

University of the Western Cape

Faculty of Law

Department of Mercantile and Labour Law

**A CRITICAL ASSESSMENT OF THE LEGITIMACY OF THE INTERNATIONAL
INVESTMENT ARBITRATION SYSTEM: A CALL FOR REFORM**



(Thesis submitted in fulfilment of the requirements for the award of the LL.D degree)

SUPERVISOR: Professor PM Lenaghan

CO - SUPERVISOR: Professor R Wandrag

Student Number: 3378809

Date: 20th February 2015.

DECLARATION

‘I declare that the work: “A critical assessment of the legitimacy of international investment arbitration system: A call for reform” is my own work and that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references’.

Signed Julius Cosmas (Candidate)

Signed Professor Patricia Lenaghan (Supervisor)

Signed Professor Riekie Wandrag (Co – Supervisor)



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DEDICATION

I dedicate this doctoral thesis to the memories of my father, Cosmas Mwakila Swigo and my brother, John Emmanuel Swigo (May your souls RIP). I also dedicated this thesis to my mother, Elizabeth Kibasi Swigo and my wife Betty Gordon Mwansasu for the continuous support all the way. Last but not least, to my kids: Jaden, Joan and Janelle.



Table of Contents

DECLARATION	ii
ACKNOWLEDGEMENT	iii
DEDICATION	iv
ABSTRACT.....	xvi
KEY WORDS	xviii
CHAPTER ONE:	1
BACKGROUND OF THE STUDY	1
1.1 Introduction.....	1
1.2 Problem statement.....	1
1.3 Significance of the problem	9
1.4 Research questions	12
1.5 Research objectives.....	12
1.6 Literature review	13
1.7 Research methodology.....	17
1.8 Thesis outline	18
CHAPTER TWO	19
THE HISTORICAL ORIGINS OF INTERNATIONAL INVESTMENT LAW AND INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT SYSTEM	19
2.1 Introduction.....	19
2.2 The historical development of international investment law	20
2.2.1 The Calvo doctrine.....	25
2.2.2 The Hull doctrine	26
2.3 International community efforts to create uniform international investment law.....	28
principles and an investor – state dispute settlement system	28
2.3.1 League of Nations efforts 1920 – 1930s	28
2.3.2 League of Nations efforts through the Convention on the Treatment of Foreigners,	30
1929	30

2.3.3 The United Nations Havana Charter, 1948.....	31
2.3.4 The Abs – Shawcross Draft Convention on Investment Abroad, 1959	33
2.3.5 The Organisation for Economic Cooperation and Development Draft Convention on	35
the Protection of Foreign Property, 1967	35
2.3.6 The Declaration on Permanent Sovereignty over Natural Resources (PSNR), 1962	36
2.3.7 The New International Economic Order (NIEO), 1974.....	39
2.3.8 The Charter of Economic Rights and Duties of States (CERD), 1974	43
2.3.9 The United Nations Draft Code of Conduct for Transnational Corporations	45
2.3.10 The OECD Multilateral Agreement on Investment (MAI), 1998	47
2.3.11 Efforts of the World Bank and the International Monetary Fund	49
2.3.11.1 The Convention on the Settlement of Investment Disputes between States and	50
Nationals of Other Contracting States (ICSID), 1965	50
2.3.11.2 The Guidelines on the Treatment of Foreign Direct Investments, 1992.	51
2.3.12 The World Trade Organisation efforts.....	53
2.4 Investor – state dispute settlement mechanisms prior to the current system	56
2.4.1 Diplomatic protection	56
2.4.2 The host state court mechanism.....	60
2.4.3 Ad hoc claim commissions	62
2.5 The current system: investor – state arbitration.....	65
2.5.1 The role of the Convention on the Settlement of Investment Disputes between States.....	67
and Nationals of Other Contracting States.....	67
2.5.2 The role of Bilateral Investment Treaties and International Investment Agreements	69
2.6 Conclusion	73
CHAPTER THREE.....	75
AN ANALYSIS OF THE CURRENT INVESTOR – STATE ARBITRATION SYSTEM.....	75
3.1 Introduction.....	75
3.2 The International Centre for Settlement of Investment Disputes (ICSID).....	77
3.2.1 Organisational structure of the International Centre for the Settlement of Investment Disputes ..	78
3.2.2 The jurisdictional requirement of the International Centre for Settlement of.....	80
Investment Disputes.....	80
3.2.2.1 Consent	81
3.2.2.2 Parties to the dispute	86

3.2.2.3 Legal dispute	90
3.2.2.4 Arising directly out of an investment.....	93
3.2.3 Dispute settlement mechanisms at the International Centre for Settlement of Investment Disputes	97
3.2.3.1 Conciliation mechanism.....	98
3.2.3.2 Arbitration mechanism.....	99
3.2.3.2.1 Steps involved in dispute settlement	100
3.2.3.2.2 Confidentiality of the proceedings	105
3.2.3.2.3 The applicable law	106
3.2.3.3 Advantages of the International Centre for Settlement of Investment Disputes.....	109
arbitration system	109
3.2.3.4 Disadvantages of the International Centre for Settlement of Investment Disputes	112
arbitration system.....	112
3.3 The Additional Facility arbitration system	116
3.3.1 The jurisdictional requirement under the Additional Facility Rules.....	119
3.3.2 Conduct of the arbitration proceedings.....	120
3.3.3 The applicable law	122
3.3.4 Recognition and enforcement of Additional Facility award	123
3.3.5 Advantages of Additional Facility arbitration	124
3.3.6 Disadvantages of Additional Facility arbitration	125
3.4 Ad hoc arbitration system under the United Nations Commission on International.....	126
Trade Law Arbitration Rules	126
3.4.1 Introduction.....	126
3.4.1.1 Scope of application of the United Nations Commission on	130
International Trade Law Arbitration Rules	130
3.4.1.2 Steps involved in arbitration under the United Nations Commission on.....	131
International Trade Law Arbitration Rules	131
3.4.1.3 Confidentiality of the proceedings	133
3.4.1.4 The applicable law	135
3.4.1.5 Recognition and enforcement of United Nations Commission on International	135
Trade Law Rules awards	135
3.4.1.6 United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration, 2013.	136

3.4.2 Advantages of arbitration under the United Nations Commission on International Trade Law	138
3.4.3 Disadvantages of the arbitration under the United Nations Commission on International Trade Law	139
3.5 The Permanent Court of Arbitration	140
3.5.1 Introduction.....	140
3.5.2 The Functioning of the Permanent Court of Arbitration.....	142
3.5.3 The Court’s jurisdiction in investor – state disputes.....	143
3.5.4 Advantages of the Permanent Court of Arbitration	144
3.5.5 Disadvantages of the Permanent Court of Arbitration.....	145
3.6.1 General strengths of the current investor – state arbitration system	146
3.6.1.1 Peaceful and civilised mechanism	147
3.6.1.2 Effective enforcement mechanism.....	148
3.6.1.4 Finality	150
3.6.2 General weaknesses of the current investor – state arbitration system.....	151
3.6.2.1 Lack of consistency.....	152
3.6.2.1.1 Divergent conclusions on similar facts and legal issues under different treaties	155
3.6.2.1.3 Divergent conclusions on a similar set of facts, related parties and similar legal norms	164
3.6.2.2 Parallel proceedings problem.....	168
3.6.2.3 Lack of institutional safeguards for the independence and impartiality of adjudicators... ..	171
3.6.2.4 Lack of transparency on matters affecting the public interest	175
3.6.2.5 Lack of an appellate body	178
3.6.2.6 Tribunals’ encroachment on government policy making space.....	180
3.6.2.7 Expensive adjudication process	186
3.7 Conclusion	189
CHAPTER FOUR.....	190
IDEAL FEATURES OF A LEGITIMATE INTERNATIONAL ADJUDICATIVE BODY.....	190
4.1. Introduction.....	190
4.2 The meaning, relevance and indicators of legitimacy.....	191
4.2.1 Relevance of legitimacy in international adjudicative bodies.....	192

4.2.2 Indicators of legitimacy	194
4.2.2.1 Evaluation of scholars' arguments on legitimacy values	202
4.2.3 The relationship between legitimacy, justice and the rule of law	205
4.3 Transparency	207
4.3.1 Transparency in the current investor – state adjudicative system	213
4.3.2 The trend towards transparency in other international institutions and instruments	215
4.3.2.1 Transparency under the Northern America Free Trade Agreement (NAFTA)	216
4.3.2.2 Transparency under the United States Model Bilateral Investment Treaties	217
4.3.2.3 Transparency under the Canadian Model Bilateral Investment Treaty	218
4.4 Independence and impartiality	220
4.4.1 The Meaning of the concepts independence and impartiality	220
4.4.2 Independent and impartial adjudicators in the international adjudicative systems	221
4.4.3 The International Bar Association (IBA) guidelines on conflict of interest in	223
international arbitration	223
4.5 Consistency/coherence	228
4.5.1 Consistency in the investor – state arbitration system	230
4.6 Cost efficiency	232
4.6.1 Cost efficiency in the investor – state arbitration system	233
4.7 Effective time frame	234
4.7.1 Effective timeframe in the investor – state arbitration system	235
4.8 Consequences of lack of legitimacy values in the current investor – state arbitration	236
system	236
4.9 Conclusion	242
CHAPTER FIVE	243
CRITICAL ASSESSMENT OF THE POSSIBLE SOLUTIONS TO THE INVESTOR – STATE	
ARBITRATION SYSTEM	243
5.1 Introduction	243
5.2 Solutions suggested by other stakeholders	247
5.2.1 Consolidation of related disputes and the principle of ‘fork in the road’	248
5.2.2 Adoption of the doctrine of precedent	253
5.2.3 Effective application of res judicata and lis pendens principles	256
5.2.4 Use of mediation/conciliation techniques	263

5.2.5 Margin of appreciation standard in the interpretation of bilateral investment treaties	266
5.2.6 The establishment of an appellate court under the International Centre for Settlement	271
of Investment Disputes	271
5.2.7 Treaty based appellate body.....	273
5.3 Author’s ‘alternative’ solutions for improving the current system.....	274
5.3.1 Investor – state dispute management centre.....	275
5.3.2 Limiting investor – state arbitration by using host state courts.....	282
5.3.3 Mandatory publication of investor – state awards	288
5.3.4 Enhance the use of member states interpretative guidelines/statements.....	293
5.3.5 Form a working group to provide interpretation to basic international investment	303
principles.....	303
5.4 Conclusion	307
CHAPTER SIX	309
A CALL FOR MAJOR REFORM: CREATION OF A MULTILATERAL AGREEMENT ON	
INVESTMENT, AN INTERNATIONAL INVESTMENT COURT AND AN INTERNATIONAL	
INVESTMENT APPELLATE COURT	309
6.1 Introduction.....	309
6.2 Historical perspective of the Multilateral Agreement on Investment (MAI).....	310
6.2.1 Argument against the creation of a Multilateral Agreement on Investment	312
6.2.2 A Case for a Multilateral Agreement on Investment	314
6.2.2.1 The fading away of the North – South divide in Foreign Direct Investment distribution	314
6.2.2.2 The increase of Foreign Direct Investment stock	316
6.2.2.3 The recent increase of regional agreements and decline of Bilateral Investment	318
Treaties.....	318
6.2.2.4 Continuous annual increase of investor – state disputes.....	321
6.2.3 General advantages of the Multilateral Agreement on Investment.....	323
6.3 A case for the court structured dispute settlement system	325
6.3.2 Advantages of establishing an Appellate Court.....	328
6.3.3 Argument against the court system and the response thereto	331
6.4 Organisation and jurisdiction of an International investment Court and an	334
6.4.1 Nature of an International investment Court.....	334
6.4.2 Jurisdiction of an International Investment Court.....	335

6.4.3 Qualifications and appointment of Judges	338
6.4.4 Dispute settlement timeframe	339
6.4.5 Litigation Costs	340
6.5 The nature and Jurisdiction of an International Investment Appellate Court	341
6.6 Creating a Multilateral Agreement on Investment: The way forward	344
6.6.1 Call for stakeholders' Conference.....	344
6.6.1.1 Possible obstacles.....	345
6.7 The Minimum Content of the Multilateral Agreement on Investment	347
6.7.1 The need for clear definition and scope of basic investment principles	348
6.7.2 The need for a provision on Common duties of foreign investor and the host state.....	349
6.7.3 The need for a provision on the rights of the host state	350
6.7.4 The need for a provision limiting forums for dispute settlement.....	351
6.7.5 The need for a provision on the qualification of the Judges	352
6.7.6 The need for a provision on litigation funding.....	352
6.7.7 The need for a provision on transparency in the adjudication process	354
6.7.8 The need for a provision on enforcement	355
6.8 Institution to host the Multilateral Agreement on Investment and the Courts	357
6.8.1 The case for the World Trade Organization (WTO).....	358
6.8.2 The case for the United Nations Conference on Trade and Development (UNCTAD).....	359
6.9 Phasing out investor- state arbitration in favour of the court structure	361
6.10 Conclusion	363
CHAPTER SEVEN.....	364
CONCLUSION AND SUMMARY OF RECOMMENDATIONS	364
7.0 Introduction.....	364
7.1 Conclusion	364
7.2 Summary of recommendations	368
7.2.1 Interim/alternative recommendations	368
7.2.2 Major Recommendation.....	371
BIBLIOGRAPHY	375

LIST OF ACRONYMS

AB	Appellate Body
ACWL	Advisory Centre on WTO Law
AF	Additional Facility
ASEAN	Association of South East Asian Nations
BIT	Bilateral Investment Treaty
BRICS	Brazil, the Russian Federation, India, China and South Africa.
CAFTA	Central American Free Trade Agreement
CJEU	Court of Justice of the European Union
COMESA	Common Market for Eastern and Southern Africa
CTC	Commission on Transnational Corporations
DSB	Dispute Settlement Body
DSB	Dispute Settlement Understanding
ECOSOC	Economic and Social Council of the United Nations
EAC	East African Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedom

EU	European Union
FCN	Treaty of Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
FTC	Free Trade Commission
GATT	General Agreement on Tariff and Trade
GATS	General Agreement on Trade in Services
IACHR	Inter - American Court of Human Rights
IBA	International Bar Association
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
IIA	International Investment Agreement
ILC	International Law Commission

IISD	International Institute for Sustainable Development
IMF	International Monetary Fund
IPFSD	Investment Policy Framework for Sustainable Development
ISDS	Investor – State Disputes Settlement System
ITLOS	International Tribunal of the Law of the Sea
ITO	International Trade Organisation
LCIA	London Court of International Arbitration
MAI	Multilateral Investment Agreement
MERCOSUR	Southern Common Market
MFN	Most Favoured Nation
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
NPM	Non - Precluded Measure
NT	National Treatment
NYC	New York Convention on Recognition and Enforcement of Foreign Arbitral Awards

OECD	Organisation for Economic Co - operation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PRT	Permanent Review Tribunal
PSNR	Permanent Sovereignty over Natural Resources
RCEP	Regional Comprehensive Economic Partnership Agreement
SADC	Southern African Development Community
TFEU	Treaty on the Functioning of the European Union
TNC	Transnational Corporation
TPP	Trans - Pacific Partnership
TRIMS	Trade Related Investment Measure
TRIPS	Trade Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development

UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States of America
USD	United States Dollar
USSR	Union of Soviet Socialist Republics
VLCT	Vienna Convention on the Law of Treaties
WB	World Bank
WEF	World Economic Forum
WTO	World Trade Organisation
WWI	World War I
WWII	World War II



ABSTRACT

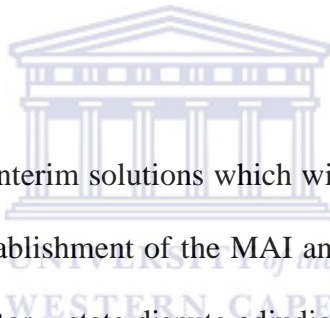
Currently most international investment disputes are settled through arbitration. The origin of this dispute settlement system can be associated with the recent proliferation of over 3000 Bilateral Investment Treaties. Through this system disputes are settled by autonomous and differently constituted tribunals which have powers to render final and binding awards. The dissatisfied party has very limited opportunity to challenge the rendered award as there are no higher bodies in the hierarchy where a dissatisfied party can lodge an appeal, save for limited procedural challenges which are allowed under the system.

These differently constituted tribunals at times reach diametrically opposed decisions on similar facts and those decisions stand side by side and all are considered valid. These inconsistent decisions are leading to lack of consistency and uniformity which in turn affects the legitimacy of the system as a whole. The rules of these institutions do not allow the proceedings to be held in public despite the fact that at times these tribunals question the regulatory powers of the state and state measures on service provision to its citizens. Another issue under the current system is that due to lack of coordination, arbitrators play dual roles: as counsels and arbitrators. This practice compromises the cherished principle of the rule of law.

In the effort to address these concerns, stakeholders have suggested a number of possible solutions. The suggested solutions include: invoking *res judicata* and *lis pendens* principles; adopting the doctrine of precedent; applying the 'fork in the road' principle; adopting the margin

of appreciation standard in interpretation of BITs; creating an appellate structure at ICSID and creating a treaty to treaty appellate body.

This research submits that, the suggested solutions singularly and cumulatively don not address the legitimacy issues adequately. The research therefore calls for the establishment of a Multilateral Agreement on Investment (MAI) in order to address the legitimacy issues cumulatively. It is submitted that establishing a Multilateral Investment Agreement (MAI) which provides for creating a standing international investment court with an appellate court is the only solution which addresses all the issues haunting the international investment dispute settlement system.



In addition, the research suggests interim solutions which will help to increase the legitimacy of the current system pending the establishment of the MAI and the courts. The interim solutions include: establishment of the investor – state dispute adjudication Centre; effective utilisation of host state courts; mandatory publication of all awards; enhancing the effective use of member states interpretative statement; and forming a working commission to provide basic interpretation and the scope of the basic international investment law principles. These measures are only meant to improve the current system pending the establishment of the MAI and the courts.

The research concludes that for the betterment of international investment law, the reform is inevitable and that the benefits would outweigh any demerits.

KEY WORDS

International investment law, bilateral investment treaty, investor – state arbitration, transparency, independence and impartiality, State’s power to regulate, public interest disputes, international investment court, international investment appellate court.



CHAPTER ONE:

BACKGROUND OF THE STUDY

1.1 Introduction

This chapter provides a background to the research. The chapter explains the research problem; sets out the scope of the research; explain the objectives and methodology of the research; and lastly outlines the chapters of the thesis. The chapter concludes that a study on reforming the international investment dispute settlement system is important and very timely.



1.2 Problem statement

Currently most international investment disputes are settled through arbitration.¹ Investment arbitration is not carried out by a single omnipotent body or court; rather, it is carried out by a number of different bodies, permanent and ad hoc. Most of the time these disputes are settled under the International Centre for Settlement of Investment Disputes (ICSID) arbitration,² or under the Additional Facility arbitration³ or the ad hoc arbitration under UNCITRAL rules.⁴ The

¹ United Nations Conference on Trade and Development (UNCTAD) 'Towards a New Generation of Investment Policies' *World Investment Report* at p 86 available at

http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf accessed on 21/02/2013.

² Governed by the Convention on Settlement of Investment Disputes between States and the Nationals of Other Contracting States, 1965 , read together with the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (hereinafter ICSID Rules) available at <http://www.worldbank.org/icsid.htm> accessed on 21/05/2013.

³ The Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes 2006, available at http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf accessed on 21/02/2013.

dispute is settled at ICSID when it involves a member state and a national from another member state.⁵ Where one of the parties to the dispute is not a member, the dispute can then be settled under the ICSID Additional Facility rules.⁶ Where neither the host state nor the foreign investor home state is a convention member, the dispute is normally settled on an ad hoc basis under the UNCITRAL Arbitration rules.⁷ In an ad hoc arbitration, parties may choose any arbitration institution to be the appointing authority for the purpose of their arbitration proceeding. Institutions, such as, the Permanent Court of Arbitration (PCA),⁸ the Stockholm Chamber of Commerce,⁹ and the London Court of International Arbitration (LCIA) formed in 1892,¹⁰ to name a few, are some of the well - established arbitration institutions.



The UNCTAD 2013 World Investment Report indicates that ICSID constitutes 61% of all investor – state disputes while UNCITRAL constitutes 26% and the remaining 13% is left for the

⁴ See the UNCITRAL Arbitration Rules, 2010, available at www.uncitral.org/pdf/arbitration/rules/arb-rules-revised-2010 accessed on 15/02/2013.

⁵ See Art.25 of the Convention on Settlement of Investment Disputes between States and the Nationals of Other Contracting States, 1965,

⁶ See Art 2(a) of the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes 2006, available at http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf accessed on 21/02/2013.

⁷ See Art. 1 (1) of the UNCITRAL Arbitration Rules, 2010, available at www.uncitral.org/pdf/arbitration/rules/arb-rules-revised-2010 accessed on 15/02/2013.

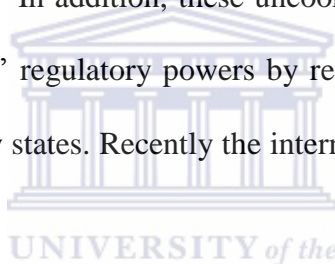
⁸ See the Permanent Court of Arbitration Website, ‘About Us’ available at http://www.pca-cpa.org/showpage.asp?pag_id=1027 accessed on 28/04/2014; see also Mackenzie R et al *The Manual on International Courts and Tribunals* 2nd ed. (2010) at 102; also see UNCTAD ‘Permanent Court of Arbitration’ UNCTAD/EDM/Misc.232/Add.26 available at http://unctad.org/en/Docs/edmmisc232add26_en.pdf accessed on 28/04/2014.

⁹ See Article 1 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, 2010, available at http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf accessed on 20/02/2013.

¹⁰ See Article 1 of the London Court of International Arbitration 2014, available at <file:///C:/Users/user/Downloads/LCIA%20Arbitration%20Rules%20effective%201%20October%202014.pdf> accessed on 02/11/2014.

International Chamber of Commerce (ICC),¹¹ the Permanent Court of Arbitration (PCA)¹² and the Stockholm Chamber of Commerce.¹³

The problem of this research is that, as a result of the lack of a single omnipotent body responsible for supervising investment disputes, a number of issues have arisen. Under the current system there is no mechanism in place to avoid inconsistent decisions,¹⁴ there are no adequate rules to ensure an impartial and independent adjudication process, there are no rules to ensure transparency despite the fact that the disputes are public in nature, and there is no appellate system to rectify errors.¹⁵ In addition, these uncoordinated and unsupervised tribunals at times encroach on governments' regulatory powers by rendering awards which challenge or illegalise legitimate laws passed by states. Recently the international community has witnessed a



¹¹ United Nations Conference on Trade and Development (UNCTAD) 'Latest Developments in Investor-State Dispute Settlement, 2013' *World Investment Report*, at 1–2, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf accessed on 23/07/2013.

¹² Established by the Hague Convention for the Pacific Settlement of Disputes of 1899 available at http://www/pca-cpa.org/showpage.asp?pag_id=1027 accessed on 18/07/2013.

¹³ See the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, 2010, available at http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf accessed on 20/02/2013.

¹⁴ See *SGS Société Générale de Surveillance S A v Islamic Republic of Pakistan* ICSID ARB/01/13 (Decision on objection to jurisdiction) (hereinafter *SGS v Pakistan*) and *SGS Société Générale de Surveillance S A v Republic of the Philippines*, ICSID ARB/02/6 (Decision on objection to jurisdiction and separate declaration) (hereinafter *SGS v Philippines*); See also *Lauder v The Czech Republic*, 9 ICSID Reports 66 and *CME Czech Republic BV v The Czech Republic* 9 ICSID Reports 121.

¹⁵ See Van Harten et al 'Public Statement on the International Investment Regime' Aug. 31, 2010 available at <http://tinyurl.com/3ghnjwr> (hereinafter Public statement) accessed 23rd January 2013; See also Brower C N et al 'The Coming Crisis in the Global Adjudication System' (2003) 19 *Arbitration International* 415 at 417; Mann H 'Civil Society Perspective: what Do Key Stakeholders Expect from the International Investment Regime?' in Alvarez JE and Sauvant KP (eds.) *The Evolving International Investment Regime: Expectations Realities, Options* (2011) 22-29; Gaiger R 'Multilateral Approach to Investment' in Alvarez J and Sauvant K P (eds.) *The Evolving International Investment Regime* (2011) 153-173; Reinisch A 'The Future of Investment Arbitration' in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894 – 916; Van Harten G 'Investment Treaty Arbitration, Procedural Fairness and the Rule of Law' in Schill S (ed.) *International Investment Law and Comparative Public Law* (2010) 627 – 658; Peterson L 'Out of Order' in Waibel et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 483 – 488; Reinisch A 'The Issues Raised by Parallel Proceedings and Possible Solutions' in Waibel M et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 113- 126.

number of cases challenging the host state's basic regulatory functions and sometimes the state's duty to provide public services to its citizens.¹⁶ In some cases the main function of the state, viz, security and peace is put in jeopardy but still the standard of review applied by the tribunals does not take these factors into consideration.¹⁷ Furthermore, state regulatory measures on environmental issues, health and other service delivery to the citizens have been declared illegal in favour of foreign investors' interests.¹⁸

In reaction to the abovementioned flaws in the system, some stakeholders have started running away from the investor – state arbitration system. Latin America countries, viz, Bolivia, Ecuador, and Venezuela, have led the way by withdrawing from the ICSID Convention.¹⁹

Australia, on the other hand, in an effort to seek more policy space in April 2011 issued a trade policy statement announcing that it would stop including investor – state dispute settlement clauses in its future International Investment Agreements (IIAs).²⁰ However, it should be noted

¹⁶ See *Aguas del Tunari S A v Bolivia* ICSID ARB/02/3 (2005) (decision on jurisdiction) and *Azurix Corp v Argentina* ICSID ARB/1/12 (2006) (final award) (all cases concerned governed measures to protect water services).

¹⁷ See *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8(2005) (final award), *Sempra Energy International v The Argentine Republic* ICSID ARB/02/16 (2005) (final award), and *Enron Corporation and Ponderosa Assets L P v Argentine Republic* ICSID ARB/01/3 (2007) (final award).

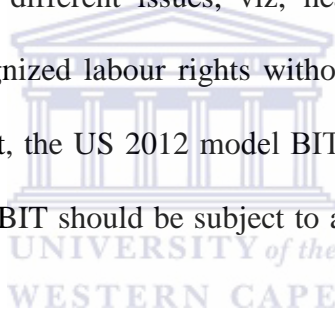
¹⁸ See *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12 in which the claimant is suing the government of Australia for enacting a legislation which require plain cigarette packaging on public health reasons; See also *Vattenfall v Federal Republic of Germany*, ICSID Case No. ARB/12/12 (2012). The case is commenced by Vattenfall against Germany as a result of Germany's nuclear opt-out decision to protect the environment and health.

¹⁹ United Nations Conference on Trade and Development (UNCTAD) 'Towards a New Generation of Investment Policies' *World Investment Report* at p 84 available at http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf accessed on 21/02/2013.

²⁰ Department of Foreign Affairs and Trade of Australia *Trading our way to more jobs and prosperity*, April 2011 available at www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html accessed on 25/01/2013.

that with the change of government in 2013, the new Australia- Korea FTA which includes an investment chapter has incorporated investor-state arbitration.²¹ With the aim of addressing the host state policy making space, the new FTA comes with the ‘general exception’ to investment obligations which parallel WTO exception provisions such as GATT Article XX and GATS Article XIV.²²

The United States has also revised its model Bilateral Investment Treaty (BIT) in order to constrain the expansive interpretations by tribunals. The revised model BIT empowers the US government more to regulate on different issues, viz, health, safety, environment, and the promotion of internationally recognized labour rights without interference from the investor – state tribunals.²³ In addition to that, the US 2012 model BIT mandates the Parties to ‘consider’ whether arbitral awards under the BIT should be subject to any new appellate mechanism to be introduced in the future.²⁴



²¹ Lester S ‘Improving Investment Treaties through General Exceptions Provisions: The Australian Example’ *Investment Treaty News*, May 2014 Issue available at http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf accessed on 16/05/2014.

²² Lester S ‘Improving Investment Treaties through General Exceptions Provisions: The Australian Example’ *Investment Treaty News*, May 2014 Issue available at http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf accessed on 16/05/2014.

²³ The Office of the United States Trade Representative, *US Model Bilateral Investment Treaty (2012)*, Art.12 available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf accessed on 23/02/ 2013.

²⁴ See Article 28(10) of the *US Model Bilateral Investment Treaty (2012)*, available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf accessed on 23/02/ 2013.

South Africa has also shown its dissatisfaction with the current dispute settlement system.²⁵ The government in 2009 issued a policy statement with regard to BITs. In an effort to balance interests between host state and foreign investors, the government has denounced a number of BITs with European countries and is pushing for utilisation of host state courts in the event of any disputes between South Africa and foreign investors.²⁶ In another move, the South African government in November 2013 published its draft Promotion and Protection of Investment Bill 2013 in the Government Gazette for public comment.²⁷ The bill provides for domestic litigation, domestic arbitration and mediation of investment disputes.²⁸

In March 2014, Germany also announced its dissatisfaction with the investor – state arbitration system and is opposing the inclusion of the system in the EU – US trade pact which is currently under negotiation.²⁹ Germany is taking the same stance on the recently concluded Comprehensive Economic and Trade Agreement (CETA) between EU and Canada.³⁰ Germany is advancing the idea of adjudicating investor – state disputes in the host state courts. According

²⁵ See The Department of Trade and Industry ‘Republic of South Africa’s Government Position Paper on Bilateral Investment Treaty Policy Framework Review’, June 2009, available at http://www.thedti.gov.za/ads/bilateral_policy.pdf accessed on 7/02/2013.

²⁶ See the Speech delivered by the Minister of Trade and Industry of South Africa Dr Rob Davies at the South African launch of the United Nations Conference on Trade and Development (UNCTAD) Investment Policy Framework for sustainable development at the University of The Witwatersrand on 26th July 2012 available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=29391&tid=77861> accessed on 07/03/ 2013).

²⁷ See the ‘Draft Bill on Promotion and Protection of Investment’, 2013 available at <http://www.tralac.org/files/2013/11/Promotion-and-protection-of-investment-bill-2013-Invitation-for-public-comment.pdf> accessed on 07/03/2014.

²⁸ See Article 11 of the ‘Draft Bill on Promotion and Protection of Investment’, 2013 available at <http://www.tralac.org/files/2013/11/Promotion-and-protection-of-investment-bill-2013-Invitation-for-public-comment.pdf> accessed on 07/03/2014.

²⁹ See the Germany Ministry Announcement in *Investment Treaty News*, May 2014 Issue at 16 available at http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf

³⁰ See the EU – Canada Comprehensive Economic and Trade Agreement (CETA) available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf accessed on 11/11/2014.

to the *Financial Times*, the Junior Minister of Economy, Brigitte Zypries, believes that foreign investors ‘have sufficient legal protection in the national courts.’³¹

Apart from countries, other stakeholders have also shown concern about the current dispute settlement mechanism. The Committee on International Trade of the European Parliament, on 22 March 2011 issued a Report on the future of International Investment Policy of the European Union.³² The Report highlighted the problem relating to: different interpretations of investment principles by different tribunals which lead to conflict between private interests and the regulatory tasks of public authorities;³³ the existence of BITs which focus on the interests of investors alone and disregard the host state interests in regulating for other development goals;³⁴ and the lack of a model BIT for member states which can enhance certainty and consistency of interpretation.³⁵ In addition, the Report raises concerns about the wide discretionary powers granted to arbitrators on interpretation of the investment principles.³⁶ The Report raises further concerns about the lack of transparency in the current system, the lack of an appellate option and the absence of the requirement for exhaustion of local remedies before resorting to international arbitration.³⁷

³¹ *Financial Times* quoted in *Investment Treaty News*, May 2014 Issue at 16 available at http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf

³² European Union Parliament *Report on the Future European International Investment Policy*, A7-0070/2011 of 22 March 2011 available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//TEXT+REPORT+A7-2011-0070+0+DOC+XML+V0//EN> (hereinafter *European Parliament Report on investment*) (accessed on 15th February 2013).

³³ See the European Parliament *Report on Investment* 2011 para G.

³⁴ See the European Parliament *Report on Investment* 2011 para J (1) and para 25.

³⁵ See the European Parliament *Report on Investment* 2011 para J (4) and (10).

³⁶ The European Parliament *Report on Investment* 2011 para 17.

³⁷ The European Parliament *Report on Investment* 2011 para 31.

Furthermore, the Law professors from different parts of the world in 2010 issued a public statement condemning the current investment arbitration system.³⁸ Among the concerns raised in the public statement are: the need to have an independent judicial system responsible for investment disputes; recognition of the state's fundamental right to regulate on behalf of public welfare; the need for arbitrators to consider the public interest in their interpretation of investment principles; and that the current adjudication system is not a fair, independent and balanced system for settlement of investment disputes.³⁹

From the stakeholders' reactions noted above, it is submitted here that it is evident that the system is experiencing a legitimacy crisis. 'Legitimacy' is defined as the basis upon which people accept or are willing to accept the legal order as they find it and is premised upon the idea that law should be good for, and justly serve, the people.⁴⁰ There is a need to assess the system as a whole and suggest the possible solutions before it loses the little remaining legitimacy it is currently enjoying. It is the purpose of this research to propose and critically analyse the type of reform required and make the necessary recommendations.

³⁸ See Van Harten et al 'Public Statement on the International Investment Regime' Aug. 31, 2010 para 1 – 8 available at <http://tinyurl.com/3qhnjwr> accessed 23rd January 2013.

³⁹ Van Harten et al 'Public Statement on the International Investment Regime' Aug. 31, 2010 para 1 – 8 available at <http://tinyurl.com/3qhnjwr> accessed 23rd January 2013.

⁴⁰ Hurst R 'Problem of Legitimacy in the contemporary legal order' (1971) 24 *Oklahoma Law Review* 224 at 225; see also Howse R 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence' in Weiler (ed.) *Towards a Common Law of International Trade?: EU, WTO and NAFTA* (2000) 211 at 218;

1.3 Significance of the problem

In the current globalised world where foreign investment plays a significant role in the world economy, it is important to have a legitimate and well organised dispute settlement system. United Nations Conference on Trade and Development (UNCTAD) statistics indicates that in 1982 the global total of FDI was only USD 27 billion.⁴¹ However, two and a half decades later the FDI stock steadily increased and reached a peak of USD 2.2 trillion by the year 2007.⁴² The 2009 world economic meltdown affected FDI development as it dwindled by almost 50% and reached USD 1.2 trillion in 2010 followed by a modest recovery up to USD 1.35 trillion in 2012 and the same figure for 2013.⁴³ However, UNCTAD 2014 indicates that in 2013 the FDI stock grew to USD 1.45 trillion and is projecting that the stock will be USD 1.6 trillion by the end of 2014.⁴⁴ As the above statistical data indicate, the FDI stock as it stands contributes hugely to world development in a number of ways including but not limited to job creation, innovation, competition and technology transfer.⁴⁵ Therefore it follows that the adjudicative system which is responsible to adjudicate on such huge amounts of money needs to adhere to basic principles of

⁴¹ See United Nations Conference on Trade and Development (UNCTAD) 'Transnational Corporations and the Infrastructure Challenge' *World Investment Report*, 2008 available at http://unctad.org/en/Docs/wir2008_en.pdf accessed on 22/05/2014.

⁴² See United Nations Conference on Trade and Development (UNCTAD) 'Transnational Corporations and the Infrastructure Challenge' *World Investment Report*, 2008 available at http://unctad.org/en/Docs/wir2008_en.pdf accessed on 22/05/2014.

⁴³ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* 2013 'Global and regional investment trends' at ix available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014.

⁴⁴ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* 2014 'investing in the SDGs: An Action Plan' at ix available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

⁴⁵ Amarasinha A & Kokott J 'Multilateral investment rules revisited' in Muschlinski P et al Oxford Handbook of International Investment Law (2008).

public adjudicative system.⁴⁶ The system amongst other things, needs to be coherent, accountable, fair, certain, predictable and reliable.⁴⁷ Furthermore, the system must apply the law consistently.⁴⁸ It is trite that consistency, certainty and predictability are very important in the process of building a legitimate adjudication system.⁴⁹ In addition, the adjudicative system must be able to deliver on core components of fair process especially the demands for independence and impartiality of adjudicators.⁵⁰ Lack of these key elements, puts the current investor – state dispute settlement system in a legitimacy crisis.

A thorough study, therefore, on reforming the international investment dispute settlement system, is of significant academic value. To date, there has been no thorough and comprehensive research done on the subject; therefore this work becomes a valuable original contribution to the topic, advances the debate on the subject and furthers knowledge in this field. The few existing publications on the topic are not addressing the legitimacy concerns comprehensively. They tend to suggest reform but without proposing the way forward; in other words, they do not address the ‘how’ part of the reform. This study provides a comprehensive analysis of the current state of the international investment arbitration system and suggests how to reform it.

⁴⁶ Franck S ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham L Rev* 1521 at 1584; see also Kaufmann – Kohler G ‘Arbitral Precedent: Dream, Necessity of Excuse? – The 2006 Freshfield Lecture’ (2007) 23 (3) *Arbitration International* 374.

⁴⁷ See Franck S ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham L Rev* 1521 at 1584; see also Van Harten *Investment Treaty Arbitration and Public Law* (2007) at 164; see also Franck T M *The Power of Legitimacy among Nations* (1990) at 24.

⁴⁸ Kaufmann – Kohler G ‘Arbitral Precedent: Dream, Necessity of Excuse? – The 2006 Freshfield Lecture’ (2007) 23 (3) *Arbitration International* 374 at 374.

⁴⁹ ⁴⁹ Franck S ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham L Rev* 1521 at 1584.

⁵⁰ Mann H et al ‘IISD Comments on ICSID Discussion Paper, Possible Improvements of the Framework for ICSID Arbitration’ IISD 2004 at 4, available at http://www.iisd.org/pdf/2004/investment_icsid_response.pdf accessed on 15/02/2013.

More importantly, the current study provides a detailed analysis of all the possible solutions for reform and explores whether the suggested solutions can really remedy the situation. This work will therefore be of considerable value in terms of its contribution to academia and the ongoing debate concerning the state of the international investment dispute settlement system and its future.

Furthermore, it is hoped that this work will act as a catalyst for discussions as to the practicalities of introducing reform. As noted earlier, a number of solutions have been suggested by experts, but not in a comprehensive manner. This work analyses the suggestions put forward by other stakeholders, such as: adopting the consolidation principle in investment disputes, adoption of the doctrine of precedent, establishing a treaty based appellate body; and establishing an appellate body at the ICSID. The pros and cons of each solution are also critically analysed. In addition to that, this research suggests its own solutions. The strengths and weaknesses of these new inputs are weighed as well.

Last but not least, is that, considering the fact that some of these disputes cut across a range of issues, such as, human rights, environmental protection and the rights of states to regulate their internal affairs, which overlap with other areas of international law, it is important to have a study like this one which provides for a comprehensive analysis of the issues at stake and provides workable solutions to improve the system and enhance harmonious relationships between state parties.

1.4 Research questions

The main question to be answered in this research is whether the current investor – state dispute settlement system is legitimate enough to settle investor – state disputes. An accurate and detailed answer to this core question requires a comprehensive examination of the current investor – state arbitration system. Therefore, the follow - up question is whether the basic tenets of a legitimate system are enshrined in the system. The study therefore seeks to find out whether transparency, consistency, predictability, certainty, timeliness, cost efficiency and independence and impartiality are upheld and cherished in the investor – state arbitration system. Considering that a number of suggestions for improvement have been made, the last question is to find out the extent to which the suggested solutions were able to improve and benefit the system as a whole.



1.5 Research objectives

This study has been motivated by the need to assess the legitimacy of the investor – state arbitration system. The aims of the study therefore are as follows:

- (i) To determine whether the investor – state system incorporates legitimacy values which are crucial to any adjudicative system.

- (ii) To propose viable solutions for the current systemic problems in an effort to enhance stakeholders trust in the system.
- (iii) To identify and critically analyse the strengths and weaknesses of the suggested solutions.
- (iv) To propose recommendations for the purpose of improving the legitimacy of the investor – state arbitration system.

1.6 Literature review



A number of options for improvement have been suggested by different stakeholders. Knahr, for example, proposes consolidation of related proceedings as a means of curbing inconsistent decisions.⁵¹ She argues that in order to avoid duplication of proceedings and conflicting outcomes parties should consolidate their proceeding in order to minimise costs and also avoid inconsistent decisions. Reinisch and Crivellaro also support this suggestion.⁵²

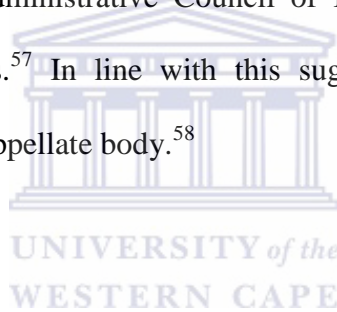
Another solution which has received a lot of consideration is the adoption of the doctrine of precedent. Kaufmann – Kohler and other authors suggest that in order to cure the problem of

⁵¹ Knahr C ‘Consolidation of Proceedings in International Investment Arbitration’ in Knahr C et al (eds.) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 1-19 at 2.

⁵² Reinisch A ‘The proliferation of international Dispute Settlement Mechanisms: The threat of fragmentation vs. The promise of more effective system? Some reflections from the perspective of investment arbitration’ in Buffard J et al (eds.) *International Law Between Universalism and Fragmentation* (2008)107 – 126; See also Crivellaro A ‘Consolidation of Arbitral and Court Proceedings in Investment Disputes’ (2005) *4 Law & Practice of International Courts & Tribunals* 371 at 371.

inconsistency in investor – state arbitration there is a need to adhere to the English common law doctrine of precedent.⁵³ The doctrine requires the court to stand by its previous decisions.⁵⁴ That is to say, when a matter before the court has facts similar to those of another matter previously decided, the court should be bound to follow the ruling of the previous case.⁵⁵

In addition to the above, others have suggested the introduction of an appellate facility under ICSID.⁵⁶ Advocates for this argue that in order to avoid the requirement of amending the ICSID Convention, the appellate body can be established under the ICSID Appeals Facility Rules which can be easily adopted by the Administrative Council of ICSID without the requirement of approval from all member states.⁵⁷ In line with this suggestion, others are proposing the establishment of the treaty based appellate body.⁵⁸



⁵³ Kaufmann – Kohler G ‘Arbitral Precedent: Dream, Necessity of Excuse? – The 2006 Freshfield Lecture’ (2007) 23 (3) *Arbitration International* 344 at 378; see also Reinisch A ‘The Future of Investment Arbitration’ in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) at 915; see also Spooreberg & Vinuales ‘conflicting decisions in International Arbitration’ *Law & Practice of International Courts & Tribunals* (2009) 91 – 113; see also Dennis J ‘Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent’ (1994) 54 *Louisiana Law Review* 1 at 3.

⁵⁴ Kaufmann – Kohler G ‘Arbitral Precedent: Dream, Necessity of Excuse? – The 2006 Freshfield Lecture’ (2007) 23 (3) *Arbitration International* 344 at 359; see also Dennis J ‘Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent’ (1994) 54 *Louisiana Law Review* 1 at 3.

⁵⁵ Reinisch A ‘The Future of Investment Arbitration’ in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) at 915; see also Kaufmann – Kohler G ‘Arbitral Precedent: Dream, Necessity of Excuse? – The 2006 Freshfield Lecture’ (2007) 23 (3) *Arbitration International* 344 at 347.

⁵⁶ See Gleason E ‘International Arbitral Appeal, What are we so afraid of?’ (2007) 7 *Pepperdine Law Review Journal* 269 at 285; see also; Frank S D ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1521 at 1586; also see Mann H ‘Civil Society Perspective: what Do Key Stakeholders Expect from the International Investment Regime?’ in Alvarez J and Sauvant K (eds.) *The Evolving International Investment Regime* (2011) at 170; see also Reinisch A ‘The Future of Investment Arbitration’ in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) at 895.

⁵⁷ Gaiger R ‘Multilateral Approach to Investment’ in Alvarez J and Sauvant K P (eds.) *The Evolving International Investment Regime* (2011) 153-173 at 170.

⁵⁸ Gantz DA ‘An Appellate Mechanism for Review of Arbitral Decisions in Investor- State Disputes: Prospects and Challenges’ (2006) 39 *Vanderbilt Journal of Transnational Law* 39.

A number of authors have suggested the establishment of one independent investment court.⁵⁹ It is suggested that this body should not be affiliated to any of the existing conventions. These previous authors rightly suggest that this single international investment court be created to review all investment arbitration awards for errors of law and legal interpretation.⁶⁰

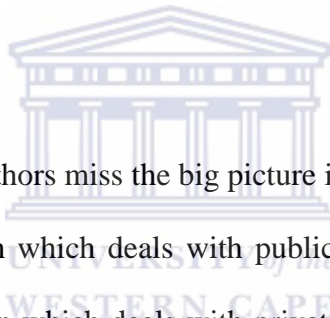
This research builds its argument from those who call for the establishment of an independent court. The research submits that although this solution has been considered by others, none of the authors have addressed the issue comprehensively. None of the previous authors have discussed how the court should be formulated, why should it be established now, where should it be hosted and what will be its mandate. Furthermore, none of the previous authors have discussed how the current investor – state adjudicative system can be phased out without affecting the legitimacy of the future courts. In addition, no one has discussed and analysed the minimum content of the future Multilateral Agreement on Investment and how the MAI will address the issues haunting investor – state adjudicative system. This research addresses all the above mentioned issues. Therefore in comparison with previous authors, this research is more comprehensive and addresses the issues in a more scholarly way.

While there is ample evidence to support the argument that the investor – state arbitration system is in crisis, there is literature which sees no need for reform. Walde argues that the current

⁵⁹ Frank S D ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1521 at 1617; see also Knull W H & Rubins N D ‘Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?’ (2000) 11 *American Review of International Arbitration* 531 at 531; also see Goldhaber MD ‘Wanted: A World Investment Court’ available at <http://www.americanlawyer.com/focuseurope/investmentcourt04.html> accessed on 25/02/2013.

⁶⁰ Van Harten G *Investment Treaty Arbitration and Public Law* (2007) at 180.

system is relatively working just fine when compared with other dispute settlement systems.⁶¹ He argues that inconsistency is a feature which cannot be avoided and that it is common even in international commercial arbitration. In support of objection to reform there are Brower & Schill,⁶² Tams⁶³ and Franck.⁶⁴ As regards the arbitrators' lack of independence and impartiality, it is argued by Brower & Schill that the claim is unfounded because presiding arbitrators are people of integrity with enormous professional experience, and they are not motivated by money in accepting their role as arbitrators.⁶⁵ With regard to establishment of an appellate facility, Tams argues that the appeal process will compromise the primary aims of arbitration which are finality of the award, cost efficiency and timeliness.⁶⁶ According to these authors the current system needs no reform.



This research submits that these authors miss the big picture in their analysis. It is stated here that international investment arbitration which deals with public law should not be compared with international commercial arbitration which deals with private law per se. Leaving the system to operate in the current manner will lead to it losing more legitimacy. Adopting their suggestion will lead to the withdrawal of more member states. What is required is to find comprehensive solutions which will be able to address the identified issues in the system. This research provides the comprehensive solutions.

⁶¹ See Wälde T 'Improving the Mechanisms for Treaty Negotiation and Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy' (2009) *Yearbook on International Investment Law & Policy* 505 at 506.

⁶² Brower C N & Schill S 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 *Chicago Journal of International Law* 471.

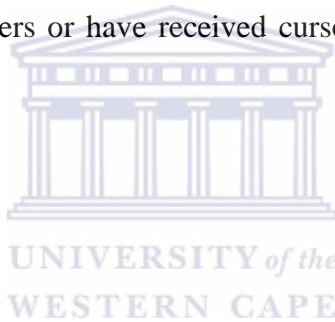
⁶³ Tams C 'An appealing Option? The debate about an ICSID Appellate Structure' (2006) 57 *Essays on Transnational Economic Law* 1

⁶⁴ Franck S 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 *Harvard International Law Journal* 435 at 440.

⁶⁵ Brower C N & Schill S 'Is arbitration a threat' at 491; see also Alvarez 'A review on Investment Treaty Arbitration and Public Law by Gus Van Harten' (2008) *The American Journal of International Law* 909 at 914.

⁶⁶ Tams C 'An appealing Option? The debate about an ICSID Appellate Structure' (2006) 57 *Essays on Transnational Economic Law* 1 at 12.

In conclusion, it is hereby submitted that while this research is in support of reform, it does not agree with the earlier authors' suggested solutions. This is due to the fact that most of the solutions suggested are narrow and do not address the problems comprehensively. They mostly address the problem of consistency but leave out other important legitimacy issues, such as: lack of transparency; costly adjudication process; lack of independence and impartiality of arbitrators; and tribunals' encroachment on state regulatory powers. In addition, each of the suggested solutions is accompanied by a number of obstacles. This research is important as it suggests new solutions which tackle all existing problems comprehensively. These new suggestions have not been discussed by earlier researchers or have received cursory consideration by others despite their potential.



1.7 Research methodology

As the nature of the subject matter requires, reliance is placed on primary and secondary sources of research. International instruments that include, but are not limited to, treaties, conventions, agreements, arbitral awards, and other international legal materials, will be extensively relied upon as primary sources. Relevant books, scholarly articles and working papers (both electronic and hard copies) are also consulted as secondary sources. Due to the fact that a number of scholars have written on the subject matter, this research is analytical in nature. The research critically analyses the existing literature and proposes its own recommendations and conclusions.

1.8 Thesis outline

Chapter 1: This chapter contains: general background of the study; central research questions; research objectives; significance of the study; chapter outline; and the methodology employed in conducting the study.

Chapter 2: This chapter focuses on the historical development of the investment arbitration system. The chapter discusses the international community's efforts in developing a uniform foreign investment dispute settlement system alongside formulating 'acceptable to all' international investment law principles. The chapter further discusses the challenges and obstacles encountered in the efforts to achieve the two goals. The mechanisms used to settle international investment disputes prior to the current BITs regime are also discussed together with the reasons for such mechanisms being abandoned in favour of the current international arbitration system.

Chapter 3: the chapter discusses the current investment arbitration system. The discussion is centred on the ICSID arbitration system, additional Facility arbitration system and Ad hoc Arbitration at the Permanent Court of Arbitration (PCA) conducted under UNCITRAL Rules. A number of cases showing the extent of legitimacy issues in the system are extensively discussed in this chapter. The rules are extensively discussed, including finding out what causes inconsistency, lack of transparency, lack of independence and impartiality of arbitrators and tribunals' encroachment on state regulatory powers. The chapter concludes that there is a need to

address the legitimacy issues as soon as possible before the system loses the little legitimacy it currently enjoys.

Chapter 4: The chapter focuses on ideal features of a legitimate adjudication system. The chapter contains a detailed discussion of the ideal features/ indicators of a legitimate adjudication system. The chapter further discusses the extent to which these indicators have been incorporated in investor – state arbitration and other international adjudicative bodies. The chapter concludes that the investor – state arbitration system needs to be improved by ensuring that all legitimacy values are given high priority and incorporated in the system.

Chapter 5: This chapter explores and critically discusses the suggestions for improvement as proposed by stakeholders. The suggested solutions under discussion include: invoking res judicata and lis pendens principles; adopting the doctrine of precedent; applying the ‘fork in the road’ principle; adopting the margin of appreciation standard in interpretation of BITs; creating an appellate structure at ICSID and creating a treaty to treaty appellate body. The strength and weaknesses of each suggestion will be critically analysed under this part.

Chapter 6: This chapter proposes the enactment of a Multilateral Agreement on Investment (MAI) which provides for the establishment of an international investment court and a permanent court of appeal for international investment disputes. The chapter further analyses the possible content of the MAI to be established and the courts to be established. The advantages of the reform is clearly analysed in this chapter. The chapter concludes that the reform is inevitable and that the time for the reform is long overdue.

Chapter 7: This chapter provides a summary of the whole thesis and states the general recommendations. The chapter recommends that the time is ripe for the establishment of a MAI which provides for the establishment of an international investment court with an international appellate court structure at the apex.



CHAPTER TWO

THE HISTORICAL ORIGINS OF INTERNATIONAL INVESTMENT LAW AND INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT SYSTEM

2.1 Introduction

This chapter focuses on the historical development of international investment law generally and international investment law dispute settlement system specifically. The chapter is divided into five sections. The first section briefly discusses the history of international investment law generally. As it is clearly known, any dispute settlement system exists for the purpose of resolving disputes in a particular field of law. Therefore it is important to discuss the development of international investment law together with the international investment dispute settlement system as the two complement each other. In the second section, the chapter discusses the international community's efforts in developing a uniform foreign investment dispute settlement system alongside formulating 'acceptable to all' international investment law principles. The section reveals that in each effort made by the international community to develop uniform international investment law principles or standards, there were always provisions addressing the dispute settlement system. The section further discusses the challenges and obstacles encountered in the efforts to achieve the two goals. The third section of the chapter discusses in detail the mechanisms used to settle international investment disputes prior to the current BITs regime. The mechanisms discussed in this section are: diplomatic protection, ad hoc claim commissions and the use of host state courts. The reasons for such mechanisms being

abandoned in favour of the current international arbitration system form part of the discussion in the section. The fourth section discusses the rise of the current investor – state arbitration system. The section reveals that BITs and the ICSID Convention are the cornerstone of the current system. The last part constitutes the conclusion and summarise the whole chapter.

2.2 The historical development of international investment law

Modern civilisation has experienced different economic activities crossing political borders within a continent and from one continent to another. For these cross border activities to operate smoothly, it becomes necessary to have a legal framework that governs such activities. For cross border investment activities, international investment law was developed for this same purpose.¹ During the colonial period, between the 18th and 19th centuries, foreign investment did not need a specific legal regime due to the existence of imperial colonial laws which provided protection for all economic activities operating in the colonies, including investment activities.² However, after the end of World War II many colonies attained their independence and demanded sovereignty over economic activities operating in their territories.³ At the same time, the developed world which now became capital exporters needed a stable legal regime to govern their investments

¹See Borchard E *The Diplomatic Protection of Citizens Abroad* (1915) at 33; see also Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 7; see also Sornarajah M *The International Law on Foreign Investment* 3rd ed. (2010) at 19; see also Newcombe A &Paradell L *Law and Practice of Investment Treaties* (2009) at 4.

² See Sornarajah M *The International Law on Foreign Investment* 3rd ed. (2010) at 20; see also Newcombe A &Paradell L *Law and Practice of Investment Treaties*(2009) at 11and 62; see also Mosoti V ‘Bilateral Investment Treaties and the Possibility of a Multilateral Investment Framework on Investment at the WTO: Are Poor Economies Caught in Between?’ (2005) 26 *Northwestern Journal of International Law & Business* 95 at 106-107; see also Van Harten G *Investment Treaty Arbitration and Public Law* (2007) 14-15.

³ See Sornarajah M *The International Law on Foreign Investment* 3rd ed. (2010) at 20.

abroad.⁴ As a result, the need to develop a specific international investment legal regime to protect foreign investment emerged. A number of efforts were made to establish a multilateral investment legal regime but due to ideological and interest differences between the developed world and new nations, the efforts proved futile for a number of times.⁵ A thorough discussion of these efforts will follow at a later stage of this chapter.⁶

As pointed out in the introduction above, the development of an investor – state disputes settlement system went hand in hand with the development of international investment law generally.⁷ International investment law as a general field influences the development of its dispute settlement system and vice versa. By the 1970s, international investment law was one of the least developed areas of international law and the same is true of the investor – state dispute settlement system.⁸ The International Court of Justice (hereinafter the ICJ) in *Barcelona Traction, Light and Power Company, Ltd (Belgium, v. Spain)*⁹ made the following remarks with regard to the slow development of investment law:

‘Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the

⁴ See Sornarajah M *The International Law on Foreign Investment* 3rd ed. (2010) at 22.

⁵ Harten G *Investment Treaty Arbitration and Public Law* (2007) at 20–21; see also Schill S W *Multilateralisation of International Investment Law* (2009) at 34; see also Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 20; see also Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 20; see also OECD Directorate of Finance and Enterprise Affairs, *Relationship between International Investment Agreement (2004)* available at <http://www.oecd.org/dataoecd/8/43/31784519.pdf>; accessed on 10/06/2013.

⁶ See subheading 2.3 below.

⁷ See the introduction above.

⁸ Salacuse J W ‘BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries’ (1990) 24 *International Law* 655 at 656.

⁹ *Barcelona Traction, Light and Power Co Case (Belgium v Spain)* (1970) ICJ Reports 3.

evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.’¹⁰

Despite the above statement, international investment law continued to develop at a slow pace.¹¹ It was not until the early 1990s that the field of international investment law rapidly developed and received worldwide recognition as the fastest growing field of international law.¹² The growth has been made possible by the coming into existence of Bilateral Investment Treaties (BITs) and International Investment Agreements (IIA).¹³ BITs or IIAs are agreements made between two or more countries that safeguard investments made in the territories of the signatory countries.¹⁴ While the first BIT was signed between Germany and Pakistan in 1959, the BIT regime did not have great impact until the early 1990s.¹⁵ Prior to this rapid growth of the BIT regime, international investment law was mainly governed by customary international law principles and general principles of law as found in the domestic law of the host state.¹⁶ In many developing states national treatment was the dominant view and accepted as a principle of international law. The principle demanded that foreign investors’ properties be accorded the

¹⁰*Barcelona Traction, Light and Power Co Case (Belgium v Spain)* (1970) ICJ Reports 3 para46 - 47.

¹¹ See Salacuse J W ‘Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain’ in Horn N (ed.) *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (2004) 51 – 88 at 55.

¹² See the United Nations Conference on Trade and Development (“UNCTAD”) *Bilateral Investment Treaties in the Mid-1990s* (1998) U N Doc UNCTAD/ITE/IIT/7, U N Sales No E 98 II D 8.

¹³ See Salacuse J W ‘Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain’ in Horn N (ed.) *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (2004) 51 – 88 at 54; see also Franck S ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1521 at 1524.

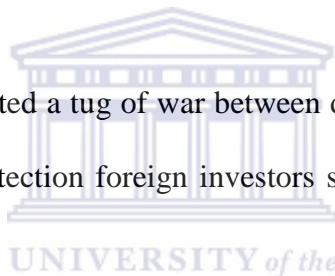
¹⁴ See generally United Nations Conference on Trade and Development (UNCTAD) *Bilateral Investment Treaties in the Mid-1990s* (1998) U N Doc UNCTAD/ITE/IIT/7, U N Sales No E 98 II D 8.

¹⁵ See generally United Nations Conference on Trade and Development (“UNCTAD”) *Bilateral Investment Treaties in the Mid-1990s* (1998) U N Doc UNCTAD/ITE/IIT/7, U N Sales No E 98 II D 8.

¹⁶ Salacuse J W ‘Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain’ in Horn N (ed.) *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (2004) 51 – 88 at 52 – 53.

same treatment that local investors enjoy.¹⁷ This international law principle was deficient in several respects.¹⁸ The first deficiency was that it failed to take into account important issues of concern to foreign investors.¹⁹ For example, it did not provide a foreign investor with the right to make monetary transfers from the host state to their home country.²⁰ Secondly, the rules were vague and subject to different interpretations. Thirdly, the national treatment principle was not accepted in some parts of the world especially developed countries.²¹ The last deficiency was that it failed to give the foreign investor an effective enforcement mechanism whenever they had a claim against the host state.²² The enforcement mechanisms available were to file a claim in the local court or seek espousal of the claim by their home country government.²³

These uncertainties in the law created a tug of war between developed and developing countries with regard to the standard of protection foreign investors should expect from the host state.²⁴



¹⁷ Dolzer R & Schreuer C *Principles of International Investment Law* (2008) at 11; see also Kronfol Z A *Protection of Foreign Investment: A study in International Law* (1972) at 14; see also Wenhua S 'Is Calvo Dead' (2007) 55 *American Journal of Comparative Law* 123 at 127.

¹⁸ See Vandeveld K J 'A brief history of international investment agreements' (2005) 12 *University of California Davis Journal of International Law and Policy* 157; see also Salacuse J W 'Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain' in Horn N (ed.) *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (2004) 51 – 88 at 52 – 53; see also Salacuse J W 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *International Law* 655 at 659; see also Dodge W 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1 at 5-8; also see Cosmas J 'Investor – state international arbitration system: is ICSID the appropriate forum for developing countries like Tanzania?' (2014) 5 (1) *Open University Law Journal* 25 – 36.

¹⁹ Salacuse J W 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *International Law* 655 at 659.

²⁰ Salacuse J W 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *International Law* 655 at 659.

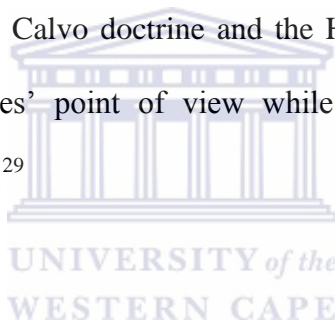
²¹ Vandeveld K J 'A brief history of international investment agreements' (2005) 12 *University of California Davis Journal of International Law and Policy* 157

²² Dodge W 'Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1 at 5-8.

²³ See Cosmas J 'Investor – state international arbitration system: is ICSID the appropriate forum for developing countries like Tanzania?' (2014) 5 (1) *Open University Law Journal* 25 – 36 at 30.

²⁴ See Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 7; see also Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 13; see also Salacuse J 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *International Law* 655 at 659; see also Dodge W 'Investor-State Dispute Settlement Between Developed

While developed states claimed that international law imposed an obligation on host states to treat foreign investors in accordance with the international minimum standard of protection principle, developing countries had a contrary view and demanded equal treatment between foreign investors and local ones.²⁵ New nations coming out of colonialism found that the international minimum standard of protection principle interfered with their sovereignty and vehemently rejected its application in their territories and favoured national treatment instead.²⁶ New nations pushed for full and equal sovereignty among nations. They argued that application of the international minimum standard of protection principle would afford foreign investors more protection than their own citizens.²⁷ The squabble between these two camps led to the development of two doctrines: the Calvo doctrine and the Hull doctrine.²⁸ The Calvo doctrine supported the developing countries' point of view while the Hull Doctrine supported the developed countries' point of view.²⁹



Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of International Law* 1 at 5-8; see also Van Harten G *Investment Treaty Arbitration and Public Law* (2007) 14-15; also see Cosmas J 'Investor – state international arbitration system: is ICSID the appropriate forum for developing countries like Tanzania?' (2014) 5 (1) *Open University Law Journal* 25 – 36.

²⁵Brownlie I *Principles of Public International Law* 7th ed. (2008) at 519; see also Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 5; see also Kronfol Z A *Protection of Foreign Investment: A study in International Law* (1972) at 14; see also Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 8; see also Salacuse J W 'Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain' in Horn N (ed.) *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (2004) 51 – 88 at 52 – 53; see also Vandavelde K J 'A brief history of international investment agreements' (2005) 12 *University of California Davis Journal of International Law and Policy* 157; see also Salacuse J 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *International Law* 655 at 660.

²⁶Kauschal A 'Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime' (2009) 50 *Harvard International Law Journal* 491 at 500; see also Borchard E, 'The minimum international standard in the protection of aliens' (1939) *American Society of International Law Proceedings* 33.

²⁷Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 8.

²⁸See Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 13.

²⁹See Newcombe A and Paradell L *Law and Practice of Investment Treaties* (2009) at 13. The Calvo doctrine originates from the Argentina jurists Carlos Calvo while the Hull doctrine originates from the US Secretary of State Cordell Hull.

2.2.1 The Calvo doctrine

The Calvo doctrine advocated equal treatment between foreign investment and local investment. The doctrine required aggrieved foreign investors to file their cases with the host state courts and the matters be adjudicated in accordance with the host state laws.³⁰ Furthermore, it required the exclusive subjection of foreigners and their property to the laws and juridical regimes of the state in which they reside or invest. Lastly, the doctrine required strict abstention from interference by other governments, notably the governments of the States of which the foreigners are nationals, in disputes over the treatment of foreigners or their property.³¹ In other words, one can say that the Calvo doctrine demanded foreign investors to exhaust local remedies before seeking assistance from international fora. That is to say, whenever there was expropriation of foreign property the appropriate court to determine the legality of the expropriation will be the host state court using the host state laws.³² The Calvo doctrine or national treatment principle received a lot of criticism from the developed world. Worth mentioning is the US Secretary of State who argued that the Calvo doctrine was contrary to international justice as it advocated confiscation of foreign properties.³³

³⁰ Dolzer R & Schreuer C *Principles of International Investment Law* (2008) at 11; see also Kronfol Z A *Protection of Foreign Investment: A study in International Law* (1972) at 14; see also Wenhua S 'Is Calvo Dead' (2007) 55 *American Journal of Comparative Law* 123 at 127.

³¹ See Wenhua S 'Is Calvo Dead' (2007) 55 *American Journal of Comparative Law* 123 at 127 see also Verwey W D & Schrijver N J 'The Taking of Foreign Property under International Law: A New Legal Perspective?' (1984) XV *Netherlands Yearbook of International Law* 3–96 at 23; see also Kronfol Z A *Protection of Foreign Investment: A study in International Law* (1972) at 128.

³² Verwey W D & Schrijver N J 'The Taking of Foreign Property under International Law: A New Legal Perspective?' (1984) XV *Netherlands Yearbook of International Law* 3–96 at 24.

³³ See the Letter of the US Secretary of State to Mexican Ambassador to the United States, 21 July 1938, as cited in Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 16.

2.2.2 The Hull doctrine

The Hull doctrine, on the other hand, advocated for the foreign investor to be treated in accordance with an international law minimum standard of protection.³⁴ The minimum standard of protection principle required prompt, adequate and effective compensation in case of expropriation of foreign property by the host state. The Hull doctrine received a lot of support from developed countries including international tribunals and courts.³⁵ By the end of the 1940's the Hull doctrine or minimum standard of protection became so strong that it swept away the Calvo doctrine. It became a rule that once the foreign property is expropriated then prompt, adequate and effective compensation must be paid.³⁶ In 1922 the Permanent Court of Arbitration (PCA) in the *Norwegian Ship - owners Claims (Norway v. United States)* case ruled that foreign properties can only be expropriated for public use and after due compensation is promptly paid.³⁷ Twenty - two years later, the International Court of Justice (ICJ) in *Barcelona Traction, Light and Power Company, Ltd (Belgium. v. Spain)*³⁸ ruled as follows regarding the minimum standard of protection of foreigners:

³⁴Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 9; see also Dolzer R & Schreuer C *Principles of International Investment Law* (2008) at 11; see also Kronfol Z A *Protection of Foreign Investment: A study in International Law* (1972) at 14; see also Wenhua S 'Is Calvo Dead' (2007) 55 *American Journal of Comparative Law* 123 at 127.

³⁵Dolzer R & Schreuer C *Principles of International Investment Law* (2008) at 13; see also Kronfol Z A *Protection of Foreign Investment: A study in International Law* (1972) at 15.

³⁶Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 18.

³⁷(1948) UNRLAA 307 at 334.

³⁸*Barcelona Traction, Light and Power Co Case (Belgium v Spain)*, ICJ Reports 1970 para3.

‘A state once it has allowed a foreigner or foreign investment in its territory whether natural or juristic persons, it becomes under duty to accord them legal protection and bears obligations with regards to treatment to be accorded to them’.³⁹

As a result of the above court decisions and many more others, international investment law started to crystallise. The state duty to protect foreign investment as per the minimum standard of protection principle was branded as the ‘The Responsibility of States for Injuries to Aliens.’⁴⁰ The Hull doctrine dominated the sphere of international investment law for quite some time. However, the doctrine did not crystallise into a customary rule of international law as newly independent states continued to oppose it.⁴¹ The developing world joined efforts against the Hull doctrine and on 1 May 1974 they managed to persuade the UN to adopt the New International Economic Order (NIEO) which principally was against the Hull doctrine.⁴² A discussion of this resolution and other efforts is undertaken in the section that follows immediately hereunder.

³⁹*Barcelona Traction, Light and Power Co Case (Belgium v Spain)*, ICJ Reports 1970, 3, para 33.

⁴⁰Nicholson F ‘The Protection of Foreign Investment under Customary International Law’ (1965) *Boston College Law Review* 391 at 391.

⁴¹Guzman A ‘Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’ (1998) 38 *Vanderbilt Journal of International Law* 639 at 646.

⁴²UN Resolution 3202 (S – VI).

2.3 International community efforts to create uniform international investment law principles and an investor – state dispute settlement system

For decades the world community, through the League of Nations, the United Nations, the Organisation for Economic Cooperation and Development (hereinafter the OECD), the World Bank and recently the World Trade Organisation (hereinafter the WTO), have been involved in efforts to establish a multilateral investment regulating body. These efforts aim at developing uniform international investment law principles together with establishing a uniform international investor – state dispute settlement system. To date these efforts have not been able to achieve that goal. As pointed out earlier, the major reason behind the failure has been the conflict of interests between developed countries and the developing world. On a number of occasions, these conflicting interests have resulted in the stalling of the multilateralisation process. Following hereunder is a discussion of the efforts made by different institutions for a number of decades to create an international investment protection regime.

2.3.1 League of Nations efforts 1920 – 1930s

The League of Nations was established in 1920 after the end of World War I (WWI). It was established as an international organisation whose role was to maintain world peace and ensure that war does not break out again.⁴³ The Covenant establishing the League also encouraged settlement of international disputes through negotiations and arbitration.⁴⁴ In 1924 the League

⁴³ See the preamble to the League of Nations Covenant, 1924 available at <http://unispal.un.org/UNISPAL.NSF/0/6CB59816195E58350525654F007624BF> accessed on 06/06/2013.

⁴⁴ See Article 12 and 13 of the League of Nations Covenant.

formed a committee of experts and tasked it to codify international law principles.⁴⁵ The committee, among other things, was supposed to codify the responsibility of states for damage done to aliens and their properties. The codification conference was held at The Hague in 1930. A renowned jurist and expert in international law, Edwin Borchard, were tasked by the committee to prepare a draft convention on responsibility of states for damage done in their Territory to the Person or Property of Foreigners.⁴⁶

Regarding dispute settlement, the draft convention provisions demanded foreign investors to be treated in accordance with the minimum standard of treatment provided for by international law.⁴⁷ The final draft, however, could not be adopted as a result of disagreement among the nations. Developing countries wanted foreign investors to receive the same treatment as nationals while developed countries demanded that foreign investors should be treated in accordance with the minimum standard principle of international law.⁴⁸ Out of 38 states present at the conference, 17, (mainly developing states) voted against the minimum standard of protection while the remaining twenty one states (developed states) voted in favour of minimum standard of protection. As a two - third majority was the requisite support required and was not obtained, the draft convention was shelved.⁴⁹

⁴⁵ See Dodge W 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of International Law* 1, at 5-8; also see Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 16.

⁴⁶ See Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 17.

⁴⁷ Dodge W 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of International Law* 1, at 5-8; also see Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 16.

⁴⁸ See Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 16.

⁴⁹ See Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 16.

2.3.2 League of Nations efforts through the Convention on the Treatment of Foreigners, 1929

This was another effort under the auspices of the League of Nations. Article 23 of the League of Nations Covenant empowered the league to make rules in order to ensure equitable treatment for the commerce of all members of the League.⁵⁰ The League through the mandate given under this Article, prepared a conference on the treatment of foreigners which was held in Paris in 1929. The Council of the League tasked the Economic Committee to prepare a draft convention. The Committee prepared the draft convention on the Treatment of Foreigners. The draft convention provided for equal protection of foreign investors and nationals. However, it went beyond the normal principles of equality as it guaranteed foreigners the rights to exercise civil, judicial and succession rights. The draft convention also empowered foreigners to establish themselves in the host state, engage in any business and pursue any occupation.⁵¹

With regard to dispute settlement, the draft convention required the disputes to be settled in the host state courts by applying the host state law. In the end, developed countries did not sign the draft convention on the ground that it was far behind the position of the law at the time as it failed to recognise the minimum standard principle.⁵²

⁵⁰ See Article 23(e) of the League of Nations Covenant, 1924 available at <http://unispal.un.org/UNISPAL.NSF/0/6CB59816195E58350525654F007624BF> accessed on 06/06/2013.

⁵¹ Dodge W 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of International Law* 1, at 5-8; see also Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 17.

⁵² See Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 17.

2.3.3 The United Nations Havana Charter, 1948

After WWII, the world community, through the newly established UN, was eager to join hands and work together again.⁵³ The UN organised a Conference on Trade and Employment in Havana, Cuba, from 21 November 1947 to 24 March 1948. The conference resulted in the Havana Charter which provided for the establishment of the International Trade Organisation (ITO).⁵⁴ It was expected that the Havana charter would be enforced through the ITO.⁵⁵ The ITO was intended for the purpose of promoting bilateral and multilateral agreements on trade.

The draft of the Charter contained Articles 11 and 12 which provided for foreign investment protection.⁵⁶ Article 11 required member countries to respect and protect other member states' enterprises, skills and capital which existed in their territories.⁵⁷ Articles 12 (a) and (b) provided for the need of host states to receive capital flow from other member states for the purposes of stimulating local economic growth. However, the provision left the mandate to the host state to determine the type of investment it would allow in its territory and warned foreign investors not to use their investment to interfere with the internal affairs of the host state.⁵⁸ Those were the only provisions providing for foreign investment protection in the Charter. One can see that with such scanty provisions on international investment, it tells it all that the Charter had less interest on unification of international investment law.

⁵³ Shenkin S T 'Trade Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving towards a Multilateral Investment Treaty' (1994) 55 *University of Pittsburgh Law Review* 541 at 555; see also Schill S W *Multilateralisation of International Investment Law* (2009) at 34.

⁵⁴ The *Havana Charter* for an International Trade Organization, U.N. Doc. E/Conf. 2/178 (24 March 1948) available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf accessed on 18/05/2013.

⁵⁵ Shenkin S T 'Trade Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Towards a Multilateral Investment Treaty' (1994) 55 *University of Pittsburgh Law Review* 541 at 555.

⁵⁶ United Nations Conference on Trade and Employment, *The Havana Charter Final Act and Related Documents UN Doc E/Conf. 2/78* available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf accessed on 18/05/2013.

⁵⁷ See Article 11 of the Charter.

⁵⁸ See Article 12(c) of the Charter.

Regarding investor – state dispute settlement, disputes were left to be settled through the host state courts. Host states were urged to avoid discrimination against foreign investments.⁵⁹ That is to say, foreign investments were to be accorded the same treatment as local investments in local courts.⁶⁰

The Charter and the ITO did not come into operation as they lacked support from the US and its allies.⁶¹ Therefore to date the Charter remains as one of the many historical documents of the efforts towards creating a unified international investment law. The only tangible outcome of the Havana Conference was the General Agreement on Tariffs and Trade (GATT).⁶² The GATT provides for contracting member state obligations regarding trade.⁶³ It essentially provided for Most Favoured Nation treatment (MFN),⁶⁴ National Treatment on internal taxation and regulation (NT),⁶⁵ Anti - Dumping and Countervailing measures,⁶⁶ and other trade obligations.⁶⁷ The GATT however did not provide anything substantial on foreign investment protection. The GATT was crucial in the formation of the current WTO as it became the framework within which the negotiations were based.⁶⁸

⁵⁹ See Article 12(2) (a) (ii) of the Charter.

⁶⁰ Shenkin S T 'Trade Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Towards a Multilateral Investment Treaty' (1994) 55 *University of Pittsburgh Law Review* 541 at 556.

⁶¹ Vandavelde K J *Bilateral Investment treaties: History, Policy and Interpretation* (2010) 41.

⁶² Vandavelde K J *Bilateral Investment treaties: History, Policy and Interpretation* (2010) 41.

⁶³ See The General Agreement on Tariffs and Trade (GATT 1947) available at <http://www.worldtradelaw.net/uragreements/gatt.pdf> accessed on 03/06/2013.

⁶⁴ See Article I of the General Agreement on Tariffs and Trade, 1947 available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf accessed on 18/05/2013.

⁶⁵ See Article III of the General Agreement on Tariffs and Trade, 1947 available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf accessed on 18/05/2013.

⁶⁶ See Article VI of the General Agreement on Tariffs and Trade, 1947 available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf accessed on 18/05/2013.

⁶⁷ The General Agreement on Tariffs and Trade (GATT 1947) available at <http://www.worldtradelaw.net/uragreements/gatt.pdf> accessed on 03/06/2013.

⁶⁸ Vandavelde K J *Bilateral Investment treaties: History, Policy and Interpretation* (2010) 41.

In conclusion, it can be said here that the failure of the Charter exemplified the existing tension between the developed and the developing world. The failure was another blow to the efforts to have agreed clear rules for regulating foreign investment and to formulate a uniform dispute settlement system for foreign investments.

2.3.4 The Abs – Shawcross Draft Convention on Investment Abroad, 1959

A decade after abandoning the Havana charter, developed nations made another effort to create a convention on investment abroad famously known as the Abs – Shawcross Draft Convention.⁶⁹ The Draft emanated from the initiatives of European business people and lawyers under the leadership of two prominent figures, Herman Abs the Chairman of Deutsche Bank in Germany and Lord Shawcross a former British Attorney General at the time.⁷⁰ The Draft had foreign investors' best interest at heart. It introduced provisions which provided for maximum protection of investment abroad.⁷¹ Article II of the Draft Convention, in particular, introduced the umbrella clause for the first time in international investment protection regime.⁷² The Article required each state party 'at all times' to ensure the observance of 'any undertakings' which it may have given in relation to investments made by nationals of any other Party. The phrase 'at all times', intended to signify that the state will always be bound to protect foreign property without any

⁶⁹Draft Convention on Investments Abroad (Abs–Shawcross Convention), reprinted in UNCTAD, *International Investment Instruments: A Compendium* (2000) Volume V, p. 395.

⁷⁰ The Draft Convention name stands for the surnames of the pioneers to the convention Herman Abs from German government and Lord Shawcross from Britain.

⁷¹ See for example Article I which provide for Fair and Equal Treatment (FET) standard and Article III providing for rule against expropriation just to name a few.

⁷²The term 'umbrella clause' is commonly used to describe clauses in investment treaties which imposes a requirement on the contracting States to observe all investment obligations entered into with investors from the other contracting State.

exceptions.⁷³ On the other hand, the words ‘any undertaking’ were intended to be interpreted widely so as to even include the state’s general promises in legislative form.⁷⁴ The Article was meant to ensure that at all times the host state will be held liable for its measures which have affected the foreign property regardless of the motive for such measure.⁷⁵

With regard to dispute settlement, the Draft Convention dispensed with the requirement of exhaustion of local remedies.⁷⁶ Investors were given an opportunity to institute their claim in a neutral forum to be established by the parties as long as the state party in question had given consent to the established tribunal.⁷⁷ In the absence of an agreement, state parties were given an option to institute their claim with the International Court of Justice.⁷⁸ The draft also empowered the injured national of another state to sue the host state in a tribunal to be established in accordance with Article VII (i).⁷⁹ The Draft Convention was viewed by many as being too ambitious to protect investors and that the political price to be paid once a state joined was too high. In the end it failed to garner support not only from developing countries but some developed nations were also sceptical of the draft.⁸⁰

⁷³ Potts J B ‘Stabilizing the Role of Umbrella Clauses in BITs: Intent, Reliance and Internationalization’ (2011) *Vanderbilt Journal of International Law* 1005 at 1011.

⁷⁴ Potts J B ‘Stabilizing the Role of Umbrella Clauses in BITs: Intent, Reliance and Internationalization’ (2011) *Vanderbilt Journal of International Law* 1005 at 1011.

⁷⁵ Potts J B ‘Stabilizing the Role of Umbrella Clauses in BITs: Intent, Reliance and Internationalization’ (2011) *Vanderbilt Journal of International Law* 1005 at 1011.

⁷⁶ See Article VII of the Draft Convention.

⁷⁷ See Article VII of the Draft Convention.

⁷⁸ See Article VII (i) of the Draft Convention.

⁷⁹ Potts J B ‘Stabilizing the Role of Umbrella Clauses in BITs: Intent, Reliance and Internationalization’ (2011) *Vanderbilt Journal of International Law* 1005 at 1010.

⁸⁰ See Potts J B ‘Stabilizing the Role of Umbrella Clauses in BITs: Intent, Reliance and Internationalization’ (2011) *Vanderbilt Journal of International Law* 1005 at 1010.

2.3.5 The Organisation for Economic Cooperation and Development Draft Convention on the Protection of Foreign Property, 1967

After the failure of the Abs – Shawcross efforts, the Organisation for Economic Cooperation and Development (OECD) Council meeting held in April 1960 tasked the OECD Committee to prepare a Draft Convention on the Protection of Foreign Property.⁸¹ The Draft Convention was more or less similar in content to the Abs – Shawcross Draft Convention. It also provided the highest standard of foreign investment protection. Article 2 imposed an obligation on all member states to observe any undertaking it had previously committed in relation to property of nationals of any other state party. The wording of this clause was similar to the Abs – Shawcross Draft Convention and intended to serve the same purpose.⁸² The word ‘property’ was intended to be interpreted in its widest sense to include direct and indirect interests.⁸³ The word ‘undertaking’ was to be interpreted widely also to include even unilateral engagement of the host state.⁸⁴

Article 7 provided for dispute settlement. The Article provided for state to state dispute settlement in an international adjudication forum to be established upon the agreement of the parties.⁸⁵ Furthermore the provision empowered the injured national of another state to institute

⁸¹ OECD Draft Convention 1967 adopted by the OECD Council on 15th October 1967 available at <http://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf> accessed on 19/05/2013.

⁸² Potts J B ‘Stabilizing the Role of Umbrella Clauses in BITs: Intent, Reliance and Internationalization’ (2011) *Vanderbilt Journal of International Law* 1005 at 1011.

⁸³ See Article 9(c) of the OECD Draft Convention.

⁸⁴ See Article 2 of the OECD Draft Convention.

⁸⁵ See Article 7(a).

proceeding against the host state when the home state decided not to pursue the claim in the state – state forum.⁸⁶

The draft however failed to garner enough support within the OECD member states and as a result it was not opened for signature to the rest of the world.⁸⁷ The reason for this early failure was that the Draft Convention did set very high standards of protection, which worried even OECD member states. Another contributing factor to the failure was the usual North – South divide on the level of protection foreign investment should be accorded.⁸⁸

2.3.6 The Declaration on Permanent Sovereignty over Natural Resources (PSNR), 1962

Developing countries' efforts towards gaining sovereignty over their natural resources started in the early 1950s. Latin American countries spearheaded the move and later it gained support from the Union of Soviet Socialist Republics (USSR), and Asian and African countries.⁸⁹ In 1952 they influenced the adoption of General Assembly Resolution 523 (VI).⁹⁰ In this Resolution it was clearly stated that trading between developing countries and developed countries is permissible as long as there are no conditions attached which violate the sovereignty of the states involved.⁹¹

The ideas behind the Resolution were further clarified in General Assembly Resolution 626 (VII)

⁸⁶ See Article 7(b).

⁸⁷ Schill S W *Multilateralisation of International Investment Law* (2009) at 36.

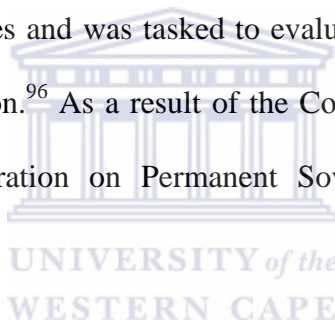
⁸⁸ Schill S W *Multilateralisation of International Investment Law* (2009) at 36.

⁸⁹ Schrijver N *Sovereignty over Natural Resources, Balancing Rights and Duties* (1997) at 4.

⁹⁰ *Declaration on Integrated Economic Development and Commercial Agreement*, UN General Assembly Resolution 523 (VI), 12th January 1952 available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/067/78/IMG/NR006778.pdf?OpenElement> accessed on 03/06/2013.

⁹¹ See Article 1(b) (ii) General Assembly Resolution on Permanent Sovereignty over Natural Resources 523 (VI) 1952.

which emphasised national economic self - determination.⁹² The economic self- determination Resolution was strongly rejected by the US and other developed countries on the ground that it ignored the foreign investor's rights and placed no obligation on the host state to honour treaties and other international agreements.⁹³ The resistance from developed countries did not deter developing countries from pursuing their goal through the UN. In 1958 developing countries again managed to facilitate the adoption of General Assembly Resolution 1314 (XIII) which specifically states that the right to self - determination includes permanent sovereignty over natural resources.⁹⁴ It is through this Resolution that the Commission on Permanent Sovereignty over Natural Resources was formed.⁹⁵ The Commission was composed of members from developed and developing countries and was tasked to evaluate the relationship between PSNR and the right to self - determination.⁹⁶ As a result of the Commission's work, on 14 December 1962 the UN passed the Declaration on Permanent Sovereignty over Natural Resources (PSNR).⁹⁷



Although there were clear differences between developed and developing countries on the level of protection needed to protect foreign property, as discussed above, the two camps reached a

⁹² *Declaration on Right to Exploit Freely Natural Wealth and Resources*, UN General Assembly Resolution, 626 (vii), 21st December 1952 available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/079/69/IMG/NR007969.pdf?OpenElement> accessed on 03/06/2013.

⁹³ Schwebel SM 'The Story of the U.N's Declaration on Permanent Sovereignty over Natural Resources' (1963) 49 *A.B.A. J* 463.

⁹⁴ *Recommendations concerning International Respect for the Rights of the People and Nations to Self Determination* UN General Assembly Resolution 1314 (xiii), 12th December 1958 available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/747/58/IMG/NR074758.pdf?OpenElement> accessed on 03/06/2013.

⁹⁵ See Article 1 of Resolution 1314 (xiii).

⁹⁶ The commission was composed of Afghanistan, Chile, Guatemala, the Netherlands, the Philippines, Sweden, Soviet Union, United Arab Republic and the United States.

⁹⁷ *Declaration on Permanent Sovereignty over Natural Resources 1962*, UN General Assembly Resolution 1803 (XVII), 14 December 1962 UN Doc A/5217 full text available at <http://unispal.un.org/UNISPAL.NSF/0/9D85892AC6D7287E8525636800596092> accessed on 19/05/2013.

consensus at the UN on sovereignty over natural resources. The Declaration is the leading UN document in garnering support from both camps: developed and developing countries.⁹⁸ It recognises sovereign equality among states and each state's sovereignty over natural resources in its territory. The Declaration received overwhelming support because it created a balance between host state interests and foreign investor interests.⁹⁹ Newly independent countries hailed it for empowering them to control foreign activities in their territories. Before its adoption, due to the existence of inherited old agreements between foreign investors and colonial masters, host states were prevented by such agreements from interfering in the foreign investments affairs. Therefore, despite the acquired political independence, many states lacked control over the major means of the economy, including natural resources, due to the inherited old agreements and concessions. The Declaration, however, mandated them to expropriate foreign properties in certain circumstances as long as appropriate compensation was paid.¹⁰⁰ It further demanded the compensation to be governed by the laws of the host state by taking into account reasons of public utility, security or national interests which override individual interests both domestic and foreign.¹⁰¹

Developed countries, on the other hand, found the Declaration fulfilling as it required host states to pay appropriate compensation in case of expropriation.¹⁰² Article 8 insisted on the principle of *pacta sunt servanda*. It required the host states to respect commitments and concessions it entered

⁹⁸Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008)18.

⁹⁹Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) 18.

¹⁰⁰ See Article 4 of the Declaration.

¹⁰¹ See Article 4 of the Declaration.

¹⁰² See Article 4 of the Declaration.

into with foreigners.¹⁰³ Through the Hull doctrine, compensation upon expropriation and respect for concessions and treaties had been the developed states' demand for a long time and had been a point of departure with developing countries.¹⁰⁴ Through this Declaration a customary law principle requiring compensation after expropriation was born with unanimous support from both camps. By and large developed countries won the argument of the day as most of their demands were met.¹⁰⁵

With regard to dispute settlement, the Declaration required the national jurisdiction of the state taking such measure to be exhausted before the matter could be taken to an international forum. However, in the presence of an agreement between national states and any other party concerned, the dispute could be settled through arbitration or international adjudication.¹⁰⁶ The Declaration did not give the injured foreign investor the capacity to institute a claim against the host state directly but provided for a state – state dispute resolution system. To date the PSNR declaration still stands as one of the strongest pillars of the UN.¹⁰⁷

2.3.7 The New International Economic Order (NIEO), 1974

After the successful passing the declaration on Permanent Sovereignty over Natural Resources, and having also being encouraged by the success of oil producing countries in raising petroleum

¹⁰³ See Article 8 of the Declaration.

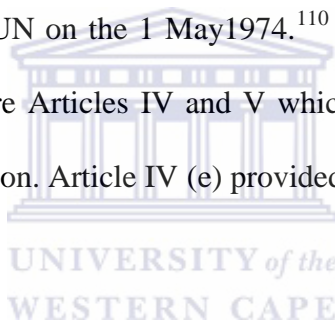
¹⁰⁴ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 23.

¹⁰⁵ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 23.

¹⁰⁶ See Article 4 of the Declaration.

¹⁰⁷ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 23.

prices in 1973, developing countries decided to push for more systemic changes.¹⁰⁸ With their majority in the United Nations Assembly they were now eager to introduce major reforms to the legal regime governing major means of production.¹⁰⁹ They introduced an agenda demanding a New International Economic Order (NIEO). The agenda had a number of aspects but the most relevant one for this work is an item on regulation of foreign investment. It was a concern for developing countries that despite the existence of the declaration on Permanent Sovereignty over Natural Resources, Trans National Corporations (TNC) were still controlling the major means of production in their territories and sometimes interfering with the running of the internal affairs of host states. Therefore, in an effort to solidify their sovereignty, developing countries pushed for a NIEO which was adopted by the UN on the 1 May 1974.¹¹⁰ The most important Articles of the NIEO to developing countries were Articles IV and V which in essence emphasised what was provided for in the PSNR Declaration. Article IV (e) provided that:



‘In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right.’¹¹¹

¹⁰⁸Kauschal A ‘Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime’ (2009) 50 *Harvard International Law Journal* 491 at 492.

¹⁰⁹Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 23.

¹¹⁰UN Declaration on the establishment of New International Economic Order, available at <http://www.un-documents.net/s6r3201.htm>, UN Resolution 3202 (S – VI) accessed 23/05/2013.

¹¹¹ See Article 4 (e) of NIEO UN Resolution 3202 (S – VI).

The Article emphasised sovereignty over natural resources and mandated states to deal with their resources in accordance with their own laws and to ensure that the resources benefit the country and its people.¹¹²

Article V, on the other hand, provided for the establishment of a mechanism which would help to control TNCs. It provided for the requirement of establishing a Code of Conduct for TNCs.¹¹³ The Article demanded that TNCs be prevented from interfering with the internal affairs of the host states and barred from cooperating with colonial administrators and racist regimes.¹¹⁴ Furthermore the provision required host states to ensure that TNCs conform to their national development plan and objectives.¹¹⁵ In addition TNCs were required to cooperate with host states in the revision of previously concluded agreements which were found to be unfavourable to the host states' plans and objectives. Apart from that, the provision required TNCs to assist host states to acquire relevant technology and management skills which are relevant for economic development, and that in the case of repatriation of profits TNCs must consider the interests of all parties including those of the host state.¹¹⁶ Lastly, the provision required TNCs to promote re-investment of their profits in developing countries.¹¹⁷ In essence Article V demanded that foreign investment should be for mutual benefit.¹¹⁸ The NIEO, despite being similar with the PSNR, differed from the PSNR in one important aspect. The NIEO empowered states to nationalise and

¹¹²Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 24.

¹¹³ See Article V of the UN Declaration on the establishment of New International Economic Order available at <http://www.un-documents.net/s6r3201.htm> accessed 23/05/2013.

¹¹⁴ See Article V (a) of the UN Declaration on the establishment of New International Economic Order available at <http://www.un-documents.net/s6r3201.htm> accessed 23/05/2013.

¹¹⁵ See Article V (b) of the NIEO.

¹¹⁶ See Article V (d) of the NIEO.

¹¹⁷ See Article V (e) of the NIEO.

¹¹⁸ See Article V (e) of the NIEO.

expropriate without obligating the host state to pay appropriate compensation. There was no mention of international law or the minimum standard principle.

In as far as dispute settlement is concerned, the NIEO empowers the host state courts to deal with investor – state disputes.¹¹⁹ As stated above, Article IV emphasises host state sovereignty over natural resources and mandates states to deal with their resources in accordance with their own laws and ensure that the resources benefit the country and its people.¹²⁰ As a result, the NIEO was seen by foreign investors as nothing but a tool to deprive them of their rights to property when operating in host states.

The resolution triggered hot debates in different fora and was condemned by many developed countries for trying to abolish a rule of customary international law approved in PSNR by both camps.¹²¹ The Declaration, as expected, did not receive support from the developed world; instead, the PSNR has been, on a number of occasions, declared to be the appropriate reflection of customary international law.¹²²

To date the two Declarations stand side by side as resolutions of the same UN despite the fact that they differ substantially with regard to host state sovereignty over foreign investors' assets. Six months after the adoption of the NIEO adoption, the Charter of Economic Rights and Duties

¹¹⁹ See Article IV (e) of the UN Declaration on the establishment of New International Economic Order available at <http://www.un-documents.net/s6r3201.htm> accessed 23/05/2013.

¹²⁰Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 24.

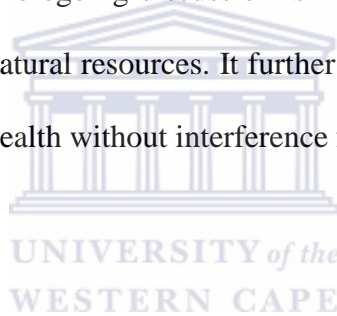
¹²¹Schill S W *Multilateralisation of International Investment Law* (2009) at 38.

¹²²Subedi S P *International Investment Law: Reconciling Policy and Principle*(2008) at 23, see also Schill S W *Multilateralisation of International Investment Law* (2009) at 38

of States (CERD) was adopted by the UN as part of the restructuring programme of the international economic legal order.¹²³

2.3.8 The Charter of Economic Rights and Duties of States (CERD), 1974

As stated above, six months after the adoption of the NIEO, the Charter of Economic Rights and Duties of States was adopted.¹²⁴ The Charter is said to be the most comprehensive UN instrument with clear stipulations on the rights and duties of states on economic matters.¹²⁵ A provision which is relevant to the foregoing discussion is Article 2 of the Charter. The Article affirms state sovereignty over its natural resources. It further provides that the state has the right to possess, use and dispose of its wealth without interference from other states.



The Article further provides for state powers to regulate and exercise authority over foreign investment operating in its territory. TNCs operating in the host state territory are required to operate without interfering in the host state's internal affairs and must respect the sovereignty of the host state.¹²⁶ In essence Article 2 intended to revive the Calvo doctrine. It was incorporated in the Charter after being recommended by Latin American countries which had been for a long time in favour of the Calvo doctrine. The newly independent states from Africa and Asia joined hands with the Latin American countries and supported Article 2. That is to say, developing

¹²³ Resolution 3281(XXIX) of 12th December 1974 available at <http://www.un-documents.net/a29r3281.htm> accessed on 23/05/ 2013.

¹²⁴ Resolution 3281(XXIX) of 12th December 1974 available at <http://www.un-documents.net/a29r3281.htm> accessed on 23/05/ 2013.

¹²⁵Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 25.

¹²⁶ See Article 2(b) of the Charter.

countries favoured application of national law over international law. With regard to expropriation, the Charter empowered the host state to nationalise, expropriate or transfer ownership of foreign property as long as appropriate compensation is paid.

Regarding dispute settlement, the Charter demanded any dispute emanating from a host state measure to be settled in the host state courts in accordance with the host state laws.¹²⁷ No single provision of the Charter referred to the need to apply international law in case of dispute. The role of international law was insignificant in the Charter.

It can be concluded here that the Charter was a continuation of developing countries' efforts to control the UN and establish laws which were favourable to their interests. The Charter reflects in many ways the NIEO and to some extent the PSNR. The language of the Charter is one - sided as it only provides for protection of host state national interests and leaves out foreign investors' interests. In the end, the Charter received less support from developed countries due to its insistence on national laws over international law. As a result of lack of support from the developed world, the charter, just like the NIEO, remains a resolution on paper with little influence on the operation of foreign investment and world economy generally.

¹²⁷ See Article 2(b) of the Charter.

2.3.9 The United Nations Draft Code of Conduct for Transnational Corporations

The United Nations Draft Code of Conduct for Transnational Corporations was developed to fulfil the requirement of Article 4 of the NIEO. The NIEO provided for the need to establish two codes of conducts: (1) a code of conduct on technology transfer and (2) a code of conduct for Transnational Corporations.¹²⁸ Therefore in 1974, the Economic and Social Council of the UN (ECOSOC) established the Commission on Transnational Corporations (CTC) which was responsible to draft a Code of Conduct for Transnational Corporations (TNCs).¹²⁹ The Code was forwarded to the UN ECOSOC on 31st May 1990 for approval.¹³⁰ Again, there were areas of disagreement between developing and developed countries.



Paragraph 48 of the Draft Code provided for host state powers over TNCs.¹³¹ It affirmed the state's right to regulate the entry and establishment of transnational corporations including determining the role that such corporations may play in the economic and social development of the host state.¹³² The Code demanded the host state to accord TNCs fair and equitable treatment and to treat TNCs in the same manner as domestic enterprises. In addition, the Code recognised the need for appropriate compensation to be paid in case of expropriation.¹³³

¹²⁸ See Article IV of the UN Declaration on the establishment of New International Economic Order available at <http://www.un-documents.net/s6r3201.htm> accessed 23/05/2013.

¹²⁹ ECOSOC Resolution 1908(LVII) of 2nd August 1974.

¹³⁰ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 27.

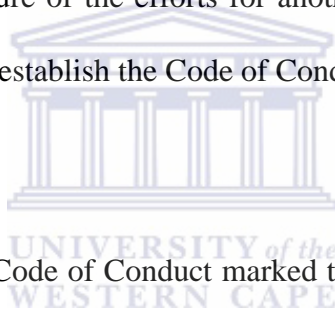
¹³¹ See The Draft Code of Conduct of Transnational Corporations available at <http://unctc.unctad.org/data/e90iia11k.pdf> accessed on 04/06/2014.

¹³² See para 48 of the Draft Code available at <http://unctc.unctad.org/data/e90iia11k.pdf> accessed on 04/06/2014.

¹³³ See para 55 of the Draft Code available at <http://unctc.unctad.org/data/e90iia11k.pdf> accessed on 04/06/2014.

Dispute settlement was left to the national court or authorities in the host state and the Code demanded exhaustion of local remedies before the matter could be forwarded to an international tribunal.¹³⁴

The use of host state courts to settle disputes between TNCs and host states was one of the areas of disagreement between member states. Another disagreement was on whether the Code should be mandatory or voluntary.¹³⁵ Countries which are the home state to many TNCs wanted the Code to be voluntary while developing countries wanted the Code to have mandatory force.¹³⁶ The disagreement led into the failure of the efforts for another time. As a result, the CTC was disbanded in 1993 for its failure to establish the Code of Conduct for TNCs.¹³⁷



It can be concluded here that, the Code of Conduct marked the end of the developing countries' efforts to control foreign investment under the auspices of the UN. Most of the UN efforts which started in the 1960s – 1980s did not achieve substantive rules on control of foreign investments and a dispute settlement framework. As pointed out earlier, this was due to a conflict of interests between the developed and the developing worlds. A little was achieved through the PSNR. However, PSNR fruits could not be realised due to the fact that developing states became too ambitious by pushing for more sovereignty and control through the NIEO and the Charter of Economic Rights and Duties of States. As a result, the door was once again open for other

¹³⁴ See Para 57 & 65 of the Draft Code.

¹³⁵ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 27.

¹³⁶ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 28.

¹³⁷ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 28.

stakeholders to try their luck. The OECD once more engaged in the efforts. The WTO also as a new body on trade regulation was involved. A discussion of these two bodies follows hereunder.

2.3.10 The OECD Multilateral Agreement on Investment (MAI), 1998

In another attempt, the OECD in 1995 introduced the negotiations on a Multilateral Investment Agreement (MAI).¹³⁸ The negotiations were launched on May 1995 by the Ministerial Council and started four months later in September the same year. The objectives of the MAI were to reach a broad investment framework with an effective dispute settlement system.¹³⁹

The MAI Draft received unprecedented protests from NGOs, civil societies and other stakeholders from different parts of the world.¹⁴⁰ The protestors argued that the MAI created rights for foreign investors without obligations. They labelled MAI as the global bill of rights for foreign investors.¹⁴¹ Furthermore they argued that the coming into force of MAI will affect sovereignty of developing countries and make the realisation of development goals difficult due to the fact that MAI were prepared for investors' interests and not host state interests.¹⁴² All obligations were to be borne by the host state while the investor enjoyed an unlimited bundle of rights.

¹³⁸ The OECD Multilateral Agreement on Investment Draft available at <http://www1.oecd.org/daf/mai/pdf/ng/ng971r2e.pdf> accessed on 24th May 2013.

¹³⁹ See the Preamble to the MAI; see also part III and IV of the Draft MAI, 1998 available at <http://www1.oecd.org/daf/mai/pdf/ng/ng971r2e.pdf> accessed on 24th May 2013.

¹⁴⁰ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 39.

¹⁴¹ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 41.

¹⁴² Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 41.

In as far as dispute settlement is concerned; foreign investors were given an option to institute a dispute in the host state court or in an internationally organised arbitral tribunal.¹⁴³ The dispute could be settled through a three tier procedure: consultation, mediation and arbitration.¹⁴⁴ The foreign investor could decide to skip the host state court and institute his claim in an international forum where the parties agreed.¹⁴⁵

After the protests the OECD abandoned the MAI and decided to adopt the OECD Guidelines for Multinational Enterprises in 2000. The Guidelines are soft law rules.¹⁴⁶ To a large extent the Guidelines are more balanced as they provide for host state powers to control the TNCs and require TNCs to operate in accordance to the laws of the host state.¹⁴⁷ In addition the Guidelines have provisions which promote human rights, environmental protection and sustainable development in general.¹⁴⁸

The limitation is that the Guidelines are not binding; hence they do not help much in creating a multilateral investment regime. An important role of soft law, however, is the ability to influence

¹⁴³ See Part V (d) (2) of the Draft MIA available at <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf> accessed on 24/05/ 2013.

¹⁴⁴ See Part V of the Draft MIA available at <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf> accessed on 24/05/ 2013.

¹⁴⁵ See Part V (d) (2) of the Draft MIA available at <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf> accessed on 24/05/ 2013.

¹⁴⁶ The limitation is that soft laws are not binding hence they do not help much in creating a multilateral investment regime.

¹⁴⁷ See the OECD Guidelines for Multinational Enterprises of 27 June 2000 available at www.oecd.org/daf/investment/guidelines/mnetext.htm accessed on 13/05/2013.

¹⁴⁸ See the OECD Guidelines for Multinational Enterprises of 27 June 2000 available at www.oecd.org/daf/investment/guidelines/mnetext.htm accessed on 13/05/2013.

the future development of hard law commitments.¹⁴⁹ This useful and innovative aspect of soft law can be a bridge between non-commitment and legally binding commitments.¹⁵⁰

2.3.11 Efforts of the World Bank and the International Monetary Fund

Apart from the OECD and the UN, the World Bank (WB) has made a number of efforts towards multilateralisation of foreign investment law. When compared with OECD and UN, the World Bank has been successful in its initiatives. Its initiatives have resulted in the Convention for the Settlement of Investment Disputes between States and the Nationals of Other States (The ICSID Convention).¹⁵¹ The ICSID Convention establishes the International Centre for Settlement of Investment Disputes famously known as the ICSID Centre. The World Bank has also managed to create the guidelines on the Treatment of Foreign Direct Investment in 1992. Therefore the World Bank has surpassed the OECD and the UN by far. One good reason behind such success is that the bodies created by the World Bank are voluntary and only become binding upon ratification. Following hereunder is a discussion on the ICSID Convention and the Guidelines on the Treatment of Foreign Direct Investments.

¹⁴⁹Boyle A &Chinkin C *The Making of International Law* (2007) at 210 – 229.

¹⁵⁰ Boyle A &Chinkin C *The Making of International Law* (2007) at 210 – 229.

¹⁵¹ The Convention on Settlement of Investment Disputes between States and the Nationals of Other Contracting States, 1965(The ICSID Convention) available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf accessed on 21/05/2013.

2.3.11.1 The Convention on the Settlement of Investment Disputes between States and Nationals of Other Contracting States (ICSID), 1965

This Convention was drafted between 1961 and 1965 by the World Bank's Legal Department. Aaron Broches - the General Counsel of the World Bank at the time - was behind the whole idea.¹⁵² Eighty six countries' experts from different parts of the world were involved in the process of drafting the Convention. It was adopted by the World Bank executive directors on the 18 March 1965. The Convention came into force the following year on 14 October 1966 after being ratified by twenty nations as required.¹⁵³ To date the Convention has been signed by 158 states of which 150 have ratified it.¹⁵⁴ It is one of the most popular international instruments as it enjoys signatures from almost all the countries of the world.¹⁵⁵ For avoidance of repetition the content of the convention is not discussed here but in 2.5.1 below.

The ICSID Convention has played a significant role in creating the current investor – state dispute settlement system. In recent years, however, the ICSID dispute settlement system has been questioned by its users and some countries have decided to get rid of it. It is said that the

¹⁵² See Schreuer C H et al *The ICSID Convention: A Commentary* (2009) at 2-9.

¹⁵³ See Article 68 of the Convention.

¹⁵⁴ The ICSID Convention Member States available at

https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home accessed on 20/05/2013.

¹⁵⁵ United Nations Conference on Trade and Development (UNCTAD) *Course on Dispute Settlement: International Convention on the Settlement of Investment Disputes*, (2003) UN DOC. UNCTAD/EDM/Misc.232.

system is lacking on a number of issues.¹⁵⁶ This convention and its dispute settlement process will be the centre of discussion in chapter three of this work.

2.3.11.2 The Guidelines on the Treatment of Foreign Direct Investments, 1992.

In their continued efforts to promote and protect foreign investment, the Joint Committee of the WB and IMF in 1991 requested the assistance of MIGA to prepare the Draft Guidelines on the Treatment of Foreign Direct Investment. Accordingly in 1992 MIGA submitted to the Joint Committee the draft guidelines as requested. The Development Committee of the World Bank and IMF adopted the guidelines in the year 1992.¹⁵⁷ The guidelines are not binding as the WB and IMF have no competence to adopt or modify international law principles. Despite that, the rules are so influential and do carry weight as they come from two powerful international financial institutions.¹⁵⁸ These Guidelines were passed almost at the same time when the international community was struggling to pass the Code of Conduct for TNCs. While the UN failed to achieve that goal the WB and IMF on the other hand managed to pass the Guidelines.

Guideline II empowers the host state to allow or reject admission of foreign investment. The Guideline urges host states to be as open as possible to the foreign investors.¹⁵⁹ However the Guideline empowers the host state to reject the admission of foreign of investment on the

¹⁵⁶ Waibel M et al *The Backlash against Investment Arbitration: Perceptions and Reality* (2010); see also Van Harten G 'Investment Treaty Arbitration, Procedural Fairness and the Rule of Law' in Schill (ed.) *International Investment Law and Comparative Public Law* (2010) 627 – 658.

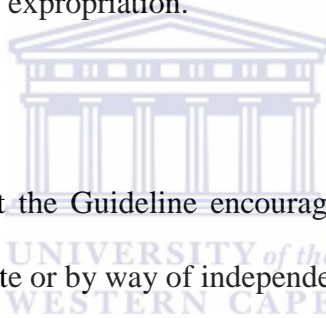
¹⁵⁷ World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992 available at <http://italaw.com/documents/WorldBank.pdf> accessed on 19/05/2013.

¹⁵⁸ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 34.

¹⁵⁹ See World Bank Guideline II (3).

grounds of national security, public health, protection of the environment and public policy issues.¹⁶⁰

Guideline III provides for the general investment protection principles. It requires states to grant foreign investment fair and equitable treatment, and the ability to transfer funds from the territory, provide full protection and security and to avoid discrimination against foreign investments.¹⁶¹ Guideline IV provides for instances which may amount to expropriation. The provision is very extensive and includes instances which according to international customary law principles would not amount to expropriation.¹⁶²



With regards to dispute settlement the Guideline encourages parties to settle their dispute by using national courts of the host state or by way of independent arbitration. In the case of arbitration, parties are encouraged to use ICSID where both are members or the Additional Facility when one party is not a member to the Convention.¹⁶³

The Guidelines in principle demand host states to facilitate the admission of foreign investment in their territories. The Guidelines demand the host state to conduct itself well in the treatment of foreign investment but do not impose any obligation on the part of the foreign investor.¹⁶⁴

¹⁶⁰ See World Bank Guideline II (4).

¹⁶¹ See Guideline III (2), (3) and (6).

¹⁶²Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 41.

¹⁶³ See Guideline V (1) – (3).

¹⁶⁴ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 41.

The Guidelines are criticised for being unbalanced as they impose obligations on the host state but do not do the same to foreign investors.¹⁶⁵ Although the primary aim of passing the Guidelines was to promote investments, the Guidelines ended up with provisions which aim at protecting investment at the expense of the host state and not merely promoting it.

2.3.12 The World Trade Organisation efforts

The WTO has also made some efforts with regards to regulation of foreign investment.¹⁶⁶ The Uruguay Round negotiations on multilateral trade addressed the issue of foreign investment through the Agreement on Trade Related Investment Measure (TRIMS).¹⁶⁷ The Agreement deals with the regulation of foreign investment trade related issues. It prohibits member countries from applying any measure that contravenes the national treatment principle. The TRIMS was meant to give foreign investors the freedom to decide on whether to purchase local raw materials for their investment or not. Furthermore, it intended to give the foreign investor the market freedom such as to be able to export without any quantitative restrictions from the host state.¹⁶⁸

¹⁶⁵ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 34.

¹⁶⁶ The WTO came into existence on 1st January 1995. See WTO, Understanding the WTO: at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm accessed on 25/05/2013.

¹⁶⁷ See WTO - The Uruguay Round on Multilateral Trade available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm accessed on 25/05/2013.

¹⁶⁸ WTO Legal Text – TRIMS available at http://www.wto.org/english/docs_e/legal_e/18-trims_e.htm#5 accessed on 25/05/2013.

While the US was not happy with the TRIMS arguing that it was narrow and restrictive on trade, developing countries found that the TRIMS was interfering with the internal affairs of the host state. They argued that the admission and regulation of foreign investors was an issue required to be administered through the host state laws and not TRIMS. The TRIMS was later adopted; hence it is one of the items regulated by the WTO today.¹⁶⁹

Apart from TRIMS there are other two WTO agreements which address foreign investment. The General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The GATS in essence requires that once a commercial establishment is established in the foreign country that foreign establishment is supposed to be accorded the same treatment as local establishments as per the National Treatment principle requirement.¹⁷⁰ The TRIPS, on the other hand, obliges WTO members to provide national treatment and MFN treatment to rights holders of other countries.¹⁷¹

Apart from these efforts through individual agreements, the WTO had previously initiated efforts towards creating a multilateral investment treaty. In 2001 at the Doha Ministerial Conference of the WTO, it was agreed to introduce new negotiations for the purposes of establishment of a multilateral investment treaty.¹⁷² The negotiations were initiated but encountered the stiff competition between the developed and developing worlds. As usual, these two camps were

¹⁶⁹Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 38.

¹⁷⁰ See WTO - GATS and MFN on foreign establishment, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm accessed on 25/05/2013.

¹⁷¹ See WTO - Trade Related Aspects of Intellectual Property, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm accessed on 25/05/2013.

¹⁷² The Fourth Ministerial Conference of the WTO, Work Programme: *Implementation related Issues*, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm accessed on 25/05/2013.

unable to agree on almost everything. The negotiations were officially buried in 2004 and the issue has never been the WTO priority ever since.¹⁷³

With regard to dispute settlement, the TRIMS and GATS both advocates for the Most Favoured Nation treatment of foreign investments. That is to say, all foreign investments have to be accorded equal treatment.¹⁷⁴

It can be concluded here that the international community's efforts to create uniform international investment law principles went hand in hand with the efforts to establish the manner in which disputes could be settled. It is clear that developed countries advocated for dispute settlement mechanisms which would properly address foreign investors' concerns, while developing countries, on the other hand, strongly stood to defend their sovereignty and advocated for the use of host state courts. As a result most of the efforts failed to yield the anticipated fruits. In the following section, the mechanisms used to settle investor – state disputes during that era are discussed. Their strengths and weaknesses are pointed out as well. The reasons as to why the current system was adopted to replace the former are also discussed in the following part.

¹⁷³Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 52.

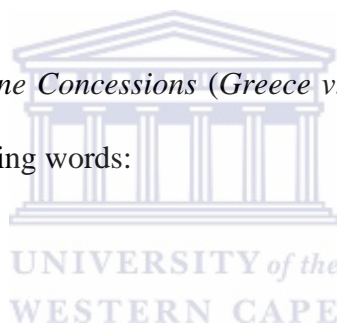
¹⁷⁴ See WTO - GATS and MFN on foreign establishment, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm accessed on 25/05/2013.

2.4 Investor – state dispute settlement mechanisms prior to the current system

Before and during the first half of the 20th century, an aggrieved foreign investor had very few options to redress wrongs committed by a host state. The options were: (1) sue the host state in the local courts, or (2) ask for the diplomatic intervention of the home government or (3) lobby the home government to espouse a claim at the ICJ or the formation of an ad hoc claim commission.¹⁷⁵ These mechanisms are discussed herein below.

2.4.1 Diplomatic protection

The PCIJ in *Mavrommatis Palestine Concessions (Greece v. U.K.)*,¹⁷⁶ explained the concept of diplomatic protection in the following words:



‘It is an elementary principle of international law that a State is entitled to protect its subject, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on

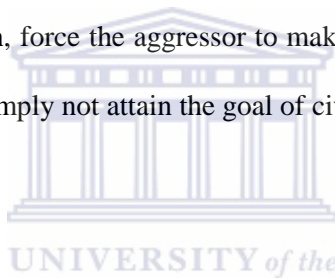
¹⁷⁵Franck SD ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’ (2005) 73 *Fordham Law Rev* 1521 at 1543(hereinafter Franck ‘Legitimacy’); Franck S D ‘The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future’ (2005) 12 *University of Columbia Davis Journal of International Law &Policy* 47 at 48 ; see also Dodge W ‘Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement’ (2006) 39 *Vanderbilt Journal of International Law* 1, at 5-8.

¹⁷⁶1924 PCIJ (ser A) No. 2, at 12 (August 30).

his behalf, a State is in reality asserting its own rights- its right to ensure, in the person of its subjects, respect for the rules of international law.¹⁷⁷

In other words the state intervenes for the purpose of ensuring that its citizens abroad receive the treatment which is not less than the international minimum standard of protection. A prominent author, Vattel, states that

‘...anyone who mistreats a citizen directly offends the state. The sovereign of that State must avenge its injury, and if it can, force the aggressor to make full repatriation or punish him, since otherwise the citizen would simply not attain the goal of civil association, namely security.’¹⁷⁸



Diplomatic protection is known for being one of the traditional means of recourse used by foreign investors once harmed by the host state’s act or omission. In the course of exercising the diplomatic protection the state may employ a number of mechanisms including, but not limited to consular action, negotiation, mediation, severance of diplomatic relations, economic pressure and, were necessary, the use of force.¹⁷⁹ Regardless of the form the state decides to use, the application of diplomatic protection normally comes after the other means of protection have failed. Before invoking diplomatic protection, the aggrieved foreign citizen must prove that

¹⁷⁷1924 PCIJ (ser. A) No. 2, at 12 (August 30); see also Borchard E *The Diplomatic Protection of Citizens Abroad* (1915) at 354; see also see also Dodge W ‘Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement’ (2006) 39 *Vanderbilt Journal of International Law* 1 at 5.

¹⁷⁸See Amerasinghe C F *Local Remedies in International Law* 2nd ed. (2005) at 44. The use of diplomatic protection followed by force as advocated by Vattel is commonly referred as gunboat diplomacy. Gunboat diplomacy was a common means after the failure of peaceful means.

¹⁷⁹International Law Commission, *First Report on Diplomatic Protection*, (2000) 15, UN Doc. A/CN.4/506.

he/she has exhausted local remedies in the host state.¹⁸⁰ Furthermore, the aggrieved citizen must prove that he remained a citizen of the espousing state from the time of the injury up to the time when the claim is presented.¹⁸¹

The use of diplomatic protection in investment disputes was however very ineffective, to say the least. There were a number of practical difficulties associated with this route. The first deficiency was that, once the aggrieved investor had asked the home state to espouse the dispute, it became a dispute of states concerned. The investor lost control over the dispute and the state could decide not to pursue it any further.¹⁸² Secondly, as the home state had exclusive rights over its nationals' claims in the international sphere, and as it was within its mandate to settle, waive or pursue them by agreement with the host state, the state discretionally could discontinue the dispute at any time.¹⁸³ Thirdly, even where the home state decided to pursue the claim and secured an award, it still had the discretion to either compensate the investor from the proceeds or not. The ICJ in *Barcelona Traction, (Belgium v Spain)*¹⁸⁴ held:

¹⁸⁰ Dodge W 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1 at 7; see also Borchard E *The Diplomatic Protection of Citizens Abroad* (1915) at 817; see also Dolzer R and Schreuer C *Principles of International Investment Law* (2008) at 211 and Kronfol Z A *Protection of Foreign Investment: A study in International Law* (1972) at 128.

¹⁸¹ See generally International Law Commission, *First Report on Diplomatic Protection*, Addendum, (2000) UN Doc. A/CN.4/506/Add.1; see also Dodge W 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1, at 7; see also the *Panavezys-Saldutiskis Railway Case*, (1938) PCIJ Series A/B No. 76; also see Amerasinghe C F *Jurisdiction of International Tribunals* (2009) at 490.

¹⁸² See Bjorklund A K 'Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims' (2005) 45 *Virginia Journal of International Law* 1, 12–16; see also Borchard E *The Diplomatic Protection of Citizens Abroad* (1915) at 366.

¹⁸³ See Amerasinghe C F *Local Remedies in International Law* 2nd ed. (2005) at 44; see also Dolzer R & Chreuer C *Principles of International Investment Law* at 212.

¹⁸⁴ *Barcelona Traction, Light and Power Company, Ltd (Belg. v. Spain)* (1970) ICJ 3 para 44

‘The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.’¹⁸⁵

The fourth deficiency was that the home state decision to pursue the claim against the host state was not in itself an assurance that the matter was going to be heard by an international body. It was only when the host state had given its consent to an international adjudication process that the matter could be heard. This is due to the fact that under international law, states have the right to plead sovereign immunity from prosecution where they have not given their consent to an international adjudication body.¹⁸⁶ The sovereign immunity defence is readily available to the host state because in dealing with foreigners, the state most of the time acts in the exercise of its sovereign powers (*jure imperii*) and not in its commercial capacity (*jure gestionis*). Under such circumstances, the doctrine of restrictive immunity will not apply and the state can successfully invoke absolute immunity. Lastly, diplomatic protection was not a home state’s favourite recourse to take because if not carefully handled it could disrupt the international relations with the host state and at times lead to protracted disputes.¹⁸⁷ Therefore, considering the possibilities of the above discussed obstacles, diplomatic protection lost popularity in investment disputes and paved the way for the proliferation of the current arbitration system.¹⁸⁸

¹⁸⁵*Barcelona Traction, Light and Power Company, Ltd* (Belg. v. Spain) (1970) ICJ 3 para 44.

¹⁸⁶ Dodge W ‘Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement’ (2006) 39 *Vanderbilt Journal of Transnational Law* 1 at 7; see also Salacuse J W ‘BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries’ (1990) 24 *Int’l Law* 655 at 659; see also *Ambatielos Claim (Greece v United Kingdom)* (1956), 12 RIAA 83 para 103.

¹⁸⁷Dolzer R &Chreuer C *Principles of International Investment Law* (2008) at 212.

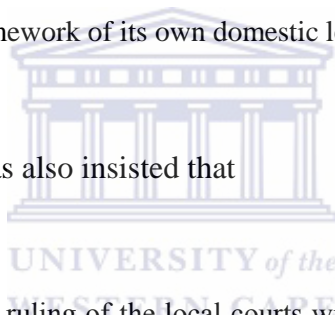
¹⁸⁸Dolzer R &Chreuer C *Principles of International Investment Law* (2008) at 213.

2.4.2 The host state court mechanism

It is a well - established principle under customary international law that the injured party before instituting any claim in an international forum/court must first exhaust all local remedies available.¹⁸⁹ Therefore foreign investors were also obligated to follow this rule. In the *Interhandel Case (Switz. v. U.S.)*,¹⁹⁰ the ICJ held:

‘Before resort may be made to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.’

In the *Norwegian Loans Case* it was also insisted that



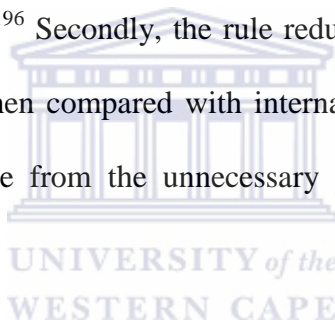
‘..it is important to obtain the ruling of the local courts with regard to the issues of fact and law involved, before the international aspects are dealt with by an international tribunal. It is also important that the respondent State which is being charged with breach of international law should have an opportunity to rectify the position through its own tribunals.’¹⁹¹

¹⁸⁹Amerasinghe C F *Local Remedies in International Law* 2nd ed.(2005) at 22; see also Dodge W ‘Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement’ (2006) 39 *Vanderbilt Journal of Transnational Law* 1 at 7; see also Borchard E *The Diplomatic Protection of Citizens Abroad* (1915) at 817; see also Dolzer R and Schreuer C *Principles of International Investment Law* (2008) at 211 and Kronfol Z A *Protection of Foreign Investment: A study in International Law* (1972) at 128.

¹⁹⁰1959 ICJ at 27.

¹⁹¹1957 ICJ Reports at p. 97.

In addition to the court decisions cited above, different authors have written about the importance of exhausting local remedies before resorting to international adjudication.¹⁹² Borchard submits that the rule on exhaustion of local remedies aimed at among other things, relieving the home state from espousing claims that could be resolved at a lower level or which were unfounded and frivolous.¹⁹³ Another purpose of the rule was to reduce the unwanted relation interference between the host state and the aliens.¹⁹⁴ Lastly, the rule aimed at giving the sovereign state an opportunity to resolve a dispute with aliens in its own regular way before it could be condemned at an international level.¹⁹⁵ The rule had several advantages. The first advantage is that the host state was given an opportunity to redress violations by individuals or its low level official misconducts.¹⁹⁶ Secondly, the rule reduced costs as disputes at local court could be settled at lower costs when compared with international bodies. The third advantage was that it relieved the host state from the unnecessary publicity involved in international adjudication.¹⁹⁷



Although the rule seemed to have the host states' best interest at heart, it was of little assistance to aliens. There were a number of issues which worried foreign investors. In local courts, foreign

¹⁹² Amerasinghe C F *Local Remedies in International Law* 2nd ed.(2005) at 22; see also Dodge W 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1 at 6; see also Dolzer R & Chreuer C *Principles of International Investment Law* (2008) at 214; see also Borchard E *The Diplomatic Protection of Citizens Abroad* (1915) at 817; see also Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 5

¹⁹³ Borchard E *The Diplomatic Protection of Citizens Abroad* (1915) at 28, 354 and 817.

¹⁹⁴ Amerasinghe C F *Local Remedies in International Law* 2nd ed. (2005) at 57.

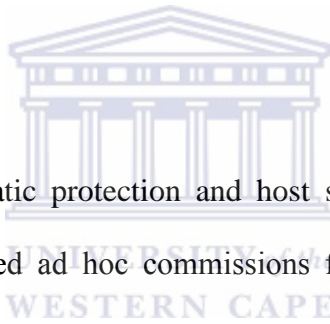
¹⁹⁵ Borchard E *The Diplomatic Protection of Citizens Abroad* (1915) at 57.

¹⁹⁶ Borchard E *The Diplomatic Protection of Citizens Abroad* (1915) at 817; see also Amerasinghe C F *Local Remedies in International Law* 2nd ed.(2005) at 22; see also Dodge W 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* L 1 at 6.

¹⁹⁷ Amerasinghe C F *Local Remedies in International Law* 2nded. (2005) at 61; see also Dodge W 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1 at 6.

investors were worried about the efficiency and the impartiality of the local judges.¹⁹⁸ Most of the time foreign investors hailed from developed countries and invested in less developed countries. They were worried that judges would be biased and protect the interest of the state as a gesture of showing loyalty to their home government. Furthermore, investors were worried that local judges could be lacking expertise in the field of international investment law.¹⁹⁹ Courts of investors' home states were not a viable option as they lacked territorial jurisdiction for the dispute which emanated in the host state. Therefore with this range of obstacles host state courts were not considered a satisfying option by foreign investors.

2.4.3 Ad hoc claim commissions



In addition to the use of diplomatic protection and host state courts for solving investment disputes, states at times established ad hoc commissions for the purposes of settling aliens' claims.²⁰⁰ This mechanism was normally used in situations of national revolutions and any other situation which involved mass destruction, confiscation or nationalisation of aliens' properties.²⁰¹ The home government negotiated with the host state and entered into a treaty for the purposes of determining compensation for the injured aliens. States liked to use this mechanism due to a number of reasons. The first reason was that, by using this mechanism the respective states avoided the complications associated with the use of diplomatic protection for each case as a lump sum settlement was used. The second reason was that disputes at these commissions did

¹⁹⁸Dolzer R &Chreuer C *Principles of International Investment Law* (2008) at 214.

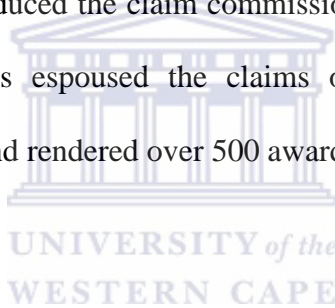
¹⁹⁹Dolzer R &Chreuer C *Principles of International Investment Law* (2008) at 214.

²⁰⁰ Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 7; see also Brownlie I *Principles of Public International Law* 7th ed. (2008) at 500 and Borchard E *The Diplomatic Protection of Citizens Abroad* (1915) at 442.

²⁰¹ Bjorklund A K 'Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims' (2005) 45 *Vanderbilt Journal of Transnational Law* 809 at 825.

not take long as the only issue to be determined was whether the claimant whose home state is espousing his claim has a right to be compensated. The third and most important reason was that these lump sum claims ended any possibility of diplomatic wrangling between the states involved.²⁰²

The first commission of this kind was formed by the United States (US) and United Kingdom (UK) on claims relating to the treatment of UK and US nationals after the American Revolution. The Treaty of Amity, Commerce and Navigation between the UK and the US, famously referred to as the Jay Treaty, of 1794 introduced the claim commission system.²⁰³ Parties to the disputes were the states concerned. States espoused the claims on behalf of their investors. The commission was very successful and rendered over 500 awards.²⁰⁴



In 1899, a century after the success of the Jay Treaty, the Hague Convention for the Pacific Settlement of International Disputes was signed.²⁰⁵ The Convention, among other things, provides for the establishment of inquiry commissions as a means of settling disputes between

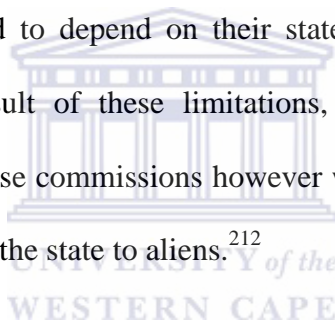
²⁰² Bjorklund A K 'Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims' (2005) 45 *Vanderbilt Journal of Transnational Law* L 809 at 826.

²⁰³ 19 Nov. 1794, 52 *Cons TS* 243, entered into force 28 Oct. 1795 available at <http://archive.org/stream/treatyofamitycom00rank#page/n5/mode/2up> accessed on 06/06/2013; see also Shenkin S T 'Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving towards a Multilateral Investment Treaty' (1994) 55 *U. Pitt. L. Rev.* 541 at 570; see also Vandavelde K J 'The Bilateral Investment Treaty Program of the United States' (1988) 21 *Cornell International Law Journal* 201 at 204.

²⁰⁴ Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 7; see also Legum B 'The Innovation of Investor-State Arbitration Under NAFTA' (2002) 43 *Harvard International Law Journal* 534.

²⁰⁵ The Hague Convention for the Pacific Settlement of International Disputes 1899 available at www.pca-cpa.org/showfile.asp?fil_id=192 accessed on 06/06/2013.

states and aliens.²⁰⁶ Article 6 provided for the mandate of the commission.²⁰⁷ The Commission was utilised on a number of disputes and provided a good alternative to dispute settlement mechanisms. For over a century, between 1840 and 1940, this mechanism was frequently utilised by states.²⁰⁸ Over 60 Commissions were formed to adjudicate disputes involving foreign nationals.²⁰⁹ States preferred this mechanism because they retained control of the proceedings and only states were allowed to be parties to the claims. The recommendations rendered by the commission were not binding hence the state concerned was not obligated to adhere to it.²¹⁰ As can be expected, investors did not like this system because it lacked mandatory force. The fact that the commission could not be formed unless the states agreed was another limitation of this mechanism. Foreign investors had to depend on their state for the setting up of the dispute settlement commission. As a result of these limitations, ad hoc claim commissions were abandoned.²¹¹ The decisions of these commissions however were important in creating the early jurisprudence on the duty owed by the state to aliens.²¹²



In conclusion it can be said that lack of effective and well balanced dispute settlement system was the major failure of customary international law in relation to foreign investment.²¹³ The system failed to give the foreign investor an effective enforcement mechanism whenever they

²⁰⁶ The Hague Convention for the Pacific Settlement of International Disputes 1899 available at www.pca-cpa.org/showfile.asp?fil_id=192 accessed on 06/06/2013.

²⁰⁷ See Article 6 of the Hague Convention for the Pacific Settlement of International Disputes 1899 available at www.pca-cpa.org/showfile.asp?fil_id=192 accessed on 06/06/2013.

²⁰⁸ Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 7.

²⁰⁹ Brownlie I *Principles of Public International Law* 7th ed. (2008) at 500; see also Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 7.

²¹⁰ Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 7.

²¹¹ Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 7.

²¹² Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 8.

²¹³ Salacuse J W 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *Int'l Law* 655 at 659; see also Dodge W 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1 at 8; see also Dolzer R & Chreuer C *Principles of International Investment Law* (2008) at 214.

had a claim against the host state. The enforcement mechanisms available were to file a claim in the local court or seek espousal of their claim by their home country government. Through diplomatic protection and ad hoc commissions, investment claims were pursued by government bureaucrats who had no interest in the respective claim. The second possible option was to institute a claim in the host state court where impartiality was not guaranteed. These options were not providing satisfactory protection of foreign investments. As a result of the limitations, Bilateral Investment Treaties (BITS) were developed to remedy the situation. With BITs one can say that foreign investors' concerns are addressed but, on the other hand, the BIT regime leaves host states with a lot of concerns. The host states' concerns form part of chapter three of this work. In the following section, the sources of and the reasons for the rise of the BIT regime are discussed.



2.5 The current system: investor – state arbitration

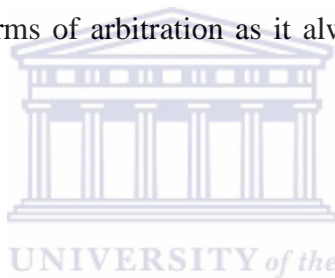
The use of international arbitration in resolving investment disputes can be traced back to The Hague Peace Conference of 1899.²¹⁴ The Conference unanimously declared arbitration to be one of the available means for settling disputes between states.²¹⁵ Arbitration involves settlement of dispute between parties through the intervention of a third party whose decision (called award) is binding upon the parties.²¹⁶

²¹⁴ Sornarajah M *The Settlement of Foreign Investment Disputes* (2000) at 151.

²¹⁵ The conference resulted into The Hague Convention for the Pacific Settlement of International Disputes 1899 available at www.pca-cpa.org/showfile.asp?fil_id=192 accessed on 06/06/2013.

²¹⁶ Redfern A et al *Redfern and Hunter on International Arbitration* (2009) 5th ed. at 1.

As discussed above, the major failure of customary international law in the field of international investment law necessitated the need for a new system which would provide satisfactory protection to foreign investments.²¹⁷ International arbitration was found to be the fulfilling option. In the early days, however, international arbitration was used to settle disputes between states only.²¹⁸ This was due to the fact that under international law individuals or corporations lacked the status to appear in international fora.²¹⁹ However, after the end of WW II international commercial arbitration flourished and paved a new path for individuals to institute claims in the private law sphere.²²⁰ As a result, the demand for a hybrid international arbitration under which dispute could involve a state party and an individual emerged. International investment arbitration is one of the hybrid forms of arbitration as it always involves a State and a private investor.²²¹



Despite the fact that the hybrid efforts date back to WWII, investor - state arbitration was unpopular until the 1990s when BITs started to proliferate.²²² In fact, the first BIT in the world which was signed between Germany – Pakistan in 1959, did not provide for investor – state procedure but state – state arbitration procedure.²²³ Later years BITs however started providing

²¹⁷ See the conclusion above under subheading 2.3.3.

²¹⁸ Dolzer R & Schreuer C *Principles of International Investment Law* (2008) at 14.

²¹⁹ Sornarajah M *The Settlement of Foreign Investment Disputes* (2000) at 151; see also Kronfol Z A *Protection of Foreign Investment: A study in International Law* (1972) at 16.

²²⁰ Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 13; see also Salacuse J 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *Int'l Law* 655 at 659.

²²¹ Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 17.

²²² See Dodge W 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1 at 5-8; see also Salacuse J W 'Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain' in Horn N (ed.) *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (2004) 51 – 88.

²²³ See Article 11(2) (b) of the Pakistan - Germany Treaty for the Promotion and Protection of Investments, 1959 available at http://www.iisd.org/pdf/2006/investment_pakistan_germany.pdf accessed on 20/05/2013; see also Art 11 of the Treaty between the Federal Republic of Germany and the United Republic of Tanzania concerning the

for arbitration as a means of settling disputes between the host state and the respective foreign investor.²²⁴ It is through BITs that international arbitration grew and became as popular as it is today. Another reason for the rise of arbitration in investment disputes is the ICSID Convention, which provides for arbitration and conciliation as the available means for resolving investment disputes. Following hereunder is a brief discussion of the role played by ICSID and BITs in the rise of the current investor – state arbitration system.

2.5.1 The role of the Convention on the Settlement of Investment Disputes between States and Nationals of Other Contracting States

As discussed above,²²⁵ the Convention was adopted by the World Bank executive directors on the 18 March 1965. The Convention came into force the following year on 14 October 1966 after being ratified by twenty nations as required.²²⁶ The Convention was drafted to address the concerns about the traditional investor – state dispute settlement mechanisms. The convention is hailed for being self - contained and a depoliticised forum. It provides the most favourable dispute settlement system to foreign investors. The investor is entitled to institute the dispute settlement process without being required to exhaust local remedies.²²⁷ Another revolution

Encouragement and Reciprocal Protection of Investment of 30/01/1965 (hereinafter Tanzania – Germany BIT) available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_germany.pdf accessed on 12/05/2013.

²²⁴ See for example Art 8 of An Agreement between the Government of Republic of Korea and the Government of the United Republic of Tanzania for the Promotion and Protection of Investment (hereinafter Tanzania – Korea BIT) available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_korea.pdf accessed on 12/05/2013; also see Art 9 the Agreement on encouragement and reciprocal protection of investments between the Republic of South Africa and the Kingdom of the Netherlands of 09/05/1995 available at http://unctad.org/sections/dite/ia/docs/bits/southafrica_netherlands.pdf accessed on 12/05/2013 (hereinafter South Africa – Netherland BIT).

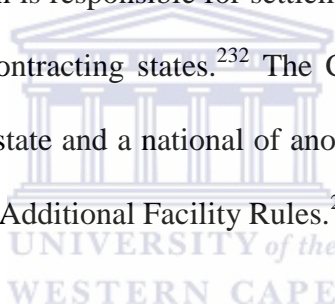
²²⁵ See sub heading 2.4.11.1 above.

²²⁶ See Article 68 of the Convention.

²²⁷ See Article 53(1) of the ICSID Convention.

brought by this Convention is that the foreign investor no longer needs the assistance of the home state to sue the host state.²²⁸ The foreign investor has been given the locus standi to sue the host state directly. The Convention has also barred contracting states from using diplomatic protection.²²⁹ The Convention requires the tribunals to apply the law chosen by the parties.²³⁰ Where the parties have not made any choice the tribunal will be required to apply the host state law and principles of international law.²³¹

The Convention provide for the establishment of the International Centre for the Settlement of Investment Disputes (ICSID) which is responsible for settlement of investment disputes between states and Nationals from other contracting states.²³² The Centre also facilitates settlement of disputes which involve a member state and a national of another state which is not a member to the ICSID Convention through the Additional Facility Rules.²³³



In its first 25 years the Convention was not that popular and disputes continued to be settled through the traditional means. ICSID registered its first case in 1972 six years after its establishment.²³⁴ By the end of the 1970s only 9 cases were registered but a slight increase was

²²⁸See Article 25 (1) of the Convention.

²²⁹ See Article 27(1) of the ICSID Convention.

²³⁰ See Article 42 of the Convention.

²³¹ See Article 42 of the Convention.

²³² See Article 25 of the Convention.

²³³ Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, 2006 available at http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf . Hereinafter “ICSID Additional Facility Rules, 2006” accessed on 21/05/2013.

²³⁴ *Holiday Inn v Morocco* ICSID Case No. ARB/72/1.

witnessed in the 1980s as 23 cases were registered in that decade.²³⁵ However, after the proliferation of BITs in the 1990s the popularity of the ICSID dispute settlement system increased tremendously.²³⁶ UNCTAD 2010 World Investment Report indicates that at least 2000 BITs have a clause providing for dispute settlement at ICSID arbitral system.²³⁷ According to UNCTAD World Investment Report 2014, by the end of 2013, the total number of known treaty based ICSID cases had reached 568 in which 98 countries were involved. Out of the total, 257 cases have been concluded.²³⁸ The year 2013 recorded the second highest number of investor – state dispute by registering 56 new cases just 2 cases behind year 2012 which recorded 58 new cases.²³⁹



2.5.2 The role of Bilateral Investment Treaties and International Investment Agreements

Multiple failures in developing a multilateral investment treaty prompted developed countries to initiate efforts by negotiating BITs with individual developing countries.²⁴⁰ Investment treaties

²³⁵ Waibel M & Wu Y ‘Are Arbitrators Political?’ available at <http://www.wipol.uni-bonn.de/lehrveranstaltungen-/lawecon-workshop/archive/dateien/waibelwinter11-12> accessed on 06/06/2013.

²³⁶ Kauschal A ‘Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime’ (2009) 50 *Harvard International Law Journal* 491 at 492; see also Coe J Jr. ‘Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods’ (2003) 36 *Vanderbilt Journal of Transnational Law* 1381 at 1400.

²³⁷ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report: ‘Non-Equity Modes of International Production and Development’*, UN Pub. Sales No.E.11.II.D.2, 2011 at 100.

²³⁸ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report (WIR)*, 2014, ‘An Overview’ at 110 available at http://unctad.org/en/publicationslibrary/wir2014_en.pdf accessed on 13/05/2014 at 22.

²³⁹ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report (WIR)*, 2014, ‘An Overview’ at 110 available at http://unctad.org/en/publicationslibrary/wir2014_en.pdf accessed on 13/05/2014 at 22.

²⁴⁰ Guzman A ‘Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’ (1998) 38 *Vanderbilt Journal of Transnational Law* 639 at 641; see also Vandeveld K J ‘The Economics of Bilateral Investment Treaties’ (2000) 41 *Harvard International Law Journal* 469 at 470; See also Ginsburg T ‘International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance’ (2005) 25 *International Review of Law & Economics* 107 at 109; see also Franck S D ‘Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law’ (2007) 19 *Global Business and Development Law Journal* 337

often referred to as (BITs) or international investment agreements (IIAs) are agreements made between two or more countries that safeguards investments made in the territories of the signatory countries.²⁴¹

Western capital exporting countries sought to conclude bilateral treaties with individual developing states to establish specific legal rules to govern investment and economic activities by their nationals in the territories of other states.²⁴² For their part, many Third World countries, with the decline in lending from commercial banks and official aid programs during the 1980s and 1990s, have seen such bilateral agreements as a way to promote foreign investment in their territories and have therefore negotiated and ratified them in bulk.²⁴³ As stated earlier, the first BIT was signed between Germany and Pakistan in 1959.²⁴⁴ The signing of this first BIT awakened other developed countries especially in Europe. They were surprised to see that developing countries agreed to BIT arrangement despite their continued resistance against minimum standard principle at the UN.²⁴⁵ Switzerland was the second to sign a BIT with Tunisia

at 341; also see Cosmas J ‘Investor – state international arbitration system: is ICSID the appropriate forum for developing countries like Tanzania?’ (2014) 5 (1) *Open University Law Journal* 25 – 36

²⁴¹See generally United Nations Conference on Trade and Development (“UNCTAD”) *Bilateral Investment Treaties in the Mid-1990s* (1998) U N Doc UNCTAD/ITE/IIT/7, U N Sales No E 98 II D 8.

²⁴²Guzman A ‘Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’ (1998) 38 *Vanderbilt Journal of Transnational Law* 639 at 641; see also Vandeveld K J ‘The Economics of Bilateral Investment Treaties’ (2000) 41 *Harvard International Law Journal* 469 at 470; See also Ginsburg T ‘International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance’ (2005) 25 *International Review of Law & Economics* 107 at 109; see also Franck S D ‘Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law’ (2007) 19 *Global Business and Development Law Journal* 337 at 341.

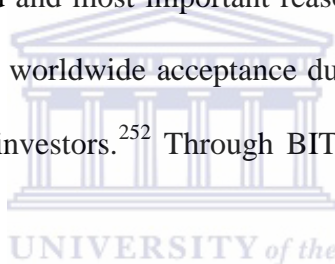
²⁴³Franck SD ‘Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law’ (2006) 19 *Pac. McGregor Global Business & Development Law Journal* 337 at 339.

²⁴⁴The Pakistan - Germany Treaty for the Promotion and Protection of Investments, 1959 available at http://www.iisd.org/pdf/2006/investment_pakistan_germany.pdf accessed on 20/05/2013.

²⁴⁵Vandeveld K J ‘The Economics of Bilateral Investment Treaties’ (2000) 41 *Harvard International Law Journal* 469; also see Parra A R ‘Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment’ (1997) 12 *ICSID Rev.-Foreign Investment L.J* 287 at 291-92.

in 1961.²⁴⁶ Italy followed suit by signing a BIT with Guinea in 1964.²⁴⁷ The United Kingdom joined the BIT system in 1975 followed by Japan and the United States in 1977.²⁴⁸ The BIT signing intensified in the early 1990s.²⁴⁹ UNCTAD World Investment Report 2014 indicates that by the end of 2013, the overall IIA universe consisted 3240 BITs and IIAs.²⁵⁰

There are mainly three reasons which motivate states to sign BITs.²⁵¹ First of all, states sign BITs for the purpose of protecting their nationals' interests in the territories of other states. The second reason is that states sign BITs as an initiative to liberalise the market which is crucial in the current globalised world. The third and most important reason is to promote and attract inward investments. BITs have received a worldwide acceptance due to the fact that they come with a number of advantages to foreign investors.²⁵² Through BITs, foreign investors are guaranteed



²⁴⁶ Vandevelde K J 'The Economics of Bilateral Investment Treaties' (2000) 41 *Harvard International Law Journal* 469 ; also see Parra A R 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment' (1997) 12 *ICSID Rev.-Foreign Investment L.J* 287 at 291-92.

²⁴⁷ United Nations Centre on Transnational Corporations *Bilateral Investment Treaties* (1998) at 9 available at <http://unctad.org/en/docs/poiteiid2.en.pdf> accessed on 05/07/2013.

²⁴⁸ United Nations Centre on Transnational Corporations *Bilateral Investment Treaties* (1998) at 9 available at <http://unctad.org/en/docs/poiteiid2.en.pdf> accessed on 05/07/2013.

²⁴⁹ See Parra A R 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment' (1997) 12 *ICSID Rev.-Foreign Investment L.J* 287 at 291-92; see also Parra A R 'ICSID and the Rise of Bilateral Investment Treaties: Will ICSID Be the Leading Arbitration Institution in the Early 21st Century?' (2000) 97 *American Society of International Law Proceedings* 41 at 43.

²⁵⁰ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014* 'investing in the SDGs: An Action Plan' at xxiii available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

²⁵¹ See Cosmas J 'Investor – state international arbitration system: is ICSID the appropriate forum for developing countries like Tanzania?' (2014) 5 (1) *Open University Law Journal* 25 – 36 at 30; see also Ginsburg T 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 *International Review of Law & Economics* 107 at 108; Salacuse J W & Sullivan N P 'Do BITS Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 *Harvard International Law Journal* 67 at 75-79.

²⁵² Franck S D 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham L Rev* 1521 at 1529; see also Dolzer R & Stevens M *Bilateral Investment Treaties* (1995); see also Vandevelde K J 'The Economics of Bilateral Investment Treaties' (2000) 41 *Harvard International Law Journal* 469 at 498; see also Vandevelde K J 'Investment Liberalization and Economic

different rights, including but not limited to; the right to compensation in case the investment is expropriated,²⁵³ the right for the foreign investment to receive fair and equitable treatment,²⁵⁴ right for the investment to be accorded protection and security²⁵⁵ and the foreign investors' right to move capital and currency from one country to another.²⁵⁶ Apart from these rights, BITs also provide for procedural rights which entitle foreign investors to sue the host state without seeking prior consent from their home governments.²⁵⁷ In other words, one can say, foreign investors acquire locus standi to be subjects of international law for purposes of investment arbitration alone. This is said to be the most important innovation brought about by BITs.²⁵⁸ This characteristic of BITs serves as an exception to the principle of customary international law

Development: The Role of Bilateral Investment Treaties' (1998) 36 *Columbia Journal of Transnational Law* 501 at 523-24.

²⁵³ See Guzman A 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law* 640 at 654. See also Article 4 of An Agreement between the Government of UK and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investment of 07/01/1994, (Hereinafter Tanzania – UK BIT) available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_UK.pdf accessed on 12/05/2013; see also Art 5 of An Agreement between the Government of Republic of Korea and the Government of the United Republic of Tanzania for the Promotion and Protection of Investment (hereinafter Tanzania – Korea BIT) available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_Korea.pdf accessed on 12/05/2013; see also Art 6 of An Agreement between the Kingdom of Netherlands and the Government of the United Republic of Tanzania for Encouragement and Reciprocal Protection of Investments of 31/07/2001 (hereinafter Tanzania – Netherlands BIT) available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_netherlands.pdf accessed on 12/05/2013; and Art 5 of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments of 27/11/2009 (hereinafter South Africa – Zimbabwe BIT) available at http://unctad.org/sections/dite/ia/docs/bits/south_africa_zimbabwe.pdf accessed on 12/05/2013.

²⁵⁴ See Art 2 of Tanzania – Korea BIT; Art 2 Tanzania – UK BIT; Art 3 Tanzania – Netherlands BIT ; Art 1 of the Treaty between the Federal Republic of Germany and the United Republic of Tanzania concerning the Encouragement and Reciprocal Protection of Investment of 30/01/1965 (hereinafter Tanzania – Germany BIT) available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_germany.pdf accessed on 12/05/2013 and Art 3 of South Africa – Zimbabwe BIT.

²⁵⁵ See Art 2 Tanzania – UK BIT.

²⁵⁶ See Art 6 of Tanzania – Korea BIT, Art 5 Tanzania – Netherlands BIT, Art 4 Tanzania – Germany BIT and Art 5 of the Agreement on encouragement and reciprocal protection of investments between the Republic of South Africa and the Kingdom of the Netherlands of 09/05/1995 available at http://unctad.org/sections/dite/ia/docs/bits/southafrica_netherlands.pdf accessed on 12/05/2013 (hereinafter South Africa – Netherlands BIT).

²⁵⁷ See Art 8 of Tanzania – Korea BIT, Art 9 Tanzania – Netherlands BIT, Art 8 Tanzania – UK BIT, and Art 9 of South Africa – Netherlands BIT.

²⁵⁸ Franck S D 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham L Rev* 1521 at 1529; see also Gantz D A 'The Evolution of FTA Investment Provisions: From NAFTA to the United States—Chile Free Trade Agreement' (2004) 19 *Am U Int'l L. Rev.* 679 at 696.

which requires states to represent their nationals in case the latter have a claim against another state.²⁵⁹ Through BITs, however, foreign investors are exonerated from applying this cumbersome route and institute their claims directly. Furthermore, BITs provide for different mechanisms for settling investment disputes. The most common mechanisms provided for include: arbitration under the auspices of ICSID, Additional Facility arbitration, and ad hoc arbitration under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.²⁶⁰ It is through BITs that the current international investment arbitration system was born. A discussion on the current dispute settlement system will be done in the following chapter of this work.

2.6 Conclusion

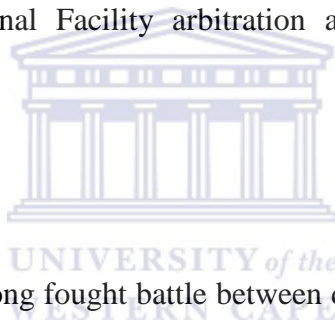
Despite different efforts being taken by the world community, especially the UN and OECD, it was always difficult to reach a consensus between developed and developing countries. Their interests most of the time were overlapping. Developing countries always wanted to protect their

²⁵⁹Van Harten *G Investment Treaty Arbitration and Public Law* (2007) at 98; see also Van Harten & Loughlin M 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) *The European Journal of International Law* 121 at 128.

²⁶⁰See Art 7(2) of the Agreement between the Government of the Kingdom of Sweden and the Government of the United Republic of Tanzania for the Promotion and Protection of Investment 01/09/1999 available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_sweden.pdf accessed on 12/05/2013 (hereinafter Tanzania – Sweden BIT) providing for ICSID arbitration; but see Art. 8(c) of the Agreement between the Government of United Republic of Tanzania and the Government of Italian Republic on the Promotion and Protection of Investment of 21/08/2001 (hereinafter Tanzania – Italy BIT) available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_italy.pdf accessed on 12/05/2013 and Art. 9(2) (d) of the Agreement between the Government of United Republic of Tanzania and the Government of Republic of Finland on the Promotion and Protection of Investment of 19/06/2001 (hereinafter Tanzania - Finland BIT) available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_finland.pdf accessed on 12/05/2013 both providing for UNCITRAL ad hoc Arbitration as an option in case of any dispute. For additional facility provision see Art 13(4) (b) of the BIT between South Africa and Canada which provide for the option of settlement of dispute through *ad hoc* arbitration under UNCITRAL rules or Additional Facility Rules of the ICSID, available at http://unctad.org/sections/dite/ia/docs/bits/canada_south_africa.pdf accessed on 05/06/2013.

sovereignty and natural resources while developed nations wanted maximum protection of their investments abroad.²⁶¹

While efforts to create a multilateral investment regulatory treaty failed, BITs continued to proliferate on an annual basis. The developed countries' goal of ensuring that foreign properties receive protection abroad has been achieved through protective provisions found in the resembling BITs. Their second goal of ensuring that foreign investment receives a neutral dispute settlement forum has been achieved as well, as BITs provide three forums to choose from: ICSID arbitration, Additional Facility arbitration and Ad hoc arbitration under the UNCITRAL Rules.

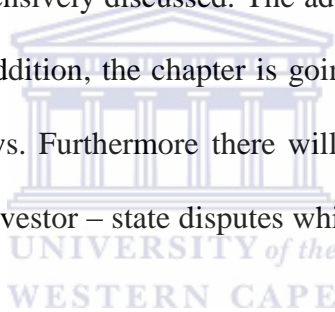


It can be concluded here that the long fought battle between developed and developing countries from the League of Nations efforts to the Abs –Shawcross Draft to MAI 1998 has ended by creating an international investment arbitration system through BITs. Developing countries in their desire to attract foreign investments have joined the West in creating the new system. BITs provide maximum protection of foreign investors' interests which goes beyond the customary international law principles. The collapse of the USSR and economic difficulties in the 1990s necessitated the proliferation of BITs which are essentially creatures of the developed world.

²⁶¹ See the discussion under 2.3.1 – 2.3.11 above.

As a result, developing countries and some other developed countries have started complaining about the current system as they feel that BITs just create rights to investors without obligations. They are further concerned that the current system lacks the basic tenets of a legitimate adjudication system. It is the purpose of this research to analyse the current investment dispute settlement system in the next chapter.

The following chapter will discuss the current dispute settlement system in a detailed manner. The Dispute settlement system under ICSID, Additional Facility and Ad hoc arbitration under the UNCITRAL Rules will be extensively discussed. The advantages and disadvantages of each system will also be analysed. In addition, the chapter is going to discuss the issues arising as a result of the current systemic flaws. Furthermore there will be a discussion as to whether the current system is appropriate for investor – state disputes which most of the time involves public interests disputes.



CHAPTER THREE

AN ANALYSIS OF THE CURRENT INVESTOR – STATE ARBITRATION SYSTEM

3.1 Introduction

This chapter describes and analyses the existing investor – state arbitration system. Arbitration, as pointed out in the previous chapter, is currently the most utilised mechanism in settling international investment disputes.¹ These disputes are either settled at the International Centre for Settlement of Investment Disputes (ICSID) in accordance with the ICSID Convention,² or in accordance with Additional Facility Rules,³ or by ad hoc arbitrations established in accordance with the UNCITRAL Arbitration Rules, 2010.⁴ Under ad hoc arbitration, parties may choose any arbitration institution to be the appointing authority for the purpose of their arbitration proceeding. The UNCTAD 2014 World Investment Report indicates that ICSID registered 62% of all investor – state disputes, UNCITRAL 28%, and the remaining 10% is managed by the London Court of International Arbitration (LCIA), and the Stockholm Chamber of Commerce.⁵

¹ See subheading 2.5.2 of Chapter two above.

² Governed by the Washington Convention on Settlement of Investment Disputes between States and the Nationals of Other Contracting States, 1965 hereinafter referred as “the ICSID Convention” read together with the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (hereinafter ICSID Rules) available at <http://www.worldbank.org/icsid.htm> accessed on 21/05/2013.

³ Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, 2006 available at http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf accessed on 21/05/2013.

⁴ UNCITRAL Arbitration Rules, 2010 available at www.uncitral.org/pdf/arbitration/rules/arb-rules-revised-2010 accessed on 15/07/2013.

⁵ See United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* ‘Investing in the SDGs: An Action Plan’ [2014] IIA Monitor, No. 1, at 125, U.N.Doc.UNCTAD/WEB/ITE/IIA/2014/3 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf accessed on 23/07/2014.

In the analysis, the chapter assesses the current system to see whether it is effective and appropriate for settling investor – state disputes which involves public interests disputes.

The overall argument of this chapter is that investor – state arbitration which is an adjudicative system in public international law, is supposed to be grounded upon public international law values.⁶ The system, among other things, needs to be transparent, presided over by independent and impartial adjudicators, accountable and consistent. However, it is submitted in this chapter that the current system is not living up to the public international law values. The specific analysis of the rules shows: that the system operates under a great deal of confidentiality; that there is no guarantee of the independence and impartiality of the process; that tribunals are presided over by ad hoc arbitrators with no security of tenure; that the adjudication process is overly expensive; and that the process has produced inconsistent decisions which have created the uncertainty and unpredictability of investor – state jurisprudence.

The chapter is divided into four parts. The first part discusses the ICSID arbitration system by looking at its design, structure, strength and weaknesses. It is concluded that despite the efforts made in 2006 to improve the ICSID system, more changes are required. The second part

⁶ For an insightful discussion on this argument see Van Harten G ‘*Investment Treaty Arbitration and Public Law*’ (2007) at 46 – 71; see also Schill S ‘International Investment Law and Comparative Public Law: Ways out of the Legitimacy Crisis’ available at <http://www.iilj.org/research/documents/if2010-11.schill.pdf> accessed on 09/09/2013; see also Schill S ‘Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach’(2011) *Virginia Journal of International Law* 57 at 59; also see Van Harten G & Loughlin M ‘Investment Treaty Arbitration as a Species of Global Administrative Law’ (2006) *European Journal of International Law* 121 at 122; see also Mann H ‘Civil Society Perspective: what Do Key Stakeholders Expect from the International Investment Regime?’ in Alvarez JE & Sauvants KP (eds.) *The Evolving International Investment Regime* (2011) 22 – 29 at 23; also see Van Harten G ‘Investment Treaty Arbitration, Procedural Fairness and the Rule of Law’ in Stephan Schill (ed.) *International Investment Law and Comparative Public Law* (2010) 627 – 657 at 630; also see Brower CN & Schill S ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’ (2009) 9 *Chicago Journal of International Law* 471.

discusses the rules applicable to the ICSID Additional Facility system. The third part discusses the ad hoc arbitration under the UNCITRAL Arbitration Rules. In this part, the Permanent Court of Arbitration (PCA) arbitral system will also be discussed. It is concluded that the UNCITRAL 2010 rules are the most confidential, and that changes need to be effected for betterment of the investor – state system. The last part analyses the strengths and weaknesses of the whole investor – state arbitration system. The part concludes that despite several strengths of the system, there are a number of legitimacy issues which need to be addressed.

3.2 The International Centre for Settlement of Investment Disputes (ICSID)

The Convention on the Settlement of Investment Disputes between States and Nationals of Other Contracting States (hereinafter ‘the Convention’) was adopted in 1965 and came into force on 14th October 1966. The main purpose of the Convention is to facilitate dispute settlement by way of conciliation and arbitration.⁷ Currently, the Convention is signed by 158 and ratified by 149 states.⁸ The Convention establishes a specialised autonomous and self – contained arbitration system through the International Centre for Settlement of Investment Disputes (hereinafter ‘the ICSID’).⁹ The ICSID is responsible for the registration and administration of Convention cases.

⁷ See Article 1(2) of the ICSID Convention, 1965; see also Lamm CB ‘Jurisdiction of the International Centre for Settlement of Investment Disputes’ (1991) 6 *ICSID Rev -Foreign Investment LJ* 462 at 463.

⁸ See ICSID List of Contracting States and Other Signatories of the Convention as of 20th May 2013 available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Contractingstates&ReqFrom=Main> accessed on 18/06/2013.

⁹ See Article 1 (1) of the Convention; see also Broches A ‘Arbitration under the ICSID Convention’ *News from ICSID No 1* (1991) 1.

The ICSID case profile has increased tremendously in the last two decades.¹⁰ The World Investment Report 2013 indicates that the ICSID is gaining more popularity over other arbitral institutions and rules. Out of 58 investor – state cases filed in 2012, 39 cases were filed with ICSID and 7 of them were filed under the Additional Facility Rules.¹¹ When combined with the Additional Facility cases, the Centre registered 67% of all new cases filed in the year 2012 alone.¹² The statistical data for the last three years reveals that two – thirds of all investment cases are settled at the Centre.¹³ It is clear therefore, that ICSID plays a significant and central role in the development of international investment law.

3.2.1 Organisational structure of the International Centre for the Settlement of Investment Disputes



The ICSID is comprised of two main organs: the administrative Council and the Secretariat. The Council is the top governing body made up of one member from each contracting state.¹⁴ The Council reaches its decisions by way of voting and each member state has equal voting power.¹⁵

¹⁰ Out of the 514 known Investor – State Disputes by the end of 2012, ICSID has been involved in more than 70% of all cases, see United Nations Conference on Trade and Development (UNCTAD) ‘Latest Developments in Investor-State Dispute Settlement’, [2013] IIA Monitor, No. 1, at 1–2, U.N.Doc. UNCTAD/WEB/ITE/IIA/2013/3

¹¹ See United Nations Conference on Trade and Development (UNCTAD), ‘Latest Developments in Investor-State Dispute Settlement’, [2013] IIA Monitor, No. 1, at 1–2, U.N.Doc. UNCTAD/WEB/ITE/IIA/2013/3.

¹² The UNCTAD 2013 *World Investment Report* indicates further that UNCITRAL Rules were selected in 7 new cases (12%), 5 other cases (8.6%) were filed in the Stockholm Chamber of Commerce while the International Chamber of Commerce (ICC) and the Cairo Centre for International Commercial Arbitration received 1 case each (1.7%).

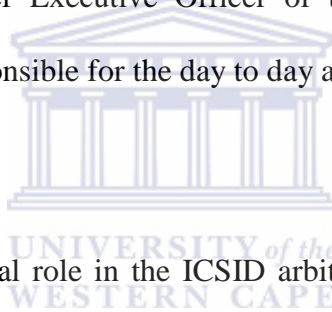
¹³ See also the UNCTAD World Investment Report for 2012 which indicates that 34 cases out of 46 cases (73%) registered in that year were registered at ICSID Centre, available at http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf; See also the UNCTAD Report for 2011 which indicates that 25 cases were registered out of which 18 (72%) of them were registered at ICSID, available at http://unctad.org/en/docs/wir2011_embargoed_en.pdf accessed on 08/08/2013.

¹⁴ See Article 4 of the International Convention on the Settlement of Investment Disputes (ICSID Convention).

¹⁵ See Article 7(2) of the ICSID Convention.

The Council elects the Secretary General and the Deputy Secretary General of the Secretariat. The Council is also responsible for the adoption of rules for the institution and conduct of ICSID proceedings, budget approval and adoption, and deliberation of the ICSID annual reports.¹⁶ The Council meets once a year but in case of an urgent matter, the Council Chairman or General Secretary to the Secretariat is mandated to convene the meeting at any time.¹⁷

The Secretariat is composed of the Secretary General, the Deputy Secretary General and the staff.¹⁸ The Secretary General acts as the lead legal counsel of the centre, the registrar of the ICSID proceedings and the Chief Executive Officer of the Centre. The Deputy Secretary General, on the other hand, is responsible for the day to day activities of the Centre.¹⁹



The Secretariat plays a very crucial role in the ICSID arbitration system. It is the duty of the Secretariat to provide institutional support for the filing and conduct of ICSID proceedings. The Secretariat is also responsible to provide assistance in constituting Conciliation Commissions, Arbitral Tribunals and Ad hoc Committees. In addition, the Secretariat provides support by maintaining a panel of conciliators and arbitrators from which member states may choose in case of any dispute.²⁰ In situations where the parties to the dispute do not agree on the appointment of arbitrators, the Chair of the ICSID Council or the Secretary General is empowered to appoint the presiding tribunal.²¹ The Chair or the Secretary General is obligated to choose arbitrators from

¹⁶See Article 6 of the ICSID Convention.

¹⁷ See Article 7 of the ICSID Convention.

¹⁸ See Article 10 of the ICSID Convention.

¹⁹ See Article 11 of the ICSID Convention.

²⁰ See Article 3 and 12 of the ICSID Convention.

²¹ See Article 38 of the ICSID Convention.

the panel.²² The purpose of empowering the Chair to appoint arbitrators in case of parties' default or disagreement is to ensure that the proceedings do not stall for failure of constituting the tribunal.

3.2.2 The jurisdictional requirement of the International Centre for Settlement of Investment Disputes

The Preamble to the ICSID Convention clearly provides that the submission of disputes to the ICSID is voluntary and no contracting state shall be under any obligation by mere ratification, acceptance or approval of the Convention to appear at the Centre.²³ In other words, the ratification of the convention does not in itself entitle foreign investors to institute proceedings against the host state at ICSID.²⁴ Article 25 (1) provides for the four requirements which need to be fulfilled before the matter can be heard at ICSID. Article 25(1) provides:

‘The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.’

²² See

<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Organization%20and%20Structure&pageName=Organization> accessed on 18/06/2013.

²³ See the last paragraph of the Preamble to the ICSID Convention.

²⁴ See Tuck AP ‘Investor – State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules’ (2007) *Law and Business Review of the Americas* 885.

It can be deduced from Article 25(1) that for the Centre to have jurisdiction there must be: (1) a legal dispute, (2) which has arisen out of an investment, (3) the contracting parties must give consent in writing, and lastly (4) the state must be a contracting state and the foreign investor must be a national of another contracting state. The section below discusses the four jurisdictional elements as provided under Article 25(1). The section reveals that there are contradicting decisions on the jurisdictional requirements. These contradictory decisions are left to exist in parallel as there is no higher court to state the true position of the law.

3.2.2.1 Consent

Consent is an indispensable condition for the jurisdiction of the Centre.²⁵ The Convention requires the contracting state to give its consent in writing.²⁶ The provision aims at avoiding dragging the parties, especially the state, to a forum it has not consented to. The consent to ICSID arbitration entails waiver of other means of dispute settlement and once given it cannot be vitiated.²⁷

²⁵ Schreuer C *The ICSID Convention: A Commentary* (2001) at 191; see also Schreuer C 'The World Bank/ICSID Dispute Settlement Procedures' in Lang & Zuger (eds.) *Settlement of Dispute in Tax Treaty Law* (2002) 579 -582 available at http://www.univie.ac.at/intlaw/wordpress/pdf/66_icsid.pdf accessed on 12/07/2013; see also Akyuz SA 'The Jurisdiction of ICSID: The Application of the Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other Contracting States' available at <http://auhf.ankara.edu.tr/dergiler/auhfd-arsiv/AUHF-2003-52-03/AUHF-2003-52-03-Akyuz.pdf> accessed on 7/7/2013; also see Mortenson JD 'The Meaning of Investment: ICSID's Travaux and the Domain of International Investment Law' (2010) 51 *Harvard International Law Journal* 257 at 268; see also Van Harten G & Loughlin M 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) *European Journal of International Law* 121 at 126.

²⁶ See Article 25(1) of the ICSID Convention.

²⁷ See Article 26 of the ICSID Convention.

The ICSID consent can be obtained in a number of ways. A report of the Executive Directors of the World Bank on ICSID provides for the ways in which the consent could be given.²⁸ The report states that the first possible way of obtaining consent is by a consent clause in the parties' agreement. The parties when entering into a contract would have included a clause which specifically name ICSID as the organ responsible for settling their disputes.²⁹ The second possible way is by having a provision in the host state investment law which names ICSID as one of the means of settling an investment dispute between the host state and foreign investors.³⁰ The third and most common way is through a treaty between the host state and the home state of the respective foreign investor.³¹ Currently, over 2000 BITs have a clause providing for dispute settlement through the ICSID arbitral system.³² The investor's consent, on the other hand, can be

²⁸ Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18th March 1965 available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB-section01.htm> accessed on 18/06/2013.

²⁹ See Mortenson JD 'The Meaning of Investment: ICSID's Travaux and the Domain of International Investment Law' (2010) 51 *Harvard International Law Journal* 257 at 268; see also Van Harten G & Loughlin M 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) *European Journal of International Law* 121 at 126.

³⁰ Mortenson JD 'The Meaning of Investment: ICSID's Travaux and the Domain of International Investment Law' (2010) 51 *Harvard International Law Journal* 257 at 268; see also Van Harten G & Loughlin M 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) *European Journal of International Law* 121 at 126.

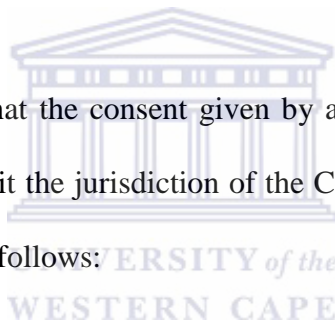
³¹ By the end of the year 2012 over 63% of all disputes filed at ICSID originated from BITs, see *The Basis of Consent Invoked to Establish ICSID Jurisdiction as of 31st December 2012* available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English> accessed on 21/06/2013.

³² United Nations Conference on Trade and Development (UNCTAD) *World Investment Report: 'Non-Equity Modes of International Production and Development'* UN Pub. Sales No.E.11.II.D.2, 2011 at 100; For cases on which jurisdiction was based on BIT see *AAPL v. Sri Lanka*, Award, 27 June 1990, ICSID Reports, 4 (1997); See also *SGS Société Générale de Surveillance S A v Islamic Republic of Pakistan* ICSID ARB/01/13 (2003) (Decision on objection to jurisdiction) (hereinafter *SGS v Pakistan*) and *SGS Société Générale de Surveillance S A v Republic of the Philippines*, ICSID ARB/02/6 (2004) (Decision on objection to jurisdiction and separate declaration) (hereinafter *SGS v Philippines*); See also *Lauder v The Czech Republic* 9 ICSID Reports 66 (2003); and *CME Czech Republic BV v The Czech Republic* 9 ICSID Reports 121(2003); see also *Aguas del Tunari S A v Bolivia* ICSID ARB/02/3 (2005) (decision on jurisdiction) and *Azurix Corp v Argentina* ICSID ARB/1/12 (2006) (final award) (all cases concerned governed measures to protect water services); See *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8(2005) (final award), *Sempra Energy International v The Argentine Republic* ICSID ARB/02/16 (2005) (final award) and *Enron Corporation and Ponderosa Assets L P v Argentine Republic* ICSID ARB/01/3 (2007) (final award).

derived from his conduct. Instituting a claim at ICSID would bring about a presumption that the parties have consented to the ICSID system.

Article 44 provides that consent to the ICSID system entails also consent to the use of ICSID rules for conciliation or arbitration.³³ The state becomes bound to adhere to the ICSID dispute system to the exclusion of its own courts and other remedies. Therefore, by giving their consent to the ICSID system, states waive their sovereignty to a limited extent. In addition, the state waives the right to use diplomatic protection and cannot bring a diplomatic claim on behalf of its citizens.³⁴

It is worth noting here however that the consent given by a particular state could be a limited one. The respective states may limit the jurisdiction of the Centre by expressly stating this in its consent. Article 25 (4) provides as follows:



‘Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary- General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).’

Under such circumstances, the Centre will have jurisdiction over disputes which are within the scope provided by that contracting state. Furthermore, Article 26 provides that states could impose a condition that the jurisdiction of the ICSID shall be subject to exhaustion of local

³³ See Article 44 of the ICSID Convention.

³⁴ See Article 27 of the ICSID Convention.

remedies and after expiration of waiting period stated in the particular BIT. ICSID in such circumstances shall only have jurisdiction after the local remedies have failed to resolve the dispute and the waiting period have expired.³⁵

In practice, tribunals have produced conflicting decisions with regard to the consent limitation set out under Article 26. In *Emilio Augustin Maffezini v the Kingdom of Spain*, the BIT between Spain and Argentina provided for a waiting period of 18 months before the foreign investor can initiate international arbitration.³⁶ During the stipulated 18 months, the foreign investor was required to exhaust the local remedies available. Mr Maffezini contested the waiting period as being long and argued before the tribunal that Spain had another BIT with Chile which provides for only a six month's waiting period. Therefore, he invoked the Most Favoured Nation (MFN) principle that obliges equal treatment to third parties.³⁷ The issue before the Tribunal was whether the MFN principle can be invoked to bypass consent limitations set by the contracting parties in a treaty by using another BIT involving the respondent state and a third party. The *Maffezini* Tribunal ruled in the affirmative and stated that jurisdictional matters constitute a part of the package of the investor's protection guarantees; hence MFN can be invoked to grant jurisdiction if that other BIT provides for a more favourable dispute settlement procedure.³⁸

³⁵ See Article 26 of the Convention.

³⁶ See *Emilio Augustin Maffezini v The Kingdom of Spain*, Award on Jurisdiction, ICSID Case No ARB/97/7, IIC 85 (2000).

³⁷ See *Emilio Augustin Maffezini v The Kingdom of Spain*, Award on Jurisdiction, ICSID Case No ARB/97/7, IIC 85 (2000) para 480 – 481.

³⁸ For similar opinion see *Gas Natural SDG, S.A. v Argentina*, ICSID Case No ARB/03/10 (2005) (Decision on Preliminary Questions on Jurisdiction); *Camuzzi International S.A. v The Argentine Republic*, ICSID Case No ARB/03/2 (2005) (Decision on Jurisdiction); *National Grid plc v The Argentine Republic*, UNCITRAL (2006) (Decision on Jurisdiction); *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, ICSID Case No ARB/03/19 (2006) and *AWG Group Ltd. v The Argentine Republic*, UNCITRAL (2006) (Decision on Jurisdiction).

However, in another case, *Plama v Bulgaria*,³⁹ on the same grounds and argument as in the *Maffezini* case, the Tribunal rejected the reasoning and conclusion drawn in the former case. The Tribunal ruled:

‘an MFN clause in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.’⁴⁰

Therefore, due to the fact that the doctrine of precedent is not recognised at ICSID, to date both decisions are valid and more contradictions can be expected.⁴¹ It is unclear therefore, whether the waiting period needs to expire before one can proceed to institute a case with ICSID. It is submitted that, for the sake of certainty and respect for the BIT provisions, the time period stipulated in a BIT should be respected and followed. Any disregard of what the parties agreed to is unnecessarily creating legitimacy concerns for the system which already has a lot of issues to address.

³⁹ *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24 (2005) (Decision on Jurisdiction), para. 223; see also *Telenor Mobile Communications AS v Republic of Hungary*, ICSID Case No ARB/04/15,(2006) (Award); see also *Salini Costruttori S.p.A and Italstrade S.p.A v The Hashemite Kingdom of Jordan* ICSID Case No ARB/02/13 (2004) (Decision on Jurisdiction).

⁴⁰ See *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24 (2005) (Decision on Jurisdiction), para. 143.

⁴¹ Reinisch A. ‘How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?’ *Journal of International Dispute Settlement* (2011) 2(1) 115 at 133; see also Douglas Z ‘The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rail’ *Journal of International Dispute Settlement* (2011) 2(1) 97 at 97.

3.2.2.2 Parties to the dispute

Article 25(1) provides for the eligible parties to the ICSID arbitration. Contracting states and nationals of other contracting states are the principal parties to the ICSID arbitration.⁴² However, under special circumstances, a state party may endorse its subsidiary company to be a party to the dispute.⁴³ A national of other contracting state could either be a natural person or a juridical person. The Convention requires the citizen of the other state to have the nationality of the other contracting party at the time of consent and at the time when the dispute arises.⁴⁴ In both circumstances, the national of other contracting states should not be a national of the contracting state which is a party to the underlying dispute. This conforms to the international law principle that a national of a particular state cannot sue their own state in an international forum.

Therefore, where the juridical person has been incorporated in the host state it will be considered a national of that state and lose the locus standi to sue it at ICSID.⁴⁵ In contemplation of difficulties which can be caused by the rule, the ICSID Convention provides an exception to the rule. Article 25(2) (b) permits the locally incorporated juridical person to be treated as a foreign national as long as it is foreign - controlled and the parties have expressly agreed to treat it as such. Both requirements must be met. It is imperative that the parties expressly agree to that, and

⁴² For insightful discussion see Amerasinghe CF 'Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1974/75) *British Year Book of International Law* 233; see also Sloane RD 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) *50 Harvard International Law Journal* 1- 60 at 37; see also United Nations Conference on Trade and Development (UNCTAD) *Requirement Ratione Personae* (2003) UNCTAD/EDM/Misc.232/Add.3 at 7 - 22 available at http://unctad.org/en/Docs/edmmisc232add3_en.pdf accessed on 07/07/2013; see also Nerets V 'Nationality of Investors in ICSID Arbitration' *Research Paper Series* (2011) Riga Graduate School of Law at 20 available at http://www.rgsl.edu.lv/images/stories/publications/2_nerets_final.pdf.

⁴³ See Article 25(3) of the Convention. For a case in which a subsidiary company instituted a case upon receiving approval of the state party see *Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited*, ICSID Case No ARB/98/8.

⁴⁴ See Article 25(2) (a).

⁴⁵ *Barcelona Traction, Light and Power Co Case (Belgium v Spain)* (1970) ICJ Reports 3.

the juridical person should be under foreign control.⁴⁶ In *Holiday Inns v Morocco*⁴⁷ the respondent state objected to the ICSID jurisdiction on the ground that the four Moroccan subsidiaries of Holiday Inns were not foreign nationals and that no agreement was entered to treat them as such. The Tribunal concurred with the Moroccan argument and stated that for Article 25(2) (b) to apply, the parties must have expressly agreed to treat the locally incorporated company as foreign.⁴⁸

It follows therefore that lack of parties' agreement renders invocation of Article 25(2) (b) unacceptable as it lacks the parties will. The *Holiday Inns* position was upheld in *Vacuum Salt Product v Ghana*.⁴⁹ In this case, Vacuum Salt, a Ghanaian company, entered into a 30 years contract with Ghana to develop and mine salt. The contract had an ICSID arbitration clause. When the dispute arose the claimant instituted a claim with ICSID. The respondent state contested the claim arguing that Vacuum Salt was not a foreign company and there was no explicit agreement to treat it as such. The Tribunal held in favour of the respondent state and insisted that Article 25(2) (b) requires explicit agreement of the parties to treat a locally incorporated company as foreign. It further held that the existence of foreign control in itself is

⁴⁶ See Sornarajah M *The Settlement of Foreign Investment Disputes* (2000) at 211.

⁴⁷ *Holiday Inns SA and others v Morocco ICSID Case No ARB/72/1*(1972).

⁴⁸ For more discussion see Wisner R & Gallus N 'Nationality Requirement in Investor – State Arbitration' (2003) *The Journal of World Investment & Trade* 927 at 933- 936; see also United Nations Conference on Trade and Development (UNCTAD) *Requirement Ratione Personae* (2003) UNCTAD/EDM/Misc.232/Add.3 at 19 - 22 available at http://unctad.org/en/Docs/edmmisc232add3_en.pdf accessed on 07/07/2013; see also Akyuz SA 'The Jurisdiction of ICSID: The Application of the Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other Contracting States' available at

<http://auhf.ankara.edu.tr/dergiler/auhfd-arsiv/AUHF-2003-52-03/AUHF-2003-52-03-Akyuz.pdf> accessed on 7/7/2013; also see Nerets V 'Nationality of Investors in ICSID Arbitration' *Research Paper Series* (2011) Riga Graduate School of Law at 28 available at http://www.rgsl.edu.lv/images/stories/publications/2_nerets_final.pdf.

⁴⁹ ICSID Case No ARB/92/1 (1997).

not sufficient but a conditional requirement to be met. In support of the same position, the Tribunal in *Letco v Liberia*⁵⁰ held that:

‘...it must be presumed that where there exists foreign control, the agreement to treat the company in question as a foreign national is ‘because’ of this foreign control.’⁵¹

Therefore, in a normal situation, a locally incorporated company has no locus standi to institute proceedings at ICSID.

Other Tribunals, however, have adopted a different position and ruled that there is no need for parties’ express agreement. In *Amco Asia v Indonesia*,⁵² the presiding tribunal widened the scope of interpretation of Article 25(2) (b) by holding that the parties’ agreement to treat a locally incorporated company as foreign can be implied from their conduct. The facts were that the respondent, Indonesia, objected to the ICSID jurisdiction on the ground that Amco Asia was locally incorporated and there was no agreement between the parties to treat Amco Asia as a foreign company. The claimant, on the other hand, argued that Amco Asia was controlled by PT Amco, a foreign company, and that the respondent state knew about the foreign control as it was indicated during the registration of the company. The Tribunal agreed with the claimant’s assertion and held that the respondent state knew about the foreign control of Amco Asia as the registration documents indicated such control. Therefore, according to the Tribunal, agreement to treat a local company as foreign can be inferred from the conduct of the parties and in some instances there is no need for express agreement.

⁵⁰ *Liberian Eastern Timber Corporation (LETCO) v. Liberia*, ICSID Case No.ARB/83/2 (1994).

⁵¹ See *Letco v Liberia* para 516.

⁵² *Amco Asia Corporation and others v. Republic of Indonesia* ICSID Case No.ARB/81/1 (1984).

The same expansive approach was taken in *Klockner v Cameroon*.⁵³ In this case the respondent argued against the ICSID jurisdiction on the ground that the corporation in question was incorporated in Cameroon and there was no agreement by the parties to treat it as foreign. It further argued that the corporation could not qualify for foreign control as it was jointly owned and controlled by the Cameroon government. The claimant, on the other hand, argued that due to the existence of an arbitration clause in their agreement which provided for ICSID arbitration, the ICSID had the jurisdiction to hear the claim. The Tribunal agreed with the claimant and ruled that the arbitration agreement in the contract suffices to give ICSID the jurisdiction to settle the dispute. It further said that the arbitration clause was conclusive proof that the host state has agreed to treat its own juridical person as foreign.⁵⁴

Again, the above discussed awards contradict each other despite the fact that they are interpreting the same provision of the ICSID Convention. It is submitted here that the wide interpretation of Article 25(2) (b) given by the *Amco Asia* and *Klockner* Tribunals was beyond the member state parties' contemplation. The Article clearly stipulates for the two conditions to be met. To use a purposive interpretation where the wording of the Article is clear is uncalled for, to say the least. The two Tribunals created unnecessary uncertainty in the jurisprudence of international investment law. It is submitted here that the strict interpretation of Article 25(2) (b)

⁵³ *Klößner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais* ICSID Case No ARB/81/2 (1983).

⁵⁴ Akyuz SA 'The Jurisdiction of ICSID: The Application of the Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other Contracting States' available at <http://auhf.ankara.edu.tr/dergiler/auhfd-arsiv/AUHF-2003-52-03/AUHF-2003-52-03-Akyuz.pdf> accessed on 7/7/2013

is more appropriate one, as otherwise state parties may lose confidence in the system which will be considered as interfering too much with states' sovereignty.

3.2.2.3 Legal dispute

Existence of a legal dispute is another requirement which needs to be met for the ICSID tribunal to assume jurisdiction.⁵⁵ The Convention does not define what constitutes a legal dispute hence it is for the presiding tribunal to determine that. The International Court of Justice (ICJ) in *Mavrommatis Palestine Concessions* defined a dispute as 'a disagreement on a point of law or fact, conflict of legal views or interests between parties'.⁵⁶ This definition has been frequently adopted by the ICSID tribunals.⁵⁷

Schreuer defines a legal dispute as a dispute which involves parties' legal rights and in which the remedies sought are damages and restitution.⁵⁸ Amerasinghe, on the other hand, suggests that for the legal dispute to exist, the parties must have reached a disagreement which have escalated to a level of confrontation and should be of interest to the parties involved.⁵⁹

⁵⁵ See Schreuer C 'What is a Legal Dispute?' (2009) 1 *TDM* 960; see also Kryvoi Y *International Centre for Settlement of Investment Disputes* (2013) at 56; see also Akyuz SA 'The Jurisdiction of ICSID: The Application of the Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other Contracting States' available at <http://auhf.ankara.edu.tr/dergiler/auhfd-arsiv/AUHF-2003-52-03/AUHF-2003-52-03-Akyuz.pdf> accessed on 7/7/2013; see also Boddicker JM 'Whose Dictionary Controls: Recent Challenges to the Term Investment in ICSID Arbitration' (2010) *American University International Law Review* 1033; also see Nerets V 'Nationality of Investors in ICSID Arbitration' *Research Paper Series* (2011) Riga Graduate School of Law at 10.

⁵⁶ *Mavrommatis Palestine Concessions*, Judgement No 2 1924 PCIJ Series A No 2 at p 11.

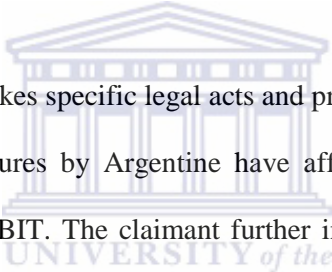
⁵⁷ See for example *Emilio August Maffezini v Kingdom of Spain* Case No ARB/97/7 Decision on Jurisdiction (2000) paras 93 – 94; see also *Tokios Tokelés v Ukraine* Case No ARB/02/18 Decision on Jurisdiction (2004) paras 106 – 107; see also *El Paso Energy International Company v Argentine Republic* Case No ARB/03/15 Decision on Jurisdiction (2006)

⁵⁸ Schreuer C et al *The ICSID Convention: A Commentary* (2009) at 102.

⁵⁹ Amerasinghe C F 'The Jurisdiction of the International Centre for the Settlement of Investment Disputes' 19 *Indian Journal of International Law* 166 (1979), pp.169-171 at 176.

The Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States requires that the dispute must concern the existence or scope of a legal right or obligation or the nature or the extent of the reparation to be made for a breach of a legal obligation.⁶⁰

A number of tribunals have also provided guidance on how to identify a legal dispute. It has been held that a legal dispute exists when the claimant asserts rights, relies on legal arguments and seeks legal remedies. In *Continental Casualty v Argentina*⁶¹, the Tribunal held:



‘In this case, the claimant invokes specific legal acts and provisions as the foundation of its claim: it indicates that certain measures by Argentine have affected its legal rights stemming from contracts, legislation and the BIT. The claimant further indicate specific provisions of the BIT granting various types of legal protection to its investments in Argentina, that in its view have been breached by those measures.’⁶²

Taking the same position, in *Suez v Argentina*⁶³, when called on to decide whether the Argentina measures which affected the claimant’s investment could result in a legal dispute, the Tribunal observed:

⁶⁰ *Report of the Executive Directors* of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18th March 1965 available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB-section01.htm> accessed on 18/06/2013, para 44 - 46.

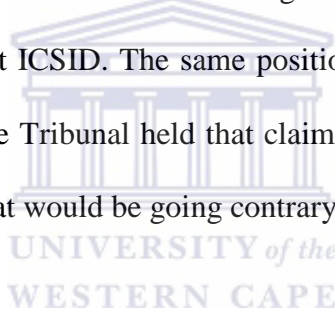
⁶¹ *Continental Casualty Company v Argentine Republic* Case No ARB/03/9 Decision on Jurisdiction (2006)

⁶² *Continental Casualty Company v Argentine Republic* Case No ARB/03/9 Decision on Jurisdiction (2006), para 67.

⁶³ *Suez Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* ICSID Case No. ARB/03/17 (2006).

‘A legal dispute, in the ordinary meaning of the term, is a disagreement about legal rights or obligations ...In the present case, the claimant clearly base their case on legal rights which they allege have been granted to them under the BITs that Argentina has concluded with France and Spain. In their written pleadings and oral arguments, the Claimants have consistently presented their case in legal terms...the dispute as presented by the Claimant is legal in nature.’⁶⁴

In addition to the above stated requirements, it has been held that the dispute needs to arise from lawful and bona fide activities. In *Inceysa Vallisoletana S.L v Republic of El Salvador* it was observed that the investor will be able to rely on ICSID protection only if the transaction creating their rights is legal.⁶⁵ Where the transactions surrounding the claim are illegal, the investor will not be able to institute his claim at ICSID. The same position was taken in *World Duty Free v Kenya*.⁶⁶ Declining jurisdiction, the Tribunal held that claims based on corrupt conducts cannot be upheld by ICSID tribunals as that would be going contrary to international public policy.⁶⁷



In conclusion, it can be said that the meaning of a legal dispute has not generated as many controversy as other ICSID jurisdictional requirements. The tribunals have been in agreement that the legal nature of a dispute is determined by the way the claimant asserts their claim. If the claimant asserts violation of the legal rights, bases the claims on legal argument, and is seeking legal remedies, then the ICSID tribunal would have jurisdiction on the matter.

⁶⁴ *Suez Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* ICSID Case No. ARB/03/17 (2006), paras 34 and 37.

⁶⁵ *Inceysa Vallisoletana S.L v Republic of El Salvador* ICSID Case No. ARB 03/26 (2006)

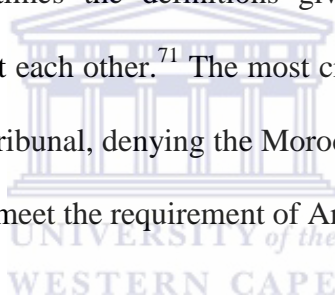
⁶⁶ *World Duty Free Co Ltd. V The Republic of Kenya* ICSID Case No. ARB/00/7 (2006).

⁶⁷ *World Duty Free Co Ltd. V The Republic of Kenya* ICSID Case No. ARB/00/7 (2006).

3.2.2.4 Arising directly out of an investment

The last ICSID jurisdictional requirement is that the dispute must have arisen directly from investment.⁶⁸ The Convention does not define what an ‘investment’ is. It is submitted that the omission was intentional so as to allow parties to dictate the scope of their intended investment venture.⁶⁹ However, many BITs define what amounts to ‘investment’ followed by a non-exhaustive list of categories of covered investments.⁷⁰

In the course of adjudicating investment disputes, ICSID tribunals have tried to define the term investment as they see fit. At times the definitions given by these tribunals have been controversial and tend to contradict each other.⁷¹ The most cited definition was given in *Salini v The Kingdom of Morocco*.⁷² The Tribunal, denying the Moroccan submission that the transaction was not an investment and did not meet the requirement of Article 25, observed:



⁶⁸ See Article 25(1) (a) of the ICSID Convention; see also *Fedax N.V. v. The Republic of Venezuela* ICSID Case No ARB/96/3 (1998). For more discussion on investment see Boddicker JM ‘Whose Dictionary Controls?: Recent Challenges to the Term Investment in ICSID Arbitration’ (2010) *American University International Law Review* 1033 at 1045; see also Hiscock ME ‘The Emerging Legal Concept of Investment’ (2009) *Penn State International Law Review* 765 at 769; see also Mortenson JD ‘The Meaning of Investment: ICSID’s Travaux and the Domain of International Investment Law’ (2010) 51 *Harvard International Law Journal* 257 at 261.

⁶⁹ See *Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18th March 1965* available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB-section01.htm> accessed on 18/06/2013, para 44; see also United Nations Conference on Trade and Development (UNCTAD) *Requirement Ratione Materiae* (2003) UNCTAD/EDM/Misc.232/Add.4 at 13 - 25 available at http://unctad.org/en/Docs/edmmisc232add3_en.pdf accessed on 07/07/2013

⁷⁰ See for example Art 1 of the Asian-African Consultative Committee: *Model Bilateral Agreements on Promotion and Protection of Investments* (1984) 23 *ILM* 237 at 242; See also article 1 of An Agreement between the Kingdom of Netherlands and the Government of the United Republic of Tanzania for Encouragement and Reciprocal Protection of Investments of 31/07/2001 (Hereinafter Tanzania – Netherlands BIT) available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_netherlands.pdf.

⁷¹ See Gaillard E ‘Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice’ available at <http://www.shearman.com/files/Publication/2319107f-1ed6-4dc1-80a6-16b4e6e24c29/Presentation/PublicationAttachment/4f72560e-8704-4a9a-a0df-1f7ca98d8fdd/IA-2009-Identify-or-define--Reflection-on-evolution-concept-of-investment-in-ICSID-pra.pdf> accessed on 29/07/2013.

⁷² *Salini Costruttori SpA v Kingdom of Morocco* ICSID Case No. ARB/00/4 (2001).

‘The doctrine generally considers that investment infers: contributions, certain duration of performance of the contract and a participation in the risks of the transaction. In reading the Convention's Preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition. In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.’⁷³

The Tribunal in this case opined that for a venture to be considered or qualify as investment, the following four criteria must be met: (1) there should be a contribution of money or other assets of economic value; (2) the venture should take a certain duration of time; (3) there should be an element of risk involved; and (4) it should contribute to the host state's development.⁷⁴ The Tribunal further stated that these factors are interdependent and should be assessed globally.⁷⁵

The same position was taken in *Jan de Nul NV v Egypt*⁷⁶ where the Tribunal ruled that the *Salini* factors should be considered collectively as indicative of existence of investment.⁷⁷ In another case, *Mitchell v Congo*,⁷⁸ the Annulment Panel ruled that each of the *Salini* tests has to be established before a venture can be treated as investment. It therefore concluded that the law firm was not an investment envisaged under the ICSID Convention as it had not contributed to the economic development of the host state.⁷⁹ The same position was upheld in *Malaysian Historical*

⁷³ *Salini Costruttori SpA v Kingdom of Morocco*, ICSID Case No. ARB/00/4 (2001), para 52.

⁷⁴ See also Schreuer C et al *The ICSID Convention: A Commentary* (2009) at 122.

⁷⁵ See *Salini Costruttori SpA v Kingdom of Morocco* ICSID Case No. ARB/00/4 (2001) para 52.

⁷⁶ *Jan de Nul NV v Islamic Republic of Egypt* ICSID Case ARB/04/13 (2006).

⁷⁷ *Jan de Nul NV v Islamic Republic of Egypt* ICSID Case ARB/04/13(2006) para 91.

⁷⁸ ICSID Case No. ARB 99/7 (2007) Decision on Annulment.

⁷⁹ See *Mitchell v Congo*, Decision on Annulment, para 39.

*Salvors v Malaysia*⁸⁰ where the Tribunal ruled that ‘if any of the *Salini* factors are absent, the tribunal will hesitate and probably decline to make a finding of investment’.⁸¹

Other tribunals, however, have disregarded the criteria set by *Salini* and have ruled that as long as the underlying consent to the arbitration recognises the activity as investment, the ICSID tribunal should not hesitate to exercise jurisdiction.⁸² Considering the *Salini* tests, the Tribunal in *Biwater Gauff v Tanzania* held as follows:

‘In the Tribunals’ view, there is no basis for a rote, or overly strict, application of the five *Salini* criteria in every case. These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention. On the contrary, it is clear from the *travaux préparatoires* of the Convention that several attempts to incorporate a definition of ‘investment’ were made, but ultimately did not succeed. In the end, the term was left intentionally undefined, with the expectation (inter alia) that a definition could be the subject of agreement as between Contracting States.’⁸³

In another case, *MCI v Ecuador*,⁸⁴ responding to Ecuador’s submission that the transaction did not meet the criteria set by *Salini*, the Tribunal observed that the *Salini* tests should be considered as mere examples and not as mandatory elements.⁸⁵

⁸⁰ *Malaysian Historical Salvors v Malaysia* ICSID Case No ARB/05/10 (2007) Award on Jurisdiction.

⁸¹ *Malaysian Historical Salvors v Malaysia*, para 106(e).

⁸² See *CMS Gas Transmission Company v The Argentine Republic* Annulment Committee (2007) para 71 – 72; see also *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No. ARB/05/22 (2008) where the Tribunal ruled that *Salini* tests can be dispensed with and they are not binding upon other tribunals.

⁸³ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22,

⁸⁴ *MCI Power Group, LCand New Turbine, Incv Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007.

⁸⁵ See *MCI Power Group, LCand New Turbine, Incv Ecuador* para 165.

In a most recent case, *Abaclat et al v. Argentina*,⁸⁶ the issue was whether the claimants' purchase of security entitlements in Argentinean bonds constituted a contribution to the host state which qualifies as investment under Article 25 of the ICSID Convention. The majority refused to follow the *Salini* tests and held:

‘Considering that these criteria were never included in the ICSID Convention, while being controversial and having been applied by tribunals in varying manners and degrees, the tribunal does not see any merit in following and copying the *Salini* criteria. The *Salini* criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which [neither] the Convention itself nor the Contracting Parties to a specific BIT intended to create.’⁸⁷

However, one dissenting arbitrator stated that ‘a contribution to the host State’s economic development forms part of the “hard core” of the ICSID Article 25 investment definition’.⁸⁸

Therefore, to date there are two conflicting positions with regard to what constitute investment as per the ICSID Convention. The *Salini* tests have received recognition from numerous tribunals while at the same time, the opposing view has also been approved by a number of tribunals. At times tribunals have arrived at contradictory conclusions on the meaning of the term ‘investment’ when interpreting the same BIT.⁸⁹ As discussed above, in *Mitchell v Congo*, the Tribunal held that a law firm was an investment in accordance with the US – Congo BIT while

⁸⁶ *Giovanna a Beccara and Others v Argentine Republic*, (also known as *Abaclat et al v. Argentina*), ICSID Case No.ARB/07/5, Decision on Jurisdiction, 4 August 2011

⁸⁷ *Abaclat et al v Argentina* para 364.

⁸⁸ *Abaclat et al v. Argentina*, Dissenting Opinion, paras. 47-51.

⁸⁹ See *Patrick Mitchell v. Democratic Republic of the Congo*, Award, November 30, 2004, 20 ICSID Rev. 587 (2005); but also see *Mitchell v Congo* ICSID Case No ARB 99/7 (2007) Decision on Annulment.

the Annulment Committee held that a law firm established by a US national in Congo does not qualify to receive protection as an investment.⁹⁰

In conclusion it can be said that the ICSID Tribunal will only exercise jurisdiction in a dispute which has met the jurisdictional requirements of Article 25.⁹¹ As evidenced above, the tribunals have produced contradictory interpretations on the jurisdictional requirements. The contradictory decisions stand in parallel and are all considered valid. There is no doctrine of precedent and no higher court in a hierarchy to state the true position of the law. This is one of the issues which bring about the legitimacy concerns of the system as a whole. Chapter five of this work deals with the possible solutions for addressing these concerns. Following hereunder is a discussion of the ICSID dispute settlement mechanisms.



3.2.3 Dispute settlement mechanisms at the International Centre for Settlement of Investment Disputes

The ICSID system provides for two alternate mechanisms for settlement of investor – state disputes.⁹² The dispute can be settled by way of conciliation or arbitration.⁹³ The convention leaves the parties with the choice of the mechanism they wish to employ in settling their

⁹⁰ See *Mitchell v Congo*, Decision on Annulment, para 39.

⁹¹ Investment disputes which fail to meet the requirements of Article 25 are meant to be settled through the Additional Facility Rules. The discussion on Additional Facility follows immediately hereafter.

⁹² See Article 1(2) of the ICSID Convention.

⁹³ Articles 28 – 35 of the ICSID Convention provides for conciliation proceedings while Article 36 – 55 provide for arbitration proceedings.

disputes. Therefore, it is for the parties filing the claim to indicate the mechanism preferred.⁹⁴ The choice must be made at the time of filing the claim at the ICSID. In *SPP v Egypt*, it was held that it is the duty of the parties to indicate the mechanism they prefer between the two alternatives.⁹⁵

3.2.3.1 Conciliation mechanism

Conciliation is an informal way of resolving disputes by involving a third party who suggest a solution for the dispute. The suggestion by the third party/ conciliator is not binding on the parties unless the parties mutually agree to the solution suggested.⁹⁶ A party seeking conciliation is required to address the request for conciliation to the Secretary General of the ICSID who shall be required to register it, unless it falls short of the jurisdictional requirements of the ICSID.⁹⁷ Article 33 provides for the establishment of ICSID conciliation rules. Currently the rules in place are the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institutional Rules) and the Rules of Procedure for Conciliation Proceedings (Conciliation Rules) as amended in 2006.

Conciliation is rarely used in investment disputes. For the past 20 years only seven cases have been resolved through conciliation.⁹⁸ This is due to the fact that the mechanism lacks mandatory

⁹⁴ United Nations Conference on Trade and Development (UNCTAD) *Dispute Settlement - International Centre for Settlement of Investment Disputes: selecting the Appropriate Forum* 2003 UNCTAD/EDM/Misc.232/Add.1 at 13.

⁹⁵ *SPP v. Egypt*, 3 ICSID Reports 156 (1988) (Decision on Jurisdiction II).

⁹⁶ See Article 34(1) of the Convention.

⁹⁷ See Article 28 of the Convention.

⁹⁸ Between 1982 and 2011 see *the Background Information on the ICSID*, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English> accessed on 11/07/2013.

force and is mostly considered as informal.⁹⁹ The conciliation process will not be discussed further as it lies outside the scope of this research.

3.2.3.2 Arbitration mechanism

Arbitration has been the cornerstone of ICSID system and for the past two decades it has been the most utilised dispute settlement system.¹⁰⁰ Before the institution of arbitration proceedings at ICSID, some BITs required the investor to exhaust the local remedies, which includes submitting a notice of dispute to the sovereign and complying with the applicable waiting period stipulated in the BIT.¹⁰¹ These two processes allow the parties an opportunity to resolve the dispute amicably by way of negotiation.

Where negotiations fail, the investor is at liberty to institute arbitration proceedings with ICSID as articulated in the investment treaty. The procedure for adjudicating the dispute is provided in the Rules of Procedure for Institution of Conciliation and Arbitration Proceedings of the ICSID and the Rules of Procedure for Arbitration Proceedings (hereinafter the Rules).¹⁰² In the

⁹⁹ United Nations Conference on Trade and Development (UNCTAD) *Dispute Settlement - International Centre for Settlement of Investment Disputes: selecting the Appropriate Forum* 2003 UNCTAD/EDM/Misc.232/Add.1 at 13.

¹⁰⁰ In the year 2012 the ICSID registered 40 cases, see the statistics at *the Background Information on the ICSID*, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English> accessed on 11/07/2013.

¹⁰¹ See An Agreement between the Government of UK and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investment of 07/01/1994, (Hereinafter Tanzania – UK BIT) available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_UK.pdf accessed on 13/07/2013.; See also Article 6 of An Agreement between the Kingdom of Netherlands and the Government of the United Republic of Tanzania for Encouragement and Reciprocal Protection of Investments of 31/07/2001 (Hereinafter Tanzania – Netherlands BIT) available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_netherlands.pdf accessed on 14/05/2014; NAFTA provides for a waiting period of 90 days, see Art 1119 and 1121. See also Schreuer C ‘Travelling the BIT route: of waiting periods, umbrella clauses and forks in the road’ (2004) *The Journal of World Investment and Trade* 231 at 232.

¹⁰² ICSID Rules. For a detailed discussion on ICSID arbitration process see Jagusch S & Sullivan J ‘A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern’ in Waibel M et al (eds.) *The Backlash against Investment Arbitration: Perception and Reality* (2010) 79 – 110; see also Sinclair A et al ‘ICSID Arbitration: How Long Does It Take?’ *Global Arbitration Review* available at

following part of this chapter a discussion on the steps involved in dispute adjudication is undertaken.

3.2.3.2.1 Steps involved in dispute settlement

Whenever an investor is aggrieved by the actor omission of the host state and wishes to bring an arbitration claim against such act or omission, Article 36 of the Convention requires the investor to submit a request for arbitration to the Secretary General of the ICSID.¹⁰³ The request must state the issues in dispute, identify the parties and indicate their consent to ICSID arbitration.¹⁰⁴ The Rules requires the request to be drawn up in an official language of the Centre, dated and signed by the party requesting arbitration.¹⁰⁵

Upon receipt of the request, the Secretary General is required to register the request and the proceedings will be considered instituted upon such registration. However, where the Secretary General is of the opinion that the request does not fall within the ICSID jurisdiction, he has the power to reject such request and notify the parties accordingly.¹⁰⁶

The second step is the constitution of the tribunal. Article 37(1) of the Convention, when read together with the Rules, requires the constitution of the tribunal to be done as soon as possible.¹⁰⁷

Rule 2(1) empowers the parties to suggest the number of arbitrators to preside over their dispute.

Where there is no such agreement, the requesting party, within 10 days after registration of the

<http://www.goldreserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf>
accessed on 20/09/2013.

¹⁰³ See Article 36(1) of the ICSID Convention.

¹⁰⁴ See Article 36(2) of the Convention

¹⁰⁵ See the Institution Rules r.1 (1).

¹⁰⁶ See Article 36(3) of the ICSID Convention; see also Rule 6(1) (b) of the Institution Rules.

¹⁰⁷ See Article 37(1) of the Convention and Rule 1(1) of the Arbitration Rules, 2006.

request, will be required to communicate to the other party his proposal on the number of arbitrators and the method to be employed in appointing arbitrators.¹⁰⁸ The other party, after receiving the proposal, will be required to respond to such proposal within 20 days indicating his agreement or making amendment to the proposal.¹⁰⁹ The requesting party is given another 20 days to scrutinise the proposal from the other party and make a decision whether to accept or reject that proposal.¹¹⁰ Upon agreement the parties will be required to notify the Secretary General.

Where the parties fail to agree on the appointment of the arbitrators, either party will be required to notify the Secretary General about the failure, after which the tribunal shall be constituted in accordance with Article 37(2) (b). Article 37(2) (1) (b) covers situations where the parties are unable to agree on the number of arbitrators and the method of their appointment. The provision empowers each party to appoint one arbitrator while the third arbitrator (Chairperson) is to be appointed by the agreement of the parties.¹¹¹ Either party will be required to name two persons: one name proposed for the post of arbitrator and the other name for the post of the President of the Tribunal. The other party shall have to indicate his acceptance to the proposed name for the post of the President of the Tribunal or suggest another name. Upon agreement the parties shall communicate such development to the Secretary General.¹¹²

In situations where the parties fails to agree on the appointment of the President of the Tribunal or any other arbitrators, either party may request the Chairman of the Administrative Council to

¹⁰⁸ See Rule 2(1) (a) of the Arbitration Rules.

¹⁰⁹ See Rule 2(1) (b) of the Arbitration Rules.

¹¹⁰ See Rule 2(1) (c) of the Arbitration Rules.

¹¹¹ See Article 37(2) (b) of the Arbitration Rules.

¹¹² See Rule 3 (1) (a) – (c) of the Arbitration Rules.

appoint the remaining number of arbitrators. This request may be lodged within 90 days after the registration of the dispute.¹¹³ The chairman shall have 30 days to make the appointment.

Upon the arbitrators' acceptance to the appointment, the Secretary General will be required to notify the parties of such development and the tribunal shall be considered constituted.¹¹⁴

Article 39 of the Convention requires the majority of the arbitrators to have nationalities different to those of the parties to a dispute. This provision aims at ensuring that the Tribunal is constituted with neutral arbitrators.¹¹⁵

After the tribunal is duly constituted, the next step is for the tribunal to convene for the purposes of adjudicating the dispute. The Rules requires the tribunal to hold its first session within 60 days of its appointment.¹¹⁶ The meetings of the tribunal are supposed to be held at the seat of the Centre or any other place chosen by the parties to the dispute.¹¹⁷

Once the matter has been determined by the ICSID tribunal and the parties are satisfied with the process, the next step is for the award to be filed in the court of the country where the enforcement is to be sought. The ICSID awards enjoy global recognition and they are enforced as national court judgments save for procedural challenges which may allow annulment.¹¹⁸ This enforceability and finality provision gives the ICSID award the edge that investors lacked in

¹¹³ See Rule 4(1) of the Arbitration Rules.

¹¹⁴ See Rule 6 (1) of the Arbitration Rules.

¹¹⁵ Alvarez GM 'The ICSID Procedure: Mind the Gap' (2011) 10 *e – Mercatoria* 171 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1987236 accessed on 23/06/2013.

¹¹⁶ See Rule 13(1) of the Arbitration Rules.

¹¹⁷ See Rule 13(3) of the Arbitration Rules.

¹¹⁸ See Art 52(1) of the ICSID Convention.

other dispute settlement mechanisms.¹¹⁹ One can say that the ICSID award is universal except that the decree holder cannot enforce it where the host state successfully pleads immunity under any law in force.¹²⁰ The court of the place where enforcement is sought has an obligation to recognise and enforce the award. The court has no mandate to scrutinise the award but must enforce it.¹²¹ Failure by a state party to honour and enforce the award revives diplomatic protection as provided under Article 27(1) of the Convention.¹²²

In cases where either party is not satisfied with the award, there are four remedies available to such a party. The first remedy is to apply for supplementation and rectification.¹²³ This remedy empowers the tribunal to correct minor omissions and technical mistakes only. The second remedy is for a party to seek interpretation of the award if there is any ambiguity regarding its meaning.¹²⁴ The objective of this remedy is to clear up any misunderstanding on the meaning of the award.¹²⁵ The third remedy is to request a revision of the award where there are new decisive facts which were unknown to the tribunal at the time of making its decision.¹²⁶ For this remedy to be granted, the discovered facts must be relevant and capable of changing the decision.

¹¹⁹ Van Harten G & Loughlin M 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) *The European Journal of International Law* 121 – 150 at 135; see also Reinisch A 'The proliferation of international Dispute Settlement Mechanisms: The threat of fragmentation vs. The promise of more effective system? Some reflections from the perspective of investment arbitration' in Buffard E *et al* (eds.) *International Law Between Universalism and Fragmentation* (2008) at 112; see also Jagusch S & Sullivan J 'A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern' in Waibel M *et al* (eds.) *The Backlash against Investment Arbitration: Perception and Reality* (2010) 79 – 110 at 99.

¹²⁰ See Art. 54 of the ICSID Convention

¹²¹ See Article 54 of the Convention; see also Reed L *et al* *Guide to ICSID Arbitration* (2006) at 13.

¹²² Van Harten G & Loughlin M 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) *The European Journal of International Law* 121 – 150 at 125.

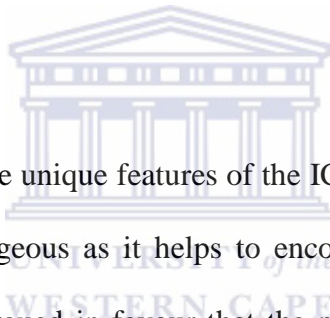
¹²³ See Article 49(2) of the ICSID Convention.

¹²⁴ See Art 50(1) of the ICSID Convention.

¹²⁵ United Nations Conference on Trade and Development (UNCTAD), *Post Award Remedies and Procedures, Course on Dispute Settlement in International Trade, Investment and Intellectual Property*, available on www.unctad.org/en/docs/edmmisc232add7_en.pdf accessed on 23/07/2013.

¹²⁶ See Art 51(1) of the ICSID Convention.

The fourth and major remedy is annulment of the award. This remedy is granted only where the party can prove either of the following: (1) that the tribunal was not properly constituted; or (2) the arbitral tribunal manifestly exceeded its powers; or (3) a tribunal member was corrupt; or (4) there was a serious departure from a fundamental rule of procedure; or (5) the award does not state the reasons upon which it was based.¹²⁷ These are the only grounds upon which an annulment of the award can be sought. The dissatisfied party has 120 days after the award was rendered, to seek an annulment.¹²⁸ The party is required to submit the request to the Secretary General of the Centre. Upon receipt of the request the chairman of the Administrative Council will be required to appoint an ad hoc committee constituting of three members from the panel of arbitrators.¹²⁹



The annulment remedy is one of the unique features of the ICSID arbitration system. Proponents argue that this process is advantageous as it helps to encourage arbitrators to arrive at well-reasoned awards.¹³⁰ It is further argued in favour that the newly constituted ad hoc annulment committee is better placed to reach an error free decision as it consist new members. Furthermore, defenders of this process, argue that the process ensures justice to the parties as the ad hoc committee is bound to follow the pre - set grounds of annulments.¹³¹

The ad hoc committee has the mandate to produce three possible outcomes. It can (1) refuse the annulment application, or (2) annul the outcome partially, or lastly (3) annul the award totally.

¹²⁷ See Art 52(1) of the ICSID Convention.

¹²⁸ See Article 52(2) of the Convention.

¹²⁹ See Article 52(3) of the Convention.

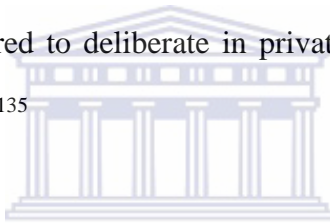
¹³⁰ Caron DD et al 'Birth of an ICSID Case- Act I, Scene I' (2008) 24/1 available at <http://www.kluwerarbitration.com/document.aspx?id=ipn28345> accessed on 7 /07/2013

¹³¹ Caron DD et al 'Birth of an ICSID Case- Act I, Scene I' (2008) 24/1 available at <http://www.kluwerarbitration.com/document.aspx?id=ipn28345> accessed on 7 /07/2013

Where the award is annulled totally, a new tribunal will be constituted to rehear the case afresh.¹³²

3.2.3.2.2 Confidentiality of the proceedings

It is a fact that ICSID arbitration has inherited a lot of principles from private international commercial arbitration. The latter has impacted on the ICSID arbitration process in many ways.¹³³ One such impact is confidentiality of the proceedings.¹³⁴ Article 48(5) of the Convention forbids publication of the award without consent of the parties. With regard to deliberations, the tribunal is required to deliberate in private and the members are required to keep the deliberations confidential.¹³⁵



The restriction applies to the Centre and the arbitrators involved in the proceedings. Furthermore, Rule 6(2) requires arbitrators to sign a confidentiality agreement.¹³⁶ In addition, Rule 22(2) of the Administrative and Financial Regulations restrict the publication of the minutes, award and other records unless both parties agree otherwise.¹³⁷ However, the Centre can publish general information regarding its operation.¹³⁸

¹³² See Article 52(6) of the Convention.

¹³³ See Van Harten G *Investment Treaty Arbitration and Public Law* (2007) at 54; see also Van Harten G & Loughlin M 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) *The European Journal of International Law* 121 – 150 at 125.

¹³⁴ Frank S D 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521 at 1544.

¹³⁵ See Rule 15 of the Arbitration Rules.

¹³⁶ See Rule 6(2) of the Arbitration Rules, 2006.

¹³⁷ See Rule 22(2) of the Administrative and Financial Regulations of the ICSID, 2006.

¹³⁸ See Rule 22(1) of the Administrative and Financial Regulations of the ICSID, 2006.

The Rules, as amended in 2006, also allow the publication of excerpts of the legal reasoning of the tribunal.¹³⁹ The amendment also allows submissions from non – disputing parties.¹⁴⁰ The Rule, however, still maintain confidentiality of the hearing. The non – disputing party and any other third party cannot attend the hearing where either party objects.¹⁴¹

3.2.3.2.3 The applicable law

The ICSID Convention only provides for the procedural framework for the settlement of investment disputes involving the host state and nationals of other contracting state.¹⁴² As a result, there is no single provision in the Convention which provides for the substantive rules to be applied in an investment dispute. Article 42(1) of the Convention, however, provides for the guidance to be employed by the tribunal in ascertaining the applicable substantive law. The Article refers the tribunal to the parties' agreement. Where there is no such agreement the tribunal is required to apply the law of the contracting state and the rules of international law. The Article was designed to give the parties to the dispute autonomy over their dispute.¹⁴³ It is open to the parties to agree on the substantive law to be applied in settling their dispute. The parties' autonomy is limited to the choice of substantive law as the procedural law is already

¹³⁹ See Rule 48(4) of the Arbitration Rules and Article 48(5) of the Convention.

¹⁴⁰ See Rule 37(2) of the Arbitration Rules.

¹⁴¹ See Rule 37(2) of the Rules; see also Jagusch S & Sullivan J 'A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern' in Waibel M et al (eds.) *The Backlash against Investment Arbitration: Perception and Reality* (2010) 79 – 110 at 94.

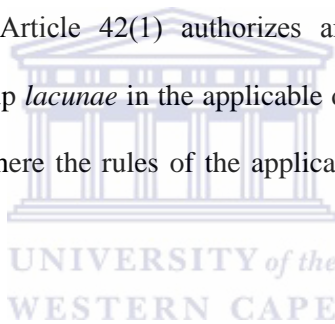
¹⁴² Schreuer C 'International and Domestic Law in Investment Disputes: The Case of ICSID' (1996) *Austrian Review of International & European Law* 89.

¹⁴³ Shihata I & Para A 'Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention' (1994) 9 *ICSID Rev- Foreign Investment Law Journal* at 188; see also Gaillard E & Bonifatemi Y 'The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) *ICSID Review Foreign Investment Law Journal* 375 at 375; see also Schreuer C 'International and Domestic Law in Investment Disputes: The Case of ICSID' (1996) *Austrian Review of International & European Law* 89 at 90; see also Leeks A 'The Relationship between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach' (2007) *University of Toronto Faculty of Law Review* 1 at 10.

provided for in the ICSID Convention and the Arbitration Rules. In the absence of parties' choice, the tribunal will be required to ascertain the applicable law at its first meeting.¹⁴⁴

Despite the clarity of Article 42 of the ICSID Convention, tribunals have produced different interpretations regarding the applicability of host state law and international law. Some tribunals have concluded that international law principles supplement the host state law and are only meant to apply when there is a gap in the host state law or where there is inconsistency between international law and the host state law.¹⁴⁵ In *Amco v Indonesia*,¹⁴⁶ the Tribunal ruled that:

‘...the second sentence of Article 42(1) authorizes an ICSID tribunal to apply rules of international law only to fill up *lacunae* in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms.’¹⁴⁷



However, in newer cases, tribunals have rejected the notion that international law is supplemental to the host state law. The Tribunal in *Siemens AG v. Argentine Republic* held that:

¹⁴⁴ Schreuer C 'International and Domestic Law in Investment Disputes: The Case of ICSID' (1996) *Austrian Review of International & European Law* 89 at 90.

¹⁴⁵ *Amco Asia Corp. v. Republic of Indonesia*, ad hoc committee decision of May 16, 1986, 1 ICSID Rep. 509 at 515 (1993); see also *Kloeckner Industrie-Anlagen GmbH v. United Republic of Cameroon*, ad hoc committee decision of May 3, 1985, 2 ICSID Rep. 95 at 122 (1994) see also *Amco Asia Corp. v. Republic of Indonesia*, award of May 31, 1990, 1 ICSID Rep. 569, 580 (1993) and *Liberian Eastern Timber Corp. v. Republic of Liberia*, award of Mar. 31, 1986, 2 ICSID Rep. 343 at 358-59 (1994).

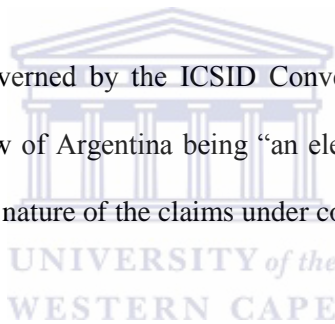
¹⁴⁶ Award 20 November 1986, 1 ICSID Reports 452.

¹⁴⁷ See *Amco Asia Corp. v. Republic of Indonesia*, ad hoc committee decision of May 16, 1986, 1 ICSID Rep. 509 at 515

‘the Tribunal’s inquiry is governed by the [ICSID] Convention, by the [BIT] and by applicable international law. Argentina’s domestic law constitutes evidence of the measures taken by Argentina and of Argentina’s conduct in relation to its commitments under the [BIT].’¹⁴⁸

Similarly, other tribunals have taken a more extreme stance against the host state law by declaring that a dispute under a BIT has to be decided in accordance with international law principles without any regard to the host state law. The *MTD Equity Sdn Bhd v. Republic of Chile*¹⁴⁹ and *Azurix Corp. v. Argentine Republic*¹⁵⁰ Tribunals are some of them. The *Azurix Corp. v. Argentine Republic* Tribunal held that:

‘the Tribunal’s inquiry is governed by the ICSID Convention, by the BIT and by applicable international law, with the law of Argentina being “an element of the inquiry,” though no more than that because of the treaty nature of the claims under consideration.’¹⁵¹



However, other tribunals have maintained the relevancy of both host state law and international law. In *AIG Capital Partners Inc. v. Republic of Kazakhstan*,¹⁵² the Tribunal insisted on the relevancy of both sets of laws. It maintained that the host state law was the applicable one but needed to be read with and controlled by the provisions of the relevant BIT.¹⁵³ A clearer position on the relationship between domestic law and international law was pronounced in *CMS Gas*

¹⁴⁸ *Siemens AG v Argentine Republic*, award of Feb. 6, 2007 para 78, available at www.investmentclaims.com/oal.htm/ accessed on 27/07/2013.

¹⁴⁹ *MTD Equity Sdn Bhd v Republic of Chile*, award of May 25, 2004 12 ICSID Rep. 6 (2007).

¹⁵⁰ *Azurix Corp. v Argentine Republic*, award of July 14, 2006, www.worldbank.org/icsid/cases/awards.htm accessed on 23/07/2013.

¹⁵¹ See *Azurix Corp. v Argentine Republic*, para 67.

¹⁵² *AIG Capital Partners Inc. v Republic of Kazakhstan*, award of Oct. 7, 2003 11 ICSID Rep. 7 (2007).

¹⁵³ See *AIG Capital Partners Inc. v Republic of Kazakhstan* at para 10.1.4.

*Transmission Co. v. Argentine Republic*¹⁵⁴ where the Tribunal stated that both laws are equally applicable.¹⁵⁵ The Tribunal stated further that the BIT, the customary international law and the host state law are all to be applied, each to its justifiable extent.¹⁵⁶

Conclusively it can be said that there are conflicting positions regarding the applicable law in investor – state disputes, especially when the parties have not indicated their preference. As discussed above, in some instances the tribunals apply both host state law and international law while in others tribunals rejected the application of host state law. It is as yet unclear whether international law is meant to fill the lacunae in the host state law or has to be applied in replacement of host state law as some tribunals have suggested. It seems that these conflicting positions are to remain as there is no higher court in a hierarchy to resolve the issue. It is submitted here that where the dispute emanates from a contractual arrangement the host state law should be applied as the main law to the dispute. However, where the dispute emanates from a BIT, international law principles should override the host state law.

3.2.3.3 Advantages of the International Centre for Settlement of Investment Disputes arbitration system

One of the major advantages of the ICSID arbitration system is that it provides a self - contained neutral forum for settling investment disputes. The parties are not subjected to a host state's

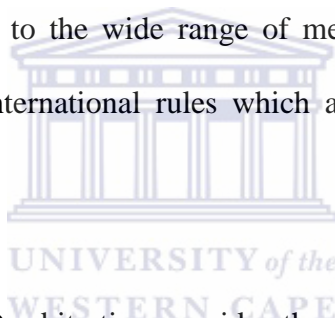
¹⁵⁴ *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8 of 20th April 2005 final award available at <http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf> accessed on 23/07/2013.

¹⁵⁵ *CMS Gas Transmission Company v The Argentine Republic*, para 116.

¹⁵⁶ *CMS Gas Transmission Company v The Argentine Republic*, para 117.

adjudication machinery and bureaucracy.¹⁵⁷ The ICSID arbitration relieves the foreign investor from using the cumbersome route of asking the home state to espouse a claim on his behalf.¹⁵⁸ On the host state side, the ICSID system guarantees more foreign investment because the system itself is considered to be ‘an improved investment climate’.¹⁵⁹ In addition, the host state by ratifying the Convention shields itself from diplomatic protection by the home state of the foreign investor.¹⁶⁰

The second advantage of ICSID arbitration is that it is international in character and enjoys worldwide recognition with over 150 member states all over the world and nearly 56 new cases registered annually.¹⁶¹ In addition to the wide range of member states, the ICSID arbitration takes place in accordance with international rules which are independent of the control and bureaucracy of the host state.¹⁶²



The third advantage is that ICSID arbitration provides the necessary facilities required for the arbitration process. The venue and other necessary tools are arranged by the Centre and paid for by the Centre. Article 63 and Rule 13(3) of the Arbitration rules provides that the tribunal shall meet at the seat of the Centre or any other place chosen by the parties.

¹⁵⁷ See Article 54 of the ICSID Convention.

¹⁵⁸ Myjer EPJ ‘ICSID and the Settlement of Investment Disputes in Poland’ (1989) 18 *Polish Year Book of International Law* 143 at 150.

¹⁵⁹ United Nations Conference on Trade and Development (UNCTAD) *Dispute Settlement - International Centre for Settlement of Investment Disputes: Overview - Module 2.1*, 2003 UNCTAD/EDM/Misc.232 at 12.

¹⁶⁰ See Article 27 of the Convention.

¹⁶¹ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report*, 2012 ‘Towards a New Generation of International Investment Policies: UNCTAD’s Fresh Approach to Multilateral Investment Policy-Making’ available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d6_en.pdf accessed on 27/05/2014.

¹⁶² Myjer EPJ ‘ICSID and the Settlement of Investment Disputes in Poland’ (1989) 18 *Polish Year Book of International Law* 143 at 148.

Another advantage is that the ICSID procedural framework which has already been tested in a number of cases makes the administration of the dispute easier and keeps it within the agreed timeframe. The President of the tribunal is empowered by Rule 26 to set a timeframe within which the dispute can be resolved. In addition, the Centre keeps a list of potential arbitrators. The parties, therefore, are in a good position to choose from the available list or suggest other names to adjudicate on their dispute.¹⁶³ This means that a dispute at the Centre cannot be stalled on the ground of lack of potential suitable arbitrators. Where the parties are unable to agree on the appointment of arbitrators, the chairman of the ICSID Council is empowered to appoint the remaining number of arbitrators on behalf of the parties.¹⁶⁴ This is important as investment disputes need to be sorted timeously as they involve huge economic interests.

The last advantage relate to the recognition and enforcement of the award. The Convention requires the state parties to recognise ICSID awards and enforce them as if they were final judgements of their own court. This gives the ICSID award an edge over those of other dispute settlement systems.¹⁶⁵ In other systems, the awards are subjected to the New York Convention it terms of which the dissatisfied party can invoke Article V (2) that empowers the state to deny recognition to the award if the recognition would be contrary to public policy of the state in question.¹⁶⁶ This cannot happen with ICSID awards as the Convention states clearly that the place of arbitration shall not have any impact on the award or the proceedings. The only possible remedies are the internal ones stipulated under Articles 49 – 52 of the Convention.¹⁶⁷

¹⁶³ See Article 40 of the Convention.

¹⁶⁴ See Article 38 of the Convention.

¹⁶⁵ See Van Harten G & Loughlin M 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) *European Journal of International Law* 121 at 134.

¹⁶⁶ The New York Convention on Recognition and Enforcement of Foreign Arbitral Award available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf accessed on 02/06/2014.

¹⁶⁷ See subheading 3.2.3.2.6 above for the avenues available against the rendered award.

3.2.3.4 Disadvantages of the International Centre for Settlement of Investment Disputes arbitration system.

One of the main critiques of the ICSID arbitration is that the proceedings take a long time before being put to rest.¹⁶⁸ The process is referred as ‘an indisputably slow process, with many arbitrations taking 4-5 years or longer before a decision is delivered’.¹⁶⁹ A lot of stakeholders have written on the length of the ICSID dispute settlement process.¹⁷⁰ A recent study indicates that a dispute at the ICSID takes an average of 4-5 years.¹⁷¹ The table below shows a sample of ICSID cases resolved in 2012 and the time taken to resolve them.

Case	Date Commenced	Date of Award	Duration
<i>Alapli Elektrik B.V. v. Turkey</i> ¹⁷²	27/08/ 2008	16/07/ 2012	47 Months
<i>Bosh International, Inc. v. Ukraine</i> ¹⁷³	3/12/ 2007	25/10/ 2012	58 Months
<i>Daimler Financial Services AG v. Argentina</i> ¹⁷⁴	2/08/ 2004	22/08/ 2012	97 Months
<i>EDF International S.A. v.</i>	16/06/ 2003	11/06/2012	108 Months

¹⁶⁸ Raviv A ‘Achieving a Faster ICSID’ (2014) 11 *Transnational Dispute Management* available at <http://www.transnational-dispute-management.com/article.asp?key=2066> accessed on 26/03/2014.

¹⁶⁹ Raviv A ‘Achieving a Faster ICSID’ (2014) 11 *Transnational Dispute Management* at 1.

¹⁷⁰ See Parra AR *The History of ICSID* (2012) at 187; see also Kapoor VJ ‘Wearing Hats and Walking the Line: How Arbitrators Reconcile Outside Activities and Judicial Duties’ (2011)24 *Georgia Journal of Legal Ethics* 625 at 626; see also Sinclair A et al ‘*ICSID Arbitration: How Long Does It Take?*’ (2009) *Global Arbitration Review* at 5.

¹⁷¹ Raviv A ‘Achieving a Faster ICSID’ (2014) 11 *Transnational Dispute Management* at 4 available at <http://www.transnational-dispute-management.com/article.asp?key=2066> accessed on 26/03/2014.

¹⁷² ICSID Case No ARB/08/13.

¹⁷³ ICSID Case No ARB/08/11

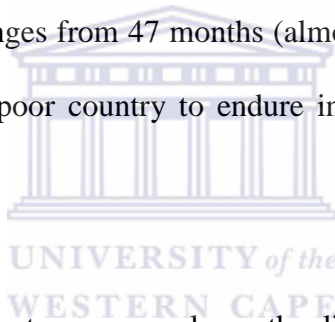
¹⁷⁴ ICSID Case No ARB/05/1.

<i>Argentina</i> ¹⁷⁵			
<i>Antoine Goetz v. Burundi</i> ¹⁷⁶	5/12/ 2000	21/06/ 2012	138 months
<i>Occidental Petroleum Corp. v. Ecuador</i> ¹⁷⁷	17/05/ 2006	5/10/ 2012	77 Months

SOURCE: ICSID: *List of ICSID Cases 2013*, available at

https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=-Cases_Home .

It can be learnt from this graph that the ICSID system lacks a timeframe within which a dispute has to be disposed of. The time ranges from 47 months (almost 4 years) to 138 months (over 11 years). This is a long time for a poor country to endure in as far as costs and time spent in litigation are concerned.



Another critique is that the annulment process prolongs the dispute; hence defeating the very aim of arbitration, viz finality of a dispute.¹⁷⁸ The annulment process takes up to six years before it is put to rest.¹⁷⁹ Even worse, the parties are not limited to one annulment application; some cases

¹⁷⁵ ICSID Case No ARB/03/23.

¹⁷⁶ ICSID Case No ARB/01/2.

¹⁷⁷ ICSID Case No. ARB/06/11).

¹⁷⁸ See Kalb J ‘Creating an ICSID Appellate Body’(2005) *UCLA Journal International Law & Foreign Affairs* 179 at 192; see also Garcia C ‘All the other dirty little secrets: Investment Treaties, Latin America and the necessary evil of investor state arbitration’(2004) 16 *Florida Journal of International Law* 301; see also Jagusch S & Sullivan J ‘A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern’ in Waibel M et al (eds.) *The Backlash against Investment Arbitration: Perception and Reality* (2010) 79 – 110; see also Sinclair A et al ‘ICSID Arbitration: How Long Does It Take?’ *Global Arbitration Review* available at <http://www.goldreserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf> accessed on 18/07/2013.

¹⁷⁹ See for example *Amco Asia Corp. v. Republic of Indonesia* Case No. ARB/81/I award rendered on 1984 and the final Annulment order was issued 1992; *KlocknerIndustrie-Anlagen GmbH v. United Republic of Cameroon* Case

have gone through several annulment processes.¹⁸⁰ The annulment process is prone to be used by an unscrupulous judgement debtor as a technique to lengthen the duration of the dispute settlement process.

Another disadvantage is that the Convention and the Rules place a higher burden of proof on a party challenging the impartiality of the arbitrator when compared to other arbitration institutional rules. It is almost impossible for the challenging party to succeed in their application. Article 57 empowers either party to challenge the appointment of an arbitrator. A party can challenge the appointed arbitrator on the basis of any fact indicating a manifest lack of the qualities stipulated under Article 14(1).¹⁸¹ The demand for ‘manifest lack of quality’ puts the challenging party in a very difficult position as he needs to prove or provide a clear doubt about the appearance of impartiality against the respective arbitrator.¹⁸² Other institutional rules just require such a challenging party to raise justifiable doubts.¹⁸³ The threshold is considered too high, to the extent that many challenges fail because the challenging party is normally unable to

No. ARB/81/2 award rendered in 1983 and the last decision on Annulment was issued in 1990; *Wena Hotels Ltd. v. Arab Republic of Egypt* Case No. ARB/98/4 award rendered in 2000 and the final annulment order issued in 2005

¹⁸⁰ *Amco v Indonesia* and *Klockner v Cameroon* both underwent two annulment processes.

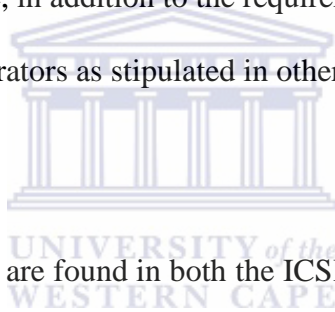
¹⁸¹ See Article 57 of the Convention.

¹⁸² See *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A* (ICSID Case No. ARB/03/17) (2008) para. 29; see also *Compana de Aguas del Aconquija & Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3) (2001) para. 25; also see Sheppard A ‘Arbitrator Independence in ICSID Arbitration’ in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christopher Schreuer* (2009) 132 at 133 – 134; see also Bernasconi – Osterwalder N et al ‘Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel’ (2010) *International Institute for Sustainable Development* (IISD) at 12.

¹⁸³ See Article 11 and 12 of the UNCITRAL Arbitration Rules 2010; see also Article 15 of the Stockholm Chamber of Commerce Arbitration Rules, 2010 available at http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf accessed on 12/08/2013; see also General Standard 2(a)& (c) of the International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#conflictsofinterest accessed on 12/08/2013.

provide facts which can meet the manifest lack of qualities requirement.¹⁸⁴ It has been held that ‘manifest lack of qualities’ requires more than mere speculation or inference of partiality and the relationship challenged must be more than trivial or de minimis.¹⁸⁵

With regards to impartiality of arbitrators there is no provision which imposes an obligation on the arbitrator to be impartial. Impartiality is one of the cornerstones of a just and fair adjudication process.¹⁸⁶ It is argued here that the omission is fatal as a person who is capable of exercising independent judgement may not necessarily be impartial to a dispute in which he has an interest. Therefore there is a need to include, in addition to the requirement of independent judgement; the requirement of impartiality of arbitrators as stipulated in other arbitration rules.¹⁸⁷



Other general disadvantages which are found in both the ICSID and the UNCITRAL systems are discussed later under the subheading ‘General Weaknesses of the Current Investor – State

¹⁸⁴ For more insightful argument on this see also Sheppard A ‘ Arbitrator Independence in ICSID Arbitration’ in Binder C et al eds. *International Investment Law for the 21st Century: Essays in Honour of Christopher Schreuer* (2009) 132 at 133 – 134; see also Schreuer *The ICSID Convention: A commentary (2001)* 1200 para 16; See also Bernasconi – Osterwalder N et al ‘ Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel (2010) ’ *International Institute for Sustainable Development (IISD)* at 11.

¹⁸⁵ See *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* ICSID Case No. ARB/03/23 (2003) paras 132 – 133.

¹⁸⁶ For a thorough discussion on this principle see Herling D & Lyon A *The Briefcase on Constitutional and Administrative Law* 4ed. (2004) at 149; see also Stott D & Felix A *Principles of Administrative Law* (1997) at 142; see also Barnett H *Constitutional and Administrative Law* 4ed. (2002) at 898; also see Alder J *General Principles of Constitutional and Administrative Law* 4ed.(2002) at 393; see also Hawke N & Parpworth N *Introduction to Administrative Law* (1998) at 165.

¹⁸⁷ See Article 11 & 12 of the UNCITRAL Rules, 2010; see also Article 14(1) of the Stockholm Chamber of Commerce Arbitration Rules; see also General Standard 1 of the International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration. For more discussion see also Sheppard A ‘ Arbitrator Independence in ICSID Arbitration’ in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christopher Schreuer* (2009) 132 at 135 – 136.

Arbitration System'.¹⁸⁸ In the following section the Additional Facility dispute settlement process is discussed.

3.3 The Additional Facility arbitration system

The Additional Facility Rules were approved on 27 September 1978 at the 12th meeting of the Administrative Council of ICSID.¹⁸⁹ The Rules were created to address the request repeatedly submitted to the Centre by capital exporting states and foreign investors who were unable to use the service of the Centre for lack of jurisdictional requirements stipulated under Article 25 of ICSID.¹⁹⁰ In particular, the ICSID Convention does not apply where one of the parties to the dispute is not a national of a member state of the ICSID Convention. It is in such situations that the Additional Facility Rules could be used.¹⁹¹

Many BITs and Free Trade Agreements have included the use of the Additional Facility Rules in disputes which may arise with foreign investors. South Africa, for example, is not a member of the ICSID Convention hence its BITs provide for this option in case of an international arbitration between South Africa and nationals of other states. Article 9 (2) (a) of the South Africa and the Kingdom of Netherlands BIT and Article XIII (4) (b) of Canada – South Africa

¹⁸⁸ See sub heading 3.6 below.

¹⁸⁹ Toriello P 'The Additional Facility of the ICSID' (1978) 4 *Italian Yearbook of International Law* 59 at 61.

¹⁹⁰ Toriello P 'The Additional Facility of the ICSID' (1978) 4 *Italian Yearbook of International Law* 59 at 61; see also Schreuer C et al *The ICSID Convention: A Commentary* 2 nd.ed (2009) at 141 para 202 - 205.

¹⁹¹ The Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes ICSID/11April 2006available at http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf (hereinafter ICSID Additional Facility Rules) (accessed on 21/06/2013).

BIT, respectively, provides for Additional Facility arbitration as an option available to the parties.¹⁹²

The Additional Facility cases constitute almost 8% of all cases filed at the ICSID Centre. Out of 514 cases filed at the Centre by the end of 2013, 41 cases were filed under the Additional Facility Rules.¹⁹³ In the year 2012, Additional Facility cases constituted 12% of all investor – state disputes, which in turn constituted 18% of all cases filed at the ICSID Centre.¹⁹⁴

The Rules are often used by foreign investors and State parties to the North American Free Trade Agreement (NAFTA).¹⁹⁵ The NAFTA consists of the US, Canada and Mexico. Among the three member states, it is only the US which has ratified the ICSID Convention.¹⁹⁶ Therefore, whenever there is a dispute between either of them, the ICSID Convention cannot apply as it requires membership of both parties involved in a dispute. Due to that limitation, disputes involving the US or a US investor and Canada or Mexico can only be settled through the

¹⁹² South Africa – Netherland BIT the Agreement on encouragement and reciprocal protection of investments between the Republic of South Africa and the Kingdom of the Netherlands of 09/05/1995 available at http://unctad.org/sections/dite/ia/docs/bits/southafrica_netherlands.pdf (hereinafter South Africa – Netherland BIT); see also the BIT between South Africa and Canada available at http://unctad.org/sections/dite/ia/docs/bits/canada_south_africa.pdf accessed on 16/08/2013.

¹⁹³ See Background Information on ICSID – Number of Cases Registered under the ICSID Convention and Additional Facility Rules by Calendar Year 1972 – 31st December 2012, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English> accessed on 11/07/2013.

¹⁹⁴ See United Nations Conference on Trade and Development (UNCTAD) *Latest Developments in Investor-State Dispute Settlement*, [2013] IIA Monitor, No. 1, at 1–2, U.N.Doc. UNCTAD/WEB/ITE/IIA/2013/3 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf accessed on 23/07/2013.

¹⁹⁵ The NAFTA (1993) 32 ILM 289, full text available at <http://www.worldtradelaw.net/fta/agreements/nafta.pdf> accessed on 12/06/2013.

¹⁹⁶ Canada signed the Convention on 15th December 2006 but it has not ratified it.

Additional Facility Rules or UNCITRAL Rules.¹⁹⁷ Article 1120 of the NAFTA provides for Additional Facility as one of the options available to the parties.¹⁹⁸

By December 2012, NAFTA provided 4% of all disputes registered at the ICSID Centre.¹⁹⁹ This indicates that the three member states have been effectively utilising the Additional Facility Rules.

Apart from NAFTA, the Energy Charter Treaty between the European Community and other European countries provides for an option of resolving disputes through the Additional Facility avenue.²⁰⁰ Article 26 provides for ICSID arbitration and Additional Facility arbitration as options available to the parties to the Charter as long as the dispute meets the minimum requirement set by the respective rules.²⁰¹ In terms of percentage, the Energy Charter, just like NAFTA, provided 4% of all disputes filed at ICSID by the end of 2012.²⁰² In the following section, the Additional Facility dispute settlement system is discussed.

¹⁹⁷ See *Metalclad Corp. v. United Mexican States*, ICSID (W. Bank), Case No. ARB (AF)/97/1, 40 I.L.M. 36 (2000); see also *Azinian v. United Mexican States*, ICSID (W. Bank), Case No. ARB (AF) /97/2, 39 I.L.M. 537 (1999).

¹⁹⁸ The Article provides that the rules shall apply where either the investor's home state is a party to the ICSID Convention or the Respondent state.

¹⁹⁹ See Background Information on ICSID – Basis of Consent Invoked to Establish ICSID Jurisdiction as of 31st December 2012, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English> accessed on 11/07/2013.

²⁰⁰ The European Energy Charter available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf accessed on 15/07/2013.

²⁰¹ See the European Energy Charter Article 26(4)(a).

²⁰² See Background Information on ICSID – Basis of Consent Invoked to Establish ICSID Jurisdiction as of 31st December 2012, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English> accessed on 11/07/2013.

3.3.1 The jurisdictional requirement under the Additional Facility Rules

As pointed out earlier,²⁰³ the Additional Facility Rules were formulated as a potential fall back where the ICSID Convention could not apply.²⁰⁴ The Additional Facility proceedings are administered by the ICSID Centre by virtue of Article 2 of the Additional Facility Rules which authorises the secretariat of the Centre to administer the Additional Facility disputes. The categories of dispute which can be settled at the Centre under the Rules include investment disputes to which the Convention does not apply and fact finding proceedings.²⁰⁵

It follows therefore that, apart from the investment dispute to which one party is not a member state of the ICSID Convention, the Additional Facility Rules can be used to resolve investment disputes which have not arisen directly out of investment.²⁰⁶ Article 4(3) requires the Secretary General, before registering the dispute, to be satisfied that the dispute is distinct from a normal commercial transaction.²⁰⁷ The Administrative Council has described transactions that are distinct from ordinary commercial transactions as:

‘Economic transactions which (a) may or may not, depending on their terms, be regarded by the parties as investment for the purposes of the Convention, which (b) involve a long – term relationship or the commitment of substantial resources on the part of either party, and which (c)

²⁰³ See subheading 3.3 above

²⁰⁴ Gantz DA ‘Investor-State Arbitration Under ICSID, the ICSID Additional Facility and the UNCITRAL Arbitral Rules’ *US – Vietnam Trade Council Education Forum*, available at http://www.usvfc.org/trade/other/Gantz/Gantz_ICSID.pdf accessed on 15/07/2012.

²⁰⁵ See Article 2(a) – (c) of the Additional Facility Rules.

²⁰⁶ Schreuer C et al *The ICSID Convention: A Commentary* 2 nd.ed (2009) at 141 para 202 - 205.

²⁰⁷ Schreuer C et al *The ICSID Convention: A Commentary* 2 nd.ed (2009) at 141 para 202 - 205.

are of special importance to the economy of the state party. Examples of such transactions may be found in various forms of industrial cooperation agreements and major civil works contracts.²⁰⁸

On the basis of the above paragraph it can be said that, for a tribunal to exercise jurisdiction, in a situation where it is not clear that there is an investment dispute, the parties' economic relationship must be a long – term one and the transaction must have special importance for the state party to the dispute. Therefore the paragraph provides for the features which an ordinary commercial transaction will not bear. In other words, the Secretary General will be guided by these features to decide whether the transaction qualifies for Additional Facility arbitration or not.



3.3.2 Conduct of the arbitration proceedings

Article 19 of the Arbitration (Additional Facility) Rules,²⁰⁹ requires arbitral proceedings to be held in States that are parties to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),²¹⁰ so as to secure the effectiveness of such awards.

²⁰⁸See the Administrative Council Report on Article 4 of Additional Facility Rules, ICSID Report at 220; see also Schreuer C et al The ICSID Convention: A Commentary 2nd ed. (2009) at 142 para 203.

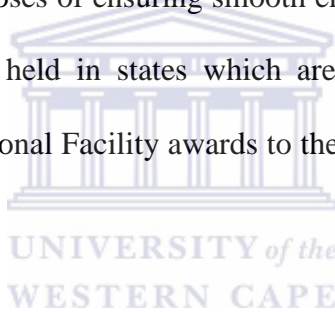
²⁰⁹ See Schedule C to the Additional Facility Rules, 2006.

²¹⁰ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), June 10, 1958 Art. III 21 UST 2517, 330 UNTS 3 available at <http://www.newyorkconvention.org/> accessed on 02/06/2013.

The procedure and steps to be taken regarding a request for arbitration, registration, constitution of the tribunal and working of the tribunal are more or less similar to the ICSID arbitration procedure above.²¹¹ Therefore this research will not go into details discussing them here again.

The award rendered under the Rules is final and binding on the parties.²¹² The award is not subject to any internal review procedure comparable to annulment found under ICSID system.²¹³

The rule on confidentiality applies to the award unless the parties agree otherwise.²¹⁴ The Secretary General is, however, authorised by Article 53(3) to publish excerpts of the legal reasoning of the tribunal. For purposes of ensuring smooth enforcement of the awards, the Rules require that the hearing must be held in states which are member states of the New York Convention, and subject the Additional Facility awards to the review mechanism available under the New York Convention.²¹⁵



²¹¹ See Article 1, 6, 13 to 18 of the Rules of Procedure for Arbitration Proceedings (Arbitration Rules) of the ICSID Convention, available at <http://www.worldbank.org/icsid.htm> and Article 2, 13, 21 to 26 of the Arbitration (Additional Facility) Rules (Schedule C) of the Additional Facility Rules available at http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf accessed on 02/06/2014

²¹² See Article 52(4) of the Additional Facility Rules, available at http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf.

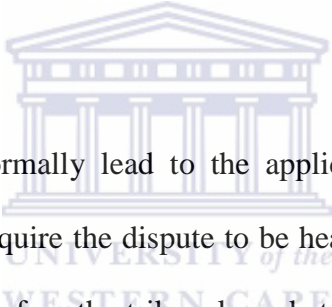
²¹³ Frank S D 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521; see also Tams C 'An Appealing Option? The Debate about an ICSID Appellate Structure' in C Tams et al (eds.) *Essays on Transnational Economic Law* 1 (2006) at 10.

²¹⁴ See Article 53(3) of the Additional Facility Rules.

²¹⁵ See Article 19 of the Additional Facility Rules.

3.3.3 The applicable law

Article 3 of the Additional Facility Rules clearly provides that the ICSID Convention is not applicable to Additional Facility disputes. It follows therefore, that the rules on applicable law stipulated by Article 42 of the Convention are of no use to the tribunal presiding over Additional Facility disputes. Instead, Article 54(1) of the Additional Facility Arbitration Rules is the guiding Article. The rule requires the tribunal to apply the rules of law designated by the parties. Where the parties made no choice, the tribunal is supposed to apply the conflict of laws rules to determine the applicable law.



The conflict of law rules will normally lead to the application of the law of the place of arbitration. The Rules, however, require the dispute to be heard only in States which are parties to the New York Convention. Therefore the tribunal needs to take into account the requirement of Article 20 before choosing a place of arbitration. Article 20 further dictates that the award shall be made at the place of arbitration.²¹⁶ It follows therefore that, in the absence of parties' choice, the applicable law in Additional Facility dispute is the law of the place of arbitration and the rules of international law the tribunal will consider relevant.²¹⁷

²¹⁶ See Article 20(3) of the Additional Facility Rules.

²¹⁷ See Article 54(1) of the Additional Facility Rules.

3.3.4 Recognition and enforcement of Additional Facility award

The award rendered under the Additional Facility Rules can be challenged in the courts of the place of arbitration or where the enforcement is sought.²¹⁸ The challenge, however, is limited to procedural grounds and not an erroneous interpretation of the law.²¹⁹ Therefore, generally the award is final and binding upon the parties. In accordance with the New York Convention,²²⁰ the respondent can ask national courts to refuse recognition under the conditions set out in Article V.²²¹ There are seven grounds on which the enforcement of a foreign award can be denied. The grounds are: (1) the agreement to arbitrate was not valid; (2) the losing party was not given an opportunity to defend his case; (3) the award has addressed issues which are beyond its mandate; (4) the procedure employed did not comply with the parties' agreement; (5) the award has been set aside and is no longer binding; (6) the matter subject of the arbitration is not subject to arbitration according to the laws of the place of enforcement; and lastly (7) enforcement will be contrary to public policy.²²² The last two grounds allow the national court to challenge the substance of the award.²²³ This means that the award rendered under the Rules can be challenged for failure to meet the requirements of the law of the place of arbitration and the place where the

²¹⁸ See Article 1 of the Arbitration (Additional Facility) Rules; see also Myjer EPJ 'ICSID and the Settlement of Investment Disputes in Poland' (1989) 18 Polish Y B Int'l L 143 at 150; Tams C 'An Appealing Option? The Debate about an ICSID Appellate Structure' (2006) *Essays on Transnational Economic Law* 1 at 11; see also Frank S D 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521.

²¹⁹ See for example section 33 of South Africa Arbitration Act, 1965 which allow the court to review the award on procedural grounds only.

²²⁰ The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, available at <http://www.newyorkconvention.org/> accessed on 02/06/2014.

²²¹ Tams C 'An Appealing Option? The Debate about an ICSID Appellate Structure' in C Tams et al (eds.) *Essays on Transnational Economic Law* (2006) at 11.

²²² See Article V of the New York Convention, 1958.

²²³ See Article V (2) (b) of the New York Convention, 1958.

enforcement is sought.²²⁴ Therefore the New York Convention sets the limits within which an arbitral award can be challenged. The court at the place of enforcement cannot go beyond the stipulated limits. While the national court has a wider role in relation to the Additional Facility awards when compared to ICSID awards, the involvement is of insignificant effect as the court is not allowed to challenge the award on merit whenever it find fit, but has to act within the limitation set out by the New York Convention.

3.3.5 Advantages of Additional Facility arbitration

One of the advantages of AF is that it widens the room for foreign investors to sue the host state even where one of the states is not a party to the ICSID Convention. This means that in a world of 192 countries, of which 150 are member states of the ICSID Convention, the Additional Facility Rules is an important fall back for foreign investors to always find an avenue for suing host states which are not ICSID members.²²⁵

Another advantage is that AF arbitrations are conducted and supervised by the Secretary General of the ICSID; hence parties benefits from the experience and institutional framework of the ICSID system.²²⁶

²²⁴ Tams C 'An Appealing Option? The Debate about an ICSID Appellate Structure' (2006) *Essays on Transnational Economic Law* 1 at 11.

²²⁵ ICSID Member states List available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home accessed on 02/06/2014.

²²⁶ See Article 9 of the Additional Facility Rules; also see Gantz DA 'Investor-State Arbitration Under ICSID, the ICSID Additional Facility and the UNCITRAL Arbitral Rules.' Available at http://www.usvtc.org/trade/other/Gantz/Gantz_ICSID.pdf accessed on 02/06/2014.

3.3.6 Disadvantages of Additional Facility arbitration

One major disadvantage of Additional Facility arbitration is that it is marred by confidentiality of the proceedings and award. All proceedings are to be conducted in camera unless the parties agree otherwise.²²⁷ Just like ICSID awards, the Secretary General is authorised by Article 53(3) to publish only excerpts from the legal reasoning of the tribunal.

Another disadvantage is that there is no room for appeal on the merits of the award. The award rendered under the Rules is final and binding on the parties.²²⁸ The award can only be challenged on procedural grounds²²⁹ in the courts of the place of arbitration or where its enforcement is sought.²³⁰



²²⁷ See Article 53(3) of the Additional Facility Rules.

²²⁸ See Article 52(4) of the Additional Facility Rules.

²²⁹ See section 33 of South Africa Arbitration Act, 1965 which allow the court to review the award on procedural grounds only.

²³⁰ See Article 1 of the Arbitration (Additional Facility) Rules; see also Myjer EPJ 'ICSID and the Settlement of Investment Disputes in Poland' (1989) 18 Polish Y B Int'l L 143 at 150; Tams C 'An Appealing Option? The Debate about an ICSID Appellate Structure' (2006) *Essays on Transnational Economic Law* 1 at 11; see also Frank S D 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521.

3.4 Ad hoc arbitration system under the United Nations Commission on International

Trade Law Arbitration Rules

3.4.1 Introduction

The second most popular investor – state arbitration, after the ICSID Centre, is the ad hoc arbitration conducted under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, 2010.²³¹

UNCITRAL was formed in 1966 as an affiliate body of the United Nations. UNCITRAL was formed for the purposes of promoting international trade among member states by reducing trade barriers.²³² It was through this mandate that UNCITRAL formulated the Arbitration rules in 1976. The Rules were primarily designed to help parties to resolve international commercial disputes.²³³ The Rules have been hailed as ‘one of the most widely recognised set of rules for settlement of disputes arising in the context of international commerce’.²³⁴ The Rules operated

²³¹ The UNCITRAL Arbitration Rules, 2010 available at www.uncitral.org/pdf/arbitration/rules/arb-rules-revised-2010. (hereinafter UNCITRAL Rules) accessed on 15/07/2013).

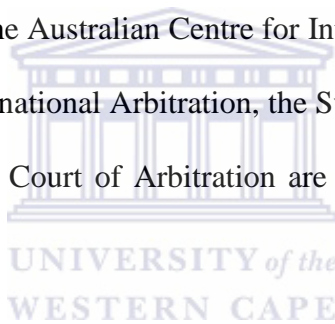
²³² UNCITRAL was established by Resolution 2205(XXI) of 17 December 1966. See UNCITRAL, *Origin, Mandate and Composition of UNCITRAL* (2007) <http://www.uncitral.org/uncitral/en/about/origin.html>. accessed on 17/07/2013.

²³³ See the United Nations General Assembly Resolution (UNGA), 31/98 Supplement No. 17 (A/31/17) of 15th December 1976; also see Van Harten G *Investment Treaty Arbitration and Public Law* (2007) at 54; see also Levine J ‘Current Trends in International Arbitration Practice as Reflected in the Revision of the UNCITRAL Arbitration Rules’ (2009) 31 *Transnational Dispute Management* 266; also see Wirth M ‘The Current Revision of the UNCITRAL Rules’ in *New Developments in International Commercial Arbitration* Müller C & Rigozzi A (eds.) 2008, available at http://www.homburger.ch/fileadmin/publications/UONO260_01.pdf accessed on 23/07/2013.

²³⁴ Wirth M ‘The Current Revision of the UNCITRAL Rules’ in *New Developments in International Commercial Arbitration* Müller C & Rigozzi A (eds.) 2008) at 1, available at http://www.homburger.ch/fileadmin/publications/UONO260_01.pdf accessed on 23/07/2013.

successfully for over 30 years until 2010 when, in a need to enhance efficiency,²³⁵ the Rules were revised and replaced by the current UNCITRAL Arbitration Rules, 2010.²³⁶ UNCITRAL Rules are applied in resolving different types of disputes as they have a one size fit all structure.

The Rules, at first, are used in ad hoc international commercial arbitration involving private parties who have a clause in their contract providing for ad hoc arbitration under UNCITRAL Rules.²³⁷ Secondly, the Rules are available to arbitral institutions which have modelled their institutional rules on the UNCITRAL Rules. Under these circumstances, the Rules are used not on an ad hoc basis but through institutional arbitration.²³⁸ A number of institutions have been using these rules in this manner. The Australian Centre for International Commercial Arbitration, the Cairo Regional Centre for International Arbitration, the Swiss Chambers Court of Arbitration and Mediation and the Permanent Court of Arbitration are some of the prominent institutions utilising the Rules.²³⁹



Thirdly, and most relevant to this research, is that the Rules can be used in investor – state disputes.²⁴⁰ Many BITs and other IIAs provide for UNCITRAL Rules arbitration as one of the option available to the parties.²⁴¹ The Northern American Free Trade Area (NAFTA) and the

²³⁵ UNCITRAL Working Group II (Arbitration), *Settlement of Commercial Disputes- Revision of the UNCITRAL Arbitration Rules - Note by the Secretariat*, UN Doc A/CN.9/WG.II/WP145 (2007) UNCITRAL <http://www.uncitral.org/uncitral/en/commission/working-groups/2Arbitration.html> accessed on 23/07/2013.

²³⁶ See paragraph 6 of the Preamble to the 2010 UNCITRAL Arbitration Rules.

²³⁷ See Article 1 (1) of the UNCITRAL Rules; see also Levine J ‘Current Trends in International Arbitration Practice as Reflected in the Revision of the UNCITRAL Arbitration Rules’ (2009) *Transnational Dispute Management* 266.

²³⁸ See Levine J ‘Current Trends in International Arbitration Practice as Reflected in the Revision of the UNCITRAL Arbitration Rules’ (2009) *Transnational Dispute Management* 267.

²³⁹ Levine J ‘Current Trends in International Arbitration Practice as Reflected in the Revision of the UNCITRAL Arbitration Rules’ (2009) *Transnational Dispute Management* 267.

²⁴⁰ Article 1(1) of the Rules provide for a wide scope of application of the rules. The Article contemplates the settlement of any ‘legal dispute’ whether contractual or not.

²⁴¹ See for example Art 7(2) (c) of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments of

Energy Charter of the European Union are some of the IIAs which provide for UNCITRAL Arbitration as an option available to the parties.²⁴²

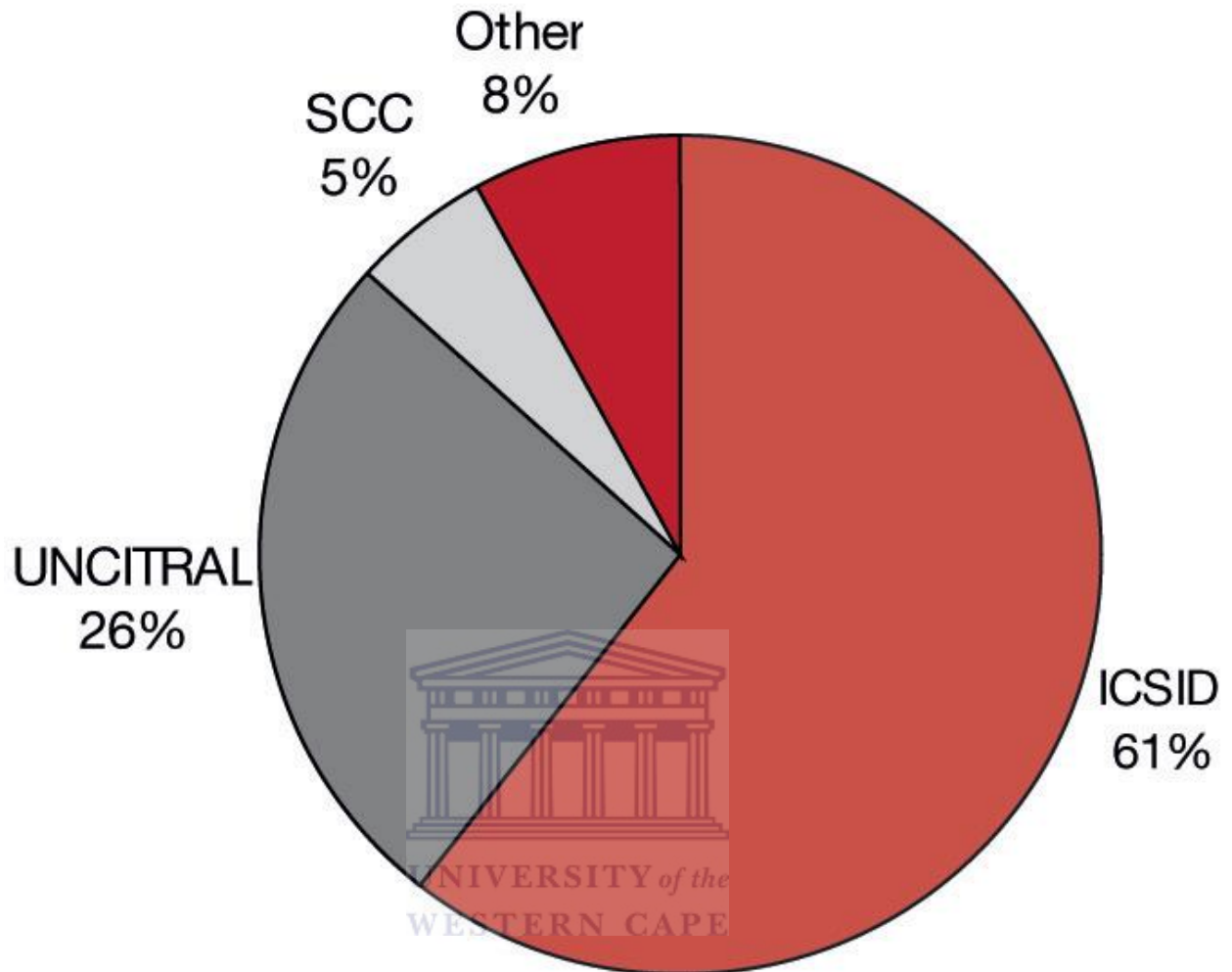
In terms of popularity, The UNCTAD 2014 World Investment Report indicates that ICSID registered 62% of all investor – state disputes, UNCITRAL 28%, and the remaining 10% is managed by the London Court of International Arbitration (LCIA), and the Stockholm Chamber of Commerce respectively.²⁴³ Therefore the Rules come third after ICSID Convention arbitration and Additional Facility arbitration. The chart below shows the distribution of Investor – State known cases among arbitral institutions/ rules in the year 2013.



27/11/2009 (hereinafter South Africa – Zimbabwe BIT) available at http://unctad.org/sections/dite/ia/docs/bits/SA_Zimbabwe.pdf; see also Article 7(4) of An Agreement between the Government of the Kingdom of Sweden and the Government of the United Republic of Tanzania for the Promotion and Protection of Investment 01/09/1999 available at http://unctad.org/sections/dite/ia/docs/bits/sweden_tanzania.pdf (hereinafter Tanzania –Sweden BIT); see also Art. 8(c) of the Agreement between the Government of United Republic of Tanzania and the Government of Italian Republic on the Promotion and Protection of Investment of 21/08/2001 (hereinafter Tanzania – Italy BIT) available at http://unctad.org/sections/dite/ia/docs/bits/italy_tanzania.pdf and the Agreement between the Government of United Republic of Tanzania and the Government of Republic of Finland on the Promotion and Protection of Investment of 19/06/2001 (hereinafter Tanzania - Finland BIT) available at http://unctad.org/sections/dite/ia/docs/bits/finland_tanzania.pdf all providing for UNCITRAL ad hoc Arbitration as an option in case of any dispute.

²⁴² See Article 1120 of Chapter 11 of the NAFTA full text available at <http://www.worldtradelaw.net/fta/agreements/nafta.pdf> accessed on 23/07/2013, see also Article 26(4) of the the European Energy Charter available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf

²⁴³ See United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* ‘Investing in the SDGs: An Action Plan’ [2014] IIA Monitor, No. 1, at 125, U.N.Doc. UNCTAD/WEB/ITE/IIA/2014/3 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf accessed on 23/07/2014



Source: UNCTAD 2013 *World Investment Report*.

The statistical data for the last three years indicates that UNCITRAL Rules are used in a quarter of all investor – state disputes.²⁴⁴ This shows that the rules command a significant recognition in the international investment world.

²⁴⁴ See also the UNCTAD *World Investment Report* for 2012 which indicates that 34 cases out of 46 cases (73%) registered in that year were registered at ICSID Centre, available at http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf; See also the UNCTAD Report for 2011 which indicates that 25 cases were registered out of which 18 (72%) of them were registered at ICSID, available at http://unctad.org/en/docs/wir2011_embargoed_en.pdf accessed on 08/08/2013.

The rules comprehensively cover all relevant aspects of the arbitration process, viz: scope of the application, notice and response of arbitration, composition of arbitral tribunal, conduct of the arbitration proceeding, and issues relating to awards and challenges to the awards. A discussion of these important aspects of UNCITRAL Rules follows.

3.4.1.1 Scope of application of the United Nations Commission on International Trade Law Arbitration Rules

The Rules, in the first place, provide for the recognition of the principle of party autonomy which is one of the cornerstones of private arbitration.²⁴⁵ That is demonstrated in the very first Article of the Rules. Article 1(1) provides that the rules shall apply to any legal dispute where the parties, in their agreement, have agreed to use the UNCITRAL Rules. In addition, the Rules mandate the parties to make any modifications to the Rules to suit their dispute needs.²⁴⁶ The Rules came into operation on 15 August 2010 and apply to disputes which arose on that date and future disputes to which the parties have designated the rules to apply.²⁴⁷

When compared to its earlier version, the current Rules provide for a wider scope of application. The older version's scope of application was confined to disputes arising out of contractual arrangement.²⁴⁸ The earlier version was not tailored to resolve investor – state disputes or claims

²⁴⁵ Redfern A & Hunter M *Law and Practice of International Commercial Arbitration* 2nd ed. (1991) at 51.

²⁴⁶ See Article 1(1) of the UNCITRAL Arbitration Rules, 2010, available at www.uncitral.org/pdf/arbitration/rules/arb-rules-revised-2010 accessed on 15/02/2013.

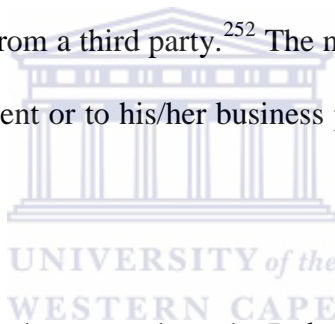
²⁴⁷ See Rule 1(2) of the UNCITRAL Arbitration Rules, 2010, available at www.uncitral.org/pdf/arbitration/rules/arb-rules-revised-2010 accessed on 15/02/2013.

²⁴⁸ See Article 1(1) of the UNCITRAL Arbitration Rules, 1976 GA 31/98 available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> accessed on 20/06/2013; see also Tuck

regarding breach of international customary or treaty law.²⁴⁹ The current Rules go beyond this as they are meant to apply to ‘any legal relationship whether contractual or not’.²⁵⁰ Therefore, under the new Rules investor – state disputes are clearly included.

3.4.1.2 Steps involved in arbitration under the United Nations Commission on International Trade Law Arbitration Rules

The first step is taken by the claimant by submitting a notice of arbitration to the other party. The Rules oblige the claimant to serve of the notice of arbitration.²⁵¹ The service process is bilateral without any intervention from a third party.²⁵² The notice can be delivered physically or by electronic means to the respondent or to his/her business place, habitual residence or mailing address.²⁵³



In order to avoid dilatory tactics by the respondent, the Rules make it clear that the respondent’s failure to respond, or lack of sufficient notice to the respondent, shall not hinder the constitution of the tribunal and any issue regarding such controversies shall be decided by the tribunal after it has been formed.

AP ‘Investor – State Arbitration Revised: A Critical Analysis of the Revision and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules’ (2007) *Law and Business Review of the Americas* 885 at 891.

²⁴⁹ Tuck AP ‘Investor – State Arbitration Revised: A Critical Analysis of the Revision and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules’ (2007) *Law and Business Review of the Americas* 885 at 897.

²⁵⁰ See Article 1(1) of the Rules.

²⁵¹ See Rule 3 (1) of the Rules.

²⁵² Gantz D A ‘The Evolution of FTA Investment Provisions: From NAFTA to the United States—Chile Free Trade Agreement’ (2004) 19 *American University International Law Review* 679 at 684.

²⁵³ See Article 2 (3) of the Rules.

The second step is the constitution of the arbitral tribunal. The Rules give the parties the mandate to decide the number of arbitrators to preside over their dispute. The parties could do this before the dispute arose or after the dispute has arisen.²⁵⁴ However, where the parties fail to agree on the number of arbitrators, the appointing authority shall have power to appoint one arbitrator to preside over the dispute.²⁵⁵

Once constituted, the tribunal is given the mandate to conduct the arbitral proceedings in the manner it finds fit and appropriate. In exercising this discretionary power, the tribunal is required to ensure that both parties are given equal opportunity to present their cases and receive the same treatment.²⁵⁶ The seat of the tribunal is supposed to be decided by the parties to suit their convenience and avoid unnecessary expenses. This is one of the advantages of ad hoc arbitration. However, where the parties did not indicate any place, the tribunal is entitled to choose a place where the proceedings will take place.²⁵⁷ The tribunal is also empowered to rule on its own jurisdiction in case any party files any jurisdictional objection.²⁵⁸

The next step is rendering of the award. The award is required to be in writing and the reasons for reaching such conclusion have to be adduced by the tribunal unless the parties have agreed otherwise.²⁵⁹ As stated above, the award rendered under the Rules is confidential unless the parties agree to its publication.²⁶⁰

²⁵⁴ See Article 7(1) of the Rules.

²⁵⁵ See Article 7(2) of the Rules.

²⁵⁶ See Article 17(1) of the Rules.

²⁵⁷ See Article 18 of the Rules.

²⁵⁸ See Article 23(1) of the Rules.

²⁵⁹ See Article 34(3) of the Rules.

²⁶⁰ See Article 34(5) of the Rules.

In conclusion, it can be said that there is not much difference, between the Additional Facility award and the UNCITRAL Rules award. Both are insulated from public scrutiny and the court can only be consulted on procedural matters.

3.4.1.3 Confidentiality of the proceedings

The Rules are very clear with regard to confidentiality of the arbitration proceedings. Article 28(3) provides that the proceedings shall be held in camera unless the parties agree otherwise. Originally the UNCITRAL Rules were designed to serve in international commercial arbitration.²⁶¹ Therefore it is not surprising to see that confidentiality is given high priority. In international commercial arbitration which is private in nature, confidentiality plays a vital role in protecting trade secrets. Another reason is that UNCITRAL arbitrations are conducted subject to the law of the seat of arbitration. These laws, or most of them, require confidentiality of the arbitral proceedings.²⁶²

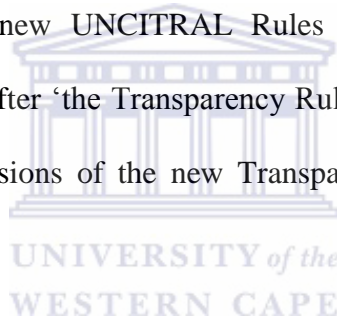
There is no public register for the purposes of registering new claims arising under the Rules. Therefore even where the dispute involves a State party, the dispute remains confidential and no third party is informed about such dispute.

²⁶¹ See Van Harten G *Investment Treaty Arbitration and Public Law* (2007) at 54; also see Friedland PD & Martinez L 'The UNCITRAL Arbitration Rules: A Commentary' (2007) *American Journal of International Law* 519; see also Levine J 'Current Trends in International Arbitration Practice as Reflected in the Revision of the UNCITRAL Arbitration Rules' (2009) *Transnational Dispute Management* 266.

²⁶² See Jagusch S & Sullivan J 'A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern' in Waibel M et al (eds.) *The Backlash against Investment Arbitration: Perception and Reality* (2010) 79 – 110 at 95.

Therefore, under UNCITRAL Rules, the proceedings and awards are confidential and there is no room for non – disputing parties to submit submissions or attend at the hearing.²⁶³ It has been held that the purpose of holding the hearing in camera is to exclude non- parties.²⁶⁴ This practice is contravening the principle of good governance especially where the dispute is of a public nature and involves a state party.

After receiving a lot of complaints from stakeholders, the UNCITRAL Commission at its 41st session in 2008 agreed by consensus on the importance of ensuring transparency in investor – state dispute resolution and formed a Working Group to work on the matter.²⁶⁵ The Working Group’s efforts resulted in the new UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (hereinafter ‘the Transparency Rules’).²⁶⁶ The Rules were adopted on 11 July 2013. The relevant provisions of the new Transparency Rules are discussed later in subheading 3.4.1.6.



²⁶³ See Articles 28(3) & 34(5) of the UNCITRAL Rules, 2010.

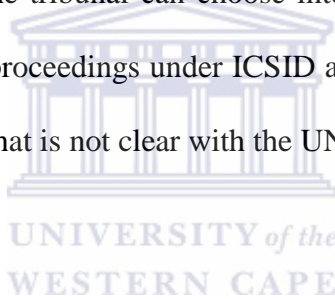
²⁶⁴ See *Methanex Corporation v United States of America* UNCITRAL NAFTA (2001) para 41.

²⁶⁵ Report of the United Nations Commission on International Trade Law, 41st session, June 16 – July 3, 2008, para 314 available at [www.uncitral.org/uncitral/en/transparency_in_investor – state_dispute/sessions/41st.html](http://www.uncitral.org/uncitral/en/transparency_in_investor_state_dispute/sessions/41st.html) .

²⁶⁶ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf> accessed on 27/09/2013.

3.4.1.4 The applicable law

The Rules only provide for the applicable procedural law.²⁶⁷ The substantive law to govern the arbitration, where the parties have not made any choice, will normally be the arbitration law of the place of arbitration (*lex arbitri*).²⁶⁸ Article 35(1) provides that the tribunal shall apply the law designated by the parties. However, where the parties have not designated any, the tribunal ought to apply the appropriate law. In determining the appropriate law, the tribunal is required to take into account the trade usage to such transactions.²⁶⁹ The Rules do not provide clearly whether international law principles can be applied by the tribunal. It is unclear whether at the time of determining the appropriate law the tribunal can choose international law over national law of the place or apply both laws. For proceedings under ICSID and Additional Facility international law is explicitly provided for, but that is not clear with the UNCITRAL Rules.²⁷⁰



3.4.1.5 Recognition and enforcement of United Nations Commission on International

Trade Law Rules awards

Article 34(2) of UNCITRAL Rules clearly provides that the award shall be final and binding on the parties and that the parties are expected to carry out the award without delay. Therefore the parties are bound and are expected to live by the terms of the award. As is the case with the Additional Facility awards the only available avenues to challenge the award are those stipulated

²⁶⁷ Gantz DA ‘The Evolution of FTA Investment Provisions: From NAFTA to the United States—Chile Free Trade Agreement’ (2004) 19 *American University International Law Review* 679.

²⁶⁸ See Article 18(1) of the Rules; see also Tuck AP ‘Investor – State Arbitration Revised: A Critical Analysis of the Revision and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules’ (2007) *Law and Business Review of the Americas* 885 at 897.

²⁶⁹ See Article 35(3) of the Rules.

²⁷⁰ See Article 54(1) of the Additional Facility Arbitration Rules and Article 42(1) ICSID Convention respectively.

under the New York Convention.²⁷¹ The Convention allows the award to be scrutinised by the national court of the place of enforcement on limited procedural grounds.²⁷² As at January 2013 the New York Convention has been ratified by 152 member states.²⁷³ Therefore, through the New York Convention, UNCITRAL awards enjoy worldwide recognition and hence are easily enforced.

3.4.1.6 United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration, 2013.

The adoption of the UNCITRAL Transparency Rules is a big step towards increasing the legitimacy of the investor – state arbitration system.²⁷⁴ Article 1(1) provides that the Rule shall take effect from 1 April 2014. The Rules are meant to apply to all future treaties providing for UNCITRAL arbitration unless the parties agree otherwise. The scope of its application therefore is in respect of treaties entered into in the future, and does not extend to the existing 3240 BITs and IIAs.²⁷⁵ The Rules will apply in the current existing BITs only where the parties have opted

²⁷¹ The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, available at <http://www.newyorkconvention.org/> accessed on 02/06/2014.

²⁷² See Article V of the New York Convention, The grounds includes: (1) the agreement to arbitrate was not valid, (2) the losing party was not given an opportunity to defend his case, (3) the award has addressed issues which are beyond its mandate, (4) the procedure employed did not comply with the parties' agreement, (5) the award has been set aside and is no longer binding, (6) the subject matter of arbitration is not subject to arbitration as per the laws of the place of enforcement and lastly (7) enforcement will be contrary to public policy.

²⁷³ See the List of New York Convention Contracting States available at <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> accessed on 12/11/2014.

²⁷⁴ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf> accessed on 27/09/2013.

²⁷⁵ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2014* 'investing in the SDGs: An Action Plan' at xxiii available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

in the new Rules or where the State of the claimant and the respondent State have agreed after 1 April 2014 to their application.²⁷⁶

The Rules bar the parties to a dispute from derogating from the application of the Transparency Rules when their dispute has arisen from a treaty which provides for the application of the UNCITRAL Transparency Rules.²⁷⁷

Subject to the limitation set under Article 7, the notice of arbitration, the response thereto, pleadings, third party submissions, transcripts of hearing, decisions and awards are required to be promptly available to the public for inspection.²⁷⁸ In addition, the public is allowed to attend any hearing except where there is a need to protect confidential information.²⁷⁹ A repository is established under Article 8 which is responsible for the keeping of the record and publishing the required information. Following the coming into force of the new Rules in April 2014, the secretariat has already established a transparency registry which will act as a repository for the publication of information and documents in treaty based investor - state arbitration.²⁸⁰

In recognition of the need for confidentiality of some business information, Article 7 requires the parties and the tribunal not to disclose information which may harm parties' trade secrets.

In conclusion, therefore, it can be said that the new Rules have addressed the transparency concerns of the international community. The new Rules are important milestone towards

²⁷⁶ See Article 1(2) of the UNCITRAL Transparency Rules, 2013.

²⁷⁷ See Article 1 (3) (a) of the Transparency Rules.

²⁷⁸ See Article 3, 4, 5, and 6 of the Rules.

²⁷⁹ See Article 6 of the Rules.

²⁸⁰ See the Transparency Registry at <http://www.uncitral.org/transparency-registry/registry/index.jsp> accessed on 03/06/2014.

transparency and hence legitimating the investor – state arbitration system. However, the efficacy of the rules cannot be predicted due to their narrow scope of application. The Rules are not going to apply to the current existing 3240 BITs and IIAs.²⁸¹ This means that the problem of confidentiality in the current 3000 BITs and IIAs is still there unless the state parties decide to amend their BITs to incorporate the new Rules or the parties to a dispute decide to adopt the new Rules for their dispute.

3.4.2 Advantages of arbitration under the United Nations Commission on International Trade Law

One of the proclaimed advantages of UNCITRAL ad hoc arbitration is that it gives the parties total control of their dispute. Every aspect of the proceedings is determined by the parties themselves as there is no administrative body to dictate the procedure and timeframe of the dispute.²⁸²

The second advantage is that the dispute is likely to end quickly as the speed of the proceeding is determined by the parties themselves. The fact that there are no institutional timeframes, procedures and deadlines to be adhered to, enhances the efficacy if the parties wish to resolve the

²⁸¹ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2014* ‘investing in the SDGs: An Action Plan’ at xxiii available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

²⁸² United Nations Conference on Trade and Development (UNCTAD) *Dispute Settlement - International Centre for Settlement of Investment Disputes: selecting the Appropriate Forum* 2003 UNCTAD/EDM/Misc.232/Add.1 at 26; see also Butler N *The state of International Investment Arbitration: The Possibility of Establishing an Appeal Mechanism* PhD Thesis, University of Leeds 2012 at 54 available at http://etheses.whiterose.ac.uk/3361/1/FINAL_CORRECTED_THESIS_%2822_jan_2013%29.pdf accessed on 12/09/2013.

dispute timely.²⁸³ The parties are at liberty to dispense with the normal adjudication bureaucracy which normally causes delay in formal institutional or court hearings.²⁸⁴

The third advantage is that it is cheaper when compared to institutional arbitration.²⁸⁵ The parties in ad hoc arbitration are relieved of the costs relating to administrative fees. In addition, the parties are at liberty to choose a cheap and convenient seat of arbitration. This is distinct from institutional arbitration where the seats are most of the time in the expensive Western world cities.²⁸⁶

3.4.3 Disadvantages of the arbitration under the United Nations Commission on International Trade Law

The major weakness of UNCITRAL arbitration is that under the 2010 rules the arbitration is conducted with a high level of confidentiality.²⁸⁷ Article 28(3) provides that the proceedings shall be held in camera unless the parties agree otherwise. Originally, as discussed earlier, the UNCITRAL Rules were designed to serve in international commercial arbitration.²⁸⁸ In

²⁸³ Butler N *The state of International Investment Arbitration: The Possibility of Establishing an Appeal Mechanism* PhD Thesis, University of Leeds 2012 at 54 available at http://etheses.whiterose.ac.uk/3361/1/FINAL_CORRECTED_THESIS_%2822_jan_2013%29.pdf accessed on 12/09/2013.

²⁸⁴ See Article 1(1) of the UNCITRAL Rules 2010.

²⁸⁵ Butler N *The state of International Investment Arbitration: The Possibility of Establishing an Appeal Mechanism* PhD Thesis, University of Leeds 2012 at 55 available at http://etheses.whiterose.ac.uk/3361/1/FINAL_CORRECTED_THESIS_%2822_jan_2013%29.pdf . Accessed on 12/09/2013.

²⁸⁶ Currently most of the ICSID Proceedings are held in Washington USA and Paris France, See *Background Information on ICSID: Where are the Proceedings Held?* At 6, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOve rview=true&language=English> accessed on 21/06/2013.

²⁸⁷ However take note of the new Transparency Rules discussed under subheading 3.4.1.3.1 which is due to start in April 2014 for future Treaties. The Current treaties will be hardly affected.

²⁸⁸ See Van Harten G *Investment Treaty Arbitration and Public Law* (2007) at 54; also see Friedland PD & Martinez L ‘The UNCITRAL Arbitration Rules: A Commentary’ (2007) *Am J Int'l L* 519; see also Levine J ‘Current Trends

international commercial arbitration, which is private in nature, confidentiality plays a vital role in protecting trade secrets. The Rules, however, provides for the same confidentiality even in investor – state disputes which are public in nature.

Under the Rules there is no room for non – disputing parties to submit submissions or attend at the hearing.²⁸⁹ The Rules were designed to exclude non- parties to the dispute regardless of the nature of the dispute.²⁹⁰ This practice goes contrary to the nature of investor – state disputes. There is a need for the Rules to adhere to public law value by making the proceedings of the investor – state disputes open to the public.²⁹¹



3.5 The Permanent Court of Arbitration

3.5.1 Introduction

The Permanent Court of Arbitration (PCA) is the oldest international court in the modern adjudicative systems.²⁹² It was established in 1899 through the Convention for the Pacific Settlement of International Disputes at the first International Peace Conference held in The

in International Arbitration Practice as Reflected in the Revision of the UNCITRAL Arbitration Rules' (2009) *Transnational Dispute Management* 266.

²⁸⁹ See Articles 28(3) & 34(5) of the UNCITRAL Rules, 2010.

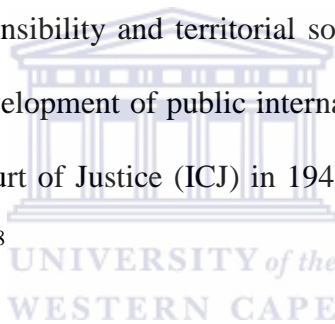
²⁹⁰ See *Methanex Corporation v United States of America*, UNCITRAL NAFTA (2001) para 41.

²⁹¹ This position will change when the new Transparency Rules 2013 come into operation, see Article 3 – 6 of the new Transparency Rules which provides for third party submission and public hearing of the investor – state dispute. The rules are discussed above under subheading 3.4.1.3.1.

²⁹² See the Permanent Court of Arbitration Website, About Us available at http://www.pca-cpa.org/showpage.asp?pag_id=1027 accessed on 28/04/2014; see also Mackenzie R et al *The Manual on International Courts and Tribunals* 2nd ed. (2010) at 102; also see UNCTAD 'Permanent Court of Arbitration' UNCTAD/EDM/Misc.232/Add.26 available at http://unctad.org/en/Docs/edmmisc232add26_en.pdf accessed on 28/04/2014.

Hague.²⁹³ The Convention was revised at the Second Hague Peace Conference in 1907. The Convention was established for the purpose of facilitating arbitration, mediation and inquiry between states so as to minimise the use of force.²⁹⁴ It was established as an optional court to which any two disputing States could agree to refer their dispute. Ever since, the PCA has developed to become a modern and multi-faceted arbitral institution that links public and private international law in the current era which is full of multi - faceted international law disputes. The Convention has 115 Member states.²⁹⁵

Early case load at the PCA involved inter – state disputes. The Court resolved disputes relating to treaty interpretation, state responsibility and territorial sovereignty.²⁹⁶ At the time the Court played a significant role in the development of public international law.²⁹⁷ However the coming into being of the International Court of Justice (ICJ) in 1946 overshadowed the PCA and very few cases were brought before it.²⁹⁸



Since 1992 the PCA has expanded its scope of jurisdiction and currently provides services for the resolution of disputes involving various combinations: state – state, state – private party, state

²⁹³ See the Permanent Court of Arbitration Website, About Us available at http://www.pca-cpa.org/showpage.asp?pag_id=1027 accessed on 28/04/2014.

²⁹⁴ See Article 1&2 of the PCA Convention, 1907 available at <file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/1907ENG.pdf> accessed on 28/04/2014.

²⁹⁵ See the Permanent Court of Arbitration Website, About Us available at http://www.pca-cpa.org/showpage.asp?pag_id=1027 accessed on 28/04/2014.

²⁹⁶ Merrills JG ‘The contribution of the Permanent Court of Arbitration to International Law and the Settlement of Disputes by Peaceful Means’ in Hamilton P et al (eds.) *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution*(1999)at 3.

²⁹⁷ Merrills JG ‘The contribution of the Permanent Court of Arbitration to International Law and the Settlement of Disputes by Peaceful Means’ at 3.

²⁹⁸ See United Nations Conference on Trade and Development (UNCTAD) ‘Permanent Court of Arbitration’ UNCTAD/EDM/Misc.232/Add.26 available at http://unctad.org/en/Docs/edmmisc232add26_en.pdf at 6 accessed on 28/04/2014.

entities – private parties and international organizations – private parties.²⁹⁹ Different types of rules have been established so as to facilitate multi - faceted dispute resolution at the PCA. The rules include: the optional Rules for Arbitrating Disputes between Two States (Inter – State Rules) 1992,³⁰⁰ Optional Rules for Arbitrating Disputes between Two Parties of which only One is a State (State Non – State Rules) 1993,³⁰¹ Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States (IGO/State Rules) 1996,³⁰² just to name the relevant ones. Most of these Rules are influenced by the UNCITRAL Rules of Arbitration 1976.³⁰³

3.5.2 The Functioning of the Permanent Court of Arbitration

The PCA does not settle disputes but maintains a roster of arbitrators appointed by the State parties to the Convention who can be appointed by the disputing parties to resolve their dispute. Therefore in reality there is no structure fitting the label ‘International Court of Arbitration’; rather, the awards and decision are made by ad hoc arbitral tribunals established under the auspices of the PCA.³⁰⁴ The PCA works through the Permanent Secretariat known as the

²⁹⁹ See [Permanent Court of Arbitration, Rules of Procedure](http://www.pca-cpa.org/showpage.asp?pag_id=1188) available at http://www.pca-cpa.org/showpage.asp?pag_id=1188 accessed on 28/04/2014.

³⁰⁰ The Inter – state Rules available at <file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/2STATENG.pdf> accessed on 28/04/2014.

³⁰¹ State Non – State Rules available at <file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/1STATENG.pdf> accessed on 28/04/2014.

³⁰² IGO/State Rules available at <file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/IGO2ENG.pdf> accessed on 28/04/2014.

³⁰³ Mackenzie R et al *The Manual on International Courts and Tribunals* 2nd ed. (2010) at 103.

³⁰⁴ Mackenzie R et al *The Manual on International Courts and Tribunals* 2nd ed. (2010) at 102.

International Bureau headed by the Secretary - General.³⁰⁵ The Bureau is responsible to provide the respective arbitral tribunals with all administrative services required.

The Convention requires members of the arbitral tribunal to be persons of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrator.³⁰⁶ Parties to the dispute determine the number of arbitrators to preside over their dispute.³⁰⁷ Once the award is rendered, the parties are bound by the decision and no appeal lies against such award.³⁰⁸

3.5.3 The Court's jurisdiction in investor – state disputes.

As pointed out,³⁰⁹ the various optional rules of the PCA adopted since the 1990s have expanded the jurisdiction of the Court. The PCA now adjudicates on state – state disputes, state – private party disputes and state – international organization disputes, just to name a few.³¹⁰ As a result, the PCA has been involved in providing registry and other services to arbitrations emanating from the BITs and IIAs.³¹¹ The 2008 PCA Annual Report indicates that the PCA acted as a

³⁰⁵ United Nations Conference on Trade and Development (UNCTAD) 'Permanent Court of Arbitration' U NCTAD/EDM/Misc.232/Add.26 at 9.

³⁰⁶ See Article 44 of the PCA Convention 1907 available at <file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/1907ENG.pdf> accessed on 28/04/2014.

³⁰⁷ See Article 5 of the Optional Rules of Procedure for State – Non State Rules available at <file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/1STATENG.pdf> accessed on 28/04/2014.

³⁰⁸ See Article 54 of the Convention and Article 32(2) of State/Non State Rules.

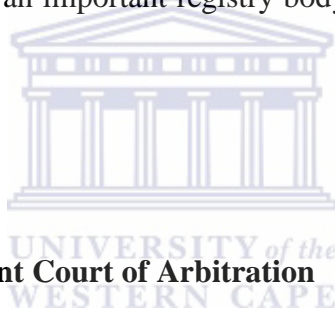
³⁰⁹ See 3.5.1 above.

³¹⁰ See [Permanent Court of Arbitration, Rules of Procedure](http://www.pca-cpa.org/showpage.asp?pag_id=1188) available at http://www.pca-cpa.org/showpage.asp?pag_id=1188 accessed on 28/04/2014.

³¹¹ Mackenzie R et al *The Manual on International Courts and Tribunals* 2nd ed. (2010) at 104.

registry for 34 cases out of which 23 cases were investor – state arbitration.³¹² In 2012 the PCA provided the registry service for 88 cases of which 54 were investor - state cases.³¹³ One can see that the PCA role in investor – state dispute has doubled over the period of only four years. Investor – state disputes constituted 61% of all cases registered at the PCA.³¹⁴ The PCA is particularly popular in NAFTA investment disputes and investment disputes conducted under the UNCITRAL Rules.³¹⁵

Therefore in conclusion it can be said here that the PCA indeed has and is exercising jurisdiction over investor – state disputes. It is an important registry body for almost all disputes filed under the UNCITRAL Rules.



3.5.4 Advantages of the Permanent Court of Arbitration

The PCA, in recognition of the cost problem facing developing countries, established a Financial Assistance Fund for developing countries in 1995.³¹⁶ The Fund is financed through voluntary contributions from states, NGOs, international organisations and individuals. For a state to benefit from the Fund it needs to meet the following conditions:³¹⁷ (1) the requesting state must

³¹² See PCA 108th *Annual Report*, 2008 available at http://www.wx4all.net/pca/PCA-annualreport_2008.pdf accessed on 28/04/2014.

³¹³ See PCA 112th *Annual Report*, 2012 available at http://www.wx4all.net/pca/PCA-annualreport_2012.pdf accessed on 28/04/2014.

³¹⁴ See PCA 112th *Annual Report*, 2012 at 11, available at http://www.wx4all.net/pca/PCA-annualreport_2012.pdf accessed on 28/04/2014.

³¹⁵ See PCA 112th *Annual Report*, 2012 at 11.

³¹⁶ The Conditions and eligibility criteria can be found at <http://www.pca-cpa.org/BD/torfundenglish.htm> accessed on 29/04/2014.

³¹⁷ See the PCA Website, Financial Assistance Fund available at http://www.pca-cpa.org/showpage.asp?pag_id=1179 accessed on 29/04/2014.

be a member of the PCA Convention; (2) the state must have concluded an agreement to refer a dispute (or disputes) to the PCA dispute settlement; and (3) the state must be listed on the Development Assistance Committee's (DAC). The International Bureau administers the Fund under the external supervision of external Board of Trustees. The Fund has disbursed funds to a number of needy states since its inception.³¹⁸ The Fund makes the adjudicative system accessible to all stakeholders, poor and rich. In this way the system increases its legitimacy.

3.5.5 Disadvantages of the Permanent Court of Arbitration

The fact that the PCA Optional Rules are based on the UNCITRAL Arbitration Rules speaks loudly about their unsuitability in adjudicating public interest disputes, including investor – state disputes. Public interest disputes are supposed to be heard in open court and the transparency principle needs to be observed.³¹⁹ The Rules, however, require disputes to be heard in camera and the award remains confidential unless the parties decide otherwise.³²⁰

In addition, the Rules provides for party appointed arbitrators.³²¹ As discussed elsewhere,³²² party appointed arbitrators contravene the cardinal principle of independence and impartiality of an adjudication process as they tend to lean to the appointing party interests.³²³

³¹⁸ United Nations Conference on Trade and Development (UNCTAD) 'Permanent Court of Arbitration' UNCTAD/EDM/Misc.232/Add.26 available at http://unctad.org/en/Docs/edmmisc232add26_en.pdf accessed on 28/04/2014.

³¹⁹ For more discussion on this see Chapter Four of this work under subheading 4.3.

³²⁰ See Article 25(4) of the State Non /State Rules available at <file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/1STATENG.pdf> accessed on 28/04/2014.

³²¹ See Article 6 of the State /Non – State Rules.

³²² For a thorough discussion on this see Chapter Four of this work under subheading 4.4.5.

³²³ See Paulsson J 'Moral Hazard in International Dispute Resolution' (2010) *ICSID Review - Foreign Investment Law Journal* 339; also see Van den Berg AJ 'Dissenting Opinion by Party Appointed Arbitrators in Investment

Lastly, the system does not allow appeal. The award rendered by the tribunal is final and cannot be challenged in any court.³²⁴ As discussed all along, an investor – state arbitration system which is mostly public law adjudicative system, need to establish an appellate structure for the purposes of developing consistency and predictability. It is submitted here that, apart from the Financial Assistance Fund, the PCA System has little to offer to investor – state arbitration system.

3.6 General critical analysis of the investor – state arbitration system

In the following part, the investor – state arbitration system is generally analysed. The main issues which put the system into the legitimacy spotlight are clearly identified. The cases which have attracted world attention and caught stakeholders’ eyes are well discussed hereunder. This part therefore discusses the strengths and weaknesses of the current system. The discussion starts with identifying the strengths of the system when compared with its predecessor followed by its weaknesses.

3.6.1 General strengths of the current investor – state arbitration system

In the following section, the current system’s strengths are discussed. As pointed out earlier, the current system came into being to replace the old regime which was dominated by the use of

Arbitration’ in Arsanjani M et al. (eds.) *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2011) 821 – 843 at 824.

³²⁴ See Article 32(2) of the State /Non – State Rules.

diplomatic protection. The strengths of the current system are therefore measured by comparing it with its predecessor.

3.6.1.1 Peaceful and civilised mechanism

When compared to its predecessors, the investor – state arbitration system is, by far, a civilised and peaceful mechanism. The current system involves settlement of disputes between the host state and the foreign investor without involving and engaging the home state. Investment disputes have been depoliticised by excluding the investor home state from the dispute.³²⁵ In the previous system dispute settlement involved the use of diplomatic protection. At times states had to employ gunboat diplomacy to intimidate the host state in order to secure compliance.³²⁶ As a result, the diplomatic relations between the two nations, at times, soured as a result of use of the force. The current system has, to a large extent, helped to improve diplomatic relations among nations.

In addition, the current system has helped in creating a fair playing field for even weaker state parties.³²⁷ Diplomatic protection was considered biased towards powerful nations as small nations feared to engage in a diplomatic wrangle with big nations for fear of losing loans and

³²⁵ See above a discussion on Article 25 of the ICSID Convention; see Also Schreuer C et al *The ICSID Convention: A Commentary* 2ed. (2009) at 71 – 348; see also Jagusch S & Sullivan J ‘A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern’ in Waibel M et al (eds.) *The Backlash against Investment Arbitration: Perception and Reality* (2010) 79 – 110 at 96.

³²⁶ See International Law Commission, *First Report on Diplomatic Protection*, (2000) 15, UN Doc. A/CN.4/506. ; see also Amerasinghe C F *Local Remedies in International Law* 2nd ed.(2005)at 44; also see Bjorklund A K ‘Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims’ (2005) 45 *Vanderbilt Journal of International Law* 1, 12–16; see also Borchard E *The Diplomatic Protection of Citizens Abroad* (1915) at 366.

³²⁷ United Nations Conference on Trade and Development (UNCTAD) *Dispute Settlement - International Centre for Settlement of Investment Disputes: selecting the Appropriate Forum* 2003 UNCTAD/EDM/Misc.232/Add.1 at 16.

foreign aid. Furthermore, by allowing the foreign investor to institute a dispute directly against the sovereign, the system has balanced the playing field between the parties by suspending the defence of state sovereignty in investment disputes.³²⁸ During the diplomatic protection era, individual investors had no standing and no direct cause of action against a sovereign for a violation of international law that adversely affected their investment.³²⁹

3.6.1.2 Effective enforcement mechanism

One of the biggest challenges facing international law in general is the lack of an effective enforcement mechanism for the international tribunal decisions or courts orders.³³⁰ In situations where the State is reluctant or refuses to cooperate, the order is rendered useless. However, in investor – state arbitration that is not the case. As pointed out earlier, the ICSID Convention and the New York Convention play a significant role to ensure recognition and enforcement of awards rendered by the arbitral tribunals.³³¹ The two Conventions have been ratified by almost 80% of all the world’s nations.³³² This acceptance of the two Conventions gives investment

³²⁸ Frank S D ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham Law Rev* 1521 at 1529; see also Gantz DA The Evolution of FTA Investment Provisions: From NAFTA to the United States—Chile Free Trade Agreement, 19 *American University International Law Review* 679 at 683.

³²⁹ Frank S D ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’ (2005) 73 *Fordham Law Rev* 1521 at 1536.

³³⁰ See Lowe V *The Settlement of Disputes in International Law* (1999) 132; see also Brownlie I *Principles of Public International Law* at 677.

³³¹ See Article 52 of the ICSID Convention which requires Member State to recognise and enforce the ICSID awards as their own court judgements. With regards to UNCITRAL and Additional Facility awards, see Article V of the New York Convention which provides for limited grounds upon which an award can be challenged; see also United Nations Conference on Trade and Development (UNCTAD) *Dispute Settlement - International Centre for Settlement of Investment Disputes: selecting the Appropriate Forum* 2003 UNCTAD/EDM/Misc.232/Add.1 at 16; see also Frank S D ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1521.

³³² As of January 20, 2013, ICSID had 158 signatory States, and 147 Contracting States had ratified the Convention, see the List of Contracting States available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language>

awards the highest rate of enforcement all over the world. It is said that the popularity of the investor – state arbitration system is mostly the result of the fact that its awards can be easily enforced.³³³

3.6.1.3 Neutral forum and impartial adjudication process

Before the invention of the current investor – state arbitration system, foreign investor disputes were settled in the host state court. Foreign investors were very sceptical about this route. They feared the lack of impartiality of the local judges. It was felt that local judges would be sympathetic to their respective governments. Another concern was that judges would rarely rely on international law owing to their limited knowledge of international law.³³⁴

The current system has, to a large extent, addressed investors' concerns. Disputes are now settled at a neutral forum chosen by the parties to the dispute or by the institution chosen by them. In addition, the parties are involved in choosing the arbitrators who will be responsible to adjudicate on their dispute.³³⁵ The Rules require the majority of arbitrators to hail from states

[English. Accessed](#) on 26/07/2013. As by January 2013 the New York Convention has been ratified by 148 member states see the List of Contracting States available at <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> accessed on 23/07/2013.

³³³ Frank S D 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham Law Rev* 1521 at 1536.

³³⁴ Amerasinghe C F *Local Remedies in International Law* 2nd ed.(2005) at 22; see also Dodge W 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1 at 6; see also Dolzer R & Chreuer C *Principles of International Investment Law* (2008) at 214; see also Borchard E *The Diplomatic Protection of Citizens Abroad* (1915) at 817; see also Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 5.

³³⁵ See Article 25 of the ICSID Convention for the Jurisdiction of ICSID Tribunals and Article 36 & 37 for the parties' autonomy on the choice of arbitrators.

other than those of the parties to the dispute.³³⁶ This provision aims at ensuring that the tribunal comprises neutral arbitrators.³³⁷

Therefore, indeed, when compared to its predecessors the current system has managed to address foreign investors' concerns. However, it is submitted here that, while the original idea of allowing the parties to choose the arbitrators intended to address impartiality in investor – state disputes, the practice indicates that impartiality of party appointed arbitrators is highly questionable as they tend to protect the interests of the appointing party. Party appointed arbitrator issues are discussed later in this chapter.



3.6.1.4 Finality

Finality of the award is one of the reasons which contributed to the popularity of ICSID arbitration.³³⁸ Under the ICSID Convention, the award is final and cannot be appealed against save for few internal rectification opportunities.³³⁹ With regard to UNCITRAL and Additional Facility awards, the New York Convention sets limited grounds upon which the award can be challenged.³⁴⁰ As earlier stated, the previous system dispute settlement involved the use of diplomatic protection. At times states had to employ gunboat diplomacy to intimidate the host

³³⁶ See Article 39 of the ICSID Convention.

³³⁷ Alvarez GM 'The ICSID Procedure: Mind the Gap' (2011) 10 *e – Mercatoria* 171.

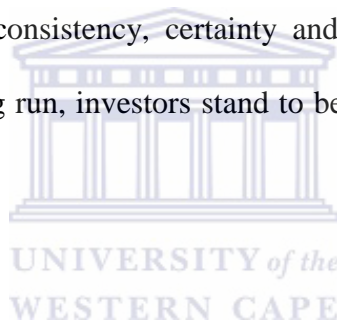
³³⁸ United Nations Conference on Trade and Development (UNCTAD) *Series on International Investment Policies for Development* at 14 available at <http://www.unctad.org/templates/webflyer.asp?docid=13762&intItemID=2340&lang=1&mode=downloads> accessed on 28 /06/ 2013.

³³⁹ See Article 52 of the ICSID Convention.

³⁴⁰ See Article V of the New York Convention. For a thorough discussion on New York Convention enforcement see above at 3.3.4 and 3.4.1.5 on recognition and enforcement of AF and UNCITRAL awards respectively.

state so as to secure compliance.³⁴¹ Proponents argue that the finality of awards plays a significant role with regard to foreign investors as the business community prefers finality over an appellate mechanism. It is said this is so because investors are more interested in resolving the dispute as quick as possible so that they can proceed with the execution of the respective project.³⁴²

It is submitted here that, as much as finality is needed, especially in investment disputes which normally involve huge amounts of money, insistence on finality of the award without having regard to the correctness of the decision made, is affecting the legitimacy of the whole system. There is a need to develop the consistency, certainty and predictability of the international investment law system. In the long run, investors stand to benefit from a consistent, certain and predictable system.



3.6.2 General weaknesses of the current investor – state arbitration system.

Investor – state arbitration has a number of critical systemic weaknesses. These weaknesses have sparked legitimacy concerns from all parts of the world. Some commentators have said investment arbitration ‘has reached its half-life and is characterized by a kind of boom and bust feel’.³⁴³ Others say that international investment law and arbitration is a booming branch of

³⁴¹ See International Law Commission, *First Report on Diplomatic Protection*, (2000) 15, UN Doc. A/CN.4/506. ; see also Amerasinghe C F *Local Remedies in International Law* 2nd ed.(2005)at 44; also see Bjorklund A K ‘Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims’ (2005) 45 *Vanderbilt Journal of International Law* 1, 12–16; see also Borchard E *The Diplomatic Protection of Citizens Abroad* (1915) at 366.

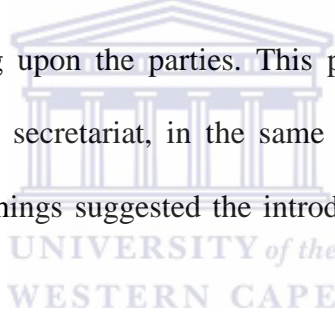
³⁴² See Tams C ‘An Appealing Option? The Debate about ICSID Appellate Structure’ (2006) 57 *Essays on Transnational Law* 1 at 15; see also Walsh TW ‘Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality’ *Berkeley Journal of International Law* 444 at 445; see also Shavell S ‘ The Appeal Process as a Means of Error Correction’ (1995) 24 *Journal of Legal Studies* 379.

³⁴³ Crawford J ‘Foreword’ in Douglas Z *The International Law of the Claims* (2009) at xxxii.

international law yet it faces challenges that aim at ‘the heart of the matter’.³⁴⁴ The central question among scholars is whether the current investment dispute adjudication system is appropriate to handle international investment disputes.³⁴⁵ The systemic flaws are identified and discussed hereunder.

3.6.2.1 Lack of consistency

Lack of consistency in the rendered awards is one of the major critiques levelled against the investor – state arbitration systems.³⁴⁶ A number of inconsistent decisions exist in parallel and all are regarded as valid and binding upon the parties. This problem was acknowledged by the ICSID secretariat in 2004.³⁴⁷ The secretariat, in the same year, issued a discussion paper to stakeholders which among other things suggested the introduction of an appellate body within



³⁴⁴ Binder C et al ‘A Preface’ in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christopher Schreuer* (2009) at v.

³⁴⁵ See Mann H ‘Civil Society Perspective: what Do Key Stakeholders Expect from the International Investment Regime?’ in Alvarez J and Sauvant K (eds.) *The Evolving International Investment Regime* (2011) 22-29; Reinisch A ‘The Future of Investment Arbitration’ in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894 - 916; Van Harten G ‘Investment Treaty Arbitration, Procedural Fairness and the Rule of Law’ in Schill S (ed.) *International Investment Law and Comparative Public Law* (2010) 627 – 658; and Peterson L ‘Out of Order’ in Waibel M et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 483 – 488. These authors are very critical on the way the International Arbitration system operates.

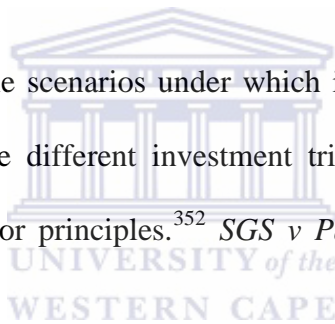
³⁴⁶ See Reinisch A ‘The proliferation of international Dispute Settlement Mechanisms: The threat of fragmentation vs. The promise of more effective system? Some reflections from the perspective of investment arbitration’ in Buffard J et al (eds.) *International Law Between Universalism and Fragmentation* (2008)107 – 126; Franck S ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham L Rev* 1521 at 1545 and Knahr C ‘Consolidation of Proceedings in International Investment Arbitration’ in Knahr C et al (eds.) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 1-19 at 2.

³⁴⁷ International Centre for Settlement of Investment Disputes, ICSID Secretariat Discussion Paper, Possible Improvements of the Framework for ICSID Arbitration, 16 (Oct. 12, 2004), available at <http://www.worldbank.org/icsid/improve-arb.pdf>.

the ICSID framework.³⁴⁸ The proposal did not receive enough support especially from foreign investors' home states and it has never been pursued since. The objectors argued that the creation of an appellate structure would be contrary to the very aim of the Convention, which is ensuring finality of disputes.³⁴⁹ It remains a fact that, although the ICSID secretariat abandoned the idea of establishing an appellate structure for lack of support, the inconsistency problem is still growing and creating more uncertainty in international investment law.³⁵⁰ As discussed hereunder, a number of reasons are responsible for the problem of inconsistency of awards in the current system.

Essentially, there are three possible scenarios under which inconsistent decisions may arise.³⁵¹

The first scenario could be where different investment tribunals reach different conclusions concerning the same legal issues or principles.³⁵² *SGS v Pakistan* and *SGS v Philipines*, also



³⁴⁸ International Centre for Settlement of Investment Disputes, ICSID Secretariat Discussion Paper, Possible Improvements of the Framework for ICSID Arbitration, 16 (Oct. 12, 2004), available at <http://www.worldbank.org/icsid/improve-arb.pdf>.

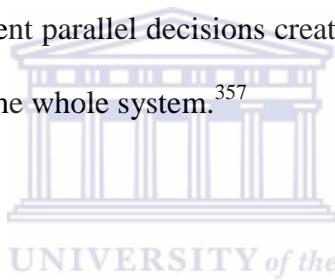
³⁴⁹ See Article 53 of the Convention.

³⁵⁰ See for example the interpretation of NPM clause in US – Argentina BIT. The tribunals in *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8 of 20th April 2005 final award available at <http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf>, *Enron Corporation and Ponderosa Assets L P v Argentine Republic* ICSID ARB/01/3 of 9th May 2007 final award available at <http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf> and *Sempra Energy International v The Argentine Republic* ICSID ARB/02/16 of 14th September 2007 final award available at <http://www.italaw.com/cases/documents/1004> ruled that necessity defence was not applicable to Argentina while the other two tribunals in *LG&E Energy Corp LG&E Capital Corp and LG&E International Inc v Argentine Republic* ICSID ARB/02/1 of 9th July 2007 final award available at <http://www.italaw.com/sites/default/files/case-documents/ita0462.pdf> and *Continental Casualty Company v Argentine Republic* Case No ARB/03/9 Decision on Jurisdiction (2006) available at <http://italaw.com/sites/default/files/case-documents/ita0228.pdf> ruled that the defence of necessity was applicable to Argentina.

³⁵¹ For more discussion on this see Franck S 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham L Rev* 1521 at 1545 -1546; see also Garcia C 'All the other dirty little secrets: Investment Treaties, Latin America and the necessary evil of investor state arbitration' (2004) 16 *Florida Journal of International Law* 301 at 348; and Reinisch A 'The Future of Investment Arbitration' in Christina Binder et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894 – 916 at 906.

³⁵² Reinisch A 'The Future of Investment Arbitration' in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894 – 916 at 906.

Maffezini v Spain and *Plama v Bulgaria* are the cases that can be used to explain this type of scenario.³⁵³ The second possible scenario is where the two or more tribunals arrive at diverging conclusions while both are dealing with almost similar facts and are interpreting the same legal principles from the same treaty. This scenario can be well explained by using the Argentina cases *CMS Gas Transmission Company v The Argentine Republic*³⁵⁴ and *LG&E Energy Corp LG&E Capital Corp and LG&E International Inc v Argentine Republic*³⁵⁵. The last and third possible scenario is where there are parallel proceedings on the same facts in different fora involving related parties but different treaties. This scenario is well illustrated through *Lauder v Czech* and *CME v Czech*.³⁵⁶ The above cited cases have created a legitimacy crisis in the investor – state arbitration system. These inconsistent parallel decisions create uncertainty in investment law and contribute to the backlash against the whole system.³⁵⁷



The discussion hereunder, shows how the above cited cases in the three scenarios have sparked legitimacy concerns in international investment arbitration system.

³⁵³ See *SGS Société Générale de Surveillance S A v Islamic Republic of Pakistan* ICSID ARB/01/13 of 6th August 2003; see also *SGS Société Générale de Surveillance S A v Republic of the Philippines*, ICSID ARB/02/6 of 24th January 2004; also see *Emilio Augustin Maffezini v Kingdom of Spain*, Award on Jurisdiction, ICSID Case No ARB/97/7, IIC 85 (2000) and *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005.

³⁵⁴ *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8 (2005).

³⁵⁵ *LG&E Energy Corp LG&E Capital Corp and LG&E International Inc v Argentine Republic* ICSID ARB/02/1 (2007).

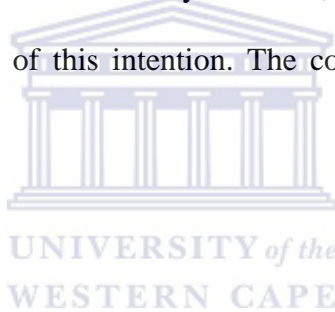
³⁵⁶ *Lauder v The Czech Republic*, 9 ICSID Reports 66 (2001) & *CME Czech Republic BV v The Czech Republic* ICSID Reports 9(2001).

³⁵⁷ See Spooberg F& Vinuales V ‘conflicting decisions in International Arbitration’ *Law & Practice of International Courts & Tribunals* (2009) 91 – 113.

3.6.2.1.1 Divergent conclusions on similar facts and legal issues under different treaties

The Tribunals in *SGS v Islamic Republic of Pakistan*³⁵⁸ and *SGS v Republic of the Philippines*³⁵⁹ were called to determine whether an umbrella clause in a treaty transforms a breach of a contract into a breach of a treaty.

SGS v Islamic Republic of Pakistan was the first case and its facts in brief were as follows. The case emanated from the pre – shipment inspection agreement entered into in 1994 between SGS and the Islamic Republic of Pakistan.³⁶⁰ Two years later, Pakistan decided to terminate the contract and notified the claimant of this intention. The contract was dully terminated on 11 March 1997.³⁶¹



The claimant, SGS, was unhappy with the termination of the contract and filed a case in Switzerland. Pakistan successfully objected against the jurisdiction of the Swiss court.³⁶² Six months after the dismissal of the Swiss case, SGS initiated ICSID proceedings pursuant to the Swiss – Pakistan BIT.³⁶³ After the constitution of the Tribunal, SGS alleged, among other things, violation of Article 11 of the BIT (the umbrella clause). Pakistan vehemently objected to the ICSID jurisdiction on the ground that the matter alleged by the claimant was contractual hence

³⁵⁸ See *SGS Société Générale de Surveillance S A v Islamic Republic of Pakistan* ICSID ARB/01/13

³⁵⁹ See *SGS Société Générale de Surveillance S A v Republic of the Philippines*, ICSID ARB/02/6.

³⁶⁰ *SGS v Islamic Republic of Pakistan* para. 11.

³⁶¹ *SGS v Islamic Republic of Pakistan* para 16.

³⁶² *SGS v Islamic Republic of Pakistan* Para 22 – 25.

³⁶³ *SGS v Islamic Republic of Pakistan* Para 32.

should be handled by the forum chosen by the parties – the Pakistan court.³⁶⁴ On the other hand, SGS submitted that contractual claims are also BIT claims.³⁶⁵ Therefore the Tribunal was required to determine whether contractual claims can be elevated to BIT claims by a BIT. The Tribunal agreed with the respondent's argument and observed that a contractual claim does not automatically become a BIT claim. It further ruled that to follow the claimant's argument would be to expand an umbrella clause to an indefinite expansion.³⁶⁶ It went further to say that any broader interpretation of an umbrella clause would override forum selection clauses in investor state conflicts.³⁶⁷

However, in *SGS v Philippines*, the facts of which are more or less similar to the *Pakistan* case the Tribunal came out with a divergent conclusion.³⁶⁸ The facts were that, in 1991 Philippines entered into a pre - shipment inspection agreement with the claimant.³⁶⁹ After nine years of service, in 2000, the respondent terminated the contract. In pursuit to recover unpaid money on the contract totalling USD 140 million, SGS instituted a case with the ICSID in accordance with the Switzerland – Philippines BIT.³⁷⁰ SGS argued that Philippines had breached Articles IV, VI and X (2) of the Switzerland – Philippines BIT.³⁷¹ In its submissions, Philippines contested the jurisdiction of the Tribunal on the ground that the claim was contractual, hence should be heard by the forum chosen by the parties in their contract – the Philippines court.³⁷² SGS, on the other hand, argued in favour of the ICSID jurisdiction on the basis of the presence of an umbrella

³⁶⁴ *SGS v Islamic Republic of Pakistan* Para 42 & 62.

³⁶⁵ *SGS v Islamic Republic of Pakistan* Para 83.

³⁶⁶ *SGS v Islamic Republic of Pakistan*, para 166.

³⁶⁷ *SGS v Islamic Republic of Pakistan*, para 168.

³⁶⁸ See *SGS v Islamic Republic Philippines* para 12 – 13.

³⁶⁹ *SGS v Islamic Republic Philippines* para 13.

³⁷⁰ *SGS v Islamic Republic Philippines* para 15.

³⁷¹ *SGS v Islamic Republic Philippines* para 16.

³⁷² *SGS v Islamic Republic Philippines* para 17 & 22.

clause in the BIT. It further submitted that an umbrella clause was designed for the purpose of elevating contractual claims to treaty claims.³⁷³ Ruling in favour of SGS, the Tribunal held that a contractual claim can be elevated to BIT claim by virtue of an umbrella clause. It further stated that a broad interpretation of the umbrella clause is the right one and contemplated by the BIT.³⁷⁴

From the two cases, one can see that the *Pakistan* tribunal on the same issue of an umbrella clause ruled that an umbrella clause does not elevate a contractual claim to a treaty claim while the *Philippines* Tribunal on a similar issue ruled in the positive that a breach of contract elevates into a breach of a treaty. The *Pakistan* Tribunal decision was supported in 2006 by two other decisions: *El Paso v Argentina* and *Pan American v Argentina*;³⁷⁵ while, on the other hand, the *Philippines* Tribunal received support from *Eureko v Poland* and *Noble Ventures v Romania*.³⁷⁶



Apart from the umbrella clause, there are also conflicting decisions with regard to the application of the Most Favoured Nation principle (MFN) in procedural matters. As discussed earlier, there are conflicting positions with regard to whether the MFN principle can be invoked to bypass

³⁷³ *SGS v Islamic Republic Philippines* para 63 – 68.

³⁷⁴ *SGS v Islamic Republic Philippines* para 115.

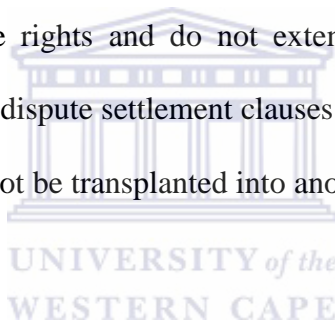
³⁷⁵ *El Paso Energy International Co v Argentina* ICSID ARB/03/15 2006 of 27th April 2006 decision on jurisdiction available at http://www.italaw.com/sites/default/files/case-documents/ita0268_0.pdf para. 82; *Pan American Energy LLC and BP Argentina Exploration Company v Argentina*, ICSID ARB/03/13 of 27th July 2006, Decision on Preliminary Objection available at <http://www.italaw.com/sites/default/files/case-documents/ita0097.pdf>, see paras. 112–115.

³⁷⁶ *Eureko BV v Poland*, *Ad hoc* – UNCITRAL Award of 19th August 2005 Partial Award available at http://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf para. 250; *Noble Ventures Inc v Romania*, ICSID ARB/01/11 of 12th October 2005 on arbitral jurisdiction available at <http://www.italaw.com/sites/default/files/case-documents/ita0565.pdf> paras 60–61.

consent limitations set by the contracting parties in a treaty by invoking another BIT involving the respondent state and a third party.³⁷⁷

On the one hand, there is *Maffezini v Spain*³⁷⁸ and other cases which support the view that procedural or jurisdictional matters are part and parcel of general investors' guarantees.³⁷⁹ The cases are therefore to the effect that a more favourable procedure set in another treaty to which the respondent state is a party has to be extended to other treaties to which that state is a party.

On the other hand there is *Plama v Bulgaria* and other cases which opine that the MFN clauses are meant to apply to substantive rights and do not extend to procedural and jurisdictional matters.³⁸⁰ According to this view, dispute settlement clauses are negotiated in specific treaties to meet specific ends hence they cannot be transplanted into another treaty unless the parties clearly indicate that.³⁸¹



³⁷⁷ See the discussion on ICSID Consent subheading 3.2.2.1 above.

³⁷⁸ See *Emilio Augustin Maffezini v Kingdom of Spain*, Award on Jurisdiction, ICSID Case No ARB/97/7, IIC 85 (2000).

³⁷⁹ For cases on similar opinion see also *Gas Natural SDG, S.A. v Argentina*, ICSID Case No ARB/03/10, Decision on Preliminary Questions on Jurisdiction, 17 June 2005; *Camuzzi International S.A. v The Argentine Republic*, ICSID Case No ARB/03/2, Decision on Jurisdiction, 11 May 2005; *National Grid plc v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, ICSID Case No ARB/03/19 and *AWG Group Ltd. v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006.

³⁸⁰ *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005 para. 223; see also *Telenor Mobile Communications AS v Republic of Hungary*, ICSID Case No ARB/04/15, Award, 13 September 2006; see also *Salini Costruttori S.p.A and Italstrade S.p.A v The Hashemite Kingdom of Jordan* ICSID Case No ARB/02/13, Decision on Jurisdiction, 15 November 2004.

³⁸¹ See *Telenor Mobile Communications AS v Republic of Hungary*, ICSID Case No ARB/04/15, Award, 13 September 2006; see also *Salini Costruttori S.p.A and Italstrade S p A v The Hashemite Kingdom of Jordan* ICSID Case No ARB/02/13, Decision on Jurisdiction, 15 November 2004; see also *Wintershall Aktiengesellschaft v Argentina Republic*, ICSID Case No ARB/04/14 Award December 8 2008.

This work supports the second group's opinion that the MFN clause should not be employed to interfere with the contracting state's intentions. It is submitted here that the position adopted in *Maffezini* case and other supporting cases is contrary to international law as it usurps the contracting state's powers. The tribunal is in essence inserting a clause which was not contemplated by the state parties. As stated earlier, the overly expansive interpretation adopted by some of the tribunals results in an unnecessary backlash against the international investment arbitration system. When the jurisdiction restrictions put in place by the parties are easily eroded by the invocation of an MFN clause, the restriction clause is rendered redundant and the parties' agreement is also unjustifiably interfered with, to say the least.

3.6.2.1.2 Divergent conclusions on the same facts and similar legal principle under the same treaty



Divergent conclusions on similar facts and similar legal principles are found in cases involving the Argentina – US BIT.³⁸² Between 2001 and 2002, Argentina faced a serious economic crisis.³⁸³ In its effort to curb the economic and social collapse, several measures were introduced by the government of Argentina. The measures affected the profitability of businesses in the country. As a result Argentina was bombarded by a flood of arbitration proceedings from foreign

³⁸² Treaty between the United States of America and the Argentina Republic Concerning the Reciprocal Encouragement and Protection of Investment of 14/11/1991, S Treaty Doc No 103 – 2 (1993); Schneiderman D 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes' (2010) 30 (2) *North-western Journal of International Law & Business* at 1; see also Burke – White W 'The Argentina Financial Crisis: State Liability under BITs and the legitimacy of the ICSID System' (2008) 3 *Asian Journal of WTO & International Health Law & Policy* 199.

³⁸³ Alvarez J and Khamsi K 'The Argentina crisis and foreign investors: A glimpse into the heart of foreign investment' in Sauvant K (ed.) *The Yearbook on International Investment law and Policy* (2009) 373.

investors.³⁸⁴ Over 50 cases have been filed before the International Centre for the Settlement of Investment Disputes (ICSID).³⁸⁵ Most of these cases were filed in accordance with the US – Argentina BIT. Differently constituted tribunals have rendered awards which contradict each other. *CMS Gas Transmission Company v The Argentine Republic*³⁸⁶ and *LG&E Energy Corp LG&E Capital Corp and LG&E International Inc v Argentine Republic*³⁸⁷ provide examples of the opportunity for and consequences of inconsistent awards. Most surprising is that one arbitrator sat in both the *CMS* and *LG&E* cases but the two awards contradict each other on whether it was appropriate for Argentina to invoke emergency measures and declare the state of emergency.³⁸⁸

The facts of the two cases are to a large extent identical and arose out of the same emergency measures taken by Argentina. To avoid repetition and for the sake of clarity, only the facts of *CMS v Argentina* are discussed.

In 1989 Argentina introduced economic reforms which resulted in the privatisation of state corporations.³⁸⁹ The reform involved the enactment of several laws including Law No 23.928 on currency convertibility of 1991 and Decree No. 2128/91 which fixed the Argentina peso at par

³⁸⁴ Alvarez J and Khamsi K ‘The Argentina crisis and foreign investors: A glimpse into the heart of foreign investment’ in Sauvant K (ed.) *The Yearbook on International Investment law and Policy* (2009) at 374.

³⁸⁵ Burke – White W ‘The Argentina Financial Crisis: State Liability under BITs and the legitimacy of the ICSID System’ (2008) 3 *Asian Journal of WTO & International Health Law & Policy* at 200.

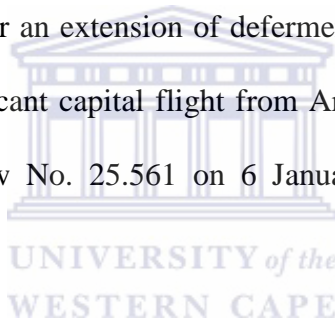
³⁸⁶ *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8.

³⁸⁷ *LG&E Energy Corp LG&E Capital Corp and LG&E International Inc v Argentine Republic* ICSID ARB/02/1.

³⁸⁸ Alvarez J and Khamsi K ‘The Argentina crisis and foreign investors: A glimpse into the heart of foreign investment’ in Sauvant K (ed.) *The Yearbook on International Investment law and Policy* (2009) 373 explaining in footnote 7 that H.E Judge Francesco Rezek sat in *CMS* and *LG&E*.

³⁸⁹ *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8. para 53.

with the US dollar.³⁹⁰ In addition, these laws required the formation of companies which were to be jointly owned by the state and the private sector. As a result, TGN was formed as one of the state companies for gas transportation in Argentina. CMS's participation in TGN started in 1995 through the purchase of 25% of the shares of the company.³⁹¹ Towards the end of 1990s Argentina encountered a severe economic crisis which forced the government to call a meeting with the representatives of gas companies to negotiate the suspension of the US Producer Price Index (PPI) of the gas tariff. It was agreed in the meeting to suspend the PPI for the period of six months only. It was further agreed that the affected parties would recoup the loss between July 2000 and April 2001.³⁹² However, the crisis deepened and the government failed to implement the agreement, instead, it called for an extension of deferment to June 2002.³⁹³ In late 2001 the crisis deepened further and significant capital flight from Argentina followed resulting into the enactment of the Emergency Law No. 25.561 on 6 January 2002 which declared a public emergency until 10 Dec 2003.³⁹⁴



Most of the cases facing Argentina today emanated from the implementation of the Emergency Law. The Argentina currency (peso) was devalued and new exchange rates were applied to different transactions. The right of licensees' of public utilities right to adjust tariffs in accordance with the US PPI was terminated as well as the calculation of tariffs in USD.³⁹⁵ The US PPI was denominated at the rate of one Peso to one USD.

³⁹⁰ *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8. para 53.

³⁹¹ *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8. Para 58.

³⁹² *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8. para 59 & 60.

³⁹³ *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8. para 61.

³⁹⁴ *CMS v Argentina* Para 64.

³⁹⁵ *CMS v Argentina* Para 65.

CMS, just like many other foreign companies, instituted a claim against Argentina in accordance with the US – Argentina BIT. The claimant argued that it had invested heavily in the project of gas transportation to the tune of 1.17 billion USD.³⁹⁶ It alleged further that the measures taken by the government between 1999 and 2002 had severely affected its investment. It contended that its shares had dropped by 92%.³⁹⁷ In addition the claimant submitted that the measures taken by Argentina were in violation of its commitment to investors and contrary to the US – Argentina BIT.³⁹⁸ They argued that the measure violated a number of obligations under the BIT.³⁹⁹

In its defence, Argentina based its argument on Article 25 of the International Law Commission Articles on State Responsibility to argue that its measures were adopted to safeguard essential economic interests. It further relied on Article XI of the BIT (emergency clause) that allowed Non - Precluded Measures (NPM) (i.e measures which are necessary for the maintenance of public order, restoration of international peace or security, and the protection of its own essential security interests). The Tribunal held that the defence of necessity advanced by Argentina was not applicable under the circumstances and found Argentina liable.⁴⁰⁰

³⁹⁶ *CMS v Argentina* Para 68.

³⁹⁷ *CMS v Argentina* Para 69.

³⁹⁸ *CMS v Argentina* Para 88.

³⁹⁹ The claimant alleged Expropriation without compensation contrary to Article IV; fair and equitable treatment contrary to Article II (2) (a); arbitrary and discriminatory contrary to Article II (2) (b); and failure to honour an umbrella clause contrary to Article II (2) (c).

⁴⁰⁰ *CMS v Argentina* para 304 -382.

The Tribunal further held that the defence of necessity is an exceptional one and needs to be invoked only when its preconditions are met. The Tribunal further held that the state cannot invoke the defence of necessity if there are other means available to overcome the difficulties, regardless of how costly or less convenient they could be. It further found that Argentina partly contributed to the emergency situation and hence could not benefit from its own fault.

Although the Tribunal agreed that there could have been an emergency situation in Argentina, it concluded that the suspension of an obligation ceases when the emergency situation ends, and the state becomes liable for what happened during the emergency period.

On the other hand, the *LG&E* Tribunal also found that by changing the very legal framework which was put in place to attract foreign investors, Argentina was in breach of fair and equitable treatment contrary to the US – Argentina BIT.⁴⁰¹ However, the Tribunal differed with *CMS* Tribunal as it found that the guarantees provided in the BIT are subject to the existence of the member state itself. The Tribunal held that where the guarantees threaten the existence of the country itself, such a country has the right to suspend its obligations under the BIT, and any international law obligation, if such suspension is necessary for its existence.⁴⁰²

It is submitted here that the *CMS* Tribunal's interpretation of the BIT was too narrow and rendered the emergency exception futile. The US- Argentina BIT intended to accord to member states powers to rely on the exception of a critical situation just like the one in which Argentina

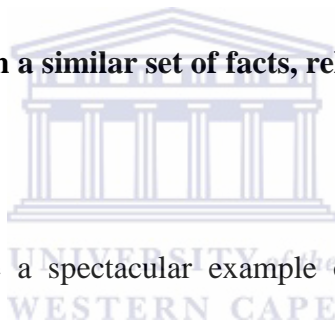
⁴⁰¹ *CMS* para 275 and 281, see also *LG&E* para 139.

⁴⁰² *LG&E* para 124.

found itself. On the other hand, one finds that *LG&E* Tribunal properly accorded considerable deference to Argentina's policy choices and reactions.⁴⁰³

In conclusion, one can say that the above contradictions show that tribunals have no guidance for interpretation of the key rights provided in the BITs. Each tribunal use its mandate to come up with its own conclusion about the scope of the rights stipulated in a particular BIT. Under the current framework, the options for addressing these inconsistent decisions are very limited.

3.6.2.1.3 Divergent conclusions on a similar set of facts, related parties and similar legal norms



The following two cases 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 *Lauder v Czech Republic* and *CME v Czech Republic* a United States investor Ronald Lauder submitted two separate but almost identical claims⁴⁰⁴ in respect of a media joint venture project in the Czech Republic. One claim was submitted in accordance with the U S - Czech treaty in his own name on the basis of his nationality,⁴⁰⁵ and the other claim under the Netherlands-Czech

⁴⁰³ Burke – White W ‘The Argentina Financial Crisis: State Liability under BITs and the legitimacy of the ICSID System’ (2008) 3 *Asian Journal of WTO & International Health Law & Policy* at 199 at 201.

⁴⁰⁴ *CME Czech Republic BV v The Czech Republic* ICSID Reports, para 412.

⁴⁰⁵ *Lauder v The Czech Republic*, 9 ICSID Reports 66 para 142.

BIT on behalf of his investment, the Dutch incorporated CME Czech Republic B V.⁴⁰⁶ Though legally speaking CME was a separate legal person, Lauder was the majority shareholder of the company and hence controlled it. The two claims related to Lauder's contention that the two companies (under his control) were squeezed out of a successful and highly profitable broadcasting business due to actions and omissions of a state regulatory body called the Czech Media Council.⁴⁰⁷

The facts in brief were that in 1991 the Czech Republic changed its media law to allow private radio and TV broadcasting.⁴⁰⁸ In accordance with the media law, the media council was established with the duty, among others, to regulate, issue licences and supervise radio and TV broadcasting.⁴⁰⁹ A local company, CET 21, under a local, Mr. Zelezny, entered into an agreement with a German company, CEDC, to acquire a TV licence jointly on the basis that CEDC would provide capital for the formation of a TV station. CEDC was partly controlled by Mr. Lauder, a US citizen. It was further agreed that CET 21 would apply for a licence which would be used exclusively by the newly formed TV station jointly owned by the parties.⁴¹⁰ The media council issued a licence to CET 21 on 30 January 1993. At a later stage the parties agreed to form a Czech company, CNTS, which would manage the to be formed TV station. The TV station was formed as agreed by the parties, named TV Nova, and operated very successfully.⁴¹¹ In 1994 CEDC assigned all its interests in CNTS to CME Media, a Dutch company which was

⁴⁰⁶ *Lauder v The Czech Republic*, 9 ICSID Reports 66 para 143.

⁴⁰⁷ *Lauder v The Czech Republic*, 9 ICSID Reports 66 para 42.

⁴⁰⁸ *Lauder v The Czech Republic*, 9 ICSID Reports 66 para 43.

⁴⁰⁹ *Lauder v The Czech Republic*, 9 ICSID Reports 6 Para 44.

⁴¹⁰ *Lauder v The Czech Republic*, 9 ICSID Reports 66 para 46 – 60.

⁴¹¹ *Lauder v The Czech Republic*, 9 ICSID Reports para 69.

also controlled by Lauder.⁴¹² The problem started when the media law was amended barring the use of the CET 21 TV licence by CNTS. On 23 May 1996 in a meeting facilitated by the media council an agreement was entered into declaring that the licence was to be used by CET 21 and not CNTS.⁴¹³ On 23 July 1996, the media council commenced administrative proceedings against CNTS alleging that it had contravened the law by continuing to operate a TV station without a licence.⁴¹⁴ All this was perpetuated by CET 21 after the CNTS board decided to dismiss Mr Zelezny from the Director General position at CNTS.⁴¹⁵ The media council revoked the CNTS TV programs.⁴¹⁶

The two disputes started when the government revoked CNTS's TV licence. Lauder initiated the arbitration proceedings against the Czech Republic, in accordance with the US-Czech Republic BIT, while *CME* instituted the arbitration proceedings on the basis of the Netherlands-Czech Republic BIT.⁴¹⁷ Lauder's interest in both cases is due to the fact that he owned 30% of shares of CME - Netherlands which in turn owned the majority of the shares (99%) of a Czech TV company (CNTS).⁴¹⁸ Each claim alleged the same violations of treaty provisions including, but not limited to; fair and equitable treatment, full protection and security and expropriation. These provisions in the two Treaties were almost identical.⁴¹⁹

⁴¹² *Lauder v The Czech Republic*, 9 ICSID Reports 66 para 77.

⁴¹³ *Lauder v The Czech Republic*, 9 ICSID Reports 66 para 93.

⁴¹⁴ *Lauder v The Czech Republic*, 9 ICSID Reports 66 para 97.

⁴¹⁵ *Lauder v The Czech Republic*, 9 ICSID Reports 66 para 136 - 141.

⁴¹⁶ *Lauder v The Czech Republic*, 9 ICSID Reports 66 para 136.

⁴¹⁷ *Lauder v The Czech Republic*, 9 ICSID Reports 66 para 142 & 143.

⁴¹⁸ *CME Czech Republic BV v The Czech Republic* ICSID Reports para 5.

⁴¹⁹ *Lauder v The Czech Republic*, 9 ICSID Reports para 42.

The *Lauder* final award was rendered on September 3, 2001, ruling in favour of the Czech Republic and denying all claims for damages.⁴²⁰ The *CME* award followed ten days later, on 13 September 13, 2001, with the majority of the panel holding in favour of the claimant. The two tribunals reached the same conclusion on whether the Czech Republic through the media council, had been arbitrary and discriminatory. This was the only issue on which the two Tribunals had a consensus.⁴²¹ On the issue of expropriation the *Lauder* Tribunal ruled that there was no expropriation at any time while the *CME* Tribunal ruled that there was.⁴²² The third issue under consideration was whether there was a breach of the requirement for fair and equitable treatment. The *Lauder* Tribunal found no breach, while the *CME* tribunal found that there was a breach by the Czech Republic.⁴²³ On the last issue, whether the investment was accorded full protection, the *Lauder* Tribunal held that the protection was accorded, while the *CME* Tribunal found that the Czech Republic had breached that obligation.⁴²⁴ On 14 March 2003, the *CME* Tribunal issued a substantial total damages award in favour of CME for \$354,655,752 USD.

It has been submitted that the contradictory results of the two *Lauder* cases has primarily had one effect: 'it brings the law into disrepute, it brings arbitration into disrepute - the whole thing is

⁴²⁰ *Lauder v The Czech Republic*, 9 ICSID Reports para 222 - 232.

⁴²¹ See *Lauder v The Czech Republic*, 9 ICSID Reports para 222 and *CME Czech Republic BV v The Czech Republic* ICSID Reports para 612.

⁴²² See *Lauder v The Czech Republic*, 9 ICSID Reports r para 201 and *CME Czech Republic BV v The Czech Republic* ICSID Reports para 609.

⁴²³ See *Lauder v The Czech Republic*, 9 ICSID Reports para 293 and *CME Czech Republic BV v The Czech Republic* ICSID Reports para 611.

⁴²⁴ See *Lauder v The Czech Republic*, 9 ICSID Reports para 309 and *CME Czech Republic BV v The Czech Republic* ICSID Reports para 613.

highly regrettable.⁴²⁵ One can easily see that, had the two cases been consolidated and heard by a single tribunal, there would not have been two divergent conclusions.

3.6.2.2 Parallel proceedings problem

Another problem with the current arbitration system is that it allows forum shopping which leads to parallel proceedings which in turn results in conflicting decisions.⁴²⁶ The earlier discussed *Lauder* and *CME* cases offer a good illustration of this issue.⁴²⁷ Investors could have different available remedies against host states, both under the contract entered into with the state authorities, and under the applicable BIT. Nothing prevents both contract and treaty claims to be brought simultaneously by the same investor, in different proceedings.⁴²⁸ An investor may commence an arbitration proceeding under a contractual arbitration clause providing for arbitration under the arbitral rules of the International Chamber of Commerce (ICC) or the UNCITRAL Arbitration Rules against a sovereign,⁴²⁹ or decide to utilise the avenue available under the BIT and file a case with the ICSID or ICSID Additional Facility.⁴³⁰ In both scenarios the investor will have the right to do so as the rights have accrued from different instruments.

⁴²⁵ See D'Agostino J & Jones O 'Energy Charter Treaty: A Step towards Consistency in International Investment Arbitration?' (2007) 25 *Journal of Energy and Natural Resources Law* 225 at 229.

⁴²⁶ Reinisch A 'The Issues Raised by Parallel Proceedings and Possible Solutions' in Waibel M et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 113- 126 at 114

⁴²⁷ See *Lauder v The Czech Republic*, 9 ICSID Reports and *CME Czech Republic BV v The Czech Republic* ICSID Reports.

⁴²⁸ Cremades BM & Madalena I 'Parallel Proceedings in International Arbitration, (2008) 24 *Arbitration International* 509.

⁴²⁹ Kreindler R 'Parallel Proceedings: A Practitioner's Perspective' in Waibel M et al (eds.) *The Backlash against Investment Arbitration* 128 (2010) 128 – 150.

⁴³⁰ Reinisch A 'The Issues Raised by Parallel Proceedings and Possible Solutions' in Michael Waibel et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 113- 126 at 114.

*Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*⁴³¹ is another good example to illustrate investment parallel proceedings in different fora involving the same parties on matters arising out of the same transaction.

The facts in brief were that in 2003 a British-German joint venture - Biwater Gauff Tanzania (hereinafter BGT) won a bid from the World Bank to renovate and upgrade the water system in the city of Dar es- Salaam, Tanzania.⁴³² The management and supply of water in the city deteriorated soon after the project started. It was learnt later that BGT was in financial difficulties and would not be able to finish the project on time. It then approached the government of Tanzania for the purposes of renegotiating the contract.⁴³³ The government of Tanzania refused to negotiate and decided to take charge of the management and the supply of water in the city.⁴³⁴ BGT was aggrieved by the government move and decided to institute a claim at ICSID pursuant to Tanzania – UK BIT alleging Tanzania action were contrary to UK – Tanzania BIT.⁴³⁵

In another move, BGT through its subsidiary Company, City Water Tanzania Ltd, initiated another proceeding under UNCITRAL Rules before a separate tribunal alleging that Tanzania breached its obligations under the project contract.⁴³⁶ Therefore there were two proceedings concurrently running against the same respondent in relation to the same dispute. In December 2007, the Tribunal under UNCITRAL Arbitration Rules rejected BGT's claim and instead

⁴³¹ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No. ARB/05/22 (2008).

⁴³² See *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No. ARB/05/22 (2008), para 3.

⁴³³ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* para 789.

⁴³⁴ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* para 15.

⁴³⁵ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* para 205.

⁴³⁶ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* para 476 - 478.

awarded three million Pounds to Tanzania.⁴³⁷ A year later the ICSID Tribunal also rendered its decision. While no compensation was awarded in the end, the Tribunal held Tanzania liable for breaching the BIT but awarded no damages to the claimant.

In this scenario it is likely for multiple inconsistent awards to be rendered and multiple enforcement proceedings by the same claimant against the same respondent. Furthermore, under the current system there is the possibility of multiple arbitrations and local court proceedings in parallel with identical parties. In the *Lauder* cases discussed above, there were parallel arbitration proceedings running under UNCITRAL Rules, at the same time there was another arbitration proceeding filed under ICC Rules and other numerous court cases in the Czech Republic courts and one in the US pertaining almost the same dispute.⁴³⁸ In this scenario it is likely for multiple inconsistent awards to be rendered and multiple enforcement proceedings to take place.

Under the current structure, where there is no mutual coordination between the respective institutions, parallel proceedings problem will not go away. Worse enough, the rules of both institutions ICSID and UNCITRAL do not provide for consolidation of proceedings.

⁴³⁷ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* para 477.

⁴³⁸ See *Lauder v The Czech Republic*, 9 ICSID Reports Para 143.

It is submitted that the multiplicity of avenues for claimants is unfair to the respondent states which most of the time turn out to be developing countries.⁴³⁹ The consequences of multiplied proceedings are dire especially for poor countries. If it loses the cases, it will be required to pay costs and damages in both. In addition to that, multiplied proceedings add up to the backlash as a result of conflicting decisions.⁴⁴⁰ It is high time now for the system to find ways of avoiding these unnecessary complications and uncertainties.⁴⁴¹ Chapters five and six of this work deals with the possible solutions to the above discussed systemic issues.

3.6.2.3 Lack of institutional safeguards for the independence and impartiality of adjudicators

The third challenge facing the current investment arbitration system is the lack of institutional safeguards for the independence and impartiality of adjudicators.⁴⁴² The UNCTAD World Investment Report 2012 clearly indicates that among the concerns in investor – state dispute settlement is the issue of impartiality and quality of arbitrators.⁴⁴³ The Report states that there is an emergence of ‘club’ of individuals who serves as counsels in some cases and arbitrators in others, often receiving repeated appointments thereby raising concerns about potential conflict of

⁴³⁹ Reinisch A ‘The Issues Raised by Parallel Proceedings and Possible Solutions’ in Michael Waibel et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 113- 126 at 114

⁴⁴⁰ Reinisch A ‘The Issues Raised by Parallel Proceedings and Possible Solutions’ in Waibel M et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 113- 126 at 114

⁴⁴¹ Reinisch A ‘The Issues Raised by Parallel Proceedings and Possible Solutions’ in Waibel M et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 113- 126 at 114

⁴⁴² See Bernasconi – Osterwalder N et al ‘Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel’ (2010) *International Institute for Sustainable Development (IISD)* at http://www.iisd.org/pdf/2011/dci_2010_arbitrator_independence.pdf accessed on 11/08/2013; see also Van Harten G ‘Five Justifications for Investment Treaties: A Critical Discussion’ (2008) *Trade Law & Development I*; see also Van Harten G *Investment Treaty Arbitration and Public Law* (2007) at 168.

⁴⁴³ UNCTAD *World Investment Report* ‘Towards a New Generation of Investment Policies’ 2012 at 88 available at http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx, accessed on 25/05/2013

interests.⁴⁴⁴ In addition, studies conducted recently reveal that 12 arbitrators have been repeatedly appearing in over 60% of all ICSID cases. This is to say that the ICSID jurisprudence is dominated by few select arbitrators. While that can be said to be an advantage for the purpose of consistency, it becomes a problem as the same group is appearing as counsels, mostly for the state parties in other cases.⁴⁴⁵ The study indicates that 50% of arbitrators on the current ICSID roster have appeared as counsel for investors elsewhere.⁴⁴⁶ It is hard to conclude that a person who serves both sides can be independent and impartial.⁴⁴⁷

The duo role problem was a hot issue in *ICS v Argentina* case.⁴⁴⁸ In this UNCITRAL case Argentina challenged the claimant's appointment of Mr Alexandrov on the ground that Mr. Alexandrov and his law firm were representing the Argentina adverse party as counsels in another pending case *Compania de Aguas del Aconqu Se and Vivendi SA v. Argentine Republic*.⁴⁴⁹ While admitting that to be the fact Mr Alexandrov refused to resign voluntarily from this appointment and stated;

⁴⁴⁴ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2012* 'Towards a New Generation of Investment Policies' at 88 available at http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx, accessed on.

⁴⁴⁵ Gaukrodger D and Gordon K 'Investor-state dispute settlement: A scoping paper for the investment policy community', *OECD Working Papers on International Investment*, No. 2012/3, (2012) OECD Investment Division at p. 44 available at <http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/50291642.pdf>

⁴⁴⁶ Gaukrodger D and Gordon K 'Investor-state dispute settlement: A scoping paper for the investment policy community', *OECD Working Papers on International Investment*, No. 2012/3, (2012) OECD Investment Division at p. 44; see also Commission J 'Precedent in Investment Arbitration: A Citation Analysis of Developing Jurisprudence' (2007) *Journal of International Arbitration* 129 – 58.

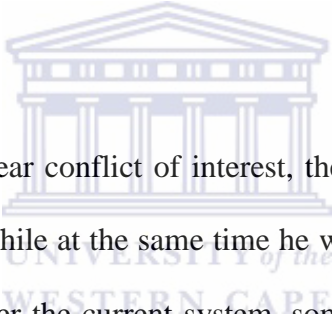
⁴⁴⁷ See Bernasconi – Osterwalder N et al 'Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel' (2010) *International Institute for Sustainable Development (IISD)* at 1 available at http://www.iisd.org/pdf/2011/dci_2010_arbitrator_independence.pdf accessed on 11/08/2013.

⁴⁴⁸ *ICS Inspection and Control Services Limited v The Republic of Argentina* Decision on challenge to Mr. Stanimir A. Alexandrov December 17, 2009 available at <http://www.italaw.com/sites/default/files/case-documents/ita0415.pdf>

⁴⁴⁹ ICSID Case No. ARB/97/3'

‘My firm and I personally are involved in the ICSID case of *Compania de Aguas del Aconqu Se and Vivendi SA v. Argentine Republic*, ICSID Case No. ARB/97/3 where my firm and I represent Claimants and are adverse to the Argentine Republic. The subject matter of the Vivendi dispute is not related to the subject matter of this case... I do not believe that these circumstances affect my impartiality and independence as an arbitrator in this case.’⁴⁵⁰

The appointing authority upheld Argentina objection and held that the appointed arbitrator was in a situation of adversity towards Argentina, a situation that is often a source of justified concerns and ought to be avoided.⁴⁵¹



One can see that, despite of the clear conflict of interest, the appointed arbitrator was ready to serve as an arbitrator in this case while at the same time he was counsel for one of the parties in another case. This shows how under the current system, some arbitrators are only interested in making money and not serving justice.

Another issue is that the investor – state system uses party appointed arbitrators who are seen as leaning on the appointing party’s interests and hence jeopardising impartiality.⁴⁵² A study conducted in 2009 reveals that in 150 cases there were 34 dissenting opinions. All 34 dissenting

⁴⁵⁰ *ICS Inspection and Control Services Limited v The Republic of Argentina* p 2.

⁴⁵¹ *ICS Inspection and Control Services Limited v The Republic of Argentina* at p 4.

⁴⁵² See Paulsson J ‘Moral Hazard in International Dispute Resolution’ (2010) *ICSID Review - Foreign Investment Law Journal* 339; see also Van Harten G ‘A Case for International Investment Court’ *Society of International Economic Law*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424 accessed on 06/09/2013.

opinions were from the arbitrators appointed by the losing party in the cases.⁴⁵³ The study further indicates that the presiding arbitrators rarely dissent. It is astonishing to find that all of the dissenting opinion came from the arbitrator appointed by the losing party. It can be concluded here that party appointed arbitrators lacks independence and impartiality contrary to the requirement of Article 14(1) of the Convention. This trend affects the development of the investor – state jurisprudence to a great extent and is contrary to the principles of dispensation of justice without fear or favour.

Independence of the judiciary is one of the cornerstones of rule of law in the modern world and it helps a lot to legitimise the judiciary in the eyes of the public. Recognising that, many countries grant judges security of tenure and emoluments.⁴⁵⁴ It is submitted that the importance of judicial independence is also recognised in many courts and tribunals that exist beyond investor - state arbitration, including those exercising regulatory powers like international investment arbitration.⁴⁵⁵ This is the case at the European Court of Human Rights, the European Court of Justice and the Inter American Court of Human Rights.⁴⁵⁶

⁴⁵³ Van den Berg AJ ‘Dissenting Opinion by Party Appointed Arbitrators in Investment Arbitration’ in Arsanjani M *et al.* (eds.) *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2011) 821 – 843 at 824.

⁴⁵⁴ See for example Article 120 of the United Republic of Tanzania Constitution, Cap 2 R.E 2005 which guarantee security of tenure for the court of Appeal Justices and Article 145 of the same constitution guaranteeing security of emolument to Judges of the High Court and Justices of Appeal that their salaries shall be drawn from the consolidated fund, available at <http://www.judiciary.go.tz/downloads/constitution.pdf> accessed on 20/07/2013; see also Section 176 of the Constitution of the Republic of South Africa No 108 of 1996 which guarantee the security of tenure and a prohibition on any reduction of the salaries and benefits of judges, available at <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf> accessed on 20/07/2013.

⁴⁵⁵ See also Van Harten ‘Investment Treaty Arbitration, Procedural fairness and the Rule of Law’ in Schill S (ed.) *International Investment Law and Comparative Public Law*(2010) 627 at 641.

⁴⁵⁶ See the European Convention on Human Rights (ECHR) 1950 Arts. 21(3) and 23(1), Rules of European Court of Human Rights 1957, R. 4, 24(2)(e), 26(1) and 27; Code of Conduct of the European Court of Justice, Art. 5; Rules of procedure of the European Court of Justice, Arts 6, 11(b) and 11(c), statute of the Inter American Court of

Chapter five and six of this work looks at the possible avenues for improvement of impartiality and independence of the system. It is important that justice must not only be done but be seen to be done. Therefore it is important for the users of the system to have trust in the system in order for it to earn legitimacy. It is submitted here that without ending the conflict of interest of arbitrators and ensuring that the safeguards for independence and impartiality are put in place, investment arbitration will suffer a serious blow in a near future.

3.6.2.4 Lack of transparency on matters affecting the public interest

Lack of transparency is yet another shortcoming of investment arbitration. The issue of transparency has not received the weight it deserves in the existing rules. As seen in the discussion hereinabove,⁴⁵⁷ the UNCITRAL Arbitration Rules 2010 are the most restrictive in their provisions on confidentiality. According to Article 28(3) hearings are supposed to be held in camera unless the parties agree otherwise. With regard to the award, Article 34(5) provides that ‘the award may be made public only with the consent of both parties’. These rules make it clear that hearings are open to the public only if there is an agreement of the parties to this effect. However, as stated earlier, the new UNCITRAL Transparent Rules have extensively addressed the transparency issue.⁴⁵⁸ The Rules are meant to apply to all future treaties providing for

Human Rights, Arts 5, 18 and 25; Rome Statute of International Criminal Court 1998, Arts 36(9)(a), 39(1), 40(2) and (3) respectively.

⁴⁵⁷ See the discussion hereinabove under subheading 3.4.3.

⁴⁵⁸ See the discussion on the new rules under subheading 3.4.1.3.1 above

UNCITRAL arbitration unless the parties agree otherwise. The scope of application therefore extends to treaties entered into from 1 April 2014 and not for the existing 3240 BITs and IIAs.⁴⁵⁹

The ICSID Convention has, to a certain extent, addressed the issue of transparency. Article 48(5) of the ICSID Convention provides: ‘The Centre shall not publish the award without the consent of the parties.’ The Arbitration Rules, as amended in 2006, also allow the publication of excerpt from the legal reasoning of the tribunal.⁴⁶⁰ The amendment, however, did not affect the parties’ autonomy as regards the publication of the award in full. To date an award cannot be published unless the parties agree.

The amendments have also increased the opportunity for third parties to participate by way of submissions. This was done in response to the call for more transparency of the hearing. Article 37(2) allows non - disputing party submission subject to the tribunal discretion. The tribunal is left with the mandate to accept or reject the third party submissions. The amendment covered only written submissions. A non - disputing party therefore is not eligible for oral hearing. Rule 32(2) of the ICSID Arbitration Rules gives the parties the power to allow or refuse third parties to attend or observe the hearings.⁴⁶¹

⁴⁵⁹ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2014* ‘investing in the SDGs: An Action Plan’ at xxiii available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

⁴⁶⁰ See Rule 48(4) of the Arbitration Rules and Article 48(5) of the Convention; see also Asteriti A & Tams CJ ‘Transparency and Representation of the Public Interest in Investment Treaty Arbitration’ Schill (ed.) *International Investment Law and Comparative Public Law* (2010) 788 at 790; see also Mistelis LA ‘Confidentiality and Third Party Participation in Investment Arbitration’ (2005) 21 *Arbitration International* 205 at 221.

⁴⁶¹ For more discussion see Asteriti A & Tams CJ ‘Transparency and Representation of the Public Interest in Investment Treaty Arbitration’ Schill S (ed.) *International Investment Law and Comparative Public Law* (2010) 787 at 794.

Currently, the inclusion of non – party submissions has taken place in ICSID arbitration only. Other institutions are yet to take the comparable step. With exception of NAFTA arbitration, the non-institutional ad hoc arbitration under the UNCITRAL Rules continues to operate with strict confidentiality and no admission of third parties to hearing and award.⁴⁶²

It is submitted here that confidentiality affects, to a large extent, the striving for legitimisation of the investor – state dispute settlement system. As the hearing and the awards are not always published, people do not know what cases have been decided and how the law was applied. Transparency creates legal certainty in the form of assuring that all cases are treated equally.⁴⁶³ It thus ensures predictability for its actual and potential users which in turn increases the confidence in the system of dispute settlement.⁴⁶⁴ Transparency can also be an important tool towards the goal of achieving consistent case law. The relevancy of transparency is even higher in investment disputes which regularly concern governmental measures.⁴⁶⁵

Therefore, by looking at these provisions one can see that with the current state of confidentiality it is difficult for the current systems to gain public sympathy. It is important that the investor – state system should be transparent by allowing public access to relevant documents especially

⁴⁶² Asteriti A & Tams CJ ‘Transparency and Representation of the Public Interest in Investment Treaty Arbitration’ in Schill C (ed.) *International Investment Law and Comparative Public Law* (2010) 787 at 794.

⁴⁶³ Choudhury B ‘Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest contributing to the Democratic Deficit?’ (2008) 41 *Vanderbilt Journal of Transnational Law* 775 at 809; see also Spooreberg F& Vinuales V ‘conflicting decisions in International Arbitration’ *Law & Practice of International Courts & Tribunals* (2009) 91 – 113 at 107.

⁴⁶⁴ Choudhury B ‘Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest contributing to the Democratic Deficit?’ (2008) 41 *Vanderbilt Journal of Transnational Law* 775 at 810.

⁴⁶⁵ Knahr C and Reinisch A ‘Transparency v Confidentiality in International Investment Arbitration – the Biwater Gauff Compromise’ *Law & Practice of International Courts & Tribunals* (2007) 97 at 115.

when the matter at hand affects public interest. Chapters five and six of this work discuss the possible ways of enhancing transparency in the international investment arbitration system.

3.6.2.5 Lack of an appellate body

As stated earlier, the current investment arbitration system does not provide for the right of appeal.⁴⁶⁶ The absence of an appellate body charged with rectifying errors made by the tribunal puts investment arbitration in a deep legitimacy crisis.⁴⁶⁷ Although the arbitral awards affect legislative, judicial and executive decisions, it is not possible to challenge the decision before a higher body in the hierarchy.⁴⁶⁸ Under the current system, decisions that are wrong as a matter of law are not reversible.⁴⁶⁹ The *CMS* Annulment Committee, which found an erroneous interpretation of Article XI of the BIT (the non - precluded measures clause) still upheld the award, noting that it has no standing as a court of appeal and thus could not reconsider the award on this ground. The Committee held:

⁴⁶⁶ See Chapter One of this work under Subheading 1.2.

⁴⁶⁷ See also Reinisch A 'The proliferation of international Dispute Settlement Mechanisms: The threat of fragmentation vs. The promise of more effective system? Some reflections from the perspective of investment arbitration' in Buffard *et al* (eds.) *International Law Between Universalism and Fragmentation* (2008)107 – 126 at 119; Spooreberg F& Vinuales V 'conflicting decisions in International Arbitration' *Law & Practice of International Courts & Tribunals* (2009) 91 – 113at 95; Franck S 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521 at 1582; Mann H 'Civil Society Perspective: what Do Key Stakeholders Expect from the International Investment Regime?' in Jose Alvarez and Karl Sauvant (eds.) *The Evolving International Investment Regime* (2011) 22 – 29; Gaiger R 'Multilateral Approach to Investment' in Alvarez J and Sauvant K (eds.) *The Evolving International Investment Regime* (2011) 153-173; Reinisch A 'The Future of Investment Arbitration' in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894 – 916 at 483 – 488.

⁴⁶⁸ Mann H 'Civil Society Perspective: what Do Key Stakeholders Expect from the International Investment Regime?' in Alvarez J and Sauvant K (eds.) *The Evolving International Investment Regime* (2011) 22-29 at 22.

⁴⁶⁹ See ICSID Art. 53 specifically provide that the decision of the tribunal shall be final and shall not be subjected to appeal.

‘Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers.’⁴⁷⁰

In a normal appeal hearing, once the appellate court has concluded as the Annulment Committee did, then certainly the decision will be quashed and replaced by the appeal court’s decision. The Annulment Committee found errors but could not rectify them as doing so would be going beyond its mandate. The Committee expressed the jurisdictional differences which exist between an annulment committee and an appellate court. The Committee observed that if it was acting as a court of appeal, it would have to reconsider the award on the ground that the Tribunal gave an erroneous interpretation to Article XI.⁴⁷¹

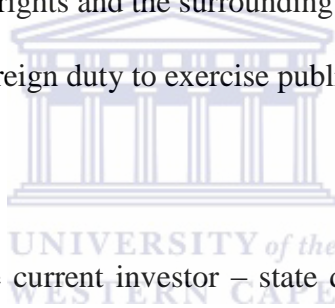
It is submitted here that as these cases often touch upon vital matters of social policy, sovereignty and even democracy, and for both sides, millions and sometimes hundreds of millions of dollars are at stake, there is a need for a higher body in the hierarchy to rectify errors made by tribunals and thereby create certainty in international investment arbitration law. Chapters five and six of this work looks at the available appellate options and analyse critically which one is suitable for international investment law.

⁴⁷⁰ *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8 (2005) Annulment Committee at paras 135-156.

⁴⁷¹ *CMS Gas Transmission Company v Argentina* ICSID Case No ARB/01/8 (2005) para 135.

3.6.2.6 Tribunals' encroachment on government policy making space

While it is the duty of the host state to protect foreign investment, the protection, it is submitted, should not hinder the host states wider policy objectives' interests. There is a need to strike a balance between the foreign investor interests and other social values. Foreign investment should not be considered as the only means for the host state's development. Foreign investment rules, therefore, should not operate to constrain the state's ability to regulate both investment matters and other social values which also aim at the development of the host state. That is to say, the host state in its sovereign capacity should be able to make rules and adopt measures which aim at protecting society's health, human rights and the surrounding environment. By so doing, the state will be legally discharging its sovereign duty to exercise public authority.⁴⁷²



Unfortunately, however, under the current investor – state dispute settlement system, the state has lost the policy space it enjoyed under the principle of state sovereignty. State regulatory measures are being questioned by the privately constituted tribunals.⁴⁷³ The 2009 and 2010 Annual Reports of the Special Representative of the UN Secretary General on the Issues of Human Rights, Transnational Corporations and Other Business Enterprises highlight the

⁴⁷² See Van Harten G & Loughlin M 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) *European Journal of International Law* 121 at 123; see also Spear S 'The Quest for Policy Space in a New Generation of International Investment Law' (2010) 13 *Journal of International Economic Law* 1037 at 1038; see also Salacuse J 'Toward a Global Treaty on Foreign Investment: The Search for a Grand Bargain' in N. Horn (ed.), *Arbitrating Foreign Investment Disputes* (2004), at 68–70; see also Mann H 'The Right of State to Regulate and International Investment Law: A Comment' in UNCTAD *The Development Dimensions of FDI: Policy and Rule Making Perspective* 2003 at 216; see also Waelde T & Kolo A 'Environmental Regulation, Investment Protection and Regulatory Taking in International Law' (2004) *International Comparative Law Quarterly* 811 - 848 at 811; see also Kingsbury B 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality' in Schill S (ed.) *International Investment Law and Comparative Public Law* (2010) 76 – 118.

⁴⁷³ Van Harten G & Loughlin M 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) *European Journal of International Law* 121 at 128.

implication of the current investor – state dispute settlement system to government ability to achieve its legitimate policy objectives. The relevant paragraph reads:

‘[R]ecent experience suggests that some [investment] treaty guarantees and contract provisions may unduly constrain the host Government’s ability to achieve its legitimate policy objectives, including its international human rights obligations. That is because under threat of binding international arbitration, a foreign investor may be able to insulate its business venture from new laws and regulations, or seek compensation from the Government for the cost of compliance.’⁴⁷⁴

Most BITs only provide for the protection of investor interests without addressing other social values. Recently a good number of decided cases challenge the host state’s basic regulatory functions and sometimes the state’s duty to provide public services for its citizens.⁴⁷⁵ In some cases the main function of the state, viz security and peace, is also challenged.⁴⁷⁶ Furthermore, state regulatory measures on environmental issues, health and other service delivery to citizens have been declared illegal in favour of foreign investors’ interests.⁴⁷⁷ Following hereunder is a

⁴⁷⁴ Report of the SRSG, Business and Human Rights: *Towards Operationalizing the ‘Protect, Respect and Remedy’ Framework* A/HRC/11/13, para 30 (2009); See also, Report of the SRSG, Business and Human Rights: *Further Steps Towards the Operationalization of the ‘Protect, Respect and Remedy’ Framework* A/HRC/14/27, paras 20–23 (2010), the reports can be accessed at <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> accessed on 9/08/2013.

⁴⁷⁵ *Biwater Gauff Tanzania v United Republic of Tanzania*, ICSID Case No ARB/05/22 and *Azurix Corp v Argentina* ICSID ARB/1/12 2006 (both cases concerned governed measures to protect water services).

⁴⁷⁶ See *CMS v Argentina*, *Sempra v Argentina*, *Enron v Argentina*, *LG&E v Argentina* respectively as discussed hereinabove under the sub heading 3.6.2.1.2.

⁴⁷⁷ See *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12 in which the claimant is suing the government of Australia for enacting a legislation which require plain cigarette packaging on public health reasons; See also *Vattenfall AB and others v Federal Republic of Germany* ICSID Case No ARB/12/12. The case is commenced by Vattenfall against Germany as a result of Germany’s nuclear opt-out decision to protect the environment and health.

discussion of cases in which the arbitral tribunals have encroached on the states' regulatory powers.

There are a number of cases in which the Tribunals have declared or are being asked to declare that legitimate state regulatory acts are invalid. One of these cases is *Philip Morris Asia Ltd v The Commonwealth of Australia*.⁴⁷⁸ In June 2011, Philip Morris Asia Limited (based in Hong Kong), a manufacturer, importer and distributor of cigarettes, commenced an investment treaty claim against Australia alleging that Australia's plain cigarette packaging legislation, (the Plain Packaging Act 2011) contravenes the Australia – Hong Kong BIT.⁴⁷⁹

The Tobacco Plain Packaging Act 2011 bans the use of cigarette companies' logos on cigarette packets and replaces them with health warnings.⁴⁸⁰ The names of the cigarette companies are required to appear in the same font and size as other words on the cigarette packets.

The claimant, Philip Morris Asia Limited, argues that the law is depriving it of the value of its investment in trademarks and other intellectual property in Australia and that this is tantamount to expropriation.⁴⁸¹ The claim is essentially based on expropriation of intellectual property without compensation under Article 6 of the Australia-Hong Kong BIT and a breach of fair and

⁴⁷⁸ *Philip Morris Asia Ltd v The Commonwealth of Australia* UNCITRAL, PCA Case No. 2012 – 12 available at <http://www.italaw.com/cases/851> accessed on 6/08/2013.

⁴⁷⁹ See *Philip Morris Asia Ltd v The Commonwealth of Australia* para 6 of the Notice of Claim under the Australia – Hong Kong Agreement dated 27/06/2011 available at <http://www.italaw.com/sites/default/files/case-documents/ita0664.pdf> accessed on 6/08/2013; see also the Notice of Arbitration para 1.2 available at <http://www.italaw.com/sites/default/files/case-documents/ita0665.pdf> accessed on 06/08/2013.

⁴⁸⁰ See *Philip Morris Asia Ltd v The Commonwealth of Australia*, Notice of Arbitration para 1.5 available at <http://www.italaw.com/sites/default/files/case-documents/ita0665.pdf> accessed on 06/08/2013.

⁴⁸¹ See *Philip Morris Asia Ltd v The Commonwealth of Australia*, Notice of Arbitration para 1.5 – 1.7.

equitable treatment under Article 2(2) of the Australia-Hong Kong BIT.⁴⁸² The claimant is therefore asking the Tribunal to order Australia to suspend enforcement of the Plain Packaging Act and to compensate the claimant for loss suffered through compliance. Alternatively, the claimant asks the Tribunal to order Australia to compensate it for loss suffered as a result of the enactment and continued application of plain packaging legislation.⁴⁸³

The case is still pending and is to be adjudicated in accordance with UNCITRAL Rules 2010.⁴⁸⁴ As can be gathered from the claimant's pleadings, the Tribunal is asked to suspend the application of the law which was passed in accordance with the state's regulatory powers. The legislation aims at protecting health, and is in line with the World Health Organisation (WHO) Framework Convention on Tobacco Control.⁴⁸⁵ Therefore Australia is not only protecting its citizens' health but also fulfilling its international obligations.

Another case is *Vattenfall AB and others v. Federal Republic of Germany*.⁴⁸⁶ In May 2012 the Swedish energy company Vattenfall filed a request for arbitration at ICSID against the Republic of Germany and the Tribunal was duly constituted on 14 December 2013.⁴⁸⁷ The case resulted

⁴⁸² *Philip Morris Asia Ltd v The Commonwealth of Australia*, Notice of Arbitration para 1.5

⁴⁸³ See *Philip Morris Asia Ltd v The Commonwealth of Australia*, Notice of Arbitration para 1.7.

⁴⁸⁴ The last Procedural Order regarding Amendment of the Timetable was issued on 31 December 2013 and is available at <http://www.italaw.com/sites/default/files/case-documents/italaw1309.pdf> accessed on 06/08/2013.

⁴⁸⁵ See the WHO Framework Convention on Tobacco Control, (2003) 42 ILM 3, 518–539, available at <http://www.fctc.org/about-fca/tobacco-control-treaty> accessed on 20/06/2014. The Treaty came in force on 27/02/2005

⁴⁸⁶ *Vattenfall AB and others v Federal Republic of Germany* ICSID Case No ARB/12/12

⁴⁸⁷ See the case procedural details available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C2220&actionVal=viewCase> accessed on 07/08/2013.

from the Germany's decision to opt out of nuclear energy in which the claimant has a vested interest. The Federal Atomic Energy Act was amended in 2011 to give effect to parliament decision to abandon the use of nuclear energy by 2018.⁴⁸⁸

The consequence of the amendment of the law is that the Brunsbüttel and Krümmel nuclear power plants, for which Vattenfall has operating responsibility and owns 66.7% and 50%, respectively, may not be restarted. Vattenfall claims a breach of rights accruing from the EU Energy Charter Treaty.⁴⁸⁹ The claimant is requesting the Tribunal for an order to the tune of EURO 700 million.⁴⁹⁰ The case is still pending and the last activity on record shows that the Tribunal issued the first Order on procedural matters on 17th July 2013.⁴⁹¹

In another case, *Metalclad Corporation v The United Mexican States*,⁴⁹² the Tribunal ordered the respondent state, Mexico, to pay compensation amounting to USD 17 million to the claimant US Company, Metaclad. The order was a result of the implementation of Mexican laws on land use and environment protection. The laws prohibited the claimant from operating a hazardous waste facility in the country. The same adverse decision was taken in *Santa Elena v Costa Rica*.⁴⁹³ The Tribunal totally ignored the relevancy of a state measure to protect the environment. Dismissing

⁴⁸⁸ Bernasconi – Osterwarder N & Hoffman RT ‘The German Nuclear Phase-Out Put to the Test in International Investment Arbitration?’ IISD *Briefing Note* June 2012 available at http://www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf accessed on 07/08/2013.

⁴⁸⁹ The European Energy Charter available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf

⁴⁹⁰ Bernasconi – Osterwarder N & Hoffman RT ‘The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the New Dispute’ IISD *Briefing Note* June 2012 available at http://www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf accessed on 07/08/2013.

⁴⁹¹ See the Case Procedural Details available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C2220&actionVal=viewCase> accessed on 07/08/2013.

⁴⁹² *Metalclad Corporation v The United Mexican States* (Final Award) NAFTA Chapter 11 Panel Case No ARB (AF)/97/1 3 August 2000.

⁴⁹³ *Compania del Desarrollo de Santa Elena, S.A v Republic of Costa Rica*, ICSID Case No.ARB/96/1.

the respondent state's submission that the measure was adopted to protect the environment, the Tribunal held:

'Expropriatory environmental measures-no matter how laudable and how beneficial to society as a whole-are in this respect, similar to any other expropriatory measure that a state may take in order to implement its policies... where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.'⁴⁹⁴

The South African government has also faced the adversity of the current investor – state dispute settlement system. *Piero Foresti and others v. South Africa*⁴⁹⁵ was launched in 2007 by the Italian investors challenging the South Africa Mineral and Petroleum Resources Development Act (MPRDA) and the Mining Charter. The claimants were alleging that the Act and the Charter contravene the Italy - South African BIT.⁴⁹⁶ The respective laws required mining companies to transfer a portion of their shares into the hands of Black investors.⁴⁹⁷ The legislation aims at addressing past racial discrimination arising from apartheid in South Africa. It required mining companies to divest themselves of a portion of their assets in order to increase indigenous ownership. The conditions include selling 26 percent of local mines to black investors by 2014, increasing the number of Black managers and improving conditions in mining communities.⁴⁹⁸ The Claimants argued that giving 26 percent of their ownership is expropriation contrary to

⁴⁹⁴ *Compania del Desarrollo de Santa Elena, S.A v Republic of Costa Rica*, ICSID Case No.ARB/96/1, 2000 paras 71-72

⁴⁹⁵ *Piero Foresti, Laura de Carli and others v Republic of South Africa* ICSID Case No ARB (AF)/07/1.

⁴⁹⁶ *Piero Foresti, Laura de Carli and others v Republic of South Africa* para 57.

⁴⁹⁷ *Piero Foresti, Laura de Carli and others v Republic of South Africa* para 64.

⁴⁹⁸ *Piero Foresti, Laura de Carli and others v Republic of South Africa* para 56.

Article 5 of the BIT.⁴⁹⁹ The case was discontinued in 2010 after the claimant acquired new licences to operate and the government reduced substantially the ownership share that was required for divestment.⁵⁰⁰

Therefore, one can see from the above discussed cases that the tension is high between the state's duty to protect investors' interests and regulate on other social values. The German reaction against nuclear energy came as a necessary measure after the nuclear catastrophe in Fukushima Japan. The German decision seeks to protect the environment and health of the German people. One would expect the Tribunal under such circumstances to grant the respective government deference. The South African measure, on the other hand, intended to address the economic gap caused by the apartheid era. The Mexican measure aimed at addressing environmental issues and the Australian measure intended to protect the health of its citizens. All measures are within the purview of a state's power to protect. The tendency to ignore the relevance of other social values, environmental, human rights and health standards, undermines the legitimacy of the system and adds to the already accumulated backlash against investment arbitration.

3.6.2.7 Expensive adjudication process

The investor – state arbitration system is also condemned by stakeholders for being so expensive.⁵⁰¹ The system is more concerned with awarding damages to the claimant and issuing

⁴⁹⁹ *Piero Foresti, Laura de Carli and others v Republic of South Africa* para 58.

⁵⁰⁰ *Piero Foresti, Laura de Carli and others v Republic of South Africa* para 133.

⁵⁰¹ Jagusch S & Sullivan J 'A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern' in Waibel M et al (eds.) *The Backlash against Investment Arbitration: Perception and Reality* (2010) 79 – 110; see also Frank S D 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham Law Rev* 1521 at 1592; see also Coe JJ 'Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch' (2005) *University College*

cost orders to the parties than reconciling the parties and creating a stable jurisprudence.⁵⁰² The claims and awards are in millions of dollars. As seen earlier in *CME v Czech Republic*,⁵⁰³ the Tribunal issued a substantial total damages award in favour of CME of USD 354,655,752.⁵⁰⁴ Argentina is currently faced with awards which exceed USD 430 million and pending claims to the tune of USD 65 billion.⁵⁰⁵ The amount claimed by the three majority shareholders of the former Yukos Oil Company in the ongoing arbitration proceedings against Russia is USD 114 billion.⁵⁰⁶

In addition, the costs of the proceedings are also excessive. Arbitrator's charges range from USD 350 – 700 per hour per arbitrator depending on the claimed dispute amount.⁵⁰⁷ The total amount per case therefore depends on the number of days the tribunal have sat and the complexity of the matter. The presiding arbitrator in *Chevron and Texaco v Ecuador* received USD 936,000.⁵⁰⁸ In addition to the arbitrators' costs, the parties are required to pay their lawyers as well. The cost for one case ranges from USD 1 million to 21 million as most of the tribunals consist of three

of Davis *Journal of International Law and Policy* 7 at 10; see also United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* (WIR) (2012) at 88 available at http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx accessed on 14/08/2013.

⁵⁰² Newman LW & Zaslowsky D 'Assessing Costs in International Arbitration' (2010) *New York Law Journal* 29.

⁵⁰³ *CME Czech Republic BV v The Czech Republic* ICSID Reports 9(2001).

⁵⁰⁴ *CME Czech Republic BV v The Czech Republic* ICSID Reports para 615.

⁵⁰⁵ See United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* 2012 at 87; see also Peterson LE 'Argentina by Numbers: Where Things Stand with Investment Treaty Claims Arising out of the Argentina Financial Crisis' available at http://www.iareporter.com/articles/20110201_9 accessed on 05/10/2013; see also Merco Press 'Argentina Faces 65 billion dollars in claim: plans to abandon international litigation court' 28th November 2012 available at <http://en.mercopress.com/2012/11/28/argentina-faces-65bn-dollars-in-claims-plans-to-abandon-international-litigations-court> accessed on 08/10/2013.

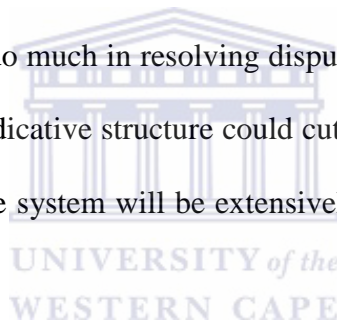
⁵⁰⁶ See *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No AA 226; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227; *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, PCA Case No AA 228.

⁵⁰⁷ International Centre for Settlement of Investment Disputes (ICSID) fees are set at US\$3000 a day; see <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&ScheduledFees=True&year=2012&language=English> accessed on 05/10/2013.

⁵⁰⁸ *Chevron and Texaco v. Ecuador* (2011) UNCITRAL Final Award available at <http://italaw.com/documents/ChevronEcuadorFinalAward.pdf> accessed on 05/10/2013.

arbitrators, and there are several lawyers on both sides.⁵⁰⁹ The Czech Republic spent USD 10 million to defend itself in the two cases, *CME v Czech* and *Lauder v Czech*.⁵¹⁰ The UNCTAD World Investment Report 2010 clearly states that the costs of investor – state disputes have skyrocketed.⁵¹¹

In conclusion, it can be said that the system, instead of being a tool for facilitating development in developing countries, has turned out to be crippling host state development initiatives. The awards rendered against Argentina and many other developing countries send a warning message to the rest of the world. It is submitted here that the system ought rather to be focussing on reconciling the parties than the trend it has followed now which is punitive award oriented. Mediation and conciliation could do much in resolving disputes amicably. It is further submitted that establishing a permanent adjudicative structure could cut the expenses to a large extent. The possible avenues for improving the system will be extensively analysed under chapters five and of this work.



⁵⁰⁹ See Franck SD ‘Rationalising Costs in Investment Treaty Arbitration’ (2011) *Washington University Law Review* 769 at 775 ; see also Eberhardt P & Olivert C ‘How Law Firms, Arbitrators and Financiers are Fueling an Investment Arbitration Boom’ (2012) Corporate Europe Observatory and the Transnational Institute available at <http://www.tni.org/sites/www.tni.org/files/download/profitfrominjustice.pdf> accessed on 05/10/2013; also see Franck S ‘Empirically Evaluating Claims About Investment Treaty Arbitration’ (2007) *North Carolina Law Review* 1 at 77.

⁵¹⁰ Gottward E ‘Leveling the Playing Field: Is it Time for a Legal Assistance Centre for Developing Nations in Investment Treaty Arbitration?’ *American University International Law Review* 237 – 75 at 254; see also Tienhaara K *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (2009) 149 – 50.

⁵¹¹ See United Nations Conference on Trade and Development (UNCTAD) ‘Investor – State Dispute: Prevention and Alternative to Arbitration’ (2010) at 16-18 available at http://www.unctad.org/en/docs/diaeia200911_en.pdf accessed on 05/10/2013.

3.7 Conclusion

This chapter has examined the current investor – state dispute settlement system in detail. The chapter has shown that ICSID when combined with Additional Facility arbitration is the most utilised forum as almost two – thirds of all known investor – state disputes are settled at the Centre. It has also shown that UNCITRAL Rules also play a significant part as almost ninety percent of the remaining one - thirds is conducted under the Rules. The chapter has tried to analyse the strengths and weaknesses of each of the three systems under examination: ICSID arbitration, Additional Facility arbitration and the ad hoc arbitration under the UNCITRAL Rules. It is evident from the analysis that there are a number of systemic flaws which call for immediate attention from the respective authorities. The chapter revealed the main problem in the system as: lack of consistency, lack of institutional safeguards for the independence and impartiality of arbitrators, tribunals’ encroachment on government policy making space, parallel proceedings involving the same parties, lack of transparency, an overly expensive adjudication process, and lack of an appellate body. The cases discussed in the chapter indicate the extent to which these problems affect the legitimacy of the system as a whole. The analysis has also shown that the ICSID system has to a certain extent addressed some of the problems but that the UNCITRAL Rules, on the other hand, are silent on the issues. The chapter concludes that there are serious legitimacy issues which need to be addressed as soon as possible in order to save the system from the possibility of collapsing.

The next chapter discusses the ideal features of a legitimate adjudicatory body. The chapter discusses the features which are missing in the current investor – state arbitration system.

Literature on the subject and other international adjudicative bodies' instruments are analysed to see how they have addressed legitimacy issues in their systems.



CHAPTER FOUR

IDEAL FEATURES OF A LEGITIMATE INTERNATIONAL ADJUDICATIVE BODY

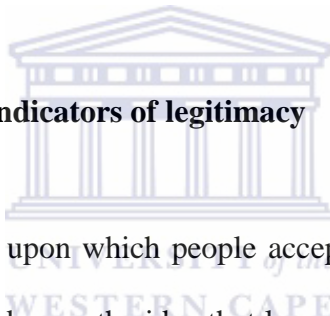
4.1. Introduction

This chapter discusses and analyses the ideal features of a legitimate adjudicative system. The theoretical foundation of the concept ‘legitimacy’ and the steps involved in legitimising an adjudicatory system are discussed. It is submitted that the legitimating process requires the satisfaction of all parties who are to be affected by the decisions of such adjudicative body. It is further submitted that, while the state parties play a significant role in the creation of an international adjudicative body, the continuance of the legitimacy of that body depends on it being perceived as legitimate by ‘other stakeholders’. The ‘other stakeholders’ perception will depend on the adjudicative body’s imbuement of legitimacy values; transparency, impartiality, consistency, timeliness and accessibility. In addition, the system must be just and adhere to the rule of law principles. The combination of all these values makes the respective adjudicative system legitimate.

The chapter is divided into four sections. The first section defines the key concepts and analyses the key indicators of a legitimate international adjudicative body. Differing scholarly analyses of what constitutes legitimacy are examined. The second section, which is the main part, discusses

in detail the ideal features/ indicators of a legitimate adjudication system. A comparative analysis is done to see the extent to which these indicators have been incorporated in investor – state arbitration and other international adjudicative bodies. The third section shows the impact of lack of the legitimacy values in the investor – state adjudication system. The section reveals that the system is lacking the legitimacy values. The last section concludes the chapter by summing up the general discussion and pointing out that reform is inevitable. It is submitted that the current system is facing a legitimacy crisis as a result of its failure to give the legitimacy attributes the required consideration.

4.2 The meaning, relevance and indicators of legitimacy



Legitimacy is defined as the basis upon which people accept or are willing to accept the legal order as they find it and is premised upon the idea that law should be good for, and justly serve, the people.¹ It is, therefore, because the rules are perceived as legitimate that people become willing to be bound by them. The legitimacy perception of a rule or a system is vital to the extent that without it, the stakeholders will likely lose confidence and trust in the system and this consequently may lead to the collapse of the system itself.² The power of legitimacy perception

¹ Hurst JW ‘Problem of Legitimacy in the contemporary legal order’ (1971) 24 *Oklahoma Law Review* 224 at 225; See also Howse R ‘Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence’ in Weiler JHH (ed.) *Towards a Common Law of International Trade?: EU, WTO and NAFTA* (2000) 211 at 218; see also Caron DD ‘The Legitimacy of the Collective Authority of the Security Council’ (1993) *American Journal of International Law* 554 at 556.

²See Afilalo A ‘Meaning, Ambiguity and Legitimacy: Judicial (Re-)Construction of NAFTA Chapter 11’ (2005) 25 *North Western Journal of International Law & Business* 279; see also Brower CN ‘A Crisis of Legitimacy,’ (2002) *National Law Journal* 1; Brower CN et al ‘The Coming Crisis in the Global Adjudication System’ (2003) 19 *Arbitration International* 415; also see Van Harten G ‘Investment Treaty Arbitration, Procedural Fairness and the Rule of Law’ in Stephan Schill (ed.) *International Investment Law and Comparative Public Law* (2010) 627 – 658; Franck TM *The Power of Legitimacy among Nations* (1990); see also Treves T ‘Aspects of Legitimacy of Decisions

becomes even more important in the international arena where there is no strong coercive machinery. In international law, adherence to international decisions depends much on whether the addressee perceives the institution giving the order as legitimate or not. The relevancy of legitimacy in international adjudicative bodies and its indicators are discussed in the section that follows.

4.2.1 Relevance of legitimacy in international adjudicative bodies

Legitimacy of domestic adjudicative institutions is among the subjects which have generated a mountain of literature. However, the same cannot be said about international adjudicative institutions. Until the 1990s, little had been written on the need for legitimacy in international adjudicative institutions.³ It is contended that the reason for such lack of development was the fact that international adjudication institutions did not play a significant adjudicative role which would attract attention or catch an international lawyer's eye.⁴

However, the trend has changed recently as some of these international adjudicative institutions have been rendering decisions which impact on many and sometimes threaten the sovereignty of

of International Courts and Tribunals' in Wolfrum R & Roben V (eds.) *Legitimacy in International Law* (2008) 169 – 188; see also Franck TM 'The Power of Legitimacy and the Legitimacy of Power Disequilibrium' (2006) *American Journal of International Law* 88; also see D'amato A 'On the Legitimacy of International Institutions' in Wolfrum R & Roben V (eds.) *Legitimacy in International Law* (2008) 83 – 92.

³ For an insightful discussion on the historical development of legitimacy of international adjudicatory bodies see Bodansky D 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) *American Journal of International Law* 596 at 596.

⁴ See Bodansky D 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) *American Journal of International Law* 596 at 597.

independent states.⁵ Awards rendered by these institutions, at times, exceed ten times the annual budget of a developing state.⁶ This new authoritative role has subsequently attracted a mountain of discussions on the legitimacy of international adjudicative institutions.⁷ Investor – state tribunals are among these new bodies which render decisions which carry greater authority and award huge amounts of money to investors as damages.⁸ For the purposes of this discussion therefore, reference to international adjudicative bodies will entail ICSID, PCA and UNCITRAL investor – state arbitral Tribunals.⁹

⁵ See the following cases under chapter three of this work *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8 (final award), *Sempra Energy International v The Argentine Republic* ICSID ARB/02/16 (final award) and *Enron Corporation and Ponderosa Assets L P v Argentine Republic* ICSID ARB/01/3 (final award). In these cases Argentina sovereign regulatory decisions is being questioned by the Tribunals; see also *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12 in which the claimant is suing the government of Australia for enacting a legislation which require plain cigarette packaging on public health reasons; The case is commenced by Vattenfall as a result of Germany’s nuclear opt-out decision to protect the environment and public health.

⁶ The amount claimed against Russia by the three majority shareholders of the former Yukos Oil Company in the ongoing arbitration proceedings against Russia is USD 114 billion. See *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No. AA 226; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228; see United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2013* ‘Reform of Investor – State Dispute Settlement: In Search of a Road Map’ available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf. The figure is a ten years annual budget for the government of United Republic of Tanzania. The 2013/2014 Tanzania whole budget was USD 10 billion see the budget at http://www.pwc.com/tz/en/pdf/tanzania_budget_speech_2013_2014.pdf accessed on 29/08/2013.

⁷ See for example Franck TM *The Power of Legitimacy among Nations* (1990); see also Treves T ‘Aspects of Legitimacy of Decisions of International Courts and Tribunals’ in Wolfrum R & Roben V (eds.) *Legitimacy in International Law* (2008) 169 – 188; see also Franck TM ‘The Power of Legitimacy and the Legitimacy of Power Disequilibrium’ (2006) *American Journal of International Law* 596 88; also see D’amato A ‘On the Legitimacy of International Institutions’ in Wolfrum R & Roben V (eds.) *Legitimacy in International Law* (2008) 83 – 92.

⁸ See for example *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* ICSID Case No ARB/06/11 Award, 5 October 2012 in which the Tribunal awarded the investor USD 1.7 billion.

⁹ There are many other international adjudication bodies for example; the International Court of Justice (ICJ) established under the Charter of United Nations in 1945 came into operation in April 1946 available at <http://www.icj-cij.org/court/index.php?p1=1> accessed on 26/08/2013; the International Criminal Court (ICC) established by the Rome Statute 1998 came into force in July 2002 available at http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx accessed on 26/08/2013; the European Court of Justice (ECJ) established by the Treaty of the European Union in 1952, available at http://curia.europa.eu/jcms/jcms/Jo2_7004/; the African Court of Justice and Human Rights established by the Protocol on the Statute of the African Court of Justice and Human Rights in 2006 available at <http://www.african-court.org/en/> accessed on 26/08/2013; the Inter American Court of Human Rights established in 1978 under the American Convention of Human Rights 1969, available at <http://www.pict-pcti.org/courts/IACHR.html> just to name a few.

4.2.2 Indicators of legitimacy

The literature indicates that for an adjudicative system to be considered legitimate, it has to comply with a number of criteria or values. The number of criteria/values differs from one author to another. In this section, different authors' perceptions on what constitute legitimacy, and indicators thereof are discussed.

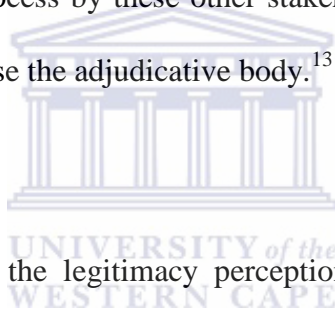
Nienke Grossman in her article 'Legitimacy and International Adjudicative Bodies' has clearly defined and stated the relevancy of legitimacy to international adjudicative bodies.¹⁰ The author contends that an international adjudicative body's legitimacy depends on it being perceived as 'justified' by its stakeholders.¹¹ The author states that the legitimating process of an international adjudicative body is achieved through two steps. The first step is for the state to give its consent by ratifying the relevant treaty. This is a crucial step in legitimating as it creates the validity of the adjudicative body and sets out the jurisdiction of such a body. The second step does not evolve until the respective adjudicative body has started performing its powers in accordance with the mandating treaty. The second step is therefore performance centred. The adjudicative body is scrutinised and evaluated by the stakeholders, and the assessment is made to see whether it performs in accordance with the agreed normative values. According to the author, state ratification or consent does not in itself guarantee that the respective adjudicative body will be

¹⁰ Grossman N 'Legitimacy and International Adjudicative Bodies' (2009) *George Washington International Law Review* 107

¹¹ Grossman N 'Legitimacy and International Adjudicative Bodies' (2009) *George Washington International Law Review* 107 at 110.

perceived as legitimate by all stakeholders.¹² According to this author, the second step which involves wider stakeholders' evaluation is more crucial and important than the earlier step which involves state parties only.

The author identifies stakeholders of an international adjudicative body to include: groups of experts and practitioners, domestic and international NGOs, local political parties, domestic policy influential groups and others who have a role to play in evaluating the legitimacy of an international adjudicative body. Where the respective body lacks the values which are perceived as relevant for the legitimating process by these other stakeholders, the government consent or ratification will do little to legitimise the adjudicative body.¹³



The author further contends that the legitimacy perception is subject to change with time. Legitimacy, according to the author, is dynamic. As a result of its performance the system can gain or lose its legitimacy. The way the adjudicative body conducts its affairs may to a large extent affect its legitimacy perception.¹⁴

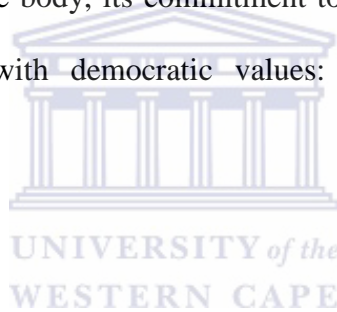
¹² Grossman N 'Legitimacy and International Adjudicative Bodies' (2009) *George Washington International Law Review* 107 at 116.

¹³ Grossman N 'Legitimacy and International Adjudicative Bodies' (2009) *George Washington International Law Review* 107 at 117; in support of this position see also Leonhardsen EM 'Looking for Legitimacy: Exploring the Proportionality Analysis in Investment Treaty Arbitration' at 3 available at http://www.jus.uio.no/english/research/areas/intrel/documents/Leonhardsen_PhD-Lunch.pdf accessed on 24/09/2013; see also Wolfrum R 'Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations' in Wolfrum R & Roben V (eds.) *Legitimacy in International Law* (2008) 1 – 24 at 17- 20.

¹⁴ Grossman N 'Legitimacy and International Adjudicative Bodies' (2009) *George Washington International Law Review* 107 at 117.

In summary, the events that follow after the state has given consent are crucial in building the legitimacy of an adjudicative body.¹⁵ The outcome of the cases, if made in accordance with the normative values and if not at odds with the expectation of stakeholders, will ultimately increase the stakeholders' legitimacy perception of the respective adjudicative body.¹⁶

In addition to the legitimating steps, Grossman also discusses the factors which are crucial in justifying an international adjudicative body. It is her contention that an adjudicative body is perceived as justified, hence legitimate, when it is influenced by the presence of three factors: unbiased nature of the adjudicative body, its commitment to interpret the law consistently, and being transparent and infused with democratic values: accountability, predictability and certainty.¹⁷



The first factor, fair and unbiased process, is much concerned with the adjudicative process and the people involved in that process.¹⁸ It is concerned with the integrity, qualification, and selection process of those who are to be involved in the adjudication process. It is also concerned with the manner in which the whole process of adjudication is conducted.

¹⁵ Leornhardsen EM 'Looking for Legitimacy: Exploring the Proportionality Analysis in Investment Treaty Arbitration' at 4 available at http://www.jus.uio.no/english/research/areas/intrel/documents/Leornhardsen_PhD-Lunch.pdf accessed on 24/09/2013.

¹⁶ Leornhardsen EM 'Looking for Legitimacy: Exploring the Proportionality Analysis in Investment Treaty Arbitration' at 9 available at http://www.jus.uio.no/english/research/areas/intrel/documents/Leornhardsen_PhD-Lunch.pdf accessed on 24/09/2013.

¹⁷ Grossman N 'Legitimacy and International Adjudicative Bodies' (2009) *George Washington International Law Review* 107 at 110.

¹⁸ Grossman N 'Legitimacy and International Adjudicative Bodies' (2009) *George Washington International Law Review* 107 at 124.

The second factor according to her is the ability to interpret and apply the law consistently in the manner expected by the stakeholders.¹⁹ It is her contention that the basic principles governing the particular field of law are supposed to be interpreted and applied consistently so as to bring certainty and predictability. Failing this, parties will lose confidence in an adjudicative body which produces inconsistent decisions, ultimately leading to the loss of justifiable authority, hence collapse of the respective adjudicative body.²⁰

The third factor, according to the author, is transparency. The author contends that transparency of the process and the availability/access of the decisions to the stakeholders are crucial in building the legitimacy of an international adjudicative body.²¹ It is contended further that opening up to the stakeholders helps the system to build its own legitimacy. Transparency, it is argued, allows domestic constituencies, academics, NGOs and other stakeholders to assess the functioning of the adjudicative body and the individual adjudicators.²²

Thomas Franck is another writer who has extensively discussed the source of power of international institutions.²³ He defines legitimacy as the perception of those addressed by a rule or a rule – making institution that the rule or institution has come into being and operates in

¹⁹ Grossman N ‘Legitimacy and International Adjudicative Bodies’ (2009) *George Washington International Law Review* 107 at 121.

²⁰ Grossman N ‘Legitimacy and International Adjudicative Bodies’ (2009) *George Washington International Law Review* 107 at 144.

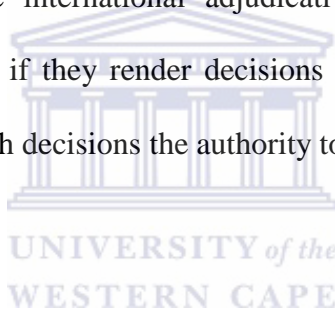
²¹ Grossman N ‘Legitimacy and International Adjudicative Bodies’ (2009) *George Washington International Law Review* 107 at 152.

²² Grossman N ‘Legitimacy and International Adjudicative Bodies’ (2009) *George Washington International Law Review* 107 at 155.

²³ See Franck TM *The Power of Legitimacy among Nations* (1990) at 49; see also Franck TM ‘The Power of Legitimacy and the Legitimacy of Power: International Law in the Age of Power Disequilibrium’ (2006) *American Journal of International Law* 88-106.

accordance with generally accepted legal process.²⁴ According to Franck determinacy, symbolic validation, coherence and adherence are the four indicators of legitimacy.²⁵

Determinacy as an indicator of legitimacy entails the ability of the rules to convey a clear message to the people who are to be affected by it. In other words, determinacy stands for clarity of the rules made by that particular body.²⁶ It follows therefore that there is a need for the rules to be transparent to such an extent that people are able to foresee the outcome. According to Franck once there is clarity in the rule, the person affected by such a rule or decision will normally be inclined to follow the rule. The international adjudicative bodies therefore will only be considered as having determinacy if they render decisions which are clear and in accordance with the rules. Clarity will give such decisions the authority to be followed.²⁷



The second indicator of legitimacy, according to Franck, is symbolic validation.²⁸ It is contended that people who are to be affected by any decision of a particular adjudicative body, will only accept to be so bound if they regard that body and its decision to be authentic.²⁹ The authenticity of the respective body is drawn from the signals and cues of its authority. The cues of an adjudicative body are evidenced by the presence of the unbiased adjudicators, impartiality and

²⁴ See Franck TM *The Power of Legitimacy among Nations* (1990) at 19.

²⁵ See Franck TM *The Power of Legitimacy among Nations* (1990) at 49; see also Franck TM 'The Power of Legitimacy and the Legitimacy of Power: International Law in the Age of Power Disequilibrium' (2006) *American Journal of International Law* 88-106.

²⁶ Franck TM *The Power of Legitimacy among Nations* (1990) at 84.

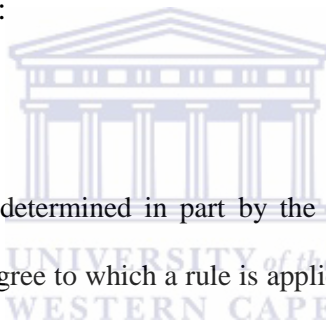
²⁷ Franck TM *Fairness in International Law and Institutions* (1995) at 30 – 31.

²⁸ Franck TM *The Power of Legitimacy among Nations* (1990) at 91.

²⁹ Franck TM *The Power of Legitimacy among Nations* (1990) at 91.

openness of the process. It follows therefore that the symbolic validation of the adjudicative body is evidenced by these cues in its rulings and awards.

The third indicator of legitimacy is coherence.³⁰ Coherence essentially requires that like cases should be treated alike. Therefore for a rule to be considered legitimate it ought to be applied consistently. There should not be room for parallel conflicting decisions when the same rule is applied. The parties should be able to predict the outcome in instances where the case at hand has issues and facts similar to those of an earlier decided case. Stressing the importance of coherence in legitimating the rule Franck says:



‘The legitimacy of a rule is determined in part by the degree to which that rule is practiced coherently; conversely, the degree to which a rule is applied coherently in practice will depend in part on the degree to which it is perceived as legitimate by those applying it.’³¹

The last indicator of legitimacy, according to Franck, is adherence. Adherence simply requires that the respective adjudicative body should conduct its affairs in accordance with the establishing instruments.³² That is to say, where the institution is a creature of a treaty then it must follow the treaty rules in its adjudication process. An adjudicative body is therefore more likely to be obeyed if it operates within the framework of an organized normative hierarchy. For

³⁰ Franck TM *The Power of Legitimacy among Nations* (1990) at 142.

³¹ Franck TM *The Power of Legitimacy among Nations* (1990) at 142.

³² Franck TM *The Power of Legitimacy among Nations* (1990) at 184.

it to be considered legitimate, it is pertinent that the body should not operate beyond its mandate³³

In summary, Franck considers that clarity of the rules and the consistent application of the rules play a significant part in the legitimation of any adjudicative system. Where the rules are considered lacking States may withdraw from the use of the system as a whole and ultimately may lead to the collapse of the system itself.

Daniel Bodansky has also discussed the relevance of legitimacy in international adjudicative bodies.³⁴ The author defines legitimacy as the justification of authority.³⁵ He argues that the authority is justified by tradition, rationality, legality, democracy and the like values. The author further argues that legitimacy has both sociological and normative dimensions.

With regard to the sociological dimension, the author contends that an adjudicative system will receive more legitimacy perception if its addressees have confidence in it. It is argued that an international adjudicative body will need to be positively perceived by the state parties and the other stakeholders who are to be affected by its decisions or orders.³⁶

³³ Franck TM *The Power of Legitimacy among Nations* (1990) at 184.

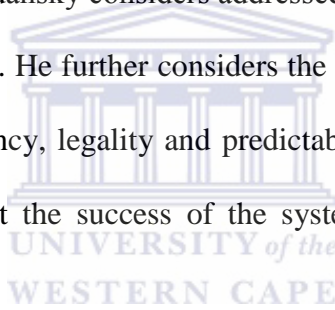
³⁴ Bodansky DM 'The Legitimacy of International Governance: A coming Challenge for International environmental Law' (1999) *American Journal of International Law* 596.

³⁵ Bodansky DM 'The Legitimacy of International Governance: A coming Challenge for International environmental Law' (1999) *American Journal of International Law* 596 at 601.

³⁶ Bodansky DM 'The Legitimacy of International Governance: A coming Challenge for International environmental Law' (1999) *American Journal of International Law* 596 at 601; see also Tyler TR 'The psychology

As regard the normative dimension, Bodansky submits that where the system is founded on legitimacy values people will automatically support its claim of authority. Lack of such values renders such a body illegitimate.³⁷ In other words, the system needs values in order to persuade people to comply with its authority. Normative legitimacy values include: impartiality, predictability, and legality.³⁸ The author further asserts that, the transparency of the process involved in reaching a particular decision plays a significant role in determining whether the decision rendered is legitimate or not.³⁹

In summary, it can be said that Bodansky considers addressees' perception of a particular system is crucial in building its legitimacy. He further considers the embodiment of normative values in the system; impartiality, transparency, legality and predictability, as pertinent for attainment of legitimacy. The author insists that the success of the system depends on its embodiment of legitimacy values.



Hefter and Slaughter in their work, *Towards a Theory of Effective Supranational Adjudication*, have also discussed the values which are necessary for a legitimate adjudicative body.⁴⁰ In this work, the authors argue that legitimacy is a tool which gives the adjudicative body the ability to

of legitimacy: A relational perspective on voluntary deference to authorities' (1997) *Personality and Social Psychology Review* at 323.

³⁷ Bodansky DM 'The Legitimacy of International Governance: A coming Challenge for International environmental Law' (1999) *American Journal of International Law* 596 at 601; see also Brower CH 'Structure, Legitimacy and NAFTA Investment Chapter' (2003) *Vanderbilt Journal of Transnational Law* 37 at 52.

³⁸ Bodansky DM 'The Legitimacy of International Governance: A coming Challenge for International environmental Law' (1999) *American Journal of International Law* 596 at 602.

³⁹ Bodansky DM 'The Legitimacy of International Governance: A coming Challenge for International environmental Law' (1999) *American Journal of International Law* 596 at 602.

⁴⁰ Hefter LR & Slaughter A 'Towards a Theory of Effective Supranational Adjudication' (1997) *Yale Law Journal* 273 – 391.

command acceptance and support from the community without applying force or coercive machinery.⁴¹ They argue that legitimacy is made up of impartiality, principled decision making, reasoned decision making and consistency of judicial decisions over time. It is further contended that the abovementioned values are not meant to be exhaustive but represent the necessary minimum values that underpin the compliance pull.⁴² The role of non - state actors in enhancing the legitimacy of an adjudicative system is also highlighted in this work. It is submitted that individuals, groups, corporations and voluntary organisations are crucial in legitimating an international adjudicatory body.⁴³

4.2.2.1 Evaluation of scholars' arguments on legitimacy values

In summary, it can be said here that, while the scholars used different terminologies, the values discussed are more alike than different. It can be gathered from the discussion, that there is a consensus among these scholars that legitimacy goes hand in hand with the imbuelement of the normative values and the proper institutional application of the authority. According to them, it is the presence and embodiment of these values that gives legitimacy to an international adjudicative system.

⁴¹ Hefter LR & Slaughter A 'Towards a Theory of Effective Supranational Adjudication' (1997) *Yale Law Journal* 273 at 284.

⁴² Hefter LR & Slaughter A 'Towards a Theory of Effective Supranational Adjudication' (1997) *Yale Law Journal* 273 at 284.

⁴³ Hefter LR & Slaughter A 'Towards a Theory of Effective Supranational Adjudication' (1997) *Yale Law Journal* 273 at 288.

With regard to differences, it can be concluded here that the above authors' scope of analysis on the legitimation process and values have some differences but the differences are hardly significant. Grossman is of the opinion that legitimacy is a two - step process which involves having the rules in place followed by the respective institution applying the rules in a manner that the stakeholders perceive as appropriate, and thus are ready to be bound by the institution's authority. Franck, on the other hand, has a narrow definition of legitimacy. According to him legitimacy is mainly centred on the clarity and consistency of the application of the rules. Therefore, Franck's legitimacy is centred on clarity of the rules. On the other hand, and in agreement with Grossmann, Bodansky argues that legitimacy is based on two processes: the rationality of the rules and the performance of the respective institution. To him the attitude of the stakeholders, which depends on the proper application of the values, plays a central role in the legitimation process. Hefter and Slaughter are also, to a large extent, in agreement with Grossmann and Bodansky that the existence of values and the performance of the institution, over time, are at the centre of the legitimation process. However, Hefter and Slaughter in their work go further and state that impartiality, reasoned decision making and consistency of judicial decisions are not meant to be exhaustive but represent the necessary minimum values that underpin the compliance pull. Therefore it can be concluded here that Hefter and Slaughter opens up a room for the existence of other legitimacy values.

This research is in agreement with Hefter and Slaughter that consistency, transparency and impartiality are not the only legitimacy values which need to be embodied in an international adjudicative body. It is submitted here that the works discussed above have not been exhaustive enough and have left out other important legitimacy values. This research submits that in

addition to the discussed values, cost efficiency and timeliness constitute other important legitimacy values. For an adjudicative system to be perceived as legitimate, it also needs to be accessible and affordable to all stakeholders, rich and poor. The costs of filing a case and adjudicating the same should be reasonable and should not be a deterring factor to the poor.⁴⁴ In addition, the adjudicative system needs also to develop a timeframe within which the dispute has to be resolved. It is important that the dispute should not drag on in the adjudication machinery for years. Parties will perceive a system as legitimate where they can predict or know beforehand how long the dispute will take.⁴⁵

Therefore, in conclusion, it can be said here that, in addition to transparency, consistency and impartiality, the adjudicative system's legitimacy also depends on it being accessible in terms of costs and having a convenient timeframe for resolving disputes. The latter two factors increase the legitimacy of an adjudicative system as much as consistency, transparency and independent and impartial adjudicators do. These values will be discussed further at a later stage of this chapter to see how they have been incorporated in the current investor – state arbitration system. In the section that follows the relationship between legitimacy, justice and the rule of law is discussed.

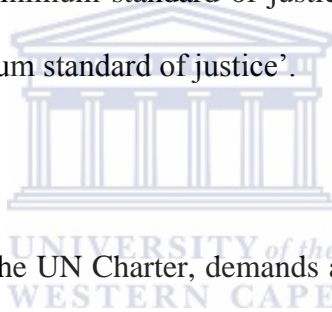
⁴⁴ For the same argument see also Coe JJ Jr 'Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods, (2003)36 *Vanderbilt Journal of Transnational Law* 1381.

⁴⁵ For more on this see Raviv A 'Achieving a Faster ICSID' (2014) 11 *Transnational Dispute Management* at 1 available at <http://www.transnational-dispute-management.com/article.asp?key=2066> accessed on 26/03/2014; see also Sinclair A et al 'ICSID Arbitration: How Long Does It Take?' *Global Arbitration Review* available at <http://www.goldreserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf> accessed on 18/07/2013.

4.2.3 The relationship between legitimacy, justice and the rule of law

The above discussion has revealed that for an adjudicative system to be considered legitimate, it requires to possess basic values: consistency, transparency, impartiality, cost efficiency and timeliness. The same values stands for justice and the rule of law. The relationship can be evidenced by a number of international instruments.

The Preamble to the Vienna Convention on the Law of Treaties requires adjudicators to settle disputes in accordance with the minimum standard of justice.⁴⁶ The Convention however does not define what constitutes ‘minimum standard of justice’.



Another international instrument, the UN Charter, demands an adjudication process to adhere to the principles of justice.⁴⁷ Article 1(1) of the Charter requires collective measures from member states to ensure that disputes are settled in accordance to the principles of justice. In addition, Article 2 (3) demands international disputes to be settled in the manner that do not endanger international peace, security and justice.⁴⁸

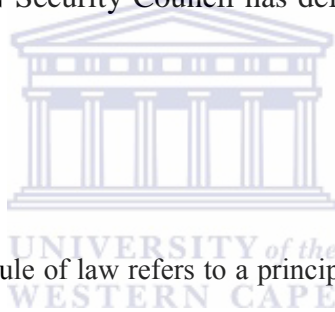
⁴⁶ See paragraph 5 of the Preamble to the Vienna Convention on the Law of Treaties 1969 UNTS Vol 1155/2005. The Convention is available at http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en accessed on 06/10/2013.

⁴⁷ See Charter of the United Nations 1945 available at <http://www.un.org/en/documents/charter/> accessed on 06/10/2013.

⁴⁸ See Articles 1(1) and 2(3) of the Charter of the United Nations.

It is submitted here that ‘minimum standard of justice’ and the ‘principles of justice’ entail adhering to rule of law principles viz; hearing both parties, impartiality of the adjudicators, resolving the dispute within a reasonable timeframe, transparency of the adjudication process, cost efficient adjudication process, certainty and consistency of the outcome on alike cases.

It follows therefore that values defining legitimacy and justice are similar and complement each other and both emanate from the principles of rule of law. Rule of law, as a concept, has received contested interpretation.⁴⁹ For the purposes of this work the UN Security Council definition will be the working definition. The UN Security Council has defined the concept the rule of law as follows:



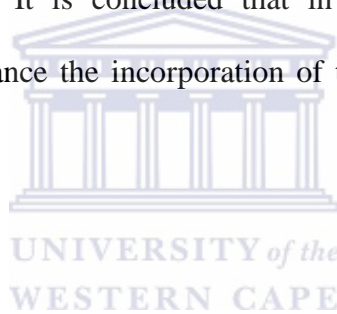
‘For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.’⁵⁰

⁴⁹ See Dicey AV *Introduction to the Study of the Law of the Constitution* 2ed. (1959) 181 – 205; see also Fallon RH ‘The Rule of Law as a Concept in Constitutional Discourse’ (1997) *Columbia L. Rev* 1 at 1; but see Fuller LL *The Morality of Law* (1964) 42 – 44; see also Waldron J ‘Kanti’s Legal Positivism’ (1996) *Harvard Law Review* 1535 at 1536 – 1538.

⁵⁰ See UNSC *the Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies S/2004/616* of 23/08/2004 available at <http://www.un.org/en/ruleoflaw/> accessed on 26/08/2013.

From the definition above, it can be concluded that an adjudicative body will be considered legitimate and within the rule of law if it is transparent, consistent, presided over by independent and impartial adjudicators, cost efficient and resolves disputes within a reasonable timeframe. As discussed earlier, these are the same values which are core in defining justice and legitimating an adjudicative system.

In the section that follows, these values are extensively discussed. An analysis is made to see the extent to which these values are incorporated in investor – state arbitration and other international adjudicative bodies. It is concluded that in order to improve the legitimacy perception there is a need to enhance the incorporation of these values in the investor – state adjudication system.



4.3 Transparency

Transparency, as pointed out above, plays a significant role in legitimating public law adjudication machinery. As early as 1790, Jeremy Bentham, a great philosopher, had this to say about the danger of confidentiality in public disputes:

‘In the darkness of secrecy, sinister and evil in every shape shall have full swing ... Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to

exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.’⁵¹

In 1924, the Chief Justice of England in *Rex v. Sussex Justices*, in the same spirit of advocating transparency in dispute settlement, introduced a very famous legal principle which states: ‘Justice should not only be done, but should manifestly and undoubtedly be seen to be done.’⁵² Eight decades later in 2001, *The New York Times* ran an article which contained the following famous paragraph against confidentiality in the sphere of investor – state arbitration:

‘Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunal’s handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors under the North American Free Trade Agreement.’⁵³

⁵¹ As quoted in Marshall F ‘Defining New Institutional Options for Investor – State Dispute Settlement’ (2009) *International Institute for Sustainable Development* at 22 available at http://www.iisd.org/%Fdefining_new_institutional_options.pdf accessed on 28/08/2013.

⁵² (1924)1KB 256 at 259.

⁵³ De Palma A ‘NAFTA Powerful Little Secrets: Obscure Tribunal Settle Dispute but Go Too Far Critics Say’ *The New York Times* 11/03/2001 available at <http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html?pagewanted=all&src=pm> accessed on 28/08/2013; see also Van Harten G *Investment Treaty Arbitration and Public Law* (2007) at 160.

In the same year, the Tribunal in *Methanex v United States*, recognising the importance of transparency over confidentiality, observed that the arbitral process has more to gain by opening up to the public than remaining secretive.⁵⁴

From the foregoing, it can be said that there is a need for transparency in public interest dispute settlement mechanisms. Transparency as a principle requires the public to have access to the whole process of adjudication especially when the adjudication involves public law or regulatory powers.⁵⁵ It is through transparency that parties to a dispute are able to determine and assess whether the adjudicative body exercised fairness to both parties. Parties will only be able to trust the system when they are able to evaluate its operations.⁵⁶ Transparency is also a principle which can be used in assessing good governance and accountability of a public adjudicative body. It requires the hearing to be conducted in the presence of the public subject to specific exceptions which may be relevant to protect the interests of the parties. It is contended that ‘transparency is a precondition of both accountability and independence in adjudication’.⁵⁷

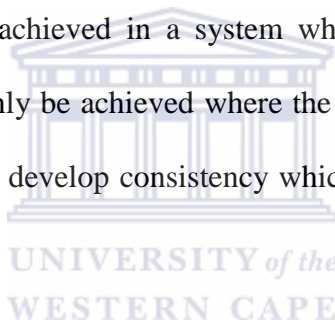
⁵⁴ *Methanex Corporation v. United States* UNCITRAL Rules Decision of the Tribunal on petitions from third persons to intervene as *amici curiae* 15 January 2001 p. 22, para 49 available at <http://italaw.com/cases/683> accessed on 28/08/2013.

⁵⁵ See also Van Harten G *Investment Treaty Arbitration and Public Law* (2007) at 159; see also Knahr C & Reinisch A ‘Transparency v Confidentiality in International Investment Arbitration – the Biwater Gauff Compromise’ (2007) *Law & Practice of International Courts & Tribunals* 97 – 118 at 110; see also Asteriti A & Tams CJ ‘Transparency and Representation of the Public Interest in Investment Treaty Arbitration’ in Schill (ed.) *International Investment Law and Comparative Public Law* (2010) 787 – 815.

⁵⁶ Grossman N ‘Legitimacy and International Adjudicative Bodies’ (2009) *George Washington International Law Review* 107 at 156.

⁵⁷ Van Harten G *Investment Treaty Arbitration and Public Law* (2007) at 159; see also Meron T ‘Judicial Independence and Impartiality in International Criminal Tribunals’ (2005) *American Journal of International Law* 359 at 360.

The need for transparency in investor – state disputes is even greater for a number of reasons: The first reason is that the mere fact that one of the parties to the dispute is a state renders the dispute public. The general public is entitled to know how the state is operating and discharging its public powers. The second reason is that an investor – state dispute mainly touches upon crucial economic sectors such as mining, energy, transportation, and the like. These sectors attract huge sums from the national budget; it is therefore understandable that the public need to be well informed about the proceedings and the outcome of the disputes which touch upon vital economic sectors. The third and last reason is that international investment law, as a branch of public international law, needs to be developed in a systematic way by being certain and predictable. This goal cannot be achieved in a system which is grounded in confidentiality. Certainty and predictability will only be achieved where the tribunals have access to previously decided cases; hence being able to develop consistency which would ultimately create certainty and predictability.



There are different ways which can be used to enhance transparency in any adjudicatory system. The first way is by making public the documents of the arbitral proceedings. The tribunal can make available for public inspection the names of litigants and arbitrators, the pleadings of each party, and the award and reasoning of the tribunal.⁵⁸ Another possible way of increasing transparency is by allowing an amicus curiae in a dispute. The amicus curiae could be

⁵⁸ Grossman N 'Legitimacy and International Adjudicative Bodies' (2009) *George Washington International Law Review* 107 at 155.

incorporated so as to represent the interests of third parties to the dispute. Alternatively the adjudicatory body could allow third parties to participate directly in the open hearing.⁵⁹

While it may be argued that total transparency may be detrimental to the foreign investor's trade secrets, it is submitted here that transparency can be achieved without compromising the business or trade interests of the foreign investors. The system, while transparent, can still provide for the necessity of protecting specific trade secrets.⁶⁰

The advantages of transparency are many and beneficial to the system as a whole. Transparency acts as a controlling tool for adjudicators' behaviour.⁶¹ The fact that arbitrators are aware that the public has access to their decisions and are able to scrutinise each arbitrator's reasoning will ultimately increase the quality of the awards. Arbitrators will be assiduous enough before rendering the award in order to avoid public humiliation resulting from poorly reasoned awards.

In addition, transparency helps the masses to evaluate the conduct of their governments through the pleadings and other court submissions. Through submissions, awards and other court proceedings, the public will be better informed about the conduct of their government; hence capable to decide whether to extend the tenure of that government or not.

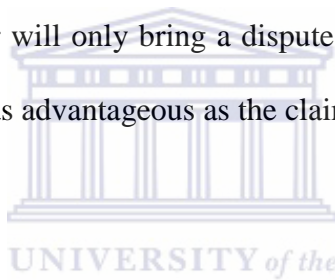
⁵⁹ Marshall F 'Defining New Institutional Options for Investor – State Dispute Settlement' (2009) *International Institute for Sustainable Development* at 22 available at http://www.iisd.org/Fdefining_new_institutional_options.pdf accessed on 28/08/2013.

⁶⁰ See Article 7 of the UNCITRAL Rules on Transparency in Treaty based Investor – State Arbitration, 2013 which specifically bars publication of certain business information.

⁶¹ Grossman N 'Legitimacy and International Adjudicative Bodies' (2009) *George Washington International Law Review* 107 at 155.

Furthermore, transparency results in public confidence in the respective adjudicatory system. Through transparent processes the system will be able to build itself, as the parties using it will be aware of the procedure applied consistently in all disputes.⁶²

Another advantage of transparency is that it can be used as a deterring mechanism against frivolous claims from the potential claimants.⁶³ The potential claimant will not be willing to institute a claim in an open and transparent forum before weighing the consequences thereof. The foreign investor in that matter will only bring a dispute if it has a genuine claim and finds that trade secrets protection is not as advantageous as the claim in an open court or forum.



Lastly, transparency is a very useful tool for achieving consistency by the respective adjudicatory body. The availability of prior decided cases which have a similarity with the new ones could be very helpful for the presiding tribunal to arrive at more or less similar conclusions; hence enhancing certainty and predictability in the investor – state dispute settlement system.⁶⁴

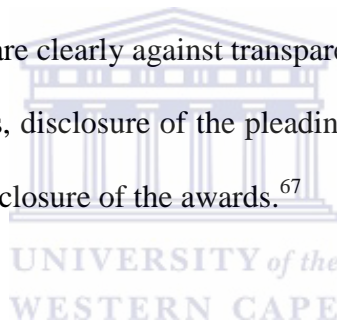
⁶² Grossman N ‘Legitimacy and International Adjudicative Bodies’ (2009) *George Washington International Law Review* 107 at 156.

⁶³ Grossman N ‘Legitimacy and International Adjudicative Bodies’ (2009) *George Washington International Law Review* 107 at 155.

⁶⁴ Grossman N ‘Legitimacy and International Adjudicative Bodies’ (2009) *George Washington International Law Review* 107 at 159.

4.3.1 Transparency in the current investor – state adjudicative system

Lack of transparency is one of the shortcomings of investor - state arbitration. The issue of transparency has not received the weight it deserves in the existing rules. As seen in the discussion in chapter three of this work,⁶⁵ the UNCITRAL Arbitration Rules 2010 are the most restrictive in their provisions on confidentiality.⁶⁶ Article 28(3) requires the hearings to be held in camera unless the parties agree otherwise. With regard to the award, article 34(5) provides that ‘the award may be made public only with the consent of both parties’. These rules make clear that hearings are open to the public only if there is an agreement of the parties to this effect. Therefore, the UNCITRAL Rules are clearly against transparency as they do not allow disclosure of the existence of the proceedings, disclosure of the pleadings and other documents filed in the proceedings, open hearings and disclosure of the awards.⁶⁷



It should be noted however that, with the coming into force of the new UNCITRAL Transparency Rules 2013 in April 2014, the stated above issues will no longer be a problem for disputes which will arise from the future negotiated treaties. The new Rules are meant to apply to future treaties which will designate UNCITRAL Rules for dispute settlement.⁶⁸ The current existing 3240 BITs and IIAs⁶⁹ will not be affected that much unless the parties to a dispute

⁶⁵ See sub heading 3.5.2.4 of Chapter three of this work.

⁶⁶ See UNCITRAL Arbitration Rules, 2010 available at www.uncitral.org/pdf/arbitration/rules/arb-rules-revised-2010 accessed on 15/07/2013.

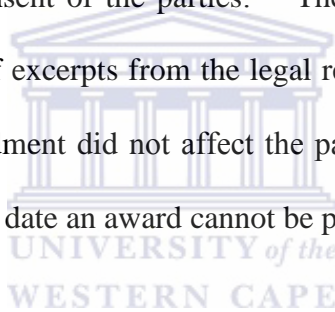
⁶⁷ See Article 28(3) UNCITRAL Arbitration Rules, 2010.

⁶⁸ See Article 1(1) of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2013.

⁶⁹ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2014* ‘investing in the SDGs: An Action Plan’ at xxiii available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

decide to opt for the new Rules.⁷⁰ Without such choice by the parties, the UNCITRAL 2010 Rules will continue to apply to all disputes emanating from treaties signed before 1 April 2014. Therefore in conclusion it can be said that while the new rules have to a large extent addressed the transparency issue, the problem is not yet solved for the current existing 3240 BITs and IIAs.⁷¹

The ICSID Convention, on the other hand, as discussed earlier,⁷² has to a large extent addressed the issue of transparency. Article 48(5) of the ICSID Convention provides: ‘The Centre shall not publish the award without the consent of the parties.’⁷³ The Arbitration Rules, as amended in 2006, also allow the publication of excerpts from the legal reasoning of the tribunal.⁷⁴ However, as pointed out earlier,⁷⁵ the amendment did not affect the parties’ autonomy with regard to the publication of the award in full. To date an award cannot be published unless the parties agree.



The amendments have also increased the opportunities for third parties to participate by way of submissions. This was done in response to the call for more transparency to the hearing. Article 37(2) allows non - disputing party submission subject to the tribunal’s discretion. The tribunal

⁷⁰ For a thorough discussion on the new Transparency Rules see Subheading 3.4.1.3.1 of chapter three of this work.

⁷¹ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2014* ‘investing in the SDGs: An Action Plan’ at xxiii available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

⁷² See Chapter Three of this research under subheading 3.6.2.4.

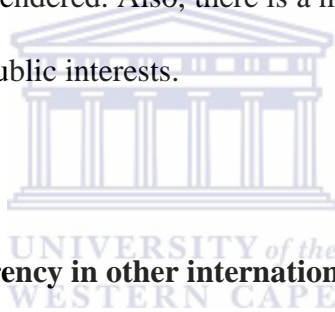
⁷³ The Washington Convention on Settlement of Investment Disputes between States and the Nationals of Other Contracting States, 1965 hereinafter referred “the ICSID Convention” read together with the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (hereinafter ICSID Rules) available at <http://www.worldbank.org/icsid.htm> accessed on 21/05/2013.

⁷⁴ See Rule 48(4) of the Arbitration Rules and Article 48(5) of the Convention; see also Asteriti A & Tams CJ ‘Transparency and Representation of the Public Interest in Investment Treaty Arbitration’ Schill (ed.) *International Investment Law and Comparative Public Law* (2010) 788 at 790; see also Mistelis LA ‘Confidentiality and Third Party Participation in Investment Arbitration’ (2005) 21 *Arbitration International* 205 at 221.

⁷⁵ See Chapter Three of this research under subheading 3.6.2.4.

has the mandate to accept or reject the third party submissions. The amendment covered only written submissions. A non - disputing party therefore is not eligible for oral hearing. Rule 32(2) of the ICSID Arbitration Rules gives the parties the power to allow or refuse third parties to the hearing of the proceedings.⁷⁶

Therefore, by looking at the ICSID and UNCITRAL Rules it can be said that more transparency is required. The amendments, while they are considered a step forward, have not addressed the problem entirely. There is still a need to have the investor – state awards accessible by the general public as soon as they are rendered. Also, there is a need to allow the public to attend the hearing of the disputes involving public interests.



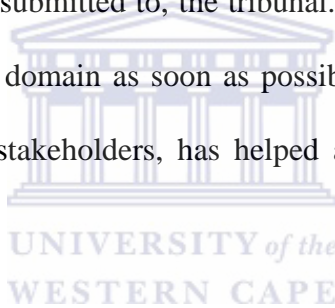
4.3.2 The trend towards transparency in other international institutions and instruments

As noted in the preceding discussion, transparency is vital where the dispute involves public interests. In an effort to enhance transparency some BITs and some IIAs have been reviewed to incorporate the transparency principle. The section below discusses the initiatives taken by countries and regional blocks in an effort to enhance transparency in their investor – state adjudicative processes.

⁷⁶ For more discussion see Asteriti A & Tams CJ ‘Transparency and Representation of the Public Interest in Investment Treaty Arbitration’ Schill (ed.) *International Investment Law and Comparative Public Law* (2010) 787 at 794.

4.3.2.1 Transparency under the Northern America Free Trade Agreement (NAFTA)

The State parties to the Northern America Free Trade Agreement (NAFTA) were the first trade block to introduce transparency in their investment disputes. Chapter 11 of the NAFTA is silent on the issue of transparency of investment disputes as there is no provision which requires the parties to make public the proceedings and the award.⁷⁷ This resulted to the public and civil societies' reaction against NAFTA.⁷⁸ As a result, the NAFTA state parties in 2001 through the Free Trade Commission (FTC) issued a Statement of Interpretation regarding proceedings under NAFTA. The Commission's Statement allows the parties to any NAFTA proceeding to provide access to documents issued by, or submitted to, the tribunal. In addition, the Statement requires the documents to be in the public domain as soon as possible.⁷⁹ The interpretative note, while receiving a mixed reaction from stakeholders, has helped a lot in increasing transparency in NAFTA arbitrations.⁸⁰



⁷⁷ See the NAFTA Text at <http://www.worldtradelaw.net/fta/agreements/nafta.pdf> accessed on 9/08/2013.

⁷⁸ See the Public Citizen publications against NAFTA Chapter Eleven at <http://www.citizen.org/documents/ACF186.PDF>; see also De Palma A 'NAFTA Powerful Little Secrets: Obscure Tribunal Settle Dispute but Go Too Far Critics Say' *The New York Times* 11/03/2001 available at <http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html?pagewanted=all&src=pm> accessed on 28/08/2013.

⁷⁹ See the NAFTA Free Trade Commission Notes of Interpretation of 31st July 2001, para 1(a) & (b) available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx> accessed on 28/08/2013.

⁸⁰ See the positive Tribunal's reaction on the FTC Note in *ADF Group Inc. v. United States* ICSID No. ARB (AF)/00/1(2003) para 177; but see the negative reaction by the Tribunal in *Pope & Talbot Inc. v. Canada* para. 11 – 16 & 47 (NAFTA Ch. 11 May 31, 2002), 41 ILM 1347 (2002); see also Roberts A 'Powers and Persuasions in Investment Treaty Arbitration: The Dual Roles of States' (2010) *The American Journal of International Law* 179 at 180- 81; also see Brower CH 'Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105' (2006) *Vanderbilt Journal of International Law* 347; also see Weiler T 'NAFTA Investment Law in 2001: As the Legal Order Starts to Settle, the Bureaucrats Strike Back' (2002) 36 *International Law* 345 at 346–48.

As a result of the Interpretative Statement the Tribunal in *ADF Group Inc v United States*⁸¹ read in the interpretative note and concluded that disputes under Chapter 11 of NAFTA can be held in open court and that the treaty parties can provide public access to documents submitted to or issued by a Chapter 11 tribunal.⁸² In addition, in *Methanex v United States*,⁸³ the tribunal allowed the amicus curiae brief and stated that the arbitral process has more to gain by opening up to the public than remaining secretive.⁸⁴

4.3.2.2 Transparency under the United States Model Bilateral Investment Treaties

The United States is one of the few countries that have taken steps to enhance the transparency principle in their model BITs. The US 2004 Model BIT requires the host state to publicise pleadings, orders, awards and any preliminary decision rendered by the presiding tribunal. The Model BIT also requires the hearing to be conducted in an open court and arrangements to be made to secure confidential business information.⁸⁵ The New US Model BIT 2012 also provides for transparency of the arbitral proceedings. Article 29 requires the respondent state to publish the notice of arbitration, parties' pleadings, memorials decisions and awards. The provision further requires the proceedings to be conducted in an open court.⁸⁶ With regard to an amicus

⁸¹ *ADF Group Inc v United States* ICSID No. ARB (AF)/00/1.

⁸² See *ADF Group Inc v United States* ICSID No ARB (AF)/00/1(2003) para 177.

⁸³ *Methanex Corporation v United States* UNCITRAL Rules available at <http://italaw.com/cases/683> accessed on 28/08/2013.

⁸⁴ *Methanex Corporation v United States* UNCITRAL Rules Decision of the Tribunal on petitions from third persons to intervene as *amici curiae* 15 January 2001 p. 22, para 49 available at <http://italaw.com/cases/683> accessed on 28/08/2013.

⁸⁵ See the US Model BIT 2004 article 29(1) available at http://www.ustr.gov/archive/Trade_Sectors/Investment/Model_BIT/Section_Index.html accessed on 28/08/2013.

⁸⁶ See the US Model BIT 2012 article 29(2) available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf accessed on 28/08/2013.

curiae submission, Article 28(3) clearly provides that the Tribunal shall have the authority to accept submissions from a person or entity that is not a disputing party.⁸⁷

As a result of the Model BITs, the Dominican Republic – Central American Free Trade Agreement (CAFTA),⁸⁸ the US - Australia Free Trade Agreement,⁸⁹ the US - Chile Free Trade Agreement,⁹⁰ and the recent agreements with Colombia, Korea, Morocco, Oman, Panama, Peru, Rwanda and Singapore all provides for transparency of investor – state disputes.⁹¹

4.3.2.3 Transparency under the Canadian Model Bilateral Investment Treaty

Canada, as well, has incorporated the principle of transparency in its Model BIT. The 2004 Canadian Model BIT makes it mandatory that the hearing should be conducted in a public place saves for some measures which can be taken to protect confidential business information.⁹² All documents submitted to, or issued by, the tribunal need to be publicly available, unless the disputing parties agree otherwise.⁹³ Non - disputing party submissions are allowed under Article 39(1). The non -disputing party is required to apply for leave to file a submission. The tribunal is

⁸⁷ See Article 28(3) of the US Model BIT 2012.

⁸⁸ See the Dominican Republic-Central American Free Trade Agreement of 05/08/2004 available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> accessed on 26/02/2014.

⁸⁹ See the United States-Australia Free Trade Agreement of 01/01/2005 available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text> accessed on 26/02/2014.

⁹⁰ See the United States-Chile Free Trade Agreement of 01/01/2004 available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta> accessed on 26/02/2014.

⁹¹ See these FTAs at <http://www.ustr.gov/trade-agreements/free-trade-agreements> accessed on 26/02/2014.

⁹² See Article 38(1) of the Canadian Model BIT 2004 available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> accessed on 28/08/2013.

⁹³ See Article 38 (3) of the Canadian Model BIT 2004.

required to grant permission unless it is of the view that the submission will disrupt the hearing or unnecessarily burden or prejudice one of the parties.⁹⁴

The Model BIT's intentions have been reflected in many trade agreements that Canada has entered into with other countries. The Canadian agreements with Colombia⁹⁵, Peru,⁹⁶ Panama⁹⁷ and Jordan⁹⁸ all provides for transparency in investor – state disputes. The recently concluded Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada also provide for transparency.⁹⁹ Rule 39 of the CETA Rules of Procedure and Code of Conduct clearly provide that hearing shall be open to the public.¹⁰⁰

In conclusion, it can be submitted here that very few of the existing BITs and IIAs provide for the requirement of transparency in disputes proceedings and awards. Only a few states have taken steps to rectify this anomaly. The arbitral institutional rules are, as well, not properly addressing this important aspect. As seen above, the UNCITRAL and ICSID Rules mandate the parties to decide whether their dispute should be public or not. While the state may be willing to go public, that desire most of the time is blocked by the investor who normally prefers

⁹⁴ See Article 39(5) of the Canadian Model BIT 2004.

⁹⁵ See the Canada-Colombia Free Trade Agreement of 21/11/2008 came into force on 15/08/2011 available at <http://www.international.gc.ca> accessed on 26/02/2014

⁹⁶ See the Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments came into force 01/08/2009 available at <http://www.international.gc.ca>. accessed on 26/02/2014.

⁹⁷ See the Free Trade agreement between Canada and Panama available at <http://www.treaty-accord.gc.ca/text-texte.aspx?id=105128&lang=eng> accessed on 26/02/2014.

⁹⁸ See the Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments of 28/06/2009 came into force on 01/10/2012 available at <http://www.international.gc.ca> accessed on 26/02/2014.

⁹⁹ See the EU – Canada Comprehensive Economic and Trade Agreement (CETA) available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf accessed on 11/11/2014.

¹⁰⁰ See CETA, Rules of Procedure and Code of Conduct made under Article 14:15 of the CETA available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf accessed on 12/11/2014.

confidentiality of the proceedings. If transparency is to be achieved there is a need for a deliberate move towards renegotiating the current BITs and the institutional rules so as to include transparency aspects. The current situation where only few states, such as, the US and Canada have taken such steps will not help much in building a legitimate investor – state adjudicatory system.

4.4 Independence and impartiality

4.4.1 The Meaning of the concepts independence and impartiality

For adjudication purposes, the term ‘independence’ refers to the absence of improper connections with either party while impartiality refers to lack of prejudgment on the matter before hand.¹⁰¹ The requirement for independent and impartial adjudicators stems from one of the cardinal principles of natural justice: the rule against bias. The rule requires that no one should preside over any matter where he/she has an interest in the outcome.¹⁰² The essence of the rule against bias, therefore, is to eliminate all possible doubts in the adjudication process. It is just logical to conclude that even an independent adjudicator is not expected to be impartial in a situation where his interests are at stake.¹⁰³ The rule is essentially concerned with appearance and

¹⁰¹ See Park WW ‘Arbitrator Integrity’ in Waibel M et al (eds.) *The Backlash against Investment Arbitration: Perception and Reality* (2010)189 -251 at 194; see also Malintopi L ‘Remarks on Arbitrators Independence, Impartiality and Duty of Disclosure’ (2008) *Law & Practice of International Courts & Tribunals* 351 at 353; also see Sheppard A ‘Arbitrator Independence in ICSID Arbitration’ in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christopher Schreuer* (2009) 131 – 156 at 131.

¹⁰² For a thorough discussion on this principle see Herling D& Lyon A *The Briefcase on Constitutional and Administrative Law* 4ed. (2004) at 149; see also Stott D& Felix A *Principles of Administrative Law* (1997) at 142; see also Barnet H *Constitutional and Administrative Law* 4ed. (2002) at 898; also see Alder J *General Principles of Constitutional and Administrative Law* 4ed. (2002) at 393; see also Hawke N & Parpworth N *Introduction to Administrative Law* (1998) at 165.

¹⁰³ See Scheuer C *The ICSID Convention: A Commentary* (2001) at 57.

no proof of actual bias is required. This is in accordance with the old adage which requires that justice should not only be done but should manifestly and undoubtedly be seen to be done.¹⁰⁴

The appearance of bias can be drawn by applying two tests: the real likelihood test and the reasonable suspicion test.¹⁰⁵ The reasonable suspicion test is much concerned with the appearance of bias in the context of public perception. On the other hand, the real likelihood test is concerned with whether bias is likely in light of all the circumstances.¹⁰⁶

It follows therefore that the mere presence of financial or personal interest, even where it does not result in actual bias but may present the appearance of bias, is sufficient to disqualify the adjudicator from presiding over the matter.¹⁰⁷ The aim of this rule is to build confidence in the integrity of the decision making process.¹⁰⁸ The rule against bias, therefore, operates against a direct personal financial interest, personal connection with a party and prior expressed personal opinion on the belief or conduct of one of the parties.¹⁰⁹

4.4.2 Independent and impartial adjudicators in the international adjudicative systems

As stated in the introduction of this part, having independent and impartial adjudicators is another key element of a legitimate adjudication system. Independence and impartiality of the

¹⁰⁴ See *R v Sussex Justices ex parte McCarthy* (1924) Kings Bench p 259.

¹⁰⁵ See Herling D& Lyon A *The Briefcase on Constitutional and Administrative Law* 4ed. (2004) at 149; also see Barnet H *Constitutional and Administrative Law* 4ed. (2002) at 898.

¹⁰⁶ See Alder J *General Principles of Constitutional and Administrative Law* 4ed. (2002) at 395.

¹⁰⁷ Barnet H *Constitutional and Administrative Law* 4ed. (2002) at 899; see also Stott D& Felix A *Principles of Administrative Law* (1997) at 144.

¹⁰⁸ See Alder J *General Principles of Constitutional and Administrative Law* 4ed.(2002) at 393

¹⁰⁹ Park WW 'Arbitrator Integrity' in Waibel M et al (eds.) *The Backlash against Investment Arbitration: Perception and Reality* (2010)189 -251 at 195.

people involved in settling the dispute are crucial for the legitimacy of the system itself. In all modern constitutional democracies, independence and impartiality of adjudicators is guaranteed by the independence of the judiciary.¹¹⁰ It follows therefore that an adjudicative system which lacks independence and impartiality of its adjudicators among its basic values will hardly be regarded as legitimate.¹¹¹ To guarantee independence and impartiality of adjudicators there are a number of safeguards which the adjudication system needs to embody. These include the safeguards for the tenure of adjudicators and guarantee of adjudicators' emoluments and remunerations.¹¹²

The presence of these safeguards ensures the independence and impartiality of adjudicators in different ways. Because of the security of tenure, adjudicators are expected to adjudicate matters without fear or favour as their employment is already secure. It is further expected that as their emoluments and remuneration are already determined and not subjected to alteration, they will be impartial as they have nothing to lose financially.

¹¹⁰ See Van Harten G 'Investment Treaty Arbitration, Procedural Fairness and the Rule of Law' in Schill S (ed.) *International Investment Law and Comparative Public Law* (2010) 627 at 640; also see Sheppard A 'Arbitrator Independence in ICSID Arbitration' in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christopher Schreuer* (2009) 131- 156 at 131; see also Van Harten 'Five justifications for investment treaties: A critical discussion' (2008) *Trade Law & Development 1*; see also Van Harten G *Investment Treaty Arbitration and Public Law* (2007) at 167 – 168; see also Bernasconi – Osterwalder N et al 'Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel' (2010) *International Institute for Sustainable Development* (IISD) at pp 1 – 2 available at http://www.iisd.org/pdf/2011/dci_2010_arbitrator_independence.pdf accessed on 11/08/2013.

¹¹¹ Van Harten G 'Investment Treaty Arbitration, Procedural Fairness and the Rule of Law' in Stephan Schill (ed.) *International Investment Law and Comparative Public Law* (2010) 627 at 640.

¹¹² See Article 2 of the UN Basic Principles on the Independence of the Judiciary UNGA Res 40/32 (1985) available at <http://www.unrol.org/doc.aspx?d=2248> accessed on 02/09/2013; see also Van Harten G 'Investment Treaty Arbitration, Procedural Fairness and the Rule of Law' in Schill S (ed.) *International Investment Law and Comparative Public Law* (2010) 627 at 641.

To establish the neutrality of the adjudicator may not be easily achieved. The International Bar Association (IBA) has developed guidelines for assessing the neutrality of the adjudicators. The Guidelines are not mandatory but they are very useful to assess the impartiality and independence of adjudicators.¹¹³ In the following section the Guidelines are discussed thoroughly.

4.4.3 The International Bar Association (IBA) guidelines on conflict of interest in international arbitration.

Responding to the growing concerns about impartiality in international arbitration, in 2002 the International Bar Association (IBA) formed a working group to formulate the Guidelines on Conflict of Interest in International Arbitration. The Guidelines were adopted in May 2004.¹¹⁴ The Guidelines were designed to apply in international arbitration. They may be used by any institution involved in international arbitration.¹¹⁵

The Guidelines aim at ensuring that arbitrators who preside in international disputes are ethical and neutral. The Guidelines contain two main parts. The first part contains the general standards regarding impartiality, independence and duty to disclose, and their respective explanations.¹¹⁶ The second part contains possible situations in which the arbitrator may find himself/herself when approached for appointment.

¹¹³ See Scherer M 'The IBA guidelines on conflicts of interest in international arbitration: The first five years 2004–2009' (2010) *Dispute Resolution Journal* at 28–29; also see Sheppard A 'Arbitrator Independence in ICSID Arbitration' in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christopher Schreuer* (2009) 131 – 156 at 136.

¹¹⁴ The IBA Guidelines on Conflicts of Interest in International Arbitration, 2004 available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#conflictsofinterest accessed on 04/09/2013.

¹¹⁵ See Wijnen OW et al 'Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration' *Business Law International* 5 (2004) 433 at 433.

¹¹⁶ The first part contains seven general standards with the explanations for each standard.

In the first part, General Standard 1 provides for the fundamental requirement that an arbitrator must be independent and impartial from the time of appointment up until the dispute comes to an end. This requirement is unconditional and the arbitrator is obliged to ensure that he remains so for the whole period of the dispute. Therefore, any doubt about independence and impartiality needs to be addressed as soon as it emerges. The arbitrator needs to do a personal assessment as to whether there are any circumstances which create a doubt or doubts about his impartiality or independence.¹¹⁷ Upon such assessment the arbitrator is required to disclose immediately any justifiable doubt about his/her impartiality and independence.¹¹⁸ Failure to make such a disclosure will entitle the appointing authority or the parties to disqualify such arbitrator.¹¹⁹ It follows therefore that the duty to disclose any doubt is absolute. General Standard 4 to 7 all stress the importance of disclosure and the consequences of lack thereof. All in all the General Standards expound the importance of the adjudicators to be as independent and impartial as possible.

The second part of the Guidelines, as earlier stated, contains possible situations in which the arbitrator may find himself/herself when approached for appointment. These situations are divided into three categories: red, orange and green. The green category represents situations in which the potential arbitrator is free from any possible doubt and therefore he/she is a perfect candidate for the job. The orange category lists situations where the parties may cast some doubt on the independence and impartiality of the prospective arbitrator. The red category which is divided into: waiveable and non - waiveable situations, lists situations which, on the face of it,

¹¹⁷ See General Standard 2(a).

¹¹⁸ See General Standard 3(a) & (d).

¹¹⁹ See General Standard 3(a).

indicate that the prospective arbitrator cannot be independent and impartial.¹²⁰ The practical implication of the categories is that in a non - waiveable situation the prospective arbitrator must decline the appointment. The red category's waiveable and the orange category situations, on the other hand, require the potential arbitrator to disclose a relationship so as to allow the parties to ascertain the risks involved.¹²¹ The main difference between the red category's waiveable situations and orange category situations is that the former require the parties to make an express waiver while the latter give the parties the right to raise an objection to the appointment within 30 days.

In conclusion, it can be said that although the IBA Guidelines are not binding, they could be an important tool in ensuring the independence and impartiality of adjudicators if they are borrowed and applied. The Guidelines can help a lot in curing the problem of dual roles of arbitrators and counsel in investor – state arbitrations. Duality would be considered to create a justifiable doubt as per General Standard 2 and be placed in a red category situation. However the fact that the Guidelines are optional limits its applicability and effectiveness.

¹²⁰ Wijnen OW et al 'Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration' *Business Law International* 5 (2004) 433 at 434 – 435; see also Bernasconi – Osterwalder N et al 'Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel '(2010) *International Institute for Sustainable Development (IISD)* at 29 available at http://www.iisd.org/pdf/2011/dci_2010_arbitrator_independence.pdf accessed on 11/08/2013.

¹²¹ Wijnen OW et al 'Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration' *Business Law International* 5 (2004) 433 at 434.

4.4.4 Independence and impartiality in the investor – state arbitration system

Under the current system independence and impartiality are not guaranteed.¹²² The safeguard for security of tenure and emoluments is seriously undermined by the fact that arbitrators are presiding over disputes on ad hoc basis. The ICSID Convention, the Additional Facility Rules and the UNCITRAL Rules all provide for ad hoc appointment of adjudicators.¹²³ This means that the adjudicators in investor – state arbitration are not certain about their tenure. As a result, adjudicators play dual roles as adjudicators and counsel in different cases.¹²⁴ There are no rules of etiquette to bar arbitrators from switching sides. Despite this anomaly the ICSID Convention and the Rules place a higher burden of proof on a party challenging the impartiality of the arbitrator. Article 57 empowers either party to challenge the appointment of an arbitrator. A party can challenge the appointed arbitrator on the basis of any fact indicating a ‘manifest lack of the quality’ as stipulated under Article 14(1).¹²⁵

The demand for ‘manifest lack of quality’ puts the challenging party in a very difficult position as he needs to prove or provide a clear doubt about the appearance of impartiality of the respective arbitrator.¹²⁶ Other institutional rules just require such a challenging party to raise

¹²² See subheading 3.6.2.3 of chapter three of this work.

¹²³ See Article 37 (1) and Rule 1(1) of ICSID Arbitration Rules, see also Article 10 of the Additional Facility Arbitration Rules, and also see Article 8 of UNCITRAL Arbitration Rules.

¹²⁴ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2012* ‘Towards a New Generation of Investment Policies’ at 88.

¹²⁵ See Article 57 of the Convention.

¹²⁶ See *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A* (ICSID Case No. ARB/03/17)(2008) para. 29; see also *Compana de Aguas del Aconquija & Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3)(2001) para. 25; also see Sheppard A ‘Arbitrator Independence in ICSID Arbitration’ in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christopher Schreuer* (2009) 132 at 133 – 134; see also Bernasconi – Osterwalder N et al ‘Arbitrator Independence

‘justifiable doubts’.¹²⁷ The ‘manifest lack of quality’ threshold is too high and many challenges fail to meet the requirement.¹²⁸ It has been held that ‘manifest lack of quality’ requires more than mere speculation or inference of partiality and the relationship challenged must be more than trivial.¹²⁹

Another issue is that there is no provision in the Convention which imposes an obligation on the arbitrator to be impartial. Article 14 of the ICSID Convention requires arbitrators to be of high moral character, competent in law and able to exercise independent judgment. The Convention does not mention impartiality as one of the requirements. It is submitted here that the omission is grave because a person who is capable of exercising independent judgment will not necessarily be impartial in a dispute in which they have an interest. Therefore, there is a need to include, in addition to the requirement of independent judgment; the requirement of impartiality of arbitrators as stipulated in other arbitration rules.¹³⁰

and Impartiality: Examining the dual role of arbitrator and counsel’ (2010) *International Institute for Sustainable Development* (IISD) at 12.

¹²⁷ See Article 11 and 12 of the UNCITRAL Arbitration Rules 2010; see also Article 15 of the Stockholm Chamber of Commerce Arbitration Rules, 2010 available at http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf accessed on 12/08/2013; see also General Standard 2(a)& (c) of the International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#conflictsofinterest accessed on 12/08/2013.

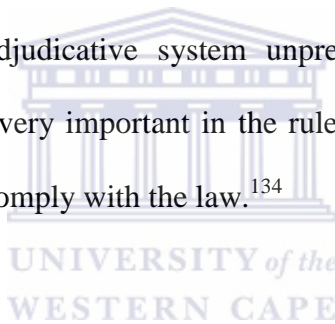
¹²⁸ For more insightful argument on this see also Sheppard A ‘Arbitrator Independence in ICSID Arbitration’ in Binder C et al eds. *International Investment Law for the 21st Century: Essays in Honour of Christopher Schreuer* (2009) 132 at 133 – 134; see also Schreuer *The ICSID Convention: A commentary* (2001) 1200 para 16; See also Bernasconi – Osterwalder N et al ‘Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel (2010) ’ *International Institute for Sustainable Development* (IISD) at 11.

¹²⁹ See *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* ICSID Case No. ARB/03/23 (2003) paras 132 – 133.

¹³⁰ See Article 11 & 12 of the UNCITRAL Rules, 2010; see also Article 14(1) of the Stockholm Chamber of Commerce Arbitration Rules; see also General Standard 1 of the International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration. For more discussion see also Sheppard A ‘Arbitrator Independence in ICSID Arbitration’ in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christopher Schreuer* (2009) 132 at 135 – 136.

4.5 Consistency/coherence

Consistent application and interpretation of the rules is another important value for building legitimacy. Consistency simply requires that in similar situations similar rules should be applied and should, as much as possible, arrive at a similar conclusion.¹³¹ Consistent application of the rules brings certainty, predictability and reliability of the system; hence enhancing its legitimacy.¹³² It is submitted that coherence or consistency legitimates a rule by providing a connection between the respective rule and its main purpose. It follows therefore that if the court or the tribunal fails to apply the same rule consistently or applies the same rule differently in different cases, it renders the adjudicative system unpredictable.¹³³ According to Franck, consistency and predictability are very important in the rule of law and without which, human beings may not anticipate how to comply with the law.¹³⁴



In an endeavour to achieve consistency a number of measures can be employed by the adjudicative body. The measures include the use of the doctrine of precedent, use of referencing system, consolidation of related proceedings and having a higher appellate structure with the

¹³¹ See Van Harten *Investment Treaty Arbitration and Public Law* (2007) at 164; see also Peerenboom R 'Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China' (2002) 23 *Michigan Journal of International Law* 471; see also Kairys D 'Searching for the Rule of Law' (2003) *Suffolk University Law Review* 307; also see Eyer KR 'Administrative Adjudication and the Rule of Law' (2008) *Administrative Law Review* 647 – 706 at 655.

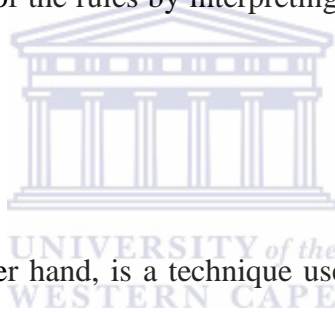
¹³² Franck SD 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521 at 1584; see also Kaufmann – Kohler G 'Arbitral Precedent: Dream, Necessity of Excuse? – The 2006 Freshfield Lecture' (2007) 23 (3) *Arbitration International* 374; see also Van Harten G *Investment Treaty Arbitration and Public Law* (2007) at 164; also see Eyer KR 'Administrative Adjudication and the Rule of Law' (2008) *Administrative Law Review* 647 – 706 at 660.

¹³³ See Grossman N 'Legitimacy and International Adjudicative Bodies' (2009) *George Washington International Law Review* 107 at 150.

¹³⁴ Franck SD 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521 at 1584.

mandate to rectify errors from first instance tribunals. These measures or factors are briefly explained in the paragraphs that follow below.

The doctrine of precedent simply means: let us stand by what has been decided.¹³⁵ A particular decided case is considered a precedent when it furnishes a basis upon which future cases with similar facts and issues are determined. The doctrine is considered to be the most effective adjudicative technique of avoiding inconsistent decisions.¹³⁶ The doctrine is a common feature in almost all countries which have adopted the English common law legal system. The aim of the doctrine is to create predictability of the rules by interpreting the rules consistently by following alike previously decided cases.



A reference procedure, on the other hand, is a technique used to enhance consistency whereby the matter is referred to the higher designated reference authority. The interpretation given by such higher authority becomes binding on all future queries on the subject at hand. Reference is regarded as one of the best tools which has contributed to the uniform application of European Community law.¹³⁷

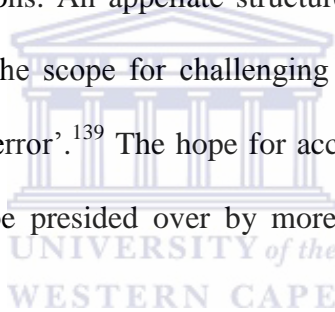
¹³⁵ Kaufmann – Kohler G ‘Arbitral Precedent: Dream, Necessity of Excuse? – The 2006 Freshfield Lecture’ (2007) 23 (3) *Arbitration International* 357 at 358; see also Reinisch A ‘The Future of Investment Arbitration’ in Binder C et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894 - 916

¹³⁶ Reinisch A ‘The Future of Investment Arbitration’ in Christina Binder et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894 – 916 at 915.

¹³⁷ Tams C ‘An Appealing option: The Debate about an ICSID Appellate Structure’ (2006) *Essays on Transnational Economic Law 1* at 41.

Consolidation entails the merging of two or more related disputes into one that is conducted or handled by the consolidation tribunal upon agreement of the parties.¹³⁸ For the claims to qualify for consolidation they need to have a common question of law or fact which arose out of the same event or circumstances. The aim of consolidation is to save the cost of running two tribunals and to avoid parallel proceedings which in turn could lead to conflicting decisions.

The last measure or technique is the use of an appellate structure. The appellate court harmonises the case law when it pronounces the true position of law which needs to be followed in situations where there are conflicting decisions. An appellate structure helps in creating accuracy in the decisions as ‘the more generous the scope for challenging decisions by appeal or review the greater the chance of eliminating error’.¹³⁹ The hope for accuracy comes from the expectations that the appellate structure will be presided over by more experienced and more competent personnel.



4.5.1 Consistency in the investor – state arbitration system

The investor – state arbitration system does not give high regard to the factors/techniques which contribute to consistency. The Convention and the UNCITRAL Rules neither provide for the

¹³⁸ Knahr C ‘Consolidation of Proceedings in International Investment Arbitration’ in Knahr et al (eds.) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 1-19 at 2; see also Spooreberg F & Vinales J ‘conflicting decisions in International Arbitration’ *Law & Practice of International Courts & Tribunals* (2009) 91 – 113; see also Reinisch A ‘The Issues Raised by Parallel Proceedings and Possible Solutions’ in Waibel M et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 113- 126 at 113.

¹³⁹ Tams C ‘An Appealing option: The Debate about an ICSID Appellate Structure’ (2006) *Essays on Transnational Economic Law 1* at 26.

doctrine of precedent, nor for the consolidation principle. The Convention and the UNCITRAL Rules are also silent on an appellate structure and a reference system. As a result, as extensively discussed in Chapter Three,¹⁴⁰ lack of consistency is one of the identifying features of the system.¹⁴¹ A number of inconsistent decisions exist in parallel and all are regarded as valid and binding upon the parties.

This problem was acknowledged by the ICSID Secretariat in 2004. The Secretariat, in the same year, issued a discussion paper to stakeholders which among other things suggested the introduction of an appellate body within the ICSID framework.¹⁴² The proposal did not receive enough support especially from foreign investors' home states and it has never been pursued since. The objectors argued that the creation of an appellate structure will be going contrary to the very aim of the Convention, which is ensuring finality of disputes.¹⁴³ It remains a fact that, although the ICSID Secretariat abandoned the idea of establishing an appellate structure for lack of support, the inconsistency problem is still growing and creating more uncertainty in international investment law.¹⁴⁴ It is submitted here that establishing an appellate court for all

¹⁴⁰ See subheading 3.6.2.1 of Chapter three of this work.

¹⁴¹ See Reinisch A 'The proliferation of international Dispute Settlement Mechanisms: The threat of fragmentation vs. The promise of more effective system? Some reflections from the perspective of investment arbitration' in Buffard J et al (eds.) *International Law Between Universalism and Fragmentation* (2008)107 – 126; Franck S 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521 at 1545 and Knahr C 'Consolidation of Proceedings in International Investment Arbitration' in Knahr C et al (eds.) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 1-19 at 2.

¹⁴² International Centre for Settlement of Investment Disputes, ICSID Secretariat Discussion Paper, Possible Improvements of the Framework for ICSID Arbitration, 16 (Oct. 12, 2004), available at <http://www.worldbank.org/icsid/improve-arb.pdf>.

¹⁴³ See Article 53 of the Convention.

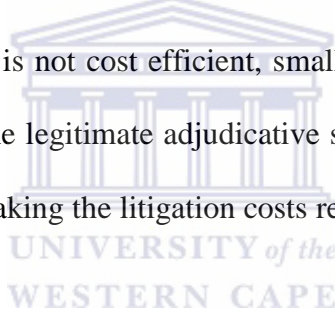
¹⁴⁴ See for example the interpretation of NPM clause in US – Argentina BIT. The tribunals in *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8 of 20th April 2005 final award available at <http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf>, *Enron Corporation and Ponderosa Assets L P v Argentine Republic* ICSID ARB/01/3 of 9th May 2007final award available at <http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf> and *Sempra Energy International v The*

investor – state disputes remains the best option available for consistent, affordable, predictable and independent investor – state adjudication processes.

4.6 Cost efficiency

As pointed out earlier, for an adjudicative system to be perceived as legitimate, it also needs to be accessible and affordable to all stakeholders, rich and poor. The costs of filing a case and adjudicating the same should be reasonable and should not be a deterring factor to the poor.¹⁴⁵

This means that where the system is not cost efficient, small investors and poor states may shy away from using the system.¹⁴⁶ The legitimate adjudicative systems always ensure that they are accessible to all stakeholders by making the litigation costs reasonable and thus affordable for all stakeholders.¹⁴⁷



Argentine Republic ICSID ARB/02/16 of 14th September 2007 final award available at <http://www.italaw.com/cases/documents/1004> ruled that necessity defence was not applicable to Argentina while the other two tribunals in *LG&E Energy Corp LG&E Capital Corp and LG&E International Inc v Argentine Republic* ICSID ARB/02/1 of 9th July 2007 final award available at <http://www.italaw.com/sites/default/files/case-documents/ita0462.pdf> and *Continental Casualty Company v Argentine Republic* Case No ARB/03/9 Decision on Jurisdiction (2006) available at <http://italaw.com/sites/default/files/case-documents/ita0228.pdf> ruled that the defence of necessity was applicable to Argentina.

¹⁴⁵ For the same argument see also Coe JJ Jr ‘Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods,’ (2003)36 *Vanderbilt Journal of Transnational Law* 1381.

¹⁴⁶ For the same argument see also Franck SD ‘Rationalising Costs in Investment Treaty Arbitration’ (2011) *Washington University Law Review* 769 at 775

¹⁴⁷ For the same argument see also Salacuse JW ‘Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution (2007) 31 *Fordham International Law Journal* 138 at 142.

4.6.1 Cost efficiency in the investor – state arbitration system

As discussed in Chapter Three of this research, exorbitant litigation costs is one of the main issues haunting an investor – state arbitration system.¹⁴⁸ Costs act as a hurdle to the poor host states and less fortunate foreign investors. The UNCTAD World Investment Report 2010 clearly states that the costs in investor – state disputes have skyrocketed.¹⁴⁹ Arbitrators’ charges range from USD 350 – 700 per hour per arbitrator depending on the claimed dispute amount.¹⁵⁰ The total cost per case therefore depends on the number of days the Tribunal have sat and the complexity of the matter. It was further revealed that the cost for one case ranges from USD 1 million to 21 million as most of the Tribunals are constituted by three arbitrators and several lawyers for both sides and take months before the dispute is put to rest.¹⁵¹ The amount claimed against Russia by the three majority shareholders of the former Yukos Oil Company in the ongoing arbitration proceedings against Russia is USD 114 billion.¹⁵² The exorbitant costs at

¹⁴⁸ See Chapter Three under Subheading 3.6.2.7.

¹⁴⁹ See United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* ‘Investor – State Dispute: Prevention and Alternative to Arbitration’ (2010) at 16-18 available at http://www.unctad.org/en/docs/diaeia200911_en.pdf accessed on 05/10/2013.

¹⁵⁰ International Centre for Settlement of Investment Disputes (ICSID) fees are set at US\$3000 a day see <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&ScheduledFees=True&year=2012&language=English> accessed on 05/10/2013.

¹⁵¹ See Franck SD ‘Rationalising Costs in Investment Treaty Arbitration’ (2011) *Washington University Law Review* 769 at 775 ; see also Eberhardt P & Olivert C ‘How Law Firms, Arbitrators and Financiers are Fueling an Investment Arbitration Boom’ (2012) Corporate Europe Observatory and the Transnational Institute available at <http://www.tni.org/sites/www.tni.org/files/download/profitfrominjustice.pdf> accessed on 05/10/2013; also see Franck S ‘Empirically Evaluating Claims About Investment Treaty Arbitration’ (2007) *North Carolina Law Review* 1 at 77.

¹⁵² See *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No AA 226; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227; *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, PCA Case No AA 228.

times intimidate poor developing countries from litigating and thus they decide to give in to the foreign investor's demands thereby forfeiting their right to be heard.¹⁵³

4.7 Effective time frame

Lastly, a legitimate adjudicative system needs also to develop a time frame within which the dispute has to be resolved. It is important that the dispute should not drag on in the adjudication machinery for years. Parties will perceive a system as legitimate where they can predict or know beforehand how long the dispute will take.¹⁵⁴ With a time frame in hand, parties will be able to estimate or budget for the case. Therefore, any adjudicative system which lacks a reasonable timeframe and takes a number of years before resolving a dispute will hardly be positively perceived by its stakeholders.¹⁵⁵

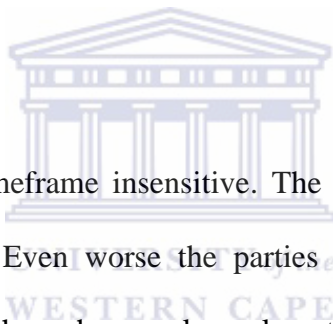
¹⁵³ See the Report of the SRSG, Business and Human Rights: *Towards Operationalizing the 'Protect, Respect and Remedy' Framework* A/HRC/11/13, para 30 (2009); See also, Report of the SRSG, Business and Human Rights: *Further Steps Towards the Operationalization of the 'Protect, Respect and Remedy' Framework* A/HRC/14/27, paras 20–23 (2010), the reports can be accessed at <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> accessed on 9/03/2014.

¹⁵⁴ For more on this see Raviv A 'Achieving a Faster ICSID' (2014) 11 *Transnational Dispute Management* at 1 available at <http://www.transnational-dispute-management.com/article.asp?key=2066> accessed on 26/03/2014; see also see also Sinclair A et al 'ICSID Arbitration: How Long Does It Take?' *Global Arbitration Review* available at <http://www.goldreserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf> accessed on 18/07/2013.

¹⁵⁵ Franck SD 'Rationalising Costs in Investment Treaty Arbitration' (2011) *Washington University Law Review* 769.

4.7.1 Effective timeframe in the investor – state arbitration system

The lack of a strict timeframe within which the dispute has to be resolved is another nagging problem in the investor – state arbitration system. As discussed under chapter three of this work, disputes drag for years before coming to a conclusion.¹⁵⁶ The ICSID process is referred as ‘an indisputably slow process, with many arbitrations taking 4-5 years or longer before a decision is delivered’.¹⁵⁷ A lot of stakeholders have written on the length of the ICSID dispute settlement process.¹⁵⁸ A research on disputes resolved in 2012 indicates that the dispute resolution timeframe ranges from 47 months (almost 4 years) to 138 months (over 11 years).¹⁵⁹



The annulment process is also timeframe insensitive. The annulment process takes up to six years before it is put to rest.¹⁶⁰ Even worse the parties are not limited to one annulment application, some cases have gone through several annulment process.¹⁶¹

In conclusion, it can be said that the current investor state arbitration system has failed to observe timeframe. No wonder that the system is facing backlash from stakeholders.

¹⁵⁶ See Chapter Three under Subheading 3.2.3.4.

¹⁵⁷ Raviv A ‘Achieving a Faster ICSID’ (2014) 11 *Transnational Dispute Management* at 1.

¹⁵⁸ See Parra AR *The History of ICSID* (2012) at 187; see also Kapoor VJ ‘Wearing Hats and Walking the Line: How Arbitrators Reconcile Outside Activities and Judicial Duties’ (2011)24 *Georgia Journal of Legal Ethics* 625 at 626; see also Sinclair A et al ‘ICSID Arbitration: How Long Does It Take?’ (2009) *Global Arbitration Review* at 5.

¹⁵⁹ See Raviv A ‘Achieving a Faster ICSID’ (2014) 11 *Transnational Dispute Management* at 4 available at <http://www.transnational-dispute-management.com/article.asp?key=2066> accessed on 26/03/2014.

¹⁶⁰ See for example *Amco Asia Corp. v. Republic of Indonesia* Case No. ARB/81/I award rendered on 1984 and the final Annulment order was issued 1992; *KlocknerIndustrie-Anlagen GmbH v. United Republic of Cameroon* Case No. ARB/81/2 award rendered in 1983 and the last decision on Annulment was issued in 1990; *Wena Hotels Ltd. v. Arab Republic of Egypt* Case No. ARB/98/4 award rendered in 2000 and the final annulment order issued in 2005

¹⁶¹ *Amco v Indonesia* and *Klockner v Cameroon* both underwent two annulment processes.

4.8 Consequences of lack of legitimacy values in the current investor – state arbitration system

In reaction to the lack of legitimacy values, some stakeholders have started running away from the investor – state arbitration system. Latin America countries, such as, Bolivia, Ecuador, and Venezuela, have led the way by withdrawing from the ICSID Convention.¹⁶² In a more adverse step against the awards, some countries have reacted by refusing to honour or declaring not to honour any future investment arbitral awards rendered against them.¹⁶³ Argentina, for example, has refused to pay the awards rendered against it in *Azurix Corp v Argentina*¹⁶⁴ and *CMS v Argentina*.¹⁶⁵ In *Azurix*, the Tribunal awarded USD 162.5 million to the claimant for Argentina's failure to accord fair and equitable treatment and for the lack of full protection and security to the foreign investor contrary to the Argentina – US BIT. In the second case, *CMS v Argentina*, the Tribunal awarded USD 133.2 million for the respondent state's failure to provide fair and equitable treatment to the foreign investor.¹⁶⁶ As a result of the Argentinian government's reaction against the awards, on 28 May 2012 the US government suspended Argentina from the Generalized System of Preferences (GSP) which exempts tariffs on imports from developing

¹⁶² United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2012* 'Towards a New Generation of Investment Policies' at 88.

¹⁶³ See CNN (Jan. 9, 2012) *Chavez Says He Won't Respect World Bank Panel's Decision*, available at <http://edition.cnn.com/2012/01/09/business/venezuela-exxon/index.html> accessed on 20/09/2013; see also Peterson LE 'How Many States Are Not Paying Awards under Investment Treaties?' (2010) *Investment Arbitration Reporter* available at http://www.iareporter.com/articles/20100507_3 citing Russia, Krygstan and Thailand as defiant states; see also Goodman LC 'Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina' (2007) 28 *Journal of International Economic Law* 449; also see Rosenberg CB 'The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards' (2013) *Georgetown Journal of International Law* 503.

¹⁶⁴ *Azurix Corp. v. Argentine Republic*, ICSID Case No ARB/01/12, Award of 14th July 2006.

¹⁶⁵ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No ARB/01/8, Award of 12th May 2005.

¹⁶⁶ For a thorough discussion on these cases see Chapter three of this Work.

countries.¹⁶⁷ Apart from Argentina, also Zimbabwe,¹⁶⁸ Liberia,¹⁶⁹ Russia,¹⁷⁰ Thailand,¹⁷¹ Senegal,¹⁷² Kyrgyzstan¹⁷³ and Venezuela¹⁷⁴ have shown dissatisfaction with the ICSID system and refused to pay the awards issued against them.¹⁷⁵

In March 2014, Indonesia, after facing a number of treaty based claims in recent years, has decided to terminate the BIT with The Netherlands.¹⁷⁶ In a more serious move the Indonesian government has indicated that it intends to terminate all 67 BITs entered into with other countries.¹⁷⁷



¹⁶⁷ See the Presidential Proclamation No. 8788, 77 Fed. Reg 18, 899 of Mar. 29, 2012 on *Generalized System of Preferences (GSP)*, Office of the US Trade Representative, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp>. accessed on 20/10/2013.

¹⁶⁸ *Funnekotter v Republic of Zimbabwe* ICSID Case No ARB/05/6, Award (2009) <http://italaw.com/documents/ZimbabweAward.pdf> accessed on 20/10/2013.

¹⁶⁹ *Liberian Eastern Timber Corp v Republic of Liberia* ICSID Case No ARB/83/2, Award 2 ICSID Rep. 346 (1994) accessed on 20/10/2013.

¹⁷⁰ *Sedelmayer v Russian Federation*, Arbitration Award (*ad hoc* arbitration under the Stockholm Chamber of Commerce arbitration rules July 7, 1998), http://italaw.com/documents/investment_sedelmayer_v_ru.pdf. accessed on 20/10/2013.

¹⁷¹ *Walter Bau AG (in liquidation) v Kingdom of Thailand*, Award (UNCITRAL Arbitration July 1, 2009), <http://italaw.com/sites/default/files/case-documents/ita0067.pdf> accessed on 20/10/2013.

¹⁷² *Soci te  Ouest Africaine des Be tons Industriels v Senegal*, ICSID Case No ARB/82/1, Award, 2 ICSID Rep 190 (1994) accessed on 20/10/2013.

¹⁷³ *Petrobart Ltd. v Kyrgyz Republic*, Arbitration No 126/2003, Award II (Arbitration Institute of the Stockholm Chamber of Commerce Mar. 29, 2005), 13 ICSID Rep. 387 (2008) accessed on 20/10/2013.

¹⁷⁴ *Mobil Corp v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (June 10, 2010), <https://icsid.worldbank.org> accessed on 20/10/2013; see also CNN (Jan. 9, 2012) *Chavez Says He Won't Respect World Bank Panel's Decision*, available at <http://edition.cnn.com/2012/01/09/business/venezuela-exxon/index.html> accessed on 20/10/2013

¹⁷⁵ For more on this see Peterson LE & Hepburn J 'Payment Round Up New Reporting on ICSID Award Debts of Kazakhstan, Kyrgyzstan and Bangladesh' (2011) *Investment Arbitration Reporter* available at http://www.iareporter.com/articles/20111231_7; see also Baldwin E 'Limits to Enforcement of ICSID Awards' (2006) 23 *Journal of International Arbitration* 1at 7; see also Peterson LE 'Zimbabwe Not Paying ICSID Award' (2010) *Investment Arbitration Reporter* http://www.iareporter.com/articles/20100507_5 accessed on 21/10/2013.

¹⁷⁶ See Indonesia Statement on *Investment Treaty News*, May 2014 Issue at 16 available at http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf

¹⁷⁷ See the Dutch Ministry Statement on Indonesia Termination of BIT at <http://indonesia.nlembassy.org/news/2014/03/bilateral-investment-treaty%5B2%5D.html> accessed on 16/05/2014

Australia, on the other hand, in an effort to seek more policy space in April 2011 issued a trade policy statement announcing that it would stop including investor – state dispute settlement clause in its future IIAs.¹⁷⁸ However, it should be noted that with the change of government in 2013, the new Australia- Korea FTA which includes an investment chapter has incorporated investor-state arbitration.¹⁷⁹ The Korea – Australia FTA provide for an exception provision which grant the host state more space to regulate on human right, labour, environmental, health, animal and plant life.¹⁸⁰

The United State, has also revised its Model BIT in order to constrain the expansive interpretations by tribunals. The revised Model BIT more empowers the US government to regulate on different issues: health, safety, environment, and the promotion of internationally recognized labour rights without interference from the investor – state tribunals.¹⁸¹ In addition to that, the US 2012 Model BIT mandates the Parties to ‘consider’ whether arbitral awards under the BIT should be subject to any new appellate mechanism to be introduced in the future.¹⁸²

¹⁷⁸Department of Foreign Affairs and Trade of Australia *Trading our way to more jobs and prosperity*, April 2011 available at <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html> accessed on 25th January 2013.

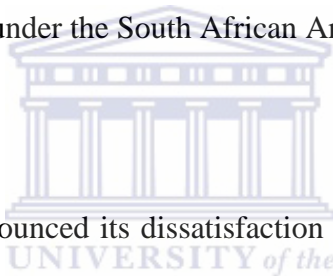
¹⁷⁹ Lester S ‘Improving Investment Treaties through General Exceptions Provisions: The Australian Example’ *Investment Treaty News*, May 2014 Issue available at http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf accessed on 16/05/2014.

¹⁸⁰ See Lester S ‘Improving Investment Treaties through General Exceptions Provisions: The Australian Example’ *Investment Treaty News*, May 2014 Issue available at http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf accessed on 16/05/2014.

¹⁸¹ The Office of the U.S. Trade Representative, *Model Bilateral Investment Treaty (2012)*, Art.12 available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf accessed on 20/08/2013.

¹⁸² 2012 U S Model BIT Art. 28(10).

South Africa has also shown its dissatisfaction with the current dispute settlement system.¹⁸³ The government in 2009 issued a policy statement with regards to BITs. In an effort to find the balance between the interests of the host state and foreign investors, the government has denounced a number of BITs with European countries and is pushing for utilisation of host state courts in case of any dispute between South Africa and foreign investors.¹⁸⁴ In another move, the South African government in November 2013 published its draft Promotion and Protection of Investment Bill 2013 in the Government Gazette for public comment.¹⁸⁵ The bill provides for domestic litigation, domestic arbitration and mediation of investment disputes.¹⁸⁶ Therefore if the bill becomes law, investment disputes in South Africa will be settled locally through court litigation, mediation or arbitration under the South African Arbitration Act.¹⁸⁷



In March 2014, Germany also announced its dissatisfaction with the investor – state arbitration system and is opposing the inclusion of the system in the EU – US trade pact which is currently under negotiation.¹⁸⁸ Germany is taking the same stance on the recently concluded Comprehensive Economic and Trade Agreement (CETA) between EU and Canada.¹⁸⁹ Germany is advancing the idea of adjudicating investor – state disputes in the host state courts. According

¹⁸³ The Department of Trade and Industry *Republic of South Africa's Government Position Paper on Bilateral Investment Treaty Policy Framework Review*, June 2009, available at http://www.thedti.gov.za/ads/bilateral_policy.pdf accessed on 7th February 2013.

¹⁸⁴ See the Speech delivered by the Minister of Trade and Industry of South Africa Dr Rob Davies at the South African launch of the United Nations Conference on Trade and Development (UNCTAD) Investment Policy Framework for sustainable development at the University of The Witwatersrand on 26th July 2012 available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=29391&tid=77861> accessed on 7th March 2013.

¹⁸⁵ See the Draft Bill on Promotion and Protection of Investment, 2013 available at <http://www.tralac.org/files/2013/11/Promotion-and-protection-of-investment-bill-2013-Invitation-for-public-comment.pdf> accessed on 07/03/2014.

¹⁸⁶ See Article 11 of the Bill.

¹⁸⁷ Arbitration Act 1965 (Act No. 42 of 1965).

¹⁸⁸ See the Germany Ministry Announcement in *Investment Treaty News*, May 2014 Issue at 16 available at http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf

¹⁸⁹ See the EU – Canada Comprehensive Economic and Trade Agreement (CETA) available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf accessed on 11/11/2014.

to the *Financial Times*, the Junior Minister of Economy, Brigitte Zypries, believes that foreign investors ‘have sufficient legal protection in the national courts.’¹⁹⁰

It is submitted here that this new stance of Germany, which was the first country to pioneer BITs and signed the first BIT with Pakistan in 1959, shows that the dispute settlement provision in the BITs indeed has problems.

Apart from countries, other stakeholders have also shown concern about the current dispute settlement mechanism. The Committee on International Trade of the European Parliament, on 22 March 2011 issued a Report on the future of International Investment Policy of the European Union.¹⁹¹ The report highlighted the problems relating to: different interpretations of investment principles by different tribunals which lead to conflict between private interests and the regulatory tasks of public authorities;¹⁹² the existence of BITs which put the interests of investors alone and disregard the host state interests in regulating for other development goals;¹⁹³ and the lack of the model BIT for member states which can enhance certainty and consistency of interpretation.¹⁹⁴ In addition, the Report raises concerns about the wide discretionary powers granted to arbitrators in the interpretation of investment principles.¹⁹⁵ The report raises more concerns on the lack of transparency on the current system, lack of an appellate option and the

¹⁹⁰ *Financial Times* quoted in *Investment Treaty News*, May 2014 Issue at 16 available at http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf

¹⁹¹ European Union Parliament *Report on the Future European International Investment Policy*, A7-0070/2011 of 22 March 2011 available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//TEXT+REPORT+A7-2011-0070+0+DOC+XML+V0//EN> (hereinafter *European Parliament Report on investment*) accessed on 15th February 2013.

¹⁹² See the *European Parliament Report on Investment* 2011 para G.

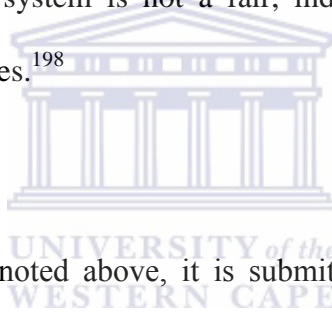
¹⁹³ See the *European Parliament Report on Investment* 2011 para J (1) and para 25.

¹⁹⁴ See the *European Parliament Report on Investment* 2011 para J (4) and (10).

¹⁹⁵ *The European Parliament Report on Investment* 2011 para 17.

absence of the requirement for exhaustion of local remedies before resorting to international arbitration.¹⁹⁶

Law professors, also, from different parts of the world, in 2010 issued a public statement condemning the current investment arbitration system.¹⁹⁷ The concerns raised in the public statement include: the need to have an independent judicial system responsible for investment disputes; recognition of the state's fundamental right to regulate on behalf of public welfare; the need for arbitrators to consider the public interest in their interpretation of investment principles; and that the current adjudication system is not a fair, independent and balanced system for settlement of investor - state disputes.¹⁹⁸



From the stakeholders' reactions noted above, it is submitted here that it is evident that the system is experiencing a legitimacy crisis. There is a need to review the system as a whole before it loses the little remaining legitimacy it currently enjoys.

¹⁹⁶ *The European Parliament Report on Investment* 2011 para 31.

¹⁹⁷ Van Harten G *et al.* 'Public Statement on International Investment Regime' available at [http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20\(June%202011\).pdf](http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20(June%202011).pdf) accessed on 06/09/2013.

¹⁹⁸ See Van Harten G *et al.* 'Public Statement on International Investment Regime' (2010) paras 1 – 8.

4.9 Conclusion

The discussion in this chapter reveals that legitimacy is an important aspect of any adjudicative system which aspires or adheres to the principle of the rule of law. The chapter has also revealed that the rule of law, justice and legitimacy are inseparable. For an adjudicative system to be considered legitimate, it requires to possess basic values: consistency, transparency, cost efficiency, timeliness and impartiality. The presence of these values renders the system just.¹⁹⁹ It is concluded that the investor – state arbitration system is lacking in some of these important values. As a result, the chapter has shown the extent to which the stakeholders are dissatisfied with the system.

In the following chapter, a critical discussion of different stakeholders' proposed solutions to the investor – state arbitration system is made. In addition to that, the chapter analyses and discusses this research 'alternative' suggested solutions.

¹⁹⁹ See Bodansky DM 'The Legitimacy of International Governance: A coming Challenge for International environmental Law' (1999) *American Journal of International Law* 596 and Grossman N 'Legitimacy and International Adjudicative Bodies' (2009) *George Washington International Law Review* 107.

CHAPTER FIVE

CRITICAL ASSESSMENT OF THE POSSIBLE SOLUTIONS TO THE INVESTOR – STATE ARBITRATION SYSTEM

5.1 Introduction

As it can be gathered from the preceding chapters, it is evidently clear that there are a number of legitimacy issues haunting the investor – state arbitration system.¹ The issues includes lack of consistency in the rendered awards, lack of institutional safeguards for independence and impartiality of adjudicators, lack of transparency on matters of public interests, encroachment on government policy making space, lack of an appellate structure to rectify errors, expensive adjudication process and the possibility of parallel proceedings involving same parties in different fora. These issues have been identified and discussed extensively in different fora by different stakeholders and institutions.² The UNCTAD World Investment Report 2013 has, for

¹ See Chapter Three of this work for a thorough discussion on the systemic issues under subheading 3.6.2 – 3.6.2.7.

² See Gaukrodger D and Gordon K ‘Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community’ OECD Working Papers on International Investment, No. 2012/3 available at http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf accessed on 03/02/2014; also see Eberhardt P & Olivet C ‘Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom’ (Corporate Europe Observatory and Transnational Institute, 2012), available at <http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>; See also Afilalo A ‘Meaning, Ambiguity and Legitimacy: Judicial (Re-)Construction of NAFTA Chapter 11’ (2005) 25 *North-western Journal of International Law & Business* 279 at 282; Afilalo A ‘Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis’ (2004) 17 *Georgia International Environmental Law Review* 51; Brower CN ‘A Crisis of Legitimacy,’ (2002) *National Law Journal* at 9; Brower CN et al ‘The Coming Crisis in the Global Adjudication System’ (2003) 19 *Arbitration International* 415 at 417; Mann H ‘Civil Society Perspective: what Do Key Stakeholders Expect from the International Investment Regime?’ in Alvarez J and Sauvant K (eds.) *The Evolving International Investment Regime* (2011) 22-29; Gaiger R ‘Multilateral Approach to Investment’ in Alvarez J and Sauvant K (eds.) *The Evolving International Investment Regime* (2011) 153-173; Reinisch A ‘The Future of Investment Arbitration’ in Christina Binder et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894 - 916; Van Harten G ‘Investment Treaty Arbitration, Procedural Fairness and the Rule of Law’ in Stephan Schill (ed.) *International Investment Law and Comparative Public Law* (2010) 627 – 658; Peterson L ‘Out of Order’ in Michael

example, recognised and identified that inconsistency of awards, expensive adjudication process and lack of transparency are, among others, the most unresolved and troubling issues in the investor – state arbitration system.³ Likewise in 2009 the International Institute for Sustainable Development (IISD) pointed out that the investor – state arbitration system is experiencing ‘a crisis of legitimacy’ as a result of lack of transparency, lack of coherence, lack of independent and impartial adjudication process and Tribunals’ encroachment on government policy making space.⁴

In addition, as discussed in Chapter Four of this work,⁵ in 2011 the Committee on International Trade of the European Parliament issued a report on the future of International Investment Policy of the European Union.⁶ The report points out more shortcomings in investor – state arbitration system. Such shortcomings include: lack of transparency on the current system; lack of an appellate option; and the absence of the precondition for exhaustion of local remedies before resorting to international arbitration.⁷

Waibel et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 483 – 488; Reinisch A ‘The Issues Raised by Parallel Proceedings and Possible Solutions’ in Michael Waibel et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 113- 126.

³ See United Nations Conference on Trade and Development (UNCTAD) *World Investment Report: ‘Reform of Investor –state Dispute Settlement: In Search of a Road Map’* 26th June 2013, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf at pp 3 - 4, accessed on 03/02/2014.

⁴ See Marshall F ‘Defining New Institutional Options for Investor – State Dispute Settlement’ International Institute for Sustainable Development (IISD) 2009 at p. 5 available at http://www.iisd.org/pdf/2009/defining_new_institutional_options.pdf accessed on 03/02/2014.

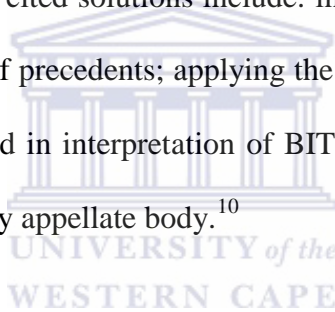
⁵ See Chapter Four of this Work under Subheading 4.8.

⁶ European Union Parliament *Report on the Future European International Investment Policy*, A7-0070/2011 of 22 March 2011 available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0070+0+DOC+XML+V0//EN> (hereinafter *European Parliament Report on investment*) (accessed on 15th February 2013).

⁷ *The European Parliament Report on Investment* 2011 para 31.

In the efforts to address the problems, the stakeholders have put forward a number of solutions to address the shortcomings identified above. In 2013 UNCTAD, for example, issued a Paper suggesting five solutions to curb the investor – state dispute settlement systemic problems.⁸ The suggested solutions include: promoting alternative dispute resolution; tailoring the existing system through individual investment agreements; limiting investor access to dispute settlement; introducing an appeals facility; and creating a standing international investment court.⁹

Other stakeholders have also suggested a number of solutions in addition to what has been suggested by UNCTAD. The most cited solutions include: invoking *res judicata* and *lis pendens* principles; adopting the doctrine of precedents; applying the fork in the road principle; adopting the margin of appreciation standard in interpretation of BITs, creating an appellate structure at ICSID and creating a treaty appellate body.¹⁰



⁸ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report: ‘Reform of Investor –state Dispute Settlement: In Search of a Road Map’* 26th June 2013, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf at pp 3 - 4, accessed on 03/02/2014.

⁹ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report: ‘Reform of Investor –state Dispute Settlement: In Search of a Road Map’* 26th June 2013, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf at pp 3 - 4, accessed on 03/02/2014.

¹⁰ See Greason E ‘International Arbitral Appeal, What are we so afraid of?’(2007)7 *Pepperdine Law Journal* 269 at 287; See for example Knahr C ‘Consolidation of Proceedings in International Investment Arbitration’ in Christina Knahr et al (eds.) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 1-19 at 2. (Suggesting that consolidation of related proceedings could help to curb the problem of parallel proceedings); See also Reinisch A ‘The proliferation of international Dispute Settlement Mechanisms: The threat of fragmentation vs. The promise of more effective system? Some reflections from the perspective of investment arbitration’ in I Buffard et al (eds.) *International Law Between Universalism and Fragmentation* (2008)107 – 126 (suggesting for multiple solutions including appellate body, a preliminary reference system, consolidation and strengthening the power of precedents); See also Spooreberg F and Vinuales A ‘conflicting decisions in International Arbitration’ in Frank Spooreberg et al (eds.) *The Law and Practice of International Courts and Tribunals* (2009) 91 – 113 at 93 (suggesting for increase of transparency); Also see Burke – White W & Von Staden A ‘The Need for Public Law Standards of Review in Investor –State Arbitration’ in *Stephan Schill International Investment Law and Comparative Public Law* 2010, 689 at 712 (suggesting the application of public law standard of review in investment arbitration); Reinisch A ‘The use and limits of *res judicata* and *lis pendens* as procedural tools to avoid conflicting dispute settlement outcomes’(2004) 3 *The Law and Practice of International Courts and Tribunals* 37(suggesting that the principles of *res judicata* and *lis pendens* could be used to curb parallel proceedings); See also

This chapter therefore provides a critical discussion of the proposed solutions to the investor – state arbitration system. It is the purpose of this chapter to critically discuss and analyse the viability of these solutions. In addition, the chapter unveil this research’s ‘alternative’ solutions. The authors’ suggested solutions are referred to as ‘alternative’ because the author strongly believes that establishing a Multilateral Agreement on Investment (MAI) which provides for the establishment of an international Investment Court followed up by an International Investment Appellate Court at apex stands to be the best solution to the legitimacy crisis of the current investor – state dispute settlement system.

The research’s ‘alternative’ solutions include: establishment of the investor – state dispute adjudication Centre; effective utilisation of host state courts; mandatory publication of all awards; effective use of member state interpretative statement; and lastly, form a working group on investment to define the scope of the basic investment principles.

It should be clearly understood here that these ‘alternative’ solutions are only relevant where the establishment of the MAI and the international investment courts and appellate court thereof have proven futile. These suggested solutions will have no relevance where the proposed international investment judicial system is established. Therefore these solutions intend to maintain the status quo by improving the existing investor – state arbitration system. As it will be seen in the course of the discussion, internal modification of the current system will be difficult and do little to legitimise and strengthen the international investment law. However, their little

Gantz D ‘An Appellate Mechanism for Review of Arbitral Decisions in Investor- State Disputes: Prospects and Challenges’ (2006)³⁹ *Vanderbilt Journal of Transnational Law* 39.

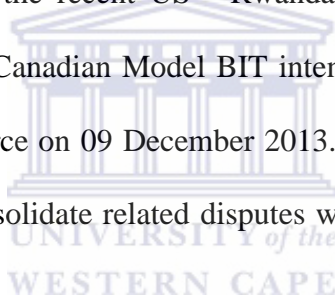
potentials are worth being analysed as interim solutions pending the establishment of the MAI. The ‘alternative’ solutions discussion follows after an analysis of other stakeholders suggested solutions.

5.2 Solutions suggested by other stakeholders

As stated in the introduction above, a number of solutions have been identified and suggested by different stakeholders. These solutions intend to achieve different results. Some call for systemic overhaul while others require modest improvements to the existing system. As mentioned in the introduction above, the most often cited solutions includes introducing an appeal facility, establishing an international investment court, limiting investor access to the ISDS, adopting of the consolidation principle in investment disputes, invoking res judicata and lis pendens principles, adopting the doctrine of precedents, applying the fork in the road principle, adopting the margin of appreciation standard in interpretation of BITs and establishing an appellate structure at ICSID, establishing of a treaty to treaty appellate structure. This section provides a critical appraisal of all the solutions mentioned above.

5.2.1 Consolidation of related disputes and the principle of ‘fork in the road’

Christina Knahr proposes consolidation of related proceedings as a means of curbing inconsistent decisions.¹¹ She argues that in order to avoid duplication of proceedings and conflicting outcomes, parties should consolidate related proceedings which have a common question of fact or law for the purposes of minimising costs but also avoiding inconsistent decisions. August Reinisch and Crivellaro also support this suggestion.¹² It is contended that the US 2004 and 2012 Model BITs provides for consolidation of related proceedings.¹³ The US Model BIT empowers any party to seek a consolidation order in accordance with Article 33. The US Model BIT intentions have been reflected in the recent US - Rwanda BIT.¹⁴ Canadian Model BIT also provides for consolidation.¹⁵ The Canadian Model BIT intentions are reflected in the Canada – Tanzania BIT which came into force on 09 December 2013.¹⁶ Article 27 of Canada – Tanzania BIT empowers the tribunal to consolidate related disputes where it is of the view that there are



¹¹ Knahr C ‘Consolidation of Proceedings in International Investment Arbitration’ in Knahr C et al (eds.) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 1-19 at 2.

¹² Reinisch A ‘The proliferation of international Dispute Settlement Mechanisms: The threat of fragmentation vs. The promise of more effective system? Some reflections from the perspective of investment arbitration’ in Buffard J et al (eds.) *International Law Between Universalism and Fragmentation* (2008)107 – 126; See also Crivellaro A ‘Consolidation of Arbitral and Court Proceedings in Investment Disputes’ (2005) 4 *Law & Practice of International Courts & Tribunals* 371 at 371.

¹³The Office of the U.S. Trade Representative, *Model Bilateral Investment Treaty 2004 &2012* Art. 33(1) available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf and <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> respectively accessed on 20/06/2013.

¹⁴ See for example Article 33 of the US – Rwanda BIT, 2008 which came in force 2012 available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/pdf-agreements/RwandaBIT.pdf accessed on 19/05/2014.

¹⁵The Department of Foreign Affairs and International Trade *Canada’s Model Foreign Investment Protection Agreement*, 2004 Art. 32(2) (hereinafter Canada Model BIT) available at <http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf> accessed on 20/01/2014.

¹⁶ See the Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/tanzania-text-tanzanie.aspx?lang=eng> accessed on 19/05/2014.

similar questions of law or fact involved.¹⁷ Consolidation is also provided for and has been applied under NAFTA Chapter 11.¹⁸ Article 1126(2) of NAFTA chapter 11 provides that:

‘Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

- (a) Assume jurisdiction over, and hear and determine together, all or part of the claims; or
- (b) Assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.’

The right to form a consolidated tribunal accrues where either party has requested for consolidation and the dispute has a common question of law or fact and it will be in the interest of fair and efficient resolution of the dispute by way of consolidation.¹⁹ In *Canfor Corp. v. United States*²⁰ the Tribunal held that in consolidating the claims all parties’ interests should be balanced and each party should be accorded the same level of due process. The discretion therefore lies with the arbitral tribunal to determine whether consolidation of claims will achieve fairness and efficiency to all parties.

¹⁷ See Article 27 of the Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/tanzania-text-tanzanie.aspx?lang=eng> accessed on 19/05/2014.

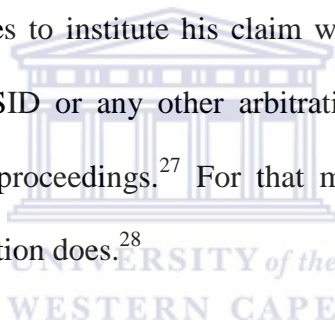
¹⁸ Knahr C ‘Consolidation of Proceedings in International Investment Arbitration’ in Knahr C et al (eds.) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 1-19 at 4.

¹⁹ See Article 1126 of NAFTA.

²⁰ *Canfor Corp v United States, Tembec et al v United States, and Terminal Forest Products Ltd. v United States*, Order of the Consolidation Tribunal, 7 September 2005, available at <http://naftaclaims.com/Disputes/USA/Softwood/Softwood-ConOrder.pdf>.

In instances where formal consolidation is impossible, parties may still agree to form same arbitrators' tribunals to handle their matter. This method has been used in cases involving the Argentinian's government privatisation of the gas industry.²¹ Reinisch argues that if consolidation is done properly, it can provide very effective remedies against inconsistent decisions.²² For example, it is submitted that had the *Lauder* and *CME* cases been consolidated, the problem of inconsistency would have been allayed.²³

Parallel to consolidation, is the principle of fork in the road or waiver provisions.²⁴ This is a treaty principle that limits the investors' venues for institution of cases.²⁵ According to this principle, once the investor decides to institute his claim with the local court, he is forbidden from seeking arbitration with ICSID or any other arbitration institution.²⁶ The aim of these provisions is to prevent parallel proceedings.²⁷ For that matter, waiver provisions intend to achieve the same goal as consolidation does.²⁸



²¹ See *Camuzzi International S.A. v. Argentine Republic* ARB/01/3 and *Sempra Energy International v. Argentine Republic*, ARB/02/16.

²² Reinisch A 'The Future of Investment Arbitration' in Christina Binder et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894 - 916' at 912.

²³ *Lauder v The Czech Republic*, 9 ICSID Reports 66 award of 03/09/ 2001 and *CME Czech Republic BV v The Czech Republic* 9 ICSID Reports Partial Award of 13/ 09/ 2001 respectively.

²⁴ Knahr C 'Consolidation of Proceedings in International Investment Arbitration' in Knahr C et al (eds.) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 1-19 at 4.

²⁵ See for example Art. 7(3) of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments of 27/11/2009 (hereinafter South Africa – Zimbabwe BIT) available at

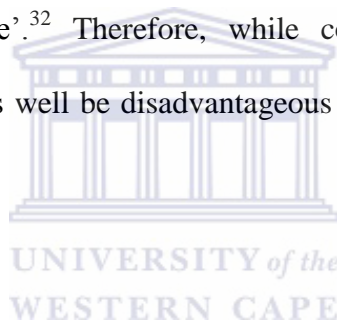
http://unctad.org/sections/dite/ia/docs/bits/south_africa_zimbabwe.pdf providing for the fork in the road provision.

²⁶ Schreuer C 'Travelling the BIT route: of waiting periods, umbrella clauses and forks in the road' (2004) *The Journal of World Investment and Trade* 231 at 232.

²⁷ Reinisch A 'The Future of Investment Arbitration' in Christina Binder et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894 - 916 at 908

²⁸ Reinisch A 'The Future of Investment Arbitration' in Christina Binder et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894 - 916' at 912.

The problem with this suggested solution is that there are currently very few BITs which allow consolidation of proceedings. The majority of existing BITs do not provide for consolidation of related proceedings.²⁹ For consolidation to occur parties need to consent.³⁰ In addition, an order for consolidation will only be granted where it is established that it is in the interest of ‘fair’ and ‘efficient’ resolution of the claim. At times, consolidation can operate as a dilatory tool where the two cases under consideration are in different stages of resolution. It may also happen that consolidation becomes more expensive than dealing with separate claim especially when the cases were in different stages before the formation of the consolidation tribunal. In *Canfor Corp. v. United States*³¹ it was held that consolidation should not be ordered where the cost of consolidation becomes ‘excessive’.³² Therefore, while consolidating the disputes can be beneficial to one party; it might as well be disadvantageous to the other party hence inefficient and unfair.³³



²⁹ See for example the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments of 27/11/2009 (hereinafter South Africa – Zimbabwe BIT) available at http://unctad.org/sections/dite/ia/docs/bits/south_africa_zimbabwe.pdf. see also An Agreement between the Government of the Kingdom of Sweden and the Government of the United Republic of Tanzania for the Promotion and Protection of Investment 01/09/1999 available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_sweden.pdf; (hereinafter Tanzania –Sweden BIT); see also the Agreement between the Government of United Republic of Tanzania and the Government of Italian Republic on the Promotion and Protection of Investment of 21/08/2001 (hereinafter Tanzania – Italy BIT) available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_italy.pdf and the Agreement between the Government of United Republic of Tanzania and the Government of Republic of Finland on the Promotion and Protection of Investment of 19/06/2001 (hereinafter Tanzania - Finland BIT) available at http://unctad.org/sections/dite/ia/docs/bits/tanzania_finland.pdf. All these BITs have no provision for consolidation of proceedings.

³⁰ See NAFTA Article 1126.

³¹ *Canfor Corp v United States, Tembec et al v United States, and Terminal Forest Products Ltd. v United States*, Order of the Consolidation Tribunal, 7 September 2005, available at <http://naftaclaims.com/Disputes/USA/Softwood/Softwood-ConOrder.pdf>.

³² *Canfor Corp v United States*.

³³ Knahr C ‘Consolidation of Proceedings in International Investment Arbitration’ in Knahr C et al (eds.) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 1-19 at 11.

In addition, it is submitted here that the current system under ICSID and UNCITRAL are not conducive for consolidation as there are no consolidation provisions under both rules. As a result, consolidation may not yield the expected results of curbing the inconsistency problem.

It is further submitted here that consolidation cannot be a panacea to all problems relating to inconsistency in international investment dispute settlement system as it only applies to same treaty disputes. Under the current system with 3240 BITs and IIAs,³⁴ consolidation will only cure a small portion of the problems. In addition, it will be submitted here that consolidation can only be a useful tool where all disputes are settled under one institution. Under the current system, consolidation of proceedings at ICSID will not help to bring consistency if there is a similar case but adjudicated at LCIA or ICC under the UNCITRAL Rules. It is further submitted here that under the current system it will be almost impossible for one tribunal to know the existence of another case with similar facts at another institution. Even where that fact is known, consolidation may not be possible because each institution is autonomous and is not obligated to consolidate or cooperate with another tribunal formed under another institution's rules.

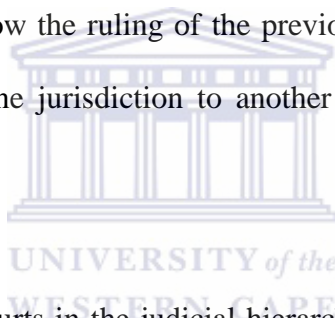
Therefore, it can be concluded here that, although consolidation can be a useful tool for disputes emanating from the same treaty, it will do very little to solve the inconsistency problem in the present situation where there are about three thousands autonomous BITs which have no consolidation provision. Worse enough, the ICSID and UNCITRAL Rules are also silent on the

³⁴ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014* 'investing in the SDGs: An Action Plan' at xxiii available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

matter. Unless the rules are amended to that end consolidation stand a small chance of curbing inconsistency in investor – state arbitration system.

5.2.2 Adoption of the doctrine of precedent

Kaufmann – Kohler and other authors suggest that in order to cure the problem of inconsistency in investor – state arbitration there is a need to adhere to the English common law doctrine of precedent.³⁵ The doctrine requires the court to stand by its previous decisions.³⁶ That is to say, when a matter before a court of law has similar facts with another matter previously decided, then such a court is bound to follow the ruling of the previous case.³⁷ The level of adhering to previous decisions differs from one jurisdiction to another and sometimes from one court to another.



As per this doctrine, the higher courts in the judicial hierarchy are allowed to depart from their previous decisions when the development of the law so requires.³⁸ In many common law countries the doctrine of precedent has been enshrined as one of the cornerstones which ensure

³⁵ Kaufman – Kohler G ‘Arbitral Precedent: Dream, Necessity of Excuse? – The 2006 Freshfield Lecture’ (2007) 23 *Arbitration International* at 378; see also Reinisch A ‘The Future of Investment Arbitration’ (2009) at 915; see also Spooreberg F & Vinuales J ‘conflicting decisions in International Arbitration’ *Law & Practice of International Courts & Tribunals* (2009) 91 – 113; see also Dennis J ‘Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent’ (1994) 54 *Louisiana Law Review* 1 at 3.

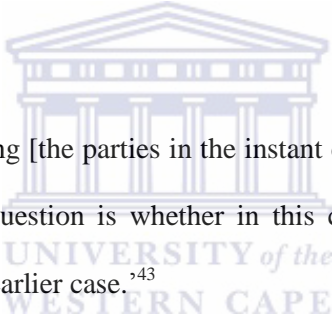
³⁶ Kaufman – Kohler G ‘Arbitral Precedent: Dream, Necessity of Excuse? – The 2006 Freshfield Lecture’ (2007) *Arbitration International* at 359; see also Dennis J ‘Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent’ (1994) 54 *Louisiana Law Review* 1 at 3.

³⁷ Reinisch A ‘The Future of Investment Arbitration’ (2009) at 915; see also Kaufman – Kohler G ‘Arbitral Precedent’ (2007) at 358.

³⁸ As per Lord Denning in *Packer v Packer* [1954] at 22.

legal certainty and consistency.³⁹ While the doctrine is highly regarded in common law countries, it does not hold the same status in civil law countries.⁴⁰

It should be borne in mind that in international law the doctrine has not been formally recognised. Article 59 of the Statute of the International Court of Justice (ICJ) clearly exclude the application of the doctrine of precedent by providing that the court decision is only binding on the parties to the dispute.⁴¹ However, in practice the ICJ has been utilising the doctrine. In *Land and Maritime Boundary between Cameroon and Nigeria*⁴² the Court expressed its recognition of the relevancy of considering prior decided cases and stated that:



‘[I]t is not a question of holding [the parties in the instant case] to decisions reached by the court in previous cases. The real question is whether in this case, there is cause not to follow the reasoning and conclusions of earlier case.’⁴³

The WTO Appellate Body has also insisted the relevancy of following previously decided cases despite the fact that the WTO Dispute Settlement Understanding does not recognise the doctrine of precedent.⁴⁴ The Appellate Body in *Shrimp Turtle II and Alcoholic Beverages*⁴⁵ held that:

³⁹ ‘Common law Countries’ signifies countries which were colonies of the United Kingdom and follows the UK legal system.

⁴⁰ Kaufman – Kohler G ‘Arbitral Precedent: Dream, Necessity of Excuse? – The 2006 Freshfield Lecture’ (2007) 23 *Arbitration International* at 359.

⁴¹ See Article 59 of the Statute of the International Court of Justice available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&> accessed on 29/03/2014.

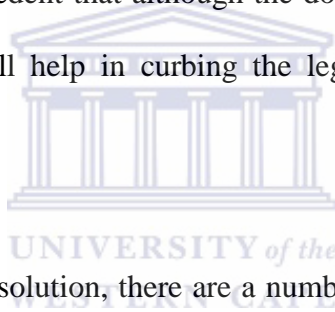
⁴² *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections Judgment) [1998] ICJ Rep. 275, para. 28.

⁴³ See para 28. For a thorough discussion on the role of the Doctrine of Precedent in International Law see Chapter Four of this work under Subheading 4.4.

⁴⁴ See the WTO DSU available at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf accessed on 23/03/2014.

‘..adopted panel reports are an important part of the GATT because they create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute.’⁴⁶

Some investment tribunals, as well, have been following previous decisions in the course of their adjudication process. The annulment Committee in *Amco v Indonesia*⁴⁷ held that it is not bound by the precedent established by other ICSID tribunals but admitted that it is instructive to consider their interpretation.⁴⁸ It is on the basis of this background that it is argued by the proponents of the doctrine of precedent that although the doctrine is not formally recognised in international law, its adoption will help in curbing the legitimacy crisis facing international investment arbitration.⁴⁹



Although this seems to be a good solution, there are a number of obstacles in its way. The first obstacle is that, the doctrine is not recognised in international law and amongst countries following the civil law system. Therefore its application may not receive a worldwide acceptance.

⁴⁵ *United States Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body Report, 12 October 1998, WT/DS58/AB/R para. 108; see also *Japan – Taxes on Alcoholic Beverages*, WTO Appellate Body Report, 4 October 1996, WT/DS8/AB/R, at 15.

⁴⁶ See *United States Import Prohibition of Certain Shrimp and Shrimp Products* para 108.

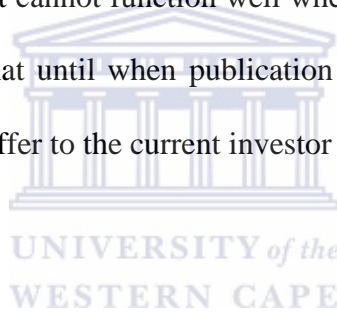
⁴⁷ *Amco v Indonesia*, ICSID ARB/81/1 (1990) at para 121.

⁴⁸ *Amco v Indonesia* ICSID ARB/81/1 (1990) para 144.

⁴⁹ See Reinisch A ‘The proliferation of international Dispute Settlement Mechanisms: The threat of fragmentation vs The promise of more effective system? Some reflections from the perspective of investment arbitration’ in Buffard J et al (eds.) *International Law Between Universalism and Fragmentation* (2008)107 – 126 at122; see also Spooreberg F & Vinuales J ‘conflicting decisions in International Arbitration’ *Law & Practice of International Courts & Tribunals* (2009) 91 – 113 at 102.

The second obstacle is that, for the doctrine to work well, it also needs to have disputes settled under one roof/institution. The doctrine of precedent works where there is a hierarchical dispute settlement system. With the current system where each tribunal is autonomous, the doctrine of precedent will not help much as no tribunal is under obligation to follow decisions handed down by another tribunal.

Furthermore, precedent requires availability of previous decided cases to the presiding tribunal. Under the current system awards are confidential unless the parties decide to publish it. Therefore the doctrine of precedent cannot function well where confidentiality is at the centre of the system. It follows therefore that until when publication of awards becomes mandatory the doctrine of precedent has little to offer to the current investor – state arbitration system.



5.2.3 Effective application of res judicata and lis pendens principles

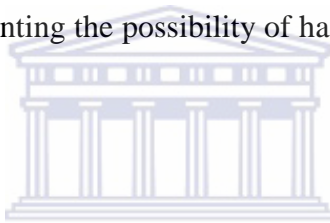
Another suggested solution is the application of the principles of res judicata and lis pendens.⁵⁰

Res judicata means that the matter has already been determined by another competent body hence it cannot be adjudicated upon again while lis pendens means that the matter is being

⁵⁰ See Reinisch A 'The Future of Investment Arbitration' in Christina Binder et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894 - 916' at 912; Reinisch A 'The Issues Raised by Parallel Proceedings and Possible Solutions' in Michael Waibel et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 113- 126 at 113; Knahr C 'Consolidation of Proceedings in International Investment Arbitration' in Knahr C et al (eds.) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 1-19 at 4; Reinisch A 'The use and limits of *res judicata* and *lis pendens* as procedural tools to avoid conflicting dispute settlement outcomes'(2004) 3 *Law & Practice of International Courts & Tribunals* 37; Spooreberg F & Vinuales J 'conflicting decisions in International Arbitration' *Law & Practice of International Courts & Tribunals* (2009) 91 – 113at 98.

adjudicated in another competent court.⁵¹ In order to apply these two principles it must be proved that the matters before the two courts are the same and involve same parties. *Res judicata* and *lis pendens* are very useful and are frequently applied in many countries in civil litigation and they help a lot to avoid parallel proceedings and inconsistent results.⁵²

The principle of *res judicata* has its roots in Roman law.⁵³ The principle aims to serve three purposes. At first, it aims at bringing to an end of a legal dispute. It is used to ensure that no defendant is tried twice on the same case. Secondly, the rule intends to serve judicial economic interest as it aims at preventing re-litigation of a previously decided case. Thirdly, the rule aims at ensuring legal certainty by preventing the possibility of having divergent conclusions on cases of the same nature and facts.⁵⁴



Lis pendens, on the other hand, aims at barring initiation of a new proceeding where there is another proceeding pending in another competent court involving same parties and same subject matter. The principle serves or aims at achieving the same goals as *res judicata*. It aims to bring judicial economy by preventing costly parallel proceedings and ensuring legal certainty by avoiding parallel conflicting decisions.

In international law, the two principles are regarded as general principles of law. In *Charzow Factory Case*, in his dissenting opinion, Judge Anzilotti opined that *res judicata* is ‘one of the

⁵¹ Reinisch A ‘The use and limits of *res judicata* and *lis pendens* as procedural tools to avoid conflicting dispute settlement outcomes’(2004) 3 *Law & Practice of International Courts & Tribunals* 37 at 43.

⁵² Knahr C ‘Consolidation of Proceedings in International Investment Arbitration’ in Knahr C et al (eds.) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 1-19 at 4.

⁵³ Knahr C ‘Consolidation of Proceedings in International Investment Arbitration’ in Knahr C et al (eds.) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 1-19 at 4.

⁵⁴ Reinisch A ‘The use and limits of *res judicata* and *lis pendens* as procedural tools to avoid conflicting dispute settlement outcomes’(2004) 3 *Law & Practice of International Courts & Tribunals* 37 at 43.

general principles of law recognized by civilised nations'.⁵⁵ The ICJ, as well, in the *UN Administrative Tribunal Case* observed that *res judicata* is a well-established and generally accepted principle of law.⁵⁶ With regard to *lis pendens*, Article 35 of the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR) clearly provides that the court shall not determine any matter which is pending in another body and which has no new information.⁵⁷

It is from the above, that stakeholders find that *res judicata* and *lis pendens* can be effectively applied in investor –state dispute system. Reinisch submits that for the two principles to have meaning in international investment arbitration, the tribunals are supposed to focus on the issues and facts of a dispute rather than on the parties and causes of actions when applying the identity test.⁵⁸ It is contended that this will help tribunals to identify the same parties appearing in different claims hence stop the rest of the claims on the basis of *lis pendens*. At the same time, future tribunals by using the same test will be able to know that the matter before it is *res judicata*.⁵⁹ It is contended further that had the *Lauder* and *CME* cases applied these principles, the likelihood of inconsistent decisions would be almost impossible.⁶⁰ Proponents concludes that under the current system where corporations' window shop for favourable nationality for

⁵⁵ *Interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzow*, 1927 PCIJ (Ser. A) No. 11, at 27 (Dec. 16) (dissenting opinion of Judge Anzilotti).

⁵⁶ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, LCJ Reports 1954, 47, at 53.

⁵⁷ See Article 35(2) (b) European Convention on Human Rights.

⁵⁸ Reinisch A 'The Issues Raised by Parallel Proceedings and Possible Solutions' in Michael Waibel et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 113- 126 at 117.

⁵⁹ Reinisch A 'The Issues Raised by Parallel Proceedings and Possible Solutions' in Michael Waibel et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 113- 126.

⁶⁰ *Lauder v The Czech Republic*, 9 ICSID Reports 66 award of 03/09/ 2001 and *CME Czech Republic BV v The Czech Republic* 9 ICSID Reports Partial Award of 13/ 09/ 2001 respectively. See a thorough discussion on the two cases on sub heading 3.5.2.1.3 of Chapter three of this work.

institution of investment disputes, there will be many cases in the future carrying the Lauder and CME features.⁶¹

While the arguments put forward in favour of res judicata and lis pendens are to a large extent, overwhelmingly convincing, there are a number of obstacle on its way. The preconditions for the applicability of res judicata and les pendens pose a great challenge for the two principles to be applied successfully in investor – state arbitration.

The first challenge is that the two principles require that both the parties and the subject matter be the same in both proceedings and the dispute has to arise in the same legal setting. In investor – state dispute these requirements may not be easily met as most of the time Corporations and shareholders are considered different legal entities hence capable of suing on their own names.

In addition, at times Corporations forms subsidiary companies to operate in the respondent state country and such companies can sue or be sued without necessarily involving the parent corporation.

Furthermore, different disputes could be filed in different legal settings each with autonomous jurisdiction. This could be the case where one dispute is filed in the local court while the other at an international adjudicative body. Neither body between the two will have the mandate in the circumstances to order res judicata or lis pendens over the other.

⁶¹ Reinisch A ‘The use and limits of res judicata and lis pendens as procedural tools to avoid conflicting dispute settlement outcomes’(2004) 3 *Law & Practice of International Courts & Tribunals* 37 at 41.

Therefore, while the subject matter could be the same, the disputes may fail to meet the res judicata and lis pendens requirements due to the lack of same or identical parties to the dispute. These scenarios can be well elaborated by the previously discussed cases,⁶² *CME V Czech Republic* and *Lauder v Czech Republic*.⁶³ In *CME V Czech Republic* and *Lauder v Czech Republic* the facts and the respondent state were the same except that the claimants were different. In the former Mr. Lauder sued Czech Republic through a company he controlled while in the later he sued the same Respondent State in his own capacity as an investor in the Czech Republic.

Furthermore, there is the possibility of multiple arbitrations and local court proceedings in parallel with different seats, different institutional or ad hoc rules, different substantive and procedural laws and identical parties. In the *Lauder* cases, there were parallel arbitration proceedings running under UNCITRAL Rules, at the same time there was another arbitration proceeding filed under ICC Rules and other numerous court cases in the Czech Republic courts and one in the US pertaining almost the same dispute.⁶⁴ The principles of res judicata and lis pendens could not be applied because the disputes emanated from different autonomous legal settings as well as different parties.⁶⁵ A dispute at ICSID is not a bar to another dispute under the UNCITRAL Rules or even other proceedings in a local court. Under this scenario multiple inconsistent awards may be rendered and multiple enforcement proceedings may take place.

⁶² For a thorough discussion on these cases see Chapter Three of this work under 3.6.2.1.

⁶³ *Lauder v The Czech Republic*, 9 ICSID 66 (2001) and *CME Czech Republic BV v The Czech Republic* 9 ICSID Reports (2001) respectively. See a thorough discussion on the two cases on sub heading 3.6.2.1.3 of Chapter three of this work.

⁶⁴ See *Lauder v The Czech Republic*, 9 ICSID 66 para 143.

⁶⁵ Reinisch A 'The use and limits of res judicata and lis pendens as procedural tools to avoid conflicting dispute settlement outcomes'(2004) 3 *Law & Practice of International Courts & Tribunals* 37 at 52.

Another possible hindrance to the application of the two principles could be the difficulty of establishing same cause of action. Investors could have different available remedies against host states, one under the contract entered with the state authorities and another under the applicable BIT. Nothing prevents both the contract and the treaty claims to be brought simultaneously by the same investor, in different proceedings and forums.⁶⁶

As discussed in Chapter Three of this research,⁶⁷ this issue can be well elaborated through *Biwater Gauff v Tanzania*.⁶⁸ In this case, a British-German joint venture Biwater Gauff Tanzania (hereinafter “BGT”) won a bid from the World Bank to renovate and upgrade the water system in the city of Dar es Salaam Tanzania.⁶⁹ The firm miscalculated the cost for the project when bidding. As a result, after 18 months the firm was in deep financial difficulties. The water supply services in Dar es Salaam deteriorated as a result. The government of Tanzania decided to take charge of the management and the supply of water in the city.⁷⁰ BGT was aggrieved by the government move and decided to institute a claim at ICSID pursuant to the Tanzania – UK BIT alleging breach on expropriation, fair and equitable treatment, full protection and security, discrimination and unrestricted transfer of capital guarantees.⁷¹ BGT also, through its subsidiary company incorporated under Tanzanian Law, DAWASCO, initiated a parallel

⁶⁶ Cremades BM and Madalena I ‘Parallel Proceedings in International Arbitration, (2008) 24 *Arbitration International* 509.

⁶⁷ See Chapter Three of this work under Subheading 3.6.2.2.

⁶⁸ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No. ARB/05/22, (2008)(Final Award)

⁶⁹ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No. ARB/05/22, (2008)(Final Award) para 3.

⁷⁰ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* Para 15

⁷¹ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* Para 205.

proceeding under UNCITRAL Rules before a separate tribunal and alleged Tanzania breached its obligations under the project contract.⁷²

That is to say, there were two proceedings concurrently running against the same respondent in relation to the same dispute. In December 2007, that tribunal under UNCITRAL Arbitration Rules rejected BGT's claim and instead awarded 3 million Pounds to Tanzania.⁷³ A year later the ICSID tribunal also rendered its decision. While no compensation was awarded in the end the arbitrators held Tanzania liable for breaching the BIT but awarded no damages to the claimant. This shows that under the current investor – state dispute system multiple inconsistent awards could be rendered and multiple enforcement proceedings by the same claimant against the same respondent can also occur. This only occurred because there were two different cause of action; rights accruing from the contract and the other accruing from the BIT. It can be said that the parties were different. Therefore under the strict application of the principles of res judicata and lis pendens, these two cases cannot qualify for the defences.

It can be concluded that, with such multiple nationalities of individual investors and corporations the principle of res judicata and lis pendens will hardly find room of application in investor – state arbitration.

⁷² *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* Para 476.

⁷³ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* Para 477.

5.2.4 Use of mediation/conciliation techniques

This is another suggestion which has received attention and could be vital in enhancing the legitimacy of the investor – state system. The ICSID system provides for two alternate mechanisms for settlement of investor – state disputes.⁷⁴ The dispute can be settled by way of conciliation or arbitration.⁷⁵ Currently, conciliation is almost redundant in investor - state dispute settlement. For the last twenty years, only seven cases have been resolved through conciliation.⁷⁶ It is argued that the redundancy is caused by the fact that the mechanism lacks mandatory force and is mostly considered informal.⁷⁷ Mediation and conciliation are normally used interchangeably and they both mean a dispute resolution technique under which the mediator/conciliator attempts to bring the parties to agreement using many different styles and techniques to facilitate settlement.⁷⁸ In mediation or conciliation, the mediator’s role is to bring the parties to their own agreed decision. In many jurisdictions today, mediation precedes any litigation or arbitration. It is only when the parties are unable to settle their dispute through mediation that the matter is referred to the court for litigation.

⁷⁴ See Article 1(2) of the ICSID Convention.

⁷⁵ Articles 28 – 35 of the Convention provides for conciliation proceedings while Article 36 – 55 provide for arbitration proceedings.

⁷⁶ Between 1982 and 2011 see *the Background Information on the ICSID*, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English> accessed on 11/07/2013.

⁷⁷ United Nations Conference on Trade and Development (UNCTAD) *Dispute Settlement - International Centre for Settlement of Investment Disputes: selecting the Appropriate Forum* 2003 UNCTAD/EDM/Misc.232/Add.1 at 13.

⁷⁸ Sussman E ‘Investor State Dispute Mediation: The Benefits and Obstacles’ *The Fordham Papers* 2009 available at <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCUQFjAA&url=http%3A%2F%2Fwww.sussmanadr.com%2Fdocs%2FFordham%2520Investor%2520state%2520mediation%2520-%2520pros%2520%26%2520cons%2520as%2520sent%2520in%25209-4-09.doc&ei=HNsdU9O8Ou2X7ObNq4G4Cw&usq=AFOjCNHS89xsEukJCylO2Y0RYPvh6UQUOO&bvm=bv.62578216.d.ZGU> accessed on 10/03/2014.

UNCTAD in 2009 considered the use of Mediation and Conciliation as an alternative in resolving investor – state disputes.⁷⁹ The Report suggests that with the surge of investor – state claims annually, mediation may be used a tool to reduce such a rapid increase of claims. It is further argued that the longevity of arbitration disputes which leads to costly inconsistent awards may be avoided if the parties turn to mediation instead.⁸⁰

In a 2010 Joint Symposium on Investment and Alternative Dispute Resolution organised by UNCTAD and Washington and Lee University School of Law, stakeholders discussed the ways in which ADR could help to improve the investor – state legitimacy. The symposium resulted in the UNCTAD ADR Resolution.⁸¹

A number of advantages exist in mediation over arbitration and litigation. The first advantage is that mediation is speedier than litigation and arbitration. As noted in the previous chapters, arbitration proceedings are lengthy and can take up to three years excluding annulment proceedings.⁸² It is argued that mediation can hardly take a year before the parties reach an agreement.⁸³ Another advantage associated with mediation is that it costs less when compared with arbitration or litigation. As discussed in chapter three of this work,⁸⁴ the investor – state

⁷⁹ United Nations Conference on Trade and Development, Latest Developments in Investor– State Dispute Settlement, IIA Issues Note n. 1 (2010) at 1 available at http://unctad.org/en/docs/diaeia200911_en.pdf accessed on 10/03/2014.

⁸⁰ Salacuse JW ‘Is There A Better Way? Alternative Methods of Treaty-Based, Investor State Dispute Resolution’ (2007) 31 *Fordham International Law Journal* 138.

⁸¹ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* ‘Exploring Alternatives to Investment Treaty Arbitration and the Prevention of Investor-State Disputes’ *UNCTAD Series on International Investment Policies for Development United Nations*, 2010 available at <http://investmentadr.wlu.edu/deptimages/UNCTAD/UNCTADAlternativesArbitrationAdvancedDraft.PDF> accessed on 10/03/2014.

⁸² For a thorough discussion on this see Chapter Three of this work under Subheading 3.2.3.4.

⁸³ Coe JJ Jr ‘Settlement of Investor-State Disputes through Mediation: Preliminary Remarks on Processes, Problems and Prospects’ in Bishop RD (ed.) *Enforcement of Arbitral Awards Against Sovereigns* (2009) at Chap. 4

⁸⁴ See Chapter Three of this Work under Subheading 3.6.2.7.

arbitration system is so expensive.⁸⁵ Argentina is currently faced with awards which run over USD 430 million and pending claims to the tune of 65 billion USD.⁸⁶ The amount claimed against Russia by the three majority shareholders of the former Yukos Oil Company in the ongoing arbitration proceedings is USD 114 billion.⁸⁷ It is submitted that mediation proceedings would not lead to such costs as the parties resolve the dispute amicably and within a short time frame agreed by the parties themselves.

The third advantage is that the dispute ends amicably as the parties engages the mediator as a facilitator of the discussion and not an adjudicator. The parties, in other words, control the resolution of their dispute as a result they leave the negotiation sessions as friends and not antagonists as it would turn out in arbitration proceedings. Therefore considering the fact that the parties in investor – state disputes normally need each other to ensure the project ends well, with future re - engagement, mediation serve both parties' interests and their relationship may even improve due to the parties 'engagement' in the mediation process.

⁸⁵ See Jagusch S & Sullivan J 'A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern' in Waibel M et al (eds.) *The Backlash against Investment Arbitration: Perception and Reality* (2010) 79 – 110; see also Frank S D 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham Law Rev* 1521 at 1592; see also Coe JJ 'Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch' (2005) *University College of Davis Journal of International Law and Policy* 7 at 10; see also United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* (WIR) (2012) at 88 available at http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx accessed on 14/08/2013.

⁸⁶ See United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* 2012 'Towards a New Generation of Investment Policies' at 87 available at http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx, accessed on 20/07/2013; see also Peterson LE 'Argentina by Numbers: Where Things Stand with Investment Treaty Claims Arising out of the Argentina Financial Crisis' available at http://www.iareporter.com/articles/20110201_9 accessed on 05/10/2013; see also *Merco Press* 'Argentina Faces 65 billion dollars in claim: plans to abandon international litigation court' 28th November 2012 available at <http://en.mercopress.com/2012/11/28/argentina-faces-65bn-dollars-in-claims-plans-to-abandon-international-litigations-court> accessed on 08/10/2013.

⁸⁷ See *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No AA 226; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227; *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, PCA Case No AA 228.

As in the previously discussed solutions, mediation also has flaws. The first practical issue is that normally parties go for arbitration after trying to resolve the dispute with the host state in amicable ways and when those amicable ways have failed. Therefore mediation or negotiations as many BITs requires ought to have been exhausted and proved futile before an investor approaches ICSID. Therefore asking the parties to go for mediation would seem like a waste of time.⁸⁸

Another flaw is that mediation, as a technique, is based on the principle of confidentiality of the proceedings. The modern approach in resolving investor – state dispute is to resolve the dispute in a transparent manner which allows the citizens and other interested parties to fully participate in the adjudication of public interest disputes. Therefore mediation can be seen, by today's standards, as obsolete in resolving public interest disputes.

Lastly is that mediation does not result in a binding final award or decision. Therefore it becomes difficult for either party to enforce what is agreed to in mediation. In other words, mediation does not always resolve the dispute once and for all. That may attract the unscrupulous party to resist the resolution after time and resources have been spent on mediation.

5.2.5 Margin of appreciation standard in the interpretation of bilateral investment treaties

It is contended by some that narrow scope in interpretation of treaty provisions which is based on private law principles is another hurdle in developing a stable international investment law

⁸⁸ Salacuse JW 'Is There A Better Way? Alternative Methods of Treaty-Based, Investor State Dispute Resolution' (2007) 31 *Fordham International Law Journal* 138 at 141.

regime.⁸⁹ It is argued that despite the fact that much broader variety of regulatory matters are adjudicated by the investor - state Tribunals, the line of reasoning is still based on law of contract principles.⁹⁰ It is therefore suggested that there is a need of adopting a new standard of reasoning grounded in public international law and investment law rather than private contract law.⁹¹

It is on the basis of these grounds that the recommendations are made to change the way of thinking of investor – state arbitrators. The standard of review suggested is the margin of appreciation standard which has been developed in the international human rights sphere.⁹²

Margin of appreciation is a deference the court is willing to grant to the national decision makers and recognises that the normative requirement articulated in the convention text can often be legitimately met by a range of different measures that may strike different but still normative acceptable balance between individual rights and government interests.⁹³ The margin also recognises that some state measures against any international convention obligation are justifiable to protect national interests such as security, public health, public morals and order. In applying the margin, the respective court is required to make a preliminary assessment of the respective social needs.⁹⁴ It will be upon the court thereafter to review the preliminary assessment to determine whether the reasons adduced by the national authority justify the breach

⁸⁹ Burke White W & Von Staden A ‘The Need for Public Law Standards of Review in Investor –State Arbitration’ in *Stephan Schill International Investment Law and Comparative Public Law* 2010, 689 at 695.

⁹⁰ Harten G V *Investment Treaty Arbitration and Public Law* (2007) at 124.

⁹¹ For a thorough discussion on this issue see Chapter Three of this Work under Subheading 3.6.2.6.

⁹² Burke White W & Von Staden A ‘The Need for Public Law Standards of Review in Investor –State Arbitration’ in *Stephan Schill International Investment Law and Comparative Public Law* 2010, 689 at 696.

⁹³ Choudhury B ‘Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest contributing to the Democratic Deficit?’ (2008) 41 *Van J Tran L* 775 at 823; Burke White W & Von Staden A ‘The Need for Public Law Standards of Review in Investor –State Arbitration’ in *Stephan Schill International Investment Law and Comparative Public Law* 2010 689.

⁹⁴ Burke White W & Von Staden A ‘The Need for Public Law Standards of Review in Investor –State Arbitration’ in *Stephan Schill International Investment Law and Comparative Public Law* 2010 689 at 305.

of its obligations under the international convention. In other words the margin of appreciation permits the Court to show the proper degree of respect for the objectives that a Contracting Party may wish to pursue, and the trade-offs that it wants to make while at the same time preventing unnecessary restrictions on the fullness of the protection which the Convention can provide.⁹⁵ According to this standard, the state's identification of a legitimate aim in pursuit of social and economic policies is rarely reviewed and the burden of proof showing that an initiative does not pursue a legitimate aim falls upon the applicant.⁹⁶ The scope of the margin to be accorded to the state authority depends on the extent to which the measure intends to address the public interest at issue. The Court in so doing acknowledges the fact that state authorities because of their closer proximity to social reality are better placed to know what constitutes public interest.⁹⁷

Burke White submits that other international dispute settlement bodies, including the European Court of Justice (ECJ), the WTO, and the Inter American Court of Human Rights have been applying margin of appreciation standard of review.⁹⁸ It is argued by these proponents that had this standard been applied by the tribunals in *CMS*,⁹⁹ *Enron*¹⁰⁰ and *Sempra*¹⁰¹ the decisions

⁹⁵ Burke White W & Von Staden A 'The Need for Public Law Standards of Review in Investor –State Arbitration' in *Stephan Schill International Investment Law and Comparative Public Law* 2010 689 at 305

⁹⁶ Choudhury B 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest contributing to the Democratic Deficit?' (2008) 41 *Vanderbilt Journal of Transnational Law* 775 at 823.

⁹⁷ Burke White W & Von Staden A 'The Need for Public Law Standards of Review in Investor –State Arbitration' in *Stephan Schill International Investment Law and Comparative Public Law* 2010 689 at 309.

⁹⁸ Burke White W & Von Staden A 'The Need for Public Law Standards of Review in Investor –State Arbitration' in *Stephan Schill International Investment Law and Comparative Public Law* 2010 689 at 697.

⁹⁹ *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8 available at http://ita.law.uvic.ca/documents/CMS_FinalAward.pdf.

¹⁰⁰ *Enron Corporation and Ponderosa Assets L P v Argentine Republic* ICSID ARB/01/3, available at http://ita.law.uvic.ca/documents/Enron-English_006.pdf.

¹⁰¹ *Sempra Energy International v The Argentine Republic* ICSID ARB/02/16 available at http://ita.law.uvic.ca/documents/Sempra-English_006.pdf.

would have been different as Argentinian measures would have been considered necessary for pursuing legitimate aims for the advancement of social and economic policies.¹⁰²

While the adoption of this solution would help to widen the reasoning and create a balance between the public interests and the private investor interests in investor – state disputes, still there are obstacles in making this option successful.

The first obstacle could be the fact that the current rules of ICSID, UNCITRAL SCC and the rest provide for party appointed tribunals. With the current rules in place, the margin of appreciation principle cannot be consistently applied as some of the presiding arbitrators are not aware of the principles requirement as they do not have a public law or international investment law background.

As discussed in Chapter Three of this research,¹⁰³ ICSID, maintains a list of potential arbitrators who to a large extent have the private law background. A recent report reveals that only 40% of the current arbitrators in the ICSID roster have public law background and the remaining 60% comprises of lawyers with commercial law background.¹⁰⁴ The report further reveals that 12 arbitrators have been repeatedly appearing in over 60% of all ICSID cases. This is to say the ICSID jurisprudence is dominated by few selected arbitrators with contract law background. In addition, the study indicates that 50% of arbitrators on the current ICSID roster have appeared as

¹⁰² For a thorough discussion on these cases see Chapter Three of this work under Subheading 3.6.2.1.2

¹⁰³ See Chapter Three of this work under Subheading 3.6.2.3.

¹⁰⁴ Gaukrodger D and Gordon K ‘Investor-state dispute settlement: A scoping paper for the investment policy community’, *OECD Working Papers on International Investment*, No. 2012/3, (2012) OECD Investment Division at p. 44 available at <http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/50291642.pdf> at 44; see also Schneiderman D ‘Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcome’ available at http://works.bepress.com/david_schneiderman/1 accessed on 12/02/2014.

counsel for investors elsewhere.¹⁰⁵ This signifies that there is, to a large extent, a rotation of same private law reasoning in the current investor – state arbitration. With the current dominance of commercial law Arbitrators, the margin of appreciation principle will hardly find a way to prosper.

It is the opinion of this research that the margin of appreciation doctrine would easily prosper in a permanent court structure which is constituted by adjudicators with international investment law background or a hybrid of public law and international trade law background. It is submitted here that adjudicators involved in the WTO system are better placed to understand the margin of appreciation doctrine which is more or less similar to the GATT Article XX provision which requires the WTO AB to consider non – trade measures.¹⁰⁶ Under the WTO system, the AB has successfully managed to balance between trade and other public interests. Trade interests have been on a number of occasions been put on balance with other government policy objectives. For example, under Article XX of the GATT a range of government measures are considered valid if they are not arbitrary and unjustifiable and meant for protection of public morals; human, animals, or plant life or health; labour; cultural value and exhaustible natural resources. The WTO Appellate Body by recognising the importance of other policy objectives has managed to create a stable jurisprudence on Article XX. In *US v Gasoline*¹⁰⁷ case the US measure to regulate the composition and emission effects of gasoline in order to reduce air pollution was held valid

¹⁰⁵ Gaukrodger D and Gordon K ‘Investor-state dispute settlement: A scoping paper for the investment policy community’, *OECD Working Papers on International Investment*, No. 2012/3, (2012) OECD Investment Division at p. 44; see also Commission J ‘Precedent in Investment Arbitration: A Citation Analysis of Developing Jurisprudence’ (2007) *Journal of International Arbitration* 129 – 58.

¹⁰⁶ See the WTO General Agreement on Tariffs and Trade, Article XX available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf accessed on 20/03/2014.

¹⁰⁷ WT/DS2/AB/R (29 April 1996).

despite the fact that it interfered with trade. Again, in *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*,¹⁰⁸ the court decided to uphold French non trade objective (health) over Canada trade objectives. Also in *Brazil – Re-treaded Tyres*¹⁰⁹ the AB affirmed the relevancy of non – trade policies by holding that the import ban on re-treaded tyres was apt to produce a material contribution to the achievement of its objective i.e. the reduction in waste tyre volumes.¹¹⁰ In summary, under the WTO non – trade policy objectives are given equal treatment.

It is submitted here therefore that recruiting adjudicators with WTO background to serve in the investor – state adjudication system may help to develop a balanced jurisprudence.

5.2.6 The establishment of an appellate court under the International Centre for Settlement of Investment Disputes



There is yet another suggestion of introducing an appellate facility under the ICSID Convention.¹¹¹ Advocates for this argue that in order to avoid the requirement of creating a new convention, the appellate body can be established under the ICSID Appeals Facility Rules which

¹⁰⁸ WT/DS135/AB/R (12 March 2001).

¹⁰⁹ WT/DS332/AB/R (12 June 2007)

¹¹⁰ WT/DS332/AB/R (12 June 2007).

¹¹¹See Greason E ‘International Arbitral Appeal, What are we so afraid of?’(2007)7 *Pepperdine Law Journal* 269 at 287; See also Mann H ‘Civil Society Perspective: what Do Key Stakeholders Expect from the International Investment Regime?’ in Alvarez J and Sauvant K (eds.) *The Evolving International Investment Regime* (2011) 22-29; Gaiger R ‘Multilateral Approach to Investment’ in Alvarez J and Sauvant K (eds.) *The Evolving International Investment Regime* (2011) 153-173; Reinisch A ‘The Future of Investment Arbitration’ in Christina Binder et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894 - 916;

can be easily adopted by the Administrative Council of ICSID without the requirement of approval from all member states.¹¹²

This suggestion has been widely considered. The ICSID Secretariat in 2004 circulated a Discussion Paper to stakeholders seeking opinion on how best the appellate structure could be introduced under the ICSID Convention.¹¹³ The Discussion Paper acknowledged the fact that there are inconsistent decisions existing in parallel and that the development of international investment law is jeopardised by such inconsistencies. While acknowledging the existence of inconsistency, the Secretariat was of the opinion that inconsistency was not the general feature of ICSID jurisprudence but the exception.¹¹⁴ The Secretariat was sceptical about the introduction of an appellate structure. It opined that introducing the structure might affect more the legitimacy of the system as appellate structure may cause delay and interfere with the finality of the award. Proponents argue that in order to maintain finality of proceedings, which is the key concept at ICSID; time limits could be stipulated within which the appellate body has to deliver its decisions.¹¹⁵ The proposal was not pursued further and was abandoned in 2005 as some stakeholders viewed that the establishment of the structure was prematurely conceived.¹¹⁶

It is submitted here that establishing the Appellate structure under the ICSID without incorporating other institutions involved in the investor – state adjudication system will do very

¹¹² Gaiger R ‘Multilateral Approach to Investment’ in Alvarez J and Sauvant K (eds.) *The Evolving International Investment Regime* (2011) 153-173 at 170.

¹¹³ ICSID Discussion Paper on Possible improvements of the framework for ICSID arbitration (2004) <http://www.worldbank.org/icsid/highlights/improve-arb.htm> accessed on 13/02/2014.

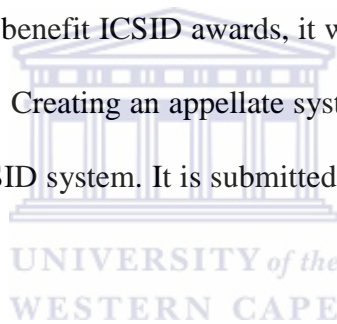
¹¹⁴ ICSID Discussion Paper on Possible improvements of the framework for ICSID arbitration (2004) <http://www.worldbank.org/icsid/highlights/improve-arb.htm> accessed on 13/02/2014.

¹¹⁵ Gaiger R ‘Multilateral Approach to Investment’ in Alvarez J and Sauvant K (eds.) *The Evolving International Investment Regime* (2011) 153-173 at 170.

¹¹⁶ Tams C ‘Is there a need for an ICSID appellate structure?’ (2004) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341268 accessed on 13/02/2014.

little in solving the problem of inconsistency of decisions. Currently the arbitrations conducted under the UNCITRAL Rules, SCC or ICC has no connection with ICSID. As stated earlier,¹¹⁷ the UNCTAD 2014 World Investment Report indicates that ICSID registered 62% of all investor – state disputes, UNCITRAL 28%, and the remaining 10% is managed by the London Court of International Arbitration (LCIA), and the Stockholm Chamber of Commerce.¹¹⁸ Therefore even after the formation of such a structure at ICSID 38% of investor – state disputes will be left out and these other institutions will still have the autonomy of rendering awards without necessarily subjecting them to the ICSID appellate body.

Therefore while this proposal may benefit ICSID awards, it will do little to benefit the investor – state arbitration system as a whole. Creating an appellate system under ICSID will entail leaving out disputes settled outside the ICSID system. It is submitted therefore that this suggestion is not as unifying as it ought to be.



5.2.7 Treaty based appellate body

Due to the existence of many BITs in place so far, it is argued by some that establishment of an appellate body for all BITs would be difficult and unrealistic.¹¹⁹ Therefore it is proposed that new BITs should have a clause providing for the establishment of an appellate tribunal. This proposal has received attention from some few countries. The Central America Free Trade

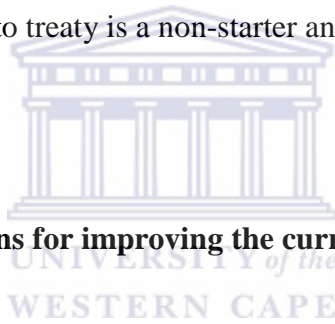
¹¹⁷ See Chapter Three of this work under Subheading 3.1.

¹¹⁸ See United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* ‘Investing in the SDGs: An Action Plan’ [2014] IIA Monitor, No. 1, at 125, U.N.Doc.UNCTAD/WEB/ITE/IIA/2014/3 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf accessed on 23/07/2014.

¹¹⁹ Gantz D ‘An Appellate Mechanism for Review of Arbitral Decisions in Investor- State Disputes: Prospects and Challenges’ (2006)39 *Vanderbilt Journal of Transnational Law* 703.

Agreement (CAFTA)¹²⁰ provides for the establishment of this kind of Appellate Body.¹²¹ The US under its recent BITs provides for the establishment of an appellate body. The US Trade Promotion Authority Act suggests that, when negotiating future investment treaties, the U.S. will consider an appellate body for each treaty.¹²² This practice is said to be increasing because of the unavailability of an appellate mechanism under the ICSID Convention.¹²³

This suggestion however does not provide a solution on how under the prevailing circumstances where there are 3240 BITs and IIAs can a treaty based appellate body bring consistency in international investment regime.¹²⁴ It is therefore submitted here that the proposal to establish an appellate structure based on treaty to treaty is a non-starter and heavily flawed.



5.3 Author's 'alternative' solutions for improving the current system.

In the discussion above, several solutions suggested by different stakeholders have been considered. It is undoubtedly clear that some of the suggested solutions are quite convincing and provide the way forward on how to rescue the impending collapse of the investor – state

¹²⁰ It is an agreement to help promote trade liberalization between the United States, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic http://www.ustr.gov/assets/Trade-Agreements/Bilateral/CAFTA/CAFTA-DRFinalTexts/asset-upload-file328_4718.pdf.

¹²¹ See Gleason E 'International Arbitral Appeal, What are we so afraid of?'(2007)7 *Pepperdine Law Journal* 269 at 287.

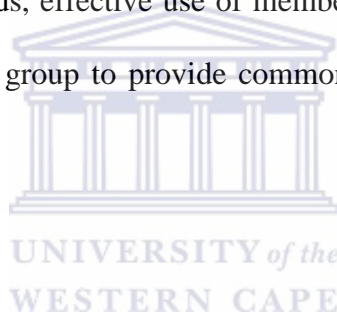
¹²² See Gleason E 'International Arbitral Appeal, What are we so afraid of?'(2007)7 *Pepperdine Law Journal* 269 at 281.

¹²³ See Gleason E 'International Arbitral Appeal, What are we so afraid of?'(2007)7 *Pepperdine Law Journal* 269 at 281 at 282.

¹²⁴ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014* 'investing in the SDGs: An Action Plan' at xxiii available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014

arbitration system. However, it has also been noted that some of the solutions suggested are accompanied with obstacles or disadvantages which as a result overshadows their effectiveness.

As stated elsewhere, it is the opinion of this research that creating the international investment court together with its appellate structure is the most realistic and goal achieving solution. However, in the event that the establishment does not materialise for any reason, this research puts forward the following alternative solutions. The suggested solutions includes establishment of investor – state dispute management centre, effective utilisation of host state Supreme Courts, mandatory publication of all awards, effective use of member state interpretative statement and lastly the formation of a working group to provide common interpretation to the international investment basic principles.



5.3.1 Investor – state dispute management centre

This research recommends the establishment of an investor – state dispute management centre. The Centre should be charged with the duty to provide legal assistance to poor developing countries which are not able to engage expensive lawyers from the developed world.¹²⁵ The fact that developing countries have been the majority respondent in the current investor – state arbitration strengthens the relevance of this proposal. The UNCTAD 2012 report indicates that 46 disputes were filled in 2011 and 80% of them (38 cases) were filed against developing

¹²⁵ For more discussion on WTO Centre see Gottwald E ‘Leveling the Playing Field: Is It Time for a Legal Assistance Centre for Developing Nations in Investment Treaty Arbitration?’ (2007) 22(2) *American University International Law Review* 237 at 252.

countries.¹²⁶ On the other hand, UNCTAD 2013 Report indicates that 58 new cases were filed in 2012 out of which 66% (37 cases) involved developing states as respondents.¹²⁷ In addition, the latest UNCTAD Report, WIR 2014, indicates that 85% of new cases were instituted by investors from the developed world against developing countries in the year ending December 2013.¹²⁸ Therefore, it is evidently clear that developing countries are the majority respondents in investor – state disputes.

The WTO, for example, through some of its member countries, introduced the Advisory Centre on WTO Law for the same purposes and it has been very helpful to developing countries.¹²⁹ The WTO Centre provides legal aid to developing countries and least developed countries. The Centre is based in Geneva and has a status of inter- governmental organisation independent from the WTO. The Centre is co – owned by both the developed and the developing countries. Despite the fact that it is co – owned, the Centre only provide legal assistance to least

¹²⁶ See United Nations Conference on Trade and Development (UNCTAD), ‘Latest Developments in Investor-State Dispute Settlement’ 11AU.N. Doc. UNCTAD/WEB/ITE/IT/2012 available at

http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf accessed on 05/03/2014.

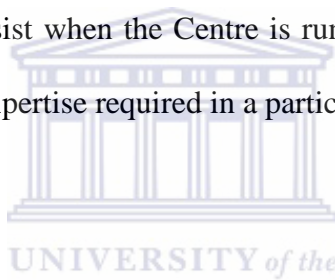
¹²⁷ See United Nations Conference on Trade and Development (UNCTAD) ‘Recent Development in Investor – State Dispute Settlement’, Issue Note IIA, 28 – 29th May 2013 at 3 available at

http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf accessed on 05/03/2014.

¹²⁸ See United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* ‘Investing in the SDGs: An Action Plan’ [2014] IIA Monitor, No. 1, at 125, U.N.Doc.UNCTAD/WEB/ITE/IIA/2014/3 available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 23/07/2014.

¹²⁹ The Centre was established in 2001 through the Agreement Establishing the WTO Advisory Centre on the WTO Law available at http://www.acwl.ch/e/documents/agreement_estab_e.pdf accessed on 04/03/2014; For more on the working modality of the Centre see Gottwald E ‘Leveling the Playing Field: Is It Time for a Legal Assistance centre for Developing Nations in Investment Treaty Arbitration?’ (2007) 22(2) *American University International Law Review* 237; see also Sauvants KP & Ortino F ‘Improving the International Investment Law and Policy Regime: Options for the future’ *Background report prepared for the Seminar on Improving the International Investment Regime*, Helsinki, April 10-11, 2013 available at <file:///C:/Users/user/Downloads/Improving%20the%20International%20Investment%20Law%20and%20Policy%20Regime%20%20Options%20for%20the%20Future%20.pdf> accessed on 04/03/2014.

developing countries, developing countries and the economy in transition countries.¹³⁰ Article 2(1) of the Agreement Establishing the WTO Advisory Centre (ACWL) provides that the main objectives of the Centre is to provide legal advice to member states on WTO law, support the parties in legal proceedings and facilitate training to government officials through internships and seminars. With regard to legal assistance in proceedings, the Centre engages in assisting the respective countries in different stages of the disputes. The Centre represents the respondent states at a discounted price but at times, the service is rendered for free if the respective respondent state is a least developed country.¹³¹ For the purposes of ensuring that it meets the demand of representing developing states whenever required, the Centre has a roster of external counsels who would chip in to assist when the Centre is running out of counsels or the Centre lacks personnel with a particular expertise required in a particular case.¹³²



Learning from the above WTO example, it is suggested here that the Centre once established should focus on providing affordable access to legal services to developing countries. It is quite clear that the competency and sometimes experience of a lawyer is crucial in achieving a favourable outcome of any legal proceeding. The relevancy of expertise and experience becomes even more vital in specialised fields like the international investment law. Currently, the legal services is monopolised by few firms and lawyers from the Western world who charge exorbitant fees which can bankrupt a poor country coffer from charges of a single case.¹³³ As earlier

¹³⁰ See the Advisory Centre on WTO Law - About Us available at <http://www.acwl.ch/e/about/about-e.aspx> accessed on 04/03/2014

¹³¹ For more information on the working of the Centre see <http://www.acwl.ch> accessed on 04/03/2014.

¹³² See the Advisory Centre on WTO Law - Roster of External Legal Counsel available at <http://www.acwl.ch/e/dispute/counsel-e.aspx> accessed on 04/03/2014.

¹³³ As discussed earlier under Chapter Three Subheading 3.5.2.3 a few group of lawyers, 12 arbitrators, appears in more than 60% percent of all ICSID cases; see also Gaukrodger D and Gordon K 'Investor-State Dispute

discussed,¹³⁴ a single case can cost US\$8 million and in some cases exceed US\$30 million.¹³⁵ The Czech Republic in addition to the damages of US\$ 354,655,752 spent an extra US\$ 10 million as legal fees¹³⁶ in *Lauder v The Czech Republic* and *CME Czech Republic BV v The Czech Republic*.¹³⁷ The impact of these cases on the economy of a development country is dire and may immensely affect development programmes of that country.¹³⁸ From these statistical data on costs one can see that legal aid services will help a lot in ensuring that developing countries get quality legal support when involved in investor – state arbitration.

The Centre may also offer preliminary legal opinion after evaluating the strengths and weaknesses of cases in which the developing countries are involved before the dispute is filed for arbitral adjudication. The advantage of preliminary evaluation of the case is that where the claimant has a strong case it will be better and for the benefit of the respondent state to sit down with the investor and settle the case amicably. Through that, the state would have avoided litigation and other related costs.

Settlement: A Scoping Paper for the Investment Policy Community’ OECD Working Papers on International Investment, No. 2012/3 at 44.

¹³⁴ For a thorough discussion on costs in the current investor – state arbitration see Chapter Three of this work under Subheading 3.6.2.7.

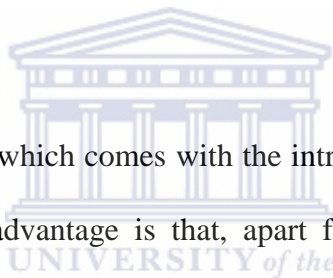
¹³⁵ See Gaukrodger D and Gordon K ‘Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community’ OECD Working Papers on International Investment, No. 2012/3 at 19 available at http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf accessed on 20/06/2013.

¹³⁶ See United Nations Conference on Trade and Development (UNCTAD) Communication on Investment, Technology & Related Financial Issues, *Investor- State Disputes and Policy Implications*, at 14, U.N. Doc. TB/B/COM.2/62 (Jan. 14,2005) available at <http://www.unctad.org/en/docs/c2d62-en.pdf> accessed on 05/03/2014.

¹³⁷ See *Lauder v The Czech Republic*, 9 ICSID Reports (2003) and *CME Czech Republic BV v The Czech Republic* ICSID Reports (2003).

¹³⁸ For a thorough discussion on the impact of these cases to the sovereignty of the host state see Chapter Three of this work under Subheading 3.5.2.6; see also UNCTAD, Communication on Investment, Technology & Related Financial Issues, *Investor- State Disputes and Policy Implications*, at 7 - 8, U.N. Doc. TB/B/COM.2/62 (Jan. 14,2005) available at <http://www.unctad.org/en/docs/c2d62-en.pdf> accessed on 05/03/2014.

It is further submitted here that the Centre, if well equipped with experts in the field, could also be helpful in assisting developing states at the negotiation stage of the BITs. As it can be noted from the previous discussions,¹³⁹ a BIT which is well framed and encompasses non - investment policy objectives can limit the jurisdiction of the Tribunal and provide deference to the host states. Apart from encompassing non - investment policy objectives, the BIT may provide for member states' rights to form a Committee which will be mandated to issue interpretative statements in case of conflict decisions on a particular principle.¹⁴⁰ Therefore the Centre can prepare a Model BIT which encompasses non - investment policy objectives but also safeguarding host states interests to be adopted by developing states.



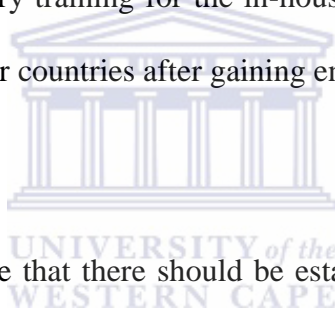
There are a number of advantages which comes with the introduction of the legal aid Centre for developing countries. The main advantage is that, apart from rescuing poor countries from paying exorbitant fees to expensive Western world firms and lawyers, the Centre shall increase the legitimacy of the whole investor – state arbitration system. Poor countries will feel free to use the system in same manner the developed world does. Through the Centre the developing world will receive the same level of representation to that of rich foreign investors hence justice will be expected to be dispensed in an even manner. Therefore until when legal representation is balanced the legitimacy of investor – state arbitration system will continue to be perceived as

¹³⁹See the discussion on Chapter Four under Subheading 4.3.2.4 and 4.3.2.5; see also Canadian Model BIT, 2004 available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> and the US Model BIT 2012 available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> both accessed on 25/02/2014 accessed on 25/02/2014.

¹⁴⁰ See for example Article 1131(2) and Article 2001 of NAFTA; for a thorough discussion on the NAFTA Interpretative Statements, see Marshall F 'Defining New Institutional Options for Investor – State Dispute Settlement' International Institute for Sustainable Development (IISD) 2009 at p. 38 available at http://www.iisd.org/pdf/2009/defining_new_institutional_options.pdf accessed on 03/02/2014

leaning towards the interests of foreign investors who are able to higher expensive legal firms to argue their cases.

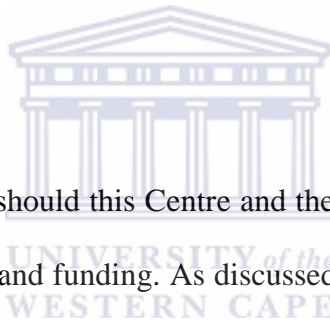
Therefore as it can be learnt from the WTO experience, the Centre for assistance to developing countries can play a significant role in creating a balanced adjudicative system in investor – state arbitration and ultimately increase the legitimacy of the system as a whole. It should also be noted here that, for the Centre to be successful, it does not need to compete with the big law firms in terms of resources but should focus on providing the developing world with the well informed legal advice and necessary training for the in-house counsels. With time the in house counsels will be able to defend their countries after gaining enough experience.



Alongside that, it is submitted here that there should be established an institute which shall be responsible in ensuring ethics of investment arbitrators. The institute should be responsible with the training and establishing of ethics to govern investor – state arbitration. In order to achieve that successfully, the institute needs to be a sole and an independent appointing authority for adjudicators to all matters relating to investor – state disputes. This practice has been done by other different international adjudicative systems. For example as discussed in Chapter Four,¹⁴¹ the International Bar Association (IBA) and the International Law Association (ILA) have developed the guidelines for assessing the neutrality of the adjudicators.

¹⁴¹ See Chapter Four of this work under Subheading 4.4.3 & 4.4.4.

The institute as an independent organ should be mandated to prepare a roster of Arbitrators from all parts of the world with expertise on public law. Therefore the appointment of credible arbitrators with public law background to the roster will be managed and done by the institute after the respective potential arbitrators have passed a qualifying test. That is to say, rules of etiquette of Investor – state arbitration need to be formulated specifically demanding the appointment of arbitrators with public law background. For the purposes of maintaining impartiality and independence of arbitrators, the rules should strictly prohibit arbitrators on the roster to serve as counsels in other investment disputes. The celebrated independence of the judiciary principles should be strictly observed and used by the Centre as an appointing authority.



One of the issues would be where should this Centre and the institute be hosted and who should be responsible for its management and funding. As discussed elsewhere, the legitimacy issues in the current investor – state system itches a lot of stakeholders, UNCTAD being one of them. The recent UNCTAD World Investment Reports have identified the issue of exorbitant costs as one of the issues haunting investor – state adjudication system.¹⁴² Therefore it is submitted here that, UNCTAD as a UN affiliate with the mandate to organise the World Investment Forum, which brings together major players from the international investment community to discuss challenges and opportunities and to promote investment policies and partnerships for sustainable development and equitable growth, need to take up the matter and establish the centre and the

¹⁴² See United Nations Conference on Trade and Development (UNCTAD), *World Investment Report*, ‘Reform of Investor –state Dispute Settlement: In Search of a Road’ Map 26th June 2013, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf at pp 3 - 4, accessed on 03/02/2014; see also UNCTAD *World Investment Report* (WIR) (2012) at 88 available at http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx accessed on 14/08/2013.

institute.¹⁴³ The fact that it is the leading institution on global economic issues, UNCTAD stands to be the best institution to establish the Centre and the institute. The two organs can be established and hosted at the Division of Investment and Enterprise of the UNCTAD. The Division is recognised as ‘a global centre of excellence on issues related to investment and enterprise for sustainable development’.¹⁴⁴ The division also provides technical support to over 150 world economies. It is submitted here that establishing the legal aid Centre and the institute should be considered as falling within its mandate of providing technical assistance.¹⁴⁵

5.3.2 Limiting investor – state arbitration by using host state courts

The effective utilisation of the host state courts also deserves an attention and has not been given the value it deserves. Some countries are considering an option of using local courts in their modern BITs. The UNCTAD 2013 World Investment Report as well suggests that limiting the foreign investor from the investor – state arbitration could be one of the solutions to curb the current legitimacy issues.¹⁴⁶

It is submitted here that conducting hearings in the host state could indeed be an effective means to address legitimacy issues as long as the judicial system in that country is just and adheres to

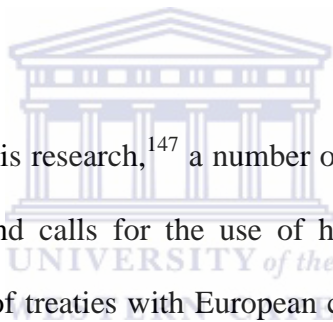
¹⁴³ United Nations Conference on Trade and Development (UNCTAD) ‘about Us’, available at <http://unctad.org/en/Pages/AboutUs.aspx> accessed on 26/05/2014.

¹⁴⁴ United Nations Conference on Trade and Development (UNCTAD), ‘Investment and Enterprise Division’ available at <http://unctad.org/en/pages/DIAE/DIAE.aspx> accessed on 26/05/2014.

¹⁴⁵ United Nations Conference on Trade and Development (UNCTAD), ‘Investment and Enterprise Division’ available at <http://unctad.org/en/pages/DIAE/DIAE.aspx> accessed on 26/05/2014.

¹⁴⁶ See United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* ‘Reform of Investor –state Dispute Settlement: In Search of a Road Map’ 26th June 2013, at 7 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf accessed on 04/03/2014.

the basic principles of independence of the judiciary. In countries like South Africa and Australia where the independence of the judiciary is firmly protected by the constitution, such an option may work quite effectively. For this proposal to be successful and to avoid backlog of cases in the normal judicial duties, a special division could be formed which will be responsible for handling investment disputes. For those countries which have investment dispute divisions in their court structure, the disputes could be directed to such division registry. This means that renegotiation of the current BITs is needed if these suggestions are to have any meaningful impact. Some countries have shown their intention of re-negotiating the first generation BITs which create legitimacy concerns.



As discussed in Chapter Four of this research,¹⁴⁷ a number of countries have reacted against the current investor – state system and calls for the use of host state courts. South Africa, for example, has cancelled a number of treaties with European countries and has clearly stated that the protection will be provided in the local legislation.¹⁴⁸ It first issued a cancellation notice to its European BIT partners involving Belgium, Luxembourg, Spain, the Netherlands, Germany and Switzerland.¹⁴⁹ In another move, the South African government in November 2013, published its draft Promotion and Protection of Investment Bill 2013 in the Government Gazette for public comment.¹⁵⁰ The bill provides for domestic litigation, domestic arbitration and mediation of

¹⁴⁷ See Chapter Four of this Work under subheading 4.8.

¹⁴⁸ The Department of Trade and Industry *Republic of South Africa's Government Position Paper on Bilateral Investment Treaty Policy Framework Review*, June 2009, available at http://www.thedti.gov.za/ads/bilateral_policy.pdf (accessed on 7th February 2013).

¹⁴⁹ South Africa Pushes Phase-out of Early Bilateral Investment Treaties after at least Two Separate Brushes with Investor-State Arbitration, *Investment Arbitration Reporter*, September 23, 2012, available online at http://www.iareporter.com/articles/20120924_1 accessed on 04/03/2014.

¹⁵⁰ See the Draft Bill on Promotion and Protection of Investment, 2013 available at <http://www.tralac.org/files/2013/11/Promotion-and-protection-of-investment-bill-2013-Invitation-for-public-comment.pdf> accessed on 07/03/2014.

investment disputes.¹⁵¹ Therefore if the Bill becomes law, investment disputes in South Africa will be settled locally through court litigation, mediation or arbitration under the South African Arbitration Act.¹⁵²

As discussed in Chapter Four of this research, In March 2014, Germany also announced its dissatisfaction with the investor – state arbitration system and is opposing the inclusion of the system in the EU – US trade pact which is currently under negotiations.¹⁵³ Germany is taking the same stance on the recently concluded Comprehensive Economic and Trade Agreement (CETA) between EU and Canada.¹⁵⁴ Germany is advancing the idea of adjudicating investor – state dispute in the host state courts.¹⁵⁵ According to the *Financial Times*, the Junior Minister of Economy, Brigitte Zypries, believes that foreign investors ‘have sufficient legal protection in the national courts.’¹⁵⁶ It is submitted here that this new Germany stance, which was the first country to pioneer for BITs and signed the first BIT with Pakistan in 1959, strengthens further the argument that dispute settlement provision in the BITs indeed has problems.

¹⁵¹ See Article 11 of the Bill.

¹⁵² Arbitration Act 1965 (Act No. 42 of 1965).

¹⁵³ See the Germany Ministry Announcement in *Investment Treaty News*, May 2014 Issue at 16 available at http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf

¹⁵⁴ See the EU – Canada Comprehensive Economic and Trade Agreement (CETA) available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf accessed on 11/11/2014.

¹⁵⁵ See Chapter Four of this Work under subheading 4.8.

¹⁵⁶ *Financial Times* quoted in *Investment Treaty News*, May 2014 Issue at 16 available at http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf

Australia has also omitted ISDS provisions in some of its BITs including the FTA with USA.¹⁵⁷ In 2011, the former government stated that it will not include investor – state dispute settlement in its future BITs.¹⁵⁸ However, as discussed earlier,¹⁵⁹ with the change of government in 2013, the new Australia- Korea FTA which includes an investment chapter has incorporated investor-state arbitration.¹⁶⁰ With the aim of addressing the host state policy making space, the new FTA comes with the ‘general exception’ to investment obligations which parallel WTO exception provisions such as GATT Article XX and GATS Article XIV.¹⁶¹

It is submitted here that, the utilisation of host state courts will have a number of advantages. Firstly, forum shopping will no longer be an issue once host state courts utilisation is given priority. Under the current settings investors choose nationalities which will provide them with more avenues for instituting investment claims. Furthermore, under the current system investors may institute a claim with more than one arbitral institution requiring the respondent state to defend the same claim in different autonomous forums. Therefore, by requiring national courts to

¹⁵⁷ See the United States-Australia Free Trade Agreement of 01/01/2005 available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text> accessed on 26/02/2014.

¹⁵⁸ See Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity, Australian Government Department of Foreign Affairs and Trade, April 2011, available online at <http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx><http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx> accessed on 04/03/2014.

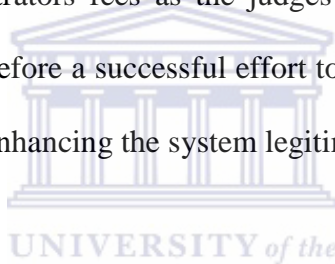
¹⁵⁹ See Chapter Four of this work under Subheading 4.8.

¹⁶⁰ Lester S ‘Improving Investment Treaties through General Exceptions Provisions: The Australian Example’ *Investment Treaty News*, May 2014 Issue available at http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf accessed on 16/05/2014.

¹⁶¹ Lester S ‘Improving Investment Treaties through General Exceptions Provisions: The Australian Example’ *Investment Treaty News*, May 2014 Issue available at http://www.iisd.org/sites/default/files/publications/iisd_itn_may_2014_en.pdf accessed on 16/05/2014.

hear the case at first instance will bar foreign investors from forum shopping as the *lis pendens* and *res judicata* principles will be squarely applied against such applications.¹⁶²

Secondly, the use of host state courts will help in reducing the costs of the proceedings. As discussed under Chapter Three of this research, costs in investor – state disputes are extremely high as parties are required to travel to the seat of arbitration but also pay hefty amount to lawyers and arbitrators.¹⁶³ Legal costs in investor-state disputes average over US\$8 million per case and in some cases exceed US\$30 million.¹⁶⁴ With host state courts there will not be any institutional costs or inflated arbitrators fees as the judges and the operation of the case are normally funded by the state. Therefore a successful effort to reduce cost by using the host state court will be a milestone towards enhancing the system legitimacy.



Thirdly, host state court utilisation will help the system to regain the trust it lost as a result of the use of party appointed arbitrators. The current system uses party appointed arbitrators who, in many occasions, tends to lean on the appointing party interests.¹⁶⁵ A study conducted in 2009 reveals that in 150 cases there were 34 dissenting opinions. All 34 dissenting opinions were from

¹⁶² For a thorough analysis on *lis pendens* and *res judicata* see above under subheading 5.2.3.

¹⁶³ For an insightful discussion on costs see Chapter Three of this work under subheading 3.6.2.7.

¹⁶⁴ Gaukrodger D and Gordon K 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' OECD Working Papers on International Investment, No. 2012/3 at 19.

¹⁶⁵ See Paulsson J 'Moral Hazard in International Dispute Resolution' (2010) *ICSID Review - Foreign Investment Law Journal* 339; see also Van Harten G 'A Case for International Investment Court' *Society of International Economic Law*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424 accessed on 06/09/2013.

the arbitrators appointed by the losing party in the cases.¹⁶⁶ This has, to a large extent, damaged the image of the investor – state arbitration system.¹⁶⁷

Fourthly, the use of host state court will help to increase transparency in investor – state disputes settlement system. As discussed in Chapter Three of this work,¹⁶⁸ it is unfortunate that the current system inherited the confidentiality principle from international commercial arbitration despite the fact that it deals with public interest disputes. Therefore, once the host state is mandated to hear investor – state cases, the general practice of the court which is public hearing is expected to be followed as well in investor – state dispute hence eliminating the problem of lack of transparency.

Another advantage is that, local court judges are better placed to know the host states' other policy objectives hence provide them with deference necessary for such a state to implement those objectives. Under the current investor – state arbitration, there is a public outcry that the system operates without taking into account other important policy objectives.¹⁶⁹ It is argued that in the current system arbitrators constrains sovereign states' ability to make rules and adopt measures which aim at protecting the society's health, human rights, culture, labour and the surrounding environment.¹⁷⁰ Judges' knowledge on the local circumstances may help them at

¹⁶⁶ Van den Berg AJ 'Dissenting Opinion by Party Appointed Arbitrators in Investment Arbitration' in Arsanjani M et al. (eds.) *Looking to the Future: Essays on International Law in Honour of W. Michael Reisman* (2011) 821 – 843 at 824.

¹⁶⁷ For an insightful discussion on impartiality see Chapter Three of this work under subheading 3.6.2.3.

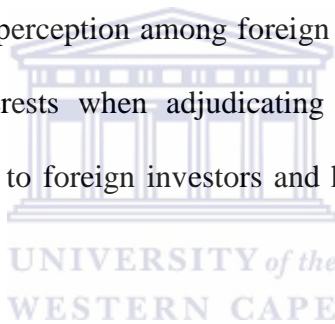
¹⁶⁸ See Chapter Three of this work under subheading 3.6.2.4.

¹⁶⁹ For an insightful discussion on impartiality see Chapter Three of this work under subheading 3.6.2.6.

¹⁷⁰ See for example Van Harten G & Loughlin M 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) *European Journal of International Law* 121 at 128; also see Report of the SRSG, Business and Human Rights: *Towards Operationalizing the 'Protect, Respect and Remedy' Framework* A/HRC/11/13, para 30 (2009); See also, Report of the SRSG, Business and Human Rights: *Further Steps Towards*

reaching a fairer judgment which takes into consideration both parties interests than commercially trained arbitrators sitting in Washington discussing the South Africa Mineral and Petroleum Resources Development Act (MPRDA) and the Mining Charter which aims at addressing past racial discrimination arising from apartheid in South Africa.

It is concluded here that, the use of host state courts can help in addressing legitimacy issues as stated herein above. However, the use of host state court must be approached with caution. In countries which lack independent judiciary, the use of host state court may be disadvantageous to foreign investors. It should be borne in mind that the reason for the growth of the current investor – state arbitration system was the perception among foreign investors that host state court were leaning to their government interests when adjudicating international investment disputes. Therefore this could be a solution to foreign investors and host states which have independent judiciary.



5.3.3 Mandatory publication of investor – state awards

Timely availability of the award for public scrutiny on matters of public nature is vital in any system which cherishes accountability and transparency. It is the opinion of the researcher that all public interest disputes should be published in full as soon as possible. As discussed in Chapter Three and Four of this research,¹⁷¹ lack of transparency is one of the shortcomings of investment arbitration.

the Operationalization of the 'Protect, Respect and Remedy' Framework A/HRC/14/27, paras 20–23 (2010), the reports can be accessed at <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> accessed on 9/08/2013.

¹⁷¹ See Chapter Three under Subheading 3.6.2.4 and Chapter Four under Subheading 4.3.1 for a thorough discussion on the issue of Transparency in the current investor – state arbitration system.

Proceedings conducted under the UNCITRAL Arbitration Rules, 2010 are conducted under the high level of confidentiality.¹⁷² Article 28(3) demands the disputes to be held in camera unless the parties agree otherwise. On the other hand, Article 34(5) of the Rules extends confidentiality with regards to the award. The award is also meant to be confidential unless the parties agree otherwise.

The ICSID Convention also maintains the parties' choice with regards to publication of the award in full but relaxes the rules with regards to the hearing and publication of excerpts. Article 48(5) of the ICSID Convention provides that; 'The Centre shall not publish the award without the consent of the parties'. The Arbitration Rules, as amended in 2006, also allow the publication of excerpt on the legal reasoning of the Tribunal.¹⁷³ With regard to hearing, Rule 37(2) of the ICSID Rules enlarged the door for interested third parties to participate in the proceedings by way of submissions.

Transparency, as discussed earlier,¹⁷⁴ has a number of advantages to the investor – state arbitration system as a whole. Firstly, international investment law, as a branch of public international law, needs to be developed in a systematic way by being certain and predictable. This goal cannot be achieved in a system which is grounded on confidentiality. Certainty and predictability will only be achieved where the tribunals have access to previously decided cases

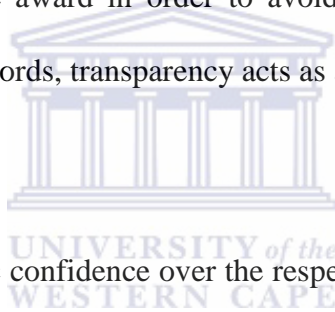
¹⁷² See UNCITRAL Arbitration Rules, 2010 available at www.uncitral.org/pdf/arbitration/rules/arb-rules-revised-2010 accessed on 15/07/2013.

¹⁷³ See Rule 48(4) of the Arbitration Rules and Article 48(5) of the Convention; see also Asteriti A & Tams CJ 'Transparency and Representation of the Public Interest in Investment Treaty Arbitration' Schill (ed.) *International Investment Law and Comparative Public Law* (2010) 788 at 790; see also Mistelis LA 'Confidentiality and Third Party Participation in Investment Arbitration' (2005) 21 *Arbitration International* 205 at 221.

¹⁷⁴ See Chapter Four of this work under subheading 4.3.

hence being able to develop consistency which would ultimately create certainty and predictability. The availability of prior decided cases which have similarity with the new ones could be very helpful for the presiding tribunal to arrive at more or less similar conclusions hence enhancing certainty and predictability in investor – state dispute settlement system.¹⁷⁵

Secondly, transparency acts as a controlling tool for adjudicators' behaviour.¹⁷⁶ The fact that arbitrators are aware that the public has access to their decisions and are able to scrutinise each arbitrator's reasoning would ultimately increase the quality of the awards. Arbitrators will be keen enough before rendering the award in order to avoid public humiliation resulting from poorly reasoned awards. In other words, transparency acts as a check and balancing tool.



Thirdly, transparency brings public confidence over the respective adjudicatory system. Through transparent process the system will be able to build itself as the stakeholders will be aware of the procedures which are to be applied consistently in all disputes.¹⁷⁷

Therefore, in order to increase transparency in investor –state arbitration system it is proposed here for the immediate publication of the investment arbitration awards online. This will only be possible if the respective institutional rules are amended to that end. The parties to the future

¹⁷⁵ Grossman N 'Legitimacy and International Adjudicative Bodies' (2009) *George Washington International Law Review* 107 at 159.

¹⁷⁶ Grossman N 'Legitimacy and International Adjudicative Bodies' (2009) *George Washington International Law Review* 107 at 155.

¹⁷⁷ Grossman N 'Legitimacy and International Adjudicative Bodies' (2009) *George Washington International Law Review* 107 at 156.

disputes would be automatically subjected to the amended version of the Rules of ICSID. With regards to UNCITRAL, parties wishing to use the new 2013 Rules are at liberty to opt in the UNCITRAL 2013 Rules which provides for transparency of the proceedings and publication of the awards.¹⁷⁸ Once the state parties to the ICSID so decides, future users of the rules will be required to adhere to the new state parties' wishes. A unit should be established under UNCITRAL or ICSID to deal with updating the investment dispute website. All newly decided cases, with public interest aspects, should be uploaded timely for the benefit of the public at large and the tribunals. It is submitted here that considering the public nature of the disputes with their impact to third parties, there is no need to bring the principles of confidentiality in international investment disputes. Therefore, where the state parties to the BIT decides to amend the Rules to bring more legitimacy values, foreign investors will have to adhere to the new rules.

As discussed in Chapter Four of this work, the move towards transparency has been slowly taking place by individual countries, arbitration institutions and some multilateral treaties.¹⁷⁹ The Common Market for Eastern and Southern Africa (COMESA) 2007 Investment Agreement, for example, recognises the importance of transparency in public interest disputes.¹⁸⁰ The Agreement requires proceedings to be conducted in an open court.¹⁸¹ The NAFTA state parties, as well, in 2001 through the Free Trade Commission (FTC) issued a Statement of Interpretation regarding proceedings under NAFTA. The Commission Statement allows the parties to any

¹⁷⁸ See the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf> accessed on 27/09/2013.

¹⁷⁹ For a thorough discussion on the state of transparency in different Agreements see Chapter Four under Subheading 4.3.2.

¹⁸⁰ COMESA Investment Agreement available at <http://vi.unctad.org/files/wksp/iawksp08/docs/wednesday/Exercise%20Materials/invagreecomesa.pdf> accessed on 28/08/2013.

¹⁸¹ See Article 28(5) & (6) of the COMESA Investment Agreement and Article 9(1) & (2) of Annex A to the Agreement

NAFTA proceeding to provide access to documents issued by, or submitted to, the Tribunal. In addition, the statement requires the documents to be in the public domain as soon as possible.¹⁸² The US Model BITs 2004 and 2012 also provide for transparency in investor – state proceedings. The two Model BITs provide under Article 29 respectively for the proceedings to be conducted in an open court.¹⁸³ Canada Model BIT 2004 also requires all documents submitted to, or issued by, the Tribunal to be publicly available, unless the disputing parties otherwise agree.¹⁸⁴

At arbitration institutional level, as discussed in the preceding chapters,¹⁸⁵ in 2013 the UNCITRAL adopted the new Transparency Rules for investor – state arbitration.¹⁸⁶ The rules are meant to apply to all future treaties providing for UNCITRAL arbitration unless the parties agree otherwise. The scope of application therefore is subjected to the future entered treaties and not for the existing 3240 BITs and IIAs.¹⁸⁷ The Rules will apply in the current existing BITs only where the parties have opted in the new Rules.¹⁸⁸ Subject to the limitation set under Article 7 the notice of arbitration, the response thereof, pleadings, third party submissions, transcripts of hearing, hearing decisions and awards are required to be promptly available to the public for

¹⁸² See the NAFTA Free Trade Commission Notes of Interpretation of 31st July 2001, para 1(a) & (b) available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx> accessed on 28/08/2013.

¹⁸³ See the US Model BIT 2012 article 29(2) available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf accessed on 28/08/2013.

¹⁸⁴ See Article 38 (3) of the Canadian Model BIT 2004.

¹⁸⁵ For a thorough discussion on the new Transparency Rules see Subheading 3.4.1.3.1 of chapter three of this work.

¹⁸⁶ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf> accessed on 27/09/2013.

¹⁸⁷ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2014* ‘investing in the SDGs: An Action Plan’ at xxiii available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

¹⁸⁸ See Article 1(2) of the UNCITRAL Transparency Rules, 2013.

inspection.¹⁸⁹ A repository is established under Article 8 which is responsible with the keeping of the record and publishing the required information.

It is submitted here that, while the move by the UNCITRAL, NAFTA, COMESA, the US and Canada has many advantages, it will remain a desire unless the parties to the ICSID Convention and the current existing 3240 BITS and IIAs decide to make this solution a reality.¹⁹⁰ The current move which involves only few countries will not help much towards achieving transparency. There is still a mountain to climb to make this solution work. The patchwork of current BITS and IIAs renegotiation will take hundreds of years if at all the bilateral partners will agree to renegotiate. Therefore it can be concluded here that bilateral efforts may not help much in building a transparent adjudication process. The world community efforts are needed if this option is to have an impact in creating a consistent and transparent adjudication system. It remains therefore a fact that creation of a standing investment court through a multilateral investment treaty is the only hope to achieve consistent and predictable international investment jurisprudence.

5.3.4 Enhance the use of member states interpretative guidelines/statements

It is surprising to see that not many stakeholders have considered the importance of establishing guidelines to the interpretation of BITS general principles. This research argue that, the fact that

¹⁸⁹ See Article 3, 4, 5, and 6 of the Rules.

¹⁹⁰ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2014* 'investing in the SDGs: An Action Plan' at xxiii available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

a BIT is a creature of the respective state parties' consent, there is a need for the respective state parties to have the mandate to provide the intended meaning to each principle in a BIT.¹⁹¹

The Permanent Court of International Justice once held that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it.¹⁹² In other words, the PCIJ was rightly saying that the contracting states retain the power to clarify the language/meaning of a treaty through an authoritative interpretation.¹⁹³ The International Court of Justice (ICJ) as well, in the *Kasikili/Sedudu Island (Botswana/Namibia)*¹⁹⁴ insisted that state parties to a treaty have a significant role to play in the interpretation of the treaty provisions.¹⁹⁵

It is submitted here that such interpretative notes will play a significant role in guiding the tribunal on the intention of the parties with regards to the relevant BIT. Tribunals will no longer be at loss on whether the parties intended to provide the deference to the parties on matters of social concerns like environmental, cultural, health and other matters of peculiar interest to the member states.¹⁹⁶

¹⁹¹ see United Nations Conference on Trade and Development (UNCTAD) *World Investment Report*, 2011 'Interpretation of IIAs: What State can Do' December 2011, available at http://unctad.org/en/docs/webdiaeia2011d10_en.pdf accessed on 03/03/2014; see also See UNCTAD IIA Issues Note 'Reform of Investor – State Dispute Settlement: In Search of a Roadmap' 26th June 2013 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf ; accessed on 03/03/2014.

¹⁹² See Permanent Court of International Justice, *Jaworzina*, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8, p. 37.

¹⁹³ Anthea R 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 *American Journal of International Law* 225.

¹⁹⁴ *Kasikili/Sedudu Island (Botswana/Namibia) Judgement* [13 Dec 1999] ICJ/594.

¹⁹⁵ *Kasikili/Sedudu Island (Botswana/Namibia)*, para 63.

¹⁹⁶ On the current state of affair on this matter see Chapter Three of this work under Subheading 3.5.2.6.

Such a move will be in line with Article 31(1) of the Vienna Convention on the Law of Treaties which provides for the general rules of interpretation of treaties. The Article provides that:

‘A treaty shall be interpreted in good faith in accordance to the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’¹⁹⁷

Sub article 31(3) (a) provides further guidance as it requires that the interpretation of a treaty has to take into account ‘any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’.¹⁹⁸ Therefore, it is submitted here that the object and purpose of the treaty is well understood by the parties themselves. Hence, any interpretative statement by the state members will be vitally important for the tribunal to ascertain the meaning of any provision from the respective BIT. As Article 31(3) (a) provides, the parties may decide at any future date to enter into an agreement pertaining the interpretation of their BIT. This means that the state members, in order to avoid any wrong interpretation by the tribunal, can issue an interpretative statement to guide future tribunals on the meaning and scope of the provisions in their BIT. Through this practice, consistency and coherence may easily develop. If, for example, an interpretative statement has been issued which requires tribunals to take into account environmental, human rights, cultural rights in the course of interpretation of the treaty, tribunals will have no option but to adhere to such a guideline.

¹⁹⁷ See the Vienna Convention on the Law of Treaties, 1969 available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed on 24/02/2014.

¹⁹⁸ See the Vienna Convention on the Law of Treaties, 1969 available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed on 24/02/2014.

As a result, tribunals' discretionary power will be contained to the level intended by the state parties. In other words, the Tribunal will not be in a position to encroach on matters to which the state parties has set the limitation otherwise the principle of ultra vires will be readily applied against such a tribunal. With such guidelines, the consistent jurisprudence on the meaning and scope of investment principles will ultimately emerge and solidify. It should be noted that while the BIT provisions differ in wording, they mostly intend to provide for the same protection to all investors.¹⁹⁹ The so called 'first generation Bits' all affords, to a large extent, protection to foreign investors without assigning them any duties. Therefore in such situations, state parties instead of cancelling the BIT, may decide to make guidelines on the investors' obligations in the host state country. The Guidelines could go as far as stipulating the investors' duty to observe environmental, health, cultural regulations. The Guidelines may as well elaborate the scope of the controversial principles which have sparked debate like the meaning of investment, umbrella clause, Most Favoured Nation (MFN) and Non Precluded Measure clauses (NPM).²⁰⁰ With the guidelines in place, the current legitimacy crisis caused by inconsistent decisions on interpretation of same principle would have been avoided.

After all, the creation of guidelines is not a novel idea in international law. It has been used successfully in other international law bodies.

The World Trade Organisation (WTO), as well, through the Marrakesh Agreement empowers the Ministerial Conference and the General Council to adopt interpretations of the WTO

¹⁹⁹ Schill S W *Multilateralisation of International Investment Law* (2009) at 394; see also Garcia CG 'All the Other Dirty Little Secrets: Investment Treaties, Latin America and the Necessary Evil of Investor – State Arbitration' (2004)16 *Florida Journal of International Law* 301 at 309.

²⁰⁰ For a thorough discussion on the inconsistency decisions on these principles see Chapter Three of this Work under Subheading 3.5.2.1 – 3.5.2.1.3.

Agreements.²⁰¹ The Appellate Body has ruled that these powers are meant to give the Ministerial Conference the powers to clarify the meaning of the existing Agreements.²⁰²

The International Monetary Fund (IMF) has also on numerous occasions utilized the interpretative note to clarify issues between the Fund and member states or among member states. Article XXIX of the IMF provides that ‘Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Board for its decision’.²⁰³ This means that the Articles place the interpretation mandate to the Executive Board of the IMF. Records indicate that the Board has used these powers in ten different occasions.²⁰⁴ The World Bank, also, in 1992 established the Guidelines on the treatment of Foreign Direct Investment.²⁰⁵

In international investment law sphere, the North American Free Trade Agreement (NAFTA) can provide a vast experience on how the interpretative guidelines can be of great help to ascertain the contracting parties’ intentions. Under its structure, NAFTA has established the Free Trade Commission constituted by the Trade Ministers from member states which is responsible for, among other things, issuance of binding interpretative statements.²⁰⁶ The statement issued by

²⁰¹ General Agreement on Tariffs and Trade 1994, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187.

²⁰² See *EC—Bananas II (Article 21.5—US)*, para 383.

²⁰³ See Article XXIX of the Articles of Agreement of the IMF 2011 available at <http://www.imf.org/External/Pubs/FT/AA/index.htm#artxxix> accessed on 26/02/2014.

²⁰⁴ For more on this see Kaufmann- Kohler G ‘Interpretative Powers of the Free Trade Commission and the Rule of Law’ in Fifteen Years of NAFTA Chapter 11 (2011) at p 180 available at http://www.arbitration-icca.org/media/1/13571335953400/interpretive_powers_of_the_free_trade_commission_and_the_rule_of_law_kaufmann-kohler.pdf accessed on 26/02/2014.

²⁰⁵ World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992 available at <http://italaw.com/documents/WorldBank.pdf> accessed on 19/05/2013.

²⁰⁶ See Article 1131(2) and Article 2001 of NAFTA; for a thorough discussion on the NAFTA Interpretative Statements, see Marshall F ‘Defining New Institutional Options for Investor – State Dispute Settlement’

the commission is binding upon any future Tribunal interpreting the provisions of the NAFTA.²⁰⁷ In its Interpretative Note issued on 31st July 2001, the Commission sought to provide clarification on the meaning of two concepts; fair and equitable treatment and full of protection and security as provided under Article 1105 of NAFTA. The Interpretative Note was necessitated by the divergent decision on the meaning of the concept fair and equitable treatment. The Tribunal in *S D Myers Inc v Canada*,²⁰⁸ *Metalclad Corporation v United Mexican States*²⁰⁹ and *Pope Talbot Inc v Canada*²¹⁰ produced contradictory decisions on the concept.²¹¹ In *S D Myers Inc v Canada*,²¹² the Tribunal interpreting article 1105(1) of NAFTA ruled that the phrase ‘fair and equitable’ should not be read in isolation but must be read in conjunction with the introductory phrase ‘treatment in accordance with international law’.²¹³



However in *Metalclad Corporation v United Mexican States*,²¹⁴ the Tribunal held the opposite as it found that ‘fair and equitable treatment’ is an independent right from the customary law principle.²¹⁵ In *Pope & Talbot, Inc v Canada*,²¹⁶ the tribunal was also faced with the task of interpreting Art.1105 of NAFTA. It concluded that the fair and equitable treatment standard in

International Institute for Sustainable Development (IISD) 2009 at p. 38 available at http://www.iisd.org/pdf/2009/defining_new_institutional_options.pdf accessed on 03/02/2014.

²⁰⁷ See Article 1131(2) of NAFTA available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/index.aspx?lang=eng> accessed on 24/02/2014.

²⁰⁸ *S D Myers Inc v Canada* UNCITRAL/NAFTA 40 *ILM* 1408 (2001).

²⁰⁹ *Metalclad Corporation v United Mexican States* ICSID Case No ARB (AF)/97/1 (2000).

²¹⁰ *Pope Talbot Inc v Canada* 7 *ICSID Reports* 148 (2001).

²¹¹ Franck SD ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham L Rev* 1521 at 1576 – 1580; see also Garcia CG ‘All the Other Dirty Little Secrets: Investment Treaties, Latin America and the Necessary Evil of Investor – State Arbitration’ (2004) 16 *Florida Journal of International Law* 301 at 349.

²¹² See *S D Myers Inc v Canada* UNCITRAL/NAFTA 40 *ILM* 1408 (2001).

²¹³ See *S D Myers Inc v Canada* para 224 -264.

²¹⁴ *Metalclad Corporation v United Mexican States* *ICSID Review* 16.

²¹⁵ As cited in Franck SD ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham L Rev* 1521 at 1576 – 1581.

²¹⁶ *Pope Talbot Inc v Canada* 7 *ICSID Reports* 148.

article 1105 was not a concept considered within a sovereign's obligations to provide minimum standards of treatment under international law; but it was an additive standard in addition to minimum guarantees under international law.²¹⁷ It further rejected the reasoning in *Myers* case above. The tribunal explained that NAFTA parties could not possibly have intended to agree to a minimum standard of treatment that would provide investors from other BITs with better treatment than investors from BITs in which NAFTA parties were members.²¹⁸ As a result of these contradicting decisions, the Free Trade Commission issued the statement providing for the scope of the concept 'fair and equitable treatment'. The interpretative note limited the scope of the concept 'fair and equal treatment' equating it to the minimum standard of aliens as understood under customary international law.²¹⁹ In cases which have been decided after the interpretative note, Tribunals have inclined to follow the interpretative statement. In 2005, the Tribunal constituted to adjudicate in *Methanex v United States*²²⁰ which was also considering the scope of Article 1105 of NAFTA rightly concluded that the interpretative note issued in 2001 was binding hence the Tribunal did not have to consider it further.²²¹ In *ADF Group Inc. v. United States of America*²²² the Tribunal acknowledged the legitimacy of the interpretative statement and held:

²¹⁷ *Pope Talbot Inc v Canada* para 110.

²¹⁸ Franck SD 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham L Rev* 1521 at 1576 – 1580.

²¹⁹ See Canadian Department of Foreign Affairs and International Trade, Trade Negotiations and Agreements, available at <http://www.dfait-maec.gc.ca/tna-nac/NAFTA-en.asp> accessed on 24/02/2014. Garcia CG 'All the Other Dirty Little Secrets: Investment Treaties, Latin America and the Necessary Evil of Investor – State Arbitration' (2004) 16 *Florida Journal of International Law* 301 at 349.

²²⁰ *Methanex v. United States*, Award, 3 August 2005 <http://italaw.com/sites/default/files/case-documents/ita0529.pdf> accessed on 25/02/2014.

²²¹ *Methanex v United States*, Award, 3 August 2005, Part II Chapter H para 23.

²²² *ADF Group Inc v United States of America*, ICSID Case No ARB (AF)/00/1, Award, Jan. 9, 2003.

‘...through the FTC, all three NAFTA parties were speaking to the arbitral tribunal and that there could be [n]o more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA.’²²³

The success of interpretative statement at NAFTA has influenced some states to consider interpretative statement provisions in their Model BITs. The United States and Canada, model BITs, for obvious reasons, have incorporated interpretative statement provisions.²²⁴ The Canadian Model BIT under Article 40 (2) establishes a Commission constituted by Cabinet - level representatives from the BIT member States.²²⁵ The Article further provides that the interpretative note shall be binding on the Tribunal and any award shall be required to conform to the interpretative statement.²²⁶ The model BIT intentions has been reflected in many Trade Agreements Canada has entered with other countries. Article 28 of the Free Trade Agreement between Canada and the States of the European Free Trade Association which constitute Iceland, Liechtenstein, Norway and Switzerland provide for the establishment of the interpretative

²²³ *ADF Group Inc v United States of America* para 177.

²²⁴ It is not surprising to see that these two countries which are member states to NAFTA have considered the interpretative statement in their Model BITs.

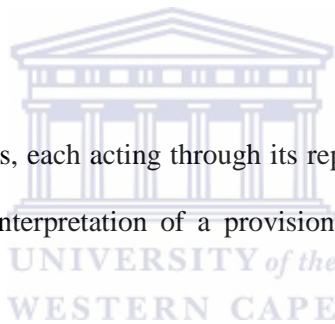
²²⁵ Canadian Model BIT, 2004 available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> accessed on 25/02/2014.

²²⁶ See Article 40(2) of the Canadian Model BIT, 2004 available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> accessed on 25/02/2014.

commission.²²⁷ The same is provided for in the Canadian agreements with Colombia²²⁸, Peru,²²⁹ Chile,²³⁰ Costa Rica,²³¹ Jordan²³² and Israel.²³³

In the same spirit, the US Model BIT 2004, while does not establish a Commission as its counterpart Canada, it takes recognition of the member state parties' joint interpretation on any provision of the BIT.²³⁴ The Model BIT considers such interpretation binding on a Tribunal and the award rendered thereby has to be in line with the joint interpretative statement.²³⁵ The same provision is reproduced in the new US Model BIT 2012 under Article 30(3). The Article in the New Model BIT provides:

‘A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a



²²⁷ Free Trade Agreement between Canada and the States of the European Free Trade Association available at <http://www.ifta.int/media/documents/legal-texts/free-trade-relations/canada/EFTA-Canada%20Free%20Trade%20Agreement%20EN.pdf> accessed on 26/02/2014.

²²⁸ See Article 832 of the Canada-Colombia Free Trade Agreement of 21/11/2008 available at <http://www.international.gc.ca> accessed on 26/02/2014

²²⁹ See Article 50 of the Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments available at <http://www.international.gc.ca> accessed on 26/02/2014.

²³⁰ See Art. N-01 of the Canada-Chile Free Trade Agreement of 05/07/1997 available at <http://www.international.gc.ca> accessed on 26/02/2014.

²³¹ See Art. XIII.1, of the Canada-Costa Rica Free Trade Agreement of 01/11/2002 available at <http://www.international.gc.ca> accessed on 26/02/2014.

²³² See Article 40 of the Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments of 28/06/2009 available at <http://www.international.gc.ca> accessed on 26/02/2014.

²³³ See Article 8(2) of the Canada-Israel Free Trade Agreement of 01/01/1997 available at <http://www.international.gc.ca> accessed on 26/02/2014.

²³⁴ See Article 30(3) of the Us Model BIT, 2004 available at <http://www.state.gov/documents/organization/117601.pdf> accessed on 25/02/2014.

²³⁵ See Article 30(3) of the Us Model BIT, 2004.

tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.²³⁶

As a result of the Model BITs, the Dominican Republic-Central American Free Trade Agreements (CAFTA),²³⁷ the U.S.-Australia Free Trade Agreement,²³⁸ the U.S.-Chile Free Trade Agreement,²³⁹ and the recent agreements with Colombia, Korea, Morocco, Oman, Panama, Peru, Rwanda and Singapore all provides for the establishment of an interpretative statement by member states representatives.²⁴⁰

Therefore, one can see that some individual countries are starting to realise the importance of coming together and spelling out their intentions in a BIT for the purposes of eliminating any form of contradictory interpretation by the future Tribunals. This is a positive move towards achieving greater consistency on the meaning of international investment law principles. The interpretative statements, apart from increasing consistency, it helps in fostering rule of law as it increases the predictability of the norms. However, the intended goal of achieving consistency and predictability through interpretative statements may not be achieved if the interpretative statements are to be issued by countries in individual BITs. The UNCTAD world investment

²³⁶ See Article 30(3) of the US Model BIT 2012 available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed on 25/02/2014.

²³⁷ See the Dominican Republic-Central American Free Trade Agreement of 05/08/2004 available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> accessed on 26/02/2014.

²³⁸ See the United States-Australia Free Trade Agreement of 01/01/2005 available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text> accessed on 26/02/2014.

²³⁹ See the United States-Chile Free Trade Agreement of 01/01/2004 available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta> accessed on 26/02/2014.

²⁴⁰ See these FTAs at <http://www.ustr.gov/trade-agreements/free-trade-agreements> accessed on 26/02/2014.

Report 2014 indicates that by the end of 2013 there are 3240 BITs and IIAs in the world.²⁴¹ It is submitted here that in order to avoid the fragmentation, the most effective way of achieving the intended result of consistency and coherence is to establish guidelines which will be applicable to the whole investor – state Tribunals. To do that, will require the endorsement from all countries involved in BITs arbitration. It is therefore suggested here that the easiest way is to have the guidelines established as a protocol to the ICSID Convention which so far has a significant number of world’s countries. The fact that the ICSID is signed by more than 155 member states will, to a large extent, give power to the guidelines and help in achieving consistency within a short period of time.²⁴²

5.3.5 Form a working group to provide interpretation to basic international investment principles



As seen in the discussion above,²⁴³ the ILC has been widely involved in encouraging and the progressive development of international law and its codification since 1946.²⁴⁴ The substantive work of the ILC today includes the 2001 Draft Articles on Responsibility of the State for International Wrongful Act²⁴⁵ and the Draft Articles on Diplomatic Protection of 2006.²⁴⁶ While

²⁴¹ United Nations Conference on Trade and Development (UNCTAD) World *Investment Report* 2014 ‘Investing in the SDGs: An Action Plan’ at xxiii available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

²⁴² As of January 20, 2013, ICSID had 158 signatory States, and 147 Contracting States had ratified the Convention, see the List of Contracting States available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> accessed on 26/07/2013. For the advantages of ICSID Arbitration see Chapter Three of this Work under Subheading 3.2.3.3.

²⁴³ See Subheading 5.3.4 above.

²⁴⁴ See Article 13, paragraph 1 (a) of the United Nations Charter available at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> accessed on 03/03/2014.

²⁴⁵ The Draft Articles on Responsibility of States available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf accessed on 12/02/2014.

the ILC is commended for doing its job of codifying and interpreting the International law, little has been done by the Commission in codification and interpretation of the international investment law principles save for the interpretation of the most favoured nation principle in 1978.²⁴⁷

This research therefore suggests for the formation of the International Investment Working Group which will be responsible with the interpretation of the basic international investment law principles. The working group will need to be constituted of expert members from all stakeholders and interested groups. The conference discussed above can be used to recommend and later approve the names of expert members to be involved in forming the Working Group. The Working Group will be required to focus on providing clear interpretation on the meaning of controversial international investment law principles which have sparked the legitimacy crisis.²⁴⁸ Among the controversial principles which resulted into inconsistent decisions and need to be given a clear interpretation includes; the meaning of the term investment,²⁴⁹ the scope of an umbrella clause,²⁵⁰ the application of Most Favoured Nations (MFN) principle to a third party on

²⁴⁶ The ILC Draft Article on Diplomatic Protection, 2006 available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf accessed on 12/02/2014.

²⁴⁷ See the ILC Draft Articles on Most Favoured Nations, 1978 available at http://legal.un.org/ilc/texts/instruments/english/draft%20articles/1_3_1978.pdf accessed on 03/03/2014.

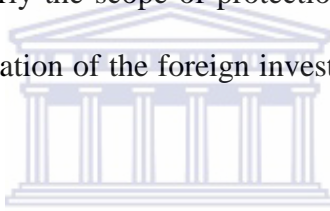
²⁴⁸ For a thorough discussion on these cases and the inconsistency caused see Chapter Three of this work under Subheading 3.5.2.1.

²⁴⁹ See *Salini Costruttori SpA v Kingdom of Morocco* ICSID Case No. ARB/00/4 (2001), *Jan de Nul Nv v Islamic Republic of Egypt* ICSID Case ARB/04/13 (2006), *Mitchell v Congo* ICSID Case No. ARB 99/7 (2007) Decision on Annulment, and *Malaysian Historical Salvors v Malaysia* ICSID Case No ARB/05/10 (2007) Award on Jurisdiction. For a different view see *CMS Gas Transmission Company v The Argentine Republic* Annulment Committee (2007) para 71 – 72; see also *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No. ARB/05/22 (2008); also see *MCI Power Group, LC and New Turbine, Inc v Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007 and *Giovanna a Beccara and Others v. Argentine Republic*, (also known as *Abaclat et al v. Argentina*), ICSID Case No ARB/07/5, Decision on Jurisdiction, 4 August 2011.

²⁵⁰ See *SGS Société Générale de Surveillance S A v Islamic Republic of Pakistan* ICSID ARB/01/13, *El Paso Energy International Co v Argentina* ICSID ARB/03/15 and *Pan American Energy LLC and BP Argentina Exploration Company v Argentina*, ICSID ARB/03/13 on one hand and *SGS Société Générale de Surveillance S A v Republic of*

procedural matters,²⁵¹ the application of the defence of necessity and Non-Precluded Measures (NPM) during emergency situations,²⁵² the scope of the principle of expropriation,²⁵³ the meaning of fair and equitable treatment (FET),²⁵⁴ and lastly the meaning of full protection and security.²⁵⁵

As one can see from the list of these cases, there is a conflicting decision on almost every principle governing international investment law. With this kind of confusion, it is important that a specialised Working Group should be formed as quickly as possible so as to guide the Tribunal on the purpose of BITs and the scope of each principle in BITs. It will also be vital for the Working Group to pronounce clearly the scope of protection needed to be accorded to foreign investors/ investment and the obligation of the foreign investors to the host state. Recently there



the Philippines, ICSID ARB/02/6, *Noble Ventures Inc v Romania*, ICSID ARB/01/11 of 12th October 2005 on arbitral jurisdiction available at <http://www.italaw.com/sites/default/files/case-documents/ita0565.pdf> , and *Eureko BV v Poland*, *Ad hoc* – UNCITRAL Award of 19th August 2005 Partial award available at http://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf on the other.

²⁵¹ In favour of the extension of the application of MFN to procedural matters see *Emilio Augustin Maffezini v Kingdom of Spain*, Award on Jurisdiction, ICSID Case No ARB/97/7, IIC 85 (2000); for similar opinion also see *Gas Natural SDG, S.A. v Argentina*, ICSID Case No ARB/03/10, Decision on Preliminary Questions on Jurisdiction, 17 June 2005; *Camuzzi International S.A. v The Argentine Republic*, ICSID Case No ARB/03/2, Decision on Jurisdiction, 11 May 2005; *National Grid plc v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, ICSID Case No ARB/03/19 and *AWG Group Ltd. v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006. However this position is disputed in other cases; see for example *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005 para. 223; see also *Telenor Mobile Communications AS v Republic of Hungary*, ICSID Case No ARB/04/15, Award, 13 September 2006; see also *Salini Costruttori S.p.A and Italstrade S.p.A v The Hashemite Kingdom of Jordan* ICSID Case No ARB/02/13, Decision on Jurisdiction, 15 November 2004; also see *Wintershall Aktiengesellschaft v Argentina Republic*, ICSID Case No ARB/04/14 Award December 8 2008.

²⁵² See *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8 on one hand and *LG&E Energy Corp LG&E Capital Corp and LG&E International Inc v Argentine Republic* ICSID ARB/02/1 on the other.

²⁵³ See *Lauder v The Czech Republic*, 9 ICSID Reports r para 201 and *CME Czech Republic BV v The Czech Republic* ICSID Reports para 609.

²⁵⁴ See *S D Myers Inc v Canada* UNCITRAL/NAFTA 40 ILM 1408 (2001) but also see *Metalclad Corporation v United Mexican States* ICSID Review 16 for a different views on the scope of Fair and Equitable Treatment principle; see also See *Lauder v The Czech Republic*, 9 ICSID Reports para 293 and *CME Czech Republic BV v The Czech Republic* ICSID Reports para 611.

²⁵⁵ See *Lauder v The Czech Republic*, 9 ICSID Reports para 309 and *CME Czech Republic BV v The Czech Republic* ICSID Reports para 613.

has arisen a trend in some BITs where the host states clearly limits the scope of the BIT and the powers of the Tribunal with regards to health, environment, labour and cultural issues.²⁵⁶

Unfortunately however, many old generation BITs still do not provide for protection of health, environment, labour and cultural issues. Most of these BITs guarantee rights to investors without addressing other social values.²⁵⁷ Therefore it is important for the working Group to address the importance of bringing in other social values in the course of adjudicating investor – state disputes. It should be clearly stated that the purpose of a BIT is to protect the foreign investment but also should be a vehicle which contribute to the development of the host state in different ways. To put it more clearly, the Working Group will be required to provide an interpretation which considers sustainable development as one of the key pillar which must be addressed in the interpretation of BITs and IIAs.²⁵⁸ To make it easier for the future tribunals, the Working Group may find it necessary to develop a checklist which will be used to assess whether a particular venture by the foreign investor is sustainable in nature and hence be considered an investment as per the BIT. The checklist will therefore help in clarifying what constitute an investment but at the same time help in assessing whether such a venture is sustainable hence deserving protection guaranteed under the ICSID and the respective BIT.

²⁵⁶ See the Canadian Model BIT, 2004 available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> accessed on 25/02/2014 and the Us Model BIT, 2004 & 2012 available at <http://www.state.gov/documents/organization/117601.pdf> accessed on 25/02/2014.

²⁵⁷ See the *Report of the SRSG, Business and Human Rights*, ‘Towards Operationalizing the ‘Protect, Respect and Remedy’ Framework’ A/HRC/11/13, para 30 (2009); See also, *Report of the SRSG, Business and Human Rights*, ‘Further Steps Towards the Operationalization of the ‘Protect, Respect and Remedy’ Framework’ A/HRC/14/27, paras 20–23 (2010), the reports can be accessed at <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> accessed on 9/08/2013.

²⁵⁸ This will be in accordance to the interpretation provided in *Salini Costruttori SpA v Kingdom of Morocco* ICSID Case No. ARB/00/4 (2001), *Jan de Nul NV v Islamic Republic of Egypt* ICSID Case ARB/04/13 (2006), *Mitchell v Congo* ICSID Case No ARB 99/7 (2007).

5.4 Conclusion

This chapter has discussed the possible solutions to the issues facing investor – state adjudicative system. Different stakeholders suggested solutions have been critically analysed.

The chapter also has discussed this research’s ‘alternative solutions’ these alternative solutions are only meant to be interim solutions pending the major reform of introducing the MAI and its court structure to the investor – state adjudicative system.

The chapter concludes that, while the suggested solutions have potential and aims at remedying the situation, they do not help much as they do not provide a solution which would address all issues cumulatively. In the chapter that follows, this research call for the establishment of the MAI and its court structure. This research submits that it is only through the MAI which provide for the international investment court and the international investment court of appeal that the issues discussed in the previous chapters will be holistically addressed.

CHAPTER SIX

A CALL FOR MAJOR REFORM: CREATION OF A MULTILATERAL AGREEMENT ON INVESTMENT, AN INTERNATIONAL INVESTMENT COURT AND AN INTERNATIONAL INVESTMENT APPELLATE COURT

6.1 Introduction

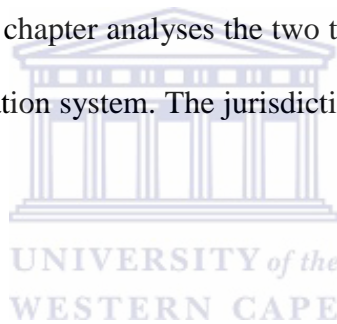
The previous chapter has discussed the possible solutions suggested by different stakeholders on issues haunting the investor – state adjudicative system. The strengths and weaknesses of each of the suggested solution were clearly identified. From the previous chapter’s discussion, it can be learnt that the suggested solutions do not address the legitimacy issues in a holistic manner and leaves a lot of issues unaddressed. As a result the suggested solutions cannot eliminate the backlashes against investor – state arbitration system.

Due to deficiencies noted in the previous chapter, this chapter argues that there is a need to establish a Multilateral Agreement on Investment (MAI) which will provide for the establishment of an International Investment Court together with an International Investment Appellate Court. The two courts will help in achieving justice for all parties and all of the current problems could be remedied by this move. While there are some concerns about some negative impact of the new court structure, this work submits that upon weighing the pros and cons one

will find that establishment of the court will be more beneficial than continuing to operate in the current setting.

The chapter starts with the succinct historical perspective of the MAI. It submits that the MAI and the courts stand a good chance of succeeding this time as the reasons for the previous failure are no longer valid.

The chapter comprehensively discusses the reasons for the call of the MAI, the organ to host the MAI, the required basic content of the MAI and how to phase out the current investor – state arbitration system. In addition, the chapter analyses the two tier court system to be introduced as a replacement to the current arbitration system. The jurisdiction and functioning of the courts are clearly and carefully discussed.



6.2 Historical perspective of the Multilateral Agreement on Investment (MAI)

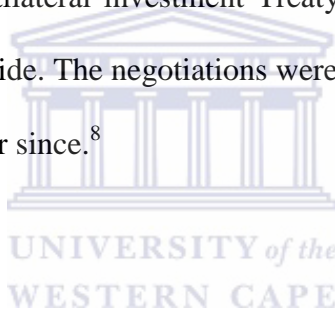
As discussed in Chapter Two of this research, for decades now the world community, through different bodies; the League of Nations, the UN, the Organisation for Economic Cooperation and Development (hereinafter the OECD), the World Bank and recently the World Trade Organisation (hereinafter the WTO), have been involved in efforts to establish a multilateral investment regulating body.¹ These efforts include the 1995 OECD negotiations on Multilateral Investment Agreement (MIA)² which failed due to, among other reasons, conflicting interests

¹ For an insightful discussion on this aspect see Chapter Two of this work under Subheadings 2.3.1 – 2.3.12.

² The OECD Multilateral Agreement on Investment Draft available at <http://www1.oecd.org/daf/mai/pdf/ng/ng971r2e.pdf> accessed on 24th May 2013.

between developed and developing countries.³ The MAI was seen as an instrument to protect foreign investors from the Western world without assigning them any obligations.⁴

Another notable effort was taken by the WTO. As discussed under Chapter Two of this work,⁵ the Agreement on Trade Related Investment Measure (TRIMS), the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) partly addresses the protection of foreign investments.⁶ As a result, the WTO in 2001, at the Doha Ministerial Conference recommended the introduction of new negotiations for the purpose of establishing a multilateral investment Treaty.⁷ These efforts however stumbled after it faced the North – South divide. The negotiations were officially discontinued in 2004 and has never been a WTO priority ever since.⁸



As stated in the introduction above, this research submits that the creation of a MAI with provisions which provides for the establishment of an international investment court and an appellate court structure will help a lot to curb and address holistically the legitimacy issues in the current international investment dispute settlement system.

³ See Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 7; see also Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 13; see also Salacuse J 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *Int'l Law* 655 at 659; see also Dodge W 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1 at 5-8; see also Van Harten G *Investment Treaty Arbitration and Public Law* (2007) 14-15.

⁴ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 41.

⁵ See Chapter Two of this work under Subheading 2.3.12.

⁶ See WTO - The Uruguay Round on Multilateral Trade available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm accessed on 25/05/2013.

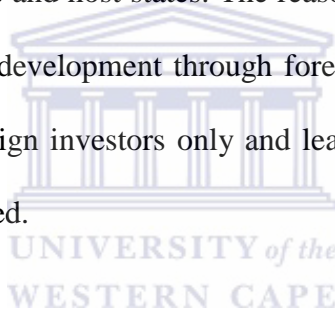
⁷ The Fourth Ministerial Conference of the WTO, Work Programme: *Implementation related Issues*, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm accessed on 25/05/2013.

⁸ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 52.

6.2.1 Argument against the creation of a Multilateral Agreement on Investment

Kennedy argues that the time is not ripe for the call of a MAI.⁹ He argues that when the time for the MAI comes, foreign investors will pressurise their home government to negotiate the MAI. In essence Kennedy is of the view that as long as foreign investors are happy and benefitting from the current BIT trend, the negotiation of a MAI is unnecessary.

It is submitted here that the author ignores one important fact that the system need to be working in favour of both players: investors and host states. The reason which motivates the host state to sign a BIT is to promote its own development through foreign investment. Therefore, the BIT system which tends to favour foreign investors only and leaves the host state interests at stake cannot be left without being rectified.



Karl also joins hands with the previous author by arguing that the recent statistics from UNCTAD indicates that FDI is booming and that is to be taken as a sign that things are well.¹⁰ It is further contended that the existing over 3240 BITs provide enough protection to the foreign investors hence there is no need to fix something that is not broken.¹¹

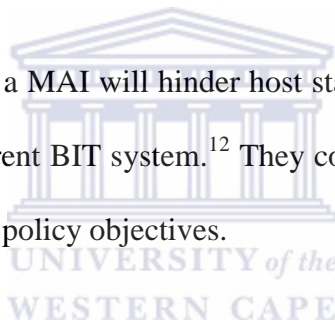
⁹ Kennedy K 'A WTO agreement on investment: a solution in search of a problem?' (2003) 24 *University of Pennsylvania Journal of International Economic Law* 77.

¹⁰ Karl J 'On the way to multilateral investment rules- some recent policy issues' (2002) 17(2) *ICSID Review* 293 at 300.

¹¹ Karl J 'On the way to multilateral investment rules- some recent policy issues' (2002) 17(2) *ICSID Review* 293 at 300.

This research finds the argument less convincing and submits that the system is broken and needs immediate attention before it collapses. The author is not taking into account the fact that the investor – state arbitration system is overwhelmed with the BITs system as a result it is facing a legitimacy crisis. The author fails to acknowledge the fact that the spaghetti bowl of BITs has created an inconsistent and unpredictable international investment law regime leading to the withdrawal and refusals to use the systems by a number of countries today. It is further submitted here that the author should have considered the increase of FDI as a reason for the need of a MAI which will address FDI at global level.

Amarasinha and Kokott argue that a MAI will hinder host states flexibility of regulating foreign investments which exist in the current BIT system.¹² They contend that the flexibility helps host states to implement other domestic policy objectives.



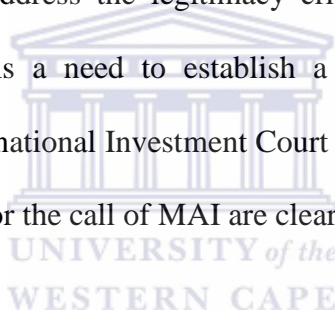
It is submitted here that the authors fail to acknowledge the fact that currently states do not enjoy flexibility as portrayed. In the BIT system states hands are tied and foreign investors have the right to institute claims against almost any state measure regardless of the importance of such a measure to the state interests. The Principle of fair and equitable treatment has been interpreted inconsistently by the Tribunals leaving states uncertain as to whether they have the mandate to regulate on other policy objectives. It is submitted here that the MAI will address this situation by providing clearly for a sovereign policy space exception just like the WTO GATT exceptions

¹² Amarasinha A & Kokott J ‘Multilateral investment rules revisited’ in Muschlinski P et al *Oxford Handbook of International Investment Law* (2008).

under Article XX and GATS Article XVI. In the part that follows this research will provide reasons as to why the creation of a MAI is required.

6.2.2 A Case for a Multilateral Agreement on Investment

As seen in the discussion above, some commentators are against the creation of the MAI. A number of reasons have been advanced in favour of their arguments. It is submitted here that the need for the multilateral treaty is there and even more ripe now than before. It is further submitted here that in order to address the legitimacy crisis in the international investment dispute settlement system there is a need to establish a MAI which will provide for the establishment of a permanent International Investment Court followed by the Appellate Court. In the following section the reasons for the call of MAI are clearly identified.



6.2.2.1 The fading away of the North – South divide in Foreign Direct Investment distribution

It is evidently clear that the old trend where foreign investors always hailed from the developed world and invested in developing countries is withering away. Currently, foreign investors from developing countries are reciprocally investing in the developed world. The stigma against FDI which existed among developing countries in the 1990s has abated as many countries have liberalised their economies and learnt the advantages which come with FDI.¹³ The UNCTAD

¹³ Draper P et al ‘Towards Global Governance of FDI Issues on Getting to Multilateral Approach’ in *Foreign Direct Investment as a Key Driver for Trade, Prosperity and Growth: The Case for A Multilateral Agreement on*

World Investment Report 2013 and 2014 attest to this fact as they provide that the North- South divide is fading away as developing countries are becoming foreign investors in the developed world.¹⁴ The 2013 Report indicates that developing economies generated almost one third of global FDI outflows and reached \$426 billion, a record 31 % of the world total and received 52% of the World investment inflow.¹⁵ The report indicates further that Asian countries, led by China which became the third largest investor in the world, are now the leading FDI outflow from the developing world. Furthermore the Report indicates that African FDI outflow tripled in the same year.¹⁶ The Report further reveals that the BRICS¹⁷ are holding 10% of the world total FDI.

The most recent report, UNCTAD World Investment Report 2014 indicates that developing countries maintained their lead in Foreign Direct Investment in the year 2013.¹⁸ The developing countries FDI outflow increased by 8% recording 39% beating the last year's 31%.¹⁹ The report further indicates that transnational corporations from developing countries are busy acquiring interests in foreign companies from the developed world. In addition, the report indicates that

Investment WEF 2013 Pp 29 – 31 at 29 available at http://www3.weforum.org/docs/GAC13/WEF_GAC_GlobalTradeFDI_FDIKeyDriver_Report_2013.pdf accessed on 18/02/2014.

¹⁴ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013* 'Global and regional investment trends' available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014.

¹⁵ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013* 'Global and regional investment trends' at xii available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014.

¹⁶ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013* 'Global and regional investment trends' at xii available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014.

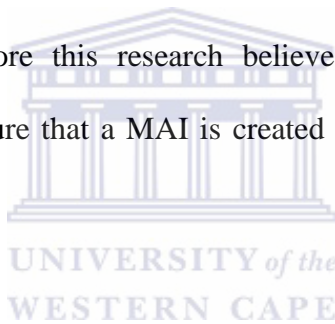
¹⁷ BRICS is an acronym for five states: Brazil, the Russian Federation, India, China and South Africa.

¹⁸ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014* 'investing in the SDGs: An Action Plan' available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

¹⁹ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014* 'investing in the SDGs: An Action Plan' at ix available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

developing and transition economies now constitute half of the top 20 countries ranked by FDI inflows.²⁰

It is clear from these statistics that, developing countries which are now investors in the developed world need the legal framework which ensures their investment abroad adequate protection as much as developed countries does. As a result of the withering away of the North - South divide, which was one of the major sources of the failure of the previous MAI negotiations, there is no doubt that new MAI negotiations stand a great chance of succeeding. The fact that developing countries constitutes 31% of the world investment outflow and 52% of world investment inflow speaks volumes on the need to involve the developing world in any future MAI negotiations. Therefore this research believes that both sides, developed and developing countries, need to ensure that a MAI is created which balances interests of foreign investors and that of the host state.



6.2.2.2 The increase of Foreign Direct Investment stock

As stated in the introduction of this research,²¹ in 1982 the global total of FDI was only USD 27 billion. However, two and a half decades later the FDI Stock steadily increased and reached a peak of USD 2.2 trillion by the year 2007.²² The 2009 world economic meltdown affected the FDI development as it dwindled by 50% and reached USD 1.2 trillion in 2010 followed by a

²⁰United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014* 'investing in the SDGs: An Action Plan' at ix available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

²¹ See Chapter One of this research under subheading 1.3.

²² See United Nations Conference on Trade and Development (UNCTAD), *World Investment Report*, 2008 available at http://unctad.org/en/Docs/wir2008_en.pdf accessed on 22/05/2014.

modest recovery up to USD 1.35 trillion in 2012 and the same figure for 2013.²³ The UNCTAD 2014 indicates that in 2013 the FDI stock grew to 1.45 trillion and is projecting that the stock will be 1.6 trillion by the end of 2014.²⁴ It is submitted here that despite the meltdown, the FDI stock as it stands contribute hugely to the world development in a number of ways including but not limited to job creation, innovation, competition and technology transfer.²⁵ It should also be noted here that the current FDI flows crosses both directions between developed and developing countries, with MNCs hailing from all parts of the world. This geographical diversity of FDI strengthens even further the call for a MAI as a tool for streamlining the principles governing international investment law.²⁶ As discussed above, UNCTAD 2013 and 2014 reports indicate that FDI inflow and outflow between developed and developing countries are almost equal. In 2012 developing economies generated one third of global FDI outflows and reached \$426 billion, a record 31 % of the world total and received 52% of the World investment inflow.²⁷ In 2013 developing countries generated 39% of the world total global FDI outflow and 54% of FDI inflow.²⁸

²³ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013* 'Global and regional investment trends' at ix available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014.

²⁴ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014* 'investing in the SDGs: An Action Plan' at ix available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

²⁵ Amarasinha A & Kokott J 'Multilateral investment rules revisited' in Muschlinski P et al Oxford Handbook of International Investment Law (2008).

²⁶ Aslund A 'The World need a Multilateral Investment Agreement' *Policy Brief* Peterson Institute for International Economics, January 2013 at 2 available at <http://stfrnik.piie.com/publications/pb/pb13-1.pdf> accessed on 21/05/2014.

²⁷ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013* 'Global and regional investment trends' at xii available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014.

²⁸ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014* 'investing in the SDGs: An Action Plan' at ix available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

It is submitted here that the FDI stock is too huge to be left governed through a patchwork of BITS. With equal distribution of FDI between the developed and developing worlds, now the time is ripe to push for a balanced disputes settlement system which will benefit both parties. It is time that the MAI is created which will help in addressing the fragmented nature of international investment law and bring about consistency, certainty, independent and impartial adjudication process, cost efficient adjudication process and balanced dispute settlement system.

6.2.2.3 The recent increase of regional agreements and decline of Bilateral Investment

Treaties

Recent UNCTAD World Investment Reports indicate that the number of BITS is falling while the number of regional agreements is increasing. The UNCTAD 2013 Report indicates that 2012 recorded the lowest annual number of only 20 BITS in a quarter century.²⁹ The Report further indicates that 10 IIAs were concluded in 2012 and eight of them were regional agreements.³⁰ However, UNCTAD 2014 report indicates the revival of BITS signing as it recorder 44 new BITS being signed in 2013 making the world BITS and IIAs to a new record of 3240.³¹ The Report further indicates that by 2013, 110 countries were involved in 22 regional negotiations. The negotiations include the ASEAN³² negotiations with Australia, China, India, Japan, New Zealand

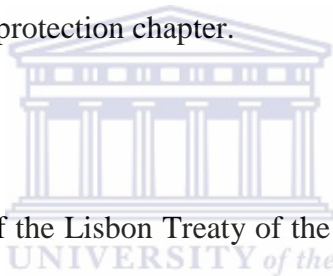
²⁹ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013* 'Global and regional investment trends' at 101 available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014.

³⁰ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013* 'Global and regional investment trends' at 101 available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014.

³¹ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014* 'investing in the SDGs: An Action Plan' at xxiii available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

³² Stands for Association of Southern Asian Nations, see <http://www.asean.org/> accessed on 21/05/2014.

and the Republic of Korea on a Regional Comprehensive Economic Partnership Agreement (RCEP).³³ Another negotiation involves Latin America countries: Chile, Colombia, Mexico and Peru in which a framework agreement was signed that establishes the Pacific Alliance as a deep integration area.³⁴ Another negotiation involves African states. The Tripartite Trade Negotiation Forum towards creating a FTA between the Southern African Development Community (SADC), the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA) took shape in 2012.³⁵ In this African Tripartite Trade Negotiations, investment chapter talks were scheduled to commence in the latter half of 2014. If these talks become successful, it will replace several hundred BITs signed by the African States into a single Tripartite FTA with an investment protection chapter.



In Europe, the coming into force of the Lisbon Treaty of the European Union in 2009, gives the European Commission the mandate to negotiate Investment agreements on behalf of all 27 Member states. This means that many BITs between individual EU countries will be replaced by common EU treaties hence tremendously cutting down the number of BITs.³⁶ On 30 September

³³ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013* 'Global and regional investment trends' at 103 available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014; see also United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014* 'investing in the SDGs: An Action Plan' at xxiv available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

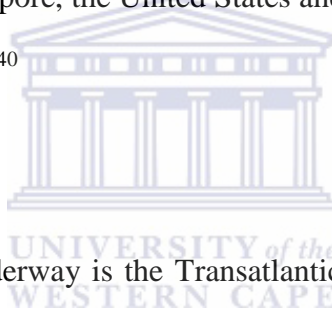
³⁴ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013* 'Global and regional investment trends' at 103 available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014; see also United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014* 'investing in the SDGs: An Action Plan' at xxiv available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

³⁵ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013* 'Global and regional investment trends' at 103 available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014.

³⁶ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2012* 'Towards a New Generation of Investment Policies' at 84 available at http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx accessed on 21/05/2014.

2014 the EU finalised a Comprehensive Economic and Trade Agreement (CETA) with Canada.³⁷ The Agreement aims at incorporating a substantive investment protection chapter as per the Lisbon Treaty requirements.³⁸ The CETA is not binding yet and will only become so after the completion of the ratification process. In addition to that the EU is involved in a Japan – EU agreement with substantive investment protection chapters.³⁹

Apart from the above, there is an interregional negotiations underway named Trans-Pacific Partnership (TPP) Agreement involving Australia, Brunei Darussalam, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. The Agreement includes a fully-fledged investment chapter.⁴⁰



Another important negotiation underway is the Transatlantic Trade and Investment Partnership (TTIP) which involves the European Commission and the United States.⁴¹ The negotiation took off in March 2013 and the negotiation is ongoing.

³⁷ See the EU – Canada Comprehensive Economic and Trade Agreement (CETA) available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf accessed on 11/11/2014.

³⁸ See United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013* ‘Global and regional investment trends’ at 104 available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014.

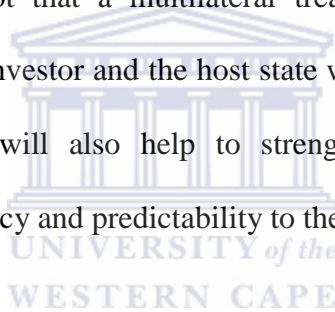
³⁹ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013* ‘Global and regional investment trends’ at 104 available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014.

⁴⁰ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013* ‘Global and regional investment trends’ at 105 available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014; also see UNCTAD *World Investment Report 2014* ‘investing in the SDGs: An Action Plan’ at xxv available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

⁴¹ See United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013* ‘Global and regional investment trends’ at 104 available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014.

All these efforts cements the submission that the world community is moving towards consolidation of BITS.⁴² It is submitted here that in the near future the number of BITs is eventually going to decline but the coverage of protection of foreign investment is going to spread through regional agreements. With this trend towards regional agreements the MAI creation become even more realistic as it will help in achieving a more unified investment protection regime.

In conclusion it can be said here that, the above statistical data reveals that there is a need to create a MAI. There is no doubt that a multilateral treaty which provide for a balanced playground for both, the foreign investor and the host state will be received with open hands by all stakeholders. Such a treaty will also help to strengthen and harmonise international investment law and bring consistency and predictability to the investment regime.



6.2.2.4 Continuous annual increase of investor – state disputes

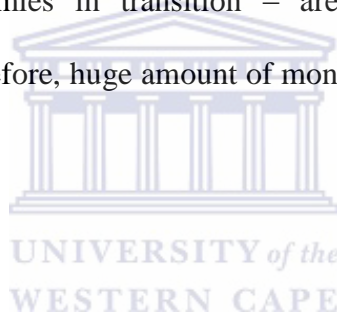
The recent statistics indicates that investor – state disputes are on the rise. This is the case despite the fact that many countries and other stakeholders are unhappy with it. UNCTAD World Investment Report for 2013 indicates that 58 new cases were registered in 2012, the highest number to be recorded in a year.⁴³ The Report further indicates that, 34 cases were registered in

⁴² Aslund A ‘The World need a Multilateral Investment Agreement’ *Policy Brief* Peterson Institute for International Economics, January 2013 at 4 available at <http://stfrnik.piie.com/publications/pb/pb13-1.pdf> accessed on 21/05/2014.

⁴³ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report* ‘Towards a New Generation of International Investment Policies: UNCTAD’s Fresh Approach to Multilateral Investment Policy-Making’ available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d6_en.pdf accessed on 27/05/2014.

2010, while 49 cases were registered in 2011 and 58 cases were registered in 2012.⁴⁴ The year 2013 recorded the second highest number of investor – state dispute by registering 56 new cases.⁴⁵ According to UNCTAD World Investment Report 2014, by the end of 2013, the total number of known treaty based ICSID cases had reached 568 in which 98 countries were involved. Out of the total, 257 cases have been concluded.⁴⁶

This figure is merely indicative as cases decided under institutions other than ICSID are confidential. This means that, more and more governments – from developed countries, developing countries and economies in transition – are potential respondents’ in future substantial claims. As discussed before, huge amount of money are awarded as damages in these cases.⁴⁷



It follows therefore that, the call for the establishment of the MAI which will develop an adjudicative system which will be consistent, predictable and cost efficient will receive positive response from these states. It is submitted here that all countries, rich and poor, will support the move for the MAI as they equally stand to benefit from a fair and impartial adjudicative system.

⁴⁴ See the report at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 27/05/2014.

⁴⁵ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014* ‘investing in the SDGs: An Action Plan’ at 125 available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

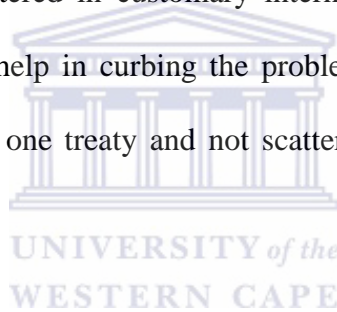
⁴⁶ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014* ‘investing in the SDGs: An Action Plan’ at 125 available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

⁴⁷ See Chapter Three of this work under subheading 3.6.2.7.

6.2.3 General advantages of the Multilateral Agreement on Investment

The creation of a MAI comes with a number of advantages. One of the advantages is that a MAI will harmonise the regulation of international investment law.⁴⁸ The increase of BITs and FTAs calls for the immediate harmonisation of international investments rules into a MAI which will provide standard treatment to all.

In addition to the above, the MAI will help in harmonising the international investment principles which are of now scattered in customary international law principles and BITs.⁴⁹ Furthermore, the treaty will also help in curbing the problem of inconsistency decision as all principles will be provided for in one treaty and not scattered in BITs as it is the case at the moment.⁵⁰



More importantly, the MAI will be an important vehicle towards attracting foreign investment from the developed world to developing countries.⁵¹ It is submitted here that the treaty will likely enhance transparency and predictability of outcomes in investor – state dispute adjudication

⁴⁸ See also Draper P et al ‘Towards Global Governance of FDI Issues on Getting to Multilateral Approach’ in *Foreign Direct Investment as a Key Driver for Trade, Prosperity and Growth: The Case for A Multilateral Agreement on Investment* WEF 2013 Pp 29 – 31 at 29 available at http://www3.weforum.org/docs/GAC13/WEF_GAC_GlobalTradeFDI_FDIKeyDriver_Report_2013.pdf accessed on 18/02/2014.

⁴⁹ Subedi S *International Investment Law: Reconciling Policy and Principle* (2008) at 196.

⁵⁰ See also Subedi S *International Investment Law: Reconciling Policy and Principle* (2008) at 197.

⁵¹ See also Kennedy K ‘A WTO agreement on investment: a solution in search of a problem?’ (2003) 24 *University of Pennsylvania Journal of International Economic Law* 77.

process.⁵² As a result of transparency, coherence to the existing ‘spaghetti bowl’ of BITs will increase.

Another advantage is that a multilateral treaty will help in developing a coherent international investment policy to all member states.⁵³ In turn consistent interpretation of the basic investment principles will be achieved across the board.⁵⁴

Furthermore, it is submitted here that global issues like international foreign investment need to be governed globally so that the linkage with other related international agendas such as environment and human rights can be found. This research believes that the MAI as a global instrument will ultimately provide a political forum for the world community to discuss investment related issues collectively.

Last but not least, the transparent MAI negotiation will allow closer scrutiny from all stakeholders: NGOs, civil societies and the general public which in turn will increase the legitimacy of the international investment law generally.

⁵² Kennedy K ‘A WTO agreement on investment: a solution in search of a problem?’ (2003) 24 *University of Pennsylvania Journal of International Economic Law* 77.

⁵³ Qureshi A & Ziegler A *International Economic Law* 3rd Ed. (2011) at 380-391.

⁵⁴ Qureshi A & Ziegler A *International Economic Law* 3rd Ed. (2011) at 380-391.

6.3 A case for the court structured dispute settlement system

As discussed before, the current investor – state arbitration system is facing a number of challenges and it has failed to develop a coherent, predictable and consistent international investment law. International investment principles are inconsistently interpreted leading to uncertainty and unpredictability of international investment law. It is submitted here that once established, the MAI must ensure that it creates a dispute settlement system which will address these issues. This research advocates for the establishment of the judicial arm in the MAI which will be responsible to settle international investment disputes as done by other international economic dispute settlement bodies. As discussed earlier, the time is ripe for the establishment of an independent international investment court which will be charged with the jurisdiction to hear all investor – state disputes.⁵⁵ In addition to the international investment court, this research calls for the establishment of an appellate court which will be the final court in hierarchy. The two courts must be concerned with the legitimacy of the system as a whole and need to adhere to the basic principles of independence of the judiciary and rule of law.⁵⁶

6.3.1. Advantages of establishing an International Investment Court

It is submitted here that one of the advantages of establishing the permanent court would be to reduce the litigation costs. Under the current investor – state adjudicative system the cost for

⁵⁵ See also Franck SD ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1521 at 1618.

⁵⁶ See also Franck S ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1521 at 1618; see also Dimsey D *The Resolution of International Investment Disputes: International Commerce and Arbitration* (2008) at 180 – 184.

litigating in one case is too high. The UNCTAD World Investment Report 2010 clearly state that the costs in investor – state disputes have skyrocketed.⁵⁷ As demonstrated in Chapter Three of this work,⁵⁸ arbitrators’ charges range from USD 350 – 700 per hour per arbitrator depending on the claimed dispute amount.⁵⁹ These exorbitant costs at times intimidate poor developing countries from litigating hence decides to give in to the foreign investor demands even where doing so interferes with its other policy objectives.⁶⁰

It is submitted here that, with a permanent court structure presided by fully employed judges, costs for litigation will go down as the court members are normally paid by the establishing institution and not the parties. The WTO serves a good example on this. At panel and appellate stage the parties to the dispute are exonerated from paying costs for the Appellate Body presiding members. Article 8(11) and 17 (8) of the DSU respectively provides that ‘the expenses of persons serving on the panel and Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration’.⁶¹

⁵⁷ See United Nations Conference on Trade and Development (UNCTAD) ‘Investor – State Dispute: Prevention and Alternative to Arbitration’ (2010) at 16-18 available at http://www.unctad.org/en/docs/diaeia200911_en.pdf accessed on 05/10/2013.

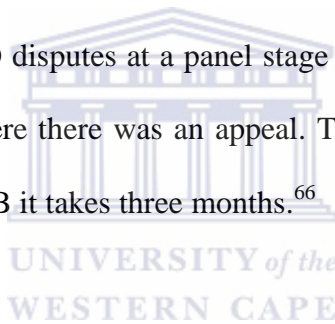
⁵⁸ See Chapter Three of this work under Subheading 3.6.2.7.

⁵⁹ International Centre for Settlement of Investment Disputes -ICSID) fees are set at US\$3000 a day see <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&ScheduledFees=True&year=2012&language=English> accessed on 05/10/2013.

⁶⁰ See the Report of the SRSG, Business and Human Rights: *Towards Operationalizing the ‘Protect, Respect and Remedy’ Framework* A/HRC/11/13, para 30 (2009); See also, Report of the SRSG, Business and Human Rights: *Further Steps Towards the Operationalization of the ‘Protect, Respect and Remedy’ Framework* A/HRC/14/27, paras 20–23 (2010), the reports can be accessed at <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> accessed on 9/03/2014.

⁶¹ See Article 8(11) and 17(8) of the WTO Dispute Settlement Understanding available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm accessed on 24/03/2014.

Another advantage of the court system is the possibility of establishing a strict timeframe for settling disputes. A recent study indicates that at ICSID a dispute takes up to an average of four to 5 years.⁶² In fact, there are cases which have been dragging at ICSID for over 11 years. *Antoine Goetz v. Burundi*,⁶³ for example, was filed in December 2000 and ended in June 2012,⁶⁴ (over 11 years); *EDF International S.A. v. Argentina*⁶⁵ was filed in June 2003 and ended in June 2012 (over 9 years), just to mention a few. Again the WTO permanent system has addressed the issue of timeframe appropriately. The WTO DSU clearly provides for the timeframe within which the dispute is supposed to be resolved. Article 20 of the DSU clearly set out the timeframe of settling WTO disputes at a panel stage to be nine months where no appeal lies to the AB and 12 months where there was an appeal. This means that the dispute at Panel level takes nine months while at AB it takes three months.⁶⁶



In conclusion, it can be said that there are valid and strong reasons for the call of a new court to deal with international investment disputes. The court will help in achieving justice for all parties, consistency and predictability of the system and many other problems could be remedied by this move. While there some concerns about some negative impact of the new court, this work submits that upon weighing the pros and cons one will find that establishment of the court will

⁶² Raviv A 'Achieving a Faster ICSID' (2014) 11 *Transnational Dispute Management* at 4 available at <http://www.transnational-dispute-management.com/article.asp?key=2066> accessed on 26/03/2014.

⁶³ ICSID Case No ARB/01/2.

⁶⁴ See List of ICSID Cases, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=Cases> accessed on 23/03/2014.

⁶⁵ ICSID Case No ARB/03/23.

⁶⁶ See Article 20 WTO Dispute Settlement Understanding available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm accessed on 24/03/2014.

be more beneficial than continuing to operate in the current setting. Careful consideration of the available options will be needed so as to create a stable and sustainable court.

6.3.2 Advantages of establishing an Appellate Court

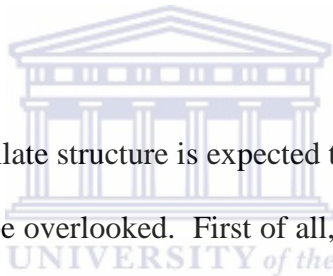
The appellate structure is expected to act as a corrective body for legal and factual errors committed by the court of first instance.⁶⁷ This is very important due to the fact that the basic aim of any adjudicative system is to ensure that the system reaches a correct decision as many times as possible.⁶⁸ The importance of correct decisions cannot be underestimated in investor – state arbitration where the tribunals adjudicate on public interest issues and most of the time a huge amount of money is involved. In addition, it is contended that the investor – state arbitration, which is public in nature, need to place more emphasis on achieving correct decisions over finality of disputes. It is a fact that tribunals had previously been more concerned with finality of disputes at the expense of correctness of decisions.⁶⁹ This wrong approach which was borrowed from the international commercial arbitration system has negatively affected the development of international investment law as flawed and poorly reasoned awards have been enforced and resulted in the current backlash against the investor – state arbitration system.

⁶⁷ Subedi S *International Investment Law: Reconciling Policy and Principle* (2008) at 207.

⁶⁸ See Qureshi A ‘An appellate system in international investment arbitration?’ in Muchlinski P et al (eds.) *The Oxford Handbook of International Investment Law* (2008) at 1157.

⁶⁹ Yannaca-Small K ‘Improving the system of investor-state dispute settlement: an overview’ (2006) <http://www.oecd.org/dataoecd/3/59/36052284.pdf> accessed 16 /02/ 2014.

In addition to the above, an appellate structure will help to make the investor – state machinery sustainable.⁷⁰ It is only when the system provides clear principles which meets the expectations of its stakeholders that the system will be able to be trusted hence making itself sustainable. Lack of trust from stakeholders will ultimately lead to members’ withdrawal from using it hence the collapse of the same. The current investor - state arbitration system is not sustainable because it is not consistent and lacks predictability. As a result, some members have already shown discomfort and have withdrawn or indicated they would do so.⁷¹ The adoption of an appellate structure therefore, is expected to bring sustainability of the system as the structure will be mandated to bring about consistency.



Alongside this advantage, the appellate structure is expected to bring predictability as well.⁷² The relevance of predictability cannot be overlooked. First of all, predictability is crucial as it allows the parties to understand the permissible and non-permissible acts hence capable of putting their houses in order when they deal with one another.⁷³ Secondly, predictability is important because it helps the parties to understand from the beginning as to whether they have a winnable case or not. This helps the parties to abstain from instituting frivolous claims hence save costs and time. Predictability therefore, will ultimately help to develop the doctrine of precedent in investor –

⁷⁰ Qureshi A ‘An appellate system in international investment arbitration?’ in Muchlinski P et al (eds.) *The Oxford Handbook of International Investment Law* (2008) at 1157.

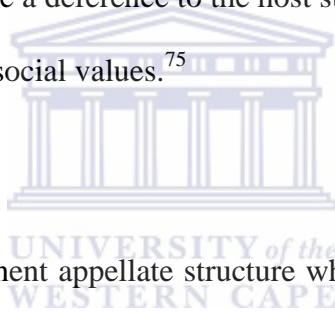
⁷¹ Bolivia, Ecuador, Venezuela and Australia have withdrawn from using the ICSID system. See Chapter Four of this work under Subheading 4.6 for a thorough discussion. For more on this see also Peterson LE & Hepburn J ‘Payment Round Up New Reporting on ICSID Award Debts of Kazakhstan, Kyrgyzstan and Bangladesh’ (2011) *Investment Arbitration Reporter* available at http://www.iareporter.com/articles/20111231_7 ; see also Baldwin E ‘Limits to Enforcement of ICSID Awards’ (2006) 23 *Journal of International Arbitration* 1at 7; see also Peterson LE ‘Zimbabwe Not Paying ICSID Award’ (2010) *Investment Arbitration Reporter* http://www.iareporter.com/articles/20100507_5 accessed on 21/10/2013.

⁷² Qureshi A ‘An appellate system in international investment arbitration?’ in Muchlinski P et al (eds.) *The Oxford Handbook of International Investment Law* (2008) at 1157.

⁷³ Franck S ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1521 at 1619.

state arbitration system. A single permanent appellate structure will easily be able to develop its own jurisprudence on all the principles governing international investment law.

In furtherance of the above, it is also expected that an independent and impartial permanent appellate body will create a balanced structure in which all parties' interests will be given the same weight and adjudicated impartially. In the current system where parties choose the arbitrators, evidence shows that each arbitrator tends to protect the interest of the appointing party.⁷⁴ A balanced adjudicative structure will be expected to take into account the host state's other policy objectives hence enable a deference to the host state on human rights, environmental protection, labour rights and other social values.⁷⁵



It is hoped therefore that, a permanent appellate structure which is not party based will create a stable and balanced jurisprudence in which government policy making space is protected and the foreign investors' interests are also taken into account. In line with the foregoing, it is also hoped

⁷⁴ For a thorough discussion on this see Chapter Three of this work under Subheading 3.5.2.3; also see Paulsson J 'Moral Hazard in International Dispute Resolution' (2010) *ICSID Review - Foreign Investment Law Journal* 339; see also Van Harten G 'A Case for International Investment Court' *Society of International Economic Law*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424 accessed on 06/09/2013.

⁷⁵ For the status of other social values in the current investor – state arbitration system see Chapter Three of this work under Subheading 3.5.2.6; see also See Van Harten G & Loughlin M 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) *European Journal of International Law* 121 at 123; see also Spear S 'The Quest for Policy Space in a New Generation of International Investment Law' (2010) 13 *Journal of International Economic Law* 1037 at 1038; see also Salacuse J 'Toward a Global Treaty on Foreign Investment: The Search for a Grand Bargain' in N. Horn (ed.), *Arbitrating Foreign Investment Disputes* (2004), at 68–70; see also Mann H 'The Right of State to Regulate and International Investment Law: A Comment' in UNCTAD *The Development Dimensions of FDI: Policy and Rule Making Perspective* 2003 at 216; see also Waelde T & Kolo A 'Environmental Regulation, Investment Protection and Regulatory Taking in International Law' (2004) *International Comparative Law Quarterly* 811 - 848 at 811; see also Kingsbury B Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality in Schill S (ed.) *International Investment Law and Comparative Public Law* (2010) 76 – 118.

that the permanent appellate structure which is not party – appointment based will help to increase objectivity in the system.

6.3.3 Argument against the court system and the response thereto

The defenders of the status quo are downplaying the legitimacy crisis by suggesting that the system is just experiencing growing pains and is working relatively fine.⁷⁶ They argue that the conflicting decisions in the system are not unique to investment arbitration as there are also conflicting decisions in other adjudication systems.⁷⁷ With regards to establishment of an appellate facility, it is argued that Article 53 of the ICSID Convention does not allow for such a facility, hence, it would require all member states to consent to amending the convention.⁷⁸ Therefore, they conclude, it will not be feasible to establish such a structure as consent from all member states might not be acquired.⁷⁹ On top of that, it is argued that the appeal process will compromise the primary aim of the convention which is finality of the award, cost efficiency and timeliness.⁸⁰

⁷⁶ See Wälde T 'Improving the Mechanisms for Treaty Negotiation and Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy' (2009) *Year Book on International Investment Law & Policy* 505 at 506; see also Franck S 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 *Harvard International Law Journal* 435 at 440

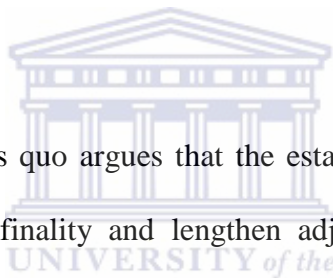
⁷⁷ Brower C N & Schill S 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 *Chi. J. Int'l L.* 471 (hereinafter Brower & Schill 'Is arbitration a threat')

⁷⁸ Tams C 'An appealing Option? The debate about an ICSID Appellate Structure' (2006) 57 *Essays on Transnational Economic Law* 1 at 12.

⁷⁹ Tams C 'An Appealing option' (2006) 57 at 12.

⁸⁰ Tams C 'An Appealing option' (2006) 57 at 14.

It is submitted here that the existence of conflicting decisions in other adjudication bodies should not be applied to justify this legitimacy crisis in international investment law. Conflicting decisions in international commercial arbitration, for example, may have no serious consequences to many as the decision affects the parties only. However, that is not the case with international investment arbitration where the tribunal decision may affect development projects the respondent state may have planned to execute or it may affect the regulatory powers of the state on environmental issues, health or any other service delivery to the citizens.⁸¹ Therefore, with such wide ranging consequences, it is very important to have an appellate body to review the dispute.



In addition, defenders of the status quo argues that the establishment of an appellate structure will be costly, will compromise finality and lengthen adjudication process.⁸² This research submits that the existing annulment process under ICSID is the longest review process that has ever existed. Cases which have been sent for annulment have taken five years and more.⁸³ In contrast the WTO appellate body timeframe for rendering an appellate decision is only three months.⁸⁴ It is therefore submitted here that the argument that appeal shall lengthen the process is

⁸¹See *Aguas del Tunari S A v Bolivia* ICSID ARB/02/3 2005 (decision on jurisdiction), *Azurix Corp v Argentina* ICSID ARB/1/12 2006 (final award), *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8 (final award), *Sempra Energy International v The Argentine Republic* ICSID ARB/02/16 (final award) and *Enron Corporation and Ponderosa Assets L P v Argentine Republic* ICSID ARB/01/3 (final award), *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, and PCA Case No. 2012-12 and [Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, \(Award\)](#) ICSID Case No ARB/09/6.

⁸² See Tams C 'An Appealing option' (2006) 57 at 42.

⁸³ See *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, (Decision on Annulment), (the annulment application was filed in 1986 but the award was rendered 6 years later in 1992) ; see also *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, (Decision on Annulment,) (filed in 1985 but award on annulment rendered five years later in 1990).

⁸⁴ WTO, *Understanding on rules and procedures governing the settlement of disputes* 1869 UNTS 401 (1994)

Art.17 (5).

unfounded. A timeframe could be established within which the appellate body has to render its decision. With regard to finality, this research argues that as long as the appellate body decides on the appeal within the timeframe stipulated, the award shall remain to be final immediately after the appellate body has rendered its decision. In short, the current annulment process which takes up to six years cannot be said to be in favour of finality and timeliness.

Conclusively, it is submitted here that the suggestion put forward by different stakeholders are very valid and intends to address the legitimacy crisis facing investor – state arbitration system. This work has tried to demonstrate the strengths and weaknesses of each of the suggested solutions. While the author agrees that the invocation of the principle of consolidation, the doctrine of precedent, the principles of *lis pendens* and *res judicata* and the application of margin of appreciation principles could play a great part in the course of reducing consistency, there are a number of obstacles which hinders their full potential. Therefore, the suggested solutions cannot eliminate the backlashes against the investor – state arbitration system. It is submitted here that establishing an independent international investment court and an appellate structure is a good move which need serious consideration. It is through the court or the appellate structure that consistency and predictability can be achieved.

6.4 Jurisdiction of an International investment Court

As discussed earlier, the establishment of a permanent international investment court and the international investment appellate court through the MAI stands to be the best option available for the reform. In the following section the jurisdiction and structure of the two courts are discussed. This research calls for enactment of the International Investment Court and International investment Appellate Court Rules. The Rules should provide, among other things: the nature of the courts, the jurisdiction of the courts and the appointment and qualification of judges. In addition, the Rules should address dispute settlement timeframe and litigation costs at the two courts. In the following section these issues are discussed.



6.4.1 Nature of an International investment Court

As discussed earlier, this research recommends that the international investment court need to be a permanent litigation court which discharges its duties akin to a normal national court. The court should be presided by permanent judges and parties should be allowed to hire counsels who would appear before this court. The fact that it hears public interest disputes and its mandate emanates from a MAI, the court will need to be as transparent as possible. As foreign investors and host states are going to be the major parties involved in disputes, the court will need to have jurisdiction on foreign investor – state disputes and state – state disputes respectively.

6.4.2 Jurisdiction of an International Investment Court

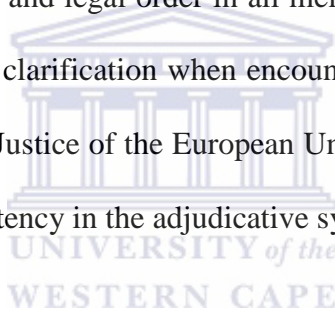
The international investment court will need to have different types of jurisdiction. First of all, the court should have original jurisdiction in all investor - state disputes at international level. As stated before, by signing the MAI, state parties will have relinquished their right to institute investment disputes to any other international adjudicative body. The same applies to their citizens.

However, in order to avoid backlog of cases, the court will need to have a provision in its Rules which allow the parties to dispute to institute investor – state dispute at the host state court if they so desire. This will address the issue of costs but also will boost the court legitimacy as state parties will feel that their national courts have not been bypassed. Allowing national courts to entertain investment disputes will also help to filter frivolous claims. It is only when the parties decide to use the international forum that they will be obliged to file their dispute only with the international investment court.

For the purpose of avoiding parallel proceedings, the rules should clearly stipulate that while a dispute is pending at a national court of their choosing, the claimant will not be allowed to file another case with the international investment court. In situations where the respective country national court is unnecessarily delaying to hear the case or there are possibilities of lack of independence of the judiciary, the international investment court Rules should have a provision which allow the respective investor to suspend such proceeding and file it at the international

investment court. A notice of suspension should be attached to such a claim as a proof that a dispute in a national court is indeed suspended. Such a provision is important to ensure that foreign investors are not left out in the cold while the national courts are unable to hear their case.

In addition, the international investment court will need to have reference jurisdiction. That is to say, any national court hearing investor – state dispute should be able to approach the international investment court for any interpretation issue of any MAI provision. This will help to secure uniformity of application and legal order in all member states and it will help national courts by providing them with the clarification when encountered with difficulty of interpreting the MAI provisions. The Court of Justice of the European Union (CJEU)⁸⁵ has successfully used referencing system to create consistency in the adjudicative system.⁸⁶



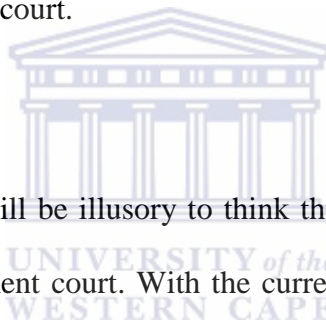
Thirdly, the international investment court will need to have appellate jurisdiction to all disputes emanating from the national courts exercising jurisdiction on investor – state disputes. In order to encourage and to create trust in the local courts, the international investment court should be able to receive appeal from a party aggrieved by a decision of a national court of a member state to the MAI. While the appeal is pending at the court, the national court will be required to suspend enforcement of its order pending the outcome of the international investment court. In a long run,

⁸⁵ Established by Protocol No. 3 on the European Court of Justice available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:265:FULL:EN:PDF> accessed on 14/04/2014

⁸⁶ On CJEU referencing system see Weiler J 'A Quiet Revolution: The European Court and Its Interlocutors' (1994) 26 *Comparative Political Studies* pp. 510-534; See also Henry J 'The Referral Procedure; The Jurisdiction, Duties and Obligations of the European Court of Justice and Member States under Article 234E.C' (2005) 1 *Elsa Spel* pp. 57-65; see also Storey H 'Preliminary references to the Court of Justice of the European Union (CJEU)' available at http://www.iarlj.org/general/images/stories/lisbon_sep_2010/storey.pdf accessed on 16/04/2014.

this practice will help to reduce the backlog of cases at the international investment court registry.

Fourthly, the international investment court will need to have original jurisdiction on state – state disputes for the interpretation of the MAI. Where any state party feels that another member state is infringing its nationals’ rights, contrary to the MAI, such state should be able to seek interpretation of such a provision from the Court. Therefore under such circumstance, the Court will be exercising original jurisdiction and its decision can be appealed against at the International Investment Appellate court.



It can be concluded here that, it will be illusory to think that all investor state disputes will be settled at the International investment court. With the current pace of registering 56 new cases annually, the courts will not be able to manage such a backlog alone.⁸⁷ Therefore resolving disputes at national court and using the international investment court as a referencing court and appellate court respectively will ultimately help to address the backlog of cases and hence allow it to build a consistent jurisprudence by way of reference and appeal.

⁸⁷ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014* ‘investing in the SDGs: An Action Plan’ at 125 available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

6.4.3 Qualifications and appointment of Judges

Lack of independence and impartiality of adjudicators is one of the major issues haunting the current investor – state adjudicative system.⁸⁸ Studies have indicated that ad hoc party appointed arbitrators lacks impartiality as they serve the interests of the appointing party.⁸⁹ To address this issue, this research recommend for permanent salaried judges.

The judges for the international investment court will need to be people with sufficient knowledge on public international law, investment law and business law generally. As recommended earlier,⁹⁰ there should be established an institute at UNCTAD which shall be responsible with the training and establishing of ethics to govern investor – state adjudication. The Rules should strictly require that any person aspiring for the judgeship position will need to undergo training at the institute and only after successful completion and acquiring the certificate he/she will be eligible to apply for the post. The Rules of the court should also require the judges to be independent and of high moral character with qualifications which would enable them to be appointed judges in their home countries or having recognised competence in international law.⁹¹

With regard to appointment, this research recommends that the state parties should have a role in the appointment of judges. As stated above, only people with the qualifications should be eligible for appointment. However in order to get political legitimacy, the judges need to come from all

⁸⁸ See chapter Three of this work under Subheading 3.6.2.3

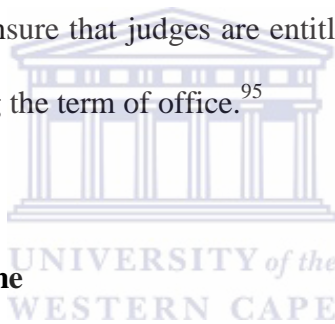
⁸⁹ Bernasconi – Osterwalder N et al ‘Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel’ (2010) *International Institute for Sustainable Development (IISD)* at 1 available at http://www.iisd.org/pdf/2011/dci_2010_arbitrator_independence.pdf accessed on 11/08/2013.

⁹⁰ See Chapter Five of this work under Subheading 5.3.1.

⁹¹ See for example Article 2 of the Statute of International Court of Justice available at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> accessed on 08/04/2014.

regions of the world. This research recommends that the Rules should provide that each region will appoint 3 judges hence making a total of 18 standing judges.⁹² The Rules should further provide that a dispute will be settled in chambers constituting of 3 judges.⁹³ This will allow the court to have at least 6 sessions at one time.

Once elected, the judges should be barred from exercising any other professional activities, political or administrative functions.⁹⁴ Security of tenure should be guaranteed and the Rules should prohibit dismissal of any kind unless other members of the court unanimously have voted that the respective member is incapable of fulfilling the required conditions. With regards to remunerations, the Rules should ensure that judges are entitled to the tax free annual salary and which may not be decreased during the term of office.⁹⁵



6.4.4 Dispute settlement timeframe

The Court will need to have a strict timeframe within which a dispute will have to be resolved. In the current system disputes takes too long to be resolved. A recent study indicates that at ICSID a dispute takes up to an average of 4 – 5 years.⁹⁶ This research recommends that a dispute once filed at the court should be resolved within 6 months. As discussed above, 18 judges with permanent tenure should be able to preside in 6 cases at one time. The recent UNCTAD report

⁹² The world consists of six active continents: Africa, Asia, Australia/Oceania, Europe, North America, and South America, information available at <http://www.nationsonline.org/oneworld/continents.htm> accessed on 12/11/2014.

⁹³ See Article 26(1) of the ICJ Statute

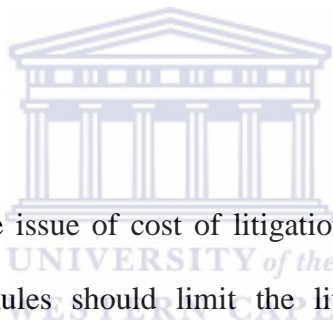
⁹⁴ See Article 16&17 of the ICJ Statute.

⁹⁵ See Article 32(8) of the ICJ Statute.

⁹⁶ Raviv A 'Achieving a Faster ICSID' (2014) 11 *Transnational Dispute Management* at 4 available at <http://www.transnational-dispute-management.com/article.asp?key=2066> accessed on 26/03/2014.

indicates that 56 investor – state cases were filed in 2013.⁹⁷ This means that, on average, 4.6 cases were filed in every month. Therefore with six chambers in the Court it means only five chambers would be required to preside on each month. At MERCUSOR, a tribunal is required to render its decision within 60 days counted from the date of the communication from the Administrative Secretariat to the parties and the other arbitrators.⁹⁸ At WTO, the timeframe of settling a dispute is 9 months where no appeal lies to the Appellate Body and 12 months where there was an appeal.⁹⁹ It is submitted here that the investor – state caseload is manageable and the 6 months timeframe is even more relaxed.

6.4.5 Litigation Costs



The court will need to address the issue of cost of litigation in investor – state disputes. This research recommends that the Rules should limit the litigation costs at the international investment court by allowing the parties to litigate through video conferencing. This will reduce the costs of travelling and accommodation to the parties and their counsels. In addition, the Rules should allow parties to make their submissions online and the hearing should only be called after

⁹⁷ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2014* ‘investing in the SDGs: An Action Plan’ at 125 available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

⁹⁸ See Article 16 of the Olivos Protocol of the Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, available at <http://www.worldtradelaw.net/fta/agreements/mercosurfta.pdf> accessed on 30/04/2014.

⁹⁹ See Article 20 of the WTO Dispute Settlement Understanding available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm accessed on 24/03/2014.

all the documentations are ready. This practice was recently successfully used at the International Criminal Court in *Kenyatta v ICC*.¹⁰⁰

In addition, the Rules should clearly provide that the expenses of the judges including travel and subsistence allowance shall be met from the UNCTAD budget. This will also reduce the litigation costs to the parties. A Trust Fund should be established that will be used to carter for litigation costs where one of the parties is a developing country. The MAI should stipulate that all member states to the MAI should contribute to the Fund on annual basis. This move will make the adjudicative system accessible to poor and rich hence enhance the court legitimacy.



6.5 The nature and Jurisdiction of an International Investment Appellate Court

As stated earlier, this research recommends the establishment of an international investment appellate court which will be the highest court in hierarchy. This court will have appellate and reference jurisdiction over decision made by the international investment court.

When exercising the appellate powers the court will be concerned with the validity of the procedure involved in reaching at a particular decision and the correctness of the decision itself. As discussed earlier, appeal focuses on higher level of scrutiny to obtain greater accuracy in the

¹⁰⁰ See the Videoconference proceedings at <https://www.youtube.com/watch?v=fClAkRSrogQ> accessed on 12/11/2014.

legal reasoning.¹⁰¹ The appellate court is an important structure and will help a lot in building consistency, predictability and certainty of international investment law.

As stated above, the court will also need to have reference jurisdiction for purposes of providing a binding opinion on the meaning of the provisions of the MAI when requested by any member state or the international investment court chambers.

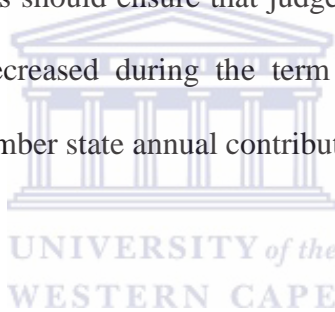
On judges qualifications, in addition to the qualifications of a judge of the international investment court, the Rules should provide that the judges of the court of appeal will need to have at least 5 years' experience of working as a judge in an international court or tribunal. It is submitted here that experience is needed as the court will be the final body in hierarchy and its decision are final. Therefore there is a need to ensure that those who preside over are indeed competent people who can pronounce the true position of the international investment law.

With regard to appointment, this research believes that member states should be involved in the appointment of the court of appeal judges. The Rules should require that the Court of Appeal should be constituted by at least two members from each continent hence a total number of 12 judges. In order to get an odd number, the Rules should empower member states to unanimously appoint one judge of the International Court of Justice who has sufficient international law expertise to be the chairman of the court hence making the number of judges to a total of 13

¹⁰¹ Yannaca-Small K 'Annulment of ICSID awards: limited scope but is there potential?' in Yannaca-Small K (ed.) *Arbitration under International Investment Agreements* (2010) 51.

judges. In hearing an appeal involving state – state dispute, the Rules should require that a full bench of 13 judges should preside while in a normal investor – state dispute a bench of 7 judges should be mandated to hear the appeal.

Similar to the international investment court, the court of appeal judges needs to be employed on permanent basis of 6 years with a possibility of renewal. To ensure Security of tenure, the Rules of the court should prohibit dismissal of any kind unless other members of the court unanimously have voted that the respective member is incapable of fulfilling the required conditions. With regards to remunerations, the Rules should ensure that judges are entitled to the tax free annual salary and which may not be decreased during the term of office. The salaries and other emoluments should come from member state annual contribution.



The Courts Rules must also provide for the appellate court dispute settlement timeframe. It is pertinent that this court should be able to render its decision within a short period of time in order to serve time and reduce the costs of litigation. This research suggests that the rules should provide that within 60 days the appellate court should render its decision.

With regard to costs, the appellate court need to follow the procedure identified in the international investment court section. The court should allow videoconferencing and online submission by the parties.

In conclusion, it can be said here that creating the international investment court and the international investment appellate court is inevitable and very timely. The two courts once established will address all legitimacy issues and provide the stakeholders with a reliable international investment adjudicative system.

6.6 Creating a Multilateral Agreement on Investment: The way forward

6.6.1 Call for stakeholders' Conference

In order to get a legitimate MAI, there is a need to involve all stakeholders in its making. This research calls for a stakeholders' conference on international investment which would provide a platform for charting the way forward. The fact that there are different stakeholders' interests and concerns at stake, it is only through meeting together that each group's concerns may be addressed and appropriate measures which considers other stakeholders interests, could be suggested for a better and inclusive MAI. Major stakeholders for the purposes of investor – state arbitration includes; governments, foreign investors, civil society organisations, NGOs, academia, law firms, arbitrators and other institutions involved or interested in the development of the investor – state adjudication system. To garner support, the conference would require collection of opinion from eminent scholars/ experts from all parts of the world representing different parties' interests. It is submitted here that through such a forum, members may come to a conclusion of forming a task force which could be mandated to draft a proposal for the purposes of encouraging states to agree on a multilateral investment agreement which takes on board all stakeholders concerns. The fact that the previous efforts failed mainly because only a

few stakeholders were involved makes this idea even more realistic.¹⁰² At the outset, the forum should assess the need of having the system, the reform required, and the purpose of the new reformed system.

It is further submitted here that such a report from the conference could help much to iron out the differences between different groups and widen the transparency of investor – state adjudication system and put at the table the possible inclusive solutions to the legitimacy issues haunting the system at the moment.

6.6.1.1 Possible obstacles

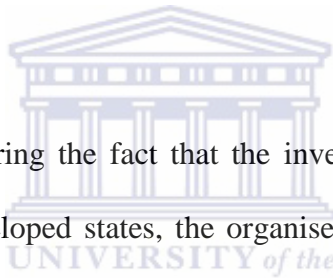


While the conception of this idea is attractive and compelling, it will require much dedication and commitment for it to be realised. Among the challenges could be to find an organiser/organisation which enjoy worldwide recognition and respect from all stakeholders involved. The organisers should not be viewed as leaning towards the interests of either group among the stakeholders but a neutral body which can balance the interests of both parties.

Another challenge towards achieving a fruitful conference could be mobilisation of funds for the conference. It is obvious that if the conference is to be successful all stakeholders must have their say and be present at the conference. To achieve that, financial resources will be of vital

¹⁰² See Chapter Two Subheading 2.3.10 and Chapter Six under Subheading 6.2. of this work both discussing the reasons for the failure of MAI 1998.

importance for the organisation, publication, accessibility, accommodation, transportation, and feeding of all conference members. While government and business entities representatives may be able to garner resources from their own internal sources, the same cannot be guaranteed of civil societies and NGOs representatives. Also financial resources may be required for the experts from different interested groups who would be asked to present their opinion at the conference. The task of finding eminent scholars on international investment law to analyse the areas of concerns may not be that difficult as Professors from different parts of the world in 2010 issued a statement regarding the investor – state arbitration system.¹⁰³ A few of them may be selected to present their views on how the system should move forward.



It is submitted here that, considering the fact that the investor - state systemic issues affects everyone involved, including developed states, the organisers may not find it very difficult to raise funds from big nations which so far have also indicated that they would prefer the system to change.¹⁰⁴ In addition to that the organisers may also seek assistance from other stakeholders including the World Bank, the IMF, and TNCs which are vital stakeholders in the development of international investment law. In the section that follows, this research suggests what should be contained in the MAI for it to address all the legitimacy issues in the current system.

¹⁰³ Van Harten G *et al.* ‘Public Statement on International Investment Regime’ available at [http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20\(June%202011\).pdf](http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20(June%202011).pdf) accessed on 06/09/2013.

¹⁰⁴ As discussed under Chapter Four of this work under Subheading 4.8, USA, Australia, South Africa and other countries have registered their concerns on the operation of the Investor – state arbitration system.

6.7 The Minimum Content of the Multilateral Agreement on Investment

For the future MAI to be successful, it needs to address legitimacy issues which are haunting the current investor – state arbitration system. The MAI need to balance the interest of both parties: foreign investors and that of the host state. As earlier discussed, one of the reason for the failure of the previous MAI is that it protected foreign investors without assigning them any duties.¹⁰⁵ The future MAI needs to have provisions which clearly define the rights and duties of the competing parties.

In addition, the MAI needs to be clear in as far as its objectives are concerned. The preamble must clearly provide that the objective of the MAI is to encourage foreign investments which will contribute to the development objectives of the host state. In the section that follows this research suggests the minimum contents of the MAI. The minimum content discussed hereunder will be an addition to the existing pre and post foreign investors' rights.

¹⁰⁵ See Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 7; see also Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) at 13; see also Salacuse J 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *Int'l Law* 655 at 659; see also Dodge W 'Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1 at 5-8; see also Van Harten G *Investment Treaty Arbitration and Public Law* (2007) 14-15.

6.7.1 The need for clear definition and scope of basic investment principles

One of the major issues in the current BITs and IIAs is that the basic international investment principles are receiving contradictory interpretations by the tribunals.¹⁰⁶ Some tribunals are giving these principles narrow scope while others are widening their scope as much as possible. This has resulted in uncertainty and unpredictability of the law. Among the principles which need to be given a clear interpretation includes: the meaning of the term investment;¹⁰⁷ the scope of an umbrella clause;¹⁰⁸ the application of the Most Favoured Nations (MFN) principle to a third party on procedural matters;¹⁰⁹ the application of the defence of necessity and Non-Precluded Measures (NPM) during emergency situations;¹¹⁰ the scope of the principle of

¹⁰⁶ See Chapter Five of this work under Subheading 5.3.5.

¹⁰⁷ See *Salini Costruttori SpA v Kingdom of Morocco* ICSID Case No. ARB/00/4 (2001), *Jan de Nul NV v Islamic Republic of Egypt* ICSID Case ARB/04/13 (2006), *Mitchell v Congo* ICSID Case No. ARB 99/7 (2007) Decision on Annulment, and *Malaysian Historical Salvors v Malaysia* ICSID Case No ARB/05/10 (2007) Award on Jurisdiction. For a different view see *CMS Gas Transmission Company v The Argentine Republic* Annulment Committee (2007) para 71 – 72; see also *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No. ARB/05/22 (2008); also see *MCI Power Group, LC and New Turbine, Inc v Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007 and *Giovanna a Beccara and Others v. Argentine Republic*, (also known as *Abaclat et al v. Argentina*), ICSID Case No ARB/07/5, Decision on Jurisdiction, 4 August 2011.

¹⁰⁸ See *SGS Société Générale de Surveillance S A v Islamic Republic of Pakistan* ICSID ARB/01/13, *El Paso Energy International Co v Argentina* ICSID ARB/03/15 and *Pan American Energy LLC and BP Argentina Exploration Company v Argentina*, ICSID ARB/03/13 on one hand and *SGS Société Générale de Surveillance S A v Republic of the Philippines*, ICSID ARB/02/6, *Noble Ventures Inc v Romania*, ICSID ARB/01/11 of 12th October 2005 on arbitral jurisdiction available at <http://www.italaw.com/sites/default/files/case-documents/ita0565.pdf>, and *Eureko BV v Poland*, *Ad hoc* – UNCITRAL Award of 19th August 2005 Partial award available at http://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf on the other.

¹⁰⁹ In favour of the extension of the application of MFN to procedural matters see *Emilio Augustin Maffezini v Kingdom of Spain*, Award on Jurisdiction, ICSID Case No ARB/97/7, IIC 85 (2000); for similar opinion also see *Gas Natural SDG, S.A. v Argentina*, ICSID Case No ARB/03/10, (2005) Decision on Preliminary Questions on Jurisdiction; *Camuzzi International S.A. v The Argentine Republic*, ICSID Case No ARB/03/2, (2005) Decision on Jurisdiction; *National Grid plc v The Argentine Republic*, UNCITRAL, (2006) Decision on Jurisdiction; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, ICSID Case No ARB/03/19 and *AWG Group Ltd. v The Argentine Republic*, UNCITRAL, (2006) Decision on Jurisdiction. However this position is disputed in other cases; see for example *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24 (2005) Decision on Jurisdiction, para. 223; see also *Telenor Mobile Communications AS v Republic of Hungary*, ICSID Case No ARB/04/15 (2006), Award; see also *Salini Costruttori S.p.A and Italstrade S.p.A v The Hashemite Kingdom of Jordan* ICSID Case No ARB/02/13 (2004), Decision on Jurisdiction; also see *Wintershall Aktiengesellschaft v Argentina Republic*, ICSID Case No ARB/04/14 (2008) Award.

¹¹⁰ See *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8 (2005) on one hand and *LG&E Energy Corp LG&E Capital Corp and LG&E International Inc v Argentine Republic* ICSID ARB/02/1 (2007) on the other.

expropriation;¹¹¹ the meaning of fair and equitable treatment (FET);¹¹² and lastly the meaning of full protection and security.¹¹³ The MAI must provide balanced definitions which will address the foreign investors' interests and those of the host state and that of third parties where necessary. As suggested before,¹¹⁴ there is a need to form an international investment Working Group which will, among other thing, recommend the definitions and scope of the basic international investment law principles to be adopted in the MAI.

6.7.2 The need for a provision on Common duties of foreign investor and the host state

The MAI also must stipulate the common duties of both parties. The common duties should include, but not limited to; parties observance of minimum standards for human rights, parties observance of environment and labour law and the duty not to engage in corruption activities. Furthermore, as discussed in Chapter Three,¹¹⁵ TNC often infringe human rights, labour and environmental standards in the countries in which they operate. Therefore the MAI has to have a provision which strictly demands that both parties are obligated to ensure that the human rights, labour and environmental core values are protected and respected by both; the host state and the foreign investor.

¹¹¹ See *Lauder v The Czech Republic*, 9 ICSID Reports r para 201 and *CME Czech Republic BV v The Czech Republic* ICSID Reports para 609.

¹¹² See *S D Myers Inc v Canada* UNCITRAL/NAFTA 40 ILM 1408 (2001) but also see *Metalclad Corporation v United Mexican States* ICSID Review 16(2000) for a different views on the scope of Fair and Equitable Treatment principle; see also See *Lauder v The Czech Republic*, 9 ICSID Reports (2001) para 293 and *CME Czech Republic BV v The Czech Republic* ICSID Reports (2001) para 611.

¹¹³ See *Lauder v The Czech Republic*, 9 ICSID Reports (2001) para 309 and *CME Czech Republic BV v The Czech Republic* ICSID Reports (2001) para 613.

¹¹⁴ See chapter Five of this work under subheading 5.3.5.

¹¹⁵ See Chapter Three under Subheading 3.6.2.6 for a thorough discussion on this issue.

It is through such an inclusive MAI with balanced parties' interests provisions that the court to be established will be able to create a consistent international investment law jurisprudence which takes on board other social values.

6.7.3 The need for a provision on the rights of the host state

While it is clear from customary international law and other general principles of international law that the host state has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development and with other legitimate social and economic policy objectives, many of the existing BITs and IIAs do not stipulate this. As a result, tribunals do not consider this right seriously. The MAI therefore must recognise and provide for specific right of the host State.

The inclusion of this provision will help to create a balance between the host state's interests and those of the foreign investor. As discussed elsewhere lack of balanced investment instruments has been one of the sources to the legitimacy crisis in investor – state arbitration system. A clear stipulation in the MAI about the host state right to regulate will help the court in determining whether the particular state action was an infringement of foreign investor interest or falls within the state power to regulate.

In addition, the MAI will need to include a provision which, under special circumstances, empowers or guarantees the host state the right to pursue development goals in a manner that suits its interest most even if the measure may include discriminatory actions. While this

provision may seem unfair to foreign investors, it will prove to be important especially to countries which have historical economic injustices and discrepancies to address. The provision will play a crucial role in motivating developing countries to join the MAI.

6.7.4 The need for a provision limiting forums for dispute settlement

It is pertinent that the MAI should also limit the forums for settling investment disputes. The international investment court should be the only international forum available for settling international investment dispute for state parties and foreign investors from state parties. The principle of fork in the road or waiver provisions needs to be incorporated.¹¹⁶ As discussed before,¹¹⁷ this is a treaty principle that limits the investors' venues for institution of cases.¹¹⁸ According to this principle, once the investor decides to institute his claim with the particular forum he/she becomes ineligible from instituting another claim with another body on the same subject matter.¹¹⁹

¹¹⁶ Knahr C 'Consolidation of Proceedings in International Investment Arbitration' in Knahr C et al (eds.) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 1-19 at 4.

¹¹⁷ See Chapter Five of this work under Subheading 5.2.1.

¹¹⁸ See for example Art. 7(3) of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments of 27/11/2009 (hereinafter South Africa – Zimbabwe BIT) available at http://unctad.org/sections/dite/ia/docs/bits/south_africa_zimbabwe.pdf providing for the fork in the road provision.

¹¹⁹ Schreuer C 'Travelling the BIT route: of waiting periods, umbrella clauses and forks in the road' (2004) *The Journal of World Investment and Trade* 231 at 232.

With this provision, it will mean that by signing on to the MAI state parties are waiving their rights to institute disputes in other international fora. This move will address the problem of forum shopping which results into conflicting decisions.¹²⁰

6.7.5 The need for a provision on the qualification of the Judges

As thoroughly discussed in Chapter Three, lack of institutional safeguards for independence and impartiality of adjudicators, is one of the major issues haunting the investor – state arbitration system. For the MAI to address this problem there is a need to have provisions which would clearly stipulate the required qualifications for those aspiring to be judges of these courts. The provision should require the judges to have knowledge in international law, business law and public law field. As earlier suggested, the MAI may also provide for the establishment of the training institute which will be issuing certificates to aspirants upon successful completion of the course.

6.7.6 The need for a provision on litigation funding

As pointed out earlier, costs in investor – state arbitration is so high.¹²¹ The court will need to address this issue and ensure that all stakeholders, poor and rich, have equal access. The MAI therefore, through a specific provision, must mandate UNCTAD to set up a litigation fund which

¹²⁰ Reinisch A ‘The Future of Investment Arbitration’ in Christina Binder et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894 - 916 at 908

¹²¹ See Chapter Three under subheading 3.6.2.7

will be financed through state parties' annual contributions. The fund may also accept voluntary contributions from interested stakeholders including multinational corporations.

Establishment of such a fund will not be a novel idea. At the International Tribunal on the Law of the Sea (ITLOS) a party who is unable to bear its own costs can apply for legal assistance from the Trust Fund.¹²² The Fund was established in 2000 through General Assembly Resolution 55/7.¹²³ It is specifically meant to assist state parties on disputes submitted or about to be submitted at ITLOS.¹²⁴

As discussed in Chapter Three, the Permanent Court of Arbitration has also established a Trust Fund to cater for litigation costs.¹²⁵ In recognition of the cost problem facing developing countries the PCA established a Financial Assistance Fund for developing countries in 1995.¹²⁶ The Fund is financed through voluntary contributions from States, NGOs, International Organisations and individuals. For a state to benefit from the Fund it needs to meet the conditions which are:¹²⁷ (1) the requesting state must be a member to the PCA Convention; (2) the state must have concluded an agreement to refer a dispute (or disputes) to PCA dispute settlement; and (3) the state must be listed on the Development Assistance Committee (DAC).

¹²² ITLOS established through the UN Convention on the Law of the Sea of 10/12/1982, UN Doc A/CONF 62/122(1982) available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf accessed on 22/04/2014

¹²³ See Article 19(1) of the ITLOS Statute.

¹²⁴ Mackenzie R et al *The Manual on International Courts and Tribunals* 2nd ed. (2010) at 54.

¹²⁵ See Chapter Three under subheading 3.5.4.

¹²⁶ The Conditions and eligibility criteria can be found at <http://www.pca-cpa.org/BD/torfundenglish.htm> accessed on 29/04/2014.

¹²⁷ See the PCA Website, Financial Assistance Fund available at http://www.pca-cpa.org/showpage.asp?pag_id=1179 accessed on 29/04/2014.

The International Bureau administers the Fund under the external supervision of external Board of Trustees. The fund has disbursed funds to a number of needy states since its inception.¹²⁸

This provision will be akin to the WTO Advisory Centre which has been specifically established for the purposes of rendering legal assistance to developing countries.¹²⁹ It is submitted here that, through this kind of provision in the MAI legal costs impediment will diminish and ultimately create a balanced investor – state adjudicative system.

6.7.7 The need for a provision on transparency in the adjudication process

As discussed before, investor – state disputes are public in nature hence needs to be adjudicated in a transparent manner. Confidentiality of proceedings affects the effort of legitimisation of the investor – state dispute settlement system. Due to the fact that the awards are not always published, people do not know what cases have been decided and how the law was applied.¹³⁰

The MAI will therefore need to ensure that transparency is given high priority in investor -state disputes so as to boost its legitimacy. The whole adjudication processes need to be open to the public. That is to say; the claimant statement of claim, the response thereof, pleadings, third

¹²⁸ UNCTAD ‘Permanent Court of Arbitration’ UNCTAD/EDM/Misc.232/Add.26 available at http://unctad.org/en/Docs/edmmisc232add26_en.pdf accessed on 28/04/2014.

¹²⁹ See Chapter five of this work for a thorough discussion on this under Subheading 5.4.1.

¹³⁰ Choudhury B ‘Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest contributing to the Democratic Deficit?’ (2008) 41 Vanderbilt Journal of Transnational Law 775 at 809; see also Spooreberg F& Vinuales V ‘conflicting decisions in International Arbitration’ Law & Practice of International Courts & Tribunals (2009) 91 – 113 at 107.

party submissions, transcripts of hearing, decisions and awards should be promptly available to the public for inspection.¹³¹ In addition, the public should be allowed to attend any hearing except where there is a need to protect confidential information.¹³² A repository needs to be established at UNCTAD which will be responsible with the keeping of the record and publishing all the required information.

It is submitted here that a MAI which clearly provide for transparency will boost its own legitimacy and that of the courts established thereunder.

6.7.8 The need for a provision on enforcement

Any adjudicative system whose decisions are incapable of being enforced, or lack enforcement power stands a poor chance of prospering. As enforcement of international courts' or tribunals' decisions is meant to be sought in the national court of the state parties, it is always important that the adjudicative system is perceived as just and fair. The MAI therefore, while needing strong provisions which guarantee enforcement of the rendered decisions, it will also need to gain trust and perception that it is just and fair.¹³³ Once so perceived, its decision will be considered legitimate and will become easily enforceable.

¹³¹ See for example Article 3, 4, 5, and 6 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf> accessed on 27/09/2013.

¹³² See for example Article 6 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf> accessed on 27/09/2013.

¹³³ For a thorough discussion on the relevancy of legitimacy perception in international adjudicative bodies see Chapter Four of this work under Subheading 4.2.1.

The current trend at ICSID speaks volume on the relevancy of legitimacy perception of an adjudicative system. Argentina and many other countries have refused to recognise and enforce awards rendered by ICSID tribunals on grounds that tribunals were unfair against states. For about 10 years now, Argentina has been involved in a battle with US investors on awards rendered against it in *Azurix Corp v Argentina*¹³⁴ and *CMS v Argentina*.¹³⁵ Argentina is contesting the awards and the claimants have not been able to enforce the same.

Apart from Argentina, Zimbabwe,¹³⁶ Liberia,¹³⁷ Russia,¹³⁸ Thailand,¹³⁹ Senegal,¹⁴⁰ Kyrgyzstan¹⁴¹ and Venezuela¹⁴² have shown dissatisfaction with the ICSID system and refused to pay the awards issued against them.¹⁴³



¹³⁴ *Azurix Corp. v. Argentine Republic*, ICSID Case No ARB/01/12, Award of 14th July 2006.

¹³⁵ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No ARB/01/8, Award of 12th May 2005.

¹³⁶ *Funnekotter v Republic of Zimbabwe* ICSID Case No ARB/05/6, Award (2009)

<http://italaw.com/documents/ZimbabweAward.pdf> accessed on 20/10/2013.

¹³⁷ *Liberian Eastern Timber Corp v Republic of Liberia* ICSID Case No ARB/83/2, Award 2 ICSID Rep. 346 (1994) accessed on 20/10/2013.

¹³⁸ *Sedelmayer v Russian Federation*, Arbitration Award (*ad hoc* arbitration under the Stockholm Chamber of Commerce arbitration rules July 7, 1998), http://italaw.com/documents/investment_sedelmayer_v_ru.pdf, accessed on 20/10/2013.

¹³⁹ *Walter Bau AG (in liquidation) v Kingdom of Thailand*, Award (UNCITRAL Arbitration July 1, 2009), <http://italaw.com/sites/default/files/case-documents/ita0067.pdf> accessed on 20/10/2013.

¹⁴⁰ *Soci te  Ouest Africaine des Be tons Industriels v Senegal*, ICSID Case No ARB/82/1, Award, 2 ICSID Rep 190 (1994) accessed on 20/10/2013.

¹⁴¹ *Petrobart Ltd. v Kyrgyz Republic*, Arbitration No 126/2003, Award II (Arbitration Institute of the Stockholm Chamber of Commerce Mar. 29, 2005), 13 ICSID Rep. 387 (2008) accessed on 20/10/2013.

¹⁴² *Mobil Corp v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (June 10, 2010), <https://icsid.worldbank.org> accessed on 20/10/2013; see also CNN (Jan. 9, 2012) *Chavez Says He Won't Respect World Bank Panel's Decision*, available at <http://edition.cnn.com/2012/01/09/business/venezuela-exxon/index.html> accessed on 20/10/2013

¹⁴³ For more on this see Peterson LE & Hepburn J 'Payment Round Up New Reporting on ICSID Award Debts of Kazakhstan, Kyrgyzstan and Bangladesh' (2011) *Investment Arbitration Reporter* available at http://www.iareporter.com/articles/20111231_7; see also Baldwin E 'Limits to Enforcement of ICSID Awards' (2006) 23 *Journal of International Arbitration* 1at 7; see also Peterson LE 'Zimbabwe Not Paying ICSID Award' (2010) *Investment Arbitration Reporter* http://www.iareporter.com/articles/20100507_5 accessed on 21/10/2013.

Difficulties in enforcement at ICSID have been possible despite the existence of Article 53 and 54 the ICSID Convention which squarely guarantees enforcement of awards. It is submitted here that for the MAI to have its courts decisions easily enforceable, it will need to operate in a manner that is perceived just and fair to both parties.

In conclusion, it can be said here that a MAI which addresses all the above issues stands a chance of being a successful multilateral investment agreement.

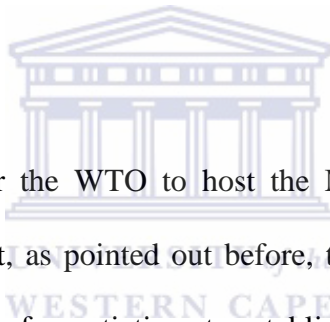
6.8 Institution to host the Multilateral Agreement on Investment and the Courts



The WTO and UNCTAD are bodies which in one way or the other have more connection with the international investment law. As previously stated, on several occasions the WTO had been involved in talks of forming the MAI under its auspice. UNCTAD is also another giant institution involved on international investment matters for over three decades now. In this section the potentialities of these two bodies to host the MAI are discussed.

6.8.1 The case for the World Trade Organization (WTO)

The WTO is often referred as a viable institution which can host the MAI and the courts.¹⁴⁴ Proponents argue that the WTO dispute settlement system has worked well and has shown maturity and emerged strong despite the current global economic crisis.¹⁴⁵ Proponents further argue that the WTO DSB and AB could be used as courts for international investment disputes.¹⁴⁶ In addition, the WTO Working Group on the Relationship between Trade and Investment established in 2002 called for the integration of investor – state dispute system into the WTO DSB.¹⁴⁷



However, the proposal calling for the WTO to host the MAI and the courts is not free of obstacles. The first obstacle is that, as pointed out before, the Doha Ministerial Conference in 2001 proposed for the introduction of negotiations to establish a multilateral investment treaty at

¹⁴⁴ Aslund A 'The World need a Multilateral Investment Agreement' *Policy Brief* Peterson Institute for International Economics, January 2013 at 2 available at <http://stfrnik.piie.com/publications/pb/pb13-1.pdf> accessed on 21/05/2014; see also Draper P et al 'Towards Global Governance of FDI Issues on Getting to Multilateral Approach' in *Foreign Direct Investment as a Key Driver for Trade, Prosperity and Growth: The Case for A Multilateral Agreement on Investment* WEF 2013 Pp 29 – 31 at 29 available at http://www3.weforum.org/docs/GAC13/WEF_GAC_GlobalTradeFDI_FDIKeyDriver_Report_2013.pdf accessed on 18/02/2014; also see Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 209.

¹⁴⁵ Draper P et al 'Towards Global Governance of FDI Issues on Getting to Multilateral Approach' in *Foreign Direct Investment as a Key Driver for Trade, Prosperity and Growth: The Case for A Multilateral Agreement on Investment* WEF 2013 p 29.

¹⁴⁶ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 209.

¹⁴⁷ Report of the Working Group on the Relationship between Trade and Investment to the General Council of the WTO' WT/WGTI/6 (2002) http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28%28+%40meta%5FSymbol+%28WT%FCWGTI%FC%2A%29+and+not+%28W+or+M%29%29+and+%28%40meta%5FTypes+Report%29%29+&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FWGTI%2F6%2EDOC%2EHTM&curdoc=6&popTitle=WT%2FWGTI%2F6 accessed on 26/05/2014.

the WTO to no avail.¹⁴⁸ The negotiations were officially discontinued in 2004 and Multilateral Investment Agreement has never been a WTO priority ever since.¹⁴⁹ Therefore it will require a lot of efforts to convince the WTO to pick the matter on board again while they already have many internal unresolved issues.

The second obstacle is that the WTO DSU is a state – state dispute settlement system which does not allow private parties to appear before the DSU and AB. As a result this system cannot be suitable to the MAI and the courts system which will need to allow individual foreign investors to appear before the courts.



6.8.2 The case for the United Nations Conference on Trade and Development (UNCTAD)

Another body which can be considered to host the MAI and the courts is UNCTAD.¹⁵⁰ It is submitted here that considering the previous reluctance of the WTO to host the MAI, UNCTAD is the best possible option remaining. UNCTAD has shown interest in international investment law development and is the leading institution to publish the World Investment Reports on annual basis for several decades now. In 2012, with the view of encouraging a multilateral

¹⁴⁸ The Fourth Ministerial Conference of the WTO, Work Programme: *Implementation related Issues*, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm accessed on 25/05/2013.

¹⁴⁹Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) at 52.

¹⁵⁰ Aslund A 'The World need a Multilateral Investment Agreement' *Policy Brief* Peterson Institute for International Economics, January 2013 at 2 available at <http://stfrnik.piie.com/publications/pb/pb13-1.pdf> accessed on 21/05/2014; see also Draper P et al 'Towards Global Governance of FDI Issues on Getting to Multilateral Approach' in *Foreign Direct Investment as a Key Driver for Trade, Prosperity and Growth: The Case for A Multilateral Agreement on Investment* WEF 2013 Pp 29 – 31 at 29 available at http://www3.weforum.org/docs/GAC13/WEF_GAC_GlobalTradeFDI_FDIKeyDriver_Report_2013.pdf accessed on 18/02/2014.

investment framework, UNCTAD launched the Investment Policy Framework for Sustainable Development (IPFSD).¹⁵¹ The Framework is hosted by the Division for Investment and Enterprise.¹⁵² The Framework was launched because UNCTAD believes that ‘there is a compelling need for a multilateral mechanism that deals with today’s investment policy-making challenges at different levels.’¹⁵³

Therefore this research submits that, UNCTAD as a UN affiliate with the mandate to organise the World Investment Forum, which brings together major players from the international investment community to discuss challenges and opportunities and to promote investment policies and partnerships for sustainable development and equitable growth, is better positioned to initiate the MAI negotiations and host the MAI and the relevant courts.¹⁵⁴ The MAI and the Courts can be established and hosted at the Division for Investment and Enterprise of UNCTAD. The Division is recognised as ‘a global centre of excellence on issues related to investment and enterprise for sustainable development’.¹⁵⁵ As earlier stated, the division also provides technical support to over 150 world economies. This research strongly advises that hosting the dispute

¹⁵¹ UNCTAD Investment Policy Framework for Sustainable Development (IPFSD) available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf accessed on 27/05/2014.

¹⁵² UNCTAD, Division of Investment and Enterprises available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf accessed on 27/05/2014.

¹⁵³ UNCTAD *World Investment Report* ‘Towards a New Generation of International Investment Policies: UNCTAD’s Fresh Approach to Multilateral Investment Policy-Making’ available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d6_en.pdf accessed on 27/05/2014.

¹⁵⁴ UNCTAD about Us available at <http://unctad.org/en/Pages/AboutUs.aspx> accessed on 26/05/2014.

¹⁵⁵ UNCTAD Investment and Enterprise Division available at <http://unctad.org/en/pages/DIAE/DIAE.aspx> accessed on 26/05/2014.

settlement system should be considered as technical assistance to the international investment regime.¹⁵⁶

6.9 Phasing out investor- state arbitration in favour of the court structure

Once the court system is established, the current system will be allowed to phase out through the member states act of signing the new MAI system. The MAI may remain silent on the matter leaving the Vienna Convention rules on successive Treaties to take its course.¹⁵⁷ Article 59 of the Vienna Convention on the Law of Treaties provides for circumstances under which a Treaty may come to an end. The Article provides as follows:

‘1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty.’

Therefore upon both member states signing to the new MAI and signifying their intention to terminate the BIT, Article 59 of the Vienna Convention could be invoked to terminate the BIT in favour of the MAI. It is submitted here that through such international practice, the new system will develop quickly.

¹⁵⁶ UNCTAD Investment and Enterprise Division available at <http://unctad.org/en/pages/DIAE/DIAE.aspx> accessed on 26/05/2014.

¹⁵⁷ Vienna Convention on the Law of Treaties (1969), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed on 21/05/2014.

Alternatively, the MAI may provide clearly that it replaces the BITs involving the respective member states. The Central America–Mexico FTA¹⁵⁸ provide a good example as it clearly provides that it replaces the FTAs between Mexico and Costa Rica (1994), Mexico and El Salvador, Guatemala and Honduras (2000), and Mexico and Nicaragua (1997).¹⁵⁹ As earlier stated, in Europe also, the coming into force of the Lisbon Treaty of the European Union in 2009, gives the European Commission the mandate to negotiate investment agreements on behalf of all 27 Member states.¹⁶⁰ This means that many BITs between individual EU countries will be replaced by common EU treaties hence tremendously cutting down the number of BITs.¹⁶¹ The European Union Regulations 1219/2012 provides how the EU Member states BITs with third states will come to an end.¹⁶² The Regulations, which entered into force on January 9, 2013, provide that the member states BITs with third states will remain in force until progressively replaced by an investment agreement between the European Union and the third state in question.¹⁶³ Therefore, the inclusion of such a provision in the MAI will not be an isolated incident. The MAI may have a similar provision directing that all BITs to which both parties are MAI member states shall automatically come to an end by parties signing to the MAI or shall be progressively replaced with the MAI when its lifespan comes to an end. After all, the good news is that many of the old BITs are coming to an end, member states to the MAI will be encouraged

¹⁵⁸ The Central America–Mexico FTA 2011 available at http://www.sice.oas.org/tpd/CACM_MEX/CACM_MEX_e.asp accessed on 31/05/2014.

¹⁵⁹ The Central America–Mexico FTA (2011) replaces the FTAs between Mexico and Costa Rica (1994), Mexico and El Salvador, Guatemala and Honduras (2000), and Mexico and Nicaragua (1997).

¹⁶⁰ See Art. 207(4) of the Treaty on Functioning of the European Union (TFEU), available at <http://eur-lex.europa.eu/legal-content/BG/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> accessed on 02/06/2014.

¹⁶¹ UNCTAD *World Investment Report* 2012 ‘Towards a New Generation of Investment Policies’ at 84 available at http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx accessed on 21/05/2014.

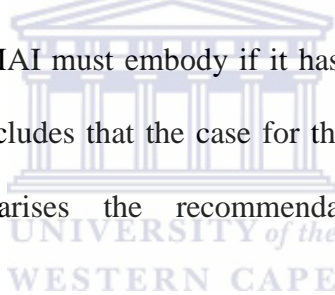
¹⁶² Regulation (EU) No. 1219/2012, OJ L 351/40, 20.12.2012 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0040:0046:En:PDF> accessed on 02/06/2014.

¹⁶³ See the EU Regulations Arts. 3 and 5 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0040:0046:En:PDF> accessed on 02/06/2014.

to phase out the old BITs and become members of the MAI court structured dispute settlement system.¹⁶⁴

6.10 Conclusion

This chapter has argued that the time is ripe for the establishment of a MAI and the courts. It is suggested that the MAI and the courts be hosted at UNCTAD. A number of reasons are given to support the proposal. In addition, the chapter has discussed the reasons as to why it is important to consider the establishment of these institutions now. In the last part, the chapter has suggested the minimum content which the MAI must embody if it has to be successful in addressing the legitimacy crisis. The chapter concludes that the case for the reform is made. The chapter that follows concludes and summarises the recommendations of the whole research.



¹⁶⁴ The United Nations Conference on Trade and Development (UNCTAD) World *Investment Report* 2013 indicates that 1300 BITs which constitutes 45% of all existing BITs came to an end in 2013, see UNCTAD World Investment Report 2013 *Global and regional investment trends*, available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014.

CHAPTER SEVEN

CONCLUSION AND SUMMARY OF RECOMMENDATIONS

7.0 Introduction

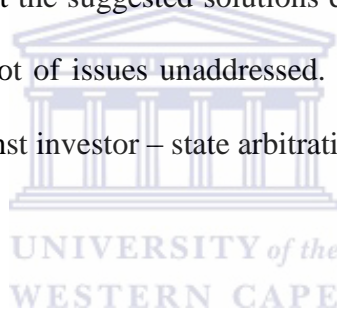
This chapter summarises the findings and recommendations made in the preceding chapters. The chapter submits that there are a number of issues which need immediate attention to be fixed in order to rescue the investor – state adjudicative system from collapsing. These issues, as discussed earlier, includes lack of consistency in the rendered awards, lack of institutional safeguards for independence and impartiality of adjudicators, lack of transparency on matters of public interests, encroachment on government policy making space, lack of an appellate structure to rectify errors, expensive adjudication process and lack of strict timeframe for settling disputes. In the section that follows a conclusion is made followed by a summary of recommendations.

7.1 Conclusion

The discussion in the previous chapters has shown that the investor – state arbitration system which deal with public interest disputes is not living up to the expectations of many

stakeholders.¹ The system lacks the necessary values/tenets required to be observed by any adjudicative body endowed with powers to handle public interest disputes.²

The discussion has also demonstrated that each of these issues has received a considerable number of possible solutions from different stakeholders. The most cited solutions include; invoking *res judicata* and *lis pendens* principles; adopting the doctrine of precedents; applying the fork in the road principle; adopting the margin of appreciation standard in interpretation of BITs, creating an appellate structure at ICSID and creating a treaty to treaty appellate body.³ The discussion has further revealed that the suggested solutions do not address the legitimacy issues in a holistic manner and leave a lot of issues unaddressed. As a result the suggested solutions cannot eliminate the backlash against investor – state arbitration system.



This research concludes that time is ripe to establish the MAI and the courts because the obstacles which caused previous MAI negotiations to fail have withered away. The research has demonstrated that currently foreign investors from developing countries are reciprocally investing in the developed world.⁴ The stigma against FDI which existed among developing countries in the 1990s has abated as most of them have liberalised their economies and learnt the advantages which come with FDI. It is clear now that developing countries which are now investors in the developed world need the legal framework which ensures their investment abroad adequate protection as much as developed countries does.

¹ See Chapter Three of this work under Subheading 3.6.2.

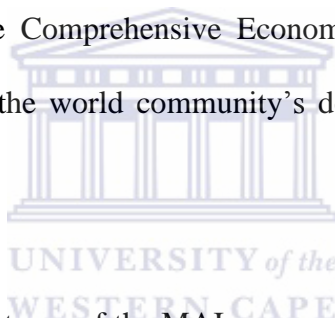
² See Chapter Four of this work under Subheadings 4.3 – 4.8

³ See Chapter Five of this work under Subheading 5.1.

⁴ See Chapter Six of this work under Subheadings 6.2.2.1 – 6.2.2.4.

The research further submits that the time is ripe because the amount of FDI has tremendously increased in the last two decades to be left governed by a patchwork of BITs. The research concludes that the time is ripe for the MAI to be established which will provide security and protection of this important field of world economy.

In addition, this research finds the time is ripe as the world today is moving towards forming regional agreements in replacement of BITs. The Regional Comprehensive Economic Partnership Agreement (RCEP), the Southern African Tripartite Trade Negotiation, the Trans - Pacific Partnership (TPP) and the Comprehensive Economic and Trade Agreement (CETA) agreements speaks volume about the world community's desire to have a single international investment governing body.⁵

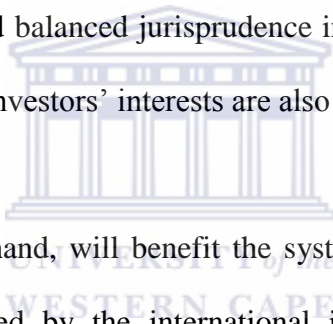


As demonstrated earlier, the Advantages of the MAI are many.⁶ First of all, the MAI will help in harmonising the international investment principles which are currently scattered in customary international law principles and BITs. Furthermore, a multilateral treaty will help in developing a coherent international investment policy for all member states. It is further believed that the MAI will enhance transparency and predictability of outcomes in investor – state process. Through the MAI, the linkage with other related international agenda such as environment and human rights can be found as the whole world community will be part of the negotiation and implementation of this global instrument.

⁵ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2013* 'Global and regional investment trends' at 103 available at http://unctad.org/en/publicationslibrary/wir2013_en.pdf accessed on 20/05/2014; see also UNCTAD *World Investment Report 2014* 'investing in the SDGs: An Action Plan' at xxiv available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed on 30/06/2014.

⁶ See Chapter Six of this work under Subheadings 6.2.3.

With regard to the establishment of the courts, this research also concludes that the time is ripe for the establishment of an independent international investment court and the appellate court thereto which will be charged with the jurisdiction to hear all investor – state disputes at international level.⁷ First of all, the court will help to address the problem of costs in investor – state adjudication process. With a permanent court structure presided by fully employed judges’ the costs for litigation will definitely go down as the court members are normally paid by the establishing institution and not the parties. Secondly, the court will address the issue of dispute settlement timeframe. The rules of the court will stipulate the timeframe within which a dispute needs to be resolved. Thirdly, it is expected that the investment court which is permanent and not party based will create a stable and balanced jurisprudence in which government policy making space is protected and the foreign investors’ interests are also taken into account



The appellate court on the other hand, will benefit the system by being a corrective body for legal and factual errors committed by the international investment court. In addition, the appellate structure is expected to bring predictability and consistency as well. It is submitted here that consistency and predictability will ultimately help to develop the doctrine of precedent in investor – state adjudicative system.

Conclusively, it is submitted here that, in consideration of all of the above, the time is indeed ripe to establish the MAI and its court to address the legitimacy crisis in investor – state adjudication process. The merits of so doing by far outweigh any demerits.

⁷ See Chapter Six of this work under Subheadings 6.3.

7.2 Summary of recommendations

This research is making two categories of recommendations.⁸ The first category contains ‘alternative’ solutions aimed at improving the existing investor – state arbitration system. The second category calls for the enacting the MAI which will provide for the establishment of the international investment court with an appellate structure. These recommendations are summarised herein below.

7.2.1 Interim/alternative recommendations

The first recommendation is that there is a need to establish the investor – state Dispute Management Centre which will be charged with the duty to provide legal assistance to poor developing countries.⁹ The Centre will be an important tool to address the issue of expensive adjudication process. It is submitted that the centre will increase the legitimacy of the whole investor – state arbitration system as poor countries will receive the same level of representation and access before the tribunals without fear of litigation costs.

The second recommended measure is to use the host state courts to settle investor- state disputes.¹⁰ This will help avoid tribunals’ encroachment on government policy making space. This research believes that local court judges are better placed to know the host states other

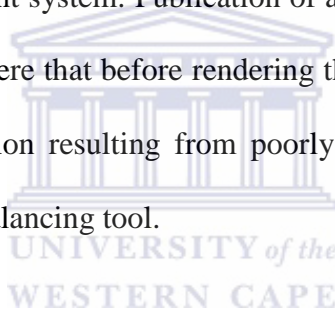
⁸ For interim or alternative recommendations see Chapter Five of this work under Subheadings 5.3.1 – 5.3.5.

⁹ See Chapter Five of this work under Subheadings 5.3.1.

¹⁰ See Chapter Five of this work under Subheadings 5.3.2.

policy objectives hence well positioned to grant deference necessary for such a state to implement those objectives. In addition, the use of host state will enhance transparency in the system as a court of law normally conducts their proceedings in open court.

Thirdly, this research proposes that, publication of investor – state awards be mandatory.¹¹ This will increase transparency, predictability, certainty and consistency. The availability of prior decided cases which have similarity with the new ones could be very helpful for the presiding tribunal to arrive at more or less similar conclusions hence enhancing certainty and predictability in investor – state dispute settlement system. Publication of awards will also increase the quality of future awards. It is submitted here that before rendering the award arbitrators will be diligent in order to avoid public humiliation resulting from poorly reasoned awards. In other words, transparency acts as a check and balancing tool.



Fourthly, this research recommends for the enhancement the use of member states interpretative guidelines/statements.¹² The fact that a BIT is a creature of the respective state parties, it is imperative that state parties should be mandated to provide the guidelines on the scope of a particular BIT provisions. This research submits that the object and purpose of the treaty is well understood by the parties themselves. Hence any interpretative statement by the state members will be important to the tribunal in ascertaining the meaning of a provision from a respective BIT. It follows therefore that tribunals' discretionary power will be contained to the level intended by the state parties. In other words, the Tribunal will not be in a position to encroach on

¹¹ See Chapter Five of this work under Subheadings 5.3.3.

¹² See Chapter Five of this work under Subheadings 5.3.4.

matters to which the state parties has set the limitation otherwise the principle of ultra vires will be readily applied against such a tribunal. In addition, the guidelines will help to solidify and ultimately create a consistent jurisprudence on the meaning and scope of investment principles.

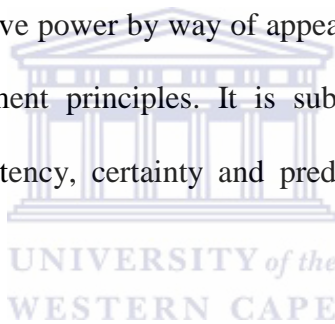
Lastly, this research recommends for the formation of a working group which should be entrusted to provide interpretation to basic international investment principles.¹³ It is recommended here that the working group should focus on providing clear interpretation on the meaning of controversial international investment law principles which have sparked the legitimacy crisis. The principles to be interpreted includes but are not limited to: the term investment, the scope of an umbrella clause, the application of Most Favoured Nations (MFN) principle to a third party on procedural matters, the application of the defence of necessity and Non Precluded Measures (NPM) during emergency situations, the scope of the principle of expropriation, the meaning of fair and equitable treatment (FET), and lastly the meaning of full protection and security.

It is submitted here that, these interim measures do not address the legitimacy issues cumulatively hence their potentiality is limited to the specific issue they address. It should be further noted that, for some of these measures to be realised, it will require amendments to the respective BITs and the institutional rules. It is submitted therefore that, the implementation of these alternative solutions may not be realised easily. It is on that basis that this research calls for a lasting solution which is the creation of the MAI and the courts.

¹³ See Chapter Five of this work under subheadings 5.3.5.

7.2.2 Major Recommendation

This research has made one major recommendation which is the call for the establishment of the MAI and two courts: an international investment court and an international investment appellate court.¹⁴ The research believes that once all disputes are settled under one roof then all the issues will be properly addressed. The problem of inconsistency will be eliminated easily by the establishment of the court structure which will ensure that the court of first instance as well the appellate court embraces the doctrine of precedent, *res judicata*, *lis pendens* and have rules which provides for consolidation of related disputes. In addition, it is recommended for establishment of an appellate court which will have power by way of appeal, to provide the final interpretation to the basic international investment principles. It is submitted that the court will play a significant role in creating consistency, certainty and predictability in the respective dispute settlement system.¹⁵



With regard to the lack of institutional safeguard for independence and impartiality of adjudicators, this research still finds that a MAI is the appropriate instrument to address the issue. The MAI once created will have to address how the adjudicators in its courts will be appointed and how long will they serve in the courts.¹⁶ This means that the MAI as the governing instrument will stipulate the qualifications of its judges, tenure of the judges and their remunerations and emoluments. The MAI may also clearly provide that only applicants who passed the institute exam can serve in the court or appear as counsel before court. This can be

¹⁴ See Chapter Six of this work under Subheadings 6.2.2.

¹⁵ See Chapter Six of this work under Subheadings 6.3.2.

¹⁶ See Chapter Six of this work under Subheadings 6.5.5.

stipulated in the MAI itself or protocols to the MAI. The inspiration on how the independence and impartiality can be guaranteed through the MAI can be gathered from the WTO Dispute Settlement Understanding,¹⁷ the Statute of the Court of Justice of the European Union¹⁸ and the statute of the International Court of Justice.¹⁹ In order to address this issue it would be expected that the MAI will require the aspiring judges of the court to possess experience and adequate knowledge on public law, international law and investment law. With such kind of a bench it is submitted that all parties to the investor – state disputes will develop confidence in the adjudication process.

On the issue of lack of transparency in public interest disputes, again, this research still believes that establishing a MAI with a provision which makes the hearing process in investor – state dispute to be open for all.²⁰ The provision should demand that the notice of dispute, the response thereof, pleadings, third party submissions, transcripts of hearing and decisions are to be promptly available to the public for inspection. In addition, it is recommended that the rules should allow the public to attend any hearing except where there is a need to protect confidential information. With this kind of rules in the international investment court, the issue of lack of transparency will be squarely addressed.

On the issue of encroachment on government policy making space, the research recommends that the MAI should have a provision guaranteeing the host state the right to regulate and to

¹⁷ The WTO Dispute Settlement Understanding available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm accessed on 24/03/2014.

¹⁸ Protocol No. 3 on the European Court of Justice available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:265:FULL:EN:PDF> accessed on 14/04/2014.

¹⁹ See the Statute of International Court of Justice all available at available at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> accessed on 08/04/2014.

²⁰ See Chapter Six of this work under Subheading 6.5.7

pursue development goals in a manner that suits its interest.²¹ Furthermore, the research finds that the UNCTAD which will be hosting the MAI, is in a better position to coordinate the establishment of an institute which will be responsible for the training for aspirants of the posts of judges in the international investment court and the international investment appellate court. This research believes that judges who are trained on international investment law are in a better position of interpreting the basic principles in a manner that strikes a balance between the interests of foreign investors and that of the host state.

This research also finds that establishment of the MAI and the court is the best option to address the problem of parallel proceedings.²² Once the disputes are settled under one roof, the application of the principles of fork in the road principle, res judicata and lis pendens becomes even more realistic. It is only when the disputes are settled under one roof that the parties and the bench will be able to know about the existence of another dispute pending or resolved with same parties and cause of action.

In addition, this research believes that through the MAI and courts, the litigation costs can easily be controlled.²³ It is recommended for a permanent court which will be presided by salaried permanent judges. This will reduce the litigation costs to a large extent. Furthermore this research recommends that a Trust Fund be established that will be used to carter for litigation costs where one of the parties is a developing country. The MAI should stipulate that all member states to the MAI should contribute to the Fund on annual basis. This Fund if established will boost the legitimacy of the system as the courts will be accessible to both, poor and rich litigants.

²¹ See Chapter Six of this work under Subheadings 6.5.3.

²² See Chapter Six of this work under Subheadings 6.3.1.

²³ See Chapter Six of this work under Subheadings 6.3.1.

In furtherance of the above, this research finds the UNCTAD which brings together major players from the international investment community to discuss challenges and opportunities and to promote investment policies and partnerships for sustainable development and equitable growth, is better positioned to initiate the MAI negotiations and host the MAI and the relevant courts.²⁴ It is recommended that the MAI and the Courts be established and hosted at the Division for Investment and Enterprise of the UNCTAD. The Division is recognised as ‘a global centre of excellence on issues related to investment and enterprise for sustainable development’.²⁵ The division also provides technical support to over 150 world economy. This research strongly advises that hosting the dispute settlement system should be considered as technical assistance to the international investment regime.

Conclusively, it is submitted here that the time is ripe for the establishment of the MAI and the courts for the sake of developing the international investment law in a proper manner and in accordance to the rule of law principles. It is through the MAI and the courts that international investment law will become a consistent, predictable, certain, transparent, cost efficient, timely and balanced adjudicative system.

WORD COUNT: text: 73,475.

Footnotes: 41,416

TOTAL 115,274

²⁴ See Chapter Six of this work under Subheadings 6.6.2.

²⁵ United Nations Conference on Trade and Development (UNCTAD), Investment and Enterprise Division available at <http://unctad.org/en/pages/DIAE/DIAE.aspx> accessed on 26/05/2014.

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