

An Appealing Option?

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Beiträge zum Transnationalen Wirtschaftsrecht

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Christian J. Tams
An Appealing Option?
The Debate about an
ICSID Appellate Structure

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An Appealing Option? The Debate about an ICSID Appellate Structure

By

Christian J. Tams

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A. Introduction

In a considerable number of ICSID proceedings, and in particular those of recent years, the stakes are daunting. Disputes often involve claims for damages amounting to hundreds of millions, or billions, of US Dollars, and require arbitrators – typically, panels of no more than three individuals – to scrutinise crucial government decisions having important policy implications. In these circumstances, the following observation by *Eli Lauterpacht*, made in the context of international dispute settlement more generally, may be considered particularly apposite:

“A domestic lawyer [...] might be forgiven for thinking it strange that the international community, apparently so well-equipped with means of judicial settlement, appears to lack what seems to be a natural or inherent feature of national judicial systems, namely a comprehensive system of appeal.”¹

Recent debate indeed suggests that some participants in the field of international investment arbitration are no longer willing to accept the "strange" state of affairs, i.e. the lack of an appellate body competent to review investment awards. The United States' legislative branch seems particularly concerned about the matter. In the 2002 *Trade Promotion Act*, it instructed U.S. treaty negotiators "to improve mechanisms used to resolve disputes between an investor and a government through ... [the] establishment of a single appellate body to review decisions in investor-to-government disputes and thereby provide coherence to the interpretations of investment provisions in trade agreements."² Following that instruction, recent US investment treaties concluded with countries such as Chile, Uruguay or Singapore, as well as the 2004 U.S. Model B.I.T. envisage the establishment of an investment appeals tribunal to which investment disputes should be submitted. The Model B.I.T. e.g. provides in Article 28.10:

“If a separate multilateral agreement enters into force as between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to agree that such appellate body will review awards rendered under Article 34 of this Section in arbitrations commenced after the multilateral agreement enters into force as between the Parties.”³

“Within three years after the date of entry into force of the Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism.”⁴

¹ *Lauterpacht*, Aspects of the Administration of International Justice, 99.

² Section 2102(b)(3)(G)(iv).

³ USTR, Model Bilateral Investment Treaty of the United States, Article 8.3 (b) (ii), available on the internet: <http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf> (visited on 15 May 2006).

⁴ *Ibid.*, Annex D.

The ICSID Secretariat has not ignored these signals. In its October 2004 Discussion Paper entitled "Possible Improvements of the Framework for ICSID Arbitration",⁵ it noted that by 2005, "as many as 20 countries [most of them ICSID parties] may have signed treaties with provisions on an appeal mechanism for awards rendered in investor-to-State arbitrations under the treaties."⁶ More importantly, the Secretariat took an active role in guiding the discussion, showing itself prepared to "pursue the creation of [...] an ICSID Appeals Facility",⁷ and putting forward rather concrete proposals for that option in an Annex.⁸

In the light of these proposals, some commentators suggested that the creation of an appeals facility would only be a matter of time.⁹ Subsequent responses have somewhat dampened the reformist spirit. With many governments voicing concern during informal debates in late 2005 and early 2006, ICSID officials seem to have discarded any immediate plans for the creation of an appeals facility, noting that its earlier proposals had been considered by many as 'premature'.¹⁰ Be that as it may, there is little indication that calls for an appeals facility should have been taken off the agenda. From an academic point of view, the newest developments may even be beneficial, as they reduce time-pressure and allow for a more settled debate of the matter. More time indeed seems necessary, as despite heated debates between supporters and critics of an appeals facility, the precise features of such an institution have never seriously been discussed. The following questions seem particularly relevant:

- (i) Would the future appellate body be a permanent, standing institution? (and if so, who would elect its members?);
- (ii) Would it be competent to hear appeals in *all* ICSID proceedings or only in some ICSID cases brought under treaties specifically providing for a two-level structure?
- (iii) Would it have the power to decide cases on its own, or rather review and possibly remand cases to panels for decision?
- (iv) Would the appellate process be a *de novo* decision, or merely a more or less thorough scrutiny of the previous decision? In particular, would the appellate body be bound by findings of fact of the first instance panel?

The present paper will address these matters only interstitially. In the main, it seeks to contribute to the more general debate of whether there should be an appeals facility at all. To that extent, it explores various arguments advanced by supporters of the reform, and assesses obstacles to such a reform. It should be noted at the outset that it does not cover investment arbitration in its entirety, but focuses on the ICSID

⁵ Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004), available on the internet: <<http://www.worldbank.org/icsid/highlights/improve-arb.htm>> (visited on 15 May 2006).

⁶ *Ibid.*, para. 20.

⁷ *Ibid.*, para. 23.

⁸ *Ibid.*

⁹ Cf. Bishop, TDM 2/2005, 12: "Like it or not, an appellate body is on the way, and it is on the way very quickly."

¹⁰ Investment Treaty News: 'ICSID Member-Governments OK watered-down changes to arbitration process' (March 29, 2006), available on the internet: <<http://www.iisd.org/investment/itn/news.asp>> (visited on 15 May 2006). Cf. already the ICSID Working Paper 'Suggested Changes to the ICSID Rules and Regulations' (12 May 2005), available on the internet: <<http://www.worldbank.org/icsid/highlights/sug-changes.htm>>, para. 4 (visited on 15 May 2006).

system established by the Washington (ICSID) Convention,¹¹ the ICSID Rules¹² and the Additional Facility Rules¹³. While some alternatives to an ICSID appeals facility are considered, no attempt is made to explore the potential role of WTO dispute settlement bodies, or the WTO more generally, in the field of international investment law.¹⁴ Lastly, given the many uncertainties about the precise features of an eventual appeals facility, it seems necessary to take a rather broad approach to the notion of 'appeal': before moving on to specific proposals for an ICSID appeals facility, it is therefore proposed to look more broadly at current options for having ICSID awards reviewed (section B.). Subsequent sections then proceed to analyse the main arguments militating for or against the establishment of an ICSID appellate structure (sections C. and D.) and consider alternatives to such a structure (section E.).

B. Current Options for Reviewing Decisions

Before examining whether the system of investment arbitration should be modified, it is necessary to look at the *status quo*. This section therefore assesses under which circumstances awards rendered by ICSID tribunals can at present be reviewed. As will become clear, even at present, the ICSID system allows for some form of reassessing awards, but deliberately excludes an appeal for substantive errors of law or fact. By exploring both aspects, the present section seeks to prepare the stage for the subsequent discussion of reform proposals, and highlights a special feature of the ICSID system. Perhaps as importantly, it introduces the crucial distinction between awards rendered under the ICSID Convention proper ("ICSID Convention awards"), and awards governed by the ICSID Additional Facility Rules ("Additional Facility awards").

I. ICSID Convention Awards

Awards rendered under the ICSID Convention can only be attacked by the procedures provided by the Convention itself. In particular, Article 54 of the Washington Convention obliges States to treat pecuniary¹⁵ awards as if they were final judgments of the State's own courts. For the purposes of recognition and enforcement,¹⁶ the

¹¹ 575 U.N.T.S. 159; also available on the internet: <<http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>> (visited on 15 May 2006).

¹² Available on the internet: <<http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>> (visited on 15 May 2006).

¹³ Available on the internet: <<http://www.worldbank.org/icsid/facility/facility.htm>> (visited on 15 May 2006).

¹⁴ On that issue see e.g. Kurtz, University of Pennsylvania Journal of International Economic Law 23 (2002), 713-789; Sidhu, ZEuS 2004, 335-366.

¹⁵ The express reference to pecuniary obligations implies that non-pecuniary injunctions are not covered by ICSID's enhanced enforcement regime: see Toope, Mixed International Arbitration (1990), 245-246.

¹⁶ The Convention regime is less ambitious with respect to State immunity from execution: As Article 55 clarifies, Article 54 does not oblige States to enforce judgments which could not be enforced because of immunity from execution. For an explanation *cf.* the Report of the Executive Directors, 1 ICSID Reports, 32.

ICSID Convention thus excludes any outside re-assessment of awards, or possibility of *vacatur*, by national courts. Clearly, this autonomy – which many unfortunately keep referring to as the ‘self-contained nature’ of the ICSID system¹⁷ – is one of the most important features of the ICSID Convention.¹⁸ While many arbitral systems declare awards to be final, ICSID awards, seen from an outside perspective, are clearly more final than others. When the Convention was drafted, this was generally regarded as a major advantage of the ICSID system over other forms of international arbitration; to date it is considered one of the reasons for the system's success.

However, Article 54, rendering ICSID Convention awards immune against national courts interference, is only part of the picture. It is one feature of a careful compromise struck during drafting. The other main feature of that compromise is equally relevant: internally, i.e. by mechanisms set out in the Washington Convention itself, ICSID awards *can* be reviewed. Unlike many other international dispute settlement mechanisms, the ICSID system to a limited extent permits the re-assessment of awards. This is important for present purposes because – as *Eli Lauterpacht's* introductory quotation shows¹⁹ – it is not common for international dispute settlement mechanisms to have review structures at all. Typically, decisions and awards by international courts and tribunals are subject only to narrowly described forms of rectification, revision and sometimes interpretation. Even before the present debate began, ICSID was different. In addition to rectification,²⁰ revision²¹ and interpretation,²² Article 52 of the Washington Convention permits for a special annulment procedure by *ad hoc* annulment committees. Without going into detail, that provision can be characterised as a form of systemic review of awards. The scope of that review, to be performed by annulment committees, has been the subject of much discussion over the years.²³ It depends first and foremost on the text of Article 52, which lists five procedural defects for which an award can be annulled: (1) the arbitral tribunal was not properly constituted; (2) it manifestly exceeded its powers; (3) a tribunal member was corrupt; (4) there was a serious departure from a fundamental rule of procedure, or (5) the award did not state the reasons upon which it was based.

At least at first glance, this list (which includes some rather vague notions such as "manifest excess of powers") may seem impressive. But Article 52 is important both

¹⁷ See e.g. *Smutney*, TDM 2/2005, 35; *Collier/Lowe*, 70. The term is problematic because it suggests more than the ICSID system could hold. Pursuant to the Shorter Oxford Dictionary, a self-contained regime would have to be “independent of external means” (Shorter Oxford Dictionary, 1973, Vol. II, 1933 [“self-contained”]). If at all, this could be said to apply the ICSID enforcement mechanism. For all other purposes, i.e. questions of applicable law, substantive investment law, questions of jurisdiction (e.g. in cases of conflicting forum selection clauses), a brief look at any ICSID award shows that arbitrators have frequent recourse to all forms of “external means”.

¹⁸ See *Lörcher*, *Neue Verfahren der Streitbeilegung im Wirtschaftssachen*, 507; *Schreuer*, *The ICSID Convention. A Commentary*, Art. 54 MN 2-3: “Art. 54 is one of the most important provisions of the Convention. [It] is one of the distinctive features of the ICSID Convention.”

¹⁹ See *supra*, fn. 1.

²⁰ Article 49 (2) ICSID Convention.

²¹ Article 51 ICSID Convention.

²² Article 50 ICSID Convention.

²³ For the most detailed assessment see the commentary on Article 52, in: *Schreuer*, *The ICSID Convention*, and the various contributions in Gaillard/Banifatemi (eds.), *Annulment of ICSID Awards*.

for what it says and for what it does not say. While allowing for an unusual review procedure on five specific grounds, it implicitly excludes other forms of review.²⁴ In fact, clear evidence suggests that the drafters intended annulment to be an exceptional remedy and that the five grounds were to be narrowly construed.²⁵ More importantly, they were adamant to prevent Article 52 from serving as a stepping stone for a substantive appellate procedure. As Article 53 (on which more will be said below) states, ICSID awards "shall not be subject to any appeal". As a consequence, the ICSID Convention draws a clear line between 'annulment' on the hand, and 'appeal' on the other.²⁶ In terms of the applicable standards governing systemic review, this means that Article 52 is only concerned with the procedural propriety of an award rather than its correctness as a matter of substance.²⁷

It is another question whether annulment committees, when called upon to review ICSID awards, have always followed this distinction. The first annulment committees seemed to take a broad view of their powers under Article 52, and interpreted notions such as 'manifest excess of power'²⁸ or 'failure to state reasons'²⁹ in a liberal way. Faithfully proclaiming that they were no appellate institution, the committees in the first *Klöckner*³⁰ and *Amco*³¹ annulment proceedings thus effectively performed a substantive review of the initial award.³² Although the second and third generation of annulment decisions³³ was informed by a more restrictive approach,³⁴ it seems fair to say that the scope of Article 52 remains controversial and that 'annulment jurisprudence' is still far from settled.³⁵ It may simply be that Article 52, by requiring committee members to turn a blind eye on a potentially wrong decision, asks too much of

²⁴ *Arnoldt*, *Praxis des Weltbankübereinkommens*, 184; *Amadio*, *Le contentieux international*, 240.

²⁵ For details see *Arnoldt*, *Praxis des Weltbankübereinkommens*, 184 *et seq.*

²⁶ *Schreuer*, *The ICSID Convention*, Art. 52 MN 8-12 and 392.

²⁷ *Franck*, *Fordham Law Journal* 73 (2005), 1521 (1547); *van den Houtte*, *Article 52 of the Washington Convention – A Brief Introduction*, in: *Gaillard/Banifatemi*, 11 (12); *Schreuer*, *The ICSID Convention*, Art. 52 MN 11.

²⁸ Article 52(1)(b) ICSID Convention.

²⁹ Article 52(1)(e) ICSID Convention.

³⁰ 2 ICSID Reports 95.

³¹ 1 ICSID Reports 509.

³² For a detailed assessment of annulment jurisprudence see *Schreuer*, *Three Generations of ICSID Annulment Proceedings*, in: *Gaillard/Banifatemi*, 17; *Schwartz*, *Finality at What Cost?*, *ibid.*, 43. For highly critical reactions to the *Klöckner* and *Amco* annulment decisions see e.g. *Redfern*, *Arbitration International* (1989/3), 98; *Reisman*, 1989 *Duke Law Journal* 739.

³³ See e.g. the annulment decisions in *MINE* (4 ICSID Reports 79), *Amco II* and *Klöckner II* (the "second generation") and *Wena* (41 ILM 933 [2002]) and *Vivendi* (41 ILM 1135 [2002]) ("third generation"). The awards in *Amco II* and *Klöckner II* have not been published; for brief comment cf. *Schreuer*, *The ICSID Convention*, Art. 52 MN 26 and 32.

³⁴ *van den Houtte*, *Article 52 of the Washington Convention – A Brief Introduction*, in: *Gaillard/Banifatemi*, 11 (15); *Schreuer*, *Three Generations of ICSID Annulment Proceedings*, *ibid.*, 17 (18). For arbitral support see especially para. 4.04 of the award in *MINE* (last footnote), where the *ad hoc* committee observed: "Article 52(1) makes it clear that annulment is a limited remedy. [...] Annulment is not a remedy against an incorrect decision. Accordingly, an *ad hoc* committee may not in fact reverse an award on the merits under the guise of applying Article 52."

³⁵ The debate between contributors to the volume edited by *Gaillard* and *Banifatemi* (*Annulment of ICSID Awards*, Huntington 2004) testifies to this. Contrast e.g. the *Schreuer's* positive assessment of the *Wena* and *Vivendi* decisions (e.g. 18: "[T]he ICSID annulment process has found its proper balance.") with the highly critical pieces by *Schwartz* (43-86) and *Cremades* (87-95).

highly qualified lawyers. But at least at the conceptual level, the limited nature of annulment under Article 52 is of crucial importance, and the distinction between annulment and forms of substantive review needs to be maintained.

In addition, ICSID also has a second level of addressing and settling disputes about the interpretation and application of the Convention. In Article 64 (which curiously is not often mentioned in the debate), it contains a standard compromissary clause providing for inter-State dispute settlement by the International Court of Justice in The Hague. There is much authority suggesting that Article 64 must not be used to undermine awards rendered by tribunals or to introduce an appeals option through the backdoor.³⁶ Also, the provision remains yet to be used in practice. However, it is part of the ICSID system of solving disputes about the scope of the Convention, and may be more relevant than is usually acknowledged.³⁷

In short, while more final than others from an external perspective, ICSID Convention awards are subject to some form of internal, systemic review procedure, and may be brought before the ICJ for interpretation. While not providing for a comprehensive appeals system, the Washington Convention thus regulates questions of review in a very differentiated manner, striking a careful balance between the need for finality on the one hand, and the possibility of review on the other.

II. Awards not Rendered under the ICSID Convention

The situation is different with respect to awards rendered outside the ICSID Convention. Additional Facility awards are not subject to an internal annulment procedure. While this might seem to strengthen awards, there is no equivalent to Article 54 of the ICSID Convention, which means that awards are not as such enforceable; instead, enforcement must be sought from national courts.³⁸ Before granting enforcement, national courts may however be competent to perform at least some form of review. More specifically, investment awards not governed by the ICSID Convention can be attacked: (i) at the seat of arbitration in a *vacatur* application, and (ii) at a place where enforcement is sought.³⁹ *Vacatur* applications are of course subject to the local arbitration law, and thus eschew any easy classification. At the risk of oversimplification, national laws tend to circumscribe the grounds for vacating awards rather narrowly.⁴⁰ In some countries (including Switzerland, France and South Africa), awards can only be set aside if they suffer from serious procedural defaults.⁴¹ Other national laws permit a limited review of the merits of an award, often by providing for

³⁶ See e.g. the references, in: Documents Concerning the Origin and Formulation of the ICSID Convention, Vol. II (1968), 423-424, 429-430, 438-440, etc. The drafters also clarified that recourse to the ICJ would not allow parties to frustrate ICSID proceedings: see *ibid.*, 906, 940, 993, 1030.

³⁷ For further comment see *infra*, section E.

³⁸ 'Enforcement' is used here to include the recognition of the award; for a similar use of terminology see e.g. *Collier/Lowe*, The Settlement of Disputes, 265.

³⁹ For a more detailed assessment of the points made in the following see *Franck*, Fordham Law Journal 73 (2005), 1521 (1548-1557).

⁴⁰ *Schreuer*, The ICSID Convention, Article 52 MN 5.

⁴¹ See *Franck*, Fordham Law Journal 73 (2005), 1521 (1552) with references.

some form of public policy exception.⁴² However, notwithstanding occasional attempts, by national courts, to use public policy arguments in order to enter into a substantive review of awards, the general tendency is for national courts to set aside investment awards in highly exceptional circumstances only.

The same applies to rules governing the enforcement of arbitral awards that have not been set aside. Unlike ICSID Convention awards, Additional Facility awards can be attacked at the enforcement stage proper. Challenging enforcement is different from typical appellate procedures in that it is directed against enforcement, rather than against the award itself.⁴³ However, in practice, it may provide debtors with a second (or even third) chance to oppose a claim. The conditions under which such attempts might succeed depend on many factors, including the precise formulation of national laws, the legal tradition of courts, and the domestic or foreign character of the award. In most cases, however, enforcement of foreign investment awards is governed by the 1958 New York Convention.⁴⁴ Article V of that Convention lists seven bases for denying enforcement: (1) the agreement to arbitrate was not valid; (2) the losing party was denied the right to present its case; (3) the award addresses issues outside the scope of the submission to arbitration; (4) the arbitral procedure did not comply with the parties' agreement or, alternatively, the law at the place of arbitration; (5) the award has not become binding or has been set aside; (6) the subject matter of the dispute is not capable of settlement by arbitration; (7) enforcement is not compatible with public policy.

The first five of these seven grounds concern procedural matters, and clearly do not allow national courts to review the substance of Additional Facility awards;⁴⁵ rather, they are broadly similar to the grounds of annulment set out in Article 52 of the ICSID Convention. The matter is more complex with respect to the last two grounds for refusing enforcement, and in particular the public policy exception set out in Article V (2)(b) of the New York Convention.⁴⁶ Just as under national laws governing vacatur applications, some courts have relied on Article V (2)(b) in order to perform a substantive review of awards. But these attempts are few and far between, and are difficult to bring in line with the overall aim of the New York Convention, which intends to enhance the prospects for enforcement.⁴⁷ Although applications of the public policy exception will often require national courts to look into the substance of an

⁴² For references see *ibid.*, 1551.

⁴³ As a consequence, if a national court refuses to enforce an award, that refusal does not invalidate the award. Enforcement can thus be sought before other courts. See *Collier/Lowe*, *The Settlement of Disputes*, 269.

⁴⁴ 330 U.N.T.S. 38. Similar provisions are included in the Inter-American [Panama] Convention on International Commercial Arbitration, OAS Treaty Series, No. 42.

⁴⁵ See *Collier/Lowe*, *The Settlement of Disputes*, 267-270, for further details.

⁴⁶ For comment *cf.* *Toope*, *Mixed International Arbitration*, 129-138.

⁴⁷ In its Report, the New York Convention drafting committee noted that public policy exceptions could only come into play if enforcement would be "distinctly contrary to the basic principles of the legal system of the country where the award is invoked" (Report of the Committee on the Enforcement of International Arbitral Awards, 28 March 1955, UN Doc. E/2704 and E/AC.42/4/Rev.1.). For a detailed treatment of national court's approaches see the ILA Study into the application of public policy by enforcement courts, eventually leading to a Resolution adopted at the ILA's 2002 New Delhi Session, both reproduced in International Law Association (ed.), *Report of the Seventieth Conference* (London, 2002).

award, this means that enforcement should only be refused in highly exceptional circumstances.

C. Obstacles to Reform

The previous section shows that there is already under the present system some room for a review of investment awards. But it is equally clear that both annulment and national court review are a far cry from a "comprehensive system of appeal" referred to in *Eli Lauterpacht's* introductory statement.⁴⁸ ICSID (including Additional Facility) arbitration thus takes a highly differentiated approach to the question of appeals. Before assessing arguments advanced by those supporting the establishment of an appeals facility, it is worth stressing that any attempt aimed at introducing a comprehensive system of appeals, whatever its specific design, would affect this differentiated structure. In fact, there are a number of major obstacles to any reform proposal.

I. Political Feasibility

The first is a matter of political feasibility: a meaningful reform of the system would require a broad consensus among States, which – as the brief summary of debates given at the outset suggests – is not likely to emerge as a matter of course. The degree of consensus required primarily depends on the type of appeals facility envisaged.

(i) The most ambitious proposal would be to introduce a single and comprehensive appeals facility competent to re-assess all awards rendered by ICSID tribunals. For that to be the case, the proposed appeals structure would have to be established by the very ICSID constitutional rules (whether ICSID Convention or Additional Facility rules) which at present deliberately opt against appeals. The instrument establishing ICSID jurisdiction would then refer to the revised ICSID system including an appeals option.⁴⁹ However, this ambitious proposal faces the most serious problems of implementation. In the case of ICSID Convention awards, it would conflict with the Convention in its present form. Article 53 not only prescribes the binding force of the award, but also stipulates in no unclear terms that it "shall not be subject to any appeal".⁵⁰ The most straightforward way of addressing this conflict would be to amend the Convention. Pursuant to Article 66, amendments require the ratification (or other form of approval) of each of the 143 member States. That far-reaching proposals

⁴⁸ See *supra*, fn. 1.

⁴⁹ Whether parties could waive their right to appeal, thus moving back to the one-level structure typical of present investment arbitration, would be a separate question. In any event, such a decision would require the consent of both parties to the dispute, or all parties to the jurisdiction-conferring instrument. As a consequence, parties to the dispute could not be deprived of an appeals stage against their will. For the possibility of waiving the right to bring annulment applications under Article 52 of the ICSID Convention see *Jacob*, *Virginia Journal of International Law* 33 (1992), 123 (152 *et seq.*).

⁵⁰ As *Sands/Mackenzie/Shany* observe (Manual of International Courts and Tribunals, 1999, 90): "the exclusion of appeal is absolute".

should meet with a unanimous consensus however hardly seems realistic, at least in the short term.

In the case of Additional Facility awards, matters would be less complicated, as there is no equivalent to Article 53. Still, Article 52(4) of the Additional Facility Rules (Schedule C)⁵¹ declares awards to be "final and binding on the parties". While this does not amount to an explicit exclusion of appeals, it shows that the Additional Facility Rules envisage a one-level system of arbitration. To allow for a comprehensive system of appeals, they would thus have to be amended. Unlike the Convention itself, this however could be done by a majority decision of the ICSID Administrative Council⁵² – which, incidentally, is how the Additional Facility was established in the first place.⁵³

(ii) Given these majority requirements, proposals aimed at establishing a single comprehensive appeals facility might simply be over-ambitious.⁵⁴ It may thus be asked whether there are more elegant (or more realistic) ways of allowing at least some parties to appeal some awards rendered by ICSID tribunals. These more realistic proposals would give up the goal of establishing a comprehensive appeals facility, and would open an appeals option for parties that jointly decide to avail themselves of it. The easiest way to do so would be to provide for an appeals option within the instruments establishing ICSID jurisdiction (typically bilateral or multilateral investment treaties).⁵⁵ Alternatively, States could agree on a Protocol to the ICSID Convention specifically providing for appeals.⁵⁶ Legally speaking, nothing could prevent States and/or investors from so doing. As far as ICSID Additional Facility arbitration is concerned, parties of course are free to define the scope of ICSID arbitration, and could do so by establishing a second level of arbitration. With respect to ICSID Convention awards, these proposals would clearly circumvent Article 53. But this circumvention would be consented to by all parties to the dispute, as it would be based on the instrument establishing ICSID jurisdiction. In terms of general treaty law, as codified in the Vienna Convention on the Law of Treaties, the circumvention would qualify as an inter-se modification of the ICSID Convention.⁵⁷ According to Article 41(1)(b) VCLT, it would be permissible, as it is not ...

"(b) ... prohibited by the treaty and:

- i] does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

⁵¹ Available on the internet: <<http://www.worldbank.org/icsid/facility/facility.htm>> (visited on 15 May 2006).

⁵² Cf. Article 6(3) of the ICSID Convention, which also served as the basis for the very establishment of the Additional Facility Rules. For comment see *Schreuer*, Art. 6, MN 23-26.

⁵³ Cf. *Schreuer*, Art. 66, MN 6.

⁵⁴ For a similar observation see South Centre Analytical Note, Developments on Discussion for the Improvements of the Framework for ICSID Arbitration and the Participation of Developing Countries, February 2005, available on the internet: <http://www.southcentre.org/tadp_webpage/research_papers/investment_project/icsid_discpaper_feb05.doc>, para. 62 (visited on 15 May 2006).

⁵⁵ This seems to be the option envisaged under the different investment treaties referred to in the Introduction.

⁵⁶ Cf. *Bishop*, TDM 2/2005, 8 (10).

⁵⁷ ICSID Discussion Paper (note 5), Annex, para. 2.

- ii] does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."⁵⁸

Yet, while legally possible and politically more feasible, a system of appeals established under specific treaties might not be able to fulfil the hopes of those arguing for a reform of the ICSID system. This is a matter to be assessed more fully in subsequent sections of this paper,⁵⁹ but the main problem may be briefly referred to at this point already. If the appeals option depended on the provisions of investment treaties or a Protocol to the Convention, ICSID would offer a 'piecemeal appeal', open in some, but not in all disputes. If appeals structures were to be established by different investment treaties, there might eventually even be not one single, but different appeals facilities, possibly functioning according to different rules and standards. These factors in turn considerably reduce the appeal (if one may put it that way) of an appeals facility.

(iii) To sum up on this point, much depends on the type of appeals structure envisaged. Attempts to introduce a single and comprehensive appeals facility would require amendments to the ICSID Convention and the Additional Facility Rules, which are subject to cumbersome amendment procedures. In contrast, a 'piecemeal appeal system' without comprehensive competence is to be had at a much lower price, but it would have to be established on the basis of treaties or other jurisdiction-conferring instruments.

II. "Finality" (Time, Cost and Trust)

The previous considerations suggest that the road towards an investment appeals facility is likely to be rather long and winding, and involves difficult political choices.⁶⁰ But this is not the only obstacle to reform. Three further factors suggest that the ICSID system may be an unlikely candidate for an appeals discussion. Their main thrust is usually summed up in the concept of finality – leading sceptics to warn that establishing an appeals structure would endanger the finality of awards. But this concern seems somewhat misstated if portrayed as a problem of finality. Proposals for an appeals structure do not aim at attacking the finality of ICSID awards as such, but rather that of the first-level decision. The question therefore is not whether, but which of the, ICSID awards would be final within a two-tiered system of dispute settlement. Rather than as an issue of finality, the problem is better seen as a question of time, cost and trust.

(i) With respect to time, drafters were keen to establish a system that would solve disputes within a reasonable period of time. Proposals for a two-tiered system, providing for appeals proper rather than annulment, were never seriously tabled. The draft-

⁵⁸ For a clear assessment of Article 41 VCLT see the discussion by the UN International Law Commission's Study Group on the Fragmentation of International Law: UN Doc. A/CN.4/L.663/Rev.1 (2004), paras. 43-48.

⁵⁹ *Infra*, section D.I.3.

⁶⁰ See also *Sheppard/Warner*, TDM 2/2005, 3 (4): "Quite apart from the question of whether an appellate mechanism is necessary is the question of implementation. [...] The problem of introducing a universal appellate mechanism may be almost insurmountable."

ers' insistence that neither Article 52 nor Article 64 should be misused for reviewing the substance of awards⁶¹ suggests that any such proposal would have been given rather short shrift. One reason for this is that drafters were aware of the need for a speedy resolution of disputes⁶² – hence their insistence on time-limits, and provisions preventing parties from frustrating proceedings.⁶³ The reason for this is not difficult to understand. Proceedings, whether judicial or arbitral, leave legal positions in abeyance, and produce uncertainty. As a general matter, dispute settlement systems striving for efficiency should therefore seek to minimise the time spent on resolving legal and factual questions. In the case of investment arbitration, this rationale would seem to be particularly relevant.⁶⁴ Often, disputes concern important investment projects binding a relevant portion of a company's budget. By definition, investments prompting ICSID disputes also occur abroad, i.e. in a country in which the investor is not registered. Finally, as the sets of *Argentine* or *SGS* cases illustrate, parties (whether investors or States) may have entered into different contracts of a similar type, which means that one decision is likely to affect a variety of legal relations.

Given these factors, the drafters were certainly correct in stressing the need for a reasonably quick resolution of disputes. Whether investment arbitration presently meets that goal is of course a matter for debate. Even now, given the popularity of objections as to jurisdiction and admissibility, proceedings often involve two awards, each with separate rounds of pleadings, not to mention potential applications for annulment. The present system, at least in practice, thus is not ideal. This however is certainly no argument for rendering it even less ideal, as the introduction of an appeals structure would inevitably do. Whatever its design, such a structure would not reduce, but increase the amount of time lapsing before a definite decision on the merits. Of course, much depends on time-frames governing appellate proceedings, and also on the scope of review. But it is clear that the possibility of having a second-level decision would prolong the period of uncertainty characterising legal proceedings. Ultimately, this might even discourage States or investors from seeking or providing foreign investment.⁶⁵ Introducing an appeals facility thus runs counter to ICISD's object of resolving disputes quickly.

(ii) The second point is related. It is based on a simple calculation: the longer the proceedings, the more they would cost. Again, much depends on the specific features of the appeals structure, but it seems clear that litigation in a two-tier system is more expansive than with only one round of proceedings. This in itself is a potential draw-

⁶¹ See *supra*, section B.I.

⁶² See e.g. South Centre Analytical Note, Developments on Discussion for the Improvements of the Framework for ICSID Arbitration and the Participation of Developing Countries, South Centre, February 2005, available on the internet: <http://www.southcentre.org/tadp_webpage/research_papers/investment_project/icsid_discpaper_feb05.doc>, para. 59 (visited on 15 May 2006).

⁶³ Cf. e.g. Articles 45, 37(2)(b) and 38 of the ICSID Convention.

⁶⁴ See *Tawil*, TDM 2/2005, 69 (70): "[I]nvestors require quick decisions as trust is a necessary requirement to be complied for investments to be done."

⁶⁵ *Ibid.*, "If we establish proceedings that do not comply with such type of needs [i.e. a quick resolution of the dispute], investors will probably look for other venues."

back of a reform.⁶⁶ However, there is a further aspect to the matter. A more expansive litigation might place smaller participants (whether smaller companies or poor States) at a disadvantage. The point has recently been put very clearly by *Thomas Wälde*. Writing from a government's perspective, he observed:

"For a well-resourced government facing an under-resourced opponent (typically a smaller, entrepreneurial company with shallow pockets), an important strategy is simply to drain away the claimant's litigation war-chest until it is compelled to give up. Adding an appeal will reinforce the strength of such a litigation-resource based strategy."⁶⁷

The risk then is that a two-tiered system of dispute settlement would indirectly favour better-resourced participants over smaller players. As a side effect, introducing an appeals facility might therefore harm the bargaining position of some ICSID participants, and ultimately may even force some of them to refrain from pursuing their rights.

(iii) Lastly, ICSID drafters were prepared to place a considerable measure of trust in ICSID panels of arbitrators. Opting for a one-level system of dispute settlement, they were convinced that the decision, by these arbitrators, should be preserved at nearly all costs – hence the decision against any national court review and the narrow scope of annulment proceedings under Article 52. This is not to suggest that their approach was the only acceptable one. However, it is a decision that was taken in 1965, and one that can certainly be described as fundamental to the ICSID dispute settlement system. Reversing it now would not only mean a departure from the drafters' original intent. More importantly, the decision in favour of a second level of dispute settlement would also risk undermining the authority of the first level decision – i.e. the regular ICSID panels of arbitrators. If first-level decisions were regularly appealed, they might very well end up de-valued. In fact, experience with the WTO system of dispute settlement suggests that this is a risk that needs to be taken seriously.⁶⁸ Since a considerable number of decisions is appealed, with governments often announcing their decision to argue "up until the Appellate Body", at least some panel decisions seem to be little more than interim pronouncements on the long way towards a final decision.⁶⁹ The same fate of course might well befall ICSID panel awards, if a general right to appeal was recognised. In any event, that decision would show a considerable degree of distrust in the one level of dispute settlement in whose decision the Convention drafters deliberately placed great trust.

⁶⁶ Cf. South Centre paper (note 62), para. 68: "A particular challenge, for developing countries, of the appeal facility is the cost of such a proceeding", noting that unlike in investment arbitration, "[t]he expense of the Appellate Body of WTO is born by the organisation itself" (*ibid.*).

⁶⁷ *Wälde*, TDM 2/2005, 71 (74).

⁶⁸ A statistical analysis shows that between 1995 and 2000, 77% of WTO Panel Reports were appealed: see *Park*, Statistical Analysis of the WTO Dispute Settlement System (1995-2000), in: *Petersmann/Ortino*, The WTO Dispute Settlement System, 531 (541).

⁶⁹ Cf. *Waincymer*, WTO Litigation, 695.

D. Arguments for Introducing an Appeals Facility

Notwithstanding these obstacles, many call for an investment appeals facility. While majority requirements render the short-term prospects of an institutional reform of the ICSID Convention system rather bleak, the different proposals merit consideration. The present section addresses them in some detail and inquires whether the reform agenda should be pursued. More specifically, it breaks down the different calls for reform into four (inter-related) arguments, and addresses each of them in turn.

I. Consistency

The main argument supporting the establishment of an ICSID appeals facility is that such a facility could improve the consistency of international investment law. This argument is widely taken up by commentators. For example, in its discussion paper of late 2004, right at the start at the section considering an appellate structure, the ICSID Secretariat recognised that "the appeal mechanism would be intended to foster coherence and consistency in the case law"⁷⁰ (while also claiming that "[s]ignificant inconsistencies have not to date been a general feature of the jurisprudence of ICSID"⁷¹). Similarly, many commentators stress the need for an investment court of appeals uniting a seemingly fragmented body of law.⁷² The propositions underlying this 'consistency argument' are that consistency is important to investment law, and that the present system, without an appeals facility, is incapable of bringing about the required degree of consistency. The argument also assumes that the establishment of an appeals facility would remedy the problem. All three issues will be addressed in turn.

1. General Considerations on Consistency

At the general level, the case for consistency is not difficult to make. One of the functions of law is to stabilise social interaction. Agreeing on norms of general application, governing a plurality of situations, is one way of bringing about stability. However, norms also have to be interpreted and applied, especially if they are vague and openly-phrased, such as notions of 'expropriation' or 'fair and equitable treatment'. More generally, very few norms have a fixed, predetermined meaning that arbitral tribunals simply had to apply. What they are required to do is to interpret the applicable legal rules, concepts and principles. It is at this level that consistency plays an important role. In theory, it requires tribunals to interpret identical legal rules in an

⁷⁰ ICSID Discussion Paper (note 5), para. 21.

⁷¹ *Ibid.*

⁷² See e.g. *Franck*, Fordham Law Journal 73 (2005), 1521 (1617 *et seq.*); *Goldhaber*, The American Lawyer, Summer 2004 issue; *Bishop*, TDM 2/2005, 8 (10). For earlier proposals see already *Holtzmann*, A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards, in: M. Hunter et al. (eds.) The Internationalisation of International Arbitration: The LCIA Centenary Conference (1995), 111; *Schwebel*, "The Creation and Operation of an International Court of Arbitral Awards", *ibid.*, 115.

identical way. The underlying rationale may be explained as an issue of equality/fairness (i.e. similar cases should be treated similarly) or as one of predictability/reliability (parties should be in a position plausibly to evaluate their chances in arbitration).⁷³ Of course, this does not mean that tribunals were required to function like robots producing identical solutions to legal problems. Clearly, cases may be distinguished on the facts. Also, and perhaps more importantly, tribunals may be called upon to apply investment treaties that deliberately use identical concepts in an inconsistent way – one BIT may deliberately adopt a notion of “fair and equitable treatment” that differs from the one of another BIT; or one umbrella clause may be broader than another.⁷⁴ But where this is not the case, tribunals accepting the relevance of consistency should base their decision on the same interpretation of the applicable legal rules.

2. *Problems of Inconsistency under the Present System*

It remains to be seen whether the ICSID system at present achieves the required degree of consistency. A proper treatment of this matter would clearly go beyond the scope of the present contribution; therefore it will only be dealt with summarily. Three points are worth making.

(i) The first point to make is that while consistency is widely hailed as an important factor in dispute settlement, the ICSID system provides relatively few safeguards to bring it about. Like other systems of arbitration or adjudication, it does not enshrine any concept of binding precedent, or *stare decisis*. Awards are binding between the parties, but have no third-party effect.⁷⁵ Decisions of tribunals (including those by annulment committees) neither bind other litigants, nor less subsequent panels of arbitrators in a different set of proceedings.⁷⁶ Also, with the potential exception of interpretative notes under NAFTA Article 1131, there is no system of reference proceedings, such as that under Article 234 TEC, by which lower tribunals can refer abstract question to a hierarchically superior institution for (binding) interpretation. What is more (and perhaps most importantly), arbitral tribunals in different proceedings usually do not apply the *same* norms, but identically-phrased norms taken from different treaties. As has been pointed out already, this opens up a further avenue for inconsistent decisions, as, despite their identical or similar wording, these norms may have been intended by the parties to have a different meaning. Finally, in a system

⁷³ Cf. *Gill*, TDM 2/2005, 12 (13-14).

⁷⁴ See *infra*, on attempts by the SGS-Philippines tribunal to justify its deviation from previous case-law by reference to the specific formulation of the relevant umbrella clause.

⁷⁵ This is implicit in Article 53(1) ICSID Convention and Article 52(4) of the Additional Facility Rules. As *Schreuer* notes: "Nothing in the Convention's travaux préparatoires suggests that the doctrine of stare decisis should be applied to ICSID arbitration" (The ICSID Convention, Article 53 MN 15, with further references to case-law).

⁷⁶ As a matter of law, the arbitral tribunal in the *SGS-Philippines* thus was entirely correct to observe that "in the end it must be for each tribunal to exercise its competence in accordance with the applicable law [...] Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision." (Decision on Jurisdiction, available on the internet: <<http://www.investmentclaims.com/oa1.html>>, para. 97 (visited on 15 May 2006)).

based on *ad hoc* arbitral tribunals, there is no personal consistency, as different cases are decided by different panels of arbitrators.

In short, there are no “hard” mechanisms for forcing tribunals to arrive at consistent decisions. The risk of inconsistent decisions therefore is inherent in the system; it is part and parcel of a process of decentralised, non-hierarchical, and *ad hoc* dispute resolution, such as that of investment arbitration.

(ii) However, a second point seems equally relevant. The different factors mentioned in the previous paragraph are not ICSID-specific, but common features of nearly all systems of international arbitration, and to a certain extent also of international adjudication. They equally apply to inter-State arbitration (whether before the PCA or any other institution),⁷⁷ and commercial arbitration not involving States. But even standing judicial bodies such as the ICJ or ITLOS are not bound by their earlier jurisprudence,⁷⁸ and cannot apply to any higher institution for binding clarification. Of course, they would often be called upon to apply the same norms (e.g. norms of general international law, or – in the case of ITLOS – the Law of the Sea Convention), and they try to provide some form of personal consistency through long terms of office. However, the difference may be one of degree. ICJ and ITLOS benches do change, and these changes occasionally produce curiously inconsistent decisions even within different phases of one and the same case.⁷⁹ Viewed from this angle, ICSID’s lack of any hard mechanism for bringing about consistent decisions therefore is no exception. Just as other systems of dispute settlement, the ICSID system has so far sought to bring about consistency through soft mechanisms. Previous decisions have usually been regarded not as binding, but as *persuasive* precedents.⁸⁰ While arbitral tribunals are constituted *ad hoc*, for a long time the circle of potential arbitrators has been relatively small, which may have fostered a sense of belonging to the same closely-knit community, and was inimical to abrupt departures from previous decisions. These soft factors may have prevented major problems at a time when ICSID tribunals rendered an average of one to three decisions per year. But it is equally clear that the risk of inconsistency increases with the number of proceedings and awards, and the number of arbitrators involved in making decisions.

(iii) As is well-known, in a number of recent proceedings, this risk has materialised. At least in some instances, tribunals have rendered diametrically opposed or conflicting decisions, and have also openly criticised the reasoning of previous awards. As the cases are well-known, it may be sufficient to deal with them *en passant*, and to focus on the different types of inconsistency that they stand for.⁸¹

⁷⁷ For a particular prominent example *cf.* Stern’s famous comment on “Trois arbitrages, un même problème, trois solutions” (concerning the Lybia’s nationalisation of petroleum companies), *Revue de l’Arbitrage*, 1981, 1-43.

⁷⁸ *Cf.* Article 59 ICJ Statute; Article 296(2) Law of the Sea Convention.

⁷⁹ With respect to the ICJ, see notably the famous *South West Africa* case, in which the 1966 merits judgment (ICJ Reports 1966, 6) effectively reversed the 1962 judgment on preliminary objections (ICJ Reports 1962, 325). For comment see *Klein*, EPIL, Vol. IV, 491 (494-497); *Tams*, *Enforcing Obligations Erga Omnes*, 63-69.

⁸⁰ *Gill* speaks of “soft precedent[s]” (TDM 2/2005, 12 [14]).

⁸¹ For a more detailed treatment of the relevant awards see e.g. *Franck*, *Fordham Law Journal* 73 (2005), 1521 (1558 *et seq.*).

The *Lauder cases*⁸² provide a spectacular example of opposite decisions by different tribunals, concerning the same set of facts, almost identical parties, and nearly identical legal norms. In fairness, it must be admitted that they were decided by UNCITRAL tribunals. Yet, their treatment may be justified here, as the decisions concerned substantive aspects of investment law not depending on a particular arbitral framework, and as they epitomise the problem of inconsistency. In essence, the two arbitral tribunals differed on the extent to which the Czech Republic had breached its obligations vis-à-vis a US American investor, Mr. *Lauder*, and a Dutch company (CME) controlled by him. A Stockholm arbitral tribunal found that the Czech Republic had committed an expropriation in the sense of Art. 5 of the Dutch-Czech BIT⁸³ when depriving CME of exclusive rights in the television business, holding that the relevant conduct (by the Czech Media Council) "smacks of discrimination against the foreign investor."⁸⁴ Faced with essentially the same expropriation standard in the US-Czech BIT,⁸⁵ the London tribunal held that the measures in question did not amount to an expropriation, as there had been no direct interference by Czech authorities, as Mr. *Lauder's* property rights had been maintained, and as the measure did not benefit the Czech Republic.⁸⁶ Based on their respective reasoning, the Stockholm tribunal in its final award ordered the defendant to pay \$355 million to CME, while the London tribunal refused to award Mr. *Lauder* any damages. Whatever the correct result, it is beyond doubt (and is widely accepted among commentators), that the contradictory result of the two *Lauder cases* has primarily had one effect: as was aptly put by one observer, it "brings the law into disrepute, it brings arbitration into disrepute – the whole thing is highly regrettable."⁸⁷

⁸² CME Czech Republic B.V. v. Czech Republic, Partial Award of 13 September 2001 and Final Award of 14 March 2003 (the 'Stockholm Award'); *Lauder v. Czech Republic*, Final Award of 3 September 2001 (the 'London Award'). All awards are available on the internet: <<http://www.investmentclaims.com/oa1.html>> (visited on 15 May 2006). See also the subsequent decision by the Swedish Svea Court of Appeals, which decided not to vacate the Stockholm award: Judgment of 15 May 2003, available on the internet: <<http://www.investmentclaims.com/oa1.html>> (visited on 15 May 2006).

⁸³ Article 5 of the Netherlands-Czech Republic BIT provides that neither country "shall take any measures depriving, directly or indirectly, investors of [...] their investments unless the following conditions are complied with: (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory; (c) the measures are accompanied by just compensation."

⁸⁴ Stockholm Award, para. 612.

⁸⁵ Article III(1) of the US-Czech Republic BIT provides that: "Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (expropriation) except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles or treatment provided for in Article II(2)."

⁸⁶ London Award, para. 201.

⁸⁷ *Rushton*, Clifford Chance Entangled in Bitter *Lauder* Arbitrations, *Legal Bus.*, Oct. 2001, 108 (cited in *Franck*, *Fordham Law Journal* 73 [2005], 1521 [1559]). For similarly outspoken criticism see *Goldhaber*, 'Wanted: A World Investment Court' (*The American Lawyer*, Summer 2004 issue: "Czech taxpayers must think poorly of what passes for the world system of investment arbitration. [...] The *Lauder cases* dramatize the tenuous legitimacy of investment dispute resolution."

Instances like the different *SGS cases*⁸⁸ concern the conflicting interpretation, given by different ICSID tribunals, of a similar legal rule enshrined in different treaties, and applicable in similar cases between different parties.⁸⁹ The legal rules in question were versions of the much-discussed 'umbrella clauses',⁹⁰ contained in the BIT between Switzerland and Pakistan, and Switzerland and the Philippines. In different cases, ICSID tribunals had to assess whether this clause would transmute breaches of contract into treaty violations coming within the scope of the relevant BITs. In *SGS-Pakistan*, the tribunal adopted a narrow reading of the umbrella clause, which provided that host States "shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the Investors". Worried that each and every contract breach might be actionable before ICSID tribunals, it held there would have to be "clear and convincing evidence" that the State parties to the BIT intended to transform contract breaches into treaty claims.⁹¹ In contrast, the tribunal in *SGS-Philippines* stressed the broad wording of the umbrella clause, by virtue of which a host State "shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other". While it sought to distinguish the formulations of the two umbrella clauses, presumably to avoid being chided for departing from earlier awards, the *SGS-Philippines* tribunal expressly criticised the award in the Pakistan case for inventing a presumption in favour of restrictive readings of umbrella clauses.⁹² This suggests that the conflict between the two decisions cannot really be explained by the wording of the respective treaties. In essence, the two tribunals adopted different interpretations of umbrella clauses. Taken together, the *SGS* decisions thus leave States and investors with a feeling of considerable uncertainty with respect to the meaning of such clauses.⁹³ Since the umbrella clauses were contained in *different* treaties, the tribunal's contradictory approaches, on a conceptual level, are not as problematic as the two *Lauder cases*.⁹⁴ But given the number of umbrella clauses within modern BITs, the practical consequences of the decisions are considerable.

Finally, a number of NAFTA cases shows that even when applying the same treaty norm, as opposed to identically-worded provisions of different treaties, arbitral tribunals do reach different conclusions. The different decisions in the cases of *S.D.*

⁸⁸ *SGS Société Générale de Surveillance S.A. v. Pakistan*, Decision on Jurisdiction of 6 August 2003 ('*SGS-Pakistan*'); *SGS Société Générale de Surveillance S.A. v. Philippines*, Decision on Jurisdiction of 29 January 2004 ('*SGS-Philippines*'), both available on the internet: <<http://www.investmentclaims.com/oa1.html>> (visited on 15 May 2006).

⁸⁹ For a brief summary see *Gill*, TDM 2/2005, 12 (12-13).

⁹⁰ On these see e.g. *Wälde*: 'The "Umbrella" Clause on Investment Arbitration – A Comment on Original Intentions and Recent Case', 6 *Journal of World Investment & Trade* (2005), 184-236; *Sinclair*: 'The Origins of the Umbrella Clause in the International Law of Investment Protection', *Arbitration International* 2004, Vol. 20 (4), 411-434.

⁹¹ *SGS-Pakistan Award*, para. 167.

⁹² *SGS-Philippines Award*, paras. 119-127.

⁹³ For subsequent decisions on the scope of umbrella clauses see the (non-ICSID) award, in: *Eureko v. Poland*, Partial Award on Liability of 19 August 2005; and the ICSID decision in *Noble Ventures v. Romania*, Final Award of 12 October 2005, both available on the internet: <<http://www.investmentclaims.com/oa1.html>> (visited on 15 May 2006).

⁹⁴ *Crawford*, TDM 2/2005, 25.

Myers v. Canada,⁹⁵ *Metalclad v. Mexico*⁹⁶ and *Pope & Talbot v. Canada*⁹⁷ are based on remarkably different interpretations of NAFTA's "fair and equitable treatment" clause, namely Article 1105. The *Metalclad* and *Pope & Talbot* tribunals seemed to consider Article 1105 to provide companies with a positive right existing independent, and going beyond, minimum standards of customary international law.⁹⁸ In contrast, in *S.D. Myers*, the tribunal took a different approach; it held Article 1105 to be violated when "an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective", thereby making Article 1105 dependent on general international law.⁹⁹ Again, for present purposes, it is not relevant to assess which of the tribunals took the correct approach. Rather, the three awards show that even within one and the same treaty system, different arbitral awards can create a level of uncertainty that is inimical to predictable and reliable dispute settlement.¹⁰⁰

Of course, as always, there is a risk that by presenting three prominent examples, one might be taken to imply that these are the rule. It should therefore be underlined that in most cases, ICSID tribunals reach consistent decisions. Among the many examples, the various Argentine cases may be mentioned, which ICSID tribunals have so far treated in a rather uniform manner.¹⁰¹ Also, with the huge number of ICSID cases registered in recent years, some degree of inconsistency is probably inevitable. Yet, even if they are exceptional, the instances of inconsistent decisions are noteworthy. They would seem to be more than occasional aberrations occurring within any system of law. Given the popularity of ICSID proceedings, their number is unlikely to decrease in the future. What is more, inconsistent decisions are clearly visible in a system now increasingly moving towards transparency and greater public scrutiny.¹⁰² Since they will usually concern similar provisions found in different but similarly-phrased treaties, the contradiction between decisions will also be particularly evident. It remains to be seen whether the problem is a fact of life with which investors and States have to put up, or whether it could be remedied by the establishment of an appeals facility.

⁹⁵ *Myers, Inc. v. Canada*, First Partial Award of 13 December 2000 (UNCITRAL), available on the internet: <<http://www.investmentclaims.com/oa1.html>> (visited on 15 May 2006).

⁹⁶ *Metalclad Corporation v. Mexico*, Award of 30 August 2000 (ICSID), available on the internet: <<http://www.investmentclaims.com/oa1.html>> (visited on 15 May 2006).

⁹⁷ *Pope & Talbot Inc. v. Canada*, Award of 10 April 2001 (UNCITRAL), available on the internet: <<http://www.investmentclaims.com/oa1.html>> (visited on 15 May 2006).

⁹⁸ See *Franck*, *Fordham Law Journal* 73 (2005), 1521 (1578-1581) for references.

⁹⁹ *Myers Award*, para. 263.

¹⁰⁰ For an attempt to influence the matter see the interpretative note issued by the NAFTA Free Trade Commission: "Notes of Interpretation of Certain Chapter 11 Provisions" (July 31, 2001), available on the internet: <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp> (visited on 15 May 2006).

¹⁰¹ *Tawil*, TDM 2/2005, 69.

¹⁰² A point stressed by *Gill*, TDM 2/2005, 13.

3. *Could an Appellate System Remedy the Problem?*

Comparative experience, both at the national and international level, suggests that indeed, hierarchically-structured systems of judicial dispute settlement can succeed in producing a consistent line of jurisprudence, and thus reduce uncertainty. For example, the WTO Appellate Body is widely credited for having rendered dispute settlement in world trade law more reliable and predictable.¹⁰³ Within many national legal systems, authoritative pronouncement by highest courts can put an end to long-term disputes, between district or regional courts, about the proper interpretation of national laws.¹⁰⁴ It is from this experience that the consistency argument draws inspiration. Of course, at the national level, many systems rely on concepts of binding precedent or *stare decisis*, which does not seem to be an option at the international level. But international experience suggests that even decisions that do not, as a matter of law, strictly bind lower tribunals or subsequent panels of the same tribunal can exercise a considerable influence as persuasive precedents.¹⁰⁵ In the case of appellate structures, that influence is no doubt augmented by the anticipation that tribunals not following previous appellate decisions will find their own awards immediately appealed and probably overturned. And indeed, the prospect of a well-reasoned appellate investment award authoritatively determining the proper interpretation of regularly-worded umbrella clauses (to take but one example) has a lot to be said for. A body of appellate jurisprudence might indeed render investment law more predictable than it currently is. At first glance, the consistency argument thus seems persuasive.

Yet, two factors qualify this optimistic assessment.

(i) For once, an investment appellate institution would have to cope with a body of substantive investment law that is derived from general international law, but that is also contained in a plethora of international investment treaties and thus not necessarily capable of being consistently applied. The point has been touched upon already, but merits to be looked at from the perspective of what an appellate body could achieve. Even if it interpreted identical norms in an identical way, it would still have to deal with the slight and subtle differences between the different norms. While it could certainly apply one and the same treaty in a consistent way, it need not necessarily arrive at identical solutions with respect to similar norms found in different treaties (as in the example of the *SGS* cases). The point need not be overstated though. As the *SGS* decisions equally show, many investment treaties contain similarly-worded provisions, and appellate jurisprudence could at least establish a general rule as to their interpretation (without excluding different readings in exceptional cases). Yet, at least on a conceptual level, an appellate investment body would have to put up with one of the

¹⁰³ This task indeed is clearly stated in Article 3:2 DSU, which in part provides that WTO dispute settlement "serves [...] to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."

¹⁰⁴ Cf. *Gill*, TDM 2/2005, 15.

¹⁰⁵ With respect to the effects of ICJ decisions see e.g. *Bernhardt*, Commentary on Article 59 MN 45-48, in: Zimmermann/Tomuschat/Oellers-Frahm, *The Statute of the International Court of Justice. A Commentary* (2006). See also the following comment by *Judge Jennings*: "[T]he slightest acquaintance with the jurisprudence of this Court shows that Article 59 does by no manner of means exclude the force of persuasive precedent" (*Continental Shelf case* (Libyan Arab Jamahiriya/Malta), ICJ Reports 1984, 157).

most distinctive features of investment law, namely the diversity and fragmentation of its sources, and would thus be hampered in its efficacy.

(ii) In addition, it must also be stressed that not all appellate systems would be likely to render investment law more consistent. Instead, the consistency argument presupposes that the future appeals facility would be established in a particular way. Three specific features can be distinguished.

First, as a minimum requirement, there would have to be one single appeals facility.¹⁰⁶ As has been noted above, it would be relatively easy for States to agree on a right to appeal under specific treaties. It has also been shown that these treaty-specific appeals could either be handled by one single appellate structure, or by different appellate structures established under the different treaties. If States agreed on various appellate structures for different treaties (such as BITs or multilateral investment treaties), these could admittedly exercise a sane influence on investment law *under that treaty*. With respect to some, widely applicable treaties, this might already be of some advantage – for example, a NAFTA appellate investment facility might consolidate the inconsistent case-law on NAFTA standards of protection. But from an ICSID perspective, this would be rather counter-productive, as other appellate structures (for example, an appellate body established under the Energy Charter Treaty) could reach different results.¹⁰⁷ This would add, rather than reduce, uncertainty, and would further fragment dispute settlement under the ICSID system.¹⁰⁸

Second, the consistency argument depends on the comprehensiveness of the would-be appellate system. It would not be sufficient for different investment treaties to envisage recourse to one and the same single appellate institution. Rather, that appellate institution would be best suited to bring about consistency if it was competent to hear appeals in *all* investment disputes. The reason for this is that, given the decentralised character of dispute settlement, appellate decisions would first and foremost have to influence subsequent arbitral awards. On that assumption, an appellate decision determining the meaning of an umbrella clause would have good chances of being followed by subsequent tribunals if these tribunals' awards were also subject to appellate review (by the same appellate institution that had rendered the first appeals decision). The situation might be different if the subsequent first-level arbitral tribunal called upon to interpret and apply the umbrella clause would not be part of the ICSID appeals system. Of course, the first-level tribunal could still be persuaded to follow the previous appellate decision – just as presently, ICSID tribunals can of course opt to follow previous arbitral decisions. However, it seems that only the possibility of appeal would really increase the likelihood of consistent decisions. In short, in order to bring about consistency, and to modify the present situation (in which tribu-

¹⁰⁶ Cf. also *Bishop*, TDM 2/2005, 8 (10).

¹⁰⁷ The point was made very clearly by *Sheppard* and *Warner* (Editorial Note, TDM 2/2005, 3 [4]): "If appellate bodies are established on a particular rather than universal basis, this runs the risk of undermining the reasons for establishing such a system in the first place." See also *Bishop*, TDM 2/2005, 8 (10): "I would suggest that if we wind up with multiple appellate bodies, as opposed to a single appellate body, that much of the reason underlying the need for an appellate body is going to be undermined."

¹⁰⁸ See also the ICSID Discussion Paper (note 5), para. 23: "If, however, multiple appeal mechanisms are to be established, ICSID might best abstain from pursuing the creation of an Appeals Facility as it might otherwise only add to the number of appeal mechanisms."

nals *can* opt for consistency, but at times do not seem to do so), the future appellate structure would have to be comprehensive, or at least competent to hear appeals in a large majority of cases. In contrast, systems of piecemeal appeal would probably produce no more than piecemeal consistency.

Third, the consistency argument also favours a specific organisational set-up of the future appeals facility. Even if there was a single and comprehensive appellate structure, the appellate institution would probably have to be organised as standing permanent body, or at least composed of members drawn from a relatively small roster of permanent members.¹⁰⁹ Once more, the matter admittedly involves a certain degree of speculation. Yet, experience with the present ICSID dispute settlement system suggests that consistency requires a certain degree of personal and institutional continuity. The point may be illustrated by reference to annulment applications under Article 52 ICSID Convention. At present, annulment is – in the terminology used here – based on a single and comprehensive system, as all annulment applications are handled by ICSID annulment committees governed by Article 52, and as all awards are in principle subject to annulment.¹¹⁰ Still, a quick glance at cases such as *Klöckner*, *Vivendi* or *MINE* shows how differently annulment committees have interpreted their task.¹¹¹ Much suggests that this difference is largely due to the lack of personal continuity. Had there been, under Article 52, a standing annulment institution, it seems safe to predict that there would not have been such vast differences between the different generations of annulment decisions. Conversely, the relative consistency of WTO Appellate Body jurisprudence (or of ICJ or ITLOS jurisprudence, to take examples of judicial institutions typically acting as first-level courts) is in large measure due to the personal and institutional continuity of the respective bodies. The lesson to be drawn from this experience is that if indeed, ICSID appellate jurisprudence should bring about consistency, it should best be conferred upon a permanent, standing institution composed of a small number of arbitrators.¹¹²

4. *Interim Assessment*

The preceding considerations considerably affect the force of the consistency argument. Following the line of argument set out above, one might say that a plurality of appellate facilities would probably do more harm than good. A piecemeal appellate institution with non-comprehensive competence would probably do little harm, but not much good either. (Although of course much may be a question of degree: 90% appealability would be non-comprehensive in theory, but would go quite some way in

¹⁰⁹ Not surprisingly, such an approach (which clearly follows Article 17:3 of the WTO DSU) is indeed suggested in the ICSID Discussion Paper (note 5): see Annex, para 5: "Such a set of ICSID Appeals Facility Rules could provide for the establishment of an Appeals Panel composed of 15 persons elected by the Administrative Council of ICSID on the nomination of the Secretary-General of the Centre. The terms of the Panel members would be staggered. Eight of the first 15 would serve for three years; all others would be elected for six-year terms. Each member would be from a different country. They would all have to be persons of recognized authority, with demonstrated expertise in law, international investment and investment treaties."

¹¹⁰ See *supra*, section B.I.

¹¹¹ *Ibid.*

¹¹² *Legum*, Visualizing an Appellate System, TDM 2/2005, 64 (66).

fostering consistency, while 20% would not.) Lastly, in order to bring about consistency, the appeals facility would probably have to have very few members, and function on a permanent basis.

These considerations are not aimed at discarding the consistency argument altogether. As a matter of principle, it remains valid, and strongly militates in favour of reforming the present system. However, it has also been shown that in order to foster consistency, the ICSID system would have to opt for a quite particular form of appeals structure, and one that is not likely to be easily agreed on. Lastly, the fragmentation of substantive investment law means that even an appeals institution fulfilling these requirements would not solve the problem of inconsistency altogether. In short, the consistency argument is much qualified by both practical considerations and the specific features of investment law.

II. Accuracy

The hope for consistency is one argument in favour of reforming the present ICSID system. But there is a more basic promise of introducing a second level of dispute settlement. Having two levels of dispute settlement could enhance the prospects of correct decisions. Following this argument (which might be termed the ‘accuracy argument’), an investment appeals court is more likely to ‘get it right’ than ICSID panels of arbitrators.¹¹³ The point is generally applicable to all types of appeals structures. In the words of *Lord Justice Dyson*, “the more generous the scope for challenging decisions by appeal or review, the greater the chance of eliminating error”.¹¹⁴ With respect to investment arbitration, *V.V. Veeder* put the matter as follows:

"Of course, for the investor or the state, the final successful arbitration award is always an undisguised blessing. [...] But, for the unsuccessful investor, an adverse final award is obviously adversely final and the result or reasoning of the award can act as a defect of precedent for other investors facing the same issues. Thus finality may be less desirable for the investor and investment arbitration than getting the answer right."¹¹⁵

In theory, it is difficult to take issue with the proposition that arbitral tribunals should render correct decisions. It is another question whether *Lord Justice Dyson's* assertion of a simple correlation between levels of dispute settlement and the improbability of errors is equally convincing. But evidence as well as common sense suggests that generally, it holds true. The reason for this is that if two tribunals look at a dispute, on average, they are less likely than one tribunal simply to overlook relevant issues. Experience with national appeals structures also suggests that appeals judges probably have more time to dispose of a given case, which again reduces the potential for errors. Also, with the benefit of already having before it one decision, the appeals body can focus on issues dividing the parties, and has the benefit of hearing and examining additional argument by the parties. At least from a WTO perspective, in which

¹¹³ For academic treatment see notably *Knoll/Rubins*, 11 *American Review of International Arbitration* (2000), 531.

¹¹⁴ The Eversheds Lectures: Finality in Arbitration and Adjudication, 66 *Arbitration* (2000), 288.

¹¹⁵ TDM 2/2005, 6.

there have been complaints about the (lack of) expertise of some panel members, one might add that appellate institutions are likely to be composed of better-qualified lawyers, which could well render better decisions. On the basis of these general considerations, it seems fair to say that a system with two levels of dispute settlement is more likely to arrive at the right decision.

However, it is equally important to stress that the factors referred to are speculative, and do not eliminate the possibility of error.¹¹⁶ What is more, they are based on relative arguments: their strength depends on the quality of, or level of trust placed in, the single-level system of dispute settlement whose reform is being discussed. In order to evaluate the 'accuracy argument', it is thus necessary to move beyond the level of general considerations and to assess how participants rate the present system of ICSID dispute settlement.

In this respect, much suggests that despite some criticism, States and investors still place a considerable degree of trust in the ICSID dispute settlement system in its present shape. For a start, this is shown by the large, and still increasing, number of States that have ratified the Convention.¹¹⁷ Perhaps more importantly, it is also evident from the readiness of investors to bring disputes before ICSID tribunals,¹¹⁸ and that of States to recognise the jurisdiction of ICSID tribunals. Admittedly, as was pointed out in the Introduction, some States have begun to envisage two-tiered system of dispute settlement within bilateral or multilateral investment treaties, which shows their desire to modify the present system.¹¹⁹ However, the number of these investment treaties needs to be placed in perspective: compared to the overall figure of roughly 2,000 treaties with ICSID jurisdictional clauses, it is rather limited, as is the number of States that signed or ratified them. As was observed in a recent South Centre Analytical Note, the prospect of 20 States having signed or ratified such investment treaties, "does not signify the need for an appeal mechanism by the community of states"; as a consequence, the debate about an appellate system "cannot be understood as a response to a ripe and apparent demand"¹²⁰. Moving on to the results of ICSID dispute settlement, ICSID's excellent compliance record (on which more will be said below¹²¹) provides further evidence that the parties still trust the system built on one level of dispute settlement. Why this is so cannot and need not be explored here. But it does not seem far-fetched to accept that it may have to do with the generally high quality of ICSID awards, which are regularly published and subjected to debate,¹²² and which are usually taken by highly-esteemed arbitrators. These factors are not intended not suggest that everything within ICSID dispute settlement was perfect, and do not undermine the general considerations about the relative advantages of two-level sys-

¹¹⁶ For a particularly sceptical assessment cf. *Volterra*, Concluding Observations, TDM 2/2005, 77 (78).

¹¹⁷ At present, the number of ratifications is at 143, and that of signatures at 155. A list is available on the internet: <<http://www.worldbank.org/icsid/constate/c-states-en.htm>> (visited on 15 May 2006).

¹¹⁸ There are currently 103 cases pending, available on the internet: <<http://www.worldbank.org/icsid/cases/pending.htm>> (visited on 15 May 2006).

¹¹⁹ See *supra*, Introduction.

¹²⁰ South Centre Analytical Note, paras. 56 and 57 respectively.

¹²¹ *Infra*, section D.III.

¹²² *Gill*, TDM 2/2005, 12 (13).

tems of dispute settlement. However, they suggest that in the view of the parties, the present system with one level of dispute settlement can still be trusted. This in turn qualifies the relative arguments in favour of a reform.

These are further qualified when briefly recalling one of the implications of moving towards a two-level system of dispute settlement. As was noted above, this would have an impact on the length of proceedings.¹²³ Of course, the length of proceedings is an external factor, but it is directly linked to the number of dispute settlement levels. It is relevant because, as was shown above, the ICSID system of dispute settlement from the outset sought to enable parties to resolve disputes speedily. The importance of the time factor is also evident from *Lord Justice Dyson's* above-quoted statement, which continues as follows: "the more generous the scope for challenging decisions by appeal or review, the greater the chance of eliminating error. *But often at a heavy price*"¹²⁴ – namely that of prolonged proceedings. Put differently, in a comprehensive system of appeals, the better chances of eventually arriving at a correct decision are bought at the price of longer proceedings, and longer periods of uncertainty. This suggests that an appellate structure should only be established if the system based on one level of dispute settlement had become untenable.

The previous considerations suggest that there is no sustained and wide-spread desire among ICSID participants to move towards a two-tiered system of dispute settlement. Proposals for a reform thus rest on general propositions about the relative advantages of appeals structures, which cannot simply be applied to the ICSID system. With respect to investment law, it seems that the drafters' decision to place trust in a single level of arbitration, and to emphasise the need for a speedy resolution of disputes, still holds true today. As a consequence, the 'accuracy argument' provides no clear support for the establishment of a comprehensive system of appeals.

III. Authority

Even if it is not strictly called for in order to bring about consistency, or to eliminate errors, setting up an appeals facility may have other positive effects. According to some, it might increase the authority of investment awards. For example, *Audley Sheppard* and *Hugo Warner*, noting the limited legitimacy of investment arbitration, argued that "the presence of an appellate mechanism" – which they held "should be as authoritative as possible" – "may partially solve this problem".¹²⁵

Few of course would dispute that investment awards lacking authority are problematic. In this respect, the basic rationale underlying the 'authority argument' seems appealing. Still, it is another question whether the introduction of an appeals facility would truly enhance the authority of investment awards. In this respect, it is necessary to distinguish between ICSID Convention awards on the one hand, and Additional Facility awards on the other.

¹²³ *Supra*, section C.II.

¹²⁴ The Eversheds Lectures: Finality in Arbitration and Adjudication, 66 *Arbitration* (2000), 288 (emphasis added).

¹²⁵ *Sheppard/Warner*, TDM 2/2005, 3 (4).

1. ICSID Convention Awards

ICSID Convention awards could gain in authority because an appellate body rendering them might enjoy a higher degree of eminence than first-level tribunals. This would not necessarily be the case, but would not be unlikely if the appellate body was set up as a permanent institution composed of highly-respected lawyers, and if its jurisprudence over time earned the respect of the investment community. Experience with WTO law but also with national legal systems indeed suggests that standing higher-level judicial bodies over time can acquire a certain status as institutions, which in turn increases the authority of their pronouncements.¹²⁶ The same would not be unlikely to happen in investment arbitration, if one particular form of appellate institution (namely a standing body) was created. This standing appellate body could over time gain an institutional respect that ad hoc panels of arbitrators could not acquire. Seen from this perspective, the creation of an appeals facility might have a positive effect on the authority of investment awards, including awards rendered under the ICSID Convention. Just as with respect to the accuracy argument, the real question however is whether this potential would justify a major overhaul of the presently decentralised system. The answer to this question does not only depend on the reform's potential effects, but on whether it is necessary. It must therefore be asked whether at present, without an appeals facility, investment awards rendered under the ICSID Convention lack the required authority. This in turn depends on legal provisions determining the status of awards, as well as on compliance in practice.

As far as legal provisions are concerned, awards leave little to be desired. Article 53 declares them to be binding, while Article 54 equates them to decisions of highest national courts. As has been noted already, the Convention deliberately rules out any possibility of national court review; instead it provides an exceptionally strong enforcement mechanism.¹²⁷ When looking at the letter of the law, ICSID Convention awards thus could hardly be more authoritative than they already are at present.

Ultimately, however, an award's authority depends on whether it is complied with in practice. In this respect, investment awards also perform rather well. Of course, States have often expressed dismay when required to pay large sums of damages; some have also voiced concern of a more general nature, and have threatened to leave the system of investment law altogether.¹²⁸ These warnings should not be ignored. But they also have to be put in perspective. From a broader angle, it seems that States' criticism of the system has remained exceptional, and has not been followed up by concrete actions. Certainly when compared to other forms of international dispute settlement, compliance with investment awards remains largely unproblematic, despite the high stakes involved. Paraphrasing a famous dictum about compliance with international law generally, it seems fair to say that 'almost all States comply with al-

¹²⁶ See already *supra*, section D.I.4.

¹²⁷ *Supra*, section B.I.

¹²⁸ See notably Argentina's threats to re-admit a review of ICSID awards by national courts, and to re-introduce the Calvo and Drago clauses: cf. *Alfaro*, OGEI, Vol. 2 Issue 4 (October 2004), available on the internet: <<http://www.gasandoil.com/ogel>> (visited on 15 May 2006) (visited on 15 May 2006).

most all investment awards almost all the time'.¹²⁹ In fact, notwithstanding a few problematic cases of enforcement,¹³⁰ all ICSID Convention award have so far been complied with; there is thus no investment law equivalent to famous inter-State instances of non-compliance such as the ICJ *Nicaragua* decision.¹³¹ Also, investment awards have usually¹³² been complied with promptly. Again, compared to other international bodies' track record, there is no equivalent to the decades it took Albania to accept the ICJ's *Corfu Channel* decision,¹³³ or Turkey's year-long refusal to pay Mrs. *Loizidou*.¹³⁴

The preceding paragraph should not be taken as a plea for complacency. Of course, even systems with good compliance records can break down, and lose their authority. What is important to note is that despite repeated warnings, and notwithstanding the high stakes involved, the ICSID system *is* a system with a good compliance record. Legally, the Washington Convention imbues awards with a high degree of authority. In practice, States have complied with awards. On that basis, it does not seem necessary to introduce an appeals system in order to increase the authority of ICSID Convention awards.

2. *Additional Facility Awards*

As far as Additional Facility awards are concerned, the different considerations set out in the last section equally apply. In particular, it is worth pointing out that despite the possibility of national court review, Additional Facility awards also have a good compliance record so far. Still, the aftermath of the *Metalclad* award¹³⁵ shows the potential for conflict. Figuratively speaking, the British Columbia Supreme Court decision¹³⁶ may have been a shot over the bow, signalling national courts' unwillingness simply to accept investment awards at face value. Of course, *Metalclad* itself was controversial, and it is worth pointing out that the shot largely went over the bow rather than hitting the ship. However, the proceedings show that investment awards rendered outside the ICSID Convention are vulnerable, and do not enjoy the protection, or authority, which Arts. 53-54 confer upon Convention awards.

According to some, the establishment of an appeals mechanism might provide an opportunity to remedy this problem. In the words of *Daniel Price*, "if we are going to have an appellate mechanism then it [...] has to displace completely the role of national courts presently exercised under the New York convention".¹³⁷ In other words,

¹²⁹ Cf. *Henkin*, *How Nations Behave*, 47: Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."

¹³⁰ Namely the *Benvenuti*, *SOABI*, and *LETSCO* cases. On compliance in the former two see the information provided in *Schreuer*, *The ICSID Convention*, Article 54, MN 50-60.

¹³¹ ICJ Reports 1986, 14.

¹³² For exceptions, see notably the cases referred to in the second-last footnote.

¹³³ ICJ Reports 1949, 4.

¹³⁴ The various awards in the case are available on the internet: <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=loizidou&sessionid=6636633&skin=hudoc-en>> (visited on 15 May 2006).

¹³⁵ *Supra*, fn. 96.

¹³⁶ Decision of 2 May 2001, [2001] SCBC 664, available on the internet: <<http://www.investmentclaims.com/oa1.html>> (visited on 15 May 2006).

¹³⁷ *Price*, TDM 2/2005, 47 (48), similarly *Legum*, *ibid.*, 64.

Additional Facility appellate awards would be as immune from national court review as ICSID Convention awards. It is not quite clear how that proposal should be implemented – probably best by including a waiver clause in the relevant jurisdiction-conferring instruments. But it is clear that it would enhance the status of investment arbitration and remedy one of the weaknesses of Additional Facility awards compared to awards rendered under the ICSID Convention. In that respect, one might indeed be tempted to say that the creation of an appeals facility could increase the authority of investment awards rendered outside the ICSID Convention. However, it should also be pointed out that this would not be an automatic consequence, but depend on the willingness of States to take the extra step of “elevating” Additional Facility awards, as far as their immunity from national court review is concerned, to the level of ICSID Convention decisions. Whether States are willing to take that step, and whether they would be willing to do so in each and every treaty envisaging an appellate investment decision, is another matter.

3. *Interim Assessment*

To sum up, the ‘authority argument’ provides limited support for the establishment of an ICSID appeals facility. A permanent investment appellate institution, possibly modelled along the lines of the WTO Appellate Body, might gain an institutional prestige increasing the authority of its decisions. With respect to Additional Facility awards, States might also be willing to sacrifice national court review of such appellate awards. Both factors are speculative though: States need not necessarily recognise the higher status of appeals decisions, and institutional prestige is not gained lightly. In any event, investment appeals in practice do not really suffer from serious problems of authority, as compliance with them is very good. Also, at least with respect to awards rendered under the ICSID Convention, it is difficult to imagine how awards, as a matter of law, could be more authoritative. Lastly, one should not forget one potential drawback of appeals systems, which may be seen as the ‘authority argument’ turned on its head. As has been noted, while potentially increasing the authority of some decisions, a move towards a two-tiered system of dispute settlement risks undermining the authority of the first level decision.¹³⁸ Even if a two-level process of dispute settlement eventually produced decisions that were more authoritative than the ones presently rendered, this increase in authority would have to be measured against a loss of authority of the first level awards. On balance, therefore, the ‘authority argument’ provides only rather ambiguous support for the creation of an ICSID appellate structure.

IV. Investor Bias

Authority, accuracy and consistency are factors that do not depend on a specific result reached in an award. Depending on the applicable law, and the specific facts of a case, it may be accurate for a tribunal to decide in favour of an investor, or in favour

¹³⁸ Section C.II.

of a State; depending on previous jurisprudence, either decision may be consistent or not; finally, depending on the legal regime governing enforcement and the persuasiveness of the tribunal's reasoning, the decision may be authoritative or not. The last argument to be examined is not as neutral as the preceding three arguments. It is the suggestion that by setting up an appeals mechanism, States could influence the results of investment arbitration in their favour, and thus correct what is perceived to be an "investor bias" allegedly informing some ICSID decisions. Clearly, there is no guarantee that a second level instance should favour host States interests over investor interests. However, it might if – following the model of the WTO Appellate Body – its members were to be elected by States, and if States selected members likely to pay particular regard to State concerns.

For obvious reasons, the 'investor bias argument' is hardly ever put in express terms; yet it may be one of the decisive factors prompting States to argue in favour of ICSID reform.¹³⁹ With respect to the most ardent supporter of these reform proposals, United States decision-makers (politicians as well as judges) seem to have realised with a certain horror that arbitral awards need not necessarily go in favour of the United States, and may be difficult to challenge before national courts. While that prospect may be shocking, it is clear that it could not in itself justify the establishment of an ICSID appeals facility. Three levels of counter-argument can be distinguished.

First it would require detailed analysis whether ICSID tribunals really suffer from what might be called an 'investor bias'. To be sure, some controversial decisions favouring investors might have equally been decided in favour of the respective host States. Perhaps more importantly, recent jurisprudence has broadened crucial concepts of investment law, such as expropriation or related notions, and has opened up the ICSID system to new types of claimants – such as minority shareholders, bond debtors and may be even companies invoking jurisdictional effects of MFN clauses. But it would be wrong to summarise ICSID jurisprudence as a series of controversial victories of investors over host States – certainly the lawyers representing Generation Ukraine, the Plama Consortium or Joy Mining would not go along with this.¹⁴⁰ Furthermore, even decisions favouring investors need not necessarily suffer from an investor bias. They could also be the consequence of a proper application of investment law, which might simply adopt a relatively broad understanding of expropriation, or permit minority shareholders claims under more liberal circumstances than general international law.

Second, assuming that ICSID tribunals indeed unduly favoured investors, there would undoubtedly be more efficient ways for States to address this problem. As has been noted already, most of the recent decisions have been rendered on the basis of inter-State BITs. If States were unconvinced by ICSID tribunals' interpretation and

¹³⁹ Cf. the observation by *Blackaby*: "If [...] developing countries are going to buy into the process [of investment arbitration], we must give them a process which is internally consistent and which is politically acceptable to them back home" (TDM 2/2005, 16 [20]). The NAFTA Free Trade Commission's Interpretative Note on Article 1105 (referred to *supra* in fn. 100) represents another example of how States might wish to reign in arbitral tribunals.

¹⁴⁰ Cf. *Generation Ukraine, Inc. v. Ukraine*, Award of 16 December 2003; *Plama Consortium Limited v. Bulgaria*, Decision on Jurisdiction of 8 February 2005; *Joy Mining Machinery v. Egypt*, Decision on Jurisdiction of 30 July 2004, all available on the internet: <<http://www.investmentclaims.com/oal.html>> (visited on 15 May 2006).

application of BIT provisions, they might either renegotiate these treaties or agree on a commonly acceptable interpretation. In the case of NAFTA, Article 1131 formalises this latter possibility; however, it exists in all cases as a matter of general treaty law.¹⁴¹ As far as future treaties are concerned, States of course remain free to agree on different standards of protection, or deliberately to move away from interpretations adopted by tribunals. In any event, States are not forced simply to cope with controversial investment awards, but can respond in a variety of ways. Setting up an ICSID appeals facility therefore would seem to be a rather curious way of seeking to influence the outcome of investment litigation.

Third, if States nevertheless were to take that course, their conduct could jeopardise the equality of parties before ICSID tribunals.¹⁴² As was stated at the outset, the investor bias argument seems to imply an appeals facility modelled on the WTO Appellate Body. While WTO experience can certainly provide helpful guidance in many respects, one crucial difference ought always to be remembered.¹⁴³ Unlike in the case of WTO law, investment proceedings oppose States and investors. If States set up an appeals facility, and appointed its members by themselves, this crucial difference would be ignored. If at all, it is clear that for reasons of equality of parties, the members of an ICSID appeals facility would have to be appointed by States *and* investors. Any attempt, by States, to influence the outcome of proceedings through the establishment of an appeals facility "*à la OMC*" would have to be seen as an attempt to bend the constitutional set-up of investment arbitration in their favour.

For these reasons, the establishment of an appeals facility should certainly not be used, and cannot be justified, as a way of correcting an alleged investor bias of ICSID tribunals.

V. Interim Conclusions

The preceding sections have examined a rather heterogeneous range of arguments put forward to support the establishment of an ICSID appeals facility. They have shown that a reasonably good case for introducing an appeals structure can be made. Primarily, this case rests on what has been labelled the 'consistency argument', i.e. the hope that an appeals facility would render investment law more coherent, and would put an end to the worrying series of inconsistent decisions by ICSID and other investment tribunals. In addition, the establishment of an appeals facility could also improve the quality of decisions; however, this is speculative and would have to be balanced against the certain prolongation of proceedings. Incidentally, the creation of an appeals facility might also increase the authority or legitimacy of investment awards (as claimed by the 'authority argument', or even, in the long run, strengthen the posi-

¹⁴¹ Cf. Article 31 (3) VCLT: "[When interpreting a treaty], [t]here shall be taken into account [...]: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."

¹⁴² For a similar observation see *Wälde*: "The first [risk the proposed reform] is that an appeals facility will further enhance the procedural disequilibrium investors already face" (DM 2/2005, 71 [74]).

¹⁴³ At a more general level, *Sheppard/Warner* also argue that "the circumstances and priorities in trade disputes may differ significantly from those in investment disputes, a fact which casts doubt over the applicability of this model" (TDM 2/2005, 3 [4-5]).

tion of States vis-à-vis investors (the main hope of those putting forward the ‘investor bias argument’). Yet, if anything, these would be incidental developments, which are difficult to predict. Seen on their own, neither of the two arguments thereby alluded to provides real support for the creation of an appeals facility.

Whether this mixed record is sufficient to overcome the various drawbacks of a reform may be a matter of perspective – depending on which the glass may be considered half-full or half-empty. As has been shown, the drawbacks of a reform (some certain, some speculative) weigh rather heavily: not so much because of abstract concepts such as finality, but because the possibility of appeals would make investment proceedings more expensive, would prolong the period of uncertainty between the application and the eventual decisions and could de-value the authority of first-level awards. Perhaps most importantly, anyone considering the opposing arguments should bear in mind that in order to achieve the desired results, one would have to opt for a specific form of appeals facility: for the various reasons explored above, a meaningful reform of the system would have to seek to establish a single permanent institution with comprehensive competence. In contrast, treaty-specific appeals jurisdictions, possibly even organised in *multiple fora*, would probably (at least from an ICSID institutional point of view) increase rather than alleviate problems.

In the light of these considerations, the better arguments suggest that the glass is half-empty. The case for establishing an appeals facility is certainly not compelling. Given the difficulties of a reform, and the range of ensuing consequential problems which the present paper has not even touched upon, one should probably not risk paralysing a still-functioning system by seriously engaging in a far-reaching institutional reform. On balance, the benefits seem too speculative, the institutional costs too high, and the chances of success too slim. The cautious approach thus advocated may of course be equally dangerous. After all, many systems break down not because of over-ambitious reforms gone awry, but because of postponing reforms until it was too late. The subsequent section of this paper therefore assesses a number of modest proposals which could be seen as alternatives to the establishment of an appeals facility.

E. Alternatives to an Appeals Facility

Even among those arguing against the establishment of an appeals facility do not usually dispute the need for some type of reform of the ICSID dispute settlement system: the debate is about the possible cure, while most agree on the patient’s symptoms. As the previous discussion suggests, the most problematic symptom is that of inconsistent awards. Accordingly, many put forward alternatives to an appellate system, which aim at enhancing the coherence of dispute settlement. Of these, the most obvious is the suggestion that tribunals simply seek to avoid outright contradictions in their respective reasoning, or that they explain contradictory approaches with reference to the specificities of the case before them. These proposals need to be taken seriously. Experience with inter-State dispute settlement suggests that a professional debate about the risks of fragmenting international law through inconsistent decisions does exercise a moderating influence on tribunals; it forces them to take the problem

seriously, and might prompt them to avoid unnecessary conflict.¹⁴⁴ Based on that experience, one might hope that “transparency, publication and informed and professional peer discussion”¹⁴⁵ would reduce the number of inconsistent investment awards. In that respect, the on-going discussion, among ICSID officials, ICSID clients, arbitrators, counsel and academics, about the coherence of investment law may have a sane influence on future ICSID panels.¹⁴⁶ This in particular because the current reform debate suggests that there is at least some movement towards a greater transparency within ICSID proceedings. In spring 2006, ICSID member States notably strengthened the provisions on publishing awards and modified the ICSID regulations to officially recognise the possibility of NGO *amicus curiae* briefs,¹⁴⁷ which tribunals had begun to admit in 2005.¹⁴⁸ While these modifications have been characterised as a “watered down” version of the initial proposals (which had e.g. envisaged a right of tribunals to open hearings to the public),¹⁴⁹ they show that the ICSID dispute settlement system has taken considerable steps away from the confidentiality and privacy characterising traditional commercial arbitration.¹⁵⁰ This greater transparency in turn is a prerequisite for a rigorous debate about strength and weaknesses of awards, which could contribute to “the development of a common legal opinion of *jurisprudence constante*, to resolve the difficult legal questions [dividing different arbitral tribunals]”.¹⁵¹

But of course, such a plea for “conflict avoidance” is by no means the only cure that is being suggested. The various proposals cannot be assessed comprehensively. But three particularly important suggestions will be considered, if only very briefly:

- an expansion of Article 52 (eventually turning annulment into a form of ‘appeals “light”’),
- the formal or informal consolidating cases, and
- the possibility of reference procedures aimed at clarifying controversial points of law.

¹⁴⁴ For example, it is interesting that since the beginning of the debate triggered by the ‘*Tadic-Nicaragua* conflict’ (with the ICTY openly criticizing the ICJ Nicaragua judgment), there do not seem to have been any further instances of serious conflicts between different international tribunals.

¹⁴⁵ *Wälde*, TDM 2/2005, 71 (77).

¹⁴⁶ *Ibid.*; similarly *Gill*, TDM 2/2005, 12 (13).

¹⁴⁷ The revised regulations are available on the internet: <<http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>> (ICSID Rules) and <<http://www.worldbank.org/icsid/facility/facility.htm>> (Additional Facility Rules) (visited on 15 May 2006).

¹⁴⁸ See *Aguas Argentinas et al v. Argentina*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, available on the internet: <<http://www.investmentclaims.com/oa1.html>> (visited on 15 May 2006).

¹⁴⁹ See e.g. *Vis-Dunbar/Peterson*, Investment Treaty News (ITN), March 29, 2006, 6-8, available on the internet: <<http://www.iisd.org/investment/itn/archive.asp>> (visited on 15 May 2006).

¹⁵⁰ For much more on the tension between confidentiality and privacy on the one hand, and demands for public scrutiny on the other, see *Mistelis*, in: Weiler (ed.), *International Investment Law and Arbitration*, 169; for a broader perspective on the role of transparency cf. *Zöllner*, 27 *Michigan Journal of International Law* (2006).

¹⁵¹ Cf. *SGS-Philippines Award*, para. 97.

I. A Broader Role for Annulment Committees

As was noted at the outset, ICSID may have been an unlikely candidate for an appeals discussion, as even before the present debate began; it already had a systemic review procedure. Not surprisingly, one alternative to appeals could be simply to provide for a broader role of annulment committees.¹⁵² But for at least four reasons, this hardly seems a convincing alternative. To begin with a minor issue, it would only cover ICSID Convention awards, but not Additional Facility awards not subject to annulment.¹⁵³ More importantly, depending on how the alternative would be implemented, it would either be as cumbersome as introducing an appeals facility or would amount to an abuse of the annulment procedure. Assuming that annulment committees would be granted more powers expressly, this would require an amendment to the ICSID Convention. Formally, this amendment faces the same hurdles as proposals for a aimed at establishing an appeals facility. Pursuant to Article 66, it would have to be ratified or approved by each and every of the 143 ICSID member States. Of course, the requirement of Article 143 is not insurmountable. However, it hardly seems likely that a reform of Article 52 should succeed where an appeals reform would fail: after all, the annulment provisions are among the most controversial of the Convention as a whole, and nearly all annulment decisions have been controversially received.¹⁵⁴

Perhaps the cumbersome amendment procedure set out in Article 66 could be avoided if annulment committees simply decided to interpret their powers in an expansive way. Experience suggests that this indeed may happen,¹⁵⁵ and may turn annulment into a ‘quasi-appeal’. Experience however also suggests that this would not be a wise course to embark on. Quite to the contrary, it would be more likely to open up a divisive confrontation within the ICSID dispute system and might again nourish concerns about the “Breakdown of the Control Mechanism in ICSID Arbitration”.¹⁵⁶ What is more, it bears repeating that such a broad re-reading would simply run counter to the wording and spirit of Article 52, and would confuse the distinction between annulment and appeal, which the Convention’s drafters were at great pains to maintain. In short, either way, whether expressly or by tacit re-interpretation, a reform of Article 52 seems to create more problems than it would solve.

Lastly, it is not even likely that a reform of Article 52 would remedy the problem of inconsistency. Whatever their scope of review, annulment committees would operate on an *ad hoc* basis, and could not develop any institutional role, status, or approach. The point has already been made with respect to the shape of a potential appellate institution, but bears repeating here: *ad hoc* tribunals without personal or insti-

¹⁵² See the South Centre Analytical Note (note 62), para. 55 (referring to annulment as a form of already existing “quasi-appeal”). Similarly *Wälde*, TDM 2/2005, 71 (72): “The logical and it seems simplest response is to develop the ICSID annulment committee procedure into an appellate facility.”

¹⁵³ *Cf. supra*, section B.II.

¹⁵⁴ See *supra*, section B.II. for a brief summary.

¹⁵⁵ *Cf.* the ICSID first generation of ICSID annulment decisions (which were really appeals under the guise of Article 52), and *supra*, section B.II.

¹⁵⁶ *Cf.* the title of *Reisman*’s critical comment on the *Klöckner I* and *Amco I* decisions: Duke Law Journal 1989, 739.

tutional continuity, possibly engaged in controversies about the scope of their mandate, are not likely to produce a body of consistent jurisprudence. Since their task is limited to annulling or upholding one specific award, their pronouncements would not necessarily enjoy more authority than other, first-instance awards. In short, expanding (or expansively construing) Article 52 does not seem a viable alternative to the establishment of an investment appeals facility.

II. Consolidating Cases

As noted above, inconsistent decisions may simply be a consequence of decentralised, ad hoc dispute settlement by different panels of arbitrators. Clearly, then, the massive growth in the number of proceedings (and consequently, of panels and panel-lists) greatly increases the risk of conflicting decisions. One pragmatic way of addressing this issue is to consolidate cases, either formally or by appointing the same panel-lists. The underlying rationale is simple: formal consolidation reduces the number of decisions rendered, while informal consolidation effectively rules out conflicting interpretations of legal rules.

Both approaches indeed can be, and have been, adopted. Unfortunately, neither the ICSID Convention nor the Rules contain provisions for the consolidation of parallel proceedings.¹⁵⁷ In contrast, a number of investment treaties, most importantly Article 1126 NAFTA, make express provision for the consolidation in case of arbitral claims arising from "the same State measure".¹⁵⁸ But even in the absence of such a provision parties remain free to consolidate disputes by agreeing to appear as parties in the same interest. Alternatively, they can also do so in an informal way, by agreeing to nominate the same arbitrators – which is what happened in some of the recent proceedings concerning the Argentine's privatisation of the gas industry.¹⁵⁹

When considering alternatives to an appeals facility, both approaches have a number of obvious drawbacks. Consolidation (whether formal or informal) only works if two or more legal proceedings concern the same subject-matter.¹⁶⁰ Focusing on the examples of inconsistent decisions referred to above, it would not have worked in the different SGS cases or the NAFTA proceedings on 'fair and equitable treatment', as these did not arise from the same State measure. While this may sound discouraging, pragmatically, consolidation has quite a lot to be said for. If the conditions are met, formal or informal consolidation provides very effective remedies against inconsistent decisions. As a rule, consolidated proceedings would also be likely to save money and time. Furthermore, consolidation is possible without a reform of the sys-

¹⁵⁷ Lew, in: Horn (ed.), *Arbitrating Foreign Investment Disputes*, 281. For a much more detailed treatment of consolidation see *Crivellaro*, 4 LPICT (2005), 371.

¹⁵⁸ See *Crivellaro* (last footnote), 371 (401-410).

¹⁵⁹ Namely *Camuzzi International S.A. v. Argentine Republic*, Case No. ARB/01/3, and *Sempra Energy International v. Argentine Republic*, Case No. ARB/02/16. In both cases, the tribunal was composed of *Francisco Orrego Vicuna*, *Marc Lalonde* and *Sandra Morelli Rico*. The concurrent decisions on objections to jurisdiction are available on the internet: <<http://www.worldbank.org/icsid/cases/awards.htm>> (visited on 15 May 2006). For brief information on other informally consolidated cases see *Blackaby*, TDM 2/2005, 16 (18-19).

¹⁶⁰ For an interpretation of what is meant by the general requirement of "same subject-matter" see *Crivellaro*, 4 LPICT (2005), 371 (394 *et seq.*).

tem. It is an option already available, and merely requires a decision to have joint proceedings. Especially where defendants face waves of ICSID claims brought by companies complaining against one and the same State measure (just as with respect to the Argentine crisis), consolidation thus seems a helpful alternative.¹⁶¹

It is another question whether there should be a provision for the mandatory (formal) consolidation of cases. This indeed has been suggested by some.¹⁶² Of course, rules on mandatory consolidation would remove the need for an agreement between the parties. But it may be too early for such an initiative, which again would require an amendment of the ICSID Convention or Rules. Still, instead of pushing for a reform, the ICSID Secretariat could of course continue its efforts to encourage the formal and informal consolidation of proceedings. The various Argentine proceedings, with the sets of parallel proceedings, might render consolidation more popular among States and investors. For present purposes, consolidation can clearly be qualified as a good (and already existing) alternative to the creation of an appeals facility. It is unlikely to solve the problem of inconsistent decisions altogether, but may reduce it.

III. Reference Procedures

By the same token, it may be helpful to make use of, or introduce, reference procedures on controversial points of law. In this respect, two different models can be distinguished.

1. *References to the International Court of Justice*

First, decisions in inter-State cases, by the United Nations “principal judicial organ”¹⁶³, the International Court of Justice (ICJ), could have a unifying effect on investment law. Just as the consolidating cases, turning to the ICJ has obvious drawbacks, but also offers some distinct advantages. The way to the Court is opened by Article 64 of the ICSID Convention, which has been briefly mentioned already.¹⁶⁴ As has also been stated, the drafting history clearly shows that Article 64 was not to be used as a form of appeals option.¹⁶⁵ This in fact follows from the formulation of the provision, which establishes the Court’s competence only for disputes „concerning the interpretation or application of this Convention“. Since no State has so far been brought an ICSID case to the ICJ, the scope of the compromissary clause has yet to be seriously tested. Still, it seems safe to say that Article 64 significantly restricts the types of cases that could be submitted for adjudication. Since it is not intended to allow for appeals from ICSID awards, the disputes in question would have to be formulated in a rather general way. According to Article 34 of the ICJ Statute, they would be disputes between two States, and thus go back to the precise pattern of in-

¹⁶¹ See also *Blackaby*, TDM 2/2005, 16 (19), and the brief observation by *Wälde*, TDM 2/2005, 71 (76).

¹⁶² Cf. *Blackaby* and *Wälde* (last footnote).

¹⁶³ Cf. Art. 92 UN Charter.

¹⁶⁴ See *supra*, section B.I.

¹⁶⁵ *Ibid.*

ter-State dispute settlement that the ICSID Convention was intended to overcome. Perhaps more importantly, it would require creative legal argument to present disputes about specific investment treaties (such as the precise interpretation of BIT standards) as “ICSID disputes” coming within the ICJ’s jurisdiction under Article 64 of the ICSID Convention. Lastly, ICJ decisions, by virtue of Article 59 ICJ Statute, would formally only be binding between the parties and in the particular dispute submitted.

Given these factors, recourse to the ICJ under Article 64 ICSID Convention clearly is no proper substitute for an appeals system, no more than consolidating cases would be. Yet, just as consolidation, recourse to the Court could play a highly helpful (if limited) role in the process of rendering investment law more coherent.¹⁶⁶ The main reason supporting some form of ICJ involvement is that decisions of the Court are more likely to be generally accepted than decisions by three member ad hoc tribunals or committees. Of course, this prediction is based on a certain degree of speculation, since subsequent ICSID tribunals would not be bound by ICJ decisions. Yet, for a number of reasons it seems likely that they would prefer to follow rather than disavow a decision of the “World Court”. The Court is a venerable institution composed of 15 permanent members representing “the main forms of civilization and the principal legal systems of the world.”¹⁶⁷ Building on the work of its predecessor, the Permanent Court of International Justice, it has earned a considerable prestige over time, as the recent celebration of its 60th anniversary once more made clear.¹⁶⁸ In terms of investment law more specifically, that special status is reflected first and foremost in the frequent references, in ICSID awards, to ICJ judgments,¹⁶⁹ but also in the broad acceptance of important ICJ decisions on issues such as diplomatic protection or the nationality of corporations. Contrary to *ad hoc* arbitral bodies, the Court thus possesses a considerable institutional authority, which would imbue its pronouncements on investment law matters with a considerable authority. What is more, members of the Court are jurists of the highest international reputation, and, as a rule, they are widely respected members of the international bar. Both factors suggest that a decision by the Court would not be departed from lightly.

Moving beyond prestige, the specific features of ICJ proceedings might further increase the authority of ICJ judgments in the field of investment law. Compared to proceedings before arbitral bodies, ICJ proceedings are characterised by a high degree of formality, but also by their relative length.¹⁷⁰ The latter fact clearly makes the ICJ unsuitable to get involved in investment dispute settlement on a regular basis. However, for matters of particular importance, ICJ procedure may be very appropriate: it would ensure that counsel have ample time to present their views, while judges would

¹⁶⁶ See also *Coe*, 36 Vanderbilt Journal of Transnational Law (2003) 1381 (1451).

¹⁶⁷ Cf. Article 9 ICJ Statute.

¹⁶⁸ For the record of these proceedings see the information available on the internet: <<http://www.icj-cij.org>> (visited on 15 May 2006).

¹⁶⁹ A particularly prominent example is the jurisdictional award in *CMS*, which extensively discusses the ICJ’s *Gabcikovo Nagymaros case*, and also refers to the *Nicaragua* and *ELSI cases*: *CMS Gas Transmission Company v. Argentina*, Decision on Jurisdiction of 17 July 2003, paras. 309, 313, 330, 339, 371, 372.

¹⁷⁰ In the words of *Rosenne*, the atmosphere of proceedings is “solemn” and “subdued” (The Law and Practice of the International Court of Justice, 1332).

go through the elaborate process of ICJ decision-making before pronouncing on the crucial legal issue. Again, this certainly does not guarantee that the eventual decision would be correct and would put an end to the preceding debates between different investment tribunals. However, the least that can be said is that because of its particular approach to dispute settlement, the Court would not rush towards a decision, but would render a well-reasoned decision. Thus, much suggests that Article 64 could be used as a form of reference procedure aimed at clarifying important issues of ICSID investment law. Just as with respect to the consolidation of cases, States submitting disputes to the ICJ would make use of an existing, but under-used, avenue available already under the present system. While the ICJ could hardly be expected to solve the problem of inconsistent decisions altogether, its status and record suggests that it could alleviate the problem.

2. *A Reference Procedure Along the Lines of Article 234 TEC*

Finally, a reference procedure along the lines of Article 234 TEC¹⁷¹ might be yet another alternative to an appeals facility.¹⁷² Under that provision, national courts can refer certain matters of law to the ECJ for decision.¹⁷³ When answering an Art. 234 reference, the ECJ is not acting as an appellate court, but simply ruling on a point of EC law. It remains for the national court to use this information to decide the case. Still, experience within Europe suggests that the reference procedure is one of the ECJ's most powerful tools in ensuring the uniform application of EC and EU law.

Of course, this experience cannot simply be used as a blueprint for investment arbitration. Unlike under Article 234 TEC, references would have to be made not by national courts, but by arbitral tribunals. In many respects, the institution competent to decide on references would face problems similar to those of an appellate institution: for example, one would have to agree on the scope of review, or on the types of questions that could be referred to it, and on its composition. In addition, one would have to decide whether which parts of its rulings should bind normal ICSID arbitral tribunals, whether this binding force should also extend to subsequent cases, and whether ICSID tribunals could be under an obligation to make reference. In short, the problems of implementation would be enormous. Still, introducing a reference

¹⁷¹ In its entirety, the provision runs as follows:

"The [European] Court of Justice shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the [European] Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the [European] Court of Justice."

¹⁷² For brief comments in that regard see e.g. *Kaufmann-Kohler*, Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?, in: Gaillard/Banifatemi, 189 (221).

¹⁷³ For details on Article 234 see e.g. *Tridimas*, Common Market Law Review 40 (2003/1), 9-50; *Dausen*, Das Vorabentscheidungsverfahren nach Artikel 177 EG-Vertrag.

procedure would have one decisive advantage over plans to establish an appeals system: it would not conflict with Art. 53 of the ICSID Convention. Even with a reference system, ICSID awards (following a reference decision) would not be "subject to any appeal". There would thus be no need for an amendment of the ICSID Convention; in contrast, the reference system could be established through an amendment of the ICSID Rules.

Compared to the other options discussed in the present section, an ICSID reference procedure is certainly the most ambitious alternative to an appeals system. Unlike ICJ references or the consolidation of cases, it would require an amendment of ICSID's institutional set-up. However, its establishment would be less cumbersome than that of an appeals system proper.

IV. Interim Assessment

The preceding assessment shows that there are indeed alternatives to the creation of investment appeals facilities. Of the different proposals commented upon, one – namely attempts to broaden Article 52 ICSID Convention – does not seem particularly helpful. In contrast, inconsistent decisions could be avoided by consolidating cases in a formal or informal way, or by submitting particularly important questions of general relevance to the ICJ for adjudication. It bears repeating that both approaches are available under the ICSID Convention in its present form, and do not require any reform. In contrast, the more ambitious proposal to introduce an ICSID panel competent to decide, by way of preliminary ruling, on questions referred to it by ICSID arbitral tribunals, would at least not require an amendment of the ICSID Convention. Finally, as stated at the beginning of this section, yet another way of addressing the problem of inconsistent decisions may simply be to draw attention to them, to scrutinise them thoroughly, and thus to make arbitrators aware of the risks involved in departing from previous decisions. While neither option solves the problem, all of them, taken together, might offer pragmatic ways out of the dilemma.

F. Concluding Observations

The present paper has attempted to look at the problem of appeals in a rather broad way. This has meant that no specific proposal has been addressed; rather, the desirability and feasibility of creating an appeals structure has been commented on in a general way. As has been shown, the ICSID system has so far deliberately opted against a two-tiered process of dispute settlement, instead stressing the need for a reasonably quick and cost-effective dispute settlement. As a consequence, the ICSID Convention confers upon these arbitral awards a surprising degree of authority, while protecting their procedural propriety through annulment proceedings. With respect to Additional Facility awards, the New York Convention in practice produces similar results, although it preserves the possibility of public policy exceptions to enforcement.

It has equally been shown that the system thus sketched out has increasingly come under strain, but that it cannot be easily reformed. The strongest argument sup-

porting the creation of an appellate system is the hope a reform of the system would render investment law more coherent. Unfortunately, however, this argument presupposes the creation of a specific form of appellate institution, which is most difficult to agree on, namely a single, comprehensive and permanent appeals institution. The consistency argument thus requires a considerable degree of political will. In contrast, other arguments put forward by supporters of a reform are of much lesser value. It may be that an appeals system could render ICSID dispute settlement more rational; but this hope has to be balanced against the certain prospects of longer and more expensive proceedings. Much then suggests that the initial approach, adopted by the ICSID drafters, should not be lightly discarded, especially since the ICSID record testifies to its popularity. It may also be that an appeals system would increase the authority of ICSID decisions. But that in itself does not seem to justify a reform, as ICSID decisions already enjoy much authority, and there are no real compliance problems. Lastly, introducing an appeals facility would clearly be an inappropriate way of rendering ICSID dispute settlement more State-friendly. On balance, there are therefore no compelling reasons to create an appellate investment structure. The present system is clearly not perfect. But it should be given time to work out pragmatic solutions to the problem of inconsistent decisions. In the meantime, ICSID participants could to some extent alleviate the problem of inconsistent decisions by consolidating cases or the submitting particularly important disputes to the ICJ.

APPENDIX

ICSID Secretariat – Comments on the Establishment of an ICSID Appeals Facility*Excerpts from:***"POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION"***ICSID Secretariat**Discussion Paper, October 22, 2004**available on the internet: <<http://worldbank.com/icsid/highlights/improve-arb.pdf>>*

[...]

contains: excerpts from pp. 14-16 and Annex

[14] ...

VI. AN ICSID APPEALS FACILITY?

20. As indicated in the introduction of this paper, interest has been shown in awards in investor-to-State cases under investment treaties being made subject to a mechanism for the appeal of the awards. There have already been concluded several treaties that envisage, in broad terms, the eventual creation of such a mechanism. Several more such treaties are being negotiated. By mid-2005, as many as 20 countries may have signed treaties with provisions on an appeal mechanism for awards rendered in investor-to-State arbitrations under the treaties. Most of these countries are also Contracting States of the ICSID Convention.

21. It was mentioned in the introduction of this paper that the appeal mechanism would be intended to foster coherence and consistency in the case [15] law emerging under investment treaties. Significant inconsistencies have not to date been a general feature of the jurisprudence of ICSID. It might also be argued that providing an appeal mechanism could fragment the ICSID arbitral regimes: ICSID arbitrations would in some instances be subject to the mechanism and in other cases remain free of the mechanism. Subjecting ICSID arbitral awards to an appeal mechanism might also detract from the finality of the awards and open opportunities for delays in their enforcement.

22. On the other hand, there clearly is scope for inconsistencies to develop in the case law, given the increased number of cases, as well as the fact that under many investment treaties disputes may be submitted to different, ICSID and non-ICSID, forms of arbitration. As to the question of fragmentation, it may be pointed out that there already are different forms of ICSID arbitration (ICSID Convention arbitration and Additional Facility Rules arbitration). With an appeal mechanism, ICSID would be extending a further dispute-settlement option to interested parties. For the cases where there is such interest, the mechanism might enhance the acceptability of investor-to-State arbitration.

23. In any event, as indicated above, a number of countries are committing themselves to an appeal mechanism. It would in this context seem to run counter to the objectives of coherence and consistency for different appeal mechanisms to be set up under each treaty concerned. Efficiency and [16] economy, as well as coherence and consistency, might best be served by ICSID offering a single appeal mechanism as an alternative to multiple mecha-

nisms. It would be on this assumption that the Centre might pursue the creation of such an ICSID Appeals Facility at this stage. The possible features of an ICSID Appeals Facility are set out in the Annex of this paper. If, however, multiple appeal mechanisms are to be established, ICSID might best abstain from pursuing the creation of an Appeals Facility as it might otherwise only add to the number of appeal mechanisms.

ANNEX

Possible Features Of An ICSID Appeals Facility

1. If ICSID undertakes the creation of a single Appeals Facility, as an alternative to multiple mechanisms under treaties providing for the appeal of awards made in investor-to-State arbitrations, the Facility might be established and operate under a set of ICSID Appeals Facility Rules adopted by the Administrative Council of ICSID. An investment or other treaty (including a treaty amending an earlier one) could then provide that awards, made in cases covered by the treaty, would be subject to review in accordance with the ICSID Appeals Facility Rules. The Facility would best be designed for use in conjunction with both forms of ICSID arbitration, UNCITRAL Rules arbitration and any other form of arbitration provided for in the investor-to-State dispute-settlement provisions of investment treaties.

2. According to Article 53(1) of the ICSID Convention, awards rendered pursuant to the Convention “shall not be subject to any appeal or to any other remedy except those provided for in this Convention.” As explained earlier, amendment of the ICSID Convention requires the unanimous ratification of the Contracting States. The assumption, however, is that the submission of an ICSID Convention award to the Appeals Facility would in each case be based on the provisions of a treaty. In accordance with the general treaty law rules [2] reflected in Article 41 of the 1969 Vienna Convention of the Law of Treaties,¹ the treaty with the submission to the Appeals Facility might also modify the ICSID Convention to the extent required, as between the States parties to that treaty, provided that the modification was not prohibited by the ICSID Convention, did not affect the enjoyment of rights and performance of obligations of the other Contracting States under the ICSID Convention and was compatible with the overall object and purpose of the ICSID Convention.² The modification would have to be notified to the other Contracting States before the conclusion of the modifying treaty.³

3. As just explained, a treaty would appear to be required to make an arbitration under the ICSID Convention subject to the Appeals Facility. But the Appeals Facility could be incorporated into consents to other forms of arbitration, such as arbitration under the Additional Facility or UNCITRAL Rules, in investment laws and contracts as well as treaties. In any event, availability of the Appeals Facility would in all cases depend on the consent of the parties. Parties wishing instead to provide for arbitration without recourse under the Appeals Facility Rules would simply omit them from the consents to arbitration. [3]

¹ For the Vienna Convention on the Law of Treaties, see www.un.org/law/ilc/texts/treaties.htm.

² See *ibid.*, Art. 41(1)(b).

³ See *ibid.*, Art. 41(2).

4. In keeping with their consensual nature, the Appeals Facility Rules would be flexible and subject to adjustment in the underlying consent instrument. The following paragraphs describe in further detail a possible set of ICSID Appeals Facility Rules, modeled, in many respects, after provisions of the ICSID Convention, Regulations and Rules.

5. Such a set of ICSID Appeals Facility Rules could provide for the establishment of an Appeals Panel composed of 15 persons elected by the Administrative Council of ICSID on the nomination of the Secretary-General of the Centre. The terms of the Panel members would be staggered. Eight of the first 15 would serve for three years; all others would be elected for six-year terms. Each member would be from a different country. They would all have to be persons of recognized authority, with demonstrated expertise in law, international investment and investment treaties.⁴

6. Under such Appeals Facility Rules, challenges of awards could be referred to an appeal tribunal constituted for each case by appointment by the Secretary-General of ICSID. Unless the disputing parties agreed otherwise, each appeal tribunal would have three members. Appointments of appeal [4] tribunal members would be made from the Panel after consultation with the parties as far as possible.⁵

7. An award could be challenged pursuant to the Appeals Facility Rules for a clear error of law or on any of the five grounds for annulment of an award set out in Article 52 of the ICSID Convention.⁶ A further ground for challenging an award might consist in serious errors of fact; this ground would be narrowly defined to preserve appropriate deference to the findings of fact of the arbitral tribunal.

8. An ICSID arbitral tribunal renders just one award, the final award disposing of the case. Earlier decisions of the tribunal will be deemed part of the award and subject at that stage to annulment and other post-award [5] remedies. In some other systems of arbitration, including arbitration under the UNCITRAL Rules, interim decisions of the tribunal may be made in the form of awards and possibly challenged immediately. To avoid discrepancies of coverage between ICSID and non-ICSID cases, the Appeals Facility Rules might either provide that challenges could in no case be made before the rendition of the final award or allow challenges in all cases in respect of interim awards and decisions. It might be best to allow such challenges subject to certain safeguards. These could include a procedure for a party to

⁴ These suggested requirements are based on those applicable to members of the WTO Appellate Body. See WTO Dispute Settlement Understanding, Art. 17(3), www.wto.org.

⁵ The approach, suggested in this and the preceding paragraph of the text, of appeal tribunals drawn from a limited Appeals Panel, might be compared to the system of subsidiary chambers familiar among international dispute-settlement bodies.

⁶ These grounds are that the arbitral tribunal was not properly constituted; that it manifestly exceeded its powers; that one of its members was corrupt; that there was a serious departure from a fundamental rule of procedure; and that the award failed to state the reasons on which it was based. Under Article 52 of the ICSID Convention, either party may apply for annulment of an award on one or more of these grounds. An application to annul an award is referred to a three-member ad hoc committee appointed by ICSID from the Panel of Arbitrators of the Centre. The ad hoc committee has the authority to annul the award in whole or in part on any of the five specified grounds. Awards made pursuant to such other rules as the Additional Facility and UNCITRAL Rules are in general subject to the control of the courts at the place of arbitration. The law there may authorize the courts to set aside arbitral awards on the grounds of non-arbitrability of the dispute or conflict with public policy, as well as on grounds similar to those for annulment under Article 52 of the ICSID Convention.

proceed with the challenge only with permission of a member of the Appeals Panel, chosen in advance by the Panel members to perform this function, and a provision making it clear that the arbitration would continue during the challenge proceeding.

9. Under the possible Appeals Facility Rules, an appeal tribunal might uphold, modify or reverse the award concerned. It could also annul it in whole or in part on any of the grounds borrowed from Article 52 of the ICSID Convention. With the exceptions mentioned in the next sentence, the award as upheld, modified or reversed by the appeal tribunal would be the final award binding on the parties. If an appeal tribunal annulled an award or decided on a modification or reversal resulting in an award that did not dispose of the dispute, either party could submit the case to a new arbitral tribunal to be constituted and operate under the same rules as the first arbitral [6] tribunal. The Appeals Facility Rules might, however, allow appeal tribunals in some such cases to order that the case instead be returned to the original arbitral tribunal.

10. As in the case of annulment proceedings under the ICSID Convention, the party requesting review of the award would, unless the appeal tribunal decided otherwise, be solely responsible for the advances to ICSID to meet the fees and expenses of the appeal tribunal members and other direct costs of the review proceeding, without prejudice to the power that the appeal tribunal would have to decide on the ultimate allocation of costs. The fees and expenses of the appeal tribunal members would be the same as those to which ICSID arbitrators are entitled.⁷ The Appeals Facility Rules would also require the party requesting review of the award, unless the appeal tribunal decided otherwise, to provide a bank guarantee, approved by the appeal tribunal, for the amount of the award. This would be similar to the practice that has been developed of requiring applicants for annulment of an award in ICSID Convention cases to furnish such guarantees as a condition of the continued stay of enforcement of the award.

11. As in the case of the Additional Facility, access to the Appeals Facility would be subject to the approval of the Secretary-General of ICSID. Like the [7] Additional Facility Rules, the Appeals Facility Rules would provide for the initiation of proceedings by request to the Secretary-General. The request would have to be made within a specified period after the rendition of the award.⁸ After verifying that the request was timely and otherwise within the scope of the Appeals Facility Rules, the Secretary-General would register it and proceed to the constitution of the appeal tribunal.

12. The Secretariat of ICSID would provide to the subsequent proceedings all of the administrative services it gives to ICSID Convention and Additional Facility proceedings. To promote a speedy process, the Appeals Facility Rules might establish in advance time limits, from the date of registration of the request, for the filing of the written pleadings of the parties. The time limits would be subject to any necessary adjustment by the appeal tribunal. The Appeals Facility Rules would also establish a time limit for the appeal tribunal to render

⁷ See ICSID Administrative and Financial Regulation 14; ICSID Schedule of Fees, para. 3.

⁸ As in the case of applications for annulment under the ICSID Convention, this might be 120 days after the rendition of the award except for requests based on corruption which could be made within 120 days after discovery of the corruption and in any event within three years. See ICSID Convention, Art. 52(2). The Appeals Facility Rules might specify a shorter period for requests for review in respect of errors of law or fact. The shorter period might be 60 days, the period specified for recourse to the WTO Appellate Body. See WTO Dispute Settlement Understanding, Art. 16(4).

its decision. The time limit might be 120 days from the closure of the proceeding.⁹ The Appeals Facility Rules could provide that in [8] other respects the proceedings would be conducted, *mutatis mutandis*, in accordance with the ICSID Arbitration Rules.¹⁰

13. The Appeals Facility Rules could incorporate general undertakings by parties not to seek enforcement of an award pending its review and to comply promptly with the award to the extent it is upheld by the appeal tribunal. The Rules might also make clear that, while recourse to the Facility would supersede other rights to appeal or seek annulment of the award, such post-award remedies as rectification, supplementation and interpretation of the award would, at least in cases governed by the ICSID, Additional Facility and UNCITRAL Rules, remain to be sought from the original arbitral tribunal.¹¹

14. The Additional Facility Rules of ICSID were initially adopted by the Administrative Council on a trial basis. Given the novelty of an Appeals Facility, the Administrative Council might be asked similarly to adopt a set of Appeals Facility Rules for an initial period of six years and then possibly modify them in the light of experience.

⁹ This is the basic period the ICSID Arbitration Rules allow arbitral tribunals to make their awards. See ICSID Arbitration Rule 46.

¹⁰ The expedited procedure for the dismissal of unmeritorious claims would thus be available for proceedings under the Appeals Facility Rules if the ICSID Arbitration Rules are amended as suggested in section II of this paper. The same point may be made with respect to the provisions regarding access of third parties suggested in section III.

¹¹ See ICSID Arbitration Rules 49-51; Additional Facility Arbitration Rules, Arts. 56-58; UNCITRAL Arbitration Rules, Arts. 35-37.

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