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*The Foundations of Investment Treaty  
Arbitration: The ICSID Convention,  
Investment Treaties and the Review of  
Arbitration Awards*

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**Abstract**—In order to lay the foundation for the papers that follow in this collection, this article explores the key policy choices underpinning the design of the ICSID arbitral system and the drafters’ assumptions and expectations as to how the system that they were designing would work in practice. It focuses in particular on the drafters’ choices in regard to the review and enforcement of awards and how the future Convention might be employed to arbitrate disputes not only under investment contracts but under investment treaties as well. These choices shaped the main features of ICSID arbitration. Notably, the Convention’s drafters recognized and accepted the prospect of inconsistent arbitral decision-making and outcomes, but deemed it impractical to attempt to create a standing tribunal, and they rejected a number of proposals for a right of appeal for error of law or substantial error of fact. The implications of this and other key drafting decisions were discovered and fleshed out in hundreds of cases brought under the Convention and in different generations of investment treaties as a result of which States gained greater experience with the investment treaty arbitration system. The choices made over fifty years ago have shaped the recent push for a standing tribunal and an appellate review mechanism.

## I. INTRODUCTION

This article explores the policy choices made by the drafters of the ICSID Convention when they designed ICSID’s arbitral regime, including its procedures and grounds for the review of awards. It will be seen that some of the questions that have arisen in connection with the European Union’s recent push for standing tribunals and appellate review were in fact considered when the Convention was developed. In the end, the Convention’s drafters opted for *ad hoc* arbitration tribunals rather than a standing tribunal and for annulment rather than appeal.

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The EU and at present two of its counterparties, Canada and Vietnam, have now chosen the opposite approach in investment chapters with the EU. If those treaties enter into force fully, a significantly different form of first instance decision-making and review therefrom will emerge.<sup>3</sup>

This article will explore the factors that have contributed to this change in approach, namely, the design of the ICSID arbitral system, its interaction with investment treaties that later provided for ICSID arbitration, and the changes in the review process effected when States that were *not* party to the ICSID Convention negotiated bilateral investment treaties (BITs) and free trade agreements (FTAs) with investment chapters. Since ICSID Convention arbitration is available only as between ICSID Contracting States and investors of other Contracting States, non-party States had to find other arbitral rules to govern arbitrations that might arise under their treaties.<sup>4</sup> This brought national courts into the review of investment treaty tribunal awards with a resulting increase in the variability in the grounds for review, the types of decisions that were amenable to review, when review could be sought, and the process of review itself.

At present, a range of different procedures governs the review of investment treaty arbitral awards: at one end of the spectrum lies ICSID's self-contained, de-localized approach which applies the grounds set out in Article 52 of the Convention. Across the balance of the spectrum are differing approaches taken by national courts applying the UNCITRAL Model Law on International Commercial Arbitration (with variations in its implementation into national law) and the approaches taken by the leading non-Model Law countries such as France, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States pursuant to arbitration laws peculiar to those countries.

One point of commonality across existing review procedures is that other than the possibility in, for example, England, that a court can set aside an award for a serious error of law, ICSID annulment committees and many other national courts have held that no review lies for legal error (or for substantial error of fact). Rather, deference is paid to the tribunal's legal and factual findings and the review's focus is on whether the tribunal has been properly constituted, whether it acted within the treaty's grant of jurisdiction, whether it complied with due process, and other matters pertaining to the basic legitimacy of the arbitral process. If the EU model continues to gain traction, review will go well beyond what hitherto has been considered to be the appropriate extent of supervisory jurisdiction. This will effect a profound change in the investment treaty regime.

How did this come about? In the authors' view, the pressure for institutional change resulted from the combined impact of four features of the investment treaty regime, although no doubt more could be identified. The first factor stemmed from the very design of ICSID arbitration which reflected the drafters' assumptions as to how future ICSID tribunals would be seised with jurisdiction.

<sup>3</sup> The European Union–Canada Comprehensive Economic and Trade Agreement (signed 30 October 2016, entered into force provisionally 21 September 2017) (CETA) and EU–Vietnam FTA are analysed in other papers in this collection. The EU's push for change has not been restricted to Canada and Vietnam; it has made this a central plank in EU negotiating policy and it has presented similar proposals to China, Japan and the United States.

<sup>4</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1966, entered into force 14 October 1966) (ICSID Convention). If the dispute arose between an investor of a State and another State, one of which States was party to the Convention, after the ICSID Additional Facility was created in 1976, an arbitration that resembled ICSID Convention arbitration in some, but not all, respects was possible.

The second factor is the generality of phrasing of many BITs. BITs were drafted so generally that arbitrators acting in good faith could legitimately arrive at different views as to how to apply the treaties' substantive provisions in concrete cases. The variability in interpretative approaches to obligations and concepts that are common to many treaties led to complaints about a lack of consistency and coherence.<sup>5</sup> The third factor was the Convention's drafters' failure to consider the desirability of specifying comprehensive rules as to what constitutes acceptable conduct for arbitrators. Finally, the drafters of investment treaties underestimated how much public interest there would be in disputes that subsequently arose under the treaties. As more cases were filed, legislators, NGOs and other representatives of civil society, academics and the public reacted negatively to the idea of cases involving the public interest being addressed behind closed doors; hence the demand for greater transparency of proceedings.

The interaction of these four factors generated criticism of the system and led some States to consider reform or even abandoning the system altogether. More detailed treaties emerged with the aim of giving tribunals more guidance as to the scope and meaning of definitions and obligations as well as more precisely stated rules on the submission of claims to arbitration, as well as for greater transparency of proceedings. Some recent treaties have included rules on arbitrator ethics. But, as the EU's foray into investment treaties shows, some States remain dissatisfied and they have sought further, deeper institutional reform.

The four factors listed above will be examined in greater detail in this and other papers in this collection. This article focuses primarily on the first two factors: the design of ICSID arbitration and the Convention's interaction with investment treaties, including the changes effected when States not party to the Convention began to opt for investor-State arbitration.

## II. THE TWO TRACKS OF INVESTMENT PROTECTION

The 1950s and 1960s witnessed the emergence of two types of treaties aimed at protecting foreign investment: the substantive and the institutional/procedural. In terms of the former, some States had long negotiated treaties, enforceable through State-to-State dispute settlement, which included basic protections for aliens and their property.<sup>6</sup> In 1958, the Federal Republic of Germany and the Islamic Republic of Pakistan concluded the first 'modern era' bilateral investment treaty aimed at the reciprocal protection of investments made by their respective nationals.<sup>7</sup> This too, however, was enforceable only at the State-to-State level.

The means for enforcing investment treaties changed after the creation of the second, institutional and procedural, track. The foundation for this track began in 1961, when at the initiative of the World Bank's then-General Counsel, Aron

<sup>5</sup> This is perhaps best exemplified by the virtually diametrically opposite outcomes in two cases arising out of the same facts, the *Lauder v Czech Republic* and *CME v Czech Republic* cases. See *Ronald S Lauder v The Czech Republic*, UNCITRAL, Final Award (3 September 2001). Cf *CME Czech Republic BV v The Czech Republic*, UNCITRAL, Final Award (14 March 2003). They differed, eg on the scope and application of the treaty obligation to accord legal protection and security. While one tribunal found a minor breach, the other found multiple breaches and awarded substantial damages.

<sup>6</sup> The Italy-United States Treaty of Friendship, Commerce and Navigation, which formed the basis for the famous *Case concerning Elettronica Sicula SpA (ELSI) (United States v Italy)*, [1989] ICJ Rep 15, is one such example.

<sup>7</sup> See UNCTAD, *World Investment Report (WIR) 2016*, ch III (Recent Policy Developments and Key Issues), for general description of phases in conclusion of international investment agreements, 101-2.

Broches, the Bank began to explore the idea of creating treaty-based mechanisms for resolving investment disputes without confronting the contentious issue of elaborating substantive rules of investment protection. Over three-and-a-half years, the Bank's staff elaborated drafts of what a future Convention might look like, consulted with legal experts at meetings held at UN regional offices in Addis Ababa, Geneva, Santiago and Bangkok, made further refinements and then convened a meeting of legal experts (the 'Legal Committee') to review the draft Convention in Washington, DC in November–December 1964.

The Legal Committee, chaired by Mr Broches, examined the draft on a line-by-line basis. It was then presented to the Bank's Executive Directors who resolved certain outstanding issues before approving the final text. On 18 March 1965, the Executive Directors approved the Convention's dissemination to the member governments of the Bank for their consideration. The Convention was brought into force upon its ratification by the first 20 States on 14 October 1966.

In articulating his conception of the Convention, Broches strove to persuade the Executive Directors and experts of the role that international dispute settlement could play in resolving investment disputes. He contended that an initiative aimed at creating an institution devoted to dispute settlement would increase investment flows and have a greater chance of gaining broader acceptance if it put the substantive rules of treatment of investment to one side and instead focused on creating mechanisms to resolve disputes. Broches was convinced that if participation was made purely voluntary, parties that consented to bring disputes to the Centre could agree on which substantive rules of law would govern their disputes in their instruments of consent.<sup>8</sup>

Separating the institutional aspects of investment protection through arbitration or conciliation, on the one hand, and the elaboration of substantive rules of treatment, on the other, could not be absolute. The two were not watertight compartments and it was inevitable that the differences of opinion held by States in relation to such issues as the sovereign right of States to regulate activities within their territories, the relationship between foreigners and the host State's law, the interaction between national law and international law more generally, and the controversial history of diplomatic protection would manifest themselves at the negotiating table.

In the end, the drafters were able to create a Convention that largely avoided taking a position on certain key issues that divided States at the time. This was done by drafting a text that remained silent or neutral on certain contentious issues, leaving them to be addressed in future consent agreements between parties who chose to use the Centre's facilities.

### III. THE KEY POLICY CHOICES MADE IN THE ICSID CONVENTION

This section discusses the key choices that have shaped ICSID arbitration, specifically as they relate to the operation of tribunals and the review of their awards.

<sup>8</sup> Report of the Executive Directors, para 40; Broches reiterated this position repeatedly during the course of the negotiation: see eg ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication 1968) (History of the ICSID Convention), vol II-1, 501–02.

### A. *A Right of Access to International Jurisdiction Conferred upon Private Parties*

The central objective from the beginning was to confer a right of access to international jurisdiction upon private parties similar to that enjoyed by States when they took their disputes to international courts and tribunals.

In his 28 August 1961 ‘Note to the Bank’s Executive Directors’, Broches sketched out his view of the nature of the problem of protecting foreign investment. He observed that an investment was subject to the host State’s national law in the first instance, and that any redress of grievances sought by the investor directly against the host Government was equally determined by national law.<sup>9</sup> The investor could also invoke the diplomatic protection of his State of nationality, but this was not without its own obstacles. In some countries, a foreign investor might be required to waive diplomatic protection as a condition of entry. Moreover, even if the investor’s State of nationality was willing to espouse the claim, the host State of the investment might be unwilling to submit to the jurisdiction of an international tribunal.<sup>10</sup>

Broches explained further that a few investors had successfully negotiated arbitration agreements with host Governments but this avenue was not widely available. Moreover, if a dispute later arose, the host Government might refuse to recognize the agreement to arbitrate and the investor would be placed back in the situation of having to seek the assistance of its own State of nationality.<sup>11</sup>

Broches argued that the absence of adequate machinery for international conciliation and arbitration often frustrated attempts to agree on an appropriate mode of settlement of disputes. Arbitral tribunals such as those established by the International Chamber of Commerce (ICC) were sometimes deemed unacceptable to States; on the other hand, the arbitral machinery of the Permanent Court of Arbitration (PCA) was available to States but not to private parties.<sup>12</sup> He therefore advocated creating a new institutional framework aimed specifically at the arbitration and conciliation of disputes arising between investors and States.<sup>13</sup>

For arbitration, the solution in his view was first, to grant private individuals or corporations a right of direct access to an international tribunal and, second, to recognize that a State’s agreement to arbitrate a dispute with a private party constituted a binding international obligation.<sup>14</sup> This could be done by creating a multilateral convention in which the basic institutional underpinnings of recognition of the right of direct access was regulated and which would confirm the binding character of an agreement to arbitrate.

### B. *Arbitration as the Preferred Method of Dispute Resolution*

Although the Convention contains a conciliation procedure, most of the negotiating history is concerned with elaborating the arbitration provisions. Broches’ first note

<sup>9</sup> *History of the ICSID Convention*, vol II-1, 6: SecM 61–192 (28 August 1961). Note by Aron Broches, General Counsel, transmitted to the Executive Directors: ‘Settlement of Disputes between Governments and Private Parties.’

<sup>10</sup> *ibid.*

<sup>11</sup> *History of the ICSID Convention*, vol II-1, 1. As was the case in the dispute leading up to the famous *Case concerning the Anglo-Iranian Oil Company (United Kingdom v Iran)* [1952] ICJ Rep 93.

<sup>12</sup> *ibid* vol II-1, 1.

<sup>13</sup> *ibid* vol II-2, 1: ‘The nature of the problem, as outlined above, suggests a solution along the following lines ... a recognition by States of the possibility of direct access by private individuals and corporations to an international tribunal in the field of financial and economic disputes with Governments.’ [Emphasis in original]

<sup>14</sup> *ibid.* ICSID Convention (n 4) art 25(1) states: ‘When the parties have given their consent, no party may withdraw its consent unilaterally.’

to the Executive Directors suggested that arbitration tribunals were to be preferred over other mechanisms. Arbitration's long history as a means of resolving State-to-State disputes meant that a convention creating such a mechanism would have a reasonable chance of widespread acceptance. Moreover, in the Bank's experience in granting sovereign loans, borrowing States were willing to subject disputes arising out of the loan agreements to international arbitration.<sup>15</sup> Broches reasoned that if States were willing to arbitrate loan disputes, they would also agree to arbitrate disputes arising out of other transactions involving the commitment of capital.

### C. *The Voluntary Nature of ICSID Arbitration*

A critical feature of the proposed convention was the voluntary nature of arbitration. Broches' first note emphasized that 'the tribunal would have no compulsory jurisdiction, and access to it would be voluntary'.<sup>16</sup>

This point was stressed time and again during the consultations<sup>17</sup> and was put in concrete terms in the Convention's Preamble, which affirms that 'no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration'.<sup>18</sup>

### D. *The Binding Effect of a Written Agreement to Arbitrate*

While agreeing to submit disputes to ICSID arbitration would be purely voluntary, if an agreement to arbitrate was made, it was legally enforceable in two important ways: first, once consent to arbitration was given by both parties, a legally enforceable arbitration agreement was formed and neither party could unilaterally prevent the arbitration from proceeding, for example, by declining to appear. Second, an award would be enforceable in any State signatory to the Convention. In his first memorandum, Broches stressed that because 'the binding force of agreements by governments to arbitrate disputes with private parties is sometimes questioned' it was 'essential [that] the binding force of such agreements properly entered into [was] recognized' in the Convention.<sup>19</sup>

This was reiterated in subsequent documents, in the consultations with the experts, and ultimately in Article 25(1) of the Convention itself.<sup>20</sup> It is further

<sup>15</sup> It is interesting to note the extent to which the Bank's experience with Loan Agreements shaped its thinking about the Convention. The Bank's Loan Regulations nos 3 and 4 figured prominently in early discussions in providing examples to illustrate or justify features of the initial draft of the Convention. For example, on the issue of sovereign immunity, the General Counsel's Note to the Executive Directors referred to the fact that the Bank did not ask its member governments to waive immunity in the Bank's loan and guarantee agreements: eg see *History of the ICSID Convention*, vol II-1, 42, 157, 214 and 471. The same approach was taken in the Convention (see art 55).

<sup>16</sup> *History of the ICSID Convention*, vol II-1, 2.

<sup>17</sup> *History of the ICSID Convention*, vol II-1, 71, 74: 'Use of these facilities would be entirely voluntary. No government and no investor would ever be under an obligation to go to conciliation or arbitration without having consented thereto.' The voluntary nature of the mechanisms was repeatedly adverted to during the regional consultations. See *History of the ICSID Convention*, vol II-1, 240, 241, 245, 287, 302, 307-308, 334, 371, 402, 446, 463, and 498.

<sup>18</sup> ICSID Convention (n 4) Preamble. This preambular statement was buttressed by art 25(1)'s requirement that the jurisdiction of the Centre could be seized only upon the written consent of the disputing parties.

<sup>19</sup> *History of the ICSID Convention*, vol II-1, 3.

<sup>20</sup> Article 25(1), last sentence, reads: 'When the parties have given their consent, no party may withdraw its consent unilaterally.' This was designed to overcome the possibility that a State having given its consent might then decide not to participate further by essentially withdrawing from the proceeding. Article 25(1) is further supported by art 45 which permits a tribunal to deal with the question submitted to it and to render an award even if a party fails to appear or to present its case.



supported by Article 54, which enlists all Contracting States to recognize an award as binding and to enforce its pecuniary obligations within their territories ‘as if it were a final judgment of a court in that State’.<sup>21</sup>

### *E. Ad hoc or standing tribunals?*

Broches initially appeared somewhat agnostic as to the way in which tribunals might be constituted:

On one end of the scale would be the creation of a permanent tribunal staffed by arbitrators, elected or appointed for a fixed period and operating under established rules of procedure. At the other end could be a panel of names, either submitted by the States-parties to the tribunal or designated by some other authority, from which the arbitrators would be selected.<sup>22</sup>

When the issue arose at an Executive Directors’ meeting, the limited discussion about establishing a permanent tribunal was directed at its impracticality in the present circumstances. Hence the discussion centred on *ad hoc* tribunals. This generated concerns about the possibility of inconsistent awards. For example, one Executive Director raised concerns about ‘the problems which might arise as a result of contradictory decisions relating to the same subject-matter rendered by different tribunals’.<sup>23</sup>

Broches responded that he ‘thought it would be possible to provide against the possibility that the same dispute would be submitted to more than one tribunal’. But he stressed that the possibility of contradictory decisions in cases arising between different parties but based on similar facts was ‘inherent in any *ad hoc* arbitration system’.<sup>24</sup> The only way to ‘avoid, or at least limit that danger – or to put it in a positive way, to promote uniformity of decisions – would be to have a standing tribunal’, which he considered was ‘clearly impractical in the present context’.<sup>25</sup> He did not elaborate on the reasons why he thought this to be the case and was not pressed on the point by the Executive Directors.

The focus of discussion thus shifted away from any consideration of the possibility of establishing a standing tribunal toward the appointment and operation of *ad hoc* tribunals. Acknowledging that this would not secure uniformity of decision-making, the Bank’s staff nevertheless sought to introduce a measure of quality control. The June 1962 Working Paper introduced the idea of appointing qualified persons to a ‘Panel of Arbitrators’ from which arbitrators could be selected by a party or which could be used if a party failed to make an appointment. But a disputing party was still ‘entirely free’ to appoint an arbitrator who was not on the list.<sup>26</sup>

There was some discomfort with the complete latitude that parties traditionally enjoyed in appointing arbitrators. The early negotiating history suggests that, left

<sup>21</sup> Article 54(1) reads: ‘Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.’

<sup>22</sup> *History of the ICSID Convention*, vol II-1, 3.

<sup>23</sup> *ibid* 114.

<sup>24</sup> *ibid* 117.

<sup>25</sup> *ibid*. Broches noted that that was the difference between the International Court of Justice, a standing tribunal, the Permanent Court of Arbitration, and a panel of arbitrators.

<sup>26</sup> *History of the ICSID Convention*, vol II-1, 30: In commentary to proposed Section 12: ‘Parties to proceedings under the auspices of the Center are entirely free to agree to use conciliators or arbitrators who do not form part of the Panels.’

to their own devices, the staff might have done away entirely with party-appointments. The Working Paper stated that party-appointed arbitrators might be the ‘least desirable method [of appointment], because of the danger that each party will look upon the arbitrator to be appointed by it as an advocate’.<sup>27</sup> However, anticipating States’ attachment to the idea of party-appointment and recognizing that sole arbitrators and five-person tribunals might be unacceptable, instead of prohibiting such appointments altogether, the drafters sought to: (i) restrict the disputing parties’ choices and (ii) encourage them to draw arbitrators from the Panel of Arbitrators in order to ‘avoid some of the dangers of having “party arbitrators”’.<sup>28</sup>

The principal proposal was to prohibit nationals of the disputing parties’ States from being appointed to a three-person tribunal.<sup>29</sup> The ‘First Preliminary Draft of the Convention’ provided that:

Section 2(2) adopts what is perhaps the most usual method for the constitution of an arbitral tribunal viz., each party appoints an arbitrator, and a third is appointed by agreement of the parties. *However, that Section introduces a significant innovation by specifying that none of the arbitrators shall be nationals of the State party to the dispute, or of the State whose national is a party to the dispute, thus seeking to minimize as far as possible the danger, inherent in conventional systems, of appointment of partisan arbitrators.* This new principle applies also to appointments of arbitrators made by the Chairman under Section 3 of this Article.<sup>30</sup>

In the end, it was agreed: (i) to create the Panel of Arbitrators of ‘qualified persons’ (with each ICSID Contracting State entitled to designate four persons ‘who may but need not be its nationals’ to the Panel and the Chairman of the Administrative Council’s having the right to designate ten persons, each of a different nationality, to the Panel);<sup>31</sup> (ii) that disputing parties could appoint arbitrators from outside the Panel of Arbitrators;<sup>32</sup> and (iii) that if the Chairman of the Administrative Council had to appoint one or more arbitrators to a tribunal, the arbitrator must be selected from the Panel of Arbitrators.<sup>33</sup> As to the nationality of arbitrators, rather than prohibiting their appointment (as initially proposed), Article 39 ultimately provided that: ‘The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute.’<sup>34</sup>

<sup>27</sup> *History of the ICSID Convention*, vol II-1, 40.

<sup>28</sup> *ibid.* ‘The draft has not followed either alternative [ie sole arbitrator or five member tribunals] because it is believed that a sole arbitrator would not be generally acceptable as a matter of principle and because a five-member tribunal would add considerably to the cost of the proceedings. The parties would be free, of course, to make any agreement they thought fit as to the manner of constituting the tribunal, as well as regarding the number of arbitrators. It will be noted from the following sections of this Article that an attempt has been made to avoid some of the dangers of having “party arbitrators”.’

<sup>29</sup> Article IV, s 2, First Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Annotated Text, 9 August 1963 in *History of the ICSID Convention*, vol II-1, 133 and 155. Cf *History of the ICSID Convention*, vol II-1, 266 (Summary Record of Proceedings, Addis Ababa Consultative Meetings of Legal Experts, 16–20 December 1963 (Z 7)): ‘Mr MOUSTAFA (United Arab Republic) objected to the prohibition in Section 2(2) regarding the nationality of arbitrators. An arbitrator of the same nationality as the party to the dispute was more likely to understand the issues involved and to be in a better position to offer the necessary explanations; he might even make an unfavorable award more acceptable.’

<sup>30</sup> Annotated First Preliminary Draft Convention (SID/63-15) in *History of the ICSID Convention*, vol II-1, 156 (emphasis added).

<sup>31</sup> ICSID Convention (n 4) arts 12–13.

<sup>32</sup> *ibid.* art 40(1).

<sup>33</sup> *ibid.*

<sup>34</sup> ICSID Convention (n 4) art 39.



This was adopted not without some misgivings. Some experts worried that precluding nationals of disputing parties from sitting on tribunals would deprive the tribunals of needed expertise in local law.<sup>35</sup> But a consensus emerged that restricting nationals from participating in tribunals considering disputes involving their own States (or investors of their own States) would reduce the possibility of arbitrator partisanship. This was made subject to an important proviso: the nationality restrictions would *not* apply if each member was appointed by agreement of the parties.<sup>36</sup> As shall be seen, some subsequent investment treaties varied the presumptive ICSID rule.

The Convention's drafters did completely restrict party autonomy when it came to establishing an ad hoc Annulment Committee to review an award. As discussed below, the Chairman of the Administrative Council, not the disputing parties, controls the appointment process and must appoint non-nationals from the Panel of Arbitrators to annulment committees.<sup>37</sup>

#### F. Rules for Arbitrators

Although there was some discussion during the course of the Convention's elaboration on the possibility of arbitrators engaging in corruption or other misbehaviour, the drafters did not see fit to prescribe detailed rules of conduct. In the end, Article 14(1) simply stated that:

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

Article 40 extended this to arbitrators who were appointed from outside the Panel of Arbitrators.

The Convention's rather terse treatment of arbitrator qualifications and conduct stands in sharp contrast to recent attempts to deal with such issues as conflicts of interest, the unanticipated phenomenon of 'double-hatting' (a person acting simultaneously as counsel and arbitrator in different investment treaty cases) and so on. These issues have been addressed by the inclusion of provisions in treaties that either contemplate the State parties formulating codes of conduct after the treaty enters into force, or actually setting out in detail in the treaty what additional duties arbitrators must comply with.<sup>38</sup> The most stringent approach to date has been the EU's attempt to eliminate a number of these issues in one fell

<sup>35</sup> For example, *History of the ICSID Convention*, vol II-1, 266: 'Mr MOUSTAFA (United Arab Republic) objected to the prohibition in Section 2(2) regarding the nationality of arbitrators. An arbitrator of the same nationality as the party to the dispute was more likely to understand the issues involved and to be in a better position to offer the necessary explanations; he might even make an unfavorable award more acceptable.' See also *History of the ICSID Convention*, vol II-1, 416-17.

<sup>36</sup> ICSID Convention (n 4) art 39 states: 'The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; *provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.*' (emphasis added)

<sup>37</sup> Beyond being able to provide comments after being informed as to proposed members of the committee; this is not a nomination procedure but rather a further precautionary step taken by ICSID to avoid conflicts.

<sup>38</sup> See eg Free Trade Agreement between the European Union and the Republic of Singapore (signed 17 October 2014, pending entry into force) (EU-Singapore FTA), annex 9-F (Code of Conduct for Arbitrators and Mediators) and the Trans-Pacific Partnership Agreement (signed 4 February 2016) (TPP), art 28.10(d), referring to code of conduct in the Rules of Procedure.

swoop by moving from ad hoc arbitration with party-appointment to a standing tribunal and prescribing rules of conduct for tribunal members.

### G. *Recognizing the Possibility of Contradictory or Inconsistent Decisions*

It is useful to revert to the concern expressed at the Executive Directors' level about ad hoc tribunals rendering contradictory decisions relating to the same subject-matter. Although there was no further discussion of establishing a standing tribunal at the Executive Directors' level, the issue did arise during the regional consultations.

The most extensive exchange occurred in Geneva. South Africa's David Gould commented that there was 'no doubt' that the present situation under bilateral treaties 'was confused' and he wondered whether 'a multiplicity of arbitral tribunals would constitute the best possible element to further the harmonious development of international law'.<sup>39</sup> By definition, he said, such tribunals would deal with disputes and their awards would only bind the disputing parties. 'Not only would these tribunals produce conflicting decisions, but many aspects of international law, particularly in the field of foreign investment, were not yet settled.'<sup>40</sup> Gould wondered whether it would be practicable 'for the arbitral tribunals to be granted by the United Nations General Assembly a status equivalent to that of the specialized agencies so as to enable them to seek advisory opinions from the International Court of Justice'.<sup>41</sup>

Broches doubted whether arbitral tribunals would be authorized formally to seek the Court's advice. Furthermore, the suggestion, 'linked as it was with the entire question of foreign investment, was unlikely to gain unanimous support in the forum of the United Nations'.<sup>42</sup> In a minor concession to Gould, Broches observed that 'arbitrators would naturally have the power to seek advice from experts, including legal experts'.<sup>43</sup> In concluding, Broches adverted to the hurdles to establishing a standing tribunal (which might reduce the possibility of conflicting decisions), noting that the 'problem was that there did not as yet exist a standing jurisdiction which was generally accepted'.<sup>44</sup>

There was no further discussion of the possibility during the Convention's elaboration.

### H. *The Applicable Law*

Although the Bank's stated intention was not to address the substantive rules of investment protection in the Convention, it was necessary to consider what law would be applied in future arbitrations. From the beginning, Broches signalled his view that international law, not just municipal law, should play a role.<sup>45</sup> The First Preliminary Draft of the Convention recognized the parties' right to specify the

<sup>39</sup> *History of the ICSID Convention*, vol II-1, 420.

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.*

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*

<sup>44</sup> *ibid.*

<sup>45</sup> *History of the ICSID Convention*, vol II-1, 418: 'The CHAIRMAN [Broches] said that the choice of national law would be a matter for the tribunal to decide in accordance with the appropriate rules of private international law. In most cases, the proper law would indeed be the municipal law of the capital-importing country. However, in certain cases—such as licensing and know-how agreements—there might be a question as to what law applied.'

law applicable to their dispute. But if they did not do so, it proposed that the tribunal would have the power to ‘decide the dispute submitted to it in accordance with such rules of law, *whether national or international, as it shall determine* to be applicable’.<sup>46</sup> Since this conferred complete discretion on the tribunal to determine which rules of law should be applied in the absence of party agreement on the applicable law, unsurprisingly the proposal was not universally embraced.

In the first consultation, in Addis Ababa, African legal experts pressed Broches on the point. Cameroon’s PT Mpanjo, for instance, asked whether in the case of an expropriation, ‘the tribunal [would] be competent to decide upon the legality of such a sovereign act, and if so, by reference to which system of law?’<sup>47</sup> Broches answered that unless the ‘parties specifically restricted the tribunal, it would look into all the legal aspects of any dispute brought before it from the standpoint not only of domestic, but also of international law, to see if the rights of either party had been infringed’.<sup>48</sup>

The disquiet exhibited by some African legal experts was shared by others. At the Bangkok meeting, Ceylon’s RS Wanasundera stated that although he had no objections of principle against third-party adjudication, ‘the law to be applied should still be local law and not international law’.<sup>49</sup> He added that raising the relationship between investors and host States ‘from the level of municipal law to that of international law would permit the supremacy of the legislature to be challenged’.<sup>50</sup>

Broches pointed out that the draft Convention left the determination of the applicable law to the tribunal only in the absence of party agreement. Accordingly, a State, ‘when entering into an investment agreement could well provide that the agreement would be governed by its own laws as they prevailed from time to time. In that case, no other law could be applied and no complaint could be made of changes in that law.’<sup>51</sup>

Rather different views were expressed on the applicable law, and the role of international law within it, at the experts meeting in Geneva. There was a frank discussion about the under-developed state of international law on the treatment of investment, with some experts arguing that it would be desirable for the Convention to clarify the basic rules of treatment. During the discussion of the applicable law clause then under consideration,<sup>52</sup> for example, a French expert, André Rodocanachi, observed that ‘unfortunately’ there were ‘few well-established rules of international law on the subject of investments’ and suggested that ‘at least

<sup>46</sup> See Working Paper in the form of a Draft Convention prepared by the General Counsel and transmitted to the Executive Directors (5 June 1962), *History of the ICSID Convention*, vol II-1, 41, art VI, s 5(1); see also *History of the ICSID Convention*, vol II-1, 157. The proposed provision (s 4(1)) provided: ‘In the absence of agreement between the parties concerning the law to be applied, and unless the parties shall have given the Tribunal the power to decide *ex aequo et bono*, the Tribunal shall decide the dispute. . . .’ [Emphasis in original.]

<sup>47</sup> *History of the ICSID Convention*, vol II-1, 267.

<sup>48</sup> *ibid.*

<sup>49</sup> *History of the ICSID Convention*, vol II-1, 501.

<sup>50</sup> *ibid.*

<sup>51</sup> *History of the ICSID Convention*, vol II-1, 502. India’s BN Adarkar echoed Wanasundera’s concern about the applicable law, commenting that ‘in the absence of any special privileges granted to a foreign investor by an agreement, it should be made clear in the whole understanding of the proposed scheme that a foreign investor must comply with the national law of the host State and that the law to be applied was the national law, unless it was otherwise agreed by that State.’ *History of the ICSID Convention*, vol II-1, 505.

<sup>52</sup> The proposed provision (Section 4(1)) provided: ‘In the absence of agreement between the parties concerning the law to be applied, and unless the parties shall have given the Tribunal the power to decide *ex aequo et bono*, the Tribunal shall decide the dispute submitted to it in accordance with such rules of law, *whether national or international, as it shall determine* to be applicable.’ [Emphasis in original.]

some general code of conduct for both the investor and the host country should be laid down'.<sup>53</sup>

But Broches demurred, observing that 'those drafting the proposed Convention had attempted to meet the difficulties by leaving the situation relatively flexible'.<sup>54</sup> He believed that there would be a variety of different types of cases going before tribunals, ranging from contract disputes to *ad hoc* agreements to arbitrate arising out of prior investments.<sup>55</sup> Moreover, 'experience had shown that international arbitral tribunals had not in the past encountered insuperable difficulties and had in fact applied international law as if the national government of the individual concerned had espoused his case'.<sup>56</sup> In sum, he stated rather obliquely that 'on balance it had been considered preferable not to state the position too specifically'.<sup>57</sup>

Broches subsequently acknowledged that some experts did not agree with the Bank's proposed approach.<sup>58</sup> Although he seemed convinced that it was justifiable, in the next iteration of the draft Convention, given the lukewarm response in some quarters and outright hostility in others, the rule was reworded to provide that a tribunal shall apply rules of national *and* international law:

In the absence of agreement between the parties concerning the law to be applied, the Tribunal shall decide the dispute submitted to it in accordance with such rules of national and international law as it shall determine to be applicable. The term 'international law' shall be understood in the sense given to it by Article 38 of the Statute of the International Court of Justice.<sup>59</sup>

Given the reluctance in some quarters to allow international law to play *any* role at all, this redrafting also did not meet with widespread approval.

The Republic of China, for example, contended that the proposed article adopted a rule 'which may be acceptable in a commercial arbitration but [which was] not satisfactory in an investment arbitration as envisaged by this Convention'.<sup>60</sup> In its view, investment arbitration was 'peculiar' because it dealt with 'disputes between a government and a national of another country, and that such disputes arise from an investment which implies the investor's reliance on the laws of the host country with respect to such investment, in the absence of an express agreement to the contrary'.<sup>61</sup> Accordingly, the law of the host country should apply first in the absence of any agreement to the contrary.<sup>62</sup>

<sup>53</sup> *History of the ICSID Convention*, vol II-1, 418.

<sup>54</sup> *ibid.*

<sup>55</sup> *History of the ICSID Convention*, vol II-1, 419.

<sup>56</sup> *ibid.* 420.

<sup>57</sup> *ibid.*

<sup>58</sup> *History of the ICSID Convention*, vol II-1, 571: 'As regards the issue of national vs. international law two points should be noted. In the first place, the basic feature of the Working Paper is the establishment of an international jurisdiction and it is reasonable to provide that an international tribunal will have the power to apply international law, unless specifically restricted. Secondly, even an international tribunal would in the first place have to look to national law, since the relationship between the investor and the host State is governed in the first instance by national law, and it would only be in those instances in which national law was in violation of international law that the tribunal would, in the application of international law, set aside national law. Therefore, it can be said with justification that the rule stated in Section 4(1) in fact covers not just a majority but all the cases which may be submitted for arbitration under the auspices of the Center.'

<sup>59</sup> Working Paper in the form of a Draft Convention (11 September 1964), *History of the ICSID Convention*, vol II-1, 610-45 (Draft Convention), 630.

<sup>60</sup> *History of the ICSID Convention*, vol II-2, 653.

<sup>61</sup> *ibid.*

<sup>62</sup> *History of the ICSID Convention*, vol II-2, 653-54.

This view persisted in some quarters when the applicable law issue was discussed in the Legal Committee. The Republic of China's Robert Tsai reiterated his country's position, stressing that: 'the principle embodied in the provision went beyond the statement of the President of the Bank made when first introducing the idea of the Convention to member governments, namely, that the problem of solving investment disputes would be tackled from the procedural angle only'.<sup>63</sup>

This directly challenged the assumption that a Convention could be developed to address the essential procedural and institutional aspects of investor-State arbitration without addressing substantive legal issues. Broches responded that the law of the host State would naturally be of 'primary importance' in a dispute and that the notion of 'international law' would in the first instance encompass such rules.<sup>64</sup> The revised article used the phrasing 'national *and* international law', as opposed to the prior draft which had used the word '*or*' in order 'to avoid the impression that international law would always apply or that it was necessarily a question of alternatives'.<sup>65</sup> He also stressed that if a State wished to exclude international law, it could agree with its counterparty that the State's law alone applied.<sup>66</sup>

Some experts continued to insist that the draft Convention must, at a minimum, recognize at least initially, that the point of departure must be the host State's law. In the end, the applicable law clause provided:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.<sup>67</sup>

When later reporting to the Executive Directors, Broches suggested that

countries were apprehensive not so much of the application of international law to the transaction, but of the national law of some foreign State, a situation with which their governments would have great difficulty. For that reason, they did not wish to give tribunals too great a freedom in choosing the applicable law. He had concluded that, in the normal case the reference should be to the law of the host State, and that it would be reasonable so to provide in Article 42(1).<sup>68</sup>

In briefing the Executive Directors on the applicable law issue, Broches also carefully distinguished between general international law and the situation that might prevail under a treaty:<sup>69</sup>

... the reference to international law in Article 42 ... in reality, comprised (*apart from treaty law*) only such principles as that of good faith and the principle that one ought to abide by agreements voluntarily made and ought to carry them out in good faith.<sup>70</sup>

<sup>63</sup> *History of the ICSID Convention*, vol II-2, 804.

<sup>64</sup> *ibid* 800.

<sup>65</sup> *ibid*.

<sup>66</sup> *History of the ICSID Convention*, vol II-2, 801.

<sup>67</sup> Draft Convention, art 42(1) in *History of the ICSID Convention*, vol II-2, 1057.

<sup>68</sup> Memorandum of the Meeting of the Committee of the Whole, SID/65-5 (25 February 1965), 4 in *History of the ICSID Convention*, vol II-1, 985.

<sup>69</sup> Chairman's Report on the Regional Consultative Meetings of Legal Experts, Z11 (9 July 1965) in *History of the ICSID Convention*, vol II-1, 570; see also Memorandum of the Meeting of the Committee of the Whole, SID/65-5 (25 February 1965) in *History of the ICSID Convention*, vol II-2, 982.

<sup>70</sup> *History of the ICSID Convention*, vol II-2, 985 (emphasis added).

This was a revealing comment because it illustrated the difference between the perceived content of the existing customary international law rules on the treatment of foreign investment and what might be provided for in an investment treaty.

Broches confirmed to the Executive Directors that there could be ‘no doubt’ that if a bilateral investment treaty provided for ICSID arbitration, the treaty itself would be encompassed by Article 42(1)’s reference to ‘such rules of international law as may be applicable’.<sup>71</sup> Thus, even if the treaty did not specify international law as the applicable law, the treaty’s substantive rules, in the default situation, would supply at least part of the applicable law.<sup>72</sup> This essential point laid the foundation permitting investment treaties to provide for ICSID arbitration.

### I. Assumptions about ICSID’s Future Caseload

Perhaps the most important set of policy choices made by the Convention’s drafters concerned the mechanism for review of tribunal awards. This was a key and occasionally contentious issue that was bound up in the drafters’ conceptions of the *number* and *kind* of disputes that they anticipated would be put before future tribunals.

With respect to the Centre’s expected workload, the discussions show that the Centre was not expected to be very busy. When discussing its proposed administrative structure and its relationship to the World Bank, Broches admitted that it seemed ‘rather formidable’ to speak of a Secretary-General and one or more Deputy Secretaries-General, but went on to observe that it was ‘not contemplated that there would be a full-time or even a part-time Deputy Secretary-General except in the event of some very unusual development in which the Center became extremely busy’. (This of course is precisely what has occurred; after lying fallow for many years with only the occasional contract dispute or even rarer dispute arising under a State’s investment legislation, starting in the late 1990s ICSID’s case load began to grow and that growth accelerated in the 2000s. In addition to a full-time Secretary-General, there are now two full-time Deputy Secretaries-General.<sup>73</sup>)

As for the kind of cases, as previously discussed, the Executive Directors, the Bank’s staff, and at least some of the experts involved in the Convention’s elaboration were alive to its possible interaction with BITs.<sup>74</sup> Nevertheless, Broches repeatedly predicted that most of the disputes before tribunals would arise out of agreements between investors and host States, typically concession contracts in which the parties agreed on ICSID arbitration in lieu of the host State’s courts.<sup>75</sup>

<sup>71</sup> In reviewing the Legal Committee’s work, Germany’s Executive Director commented that ‘he understood the reference in Article 42(1) to “rules of international law” as including the rules of law set down in bilateral investment treaties between the State party to the dispute and the State whose national was a party to the dispute. . . . Could Mr Broches give an assurance that there was in fact no doubt on this point? . . . Mr Broches said that there could be no doubt whatever that the term “international law” in Article 42(1) did in fact include rules set out in bilateral agreements between the States concerned’ (*History of the ICSID Convention*, vol II-2, 984). See also Aron Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Applicable Law and Default Procedure’ in Aron Broches (ed.), *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff Publishers 1995), 184.

<sup>72</sup> Report of the Executive Directors, para 40.

<sup>73</sup> Martina Polasek and Gonzalo Flores were appointed to their positions in October 2016.

<sup>74</sup> For example, see *History of the ICSID Convention*, vol II-1, 58–59.

<sup>75</sup> 28 December 1961, Note by the President to the Executive Directors, *History of the ICSID Convention*, vol II-1, 4. Broches also raised the possibility of States enacting investment legislation which includes an offer to consent to ICSID arbitration. Memorandum of the Meeting of the Committee of the Whole, 18 December 1962 in *History of the ICSID Convention*, vol II-1, 59.



Broches thus opined that it was ‘more likely’ ‘that an arbitration clause would be incorporated in an investment agreement’, thereby limiting the scope of any possible arbitration to ‘disputes arising out of that contract’, than the ‘the situation in which a government, when accepting the convention ... made a general statement that it would submit to arbitration a defined class of disputes with all comers’.<sup>76</sup> He could also conceive of the situation where a ‘dispute had arisen and the government and the investor then decided to arbitrate’.<sup>77</sup> In both instances, it presupposed a relationship of privity.<sup>78</sup>

Indeed, at the Bangkok consultation, Broches went so far as to state that: ‘*If the Convention were limited to disputes arising out of investment agreements with governments, perhaps 95% of possible disputes would be covered*’.<sup>79</sup>

An Indian expert, BN Adarkar, was prompted to take up this prediction. If ‘95 per cent of the cases intended to be dealt with by the Convention’ might be covered if the Convention were limited to disputes arising out of investment agreements, he ‘wondered whether, from a practical point of view, 95 per cent of the objective of the proposal could not be obtained, if not the whole of it, by limiting the scope of the Convention in that way’.<sup>80</sup>

Adarkar’s concern evidently was with the degree of elasticity of the class of disputes that might be submitted to arbitration in the future. While the potential for a dispute over contractual performance could be anticipated at the time of the contract’s making, Adarkar wondered whether a dispute concerning a legal right or obligation or facts relating to such a legal right or obligation, ‘could cover any dispute concerning what an investor might regard as his legal right’.<sup>81</sup> This anticipated what has occurred under investment treaties. ICSID’s caseload has been dominated by investment treaty rather than investment contract disputes.<sup>82</sup> When States give their consent to arbitrate in an investment treaty, they consent to arbitrate disputes with claimants, the identity of which is not yet known, and in relation to the impact of governmental measures on investments that are not yet known.<sup>83</sup>

<sup>76</sup> Memorandum of the Meeting of the Committee of the Whole, 18 December 1962 in *History of the ICSID Convention*, vol II-1, 59.

<sup>77</sup> *ibid.*

<sup>78</sup> Note para 24 of the Report of the Executive Directors: ‘Consent of the parties must exist when the Centre is seized (arts 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given. ... Nor does the Convention require that the consent of both parties be expressed in a single instrument.’

<sup>79</sup> Consultative Meeting of Legal Experts, Bangkok, Thailand, 27 April–1 May 1964 in *History of the ICSID Convention*, vol II-1, 494 (emphasis added) and 500 (‘The reason why the draft went beyond the case of investment agreements, in a permissive sense, was to take account of different situations prevailing in different parts of the world, and specifically, to permit *ad hoc* submission of disputes, which he thought was very important.’).

<sup>80</sup> *ibid.* 504.

<sup>81</sup> He posed the following example: ‘If a foreign investor argued that he had a legal right to the ownership, control and the management of a particular investment in a foreign country and the state of that country passed a law affecting, for instance, the social security legislation or the taxation legislation or exercised its powers to direct a particular industrial undertaking to sell its output to the State for security reasons or for better enforcement of the regulation of prices, could such a measure be challenged on the grounds that it affected the legal right of that investor to the ownership, control or management?’ Consultative Meeting of Legal Experts, Bangkok, Thailand, 27 April–1 May 1964 in *History of the ICSID Convention*, vol II-1, 504.

<sup>82</sup> See ICSID Caseload—Statistics (Issue 2017-1) 10: ‘Basis of Consent Invoked to Establish ICSID Jurisdiction in Cases Registered under the ICSID Convention and Additional Facility Rules’ and 24: ‘Basis of Consent Invoked to Establish ICSID Jurisdiction in New Cases Registered in 2016.’

<sup>83</sup> This helps to explain why investment treaty arbitration so frequently involves objections to the jurisdiction and competence of the tribunal. Respondents frequently argue that while they consented to arbitrate certain disputes, their prior consent did not extend to the particular claimant or in respect of the particular type of dispute at issue in the case, and so on, and such objections have not infrequently been accepted by tribunals.

Although he stressed that the vast majority of future arbitrations would arise from investment contracts, Broches kept the possibility of non-contractual arbitrations open by emphasizing the pivotal role of written consent. Ultimately, if a State was inclined to use the Centre, he pointed out, it was up to it to decide what sort of disputes it could agree to submit under the Convention. If it wished to submit contract disputes only, that was its right. The phrase 'prior written undertaking' then being used in the draft should remain because the consent could be given within the contract or it could be given in some other way, such as 'a unilateral statement by a government in an investment law or by some other means in which it would undertake in advance that whenever there was an approved investment under the provisions of that law, to arbitrate certain specified issues'.<sup>84</sup>

Nevertheless, since the contractual paradigm is what many thought would be the primary basis for ICSID jurisdiction, there was good reason to expect little 'connectivity' between future ICSID arbitrations. Contract cases would be governed by the parties' choice of law clauses, more likely than not the law of the host State. In these cases, other than in respect of interpreting the Convention itself, what one ICSID tribunal did when deciding a contractual dispute arising under the law of one State would have little relevance to another tribunal's deciding another contractual dispute under some other State's law. *In short, except for those issues pertaining to the application and interpretation of the Convention itself, there would be no broader systemic dimensions to ICSID arbitration.*

This is worth bearing in mind because the international legal character of BITs that later provided for ICSID arbitration meant that the operative legal rules would largely, if not exclusively, be public international law, including not only the obligations expressed in the treaties themselves, but also the larger *corpus* of international law including its general rules and principles, the rules of customary international law, the rules of treaty interpretation, and the rules of State responsibility.

Subject to differences in drafting (in particular in the varying ways in which the treaties deal with the applicable law), at a high level of generality, BITs resemble each other, and their resemblance, combined with the fact that international law is applicable to investment treaty claims means there is a greater level of informal connectivity between ICSID treaty cases than there is for ICSID contractual arbitration. The lawyer's natural tendency to look for prior solutions to recurring questions led parties and tribunals alike to examine prior decisions for their guidance and persuasiveness. A kind of *de facto stare decisis* rule emerged as investment treaty tribunals began to cite prior decisions and awards, with some tribunals going so far as to label them as 'authorities' on the treatment of issues common to investment treaty cases, even though the term fits more comfortably in a formally binding legal system.<sup>85</sup> To similar effect, one prominent arbitrator, Gabrielle Kaufmann-Kohler, took to including in awards text to the effect that 'subject to compelling contrary grounds, [the tribunal] has a duty to adopt solutions established in a series of consistent cases'. The objective was 'to seek to contribute to the harmonious development of investment law and thereby to meet

<sup>84</sup> Consultative Meeting of Legal Experts, Bangkok, Thailand, 27 April–1 May 1964 in *History of the ICSID Convention*, vol II-1, 506.

<sup>85</sup> See for example, *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No ARB/07/14, Excerpts of Award (22 June 2010) para 194, where the tribunal stated: 'The Tribunal agrees with the authorities cited by the Parties that it does not have jurisdiction over investments made in violation of international public policy.'

the legitimate expectations of the community of States and investors towards certainty of the rule of law'.<sup>86</sup>

This sentiment would almost certainly not have been expressed had 95% of ICSID's cases been contract disputes decided under host State law.

### J. *A Self-Contained Annulment Process*

We now turn to the drafters' conception of what recourse should be available against an award. From the beginning, the drafters were heavily influenced by the work of the International Law Commission ('the ILC'). The Preliminary Draft of the Convention circulated for the regional consultations borrowed from the ILC's work and from the outset it contemplated that any review power to be established would *not* encompass appeal for error of law.<sup>87</sup>

During the 1950s, the ILC had reviewed the rules and practices of States in international arbitration with a view to developing a treaty. This was ultimately put to one side,<sup>88</sup> but the ILC did produce the 1958 Model Rules on Arbitral Procedure, intended to both codify and formulate desirable practices in international arbitration.<sup>89</sup> Interestingly, in the early 1950s the ILC debated whether to include review for error of law in its then-contemplated draft treaty. Hersch Lauterpacht in particular advocated the inclusion of such a ground, but in the end, appeal for error of law was rejected by the Commission, which settled on a right to challenge an award on grounds of invalidity, but not for legal error.<sup>90</sup>

The ILC Rules' Article 35 thus provided that:

The validity of an award may be challenged by either party on one or more of the following grounds:

- (a) That the tribunal has exceeded its powers;
- (b) That there was corruption on the part of a member of the tribunal;
- (c) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;
- (d) That the undertaking to arbitrate or the *compromis* is a nullity.

The Convention's drafters incorporated much of Article 35 into the Preliminary Draft's Section 13(1):

<sup>86</sup> *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) para 67. This is a point repeated in many of the awards rendered by tribunals in which Professor Kaufmann-Kohler acts as the presiding arbitrator. It is not universally accepted. Another prominent arbitrator, Professor Brigitte Stern, takes the opposing view in a case in which both were serving as arbitrators and the 'harmonious development' point was made: 'Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.' *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Liability (14 December 2012) para 187.

<sup>87</sup> Preliminary Draft Convention: Working Paper for the Consultative Meetings of Legal Experts in *History of the ICSID Convention*, vol II-1, 184-235, Commentary to ss 13 to 15 at 218-19: 'It may be noted that this is not a procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon one or other of the three grounds listed in Section 13 (1).'

<sup>88</sup> United Nations, 'Organisation, Programme and Methods of Work' *The Work of the International Law Commission* (8th edn, 2012), vol 1, 50.

<sup>89</sup> *ibid* 135; ILC 1958 Model Rules on Arbitral Procedure <[http://legal.un.org/ilc/texts/instruments/english/commentaries/10\\_1\\_1958.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/10_1_1958.pdf)> accessed 21 July 2017.

<sup>90</sup> The minutes of the 153rd meeting of the ILC (30 June 1952), [1952] 1 ILC YB 92 record Lauterpacht as arguing: 'that there should be the possibility of appeal from the decisions of the tribunal of first instance was *fully in accordance with the legal character of arbitration*, which had been so much stressed. All members of the Commission could cite cases of arbitral awards which it would have been in the interests of justice to reverse.'

Section 13. The validity of an award may be challenged by either party on one or more of the following grounds:

- (a) that the Tribunal has exceeded its powers;
- (b) that there was corruption on the part of a member of the Tribunal; or
- (c) that there has been a serious departure from a fundamental rule of procedure, including failure to state the reasons for the award.<sup>91</sup>

With minor textual modifications, the drafters borrowed the first three of the four grounds in Article 35. The fourth, ‘that the undertaking to arbitrate or the *compromis* is a nullity’, was omitted. (We shall revert to the grounds for review below.)

In terms of *who* would decide an annulment application, the Preliminary Draft chose a different path from that taken in the ILC Model Rules (which made the ICJ the reviewing body).<sup>92</sup> The draft proposed instead to locate the review process within the Centre itself.<sup>93</sup>

The grounds of review and the means by which review would occur were summarized in the Preliminary Draft’s commentary:

... where there has been some violation of the fundamental principles of law governing the Tribunal’s proceedings ... the aggrieved party may apply to the Chairman [of the Administrative Council] for a declaration that the award is invalid. Under that section the Chairman is required to refer the matter to a Committee of three persons which shall be competent to declare the nullity of the award. *It may be noted that this is not a procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon one or other of the three grounds listed in Section 13(1).*<sup>94</sup>

The limited, self-contained, and de-localized nature of review was buttressed by requiring *ad hoc* annulment committee members to be selected from the Panel of Arbitrators and by the idea expressed in then-Article IV, that no reviewing power would be vested in the courts of ICSID Contracting States. The idea was to transform the courts from exercising a reviewing power (either in relation to set-aside or enforcement) into purely enforcement bodies: ie to treat the award as if it was a final judgment of the enforcing State’s own courts.<sup>95</sup> Compliance with the award was intended to be automatic and not subject to further review by the enforcing national court.<sup>96</sup>

<sup>91</sup> *History of the ICSID Convention*, vol II-1, 217.

<sup>92</sup> ILC Model Rules, art 36.

<sup>93</sup> *History of the ICSID Convention*, vol II-1, 217: ‘(2) An application pursuant to paragraph 1 of this Section shall be made in writing to the Chairman who shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons which shall be competent to declare the nullity of the award or any part thereof on any of the grounds, set forth in the preceding paragraph. ...’

<sup>94</sup> *History of the ICSID Convention*, vol II-1, 218–19 (emphasis added).

<sup>95</sup> Addis Ababa Consultative Meetings, *History of the ICSID Convention*, vol II-1, 242; Santiago Consultative Meetings, *History of the ICSID Convention*, vol II-1, 304; Geneva Consultative Meetings, *History of the ICSID Convention*, vol II-1, 372; Bangkok Consultative Meetings, *History of the ICSID Convention*, vol II-1, 464.

<sup>96</sup> See eg Broches: ‘Since one of the purposes of the Convention was to give a greater sense of confidence not only to investors but also to capital importing countries the latter would expect some assurance that compliance with an award made in their favor would be just as automatic as it would be if they lost the case’ (*History of the ICSID Convention*, vol II-1, 424). See also *History of the ICSID Convention*, vol II-1, 425: ‘He felt that it was essential in order to obtain the widest possible acceptance of this Convention, particularly by the developing countries, to ensure that, a winning State, could obtain satisfaction of the rights conferred by the award wherever the investor’s property was located without being subject to undue delays and being met by defenses based on local laws.’

During the consultations, different views were expressed on the annulment process, but a recurring query was whether there ought to be some form of review for error of law. This issue was sometimes bound up with the separate question of whether the Convention should confer some kind of review power on the ICJ.

The latter was dispensed with because of the complications that conferring a review power on the Court would entail. Although a draft provision to that effect was prepared and presented,<sup>97</sup> it quickly became clear that not all of the experts favoured such a provision.<sup>98</sup> When Broches referred to the proposal in Santiago, the United States' Gaspard d'Andelot Belin objected, stating that including such a provision 'would be more likely to lead to unnecessary delay and confusion than to be helpful and would provide an occasion for the possible intervention of States which would presumably have to espouse their national's case in order to bring it before the International Court'. He added that he 'thought that the purpose of the Convention was to avoid as much as possible the intervention of States and he would prefer to see the amendment deleted'.<sup>99</sup> The draft provision was ultimately omitted.<sup>100</sup> In the end, Article 64 of the Convention provided that only disputes between Contracting States concerning only the interpretation or application of the Convention could be referred to the ICJ, and this 'unless the States concerned agreed to another method of settlement'.

The mechanics of the annulment process (in which three members drawn from the Panel of Arbitrators would review the decision of three other arbitrators) still occupied some experts. One delegate thought that it was 'unusual that the award of one arbitral tribunal should be reviewed by another such tribunal'.<sup>101</sup>

Other experts queried the grounds for review. Belgium's Jacques Karelle, for example, argued that they 'should be set out in greater detail, and referred in this respect to Article 26 of the European Convention on uniform arbitration law'.<sup>102</sup> Broches acknowledged that the proposal's 'acceptance of the binding character of the award went beyond what was normally expected in respect of an arbitral tribunal', but suggested that the parallel with commercial arbitration should not be drawn too closely because the Convention sought to establish a new jurisdiction. The parallel, if any, lay with the ICJ rather than with commercial arbitration.<sup>103</sup>

Honduras' Roberto Ramirez suggested that the provision should be expanded by including 'violation or unwarranted interpretation of principles of substantive law'. Broches was unenthusiastic, commenting that this would be 'tantamount to providing for an appeal'.<sup>104</sup> But the feeling persisted in some quarters that some form of review for substantial misapplication of law was warranted. At the last regional experts meeting held in Bangkok, the Republic of China's Paul Chung-Tseng Tsai suggested that the ground that 'the tribunal exceeded its power' could

<sup>97</sup> *History of the ICSID Convention*, vol II-1, 290.

<sup>98</sup> *ibid* 294: Sudan's Osman El Tayeb considered that as presently drafted, the Convention was a 'friendly instrument' but the referral clause went some way towards dispelling that atmosphere. In his view, 'recourse to the International Court of Justice should be avoided and some way found of settling disputes on interpretation or application of the Convention through the Center'.

<sup>99</sup> *History of the ICSID Convention*, vol II-1, 354.

<sup>100</sup> *ibid* 355.

<sup>101</sup> *ibid* 423.

<sup>102</sup> The grounds for setting aside under the European Convention were extensive and included set aside of an award for being *inter alia* 'contrary to *ordre public*', involving a dispute that was not capable of settlement by arbitration, if the arbitral tribunal exceeded its jurisdiction or its powers, and if the parties had not been given an opportunity of substantiating their claims and presenting their case, or if there has been disregard of any other obligatory rule of the arbitral procedure, in so far as such disregard has had an influence on the arbitral award.

<sup>103</sup> *History of the ICSID Convention*, vol II-1, 423.

<sup>104</sup> *ibid* 340.



be improved if the words ‘including failure to apply the proper law’ were added.<sup>105</sup> Broches replied that ‘the draft Convention did not provide for an appeal against the award and in his opinion a mistake in the application of the law would not be a valid ground for annulment of the award’. The reason? ‘*A mistake of law as well as a mistake of fact constituted an inherent risk in judicial or arbitral decision for which appeal was not provided*’.<sup>106</sup>

After the regional consultations were completed, the Bank’s staff revised the draft Convention, preparing the September 1964 Draft Convention in anticipation of the Legal Committee meeting to be held in November of that year. The draft updated the grounds for annulment (with the new text underlined below):

Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds,

- (a) that the Tribunal was not properly constituted;<sup>107</sup>
- (b) that the Tribunal has manifestly exceeded its powers;<sup>108</sup>
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) failure to state the reasons for the award, unless the parties have agreed that reasons need not be stated.

When the Legal Committee convened in Washington DC, the annulment discussion centred on a variety of disparate points: (i) whether the possibility of annulment ought to be restricted only to a final award (with no challenge of any decisions taken prior to the award’s issuance);<sup>109</sup> (ii) whether the failure to state reasons as a ground of annulment should be deleted;<sup>110</sup> (iii) whether the word ‘manifestly’ ought to be deleted from the ‘excess of powers’ ground (and whether the ground was properly phrased in Spanish to apply to the *ultra petita* problem);<sup>111</sup> (iv) whether the word ‘serious’ ought to be deleted from ‘departure from a fundamental rule of procedure’;<sup>112</sup> (v) whether the corruption ground ought to be expanded to encompass arbitrator misconduct;<sup>113</sup> and (vi) whether an

<sup>105</sup> *ibid* 517.

<sup>106</sup> *ibid* 518 (emphasis added).

<sup>107</sup> This was later described by the Deputy-Secretary of the Legal Committee as ‘intended to cover a variety of situations such as, for instance, absence of agreement or invalid agreement between the parties, the fact that the investor was not a national of a Contracting State, that a member of the Tribunal was not entitled to be an arbitrator, etc.’ (*History of the ICSID Convention*, vol II-2, 850).

<sup>108</sup> Mr Broches later explained: ‘that the expression “manifestly exceeded its powers” concerned the cases referred to earlier as *ultra petita*, namely, where the Tribunal would have gone beyond the scope of agreement of the parties or would have decided points which had not been submitted to it or had been improperly submitted to it. He added that the *ad hoc* Committee would limit itself to cases of manifest excess of those powers’ (*History of the ICSID Convention*, vol II-2, 850). He added that ‘failure to apply the right law would constitute an excess of power if the parties had instructed the Tribunal to apply a particular law. With respect to the meaning of the word “reasons”, he ascertained that no delegate objected to the understanding recorded earlier, that both fact and law were implied’ (*History of the ICSID Convention*, vol II-2, 851).

<sup>109</sup> *History of the ICSID Convention*, vol II-2, 850–51. The Ghanaese delegate, NMC Dodoo, suggested that an objection to the constitution of the tribunal should be dealt with as a preliminary objection and ought not to be left to annulment at the end of the process.

<sup>110</sup> *History of the ICSID Convention*, vol II-2, 851. This idea was resisted by the Deputy Secretary, Victor Salomon Pinto, who noted that: ‘In the commentary attached to the “Model Rules of Procedure” of 1955 drafted by the International Law Commission, failure to state the reasons for the award was considered as a serious departure from the fundamental rules of procedure.’

<sup>111</sup> *History of the ICSID Convention*, vol II-2, 851.

<sup>112</sup> *ibid*.

<sup>113</sup> *ibid*.



award could be challenged for the tribunal's making a decision beyond the scope of the submissions.<sup>114</sup>

After these issues were debated, the question of misapplication of the law arose yet again, this time in the form of a suggestion that the words 'or substance' could be included after 'procedure' (so that ground (d) would read 'there has been a serious departure from a fundamental rule of procedure *or substance*').<sup>115</sup>

This caused discomfort in certain quarters. The Netherlands delegate, CW van Santen, stated he was 'a little disturbed by the various suggestions directed at relaxing the terms of annulment. In his opinion, they should be confined to very rare cases because in the ordinary course of events the award should be treated as final'.<sup>116</sup> The United Kingdom's F Burrows, agreed, stating that 'it would be unfortunate to open endless possibilities for one party to frustrate or delay the proceedings'.<sup>117</sup> When Broches put the various proposals for relaxing the grounds for annulment to a vote, they were rejected.<sup>118</sup> Likewise, a French proposal to change 'corruption' to a lack of 'integrity' or 'a defect in moral character' which could be in lieu of 'corruption' was soundly defeated.<sup>119</sup>

The meeting then turned to consider the proposal to include the words '*or substance*' in the 'serious departure from a fundamental rule of procedure' ground. Iran's Fuad Rouhani argued that there were 'fundamental rules which were not of procedure but of substance' and this ought to be included. When Broches asked the Indian delegate, BN Lokur, whether Rouhani's text would encompass the 'erroneous application of the law', Lokur agreed.<sup>120</sup> Van Santen objected.<sup>121</sup> Broches then requested a show of hands on the proposal to include as a ground for annulment a 'manifestly incorrect application of the law'. The proposal was defeated by a two to one margin.<sup>122</sup>

In the end, it was settled that review of an ICSID tribunal's award can occur only under the limited grounds listed in Article 52 of the Convention and such grounds did not include 'manifestly incorrect application of the law' or the like. As noted above, the ICJ was also given only a limited role under the Convention, and even then, it was not given an exclusive role.<sup>123</sup>

### *K. Summary of the Drafters' Policy Choices*

In sum, it was decided that ICSID arbitration would operate as follows:

The Convention's signing or ratification of itself would not oblige any Contracting State to submit to ICSID arbitration. However, if a Contracting State did agree to submit an existing or future dispute to arbitration, and a national of another Contracting State provided its own written consent, the

<sup>114</sup> *ibid* 853.

<sup>115</sup> *ibid* 854.

<sup>116</sup> *ibid* 852. (The view that (a) ought to be eliminated was later put to a vote and defeated by a vote of 18 to 2. *History of the ICSID Convention*, vol II-2, 853.) However, the idea that the constitution of the tribunal ought not to be challengeable until after the issuance of the final award was accepted by a vote of 9 to 3.

<sup>117</sup> *History of the ICSID Convention*, vol II-2, 852.

<sup>118</sup> *ibid*.

<sup>119</sup> *ibid*.

<sup>120</sup> *ibid* 853.

<sup>121</sup> *ibid*.

<sup>122</sup> *ibid* 853-54.

<sup>123</sup> Under Article 64, disputes between Contracting States concerning the interpretation or application of the Convention could, if not settled by negotiation, be referred to the ICJ by any party to such dispute, unless the States concerned agreed to another method of settlement. No other role for the Court was contemplated.

resulting agreement to arbitrate would be legally binding and enforceable under the Convention. The consents did not need to be recorded in a single instrument or at the same time.

The disputing parties had their choice of arbitrators and need not draw them from the Panel of Arbitrators. However, the general rule was that a majority of the members of a tribunal could not be nationals of the State party to the dispute or of the State whose national is a party to the dispute, unless each and every arbitrator was appointed by agreement of the parties.

The applicable law(s) would be such rules of law agreed by the disputing parties. In the absence of such agreement, the tribunal would apply the law of the Contracting State party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable. In the latter situation, no guidance was provided in the Convention as to how to sort out the relationship between the two sources of law applicable in the default situation.

The grounds for annulment of *awards* only focused on the integrity of the process rather than the correctness of the tribunal's findings of law or fact. Appeal for error of law was explicitly rejected with full knowledge of the likelihood that different tribunals might arrive at different conclusions which was seen to be an inherent feature of *ad hoc* arbitral decision-making avoidable only by establishing a standing tribunal—and this was deemed infeasible in the circumstances.

The national courts of Contracting States would play no role in reviewing an ICSID award; rather, their role instead would be to enforce the pecuniary obligations of the award. This restriction of the power to review, labelled as the 'acceptance of foreign awards without the right to attack them', was recognized as a 'new departure' that raised a 'question of principle' according to one British expert, Philip Allott, who identified the risk underlying a system that did not insist on legal correctness. He felt:

... that the Section should be accepted regardless of the fact that on paper it appeared a strange innovation. *The final result would depend on the quality of the awards given; if the awards were good, they would justify the acceptance of the system.*<sup>124</sup>

What was left unsaid was what could or would be done if the awards were not good.

## IV. INVESTMENT TREATIES AND THE ICSID CONVENTION

After the ICSID Convention entered into force and States began to negotiate investment treaties that provided for ICSID arbitration, the two tracks of substantive legal protection and institutional/procedural mechanisms came together. The Convention's interaction with BITs is crucial to understanding the system's evolution through successive treaty arbitrations and treaty negotiations.

### A. *Providing for ICSID Arbitration*

The first way in which investment treaties subsequently interacted with the Convention arose from the decision of pairs or groups of States to include an ICSID arbitration clause in their (principally bilateral) treaties. From the late 1960s

<sup>124</sup> *History of the ICSID Convention*, vol II-1, 427 (emphasis added).

through to the 1990s, BITs typically provided exclusively for ICSID arbitration. Following the approach suggested by the ICSID Secretariat, the treaty would record each Contracting Party's written consent to arbitration with investors of the other Contracting Party.<sup>125</sup> One half of any future agreement to arbitrate therefore appeared in the investment treaty itself, in the form of an offer by each Contracting Party to the class of investors holding the requisite connection to the other Contracting Party (as defined by the BIT). Unsurprisingly, given the frequent generality of phrasing of this class (in respect of legal persons<sup>126</sup>), disputes would later arise as to whether a claimant held the requisite standing under the treaty to bring a claim.<sup>127</sup>

### B. *Defining What Was Disputable*

Even though many BITs contained only a single clause that provided for ICSID arbitration, small differences in their drafting could lead to significant differences in application. The phrasing of what was actually disputable under the BIT is a good example.

Some treaties allowed a claimant to allege a breach only of certain specified obligations (and in some cases only questions of compensation arising out of an expropriation<sup>128</sup>), others provided for the arbitration of '*disputes arising under this Agreement*', while others were broader in reach, using phrasing such as '*disputes in relation to investment*'. The latter phrasing led the *ad hoc* Annulment Committee in *Vivendi et al v Argentine Republic* to observe that read literally, the requirements for arbitral jurisdiction in the BIT did 'not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT'.<sup>129</sup>

The precise wording of the arbitration clause of a BIT thus has a significant impact on a tribunal's subject-matter jurisdiction. A trend, traceable back to the 1994 North American Free Trade Agreement (NAFTA),<sup>130</sup> shows that States have often opted to specify more precise limits. In contrast to the BIT at issue in *Vivendi*, the NAFTA, for example, restricts the subject-matter jurisdiction of tribunals only to claims of alleged breaches of the obligations set out in Section A of its investment chapter, a plainly narrower grant of jurisdiction.<sup>131</sup> The

<sup>125</sup> *History of the ICSID Convention*, vol II-1, 427. The 'Model Clauses' document provided: 'Since it is governments that are parties to investment treaties, there is no formal difficulty in providing directly in those instruments that these governments will consent to the jurisdiction of the International Centre for Settlement of Investment Disputes. . . .'

<sup>126</sup> The issue was most acutely presented when nationals of the respondent state brought a claim through a legal person incorporated under the law of the other State party to the BIT. The ICSID Convention explicitly precluded natural persons from suing their State of nationality (see art 25(2)(a)).

<sup>127</sup> See eg *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) paras 81–86; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (29 July 2008) para 326; *TSA Spectrum de Argentina, SA v Argentine Republic*, ICSID Case No ARB/05/5, Award (19 December 2008) para 156.

<sup>128</sup> The most notable example of this are the many treaties concluded by former eastern bloc countries and some Asian countries that contain the typical range of substantive obligations, but allow investor-State arbitration only for disputes over the compensation due for an expropriation. See eg *Sanum Investments Limited v The Government of the Laos People's Democratic Republic*, PCA Case No 2013-13, Award on Jurisdiction (13 December 2013).

<sup>129</sup> *Compañía de Aguas del Aconquija and Vivendi v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) para 55.

<sup>130</sup> North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (NAFTA).

<sup>131</sup> For another example, see United States-Singapore Free Trade Agreement (signed 6 May 2003, entered into force 1 January 2004) (US-Singapore FTA), which in art 15.15 provides that the subject-matter jurisdiction of the tribunal may be rooted in an obligation in its investment chapter, an investment authorization or an investment agreement.

modern treaty-making trend is in the direction of greater specificity as to the subject-matter jurisdiction of tribunals.<sup>132</sup>

### C. Treatment of the Local Remedies Rule

The ICSID Convention left open the possibility of requiring the exhaustion of local remedies but put the onus on the Contracting State to specify that this was required.<sup>133</sup> As it turned out, the vast majority of BITs were silent on the local remedies rule. Successive ICSID tribunals viewed this as amounting to a waiver of the rule; accordingly a claimant was not required to exhaust local remedies before proceeding to international jurisdiction.<sup>134</sup>

Some treaties modified the rule by prescribing a phased form of dispute settlement which first required that a dispute between the investor and the host State be submitted to the courts or administrative tribunals of the State for a defined period of time such as 18 months. When these types of provisions were tested in claims where the investor/claimant had either refused or failed to resort to local remedies, and instead invoked the treaty's most-favoured-nation clause to seek more favourable treatment in terms of gaining access to international jurisdiction, the variability in the respondent State's treaty-making practice often came back to haunt it, because some tribunals found that since the respondent had entered into other treaties which did not provide for prior resort to local remedies, the claimant could claim the benefit of that more favourable treatment.<sup>135</sup> The cases on the impact of an MFN clause on a BIT's dispute settlement provisions of course depended on the wording of the applicable MFN clause, but also exposed divergent views amongst tribunals and arbitrators as to the clause's proper interpretation. In recent years, States have tended to resolve the issue through treaty language expressly providing that the MFN clause does *not* apply to the treaty's dispute settlement clause.<sup>136</sup>

### D. Definitions

The fourth way in which investment treaties interacted with the Convention was to supply definitions that had either proved unattainable during the Convention's

<sup>132</sup> EU-Singapore FTA (n 38) ch 9, art 9.11, which provides it shall apply to 'treatment alleged to breach the provisions of Section A (Investment Protection)'; CETA (n 3) art 8.18, which provides in relevant part that a tribunal's subject-matter jurisdiction in an investor-state dispute arising under it is restricted to sections C and D of the agreement.

<sup>133</sup> ICSID Convention (n 4) art 26: 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.' (emphasis added)

<sup>134</sup> *IBM World Trade Corporation v Republic of Ecuador*, ICSID Case No ARB/02/10, Decision on Jurisdiction and Competence (22 December 2003) paras 80–84; *Saar Papier Vertriebs GmbH v Republic of Poland*, UNCITRAL, Final Award (16 October 1995) paras 72–77; *Yaung Chi Oo Trading Pte Ltd. v Government of the Union of Myanmar*, ASEAN ID Case No ARB/01/1, Award (21 March 2003) paras 40–41; *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award (13 September 2001) para 417; *Vivendi* Decision on Annulment (n 123) paras 51–60, 75–80.

<sup>135</sup> See *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) paras 36–64; *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction (3 August 2004) para 102; *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Award (21 June 2011) paras 95–108. Cf. *Wimmershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award (8 December 2008) paras 167–68; *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award (22 August 2012) paras 238–50.

<sup>136</sup> See eg the TPP (n 38) MFN clause, art 9, para 5: 'For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement)'. See also CETA (n 3) art 8.7. Cf. the United Kingdom which went the other way, clarifying in its 2001 Model BIT that the MFN clause *did* apply to dispute settlement procedures.

negotiation or were considered better left for the agreement of the parties. During the Convention's elaboration there were lengthy discussions about including a definition of 'investment'. Although various definitions were proffered, ultimately it was decided *not* to include one.<sup>137</sup> As in other cases where consensus was difficult to reach, the idea was to leave it to the parties to define.<sup>138</sup> In the investment treaty context, this meant that the states party to the treaties would agree a definition.

The first generation of BITs included just a few definitions of such key terms as 'national', 'company', and of particular importance, 'investment'. BITs typically defined the latter in illustrative ways.<sup>139</sup> Early treaties employed an asset-based definition which was formulated in indicative terms ('investment' *includes* ...).<sup>140</sup>

Treaty-making practice evolved over time, evidently because States disagreed with what the tribunals sometimes accepted as constituting an investment. In early NAFTA cases, for example, tribunals opined that 'goodwill' or access to another NAFTA Party's market could be a protected investment.<sup>141</sup> This led the United States to develop a somewhat circular definition of investment in its 2004 Model BIT (which carried over into subsequent US treaties and into treaties concluded by other States).<sup>142</sup> In phrasing reminiscent of the attempts of a well-known and oft-debated ICSID decision (the *Salini* decision<sup>143</sup>) which divined an objective meaning of 'investment' under the Convention (even though it was undefined) the US began to employ the idea of defining 'investment' as 'every asset that an investor owns or controls, directly or indirectly, *that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk*' and then setting out the forms that an investment might take in an illustrative list.<sup>144</sup>

<sup>137</sup> Report of the Executive Directors, para 27: 'No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting states can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre.'

<sup>138</sup> *ibid.* See generally, *History of the ICSID Convention*, vol II-2, 957; *History of the ICSID Convention*, vol II-1, 293, 496–500 and 564–65: 'Several suggestions were made for a definition of "investment" based on definitions contained in domestic legislation or bilateral agreements, but all of these suggestions appeared to be open to criticism. This led some delegations to conclude that the approach of the Working Paper—omitting a definition of investment—was preferable and others that a definition, if included, should be of a non-exhaustive character, listing the principal types of "investment" followed by a residual clause referring to "other transactions of a like nature", or some such expression.' There has since developed a substantial body of case law in which tribunals recognize an 'objective meaning' of 'investment' in the Convention: *Mihaly International Corp v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/00/2, Award (15 March 2002) para 33; *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/04, Decision on Jurisdiction (21 July 2002) para 52.

<sup>139</sup> See eg the Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey (1986), art 1(b): "'investment" means every kind of asset such as equity, debt, claims and service and investment contracts and includes: (i) tangible and intangible property, including rights such as mortgages, liens and pledges; (ii) shares of stock other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value and associated with an investment; (iv) industrial property rights, including rights with respect to patents, trademarks, trade names, industrial designs and know-how and goodwill and copyrights; (v) any right conferred by law or contract, and any licences and permits pursuant to law.'

<sup>140</sup> *ibid.*

<sup>141</sup> *Pope & Talbot v Canada*, UNCITRAL, Interim Award (26 June 2000) para 96; *SD Myers v Canada*, UNCITRAL, Second Partial Award (21 October 2002) para 107, fn 32.

<sup>142</sup> See TPP (n 38) art 9.1; CETA (n 3) art X.3; EU-Singapore FTA (n 38) art 15.1.

<sup>143</sup> *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/04, Decision on Jurisdiction (21 July 2002) para 52: 'The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (cf commentary by E Gaillard, cited above, 292). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.'

<sup>144</sup> 2004 US Model Bilateral Investment Treaty, art 1, 3 (emphasis added).



This meant that the exercise of determining the existence of an investment was no longer restricted to reviewing the illustrative list of assets and either finding that an alleged investment met a listed example or was sufficiently close. The illustrative list was still employed, but to the extent that an asset not on the list was contended to be an investment, the tribunal was directed to consider its characteristics against *Salini*-type criteria.

The early BITs also contained definitions of ‘national’ or ‘investor(s)’ or ‘company’. As compared to the lengthier illustrative list of assets that constituted an investment, these definitions tended to be quite simple, often raising questions, particularly with respect to legal persons, as to the degree of connection required between a legal person and the State whose treaty it was invoking.

Not surprisingly, issues arose where it was alleged that nationals of the respondent State were using the intermediation of a legal person incorporated in the other Contracting State to bring a claim against their own State. Such a claim could not have been maintained under the Convention had it been initiated by nationals against their own State, due to its prohibition on claims by dual nationals bringing claims against either of their States of nationality.<sup>145</sup> The first tribunal to have the issue squarely presented to it resulted in a split in which the two party-appointed arbitrators formed the majority. In an apparent first in ICSID arbitration, the president dissented and later resigned from the tribunal.<sup>146</sup>

Treaties also differed significantly as to the degree of connection between a legal person and the State whose nationality it was claiming. Some required a fairly close link, for example requiring the company to have its seat or *siège social* in the country and/or ‘substantial business activities’ in the territory in order to have standing.<sup>147</sup> Others used a simple ‘place of incorporation’ test.<sup>148</sup> Still others extended the degree of connection such that a company incorporated in a third State (not party to the treaty) had rights of standing against a State party to the treaty if it was controlled by a national or company of a State party to the treaty.<sup>149</sup> Still others permitted a fairly light connection to a State Party but allowed the other State to deny the treaty’s benefits in certain limited instances.<sup>150</sup>

As time passed, and as tribunals wrestled with the generality of the early treaties’ definitions when applying them to concrete cases, States saw fit to provide for longer sets of definitions.

<sup>145</sup> ICSID Convention (n 4) art 25(1)(2)(a).

<sup>146</sup> *Tokios Tokelés* Decision on Jurisdiction (n 127). The President, Prosper Weil, resigned, leaving Daniel Price and Piero Bernardini as the remaining arbitrators. Professor Weil was succeeded by Lord Mustill.

<sup>147</sup> For example, the Agreement between the Macedonian Government and the Swiss Federal Council on the Promotion and the Reciprocal Protection of Investments, Article 2(2): ‘The term “investor” shall refer with regard to either Contracting Party to ... (b) juridical persons which are constituted or otherwise organized under the law of that Contracting Party and are engaged in substantive business operations in that Contracting Party.’

<sup>148</sup> For example, the Agreement on encouragement and reciprocal protection of investments between the Republic of Kazakhstan and the Kingdom of the Netherlands, art 1(2): ‘the term “nationals” shall comprise with regard to either Contracting Party: ... legal persons constituted under the law of that Contracting Party ...’.

<sup>149</sup> For example, the France–Ecuador Bilateral Investment Treaty (1994), art 1: ‘3. The term “companies” shall apply to: ... (ii) Any body corporate controlled by nationals of one Contracting Party or by bodies corporate having their registered office in the territory of one of the Contracting Parties and constituted in accordance with that Party’s legislation.’

<sup>150</sup> See eg NAFTA, art 1113.



### E. *Elaboration of Substantive Obligations*

Investment treaties of course supplied the substantive rules of treatment that Contracting Parties agreed to accord to their respective investors and their investments. Treaties tended to more or less choose from a ‘menu’ of substantive obligations and unsurprisingly they were worded differently. As a result, there are many facially similar, but not identical, BITs and many very differently worded BITs in force. Even BITs that follow a State’s preferred model vary due to the give-and-take of negotiations.

The early treaties typically included national and most-favoured nation treatment, fair and equitable treatment and full protection and security, protection against uncompensated expropriation, the right to make transfers to and from an investment, and in many cases a simply-worded ‘observance of obligations’ (umbrella) clause.<sup>151</sup> Variations in the wording of these provisions abound. Some States tailored the obligations by adding in protections against ‘unreasonable’, ‘arbitrary’, ‘discriminatory’ or ‘unjustified’ measures. Some tied the fair and equitable treatment standard to ‘international law’ while others made no reference to law at all, thus implying an autonomous standard of fairness and equity.<sup>152</sup> Limited exceptions to the substantive obligations were often included.

The generality of phrasing, particularly with respect to fair and equitable treatment, made it almost inevitable that tribunals would differ as to its meaning and application.<sup>153</sup> Take for example an unqualified fair and equitable treatment provision (ie not tethered to customary international law or to international law generally). If considered strictly on the basis of the ordinary meaning of the words, it was inevitable that different arbitrators would have different conceptions of what amounted to unfair and inequitable treatment.<sup>154</sup> Arbitrators acting in good faith and applying the Vienna Convention on the Law of Treaties could arrive at significantly different interpretations of the same (or similar) treaty texts. This might be explainable by differences in legal culture and perspective, and the arbitrators’ need to anchor their interpretation of generally-worded provisions in their own conceptions of public international law and private law rules. To the extent that this suggested idiosyncratic bases for decision based on who sits on a tribunal, it would cause discomfort to those who aspire to a modicum of systemic consistency and coherence.<sup>155</sup>

<sup>151</sup> Taken collectively, these provisions went considerably further than the fragmentary and undeveloped rules of customary international law which had led certain European legal experts to advocate unsuccessfully for the inclusion of basic rules of treatment of foreign investment in the Convention itself.

<sup>152</sup> See *Técnicas Medioambientales Tecmed, SA v United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003) paras 154–56 and *AWG v Argentine Republic*, UNCITRAL, Decision on Liability (30 July 2010) paras 221–30.

<sup>153</sup> As the *AWG Group Ltd v Argentine Republic* tribunal observed in its Decision on Liability, at para 189: ‘In interpreting this vague, flexible, basic, and widely used treaty term, this Tribunal has the benefit of decisions by prior tribunals that have struggled strenuously, knowledgeably, and sometimes painfully, to interpret the words “fair and equitable” in a wide variety of factual situations and investment relationships.’

<sup>154</sup> See *Joseph C. Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) para 258: ‘an inquiry into the ordinary meaning of the expression “fair and equitable treatment” does not clarify the meaning of the concept; “Fair and equitable treatment” is a term of art, and any effort to decipher the ordinary meaning of the words used only leads to analogous terms of almost equal vagueness.’ [Emphasis in original.]

<sup>155</sup> As the *Mondev International Ltd v United States of America* tribunal observed in its Award, at para 119: ‘NAFTA Article 1105(1) did not give a NAFTA tribunal an unfettered discretion to decide for itself, on a subjective basis, what was “fair” or “equitable” in the circumstances of each particular case. While possessing a power of appreciation, the United States stressed, the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals. It may not simply adopt its own idiosyncratic standard of what is “fair” or “equitable”, without reference to established sources of law.’

The generality of phrasing likely explains successive tribunals' attempts to identify elements of State behaviour that would give rise to a finding of breach. The doctrine of 'legitimate expectations', which has played a role in many cases involving an alleged breach of fair and equitable treatment, is one such example. It was derived not from the express wording of any first-generation BIT, but from an arbitral construct, namely, the doctrine's transplantation from European law.<sup>156</sup> As one dissenting arbitrator noted rather plaintively:

The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the ordinary meaning to be given to the terms 'fair and equitable'. Therefore, *prima facie*, such a conception of fair and equitable treatment is at odds with the rule of interpretation of international customary law expressed in Article 31.1 of the Vienna Convention on the Law of Treaties (VCLT).<sup>157</sup>

Even the fairly standard wording of an expropriation clause could give tribunals difficulty. The *Feldman* tribunal noted, for example, when discussing NAFTA's expropriation provision, that the 'language is of such generality as to be difficult to apply in specific cases'.<sup>158</sup>

It is beyond the scope of this brief review of how investment treaties interacted with the ICSID Convention to explore the full implications of varied treaty-drafting.<sup>159</sup> What can be seen, however, is a consistent use of fairly simply and generally-worded treaties in the first generation of treaties with a shift in treaty-making starting in the mid-2000s. The impetus for this change in approach came from the early experience with the NAFTA, where two of the three Parties (Canada and the United States) began to explore ways of more precisely articulating the rules and procedures governing investment disputes. Having witnessed how a generally-worded provision could sometimes be interpreted unexpectedly, both States went back to the drawing board.

As a result, in the second generation of treaties (post-2004) one can see more guidance being given to tribunals on such obligations as fair and equitable treatment and expropriation. This trend has continued to the present day. The emergence of multi-party or plurilateral FTAs and the European Commission's foray into negotiating investment chapters within FTAs can be seen as the beginning of the third generation of treaties. (This will be discussed in more detail in the papers that follow.)

## F. Exclusions and Reservations

One of the notable features of BITs concluded in the 1960s to 1990s is the paucity of reservations and exceptions to the substantive obligations. This is surprising because States frequently have many legislative and regulatory exceptions to general rules of non-discriminatory treatment. For example, States commonly

<sup>156</sup> *International Thunderbird Gaming Corporation v United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde (1 December 2005) para 27.

<sup>157</sup> *Suez, Sociedad General de Aguas de Barcelona SA and InverAgua Servicios Integrales del Agua SA v the Argentine Republic*, ICSID Case No ARB/03/17, Decision on Liability, Separate Opinion of Arbitrator Pedro Nikken (30 July 2010) para 3.

<sup>158</sup> *Marvin Roy Feldman v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002) para 98.

<sup>159</sup> See generally Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties* (OUP 2012).

restrict the granting of licences for ‘sensitive sectors’ such as broadcasting, civil aviation, and professional services by conditioning participation in such sectors on nationality requirements.<sup>160</sup> Yet the only exceptions mentioned in many first generation BITs are preferences granted pursuant to an FTA or a customs union or pursuant to a bilateral taxation treaty.<sup>161</sup>

When States began to negotiate investment chapters within FTAs, investment negotiators grew more attuned to the reality that their States often had measures which could be considered inconsistent with the general obligations of non-discriminatory treatment they proposed to undertake. Trade negotiators had long been sensitive to the political imperatives of negotiating exceptions to general obligations such as national treatment. In this respect, international trade agreements, replete with reservations, exceptions, and schedules that led to patchwork coverage of their substantive provisions, differed from investment treaties, which tended to have only a few exceptions.

The NAFTA, for example, which was the first comprehensive FTA to include an investment chapter, displays the investment negotiators’ adoption of the trade negotiators’ approach. Its Article 1108 lists exceptions and directs the interpreter to consult Party-specific schedules in Annexes I to III which contain lengthy lists of nonconforming measures maintained by each NAFTA Party. This approach has been emulated in many subsequent investment treaty negotiations.<sup>162</sup>

### G. *Applicable Law*

As seen earlier, the ICSID Convention’s negotiation reflected the belief that ICSID’s future caseload would arise from investment contracts. In such cases, the investor and the host State would be expected to have specified the *lex contractus*. If the law of the host State was the exclusive choice of law, international law did not apply to the dispute.

Oddly, given the extensive attention devoted to the applicable law issue during the Convention’s negotiation, many investment treaties were simply silent on the issue. As a result, when tribunals considered disputes arising under these treaties, it was not immediately apparent precisely what rules of law were to be applied.

If no applicable law was specified, the tribunal would have to consider the BIT’s silence under the Convention’s Article 42(1). As a treaty, the BIT itself was conventional international law. This could be viewed as an implicit decision by the States party to the treaty that international law *alone* should apply (thus relegating

<sup>160</sup> TPP (n 38) 9–3, fn 8; Understanding Concerning Certain US Bilateral Investment Treaties, signed by the US, the European Commission, and acceding and candidate countries for accession to the European Union (22 September 2003), III. Measures in Sensitive Sectors or Matters, Annex D Sensitive Sectors or Matters; Canada–Colombia FTA (2008), art 838, fn 11; Australia–Chile FTA (2008), art 10.1(j)(iii); Agreement between the Government of the Republic of Croatia and the Government of the Republic of Azerbaijan on the Promotion and Reciprocal Protection of Investments (2007); Chile–Japan FTA (2007), art 105.

<sup>161</sup> For example, see the Agreement between the Government of the Great Britain and Northern Ireland and the Government of the Republic of Singapore for the Promotion and Protection of Investments (1975), art 7; Agreement between the Government of the United Kingdom of Great Britain, Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (1993).

<sup>162</sup> See eg the TPP (n 38) art 9.19, 9–20, fn 31, annexes I, II, II and IV; the EU–Singapore FTA (n 38) art 9.3(2), fn 8, app 2-A, annex 8-A, annex 8-B; CETA (n 3) art 8.9; the Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (2005).

the law of the host State to the role of juridical fact).<sup>163</sup> Alternatively, the BIT's silence might be taken as the absence of agreement on the applicable law. If so, the default rule in Article 42(1), second sentence, would apply and the tribunal would be obliged to apply the law of the State party to the dispute and such rules of international law as may be applicable—the latter clearly encompassing the treaty. In either case, tribunals had to confront the fact that international law was going to play a major role in the resolution of the dispute. The question was whether it was to apply exclusively and if not, how a tribunal should approach when each source of law applied. Unsurprisingly, tribunals have taken different approaches. The first ICSID case based on a bilateral investment treaty wrestled with precisely this issue, and revealed a strained and perplexing discussion of the applicable law by both the majority and dissenting arbitrator (who dissented on this issue as well as others).<sup>164</sup>

In either situation, investment treaty arbitration presented a greater likelihood than ICSID *contract* arbitration that the two sources of law could be pitted in opposition to each other. This is due to the dual nature of a State's acts. A State's laws, regulations and policies are the 'measures' that tribunals examine when determining whether a State is in breach of its international obligations. Depending upon the answer given to the applicable law question, the law of the host State can thus simultaneously constitute the measures at issue in the dispute *and* a source of applicable law.

There was another dimension to this issue that BITs generally left unaddressed. While applicable international law has primacy over inconsistent municipal law, the fact is that municipal law is far more developed than general international law, or for that matter, conventional international law, in terms of the specificity of legal rules pertaining to the creation and identification of legal rights and interests. This implies a continuing role for the application of domestic law, particularly when it comes to ascertaining the existence of rights and interests which are the subject of treaty claims.<sup>165</sup> This is reflected in recent treaty-making where States frequently direct tribunals to refer to domestic law when deciding whether a particular right or interest exists. The US–Singapore FTA, for example, includes as a type of 'investment' 'licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law'.<sup>166</sup>

This explains why, starting in the 1990s and on an accelerated basis, many investment treaties began to include applicable law clauses. Again, there has been substantial diversity in drafting, with some treaties such as the NAFTA specifying the 'Agreement and applicable rules of international law' as the governing law,<sup>167</sup>

<sup>163</sup> *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award (27 June 1990) paras 18–20; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006) para 292: 'As the reference to domestic law is used for one isolated subject matter only, it must be presumed that all other matters are governed by the provisions of the Treaty itself which in turn is governed by international law.'; *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Decision on Annulment (5 February 2002) paras 37–45.

<sup>164</sup> *AAPL* Final Award (n 162). The Sri Lanka–UK treaty did not contain an applicable law clause. The majority inferred an agreement on the applicable law from the disputing parties' conduct in the arbitration itself, noting that they had effectively come to the same position that the applicable law was primarily the treaty as *lex specialis*, with international law and domestic law applying as supplementary sources (paras 19–22). Samuel KB Asante in dissent disagreed, contending the treaty was a clear example of the absence of an agreed applicable law, thus requiring the tribunal to apply art 42(1), second sentence, rather than proceeding on a potentially unreliable inference from the parties' pleadings [see Dissenting Opinion (27 June 1990) paras 8–10].

<sup>165</sup> See eg the 2012 US Model BIT, art 1(g) ('licenses, authorizations, permits, and similar rights conferred pursuant to domestic law . . .') (emphasis added).

<sup>166</sup> US–Singapore FTA (n 131) art 15.1(13)(g) (emphasis added).

<sup>167</sup> NAFTA, art 1131; CETA (n 3) art 8.31.1; TPP (n 38) art 9.25.2; EU–Singapore FTA (n 38) art 9.19.

while some others, such as treaties entered into by certain European states, list in a non-hierarchical fashion different sources of law including the law of the host State.<sup>168</sup> Finally, amongst the most recent treaties, the applicable law differs according to the disputable subject-matter.<sup>169</sup>

### H. *Binding Interpretations*

The early BITs did not address the possibility that their Contracting Parties might desire the capacity to later clarify their treaties' meaning. It has been recognized that, pursuant to the Vienna Convention on the Law of Treaties, it is open to the State parties to a treaty to agree on an interpretation which 'shall be taken into account' when interpreting the treaty.<sup>170</sup> But a tribunal's taking into account a shared interpretation is not the same as its being bound to apply an agreed interpretation. Starting with the NAFTA, and in other treaties, joint ministerial commissions have been created that have the authority to issue such binding interpretations.<sup>171</sup>

When, after the NAFTA Free Trade Commission issued a Note of Interpretation dealing with the interpretation of Article 1105, *Minimum Standard of Treatment*, and one tribunal initially balked at applying the Note, this led to a change in US and Canadian treaty-making practice to underscore the binding character of a joint interpretation.<sup>172</sup> Hence, the EU–Singapore FTA's Article 19.19(3) provides not only that an interpretation 'shall be binding on a tribunal' but that 'any award shall be consistent with that decision'.<sup>173</sup> CETA went a step further to clarify that the Joint Committee can determine *when* the binding interpretation shall take effect in order to deal with any legitimacy concerns that might arise from an interpretation that might be seen to 'change the rules of the game' after the critical date that a claim is submitted to arbitration.<sup>174</sup>

Likewise, in NAFTA and many other treaties negotiated that have been inspired by the NAFTA model, States have also included express rights of intervention for non-disputing State Parties,<sup>175</sup> 'gate-keeping' provisions that require special consents of the State Parties concerned in order to challenge taxation measures,<sup>176</sup> and so on.

<sup>168</sup> Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (1 October 1992), art 8(6).

<sup>169</sup> Certain US free trade agreements and BITs permit claimants not only to allege breaches of the substantive obligations of the treaty, but also to allege breaches of 'investment agreements' or 'investment authorizations' (as defined by the treaty). Since disputes arising out of these types of instruments naturally leads to consideration of the law of the host State, the applicable law clause of these types of treaties has been expanded and differentiated to permit the tribunal to apply different rules of law depending upon the nature of the claim(s). See eg art 10.21 of the US–Oman FTA.

<sup>170</sup> For example, see *Telefónica SA v Argentine Republic*, ICSID Case No ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006) fn 65: 'Even when a BIT does not establish such a commission or does not provide for consultations between the parties in respect of matters arising under the BIT, as is the case of the Argentina–Spain BIT, contracting States would of course be free to enter into consultations and conclude an interpretative agreement.'

<sup>171</sup> For example, NAFTA's art 1131(2) states that: 'An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.'

<sup>172</sup> The *Pope & Talbot Inc v Canada* tribunal initially suggested that the Note of Interpretation was more in the nature of an amendment than an interpretation, but eventually, rather grudgingly, applied it. *Pope & Talbot Inc v Government of Canada*, UNCITRAL, Award in Respect of Damages by Arbitral Tribunal (31 May 2002) para 47.

<sup>173</sup> See also the Canada–China Foreign Investment Protection Agreement (4 November 2011), art 30(1).

<sup>174</sup> CETA (n 3) art 8.31(3) (Applicable Law and Interpretation).

<sup>175</sup> CETA (n 3) art 8.31(3); NAFTA, art 1128; TPP (n 38) art 28.14.

<sup>176</sup> NAFTA, art 2103(6); TPP (n 38) art 29.4; CETA (n 3) art 28.7.



### I. *Additional Rules of Procedure*

The early BITs typically did not offer rules of arbitral procedure but rather plugged into the Convention and its arbitration rules (first promulgated in 1968). Provisions that varied or elaborated upon the otherwise applicable arbitration rules did not appear until the early 1990s. Again, NAFTA marked a turning point by adding further detail on such issues as conditions precedent to the submission of claims, specific restrictions on tribunal powers, including a mechanism for the forcible consolidation of claims having common questions of fact and/or law, and including rules that modified the otherwise applicable arbitral procedures.

The NAFTA's treatment, for example, of ICSID Convention's exception to the appointment of nationals of disputing Parties to tribunals is illustrative. Recall that Article 39 provides that the rule that nationals of either the State of the investor or the Contracting State party to the dispute cannot form a majority on the tribunal can be varied by party-agreement. NAFTA Article 1125 constitutes such an agreement by providing that for the purposes of Article 39 of the Convention both the disputing Party and the disputing investor shall agree in writing to the appointment of each member of the tribunal.<sup>177</sup>

Another instance is in the granting of provisional measures (also known as interim measures). Article 47 of the Convention provides the tribunal may recommend provisional measures, with little restriction on its power to do so.<sup>178</sup> While NAFTA recognizes the power to grant interim measures, it states the tribunal 'may not order attachment or enjoin the application of the measure alleged to constitute a breach'.<sup>179</sup> This restriction has become standard US and Canadian practice and it also shows up in many treaties such as the US–Singapore FTA, CETA, the EU–Vietnam FTA, and the TPP.<sup>180</sup>

## V. THE EMERGENCE OF NON-ICSID TREATY ARBITRATION AND ITS EFFECT ON THE REVIEW OF AWARDS

ICSID's place in the centre of investment treaty arbitration world persisted for many years until States that were not parties to the Convention began concluding investment treaties. With the fall of communism in the Eastern Bloc, many Eastern European states quickly entered into BITs with Western states. Since few of the former Communist countries were ICSID Contracting States at the time, the drafters had to consider which other arbitration rules could apply in the event of a dispute. Some treaties, such as that between the Federal Republic of Germany and the then-Republic of Czechoslovakia, left it to the tribunal to determine the

<sup>177</sup> Adopted in subsequent treaties. See eg US–Singapore FTA (n 130) art 15.18(4).

<sup>178</sup> As a result, many tribunals have issued detailed recommendations aimed at enjoining the respondent State from engaging in the measures which have given rise to the dispute. See eg *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009; *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No ARB/08/6, Decision on Provisional Measures (8 May 2009) and other such cases.

<sup>179</sup> NAFTA, art 1134 (emphasis added).

<sup>180</sup> EU–Singapore FTA (n 38) art 9.17.4; CETA (n 3) art 8.34; EU–Vietnam FTA, ch 8, ch II, art 21; TPP (n 38) art 9.21.3.



applicable rules of procedure.<sup>181</sup> The Energy Charter Treaty offered four different sets of arbitral rules, subject to the claimant's choice.<sup>182</sup> The issue also arose in North America because at that time, of the three Parties to the NAFTA, only the United States was an ICSID Convention Contracting State.<sup>183</sup>

Granting a choice of arbitral rules led to investment treaty cases being administered by other institutions such as the Permanent Court of Arbitration, the Stockholm Chamber of Commerce, the ICC, and regional centres such as the London Court of International Arbitration. It also led counsel to study their differences in phrasing and structure, some subtle and others more obvious, in order to determine which might be most advantageous from their client's perspective.

Most significantly for current purposes, ICSID *ad hoc* Annulment Committees were no longer the only bodies exercising a reviewing power over investment treaty tribunals. Since all of the non-ICSID arbitral regimes required the courts of the place of arbitration to exercise a reviewing power, the new treaties brought national courts into the mix. As a result, there was no longer a single set of grounds for the review of an investment treaty award to be applied by a decentralized international body. Rather, judges of national courts began to review awards in accordance with the judicial review laws peculiar to their state. In addition, while the ICSID Convention had precluded national courts from exercising any kind of review power in either the set-aside or the enforcement context, the situation in the non-ICSID case was different; national courts called upon to enforce awards under the New York Convention could be presented with arguments from the resisting party as to the alleged non-enforceability of the award. They might refuse enforcement because the award was set aside at the seat or for the enforcement court's own reasons. This review power is entirely foreign to the ICSID framework.

The availability of different forms of review, including the availability of review at different points of an arbitration depending upon the arbitral rules selected by the claimant, raises important questions for any attempt to graft an appellate body onto existing rules.

### A. *Post-Award (Pre-Challenge Procedures)*

The differences between ICSID and non-ICSID arbitration manifest themselves in many ways that bear upon the question of appellate review, such as in differences in timing, in the effect of an 'interim' award, whether there could be only one award or more in a particular proceeding, what procedures were available to revert to the tribunal after its award was issued but before it was challenged, and so on.

Arbitral regimes typically provide avenues for the correction, interpretation and sometimes supplementation of awards. Correction (or rectification) is meant for

<sup>181</sup> Now Germany and the Czech Republic and Germany and the Slovak Republic, respectively. See eg in *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstueckgesellschaft mbH & Co v Czech Republic*, PCA Case No 2010-5, Award (19 September 2013) para 1.31, quoting art 9(5): 'The arbitral tribunal shall reach its decisions by a majority of votes. Such decisions shall be binding. ... In all other respects, the arbitral tribunal shall determine its own procedure.'

<sup>182</sup> ECT, art 26(4)(a): 'In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to: [ICSID], (ii) [ICSID Additional Facility], (iii) [UNCITRAL], or (iv) [Stockholm Chamber of Commerce].'

<sup>183</sup> Canada became an ICSID Contracting State in December 2013. The Parties therefore agreed that a claimant could choose between, as applicable, the ICSID Convention, the Additional Facility Rules of ICSID, or the UNCITRAL Rules.

minor problems such as calculation errors which do not affect the substance of the award. Interpretation is intended to allow one or both parties to request the tribunal to explain its reasoning. Supplementation allows the tribunal to deal with any claims that it may have omitted to decide.

In the ICSID context, a party may request the correction or supplementation of the award within 45 days of its issuance.<sup>184</sup> Parties can also request the interpretation of the award, which the Convention specifies, where possible, should be heard by the original tribunal.<sup>185</sup> The Convention also allows the revision of an award on the discovery of ‘some fact of such a nature as decisively to affect the award’, which was ‘unknown to the Tribunal and to the applicant’ at the time the award was rendered and where ‘the applicant’s ignorance of that fact was not due to negligence’.<sup>186</sup> The drafters derived this procedure from the Statute of the International Court of Justice.<sup>187</sup>

The other possibly applicable arbitration rules share some similarities with the ICSID rules, but they are not identical.<sup>188</sup> Unlike Article 51 of the ICSID Convention, revision based on the discovery of a new fact is not provided for in the UNCITRAL Rules, nor in a number of other rules.

### B. Review of Interim Awards

The review mechanisms *during* the arbitration differ significantly. In ICSID, the various pre-annulment and the annulment procedures refer to the ‘award’ alone. In this respect, ICSID arbitration differs significantly from that conducted under other rules, which typically refer to the different decisions issued by tribunals over the course of an arbitration as each constituting an award. The difference is illustrated in a case recently heard by the Singaporean courts, *Sanum Investments Limited v The Government of the Lao People’s Democratic Republic*, where after the tribunal determined that it had jurisdiction, a set-aside application was filed in the Singapore High Court.<sup>189</sup> For arbitrations seated in non-Model Law jurisdictions, such as Germany, Switzerland, and the United Kingdom, jurisdictional decisions or partial awards can also be challenged before the courts.<sup>190</sup> This sort of challenge of a positive finding of jurisdiction would not be possible in the ICSID system until the award was rendered and an annulment proceeding was brought under the ICSID Convention.

### C. Grounds for Review

The ICSID Convention’s grounds for annulment are limited only to cases where (a) the tribunal was not properly constituted; (b) the tribunal has manifestly exceeded its powers; (c) there was corruption on the part of a member of the tribunal; (d) there has been a serious departure from a fundamental rule of

<sup>184</sup> ICSID Convention (n 4) art 49(2); ICSID Arbitration Rules, art 49.

<sup>185</sup> ICSID Convention (n 4) art 50(3), art 51(3).

<sup>186</sup> ICSID Convention (n 4) art 51(1); derived from art 61 of the ICJ Statute.

<sup>187</sup> Statute of the International Court of Justice, art 61.

<sup>188</sup> UNCITRAL Arbitration Rules 2010, art 37(1); ICC Arbitration Rules 2012, art 35; SCC Arbitration Rules 2010, art 41.

<sup>189</sup> In the High Court: *Government of the Lao People’s Democratic Republic v Sanum Investments Limited* [2015] SGHC 15. The High Court found that the tribunal lacked jurisdiction; this was later overturned by the Singapore Court of Appeal, [2016] SGCA 57.

<sup>190</sup> *Saluka Investments v Czech Republic*, Swiss Federal Tribunal, Case 4P.114/2006 (7 September 2006); *Achmea BV v Slovak Republic*, Decision of the Frankfurt Regional Court of Appeals (10 May 2012); English Arbitration Act 1996 (ch 23), s 67.

procedure, or (e) the award failed to state the reasons on which it is based.<sup>191</sup> The review can only be conducted by an *ad hoc* Annulment Committee.

For non-ICSID investment treaty arbitration, the review of such awards is subject to the laws of the seat of the arbitration.<sup>192</sup> The mechanisms and standards of review are accordingly determined by the jurisdiction selected. States have adopted different substantive and procedural rules for the review of arbitral awards and generally have not distinguished between the review of regular international commercial arbitration awards and those rendered by investment treaty tribunals. The procedures, grounds and substantive principles, dictated by national laws and legal practices of the seat, inevitably introduce variability in the review of non-ICSID awards.

What is clear is that most countries do not provide for any review as to the substantive correctness of the award.<sup>193</sup> In contrast, under the English Arbitration Act, a set-aside application can extend beyond jurisdictional and procedural grounds,<sup>194</sup> to include review on the basis of a question of law that is obviously wrong and of general public importance.<sup>195</sup> Parties can also apply for the court's ruling on a preliminary point of law.<sup>196</sup>

#### D. *Standards of Review*

Stepping beyond variability in the grounds of review, there are also differences in the *standards* of review. On questions of jurisdiction, for example, the courts of State A might employ a *de novo* standard of review, permitting the parties to adduce evidence that was not before the tribunal and permitting the judge to decide the issue for her/himself. The courts of State B, on the other hand, might apply a correctness standard, but restrict the review to the evidence that was before the tribunal. The courts of State C, employing presumptions of correctness, might be inclined to apply an even more deferential standard of review.

In the ICSID system, there is a high level of consistency at one level in the sense that all annulment committees must apply the same grounds of review. At another level, however, since the annulment system exists within a regime that lacks a formal *stare decisis* rule, and since committee members tend to be from different national legal and cultural backgrounds, decisions may be less rooted in shared understandings of the ICSID 'legal system' than is the case with judges operating in their national (more nuanced, detailed and binding) legal framework of a municipal legal system.<sup>197</sup>

<sup>191</sup> ICSID Convention (n 4) art 52(1).

<sup>192</sup> Anders Nilsson and Oscar Englesson, 'Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?' (2013) 30 J Intl Arb 561, 570–571.

<sup>193</sup> In Switzerland, the grounds upon which an award may be annulled are improper constitution of the arbitral tribunal, lack of jurisdiction of the arbitral tribunal, when the award goes beyond the issues submitted for consideration or fails to consider any issues it was required to decide, violation of public policy and failure to adhere to due process. Robert Briner, 'Switzerland', in Jan Paulsson (ed) *International Handbook on Commercial Arbitration* (Kluwer Law 2004), 33–36, annex II, art 190. In France, art 1520 of the French Arbitration Law limits the grounds for annulment similarly. French New Code of Civil Procedure 2011, Book IV—Arbitration, Title II—International Arbitration, art 1520.

<sup>194</sup> English Arbitration Act 1996 (ch 23), ss 67 (no jurisdiction), 68 (serious irregularity).

<sup>195</sup> English Arbitration Act 1996 (ch 23), s 69.

<sup>196</sup> English Arbitration Act 1996 (ch 23), s 45.

<sup>197</sup> David Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges' (2009) 39 Vanderbilt J Trans L 39, 50.

In non-ICSID arbitrations, there is neither a coincidence of decision-makers nor of legal regimes (even as between UNCITRAL Model Law jurisdictions). Each court's level of deference to the tribunal's findings depends not only on the specific laws of the seat, but the attitudes of its courts towards international arbitration.<sup>198</sup> While, due to the role of precedent, the degree of consistency of review outcomes *within* national legal systems might well be greater than in ICSID, the potential for divergence and variability in approaches to the review of investment treaty tribunal awards as *between* national legal systems is greater.<sup>199</sup>

One can, however, find common strands in ICSID and non-ICSID systems in the treatment of the tribunal's findings on the facts and the law. Three commonly examined issues are described below on a spectrum of least to most interventionist.

### (i) *Findings of fact and law*

The starting point for annulment committees and reviewing courts is deference to a tribunal's findings of fact and law. In *MTD v Chile*, the annulment committee emphasized that the tribunal's admission of evidence and appreciation of the facts cannot be reviewed.<sup>200</sup> Many ICSID annulment committees have stressed that they cannot substitute their determinations on the merits for that of the tribunal when asked to review whether there has been a manifest excess of powers due to a failure to apply the correct law.<sup>201</sup> National courts and annulment committees have similarly distinguished between the failure to apply the proper law and an error in the application of that law. As long as the tribunal applies the applicable law rather than some other law, under almost all review regimes, the tribunal is entitled to be wrong.

In this regard, the annulment committee in *MINE v Guinea* found that even a manifestly erroneous application of the applicable rule of law does not constitute a ground for annulment.<sup>202</sup> Similarly, in *CMS Gas Transmission v Argentina*, the tribunal expressed the view that 'an *ad hoc* committee is not a court of appeal', and quoted *MCI v Ecuador's* statement that an ICSID annulment committee 'cannot substitute its determination on the merits for that of the Tribunal'.<sup>203</sup>

There are, of course, limits to deference. In *Enron v Argentina*, the annulment committee annulled the award on the basis that the tribunal relied on the opinion of an economic expert and thus failed to apply the proper law.<sup>204</sup> In *Sempra v Argentina*, the annulment committee annulled the award because the tribunal

<sup>198</sup> Katia Yannaca-Small, *Arbitration under International Investment Agreements: a Guide to the Key Issues* (OUP 2010), 603, 663.

<sup>199</sup> Jack J Coe, 'Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel within NAFTA and the Proposed FTAA?' (2002) 19 J Intl Arb 185, s III.C.1; Stephen L Hayford, 'A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur' (1998) 66 George Washington LR 443, 461-501.

<sup>200</sup> *MTD Equity Sdn Bhd. & MTD Chile SA v The Republic of Chile*, ICSID Case No ARB/01/7, Decision on Annulment (21 March 2007).

<sup>201</sup> *CDC Group plc v Republic of Seychelles*, ICSID Case No ARB/02/14, Decision on Annulment (29 June 2005) para 45; *CMS Gas Transmission Company v Argentine Republic* ICSID Case No ARB/01/8, Decision on Annulment (25 September 2007).

<sup>202</sup> *Maritime International Nominees Establishment v Republic of Guinea* ICSID Case No ARB/84/4, Decision on Annulment (22 December 1989) para 5.04.

<sup>203</sup> *CMS* Decision on Annulment (n 200) paras 43-45.

<sup>204</sup> *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No ARB/01/3, Award (22 May 2007) paras 304-12.

wrongly equated the definition of necessity under the BIT to the definition of necessity in the ILC Articles on State Responsibility.<sup>205</sup>

There has also been mixed treatment of the issue in municipal courts. The English courts have been consistent in distinguishing between an error of law and misapplication of the proper law.<sup>206</sup> In Switzerland, an allegation that the tribunal failed to apply the proper law can only be challenged at the high threshold of public policy.<sup>207</sup> In the United States, the Federal Arbitration Act enables courts to review awards on the ground of a ‘manifest disregard of the law’.<sup>208</sup> In *International Thunderbird Gaming v United Mexican States*, the District Court of Columbia emphasized that manifest disregard of the law had to be more than an error or misapplication.<sup>209</sup> In Canada, however, a misstatement of the applicable law was found to be a failure to apply the proper law. The court in *United Mexican States v Metalclad Corporation* analysed whether the tribunal misstated the applicable law to include transparency obligations located in a NAFTA chapter over which the tribunal lacked jurisdiction.<sup>210</sup>

### (ii) *Due process and sufficiency of reasons*

Although an ICSID annulment committee cannot review the substantive correctness of determinations on the facts or the law, ICSID annulment does focus on the process’ legitimacy.<sup>211</sup> Therefore, annulment committees are more likely to intervene if they form the view that a tribunal failed to abide by fundamental rules of procedure.

For example, in *Fraport v Philippines*, the ICSID annulment committee annulled the tribunal’s award for admitting evidence from one party without giving the other party the opportunity to comment.<sup>212</sup> In *Vivendi v Argentina*, the annulment committee scrutinized whether the constitution of the tribunal was defective because of an arbitrator’s failure to disclose a conflict of interest.<sup>213</sup> However, even in this area, deference might still be accorded to the tribunal’s conclusions, despite a technical breach of due process. In *Wena Hotels v Egypt*, for instance, the annulment committee explained that a ‘serious departure from a fundamental rule

<sup>205</sup> *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Decision on Annulment (29 June 2010) para 209.

<sup>206</sup> According to the Commercial Court in *B v A*, under s 68(2)(b) of the English Arbitration Act, an error in the application of the law does not lead to a finding of excess of powers. *B v A* [2010] EWHC 1626 (Comm) (1 July 2010). However, under s 69 of the English Arbitration Act, decisions on questions of law that are ‘obviously wrong’ can be set aside by the English courts.

<sup>207</sup> Swiss Federal Tribunal, BGE 116, II, 634 (11 November 1990). In *CME v Czech Republic*, the Swedish Court of Appeal was careful to differentiate between an error of law and the total failure to apply the proper law. *CME v Czech Republic*, Case No T8735-01, Svea Court of Appeal Decision (15 May 2003).

<sup>208</sup> US Federal Arbitration Act 1925, 9 USC, s 1.

<sup>209</sup> *International Thunderbird Gaming Corporation v Mexico*, District Court of Columbia 473 F Supp 2d 80.

<sup>210</sup> *United Mexican States v Metalclad Corporation*, Reasons for Judgment (2 May 2001) (2001) BCSC 664, Supplementary Reasons for Judgment (31 October 2001) (2001) BCSC 1529, paras 72–76.

<sup>211</sup> David D Caron, ‘Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal’ (1992) 7(1) ICSID Rev—FILJ 21, at 24.

<sup>212</sup> *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Decision on the Application for Annulment (23 December 2010) paras 244–46. See similar example: In *Victor Pey Casado v Chile*, the annulment committee examined the transcripts and record to determine whether there was a violation of the right to be heard. *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Decision on the Application for Annulment (18 December 2012) paras 72–74.

<sup>213</sup> *Compañía de Aguas del Aconquija and Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (10 August 2010) paras 236–38.



of procedure' requires the violation to have caused the tribunal to reach a result substantially different than it would otherwise have arrived at.<sup>214</sup>

Moreover, when an applicant alleges, for example, that the tribunal breached due process in failing to give reasons for its awards, annulment committees and reviewing courts alike still tend to defer to the tribunal. ICSID annulment committees have drawn inferences from the reasoning of tribunals in order to avoid having to annul an award for a failure to state sufficient reasons.<sup>215</sup> In *Amco v Indonesia*, for example, the annulment committee stated that implicit reasoning was sufficient.<sup>216</sup>

National courts have proceeded similarly. In the United Kingdom, a court decided that the ground for setting aside due to a serious irregularity applies only to a failure to deal with a claim or defence submitted to the tribunal and does not include a failure to provide thorough reasons for its conclusions.<sup>217</sup> In Canada, the court in *United Mexican States v Metalclad Corporation* adopted a similar approach, finding that a failure to answer every argument put before the tribunal was not a sufficiently serious defect in procedure.<sup>218</sup> In France, the Cour d'Appel in *Société Isover-Saint-Gobain v Sociétés Dow Chemical France* reflected the judicial attitude that it would decline to review an award so long as there was coherent reasoning.<sup>219</sup>

### (iii) *Jurisdictional error*

Some ICSID annulment decisions suggest that annulment committees are more interventionist on jurisdictional issues.<sup>220</sup> In *Vivendi v Argentina II*, the annulment committee found that if the tribunal was found to lack jurisdiction, it would constitute a manifest excess of powers.<sup>221</sup> In *Patrick Mitchell v Congo*, the tribunal's interpretation of the definition of 'investment' in Article 25(1) was rejected by the annulment committee, which proceeded to annul the award based on their own finding that the investor's firm did not contribute to the economic development of the host state and did not qualify as an investment.<sup>222</sup>

That said; the precise formulation of the committee's power to intervene has an impact on the review process. Article 52 uses adjectival modifiers in various grounds ('manifest' excess of powers, a 'serious' departure from a 'fundamental' rule of procedure), and this connotes that the tribunal's error must be more than *de minimis*. In this regard, contrast the *de novo* standard of review of jurisdictional

<sup>214</sup> *Wena Hotels* Decision on Annulment (n 162) paras 59–61, 66–70.

<sup>215</sup> *Vivendi* Decision on Annulment (n 129) paras 64, 91.

<sup>216</sup> *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Annulment (16 May 1986) para 58.

<sup>217</sup> *Margulead Ltd v Exide Technologies* [2005] 1 Lloyd's Rep 324 (QB).

<sup>218</sup> *United Mexican States v Metalclad*, Reasons for Judgment (2 May 2001) (2001) BCSC 664, Supplementary Reasons for Judgment (31 October 2001) (2001) BCSC 1529, para 126.

<sup>219</sup> *Société Isover-Saint-Gobain v Sociétés Dow Chemical France*, Cour d'Appel Paris (21 October 1983); Pierre Mayer, 'Arbitration and National Courts: Conflict and Cooperation: The Second Look Doctrine: The European Perspective' (2010) 21 *Am Rev Intl Arb* 201, 203–04.

<sup>220</sup> *Sempre* Decision on Annulment (n 204); *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Annulment (30 July 2010); *Vivendi* (resubmitted) Decision on Annulment (n 212).

<sup>221</sup> *Vivendi* (resubmitted) Decision on Annulment (n 212) paras 86, 102, 115.

<sup>222</sup> *Patrick Mitchell v Democratic Republic of Congo*, ICSID Case No ARB/99/7, Decision on Annulment (1 November 2006) para 46.



error taken in some national courts<sup>223</sup> with this recent statement of an annulment committee:

The requirement of Article 52(1)(b) of the Convention that the excess of powers must be manifest applies equally to jurisdictional decisions and to a failure to apply the proper governing law. This means that an *ad hoc* committee cannot generally review *de novo* the decision of the tribunal on jurisdiction. An *ad hoc* Committee could only annul an award for manifest excess powers related to jurisdiction if it is obvious, clear or self-evident, without the need for an elaborate analysis of the decision, that the tribunal exercised jurisdiction that it does not have or failed to exercise jurisdiction that it has.<sup>224</sup>

This is a more deferential standard of review for jurisdictional error than that which applies outside the ICSID context.

### E. Consequences of Annulment and Layers of Appeal

#### (i) Availability of further appeal?

An ICSID annulment committee may either annul an award in whole or in part, or let it stand.<sup>225</sup> The committee's decision is not subject to any further review or appeal. Once an award is annulled, there is no possibility of remission to the original tribunal,<sup>226</sup> but a party could submit the dispute to a fresh tribunal.<sup>227</sup> Therefore, ICSID annulment committee decisions are not necessarily the end of a dispute. For example, the first *Vivendi v Argentina* award was rendered on 21 November 2000, annulled on 3 July 2002, was re-submitted on 26 August 2002, decided by a new tribunal, and a second decision on annulment (upholding the award) was rendered on 10 August 2010.<sup>228</sup>

In non-ICSID arbitrations, depending upon the national law there are possibilities of setting aside or upholding the tribunal's award(s), remission to

<sup>223</sup> In *Dallah v Pakistan*, the Supreme Court of England and Wales held that whether or not a party's challenge to jurisdiction has been decided by the tribunal, a party is entitled to a full judicial determination on an issue of jurisdiction and the court should undertake an 'independent investigation' (*de novo*). *Dallah Real Estate & Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763, paras 26, 159–60. *Republic of Ecuador v Occidental Petroleum* held that the same approach should be applied in investor-state arbitration. *Republic of Ecuador v Occidental Petroleum* [2007] EWCA Civ 656. Likewise, in *Sanum Investments v Laos*, the Singapore Court of Appeal affirmed that the *de novo* approach was the correct one in Singaporean law. *Sanum Investments Limited v The Government of the Laos People's Democratic Republic* [2016] SGCA 57. Compare this to *BG v Argentina*, where the majority of the US Supreme Court emphasized the autonomy of the parties in consenting to arbitration in a bilateral investment treaty instead of applying a *de novo* standard to the issue. *Argentina v BG Group* [764 F Supp 2d 21 (DC 2011) 715 F Supp 2d 108 (DC 2010)]; 665 F 3d 1363 (2012), Decision of Supreme Court (5 March 2014), 12–138, 14. In *Attorney General of Canada v SD Myers Inc*, the Federal Court of Canada applied a correctness standard to pure questions of law and a reasonableness standard to mixed questions of law and fact. *Attorney General of Canada v SD Myers Inc*, Federal Court of Canada (13 January 2004) [2004] 3 FCR 368, para 58. In the recent *Yukos* case, the court (The Hague District Court), without explicitly specifying what standard of review was being applied, appeared to view it as being one of correctness. *Russian Federation v Veteran Petroleum Limited, Yukos Universal Limited and Hulley Enterprises Limited*, Hague District Court (C/09/477160/HA ZA 15-1, 15-2 and 15-112) (20 April 2016) paras 5.51 and 5.73.

<sup>224</sup> *Total S.A. v Argentine Republic*, ICSID Case No ARB/04/01, Decision on Annulment (1 February 2016) para. 242.

<sup>225</sup> ICSID Convention (n 4) art 52(3).

<sup>226</sup> Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32 J Intl Arb 621, 627.

<sup>227</sup> ICSID Convention (n 4) art 52(6).

<sup>228</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award (21 November 2000) and *Vivendi Decision on Annulment* (n 129); *Compañía De Aguas Del Aconquija SA & Vivendi Universal SA v Argentine Republic* (resubmitted), ICSID Case No ARB/97/3, Award (20 August 2007), and *Vivendi* (resubmitted) Decision on Annulment (n 212).

the original tribunal, or constitution of a new one.<sup>229</sup> An annulment decision by a first instance court might also be subject to appeal within the appeals system of that country.<sup>230</sup> In Canada, for instance, set-aside applications before the Ontario courts have been further appealed to the Ontario Court of Appeal and in one case leave to appeal to the Supreme Court of Canada was sought but refused.<sup>231</sup>

### (ii) Resisting enforcement

Even after an award has survived set-aside in the non-ICSID context, it can be reviewed again at the enforcement stage. This stands in sharp contrast to the ICSID enforcement regime, whereby the pecuniary obligations of awards are automatically enforceable in the courts of ICSID Contracting States 'as if it were a final judgment of a court in that State' (subject only to the possibility that a resisting state can invoke sovereign immunity in relation to an attempted execution against certain types of assets).<sup>232</sup> The award 'shall be binding on the parties' and each Contracting State has an international law obligation to comply with the terms of ICSID awards rendered against them.<sup>233</sup> If a state fails to comply with the terms of an award, Article 64 of the Convention provides for dispute resolution between Contracting States before the ICJ or some other mutually acceptable forum. To date, it has never been invoked.<sup>234</sup> In addition, ICSID awards are enforceable even if annulment proceedings are pending, unless a request to stay is granted by the annulment committee under Article 52(5).<sup>235</sup> Upon a request for stay, some annulment committees have ordered the provision

<sup>229</sup> Debra Steger, 'Enhancing the Legitimacy of International Investment Law by Establishing an Appellate Mechanism' (18 October 2012) in Armand de Mestral and Céline Lévesque (eds), *Improving International Investment Agreements* (Routledge 2012), 10–11.

<sup>230</sup> For example, under s 24 of the Singapore International Arbitration Act, a decision on annulment may be appealed to the Court of Appeal with leave of the Court. Singapore International Arbitration Act 1994 (ch 143A) (revised 2002), s 24. In *Sanum v Laos*, the tribunal's Award on Jurisdiction made under the UNCITRAL Rules was set aside by the Singapore High Court and then appealed to the Singapore Court of Appeal. *Laos v Sanum Investments* [2015] SGHC 15.

<sup>231</sup> *United Mexican States v Marvin Roy Feldman Karpa* (2005), 74 OR (3d) 180 (CA) and *United Mexican States v Cargill, Inc*, 2011 ONCA 622, *United Mexican States v Cargill, Incorporated*, SCC Case No 34559, 10 May 2012, Supreme Court of Canada Docket no 34559. Examples from other jurisdictions: A decision on annulment by the English courts under sections 66, 67 and 68 of the English Arbitration Act may also be appealed to a higher court with leave of the court. In *Renta4 v Russian Federation*, the SCC award was reviewed first at the Stockholm District Court, then at the Svea Court of Appeal. *Renta4 v Russia* (SCC no 24/2007), Ruling of the Stockholm District Court (14 September 2014), Judgment of the Svea Court of Appeal (18 January 2016).

<sup>232</sup> ICSID Convention (n 4) arts 54 and 55. Although the Convention does not prevent an enforcing court from applying its own laws of sovereign immunity, some enforcing courts have relied on the 'automatic' enforcement of ICSID awards as a basis for narrowly interpreting sovereign immunity. *Mobil Cerro Negro Ltd et al v Bolivarian Republic of Venezuela*, Southern District of New York Case No 14 Civ 8163 (13 February 2015); *Société Ouest Africaine des Bétons Industriels v Republic of Senegal*, ICSID Case No ARB/82/1, Decision of Cour d'Appel, Paris (5 December 1989), 341.

<sup>233</sup> ICSID Convention (n 4) art 53. Antonio Parra, *The History of ICSID* (OUP 2012), at 61–63, 318–19; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Argentina's Request for a Continued Stay of Enforcement of the Award (7 October 2008) para 56.

<sup>234</sup> *Patrick Mitchell v Democratic Republic of Congo*, ICSID Case No ARB/99/7, Decision on the Stay of Enforcement of the Award (30 November 2004) para 41; *Lanco International, Inc v Argentine Republic*, ICSID Case No ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal (8 December 1998) para 40; Christoph H Schreuer, 'Article 64', *The ICSID Convention: A Commentary* (CUP 2009), 1263.

<sup>235</sup> *GDC Group plc v Seychelles*, ICSID Case No ARB/02/14, Decision on Whether or Not to Continue Stay and Order (14 July 2005); *Sempre Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (5 March 2009).

of an undertaking to comply with the award, or security for the amount of the award.<sup>236</sup>

ICSID awards cannot be reviewed as against international public policy, the public policy of the host State, that of regional entities such as the EU, or the enforcing State. The obligation of a state to enforce an ICSID award is separate from its concerns of domestic public policy or regional public policy. For example, in *Micula v Romania*, the respondent remained bound by its Convention obligation to comply with and recognise and enforce the award, even though the European Commission considered its enforcement would breach EU rules on state-aid.<sup>237</sup> In a judgment of 20 January 2017, the High Court of Justice of England and Wales upheld the award's registration under the applicable English act, but ordered a stay of its enforcement pending the outcome of proceedings in the European Court of Justice concerning the European Commission's order prohibiting Romania from complying with the award.<sup>238</sup>

In contrast, awards rendered under other arbitral rules are only enforceable as per the municipal laws of the jurisdictions in which enforcement is sought. The mechanisms and locations available for enforcement of the award is thus a key consideration for claimants in their selection of arbitral rules. Currently, 157 states are signatories to the New York Convention, which provides a network for the enforcement of arbitration awards.<sup>239</sup> Under the New York Convention, enforcement may be refused under Article V(1) on the grounds that: (a) the parties to the agreement were under some incapacity, the arbitration agreement is not valid, (b) the party against whom the award is invoked was not given proper notice or was unable to present his case, (c) the award deals with an issue that was not submitted to arbitration, (d) the tribunal was not properly constituted, and (e) the award is not binding or has been set aside.<sup>240</sup> Enforcement may also be refused under Article V(2) on the basis of non-arbitrability and public policy.<sup>241</sup> Alongside the New York Convention, jurisdictions adopting Article 36 of the UNCITRAL Model Law provide the same grounds for refusal of enforcement.<sup>242</sup>

Despite the adoption of the UNCITRAL Model Law and the New York Convention, substantial differences arise in the enforcement of an award amongst different jurisdictions. For example, differences in enforcement exist

<sup>236</sup> *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No ARB/01/7, Decision on the Respondent's Request for a Continued Stay of Execution (1 June 2005); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Decision of the *ad hoc* Committee on the Stay of Enforcement of the Award (19 March 2009); *Duke Energy International Peru Investments No. 1 Ltd. v Republic of Peru*, ICSID Case No ARB/03/28, Decision on Peru's Stay Request (23 June 2009); Antonio Parra, *The History of ICSID* (OUP 2012) 315–17.

<sup>237</sup> EU Commission Decision, 2015/1470 of 30 March 2015, on State aid, Arbitral award *Micula v Romania* of 11 December 2013 SA.38517 (2014/C) (ex 2014/NN); *Micula v Romania*, New York District Court, no 15 MISC. 107, 2015 WL 4643180 (SDNY 5 August 2015) 7.

<sup>238</sup> *In the Matter of the Arbitration (International Investment Disputes) Act 1966, between Viorel Micula and others v Romania and European Commission* [2017] EWHC 31 (Comm) Case No: CL-2014-000251.

<sup>239</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

<sup>240</sup> New York Convention, art V(1).

<sup>241</sup> New York Convention, art V(2).

<sup>242</sup> UNCITRAL Model Law, art 36; Singapore International Arbitration Act, art 31; *PT First Media TBK v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372.

based on grounds such as public policy,<sup>243</sup> non-arbitrability,<sup>244</sup> and sovereign immunity.<sup>245</sup> For example, in Switzerland EU anti-competition laws are not part of public policy, whereas member states of the EU regard EU anti-competition laws as part of public policy. Different jurisdictions also have differing approaches to non-arbitrable issues such as protection of minority shareholder rights<sup>246</sup> and intellectual property disputes.<sup>247</sup> As for sovereign immunity, each jurisdiction applies different legislation, and there is currently no settled consensus on whether purely commercial activities are excluded.<sup>248</sup>

## VI. CONCLUSION

This article has sought to show how the design of the ICSID arbitral system, including annulment, reflected the drafters' assumptions as to how the system would work in the future. Notwithstanding concerns about inconsistent decision-making and outcomes, and potential dis-uniformity in the interpretation of the Convention, it was deemed impractical to attempt to create a standing tribunal and proposals for a right of appeal for error of law or substantial error of fact were debated and rejected. It is reasonable to ask whether this makes sense in the present day, when ICSID arbitration is mainly concerned with the interpretation and application of treaties, such that a substantial degree of informal connectivity exists between cases in the sense of repeated consideration of recurring issues, and where ICSID is no longer the exclusive forum for investment treaty arbitration.

The import of this discussion in this article is four-fold. First, we have seen that the first generation BITs were generally worded and, as such, in many instances did not answer questions left open in the negotiation of the ICSID Convention fully or even sometimes at all. Provisions that could have given tribunals greater guidance, such as specifying the applicable law, were often not included, thus creating entirely avoidable interpretative issues for future tribunals.

Second, when BITs did address questions the Convention left to be answered in consent agreements, they often did so with open-textured substantive obligations and very simple definitions, raising as many questions as they answered. There are divisions of opinion between tribunals such as over 'fair and equitable treatment', 'observance or undertakings' clauses and the effect of MFN clauses on conditions affecting access to international jurisdiction.

However, and this leads to the third point, the difficulty in identifying allegedly 'wrongly decided' cases brings us back to the generality of the substantive provisions in many treaties. It might be that awards labelled as 'wrongly decided'

<sup>243</sup> *Eco Swiss China Time Ltd v Benetton International NV*, Case C-126/97, [1999] ECR I-3055, Court of Justice of the European Union (1 June 1999) paras 37–39; For a brief description of the treatment of public policy in different jurisdictions, see <<http://newyorkconvention1958.org/index.php?lvl=cmepage&pageid=11&provision=304>> accessed 21 July 2017.

<sup>244</sup> For brief descriptions and excerpts on the treatment of non-arbitrability in different jurisdictions, see <<http://www.newyorkconvention.org/court+decisions/decisions+per+topic>> accessed 21 July 2017.

<sup>245</sup> United States Foreign Sovereign Immunities Act Title 28, ss 1330, 1332, 1391(f), 1441(d), and 1602–11; United Kingdom State Immunity Act 1978 (ch 33); Singapore State Immunity Act 1979 (Cap 313).

<sup>246</sup> *Silica Investors Ltd v. Tomolugen Holdings Ltd and others* [2014] SGHC 101.

<sup>247</sup> William Grantham, 'The Arbitrability of International Intellectual Property Disputes' (1996) 14 Berkeley J Intl L 173.

<sup>248</sup> *EM Ltd and NML Capital Ltd v Argentina*, United States Court of Appeals, 2nd Circuit 473 F.3d 463 (5 January 2007), 16; *NML Capital Ltd v Argentina*, UKSC Judgment (6 July 2011), 11–12; Olga Gerlich, 'State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of the Investor-State Arbitration System?' (2015) 26 Am Rev Intl Arb 1.

are ones in which the critic disagrees with the normative choices underlying the reasoning, rather than an identifiable error of law made by the tribunal. It might also be that differences in the form and expression of a tribunal's legal reasoning contribute to the perception in that the reasons stated in some cases might be terse to the point of appearing to be *ipse dixit*, whereas other sets of reasons might look comparatively more rooted in an explicitly articulated conceptual framework of public international law. Whatever the reasons, as more cases were decided, questions arose as to whether the system lacked coherence and certainty and whether the outcomes of disputes depended as much on the arbitrators as the phrasing of the treaties themselves.

At the end of the day, however, the 'problem', if indeed it was a problem, laid with the individual investment treaties. Although the Convention's drafters recognized the desirability of consistent interpretation, they were not uncomfortable with inconsistent decisions. But that might have been because they were mainly thinking of 'one-off' contractual disputes having no connection to each other. They might have thought otherwise had they anticipated how ICSID's caseload would develop. As for the drafters of BITs, they too might not have anticipated the extent to which their treaties would be invoked. They could have given tribunals greater guidance on procedural, jurisdictional and substantive matters. It was only after tribunals began to wrestle with generally phrased treaty language and arrived at interpretative outcomes with which the States party to the treaties did not agree, that States began to draft longer, and more substantively and procedurally precise, treaties.

This is of no minor significance because it raises an important question for those who favour creating appeal tribunals for investment treaty arbitration. On the one hand, it might be that making appellate review available to parties to an arbitration conducted under a first generation BIT (hundreds of which remain in force even as new treaty models take root) would yield little value because the substantive provisions were drafted to confer broad discretion on tribunals. If the legal determinations sought to be challenged are essentially fact-driven and a matter of broad appreciation authorized by generally worded treaty provisions, a reviewing body is unlikely to be able to find that the award was wrongly decided as a matter of law. On the other hand, if States have drafted more detailed treaties that provide greater guidance to tribunals with a corresponding reduction in the discretion afforded them, there might be less need for review for error of law as tribunals would be better able to ascertain the shared intention of the State-parties.

This does not, however, mean that an appellate body cannot perform certain important functions. One of the notable features of present-day investment treaty arbitration is the extent to which general rules and principles—independent of the applicable treaties—have been developed and refined by tribunals. This interstitial law is crucial to the proper functioning of tribunals. An appellate tribunal could be expected to contribute to the consistent, further development, of such law.

An appellate body would also conceive of its task in a fundamentally different way than an *ad hoc* arbitral tribunal or annulment committee. Perhaps the most explicit elaboration of the significance of its status as an *ad hoc* decision-maker was given by the tribunal in *Glamis Gold Ltd v United States of America*:

... the Tribunal sees its mandate under Chapter 11 of the NAFTA as similar to the case-specific mandate ordinarily found in international commercial arbitration. In the normal



contractual setting, a tribunal is a creature of contract, tasked with resolving a particular dispute arising under a particular contract. In all likelihood, a particular contract gives rise to only one arbitration. If there is a second dispute under a contract resolved by arbitration, the second panel likely will involve different arbitrators and it may or may not have knowledge of, or access to, the previous arbitration. Unlike a standing adjudicative body which addresses multiple disputes (for example, the Iran-United States Claims Tribunal which addressed several thousand disputes arising out of the 1979 Iranian Revolution), an arbitral panel that is focused on a particular dispute is not confronted with the possibility that it will need to apply an earlier decision in a later proceeding. Likewise, an arbitral tribunal is not confronted with the task of reconciling its later decisions with its earlier ones. Notwithstanding the likelihood that numerous arbitrations would arise under Chapter 11 of the NAFTA, the three states of North America did not establish a standing adjudicative body but rather chose to have arbitrations resolved by distinct arbitral panels. In this sense, it is clear that this Tribunal is asked to have a case-specific focus as it proceeds to address this dispute.<sup>249</sup>

It is evident from further comments made by the tribunal that it did not conceive of its task as being completely disconnected from that of other NAFTA tribunals.<sup>250</sup> But its acknowledgement that ‘an arbitral panel that is focused on a particular dispute is not confronted with the possibility that it will need to apply an earlier decision in a later proceeding’ and ‘an arbitral tribunal is not confronted with the task of reconciling its later decisions with its earlier ones’ identifies precisely what an appellate tribunal is concerned with, namely, developing and preserving the internal logic of the body of applicable law in a way that allows affected persons to order their affairs with some sense of predictability of outcomes.

Fourth and finally, given the variegated nature of investment treaty arbitration under treaties that confer a choice of arbitral rules on the claimants, if the approach advocated by the European Union develops into a trend in treaty-making, negotiators will have to give careful consideration to the impact of an appellate mechanism on the various forms of arbitration that their treaties permit to be conducted under different arbitral rules. As has been seen, in an UNCITRAL arbitration, an award on jurisdiction—either positive or negative—can be taken on to judicial review. Likewise, in some systems, decisions on disqualification of arbitrators can be taken to judicial review, whereas such a decision could not be taken to annulment under the ICSID Convention until the award was issued. Will review for error of law be available for interim decisions and awards? Negotiators will have to consider the way in which an appellate review mechanism operates in relation to arbitrations conducted under all possibly applicable rules. In sum, if States pursue the path forged by the EU, Canada and Vietnam, they will have to turn their minds to the interaction of any appellate mechanism with the different arbitral rules that many treaties now permit claimants to choose.

<sup>249</sup> *Glamis Gold Ltd v United States of America*, an UNCITRAL Arbitration Proceeding pursuant to the NAFTA, Award (8 June 2009) para 3.

<sup>250</sup> *ibid* paras 4–8.