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### Creating an ICSID Appellate Body

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# CREATING AN ICSID APPELLATE BODY

*Johanna Kalb\**

*Since the creation of the International Centre for Settlement of Investment Disputes (ICSID) over forty years ago, states have increasingly relied on this body to resolve conflicts in bilateral investment treaties (BITs). In light of such exponential growth in the number of disputes brought to the ICSID, the ICSID Secretariat has proposed the adoption of an optional appellate body to promote “coherence and consistency” in ICSID arbitrations. This comment argues that, given the realities of tribunal decision-making and of the interdependent global economy, states should consider taking steps towards reforming the ICSID system as a way of maximizing their remaining sovereignty and autonomy.*

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## INTRODUCTION

Attracting foreign direct investment (FDI) is key to economic growth for both developing and developed states. In the last few decades, FDI has expanded tremendously. From 1982 to 2003, FDI inflows increased from \$59 billion to \$560 billion,<sup>1</sup> peaking in 2000, at \$1,393 billion,<sup>2</sup> then falling somewhat as the global economy experienced a recession. Accompanying this rapid increase in cross-border investment has been a proliferation of legal agreements designed to protect and facilitate it. Bilateral investment treaties (BITs) establish frameworks for investment by creating, as the preamble to a typical BIT states, “favorable conditions for greater investment by nationals and companies of one state in the territory of the other state.”<sup>3</sup> One of the most significant aspects of the BIT regimes is that they require the party signatories to submit in advance to binding international arbitration of investment disputes. The mechanism most frequently chosen is the International Centre for the Settlement of Investment Disputes (ICSID).<sup>4</sup>

<sup>1</sup> U.N. Conference on Trade and Development, *World Investment Report 2004: The Shift Towards Services*, U.N. Doc. UNCTAD/WIR/2004 (2004), available at [http://www.unctad.org/en/docs/wir2004overview\\_en.pdf](http://www.unctad.org/en/docs/wir2004overview_en.pdf) (last visited Jan. 1, 2005).

<sup>2</sup> Export Development Canada, *EDC Economics: Economic Analysis and Forecasting* (Dec. 2003), available at [http://www.edc.ca/docs/ereports/monitors/fdi/FDIMonitorFull\\_e.pdf](http://www.edc.ca/docs/ereports/monitors/fdi/FDIMonitorFull_e.pdf) (last visited Jan. 15, 2005).

<sup>3</sup> W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. 115 (2003), available at 2003 WL 24025545 (referencing the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Panama for the Promotion and Protection of Investments, Oct. 7, 1983, U.K.-Pan., pmbl., 23 ILM 708, 708 (1984)) [hereinafter *Indirect Expropriation*].

<sup>4</sup> *Id.* There are now over 1,500 BITs that reference ICSID. *Id.*

In 1964, the World Bank was asked to draft a convention that would establish facilities and procedures to be available on a voluntary basis for the settlement of investment disputes between contracting states and nationals of other contracting states.<sup>5</sup> The ICSID<sup>6</sup> was created for this purpose, with the overarching goal of enabling increased flows of international investment, primarily between developing and developed countries.<sup>7</sup> The ICSID is unique amongst international adjudicatory institutions in that it has no permanent court and its tribunals are convened on an ad hoc basis upon request by a contracting state or national of another contracting state.<sup>8</sup> Additionally, and perhaps most significantly, “ICSID is the first truly international institution which administers tribunals with judicial powers to allow a private party to bring the equivalent of an action against a state.”<sup>9</sup> To date, 140 states have ratified the Convention. As the number of BITs has grown exponentially, so has the number of arbitrations under the ICSID.<sup>10</sup>

The growth in ICSID activity has raised new concerns about the structure and effectiveness of its dispute resolution mechanism. Recognizing that an increasing number of Convention signatories have begun to include provisions for appellate proceedings in their new BITs,<sup>11</sup> the ICSID Secretariat

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<sup>5</sup> Int’l Bank for Reconstruction and Dev., Res. No. 214 (Sep. 10, 1964).

<sup>6</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention], available at <http://www.worldbank.org/icsid/basicdoc-archive/9.htm>.

<sup>7</sup> “In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.”

International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention for the Settlement of International Investment Disputes between States and Nationals of Other States (Mar. 18, 1965) 23-33, available at <http://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/doc>.

<sup>8</sup> K.V.S.K. NATHAN, THE ICSID CONVENTION: THE LAW OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES 51 (2000).

<sup>9</sup> *Id.* at 51-52.

<sup>10</sup> Through 2001, 85 ICSID arbitrations were registered. Since then, an additional 73 arbitral proceedings have been initiated. Until the early 1990s, the number of BITs increased only moderately. From the mid-1990s to the present, however, the number of BITs in force grew from 700 to 2181. Reisman & Sloane, *Indirect Expropriation*, *supra* note 3, at 115.

<sup>11</sup> According to the ICSID, “[b]y mid-2005, as many as 20 countries may have signed treaties with provisions on an appeal mechanism for awards rendered in investor-to-State arbitrations

has recently proposed that the ICSID Convention should provide for an optional, common appellate mechanism. The express goal of creating a standardized appellate process is to promote "coherence and consistency" in ICSID arbitrations.

In this comment I present a framework in which states should consider the appellate body proposal. I begin by locating the diverging interpretations within the rapidly growing ICSID "jurisprudence." I argue that the contradictions in the developing jurisprudence threaten the success of the ICSID system in promoting foreign direct investment. I then evaluate the effectiveness of the proposed appellate body as a remedy, in light of the potential causes of this trend and as compared to the current mechanisms of control in the ICSID system. I suggest that if the source is essentially administrative, resulting from the growing use of the system, the appellate body may in fact help to improve the system outcomes. In contrast, if the source of ICSID incoherence is inherently political, then legalization of the system may do little to address, and may even exacerbate, the underlying conflict. I offer illustrative case studies of two other appellate systems to demonstrate the relationship between the causes of the jurisprudential inconsistencies and the efficacy of the appeals mechanism.

Because the sources of the inconsistency are likely to be both administrative and political, if the appellate body is to be successful, states will have to make a concerted effort to transform it from a consent-based, individualized system of dispute resolution to one that is rule-based and consistent. To make this transition, states will have to substantially revise the historical understanding of their role in the international system. I argue that in practice, that role has already changed—by giving investors standing to bring suit against them, state sovereigns have agreed to become more equal players in the international investment regime. While the increased legalization of the ICSID system may be viewed with suspicion as a transfer of rule-making power from states to appellate arbitrators, and therefore as a challenge to state sovereignty, I argue that it will actually increase sovereign control by creating the transparency and predictability to allow states to optimize the benefits of their participation.

The comment proceeds as follows. Section I provides an overview of the current ICSID system through a description of current ICSID procedures and a more detailed explanation of the proposed mechanism for appellate re-

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under the treaties." 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> [hereinafter *Possible Framework Improvements*].

view. In Section II I examine the current body of ICSID cases to demonstrate that there are significant inconsistencies around key issues of international investment law interpretation and explain in greater detail why this trend toward inconsistency threatens the fundamental purpose of bilateral investment treaties. Section III explores the potential causes of this trend and evaluates the current systems of control in the ICSID system and presents a comparative analysis of the dispute resolution procedures of the World Trade Organization and the Canada-United States Free Trade Agreement. Finally, in Section IV I conclude by offering a revised understanding of the place states occupy within the system of international investment arbitration. I argue that, given the realities of tribunal decision-making and of the interdependent global economy, states should consider taking steps towards reforming the ICSID system as a way of maximizing their remaining sovereignty and autonomy.

### I. ICSID AND THE APPELLATE BODY PROPOSAL

The Convention provides for explicit procedures for commencing and conducting arbitration under ICSID. I will not fully describe all of the rules, but rather give a general description of the procedure to situate the discussion of the proposed changes. A contracting state, or a national of the contracting state, must send a written request to the Secretary-General at the ICSID headquarters “contain[ing] information concerning the issues in dispute, the identity of the parties and their consent to arbitration.”<sup>12</sup> The Secretary-General registers the request or, under very limited circumstances, refuses it<sup>13</sup> if he finds “that the dispute is manifestly outside the jurisdiction of the Centre.”<sup>14</sup> After the dispute is registered, the parties are encouraged to establish the tribunal “as soon as possible.”<sup>15</sup>

The rules governing the creation of the tribunal are extremely flexible to permit maximum party autonomy. A tribunal may have a single arbitrator, or any uneven number of arbitrators.<sup>16</sup> The tribunal may not consist of a ma-

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<sup>12</sup> *ICSID Convention*, *supra* note 6, art. 36(2).

<sup>13</sup> *Id.*

<sup>14</sup> ICSID Institution Rule 6(1)(b). “The threshold test is purposefully lenient, as the drafters of the Convention intended to prevent registration only of cases patently lacking a jurisdictional foundation. This would be the case, for example, where one party is neither a Contracting State nor a national of a Contracting State, or where the claimant had produced no evidence of written consent to ICSID jurisdiction.” LUCY REED ET AL., *GUIDE TO ICSID ARBITRATION* 76 (2004).

<sup>15</sup> *ICSID Convention*, *supra* note 6, art. 37(1).

<sup>16</sup> *Id.* art. 37(2)(a).

jority of arbitrators with the same nationality as either party, unless the arbitrators are selected by party consent.<sup>17</sup> If the parties have not previously agreed on a number of arbitrators or the method for their appointment, Arbitration Rule 2 creates a procedure for exchanging proposals and provides for a decision within 60 days, subject to extension by mutual agreement of the parties. If the parties cannot agree, a three-member panel is created; each party names one arbitrator and the two parties then agree on a third arbitrator who becomes president of the tribunal. If the parties cannot agree on the third arbitrator, one is appointed by the Centre. ICSID maintains a Panel of Arbitrators composed of candidates selected by the parties and by the Centre. Parties may appoint arbitrators from this Panel, but are not obliged to do so. Once a tribunal is constituted, the Convention provides specific procedures governing the arbitration.<sup>18</sup> Each case is decided individually and is binding only on the parties.

A significant number of disputes are resolved by settlement after the registration of the dispute with ICSID. Many disputes are also dismissed for lack of jurisdiction. Assuming that the arbitration proceeds to award, the arbitrators generally have 120 days after the close of proceedings for drafting their award. The Secretary-General must then authenticate the original text and dispatch copies to the parties.<sup>19</sup> "There is no provision...for ICSID to scrutinize or otherwise review a draft award."<sup>20</sup> An award must deal with every question submitted to the tribunal and state the reasons upon which it is based.<sup>21</sup> Currently, international arbitral awards are final and may not be appealed.<sup>22</sup> Party states are required to "recognize and enforce monetary awards immediately" as if they were final judgments of their own domestic courts.<sup>23</sup> The Convention "accepts no grounds whatsoever for refusing recognition and enforcement of ICSID tribunal awards."<sup>24</sup> The sole process by which an ICSID award may be reviewed is through the provision for annulment. Either party may request annulment of an award if: (1) the tribunal was not properly constituted, (2) the tribunal manifestly exceeded its powers, (3) the proceedings were tainted by arbitrator corruption, (4) the tribunal de-

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<sup>17</sup> *Id.* art. 39.

<sup>18</sup> For a more in-depth discussion of the proceedings, see generally REED, *supra* note 14.

<sup>19</sup> ICSID Convention, *supra* note 6, art. 49(1).

<sup>20</sup> REED, *supra* note 14, at 89.

<sup>21</sup> ICSID Convention, *supra* note 6, arts. 48(2)-48(3). These provisions are mandatory and require arbitrator compliance. REED, *supra* note 14, at 89.

<sup>22</sup> REED, *supra* note 14, at 95.

<sup>23</sup> *Id.* at 96.

<sup>24</sup> *Id.*

parted from a fundamental rule of procedure, or (5) if the award failed to state the reasons upon which it was based.<sup>25</sup>

Once a request for annulment is lodged, the chairman of the ICSID administrative council appoints a committee from a panel of names proposed by states' members.<sup>26</sup> The committee is effectively a second tribunal, following the procedures prescribed by the Convention for the first tribunal.<sup>27</sup> If the committee finds that there was a violation of the standards, it is authorized to annul the award entirely, or in part. If the award is annulled, either party may restart the process by submitting the dispute to a new tribunal.<sup>28</sup> The use of the annulment proceedings will be discussed in greater detail below in connection with the discussion of the advantages of the proposed appellate body.<sup>29</sup>

With the growth in recent years in the number of arbitral panels constituted and awards rendered, the potential for interpretive inconsistencies within and across BIT regimes has increased.<sup>30</sup> In response, the Centre has proposed the creation of an appellate mechanism. To avoid the necessity of an amendment to the Convention that would require the consent of all 140 contracting states, the appellate body would be established under a set of ICSID Appeals Facility Rules adopted by the Administrative Council of ICSID. In this case, referral to the Appeals Facility would be optional and an investment or other treaty could then provide "that awards made in cases covered by the treaty, would be subject to review in accordance with the ICSID Appeals Facility Rules."<sup>31</sup>

The proposed rules would provide for a panel composed of 15 persons elected by the Administrative Council of ICSID on the nomination of the Secretary-General of the Centre.<sup>32</sup> Appeals panel members would serve for six years and each member would be a national of a different country.<sup>33</sup> "They would all have to be persons of recognized authority, with demonstrated expertise in law, international investment and investment treaties."<sup>34</sup>

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<sup>25</sup> *ICSID Convention*, *supra* note 6, art. 52.

<sup>26</sup> *Id.* art. 52(3).

<sup>27</sup> *Id.* art. 52(4).

<sup>28</sup> W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* 50 (1992).

<sup>29</sup> See discussion *infra* Section III.B.1.

<sup>30</sup> See discussion *infra* Section II.

<sup>31</sup> *Possible Framework Improvements*, *supra* note 11, at 19.

<sup>32</sup> *Id.* at 21.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*



Unless the disputing parties determined otherwise, appellate tribunals would consist of three members appointed by the Panel in consultation with the parties.<sup>35</sup> An award could be challenged for a clear error of law or a serious error of fact, as well as on any of the grounds for annulment.<sup>36</sup> While each decision would continue to be applicable only to the parties to that dispute, the creation of a standing appellate body would help ensure that the fundamental principles of investment protection remain relatively constant from one case to the next.

## II. INCONSISTENCY: A GROWING PROBLEM IN ICSID AWARDS

One of the primary objections to adopting the proposed appellate body is that it is unnecessary to the continued survival and success of the ICSID system.<sup>37</sup> In this section, I argue that the problem of inconsistent holdings in ICSID awards is present and growing, although this phenomenon, is only beginning to be recognized in the academic literature.<sup>38</sup> Through an examination of the interests of each kind of participant in the ICSID system, I demonstrate that consistency in BIT interpretation is critical to its success.

This section identifies and summarizes some of the key areas where disagreements are emerging to demonstrate that there are growing divergences. I focus on three concepts common to most bilateral investment treaties and NAFTA: the clauses on "national" treatment, "fair and equitable" treatment, and "most favored nation" status.<sup>39</sup> After illustrating these contradictions in

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Interview with W. Michael Reisman, Professor, Yale Law School and Rudolph Dolzer, Professor, University of Bonn in New Haven, Ct. (Dec. 6, 2000) [hereinafter *Reisman & Dolzer Interview*].

<sup>38</sup> See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1558-83 (2005). Several commentators have noted the possibility of incoherence created by ad hoc tribunals. See David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 *GEO. WASH. INT'L L. REV.* 651, 658 (2001) (identifying the lack of "any assurance that the ad hoc arbitral decisions ... emerging under Chapter 11 will be consistent"); Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 *MICH. J. INT'L L.* 697, 757 (noting that "ad hoc...arbitration panels...have the potential for creating confusion for investors"); see also Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 *VAND. J. TRANSNAT'L L.* 37, 67 (2003) (noting contradictions in tribunal interpretations of "fair and equitable treatment").

<sup>39</sup> For each concept I compare the interpretations of two or more tribunals to demonstrate how they differ. The purpose in doing so is not to suggest that one reading is "better" than another, but to point out that real differences are emerging as common BIT clauses are more

BIT interpretation, I argue that they are, in fact, a threat to the success of international investment regimes, and that structural reform is necessary to reverse this trend. I address the issue from two perspectives. First, I examine the costs of inconsistencies to the “insiders,” the private investors, and the state sovereigns who are direct participants in the ICSID system. I demonstrate how inconsistency in BIT interpretation increases the cost of the foreign direct investment for private investors and for governments alike. Second, I introduce the perspective of the “outsiders.” I argue that in the current global political environment in which the decisions on international investment disputes have been the source of widespread critique, lack of consistency in decision-making threatens the *public* legitimacy of these legal regimes and undermining their success in a less direct, but equally damaging way.

#### A. *National Treatment: Defining “Like Situations”*

Investment protection treaties frequently contain a clause on national treatment which guarantees to foreign investors that they will be treated in a non-discriminatory way, or, in other words, on a basis no less favorable than that accorded in like situations to investment or associated activities of the recipient country’s own nationals or companies. The seemingly simple words “in like situations” have resulted in directly contradictory interpretations by arbitral tribunals.

In *Feldman v. Mexico*, Mr. Feldman (“the Claimant”), a United States citizen, commenced arbitration against the United Mexican States (“the Respondent”) on behalf of the Corporacion de Exportaciones Mexicanas, S.A. de C.V. (CEMSA), alleging that Mexico’s refusal to rebate excise taxes applied to cigarettes exported by CEMSA constituted a breach of Mexico’s NAFTA Chapter 11 obligations.<sup>40</sup> NAFTA’s Article 1102(2) provides that: “Each Party shall accord to investments of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”<sup>41</sup> The Claimant argued that CEMSA was denied national treatment

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frequently interpreted by a growing number of arbitrators. While some of these interpretive inconsistencies may result from differences in BIT text, I have attempted to select concepts that are commonly worded across BITs, and that are commonly interpreted by the tribunals with reference to awards based on other BITs.

<sup>40</sup> *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, ¶ 1 (Dec. 16, 2002), 42 I.L.M. 625 (2003).

<sup>41</sup> *Id.* ¶ 165.

because the Mexican Ministry of Finance and Public Credit permitted at least three domestic resellers of cigarettes to export cigarettes and to receive rebates, but did not accord the same treatment to Claimant.<sup>42</sup>

The tribunal said that:

In the investment context, the concept of discrimination has been defined to imply *unreasonable* distinctions between foreign and domestic investors in like circumstances...[T]here are at least some rational bases for treating producers and re-sellers differently, e.g., better control over tax revenues, discourage smuggling, protect intellectual property rights, and prohibit gray market sales, even if some of these may be anti-competitive.<sup>43</sup>

The tribunal went on to hold that “the ‘universe’ of firms in like circumstances is defined as those foreign-owned and domestic-owned firms that are in the business of reselling-exporting cigarettes. Other Mexican firms that may also export cigarettes...are not in like circumstances.” In *Feldman*, therefore, “like circumstances” was defined by both sector and activity. The tribunal found that there were rational policy decisions, which were non-discriminatory, for treating businesses engaged in different activities differently. The *Feldman* tribunal did not directly address the issue of differences by sector, perhaps because that question seemed less obvious and was not debated by the parties.

In *Occidental v. Ecuador*, the tribunal came to a contradictory outcome.<sup>44</sup> In 1999, Occidental Exploration and Production Company (OEPC), a company registered in the United States, entered into a contract with Petroecuador, a State-owned corporation of Ecuador.<sup>45</sup> OEPC applied regularly to the Servicio de Rentas Internas (SRI) for the reimbursement of Value-Added Tax (VAT) paid by the Company on purchases required for its exploration and exploitation activities and on the ultimate exportation of the oil produced. Reimbursement was made on a regular basis.<sup>46</sup> Beginning in 2001, SRI began to deny VAT reimbursement and to request repayment of amounts previously reimbursed.<sup>47</sup> OEPC challenged actions under the bilateral investment treaty between the United States and the Republic of Ecua-

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<sup>42</sup> *Id.* ¶ 155.

<sup>43</sup> *Id.* ¶ 170.

<sup>44</sup> Occidental Exploration and Prod. Co. v. Republic of Ecuador, Final Award, LCIA Case No. UN 3467 (July 1, 2004), available at [http://ita.law.uvic.ca/alphabetical\\_list.htm#no](http://ita.law.uvic.ca/alphabetical_list.htm#no).

<sup>45</sup> *Id.* ¶ 1.

<sup>46</sup> *Id.* ¶ 2.

<sup>47</sup> *Id.* ¶ 3.

dor.<sup>48</sup> Article II(1) of the Treaty establishes the obligation to treat investments and associated activities “on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies.”<sup>49</sup>

OEPC argued that Ecuador breached its treaty obligations because a number of companies involved in the export of *other goods*, particularly flowers, mining, and seafood producers, received VAT refunds.<sup>50</sup> It asserted that the meaning of “in like situations” does not refer to those industries or companies involved in the same sector of activity, such as oil producers, but to companies that are engaged in export even if encompassing different sectors.<sup>51</sup> Ecuador responded that “in like situations” could only mean that all companies in the same sector are to be treated alike, so OEPC could only claim discriminatory treatment if it was being treated differently than other oil producers. The comparison could not be extended across sectors because “the whole purpose of the VAT refund policy is to ensure that the conditions of competition are not changed, a scrutiny that is relevant only in the same sector.”<sup>52</sup> Because Petroecuador, the domestic oil producer, was also denied VAT refunds, the treatment of foreign-owned companies and national companies, Ecuador argued, was not different.<sup>53</sup>

The tribunal found that: “‘in like situations’ cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken.”<sup>54</sup> Given the result in *Feldman*, one might have expected *Occidental* to turn out differently. The *Feldman* tribunal’s reasoning suggested that it would be hesitant to find discrimination when differences in treatment had a rational basis. Therefore, it limited review of companies to those in the same sector, performing the same activity. One cannot be sure how *Occidental* would have come out, had it been decided by the *Feldman* panel, but it seems at least arguable that policies distinguishing between the oil industry and the flower industry would have been found to have a rational basis. While it may be possible to distinguish these two situations in such a way so as to assimilate both outcomes, because each arbitral tribunal decides only

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<sup>48</sup> *Id.* ¶ 4.

<sup>49</sup> *Id.* ¶ 167.

<sup>50</sup> *Id.* ¶ 168.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* ¶ 171.

<sup>53</sup> *Id.* ¶ 172.

<sup>54</sup> *Id.* ¶ 173.

its own case, there is no requirement that any panel give that sort of explanation. More significantly, the existence of both decisions means that investors and state parties attempting to understand the protections and obligations of bilateral investment treaty will receive little guidance from the past ICSID jurisprudence.

### B. *Fair and Equitable Treatment*

Another concept that is frequently litigated is the meaning of “fair and equitable” treatment. The most frequent area of disagreement is whether this concept requires only a minimum standard of treatment under international law or whether within the BIT context an additional fairness requirement is imposed.<sup>55</sup>

The “fair and equitable” provision has been the source of continuing dispute in NAFTA arbitrations. In *Metalclad Corporation v. United States*, the tribunal interpreted Article 1105 of NAFTA as requiring more than a minimum standard of equitable treatment. NAFTA Article 1105(1) provides that “each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”<sup>56</sup> The tribunal interpreted article 1105 as including a requirement of “transparency” referenced in the statement of principles and rules that introduces the NAFTA agreement.<sup>57</sup> The tribunal said:

[This reference] includes the idea that all relevant legal requirements for the purposes of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party ... become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with relevant law.

This interpretation of the requirements of 1105 was subsequently adopted in *Pope & Talbot v. United States*, over the protestations of both Canada and

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<sup>55</sup> Brower, *supra* note 38, at 68.

<sup>56</sup> *Metalclad Corp. v. United Mexican States*, Merits, Award, ICSID Case No. ARB(AF)/97/1, ¶ 74 (NAFTA, Aug. 30, 2000), 40 I.L.M. 36, 47 (2001) [hereinafter *Metalclad Award*].

<sup>57</sup> *Id.* ¶ 76.

the United States. The party signatories both adopted the “minimum standard” interpretation of this clause. The more inclusive reading of the requirements of 1105, adopted in *Metalclad* and *Pope & Talbot*, was subsequently rejected by the Free Trade Commission, which adopted an official interpretation of 1105(1) on July 31, 2001. The new interpretation was explained in *Loewen v. United States*, in which the tribunal stated that “fair and equitable treatment” constitutes an obligation “only to the extent that [it] is recognized by customary international law.”<sup>58</sup> The *Loewen* panel explicitly disregarded the opinions of the tribunals in *Metalclad* and *Pope v. Talbot*.

Despite the clarification by the Free Trade Commission, the decision by an ICSID tribunal in *Waste Management v. United States* seems to be moving back towards the position adopted by the *Metalclad* and *Pope & Talbot* tribunals.<sup>59</sup> The *Waste Management* tribunal cited another ICSID tribunal’s statement that “both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.”<sup>60</sup> It then reviewed a series of arbitral awards both prior to and after the FTC’s interpretation to hold that:

The minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.<sup>61</sup>

The *Waste Management* tribunal appears to have reintroduced the additive interpretation of the “fair and equitable” concept that the FTC specifically rejected. Notably the concept of lack of transparency that was the source of dispute in *Metalclad*—and was rejected by both Canada and the United States as being part of the “fair and equitable” standard—has reappeared in *Waste Management*, but as part of customary international law.

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<sup>58</sup> *Loewen Group, Inc., v. United States*, ICSID Case No. ARB(AF)/98/3 (Award, NAFTA June 26, 2003), 42 I.L.M. 811, ¶ 128 [hereinafter *Loewen Award*].

<sup>59</sup> *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3 (NAFTA Apr. 30, 2004).

<sup>60</sup> *Id.* ¶ 92 (citing *ADF Group Inc. v. United States of America*, Award, ICSID Case No. ARB(AF)/00/, ¶ 179 (Jan. 9 2003)).

<sup>61</sup> *Id.* ¶ 98.

Outside the NAFTA context, the interpretation of “fair and equitable” is also inconsistently interpreted. In *Genin v. Estonia*, a case in which the addition of a “transparency” requirement might have resulted in a different outcome, the tribunal held that Article II(3)(a) of the BIT between the United States and Estonia, which requires signatory governments to treat foreign investment in a “fair and equitable” way, should be interpreted in light of established customary international law. The tribunal stated that:

While the exact content of this standard is not clear, the Tribunal understands it to require an “international minimum standard” that is separate from domestic law, but that is, indeed, a minimum standard. Acts that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards or even subjective bad faith.<sup>62</sup>

The *Genin* tribunal therefore applied a minimum standard understanding of the requirements of the “fair and equitable” clause. The tribunal seemed unwilling to imply unfair treatment in cases when a rational basis exists for the state’s actions. As with the discrepancy that exists in the tribunals’ interpretation of “like circumstances,” the inconsistencies in the tribunals’ readings of “fair and equitable” means that the protections and obligations of a bilateral investment treaty are unclear.

### C. MFN Clauses

The interpretation of most-favored nation (MFN) clauses within the context of investment protection treaties is another area where arbitral decisions have not been entirely consistent and where the inconsistencies substantially impact parties’ rights. Most-favored nation clauses allow for “drafting by reference.”<sup>63</sup> When an MFN clause is included in

[A]n investment protection agreement (the “base agreement”), if one of the contracting parties has made an agreement with a third party (in a “third party agreement”) which favors nationals of the third country over those of the remaining party to the third agreement, nationals of the remaining party can claim the additional benefits provided under the third party agreement.<sup>64</sup>

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<sup>62</sup> *Genin v. Estonia*, Award, ICSID Case No. ARB/99/2, ¶ 367 (June 25, 2001), available at [http://ita.law.uvic.ca/alphabetical\\_list.htm#gi](http://ita.law.uvic.ca/alphabetical_list.htm#gi).

<sup>63</sup> GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY THE INTERNATIONAL COURTS AND TRIBUNALS 243 (3d ed. 1957).

<sup>64</sup> Rudolf Dolzer & Terry Myers, *After TECMED: MFN Clauses in Investment Protection Agreements*, 19 ICSID REV. – FOREIGN INVESTMENT L.J. 49 (2004).

Inconsistencies emerge in the determination of how broadly to interpret the scope of the rights covered by the MFN clause. Three recently decided cases have all decided this issue of scope in ways that are necessarily inconsistent and provide little direction to either the state or the investor as to how they may define the scope of their obligations and protections under that treaty in the future.

In *Maffezini v. Spain*, an ICSID tribunal interpreted a BIT between Spain and Argentina to hold that its MFN protections applied to the provisions on dispute resolution, as well as those dealing with substantive protections of foreign investment.<sup>65</sup> The *Maffezini* panel found that the dispute resolution element in an investment treaty is “inextricably related to the protection of foreign investors”<sup>66</sup> and concluded that:

[I]f a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investors’ rights and interests in the base treaty, such provisions may be extended to the beneficiary of the MFN clause as they are fully compatible with the *ejusdem generis* principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty.<sup>67</sup>

Despite this generally broad and expansive conclusion, the panel identified four exceptions to its application. The common element underlying the four exceptions was that “[a]ll four related to the expressed intentions of the parties, an intention that, according to the court, overrode an unexpressed intention imported by reason of MFN treatment.”<sup>68</sup> The four exceptions are as follows. First, an MFN clause cannot be invoked in a case in which one of the consenting parties conditioned its consent to arbitration on the exhaustion of local remedies. Second, an MFN cannot be used to overrule a “fork in the road” clause, “pursuant to which the contracting parties have a choice between submission to domestic courts or to international arbitration, and where the choice once made becomes final and irreversible.” Third, an MFN clause may not be invoked when an alternative system of arbitration

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<sup>65</sup> *Maffezini v. Spain*, Award on Jurisdiction, ICSID Case No. ARB/97/7, ¶ 54 (Jan. 25, 2000), available at [http://ita.law.uvic.ca/alphabetical\\_list.htm#mo](http://ita.law.uvic.ca/alphabetical_list.htm#mo) [hereinafter *Maffezini Award*].

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* ¶ 56.

<sup>68</sup> Dolzer & Myers, *supra* note 64, at 7. The *Maffezini* tribunal stated that: “As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might not have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor.” *Maffezini Award*, *supra* note 65, ¶ 62.



was explicitly selected by the parties. Finally, the MFN clause may not be applied where the parties “have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure.”<sup>69</sup> The panel held that “these very specific provisions reflect the precise will of the contracting parties.”<sup>70</sup> The basic policy driving the *Maffezini* decision was, therefore, “that the MFN clause does not override specific contractual situations in the base agreement.”<sup>71</sup>

In *Pope & Talbot v. Canada*, a NAFTA case decided two years later, the tribunal interpreted the presence of an MFN clause differently to override the intention of the states parties. In *Pope & Talbot*, a dispute arose over the meaning of Article 1105(1), which states: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”<sup>72</sup> The parties agreed that 1105(1) provided for a minimum standard of treatment, but “disagreed as to the content of the standard.”<sup>73</sup> The investor claimed the basic protections of international law, as well as certain “fairness elements.”<sup>74</sup> Canada, to the contrary, saw the fairness elements as being included within the general requirements of international law, and argued that the State’s conduct must be “egregious” to be actionable.

The tribunal sought the opinions of the two party governments in interpreting this clause—and both states agreed with Canada’s interpretation that there was no “cumulative effect.”<sup>75</sup> The panel, however, determined otherwise.<sup>76</sup> The panel’s decision relied in part on the “context, object and purpose of NAFTA” but the presence of additional MFN provisions appears to have been the determining factor. The panel held:

[T]here is a practical reason for adopting the additive interpretation to Article 1105. As noted, the contrary view of that provision would provide to NAFTA investors a more limited right to object to laws, regulations and administration than accorded to host country investors and investments as well as to those from countries that have

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<sup>69</sup> Dolzer & Myers, *supra* note 64, at 6.

<sup>70</sup> *Maffezini Award*, *supra* note 65, ¶ 63.

<sup>71</sup> Dolzer & Myers, *supra* note 64, at 7.

<sup>72</sup> *Pope & Talbot, Inc. v. Gov’t of Canada*, NAFTA/UNCITRAL Tribunal, Award on Merits, ¶ 117 (Nov. 26, 2002), 41 I.L.M. 1347, 1349 (2002), available at [http://ita.law.uvic.ca/alphabetical\\_list.htm#pr](http://ita.law.uvic.ca/alphabetical_list.htm#pr) [hereinafter *Pope & Talbot, Merits*].

<sup>73</sup> Dolzer & Myers, *supra* note 64, at 8.

<sup>74</sup> *Id.*

<sup>75</sup> For a discussion of the position of the United States, see *id.* ¶¶ 112-14.

<sup>76</sup> *Id.* ¶ 115.

concluded BITs with a NAFTA party. This state of affairs would surely run afoul of Articles 1102 and 1103, which give every NAFTA investor and investment the right to national and most favoured nation treatment.<sup>77</sup>

The tribunal went on to state that it “is unwilling to attribute to the NAFTA Parties an intention that would lead to such a patently absurd result.”<sup>78</sup> Interestingly, “the Tribunal expressly rejected according ‘deference’ to the intentions of the NAFTA draftsman due to their failure to produce evidence concerning this intention beyond the words of the treaty.”<sup>79</sup> While *Pope & Talbot* left open the possibility that the express intent of the parties, *as expressed in text*, could overcome a provision drafted into the agreement by reference through an MFN clause, it challenged the basic notion that the intent of the party states should be the dominant policy concern driving the Tribunal’s interpretation of the applicability of an MFN clause.

Further ambiguities into the applicability of MFN clauses were introduced by the ICSID panel decision in *Tecnicas Medioambientales Tecmed v. The United Mexican States*.<sup>80</sup> *Tecmed* involved an investment treaty between Mexico and Spain that included an MFN clause. The Claimant had received a contract to operate a landfill in Mexico, but was then denied a permit to run it.<sup>81</sup> The Claimant alleged that the denial was improper. One of the issues considered by the tribunal was “whether it could consider certain alleged conduct of the Respondent which occurred prior to the effective date of the subject agreement . . . in other words, whether the agreement applied retroactively.”<sup>82</sup> The Claimant argued, based on *Maffezini*, that: “1) the subject agreement contained an MFN clause; and 2) an Austrian investor under a Mexican-Austrian investment protection treaty of 1998 received more favorable treatment concerning the scope of the panel’s review; and 3) Claimant should be entitled to the same treatment as Austrian investor[s].”<sup>83</sup> The tribunal rejected this argument for retroactive application, determining that “the time dimension of application of [the BIT’s] substantive provisions . . . go[es] to the core of matters that must be deemed to be specifically negoti-

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<sup>77</sup> *Id.* ¶ 117.

<sup>78</sup> *Id.* ¶ 118.

<sup>79</sup> Dolzer & Myers, *After TECMED*, *supra* note 64, at 9 (citing *Pope & Talbot, Merits*, *supra* note 72 at ¶ 114, fn. 110).

<sup>80</sup> *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2 (May 29, 2003), 42 I.L.M. 133 (2004) [hereinafter *Tecmed Award*].

<sup>81</sup> *Id.* ¶¶ 38-39.

<sup>82</sup> Dolzer & Myers, *supra* note 64, at 10.

<sup>83</sup> *Id.* at 10-11.

ated by the Contracting Parties.”<sup>84</sup> Because these “determining factors” defined the scope of the applicability of the Agreement, the tribunal held that they could not “be impaired by the principle contained in the most favored nation clause.”<sup>85</sup>

While these three cases are not directly inconsistent, they are not entirely reconcilable. Reading *Maffezini* suggests that tribunals should look to the will of the parties when interpreting the applicability of an MFN clause to a certain substantive area. *Pope v. Talbot* provides a slightly contradictory interpretation—the intent of the party still matters, but only if the tribunal can discern that intent from the text. When the tribunal finds the text unclear, it will apply *its own* understanding of the treaty’s purpose, not the parties’, to determine what the text means. *Maffezini* and *Tecmed* are also contradictory. *Maffezini* interpreted the scope of the MFN clause broadly to suggest that significant provisions “drafted by reference” (which include procedural protections) would apply by default except in cases when the parties clearly “opted out.” *Tecmed*, in essence, held the reverse, stating that in areas of substantial significance, the MFN clause would not be used as a source of interpretive authority. Some of these interpretive differences may be due to the drafting of the MFN clauses; however, they also reflect fundamentally different understandings of how the text of the treaty should be read and the principles on which ambiguities in the text should be resolved.

#### D. *Inconsistency in Interpretation Undermines International Investment*

As I have demonstrated, the interpretation of key concepts and terms in the ICSID arbitration is splintering. If no preventative steps are taken, this trend can be expected to grow more pronounced as the number of awards rendered rapidly increases. At the moment, for example, there are 32 pending ICSID cases against the state of Argentina, primarily resulting from that country’s debt default.<sup>86</sup> All of these cases will be decided by separate panels and will involve interpretations of the same fundamental concepts, creating a strong possibility that similarly-situated plaintiffs will be treated differently by different panels. The question therefore becomes, can we live with these increasing inconsistencies? The exponential growth in the number of BITs signed and in cases submitted to ICSID might suggest that these inconsistencies are relatively unproblematic. In this section I argue that, in fact, they

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<sup>84</sup> *Tecmed Award*, *supra* note 80, ¶ 69.

<sup>85</sup> *Id.*

<sup>86</sup> Data gathered from the ICSID website, <http://www.worldbank.org/icsid/cases/pending.htm> (last visited Apr. 20, 2005).

pose a real threat to the success of the ICSID system, if not to its continued existence.

The fundamental goal of the ICSID system is to promote the flow of foreign direct investment. The role of the BIT is to create a credible commitment to foreign investment by creating a set of legal protections that can be enforced through a neutral international mechanism. As described by Professor Reisman,

The two states that conclude a BIT most frequently elect to create such a regime for different, albeit interlocking and interdependent, reasons, and based on distinct, albeit interrelated, interests. For capital-exporting states, on one hand, BITs offer their investors vital insurance against expropriation or other arbitrary treatment of investments; for developing, capital-importing states, on the other hand, BITs “send an important signal to the international business community to the effect that that [state] not only welcomes foreign investment but will also facilitate and protect certain foreign ventures.”<sup>87</sup>

State parties selecting ICSID arbitration within the context of the BIT have the goal of reducing the risks of investment for the international investors and of “signaling” that desire. This goal is threatened by increasing inconsistencies in the interpretation of key BIT provisions. While the initial adoption of a BIT does provide foreign investors with the signal that a state is serious about attracting foreign investment, that signal will grow weaker over time if the content of that commitment is unclear.

ICSID arbitration, unlike standard international commercial arbitration, occurs in the context of a fixed bilateral or multilateral treaty, which provides the basis for future arbitrations and the context for future contractual arrangements between the government and other private party investors from the same state. Because the BIT is an international treaty between two state parties, a state may not unilaterally contract out of its BIT obligations when entering into a contract with a foreign investor national from the other state party. In specific arbitral proceedings, therefore, what is often being interpreted is the underlying BIT, not the contract between the state and the private investor. Given that all investments between two signatory parties are governed by the same BIT and that many BITs have similar provisions (or provisions with identical meaning due the presence of an MFN clause), both investors and states reasonably look to tribunal decisions to learn more about how these provisions of the BITs will be interpreted, even though the interpretation of the BIT made by one arbitral body has no binding effect on sub-

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<sup>87</sup> Reisman & Sloane, *supra* note 3, at 116.

sequent arbitral bodies. If those interpretations are inconsistent, they provide no guidance as to the content of the BIT protections.

The value of an investment treaty in reducing investor fears and in providing guiding investment norms for government is significantly reduced if the same BIT is interpreted frequently (as the current trends suggest that they will be), but is found to have contradictory meanings. It then provides no direction to either governments or private parties to allow them to mold their subsequent behavior to avoid future losses or liability. A worst-case scenario is that entering into long-term binding investment treaties will simply become too risky for state parties and for investors, and the popularity of such agreements will decline.<sup>88</sup> The lack of predictability will frustrate the goals that motivated the adoption of the treaty regimes.

It is possible that despite the interpretive inconsistencies tribunal *outcomes* are actually consistent and correct most of the time. In this view, the interpretive differences represent compromises on the part of party-appointed negotiators to reach a decision that is as beneficial as possible to both parties, whatever the ultimate outcome.<sup>89</sup> Given that states and investors are repeat players in BIT arbitration, it would seem that the value of understanding their legal obligations would outweigh the benefit of receiving "face-saving" concessions. Even assuming, however, that a certain amount of obfuscation is acceptable to the disputing parties, and that the outcomes are consistent and coherent enough to permit the necessary adjustments in subsequent behavior by states and investors, the lack of consistency in *reasoning* is still problematic to the "outsiders" involved in the dispute.

Unlike in private commercial arbitration, there are significant "outsider" interests in international investment arbitration and the decisions of ICSID tribunals are closely scrutinized not only by the actual parties to the dispute, but also by the international community. International institutions have been severely criticized in recent years as their interpretations of trade and investment treaties have begun to limit the rights of sovereigns over their own domestic policy agendas.<sup>90</sup> Domestic backlash, in both developing and developed countries, threatens both the expansion of these kinds of treaties, as well as their utility.<sup>91</sup> This problem is particularly pronounced in the interna-

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<sup>88</sup> Prompted by concerns about how NAFTA's Chapter 11 has been used, the Organization for Economic Cooperation and Development ended negotiations on a Multilateral Agreement on Investment (MAI) in 1998.

<sup>89</sup> *Reisman & Dolzer Interview, supra* note 37.

<sup>90</sup> Samrat Ganguly, *The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health*, 38 COLUM. J. TRANSNAT'L L. 113, 114 (1999).

<sup>91</sup> In the United States, for example, Senator and former Presidential candidate John Kerry of

tional investment context given that BITs often involve an imbalance of economic and political power between the signatory states.<sup>92</sup> The “realpolitik” of international politics already appears in the decisions of ICSID panels, and threatens their credibility. One example is the decision in *Loewen v. United States*, in which the tribunal wrote a lengthy opinion critiquing the proceedings of an American jury trial, then relied upon a questionable jurisdictional loophole to avoid having to slap the United States with liability.<sup>93</sup>

For international investment law to survive and flourish it must appear to participants and to the public as providing fair outcomes, which can only be the case if both the reasoning and the outcomes appear consistent for similarly situated disputants. “Consistency, coherence, and persuasiveness, along with many other qualities, are all necessary to give the decisions of various institutions the legitimacy that ameliorates domestic opposition.”<sup>94</sup> Simple fairness requires that a legal system provide the same outcome to

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Massachusetts introduced the “Kerry Amendment” which would have “eliminated investor state arbitration from future investment agreements in favour of a government screen” returning to a system in which only a State could bring a claim against another State. Daniel M. Price, *U.S. Trade Promotion Legislation*, 48 TRANSNATIONAL DISPUTE MANAGEMENT (Vol. 2, Issue #2 April 2005). Senator Kerry also “proposed that there be a general obligation from investment treaty obligations for environmental measures, public health or social welfare measures.” *Id.*

<sup>92</sup> One commentator notes that “[p]ower-oriented mechanisms of dispute settlement prevail in non-regional [international] institutions. They are often indistinguishable from decision-making procedures at large, based on the power of governing bodies to interpret the basic charter and the acts of the organization in the light of political rather than legal considerations.” Giorgio Sacerdoti, *Appeal and Judicial Review in International Arbitration: The Case of the WTO Appellate Review*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 248 (Ernst-Ulrich Petersmann ed., 1997).

<sup>93</sup> *Loewen Award*, *supra* note 58. In *Loewen*, the Canadian NAFTA complainant challenged the outcome of a Mississippi state court trial that had resulted in a \$500,000,000 damages award. *Id.* ¶¶ 3-4. In its NAFTA claim, Loewen “challenged a sensitive set of U.S. procedures and practices; specifically punitive damages, unfettered jury verdicts, and the use of biases and xenophobic stereotypes in trials that allegedly resulted in an unfair and disproportionate verdict.” Ari Afilalo, *Meaning, Ambiguity, and Legitimacy: Judicial (Re-) Construction of NAFTA Chapter 11*, 25 NW. J. OF INT’L L. & BUS. 279, 294 (2005). Even though the *Loewen* tribunal found a clear violation of Article 1105, the case was dismissed on jurisdictional grounds. *Loewen Award* at ¶ 240.

<sup>94</sup> Raj Bhala, *The Power of the Past: Towards de Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT’L L. REV. 873, 895 (2001). I do not mean to suggest that creating an appellate body will fully alleviate the problem of legitimacy faced by international investment tribunals. Like other international bodies, they will continue to be challenged as undemocratic. I expect only that increasing the transparency of the proceedings, and their fairness, will begin to ameliorate the perception that they are tools used only to benefit rich investors against the expense of poor countries.

similarly situated disputants. Following the logic of previous cases “unless there is good reason to do otherwise contributes to legal credibility by avoiding the appearance of excess judicial discretion, which may be perceived as an *ex post* rationalization for a conclusion influenced by realpolitik considerations.”<sup>95</sup> While a “doomsday” scenario in which the trend toward increased investment is reversed seems unlikely, a few extremely large awards might create such a popular backlash against the treaty regime that a state government is ultimately hamstrung in its efforts toward investment liberalization.<sup>96</sup>

The threat posed to the ICSID system by the growing inconsistencies in the interpretations of key, repeating concepts in investment law is real and it impacts both the “insiders” and the “outsiders” to the system. Lack of uniformity reintroduces risk into international investment, making it less attractive for the investors and states alike. Lack of uniformity both in reasoning and in outcomes also creates the appearance of unfairness and exploitation, mobilizing populations against BIT regimes. States may decide that ICSID awards are simply too important to be entrusted to a system that lacks an effective control mechanism to correct errors in outcome or reasoning. States as “rational actors are unlikely to submit matters that are important to them to a voluntary dispute system that ranges from uncertain to capricious.”<sup>97</sup> The growing uncertainties in BIT interpretations, therefore, present a real threat to the ICSID system as a whole.

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<sup>95</sup> Adrian T.L. Chua, *Precedent and Principles of WTO Panel Jurisprudence*, 16 BERKELEY J. INT'L L. 171, 174 (1998). This problem has generally plagued international adjudicatory institutions. Professor Caron says,

I am reminded of how many times I have run across a nation's attitude towards arbitration generally, or a specific arbitral institution being colored by some infamous arbitration which is remembered as unjust: the Latin American view of the Venezuelan Claims Commissions and their difficulty in moving beyond the Calvo doctrine; the Arab critical perception of the arbitration between Saudi Arabia and Aramco; and most recently, the U.S. official view of the unjudicial character of the International Court of Justice's judgment in the Nicaragua case.

David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV.-FOREIGN INVESTMENT L.J. 21, 50 (1992).

<sup>96</sup> In a 1998 world-wide opinion survey, the question was asked: “Which of the following two broad approaches do you think would be the best way to improve the economic and employment situation in this country—protecting our local industries by restricting imports, or removing restrictions to increase our international trade?” The findings demonstrated that protectionists outnumber free traders by 47 percent to 42 percent. *Liberalism Lives*, ECONOMIST, 59 (Jan. 2, 1999). The survey was conducted in 22 countries among over 12,000 adults.

<sup>97</sup> REISMAN, *supra* note 28, at 7.

### III. THE COSTS AND BENEFITS OF AN APPELLATE MECHANISM: FACTORS TO CONSIDER

The creation of a standing appellate body could potentially help to promote consistency in ICSID jurisprudence, thereby alleviating concerns about the system's potential for error or unfairness, but only if it would address the cause of these inconsistencies more effectively than ICSID's current mechanisms of control. In Part A I suggest possible causes for the growing disparities and explain how the appellate body would work to alleviate or exacerbate them. In Part B I examine the systems of control currently operating in ICSID to evaluate their efficacy in promoting coherent awards. I argue that the appellate body would be more effective than the existing mechanisms of control, however, its efficacy would depend on the sources of the inconsistency. To the extent the inconsistencies are administrative and result from growth of the system, the Appeals Facility would help to correct the discrepancies. However, in those cases in which a problematic decision results from the arbitrators' attempt to protect the political interests of the state party, an additional appellate review would do little to correct the problem. Finally, in Part C I present comparative case studies of the World Trade Organization Appellate Body and the dispute resolution mechanism of the Canada-United States Free Trade Agreement. I discuss each in turn to draw out lessons applicable to the consideration of the ICSID Appeals Facility.

#### A. Sources of Inconsistency

One possible reason for the disparities in awards is that the increasing number of disputes necessitates the involvement of a growing number of arbitrators, who bring different interpretations of BIT provisions to the awards. If this is the case, then creating a standing appellate body would likely help to resolve the problem. A standing appellate body would be unlikely to give contradictory holdings to similarly situated disputants because the arbitrators would feel personally bound to their prior holdings, even in the absence of any legal obligation to consider past tribunal decisions. At a minimum, appellate arbitrators would be likely to distinguish a different result from earlier decisions in order not to appear inconsistent, incompetent, or politically motivated. For panels, the knowledge that an award could be easily appealed would provide an incentive to ground the decision in sound principles of investment or international law.<sup>98</sup> Over time a clear interpretive trend

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<sup>98</sup> Currently a panel decision can, in theory, only be overturned when a serious abuse of authority has occurred. The current annulment awards do not suggest that the ad hoc committees are adopting such a strict interpretation of Article 52. However, the adoption of an ap-



would emerge that would provide guidance for private investors and state parties as to the scope of their rights and responsibilities under an investment treaty.<sup>99</sup> If the cause of the disparity is the increasing number of cases and arbitrators, the appellate mechanism would seem to provide a reasonable solution.

Another possibility is that the growing disparities in ICSID interpretation result from the arbitrators' efforts to produce fair outcomes while taking into account the delicate political concerns implicated in each decision. As I suggested in Section II, D, *supra*, it is possible that the tribunals are reaching the correct outcomes, but applying flawed reasoning in order to make the award as inoffensive as possible to both parties. While, as I suggested, this obfuscation may threaten the legitimacy of the award in the public's eyes, it may also be necessary to prevent breakdowns in inter-state relations or in the ICSID system. If *Loewen* had been decided against the United States, it is entirely possible that the United States would have withdrawn its support from ICSID in retaliation for the panel's castigation of the Mississippi judge and jury.<sup>100</sup> Similarly, in situations in which the panel suspects corruption or other governmental misconduct, finding an alternative method of reasoning that allows the arbitrators to avoid exposing the State protects the ICSID system. If, in fact, the disparities in award reasoning and outcomes result from these types of concerns, the appellate panel might be able to do little to correct the decisions. Appellate arbitrators would be placed in the awkward spot of having to contradict their own earlier positions or of rendering a more honest, but politically damaging, award. The perverse outcome might actually be that more obfuscation would occur as two sets of arbitrators struggle to reach the desired outcome without revealing their true motives.

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peals process would still create a better set of incentives for the first tribunal to develop an award that would stand up to scrutiny.

<sup>99</sup> This is the understanding of appellate process at the national level.

The purpose [of appellate review in domestic law] is to afford to the parties or to the accused the right of having the first decision reviewed, so to afford a re-examination of whether the case was rightly or wrongly decided in law and possibly, also as to the facts. Secondly, through the re-examination by other judges, in principle more senior and more competent, the legal system aims at reducing the likelihood of judicial errors and at enhancing the consistency of the interpretation and application of the law.

Sacerdoti, *supra* note 92, at 247.

<sup>100</sup> The question then becomes whether arbitrators in "transitional regimes" should always present their first-best solution, regardless of the possible systemic consequences, or whether they should take political considerations into account. For a discussion of this issue, see Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553, 574 (2003).

A final and related possibility is that the incoherence in the developing ICSID jurisprudence reflects true continued disagreement among states on the underlying principles of investment law. The diversity necessary to achieve credibility in the international community brings a diversity of political perspectives to the arbitral process.<sup>101</sup> The political disagreements between states are therefore introduced into the dispute settlement process in legal terms. Creating an appellate mechanism would not necessarily correct this problem. If these unresolved political conflicts between states are at the source of the incoherence, the appellate body would likely continue to reflect them. Additionally, although the procedure of having repeated adjudications by the same group of arbitrators might help bring consensus among *arbitrators*, it would not necessarily resolve the underlying conflict among states. Forcing consistency where there is no true consensus might de-legitimize the ICSID system for its users.

Likely some combination of these three explanations is responsible for the developing disparities in ICSID awards. As I have demonstrated here, an appellate mechanism will be more or less successful in promoting a consistent jurisprudence, depending upon its true cause. One further observation, which I will discuss in more detail later, is that the “political” sources of inconsistency in the system result from the fact that international investment disputes include states as parties. For obvious reasons, criticizing the action of a state is different and more sensitive than making the same judgment about the behavior of a private party. Party-appointed arbitrators must be particularly attuned to these concerns. Because state participation is at the root of the most intractable sources of the growing irregularities in ICSID jurisprudence, states will play a significant role in making the Appeals Facility successful. I will return to this issue in the next section, after a review of

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<sup>101</sup> This is reflected in the parties’ choice of arbitrators. A party may select one of its own nationals as its party-appointed arbitrator, on the theory that that individual will be more sympathetic to its position. Additionally it is well-established that parties “seek to secure the appointment of someone who they think will ‘see things their way.’” Judith Gill, *Inconsistent Decisions: An Issue to be Addressed or a Fact of Life*, 14 TRANSNATIONAL DISPUTE MANAGEMENT (Vol. 2, Issue 2, Apr. 2005). As one practitioner recently noted,

particular arbitrators gain a reputation for being perhaps “pro jurisdiction” or “pro investor” and for every arbitrator with such a reputation, one can find someone who is perceived as taking a different and perhaps opposite view. We all know that this “profiling” is part of the process that parties and their legal representatives already engage in, but, stepping back and looking at this from an overall perspective, the more marked that this sort of profiling becomes, the more damage that may be done to the reputation of treaty arbitration and investment arbitration in general amongst the users of the system.”

the current mechanisms of control.

### B. *Mechanisms of Control*

Once the causes of the growing inconsistencies are identified, the question remains what mechanism of control will be most effective in promoting the development of a coherent jurisprudence. ICSID currently has three operating control mechanisms: (1) the annulment process detailed in Article 52 of the Convention, which permits parties to challenge the outcomes of their own cases; (2) the possibility of national review, in which parties challenge an ICSID award in a domestic court; and (3) the informal arbitrator dialogue that occurs between decisions, which helps to identify and reject faulty awards. These mechanisms may work to bring consistency to ICSID awards. The question for this section is whether they do so efficiently and adequately, as compared to the proposed standing appellate body.

#### 1. Annulment

Annulment is currently the only formal mechanism for review of an ICSID panel decision, and commentators are divided as to its effectiveness.<sup>102</sup> For almost two decades after the enactment of the Convention, Article 52 was never invoked. The first case to be reviewed for annulment was *Klöckner v. Government of Cameroon*.<sup>103</sup> The tribunal decided by majority against *Klöckner*, with *Klöckner's* party-appointed arbitrator, Professor Dominique Schmidt filing a fifty-three-page dissenting opinion. Professor Schmidt's dissent did not express a different legal interpretation, but rather stated that "important mistakes, the numerous contradictions and failures to state the grounds, and the misrepresentation of contract[ual] clauses" rendered the award null.<sup>104</sup> This decision was rendered on October 21, 1983. The ad hoc committee nullified the entire award and *Klöckner* initiated a second arbitration. Because the holdings of the ad hoc committee have no res judicata effect, the second arbitration was forced to re-litigate the entire dispute. A second award was rendered and promptly challenged again in a second annulment proceeding. The second ad hoc committee ultimately is-

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<sup>102</sup> See e.g., Aron Broches, *The Finality of ICSID Awards*, 6 ICSID REVIEW—FOREIGN INVESTMENT L.J. 321, 376 (1991) ("[A]fter a breaking-in phase . . . the ICSID annulment process is 'on track' and will fulfill the limited purposes for which it was established.").

<sup>103</sup> *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon*, ICSID Case No. ARB/81/2, Award, (October 21, 1983), English translations of French original in 1 J. INT'L ARB. 145 (1984).

<sup>104</sup> Friedrich Niggemann, *The ICSID Klöckner v. Cameroon Award: The Dissenting Opinion*, 1 J. INT'L ARB. 331, 348 (1984).

sued a decision rejecting the parties' applications for annulment on May 17, 1990.

Following *Klöckner*, "a significant number of ICSID awards have not been accepted as final."<sup>105</sup> Under the ICSID regime, just over 30 public cases have resulted in awards that have not been challenged by annulment. This does not include awards on jurisdiction or awards embodying a settlement by the parties.<sup>106</sup> Annulment proceedings have been initiated in 12 cases. The possibility of repeated adjudications of the same dispute threatens the value of arbitration, which stems in part from "its promise of simplicity, economy, supranational neutrality, and speed."<sup>107</sup> Repeated adjudications certainly belie that promise, as "the function of a control system is not to undermine the operation of a dispute mechanism by extending disputes ad infinitum nor to deter potential litigants from incorporating this mode of dispute resolution in their agreements."<sup>108</sup> The annulment proceedings permitted by Article 52 are essentially being used as appeals proceedings, but in a way that endangers the usefulness of the arbitral process.

Despite fears that the Appeals Facility will negatively impact the efficiency of the ICSID process,<sup>109</sup> this view of the use of Article 52 suggests that the parties are currently using the annulment process as an inefficient appellate mechanism. Given the current situation, the Appeals Facility could *improve* the efficiency of ICSID tribunal operation. The ICSID Secretariat has already proposed a series of rules to expedite the appellate process. The Appeals Facility could establish time limits in advance for registering a request for an appeal and for the filing of written pleadings.<sup>110</sup> The Appeals Facility could also establish a time limit for the appeal tribunal to render a decision—which might also be 120 days from the closure of proceedings.<sup>111</sup> Additionally, the establishment of an Appeals Facility could promote efficiency by preventing cases that have "already been decided" from ever

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<sup>105</sup> REISMAN, *supra* note 28, at 86.

<sup>106</sup> These numbers were collected from a review of ICSID's List of Concluded Cases and List of Pending Cases. The World Bank Group, List of Pending Cases, <http://www.worldbank.org/icsid/cases/pending.htm> (last visited Jan. 15, 2005); The World Bank Group, List of Concluded Cases, <http://www.worldbank.org/icsid/cases/conclude.htm> (last visited Jan. 15, 2005).

<sup>107</sup> REISMAN, *supra* note 28, at 7.

<sup>108</sup> *Id.* at 86.

<sup>109</sup> "Subjecting ICSID arbitral awards to an appeal mechanism might also detract from the finality of the awards and open opportunities for delays in their enforcement." *Possible Framework Improvements*, *supra* note 11, at 15.

<sup>110</sup> *Id.* at 7.

<sup>111</sup> *Id.*

reaching arbitration. With stronger interpretive trends, and less room for outlier decisions, potential litigants would sometimes realize that they just "don't have a case" and choose to settle rather than face an adverse decision.

Finally, the appeals process would provide an expedited and more final review than the annulment process under Article 52. The annulment process renders ICSID arbitrations extremely lengthy. From the registration of the dispute on April 14, 1981, to its final resolution, *Klöckner* took just over nine years to complete. No case in which annulment review has been requested has ever lasted less than six years,<sup>112</sup> and most cases take substantially longer.<sup>113</sup> The presence of a standing appellate body to review decisions for any of the errors present in Article 52, as well as incorrect interpretations of treaty and customary international law, offers the possibility of review without opening the floodgates for repeat adjudications of the same dispute. Unlike the ad hoc committee, the appellate body would be able to issue final, binding awards. Additionally, because the appellate body would be standing instead of ad hoc, it would provide a more experienced and consistent interpretation of the law, rather than just a second review. The body could therefore increase the efficiency of the ICSID review process.

## 2. Nationalization

Another mechanism of control is the nationalization of international investment disputes. Barring annulment, there is currently no sanctioned possibility for appealing an ICSID tribunal decision to a domestic court. Recently, however, the Supreme Court of British Columbia set aside part of an award granted by a NAFTA tribunal, finding that the tribunal had misapplied certain NAFTA provisions.<sup>114</sup> Mexico challenged the award rendered to the Metalclad Corporation in a Canadian court because Vancouver, British Columbia was designated as the place of arbitration. Mr. Justice Tysoe found jurisdiction to review the NAFTA decision under a Canadian statute, the In-

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<sup>112</sup> One exception is *Gruslin v. Malaysia*, a case that was registered on May 12, 1999. *Gruslin v. Malaysia*, Award, ICSID Case No. ARB/99/3 (Nov. 27, 2000). The annulment proceeding was registered on December 19, 2000, but discontinued because of lack of payment of advances on April 2, 2002.

<sup>113</sup> The dispute between Southern Pacific Properties Limited and the Arab Republic of Egypt was registered on August 28, 1984. The annulment proceeding was registered on May 27, 1992. The parties eventually settled and the proceedings were discontinued as of March 9, 1993. With the exception of the *Gruslin* case, no arbitral proceeding commenced since 1997 that was submitted for annulment review has been finalized to date.

<sup>114</sup> *United Mexican States v. Metalclad Corporation*, 2001 BCSC 664 (2001), available at <http://www.courts.gov.bc.ca/jdb-txt/sc/01/06/2001BCSC0664.htm>.

ternational Commercial Arbitration Act.<sup>115</sup> Although NAFTA awards by a tribunal are expected to be final and enforceable, the treaty also leaves open the possibility of a request by one party to the courts at the “seat” of the arbitration to set aside or annul the award under the review procedures specified in the national law of the seat of arbitration.<sup>116</sup> As one commentator notes, “[t]his somewhat anomalous situation results from the fact that there is no appeal in most arbitral proceedings.”<sup>117</sup>

The recourse to national courts is a troubling development. The ICSID mechanism was incorporated into the BITs because it allowed investors to forgo national courts, which might be biased, corrupt, or inefficient, in favor of a flexible, neutral international body. If national courts take it upon themselves to resolve perceived problems in arbitral awards, or refuse to enforce awards immediately as if they were judgments from a sister court, then ICSID will lose its value entirely. Creating an appellate body certainly provides no guaranty against incursions by national courts, but the availability of another level of review might help national courts feel more justified in staying out of ICSID arbitrations. This is particularly true in cases that are highly controversial like *Metalclad*, in which a NAFTA tribunal found that a state environmental regulation, that would have prevented the Metalclad corporation from being able to operate its hazardous waste facility, constituted an illegal expropriation. The decision has been broadly criticized in the popular media as detrimental to environmental regulation and to national sovereignty.<sup>118</sup> Charges were leveled at the NAFTA tribunal as helping large multinational corporations at the expense of local populations.<sup>119</sup> Appellate

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<sup>115</sup> International Commercial Arbitration Act, R.S.B.C., ch. 233, § 16 (1996) (Can.).

<sup>116</sup> North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, arts. 1136(2), (3) [hereinafter NAFTA]. This differs from the ICSID Convention as described in part II, *supra*, which provides that “the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.” ICSID Convention, *supra* note 6, at art. 53.

<sup>117</sup> David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651, 684 (2001). Another NAFTA award has also been challenged in Ontario. *Canada Appeals NAFTA Chapter 11 Case* [S.D. Myers], Int'l Trade Daily (BNA), Feb. 9, 2001, at D4 (arguing that panel exceeded its jurisdiction).

<sup>118</sup> *Secret Trade Courts*, INT'L HERALD TRIB., Sept. 28, 2004, at 8; Letta Tayler, *A Free Trade Boom or an Environmental Bust? NAFTA Missteps Harm Mexico Critics Say*, NEWSDAY, Dec. 29, 2003, at A12; Katherine Yung, *Foreign Firms' Suits are Messy for Environmentalists: Groups Cry Foul Over Litigation Stemming from a Part of NAFTA*, DALLAS MORNING NEWS, July 13, 2003, at 2D; Bill Carey, *The Case Against a New Fast-Track Trade Bill*, INDIANAPOLIS STAR, May 13, 2002, at 9A.

<sup>119</sup> *NAFTA May Hurt Everyone*, IOWA CITY PRESS-CITIZEN, Nov. 2, 2003, at 3A.

review of controversial decisions might, at a minimum, take some of the pressure off domestic courts to review arbitral awards that are arguably wrongly decided.<sup>120</sup>

### 3. Arbitrator Dialogue

A third system of control, and perhaps the most promising, is the dialogue among arbitrators that occurs between awards. ICSID arbitrators are generally selected from amongst a select group of international law practitioners and scholars, who put considerable thought into the demands of their role. As one commentator noted, the arbitrators are:

senior international lawyers with considerable personal authority who have approached their task with diligence. They have been conscious of the special challenge of applying an unusual set of rules of particular interest to the international community. They have understood that ICSID cases are not routine cases, and that they should not be treated as such.<sup>121</sup>

A brief review of the current list of state-designated arbitrators demonstrates that this limited list includes many scholars of international investment arbitration and frequent contributors to the ICSID Review, a legal journal that reports on trends in ICSID jurisprudence.<sup>122</sup> ICSID arbitrators therefore are in constant dialogue with each other—reviewing and critiquing the work of other tribunals. This kind of “peer pressure” could and probably does work as a control mechanism to keep errant arbitrators in line. This effect is, however, difficult to measure and there is a real question as to how much we can rely “on the social controls inherent in face-to-face relationships, small groups, and ‘old boy networks’ to produce a consistent, coherent

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<sup>120</sup> The pressure is not entirely from those outside the system. Professor Caron tells the story of his discussion with a senior partner in a law firm who had to inform a client, the legal counsel of an international corporation, that the ICSID panel had ruled against them in a dispute involving millions of dollars. The client instructed the partner to appeal, at which point the partner was forced to inform his client that there was no possibility of appeal under ICSID. The client’s response was, “You advised resolving a million dollar dispute with only one role of the die?” Caron, *supra* note 95, at 48-49. Because all national systems contain a process of appellate review, it is an expected part of the dispute resolution process. As the number of cases grows, we can expect that there will be greater pressure on national courts to intervene in high stakes cases.

<sup>121</sup> Jan Paulsson, *ICSID's Achievements and Prospects*, 6 ICSID REV.—FOREIGN INVESTMENT L.J. 380, 395 (1991).

<sup>122</sup> ICSID Members of the Panels of Conciliators and of Arbitrators, *at* <http://www.worldbank.org/icsid/pubs/icsid-10/icsid-10.htm>.

body of awards in the international context.”<sup>123</sup> To conclude, this dialogue of arbitrators probably does have the effect of controlling error in ICSID arbitration, but its efficacy is difficult to measure, and is likely to decrease as the number of awards necessitates a larger pool of arbitrators. An appellate mechanism, while more formal, would provide a more structured, transparent approach to review.

To summarize, there are currently three systems of control operating in the ICSID system, all of which may be working to promote consistency in ICSID decision-making. Despite these control mechanisms, there remains a trend towards disparity that an appellate body might help to resolve if, as discussed in Part IV, A, *supra*, the cause of the disparity is the increasing number of awards and arbitrators and not the accommodation of political concerns. Ironically, a better understanding of the driving forces behind these inconsistent decisions may not be possible if the cause of the trend is political, rather than structural. The high stakes described in Section II, however, mean that States should not be too comfortable with the status quo and should remain open to reforms that help to promote the development of a more coherent jurisprudence.

### C. *The World Trade Organization and the U.S.-Canada Free Trade Agreement*

The experiences of the World Trade Organization (WTO) and Canada-United States Free Trade Agreement (FTA) provide useful points of reference for considering the desirability of an ICSID appellate body. The generally positive experience of the WTO dispute settlement procedures suggests a standing appellate body can help promote consistent decision-making. The more problematic experience of the FTA’s extraordinary challenge committee process highlights some of the potential challenges that could negatively affect the efficacy of an appellate mechanism. In this section, I discuss each to draw out lessons applicable to the ICSID Appeals Facility.

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<sup>123</sup> The closeness of the ICSID community could also be conceived of as a liability. As Professor Reisman notes:

The very scale and wide dispersal of transnational events reduces the efficacy of these social controls. National, legal, and general cultural heterogeneity, the larger number of actors and the increased randomness of arbitrator combinations, all of which are characteristic of contemporary international arbitration make latent social controls such as peer pressure and common values of personal conscience more ephemeral and marginal and, on the whole, less effective than in more homogenous national settings.

REISMAN, *supra* note 28, at 8.



## 1. The WTO Appellate Body

The WTO experience suggests the adoption of an appellate body can promote the development of a coherent, stable jurisprudence, even when the underlying disputes are politically charged negotiations between states. The decision to create an appellate body for the WTO raised concerns similar to those accompanying the proposed Appeals Facility. Under the General Agreement on Tariffs and Trade (GATT), which preceded the Dispute Settlement Understanding (DSU), “dispute settlement was governed by the same principle as political decision-making—the rule of consensus.”<sup>124</sup> The DSU was introduced to “provid[e] security and predictability to the multilateral trading system.”<sup>125</sup> At the time of its adoption, the DSU was strongly opposed by those who felt GATT’s success could be attributed to its non-legalistic, pragmatic approach to dispute resolution.<sup>126</sup> The GATT’s strength, from this perspective, was that it provided a general framework in which trade problems could be negotiated and compromises found that might not be technically based on “law,” but that would be sufficient to diffuse the conflict between the states.<sup>127</sup> On the other side of the debate, the “legalists” felt that “GATT may have succeeded *despite* the pragmatic approach.”<sup>128</sup> The legalists expressed arguments similar to those I have presented here: to maximize the predictability, stability, and efficiency for traders the rules of the trade system should be clarified through a system of adjudication.<sup>129</sup>

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<sup>124</sup> Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body*, 38 TEX. INT’L L.J. 469, 483 (2003).

<sup>125</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 3.2, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Result of the Uruguay Rounds, vol. 31, 33 I.L.M. 1226 (1994).

<sup>126</sup> See, e.g., KENNETH W. DAM & ROBERT E. HUDEC, *THE GATT—LAW AND THE INTERNATIONAL ECONOMIC ORGANIZATION* (1970); ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1975); Donald E. deKieffer, *GATT Dispute Settlements: A New Beginning in International and U.S. Trade Law*, 2 NW. J. INT’L L. & BUS. 317 (1980).

<sup>127</sup> Phillip R. Trimble, *1985 Survey of Books Relating to the Law: V. Foreign, International and Comparative Law: International Trade and the “Rule of Law,”* 83 MICH. L. REV. 1016, 1017 (1985) (reviewing JOHN H. JACKSON, JEAN-VICTOR LOUIS & MITSUO MATSUSHITA, *IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES* (1984)).

<sup>128</sup> *Id.*

<sup>129</sup> Professor John H. Jackson has been one of the most vocal advocates of this position. He has argued that a shift from “power-oriented” to “rule-oriented” techniques of diplomacy would lead to a more efficient and credible international trade system. See, e.g., JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 109-11 (2d ed. 1997).

With the adoption of the DSU, the WTO took a significant step towards the legalists' position.

While no final judgment can be made about the success of the DSU, it has generally been received favorably as having succeeded in its intended purpose.<sup>130</sup> Much of the criticism comes from those that seem to favor changes that would increase the judicialization of the process, rather than those wishing to turn back the clock.<sup>131</sup> Despite concerns that moving away from a diplomatic process toward a legal one would destroy the usefulness of the WTO, the use of the WTO for dispute settlement has actually increased significantly under the DSU<sup>132</sup> and has grown steadily since the adoption of the new procedures. While this may be due primarily to growth in trade flows, it does suggest that the new procedures have not made the DSU less attractive to states as a method for resolving trade disputes.<sup>133</sup> Neither has the availability of the DSU interfered with the states' ability to resolve disputes through diplomatic channels. As of October 2004, the number of disputes decided by panel and those settled or dismissed were approximately equal.<sup>134</sup> The emphasis of the DSU continues to be, "on find-

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<sup>130</sup> Terence P. Stewart & Amy Ann Karpel, *Part I: Review of the Dispute Settlement Understanding (DSU): Panel 1 B: Stage II—Operation of Panels: Review of the Dispute Settlement Understanding: Operation of Panels*, 31 LAW & POL'Y INT'L BUS. 593, 594 (2000). *But cf.* Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2 CHI. J. INT'L L. 403, 408 (2001) (arguing that "in its present form the new 'judicialized' WTO dispute settlement system is substantively and politically unsustainable" and advocating a return to conciliation, mediation, and voluntary arbitration).

<sup>131</sup> See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 602-05 (2000) (advocating limited tenure for appellate body members, increased policing of conflicts on panels and in the appellate body, greater transparency and increasing reliance on standardized procedural tests). See generally THE NEXT TRADE NEGOTIATING ROUND: EXAMINING THE AGENDA FOR SEATTLE (Jagdish Bhagwati ed., 1999).

<sup>132</sup> In the first five years after the adoption of the DSU, the number of requests for consultations was three times higher, on a per annum basis, than it had been under the GATT. Bernard M. Hoekman & Petros C. Mavroidis, *WTO Dispute Settlement, Transparency and Surveillance*, 23 WORLD ECON. 4, 527 (2000) at [http://www1.worldbank.org/wbiep/trade/papers\\_2000/dispute\\_settlement.pdf](http://www1.worldbank.org/wbiep/trade/papers_2000/dispute_settlement.pdf).

<sup>133</sup> From 1995 to 2000, 144 requests for consultation were filed. Stewart & Karpel, *supra* note 130, at 595. That number has approximately doubled since 2000.

<sup>134</sup> WTO DISPUTE SETTLEMENT BODY, UPDATE OF WTO DISPUTE SETTLEMENT CASES (Oct. 14, 2004), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm). This represents a slight increase in the proportion of panel decisions to settlements since 1995 when fifty-three of a total of 144 submitted complaints were settled and thirty-three were resolved by panel decision. Stewart & Karpel, *supra* note 130, at 593. Due to the large number of pending consultations, however, it is unclear that this slight increase reveals a real change in preference by member states.

ing solutions that are mutually acceptable among the disputing parties. Panels are the last resort, not the first.”<sup>135</sup> In general, therefore, the experience of the WTO appellate body demonstrates that introducing an Appeals Facility can aid in creating coherent jurisprudence, even when the underlying disputes involve sensitive political negotiations between states.

## 2. Canada-United States Free Trade Agreement

The dispute resolution mechanism in the Canada-United States Free Trade Agreement (FTA) was far less successful. The FTA experience suggests that political disputes between states, if not resolved prior to introduction of a dispute resolution mechanism, may be replicated by the adjudicatory process. The dispute resolution process under the FTA was the result of a lengthy, and partially unsuccessful political process.<sup>136</sup> Facing impending deadlines for concluding negotiations, and unable to resolve the differences between national trade remedy laws, the negotiators adopted a bi-national panel review process, which was designed to “ensure that the laws of the respective countries would continue to be applied until agreement on the outstanding issues could be reached.”<sup>137</sup> Under Chapter Nineteen of the FTA, therefore, parties wishing to review a domestic court’s administrative decisions on a dumping or countervailing duty claim were permitted to bring their actions before five-person bi-national panels made up of citizens of the two states parties. The FTA required the panels to apply the substantive law of the country whose administrative decision was the source of the appeal, so, for example, “in considering appeals from the decisions of American administrative agencies, the panels [applied] the substantive law that would be applied by the [Court of International Trade] in a similar action.”<sup>138</sup>

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<sup>135</sup> Stewart & Karpel, *supra* note 130, at 593. One concern that has been raised is that the panel stage has been reduced to a stepping-stone on the way to the appellate body because the majority of complaints that are resolved by panel decision are subsequently appealed. *Reisman & Dolzer Interview*, *supra* note 37. This outcome could be easily avoided in the ICSID context simply by adopting the same procedure for appeal that is currently used for annulment proceedings, which requires the appealing state to post a bond for the entire amount of the award. This would encourage states to take the initial tribunal seriously—and to think carefully about the benefits of proceeding with an appeal.

<sup>136</sup> During the FTA negotiations, Canada and the U.S. were unable to agree on whether the FTA should properly include provisions on unfair trade practices. Herbert C. Shelley et al., *The Standard of Review Applied by the United States Court of Appeals for the Federal Circuit in International Trade and Customs Cases*, 45 AM. U.L. REV. 1749, 1809 (1996).

<sup>137</sup> *Id.* at 1810.

<sup>138</sup> Gilad Y. Ohana, *The Constitutionality of Chapter Nineteen of the United States-Canada Free Trade Agreement: Article III and the Minimum Scope of Judicial Review*, 89 COLUM. L.

The decisions made by the panels were binding on the parties and on the national governments, but could, in certain limited circumstances, be appealed to another panel through the extraordinary challenge process.<sup>139</sup> Reviews were conducted by a three-person panel and each review panel was chosen from a ten-person roster composed of five American federal judges and five Canadian judges of superior jurisdiction. Necessarily, therefore, each panel had a majority of judges from one state party.

From this description, it is apparent the extraordinary challenge procedure more closely resembles the ICSID annulment mechanism than the Appeals Facility. However, the FTA experience is still informative in evaluating the Secretariat's proposal. The extraordinary challenge was used only three times under the FTA but was the source of significant criticism.<sup>140</sup> In all three cases, the United States requested review by the extraordinary challenge committee (ECC) and each time the request was rejected on the grounds that the standard for an extraordinary challenge had not been met.<sup>141</sup> Judge Malcolm Wilkey, the sole American who sat on the ECC review panel for the decision in *Softwood Lumber from Canada*, wrote a vociferous dissent arguing that the panel should have sided with the United States because the original panel had reached "egregiously erroneous results" and had seriously misinterpreted U.S. law. Wilkey criticized the Canadian majority's holding that the ECC's role is not to determine whether the law the panel applied was "absolutely correct," but merely to determine "whether the panel conscientiously attempted to apply the appropriate law as they understood

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REV. 887, 900 (1989).

<sup>139</sup> The extraordinary challenge process permitted a party to challenge an initial panel determination on the grounds that (1) a panel member "was guilty of gross misconduct, bias," or other serious offense; (2) the panel "seriously departed from a fundamental rule of procedure;" or (3) "the panel manifestly exceeded its powers, authority or jurisdiction." FTA art. 1904.13(a). The party seeking the extraordinary challenge proceeding was also required to establish that the violation materially affected the panel's decision and threatened the integrity of the review process.

<sup>140</sup> Shelley et al., *supra* note 136, at 1812.

<sup>141</sup> See *In re Certain Softwood Lumber Prods. from Canada (U.S. v. Can.)*, 1994 WL 405928, at 28 (NAFTA Bilat. Panel August 3, 2005) [hereinafter *Softwood Lumber*] (rejecting extraordinary challenge and holding that the United States failed to establish that panel member violated standards of conduct as specified by NAFTA art. 1904.13); *In re Live Swine from Canada*, 15 Int'l Trade Rep. Decisions (BNA) at 2030-31 (rejecting extraordinary challenge on the grounds that the United States didn't satisfy criteria for reversing panel decision); *In re Fresh, Chilled, or Frozen Pork from Canada*, 13 Int'l Trade Rep. Decisions (BNA) at 1865-66 (rejecting extraordinary challenge because state failed to meet standards set under FTA art. 1904.13).

it.”<sup>142</sup>

The panel decision in *Softwood Lumber* seems, therefore, not to have solved the Canadian-American dispute over trade remedies, but rather to have incorporated it into the dispute resolution process. As one group of commentators noted, “[t]his alternative dispute resolution mechanism unquestionably was spawned by a political process and accordingly cannot be said to yield politically neutral results.”<sup>143</sup> The mechanism for “appeal,” the extraordinary challenge process, did nothing to correct that flaw—the inclusion of national judges and national law merely replicated the political disagreements between the two countries within the international dispute resolution process. The Canada-U.S. FTA was much critiqued and short-lived. However, its successor, NAFTA, did incorporate similar mechanisms into Chapter Nineteen, which suggests that the system’s problems did not outweigh its perceived benefits.

The experiences of DSU and the FTA offer two different perspectives on the potential usefulness of an ICSID appellate mechanism. The WTO experience suggests that an appellate mechanism can lend credibility to, and increase the usefulness of, a system of international dispute resolution when the states are willing to commit to the rules of the system. The experience of the Canada-U.S. FTA demonstrates that attempts to resolve ongoing political conflicts through international dispute resolution may only exacerbate the underlying disagreement. This discrepancy suggests that the attitude adopted by the states toward the Appeals Facility, and to the development of a set of shared principles of investment law, will be crucial in its success.

In the previous four sections of this comment, I have attempted to frame the debate around creating an Appeals Facility to the ICSID system. I have demonstrated that the growth in the use of the ICSID system is creating more visible discrepancies in its developing jurisprudence, and I have attempted to show the urgency in considering this problem, by arguing that the invasive and visible results of tribunal awards on domestic economies will necessitate an increasing legitimatization of the system. I have also discussed the relationship between the possible causes of these inconsistencies and this proposed appellate body, suggesting that increased judicialization may not work if the causes of the discrepancies in ICSID awards are inherently political. In the final section, I argue that it is in the states’ interest to adopt an appellate system, and to work to make it successful, despite the reality that a more legal system will be less adept in managing (or masking)

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<sup>142</sup> *Softwood Lumber*, supra note 141, at 78 (Wilkey, J., dissenting) (quoting majority opinion of Hart, J., at 21).

<sup>143</sup> Shelley et al., supra note 136, at 1810.

political disputes.

#### IV. CONVINCING THE STATES: RETHINKING INTERNATIONAL INVESTMENT ARBITRATION

In the previous section, I demonstrate that some of the causes of the inconsistent awards are likely political in nature and result from the special treatment that states receive as a result of their status. The Appeals Facility will therefore be unsuccessful unless states are willing to re-conceive their place in international investment arbitration, and work to transform ICSID arbitration into a more transparent, rules-based system of dispute resolution. The Secretariat's proposal is likely to generate significant resistance from at least some of the states, which will want to try to maintain the individualized, consent-based type of system that has historically characterized international dispute resolution. Additionally, as was the case when the DSU was proposed, reforms that promote the judicialization of international investment arbitration will be viewed by some states upon as an intrusion into their sovereignty.<sup>144</sup> In this section I argue that, in the context of international investment, this intrusion has already occurred. States now have more to gain than to lose from adopting and promoting an Appeals Facility designed to improve consistency of ICSID decisions. The existence of a coherent and predictable ICSID jurisprudence would help states maximize their control and minimize their liability in the international economic system. To adopt this perspective, however, requires States to change their understanding of the role they play in the international investment regime.

International dispute resolution between States has traditionally been an intrinsically political or diplomatic process based on the consent of the states. In international law "[t]here is no obligation . . . to settle disputes,

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<sup>144</sup> As Barton Legum, former Chief of the NAFTA Arbitration Division in the Office of the Legal Advisor at the United States Department of State, has noted, "A standing tribunal that takes an exceedingly expansive view of its mandate and the substantive law may be more of a liability than a benefit from the perspective of the States that create it." Barton Legum, *The Introduction of an Appellate Mechanism: The U.S. Trade Act of 2002*, in ANNULMENT OF ICSID AWARDS (Emmanuel Gaillard & Yas Banifatemi eds., 2004). As discussed above, this issue was a source of concern for states when the WTO appellate body was considered. Creating a standing appellate body is seen as transforming the role of the arbitrator from an interpreter to a legislator. See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 336 (1999) ("[D]ispute resolution is not simply a mechanism for neutral application of legislated rules but is itself a mechanism of legislation and of governance."); Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of Trilogy)*, 14 AM. U. INT'L L. REV. 845, 848-49 (1999) (noting that the distinction between judges as legislators and judges as arbitrators is disappearing at WTO).

and procedures for settlement by formal and legal procedures rest on the consent of the parties.”<sup>145</sup> The notion of adjudication based on the consent of the parties, rather than universally applicable rules, accounts in part for the lack of a doctrine of *stare decisis* in international law. The decision of two state parties to submit to a single, binding adjudication is fundamentally inconsistent with the notion of a legal doctrine of general applicability. This lack of a coherent and centralized legal system means that in international law “the system tends to favour the finality of decisions. . . [while] consistency in interpretation of the law, which would be served by an institutionalized mechanism of review, is not of primary concern.”<sup>146</sup> In most forms of state-to-state dispute resolution, therefore, the process of dispute resolution is consent-based and particularized.

Given the interest of the state parties in maintaining control over the conditions under which they submit to international adjudication, the traditional arbitral model is facially more suited to resolving international investment disputes. Commercial arbitration has been described as:

a natural extension of the informal practice of traders calling upon a respected colleague to express a view on disputes between them. Where courts might appear remote, rigid, and slow and expensive in their procedures and the judges might seem unversed in the ways of commerce and the law, insensitive and ill-adapted to the exigencies of commercial life, arbitrators offered an attractive alternative.<sup>147</sup>

The advantage of arbitration is that it offers a consent-based model of adjudication that is tailored to the needs of particular disputants, which corresponds well to the way that state parties traditionally have resolved disputes in international law.

In international investment law, however, the picture is quite different. For the purposes of attracting foreign investment and promoting growth, developing countries and developed countries have committed themselves to a standardized legal regime to be applied to all investment disputes with the other state party's nationals. After the BIT is signed, the resulting arbitrations over specific contract disputes no longer require the consent of the state party. The BIT regime provides an underlying, consistent set of substantive and procedural rules that apply to every eligible investment dispute. The purpose of the BIT regime is to prevent each alleged breach of an investment

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<sup>145</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 708 (1990).

<sup>146</sup> *Id.*

<sup>147</sup> JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW* 45 (1999).

contract from being considered anew by binding the receiving state ex ante to a specific set of economic and legal commitments to foreign investors. In direct contrast to most forms of international dispute resolution, therefore, the success of the BIT system is dependent upon the creation of a standardized legal system.

The standardization of BIT interpretation has resulted in a significant transfer of control away from States parties to their appointed arbitrators in the context of individual disputes. Arbitrators within the BIT system have recognized that the decisions that they render are not individualized, but occur within the framework of a treaty regime and have increasingly looked to earlier awards for interpretive assistance. As the number of arbitrations has grown, a “de facto doctrine” of stare decisis has become apparent in ICSID decisions, despite the lack of any formal system of precedent.<sup>148</sup> A review of recent decisions of ICSID tribunals demonstrates that they are replete with references to other panel decisions, most of which were made based on interpretations of different BITs.<sup>149</sup> Persuasive arguments are adopted and built

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<sup>148</sup> Professor Bhala has described a similar phenomenon in the WTO context. To locate the de facto doctrine:

We need only watch how the adjudicator comes to its conclusions to see stare decisis in operation. We may, for example, see the adjudicator referring to and citing cases repeatedly in ways that suggest that it feels bound by the force of the past. We may see the adjudicator struggling mightily to distinguish prior cases from the case at bar, and infer therefrom the binding force of precedent. We may even see lines of precedent, spawned by leading cases, on certain issues that do indeed appear to bind future disputants.

Bhala, *supra* note 144, at 937.

<sup>149</sup> In *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, the tribunal, in interpreting Egypt’s obligations under the BIT between Greece-Egypt BIT, cited and relied upon the decisions of other tribunals in determining that the Claimant bore the burden of proof for establishing the conditions required to make out a claim and in holding that interest is an integral part of compensation. The panel cited four different decisions for these propositions, all of which were based in interpretations of other BITs. *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ICSID Case No. ARB/99/6, Award (Apr. 12, 2002), available at [http://www.worldbank.org/icsid/cases/me\\_cement-award.pdf](http://www.worldbank.org/icsid/cases/me_cement-award.pdf). In *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, the tribunal made repeated references in determining jurisdiction, examining the merits of the claims, and deciding upon an award to more than ten arbitral decisions, none of which interpreted the BIT between Spain and Mexico that was controlling in that case. *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2 (2003). Even in the NAFTA context, where an interpretive jurisprudence is growing around a particular BIT, arbitrators do not rely exclusively (or even primarily) on earlier interpretations of the same BIT. In *Metalclad Corp. v. United Mexican States*, the tribunal relied most heavily on the decision in *Biloune v. Ghana Inv. Ctr.*, 95 I.L.R. 183 (1993). While recognizing that the decision was not binding, the tribunal stated that “it is



upon by other tribunals. It is logical, therefore, for arbitrators to look to previous decisions for interpretive guidance—and to ensure that similarly situated parties receive like treatment in adjudication.

In a real sense, therefore, both at the systemic level and in each individual award, states have already lost control of the conditions under which they submit to adjudication. By entering into binding international treaties, states have committed *ex ante* to the adjudication of disputes on the basis of a set of standardized commitments. Simply through a process of repetitive interpretation, certain understandings of these commitments are acquiring credibility among arbitrators that stems from their repeated adoption or citation, rather than from the consent of the state. This *de facto* system of *stare decisis* is likely to become more pronounced as the number of ICSID arbitrations grow, and particularly, as the same BITs are repeatedly interpreted. Because ICSID permits private parties to bring States into arbitration, the number of suits occurring under ICSID is likely to expand far beyond the number in any other international court, in which only states can bring suit against other states.<sup>150</sup> If the BIT regimes are successful in expanding foreign direct investment, we should expect ICSID arbitrations to become more frequent and regularized. Given that states can expect an increasing number of cases, they should be open to strategies by which they can reduce their liabilities. The adoption of an appellate body would require allocating limited additional power to the international investment regime, but the increased predictability of the outcomes states would face, and the corresponding ability to alter their behavior to prevent future liability, would provide a compensatory reward on the domestic front.

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a persuasive authority and the Tribunal is in agreement with its analysis and its conclusion.” *Metalclad Award*, *supra* note 56, at ¶ 108.

<sup>150</sup> A potentially useful comparison would be the growth in §1983 litigation after the Supreme Court’s ruling in *Monroe v. Pape* that § 1983 created “a federal remedy, cognizable in federal court, against state officials for violation of federal rights.” RICHARD H. FALLON ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1079 (5th ed. 2003). According to statistics gathered by the Administrative Office of the United States Courts, in 1961 there were 296 civil rights cases filed; in 1986 there were over 40,000. *Id.* at 1082.

This growth is beginning already. Through 2001, eighty-five cases had been brought before tribunals constituted under ICSID—since then seventy-three additional proceedings have been initiated. Although the absolute numbers are still small, the trajectory points towards significant growth. The International Court of Justice, in comparison, has heard over 100 contentious suits, however, the numbers of suits brought in the ICJ each year has not substantially increased since its first case in 1947. The Court has consistently had between one and three cases a year. A notable exception was in 1999 when the Court had seventeen. See INTERNATIONAL COURT OF JUSTICE, LIST OF CASES BROUGHT BEFORE THE COURT SINCE 1946, at <http://www.icj-cij.org/icjwww/idecisions.htm>.

Underlying this discussion is the reality that states must continue to seek opportunities for foreign investment to promote sustained economic growth. States that cannot provide for their citizens face growing pressure, as the spread of democratic principles makes authoritarian governance increasingly difficult to sustain. Participating in international investment treaties has been a necessary step towards attracting foreign investment, but has had surprising and sometimes negative consequences for state parties. Developing countries have found themselves in the grip of the “Golden Strait-jacket,”<sup>151</sup> forced by economic necessity to participate in BIT regimes, but severely limited by these commitments in their ability to regulate domestically. Developed countries, which anticipated that developing countries would be the real targets of the BIT regimes, have also, to their surprise, found their BIT commitments more restrictive than anticipated.<sup>152</sup> Despite the negative ramifications of the BIT regimes, however, neither developing nor developed countries have much of an alternative. Foreign investment is simply too essential to economic growth for most countries to be able to afford to back out of their treaty commitments, alienating current and future investors. In this kind of economic environment, states’ retained consent and control are minimal—if they are committed to the success of the BIT regime, states are bound to participate in arbitrations with disgruntled investors and bound to pay the awards. As the number of cases grows, states should see that increased predictability (and a corresponding ability to alter behavior to avoid future liability) outweighs the value of ostensible but illusory control.

### CONCLUSION

In this comment, I have attempted to frame a discussion of the ICSID Secretariat’s proposal for creating an Appeals Facility. Through reviewing

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<sup>151</sup> THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 105 (1999).

<sup>152</sup> In NAFTA for example, American and Canadian negotiators requested the investment protections to guard against expropriations by the Mexican government. United States General Accounting Office Report to the Congress, *North American Free Trade Agreement: Assessment of Major Issues*, Vol. 2 (Sept. 1993), at 19. NAFTA investor suits “for harmful government conduct, however, have been raised by investors against each of the three countries, not merely against Mexico.” Dana Krueger, *Note: The Combat Zone: Mondev International, LTD. v. United States and the Backlash Against NAFTA Chapter 11*, 21 B.U. INT’L L.J. 399, 420 (2003). Investors “have now submitted...claims which seek billions of dollars in damages; challenge measures that ostensibly protect public health, safety, and the environment; and attack the legitimacy of important government services, including the state judicial systems of Massachusetts and Mississippi.” Charles H. Brower, II, 26 VAND. J. TRANSNAT’L L. 37, 45 (2003).

the body of awards, I have shown that inconsistency is in fact a growing problem, and I have argued that it poses a threat to the underlying goals of the ICSID system. I have offered theories as to the potential causes of this trend, political and administrative, and explored the likelihood that appellate review would prove more effective in correcting the trend as compared to the current mechanisms of control in the ICSID system. Through a discussion of the WTO and Canada-U.S. FTA experiences, I demonstrated how the source of the inconsistencies may be determinative in the success of the Appeals Facility and the role that the state sovereigns will have to play not only in adopting the Appeals Facility, but in creating an environment which will permit it to be effective.

In closing, I advocate that a careful consideration of the Secretariat's proposal should occur within the context of a revised understanding of the unique characteristics of international investment arbitration. In committing themselves to the ICSID regime, states have waived their traditional immunities and subjected themselves to suits by private investors, committing themselves as more equal players in the international investment regime. As I have explained, this transition has not been entirely voluntary; states have been forced to commit to international standards that are externally defined to attract much-needed foreign investment. The current procedures for ICSID arbitration do not adequately address the unique set of interests that come into play in international investment disputes. The stakes in these suits for state sovereigns and for their citizens are very high; efforts to promote accuracy, consistency, transparency, and efficiency should be correspondingly high. Given the constraints under which they operate, states should not see the creation of an appellate body as a further incursion into their sovereignty, but rather as an opportunity to maximize their remaining control, and should take the lead in promoting reform. As I have argued here, the adoption of an ICSID appellate mechanism would represent a substantial step toward transforming the ICSID system into one that more closely addresses the reality of what international investment disputes mean to states in the global economic system.