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NUS CENTRE FOR INTERNATIONAL LAW COLLECTION OF ARTICLES ON AN APPELLATE BODY IN ISDS

The Impetus for the Creation of an Appellate Mechanism

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Abstract—By design, investor-State arbitration affords no possibility of review for errors of law for arbitral awards rendered under the ICSID regime, and rarely pursuant to judicial review for non-ICSID processes. The long-standing 'one-kick-at-the-can' nature of international arbitration has generated concerns from some critics, which in turn have coalesced into a call for the creation of a centralized appellate review mechanism. Establishing an appellate body is seen by some commentators as a way to resolve inconsistencies in how similar and identical points of law are interpreted and applied. While investor-State dispute settlement (ISDS) has grown rapidly, the field is still nascent in many respects, and concerns about its legitimacy, efficacy, and long-term sustainability could endanger its future. The article presents a comprehensive review of the factors that have driven the pressure to create one or more appeals facilities to review arbitral awards for errors of law and fact. The discussion highlights the ways in which States have sought to remedy perceived problems or uncertainties in the ISDS system through a recent shift towards more detailed treaty-drafting. Better drafting will, it seems, inevitably lessen the risk of tribunals getting it 'wrong' on the law. Interestingly, for many proponents of an appeals mechanism, like the EU in its recent treaties with Canada and Vietnam, appellate review is but one part of a broader package of reforms that ought to be introduced in order to address a host of criticisms against the current system, including: the alleged problems with the constitution of tribunals (in particular, the tradition of party-appointed arbitrators and the lack of transparency and common understanding as to what is appropriate behaviour of parties and arbitrators when it comes to appointing a presiding arbitrator and deliberations); conflicts of interest for counsel and arbitrators; the alleged lack of arbitrator independence in comparison to tenured judges; perceived commercial incentives for arbitrators seeking further appointments, and how those might influence their exercise of judgment; skeletally drafted and generally worded treaty provisions that confer broad discretion on arbitrators; and, finally, how tribunals conceive of their role in evaluating State determinations of the public interest.

I. INTRODUCTION

By design, investor–State arbitral awards afford no possibility of review for errors of law under the International Centre for Settlement of Investment Disputes

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(ICSID)[2] regime and rarely pursuant to judicial review for non-ICSID arbitrations.[3] Unsurprisingly, this feature of investment arbitration leads to a simple, but significant, consequence: awards that are wrong on the law, but that result from an otherwise unobjectionable arbitral procedure, are essentially unchallengeable. The pressure for the creation of an appellate review mechanism has grown out of the scrutiny facing the investor–State dispute settlement (ISDS) system since the early 2000s. Establishing an appellate body is seen by some commentators as a way to resolve certain legitimacy issues within the system, such as the perception, in some circles, that investment jurisprudence is riddled with inconsistencies in the interpretation and application of similar or even identical points of law. With this objective in mind, this article examines the criticisms advanced by scholars, practitioners, non-governmental organizations (NGOs), States, and other interlocutors, which are said to pervade the traditional ISDS model.

The discussion endeavours to present a comprehensive picture of the factors that have driven calls for an appellate mechanism and, in certain instances, distinguishes those problems that have already been resolved in recent international investment agreements (IIAs), or are unfounded or over-stated, from the legitimacy and other issues that persist in the ISDS system. As the numerous criticisms listed below demonstrate, calls for the establishment of an appellate mechanism have not only focused on issues of consistency in arbitral awards. Instead, for many proponents of an appeals mechanism, appellate review is but one part of a package of reforms that ought to be introduced in order to address a host of criticisms of the ISDS regime, namely:

- the 'one-kick-at-the-can' character of investor–State arbitration, given the lack of review for error of law in annulment under the ICSID Convention and judicial review (non-ICSID) processes;[4]
- alleged problems with the constitution of tribunals—in particular, the tradition of disputing parties being able to appoint arbitrators and, when an appointing authority is not involved in the appointments process, the lack of transparency and common understanding as to what is appropriate behaviour of parties and arbitrators when it comes to appointing a presiding arbitrator and deliberations;
- conflicts of interest for counsel and arbitrators;
- the alleged lack of arbitrator independence in comparison to tenured judges;
- commercial incentives for arbitrators interested in attracting future appointments and how those might influence their exercise of judgment;
- skeletally drafted and generally worded treaty provisions that confer broad discretion on arbitrators and are thus capable of generating broad and/or idiosyncratic interpretations; and
- how tribunals conceive of their role in evaluating State determinations of the public interest.

[2] International Centre for Settlement of Investment Disputes (ICSID) <https://icsid.worldbank.org/apps/icsidweb/about/pages/default.aspx>.

[3] Albeit the grounds for review depend on the jurisdiction seized to conduct the review.

[4] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention); *ICSID Convention, Regulations and Rules*, Doc ICSID/15 (April 2006) <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf>.

While it is important to acknowledge the existence of the backlash against ISDS,[5] the commentaries assessed in this article range from the highly critical to the more nuanced concerns about the operation of specific features of the system,[6] largely from the vantage point of specialists in international trade and investment law, rather than from anti-globalization proponents who reject ISDS in its entirety.[7] It also warrants noting that different reform proposals naturally respond to different perceived problems with the ISDS system. The criticisms against investment arbitration are context specific, often reflect broad philosophical questions about the relationship between national and international law or whether international institutions improperly usurp powers better exercised by State institutions, and range from the general to the particular. Further, as trenchant as many of the above listed criticisms may be, not all relate to proposals for one or more appellate mechanisms, and, thus, they go well beyond the correctness of arbitral awards.[8] To be clear, some proponents of an appellate mechanism do not necessarily seek to replicate the multi-tier adjudication hierarchy present in most developed national legal systems. Instead, a standing or *ad hoc* appeals facility could preserve the structure of the existing investment arbitration mechanism (including the practice of party-appointed arbitrators) and simply add a new layer to it.[9]

Recent changes in treaty-drafting practice reveal the ways in which States have sought to remedy perceived problems or uncertainties in the ISDS system. Until the 2000s, States concluded skeletally drafted and generally worded treaties that conferred considerable discretion upon tribunals to give meaning to the core investment protections in concrete cases.[10] The European Union (EU)-led attempt to overhaul some of the long-standing features of ISDS reflects a continuation of a treaty-making trend that originated in North America (and was reflected in subsequent negotiations between individual countries and other States) under the North American Free Trade Agreement (NAFTA).[11] The pressure for increased transparency, for instance, arose from the public reaction to the early NAFTA cases, which led NAFTA ministers to favour open hearings and the publication of documents pertaining to NAFTA arbitrations. Treaty tools now

[5] See eg Michael Waibel and others (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010); Asha Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' (2009) 50(2) Harvard Intl LJ 491.

[6] The discussion also tries to avoid contending with allegations that are incomplete, anecdotal, or based on suspicion, speculation, or generalization.

[7] In examining the critical discourse in this field, this article presumes the continuation of investor–State dispute settlement (ISDS). That is to say, while opinions diverge, sometimes dramatically, on the merits and demerits of the prevailing ISDS regime, the purpose of this article is not to address the opposition of those who reject the system in its entirety. See eg Alex Stone Sweet, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (forthcoming, OUP 2017; chapter on file with the author).

[8] The perceived lack of transparency of ISDS, eg, has animated many of the criticisms waged against ISDS. Consequently, many States have embraced stronger transparency provisions in their recent treaties; States have done so without going on to consider adopting standing tribunals or an appellate mechanism.

[9] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2015: Reforming International Investment Governance* (UNCTAD 2015) 150 <http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf> accessed 18 October 2016.

[10] Open-textured provisions were common in the 'first generation' of investment treaties from the 1950s to the 1990s. See eg Zachary Douglas, 'The MFN Clause in Investment Arbitration Treaty Interpretation Off the Rails' (2011) 2 J Intl Dispute Settlement 97, 99–100.

[11] North American Free Trade Agreement between Canada, the US, and Mexico (signed 17 December 1992, entered into force 1 January 1994) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/-nafta-alena/text-texte/toc-tdm.aspx?lang=eng> accessed 26 October 2017 (NAFTA).

exist to make the arbitral process entirely transparent, with many States having embraced stronger transparency provisions in their recent treaties. However, with older treaties still in effect, some of the legitimacy concerns resolved in newer treaties remain relevant to the dialogue surrounding the establishment of an appellate mechanism.

The EU's new approach to investor–State arbitration, recently adopted in the Comprehensive Economic and Trade Agreement (CETA)[12] and the draft EU–Vietnam Free Trade Agreement (EU–Vietnam FTA),[13] responds to some of the criticisms facing ISDS.[14] Notably, the EU's two-tier investment tribunal system (ITS) replaces the 'traditional' ISDS system of *ad hoc* tribunals and party-appointed arbitrators with a permanent tribunal and an appeal tribunal, featuring a pre-selected roster of tribunal members. The appellate tribunal is competent to review the tribunal's decisions for errors of law and fact, in addition to the grounds stipulated in Article 52 of the ICSID Convention. Both treaties also contain a firm commitment that the respective parties will join with other interested parties to strive towards the creation of a multilateral investment court tribunal and appellate mechanism. Such a multilateral mechanism, if established, would supersede the permanent tribunal and the appellate tribunal established by CETA[15] and the draft EU–Vietnam FTA, respectively.[16] In August 2016, the European Commission released a document outlining the need for, and possible structure of, a multilateral appellate mechanism.[17] Akin to the process that initially brought the ITS concept to the fore, the EU announced its call for public input on further reforms to ISDS in December 2016 and, specifically, on the proposed multilateralization of the ITS.[18] The deadline for comments closed in March 2017.[19] At the time of writing, the EU's discussions with its trading partners are

[12] Canada-EU Comprehensive Economic and Trade Agreement (signed 30 October 2017, entered into force provisionally 21 September 2017; final text published 29 February 2016) <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf> accessed 19 September 2017 (CETA).

[13] Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (draft text published 1 February 2016) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 19 September 2017 (EU–Vietnam FTA).

[14] See Elsa Sardinha, 'The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement' (2017) 32(3) ICSID Rev—FILJ 625. Both CETA and the EUVietnam FTA are characterized as 'mixed agreements', which means that each EU Member State's Parliament must approve the treaty before it can enter into force. CETA entered into provisional effect on 21 September 2017, although it's investment chapter is excluded from this provisional application. Complicating this ratification process is Belgium's request, on 6 September 2017, for an opinion from the Court of Justice of the EU (CJEU) regarding the compatibility of certain aspects of CETA with European IIAs. Specifically, the CJEU has been asked to opine on the compatibility of the ITS with the exclusive competence of the CJEU to provide definitive interpretation of EU law, the general principle of equality and the "practical effect" requirement, the right of access to the courts, and the right to an independent and impartial judiciary. CETA provisionally entered into force on 21 September 2017. However, the dispositions on which Belgium is requesting the CJEU's opinion have been excluded from CETA's provisional application, and will only enter into force when all EU Member States have ratified CETA.

[15] CETA (n 12) art 8.29: 'Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism.'

[16] EU–Vietnam FTA (n 13) art 15.

[17] European Commission, *Establishment of a Multilateral Investment Court for Investment Dispute Resolution*, Doc DG Trade F2 (1 August 2016) <http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf> accessed 7 June 2017.

[18] European Commission, 'Questionnaire on Options for a Multilateral Reform of Investment Dispute Resolution' (27 December 2016) <http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233> accessed 27 December 2016. For the questionnaire, see <https://ec.europa.eu/eusurvey/runner/mutlilateralinvestmentcourt>.

[19] Results of the questionnaire received pursuant to the open consultation regarding a multilateral investment court can be found at < http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233> accessed 13 April 2017.

gaining momentum, although prior expressions of opposition from some countries will be challenging to overcome.[20]

II. GENESIS OF THE APPELLATE MECHANISM IDEA

The charges levelled at the perceived inadequacies of the ISDS system are far from novel. The debate about whether the current international investment law environment would benefit from the introduction of an appellate mechanism has been going on for some time.[21] However, despite past discussions on the topic, and various States reserving the possibility in their treaties of acceding to a future appellate body,[22] it was only in 2015 that certain States and stakeholders were moved to take concrete action. This delay, coupled with the fact that the EU advocates more reforms to ISDS than just adding an appellate mechanism, suggests that, until recently, the appellate review imperative by itself has not been a sufficiently strong driver for States to establish an appellate body. Interestingly, it might be that States have tolerated (and may continue to tolerate) a degree of inconsistency given the costs and complications involved in creating an appellate mechanism.

The original impetus for an appellate mechanism is said to date back to 1991 and has been credited to Sir Elihu Lauterpacht.[23] This proposal for reform moved into the mainstream during the debate leading up to the enactment of the US Trade Promotion Authority Act in 2002, during which the US reserved the possibility of creating an appellate body in future treaties.[24] Congress instructed US treaty negotiators to improve ISDS mechanisms through the establishment of 'a single appellate body to review decisions of investor-to-government disputes and thereby provide coherence to the interpretation of investment provisions in trade agreements'.[25] Pursuant to congressional direction, the 2004 US Model Bilateral Investment Treaty (BIT) required the inclusion of the following language in subsequent US investment treaties: '[W]ithin three years after the date of entry into force of the Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards.'[26]

[20] On 13 September 2017, the Council of the EU authorized the European Commission to formally open negotiations for the establishment of a multilateral investment court. In December 2016, Argentina, Brazil, India, Japan, and other nations reportedly met and rejected the multilateral investment court initiative. 'European Union and Canada Co-Host Discussions on a Multilateral Investment Court' *Investment Treaty News* (13 March 2017) <https://www.iisd.org/itn/2017/03/13/european-union-and-canada-co-host-discussions-on-a-multilateral-investment-court/> accessed 6 June 2017.

[21] Anders Nilsson and Oscar Englesson, 'Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?' (2013) 30(5) J Intl Arb 561, 573.

[22] All post-2002 US investment treaties contemplate this, such as Dominican Republic–Central America-United States Free Trade Agreement (signed 5 August 2004) (CAFTA–DR); Singapore–US Free Trade Agreement (entered into force 1 January 2004); Trans-Pacific Partnership (signed 4 February 2016, unsigned by the US on 23 January 2017, not yet in force) <tpp.mfat.govt.nz> accessed 25 February 2016 (TPP).

[23] David Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges' (2009) 39 Vanderbilt J Transntl L 40, n 2; Elihu Lauterpacht, *Aspects of the Administration of International Justice* (CUP 1991); Stephen Schwebel, 'The Creation and Operation of an International Court of Arbitral Awards' in Martin Hunter, Arthur Mariott and VV Veeder (eds), *The Internationalisation of International Arbitration* (Martinus Nijhoff 1995) 115.

[24] Bipartisan Trade Promotion Authority Act of 2002, Pub L No 107-210, 116 Stat 993 (enacted 6 August 2012) (Trade Act of 2002).

[25] ibid art 3802(b)(3)(G)(iv).

[26] Model US BIT (2004) art 28.10.

Seeing this new interest in Washington, and the discussion that it provoked, ICSID began to consider the idea in 2004.[27] In recognition of the fact that as many as 20 ICSID Convention signatories had begun to reserve the possibility of establishing an appellate mechanism in their (BITs) and free trade agreement (FTAs), the ICSID Secretariat proposed that an optional appeals facility be established under the ICSID Additional Facility (AF) Arbitration Rules.[28] The facility could be authorized to hear appeals from awards [rendered pursuant to ICSID, the ICSID AF Arbitration Rules, or the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules[29]] which parties agreed in their treaties to submit for appellate review.[30] Commentators have observed that the lukewarm response from States to this initiative 'dampened the reformist spirit', and the ICSID Secretariat suspended consideration of an appellate facility, calling its earlier proposal 'premature'.[31]

III. LEGITIMACY CONCERNS

The number of investor-State disputes has risen significantly in the past 20 years. International investment arbitration is most frequently based on BITs, followed by claims brought pursuant to multilateral or regional treaties, such as the Energy Charter Treaty (ECT),[32] NAFTA, the Dominican Republic-Central America Free Trade Agreement,[33] and others. This veritable growth in ISDS has generated some controversy from the perspectives of State executive and legislative branches, the scholarly community, the arbitration profession, various civil society actors, and the general public.

Yet the negotiation of IIAs continues.[34] To date, approximately 3,300 BITs have been concluded.[35] The vast majority of these treaties contain arbitration clauses that provide for investor–State arbitration.[36] While variations across different IIAs certainly exist, the prevailing investor–State model typically includes the following three elements:

(i) a claimant investor that meets the treaty's standing requirements may bring a claim directly against the host State;
(ii) the dispute is heard by a tribunal constituted *ad hoc* to hear that particular dispute; and
(iii) the claimant and the respondent State can appoint an arbitrator and generally participate in the selection of the presiding arbitrator.

[27] For discussion of ICSID Convention's drafting history, see JC Thomas and HK Dhillon, 'The ICSID Convention, Investment Treaties and the Review of Arbitration Awards: The Evolution of Investment Treaties and Arbitration' (2017) 32(3) ICSID Rev—FILJ 459.
[28] ICSID Arbitration (Additional Facility) Rules (April 2006) (ICSID AF Arbitration Rules).
[29] Arbitration Rules of the United Nations Commission on International Trade Law (1976) (UNCITRAL Arbitration Rules).
[30] ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, discussion paper (22 October 2004).
[31] Antonio Parra, the principal drafter of the 2004 ICSID Secretariat discussion paper, explained at a June 2005 ICSID conference that the proposal for an ICSID-based appellate mechanism had been premature, and the subsequent iteration of the working paper did not mention the proposal.
[32] Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998).
[33] CAFTA-DR (n 22).
[34] UNCTAD (n 9) 106.
[35] ibid. UNCTAD provides an extensive database on international investment agreements <http://investmentpolicyhub.unctad.org/IIA> accessed 6 June 2017.
[36] Kaj Hobér, 'Does Investment Arbitration Have a Future?' in Marc Bungenberg and others (eds), *International Investment Law* (Hart 2015) 1873.

Most IIAs provide for ICSID arbitration under the ICSID Convention Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules),[37] but many also confer a choice of arbitral rules upon the claimant (allowing, for example, for arbitration under the UNCITRAL Arbitration Rules,[38] the ICSID AF Arbitration Rules,[39] and other regimes, such as the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce).[40]

The nature of investment disputes has also changed over time. Most present-day claims engage the fair and equitable treatment and indirect expropriation standards of protection rather than the more straightforward claims of nationalization or direct expropriation. Claims sometimes challenge States' regulatory measures taken in relation to environmental, energy, health, privatization, subsidies, taxation, natural resource management and exploitation policies, and responses to economic crises.[41] The potentially far-reaching political, financial, legal, and social implications of investment tribunal awards on governance and the public interest makes this private arbitral system—which is entirely disconnected from domestic court and administrative law processes in the case of ICSID arbitration (and substantially free of any judicial review on the merits in non-ICSID cases)—prone to scrutiny and criticism. Important issues of public interest, associated with the right of States to regulate commercial activities in a way that is compatible with their domestic obligations to their citizenry, can conflict with investors' conceptions of what treatment they are owed.

Some commentators contend that concerns about ISDS stem from the perception, in some circles, that 'investment treaty arbitration is pro-investor, or anti-developing state; that jurisprudence is incoherent, riddled with contested interpretations; and that the levels of monetary compensation are too high'.[42] Conversely, supporters of the ISDS regime maintain that arbitral awards are not as pro-investor, unpredictable, and insensitive to the public interest as some critics claim.[43] Somewhere in between these two camps is the view that the legitimacy concerns beleaguering investor–State arbitration are merely 'growing

[37] ICSID Rules of Procedure for Arbitration Proceedings (April 2006) (ICSID Arbitration Rules).

[38] UNCITRAL Arbitration Rules (n 29).

[39] The ICSID AF Arbitration Rules (n 28) set out a framework for conciliation and arbitration proceedings for the settlement of investment disputes: (i) where either the State party to the dispute or the home State of the foreign national involved is not a contracting State of the ICSID Convention; (ii) where the disputes do not arise directly out of an investment, provided that at least one of the parties is a contracting State or a national of a contracting State; and (iii) where fact-finding proceedings are required.

[40] Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2010).

[41] Joachim Karl, *Investor-State Dispute Settlement: A Government's Dilemma*, Columbia Center on Sustainable Development (18 February 2013 <http://justinvestment.org/2013/02/investor-state-dispute-settlement-a-governments-dilemma/> accessed 6 June 2017; Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator' EJIL (forthcoming) (discussing how controversial cases have, in part, driven the legitimacy discourse and elicited direct responses by States. Examples include the large number of cases filed against Venezuela, Bolivia, and Ecuador after they countries passed nationalization laws, which led to a denouncement of the ICSID Convention and the termination of many BITs).

[42] Langford and Behn (n 41); see also Gus van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall LJ 211, 251; Malcolm Langford, 'Cosmopolitan Competition: The Case of International Investment' in C Bailliet and K Aas (eds) *Cosmopolitanism Justice and its Discontents* (Routledge 2011).

[43] See eg Charles Brower and Sadie Blanchard, 'From Dealing in Virtue to Profiting from Injustice': The Case against Re-Satisfaction of Investment Dispute Settlement' (2014) 55 Harvard Intl LJ 45; Joseph HH Weiler, 'European Hypocrisy: TTIP and ISDS' EJIL Talk (21 January 2015) <http://www.ejiltalk.org/european-hypocrisy-ttip-and-isds/> accessed 6 June 2017.

pains'[44] and that the system will continue to evolve and adapt into a more effective and consistent mode of resolving disputes, which might be led, in part, by the arbitrators themselves.[45]

Although strictly speaking not a source of law, investor–State awards contribute to the development of a *de facto* body of international investment law as well as to the evolution of public international law.[46] As such, investment tribunal awards influence States' policies beyond the immediate disputes they resolve (although the degree to which this might occur is debated by commentators).[47] States are, naturally, wary of attracting liability, notwithstanding: (i) the principle that there is no formal rule of *stare decisis* in international law; (ii) that the decisions of international tribunals are binding only upon the parties to a particular dispute; and (iii) that tribunals usually confine their awards to monetary damages and costs.[48] Hence, the perception of 'regulatory chill' on States' right to regulate is a result of legal challenges to regulatory measures that might prove controversial with investors. This might help explain why States have moved towards including text in their treaties that clarifies and constrains the bounds of fair and equitable treatment in an attempt to provide greater direction to tribunals for distinguishing between an indirect expropriation and *bona fide* regulatory measures.

While ISDS has grown rapidly, some commentators warn that the field is still nascent in many respects, and concerns about its legitimacy, efficacy, and long-term sustainability could endanger its future.[49] The criticisms voiced against international investment arbitration stem, in part, from the absence of a centralized form of review. Each tribunal is sovereign in respect of the dispute and the parties before it, and no tribunal is bound by the decisions of any other tribunal. Such review mechanisms as currently exist—the annulment process under Article 52 of the ICSID Convention and judicial review in the place of arbitration for non-ICSID arbitrations—do not permit review for errors of law. Nonetheless, there is currently no single, permanent appeals facility empowered to resolve inconsistencies in the application of treaties. Further fueling these legitimacy concerns is the allegation of biased arbitrators by some critics.

Unsurprisingly, some commentators provocatively question the future of international investment arbitration, and some actively seek its replacement with alternative regimes.[50] Yet, at the same time, the negotiation of BITs or FTAs with investment chapters continues. This suggests that States have not turned their

[44] Andrea K Bjorklund, 'Report of the Rapporteur Second Columbia International Investment Conference: What's Next in International Investment Law and Policy?' in J Alvarez and others (eds) *The Evolving International Investment Regime: Expectations, Realities, Options* (OUP 2011) 219.

[45] Langford and Behn (n 41).

[46] Domenico Di Pietro, 'The Use of Precedents in ICSID Arbitration: Regularity or Certainty?' (2007) 3 Intl Arb L Rev 96; Jeffrey P Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' (2007) 24 J Intl Arb 129; David Collins, 'ICSID Annulment Committee Appointments: Too Much Discretion for the Chairman?' (2013) 30 J Intl Arb 340.

[47] Stone Sweet (n 6) 8 (contending that 'it is widely recognized that international courts – including arbitral tribunals – can (and should) produce case law, the persuasive authority of which will depend on its longevity, coherence, and relevance to stakeholders beyond the parties'); Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 J Intl Disp Settlement 5.

[48] Some treaties go so far as to state that if the tribunal orders restitution, it must also prescribe damages as an alternative, see eg NAFTA (n 11) art 1135.

[49] Charles T Kotuby, Jr and Luke A Sobota, 'Practical Suggestions to Promote the Legitimacy and Vitality of International Investment Arbitration' (2013) 28(2) ICSID Rev—FILJ 2, 454; Johanna Kalb, 'Creating an ICSID Appellate Body' (2005) 10 UC J Intl L & Foreign Affairs 179, 181.

[50] Hobér (n 36) 1873; M Sornarajah, 'The Past, Present and Future of the International Law' in Wenhua Shan (ed), *China and International Investment Law* (Martinus Nijhoff 2014) 24.

backs on investor–State arbitration. Rather, they are engaged in a process of recalibration, elaboration, and restatement of the procedural and substantive aspects of treaties. The fact that they have begun to engage in this process, and to consider appellate review options, has not diminished all the criticisms, but a shift in treaty-drafting practice has arguably assuaged certain legitimacy concerns.

A. *The EU's New Approach to Investor–State Arbitration: A Permanent Appeal Tribunal*

Recent events surrounding the negotiations between the US and the European Commission to conclude the Transatlantic Trade and Investment Partnership (TTIP), which date back to July 2013, but remain uncertain since US President Donald Trump took office in early 2017, illustrate some of the legitimacy concerns currently facing ISDS.[51] The TTIP (if the parties are able to conclude an agreement, and it enters into force) would constitute the first preferential trade and investment agreement between two of the world's two dominant economic powers, the effect of which is to eliminate nearly all tariffs and many non-tariff barriers, provide better access to markets and possibly increase regulatory coherence.[52] However, at the time of writing, the EU–US trade deal is said to be in 'deep freeze', 'locked in a filing cabinet and the code to open it had been lost'.[53] However, the most notable feature of its draft investment chapter—the investment tribunal system—remains alive and well in CETA and the EU–Vietnam FTA.

In Europe, the inclusion of an ISDS provision in the TTIP was met with fierce resistance from the public, anti-globalization non-governmental organizations (NGOs), and a few EU Member States (particularly parliamentarians from France and Germany). These stakeholders expressed fears that the TTIP would make it more difficult for governments to regulate markets for the public benefit.[54] In March 2014, the European Commission issued a consultation document, wherein it identified three main problems with ISDS—namely, a lack of transparency, the conduct and qualifications of arbitrators, and the absence of an appellate mechanism—and sought public comments.[55] Many of the 150,000 comments that were received were coordinated by NGOs and largely reflected a similar anti-ISDS sentiment. Some commentators opposed investor–State arbitration as the primary method of resolving treaty claims altogether, while others wanted to see a system in place with tenured judges and an appellate court.

[51] Transatlantic Trade and Investment Partnership (draft dated 12 November 2015) (TTIP).

[52] Doak Bishop, 'Investor-State Dispute Settlement under the Transatlantic Trade and Investment Partnership: Have the Negotiations Run Aground?' (2015) 30(1) ICSID Rev—FILJ 1, 1.

[53] Daniel Boffey, 'Hopes of EU-US Trade Agreement Put on Ice, Says Brussels Sources' *The Guardian* (5 June 2017) <https://www.theguardian.com/business/2017/jun/05/hopes-of-eu-us-trade-agreement-put-on-ice-say-brussels-sources?CMP=share_btn_link> accessed 12 June 2017.

[54] Adrian-Catalin Bulboaca and Marius Iliescu, *Future of ISDS in TTIP and Beyond: Is Now the Time for Reform?* (18 June 2015) <http://www.lexology.com/library/detail.aspx?g=8cbea00c-5008-4142-be72-de4bf48c647d> accessed 6 June 2017; European Federation for Investment Law and Arbitration, *A Response to the Criticism against ISDS* (17 May 2015) <http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf> accessed 6 June 2017; George Monbiot, 'This Transatlantic Trade Deal Is a Full-Frontal Assault on Democracy' *The Guardian* (4 November 2013) <http://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assaulton-democracy> accessed 6 June 2017.

[55] European Commission, *Public Consultation on Modalities for Investment Protection and ISDS in TTIP* (March 2014).

In May 2015, the European Commission released a concept paper, calling for the establishment of an 'investment court system' (nearly identical to the two-tier investment tribunal system that recently made its way into CETA and the draft EU–Vietnam FTA, respectively).[56] The 'court' would have the power to review investor–State awards for errors of law and manifest errors in the assessment of facts.[57] The European Commission also voiced concerns about the 'double-hatting' practice (arbitrators who also act as counsel or expert), which it asserted could 'give rise to conflicts of interest—real or perceived' in cases with similar facts and law at issue.[58]

In July 2015, the European Parliament voted in favour of the negotiation of the TTIP on the condition that the ISDS mechanism be replaced by tenured judges and an appellate mechanism,[59] and the EU's draft investment chapter was presented to the US in November 2015.[60] The TTIP proposal illustrates the importance for States of ensuring that investment arbitrators are independent and impartial. The EU's proposal attempts to remedy the double-hatting phenomenon by barring appeal tribunal judges from acting as counsel in investment arbitration cases. Significantly, both members of the tribunal and appeal tribunal would be prohibited from taking on work as legal counsel on any investment disputes and would be subject to strict ethical rules.[61]

As is the case with CETA and the EU–Vietnam FTA, in the TTIP context, the EU's appellate tribunal would have no jurisdiction to hear appeals from claims arising under other investment treaties. While it certainly could aid in ensuring consistency in TTIP cases, given the hundreds of BITs that remain in force, the potential for divergent interpretation of key substantive investor protections would continue.

B. *Different Perspectives on Legitimacy and the Difficulty in Identifying Wrongly Decided Cases*

Before turning to the discussion of the criticisms that have prompted proposals to create an appellate mechanism, two further aspects related to the legitimacy discourse warrant canvassing. First, there are differing perspectives on whether an appellate mechanism can achieve the high error correction objectives that its proponents foreshadow. Second, the generality of wording and skeletal drafting of treaties (particularly older instruments), and complicated underlying factual matrixes in each case (not always made publicly available), makes it difficult for

[56] The European Union's (EU) proposal in the TTIP (n 51) is that the appellate tribunal would be composed of six members; two nationals from the EU, two from the US, and two from other countries (one from each sitting on a panel in each case). The members would be appointed for a six-year term, once renewable. The grounds of appeal would be limited to: (i) error of law; (ii) manifest error on the facts (including relevant domestic law); and (iii) the grounds for annulment of an award under the ICSID Convention to the extent not covered by (i) or (ii). Appeals would have to be concluded within 180 days.

[57] European Commission, *Investment in TTIP and Beyond: The Path for Reform* (May 2015) 4 <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 6 June 2017.

[58] ibid.

[59] European Parliament Resolution of 8 July 2015 Containing the European Parliament's Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership (TTIP), Doc 2014/2228(INI)) (8 July 2015) xv < http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0252&format=XML&language=EN> accessed 6 June 2017.

[60] TTIP (n 51).

[61] *Draft Text of Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP)*, European Commission Fact Sheet, Reading Guide (16 September 2015) <http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm> accessed 6 June 2017.

critics to identify those cases that have been wrongly decided and, thus, would have benefitted from appellate review. These two issues should inform the realistic expectations on, and operative structure of, any appellate body.

With respect to the first point, as international investment arbitration evolves further, it might be increasingly important to differentiate whose concept of legitimacy is being referred to. One set of commentators query whether it is possible to meaningfully evaluate the arguments for and against the establishment of an appellate mechanism, which is aimed at improving the normative coherence and consistency of arbitral awards, 'in circumstances in which the multilateral consensus on substantive matters is not very evident'.[62] Judicial reasoning is not always constant or uniform among different legal regimes as well as between different fields within the same legal system. While a major theme underlying recent criticisms of investor–State jurisprudence is legitimacy, it might therefore be prudent to ask from whose perspective are these legitimacy concerns espoused. For instance, legitimacy from the point of view of the disputing parties would likely require that the process meet the standards set out in the treaty and that the arbitral proceedings be fair and accord with due process. By contrast, legitimacy may look quite different through the eyes of nationals of the respondent State, who ask why foreigners should have access to a legal remedy that is not available to nationals. This is particularly true if they construe the process as lacking democratic accountability because, in addition to the special right of access, the dispute is heard by an *ad hoc* tribunal whose members are appointed by the disputing parties and are not tenured judges.[63]

Second, there is a real difficulty in identifying wrongly decided arbitral awards. While it is challenging to document (aside from outlier cases like *CME v Czech Republic* and *Lauder v Czech Republic*), some commentators complain of inconsistency in arbitral decision making and of the tribunal dependency of outcomes.[64] Such instances normally involve the interpretation of not only similar provisions across different IIAs but also provisions of the same agreement in relation to virtually identical facts.[65] Generally worded treaties using open-textured concepts like 'fair and equitable treatment' contribute to the problem of perceived inconsistency in the jurisprudence.[66] If such a clause is taken at face value, it is inevitable that different arbitrators and tribunals would have different conceptions of what amounts to unfair and inequitable treatment. To the extent an award implies an idiosyncratic basis for that decision, this would cause discomfort.[67]

[62] Asif H Qureshi and Shandana Gulzar Khan, 'Implications of an Appellate Body for Investment Disputes from a Developing Country Point of View' in Karl P Sauvant (ed), *Appeals Mechanism in Investment Disputes* (OUP 2008) 272.

[63] That said, this line of argument tends to downplay the fact that the treaties and the regime that they create have emerged through the exercise of sovereignty by (usually) democratically elected governments.

[64] These were parallel cases decided by two separate tribunals in 2001, which produced conflicting decisions. August Reinisch called the *CME* and *Lauder* cases the 'ultimate fiasco in investment arbitration'. See August Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs the Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration' in Isabelle Buffard and others (eds), *International Law between Universalism and Fragmentation (Festschrift in Honor of Gerhard Hafner* (Martinus Nijhoff 2008) 116.

[65] Debra P Steger, 'Enhancing the Legitimacy of International Investment Law by Establishing an Appellate Mechanism' in Armand de Mestral and Céline Lévesque (eds), *Improving International Investment Agreements* (Routledge 2012) 5, 7.

[66] See Thomas and Dhillon (n 27).

[67] The generality of phrasing likely explains successive tribunals' attempts to identify elements of State behaviour that would give rise to a finding of breach. The doctrine of 'legitimate expectations', which until very recently was not

There are clearly some areas, such as divisions of opinion over clauses on the 'observance of undertakings' and the effect of most-favoured-nation clauses on access to international jurisdiction, which lend themselves more to inconsistent decisions.

The difficulty in identifying allegedly wrongly decided cases, however, might be tied to the generality of the substantive provisions in many treaties. J.C. Thomas posits that most awards that are susceptible to being labelled 'wrongly decided' are cases in which one disagrees with the normative choices underlying the reasoning rather than with an identifiable error of law made by one tribunal, but not the other. It might also be that differences in the form and expression of a tribunal's legal reasoning contribute to the perception that a case has been wrongly decided. Some reasons might be terse and reflect the generality of the phrasing of the applicable treaty to the point of appearing to *ipse dixit*, whereas others are more clearly embedded in a sophisticated conceptual framework of public international law. The vastly different ways awards are written inevitably reflect the different backgrounds and interests of arbitrators and lead to different processes in expressing legal reasoning.

This is another instance where States may fix the problem by drafting more detailed treaty provisions, perhaps thereby reducing the need for appellate review because tribunals have been given more guidance from the outset. In other words, there is a relationship between, on the one hand, the generality of wording and the skeletal drafting of treaties (particularly older treaties) and arbitral outcomes, on the other hand. If two tribunals are asked to analyse the same generally drafted treaty, it is unsurprising that they will arrive at different conceptions of what it means. This might not be the case with a more detailed and directive treaty such as the Trans-Pacific Partnership (TPP), CETA, or the EU–Vietnam FTA. If that is correct, the chances that tribunals applying properly drafted treaties will err in interpreting the law is lessened, and, hence, arbitral awards stemming from such treaties will be less likely to be susceptible to review for legal error.

It has also been noted that there is 'no obvious reason why thousands of specific treaties should be bundled together and interpreted in the aggregate unless systemic coherence is a goal of a significant number of users, arbitrators, and officials'.[68] Due to the serious heterogeneity across the network of IIAs, which is often intentional on the part of States, aiming for strong jurisprudential consistency may be counter-intuitive and might negatively impact confidence in the system. As such, if a multilateral appellate body were to be created, it would need to be constructed in a way that could accommodate this heterogeneity of treaty making. This may require a departure from consistency by the appellate tribunal, depending on the legal, factual, and circumstantial matrix of the dispute. Conversely, any accommodation by an appellate mechanism of the heterogeneous nature of the system should not be at the expense of consistency in legal interpretation, application of general rules of international law, and application of

expressed in investment treaties, is one such example of an arbitral construct aimed at divining the meaning of fair and equitable treatment.

[68] Stone Sweet (n 6) 7.

substantive treaty provisions that are similar in form and content. This is especially true with respect to the interpretation of issues related to the public interest.

IV. THE CRITICISMS

A. *The 'One-Kick-at-the-Can' Character of Investor–State Arbitration Given the Lack of Review for Error of Law in Annulment (ICSID) and Judicial Review (non-ICSID Processes)*

Errors of law result, in part, because *ad hoc* tribunals can, and sometimes do, come to conflicting decisions on similar or even identical points of law. Conflicting approaches to, and weaknesses in, the interpretative methodology employed by arbitrators have led to varying levels of quality and coherence in awards. *Ad hoc* tribunals sometimes render awards that differ in their application and interpretation of treaties that have been interpreted repeatedly by other tribunals. This has, in some instances, produced a fragmented, horizontal jurisprudence in which it can be difficult for investors and States to know what the law is under their investment treaties.[69] These often subtle, sometimes more obvious, differences in how arbitrators interpret certain procedural and substantive treaty provisions has, for some critics, led to a perceived reduction in the predictability of this form of dispute settlement. In a 'flat' system, with no centralized form of review to resolve occasional inconsistencies in the application of treaties and general rules and principles of international law, a growing chorus of commentators advocate that there should be a system in place to review investor–State awards for errors of law.

Why is an appellate mechanism for investor–State disputes even necessary in light of the existing avenues for annulment under ICSID or judicial review by national courts? The answer lies in the lacunae within the scope of review afforded to these limited review mechanisms, whose mandate falls intentionally short of that of a typical appellate body. ICSID awards are governed by the ICSID Convention, whereby review proceedings are conducted within the 'self-contained' ICSID system by an *ad hoc* 'Annulment Committee'[70] and only pursuant to an exhaustive list of grounds that does not include appeal for error of law. ICSID Annulment Committee decisions have consistently reflected the view that the role of that body is not that of a court of appeal from the tribunal, thus reinforcing the 'one-kick-at-the-can' nature of arbitration.[71]

In contrast, the review of non-ICSID investment awards is delocalized to domestic courts (located either at the seat of the arbitration or at one of the State parties to the treaty, depending on the precise language of the agreement). For cases under the UNCITRAL Arbitration Rules and the ICSID AF Arbitration

[69] N Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime (2017) 18 JWIT 585, 587, n 5. Compare the interpretation and application of NAFTA (n 11) in *Glamis Gold, Ltd v United States of America*, UNCITRAL, Award (8 June 2009) with *Merrill & Ring Forestry LP v Canada*, ICSID Case No UNCT/07/01, Award (31 March 2010).

[70] ICSID Convention (n 4) art 52(3).

[71] See eg *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Decision on Admissibility of the Application for Annulment (4 May 2010) (the Committee affirms that it is not an appeal body); *Klöckner* (1985) 2 ICSID Rep—FILJ 4 [61]; *Amco Asia I* (1986) 1 ICSID Reports 509, para 23; *MINE* (1989) 4 ICSID Reports 79 [5.04, 5.08]; *Amco Asia II* (1992) 9 ICSID Reports 3 [7.19, 8.08]; *Wena Hotels* (2002) 6 ICSID Reports 129 [18]; *Vivendi* (2002) 6 ICSID Reports 34, para 62, 64; *CDC Group PLC v. Republic of the Seychelles* (2005) 11 ICSID Reports 237 [34–37]; *Mitchell v. DRC*, decision of 1 November 2006 [19–20].

Rules, for instance, applications to set aside awards must be brought in national courts and are normally subject to a highly deferential standard of review. The success of judicial review applications depends on the national laws of the State where review is sought, the legal traditions of the courts of that country, and the character of the award. There are obviously variations between different national legislative schemes governing arbitration issues. While there are certainly exceptions to this rule, the overwhelming majority of jurisdictions confine the grounds for vacating awards very narrowly.[72] In many States, awards may only be vacated if serious procedural errors exist; in other countries, a limited review of the substance of the award is permissible, normally only on public policy grounds, which typically employs an exceptionally high threshold of proof.[73]

The ICSID Convention, the ICSID AF Arbitration Rules, and the UNCITRAL Arbitration Rules differ in their respective standards of review. The grounds on which an award can be challenged are narrowly defined in Article 53(1) of the ICSID Convention, Article V of the New York Convention,[74] and Article 34(2) of the UNCITRAL Model Law on Commercial Arbitration.[75] Decidedly, annulment and judicial review processes are not appeals or *de novo* assessments of the factual and/or legal findings in a particular case. By virtue of investment arbitration's 'embryonic institutional design',[76] awards cannot be appealed for errors of law,[77] for this would require a reconsideration of the merits of the case.

Opponents of establishing an appellate procedure contend that an appellate mechanism would run counter to one of the most fundamental principles of arbitration, namely that arbitral awards should not be capable of being revisited on the merits.[78] However, the absence of an appellate mechanism whose competence would contend with errors of law has become one of the most heavily criticized aspects of investor–State arbitration. Commentators question the effectiveness of the ICSID annulment system, particularly in the wake of several criticized annulment decisions.[79] Scholars and practitioners have noted 'considerable uncertainty' in the articulation and application of the standard of review applicable to the judicial review of arbitral awards by national courts in different jurisdictions.[80]

The arbitration community's attitude towards limiting the review of awards to errors of a procedural nature is driven, in part, by a desire for speed and finality in the proceedings.[81] While many parties may prefer the finality, efficiency, and cost savings typically associated with a 'one-shot' process, arbitration's paramount goal of finality has come under attack in recent years. In this regard, it appears that the

[72] Christoph H Scheurer and others (ed), *The ICSID Convention: A Commentary* (2nd edn, CUP 2009).
[73] Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham L Rev 1551.
[74] Convention on Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959) art V.
[75] United Nations Commission on International Trade Law Model Law (2006) art 34.
[76] Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 287.
[77] But can be reviewed for 'manifest' error.
[78] Hobér (n 36) 1877.
[79] See eg Dohyun Kim, 'The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration' (2011) 86(1) NYU L Rev 242; Claire Stockford, 'Appeal *versus* Annulment: Is the ICSID Annulment Process Working or Is it Now Time for an Appellate Mechanism' in Ian A Laird and Todd J Weiler (eds), *Investment Treaty Arbitration and International Law*, vol 5 (Juris Publishing 2012) 307.
[80] Henri C Alvarez, 'Judicial Review of NAFTA Chapter 11 Arbitral Awards' in Fréderic Bachand and Emmanuel Gaillard (ed), Fifteen Years of NAFTA Chapter 11 Arbitration (Juris Publishing 2009) ch 2, 103–71, 170.
[81] George Kahale III, 'Is Investor-State Arbitration Broken?' (2012) 9 TDM 7, 15.

pendulum of public opinion is swinging in favour of 'correctness' in arbitral awards. One commentator notes that the goals of legitimacy and consistency are 'too important to subjugate to the goal of finality, especially when cost and timing issues can be easily remedied'.[82]

A common argument against the establishment of an appeals mechanism is that an appeals facility would increase costs and delay in arbitral proceedings.[83] This might not be the case, in light of the high cost and delay, under ICSID annulment and judicial review, associated with remanding a case to the original or new tribunal or to further appeals.[84] Moreover, concerns relating to costs could be remedied by measures such as: (i) requiring the appellant to post security for costs of the appeal in the form of a bond or escrow agreements; (ii) imposing filing fees for appeals; (iii) establishing procedures for preliminary rulings;[85] and (iv) imposing sanctions for frivolous claims. This could help assuage investors' concerns about non-payment by States in the event that their appeals fail and help to deter frivolous applications for appeal.

B. *Constitution of Tribunals*

The parties' right to participate in the constitution of tribunals in investor–State arbitration has led to concerns over the system's legitimacy due to potential conflicts of interest when the disputing parties are allowed to appoint their arbitrators.[86] Where an appointing authority is not involved in the appointments process, some critics also allege a lack of transparency and common understanding as to what is appropriate behaviour of parties and arbitrators when appointing a presiding arbitrator and in deliberations. These two issues will be discussed in turn.

Recall that, for a three-member tribunal, each party (or side, in the case of multiple claimants and/or respondents) typically appoints one arbitrator, and the third and presiding arbitrator is either agreed by the disputing parties directly or selected by the

[82] Steger (n 65) 4.

[83] Gabrielle Kaufmann-Kohler, 'In Search of Transparency and Consistency: ICSID Reform Proposal' (2005) 2 TDM 1, 6; Rainer Geiger, 'The Multifaceted Nature of International Investment Law' in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 26; Jan Paulsson, 'Avoiding Unintended Consequences' in Sauvant and Chiswick-Patterson, ibid, 241, 257, 260; Christian J Tams, 'Is There a Need for an ICSID Appellate Structure?' in R Hoffman and Christian J Tams (eds) *The International Convention for the Settlement of Investment Disputes: Taking Stock After 40 Years* (Nomos 2007) 223, 228.

[84] Steger (n 65) 10–11.

[85] Christoph Schreuer, 'The Future of International Investment Law' (2015) in Marc Bungenberg and others (eds) *International Investment Law* (Hart 2015) 1904, 1907 (Schreuer states that '[a]n alternative that has been put forward repeatedly but has so far met with little response would be the introduction of a system of preliminary rulings. Such a mechanism would not correct a "wrong" decision but would address the problem of inconsistency through preventative action. Preliminary rulings would be rendered upon a tribunal's request while the original proceedings are still pending. Under such a system a tribunal would suspend proceedings and request a ruling on a question of law from a central and permanent body established for that purpose'; see also Gabrielle Kaufman-Kohler, 'Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?' in Emmanuel Gaillard and Yas Banifatemi (eds), *Annulment of ICSID Awards* (Stampfli 2004) 189; Christoph Schreurer, 'Preliminary Rulings in Investment Arbitration' in Sauvant (n 62) 207.

[86] See eg Albert Jan van den Berg, 'Charles Brower's Problem with 100 per cent: Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' *Arbitration International* (18 June 2015) 1–11; Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25(2) ICSID Rev—FILJ 339; Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnoush Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Brill 2011); Hans Smit, 'The Pernicious Institution of the Party-Appointed Arbitrator' (2010) 33 Columbia FDI Perspectives <http://www.vcc.columbia.edu/content/pernicious-institution-party-appointed-arbitrator> accessed 7 June 2017; Gus van Harten, 'The (Lack of) Women Arbitrators in Investment Treaty Arbitration' (2012) 59 Columbia FDI Perspectives <http://www.vcc.columbia.edu/content/lack-women-arbitrators-investment-treaty-arbitration> accessed 6 June 2017.

party-appointed arbitrators[87] (with or without consultation with the respective appointing party)[88] or by an appointing authority. Needless to say, the selection of arbitrators by the parties is one of the most powerful and attractive advantages of arbitration over national litigation,[89] but it is not without its challenges.[90]

As the early negotiating history of the ICSID Convention reveals, the drafters acknowledged that party involvement in the arbitrator appointment process might be 'the least desirable method' of constituting a tribunal because of the risk that each party would look upon its arbitrator as an advocate, such that 'the umpire would be the only true arbitrator'.[91] However, some proponents of preserving the system of party appointments insist the 'timeless right of the parties to choose the arbitrators' is essential to the perceived legitimacy of ISDS.[92] In line with this view, one commentator notes that to 'promote confidence in the international arbitral process, party input into the selection of arbitrators has long been common practice'.[93] In contrast, another commentator asserts that 'there is no such right' for a party to name an arbitrator and that, even if such a right existed, 'it would certainly not be fundamental'.[94]

Recent writings have focused on the allegation, voiced by some critics, that party-appointed arbitrators are inherently biased. It has been suggested that while many users of the investor–State regime view arbitrator independence as critical to legitimacy and effectiveness, there are others that worry that States may be reluctant to consent to *ad hoc* international tribunals unless they have an element of control over the selection of the decision makers.[95] Jan Paulsson once lamented that 'forgotten is the ideal of an arbitrator trusted by both sides'.[96] In response, Judge Charles Brower queried whether it was 'ever so that a party-appointed arbitrator was trusted by both sides?'[97] Brower noted that, in the end, most

[87] Most international arbitration rules provide that the two party-appointed arbitrator may select in arbitrations under the UNCITRAL Arbitration Rules (n 29). The term 'party-nominated' is employed in the case of arbitrations under the London Court of International Arbitration (LCIA), with only the LCIA having the power to 'appoint' arbitrators.

[88] Where the parties agree that the party-appointed arbitrators are to select the presiding arbitrator, they sometimes further agree that they are to be consulted by their appointed arbitrator in making his or her selection for the presiding arbitrator. However, in many recent cases, the two co-arbitrators have sought to sever any consultations with their appointing party by seeking party agreement to their coming up with a list of candidates for presiding arbitrator, which is then put to the parties for their ranking of the candidates.

[89] For the proposition that the right of a party to appoint its arbitrator 'has been one of the most attractive aspects of arbitration as an alternative to domestic litigation', see Charles N Brower and Charles B Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson–van den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded' (2013) Arb Intl 1, 9, n 10; Daphna Kapeliuk, 'The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators' (2010) 96 Cornell L Rev 47, 60; Loukas Mistelis and Crina Mihaela Baltag, 'Trends and Challenges in International Arbitration: Two Surveys of In-House Counsel of Major Corporations' (2008) 2 World Arb & Med Rev 83, 94.

[90] ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, vol II-1 (ICSID 1970) 40 <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf> accessed 6 June 2017.

[91] ibid. Discussed in greater detail, along with the nationality restrictions considered by the drafters of the ICSID Convention in Thomas and Dhillon (n 27).

[92] Brower and Rosenberg (n 90) 8.

[93] William W Park, 'Arbitrator Integrity: The Transient and the Permanent' (2009) 46 San Diego L Rev 629, 644.

[94] Paulsson (n 87) 348.

[95] See eg Erica A Posner and John C Yoo, 'Judicial Independence in International Tribunals' (2005) 93 California L Rev 1, 7; Jeffrey L Dunoff and Mark A Pollack, 'The Judicial Trilemma: Judicial Independence, Accountability and Transparency in WTO Dispute Settlement and International Investment Arbitration' (presented at PluriCourts Conference on Adjudicating International Trade and Investment Disputes: between Isolation and Interaction, 25–26 August 2016).

[96] Paulsson (n 87) 339.

[97] Brower and Rosenberg (n 90) 13.

tribunals are two-thirds appointed by each disputing party. The disputing party has the right to appoint one arbitrator and likely participates in agreeing on the chair but, with the exception of being able to mount a challenge, obviously has no say on the appointment of the arbitrator appointed by the other party.[98] Along similar lines, William W. Park suggests that '[s]uch party participation democratizes the process, serving to foster trust that at least one person on the tribunal (the party's nominee) will monitor the procedural integrity of the arbitration'.[99]

Another source of criticism is the fact that experienced counsel may sometimes select arbitrators that evince 'some inclination or predisposition to favour that party's side of the case, such as by sharing the appointing party's legal or cultural background or by holding doctrinal views that, fortuitously, coincide with a party's case'.[100] For instance, Martin Hunter observes that what he looks for in a party-nominated arbitrator is 'maximum pre-disposition towards [his] client, but with minimum appearance of bias'.[101] However, another commentator notes the danger of party-appointed arbitrators exerting undue influence on their co-arbitrators to reach conclusions sympathetic to that party.[102] Some might say this tactic of finding a 'reliable' arbitrator is unseemly and that a standing tribunal would remove the strategic advantage of a party appointing an arbitrator with a particular world view. This is all the more concerning given that 'the same facts can lead to different outcomes depending upon the tribunal's proclivities, especially those of the president or chairman of the tribunal, which can be gleaned from prior decisions or writings on the subject of investor-State relations'.[103] That said, it is not easy to infer judicial attitudes from published arbitral awards. Somewhat akin to the tasseography of reading tea leaves, it is often difficult to discern which arbitrator holds what view (or what compromises were made in the deliberations to reach a majority decision) because awards are often a melding of three individuals' different world views.

While some commentators note that certain arbitrators are appointed repeatedly,[104] one can also see a generational, regional, gender, and diversity shift in recent years, with several new individuals getting first-time appointments and lesser-known arbitrators increasing in popularity. Donald McRae posits that the rise of leaders in public international law, investment law, and international trade law is partly the consequence of market demand and the expansion of arbitral institutions, such as ICSID and the World Trade Organization's Appellate Body, which require the expertise of these individuals.[105] Some critics complain that the 'arbitration mafia' remains, and they allege that repeat arbitrators inter-change

[98] ibid.
[99] Park (n 94) 645.
[100] Doak Bishop and Lucy Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration' (1998) 14 Arb Intl 4.
[101] Martin Hunter, 'Ethics of the International Arbitrator' (1987) 53 Arb Intl 219, 223.
[102] Alexis Mourre, 'Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration' *Kluwer Arbitration Blog* (5 October 2010) <http://kluwerarbitrationblog.com/blog/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulsson%E2%80%99s-moral-hazard-in-international-arbitration> accessed 6 June 2017.
[103] Kahale (n 82) 3.
[104] Chiara Giorgetti, 'Who Decides Who Decides in International Investment Arbitration' (2013) 35 U Penn J Intl L 2, 431–86, 458, 460; Susan D Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 Harvard Intl LJ 435, 437.
[105] Donald McRae, 'International Economic Law and Public International Law: The Past and the Future' (2014) J Intl Econ L 17, 629.

roles as counsel and experts in investment arbitration cases, which compounds their influence and increases the potential for conflicts of interest.[106]

Some critics contend that the practice of having the parties appoint one or more of the arbitrators should be eliminated or transferred wholly to appointing authorities on the basis that party-appointed arbitrators are perceived to be partial to the party that has appointed them.[107] This potential for bias is alleged by critics to most often occur at the constitution of the tribunal stage of the proceedings, when the way in which party-appointed arbitrators interact with the party that appoints them is least transparent, particularly if they discuss the identity of candidates for appointment as the presiding arbitrator. While most institutional arbitration rules contain provisions that forbid unilateral discussions between the party-appointed arbitrators and the party that appoints them (save where this is mutually agreed by the parties), some commentators allege a lack of transparency in how party-appointed arbitrators interact with their appointing party and how this plays out during the tribunal's deliberations on both procedural issues and awards. Recall that, except where the parties agree that the presiding arbitrator must act alone on certain decisions, all procedural decisions and partial and final awards in the arbitration are preceded by a deliberation by all members of the tribunal. Yves Derains observes that sometimes the interest of the arbitrator is to favour the party that has appointed him or her, which constitutes collusion between the arbitrator and that party.[108]

An additional, albeit rare, concern is that the arbitrator might act as a sort of informant, who initiates or responds to unilateral discussions with the counsel that appointed him or her about the facts, proceedings, or draft decisions, as was the case with one of the arbitrators in the ongoing *Croatia v Slovenia* arbitration.[109] Further, it might be that an arbitrator attempts to derail the arbitration schedule by purporting 'to have a busy schedule that prevents him or her from participating in the meetings or refusing to deliberate by correspondence or, more severely, by resigning'.[110] These concerns also tie into another area that has generated considerable criticism, namely the lack of arbitrator independence when compared to judicial independence prevalent in many domestic legal orders.

B. *Conflicts of Interest for Counsel and Arbitrators*

Most, if not all, international arbitration rules contain provisions that state that arbitrators must be independent and impartial from the parties. However, the debate over when conflicts of interest actually become an issue, and how to deal with them, is far from settled.[111] The risk of actual or potential conflicts arises in all judicial contexts, but some critics contend that this is especially the case where *ad hoc* arbitrators are appointed.[112] Counsel naturally tend to recommend to their

[106] Giorgetti (n 105) 460; Alyx Barker, 'London: Taking on the Inner Mafia' (2012) 7 Global Arb Rev 6 <http://globalarbitrationreview.com/news/article/30863/> accessed 6 June 2017.
[107] Giorgetti (n 105) 431; Kahale (n 82) 5; Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (inaugural lecture as holder of the Michael R Klein Distinguished Scholar Chair, University of Miami School of Law, 29 April 2010).
[108] Yves Derains, 'The Arbitrator's Deliberation' (2012) 27 Am U Intl L Rev 274, 915.
[109] See Permanent Court of Arbitration <https://pcacases.com/web/view/3> accessed 6 June 2017.
[110] Derains (n 109) 915.
[111] James D Fry and Juan Ignacio Stampalija, 'Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes' (2014) 30 Arb Intl 2, 190.
[112] Gantz (n 23) 68.

clients arbitrator candidates that are knowledgeable in the field of law at issue, are reliable, exhibit certain legal philosophies, and have rendered past decisions in line with the outcome their clients want to achieve. The international law firms that frequently dominate large investor–State disputes naturally tend to put forth candidates that impress their clients with good 'track records', which perhaps helps to explain why several reputable arbitrators receive repeat appointments.

In contrast to the EU's two-tier investment tribunal system, it is possible that an appellate mechanism could be 'grafted' on top of the existing system and that parties would retain the power to appoint tribunal members. In that scenario, concerns about the prevalence of undisclosed conflicts of interest between party-appointed arbitrators and the parties' counsel who appoint warrant discussion. While recent treaty-drafting practice and many institutional arbitral rules evince a shift towards stricter conflict-of-interest disclosure obligations on arbitrators, there is still a perception among some critics that arbitrators do not always disclose everything they should. For instance, arbitrators might not always disclose instances where they wear 'double-hats'—namely, where they act as counsel or experts in other treaty cases in which the issues might be the same as those with which they are confronted as arbitrators.[113] The basis of the alleged bias in this scenario is that the arbitrator may not be perceived to be able to provide an impartial and independent approach to the same issues before them in the arbitration in question.[114] One commentator notes the difficulty in arbitrators being 'capable of such extraordinary compartmentalization', where the two conflicting roles are served concurrently or within the span of a few years.[115] Whether perceived or actual, conflicts of interest between members of the tribunal and counsel engender a lack of confidence in the investment arbitration system.

It is important to also highlight the contributions made by the ICSID Convention, which contains rules that disqualify arbitrators who do not exercise impartial and independent judgment. Granted, Articles 14 and 57 of the ICSID Convention set a high bar for disqualification, requiring evidence of 'manifest lack of the qualities' to result in removal of the arbitrator. The need to demonstrate 'manifest' lack of independence and/or impartiality in the context of any prior relationship between counsel and arbitrator creates, what some deem to be, a heavy burden of proof and one that is higher than ordinary conflict-of-interest rules in national systems as well as in commercial arbitration.[116] Some commentators assert that Article 6(2) of the ICSID Arbitration Rules, for instance, which requires an arbitrator to certify that he or she is independent and impartial and imposes a continuing disclosure obligation, 'is notably ambiguous and potentially very broad' in that it does not provide any guidance on what circumstances ought to be disclosed.[117]

The potential for conflicts is a significant challenge that must be addressed and internalized when structuring any eventual appellate mechanism. As one publicist points out, unless the appellate mechanism is a permanent court, like the International Court of Justice (ICJ) for instance, the arbitrators are likely to only serve part-time

[113] Kahale (n 82) 8.
[114] Loretta Malintoppi, 'Remarks on Arbitrators' Independent, Impartiality and Duty to Disclose in Investment Arbitration' (2008) 7L & Practice Intl Courts & Tribunals 351, 352.
[115] Kahale (n 82) 9.
[116] Audley Sheppard, 'International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer' *Oxford Scholarship Online* (September 2009) 2.
[117] ibid.

and work in their respective fields of expertise as arbitrators or counsel in international investment disputes.[118] This reality makes it particularly important that a strong code of conduct for conflicts of interest be developed for use by the appellate mechanism.

C. *Arbitrator Independence in Comparison to Tenured Judges*

Some critics argue that the threat of arbitrators' biases infiltrating their reasoning, and sometimes the outcome of the cases they sit on, 'cannot be disentangled from the more commonly cited problems with investor–State arbitration, namely issues of accountability, coherence and transparency … each of which poses its own challenges to judicial independence'.[119] One particularly ardent critic argues that the lack of secure judicial tenure for arbitrators—in what he calls 'a one-sided system of State liability, in which only investors bring the claims and only States pay damages for breach of the treaties'—makes arbitrators dependent on prospective disputants in a way that tenured judges are not, at least in highly developed judiciaries.[120] While certainly no domestic or international court is entirely void of concerns over its adjudicators' independence, this commentator argues that 'the judiciary remains the closest that modern constitutional democracy has come to an institution that is free from the economic levers that are controlled by senior decision-makers in government and business'.[121] In his view, public adjudicators, in contrast to privately appointed arbitrators, are more likely to be shielded from influences that affect their impartiality and pressure them to produce outcomes that improve their prospects for future enrichment.[122]

Courts instil confidence because they are perceived to be independent, the judges 'disinterested' in the proper sense of the word, in large part because they have a measure of tenure and their remuneration is not tied to their appointment. Some critical authors have argued that the perception of independence of traditional court judges is informed by their 'judicial security of tenure'—namely, that they are appointed for a set term and receive a predetermined salary, regardless of how they decide individual cases.[123] One such commentator states that security of tenure removes the temptation to further one's career by applying the law in ways that may improperly favour certain government and industry stakeholders.[124]

Domestic judges may nonetheless be susceptible to pressures from other judges, their family, the media, and/or other branches of government.[125] Some retired judges become arbitrators so it is conceivable that even tenured judges may be perceived to exhibit a pro-arbitration bias while on the national bench. At the end of the day, it must be acknowledged that any decision maker, at any decisional level, may ultimately exhibit some institutional or personal bias. That said, some still take the view that, under structures such as tenured judgeships under many domestic legal orders, the system in place reduces the likelihood of such bias seeping into judicial decision making.

[118] Gantz (n 23) 68.
[119] ibid 167; Theodor Meron, 'Judicial Independence and Impartiality in International Criminal Tribunals' (2005) 99 AJIL 2, 360–61.
[120] Gus van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 167.
[121] ibid 167.
[122] ibid 168.
[123] ibid.
[124] ibid.
[125] ibid.

D. *Commercial Incentives for Arbitrators Interested in Attracting Future Appointments and How Those Might Influence Their Exercise of Judgment*

A new class of full-time professional arbitrators has emerged (and the likely cause is the difficulty of avoiding conflicts of interest if they double-hat as counsel or expert *and* as arbitrator), which some say might be a result of the large increase in investor–State arbitrations initiated over the past two decades.[126] While some observers in the international arbitration community view this development optimistically and opine that it provides governments and business with a highly skilled 'private judiciary',[127] other commentators query whether the outcomes of investor–State awards are being influenced by an arbitrator's financial or strategic career interests and by the broader economic ambitions of the arbitration industry.[128]

One commentator highlights the view held by some critics that since investor–State arbitrations are only ever initiated by investors, arbitrators might depend on investors for future appointments and, ultimately, for work, which would make arbitrators more inclined to cater to their interests.[129] Noting this risk, the late Pierre Lalive observed that 'the activity of the international arbitrator can hardly be described, as it often was in the first half of the last century, as a '*nobile officium*'. The fact is that it has become a business (especially for lawyers, experts, engineers, accountants, and the like)'.[130]

Unsurprisingly, the rise of a professional class of arbitrators has sparked debate over the propriety of the party-appointment system (which is employed almost exclusively in investment arbitrations). In particular, the intersection between party involvement in the appointments process and perceived commercial incentives for full-time arbitrators raises interesting questions about the magnitude of the potential partisanship, or so-called 'moral hazard', said to attend the 'private judiciary'.[131] Paulsson and Derains suggest that the 'moral hazard' of partial arbitrators is real.[132] Party-appointed arbitrators sometimes generate what Derains describes as 'pathological' deliberations within the tribunal, when one or both of the wing arbitrators do not make decisions or offer solutions based on an objective analysis of the issues submitted to the tribunal 'but rather on a personal interest more or less disguised'.[133]

[126] David Branson, 'Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand Them' (2010) 25(2) ICSID Rev—FILJ 2, 367.
[127] Yves Dezalay and Bryant G Garth, *Dealing in Virtue International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996).
[128] Van Harten (n 42) 213.
[129] Gabrielle Kaufman-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?' *Geneva Centre for International Dispute Settlement* (3 June 2016) 12 <http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf> accessed 6 June 2017, citing several sources at n 37.
[130] Pierre Lalive, 'Absolute Finality of Arbitral Awards?' in Associação Portuguesa de Arbitragem (ed), *Revista Internacional de Arbitragem e Conciliaçao, Año I-2008* (Almedina 2009) 109 <http://www.arbitration-icca.org/media/0/12641359550680/lalive_absolute_finality.pdf> accessed 6 June 2017.
[131] Branson (n 126) 367–68.
[132] Paulsson (n 108). Paulsson noted the 'moral hazard' inherent in the party-appointment system and called for its abolishment; see also the article based on this speech: Paulsson (n 87); Yves Derains, 'Fifth Annual Lecture on International Commercial Arbitration' (presentation at American University Washington College of Law, Washington, DC, 11 November 2010); Yves Derains, 'The Arbitrator's Deliberation' (2012) 27 Am U Intl L Rev 4, 911–23.
[133] Derains (n 109) 914–15.

Gus van Harten is highly critical of entrusting arbitrators with the ultimate authority to resolve core matters of public law in investment treaty arbitration. He argues that the financial incentives of full-time professional arbitrators (as well as private lawyers and academics who occasionally sit as arbitrators) 'may be seen to encourage them while sitting as arbitrators to eschew a prudential approach to State liability'.[134] Unlike judges sitting at what is traditionally viewed as a 'real' court (national courts, the ICJ, the Court of Justice of the European Union, the European Court of Human Rights, the International Tribunal for the Law of the Sea, the Inter-American Court of Human rights, and so on), who typically receive a fixed salary, commercial arbitrators can earn relatively high hourly rates. Van Harten argues that arbitrators who render 'business-friendly' awards are often nominated by parties who hold those same interests, which could be seen a potential profit motive for arbitrators. Van Harten acknowledges that a conclusive finding of actual bias on the part of any individual, in any particular instance, or even systemic bias is difficult to adduce, but he nonetheless insists that the asymmetrical claims structure, as well as the lack of secure tenure, objective criteria for appointment, and restrictions on outside remuneration create temptations for arbitrators to render decisions that appease investors (claimants), States (respondents), or their counsel.[135]

Other commentators disagree that commercial incentives motivate arbitrators to decide one way or another. For proponents of this view, most arbitral appointments are made by parties on the basis of the arbitrators' views on international law, their ability to resolve the complex issues expeditiously, and their expertise in the legal areas at issue (rather than their business sense or any commercial incentives). Judge Charles Brower advances the view that an arbitrator's reputation for apparent bias would 'undercut his or her credibility (hence influence) within a tribunal'.[136] Similarly, the authors of the seminal *Redfern and Hunter* text posit that experienced counsel recognize that the 'deliberate appointment of a partisan arbitrator is counterproductive, because the remaining arbitrators will very soon perceive what is happening and the influence of the partisan arbitrator during the tribunal's deliberations will be dismissed'.[137] They further observe that it is far more strategic 'to appoint a person who may, by reason of culture or background, be broadly in sympathy with the case theory to be put forward'.[138] Rusty Park observes that a partisan party-appointed arbitrator will be seen to lack credibility, which 'users should realise (as many smart ones do)'.[139]

E. *Skeletally Drafted and Generally Worded Treaty Provisions That Confer Broad Discretion on Arbitrators and Are Thus Capable of Generating Broad and/or Idiosyncratic Interpretations*

This section further explores the criticism that skeletally drafted and generally worded treaty texts confer wide discretion on arbitrators and have led arbitrators to sometimes render conflicting awards on similar or identical points of law. IIAs impose binding legal obligations on host States and enforceable rights for foreign

[134] Van Harten (n 121) 151.
[135] ibid 218–19.
[136] Brower and Rosenberg (n 90) 15.
[137] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (OUP 2009) 266.
[138] ibid.
[139] 'The American President: An Interview with Rusty Park' (2011) 6 Global Arb Rev 28.

investors in the event of a breach. Yet, despite the seriousness of the endeavour, many IIAs still include potentially broad and vague provisions, arguably capable of supporting broad, diverging, and sometimes idiosyncratic interpretations. The result is a reduction of predictability and consistency in the jurisprudence, which some argue also increases the likelihood of tribunals delivering widely differing interpretations that might unduly limit a State's regulatory powers.[140]

For instance, all treaties include a provision requiring that States treat investments in a fair and equitable manner, but the specificities in how this rule is worded and understood in the context of customary international law may differ from treaty to treaty. The open-textured nature of the rule (particularly in older BITs), the ambiguous relationship between the vague treaty and equally vague customary rules, and States' interpretations of the content and relationship to both rules (not to mention the frequency of successful invocation by investors) makes fair and equitable treatment one of the most controversial aspects of investment protection law.[141] Due to the broad and vague wording associated with traditional formulations of commonly invoked standards in investment treaty arbitration, commentators note the difficulty for States of predicting what policies will violate the standard.

Accordingly, key concepts like fair and equitable treatment and indirect expropriation will likely continue to be more precisely defined within the treaty document itself, as has been the case with recent treaties like CETA and the EU–Vietnam and EU–Singapore FTAs. These treaties include detailed language that serves to clarify the scope of indirect expropriation and exclude claims by investors against legitimate public policy measures.[142]

F. *How Tribunals Conceive of Their Role in Evaluating State Determinations of the Public Interest*

Investment disputes involve large damage claims against States and sometimes require that arbitrators evaluate crucial government decisions, which have important policy implications for the State.[143] This reality engenders an inherent tension between the public nature of the interests at stake in international investment disputes and the private character of arbitration.[144] This contradiction, which also manifests itself in traditional legal discourse and pits private ideas against public sensibilities, has led to legitimacy concerns in the field under study. Some critics allege that an appellate mechanism is needed to review arbitrators' evaluations of States' determinations of the public interest.

While some commentators note that tribunals have exhibited a relatively balanced approach to public policy questions,[145] others note the potential risk inherent in granting private individuals appointed in international investment cases

[140] 'Investment Treaties' *International Institute for Sustainable Development* <http://www.iisd.org/investment/law/treaties.aspx> accessed 6 June 2017.
[141] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford Monographs in International Law 2013) (book abstract).
[142] European Commission, *Investment in TTIP and Beyond: The Path for Reform* (May 2015) 2 <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 6 June 2017.
[143] Christian J Tams, 'An Appealing Option? The Debate about an ICSID Appellate Structure' *Essays in Transnational Economic Law* (June 2006) 5, 57.
[144] William B Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (2010) 35 Yale J Intl L 283, 285.
[145] Hobér (n 36) 1876.

the extraordinary power to make determinations on what were essentially issues of the public interest.[146] Van Harten questions the legitimacy of having an *ad hoc* tribunal 'usurp' the role of domestic courts, without any of the constitutional guarantees that accompany a national court's mandate.[147] Frequently, the key issues in investment law cases focus on the legality of State conduct, 'in an exercise that is analogous to constitutional judicial review in a national regime'.[148] This reality has informed the call to establish an appellate mechanism, in part to oversee consistency in legal interpretation in cases where the tribunal must evaluate States' regulatory policies and laws. On account of the often broad impact of a tribunal's decision on the functioning of a State, concise but thorough reasons also 'take on heightened importance when the respondent is a sovereign State with its exercise of sovereign prerogatives under review'.[149] It follows that the 'absence of detailed reasoning in a final judgment can engender a lack of confidence in the process and threaten the integrity of the tribunal itself'.[150]

V. CONCLUSION

The criticisms discussed in this article consider particularly problematic trends in investment arbitration, which have coalesced into the impetus for the establishment of one or more appeals facilities to review arbitral awards for errors of law and fact. The time is ripe for States to consider whether the creation of an appellate mechanism is 'the next logical step' in the evolution of ISDS.[151] The warning bells have been sounded for some time, and 'it would be wise to take action before they turn into a cacophony'.[152]

Proponents of an appellate review function contend that such a mechanism, if well-staffed and structured in such a way to address the relevant challenges and critiques, could enhance the consistency and predictability of the investment treaty regime by ensuring the proper application of the Vienna Convention on the Law of Treaties[153] and the applicable law provisions in treaties. More generally, an appeals body could act as a guardian over the application and interpretation of key procedural and substantive investment treaty provisions.[154] Any eventual appellate mechanism might have both the power to review awards for alleged errors of law as well as for manifest misapprehensions of fact.

While legitimacy cannot be measured solely by reference to consistency among arbitral decisions—on account of the vast variation across arbitral jurisprudence on individual treaty obligations as to when and why State parties may attract or escape liability—the corrective role envisioned for an appellate mechanism would promote predictability in investment law (at least with respect to the treaty at

[146] McRae (n 106) 634.
[147] See generally van Harten (n 121).
[148] Kotuby and Sobota (n 49) 464.
[149] ibid 455.
[150] ibid 455–56.
[151] Steger (n 65) 22.
[152] ibid.
[153] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980).
[154] Franck (n 74) 1617; Gantz (n 23) 74.

issue).[155] As a corollary, awards must be perceived to be fair, particularly since their enforcement rests, in part, on States' acceptance.[156] It 'therefore behoves the arbitral bench and bar to take whatever steps they can to mitigate criticism and burnish the legitimacy of investment arbitration'.[157] As early as 2008, Paulsson warned that if tribunals failed to 'deliver decent justice', one could expect 'sharp reactions', which may 'harm a very valuable tool'.[158] Just two years prior, Judge James Crawford agreed that an appellate body could eventually lend greater legitimacy to the ISDS regime.[159] Similarly, Doak Bishop suggested that review by an appellate tribunal of awards for alleged errors of law would increase the sustainability of investment treaty arbitration and legitimize the process.[160]

An appellate mechanism might not be able to address all of the criticisms waged against ISDS, but it certainly has the ability to rectify some of them and thereby help to promote legitimacy, coherence, and predictability in ISDS. That said, an appellate body is but one part of a solution. Better treaty drafting will, it seems, inevitably lessen the risk of arbitral tribunals committing errors of law in their interpretation of such provisions. In so doing, the argument for appeal for error of law becomes diminished with advances in the other areas discussed above. CETA and the draft EU–Vietnam FTA now each contain an appellate tribunal, and reflect a notable shift in treaty-drafting practice towards increased precision and detail. If these treaties enter into force, they might eliminate inconsistent interpretations of those treaties. However, if similar permanent investment tribunals and appellate tribunals were to proliferate on a bilateral basis as a result of the EU's new approach to ISDS, inconsistencies in the approaches of different tribunals under different treaties will likely persist, given the impossibility of such an approach having the jurisdiction to address inconsistencies in interpretation or application of corresponding provisions in different treaties.[161] As such, proposals for a multilateral appellate mechanism—such as that currently being discussed by the EU and its trading partners or a stand-alone appellate body bolted onto the prevailing ISDS system—might better ensure cross-treaty consistency in investment jurisprudence.

[155] Jürgen Kurtz, 'Building Legitimacy through Interpretation in Investor-State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Vinuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford Scholarship Online 2014) 270.

[156] Technically, in the case of Contracting Parties to the ICSID Convention (n 4), once they have ratified the Convention, under art 54, they must give effect to the pecuniary obligations of ICSID awards in their territories as if they were final judgments of their own courts and without engaging in any review process.

[157] Jan Paulsson, 'International Arbitration Is Not Arbitration' (2008) 2 Stockholm Intl Arb Rev 3; Kotuby and Sobota (n 49) 456.

[158] Paulsson (n 158).

[159] James Crawford, 'Is There a Need for an Appellate System?' in Federico Ortino and others, *Investment Treaty Law: Current Issues* (BIICL 2006) 1, 13.

[160] Doak Bishop, 'The Case for an Appellate Panel and Its Scope of Review' in Ortino (n 160) 17.

[161] Stephan 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 *ASIL Insights* 9 <https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping#_edn4> accessed 6 June 2017.