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*Investment Arbitration Appellate
Mechanism Options: Consistency, Accuracy,
and Balance of Power*

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Abstract—For policymakers exploring appellate mechanism options for the international investment law (IIL) regime, the competing interests of efficiency and finality will receive due consideration. But two additional—and possibly overlooked—risks also merit close analysis.

First, gains in the consistency of treaty interpretation by a standing, permanent appellate body would not guarantee corresponding gains in the accuracy of treaty interpretation. As illustrated by two lines of case law applying denial of benefits provisions, consistent treaty interpretation does not ensure accurate treaty interpretation.

Second, a shift from an *ad hoc* to a more institutionalized international investment dispute settlement regime would significantly impact the balance of power between States and adjudicators. Standing, permanent tribunals generally are associated with greater levels of independence than *ad hoc* tribunals. The WTO Appellate Body illustrates how standing, permanent tribunals can develop as institutions through decisive acts of independence. Greater levels of tribunal independence give rise to a greater need for control mechanisms to address the risk of tribunals exceeding their mandate. That risk is heightened in the context of international investment arbitration, where, even under the current *ad hoc* regime, the level of tribunal independence is significant.

Persuasive policy arguments—based on goals of achieving greater consistency, coherence, and predictability—can be made in favor of the development of one or more appellate mechanisms within the IIL regime. But policymakers exploring appellate mechanism options should give careful consideration to all competing policy interests, which are not limited to the goals of efficiency and finality. The two additional risks analyzed in this article—the gap between consistent and accurate treaty interpretation, and the balance of power consequences of greater institutionalization—should be part of the policy discussion. That discussion also should consider a range of control mechanism options—including budget power, appointments, specificity in rulemaking, joint interpretations, and soft law—to address such risks.

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I. INTRODUCTION

More than 10 years ago, the potential development of one or more appellate mechanisms emerged as a key discussion point within the international investment law (IIL) community. Interest in appellate mechanism options was reflected in a variety of settings: parties to the CAFTA-DR free trade agreement agreed to establish a negotiating group ‘to develop an appellate body or similar mechanism’;² scholars considered the merits of creating some form of appellate mechanism;³ the International Centre for Settlement of Investment Disputes (ICSID) proposed a set of ‘possible features’ of an ICSID appeals facility.⁴

Within the past few years, interest in appellate mechanism options has resurged, as part of a larger discussion involving calls for greater institutionalization within the IIL regime.⁵ Both the older, and more recent, discussions of appellate mechanism options have been driven by the same policy concern: a perceived need to achieve greater consistency, coherence, and predictability in investment arbitration case law.⁶

Arguments made in opposition to the development of an appellate mechanism within the IIL regime normally have been based on the policy considerations of efficiency and finality.⁷ This article does not express opposition to the

² Dominican Republic-Central America-United States Free Trade Agreement (signed 5 August 2004, entered into force 1 March 2006) [hereinafter CAFTA-DR] Chapter 10, Annex 10-F.

³ See eg David A Gantz, ‘An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges’ (2006) 39 *Vanderbilt J Transn'l L* 39; Susan D Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham LR* 1521.

⁴ Possible Improvements of the Framework for ICSID Arbitration, ICSID Secretariat Discussion Paper (22 October 2004) [hereinafter ICSID Discussion Paper], Annex.

⁵ See eg Karl Sauvant, *The International Law and Policy Regime: Challenges and Options*, E15 Initiative, Geneva, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum (2015), www.e15initiative.org/, p 11 (‘a topical and urgent question is whether appeals mechanisms for the current ad-hoc tribunals, a world investment court as a standing first-instance tribunal making the decision in any dispute settlement case, or a combination of both should be established. Institutionalising dispute settlement in this manner would be a major step towards improving the investment regime’).

⁶ See eg Anna Joubin-Bret, ‘Why We Need a Global Appellate Mechanism for International Investment Law’ (27 Apr. 2015) *Columbia FDI Perspectives* (an appellate mechanism ‘that could work for all treaties and parties . . . offers the best hope for enhancing consistency and coherence’); Eun Young Park, ‘Appellate Review in Investor State Arbitration’ in Jean Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill-Nijhoff 2015) 444 (discussing ‘inconsistent interpretation among ICSID cases’); Jaemin Lee, ‘Introduction of an Appellate Review Mechanism for International Investment Disputes—Expected Benefits and Remaining Tasks’ in Jean Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill-Nijhoff 2015) 477 (‘an appellate mechanism will be able to facilitate and foster ‘rule of law’ in international investment arbitration by accumulating and spreading consistent jurisprudence in the international community’); ICSID Discussion Paper, pp 14–15 (‘an appeal mechanism would be intended to foster coherence and consistency in the case law emerging under investment treaties’); Gantz (n 3), at 44 (‘Supporters of an investment appellate mechanism desire greater consistency among the increasing volume of ICSID, UNCITRAL, and other investment tribunal decisions that are increasingly adopting conflicting interpretations of similar treaty provisions’) (footnote omitted); Franck (n 3), at 1607 (‘an appellate body could restore faith in the system, promote consistency, provide predictability, and reduce the risk of inconsistent decisions to make the system sustainable and legitimate in the long term’).

⁷ See eg Lee (n 6), at 483 (noting risk of ‘increased cost and burden’ associated with appellate mechanism ‘would run the risk of further exacerbating the concerns of some States concerning investment arbitration’); Gabriel Bottini, ‘Reform of the Investor-State Arbitration Regime: The Appeal Proposal’ in Jean Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill-Nijhoff 2015), at 471 (responding to arguments concerning increased ‘delays’ and ‘costs’ that could result from the development of an appellate mechanism); Irene M Ten Cate, ‘International Arbitration and the ends of Appellate Review’ (2012) 44 *NYU J Intl L & Pol* 1109, 1110 (‘[I]n international commercial and investment arbitration . . . the dogma of finality has come under attack, as practitioners and academics have advocated for the introduction of appeals mechanisms’); Ian Laird and Rebecca Askew, ‘Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System?’ (2005) 7 *J App Prac & Process* 285,

development of appellate mechanism options, and does not address the policy goals of efficiency and finality. Rather, this article raises two cautionary points that, to date, have not received substantial attention by scholars or policymakers when addressing appellate mechanism options.

First, gains in the consistency of treaty interpretation by a standing, permanent appellate body would not guarantee corresponding gains in the accuracy of treaty interpretation. For policymakers exploring appellate mechanism options, analysis should include consideration of the risk of a standing, permanent appellate body developing a consistent, but inaccurate, line of case law on certain issues. Addressing that risk requires consideration of control mechanisms, ie ‘checks on the powers of an organization that ensure that the organization acts within its assigned mandate’⁸ or, alternatively, ‘procedures that allow for oversight and override.’⁹ The gap between consistent and accurate treaty interpretation is discussed below in the context of two consistent—but not necessarily accurate—lines of international investment law case law that have developed with respect to the application of denial of benefits provisions.

Second, transitioning from an *ad hoc* to a more institutionalized dispute settlement regime would significantly impact the balance of power between the States that enter into investment treaties and the decision-makers who resolve investment disputes under those treaties. In general terms, standing, permanent tribunals are associated with greater levels of independence than *ad hoc* tribunals¹⁰ and have the capacity—unlike *ad hoc* tribunals—to ‘take greater responsibility’¹¹ for their institution over time. The capacity of standing, permanent tribunals to develop as institutions over time through decisive acts of independence is discussed below in the context of the WTO Appellate Body. A transition to a more institutionalized IIL dispute settlement regime would increase—at least for appellate tribunals—the level of investment tribunal independence, and, accordingly, the need for control mechanisms to address the risk of tribunals exceeding their mandate.¹²

298 (‘[I]f you add another entire full appeals step to the overall arbitration process, the finality benefit of arbitration is severely undermined’).

⁸ Jacob Katz Cogan, ‘Competition and Control in International Adjudication’ (2007–08) 48 *Virginia J Intl L* 411, 413.

⁹ Alec Stone Sweet and Thomas L Brunell, ‘Trustee Courts and Judicialization of International Regimes’ (March 2013) 1 *J Law and Courts* 61, 64.

¹⁰ See eg Lee (n 6), at 481 (‘by being involved in the arbitrator selection process parties [in an *ad hoc* dispute settlement system] can preserve more control over the case’); Anna T Katselas, ‘Exit, Voice, and Loyalty in Investment Treaty Arbitration’ (2014–15) *Nebraska L Rev* 313, 361 (‘due to the [IIL] regime’s fragmented nature and lack of a centralized multilateral body akin to the WTO, the opportunities for voice and the ability of states to influence the organization for their purposes are very high’); David D Caron, ‘Towards a Political Theory of International Courts and Tribunals’ (2006) 24 *Berkeley J Intl L* 401, 417 (‘it can be argued’ that the ability of an *ad hoc* panel to ‘push back collectively’ on the analysis of the WTO secretariat is ‘structurally limited’ because the panelists ‘may not have worked together before’); Eric A Posner and John C Yoo, ‘Judicial Independence in International Tribunals’ (2005) 93 *California L Rev* 1, 7 (identifying ‘fixed terms and salary protection’ for adjudicators as characteristics of ‘independent’ tribunals); Richard H Steinberg, ‘Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints’ (2004) 98 *American J Intl L* 247, 257 (‘There is reason to believe that an insulated, full-time judicial body, backed by the power to issue legal sanctions, such as the WTO Appellate Body, would be more likely to engage in strategic political action than a system of exclusively *ad hoc* panels, which characterized the GATT judiciary’).

¹¹ Caron (n 10), at 417 (‘It takes repeat interactions for adjudicators to be comfortable with one another and a full time presence for the adjudicators to take greater responsibility for an institution (as opposed to simply deciding the particular case put before them)’).

¹² See Cogan (n 8), at 413 (controls ‘have greater importance the greater the power given to the organization’); Tom Ginsburg, ‘Bounded Discretion in International Judicial Lawmaking’ (2004–05) 45 *Virginia J Intl L* 631, 672 (‘states that create standing bodies will seek to develop mechanisms to constrain lawmaking at its outer boundaries’); see also Jason Webb Yackee, ‘Controlling the International Investment Law Agency’ (2012) 53 *Harvard Intl LJ* 391,

Persuasive policy arguments—based on goals of achieving greater consistency, coherence, and predictability—can be made in favor of the development of one or more appellate mechanisms within the IIL regime. But policymakers exploring appellate mechanism options should give careful consideration to all competing policy interests, which are not limited to the goals of efficiency and finality. The two additional risks analyzed in this article—the gap between consistent and accurate treaty interpretation, and the balance of power consequences of greater institutionalization—should be part of the policy discussion. The first of those two risks is discussed below.

II. THE GAP BETWEEN CONSISTENT AND ACCURATE TREATY INTERPRETATION

Calls for greater consistency in investment arbitration recognize the relationship between consistent and accurate treaty interpretation.¹³ But consistent treaty interpretation does not ensure accurate treaty interpretation, as illustrated by two lines of case law that have developed with respect to the interpretation of denial of benefits provisions under a number of investment treaties.¹⁴

In general terms, denial of benefits provisions authorize host States to deny treaty benefits to corporations that lack a sufficient connection to their home States; for example, such provisions often will authorize the denial of treaty benefits to corporations that are owned or controlled by nationals of a non-Party and have no ‘substantial business activities’ in their purported home State.¹⁵

On the particular issue of whether a State can deny a corporate entity treaty benefits after that entity has submitted a treaty claim to arbitration, two lines of case law have emerged, each of which can be seen as consistent. The first line of case law—under the Energy Charter Treaty (ECT)—has found that States are not permitted to deny treaty benefits after a claim has been submitted to arbitration, on grounds that denying benefits at that time would constitute an impermissible retroactive application of the treaty.¹⁶ The second line of case law, under a number

434 (‘A World Investment Court, unless carefully designed as more of a political than a judicial organ, would risk further consolidating the law-making functions of IIL experts while diminishing the ability of states to control system outcomes’).

¹³ See eg Park (n 6), at 452 (‘Considering that the main objective of establishing an appellate review system is to promote the consistency, accuracy and predictability of ICSID jurisprudence, it would be necessary to establish a fixed body or roster of members to serve in the appellate review body’); Franck (n 3), at 1546 (‘there is no uniform mechanism to correct inconsistent decisions’).

¹⁴ For detailed discussion of these two lines of jurisprudence, see Lindsay Gastrell and Paul-Jean Le Cannu, ‘Procedural Requirements of ‘Denial of Benefits’ Clauses in Investment Treaties: A Review of Arbitral Decisions’ (2015) 30 ICSID Rev-FILJ 78.

¹⁵ See eg Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998), 34 ILM 360 [hereinafter ECT], art 17(1); Japan–Korea–China Trilateral Investment Agreement (signed 13 May 2012, entered into force 17 May 2014), art 22(2).

¹⁶ See *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005), para 162 (characterizing respondent’s attempt to deny benefits after claim had been submitted to arbitration as ‘very late’). For cases following *Plama*’s interpretation of ECT Article 17(1), see *Anatolie Stati et al v The Republic of Kazakhstan*, SCC Arbitration V (116/2010), Award (19 December 2013), para 716 (State cannot deny benefits after dispute arose); *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No ARB/07/14, Award (22 June 2010), para 225 (retroactive application of ECT Article 17(1) would be incompatible with object and purpose of ECT); *Yukos Universal Ltd (Isle of Man) v The Russian Federation*, PCA Case No AA 227, Interim Award on Jurisdiction and Admissibility (30 November 2009), para 458 (retrospective application of ECT Article 17(1) would be ‘incompatible’ with the ‘objectives and principles’ of the ECT); *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No AA 226, Interim Award on Jurisdiction and

of investment treaties other than the ECT, has permitted States to deny treaty benefits after a claim has been submitted to arbitration.¹⁷

The effectiveness of denial of benefits provisions—and, more generally, the effectiveness of attempts by States to set limits on so-called ‘treaty shopping’ by multinational enterprises¹⁸—depends in part on when the provisions can be invoked by States. For example, in the context of the CAFTA-DR denial of benefits provision, Costa Rica has argued that a failure to permit States to deny treaty benefits after a claim has been submitted to arbitration would ‘deprive’ the provision ‘of any effectiveness,’ given that in many instances a State ‘only becomes aware of who owns or controls a company at the time when there is a dispute.’¹⁹ Because the effectiveness of denial of benefits provisions turns in part on when they can be invoked, there is a particularly significant need for accurate treaty interpretation when determining what time limitations, if any, apply to a particular denial of benefits provision.

On the issue of when States can invoke denial of benefits provisions, the two lines of case law that have emerged can be seen as consistent, reaching one outcome under the ECT (treaty benefits cannot be denied after a claim has been submitted to arbitration) and a different outcome under treaties other than the ECT (treaty benefits can be denied after a claim has been submitted to arbitration). But that consistency does not establish that the tribunals in both lines of decisions have interpreted the applicable treaty in each case according to customary international law treaty interpretation rules, ie that the tribunals in each case have interpreted the applicable treaty *accurately*.

Under Article 31(1) of the Vienna Convention on the Law of Treaties—which is widely considered to be reflective of customary international law²⁰—a treaty ‘shall’ be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’²¹ The two lines of denial of benefits case law discussed above—one under the ECT, one under treaties other than the ECT—both can be seen as consistent with Vienna Convention rules on treaty interpretation, so long as there

Admissibility (30 November 2009), para 457 (same); *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, PCA Case No AA 228, Interim Award on Jurisdiction and Admissibility (30 November 2009), para 514 (same).

¹⁷ See *Guaracachi America, Inc and Rurelec PLC v Bolivia*, UNCITRAL, PCA Case No 2011-17, Award (31 January 2014), para 376 (‘proper’ under US–Bolivia BIT that denial of benefits be “activated” when the benefits are being claimed’); *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent’s Jurisdictional Objections (1 June 2012), para 4.85 (requiring CAFTA-DR denial of benefits provision to be invoked before filing of respondent’s counter-memorial ‘would create considerable practical difficulties for CAFTA Parties inconsistent with this provision’s object and purpose’); *Ulysseas, Inc v Republic of Ecuador*, UNCITRAL, Interim Award (28 September 2010), para 172 (denial of benefits provision under US–Bolivia BIT did not prevent State from exercising right to deny benefits ‘at the time when such advantages are sought by the investor through a request for arbitration’); *Empresa Eléctrica del Ecuador, Inc (EMELEC) v Republic of Ecuador*, ICSID Case No ARB/05/9, Award (2 June 2009), para 71 (Ecuador ‘announced’ denial of benefits under US–Ecuador BIT ‘at the proper stage of the proceedings, ie upon raising its objections to jurisdiction’).

¹⁸ See eg *Organization for Economic Cooperation & Development, International Investment Law: Understanding Concepts and Tracking Innovations* (OECD 2008) ch 1, 20 (observing that investment treaties can include denial of benefits provisions to respond to the potential for ‘treaty shopping’ by multinational enterprises).

¹⁹ *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent’s Jurisdictional Objections (1 June 2012), para 4.53 (quoting non-disputing Party submission of Costa Rica).

²⁰ See eg Richard K Gardiner, *Treaty Interpretation* (Oxford University Press 2015) 7 (‘The ICJ has pronounced that the Vienna rules are in principle applicable to the interpretation of all treaties. This proposition now constitutes a statement of customary international law, with the effect that the rules apply to any treaty interpretation whether the States involved are parties to the Vienna Convention or not’).

²¹ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) [hereinafter Vienna Convention], art 31(1).

is something distinctive about the ECT that supports the different set of outcomes under that treaty. As discussed below, however, no such distinctive ECT characteristics exist. Thus, in terms of treaty interpretation, while the two lines of denial of benefits case law can be seen as consistent, only one of those two lines of case law can be accurate.

The ECT denial of benefits provision, Article 17, states, in relevant part:

Each Contracting Party reserves the right to deny the advantages of this Part [III] to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized[.]

Compared to other denial of benefits provisions, one distinctive characteristic of ECT Article 17(1) is the limitation on the scope of benefits that can be denied under the treaty. Specifically, under ECT Article 17(1), a host State can deny the ‘advantages’ of Part III (‘Investment Protection and Promotion’) of the ECT. But specifying *which* benefits can be denied does not establish *when* benefits can be denied.

The ‘reserves the right’ language under ECT Article 17(1) could support an argument that some form of additional notice is required before denying benefits under the provision.²² But tribunals interpreting similar ‘reserves the right’ language under other denial of benefits provisions have permitted host States to deny benefits after a claim has been submitted to arbitration.²³

In addition, inclusion of a notice and/or consultation requirement in the ECT denial of benefits provision could have strengthened an argument that the provision must be invoked at a relatively early stage of a dispute, but ECT Article 17(1) includes no such requirement.

Finally, when finding that ECT Article 17(1) could not be invoked by a State after a claim has been submitted to arbitration, the *Plama* tribunal relied in part on the purpose of the ECT, which, as stated in ECT Article 2, is to ‘establish[] a legal framework in order to promote long-term cooperation in the energy field[.]’ The tribunal found that it was ‘not easy to see’ how giving ‘retrospective effect’ to ECT Article 17(1) ‘is consistent with this “long-term” purpose.’²⁴ As observed by the tribunal, once an investor has made an investment in the host State, ‘the “hostage factor” is introduced’; an investor’s choices become ‘more limited’ and the investor is ‘correspondingly more vulnerable to the host state’s exercise of its right under Article 17(1) ECT.’²⁵ But if the ECT drafters had been concerned about the risk of host States denying treaty benefits to long-term investors with ‘limited’ choices, they could have included notice and/or consultation requirements in Article 17(1). As noted above, however, Article 17(1) includes no such requirements.²⁶

²² See eg *Plama* (n 16), para 157 (‘By itself, Article 17(1) ECT is at best only half a notice; without further reasonable notice of its exercise by the host State, its terms tell the investor little; and for all practical purposes, something more is needed’).

²³ See *Guaracachi America, Inc* (n 17), para 376 (applying US–Bolivia BIT); *Empresa Electrica del Ecuador* (n 17), para 71 (applying US–Ecuador BIT); *Ulysseas, Inc* (n 17), para 172 (applying US–Ecuador BIT).

²⁴ *Plama* (n 16), para 161.

²⁵ *Plama* (n 16), para 161.

²⁶ For additional discussion comparing ECT Article 17(1) with other denial of benefits provisions, see Mark Feldman, ‘Denial of Benefits after *Plama v Bulgaria*’ in Meg Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer 2015).

For the above reasons, the separate line of denial of benefits case law that has developed under the ECT cannot be explained by any distinctive characteristics of the ECT. If the ECT line of denial of benefits case law reflects accurate treaty interpretation—ie that the ordinary meaning of ECT Article 17(1), read in context and in light of the object and purpose of the treaty, leads to the conclusion that a State cannot deny treaty benefits after a claim has been submitted to arbitration—the accuracy of the non-ECT line of denial of benefits case law would have to be questioned. Conversely, viewing the treaty interpretation in the non-ECT line of denial of benefits decisions as accurate should cast doubt on the accuracy of the ECT line of treaty interpretation. In terms of treaty interpretation, while the two lines of denial of benefits case law can be seen as consistent, only one can be accurate.

As discussed above, consistent treaty interpretation does not ensure accurate treaty interpretation. Policymakers considering appellate mechanism options should remain aware of the risk of consistent, but inaccurate, treaty interpretation by standing, permanent appellate tribunals. Given that risk, various control mechanisms—discussed below—should be considered. Preceding that discussion, this article addresses a second risk that should be considered by policymakers evaluating appellate mechanism options: the balance of power consequences of greater institutionalization.

III. BALANCE OF POWER CONSEQUENCES OF GREATER INSTITUTIONALIZATION

A greater level of institutionalization within the IIL regime would significantly impact the balance of power between the States that sign investment treaties and the decision-makers who resolve investment disputes under those treaties. Compared to standing, permanent tribunals, *ad hoc* tribunals generally are associated with greater levels of dependence on, and control by, the States that create them.²⁷

One core challenge associated with *ad hoc* dispute settlement regimes is the difficulty—if not impossibility—of producing consistent case law. According to Posner and Yoo, States opting for *ad hoc* dispute resolution:

lose the benefit of being able to rely on a coherent set of rules emerging from the repeated examination of similar issues by a discrete, relatively permanent group of people—a proper judiciary ... [a] coherent jurisprudence can only arise when states are required to use the same body for dispute resolution.²⁸

Compared to an *ad hoc* regime, a standing, permanent body offers the clear advantage of greater coherence and consistency. Two key characteristics of standing bodies are the ‘full time presence’ of the adjudicators and the opportunity for those adjudicators to have ‘repeat interactions’;²⁹ such high levels of

²⁷ See (n 10).

²⁸ Posner and Yoo (n 10), at 24. See also *Romak SA v Uzbekistan*, PCA Case No AA280, Award (2009), ¶ 171 (*ad hoc* tribunal observes that it had not been ‘entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of ‘arbitral jurisprudence’; rather, the tribunal’s ‘mission’ was ‘to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal’s analysis might have on future disputes in general’).

²⁹ Caron (n 10), at 417.

engagement over an extended period of time allow adjudicators to ‘take greater responsibility for an institution.’³⁰ As stated by David Caron: ‘[t]he more adjudicators are present and the more they can interact, the more they will operate at the extent of the powers available to them under the constitutive instrument.’³¹

As discussed below, the experience of the WTO Appellate Body³² illustrates how members of a standing, permanent tribunal can contribute to the development of their institution over time by decisively exercising their independence. Specifically, the Appellate Body’s (i) collegiality practice, (ii) acceptance of unsolicited *amicus* submissions, and (iii) ‘evolutionary’ approach to treaty interpretation illustrate how a standing, permanent tribunal can expand its authority over time.

Regarding the Appellate Body’s collegiality practice, Article 17(1) of the DSU provides that the Appellate Body ‘shall’ be composed of seven persons, but that only three of the seven members ‘shall serve on any one case.’³³ When developing its working procedures, however, the Appellate Body included a section on ‘Collegiality,’ under which the three-member division responsible for deciding a particular appeal ‘shall exchange views’ with the other four Appellate Body members ‘before the division finalizes the appellate report for circulation to the WTO Members.’³⁴ The Appellate Body has implemented the practice of collegiality by, among other actions, holding meetings of the seven Appellate Body members in person in Geneva ‘in the deliberation phase of each appeal to exchange views on the matters at issue in the appeal.’³⁵ Whether the Appellate Body’s development of its collegiality practice is consistent with its decision-making authority under DSU Article 17 is debatable.³⁶

Two additional examples further illustrate how Appellate Body members have taken greater responsibility for their institution. First, the Appellate Body has departed from earlier panel practice by permitting unsolicited *amicus* submissions. Second, when balancing trade and environmental interests, the Appellate Body

³⁰ Caron (n 10), at 417.

³¹ Caron (n 10), at 417.

³² For detailed discussion of WTO Appellate Body practice in the context of investment arbitration appellate mechanism options, see Mark Huber and Greg Tereposky, ‘The WTO Appellate Body: Viability as a Model for an Investor-State Dispute Settlement Appellate Mechanism’ (2017) 32(3) ICSID Rev-FILJ 545–94.

³³ Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 15 April 1994, 33 ILM 1226 (1994) [hereinafter DSU], art 17.1.

³⁴ WTO Appellate Body, Working Procedures for Appellate Review, WTO Doc WT/AB/WP/6, Rule 4(3) (16 August 2010).

³⁵ Debra P Steger and Peter Van den Bossche, ‘WTO Dispute Settlement: Emerging Practice and Procedure’ (1998) 92 American Soc Intl L Proc 79.

³⁶ See eg Alberto Alvarez-Jimenez, ‘The WTO Appellate Body’s Decision-Making Process: A Perfect Model for International Adjudication?’ (2009) 12 J Intl Econ L 289, 305 (the ‘exchange of views’ under the Appellate Body’s collegiality practice cannot be characterized as *en banc* decision-making, except with respect to ‘certain issues of paramount relevance for the WTO dispute settlement system that come for the first time’ before the Appellate Body); Shoab A Ghais, ‘International Judicial Lawmaking: A Theoretical and Political Analysis of the WTO Appellate Body’ (2006) Berkeley J Intl L 534, 543 (‘The Appellate Body’s composition as a rotating three-member appellate panel as envisioned by the DSU has been transformed into a seven-member fixed appellate bench’); Marc Lynedjian, ‘Reform of the WTO Appeal Process’ (2005) 6 J World Investment & Trade 809, 823 (‘All AB members participate in the exchange of views, which usually lasts between two days and a week. Practically, an appeal is thus heard by seven individuals’) (internal footnote omitted); Claus-Dieter Ehlermann, ‘Experiences from the WTO Appellate Body’ (2003) 38 Texas Intl LJ 469, 477 (‘The system of “exchange of views” could have been criticized by WTO Members as being contrary to the DSU. It is remarkable that this has not been the case.’).

adopted an ‘evolutionary’ approach to treaty interpretation³⁷—which similarly has been characterized by scholars as ‘dynamic’³⁸ and ‘organic’³⁹—finding that the treaty language at issue should be interpreted in light of ‘contemporary concerns of the community of nations’⁴⁰ as reflected in a number of ‘modern international conventions and declarations.’⁴¹ Both issues—concerning unsolicited *amicus* submissions and an ‘evolutionary’ approach to treaty interpretation—arose in the context of the *Shrimp/Turtle* dispute, which concerned a US import ban on shrimp ‘harvested with commercial fishing technology’ that could adversely affect sea turtles.⁴²

Regarding unsolicited *amicus* submissions, the *Shrimp/Turtle* Panel Report had found that ‘[a]ccepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied.’⁴³ In particular, the panel had found that ‘pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the Panel. In any other situations, only parties and third parties are allowed to submit information directly to the Panel.’⁴⁴ Article 13 provides that each panel ‘shall have the right to seek information and technical advice from any individual or body which it deems appropriate.’

Reviewing the *Shrimp/Turtle* Panel Report, the Appellate Body found that ‘the Panel’s reading of the word ‘seek’ [under Article 13] is unnecessarily formal and technical in nature,’ and that the word ‘seek’ should not be read ‘in too literal a manner.’⁴⁵ ‘In the present context,’ the Appellate Body found, ‘authority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel. A panel has discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not.*’⁴⁶ Thus, the Appellate Body rejected an ‘unnecessarily formal and technical’ application of the existing rules to find that it was within the discretion of a WTO panel to accept unsolicited *amicus* submissions.

Regarding the Appellate Body’s ‘evolutionary’ approach to treaty interpretation, in *Shrimp/Turtle* the Appellate Body addressed the issue of whether the US import ban fell within the scope of general exceptions set out in Article XX of GATT 1994. In particular, the Appellate Body considered whether Article XX(g)—which includes measures ‘relating to the conservation of exhaustible natural resources’—could include measures relating to the conservation of living resources, such as sea

³⁷ WTO Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc No WT/DS58/AB/R (12 October 1998) [hereinafter *Shrimp/Turtle*] para 130 (‘[W]e note that the generic term “natural resources” in Article XX(g) [of GATT 1994] is not “static” in its content or reference but is rather “by definition, evolutionary.”’) [quoting *Namibia (Legal Consequences)*, Advisory Opinion, 1971 ICJ REP. 16, 31].

³⁸ Steinberg (n 10), at 252 (‘The Appellate Body offered a dynamic interpretation of the conditions under which the GATT Article XX(g) exception could be invoked’).

³⁹ Joel P Trachtman, ‘The Domain of WTO Dispute Resolution’ (1999) 40 *Harvard Intl LJ* 333, 361 (‘Referring to the drafting history of article XX(g), which involved discussions of mineral resources, the Appellate Body endorsed an organic approach to interpretation’).

⁴⁰ *Shrimp/Turtle* (n 37), para 129.

⁴¹ *Shrimp/Turtle* (n 37), para 130.

⁴² *Shrimp/Turtle* (n 37), para 3.

⁴³ *Shrimp/Turtle* (n 37), para 99 (quoting Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, 15 May 1998 [hereinafter *Shrimp/Turtle* Panel Report] para 7.8).

⁴⁴ *Shrimp/Turtle* (n 37), para 99 (quoting *Shrimp/Turtle* Panel Report para 7.8).

⁴⁵ *Shrimp/Turtle* (n 37), para 107.

⁴⁶ *Shrimp/Turtle* (n 37), para 108 (emphasis in original).

turtles. The Appellate Body observed that the ‘exhaustible natural resources’ language had been ‘crafted more than 50 years ago,’ but that the language ‘must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.’⁴⁷ According to the Appellate Body, such ‘contemporary concerns’ included ‘the importance and legitimacy of environmental protection’ as reflected in the goal of ‘sustainable development’ set out in the preamble of the WTO Agreement.⁴⁸ Such contemporary concerns also were reflected in a number of ‘modern international conventions and declarations,’⁴⁹ including the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, Agenda 21, and the Resolution on Assistance to Developing Countries.⁵⁰ According to Joel Trachtman, by adopting a ‘dynamic’ approach to treaty interpretation ‘to fit modern circumstances,’ the Appellate Body ‘aggregated substantial power to itself, both to engage in balancing and to ‘modernize’ the interpretation of Article XX.’⁵¹

Although the Appellate Body’s ‘dynamic’ treaty interpretation approach in *Shrimp/Turtle* is well supported under international law,⁵² the Appellate Body opted to take decisive action notwithstanding preexisting policy disagreements among WTO members on the proper balancing of trade and environmental interests. Similarly, notwithstanding preexisting policy disagreements among WTO members on the issue of *amicus* submissions, the Appellate Body again took decisive action.

Regarding WTO policy disagreements on the admissibility of *amicus* submissions, according to Richard Steinberg, ‘the Appellate Body’s interpretation of Article 13 was made in the context of several years of North–South deadlock over whether to permit *amicus* briefs. Few developing countries would have consented to an agreement with that outcome, yet the Appellate Body interpreted the DSU as supporting it.’⁵³ Furthermore, according to Claus-Dieter Ehlermann, the Appellate Body’s approach to *amicus* submissions ultimately ‘gave rise to a major diplomatic row’; a special meeting of the WTO’s legislative body, the General Council, was held ‘to discuss the Appellate Body’s action,’ at which, with one exception, ‘all those who spoke criticized the Appellate Body’s decision.’⁵⁴

⁴⁷ *Shrimp/Turtle* (n 37), para 129.

⁴⁸ *Shrimp/Turtle* (n 37), para 129.

⁴⁹ *Shrimp/Turtle* (n 37), para 130.

⁵⁰ *Shrimp/Turtle* (n 37), para 130.

⁵¹ Trachtman (n 39), at 364.

⁵² See eg Robert Howse, ‘The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate’ (2002) 27 *Columbia J Envt’l L* 491, 520–21 (‘It is well established public international law that some provisions of treaties are to be treated in an evolutionary fashion. By reverting to the preamble of the WTO Agreement to establish that exhaustible natural resources is an evolutionary term, the Appellate Body merely followed Vienna Convention Article 31, which specifically mentions the “preamble” as part of the “context” which is fundamental to the interpretation of treaty text’).

⁵³ Steinberg (n 10), at 251. See also ‘Doha Round Briefing Series’, Vol 1 No 8 (*Review of the Dispute Settlement Understanding*, February 2003) <http://www.iisd.org/pdf/2003/wto_doha_review_dispute.pdf> accessed 27 May 2017 (noting that ‘[m]ost developing countries vigorously oppose’ the practice of accepting unsolicited *amicus* submissions); UNCTAD, Dispute Settlement, World Trade Organization, 3.3 (*Appellate Review 2003*) <http://unctad.org/en/docs/edmmisc232add17_en.pdf> accessed date 27 May 2017, 21 (‘One of the most contentious issues among WTO Members with respect to WTO dispute settlement is the issue of *amicus curiae* (friend of the court) briefs submitted to panels or to the Appellate body by non-governmental organizations or other entities that are not a party to the dispute’).

⁵⁴ Ehlermann (n 36), at 484.

Regarding WTO policy disagreements on the proper balancing of trade and environmental interests, in 1994:

governments established a Committee on Trade and Environment (CTE), open to all WTO member governments, and gave it a mandate to examine a variety of trade/environment issues . . . Some commentators were optimistic that the creation of the CTE would lead to a general political resolution of trade/environment issues, but it has produced virtually nothing of substance.⁵⁵

Gregory Shaffer identified a failure by the United States and European Union to ‘agree internally . . . on a coherent negotiating package’ as well as the pursuit of ‘narrow “mercantilist” interests’ by WTO members as two key reasons for the failure by WTO members to reach agreement on the balancing of trade and environmental interests.⁵⁶

The Appellate Body’s decisions to act decisively with respect to balancing trade and environmental interests and considering unsolicited *amicus* submissions— notwithstanding preexisting policy disagreements among WTO members on both issues—provide two examples of what Stone Sweet and Brunell have described as adjudication ‘replac[ing] interstate bargaining as a primary mechanism for rule innovation.’⁵⁷

As discussed above, the Appellate Body’s (i) collegiality practice, (ii) acceptance of unsolicited *amicus* submissions, and (iii) ‘evolutionary’ approach to treaty interpretation illustrate how members of standing, permanent tribunals can take greater responsibility for their institution through decisive acts of independence. Such acts often will be consistent with the expectations of the States that created them. When, however, such acts ‘produce unforeseen and unwanted policy,’⁵⁸ control mechanisms should be available for States to be able to respond effectively.

IV. THE NEED FOR CONTROL MECHANISMS TO COUNTERBALANCE INSTITUTIONALIZATION OF THE INTERNATIONAL INVESTMENT LAW REGIME

As discussed above, greater institutionalization of the IIL regime through the creation of one or more standing, permanent appellate bodies would affect the balance of power between States and adjudicators. Also as discussed above, while greater institutionalization likely would lead to greater consistency in investment treaty interpretation, such gains in consistency would not eliminate the risk of inaccurate treaty interpretation. Given those factors, policymakers evaluating

⁵⁵ John H Knox, ‘The Judicial Resolution of Conflicts between Trade and the Environment’ 28 *Harvard Envtl LR* 1, 26 (2004). See also John H Barton and others, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO* (Princeton University Press 2006) 76 (‘the Appellate Body ruling [in *Shrimp/Turtle*] provided an approach to balancing trade-environment issues, despite WTO members having been deadlocked for a decade about how to achieve balance on the question’).

⁵⁶ Knox (n 55), at 27–28 (quoting Gregory C Shaffer, ‘The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of Trade and Environment Matters’ (2001) 25 *Harvard Envtl LR* 1, 52).

⁵⁷ Stone Sweet and Brunell (n 9), at 66.

⁵⁸ Stone Sweet and Brunell (n 9), at 64.

appellate mechanism options for the IIL regime should include consideration of control mechanisms to counterbalance the effects of greater institutionalization.

Such control mechanisms are particularly important in the context of the IIL regime, given a number of factors—discussed below—that impede the ability of States to limit the independence of investor-State tribunals, even within an *ad hoc* regime. First, investment treaties normally rely more on broad standards than specific rules,⁵⁹ which accords greater discretion to decision-makers,⁶⁰ although more recent investment treaties in some instances have adopted ‘rule-like’ formulations.⁶¹ Second, the significant interpretive power delegated to investment arbitration tribunals ‘is amplified by investment tribunals’ habitual reference primarily to other arbitral awards and academic opinions when interpreting treaties, with little or no citation of state practice.⁶² Third, with respect to recent treaty practice, investment obligations, with increasing frequency, are being negotiated in the context of plurilateral trade agreements,⁶³ which gives rise to greater coordination challenges for States.⁶⁴ Fourth, jurisdiction under investment treaties is ‘compulsory’⁶⁵ in the sense that States consent to arbitrate an entire category of future disputes when entering into a treaty.⁶⁶ Fifth, States cannot ‘starve’⁶⁷ tribunals of cases because claims are brought by private investors. Sixth,

⁵⁹ See eg Anthea Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 *Am J Int’l L* 179, 189 (investment treaties typically reflect ‘a low level of precision, because the commitments themselves are broad and vague (eg the promise to treat investors fairly and equitably)’).

⁶⁰ See Anne van Aaken, ‘Control Mechanisms in International Investment Law’, in Zachary Douglas, Joost Pauwelyn, and Jorge Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford 2014), at 415 (‘the more incomplete a given contract is, the more extensive the delegation to the tribunal will be’); Gregory Shaffer and Joel Trachtman, ‘Interpretation and Institutional Choice at the WTO’ (2011–12) 52 *Virginia J Int’l L* 103, 110 (‘The more precisely the parties draft the text of an agreement—ie the more the text constitutes a specific rule—the less discretion is available to a WTO panel. The more open-ended the drafting—i.e. the more it constitutes a general standard—the more discretion is accorded to a panel’); Cogan (n 8), at 421 (‘the detailed Statute, Elements of Crimes, and Rules of Procedure and Evidence set out by the drafters of the Rome Statute and the States Parties to the International Criminal Court demonstrate the lengths to which States can go to limit a court’s discretion *ex ante*’); Paul B Stephan, ‘Courts, Tribunals, and Legal Unification—The Agency Problem’ (2002) 3 *Chicago J Int’l L* 333, 336 (‘Through bonding, nations can adopt precise rules that significantly limit the adjudicator’s discretion. Alternatively, they can endow the adjudicatory body with the authority to decide the specific content of the unified law’).

⁶¹ See van Aaken (n 60), at 416 (noting that expropriation obligations have taken a ‘more rule-like form’ in recent US and Canadian Model BITs, ‘where a finding of expropriation is excluded if certain requirements concerning the purpose of the measure and the means chosen are met by the host states’).

⁶² Roberts (n 59), at 190. See also Yackee (n 12), at 426 (‘Many commentators ... suggest that the IIL system is rapidly developing into at least a quasi-precedential one, as awards are ever more frequently published and cited as support in later opinions’).

⁶³ In particular, 12 States negotiated the recently concluded Trans-Pacific Partnership, and 16 States currently are negotiating a Regional Comprehensive Economic Partnership agreement. See Government of Australia, Department of Foreign Affairs and Trade, Free Trade Agreements <<http://dfat.gov.au/trade/agreements/pages/trade-agreements.aspx>> accessed 27 May 2017.

⁶⁴ See eg Stone Sweet and Brunell (n 9), at 66 (‘the principal in international regimes is a composite, not a unified, entity. The situation weakens the threat of override. A composite principal, one comprising multiple states whose leadership will change periodically (though elections, eg), may not possess stable policy preferences over time’); Cogan (n 8), at 427 (‘Constraints on State control flow, in part, from the fact that international courts have multiple and/or collective principals ... even when the control mechanism is centralized ... control is effectively mitigated by the inability of States to agree’).

⁶⁵ See eg Posner and Yoo (n 10), at 36 (observing, in the context of the ICJ, that the level of a tribunal’s independence ‘turns on the type of jurisdiction’; ‘[t]o the extent states use the Court’s *ad hoc* jurisdiction, the ICJ is dependent ... To maintain its relevance and power, the ICJ must resolve [*ad hoc*] disputes in a manner consistent with the interest of the disputing parties. To the extent that states submit to compulsory (*ex ante*) jurisdiction, the ICJ is relatively independent’).

⁶⁶ See eg Joost Pauwelyn, ‘Rational Design or Accidental Evolution? The Emergence of International Investment Law’ in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford 2014) 30 (referring to ‘broad-based, *ex ante* consent to investor-State arbitration in BITs’).

⁶⁷ Roberts (n 59), at 193. See also Laurence R Helfer and Anne-Marie Slaughter, ‘Why States Create International Tribunals: A Reponse to Professors Posner and Yoo’ (2005) 93 *California L Rev* 899, 928 (‘highly independent

an effective enforcement regime renders the option of ignoring international investment arbitration awards less practicable.⁶⁸

The independence of international investment arbitration tribunals is reinforced when analyzed under the framework developed by Stone Sweet and Brunell for predicting when a ‘trustee court, rather than the contracting states, will dominate the institutional evolution of the regime’: (i) a steady caseload, (ii) decisions that provide reasons to justify rulings, and (iii) ‘a minimally robust conception of precedent.’⁶⁹ The existing IIL regime satisfies all three criteria, which suggests that a standing, permanent appellate tribunal operating within that regime could be expected to play a significant role in shaping international investment law.

For the above reasons, policymakers considering the development of one or more appellate mechanisms within the IIL regime should, at the same time, consider options for establishing effective control mechanisms within that regime.

Certain control mechanism options have received considerable attention from scholars, including budget power,⁷⁰ decision-maker appointments,⁷¹ specificity in rulemaking,⁷² and as a last resort, exit from the regime.⁷³

Notably, the control mechanism of decision-maker appointments includes reappointments, as illustrated by recent discussions within the WTO concerning the potential reappointment of WTO Appellate Body member Seung Wha Chang. As reported by the WTO, the United States objected to Mr Chang’s reappointment on grounds that ‘his service did not reflect the role assigned to the Appellate Body.’⁷⁴ In particular, according to the WTO, the United States reiterated previously-expressed concerns ‘with the Appellate Body’s adjudicative approach in a number of appellate proceedings in which Mr. Chang was involved’ and ‘stated that it was also concerned about the manner in which Mr. Chang conducted oral hearings ... not[ing] that his questions spent a considerable amount of time on issues that were not on appeal or that were not focused on the resolution of the matter between the parties.’⁷⁵ The US objection to Mr. Chang’s reappointment has

tribunals’ are ‘likely to exercise supranational jurisdiction over cases filed by private parties’; van Aaken (n 60), at 414 (‘private right of action tends to be used more frequently’ in international investment arbitration than State-to-State dispute settlement procedures ‘where diplomatic considerations have a filter function’).

⁶⁸ See Roberts (n 59), at 193.

⁶⁹ Stone Sweet and Brunell (n 9), at 66.

⁷⁰ See eg Stone Sweet and Brunell (n 9), at 67 n 7 (States can ‘seek to constrain a trustee’ by ‘threaten[ing] budget cuts’); Helfer and Slaughter (67), at 948 (discussing funding limitations faced by the International Tribunal for the Former Yugoslavia and the Inter-American Commission on Human Rights); Ginsburg (n 12), at 665 (identifying ‘budget power’ as one form of control mechanism).

⁷¹ See eg Stone Sweet and Brunell (n 90), at 67 n 7 (identifying the appointment of ‘judges thought to be more keenly attuned to national positions’ as one method by which States may ‘seek to constrain a trustee’); Helfer and Slaughter (n 67), at 948 (‘In contrast to using textual methods to refine treaty obligations, the power of reelection is a more indirect and less subtle method of control’); Ginsburg (n 12), at 665 (identifying ‘control over appointments’ as one form of control mechanism).

⁷² See eg van Aaken (n 60), at 416 (discussing greater specificity with respect to the expropriation obligation reflected in recent US and Canadian Model BITs).

⁷³ See eg Katselas (n 10), at 339–44 (discussing denunciation of the ICSID Convention by Bolivia and Ecuador); Ginsburg (n 12), at 657 (‘A party unhappy with a court decision can abandon the organization by exiting the court’s jurisdiction’).

⁷⁴ WTO, 2016 News Items (*WTO Members Debate Appointment/Reappointment of Appellate Body Members*, 23 May 2016) <https://www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm> accessed 27 May 2017 [hereinafter WTO Member Debate]. A few months after the United States expressed opposition to the reappointment, ‘Geneva sources’ said that WTO members had agreed ‘to move ahead with finding someone else for the spot.’ Doug Palmer, ‘Trump’s New World Order’, *Politico* (22 July 2016).

⁷⁵ WTO Member Debate (n 74).

been controversial,⁷⁶ but at the same time powerfully illustrates how the appointments process can place limits on the independence of international tribunals.

In the context of the IIL regime, one control mechanism option that merits particular attention is the availability of binding joint interpretations. When a binding joint interpretation mechanism is available under a treaty, joint interpretations of treaty provisions by the parties to the treaty are binding on tribunals. Absent such a treaty-based joint interpretation mechanism, under customary international law rules a ‘subsequent agreement’ between the parties to a treaty on a question of treaty interpretation must be ‘taken into account’ by tribunals,⁷⁷ but does not itself constitute binding legal authority.⁷⁸

For many years the USA has included binding joint interpretation mechanisms in its investment treaties and investment chapters of free trade agreements;⁷⁹ the European Commission recently included such a mechanism in its proposal for an Investment Court System and in the CETA and EU-Vietnam agreements.⁸⁰

Notably, however, the *availability* of a binding joint interpretation mechanism does not entail the *use* of a binding joint interpretation mechanism. In the NAFTA context, the NAFTA Parties, on dozens of occasions,⁸¹ have acted separately pursuant to NAFTA Article 1128, which authorizes the NAFTA Parties to make submissions, on an individual basis, to NAFTA Chapter 11 tribunals on questions of NAFTA treaty interpretation. But on only one occasion—more than 15 years ago—have the NAFTA Parties issued a binding joint interpretation.⁸² To the extent that coordination challenges have played a role in the very limited number

⁷⁶ See eg WTO Member Debate (n 74) (‘Korea expressed several “systemic” concerns with the United States’ position’); ‘Washington threatens to undermine the WTO’ *Financial Times* (31 May 2016) (‘Washington wants to start imposing ideological litmus tests on judges to make sure they adopt the same judicial philosophy as does the US’); Gregory Shaffer, ‘Will the US Undermine the World Trade Organization?’ *The World Post* (23 May 2016) (‘The USTR opposition to Mr. Chang’s reappointment aims to compromise the tribunal’s judicial independence’).

⁷⁷ See Vienna Convention art 31(3).

⁷⁸ The Doha Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/Dec/2 (14 November 2001) [hereinafter Doha Declaration] illustrates how a joint interpretation, when not made binding by a treaty, can serve as a relevant interpretive source but does not itself constitute binding legal authority. In the Doha Declaration, WTO Members jointly issued a declaration on the TRIPS Agreement, which stated in part that the agreement ‘should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all.’ Consistent with Vienna Convention Article 31(3), scholars characterized the Doha Declaration as a relevant source for interpreting the TRIPS Agreement, but not as binding legal authority. See Alan O Sykes, ‘TRIPS, Pharmaceuticals, Developing Countries, and the Doha “Solution”’ (2002) 3 *Chicago J Intl L* 47, 54 (Doha Declaration ‘is likely to be persuasive authority in the interpretation of TRIPS in the event of a dispute’); James Thuo Gathii, ‘The Legal Status of the Doha Declaration on TRIPS and Public Health under the Vienna Convention on the Law of Treaties’ (2002) 15 *Harvard J of Law & Tech* 291, 292–93 (Doha Declaration should be regarded ‘as an interpretative element in the interpretation of the TRIPS Agreement under customary international law’). The Doha Declaration did, however, ultimately lead to the adoption of binding legal authority in the form of an amendment to the TRIPS Agreement. See WTO, Press Releases, (*Members OK Amendment to Make Health Flexibility Permanent*, 6 December 2005) <https://www.wto.org/english/news_e/pres05_e/pr426_e.htm> accessed 27 May 2017 (‘The amendment completes a process that began with the declaration on TRIPS and health that ministers made at the Doha Ministerial Conference in November 2001’).

⁷⁹ See eg NAFTA art 1131(2) (‘An interpretation by the [NAFTA Free Trade] Commission of a provision of this Agreement shall be binding on a tribunal established under this Section’); CAFTA-DR art 10.22(3) (‘A decision of the Commission declaring its interpretation of a provision of this Agreement under Article 19.1.3(c) (The Free Trade Commission) shall be binding on a tribunal established under this Section, and any decision or award issued by the tribunal must be consistent with that decision’).

⁸⁰ See European Commission Draft Text TTIP—Investment, art 13(5) <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 27 May 2017; Canada–European Union Comprehensive Economic and Trade Agreement, agreed text as of February 2016, Article X.27 <<http://ec.europa.eu/trade/policy/in-focus/ceta/>> accessed date ; European Union–Vietnam Free Trade Agreement, agreed text as of January 2016, Chapter 8 Article 16(4) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>> accessed 27 May 2017.

⁸¹ See Mark Feldman, ‘Joint Interpretations Under a Divided TPP Investment Chapter’ in Wenhua Shan and Jinyuan Su (eds), *China and International Investment Law* (Brill 2015) [hereinafter Joint Interpretations], 417.

⁸² See ‘Interpretation of the NAFTA Free Trade Commission of Certain Chapter 11 Provisions’ (31 July 2001) <<http://www.state.gov/documents/organization/38790.pdf>> accessed 27 May 2017.

of binding joint interpretations under the NAFTA, such coordination challenges would be heightened under treaties involving a large number of parties, such as the plurilateral TPP and RCEP agreements noted above.⁸³ Thus, while binding joint interpretation mechanisms can play an important role in counterbalancing the effects of greater institutionalization within the IIL regime,⁸⁴ policymakers should consider a wide range of additional control mechanism options.

In particular, in addition to the budget power, appointments, and specificity in rulemaking control mechanisms noted above, policymakers should consider the role that soft law—ie non-binding rules, guidelines, standards, and/or principles—could play in counterbalancing the effects of greater institutionalization within the IIL regime. States can collaborate in the development of soft law either as parties to particular treaties or as members of international organizations; such soft law can influence tribunal practice and decision-making.

In the treaty context, the NAFTA illustrates how States can influence tribunal practice and decision-making through the issuance of soft law instruments. Specifically, the NAFTA Free Trade Commission (FTC) has issued two ‘Statements’ that provide non-binding guidance on non-disputing party participation⁸⁵ and notices of intent to submit a claim to arbitration.⁸⁶ The FTC’s guidance on non-disputing party participation has been applied in a number of NAFTA investor-State cases.⁸⁷

States also can develop soft law as members of international organizations. Examples of such initiatives include the work of: (i) the International Law Commission, which, in addition to developing draft articles with commentaries on the law of treaties,⁸⁸ most-favored-nation clauses,⁸⁹ and state responsibility,⁹⁰ has addressed a number of additional topics that are of central importance for international investment law, including guidance on treaty reservations and the formation of customary international law;⁹¹ (ii) the OECD, which regularly develops working papers on international investment and has issued a Declaration on International Investment and Multinational Enterprises;⁹² (iii) UNCTAD,

⁸³ For discussion of potential coordination challenges under the TPP, see Feldman, ‘Joint Interpretations’, (n 81), at 417–20. Regarding coordination challenges within the WTO, see Ginsburg (n 12), at 664 (‘Compared with NAFTA, which has three states parties, formal overruling of the Appellate Body’s interpretations is more difficult because of the large number of parties to the WTO’).

⁸⁴ For additional discussion of the role of joint interpretation mechanisms within the IIL regime, see Tomoko Ishikawa, ‘Keeping Interpretation in Investment Treaty Arbitration “on Track”: The Role of States Parties’ in Jean Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill 2015).

⁸⁵ See ‘Statement of the Free Trade Commission on Non-Disputing Party Participation’ <<http://www.state.gov/documents/organization/38791.pdf>> accessed 27 May 2017.

⁸⁶ See ‘Statement of the Free Trade Commission on Notices of Intent to Submit a Claim to Arbitration’ <available at <http://www.state.gov/documents/organization/38792.pdf>> accessed 27 May 2017.

⁸⁷ See eg *Eli Lilly v Canada*, ICSID Case No UNCT/14/2, Procedural Order No 4 (23 February 2016) (applying FTC Statement on non-disputing party participation); *Lone Pine Resources v Canada*, UNCITRAL, Procedural Order No 1 (11 March 2015), para 58 (applying FTC Statement on non-disputing party participation); *Apotex Holdings Inc and Apotex Inc v United States*, ICSID Case No ARB/AF/12/1, Procedural Order on the Participation of the Applicant, Mr Barry Appleton, as a Non-Disputing Party (4 March 2013), para 4 (applying FTC Statement on non-disputing party participation).

⁸⁸ International Law Commission, ‘Draft Articles on the Law of Treaties with Commentaries’ (1966) <http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/1_1_1966.pdf&lang=EF> accessed 27 May 2017.

⁸⁹ International Law Commission, ‘Draft Articles on Most-Favored Nation Clauses with Commentaries’ (1978) <http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/1_3_1978.pdf&lang=EF> accessed 27 May 2017.

⁹⁰ International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’ (2001) <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 27 May 2017.

⁹¹ See International Law Commission, ‘Summaries of the Work of the International Law Commission’ <<http://legal.un.org/ilc/summaries/summaries.shtml>> accessed 27 May 2017.

⁹² See OECD, ‘Working Papers on International Investment’ <<http://www.oecd.org/daf/inv/investment-policy/working-papers.htm>> accessed 27 May 2017; ‘OECD Declaration and Decisions on International Investment and

which maintains multiple series addressing investment law issues;⁹³ and (iv) UNCITRAL, which has developed conventions, model laws, model rules, and explanatory texts in the area of international dispute settlement,⁹⁴ and which also endorses texts developed by other organizations.⁹⁵ UNCITRAL's recently-developed set of Rules on Transparency in Treaty-based Investor-State Arbitration has been applied in at least two investor-State cases.⁹⁶

In addition to the organizations outlined above, the G20 recently has made, and can continue to make, significant contributions to the development of international investment law. In December 2015, China—which had assumed the G20 presidency for 2016—announced that it would hold ‘several Trade and Investment Working Group Meetings’ in 2016 to implement the consensus reached at the 2015 G20 summit in Antalya, Turkey on the need to strengthen the G20's ‘trade and investment agenda,’ including the establishment of a ‘supporting working group.’⁹⁷ In 2016, following G20 Trade and Investment Working Group meetings in Beijing (January) and Nanjing (April),⁹⁸ G20 Trade Ministers reached agreement on the G20 Guiding Principles for Global Investment Policymaking,⁹⁹ a set of ‘non-binding principles to provide general guidance for investment policymaking.’¹⁰⁰ In September 2016, G20 Leaders endorsed the Guiding Principles at the Hangzhou Summit.¹⁰¹ The G20 has decided ‘to maintain its Trade and Investment Working Group ... [which] could remain a valuable additional platform for intergovernmental discussion regarding governance of international investment in a non-rule-making setting[.]’¹⁰²

If policymakers ultimately decide to pursue one or more appellate mechanism options for the IIL regime, all of the control mechanism options outlined above—budget power, appointments, specificity in rulemaking, joint interpretations, and the development of soft law (whether as Parties to treaties or as members of international organizations)—should be considered. A sophisticated combination of control mechanisms could effectively counterbalance the impact of greater institutionalization within the IIL regime.

Multinational Enterprises’ <<http://www.oecd.org/investment/mne/oecddeclarationanddecisions.htm>> accessed May 27, 2017.

⁹³ See UNCTAD Series <<http://unctad.org/en/Pages/Publications/Series.aspx>> accessed 27 May 2017.

⁹⁴ See UNCITRAL, ‘Texts and Status, International Commercial Arbitration and Conciliation’ <http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html> accessed 27 May 2017.

⁹⁵ See UNCITRAL, ‘Texts of other Organizations Endorsed by UNCITRAL’ <http://www.uncitral.org/uncitral/en/other_organizations_texts.html> accessed 27 May 2017.

⁹⁶ See Herbert Smith Freehills, ‘UNCITRAL Transparency Rules Applied for the First Time in Investor-State Arbitration’ (26 October 2015) <<http://hsfnotes.com/publicinternationallaw/2015/10/26/uncitral-transparency-rules-applied-for-the-first-time-in-investor-state-arbitration/>> accessed 27 May 2017.

⁹⁷ G20 Summit 2016, China, ‘Theme and Key Agenda Items of the G20 Summit in 2016’, 10 <http://www.g20chn.org/English/G20Calendar/201512/t20151231_2098.htm> accessed 27 May 2017.

⁹⁸ See ‘Draft Meetings Calendar for China's 2016 G20 Presidency’ <http://www.g20chn.org/English/G20Calendar/201512/t20151231_2098.html> accessed 30 May 2017.

⁹⁹ See ‘G20 Trade Ministers Meeting Statement, Shanghai’ (9–10 July 2016) <http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154788.pdf> accessed 30 May 2017.

¹⁰⁰ ‘G20 Guiding Principles for Global Investment Policymaking’ <http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154790.pdf> accessed 30 May 2017.

¹⁰¹ See ‘G20 Leaders’ Communique Hangzhou Summit’ (5 September 2016), para 29 <http://europa.eu/rapid/press-release_STATEMENT-16-2967_en.htm> accessed 30 May 2017.

¹⁰² Karl P. Sauvant, ‘China Moves the G20 on International Investment’ (2 January 2017) Columbia FDI Perspectives No 190.

V. CONCLUSION

For policymakers exploring appellate mechanism options for the IIL regime, the competing interests of efficiency and finality will receive due consideration. But two additional—and possibly overlooked—risks also merit consideration.

First, gains in the consistency of treaty interpretation by a standing, permanent appellate body would not guarantee corresponding gains in the accuracy of treaty interpretation. Two lines of case law applying denial of benefits provisions under a number of investment treaties illustrate the gap between consistency and accuracy. Both lines of decisions have been consistent in the sense that tribunals have allowed States to deny treaty benefits after a claim has been submitted to arbitration under investment treaties generally, but not under the Energy Charter Treaty. Such consistency, however, does not establish the accuracy of the two lines of treaty interpretation because the difference in outcomes cannot be explained by any distinctive characteristics of the Energy Charter Treaty.

Second, a shift from an *ad hoc* to a more institutionalized international investment dispute settlement regime would significantly impact the balance of power between States and adjudicators. In general terms, standing, permanent tribunals are associated with greater levels of independence than *ad hoc* tribunals. The experience of the WTO Appellate Body illustrates how members of a standing, permanent body can, over time, take greater responsibility for their institution through decisive acts of independence. The greater the independence of an international tribunal, the greater the need for control mechanisms to address the risk of tribunals exceeding their mandate. That risk is heightened in the context of the international investment arbitration, where, even under the current *ad hoc* regime, the level of tribunal independence is significant.

Persuasive policy arguments—based on goals of achieving greater consistency, coherence, and predictability—can be made in favor of the development of one or more appellate mechanisms within the IIL regime. But policymakers evaluating appellate mechanism options should give careful consideration to all competing policy interests, which are not limited to the goals of efficiency and finality. The two additional risks analyzed in this article—the gap, for purposes of treaty interpretation, between consistency and accuracy, and the balance of power consequences of greater institutionalization—should be part of the policy discussion. That policy discussion also should consider a range of control mechanism options—including budget power, appointments, specificity in rulemaking, joint interpretations, and soft law—to address such risks.