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

A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches

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Abstract—Investor state dispute settlement (ISDS) has emerged as one of the most contested elements of the international trade and investment regime. It is also, in many senses, the most antiquated, in the sense it was designed with an expectation that the disputes would be very different from the type of disputes which in fact most frequently arise. This contribution surveys a number of the issues which arise with the current system, arguing that conceptually these disputes should be seen as a form of public law dispute. This implies that the institutional set up for investment disputes should be revisited. The author then offers some preliminary sketches of what a multilateral mechanism for the settlement of investment disputes could look like which would address these concerns.

1. INTRODUCTION

It is an understatement to point out that the investor state dispute settlement (ISDS) system has emerged as one of the most contested elements of the global trade and investment regime. Not only is it one of the most contested elements but it is, arguably, one of the most antiquated elements of the global governance structure. The basic structure of the regime has been established since the 1960s, that is, a reliance on the dispute settlement mechanisms of commercial arbitration or mechanisms derived therefrom to decide disputes dealing with the consistency of public measures with an international treaty. In the debate around the ISDS regime the question has come to the fore as to whether the system can be sustained for the foreseeable future.

The European Union (EU) has been at the centre of that debate. It is now at the vanguard of looking at how that system can be made sustainable in the medium to long term. This flows from the EU's long-term interest in global

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investment policy—the EU is the world's largest exporter and importer of foreign direct investment.

The idea of establishing a permanent body for the settlement of investment disputes is one of the main planks of the EU's response to that debate. It took shape in the European polity in the responses to the public consultation (which attracted almost 150,000 responses) organized by the European Commission on the European Union's approach to investment protection and investor-state dispute settlement in the Transatlantic Trade and Investment Partnership Agreement in 2014. It was thereafter taken up in the Commission's 2015 Concept Paper, 'Investment in TTIP and Beyond—The Path for Reform, Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration Towards an Investment Court', which stated:

> Therefore, the EU should pursue the creation of one permanent court. This court would apply to multiple agreements and between different trading partners, also on the basis of an opt-in system. The objective would be to multi-lateralize the court either as a self-standing international body or by embedding it into an existing multilateral organization. Work has already begun on how to start this process, in particular on aspects such as architecture, organization, costs and participation of other partners.[2]

It is also mentioned in the Commission's 2015 Communication 'Trade for All' which sets out the Commission's trade and investment policy for the mandate of the current Commission (2014–19).[3] More significantly, it features in the Joint Interpretative Instrument which was adopted by the European Union and Canada at the same time as the EU-Canada Comprehensive Economic and Trade Agreement (CETA) was signed. It states:

> ... CETA represents an important and radical change in investment rules and dispute resolution. It lays the basis for a multilateral effort to develop further this new approach to investment dispute resolution into a Multilateral Investment Court. The EU and Canada will work expeditiously towards the creation of the Multilateral Investment Court. It should be set up once a minimum critical mass of participants is established, and immediately replace bilateral systems such as the one in CETA, and be fully open to accession by any country that subscribes to the principles underlying the Court.[4]

A reference is also made in a declaration of the Council of the European Union associated with the EU-Canada Comprehensive Economic and Trade Agreement (CETA):

> Moreover, the Council supports the European Commission's efforts to work towards the establishment of a multilateral investment court, which will replace the bilateral system established by CETA, once established, and according to the procedure foreseen in CETA.[5]

[2] European Commission, 'Investment in TTIP and Beyond—The Path for Reform, Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration Towards an Investment Court' (May 2015) 11 <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 30 June 2017.

[3] European Commission, 'Trade for all—Towards a more responsible trade and investment policy' (October 2015) 20 <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> accessed 30 June 2017.

[4] 'Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States' OJ L 11, 14 January 2017, 3.

[5] Declaration no 36, 'Statement by the Commission and the Council on Investment Protection and the Investment Court System' OJ L 11, 14 January 2017, 9.

This idea has some similarities to the idea of the creation of a multilateral appellate mechanism for investment disputes. That idea can be traced back to the 2002 Trade Promotion Authority legislation in the United States. The International Centre for Settlement of Investment Dispute (ICSID) took soundings amongst its members in 2006 but further concrete work did not materialize.[6]

At the time of writing, the idea of establishing such a permanent body is at a conceptual stage. There is not yet agreement on whether such a body should be established or what form it should take. This short piece sketches out the main reasons for establishing such a permanent body and outlines some of the key design features which need to be considered in establishing such a body.

2. CONCEPTUAL ISSUES

ISDS has emerged as one of the most contentious issues in global economic governance over the last few years. This contentiousness is not limited to particular groups in society, nor particular positions on the political spectrum. The debates cover a number of issues but the core ones can be summarized as follows.

There is a sentiment, often associated with the term 'private justice' (as employed by the European Parliament in its resolution on TTIP), that the form of dispute settlement used for ISDS is inappropriate for resolving issues involving the regulatory autonomy of states.

There is a perception that the system lacks neutrality, or at least lacks the neutrality associated with other systems judging similar matters. Arbitrators often have the reputation of being either pro-investor or pro-state. This runs counter to the expectations of neutrality for persons undertaking the sensitive balancing act to be performed when looking at limitations to the regulatory autonomy of states. This risk to neutrality may be exacerbated by the background of many of the individuals. Relatively few have a background in public international law, or have experience in public law disputes in domestic law. Many have backgrounds in commercial arbitration, meaning that they have had little or no exposure to the complex issues which often arise when assessing the regulatory autonomy of states when their actions are being judged against public international law standards. Given the individuals in question are not employed on a fulltime but rather on an ad-hoc basis there is an increased risk of conflicts of interest. This is because arbitrators may earn their living by also acting as counsel or experts creating the risk that they be both judging and pleading a particular issue (so-called 'double hatting'). In addition to the risks that flow from these elements there is the risk that arbitrators have a vested interest, again real or perceived, because they have a financial interest in either assuming jurisdiction or failing to dismiss unmeritorious claims since that will ensure continued employment. These elements further undermine the notion of neutrality.

Added to these elements is the structural element that there is no form of appeal and hence no remedy for errors of law or errors in fact finding. This is significant because the disputes at issue are not simple bilateral commercial disputes but

[6] Aurélia Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21(2) ICSID Rev–FILJ 427.

rather disputes dealing with actions of public authorities. It is almost unknown in other systems where a vertical relationship exists and public actions are judged that there is no system of appeal. The lack of appeal means that consistency is hard to establish—similar situations are not always judged in the same manner.

These different elements also add to the expense of the system. Investors incur costs as their legal counsel identify and strategize on who should be appointed as arbitrator, including how different potential arbitrators would interact. Similarly, the lack of systemic consistency removes incentives against running all possible arguments. Simply put, one never knows how any specific three-person tribunal might decide a particular case. Hence, there is an obvious temptation to run every available argument, even those which are unlikely to succeed. Had that argument been dismissed by an appeal mechanism then the wisdom of running the same argument again would be diminished, and hence the expense to the investor decreased.

Defenders of the current system would argue that these elements are unobjectionable and that they are inherent features of arbitration. But this takes one to the key question. Is the use of arbitration appropriate for handling disputes of the nature of those rising under investment treaties?

The starting point for responding to this question is the framework one takes for analysing the adjudication of investment treaty disputes. Should they be conceptualized as public law matters where the state has both a specific interest in a particular dispute and a longer-term interest in the treaties as providing a framework for future action by the state and its treaty partners? Or rather should disputes be considered as one-off events, where the state and the investor are on the same level?

The literature on this debate is rich and evolving and this contribution neither seeks to capture its richness nor summarize its breadth.[7] It is submitted, nevertheless, that what is happening in investment treaty adjudication tends towards the public end of the spectrum. Investment adjudication is public in the sense that investment treaties are products of public international law and also in the sense that the relationship which is being judged is a vertical one between the state and an individual, i.e. between the state and the foreign investor.

At the core of investor to state dispute settlement is the testing of an allegation that a public authority has acted inconsistently with certain, specified international obligations deliberately drafted in a relatively open manner.[8] Public authorities are vested with powers to pursue the public interest and investment treaties provide a framework for such action (one of many, together with domestic constitutions and public law rules, international treaties protecting human rights, international trade law treaties, etc). Disputes may range from relatively insignificant contractual obligations to potentially very sensitive public interest regulation. The most typical remedy is the payment of compensation, which is of course likely to come from the public budget. And this is a repeat action (the treaties are in place permanently and any investor meeting the nationality requirements can bring a claim). The

[7] For a discussion see, in particular, the work of Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 AJIL 45. Also noteworthy in this respect is Andreas Kulick, *Global Public Interest in International Investment Law* (CUP 2012).

[8] The WTO and other trade agreements are drafted in an equally open manner as are many constitutions or international human rights conventions.

treaties are in place on a permanent basis and actors, be they investors, government agencies or the general public develop expectations as to how they will be understood and applied.

The problems noted above are not problems for international commercial arbitration. These public nature issues do not arise for commercial arbitration. However, these are problems in the investment treaty system because it involves judging the conduct of states acting in their public capacity against their public international law obligations.

The answer to these problems, it is submitted, is to recognize that a private system of dispute resolution is not suited to the resolution of public international law and public law disputes. Instead, we need to look to how dispute resolution is managed in other public international law areas that regulate public law actions, like trade and human rights. When we do this, we see that parties typically adopt a court-like solution that adheres to certain key public law principles (for example, independence, impartiality, correctness). Adopting a similar approach in the investment treaty system would resolve the key problems identified with ISDS above.

One can posit that systems of public adjudication have a number of features. They place a significant importance on the manner in which disputes are decided. At the core of that contention is a high degree of independence of the decision makers, which needs to be both real and perceived. Typically this is achieved through ensuring both that they are free from other financial pressures (that is, that the activity of adjudicating is their quasi-exclusive occupation) and that they cannot be pressured into taking decisions on particular matters through their employment not being continued (typically through tenure). Another important feature of public adjudication is a pursuit of predictability through the development of consistent approaches to comparable situations. The value here is that the different actors in the system know with a sufficient degree of probability how the relevant norms will be interpreted in any given situation. This permits them to shape their action. Typically this works through a combination of permanency and the availability of corrective mechanisms in the system, most often through the possibility of an appeal.

It is quite clear that as a factual matter the manner in which ISDS arbitration currently functions is very different from the way administrative or constitutional type complaints are handled in other international or domestic tribunals dealing with complaints about public action. ISDS does not have many of the features of those tribunals. In particular a far greater independence of the adjudicators (real and perceived) can be identified in those tribunals. A statement of these notions of independence can be found in the 2002 *Bangalore Principles of Judicial Conduct* which is regarded as a highly influential global statement of the manner in which judges should operate. The first principle is that of independence and that is stated to imply:

> 1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

> 1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.[9]

It is a fundamental tenet of any judicial system (and this is stated explicitly in the *Bangalore Principles*) that 'not only must Justice be done, it must also be seen to be done'[10]

There are a number of features of ISDS which sit awkwardly with these notions of independence and in particular the notion that the perception of independence is vital.

As is well known ISDS broadly uses the mechanisms of commercial arbitration to resolve disputes. Disputes are typically subject to the jurisdiction of ICSID or to the Arbitration Rules of the United Nations Commission for International Trade Law (UNCITRAL). Both of these sets of rules provide for arbitrators appointed to hear a specific case to decide that case. The arbitrators are appointed by the parties to the dispute. The president of the tribunal is appointed by agreement of the disputing parties, by the party-appointed arbitrators or by an appointing authority (under the ICSID Convention, the Chairman of the ICSID Administrative Council). These tribunals are judges of their own competence.

ISDS is the most frequently used system of public adjudication where the disputing parties in a particular case are able to individually choose their adjudicators.[11] This creates doubts about the objectivity and the systemic impacts of the current approach to ISDS.[12] The polarisation of many frequent ISDS arbitrators (that is, arbitrators are considered as being either 'pro-investor' or 'pro-state') is a symptom of this approach that contributes to rising concerns about the objectivity of the system.[13]

It is also clear that the dynamics of the ad hoc system work very differently from a system where judges are permanent and have tenure. Much effort is put into identifying the arbitrators most likely to produce an optimal result for the appointing disputing party. To quote one person involved in arbitration: 'When I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the *maximum predisposition towards my client*, but with the *minimum appearance* of bias.'[14]

There is also an increasing awareness that the result is then impacted by the dynamics between the arbitrators, who, as is only human, have an eye to how they might fare in the system in the future. This is considered as being likely to produce fact-specific outcomes.[15]

[9] The Banglore Principles of Judicial Conduct (2002). Available at < http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf> accessed 30 June 2017.

[10] *R v Sussex Justices*, Ex Parte McCarty [1924] 1 KB 256.

[11] The same is true for the State-to-State mechanisms included in many FTAs. However, these have been rarely used.

[12] For a discussion, see Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (Inaugural Lecture, University of Miami Law School, 29 April 2010) and Albert Jan van den berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration', in Arsanjani and others (eds), *Looking to the Future, Essays on International Law in Honor of W. Michael Reisman* (Brill/Nijhoff 2011) 821–43.

[13] See Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus' (October 2015) 109(4) ASIL 18–20.

[14] Martin Hunter, 'Ethics of the International Arbitrator,' (1987), 53 Arb 219, 233.

[15] For an analysis of the dynamics of the interactions between arbitrators and the potential effects on the outcomes of cases see Todd Tucker, 'Inside the Black Box: Collegial Patterns on Investment Tribunals' (2016) 7(1) J Intl Disp Settlement 183–204.

Similar considerations apply to the question of the remuneration of the adjudicators. Whereas the administration of justice is considered a public good in most domestic and international judicial systems and hence financed from the public purse, the disputing parties themselves pay the remuneration of the adjudicators in the current ISDS system. This raises concerns about the risk that financial incentives may have an impact on the decision-making processes. Here, what is primordial is the *perception* of the impacts of such financial incentives. It is now established in public adjudication that remuneration is provided on a stable basis, not linked to the number of cases a particular adjudicator is handling.[16]

A system of remuneration on a case-by-case basis also creates risks of conflicts of interest that may result from other professional activities that, by necessity, are pursued in parallel by the adjudicators.

As noted, another feature of public law adjudication is the importance given to predictability. Predictability implies consistency in terms of interpretation which is repeated and which creates expectations providing guidance for actions of public authorities and for investors as to whether litigation under an investment treaty is a useful action.

An appeal from the award of a tribunal, in the sense of an appeal that there is a legal error, is not possible. Article 52 of the ICSID Convention provides for a limited number of grounds for seeking annulment of an award. These do not include an error of law (or an error in the appreciation of the facts, however they are characterized). Similarly, Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) is narrowly drawn and does not permit a review (in this case decentralized) of the award on grounds of correctness. Similar narrow grounds are also typically found in domestic arbitration laws based, for example, on Article 36 of the UNCITRAL Model Law on International Commercial Arbitration.[17]

This situation is hardly surprising. The New York Convention and the UNCITRAL Model law are designed to deal with commercial arbitration. Their use for ISDS has been grafted on top of a system created for commercial arbitration. Similarly, the authors of the ICSID Convention did not envisage that it would be used for investment *treaty* dispute settlement to any significant degree, as has indeed proven to be the case. As JC Thomas and HK Dhillon note in another contribution to this collection, the authors of ICSID considered that around 95 percent of cases would be under investment contracts and concessions and not under investment treaties.[18] This was used to justify a number of the choices made in the design of the ICSID system, which of course borrowed heavily from commercial arbitration. The reality, however, proved to be very different. Up to 1 June 2016, only 26.4 percent of ICSID cases are in fact based on investment contracts or the investment law of the host state.[19]

[16] See the analysis of this matter in 'OECD Economic Considerations in Dispute Settlement: Adjudicator Compensation Systems' (10 February 2017) DAF/INV/WD 3.

[17] UNCITRAL Model Law on International Commercial Arbitration (1994) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf> accessed 30 June 2017.

[18] See JC Thomas and HK Dhillon, 'The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards' (2017) 32(3) ICSID Rev–FILJ 459.

[19] See ICSID, 'The ICSID Caseload-Statistics' (Issue 2016-2) 10 <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-2%20(English)%20Sept%2020%20-%20corrected.pdf> accessed 30 June 2017.

The effect of this structure is that it means ISDS decisions can be legally wrong, but cannot be corrected. This is difficult to explain to constituents, who are used to the idea that legal decisions can be reviewed by several layers of courts. It is particularly difficult to explain in cases where, for example, as has happened, an ICSID annulment committee determines that the first instance tribunal's decision is legally wrong, but beyond the scope of review in annulment proceedings (CMS vs Argentina). This may be less problematic in the field of private contract-based arbitration where reaching a quick decision may outweigh systemic and societal interests. The absence of an appeal becomes, however, problematic when the governments' long-term treaty obligations are at stake and public policy choices are subject to challenge. An appeal mechanism also of course establishes a more settled interpretation of the treaty norms. Even without an explicit requirement that first instance panels follow the interpretations of an appellate mechanism it is highly likely that an expectation arises that tribunals at first instance follow the appeal mechanism.

Another element which is very different from the 1960s when the ICSID Convention was drafted is the sheer number of investment treaties. The number of such treaties has grown exponentially. UNCTAD estimates that there are 3323 treaties with investment provisions, with around 2600 in force. UNCTAD is, at the time of writing, mapping those treaties. Of that mapping 1869 out of 1959 treaties (that is, 95 percent) examined provide for ISDS.[20] This is a massive expansion in treaties providing for ISDS, in all likelihood far beyond what the authors of the ICSID Convention could foresee.

What is of major significance is that there is also a high degree of homogeneity in those treaties. They essentially have the same core obligations of most-favoured nation treatment, national treatment, protection against uncompensated expropriation and fair and equitable treatment. Stephan Schill describes this in detail in *The Multilateralization of International Investment Law* in which he points out: 'Above all with respect to the standards of treatment of foreign investment, investment treaties display considerable convergence in their structure, object and purpose, and content.'[21] Whilst it is true that recent treaty practice has led to greater heterogeneity, as different approaches to reform have been taken up, it remains the case that the core standards are the same, and hence the interpretation given, for example, to the national treatment clause in one agreement will likely be relevant and useful, if not necessarily determinant, in interpreting a national treatment clause in another agreement.

Arbitrators chosen for a particular dispute cannot be expected to focus on the impact of their rulings or interpretations for other agreements. Their mandate is to solve the dispute before them. That is not to imply that they are ignorant of the possible precedential consequences of their interpretations, just that it is not a function of the design of the system that they should prioritize or, of necessity, take those consequences into account. Hence the existence of contradictory awards, even when the same facts and same obligations are in play, should not

[20] UNCTAD, 'Investment Policy Hub: IIA Mapping Project' <http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu> accessed 11 December 2016.

[21] Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 88. See in particular Chapter 3.

necessarily be a surprise.[22] This is arguably explained by the analysis of the dynamics of the system which suggests that results will tend towards the fact-specific without a focus on the systemic.[23]

Consequently, the *ad hoc* nature of the current system of different ISDS tribunals constituted for each individual case brings problematic systemic implications in terms of predictability.[24] Given the vast majority of investment treaties are based on similar concepts with identical or very similar wording, the interpretation of investment rules in a particular dispute may have an impact on the interpretation of that rule or of similar rules in other agreements. Hence the problem of predictability is amplified as a result of the large numbers of agreements with similar or identical terms.

Creating a permanent mechanism can address in a systemic manner three of the key concerns in investment dispute resolution; that is, the need for legitimacy, correctness and consistency. Responding to these key concerns can increase the degree of determinacy of the rules to the benefit of states and investors alike.

3. WHY IS A MULTILATERAL REFORM PREFERABLE TO A BILATERAL APPROACH?

There are, of course, already significant efforts at reform taking place. These mostly concern new treaties and treaties under negotiation. With a few exceptions, states are not looking at amending existing treaties. Evidently, amending existing treaties is a complicated exercise, requiring the agreement of both parties and hence the risk that the cost of renegotiating renders amendment not a feasible option. Another option exists in terminating existing agreements. With that comes the price of exit from the system and hence a renunciation of the benefits of such agreements.

If individual renegotiation is not feasible then it makes sense to seek to find a co-ordinated approach which can be applied to the large number of existing treaties.

A multilateral approach also has advantages over a bilateral approach. In particular, if an objective is to ensure adjudicators have no or limited other activities and are remunerated not by the disputants but by the states more generally then a multilateral approach increases the cases they are eligible to hear and permits a more efficient management of costs.

This approach is reflected in the EU's texts which foresee that the reformed bilateral system is replaced by a multilateral reformed system. For example, the CETA text in Article 8.29 states:

> *Establishment of a multilateral investment tribunal and appellate mechanism*
> The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.

[22] See, for example, *CME Czech Republic BV v The Czech Republic*, UNCITRAL, and *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, or *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, and *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No. ARB/02/1.

[23] See Tucker, above.

[24] cf N Jansen Calamita, 'The Principle of Proportionality and Problem of Indeterminacy in Investment Treaties,' in *Yearbook of International Investment Law and Policy* (OUP 2014) 157, 158.

The EU is currently engaging on a similar basis with all of its negotiating partners (Viet Nam, Singapore, Japan, the United States, China, Myanmar, Indonesia, Malaysia, Mexico etc.). In all of these negotiations the EU is putting forward the Investment Court System but also discussing the possible creation of a multilateral court mechanism. Discussions are also taking place in multiple other fora.

4. PRELIMINARY SKETCHES OF A MULTILATERAL INVESTMENT DISPUTE RESOLUTION MECHANISM

Much conceptual work remains to be done as to the shape of any future multilateral mechanism and it is obvious that the final outcome would depend on any eventual negotiations; having said that a number of potential features and design issues can be sketched out already.

One important point to make at the outset is that the initiative to establish a multilateral mechanism for settling investment disputes is not an effort to expand the scope of the CETA Investment Court system and was never intended either as an effort to expand the EU's TTIP proposals. Rather, it is intended as ground-up effort to build a truly multilateral mechanism. Of course, the EU takes the view that many of the principles underlying the EU's CETA and TTIP proposals should also be found in the multilateral mechanism. But it is certainly not the case that intention is to recreate, word for word, the approach taken in the EU's agreements.

There are a number of key issues which can be identified and which are examined below.

A. *Status and Qualifications of Adjudicators*

A first feature concerns the status of the adjudicators. As has been discussed in the previous sections one of the hallmarks and perceived problems of the existing system derives from the ad hoc nature of tribunals. Changing this implies the employment of full time adjudicators. This would imply that these adjudicators would be remunerated irrespective of the number of cases which they are handling.

Qualifications would need to be carefully considered. It is striking that a significant number of international tribunals require qualifications identical to or very similar to those required for the International Court of Justice:

> The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.[25]

Another important issue is that of security of tenure. In domestic legal systems judges tend to have tenure until the age of retirement. Such an approach is less

[25] Article 2 of the Statute of the International Court of Justice (opened for signature 26 July 1945, entered into force 24 October 1945). See Article 253 of the Treaty in the Functioning of the European Union (signed 13 December 2007, entered into force 1 December 2009), Article 21 of the European Convention on Human Rights (signed 4 November 1950, entered into force 3 September 1953), Article 4 of the Statue of the Inter-American Court of Human Rights (adopted 1 October 1979, entered into force 1 November 1979), Article 36(3) of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UNTS 2187.

common in international courts. In international courts most adjudicators are appointed for fixed term periods. In some circumstances the appointment can be renewed (such as for the WTO Appellate Body) and this is often associated with shorter term periods. However, the fact that appointments are renewable can lead to judges being subjected to pressure on them, meaning that this is a key issue for examination.

B. *First Instance Tribunal*

A first level tribunal would carry out the essential work of adjudicating investment disputes. It would take the role currently played by ad hoc tribunals of examining the allegations, examining evidence, conducting an analysis and rendering a decision or judgment.

On one model, the first level tribunal would be staffed by permanently appointed adjudicators. As is the principle before other international courts or domestic courts the disputing parties would not have a say in who sat on their particular case. Removing this nexus between the disputing parties and the adjudicators would address one element of the concern as to the manner in which incentives in the current ad hoc system operate.

It would also remove the need for disputants to appoint arbitrators in a particular dispute. This is a time consuming and often expensive part of the current system since it involves counsel profiling potential arbitrators and strategizing as to how they might interact with the other arbitrators to be appointed.[26] Furthermore, time and expense is often expended in introducing challenges to arbitrators, seeking to disqualify them on a wide range of grounds. The former element would be removed by the use of permanent adjudicators and the latter would become less frequent, if not non-existent, to the extent that adjudicators work full-time as part of the mechanism. The fewer outside activities the less likely that a challenge would be lodged, never mind be successful.

C. *Establishing an Appellate Mechanism*

Establishing an appellate mechanism raises a significant number of questions. An appeal tribunal is less a function of conceptualizing the investment treaty regime as a system flowing from public international law but rather via the lens of a public law review of the legality of the actions of public authorities. In such a conceptualization the element of ensuring correctness takes precedence. The function is thus closer to the function of appeal or supreme courts in domestic legal systems (and comparable to the appeal that lies from the General Court of the EU to the Court of Justice as regards actions against decisions of the European Commission).

An important issue in relation to appeal is the standard of review. It would seem evident that an appeal should lie in respect of an alleged error in the application of the law. More complicated is whether a panel's factual determinations should be subject to review. It would seem inappropriate for an appellate mechanism to conduct a *de novo* review. However, the question can be asked whether factual determinations should not be capable of being revisited, for example, where they contain conclusions which are not supported by the facts on the basis of a

[26] On these issues see the work of Todd Tucker, above.

reasonable reading of those facts (so checking for a manifest error in the appreciation of the facts). This is close to the standard which has been applied by the WTO Appellate Body and has not led to the Appellate Body undertaking *de novo* reviews of the facts established by WTO Panels.[27]

Organizational issues also arise with the establishment of an appellate tribunal. Observers raise the concern that there will be a high frequency of appeals, pointing to the WTO where indeed a majority of cases are subject to appeal. Whilst it is true that in the early days large numbers of appeals are likely it is not necessarily the case that the dynamics of WTO dispute settlement can be so directly translated to investment treaty adjudication. A particular feature of the WTO is that most of the significant users of the dispute settlement system litigate with in-house counsel. This implies that there is no financial cost of an appeal. In investment litigation by contrast, relatively few states use in-house counsel and certainly investors will use outside counsel. Appealing an investment dispute will have a real financial impact and meritless appeals can be considered to be likely to be rare.

In any event, thought can be given to different approaches to manage the frequency of appeals. One is to require security for the lodging of an appeal.[28] Thought can also be given to instituting a system of leave for appeal, as is common in many domestic systems, such that an appeal would only be granted if it was determined that it was warranted in a particular case. It is likely that leave to appeal would be granted more frequently in the early years of operation with a gradual thinning out as case law and precedents are gradually established.

It will also be important to consider how best to ensure that disputes are handled, both at appeal and first instance stage, effectively and expeditiously. Consideration should be given to including time lines for the tribunals to act, as is the case, for example, of the WTO Appellate Body and in EU texts provided for the Investment Court System.

Another feature of appeal which is important is the question of remand. One feature of WTO dispute settlement, and in particular the operation of the Appellate Body, is that the Appellate Body cannot remand matters back to the original panel when it reverses a legal finding but does not dispose of the facts to complete the analysis. This means in the case of the WTO that the case would need to be re-litigated from the beginning of the procedure. Considering mechanisms to avoid such re-litigation would be desirable.

D. *Opt-in Approach*

A key question to be resolved would be seeking to ensure application of any mechanism to existing treaties. As is well known, there are around 3300 existing investment agreements. A reform which only applied to future treaties would be valuable but that value would be limited. The European Union and its Member

[27] The WTO Appellate Body has stated 'in assessing the panel's appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence.' EC Asbestos, Appellate Body Report (AB-2000-11) para 159.

[28] This is the approach taken in EU bilateral agreements. See eg art 29(4) of the text of the Transatlantic Trade and Investment Partnership (draft dated 12 November 2015) (TTIP) and art 28(6) of the final draft of the Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (final draft of 1 February 2016) (EU-Vietnam FTA) (s 3 of the investment section).

States have an obvious interest; 1384 of the 3300 treaties have been concluded by the EU Member States. The European Union itself is party to the Energy Charter Treaty.

Investment treaty making has an example of an instrument designed precisely to apply to existing treaties; the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the 'Mauritius Convention on Transparency').[29] The mechanism works on the basis that when countries A, B and C have ratified the Mauritius Convention the UNCITRAL Transparency Rules[30] apply to disputes based on the investment treaties concluded between countries A, B and C (so a treaty between A and B, between A and C, between B and C). The Mauritius Convention has a certain amount of flexibility built into it.[31] For example, countries may decide not to apply the Transparency Rules for certain treaties (in the example country C could decide to apply the transparency rules to its treaty with country B but not for its agreement with country A).[32] This flexibility was designed to allow policy makers to tailor coverage to their particular situation, for example, to give some time to see how the transparency rules are applied in practice for some agreements.

Kaufmann-Kohler and Potestà have examined the possibility to use a similar technique for the establishment of a multilateral mechanism for dispute settlement.[33] Their conclusion is that the Mauritius Convention model can be used to bring about the application of a multilateral dispute settlement mechanism to existing treaties. They recognize that applying this approach to a multilateral dispute settlement mechanism which will be broader in scope and effect than the Transparency rules may raise certain complications but do not conclude that it would be impossible.

Investment treaty policy makers are not the only policy makers who have made use of such instruments. The OECD has recently negotiated the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*.[34] This Convention is intended to amend around 2000 existing tax treaties. A perusal of the Convention suggests that it is significantly more complicated than the Mauritius Convention. Most importantly, it points to a growing understanding in international law that amendments to existing bilateral treaties can be validly made through later multilateral treaties.

This approach has the significant advantage of not requiring an amendment of the existing agreements one by one to make them subject to the multilateral

[29] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, entered into force 18 October 2017) (Mauritius Convention on Transparency) Adopted by the United Nations General Assembly on 10 December 2014. <http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html> accessed 30 June 2017.

[30] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (adopted 9 July 2013, entered into force 1 April 2014) <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> accessed 30 June 2017 (the 'Transparency Rules').

[31] See in particular article 3 of the Mauritius Convention on reservations.

[32] It can be noted that no country which has signed the Mauritius Convention has in fact excluded any treaties from its application.

[33] Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap' (CIDS-Geneva Center for International Dispute Settlement, 3 June 2016) <http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf> accessed 30 June 2017.

[34] Multilateral Convention to Implement Tax Related Measures to Prevent Base Erosion and Profit Shifting (signed 7 June 2017, not yet entered into force). The Convention has been negotiated by around 100 states. See <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm> accessed 30 June 2017.

mechanism and to follow an approach which is already established for the UNCITRAL Convention. Moreover, it grants significant flexibility in the approach to the mechanism. This can be manifested in various ways, both in terms of the scope of treaties to which the instrument would apply (for example to include future treaties, be they bilateral, plurilateral or multilateral) and the specifics of any particular mechanism (the OECD Convention provides for 21 instances of potential flexibility as regards the instrument in the form of the ability to lodge reservations).[35]

E. *Ensuring Consistency*

A multilateral mechanism will contribute to creating a consistent interpretation and understanding of the substantive standards of investment protection. Consistency is an inherent desideratum in any legal system, since it enables stakeholders to conduct their operations in knowledge of how the law is likely to apply to specific situations.

It goes without saying that an opt-in approach such as that used for the Mauritius Convention would lead to the application of any mechanism to multiple treaties. Whilst, as previously noted, the central core of substantive provisions on investment protection is common to practically all international investment agreements (most-favoured nation, national treatment, protection against uncompensated expropriation and fair and equitable treatment) there are, of course, differences across agreements (for example, the EU approach to fair and equitable treatment as compared to the North American approach on the minimum standard of treatment). These differences are nevertheless largely speaking found in different groups of agreements; for example, in traditional standard BITs, in agreements with North American countries, in the more recent EU agreements. Ensuring their consistent and uniform interpretation in the first place across individual agreements, across agreements in similar groups and across agreements in general would be a major achievement and a major improvement on the existing system. This, of course, does not mean that differences in drafting would be obviated. Any treaty interpreter would need to be conscious of differences in drafting and take them into account when interpreting texts. Both domestic and international courts are more than capable of analysing texts and distinguishing where there are relevant differences in drafting. It should be clear that the creation of a multilateral mechanism for the resolution of investment disputes will not lead to the harmonization of substantive investment rules.

F. *Appointment of Adjudicators*

One of the key questions which will need to be determined is the manner of appointment of adjudicators. As noted previously, the move to create a permanent multilateral mechanism should be understood through a paradigm shift where treaty actors are motivated by their long term interests in the correct interpretation of the underlying treaties where they have sought a balance between their offensive (to ensure protection for their investors abroad) and defensive (as entities acting in the public interest) interests. But thought needs to be given to ensuring that this paradigm shift is sufficient to ensure the quality and effectiveness of adjudicators.

[35] See article 28 of the draft Convention (n 34).

It is vital that any system for appointment ensures that adjudicators are appropriately qualified for the tasks bestowed on them.

This will be one of the key elements of institutional design of any multilateral mechanism. It will be extremely important to ensure adjudicators are appointed who will pay careful attention to the intention of the treaty drafters.

G. *Institutional Support*

The adjudicators would also need institutional support. They would need to have support on both substantive and logistical matters. It may also be necessary to have other support; for example, in the management of the organisation and in other matters (if there are premises to be managed, etc).

There are different ways of conceiving of this element. One is to contemplate the creation of a new institution which would be established on the basis of the instrument creating the mechanism.

Another is to envisage some form of merging with existing organizations. Evidently fitting a multilateral mechanism into an existing organization would imply that account would need to be taken of the existing structure. To analyse the pros and cons of 'hosting' a multilateral investment mechanism in one of the existing organizations, the following elements would amongst others need to be analysed: (a) acquired experience in dispute resolution; (b) expertise in international investment law; (c) existing membership/voting rules and (d) public image of the organization.

H. *Costs*

Costs will evidently be a key issue. It goes without saying that one of the results of breaking the link between the arbitrator's payment and the disputing parties will be the need for states party to the mechanism to contribute to the costs of running the mechanism. This is, of course, the case for domestic public law tribunals and for international courts. A multilateral mechanism is likely to cost significantly less than the current system for the international community as a whole. Comparable international tribunals cost in the region of €10/15 million per year in total. Consideration would need also to be given to requiring users to pay some fees, although clearly this could not be linked to the salary of the specific judges hearing the case.

Careful thought would need to be given to the distribution of costs across the parties. Clearly account would need to be taken of the development status of different parties. This is a common feature of other international organizations.

I. *Adaptation over Time*

Evidently the objective of any such multilateral mechanism would be to have as broad a coverage as possible. Nevertheless, it is likely that the organization would start small and grow over time. It is worth recalling that the General Agreement on Tariffs and Trade (GATT) started with 23 contracting parties[36] and grew to

[36] Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom and the United States. General Agreement on Tariffs and Trade 1947 (30 October 1947) 55 UNTS 194.

128 at the time of entry into force of the World Trade Organization (WTO) which has in turn grown to 164 members. ICSID currently has 153 contracting states but started with 20. While the goal should be to have the broadest coverage possible, it appears advisable to allow the entry into force of the mechanism with a limited number of countries. A balance would have to be struck between permitting a relatively expeditious entry into force and having a sufficient number of countries and agreements subject to the mechanism to justify the operational expenditure which would be involved in its establishment.

This in turn will create a challenge which will be the requirement that any mechanism would be able to grow organically without formal amendment so that it would be capable of adaptation to manage the challenges raised by expanding membership or by an expanding or increasing workload (for example, in terms of geographical representativeness of judges, allocation of costs between member countries, etc).

There are examples of such mechanisms; one being the Rome Statute establishing the International Criminal Court.[37] It provides for a mechanism by which the number of judges of the Court (set initially at 18) may be increased. Article 36(2) of the Statute provides:

(a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.
(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

Similar mechanisms would need to be built into any mechanism to allow the number of adjudicators to be adjusted as a function of the workload of the mechanism.

J. *Enforcement*

Enforceability will be a key issue. The ICSID Convention provides for the enforcement of the award without review at domestic level in any country party to the ICSID Convention. Awards rendered under the New York Convention can be subject to review at domestic level.

The key reason of course that the ICSID Convention does not provide for review at domestic level is that annulment is available via the ad hoc committee. In the architecture of the ICSID Convention, the annulment procedure replaces the need for domestic review which is provided for under the New York Convention. The mechanism being sketched out in this piece would in principle include an appeal function. Such an appeal function would at a minimum cover the same grounds as Article 52 of the ICSID Convention. Hence, in terms of architecture,

[37] Rome Statute of the International Criminal Court (n 25).

it would make sense that the awards or decisions of such a mechanism should not be subject to domestic review.

Moreover, the particular system of domestic review of arbitration awards is a specific feature of arbitration. Domestic review provides a function which would otherwise be provided by the structure of domestic courts (their systems of appointment) or through the availability of appeal. It works well for commercial arbitration, since arbitration provides in principle a lighter procedure than domestic courts but is less suited to international investment law where the repeat factor of the interpretation of the relevant rules assumes an importance which is not present in commercial arbitration. A survey of international courts indicates that none of their judgements or decisions is subject to a form of domestic review before acceptance.

Important questions arise which will require further consideration as to whether such a mechanism should have its own rules on enforcement or should operate with a combination of the ICISD Convention and New York Convention rules on enforcement.[38]

K. *State to State Dispute Settlement*

An issue to consider is the approach to be taken to state-to-state dispute settlement. Most investment agreements or chapters provide for the possibility of state-to-state dispute settlement. Early treaties may contain the possibility to refer a dispute to the International Court of Justice. More recent agreements apply the full trade-based dispute settlement system to breaches of the investment protection provisions. These typically also involve ad hoc arbitration although some also provide for other forms of dispute settlement. Despite there being some examples of state-to-state dispute settlement being used such cases are nevertheless rare.

State-to-state dispute settlement cases will deal of course with the same issues of interpretation as in investor-to-state dispute settlement cases under the same agreement. Given the concerns around consistency and predictability it makes sense to apply the same mechanisms to state-to-state dispute settlement. Moreover, the permanency which the mechanism would provide will further reinforce this consistency and predictability. It will need to be considered whether this implies any modification to the structure which would otherwise be envisaged.

L. *Advisory centre for investment disputes*

The possible creation of a multilateral mechanism for investment disputes opens the way to also think about addressing other issues. One which has been discussed for some time is the possible establishment of an advisory centre to assist developed and least developed country in investment disputes and more generally

[38] For a discussion of these matters, see N Jansen Calamita, 'The (In) Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (18 JWIT 585) and August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' (2016) 19(4) J Intl Econ L 761–86. Note that the present author does not, with respect, agree entirely with conclusions in these discussions.

in investment treaty making.[39] Such an organization already exists for WTO law; the Advisory Centre for WTO Law. A question to be considered is whether such a project could be set up as part of the larger process of seeking to establish a multilateral investment dispute settlement mechanism or whether it should take a separate path.

5. CONCLUDING REMARKS

This article has sought to set out the main rationale for the establishment of a multilateral investment dispute settlement mechanism that is being explored at an incredibly rich level in academia. It is impossible to capture the richness of that debate in such a short contribution.

However, it should be obvious to any observer that throughout the world, investment dispute resolution is questioned and discussed. The debate takes different forms. Some of it is within governments, others between governments and civil society, some in academia and with policy makers and others in parliaments and even in the streets. It seems clear that the current system cannot be maintained as it is in the long term. The debate has pushed practically all countries to consider reforms of the current system and some to exit the system. However, there is a system of international investment rules characterized by more than 3323 treaties which have essentially the same features. Whilst reform on a bilateral basis is of course preferable to no reform at all it is in the interests of all and indeed logical that the reform be multilateral. This, it is submitted, is the best way forward for all stakeholders, whether they are investors or other actors since one system will be easier for all stakeholders to work from than multiple reformed systems.

The contribution of J Christopher Thomas and Harpreet K Dhillon to this collection has already explained how the authors of the ICSID had not anticipated the massive increase in investment treaties and the investment disputes that would be brought under them and so had designed the ICSID system on the basis of commercial arbitration. If that model no longer seems as apt as it once was, the central insight of Aron Broches arguably remains entirely apt; that a construction site establishing a multilateral approach on dispute settlement is more likely to be able to construct an edifice than one seeking to construct an agreed approach on substantive investment protection matters.

This contribution has sought to sketch out some of the issues which would need to be addressed in establishing a multilateral mechanism to resolve investment disputes. It does not purport to be exhaustive, or to have answers for all the questions which arise. As noted, the EU does not take the view that the approach it has developed bilaterally is necessarily the best approach to these matters in a multilateral context. Rather, the best approach multilaterally is a process which involves all parties and which permits a discussion of the rationale, the issues which need to be examined and possible solutions. This contribution hopefully provides some elements to initiate that discussion.

[39] See Anna Joubin-Bret, 'Establishing an International Advisory Centre on Investment Disputes?' in *E15Initiative* [International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 2015] <www.e15initiative.org/> accessed 30 June 2017 and Umirdinov Alisher, 'The Case for an Advisory Center on International Investment Law' Columbia FDI Perspectives, No 175 (6 June 2016).