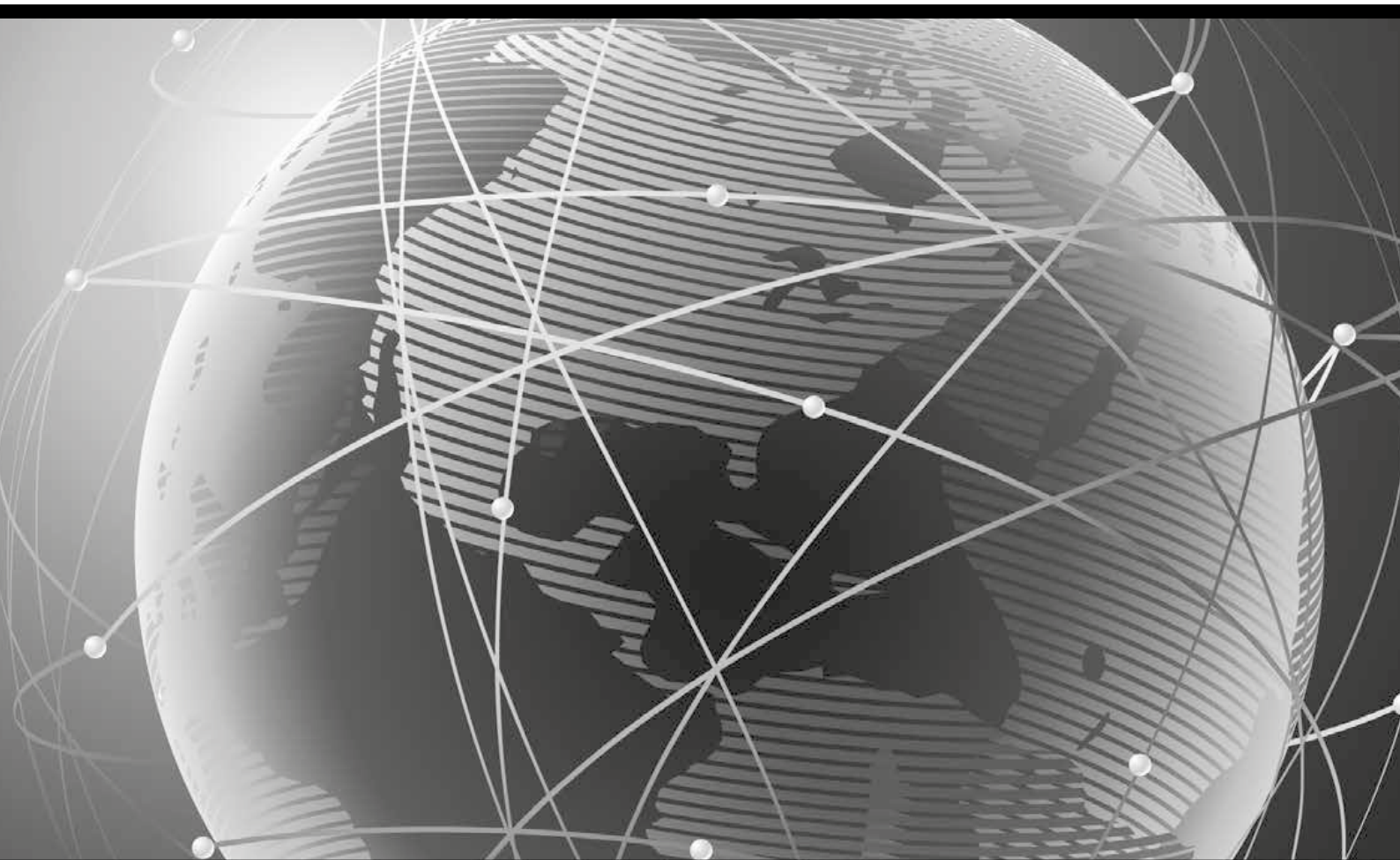




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Consistency, efficiency and transparency in investment treaty arbitration

November 2018



A report by the IBA Arbitration Subcommittee on Investment Treaty Arbitration

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Preface¹

In 2014, the International Bar Association (IBA) Subcommittee on Investment Treaty Arbitration (the ‘Subcommittee’) conducted a survey (the ‘Survey’) to gain an understanding of the criticisms levelled at investment treaty arbitration and the extent to which such criticism justified reform. The Survey contained 51 questions and covered a wide variety of topics, reflecting the practical experience of investor-state arbitration users. In 2016, the Subcommittee summarised the responses received (the ‘2016 Report’).²

The purpose of this report is to discuss the salient issues currently facing investment arbitration and to offer proposed solutions on the matters of concern raised in the Survey. Three broad topics are addressed – consistency, efficiency and transparency – which capture most of the subjects raised with the current state of investment treaty arbitration. Indeed, increasing consistency, efficiency and especially transparency foster the legitimacy of investor-state dispute settlement (ISDS). Each section of the report outlines specific questions and proposes potential solutions to the problems discussed, with the goal of affirming the overall legitimacy of investment treaty arbitration. Ultimately, the hope is that this report will both deepen the understanding of some of the challenges facing investment arbitration and promote a productive discussion concerning potential improvements.

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1 Editorial note: the report does not reflect changes to treaties and/or cases that were released after the contributions of the members of the Subcommittee on Investment Treaty Arbitration were received in August 2018.

2 IBA Subcommittee on Investment Treaty Arbitration, *Report on the Subcommittee’s Investment Treaty Arbitration Survey* (May 2016).

3 The members of the Subcommittee are listed at the end of this report in Appendix 1. They include government officials, representatives of arbitral organisations, academics, corporate counsel, arbitrators and arbitration practitioners.

Summary of the 2016 report

The 2016 Report provided a useful reference point for areas identified by stakeholders as needing reform.⁴ The Survey contained 51 questions on topics frequently raised in reform-related discussions. The Survey was designed by professionals in the field with the advice of a core advisory group comprising some of the leading experts in the field of investment treaty arbitration. Input was received from 109 individuals from a variety of jurisdictions.

The key findings of the Survey, as summarised in the 2016 Report, are set forth below:

Substantive protections and regionalisation

- More than half of the respondents expressed some concern regarding substantive inconsistency between arbitral decisions in investment treaty arbitration.
- Most respondents believed that an appellate mechanism for investment treaty arbitration could address that concern, in part.
- Most respondents believed that, to some extent, regionalisation of investment treaty protection was an issue of concern. Regionalisation of investment treaty protection refers to the phenomenon that has emerged in the past decade whereby states are increasingly framing their international investment agreements (IIAs) within larger regional arrangements. The North American Free Trade Agreement (NAFTA) and the attempted negotiations for a Trans-Pacific Partnership (TPP) Agreement and Transatlantic Trade and Investment Partnership (TTIP) represent examples of this.⁵ For instance, some commentators have argued that the overlap between bilateral and regional treaty layers, a consequence of this regionalisation phenomenon, ‘raises coordination challenges as parallel treaties may duplicate or contradict each other, increasing the risk of parallel proceedings, double jeopardy and normative conflict’.⁶

Arbitrator appointments, disclosure and challenges

- A large majority of respondents considered that parties should have the right to appoint an arbitrator.
- A majority expressed some concern about the distrust that parties may feel in the ability of arbitral institutions to appoint good arbitrators.⁷ This distrust may be heightened by the absence of system-wide disclosure practices and variations among institutional appointment policies.⁸

4 See generally, the 2016 Report.

5 See generally, N Jansen Calamita Calamita and Mavluda Sattorova, *The Regionalization of International Investment Treaty Arrangements*, British Institute of International & Comparative Law (2015).

6 Wolfgang Alschner, ‘Regionalism and Overlap in Investment Treaty Law – Towards Consolidation or Contradiction?’ (2014) 17(2) *J Int’l Econ L* 271.

7 Edna Sussman, ‘The Debate: Unilateral Party Appointment of Arbitrators’ (2013) 1(1) *ABA Section of Int’l L* 2.

8 David Gaukrodger, *Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview*, OECD Consultation Paper (2018) www.oecd.org/investment/investment-policy/ISDs-Appointing-Authorities-Arbitration-March-2018.pdf accessed 8 October 2018.

- A majority considered that the arbitrator disclosure process and arbitrator challenges were issues of particular concern.
- An overwhelming proportion of respondents considered the fact that certain arbitrators who had been previously appointed by the same party or the same law firm in a particular dispute should be reported to the other members of the tribunal and counterparties in an investment treaty arbitration.
- A majority considered that arbitrators should be able to act as counsel or legal experts in addition to serving as arbitrators.
- A majority considered that arbitrators may sit in proceedings involving *legal issues* that they previously decided in other proceedings.
- However, respondents were evenly divided on whether arbitrators should be permitted to sit in proceedings involving *factual issues* that they previously decided in other proceedings.
- Tribunal-appointed arbitral secretaries were not an issue of concern for a majority of respondents.
- Most respondents considered that the International Centre for the Settlement of Investment Disputes (ICSID) procedure for challenging arbitrators is in need of reform. This was not true with respect to the United Nations Commission on International Trade Law (UNCITRAL) and International Chamber of Commerce (ICC) Rules.
- A majority of respondents considered diversity (eg, gender, race, religion and sexual orientation) of arbitrators to be an issue of concern.

Arbitrator conduct and efficiency of proceedings

- An overwhelming number of respondents supported a code of conduct for arbitrators in investment treaty arbitration.
- The majority of respondents thought that arbitrator availability, duration of arbitration proceedings and the time taken to render awards were significant issues of concern in investment treaty arbitration.
- Slightly less than 50 per cent expressed some support for limiting document disclosure and approximately 30 per cent fully supported limitations on document disclosure.

Arbitration costs

- An overwhelming majority of respondents expressed some or significant concern about attorney's fees and expert fees, and to a lesser extent, concern was expressed about arbitrator fees.

Parallel and collective proceedings

- The majority of respondents indicated some concern over parallel court and arbitration proceedings by the same party against the same state and related parties against the same state, as well as parallel court proceedings by the state against the claimant or its affiliates.
- Some concern was also expressed about situations in which a single arbitration is commenced by unrelated parties under the same treaty, state respondent and measures at issue, and where multiple arbitrations are brought by the same or related parties under different treaties against the same state.

Assessment of damages

- Most respondents were significantly concerned with the assessment of damages.
- The majority thought that tribunals are reasonably equipped to quantify damages, but there was strong support for use of tribunal-appointed damages experts.

Third-party financing

- Just under half of respondents thought that third-party funding was a concern in investment treaty arbitration.
- A majority of respondents considered that the existence of third-party funding should not affect allocation of costs, and that security for costs should be available to parties faced with claims funded by third parties.

Standards for annulment or setting aside of awards

- The majority of respondents considered that ICSID annulment grounds do not require reform and that annulment committees or national courts hearing set aside applications have not often exceeded their mandates.

Transparency

- Despite criticism calling for greater transparency, such as public access to hearings and materials, most respondents were in favour of maintaining the status quo (and were against, eg, open hearings, publication of pleadings and third-party participation,).
- Respondents were strongly in favour of the mandatory publication of partial and final awards, which already exists in many cases.

Chapter 1: Consistency in investor-state arbitration

A legal system is consistent when it produces coherent solutions. Consistency engenders predictability, thereby contributing to the system's credibility and legitimacy. Conversely, a dispute system where comparable cases produce contradictory results is unpredictable, which increases disputes and their associated costs.

The debate over the lack of consistency in investment arbitration is not new. Several authors have extensively analysed instances of alleged inconsistency in an attempt to identify its causes and propose solutions.⁹

Certain features of investment law explain why it may be perceived as being more prone to inconsistent decisions than other areas of law. Specifically, its reliance on broad legal concepts and its decentralisation may foster inconsistent decisions, whereas other aspects, such as factual commonality and public availability of awards, may make the pre-existing inconsistencies more visible to observers.

Catalysts for inconsistency

- *Broad legal concepts:* The legal issues addressed in investment arbitration generally involve legal concepts that are designed to be applied to a broad range of situations, and, therefore, are open to criticism and different interpretations (eg, fair and equitable treatment (FET), full protection and security (FPS), transparency, and arbitrary and discriminatory treatment).¹⁰
- *Decentralisation:* The decentralised nature of dispute resolution under investment treaties contributes to its inconsistency: treaties provide for arbitration in the context of different arbitral institutions, each with its own set of differing rules; in addition, the mere nature of arbitration, where parties have a determining influence over the composition of the tribunal, allows for inconsistent results. Each dispute is decided by tribunals consisting of different arbitrators chosen by the parties, sometimes with opposing views on the relevant matters.¹¹
- *Newness:* Finally, international investment law only emerged in its current form in '1959, when Germany and Pakistan adopted a bilateral agreement, which entered into force in 1962'.¹² The ICSID was not established until 1965, and significant case law in international investment law did not begin to take shape until the early 1990s with the end of the Cold War.¹³ While it may appear that investment law offers less certainty than many areas of domestic law, this is, in part, a product of the fact that many (if not most) areas of investment law are in the process of being formed.

9 See eg, Gabrielle Kaufmann-Kohler, 'Is Consistency a Myth?' in Emmanuel Gaillard and Yas Banifatemi (eds), *Int'l Arbitration Inst, Precedent in International Arbitration* (Juris Publishing, Inc 2008) 137–148; Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham L Rev* 1521; Charles N Brower, Charles H Brower II and Jeremy K Sharpe, 'The Coming Crisis in the Global Adjudication System' (2003) 19 *Arb Intl* 415; ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, Annex, at 3 (22 October 2004) <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> accessed 8 October 2018.

10 Christoph Schreuer, 'Coherence and Consistency in International Investment Law' in Robert Ehandi and Pierre Sauvé (eds), *World Trade Forum: Prospects in International Investment Law and Policy* 1 (Cambridge University Press 2013).

11 *Ibid.*, 9.

12 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 6.

13 *Ibid.*, 9–11.

Magnifiers of inconsistency

- *Factual commonality*: Different cases with similar factual patterns are also common. In fact, it is not unusual for different cases to challenge a single state measure or group of measures affecting several investors. Occasionally, the common facts are not limited to the challenged measures, but also extend to the investment itself, which is sometimes jointly owned by different investors filing separate claims. The fact that different arbitration tribunals address similar facts contributes to the risk of inconsistent arbitral decisions.
- *Public availability of awards*: Investment arbitration cases and decisions are often publicly available and regularly attract attention as they deal with state policies and matters of public interest. Although transparency may be seen generally as a factor that increases consistency – because it allows arbitral tribunals and practitioners to have access to previous decisions – it also highlights contradictions among decisions by different tribunals. Scholars and practitioners closely scrutinise decisions focusing on contradictions and thereby increase the perception of inconsistency.

Some commentators contend that inconsistency is an inherent feature of investment arbitration.¹⁴ Eliminating inconsistency, they argue, would risk jeopardising the decision-maker's duty to decide the dispute in an accurate, sincere and transparent manner.¹⁵ The majority view, however, is that consistency in the interpretation of the applicable rules of investment law is a desirable goal, and thus, measures to avoid inconsistency should be developed and implemented.¹⁶ The Tribunal in *Saipem v The People's Republic of Bangladesh* expressly referred to consistency as a duty of arbitral tribunals and a necessary requirement to meet 'the legitimate expectations of the community of States and investors towards certainty of the rule of law'.¹⁷ However, this view is far from uniform, and differences on this issue have even arisen between arbitrators presiding over the same dispute. In *Burlington Resources v Ecuador*, co-arbitrator, Professor Brigitte Stern, wrote that arbitrators have a duty to 'decide each case on its own merits, independently of any apparent jurisprudential trend'.¹⁸ In opposition, Professor Gabrielle Kaufmann-Kohler commented that arbitrators have a contrary duty to instead 'adopt solutions established in a series of consistent cases' (absent compelling contrary grounds) to 'contribute to the harmonious development of investment law, and thereby meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law'.¹⁹

A solution to the status quo

Multilateralism/regionalism?

Since the end of the Second World War, 'bilateral investment treaties (BITs) have been the most important international legal mechanism for the encouragement and governance of foreign direct

14 Thomas Schultz, 'Against Consistency in Investment Arbitration' in Zachary Douglas, Joost Pauwelyn, and Jorge E Vinuales (eds) *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014).

15 *Ibid.*

16 See n 9 above, 1.

17 *Saipem SpA v The People's Republic of Bangladesh*, Decision on Jurisdiction, 21 March 2007, ICSID Case No ARB/05/07 67. See www.italaw.com/sites/default/files/case-documents/ita0733.pdf accessed 15 December 2017.

18 *Burlington Resources v Ecuador*, Decision on Liability, 14 December 2012, ICSID Case No ARB/08/5 para 187.

19 *Ibid.*

investment'.²⁰ For the past three decades, however, multilateralism has been on the rise.²¹ New regional and 'mega-regional' treaties have supplanted or supplemented older bilateral investment relationships.

Negotiations on a proposed multilateral agreement on investment (MAI) were launched by governments at the Annual Meeting of the Organisation for Economic Co-operation and Development (OECD) Council at Ministerial Level in 1995.²² In 2013, the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement entered into force,²³ and the China-Japan-South Korea Investment Treaty followed a year later.²⁴ In 2014, in what was perhaps the high-water mark for the trend towards multilateral investment agreements, the UN Conference on Trade and Development (UNCTAD) reported that upwards of seven mega-regional treaties were under negotiation and that some version of a MAI would touch over 80 developing and developed economies, and cover nearly all of the world's foreign investment flows.²⁵ At the time, approximately 45 states and four regional integration organisations were creating or revising model investment agreements.²⁶ These mega-regional treaties were meant to usher in a new era of harmonisation for international investment law with the hope that disparate obligations would converge, common approaches to interpretation would be formalised, and arbitral decisions would become more consistent over time. The perceived difficulties of a regime 'too big and complex to handle for governments and investors alike'²⁷ would be overcome.

One of the promised benefits of mega-regional treaties was to mitigate the risk of inconsistent interpretations.²⁸ Through mega-regional consolidation, similar overlapping treaty provisions would become more uniform in both substance and procedure. In turn, this would increase certainty in the

20 Zachary Elkins, Andrew T Guzman and Beth A Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000', (2006) 60 *Int'l Org* 81.

21 See Robert O Keohane, 'Multilateralism: An Agenda for Research', (1990) 45(4) *Int'l J* 731 (defining multilateralism as 'the practice of coordinating national policies in groups of three or more states'); John Ruggie, 'Multilateralism: The Anatomy of an Institution' (1992) 46(3) *Int'l Org* 561.

22 See OECD Press Release www.oecd.org/daf/inv/internationalinvestmentagreements/43389907.pdf accessed 8 October 2018. See also, David Henderson, *The MAI Affair: A Story and its Lessons* (The Royal Institute of International Affairs 1999) 20–32; Peter T Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now?' (2000) 34 *Int'l L* 1033, 1037; Sam Zia-Zarifi, 'The Multilateral Agreement on Investment: Special Report' 9 (1999) *YB Int'l Env L* 345.

23 ASEAN, *ASEAN Comprehensive Investment Agreement* (8 February 2013) [http://www.asean.org/wp-content/uploads/images/2013/resources/publication/2012%20-%20ACIA%20An%20Introduction%20\(Apr\).pdf](http://www.asean.org/wp-content/uploads/images/2013/resources/publication/2012%20-%20ACIA%20An%20Introduction%20(Apr).pdf) accessed 15 December 2017.

24 Trilateral Investment Agreement for the Promotion, Facilitation and Protection of Investment, China-Japan-S Kor, 13 May 2012 [ww.mofa.go.jp/announce/announce/2012/5/pdfs/0513_01_01.pdf](http://www.mofa.go.jp/announce/announce/2012/5/pdfs/0513_01_01.pdf) accessed 15 December 2017.

25 UNCTAD, *World Investment Report: Investing in the SDGs: Action Plan* (2014), XXV, 119 http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed 8 October 2018. In 2014, hopes were high that as of this writing the following multilateral treaties would be nearing completion: European Union-Canada Comprehensive Economic and Trade Agreement CETA; the Tripartite Agreement (the Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC) and Southern African Development Community (SADC)); EU-Japan FTA; the Pacific Agreement on Closer Economic Relations (PACER Plus – Australia, New Zealand and Pacific Island Forum developing countries); the Regional Comprehensive Economic Partnership (ASEAN, China, India, Australia, South Korea and New Zealand); TPP (NAFTA parties, Chile, Vietnam, Australia, New Zealand, Japan, Peru, Singapore, Malaysia and Brunei); TTIP (United States-EU). UNCTAD striking an optimistic tone noted: 'the more countries engage in IIA negotiations, including mega-regional ones, the more they create a spirit of action and engagement also for those countries that are not taking part'. *Ibid*, 116.

26 UNCTAD, *IIA Issues Note No 1* (2015 February) 1 http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf accessed 15 December 2017.

27 UNCTAD, *World Investment Report*, XVII (2011); see also Wolfgang Alschner, 'Regionalism and Overlap in Investment Treaty Law - Towards Consolidation or Contradiction?' (2014) 17 *JIEL* 271 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2430242 accessed 15 December 2017, noting that 'more than one BIT may result in difficulties'.

28 Mark Feldman, 'Mega-Regional Investment Arbitration', *Kluwer Arbitration Blog* (9 December 2016) <http://arbitrationblog.kluwerarbitration.com/2016/12/09/mega-regional-investment-arbitration> accessed 15 December 2017 ('Investment tribunals constituted under mega-regional FTAs thus could make significant – and much needed – contributions to the development of investment law by analyzing distinctions between intertwined trade and investment activities occurring in the contract of international production networks').

obligations undertaken by states, and benefit host countries and investors alike.²⁹

Events at the end of 2016 and 2017 caused the international investment law community to reassess the likelihood of this new era, at least in the Global North. Diplomatic setbacks in the negotiations of the TTIP and the United States' withdrawal from the original TPP proposal, as well as political challenges to the status quo attendant to Brexit and the 2016 United States election have called the promise of this new multilateral era into question. Nevertheless, in the Global South, multilateralism seems to have been proceeding at full pace.³⁰ At this stage, it remains difficult to predict whether we are entering into a new era of retrenchment from multilateralism or simply readjusting to the emergence of multilateralism in a different form, where countries like the US are no longer at the centre of gravity.

Moreover, increasing instances of overlap between regional treaties and BITs have raised separate concerns that the obligations in those instruments create duplicate or contradictory standards, thereby increasing, rather than decreasing, the risk of inconsistent results and parallel proceedings. The scepticism now evident on whether large multilateral relationships between states will shape the future is coupled with a renewed critique that ISDS is illegitimate and not sufficiently 'fit for purpose' as an ad hoc mechanism.³¹

The prevalence of overlapping international investment instruments resulting from regional treaties

Recent studies helped to clarify where overlaps exist within the investment law system and how multilateral agreements may affect the consistency of interpretation in a given ISDS dispute. One 2014 study demonstrates that about 24 per cent of all bilateral relationships are governed by more than one overlapping investment treaty or agreement, and upwards of nine per cent of all bilateral relationships are governed by more than three investment treaties existing in parallel.³²

This parallelism is sometimes by design and can result from carefully crafted integration efforts by a state or group of states to establish a floor of substantive obligations. At the same time, it permits those states to maintain a more nuanced or tailored bilateral relationship with individual states. In other instances, the overlap is accidental, or not well accounted for, and is the result of a state's membership in separate, but intersecting, regional groups.³³ The study cautions that 'the rise of regional investment arrangements can reduce, but also exacerbate, complexities in the investment universe, furthering or diminishing the prospect of coherence and convergence towards multilateralism', and that ultimately 'the impact of regionalism' on 'investment laws is, in the end, what States make of it'.³⁴ Thus, investment law's turn towards regionalism requires a balancing between the challenges to manage treaty overlap and the new opportunities to develop best practices

29 See generally World Economic Forum, 'Mega-regional Trade Agreements: Game-Changers or Costly Distractions for the World Trading System?' (2014 July) www3.weforum.org/docs/GAC/2014/WEF_GAC_TradeFDI_MegaRegionalTradeAgreements_Report_2014.pdf accessed 15 December 2017.

30 Matthew P Goodman, *From TPP to CPTPP*, CSIS (8 March 2018) www.csis.org/analysis/tpp-cptpp accessed 8 October 2018 (analysing the transition from TPP to CPTPP after the US's withdrawal in 2017).

31 Louise Woods, 'Fit for purpose? The EU's Investment Court System', *Kluwer Arbitration Blog* (23 March 2016) <http://arbitrationblog.kluwerarbitration.com/2016/03/23/to-be-decided> accessed 15 December 2017; Anders Nilsson and Oscar Englesson, 'Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?' (2013) 30 *JIA* 561.

32 See n 5 above, 271.

33 *Ibid.*

34 *Ibid* (citing UNCTAD, UNCTAD, *World Investment Report* (2013) 106–107) http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf accessed 15 December 2017).

arising from the interplay between trade and investment law.³⁵

Regionalisation has resulted in a large number of overlapping agreements that are subject to ISDS. This, in turn, has given rise to a significant risk of discordant interpretations of substantive obligations, divergent awards on similar facts, and ultimately the spectre that ISDS could be delegitimised as a viable system of international justice.

Tools to ensure consistency in arbitral awards in the context of multilateral treaties

Where regionalism is especially ascendant, some states have attempted to create tools to exercise control over their treaties and ensure that the obligations they have undertaken are interpreted consistently across their overlapping investment agreements. A review of some of the multilateral treaties negotiated in recent years offers insight into how states may be responding to concerns regarding overlap and inconsistency in ISDS awards. States may use these tools to ensure that tribunals provide consistent interpretations of the obligations they have undertaken to avoid conflicts between different legal regimes and instruments. Some of those tools are:

Draft substantive provisions to guide interpretation: The first and most obvious tool a state has to ensure consistent interpretation is to draft substantive provisions in the text that will guide interpretation. The US, for example, favours a separate annex that sets out two categories of expropriation – direct and indirect – and elaborates on factors that are relevant to determining when an indirect expropriation through regulatory conduct may occur.³⁶ Potentially less precise as guidance for a tribunal, although equally determinative, is text that links substantive obligations to an evolving area of the law. For example, states may tie the obligation to accord FET and FPS with customary international law, as a way to provide an objective standard that is grounded in both state practice and *opinio juris*, rather than based on any particular ad hoc tribunal’s view of what is unfair or inequitable.³⁷ Similarly, another example of how states guide the substantive interpretation of their obligations to ensure consistency is found in the European Union-Canada Comprehensive Economic and Trade Agreement (CETA),³⁸ which sets forth a closed list of acts that may violate the FET obligation.³⁹

Joint-interpretations: Another tool states have at their disposal in several regional IIAs is the ability to issue joint interpretations of their treaties. One such example is the Joint Interpretative Instrument, attached to the CETA between Canada and EU Member States. This instrument purports to

35 *Ibid* (noting that ‘[c]ountries have two broad options in managing the rise of regionalism. They can either use regionalisation to *de jure* or *de facto* consolidate overlapping treaties or they can opt for a co-extensive overlapping of treaty layers’, and that currently ‘the latter strategy seems to be the dominant one’).

36 ‘Except in rare circumstances, non-discriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives such as public health, safety, and the environment do not constitute indirect expropriations’. US Model Bilateral Investment Treaty: Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection Investment (2012) (the ‘US Model BIT’) <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 15 December 2017.

37 Many states have adopted this approach, including Australia, Brunei, Canada, Chile, China, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Japan, Mexico, Nicaragua, Peru, Singapore, South Korea, the US and Vietnam.

38 Eur Comm’n, *In Focus: Comprehensive Economic and Trade Agreement* (16 December 2016) <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> accessed 15 December 2017.

39 See, eg, Fabien Gélinas and Flavien Jadeau, ‘CETA’s Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation’ (2016) 1 *Transnational Dispute Mgmt* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2931503 accessed 15 December 2017. CETA Art 8.10.2 provides: ‘A party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment...’

clarify obligations ranging from the states' right to regulate to investment protection and dispute resolution, and expressly brings them in line with Article 31 of the Vienna Convention of the Law of Treaties (the 'Vienna Convention').⁴⁰ While these provisions are becoming more commonplace, it is unclear whether they are a practical means of achieving consistency across awards, especially in large multilateral treaties. Indeed, in NAFTA,⁴¹ the Notes of Interpretation of Certain Chapter 11 Provisions (Interpretation) have not been used much by the three state parties to clarify substantive provisions related to the minimum standard of treatment provision in Chapter 11 of the agreement. Furthermore, joint interpretations may impact consistency in instances where the statement effectively 'amends' rather than 'clarifies' the treaty, as was the case in *Pope & Talbot*, where the tribunal found that the aforementioned note to NAFTA effectively amended obligations under Article 1105 of the treaty.⁴² Moreover, it has been disputed, at least in the NAFTA context, whether joint interpretations and notes of interpretation are binding on investors.⁴³

Non-disputing party submissions by states: Perhaps the most underused tool that a state has to ensure the proper interpretation of its treaty provisions is the non-disputing party submission procedure.⁴⁴ These submissions are non-binding persuasive pronouncements by a single state on the meaning of certain provisions. In the US, for example, these submissions are the product of internal deliberations across many agencies. Most commentators and tribunals have recognised that state treaty-members' 'common, concordant, and consistent statements' of their intent with respect to a treaty provision provide the best evidence of its meaning.⁴⁵ Non-disputing party submissions are not as frequent as one might expect, however, especially considering that all member states, including non-parties to the dispute, have a right to submit statements on treaty interpretation, even without prior tribunal approval or party consent.⁴⁶ In addition, it is an open question whether tribunals sitting in an investment dispute under a mega-regional multilateral treaty will be able to discern common, concordant and consistent statements among more than 12, 16 or even 26 parties.⁴⁷

40 Council of the EU, Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States No 13541/16, 27 October 2016 <http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en> accessed 15 December 2017.

41 North American Free Trade Agreement, US-Can-Mex, 17 December 1992, (1993) 32 ILM 612. See also [www.italaw.com/sites/default/files/laws/italaw6187\(15\).pdf](http://www.italaw.com/sites/default/files/laws/italaw6187(15).pdf) accessed 15 December 2017. NAFTA is currently being renegotiated. A future revision or replacement to NAFTA could alter the investment arbitration provisions discussed throughout this report.

42 *Pope & Talbot Inc v Gov't of Can*, Award in Respect of Damages, 31 May 2002 www.italaw.com/sites/default/files/case-documents/ita0686.pdf accessed 15 December 2017.

43 David Gaukrodger, *The Legal Framework Applicable to Joint Interpretive Agreements of Investment treaties*, OECD Working Papers on International Investment, No 2016/01, OECD Publishing, Paris; Eleni Methymaki and Antonios Tzanakopoulos, 'Masters of Puppets? Reassertion of Control Through Joint Investment Treaty Interpretation' in Andreas Kulick (ed) *Reassertion of Control Over the Investment Treaty Regime* (Cambridge University Press 2017) 155–181.

44 'United Nations Convention on Transparency in Treaty-based Investor-State Arbitration' (2015) 54 ILM 747 (the 'Mauritius Convention'). See also www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf (2015) accessed 15 December 2017.

45 Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Points' (1957) 33 Brit YB Int'l L 203, 223 ('a consistent [subsequent state] practice must come very near to being conclusive as to how the treaty should be interpreted' [emphasis omitted]). See Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Roles of States' (2010) 104 AJIL 179, 200 ('Under Article 31(3)(b), tribunals look for a "concordant, common and consistent" sequence of acts or pronouncements about a treaty that "is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation"' (citing, eg, Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 137, and Arnold D McNair, *The Law of Treaties* (Clarendon Press 1961) 424).

46 In the NAFTA Chapter 11 context, the Art 1128 right to make submissions on treaty interpretation has been invoked by at least one non-disputing state party in the majority of NAFTA arbitrations concluded to date. This has not been the experience to date in CAFTA-DR Art 10.20.2 context. Whether and to what extent the six non-disputing state parties in any CAFTA arbitration will take advantage of these procedures remains an open question.

47 See n 27 above, Feldman ('[B]y including a large number of signatories, mega-regional FTAs could give rise to coordination challenges. Such coordination challenges could weaken the effectiveness of joint interpretation mechanisms – a form of control mechanism on which States can rely to limit the independence of tribunals constituted under a particular treaty').

Treaty drafting

Clear treaty drafting

Many commentators believe that inconsistency in awards is an inevitable consequence of the fact that there are more than 3,400 individual investment treaties, with numerous variations in the language used, to express the parties' substantive obligations.⁴⁸ These differences in treaty language may result in different interpretations and outcomes.

If a treaty is drafted clearly, it is less likely to lead to disputed treaty interpretations. The lessons from interpretations of early treaties have already been incorporated by many states into their new treaties, which are, typically, substantially more detailed than first-generation treaties. UNCTAD has expressly advised states to review their early generation treaties to revise any language that may be unclear.

However, a balance must be struck between broad, even if imprecise, language and overly detailed drafting, which may limit the inherent flexibility of concepts like FET, transparency, and arbitrary and discriminatory treatment. Leaving room for interpretation in treaty language also allows standards to be adapted to new situations.

Use of exceptions and reservations

The use of treaty drafting techniques such as exceptions, carve-outs and reservations should also be considered to increase the clarity of investment treaties. Traditionally, investment treaties were short documents that stated the substantive obligations agreed to by states, and rarely contained elaborate exceptions to or explanations of treaty coverage. This can be contrasted with other economic treaties, such as the World Trade Organization (WTO) Agreements and other free trade agreements (FTAs), which typically contain carefully negotiated exceptions that clarify the intended scope of the treaty for users and interpreters. Newer investment treaties have begun to include such exceptions. For example, CETA contains a number of annexes clarifying the investment chapter, exclusions to the chapter, joint declarations concerning the meaning of the text, and reservations from existing and future measures.⁴⁹

The use of exceptions is not without potential shortcomings. First, exceptions may limit the flexibility of international legal concepts that protect investors. Second, substantial exceptions – especially those that can be broadly interpreted in a dispute – may reduce the level of protection granted to investors. Whether it is desirable to decrease protections and eliminate flexibility in this way can be debated, given the small number of successful investor claims and the restraint shown by international tribunals, even absent specific carve-outs. Third, exceptions included in treaties are almost always backwards-looking, reflecting the state parties' attempts to update the treaty in response to investment disputes they have faced in the past. Consequently, they may not necessarily reflect the disputes that could arise in the future. Fourth, exceptions drafted in an overly rigid manner may restrict the ability of states to enact regulations and lead to further disputes regarding the scope of

48 See eg, Asia-Pacific Economic Cooperation's (APEC's) International Investment Agreements Negotiators Handbook: APEC/UNCTAD Modules for an idea of the dozens of different potential wordings used for each obligation and how these might affect interpretation.

49 See n 37 above, ch 8 and annexes; see n 40 above at Art 1108 and annexes.

the exceptions' application. These concerns should be weighed in deciding whether or not to include exceptions in investment treaties.

Availability of travaux préparatoires

Travaux préparatoires are another tool that may enhance consistency in treaty interpretation mechanisms. While states do not generally maintain *travaux préparatoires*, either because of record-keeping practices or due to the use of model BITs, future negotiators might consider doing so. Treaty drafts can also serve as legislative history, which may be a valuable aid to interpreters. Where such texts are available, making *travaux préparatoires* to treaties available to arbitrators would be a welcome step, as they can be resorted to under the Vienna Convention to confirm the ordinary meaning of the treaty or to determine its meaning when general principles of interpretation leave it ambiguous or obscure, or lead to a result that is manifestly absurd or unreasonable.⁵⁰ Of course, the use of *travaux préparatoires* is not without controversy, as they may introduce ambiguity into treaty interpretation, or be used to try to modify the intended interpretation of the final treaty language. Tribunals may, therefore, wish to limit the use of *travaux préparatoires* in disputes to only those situations when they are necessary to resolve a disagreement over interpretation.

Non-disputing state participation in arbitration

As mentioned in section (a) (ii) above, treaty provisions that give states a right to appear in an individual case to address the proper interpretation and/or application of the treaty in question may enhance consistency.⁵¹ While not determinative, the fact that the treaty parties are (or are not) in accord about the interpretation of a provision should be useful guidance to tribunals that must determine the intended meaning of that provision.⁵² Similarly, intervention of supranational institutions, such as the European Commission, in recent proceedings, may provide guidance as to how competing treaty obligations should be interpreted. The potential benefit from such outside intervention should be weighed against the possibility that such input may add complexity to proceedings, as well as the risk that non-disputing states will have diverging interpretations of the treaty.

Binding and non-binding interpretive notes

Some new treaties include a provision that gives state parties to a treaty the power to issue binding interpretive statements on the intended meaning of a treaty provision. This power was first exercised in NAFTA under Article 1131. At the time, a number of commentators were concerned that this would constitute a 'de facto' and retroactive amendment of the treaty. Alternatively, some have said that the interpretation issued by NAFTA, the Notes of Interpretation of Certain Chapter 11 Provisions (the 'Interpretation'), contributed to a more cohesive approach to the NAFTA FET standard. New treaties address the concern about possible retroactivity of binding interpretation by making notes of interpretation effective from the dates they are issued (or even from later dates), rather than making them instruments that purport to interpret both retroactively and prospectively.

50 Vienna Convention on the Law of Treaties, Arts 31–32, 23, 23 May 1969, 1155 UNTS 331.

51 See, eg, n 40 above, Art 1128.

52 *Ibid.*

For example, CETA provides that ‘[a]n interpretation adopted by the CETA Joint Committee shall be binding on the tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date’.⁵³ A related technique would be for states to issue non-binding guidance on treaty interpretation. For example, under NAFTA, the parties have issued statements for non-disputing party participation, notices of intent to submit a claim to arbitration and open hearings. While these do not purport to be binding, they have proved useful. While interpretative notes have provided helpful guidance in some circumstances, they may also carry the risk of introducing further ambiguity depending on their drafting. To the extent that interpretative notes are non-binding, parties should be conscious of their limited applicability, as attempts to overreach in issuing interpretative guidance may run into opposition to the extent they conflict with the treaty’s plain text.

Agreed upon interpretations by domestic authorities

Another tool is to include provisions allowing domestic regulatory agencies of the treaty parties to consult and agree on the interpretation of disputed legal provisions. This has been incorporated in the prudential measures provisions of the Canadian and American model investment agreements. These provisions essentially require the competent authorities of the claimants’ home state and the respondent to confer on whether a taxation measure constitutes expropriation.⁵⁴ Inter-state discussions may increase the predictability of outcomes for states and provide helpful technical analysis in some circumstances, but interpretation by state authorities may not necessarily increase consistency.

Adoption of stare decisis or jurisprudence constante approaches

Agreement that treaty interpretations by a prior tribunal carry persuasive value may also be helpful. Traditionally, investment treaty decisions were binding only as between the individual parties to the case, with some treaties expressly stating this rule (eg, NAFTA).⁵⁵ Over time, however, a number of arbitrators have recognised the systemic importance of consistency and have thus sought to follow prior decisions unless they were clearly incorrect. For example, in *Canadian Cattlemen v United States*, the tribunal noted that case law could be considered as a supplemental means of interpretation under Article 32 of the Vienna Convention.⁵⁶ In other cases, this approach has evolved into a doctrine known as ‘*jurisprudence constante*’, whereby tribunals strive to follow prior relevant decisions unless they are distinguishable on the facts or the tribunal believes they are wrongly decided.⁵⁷ Treaty drafters might consider requiring arbitrators to follow prior cases under the same treaty so that systemic consistency is ensured. This could be done by adopting a doctrine of precedent or *stare decisis*. However, the *stare decisis* rule is unknown to many national legal systems and might be questioned when it is not placed in the context of a hierarchical legal system where appeal courts

53 See n 37 above, Art 8.31(3).

54 See n 35 above and Canada’s Foreign Investment Promotion and Protection Agreements (FIPA).

55 See n 40 above, Art 1136(1) (‘An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case’).

56 *Canadian Cattlemen for Fair Trade v United States*, Award on Jurisdiction (UNCITRAL 2008) www.italaw.com/sites/default/files/case-documents/ita0114.pdf accessed 15 December 2017.

57 *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, Award, 14 November 2005, ICSID Case No ARB/03/29 www.italaw.com/sites/default/files/case-documents/ita0075.pdf accessed 15 December 2017.

can correct lower courts. The existence of a permanent investment court or other permanent interpretative body, as discussed in this report, may reduce this risk. Furthermore, the absence of full factual records and legal analysis of issues in prior cases may limit the ability of subsequent tribunals to apply or distinguish previous findings. An alternative to *stare decisis* and potential middle ground would be for treaties to adopt a softer approach to precedent, along the lines of the *jurisprudence constante* approach espoused by some arbitrators.

Procedural mechanisms

Tackling parallel proceedings

Parallel proceedings may threaten the credibility of investment arbitration as a public form of adjudication because, for some, they can run against the principle of legal certainty and undermine arbitration as a credible method of dispute settlement.⁵⁸

It is often in the context of parallel proceedings that inconsistency in investment arbitration arises. Well-known examples are the *CME* and *Lauder* cases, which involved parallel proceedings brought by a single investor against the same state, based upon the same set of facts and under two different BITs.⁵⁹ The two arbitral tribunals in both cases reached opposite conclusions – one found that the actions of the government entity at issue caused the destruction of the investment and awarded damages, while the other found insufficient proof of causation and dismissed the claim.⁶⁰ Another paradigmatic case is *Ampal-American Israel Corporation and others v Arab Republic of Egypt*,⁶¹ in which Ampal-American Israel Corp and other companies brought an investment arbitration under the ICSID Convention and two BITs, as well as four other related arbitrations: three commercial and one additional investment arbitration under UNCITRAL Rules.⁶² The *Ampal* tribunal found that it was jurisdictionally acceptable ‘to pursue distinct claims in different fora seeking redress for loss allegedly suffered by each [investor] arising out of the same factual matrix’.⁶³ The tribunal reasoned that ‘contract claims are distinct from treaty claims’ and it has jurisdiction to consider treaty claims made by separate investors when those claims arise from distinct tranches of the same investment.⁶⁴ The tribunal drew the line, however, at claims in parallel arbitrations that are ‘double pursuit of the same claim in respect to the same interest’, reasoning that it would be an abuse of process to pursue this kind of parallel proceeding once the jurisdiction of one of the fora is confirmed.⁶⁵ Thus, the tribunal

58 See eg, Giovanni Zarra, *Parallel Proceedings in Investment Arbitration* (Giappichelli Editore 2016).

59 The *CME* and *Lauder* arbitrations concerned the Czech Media Council, a government agency that granted television broadcasting licences in the Czech Republic. *Lauder*, an American national, was a controlling shareholder of *CME*, a Dutch company through which *Lauder* invested in the Czech broadcasting industry. *Lauder* was able to initiate one arbitration proceeding under the US-Czech Republic BIT and the other under the Netherlands-Czech Republic BIT (through *CME*). In both arbitrations, *Lauder* claimed that the Czech Media Council interfered with his contractual relationships and caused him to lose his investment. See *CME Czech Republic BV (The Netherlands) v Czech Republic*, Final Award (UNCITRAL 2003) www.italaw.com/sites/default/files/case-documents/ita0180.pdf accessed 15 December 2017; *Lauder v Czech Republic*, Final Award (UNCITRAL 2001) www.italaw.com/sites/default/files/case-documents/ita0451.pdf accessed 15 December 2017.

60 See n 5 above, 271–298.

61 *Ampal-American Israel Corp & others v Arab Republic of Egypt*, Decision on Liability and Heads of Loss, 1 February 2016, ICSID Case No ARB/12/11 www.italaw.com/sites/default/files/case-documents/italaw7310.pdf accessed 15 December 2017.

62 This parallel investment treaty arbitration against Egypt was initiated under the 2013 UNCITRAL Arbitration Rules (‘UNCITRAL Rules’) and Egypt’s investment treaty with Poland. In that proceeding, the claimants were Polish-Israeli national Yosef Maiman and three companies of the Merhav group of companies that he allegedly controls, including Ampal’s subsidiary, Merhav Ampal Group Ltd (*ibid*, 10(ii)).

63 *Ampal-American Israel Corp & others v Arab Republic of Egypt*, Decision on Jurisdiction, 1 February 2016, ICSID Case No ARB/12/11, at para 329 www.italaw.com/sites/default/files/case-documents/italaw7310.pdf accessed 8 October 2018.

64 *Ibid*.

65 *Ibid*, para 331.

held that *Ampal* had to ‘cure the abuse’ – which the tribunal clarified to not having been tainted by bad faith, but rather the result of the factual situation – and submit the claim to the exclusive jurisdiction of one tribunal, relinquishing the other.⁶⁶

The issue of parallel proceedings in investment arbitration was included in the Survey conducted by this Subcommittee in 2014. The responses to the questionnaire reflected concerns about parallel court and arbitration proceedings by the same or related parties against the same state, and parallel court proceedings by the state against the claimant or its affiliates. The questionnaire also reflected the lack of general solutions to this issue. Similarly, a relatively recent phenomenon of multiple investors bringing their claims collectively against a host state in a single arbitration proceeding has also generated lively debate, as seen in *Photovoltaic Investors Club v Czech Republic*, and *PV Investors v Kingdom of Spain*. This report tries to analyse whether the parties, arbitral tribunals or courts are empowered to address these situations properly, what types of tools those stakeholders should be given – adjudicators, in particular – to avoid undesirable situations of jurisdictional overlap between two arbitral tribunals, or between a national court and an arbitral tribunal.

The respondents to this Subcommittee’s Survey were most concerned about the following three types of parallel proceedings:⁶⁷

- parallel court or commercial arbitration proceedings by the same party or related parties against the same state, and parallel court or commercial arbitration proceedings by the state against the claimant (or affiliates of the claimant);⁶⁸
- multiple investors bringing their claims collectively against a host state in a single arbitration proceeding. For example, the aforementioned *Ampal v Egypt* and *Merhav v Egypt* cases, where the state refused to consolidate two overlapping treaty claims under different treaties. The issue in these situations is whether there is double consent of the state to arbitrate and to consolidate the cases. For example, in *Erhas and others v Turkmenistan*, an UNCITRAL tribunal declined jurisdiction over a joint treaty claim brought against Turkmenistan by a series of unrelated claimants.⁶⁹ Conversely, in *Flughafen Zürich AG and Gestión e Ingeniería IDC SA v Bolivarian Republic of Venezuela*, the tribunal declared its jurisdiction over the dispute even though the claimants were protected under different BITs, as they were affected by the same set of measures attributable to the state. The

66 *Ibid*, para 334.

67 To some, parallel proceedings encompass both successive and concurrent proceedings. Although this broader definition is sometimes referred to as ‘multiple proceedings’, for the purpose of this report, we will use ‘parallel proceedings’ to encompass both successive and concurrent proceedings. See Nadja Erk-Kubat, *Jurisdictional Disputes in Parallel Proceedings: A Comparative European Perspective on Parallel Proceedings before National Courts and Arbitral Tribunals* (Universitat St Gallen 2014) 98 [www1.unisg.ch/www/edis.nsf/SysLkpByIdentifier/4226/\\$FILE/dis4226.pdf](http://www1.unisg.ch/www/edis.nsf/SysLkpByIdentifier/4226/$FILE/dis4226.pdf) accessed 15 December 2017; see also n 57, 2.

68 Eg, ‘a foreign investor forms a local company in the host state of the investment and that company enters into a 30-year oil concession contract with the host state’s oil company. After a few peaceful years, the host state terminates the contract. The local company starts proceedings against the host state under the contract dispute resolution clause and claims that the contract termination was unlawful. In addition, the foreign majority shareholder of the local company starts a treaty arbitration claiming that the contract termination was an expropriation and a breach of fair and equitable treatment in violation of the investment treaty concluded by the host State and the national State of the foreign shareholder. As a result, you will face two arbitrations about the same measure, the termination of the contract, and about the same economic harm, the loss caused by the termination or expropriation’. Gabrielle Kaufmann-Kohler, ‘Multiple Proceedings in International Arbitration: Blessing or Plague?’ [2015] *The Asian Arbitration Lecture*, Singapore 3.

69 Luke Eric Peterson, ‘UNCITRAL Tribunal Will Hear Turkmenistan’s Argument that a Bloc of Claimants Can’t Band Together to Bring a Multi-party BIT Claim’ *IA Rep* (Santa Monica, 8 January 2014) www.iareporter.com/articles/uncitral-tribunal-will-hear-turkmenistans-argument-that-a-bloc-of-claimants-cant-band-together-to-bring-a-multi-party-bit-claim accessed 15 December 2017; Luke Eric Peterson, ‘An UNCITRAL Tribunal Declines Jurisdiction Over a Joint Treaty Claim Brought Against Turkmenistan by a Series of Unrelated Claimants’ *IA Rep* (Santa Monica, 23 June 2015) www.iareporter.com/articles/an-uncitral-tribunal-declines-jurisdiction-over-a-joint-treaty-claim-brought-against-turkmenistan-by-a-series-of-unrelated-claimants accessed 15 December 2017.

question remains, though, whether treaties should address collective claims specifically, and whether institutions should provide specific rules for such cases;⁷⁰ and

- multiple arbitration proceedings by the same or related parties under different investment treaties against the same state.

1. *The causes of parallel proceedings*

In the context of investment arbitration, parallel proceedings may take place for various reasons. Investors and affiliates may be required to press rights in one forum as part of their fiduciary obligation, while voluntarily proceed in another forum in order to preserve their own rights. Or, different fora may be governed by different instruments and legal regimes, providing different remedies (parallel contract and ISDS arbitration is the quintessential example). Investors and affiliates may also be forced into more than one forum by the state's practices. Initiating arbitrations under a particular treaty may be required to, practically (or even legally), preserve the ability to seek home government assistance in a negotiated dispute. Often, parallel proceedings are undertaken by investors whose parent companies have a different nationality. Each company may be considered an investor under the relevant BIT and, therefore, commence its own arbitration.⁷¹ To this end, the investor may use any of its subsidiaries and rely on the same or a different BIT. Under Article 25(2) (b) of the ICSID Convention, the investor may even avail itself of a locally incorporated company.⁷² This may give the appearance that investors could be pursuing the parallel proceedings as an abusive strategy; however, many would argue that only an exceedingly small number of investors, if any, undertake the expense and complexity of multiple proceedings with the sole intent of increasing their chances of receiving a favourable award.⁷³ Apart from the reasons laid out above, a multiplicity of claims may also simply reflect the modern economic realities of global corporations.

2. *Adverse consequences of parallel proceedings*

Parallel proceedings may have negative consequences that undermine the advantages of arbitration:⁷⁴

1. The risk of inconsistent awards, in particular when contradictory decisions are made, and a party tries to enforce the judgment or the award: In *CME*, the risk arguably materialised because the Czech Republic refused a consolidated tribunal. In *CME v Czech Republic*⁷⁵ and

70 See n 67 above 10–11.

71 See n 57 above.

72 Art 25(2) (b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention') for the purpose of the jurisdiction the ICSID considers as the national of another contracting state to 'any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention'. See <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf> accessed 15 December 2017.

73 *Ibid*, 8–9; see n 60 above, para 331.

74 See n 8 above, 1 (setting the following example: 'I act as counsel in an on-going matter involving four parallel arbitrations concerning the same dispute. The arbitrations were brought against our clients, a State and two State-owned companies, for the benefit of the same interests. Shareholders at different levels of a chain of companies initiated two duplicative investment treaty arbitrations against the State under separate investment treaties. The locally incorporated company sought the same relief as its shareholders in two duplicative commercial arbitrations in different fora. Seeking to multiply their chances of obtaining recovery, these related parties dragged our clients through a series of four full-blown proceedings before four different tribunals, each with two-week hearings involving essentially the same fact witnesses and experts' [footnotes omitted]).

75 7 UNCITRAL Arbitration No 403/VERMERK/2001/CME, Partial Award and Separate Opinion, para 418 (13 September 2001), 9 ICSID Reports 113 (2006).

Lauder v Czech Republic,⁷⁶ two different tribunals considered the same actions taken by the government of the Czech Republic and notoriously came to opposite conclusions.⁷⁷

2. The double recovery that allegedly may occur where a company, shareholder or another company within the same group brings a treaty claim and a claim for breach of contract and prevail in both proceedings for the same wrong: The tribunal in *Sempra* stated that ‘international law and decisions offer numerous mechanisms for preventing the possibility of double recovery’ but offered no examples.⁷⁸ The tribunal in *Suez* similarly alluded to the need to prevent double-recovery at the jurisdictional phase,⁷⁹ but the tribunal later determined that ‘because the Claimants... did not intend to seek compensation in local court proceedings for any loss already awarded and paid to them in this arbitration’, there was no double recovery problem.⁸⁰
3. The undermining of fundamental legal principles, such as legal certainty and procedural fairness: Indeed, some commentators have argued that ‘arbitration fulfils its function only if it finally settles the dispute underlying the claims of the parties. This means that the end of arbitration proceedings shall coincide, from a substantial point of view, with the end of the dispute between the parties. If, when a claim is judged, another substantially identical claim is pending in another arbitration (or can be started again before another tribunal), arbitration has failed in fulfilling that function’.⁸¹
4. The increase in legal costs, and in logistical issues because the parties need to present their arguments before multiple fora sometimes in different jurisdictions.⁸²

3. *Potential mitigators*

Preventing parallel proceedings has not usually been a key concern for drafters of bilateral or multilateral investment arbitration treaties.⁸³ Some treaties, however, include procedural mechanisms, which some consider may prevent parallel proceedings.⁸⁴

- *Fork-in-the-road clause*: gives parties a choice between seeking relief via either litigation in the host-state’s domestic courts, or international arbitration.⁸⁵ Once the decision is made, the party waives its right to seek relief through the unchosen fora. While this does prevent the same entity from bringing claims in both litigation and arbitration, its effect is limited to that specific party.
- *Denial of benefits clause*: allows states to reserve the right to deny benefits of a treaty to ‘a

76 In the Matter of an UNCITRAL Arbitration, Final Award, para 77 (3 September 2001), 9 ICSID Reports 62 (2006).

77 See James Crawford, ‘Ten Investment Arbitration Awards That Shook the World: Introduction and Overview’ (2010) 4 Disp Resol Int’l 71, 72.

78 *Sempra*, ICSID Case No ARB/02/16, Decision on Objections to Jurisdiction, para 102.

79 *Suez*, ICSID Case No ARB/03/17, Decision on Jurisdiction, para 51.

80 *Suez*, ICSID Case No ARB/03/17, Award, paras 38–40.

81 Giovanni Zarra, *Parallel Proceedings in Investment Arbitration XV* (2017).

82 See n 66 above, 338.

83 See n 75 above, 8.

84 See generally n 67 above, 12. As to the denial-of-benefits clause, some treaties use it to guard against the use of shell companies for the purpose of initiating parallel proceedings – eg, shell companies tailor-made to meet nationality requirements. This clause allows the state to deny treaty protection to a company controlled by nationals of a non-party. See, eg, Energy Charter Treaty, 2080 UNTS 95 <https://treaties.un.org/doc/Publication/UNTS/Volume%202080/v2080.pdf> accessed 15 December 2017

85 See n 11 above, 267.

company incorporated in a state, but with no economic connection to that state’.⁸⁶ As economic connection is normally defined as ‘substantial business activities’ within the host-state, it has been used as a means of denying jurisdiction to shell companies.⁸⁷ There has, notably, also been some divergence among tribunals as to when and how the host-state will be entitled to deny the advantages of a treaty to an investor, and whether the denial will have retrospective or prospective effect.⁸⁸

Courts and tribunals may also resort to the following doctrines in addressing parallel proceedings:

- *Res judicata*: a legal principle according to which courts and tribunals are bound by the earlier judgments or findings of another court or tribunal as to a dispute before them.⁸⁹ The principle is grounded in the desire to ensure finality in the resolution of a dispute and to eliminate the harassment of respondents. However, the effect of this principle is limited; it only comes into play after a proceeding is complete, where there is a triple identity of object, cause, and parties, and it applies only to successive, but not simultaneous, parallel proceedings.⁹⁰
- *Lis pendens*: used by an adjudicator to stay or suspend a proceeding until the conclusion of a parallel proceeding before another adjudicator.⁹¹ This doctrine is applicable when parallel proceedings involve the same parties (*persona*), cause of action (*causa petendi*) and claims (*petitum*).⁹² Some commentators have suggested that this triple identity test should be relaxed. The *persona* requirement, in particular, to include identical claims brought by shareholders, locally incorporated companies and companies within the same chain of ownership.⁹³
- *Stay of arbitral proceedings*: arbitrators’ competence to rule on their own jurisdiction – the principle of *competence-competence* – provides tribunals with the means to stay proceedings before them for reasons that include the mitigation of adverse impacts of parallel proceedings. Although rules that govern investment arbitration are silent as to a tribunal’s power to stay proceedings, it is generally accepted that it falls within their inherent powers to conduct them in the manner they consider appropriate. In *Spence v Costa Rica*, the tribunal recently reasoned that, if need be, it would have the power to stay

86 *Ibid.*

87 See *Pac Rim Cayman LLC v Republic of El Salvador*, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, ICSID Case No ARB/09/12 paras 4.71–4.92 (Tribunal granted El Salvador’s Denial of Benefits Defence brought under CAFTA Art 10.12.2, finding Pac Rim (1) did not conduct substantial business activities in the US, as evidenced by (a) lacking a board of directors, board minutes, a continuous physical presence, and a bank account, and (b) the fact that Pac Rim operated solely as a holding company for other subsidiaries which conducted business in El Salvador, and (2) was owned by a Canadian parent company (Pacific Rim). The tribunal further noted this defence had no impact on the Claimant’s non-CAFTA claims) www.italaw.com/sites/default/files/case-documents/ita0935.pdf accessed 15 December 2017.

88 See generally Lindsay Gastrell and Paul-Jean Cannu, ‘Procedural Requirements of “Denial-of-Benefits” Clauses in Investment Treaties: A Review of Arbitral Decisions’ (2015) 30(1) ICSID Review, 78–97.

89 See Denis Bensaude, ‘The International Law Association’s Recommendations on *Res Judicata* and *Lis Pendens* in International Commercial Arbitration’ (2007) 24 JIA 415; see also Bernardo M Cremades and Ignacio I Madalena, ‘Parallel Proceedings in International Arbitration’ (2008) 24 AI 507, 519.

90 See n 67 above, 6.

91 Gary B Born, *International Commercial Arbitration, Vol III: International Arbitral Awards* (Wolters Kluwer 2014) 3792.

92 Denice Forstén, *Parallel Proceedings and the Doctrine of Lis Pendens in International Commercial Arbitration: A Comparative Study between the Common Law and Civil Law Traditions* (Uppsala University 2015). See also www.diva-portal.org/smash/get/diva2:813565/FULLTEXT01.pdf accessed 15 December 2017.

93 See Christoph Schreuer, ‘Shareholder Protection in International Investment Law’ (2005) 3 TDM 1, 14; Silja Schaffstein, ‘The Doctrine of Res Judicata Before International Arbitral Tribunals’ (PhD Thesis, University of Geneva and University of London, 2011) paras 713–715.

proceedings, based on its general power to conduct the arbitration under article 17(1) of the UNCITRAL Arbitration Rules.⁹⁴ But, in *Cairn Energy PLC & Cairn UK Holdings Limited (CUHL) v The Republic of India*, the tribunal denied a request to stay the proceedings and reasoned that stays should be granted only exceptionally and for compelling reasons; and the following four items should be considered: equality, the right to be heard, the prevention of unreasonable delays and requiring that the outcome of the parallel proceeding be ‘material’ to the outcome of the arbitration where the request to stay is submitted.

- *Consolidation of arbitral proceedings*:⁹⁵ the joinder of two or more pending arbitrations into a single proceeding. Consolidation may be an option for parallel proceedings, in particular, when one or more of the arbitrators appointed in the various and related cases are identical.⁹⁶ However, consent of all the parties involved is required, either expressly or by accepting the rules of the institution administering the arbitration or by explicit consent of the parties. Consolidation as a mechanism to increase the likelihood of consistent awards has been included on ICSID’s agenda for the amendment of its arbitration rules.⁹⁷
- *Quasi-consolidation*: or de facto consolidation encompasses a broad set of practices requiring parties’ consent, one of which consists of submitting related cases to the same appointing authority for the designation of the same arbitral tribunal or the same chairperson. Another practice consists of different tribunals exchanging points of view on the core issues of their cases. In one instance, the *Chambre Arbitrale Maritime de Paris* went further and decided that various tribunals would sit together to hear evidence and submissions by the parties and would then separate and draft their awards in a predetermined and agreed order.⁹⁸

Other procedural mechanisms to tackle inconsistency of awards

Transparency of decisions and awards

Increased transparency of decisions and awards benefit the goal of consistency. It is difficult to expect consistent case law if the cases themselves are not available to parties and arbitrators. Significant steps have been taken in this regard, notably the 2006 ICSID rule amendments requiring publication

94 *Aaron C Berkowitz, Brett E Berkowitz and Trevor B Berkowitz (formerly Spence International Investments and others) v Republic of Costa Rica*, Procedural Order on Stay Applications, ICSID Case No UNCT/13/2 (28 February 2017) 45 www.italaw.com/sites/default/files/case-documents/italaw8478.pdf accessed 15 December 2017.

95 Art 10 of the 2017 ICC Rules of Arbitration (the ‘ICC Rules’) deals in detail with the issue of consolidation. Under this provision, the ICC court can consolidate arbitrations in three circumstances: (1) the parties have agreed to consolidation; (2) all of the claims in the arbitrations are made under the same arbitration agreement; or (3) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the court finds the arbitration agreements to be compatible. See also, eg, the *Suez v Argentina* water cases, in which three ICSID and UNCITRAL arbitrations were combined into one proceeding.

96 See ICC, Arbitration Rules Art 10 (2017) (‘In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed. When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties’).

97 See IAREporter, ‘ICSID Identifies Sixteen Topics that Have Emerged from Rules Amendment Consultation, and Turns to Study and Drafting’, *IA Rep* (Santa Monica, 8 May 2017) www.iareporter.com/articles/icsid-identifies-sixteen-topics-that-have-emerged-from-rules-amendment-consultation-and-turns-to-study-and-drafting accessed 15 December 2017.

98 Cornelis Carel Albert Voskuil and John Anthony Anthony, *Hague-Zagreb Essays 5: On the Law of International Trade: Reservation of Title, Domestic Law, Conflict of Laws: Multiparty Arbitration* (Kluwer Academic Publisher 1985) 131.

of awards or excerpts of awards,⁹⁹ the 2014 UNCITRAL Rules on Transparency in Investment Arbitration¹⁰⁰ and the Mauritius Convention.¹⁰¹ Further efforts to publish arbitral awards will result in a more consistent jurisprudence.

Preliminary rulings

Some commentators have suggested the creation of an advisory facility to which a tribunal might refer a contentious legal interpretation and receive guidance in advance of its ruling. A similar system has worked in Europe.¹⁰² Article 267 of the Treaty on the Functioning of the EU allows domestic courts of Member States to request a preliminary ruling by the Court of Justice of the EU (CJEU) on the interpretation or validity of a relevant provision of EU law, with the underlying purpose of ensuring its uniform interpretation across the EU. This provision has been applied to arbitration in the context of the *Yukos* case, where the Court of Appeal in Paris formulated eight questions for potential referral to the CJEU concerning the interpretation of the Energy Charter Treaty. Furthermore, some have argued that tribunals be considered as courts under this provision, allowing them to bring preliminary questions to the CJEU. In the decentralised system of investment arbitration, however, there are significant difficulties in establishing an impartial and authoritative advisory facility of this kind.

A permanent body issuing interpretive guidance

Consistency in international investment arbitration could be enhanced by creating a body tasked with issuing either guidance or binding treaty interpretation. Existing examples of approaches that favour a state interpretation are found in NAFTA, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and CETA.

Interpretations by the NAFTA Free Trade Commission

NAFTA establishes the Free Trade Commission (FTC), composed of ‘cabinet level representatives’ of the NAFTA parties or their designees. The FTC may issue joint interpretations of treaty provisions that are binding on NAFTA arbitral tribunals. The FTC is tasked with, among other things, supervising NAFTA’s implementation, and ‘resolv[ing] disputes that may arise regarding its interpretation or application’ in accordance with the treaty ‘and applicable rules of international law’.¹⁰³

This kind of interpretation may foster predictability of the law, as it ‘will bind all addressees of that norm and all future NAFTA tribunals’, unlike the interpretation by a NAFTA tribunal, which would have ‘more limited force’ as it would ‘bind the parties to the arbitration and may have some de facto

99 Aurélie Antonietti, ‘The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules’ (2006) 21 ICSID Rev 427, 442 <https://academic.oup.com/icsidreview/article/21/2/427/628910> accessed 15 December 2017.

100 UNCITRAL, Rules on Transparency in Treaty-based Investor-State Arbitration (2014).

101 See n 43 above 747.

102 See, eg, Christoph Schreuer, ‘Preliminary Rulings in Investment Arbitration’ in Karl Sauvant (ed) *Appeals Mechanism in International Investment Disputes* (OUP 2008) 207.

103 See Gabrielle Kaufmann-Kohler, ‘Interpretive Powers of the Free Trade Commission and the Rule of Law’ in *Fifteen Years of NAFTA Chapter 11 Arbitration* (Juris, 2011) 176 www.arbitration-icca.org/media/1/13571335953400/interpretive_powers_of_the_free_trade_commission_and_the_rule_of_law_kaufmann-kohler.pdf accessed 15 December 2017.

precedential value'.¹⁰⁴ Of course, it will not bind tribunals deciding a case under a different treaty with identical or similar language.¹⁰⁵

Interpretations under the CPTPP and CETA

More recent treaties have established similar mechanisms allowing a commission composed of government representatives of the state parties involved to issue interpretations on the provisions of the treaty. For example, Article 9.25 of the original TPP as incorporated into the CPTPP provides that: '[a] decision of the Commission on the interpretation of a provision of this Agreement... shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision'.¹⁰⁶ In turn, Article 8.31.3 of CETA provides: 'Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on a tribunal established under this Section'.¹⁰⁷

As is the case with NAFTA, these types of provisions may indeed promote consistency within the TPP and CETA regimes, respectively, but their binding effects would be limited to their respective parties and their respective languages.

Obstacles in the use of authoritative guidance on treaty interpretation

In addition to the coordination challenges associated with issuing such an interpretation, the exercise of interpretative power by interpretive commissions created by treaties may be problematic for other reasons as well. A well-known illustrative example of those reasons is the interpretation issued by the FTC on 31 July 2001, prompted, in part, by the expansive reading of NAFTA's Article 1105, that had been adopted by the arbitral tribunals in *Metalclad*,¹⁰⁸ *SD Myers*¹⁰⁹ and *Pope & Talbot* regarding the minimum standards of treatment under Article 1105.¹¹⁰ The FTC's interpretation of Article 1105 purported to clarify that the concepts of FET and FPS did not require treatment in addition to, or beyond that, which is required by the customary international law minimum standard of treatment of aliens.¹¹¹ It was also 'issued at a time when a number of Chapter 11 proceedings were pending'.¹¹²

The FTC's interpretation of NAFTA Article 1105 has been heavily criticised on a number of grounds:

'First, it has been argued that the Interpretation might be an *ultra vires* amendment of NAFTA,

104 *Ibid*, 187.

105 Andrea J Menaker, 'Seeking Consistency in Investment Arbitration: The Evolution of ICSID and Alternatives for Reform' in Albert Jan van den Berg (ed), *International Arbitration: The Coming of a New Age?* 17 ICCA Congress Series (Kluwer Law Int'l 2013) 634.

106 CPTPP Agreement, Art 1 (incorporating TPP Agreement Art 9.25.3) <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng>.

107 Comprehensive Economic and Trade Agreement, Art 8.44.3(a), 30 October 2016 http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf accessed 8 October 2018.

108 *Metalclad Corp v United Mexican States*, Award, 30 August 2000, ICSID Case No ARB(AF)/97/1 para 100 www.italaw.com/sites/default/files/case-documents/ita0510.pdf accessed 15 December 2017.

109 *SD Myers, Inc v Canada*, Partial Award, 13 November 2000, (2001) 40 ILM 1408 paras 224–264. See also www.italaw.com/sites/default/files/case-documents/ita0747.pdf accessed 15 December 2017.

110 *Pope & Talbot, Inc v Canada*, Award on the Merits of Phase 2, 10 April 2001, 7 ICSID Rep 236 para 110. See also www.italaw.com/sites/default/files/case-documents/ita0678.pdf accessed 15 December 2017.

111 See n 102 above, 181.

112 *Ibid*, 182.

as it adds words that are neither in the text nor in the drafting history of Article 1105. Second, some have taken the view that the Interpretation is inconsistent with the ordinary meaning of the words in Article 1105 of the NAFTA and, therefore, is not an interpretation in accordance with Article 31 of the Vienna Convention on the Law of Treaties (VCLT). Third, concerns have been voiced about the fact that the Interpretation intended to apply to pending disputes, which violated the principle of non-retroactivity and the principle that no one may be the judge of his or her own cause. Fourth, it has been argued that the FTC issued the Interpretation “out of the blue,” “without any prior public consultation” and without giving “any warning to investors party to ongoing Chapter Eleven arbitrations,” which may violate the principle of equal treatment of parties’.¹¹³

Among these criticisms, of particular concern, is the notion that this kind of regime may allow states to circumvent the principle of non-retroactivity of treaty amendments (because the amendment creates a new norm) through the use of treaty interpretations. However, a genuine joint treaty interpretation by an interpretive body should not constitute a breach of non-retroactivity because ‘true interpretations merely clarify the content of an existing norm’.¹¹⁴ An interpretation may indeed be an amendment in disguise, as in the *Pope & Talbot* decision regarding NAFTA Article 1105, where the FTC’s interpretation there ‘limited the reference to international law in Article 1105 to customary international law’.¹¹⁵ Last, but not least, the fact that the state involved in the dispute is both a litigant and a member of the commission that issues the interpretation could also be considered, because of the ‘two hats worn by the respondent State’.¹¹⁶

Conclusion

An interpretive authority may contribute to the standardisation of treaty interpretation, but utility may be limited. Coordination challenges among signatory states may contribute to this mechanism not being used as often as it could be, a problem that is exacerbated under treaties involving a large number of parties. In addition, there is also significant concern that: (1) states, as members of the commissions issuing the authoritative treaty guidance, may unduly influence the outcomes of the cases they are involved in as litigants; and (2) that this regime gives states undue power to retroactively change the rules of the game without formally amending them. Moreover, even if interpretive authorities continue to define treaty provisions to greater degrees of specificity, tribunals will still likely reach different conclusions on the disputes before them.

An overhaul of the system?

The idea of establishing a standing court or some form of appellate mechanism for investment arbitration has been evoked both by multilateral organisations at the international level, and among individual states as a treaty-negotiation objective. In the Trade Promotion Authority Act of 2002, the US proposed, as an objective in the negotiation of investment treaties, the establishment of an

113 *Ibid*, 188.

114 *Ibid*, 189.

115 *Ibid*, 190.

116 *Ibid*, 192.

‘appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements’.¹¹⁷

Practitioners and academics alike have also sought mechanisms to promote coherence in the investment arbitration system given that the ICSID annulment mechanism, due to its impermanence and inobservance of the *stare decisis* doctrine, has not always succeeded in doing so.¹¹⁸ However, the form that such a mechanism should take remains the subject of debate. While some have proposed a global multilateral institution as a solution, other less ambitious solutions, including regional multilateral mechanisms and even bilateral mechanisms, have begun to take shape.

Historical background

Appellate mechanisms have been incorporated in several trade agreements. For example, the US has incorporated an appellate mechanism into IIA’s entered into with Chile, Morocco and Singapore. Taking it a step further, and with the same goal of ‘provid[ing] coherence to the interpretation of investment provisions in the Agreement’, the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) provides for the establishment of a ‘Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals’ within three months of the date of entry into force of the agreement.¹¹⁹

CAFTA-DR, the Chile-US IIA and the CPTPP all provide that, in the case where a separate multilateral agreement enters into force establishing an international investment appellate body for the parties, they shall strive to reach an agreement whereby such an appellate body would review awards rendered under their prior IIA.¹²⁰

In a 2004 discussion paper titled *Possible Improvement of the Framework for ICSID Arbitration* the ICSID Secretariat suggested that the establishment of an appellate mechanism for ICSID could be ‘desirable to ensure coherence and consistency in case law generated in ICSID and other investor-to-state arbitrations initiated under investment treaties’.¹²¹ Furthermore, such a system ‘might be beneficial for ICSID to establish a single mechanism as an alternative to multiple mechanisms’.¹²² The proposal, however, was not adopted since a subsequent paper noted that ‘most members of the ICSID Administrative Council... considered that it would be premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues raised in the Discussion Paper’.¹²³

As of today, the situation remains the same, with no palpable political consensus among states to undertake the full-scale efforts that would be necessary to establish a universal appellate system. As

117 Bipartisan Trade Promotion Authority Act of 2002, 19 USC ss 3801–3813 (West Supp 2003).

118 Gabrielle Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?’ (2007) 23 AI 357 www.arbitration-icca.org/media/0/12319143087130/00950001.pdf accessed 15 December 2017.

119 CAFTA-DR, annex 10-F <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> accessed 15 December 2017.

120 US-Chile Free Trade Agreement Art 10.19.10, US-Chile, 6 June 2003, 42 ILM 1026. See also <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text> accessed 15 December 2017.

121 ICSID; ‘Possible Improvements of the Framework for ICSID Arbitration’ (2004) TDM 4 www.transnational-dispute-management.com/welcome.asp accessed 8 October 2018.

122 *Ibid.*

123 Int’l Ctr for Settlement of Inv Disputes, ‘Suggested Changes to the ICSID Rules and Regulations’, Working Paper of the ICSID Secretariat (12 May 2005) para 4 <https://icsid.worldbank.org/en/Documents/resources/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf> accessed 15 December 2017.

such, individual states and regional blocs have begun to take matters into their own hands, pursuing less ambitious but more feasible solutions.

Regional multilateral and bilateral solutions

One of the vehicles pursued by states to incorporate some form of appellate mechanism to investment awards is the establishment of a different form of dispute resolution under regional or multilateral FTAs. In fact, a different structure for the resolution of investment disputes has currently been incorporated into two multilateral FTAs: CETA and the EU-Vietnam Free Trade Agreement (the 'EU-Vietnam Agreement').

These are the first two FTAs that contain provisions on ISDS and incorporate, inter alia, a new method for the resolution of disputes between foreign investors and the states that host their investments. Both treaties provide a number of substantive protections for qualifying investors who are enabled under the treaties to enforce these protections through a direct claim against the state hosting the investment. The novelty of these agreements is that claims are adjudicated by a new court with its own appellate mechanism, not by international arbitration.

Thus, investment disputes arising under CETA and the EU-Vietnam Agreement will be decided in the first instance by a permanent court, referred to in the treaties as the 'tribunal'.¹²⁴ Some key features of CETA's dispute resolution mechanism are:

- the tribunal will be composed of 15 members appointed by the CETA Joint Committee upon full entry into force of the treaty: 'Five of the Members of the tribunal shall be nationals of a Member State of the EU, five shall be nationals of Canada and five shall be nationals of third countries';¹²⁵
- members 'shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence [...] [with] demonstrated expertise in public international law. It is desirable that they have particular expertise in international investment law, in international trade law and in the resolution of disputes under international investment or international trade agreements';¹²⁶
- the agreement requires that the tribunal 'hear cases in divisions consisting of three Members of the tribunal, of whom one shall be a national of a Member State of the EU, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the tribunal who is a national of a third country';¹²⁷
- the agreement provides for the establishment of a self-contained appellate mechanism with the power 'to uphold, modify or reverse [a] tribunal's award' or remand it for further consideration, on the basis of: '(a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of

124 See n 37 above, Art 8.27.

125 *Ibid*, Art 8.27(2).

126 *Ibid*, Art 8.27(4).

127 *Ibid*, Art 8.27(6).

relevant domestic law; and (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b)';¹²⁸ and

- in line with the provisions of CAFTA-DR, the CETA provides an obligation on the parties to 'pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes'.¹²⁹

Similarly, Vietnam and the EU have also agreed on a reformed investment dispute resolution mechanism, consisting of a tribunal composed of nine members, and an accompanying appellate tribunal, composed of six members. As in CETA, the EU-Vietnam Agreement imposes required qualifications to serve as arbitrator and includes its own code of conduct.¹³⁰ But, a bilateral or even regional, appellate court may be seen as exacerbating the problem, as it creates just one more avenue that may lead to more inconsistency in the system.

Global multilateral approach

The more radical approach to address inconsistency in international arbitration is the creation of a permanent investment tribunal through a multilateral investment agreement, adopted in the context of multilateral negotiations in the UN. This could be achieved through the creation of a permanent international tribunal designed to resolve investment disputes between private parties and states that would contain a built in, self-contained appellate system. Another option would be limited to the creation of an international appellate system from which awards rendered under the existing system could be appealed.

Both proposals have been studied by the Center for International Dispute Settlement (CIDS) in a report presented at UNCITRAL, which decided, at its 50th session in July 2017, to mandate its Working Group III on ISDS reform to proceed to: first, identify and consider concerns regarding ISDS; second, consider whether reform was desirable in the light of any identified concerns; and third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to UNCITRAL.

In its current presentation of the CIDS report (Document A/CN.9/917) of 20 April 2017 (the 'Secretariat Note'), the CIDS notes that 'the CIDS report considered two different options in depth: (i) a permanent international dispute settlement body providing direct access to private parties and State parties alike for investment related matters, and (ii) an appeal mechanism for investor-state arbitral awards'.¹³¹ The Secretariat Note 'addressed possible means for States to incorporate those options into their existing and future investment treaties' and concluded that 'a convention modeled on the Mauritius Convention on Transparency with certain adaptations could effectively extend new dispute settlement options to existing investment treaties'.¹³²

128 *Ibid*, Art 8.28(2).

129 *Ibid*, Art 8.29.

130 EU-Vietnam Free Trade Agreement, ch 8, annex II, January 2016 <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 15 December 2017.

131 UN Secretariat, *Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS)*, para 4, UN Doc A/CN.9/917 (20 April 2017) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/023/69/PDF/V1702369.pdf?OpenElement> accessed 15 December 2017.

132 *Ibid*, para 4.

The Secretariat Note underlines that one of the main issues when choosing a type of appellate mechanism is ‘the articulation between the new body and the current ISDS regime’.¹³³ Both the appellate and investment court options will be discussed succinctly below.

Standalone appellate body

One of the possible reform options of the current system discussed in the Secretariat Note is to create a standalone appellate body, which would review appeals from decisions issued by current arbitral tribunals.

The ICSID system in force would thus preserve most of its basic features, but would be complemented by a newly devised appellate system. ‘A standing or at least semi-permanent appellate body as opposed to *ad hoc* arbitral tribunals would pursue coherence and consistency across separate investment treaties’.¹³⁴ Notwithstanding that most arbitration regimes are premised upon the finality of awards, the report cites a number of institutional arbitration regimes that provide appellate review of arbitral awards. It notes that ‘under some national arbitration laws, parties may agree on a two-level arbitration process, and there is no suggestion that the presence of an appeal makes the process different from arbitration’.¹³⁵ Many questions, however, must be considered including, but not limited to ‘[w]hether a single appellate body should be created to hear appeals against awards irrespective of the rules applied, and the extent to which this would be feasible’.¹³⁶ Indeed, this raises procedural questions concerning the composition of the appellate body, the appointment of the members of the appellate tribunal, the applicable procedures, the role of parties in appointing members to the tribunal and the applicable codes of conduct. Substantive questions also concern grounds forming the basis of an appeal and enforcement questions linked to the binding nature of the award, as well as the role, if any, for the seat of the tribunal and appellate tribunal.¹³⁷

Institutional obstacles

The establishment of a permanent or semi-permanent appeals mechanism requires careful consideration of its composition and structure. Relevant issues include the method of selection of the members of the appellate body, the determination of their pay, the number of members, the duration of their respective terms and eligibility requirements.

- *Method of selection:* One of the most contentious issues is the method of selection of the adjudicators. There are two main options: one is to create a standing appellate body staffed with permanent members, like the WTO Appellate Body. The second is to rely on the formation of an *ad hoc* tribunal, the members of which would be selected from a roster of arbitrators, like the ICSID Annulment Committee. Both options present challenges. A standing appellate body would present issues with respect to its composition and related costs. To some, it is particularly troublesome that a permanent appellate body would curtail the parties’ ability to choose their arbitrators on a case-by-case basis. The ‘roster system’

133 *Ibid*, paras 16–28.

134 *Ibid*, para 20.

135 *Ibid*, para 21.

136 *Ibid*, para 24.

137 *Ibid*.

method is of concern based on the membership of the roster and the question of whether states would ‘pack’ the roster with pro-respondent adjudicators.¹³⁸

These issues require consideration of whether the appointment process should be undertaken by states only, or whether organisations representing the interests of investors should be involved as well, thus giving investors reassurance that their interests will be taken into account in the appellate adjudicators’ selection process. Pursuant to the CIDS report, consulting ‘business organizations... would mitigate the risk of shifting from the current model that resembles commercial arbitration to the other extreme [by] neglect[ing] the fact that investor-State dispute settlement is asymmetric, i.e., the disputes are between an investor and a State and not between two States’.¹³⁹

- *Adjudicators’ pay*: The adjudicators of an appellate body may be remunerated in different ways, depending on their employment status (full-time, part-time or on call) and the number of disputes expected to be handled. For example, adjudicators could be paid a monthly retainer fee, which would be financed by the states that have consented to the establishment of the permanent appeals body.¹⁴⁰ Should the workload increase, the retainer fee, other fees and expenses could be transformed into a regular salary, and the member could serve on a full-time and exclusive basis.¹⁴¹ Or, the system may be financed through fees paid by its users, including both investors and states.¹⁴² The amounts may vary, ranging from covering the minimal cost of administration to providing for an amount allowing the system to cover a significant portion of its budget.
- *Number of members of the appellate body*: Particular consideration is given to the number of adjudicators who would sit on the appellate body. While in current investor-state arbitration practice arbitrators typically sit on panels of three – and occasionally one – the idea of an appellate body with a larger composition merits attention. For example, studies show that a panel of five adjudicators is ‘possibly... the ideal number’.¹⁴³ This is because, ‘[i]n smaller groups of two or three, individuals are less efficient because they feel more exposed [and] [i]n larger groups, the process is more cumbersome and individual members tend to be less engaged’.¹⁴⁴
- *Duration of the adjudicators’ terms*: Also important in the context of a permanent appellate body is the decision on the length of adjudicators’ terms, and whether re-election should be allowed. A strong case can be made for longer single-term periods, as opposed to shorter ones with the possibility of re-election, as adjudicators so appointed would be ‘shield[ed] from the possible (conscious or unconscious) pressure deriving from the desire to be re-elected and would thus strengthen their actual and perceived independence’.¹⁴⁵

138 See Robert Howse, ‘Courting the Critics of Investor-State Dispute Settlement: the EU proposal for a Judicial System for Investment Disputes’, Working Paper (2015) https://cdn-media.web-view.net/i/fjj3t288ah/Courting_the_Criticsdraft1.pdf accessed 15 December 2017.

139 Gabrielle Kaufmann-Kohler and Michele Potestà, ‘Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and Roadmap’, CIDS Geneva Ctr for Int’l Dispute Settlement (2016) para 168 www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf accessed 15 December 2017.

140 *Ibid*, para 48.

141 *Ibid*.

142 *Ibid*.

143 *Ibid*, para 175.

144 *Ibid*.

145 *Ibid*, para 170.

- *Qualifications of appellate members:* The election and appointment process of the members of the appellate body should consider a number of factors, including their independence and impartiality, their nationality, their expertise and experience, as well as issues associated with geographical and gender balance.¹⁴⁶ Commentators insist on the notion that appellate adjudicators should not sit on cases involving their state of nationality because, unlike the usual commercial dispute, investment disputes ‘involve issues of public interest and sometimes of high political sensitivity’ which can create in an adjudicator national of the respondent state ‘certain psychological, if not actual political, pressure’ that inevitably permeates the decision.¹⁴⁷ While international judges ‘feel absolutely impartial... temptations of ‘judicial nationalism’ may and do occur’.¹⁴⁸

Competing policy interests

i. Undue burden on emerging markets

Policy-makers exploring appellate mechanism options should take into account all competing policy interests, including the fact that an appellate mechanism may place a financial burden on emerging markets. While in the current system costs associated with a dispute fall on the parties involved, a permanent or semi-permanent appellate body would primarily be financed by the states.¹⁴⁹ In addition, the existence of an appeal mechanism will likely result in a greater number of challenges brought against arbitral awards, which would cause additional costs and delays in the dispute resolution process. As a result, states will be forced to increase the resources they allocate to defending investment-treaty claims, to the detriment of their domestic expenditures. This consideration is particularly important to low-to-medium income states ‘who obviously do not have as much money to spend on arbitration’.¹⁵⁰

ii. No guarantee of accuracy

A permanent or semi-permanent appellate body would not be a guarantee for accurate treaty interpretation. A comparison of two lines of case law applying the denial of benefits provision (one under the Energy Charter Treaty, the other under other investment treaties) helps illustrate the gap between consistency and accuracy:

‘Both lines of decisions have been consistent in the sense that tribunals have allowed states to deny treaty benefits after a claim has been submitted to arbitration under investment treaties generally, but not under the Energy Charter Treaty. Such consistency, however, does not establish the accuracy of the two lines of treaty interpretation because the difference in outcomes cannot be explained by any distinctive characteristics of the Energy Charter Treaty’.¹⁵¹

146 See n 130 above, para 34.

147 See n 138 above, para 174.

148 *Ibid.*

149 See n 104 above, 623–624.

150 Nicolette Butler, *The State of International Investment Arbitration: the Possibility of Establishing an Appeal Mechanism* (University of Leeds, PhD Thesis, 2012) 138 [http://etheses.whiterose.ac.uk/3361/1/FINAL_CORRECTED_THESIS_\(22_jan_2013\).pdf](http://etheses.whiterose.ac.uk/3361/1/FINAL_CORRECTED_THESIS_(22_jan_2013).pdf) accessed 15 December 2017.

151 See n 27 above, 1, 8.

In light of the consistency-accuracy gap described above, policy-makers evaluating appellate mechanisms may wish to consider the use of control mechanisms to offset the effects of greater institutionalisation. Some of these mechanisms include: (1) the use of binding joint interpretations; (2) the use of soft law (including non-binding rules, guidelines, standards and/or principles); and (3) appointment (and reappointment) of members of the appellate body more attuned to national positions.

iii. A standing investment court

The creation of a permanent international investment court by a multilateral treaty constitutes the most radical proposal for the reform of the current system. This court would be similar in nature to one of the existing established international tribunals (International Court of Justice, International Criminal Court, International Tribunal for the Law of the Sea, etc) but would be tasked exclusively with the resolution of international investment disputes. The court would be established through a founding constituent instrument or statute to which states would become a party after a multilateral negotiation in the context of UNCITRAL, with the participation of all member states of the UN.

As currently proposed in the Secretariat Note, such an investment court ‘could either be based on a two-tier adjudicative system with a built-in appeal or without one’.¹⁵² This appeal mechanism is distinct from the appellate mechanism described above, which is premised on preserving the ICSID system. Indeed, ‘the setting up of an international investment court would constitute a departure from the current ISDS regime. In short, an international investment court would bring key features of domestic and international courts to the settlement of investment disputes. A multilateral process to set up such a court would aim at ensuring coherence of the reform efforts, and address the fragmentation of the current regime’.¹⁵³

The main elements of an international investment court include issues regarding ‘adjudicators, review mechanisms, enforcement and costs of its establishment and operation’.¹⁵⁴ Consultations ‘covered the questions of composition and structure of an international investment court with the purpose to review in more detail issues relating to the appointment of adjudicators, and ethical and nationality requirement’.¹⁵⁵ It was noted that a distinction should be made ‘between the way adjudicators are elected as members of an international investment court and the way those adjudicators are appointed or assigned to a panel to decide a specific dispute’.¹⁵⁶ Any selection process for potential arbitrators or adjudicators should be ‘transparent, rigorous, susceptible of being clearly monitored by all stakeholders in order ensure legitimacy and gain public confidence’.¹⁵⁷ Such selection process would need to take into account, inter alia, ‘the independence and impartiality of the adjudicators, their nationality, as well as of the possibility of investors’ input or involvement in the election and appointment process’.¹⁵⁸ Moreover, it would be worth considering ‘the expertise

152 See n 130 above, para 30.

153 *Ibid.*

154 *Ibid.*, para 32.

155 *Ibid.*, para 33.

156 *Ibid.*

157 *Ibid.*, para 34.

158 *Ibid.*

and experience of the adjudicators, as well as the geographical and gender balance'.¹⁵⁹ One point that was emphasised was the need to prevent so-called 'double-hatting', whereby adjudicators would simultaneously act as counsel, experts or even arbitrators in other ISDS matters.¹⁶⁰

The Secretariat Note also points out that:

'[q]uestions were raised whether only States would participate in the election process or whether a consultation with business organizations, i.e., organizations representing the interest of the investors should be considered in order to avoid that only or mainly "pro-State" adjudicators are selected, in particular if the system were to be funded by States entirely. It was underlined that States were both hosting investments and home State of investors, and would therefore take account of the interests of both when electing adjudicators'.¹⁶¹

Specifically, the Secretariat Note recommends consideration of issues involving the standards and mechanisms of review in light of alternative mechanisms such as preliminary rulings, *en banc* determinations, and consultation. For example, due consideration should be given to:

- (i) the main purposes and usefulness of control mechanisms;
- (ii) whether annulment would be better conducted through a self-contained built-in system; if so, what are the procedural aspects to be considered, including grounds for annulment;
- (iii) [r]egarding built-in appeal, how would an appeal mechanism interact with annulment (if provided for); [...] what would be the grounds for appeal [...]; what should the standard of review be [...]; whether there should be any remand power of the appellate body to the arbitral tribunal and, if so, how should it be delineated; and
- (iv) Regarding alternatives, what mechanisms may be considered [...] how could they best be applied to the new regime'.¹⁶²

The Secretariat Note also recommends consideration of award enforcement issues. For example, due consideration must be given to: (1) whether the statute of an international investment court should include a specific enforcement regime; (2) enforceability of decisions of an international investment court in states that would not be party to its statute; and (3) enforceability of decisions under the New York Convention.¹⁶³

During the consultation process, two options were presented: under the first option, a system would be designed as 'an add-on to the current ISDS regime or under the auspices of an existing institution. Such an approach would allow the use of existing resources for the preparation and initial set-up, saving costs. This would essentially require the approval by the existing regime or institution constituents for an additional mandate and that, in any case, would require additional financial resources'.¹⁶⁴

159 *Ibid.*

160 *Ibid.*, paras 33, 34.

161 *Ibid.*, para 36.

162 *Ibid.*, para 45.

163 *Ibid.*, para 50.

164 *Ibid.*, para 53.

Another possibility would be to establish an international investment court independently from any existing mechanism or institution and if so, ‘States that have consented to the statute of an international investment court would generally be responsible for the financing of the court (the same applies to a permanent appeals body)’.¹⁶⁵ As an alternative, the users of the system should be charged a fee.¹⁶⁶

Finally, the Secretariat Note discusses to what extent could the proposed reforms, be it by the creation of a standalone appellate body or an international investment court, be applicable to disputes that would arise under existing investment treaties. Questions for consideration include whether or not it would be possible to model such a multilateral mechanism on the Mauritius Convention on Transparency, which could provide a framework for extending the mechanism to existing treaties. Indeed, ‘a multilateral mechanism modelled on the Mauritius Convention approach could allow a reform to begin as a plurilateral project, with the possibility for other States joining at a later stage, whenever they consider it appropriate. This, too, would strengthen the chances for success of such reform’.¹⁶⁷

Furthermore, ‘this approach would relieve States from the burden of pursuing potentially complex and long amendment procedures set forth in their numerous existing investment treaties. Indeed, a mechanism implementing reforms, modelled on the Mauritius Convention, would render the innovations directly applicable to existing investment treaties for those States that wish to embrace such innovations’.¹⁶⁸

Advantages of a standing investment court

The main advantages of a standing investment court are increased uniformity and legitimacy.

- *Uniformity*: A standing investment court consisting of a small group of designated jurists addressing ISDS cases on a repeat basis would likely promote greater uniformity in reasoning than the current system of appointment. Having a smaller designated group of decision-makers expressly tasked with building a consistent *jurisprudence* could be effective. Complementary tools, such as requiring collegial decision-making (as in the WTO Appellate Body), making case law widely available and adopting an express requirement to issue consistent awards will further strengthen this aspect of the system. It also seems practical and more economical to focus on the initial decision-makers, so that cases are more likely to be decided correctly at first instance rather than waiting to correct them through an appellate mechanism.
- *Legitimacy*: A designated standing investment court could also address legitimacy concerns such as repeat appointment leading to an alleged ‘arbitrator elite’, strategic appointment of claimant or respondent friendly arbitrators and concerns that arbitrators are motivated

165 *Ibid*, para 54.

166 *Ibid*, para 55 (‘The fee to be charged to users could vary, from covering the minimal cost of administration to an amount which would allow the system to cover a significant portion of its budget. The latter approach was seen as potentially useful to discourage frivolous claims by investors... [However] one of the criticisms about the current system was that the tribunal members were being selected and paid by the parties and therefore the funding of any new system should be set up so as to guarantee the independence and impartiality of the adjudicators’).

167 *Ibid*, para 62.

168 *Ibid*, para 61.

by the hope of reappointment rather than the merits of a case. By definition, members of a standing investment court act on a repeat basis. This would develop the expertise and collegiality of the court members and is the norm in international tribunals. It is not usually seen as creating an objectionable elite, but rather the creation of an expert body. In terms of strategic appointment, court members presumably would be named to specific cases by a neutral entity (institution, standing investment court president or other), and so concerns about strategic appointment by parties and resulting bias should not arise. Similarly, the fact that the court members would be appointed by a neutral entity means that the outcome of a decision should not be perceived as having an impact on further appointment and addresses this concern.

The selection of court members from a court roster and by a neutral entity should also address concerns about the absence of legitimacy or democratic accountability that some have suggested is absent from the current party appointment system. A carefully selected and skilled standing investment court would have the same legitimacy as other standing international bodies. Several corollary requirements could reinforce these impacts, including transparent selection requirements, selection based on merit, collegial decision-making and publicly accessible decision-making.

Disadvantages of a standing investment court

The main disadvantages of creating a standing investment court are: (1) losing the confidence created by party appointment; (2) ensuring a credible selection mechanism; and (3) costs.

- *Claimants may lose confidence in the system:* One of the key advantages of the current party appointment system is that it gives each party a voice in the selection of a tribunal and gives counsel and their clients confidence that their position will be fairly assessed. Counsel have stressed this attribute of party appointment and warned that it should not be underestimated as a strength of the system. This is especially the case in ISDS, where the core of the dispute involves a private citizen complaining of state conduct, and the dispute is not between two states on relatively equal footing. Similarly, both parties will be deprived of the ability to agree on a presiding arbitrator, which is seen as an advantage by all.
- *Who selects the standing investment court member?* A particular concern about who selects a standing court member is that it is likely to be selected only by states who are respondents in the ISDS scenario. Commentators have suggested that this creates an incentive to appoint tribunal members who are state focused and that it gives states an advantage. States reject this argument, noting that in selecting a court member, they would represent the interests both of investors from their jurisdiction who act as claimants and states who act as respondents, and so they have every incentive to choose open-minded candidates that will decide on the merits of each case.
- *Cost:* The cost of a standing investment court is also a concern. Presumably, standing court members would be paid commensurate with other standing international courts, including a salary, pension and employment benefits. If states want to avoid double-hat situations and to ensure members are fully available to hear and decide cases expeditiously, they will likely want a full-time body and must compensate tribunal members on this basis.

Similarly, a standing investment court would need facilities and support, including offices, computers, technology support, administration, archives, legal support, tribunal secretaries, court reporters, interpreters, hearing rooms, and so on. While this may be moderated by using existing facilities, such as those of ICSID or the WTO, there is certainly a cost to establishing a court. Furthermore, the process of filling vacancies on the bench, with the political implications it entails, may lead to longer proceedings, thereby increasing costs for attending parties.

The size of the standing investment court (and therefore its cost) will depend on how many states adopt this system and how it is designed. Regardless of the number of cases, it will require a core number of members who are independent and impartial, available for cases and able to operate in the main languages of arbitration. One might also want to have a variety of nationalities so that a court member would not be a national of the investor's home state or the respondent state. The size of the standing investment court will also depend on whether it sits in panels (three, five or more) and whether it uses sole members for some tasks.

Most international courts are paid for by the states who established the court. The cost of these courts can be substantial. It might be possible to have claimants contribute to the cost of a case or be responsible for reimbursement of costs where they are unsuccessful.

i. How to design a standing investment court

There are many ways to design a standing tribunal. Several ideas (ranging from simple to complex) might be considered. For example:

- States could agree on a list of persons who would act as members of the standing investment court. These persons could be exclusively available for cases and could be selected by parties (keeping some aspects of party selection), by an appointing authority or by a designated standing investment court president. Once selected, all other aspects of the applicable rules, including facilities support, would be provided as in the current system. This would provide the advantages of a standing body with minimal cost.
- States could appoint a standing tribunal and have their work administered by an existing arbitral institution under existing rules. This could provide more traditional administration of the court, including having standing investment court members paid from a common fund, using common support systems and having common offices where they could share views on legal decisions. It would still allow for use of existing rules, with some modifications.

States could establish a new standing investment court with full administration services and rules. In so doing, numerous decisions would have to be made, including criteria for appointment, selection process, length of term, funding of the court, support facilities required, designing procedural rules, and so on. This would have the advantage of starting from a 'green field', but is likely to be the most costly option.

ii. Criteria for members of standing tribunals

Finally, a credible standing investment court will depend on the selection of highly skilled members. Among the criteria that should be considered are:

- expertise in the applicable law;
- familiarity with adjudicative processes;
- impartiality;
- availability;
- language skills; and
- diversity.

Chapter 2: Efficiency in investor-state arbitration

Results of the 2014 Survey revealed that many practitioners regard international arbitration as inefficient. For example:

- approximately 95 per cent of all Survey respondents considered the duration of arbitration proceedings and the availability of arbitrators to be issues of concern, with more than half expressing significant concern in both respects;¹⁶⁹
- approximately 85 per cent of all Survey respondents thought that the time tribunals take after the last hearing to render their award is an issue of concern, with nearly 60 per cent expressing a significant concern with the status quo;¹⁷⁰
- approximately 75 per cent of all Survey respondents were in favour of limiting the opportunity for document disclosure in investment treaty arbitration, with nearly half of all respondents in favour of this measure to a significant extent;¹⁷¹ and
- a clear majority of all Survey respondents thought that attorneys' fees, expert fees and arbitrator's fees were issues of at least some concern.¹⁷²

Commentators ascribe the increasing time and cost of investment arbitration to a variety of factors.¹⁷³ Regardless of the reason, investment arbitrations have taken more and more time and resources to resolve. ICSID and UNCITRAL proceedings last an average of 3.6¹⁷⁴ and 3.9 years,¹⁷⁵ respectively. For example, ICSID arbitrations require a \$25,000 filing fee and take, on average, four to six months just to constitute an arbitration tribunal.¹⁷⁶ Of the matters arbitrated with ICSID in 2015, the average amount of time to reach a resolution was 39 months.¹⁷⁷ This Subcommittee's Survey also found growing dissatisfaction with the efficiency of proceedings. Recently, ICSID and other institutions have begun to call for change to address this concern. While the international arbitration community has had substantive discussions about increasing efficiency since the 1990s, efficiency as applied to investment arbitration is a newer topic.¹⁷⁸

Efficiency challenges before constitution of the tribunal (including settlement and alternative dispute resolution)

Inefficiency concerns often arise before the merits may be decided. This section proceeds by highlighting five pre-merit areas where issues of efficiency regularly arise: the process of selecting

169 2016 Report 7 (response to Qs 38 and 39).

170 *Ibid* (response to Q 40).

171 *Ibid* (response to Q 44).

172 *Ibid* (response to Qs 41–43).

173 Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3 GJIL 110 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2611337 accessed 15 December 2017.

174 Anthony Sinclair, 'ICSID Arbitration: How Long Does it Take?' *Glob Arbitration Rev* (26 October 2009) 20. See also <https://globalarbitrationreview.com/article/1028686/icsid-arbitration-how-long-does-it-take> accessed 15 December 2017.

175 Jeffrey Commission, 'The duration costs of ICSID and UNCITRAL investment treaty arbitrations', *Vannin Capital Funding in Focus* (July 2016) 9 <https://vannin.com/downloads/funding-in-focus-three.pdf> accessed 15 December 2017.

176 Lars A Markert, 'Improving Efficiency in Investment Arbitration' (2011) 4 *Contemp Asia AJ* 215, 224 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966467 accessed 15 December 2017.

177 ICSID, *Annual Report* (2015) 31 https://icsid.worldbank.org/en/Documents/resources/ICSID_AR15_ENG_CRA-highres.pdf accessed 15 December 2017.

178 See n 172 above, 117.

arbitrators, the number of arbitrators required, the availability of the arbitrators selected, the strength of the claims or issues raised, and settlement procedures.

Selecting a tribunal

According to several studies, it can take anywhere from five to nine months to constitute an ICSID tribunal from the moment that the request is registered.¹⁷⁹

Under the ICSID Convention, tribunals are composed of three arbitrators, unless the parties agree otherwise.¹⁸⁰ When the parties do not agree on the number of arbitrators or method of selection, they have 60 days after the registration of the request to notify the Secretary General that at least one of them chooses the default mechanism set out in Article 37(2) (b) of the ICSID Convention. Thus, even if it is clear that there will be no agreement regarding the number or method, the parties may still wait 60 days from the registration of the request before they invoke the default mechanism.¹⁸¹

Under the default mechanism, each party appoints an arbitrator and then agrees on a third presiding arbitrator.¹⁸² This presents two concerns. First, the parties themselves may take some time to appoint their nominees, and in most cases the parties take ample time to mutually agree on a presiding arbitrator. Second, a party often objects to the nominees of its counterpart, which delays the proceedings. Indeed, some analyses have indicated that objections and challenges to party-appointed arbitrators are on the rise.¹⁸³

In some circumstances, an arbitrator challenge may be tactical. It can have the desired effect of delaying the proceedings. The moving party may also seek to send the arbitrator a warning, drive him or her into making a mistake that would in turn create cause for challenge, or simply push him or her to resign.¹⁸⁴

Regardless of the motive, a decision on a challenge may take months,¹⁸⁵ after which, finding and appointing a replacement may again be time-consuming. Under the ICSID and UNCITRAL rules, the same procedures apply for both the original appointment and its replacement.¹⁸⁶

The ICSID Convention creates a deadline of 90 days for the completion of the constitution of the tribunal.¹⁸⁷ When that deadline is reached, a party may request the ICSID Administrative Council to appoint the arbitrators itself.¹⁸⁸ However, this deadline may be altered by the parties, and the mechanism does not trigger automatically. Instead, parties are given the right to an appointment by the ICSID Administrative Council. Moreover, the Chairman of the ICSID Administrative Council's

179 Stephen Jagusch and Jeffrey Sullivan, 'A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern' in Michael Waibel, Asha Kaushal, Kyo-Hwa Chung and Claire Balchin (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer 2010) 82.

180 ICSID Convention Art 37(2) (b).

181 See n 178 above, 81.

182 ICSID R 2(3).

183 Jason Gottlieb and Michael Mix, 'Arbitrator Challenges: Balancing Flexibility, Confidentiality and Efficiency', *New York Law Journal* (30 March 2015) www.law.com/newyorklawjournal/almID/1202721577764/?sreturn=20180821155836 accessed 15 December 2017.

184 Constantine Partasides, 'The Art of Selecting the Right Arbitrator' (2011) London Sch of Econ www.lse.ac.uk/lse-player?id=1252 accessed 15 December 2017.

185 Adam Raviv, 'Achieving a Faster ICSID' in Jean E Kalicki and Anna Joubin-Bret (eds), *J Reshaping the Investor-State Dispute Settlement System for Journeys for the 21st Century* (Brill 2015) 653, 669.

186 ICSID Convention Art 56; UNCITRAL Rules Art 14.

187 ICSID Convention Art 38; ICSID Rule 4.

188 *Ibid.*

mandate is to consult both parties on an ‘as far as possible’ basis,¹⁸⁹ which also leaves sufficient room for recalcitrant parties to slow down proceedings.

Similarly, under UNCITRAL rules, a three-member tribunal is presumed unless the parties otherwise agree within 15 days from when the respondent receives the notice of arbitration. As under the ICSID Convention, the two sides appoint their respective arbitrators, and then agree on the presiding arbitrator.¹⁹⁰ If the parties are unable to agree on a sole arbitrator, they are required to designate an appointing authority that will carry out such an appointment under UNCITRAL rules. If the parties do not agree on an appointing authority within 30 days of the date of the proposal, the Secretary General of the Permanent Court of Arbitration (PCA) may be requested to designate an appointing authority required to make the appointment ‘as promptly as possible’.¹⁹¹ Thus, while in theory the appointment of a sole arbitrator in the event of disagreement should take about 60 days, in practice, it ends up taking between 90 and 120 days.¹⁹²

Accordingly, under both the ICSID and UNCITRAL rules, while there are deadlines to avoid delays in constituting the tribunal, there remains room for delay to be created by the parties.¹⁹³ In ICSID proceedings, a party may delay triggering the default mechanisms up to 60 days after the request is registered, and under the UNCITRAL rules, much is at the discretion of the appointing authority, and delays may also occur.¹⁹⁴ The counter-argument, which helps to explain the long-time parties may take in appointing arbitrators, is that ‘the selection of the party-appointed arbitrator may be the most critical decision in an international arbitral proceeding’.¹⁹⁵ Indeed, it is often said to be the reason for parties to prefer arbitration over litigation.¹⁹⁶ Parties and their counsel legitimately spend substantial time and resources selecting the party-appointed arbitrator, underlining the importance of the issue. The selection is normally completed after serious research by counsel with the client.¹⁹⁷

There are several measures that institutions could adopt to minimise the time taken to select tribunals. First, institutional rules might be amended to create a sanction mechanism for those parties who create undue delays in selecting an arbitrator.¹⁹⁸ Sanctions could mirror those enumerated in the London Court of International Arbitration Rules, which include a written reproach, a written warning concerning future conduct in arbitration, or any additional measures required to ensure a fair and expeditious arbitration.¹⁹⁹ Second, arbitral bodies could communicate to the parties the benefits of a sole arbitrator. The UNCITRAL Rules could be changed to reflect the default rules regarding three membered tribunals. And third, arbitration practitioners themselves might do their part to enlarge the pool of arbitrators by nominating younger, lesser known arbitrators.

189 *Ibid.* Rule 4(4).

190 UNCITRAL Rules Art 7.

191 *Ibid.*, Art 6(3).

192 David D Caron, Matti Pellonpää, Lee M Caplan, ‘The UNCITRAL Arbitration Rules: A Commentary’ (Oxford University Press 2006) 176.

193 See n 178 above, 84.

194 *Ibid.*

195 Claudia T Salomon, ‘Selecting an International Arbitrator: Five Factors to Consider’ (2002) 17 Mealey’s Int’l Arb Rep; Wendy Miles, ‘International Arbitrator Appointment’ (2002) 57 DRJ 36, 37.

196 Chiara Giorgetti, ‘Who Decides Who Decides in International Investment Arbitration?’ (2014) 35 UPenn JIL 431, 443 <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1863&context=jil> accessed 15 December 2017.

197 *Ibid.*, 445.

198 Margaret Moses, ‘The Growth of Arbitrator Power to Control Counsel Conduct’ *Kluwer Arbitration Blog* (2014) <http://arbitrationblog.kluwerarbitration.com/2014/11/12/the-growth-of-arbitrator-power-to-control-counsel-conduct> accessed 15 December 2017.

199 London Court of International Arbitration Rules Art 18.6, 1 October 2014. ‘The Arbitral Tribunal may order any or all of the following sanctions against the legal representative: (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.4(i) and (ii)’.

Number of arbitrators

A further efficiency-advancing reform could be the mandatory direction or encouragement of parties to arbitrate disputes via a sole arbitrator rather than a panel of three arbitrators in smaller value or less complex disputes. This could save parties the time and expense of proceeding with more arbitrators than may be necessary for the timely disposition of the case. Such reform would not necessarily require wholesale revisions to major institutional rules. While most investment disputes have historically proceeded before a panel of three arbitrators, no major arbitral rule concerning investment disputes requires that there be three arbitrators instead of one.²⁰⁰

Modifying the framework for investment disputes to require or incentivise the use of a sole arbitrator would address two key efficiency challenges that concerned Survey respondents. First, more than 90 per cent of Survey respondents expressed concern with the availability of arbitrators in investment treaty arbitration and, relatedly, the duration of investment arbitration proceedings.²⁰¹ As a matter of scheduling, there is a clear advantage in having just one arbitrator rather than three. With two fewer calendars and conflicting case commitments to coordinate, proceedings would no longer be protracted from scheduling conflicts among the arbitrators. Further, to the extent that Survey respondents interpreted arbitrator availability to connote the conflict-free commitment of an arbitrator, requiring or incentivising a joint-party or institution-led appointment of a sole arbitrator would mitigate the parties' scope for arbitrator challenge and minimise the otherwise potentially lengthy period before the arbitration where arbitrators are nominated and challenges are made and adjudicated.²⁰² Second, nearly 60 per cent of Survey respondents expressed significant concern with post-hearing deliberation period.²⁰³ With just one arbitrator, the time required for extensive consultation or the drawn out exchange of draft awards could be avoided.²⁰⁴ The time taken in these respects by a three-arbitrator panel can be significant. Some commentators have suggested that a party-appointed arbitrator may feel the need to pay specific regard to the facts or arguments presented by the party appointing him or her, even – controversially – going so far as to actively promote the appointing party's interests in tribunal deliberations.²⁰⁵

However, while reducing the number of arbitrators on a panel may truncate the post-hearing deliberation period, not all cases are suitable for a single arbitrator. The value of the claim, complexity of the issues, and potential policy impact are some considerations to be made before referring a case to a single arbitrator. In fact, most disputes involve high stakes matters, limiting the

200 See, eg, ICSID Convention Art 37(2)(a); UNCITRAL Rules Art 7; ICC Rules Art 12; Permanent Court of Arbitration, Arbitration Rules 2012 Art 7; Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the 'SCC Rules') Art 16; Investment Arbitration Rules of the Singapore International Arbitration Centre Rule 5.1.

201 2016 Report 7 (response to Qs 38 and 39). More than half of Survey respondents characterised their concern about both of these issues as significant.

202 Around 90 per cent of Survey respondents expressed that challenges to arbitrators was an issue of at least some concern in investment treaty arbitration. More than 40 per cent of Survey respondents said it was an issue of significant concern. See *ibid*, 4 (response to Q 33).

203 *Ibid*, 7 (response to Q 40). A further nearly 30 per cent of Survey respondents expressed some concern with the time investment tribunals take after the last hearing to render their award.

204 Cases such as *Pantechniki v Albania* exemplify the benefit in terms of speed and cost that investment arbitration assumes, when the arbitration is conducted by sole arbitrators: the entire procedure from the registration of the request to the award was completed in less than two years.

205 See generally n195 above. Giorgetti 454–458 (quoting Hand Smit, 'The Pernicious Institution of the Party-Appointed Arbitrator' (2010) 33 Colum FDI Persp, 1 <https://academiccommons.columbia.edu/doi/10.7916/D8G167Q9> accessed 15 December 2017); Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahanoush H Arsanjani, Jacob Katz Cogan, Robert D Sloane, and Siegfried Wiessner (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Martinus Nijhoff 2010) 821, 834; and Yves Derains, 'Fifth Annual International Commercial Arbitration Lecture: The Arbitrator's Deliberation' (2012) 27 AUIL Rev 911, 913–919 <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1790&context=auilr> accessed 15 December 2017.

utility of a sole arbitrator in practice to a limited number of cases. From 2012–2017, the average investment treaty claim was \$719,334,000 (excluding the *Yukos v Russia* arbitrations).²⁰⁶ Furthermore, according to ICC statistics, states and state-entities often prefer three-member arbitral tribunals, as ‘85% of ICC cases involving States and 86% of ICC cases involving State-entities were referred to three-member tribunals, compared to only 57.5% of ICC cases in general’.²⁰⁷

The most problematic issue with having a single arbitrator is that it denies parties to an investment dispute the ability to appoint an arbitrator of their own choosing. That denial, even under limited circumstances, is an extreme measure. Any efficiency-serving benefit of an innovation that directs parties to a sole arbitrator must be balanced against the impact this might have on the ongoing willingness of investors and states to subject themselves to investor-state dispute resolution. With more than 80 per cent of Survey respondents supporting parties’ ability to appoint an arbitrator in investment treaty arbitration,²⁰⁸ the Survey results suggest that any measure that removes from parties the ability to resort to a panel of three arbitrators would instigate re-evaluation of recourse to the system. The fact that more than 60 per cent of Survey respondents also expressed at least some concern with the appointment of arbitrators by institutions²⁰⁹ further highlights concerns beyond the number of arbitrators. Having the autonomy to appoint an arbitrator to the panel remains a central appeal of the investment treaty arbitration system to a large proportion of its users.

Automatic referral of cases to a sole arbitrator advances efficiency at too high a cost to most users of the system. However, pre-arbitration arrangements may allow for parties to proceed with one arbitrator. Pre-arbitration agreements preserve party autonomy in the panel constitution phase. The parties themselves choose whether their ability to appoint an arbitrator of their choice should be limited. Parties who genuinely value a more efficient process could explore the complexity of factual and legal issues of the case. This would inform a discussion on damages appraisals and scheduling. Parties would then be free to determine whether a sole arbitrator or a panel of three would, on balance, be more desirable for the resolution of the dispute.²¹⁰ While it is a modest innovation, this measure might allow parties who truly desire a speedy outcome to proceed more efficiently with a sole arbitrator.

Lack of availability of arbitrators

In 1995, the International Court of Arbitration of the ICC (the ‘ICC Court’) expressed concern about arbitrator availability and added to the arbitrator’s statement of independence a declaration that the prospective arbitrator is ‘able and available to serve as an arbitrator in accordance with all of the requirements of ‘the Rules’.²¹¹ The ICC believes that ‘[t]he availability of arbitrators, to be intended

206 Investment Treaty Arbitration: Cost, Duration and Size of Claims All Show Steady Increase, Allen & Overy, (14 December 2017) www.allenoverly.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-cost-duration-and-size-of-claims-all-show-steady-increase.aspx accessed 8 October 2018.

207 ICC, *Commission Report, States, State Entities and ICC Arbitration* (2012) 3 n 1 <https://cdn.iccwbo.org/content/uploads/sites/3/2015/10/ICC-Arbitration-Commission-Report-on-Arbitration-Involving-States-and-State-Entities-under-the-ICC-Rules-of-Arbitration-2012.pdf> accessed 16 December 2017.

208 2016 Report 3 (response to Q 28).

209 *Ibid*, 4 (response to Q 29).

210 To preserve the confidentiality of the dispute, potential arbitrator appointees in any such pre-arbitration procedure may need to sign a non-disclosure agreement. In this way, should the parties elect to proceed with an alternative arbitrator – or alternative arbitrators – the confidence of the dispute remains protected.

211 Yves Derains and Eric Schwartz, *A Guide to the ICC Rules of Arbitration* (Kluwer Law Int’l 2005) 156.

as their ability to devote the necessary time to hearing the case, is fundamental to the streamlined course of the proceedings. The quality of arbitral tribunals also results from this, as international arbitrators are very often overloaded with work. A desired arbitrator may not be available in time and in travelling capacity, thus endangering the celerity of the proceedings'.²¹²

One potential solution is greater disclosure regarding arbitrator availability. In order to increase efficiency, it is important to ensure that the nominated arbitrators (whether party or institutional) do not have back-to-back hearings for the next 18 months. In this regard, institutions should require broader disclosure by arbitrators of their commitments and availability to take on the case by asking as a default rule for written confirmations about their calendar commitments in the next 18 months. For instance, in August 2009 the ICC took a major step towards transparency with respect to arbitrators' availability and workload. As a result of these measures, the ICC now requires ICC arbitrators to complete an ICC Arbitrator Statement of Acceptance, Availability and Independence listing their 'currently pending' cases, and confirming their ability to devote the necessary amount of time to the arbitration and to conduct the process 'diligently, efficiently and in accordance with the time limits in the Rules'. Other institutions have followed suit. The ICSID Secretariat regularly asks prospective arbitrators for their availabilities in form of marked-up calendars for the near future, indicating the prospective arbitrator's pre-scheduled commitments.

Some suggest that the number of arbitrated cases by one arbitrator could also be limited to allow adequate time to handle the case, or at least to impose an obligation on prospective arbitrators and chairpersons to raise the flag when the number of appointments in ongoing cases meets a certain figure. This process should also be used for appointing authorities. However, more important and practicable than imposing such limits might be intensive data collection by institutions concerning arbitrator's performance during proceedings. Feedback from parties on questionnaires or even from co-arbitrators can be helpful in that regard. This would encourage newer faces to emerge and replace the latter kind of arbitrators.

Meritless claims or issues

The current international investment arbitration system may not deal adequately with meritless claims. In many court systems, a meritless claim, which is either legally, factually, or jurisdictionally deficient, can be dismissed long before trial. In international arbitration, however, the claimant is often permitted to request documents from the other side, submit witness statements, submit expert reports and conduct a full hearing on all of the issues. After these numerous steps, a tribunal may rule that the claim was meritless and fails as a matter of law. Such a ruling could often come earlier in the process, eliminating the need for extensive factual development, as well as the time and expense necessary to provide expert testimonies and argue at hearings.

There is a need to find a workable system of dispositive motions that fits into the existing framework of international investment arbitration in order to increase efficiency of the system.²¹³ For example, an arbitral system that employed a way to dismiss a meritless claim as a matter of law before it moved

212 Institute for the Promotion of Arbitration and Mediation in the Mediterranean, 'Report on the Criteria for Selection of Arbitrators' (2012) www.ispramed.it/root/wp-content/uploads/2012/09/Report-on-the-Criteria-for-the-Selection-of-Arbitrators5.pdf accessed 15 December 2017.

213 See *ibid.*, (discussing some of the most commonly raised objections to the practice of dispositive motions in international arbitration and explaining why they do not pose a major stumbling block).

on to a tribunal arguably could increase the efficiency of international investment arbitration.

To address this issue, ICSID amended its rules in 2006 to allow claims that manifestly lack legal merit to be dismissed early on in the process before the claim unnecessarily consumes the opposing parties' resources, while not wrongly depriving the claimant of due process guarantees.²¹⁴ Rule 41 (5) applies to objections to jurisdiction, as well as to objections on the merits. The objection will be upheld if the claim is 'manifestly without legal merit', which is a high standard. Parties must file preliminary objections within 30 days of the constitution of the tribunal. Then, a decision is reached at the tribunal's first session, within 60 days of the constitution of the tribunal. From its inception in 2006 until 2017, this procedure has been used in 25 cases.²¹⁵

A main criticism of Rule 41 (5) is that it may not actually increase efficiency.²¹⁶ For example, in *Global Trading v Ukraine*, ten months passed from the filing of the objection until the date of the award.²¹⁷ Rule 41 (5) objections that are overruled may cause the arbitration to last longer and be more costly because they must be argued and ruled upon before the rest of the arbitration commences.²¹⁸

The standard of 'manifestly without legal merit' requires the 'respondent to establish its objection clearly and obviously, with relative ease and dispatch. The standard is thus set high'.²¹⁹ 'Manifest' implies that it is not necessary to engage in elaborate analysis. Accordingly, objections involving complex legal issues are outside the scope of Rule 41 (5). This high bar protects the due process of claimants. However, it also impedes efforts to increase efficiency in international investment arbitration.

Many other arbitral systems have created mechanisms for early dismissal of meritless claims. In October 2017, the ICC permitted tribunals to immediately dismiss manifestly unmeritorious claims or defences. In 2016, Singapore International Arbitration Centre (SIAC) enacted Article 29.1, which allows for the early dismissal of a 'claim or defence... manifestly without legal merit', and a 'claim or defence... manifestly outside the jurisdiction of the tribunal'.²²⁰ In 2017, the Stockholm Chamber of Commerce (SCC) followed suit and introduced Article 39, which declared 'a request for summary procedure may concern issues of jurisdiction, admissibility, or the merits'.²²¹ The CPTPP adopts a similar process, stating, 'a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 9.29 (Awards) or that a claim is manifestly without legal merit'.²²²

214 ICSID, 'Manifest Lack of Legal Merit - ICSID Convention Arbitration' <https://icsid.worldbank.org/en/Pages/process/Manifest-Lack-of-Legal-Merit.aspx> accessed 15 December 2017.

215 ICSID, 'Decisions on Manifest Lack of Legal Merit' <https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Manifest-Lack-of-Legal-Merit.aspx> accessed 15 December 2017.

216 Christoph H Schreuer and Loretta Malintoppi, *The ICSID Convention: A Commentary* (Cambridge University Press 2009) 544.

217 *Global Trading Res Corp & Globex Int'l, Inc v Ukraine*, Award, 1 December 2010, ICSID Case No ARB/09/11 www.italaw.com/sites/default/files/case-documents/ita0379.pdf accessed 15 December 2017.

218 An efficiency-serving measure might also be extracted from the cases *Global Trading v Ukraine*, *RSM Production v Grenada* and others that would require adjusting the rules so that ICSID Rule 41 (5) does not become a dilatory instrument. See Adam Raviv, 'A Few Steps to a Faster ICSID' (2016) 8 *Glob Arbitration Rev*. For instance, after a Rule 41 (5) objection, there could be a specific deadline for the tribunal to decide.

219 *Trans-Global Petroleum, Inc v Jordan*, Decision on the Respondent's Objection Under Rule 41 (5), 12 May 2008, ICSID Case No ARB/07/25 para 88 www.italaw.com/documents/TransglobalRule41Decision.pdf accessed 15 December 2017.

220 SIAC Rules 2016 Art 29.1.

221 SCC Rules 2017 Art 39.

222 CCTPP Rules (Art 1) (incorporating TPP Rules (Art 9.23(4))).

Separate and apart from the early dismissal of claims, tribunals may allow the strength of the claims to weigh upon the final award of costs, which is often within their discretion. For example, if multiple meritless claims were brought, but only one claim had merit, the claimant may receive a lesser award of costs as to its meritorious claim or none at all. Cost allocation has been used in arbitration to persuade parties to maximise efficiency and to deter meritless claims.

A tribunal may use a variant on the ‘loser pays’ approach to allocate costs in proportion to the outcome of the case. This may take into consideration the relative success of certain claims and defences while also taking into account of factors such as the amount of the claims compared to the amount actually awarded.²²³ By seeking to allocate costs in proportion to the outcome of the case, both sides in the arbitration are encouraged to engage in reasonable conduct during the proceeding. For example, counsel are dissuaded from arguing frivolous claims. This approach has gained traction in investment arbitrations in recent years²²⁴ and is sometimes termed ‘relative success’.

Claim settlement procedures

After an arbitration spanning more than three and a half years resulting in an award of damages amounting to \$17m in favour of Metalclad Corporation,²²⁵ the CEO of Metalclad Corporation revealed at an American Bar Association event ‘that the arbitral mechanism he experienced was so dissatisfying that he wished he had merely entrusted his company’s fate to informal mechanisms’.²²⁶ His comment, which was made in 2004, was one of the first public endorsements of alternative dispute resolution (ADR) mechanisms.

Many have criticised mechanisms, such as arbitration and adjudication before courts, for depriving disputants of control over the dispute resolution process and for potentially ‘destr[oying]’ the business relationship between the disputants.²²⁷ In fact, investor-state arbitrations may carry the potential of creating significant political consequences beyond the disputants.²²⁸ One way to avoid adverse political and financial implications of investment disputes while preserving business relationships is to open the gateways for ADR mechanisms, including mediation. However, there are numerous roadblocks inhibiting the use of such procedures in claim settlement.

i. Lack of knowledge or information

Although ICSID has been promoting mediation for several years²²⁹ through its Rules of Procedure for Conciliation Proceedings (the ‘Conciliation Rules’), government officials, corporate executives and lawyers tend to lack knowledge on this process. ADR mechanisms such as mediation, conciliation and

223 Matthew Hodgson, ‘Costs in Investment Treaty Arbitration: The Case for Reform’ (2014) 11 *Transnational Dispute Management* 3.

224 *Ibid*; see *EDF (Services) Limited v Romania*, Award, 8 October 2009, ICSID Case No ARB/05/13 paras 327–329 www.italaw.com/sites/default/files/case-documents/ita0267.pdf accessed 15 December 2017; *Occidental Petroleum Corp & Occidental Expl & Prod Co v Republic of Ecuador*, Award, 5 October 2012, ICSID Case No ARB/06/11 paras 873–874 www.italaw.com/sites/default/files/case-documents/italaw1094.pdf accessed 15 December 2017; *Helman Int’l Hotels A/S v Arab Republic of Egypt*, Award, 3 July 2008, ICSID Case No ARB/05/19 paras 173–174 www.italaw.com/sites/default/files/case-documents/ita0399.pdf accessed 15 December 2017.

225 See n 107 above.

226 Jack J Coe, Jr, ‘Toward a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch’ (2005) 12(7) *UC Davis JIL & Pol’y* 7, 8.

227 Jeswald W Salacuse, ‘Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution’ (2007) 31(1) *Fordham ILJ* 138, 155.

228 *Ibid*, 147.

229 Wolf von Kumberg, Jeremy Lack and Michael Leathes, ‘Enabling Early Settlement in Investor-State Arbitration the Time to Introduce Mediation Has Come’ (2014) 29 *ICSID Rev* 133, 134.

consultation are rarely used.²³⁰ Indeed, statistical studies show that until 2014, of the 400-plus ICSID cases filed, only nine cases (approximately two per cent) included conciliation.²³¹ Moreover, while most BITs have a so-called cooling off period built in to enable the parties to negotiate amicably at the outset of a dispute, there are no guidelines or international norms suggesting how parties can use this period productively.²³²

Further, while arbitration rules contemplate the possibility of settlement or consent awards,²³³ they do not assist the parties in re-evaluating and actively exploring additional dispute resolution mechanisms. The disputants may need guidance and education to overcome concerns about conveying a perception of weakness if they propose negotiation or consultation. Disputants may not effectively utilise cooling-off periods. In fact, disputants may even waste them by ‘turning the temperature up, not down, and concentrating on arbitration, not settlement’.²³⁴

ii. Lack of inclination from the disputants

Some have argued that investors have developed a resistance towards alternative mechanisms of dispute resolution because they are using expansive legal services and are motivated to win as much of the claimed damages as possible.²³⁵ From the states’ perspective, governments often hesitate to use mediation in ISDS cases, apparently due to transparency and personal liability concerns.²³⁶ Furthermore, the host state may be weary of negotiating a settlement because any such settlement ‘may be challenged by political opponents and the media as ‘selling out to foreigners’, weakness, or the product of corruption’.²³⁷ Some authors even have asserted that ADR mechanisms have the potential to destroy state sovereignty because they do not constitute a resolution of the dispute pursuant to law.²³⁸

Mechanisms such as mediation, conciliation and consultation are often categorised as ‘interests-based’ dispute resolution mechanisms, as opposed to strictly ‘rights-based’ because they entail a degree of compromise of legal rights if the interests of both sides are adequately protected.

Much has been written about the rights-based versus interests-based approach, and whether the latter is suitable to international law disputes.²³⁹ Mediators focus on the subjective interests of the parties as the basis for negotiated outcomes. They help the parties switch focus from their rights and positions to their needs and interests to explore options for mutual gain.²⁴⁰ However, there is a difference of opinion on the focus of conciliation. While some believe that conciliators use rights-based settlement

230 See n 226 above, 177–78.

231 See n 228 above, 136.

232 See n 226 above, 166.

233 SCC Rules 2017 Art 45; SIAC Investment Arbitration Rules Art 30.10 (2017) www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf accessed 15 December 2017 ; ICSID Arbitration Rule 43.

234 See n 228 above, 135–136.

235 See n 226 above, 150–153.

236 See n 228 above, 134.

237 See n 226 above, 149–150.

238 Fatma Khalifa, ‘Mediation use in ISDS’ (2014) 11(1) TDM 1, 5.

239 See generally Céline Lévesque, ‘Increasing the use of alternative dispute resolution in IIAs’ in Armand de Mestral and Céline Lévesque (eds) *Improving International Investment Agreements* (Routledge Taylor & Francis Group 2013).

240 See in this regard, Art 7(4) of the 2012 IBA Rules for Investor-State Mediation (‘[T]he mediator shall take into account the *wishes of the parties* (...)’ [emphasis author’s own]).

options for parties to choose from,²⁴¹ others are of the opinion that the role of conciliators, especially under the ICSID regime, is not so strictly demarcated.²⁴² In other words, nothing prohibits conciliators from undertaking an interests-based analysis.

In this regard, the ICSID Conciliation Rules themselves prescribe that the role of a conciliation commission is ‘to clarify the issues in dispute between the parties and to endeavor to bring about agreement between them on mutually acceptable terms’.²⁴³ This definition of the conciliator’s role is not specifically indicative of either a rights-based or interests-based approach. However, the conciliator’s role is much different from that of the arbitral tribunal. The role of an arbitral tribunal is to decide a dispute in accordance with the applicable law as agreed upon by the parties or, in the absence of such agreement, the law of the contracting state party to the dispute and any applicable rules of international law.²⁴⁴

While the categorisation of ADR mechanisms as either rights-based or interests-based may not be strictly relevant, it can be said that disputants (especially states) generally tend to be disinclined to change their focus from their legal rights and obligations to mutual needs and interests.

iii. Solutions

Educating disputants about ADR in ISDS

ICSID has taken important steps to encourage ADR in addition to promoting its mediation rules.²⁴⁵ For instance, in 2014, ICSID established a chairman’s list of conciliators who could likely serve as third-party neutrals facilitating mediation proceedings.²⁴⁶ Further, ICSID together with the Centre for Effective Dispute Resolution, the International Energy Charter Secretariat and the International Mediation Institute offered a three-day mediator training course for investor-state disputes in June 2017.²⁴⁷ UNCTAD has also published several reports discussing the utility of mediation, suggesting that ADR is vital to the future of international investment law.²⁴⁸

While such initiatives help in making ADR more accessible for investor-state disputes, more widespread awareness of ADR should be encouraged. For instance, a Mediation Manual, such as the one sponsored by the Netherlands, Norway and the United Kingdom in 2012, in cases under the OECD Guidelines for Multinational Enterprises, may constitute a useful educational tool on the process of mediation by providing suggestions on how and why mediation may be used to resolve claims in specific instances.²⁴⁹

Apart from such broad-based awareness, institutions such as the ICSID, ICC, SCC and others should continue to take a proactive approach to inform the disputants about the options of mediating or

241 See n 228 above, 134.

242 Frauke Nitschke, ‘The IBA’s Investor-State Mediation Rules and the ICSID Dispute Settlement Framework’ (2014) 29 ICSID Rev 112, 127.

243 ICSID Conciliation Rules Art 34(1).

244 ICSID Convention Art 42(1).

245 See Ucheora Onwuamaegbu, ‘The Role of ADR in Investor–State Dispute Settlement: The ICSID Experience’ (2005) 22 News from ICSID 12 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2389763 accessed 15 December 2017.

246 Susan D Franck, ‘Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide’ (2014) 29 ICSID Rev 66, 68.

247 See ICSID, *Investor-State Mediator Training* <https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/January%2017/Investor-State-Mediator-Training.aspx> accessed 15 December 2017.

248 UNCTAD, ‘Investment Policy Framework for Sustainable Development’ (2012) http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf accessed 15 December 2017; UNCTAD, *IIA Issues Note No 2* (June 2013) http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.

249 See n 228 above, 137.

consulting for every instance they consider recourse to such mechanisms to be beneficial. Given that their officials have the most frequent access to potential disputants, they are well placed to suggest that disputants explore such possibilities.²⁵⁰

Encouraging the use of ADR mechanisms: usability of IBA rules?

In 2012, the IBA enacted its Rules for Investor-State Mediation (the 'IBA Rules'). The IBA created a Subcommittee specifically to address issues related to investor-state mediation,²⁵¹ which developed a set of mediation rules specifically designed to assist investors and states in settling disputes under investment treaties, investment contracts or investment laws.²⁵² These IBA Rules were meant to educate parties on mediation and how it might be used to resolve a dispute. They also afford flexibility and can be adapted by the parties to address their particular needs with respect to a conflict or a dispute.²⁵³ The IBA Rules do not address specific details as far as the conduct of the mediation process is concerned, such that the parties and the mediator may adapt the process to their specific needs and preferences.²⁵⁴

The IBA Rules have been lauded as 'an essential first step in legitimizing and normalizing' mediation for investor-state disputes.²⁵⁵

Many suggest the use of the IBA Rules during the 'cooling-off' period in the ICSID regime. Thus, an instrument containing consent to ICSID jurisdiction could be drafted to require a two-tier procedure, namely mediation under the IBA Rules at a preliminary stage, followed by an ICSID arbitration or conciliation proceeding.²⁵⁶ Mediation may also be inserted in an ad hoc fashion before arbitration, or in conjunction with the ICSID Conciliation Rules, even after arbitration has commenced.²⁵⁷

Data shows that ADR contributes to case settlement. A study published in the ICSID Review (2014), reveals that disputes in sectors that regularly utilise ADR, such as construction, oil and gas, information and communication, settle almost 50 per cent of the time as opposed to disputes in sectors that do not regularly utilise ADR, such as power, agriculture, fishing and forestry.²⁵⁸

Interestingly, host states from Southeast Asia and South America appear most amenable to continuing negotiations after commencement of the arbitration, whereas host states from North America appear least amenable to settlement talks. Indeed, not a single North American case, even under the NAFTA regime, appears to have reached settlement.²⁵⁹

Even if the parties are unable to reach a negotiated settlement of the entirety of the claims in issue, the use of ADR mechanisms can certainly help to streamline the dispute such that only a portion of it remains to be determined by a tribunal. Thus, ADR techniques may reduce the time and costs of arbitral proceedings.

250 See n 226 above, 181.

251 See n 245 above, 68.

252 Anna Joubin-Bret and Barton Legum, 'A Set of Rules Dedicated to Investor-State Mediation: The IBA Investor-State Mediation Rules' (2014) 29 ICSID Rev 17.

253 *Ibid*, 20.

254 *Ibid*.

255 See n 245 above, 80.

256 See n 241 above, 129.

257 IBA Rules Art 2(4).

258 See n 241 above, 121.

259 *Ibid*, 123, 125.

Solutions specific to states

While some states, such as Australia and India, have shown faith in consultations and negotiations, a number of states are not comfortable with using ADR to resolve highly political disputes under intense public scrutiny.

Educational programmes may be specifically directed at assisting state institutions in coming to trust mediation, negotiation or consultation. Transparent procedures may encourage state officials or senior executives to engage in consultations. Further, the benefits of ADR over conventional dispute settlement mechanisms may be highlighted. These include the opportunity in mediation to have a private caucus with a mediator to express concerns. Mediation also allows the parties to explore sensitive topics with the other side without feeling vulnerable and without compromising the confidentiality of the dispute settlement process.²⁶⁰

Another important way to encourage states to use ADR is to inform them of their right to commence mediation or consultation.²⁶¹ While arbitration usually offers only the investor the right to commence a dispute, both an investor and state may initiate mediations or consultations. Although there have been a handful of investment arbitrations that were initiated by states, this remains relatively uncommon. Mediation, conciliation or consultation procedures are motivated more by the needs and interests of the parties than their legal rights. Therefore, a state may still be encouraged to mediate a dispute over arbitrating it.²⁶²

While some governments in recent years have turned their attention to ‘conflict management’ for investor-state disputes,²⁶³ many still do not have dedicated resources to deal with investment dispute settlement. Accordingly, they may not trust their counsel to represent their interests in negotiations. Some governments could designate a specific agency to have responsibility for managing investor-state conflicts, and the resultant negotiations and consultations. This would enable governments to manage the conflict before it escalates into a contested dispute. Placing trusted government officials in this role may make governments more comfortable with their representation during such processes.²⁶⁴

Treaty practice

The unpopularity of procedures surrounding claim settlement may be rectified by including such procedures in investment treaties. While conciliation is often an option for the parties, it would help if more treaties made explicit reference to mediation as an alternative to arbitration. While most treaties call for ‘amicable settlement’ in their dispute resolution clauses, these provisions are mostly kept open-ended. The absence of clearly delineated procedures leads to confusion.²⁶⁵ A description of a procedure for mediation or a reference to the IBA Rules would help disputants utilise mediation even during the arbitration, when settlement efforts fail during the preliminary stage. This would allow for the exploration of interests-based settlement and rights-based outcomes.²⁶⁶

260 See n 228 above, 141.

261 See n 245 above, 82.

262 See n 226 above, 144–145.

263 See n 238 above, 137.

264 *Ibid*, 166.

265 *Ibid*, 150.

266 See n 228 above, 137.

To this end, states may seek to revise their existing investment treaties, as well as the treaty models they use in negotiations, to incorporate specific language authorising and encouraging disputants to employ ADR techniques. Such treaties should make clear that disputants should resort to international arbitration only after they are convinced that negotiations and various forms of alternative dispute settlement techniques would not be successful.²⁶⁷

Examples of prescribed ADR mechanisms can be derived from various BITs from the Australia, Canada, India and the US. From 2004²⁶⁸ to 2012,²⁶⁹ the US Model BIT has provided for consultations and negotiations as preconditions to arbitration. Similarly, the 2004 Canadian Model Foreign Investment Protection and Promotion Agreement also prescribed that '[t]he disputing parties shall first hold consultations in an attempt to settle a claim amicably'.²⁷⁰ A few of India's older BITs provided for either 'amicable' settlement through negotiations²⁷¹ or a broad obligation among state parties to indulge in consultation for any aspects relating to the BIT.²⁷² However, its recent BITs are more unequivocal in their preference for ADR mechanisms, providing for the use of an ombudsman, state-state arbitration and procedures for dispute prevention.²⁷³

Notably these 'new generation' BITs encourage amicable settlement on the part of both parties. Consultation and negotiation is available to the states or to the investor during the phase before an investor invokes the right to initiate international arbitration.²⁷⁴ More recent treaty practice goes even further in encouraging ADR mechanisms as an alternative or additional means of solving disputes between investors and states.²⁷⁵ For instance, CETA provides a detailed prescription of both consultation and mediation, with the former being a condition precedent to submission of a claim to the tribunal²⁷⁶ and the latter being an option available at any time to the disputing parties.²⁷⁷

In addition to the ongoing evolution of treaty practice, practitioners have also suggested the inclusion of 'convening clauses' in BITs, which provide for an independent third person to convene a meeting between the parties to assist them in evaluating and choosing an appropriate dispute resolution process.²⁷⁸ Similar to this procedure is the process of an 'early neutral evaluation', which was also proposed by UNCTAD, and involves an evaluator who hosts an informal meeting with investors and the state representative, to examine and inform the investor of the prospects of the case.²⁷⁹ Both of

267 See n 226 above, 184.

268 US Model Bilateral Investment Treaty: Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection Investment (2004) Art 23 ('In the event of an investment dispute, the claimant and the respondent shall initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures') www.state.gov/documents/organisation/117601.pdf accessed 15 December 2017.

269 See n 35 above, Art 23 ('In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party procedures').

270 Canada's Model Foreign Investment Protection and Promotion Agreement Art 25 (2004) www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf accessed 15 December 2017.

271 India-Argentina BIT Art 9(1) (1999).

272 *Ibid*, Art 11.

273 Nicholas Peacock, Donny Surtani, and Kritika Venugopal, 'India and Brazil conclude negotiations of Bilateral Investment Treaty', Herbert Smith Freehills Arbitration Notes, 5 December 2016 <http://hsfnotes.com/arbitration/2016/12/05/india-and-brazil-conclude-negotiations-of-bilateral-investment-treaty> accessed 8 October 2018.

274 See n 251 above, 18.

275 *Ibid*.

276 Art 8.22(1), CETA.

277 Art 8.20(1), CETA.

278 See n 238 above, 154–155.

279 UNCTAD, 'Investor-State Disputes: Prevention and Alternative to Arbitration' (New York and Geneva, 2010), xvii.

these procedures may assist in not only filtering out unmeritorious claims from going into arbitration, but also in avoiding arbitration altogether.

Efficiency challenges after constitution of the tribunal

After arbitration has commenced, many relevant efficiency considerations remain. Some of the most common complaints parties raise concern extensive document disclosures and the length of time it takes for tribunals to render an award after the proceedings are closed. Further, while many are proposing that there should be an expedited procedure for smaller claims, this proposal raises issues related to due process. Finally, the results of the Survey also revealed that users and observers of investment arbitration are concerned that the costs associated with arbitration undermine the efficient resolution of investment disputes.

Time taken to deliver an award

Counsel, arbitrators and institutions can all contribute to an efficient drafting and delivery of the award. In respect of counsel, well-pleaded cases help produce well-drafted awards. Counsel can do a lot to increase efficiency in drafting the award. Efficiency can be improved if counsel are sensitive to the factual and legal issues that seem to be of interest to the tribunal. This may be determined in part from the questions arbitrators pose to witnesses and experts. Counsel may also assist the arbitrators establishing the facts. For example, some have suggested that parties confer and draft together a timeline of all the undisputed factual events for the tribunal's benefit. Where necessary, parties could also include disputed facts and provide an account of their differences in the timeline. Additionally, summarising legal arguments, or providing lists containing disputed issues of law and damages, may assist the arbitrators in drafting the award.

Arbitrators can also contribute to the efficiency of the deliberations and the drafting of the awards first by preparing well for the hearing. This will allow them to identify the areas that are relevant to resolving the dispute and take advantage of the evidentiary hearings to resolve lingering questions. Arbitrators should draft a summary of the parties' position in preparation for the hearing. Second, at the end of the hearing, the tribunal can establish a deadline for submitting post-hearing briefs and foreshadow an approximate date for the issuance of the award. If the tribunal is not able to meet this deadline, it should inform the parties with advance notice and a reasoned explanation. Third, arbitrators would be well advised to set aside a certain period of time after the hearing for deliberations. If the deliberations reveal the existence of factual or legal lacunae, arbitrators should issue a procedural order on post-hearing issues, requesting counsel to address those issues in their post-hearing briefs. Fourth, drafting an award takes time. Yet some arbitrators may fail to set aside and devote sufficient uninterrupted time to the drafting of awards. The presiding arbitrator, in particular, may consider setting aside at least two complete weeks after the submission of the post-hearing briefs to devote him or herself to this task. Finally, awards probably could be shorter than they tend to be. Procedural sections could be more concise, and long quotations avoided as much as possible. It is the tribunal's reasoning that should be more developed. Further, the award should be limited to the relief sought and the legal arguments put forward by the parties. To that end, it is of paramount importance that the parties draft the relief section of their pleadings with utmost care and in an exhaustive fashion, including not only the principal relief sought but also any other subsidiary relief they may seek.

Institutions, too, can boost the efficiency of investment arbitration conducted under their auspices. This can be achieved by several means. First, for example, institutions might request from each arbitrator a written commitment to open as much time in his or her schedule as reasonably needed to solve the dispute. This should include a statement by the president of the tribunal that he or she will endeavour to reserve sufficient time (and in no case less than two weeks) within two months after the submission of the post-hearing brief to prepare a first draft of the award. Second, institutions might consider a reform by which arbitrators' fees are linked to the time spent in drafting the award, subject to all relevant circumstances. In the same vein, it may be good policy to gradually reduce the arbitrators' fees when the tribunal is late in delivering the award for unjustified causes, as is the current policy in the ICC for all cases registered after 1 January 2016.²⁸⁰ And finally, institutions can ensure that the signature and notification of the award is as simple as possible. E-signing should be accepted as a valid method, followed by execution of hard copies where required.

Lengthy submissions and exhibits

Both counsel and arbitrators have a duty to produce evidence efficiently. There are three specific areas in which counsel might minimise the impact of lengthy submissions and exhibits on the efficiency of investment arbitration proceedings. First, counsel should use the opportunity to produce evidence wisely, using efficient bundles containing core documents of the arbitration. Attempts to overwhelm arbitrators with evidence entails a risk that significant evidence goes overlooked. Citations to and quotes of evidentiary material should be as specific as possible, pointing to the relevant page or paragraph as references to large documents tend to be disregarded. Second, only case law on point should be cited. Third, the number of post-hearing memorials should be reduced, and those filed should be targeted to answer specific questions from the tribunal. And fourth, document production should also be carried out responsibly.²⁸¹

Arbitrators also play a crucial role in policing lengthy submissions and exhibits through the use of well-crafted procedural orders. Procedural orders should establish the categories of evidence – documents, legal authorities, witness statements or expert reports – that are admissible, the scope of the evidence (eg, rebuttal evidence), the procedural stage for its introduction and possible page limits for submissions. Evidence should always be aimed at proving factual or legal allegations. Arbitrators should not admit evidence that is not cross-referenced to a written submission. Procedural orders should clearly state that the tribunal will reject evidence untimely introduced, as well as unsolicited submissions on the merits, save under exceptional circumstances. The determination of costs in the award should penalise the parties that breached this instruction. Procedural orders should also ensure that the document production phase is carried out efficiently. Arbitrators should provide in advance a set of clear instructions, rules and guidelines governing the document production exercise. The tribunal should inform the parties that the document production costs will be allocated separately, and will take into consideration the conduct of the parties. Additionally, awarding costs immediately following document production may make counsel more cognisant of the price of their requests, and therefore shield against unnecessary or overly expansive document production.

280 See *ICC to Name Sitting Arbitrators and to Penalize Delay in Issuing Awards*, Global Arbitration Review (6 January 2016) <http://arbitrationblog.kluwerarbitration.com/2016/01/06/icc-to-name-sitting-arbitrators-and-penalize-delay-in-issuing-awards> accessed 8 October 2018.

281 Joerg Risse, 'Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings', (2013) 29(3) *Arbitration International*, 456, 460.

Expedited proceedings and other means to foster expedition

The Swiss Rules of International Arbitration (the ‘Swiss Rules’) are among the pioneers of specific rules on mandated expedited proceedings, and have provided such a mechanism since 2004²⁸² (and even earlier in the Geneva Chamber of Commerce (Chambre de commerce, d’industrie et des services de Genève (CCIG)) Rules of 1992).²⁸³ In the current version, the Swiss Rules provide for the same in Article 42 of the 2012 Rules. Both, voluntary and mandatory procedures are envisaged therein for disputes below CHF 1m. The procedure provides the Swiss Chamber the discretion to limit the rounds of submissions and numbers of hearings, shorten the time limits in the Swiss Rules and have summary arbitral awards. All disputes below the said amount of CHF 1m are arbitrated before a sole arbitrator as a default rule. Notably, the Swiss courts have had the chance to deal with all due process related counterarguments that arise in the context of expedited proceedings, for instance, the lack of sufficient reasons in an award, unequal treatment of parties, lack of consideration of submissions and so on.²⁸⁴ Inspiration can be sought from their jurisprudence in this regard. It is only now, when the Swiss Rules have progressed to what is called ‘super-expedited’ procedures²⁸⁵ that expedited procedures are making a foray into other institutions’ rules. The prime examples of these are the ICC Rules of 2017 and the SIAC Rules of 2016.

There are potential due process concerns that arise as a result of implementing expedited proceedings in investment arbitration, particularly due to the involvement of states and state entities.²⁸⁶ These concerns include whether these expedited proceedings would be mandatory for disputes below a particular amount in dispute, or whether they would be purely optional; whether setting such threshold amounts is suitable for investment cases as it is for cases under the ICC or Swiss Rules, considering that often, even smaller claims can be extremely factually complicated in investment cases; whether having mandatory expedited proceedings for investment cases interferes with state sovereignty, given the principle that state consent to dispute resolution has to be clear and unambiguous; and whether the different institutions can assume as much power as they do in expedited proceedings in commercial arbitration, given that in the investment context states are involved and, if so, whether this would push institutions to issue more reasoned decisions and change the notion of administrative functions of arbitral institutions.

Beyond reforming other major institutional rules to permit expedited proceedings, there are solutions, some of which have already been discussed above, that do not require a revamp of the rules that warrant consideration. One such solution that should be considered is whether to reduce bifurcation of the proceedings. When a tribunal bifurcates proceedings and ‘at the end of the jurisdictional stage decides it does have jurisdiction, the result is usually a very long case’.²⁸⁷ In addition, bifurcation can cost a lot of time and money if the case ends up with pleadings in every stage. Another practical solution involves increasing the use of *instant cost orders*, whereby the tribunal determines which party will bear the costs of a specific part of the proceedings based on multiple

282 Art 42, Swiss Rules 2004.

283 Art 31, CCIG Rules 1992.

284 See 4A_294/2008 (28 October 2008); see also Matthias Scherer, ‘Review of the Swiss Rules of International Arbitration and Commercial Mediation’ in Horacio A Grigera and Paul E Mason (eds), *International Commercial Arbitration Practice: 21st Century Perspectives* (LexisNexis 2016) 50-4-50-5.

285 See Swiss Chambers’ Arbitration Institution, *Always One Step Ahead* (March 2016).

286 See n 173 above.

287 See n 217 above, 5.

considerations. While these orders are of course subject to the final determination of the tribunal regarding costs, an instant cost order could put recalcitrant parties on a backseat and inhibit bad faith initiatives.²⁸⁸ Other solutions involve increasing the use of technology when practicable, as opposed to traditional paper proceedings and in-person hearings, and making the presiding arbitrator the sole member of the tribunal for procedural matters, even if the other members of the panel join for the merits.

288 Niuscha Bassiri, 'The Instant Cost Order' www.youngicca-blog.com/the-instant-cost-order-by-niuscha-bassiri-for-yiag accessed 8 October 2018; Niuscha Bassiri, 'Guidelines to the Instant Cost Order' www.arbitration-icca.org/media/0/12996309460860/guidelines_to_the_instant_cost_order.pdf accessed 8 October 2018.

Chapter 3: Transparency in international investment arbitration

Critics of investment arbitration have long condemned the lack of transparency at all stages of a dispute. Demands for increased public access to hearings, materials and awards produced in arbitrations, third-party participation through ‘*amicus*’ briefs, and disclosure of third-party funding have all become more widespread over recent years. Recent changes in treaty practice and arbitration rules have increased transparency significantly, and today, investment arbitration is arguably more transparent than domestic dispute resolution practice in many states.

At the treaty level, the EU recently negotiated FTAs with Japan and Vietnam, ratified an FTA with Canada (CETA), and is currently negotiating an FTA with China. Those agreements all have provisions for the disclosure of third-party funding, which remains one of the most controversial issues related to transparency in investment arbitration. Additionally, several BITS incorporate the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the ‘UNCITRAL Transparency Rules’), or include provisions modelled on these rules on transparency.²⁸⁹ These instruments establish principles of transparency in investor-state arbitration. It remains to be seen how these principles are put into practice.

The Survey questionnaire developed by the 2014 Subcommittee explored a variety of perspectives regarding transparency in investment arbitration. Survey questions revealed respondents’ opinions on the appointment of arbitrators, third-party funding, and general transparency and accessibility in international investment arbitration.

Appointment of arbitrators: The responses overwhelmingly reflected the view that appointments made by the same party, the same counsel and same law firm should be disclosed.²⁹⁰ Survey responses also showed that arbitrators should provide more fulsome disclosure of potential conflicts or ties with the parties, including relationships with party counsel or the facts of the case at the start of the proceedings.²⁹¹ Like the 2015 International Arbitration Survey conducted by Queen Mary University of London and White & Case, the IBA Survey called attention to the need for increased transparency in institutional decision-making on the appointment of and challenges to arbitrators, as well as consideration of arbitrator performance in making arbitral appointments.

Third-party funding: A majority of the respondents expressed the view that the existence of third-party funding should not affect the way in which costs are allocated. A plurality, approximately 45 per cent, responded that some degree of security for costs should be available to parties faced with claims funded by third parties. However, about 21 per cent responded that no security for costs should be available. At least one respondent state has recently taken criminal action against a third-party funder and its client recipient of the funding.²⁹²

289 The Transparency Rules and the Mauritius Convention (the ‘Transparency Rules’) have been developed by approximately 90 states. A number of treaties (nearly 40 since April 2014) incorporate the Transparency Rules via the UNCITRAL Arbitration Rules. A high number of these treaties further include large parts of the Transparency Rules for all arbitrations. See Report of the UN Commission in International Trade Law, Official Records of the General Assembly, Seventy-second Session, Supplement No 17 (A/72/17), para 317 www.uncitral.org/pdf/english/commission/sessions/unc-50/A-72-17-E.pdf accessed 8 October 2018 .

290 2016 Report, Q31, Q32.

291 *Ibid.*, Q29, Q33.

292 *Ibid.*

Transparency and accessibility: Half of all respondents considered that the present levels of transparency and accessibility in investment arbitration are sufficient. Less than half, approximately 42 per cent, called for greater levels thereof. With regard to third-party participation in proceedings, 56 per cent considered the access to participation sufficient, while about 32 per cent responded that the status quo is insufficient.

The majority of respondents (57 per cent) thought that open hearings should not be a requirement for arbitral proceedings. Similarly, 50 per cent of respondents felt that pleadings should not be published. An overwhelming 88 per cent of respondents, however, considered that publication of partial and final awards should be a requirement in investment treaty arbitration

Publication of arbitral awards, broadcasting of hearings and document production

This section highlights recent trends towards greater transparency in international arbitration and proceeds first by discussing provisions pertaining to transparency in NAFTA and CAFTA, and continues by discussing transparency measures implemented by the ICSID, ICC and UNCITRAL Rules. The section concludes by detailing recent developments pertaining to submissions by third parties and third-party funding.

Treaties and legal instruments

i. NAFTA

In 2001, NAFTA's FTC clarified that '[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and... nothing in the NAFTA precludes the parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal'.²⁹³ The FTC's clarification further details rules applicable to the access of documents in Chapter 11 arbitrations. Subject to certain exceptions, the FTC pledges that all parties to a Chapter 11 dispute will 'make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal'.²⁹⁴ A party may, however, withhold information pursuant to the relevant arbitral rules.²⁹⁵

In 2003, the NAFTA Commission announced new transparency measures to make Chapter 11 arbitration proceedings more accessible to the public. The commission's statement reaffirmed tribunals' authority to accept *amicus curiae*, and endorsed the use of standard forms for the Notice of Intent to arbitrate.²⁹⁶

Subsequently Canada and the US published statements supporting open hearings in NAFTA Chapter 11 arbitrations.²⁹⁷ Mexico announced its support for open hearings in investor-state disputes following

293 Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions dated 31 July 2001.

294 Aaron Cosbey, 'Note on NAFTA Commission's July 31, 2001, Initiative to Clarify Chapter 11 Investment Provisions' (January 2002) www.iisd.org/pdf/2001/trade_nafta_aug2001.pdf accessed 8 October 2018.

295 *Ibid.*

296 See Office of the United States Trade Representative, 'NAFTA Commission Announces New Transparency Measures' (October 2003) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/archives/2003/october/nafta-commission-announces-new-transparen> accessed 8 October 2018.

297 Office of the United States Trade Representative, 'Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations' (October 2003) https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf accessed 8 October 2018.

the 2004 NAFTA Commission Meeting.²⁹⁸ Subject to certain exceptions, the statements affirmed that each country would consent to have hearings in Chapter 11 disputes open to the public and would request consent for open hearings from disputing investors.²⁹⁹ The statements explained that the countries could revoke consent for public hearings to protect confidential information where appropriate.³⁰⁰ The countries encouraged tribunals to make arrangements with the disputing parties to live broadcast hearings, use closed-circuit television or use other forms of access to make the hearings public.³⁰¹

Although contracting parties' statements are not binding on tribunals, they provide Canada and the US with incentives to actively seek open hearings in cases against them.³⁰² So far Canada and the US have steadfastly adhered to their commitments to make arbitrations more transparent. For example, in *United Parcel Service v Canada*, the parties agreed to hold public proceedings in Washington, DC, except for those parts of the hearing that involved confidential information.³⁰³ Cameras and recording equipment were not allowed to record the proceedings.³⁰⁴ Similarly, in *Methanex v United States*, the US supported public access to arbitral documents and proceedings. However, the tribunal ruled that it had no authority to open hearings to non-disputing parties without both parties' consent.³⁰⁵ While the tribunal was unwilling to open hearings to non-disputing parties without Methanex's consent, it did assert its authority to accept *amicus curiae* submissions.³⁰⁶

In 2013, Eli Lilly and Co, a US company, initiated arbitration to resolve claims related to its patents in Canada. The Claimant argued that the Canadian court's interpretation of the Patent Act violated Canada's obligations under NAFTA.³⁰⁷ All pleadings and procedural orders were made public shortly after they were submitted or issued in *Eli Lilly and Co v Canada*.³⁰⁸ Instructions for submitting *amicus curiae* petitions were published on the ICSID website.³⁰⁹ Ultimately, the tribunal accepted six out of the nine non-disputing party briefs submitted.³¹⁰ In addition, the disputing parties agreed to make hearings public and the remaining member states, Mexico and the US, had representatives present during hearings.³¹¹

298 Meg Kinnear, 'Transparency and Third party Participation in Investor-State Dispute Settlement', 3 n 10 (December 2005) www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf.

299 See Office of the United States Trade Representative, 'Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations' (October 2003), 3 https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf accessed 8 October 2018.

300 *Ibid.*

301 *Ibid.*

302 Howard Mann, 'The Free Trade Commission Statements of October 7, 2003, on NAFTA's Chapter 11: Never-Never Land or Real Progress?' (October 2003), 3 www.iisd.org/pdf/2003/trade_ftc_comment_oct03.pdf accessed 8 October 2018.

303 *Ibid.*, 3–4.

304 'United Parcel Service of America, Inc v Government of Canada, NAFTA/UNCITRAL Arbitration Rules Proceeding', (December 2005) http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/Archive_%20Announcement23.html accessed 8 October 2018.

305 *Methanex Corp v United States*, Decision of the tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', para 42 (NAFTA Ch 11 Arb Trib 15 January 2001).

306 *Methanex Corp v United States*, Decision of the tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', para 53 (NAFTA Ch 11 Arb Trib 15 January 2001).

307 Global Affairs Canada, 'Cases Filed Against the Government of Canada: Eli Lilly and Company v Government of Canada' www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/dis-diff/eli.aspx?lang=eng accessed 8 October 2018.

308 ICSID, 'Transparency and Public Participation in Arbitration Proceedings – *Eli Lilly and Company v Government of Canada*' <https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/2017-Issue2/Transparency-and-public-participation-in-arbitration-proceedings.aspx> accessed 8 October 2018.

309 *Ibid.*

310 *Ibid.*

311 *Ibid.*

By comparison, prior to the FTC's 2001 Note of Interpretation and the 2003 statements of the NAFTA parties on transparency, tribunals regularly denied party requests to make proceedings and filings open to the public. In *Metalclad Corporation v Mexico*, the tribunal ordered the parties to keep the proceedings confidential, overruling the claimant's request to make the proceedings public.³¹² Likewise, the *Loewen Group v United States* tribunal denied the US request to make filings public.³¹³

ii. CETA

CETA contains provisions on transparency in investment arbitration as a means of enhancing its legitimacy. The UNCITRAL Transparency Rules are incorporated by reference under Article 8.36.³¹⁴ Further, the article provides that: 'the request for consultations, the notice requesting a determination of the respondent, the notice of determination of the respondent, the agreement to mediate, the notice of intent to challenge a Member of the tribunal, the decision on challenge to a Member of the tribunal and the request for consolidation... shall be... made available to the public'.³¹⁵

Article 8.36.5 establishes that CETA hearings will also be open to the public.³¹⁶ The tribunal, along with the disputing parties, will decide the method of making the hearings publicly accessible. This may entail physical public access to hearings or video broadcasting.³¹⁷ Pursuant to Article 8.36.5, arrangements would be made to withhold confidential information from the public proceedings.³¹⁸

CETA Article 8.37 permits a respondent-state to disclose to officials of the EU, Member States of the EU and sub-national governments documents that it considers necessary in the course of the proceedings, but requires that confidential information be protected.³¹⁹ Article 8.38 further provides that respondent-states 'shall' share certain information with a non-disputing state, even where such information has not been requested.³²⁰

Both Canada and the EU have ratified the treaty, which has allowed approximately 90 per cent of the treaty to come into effect since its provisional application date of 21 September 2017.³²¹ The investment protection provisions and the new investment court system introduced in CETA require approval from each EU Member State's legislature and regional legislatures before they go into effect.³²² So far, Austria, Croatia, Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Portugal, Spain and Sweden have voted to pass CETA.³²³

312 See n 107 above, para 13 (discussing and quoting from the tribunal's October 1997 order on confidentiality).

313 *Loewen Group v United States*, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, paras 25–26, 28 (NAFTA Ch 11 Arb Trib 9 January 2001) www.italaw.com/sites/default/files/case-documents/ita0469.pdf accessed 8 October 2018 (discussing the tribunal's September 1999 and June 2000 orders on confidentiality).

314 See n 37 above, Art 8.36.

315 *Ibid*, Art 8.36.2.

316 *Ibid*, Art 8.36.5.

317 *Ibid*.

318 *Ibid*.

319 *Ibid*, Art 8.37.

320 *Ibid*, Art 8.38.

321 *Ibid*; see http://ec.europa.eu/trade/policy/in-focus/ceta/index_en.htm accessed 15 December 2017.

322 *Ibid*.

323 *Ibid*.

iii. Arbitral bodies and institutions

ICSID

In 2006, the ICSID Rules and Regulations were amended to increase transparency. Specifically, Arbitration Rule 48 was amended to require the centre to publish excerpts of the tribunal's legal reasoning in cases where the parties do not consent to full publication of the award.³²⁴ In essence, the amended rule guarantees that every ICSID legal decision is published either in full or as an excerpt.

Since the rule's revision, entire proceedings have been made public in several notable cases. For example, in *The Renco Group Inc v Republic of Peru*, the parties agreed to publish all documents and hold open hearings.³²⁵ Likewise, in *Bear Creek Mining Co v Republic of Peru*, the hearings were held publicly³²⁶ and the parties agreed that Arbitration Rule 48(4) mandated that all documents be made public subject to the redaction of confidential information.³²⁷ Between 1 July 2016 and 30 June 2017, public hearings were broadcast in seven ICSID cases.

Additionally, ICSID Rule 32 now provides that all hearings are open, provided that neither party objects.³²⁸ Formerly, the rule required affirmative party consent to open hearings to any non-disputing parties.³²⁹ As a result of the Rule 32 revision, proceedings that had previously been criticised for lack of transparency began holding public hearings. Indeed, in *Vattenfall AB and others v Federal Republic of Germany*, the hearings on jurisdiction, merits and damages were publicly broadcasted by ICSID on a four-hour delay to ensure that portions of the hearings involving confidential or sensitive information were omitted from public broadcast.³³⁰

In certain cases, the parties and the tribunal opted to broadcast hearings, instead of allowing non-disputants to be present at hearings. Video broadcasting is an interesting compromise between transparency and confidentiality. Live streaming can avoid the criticism that transparency necessarily comes at higher administrative costs for parties. It also allows parties to protect confidential information without the delay of clearing a public hearing. The parties in *Spence International Investments et al v Republic of Costa Rica* took advantage of video broadcasting and live streamed the hearings on the merits for the public on the ICSID website.³³¹

Broadcasting proceedings also offers parties a feasible way to handle and protect confidential information. For example, streaming delays allows parties to inhibit the release of confidential information. However, parties can raise objections on the confidentiality ground. This seems to strike a reasonable balance between the quest for more transparency and the need for confidentiality.

324 ICSID, Arbitration Rules, Rule 48(4) dated April 2006.

325 *The Renco Group Inc v Republic of Peru*, Procedural Order No 1 (ICSID Case No UNCT/13/1) http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3004/DC3712_En.pdf accessed 8 October 2018.

326 *Bear Creek Mining Corporation v Republic of Peru*, Procedural Order No 1, para 21.6 (ICSID Case No ARB/14/21) http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DC5432_En.pdf accessed 8 October 2018.

327 *Ibid.*, paras 24.1–24.2.

328 ICSID, Arbitration Rules, rule 32 (April 2006).

329 ICSID, Arbitration Rules, rule 32 (January 2003).

330 *Ibid.*

331 See eg, *Spence International Investments et al v Republic of Costa Rica*, Hearing on the Merits (ICSID Case No UNCT/13/2) <https://livestream.com/ICSID/events/3954046> accessed 8 October 2018.

Another significant and often invoked amended ICSID rule allows non-disputing parties to file *amici* submissions.³³² Amended Rule 37 establishes the necessary criteria for *amicus* participation.³³³ In *Biwater Gauff Ltd v United Republic of Tanzania*³³⁴ and *Philip Morris v Uruguay*,³³⁵ *amici* successfully invoked Amended Rule 37. The tribunal granted five non-governmental organisations the right to make written submissions. The tribunal concluded that the non-disputing parties' written submissions had a reasonable potential to assist the arbitral tribunal by bringing a perspective, knowledge or insight that was different from that of the disputing parties.³³⁶

Chapter 10, Article 10.20.3 of CAFTA-DR also authorises the tribunal to 'accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party'.³³⁷ In accordance with CAFTA-DR Chapter 10, Article 10.20.3 and ICSID Arbitration Rule 37(2), tribunals in both *Pac Rim Cayman LLC v Republic of El Salvador*³³⁸ and *Commerce Group Corp & San Sebastian Gold Mines, Inc v Republic of El Salvador*³³⁹ allowed *amicus* submissions. The tribunals in both cases published procedural orders detailing the characteristics that non-disputing parties' written applications should fulfil.³⁴⁰ The publication included the deadline for *amici* petitions, the form and the substance of the petitions.³⁴¹

Recently, in August 2018, ICSID published its Proposals for Amendment of the ICSID Rules, which aims to provide greater transparency by including provisions relating to access of documents (including arbitral awards), access to hearings and participation of non-disputing parties in ICSID proceedings. A vote on these proposed amendments is expected in 2019 or 2020.

UNCITRAL

The adoption of the UNCITRAL Transparency Rules³⁴² by UNCITRAL in 2013 marked a departure from the approach to transparency under the UNCITRAL Arbitration Rules. The UNCITRAL Transparency Rules apply to investor-state arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to treaties concluded on or after 1 April 2014. The new rules provide for hearings to be held in public, and for a range of arbitral documents to be made public, including awards of tribunals. Under the new rules, the disputing parties cannot withhold consent to open hearings.³⁴³

332 ICSID, Arbitration Rules, rule 37 (April 2006).

333 *Ibid.*

334 *Biwater Gauff (Tanz) Ltd v United Republic of Tanz*, Procedural Order No 5, para 55 (ICSID Case No ARB/05/22) (February 2007) www.italaw.com/sites/default/files/case-documents/ita0091_0.pdf accessed 8 October 2018 ('The arbitral tribunal grants the Petitioners the opportunity to file a written submission in these arbitral proceedings, pursuant to Rule 37(2)').

335 *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award of 8 July 2016.

336 *Ibid.*, para 50.

337 CAFTA-DR, ch 10, Art 10.20.3, 5 August 2004.

338 *Pac Rim Cayman LLC v Republic of El Salvador*, Decision on Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, para 50 (ICSID Case No ARB/09/12) (August 2010) www.italaw.com/sites/default/files/case-documents/ita0592.pdf accessed 8 October 2018.

339 *Commerce Group Corp & San Sebastian Gold Mines Inc v Republic of El Salvador*, Award, para 39 (ICSID Case No ARB/09/17) (Mar. 2011) www.italaw.com/sites/default/files/case-documents/ita0202.pdf accessed 8 October 2018.

340 ICSID, 'Procedural Order Regarding Amici Curiae', (February 2011) www.italaw.com/sites/default/files/case-documents/ita0608.pdf accessed 8 October 2018.

341 *Ibid.*

342 UNCITRAL Rules on Transparency, 'General Assembly Resolution 109', 68 GAOR Vol I at 829, UN Doc A/68/462 (2013). For the Adoption of the UNCITRAL Rules on Transparency, see Report of the UN Commission in International Trade Law, Official Records of the General Assembly, Sixty-eighth Session, Supplement No 17 (A/68/17), para 128 http://legal.un.org/docs/?symbol=A/68/17&referer=http://www.un.org/en/ga/sixth/70/resolutions_extracts_70.pdf accessed 8 October 2018. See also General Assembly Resolution A/RES/68/109 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/445/99/PDF/N1344599.pdf?OpenElement> accessed 8 October 2018.

343 Lise Johnson and Nathalie Bernasconi-Osterwalder, 'New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps' (September 2013) www.iisd.org/itn/2013/09/18/new-uncitral-arbitration-rules-on-transparency-application-content-and-next-steps-2 accessed 8 October 2018.

Only the tribunal has the authority to decide how a hearing will be open to the public or to close a hearing for logistical or confidentiality concerns.³⁴⁴

The commission was informed that the UNCTAD International Investment Agreement Navigator database contained 60 treaties that had been concluded after 1 April 2014. Of those treaties, 46 offered investors the possibility of initiating arbitration according to the UNCITRAL Arbitration Rules (with new Article 1, paragraph 4, as adopted in 2013) and thereby incorporating the UNCITRAL Transparency Rules. In addition, about 50 per cent of those treaties established elements of transparency for arbitral proceedings not conducted under the UNCITRAL Arbitration Rules. Only 14 treaties excluded the application of the UNCITRAL Transparency Rules. However, half of these treaties implemented some elements of transparency, either the publication of documents, access to hearings or the possibility of third parties turning in submissions, inspired by the UNCITRAL Transparency Rules.³⁴⁵

The Mauritius Convention³⁴⁶ seeks to provide an efficient mechanism for states to apply the UNCITRAL Transparency Rules to treaties concluded prior to 1 April 2014. To date, Cameroon, Canada, Mauritius and Switzerland have ratified the Mauritius Convention, which entered into force on 18 October 2017.³⁴⁷ Thus, the UNCITRAL Transparency Rules would apply on a unilateral basis, under all treaties concluded by those states, if the claimant agreed to their application (eg, 35 treaties for Canada, 28 treaties for Mauritius and 114 treaties for Switzerland). A further 19 states have signed it,³⁴⁸ including Australia, Belgium, Congo, Finland, France, Gabon, Germany, Italy, Luxembourg, Madagascar, Netherlands, Sweden, Syria, the UK and the US (where the convention has been transmitted to the Senate for debate). Bolivia became the most recent signatory in April 2018.³⁴⁹ Furthermore, the EU is currently debating the signing of the convention.³⁵⁰

Current efforts by states to implement the convention are reflective of their perception of the text, as well as their attitude towards transparency. At the same time, it must be noted that the convention opened for signature only three years ago, in March 2015. More widespread accession to and ratification of the UN Convention on Transparency is necessary to normalise the UNCITRAL Transparency Rules as the institutional norm for facilitating greater transparency in investment arbitration. The rules have, however, already been applied for the first time in investor-state arbitrations by party consent.

Iberdrola SA and Iberdrola Energia SAU v Bolivia was the first arbitration to apply the UNCITRAL Transparency Rules by party consent. Iberdrola initiated arbitral proceedings in 2014 under the

344 *Ibid.*

345 See Report of the UN Commission in International Trade Law, Official Records of the General Assembly, Seventy-second Session, Supplement No 17 (A/72/17), para 317 www.uncitral.org/pdf/english/commissionsessions/unc-50/A-72-17-E.pdf accessed 8 October 2018.

346 Adopted by General Assembly Resolution A/Res/69/116 (2014) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/686/64/PDF/N1468664.pdf?OpenElement> accessed 8 October 2018.

347 Jakob Hans Johansen, 'The UN Convention on Transparency in Treaty-Based Investor-State Arbitration Will Enter into Force in Six Months' (April 2017) www.kromannreumert.com/Nyheder/2017/05/The-United-Nations-Convention-on-Transparency accessed 8 October 2018.

348 UN Treaty Collection, 'Status of Treaties: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration' https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-3&chapter=22&lang=en accessed 8 October 2018.

349 *Ibid.*

350 European Commission, 'Proposal for a Council Decision on the signing, on behalf of the European Union, of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration' (January 2015) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015PC0021> accessed 8 October 2018.

Bolivia-Spain BIT.³⁵¹ Although the treaty was entered into prior to 1 April 2014, meaning that the UNCITRAL Transparency Rules would not automatically apply, the parties opted to abide by the UN Transparency Rules nevertheless.³⁵² The tribunal held that the PCA would act as the repository for documents pursuant to the parties' agreement. The PCA would make the documents available to the public and would conduct public hearings in the case.³⁵³

Similarly, the parties to *BSG Resources Limited v Republic of Guinea* agreed to apply the UNCITRAL Transparency Rules with certain modifications intended to protect confidential information. The parties made all written submissions public, including the request for arbitration, memorials, exhibits, witness statements, expert reports, hearing transcripts and decisions of the tribunal.³⁵⁴ Additionally, the hearings were made accessible through a video link on the ICSID website.³⁵⁵ The tribunal had the discretion to admit or deny third parties from physically accessing the hearing. The parties also added a 30-minute delay to the video broadcast in order to protect confidential information.

The *Iberdrola* and *BSGR* cases represent an important turning point in investment arbitration transparency, since it is the first time that disputing parties have exercised the Transparency Rules' article 1(2)(a) opt-in provision, a mere six months after the Treaty was opened for signature. Furthermore, even where the UNCITRAL Rules on Transparency are not overtly adopted, there has been an increasing trend for parties to agree to some degree of transparency.

ICC

The Secretariat's Guide to the ICC clarifies in paragraph 3-807 that '[t]he Rules do not provide that the arbitration proceedings are confidential'. Since the 2012 revision of the rules, under Article 22, the tribunal has the power to enter orders regarding the confidentiality of the proceedings.³⁵⁶ Prior to the 2012 revisions; the rules only allowed the tribunal to take general measures to protect trade secrets and other confidential information.

Article 26 provides parties' rights with regard to hearings, adding that 'persons not involved in the proceedings shall not be admitted', unless the tribunal and the parties approve the third party's attendance.³⁵⁷ Appendix II, Article 1(3) provides that 'in exceptional circumstances, the President of the Court may invite other persons to attend [sessions of the court]'.³⁵⁸

The confidentiality of the ICC's work is emphasised in Appendix I to the ICC's Arbitration Rules. Article 6 of Appendix I provides: '[t]he work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to materials related to the work of the Court and its Secretariat'.³⁵⁹

351 Christian Leathley and Daniela Paez, 'UNCITRAL Transparency Rules Applied for the First Time in Investor-State Arbitration' (October 2015) <http://hsfnotes.com/publicinternationallaw/2015/10/26/uncitral-transparency-rules-applied-for-the-first-time-in-investor-state-arbitration> accessed 8 October 2018.

352 *Ibid.*

353 *Ibid.*

354 *Ibid.*

355 *Ibid.*

356 ICC, Arbitration Rules, Art 22 (March 2017) <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration> accessed 8 October 2018.

357 *Ibid.*, Art 26.

358 *Ibid.*, app II, Art 1.

359 *Ibid.*, app I, Art 6.

The ICC's Appendix II, Article 1 underscores the importance that any individual outside the tribunal who is granted access to arbitral documents must ensure that the materials remain confidential. Under ICC rules, there is no requirement that documents submitted to the tribunal be made public. Rather, Appendix II, Article 1(4) establishes that '[t]he documents submitted to the Court, or drawn up by it or the Secretariat in the course of the Court's proceedings, are communicated only to the members of the Court and to the Secretariat and to persons authorised by the President to attend Court sessions'.³⁶⁰

In the rare event that a third party is granted access to documents submitted to the ICC tribunal or any awards or decisions emanating from the ICC tribunal, Appendix II, Articles 1(5) and 1(6) provide the limitations for the use of the documents. Article 1(5) provides that the President or Secretary General of the ICC may authorise researchers to access certain awards and other documents of general interest.³⁶¹ The President and Secretary General do not have authority to grant access to documents that were remitted by the parties, such as memoranda, notes and statements.³⁶² Before granting any third-party access to arbitral documents, the tribunal must ensure that the third party will respect the confidentiality of the proceedings.³⁶³ Any academic work that the third party wishes to publish using the ICC arbitral documents must be submitted to the Secretary General of the ICC for approval.³⁶⁴

In an effort to make ICC proceedings more transparent, the ICC began publishing details about arbitrators in 2016.³⁶⁵ Both ICC and party-appointed arbitrators' details are uploaded on the ICC's website monthly.³⁶⁶ In addition to the name and nationality of the arbitrators, the ICC also posts the arbitrator's method of appointment, the role of the arbitrator, the status of the arbitration and the status of the arbitrator on a particular case.³⁶⁷ The ICC has also begun publishing excerpts of awards and procedural orders, along with reasoning for decisions on challenges to arbitrators.

Submissions by third parties

Investment disputes may implicate matters of public interest, particularly where they affect the ability of a state to regulate for public welfare.³⁶⁸ Civil society and some governments have increasingly pushed for greater transparency and participation in arbitration, demanding greater involvement in proceedings and urging that governments not withhold information, including awards.

NAFTA's FTC provided details regarding participation by non-disputing parties, stating that '[n]o provision of [NAFTA] limits a tribunal's discretion to accept written submissions from a person or

360 *Ibid*, app II, Art 1(4).

361 *Ibid*, app II, Art 1(5).

362 *Ibid*, app II, Art 1(5).

363 *Ibid*, app III, Art 1(6).

364 *Ibid*, app III, Art 1(6).

365 Markus Altenkirch and Malika Boussihmad, 'ICC Publishes Arbitrator's Details – A New Level of Transparency' <https://globalarbitrationnews.com/icc-publishes-arbitrators-details-new-level-transparency> accessed 8 October 2018.

366 ICC, 'ICC arbitral tribunals' <https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals> accessed 8 October 2018.

367 *Ibid*.

368 In *Methanex v United States*, eg, the disputed state action was a ban imposed by California on the use of Methyl tert-butyl ether (MTBE) because it contaminated water supplies. Likewise, in *Piero Foresti v South Africa*, the disputed state action related to South Africa's Black Economic Empowerment programme, a post-apartheid measure to ameliorate the disenfranchisement of historically disadvantaged South Africans.

entity that is not a disputing party’, and detailing the applicable procedures for such participation.³⁶⁹ The 2003 statement clarifies that ‘[n]o provision in the NAFTA limits a tribunal’s discretion to accept written submissions from a... non-disputing party’.³⁷⁰ The FTC’s statement lists recommended procedures and requirements with respect to the submissions.³⁷¹ Additionally, the statement provides tribunals with the criteria to consider when deciding whether to grant leave to file a non-disputing party’s submission.³⁷² Ultimately the FTC’s statement serves as a suggested structure for handling *amicus curiae* submissions.³⁷³

The most recent investment agreement developments came from the TTIP draft text. Under the TTIP, those who ‘have a direct and present interest in the result of the dispute (called the intervener)’ may have a right ‘to intervene as a third party’ (Article 23).

The openness of the hearing is not clearly enshrined in any provision of the TTIP draft. However, if the application to intervene is granted, the intervener obtains a right to request a copy of every procedural document, minutes included, thus gaining the opportunity to be fully aware of how the proceeding has been conducted.

ICSID’s 2006 amendments to its Rules and Regulations permitted tribunals to allow a person or entity that is not a party to the dispute to file written submissions. ICSID provides a list of decisions, dating back to 2003 before the 2006 amendments, pertaining to non-disputing party participation.³⁷⁴

The new SCC Rules include an appendix applicable to investment, which allows a person or entity (other than a state) that is not a disputing party to apply to an arbitral tribunal for permission to make a written submission in the arbitration. Appendix III, Article 3 permits *amici* to apply for permission to make submissions to the tribunal.³⁷⁵ The article also provides a list of the requirements for *amici* submissions, including the contents and format of the submission.³⁷⁶ Notably, the tribunal may, after consulting with the disputing parties, invite a non-disputing party to make a submission.³⁷⁷

Similar to the UNCITRAL Transparency Rules, Rule 29 of the SIAC Rules contains specific provisions on the participation of non-disputing parties. SIAC IA Rule 29.2 confers tribunals with the discretion to permit non-disputing party submissions. However, the tribunal must first consult with all parties to the dispute. This gives the tribunal the opportunity to balance the public interest and non-disputing party participation with the confidentiality of proceedings.

The tribunal must consider the extent to which the non-disputing party submissions will bring a different perspective to the legal or factual matters that are relevant to the dispute, and whether the

369 US Department of State, ‘Statement of the Free Trade Commission on Non-Disputing Party Participation’ www.state.gov/documents/organization/38791.pdf accessed 8 October 2018.

370 US Trade Representative, ‘Statement of the Free Trade Commission on Non-Disputing Party Participation’ https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file45_3600.pdf accessed 8 October 2018.

371 *Ibid.*

372 *Ibid.*

373 Howard Mann, ‘The Free Trade Commission Statements of October 7, 2003, on NAFTA’s Chapter 11: Never-Never Land or Real Progress?’ www.iisd.org/pdf/2003/trade_ftc_comment_oct03.pdf accessed 8 October 2018.

374 ICSID, ‘Decisions on Non-Disputing Party Participation’ <https://icsid.worldbank.org/en/Pages/process/Decisions-on-Non-Disputing-party-Participation.aspx> accessed 8 October 2018.

375 Arbitration Institute of the Stockholm Chamber of Commerce, ‘2017 Arbitration Rules’ app III Art 3 (January 2017) https://sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf accessed 8 October 2018.

376 *Ibid.*

377 *Ibid.*, app III, Art (4).

non-disputing party has a ‘sufficient interest’ in the proceedings (SIAC IA Rules, Rule 29.3).³⁷⁸

Inspired by equivalent provisions in the ICSID Rules (Rule 37) and the UNCITRAL Transparency Rules (Article 4), SIAC IA Rules, Rule 29.3 arguably goes further by only requiring the non-disputing party to show a ‘sufficient’ rather than ‘significant’ interest in the proceedings.

In addition to the general provision on non-disputing party submissions in the SIAC IA Rules, Rules 29.1–29.2 also specifically permit a party to the contract, treaty or other instrument that is not a party to the dispute (ie, a non-disputing contracting party) to make submissions to the tribunal on written notice to the parties (SIAC IA Rules, Rule 29.1). Under Rule 29.1, neither tribunal nor disputing party consent is required, but the submissions must be limited to a question of treaty or contractual interpretation that is directly relevant to the dispute (SIAC IA Rules, Rule 29.1).

i. Third-party funding

Third-party funding, if not disclosed, may impede transparency in investment arbitration. The text of the agreed EU-Vietnam FTA released in January 2016 contains a specific provision which requires that the presence of third-party funding be disclosed (but not the terms of the funding agreement).

In February 2016, the revised version of CETA was released. In addition to the reworked ISDS provisions, it now also includes a provision requiring the disclosure of third-party funding. Article 8.26 requires the funded party to disclose ‘the name and address of the third party funder’. Although CETA does not go any further, this is a step towards increased transparency of this type of arrangement. CETA also provides for the application of the UNCITRAL Transparency Rules, as modified, in Article 8.36.

The SIAC IA Rules also address third-party funding. SIAC IA Rule 24.1 expressly empowers the tribunal to ‘order the disclosure of the existence and details of a party’s third-party funding arrangement, including details concerning the identity of the funder, the funder’s interest in the outcome of the proceedings, and whether or not the funder has committed to undertake adverse costs liability’.

Neither the ICSID nor UNCITRAL Rules (or the ICC/SCC Rules) provide for a similar express power to inquire into a third-party funder’s involvement. Although ICSID tribunals have relied on their inherent power to order disclosure in cases involving a potential conflict of interest³⁷⁹ this is not a settled matter. SIAC IA Rule 24.1 overcomes this uncertainty by bestowing on the tribunal broad discretion to inquire into both the existence and details of third-party funding arrangements. Rule 33.1 allows the tribunal to take into account any third-party funding arrangements in apportioning the costs of the arbitration. Rule 35 empowers the tribunal to make adverse costs orders against third-party funders ‘where appropriate’.

Although most major funders will procure after-the-event insurance and are required by the Association of Litigation Funders to address responsibility for adverse costs liability in their funding agreements, such self-regulatory practices are neither uniformly observed nor mandatory. Rules 32.1

³⁷⁸ This is a lower threshold than under the ICSID Rules (ICSID Rules, Rule 37(c)). See also UNCITRAL Transparency Rules, Art 4(3)(a), which may allow experts and *amicus curiae* without a strong link to the proceedings per se, but who nonetheless have important expertise to bring to bear on the understanding or resolution of the dispute, to meaningfully participate in the proceedings.

³⁷⁹ See *Muhammet Çap & Şehil In aat Endustri ve Ticaret Ltd Sti v Turkmenistan*, Procedural Order No 3, ICSID Case No ARB/12/6.

and 34 reduce the risk of exposing successful respondent-states to a costs bill that they cannot recover. The adverse cost consequences may also deter the funding of frivolous claims.

In an ICSID decision, the tribunal ordered the claimants to disclose whether they were the recipients of third-party funding, and to divulge the names and details of the funder and some terms upon which the funding had been provided. On 12 June 2015, the ICSID tribunal in *Muhammet Çap & Sehil In aat Endustri ve Ticaret Ltd Sti v Turkmenistan* ordered the claimants, two Turkish construction companies, to disclose whether their claims in the arbitration are being funded by a third party. In another PCA case under the UNCITRAL Rules, *South American Silver Limited v Bolivia*, the tribunal ordered the claimant to disclose the identity of the third-party funder that granted financing to the claimant in the arbitration.³⁸⁰ Tribunals have also considered the presence of third-party funding in whether to grant security for costs. In *RSM v Saint Lucia*, the tribunal granted RSM's request for security stating that the presence of third-party funder 'supports the Tribunal's concern that Claimant will not comply with a costs award rendered against it'.³⁸¹ More recently, in *Eskosol v Italy*, the tribunal rejected Italy's request for security for costs on the grounds Eskosol, with the assistance of a third-party funder, obtained an insurance policy from which costs could be paid.³⁸² Conversely, it has been reported that in *Luis García Armas v Bolivarian Republic of Venezuela*, the ICSID tribunal ordered the claimants to provide guarantee for Venezuela's costs in defending the investment arbitration on the basis that claimants' third-party funding agreement provides that the funder is not liable for any adverse cost orders and claimants have not established that they have the resources to pay an adverse costs order themselves.³⁸³

The proposal of the EU for the TTIP contains an express rule on disclosure of third-party funding: 'Where there is third party funding, the disputing party benefiting from it shall notify to the other disputing party and to the division of the tribunal, or where the division of the tribunal is not established, to the President of the tribunal, the name and address of the third party funder'.³⁸⁴

Conclusion

While a number of challenges exist within the ISDS system, increasing its consistency, efficiency and transparency fosters its legitimacy. Many of the criticisms levelled at ISDS can in fact be addressed through comprehensive, disciplined and collective efforts to attain those objectives.

380 *South American Silver Limited v Bolivia*, PCA Case No 2013-15, Procedural Order No 10 dated 11 January 2016.

381 *RSM Production Corporation v Saint Lucia*, Decision on Saint Lucia's Request for Security for Costs of 13 August 2014, para 83.

382 *Eskosol SpA in Liquidazione v St Italian Republic*, ICSID Case No ARB/15/50, Procedural Order No 3 of 12 April 2017, para 37.

383 *Luis García Armas v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/16/1, Procedural Order No 8 of 20 June 2018.

384 EU's proposal for Investment Protection and Resolution of Investment Disputes, Chapter II, Art 8(1).

IBA Arbitration Committee

Appendix 1

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