

The identification and consideration of concerns as regards investor to state dispute settlement

1. Introduction

1. This paper is intended as a contribution to the discussions in Working Group III of the United Nations Commission on International Trade (UNCITRAL). The aim of the paper is to identify and consider concerns as regards the current system of investor to state dispute settlement (ISDS) in line with the first stage of the mandate given to Working Group III by the UNCITRAL Commission. Consideration of what reforms might be desirable is for the second stage of discussions and is not addressed in this paper.
2. The Note by the UNCITRAL Secretariat, "Possible reform of investor-State dispute settlement (ISDS)" of 18 September 2017¹ lists a number of concerns which have been identified regarding ISDS (para 19 et seq.). The present paper builds on and responds to that paper. In particular, it suggests that a further and complementary way of thinking about the concerns with the ISDS system is to consider the framework in which the current system of ISDS operates. Considering the system as a whole provides a way of identifying concerns because it permits the existing system of dispute settlement to be compared and contrasted to other systems with similar attributes. Consequently, this paper first examines the key attributes and characteristics of the investment treaty regime (section 2). It then briefly looks, in a comparative manner, at how disputes in regimes with comparable characteristics to the investment regime are managed (section 3). Thereafter, it looks at the factors influencing the design of the current system of ISDS (section 4) before turning, on the basis of the analysis in these previous sections, to identify a number of concerns which merit further consideration (section 5).

2. Key attributes of the investment treaty regime

3. The key attributes of the current investment regime stem from two fundamental features. First, the regime is a **public international law** regime. Second, it resembles **public law** in that it is largely concerned with the treatment of investors and hence the relationship between individual actors and the state.
4. The international investment regime is made up of a large number of international treaties. These are **instruments of public international law**, concluded between

¹ A/CN.9/WG.III/WP.142.

public international law actors acting in their sovereign capacity.² In these agreements, states grant the power to bring claims to enforce these international treaties to natural or legal persons (investors). However, that does not take away the public international law nature of these agreements, agreed, as they are, between two sovereigns. As treaties, these agreements are also meant to be interpreted in accordance with public international law. This includes the rules on interpreting treaties and other rules, such as the rules on state responsibility.

5. These public international law treaties deal with the **sovereign capacity of states to regulate**, by providing certain protections which are enforceable by investors.³ This creates a situation similar to public or constitutional law, in which individuals are protected from acts of the state and can act to enforce those protections.⁴ It is important to recall that the state is acting in its sovereign capacity, both in approving these treaties and as regards the acts challenged. Investment treaty obligations apply to any acts that can be attributed to a state, be it legislation passed by a parliament or an individual decision taken by a local council. In the event that a state is found not to have respected these obligations it must make reparations. Such reparations typically take the form of monetary compensation, implying a charge on the budget of a state.
6. Framed by these two key features, i.e. the public international law basis of the treaties and the public law nature of the relationship, one can identify a number of characteristics of the international investment regime which are relevant for thinking about the present system and assessing concerns. These can be enumerated as follows:
 - a) A constitutional/administrative law component: the obligations set down in the investment treaties are intended to protect investors from certain (limited) state conduct. Hence applying the obligations implies striking a balance between the right to exercise sovereign authority and the duty to protect individuals, typical of constitutional/administrative law determinations;
 - b) A unidirectional system: the investor initiates the case against the state because the investor accepts the standing offer to arbitrate provided in the treaties;

² Roberts, Anthea "Clash of paradigms: actors and analogies shaping the investment treaty system" (2013) American Journal of International Law, 107 (1) 45-94, 58-63.

³ Ibid, at 63-68.

⁴ See, amongst others, the works of Van Harten, Gus & Loughlin, Martin "Investment Treaty Arbitration as a Species of Global Administrative Law", 17 European Journal of International Law 121 (2006); Van Harten, "Investment Treaty Arbitration and Public Law" (2007); Schneiderman; David, "Constitutionalizing Economic Globalization: Investment Rules And Democracy's Promise" (2008); Schill, Stephan W. "International Investment Law and Comparative Public Law—An Introduction", in "International Investment Law and Comparative Public Law" 3 (Stephan W. Schill ed., 2010); Montt, Santiago "State Liability in Investment Treaty Arbitration: Global Constitutional And Administrative Law in the BIT Generation" (2009).

- c) A vertical relationship: disputes predominantly concern foreign investors bringing cases against host states that arise from the vertical, regulatory relationship between those actors due to the fact that the investor enters into the host state territory and its economic and legal order;
- d) A repeat function: the treaties in question potentially will give rise to multiple disputes over a potentially extended period of time. This is to be distinguished from legal instruments establishing one-off contractual arrangements;
- e) A determinacy component: the substantive obligations are indeterminate in the sense that they set down general, high level standards intended to apply in multiple different fact patterns, much like constitutional law provisions; and,
- f) A predictability/consistency function: given the general formulation of investment protection standards and conscious of the repeat function stakeholders (governments, investors, civil society) look at precedents in order to understand how obligations in the treaties are being or should be interpreted. This occurs both within the same treaty and across treaties, given the relatively high degree of homogeneity of the treaties. This means the adjudicative role is key in elaborating and further refining the precise meaning of the substantive obligations.

3. Comparative analysis

7. Disputes flowing from systems with the characteristics identified above frequently lead to the creation of permanent bodies with full-time and tenured adjudicators to adjudicate disputes. Permanent adjudicatory bodies offer a number of advantages for adjudicating disputes in regimes which display these characteristics. These advantages operate in multiple and overlapping ways. Permanent bodies, by their very permanency, deliver predictability and consistency and manage the fact that multiple disputes arise, since they can elaborate and refine the understanding of a particular set of norms over time and ensure their effective and consistent application. This is particular relevant when the norms are relatively indeterminate. When appointing adjudicators in a permanent setting, thought is given to a long-term approach. States have an interest that public actions can be taken and at the same time individual interests protected and they know that the balance between these interests is to be maintained in the long term. Permanent bodies with full-time adjudicators also free the adjudicators from the need to be remunerated from other sources and typically provide some form of tenure. This prevents the adjudicators from coming under pressure to take short-term considerations into account and ensures that there are no concerns as to their impartiality.

8. It can be observed, both on the international and domestic level, that disputes in other regimes involving the characteristics enumerated above for the investment regime are normally settled before standing bodies. The members of these adjudicative bodies are composed of full time adjudicators who are appointed by states, associated with a high degree of independence and impartiality. Frequently, decisions of these standing bodies are subject to review via appeal in order to ensure correctness and greater predictability.
9. At the international level, examples include the European Convention on Human Rights with the European Court of Human Rights and the Inter-American Convention on Human Rights with the Inter-American Court of Human Rights. The legal regimes applied by these courts share many of the characteristics identified above as regards the investment regime.⁵ Both of these bodies have permanent, standing courts with full time adjudicators appointed by the treaty parties. Although it does not have jurisdiction on claims advanced by individuals, the WTO also deals with the review of state action. These claims are heard within a structure that permits for appellate review by adjudicators appointed by the treaty parties.
10. At the domestic level, legal regimes with similar characteristics to the investment regime are also typically provided with permanent bodies for adjudication. It is a recognisable feature in domestic legal systems throughout the world that public or administrative law disputes are dealt with by standing permanent courts with independent judges that are positioned within a hierarchy that permits appellate review.
11. These examples are useful, not necessarily in all their details and features, but in showing that when creating or developing regimes with comparable characteristics to the investment regime, countries have consistently created permanent standing bodies. The next section briefly recalls the nature of the existing regime before the paper turns to consider the concerns arising within the existing regime in the light of the characteristics enumerated in section 2.

4. The current dispute settlement mechanisms for the investment regime

12. As of the 1960s the overall approach to the regulation of foreign investment has been characterised by 1) the emergence of international arbitration as a common means of settling investment disputes and 2) the increasing recognition by treaty law of the ability of investors to enforce the treaties directly against host states. The ICSID Convention, concluded in 1965 and currently binding for 161 States, represented and

⁵ There are of course also significant differences, such as the nature of the remedies or the relationship to domestic litigation.

continues to represent a significant advance in the development of international investment law.

13. The ICSID Convention uses a model of dispute settlement based on arbitration. Tribunals are appointed by disputing parties and composed on an ad hoc basis to hear a particular dispute. Awards can be annulled on certain limited grounds by an ad hoc annulment committee. Other ISDS takes place on the basis of rules originally created for commercial arbitration, such as the UNCITRAL Arbitration Rules.
14. The ICSID Convention was conceived before the large body of investment treaties came into existence. Of the 2667 currently in force only 63 were in place in 1970⁶ (the ICSID Convention entered into force on 14 October 1966). The drafters therefore did not have in mind that the system of dispute settlement contained in the ICSID Convention would be used, as it currently is, primarily for treaty dispute settlement. Indeed, they envisaged it would primarily be used for investment contract dispute settlement. The drafters of ICSID estimated that around 90% of cases would be under investment contracts and concessions and not under investment treaties.⁷ This can be understood to have motivated the key design choices made in the ICSID Convention.⁸
15. Indeed, it was only from the 1970s onwards that states started to include provisions permitting investors to themselves enforce the treaties, in part at least on the suggestion of ICSID. This reflected the deliberate choice of states to remove treaty disputes from the state-to-state level, permitting the investor to enforce the agreement without the need to persuade its home state to espouse the claim.
16. The first cases brought at ICSID were based on arbitral clauses in investment contracts or domestic legislation on the promotion and protection of foreign investments. The AAPL dispute from 1990 was the first case where foreign investor's treaty claims were permitted on the understanding that the parties' consent to ICSID arbitration was "perfected" by the investor accepting the host state's offer to arbitrate in the treaty.⁹

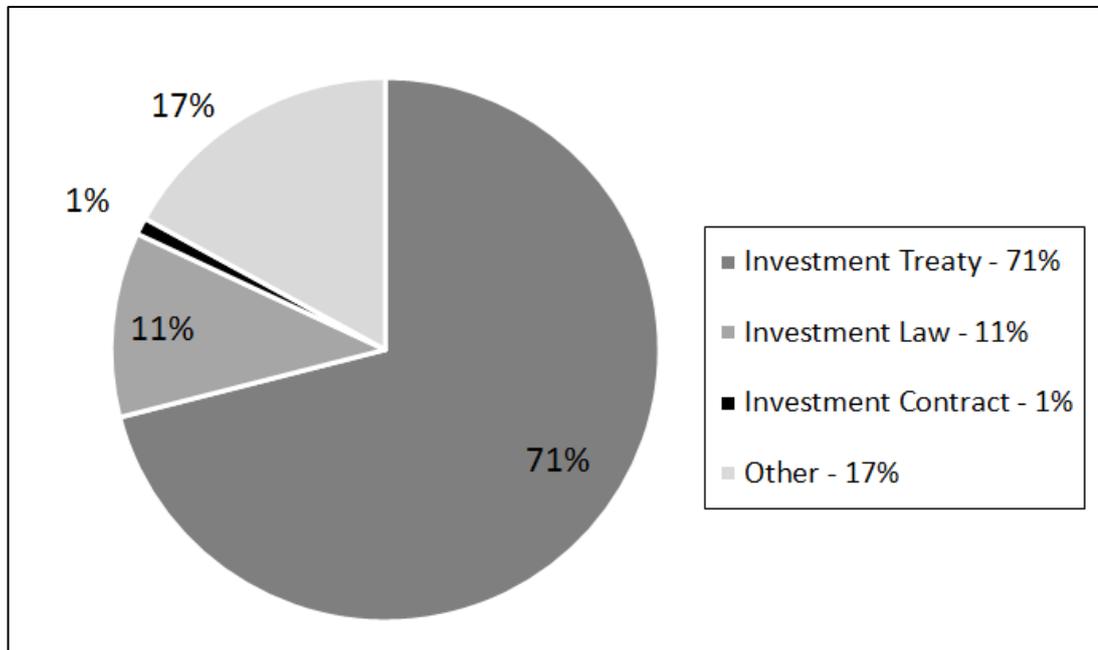
⁶ Source: UNCTAD Investment Policy Hub.

⁷ See, J.C. Thomas and H.K. Dhillon "The Foundations of Investment treaty Arbitration, The ICSID Convention, Investment Treaties and the review of Arbitration Awards" (2017) 32(3) ICSID Review.

⁸ See, J Pauwelyn, "At the Edge of Chaos ? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed," ICSID Review, Vol. 29, No. 2 (2014) pp. 372-418, in particular pp 401-402 quoting Professor Lowenfeld (a member of the US Delegation negotiating ICSID) who wrote: "None of the discussions at the consultative meetings [in preparation of the ICSID Convention], or so far as I know in the contemporary writing and legislative consideration, addressed the possibility that a host state in a bilateral treaty could give its consent to arbitrate with investors from the other state without reference to a particular investment agreement or dispute. I know that I did not mention that possibility in my testimony before the US Congress, and neither did anyone else."

⁹ *Asian Agricultural Products Ltd (AAPL) v Democratic Socialist Republic of Sri Lanka*, ICISD Case No. ARB/87/3, Award (27 June 1990). See also J. Paulsson, "Arbitration without Privity" ICSID Review, Vol. 10, No. 2 (1995) pp. 232-257.

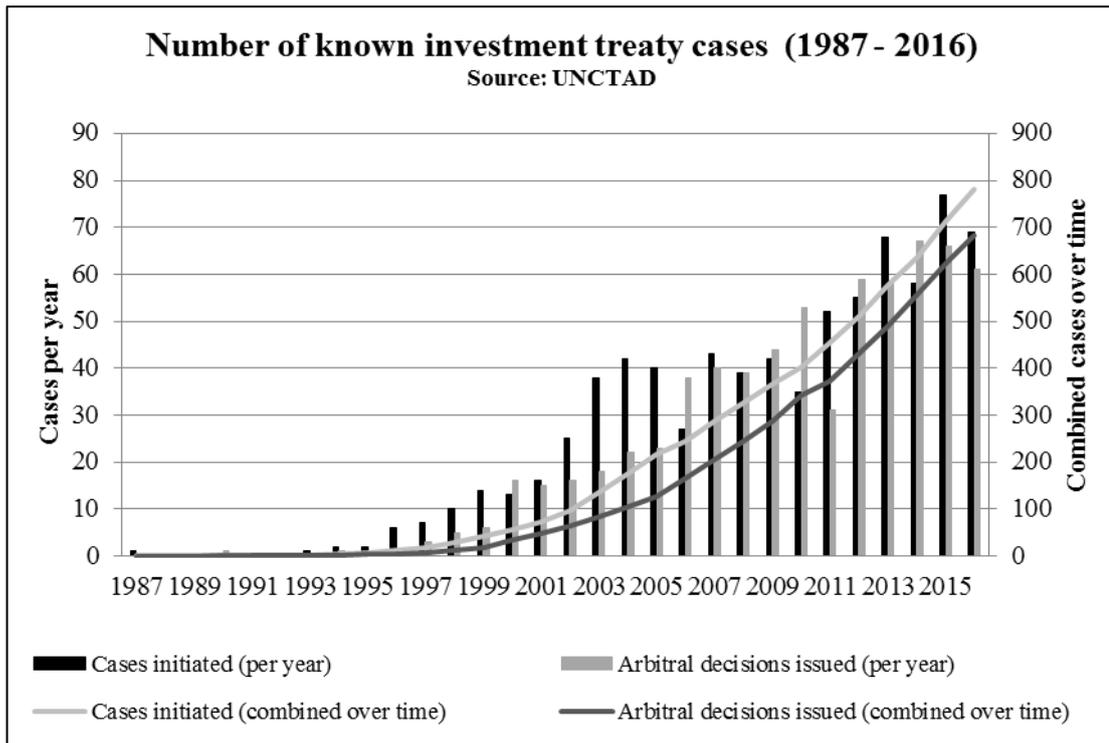
17. The AAPL dispute initiated an increase in treaty based cases, buttressed by the changing practice of states in inserting ISDS clauses. More than 70% of ICSID cases have in fact been brought under investment treaties and only 1% exclusively under investment contracts, as illustrated in Graph 1. below.



Graph 1. Instruments of consent in ICSID arbitrations (1976-2016).¹⁰

18. The growth of cases has come in the 1990s and in particular in the last two decades, as demonstrated in Graph 2 below.

¹⁰ Jonathan Bonnitcha, Lauge Poulsen and Michael Waibel *"The Political Economy of the Investment Treaty Regime"* Oxford University Press, 2017 P. 61 Source: Author compilation from the ICSID website, based on 573 ICSID Cases, as of August 2016.



Graph 2. Known investment treaty cases (1987 – 2016).

19. The extensive network of investment treaties has given rise to a substantial and ever-growing investment arbitration case-law. The rising number of investment treaty-based cases has led to questioning of the current system of investment dispute settlement.

5. Concerns with the current dispute settlement mechanisms for the investment regime

20. When the main attributes of the investment treaty regime are set against the structure of the system of arbitration for investment disputes, a number of concerns can be identified within the existing system. These concerns coincide with those identified in the Secretariat paper but also arise at a systemic level or result from the nature of the system. These concerns take on heightened significance with the knowledge of the relatively high and sustained level of cases. These concerns can be identified as follows:

a) The ad hoc system impacts consistency and predictability

21. The ad hoc nature of the system impacts consistency and predictability. The ad hoc constitution of arbitral tribunals potentially influences outcomes, inasmuch as arbitrators are repeat players, or are seeking to be repeat players, in a system where the adjudicators need to be appointed afresh for each dispute. When considered at a

systemic level, this can be considered as likely to lead to more fact-specific outcomes.¹¹ This does not enhance the stability and consistency of the system and hence the ability of stakeholders, be they businesses, governments or civil society actors to seek guidance on previous cases to try to determine how the rules will be applied in a particular set of circumstances.

22. There are a number of examples of inconsistent arbitral decisions on core aspects of the traditional investment protection provisions. The questions raised in those conflicting cases concern general concepts and functions of the substantive investment rules that are repeatedly raised in many disputes where consistent responses would be desirable.
23. One example is the ongoing saga on the applicability of the most-favoured nation (MFN) clauses to procedural matters (i.e. dispute resolution). While some tribunals have held that the MFN clause extends to dispute settlement provisions contained in treaties between the respondent State and third States,¹² other tribunals have reached the opposite conclusion.¹³ This issue continues to be raised in many cases. An example is *APR Energy and others v. Australia* where the claimants are seeking to import a dispute resolution clause into a treaty that contains no consent to arbitration.¹⁴
24. In relation to the interpretation of the scope and effect of the umbrella clause, some tribunals have held that the clause would have the effect that breaches of certain contractual commitments would amount to breaches of the investment treaty,¹⁵ whereas others have denied this effect for ordinary commercial contracts.¹⁶
25. Other examples include several arbitral decisions taken in the aftermath of the Argentine financial and economic crisis of 2001-2002 in relation to the necessity defence under Article XI of the US-Argentina BIT. For instance, while the *Enron* tribunal interpreted this provision by reference to the very strict test for "necessity" as

¹¹ See Todd Tucker, *"Inside the Black Box: Collegial Patterns on Investment Tribunals"* (2016) 7(1) J Intl Disp Settlement 183–204..

¹² See for instance *Emilio Augustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, para. 64; *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 103; *Gas Natural v. Argentina*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, paras. 31 and 49; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, paras. 53-66.

¹³ See for instance *Plama Consortium Ltd v. Republic of Bulgaria* ICSID Case No. ARB/03/24, Decision on Jurisdiction, paras. 184, 223, 227; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, para. 119; *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, paras. 90-100.

¹⁴ *Power Rental Asset Co Two LLC (AssetCo), Power Rental Op Co Australia LLC (OpCo), APR Energy LLC v. the Government of Australia*, UNCITRAL.

¹⁵ *SGS Société Générale de Surveillance s.a. (SGS) v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, para. 128.

¹⁶ *SGS Société Générale de Surveillance s.a. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, para. 166.

a circumstance precluding wrongfulness,¹⁷ the *Continental Casualty* tribunal interpreted the rule by reference to the less stringent test for "necessary" state measures developed under the law of the World Trade Organization.¹⁸

26. Counsel would not be acting with due diligence if they did not exploit every possibility to bring an argument which might be of aid to their clients. The ad hoc system creates incentives to run these arguments given there is no structure creating and enforcing consistency. The system therefore in and of itself creates additional costs. This is in addition to the obvious difficulty which arises in terms of consistency and predictability. The repeat nature of the regime and the relative indeterminate nature of obligations heighten the importance of these consistency and predictability concerns.

b) Significant concerns of perception

27. It is a core feature of the domestic and international adjudicative systems mentioned earlier, that, in the words of a Chief Justice of the English Courts, "justice should not only be done, but should manifestly and undoubtedly be seen to be done."¹⁹ That statement is an expression of the decisive move away from ad hoc systems for public matters in all legal systems, led by the thinking of Jeremy Bentham, Voltaire and Alexander Hamilton.²⁰ The ad hoc nature of the investor-state arbitration wherein the arbitrators, by definition, have other activities creates significant perception problems. These perception problems derive from the fact that the professional and/or personal interests of the persons involved in the system might be perceived to have an effect on the outcomes of the disputes. Whilst the detailed reality and the complex interactions between arbitrators themselves and the actors which appoint them undoubtedly paints a more complex picture, the combination of the unidirectional nature of the system and the importance of perception, of justice being seen to be done, raises concerns.

c) The limited systemic checks on correctness and consistency

28. Another concern regarding the existing system is the limited possibility for a systemic check for correctness and consistency. Under the ICSID system, annulment is only available to correct a very limited set of errors. Article 52 of the ICSID Convention only provides for annulment in limited circumstances.²¹ These do not touch upon the

¹⁷ *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, paras. 322-345.

¹⁸ *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, paras. 189-230.

¹⁹ Lord Chief Justice Gordon Hewart in *R v Sussex Justices, Ex Parte McCarty* [1924] 1KB 256

²⁰ OECD Secretariat Freedom of Investment Roundtable 27, *Economic considerations in dispute settlement: Adjudicator compensation systems* [forthcoming].

²¹ See Article 52(1) ICSID-Convention ("Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:(a) that the Tribunal was not properly constituted;(b) that the Tribunal has manifestly exceeded its powers;(c) that there was corruption on the part of a member of the Tribunal;(d) that there has been a serious departure from a fundamental rule of procedure; or(e) that the award has failed to state the reasons on which it is based.").

substantive correctness of the award. Similarly, domestic arbitration laws or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards limit the grounds on which recognition and enforcement of an award can be refused.

29. This means that awards can be legally incorrect but the system does not allow for them to be corrected. In *CMS v Argentina*, for example, the Annulment Committee said:

"Throughout its consideration of the Award, the Committee has identified a series of errors and defects. The Award contained manifest errors of law. It suffered from lacunae and elisions. All this has been identified and underlined by the Committee. However the Committee is conscious that it exercises its jurisdiction under a narrow and limited mandate conferred by Article 52 of the ICSID Convention. The scope of this mandate allows annulment as an option only when certain specific conditions exist. As stated already (paragraph 136 above), in these circumstances the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal."²²

30. This problem of ensuring correctness compounds the other features of the existing regime leading to lack of consistency and predictability mentioned above. The significance of this is again linked to the repeat function of potential disputes and the relative level of determinacy. It is notable that constitutional and supreme courts function to interpret general and relatively indeterminate norms, fleshing them out and clarifying them over time. These often have important effects on legitimising and stabilising understandings of the underlying substantive rules. An example of this is the WTO Appellate Body, which with a number of foundational reports in the late 1990s and early 2000s effectively calibrated the balance between the free trade obligations of the WTO Agreements and the ability of WTO Members to regulate.²³

d) Nature of appointment of adjudicators

31. When states appoint adjudicators *ex ante* (before particular disputes arise), they act in their capacity as treaty parties and have an incentive to balance their interests, ensuring the selection of fair and balanced adjudicators that they would be happy to live with whether a future case is brought by their investors or against them as respondents. In arbitration, however, the choice of arbitrator is made not in advance but *ex post* (i.e. at the time a dispute has arisen), which means that investors and state respondents make decisions about arbitrators with a view to best serving their interests in that particular

²² CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Annulment Decision, para. 158.

²³ Wagner, Markus, Regulatory Space in International Trade Law and International Investment Law (March 16, 2014). University of Pennsylvania Journal of International Law, Vol. 36, No. 1, 2014-2015; University of Miami Legal Studies Research Paper No. 2014-10.

case. This leads them to focus on arbitrators who are already known in the system and who are considered as having a predisposition towards one or other side (being perceived as investor or state-friendly). On the one hand, that is a natural reaction to the paradigm in which the disputing parties operate as that represents the safest option in the circumstances.²⁴ On the other, however, it means that parties are looking at appointment to the dispute primarily in their capacity as disputing party and not in their capacity as sovereigns, where their long term interests lies in providing for adjudicative bodies that faithfully interpret and apply the underlying substantive provisions. This is heightened by the repeat nature of potential disputes, the relative indeterminacy, the vertical relationship and both the public international law and public law features of the system.

32. In addition to encouraging the appointment of predisposed (i.e. perceived as investor or state friendly) arbitrators and a small number of repeat players, one of the problems with this approach is that it leads to a continued high concentration of persons who have gained their experience as arbitrators primarily in the field of commercial arbitration involving disputes of "private law" rather than public international law disputes. Such persons often are professionally less familiar with public international law (investment treaties are of course a field of public international law) and public law (which is important because the cases concern the actions of states in their sovereign capacity). Finally, the ad hoc appointment system also impacts on the regional and gender diversity of the individuals chosen to sit as arbitrators, with the system leading to relatively limited diversity on both fronts.

e) Significant costs

33. As already noted, a problem with the system is the manner in which it generates costs.²⁵ This comes from the lack of consistency and predictability inherent in the system where diligent counsel will run arguments which might have been dismissed in another case because it is always possible that another tribunal will accept them. Costs are also generated by the need to identify and then appoint arbitrators. Moreover, the disputing parties themselves bear the burden of the costs of the arbitrator's fees and the fees of the arbitral institutions.
34. These elements combine with the already significant costs of litigating a dispute, in particular in hiring specialised counsel, and the lengthy nature of litigation to make the overall costs of bringing a claim under the existing system potentially prohibitive for a significant number of smaller and medium sized investors.

²⁴ Roberts, Anthea *"Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States"* (2010) *American Journal of International Law*, 104 (4) 179-225.

²⁵ See, Gaukrodger, D. and K. Gordon (2012), *"Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community"*, OECD Working Papers on International Investment, 2012/03, OECD Publishing, p. 19 et seq..

e) Lack of transparency

35. The existing system, being largely based on or derived from commercial arbitration has historically not regarded transparency as being a necessary component of dispute settlement. This has meant that information is not always provided to the public on investment disputes. Whilst significant steps have been taken to improve this situation, through the amendments of the ICSID Arbitration Rules to provide for certain levels of transparency, to the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency") to more regular acceptance by disputing parties of the desirability of transparency, this remains a problem with the existing system.

6. Conclusion

36. There are significant concerns with the existing ISDS system. These can be identified as:
- the lack of consistency and predictability flowing from the ad-hoc nature of the system;
 - significant concerns arising from the perception generated by the system;
 - limited systemic checks on correctness and consistency in the absence of an effective appeal mechanism;
 - the nature of the appointment process impacting the outputs of the adjudicative process;
 - significant costs; and,
 - a lack of transparency.
37. These concerns are systemic in nature. That is they derive from the interplay of multiple elements of the current system, but above all the ad hoc nature of the tribunals and the lack of appellate review. As demonstrated above, the contemporary investment regime is strongly characterised by repeat disputes, relative indeterminacy and vertical relationships in a context of public international law and public law situations. A comparison shows that the international community and states individually have typically chosen to create or develop permanent standing bodies to adjudicate disputes in the context of such regimes.

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