

ISDS Reform Conference – Mapping the Way Forward Discussion Paper for the Session on Appeal Mechanism for ISDS Awards

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Is an appeals mechanism for ISDS awards desirable and practicable?

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INTRODUCTION

1. This paper seeks to provide a framework for discussion of the desirability and practicability of the introduction of an appeals mechanism or establishment of a permanent appellate body as reform options to address existing concerns regarding the investor-State dispute settlement (ISDS) system. The paper is divided into four parts as follows: Part 1 includes a brief introduction to the ISDS system and some of the criticisms that form the background to calls for reform; Part 2 briefly describes the particular concerns that have arisen in relation to consistency and correctness of awards rendered by ISDS tribunals and limitations of the existing system in terms of addressing those concerns; Part 3 then considers the desirability and practicability of establishing an appeals mechanism, with particular reference to competing concerns of finality, cost and efficiency versus consistency and correctness of awards; and Part 4 includes brief remarks on a range of additional considerations relating to the design of a permanent appeals mechanism.
2. In this discussion paper, ISDS refers to the system developed to allow private claimants (who may be individuals or legal persons) to bring claims under treaties concluded between two or more States seeking compensation or other remedies based on a breach of treaty obligations by the "host" State, where the person affected has made or proposes to make an investment.² This system is based on more than 3000 international treaties in which States have undertaken to observe certain standards in relation to the admission and treatment of foreign investors and their investments, such as the obligation to accord fair and equitable treatment and the prohibition of unlawful expropriation.³
3. Typically, investment treaties give investors a right to commence arbitration proceedings against the host State under the Convention on the Settlement of Investment Disputes (the ICSID Convention)⁴, under the UNCITRAL Arbitration Rules⁵ or under the rules of another arbitral institution, such as the Rules of Arbitration of the International Chamber

² Disputes between States and foreign investors may, of course, also arise under contract and/or provisions of domestic law.

³ For detailed discussion of substantive obligations in international investment treaties, see Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009).

⁴ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (opened for signature 18 March 1965, entry into force 14 October 1966) 575 UNTS 159.

⁵ United Nations Commission on International Trade Law Arbitration Rules ('UNCITRAL Arbitration Rules') (December 2013).

of Commerce.⁶ Some bilateral investment treaties also provide investors with other options, including to bring claims before the domestic courts of the host State⁷ or to submit the dispute to conciliation or another alternative dispute resolution process.

4. When an investor-State dispute is referred to arbitration, the resulting award (which is equivalent to a judgment) is legally binding and enforceable either pursuant to the ICSID Convention or, in the case of most non-ICSID awards, the New York Convention.⁸ According to UNCTAD data, there have been at least 904 ISDS cases submitted to arbitration since 1987.⁹ As illustrated in Figure 1, below, the number of cases filed each year has been steadily increasing.
5. In terms of overall outcomes, by the end of 2017, roughly one-third of cases were decided in favour of the State (i.e. claims were dismissed based on the merits or on jurisdictional grounds); about a quarter of cases were decided in favour of the investor with compensation awarded; a further quarter of cases were settled; and the remaining cases were either discontinued, or the investor was successful but was not awarded compensation (see Figure 2).¹⁰ Excluding the awards in the three claims against Russia relating to the Yukos oil company,¹¹ where US\$ 50 billion was awarded to the claimants, the average amount claimed by investors in ISDS cases is \$454 million and the average amount awarded is \$125 million.¹²
6. The ISDS system has been subject to significant public criticism as a result of the large sums which can be awarded in ISDS cases as well as

⁶ International Chamber of Commerce Arbitration Rules ('ICC Rules') (March 2017).

⁷ See e.g. Article 9 of the Agreement between the Government of the Republic of Indonesia and the Government of the Kingdom of Denmark concerning the Promotion and Protection of Investments (signed 22 January 2007, entry into force 15 October 2009).

⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (opened for signature on 10 June 1958, entry into force on 7 June 1959) 330 UNTS 38.

⁹ See Investment Dispute Settlement Navigator <<https://investmentpolicyhub.unctad.org/ISDS>>, accessed 8 January 2019. The figure of 904 was current as at 31 July 2018.

¹⁰ See UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2017' (IIA Issues Note, Issue 2, June 2018) <https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf>, accessed 8 January 2018.

¹¹ See the awards in *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (PCA Case No. AA 226), *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA 227), and *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* (PCA Case No. AA 228), each dated 18 July 2014. These awards were subsequently set aside by Hague District Court: see *The Russian Federation v Veteran Petroleum Limited* (C/09/477160/HA ZA 15-1), *The Russian Federation v Yukos Universal Limited* (C/09/477162/HA ZA 15-2), *The Russian Federation v Hulley Enterprises Limited* (C/09/481619/HA ZA 15-112), each dated 20 April 2016.

¹² UNCTAD (n 10) 5. It is worth noting that these averages are not adjusted for inflation and as they include sums claimed and awarded over a period of three decades, the averages may give an incorrect impression on the importance of ISDS claims in terms of the potential monetary liabilities for States who are ordered to pay damages to investors.

concerns regarding investors seeking to challenge regulations relating to taxation, public health or environmental protection. Concerns such as these have led to some States taking steps to prevent future disputes being referred to arbitration, for example by denouncing the ICSID convention,¹³ terminating their investment treaties,¹⁴ narrowing or clarifying substantive standards of protection,¹⁵ or stating that they will not include ISDS provisions in future investment treaties.¹⁶

7. On the whole, however, ISDS still appears to enjoy significant support from States: since Bolivia's withdrawal from the ICSID Convention in 2007, many more States have acceded to the ICSID Convention¹⁷ than have denounced it. ISDS provisions are also still commonplace in recently concluded BITs¹⁸ and were included in, for example, the 11-country Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) that entered into force on 30 December 2018.¹⁹
8. States and other stakeholders have engaged in discussions in various fora regarding possible reforms to address criticisms of the ISDS system, albeit without necessarily abandoning ISDS entirely. For example, Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) has been considering the topic of ISDS reform since 2017. In this context, key concerns relating to ISDS identified by

¹³ E.g. Bolivia in 2007, Ecuador in 2009, and Venezuela in 2012. See 'Bolivia Withdraws from ICSID' (Global Arbitration Review, 1 July 2007) <<https://globalarbitrationreview.com/article/1028104/bolivia-withdraws-from-icsid>>; 'Ecuador to pull out of ICSID' (Global Arbitration Review, 15 June 2009) <<https://globalarbitrationreview.com/article/1028325/ecuador-to-pull-out-of-icsid>>; 'Adiós to ICSID' (Global Arbitration Review, 25 January 2012) <<https://globalarbitrationreview.com/article/1030923/adi%C3%B3s-to-icsid>>, accessed 8 January 2018.

¹⁴ The termination of investment treaties does not, of course, automatically imply dissatisfaction with ISDS and may be in pursuit of other objectives, for example to replace older treaties with new agreements. See e.g. Antony Crockett, 'The Termination of Indonesia's BITs: Changing the Bathwater, but Keeping the Baby?' in Julien Chaisse and Luke Nottage (eds), *International Investment Treaties and Arbitration Across Asia* (Brill Nijhoff 2018) 159.

¹⁵ Catharine Titi, 'The Evolution of Substantive Investment Protections in Recent trade and Investment Treaties' (International Centre for Trade and Sustainable Development, November 2018) https://www.ictsd.org/sites/default/files/research/ictsd_-_the_evolution_of_substantive_investment_protections_in_recent_trade_and_investment_treaties_-_titi.pdf, accessed 28 January 2019.

¹⁶ See Amokura Kawharu and Luke Nottage, 'NZ Renounces ISDS: Déjà Vu?' (Kluwer Arbitration Blog, 6 December 2017) <<http://arbitrationblog.kluwerarbitration.com/2017/12/06/booked-luke-nottage/>>, accessed 8 January 2019.

¹⁷ Since Bolivia served its notice of withdrawal on 2 May 2007, 14 States have acceded to the ICSID Convention, including e.g. Canada (2013), Haiti (2009), Iraq (2015), Mexico (2018), Moldova (2011), and Qatar (2011). See ICSID, '2018 Annual Report' 16-28 <<https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf>>, accessed 15 January 2019.

¹⁸ See e.g. the 2018 Kazakhstan – Singapore BIT; the 2018 Belarus – India BIT; and the 2018 Japan – United Arab Emirates BIT.

¹⁹ See the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entry into force 30 December 2018), Section B.

UNCITRAL Working Group III and in relation to which potential reforms are being considered include three main topics:²⁰

- (a) Concerns pertaining to consistency, coherence, predictability and correctness of decisions by ISDS tribunals;
 - (b) Concerns pertaining to arbitrators and decision-makers; and
 - (c) Concerns pertaining to the cost and duration of ISDS cases.
9. In relation to point (a) above, Working Group III has expressed concern in relation to divergent interpretations of investment treaty provisions, procedural inconsistency (i.e. tribunals reaching contradicting conclusions about the same procedural issue), the lack of a mechanism to address issues arising from multiple proceedings, and the limited availability of mechanisms to address inconsistent and incorrect arbitral decisions.²¹
10. The introduction of an appeals mechanism or the establishment of a permanent appellate body have been identified as among the reform options which could address these concerns.²² Although these are not the only reform options suggested for discussion by UNCITRAL Working Group III,²³ they form the focus of the present paper.

²⁰ See UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October – 2 November 2018)' (6 November 2018) <<http://undocs.org/en/A/CN.9/964>>, accessed 24 January 2019.

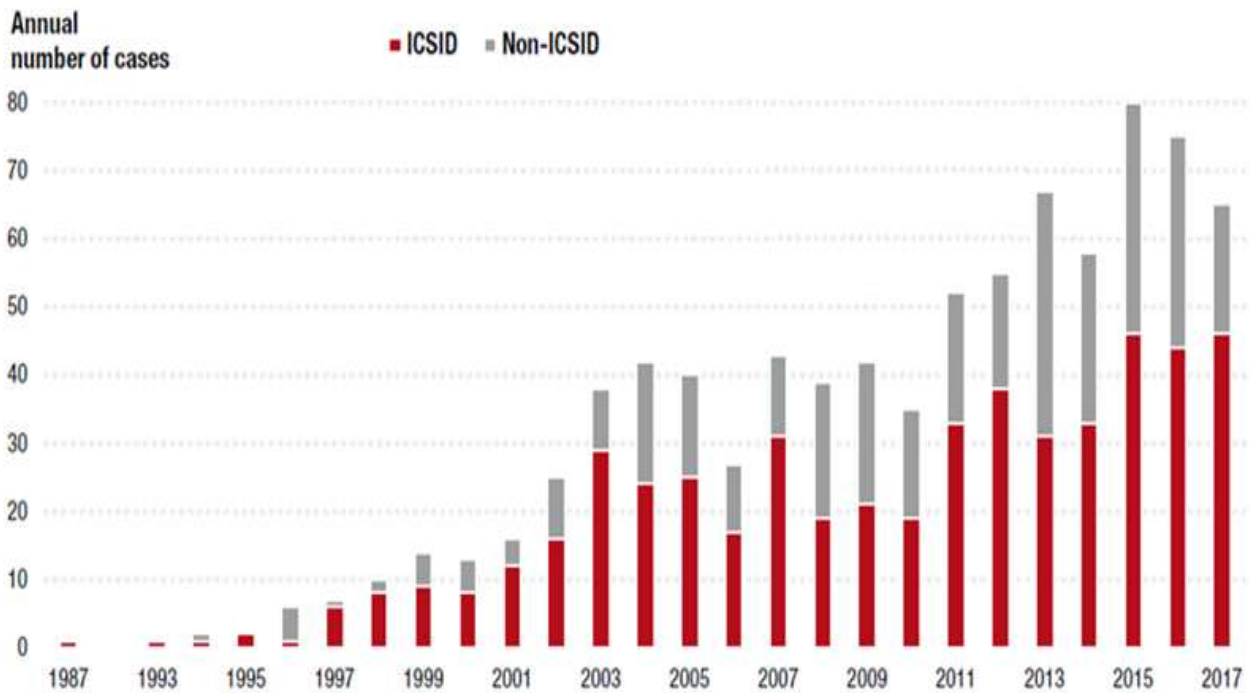
²¹ See UNCITRAL Working Group III (n 20) 6-11.

²² See UNCITRAL Working Group III Secretariat, 'Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters (28 August 2018)' paras 44-45, 47. <http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-36th-session/149_main_paper_7_September_DRAFT.pdf>, accessed on 18 January 2019.

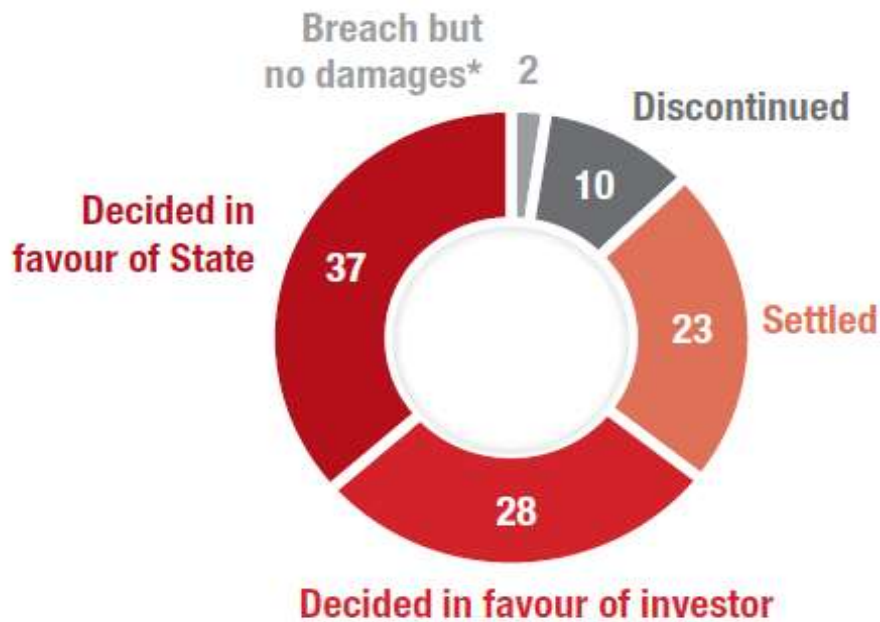
²³ Other options included the introduction of a system of precedent, providing guidance to arbitral tribunals, prior scrutiny of arbitral awards, and establishing an international court system. See UNCITRAL Working Group III Secretariat (n 22) paras 37-47.

Figure 1: Trends in known treaty-based ISDS cases, 1987-2017²⁴

Figure 2: Results of concluded ISDS cases, 1987-2017 (Per cent of all cases)²⁵



cases)²⁵



²⁴ UNCTAD (n 10) 2.

²⁵ UNCTAD (n 10) 6.

CONCERNS REGARDING CONSISTENCY AND CORRECTNESS OF DECISIONS BY ISDS TRIBUNALS AND LIMITATIONS OF THE EXISTING SYSTEM TO ADDRESS THESE CONCERNS

11. In 2016, it was reported that more than half of the respondents to a survey conducted by the IBA Arbitration Subcommittee on Investment Treaty Arbitration (the IBA Subcommittee) expressed concern regarding substantive inconsistency in decisions of ISDS tribunals.²⁶ A majority of respondents also believed that an appellate mechanism could (at least partially) address this concern.²⁷ Academic opinion has been divided on the impact (and indeed the existence) of inconsistency in ISDS. Some authors refer to inconsistency issues in ISDS as "*considerable and in need of serious attention*"²⁸ and highlight the damage to the legitimate expectations of parties as a result of uncertainty caused by inconsistency.²⁹ Others warn against exaggerating the extent of any inconsistencies³⁰ and comment that "*the need for greater consistency and coherence has not compellingly been established*".³¹ As noted in the introduction, UNCITRAL Working Group III has also discussed concerns pertaining to the consistency, coherence, predictability and correctness of decisions by ISDS tribunals and, at least in the context of those discussions, there would appear to be a consensus that these concerns are sufficiently serious to merit attention from the Working Group.

i. Features of the existing ISDS system that create a risk of inconsistency

12. In a recent paper, Lise Johnson and Lisa Sachs suggest that concerns regarding inconsistency can be grouped into at least four categories:³²

²⁶ See IBA Subcommittee on Investment Treaty Arbitration, 'Report on the Subcommittee's Investment Treaty Arbitration Survey' (May 2016) 2, available at <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx>, accessed 8 January 2019.

²⁷ *Ibid.*

²⁸ Charles N. Brower and Stephan W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International investment Law?', Vol.9 (2) Chicago Journal of International Law 473.

²⁹ See Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' Vol. 73(4) Fordham Law Review 1558.

³⁰ See Stanimir A. Alexandrov, 'On the Perceived Inconsistency in Investor-State Jurisprudence' in Jose E. Alvarez, Karl P. Sauvant et al. (eds), *The Evolving International Investment Regime: Expectations, Realities, Opinion* (OUP 2011) 69.

³¹ Barton Legum, 'Options to Establish an Appellate Mechanism for Investment Disputes' in Karl P. Sauvant (ed), *Appeal Mechanism in International Investment Disputes* (OUP 2008) 236.

³² Lise Johnson and Lisa Sachs, 'Inconsistency's Many Forms in Investor-State Dispute Settlement and Implications for Reform' (CCSI Briefing Note, November 2018) <http://ccsi.columbia.edu/files/2018/11/Inconsistencies_ISDS_Briefing-Note_11.28.18.pdf>, accessed 8 January 2019.

- (a) Inconsistency in the interpretation of the same treaty: some investment protection instruments have been invoked multiple times, such as the North American Free Trade Agreement (NAFTA)³³ and the Energy Charter Treaty. This has required ISDS tribunals to construe the same treaty provisions in different cases.
 - (b) Inconsistency in the interpretation of identical or similar language across treaties: the investment protection provisions found in investment treaties are often similar, but not always identical. Parties nevertheless refer to past awards dealing with similar language and tribunals are required to make findings on the extent to which differences in language imply a different substantive standard.
 - (c) Inconsistency with the intent of State parties to the applicable treaty: In the early experience of arbitration under NAFTA Article 11, for example, several tribunals determined that the fair and equitable treatment standard set out in Article 1105(1) had been breached and ordered the payment of damages by the respondent State. This experience prompted the NAFTA States to adopt, via the NAFTA Free Trade Commission, a binding note of interpretation "*to clarify and reaffirm the meaning of certain of its provisions.*"³⁴
 - (d) Inconsistency with other international or domestic laws and public expectations: This form of inconsistency is an emerging and controversial subject, arising from the increasing complexity of international and domestic legislation and heightened concern of the public in relation to environmental protection, public health, labour, and human rights.³⁵
13. The November 2018 report of the IBA Subcommittee (the 2018 IBA Report) – which discusses concerns and proposed reforms relating to consistency, efficiency and transparency in ISDS arbitration – further contends that there is a greater risk of inconsistency in ISDS cases compared with other areas of law.³⁶

³³ North American Free Trade Agreement (adopted on 17 December 1992, entry into force 1 January 1991) 32 ILM 289.

³⁴ NAFTA Free Trade Commission, 'North American free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001).

³⁵ For example, Bruno Simma has argued that ISDS tribunals have failed to pay adequate attention to international human rights norms. See 'Arbitrators and human rights' (Global Arbitration Review, 13 June 2011) <<https://globalarbitrationreview.com/article/1030367/arbitrators-and-human-rights>>, accessed 8 January 2019.

³⁶ See IBA Subcommittee on Investment Treaty Arbitration, 'Consistency, efficiency and transparency in

14. According to the 2018 IBA Report, the 'catalysts for inconsistency' include:
 - (a) that ISDS cases "*generally involve legal concepts that are designed to be applied to a broad range of situations, and, therefore, are open to ... different interpretations*";
 - (b) that ISDS is 'decentralised' by virtue of the fact that ISDS cases may be referred to different institutions and because the parties have a determining influence over the composition of the tribunal; and
 - (c) the relative 'newness' of international investment law, in other words, "*the fact that many (if not most) areas of investment law are in the process of being formed*".³⁷

15. The 2018 IBA Report further suggests that perceptions of inconsistency in ISDS awards may be 'magnified' by the fact "*that it is not unusual for different cases to challenge a single state measure or group of measures affecting several investors*" and also as a result of the close scrutiny of awards by scholars and practitioners "*focusing on contradictions*".³⁸

16. In addition to the factors discussed above, it is worth noting that tribunals are often called upon to interpret treaty provisions which are in similar but not identical language to provisions interpreted in previous awards. The huge number of investment treaties signed by States and the fact that the language used is not uniform creates an obvious risk of ostensibly inconsistent decisions. This risk is likely exacerbated by the fact that States often agree to different language for the same provision in two or more treaties (i.e. it may be difficult reasonably to discern a consistency of practice or intention as to the effect of the relevant provisions from one treaty to the next).³⁹

ii. Tribunals' views on the precedential value of previous decisions

investment treaty arbitration' (November 2018) 6, available at <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx>, accessed 8 January 2019.

³⁷ See IBA Subcommittee on Investment Treaty Arbitration (n 37) 6.

³⁸ See IBA Subcommittee on Investment Treaty Arbitration (n 37) 7.

³⁹ Compare, for example, Article 11 (*Treatment of Investment*) of the ASEAN Comprehensive Investment Agreement with Article 7 (*Treatment of Investment*) of the ASEAN–China Investment Agreement. See Association of Southeast Asian Nations Comprehensive Investment Agreement (signed 26 February 2009, entry into force 24 February 2012); Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations (signed 15 August 2009, entry into force 1 January 2010).

17. The existing ISDS system has a number of inherent limitations in terms of addressing the risk of inconsistent or incorrect decisions. A limitation relevant to the present discussion is that there is a tension between the objective of consistency and the duty of arbitrators to decide each case by reference to its particular circumstances. Two cases are cited in the 2018 IBA Report which serve to highlight this tension.
18. In *Saipem v Bangladesh* the tribunal addressed the fact that both parties had referred it to numerous prior awards and stated as follows [citations omitted]:⁴⁰

"The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law."

19. In *Burlington Resources v Ecuador*, a majority of the tribunal formed the same view, but Professor Brigitte Stern dissented [emphasis added]:⁴¹

"As stated in the Decision on Jurisdiction, the Tribunal considers that it is not bound by previous decisions. Nevertheless, the majority considers that it must pay due regard to earlier decisions of international courts and tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law. Arbitrator Stern does not analyse the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend."

⁴⁰ *Saipem S.p.A. v The People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Award dated 30 June 2009, at ¶67.

⁴¹ *Burlington Resources Inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability dated 14 December 2012, at ¶187.

20. It is apparent from these conflicting views on arbitrators' duties that there is no consensus as to whether tribunals are under a duty (or have the authority) to seek consistency in the interpretation of treaty provisions.

iii. Rights of recourse against ISDS awards

21. Another limitation of the existing system in addressing inconsistency is that, generally speaking, there are no existing mechanisms permitting appeals on the merits in ISDS cases.

22. The majority of ISDS cases are conducted under the auspices of ICSID and subject to the ICSID Convention.⁴² The ICSID Convention provides for only limited rights of review of an award: in Article 50, which allows either party to apply to the Secretary-General for an "*interpretation*" of the award; Article 51, which allows either party to request revision of the award "*on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence*"; and Article 52, which creates a right to seek annulment of an award on limited specified grounds (discussed in further detail below).

23. The rights created in Article 50 and 51 are obviously limited and not analogous to a right of appeal on the merits. Further, requests under these provisions, if allowed by the Secretary-General, will, where possible, be referred to the same tribunal which rendered the award. Applications under these provisions are also very rare.⁴³

24. Article 52(1) provides that:

"either party may request annulment of the award by an application 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;

⁴² See Figure 1 above.

⁴³ Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International 2004) 160-162.

- (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."*
25. The application for annulment will be referred to a three-member *ad-hoc* committee constituted for the sole purpose of the application. The members of the *ad-hoc* committee are appointed from the ICSID Panel of Arbitrators.⁴⁴
26. The annulment procedure is not analogous to a right of appeal on the merits in two key respects. First, if successful it leads to annulment of the award (in full or in part). The *ad-hoc* committee decision does not substitute for the award and, if the award is annulled, the same dispute can subsequently be referred to a new tribunal. Second, the annulment procedure may not be used to challenge the merits of the tribunal's decision.⁴⁵ Instead, the procedure is designed⁴⁶ to ensure procedural integrity and due process.⁴⁶
27. For non-ICSID ISDS awards, an award may, in theory, be subject to appeal on the merits in two ways: an 'internal' process whereby the parties design the arbitration agreement to allow for appeal to another tribunal, or an 'external' process where parties opt-in to (or do not opt-out of) a right of appeal under an applicable domestic arbitration statute.
28. Consistent with the principle of party autonomy, parties are, generally speaking, free to agree on an internal appeals process to a second tribunal as part of their chosen arbitral procedure. Internal appeals are, for example, common in commodities arbitration⁴⁷ and have been included as an option in institutional rules such as those of the Institute of Conflict

⁴⁴ ICSID Convention (n 4) Article 52(3).

⁴⁵ In some cases *ad-hoc* committees have been criticised for straying into the merits of the case in their annulment decisions. See, e.g. Paul Friedland and Paul Brumpton, 'Rabid Redux: The Second Wave of Abusive ICSID Annulments' (2012) Vol. 27(4) American University International Law Review 727.

⁴⁶ Reed, Paulsson and Blackaby (n 43) 162.

⁴⁷ Under the Rules of the British Coffee Association (BCA), for example, after proceedings before a first instance tribunal have resulted in an award, either party may appeal to a second tribunal within 30 days of the publication of the award. The case is then heard *de novo* by the appellate tribunal, consisting of either three or five arbitrators. The award issued by the appellate tribunal is final and binding (but can be subject to appeal to the High Court under Section 69 of the Arbitration Act 1996). See the BCA Rules, Article 7.9.6; Michael Swangard, 'Chapter 7: Commodity Arbitration' in Julian D.M. Lew, Harris Bor, et al. (eds), *Arbitration in England, with chapters on Scotland and Ireland* (Kluwer Law International 2013) 120-123.

Prevention and Resolution, JAMS, the European Court of Arbitration, and the Spanish Court of Arbitration.⁴⁸ There is no obvious reason why internal appeal decisions would not be enforceable under most domestic arbitration laws; the UNCITRAL Model Law, for example, would uphold the process of "*any such appeal if agreed on by the parties*".⁴⁹

29. Domestic arbitration laws may also provide for an 'external' process of appeal on the merits to the domestic courts at the place of arbitration. In England & Wales, for example, there is a limited right of appeal on a point of law under Section 69 of the Arbitration Act 1996 where an award is rendered in arbitration proceedings where the place of arbitration is England and where the substantive governing law of the dispute is English law. Parties may opt-out of the application of Section 69. If the parties do not opt-out, an appeal under the provision may only be brought with the agreement of all parties or with leave of the court. Hong Kong has an opt-in regime. Specifically, parties may opt-in to Sections 5, 6 and 7 of Schedule 2 to the Arbitration Ordinance (Cap 609),⁵⁰ which provide for appeal on a question of law with the agreement of all parties or with the leave of the court.
30. The limited rights of appeal to domestic courts found in certain domestic arbitration laws are not likely to be relevant in the context of non-ICSID ISDS awards because it is unlikely that the circumstances of an ISDS case would satisfy the requirements for bringing an appeal. The right of appeal under the English Arbitration Act, for example, is limited to questions of English law,⁵¹ whereas the majority of ISDS cases will be decided under international law.
31. The UNCITRAL Rules and other institutional rules, in particular the ICC Rules, which are sometimes applied in ISDS cases, do not provide for any internal appeals process.⁵² As such, in the present ISDS system it will also usually be impossible for a non-ICSID award to be appealed on the merits. Accordingly, subject to a limited right included in most arbitration laws to seek correction of computational, clerical or

⁴⁸ See Rowan Platt, 'The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?' (2013) Vol. 30(5) Journal of International Arbitration 548-551.

⁴⁹ Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on international Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 1989) 924.

⁵⁰ See Annex 1.

⁵¹ Section 2(1) of the Arbitration Act 1996 limits the scope of appeals to arbitrations where the seat is located in England, Wales and Northern Ireland.

⁵² Of course, in theory, and as the examples of commodities and sports arbitration illustrate, the parties to an ISDS case could agree to an internal appeals process and the resulting decision would be enforceable as an award. Whether such a process could make a significant contribution to improving the consistency and coherence of awards is less clear.

typographical errors in the award, the only recourse available against an award is to apply for an order setting aside the award. The circumstances in which an award will be set aside are, however, exceptional. For example, in Hong Kong, under Section 81(2)(a) or (b) of the Arbitration Ordinance (Cap 609), a successful application to annul the award requires the applicant to prove that:

- (a) a party to the arbitration was under some incapacity;
- (b) the arbitration agreement is invalid;
- (c) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitration, or was otherwise unable to present its case;
- (d) the award deals with a dispute not contemplated by the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;
- (e) the composition of the tribunal or the arbitration proceedings was not in accordance with the agreement of the parties, unless such agreement conflicted with a mandatory provision of the ordinance;
- (f) the subject matter of the dispute is not capable of settlement by arbitration under Hong Kong law; or
- (g) the award conflicts with public policy in Hong Kong.

32. This provision implements Article 34 of the UNCITRAL Model Law on International Commercial Arbitration which mirrors the limited grounds on which domestic courts are permitted to refuse to recognise or enforce arbitral awards as set out in Article V of the New York Convention.⁵³

⁵³ Article V of the New York Convention provides:

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

33. It is well established that Article 34 of the UNCITRAL Model Law is not intended to create rights to appeal the merits of an award. In the leading Hong Kong case, involving an application to set aside an ICC award rendered in Hong Kong, the Court of Appeal stated as follows [citations omitted]:⁵⁴

"The court's approach to such application is not controversial. The court is concerned with "the structural integrity of the arbitration proceedings". The remedy of setting aside is not an appeal, and the court will not address itself to the substantive merits of the dispute, or to the correctness or otherwise of the award, whether concerning errors of fact or law. It will address itself to the process."

DESIRABILITY AND PRACTICABILITY OF AN APPEALS MECHANISM

34. The discussion in this part considers whether an appeals mechanism is desirable and practicable, with particular reference to competing concerns of finality, cost and efficiency versus consistency and correctness of awards.

i. Desirability of an appeals mechanism

35. Finality – the principle that arbitral awards are not subject to any appeal on the merits – is a cardinal rule of international arbitration. The principle is reflected in the New York Convention, the UNCITRAL Model Law, the ICSID Convention, the rules of the majority of arbitral institutions and the arbitration statutes of many leading centres for international arbitration.

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

⁵⁴ *Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd* [2012] 4 HKLRD 1 (Hong Kong Court of Appeal) [7].

36. Surveys of corporations have confirmed that finality is seen as an important virtue of international arbitration.⁵⁵ The fact that the principle is reflected in the key international instruments relating to international arbitration, including investor-State arbitration, would suggest that, for at least the past 60 years, the principle of finality has also been regarded by States as a desirable policy. The principle may be seen as less desirable, however, where the stakes are very high, either in terms of the sums of money involved in a dispute, or because of the nature of the issues.⁵⁶
37. In terms of public attitudes, it was already noted in the introduction that there has been very strong public opposition to ISDS in numerous countries. In 2014, the European Commission conducted an online public consultation on ISDS in the Transatlantic Trade and Investment Partnership (TTIP). One of the key conclusions drawn from the responses to the consultation (which numbered in the many thousands) was that the establishment of an appeals mechanism to ensure the 'legal correctness' of ISDS decisions was of particular importance to respondents.⁵⁷
38. Correctness and consistency of ISDS decisions is, arguably, of greater importance to States (and to the public) than to investors. This is because States may face numerous claims whereas investors are relatively unlikely to ever be involved in more than one ISDS dispute (with the possible exception of the largest multinationals). Having said this, in considering whether an appeals mechanism is desirable, it is worth asking whether appeals are likely to prolong or complicate ISDS disputes, resulting in higher costs to the public purse, at least as far as legal costs are concerned. It is not obvious, of course, that this is the case. An appeals mechanism might lead to lower costs over time, through improving consistency and discouraging the pursuit of frivolous claims, or the practice of legal counsel pursuing every possible argument, however speculative.
39. A further question is whether an appeals mechanism will achieve meaningful improvements in terms of the consistency and correctness of

⁵⁵ Loukas Mistelis and Emilia Onyema, 'International arbitration: Corporate attitudes and practices' (2006) 15 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf>, accessed 8 January 2019; Loukas Mistelis and Rutger Metsch, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf>, accessed 29 January 2019, 6; Stavros Brekoulakis and Adrian Hodis, '2018 International Arbitration Survey: The Evolution of International Arbitration' <<http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>>, accessed 29 January 2019, 7.

⁵⁶ See Platt (n 48) 534.

⁵⁷ See European Commission, 'Reports presented today: Consultation on investment protection in EU-US trade talks' (13 January 2015) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1234>>, accessed 8 January 2019.

ISDS decisions, or improvements in perceptions of consistency and correctness and therefore the overall legitimacy of the system. Susan Franck has argued that a "*single, unified, permanent body*" charged with "*creating consistent jurisprudence*" will promote the legitimacy of ISDS more than the current system of stand-alone arbitral tribunals.⁵⁸ The 2018 IBA Report, however, argues that "*a permanent or semi-permanent appellate body would not be a guarantee for accurate treaty interpretation*" and that other mechanisms are also needed to achieve consistency and accuracy of decisions, including, for example, the use of binding joint interpretations by States.⁵⁹

40. States will also need to consider the extent to which an appeal mechanism can assist to improve consistency of ISDS decisions given the huge number of bilateral and multilateral investment treaties which increasingly overlap one another and which are often inconsistent in terms of how their substantive provisions are drafted.⁶⁰ For this reason, UNCTAD has recommended that States should review their older treaties and consider revising or terminating them as new treaties are signed.⁶¹ UNCITRAL Working Group III has noted the impact of fragmented substantive protection standards on the lack of consistency in ISDS decisions,⁶² but has made it clear that its mandate is focused on the procedural rather than the substantive aspects of ISDS.⁶³

(ii) *Is there a consensus that an appeals mechanism is desirable?*

41. Before turning to questions of practicability of an appeals mechanism from a legal perspective, it is worthwhile to consider briefly the extent to

⁵⁸ See Franck (n 29) 1617-1620. See also Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) Vol .23(3) *Arbitration International* 376, arguing that uniform rule creation would increase the "predictability of investments and the credibility of the dispute resolution system".

⁵⁹ See IBA Subcommittee on Investment Treaty Arbitration (n 36) 29-30. In UNCITRAL Working Group III, it has been observed that joint interpretations are rare and that States may find it difficult to agree on a joint interpretation after a treaty has been executed. See UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November – 1 December 2017): Part II' (26 February 2018) <<https://undocs.org/en/A/CN.9/930/Add.1/Rev.1>>, accessed 8 January 2019.

⁶⁰ See Anna Joubin-Bret, 'Why we need a global appellate mechanism for international investment law' *Columbia FDI perspectives* No. 146 (27 April 2015), arguing that the likelihood of successfully addressing consistency issues through an appeals mechanism is increased if the design of such a mechanism takes into account the impact it will have on all investment treaties that are in force (rather than a select few) and enjoys widespread support from States.

⁶¹ See UNCTAD (n 10) 1.

⁶² See UNCITRAL Working Group III Secretariat, 'Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters' (28 August 2018) para 30 <http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-36th-session/149_main_paper_7_September_DRAFT.pdf>, accessed on 18 January 2019.

⁶³ UNCITRAL Working Group III, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November – 1 December 2017)' (19 December 2018) para 20, <<https://undocs.org/en/A/CN.9/930/Rev.1>>, accessed on 24 January 2019.

which there may be consensus amongst States that an appeals mechanism is a desirable goal.

42. Starting with the United States, provisions in the Bipartisan Trade Promotion Authority Act of 2002 required the US government to include the establishment of an "*appellate body or similar mechanism to provide coherence to the interpretation of investment provisions in trade agreements*" as a negotiating objective in future US trade agreements.⁶⁴ In trade and investment-related agreements concluded after 2002, this objective was pursued via the inclusion of provisions obliging the contracting parties to consider the establishment of a bilateral appeals mechanism or to reach an agreement that would allow a future permanent appellate body to review awards rendered under the ISDS provisions of the relevant treaty.⁶⁵ The 2004 US Model BIT reflected this position in its Annex D, which required the parties to consider establishing an appeals mechanism relating to the ISDS provisions of the BIT within three years of its entry into force.⁶⁶ The US approach seems to have influenced other States' practice as well: the 2015 China – Australia FTA, for example, contains a similar clause requiring the parties to initiate negotiations to establish a (bilateral) appellate mechanism within three years of the treaty entering into force.⁶⁷
43. In 2012, the US changed its approach to appeals mechanisms in ISDS through the issue of a new Model BIT.⁶⁸ In the 2012 Model BIT, Annex D was removed and, consequently, parties were no longer obliged to consider establishing a bilateral appeals mechanism. However, similar to the 2004 US Model BIT, the 2012 US Model BIT provides that the parties "*shall consider*" whether any awards issued under the BIT's

⁶⁴ Bipartisan Trade Promotion Authority Act of 2002, 19 USC § 3801-3813 (West Supp 2003).

⁶⁵ For example, Articles 10.19(10) and Annex 10-H of the Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile (signed 6 June 2003, entry into force 1 January 2004) provide, respectively, as follows:

"If a separate multilateral agreement enters into force as between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment agreements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 10.25 in arbitrations commenced after the appellate body's establishment."

"Within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 10.25 in arbitrations commenced after they establish the appellate body or similar mechanism."

⁶⁶ See 2004 US Model BIT, Annex D, accessible at <<https://www.state.gov/documents/organization/117601.pdf>>.

⁶⁷ Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (signed 16 June 2015, entry into force 20 December 2015), article 9.23.

⁶⁸ See 2012 US model BIT, accessible at <<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>>.

dispute settlement provisions should be subject to a multilateral appellate mechanism, in the event such a mechanism is developed in the future.⁶⁹

44. On 30 January 2017, the United States withdrew from the Trans-Pacific Partnership (TPP), which had been negotiated to include text that was consistent with the US negotiating objectives outlined in 2012.⁷⁰ In particular, TPP Article 9.23(11) contemplated the possibility of the establishment of a multilateral appellate mechanism, but did not require the Parties to negotiate an appellate mechanism specific to TPP awards.
45. The recently signed United States-Mexico-Canada Agreement (USMCA),⁷¹ which is intended to replace the NAFTA, is not in force. The concluded text represents a departure from both the multilateral and bilateral practice of the United States between 2002 and 2012 as well as from the United States' approach to the TPP (i.e. between 2012 and 2016). In particular:
 - (a) the USMCA is silent regarding the possible establishment of an appellate mechanism to review the awards of tribunals constituted to determine ISDS disputes under the USMCA;
 - (b) there is no requirement or aspiration expressed in the text to negotiate toward the establishment of a review mechanism; and
 - (c) in a more significant move away from investment arbitration – and in notable contrast to the recent practice of the European Union (the EU), discussed below – the USMCA eliminated arbitration for US investors in Canada (and vice versa), and significantly curtails the rights of Mexican investors to pursue ISDS claims in arbitration against the US (and vice versa).
46. The EU has also been reconsidering its position on 'traditional' ISDS provisions in treaties. Since the EU consultation on the TTIP in 2014 (mentioned above), the European Commission now favours replacement of the existing system of ISDS arbitration with a multilateral investment court system, which would include an appeals mechanism (M-ICS).⁷² As

⁶⁹ See 2004 US Model BIT (n 66) Article 28.10; 2012 US Model BIT (n 68), Article 28.10.

⁷⁰ See Letter from the Office of the United States Trade Representative to the Trans-Pacific Partnership Depository dated 30 January 2018 <<https://ustr.gov/sites/default/files/files/Press/Releases/1-30-17%20USTR%20Letter%20to%20TPP%20Depository.pdf>>, accessed 8 January 2019.

⁷¹ See the Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018).

⁷² See European Commission, 'The Multilateral Investment Court Project' <

a first step towards this goal, the EU has been seeking to establish standing investment courts (ICS)⁷³ under each of its recent investment agreements with third countries.⁷⁴

47. While the EU has described these agreements as providing for the establishment of an ICS,⁷⁵ the agreements themselves do not refer to an 'investment court' but instead provide for arbitration with the possibility of appeal to a second arbitral tribunal. The arbitrators on each tribunal are selected from a list of pre-approved arbitrators who are kept on retainer by the EU and the relevant counterparty. Whether the ICS is a 'court' or an 'arbitral tribunal' is not just a question of labelling. The characterization of the process will impact, for example, whether decisions are enforceable as arbitral awards under the New York Convention.
48. Questions of labelling aside, it is clear that the EU favours substantial reform to the 'traditional' model of ISDS arbitration. Indeed, in a July 2017 factsheet concerning the negotiation of the EU-Japan Free Trade Agreement, the Commission noted that "*[f]or the EU ISDS is dead*", and that the ICS model is now being pursued in all EU agreements.⁷⁶
49. However, in apparent recognition of the difficulty of achieving widespread consensus on the M-ICS model, the EU has proposed the establishment of a multilateral appeals tribunal (MAT) as an alternative to

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>>, accessed 24 January 2019.

⁷³ Belgium has requested an opinion from the Court of Justice of the European Union regarding the compatibility of the ICS provisions in CETA (which are similar to those in several new treaties signed by the EU) with EU law. Advocate General Bot, in his opinion of 29 January 2019, proposed that the Court should opine that the ICS provisions in CETA are compatible with EU law. The Advocate General's opinions usually have considerable influence over the Court's judgments, but are not always followed (notably in the recent *Achmea* judgment where the Court came to a different conclusion than Advocate General Wathelet and concluded that intra-EU BITs were incompatible with EU law). See Opinion 1/17 of Advocate General Bot, Request for an Opinion by the Kingdom of Belgium (delivered on 29 January 2019) <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=210244&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9263214>>, accessed on 30 January 2019.

⁷⁴ See the concluded EU's FTAs with Canada, Mexico, Singapore and Vietnam. The European Commission is negotiating similar agreements with Chile, China, Indonesia, Japan, Malaysia, Myanmar and the Philippines. See Opinion 1/17 of Advocate General Bot (n 73) at footnote 10.

⁷⁵ See e.g. European Commission, 'Key Elements of the EU-Singapore trade and investment agreements' (18 April 2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1827>>, accessed 18 January 2019; European Commission, 'The EU-Singapore agreements explained' (last update 13 July 2018) <<http://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/agreement-explained/>>, accessed 18 January 2019.

⁷⁶ European Commission, 'A new EU trade Agreement with Japan' (July 2017) 6 <https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.pdf>, accessed 8 January 2019. Any ICS established pursuant to an EU agreement with a third State will, however, only be empowered to decide on disputes arising under that particular agreement. To date, the EU has concluded agreements containing ICS provisions with Vietnam, Canada and Singapore, none of which have entered into force

the M-ICS. It is understood that the MAT, as proposed by the EU, would hear appeals from awards rendered under existing treaties providing for *ad-hoc* arbitration tribunals and would also replace the appellate tribunal in the new generation of EU treaties⁷⁷ in which ICS provisions are included.⁷⁸ The MIC and MAT can,⁷⁹ of course, only achieve their goals in terms of improving consistency of ISDS decisions if a significant number of third States agree to join the mechanism.

50. Experience of successive rounds of reform discussions at ICSID suggests that achieving widespread consensus amongst States may be difficult.⁸⁰ In 2004, ICSID issued a public discussion paper⁸¹ on possible improvements of the ICSID arbitration framework, including the introduction of an appeals mechanism but ICSID members decided at that time not to pursue this proposal further.⁸² ICSID is currently undergoing another reform process to modernise its rules, regulations and procedures.⁸³ The Secretary-General has indicated, however, that an appeals mechanism is not being considered as part of the current reform process because, again, there is insufficient consensus amongst ICSID

⁷⁷ See (n 74).

⁷⁸ The questionnaire of the European Commission's 2016-2017 consultation on reform of investment dispute resolution states in question 44: "*[a]nother option that has emerged is the establishment of a permanent Multilateral Appeal Tribunal, i.e. without changing the existing first instance tribunals. Thus a Multilateral Appeal Tribunal would be limited to deal with ISDS awards appealed on the grounds of errors of law and manifest errors of fact, which the current ISDS system does not allow for. This would address the issue of ensuring legal correctness and assist with consistency of case law. The Multilateral Appeal Tribunal would rule on ISDS awards rendered under the ad hoc ISDS tribunals established under existing investment treaties (e.g. EU Member States' BITs) and under investment treaties in force between third countries. Such a Multilateral Appeal Tribunal would also replace the Appeal Tribunals included in the EU's ICSs in EU trade and investment agreements with third countries.*" (emphasis added) The original questionnaire is no longer open to view, but filed responses (which include the original questions) are available at < <http://ec.europa.eu/trade/trade-policy-and-you/consultations/multilateral-reform/>>.

⁷⁹ It is noted that, in the European Union's submission to UNCITRAL Working Group III of 18 January 2019, there are no references to multilateral investment courts or multilateral appeals tribunals. Rather, the proposal is to establish a "*standing mechanism for the settlement of international investment disputes*". See European Commission, 'Submission of the European Union and its Member States to UNCITRAL Working Group III: Establishing a standing mechanism for the settlement of international investment disputes' (18 January 2019) < http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf>, accessed 24 January 2019.

⁸⁰ In 2006, the OECD Investment Committee also explored the feasibility of creating an appeals mechanism for ISDS disputes but it would appear that there was likewise insufficient support from OECD members for the initiative to be pursued further within the OECD, See Katia Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement: an Overview' (OECD Working papers on International Investment Number 2006/1) <https://www.oecd.org/china/WP-2006_1.pdf>, accessed 8 January 2019.

⁸¹ See ICSID Secretariat Discussion Paper, 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004) <<https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>>, accessed 8 January 2019.

⁸² See Meg Kinnear, 'Appeal, Review, Annulment ... What's it all about?' (ISDS Blog, 23 October 2015) <<http://isdsblog.com/2015/10/23/icsid-guest-post-appeal-review-annulment-whats-it-all-about/>>, accessed 8 January 2019.

⁸³ See ICSID, 'Backgrounder on Proposals for Amendment of the ICSID Rules' (3 August 2018) <https://icsid.worldbank.org/en/Documents/Amendment_Backgrounder.pdf>, accessed 8 January 2019.

members⁸⁴ that an appeals mechanism is desirable.⁸⁵

(iii) *Legal issues associated with the design of an appeals mechanism*

51. Assuming consensus on the desirability of an appeals mechanism can be established, there are a significant number of legal issues to be considered in terms of how the mechanism would operate, including in terms of interaction with the existing ISDS system and instruments, in particular existing investment treaties, the ICSID Convention and the New York Convention.
52. Gabrielle Kaufmann-Kohler and Michele Potestà⁸⁶ have proposed that an appeals mechanism be established through the adoption of a multilateral "*opt-in*" convention modelled on the Mauritius Convention,⁸⁷ which provides for the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration⁸⁸ to ISDS cases arising under both new and existing investment treaties. The primary advantage of this proposal is that it avoids (arguably) the need to amend the thousands of existing investment treaties, and other relevant international instruments.⁸⁹ Under this proposal, ISDS claims would, at first instance, be submitted to arbitration in accordance with the relevant provisions of the applicable investment treaty; the multilateral instrument would then provide for an appeal procedure.
53. The Kaufmann-Kohler / Potestà proposal also makes a number of important observations and suggestions regarding the design of the

⁸⁴ ICSID published the comments it had received on the proposed amendments to its rules in January 2019. It appears that only France addressed appeals mechanisms in its comments, noting that "*the French delegation would more particularly appreciate that more consideration be given to the establishment of an appeal facility, as envisaged during the previous ICSID rules' update process*". ICSID Secretariat, 'Rule Amendment Project – Member State & Public Comments on Working Paper of August 3, 2018' (15 January 2019) 452 <https://icsid.worldbank.org/en/Documents/State_Public_Comments_Rule_Amendment_Project_1.17.19.pdf>, accessed on 24 January 2019.

⁸⁵ See Crina Baltag, 'Interview with Meg Kinnear, Secretary General of the International Centre for Settlement of Investment Disputes' (Kluwer Arbitration Blog, 15 April 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/04/15/updates-from-the-icsid-interview-with-meg-kinnear-secretary-general-of-the-icsid>>, accessed 8 January 2019.

⁸⁶ Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention serve as a model for the reform of Investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?' (3 June 2016) <http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf>, accessed 8 January 2019.

⁸⁷ See Kaufmann-Kohler and Potestà (n 86) 27-33, 75-93. It should be noted that, at the time of writing, the Mauritius Convention has been ratified by only five states (Cameroon, Canada, Gambia, Mauritius and Switzerland) out of 23 signatories.

⁸⁸ See Kaufmann-Kohler and Potestà (n 86) 29.

⁸⁹ See Kaufmann-Kohler and Potestà (n 86) 31,

appeals mechanism:

- (a) the authors suggest that the appeal procedure could be characterised as arbitration, meaning that appeal decisions would be regarded as arbitral awards for the purposes of the ICSID Convention (where relevant), New York Convention and other relevant international instruments;⁹⁰
- (b) in non-ICSID arbitrations, the law of the arbitration (*lex arbitri*) would be the same as that applicable in the first-tier proceedings, the parties or appellate tribunal could choose an alternative seat, or the appeals procedure could be completely 'de-nationalised' in a similar manner to proceedings under the ICSID Convention. Such a system might prove complex in practice. Issues may arise with respect to, for example, the position of the parties' rights in relation to the award under the law of the seat at first instance (including annulment rights which parties cannot contract out of in some jurisdictions), or the question of which law would be applicable to the appeals procedure and how that law would interact with the law of the seat at first instance;⁹¹
- (c) it is suggested that the appellate tribunal would also have jurisdiction to review challenges on grounds mirroring those under Article 52 of the ICSID Convention, in order to avoid creating a three-tier system, where first instance awards might be subject to both annulment and appeal proceedings.⁹² It is not entirely clear why the authors of the proposal consider that a three-tier system would result if parties were still able to seek annulment of an award under Article 52 of the ICSID Convention given that the consequence of annulment is, as explained above, that the claim may be referred to a new tribunal. Nevertheless, the suggestion of allowing the appellate tribunal to determine procedural challenges equivalent to annulment reflects a valid concern to avoid the prolongation and complication of proceedings through having two potential avenues of review (i.e. annulment or appeal). For the same reason, the authors suggest that the agreement establishing the appeals mechanism would operate to waive parties' right to seek review of a non-ICSID award pursuant to the law of the place of arbitration.⁹³

⁹⁰ See Kaufmann-Kohler and Potestà (n 86) 70-71.

⁹¹ See Kaufmann-Kohler and Potestà (n 86) 71.

⁹² See Kaufmann-Kohler and Potestà (n 86) 71-72.

⁹³ See Kaufmann-Kohler and Potestà (n 86) 72. In the OECD Investment Committee discussions on an ISDS appeals mechanism it was also suggested that appeal decisions should not be subject to domestic court review. See Yannaca-Small (n 80) 12.

(d) in terms of the goals of consistency and coherence of ISDS decisions, the authors propose that the appellate tribunal would be bound to decide in accordance with the specific text of the investment treaty at issue, but would naturally endeavour to pursue consistency and coherence and through doing so would "*develop a body of legally authoritative general principles which would transcend the [treaty] at issue*" in any individual case.⁹⁴ Discerning and applying these general principles may prove challenging in practice. States presumably negotiate particular language in treaties to reflect their specific interests in that situation: if different treaties contain different language, this is likely to be intentional.⁹⁵ There is therefore an inherent tension between States' freedom to negotiate the language of (and standard of protection in) their treaties and the creation of a body of legally authoritative general principles that transcend any one treaty. The authors further suggest that a doctrine of binding precedent would not be critical because first instance tribunals in subsequent cases would take this established body of principles into account when making their decisions.⁹⁶ In this regard, it is worth noting that the US has recently criticised⁹⁷ the approach of the WTO Appellate Body in adopting a presumption that prior Appellate Body decisions should be followed in subsequent cases absent "*cogent reasons*".⁹⁸ When that presumption was adopted, the WTO Appellate Body cited, amongst other authorities, the decision of the *Saipem* tribunal (previously quoted) where the tribunal concluded that "*subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases*".⁹⁹ As noted above, while the US has, until recently, pursued the establishment of an ISDS appeals mechanism in its treaties in order to achieve coherence in the interpretation of investment treaties,¹⁰⁰ it is no longer clear that this remains an objective and the criticism of the

⁹⁴ See Kaufmann-Kohler and Potestà (n 86) 69. See also, Donald McRae, 'The WTO Appellate Body: A Model for an ICSID Appeals Facility?' (2010) Vol. 1(2) Journal of International Dispute Settlement 371–387.

⁹⁵ See Alexandrov (n 30) 63-64.

⁹⁶ It is likely that any appellate body would be established through a multilateral treaty. It would be open to the parties to draft into the treaty a standard of consideration of previous decisions. This standard could range from 'taking into account' previous interpretations of identical (or similar) provisions to a formal doctrine of *stare decisis*. Article 3.42 of the Singapore-EU FTA, for example, stipulates, where an obligation under the FTA is identical to an obligation under the WTO agreement, an arbitration panel must "*take into account any relevant interpretation established in rulings of the WTO Dispute Settlement Body*".

⁹⁷ See 'Statements by the United States at the meeting of the WTO Dispute Settlement Body' (18 December 2018) <https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_public.pdf>, accessed 8 January 2019.

⁹⁸ See WTO, *United States: Final Anti-Dumping Measures on Stainless Steel from Mexico – Report of the Appellate Body* (30 April 2008) AB-2008-1 [160].

⁹⁹ *Saipem v Bangladesh* (n 40).

¹⁰⁰ However, even though the 2004 US Model BIT required bilateral discussions between the US and its counterparty "*within three years*" of the parties entering into the treaty, and this provision was included in the US' BITs with e.g. Chile (2004), Morocco (2006) and Uruguay (2006), there is no public record of any such discussions taking place.

WTO Appellate Body may provide further evidence that the US is unlikely to support the creation of an appeals mechanism if decisions are to have binding effect in future cases.

ADDITIONAL CONSIDERATIONS IN RELATION TO THE DESIGN OF A PERMANENT ISDS APPEALS MECHANISM

54. Designing an appeals mechanism for ISDS cases is very much an exercise in innovation because there are relatively few models, at an international level, to draw inspiration. Existing international adjudicative bodies which allow appeals include:
- (a) The WTO dispute settlement mechanism;
 - (b) The International Criminal Court;
 - (c) The European Court of Human Rights (ECHR); and
 - (d) various *ad-hoc* international criminal tribunals.¹⁰¹
55. It has been suggested elsewhere that the appeals processes of the international criminal tribunals and the ECHR are not apposite to the ISDS context because the existence of rights of appeal before these tribunals are justified by reference to the need to ensure due process and to protect fundamental rights of individuals, rather than the need to ensure consistency and coherence of decisions.¹⁰²
- i. Lessons from the WTO Appellate Body*
56. The WTO Appellate Body has frequently been suggested as a model for an ISDS appeals mechanism on the basis that Appellate Body decisions have generally been followed by panels hearing disputes at first instance, thus contributing to a coherence and consistent interpretation of the WTO Agreements. Nevertheless, it is important to appreciate the differences in context between the WTO system and ISDS. In particular, an appeals mechanism for ISDS would be seeking to achieve consistency and

¹⁰¹ E.g. the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Tribunal for Lebanon, and the Extraordinary Chambers in the Courts of Cambodia.

¹⁰² See Giorgio Sacerdoti and Matilde Recanatì, 'Chapter 11: From Annulment to Appeal in Investor-State Arbitration: Is the WTO Appeal Mechanism a Model?' in Jorge A. Huerta-Goldman, Antoine Romanetti, et al. (eds), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Global Trade Law Series 2013) Vol. 43, 329-330.

coherence in relation to the interpretation of thousands of bilateral and multilateral investment agreements, whereas the Appellate Body of the WTO is only required to adjudicate on a single set of WTO-covered agreements.¹⁰³

57. Another reason that the WTO Appellate Body is proposed as a model is based on the perception that it is reasonably efficient, in particular because appeal proceedings are to be completed at the latest within 90 days.¹⁰⁴ However, in recent years the Appellate Body has failed to conclude proceedings within this timeframe and the process for appointment of Appellate Body members has become increasingly politicised and controversial.¹⁰⁵ The experience of the WTO Appellate Body—where the veto of one member is able to significantly disrupt operations of the appeals mechanism—is to some extent also a cautionary tale to consider when designing an ISDS appeals mechanism.¹⁰⁶
58. It is nevertheless useful to consider the composition of the WTO Appellate Body, which is composed of seven members appointed by the Dispute Settlement Body, which comprises all members of the WTO. Under Article 17(2) of the Dispute Settlement Understanding (DSU),¹⁰⁷ Appellate Body members are appointed for a four-year term and may be reappointed only once. Further, Article 17(3) of the Dispute Settlement Understanding:¹⁰⁸

"The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant

¹⁰³ WTO Dispute Settlement Understanding only applies to just 15 agreements. See WTO, 'Legal provisions in the multilateral trade agreements and the DSU'

<https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s1p1_e.htm>, accessed 18 January 2019. ,

¹⁰⁴ See Annex 2 of the WTO Agreement: Understanding on rules and procedures governing the settlement of disputes ('DSU'), Article 17(5).

¹⁰⁵ See International Centre for Trade and Sustainable Development, 'WTO Appellate Body Prepares for Reduced Slate of Judges by Month's End' (2018) Vol.22 (29) Bridges 1 <<https://www.ictsd.org/bridges-news/bridges/news/wto-appellate-body-prepares-for-reduced-slate-of-judges-by-months-end>>, accessed 8 January 2019.

¹⁰⁶ Tom Miles, 'U.S. blocks WTO judge reappointment as dispute settlement crisis looms' (Reuters 27 August 2018) <<https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC19O>>, accessed 24 January 2019.

¹⁰⁷ DSU (n 104) Article 17(2).

¹⁰⁸ DSU (n 104) Article 17(3).

activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest."

59. Commentators have argued that the legitimacy of the ISDS system is undermined as a result of the pool of decision makers lacking independence (in particular through being sympathetic to the interests of States or investors who repeatedly appoint them),¹⁰⁹ diversity¹¹⁰ and, more controversially, expertise in international law and the subject matter of the disputes which they are called to adjudicate.¹¹¹ The provisions of Article 17(3) of the DSU may therefore be instructive in considering how members of a permanent ISDS appeals mechanism should be chosen, and what qualifications and attributes they should possess.

(ii) *Considerations relating to the scope of review*

60. Two further considerations merit brief comment. The first consideration relates to the scope of review of a future ISDS appeals mechanism. Under Article 17(6) of the DSU, appeals to the WTO Appellate Body "*shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel*". In contrast, the 2004 ICSID Discussion paper on an ICSID Appeals Facility suggested that the grounds for appeals might include (i) a clear error of law; (ii) any of the five grounds for annulment in Article 52 of the ICSID Convention; and (iii) serious errors of fact.¹¹² A concern with expanding the scope of appeal to include errors of fact is that this is very likely to prolong the resolution of disputes because of the need for the appeals tribunal to review the factual evidence and reasoning of the tribunal.

61. An appeals mechanism confined to review of serious errors of law (and potentially also hearing challenges under Article 52 of the ICSID Convention or on analogous grounds¹¹³) would seem to be less

¹⁰⁹ The issue of apparent bias arising from repeat appointments of an arbitrator by the same party has also become a topical issue in international commercial arbitrations in recent years: *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817, *Cofely Ltd v Bingham & Knowles Limited* (2016) EWHC 240, *W Limited v M SDN BHD* (2016) EWHC 422 (Comm).

¹¹⁰ It has been argued that the WTO dispute settlement process has been seen as more legitimate by virtue of the pool of decision makers being more diverse. See José Augusto Fontoura Costa, 'Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields' (2011) 1(4) *Oñati Socio-Legal Series* 1-24.

¹¹¹ See e.g. Muthucumaraswamy Sornarajah, 'Evolution or revolution in international investment arbitration? The descent into normlessness' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 631-657.

¹¹² Which reflects more of a common law approach: in civil law countries, a case is usually heard *de novo* on appeal.

¹¹³ *Ad-hoc* committees appointed in ICSID annulment proceedings have been criticised for concluding that serious errors of law were equivalent to a manifest excess of power for the purposes of Article 52(1)(b) of the ICSID Convention. See Christoph Schreuer, 'From ICSID Annulment to Appeal: Halfway Down the Slippery

controversial. Nevertheless, there would remain a concern that the existence of a right of appeal would inevitably prolong proceedings. Various proposals have been made to alleviate this concern, including that parties wishing to bring an appeal should pay security in relation to costs and/or in relation to other sums ordered to be paid under the award.

62. Another option would be to limit the right of appeal to cases where all parties agreed to the appeal, or leave is granted. For example, Section 6(4) of Schedule 2 to Hong Kong's Arbitration Ordinance provides that leave to appeal shall be given only if the court is satisfied—
- (a) that the decision of the question will substantially affect the rights of one or more of the parties,
 - (b) that the question is one which the tribunal was asked to decide,
 - (c) that, on the basis of the findings of fact in the award—
 - (i) the decision of the tribunal on the question is obviously wrong, or
 - (ii) the question is one of general importance and the decision of the arbitral tribunal is at least open to serious doubt.

It is worth considering whether a similar test might be imposed for appeals against ISDS awards.

CONCLUSION

63. As stated in the introduction, this discussion paper aims to provide a framework for further discussion of the desirability and practicability of the introduction of an ISDS appeals mechanism. The paper briefly introduced the criticisms of the existing system which have led to calls for reform, in particular concerns relating to the consistency and correctness of ISDS decisions. The paper then outlined the limitations of the existing system in addressing concerns relating to consistency and correctness, and in particular the absence (generally speaking) of any right to appeal the merits of a decision.
64. The desirability and practicability of establishing an appeals mechanism was also discussed, with particular reference to competing concerns of

Slope' (2011) 10 The Law and Practice of International Courts and Tribunals 211.

finality, cost and efficiency. In this respect, it was emphasised that States will also need to consider the extent to which an appeal mechanism can assist in improving consistency of ISDS decisions given the huge number of bilateral and multilateral investment treaties which increasingly overlap with one another and which are often inconsistent in terms of how their substantive provisions are drafted.

65. Finally, various considerations relating to the design of a permanent appeals mechanism were briefly introduced. This part of the paper was not comprehensive and further questions meriting attention will surely arise, including:
- (a) how would the appeals mechanism interact with joint interpretation or joint determination provisions contained in some investment treaties?
 - (b) is a permanent body needed, or would an ad-hoc arrangement suffice?
 - (c) in either case, who would select the appellate decision makers and what criteria should apply to their appointment?

ANNEX 1
OPT-IN APPEALS PROVISIONS OF SCHEDULE 2 OF THE
HONG KONG ARBITRATION ORDINANCE (CAP. 609)

5. Appeal against arbitral award on question of law

- (1) Subject to section 6 of this Schedule, a party to arbitral proceedings may appeal to the Court on a question of law arising out of an award made in the arbitral proceedings.
- (2) An agreement to dispense with the reasons for an arbitral tribunal's award is to be treated as an agreement to exclude the Court's jurisdiction under this section.
- (3) The Court must decide the question of law which is the subject of the appeal on the basis of the findings of fact in the award.
- (4) The Court must not consider any of the criteria set out in section 6(4)(c)(i) or (ii) of this Schedule when it decides the question of law under subsection (3).
- (5) On hearing an appeal under this section, the Court may by order—
 - (a) confirm the award;
 - (b) vary the award;
 - (c) remit the award to the arbitral tribunal, in whole or in part, for reconsideration in the light of the Court's decision; or
 - (d) set aside the award, in whole or in part.
- (6) If the award is remitted to the arbitral tribunal, in whole or in part, for reconsideration, the tribunal must make a fresh award in respect of the matters remitted—
 - (a) within 3 months of the date of the order for remission; or
 - (b) within a longer or shorter period that the Court may direct.
- (7) The Court must not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration.
- (8) The leave of the Court or the Court of Appeal is required for any further appeal from an order of the Court under subsection (5).
- (9) Leave to further appeal must not be granted unless—
 - (a) the question is one of general importance; or
 - (b) the question is one which, for some other special reason, should be considered by the Court of Appeal.
- (10) Sections 6 and 7 of this Schedule also apply to an appeal or further appeal under this section.

6. Application for leave to appeal against arbitral award on question of law

- (1) An appeal under section 5 of this Schedule on a question of law may not be brought by a party to arbitral proceedings except—
 - (a) with the agreement of all the other parties to the arbitral proceedings; or

- (b) with the leave of the Court.
- (2) An application for leave to appeal must—
 - (a) identify the question of law to be decided; and
 - (b) state the grounds on which it is said that leave to appeal should be granted.
- (3) The Court must determine an application for leave to appeal without a hearing unless it appears to the Court that a hearing is required.
- (4) Leave to appeal is to be granted only if the Court is satisfied—
 - (a) that the decision of the question will substantially affect the rights of one or more of the parties;
 - (b) that the question is one which the arbitral tribunal was asked to decide; and
 - (c) that, on the basis of the findings of fact in the award—
 - (i) the decision of the arbitral tribunal on the question is obviously wrong; or
 - (ii) the question is one of general importance and the decision of the arbitral tribunal is at least open to serious doubt.
- (5) The leave of the Court or the Court of Appeal is required for any appeal from a decision of the Court to grant or refuse leave to appeal.
- (6) Leave to appeal from such a decision of the Court must not be granted unless—
 - (a) the question is one of general importance; or
 - (b) the question is one which, for some other special reason, should be considered by the Court.

7. Supplementary provisions on challenge to or appeal against arbitral award

- (1) An application or appeal under section 4, 5 or 6 of this Schedule may not be brought if the applicant or appellant has not first exhausted—
 - (a) any available recourse under section 69; and
 - (b) any available arbitral process of appeal or review.
- (2) If, on an application or appeal, it appears to the Court that the award—
 - (a) does not contain the arbitral tribunal’s reasons for the award; or
 - (b) does not set out the arbitral tribunal’s reasons for the award in sufficient detail to enable the Court properly to consider the application or appeal,
 the Court may order the tribunal to state the reasons for the award in sufficient detail for that purpose.
- (3) If the Court makes an order under subsection (2), it may make a further order that it thinks fit with respect to any additional costs of the arbitration resulting from its order.
- (4) The Court—
 - (a) may order the applicant or appellant to give security for the costs of the application or appeal; and
 - (b) may, if the order is not complied with, direct that the application or appeal is to be dismissed.

- (5) The power to order security for costs must not be exercised only on the ground that the applicant or appellant is—
- (a) a natural person who is ordinarily resident outside Hong Kong;
 - (b) a body corporate—
 - (i) incorporated under the law of a place outside Hong Kong; or
 - (ii) the central management and control of which is exercised outside Hong Kong; or
 - (c) an association—
 - (i) formed under the law of a place outside Hong Kong; or
 - (ii) the central management and control of which is exercised outside Hong Kong.
- (6) The Court—
- (a) may order that any money payable under the award is to be paid into the Court or otherwise secured pending the determination of the application or appeal; and
 - (b) may, if the order is not complied with, direct that the application or appeal is to be dismissed.
- (7) The Court or the Court of Appeal may impose conditions to the same or similar effect as an order under subsection (4) or (6) on granting leave to appeal under section 4, 5 or 6 of this Schedule.
- (8) Subsection (7) does not affect the general discretion of the Court or the Court of Appeal to grant leave subject to conditions.
- (9) An order, direction or decision of the Court or the Court of Appeal under this section is not subject to appeal.