 5 February 2002) [59]–[61]; *Total v Argentina (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/04/01, 1 February 2016) [314].

⁴⁶⁴ See, eg, *CDC v Seychelles (Decision on Annulment)* (ICSID Annulment Committee, ARB/02/14, 29 June 2005) [58]; *Daimler Financial Services AG v Argentine Republic (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/05/1, 7 January 2015) (‘*Daimler v Argentina*’) [297]–[303].

⁴⁶⁵ *Maritime International Nominees Establishment v Republic of Guinea (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/84/4 (‘*MINE v Guinea*’)) [5.05].

⁴⁶⁶ *Wena Hotels v Egypt (Decision on Annulment)* (ICSID Annulment Committee, ARB/98/4, 5 February 2002) [58]; *Repsol YPF Ecuador SA v Empresa Estatal Petróleos del Ecuador (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/01/10, 8 January 2007) (‘*Repsol v Ecuador*’) [81]; *CDC v Seychelles (Decision on Annulment)* (ICSID Annulment Committee, ARB/02/14, 29 June 29, 2005) [49]; *Fraport v Philippines (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/03/25, 23 December 2010) [246]; *Azurix v Argentina (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/01/12, 1 September 2009) [238].

example, the ad hoc committee for *Wena Hotels v Egypt* stated that ‘the departure from such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed’.⁴⁶⁷ Some others, such as the ad hoc committee for *Enron*, referred to either a threshold established in *MINE v Guinea* or to a threshold set in *Wena Hotels v Egypt*.⁴⁶⁸ The World Bank observes that the threshold for this ground for annulment is ‘very fact-specific’; that is, the annulment committee must investigate the conduct of the arbitral tribunal’s proceeding.⁴⁶⁹

The last ground for annulment under article 52(1)(e) of the *ICSID Convention* is that ‘the award has failed to state the reasons on which it is based’.⁴⁷⁰ According to the World Bank, this ground for annulment aims to ensure that the tribunal’s reasoning is understandable.⁴⁷¹ The ground conventionally encompasses a situation wherein a tribunal does not address a question that results in a final decision being affected;⁴⁷² however, the *inaccuracy* of the reasoning does not constitute this ground for annulment.⁴⁷³ As is illustrated later on, controversy often arises in terms of whether the *inadequacy* and *insufficiency* of the reasoning could constitute a failure to state reasons. The committee for *Amco v Indonesia II* considers that article 52(1)(e) of the *ICSID Convention* does not allow annulment committees to review the adequacy of the reasoning behind the arbitral award because this is comparable to the power of an appellate review, which is not an object and purpose of the *ICSID Convention*.⁴⁷⁴ Some ad hoc committees expand the scope of review under article 52(1)(e) to include contradictory or frivolous reasons—for example, the ad hoc annulment committee for *MINE v Guinea* held that ‘the adequacy of the reasoning is not an appropriate standard of review’,⁴⁷⁵ but considered that ‘contradictory or frivolous reasons’ could lead to annulment under this provision.⁴⁷⁶ Other annulment committees have expressly stated that a failure to state reasons

⁴⁶⁷ *Wena Hotels v Egypt (Decision on Annulment)* (ICSID Annulment Committee, ARB/98/4, 5 February 2002) [58].

⁴⁶⁸ *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/01/3, 30 July 2010) (‘*Enron v Argentina*’) [211].

⁴⁶⁹ ICSID, ‘Updated Background Paper on Annulment for the Administrative Council of ICSID’, above n 433 [100].

⁴⁷⁰ *ICSID Convention* art 52(1)(d).

⁴⁷¹ ICSID, ‘Updated Background Paper on Annulment for the Administrative Council of ICSID’, above n 433, 60 [102].

⁴⁷² *Soufraki v UAE (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/02/7, 5 June 2007) [126]; *Duke Energy International Peru Investments No 1 Ltd v Republic of Peru (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/03/28, 1 March 2011) (‘*Duke v Peru*’) [228]; *Enron v Argentina (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/01/3, 30 July 2010) [368], [370], [371].

⁴⁷³ See eg, *Wena Hotels v Egypt (Decision on Annulment)* (ICSID Annulment Committee, ARB/98/4, 5 February 2002) [79]; *CDC v Seychelles (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/02/14, 17 December 2003) [70]–[5]; *CMS v Argentina (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/01/8, 25 September 2007) [124]–[6]; *MCI v Ecuador (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/03/6, 19 October 2009) [82]; *Fraport v Philippines (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/03/25, 23 December 2010) [277].

⁴⁷⁴ *Amco v Indonesia II (Decision on the Applications for Annulment of the 1990 Award and the 1990 Supplemental Award)* (ICSID Annulment Committee, Case No ARB/81/1, 17 December 1992) [7.55].

⁴⁷⁵ *MINE v Guinea (Decision on Annulment)* (ICSID Annulment Committee, Case No ARB/84/4, 6 January 1988) [5.05].

⁴⁷⁶ *Ibid* [5.09].

encompasses inadequate and insufficient reasons.⁴⁷⁷ In relation to this ground of annulment, the World Bank notes that the extent of insufficiency and inadequacy of the reasoning that establishes annulment under article 52(1) (e) of *ICSID Convention* remains controversial among ICSID annulment committees.⁴⁷⁸

As to the annulment proceedings themselves, they start with the first session, in which the ad hoc committee and the disputing parties discuss procedural matters.⁴⁷⁹ This is followed by the hearing, which is usually confined to parties' oral presentation and legal experts' examination, and the closure of the annulment proceeding, from which the ad hoc committee progresses to deliberations and issues the decision.⁴⁸⁰ Unlike an appeal mechanism, the ad hoc committee has the power to leave the arbitral award valid or annul it (fully or partially).⁴⁸¹ If an arbitral award is wholly annulled, a party may resubmit the dispute to a new arbitral tribunal.⁴⁸² If such an award is partially annulled, only annulled parts can be resubmitted.⁴⁸³ If the award is annulled again, the party may refile the case, and a new round of arbitration will start.

The effect of annulment proceedings on the enforcement of arbitral awards is the critical factor in the effectiveness of ICSID arbitration. Under the ICSID framework, an annulment proceeding does not automatically stay enforcement of the arbitral award—that is, a winning party can enforce the arbitral award unless a losing party requests stay enforcement.⁴⁸⁴ If a request for stay enforcement is filed, a temporary stay of enforcement is in force until the ad hoc committee makes a decision.⁴⁸⁵ If stay enforcement is granted, it remains in effect throughout the annulment proceeding.⁴⁸⁶ However, before the final decision on annulment is made, stay enforcement may be modified or terminated modified or terminated by the ad hoc committee at the request of either party.⁴⁸⁷ Once a final decision on annulment is issued, stay of enforcement is automatically terminated; however, an ad hoc annulment committee (in

⁴⁷⁷ See, eg, *Patrick Mitchell v Democratic Republic of the Congo (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/99/7, 1 November 2006) [22]; *Soufraki v UAE (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No ARB/02/7, 5 June 2007) [122]; *TECO v Guatemala (Decision on Annulment)* (ICSID Annulment Committee, ICSID Case No. ARB/10/23, 5 April 2016) [248]–[250].

⁴⁷⁸ ICSID, 'Updated Background Paper on Annulment for the Administrative Council of ICSID', above n 433, 62 [106].

⁴⁷⁹ *ICSID Convention* art 52(3); *ICSID Arbitration Rules* r 53; ICSID, 'Updated Background Paper on Annulment for the Administrative Council of ICSID', above n 433, 17.

⁴⁸⁰ *Ibid.*

⁴⁸¹ *ICSID Convention* art 52(3).

⁴⁸² *ICSID Convention* art 52(6); *ICSID Arbitration Rules* r 55(1).

⁴⁸³ *ICSID Convention* art 52(6); *ICSID Arbitration Rules* r 55(3).

⁴⁸⁴ *ICSID Convention* art 52(5).

⁴⁸⁵ *ICSID Convention* art 52(5); *ICSID Arbitration Rules* r 54(2)–(3).

⁴⁸⁶ *ICSID Arbitration Rules* r 54(2).

⁴⁸⁷ *Ibid* r 54(4).

this annulment case) may allow a temporary stay (for a valid part of an award) to enable either party to resubmit the annulled part of award to a new tribunal (to grant a further stay).⁴⁸⁸

The ICSID annulment proceeding is not without costs and duration additional to those of arbitral proceeding. As noted in the Thesis Introduction, costs and duration are factors affecting the efficiency of any dispute resolution. According to the World Bank, costs associated with ICSID annulment proceedings include hearing expenses, the ICSID administrative fee, and the ad hoc committee’s fees and expenses.⁴⁸⁹ Except as otherwise agreed by the parties, the party that applies for annulment has to pay all advance payments to the ICSID;⁴⁹⁰ however, the ad hoc committee might assign the costs of annulment later in the annulment decisions.⁴⁹¹ Based on data available in the *ICSID Updated Background Paper* (2016), the average costs of annulment proceedings (concluded since July 2010 to 2016) were 388,000 United States dollars,⁴⁹² and the duration of such annulment proceedings was approximately 22 months from the annulment registration date.⁴⁹³ The requirement to circulate and publish annulment decisions does not exist under the *ICSID Convention*, but some annulment decisions are posted on the ICSID website.⁴⁹⁴

In sum, both ICSID and non-ICSID awards are final and may bind the parties to protect party autonomy. However, the degree of domestic court intervention varies between ICSID and non-ICSID awards. While the domestic courts of the arbitration forum may review non-ICSID awards, ICSID awards can be annulled based on only five limited grounds per article 52(1) of the *ICSID Convention*. An annulment does not spontaneously stay enforcement of the arbitral award unless an applicant requests a stay of enforcement.

3.2.5 Recognition and Enforcement of Arbitral Awards

The crucial last feature examined here is the enforcement of the arbitral award. According to Alexandroff and Laird, ‘[o]ne of the most important elements of an effective system of dispute resolution is that decisions must be enforceable’.⁴⁹⁵ As mentioned in section 3.2.1, recognition and enforcement of arbitral awards vary between ICSID and non-ICSID awards. The ICSID awards are binding under article 53(1) of the *ICSID Convention*.⁴⁹⁶ If the losing State does not pay compensation to a foreign investor as per the ICSID award, foreign investors can enforce the ICSID award through any domestic court of the ICSID

⁴⁸⁸ Ibid r 54(3).

⁴⁸⁹ ICSID, ‘Updated Background Paper on Annulment for the Administrative Council of ICSID’, above n 433, 17.

⁴⁹⁰ See *ICSID Administrative and Financial Regulation* r 14 (direct costs of individual proceedings).

⁴⁹¹ Ibid.

⁴⁹² ICSID, ‘Updated Background Paper on Annulment for the Administrative Council of ICSID’, above n 433, 18.

⁴⁹³ Ibid 22– 3.

⁴⁹⁴ ICSID, *Decision on Annulment Case* <<https://icsid.worldbank.org/en/Pages/process/Decisions-on-Annulment.aspx>>.

⁴⁹⁵ Alan S Alexandroff and Ian A Laird, ‘Compliance and Enforcement’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 1172, 1172.

⁴⁹⁶ *ICSID Convention* art 53(1).

Contracting States, which are required to recognise and implement the award in their jurisdictions.⁴⁹⁷ Unlike the ICSID awards, local courts may refuse to enforce non-ICSID awards as per article V of the *New York Convention*.⁴⁹⁸

Altogether, an examination of the current investor–State arbitration regime highlights the fact that the current arbitration regime has operated to resolve investor–State disputes in a similar way to private commercial disputes. Despite the distinctive features of ICSID arbitration, the common features of ICSID and non-ICSID arbitrations are that parties to a dispute can present claims and evidence to the arbitral tribunal that they appoint; arbitral procedures may be flexible and conducted confidentially or transparently depended on each tribunal, and arbitral awards are binding and enforceable. This Thesis also notes that, except for the disputes administered by the Permanent Court of Arbitration (PCA), ICSID and non-ICSID arbitrations do not have a secretariat to provide administrative support to the arbitral tribunal. Although these elements represent the private characteristics of international arbitration that aim to resolve investment disputes efficiently, they have both advantages and drawbacks in light of the characteristics of investor–State disputes, as discussed below.

3.3 Analysis of the Advantages and Drawbacks of the Current Investor–State Arbitration Regime in Light of Characteristics of Investor–State Disputes

Like other adjudications, international arbitration has both advantages and disadvantages, which depend on the context. Specifically, this Thesis argues that the pros and cons of international arbitration depend on the characteristics of the involved disputes. Via prior synthesising lessons, which were learned from the current investor–State arbitration regime on a prospective multilateral ISDS regime reform, the advantages and disadvantages of the current investor–State arbitration regime are analysed in light of the

⁴⁹⁷ Ibid art 54–55.

⁴⁹⁸ *New York Convention* provides in art V that:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

characteristics of investor–State disputes identified in Chapter 2 (see section 2.2). It is argued here that, because the investor–State disputes involve contract-based claims, treaty-based claims and hybrids thereof, a key advantage of the current investor–State arbitration regime is that it is likely to promote efficiency in relation to the contract-based claims of such disputes; however, it will be less effective in promoting the accuracy and consistency of treaty-based claims.

3.3.1 Advantages of the Current Investor–State Arbitration Regime in Light of Investor–State Disputes

It can be argued that the current investor–State arbitration regime has several positive aspects regarding the resolution of investor–State disputes. The main benefits include the following: it depoliticises interstate disputes between capital-exporting and capital-importing States; it allows foreign investors and host States to appoint arbitral tribunals that suit the characteristics of the dispute; flexible and confidential arbitral proceedings result in efficient resolutions; final and binding arbitral awards protect party autonomy and result in efficient resolutions; and the enforcement mechanisms ensure that awards are enforceable. Hypothetically, it can be argued that these elements have contributed to a private and efficient method for resolving investor–State disputes and an improved cross-border investment climate.

3.3.1.1 Investor–State Arbitration Regime Depoliticises Interstate Disputes

Despite some criticism, which is discussed later (in section 3.3.2.1), it can be argued that investor–State arbitration depoliticises the disputes that arise between a host State and the investor’s home State in the interests of the investment climate, which is the traditional policy rationale of the *ICSID Convention*, as discussed in Chapter 2 (section 2.3).⁴⁹⁹ This advantage has been recognised by both the international governmental organisations—the ICSID⁵⁰⁰ and the UNCTAD⁵⁰¹—and some commentators.⁵⁰² For example, Schreuer points out the following:

[T]he arbitration procedure provided by ICSID offers considerable advantages to both sides. The foreign investor no longer depends on the uncertainties of diplomatic protection but obtains direct access to an international remedy. The dispute settlement process is depoliticized and subjected to objective legal criteria.

⁴⁹⁹ See *ICSID Convention* preamble; IBRD, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nations of Other States*, above n 293, [12].

⁵⁰⁰ ICSID, *About ICSID*, above n 80.

⁵⁰¹ UNCTAD, ‘Investor–State Disputes: Prevention and Alternatives to Arbitration’, above n 20, 13.

⁵⁰² See, eg, Broches, ‘Matière préliminaire,’ above n 292; Schreuer, ‘Do We Need Investment Arbitration?,’ above n 241; Kho et al, above n 192; Ursula Kriebaum, ‘Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes’ (2018)33 (1) *ICSID Review* 14.

... In turn, the host State by consenting to ICSID arbitration obtains the assurance that it will not be exposed to an international claim by the investor’s home State.⁵⁰³

As suggested by the UNCTAD, host States and foreign investors would benefit from depoliticisation.⁵⁰⁴ The UNCTAD notes that, by using international arbitration, foreign investors ‘do not have to approach their home States or international adjudicative bodies for assistance in a dispute with a host State, avoiding the possibility of being caught up in other geopolitical dialogues’.⁵⁰⁵ Conversely, a host State (which may be a less powerful State) could make a legal claim to an investor without involving the investors’ home State (which may be a more powerful State).⁵⁰⁶ As examined in Chapter 2 (section 2.2), investor–State disputes often arise from a direct relationship between an investor and a host State; accordingly, a private foreign investor is the direct beneficiary in the dispute. Thus, this Thesis considers that the current investor–State arbitration regime results in more efficient resolutions than interstate dispute resolution.

3.3.1.2 The Advantages of Party-Appointed Arbitral Tribunals for Investor–State Disputes

Another advantage of investor–State arbitration is that investors and host States can appoint an arbitral tribunal to solve disputes. In general, this advantage has been recognised by the United Nations as a merit of arbitration over litigation.⁵⁰⁷ The main advantages of party-appointed arbitral tribunals for investor–State disputes are discussed below.

First, it may be argued that a party-appointed arbitral tribunal ensures that investor–State disputes are decided without the interference of domestic courts, which may minimise the political influence of host States and protect foreign investor interests. Regarding this advantage, the UNCTAD states: ‘This assurance of adjudicative neutrality and independence was an advantage when investors did not trust the independence of the domestic courts or when the judiciary of the host State had not been exposed to hearing many cases under international law.’⁵⁰⁸ Kaufmann-Kohler and Potestà suggest that ‘in an ad hoc setting, structural independence is largely achieved through equal influence of the disputing parties on the constitution of the arbitral tribunal’.⁵⁰⁹ As noted by Bernardini, a party-appointed arbitral tribunal prevents all arbitrators from being dependent States for their appointment, which, in turn, protects the interest of investors.⁵¹⁰ Kho et al. also note the following:

⁵⁰³ Christoph H Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd ed, 2009) 398.

⁵⁰⁴ UNCTAD, ‘Investor–State Disputes: Prevention and Alternatives to Arbitration’, above n 20, 13.

⁵⁰⁵ Ibid.

⁵⁰⁶ Ibid.

⁵⁰⁷ See United Nations, *Handbook on Peaceful Dispute Settlement Between States*, above n 70.

⁵⁰⁸ UNCTAD, ‘Investor–State Disputes: Prevention and Alternatives to Arbitration’, above n 20, 14.

⁵⁰⁹ Kaufmann-Kohler and Potestà, ‘The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards’, above n 231, 49 [80].

⁵¹⁰ Bernardini, above n 231, 46–8.

These divergent interests are dealt with in the current ISDS system by allowing each party to the dispute to nominate one arbitrator, and for the third arbitrator to be chosen by agreement of the other two. In constituting the ISDS tribunal in this manner, the current system seeks to preserve the equal treatment of the parties in the composition of the tribunal, which effectively strikes a balance between their divergent interests in the outcome of the dispute.⁵¹¹

Second, it may be argued that a party-appointed arbitral tribunal allows the parties to appoint arbitrators who suit the specific characteristics and demands of each case. As the UNCTAD notes, ‘These arbitrators could be picked according to their expertise in the relevant subject area’.⁵¹² The party autonomy principle also allows the disputing parties to appoint arbitrators from diverse professions to resolve a dispute. As Judge Schwebel observes:

[a]rbitrators of investment disputes may be predominantly drawn from those who act as commercial arbitrators, or even as practitioners, though in fact there are a number of leading international arbitrators who have been government officials or national or international judges or who are academics.⁵¹³

Despite the concerns regarding the dual role of arbitrators as counsel (further discussed in section 3.3.2.2), Judge Schwebel, in relation to his observation that arbitrators also act as lawyers and counsel, which gives them expertise and experience, states the following: ‘At this very gathering, which brings together the leading international arbitrators of the world, many also act as counsel. Some of the most distinguished arbitrators of our or any time were or remain practicing lawyers.’⁵¹⁴ Because the parties have different interests in the qualifications and experience of the arbitrators who will hear their dispute, the flexible requirements regarding composition, nationality and skills allow them to appoint suitable arbitrators. As noted earlier, the criteria for selecting arbitrators are varied—for example, availability, knowledge, experience, nationality, languages proficiency, conflict of interest and common sense.⁵¹⁵

Third, arguably, a party-appointed arbitral tribunal may boost efficiency in a dispute resolution process. As Kessedjian observes, because the parties can appoint an arbitral tribunal when a dispute arises, this flexible timing allows for efficiency in resolving disputes.⁵¹⁶ Additionally, a manageable number of arbitrators is one of the main factors determining the efficiency of arbitration processes. As examined previously (in section 3.2.3.1), the number of arbitrators for each arbitration can be diverse—that is, the disputing parties can appoint one or more arbitrators who are suitable for the value and complexity of a

⁵¹¹ Kho et al, above n 192.

⁵¹² UNCTAD, ‘Investor–State Disputes: Prevention and Alternatives to Arbitration’, above n 20.

⁵¹³ Stephen M Schwebel, ‘In Defense of Bilateral Investment Treaties’ (Keynote speech delivered at ICCS, Miami, April 2014).

⁵¹⁴ Ibid.

⁵¹⁵ Wood, above n 68, 6.

⁵¹⁶ Kessedjian, above n 75, 3–4.

particular dispute. In case of a sole arbitrator, the costs are likely to be lower than those for three arbitrators, and the duration of arbitral processes may be shorter. Thus, theoretically, a parties-appointed arbitral tribunal that allows the disputing parties to determine the number of arbitrators may save costs and time, which, in turn, boosts efficiency in a dispute resolution process.⁵¹⁷

3.3.1.3 The Advantages of Flexible Arbitral Procedures for Investor–State Disputes

An additional advantage of the investor–State arbitration regime is that the disputing parties determine the arbitration procedure. As with a party-appointed arbitral tribunal, the primary benefit of the flexible arbitral process has been recognised by the United Nations as a merit of arbitration over litigation.⁵¹⁸ In light of the characteristics of investor–State disputes, the main advantages of flexible arbitral procedures are discussed below.

First, international arbitration procedures (particularly those of ICSID arbitration) ensure that the procedure is governed by international standards, rather than local court procedures. As recognised by the Organisation for Economic Co-operation and Development (OECD), ‘one of the advantages of investment arbitration for foreign investors is that investor–State disputes are resolved by means of mechanisms governed by international standards and procedures and do not rely on standards of the host State and the domestic courts’.⁵¹⁹ Correspondingly, the UNCTAD states: ‘Compared to settlement by national courts, arbitration allowed the parties to exercise more control over the litigation procedure’; accordingly, ‘parties further had the possibility to demand that arbitration be held in a neutral third country and be conducted in a language familiar to all parties’.⁵²⁰

Besides the international standard, the second advantage of arbitration is that it allows investors and host states to decide the rules governing the proceeding and customise the process to suit the characteristics of the dispute. As noted earlier, Kessedjian states that ‘arbitration proceedings are to be tailor-made instead of a “one-size fits all” mechanism’.⁵²¹ Böckstiegel also emphasises the following:

The arbitrator in such cases will have to take into account both the general experience of commercial arbitration and the particularities of this kind of arbitration to shape the procedure in such a way that both the investor and the host state are provided sufficient opportunities to present their case from their rather different

⁵¹⁷ But see Malmström, above n 2 (argues that: ‘a permanent body can effectively address costs and duration. It will remove the costs of choosing the arbitrators. It would reduce the duration and costs of proceedings too.’)

⁵¹⁸ See United Nations, *Handbook on Peaceful Dispute Settlement Between States*, above n 70.

⁵¹⁹ OECD, *Improving the System of Investor–State Dispute Settlement: An Overview* (Paper presented at the symposium Co-Organised by ICSID, OECD AND UNCTAD: Making the Most of International Investment Agreement: A Common Agenda 12 December 2005) 8.

⁵²⁰ UNCTAD, ‘Investor–State Disputes: Prevention and Alternatives to Arbitration’, above n 20.

⁵²¹ Kessedjian, above n 75, 5.

backgrounds and interests in order to enable the arbitrators to come to convincing or at least adequate decisions.⁵²²

The third arguable advantage of arbitration is that the flexible and confidential arbitral procedure may reduce the costs and duration of arbitral proceedings, which, in turn, will boost efficiency in a dispute resolution process. Confidentiality also protects trade and commercial secrets, which can be considered a positive consequence of the arbitration process. As Wood observes, ‘one of the perceived advantages of arbitration is that it can be held in private’.⁵²³ In addition, confidential arbitral procedures may prevent the disputing parties from the unfavourable effects of dispute publication.⁵²⁴

3.3.1.4 The Advantages of Limited Rights to Challenge Arbitral Awards for Investor–State Disputes

The fourth benefit of the investor–State arbitration regime is that the arbitral award is final and binding, and not subject to appeal. The finality of arbitral awards has been recognised as a perceived advantage of arbitration over litigation—for example, the OECD notes that because ‘an arbitration award is binding and not subject to appeal on the merits, it has generally been seen as an advantage over judicial settlement’.⁵²⁵ In addition, Bernardini states:

The finality of arbitral awards is a basic tenet of arbitration, and this is generally held to constitute one of the reasons that international arbitration is so widespread as a method for settling disputes at the transnational level since it ensures the more expeditious and economical settlement of disputes.⁵²⁶

Wood also notes that ‘one of the greatest merits of arbitration, it is said, is speed and finality’.⁵²⁷ The UNCTAD further states: ‘International arbitration was generally perceived by foreign investors as providing an expeditious way of settling a dispute arising with the host State, thereby avoiding the dispute to linger and the costs to escalate.’⁵²⁸

3.3.1.5 The Advantages of Enforceability of Arbitral Awards for Investor–State Disputes

As examined previously (in section 3.2.5), both ICSID and non-ICSID arbitrations ensure that arbitral awards are enforceable. Per the UNCTAD, ‘recourse to arbitration was considered as efficient, as it is normally ensured that the award would be enforceable against the other party that was generally a sovereign’.⁵²⁹ In practice, UNCTAD notes:

⁵²² Böckstiegel, above n 34, 373–4.

⁵²³ Wood, above n 68, 8.

⁵²⁴ Delaney and Magraw, above n 410, 721–87.

⁵²⁵ OECD, *Improving the System of Investor–State Dispute Settlement: An Overview*, above n 519, 8.

⁵²⁶ Bernardini, above n 231, 47.

⁵²⁷ Wood, above n 68, 13.

⁵²⁸ UNCTAD, ‘Investor–State Disputes: Prevention and Alternatives to Arbitration’, above n 20, 14.

⁵²⁹ *Ibid* 15.

This is verified by experience with the ICSID Convention. Its self-contained execution mechanism has proven successful in achieving the enforcement of arbitral awards. However, the increasing amount of annulment cases shows that not all decisions are eventually enforced. A similar rate of enforcement can be found for awards rendered under the auspices of various arbitration centres or with ad hoc arbitration using the UNCITRAL arbitration rules, as long as the *New York Convention on Recognition and Enforcement of Foreign Arbitral Awards* applies.⁵³⁰

At present, an award rendered under the *ICSID Convention*, which was ratified by 154 States, is enforceable as a final judgement of the courts in every ICSID Member State.⁵³¹ Non-ICSID awards are enforceable in States that are signatories to the *New York Convention*, which was adopted by 159 States.⁵³²

3.3.1.6 The Advantages of Investor–State Arbitration in Promoting Efficiency in a Resolution of Investor–State Disputes

The overall advantages of the investor–State arbitration regime is that party autonomy, flexible and confidential arbitral procedures, and the final and binding characteristics of the arbitral award contribute to efficiency in the dispute resolution process.⁵³³ The UNCTAD states:

The choice for international arbitration to hear investor–State cases was motivated mainly by the perception that arbitration is swifter, cheaper, more flexible, and more familiar for economic operators. International arbitration was generally perceived by foreign investors as providing an expeditious way of settling a dispute arising with the host State, thereby avoiding the dispute to linger and the costs to escalate.⁵³⁴

As discussed in Chapter 2, the traditional policy rationale of the investor–State arbitration regime, especially the *ICSID Convention*, is to provide additional inducement and stimulate cross-border investment;⁵³⁵ however, as noted in the same Chapter, the effect of dispute resolution on cross-border investment is a matter of empirical evidence, which remains inconclusive and controversial.⁵³⁶

In sum, the current features of the investor–State arbitration regime have several positive aspects regarding the resolution of disputes. Investor–State arbitration depoliticises interstate disputes between capital-exporting and capital-importing States; party-appointed arbitral tribunals and flexible requirements result in disputes being resolved quickly, and the arbitral award being binding and not subject to appeal; and the

⁵³⁰ Ibid.

⁵³¹ ICSID, *Member States* (2019) <<https://icsid.worldbank.org/en/Pages/about/Member-States.aspx>>.

⁵³² UNTC, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York, 10 June 1958* (2019) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-1&chapter=22&clang=_en>.

⁵³³ For discussion about the efficiency of arbitration, see, eg, Cooter and Ulen, above n 21; Steffek, above n 29; Heiskanen, above n 75; Kessedjian, above n 75; Clyde Croft, above n 79.

⁵³⁴ UNCTAD, ‘Investor–State Disputes: Prevention and Alternatives to Arbitration’, above n 20, 14.

⁵³⁵ IBRD, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nations of Other States*, above n 293, [12].

⁵³⁶ For some empirical studies on the relationship between ISDS and FDI, see above n 313 and accompanying text.

enforcement mechanism ensures that arbitral awards are respected. Hypothetically, these elements are likely to contribute to an expedient and efficient method for resolving investor–State disputes. Therefore, this method will help stimulate a cross-border investment climate, which is a primary objective of the *ICSID Convention*.

3.3.2 The Drawbacks of the Current Investor–State Arbitration Regime in Light of Investor–State Disputes

Although there are several positive features of the international arbitration regime, it may be argued that these features also have some drawbacks. This section examines the inadequacies of investor–State arbitration regime in light of characteristics of investor–State disputes. It also explores how the current features of this regime—namely non-uniform dispute settlement regimes, party-appointed arbitral tribunals, flexible arbitral procedures, awards finality and enforcement mechanisms—are unlikely to promote accuracy and consistency in the treaty-based claims of investor–State disputes.

3.3.2.1 The Limits of Depoliticisation of the Investor–State Arbitration Regime and a Concern Regarding Forum Shopping

While the depoliticisation of investment dispute settlement is one advantage of investor–State arbitration, as previously discussed (in section 3.3.1.1), it may be argued that depoliticisation has not yet occurred. This proposition was put forward by Paparinskis in 2010. According to Paparinskis, even though the claimant is the investor (instead of the home State), the dispute remains unchanged. In addition, the subject-matter jurisdiction retains the same degree of political sensitivity. Moreover, the home State of investors may procure investment through different means, such as by ownership or control of the investor.⁵³⁷ In 2018, an empirical study on depoliticisation (in the context of the United States) by Gertz, Jandhyala and Poulsen reached similar conclusions, asserting that, in the United States context, diplomatic engagement remains influential for the current investor–State arbitration regime.⁵³⁸ This seems to confirm that the investor–State arbitration regime remains political in nature.⁵³⁹ Additionally, there is a concern that the current investor–State arbitration regime allows investors to engage in forum shopping practices (for example, by appointing different arbitrators in the two proceedings and/or by reorganising the

⁵³⁷ Martins Paparinskis, ‘Limits of Depoliticisation in Contemporary Investor State Arbitration’ (2010) 11 (4) *Select Proceedings of the European Society of International Law* 1071.

⁵³⁸ Geoffrey Gertz, Srividya Jandhyala, Lauge N Skovgaard Poulsen, ‘Legalization, Diplomacy, and Development: Do Investment Treaties De-Politicize Investment Disputes?’ (2018) 107 *World Development* 239–52.

⁵³⁹ Cf Kriebaum, ‘Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes,’ above n 504.

business without any investment activities in the host State),⁵⁴⁰ which has resulted in an abuse of the arbitration process.

3.3.2.2 The Drawbacks of Party-Appointed Arbitral Tribunals for Investor–State Disputes

While a party-appointed arbitral tribunal offers several advantages, as indicated in section 3.3.1.2, it may be argued that party-appointed arbitral tribunals have some drawbacks for investor–State disputes. The main disadvantages of party-appointed arbitral tribunals for investor–State disputes are discussed below.

First, it may be argued that an absence of permanency in ad hoc arbitral tribunals can cause inconsistent interpretations of similar facts and law. For example, Wälde notes that ‘Investment arbitration does have very limited political legitimacy. It is new. It is an outside constraint (which is always suspicious to most people instinctively anchored in tribunal attitudes). It has not built up the legitimacy that courts of the long-standing’. Wälde further observes that it has ‘[n]o element of permanence which makes people more familiar with its working which is the root of legitimacy’.⁵⁴¹ Van Harten also contends that in public law adjudication, ‘where only investors bring claims that trigger the appointments, this method of appointment seriously undermines judicial independence by foreclosing security of tenure’.⁵⁴² From the European Union perspective, Colin Brown argues that a lack of permanency is the main cause of the inconsistency problem:

[T]he ad hoc nature of a system, coupled with public law nature of the disputes under treaties concluded between sovereigns is such it fundamentally cannot provide the certainty and predictability about the core aspects of these investment protection standards that is required by all stakeholders, whether they be investors or governments or other interested parties.⁵⁴³

Second, while the ad hoc model is likely to remove the States’ political influence (as noted in section 3.3.1.2), this model may encourage polarisation among adjudicators in relation to proposed future appointments⁵⁴⁴—that is, arbitrators (who are chosen by foreign investors and States) may decide the dispute in favour of their clients (who appoint them) to be appointed in other or future disputes. There is also a concern regarding the dual role of arbitrators as counsel. Despite its advantages, as previously discussed (in section 3.3.1.2), the dual role of arbitrators as counsel may affect the independence and

⁵⁴⁰ Bernardini, above n 231, 54.

⁵⁴¹ Wälde, ‘Alternative for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution After the WTO, Authoritative treaty Arbitration or Mandatory Consolidation?’, above n 333.

⁵⁴² Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007) 169.

⁵⁴³ Colin Brown, ‘The European Union’s Approach to Investment Dispute Settlement’ (Speech delivered at the 3rd Vienna Investment Arbitration Debate, 22 June 2018) <http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157112.pdf>.

⁵⁴⁴ Kaufmann-Kohler and Potestà, ‘The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards’, above n 231, 13 [11].

impartiality of arbitral tribunals. Some commentators, such as Bernasconi-Osterwalder, Johnson and Marshall, note that the dual role of arbitrators may raise a conflict of interest.⁵⁴⁵

Third, it may be argued that the flexible composition and qualification requirements of ad hoc arbitral tribunals may affect the quality of legal reasoning and dispute outcomes. In respect to the expertise of arbitrators, Waincymer notes:

There is also the question of whether eminent arbitrators, who have developed their reputation in the field of private corporate disputes dealing primarily with contract and construction claims, are best suited to deal with non-discriminatory norms, fair dealing, and expropriation elements of international treaties together with the jurisdictional complexities as to the various international, national, and contract-based sources of law discussed in the following section. Of course, the ability of the parties to select appropriate experts enables them to deal with these concerns. However, the lack of standing for human rights proponents means that they are not part of that selection process. If human rights law is a key incidental element of the claims, the selections made might not have given enough weight to this area of expertise.⁵⁴⁶

Burke-White and von Staden also note that the ICSID tribunal lacks expertise in public law, which is required for investor–State disputes.⁵⁴⁷ Volterra observes that in some cases, ‘the State appointed an economist as its arbitrators with no legal training whatsoever’.⁵⁴⁸ Kurtz argues that ‘[t]he system of international investment law and arbitration sits uncomfortably close to a precipice’⁵⁴⁹ and suggests that ‘arbitral adjudication has the potential to alleviate this problem so long as arbitrators are attuned to the fact that they are *agents of the contracting States parties* rather than *independent trustees* of the values encapsulated by the investment treaty regime’.⁵⁵⁰

In addition to the abovementioned concerns, the particular weaknesses of party-appointed arbitral tribunals include those regarding the quality of decisions rendered by sole arbitrators, diversity deficit and the lack of a secretariat. With respect to the quality of decisions rendered by sole arbitrators, as examined previously, disputing parties can appoint a sole arbitrator to decide the dispute under the current arbitration regime. If a single arbitrator is selected, this arbitrator can determine the argument at their sole discretion—that is, without consulting with other arbitrators—and this may lead to a higher risk of

⁵⁴⁵ Nathalie Bernasconi-Osterwalder, Lise Johnson and Fiona Marshall, ‘Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel’ (Background Papers for IV Annual Forum for Developing Country Investment Negotiators, New Delhi, 27–29 October 2010).

⁵⁴⁶ Waincymer, ‘Balancing Property Rights and Human Rights in Expropriation’, above n 93, 308.

⁵⁴⁷ William W Burke-White and Andreas von Staden, ‘Private Litigation in a Public Law Sphere: The Standard of Review in Investor–State Arbitrations’ (2010) 35 *Yale Journal of International Law* 283.

⁵⁴⁸ Volterra, ‘Conclusion’, above n 187, 146.

⁵⁴⁹ Jürgen Kurtz, ‘Building Legitimacy through Interpretation in Investor–State Arbitration: On Consistency, Coherence, and the Applicable Law’ in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds) *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014) 257, 269.

⁵⁵⁰ Ibid 257 (emphasis in original).

inaccuracy and inconsistency and the lack of a chance of appeal. Another concern is the diversity deficit in the present arbitration regime. As indicated in the study by Working Group Six of the Academic Forum on ISDS, the present ISDS arbitration regime lacks geographical representation and gender diversity.⁵⁵¹ Additionally, the lack of a secretariat in the current arbitration regime (except for the PCA) may exacerbate problems of inaccuracy and inconsistency among ad hoc arbitral tribunals.⁵⁵²

3.3.2.3 The Drawbacks of Flexible Arbitral Procedures for Investor–State Disputes

While flexible arbitral procedures promote efficiency (as discussed in section 3.3.1.3), they may also create inconsistencies in dispute resolution processes, particularly in relation to the treaty-based claims of investment disputes. The main disadvantages of flexible arbitral procedures for investor–State disputes are discussed below.

First, the power of arbitral tribunals, which is constrained by party autonomy, may not suit treaty-based disputes; adjudicators may have to exceed the scope of the parties' arbitration agreement, make decisions beyond the party submission or apply the law beyond the agreement of the parties to protect public interests. Though adversarial or inquisitorial proceedings do not bind international arbitration, Brown notes that most arbitral procedures are similar to the adversarial system (which is typically used in States that are based on the common law system),⁵⁵³ rather than the inquisitorial proceeding (which is commonly used for public disputes in the civil law-based States).

Second, the flexible burden and standard of proof that allows each ad hoc tribunal to employ its approach may be unsuitable for treaty-based disputes, which may require evidence beyond that submitted by the parties. Unlike some domestic administrative courts, the main weakness of arbitral procedures is a lack of compulsory evidence-gathering powers.⁵⁵⁴ Further examination shows that the arbitral tribunal, which is selected by the party, has broad discretion to make evidentiary decisions and may modify the rules of evidence and burden of proof to suit the issues at hand, leading to the inconsistent approaches of the arbitral procedure. With regard to a distinction between the arbitral proceeding and the proceeding before the court, Van Harten notes that in the court proceeding,

The judges would adopt rules of the court to replace the various sets of rules that now govern claims, so that the court itself—guided by overarching principle laid out by the States parties to the multilateral code—can

⁵⁵¹ Bjorklund et al, 'The Diversity Deficit', above n 176.

⁵⁵² Schneider, above n 188, 106.

⁵⁵³ Chester Brown, 'Procedure in Investment Treaty Arbitration and the Relevance of Comparative Public Law' in Stephen W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 681.

⁵⁵⁴ Ibid.

address anomalies in the present system, such as the presumption of confidentiality and the ability of claimants to pick the procedural rules that apply to their claims.⁵⁵⁵

Third, because investor–State arbitration involves the State as a party as well as the host States’ public interests, this characteristic of an investment dispute raises the concern of whether the confidentiality of an arbitral proceeding is appropriate for investor–State disputes. Böckstiegel observes:

[I]n spite of the confidentiality of the procedure itself, the arbitrators have to be aware that often they are involved in a semi-public dispute settlement procedure, because the representatives of the host State will have to report back to administrative and political authorities at home in application of mandatory national law provisions. This may also lead to public interest groups and private interest groups trying to get involved.⁵⁵⁶

Other commentators note that arbitral proceedings conducted confidentially may raise concerns about accuracy, consistency and good governance in a public dispute; Wälde notes that ‘[q]uality control is also *achieved by transparency*, publication and informed and professional peer discussion’.⁵⁵⁷ Van Harten states that ‘[i]f adjudication—above all in public law—were not fully open and transparent, it would be immune from public scrutiny and matters affecting the community at large could routinely be decided in secret’.⁵⁵⁸ Mann contends that ‘[s]ecrecy in many cases as to the very existence of an arbitration, lack of access to documents, closed hearings, and, in many cases, no public release of the final or interim decisions’ has diminished the notion of ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’, which is a fundamental principle of most legal systems.⁵⁵⁹ Yannaca-Small highlights that the transparency of awards would benefit the investor–State arbitration regime in many ways: it would enhance the equality of both parties, giving both sides access to all opinions and decisions, and would expand the public characteristics of the investor–State arbitration regime.⁵⁶⁰ As noted in Chapter 1 (sections 1.4.1 and 1.4), the ISDS regime has been trending towards transparency, reflecting the awareness of public interests in ISDS disputes. In addition to the *Mauritius Convention on Transparency*, which opened for signatures on 17 March 2015, a recent empirical study conducted by Ubilava (2019) shows an improving trend in the publication of ISDS awards,⁵⁶¹ which could alleviate inaccuracy and inconsistency in the present ISDS regime.

⁵⁵⁵ Van Harten, *Investment Treaty Arbitration and Public Law*, above 544, 159.

⁵⁵⁶ Böckstiegel, above n 34, 373–4.

⁵⁵⁷ Wälde, ‘Alternative for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution After the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?’, above n 333, 77 (emphasis added).

⁵⁵⁸ Van Harten, *Investment Treaty Arbitration and Public Law*, above n 544, 159.

⁵⁵⁹ Mann, ‘Transparency and Consistency in International Investment Law: Can the Problems be Fixed by the Tinkering?’ above n 327, 219.

⁵⁶⁰ Katia Yannaca-Small, ‘Improving the System of Investor–State Dispute Settlement: the OECD Government’s Perspective’ in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) 227.

⁵⁶¹ See Ubilava, above n 174.

3.3.2.4 The Drawbacks of Limited Rights to Challenge Arbitral Tribunal Awards for Investor–State Disputes

A fundamental criticism of current investor–State arbitration is the lack of review mechanisms in place. This, in turn, causes concerns regarding inaccuracies and inconsistencies in interpreting and applying public international law to similar facts and dispute outcomes. As examined previously (in section 3.2.4), ICSID annulment committees are unable to reverse or modify arbitral tribunal decisions, or to establish formal legal precedents; this allows for inaccuracy and inconsistency determined to stand. This constraint of the current regime has been recognised by several commentators.⁵⁶² Among others, Franck argues that ‘[t]here is no uniform mechanism to correct inconsistent decisions. A patchwork of mechanisms was inherited from international commercial arbitration, but these neither permit review of the merits nor correction of legal errors. Instead, there are narrow options to review awards to address procedural deficiencies’.⁵⁶³ However, the drawback of limited rights to challenge arbitral tribunal awards in the treaty-based claims of investor–State disputes should be distinguished from the limited rights to challenge such awards in contract-based claims, which may require a lower degree of consistency.⁵⁶⁴ As Mann notes, ‘Whilst the waiver of a right of appeal may be appropriate in arbitration rules applicable to private commercial dispute, such a waiver is not appropriate in arbitrations where public interests are at stake’.⁵⁶⁵

3.3.2.5 The Drawbacks of Recognition and Enforcement Mechanisms for Investor–State Disputes

Another disadvantage of the current investor–State arbitration regime is the non-uniform nature of arbitral award enforcement. As noted earlier, in the ICSID framework, awards rendered by ICSID arbitral tribunals cannot be challenged outside the *ICSID Convention*,⁵⁶⁶ while the execution of non-ICSID awards must be done through the *New York Convention*. In the latter case, the award may be refused enforcement by domestic courts as per article V of the *New York Convention*.⁵⁶⁷ Some commentators note that national courts may be biased or influenced by States and that their power of review may be impractical and uncertain. For example, Wälde observes that

While the New York Convention standards listed in Art 5 seem to reduce the discretion of domestic courts, there are ample facilities for a more intensive control of investment awards by courts, based on using the

⁵⁶² For some discussions about a lack of review mechanisms in the investor–State arbitration regime, see above n 187 and accompanying text.

⁵⁶³ Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’, above n 147.

⁵⁶⁴ *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union*, UN Doc A/CN.9/WG.III/WP.145 (12 December 2017) annex [28]–[30].

⁵⁶⁵ Howard Mann, ‘Revision of the UNCITRAL Arbitration Rules: Good Governance and the Rule of Law: Express Rules for Investor–State Arbitration Required’ (International Institute for Sustainable Development (IISDS), September 2006) 13.

⁵⁶⁶ *ICSID Convention* art 53(1).

⁵⁶⁷ *New York Convention* art V.

limitations of the required consent to scrutinize the way tribunals apply relevant law and by an extensive notion of public policy and arbitrability.⁵⁶⁸

Legum also notes that the ‘national-court review of arbitration awards against foreign states undermines the effectiveness of arbitration as an institution. If an appellate system displaced national court review in cases subject to its jurisdiction, that development would be notable in and of itself’.⁵⁶⁹ Some others point out concerns regarding the inconsistent approaches of standards that national courts should adopt (de novo review or deference review) when reviewing awards rendered by an international arbitral tribunal.⁵⁷⁰ Although the available resources for the statistical activities of domestic courts are quite limited, it is noted that the role of these courts is narrow because in the context of ICSID awards, the *ICSID Convention* restrains them from reviewing ICSID awards⁵⁷¹; in the context of non-ICSID awards, there are few instances of set aside on the basis of public policy as stipulated in article V of the *New York Convention*.⁵⁷²

3.3.2.6 Concerns Regarding Costs and Time of Arbitral Proceedings

As discussed in Chapter 1 (section 1.2.2), in theory, arbitration is likely to resolve disputes in an efficient manner. However, in practice, the costs and duration of arbitration processes be cause for concern. As the UNCTAD (2010) notes: ‘The costs for conducting arbitration procedures are extremely high, with legal fees amounting to an average of 60 per cent of the total costs of the case.’⁵⁷³ The UNCTAD indicates that the average timeframe for this process ranged from three to four years,⁵⁷⁴ and that the increased time allows both parties ‘make use of every procedural possibility to avoid the enforcement of awards’.⁵⁷⁵ Currently, the cost and duration of arbitral proceedings is an issue under discussion at the UNCITRAL.⁵⁷⁶

To conclude, there are certain drawbacks to international arbitration when dealing with investor–State disputes. First, it may be argued that the depoliticisation of investment dispute settlement has not yet occurred. Second, party-appointed arbitral tribunals lack permanency. Their flexible structure and qualification requirements may also affect the quality of legal reasoning and dispute outcomes. Third, the arbitral tribunal, which is selected by the party, has the discretionary power to make evidentiary decisions, and may modify the rules of evidence and burden of proof to suit the issues at hand. Confidentiality may

⁵⁶⁸ Wälde, ‘Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution After the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?’, above n 333, 140.

⁵⁶⁹ Legum, ‘Visualizing an Appellate System’, above n 149, 65.

⁵⁷⁰ Anthea Roberts and Christina Trahanas, ‘Judicial Review of Investment Treaty Awards: *BG Group v Argentina*’ 108 (4) (2014) *The American Journal of International Law* 750, 750.

⁵⁷¹ See *ICSID Convention* art 54.

⁵⁷² See *New York Convention* art V.

⁵⁷³ UNCTAD, ‘Investor–State Disputes: Prevention and Alternatives to Arbitration,’ above n 20, 17.

⁵⁷⁴ Ibid 18.

⁵⁷⁵ Ibid.

⁵⁷⁶ See *Possible Reform of Investor-State Dispute Settlement (ISDS)—Cost and Duration*, UN Doc A/CN.9/WG.III/WP.153, above n 63, 2.

raise concerns about accuracy, consistency and good governance in a dispute that involves States. Fourth, the arbitral award is final and binding without an appellate review, which means it has certain limitations in terms of promoting consistency. Fifth, the enforcement mechanisms of arbitral awards are not uniform. Finally, the costs and duration of arbitration processes tend to increase. These drawbacks fail to promote accuracy and consistency and give cause for concern regarding efficiency in the current investor–State arbitration regime.

3.4 Synthesising Lessons That Can Be Learned from the Current Investor–State Arbitration Regime for the Further Development of a Multilateral Investor–State Dispute Settlement Regime

An analysis of both sides of these arguments reveals that there are positive and negative lessons that can be learned from the current investor–State arbitration regime in settling investor–State disputes, which will be useful for a multilateral reform of the ISDS regime. Based on the current features of international arbitration, examined in section 3.2, this Thesis argues that international arbitration may be better suited to disputes that prefer efficiency, such as private commercial disputes or contract-based disputes that do not affect the third party. At the same time, the current features of international arbitration may not be suitable for disputes that have a greater effect on the third party and require accuracy and consistency of interpretation and the application of public law or public international law.

Investor–State disputes are complex because they are hybrids of contract-based claims and treaty-based claims. They also concern claims that are filed by one or more foreign investors against one or more host States under contract law, investment treaty law and other sources of public international law. They concern a conflict between the private interests of one or more investors and the public interests of the host State. In the context of treaty-based claims, it may be necessary for arbitrators to ascertain a State’s objectives, weigh values and interests, and draw conclusions regarding the effect of a State’s measures on foreign investments. The significance of investment disputes requires a higher degree of consistency; however, the current features of arbitration—party autonomy, confidentiality and finality—cannot sufficiently promote accuracy and consistency in the interpretation of treaty norms and dispute outcomes. Based on the above characteristics, this Thesis supports the view that it is possible to reform the current investor–State arbitration regime without abolishing it and most of the benefits it provides—for example, an international neutral, efficient and effective forum, party autonomy and flexible arbitral procedures that can be framed by the disputing parties in a specific case. In particular, accuracy and consistency could be improved by incorporating some litigation features into the current investor–State arbitration regime. This goal can be reached by considering several key areas.

The first key area is the institutional aspects of the tribunal in the first instance. The lesson learned from the current investor–State arbitration regime shows that an ad hoc arbitral tribunal provides efficiency to investors and States, and also produces inconsistencies. In the current arbitration regime, an arbitral tribunal is established for each dispute, and the composition, nationality and qualification requirements of investment tribunals are based on party agreement. In the absence of agreement, these requirements are subject to arbitral rules that are chosen by the parties, and these rules are not uniform. Because the disputing parties establish an ad hoc arbitral tribunal at any time or in any venue in which a dispute arises and under flexible requirements (such as those relating to the composition, nationality and qualification of arbitral tribunal members), this feature is likely to promote efficiency in a dispute resolution process. Further, it allows the parties to appoint arbitrators who suit the specific characteristics and demands of each case. The impartiality and independence requirements continue to guarantee that the dispute will be fairly decided.

Conversely, it is likely that ad hoc arbitral tribunals, which lack permanence and independence, will give rise to inconsistencies in the interpretations of similar facts and laws. These flexible composition and qualification requirements may also affect the quality of dispute outcomes. Although the dual role of arbitrators as counsel gives arbitrators expertise and experience, this feature may also affect the independence and impartiality of arbitral tribunals because it can raise a conflict of interest. For example, party-appointed arbitrators may decide the present case in favour of their clients (either investors or States), rather than focusing on the dispute outcome being correct under the law, to obtain appointments (as arbitrators and/or counsel) in future and/or other cases. This dual role of arbitrators may be of less concern for contract-based disputes because such a private dispute does not directly affect any third party. Unlike private commercial disputes, investor–State disputes are hybrids of contract-based claims and treaty-based claims. Therefore, the party-appointed arbitral tribunal ought to be preserved to a certain degree to maintain efficiency in a multilateral ISDS regime reform. However, it may be useful to incorporate certain features of public adjudication to enhance the accuracy and consistency of the treaty-based claims of investor–State disputes.

The second key area is the arbitral procedure. The lesson learned from the current investor–State arbitration regime suggests that a flexible arbitral tribunal is efficient for investors and State disputes, but also leads to inconsistency. Under the current arbitration regime, procedures are based on party agreement. In the absence of agreement, arbitral procedures are subject to arbitral rules that the parties choose, and these procedures are not uniform. In the absence of mandatory standards, tribunals can determine these procedures (such as the formulation of issues that must be decided), the general rules of evidence, the confidentiality of proceedings and the publication of arbitral awards for each case. This will provide

efficiency and be beneficial for commercial disputes that concern the conflicts of private interests. However, because an ad hoc tribunal can employ its approach in an individual case, this feature may not be suitable for treaty-based disputes, which may require a higher degree of consistency. On account of the nature of investor–State disputes, this study suggests that the flexible and confidential arbitral procedures should be preserved to a certain degree to maintain efficiency in a new, multilateral ISDS regime. However, it may be useful to incorporate certain features of public adjudication to enhance the accuracy and consistency of the treaty claims of investor–State disputes.

The other two key areas are finality, and recognition and enforcement of arbitral awards. Under the current investor–State arbitration regime, the arbitral award is final and binding to protect party autonomy. While it is likely that this helps promote efficiency, it is unlikely that it also sufficiently encourages consistency. Because investor–State disputes are hybrids of contract-based disputes and treaty-based disputes, the finality ought to be preserved to a certain degree to maintain efficiency within a multilateral ISDS regime. However, it may be useful to incorporate certain features of public adjudication to enhance the accuracy and consistency of the treaty-based claims of investor–State disputes. Another key area is the recognition and enforcement of awards. The current investor–State arbitration regime shows that the enforcement mechanism is not uniform. Notably, in the case of non-ICSID awards, domestic courts can refuse to enforce an award, and the national courts’ review powers remain impractical and uncertain—although infrequently used in practice. This issue should be addressed in a multilateral ISDS regime reform to enhance the accuracy and consistency of the enforcement mechanisms of investor–State disputes.

Finally, it is necessary for the current investor–State arbitration regime to provide valuable lessons for a multilateral ISDS regime reform. An ad hoc arbitral tribunal, flexible proceedings, finality and the enforcement of arbitral awards ensure efficiency in dispute resolution processes. However, these features may not be adequate for promoting accuracy and consistency in investor–State disputes, which have certain special characteristics, as identified above. Therefore, it is recommended that alternative options to reconcile efficiency with accuracy and consistency in a multilateral ISDS regime reform should be further explored. The key to attaining this goal is through considering several key areas: the institutional aspects of the tribunal in the first instance, arbitral procedure, the finality of an arbitral award, and the recognition and enforcement of this award.

3.5 Conclusion

This Chapter has argued that the current features of investor–State arbitration may be used for a multilateral reform of the investor–State dispute settlement regime to serve the proposed policy goal of reconciling efficiency with consistency. To reach this conclusion, this Chapter first highlighted the general

characteristics and critical features of investor–State arbitration—namely that the parties to a dispute can present disputes and evidence to an arbitral tribunal appointed by them. Arbitral procedures may be flexible and conducted in a confidential manner, with awards being both binding and enforceable. These elements have contributed to an expedient, private and efficient method for resolving investor–State disputes. At the same time, these features constrain adjudicators from developing consistent interpretation and application of investment treaty norms in line with the rule of law. To balance efficiency with accuracy and consistency in investor–State dispute resolution processes, this Thesis argues that the current investor–State arbitration regime can be reformed without abolishing the current regime and most of the benefits it provides, such as party autonomy, flexibility, finality and enforceability. In particular, accuracy and consistency can be improved by incorporating some litigation features into the current investor–State arbitration regime. The key to achieving this goal lies in focusing on several areas, particularly the institutional aspects of the tribunal in the first instance, arbitral procedure, the finality of an arbitral award, and the recognition and enforcement of this award. Ultimately, the lessons learned from the current regime added impetus and insight for the ongoing reform of a multilateral investor–State dispute settlement regime.

CHAPTER 4:

LESSONS THAT CAN BE LEARNED FROM THE WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT SYSTEM FOR THE FURTHER DEVELOPMENT OF A MULTILATERAL INVESTOR–STATE DISPUTE SETTLEMENT REGIME

4.1 Introduction

Chapter 3 demonstrated how the current investor–State arbitration regime is likely to promote efficiency in relation to contract-based claims, but is less effective in promoting accuracy and consistency in treaty-based claims. It also argued that it may be useful to incorporate certain features of public adjudication to enhance the accuracy and consistency of treaty-based claims as a policy goal. Based on the results presented in Chapter 3, this Chapter uses a comparative method, taking the World Trade Organization dispute settlement system as a model of public adjudication to develop an alternative solution for reforming the multilateral investor–State dispute settlement regime.⁵⁷⁷ The research questions addressed in this Chapter involve the extent to which current features of the World Trade Organization model may be adopted for a multilateral reform of the investor–State dispute settlement regime. Hence, the research sub-questions are as follows. How does the World Trade Organization litigation ordinarily operate to promote accuracy and consistency, which then evolve towards efficiency in international trade jurisprudence? What are the benefits and limitations of the World Trade Organization model in light of investor–State disputes? To what extent might features of the World Trade Organization model be used for a multilateral investor–State dispute settlement regime reform?

This Chapter begins with an overview of general characteristics and key features of the World Trade Organization dispute settlement system, including how it promotes accuracy and consistency, which then leads to efficiency in the international trade system. The benefits and limitations of the World Trade Organization litigation model are considered in light of the characteristics of investor–State disputes. Based on the benefits and limitations identified, it is argued that although the entire process of the World Trade Organization litigation model may not suit the characteristics of investor–State disputes, some features of the model can be usefully incorporated into the investor–State arbitration regime to improve its capability by promoting accuracy and consistency, which then evolve towards efficiency within the international investment system. The lessons learned from the World Trade Organization litigation model

⁵⁷⁷ The rationales for the comparative legal studies and model selection were described in the Introduction of the Thesis (section II).

may well contribute to a multilateral reform of the investor–State dispute settlement regime that is currently under discussion internationally.

4.2 Overview of General Characteristics and Key Features of the World Trade Organization Dispute Settlement System

As noted in Chapter 1, the World Trade Organization (WTO) dispute settlement mechanism is a multilateral trade dispute resolution system based on litigation theory,⁵⁷⁸ with an objective to provide ‘security and predictability to the multilateral trading system’.⁵⁷⁹ This section examines how the WTO dispute settlement system operates to resolve the interstate trade dispute with the purpose of illustrating its contribution to accuracy and consistency, which then evolve towards efficiency in international trade jurisprudence. The WTO system includes the following features: it has compulsory jurisdiction over interstate trade disputes emerging under the *WTO Agreements*; the WTO panel resolves the disputes under a uniform and transparent set of procedural rules governed by public international law; the WTO Appellate Body can review the panel’s legal findings and conclusions; the ruling of the WTO Appellate Body tends to have a persuasive precedential value; and the rulings of the panel and/or Appellate Body are enforced through a uniform enforcement mechanism. These features represent the characteristics of the multilateral dispute settlement system, which stands in contrast to the investor–State arbitration regime examined in Chapter 3.

4.2.1 General Characteristics of the World Trade Organization Dispute Settlement System

As distinguished from the investor–State arbitration regime, the WTO dispute settlement system is a uniform dispute settlement system and used for resolving interstate disputes arising from the *WTO Agreements*, which is public international law. Even though the panel and the Appellate Body deal with public international law, they are not authorised by the *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)* to ‘add or diminish the rights and obligations provided in the *WTO Agreements*’.⁵⁸⁰

Because this system was established and conducted under the auspices of the WTO, which is an international governmental organisation, the system has been provided with institutional support. The WTO dispute settlement system is organised into organ systems (including the panel, the Appellate Body, the WTO Secretariat, arbitrators, independent experts, specialised institutions, the council and the office

⁵⁷⁸ Ehlermann views the WTO dispute settlement system as a ‘quasi-judicial system’ rather than a ‘judicial system’, see Claus-Dieter Ehlermann, ‘Six Years on the Bench of the “World Trade Court”’ (2002) 36 (4) *Journal of World Trade* 605.

⁵⁷⁹ *DSU* art 3.2.

⁵⁸⁰ *Ibid* art 19.2.

of the Director-General) and governed by the Dispute Settlement Body, which is a political organ and consists of all the WTO members.⁵⁸¹ The authorities of the Dispute Settlement Body encompass the power to establish panels for considering cases, to adopt or reject the panels or the Appellate Body's reports, and to monitor the implementation of the rulings and recommendations.⁵⁸² Regarding the dispute settlement processes, the WTO dispute resolution procedure consists of four stages: first, the consultation stage; second, the panel process; third, the appeal process; and fourth, the enforcement process (including implementation of adverse rulings, compensation and/or bilateral retaliation by the winning WTO member State against the losing member State delaying implementation).

As is apparent from the above examination, these characteristics of the WTO dispute settlement system are distinct from those of the investor–State arbitration regime in terms of international character, applicable procedural law, jurisdiction, structure and the enforcement system. Arguably, these general attributes of the WTO dispute settlement system are more likely to support accuracy and consistency in international trade jurisprudence than the characteristics of the current investor–State arbitration regime, which is not uniform and lacks institutional assistance.

4.2.2 The Consultation Stage under the World Trade Organization Dispute Settlement System

Although the WTO dispute settlement system is a formal dispute resolution system, it provides consultation before the commencement of a panel,⁵⁸³ which is similar to an amicable settlement provided in the investor–State arbitration regime, as examined in Chapter 3 (section 3.2.2). The rationale of the consultation stage is to encourage WTO members to resolve their disputes on an amicable basis.⁵⁸⁴ As Schuchhard explains, the consultation is 'informal, party-controlled and settlement-oriented, rather than a formalized transition stage on the way to panel proceedings'.⁵⁸⁵ Based on this characteristic, Bernauer, Elsig and Pauwelyn assert that 'consultations remain the cornerstone of dispute settlement'.⁵⁸⁶ From the perspective of Fried, a former Chair of the WTO Dispute Settlement Body, consultation is an essential element that contributes to the efficiency of the WTO dispute settlement system.⁵⁸⁷

⁵⁸¹ Asif H Qureshi, *The World Trade Organization: Implementing International Trade Norms* (Manchester University Press, 1996) 97–107.

⁵⁸² See *DSU* art 2.1 (Notably, the WTO is a regime of positive consensus, so effectively the Dispute Settlement Body has no real role other than symbolic. It would be a major political and/or diplomatic incident if rulings and recommendations were not adopted).

⁵⁸³ *DSU* art 4.1.

⁵⁸⁴ WTO, *The Process — Stages in a Typical WTO Dispute Settlement Case: 6. 2 Consultations* <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm>.

⁵⁸⁵ Christiane Schuchhardt, 'Consultations' in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) vol 1, 1119, 1204.

⁵⁸⁶ Bernauer, Elsig and Pauwelyn, above n 56, 486.

⁵⁸⁷ Jonathan T Fried, 2013 In WTO Dispute Settlement: Reflections from the Chair of the Dispute Settlement Body <https://www.wto.org/english/tratop_e/dispu_e/jfried_13_e.htm>.

4.2.3 The World Trade Organization Panel and Procedure

If a dispute cannot be resolved through a consultation, the complainant may request adjudication by the WTO panel,⁵⁸⁸ which is a formal process.⁵⁸⁹ The main function of the WTO panel is to adjudicate disputes, as stated by the WTO panel for the *United States—Section 301*: ‘[p]art of our task in accordance with Article 11 of the *DSU* is to make factual findings.’⁵⁹⁰ This section examines key institutional aspects of the WTO panel and some key elements of the panel procedure to illustrate how these features have contributed to accuracy and consistency, which then evolve towards efficiency in the WTO dispute settlement system. This examination highlights the fact that although the WTO panel is appointed on an ad hoc basis (similar to arbitral tribunals), institutional aspects of the WTO panel and procedure are based on uniform requirements under the *DSU*, which is public international law. If there is an insufficiency of any procedural aspect, the WTO panel has applied principles established by the Appellate Body to the panel procedure. These uniform institutional aspects and procedure have delivered accuracy and consistency in the WTO dispute settlement system.

4.2.3.1 Institutional Aspects of the World Trade Organization Panel

This section examines six key institutional aspects of the WTO panel (including establishment, composition, nationality, qualification, impartiality and independence, and the panel secretariat) with the purpose of illustrating its contribution to accuracy, consistency and efficiency in the WTO system in comparison with the institutional aspects of arbitral tribunals examined in Chapter 3. This examination indicates that although the WTO panel is established for a specific dispute, its institutional requirements that are mandated by the *DSU* are more likely to promote accuracy and consistency in the WTO system than are the flexible requirements of arbitral tribunals under the arbitration regime.

While an investment arbitral tribunal is established by an agreement between the parties to the dispute, the WTO panel must be established through a formal process. The establishment process begins with the request for the WTO panel (which must be initiated by member States) to the Dispute Settlement Body (which consists of all WTO members).⁵⁹¹ Subsequently, the WTO Secretariat nominates the panellists⁵⁹² (who may be selected from the *Indicative List of Governmental and Non-Governmental Panelists*)⁵⁹³ to

⁵⁸⁸ *DSU* art 4.7.

⁵⁸⁹ Werner Zdouc, ‘The Panel Process’ in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) vol 1, 1231, 1231–75.

⁵⁹⁰ Panel Report, *United States — Sections 301-310 of the Trade Act of 1974*, WTO Doc WT/DS152/R (22 December 1999) (*‘United States—Section 301’*) [7.14].

⁵⁹¹ *DSU* art 6.1.

⁵⁹² *Ibid* art 8.6.

⁵⁹³ *Ibid* art 8.4; Proposed *Nominations for the Indicative List of Governmental and Non-Governmental Panelists*, WTO Doc WT/DSB/W/640 (26 March 2019).

the disputing parties. If the parties disagree, the *DSU* authorises the Director-General to appoint appropriate panellists on request of the disputing parties.⁵⁹⁴ This analysis shows that although the WTO panels are selected on an ad hoc basis, similar to ad hoc arbitral tribunals, establishment processes are different—that is, establishing an WTO panel for deciding a particular dispute does not only involve the disputing parties, but also the WTO organs. Arguably, this feature of the WTO panel, which is considered in more depth below, may provide a more neutral forum than the current investor–State arbitration regime.

In addition, the *DSU* imposes stricter requirements regarding the composition of the WTO panel than do arbitral rules. The *DSU* requires that a panel must meet the following requirements: ‘Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists.’⁵⁹⁵ Compared with the composition requirement of the arbitral tribunal, which depends on the agreement of the parties or arbitral rules, this requirement under the WTO ensures that there is a minimum of three WTO panellists; three is more encompassing than the compositional requirements under the ICSID and non-ICSID arbitrations, in which the tribunal may consist of a sole arbitrator (see Chapter 3, section 3.2.3.1).

The nationality requirements of the WTO panel are also stricter than arbitral rules. Article 8.3 of the *DSU* states: ‘[C]itizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 10 *shall not serve* on a panel concerned with that dispute unless the parties to the dispute agree otherwise.’⁵⁹⁶ In the case of trade disputes under the WTO that involve developed and developing States, article 8.10 of the *DSU* further states that ‘[w]hen a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panellist from a developing country Member’.⁵⁹⁷ In an arbitral tribunal, the nationality of arbitrators depends on each party’s agreement; this Thesis takes the view that although this nationality requirement is not mandatory, the nationality requirement of the WTO panel ensures that trade disputes are decided in a fairer manner than the requirement under arbitral rules.

Compared with the various and flexible qualification requirements of the arbitral tribunal, the qualification requirements of the WTO panel are stricter. The *DSU* requires that WTO panels be well qualified. Article 8.1 states:

Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a

⁵⁹⁴ *DSU* art 8.7.

⁵⁹⁵ *Ibid* art 8.5.

⁵⁹⁶ *Ibid* art 8.3 (emphasis added).

⁵⁹⁷ *Ibid* art 8.10.

contracting party to *GATT* [*General Agreement on Tariffs and Trade*]1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.⁵⁹⁸

In addition, article 8.2 of the *DSU* requires that panel members have ‘a sufficiently diverse background and a wide spectrum of experience’.⁵⁹⁹ Importantly, as noted previously, the WTO Secretariat maintains the *Indicative List of Governmental and Non-Governmental Panelists* who are regularly proposed by WTO members.⁶⁰⁰ These WTO panel requirements may ensure higher quality of legal reasoning and dispute outcomes than the flexible requirements of arbitral tribunals in the current investor–State arbitration regime.

Similar to the arbitral tribunal, the WTO panel must be impartial and independent. In the context of the WTO, article 8.2 states: ‘Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.’⁶⁰¹ In addition, article 8.9 states: ‘[P]anellists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.’⁶⁰² This Thesis takes view is that both the current investor–State arbitration regime and the WTO dispute settlement system require adjudicators to be impartial and independent; however, since arbitrators also act as lawyers and counsel, this may raise concerns about the arbitral tribunal’s independence and impartiality compared with the WTO panel.

Unlike the current investor–State arbitration regime, the WTO panel is supported by the Secretariat. As provided in article 27.1 of the *DSU*, the duties of the WTO Secretariat include ‘assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and ... providing secretarial and technical support’.⁶⁰³ From the perspective of a former Chair of the WTO Dispute Settlement Body, institutional support from the Secretariat is one essential element of the success of the WTO dispute settlement system.⁶⁰⁴ In contrast, the lack of a secretariat in the investor–State arbitration regime—except for the Permanent Court of Arbitration (PCA)—raises concerns about the accuracy and consistency of investor–State jurisprudence.

⁵⁹⁸ Ibid art 8.1.

⁵⁹⁹ Ibid art 8.2.

⁶⁰⁰ Ibid art 8.4.

⁶⁰¹ Ibid art 8.2.

⁶⁰² Ibid art 8.9.

⁶⁰³ Ibid art 27.1. See also *Rule of Conduct for Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DSB/RC/1 (11 December 1996).

⁶⁰⁴ Fried, above n 589, [3].

In sum, the institutional requirements of WTO panels are more consistent than those of the arbitration regime. Although WTO panels are not permanent bodies, they are constituted under a uniform process. The composition, nationality, qualification, impartiality and independence requirements of WTO panels are subject to more uniform and strict rules than are arbitral rules. In addition, the WTO Secretariat provides continuity and consistency between panels. Thus, it may be considered that the institutional requirements of WTO panels are a factor that contributes to accuracy and consistency in the WTO system.

4.2.3.2 The World Trade Organization Panel Procedure

Similar to arbitral procedures, the function of the WTO panel involves a review of both legal and factual matters of interstate trade disputes occurring under the *WTO Agreements*. The panel proceedings include several stages, beginning with filing written pleadings and ending with issuing final reports.⁶⁰⁵ In this section, four critical aspects of panel procedures (analogous to arbitral proceedings) are examined with the purpose of illustrating their contribution to accuracy, consistency and efficiency in a dispute resolution process: first, the powers of the WTO panel to formulate issues to be decided; second, burden of proof and evidence; third, confidentiality and public participation in WTO panel proceedings; and fourth, the timeframe of panel proceedings. The examination indicates that the *DSU* determines the panel procedure. In the absence of any procedural aspects under the *DSU*, the WTO panels have applied principles established by the Appellate Body to their procedures. Accordingly, the WTO panel procedure is more consistent than that of arbitral procedures.

In the WTO panel procedure, the WTO panel can only address those claims that address resolving the matter under dispute. Article 11 of the *DSU* merely provides that the panels have the functions ‘to assist the Dispute Settlement Body in discharging its responsibilities under this Understanding and the covered agreements’,⁶⁰⁶ but does not stipulate whether the WTO panel must decide all claims raised by the parties. With respect to this issue, the Appellate Body in the *United States—Woven Wool Shirts and Blouses* determined that ‘Nothing in this provision or in previous *GATT* practice requires a panel to examine all legal claims made by the complaining party. Previous *GATT* 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues’.⁶⁰⁷ The judicial economy established by the Appellate Body of *United States—Woven Wool Shirts and Blouses* has been reaffirmed by the Appellate Body of

⁶⁰⁵ *DSU* art 12.

⁶⁰⁶ *Ibid* art 11.

⁶⁰⁷ Appellate Body Report, *United States — Measure Affecting Imports of Woven Wool Shirts and Blouses from India* WTO Doc WT/DS33/AB/R, AB-1997-1 (25 April 1997) (*‘United States — Wool Shirts and Blouses’*) 18.

Canada—Periodicals.⁶⁰⁸ It may be observed that the WTO panel has a right to apply the principle of judicial economy as established by the WTO Appellate Body, whereas the power of arbitral tribunals (as discussed in section 3.2.3.2) is set by the arbitration agreement or the applicable arbitration law, which may vary.

As with arbitral procedures, the burden of proof is a crucial issue in WTO panel proceedings, since it decides which party is responsible for proving what in litigation processes. As noted by Matsushita, the burden of proof can have ‘a decisive factor effect on the outcome of litigation’.⁶⁰⁹ Although the *DSU* rarely addresses the burden of proof and evidence, the following examples demonstrate that WTO panels are likely to follow the ruling established by the Appellate Body regarding the principle of *onus probandi actori incumbi*, the principle of cooperation and equity, presumption, adverse inference and standards of review. Accordingly, the burden of proof and evidence in WTO panel proceedings is likely to be more consistent than arbitral processes because arbitral tribunals are likely to take ad hoc approaches in each case.

As with arbitral tribunals and most international adjudications, the WTO panel and the Appellate Body accept the principle of *onus probandi actori incumbi* (or that the burden of proof lies with a party making an allegation of fact).⁶¹⁰ Although the *DSU* does not stipulate which party in the WTO proceedings has the burden of proof, the Appellate Body of *United States—Woven Wool Shirts and Blouses* established: ‘It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact whether the claimant or the respondent, is responsible for providing proof thereof.’⁶¹¹ In 1999, the panel for the *United States—Section 301 Trade Act* further stated that the ‘prima facie case will stand unless sufficiently rebutted by the other party’.⁶¹²

In the context of the WTO, the principle of *onus probandi actori incumbi* could be relaxed when the evidence is insufficient. Article 13.1 of the *DSU* requires the WTO member to ‘respond promptly and fully to any request by a panel for information as the panel considers necessary and appropriate’.⁶¹³ The *DSU* also provides for the presumptions (the circumstance that certain facts are not required to be proved) in article 3.8: ‘This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members’ parties to that covered agreement, and in such cases, it shall be up to the

⁶⁰⁸ Appellate Body Report, *Canada — Certain Measures Concerning Periodicals*, WTO Doc WT/DS31/AB/R, AB-1997-2 (30 June 1997) (‘*Canada — Periodicals*’) 13.

⁶⁰⁹ Matsushita, ‘The Dispute Settlement at the WTO: The Appellate Body-Assessment and Problems’, above n 193, 516.

⁶¹⁰ See Bin Cheng, above n 391.

⁶¹¹ Appellate Body Report, *United States — Woven Wool Shirts and Blouses*, WTO Doc WT/DS33/AB/R, 14.

⁶¹² Panel Report, *United States — Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (27 January 2000) [7.15].

⁶¹³ *DSU* art 13.

Member against whom the complaint has been brought to rebut the charge.’⁶¹⁴ If the presumption is established, the defaulting party has the burden to refute that presumption. In the context of the WTO, the Appellate Body in the *United States—Woven Wool Shirts and Blouses* further clarified that the presumption only applies in violation cases.⁶¹⁵ This principle has been endorsed and applied consistently in later cases,⁶¹⁶ with the Appellate Body reaffirming that ‘such a presumption would be inconsistent with the rules on the burden of proof because it would prematurely shift the burden of proof to the defending party’.⁶¹⁷

As to the inherent powers of arbitral tribunals,⁶¹⁸ WTO panels have applied adverse inferences, but more consistently than arbitral tribunals. As discussed in Chapter 3, adverse inference refers to a situation wherein the tribunal deduces facts from other facts.⁶¹⁹ This applies when a party has relevant evidence within its control and fails to produce it.⁶²⁰ Article 13.1 of the *DSU* provides that ‘each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate’,⁶²¹ but does not stipulate the panel’s power to hold the authority to draw adverse inferences. The Appellate Body of *Canada—Aircraft* filled the gap by establishing that the panel shall have the authority to derive adverse inferences if the WTO member denies granting information requested as follows:

The *DSU* does not purport to state in what detailed circumstances inferences, adverse or otherwise, may be drawn by panels from infinitely varying combinations of facts. Yet, in all cases, in carrying out their mandate and seeking to achieve the ‘objective assessment of the facts’ required by Article 11 of the *DSU*, panels routinely draw inferences from the facts placed on the record. The inferences drawn may be inferences of fact: that is, from fact A and fact B, it is reasonable to infer the existence of fact C. Or the inferences derived may be inferences of law: for example, the ensemble of facts found to exist warrants the characterization of a ‘subsidy’ or a ‘subsidy contingent ... in fact ... upon export performance’. The facts must, of course, rationally support the inferences made, but inferences may be drawn whether or not the facts already on the

⁶¹⁴ Ibid art 3.8.

⁶¹⁵ Appellate Body Report, *United States — Woven Wool Shirts and Blouses*, WTO Doc WT/DS33/AB/R, 13.

⁶¹⁶ See, eg, Panel Report, *Japan — Alcoholic Beverages II*, WTO Doc WT/DS8/R, WT/DS10/R, WT/DS11/R (11 July 1996) (*‘Japan—Alcoholic Beverages II’*) [6.28].

⁶¹⁷ Appellate Body Report, *Korea—Taxes on Alcoholic Beverages*, WTO Doc WT/DS75/AB/R; WT/DS84/AB/R AB-1998-7 (18 January 1999) [156].

⁶¹⁸ See, eg, Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2nd ed, Sweet & Maxwell, 2007) [650]; Martins Paparinskis, ‘Inherent Powers of ICSID Tribunals: Broad and Rightly So’ in Ian A Laird and Todd J Weiler (eds) *Investment Treaty Arbitration and International Law* (JurisNet LLC, 2012).

⁶¹⁹ Matsushita, ‘The Dispute Settlement at the WTO: The Appellate Body-Assessment and Problems’, above n 193, 517.

⁶²⁰ David Palmeter and Petros C Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge University Press, 2nd, 2004) 118–20.

⁶²¹ *DSU* art 13.

record deserve the qualification of a *prima facie* case. The drawing of inferences is, in other words, an inherent and unavoidable aspect of a panel's basic task of finding and characterizing the facts making up a dispute.⁶²²

Matsushita emphasises that ‘it is significant that the Appellate Body clarified that the principle of negative inference applied to the dispute settlement process at the WTO’.⁶²³

In addition, WTO panels have followed the principles regarding standards of review established by the WTO Appellate Body that neither the *de novo* principle nor the deference principle should be applied. In general, there are two principles with respect to standards of review: the *de novo* principle allows the panel to make its own fact-findings regarding the matter before it, whereas the deference principle establishes that a panel must ‘respect the fact-finding of the national authority and defer to it’.⁶²⁴ In the context of the WTO, article 11 of the *DSU* merely provides that ‘a panel should make an objective assessment of the matter before it’.⁶²⁵ The Appellate Body of *European Commission—Hormones* established that neither the *de novo* principle nor the total deference principle should be applied.⁶²⁶

The WTO panels have followed the WTO Appellate Body’s rulings regarding transparency and public participation in the WTO panel proceedings. Although the United Nations recognises transparency as one aspect of the rule of law,⁶²⁷ there is no consensus about the conception of transparency in litigation. Transparency is considered a crucial factor in some litigation systems, as opposed to private dispute resolution systems (such as alternative dispute resolution or arbitration) that are based on confidentiality principles.⁶²⁸ In the context of the WTO system, Waincymer explains that trade scholars ‘raise the notion of transparency as a constitutional and administrative control through domestic openness and, in a related sense, transparency as an essential element of democracy’.⁶²⁹

In contrast to arbitral procedures, in which the disclosure of disputes varies among ICSID and non-ICSID arbitrations, the disputes initiated under the WTO system are usually published on its website.⁶³⁰ Although the panel’s deliberation, panel report and opinions expressed in the report are confidential,⁶³¹ the parties

⁶²² Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, WTO Doc WT/DS70/AB/R, AB-1999-2 (2 August 1999) (*‘Canada—Civilian Aircraft’*) [198].

⁶²³ Matsushita, ‘The Dispute Settlement at the WTO: The Appellate Body-Assessment and Problems’, above n 193, 517.

⁶²⁴ Ibid 516.

⁶²⁵ *DSU* art 11.

⁶²⁶ Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R WT/DS48/AB/R AB-1997-4 (16 January 1998) (*‘European Commission—Hormones’*) [117].

⁶²⁷ See *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies — Report of Secretary-General*, UN Doc S/2004/616 (23 August 2004) <<https://www.un.org/ruleoflaw/files/2004%20report.pdf>>.

⁶²⁸ Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press, 2017) 229.

⁶²⁹ Jeffrey Waincymer, ‘Transparency of Dispute Settlement within the World Trade Organization’ (2000) 24(3) *Melbourne University Law Review* 797.

⁶³⁰ WTO *Find disputes Cases* <https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm>.

⁶³¹ *DSU* art 14.

to the dispute may disclose statements of their positions and a non-confidential summary of information to the public following the conditions set out in article 18 of the *DSU*.⁶³² Article 9 of the *DSU* also offers procedures for resolving multiple trade disputes involving the same matter by a single panel.⁶³³ Article 10 of the *DSU* guarantees third parties' rights, such as the right to be heard by the panel and the right to submit written submissions to the panel.⁶³⁴ This feature is contrary to the arbitral proceedings considered in Chapter 3, where the transparency of arbitral proceedings is based on the parties' consent, except in cases where parties have adopted the *UNCITRAL Rules on Transparency*⁶³⁵ in the arbitral proceeding.

As in the current arbitration regime, the *DSU* does not clearly stipulate the power of the WTO panel with respect to the admissibility of amicus curiae briefs (or an offer of information by non-disputing parties).⁶³⁶ However, the Appellate Body of *the United States—Shrimp* held that amicus briefs may be accepted at the discretion of the panels, but that panels do not necessarily have an obligation to do so.⁶³⁷ Since the advantages of amicus curiae briefs are that they enable those players to provide information on various aspects of the dispute, allowing the panel to make an appropriate decision on the matter, McRae observes that the Appellate Body's appreciation of a panel's right to receive amicus curiae briefs has made the WTO dispute settlement system 'more open to the views of civil society'.⁶³⁸ Regarding the publication of the WTO panel report, article 16 of the *DSU* requires that the report be disclosed not only between the parties to the dispute, but also to all the WTO members.⁶³⁹ This feature is contrary to the publication of arbitral awards, in which the award publication is founded on the parties' consent, except in cases where parties have adopted the *UNCITRAL Rules on Transparency*. Moreover, the WTO panel proceedings are conducted within a limited timeframe prescribed by the *DSU*.⁶⁴⁰ According to the WTO website (March 2019), panel proceedings take approximately one year exclusive of appeal, or one year and three months inclusive of appeal.⁶⁴¹

In sum, an examination of the WTO panel proceedings indicates that the *DSU* sets more uniform procedural rules than do arbitral proceedings. The WTO panels have the power to address the dispute

⁶³² Ibid art 18.

⁶³³ Ibid art 9.

⁶³⁴ Ibid art 10.

⁶³⁵ *UNCITRAL Rules on Transparency*.

⁶³⁶ Brigitte Stern, 'The Intervention of Private Entities and States as "Friend of Court" in WTO Dispute Settlement Proceedings' in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) vol 1, 1427, 1427–58.

⁶³⁷ Appellate Body Report, *United States — Import Prohibition of Certain Shrimps and Shrimp Product*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) ('*United States—Shrimps*') [78].

⁶³⁸ McRae, above n 188.

⁶³⁹ *DSU* art 16.

⁶⁴⁰ Ibid art 12.

⁶⁴¹ WTO, *Understanding the WTO: Settling Disputes: A Unique Contribution* (2019) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm>.

arising from the *WTO Agreements* and can apply the judicial economy contributing to efficiency, while the powers of the arbitral tribunals are limited to the arbitration agreements or applicable arbitration laws, which may vary. While the WTO panels have applied consistent evidentiary and transparency decisions, the arbitral tribunal has modified evidentiary decisions and the level of confidentiality or transparency for each arbitral proceeding to suit the issues at hand. In addition, the WTO panel procedures are conducted within the timeframe that is important in terms of dispute resolution efficiency. Together with the institutional aspects of the WTO panel, the panel procedure is considered an important factor that contributes to the accuracy, consistency and efficiency of the WTO system.

4.2.4 The World Trade Organization Appellate Body and Procedure

In contrast to the investor–State arbitration regime, the key feature of the WTO system is the right to appeal, which is considered a significant evolution in the WTO dispute settlement system.⁶⁴² The WTO Appellate Body was established to correct substantive and procedural errors committed by panels and to ensure the consistency of WTO case law.⁶⁴³ The WTO appeal procedure is governed by the *DSU* and *Working Procedures for Appellate Review*.⁶⁴⁴ This section explores the Appellate Body’s institutional aspects and appeals procedure with the purpose of illustrating its relevance in regard to accuracy, consistency and efficiency in the international trade system. An examination indicates that the WTO appellate review is performed by the Appellate Body, which is a permanent body. The Appellate Body can uphold, modify or reverse the panel’s legal findings and conclusions, but cannot review its factual findings or remand the cases to the panel. The Appellate Body’s rulings tend to have precedential value. These features are considered to contribute to accuracy, consistency and efficiency in the WTO dispute settlement system.

4.2.4.1 Institutional Aspects of the World Trade Organization Appellate Body

The WTO Appellate Body is a permanent body that considers appeals from various panel cases.⁶⁴⁵ The Dispute Settlement Body’s consensus appoints the seven members of the WTO Appellate Body⁶⁴⁶ to serve a four-year term, with a possibility of one-time renewal.⁶⁴⁷ The seven members of WTO Appellate Body

⁶⁴² For the historical development of the WTO Appellate Body, see, eg, Fernando Pierola, ‘The Question of Remand Authority for the Appellate Body’ in Andrew D Mitchell (ed) (Cameron May 2005); Mitsuo Matsushita, ‘Some Thoughts on the Appellate Body’ in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) vol 1, 1389.

⁶⁴³ Andreas R Ziegler, ‘Scope and Function of the WTO Appellate System: What Future after the Millennium Round? (1999) 3 *The Max Planck Yearbook of United Nations Law* 444.

⁶⁴⁴ *Working Procedures for Appellate Review*, WTO Doc WT/AB/WP/6 (16 August 2010) r 3. <https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm>.

⁶⁴⁵ *DSU* art 17.1.

⁶⁴⁶ *Ibid* art 2.4.

⁶⁴⁷ *Ibid* art 17.2.

are directed by the chairperson,⁶⁴⁸ who serves a one-year term with the chance of one-year extension.⁶⁴⁹ It can be concluded that the WTO Appellate Body is established separately from the panel that decides the case in the first instance. This is similar to the ICSID annulment committee; however, the institutional aspects of the WTO Appellate Body contrast with those of the annulment committee. Mainly, the permanency of the WTO Appellate Body is more likely to contribute to accuracy and consistency than an ad hoc annulment committee, which is appointed for a particular annulment case.

The seven members of WTO Appellate Body need to meet specific requirements prescribed by the *DSU* encompassing qualifications, nationality, impartiality and independence to ensure the Appellate Body's effectiveness. In respect of qualifications, the *DSU* requires the members of the Appellate Body to have a high level of expertise in the international trade area, specifically the *WTO Agreements*. Article 17.3 states that '[t]he Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally'.⁶⁵⁰ In practice, the WTO suggests that the members of the Appellate Body encompass various professional backgrounds, such as senior academics, lawyers, former government officials or senior judges.⁶⁵¹ In respect of nationality, the *DSU* also guarantees the diversity of Appellate Body members' geographical spread. Article 17.3 states that '[t]he Appellate Body membership shall be broadly representative of membership in the WTO'.⁶⁵² Similar to the ICSID arbitral rule for an ad hoc committee,⁶⁵³ WTO Appellate Body members must be impartial and independent. Article 17.3 of the *DSU* states that '[t]hey shall be unaffiliated with any government' and '[t]hey shall not participate in consideration of any disputes that would create a direct or indirect conflict of interest'.⁶⁵⁴ These requirements are crucial—as Julio Lacarte-Muro, former Chair of the Appellate Body, states: 'We are well aware that none of our rulings is likely to be greeted with universal approval; but our function is another: to be independent, impartial and objective at all times. I believe that this also to have been the case.'⁶⁵⁵

Although the WTO Appellate Body consists of seven persons, each appeal is served by a division comprising three members on rotation, as stated in article 17.1 of the *DSU*: 'Three of whom shall serve

⁶⁴⁸ *Working Procedures for Appellate Review*, WTO Doc WT/AB/WP/6, r 3(1).

⁶⁴⁹ *Ibid* r 3(2).

⁶⁵⁰ *DSU* art 17.3.

⁶⁵¹ WTO, *WTO Bodies Involved in the Dispute Settlement Process* (2019) <https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c3s4p1_e.htm>.

⁶⁵² *DSU* art 17.2.

⁶⁵³ *ICSID Convention* art 52 (3).

⁶⁵⁴ *DSU* art 17.3.

⁶⁵⁵ Valerie Hughes, 'The WTO Appellate Body: What Lessons Can Be Learned?' (PowerPoint presentation presented at the Second Conference of the British Institute of International and Comparative Law's Investment Treaty Forum on Appeals and Challenges to Investment Treaty Awards: Is It Time For An International Appellate System?, London, 7 May 2004) 50. <https://www.biicl.org/files/945_valerie_hughes_presentation.pdf>.

on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.’⁶⁵⁶ Pursuant to the WTO, the rationale underlying the rotation is to warrant ‘randomness, unpredictability and opportunity for all Appellate Body members to serve, regardless of their national origin’.⁶⁵⁷ As McRae observes, the effectiveness of the WTO Appellate Body is driven by its compact size and random selection: the compact size helps drive cohesion among the Appellate Body’s members, and the random selection for each division ensures the neutrality of the appellate procedures—that is, when appealing, neither party knows who is going to be a division member.⁶⁵⁸ By contrast, the ICSID annulment committee does not have such a division because each setup is ad hoc and comprises three separate members for each annulment case.

While the secretariat does not exist under the arbitration regime, the Appellate Body of the WTO is supported by the Secretariat, as stated in article 17.7 of the *DSU*: ‘The Appellate Body shall be provided with appropriate administrative and legal support as it requires.’⁶⁵⁹ The Appellate Body Secretariat comprises 11 lawyers and four support staff.⁶⁶⁰ The staff members are bound by the *Rules of Conduct* for the *DSU* to ensure independence, impartiality, avoidance of conflicts of interest and confidentiality of the proceedings.⁶⁶¹

The above examination shows that the institutional requirements of the WTO Appellate Body are both different and similar to those of ICSID ad hoc annulment committees. While the composition, nationality, qualification, impartiality and independence requirements of the WTO Appellate Body are subject to uniform rules similar to those of annulment committees under the *ICSID Convention*, the main difference is that the WTO Appellate Body is a permanent standing body. In addition, the WTO Appellate Body Secretariat provides continuity and consistency between members of the Appellate Body. Thus, it may be considered that the institutional requirements of the WTO Appellate Body are a crucial factor that contributes to accuracy and consistency in the WTO system.

4.2.4.2 The World Trade Organization Appellate Procedure

In the context of the WTO, the *DSU* creates the automatic right, without leave, for appellate review.⁶⁶² The grounds for appeal cover the question of law, but do not extend to the question of fact. As stated in

⁶⁵⁶ *DSU* art 17.1.

⁶⁵⁷ WTO, *Appellate Body Members* (2019) <https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm>.

⁶⁵⁸ McRae, above n 188, 371–87.

⁶⁵⁹ *DSU* art 17.7.

⁶⁶⁰ WTO, *Dispute Settlement Appellate Body Secretariat* <http://www.wto.org/english/tratop_e/dispu_e/ab_secretariat_bio_e.htm>.

⁶⁶¹ *Working Procedure for Appellate Review*, WTO Doc WT/AB/WP/6, annex II.

⁶⁶² *Ibid* r 20. See also Victoria Donaldson, ‘The Appellate Body: Institutional and Procedural Aspects’ in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) vol 1, 1277, 1294.

article 17.6 of the *DSU*: ‘An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel.’⁶⁶³ The definitions of questions of law and fact were clarified by the Appellate Body of *European Commission—Hormones*, which held that the issue of fact is ‘the occurrence of a certain event in time and space’,⁶⁶⁴ and that the issue of law is ‘the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is a legal question’.⁶⁶⁵ The Appellate Body also established that the issue of law includes the compliance of the panel’s factual examination with the legal requirements under article 11 of the *DSU* and that ‘whether or not a panel has made an objective assessment before of the facts before it, as required by Article 11 of the *DSU*, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review’.⁶⁶⁶ In practice, the question arises as to whether the panel’s assessment of domestic legislation is a question of law (which is within the scope of WTO appellate review)⁶⁶⁷ or a question of fact (which is beyond the scope of WTO appellate review).⁶⁶⁸ While this question remains controversial in the WTO context, in the international investment system, some bilateral investment courts take the approach that domestic legislation is a question of fact (this is discussed in detail in Chapter 5). It is apparent that the grounds for appeal differ from the grounds for annulment, which are restricted to a review of the arbitral process, as stipulated in article 52 of the *ICSID Convention*—that is, the ICSID annulment committees have no review power on arbitral tribunals’ findings of law or of fact.

In relation to the mandate, the WTO Appellate Body has a mandate to ‘uphold, modify or reverse the panel’s legal findings and conclusions’.⁶⁶⁹ If the Appellate Body completely sympathises with both the panel’s findings and conclusions, it will uphold them. If the Appellate Body only approves the panel’s conclusions, but does not agree with the reasoning, it will partly modify such conclusions. If the Appellate Body disagrees with the panel’s conclusions, it will reverse them.⁶⁷⁰ In the case of a complete reversal, the *DSU* does not state whether the Appellate Body has to complete the legal analysis or can leave the dispute unresolved. To avoid a dispute remaining unresolved, the Appellate Body in *Canada—Periodicals* decided that it could complete the legal analysis and end the dispute without having the parties return to the panel.⁶⁷¹ This analysis shows that the mandate of the WTO Appellate Body contrasts with that of the

⁶⁶³ *DSU* art 17.6.

⁶⁶⁴ Appellate Body Report, *European Commission—Hormones*, WTO Doc WT/DS26/AB/R WT/DS48/AB/R, [132].

⁶⁶⁵ Ibid.

⁶⁶⁶ Ibid.

⁶⁶⁷ For the case that domestic legislation is viewed as a question of law, see Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (1 February 2002) [105].

⁶⁶⁸ For the case that the domestic legislation is viewed as a question of facts, see Panel Report, *United States—Sections 301*, WTO Doc WT/DS152/R, [7.18].

⁶⁶⁹ *DSU* art 17.13.

⁶⁷⁰ Appellate Body Report, *United States—Shrimps*, WTO Doc WT/DS58/R (15 May 1998) [114] – [124].

⁶⁷¹ Appellate Body Report, *Canada—Periodicals*, WTO Doc WT/DS31/AB/R AB-1997-2, (30 June 1997) [13].

ICSID annulment mechanism, in which the annulment committee has the review power over the arbitral process. The annulment committee thereby has the ability to leave the arbitral award valid or annul it (fully or partially), but does not have the mandate to uphold, modify or reverse the arbitral decisions.

Before exploring the rest of the WTO appellate procedure, it is essential to mention here that the grounds for appeal and mandate of the WTO Appellate Body have raised some concerns. Because the *DSU* limits the grounds for appeal to issues of law, the Appellate Body neither has the power to review the question of facts, nor send a case back to the panel.⁶⁷² Accordingly, the Appellate Body can complete the legal analysis only if there are sufficient factual findings. If there was factual insufficiency,⁶⁷³ or where such a legal analysis related to a new issue,⁶⁷⁴ the Appellate Body could not complete the legal analysis. As a result, the dispute would remain unresolved.

Before the WTO Appellate Body report is finalised, all written submissions and transcripts of the hearings for every appeal must be reviewed by seven Appellate Body members.⁶⁷⁵ Commentators have recognised this system of collegiality as having a significant role in promoting consistency in the WTO system.⁶⁷⁶ Collegiality does not exist under the ICSID annulment mechanism, which is based on a different philosophy. Like the WTO panel procedures, the WTO appellate proceedings are conducted within a timeframe prescribed by the *DSU*. Except for a shorter deadline required by the *Agreement on Subsidies and Countervailing Measures*,⁶⁷⁷ the overall proceeding of the WTO appellate review should generally not ‘exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report’.⁶⁷⁸ Although article 17.5 of the *DSU* grants the appellate proceedings for a maximum period of 90 days,⁶⁷⁹ it almost invariably takes over 90 days in practice. Recently (November 2018), the European Union and some countries outside the European Union proposed amending article 17.5 of the *DSU* to allow disputing parties to agree to exceed the 90-day timeframe.⁶⁸⁰

After the Appellate Body report is released, the *DSU* requires that the report is to be adopted by the Dispute Settlement Body prior to being accepted by the disputing parties.⁶⁸¹ In practice, the WTO Appellate Body

⁶⁷² David Palmeter, ‘The WTO Appellate Body Needs Remand Authority’ (1998) 32 *Journal of World Trade* 41.

⁶⁷³ See Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/AB/R (6 November 1998) (‘*Australia – Salmon*’) [187].

⁶⁷⁴ See Appellate Body Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/12 (11 April 2001) (‘*European Commission – Asbestos*’) [79]–[83].

⁶⁷⁵ *Working Procedure for Appellate Review*, WTO Doc WT/AB/WP/6, r 4.

⁶⁷⁶ Claus-Dieter Ehlermann, ‘The Experience from the WTO Appellate Body’ (2003) 8 *Texas International Law Journal* 469.

⁶⁷⁷ See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A art 4.9.

⁶⁷⁸ *DSU* art 17.5.

⁶⁷⁹ *Ibid.*

⁶⁸⁰ See *Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Singapore and Mexico to the General Council*, WTO Doc WT/GC/W/752 (26 November 2018).

⁶⁸¹ *DSU* art 17.14.

decision does not only bind the disputing parties, but also tends to have precedential value. In *United States—Stainless Steel from Mexico*, the Appellate Body stated:

Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquits of the WTO dispute settlement system. Ensuring ‘security and predictability’ in the dispute settlement system, as contemplated in Article 3.2 of the *DSU*, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case. The Panel’s failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members’ rights and obligations under the covered agreements as contemplated under the *DSU*.⁶⁸²

McRae further observes that the more the WTO Appellate Body decides appeals that involve similar legal issues, the more development of international trade law there will be.⁶⁸³ An examination of the WTO appellate mechanism indicates that both institutional aspects of the WTO Appellate Body and appellate procedure are essential factors that contribute to accuracy, consistency and efficiency in the WTO system. The WTO Appellate Body is a permanent standing body with the power to uphold, modify or reverse the panel’s ruling. The WTO Appellate Body not only corrects legal errors and promotes the consistency of WTO case law, but has also established several *substantive* and *procedural* principles under WTO jurisprudence.⁶⁸⁴ Further, the WTO appellate procedures are conducted within a timeframe that is important in terms of dispute resolution efficiency. Thus, it is considered that both the institutional aspects of the Appellate Body and the appeals procedure are crucial elements contributing to accuracy and consistency, which then evolve towards efficiency in the international trade system.

4.2.5 Enforcement of the World Trade Organization Panels and Appellate Body Rulings

As noted in Chapter 1, the outcomes of trade disputes under the WTO usually require the losing States to modify the domestic laws, regulations and/or tariff rates for the goods or services under disputes,⁶⁸⁵ which is likely to affect other WTO members. Unlike under the current arbitration regime, whereby the winning party has to recourse to the domestic court for enforcement, the *DSU* provides a consistent implementation of panels and Appellate Body rulings that is monitored by the Dispute Settlement Body.⁶⁸⁶ If a losing State fails to meet a requirement of a panel or Appellate Body decision, article 22.2 of the *DSU* allows the disputing parties to negotiate a mutually agreeable compensation.⁶⁸⁷ If this compensation is not agreed

⁶⁸² Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WTO Doc WT/DS344/AB/R AB-2008-1(30 April 2008) (*‘United States—Stainless Steel’*) [160].

⁶⁸³ See McRae, above n 188, 387.

⁶⁸⁴ See Matsushita, ‘The Dispute Settlement at the WTO: The Appellate Body-Assessment and Problems’, above n 193.

⁶⁸⁵ *DSU* art 19.1.

⁶⁸⁶ *Ibid* art 21.

⁶⁸⁷ *Ibid* art 22.2.

upon, article 22.3 of the *DSU* enables a complainant State, with authorisation from the Dispute Settlement Body, to impose trade sanctions.⁶⁸⁸ It is thus evident that the remedy and enforcement mechanisms of the WTO system differ from the remedy and enforcement mechanisms under the international investment system, which typically take the form of compensation to a specific investor rather than requiring the host State to change its domestic laws and/or regulatory measures.

To conclude, this examination indicates that the WTO dispute settlement system is a specialised international adjudication system for resolving international trade disputes under public international law. It highlights that several factors contribute to accuracy, consistency and efficiency in the WTO dispute settlement system. In terms of policy, the WTO dispute settlement system has a clear objective to be a ‘central element in providing security and predictability to the multilateral trading system’.⁶⁸⁹ In addition, the members of WTO are required to accept the compulsory jurisdiction of the WTO dispute settlement system to resolve their disputes that occur under the *WTO Agreements*. The WTO dispute settlement system consists of the panel, the Appellate Body and the Dispute Settlement Body, which operate within a uniform set of procedural rules and a particular timeframe. The WTO Appellate Body is the important authoritative organ in promoting the accuracy, consistency and efficiency of the WTO dispute settlement system by correcting legal errors in panel decisions and supporting the development of well-established WTO case law through persuasive or de facto precedent. Altogether, it may be considered that these features of the WTO dispute settlement system contribute to the system’s consistency and efficiency.

4.3 Analysis of the Potential Benefits and Some Considerations on the Application of the World Trade Organization Dispute Settlement System in the Investor–State Dispute Context

Although the WTO dispute settlement system contains several features that serve to promote accuracy, consistency and efficiency in the international trade system, as indicated in Chapter 1, trade disputes under WTO share some similarities with investor–State disputes as well as differing in some respects. Consequently, commentators have debated the potential of the WTO model for ISDS regime reform. This section examines both sides of that argument and shows that although the WTO process as a whole may not be appropriate for investor–State disputes that are hybrids of contract-based claims and treaty-based claims, some features of the WTO model may usefully be incorporated into arbitration to promote greater consistency.

⁶⁸⁸ Ibid art 22.3.

⁶⁸⁹ Ibid art 3.2.

4.3.1 Potential Benefits of the World Trade Organization Dispute Settlement System for a Resolution of Investor–State Disputes

It may be argued that the WTO system offers several advantages as a model for a multilateral ISDS regime reform. This section examines arguments for the WTO model and identifies the model’s key benefits in this regard, showing how litigation features—such as institutional aspects of the WTO panel, panel procedure, and aspects of the WTO Appellate Body and appeal procedure—are likely to improve arbitration capability to promote greater accuracy and consistency in investor–State disputes.

4.3.1.1 Potential Benefits of General Characteristics of the World Trade Organization Dispute Settlement System for Investor–State Disputes

Despite some considerations that are discussed later (in section 4.3.2.1), it can be argued that a uniform dispute resolution policy (as in the WTO system) prevents disputants from being subjected to different policy issues and dispute resolution processes, creating greater accuracy and consistency in the dispute resolution process and outcomes. In this respect, some general characteristics of the WTO dispute settlement system that were examined in section 4.2.1 might be beneficial for a multilateral ISDS regime reform by improving accuracy and consistency in the international investment regime. First, a single international adjudication system for resolving disputes is more likely to promote consistency than a non-uniform international arbitration regime. In addition, a uniform dispute settlement system established by a multilateral treaty under the auspices of the IGO is more likely to promote consistency than a plethora of bilateral instruments. Moreover, a multilateral dispute resolution may work best if it has jurisdiction over any investment treaties. Further, the stages of a dispute settlement system (such as the amicable settlement, the first instance procedure, the appellate procedure and the enforcement procedure) should be designed to complement one another.

4.3.1.2 Potential Benefits of Institutional Aspects of the World Trade Organization Panel and Procedure for Investor–State Disputes

The institutional aspects of the WTO panel may usefully be incorporated into the investor–State arbitration regime to improve accuracy and consistency in relation to the treaty-based claims of investor–State disputes. It can be argued that the establishment of an investment tribunal under the flexible requirement of an agreement between States and investors creates concern about inconsistency and the need for ‘a more systematic approach to appointments’.⁶⁹⁰ Although WTO panels are normally selected on an ad hoc basis that reflects the interests of the disputing parties,⁶⁹¹ not unlike how investment arbitral tribunals are

⁶⁹⁰ Sands, above n 188, 207.

⁶⁹¹ Fried, above n 589, [20].

selected, detailed analysis shows that these processes differ in terms of establishment and other requirements that may usefully be incorporated into the investor–State arbitration regime.

One feature of institutional aspects of the WTO panel that may usefully be incorporated into the investor–State arbitration regime is panel composition. While the composition of the arbitral tribunal depends on the agreement of the parties or arbitral rules, the WTO requirement ensures a minimum of three WTO panellists. This minimum compositional requirement is likely to ensure more accuracy and consistency than the ICSID and non-ICSID compositional requirements, in which the tribunal can consist of a sole arbitrator. In addition, the nationality requirement for the WTO panels might usefully be incorporated into the investor–State arbitration regime. While in the case of the arbitral tribunal, the nationality of arbitrators depends on each party’s agreement, it is argued here that although this requirement is not mandatory, the WTO nationality requirement ensures that trade disputes are adjudicated more fairly than under arbitral rules.

The WTO qualification requirements may also prove useful in this context. Compared with the various and flexible qualification requirements of the arbitral tribunal, WTO requirements are likely to ensure legal reasoning and dispute outcomes of higher quality than in the investor–State arbitration regime. Although States nominate panellists, the WTO requirements ensure that the panel is independent and impartial. Although both arbitral rules and the *DSU* ensure that adjudicators are impartial and independent, there is a difference between them—that is, the current investor–State arbitration regime allows arbitrators to act as lawyers and counsel. Accordingly, there may be concerns about the arbitral tribunal’s independence and impartiality.

Additionally, the WTO panel secretariat may usefully be incorporated into the investor–State arbitration regime. As noted earlier in Chapter 3 (section 3.3.2.2), under the current arbitration regime (except for the PCA), the lack of a secretariat may raise concerns about inaccuracy and inconsistency between arbitral tribunals. Although WTO panels are not permanent bodies, the institutional support provided by the WTO secretariat reinforces coherence among them. As McRae observes, the panel secretariat not only provides ‘legal expertise’, but also the ‘institutional memory’ that contributes to the consistency between WTO panels.⁶⁹² These positive aspects of WTO panels are likely to prove useful for a multilateral ISDS regime reform if incorporated into the investor–State arbitration regime.

In addition to institutional aspects of the WTO panel, the WTO panel procedure may prove useful for multilateral ISDS regime reform. As discussed in Chapter 3, arbitral tribunals are likely to adopt a distinct approach in each investor–State case because arbitral procedures are flexible, leading to inconsistency. By

⁶⁹² McRae, above n 188, 387.

contrast, the WTO panel procedure is mandated by the *DSU*. Where the *DSU* does not clearly stipulate the WTO panel's power relating to the burden of proof, the Appellate Body has bridged these gaps (for example, in relation to adverse inferences, presumptions and standard of review). The WTO panels are likely to follow the ruling developed by the Appellate Body. In addition, the WTO panel report is disclosed not only to the disputing parties, but to all WTO members. This is not the case for arbitral awards, in which disclosure of the award depends on the parties' consent, other than in cases where the parties have adopted the *UNCITRAL Rules on Transparency*. Finally, the timeframe for panel proceedings can help improve efficiency in resolving disputes. For that reason, these features might usefully be incorporated into a multilateral ISDS regime.

4.3.1.3 Potential Benefits of Institutional Aspects of the WTO Appellate Body and Appellate Procedure for Investor–State Disputes

Institutional aspects of the WTO Appellate Body are likely to be of benefit to multilateral ISDS regime reform, and these aspects are absent from the current arbitration regime. As discussed in Chapter 3, one of the main drawbacks of the existing investor–State arbitration regime is its lack of an appeal mechanism, leading to inconsistent interpretation and application of treaty norms and dispute outcomes. By contrast, the WTO Appellate Body contributes crucially to the accuracy and consistency of the international trade system, as noted by Crawford:

One is the comparative success of the World Trade Organization appellate system. I do not think anyone will deny that the Appellate Body has had a very significant impact both in terms of individual decisions and in terms of the general perception of the way the WTO dispute settlement system has worked. It has unquestionably enhanced confidence in the WTO as a whole.⁶⁹³

As discussed earlier, various elements of the WTO Appellate Body (including requirements for a permanent standing body, a division of the WTO Appellate Body and the WTO Secretariat) do not exist under the arbitration regime. In particular, the WTO Appellate Body requirement of a permanent standing body might benefit from a multilateral ISDS regime reform.⁶⁹⁴ As Colin Brown states, from the European Union perspective, permanency is

created by the establishment of the WTO Appellate Body. Since the Appellate Body is a standing body, in distinction to the *ad hoc GATT* and even the WTO panels, one could have confidence that its pronouncements on, say the *GATT* Article XX exceptions, would be followed both by future panels and in later cases dealt with by the Appellate Body.⁶⁹⁵

⁶⁹³ Crawford, 'Is There a Need for An Appellate System,' above n 188, 13.

⁶⁹⁴ Sands, above n 188, 207.

⁶⁹⁵ Colin Brown, 'The European Union's Approach to Investment Dispute Settlement,' above n 545, 6.

In addition, a division of the WTO Appellate Body that is based on a rotation system and its small size might benefit a multilateral ISDS regime reform. As noted previously (in section 4.2.4.1), the rotation system is essential in ensuring the neutrality of the division. Despite the concern that is discussed later (in section 4.3.2.3), the compact size of the WTO Appellate Body and its division also contributes to the unity of the appellate procedure. Like the panel stage, an essential feature of the WTO Appellate Body is the Secretariat, which again does not exist under the arbitration regime. McRae observes that ‘a greater role for the ICSID Secretariat could go some way towards ensuring more coherence in the ICSID dispute settlement process, and this is a first essential step if there is to be any future discussion of an ICSID appeals facility’.⁶⁹⁶ These features of the WTO Appellate Body might be usefully incorporated into reform of a multilateral ISDS regime.

Another feature of the WTO model that may benefit reform of a multilateral ISDS regime is its appeal procedure, which is absent from the current arbitration regime, thus leading to inaccuracy and inconsistency in the interpretation and application of treaty norms and dispute outcomes. Unlike the arbitration regime, the WTO appeal mechanism ensures consistency in the international trade system, based on requirements regarding grounds for appeal, the mandate of the WTO Appellate Body, the collegiality of the WTO Appellate Body report, circulation and publication of the Appellate Body report, precedential value of the WTO Appellate Body report and timeframes for WTO appellate proceedings.

In the present context, the critical elements of the WTO appeal procedure are grounds of appeal and the mandate of the WTO Appellate Body. As discussed, grounds for annulment are confined to procedural legitimacy; in the WTO model, this encompasses the issue of law. In this respect, Sands suggests that an investment appellate body should be a permanent one that has the power to review an appeal on points of law.⁶⁹⁷ Regarding mandate, the power of the annulment committee is limited to upholding or annulling the arbitral award; the mandate of the WTO Appellate Body includes upholding, modifying or reversing the panels’ decisions, and this feature would make it useful for developing an appellate mechanism under a multilateral ISDS regime.

Commentators also suggest that consistency is promoted by the collegiality of the WTO Appellate Body report, which does not exist under the ICSID annulment mechanism.⁶⁹⁸ For example, Van den Bossche observes that ‘the [Appellate Body] has avoided making statements *obiter dicta*’.⁶⁹⁹ McRae notes that the

⁶⁹⁶ McRae, above n 188, 387.

⁶⁹⁷ Sands, above n 188, 207.

⁶⁹⁸ Claus-Dieter Ehlermann, ‘The Experience from the WTO Appellate Body’, above n 678, 469.

⁶⁹⁹ Peter Van den Bossche, ‘From After Thought to Counter Piece: The WTO Appellate Body and its Rise to Prominence in the World Trading System’ in Giorgio Sacerdoti, Alan Yanovich and Jan Bohanes (eds), *WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge University Press, 2006) 289.

collegiality system of the WTO Appellate Body is unique among other international adjudications, where judges of those international courts conventionally express individual and dissenting opinions.⁷⁰⁰ Alvarez Jimenez argues that collegial decision-making is a factor that contributes to the unity of the WTO dispute settlement system: ‘the exchange of views is a very effective decision-making tool, because, with a very low cost of deliberation compared with *en banc* decisions, it is able to have a deep impact on final reports prepared by AB [Appellate Body] Divisions.’⁷⁰¹

The final feature of the WTO appeal procedure that seems likely to be of benefit to a multilateral ISDS regime reform is the timeframe of the WTO appellate proceedings.⁷⁰² McRae observes that this timeframe serves to expedite the process; ‘it also has the effect of bringing all of the members of the Appellate Body together frequently, adding to their collegiality and cohesiveness of the members operating as a judicial organ.’⁷⁰³ As noted previously (in section 4.2.4.2), the 90-day timeframe is not kept in practice. To that end, in November 2018, the European Union and some countries outside the European Union proposed an amendment of article 17.5 of the *DSU* to permit the disputing parties to agree to exceed the 90-day timeframe.⁷⁰⁴

4.3.1.4 Potential Benefits of the World Trade Organization Model in Balancing Accuracy and Consistency with Efficiency in Treaty-Based Claims of Investor–State Disputes

The overall benefit of the WTO dispute settlement system is that the WTO panel, panel procedure and institutional aspects of the WTO Appellate Body, as well as the WTO appeal procedure, contribute to consistency, which, in turn, serves a central objective of the WTO dispute settlement system in providing ‘security and predictability to the multilateral trading system’.⁷⁰⁵ As noted in Chapter 1, this advantage has been recognised by several commentators.⁷⁰⁶ For example, Panitchpakdi, the WTO Director-General from 2002–2005, emphasises the positive effect of the rule of law on the stability of the international trade system as follows: ‘The WTO has extended the rule of law into the international trade realm and has contributed significantly to keeping peaceful and stable trading relations between WTO Members.’⁷⁰⁷ As also observed by Jackson, the nature of WTO dispute settlement as a rule-oriented approach could reduce

⁷⁰⁰ McRae, above n 188, 387.

⁷⁰¹ Alvarez Jimenez, ‘The WTO Appellate Body’ s Decision-Making Process: A Perfect Model for International Adjudication?’, above n 188, 330.

⁷⁰² *DSU* art 17.5.

⁷⁰³ McRae, above n 188, 375.

⁷⁰⁴ See *Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Singapore and Mexico to the General Council*, above n 682.

⁷⁰⁵ *DSU* art 3.2.

⁷⁰⁶ See above n 56 and accompanying texts.

⁷⁰⁷ Panitchpakdi, above n 191.

risk regarding inconsistent decisions and increase predictability, which, in turn, could increase efficiency in the international trade system.⁷⁰⁸

To sum up, although the WTO process as a whole may not be appropriate for investor–State disputes that involve contract-based claims, treaty-based claims and hybrids thereof, some features of the WTO model may usefully be incorporated into investor–State arbitration to promote greater accuracy and consistency in the treaty-based claims of investor–State disputes. These include a multilateral characteristic of the WTO dispute settlement system, some features of the WTO panel and panel procedure, and institutional aspects of the WTO Appellate Body as well as the WTO appellate procedure. These features may have contributed to accuracy, consistency and efficiency in the treaty-based claims of investor–State disputes. However, there are some considerations to be made in considering applying the WTO model to a multilateral ISDS regime. These are further discussed in the following section.

4.3.2 Considerations on the Application of the World Trade Organization Dispute Settlement System in the Investor–State Dispute Context

Although the WTO dispute settlement system has certain positive features, it can be argued that it has limitations for investor–State disputes because of their differing characteristics. This section examines the general and specific limitations of the WTO model in relation to a multilateral ISDS regime reform. General limitations relate to WTO and ISDS jurisdiction, parties to disputes, and the nature and outcomes of disputes. Beyond these general limitations, the design of institutional aspects of the WTO panel and procedure, institutional aspects of the WTO Appellate Body and appeal procedure, and the WTO enforcement mechanism may not be fully compatible with a multilateral ISDS regime.

4.3.2.1 Considerations in Applying General Characteristics of the World Trade Organization Dispute Settlement System in the Investor–State Dispute Context

One consideration of applying the WTO model to investor–State disputes relates to the model’s litigation characteristic, which has important implications for a multilateral ISDS regime reform. First, the WTO system has compulsory jurisdiction over interstate trade disputes arising from the *WTO Agreements*, which are multilateral instruments. By contrast, the current international investment regime is based on a bilateral investment treaty numbering more than 3,000 instruments.⁷⁰⁹ Accordingly, some commentators have questioned how the WTO model would work with different investment treaties; as Wood observes, ‘inter-state trade disputes concerning the interpretation and application of multilateral WTO treaties are hardly

⁷⁰⁸ John H Jackson, ‘Dispute Settlement in the WTO: Policy and Jurisprudential Considerations’ (Discussion Paper No 419, Research Seminar in International Economics School of Public Policy, University of Michigan, 1998) 3.

⁷⁰⁹ See UNCTAD, *International Investment Agreements Navigator*, above n 137.

comparable to the investor–State investment disputes under more than 3,000 bilateral investment treaties, each with different wording and negotiating history’.⁷¹⁰

In addition, the parties to WTO and investor–State disputes differ. As already discussed (in section 4.2.1), the WTO dispute settlement system deals with interstate disputes, and is confined to members of the WTO. In principle, members have equal status in multilateral trade agreements, which means that any WTO member State can be either a complainant or a respondent in such disputes. According to Kho et al., ‘both parties to the dispute are States with an equal interest in protecting their sovereign interests, both offensively and defensively, regardless of whether they are acting as complainant or respondent in a particular dispute’.⁷¹¹ By contrast, investor–State disputes involve a foreign investor and a host State. In most investor–State disputes, foreign investors and States are not considered equal—that is, the foreign investor is often the claimant while the host State is the respondent.

Moreover, parties to trade and investment disputes also have different interests in the outcome. In the WTO context, conflicts arise from multilateral trade agreements, and results include policy, laws and regulation changes. Accordingly, WTO member States share a similar interest in both the interpretation of *WTO Agreements* and the outcomes of the disputes. By contrast, the remedies available to an investor in the context of investor–State disputes for breaches of a foreign investment contract or treaty typically take the form of compensation awarded to a specific investor rather than requiring the host State to modify domestic laws and regulations. Accordingly, the foreign investor has an interest in seeking compensation from the host State rather than in changes being made to domestic laws and regulations.

On that basis, a multilateral ISDS regime is likely to deal with issues that differ from those addressed by the WTO dispute settlement system in terms of legal instruments (contract law and investment treaties) and parties to the disputes (a foreign investor is a plaintiff, and a host State is a defendant). In addition, the investment tribunal of a multilateral ISDS regime will have to rule on compensation rather than on change to policies and regulations. These differences have important implications and must be considered when applying the WTO model to a multilateral ISDS regime reform.

4.3.2.2 Considerations in Applying Institutional Aspects of the World Trade Organization Panel and Procedure in the Investor–State Dispute Context

Given the general limitations outlined above, one specific limitation in applying the WTO dispute settlement system to a multilateral ISDS regime reform relates to the institutional aspects of the WTO panel. As discussed, these institutional aspects were designed to address trade disputes emerging under

⁷¹⁰ Wood, above n 68, 15.

⁷¹¹ Kho et al, above n 192.

the *WTO Agreements*, whereas investor–State disputes entail different legal instruments, various parties to disputes and rules on compensation rather than changes to policies and regulations, as noted by Kho et al.:

These divergent interests are dealt with in the current ISDS system by allowing each party to the dispute to nominate one arbitrator, and for the third arbitrator to be chosen by agreement of the other two. In constituting the ISDS tribunal in this manner, the current system seeks to preserve the equal treatment of the parties in the composition of the tribunal, which effectively strikes a balance between their divergent interests in the outcome of the dispute.⁷¹²

Although institutional aspects of the WTO panel such as establishment, composition, nationality requirements and qualification requirements may be suitable for interstate trade disputes, these features may be less appropriate to investor–State disputes under different bilateral investment treaties. The design of a multilateral ISDS regime reform should thus take these differences into consideration.

A further limitation of applying the WTO dispute settlement system to a multilateral ISDS regime reform relates to the WTO panel procedure. In the WTO context, the *DSU* provides a uniform set of procedural rules designed to address trade disputes from the *WTO Agreements*, which are purely treaty-based disputes. By contrast, investor–State disputes involve contract-based claims, treaty-based claims and hybrids thereof. Accordingly, commentators have observed some of the limitations of the WTO panel procedure for a multilateral ISDS regime reform. In the Geneva Center of International Dispute Settlement research paper to the United Nations Commission on International Trade Law (UNCITRAL), Kaufmann-Kohler and Potestà note that ‘the manageability or workability of the [arbitral] process ... is “light” compared with “heavier” permanent adjudicatory bodies requiring significant resources, so, for instance, the World Trade Organization (WTO) Legal Affairs and Rules Divisions and Appellate Body (AB) Secretariat’.⁷¹³ With regard to the transparency of proceedings, Kho et al. argue:

As discussed, an advantage of the current ISDS process is that disputes are kept relatively confidential, which helps to de-politicize the dispute and avoid collateral damage to the investor due to publicity stemming from a dispute against a State. Some have argued that this is beneficial to the State as well. Moreover, expanding the nature of litigation (e.g., through third party intervention and amicus curiae submissions) will only increase the overall cost of litigation, which may harm smaller investors that lack the means to finance large-

⁷¹² Ibid.

⁷¹³ Kaufmann-Kohler and Potestà, ‘Can the Mauritius Convention Serve as a Model for the Reform of Investor–state Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?’, above n 214, 15.

scale litigation against a well-funded government, and in turn again discourage foreign investment in the first place.⁷¹⁴

As noted in Chapter 3, the parties in WTO and investor–State disputes have unequal abilities regarding the burden of proof and evidence. For example, in respect of the burden of proof concerning the WTO’s reasonable alternatives available, Alvarez and Brink observe that in WTO disputes, ‘both governmental parties are generally familiar with legitimate policy objectives and can equally bear the burden of demonstrating these’,⁷¹⁵ but in investor–State disputes, ‘arbitrators charged with interpreting treaties that are often more intent on protecting the rights of their third party beneficiaries, might not be quite as deferential’.⁷¹⁶ With regard to the burden of proof concerning the WTO’s reasonable alternatives available employed by the arbitral tribunal of *Continental Casualty v Argentina*, Alvarez and Brink suggest that ‘the government entity (which is better able to articulate the alternatives that it considered (and rejected) in responding to a crisis) and not a private party, should bear the burden of proof’.⁷¹⁷ Although some aspects of the WTO panel procedure may benefit a multilateral ISDS regime reform, some procedural features may not suit contract-based claims. The design of a multilateral ISDS regime reform should thus take these differences into account.

4.3.2.3 Considerations in Applying Institutional Aspects of the World Trade Organization Appellate Body and Appellate Procedure in the Investor–State Dispute Context

While it is clear that the WTO appeal mechanism has the advantage of promoting accuracy and consistency in international trade jurisprudence, establishing an appeal mechanism in the context of the international investment system raises several concerns (as discussed in greater detail in Chapter 5). Among these, the main concerns include the institutional aspects of the WTO Appellate Body, the WTO appeal procedure and the appeal mechanism’s compatibility with different existing ad hoc arbitral procedures.

This sub-section turns first to the institutional character of the WTO Appellate Body. Some considerations in applying the institutional aspect of the WTO Appellate Body for the purpose of investor–State disputes include the composition of the WTO Appellate Body and its members’ term of office and qualification requirements. First, the small structure of the WTO Appellate Body may raise concerns regarding blocking the appointment of WTO Appellate Body members (as noted in Chapter 1, section 1.4.3).⁷¹⁸ As previously

⁷¹⁴ Kho et al, above n 192.

⁷¹⁵ José E Alvarez and Tegan Brink, ‘Revisiting the Necessity Defense: *Continental Casualty v Argentina* (New York University Public Law and Legal Theory Working Papers 2010/3, New York University School of Law, 14 April 2010) 14.

⁷¹⁶ Ibid 35.

⁷¹⁷ Ibid.

⁷¹⁸ See Stoler, above n 197.

examined, the WTO Appellate Body comprises seven persons appointed by Dispute Settlement Body consensus. While this small-scale body is more likely to promote consistency, recently, the WTO has been unable to fill three vacancies for Appellate Body members. As stated by Ujal Singh Bhatia, Chair of WTO Appellate Body:

The unprecedented challenges that confront us today stem from two interrelated factors. On the one hand, the high number and complexity of appeals currently before us is stretching our ability to staff cases and complete our work in a timely fashion; on the other hand, the composition of the Appellate Body is currently down to only four members due to the DSB [Dispute Settlement Body]’s inability to fill three outstanding vacancies.⁷¹⁹

In addition, the short term of office of WTO Appellate Body members may raise concerns about their permanence and independence. As discussed earlier, all members of the WTO Appellate Body serve a four-year term; renewal is possible only once. As Ehlermann suggests, a non-renewable Appellate Body member term of eight years would be an improvement and would better guarantee the WTO Appellate Body’s independence.⁷²⁰ Moreover, the qualification requirements of the WTO Appellate Body may not be suitable for investment disputes and should be adapted for investor–State disputes. As outlined previously, the WTO Appellate Body was established to correct possible legal errors on the part of panels and to ensure consistency in WTO jurisprudence. Accordingly, the members of WTO Appellate Body must have expertise in international trade law and the *WTO Agreements*.⁷²¹ As the investment appellate tribunal must deal with different legal instruments (especially separate investment treaties and contract law), parties to disputes and compensation rules rather than changed policies and regulations, this qualification requirements should be adapted to suit investor–State disputes.

Turning to the WTO appellate procedure, some considerations in applying the institutional character of the WTO Appellate Body in the context of investor–State disputes are the automatic right of appeal, grounds of appeal, the precedential effect of appeal rulings and the timeframe of appeal proceedings. First, the advantages and disadvantages of an automatic right of appeal under the WTO system should be further considered in the context of investor–State disputes because the parties to trade and investment disputes are different. In the context of the WTO, States have the potential, in any given case, to act either as a complainant or as a respondent. Accordingly, an automatic right of appeal under the WTO system prevents a powerful State from placing political pressure on the Appellate Body to grant or deny leave of appeal.⁷²² In the context of investment disputes, a foreign investor is a frequent claimant, and the host State is a

⁷¹⁹ WTO Appellate Body Chair Calls for “Constructive Dialogue” on Addressing Dispute Settlement concerns (3 May 2018) <https://www.wto.org/english/news_e/news18_e/ab_07may18_e.htm>.

⁷²⁰ Ehlermann, ‘The Experience from the WTO Appellate Body’, above n 678.

⁷²¹ See *DSU* art 17.3.

⁷²² Rob Howse, ‘Designing a Multilateral Investment Court: Issues and Options’ 36(1) (2017) *Yearbook of European Law* 209, 217, 233.

respondent. If an automatic right of appeal applies in the investor–State dispute context, the host State is likely to gain an advantage over a foreign investor. As Kaufmann-Kohler notes, if an appeal mechanism is established, the loser is expected to appeal on every case: ‘[i]t is obvious that if an appeal exists, practically no government or corporate management having lost the case can afford not to file an appeal, be it only for reasons of internal pressures and accountability.’⁷²³ In addition, Wälde points out that a well-resourced State is more likely to benefit from an appeal mechanism than a poor State: ‘But there are risks: The first is that an appeals facility will further enhance the procedural disequilibrium investors already face ... Adding an appeal will reinforce the strength of such a litigation-resource based strategy.’⁷²⁴ Because an automatic right of appeal has the advantages and disadvantages, alternatives should be further considered in a multilateral ISDS regime reform (This is discussed in Chapter 6).

Another issue that should be considered in applying the WTO model to a multilateral ISDS regime is the ground of appeal. As noted earlier, the grounds for appeal under the WTO system are limited to the issue of law. Accordingly, a concern may arise that the Appellate Body would reverse the panel’s findings. In this case, if the panel’s factual findings are not enough, the WTO Appellate Body will be unable to complete legal analyses and may have to leave the dispute unresolved. Accordingly, a multilateral ISDS regime should be considered, whether the grounds for appeal will include the only the issue of law or extend to the issue of facts. Moreover, the WTO Appellate Body is likely to have de facto precedential value, resulting in a more coherent system within the *WTO Agreements*. By contrast, a multilateral ISDS regime involves different investment treaties, raising a matter that requires more discussion of the extent to which the decisions of the investment appeal tribunal serve to inform the interpretations of separate agreements by other tribunals, lending further coherence to the broader global investment regime.

In sum, the above analysis suggests that although the WTO appeal mechanism might usefully be applied to a multilateral ISDS regime reform, this would raise some concerns. These include the institutional aspect of the WTO Appellate Body and appellate procedure. Additionally, this Thesis observes that the WTO panel and Appellate Body procedures are designed to complement each other under the *DSU*, which is a well-established set of procedural rules. Based on this observation, it is questioned whether the WTO appellate mechanism’s is compatible with different existing ad hoc arbitrations. The current investor–State arbitration regime operates under different and flexible procedural rules, which means that a standalone appeal mechanism in addition to existing ad hoc arrangements may not provide a viable solution. Again, a multilateral ISDS regime reform should take these issues into consideration.

⁷²³ Kaufmann-Kohler, ‘In Search of Transparency and Consistency: ICSID Reform Proposal’, above n 187, 6.

⁷²⁴ Wälde, ‘Alternative for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?’, above n 333, 74.

4.3.2.4 Considerations in Applying the World Trade Organization Enforcement Mechanism in the Investor–State Dispute Context

Another consideration of applying the WTO model to investor–State disputes relates to the enforcement mechanism. As discussed earlier, the remedies in the WTO context require the WTO member State to make its measures conform with the *WTO Agreements* and include a specific mechanism (such as suspending concessions or other obligations) against a State that does not follow decisions of the WTO panel and/or Appellate Body.⁷²⁵ In the context of investor–State disputes, the remedy under international investment agreements typically takes the form of compensation to a specific investor, while the host State is still entitled to adopt measures. As observed by Kho et al., in practice, ‘the host State may voluntarily pay the amount of the award or settle the award debt at a discount, which many States often do’.⁷²⁶ For that reason, the WTO enforcement mechanism may not be compatible with investor–State disputes.

4.3.2.5 Considerations about the Suitability of the World Trade Organization Dispute Settlement System for the Contract-Based Claims of Investor–State Disputes

Although it is widely acknowledged that the WTO model contributes to accuracy, consistency and efficiency to the global trading system, it can be argued that the WTO model may be limited in its application to disputes involving contract-based claims. In the WTO context, trade disputes arising from the *WTO Agreements* are purely treaty-based disputes, and outcomes include policy, laws and regulation changes. Because WTO member States share a similar interest in both the interpretation of the *WTO Agreements* and the outcomes of the disputes, the benefits of the WTO model outweigh the costs. By contrast, the investor–State disputes involve contract-based claims, treaty-based claims and hybrids thereof. The remedies available to an investor in the context of such disputes typically take the form of compensation awarded to a specific investor rather than changes to domestic laws and regulations. Although the WTO model may be efficient for interstate trade disputes, these features may be less suited to investor–State disputes under different bilateral investment treaties. The design of a multilateral ISDS regime reform should thus consider these differences.

In sum, analysis of both sides of the argument reveals that adopting the WTO dispute settlement system for investor–State disputes has both benefits and limitations. The general boundaries of the WTO system relate to jurisdiction, parties to the dispute and dispute outcomes. Second, while the institutional aspect of the WTO panel is likely to promote accuracy and consistency in multilateral trade agreements, it may not be appropriate for investor–State disputes. Third, a uniform panel procedure and transparency of

⁷²⁵ See *DSU* art 22.

⁷²⁶ Kho et al, above n 192.

proceedings are likely to promote accuracy and consistency, but may not suit investor–State disputes. Fourth, the WTO appeal mechanism clearly improves accuracy and consistency in multilateral trade agreements, but should be adapted to suit investor–State disputes that involve different bilateral investment treaties and contract law. Ultimately, differing remedies mean that the enforcement mechanism for the WTO system is unlikely to suit investor–State disputes, which involve compensation being given to a specific investor. In applying the WTO model to a multilateral ISDS regime reform, all these issues have important implications, and any such reform should take account of them.

4.4 Synthesising Lessons That Can Be Learned from the World Trade Organization Dispute Settlement System for the Further Development of a Multilateral Investor–State Dispute Settlement Regime

The WTO dispute settlement system offers both positive and negative lessons that may prove useful for a multilateral ISDS regime reform. In general, the WTO model is a specialised public international adjudication system for resolving interstate disputes arising from multilateral trade agreements. It is argued here that the WTO system may be of use in disputes arising from multilateral agreements or involving multiple parties where there are concerns about the transparency of proceedings, the accuracy and consistency of dispute outcomes, and a preference for a formal dispute resolution. At the same time, the WTO system may be less useful in cases of contract-based disputes (such as private commercial disputes between individual traders), where parties prefer to resolve efficiently and appointing their own adjudicators, or where there are concerns about maintaining flexibility, privacy and confidentiality about publicising the dispute or about the cost and duration of the proceedings.

As noted in Chapter 1 (section 1.3.2), investor–State disputes are both similar to and distinct from WTO trade disputes. To recap, the main similarity is that both involve assessing the compliance of a States’ domestic laws and regulatory measures with public international law. On that account, the core both systems’ legitimacy is the degree to which international adjudicators can review domestic public policies and regulatory frameworks. Unlike trade disputes under the WTO, investor–State disputes are hybrids of contract-based claims and treaty-based claims. In addition, an investment dispute may affect either specific investors or foreign investors in general, rather than the treatment of a class of goods or services. Accordingly, the significant difference between WTO and investor–State disputes relates to the stakeholders in a dispute—that is, investor–State disputes concern private investors who are claimants and States that are respondents. In addition, these disputes relate to one or more foreign investors’ claims against one or more host State within the ambit of investment treaties and other sources of public international law. Such disputes relate to a conflict between the private interests of one or more investor and the public interests of the host State. Moreover, while the outcomes of investor–State disputes are

likely to affect specific investors regarding compensation, the outcomes of trade disputes under the WTO usually require the losing States to modify the domestic laws, regulations and/or tariff rates for the goods or services under dispute, which is likely to affect other WTO members.

Taking these similarities and differences into account, some features of the WTO litigation model may be useful for the treaty-based claims of investor–State disputes, but may not suit contract-based claims. Applying all the above features of the WTO litigation model to an investor–State dispute could reduce its efficiency and its crucial role in promoting a cross-border investment climate. Since the core legitimacy of both international investment and trade systems (i.e., an equilibrium between the right of host States to regulate matters pertaining to their national interests and their international obligations under trade and investment treaties) depends on the capacity of international adjudicators to review national regulatory policies and legislation, and the WTO dispute settlement system has proven that it is more likely to promote a consistent interpretation of the *WTO Agreements* than the investor–State arbitration regime. On that basis, it is argued that some features of the WTO model can usefully be incorporated into the investor–State arbitration regime to improve a future multilateral ISDS regime’s capability to promote accuracy and consistency in developing standards of review of international investment treaty norms.

The WTO dispute settlement system offers several key lessons that may prove useful for a multilateral ISDS regime reform. The first lesson learned from the WTO dispute settlement system relates to institutional aspects of the tribunal. Although the WTO panel is established for each dispute, the composition, nationality and qualification requirements of investment tribunals are subject to a uniform set of procedural rules (*DSU*) rather than depending on agreement among parties, as under the current investor–State arbitration regime. These stricter composition, nationality and qualification requirements are more likely than the flexible requirements of ad hoc arbitral tribunals to promote the consistent interpretation of similar facts, law and dispute outcomes. The impartiality and independence requirements also provide greater assurance that the dispute will be fairly adjudicated than does the dual role of arbitrators as counsel in the current investor–State arbitration regime. Conversely, the institutional aspects of the WTO panel may limit the autonomy of the parties (investors and States) to appoint adjudicators who are trusted or compatible with the specific characteristics and demands of each case, as in the current investor–State arbitration regime. The formal appointment process under the *DSU* may exacerbate problems of expense and delay. Because investor–State disputes are hybrids of contract-based claims and treaty-based claims, it may be useful to incorporate some requirements of WTO panels in the current investor–State arbitration regime to enhance the accuracy and consistency of the public aspects of such disputes. However, it is worth noting that because a multilateral ISDS regime will have to deal with

disputes arising from different bilateral investment treaties, some of a tribunal's first instance requirements should be adapted to suit the characteristics of the dispute.

A second lesson learned from the WTO dispute settlement system relates to the first instance procedure. An examination of the WTO panel procedure reveals that it is subject to the *DSU*, which is uniform, as opposed to the varying and flexible arbitral procedures of the current investor–State arbitration regime. The *DSU* is more likely to promote consistency than current arbitral procedures, which are based on party agreement. Additionally, the WTO panel is likely to decide consistently on procedures such as judicial economy, rules of evidence, the confidentiality of the proceedings and publication of awards. While the WTO system's uniform set of procedural rules is likely to promote consistency in resolving interstate disputes under the *WTO Agreements*, it is likely less flexible than arbitral procedures, which allow an ad hoc tribunal to employ its own approach to such issues in each case. Because investor–State disputes are hybrids, it may be useful to incorporate a compulsory set of procedural rules to enhance the consistency of treaty-based claims, while maintaining flexible and confidential arbitral procedures for efficiency in a multilateral ISDS regime.

A third lesson learned from the WTO dispute settlement system relates to its appellate mechanism promoting accuracy and consistency, which the current investor–State arbitration regime lacks. The WTO appeal mechanism (including the WTO Appellate Body and procedure) is likely to encourage greater accuracy and consistency, but less efficiency of dispute resolution. Because investor–State disputes involve treaty-based claims, it may be useful to incorporate an appeal mechanism to enhance the accuracy and consistency of the treaty-based claims of investor–State disputes. However, to maintain the efficiency of resolving contract-based claims, finality should be preserved to a certain degree. In this respect, the design of institutional features and procedures is crucial to promoting accuracy and consistency with efficiency.

A fourth key lesson learned from the WTO dispute settlement system relates to the compliance and enforcement of the WTO panel and Appellate Body rulings, which differ from the current investor–State arbitration regime. While WTO trades disputes require members to adopt measures in compliance with the *WTO Agreements*, international investment agreement remedies typically take the form of compensation awarded to a specific investor. Monitored by the Dispute Settlement Body, the mechanism for implementing the rulings and recommendations of the panel and WTO Appellate Body is uniform, but this is not true of enforcement mechanisms under the current investor–State arbitration regime. In this regard, the WTO model might not be used for investor–State disputes, and a multilateral ISDS regime may have to consider establishing a new enforcement mechanism (similar to the *ICSID Convention*) or enforcement of the award through the current investor–State arbitration regime.

Overall, the WTO dispute settlement system offers valuable lessons for a multilateral ISDS regime reform. On the positive side, the WTO model's panel, uniformity of proceedings and appeal mechanism are likely to provide accuracy and consistency in dispute resolution processes. On the negative side, these features may not adequately promote efficiency. For that reason, it is recommended that alternative options should be explored for reconciling efficiency with accuracy and consistency in relation to a multilateral ISDS regime reform. Lastly, it may be observed that no perfect model can be adopted from other jurisprudence that will turn the investor–State arbitration regime into a perfect dispute settlement process for investor–State disputes. The current investor–State arbitration regime can learn a great deal from the practices and processes that have been developed in the WTO to grapple with similar problems in the global economy.

4.5 Conclusion

This Chapter has demonstrated how some features of the World Trade Organization litigation model might be used for a multilateral investor–State dispute settlement reform, first highlighting several elements of the World Trade Organization model that contribute to accuracy and consistency, which then evolve towards efficiency in the international trade system. These include institutional aspects of the panel, in which procedures are uniform and transparent. Panel rulings can be reviewed by the Appellate Body, which is a permanent body. The World Trade Organization model also provides an enforcement mechanism. Although it is the key mechanism in promoting accuracy and consistency in the international trade system, the World Trade Organization model has both benefits and limitations in relation to a multilateral investor–State dispute settlement reform. While trade disputes are purely treaty-based disputes, investor–State disputes involve contract-based claims, treaty-based claims and hybrids thereof. Taking account of the similarities and differences between trade and investment disputes, the World Trade Organization model seems appropriate for disputes arising from multilateral agreements or involving multiple parties, but may not prove useful in cases of disputes under contract law, where the parties would prefer more efficient resolution. On that basis, it is proposed that some features of the World Trade Organization model can usefully be incorporated into investor–State arbitration to improve that arbitration's capability to promote accuracy and consistency within the international investment regime. However, these features should be further adapted in the case of investor–State disputes by considering several key areas: institutional aspects of the World Trade Organization panel, panel procedure and appeal mechanism.

CHAPTER 5:

LESSONS THAT CAN BE LEARNED FROM THE EUROPEAN UNION MULTILATERAL INVESTMENT COURT PROPOSAL FOR FURTHER DEVELOPMENT OF A MULTILATERAL INVESTOR–STATE DISPUTE SETTLEMENT REGIME

5.1 Introduction

Chapter 4 argued that some features of the World Trade Organization model might usefully be incorporated into the investor–State arbitration regime to improve its capability to promote accuracy and consistency in the treaty-based claims of investor–State disputes. In developing an alternative solution that can reconcile efficiency and consistency, this Chapter further explores the European Union multilateral investment court proposal. The research question addressed in this Chapter involves the extent to which the European Union multilateral investment court proposal may be used for a multilateral reform of the investor–State dispute settlement regime. To achieve this, the sub-questions include: How will the European Union multilateral investment court proposal operate to resolve investor–State disputes? What are the potential benefits and concerns of the European Union multilateral investment court proposal? To what extent might the features of the European Union multilateral investment court proposal be used for a multilateral reform of the investor–State dispute settlement regime?

This Chapter initially explores the general characteristics and key features of the European Union multilateral investment court proposal: amicable settlement, institutional aspects of the first instance and appellate tribunals, procedures and a proposed enforcement mechanism. It then discusses the potential benefits and criticisms of the proposal. Based on the potential benefits and criticisms identified, this Chapter synthesises lessons that can be learned from the European proposal. It is argued that even though the European Union multilateral investment court proposal does not fully explain nor yet make clear exactly how a proposed multilateral investment court would balance accuracy and consistency with efficiency in the investor–State dispute resolution process, some features of the proposal might be used to further develop a multilateral investor–State dispute settlement regime. This Chapter’s findings will add value to a multilateral reform of the investor–State dispute settlement regime that is currently under discussion internationally.

5.2 Overview of General Characteristics and Key Features of the European Union Multilateral Investment Court Proposal

As noted in Chapter 1, the European Union multilateral investment court proposal is the latest development in the investor–State dispute settlement (ISDS) area, and is presently under discussion. Prior

to evaluating the potential benefits and concerns regarding the European Union multilateral investment court proposal, this section examines how the proposal will operate to resolve investor–State disputes. To this end, the concept of the European Union multilateral investment court proposal presented by Colin Brown at the third Vienna Arbitration Debate on 22 June 2018,⁷²⁷ the European Commission’s paper on the *Multilateral Investment Court Project* (10 October 2018)⁷²⁸ and its submission to United Nations Commission on International Trade Law (UNCITRAL) Working Group III (18 January 2019)⁷²⁹ are examined in this Chapter. Some relevant features of bilateral investment courts that have been implemented in investment protection agreements between the European Union and some States (Canada, Vietnam and Singapore) are also discussed as complementary information to the multilateral investment court proposal. This examination indicates that a proposed multilateral investment court is likely to consist of the following features: an amicable resolution, a permanent first instance and appeal tribunals. Although the procedural rules for a proposed multilateral investment court are uncertain, it is probable that the European Union will use current arbitral procedures (such as those in the investment agreements with Canada, Vietnam and Singapore) instead of creating a new uniform set of procedural rules analogue to the World Trade Organization (WTO) model. In addition, awards rendered by a proposed multilateral investment court are likely to be enforced through existing investor–State arbitration instruments, rather than a new one being created.

5.2.1 General Characteristics of the European Union Multilateral Investment Court Proposal

Interestingly, there are some similarities and differences between the European Union multilateral investment court proposal and the current investor–State arbitration regime (as examined in Chapter 3) and the WTO dispute settlement system (as explored in Chapter 4). At a conceptual level, a proposed multilateral investment court is likely to be a uniform dispute settlement system similar to the WTO model. According to the European Commission, a proposed multilateral investment court would ‘be open to all interested countries to join’.⁷³⁰ Based on this, a proposed multilateral investment court is likely to have jurisdiction over investment disputes arising from different investment treaties, which is similar to the *ICSID Convention*, but broader than that of the WTO dispute settlement system, which is limited to trade disputes occurring between the WTO member States under the *WTO Agreements*. The European Commission states that a proposed multilateral investment court would ‘rule on disputes arising under

⁷²⁷ Colin Brown, ‘The European Union’s Approach to Investment Dispute Settlement,’ above n 545.

⁷²⁸ European Commission, ‘The Multilateral Investment Court Project’ (10 October 2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>>.

⁷²⁹ European Commission, ‘Establishing a Standing Mechanism for the Settlement of International Investment Disputes’ (Submission of the European Union and its Member States to UNCITRAL Working Group III International Intergovernmental Organization, 18 January 2019) <http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf>.

⁷³⁰ European Commission, ‘The Multilateral Investment Court Project’, above n 699.

future and existing investment treaties’.⁷³¹ Following this, a proposed multilateral investment court would not have a compulsory jurisdiction, as does the WTO dispute settlement system—rather, its jurisdiction would depend on investment treaties. As stated by the European Commission, a prospective multilateral investment court will ‘only apply where an investment treaty already explicitly allows an investor to bring a dispute against a State’.⁷³² For this reason, a proposed multilateral investment court is likely to operate simultaneously with the current investor–State arbitration regime. These general characteristics of the European Union multilateral investment court proposal offer benefits as well as concerns, which are discussed later in this Chapter (in section 5.3).

5.2.2 Amicable Settlement of the European Union Multilateral Investment Court Proposal

Similar to the current investor–State arbitration regime and the WTO dispute settlement system, the European Union multilateral investment court proposal includes an amicable resolution, consultation or mediation as the first consideration. In the multilateral context, the European Union states that ‘consideration should be given as to how alternative dispute resolution can be enhanced in investment disputes, with a view to avoiding that disputes actually lead to litigation’.⁷³³ In the bilateral context, an amicable resolution is included in bilateral investment courts with Canada, Vietnam and Singapore. The *European Union–Canada Comprehensive Economic and Trade Agreement (CETA)* provides for consultation⁷³⁴ and mediation⁷³⁵ before a claim can be submitted to a permanent investment tribunal. In addition to consultations and mediation,⁷³⁶ the *European Union–Vietnam Investment Protection Agreement* provides for arbitration before the commencement of the investment tribunal.⁷³⁷ Besides consultation, mediation and negotiation,⁷³⁸ the *European Union–Singapore Investment Protection Agreement* allows the disputing parties to use other alternative dispute resolution methods.⁷³⁹ As noted in previous Chapters, although an outcome of amicable resolution is not binding (except for those provided under the *ICSID Convention* discussed in Chapter 3, section 3.2.2), it is considered that incorporating an amicable resolution into a multilateral ISDS regime is a positive development because this mechanism can boost efficiency in the dispute resolution process.

⁷³¹ Ibid.

⁷³² Ibid.

⁷³³ Colin Brown, ‘The European Union’s Approach to Investment Dispute Settlement,’ above n 545.

⁷³⁴ *CETA* arts 8.19.

⁷³⁵ Ibid 8.20.

⁷³⁶ *European Union–Vietnam Investment Protection Agreement* arts 3.3–3.4.

⁷³⁷ Ibid art 3.5.

⁷³⁸ *European Union–Singapore Investment Protection Agreement* arts 3.2–3.4.

⁷³⁹ Ibid 3.4(7).

5.2.3 First Instance Tribunal and Procedure under the European Union Multilateral Investment Court Proposal

Where the settlement of a dispute cannot be reached in an amicable way, the next step is a resolution of dispute by the first instance tribunal of a prospective multilateral investment court. This section examines the European approach to the first instance tribunal and procedure with the purpose of illustrating its contribution to accuracy, consistency and efficiency in a resolution of investor–State disputes. First, the key institutional aspects of the investment tribunal are examined, followed by key aspects of first instance procedure. This consideration highlights the possibility that States will constitute the first instance tribunal permanently; it is uncertain whether the European Union will use either current arbitral procedures or create a new uniform set of procedural rules for a prospective multilateral investment court. Consequently, it is uncertain how, in this regard, these proposed features would balance accuracy and consistency with efficiency in the dispute resolution process.

5.2.3.1 Institutional Aspects of a First Instance Tribunal under the European Union Multilateral Investment Court Proposal

Unlike the institutional aspects of arbitral tribunals and the WTO panel previously examined, a first instance tribunal under the European Union multilateral investment court proposal is likely to be a permanent body rather than an ad hoc tribunal. At a conceptual level, the European Union proposes that a prospective multilateral investment court would ‘prevent disputing parties from choosing which judges ruled on their case’.⁷⁴⁰ Based on this concept, the establishment, composition, nationality, qualification, impartiality and independence requirements of a first instance tribunal will be mandated by a treaty establishing a prospective multilateral investment court rather than by parties’ agreements.

To begin, the establishment and composition of a permanent first instance tribunal are likely to be mandated by the treaty rather than by the parties’ agreements that currently operate under the investor–State arbitration regime. In the multilateral context, the European Union has not provided details regarding the establishment and composition of a first instance tribunal. In the bilateral context, the investment protection agreements between the European Union and some States (Canada, Vietnam and Singapore) require that first instance tribunals must be established by committees made up of European Union and counterparty (Canada, Vietnam and Singapore) representatives, but the composition of first instance tribunals varies. For example, in the *CETA* with Canada, the first instance tribunal comprises 15 members who are selected by the *CETA* Joint Committee.⁷⁴¹ The first instance tribunal under the *European Union–*

⁷⁴⁰ European Commission, ‘The Multilateral Investment Court Project’, above n 699. See also European Commission, ‘Establishing a Standing Mechanism for the Settlement of International Investment Disputes’, above n 700, [41].

⁷⁴¹ *CETA* art 8.27(2).

Vietnam Investment Protection Agreement comprises nine members appointed by a committee consisting of representatives from the European Union and Vietnam.⁷⁴² Under the *European Union–Singapore Investment Protection Agreement*, the first instance tribunal includes six members appointed by a committee comprising European Union and Singaporean representatives.⁷⁴³ This Thesis observes that the even numbers of the first instance tribunal under the *European Union–Singapore Investment Protection Agreement* is a unique composition of the international tribunals.

The nationality of the first instance tribunal is likely to be mandated by the treaty rather than by parties' agreements, as in the current investor–State arbitration regime. In the multilateral context, the European Union has proposed that the first instance tribunal will 'ensure geographical representation'.⁷⁴⁴ In the bilateral context, the nationality requirements vary, but there must be nationals from the European Union, counterparty States and third States on the equal propositions. In the context of the *CETA*, the 15 members of the first instance tribunal are five European States nationals, five Canadian nationals and five nationals of third States.⁷⁴⁵ In the *European Union–Vietnam Investment Protection Agreement*, the nationalities of nine members of the first instance tribunal are also equally distributed: three European States nationals, three Vietnamese nationals and three other nationals.⁷⁴⁶ On the same basis as the abovementioned bilateral investment courts, the six permanent first instance tribunal members under the *European Union–Singapore Investment Protection Agreement* are two European Union member State nationals, two Singapore nationals and two nationals of third States.⁷⁴⁷

Rather than the flexible requirements currently implemented under the investor–State arbitration regime, the qualifications of the first instance tribunal members are likely to be mandated by the treaty establishing a prospective multilateral investment court. The European Union has proposed that a prospective multilateral investment court will have tenured and highly qualified adjudicators.⁷⁴⁸ In addition, expertise in public international law, especially investment and trade, is mandatory for tribunal members.⁷⁴⁹ In the bilateral context, investment protection agreements between the European Union and some States (Canada, Vietnam and Singapore) impose similar qualification requirements. For example, the *CETA*

⁷⁴² *European Union–Vietnam Investment Protection Agreement* art 3.38(2).

⁷⁴³ *European Union–Singapore Investment Protection Agreement* art 3.9(2).

⁷⁴⁴ Colin Brown, 'The European Union's Approach to Investment Dispute Settlement', above n 545, 11. See also European Commission, 'Establishing a Standing Mechanism for the Settlement of International Investment Disputes', above n 700, [50].

⁷⁴⁵ *CETA* art 8.27 (2).

⁷⁴⁶ *European Union–Vietnam Investment Protection Agreement* art 3.38(2).

⁷⁴⁷ *European Union–Singapore Investment Protection Agreement* art 3.9(2).

⁷⁴⁸ European Commission, 'The Multilateral Investment Court Project,' above n 699. See also European Commission, 'Establishing a Standing Mechanism for the Settlement of International Investment Disputes', above n 700, [47].

⁷⁴⁹ Colin Brown, 'The European Union's Approach to Investment Dispute Settlement', above n 545, 11. See also European Commission, 'Establishing a Standing Mechanism for the Settlement of International Investment Disputes', above n 700, [49].

requires that tribunal members ‘shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence’.⁷⁵⁰ Alongside expertise in public international law (principally in investment and trade), the *CETA* tribunal must have expertise in the resolution of trade and investment disputes.⁷⁵¹ The *European Union–Vietnam Investment Protection Agreement*⁷⁵² and the *European Union–Singapore Investment Protection Agreement* impose similar qualifications requirements to the *CETA*. Notably, the tribunals’ qualifications required under the *European Union–Singapore Investment Protection Agreement* are not limited to knowledge, but also include experience in public international law.⁷⁵³ Although this Thesis agrees with the view that tribunal members should possess expertise in international trade and investment laws, it observes that domestic requirements for judicial officers may vary among States that have different legal traditions. To internationalise a multilateral ISDS regime, qualification requirements should be of an international standard (similar to the WTO model), rather than based on national requirements for judicial officers.

In respect of the independence requirements of a first instance tribunal, the European Union multilateral investment court proposal is likely to impose stricter standards than the current arbitration regime. The European Union states that the tribunal will be obliged to adhere to the strictest ethical standards.⁷⁵⁴ For example, in the bilateral context, the *CETA* notes:

The Members of the Tribunal shall be independent. They shall not be affiliated with any government. They shall not take instructions from any organisation, or government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.⁷⁵⁵

In the context of *CETA*, the International Bar Association (IBA) *Guidelines on Conflicts of Interest in International Arbitration* (including any supplemental rules) also apply to the investment tribunal of a bilateral investment court.⁷⁵⁶ To address the concern regarding the dual role of arbitrators as counsel (as noted in Chapter 3, section 3.3.2.2), the *CETA* requires the tribunal of an investment court to ‘refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement’.⁷⁵⁷ The *European Union–Vietnam Investment Protection*

⁷⁵⁰ *CETA* art 8.27 (4).

⁷⁵¹ *Ibid.*

⁷⁵² *European Union–Vietnam Investment Protection Agreement* art 3.38(4).

⁷⁵³ *European Union–Singapore Investment Protection Agreement* art 3.9(4).

⁷⁵⁴ European Commission, ‘The Multilateral Investment Court Project,’ above n 699. See also European Commission, ‘Establishing a Standing Mechanism for the Settlement of International Investment Disputes,’ above n 700, [47].

⁷⁵⁵ *CETA* art 8.30.

⁷⁵⁶ *Ibid.*

⁷⁵⁷ *Ibid.*

*Agreement*⁷⁵⁸ and the *European Union–Singapore Investment Protection Agreement*⁷⁵⁹ impose similar provisions regarding ethics. However, the *European Union–Singapore Investment Protection Agreement* further adds that the independence of the tribunal must be ‘beyond doubt’.⁷⁶⁰

Because the first instance tribunal will be a permanent body, an important feature of this tribunal is its terms. In the multilateral context, the European Union has proposed that the adjudicators will be ‘working full-time on non-renewable terms’.⁷⁶¹ In the bilateral context, the terms of the first instance tribunal vary (ranging from four to eight years with possible chances for reappointment or extension). For example, the *CETA* requires the following:

The Members of the Tribunal appointed pursuant to this Section shall be appointed for a five-year term, renewable once. However, the terms of seven of the 15 persons appointed immediately after the entry into force of this Agreement, to be determined by lot, shall extend to six years. Vacancies shall be filled as they arise. A person appointed to replace a Member of the Tribunal whose term of office has not expired shall hold office for the remainder of the predecessor’s term. In principle, a Member of the Tribunal serving on a division of the Tribunal when his or her term expires may continue to serve on the division until a final award is issued.⁷⁶²

In the context of the *European Union–Vietnam Investment Protection Agreement*, members of the tribunal are appointed for a term of four years, with a one-time renewal.⁷⁶³ The *European Union–Singapore Investment Protection Agreement* provides for an eight-year term, in which ‘the inaugural terms of three of the six persons appointed immediately after the entry into force of this Agreement, to be determined by lot, shall extend to twelve years. Upon expiry, a tribunal member’s term may be renewed by the Committee’s decision’.⁷⁶⁴

In sum, the investment tribunal under a proposed investment court will be constituted permanently by States, rather than by an ad hoc tribunal. Accordingly, the composition, nationality, qualification and independence requirements and the terms of an investment court tribunal are mandated by the treaty. This feature of a prospective multilateral investment court tribunal contrasts with current investor–State arbitration and the WTO panel examined in previous Chapters. This Thesis notes that although the proposed permanent tribunal is likely to address the inaccuracy and inconsistency problems that are occurring in the current arbitration regime, it is uncertain how this proposed feature will affect the

⁷⁵⁸ *European Union–Vietnam Investment Protection Agreement* art 3.40.

⁷⁵⁹ *European Union–Singapore Investment Protection Agreement* art 3.11.

⁷⁶⁰ *Ibid.*

⁷⁶¹ Colin Brown, ‘The European Union’s Approach to Investment Dispute Settlement’, above n 545, 11.

⁷⁶² *CETA* art 8.27 (4).

⁷⁶³ *European Union–Vietnam Investment Protection Agreement* art 3.38(4).

⁷⁶⁴ *European Union–Singapore Investment Protection Agreement* art 3.9(4).

efficiency of the dispute resolution process—particularly if a proposed permanent tribunal has to deal with a large number of investment cases at the same time.

5.2.3.2 First Instance Procedures under the European Union Multilateral Investment Court Proposal

Turning to first instance procedures, at the time of writing (March 2019), it is uncertain whether the European Union will use either current arbitral procedures (such as those in the international trade and investment agreements with Canada, Vietnam and Singapore) or create a new uniform set of procedural rules for a prospective multilateral investment court (as in the WTO model). In the bilateral context, the procedural rules under bilateral investment courts vary. The international investment protection agreements with Canada⁷⁶⁵ and Singapore⁷⁶⁶ allow disputing parties to submit investment claims under one of several sets of existing arbitral rules, including the *ICSID Convention* and its arbitration rules, the *ICSID Additional Facility Rules*, the *UNCITRAL Arbitration Rules* or any other commercial arbitration rules. The choices of arbitral procedure under the *European Union–Vietnam Investment Protection Agreement* are slightly different, as they are limited to the *ICSID Convention* and the *ICSID Additional Facility Rules*.⁷⁶⁷

While the first instance procedure of a prospective multilateral investment court is uncertain, the European Union emphasises the need for transparency in both multilateral and bilateral contexts. In the multilateral context, the European Union has proposed that the investment tribunal will work transparently.⁷⁶⁸ More specifically, it states: ‘The procedures of the court should ensure transparency, we would suggest based on the *UNCITRAL Rule on Transparency for ISDS*.’⁷⁶⁹ In the bilateral investment court context, the *CETA* adopts the *UNCITRAL Rules on Transparency* into the first instance procedure, requiring that the conduct of first instance proceedings must comply with the *UNCITRAL Rules on Transparency*, except those that are modified by the *CETA*.⁷⁷⁰ As with the *CETA*, the *European Union–Vietnam Investment Protection Agreement* imposes similar provisions for transparency.⁷⁷¹ By contrast, the *European Union–Singapore Investment Protection Agreement* imposes specific provisions regarding transparency: the *Rules on Public Access to Documents, Hearings and the Possibility of Third Persons to Make Submissions* (annex 8).⁷⁷²

In sum, an examination of the European approach to the first instance tribunal and the procedure of a multilateral investment court suggests that such a tribunal is likely to be constituted by States on a

⁷⁶⁵ *CETA* art 8.23 (2).

⁷⁶⁶ *European Union–Singapore Investment Protection Agreement* art 3.6.

⁷⁶⁷ *European Union–Vietnam Investment Protection Agreement* art 3.36.

⁷⁶⁸ European Commission, ‘The Multilateral Investment Court Project,’ above n 699.

⁷⁶⁹ Colin Brown, ‘The European Union’s Approach to Investment Dispute Settlement’, above n 545, 12.

⁷⁷⁰ *CETA* art 8.36.

⁷⁷¹ *European Union–Vietnam Investment Protection Agreement* art 3.46.

⁷⁷² *European Union–Singapore Investment Protection Agreement* art 8.36.

permanent rather than an ad hoc basis, as is the case under the current investor–State arbitration regime. Based on this, the establishment of a first instance tribunal, as well as the requirements of nationality, qualification, impartiality and independence, will be mandated by a treaty establishing such a court. In respect of the first instance procedure, it is uncertain whether the European Union will use either current arbitral procedures or create a new uniform set of procedural rules for a prospective multilateral investment court. Regarding the first instance procedure, this Thesis observes that a variety of procedures is one factor contributing to inconsistency and dispute outcomes (as in the current investor–State arbitration regime, examined in Chapter 3). Without this uniform set of procedural rules (as in the WTO system, examined in Chapter 4), this Thesis contends that the inconsistencies are likely to remain.

5.2.4 Appellate Tribunal and Procedure under the European Union Multilateral Investment Court Proposal

As opposed to the current investor–State arbitration regime, the decision made by the tribunal of a proposed multilateral investment court can be reviewed by an appellate tribunal of such a court. This section examines some key institutional aspects of an appellate tribunal and procedure to be established under a proposed multilateral investment court. An examination recalls the fact that States will constitute an appellate tribunal under such a court permanently (similar to a first instance tribunal). Although some characteristics of the appellate procedure are similar to the WTO model (examined in Chapter 4), grounds for appeal under a proposed multilateral investment court will be broader than grounds for appeal under the WTO system. These will not only include the issue of law made by the tribunal of the first instance, but will extend to encompass a manifest error in the assessment of the facts, and the grounds for annulment (examined in Chapter 3).

5.2.4.1 Institutional Aspects of an Appellate Tribunal under the European Union Multilateral Investment Court Proposal

Similar to the WTO Appellate Body previously examined, an appellate tribunal under a proposed multilateral investment court will be a permanent standing body. As highlighted hereafter, an appellate tribunal will be established by States. The composition, nationality, qualification independence and impartiality requirements will be mandated by a treaty establishing a prospective multilateral investment court. An appellate tribunal will be supported by the secretariat, similar to the WTO model.

This sub-section first addresses the establishment and composition of an appellate tribunal. In the multilateral context, the European Union has proposed that full-time tenured adjudicators would serve as members of an appeal tribunal,⁷⁷³ but has not indicated how the appellate tribunal will be established, nor

⁷⁷³ Ibid 12.

its composition. In the bilateral context, the composition varies. While the *CETA* merely empowers its Joint Committee to appoint an appellate tribunal,⁷⁷⁴ the investment protection agreement between the European Union and Vietnam specifies that the appeal tribunal comprises six members, but that this figure may be increased or decreased by multiples of three.⁷⁷⁵ The composition of the appeal tribunal under the agreement on investment protection between the European Union and Singapore is the same.⁷⁷⁶ In the bilateral context, the *CETA*,⁷⁷⁷ *European Union–Vietnam Investment Protection Agreement*⁷⁷⁸ and *European Union–Singapore Investment Protection Agreement*⁷⁷⁹ provide that each appeal shall be decided by a division consisting of three members rotated among the members of an appellate tribunal. This feature is similar to the WTO Appellate Body model.

In respect of the nationality requirement of an appellate tribunal’s members, in the multilateral context, the European Union emphasises the importance of geographical representation, as with the tribunal of the first instance⁷⁸⁰ but has not indicated nationality requirements. In the bilateral context, the nationality requirements of appellate tribunals vary. Without precise specifications regarding appeal tribunal members’ nationalities, the *CETA* only gives the Joint Committee the authority to appoint the members of the appellate tribunal.⁷⁸¹ Notably, this feature differs from the nationality requirement of a first instance tribunal (as examined previously in section 5.3.2.1). Unlike the *CETA*, the nationality requirement of an appellate tribunal’s members under the investment protection agreements between the European Union and Vietnam is similar to that of a first instance tribunal—that is, an appellate tribunal comprises two European States nationals, two Vietnamese nationals and two nationals of third States.⁷⁸² Likewise, the six members of an appellate tribunal under the *European Union–Singapore Investment Protection Agreement* consist of an equal proportion of European nationals, Singapore nationals and third States nationals.⁷⁸³

Unlike the qualification requirements for the ICSID ad hoc annulment committee and the WTO Appellate Body (which are non-identical to the requirements for the arbitral tribunal or WTO panel), the European Union multilateral investment court proposal does not differentiate between the qualification requirements for a first instance and an appellate tribunal. Similar to a first instance tribunal, the European Union has

⁷⁷⁴ *CETA* art 8.28.

⁷⁷⁵ *European Union–Vietnam Investment Protection Agreement* art 3.39(2).

⁷⁷⁶ *European Union–Singapore Investment Protection Agreement* art 3.10(2).

⁷⁷⁷ *CETA* art 8.28 (5).

⁷⁷⁸ *European Union–Vietnam Investment Protection Agreement* art 3.39(8).

⁷⁷⁹ *European Union–Singapore Investment Protection Agreement* art 3.10(7).

⁷⁸⁰ Colin Brown, ‘The European Union’s Approach to Investment Dispute Settlement,’ above n 54516.

⁷⁸¹ *CETA* art 8.28 (3).

⁷⁸² *European Union–Vietnam Investment Protection Agreement* art 3.39(2).

⁷⁸³ *European Union–Singapore Investment Protection Agreement* art 3.10(2).

proposed that the court would have tenured and highly qualified judges.⁷⁸⁴ In addition to expertise in public international law (especially trade and investment), the European Union has posited that ‘insights should be drawn from the practices of existing courts’.⁷⁸⁵ In the context of the *CETA*, the qualification requirements for members of an appeal tribunal are identical to those for a first instance tribunal.⁷⁸⁶ In the context of the *European Union–Vietnam Investment Protection Agreement*⁷⁸⁷ and the *European Union–Singapore Investment Protection Agreement*,⁷⁸⁸ the qualification requirements for appeal tribunal members are equivalent to those for first instance tribunal members.

Likewise, the independence and impartiality requirements for an appellate tribunal under the European Union proposal are equivalent to those for a first instance tribunal, as previously examined. In the multilateral context, the European Union emphasises that the court must ‘adhere to the strictest ethical standards’.⁷⁸⁹ In the context of the *CETA*, the ethical requirements for members of an appeal tribunal are the same as for a first instance tribunal.⁷⁹⁰ In the context of the *European Union–Vietnam Investment Protection Agreement*, appeal tribunal members are subject to provisions on ethics and a compulsory code of conduct.⁷⁹¹ As with members of a first instance tribunal, the *European Union–Singapore Investment Protection Agreement* requires the following:

The Members of the Tribunal and of the Appeal Tribunal shall be chosen from amongst persons whose independence is beyond doubt. They shall not be affiliated with any government, and in particular, shall not take instructions from any government or organisation with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. In so doing they shall comply with Annex 7 (Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators). In addition, upon appointment, they shall refrain from acting as counsel, party-appointed expert or party-appointed witness in any pending or new investment protection dispute under this or any other agreement or domestic law.⁷⁹²

In respect of the terms of office, in the multilateral context, the European Union has proposed that the adjudicators will be ‘working full-time on non-renewable terms’,⁷⁹³ similar to a first instance tribunal. In the bilateral context, the terms of membership vary. The *CETA* does not specify these terms.⁷⁹⁴ While the

⁷⁸⁴ European Commission, ‘The Multilateral Investment Court Project,’ above n 699.

⁷⁸⁵ Colin Brown, ‘The European Union’s Approach to Investment Dispute Settlement,’ above n 545, 12.

⁷⁸⁶ *CETA* art. 8.28 (4).

⁷⁸⁷ *European Union–Vietnam Investment Protection Agreement* art 3.39(7).

⁷⁸⁸ *European Union–Singapore Investment Protection Agreement* art 3.10(4).

⁷⁸⁹ Colin Brown, ‘The European Union’s Approach to Investment Dispute Settlement,’ above n 545.

⁷⁹⁰ *CETA* 8.28 (4).

⁷⁹¹ *European Union–Vietnam Investment Protection Agreement* art 3.40.

⁷⁹² *European Union–Singapore Investment Protection Agreement* art 3.11(1).

⁷⁹³ Colin Brown, ‘The European Union’s Approach to Investment Dispute Settlement,’ above n 545, 11.

⁷⁹⁴ *CETA* art 8.28 (1).

terms of a permanent appellate tribunal under the *European Union–Vietnam Investment Protection Agreement*⁷⁹⁵ is four years,⁷⁹⁶ the *European Union–Singapore Investment Protection Agreement* adopts an eight-year term for an appellate tribunal.⁷⁹⁷ Similar to the WTO model, the European Union has proposed an appeal tribunal secretariat by stating that ‘the court would have a secretariat to support its daily work’.⁷⁹⁸ However, in the bilateral context, a secretariat varies. While the *CETA* does not mention the appeal tribunal secretariat, the *European Union–Vietnam Investment Protection Agreement*⁷⁹⁹ and *European Union–Singapore Investment Protection Agreement*⁸⁰⁰ specify that the ICSID Secretariat will provide appropriate support for the appeal tribunal.

In sum, an examination of the institutional aspects of an appellate tribunal under the European Union proposal has highlighted that an appellate tribunal will be constituted by States on permanent basis, similar to a first instance tribunal under the proposal. The composition, nationality, qualification and independence requirements and the terms of an appellate tribunal will be mandated by the treaty. However, it is noted that the qualification and independence requirements of an appellate tribunal are equivalent to those of a first instance tribunal.

5.2.4.2 Appellate Procedure under the European Union Multilateral Investment Court Proposal

This sub-section turns to the appellate procedure of a proposed multilateral investment court. An appellate procedure recommended by the European Union will include the grounds for appeal, the mandates of the appellate tribunal, the transparency and the timeframes of appellate proceedings. However, grounds for appeal under a proposed multilateral investment court are likely to be broader than grounds for appeal under the WTO system (which is limited to the issue of law). In addition, it is expected that the European Union will incorporate grounds for annulment under the current investor–State arbitration regime into a prospective multilateral investment court.

In the multilateral context, the European Union has proposed that the grounds for appeal will be limited to the error of law and a serious error of fact, stating: ‘Appeal should not imply that a case is heard again de novo. An appeal should only be on issues of law and, we would suggest, on allegations that there has been a manifest error in the appreciation of the facts.’⁸⁰¹ In the bilateral investment court context, the grounds for appeal incorporate errors in applying or interpreting applicable law, manifest errors in

⁷⁹⁵ *European Union–Vietnam Investment Protection Agreement* art 3.39(5)

⁷⁹⁶ *Ibid* art 13(5).

⁷⁹⁷ *European Union–Singapore Investment Protection Agreement* art 3.10(5).

⁷⁹⁸ Colin Brown, ‘The European Union’s Approach to Investment Dispute Settlement’, above n 545, 11.

⁷⁹⁹ *European Union–Vietnam Investment Protection Agreement* art 3.39(18).

⁸⁰⁰ *European Union–Singapore Investment Protection Agreement* art 3.10(14).

⁸⁰¹ Colin Brown, ‘The European Union’s Approach to Investment Dispute Settlement’, above n 545, 11.

appreciating the facts (which include domestic law) and the grounds for annulment provided under article 52(1) of the *ICSID Convention*.⁸⁰² For example, the *CETA* states:

- (a) errors in the application or interpretation of applicable law;
- (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law;
- (c) the grounds set out in Article 52(1)(a) through (e) of the *ICSID Convention*, in so far as they are not covered by paragraphs (a) and (b).⁸⁰³

Another essential feature is the mandate of an appellate tribunal under a multilateral investment court. In the multilateral context, the European Union has not provided any detail; however, according to its submission to the UNCITRAL Working Group III on 18 January 2019, an appellate tribunal under the European Union proposal tends to have a remand power—that is, an appellate tribunal will have the ability to send a case back to the first instance tribunal to complete the legal analyses, which differs from the power of the WTO Appellate Body, as discussed in Chapter 4 (section 4.2.4.2).⁸⁰⁴ In the bilateral context, the *CETA*,⁸⁰⁵ the *European Union–Vietnam Investment Protection Agreement*⁸⁰⁶ and the *European Union–Singapore Investment Protection Agreement*⁸⁰⁷ provide that the appellate tribunal has the mandate to uphold, modify or reverse the award. This feature is comparable to a mandate of the WTO Appellate Body, but contrasts with the ICSID annulment mechanism, where the ICSID annulment committee is empowered to annul arbitral decisions in whole or in part, or to leave the arbitral decisions valid; it does not have the mandate to uphold, modify or reverse the arbitral decisions.

Similar to first instance procedures, the European Union has proposed that the appellate tribunal proceedings will be conducted transparently. In the multilateral context, a proposed multilateral investment court will be based on the *UNCITRAL Rules on Transparency*,⁸⁰⁸ established for the current arbitration procedures. As noted earlier (in section 5.2.3.2), in the bilateral context, the transparency requirements for the first instance procedures vary, and so do the appellate procedures. Except those that

⁸⁰² See *CETA* art 8.28(2); *European Union–Vietnam Investment Protection Agreement* art 3.54(1); *European Union–Singapore Investment Protection Agreement* art 3.19(1).

⁸⁰³ *CETA* art 8.28(2). *ICSID Convention* art 52(1) provides 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.

⁸⁰⁴ European Commission, ‘Establishing a Standing Mechanism for the Settlement of International Investment Disputes’, above n 700, [45].

⁸⁰⁵ *CETA* art 8.28(2).

⁸⁰⁶ *European Union – Vietnam Investment Protection Agreement* art 3.54.

⁸⁰⁷ *European Union – Singapore Investment Protection Agreement* art 3.19(1).

⁸⁰⁸ Colin Brown, ‘The European Union’s Approach to Investment Dispute Settlement’, above n 545, 11.

are modified by the *CETA*, the *UNCITRAL Rules on Transparency* will apply to the appellate proceedings.⁸⁰⁹ Similar to the *CETA*, the *European Union–Vietnam Investment Protection Agreement* provides that the provisions of transparency shall apply mutatis mutandis in respect of the appeal procedure.⁸¹⁰ By contrast, the *European Union–Singapore Investment Protection Agreement* provides that annex 8 (*Rules on Public Access to Documents, Hearings and the Possibility of Third Persons to Make Submissions*) will apply mutatis mutandis in respect of the appeal procedure.⁸¹¹

Regarding the timeframes and costs of the appellate proceedings, the European Union has not provided any details on these issues. In the bilateral context, the *CETA* provides that ‘an award rendered under article 8.39 shall not be considered final and no action for enforcement of an award may be brought until 90 days have elapsed from an award by the Appellate Tribunal and the Appellate Tribunal has not referred the matter back to the tribunal’.⁸¹² The *European Union–Vietnam Investment Protection Agreement*⁸¹³ and the *European Union–Singapore Investment Protection Agreement*⁸¹⁴ provide that the appeal proceedings shall not exceed 180 days, and in no case should the processes exceed 270 days. Under both the *European Union–Vietnam Investment Protection Agreement*⁸¹⁵ and the *European Union–Singapore Investment Protection Agreement*,⁸¹⁶ an appeal tribunal may order an appellant to give security for the costs.

To summarise, an examination of an appellate procedure proposed by the European Union suggests that such a procedure will include grounds for appeal, the mandate of the appellate tribunal and transparency in the appellate proceedings. However, the timeframes and costs of the appellate proceedings have not yet been indicated in a prospective multilateral investment court context. It is noted that while an appellate tribunal is likely to split into a division, as in the WTO model, a system of collegiality (such as the WTO model) does not exist under the European Union multilateral investment court proposal.

5.2.5 Enforcement Mechanism under the European Union Multilateral Investment Court Proposal

The last key feature of the European Union multilateral investment court proposal is a recognition and enforcement mechanism. In the multilateral context, the European Union has proposed that a prospective multilateral investment court would provide for effective enforcement of its decisions,⁸¹⁷ which is ‘in a manner comparable with the current system’.⁸¹⁸ In the bilateral context, the *CETA* requires a disputing

⁸⁰⁹ *CETA* art 8.28 (6).

⁸¹⁰ *European Union–Vietnam Investment Protection Agreement* art 3.46.

⁸¹¹ *European Union–Singapore Investment Protection Agreement* art 3.19(6).

⁸¹² *CETA* art 8.28(9) (c) (iii).

⁸¹³ *European Union–Vietnam Investment Protection Agreement* art 3.54(5).

⁸¹⁴ *European Union–Singapore Investment Protection Agreement* art 3.19(4).

⁸¹⁵ *European Union–Vietnam Investment Protection Agreement* art 3.48.

⁸¹⁶ *European Union–Singapore Investment Protection Agreement* art 3.19(5).

⁸¹⁷ European Commission, ‘The Multilateral Investment Court Project,’ above n 699.

⁸¹⁸ Colin Brown, ‘The European Union’s Approach to Investment Dispute Settlement’, above n 545, 11.

party to ‘recognise and comply with an award without delay’.⁸¹⁹ The *CETA* clarifies that in case a claim has been submitted under the *ICSID Arbitration Rules*, final awards shall be deemed arbitral awards under the *ICSID Convention* and, in case a claim has been submitted under non-ICSID arbitrations, final awards shall be deemed arbitral awards under the scope of *New York Convention*.⁸²⁰ Likewise, the *European Union–Vietnam Investment Protection Agreement* requires each party to recognise an award as ‘binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that party’,⁸²¹ and clarifies that final awards issued shall be deemed arbitral awards under the *New York Convention*⁸²² or the *ICSID Convention*.⁸²³ The *European Union–Singapore Investment Protection Agreement* provides the same.⁸²⁴

In sum, an examination of the European Union multilateral investment court proposal has highlighted that a proposed investment court has the main objective of fostering the rule of law in the international investment system, similar to the WTO dispute settlement system. Although some features of a proposed court are uncertain, the key features of a proposed multilateral investment court proposal will consist of amicable resolution, a permanent first instance tribunal and a permanent appellate tribunal. Both the first instance and appellate proceedings will be conducted transparently by the *UNCITRAL Rules on Transparency*. However, it is uncertain whether the European Union will use either current arbitral procedures or create a new uniform set of procedural rules for a prospective multilateral investment court. Lastly, awards rendered by a proposed multilateral investment court are likely to be enforced through the existing investor–State arbitration instruments, as examined in Chapter 3 (see section 3.2.5).

5.3 Analysis of Potential Benefits of and Concerns Regarding the European Union Multilateral Investment Court Proposal and Areas for Further Development

An examination of the general characteristics and key features of the European Union multilateral investment court proposal reveals that an international investment court moves the whole system of international arbitration to international public adjudication. Although the European Union multilateral investment court proposal is an interesting idea, different views have been expressed regarding the need to establish such an international investment court. This section investigates the potential benefits and risks of the European Union multilateral investment court proposal. It first highlights the point that accuracy and consistency are the main potential benefits of the European Union multilateral investment

⁸¹⁹ *CETA* art 8.41(2).

⁸²⁰ *Ibid* art 8.37 (2).

⁸²¹ *European Union–Vietnam Investment Protection Agreement* art 3.57(2).

⁸²² *Ibid* art 3.57(7).

⁸²³ *Ibid* art 3.57(8).

⁸²⁴ *European Union–Singapore Investment Protection Agreement* art 3.22.

court proposal; it then discusses some concerns regarding this proposal before synthesising lessons learned for a multilateral reform of the ISDS regime.

5.3.1 Potential Benefits of the European Union Multilateral Investment Court Proposal

It can be argued that the European Union multilateral investment court proposal has several positive aspects regarding the resolution of investor–State disputes. The potential benefits can be classified according to five main elements. First, the European Union multilateral investment court proposal would provide a delocalised method of dispute resolution for investor–State disputes and prevent forum shopping. Second, a permanent tribunal of such a court would improve accuracy and consistency in international investment law. Third, an investment court procedure would be open to the public. Fourth, an appeal mechanism of the court would improve accuracy and consistency in international investment law. Fifth, a proposed multilateral investment court would uphold an international rules-based system.

5.3.1.1 A Proposed Multilateral Investment Court Will Provide a Delocalised Dispute Resolution System and Prevent Forum Shopping

One potential advantage of the European Union multilateral investment court proposal is that such a court would provide an international method of dispute resolution. This proposition was recently put forward by the European Union. In a speech in Geneva in June 2018, Colin Brown stated that the primary function of an international investment court is to ‘delocalise a dispute, to take it out of its national context, to ensure that the international nature of the obligation is not lost in the interpretation applied by the domestic courts’.⁸²⁵ Additionally, some commentators point out the advantage of a prospective multilateral investment court in alleviating a concern regarding forum shopping. For example, Howse argues that by ‘entering into a multilateral treaty instrument, States parties could vitiate their consent to dispute settlement in all other fora in relation to the same matter and claimant, thus stopping forum shopping dead in its tracks’.⁸²⁶ This Thesis notes that a prospective multilateral investment court will delocalise investment disputes under the condition that the court’s procedure is governed by public international law (rather than different arbitral procedures) and that the current investor–State arbitration regime is replaced by such a court. The concerns regarding these issues are discussed in greater detail in section 5.3.2.1.

5.3.1.2 Potential Benefits of a Permanent First Instance Tribunal under the European Union Multilateral Investment Court Proposal

One key feature of the European Union multilateral investment court is that to ensure the rule of law, the decision-makers are independent, well-qualified and respected judges. Based on this characteristic, a

⁸²⁵ Colin Brown, ‘The European Union’s Approach to Investment Dispute Settlement’, above n 545, 6.

⁸²⁶ Howse, ‘Designing a Multilateral Investment Court: Issues and Options’, above n 724, 217.

proposed multilateral investment court would replace ad hoc arbitral tribunals with permanent judges. From the European Union perspective, Malmström claims that permanent judges of an international investment court would improve the independence of the first instance tribunal and, in turn, promote legitimacy (including consistency) in the international investment system.⁸²⁷

Correspondingly, the United Nations Commission on Trade and Development (UNCTAD) states that an investment court ‘would go a long way to ensure the legitimacy and transparency of the system, facilitate consistency and accuracy of decisions and ensure independence and impartiality of adjudicators’.⁸²⁸ Recently, the European Union further stated in its submission to the UNCITRAL:

Permanent bodies, by their very permanency, deliver predictability and consistency and manage the fact that multiple disputes arise, since they can elaborate and refine the understanding of a particular set of norms over time and ensure their effective and consistent application. This is particularly relevant when the norms are relatively indeterminate.⁸²⁹

Besides its potential advantage in promoting accuracy, consistency and other values, the permanent model may address concerns regarding a repeat appointment and a lack of public international law expertise that arise from a party-appointed model (as noted in Chapter 3, section 3.3.3.2). As Kaufmann-Kohler and Potestà suggest, because the permanent model would remove the investor’s involvement in the appointment process, it would also address the concerns of a repeat appointment and issue conflicts.⁸³⁰ Howse also notes that qualification and independence requirements for members of a permanent tribunal will alleviate concerns over a lack of expertise in public international law and State regulations as well as a lack of arbitrator independence in the current arbitration regime.⁸³¹

With respect to this argument, this Thesis contends that permanent tribunals have both strengths and weaknesses. Since the parties do not appoint the judges to the disputes, they may accordingly have a sense of permanence, impartiality and independence, which, in turn, can alleviate concerns regarding inaccuracy and inconsistency in the current arbitration regime. Despite this, a permanent tribunal appointed by States still raises some concerns, which are discussed in greater detail later (in section 5.3.2.1). Therefore, this potential benefit is dependent on the institutional aspects of the tribunal. Since investor–State disputes involve contract-based claims, treaty-based claims and hybrids thereof, it is worth considering the pros

⁸²⁷ See Malmström, above n 2.

⁸²⁸ UNCTAD, ‘Reform of Investor–State Dispute Settlement: In Search of a Roadmap Special Issue for the Multilateral Dialogue on Investment’, above n 201, 9.

⁸²⁹ *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union*, UN Doc A/CN.9/WG.III/WP.145, above n 566, 4.

⁸³⁰ Kaufmann-Kohler and Potestà, ‘The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards’, above n 231, 54–60 [96]– [105].

⁸³¹ Howse, ‘Designing a Multilateral Investment Court: Issues and Options’, above n 724, 212.

and cons of this permanent model and exploring alternatives to suit the characteristics of investor–State disputes.

5.3.1.3 Potential Benefits of First Instance Procedures under the European Union Multilateral Investment Court Proposal

Despite the uncertainty regarding whether the European Union will either use the current arbitral procedures or create a new uniform set of procedural rules for a proposed multilateral investment court, a general key advantage of litigation over arbitration is that it generally provides uniform procedural and evidentiary rules, which ensure that the tribunal will consistently decide disputes on the same procedural basis.⁸³²

Consequently, it may be argued that a uniform set of procedural rules would more effectively promote legitimacy compared with the current arbitral procedure. As Van Harten asserts:

[T]he judges would adopt rules of the court to replace the various sets of rules that now govern claims, so that the court itself—guided by overarching principle laid out by the States parties to the multilateral code—can address anomalies in the present system, such as the presumption of confidentiality and the ability of claimants to pick the procedural rules that apply to their claims.⁸³³

In addition, a multilateral investment court procedure would allow the consolidation and streamlining of proceedings, leading to consistency in the dispute resolution process.⁸³⁴ Moreover, the process of a proposed multilateral investment court that is likely to be based on the *UNCITRAL Rules on Transparency* may enhance consistency, as pointed out by the UNCITRAL:

It is expected that such reform efforts will allow for a better understanding of the interpretations given by arbitral tribunals to investment protection standards. This, in turn, may lead to increased consistency and a meaningful opportunity for public participation in the proceedings possibly enhancing the public understanding of the process.⁸³⁵

However, since it is uncertain whether the European Union will either use the current arbitral procedures or create a new uniform set of procedural rules for a proposed multilateral investment court, this Thesis is of the view that it depends on how the investment court procedures are designed. The difficult issue is that investor–State disputes involve contract-based claims, treaty-based claims and hybrids thereof. The design of procedural rules, particularly the burden of proof, standard of proof and transparency, is crucial to

⁸³² United Nations, *Handbook on Peaceful Dispute Settlement between States*, above n 70.

⁸³³ Van Harten, *Investment Treaty Arbitration and Public Law*, above n 544, 159.

⁸³⁴ Howse, ‘Designing a Multilateral Investment Court: Issues and Options’, above n 724, 216.

⁸³⁵ *Possible Reform of Investor-State Dispute Settlement (ISDS)*, UN Doc A/CN.9/WG.III/WP.142 (Note by the Secretariat), above n 7, 7.

determining the outcome. Thus, it is worth exploring alternatives to suit the characteristics of investor–State disputes.

5.3.1.4 Potential Benefits of Appellate Tribunal and Procedure under the European Union Multilateral Investment Court Proposal

Even though the right to appeal is not uniformly seen as a necessary element and is not universally guaranteed, another critical element of the European Union multilateral investment court proposal is that the decisions of investment tribunals are subject to appeal to a permanent appeal tribunal with the authority to correct any errors to ensure accuracy and consistency. Despite the concerns that are discussed shortly (in section 5.3.2.4), the potential benefits of an appeal mechanism include the following: first, an appeal mechanism would improve accuracy and consistency in the application and interpretation of investment treaty norms and dispute outcomes; second, the potential benefits of an appeal mechanism outweigh the potential cost of erroneous and inconsistent decisions; third, an appeal mechanism would promote the reputation of the ISDS regime; and fourth, if an appellate mechanism replaces national courts, this may enhance the authority of enforcement of awards.

The first argument for an investment appeal mechanism is that it would develop the accuracy and consistency of the application and interpretation of investment treaty norms and dispute outcomes. For example, Wälde claims: ‘An appeal facility might, therefore, help not only to increase the “legal” quality, but also provide a sense of more permanence, continuity and familiarity. An appeal facility has therefore many qualities of a good thing.’⁸³⁶ Yannaca-Small states that an appeal mechanism ‘might help allay public concern that awards affecting important public policy issues and interests could be enforced despite serious errors’.⁸³⁷ Johnson notes, ‘I have often thought that, a true appellant process in investor–State dispute is a solution’.⁸³⁸ Regarding consistency, although international investment law is based on bilateral investment treaties (not a multilateral agreement, as in the WTO system), an appeal mechanism would promote the consistency of some basic principles underlying differently worded provisions. For example, Schreuer and Weiniger assert that an appeal mechanism would promote the coherency of some basic principles underlying differently worded provisions, such as the most-favoured-nation clause and the umbrella clause.⁸³⁹ Moreover, good decisions would create good precedents for later cases, at least under the same bilateral investment treaties.⁸⁴⁰ Howse points out that ‘a standing body of jurists and appeal

⁸³⁶ Wälde, ‘Alternative for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?’, above n 333, 74.

⁸³⁷ Yannaca-Small, ‘Improving the System of Investor–State Dispute Settlement: The OECD Governments’ Perspective’, above n 207, 224.

⁸³⁸ Thomas Johnson, ‘Factual Review,’ above n 187, 89.

⁸³⁹ Schreuer and Weiniger, ‘A Doctrine of Precedent?’, above n 311, 1202.

⁸⁴⁰ Veeder, ‘The Necessary Safeguards of an Appellate System,’ above n 187, 6.

allows for the application of the doctrine of precedent to address the concern with inconsistency and incoherence in arbitral awards (the latter has led to lack of security for policy space and regulatory chill).⁸⁴¹ Howard further suggests that a persuasive precedent (similar to the WTO jurisprudence) should apply to an investment court, stating: ‘This type of precedent where the Court would stick to its prior decisions absent compelling reasons would contribute to a more consistent and coherent body of investment law, yet would allow the Lower Court to decide or distinguish prior decisions based on the facts and specific issues in the case.’⁸⁴²

The second argument for an investment appeal mechanism is that the potential benefits of an appeal mechanism outweigh the potential cost of erroneous and inconsistent decisions. With respect to the level of balance between accuracy and finality, Veeder asserts, ‘[h]ere again, finality seems to be less desirable than just getting it right’.⁸⁴³ Knull and Rubins argue that

[t]he benefits of arbitration in the international context are manifold. However, given the stakes often involved in transnational investment and other contracts, finality and speed may be decidedly secondary to neutrality, enforceability, and technical expertise, among others. In particular, those stakes may dramatically reduce the significance of increased time and costs incurred through appeal in relation to the potential cost of an erroneous decision.⁸⁴⁴

Regarding the level of balance between consistency and finality, Franck notes, ‘[t]he slight cost of sacrificing some degree of finality to create a temporal window for the Appellate process is ultimately preferable to a dispute resolution system that renders incoherent decisions and adversely affects the expectations of investors and sovereigns’.⁸⁴⁵ Bottini observes, ‘[i]f ISDS cases become [an] ounce more consistent and the system more coherent, this body could mean less revision, not more. Relatedly, the finality of awards would also be strengthened by eliminating the need to resubmit disputes to a new tribunal in case of annulment’.⁸⁴⁶

The third argument for an appeal mechanism is that it promotes the reputation of the ISDS regime. Veeder points out that ‘appeal seems to have done no harm but much good to ICSID’s general reputation and popularity. It allows the result and reasoning of ICSID awards to be tweaked for the common good of the parties and investment arbitration generally’.⁸⁴⁷ According to Sheppard and Warner, ‘[i]nvestment

⁸⁴¹ Howse, ‘Designing a Multilateral Investment Court: Issues and Options,’ above n 724, 211.

⁸⁴² David M Howard, ‘Creating Consistency Through a World Investment Court’ 41 (1) (2017) *Fordham International Law Journal* 1, 47, 48.

⁸⁴³ *Ibid* 9.

⁸⁴⁴ Knull and Rubins, above n 187, 45.

⁸⁴⁵ Susan D Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’, above n 147, 1622.

⁸⁴⁶ Bottini, above n 187, 14.

⁸⁴⁷ Veeder, ‘The Necessary Safeguards of an Appellate System,’ above n 187, 10.

arbitration may have limited political legitimacy, for example, because it is relatively new, it appears an external constraint on sovereignty (particularly in the case of ICSID arbitration), and lacks the semblance of sensitivity required for acceptability by capital importing States. The presence of an appellate mechanism may partially solve this problem’.⁸⁴⁸

The fourth argument for an appellate mechanism is that if it replaces national courts, it will improve the authority and effective enforcement of non-ICSID awards. Legum notes that the problem of the domestic court as experienced by American investors is that ‘[a] complaint frequently heard by the [United States] Office of the Legal Adviser is that national-court review of arbitration awards against foreign States undermines the effectiveness of arbitration as an institution’, suggesting that ‘if an appellate system displaced national court review in cases subject to its jurisdiction, that development would be notable in and of itself’.⁸⁴⁹ Wälde also states: ‘[w]hile the *New York Convention* standards listed in Art 5 seem to reduce the discretion of domestic courts, there are ample facilities for a more intensive control of investment awards by courts, based on using the limitations of the required consent to scrutinise the way tribunals apply relevant law and by an extensive notion of public policy and arbitrability’.⁸⁵⁰ Yannaca-Small points out: ‘It was suggested that the creation of appeal mechanism might enhance the expeditious and effective enforcement of awards if a respondent filing an appeal were required to post a bond in the amount of the award and if appeal decisions were excluded from domestic court review.’⁸⁵¹ According to Price, ‘if we are going to have an appellate mechanism ... it has to displace completely the role of national courts presently exercised under the *New York Convention*’.⁸⁵²

In sum, there are several potential benefits of an appeal mechanism. It may be considered potentially useful in the context of multilateral ISDS regime for the following reasons. First, as examined in Chapter 2, an investor–State dispute concerns general public importance. In addition, besides contract-based claims, an investor–State dispute involves treaty-based claims, which should be correctly interpreted in view of the treaty interpretation rule.⁸⁵³ In addition, an interpretation of an investment treaty has a greater potential effect on third parties compared with contract-based claims, the same or different international investment agreements that have similar wording, and the international community. Additionally, an appellate mechanism may improve the reputation of a multilateral ISDS regime and enforcement of the award. However, these potential benefits should be weighed against the concerns discussed subsequently

⁸⁴⁸ Sheppard and Warner, above n 194, 3.

⁸⁴⁹ Legum, ‘Visualizing an Appellate System’, above n 149, 65.

⁸⁵⁰ Wälde, ‘Alternative for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution After the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?’, above n 333, 140.

⁸⁵¹ Yannaca-Small, ‘Improving the System of Investor–State Dispute Settlement’, above n 207, 225.

⁸⁵² Daniel M Price, above n 178, 48.

⁸⁵³ *Vienna Convention on the Law of Treaties* art 31.

(in section 5.3.2.6). Alternatives that can balance accuracy and consistency with efficiency in the context investor–State disputes should be further explored.

5.3.1.5 Potential Benefits of a Prospective Multilateral Investment Court in Upholding an International Rules-Based System

Overall, it may be argued that the public features of a prospective multilateral investment court (permanent tribunal, transparent court procedure and appellate mechanism) would reinforce the rule of law within the international investment system. The UNCTAD states:

A standing investment court would be an institutional public good serving the interests of investors, States and other stakeholders. The court would address most of the problems outlined above: it would go a long way to ensure the legitimacy and transparency of the system, facilitate consistency and accuracy of decisions and ensure independence and impartiality of adjudicators.⁸⁵⁴

While there is a view that a prospective multilateral investment court may not suit a bilateral investment treaty regime (as is discussed in section 5.3.2.1), there is an opinion that if a prospective multilateral investment court has jurisdiction over investment treaties and other public international law, it will promote consistency of the common norms across investment agreements as well as other related sources of public international law. Howse notes, ‘Even in the exercise of determining the law under different treaties, a multilateral court would have a considerable harmonizing or de-fragmenting effect’.⁸⁵⁵ From the European Union perspective, the multilateral investment court ‘should be for investment dispute settlement what the World Trade Organization is for trade dispute settlement, thus upholding a multilateral rules-based system’.⁸⁵⁶

To summarise, it may be argued that a proposed investment court proposal has potential positive aspects regarding the resolution of investor–State disputes. The proposal is likely to provide a uniform, delocalised method of dispute resolution and prevent forum shopping practices. A permanent tribunal, transparent court procedure and appeal mechanism would improve accuracy and consistency in international investment treaty law. The predictability an international investment court would generate through consistent decision-making would minimise the costs to investors and contribute to long-term system efficiency.

⁸⁵⁴ UNCTAD, ‘Reform of Investor–State Dispute Settlement: In Search of a Roadmap Special Issue for the Multilateral Dialogue on Investment’, above n 201, 9.

⁸⁵⁵ Howse, ‘Designing a Multilateral Investment Court: Issues and Options’, above n 724, 215.

⁸⁵⁶ European Commission, *Commission Welcomes Adoption of Negotiating Directives for a Multilateral Investment Court* (20 March 2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1819>>.

5.3.2 Concerns Regarding the European Union Multilateral Investment Court Proposal and Areas for Further Development

Although there are certain positive aspects of the European Union multilateral investment court proposal, several concerns have been raised about it. The main concerns can be classified as follows: the suitability of an investment court for the bilateral investment treaties regime; the difficulty in transitioning from the current investor–State arbitration regime to a multilateral investment court system; the State-appointed permanent tribunal, which is likely to give the sovereign State control of the dispute settlement process; the non-uniform investment court procedures; the incompatibility of an appeal mechanism with existing arbitral procedures; the unenforceability of awards rendered by an investment court under existing enforcement mechanisms; the potential negative effect of an investment court on the investment climate; and the difficulty of establishing an investment court.

5.3.2.1 A Prospective Multilateral Investment Court Is Unsuitable for the Bilateral Investment Treaty Regime

Despite the potential benefits of an investment court in providing delocalised dispute resolution, one concern is that an investment court is unlikely to improve the accuracy and consistency of the international investment system as a whole. This is because the investment system has operated under the bilateral investment treaties regime, which is different from multilateral trade agreements under the WTO system. As the UNCTAD notes:

Finally, it is questionable whether a new court would be fit for a fragmented regime that consists of a huge number of mostly bilateral IIAs [international investment agreements]. It has been argued that this option would work best in a system with a unified body of applicable law. Nonetheless, even if the current diversity of IIAs is preserved, a standing investment court would likely be much more consistent and coherent in its approach to the interpretation and application of treaty norms, compared with numerous ad hoc tribunals.⁸⁵⁷

García asserts: ‘With more than 3,000 IIAs [international investment agreements] in place and more than 514 treaty-based cases doubts remain as to how an investment court which would have jurisdiction over a considerable number of legal texts with different wording would be able to remove the ambiguity, confusions and contradictions in investment treaty arbitration.’⁸⁵⁸ To illustrate this, Hamida contends that ‘[t]he Arab Investment Court [AIC] has failed to reach the level of coherence and authority of the case law developed by international arbitral tribunals constituted under bilateral and multilateral investment

⁸⁵⁷ UNCTAD, ‘Reform of Investor–State Dispute Settlement: In Search of a Roadmap Special Issue for the Multilateral Dialogue on Investment’, above n 201, 9.

⁸⁵⁸ García, above n 233, 7.

treaties’.⁸⁵⁹ In addition, there is an argument that an international investment court could not create legal precedents over parallel arbitrations, as noted by Zuleta:

[e]ven if the new court would provide for a system of precedents, problems of inconsistent decisions and predictability would still exist, in light of its coexistent with adjudication of investment disputes via ad hoc arbitral tribunals or those constituted under the auspices of ICSID or other institutions.⁸⁶⁰

In this regard, Gaffney suggests an alternative solution: ‘[I]CS [International Court System] judges should draw on the case law developed by international arbitral tribunals constituted under bilateral and multilateral investment treaties, notwithstanding misplaced public criticism of the role of such tribunals.’⁸⁶¹ Howse adds, ‘While the court should not be prohibited from considering prior investment arbitration awards as persuasive authority in its adjudicative function, it should exercise fundamental caution when relying on concepts and doctrines that have arisen in the context of investment arbitration’.⁸⁶²

This Thesis notes that though the current international investment system has operated under the bilateral investment treaties regime, one treaty applies to several investors. Even when considering different treaties, the arbitral tribunals have also used third-party treaties or other tribunal decisions to assist with their interpretation.⁸⁶³ Thus, if established, an international investment court may improve the consistency of the norms under one treaty, at least. In addition, the court may improve the consistency of basic principles underlying different treaties that contain the same or similar norms, as well as customary international law and general principles of law that have relevance to the third party and international investment communities. In the present stage of development, international investment law is likely to move from bilateral investment treaties to mega-region free trade agreements. In this regard, an international investment court with an appeal mechanism is likely to improve accuracy and consistency on a larger scale.

5.3.2.2 Concerns Regarding Difficulty in Establishing a Prospective Multilateral Investment Court

The most recent debate over an international investment court is about how hard it may be to implement this court in practice, since it requires consent from the States. In this respect, the UNCTAD notes:

[H]owever, this solution would also be the most difficult to implement as it would require a complete overhaul of the current regime through a coordinated action by a large number of States. Yet, the consensus would not

⁸⁵⁹ Hamida, above n 233, 12.

⁸⁶⁰ Zuleta, above n 233, 15.

⁸⁶¹ Gaffney, above n 233, 2.

⁸⁶² Howse, ‘Designing a Multilateral Investment Court: Issues and Options’, above n 724, 221.

⁸⁶³ Stephen W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009) vol 2 294.

need to be universal. A standing investment court may well start as a plurilateral initiative, with an opt-in mechanism for those States that will wish to join.⁸⁶⁴

One possible solution is the opt-in convention, which allows non-party States to submit disputes to a multilateral ISDS regime by giving their consent in their international investment agreements.⁸⁶⁵ Based on this, Roberts considers ISDS regime reform as likely to be implemented at the plurilateral level and to require a binary choice—that is, both bilateral and multilateral exist⁸⁶⁶—and suggests that, besides the UNCITRAL, a prospective multilateral investment court may be established under other international governmental organisations, such as ICSID, UNCTAD or the Organisation for Economic Co-operation and Development (OECD).⁸⁶⁷ However, Howard is of the opinion that an investment court should be established under the WTO, stating: ‘The investment court should preferably be created under the auspices of the WTO, as there currently is no supranational entity for regulating foreign direct investment, and the closest regulatory organization would be the WTO.’⁸⁶⁸ This Thesis notes that although the international investment court may be difficult to establish, this may start with an agreement between more than two States. A platform for establishing a multilateral ISDS regime should be further explored.

5.3.2.3 Concerns Regarding Difficulty in Transitioning from the Current Investor–State Arbitration Regime to a Prospective Multilateral Investment Court System

Besides the difficulty in establishing a prospective multilateral investment court, there might be difficulty transitioning from the current investor–State arbitration regime to a proposed multilateral investment court system, and difficulties regarding the relationship between a prospective multilateral investment court system and existing investor–State and interstate arbitrations. Opinions on these difficulties are divided.

One view is that a multilateral investment court should replace the current investor–State arbitration regime.⁸⁶⁹ Another view is that the States should decide whether a prospective multilateral investment court would entirely replace the current investor–State arbitration regime or complement it.⁸⁷⁰ Others contend that the prospective multilateral investment court is likely to coexist with the existing investor–State arbitration regime because some States are not willing to adopt the new practice.⁸⁷¹ To ensure a

⁸⁶⁴ UNCTAD, ‘Reform of Investor–State Dispute Settlement: In Search of a Roadmap Special Issue for the Multilateral Dialogue on Investment’, above n 201, 9.

⁸⁶⁵ Kaufmann-Kohler and Potestà, ‘Can the Mauritius Convention Serve as a Model for the Reform of Investor–State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?: Analysis and Roadmap’, above n 214, 75–93 [212]–[273].

⁸⁶⁶ Roberts, ‘UNCITRAL and ISDS Reform: Pluralism and the Plurilateral Investment Court,’ above n 233, [3]–[4]

⁸⁶⁷ Ibid [16].

⁸⁶⁸ Howard, above n 844, 45.

⁸⁶⁹ Howse, ‘Designing a Multilateral Investment Court: Issues and Options’, above n 724, 220.

⁸⁷⁰ Kaufmann-Kohler and Potestà, ‘The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards’, above n 231, 10 [6].

⁸⁷¹ Roberts, ‘UNCITRAL and ISDS Reform: Pluralism and the Plurilateral Investment Court,’ above n 233, [9].

smooth transition from the investor–State arbitration regime to the international investment court, Gaffney suggests that

[c]onsideration should be given either to reformulating the ICS [International Court System] as a system having subsidiary jurisdiction, i.e., either allowing the parties recourse to the ICS where they failed to agree to submit investment disputes to arbitration or affording investors the discretion to submit disputes to arbitration or to the ICS. While, akin to the AIC [Arab Investment Court]’s experience, this is likely to reduce the ICS’ potential caseload, it would help ensure a smooth transition from the long-established ISDS system to the ICS.⁸⁷²

In respect of the relationship between a prospective multilateral investment court and interstate arbitration, Kaufmann-Kohler and Potestà suggest entrusting interstate disputes (which deal with the interpretation of the international investment agreements) to a prospective multilateral investment court to promote consistency.⁸⁷³ In addition to the above, Schill and Vidigal suggest creating a new institution, the Multilateral Investment Dispute Settlement Institution, to administer a prospective multilateral investment court, investor–State arbitration and interstate arbitration under one umbrella.⁸⁷⁴ They further suggest that arbitral tribunals may be allowed to serve as first instance tribunals of a prospective multilateral investment court.⁸⁷⁵ Arguably, the alternative solution proposed by Gaffney (as mentioned above) may be suitable for a transition period. In the long term, the relationship between the current investor–State arbitration regime and a prospective multilateral investment court should be further explored. This is discussed in Chapter 6.

5.3.2.4 Concerns Regarding a Permanent First Instance Tribunal under the European Union Multilateral Investment Court Proposal

While a permanent investment tribunal of the European Union multilateral investment court proposal may offer several advantages, including consistency, several concerns have been raised about a permanent investment tribunal. For example, a State-appointed permanent tribunal may be less balanced and fair than the party-appointed arbitral tribunals of the current arbitration regime; a permanent tribunal would not guarantee the quality of legal reasoning and decisions; and a proposed multilateral investment court could lose the benefits of existing enforcement instruments. Let us consider this in turn.

⁸⁷² Gaffney, above n 233.

⁸⁷³ Kaufmann-Kohler and Potestà, ‘Can the Mauritius Convention serve as a Model for the Reform of Investor–State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?: Analysis and Roadmap’, above n 214, 67 [182].

⁸⁷⁴ Schill and Vidigal, ‘Cutting the Gordian Knot: Investment Dispute Settlement à la Carte’, above n 233, 18.

⁸⁷⁵ Ibid 19.

First, it may be argued that the State-appointed permanent tribunal is likely to give the sovereign State control of the tribunal. Kho et al. note that the State-appointed permanent tribunal ‘will give rise to an imbalance in favor of the State as the respondent, given that the chosen panel members may be more inherently sympathetic to the interests of the States who selected them than to the interests of the foreign investors whose claims they are being called upon to adjudicate’.⁸⁷⁶ Bernardini observes: ‘From the investor’s perspective, judges appointed by States and paid a retainer fee by States that are the disputing parties would have an inherent pro-State bias that, although per se not a sufficient reason for challenge, would undermine the confidence in the full neutrality of the adjudicating body, therefore of the system as a whole.’⁸⁷⁷

Second, some commentators believe that the permanent judges of an international investment court may not guarantee the quality of legal reasoning and decisions. García states: ‘[t]he appointment of permanent judges that have been appointed by States *would not guarantee* the quality of the decisions, reconcile divergent opinions with respect to the content of the investment treaty protections or strengthen the credibility of the system just because the appointment was made by the State.’⁸⁷⁸ Sornarajah observes:

[A]n Investment Court would not cure such illegitimacy. A Court would become a device for neoliberal rules of investment protection with even greater authority. Judges of the International Court of Justice (ICJ) have been sitting as investment arbitrators. A study of their record does not show that they avoid the prejudices of those arbitrators who had not also served as judges at such a high level. On the few occasions ICJ judges from developing countries sat on investment arbitration panels, they dissented from the (developed country) majority. Having a minority of five judges from developing countries is no help. They are in a minority, even assuming those appointed are not already acculturated to the neoliberal vision. They could be strong-armed into complying with majority decisions. There is no indication as to the geographical areas they may come from or how they would be chosen.⁸⁷⁹

In relation to the selection criteria for the judges of a multilateral investment court, Wood observes that ‘it is not always easy to find the right people for the many existing courts and tribunals’ and raised the following question: ‘[W]ill they really be any different from those experts in the field who regularly sit in investor State arbitrations?’⁸⁸⁰ Veeder further notes the difficulties in choosing suitable judges for a new court, and the seat.⁸⁸¹

⁸⁷⁶ Kho et al, above n 192.

⁸⁷⁷ Bernardini, above n 231, 48.

⁸⁷⁸ García, above n 233, 8.

⁸⁷⁹ Sornarajah, ‘An International Investment Court: Panacea or Purgatory?’, above n 337.

⁸⁸⁰ Wood, above n 68.

⁸⁸¹ John Veeder, ‘What Matters about Arbitration’ (2016) 82 (2) *Chartered Institute of Arbitrators* 153.

Third, some commentators observe that if a tribunal is appointed only by States, an investment court can lose the benefits of existing enforcement instruments.⁸⁸² To address this concern, Bernardini proposes that the investment court tribunal may be appointed by an existing permanent arbitral institution, such as the Permanent Court of Arbitration (PCA), instead of States.⁸⁸³ Others, such as Schill and Vidigal, recommend that the ICSID list of arbitrators model might be used for the first instance tribunal of a multilateral investment court.⁸⁸⁴

In addition to the above main concerns, there are several issues arising from a permanent tribunal model that have not yet been addressed in the European Union multilateral investment court proposal. For example, in respect of a method of appointment, there is a suggestion that a permanent tribunal might be based on the full representation model (which represents all State parties, but may cause more complexity and be more costly) or the selective representation model (which does not represent all States parties, but may be less complex and more workable).⁸⁸⁵ A selection process of members of the tribunal should be multi-layered, open and transparent, and may include several stages: nomination, consultation, screening and election/appointment.⁸⁸⁶ Terms of office is another issue for further consideration in a multilateral ISDS regime reform. While there is a view that a non-renewable longer term would be a better option than a short term office because it would reduce the concern about having another job after the incumbency and strengthen the independence, knowledge and experience of adjudicators,⁸⁸⁷ Howard contends that ‘a relatively shorter term would allow the contracting States to appoint judges perceived to be more balanced towards State sovereignty and investor protection’.⁸⁸⁸ This view of Howard’s is also that the size of the tribunal might be adjusted in relation to caseload.⁸⁸⁹

In addition, further studies are needed to investigate the nationality, qualification, independence and impartiality requirements of a permanent tribunal. In respect of a nationality requirement, there is a suggestion that a multilateral ISDS regime should prohibit members of the tribunal from sitting ‘on cases involving their State of nationality (or an investor of the same nationality as the ITI [International Tribunal for Investments] member)’.⁸⁹⁰ In respect of a qualification requirement, there is also an observation that the expertise and experience of permanent tribunal members may be gained in a variety of ways.

⁸⁸² Bernardini, above n 231, 57.

⁸⁸³ Ibid.

⁸⁸⁴ Schill and Vidigal, ‘Cutting the Gordian Knot: Investment Dispute Settlement à la Carte’, above n 233, 19–20.

⁸⁸⁵ Kaufmann-Kohler and Potestà, ‘The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards’, above n 231, 17–20 [21]–[26].

⁸⁸⁶ Ibid 64–65 [113]–[115].

⁸⁸⁷ Ibid 90–91 [162]–[163].

⁸⁸⁸ Howard, above n 844, 46.

⁸⁸⁹ Ibid 45.

⁸⁹⁰ Kaufmann-Kohler and Potestà, ‘The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards’, above n 231, 107 [205].

Therefore, a qualification requirement should focus on candidates' competence, rather than be limited to judges or academic professionals.⁸⁹¹ There is a view that diversity (such as nationality, qualification and gender) would also benefit the tribunal of a multilateral ISDS regime as a whole.⁸⁹² In case the new, multilateral ISDS regime is established as a permanent body, the independence and impartiality requirements of the tribunals will be a critical issue. Kaufmann-Kohler and Potestà point out:

In an ad hoc setting, structural independence is largely achieved through equal influence of the disputing parties on the constitution of the arbitral tribunal. In a permanent setting, however, that implementation method does not work anymore, because only the disputing respondent will influence the composition of the adjudicative body as Contracting State (to a greater extent in a permanent system than in a semi-permanent roster system).⁸⁹³

There is a suggestion that a permanent tribunal may be divided into divisions, which could be a standing body (in which the members of the division could be composed at random or by the decision of the president or an authorised organ, as in the European Union bilateral investment court with Canada, Vietnam and Singapore) or a roster model (in which the members of the division are selected by the parties). A standing division could prevent the disputing party from influencing the composition of the division, but may not suit the specific characteristic of a particular dispute. A roster division would provide an opportunity for both sides of the dispute to select the division's members to hear the case and may be justified as arbitration for enforcement purposes; it may cause polarisation.⁸⁹⁴ Further, a division may be divided into a first competent chamber and the grand chamber to deal with an issue of systemic relevance.⁸⁹⁵

Regarding a tribunal being divided into divisions, further considerations should be given to how the case will be assigned to a division to ensure that disputes are allocated without political considerations or outside influence. Two possible options are a random assignment and case assignment by the president or an authorised organ. While a random assignment may warrant the independence of division members from internal and external interferences, this method of assignment may pose concerns in relation to the allocation of workload between the division and the availability of tribunal members. A case assigned by the president or an authorised organ may alleviate the weaknesses of the random assignment in regard to

⁸⁹¹ Ibid 26 [39].

⁸⁹² Katia Fach Gómez, 'Diversity and the Principle of Independence and Impartiality in the Future Multilateral Investment Court' 17 (2018) *The Law and Practice of International Courts and Tribunals* 78–97.

⁸⁹³ Kaufmann-Kohler and Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards', above n 231, 49 [80].

⁸⁹⁴ Ibid 93–5 [168]–[175].

⁸⁹⁵ Ibid 105 [200].

the allocation of workload and the availability of tribunal members, but may pose risks of internal and external interferences, such as lobbying, pressure from powerful disputing parties or bias preference.⁸⁹⁶

Based on the above discussion, this Thesis considers that several concerns exist regarding a permanent tribunal that deserve further consideration. For example, a State-appointed permanent tribunal may be less balanced and fair than the party-appointed arbitral tribunals under the current arbitration regime; a permanent tribunal would not guarantee the quality of legal reasoning and decisions; and a proposed multilateral investment court could lose the benefits of existing enforcement instruments. Additionally, some aspects of a permanent tribunal—notably method of appointment, selection process, terms of office, division of the tribunal and case assignment methods—need further consideration.

5.3.2.5 Concerns Regarding First Instance Procedures under the European Union Multilateral Investment Court Proposal

Another concern is the first instance procedure under the European Union multilateral investment court proposal. As examined previously, at this point, it is uncertain whether the European Union will either use the current arbitral procedures (such as those of its international trade and investment agreements with Canada, Vietnam and Singapore) or create a new uniform set of procedural rules for a prospective multilateral investment court (as in the WTO model). Kaufmann-Kohler and Potestà point out:

Certainly, the treaty creating the court. Beyond, it will depend whether the proceedings remain arbitration-like or are exclusively court-like. If the former, proceedings could either be subject to a domestic *lex arbitri* or be completely delocalized, similarly to proceedings under the *ICSID Convention*. Whatever the choice, it will need to be articulated clearly to avoid uncertainties when it comes to national court.⁸⁹⁷

With respect to transparency, the European Union multilateral investment court proposal is likely to include a provision requiring parties to the dispute to adopt the *UNCITRAL Rules on Transparency*. As examined previously, the *UNCITRAL Rules on Transparency* is likely going beyond what is currently required in the context of both the investor–State arbitration regime and the WTO dispute settlement system. Accordingly, some commentators observe that this proposal might affect efficiency in the dispute resolution process. For example, Kho et al. note:

Moreover, expanding the nature of litigation (e.g., through third party intervention and amicus curiae submissions) will only increase the overall cost of litigation, which may harm smaller investors that lack the

⁸⁹⁶ Ibid 104 [194]– [195].

⁸⁹⁷ Gabrielle Kaufmann-Kohler and Michele Potestà, ‘Challenges on the Road Toward a Multilateral Investment Court’ (2017) 201 *Columbia FDI Perspectives on Topical Foreign Direct Investment* 2.

means to finance large-scale litigation against a well-funded government, and in turn, again discourage foreign investment in the first place.⁸⁹⁸

With regard to this concern, this Thesis contends that it depends on how the investment court procedures are designed. The difficult issue is that investor–State disputes involve contract-based claims, treaty-based claims and hybrids thereof. The design of procedural rules—particularly the burden of proof, standard of proof and transparency—is crucial to determining the outcome.

5.3.2.6 Concerns Regarding an Appellate Tribunal and Procedure under the European Union Multilateral Investment Court Proposal

Despite its potential benefits, as discussed previously (in section 5.3.1.4), there are also concerns about an appellate review in the context of investment disputes. These concerns can be summarised as follows: first, if an appellate mechanism is not properly designed, it may produce inaccurate decisions and legal precedent, and could not achieve consistency and coherence across a plethora of bilateral investment instruments; second, an appellate mechanism (especially the grounds for appeal under the European Union multilateral investment court proposal, which would overlap with the grounds for annulment and cover manifest errors in the appreciation of the fact) may result in an increase of proceeding cost and time; third, there are alternatives to the appellate mechanism; fourth, an appeal mechanism is not necessary for enhancing the enforcement of arbitral awards; and fifth, an appeal mechanism may not be compatible with the existing enforcement instruments of the current international arbitration regime.

First, while the significant argument for an appellate mechanism is that it would build accuracy and consistency in the international investment system, there is a concern that an appeal could also lead to a wrong decision and be unable to foster consistency across the plethora of bilateral investment instruments. Regarding accuracy, Legum argues, ‘[t]he third and final reason why there are no options on the table for an appellate mechanism is that the cure here could be far worse than the disease. The wrong sort of appellate body for investment disputes could do a tremendous amount of damage’.⁸⁹⁹ If one understands the writer correctly, Legum makes the reader aware that if an appellate mechanism were poorly designed, inaccurate outcomes would not only have a negative effect on the disputing parties, but also on later cases and the international investment system at large. With respect to the observation regarding the risk of inaccuracy created by an investment appellate mechanism, this Thesis agrees that investment treaty norms should be correctly interpreted as per the rules of treaty interpretation under the *Vienna Convention on the Law of Treaties*.⁹⁰⁰ However, because an investment appellate mechanism has not yet been established to

⁸⁹⁸ Kho et al, above n 192.

⁸⁹⁹ Legum, ‘Options to Establish an Appellate Mechanism for Investment Dispute’, above n 149, 238.

⁹⁰⁰ *Vienna Convention on the Law of Treaties* arts 31–32.

allow a conclusion as to whether such an appellate mechanism would promote accuracy in the international investment system, this Thesis holds that this will depend upon how the new international appeal mechanism is designed. Nonetheless, the comparative analysis with the WTO dispute settlement system presented in Chapter 4 proves that the WTO Appellate Body is a crucial factor in improving accuracy and consistency in international trade law.

In respect to the concern regarding the capability of an appeal mechanism to develop consistency across the plethora of bilateral investment instruments, Paulsson asserts: ‘Given the multiplicity of BITs [bilateral investment treaties] and other instruments underlying investor protection, the plain fact is that one would have to imagine a plethora of distinct appellate mechanisms—each reflecting the desiderata of its drafters, each responsive to different articulations of substantive norms, each with different personnel.’⁹⁰¹ Again, Legum argues:

The goal of achieving consistency and coherence across the full body of international investment law today, therefore, is chimerical. The diversity of texts and contexts across 2,500 treaties is such that a truly consistent and coherent interpretation of them is neither possible nor permissible under accepted rules of treaty interpretation.⁹⁰²

Concerning this issue, this Thesis considers that although the current international investment system has operated under the bilateral investment treaties regime, one treaty applies to several investors. The bilateral investment treaties also share some common principles. Even when considering different treaties, the arbitral tribunals have also used third-party treaties or other tribunal decisions that contain the same or similar subject matter to assist with their interpretation; Schill refers to this method as ‘cross-treaty interpretation’.⁹⁰³ In addition, some investment disputes may require arbitral tribunals to consider customary international law and general principles of law, such as the good faith principle, in interpreting investment treaty provisions. Thus, an investment appeal mechanism, if established, may improve the consistency of the norms under one treaty, at least. In addition, the appeal mechanism may improve the consistency of basic principles underlying different treaties that contain the same or similar norms, as well as relevant customary international law and general principles of law.

The second argument against an appeal mechanism relates to its cost and duration. While the proponent argues that the benefits of an appeal mechanism are likely to outweigh the costs, the opponent views that the additional cost and time of the appellate proceedings may negatively affect foreign investors and the investment climate. Lalive contends that the parties decide to resource international arbitration because

⁹⁰¹ Jan Paulsson, ‘Avoiding Unintended Consequences’, above n 149, 259.

⁹⁰² Lagum, ‘Options to Establish an Appellate Mechanism for Investment Dispute’, above n 149, 235.

⁹⁰³ Schill, *The Multilateralization of International Investment Law*, above n 865, 294.

they can choose arbitrators, the procedure and confidentiality, and save time and cost so they can resume their business relations.⁹⁰⁴ Tawil contends that an appeal mechanism could also increase costs and become prohibitive for some developing States, further asserting that ‘investors require quick decisions as trust is a necessary requirement to be complied for investments to be done. If we establish proceedings that do not comply with such type of needs, investors will probably look for other venues’.⁹⁰⁵

In the context of the European Union multilateral investment court proposal, Kaufmann-Kohler and Potestà observe that ‘keeping the annulment remedy would de facto create a three-tier dispute settlement system, which would go against the objectives of finality and efficiency’.⁹⁰⁶ They suggest that the grounds for annulment under article 52(1) of the *ICSID Convention* should be excluded from the grounds for appeal under a new investment appeal mechanism.⁹⁰⁷ In addition, there is a view that grounds for appeal under the European Union multilateral investment court proposal (that an appellate tribunal would have the power to review both legal errors and serious factual errors committed by the tribunal at first instance) will create additional costs and delays in a dispute resolution process. Kho et al. observe:

[I]t is unclear how the Appeal Court could feasibly re-open factual findings by the Tribunal. The resulting cost and delay in pursuing an appeal could itself pose a barrier for foreign investors with limited resources to prosecute their claims against the host State in arbitration, causing them to think twice before investing in the first place.⁹⁰⁸

With respect to this argument, this Thesis views that the equilibrium of an appeal mechanism depends on dispute characteristics. Although the benefits of an appellate review in an investment context may not be as evident in interstate disputes under the WTO, an appeal mechanism might be useful for a multilateral ISDS regime. However, it should be designed to reconcile efficiency and consistency.

The third argument against an appellate mechanism is that there are alternatives to an appeal mechanism that can promote consistency, including authoritative arbitration, preliminary rulings and consolidation. The question is whether these alternatives could substitute an appellate mechanism. Authoritative arbitration has been used in the Court of Justice of the European Union jurisprudence, where such a court meets regularly with the national court. Wälde suggests that ‘the purpose of these meetings was to minimise conflicts, to understand each other’s views and to make sure a non-conflicting jurisprudence

⁹⁰⁴ Lalive, above n 304, 6.

⁹⁰⁵ Tawil, above n 149, 131– 3.

⁹⁰⁶ Kaufmann-Kohler and Potestà, ‘The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards’, above n 231, 72[196].

⁹⁰⁷ Ibid 72[198].

⁹⁰⁸ Kho et al, above n 192.

emerged in both and that was successful’.⁹⁰⁹ Slightly different from authoritative arbitration is a preliminary ruling mechanism, another alternative in which the arbitral tribunal requests a ruling on an interpretation of the law from an authoritative body during the proceedings. Schreuer states that ‘This method could become a successful means to ward off inconsistency and fragmentation’.⁹¹⁰ Kaufmann-Kohler also proposes:

A possible model may be provided by the procedure of Article 234 (formerly 177) of the EEC Treaty [the Treaty Establishing the European Economic Community], pursuant to which national courts of Member States request interpretative rulings from the European Court of Justice on matters of European law. If properly designed, such a mechanism would ensure consistency, without the drawbacks of a full-fledged appellate procedure.⁹¹¹

Besides an authoritative arbitration and a preliminary ruling mechanism, another alternative is a consolidation of claims (or the process of uniting two or more claims into a single procedure).⁹¹² Wälde suggests that this mechanism is likely to minimise conflicting arbitral awards without changing the current structure of investor–State arbitration.⁹¹³ In the report to the UNCITRAL (2016), Kaufmann-Kohler and Potestà suggest that only a preliminary ruling may be used under the new, multilateral ISDS regime, but ‘there would be serious risk of duplication of proceedings and waste of resources, as the appeal function would co-exist alongside the referral function’.⁹¹⁴ Although some alternatives to an appeal mechanism have been suggested, this Thesis considers that these mechanisms may help minimise costs and delay in appeal proceedings; but, in this case, the costs and timeframe will likely be shifted from appeals to the first instance tribunal. Another limitation is that these alternatives to an appeal mechanism are unlikely to create precedents valued as appeals decisions (as in the WTO Appellate Body). Although this mechanism cannot substitute an appellate mechanism, it may be used to complement an appeal mechanism or an international investment court.

Fourth, while proponents view that an appellate mechanism may enhance the authority of enforcement of awards, there is a counterargument that an appeal mechanism is not necessary for strengthening the enforcement of arbitral awards. Tams admits that an appeal mechanism would improve the enforcement of non-ICSID awards, but notes that ‘[t]his would not be an automatic consequence, but depend on the

⁹⁰⁹ Wälde, ‘Alternative for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative treaty Arbitration or Mandatory Consolidation?’, above n 333, 76.

⁹¹⁰ Schreuer, ‘Preliminary Rulings in Investment Arbitration’, above n 148, 209–11.

⁹¹¹ Kaufmann-Kohler, ‘Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?’, above n 35, 24.

⁹¹² OECD, *International Investment Perspectives* (OECD, 2006) 226.

⁹¹³ Wälde, ‘Alternative for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative treaty Arbitration or Mandatory Consolidation?’, above n 333, 76.

⁹¹⁴ Kaufmann-Kohler and Potestà, ‘The Composition of a Multilateral Investment Court and of an Appeal Mechanism, above n 231, 74 [210].

willingness of States to take the extra step of elevating AF [Additional Facility] awards, as far as their immunity from national court review is concerned, to the level of the *ICSID convention* decisions'.⁹¹⁵ With respect to this issue, this Thesis contends that an appeal mechanism is likely to help improve enforcement of non-ICSID awards only if appeal decisions are excluded from national court reviews, although the role of national courts under the current system is extremely limited.

The final concern about an appeal mechanism is that it may not be compatible with existing instruments of the international investment treaty regime. This argument has recently been put forward by Calamita,⁹¹⁶ who argues that while establishing an appeal mechanism under non-ICSID arbitrations is likely to be less problematic, incorporating an appeal mechanism into ICSID arbitration may be challenging, since article 53 of the *ICSID Convention* currently excludes an appeal mechanism. Amending the *ICSID Convention* would be difficult because it would require all parties to agree.⁹¹⁷ By contrast, Cheng suggests that 'government officials may provide for the appeal of ICSID awards by inserting an appellate review provision into the dispute resolution clauses of their BITs [bilateral investment treaties]... without modifying the *ICSID Convention*'.⁹¹⁸ However, one limitation of this option is that the awards rendered by an appellate mechanism established under bilateral investment treaties or a prospective multilateral investment court can only be enforced in States that are party to such bilateral investment treaties or the treaty establishing such a court, but not in every State that is a party to the *ICSID Convention*.⁹¹⁹

In sum, an appellate review is not uniformly seen as a necessary element of international adjudication. However, in light of the characteristics of investment disputes that involve contract-based claims, treaty-based claims and hybrids thereof, this Thesis is of the opinion that an appeal mechanism is needed in a multilateral ISDS regime reform, but should be designed to reconcile efficiency and consistency. Accordingly, overall confidence and trust in a future multilateral ISDS regime would increase in the long term.

5.3.2.7 Concerns Regarding Enforceability of Awards Rendered by a Prospective Multilateral Investment Court

If a proposed multilateral investment court is established, the question arises as to how the award rendered under such a proposed multilateral investment court will be enforced. As discussed previously, the European Union has proposed that awards rendered by a proposed multilateral investment court will be

⁹¹⁵ Tams, above n 149, 29.

⁹¹⁶ Calamita, above n 233, 19.

⁹¹⁷ Ibid.

⁹¹⁸ Tai-Heng Cheng, above n 187, 241.

⁹¹⁹ See, eg, Bernardini, above n 231; Schreuer and de la Brena, above n 233,4.

executed through the *ICSID Convention* and *New York Convention*, which are the existing investor–State arbitration instruments.

Although enforcing awards through the existing enforcement instruments may be easier, since the States do not need to create a new enforcement instrument, some commentators, such as Calamita, question whether awards rendered by an international investment court qualify as arbitral awards under the *ICSID Convention*.⁹²⁰ Likewise, Reinisch observes:

Still, even though the treaty negotiators have carefully attempted to make the resulting ICS [International Court System] awards appear like ICSID awards, it would not ensure that the other ICSID Contracting Parties had to recognize them as ICSID awards enforceable under the specific rules of the *ICSID Convention*. Permissible *inter se* agreements under general treaty law remain *inter se* agreements, i.e. agreements modifications binding the modifying partners only.⁹²¹

While establishing an appeal mechanism under ICSID arbitration is likely to be challenging, incorporating an appeal mechanism under non-ICSID arbitration may be less so. Since the term *arbitral awards* in article I(2) of the *New York Convention* encompasses both awards that are rendered by ad hoc arbitrators and ‘permanent arbitral bodies’,⁹²² Calamita considers that awards rendered by an appellate mechanism could qualify as *arbitral awards* under article I(2) of the *New York Convention*.⁹²³ However, Reinisch observes that this depends on the interpretation of national courts: ‘[O]ne’s trust must lie in national courts; that they recognize them as enforceable awards under the *New York Convention*—which seems plausible though not inescapable.’⁹²⁴ In relation to this option, Bernardini suggests that

New treaties should provide:

- (i) With respect to the ICSID Convention, that the respondent is a Member State, not the EU [European Union];
- (ii) With respect to New York Convention, that the proceedings are conducted, and the dispute decided, by a tribunal or a permanent arbitral body, rather than a judicial or quasi-judicial system, as the ICS [International Court System] has been defined by the EC [European Commission].⁹²⁵

⁹²⁰ Calamita, above n 233, 19; *ICSID Convention* article 53(2) (states, ‘For the purposes of this Section, “award” shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.’)

⁹²¹ August Reinisch ‘Will the EU’s Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? —The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration’ (2016) 19 (4) *Journal of International Economic Law* 761, 785.

⁹²² *New York Convention* art I (2) (states, ‘The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.’)

⁹²³ Calamita, above n 233.

⁹²⁴ Reinisch, ‘Will the EU’s Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? —The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration’, above n 923.

⁹²⁵ Bernardini, above n 231, 56.

This Thesis views that the existing enforcement instruments as provided in *ICSID Convention* and *New York Convention* are aimed at enforcing the awards rendered by arbitral tribunals, rather than by an investment court. Based on this, enforcing the award rendered by an investment court through the existing instruments could raise an issue regarding treaty interpretation of the provisions. Another possible solution is to create a new mechanism for enforcing awards rendered by a proposed multilateral investment court. Creating a new enforcement instrument may be harder, since it requires consent from States, but a new instrument will solve the issue of whether awards rendered by a proposed multilateral investment court qualify as arbitral awards under the existing instruments. Thus, the option of creating a new uniform enforcement instrument may be more feasible. This may start with an agreement between more than two States.

5.3.2.8 A Concern Regarding Negative Effect of a Proposed Multilateral Investment Court on Cross-Border Investment Climate

The last concern regarding the European Union multilateral investment court proposal is that a prospective multilateral investment court may negatively affect the investment climate. While a permanent tribunal, transparent court procedure and appellate review may contribute to accuracy and consistency in the dispute resolution process and dispute outcomes, these features contrast with the current investor–State arbitration that is based on party autonomy, confidentiality and finality of arbitration and that was established to create a depoliticised arbitral forum and stimulate a cross-border investment climate. Accordingly, some commentators, such as Kho et al., have been concerned that

Expanding the nature of litigation ... will only increase the overall cost of litigation, which may harm smaller investors that lack the means to finance large-scale litigation against a well-funded government, and in turn again discourage foreign investment in the first place.⁹²⁶

In fact, several variables may influence the investment inflow (such as taxation, labour skills, infrastructure, political stability, exchange rate, legal framework and dispute resolution). Although the justification for the relationship between a dispute resolution and investment inflow is hard to ascertain, this Thesis is of the opinion that efficient investor–State dispute resolution remains an essential legal framework in stimulating the investment climate. Therefore, a multilateral ISDS regime reform should strike a balance between accuracy, consistency and efficiency.

Overall, an analysis of the potential benefits and concerns regarding the European Union multilateral investment court proposal suggests that such a court may address the issue of consistency. In turn, the predictability that a prospective multilateral investment court would generate through consistent decision-

⁹²⁶ Kho et al, above n 192.

making would minimise the costs to investors and contribute to long-term system efficiency. However, the challenges in establishing a prospective multilateral investment court include the jurisdiction of a prospective multilateral investment court over thousands of bilateral investment treaties; the State-appointed tribunal of first and appeal instances, which are likely to give the sovereign State control of the dispute settlement process; the incompatibility of an appeal mechanism under a prospective multilateral investment court with existing arbitral procedures; the unenforceability of awards rendered by a prospective multilateral investment court under existing enforcement mechanisms; and the difficulty of establishing a prospective multilateral investment court, which requires consent from States, and transitioning from the current investor–State arbitration regime to a prospective multilateral investment court regime. In addition, the main concern is that a longer and more complex court process may affect stakeholders. Under the current European Union multilateral investment court proposal, foreign investors might be placed at a competitive disadvantage compared with host States because the party autonomy of investors (in relation to an appointment of the tribunal and determining of the procedure), as well as the finality and enforceability of the award, will be diminished. Thus, both the benefits and concerns of the current European Union multilateral investment court proposal discussed here should be taken into account to further develop a multilateral ISDS regime.

5.4 Synthesising Lessons That Can Be Learned from the European Union Multilateral Investment Court Proposal for Further Development of a Multilateral Investor–State Dispute Settlement Regime

An analysis of both sides of the argument reveals that the European Union multilateral investment court proposal offers both positive and negative effects, which may prove useful for a multilateral ISDS regime reform. Based on an examination of the current features of this proposal, this Thesis argues that the current stage of the European Union multilateral investment court proposal does not yet fully explain nor make clear exactly how the investment court would balance accuracy and consistency with efficiency in an investor–State dispute resolution process. However, there are valuable lessons that can be learned from the European Union multilateral investment court proposal.

The first lesson that can be learned from the European Union multilateral investment court proposal is that the court is likely to be a public international adjudication system for resolving investor–State disputes that arise from various investment treaties, which differs from the current investor–State arbitration regime and the WTO model examined in previous Chapters. The European Union multilateral investment court proposal is considered useful in purely public international law disputes, but may be a less efficient method for resolving investor–State disputes compared with the current investor–State arbitration regime.

Subsequently, the second lesson of the European Union multilateral investment court proposal is represented by institutional aspects of the proposed first instance tribunal. Unlike the current investor–State arbitration regime and the WTO model, the European Union here proposes a permanent tribunal for the first instance resolution of a dispute. The composition, nationality and qualification requirements of the investment tribunals suggested by the proposal are to be subject to uniform requirements rather than party agreements, as is the case in the current investor–State arbitration regime. Further, these requirements are also more likely to promote the consistent interpretation of similar facts, laws and dispute outcomes than are the flexible requirements of ad hoc arbitral tribunals. The proposed impartiality and independence requirements also guarantee that a dispute is more fairly adjudicated than is allowed by the dual role of arbitrators as counsels in the current investor–State arbitration regime.

At the same time, the main concern of this European Union proposal is the State-appointed tribunal of the first instance, which is likely to give a sovereign State control of the dispute settlement process. The institutional aspects of the investment court tribunal may limit the autonomy of the parties in disputes to appoint the adjudicators they trust or that suit the specific characteristics and demands of specific cases, as in the current investor–State arbitration regime. The formal process of appointment provided by the proposal may increase the expense and create a delay in the appointment process. Because investor–State disputes are hybrids of contract-based disputes and treaty-based disputes, it is suggested here that it may be useful to preserve the party autonomy of the current investor–State arbitration regime. In addition, a multilateral ISDS regime must deal with disputes arising from different investment treaties, and some requirements of the first instance tribunal should be adapted to suit each dispute separately.

The third lesson that can be learned from the European Union multilateral investment court proposal pertains to the first instance procedure. Unlike the current investor–State arbitration regime and the WTO model, it is uncertain whether the European Union will either use the current arbitral procedures (such as those of its international trade and investment agreements with Canada, Vietnam and Singapore) or create a new uniform set of procedural rules for a prospective multilateral investment court (as in the WTO model). It is noted that a uniform set of procedural rules, as in the WTO model, is more likely to promote consistency than are the current arbitral procedures, which are based on party agreement. However, a uniform set of procedural rules may be less flexible than the arbitral procedures that allow the ad hoc tribunal to employ its approach, such as formulating the issues to be decided, general rules of evidence, the confidentiality of proceedings and the publication of the arbitral awards under a particular case. Thus, once again owing to the investor–State disputes being hybrids of contract-based disputes and the treaty-based disputes, it is suggested here that it may be useful to incorporate a uniform set of rules of procedure

to enhance the consistency of the treaty-based claims of investor–State disputes, while maintaining flexible and confidential procedures to maintain the efficiency of a prospective multilateral ISDS regime.

The fourth lesson that can be learned from the European Union multilateral investment court proposal lies in its appeal mechanism, which is similar to the WTO model, but contrasts with the current investor–State arbitration regime. An appeal mechanism is likely to promote accuracy and consistency, but has less efficiency in a dispute resolution process. A central concern of the European Union proposal is the appeal tribunal appointed by sovereign States, which is likely to make the States dominate the dispute settlement process. If the European Union uses current arbitral procedures, there is also a concern about the incompatibility of an appeal mechanism under the investment court proposal with existing arbitral procedures. It is suggested that it may be useful to incorporate an appeal mechanism to enhance the accuracy and consistency of the treaty-based claims of investor–State disputes. However, finality should be preserved to a certain degree to maintain efficiency in a prospective multilateral ISDS regime. In this respect, the design of institutional aspects and procedures is crucial to balancing accuracy and consistency with efficiency.

The fifth lesson that can be learned from the European Union multilateral investment court proposal is the way the awards made by such a court will be recognised and enforced, which contrasts with the WTO model. Because the remedy provided under the investment treaties typically takes the form of compensation to a specific investor, it is likely that the European Union will enforce the awards rendered by an international investment court under existing enforcement mechanisms. This Thesis notes that the enforcement mechanism under the current investor–State arbitration regime is not uniform. Therefore, a prospective multilateral ISDS regime may have to consider the option of establishing a new enforcement mechanism (similarly to the *ICSID Convention*).

The European Union multilateral investment court proposal thus provides valuable lessons for a multilateral ISDS regime reform. The investment court can address the accuracy and consistency concerns that are a key component of the rule of law. In turn, the predictability that an international investment court would generate through consistent decision-making would minimise the costs to investors and contribute to long-term system efficiency. However, the main concern is that a longer and more complex court process may affect stakeholders. Foreign investors might be placed at a competitive disadvantage if they are required to adjudicate their disputes under a litigation system that poses higher standards than other arbitration processes. Since investor–State disputes concern the private interests of foreign investors and the public interests of host States, as well as the benefits of the international investment community, it is essential to balance the function of a multilateral ISDS regime to promote accuracy and consistency against the benefits of efficiency and the attractive features of the current arbitration regime that serve the

traditional policy goal of providing additional investment incentives. Therefore, it is recommended that alternative options to reconcile efficiency with accuracy and consistency in a multilateral ISDS regime reform should be further explored.

It can be envisaged that some general issues need to be further considered in a multilateral ISDS regime reform. These include the jurisdiction of a multilateral ISDS regime, the characterisation of a multilateral ISDS regime, procedural laws applicable to a multilateral ISDS regime, platforms for establishing a multilateral ISDS regime, the relationship between a multilateral ISDS regime and existing investor–State arbitration, and the relationship between a multilateral ISDS regime and existing interstate arbitration. A specific issue to be considered is the adjudicators of the new dispute resolution process, who should not be appointed by States only. The adjudicators should not be accountable to sovereign States’ interests, but also to the interests of foreign investors who are affected by the adverse actions of host States; the adjudicators must also consider the interests of the third party and the international investment community. An additional issue for consideration is the procedures of the new, multilateral dispute resolution processes, which should be flexible enough to adapt to the needs of each case and respond to its contract-based claims, but uniform enough to serve the treaty-based claims of disputes. Further, a review system should strike a balance between efficiency and accuracy and achieve consistency in the private and public aspects of disputes. Moreover, the new, multilateral ISDS regime should ensure that the awards rendered under a new, multilateral ISDS regime are enforceable either through the existing enforcement mechanism or through the new enforcement mechanism. If the efficiency in the dispute resolution process could be reconciled with accuracy and consistency, it is expected that the new, multilateral ISDS regime would gain acceptability from both stakeholders and the international community. Overall confidence and trust in the further dispute resolution system would increase in the long term. An alternative tribrid framework for a multilateral ISDS regime reform is suggested in the next Chapter.

5.5 Conclusion

The Chapter has argued that some features of the European Union multilateral investment court model might be used for a multilateral investor–State dispute settlement regime reform. The Chapter first highlighted the features of the European Union multilateral investment court proposal, including a permanent tribunal appointed by the States. A multilateral investment court procedure would be conducted in a transparent manner, and the awards would be subject to an appeal mechanism. These features would promote accuracy and consistency and assist the adjudicators in developing consistent legal principles and standards of review in investment treaty norms. However, these elements would contribute to a less efficient method of resolving investor–State disputes. This Thesis presents the belief that the European Union multilateral investment court proposal could be further developed to balance efficiency with

accuracy and consistency in the investor–State dispute resolution process. The key to attaining this goal lies in considering several key areas: the institutional aspects of the first instance tribunal, the first instance procedure, the finality of the arbitral award, and the mechanism for recognising and enforcing the award made by a multilateral ISDS regime. These suggestions aim to provide an additional resource for current international debates regarding a multilateral investor–State dispute settlement reform.

CHAPTER 6

A PROPOSED ALTERNATIVE TRIBRID FRAMEWORK FOR THE FURTHER DEVELOPMENT OF A MULTILATERAL INVESTOR–STATE DISPUTE SETTLEMENT REGIME

6.1 Introduction

Previous Chapters have demonstrated that the current theories and practices of the investor–State arbitration regime and the World Trade Organization and European investment court models have not yet delivered a proposed alternative policy rationale for a multilateral investor–State dispute settlement regime—a regime that would facilitate cross-border investment and reconcile efficiency with accuracy and consistency to ensure legal certainty as a tenet of the rule of law. Owing to the unique characteristics of investment disputes, which may be complex in nature, the current procedural principles and requirements of the investor–State arbitration regime do not differentiate between contract-based claims, treaty-based claims and hybrids thereof, thus creating inaccuracy and inconsistency problems in the treaty-based claims of investment disputes. Although comparative analysis of the World Trade Organization model confirms that it clearly promotes accuracy and consistency, which then evolve towards long-term efficiency in the international trade system, some features of this model may be less capable of promoting the efficiency of the contract-based claims of investment disputes. The critical evaluation of the European Union multilateral investment court proposal further highlights the potential benefits of an investment court in promoting accuracy and consistency, but this proposal still raises some concerns, and does not fully explain how a proposed investment court would balance accuracy and consistency with efficiency in the dispute resolution process.

Based on the lessons learned from these existing models, this Chapter discusses prospective changes in theory and practice that can help achieve the proposed policy goal. It argues that the classical theory of the investor–State arbitration regime (based on party autonomy, confidentiality and finality of award) is insufficient to address the need for accuracy and consistency in the treaty-based claims of investment disputes; equally, public adjudication theory (based on permanent adjudicators, a uniform set of procedural rules, transparency and appeals) fails to consider the need for efficiency in contract-based claims. To serve the proposed policy rationale in promoting accuracy and consistency in a way that minimises private costs, this Chapter advances a theoretical view of the investor–State arbitration regime by first outlining a conceptual framework for a multilateral investor–State dispute settlement theory. Based on this new theoretical perspective, some key procedural features for a multilateral investor–State

dispute settlement regime are suggested. This alternative tribrid framework provides a unique perspective on the tensions between the key elements of the rule of law—accuracy and consistency—and efficiency, and contributes to the current state of knowledge on a multilateral reform of the investor–State dispute settlement regime.

6.2 Proposed Alternative Theoretical Framework Underlying a Multilateral Investor–State Dispute Settlement Regime

The new normative standard, as proposed in Chapter 2, is for a multilateral investor–State dispute settlement (ISDS) regime that can promote accuracy and consistency while keeping private costs at a minimum. This would make it possible to facilitate both cross-border investment and legal certainty, which is one element of the rule of law that may challenge existing theories of arbitration and litigation. As noted in Chapter 1, the current investor–State arbitration regime is based on the classical arbitration theory (that party autonomy, confidentiality and finality are underlying principles), and serves the policy rationale of attracting foreign investors to host States.⁹²⁷ Transforming the current investor–State arbitration regime (discussed in Chapter 3) by investing in all the features of a litigation process, similar to the World Trade Organization (WTO) dispute settlement system (discussed in Chapter 4) or the European Union multilateral investment court proposal (discussed in Chapter 5), may reduce the efficiency of the current regime and limit its traditional role in promoting a cross-border investment climate.⁹²⁸ Nevertheless, the inconsistency problem causes legal uncertainty and unpredictability for foreign investors and States in the long run.⁹²⁹ This section outlines a conceptual framework for a multilateral ISDS theory based on the following premises.

6.2.1 Tribrid Tribunals

The first premise of a multilateral ISDS regime is that the tribrid tribunal will comprise an ad hoc tribunal, a permanent tribunal and a hybrid tribunal. As considered in Chapter 1, the party autonomy principle indicates arbitrators who adjudicate the dispute. Hypothetically, this principle may suit the specific characteristics and demands of each case, promote efficiency and maintain harmonised relationships between the parties; however, it may not adequately promote accuracy and consistency in investor–State disputes concerning contract-based claims, treaty-based claims and hybrids thereof. However, while

⁹²⁷ See *ICSID Convention*, preamble; IBRD, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nations of Other States*, above n 293.

⁹²⁸ See, eg, Wood, above n 68, 14; Clapham, above n 149; Kho et al, above n 192; Bernardini, above n 231; Marike Paulsson, above n 231; Lalive, above n 304.

⁹²⁹ See, eg, *Possible Reform of Investor-State dispute settlement (ISDS)*, UN Doc A/CN.9/WG.III/WP.142, above n 7; Yannaca-Small, 'Improving the System of Investor–State Dispute Settlement: The OECD Governments' Perspective', above n 207; Gaukrodger and Gordon, 'Inter-Government Evaluation of Investor–State Dispute Settlement: Recent Work at the OECD-hosted Freedom of Investment Roundtable', above n 327.

replacing the party autonomy principle with the permanency principle may ensure that an investor–State dispute would be fairly adjudicated per the rule of law, it may not suit the specific characteristics and demands of each case. Arguably, the permanent tribunal may also increase expense and delay and affect the autonomy of the disputing parties, such as the appointment of the arbitral tribunal and determining arbitral procedures. Therefore, the new, multilateral ISDS regime should offer these three different types of tribunal in the special area of investor–State disputes.

6.2.2 Tribrid Procedures

The second premise proposed is that the tribrid procedure, under a multilateral ISDS regime, will include a flexible procedure for contract-based claims, a uniform set of procedures for treaty-based claims, and a hybrid procedure for hybrid contract-based and treaty-based claims. As discussed in Chapters 1 and 3, party autonomy also determines the arbitral procedure. This flexibility is acceptable when resolving private disputes because the dispute can be solved quickly, and the parties will hold equal positions with respect to evidence. However, unlike private commercial disputes, investor–State disputes involve contract-based claims, treaty-based claims, and a hybrid of contract-based and treaty-based claims. The flexible procedural rule that allows each ad hoc tribunal to employ its own approach may not be suitable for treaty-based claims in investor–State disputes. Replacing the flexible procedural rules with a mandatory and uniform set of procedural rules may ensure that the disputes would be decided according to the same procedural and evidentiary rules, but it is recognised this may not suit the specific characteristics of each issue raised in each case. Therefore, this Thesis proposes that, under a new, multilateral ISDS regime, a tribrid procedure may serve in the special case of investor–State disputes.

6.2.3 Tribrid Review Mechanisms

The third premise put forward is the tribrid review mechanism, which includes an annulment mechanism for contract-based claims, an appeal mechanism for treaty-based claims, and a hybrid review mechanism for hybrids of contract-based and treaty-based claims. As discussed in Chapters 1 and 3, the arbitral award is final and binding to protect party autonomy and end disputes economically. However, the finality principle may not sufficiently promote accuracy and consistency in such disputes. Replacing finality with a fully- fledged appellate mechanism, as in some litigation systems, may guarantee accuracy and consistency in jurisprudence and help with clarifying and interpreting international investment law, but it also affects party autonomy and the efficiency of the dispute resolution process. Since investor–State disputes involve issues of contract-based claims, treaty-based claims, and hybrids of contract-based and treaty-based claims, this Thesis asserts that a tribrid review mechanism can serve in the special case of investor–State disputes.

On the theoretical level, this Thesis proposes that a multilateral ISDS regime may be based on the three following premises: first, tribrid tribunals; second, tribrid procedures; third, tribrid review mechanisms. This unique combination of arbitration theory and public adjudication theory may help a multilateral investor–State arbitration regime foster accuracy and consistency in treaty-based claims while still maintaining the efficiency of resolving contract-based claims, which is the main strength of the current arbitration regime. Based on the proposed principles, a multilateral ISDS regime may be implemented in different ways. The next section suggests some alternatives for practical implementation.

6.3 Recommendations for Implementing the Tribrid Theoretical Framework in Practice

This section suggests some alternative features for implementing the proposed tribrid theoretical framework in practice. To this end, it is organised into four main sub-sections. The first discusses general issues that should be considered before designing a multilateral ISDS regime; the second develops feasible features for a tribrid tribunal and procedures for the first instance; the third suggests some feasible features for the tribrid review mechanism; and the fourth proposes a uniform system for enforcing awards rendered by a multilateral ISDS regime.

6.3.1 General Recommendations for Developing a Multilateral Investor–State Dispute Settlement Regime

To develop a multilateral ISDS regime, some general issues need to be considered. These include the following questions: First, how will a multilateral ISDS regime be established? Second, which platform (international governmental organisation) is suitable for establishing a multilateral ISDS regime? Third, how will a multilateral ISDS regime be structured? Fourth, what will a multilateral ISDS regime’s jurisdiction be? Fifth, what is the relationship between a multilateral ISDS regime and the existing investor–State and interstate arbitration regimes? This Thesis recommends that a multilateral ISDS regime should be established by an international treaty under the auspices of an international governmental organisation. It should consist of both first instance and appeal tribunals with jurisdiction over contract-based claims, treaty-based claims and hybrids thereof. A multilateral ISDS regime should be complemented with the existing investor–State arbitration and interstate arbitration regimes.

6.3.1.1 A Treaty Establishing a Multilateral Investor–State Dispute Settlement Regime and Applicable Procedural Laws

First, it is recommended that a multilateral ISDS regime should be established by the international treaty to improve consistency in the international dispute resolution process. A legal instrument establishing a multilateral ISDS regime is important in terms of its international characteristics and applicable procedural

law, and hence relates to consistency and efficiency in a dispute resolution process. In general, international adjudications could be established by an international convention or created as private institutions under domestic laws. If a multilateral ISDS regime is established by an international treaty, public international law will apply. Otherwise, a procedure would be applied by national *lex arbitri*. As illustrated in Chapter 3, the current investor–State arbitration regime is not uniform. The International Centre for Settlement of Investment Disputes (ICSID) arbitral procedure is governed by the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)*, which is public international law, whereas other commercial arbitrations are governed by a national *lex arbitri*. This feature has created fragmentation and inconsistency in both substantive and procedural aspects of the international investment system. By contrast, the WTO model is likely to promote better consistency than the arbitration regime because the WTO is a self-contained system governed by the *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)*, which is public international law. As discussed in Chapter 5, the prospective multilateral investment court is likely established by a multilateral treaty. However, a major challenge in establishing such a court is that the multilateral treaty may be difficult to implement because it requires consent from several States. One possible solution is the opt-in convention, which allows non-member States to submit their disputes to a multilateral ISDS regime by giving their consent under their international investment agreements. Based on the findings, it is argued that if a multilateral ISDS regime is established by a multilateral convention in a way analogous to the *ICSID Convention* or the WTO system, it will provide an international and neutral forum for investor–State disputes. Although establishing a multilateral ISDS regime under a multilateral treaty may take longer to be accepted by the international community, it is likely to lead to consistency and efficiency in the long term.

6.3.1.2 Platforms for Establishing a Multilateral Investor–State Dispute Settlement Regime

Second, it is recommended that a multilateral ISDS regime should be established under the auspices of an existing international governmental organisation. The platform for establishing a multilateral ISDS regime is essential in terms of institutional support for resolving investment disputes, and hence relates to accuracy, consistency and efficiency in a dispute resolution process. In general, international adjudications could be established independently by international convention or under the auspices of an international governmental organisation. An international adjudication established under the auspices of an international governmental organisation is more likely to promote accuracy and consistency than an international adjudication established independently by international convention.

As examined in Chapter 3, the current investor–State arbitration regime is not uniform. The ICSID was established as one of the international governmental organisations of the World Bank Group, while other

international commercial arbitrations were created ad hoc (that is, not administered by an institution such as the United Nations Commission on International Trade Law [UNCITRAL]) or as private institutions under domestic laws (such as the International Chamber of Commerce [ICC] and London Court of International Arbitration [LCIA]). Institutional arbitrations may be more expensive, time-consuming and rigid, but they provide arbitration rules and other institutional support. Ad hoc arbitration may be less expensive; however, a lack of institutional support is likely to create inaccuracy and inconsistency. Unlike the current arbitration regime, the WTO dispute settlement system was established under the WTO, which is an international governmental organisation; accordingly, the WTO system clearly promotes accuracy and consistency more than the current arbitration regime. As discussed in Chapter 5, although the European Union’s multilateral investment court proposal is under discussion with the UNCITRAL, the platform for establishing such a court remains undetermined.

On considering the characteristics of investment disputes together with the lessons learned from the current investor–State arbitration regime, the WTO system and the European Union multilateral investment court proposal, it is proposed that if a multilateral ISDS regime is established under the auspices of an international governmental organisation, it will be given a platform for negotiation, institutional support and a secretariat for the tribunals being established for a multilateral ISDS regime. This will be incorporated as a mechanism to prevent secretariats influencing the independence and impartiality of tribunals, and this is the primary concern of this feature.⁹³⁰ The model used by the WTO secretariat (particularly as it relates to the nationality, gender diversity, impartiality and independence of the secretariat) may be adapted for use with a new, multilateral ISDS regime.

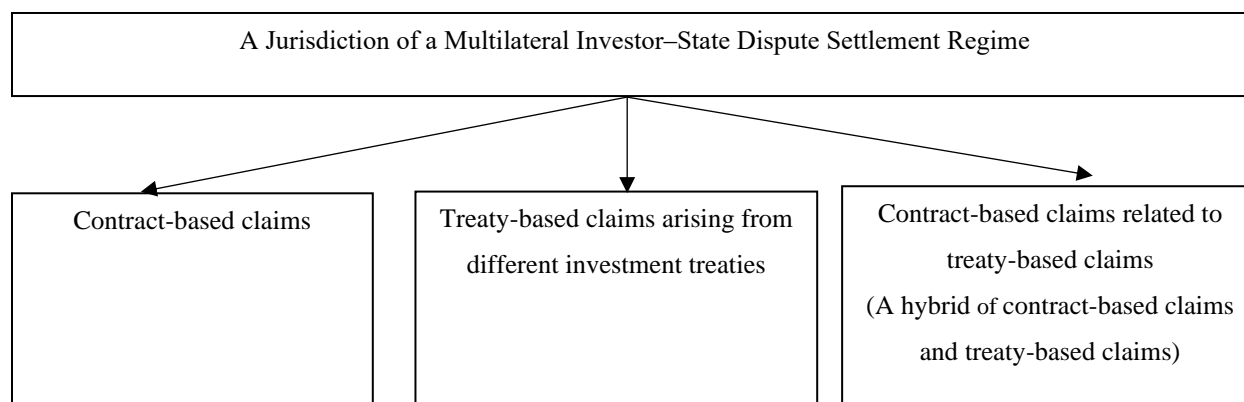
Additionally, it is observed that when choosing a platform for a multilateral ISDS regime, the major factors to consider might include functionality, familiarity, institutional support and costs. Among several international governmental organisations discussed in Chapter 5, this Thesis considers that incorporating a multilateral ISDS regime under the ICSID of the World Bank may be the most effective solution. This is because the ICSID has a well-established platform for resolving investor–State disputes with 153 member States and is currently processing amendment of the ICSID’s rules and regulations. However, modifying the *ICSID Convention* requires the consent of all party States to it, which could be a major obstacle for the practical implementation of a new, multilateral ISDS regime. Alternatively, a new, multilateral ISDS regime may be established under other international governmental organisations or established independently by international treaty.

⁹³⁰ See Dunoff et al, above n 175.

6.3.1.3 Jurisdiction of a Multilateral Investor–State Dispute Settlement Regime

As investor–State disputes may arise from state breaches of contract, of treaty or of both, and as they are governed by multiple legal sources, it is recommended that a multilateral ISDS regime should have jurisdiction over contract-based claims, treaty-based claims arising from different investment treaties and contractual claims related to claims under a treaty.

Diagram I: A Proposed Jurisdiction of a Multilateral Investor–State Dispute Settlement Regime



In general, the jurisdictions of domestic and international adjudications are essential in terms of specialisation as well as caseload, and hence relate to efficiency in a dispute resolution process. As illustrated in Chapter 3, the current investor–State arbitration regime is not uniform. ICSID arbitration is particularly used for resolving investment disputes, while other commercial arbitrations have not only been used to resolve investor–State disputes, but also private commercial disputes and interstate disputes. The WTO dispute settlement system is a specialised international adjudication that has jurisdiction over interstate disputes arising from the *WTO Agreements*. Therefore, the WTO dispute settlement system has contributed to more accuracy and consistency, which lead to efficiency, in international trade jurisprudence than has a non-uniform arbitration regime. Unlike the WTO model, the jurisdiction of the European Union’s multilateral investment court potentially covers treaty-based claims arising from various international investment treaties.

As illustrated in the above diagram, it is first suggested that a multilateral ISDS regime would have jurisdiction over contract-based claims (investment contracts or State contracts). The jurisdiction may be limited to significant public investments to control caseload. Additionally, foreign investors would still have the option of bringing purely contract-based claims to other international commercial arbitrations under the existing arbitration regime. Notably, contractual disputes between States and investors may also involve some public interests; therefore, it is also suggested that some of the proposed design features for

a multilateral ISDS regime (such as the *UNCITRAL Transparency Rules*) should be included in the existing international commercial arbitration.

In addition to contractual-based disputes, it would be crucial for a multilateral ISDS regime to have jurisdiction over treaty-based claims arising from different investment treaties. Considering the lessons learned from the current investor–State arbitration regime, the WTO system and the European Union multilateral investment court proposal, since different investment treaties share some common norms and principles, it is argued that if a multilateral ISDS regime has jurisdiction over investment disputes arising from different investment treaties, this is likely to contribute to consistency in treaty-based disputes. As also illustrated in the above diagram, an added complexity is that investor–State disputes may concern contract and treaty claims that might overlap. Another added complexity is that investor–State disputes may involve overlapping contract and treaty claims. As considered in Chapter 2 (in section 2.2), under some conditions, a breach of an investment contract by a host State may be considered a violation of treaty norms, resulting in a concern regarding concurrent proceedings in the current investor–State arbitration regime. Therefore, if a multilateral ISDS regime has jurisdiction over both treaty-based claims and contract-based claims that are related to claims under treaty, it will allow disputing parties to resolve related contract-based claims and treaty-based claims at the same time. This is likely to be more efficient than a separate jurisdiction approach.

6.3.1.4 Structure of a Multilateral Investor–State Dispute Settlement Regime

Fourth, it is recommended that a multilateral ISDS regime should consist of both first instance and appeal tribunals. As discussed in Chapter 1, in theory, arbitration and litigation offer different degrees of efficiency and consistency. In practice, the structures of international dispute resolution diverge greatly. These include an ad hoc tribunal in a one-instance proceeding (as in the current arbitration regime), a permanent tribunal in a one-instance proceeding (as in the International Court of Justice and Arab Investment Court), an international adjudication that combines an ad hoc panel model with a permanent Appellate Body model (such as the WTO), or an international adjudication that both first and second instance tribunals are permanent (such as the European Union multilateral investment court proposal). As demonstrated in Chapters 3 and 4, while an ad hoc tribunal in a one-instance proceeding is likely to promote efficiency, an international adjudication that consists of both first and second instance tribunals is more likely to promote accuracy and consistency than an ad hoc tribunal in a one-instance proceeding. Based on the characteristics of investment dispute and lessons learned from the current arbitration regime, the WTO system and the European Union multilateral investment court proposal, it is argued that if a multilateral ISDS regime consists of both first instance tribunals and appeal tribunals, it will promote

accuracy and consistency in international investment treaty norms. This is because each tribunal serves distinct functions. While the first instance tribunal has a key role in adjudicating disputes, particularly fact-finding processes, an appeal tribunal plays a crucial role in ensuring accuracy, consistency and predictability. Without an appellate review, it is unlikely that a multilateral ISDS regime would sufficiently promote consistency. A crucial issue is that both need to be designed to complement each other. In addition, the structure of a multilateral ISDS regime is important because if a multilateral ISDS regime is designed to be justified as an arbitrator or permanent arbitral body under the *ICSID Convention* and the *New York Convention*, it may benefit from these existing enforcement instruments.

6.3.1.5 The Interrelationship between a Multilateral Investor–State Dispute Settlement Regime and Existing Investor–State and Interstate Arbitrations

Fifth, it is recommended that a multilateral ISDS regime should be coordinated and complemented with existing arbitration regimes. In principle, a single multilateral ISDS regime, as in the WTO dispute settlement system, is likely to promote consistency more effectively than a co-existence scenario. The co-existence scenario would lead to fragmentation, as is occurring in the current investor–State arbitration regime (as demonstrated in Chapter 3). However, in practice, a multilateral ISDS regime is likely to coexist with the investor–State arbitration and interstate arbitration regimes because, since the end of World War II, the international arbitration regime has been the dominant method of settling investor–State disputes, and this practice is likely to continue. Consequently, replacing the current arbitration regime with a multilateral ISDS regime would not be easy without transition. Thus, it is argued that a cooperative approach may be more beneficial than a competitive one. This means a multilateral ISDS regime and the existing arbitration regime may complement each other (as examined in Chapter 5). If a multilateral ISDS regime and the existing arbitration regime cooperate, this will lead to consistency and development in international investment law in the long term.

In summary, this section has recommended general issues to be considered in establishing a multilateral ISDS regime. First, a multilateral ISDS regime should be established by international convention in a way analogous to the *ICSID Convention* to provide an international and neutral forum. In addition, creating a multilateral ISDS regime under the auspices of an international governmental organisation is better than creating it independently by international treaty because the international governmental organisation could provide a platform for negotiation and institutional support. In addition, a multilateral ISDS regime should consist of both first instance and appeal tribunals, and should have jurisdiction over treaty-based claims, but the jurisdiction may extend to the contract-based claim that is related to claims under the treaty. Moreover, although a single multilateral ISDS regime is likely to promote consistency better than a co-existence scenario, in practice, a multilateral ISDS regime should operate alongside and complement

existing investor–State arbitration and interstate arbitration regimes. These recommendations might serve a proposed policy rationale of a multilateral ISDS regime in promoting accuracy and consistency, while keeping the costs of investor–State dispute resolution at a minimum.

6.3.2 A Recommendation for Developing Amicable Settlement under a Multilateral Investor–State Dispute Settlement Regime

It is recommended that the amicable settlement that exists in the current arbitration regime should be maintained in a multilateral ISDS regime. Although the amicable settlement is a non-binding solution and does not promote consistency, it allows parties to resolve disputes amicably and maintain relationships during and after the conflict. As examined in Chapters 3, 4 and 5, an amicable settlement exists in the current arbitration regime, the WTO system and the European Union multilateral investment court proposal. Remarkably, if an amicable settlement is included in an ICSID award, it would be final and binding and could be recognised and enforced in States that are members of the *ICSID Convention*. Therefore, including amicable settlement in a multilateral ISDS regime would benefit investors and States who are parties to the disputes and promote efficiency in a dispute resolution process.

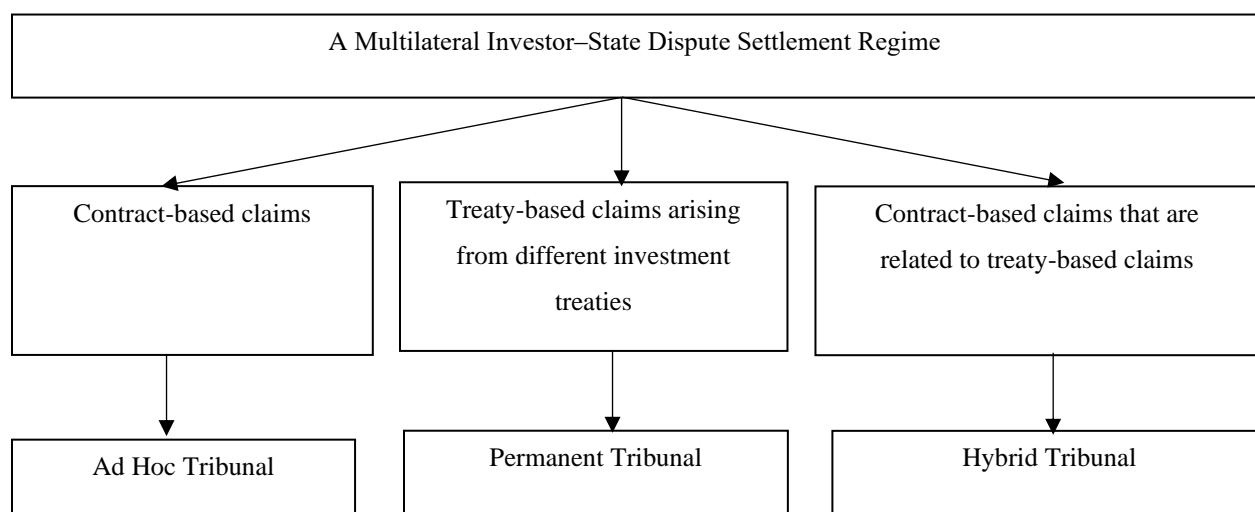
6.3.3 Recommendations for Developing a First Instance Tribunal and Procedure under a Multilateral Investor–State Dispute Settlement Regime

It is recommended that the ability of a multilateral investor–State arbitration regime to promote accuracy and consistency may be achieved by using a tribid tribunal model. This section proposes some features of the first instance tribunal and procedure for a multilateral ISDS regime. To this end, this section is organised into two sub-sections. The first recommends that the first instance tribunal comprise the ad hoc tribunal, the permanent tribunal and a hybrid tribunal. The second proposes that the first instance procedure should consist of three tracks: a flexible procedure for contract-based disputes, a uniform procedure for treaty-based disputes, and a hybrid procedure for contract-based and treaty-based claims.

6.3.3.1 Recommendations for Developing a First Instance Tribunal under a Multilateral Investor–State Dispute Settlement Regime

Beginning with the institutional aspects of a first instance tribunal, it is recommended that a multilateral ISDS regime should incorporate the following features: first, the first instance tribunal should comprise the ad hoc tribunal, the permanent tribunal and a hybrid of both the ad hoc and permanent members; second, the ad hoc and permanent members should be subject to different requirements regarding nationality, qualification, independence, impartiality and accountability; third, the tribunal should be established once the case is filed to serve a particular dispute; and fourth, the tribunal should be assisted by a secretariat.

Diagram II: A Proposed First Instance Tribunal under a Multilateral Investor–State Dispute Settlement Regime



First, the new, multilateral ISDS regime would offer three different types of tribunal, which would be established once the case was filed so that it served the specific characteristics of investor–State disputes. The first type is an ad hoc tribunal, established to decide on purely contract-based claims. The second type is a permanent tribunal, established to adjudicate on purely treaty-based claims. The third type is a hybrid tribunal comprising permanent and ad hoc members, established to adjudicate contract claims that are related to treaty claims, in which the applicable laws could be both contract law and public international law.

In general, the first instance tribunals could be established differently—for example, an ad hoc model or a permanent model. Each model offers different degrees of accuracy, consistency and efficiency in dispute resolution. For example, an ad hoc arbitral tribunal based on the parties’ agreement is likely to promote efficiency. However, this model alone is insufficient to promote accuracy and consistency in a dispute resolution process. Although the WTO panels are constituted for a particular dispute, WTO panels are subjected to uniform requirements under the *DSU*, and each panel must be established by the Dispute Settlement Body, which consists of all States that are members of the WTO. For this reason, the WTO panel model is likely to promote accuracy and consistency better than an ad hoc arbitral tribunal. The State-appointed permanent arbitral tribunal proposed by the European Union under its multilateral investment court proposal may improve accuracy, consistency and other elements of the rule of law (such as independence, impartiality and accountability), but the permanent model may be less efficient than the ad hoc model and would remove investors’ involvement in the appointment process.

In light of the lessons that can be learned from these models together with the characteristics of investor–State disputes, this Thesis contends that the ad hoc tribunal may promote efficiency in the contract-based disputes of investment disputes, but is unable to promote accuracy and consistency in the treaty-based claims of such disputes. However, the permanent tribunal is likely to promote accuracy and consistency in treaty-based disputes, but its characteristics and complexity may resolve investor–State disputes less efficiently than an ad hoc model. Therefore, if the first instance tribunal consists of a party-appointed tribunal, permanent tribunal and hybrids thereof, this would potentially improve accuracy and consistency in a multilateral ISDS regime while maintaining efficiency and the other advantages of ad hoc arbitral tribunals (including a neutral specialised forum and removing politicisation).

Second, different requirements should apply to permanent and ad hoc members to serve the unique characteristics of investor–State disputes concerning the claims filed by foreign investors against the host State, in which the applicable laws could be contract law and public international law. As discussed previously, the disputes may concern both commercial/business issues and public policy issues (such as an assessment of the compliance of a host State’s actions, domestic laws and regulatory measures with investment treaty norms). In light of the unique characteristics of investor–State disputes, it is suggested that the requirements for diversity, qualification, impartiality and independence, as proposed below, should be envisaged in a future multilateral ISDS regime.

As considered in Chapter 3, the lack of diversity among arbitrators is widely recognised as a problem in the present ISDS regime. To prevent the same issues from recurring in future, the new, multilateral ISDS regime would incorporate diversity requirements for its permanent members—that is, gender diversity should be recognised, and candidates for permanent membership should represent the broader international investment community. However, the gender and nationality of ad hoc members may depend on party agreement—that is, ad hoc members may be any gender and may be nationals of the disputing parties, as is currently the case in the international arbitration regime.

However, the gender and nationality of ad hoc members may depend on party agreement—that is, ad hoc members can be any gender and may be nationals of the disputing parties, as is currently the case in the international arbitration regime. In respect of qualification requirements, permanent members may be required to have competence in public international law (similar to the requirements for the WTO panel and/or the requirements for a first instance tribunal under the European Union multilateral investment court proposal), while ad hoc members may be required to have specialised expertise in specific areas related to the disputes (similar to ICSID arbitrators). This combination could ensure quality legal reasoning and maintain flexibility for investor–State disputes that involve contract-based claims, treaty-based claims and hybrids thereof.

In addition to the diversity problem, as considered in Chapter 3, the dual role (double-hatting) of arbitrators as counsel is seen as problematic in the present investor–State arbitration regime. As a result, this double-hatting is prohibited under some existing reform options, such as the European Union multilateral investment court proposal and the investor–State arbitration under the *CPTPP Agreement*.⁹³¹ Taking a slightly different position, this Thesis suggests that, although impartiality and independence requirements should apply to both the ad hoc and permanent members, it is recommended that different standards should apply to permanent and ad hoc members. The reason for preserving this existing requirement is that it enables the ad hoc members to acquire extensive global expertise, experience, and the skills needed to resolve complex factual and legal issues in international investment disputes, and allows them to maintain and improve these skills through practice. Although the dual role of arbitrators as counsel raises concerns regarding conflict of interest, this concern can be counterbalanced by subjecting the permanent members of the tribunal to stricter requirements (in particular, a prohibition on double-hatting). This Thesis expects that the proposed model may help improve independence while also maintaining flexibility in the new, multilateral ISDS regime.

Ultimately, because the proposed new, multilateral ISDS regime will be a delocalised system without domestic seat court supervision, procedures for challenge adjudicators to ensure that members of the tribunal qualify under the proposed requirements should be included within this new regime. The processes for such a challenge could be designed differently. Under the ICSID arbitration framework, the proposal to disqualify a member is decided by the other members of the ICSID tribunal.⁹³² This procedure raises concerns in practice—that is, co-arbitrators are very rarely disqualified by their colleagues. Unlike under ICSID arbitration, disqualification from the WTO panel, the Appellate Body, or disqualification as arbitrator, is decided by the Chair of the Dispute Settlement Body.⁹³³ Thus, to alleviate concerns that exist in relation to the present ICSID arbitration framework, this Thesis takes the view that, in the proposed multilateral ISDS regime, the procedures for challenging should be similar to those of the WTO model.

Third, different composition requirements should apply to the ad hoc, permanent and hybrid tribunals. In the interest of efficiency, the minimum number for an ad hoc tribunal that decides contract-based disputes should be three. Similarly, the permanent tribunal should also be composed of three members when

⁹³¹ *Code of Conduct For Investor-State Dispute Settlement under Chapter 9 Section B (Investor State Dispute Settlement) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (Annex to CPTPP/COM/2019/D004) art 3(d) provides that: ‘Upon selection, an arbitrator shall refrain, for the duration of the proceeding, from acting as counsel or party-appointed expert or witness in any pending or new investment dispute under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership or any other international agreement.’

⁹³² *ICSID Convention* art 58.

⁹³³ *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DSB/RC/1 (96-5267) (11 December 1996) <https://www.wto.org/english/tratop_e/dispu_e/rc_e.htm>.

deciding on treaty-based disputes. However, unlike the first two types, the hybrid tribunal should have more than three members for each dispute. A minimum of five would be preferable, of which three would be permanent members and two ad hoc members. Ad hoc members will be appointed by the foreign investor and the host State—which are parties to the dispute, as in the current arbitration regime—while three permanent members will be selected from a list of candidates for permanent members based on randomisation. Although a list of candidates for permanent members must ensure geographical representation of the international community, the candidates who will be appointed as members for a specific case must be third State nationals. To ensure that the candidates for permanent members have qualifications and expertise, the designation process for the ICSID panel of arbitrators or the *Indicative List of Governmental and Non-Governmental Panelists* of the WTO may be used for a multilateral ISDS regime. Following this, candidates for permanent members of the tribunal would require an appropriate term of office, such as a minimum of five years, with renewability of five years ensuring their independence and strengthening their experience while preventing dominance and influence over decisions, which are disadvantages of a long tenure of permanent tribunal members.

Fourth, a secretariat should be established to assist the tribunal with the substantive and procedural aspects of the investment dispute. Examination of arbitral tribunals, the WTO panels and the European Union multilateral investment court proposal suggests that this aspect varies. While there is no secretariat for arbitral tribunals, the WTO provides one that gives support and assistance to panels about the substantive and procedural matters of the dispute. Since a secretariat for panels, which currently operates in the WTO, is one of the most effective ways to foster consistency, the European Union has proposed that the secretariat of the ICSID or the Permanent Court of Arbitration (PCA) be a secretariat for the tribunal of a multilateral investment court. Based on the lessons learned from the WTO model in Chapter 4, this Thesis takes the view that if the tribunal secretariat is established, this will help improve accuracy, consistency and efficiency in a multilateral dispute resolution process. As noted in section 6.3.1.2, a secretariat could pose challenges regarding the independence and impartiality of tribunals. Accordingly, a mechanism that would ensure the independence and impartiality of secretariat staff would need to be considered. On this matter, it is suggested that the composition and requirements for the WTO panel secretariat (as discussed in Chapter 4) could be adapted for a multilateral ISDS regime. The secretariat for each tribunal might be selected from the professional staff of a multilateral ISDS regime secretary (as proposed in section 6.3.1.2), who would comply with the diversity, impartiality and independence requirements.

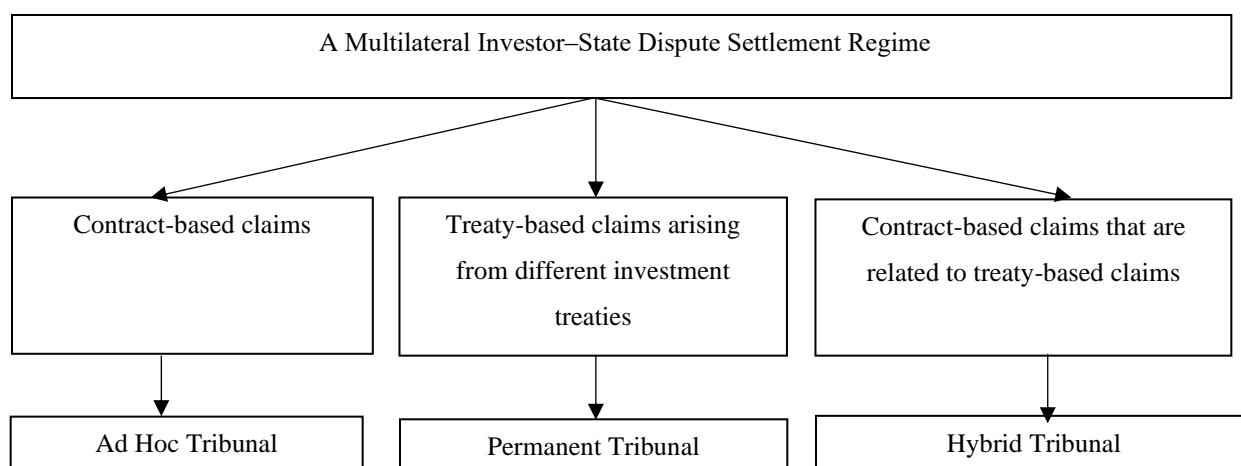
In summary, this section has recommended the use of a three-tribunal model in a multilateral ISDS regime to address concerns regarding inaccuracy and inconsistency in the treaty-based disputes arising in the current regime. At the same time, it would preserve the advantages of the existing ad hoc tribunal model

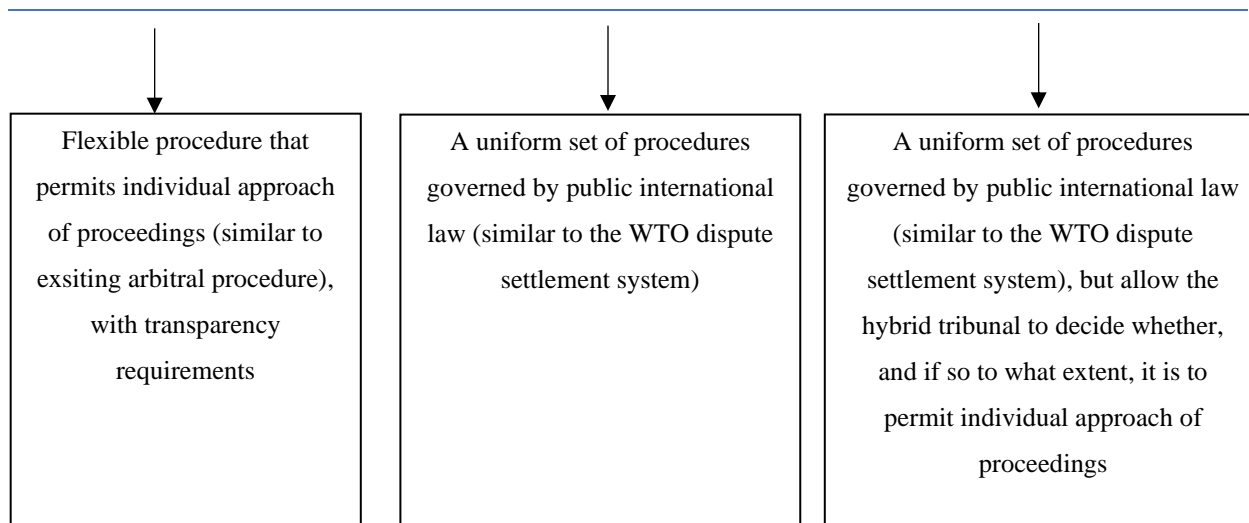
in resolving contract-based disputes. The proposed tribunal would include the following features: first, the tribunal would comprise an ad hoc tribunal, permanent members and a hybrid thereof; second, the ad hoc and permanent members would be subject to different requirements regarding nationality, qualifications, independence, impartiality and accountability; third, a tribunal would be established once the case was filed to match the particular dispute; and fourth, the tribunal would be assisted by a secretariat to improve accuracy and consistency and to build efficiency into the new, multilateral ISDS regime.

6.3.3.2 Recommendations for Developing a First Instance Procedure under a Multilateral Investor–State Dispute Settlement Regime

Turning to the first instance procedure, the procedural rules of a multilateral ISDS regime will play a crucial role in promoting accuracy, consistency and efficiency in resolving investment disputes. Although far from exhaustive, the following recommendations may provide ideas for designing procedural rules for a multilateral ISDS regime that addresses the current problems of inaccuracy and inconsistency while still maintaining efficiency: first, a three-track system should be established within a multilateral ISDS regime; second, the procedures should strike a balance between confidentiality and transparency; and third, the concepts of timeframe and cost-reduction measures should be adopted in the new, multilateral ISDS regime; and fourth, it is impossible to stipulate all proceedings of the first instance in detail (such as a standard of review or the factual findings made by the WTO panel and evidence)—therefore, appellate review is needed to promote consistent practice with respect to first instance procedures.

Diagram III: A Proposed First Instance Procedure under a Multilateral Investor–State Dispute Settlement Regime





First, a new, multilateral ISDS regime should offer the three-track system of procedure to serve the different characteristics of the investor–State disputes. As examined in Chapters 3, 4 and 5, the first instance procedures could be established differently—for example, as with non-uniform and flexible arbitral procedures (as in the current arbitration regime and the European Union’s bilateral investment court with Canada, Vietnam and Singapore) or a uniform set of procedures under public international law (as in the WTO system), each model has advantages and disadvantages. Flexible arbitral procedures that allow each arbitral tribunal to employ individual approaches may contribute to efficiency in resolving a particular dispute, but flexible arbitral procedures are unlikely to promote accuracy and consistency in resolving investment disputes. Conversely, a uniform procedural rule is likely to promote accuracy and consistency in a dispute resolution process, but may make a dispute resolution less efficient. In light of the unique characteristics of investor–State disputes, the new, multilateral ISDS regime would offer a three-track system of procedure to serve different types of investor–State disputes. The first track would be a flexible procedure that permits an individual approach in the proceedings, but also includes a transparency requirement in dealing with contract-based disputes. The second track would involve a uniform set of procedures that exist under public international law and are used to deal with treaty-based disputes. The third track would be a hybrid procedure that adopts the uniform set of procedures, but also allows the tribunal to decide whether, and if so to what extent, it will permit individual approaches in the proceedings.

Second, the procedures of a multilateral ISDS regime should strike a balance between confidentiality and transparency in proceedings. Examinations of the arbitral tribunals the WTO panels and the European Union multilateral investment court proposal suggest that the rules on confidentiality and transparency of proceedings are diverse among international tribunals. As explored in Chapter 3, the entire arbitration

process is typically confidential to guarantee party autonomy and efficiency of proceedings, although the arbitral tribunal may modify the level of confidentiality or transparency for each proceeding. By contrast, the WTO dispute settlement system provides for a significant degree of openness throughout the panel proceedings. The European Union multilateral investment court proposal is likely to incorporate the *UNCITRAL Rules on Transparency* into a proposed investment court procedure. This Thesis observes that, although the private proceedings may be beneficial for commercial trade and secrets and efficiency of proceedings, the confidentiality of proceedings may raise concerns regarding accuracy and consistency in treaty-based disputes. Since investor–State disputes concern contract-based claims and treaty-based claims, this Thesis proposes that the new proceedings should be transparent, but should provide some exceptions for sensitive trade and commercial secrets. However, as noted in Chapters 1 (sections 1.4.1 and 1.4.4) and 3 (section 3.3.2.3), there has been a substantial improvement in transparency in the ISDS regime following the introduction of the *UNCITRAL Rules on Transparency* and the *Mauritius Convention on Transparency*, in addition to the availability of most arbitral awards. Accordingly, this proposal for promoting greater transparency in a multilateral ISDS regime may be of lesser priority than originally perceived.

Third, a multilateral ISDS regime should adopt into the new uniform set of procedural rules the concepts of timeframe and cost-reducing measures for its first instance proceedings. In relation to timeframe, examination of arbitral tribunal proceedings, WTO panel proceedings and the European Union multilateral investment court proposal suggests that the timeframe for the process varies. In international arbitration, the timetable for first instance proceedings depends on the individual case. As discussed in Chapter 1, although duration is less problematic in the present ISDS regime, the new uniform set of procedural rules might increase the duration of proceedings; thus, the concept of timeframe should be included in the new uniform set of procedural rules for the new, multilateral ISDS regime. Additionally, cost-reducing measures should be incorporated into the new, multilateral ISDS regime to boost efficiency. One possible proposal is to cap the tribunal fees paid to tribunals, lawyers and the experts involved in the proceedings.

Fourth, even though a uniform set of procedural rules is established, all the procedural issues of a multilateral ISDS regime might not be able to be precisely defined because some procedural issues are situational; therefore, an appellate review should be established to promote consistent practice with respect to first instance procedures. The lessons that can be learned from current international arbitration is that the arbitration agreement and arbitral rules only provide general guidelines. In practice, the ad hoc arbitral tribunal has modified the rules of evidence and burden of proof (such as the burden of proof, adverse inference, presumption and standard of proof) to suit their proceedings. This practice has led to inconsistency in resolving investment disputes, even in similar cases. Conversely, in the context of the

WTO, although the *DSU* does not precisely define some procedural issues, the Appellate Body has filled the gaps. One example illustrated in Chapter 4 is that a standard of review or the factual findings made by the WTO panel could be either the *de novo* or deference principles on a case-by-case basis. This Thesis observes that the WTO panel's standard of review and other procedural issues, such as the burden of proof and evidence, are not able to be precisely defined because the standard may depend on the subject under dispute. Thus, some procedural issues must be further consistently developed by an appellate mechanism under a multilateral ISDS regime.

In summary, this section has recommended some key institutional aspects of the tribunal and procedure of the first instance. In respect of institutional aspects, it has been recommended that the first instance tribunal should be consisted of an *ad hoc* tribunal, permanent tribunal and hybrids thereof. The *ad hoc* and permanent members should be subject to different requirements. The tribunal should be established once the case is filed to serve a particular dispute, and should be assisted by the secretariat. In respect of the first instance procedure, a three-track system of procedures should be established. Such procedures should strike a balance between flexible and mandatory procedures, adversarial and inquisitorial proceedings, and confidentiality and transparency. Because it is impossible to stipulate the details of all proceedings, an appellate review is needed to fill these procedural gaps to improve consistency, as discussed in the following section.

6.3.4 Recommendations for Developing an Appellate Tribunal and Procedure under a Multilateral Investor–State Dispute Settlement Regime

Although the right to appeal is not uniformly seen as a necessary element of international adjudication, in light of the unique characteristics of investor–State disputes, this Thesis argues that appellate review should be established under a multilateral ISDS regime. Without appellate review, it is unlikely that a multilateral ISDS regime would sufficiently develop the legal precedent that would improve accuracy and consistency in international investment treaty law. However, an appellate review also poses several concerns, mainly regarding cost and time. Therefore, designing an appellate review in a way that minimises private costs is essential. This section recommends that the institutional aspects of an appellate tribunal should differ from a first instance tribunal because the decision of an appellate tribunal of a multilateral ISDS regime potentially affects a third party other than investors and States who are parties to the dispute (either by persuasive or binding precedent). Following this, it suggests a three-track system of review mechanism to serve different types of investor–State disputes that might alleviate concerns posed by appellate review, which were discussed in Chapters 4 and 5.

6.3.4.1 Recommendations for Developing an Appellate Tribunal under a Multilateral Investor–State Dispute Settlement Regime

To begin with the institutional aspects of an appellate tribunal, it is recommended that an appellate tribunal for a multilateral ISDS regime should include the following features.

First, the appellate tribunal of a multilateral ISDS regime should be a permanent standing body that hears different appeals from different first instance tribunals. As examined throughout this Thesis, the second instance tribunal could be established in different ways. These include the ad hoc tribunal—similar to the ICSID ad hoc annulment committee—or a permanent standing body, similar to the WTO Appellate Body and the European Union multilateral investment court proposal. Each has advantages and disadvantages. As argued previously, the standing nature of the appeal tribunal, similar to the WTO, is more likely to promote accuracy and consistency than the ad hoc arbitral tribunal and the ICSID annulment committee in the current investor–State arbitration regime. Thus, a permanent standing body that hears different appeals from different tribunals might be a better option for a multilateral ISDS regime, as it would enable an appellate tribunal to fulfil its essential role in promoting accuracy and consistency.

Second, the members of the appellate tribunal in a multilateral ISDS regime should be subject to stricter requirements than a first instance tribunal. In respect of nationality requirements, the appeal tribunal should be broadly represented by the international community, although arguably, it is not necessary that members of an appellate tribunal be nationals of a State that is a member of an international treaty establishing a multilateral ISDS regime. Members of an appellate tribunal should have qualification requirements, similar to the ICSID ad hoc annulment, the WTO and the European Union models. However, it may be further suggested that the qualification requirements for an appellate tribunal's members should not focus only on domestic judicial officers (as is implemented under a bilateral investment court between the European Union and Canada, Vietnam and Singapore), but should also consider the expertise and practical experiences of candidates in international adjudications. If an international candidate possess both qualifications and experience, the candidate who meets the necessary requirements would be highly recommended to be invited by the international governmental organisation (from which a multilateral ISDS regime is established) to be a candidate for an appellate tribunal. Members of an appeal tribunal should be subjected to impartiality and independence requirements, similar to those of the WTO and European Union multilateral investment court proposal, to ensure the quality of a decision that is likely to affect large numbers of investors and States. Importantly, an appeal tribunal member should not have been either an ad hoc or a permanent member of the tribunal that decided the case in the first instance. Additionally, the procedures for a challenge, similar to those of the WTO model,

should also be used for members of an appellate tribunal under the proposed new, multilateral ISDS regime.

Third, as an appellate tribunal of a multilateral ISDS regime is to be established as a permanent body, it ought to be divided into divisions—similar to the WTO model—to deal with a particular appeal. In respect of permanent members, the number should be sufficient. Members of an appellate tribunal should be chosen by a selection process that is distinguished from that of a first instance tribunal. Permanent members of an appellate tribunal would require an appropriate term of office, such as a minimum of five years, with renewability of five years. The members for each division should operate on a rotation basis, and the case may be assigned based on randomisation (similar to the WTO model).

Fourth, an appellate tribunal of a multilateral ISDS regime should be assisted by a secretariat. As examined in preceding Chapters, not all international adjudications provide a secretariat. Chapter 4 demonstrated that there is no secretariat under the ICSID annulment framework. By contrast, the *DSU* established the Secretariat to provide administrative and legal support to the Appellate Body. The European Union multilateral investment court proposal proposes a secretariat similar to that of the WTO model. This Thesis considers that the Appellate Body Secretariat has a crucial role in supporting the Appellate Body, which leads to consistency; thus, it may be suggested that the secretariat should also be used to assist with investment appeal tribunals. Unlike the secretariat for a first instance tribunal, the secretariat for an appeal tribunal should be a freestanding and permanent body (analogous to the WTO Appellate Body Secretariat).⁹³⁴ The secretariat can be the ICSID Secretariat (as implemented in the European Union bilateral investment courts with Vietnam/Singapore), or it can be newly established under the treaty. In the latter case, the secretariat should comprise legal and administrative staff who are bound by rules of conduct (analogous to the *Working Procedure for Appellate Review of the WTO*).⁹³⁵ These features can alleviate concerns regarding interference by the secretariat staff in the appeal tribunal's exercise of independent judgement.

In summary, this section has recommended some institutional aspects of an appellate tribunal for further development of a multilateral ISDS regime. As recommended, an investment appellate tribunal should be a permanent standing body. Second, appellate tribunal members should be subject to different requirements from those of a first instance tribunal. Third, an appellate tribunal should be divided into divisions. Fourth, an investment appellate tribunal should be assisted by a secretariat to improve accuracy and consistency in appellate proceedings.

⁹³⁴ See *DSU* art 17.7.

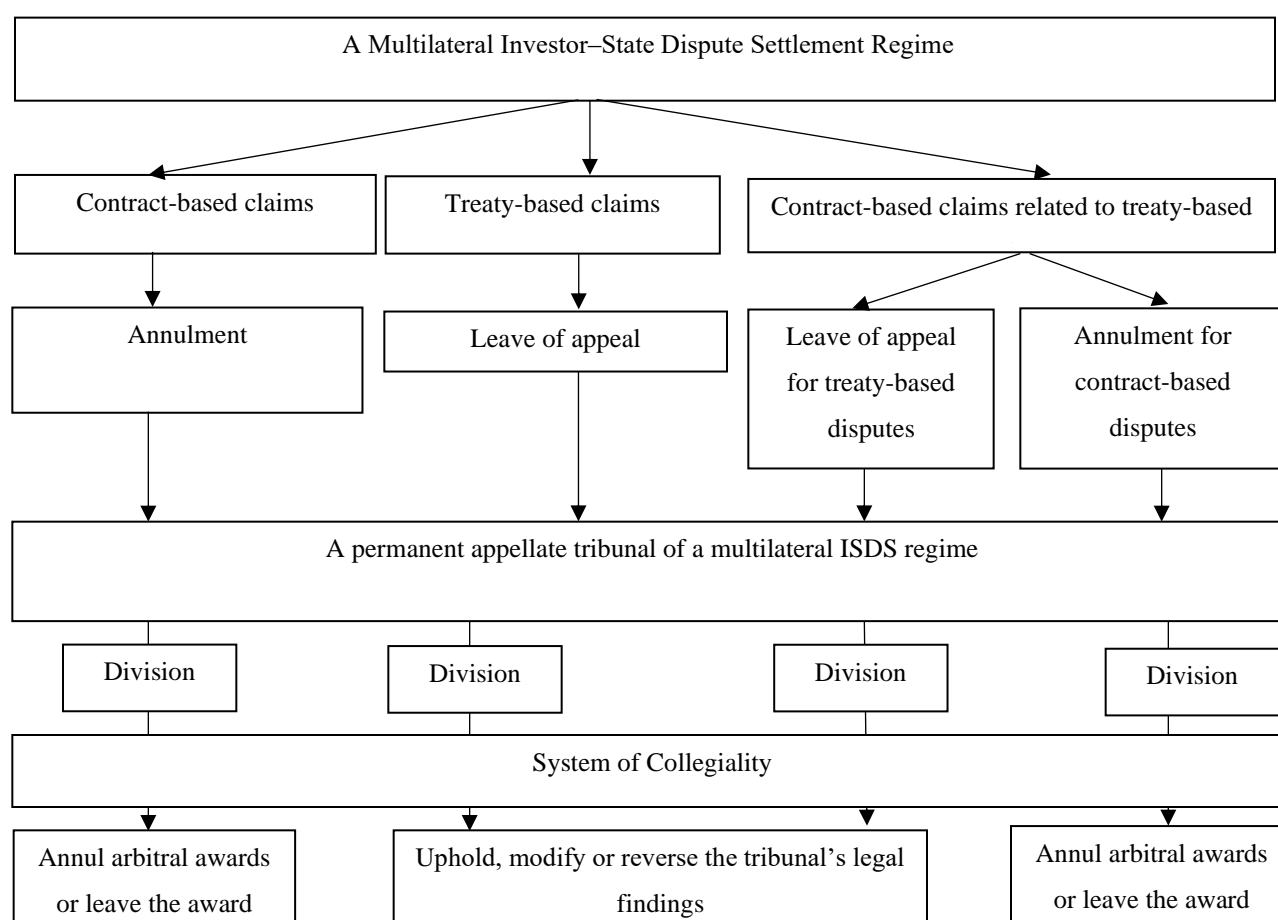
⁹³⁵ See *Working Procedure for Appellate Review*, WTO Doc WT/AB/WP/6, annex II.

6.3.4.2 Recommendations for Developing Appellate Procedure under a Multilateral Investor–State Dispute Settlement Regime

Turning now to the investment appeal proceedings, the appeal procedure is vital in relation to the degrees of accuracy, consistency and efficiency offered by the dispute resolution system. In general, the appellate procedure differs from the first instance procedure in many aspects. This section recommends that the following key aspects might be considered for a multilateral ISDS regime reform.

As illustrated in the diagram below, it is first suggested that a multilateral ISDS regime may consider using a three-track system of review mechanism to serve different types of investor–State disputes. The first track involves the annulment mechanism (as in the *ICSID Convention*) for contract-based disputes. The second track is an appeal mechanism for treaty-based disputes. The third track is a hybrid of the annulment mechanism and the appeal mechanism for disputes that are hybrids of contract-based and treaty-based claims.

Diagram IV: A Proposed Appellate Mechanism under a Multilateral Investor–State Dispute Settlement Regime



Second, on the appellate track, it is recommended that a multilateral ISDS regime consider using leave to appeal in an investment appeal procedure. In general, appeal mechanisms may create an automatic right (which does not require permission from the first instance or appellate tribunals) or leave to appeal (which requires approval from the first instance or appellate tribunals). Not all international adjudications provide leave to appeal. Under the ICSID annulment framework, an annulment is a right—that is, either party may initiate annulment proceedings. Likewise, the WTO creates the automatic right, without leave, for appellate review, as does the European Union multilateral investment court proposal. Both an appeal by right and an appeal by application for leave have costs and benefits that must be considered, and the technique selection will reflect the characteristics of the dispute. Although deciding whether to give leave (or consent) for appeal is an additional procedure that might lead to more costs and delays, requiring leave to appeal may ensure that the appeal has the most benefits. If the potential benefits of the leave to appeal system are greater than its costs, this might support an application for leave to the appeal system. In the new investment appellate procedure, it might be considered that leave to appeal is not only beneficial for investor–State disputes in terms of efficiency and caseload control, but also prevents respondent States from appealing too frequently (as happens in the WTO dispute settlement system) and from appealing more often than investors, which is a structural problem of the current appellate procedure (as considered in Chapter 4, section 4.3.2.3). Therefore, using leave to appeal might be beneficial in a new, multilateral ISDS regime.

Third, a multilateral ISDS regime ought to permit appeals on legal questions to alleviate inaccuracy and inconsistency problems in the current investor–State arbitration regime, while preserving some degree of efficiency in a multilateral ISDS regime. As examined in preceding Chapters, grounds for appeal are broader than grounds for annulment in the investor–State arbitration framework. Under the ICSID arbitration scheme, the arbitral award can be annulled based on five grounds to ensure that the arbitral process is acceptable according to the ICSID rules of procedure and the parties’ agreement. Based on these limited grounds for annulment, ICSID annulment committees cannot review the substance of arbitral tribunal decisions. This demonstrates the limitations of the current investor–State arbitration regime for promoting accuracy and consistency in the international investment system. By contrast, the Appellate Body of the WTO dispute settlement system aims to ensure that the multilateral trade rules are consistent and predictable. However, in the context of the WTO, the grounds for appeal are limited to the issue of law (which covers the question of whether the panel’s factual findings meet the standard required by article 11 of the *DSU*), while the factual findings fall beyond the scope of the WTO appellate review. As noted in Chapter 4, while restricting appeals against a question of fact is likely to promote efficiency, the main concern is that the WTO Appellate Body is occasionally unable to complete the legal analyses. Unlike the

WTO model, the current European Union multilateral investment court proposal proposes that the grounds for appeal include the issue of law and a serious error of fact (which includes domestic law). In the bilateral investment court context, the grounds for appeal extend to grounds for annulment in article 52 of the *ICSID Convention*. As discussed in previous Chapters, each model has advantages and disadvantages with regard to accuracy, consistency and efficiency. To serve the policy rationale of improving accuracy and consistency while minimising the administrative costs of the dispute resolution, this Thesis takes the view that the grounds for appeal under a multilateral ISDS regime ought to permit appeals on legal issues (similar to the WTO model). The main reason for this is that allowing both questions of law and fact might create costs and delays, which may lead to inefficiency in a multilateral ISDS regime. Additionally, errors of law generally encompass both substantive and procedural legal errors, which already cover grounds for annulment in article 52 of the *ICSID Convention*; therefore, it may be suggested that it is not necessary to add grounds for annulment to grounds for appeal under a multilateral ISDS regime.

Following grounds of appeal, the fourth issue that should be considered is the degree of deference an appellate tribunal of a multilateral ISDS regime will grant to a first instance tribunal when reviewing the case at the appeals stage. Unlike an appellate tribunal, in the ICSID arbitration framework, ICSID annulment committees grant a significant degree of deference to arbitral tribunals because article 52(1) of the *ICSID Convention* expressly limits the review powers of ICSID annulment committees to five grounds for annulment (as discussed in Chapter 3). In the context of the WTO, the Appellate Body has the power to review errors of law de novo and substitute its judgement for that of the panel's report. As examined in Chapter 5, although it is uncertain which approach would be adopted in a prospective multilateral investment court, the European Union has expressed the view that a case should not be heard de novo. Arguably, if a multilateral ISDS regime permits appeals on legal questions, the de novo principle might be applied. Alternatively, if a multilateral ISDS regime permits appeals on both errors of law and serious errors of fact (as implemented in the bilateral investment court context), different standards might be applied—for example, the de novo principle might be applied to legal questions, while the deference standard of review might be applied to factual issues.

Fifth, the appellate proceedings of a multilateral ISDS regime should be transparent, but provide some exceptions for sensitive trade and commercial secrets. As examined in the preceding Chapters, the rules on the confidentiality and transparency of proceedings are diverse among international tribunals. The entire annulment process is typically confidential to guarantee party autonomy and efficiency of proceedings, though the arbitral tribunal may modify the level of confidentiality or transparency for each proceeding. By contrast, the WTO dispute settlement system provides for a significant degree of openness throughout the arbitral and appeal proceedings. The European Union multilateral investment court

proposal is likely to incorporate the *UNCITRAL Rules on Transparency* into the multilateral investment court treaty. In this respect, this Thesis considers that although private proceedings may be beneficial for commercial and trade secrets and efficiency of proceedings, the confidentiality of proceedings may raise concerns regarding accuracy and consistency in treaty-based claims. However, transparency may promote accuracy and consistency, but could negatively affect the commercial secrets of private investors. If the new appellate proceeding requires transparency only for the matters that are likely to influence other investors, States and the international investment community, but provides some exceptions for sensitive trade and commercial secrets that do not affect them, this will balance private and public interests of disputing parties. This Thesis contends that the published decisions of an appeal tribunal that create legal precedents for later cases would promote accuracy and consistency, which will then lead to the long-term efficiency of the international investment system.

Sixth, an appeal tribunal should have mandates to uphold, modify or reverse the tribunal's legal findings to promote accuracy and consistency. As examined in preceding Chapters, the mandates are diverse between the annulment system and the WTO Appellate Body because they are based on different rationales. In the context of the current investor–State arbitration regime, the mandates of the ICSID annulment committee are limited to annulling arbitral awards or not. Unlike the arbitration regime, the mandates of the WTO Appellate Body encompass upholding, modifying or reversing the legal findings and conclusions made by the panel. In the context of the European Union's multilateral investment court proposal, the European Union indicates in its submission to UNCITRAL (18 January 2019) that the appellate tribunal of a multilateral investment court should have a remand power. In the bilateral investment court context, an appellate tribunal (established under bilateral investment protection agreements with Canada, Vietnam and Singapore) has the mandate to uphold, modify or reverse the award. Arguably, if an appellate tribunal of a multilateral ISDS regime has a mandate to uphold, modify or reverse the panel's legal findings and conclusions, similar to the WTO Appellate Body, this would promote accuracy and consistency of decisions and reasoning in the award.

Seventh, the system of collegiality should be used in the appellate procedure of a multilateral ISDS regime. As examined in Chapter 4, the system of collegiality is unique to the WTO Appellate Body, meaning that a full Appellate Body member must review all written submissions and transcripts of the hearings prior to the report being finalised by the division. Unlike the WTO model, the system of collegiality does not exist in the ICSID annulment framework and the European Union multilateral investment court proposal. Under the ICSID annulment framework, there is no requirement of collegiality, as the annulment committee is appointed ad hoc. The European Union multilateral investment court proposal has not proposed a system of collegiality. If an appellate tribunal under a multilateral ISDS regime is established as a permanent

standing body and split into divisions, the system of collegiality will help promote accuracy and consistency in a multilateral ISDS regime.

Eight, the decisions of an appellate tribunal of a multilateral ISDS regime should have persuasive precedential value for subsequent cases that address the same issues under investment treaty and public international law. As examined in preceding Chapters, while the system of precedent does not exist under the current investor–State arbitration regime, the WTO Appellate Body decisions tend to have precedential value. While the European Union multilateral investment court proposal has not mentioned this issue, a lack of the system of precedent in the current investor–State arbitration regime is one topic that has been discussed in the UNCITRAL meetings. Based on a lesson learned from the WTO dispute settlement system, creating a legal precedent requires a public adjudication model and, especially, the appellate mechanism. However, a precedent applies only to lower tribunals within the jurisdiction, and these lower tribunals must determine whether the issues in the cases are sufficiently similar for a precedent to apply. In some circumstances, the lower tribunals may deviate from precedent if such a precedent is flawed or if the policy underlying it does not reflect current public policy. A precedent is not static; it can develop over time (such as Article XX of *GATT*). Although courts are not required to follow precedents established in other jurisdictions, they may look to them for guidance. Arguably, if the appeal decisions have persuasive precedential value, similar to the decisions of the WTO Appellate Body, this will substantially contribute to consistency and predictability, which, in turn, can boost long-term efficiency in international investment jurisprudence.

Ninth, the concept of timeframe, as with the WTO, should be applied to an investment appeal tribunal. As examined in preceding Chapters, the timeframes and costs of international adjudications vary. Under the ICSID framework, the World Bank indicates that the annulments proceedings (between 2010 and 2016) took approximately 22 months from the date of registration (see Chapter 3, section 3.2.4.2). In the context of the WTO, the overall appellate proceedings of the WTO take between 60 and 90 days, but as noted in Chapter 4, a recent proposal suggests allowing the parties to agree to go beyond the 90-day timeframe. The European Union multilateral investment court proposal has not specified the timeline for appellate proceedings. Although the timeframe may vary based on the complexity of the dispute, if the concept of timeframe applies to an investment appeal procedure (as with the WTO), this might alleviate concerns over the possible cost and delay of the appeals process and can help drive efficiency.

The last issue discussed here is alternative options to an appeal mechanism. As examined in Chapter 5, commentators have debated alternative options to the appeal mechanism (including authoritative arbitration, preliminary rulings and consolidation), but no consensus has emerged. In the same Chapter, the analysis suggests that these mechanisms may help minimise costs and delays in appeal proceedings—

but in this case, the costs and length are likely to be shifted from appeals to the first instance tribunal. Another limitation is that they are unlikely to create precedents valued as appeals decisions. The European Union bilateral investment courts have included some mechanisms complementing appellate procedures. Although this mechanism cannot substitute an appellate mechanism, it may be used to complement an appeal mechanism under a multilateral ISDS regime.

In summary, this Thesis argues that an appeal mechanism is needed in a multilateral ISDS regime to promote accuracy and consistency. To maintain the efficiency of the regime, this section has recommended some critical features for the appellate tribunal and its procedures. In respect of the institutional aspects of the appellate tribunal, an appellate tribunal should be a permanent body split into divisions to deal with particular appeals (and annulment cases). Members of an appellate tribunal should be subject to stricter requirements than those of a first instance tribunal. An appellate tribunal should be supported by a secretariat. In respect of review procedures, this Thesis proposes that a multilateral ISDS regime may consider using the three-track system of review mechanism: the annulment track (for contract-based disputes), the appeal track (for treaty-based disputes) and the hybrid track (for hybrids of the first two).

6.3.5 A Recommendation for Developing a Uniform System of Recognition and Enforcement of Awards Rendered by a Multilateral Investor–State Dispute Settlement Regime

It is recommended that a treaty establishing a multilateral ISDS regime should create a new uniform enforcement mechanism similar to the *ICSID Convention*. As examined in Chapter 2, the remedy under international investment agreements almost invariably takes the form of compensation to a specific investor, while the host State is still entitled to adopt measures it deems appropriate. Chapter 3 demonstrated that there is no uniform system of enforcement of the arbitral award. While the ICSID awards are binding and the domestic courts could not examine the merits of the award, the enforcement of non-ICSID awards must be conducted according to the *New York Convention*. This differs from the WTO dispute settlement system, which provides a uniform enforcement mechanism that requires the losing State to modify its domestic laws, regulations or tariff rates in conformity with the *WTO Agreements*. Failure to do so could lead to losing States being liable to pay compensation or have trade sanctions imposed upon them by a complainant State. However, the European Union tends to prefer to enforce the award rendered by a proposed multilateral investment court through existing enforcement instruments, as in the current international arbitration regime. Considering advantages and disadvantages, this Thesis argues that creating a new enforcement instrument, such as the *ICSID Convention*, where domestic courts could not examine the merits of the award, would offer a uniform and effective

enforcement mechanism superior to the existing one. Implementing this option would require significant long-term efforts and commitment from a large number of states, but would go a long way towards limiting the possible intervention of domestic courts, a significant weakness of the enforcement under the *New York Convention*.

Overall, this section has developed some recommendations for implementing a proposed tribrid theoretical framework in practice. First, some general issues that should be considered before designing a new, multilateral ISDS regime (including a treaty establishing a multilateral ISDS regime and applicable procedural laws, platforms, jurisdiction, structure, the interrelationship between a multilateral ISDS regime, and existing investor–State arbitration and interstate arbitration regimes) are recommended. These are followed by recommendations for an amicable settlement, first instance and appellate tribunals and procedures. Lastly, a uniform system for enforcing awards rendered by a multilateral ISDS regime is proposed. Altogether, these recommendations provide ideas for implementing a proposed tribrid theoretical framework in practice to serve the proposed policy rationale of improving accuracy and consistency while minimising administrative costs, thus promoting both a cross-border investment climate and legal certainty.

6.4 Potential Benefits and Limitations of an Alternative Tribrid Framework for a Multilateral Investor–State Dispute Settlement Regime Reform and Suggestions for Further Research

This Chapter has discussed and proposed prospective changes in the policy rationale, theory and practical implementation of a multilateral ISDS regime. Compared with other current reform options, the tribrid model proposed in this Chapter has features distinct from those of other existing options for a multilateral reform of the investor–State arbitration regime at policy, theoretical and practical levels.

At a policy level, this alternative proposal is intended to reconcile the need to promote accuracy and consistency with efficiency, thereby facilitating both a cross-border investment climate and legal certainty rather than one or the other. Based on this new policy rationale, this Thesis presents a tribrid theory for a multilateral ISDS regime based on the following premises: first, a tribrid of party autonomy and a permanent tribunal; second, a tribrid procedure; and third, a tribrid review mechanism. At the practical level, it also suggests some alternatives for practical implementation based on the proposed principles. This Chapter has initially discussed general issues to be considered in establishing a multilateral ISDS regime: a treaty establishing a multilateral ISDS regime and applicable procedural laws, feasible platforms for establishing a multilateral ISDS regime, jurisdiction of a multilateral ISDS regime, structure of a multilateral ISDS regime, and the relationship between a multilateral ISDS regime and existing investor–State arbitration and interstate arbitration regimes.

This Chapter has also addressed the feasible features of the tribunal and procedure of the first instance. This Thesis argues that a multilateral regime should have both a first instance tribunal and an appeal tribunal. The first instance level may include major improvements, especially the three individual tribunals that consist of a party-appointed tribunal, a permanent tribunal and a hybrid thereof. Based on this proposed model, key institutional aspects of the tribunal, including its establishment, composition, selection process and the term, have been discussed and proposals made. This Chapter has further explored and suggested several key aspects of the tribunal divisions (including types of division and the composition of and case assignment method for divisions) and other requirements (including nationality, qualification, independence and impartiality) and the tribunal secretariat. In respect of the first instance procedure, this Thesis argues that the three-track system of procedure should be established to serve different types of investor–State disputes. The first instance proceedings should incorporate transparency requirements, but provide the protection of private business information. However, it is impossible to stipulate all the proceedings’ details. Certain aspects of a multilateral ISDS regime’s procedure, such as the burden of proof, adverse inference, presumption and standard of proof, may vary in each case. Thus, investment appeal tribunals are needed to fill these procedural gaps.

This Chapter also has discussed and proposed the feasible features for the tribunal and procedures at an appeal level. Eight key institutional aspects of an appeal tribunal were introduced: requirements for establishment, composition requirements, division, qualification requirements, nationality requirements, impartiality, independence and the secretariat. A three-track system for the review mechanism was proposed: an annulment mechanism, an appeal mechanism and a hybrid thereof. In respect of an appeal mechanism, some key procedural aspects of an appeal procedure have been outlined: leave to appeal, grounds for appeal, standard of review, confidentiality and transparency of appeal proceedings, mandates of an appeal tribunal, system of collegiality, publication and precedential value of appeal decisions, timeframes and costs of appeal proceedings, and alternative options to the appeal mechanism. Importantly, this Thesis also proposes that a new investment appeal tribunal would be transparent, and decisions published to create legal precedents for later cases. Lastly, the decisions of the first instance and appeal tribunals should be binding and enforceable. Two feasible options for enforcing awards are either enforcing them through existing instruments or creating a new enforcement instrument. This Thesis argues that creating a new enforcement instrument, such as the *ICSID Convention*, where domestic courts could not examine the merits of the award, would offer a uniform and effective enforcement mechanism superior to the existing one.

Overall, this unique combination of arbitration theory and public adjudication theory may enhance investor–State arbitration’s capacity to promote greater accuracy and consistency in giving effect to legal

certainty—an element of the rule of law—while reconciling efficiency, which is a primary advantage of the arbitration regime in promoting a cross-border investment climate. Although this Thesis highlights some key elements of a future multilateral ISDS regime, this proposal is not comprehensive. To create a comprehensive model of a multilateral ISDS regime, several additional areas are worthy of further study. These include other procedural aspects of the first instance and appeal procedures as well the effect of appeals on the enforcement of awards. In this respect, some critical analytical considerations highlighted in this Thesis may be taken into account when planning further studies.

6.5 Conclusion

This Chapter has accomplished the main Thesis objective of enhancing the theoretical perspective of a multilateral investor–State dispute settlement regime and proposing recommendations for its practical implementation. This Thesis argues that the traditional arbitration theory underlying the current investor–State arbitration regime fails to understand the necessity of accuracy and consistency in the treaty-based claims of investor–State disputes, while public adjudication theory fails to consider the need for efficiency in resolving the contract-based claims of investor–State disputes and the private interests of investors who are adversely affected by host states’ actions. This final Chapter has posited a new normative standard for a multilateral investor–State dispute settlement regime, asserting that it should reconcile efficiency with accuracy and consistency, facilitating both a cross-border investment climate and legal certainty, which is the main element of the rule of law. This Chapter has also proposed a tribrid theory of a multilateral investor–State dispute settlement regime; advanced key concepts of arbitration theory (party autonomy, confidentiality and finality) by incorporating some concepts of litigation theory; and suggested alternatives for putting this theory into practice. Lastly, it has outlined the advantages and limitations of this alternative proposal, and recommended some issues requiring further study.

CONCLUSIONS

The Thesis has proposed an alternative tribrid framework that contributes to resolving the debates regarding a multilateral reform of the investor–State dispute settlement regime, which is presently under discussion internationally. The hypothesis is that this alternative tribrid framework will promote accuracy and consistency in a way that minimises the costs of a multilateral investor–State dispute resolution process and enhances legal certainty, which is a core element of the rule of law, while preserving the traditional policy of the current investor–State arbitration regime that aims to stimulate a cross-border investment climate.

To achieve this, Chapter 1 reviewed the current state and limitations of existing theories, current policies and practices, and debates regarding investor–State dispute settlement regime reform up to March 2019. It also highlighted avenues for further research on a multilateral investor–State dispute settlement reform to complement and enhance existing thoughts on theoretical and practical perspectives regarding investor–State dispute settlement. The Chapter also reviewed international arbitration and international litigation theories, which offer different degrees of accuracy, consistency and efficiency. While the key benefit of international arbitration is that a solution will be recognised as efficient by the disputing parties, the drawback is that international arbitration creates concerns regarding inaccuracy and inconsistency in interpreting and applying public international law to similar facts and dispute outcomes. Hypothetically, international litigation is likely to resolve disputes in a way that serves consistency, but long and complex litigation processes may increase the costs of dispute resolution, which, in turn, makes international litigation less efficient than international arbitration processes or out-of-court settlement. Therefore, this Chapter highlighted the significant challenge that exists in enacting a multilateral reform of the investor–State dispute settlement regime in relation to dealing with the investor–State disputes that are contract-based claims, treaty-based claims and hybrids thereof, as these claims require different degrees of accuracy, consistency and efficiency in a single dispute resolution process.

Chapter 2 proposed that a multilateral investor–State dispute settlement regime should be reformed to promote accuracy and consistency in a way that minimises private costs to promote both a cross-border investment climate and legal certainty, the main element of the rule of law. Thus, this Chapter initially demystified the characteristics of investor–State disputes. It first highlighted that cross-border investment involves private sector and public sector relationships. Accordingly, disputes arising from international investment transactions feature the following characteristics. First, investor–State disputes relate to foreign investors' claims against the host State. Second, investor–State disputes may arise from host State breaches of contract, treaty or both. Third, investor–State disputes are governed by multiple legal sources (including contract law and investment treaty) and involve an assessment of a host State regulatory

power's compliance with investment treaty norms. Fourth, the remedies available to an investor for breaches of a foreign investment contract or treaty typically take the form of compensation to a specific investor rather than requiring the host State to modify domestic laws and regulations. An added complexity is that investor–State disputes arise in various circumstances. Investor–State disputes may involve multiple claims based on a similar set of facts in relation to one or more States under the same or different investment treaties. The outcomes of an investor–State dispute not only resolve the conflict between parties to the dispute, but are likely to influence other investors, States and the international investment community. Taking account of both sides of the arguments for and against reform, the findings suggest that the rule of law (including consistency) is a crucial element for promoting political, economic and social development; however, the investor–State arbitration regime is intended to facilitate a cross-border investment climate rather than consistency. Since investor–State disputes involve contract-based claims, treaty-based claims and hybrids thereof, Chapter 2 developed an alternative policy rationale in an attempt to reconcile efficiency and consistency, thereby facilitating both a cross-border investment climate and legal certainty. This alternative policy rationale informed the evaluations of the current investor–State arbitration regime, the World Trade Organization model and the European Union investment court proposal in subsequent Chapters.

Chapter 3 proposed that some features of the current investor–State arbitration regime should be preserved, but a new regime may incorporate some litigation features to improve its capability to promote accuracy and consistency within the international investment system. To achieve this, Chapter 3 initially highlighted that the current investor–State arbitration regime operates based on party autonomy, confidentiality, finality and binding force principles. Based on its current features, the investor–State arbitration regime has both advantages and disadvantages when dealing with investor–State disputes that involve contract-based claims, treaty-based claims and hybrids thereof. The advantage of these arbitration features is to efficiently resolve private commercial and investment disputes, facilitating trade and cross-border investment transactions. At the same time, these features of arbitral procedures constrain the arbitral tribunal from developing a consistent approach to treaty interpretation and standards of review for assessing whether those treaty norms have been breached. The lesson that can be learned from the current investor–State arbitration regime is that it might be suitable for private commercial disputes. Since investor–State disputes involve contract-based claims, treaty-based claims and hybrids thereof, this Chapter argued that the theory and practice of the investor–State arbitration regime promote efficiency in relation to the contract-based claims of such disputes, but are less effective in promoting accuracy and consistency in relation to treaty-based claims. Ultimately, it recommended that incorporating some

litigation features into the investor–State arbitration regime would improve the regime’s ability to promote accuracy and consistency within international investment jurisprudence.

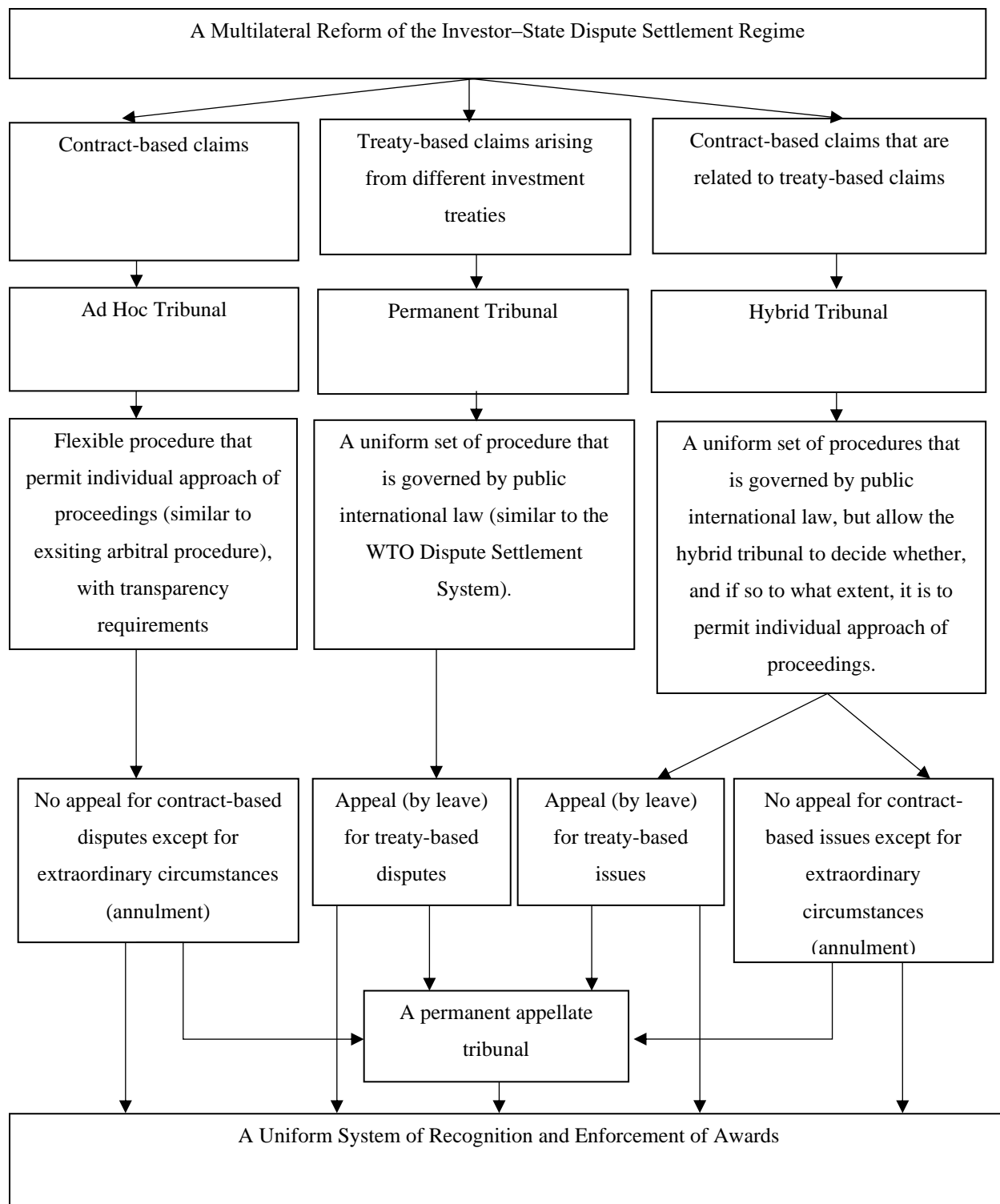
Following Chapter 3’s findings, Chapter 4 proposed that some features of the World Trade Organization model may usefully be incorporated into the investor–State arbitration regime to promote greater accuracy and consistency in the treaty-based claims of such disputes. To achieve this, the Chapter initially highlighted that the panel and Appellate Body of the World Trade Organization are crucial factors in promoting accuracy and consistency in jurisprudence. These features support the development of standards of review within = international trade norms. The World Trade Organization model clearly promotes consistency and efficiency in public international trade law disputes, and investment disputes and trade disputes under the World Trade Organization concern reviews of national regulatory policies and legislation by international adjudicators. However, investor–State disputes and trade disputes under the World Trade Organization appear distinct in their characteristics regarding parties to the disputes, grounds for disputes, applicable laws and remedies available to foreign investors. The lesson that can be learned from the World Trade Organization system is that the model might be suitable for multilateral trade disputes, rather than private commercial disputes. Since investor–State disputes involve contract-based claims, treaty-based claims and hybrids thereof, this Chapter argued that the World Trade Organization model promotes accuracy and consistency in relation to the treaty-based claims of such disputes, but is less effective in promoting efficiency in relation to contract-based claims. Although applying all the features of the World Trade Organization litigation model to an investor–State arbitration regime could reduce the efficiency of the current arbitration regime and its key role in promoting a cross-border investment climate, some features can usefully be incorporated into the investor–State arbitration regime to improve that regime’s capability to support accuracy and consistency in the interpretation and application of international investment treaty norms.

To develop a solution that serves the proposed policy goal of improving accuracy and consistency in a way that minimises private costs, Chapter 5 proposed that some features of the European Union multilateral investment court proposal may be used for a multilateral reform of the investor–State dispute settlement regime. Thus, this Chapter initially highlighted that a proposed multilateral investment court would likely consist of an amicable resolution, a permanent tribunal appointed by States, transparent proceedings and a permanent appellate review process. However, some concerns regarding the European Union proposal are as follows: a proposed multilateral investment court, which is unsuitable for the bilateral investment treaty regime; the State-appointed tribunal of first and appeal instances, which is likely to make the sovereign State dominate the dispute settlement process; the incompatibility of an appeal mechanism under the multilateral investment court proposal with existing arbitral procedures; the

unenforceability of awards that are rendered by a multilateral investment court under existing enforcement mechanisms; possible difficulties with implementing a multilateral investment court in practice because of the requirement of State consent; concerns regarding transitioning from the current arbitration regime to a multilateral investment court system; and concerns regarding the adverse effects of a proposed multilateral investment court on a cross-border investment climate. It is uncertain whether the European Union will either use the current arbitral procedures (such as those of its international trade and investment agreements with Canada, Vietnam and Singapore) or create a new uniform set of procedural rules for a multilateral investment court (as in the World Trade Organization model). The lesson that can be learned from the European Union’s multilateral investment court proposal is that such a court might be suitable for public international law disputes, similar to the World Trade Organization system, but may not be suitable for private commercial disputes. Although the proposal does not fully explain, nor yet make clear, exactly how a multilateral investment court would balance accuracy and consistency with efficiency in the investor–State dispute resolution process, some features of the European Union multilateral investment court proposal may be used for a multilateral reform of the investor–State dispute settlement regime.

Chapter 6 consolidated the lessons that have been learned from these models and proposed ways to advance them. In light of the unique characteristic of investor–State disputes that distinguishes them from both private commercial disputes and interstate disputes, Chapter 6 argued that the traditional arbitration theory underlying the current investor–State arbitration regime is insufficient to address the necessity of accuracy and consistency in treaty-based claims, while public adjudication theory fails to address the need for efficiency in contract-based claims and the interests of foreign investors who are adversely affected by host States’ actions. To serve the new policy goal (proposed in Chapter 2), this Chapter developed and introduced a tribrid theory in contrast with the existing arbitration and litigation theories expounded in previous Chapters, advanced key concepts of arbitration theory by incorporating some concepts of litigation theory and suggested alternatives for putting this tribrid theory into practice, which are the main Thesis objectives. At the theoretical level, Chapter 6 proposed that a multilateral investor–State dispute settlement regime may be based on the following three premises: first, tribrid tribunals; second, tribrid procedures; third, tribrid review mechanisms. Based on the proposed principles, this Chapter suggested some alternatives for implementing theory in practice. This unique combination of arbitration theory and public adjudication theory may help a future multilateral investor–State dispute settlement regime improve accuracy and consistency in a way that minimises private costs, which will then evolve towards long-term efficiency, thereby facilitating both a cross-border investment climate and legal certainty, which is a core element of the rule of law.

Bringing together the findings and proposals, this Thesis has contributed to answering the main research question: how may theoretical and practical perspectives of a multilateral investor–State dispute settlement regime be advanced to resolve investor–State disputes that involve contract-based claims, treaty-based claims and hybrids thereof? Alongside its findings, the proposals suggested in this Thesis contribute new knowledge to the field of investor–State dispute settlement research. At a policy level, this Thesis has explained why the competing policy rationales of investor–State dispute settlement (such as a cross-border investment climate versus the rule of law) are inadequate, and has addressed why the proposed policy rationale to promote both values is more convincing. At a theoretical level, this Thesis has highlighted the inadequacies of existing arbitration and litigation theories and why these theories should be advanced. It has also indicated how the proposed tribrid investor–State dispute settlement theory might be able to resolve the inadequacies of existing theories. In addition, alternative features could offer some guidelines for putting new theory into practice. Together, these findings and proposals could provide some critical and novel conceptualisations, and generate new knowledge that contributes to resolving the debates regarding a multilateral reform of the investor–State dispute settlement regime, which is currently under discussion internationally.

Appendix:**A Diagram of a Proposed Alternative Tribrid Framework for a Multilateral Reform of the Investor–State Dispute Settlement Regime**

BIBLIOGRAPHY

I. Table of Treaties

Charters/Statutes/Multilateral Treaties⁹³⁶

Articles of Agreement of the International Monetary Fund and Articles of Agreement of the International Bank -For Reconstruction and Development, opened for signature 27 December 1945, 1 UNTS 39, entered into force 27 December 1945) (*‘Bretton Wood Agreements’*)
<<https://treaties.un.org/doc/Publication/UNTS/Volume%202/v2.pdf>>.

Articles of Agreement of the International Monetary Fund, opened for signature 27 December 1945, 2 UNTS 39 (entered into force 27 December 1945) (*‘IMF Agreement’*)
<<https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf>>.

Charter of the United Nations

Convention for the Pacific Settlement of International Dispute, opened for signature 29 July 1899 (entered into force 4 September 1900)

Havana Charter for an International Trade Organization (reprinted in Interim Commission for the International Trade Organization, ‘Final Act and Related Document’ (United Nations Conference on Trade and Employment Havana, Cuba, 21 November 1947 – 24 March 1948)
<https://www.wto.org/english/docs_e/legal_e/havana_e.pdf>.

Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002)

Statute of the International Court of Justice

Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (*‘VCLT’*)

European Supranational Treaties⁹³⁷

Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by Protocol No. 11

⁹³⁶ The full texts of charters/statutes/multilateral treaties are available on the United Nations treaty collections website <<https://treaties.un.org/>>.

⁹³⁷ The full texts of EU law and related legal documents are available on the EUR-lex website <<http://eur-lex.europa.eu/collection/eu-law.html>>.

and 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 13 May 2004, ETS No 5 (entered into force 1 June 2010) (ECHR) <<https://rm.coe.int/1680063765>>

**General Agreement on Tariffs and Trade (GATT)/ World Trade Organization (WTO)
Agreements⁹³⁸**

Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, opened for signature 15 April 1994, 33 ILM 1140 (1994)

General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 29 July 1948) (*‘General Agreement on Tariffs and Trade (GATT) 1947’*)

Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) (*‘Marrakesh Agreement’*)

Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*‘General Agreement on Tariffs and Trade (GATT) 1994’*)

Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*‘Anti-Dumping Agreement’*)

Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*‘Telecommunications’*)

Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*‘TBT Agreement’*)

Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*‘SPS Agreement’*)

Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*‘TRIPS Agreement’*)

⁹³⁸ The full texts of the *WTO agreements* are available on the WTO website <https://www.wto.org/english/docs_e/legal_e/legal_e.htm>.

Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘*Agreement on Subsidies and Countervailing Measures*’)

Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1B (‘*GATS*’)

Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 (‘*DSU*’)

Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 4(b) (‘*Agreement on Government Procurement*’)

International Investment Agreement (IIAs)⁹³⁹

Draft Conventions (Not in Force)

Draft Convention on Investment Abroad (reprinted in UNCTAD, ‘International Investment Instruments: A Compendium’ (No UNCTAD/DITE/2, United Nations, 29 May 2000) vol V, 301 (‘*Abs–Shawcross Draft Convention*’)) <http://unctad.org/en/Docs/dite2vol5_en.pdf>

Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention (1967) 7 ILM 117 (reprinted in UNCTAD, ‘International Investment: A Compendium’ (No UNCTAD/DTCI/30 (Vol II), United Nations, 1996) vol II, 113
<<https://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf>>;
<http://unctad.org/en/Docs/dtci30vol2_en.pdf>

Draft Multilateral Agreement on Investment: Draft Consolidated Text (OECD, No DAF/MAI(98)7/REV1, 22 April 1998) <<http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>>

Selected United States Treaties of Friendship, Commerce and Navigation

Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua, 21 January 1956, 367 UNTS 3 (entered into force 24 May 1958) (‘*United States Nicaragua FCN Treaty*’) <<https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280139d26>>

⁹³⁹ The full texts of most IIAs are available on the UNCTAD website
<<http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu>>.

Opened Reginal International Treaties (Open for Signature)

Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area, opened for signature 27 February 2009, 2672 UNTS 3 (entered into force 1 January 2010)

Energy Charter Treaty, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998)

Closed Reginal International Treaties (Not Open for Signature)

ASEAN Comprehensive Investment Agreement, opened for signature 26 February 2009 (entered into force 29 March 2012)

North American Free Trade Agreement, signed 17 December 1992 [1994] CTS 2 (entered into force 1 January 1994) ('NAFTA')

NAFTA Free Trade Commission, *North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001) ('NAFTA Notes of Interpretation')

<http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp>

Closed Bilateral Investment Treaties (Not Open for Signature)

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, signed 11 December 1990, 1765 UNTS 33 (entered into force 19 February 1993) ('UK –Northern Ireland–Argentina BIT')

Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed 29 April 1991, 2242 UNTS 205 (entered into force 1 October 1992) ('Netherlands –Czech Republic BIT')

Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Argentine Republic, signed 3 October 1991, 1699 UNTS 202 (entered into force 28 September 1992) ('Spain and Argentina BIT')

Thailand –Australia Free Trade Agreement, signed 5 July 2004 [2005] ATS 2 (entered into force 1 January 2005) ('TAFTA')

Thailand–New Zealand Closer Economic Partnership Agreement, signed April 2005 (entered into force July 2005) ('TNZCEP') <http://www.thailandntr.com/ROO/TNZCEP_Full_EN.pdf>

Treaty between Pakistan and the Federal Republic of Germany for the Promotion and Protection of Investments (with Protocol and exchange note), signed 25 November 1959, 6575 UNTS 24 (entered into force 28 April 1962) (*‘Pakistan–Germany BIT’*)

Treaty between the Federal Republic of Germany and the Kingdom of Thailand concerning the encouragement and reciprocal protection of investments, signed 24 June 2002, 2286 UNTS 159 (entered into force 20 October 2004) (*‘Germany–Thailand BIT’*)

Treaty Between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments, signed 3 December 1985 (entered into force 18 May 1990) art II. (*‘the United States–Turkey BIT’*)

<<https://www.italaw.com/sites/default/files/laws/italaw6247.pdf>>

Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed 14 November 1991, 31 ILM 124 (entered into force 20 October 1994) preamble (*‘The United States–Argentina BIT’*).

New-Generation International Investment Agreements

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Agreement, signed 8 March 2018 (not yet in force) <<https://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/official-documents/Documents/tpp-11-treaty-text.pdf>>

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Agreement, signed 8 March 2018 (not yet in force), annex to CPTPP/COM/2019/D004 (Code of Conduct for Investor–State Dispute Settlement under Chapter 9 Section B)

European Union and Canada Comprehensive and Economic Trade Agreement (CETA), signed 30 October 2016 (entered into force provisionally on 21 September 2017) <<http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>>

European Union and Singapore Investment Protection Agreement (not yet in force) (*‘European Union–Singapore Investment Protection Agreement’*) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>>

European Union and Vietnam Investment Protection Agreement (not yet in force) (*‘European Union–Vietnam Investment Protection Agreement’*) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>>

Free Trade Agreement Between The European Union and the Socialist Republic of Vietnam (January 2016) ‘*European Union–Vietnam FTA*’)
 <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf>

Transatlantic Trade and Investment Partnership Negotiations (not yet in force) (*TTIP negotiations*)
 <<http://ec.europa.eu/trade/policy/in-focus/ttip/>>

Trans-Pacific Partnership Agreement (signed 4 February 2016) (not yet in force) (*TPP Agreement*)
 <<http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx>>
 (incorporated into the *CPTPP Agreement* in 2018)

Selected Model Bilateral Investment Treaties

Indian Model Bilateral Investment Treaty (2015)
 <http://finmin.nic.in/the_ministry/dept_eco_affairs/investment_division/ModelBIT_Annex.pdf>

International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development
 <http://www.iisd.org/sites/default/files/publications/investment_model_int_handbook.pdf>

United States Model Bilateral Investment Treaty (2012)
 <<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>>

International Arbitration Conventions, Rules and Guidelines

International Arbitration Conventions

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) (*‘New York Convention’*)

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) (*‘ICSID Convention’*)

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, opened for signature 10 October 2014 (entered into force 18 October 2017) (*‘Mauritius Convention’*)

The International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules and Guidelines⁹⁴⁰

ICSID, *Administrative and Financial Regulations* (10 April 2006)

ICSID, *Rules of Procedure for Arbitration Proceedings* (as amended and effective 10 April 2006) ('*ICSID Arbitration Rules*') <<http://icsidfiles.worldbank.org/icsid/icsid/StaticFiles/basicdoc/partF.htm>>.

ICSID, *Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings* (10 April 2006) ('*ICSID Institution Rules*')

The International Centre for Settlement of Investment Disputes (ICSID) Additional Facility (AF) Rules

ICSID, *Additional Facility Rules*, Doc ICSID/11 (as amended and effective 10 April 2006) <<http://icsidfiles.worldbank.org/icsid/icsid/StaticFiles/facility/iii.htm>>

ICSID, *Conciliation (Additional Facility)* (10 April 2006)

ICSID, *Fact-Finding (Additional Facility) Rules* (11 April 2006)

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules⁹⁴¹

United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013), UNGAOR, 68th sess, 68th plen mtg, Agenda Item 79, UN Doc A/RES/68/109 (16 December 2013) <<https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>>

Other International Commercial Arbitration Rules

Cairo Regional Centre for International Commercial Arbitration (CRCICA), *Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration* (in force as from 1 March 2011) ('*CRCICA Arbitration Rules*') <<http://crica.org/Arbitration.aspx?AspxAutoDetectCookieSupport=1>>.

International Chamber of Commerce (ICC), *Rules of Arbitration of the International Chamber of Commerce* (in force 1 March 2017) ('*ICC Rules of Arbitration*') <<https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>>

⁹⁴⁰ The full texts of the *ICSID Convention*, rules and regulations are available on the ICSID Website <https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf>.

⁹⁴¹ The full texts of the UNCITRAL arbitration rules are available on the UNCITRAL website <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html>.

London Court of International Arbitration (LCIA), *Arbitration Rules* (approved on 20 July 2012, in effect since 1 August 2012) (effective 1 October 2014) (‘ *LCIA Arbitration Rules* ’)
http://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx

Moscow Chamber of Commerce and Industry (MCCI), *Rules of the Arbitration at the Moscow Chamber of Commerce and Industry* (effective 1 August 2012) (‘ *MCCI Rules of Arbitration* ’)
 <<https://mostpp.ru/arb/Reglament>>

Stockholm Chamber of Commerce (SCC), *Arbitration Rules* (adopted and in force 1 January 2017) (‘ *SCC Arbitration Rules* ’) <http://sccinstitute.com/media/168084/arbitration-rules_eng_17_final.pdf>

International Bar Association (IBA) Rules and Guideline⁹⁴²

International Bar Association (IBA), *Guidelines on Conflicts of Interest in International Arbitration* (2014)

International Bar Association (IBA), *Guidelines on Party Representation in International Arbitration* (2013)

International Bar Association (IBA), *Rules for Investor-State Mediation* (2012)

International Bar Association (IBA), *Rules on the Taking of Evidence in International Arbitration* (2010)

II. Table of Cases

Historical International Arbitration and Judicial Awards

Affaire des forêts du Rhodope central (question préalable) (Grèce v Bulgarie) (Awards) (1933) 3 RIAA 1405, 1389 <http://legal.un.org/docs/?path=../riaa/cases/vol_III/1389-1436.pdf&lang=O>

Anglo-Portuguese Dispute (1832) reprinted in Lord McNair (ed), *International Law Opinions* (Cambridge University Press, 1956) vol II 232

Caroline Incident (1837) reprinted in WR Manning (ed), *Diplomatic Correspondence of the United States: Canadian Relations 1784-1860* (Carnegie Endorsement for International Peace, 1943) vol III 422

French Company of Venezuelan Railroads v Venezuela (1905) 10 RIAA Rep 285
 <http://legal.un.org/riaa/cases/vol_X/285-355.pdf>

⁹⁴² The full texts of IBA rules and guideline are available on the IBA website
 <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>.

LFH Neer and Pauline Neer (USA) v United Mexican States (1926) 15 4 RIAA Rep 60 ('Neer')
<http://legal.un.org/riaa/cases/vol_IV/60-66.pdf>

Neptune (1797) reprinted in John Bassett Moore (ed), *International Adjudication: Modern Series* (Oxford University Press, 1931) vol IV 398

The Permanent Court of Arbitration (PCA) Awards (From 1988)⁹⁴³

Russian Claim for Interest on Indemnities (Russia v Turkey) (Awards) (1912) 11 RIAA Rep 421
<http://legal.un.org/docs/?path=../riaa/cases/vol_XI/421-447.pdf&lang=O> (Original);
<<https://pcacases.com/web/sendAttach/643>> (Unofficial English Translation)

The Permanent Court of International Justice (PICJ) Awards (1922-1946)⁹⁴⁴

Factory at Chorzow (Germany and Poland) (Merits) [1928] PCIJ Rep (ser A) No17 <http://www.icj-cij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf>

International Court of Justice (ICJ) Judgements (1948-)⁹⁴⁵

Case concerning rights of nations of the United States of America in Morocco (France v United States of America) (Judgment) [1952] ICJ Rep 176 <<http://www.icj-cij.org/docket/files/11/1927.pdf>>

Elettronica Sicola SpA (ELSI) (United States of America v Italy) (Judgment) [1989] ICJ Rep 15
<<http://www.icj-cij.org/docket/files/76/6707.pdf>>

Fisheries Jurisdiction Case (United Kingdom v Iceland) (Judgment) [1974] ICJ Reports 3
<<http://www.icj-cij.org/docket/files/55/5977.pdf>>

Gabčíkovo–Nagymaros Case (Hungary v Slovakia) (Judgment) [1997] ICJ Rep 7 <<http://www.icj-cij.org/docket/files/92/7375.pdf>>

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgment) [1986] ICJ Rep 14 <<http://www.icj-cij.org/docket/files/70/6503.pdf>>

Nuclear Tests Case (Australia v France) (Judgment) [1974] ICJ Rep 253 <<http://www.icj-cij.org/docket/files/58/6093.pdf>>

⁹⁴³ The full texts of the PCA cases are available on the PCA website <<https://pca-cpa.org/en/cases/>>.

⁹⁴⁴ The full texts of the PICJ cases are available on the ICJ website <<http://www.icj-cij.org/pcij/>>.

⁹⁴⁵ The full texts of the ICJ cases are available on the ICJ website <<http://www.icj-cij.org/docket/index.php?p1=3>>.

Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment) [2003] ICJ Rep 161 <<http://www.icj-cij.org/docket/files/90/9715.pdf>>

United States Diplomatic and Consular Staff in Tehran (Judgment) [1980] ICJ Rep 3 <<http://www.icj-cij.org/docket/files/64/6291.pdf>>

Iran–United States Tribunals (From 1981)⁹⁴⁶

Amoco International Finance Corp v Government of the Islamic Republic of Iran (Partial Award) (1987) Iran–US CTR [145].

Emanuel Too v Greater Modesto Insurance Associates and United States of America (Award) (1989) 23 Iran–US CTR 378

Oil Field of Texas, Inc v The Government of the Islamic Republic of Iran, National Iranian Oil Company and Oil Service Company of Iran (Award) (1986) 12 Iran US–CTR 308 (‘*Oil Field of Texas v Iran*’)

Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc., v The Government of the Islamic Republic of Iran, Bank Omran, Bank Mellat (Award) (1983) 16 Iran–US CTR 122

Tippetts, Abbott, McCarthy, Stratton v TAMS-AFFA (Award) (1986) 6 Iran–US CTR 219

General Agreement on Tariffs and Trade (GATT) Panel Report/ World Trade Organization (WTO) Panel and Appellate Body Decisions⁹⁴⁷

GATT Panel Reports (Pre-1995)

GATT Panel Report, *Canada — Administration of the Foreign Investment Review Act*, GATT Doc L/5504–30S/140 (25 July 1983, adopted 7 February 1984) GATT BISD 30S/140 (‘*Canada — Administration of the Foreign Investment Review Act*’)
<https://www.wto.org/english/tratop_e/dispu_e/82fira.pdf>

GATT Panel Report, *European Economic Community — Regulation on Imports of Parts and Components*, GATT Doc L/6657 (adopted 16 May 1990, adopted on 16 May 1990) GATT BISD

⁹⁴⁶ The full texts of the Iran–United States tribunals decisions are available at <https://www.iusct.net/Pages/Public/A-Documents.aspx>.

⁹⁴⁷ The full texts of GATT Panel Reports/WTO Panel and Appellate Body decisions are available on the WTO website <https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>.

37S/132EEC (*‘EEC— Parts and Components’*)

<<http://www.worldtradelaw.net/document.php?id=reports/gattpanels/eecpartscomponents.pdf>>

GATT Panel Report, *Thailand — Restrictions on Importation and Internal Taxes on Cigarettes*, GATT Doc DS10/R–37S/200 (adopted on 7 November 1990) GATT BISD 37S/200 (*‘Thailand — Cigarettes’*)

<https://www.wto.org/english/tratop_e/dispu_e/90cigart.pdf>

GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) (*‘Tuna-Dolphin II’*)

<<http://www.worldtradelaw.net/document.php?id=reports/gattpanels/tunadolphinII.pdf>>

GATT Panel Report, *United States — Taxes on Petroleum and Certain Imported Substances*, GATT Doc L/6175–34S/136 (5 June 1987, adopted on 17 June 1987), GATT BISD 34S/136

<https://www.wto.org/english/tratop_e/dispu_e/87superf.pdf>

GATT Panel Report, *United States—Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) GATT BISD 39S/155 (*‘Tuna-Dolphin I’*)

<<http://www.worldtradelaw.net/reports/gattpanels/tunadolphinI.pdf.download#page=1>>

GATT Panel Report, *United States—Section 337 of the Tariff Act of 1930*, GATT Doc L/6439–36S/345 (16 January 1989, adopted on 7 November 1989) GATT BISD 36S/345

<https://www.wto.org/english/tratop_e/dispu_e/87tar337.pdf>

WTO Panel Reports (From 1995)

Panel Report, *Brazil—Measures Affecting Imports of Rethreaded Tyres*, WTO Doc WT/DS332/R (12 June 2007) (*‘Brazil —Rethreaded Tyres’*)

Panel Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products*, WTO Doc WT/DS363/R, Corr. 1 (19 August 2009) (*‘China —Audio-visual Products’*)

Panel Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc WT/DS302/R (26 November 2004) (*‘Dominican Republic —Import and Sale of Cigarettes’*)

Panel Report, *European Communities Measures Affecting Asbestos and Asbestos—Containing Products*, WTO Doc WT/DS135/R, Add.1(18 September 2000) (*‘EC — Asbestos’*)

Panel report, *Japan — Alcoholic Beverages II*, WTO Doc WT/DS8/R, WT/DS10/R, WT/DS11/R (11 July 1996) (*‘Japan — Alcoholic Beverages II’*)

Panel Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/R WT/DS169/R (31 July 2000) (*‘Korea — Various Measures on Beef’*)

Panel Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/R (7 October 2005) (*‘Mexico — Tax on Soft Drinks’*)

Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) (*‘United States—Gambling’*)

Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (September 2011)

Panel Report, *United States — Measures Relating to Shrimp from Thailand*, WTO Doc WT/DS343/R (29 February 2008) (*‘United States—Shrimp (Thailand)’*)

Panel Report, *United States — Sections 301-310 of the Trade Act of 1974*, WTO Doc WT/DS152/R (22 December 1999) (*‘United States—Section 301’*)

Panel Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/R (29 January 1996)

The WTO Appellate Body Reports (From 1995-)

Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/AB/R (6 November 1998) (*‘Australia – Salmon’*)

Appellate Body Report, *Brazil—Measures Affecting Imports of Rethreaded Tyres*, WTO Doc WT/DS332/AB/R, AB-2007-4 (3 December 2007) (*‘Brazil — Rethreaded Tyres’*)

Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, WTO Doc WT/DS31/AB/R AB-1997-2 (30 June 1997) (*‘Canada — Periodicals’*)

Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, WTO Doc WT/DS70/AB/R, AB-1999-2 (2 August 1999) (*‘Canada—Civilian Aircraft’*)

Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products*, WTO Doc WT/DS363/AB/R, AB-2009-3 (21 December 2009) (*‘China —Audio-visual Products’*)

Appellate Body Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc WT/DS302/AB/R, AB-2005-3 (25 April 2005) (*‘Dominican Republic —Import and Sale of Cigarettes’*)

Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (12 March 2001) (*‘EC — Asbestos’*)

Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R WT/DS48/AB/R AB-1997-4 (16 January 1998) (*‘EC — Hormones’*)

Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R WT/DS169/AB/R, AB-2000-8 (11 December 2000) (*‘Korea —Various Measures on Beef’*)

Appellate Body Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products*, WTO Doc AB-1999-8, WT/DS98/AB/R (14 December 1999) (*‘Korea—Dairy Products’*)

Appellate Body Report, *Korea — Taxes on Alcoholic Beverages*, WTO Doc WT/DS75/AB/R; WT/DS84/AB/R, AB-1998-7 (18 January 1999) (*‘Korea —Alcoholic Beverages’*)

Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/AB/R, AB-2005-10 (6 March 2006) (*‘Mexico — Tax on Soft Drinks’*)

Appellate Body Report, *United States — Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WTO Doc WT/DS213/AB/R, AB-2002-4 (28 November 2002) (*‘United States —Carbon Steel Flat Products from Germany’*)

Appellate Body Report, *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, WTO Doc WT/DS344/AB/R AB-2008-1 (30 April 2008) (*‘United States — Stainless Steel’*)

Appellate Body Report, *United States — Import Prohibition of Certain Shrimps and Shrimp Product*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) (*‘United States—Shrimps’*)

Appellate Body Report, *United States — Measure Affecting Imports of Woven Wool Shirts and Blouses from India* WTO Doc WT/DS33/AB/R, AB-1997-1 (25 April 1997) (*‘United States — Wool Shirts and Blouses’*)

Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R and Corr.1, AB-2005-1 (20 August 2007) (*‘United States—Gambling’*)

Appellate Body Report, *United States — Measures relating to Shrimp from Thailand and United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WTO Doc WT/DS343/AB/R and WT/DS345/AB/R, AB-2008-3 and AB-2008-4 (16 July 2008) (*‘United States—Shrimp (Thailand)’*)

Appellate Body Report, *United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WTO Doc AB-2003-5, WT/DS244/AB/R (15 December 2003) (*‘United States—Carbon Steel Flat Products from Japan’*)

Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (1 February 2002)

Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (29 April 1996) (*‘United States — Gasoline’*)

Other WTO Documents

Russia — Measures Concerning Traffic in Transit, WTO Doc WT/DS512/6 (28 September 2018) (Communication from the Panel).

Investors–States Arbitral Tribunal Decisions and Related Documents

(ICSID and Non-ICSID Arbitrations)⁹⁴⁸

Aaron C Berkowitz, Brett E Berkowitz and Trevor B Berkowitz (formerly Spence International Investments and others) v Republic of Costa Rica (Interim Award) (UNCITRAL, ICSID Case No UNCT/13/2, 25 October 2016)

ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary (Award) (ICSID Arbitral Tribunal, Case No. ARB/03/16, 2 October 2006) ('*ADC v Hungary*')

ADF Group Inc v United States of America (Award) (ICSID Arbitral Tribunal, Case No ARB(AF)/00/1, 9 January 2003) ('*ADF v United States*')

AES Summit Generation Limited and AES-Tisza Erőmű Kft v Republic of Hungary (Award) (ICSID Arbitral Tribunal, Case No ARB/07/22, 23 September 2010) ('*AES v Hungary*')

Amco Asia Corporation and others v Republic of Indonesia (Award) (ICSID Arbitral Tribunal, Case No ARB/81/1, 21 November 1984)

Amco Asia Corporation and others v Republic of Indonesia (Award) (ICSID Arbitral Tribunal, Case No ARB/81/1–Resubmission, 5 June 1990)

Amto v Ukraine (Final Award) (SCC, Case No 080/2005, 26 March 2008)

Apotex Holdings Inc, Apotex Inc v United States of America (Award) (ICSID Additional Facility, Case No. ARB(AF)/05/, 25 August 2014) ('*Apotex v United States*')

Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka (Award) (ICSID Tribunal, Case No ARB/87/3, 27 June 1990) ('*AAPL v Sri Lanka*')

Azurix Corp v The Argentina Republic (Award) (ICSID Arbitral Tribunal, Case No ARB/01/12, 14 July 2006) ('*Azurix v Argentina*')

⁹⁴⁸ The full texts of the published ISDS decisions are available on the UNCTAD website <<http://investmentpolicyhub.unctad.org/ISDS>>; the ICSID website <<https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>>; the ITALAW website <<https://www.italaw.com/>>.

BG Group Plc v The Republic of Argentina (Award) (UNCITRAL, 24 December 2007) (*‘BG v Argentina’*)

Biwater Gauff (Tanzania) Ltd v Tanzania (Award and Concurring and Dissenting Opinion) (ICSID Arbitral Tribunal, Case No ARB/05/22, 24 July 2008) (*‘Biwater v Tanzania’*)

Biwater Gauff (Tanzania) Ltd v Tanzania (Procedural Order No 5) (ICSID Arbitral Tribunal, Case No ARB/05/22, 2 February 2007) (*‘Biwater v Tanzania’*)

Cargill, Incorporated v United Mexican States (Award) (ICSID Arbitral Tribunal, Case No ARB (AF)/05/2, 18 September 2009) (*‘Cargill v Mexico’*)

CDC Group plc v Republic of Seychelles (Award) (ICSID Arbitral Tribunal, Case No ARB/02/14, 17 December 2003)

Chemtura Corporation v Government of Canada (Award) (UNCITRAL, 2 August 2010) (*‘Chemtura Corporation v Canada’*)

CME Czech Republic BV v The Czech Republic (Partial Award) (UNCITRAL, 13 September 2001) (*‘CME v Czech Republic’*)

CMS Gas Transmission Company v Argentina Republic (Award) (ICSID Arbitral Tribunal, Case No ARB/01/8, 12 May 2005) (*‘CMS v Argentina’*)

Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Award) (ICSID Arbitral Tribunal, Case No ARB/97/3, 21 November 2000)

Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina (Award) (ICSID Arbitral Tribunal, Case No ARB/97/3, 20 August 2007)

Compañía del Desarrollo de Santa Elena, SA v the Republic of Costa Rica (Award) (ICSID Arbitral Tribunal, Case No ARB/96/1, 17 February 2000) (*‘CDSE v Costa Rica’*)

Continental Casualty Company v Argentine Republic (Award) (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008) (*‘Continental v Argentina’*)

Crystallex International Corporation v Bolivarian Republic of Venezuela (Award) (ICSID Arbitral Tribunal, Case No ARB(AF)/11/2, 4 April 2016) (*‘Crystallex v Venezuela’*)

Desert Line Projects LLC v Yemen (Award) (ICSID Arbitral Tribunal, Case No ARB/05/17, 6 February 2008) (*‘DLP v Yemen’*)

Duke Energy Electroquil Partners and Electroquil SA v Ecuador (Award) (ICSID Arbitral Tribunal, Case No ARB/04/19, 18 August 2008) (*‘Duke v Ecuador’*)

EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic (Award) (ICSID Arbitral Tribunal, Case No ARB/03/23, 11 June 2012) (*‘EDF v Argentina’*)

EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Romania (Award) (ICSID Arbitral Tribunal, Case No ARB/05/13, 8 October 2009) (*‘EDF v Romania’*)

El Paso Energy International Company v Argentine Republic (Decision on Jurisdiction) (ICSID Arbitral Tribunal, Case No ARB/03/15, 27 April 2006)

El Paso Energy International Company v Argentine Republic (Award) (ICSID Arbitral Tribunal, Case No ARB/03/15, 31 October 2011) (*‘El Paso v Argentina’*)

Eli Lilly and Company v The Government of Canada (Final Award) (UNCITRAL, ICSID Case No. UNCT/14/2, 16 March 2017)

Emilio Agustín Maffezini v The Kingdom of Spain (Award) (ICSID Arbitral Tribunal, Case No ARB/97/7, 13 November 2000) (*‘Maffezini v Spain’*)

Enron Corporation and Ponderosa Assets, LP v Argentina (Award) (ICSID Arbitral Tribunal, Case No ARB/01/3, 22 May 2007) (*‘Enron v Argentina’*)

Eudoro Armando Olguín v Republic of Paraguay (Award) (ICSID Arbitral Tribunal, Case No ARB/98/5, 26 July 2001) (*‘Olguín v Paraguay’*)

Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (Award) (ICSID Arbitral Tribunal, Case No ARB/03/25, 16 August 2007)

GAMI Investments, Inc v The Government of the United Mexican States (Award) (UNCITRAL, 15 November 2004) (*‘GAMI v Mexico’*)

Glamis Gold Ltd v The United States of America (Award) (UNCITRAL/NAFTA, 8 June 2009) (*‘Glamis Gold v United States’*)

Glamis Gold Ltd v The United States of America (Decision on Application and Submission by Quechan Indian Nation) (UNCITRAL, 16 September 2005)

Grand River Enterprises Six Nations, Ltd., et al. v United States of America (Award) (UNCITRAL, 12 January 2011)

Helnan International Hotels A/S v Arab Republic of Egypt (Award) (ICSID Arbitral Tribunal, Case No ARB/05/19, 3 July 2008)

Hussein Nuaman Soufraki v United Arab Emirates (Award) (ICSID Arbitral Tribunal, Case No ARB/02/7, 7 July 2004)

International Thunderbird Gaming Corporation v The United Mexican States (Award) (UNCITRAL, 26 January 2006) (*‘Thunderbird v Mexico’*)

Impregilo SpA v Argentine Republic (Award) (ICSID Arbitral Tribunal, Case No ARB/07/17 21 June 2011)

Impregilo SpA v Islamic Republic of Pakistan (Decision on Jurisdiction) (ICSID Arbitral Tribunal, Case No ARB/03/3, 22 April 2005) (*‘Impregilo v Pakistan’*)

Impregilo SpA v Islamic Republic of Pakistan (Decision on Jurisdiction) (ICSID Arbitral Tribunal, Case No ARB/07/17, 21 June 2011) (*‘Impregilo v Pakistan’*)

Inceysa Vallisoletana SL v Republic of El Salvador (Award) (ICSID Arbitral Tribunal, Case No ARB/03/26, 2 August 2006) (*‘Inceysa v El Salvador’*)

Jan de Nul NV and Dredging International NV v Arab Republic of Egypt (Award), Case No ARB/04/13, 6 November 2008) (*‘Jan de Nul NV v Egypt’*)

Joseph Charles Lemire v Ukraine (Award) (ICSID Arbitral Tribunal, Case No ARB/06/18, 28 March 2011) (*‘Lemire v Ukraine’*)

Joseph Charles Lemire v Ukraine (Decision on Jurisdiction and Liability) (ICSID Arbitral Tribunal, Case No ARB/06/18, 14 January 2010) (*‘Lemire v Ukraine’*)

Klöckner IndustrieAnlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais (Award) (ICSID Arbitral Tribunal, Case No. ARB/81/2, 21 October 1983) (Original French)

Klöckner IndustrieAnlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais (Award) (ICSID Arbitral Tribunal, Case No ARB/81/2 – Resubmission, 26 January 1988) (‘Klöckner II’) (Original French)

LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic (Decision on Liability) (ICSID Arbitral Tribunal, Case No ARB/02/1, 3 October 2006) (‘LG&E v Argentina’)

Link-Trading Joint Stock Company v Department for Customs Control of the Republic of Moldova (Final Award) (UNCITRAL, 18 April 2002) (‘Link-Trading v Moldova’)

Loewen Group, Inc and Raymond L Loewen v United States of America (Award) (ICSID Arbitral Tribunal, Case No ARB (AF)/98/3, 26 June 2003) (‘Loewen v United States’)

Malicorp Limited v The Arab Republic of Egypt (Decision on Annulment) (ICSID Annulment Committee, ICSID Case No ARB/08/18, 3 July 2013) (‘Malicorp v Egypt’)

Maritime International Nominees Establishment v Republic of Guinea (Award) (ICSID Arbitral Tribunal, Case No ARB/84/4, 6 January 1988)

Marvin Roy Feldman Karpa v United Mexican States (Award) (ICSID Arbitral Tribunal, Case No ARB(AF)/99/1 (Award) (ICSID Arbitral Tribunal, Case No ARB (AF)/99/1, 16 December 2002) (‘Feldman v Mexico’)

Merrill & Ring Forestry LP v Canada (Award) (UNCITRAL, 31 March 2010) (‘Merrill & Ring v Canada’)

Metalclad Corporation v The United Mexican States (Award) (ICSID Arbitral Tribunal, Case No ARB (AF)/97/1, 30 August 2000) (‘Metalclad v Mexico’)

Methanex Corporation v United State of America (Final Award on Jurisdiction and Merits) (UNCITRAL, 3 August 2005) (‘Methanex v United States’)

Methanex Corporation v United State of America (Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae) (UNCITRAL, 15 January 2001)

<https://www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf>.

Mondev International Ltd v United States of America (Award) (ICSID Arbitral Tribunal, Case No ARB (AF)/99/2, 11 October 2002) (‘Mondev v United States’)

MTD Equity Sdn Bhd & MTD Chile SA v Chile (Award) (ICSID Arbitral Tribunal, Case No ARB/01/7, 25 May 2004)

National Grid plc v The Argentine Republic (Award) (UNCITRAL, 3 November 2008) (‘*National Grid v Argentina*’)

Noble Ventures, Inc v Romania (Award) (ICSID Arbitral Tribunal, Case No ARB/01/11, 12 October 2005) (‘*Noble Ventures v Romania*’)

Occidental Petroleum Corp. and Occidental Exploration and Production Co. v Republic of Ecuador (Award) (ICSID Arbitral Tribunal, Case No ARB/06/11, 5 October 2012) (‘*OPC & OEPC v Ecuador*’)

Occidental Exploration and Production Company v The Republic of Ecuador (Award) (LCIA, Case No UN 3467, 1 July 2004)

Pan American Energy LLC and BP Argentina Exploration Company v The Argentine Republic (Decision on Preliminary Objections) (ICSID Arbitral Tribunal, Case No ARB/03/13, 27 July 2006) (‘*Pan v Argentina*’)

Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania (Award) (ICSID arbitral tribunal, Case No ARB/07/21, 30 July 2009) (‘*Pantechniki v Albania*’)

Petrobart Limited v The Kyrgyz Republic (Award) (SCC, Case No 126/2003, 29 March 2005) (‘*Petrobart v Kyrgyz*’)

Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay (Award) (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016) (‘*Philip Morris v Uruguay*’)

Philip Morris Asia Limited v The Commonwealth of Australia (Award on Jurisdiction and Admissibility) (UNCITRAL, PCA Case No 2012-12, 17 December 2015) (‘*Philip Morris v Australia*’)

Pope & Talbot Inc v The Government of Canada (Award in Respect of Damages) (UNCITRAL, 31 May 2002) (‘*Pope & Talbot v Canada*’).

Pope & Talbot Inc v The Government of Canada (Award on the Merits of Phase 2) (UNCITRAL, 10 April 2001) (‘*Pope & Talbot v Canada*’)

PSEG Global, Inc, The North American Coal Corporation, and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v Republic of Turkey (Award) (ICSID Arbitral Tribunal, Case No ARB/02/5, 19 January 2007) (‘*PSEG v Turkey*’)

Renta 4 SVSA, Ahorro Corporación Emergentes FI, Ahorro Corporación Eurofondo FI, Rovime Inversiones SICAV SA, Quasar de Valores SICAV SA, Orgor de Valores SICAV SA, GBI 9000 SICAV SA v The Russian Federation (Award) (SCC, Case No 24/2007, 20 July 2012) (‘*Renta 4 v Russia*’)

Renée Rose Levy and Gremcitel SA v Republic of Peru (Award) (ICSID Tribunal, ICSID Case No ARB/11/17, 9 January 2015)

Rompetrol Group NV v Romania (Award) (ICSID Arbitral tribunal, Case No ARB/06/3, 6 May 2013) (‘*Rompetrol v Romania*’)

Ron Fuchs v Georgia (Award) (ICSID Arbitral Tribunal, Case No ARB/07/15, 3 March 2010) (‘*Ron Fuchs v Georgia*’)

Ronald S Lauder v The Czech Republic (Award) (UNCITRAL, 3 September 2001) (‘*RS Lauder v Czech Republic*’)

Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan (Award) (ICSID Arbitral Tribunal, Case No ARB/05/16, 29 July 2008) (‘*Rumeli v Kazakhstan*’)

Rusoro Mining Ltd v Bolivarian Republic of Venezuela (Award) (ICSID Arbitral Tribunal, Case No ARB(AF)/12/5, 22 August 2016) (‘*Rusoro v Venezuela*’)

Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco (Decision on Jurisdiction) (ICSID Arbitral Tribunal, ICSID Case No. ARB/00/4, 31 July 2001).

Salini Costruttori S.p.A. and Italstrade S.p.A.v The Hashemite Kingdom of Jordan (Award) (ICSID Arbitral Tribunal, Case No ARB/02/13, 2006) (‘*Salini v Jordan*’)

Saluka Investments BV (The Netherlands) v Czech Republic (Partial Award) (UNCITRAL, 17 March 2006) (‘*Saluka v Czech Republic*’)

SD Myers Inc v Government of Canada (First Partial Award) (UNCITRAL, 13 November 2000 (‘*SD Myers v Canada*’)

Sempra Energy International v Argentine Republic (Award) (ICSID Arbitral Tribunal, Case No ARB/02/16, 28 September 2007) (‘*Sempra v Argentina*’)

SGS Société Générale de Surveillance SA v Republic of the Philippines (Decision of the Tribunal on Objections to Jurisdiction) (ICSID Arbitral Tribunal, Case No ARB/02/6, 29 January 2004) (‘*SGS v Philippines*’)

Siemens AG v Argentina (Award on Jurisdiction) (ICSID Arbitral Tribunal, Case No ARB/02/8, 3 August 2004) (‘*Siemens AG v Argentina*’)

Siemens AG v Argentine Republic (Award) (ICSID Arbitral Tribunal, Case No ARB/02/8, 6 February 2007) (‘*Siemens AG v Argentina*’)

Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (Award) (ICSID Arbitral Tribunal, Case No ARB/84/3 (SPP), 20 May 1992) (‘*Southern Pacific v Egypt*’)

Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v The Argentine Republic (Decision on Liability) (ICSID arbitral tribunal, Case No ARB/03/17, 30 July 2010) (‘*Suez et al v Argentina*’)

Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v The Argentine Republic (Order in Response to a Petition for Transparency and Participation as Amicus Curiae in Suez) (ICSID Arbitral Tribunal, Case No ARB/03/19, 30 July 2010) (‘*Suez et al v Argentina*’)

Técnicas Medioambientales Tecmed, SA v Mexico (Award) (ICSID Arbitral Tribunal, Case No ARB (AF)/00/2, 29 May 2003) (‘*Tecmed SA v Mexico*’)

Tokios Tokelés v Ukraine (Award) (ICSID Tribunal, Case No. ARB/02/18, 26 July 2007) (‘*Tokios v Ukraine*’)

Total SA v Argentine Republic (Award) (ICSID Arbitral Tribunal, Case No ARB/04/1, 27 November 2013) (‘*Total v Argentina*’)

United Parcel Service of America Inc v Canada (Award) (UNCITRAL, Case No UNCT/02/1, 24 May 2007) (‘*UPS v Canada*’)

United Parcel Service of America Inc v Canada (Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae) (UNCITRAL, Case No UNCT/02/1, 17 October 2001)

Waste Management Inc v United Mexican States (Award) (ICSID Arbitral Tribunal, Case No ARB(AF)/00/3, 30 April 2004) (*‘Waste Management v Mexico’*)

Walter Bau Ag (In Liquidation) v The Kingdom of Thailand (Award) (UNCITRAL, 1 July 2009) (*‘Walter Bau v Thailand’*)

Waste Management, Inc v United Mexican States (Award) (ICSID Arbitral Tribunal, Case No ARB(AF)/00/3, 30 April 2004) (*‘Waste Management v Mexico’*)

Wena Hotels Limited v Arab Republic of Egypt (Award) (ICSID Arbitral Tribunal, Case No ARB/98/4, 8 December 2000) (*‘Wena Hotels v Egypt’*)

Pleadings and Other Documents

‘Expert Statement of Professor W Michael Reisman’ (*Sempra v Argentina*), ICSID Arbitral Tribunal, Hearing Transcript vol 6, 11 February 2006), 1007.

ICSID Annulment Decisions⁹⁴⁹

Amco Asia Corporation and others v Republic of Indonesia (Decision on Annulment) (ICSID Annulment Committee, Case No ARB/81/1, 16 May 1986) (*‘Amco v Indonesia’*)

Amco Asia Corporation and others v Republic of Indonesia (Supplemental Decision and Rectification annulled) (ICSID Annulment Committee, Case No ARB/81/1, 17 December 1992) (*‘Amco v Indonesia II’*)

Azurix Corp v Argentine Republic (Decision on Annulment) (ICSID Annulment Committee, Case No ARB/01/12, 1 September 2009) (*‘Azurix v Argentina’*)

CDC Group plc v Republic of Seychelles (Decision on Annulment) (ICSID Annulment Committee, ARB/02/14, 29 June 29, 2005) (*‘CDC v Seychelles’*)

CMS Gas Transmission Company v Argentine Republic (Decision on Annulment) (ICSID Annulment Committee, Case No ARB/01/8, 25 September 25, 2007)

⁹⁴⁹ The full texts of the ICSID annulment decisions are available on the ICSID Website <<https://icsid.worldbank.org/en/Pages/process/Decisions-on-Annulment.aspx>>.

Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Annulment Decision) (ICSID Annulment Committee, Case No ARB/97/3, 3 July 2002)

Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (Decision on Annulment) (ICSID Annulment Committee, Case No ARB/97/3–Resubmission, 10 August 2010) (‘*Vivendi v Argentina I*’)

Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic Vivendi v Argentina (Decision on Annulment) (ICSID Annulment Committee, Case No ARB/97/3 – Resubmission, 5 May 2017) (‘*Vivendi v Argentina II*’)

Continental Casualty Company v Argentine Republic (Annulment Decision) (ICSID Annulment Committee, Case No ARB/03/9, 16 September 2011)

Daimler Financial Services AG v Argentine Republic (Decision on Annulment) (ICSID Annulment Committee, ICSID Case No ARB/05/1, 7 January 2015) (‘*Daimler v Argentina*’)

Duke Energy International Peru Investments No 1 Ltd v Republic of Peru (Annulment Decision) (ICSID Annulment Committee, Case No ARB/03/28, 1 March 2011) (‘*Duke Energy v Peru*’)

EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic (Annulment Decision) (ICSID Annulment Committee, Case No ARB/03/23, 5 February 2016)

El Paso Energy International Company v Argentine Republic (Annulment Decision) (ICSID Annulment Committee, Case No ARB/03/15, 22 September 2014)

Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic (Decision on Annulment) (ICSID Annulment Committee, ICSID Case No ARB/01/3, 30 July 2010) (‘*Enron v Argentina*’)

Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (Decision on Annulment) (ICSID Annulment Committee, ICSID Case No ARB/03/25, 23 December 2010) (‘*Fraport v Philippines*’)

Helnan International Hotels A/S v Arab Republic of Egypt (Decision on Annulment) (ICSID Annulment Committee, Case No ARB/05/19, 14 June 2010) (‘*Helnan v Egypt*’)

Hussein Nuaman Soufraki v United Arab Emirates (Decision on Annulment) (ICSID Annulment Committee, ICSID Case No ARB/02/7, 5 June 2007) (‘*Hussein v UAE*’)

Impregilo SpA v Argentine Republic (Annulment Decision) (ICSID Annulment Committee, Case No ARB/07/17, 24 January 2014)

Joseph C Lemire v Ukraine (Annulment Decision) (ICSID Annulment Committee, Case No ARB/06/18, 8 July 2013)

Klöckner IndustrieAnlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais (Annulment Decision) (ICSID Annulment Committee, Case No ARB/81/2, 3 May 1985)

Klöckner IndustrieAnlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais (Annulment Decisions) (ICSID Annulment Committee, Case No ARB/81/2 –Resubmission, 17 May 1990)

MCI Power Group, LC and New Turbine, Inc v Republic of Ecuador (Decision on Annulment) (ICSID Annulment Committee, ICSID Case No ARB/03/6, 19 October 2009)

Maritime International Nominees Establishment v Republic of Guinea (Annulment Decision) (ICSID Annulment Committee, Case No ARB/84/4, 22 December 1989) (*‘MINE v Guinea’*)

Occidental Petroleum Corp. and Occidental Exploration and Production Co. v Republic of Ecuador (Annulment Decision) (ICSID Annulment Committee, Case No ARB/06/11, 2 November 2015)

Patrick Mitchell v Democratic Republic of the Congo (Decision on Annulment) (ICSID Annulment Committee, ICSID Case No ARB/99/7, 1 November 2006)

Repsol YPF Ecuador SA v Empresa Estatal Petróleos del Ecuador (Decision on Annulment) (ICSID Annulment Committee, ICSID Case No ARB/01/10, 8 January 2007) (*‘Repsol v Ecuador’*)

Sempra Energy International v Argentine Republic (Decision on Annulment) (ICSID Annulment Committee, ICSID Case No ARB/02/16, 29 June 2010) (*‘Sempra v Argentina’*)

TECO Guatemala Holdings, LLC v Republic of Guatemala (Decision on Annulment) (ICSID Case No ARB/10/23, 5 April 2016) (*‘TECO v Guatemala’*)

Total SA v Argentine Republic (Annulment Decision) (ICSID Annulment Committee, ICSID Case No ARB/04/1, 1 February 2016)

Tulip Real Estate and Development Netherlands BV v Republic of Turkey (Decision on Annulment) (ICSID Annulment Committee, ICSID Case No ARB/11/28, 30 December 2015) (*‘Tulip v Turkey’*)

Wena Hotels Limited v Arab Republic of Egypt (Decision on Annulment) (ICSID Annulment Committee, ARB/98/4, 5 February 2002) (‘*Wena Hotels v Egypt*’)

Domestic Cases

High Court, Canada

United Mexican States v Metalclad Corporation [2001] BCSC 664, 7-8

<<https://www.italaw.com/documents/Metalclad-BCSCReview.pdf>>

The Central Administrative Court, Thailand

Philip Morris (Thailand) Limited et al. v Ministry of Public Health (Central Administrative Court, Black Case No 1324/2556, 23 August 2013) <<http://www.tobaccocontrolaws.org/litigation/decisions/th-20130823-philip-morris-thailand-limit-1>>

III. International Governmental Organization Official Materials

The UN official materials are cited in accordance with rule 8 of the *AGLC* (2010). This Thesis adapts rule 6.9 of the *AGLC* (2010), which may be considered the closest fitting rule, to other international governmental organisations materials.

United Nations (UN) Materials

General Assembly Resolution

Declaration on Permanent Sovereignty Over Natural Resources, UNGA Res 1803 (XVII) (14 December 1952) <http://legal.un.org/all/ha/ga_1803/ga_1803.html>

Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A Res 67/1 and 67/97, UNGAOR, 67th sess, Agenda Item 83 (30 November 2012) <<https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>>.

Responsibility of States for Internationally Wrongful Acts, A/RES/56/83, 56th sess., 85th plenary meeting, Agenda item 162, Supp No 10 and corrigendum, UN Doc A/56/10 and Corr 1 (12 December 2001) (‘*General Assembly Resolution 56/83*’)

Report of Principle Organ

Ago, Roberto, Special Rapporteur, Addendum to the eighth report on State responsibility, 32nd sess, Agenda Item 2, UN Doc A/CN.4/318/Add.5–7 (29 February, 10 and 19 June 1980) (also reproduced in the Yearbook of the International Law Commission, 1980, vol. II (1))

Crawford, James, Special Rapporteur, Second Report on State Responsibilities, Agenda item 3, UN Doc A/CN.4/498 and Add.1–4 (17 March, 1 and 30 April, 19 July 1999)

Report of the International Law Commission covering the work of its Tenth Session to General Assembly: Arbitral Procedure 1958, A/CN.4/117, 13th sess, Agenda Item 1, Supplement No 9 (A/3859), UN Doc A/3859 (A/13/9) (28 April – 4 July 1958) (*‘Model Rule on Arbitral Procedure with a general commentary’*) <http://legal.un.org/ilc/texts/instruments/english/commentaries/10_1_1958.pdf>

Report of the International Law Commission on the Work of Its Fifty-third session (23 April – 1 June and 2 July–10 August 2001) [2001] II (2) *Yearbook of the International Law Commission* ch IV (*‘Draft Article on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001’*) <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>

Report of the 6th Committee, UNGAOR, 68th session, UN Doc A/68/468 (19 November 2013)

Secretariat-General’s Report

The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies — Report of Secretary-General, UN Doc S/2004/616 (23 August 2004) <<https://www.un.org/ruleoflaw/files/2004%20report.pdf>>

Annex

Responsibility of States for Internationally Wrongful Acts, GA Res 56/83, 56th sess., 85th plen mtg, Supp No. 49, UN Doc A/RES/56/83 (adopted 12 December 2001) annex (*‘Responsibility of States for Internationally Wrongful Acts’*)

Draft Resolution

Draft Resolution—The rule of law at the national and international levels, Sixty-eighth session, Agenda Item 85, UN Doc A/C.6/68/L.22 (11 November 2013)

Others

United Nations, *Handbook on Peaceful Dispute Settlement between States* (United Nations, 1992)

United Nations Conference on Trade and Development (UNCTAD) Materials

UNCTAD, ‘The World of Investment Promotion at A Glance a Survey of Investment Promotion Practices’ (ASIT Advisory Studies No 17, UNCTAD Doc No UNCTAD/ITE/IPC/3, United Nations, 2001) <<http://unctad.org/en/Docs/poiteipcd3.en.pdf>>

UNCTAD, ‘Report on the Expert Meeting on the transformation of International Investment Agreement Regime: The Path Ahead’ (Report, UNCTAD Doc No TD/B/C.II/EM.4/3, 17 April 2015) <http://unctad.org/meetings/en/SessionalDocuments/ciiem4d3_en.pdf>

UNCTAD IIA Monitor (2005-2009)⁹⁵⁰

UNCTAD, ‘South-South Investment Agreements Proliferating’ (IIA Monitor No. 1 (2005), UNCTAD Doc No UNCTAD/WEB/ITE/IIT/2006/1, 2 November 2004)

UNCTAD, ‘Recent Developments in International Investment Agreements’ (IIA Monitor No. 2(2005), UNCTAD Doc No UNCTAD/WEB/ITE/IIT/2005/1, 29 August 2005)

UNCTAD, ‘Latest Developments in Investor–State Dispute Settlement’ (IIA Monitor No. 3 (2005), UNCTAD Doc No UNCTAD/WEB/ITE/IIT/2005/2, 15 January 2006)

UNCTAD, ‘Systemic Issues in International Investment Agreements (IIAs)’ (IIA Monitor No. 4 (2005), UNCTAD Doc No UNCTAD/WEB/ITE/IIA/2006/2, 20 March 2006)

UNCTAD, ‘Developments in international investment agreements in 2005’ (IIA Monitor No. 2 (2006), UNCTAD Doc No UNCTAD/WEB/ITE/IIA/2006/7, 30 September 2006)

UNCTAD, ‘The Entry into Force of Bilateral Investment Treaties (BITs)’ (IIA Monitor No. 3(2006), UNCTAD Doc No UNCTAD/WEB/ITE/IIA/2006/9, 30 September 2006)

UNCTAD, ‘Intellectual Property Provisions in International Investment Arrangements’ (IIA Monitor No. 1 (2007), UNCTAD Doc No UNCTAD/WEB/ITE/IIA/2007/1, 30 April 2007)

UNCTAD, ‘Development implications of international investment agreements’ (IIA Monitor No. 2(2007), UNCTAD Doc No UNCTAD/WEB/ITE/IIA/2007/2, 31 August 2007)

UNCTAD, ‘Recent developments in international investment agreements 2006 – June 2007’ (IIA Monitor No. 3 (2007), UNCTAD Doc No UNCTAD/WEB/ITE/IIA/2007/6, 20 January 2008)

⁹⁵⁰ The full texts of the UNCTAD IIA Monitor are available on the UNCTAD website <[http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-Monitor.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Monitor.aspx)>.

UNCTAD, ‘Latest Developments in Investor– State Dispute Settlement’ (IIA Monitor No. 1 (2008), UNCTAD Doc No UNCTAD/WEB/ITE/IIA/2008/3(IIA), 31 March 2008)

UNCTAD, ‘Recent developments in international investment agreements (2007–June 2008)’ (IIA Monitor No. 2 (2008), UNCTAD Doc No UNCTAD/WEB/DIAE/IA/2008/1, 31 August 2008)

UNCTAD, ‘Latest Developments in Investor–State Dispute Settlement’ (IIA Monitor No. 1 (2009), UNCTAD Doc No UNCTAD/WEB/DIAE/IA/2009/6, 31 March 2009)

UNCTAD, ‘Selected Recent Developments in IIA Arbitration and Human Rights’ (IIA Monitor No. 2 (2009), UNCTAD Doc No UNCTAD/WEB/DIAE/IA/2009/7, 10 June 2009)

UNCTAD, ‘Recent developments in international investment agreements (2008–June 2009)’ (IIA Monitor No. 3 (2009), UNCTAD Doc No UNCTAD/WEB/DIAE/IA/2009/8), 2 July 2009)

UNCTAD Series on International Investment Policies for Development (2009-2010)⁹⁵¹

UNCTAD, ‘International Investment rule-making: stocktaking, challenges and the way forward’ (Series on International Investment Policies for Development, UNCTAD Doc UNCTAD/ITE/IIT/2007/3, 9 February 2009)

UNCTAD, ‘The Protection of National Security Interest in IIAs’ (Series on International Investment Policies for Development, UNCTAD Doc UNCTAD/DIAE/IA/2008/5, 31 July 2009)

UNCTAD, ‘The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries’ (Series on International Investment Policies for Development, UNCTAD Doc UNCTAD/DIAE/IA/2009/5, 30 November 2009)

UNCTAD, ‘Investor–State Disputes: Prevention and Alternatives to Arbitration’ (Series on International Investment Policies for Development, UNCTAD Doc UNCTAD/DIAE/IA/2009/11, 31 July 2010)

UNCTAD, ‘Investor–State Disputes: Prevention and Alternatives to Arbitration: Proceedings of Symposium held on 29 March 2010’ (Series on International Investment Policies for Development, UNCTAD Doc UNCTAD/WEB/DIAE/IA/2010/8, 12 Jul 2011)

⁹⁵¹ The full texts of the UNCTAD series on international investment policies for development are available on the UNCTAD website <<http://unctad.org/en/Pages/DIAE/DIAE%20Publications%20-%20Bibliographic%20Index/UNCTAD-Series-on-International-Investment-Policies-for-Development.aspx>>.

UNCTAD Series on Issues in International Investment Agreements (1999-2014)⁹⁵²

UNCTAD, ‘Fair and Equitable Treatment’ (Series on issues in International Investment Agreements, United Nations, UNCTAD Doc UNCTAD/ITE/IIT/11 (Vol III), May 1999)

<<http://unctad.org/en/Docs/psiteiitd11v3.en.pdf>>

UNCTAD, ‘Free Transfer of Funds’ (UNCTAD Series on Issues in International Investment Agreements, UNCTAD Doc UNCTAD/ITE/IIT/20, July 2000) <<http://unctad.org/en/Docs/psiteiitd20.en.pdf>>.

UNCTAD, ‘Key Terms and Concepts in IIAs: A Glossary’ (UNCTAD Series on Issues in International Investment Agreements, UNCTAD Doc UNCTAD/ITE/IIT/2004/2, 2004)

UNCTAD, ‘Fair and Equitable Treatment: A Sequel’ (Series on Issues in International Investment Agreements II, UNCTAD Doc UNCTAD/DIAE/IA/2011/5, 31 December 2010)

UNCTAD, ‘Most-Favoured Nation Treatment’ (Series on Issues in International Investment Agreements II, UNCTAD Doc UNCTAD/DIAE/IA/2010/1, 23 January 2011)

UNCTAD, ‘Expropriation: A Sequel’ (Series on Issues in International Investment Agreements II, UNCTAD Doc UNCTAD/DIAE/IA/2011/7, 29 Nov 2011)

UNCTAD, ‘Transparency’ (Series on Issues in International Investment Agreements II, UNCTAD Doc UNCTAD/DIAE/IA/2011/6, 31 December 2012)

UNCTAD, ‘Investor–State Dispute Settlement: A Sequel’ (Series on Issues in International Investment Agreements II, UNCTAD Doc UNCTAD/DIAE/IA/2013/2, United Nations, 2014)

UNCTAD World Investment Report (1991-1996, 2006-2016)⁹⁵³

UNCTAD, ‘The Triad in Foreign Direct Investment’ (World Investment Report 1991, UNCTAD Doc ST/CTC/118, 31 July 1991)

UNCTAD, ‘Overview—Transnational corporations as engines of growth’ (World Investment Report 1992, UNCTAD Doc ST/CTC/143, 31 July 1992)

⁹⁵² The full text of the UNCTAD series on issues in international investment agreements are available on the UNCTAD website <<http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/UNCTAD-Series-on-issues-on-international-investment-agreements.aspx>>.

⁹⁵³ The full texts of the UNCTAD world investment report are available on the UNCTAD website <<http://unctad.org/en/pages/DIAE/World%20Investment%20Report/WIR-Series.aspx>>.

UNCTAD, ‘Transnational corporations as engines of growth’ (World Investment Report 1992, UNCTAD Doc ST/CTC/130, 31 July 1992)

UNCTAD, ‘Overview—Transnational corporations and integrated international production’ (World Investment Report 1993, UNCTAD Doc ST/CYC/159, 30 June 1993)

UNCTAD, ‘Overview—Transnational Corporations, Employment and the Workplace’ (World Investment Report 1994, UNCTAD/DTCI/10 (Overview), 30 June 1994)

UNCTAD, ‘Transnational Corporations, Employment and the Workplace’ (World Investment Report 1994, UNCTAD/DTCI/10, United Nations, 31 July 1994)

UNCTAD, ‘Overview—Transnational corporations and competitiveness’ (World Investment Report 1995, UNCTAD/DTCI/26 (Overview), 31 July 1995)

UNCTAD, ‘Transnational corporations and competitiveness’ (World Investment Report 1995, UNCTAD/DTCI/26, 31 July 1995)

UNCTAD, ‘Overview—Investment, Trade and International Policy Agreements’ (World Investment Report 1996, UNCTAD/DTCI/32 (Overview), 31 August 1996)

UNCTAD, ‘Overview’ (World Investment Report 2006, UNCTAD/WIR/2006 (Overview), 15 October 2006)

UNCTAD, ‘FDI from Developing and Transition Economies: Implications for Development’ (World Investment Report, UNCTAD/WIR/2006, 15 October 2006)

UNCTAD, ‘Overview—Transnational Corporations, Extractive Industries and Development’ (World Investment Report 2007, UNCTAD/WIR/2007(Overview), 15 October 2007)

UNCTAD, ‘Transnational Corporations, Extractive Industries, and development’ (World Investment Report 2007, UNCTAD/WIR/2007, 15 October 2007)

UNCTAD, ‘Overview’ (UNCTAD, World Investment Report 2008, UNCTAD/WIR/2008(Overview), United Nations, 23 September 2008)

UNCTAD, ‘Transnational Corporations, and the Infrastructure Challenge’ (World Investment Report 2008, UNCTAD/WIR/2008, 23 September 2008)

UNCTAD, ‘Overview’ (World Investment Report 2009, UNCTAD/WIR/2009(Overview), 16 Sep 2009)

UNCTAD, ‘Transnational Corporations, Agricultural Production and Development’ (World Investment Report 2009, UNCTAD/WIR/2009, 16 September 2009)

UNCTAD, ‘Overview’ (World Investment Report 2010, UNCTAD/WIR/2010(Overview), 21 July 2010)

UNCTAD, ‘Investing in a low-carbon economy’ (World Investment Report 2010, UNCTAD/WIR/2010, 21 July 2010)

UNCTAD, ‘Non-equity modes of international production and development’ (World Investment Report 2011, UNCTAD/WIR/2011, 16 March 2012)

UNCTAD, ‘Overview’ (World Investment Report 2011, UNCTAD/WIR/2011 (Overview), 16 March 2012)

UNCTAD, ‘Overview’ (World Investment Report 2012, UNCTAD/WIR/2012(Overview), 5 July 2012)

UNCTAD, ‘Towards a New Generation of Investment Policies’ (World Investment Report 2012, UNCTAD/WIR/2012, 5 July 2012)

UNCTAD, Overview (World Investment Report 2013, UNCTAD/WIR/2013(Overview), 27 Jun 2013)

UNCTAD, ‘Global Value Chains: Investment and Trade for Development’ (World Investment Report, UNCTAD/WIR/2013, 27 Jun 2013)

UNCTAD, ‘Overview’ (World Investment Report 2014, UNCTAD/WIR/2014(Overview), 24 June 2014)

UNCTAD, ‘Investing in the SDGs: An Action Plan’ (World Investment Report, UNCTAD/WIR/2014, 24 Jun 2014)

UNCTAD, ‘Reforming International Investment Governance’ (World Investment Report, UNCTAD/WIR/2015, 25 Jun 2015)

UNCTAD, ‘Investor Nationality: Policy Challenges’ (World Investment Report, UNCTAD/WIR/2016, 22 Jun 2016)

UNCTAD IIAs Issue Notes (2010-2017)⁹⁵⁴

UNCTAD, ‘Latest Developments in Investor–State Dispute Settlement’ (IIA Issues Note No. 1 (2010), UNCTAD/WEB/DIAE/IA/2010/3, 25 May 2010)

⁹⁵⁴ The full texts of the UNCTAD IIAs issue notes are available on the UNCTAD website <<http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx>> .

UNCTAD, ‘Denunciation of the ICSID convention and BITS: impact on investor–state claims’ (IIA Issues Note No. 2 (2010), UNCTAD/WEB/DIAE/IA/2010/6, 9 December 2010)

UNCTAD, ‘Latest Developments in Investor–State Dispute Settlement’ (IIA Issues Note No. 1 (2011), UNCTAD/WEB/DIAE/IA/2011/3, 24 March 2011)

UNCTAD, ‘Sovereign Debt Restructuring and International Investment Agreements’ (IIA Issues Note No. 2 (2011), UNCTAD/WEB/DIAE/PCB/2011/3, 29 June 2011)

UNCTAD, ‘Interpretation of IIAs: What States can do’ (IIA Issues Note No. 3 (2011), UNCTAD/WEB/DIAE/IA/2011/10, 10 January 2012)

UNCTAD, ‘Latest Developments in Investor–State Dispute Settlement’ (IIA Issues Note No. 1 (2012), UNCTAD/WEB/DIAE/IA/2012/10, 16 April 2012)

UNCTAD, ‘Recent Developments in Investor–State Dispute Settlement (ISDS)’ (IIA Issue Note No. 1 (2013), UNCTAD/WEB/DIAE/PCB/2013/3, 10 April 2013)

UNCTAD, ‘Reform of Investor–State Dispute Settlement: In Search of a Roadmap Special issue for the Multilateral Dialogue on Investment’ (IIA Issues Note No 2 (2013), UNCTAD/WEB/DIAE/PCB/2013/4, 24 May 2013)

UNCTAD, ‘The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity?’ (IIA Issues Note No. 3 (2013), UNCTAD/WEB/DIAE/PCB/2013/8, 13 June 2013)

UNCTAD, ‘International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal’ (IIA Issues Note No. 4 (2013), UNCTAD/WEB/DIAE/PCB/2013/9, 21 June 2013)

UNCTAD, ‘Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy- Making’ (IIA Issues Note No 5 (2013) , UNCTAD/WEB/DIAE/PCB/2013/6, 19 July 2013)

UNCTAD, ‘The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014’ (IIA Issues Note Working Draft, September 2014)

UNCTAD, ‘Recent Developments in Investor–State Dispute Settlement (ISDS)’ (IIA Issue Note No. 1 (2014), UNCTAD/WEB/DIAE/PCB/2014/3, 7 April 2014)

UNCTAD, ‘Investor–State Dispute Settlement: An Information Note on the United States and the European Union’ (IIA Issue Note No. 2 (2014), UNCTAD/WEB/DIAE/PCB/2014/4, 10 July 2014)

UNCTAD, ‘Reform of the IIA Regime: Four Paths of Action and a Way Forward’ (IIA Issue Note No. 3 (2014), UNCTAD/WEB/DIAE/PCB/2014/6, 11 July 2014)

UNCTAD, ‘Recent Trends in IIAs and ISDS’ (IIA Issue Note No 1 (2015), UNCTAD/WEB/DIAE/PCB/2015/1, 19 February 2015)

UNCTAD, ‘Investor–State Dispute Settlement: Review of Developments in 2014’ (IIA Issue Note No. 2, (2015), UNCTAD/WEB/DIAE/PCB/2015/2, 15 July 2015)

UNCTAD, ‘Taking Stock of IIA Reform’ (IIA Issue Note No 1 (2016), UNCTAD/WEB/DIAE/PCB/2016/3, 1 March 2016)

UNCTAD, ‘Investor–State Dispute Settlement: Review of Developments in 2015’ (IIA Issue Note No 2 (2016), UNCTAD/WEB/DIAE/PCB/2016/4, 8 June 2016)

UNCTAD, Investor–State Dispute Settlement: Review of Developments in 2016 (IIA Issue Note No 1 (2017), UNCTAD/DIAE/PCB/2017/1, 19 May 2017)

UNCTAD, ‘Phase 2 of IIA Reform: Modernizing the existing stock of old-generation treaties’ (IIA Issue Note No. 2 (2017), UNCTAD/DIAE/PCB/2017/3, 6 June 2017)

UNCTAD Series on Investment Policy Framework for Sustainable Development⁹⁵⁵

UNCTAD, ‘Investment Policy Framework for Sustainable Development [2012 Edition]’ (Series on Investment Policy Framework for Sustainable Development, UNCTAD Doc No UNCTAD/DIAE/PCB/2012/5, 22 September 2012)

UNCTAD, ‘Investment Policy Framework for Sustainable Development [2015 Edition]’ (Series on Investment Policy Framework for Sustainable Development, UNCTAD Doc No UNCTAD/DIAE/PCB/2015/5, 23 December 2015)

⁹⁵⁵ The full texts of the UNCTAD Series on Investment Policy Framework for Sustainable Development are available on the UNCTAD website <[http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-IPFSD.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-IPFSD.aspx)>.

**The United Nations Commission on International Trade Law (UNCITRAL) Working Group III
Investor–State Dispute Settlement Reform**

Note by the Secretariat

Possible Future Work in the Field of Dispute Settlement: Concurrent Proceedings in International Arbitration, UN Doc A/CN.9/915 (24 March 2017) (Note by the Secretariat)

34th session, 27 November–1 December 2017, Vienna

Possible Reform of Investor–State Dispute Settlement (ISDS): Annotated Provisional Agenda, UN Doc A/CN.9/WG.III/WP.141 (15 September 2017)

Possible Reform of Investor–State Dispute Settlement (ISDS): Submission from International Intergovernmental Organization, UN Doc A/CN.9/WG.III/WP.143 (13 October 2017)

Possible Reform of Investor –State Dispute Settlement (ISDS), UN Doc A/CN.9/WG.III/WP.142 (12 December 2017) (Note by the Secretariat)

Report of Working Group III (Investor–State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session - Part I, UN Doc A/CN.9/930/Rev.1 (19 December 2017)

Report of Working Group III (Investor–State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session - Part II, UN Doc A/CN.9/930/Add.1/Rev.1 (26 February 2018)

35th session, 23-27 April, New York

Possible Reform of Investor –State Dispute Settlement (ISDS): Submissions from the European Union, UN Doc A/CN.9/WG.III/WP.145 (12 December 2017)

Report of Working Group III (Investor–State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session, UN Doc A/CN.9/935 (19 December 2017)

Possible Reform of Investor–State Dispute Settlement (ISDS), UN Doc A/CN.9/WG.III/WP.14 (5 February 2018) (Annotated provisional agenda)

Possible Reform of Investor–State Dispute Settlement (ISDS): Submissions from International Intergovernmental Organizations and Additional Information: Appointment of Arbitrators, UN Doc /CN.9/WG.III/WP.146 (19 February 2018)

Possible Reform of Investor–State Dispute Settlement (ISDS): Comments by the Government of Thailand, UN Doc A/CN.9/WG.III/WP.147 (11 April 2018) (Note by Secretariat)

36th session, 29 October –2 November 2018, Vienna

Possible Reform of Investor–State Dispute Settlement (ISDS), UN Doc A/CN.9/WG.III/WP.148 (30 July 2018) (Annotated provisional agenda)

Possible Reform of Investor–State Dispute Settlement (ISDS): Consistency and Related Matters, UN Doc A/CN.9/WG.III/WP.150 (28 August 2018)

Possible Reform of Investor–State Dispute Settlement (ISDS): Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS, UN Doc A/CN.9/WG.III/WP.151 (30 August 2018) (advance copy)

Possible Reform of Investor–State Dispute Settlement (ISDS): Arbitrators and Decision Makers: appointment mechanisms and related issues, UN Doc A/CN.9/WG.III/WP.152 (30 August 2018)

Possible Reform of Investor–State Dispute Settlement (ISDS): Cost and Duration, UN Doc A/CN.9/WG.III/WP.153 (31 August 2018)

Possible Reform of Investor–State Dispute Settlement (ISDS), UN Doc A/CN.9/WG.III/WP.149 (5 September 2018) (Note by the Secretariat) (draft copy)

Possible Reform of Investor–State Dispute Settlement (ISDS), UN Doc A/CN.9/WG.III/WP.149A/CN.9/WG.III/WP.149 (5 September 2018) (Annex—Tabular presentation of framework for discussions (draft copy)

Organisation for Economic Co-operation and Development (OECD) Materials

OECD Official Materials

OECD, ‘Selected Issues on Dispute Settlement’ (Note by the Chairman, DAF/MAI (98)12, OECD, 13 March 1998) 5 <<http://www1.oecd.org/daf/mai/pdf/ng/ng9812e.pdf>>

OECD Report

OECD, ‘Intergovernmental Agreements Relating to Investment in Developing Countries’ (Report, Doc No 84/14, 27 May 1984)

OECD Publications

D Gaukrodger and K Gordon, OECD, ‘Government Perspectives on Investor–State Dispute Settlement: A Progress Report’ (Freedom of Investment Roundtable, OECD, 14 December 2012) <<https://www.oecd.org/daf/inv/investment-policy/ISDSprogressreport.pdf>>

Katia Yannaca-Small, OECD, ‘International Investment Law: Understanding Concepts and Tracking Innovations’ (OECD, 2008) ch 2 Interpretation of the Umbrella Clause in Investment Agreements <<https://www.oecd.org/investment/internationalinvestmentagreements/40471535.pdf>>.

OECD, ‘Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Cost’ (OECD, 2002) <<http://www.oecd.org/investment/investmentfordevelopment/foreigndirectinvestmentfordevelopmentmaximisingbenefitsminimisingcosts.htm>>

OECD, *International Investment Perspectives* (OECD, 2006) <https://www.oecd-ilibrary.org/finance-and-investment/international-investment-perspectives-2006/consolidation-of-claims_iip-2006-9-en>

OECD, ‘Guidelines on Corporate Governance of State-Owned Enterprises: 2015 Edition’ (OECD, 2015) <<http://dx.doi.org/10.1787/9789264244160-en>>

OECD, ‘Key Issues on International Investment Agreements’ (OECD, 2017) <<https://www.oecd.org/investment/globalforum/2017-GFII-Background-Note-Freedom-of-Investment.pdf>>

OECD Working Paper on International Investment⁹⁵⁶

OECD, ‘Survey of OECD work on international investment’ (Working Papers on International Investment No 1998/1, 1998)

OECD, ‘Southeast Asia: The Role of FDI Policies in Development’ (Working Papers on International Investment, No 1998/1, OECD Publishing, 1998)

OECD, ‘Rules for the Global Economy: Synergies between Voluntary and Binding Approaches’ (Working Papers on International Investment, 1999/3, OECD Publishing, 1999)

OECD, ‘Relationships between International Investment Agreements’ (Working Papers on International Investment, No 2004/1, OECD Publishing, 2004)

OECD, ‘Most-Favoured-Nation Treatment in International Investment Law’ (Working Papers on International Investment, 2004/2, OECD Publishing, 2004)

⁹⁵⁶ The full texts of the OECD working papers on international investment are available on the OECD website <<http://www.oecd.org/daf/inv/investment-policy/working-papers.htm>>.

OECD, ‘Fair and Equitable Treatment Standard in International Investment Law’ (Working Papers on International Investment, No 2004/03, September 2004) <https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf>

OECD, ‘Transparency and Third Party Participation in Investor–State Dispute Settlement Procedures’ (Working Paper on International Investment, No 2005/1, OECD, 2005) <https://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf>.

Yannaca-Small, K, ‘Improving the System of Investor–State Dispute Settlement’, OECD Working Papers on International Investment No 2006/01, OECD, 2006) <https://www.oecd.org/china/WP-2006_1.pdf>

Paterson, C, ‘Investor-to-State Dispute Settlement in Infrastructure Projects’ (OECD Working Papers on International Investment No 2006/02, OECD, 2006) <https://www.oecd.org/daf/inv/investment-policy/WP-2006_2.pdf>

OECD, ‘Interpretation of the Umbrella Clause in Investment Agreements’ (Working Papers on International Investment, No 2006/3, OECD Publishing, 2006)

OECD, ‘Environmental concerns in international investment agreements: a survey (Working Papers on International Investment’, No 2011/1, OECD Publishing, 2011)

OECD, ‘Dispute settlement provisions in international investment agreements: A large sample survey’ (Working Papers on International Investment, No 2012/2, OECD Publishing, 2012)

OECD, ‘Investor–State dispute settlement: A scoping paper for the investment policy community’ (Working Papers on International Investment, 2012/3, OECD Publishing, 2012)

D Gaukrodger D and K. Gordon, ‘Investor–State Dispute Settlement: A Scoping Paper for the Investment Policy Community’ (OECD Working Papers on International Investment No 2012/03, OECD, 2012) <http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf>.

Pohl, J, K Mashigo and A Nohen, ‘Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey’ (Working Papers on International Investment No 2012/02, OECD, 2012) <https://www.oecd.org/investment/investment-policy/WP-2012_2.pdf>

OECD, ‘Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact-Finding Survey’ (Working Papers on International Investment, No 2014/1, OECD Publishing, 2014)

OECD, ‘The legal framework applicable to joint interpretive agreements of investment treaties’ (Working Papers on International Investment, No 2016/1, OECD Publishing, 2016)

OECD, ‘Investment policies related to national security’ (Working Papers on International Investment, No 2016/2, OECD Publishing, 2016)

OECD, ‘State-to-State dispute settlement and the interpretation of investment treaties’ (Working Papers on International Investment, No. 2016/3, OECD Publishing, 2016)

OECD, ‘The balance between investor protection and the right to regulate in investment treaties: A scoping paper’ (Working Papers on International Investment, No 2017/2, OECD Publishing, 2017)

OECD, ‘Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law’ (Working Papers on International Investment, No 2017/3, OECD Publishing, 2017)

European Union Materials

European Commission (EC), ‘Concept Paper Investment in TTIP and beyond – the path for reform Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court’ (Concept Paper, 2015) <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>

European Commission (EC), ‘Establishing a Standing Mechanism for the Settlement of International Investment Disputes’ (Submission of the European Union and its Member States to UNCITRAL Working Group III International Intergovernmental Organization, 18 January 2019) <http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf>

World Trade Organization Materials

WTO Official Documents

Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Singapore and Mexico to the General Council, WTO Doc WT/GC/W/752 (26 November 2018)

Proposed Nominations for the Indicative List of Governmental and Non-Governmental Panelists, WTO Doc WT/DSB/W/640 (26 March 2019)

Rule of Conduct for Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Doc WT/DSB/RC/1 (11 December 1996)

Working Procedures for Appellate Review, WTO Doc WT/AB/WP/6 (16 August 2010). <https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm>

WTO Working Paper

Working Group on the Relationship between Trade and Investment, WTO, ‘Non-Discrimination, Most-Favoured-Nation Treatment and National Treatment’ (Working Paper WT/WGTI/W/118, WTO, 4 June 2002) <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=48333&CurrentCatalogueIdIndex=0&FullTextSearch>

WTO Publications

WTO, *Annual Report 2016* (World Trade Organization, 2016)

<https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep16_e.pdf>

WTO, *GATT Analytical Index* (World Trade Organization)

<https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf>

Legal Affairs Division, WTO, *WTO Analytical Index – Guide to WTO Law and Practice* (World Trade Organization, 1995) <https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/gatt_ai_e.htm>

Legal Affairs Division, WTO, *WTO Analytical Index: Supplement Covering New Developments in WTO Law and Practice October 2011 – June 2015* (WTO, 2015)

<https://www.wto.org/english/res_e/booksp_e/analytic_index_e/ai_new_dev_e.pdf>

Appellate Body Secretariat, WTO, *WTO Appellate Body Repertory of Reports and Awards 1995–2010* (Cambridge University Press, 2011)

Legal Affairs Division, WTO, *Dispute Settlement One-Page Case Summaries (1995-2014) 2015 edition* (World Trade Organization, 2011)

<https://www.wto.org/english/res_e/booksp_e/dispu_settl_1995_2014_e.pdf>

International Monetary Fund Materials

Independent Evaluation Office (IEO), International Monetary Fund, ‘The Role of the IMF in Argentina, 1991-2002’ (Issue Papers /Terms of Reference for an Evaluation, IMF, July 2003)

<<http://www.imf.org/External/NP/ieo/2003/arg/>>

International Bank for Reconstruction and Development Materials

International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nations of Other States* (18 March 1965) <<http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/partB.htm>>

World Bank Materials

World Bank, ‘The Role of Foreign Investment in Development’ (Presentations to the 41st Meeting of the Development Committee, No DEV-27 E73, 30 April 1991)

World Bank, ‘Legal Framework for the Treatment of Foreign Investment Volume II’ (Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment, World Bank, 1992)

World Bank, ‘Guidelines on the Treatment of Foreign Direct Investment’ (World Bank, 1992)
<<https://www.italaw.com/documents/WorldBank.pdf>>

International Centre for Settlement of Investment Disputes Materials

ICSID, ‘List of Topics for Potential ICSID Rule Amendment’ (February 2017)
<<https://icsid.worldbank.org/en/Documents/about/List%20of%20Topics%20for%20Potential%20ICSID%20Rule%20Amendment-ENG.pdf>>

ICSID, ‘Annual Report 2016’ (World Bank, 2016)
<<https://icsid.worldbank.org/en/Pages/resources/ICSID-Annual-Report.aspx>>

ICSID, ‘Possible Improvements of the Framework for ICSID Arbitration’ (Discussion Paper, World Bank, 22 October 2004)
<<https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>>

ICSID, ‘Suggested Changes to the ICSID Rules and Regulations’ (Working Paper, World Bank, 12 May 2005)
<<https://icsid.worldbank.org/en/Documents/resources/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf>>

ICSID, ‘The ICSID Rules Amendment Process’ (April 2017)
<<https://icsid.worldbank.org/en/Documents/about/ICSID%20Rules%20Amendment%20Process-ENG.pdf>>

ICSID, ‘Updated Background Paper on Annulment for the Administrative Council of ICSID’ (Background Paper, World Bank, 5 May 2016)

<<https://icsid.worldbank.org/en/Documents/resources/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf>>

International Institute for Sustainable Development

Jonathan Bonnitcha, IISD, ‘Assessing the Impacts of Investment Treaties: Overview of the Evidence’ (International Institute for Sustainable Development, 2017).

IV. Books/ Edited Book/Journal Articles and Other Secondary Sources

Books/Chapter in Edited Book/Journal Articles

Abbott, Kenneth, ‘GATT as a Public Institution: The Uruguay Round and Beyond’ [1992] 18 *Brooklyn Journal of International* 141

Acconci, Pia, ‘Most-Favoured-Nation Treatment’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008)

Alexandroff, Alan S and Ian A Laird, ‘Compliance and Enforcement’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008)

Alexandrov, Stanimir A and James Mendenhall, ‘Breach of Treaty Claims and Breach of Contract Claims: Simplification of International Jurisprudence’ in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014* (Brill, 2015) 24.

Alvarez, José E, *International Organizations as Law-Makers* (Oxford University Press, 2005)

Alvarez, José E, ‘the Return of the State’ (2011) 20 (2) *Minnesota Journal of International Law* 223

Alvarez-Jiménex, Alberto, ‘The Interpretation of Necessity Clauses in Bilateral Investment Treaties After the Recent ICSID Annulment Decisions’ 94 *Revista Académica e Institucional Páginas de la UCP* 1

Alvarez-Jiménex, Alberto, ‘The WTO Appellate Body’s Decision-Making Process: A Perfect Model for International Adjudication?’ (2009) 12 *Journal of International Economic Law* 289

Alvik, Ivar, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart Publishing, 2011)

Amerasinghe, CF, ‘Presumptions and Inferences in Evidence in International Litigation’ (2004) 3 *The Law and Practice of International Courts and Tribunals* 395

Andenas, Mads and Stefan Zleptnig, ‘Proportionality and Balancing in WTO law: A Comparative Perspective’ in Kern Alexander and Mads Andenas (eds), *The World Trade Organization and Trade in Services* 147 (Martinus Nijhoff, 2008)

Anton, AE et al, *Private international law* (Thomson Reuters, 3rd ed, 2011)

Aristotle, ‘Justice, The Nicomachean Ethics, Book V.’ in Joel Feinberg and Hyman Gross (eds), *Philosophy of Law* (Dickenson, 1975)

Aristotle, *Politics Book III:16* ch XVI <<http://www.literaturepage.com/read/treatiseongovernment-104.html>>

Aristotle, *Rhetoric* I.13: 1373b2–15

Balaam, David N and Michael Veseth, *Introduction to International Political Economy* (Routledge, 2016)

Balas, Vladimir, ‘Review of Awards’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008)

Baldwin, Robert E, ‘The Case for a Multilateral Trade Organization’ in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook of World Trade Organization* (Oxford University Press, 2012) [First Page]

Barnet, Randy E, ‘Four Senses of the Public Law-Private Law Distinction, Foreword to the “Symposium on the Limits of Public Law”’ (1986) 9 *Harvard Journal of Law and Public Policy* 267

Becrof, Ross, *The Standard of Review in The WTO Dispute Settlement: Critique and Development* (Edward Elgar Publishing, 2012)

Benedict, Kingsbury and Stephen W Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest: The Concept of Proportionality’ in Stephen Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 75

Bernardini, Piero, ‘Reforming Investor–State Dispute Settlement: The Need to Balance Both Parties’ Interests’ 2017) 32 (1) *ICSID Review* 38–57

Bernauer, Thomas, Manfred Elsig and Joost Pauwelyn, ‘Dispute Settlement Mechanism- Analysis and Problems’ in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook of World Trade Organization* (Oxford University Press, 2012) 485

Bhagwati, Jagdish and Hugh T Patrick, *Aggressive Unilateralism: America’s 301 Trade Policy and the World Trading System* (University of Michigan Press, 1990)

Bilder, Richard, ‘The Fact/Law Distinction in International Adjudication’ in Richard Lillich (ed), *Fact-Finding Before International Tribunals: Eleventh Sokol Colloquium* (Transnational Publishers, 1991) 95 – 101

Bishop, Doak, ‘The Case for an Appellate Panel and its Scope of Review’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 15

Bix, Brian ‘Natural Law Theory’ in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 1999)

Bjorklund, Andrea K, ‘Emergency Exceptions: State of Necessity and Force Majeure’ in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008)

Blackaby, Nigel, ‘Public Interest and Investment Treaty Arbitration’ in Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions Series: ICCA Congress Series 11* (Kluwer Law International, 2003) 355

Blackaby, Nigel, ‘Testing the Procedural Limits of the Treaty System: The Argentinean Experience’ in Federico Ortino and Audley Sheppard (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 29

Blackaby, Nigel et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009)

Blackaby, Nigel and Alex Wilbraham, ‘Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration’ (2016) 31(3) ICSID Review 655.

Böckstiegel, Karl-Heinz, ‘Commercial and Investment Arbitration: How Different are they Today?’: The Lalive Lecture’ (2012) 28 (4) *The Journal of the London Court of International Arbitration* 577–590

Böckstiegel, Karl-Heinz, ‘The Role of the Arbitrators in Investment Treaty Arbitration’ in Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions Series: ICCA Congress Series 11* (Kluwer Law International, 2003) 366

Boed, Roman, ‘State Necessity as a Justification for Internationally Wrongful Conduct’ (2014) 3 (1) *Yale Human Rights and Development Journal*

Bohanes, Jan and Nicolas Lockhart, ‘Standard of Review in WTO Law’ in Daniel Bethlehem, Donald McRae, Rodney Neufeld, Isabelle Van Damme (eds), *The Oxford Handbook of International Trade Law* (2009) 378

Bonnitcha, Jonathan, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press, 2014)

Bonnitcha, Jonathan, Lauge Poulsen, Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017)

Boorman, Jack T and Andre Icard (eds), *Reform of the International Monetary System: The Palais Royal Initiative* (Sage Publication, 2011)

Borchard, Edwin, ‘Minimum Standard of the Treatment of Aliens’ (1940) 38 (4) *Michigan Law Review* 445

Bottini, Gabriel, ‘Reform of the investor state arbitration regime: the appeal proposal’ (2014) 11 *Transnational Dispute Management*

Bowett, Derek W, *Self-Defense in International Law* (Manchester University Press, 1958)

Brecher, Michael and Jonathan Wilkenfeld, *A Study of Crisis* (University of Michigan Press, 1997)

Broches, Aron, ‘Matière préliminaire’ in Hague Academy of International Law (ed), *Collected Courses of the Hague Academy of International Law: The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (Brill, Nijhoff, Boston, 1972) vol 136, 331.

Brower, Charles, ‘The Anatomy of Fact-Finding Before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence’ in Richard Lillich (ed), *Fact-Finding Before International Tribunals: Eleventh Sokol Colloquium* (Transnational Publishers, 1991) 147–153

Brower, Charles, ‘Evidence before International Tribunals: The Need for Some Standard Rules’ (1994) 28(1) *The International Lawyer* 47

Brown, Chester, ‘Procedure in Investment Treaty Arbitration and the Relevance of Comparative Public Law’ in Stephen W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 681

Brown, Chester (ed), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013)

Brown, Julia G, ‘International investment agreements: regulatory chill in the face of litigious heat?’ (2013) 3 (1) *Western Journal of Legal Studies* 1

Brown, L Neville and John Bell, *French Administrative Law* (Oxford University Press, 5th ed, 2003)

Brummer, Christopher, ‘Examining the Institutional Design of International Investment Law’ in Karl P Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008)

Buergenthal, Thomas, ‘Judicial Fact-Finding: Inter-American Human Rights Court’ in Richard Lillich (ed) *Fact-Finding Before International Tribunals: Eleventh Sokol Colloquium* (Transnational Publishers, 1991) 261

Burke-White, William and A von Staden, ‘Investment protection in extraordinary times: the interpretation and application of non-precluded measures, provisions in bilateral investment treaties’ (2008) 48 *The Virginia Journal of International Law* 307

Burke-White, William W and Andreas von Staden, ‘Private litigation in a public law sphere: The Standard of Review in investor–State arbitrations’ (2010) 35 *Yale Journal of International Law* 283

Burke-White, William W and Andreas von Staden, ‘The Need for Public Law Standards of Review in Investor–State Arbitrations’ in Stephen Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 690

Burke-White, William, ‘The Argentine Financial Crisis: State Liability under BITS and the Legitimacy of the ICSID System’ (2008) 3 *Asian World Trade Organization and International Health Law and Policy* 199

Busch, Marc L, Eric Reinhardt and Gregory C Shaffer, ‘Does Legal Capacity Matter? A Survey of WTO Members’ (2009) 8(4) *World Trade Review* 559

Cairton, Kenneth S, ‘Theory of the Arbitration Process’ (1952) 17(4) *Law and Contemporary Problems* 631

Cameron, James and Kevin R Gray, ‘Principles of International Law in the WTO Dispute Settlement Body’ (2001) 50 (2) *The International and Comparative Law Quarterly* 248

Cappelletti, M, *Giudici Legilatori?* (Milano, Giuffre, 1984)

Carbonneau, Thomas, ‘Darkness and Light in the Shadows of International Arbitral Adjudication’ in Richard Lillich (ed), *Fact-Finding Before International Tribunals: Eleventh Sokol Colloquium* (Transnational Publishers, 1991) 153

Chapman, Bruce, ‘Economic Analysis of Law and the Value of Efficiency’ in Aristides N Hatzis (ed) *Economic Analysis of Law: A European Perspective* (Elgar, 2005)

Chaudoin, S, H Milner, X Pang, ‘International Systems and Domestic Politics: Linking Complex Interactions with Empirical Models in International Relations’ (2015) 69(2) *International Organization* 275

Cheng, Bin, *General Principles of Law Applied by International Courts and Tribunals* (Grotius Publications, 1987)

Cheng, Tai-Heng, ‘The Role of Justice in Annulling Investor–State Arbitration Awards’ (2013) 31 (1) *Berkeley Journal of International Law* 236

Chiang, Eric P, *Economics: Principles for a Changing World* (Worth, 4th ed, 2017)

Choudhury, Bamali, ‘Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?’ (2008) 41(3) *Vanderbilt Journal of International Law* 775

Clapham, Jason, ‘Finality of Investor–State Arbitral Awards: Has the tide turned and is there a need for Reform’ (2009) 26 (3) *Journal of International Arbitration* 437

Clay, H, *Economics for the General Reader* (Macmillan, 1925)

Constain, S, ‘ISDS Growing Pains and Responsible Adulthood’ (2014) 11 *Transnational Dispute Management* 3

Cooter, Robert and Thomas Ulen, *Law and Economic Theory* (Addison-Wesley, 6th ed, 2016)

Cordero-Moss, Giuditta, ‘Limits on Party Autonomy in International Commercial Arbitration’ (2015) 4 (1) *Penn State Journal of Law & International Affairs*

Cordero-Moss, Giuditta, ‘Tribunal’s Powers versus Party Autonomy’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008)

Cordero-Moss, Giuditta, ‘Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?’ in Christina Binder et al, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009, Oxford University Press) 782

Crawford, James, *The International Law’s Commission Articles on State Responsibility – Introduction, Text and Commentaries* (Cambridge University Press, 2002)

Crawford, James, ‘Is there a need for an appellate system’ in Audrey Sheppard and Hugo Warner (eds) in Audrey Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issues* (Institute of International and Comparative Law, 2006) vol 1, 13

Crawford, James ‘Treaty and Contract in Investment Arbitration’ (2008) 24 3 *Arbitration International* 351

Crawford, James, *Brownlie’s Principle of Public International Law* (Oxford University Press, 8th ed, 2012)

Cremades, Bernardo M, ‘Promoting and Protection International Investments’ [2001] 3 *International Arbitration Law Review* 53

Croley, Stephen and John Jackson, ‘WTO Dispute Procedures, Standard of Review and Deference to National Governments’ (1996) 90(2) *American Journal of International Law* 197

Czaplinski, W and G Danilenko, ‘Conflicts of Norms in International Law’ (1990) 21 *Netherlands Yearbook of International Law* 3 – 42

Danneman, Gerhard, ‘Comparative Law: Study of Similarities or Differences?’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 384

Danner, Marston, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97(3) *The American Journal of International Law* 510

Daunton, Martin, ‘The Inconsistent Quartet: Free Trade Versus Competing Goals’ in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012)

De Cruz, Peter, *Comparative Law in a Changing World* (Routledge-Cavendish, 2008)

de Mestral, Armand CM, ‘Exceptions Clauses in the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada: A Model for Future ‘Mega-Regional’ Agreements?’ (2016) 13(1) *Transnational Dispute Management*

del Moral, Ignacio Rasilla, ‘The Increasingly Marginal Appreciation of the Margin of Appreciation Doctrine’ (2006) 7(6) *German Law Journal* 611

Delaney, Joachim and Danial Barstow Magraw, ‘Procedural Transparency’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008)

della Cananea, Giacinto, ‘Minimum Standards of Procedural Justice in Administrative Adjudication’ in Stephen Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010)

Derham, D P, F K H Manher and P L Waller, *An Introduction to Law* (Law Book, 5th ed, 1986)

de Vries, Margaret Garritsen ‘The Bretton Woods Conference and the Birth of the International Monetary Fund’ in Orin Kirshner, *The Bretton Woods-GATT System: Retrospect and Prospect After Fifty Years* (M E Sharpe, 1996) 3.

Dickson, Julie, *Legal Positivism: Contemporary Debates* in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge, 2012)

Diebold, Nicolas, *Non-Discrimination in International Trade in Services: ‘Likeness’ in WTO/GATS* (Cambridge University Press, 2010)

Diehl, Alexandra, *The Core Standards of International Investment Protection* (Kluwer Law International, 2012)

Dolzer, Rudolf and M Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff, 1995)

Dolzer, Rudolf, ‘Indirect Expropriation, New Developments?’ (2002) 11 *New York University Environment Law Journal* 65

Dolzer, Rudolf and Christopher Schreuer, *Principle of International Investment Law* (Oxford University Press, 2nd ed, 2012)

Donaldson, Victoria, ‘The Appellate Body: Institutional and Procedural Aspects’ in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) vol 1, 1277.

Dore, Laurie K, ‘Public Courts versus Private Justice: It’s Time to Let Some Sunshine in on Alternative Dispute Resolution’ (2006) 81 (2) *Chicago-Kent. Law Review* 463

Douglas, Zachary, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 185 (74) *British Yearbook of International Law* 151–289

Douglas, Zachary, *The International Law of Investment Claims* (Cambridge University Press, 2009)

Dryzek, John S, Bonnie Honig and Anne Phillips, ‘Introduction’ in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press, 2006) 3

Dugan, Christopher et al, *Investor–State Arbitration* (Oxford University Press, 2008)

Dumberry, Patrick, ‘The Legal Standing of Shareholders Before Arbitral Tribunals’ (2010) 18 (3) *Michigan State Journal of International Law* 353

Dumberry, Patrick ‘Drafting the Fair and Equitable Treatment Standard Clause in the TPP and the RCEP Lessons Learned from the NAFTA Article 1105 Experience’ (2015) 12(1) *Transnational Dispute Management*

Dworkin, Ronald, *Taking Right Seriously* (Gerald Duckworth, 1977)

Dworkin, Ronald, *Law’s Empire* (Belknap Press, 1988)

Edwards, Harry T, ‘Alternative Dispute Resolution: Panacea or Anathema?’ (1986) 99 (3) *Harvard Law Review* 668

Ehlerman, Claus-Dieter, ‘Six Years on the Bench of the “World Trade Court”’ (2002) 36(4) *Journal of World Trade* 605

Ehlermann, Claus-Dieter, ‘The Experience from the WTO Appellate Body’ (2003) 8 *Texas International Law Journal* 469

Ehlermann, Claus-Dieter and Nicolas Lockhart, ‘Standard of Review in WTO Law’ (2004) 7(3) *Journal of International Economic Law* 491

Emerson, Frank D, ‘History of Arbitration Practice and Law’ (1970) 19 *Cleveland State Law Review* 155

Emiliou, Nicholas, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer Law International, 1996)

Endicott, Timothy, ‘Legal Interpretation’ in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge, 2011)

Epps, Tracey, ‘Recent Development in WTO jurisprudence: Has the Appellate Body Resolved the Issue of An Appropriate Standard of Review in SPS Cases’ (2012) 62 *University of Toronto Law Journal* 202-227

Fallon, Richard H, “‘The Rule of Law’ as a Concept in Constitutional Discourse’ (1997) 97 (1) *Columbia Law Review* 1

Farrar, John H, *Introduction to Legal Method* (Sweet&Maxwell, 1977)

Feinberg, Joel and Hyman Gross (eds), *Philosophy of Law* (Dickenson, 1975)

Fenwick, Charles G, *International Law* (Century Co, 1924)

Finnis, John ‘Natural Law Theory: Its Past and Its Present’ in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge, 2012)

Fortier, L Yves and Stephen Drymer, ‘Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor’ (2005) 13 *Asia Pacific Law Review* 79

Foster, Caroline, *Science and the Precautionary Principle in International Courts and Tribunals* (Cambridge University Press, 2011)

Francioni, Francesco, ‘Foreign Investments, Sovereignty and the Public Good’ in Benedetto Conforti et al (eds), *Italian Yearbook of International Law* 2013 (Brill Academic Publishers, 2014) vol 23

Frank, Jill, ‘The Political Theory of Classical Greece’ in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press, 2006) 175.

Franck, Susan D, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’ (2005) 73(4) *Fordham Law Review* 1521

Franck, Thomas M, *The Power of Legitimacy among Nations* (Oxford University Press, 1990)

Frank, Thomas M, *Fairness in International Law and Institutions* (Clarendon Press, 1995)

Frank, Thomas M, ‘Legitimacy in International System’ 82 (1998) *The American Journal of International Law* 705

Frieden, Jeffrey A, *Global Capitalism: Its Fall and Rise in the Twentieth Century* (WW Norton, 2006)

Frischmann, Brett M, ‘An Economic Theory of Infrastructure and Commons Management’ (2005) 89 *Minnesota Law Review* 917

Fritsch, Stefan, ‘International Political Economy and Trade’ in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge, 2011)

Fuller, Lon L, *The Morality of Law* (Yale University Press, revised ed, 1964)

Fuller, Lon L, ‘The Forms and Limits of Adjudication’ (1978) 92(2) *Harvard Law Review* 35

Gaffney, John, ‘The EU Proposal for an Investment Court System: What Lessons Can Be Learned from the Arab Investment Court?’ (2006) 181 *Columbia FDI Perspectives on Topical Foreign Direct Investment Issues* <<http://ccsi.columbia.edu/files/2013/10/Perspective-Gaffney-Final-Formatted.pdf>>.

Gaillard, Emmanuel, ‘Comment in Panel Two’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 70

Gaillard, Emmanuel, *Legal Theory of International Arbitration* (Martinus Nijhoff, 2010)

Gaines, S, ‘The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environment Measure’ (2001) 22 *University of Philadelphia Journal of International Economic Law* 739

Galligan, DJ, *Due Process and Fair Procedures* (Clarendon Press, Oxford, 1996)

Gal-Or, Noemi, ‘The Concept of Appeal in International Dispute Settlement’ (2008) 19(1) *The European Journal of International Law* first page

Gamble, Andrew, *The Global Gamble: Washington’s Faustian Bid for World Dominance* (Verso, 1999)

García, Gonzalez, ‘Making Impossible Investor–State Reform Possible’ (2014) 11(1) *Transnational Dispute Management*

Garnaut, Ross, Ligang Song and Yang Yao, ‘Impact and Significance of State-Owned Enterprise Restructuring in China’ (2006) 55 *The China Journal* 35

Gaukrodger, D and K Gordon, ‘Inter-Government Evaluation of Investor–State Dispute Settlement: Recent Work at the OECD-hosted Freedom of Investment Roundtable’ (2014) 11 *Transnational Dispute Management* 10

Gazzini, Tarcisio ‘Necessity in International Investment Law: Some Critical Remarks on CMS v Argentina’ (2008) 26 (3) *Journal of Energy and Natural Resources Law* 450

Gélinas, Fabien and Flavien Jadeau, ‘CETA’s Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation’ (2016) 13 (1) *Transnational Dispute Management* 13

Gerards, Janneke, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (2011) 17(1) *European Law Journal* 80

Gertz, Geoffrey, Srividya Jandhyala, Lauge N Skovgaard Poulsen, ‘Legalization, Diplomacy, and Development: Do Investment Treaties De-Politicize Investment Disputes?’ (2018) 107 *World Development* 239

Ghias, Shoaib A, ‘International Judicial Lawmaking: A Theoretical and Political Analysis of the WTO Appellate Body’ (2006) 24 (2) *Berkeley Journal of International Law* 534

Gibson, Catherine H, ‘Beyond Self-Judgment: Exceptions Clauses in US BITS’ (2015) (38) 1 *Fordham International Law Journal* 1

Gill, Judith ‘Inconsistent Decisions: An Issue to be addressed or A Fact of Life?’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 23

Goddard, C et al (eds), *International Political Economy: State-Market Relations in a Changing Global Order* (Ringgold, 2nd ed, 2003)

Goldhaber, Michael D, ‘The Rise of Arbitral Power Over Domestic Courts’ (2013) 1(2) *Stanford Journal of Complex Litigation* 374

Goldstein, Judith, ‘Trade Liberalization and Domestic Politics’ in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012)

Gómez, Katia Fach, ‘Diversity and the Principle of Independence and Impartiality in the Future Multilateral Investment Court’ 17 (2018) *The Law and Practice of International Courts and Tribunals* 78–97

Gray, Christine and Benedict Kingsbury, ‘Developments in Dispute Settlement: Inter-State Arbitration Since 1945’ (1993) 63 (1) *British Yearbook of International Law* 97

Gray, H Peter, *International Trade and Foreign Direct Investment: The Interface* in John H Dunning (ed), *Globalization, Trade and Foreign Direct Investment* (Elsevier, 1998) 20–25.

Greenberg, George D et al ‘Developing Public Policy Theory: Perspectives from Empirical Research’ (1977) 71(December) *The American Political Science Review* 1532

Grierson-Weiler, Todd and Ian Laird, ‘Standards of Treatment’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 259

Grosse, Rober, ‘The Bargaining Theory and the Obsolescing Bargain’ in Rober Grosse (ed), *International Business and Government Relations in the 21st Century* (Cambridge University Press, 2005) 273

Grossman, Nienke, ‘The Normative Legitimacy of International Courts’ (2013) 86 *Temple Law Review* 61

Grotius, Hugo, *The Rights of War and Peace: Including the Law of Nature and of Nations* (Archibald Colin, trans) (Jazzybee Verlag, 1939) [trans of: *De jure belli ac pacis* (first published 1625)]

Gutteridge, Harold Cooke, *An Introduction to the Comparative Method of Legal Study & Research* (Cambridge University Press, 1946)

Habermas, Jurgen, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans, MIT, 1996) [trans of: *Faktizitiit und Geltung. Beitrige zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (first published 1992)]

Hamida, Walid Ben, ‘The development of the Arab Investment Court's case law: new decisions rendered by the Arab Investment Court’ (2014) 6 *International Journal of Arab Arbitration* 12

Hanson, Jon D and Mellisa R Hart, ‘Law and Economics’ in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing, 1999)

Hart, H L A, *The Concept of Law* (Penelope A Bulloch and Joseph Raz (eds), Oxford University Press, 1997) [edited of: *The Concept Law* (first published 1961)]

Harvey, David, *A Brief History of Neoliberalism* (Oxford University Press, 2005)

Heiskanen, Veijo, ‘Key to Efficiency in International Arbitration’ (2015) 30(3) *ICSID Review: Foreign Investment Law Journal* 481

Helfer, Laurence R and Anne-Marie Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’ 107 (1997) *The Yale Law Journal* 273–392

Henckels, Caroline, ‘Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor–State Arbitration’ (2012) 15 *Journal of International Economic Law* 223

Henckels, Caroline, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press, 2015)

Henckels, Caroline, ‘Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP’ (2016) 19(1) *Journal of International Economic Law* 27

Henckels, Caroline, ‘Scope Limitation or Affirmative Defence? The Purpose and Role of Investment Treaty Exception Clauses’ in Federica Paddeu and Lorand Bartels (eds) *Exceptions in International Law* (Oxford University Press, forthcoming 2019)

Hershey, Amos S, *The Essentials of International Public Law and Organization* (Macmillan, 1927)

Heywood, Andrew, *Politics* (Palgrave Macmillan, 4th ed, 2013)

Hirsch, Moshe, ‘Interactions between Investment and non-investment obligations’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008)

Hirsch, Moshe, ‘Sources of International Investment Law’ in A K Bjorklund and A Reinisch (eds.), *International Investment Law and Soft Law* (Edward Elgar, 2012) 9

Ho, Jean, ‘Internationalisation and State contracts: are State contracts the future or the past?’ in C L Lim (ed), *Alternative Visions of the International Law on Foreign Investment: Essay in Honour of Muthucumoraswamy Sornarajah* (Cambridge University Press, 2016) 377.

Hober, Kaj, ‘Arbitration Involve State’ in Lawrence W Newman, Richard D Hill (eds), *The Leading Arbitrators’ Guide to International Arbitration* (Juris Publishing, 2004)

Hollis, Martin, *Invitation to Philosophy* (Basil Blackwell, 1985)

Holmes, James R, *Theodore Roosevelt and World Order: Police Power in International Relations* (Potomac Books, 2006)

Howard, David M, ‘Creating Consistency Through a World Investment Court’ 41 (1) (2017) *Fordham International Law Journal* 1

Howse, Robert and Kalypso Nicolaidis, ‘Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?’ <http://migration.nyulaw.me/sites/default/files/ECM_PRO_060039.pdf>

Howse, Robert, ‘Adjudicative Legitimacy, and Treaty Interpretation in International Trade Law: The Early Years of WTO jurisprudence’ in Joseph HH Weiler (ed), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade* (Oxford University Press, 2000)

Howse, Robert, ‘Regulatory Measures’ in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012) 441

Howse, Rob, ‘Designing a Multilateral Investment Court: Issues and Options’ 36(1) (2017) *Yearbook of European Law* 209

Hug, Walther, ‘The History of Comparative Law’ (1932) 45 *Harvard Law Review* 1027

Hurst, James Willard, ‘Problems of Legitimacy in the Contemporary Legal Order’ (1971) 24 (2) *Oklahoma Law Review* 224

Issak, Robert A, *Managing World Economic Change: International Political Economy* (Prentice Hall, 2nd ed, 1995)

Jackson, John et al, *Microeconomics* (McGraw-Hill Irwin, 8th ed, 2007)

Jackson, John H, ‘Status of Treaties in Domestic Legal Systems: A Policy Analysis’ (1992) 86 *American Journal of International Law* 310

Jackson, John H, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge University Press, 2002)

Jackson, John H, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 2nd ed, 1997)

Jackson, John H, ‘The Case of the World Trade Organization’ in Paul F Diehl and Brian Frederking, *The Politics of Global Governance: International Organizations in an Interdependent World* (Lynne Rienner, 4th ed, 2010) 239

Jadeau, Flavien and Gélinas, Fabien, ‘CETA’s Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation’ (2016) 13 (1) *Transnational Dispute Management* 13.

Janeba, E, ‘Corporate Income Tax Competition, Double Taxation Treaties, and Foreign Direct Investment’ (1995) 56 *Journal of Public Economics* 311

Johnson, Thomas and Jonathan Gimblett, ‘From Gunboats to BITs: The Evolution of Modern International Investment Law’ in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2010-2011* (Oxford University Press, 2012) 649

Johnson, Thomas, ‘Factual Review’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 89

Johnston, David, ‘Introduction’ in David Johnston (ed), *The Cambridge Companion to Roman law* (Cambridge University Press, 2015) 3

Jorgenson, Dale, ‘Capital Theory and Investment Behavior’ (1963) 53 (2) *American Economic Review* 247

John Maynard Keynes, *The General Theory of Employment, Interest and Money* (Harcourt Brace Jovanovich, 1953)

Kalderimis, Daniel, ‘Investment Treaty Arbitration as Global Administrative Law: What This Might Mean in Practice’ in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 145

Kaplow, Louis and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press, 2002) ch V Legal Procedure

Kaplow, Louis, ‘The value of Accuracy in Adjudication’ in Avery Wiener Katz (ed), *Foundations of the Economic Approach to Law* (Oxford University Press, 1998)

Kaufmann-Kohler, Gabrielle, ‘Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?’ in Emmanuel Gaillard and Yas Banifatemi (eds), *Annulment of ICSID Awards* (Juris Publishing, 2004)

Kaufmann-Kohler, Gabrielle, ‘In Search of Transparency and Consistency: ICSID Reform Proposal’ (2005) 2 (5) *Transnational Dispute Management*

Kaufmann-Kohler, Gabrielle, ‘Is Consistency a Myth?’ in Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in International Arbitration* (Juris Publishing, 2008)

Kaufmann-Kohler, Gabrielle and Michele Potestà, ‘Challenges on the Road Toward a Multilateral Investment Court’ (2017) 201 *Columbia FDI Perspectives Perspectives on topical foreign direct investment*

Kaushal, Asha, ‘Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime’ (2009) 50(2) *Harvard International Law Journal* 491

Kazazi, Mojtaba, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer Law International, 1996)

Kellor, Frances, *American Arbitration: Its History, Functions and Achievements* (Harper & Brothers, 1948)

Kelsen, Han, *Essays in Legal and Moral Philosophy* (Dordrecht; Boston: Reidel, 1974)

Kelsen, Hans, *The 'orie pure du droit* (Daloz, 1962) (Original French)

Kelsey, Jane, ‘Regulatory Chill: Learning from New Zealand’s Plain Packaging Tobacco Law’ (2017) 17 (2) *QUT Law Review* 21

Kennedy, Kevin, ‘GATT 1994’ in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) vol 1, 89

Kerner, Andrew, ‘What Can We Really Know about BITs and FDI?’ (2018) 33 (1) *ICSID Review* 1

Kesgin, Baris, ‘Foreign Policy Analysis’ in John T Ishiyama and Marijke Breuning (ed), *21st Century Political Science: A Reference Handbook* (Sage, 2011) vol 1, 336

Kessedjian, Catherine, ‘Keynote Address: International Arbitration – More Efficiency for Greater Credibility’ in Arthur W Rovine (ed) *International Arbitration and Mediation: The Fordham Papers 2014* 1

Kevin, Jason G, A Hassett, and Stephen D Oliner, ‘Investment Behavior, Observable Expectations, and Internal Funds’ (2006) 96(3) *American Economic Review* 796

Keyt, David, ‘Three Fundamental Theorems in Aristotle's Politics’ (1987) 32 (1) *Phronesis* 54

Kho, Stephen S et al, ‘The EU TTIP Investment Court Proposal and the WTO Dispute Settlement System: Comparing Apples and Oranges?’ (2017) 32(2) *ICSID Review-Foreign Investment Law Journal* 326

Kingsbury, Benedict, Nico Krisch and Richard Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15

Kingsbury, Benedict and Stephen W Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest: The Concept of Proportionality’ in Stephen Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 75

Klare, Michael T and Yogesh Chandrani (eds), *World Security: Challenge for a New Century* (St. Martin, 3rd ed, 1998)

Knull, William H III and Noah D Rubins, ‘Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?’ (2000) 11 *American Review of International Arbitration* 531

Kreinin, Mordechai E, and Michael G Plummer, ‘Economic Principles of International Trade’ in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer, *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) vol 2, 3.

Kriebaum, Ursula, ‘FET and Expropriation in the Comprehensive Economic Trade Agreement between the European Union and Canada’ (2016) 13(1) *Transnational Dispute Management* 23

Kriebaum, Ursula, ‘Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes’ (2018) 33(1) *ICSID Review* 14

Kuijper, PJ, ‘The New WTO Dispute Settlement System: The Impact on the European Community’ (1995) 6 (29) *Journal of World Trade* 49

Kurtz, Jürgen, ‘The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO’ in Stephen W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010)

Kurtz, Jürgen, ‘Building Legitimacy through Interpretation in Investor–State Arbitration: On Consistency, Coherence, and the Applicable Law’ in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014) 257

Kurtz, Jürgen, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016)

Lalive, Pierre, ‘Absolute Finality of Arbitral Awards?’ (2009) I *Revista Internacional de Arbitragem e Conciliação* 109

Lauterpacht, Hersch, *The Development of International Law by International Court* (Cambridge University Press, 1982)

Law, Stephen, *Philosophy* (Dorling Kindersley, 2007).

Leben, Charles, *The Advancement of International Law* (Hart Publishing, 2010)

Lee, Simon, ‘Ideologies of Political Economy’ in R J Barry Jones (ed), *Routledge Encyclopedia of International Political Economy* (Routledge, 2001) vol 2, 704, 704.

Leeks, Annie, ‘The Relationship between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach’ (2007) 65(2) *University of Toronto Faculty of Law Review* 1

Legrand, P, ‘The Impossibility of Legal Transplants’ (1997) 4 *Maastricht Journal of European and Comparative Law* 111

Legum, Barton, ‘Visualizing an Appellate System’ in Audrey Sheppard and Hugo Warner (eds) *Investment Treaty Law: Current Issues* (British Institute of International and Comparative Law, 2006) vol 1, 121

Legum, Barton, ‘Options to Establish an Appellate Mechanism for Investment Dispute’ in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008)

Legum, Barton, ‘Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-US FTA?’ (2014) 11 *Transnational Dispute Management* 8

Letsas, George, ‘Two Concepts of the Margin of Appreciation’ (2006) 26(4) *Oxford Journal of Legal Studies* 705

Levich, Richard M, *International Financial Market* (Irwin McGraw-Hill, 1998)

Lewandowski, James P, ‘Risk and Foreign Direct Investment in Emerging Economies: Lessons from the former Soviet Union’ (1997)30 *Middle States Geographer* 97

- Lewin, L, *Self-Interest and Public-Interest in Western Politics* (Oxford University Press, 1991)
- Locke, John, *Two Treaties of Government* (Cambridge University Press, 1967)
- Loibl, Gergard, ‘International Economic Law’ in Malcolm D Evans, *International Law* (3rd ed, Oxford University Press, 2010)
- Löhnig, Martin, ‘Comparative Law and Legal History: A Few Words about Comparative Legal History’ in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law* (Hart Publishing, 2015)
- Lott, Antony D, ‘History of International Relations’ in John T Ishiyama and Marijke Breuning (ed), *21st Century Political Science: A Reference Handbook* (Sage, 2011) vol 1 303
- Lovric, Daniel, *Deference to the Legislature in WTO Challenges to Legislation* (Kluwer Law International, 2010)
- Macdonald, R St J, ‘The Margin of Appreciation’ in R St J Macdonald, F Mantscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993) 83
- Macrory, Patrick FJ, Arthur E Appleton and Michael G Plummer, *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) vol 1
- Malanczuk, Peter and Michael Barton Akehurst, *Akehurst’s Modern Introduction to International Law* (Routledge, 1997)
- Malintoppi, Loretta, ‘Independence, Impartiality, and duty of Disclosure of Arbitrators’ in Peter Muchilinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008)
- Mann, FA, ‘British Treaties for the Promotion and Protection of Investments’ (1981) 52(1) *British Yearbook of International Law* 241
- Mann, Howard, ‘Transparency and Consistency in International Investment Law: Can the Problems be Fixed by the Tinkering?’ in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008)
- Mann, Howard, ‘International Investment Agreements: Building the New Colonialism?’ (NAFTA’s Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA) (Conflict and

Coordination Across International Regimes) 97 (2003) *Proceedings of the Annual Meeting-American Society of International Law* 247

Martinez, Alexis, ‘Invoking State Defenses in Investment Treaty Arbitration’ in Michael Waibel et al (eds), *The Backlash against Investment Arbitration* (Kluwer Law International, 2010) 315

Matsushita, Mitsuo, ‘The Dispute Settlement at the WTO: The Appellate Body-Assessment and Problems’ in Amrita Narlikar, Martin Daunton and Robert M Stern, *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012) 507

McLachlan, Campbell, Laurence Shore and Matthew Weiniger, *International Investment Arbitration* (Oxford University Press, 2007)

McRae, Donald, ‘The WTO Appellate Body: A Model for and ICSID Appeals Facility?’ (2010) 1(2) *Journal of International Dispute Settlement* 371

Medema, Steven G and Warran J Samuels (eds), *The History of Economic Thought: A Reader* (Routledge, 2003)

Merrills, John, ‘The Means of Dispute Settlement’ in Malcolm D. Evan (ed), *International Law* (Oxford University Press, 2010) 559.

Mikesell, Raymond F, ‘Some Issues in the Bretton Woods Debates’ in Orin Kirshner, *The Bretton Woods-GATT System: Retrospect and Prospect After Fifty Years* (M E Sharpe, 1996) 19

Mill, John Stuart, *Principles of Political Economy* (Prometheus Books, first published 1900, 2004 ed)

Jonh Stuart Mill and Jeremy Bentham, *Utilitarianism and Other Essays* (Penguin, 1987).

Mills, Alex, ‘The Public–Private Dualities of International Investment Law and Arbitration’ in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 97

Moellers, Christoph, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press, 2013)

Møller, Jørgen and Svend-Erik Skaaning, *The Rule of Law: Definitions, Measures, Patterns and Causes* (Palgrave, 2014)

Moloo, Rahim and Justin Jacinto, ‘Health and Environment Regulation: Assessing Liability under Investment Treaties’ (2010) 29 *Berkeley Journal of International Law* 37

Moloo, Rahim and Justin Jacinto, ‘Standard of Review and Reviewing Standards: Public Interest regulation in International Investment Law’ in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy 2011–2012* (Oxford University Press, 2013)

Montt, Santiago, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Bloomsbury Publishing, 2009)

Moore, Mike, ‘The Democratic Roots of the World Trade Organization’ in Patrick F J Macrony, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analyses* (Springer, 2005) vol I, 39

Moosa, Imad A, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave, 2002)

Morgenstern, Felice, ‘Judicial Practice and the Supremacy of International Law’ (1950) 27 *British Yearbook of International Law* 42

Mostafa, Ben, ‘The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law’ (2008) 15 *Australian International Law Journal* 267

Muchlinski, Peter T, *Multinational Enterprises & the Law* (Oxford University Press, 2nded, 2007)

Mulgan, RG, *Aristotle's Political Theory: An Introduction for Students of Political Theory* (Clarendon Press, 1977)

Mustill, Michael, ‘Arbitration: History and Background’ 6 (1989) *Journal of International Arbitration* 43.

Narlikar, Amita, Martin Dauntion and Robert M Stern, ‘Introduction’ in Amita Narlikar, Martin Dauntion and Robert M Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012)

Nathan, KVS, *the ICSID Convention: The Law of the International Centre for Settlement of Investment Disputes* (Juris Publishing, 2000)

Newcombe, Andrew and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009)

Newcombe, Andrew, ‘Sustainable Development and Investment Treaty Law’ (2007) 8 *Journal of World Investment & Trade* 357

Newcombe, Andrew, ‘The Boundaries of Regulatory Expropriation in International Law’ in Philippe Kahn, Thomas W Wälde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff, 2007)

Nilsson, Anders and Oscar Englesson, ‘Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?’ (2013) 30 (5) *Journal of International Arbitration* 561

Nocke, Volker and Stephen Yeaple, ‘An Assignment Theory of Foreign Direct Investment’ (2008) 75(2) *Review of Economic Studies* 529

Nordstrom, Hakan and Gregory C Shaffer, *Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure* (ICTSD Dispute Settlement and Legal Aspects of International Trade, 2007)

Oesch, Matthias, *Standards of Review in WTO Dispute Resolution* (2003)

Ortino, Federico and Ernst-Ulrich Petersmann (eds), *The WTO Dispute Settlement System 1995-2003* (Kluwer Law International, 2004) vol 17

Ortino, Federico, ‘Non-Discriminatory Treatment in Investment Disputes’ in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 345

Osborne, Stephen, *Public-Private Partnerships: Theory and Practice in International Perspective* (*Routledge Advances in Management and Business Studies* (Book 19) (Routledge, 1sted, 2000)

Palmeter, David ‘The WTO Appellate Body Needs Remand Authority’ (1998) 32 *Journal of World Trade* 41

Paparinskis, Martins, ‘Limits of Depoliticisation in Contemporary Investor–State Arbitration’ (2010) 11 (4) *Select Proceedings of the European Society of International Law* 1071

Paparinskis, Martins, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013)

Paparinskis, Martins, ‘Inherent Powers of ICSID Tribunals: Broad and Rightly So’ in Ian A Laird and Todd J Weiler (eds), *Investment Treaty Arbitration and International Law* (Juris Net LLC, 2012)

Park, EY, ‘Appellate Review in Investor–State Arbitration’ (2014) 11 *Transnational Dispute Management*

Parra, Antonio R, *The History of ICSID* (Oxford University Press, 2012)

Pascariu, Liana-Teodora, ‘The Distinction of the Administrative Contract from other types of contracts’ (2010) 10 (Special Issue) *The Annals of the "Stefan cel Mare" University of Suceava. Fascicle of The Faculty of Economics and Public Administration* 407

Paulsson, Jan and Zachary Douglas, ‘Indirect Expropriation in Investment Treaty Arbitrations’ in Norbert Horn and Stefan Michael Kröll (eds), *Arbitrating Foreign Investment Disputes* (Kluwer Law International, 2004) 145

Paulsson, Jan, ‘Avoiding Unintended Consequence’ in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008)

Peel, Jacqueline, ‘Precaution—A Matter of Principle, Approach or Process?’ (2004) 5(2) *Melbourne Journal of International Law* 483

Peel, Jacqueline, *Science and Risk Regulation in International Law* (Cambridge University Press, 2010)

Perezcano Díaz, Hugo, ‘Transparency in International Dispute Settlement Proceedings on Trade and Investment’ in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008)

Petersmann, Ernst-Ulrich, ‘The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948’ (1994) 31 (6) *Common Market Law Review* 1157

Petersmann, Ernst-Ulrich, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Kluwer Law International, 1997)

Pierola, Fernando, ‘The Question of Remand Authority for the Appellate Body’ in Andrew D Mitchell (ed), *Challenges and Prospects for the WTO* (Cameron May, 2005)

Pietrowski, Robert, ‘Evidence in International Arbitration’ (2006) 22(3) *Arbitration International* 373

Palmeter, David and Petros C Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge University Press, 2nd, 2004)

Plessis, Jean du et al, *Principles of Contemporary Corporate Governance* (Cambridge University Press, 2005)

Polak, JJ, *An International Economic System* (University of Chicago Press, 1951)

Posner, Richard A, *Economic Analysis of Law* (Little, Brown, 1986)

Posner, Richard, ‘An Economic Approach to Legal Procedure and Judicial Administration’ in Avery Wiener Katz (ed), *Foundations of the Economic Approach to Law* (Oxford University Press, 1998)

Posner, Richard, ‘Utilitarianism, Economics, and Legal Theory’ (1979) 8(1), *The Journal of Legal Studies* 103

Postema, Gerald J, ‘Legal Positivism: Early Foundations’ in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge, 2012)

Potestà, Michele, ‘Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept’ (2013) 28 (1), *ICSID Review-Foreign Investment Law Journal* 88

Poudret, Jean-François and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd ed, 2007)

Prasad, P Satyanarayana (ed), *International Investment Agreements – Issues and Perspectives* (ICFAI University Press, 2008)

Preeg, Ernest H, ‘The Uruguay Round Negotiations and the Creation of the WTO’ in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook of World Trade Organization* (Oxford University Press, 2012)

Price, Daniel M, ‘US Trade Promotion Legislation’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 89

Pritchard, Robert ‘Introduction: The Contemporary Challenges of Economic Development’ in Robert Pritchard (ed), *Economic Development, Foreign Investment and the Law - Issues of Private Sector Involvement, Foreign Investment and the Rule of Law in a New Era* (Kluwer Law International and International Bar Association, 1996) 3.

Pryles, Michael, ‘Limits to Party Autonomy in Arbitral Procedure’ (2007) 24 (3) *Journal of International Arbitration* 327

Qureshi, Asif, ‘Development Perspectives on the Establishment of an Appellate Process in the Investment Sphere’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 99

Querishi, Asif H, ‘An Appellate System in International Investment Arbitration’? in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008)

- Quick, Reinhard and Andreas Blüthner, ‘Has the appellate body erred? An appraisal and criticism of the ruling in the WTO Hormones case’ (1999) 2 (4) *Journal of International Economic Law* 603
- Ralston, Jackson H, *International Arbitration from Athens to Locarno* (Stanford University Press, 1929)
- Ramsay, Ian M, ‘Corporate Theory and Corporate Law Reform in Australia’ (1994) 1(2) *Agenda: A Journal of Policy Analysis and Reform* 179
- Ratner, Steven, ‘Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law’ (2008) 102(3) *American Journal of International Law* 475
- Rawls, John ‘Justice as Fairness’ in Joel Feinberg and Hyman Gross (eds), *Philosophy of Law* (Dickenson, 1975).
- Rawls, John, *A Theory of Justice* (Harvard University Press, Revised Edition, 1999)
- Raz, Joseph, ‘The Functions of Law’ in Joseph Raz (ed), *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979)
- Raz, Joseph, ‘The Rule of Law and Its Virtue’ in Joseph Raz (ed), *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 210
- Reid, John Phillip, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (Northern Illinois University Press, 2004)
- Reinisch, August and Loretta Malintoppi, ‘Methods of Dispute Resolution’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008)
- Reinisch, August, ‘The Future of Investment Arbitration’ in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 894
- Reinisch, August, ‘Will the EU’s Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? —The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration’ (2016) 19 (4) *Journal of International Economic Law*
- Reisman, Michael W, *Nullity and Revision: The Review and Enforcement of International Judgment and Awards* (Yale University Press, 1971)
- Redfern, Alan et al, *Law and Practice of International Arbitration* (Sweet and Maxwell, 4th ed, 2004)

Reuter, Tina Kempin, ‘International Law’ in John T Ishiyama and Marijke Breuning (ed), *21st Century Political Science: A Reference Handbook* (Sage, 2011) vol 1 431

Ricardo, David, *The Principles of Political Economy and Taxation* (Dent, 1957)

Roberts, Anthea and Christina Trahanas, ‘Judicial Review of Investment Treaty Awards: BG Group v Argentina’ 108 (4) (2014) *The American Journal of International Law* 750

Roberts, Anthea, ‘Incremental, Systemic, and Paradigmatic Reform of Investor–State Arbitration’ (2018) 112 (3) *The American Society of International Law* 410

Robin, Noah, ‘Judicial Review of Investment Arbitration’ in Audrey Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issues* (Institute of International and Comparative Law, 2006) vol 1

Robock, Stefan H, ‘How Will Third World Countries Welcome Foreign Direct Investment in the Twenty-First Century?’ in Robert Grosse (ed), *International Business and Government Relations in the 21st Century* (Cambridge University Press, 2005) 379

Rodick, Burleigh C, *The Doctrine of Necessity in International Law* (Columbia University Press, 1928)

Rourke, John T, *International Politics on the World Stage* (McGraw-Hill, 11th ed, 2007)

Roy, Ravi K, Arthur T Denzau and Thomas D Willett (eds), *Neoliberalism: National and Regional Experiments with Global Ideas* (Routledge, 2006)

Ruffert, Matthias (ed), *The Public–Private Law Divide: Potential for Transformation?* (British Institute of International and Comparative Law, 2009)

Rugraff, Eric, Diego Sánchez-Ancochea and Andy Summer, ‘How Have TNCs Changed in the Last 50 Years?’ in Eric Rugraff, Diego Sánchez-Ancochea and Andy Summer (eds), *Transnational Corporations and Development Policy: Critical Perspective* (Palgrave Macmillan, 2009)

Saad-Filho, Alfredo and Deborah Johnson, *Neoliberalism: A Critical Reader* (Pluton Press, 2005)

Sandholz, W and A Stone Sweet, ‘Law, Politics and International Governance’ in C Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) 238.

Sandifer, Durward, *Evidence Before International Tribunals* (The Foundation Press Inc, 1939)

Sands, Philippe, ‘Searching for Balance: Concluding Remarks. Regulatory Expropriations in International Law: Colloquium Articles’ (2002–2003) 11(1) *New York University Environmental Law Journal* 198

Sattler, Thomas and Thomas Bernauer, ‘Gravitation or discrimination? Determinants of litigation in the World Trade Organisation’ (2011) 50 (2), *European Journal of Political Research* 143

Schatz, Sylvia, ‘The Effect of the Annulment Decisions in *Amco v Indonesia* and *Klöckner v Cameroon* on the Future of the International Centre for the Settlement of Investment Disputes’ (1988) 3 (2) *American University International Law Review* 481

Schneider, Kupfer, ‘Error Correction and Dispute System Design in Investor–State Arbitration’ (2014) 11 *Transnational Dispute Management* 218

Scherer, Matthias, ‘ICSID Annulment Proceedings Based on Serious Departure from a Fundamental Rule of Procedure (Article 52(1)(d) of the ICSID Convention)’ (2011) *Czech (& Central European) Yearbook of Arbitration* 211

Schill, Stephan W, Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review (2012) 3 (3) *Journal of International Dispute Settlement* 577–607

Schill, Stephen W and Robyn Brieze, “‘If State Consider’: Self-Judging Clause in International Dispute Settlement” (2009) 13 *Max Planck UNYB* 121

Schill, Stephen W, ‘Fair and Equitable treatment, the Rule of Law, and Comparative Public Law’ in Stephen W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010)

Schill, Stephen W, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009) vol 2

Schill, Stephen W, ‘The European Commission’s Proposal of an Investment Court System for TTIP: Steppingstone or Stumbling Block for Multilateralizing International Investment Law?’ (2016) 20 (9) *American Society of International Law* <<https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping>>

Schill, Stephen W, ‘Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework’ (2017) 20(3) *Journal of International Economic Law* 649

Schill, Stephen W and Geraldo Vidigal, ‘Investment Dispute Settlement à la carte within a Multilateral Institution: A Part Forward for the UNCITRAL Process?’ (2019) 248 *Columbia FDI Perspective* <<http://ccsi.columbia.edu/files/2018/10/No-248-Schill-and-Vidigal-FINAL.pdf>>

Schneider, Michael, ‘Does the WTO Confirm the Need for a More General Appellate System in Investment Disputes?’ (2005) (2) *Transnational Dispute Management* 55–57

Schofield, Malcolm, *Plato: Political Philosophy* (Oxford University Press, 2006)

Schreuer, Christoph H, ‘Fair and Equitable treatment (FET): Interactions with Other Standards’ in Graham Coop and Clarisse Ribeiro (eds), *Investment Protection and the Energy Charter Treaty* (JurisNet, 2008)

Schreuer, Christoph H, ‘ICSID Annulment Revisited’ (2003) 30 (2) *Legal Issues of Economic Integration* 103.

Schreuer, Christoph H, ‘Three Generations of ICSID Annulment Proceedings’ in Emmanuel Gallard and Yas Banifatemi (eds), *Annulment of ICSID Awards* (Juris Publishing, 2004) (also available at <<http://www.univie.ac.at/intlaw/wordpress/pdf/69.pdf>>)

Schreuer, Christoph, ‘Fair and Equitable Treatment in Arbitral Practice’ (2005) (6) *Journal of World Investment & Trade* 234

Schreuer, Christoph, ‘Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Case Considered’ in T Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005) 281, 296–9

Schreuer, Christoph H, ‘Preliminary Rulings in Investment Arbitration’ in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008)

Schreuer, Christoph H, ‘Selected Standards of Treatment available under the Energy Charter Treaty: Part I-Fair and Equitable Treatment (FET) Standards’ in Graham Coop and Clarisse Ribeiro (eds), *Investment Protection and the Energy Charter Treaty* (JurisNet, 2008) 63

Schreuer, Christoph H, ‘Preliminary Rulings in Investment Arbitration’ in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008)

Schreuer, Christoph H and Matthew Weiniger, ‘A Doctrine of Precedent?’ in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008)

Schreuer, Christoph H, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd ed, 2009)

Schreuer, Christoph H, ‘Full Protection and Security’ (2010) *Journal of International Dispute Settlement*

Schreuer, Christoph, ‘Coherence and Consistency in International Investment Law’ (2014) <<http://www.univie.ac.at/intlaw/wordpress/wp-content/uploads/2014/01/Coherence-and-Consistency-in-International-Investment-Law.pdf>>

Schreuer, Christoph H, ‘Do We Need Investment Arbitration?’ in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journey for the 21st Century* (TDM, Brill Nijhoff, 2015) 879

Schreuer, Christoph and A de la Brena ‘Does ISDS Need an Appeals Mechanism?’ (2018) (Provisional Issue) *Transnational Dispute Management* (This paper will also appear in the Austrian Yearbook on International Arbitration in 2019)

Schuchhardt, Christiane, ‘Consultations’ in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) vol 1, 1119

Schultz, Thomas, ‘Against Consistency in Investment Arbitration’ in Z Douglas, J Pauwelyn, and JE Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014)

Schwartz, Bernard, *French Administrative Law and the Common-Law World* (New York University Press, 1954)

Schwarzenberger, Georg, ‘The Principle of International Responsibility’ in The Hague Academy of International Law (ed), *The Fundamental Principle of International Law: Collected Courses of the Hague Academy of International Law* (Nijhoff, 1955)

Shany, Yuval, ‘Contract Claims vs Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims’ (2005) 99 (4) *The American Journal of International Law* 835

Shany, Yuval, ‘Toward a General Margin of Appreciation Doctrine in International Law?’ (2005) 16 *European Journal of International Law* 907

Shaw, Malcolm N, *International Law* (Cambridge University Press, 6th ed, 2008)

Sheppard, Audrey and Hugo Warner, ‘Editorial Note’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 103

Sheppard, Audley ‘The Approach of Investment Treaty Tribunals to Evidentiary Privileges’ (2016) 31(3) *ICSID Review* 670

Shihata, Ibrahim FI, ‘Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA’ (1986) 1 (1) *ICSID Review—Foreign Investment Law Journal* 1

Shoyer, Andrew W, Eric M Solovy and Alexander W Koff, ‘Implementation and Enforcement of Dispute Settlement Decisions’ in Patrick F J Macrory, *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) vol 1, 1341

Silberman, Linda J et al, *Civil Procedure: Theory and Practice* (Wolters Kluwer, 4th ed, 2013)

Silver, Gerald D, ‘Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives “Of Their Choice”’ (1989) 57 (5) *Fordham Law Review* 765

Simmons, Beth A, ‘Money and the Law: Why Comply with the Public International Law of Money?’ (2000) 25 (2) *Yale Journal of International Law* 323

Sirks, A J B, ‘Public Law’ in David Johnston (ed), *The Cambridge Companion to Roman law* (Cambridge University Press, 2015) 332

Smith, Adam, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Edwin Cannan (ed), Methuen & Co, 1904) [edited of *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776)]

Smith, M B E, ‘The Duty to Obey the Law’ in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 2010) 457

Sornarajah, M, *The Settlement of Foreign Investment Dispute* (Kluwer Law International, 2000)

Sornarajah, M, ‘A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration’ in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) 73

Sornarajah, M, ‘An International Investment Court: Panacea or Purgatory?’ (2016) 180 *Columbia FDI Perspectives on Topical Foreign Direct Investment* <<http://ccsi.columbia.edu/files/2013/10/No-180-Sornarajah-FINAL.pdf>>

Sornarajah, M, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015)

Sornarajah, M, *The International Law on Foreign Investment* (Cambridge University Press, 3rd ed, 2010)

Spears, Suzanne A, ‘The Quest for Policy Space in a New Generation of International Investment Agreement’ (2010) 13(4) *Journal of International Economic Law* 1037–1075

Spears, Suzanne A, ‘Making Way for the Public Interest in International Investment Agreements’ in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 271

Spoorenberg, Frank, Tavernier Tschanz and Jorge E Viñuales, ‘Conflicting Decisions in International Arbitration’ (2009) 8 (1) *The Law and Practice of International Courts and Tribunals* 91–113

Starke, Joseph G, ‘Monism and Dualism in the Theory of International Law’ in Stanley L Paulson (ed), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press, 1999)

Steiner, Henry and Philip Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford University Press, 2000)

Stern, Brigitte, ‘The Intervention of Private Entities and States as “Friend of Court” in WTO Dispute Settlement Proceedings’ in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) vol 1, 1427

Steffek, Felix, ‘Principled Regulation of Dispute Resolution: Taxonomy, Policy, Topics’ in Felix Steffek et al (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Hart Publishing, 2013) 33

Stilwell, Frank, *Political Economy: The Contest of Economic Ideas* (Oxford University Press, 3rd ed, 2011)

Stone Sweet, Alec and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 72

Stone Sweet, Alec, ‘Investor–State Arbitration: Proportionality’s New Frontier’ (2010) 41 *Law & Ethics of Human Rights* 47

Stone Sweet, Alec, and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (OUP, 2017)

Stretton, Hugh, *Economics: A New Introduction* (Pluto Press, 2000) 74.

Suarez Anzorena, Carlos Ignacio, ‘Multiplicity of Claims under BITs and the Argentina Case’ in Federico Orino, Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1

Sullivan, Arthur and Steven M Sheffrin, *Economics: Principles in Action* (Pearson Prentice Hall, 2003)

Sureda, Rigo, ‘Precedent in Investment Treaty Arbitration’ in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 830

Sutherland, Peter, ‘The Politics of Trade Policy Development —The New Complexity’ in Patrick F J Macroney, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analyses* (Springer, 2005) vol I, 27

Tamanaha, Brian Z, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004)

Taggart, Michael, ‘The Nature and Functions of the States’ in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2005) 101

Tawil, Guido, ‘An International Appellate System: Progress or Pitfall?’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1, 131

Ten Cate, Irene M, ‘International Arbitration and the Ends of Appellate Review’ (2012) 44 *New York University Journal of International Law and Politics* 1109

Thibaut, John and Laurens Walker, ‘A Theory of Procedure’ (1978) 66 (3) *California Law Review* 541

Thomas, JC, ‘Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators’ (2002) 17(1) *ICSID Review* 21

Thomas, Christopher, ‘The Uses and Abuses of Legitimacy in International Law’ (2014) 34(4) *Oxford Journal of Legal Studies* 729

Tienhaara, Kyla, ‘Regulatory Chill and the Threat of Arbitration: A View from Political Science’ in Chester Brown and Kate Miles, University of Sydney (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 606

Tietje, Christian. ‘The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy’ (1997) 2 (2), *European Foreign Affairs Review* 211

Titi, Catharine, *The Right to Regulate in International Investment Law* (Hart Publishing, 2014) 41–42.

Toye, Richard, ‘The International Trade Organization’ in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook of World Trade Organization* (Oxford University Press, 2012)

Tracton, Michael K, ‘Provisions in the New Generation of the US Investment Agreements to Achieve Transparency and Coherence in Investor–State Dispute Settlement’ in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008)

Trakman, Leon and Nicola Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press, 2013)

Tsakyrakis, Stavros, ‘Proportionality: An Assault on Human Rights?’ (2009) 7 *International Journal of Constitutional Law* 261

Tschanz, Pierre-Yves and Jorge E Viñuales, ‘Compensation for Non-expropriatory Breaches of International Investment Law—The Contribution of the Argentine Awards’ (2009) 26 (5) *Journal of International Arbitration*, 729

Tudor, Ioana, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press, 2008)

Turley, Jonathan, *Dualistic Values in the Age of International Legisprudence* (1993) 44 *Hastings Law Journal* 185,

Twiss, Travers, *The Law of Nations Considered as Independent Political Communities* (Clarendon Press, 2nd ed, 1884)

Tyler, Tom R, *Why People Obey the Law* (Yale University Press, 1990)

United States of America Department of State, *United Nations Monetary and Financial Conference: Bretton Woods, New Hampshire, July 1 to July 22, 1944: Final Act and Related Documents* (United States of America Government Printing Office, 1944)

Vadi, Valentina Sara, ‘Through the Looking-Glass: International Investment Law through the Lens of a Property Theory’ (2011) 8 (3) *Manchester Journal of International Economic Law* 22

Van den Bossche, Peter, ‘From After Thought to Counter Piece: The WTO Appellate Body and its Rise to Prominence in the World Trading System’ in Giorgio Sacerdoti, Alan Yanovich and Jan Bohanes (eds), *WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge University Press, 2006) 289.

Van Grastek, Craig, *The History and Future of the World Trade Organization* (World Trade Organization, 2012)

Van Harten, Gus and Martin Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’ (2006) 17(1) *European Journal of International Law* 121

Van Harten, Gus, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007)

Van Harten, Gus, ‘Investment Treaty Arbitration, Procedural, Fairness, and the Rule of Law’ in Stephen Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010)

Van Harten, Gus, *Sovereign Choices and Sovereign Constraints Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press, 2013)

Van Harten, Gus, ‘Reforming the system of international investment dispute settlement in C.L. Lim (ed.) *Alternative Visions*’ in C L Lim (ed), *the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (Cambridge University Press, 2016) 103

Van Rhee, C H, ‘Public Justice: Some Historical Remarks’ in A Uzelac and C H van Rhee (eds), *Public and Private Justice* (Intersenti, 2007)

Vandavelde, Kenneth J, ‘The Political Economy of Bilateral Investment Treaties’ (1998) 92 (4) *The American Journal of International Law* 621–641

Vandavelde, Kenneth, ‘A Brief History of International Investment Agreements’ (2005) 12 (1) *UC Davis Journal of International Law and Policy* 157

Vandavelde Kenneth J, *Bilateral Investment Treaties: History, Policy and Interpretation* (Oxford University Press, 2010)

Vandavelde, Kenneth, ‘The Liberal Vision of the International Law on Foreign Investment’ in CL Lim (ed), *Alternative Visions of the International Law on Foreign Investment: Essay in Honour of Muthucumoraswamy Sornarajah* (Cambridge University Press, 2016)

Vasciannie, Stephen, ‘The Fair and Equitable Treatment Standard in International Investment Law and Practice’ (1999) 70(1) *British Yearbook of International Law* 99

Veeder, VV, ‘The Necessary Safeguards of an Appellate System’ in Audley Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issue* (British Institute of International and Comparative Law, 2006) vol 1 89

Veeder, Johnny, ‘The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator: from Miami to Geneva’ (2013) *American Society of International Law Proceedings* 107

Veeder, John, ‘What Matters about Arbitration’ (2016) 82 (2) *Arbitration*, 153

Vicuna, Francisco Orrego, ‘Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society’ (2003) 5 *International Law Forum Du Droit* 188

Volterra, Robert, ‘Conclusion’, in Audrey Sheppard and Hugo Warner (eds), *Investment Treaty Law: Current Issues* (British Institute of International and Comparative Law, 2006) vol 1 first page

Waddams, SM, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, 2003)

Waddams, SM, *Introduction to the Study of Law* (Carswell, 7thed, 2010)

Waibel, Michael et al, ‘The Backlash Against Investment Arbitration: Perceptions and Reality’ in Michael Waibel et al (eds), *The Backlash Against Investment Arbitration* (Kluwer Law International, 2010)

Waincymer, Jeffrey, ‘Reformulated Gasoline Under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora Out of a Chapeau?’ (1996) 18 *Michigan Journal of International Law* 141

Waincymer, Jeffrey, ‘Transparency of Dispute Settlement within the World Trade Organization’ (2000) 24(3) *Melbourne University Law Review* 797

Waincymer, Jeffrey, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (Cameron May, 2002)

Waincymer, Jeffrey, ‘Balancing Property Rights and Human Rights in Expropriation’ in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 275

Waincymer, Jeffrey Maurice, ‘International Commercial Arbitration and the Application of Mandatory Rules of Law’ (2009) 5(1) *Asian International Law Journal*, 1

Waincymer, Jeffrey, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012)

Waincymer, Jeffrey, ‘Investor–State Arbitration: Finding the Elusive Balance between Investor Protection and State Police Powers’ (2014) 17 (1) *International Trade and Business Law Review* 261.

Wälde, Thomas and Abba Kolo, ‘Environmental Regulation, Investment Protection and Regulatory Taking in International Law’ (2001) 50(4) *The International and Comparative Law Quarterly* 811

Wälde, Thomas W and Abba Kolo, ‘Coverage of Taxation under Modern Investment Treaties’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 308

Wälde, Thomas W and Borzu Sabahi, ‘Compensation, Damages, and Valuation’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008)

Wälde, Thomas W, ‘Alternative for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative treaty Arbitration or Mandatory Consolidation?’ (2005) 2 (2) *Transnational Dispute Management* 71–77

Waldron, Jeremy, ‘Legal and Political Philosophy’ in Jules L Coleman, Kenneth Einar Himma, and Scott J. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2004)

Ward, Ian, *Introduction to Critical Legal Theory* (Gavendisch, 1998) 3, citing Plato, *Republic* (Penguin, 1987)

Watson, Alan, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 2nd ed, 1993)

Watson, James KR, *The WTO and the Environment: Development of Competence beyond Trade* (Routledge, 2013)

Weiler, Todd et al (eds), *Investment Treaty Arbitration and International Law* (JurisNet, 2008)

Wells, Louis T, ‘Protecting Foreign Investors in the Developing World: A Shift in US Policy in the 1990s?’ in Robert Grosse (ed), *International Business and Government Relations in the 21st Century* (Cambridge University Press, 2005) 421

Werner, Jacques, ‘Limits of Commercial Investor–State Arbitration: The Need for Appellate Review’ in Pierre- Marie Dupuy, Ernst- Ulrich Petersmann, and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 115.

White, Colin and Miao Fan, *Risk and Foreign Investment* (Palgrave, 2006) 146–167

Williams, Glanville L, *Learning the Law* (Stevens, 11th ed, 1982)

Wilson, Robert Renbert, *United States Commercial Treaties and International Law* (The Hauser Press, 1961)

Wolaver, Earl S, ‘The Historical Background of Commercial Arbitration’ (1934) 83 (2) *University of Pennsylvania Law Review and American Law Register* 132

Wolfgang, Alschner, ‘Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law’ (2013) 5 *Goettingen Journal of International Law*

Wong, James K L ‘Evolution of Science in Political Science’ in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press, 2006) 451

Woo, Byunwon, ‘International Organizations and Regimes’ in John T Ishiyama and Marijke Breuning (ed), *21st Century Political Science: A Reference Handbook* (Sage, 2011) vol 1

Wood, Michael, ‘Choosing between Arbitration and a Permanent Court’ (2017) 32(1) *ICSID Review* 1

Yannaca-Small, Katia, ‘Improving the System of Investor–State Dispute Settlement: The OECD Government’s Perspective’ in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008)

Yanovich, Alan and Tania Voon, ‘What is the Measure at Issue?’ in Andrew Mitchell (ed), *Challenge and Prospects for the WTO* (Cameron May, 2005)

Zdouc, Werner, ‘The Panel Process’ in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) vol 1, 1231

Zeiler, Thomas W, ‘The Expanding Mandate of the GATT: The First Seven Rounds’ in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook of World Trade Organization* (Oxford University Press, 2012)

Zeitler, Helge E, ‘Full Protection and Security’ in Stephen W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010)

Ziegler, Andreas R, ‘Scope and Function of the WTO Appellate System: What Future after the Millennium Round?’ (1999) 3 *The Max Planck Yearbook of United Nations Law* 444

Zimmer, Markus B, ‘Overview of Specialized Courts’ (2009) *International Journal for Court Administration* 1–15.

Zuleta, E, ‘The Challenge of Creating a Standing International Investment Court’ (2014) 11 (1) *Transnational Dispute Management*

Zweigert, Konrad and Hein Kötz, *Introduction to Comparative Law* (Oxford University Press, 1998)

Legal Encyclopedias

D’ Amato, Anthony, ‘Good Faith’ in Rudolf Bernhardt, *Encyclopedia of Public International Law* (North Holland, 1992) vol 2, 599.

Press and Media Release

European Commission (EC), ‘A future multilateral investment court’ (Press Release, MEMO/16/4350, 13 December 2016) <http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm>

European Commission (EC), ‘Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations’ (Press Release, IP/15/5651, 16 September 2015) <http://europa.eu/rapid/press-release_IP-15-5651_en.htm>

European Commission (EC), ‘EU finalizes proposal for investment protection and Court System for TTIP’ (Press release, 12 November 2015) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396>>

World Trade Organization (WTO), ‘Trade and foreign direct investment’ (Press releases, Press/57, 9 October 1996) <https://www.wto.org/english/news_e/pres96_e/pr057_e.htm>

Working/Research/Discussion Papers

Academic Forum on ISDS, ‘Summary Conclusions’ (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS, 2019)

Academic Forum on ISDS Working Group 4, ‘Incorrectness of ISDS Decisions’ (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS Working Group 4, 2019)

Alvarez, José E and Tegan Brink, ‘Revisiting the Necessity Defense: *Continental Casualty v Argentina*’ (New York University Public Law and Legal Theory Working Papers 2010/3, New York University School of Law, 14 April 2010)

Arato, Julian et al, ‘Lack of Consistency and Coherence in the Interpretation of Legal Issues’ (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS Working Group 3, 30 January 2019)

Bernasconi-Osterwalder, Nathalie, ‘State–State Dispute Settlement in Investment Treaties’ (International Institute for Sustainable Development (IISD) Best Practices Series, IISD, October 2014) <https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf>

Bernasconi-Osterwalder, Nathalie, and Martin Dietrich Brauch, ‘Comparative Commentary to Brazil’s Cooperation and Investment Facilitation Agreements (CIFAs) with Mozambique, Angola, Mexico, and Malawi’ (International Institute for Sustainable Development, September 2015)

Bjorklund, Andrea K et al, ‘The Diversity Deficit’ (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS Working Group 5, 30 March 2019)

Bungenberg, Marc and August Reinisch, ‘Von bilateralen Schieds-und Investitionsgerichten zum multilateralen Investitionsgerichtshof: Optionen für die Institutionalisierung der Investor-Staat-Streitbeilegung’ (Machbarkeitsstudie, 21 August 2017) (German with English Executive Summary)

Delmon, Jeffrey, ‘Understanding Options for Public–Private Partnerships in Infrastructure’ (World Bank Policy Working Research Paper, World Bank, 2010)

Diebold, Nicolas F, ‘Standards of Non-discrimination in International Economic Law: Comparative analysis and building coherency’ (IILJ Emerging Scholars Paper, Institute for International Law and Justice (IILJ), 2010)

Dunoff, Jeffrey et al, ‘Lack of Independence and Impartiality of Arbitrators’ (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS Working Group 6, March 2019).

ISDS Academic Forum–Working Group 2, ‘Duration of ISDS Proceedings’ (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS Working Group 2, 2019)

Jackson, John H, ‘Dispute Settlement in the WTO: Policy and Jurisprudential Considerations’ (Discussion Paper No 419, Research Seminar in International Economics School of Public Policy, University of Michigan, 1998)

Joubin- Bret, Anna and Cristian Rodriguez Chiffelle, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, ‘G20 Guiding Principles for Global Investment Policymaking: A Stepping Stone for Multilateral Rules on Investment’ (White Paper, ICTSD and World Economic Forum, February 2017)
<file:///C:/Users/hp/Downloads/G20%20Guiding%20Principles%20for%20Global%20Investment%20Policymaking%20A%20Stepping%20Stone%20for%20Multilateral%20Rules%20on%20Investment.pdf>

Kaufmann-Kohler, Gabrielle and Michele Potestà, ‘Can the Mauritius Convention serve as a model for the reform of investor–State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?: Analysis and Roadmap’ (Geneva Center for International Dispute Settlement (CIDS) Research Paper, 3 June 2016)

Kaufmann-Kohler, Gabrielle and Michele Potestà, ‘The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards’ (Geneva Center for International Dispute Settlement (CIDS) Supplement Report, 15 November 2017)

Kaufmann-Kohler, Gabrielle and Michele Potestà, ‘Introduction’ (Concept Papers Project Matching Concerns and Reform Options, the Academic Forum on ISDS, 2019)

Langford, Malcolm, Daniel Behn and Laura Létourneau-Tremblay, ‘Empirical Perspectives on Investment Arbitration: What do we know? Does it Matter?’ (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS Working Group 7, 15 March 2019)

Stoler, Andrew, ‘Crisis in the WTO Appellate Body and the Need for Wider WTO Reform Negotiations’ (Institute for International Trade, University of Adelaide, 1 March 2019)

Tams, Christian J, ‘An Appealing Option? The Debate about an ICSID Appellate Structure’ (Essays in Transnational Economic Law No 57, Inst. für Wirtschaftsrecht, 2006) <<http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft57.pdf>>

Titi, Catherine et al, ‘Excessive Costs & Insufficient Recoverability of Cost Awards’ (Concept Papers Project Matching Concerns and Reform Options, Academic Forum on ISDS Working Group 1, 14 March 2019)

Ubilava, Ana, ‘Amicable Settlements in Investor–State Disputes: Empirical Analysis of Patterns and Perceived Problems’ (Sydney Law School Research Paper No. 19/17, 13 March 2019)

Weiler, J H H, ‘The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’ (Harvard Jean Monnet Working Paper 9/00, 2000)

Conference/Seminar Papers/Presentation

Adeleke, Fola, ‘Investor–State Arbitration and the Public Interest Regulation Theory’ (Paper presented at the Fourth Biennial Global Conference, World Trade Institute University of Bern, 10–12 July 2014)

Baldi, Marino, ‘Dispute’ (Paper presented at Symposium on the MAI, Cairo, Egypt, 20 October 1997) <http://training.itsilo.it/actrav_cdrom1/english/global/blokit/maisym.htm>

Baldi, Marino, ‘The Need for a Broader Policy Approach for FDI’ (Paper presented at OECD Global Forum on International Investment New Horizons and Policy Challenges for Foreign Direct Investment in the 21st Century, Mexico City, 26–27 November 2001)

Bernasconi-Osterwalder, Nathalie, Lise Johnson and Fiona Marshall, ‘Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel’ (Background Papers for IV Annual Forum for Developing Country Investment Negotiators, New Delhi, 27–29 October 2010)

Fernández, Carlos García, ‘International Investment Agreements and Instruments’ (Paper presented at OECD Global Forum on International Investment New Horizons and Policy Challenges for Foreign Direct Investment in the 21st Century, Mexico City, 26–27 November 2001) <<http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/2423821.pdf>>

Hughes, Valerie, ‘The WTO Appellate Body: What Lessons Can Be Learned?’ (Presentation presented at the Second Conference of the British Institute of International and Comparative Law’s Investment Treaty Forum on Appeals and Challenges to Investment Treaty Awards: Is It Time For An International Appellate System? London, 7 May 2004) <https://www.biiicl.org/files/945_valerie_hughes_presentation.pdf>

John, Peter, ‘New Directions in Public Policy: Theories of Policy Change and Variation Reconsidered’ (Paper presented at the International Conference on Public Policy, Grenoble, 26–28 June 2013) <http://archives.ippapublicpolicy.org/IMG/pdf/panel_84_1_peter_john.pdf>

Maher, M and F Fortannier, ‘FDI and Sustainable Development’ (Paper presented at OECD Global Forum on International Investment New Horizons and Policy Challenges for Foreign Direct Investment in the 21st Century, Mexico City, 26–27 November 2001)

Mann, Howard, ‘The Right of States to Regulate and International Investment Law’ (Paper presented at the Expert Meeting on the Development Dimension of FDI: Policies to Enhance the Role of FDI in Support of the Competitiveness of the Enterprise Sector and the Economic Performance of Host Economies, Taking into Account the Trade/Investment Interface, in the National and International Context, Geneva, 6–8 November 2002)

Mann, Howard, ‘International Investment Agreements, Business and Human Rights Key Issues and Opportunities’ (paper presented at Global Forum on International Investment, 27–28 March 2008)

OECD, ‘Improving the System of Investor–State Dispute Settlement: An Overview’ (Paper presented at the symposium Co-Organised by ICSID, OECD AND UNCTAD: Making the Most of International Investment Agreement: A Common Agenda, 12 December 2005)

Sauvant, Karl P and Federico Ortino, ‘Improving the International Investment Law and Policy Regime: Options for the Future’ (Paper presented at the Seminar on Improving the International Investment Regime, Helsinki, 10 –11 April 2013)

Tomuschat, Christian, ‘International Courts and Tribunals with Regionally Restricted and/or Specialised Jurisdiction’ (Proceedings of the Symposium on the Judicial Settlement of International Disputes, Heidelberg, 10–12 July 1972)

Speeches

Annan, Kofi, ‘The 1958 New York Convention as a Model for Subsequent Legislative Texts on Arbitration’ (Opening Address delivered at the New York Convention Day, 10 June 1998)

Ban Ki-Moon, ‘Secretary-General's address to International Council for Commercial Arbitration Congress’ (Speech delivered at the 23rd ICCA Congress, Mauritius, 9 May 2016)

Brown, Colin, ‘The European Union’s Approach to Investment Dispute Settlement’ (speech delivered at the 3rd Vienna Investment Arbitration Debate, 22 June 2018)

<http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157112.pdf>

Croft, Clyde, ‘Recent Developments in Arbitration: At Home and Abroad’ (Speech delivered at Resolution Institute, Melbourne, 16 October 2017) <https://www.supremecourt.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2017/10/ec/f671a35d4/Recentdevelopmentsinarbitrationathomeandabroad.pdf>

Malmström, Cecilia, ‘A Multilateral Investment Court: A Contribution to the Conversation about Reform of Investment Dispute Settlement’ (Speech delivered at Brussels, 22 November 2018) <http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157512.pdf>

Morgenthau, Henry, ‘Inaugural Address’ (Speech delivered at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, United States, 1 July 1944) <https://fraser.stlouisfed.org/files/docs/historical/eccles/036_17_0004.pdf>

Nariman, Fali S, ‘Introduction to the New York Convention –The Convention and Sovereignty’ (Speech delivered at Casuarina Hall, India Habitat Centre, 23 November 2013) <http://www.arbitration-icca.org/media/2/13916005409590/nyc_roadshow_speech_23rd_nov_nariman.pdf>

Panitchpakdi, Supachai, ‘WTO After Ten Years: Global Problems and Multilateral Solutions’ (Introductory Remarks delivered at the WTO Public Symposium, Geneva, Switzerland, 20 April 2005) <https://www.wto.org/english/news_e/news05_e/remarks_chair_8july05_e.htm>

RS French, ‘Investor–State Dispute Settlement—A Cut Above the Courts?’ (Speech delivered at Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014)

Schwebel, Stephen M, Judge, ‘In Defense of Bilateral Investment Treaties’ (Keynote speech delivered at ICCS, Miami, April 2014)

Schwebel, Stephen M, ‘The Proposals of the European Commission for Investment Protection and Investment Court system’ (Speech delivered at Sidley Austin, Washington, DC, 17 May 2016)

Spielmann, Dean, ‘Whither the Margin of Appreciation?’ (Speech delivered at Current Legal Problems (CLP) lecture, London, 20 March 2014) <http://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf>

Written Correspondence

Nikos Lavranos, ‘The outcome of the UNCITRAL meeting: The first steps towards a Multilateral Investment Court (MIC)’ in an email from John Gaffney to OGEMID@ogeltdm.com (7 August 2017).

Blogs and Online Forums

Frank, Susan D, ‘Precision and Legitimacy in International Arbitration: Empirical Insights From ICCA’ on *Kluwer Arbitration Blog* (10 September 2014) <<http://arbitrationblog.kluwerarbitration.com/2014/09/10/precision-and-legitimacy-in-international-arbitration-empirical-insights-from-icca>>

Fried, Jonathan T, 2013 In WTO Dispute Settlement: *Reflections from the Chair of the Dispute Settlement Body* <https://www.wto.org/english/tratop_e/dispu_e/jfried_13_e.htm>.

Kinnear, Meg, ‘Appeal, Review, Annulment ... What’s it all about?’ on *Stockholm Chamber of Commerce ISDS Blog* (23 October 2015) <<http://isdsblog.com/2015/10/23/icsid-guest-post-appeal-review-annulment-whats-it-all-about/>>

Paulsson, Marike, ‘Revisiting the Idea of ISDS Within the EU and Arbitration Court: The Effect on Party Autonomy as the Main Pillar of Arbitration and the Enforceability of Arbitral Awards’ on *Kluwer Arbitration Blog* (21 May 2018)

Roberts, Anthea, ‘UNCITRAL and ISDS Reform: Pluralism and the Plurilateral Investment Court’ on *International Economic Law and Policy Blog* (12 December 2017) <<https://www.ejiltalk.org/uncitral-and-isds-reform-pluralism-and-the-plurilateral-investment-court/>>

Van Harten, Gus, *The Boom in Parallel Claims in Investment Treaty Arbitration* on *Investment Treaty News*, International Institute for Sustainable Development (IISD) (19 January 2014) <<https://www.iisd.org/itn/2014/01/19/the-boom-in-parallel-claims-in-investment-treaty-arbitration/>>

Internet Materials/Webpages

Cairo Regional Centre for International Commercial Arbitration (CRCICA), *About Us* <<http://crcica.org/AboutUs.aspx>>

Department of Foreign Affairs and Trade (DFAT), Australia Government, *About the Trans-Pacific Partnership Agreement* <<http://dfat.gov.au/trade/agreements/tpp/pages/trans-pacific-partnership-agreement-tpp.aspx>>

Department of Foreign Affairs and Trade (DFAT), *Australian Government, About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11)* (2018) <<https://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/Pages/trans-pacific-partnership-agreement-tpp.aspx>>

Europa, *Goals and Values of the EU* <https://europa.eu/european-union/about-eu/eu-in-brief_en>

European Commission (EC), *In Focus: EU–Canada Comprehensive Economic and Trade Agreement (CETA)* <<http://ec.europa.eu/trade/policy/in-focus/ceta/>>

European Commission (EC), *In focus: Transatlantic Trade and Investment Partnership (TTIP)* <<http://ec.europa.eu/trade/policy/in-focus/ttip/>>

European Commission (EC), *Negotiations and Agreements* <<http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements>>

European Commission (EC), *EU-Singapore Trade and Investment Agreements* (authentic texts as of April 2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>>

European Commission (EC), *EU Japan Economic Partnership* <<http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/>>

European Commission (EC), *EU-Singapore trade and investment agreements (authentic texts as of April 2018)* <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>>

European Commission (EC), *EU Japan Economic Partnership* <<http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/>>.

European Commission (EC), *The Multilateral Investment Court Project* (20 March 2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608&title=The-Multilateral-Investment-Court-project>>

European Commission (EC), ‘The EU Moves Forward Efforts at UN on Multilateral Reform of ISDS’ (18 January 2019) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1972>>

European Court of Human Rights, *History of the Court's Reforms* <http://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=#n13740528735758554841286_poi_nter>

Group of Twenty (G20), *What is the G20?* <<https://www.g20.org/en/g20/what-is-the-g20>>

International Centre for the Settlement of Investment Dispute (ICSID), *About ICSID* <<https://icsid.worldbank.org/en/Pages/about/default.aspx>>

International Centre for the Settlement of Investment Dispute (ICSID), *Amendment of ICSID's Rules and Regulations* <<https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx>>

International Centre for the Settlement of Investment Dispute (ICSID), *Confidentiality and Transparency—ICSID Convention Arbitration* <<https://icsid.worldbank.org/en/Pages/process/Confidentiality-and-Transparency.aspx>>

International Centre for the Settlement of Investment Dispute (ICSID), *Decisions on Annulment* <<https://icsid.worldbank.org/en/Pages/process/Decisions-on-Annulment.aspx>>

International Centre for the Settlement of Investment Dispute (ICSID), *List of Contracting States and Other Signatories of the Convention* <<https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>>

International Centre for the Settlement of Investment Dispute (ICSID), *Members of the Panels of Conciliators and of Arbitrators* <<https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%2010%20-%20Latest.pdf>>

International Centre for the Settlement of Investment Dispute (ICSID), *ICSID Rules and Regulations Amendment Process* (August 2018) <<https://icsid.worldbank.org/en/amendments>>

International Chamber of Commerce (ICC), *History* <<https://iccwbo.org/about-us/who-we-are/history/>>

International Court of Justice (ICJ), *History* (2017) <<http://www.icj-cij.org/en/history>>

International for the Law of the Sea, *The Tribunal* <<https://www.itlos.org/en/the-tribunal/>>

International Monetary Fund (IMF), *About the IMF* <<http://www.imf.org/external/about.htm>>

International Monetary Fund (IMF), *Argentina and the IMF* (2018)
<<https://www.imf.org/external/country/ARG/index.htm?type=9998>>

London Court of International Arbitration (LCIA), *Introduction*
<<http://www.lcia.org/LCIA/introduction.aspx>>.

Monash University, *Handbook for Doctoral Degrees: 7.1 Preparation, Presentation and Submission*
<<https://www.monash.edu/graduate-research/faqs-and-resources/content/chapter-seven/7-1>>.

Moscow Chamber of Commerce and Industry (MCCI), *About MCCI* <<https://mostpp.ru/about>>.

Organisation for Economic Co-operation and Development (OECD), *About*
<<http://www.oecd.org/about/>>

Organisation for Economic Co-operation and Development (OECD), *Access to Justice* (2018)
<<http://www.oecd.org/gov/access-to-justice.htm>>

Permanent Court of Arbitration (PCA), *About US* <<https://pca-cpa.org/en/about/>>

Stockholm Chamber of Commerce (SCC), *About the SCC* <<http://www.sccinstitute.com/about-the-scc/>>.

United Nations (UN), *International Law Commission* (2017) <<http://legal.un.org/ilc/>>

United Nations (UN), *Overview* <<http://www.un.org/en/sections/about-un/overview/index.html>>

United Nations (UN), *Sustainable Development Goals*
<<http://www.un.org/sustainabledevelopment/sustainable-development-goals/>>

United Nations Commission on International Trade Law (UNCITRAL), *About UNCITRAL*
<http://www.uncitral.org/uncitral/en/about_us.html>

United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL Arbitration Rules*
<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html>

United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (effective date: 1 April 2014)
<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html>

United Nations Commission on International Trade Law (UNCITRAL), *Working Group III 2017 to Present: Investor–State Dispute Settlement Reform* (2018)

<http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html>

United Nations Commission on Trade and Development (UNCTAD), *About UNCTAD*

<<http://unctad.org/en/Pages/aboutus.aspx>>

United Nations Commission on Trade and Development (UNCTAD), *Arbitral Rules and Administering Institution* <<https://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution>>

United Nations Commission on Trade and Development (UNCTAD), *IAs By Economy: Germany*

<<http://investmentpolicyhub.unctad.org/IIA/CountryBits/78#iiaInnerMenu>>

United Nations Commission on Trade and Development (UNCTAD), *IAs By Economy: Australia*

<<http://investmentpolicyhub.unctad.org/IIA/CountryBits/11#iiaInnerMenu>>

United Nations Commission on Trade and Development (UNCTAD), *IAs By Economy: Thailand*

<<http://investmentpolicyhub.unctad.org/IIA/CountryBits/207#iiaInnerMenu>>

United Nations Commission on Trade and Development (UNCTAD), *International Investment Agreements Navigator* <<http://investmentpolicyhub.unctad.org/IIA>>

United Nations Commission on Trade and Development (UNCTAD), *Investment Dispute Settlement Navigator: Country* <<http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>>

United Nations Commission on Trade and Development (UNCTAD), *Known Treaty-Based Investor-State arbitrations* <<http://investmentpolicyhub.unctad.org/ISDS>>

United Nations Commission on Trade and Development (UNCTAD), *World Investment Report 2017: Annex Tables* <<http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Annex-Tables.aspx>>

United Nations Commission on Trade and Development (UNCTAD), *Breaches of IIA Provisions Alleged and Found* (2017) <<http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches>>

United Nations Commission on Trade and Development (UNCTAD), *Economic Sector and Sub Sector* (2017) <<http://investmentpolicyhub.unctad.org/ISDS/FilterByEconomicSector>>

United Nations Commission on Trade and Development (UNCTAD), *UNCTAD Puts Forward Reform Options for Investor–State Dispute Settlement System* (27 May 2013)
<<https://unctad.org/fr/pages/newsdetails.aspx?OriginalVersionID=508>>

United Nations Treaty Collection (UNTC), *Status of Treaties*
<https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&lang=en>

United Nations Treaty Collection (UNTC), *Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York, 10 June 1958* (2018)
<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-1&chapter=22&clang=_en>

United States Department of State, *Independent States in the World* (20 January 2017)
<<https://www.state.gov/s/inr/rls/4250.htm>>

World Bank, *About the World Bank* <<http://www.worldbank.org/en/about>>

World Trade Organization (WTO), *Appellate Body Chair Calls for “Constructive Dialogue” on Addressing Dispute Settlement concerns* (3 May 2018)
<https://www.wto.org/english/news_e/news18_e/ab_07may18_e.htm>

World Trade Organization (WTO), *Appellate Body Members*
<https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm>

World Trade Organization (WTO), *Australia and the WTO*
<https://www.wto.org/english/thewto_e/countries_e/australia_e.htm>

World Trade Organization (WTO), *Dispute Settlement*
(<https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm>

World Trade Organization (WTO), *Dispute Settlement Appellate Body Secretariat*
<http://www.wto.org/english/tratop_e/dispu_e/ab_secretariat_bio_e.htm>

World Trade Organization (WTO), *Dispute Settlement: Dispute DS507 Thailand — Subsidies concerning Sugar* (4 April 2016) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds507_e.htm>

World Trade Organization (WTO), *Find disputes Cases* (2017)
<https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm>.

World Trade Organization (WTO), *Historical Development of The WTO Dispute Settlement System*

<https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm>

World Trade Organization (WTO), *Mexico etc versus US: ‘Tuna-Dolphin’*

<https://www.wto.org/english/tratoP_e/envir_e/edis04_e.htm>

World Trade Organization (WTO), *Overview of the WTO Secretariat*

<https://www.wto.org/english/thewto_e/secre_e/intro_e.htm>

World Trade Organization (WTO), *Thailand and the WTO*

<https://www.wto.org/english/thewto_e/countries_e/thailand_e.htm>

World Trade Organization (WTO), *The Process—Stages in a Typical WTO Dispute Settlement Case: 6.2*

Consultations <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm>

World Trade Organization (WTO), *Understanding the WTO: Settling Disputes: A Unique Contribution*

<https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm>

World Trade Organization (WTO), *Understanding the WTO: The Organization Members and Observers*

<https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>

WTO, *WTO Bodies Involved in the Dispute Settlement Process*

<https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm>

V. Suggested Websites for Further Research

American Society of International Law <www.eisil.org>

Australian Treaties Series <<http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf>>

EUR-lex <<http://eur-lex.europa.eu/collection/eu-law.html>>

European Commission (EC) <<http://ec.europa.eu>>

European Commission (EC) Multilateral Investment Court Project
<<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>>

European Court of Human Rights (ECHR) <<http://www.echr.coe.int>>

International Centre for Settlement of Investment Disputes (ICSID) <<https://icsid.worldbank.org>>

International Chamber of Commerce (ICC) <<http://www.iccwbo.org/>>

International Court of Justice (ICJ) <<http://www.icj-cij.org>>

International Monetary Fund (IMF) <<http://www.imf.org>>

ITALAW <<http://italaw.com>>

London Court of International Arbitration (LCIA) <<http://www.lcia.org/>>

Moscow Chamber of Commerce and Industry (MCCI) <<https://mostpp.ru/about/strategy?lang=en-us>>

Office of the United States Trade Representative <<https://ustr.gov/tpp/>>

Organisation for Economic Cooperation and Development (OECD) <<http://www.oecd.org/>>

Stockholm Chamber of Commerce (SCC) <<http://www.sccinstitute.com/>>

United Nations Commission on International Trade and Law (UNCITRAL) <<http://www.uncitral.org>>

United Nations Commission on International Trade and Law (UNCITRAL) Working Group III: Investor–
State Dispute Settlement Reform
<http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html>

United Nations Conference on Trade and Development (UNCTAD) Investment Policy Hub
<<http://investmentpolicyhub.unctad.org/IIA>>

United Nation International Law Commission (ILC) <<http://legal.un.org/ilc/>>

United Nation Reports of International Arbitral Awards (RIAA) <<http://legal.un.org/riaa/>>

United Nation Rule of Law <<https://www.un.org/ruleoflaw/>>

United Nations Sustainable Development <<https://sustainabledevelopment.un.org/>>

United Nations Treaty Collections <<https://treaties.un.org>>

World Bank <<http://www.worldbank.org>>

World Trade Organization <https://www.wto.org/english/docs_e/legal_e/legal_e.htm>

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