EXPLORING THE PROSPECTS OF A PRELIMINARY RULINGS SYSTEM IN ICSID ARBITRATION: AN EFFICIENT AND AFFORDABLE ALTERNATIVE TO AN APPELLATE SYSTEM

—Chitransh Vijayvergia[*]

ABSTRACT

While the regime of investment treaty arbitration has developed enormously over time, there hasn't been much progress on the introduction of an appellate body or any other form of a review mechanism. Though certain arbitral institutions like JAMS and CPR provide optional appeals provisions, the debate around the introduction of an appeals facility in the International Centre for Settlement of Investment Disputes (ICSID) is still unsettled. This debate is centered around the see-saw between the finality of awards and the desire for consistency and coherence in international arbitration. Some scholars have put forward the view that the finality of awards should take a backseat in this journey of achieving consistency and have thus proposed for an appellate system in the ICSID arbitration. This has attracted a mixed reaction from the legal fraternity with some navigating the ways to implement the appeals system, and the others delving into efficient alternatives. In this paper, the author takes the latter approach and suggests that a Preliminary Rulings System (PRS), as promoted by Katharina Diel-Gligor, should be incorporated into the ICSID arbitration. The paper first suggests certain additional changes to the already proposed system for better efficiency. Thereafter, it establishes that the proposed PRS fulfils all the objectives which are sought to be achieved by an appellate system. Finally, the paper highlights how the system is a better alternative than an appeals facility in ICSID arbitration and suggests it as an efficient and affordable alternative to the appeals system.

[*] The author is an Associate at Panicker & Panicker, Advocates (Kochi) and a graduate of the National University of Advanced Legal Studies, Kochi.

1. INTRODUCTION

The regime of international investment law has grown tremendously in the last few decades with the growing number of Bilateral Investment Treaties ("**BIT**(s)") and other International Investment Agreements ("**IIA**(s)").[1] However, one cannot deny the need for the reformation of the system owing to the inconsistent decisions rendered,[2] issues with the enforcement of awards,[3] investor bias[4] etc. The pursuit of 'coherence and consistency'[5] in the awards rendered in investor-State arbitration has given rise to the debate of one such reform. This debate is about the requirement of an appellate system in investor-State dispute settlement ("**ISDS**").[6]

The discussions on the subject regarding the International Centre for Settlement of Investment Disputes ("**ICSID**") arbitration regime were spearheaded by the 2004 Report of the ICSID which proposed for an ICSID Appeals Facility.[7] Since then, various scholars have pitched in their voice and promoted the idea of introduction of an appellate mechanism in the ISDS. Various reasons have been put forward to justify the need for an

1. Sachet Singh and Sooraj Sharma, *Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap* (2013) 29(76) Utrecht Journal of International and European Law 88.
2. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions* (2005) 73 Fordham L Rev 1521, 1607.
3. Olivia Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration* (2007) 47(4) Va J Intl L 953, 969-75; Andrew P. Tuck, *Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules* (2007) 13(4) L & Bus Rev Am 885, 905-10.
4. C.J. Tams, *An Appealing Option? The Debate about an ICSID Appellate Structure* (2007) 4(5) Transnational Dispute Management 1, 38.
5. ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* (Discussion Paper), 22 Oct. 2004 https://icsid.worldbank.org/sites/default/files/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf accessed 13 Sept. 2020, para 6.
6. Elihu Lauterpacht, *Aspects of the Administration of International Justice* 112 (Cambridge University Press 1991); see also William H. Knull, III and Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?* (2000) 11 Am Rev Intl Arb 531; see generally, The Special Issue on "NUS Centre for International Law Collection of Articles on an Appellate Body in ISDS" (2017) 32(3) ICSID Review.
7. ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* (Discussion Paper) (22 Oct. 2004) https://icsid.worldbank.org/sites/default/files/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf accessed 13 June 2010.

appellate mechanism but some of these have been at the forefront *viz.* consistency,[8] accuracy[9] and legitimacy.[10]

Scholars have argued that due to a lack of a system of precedents in ISDS, different tribunals have come to different conclusions based on the same set of facts which goes against the idea of predictability in legal decisions.[11] Further, it has also been argued that the scope of powers vested in the hands of the Annulment Committee is not wide enough to fulfil the purpose of keeping a reasonable check on the injustice done by the arbitral tribunals.[12] Annulment of awards under the ICSID is indeed allowed on certain specific grounds which restricts the annulment committee's scope of review.[13]

To ensure that the decisions are not inconsistent and have more authority, various models of an appellate mechanism have been suggested in the last two decades: *ad hoc* appeals tribunals in each IIA,[14] WTO like permanent appellate body,[15] multilateral investment appeals tribunal,[16] the European

8. Ian Laird and Rebecca Askew, *Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System* (2005) 7 Journal Appellate Practice & Process 285.
9. Mark Feldman, *Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power* (2017) 32(3) ICSID Review 528.
10. Kendall Grant, *ICSID's Reinforcement?: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration* (2015) 52(3) Osgoode Hall L J 1115.
11. M.M. Rodgers, *Bilateral Investment Treaties and Arbitration: An Argument and a Proposal for the ICSID's Implementation of a System of Binding Precedent* (2008) 5(3) Transnational Dispute Management.
12. Yenkong Ngangjoh Hodu and Collins C. Ajibo, *ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration* (2015) 6(2) Journal of International Dispute Settlement 308.
13. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 Mar. 1965, entered into force 14 Oct. 1966) (ICSID Convention).
14. Dohyun Kim, Note, *The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System* (2011) 86 NYU L Rev 242, 276.
15. Donald McRae, *The WTO Appellate Body: A Model for an ICSID Appeals Facility* (2010) 1(2) J Intl Dispute Settlement 371.
16. M. Bungenberg and A. Reinisch, From *Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement, European Yearbook of International Economic Law* (2nd ed., Springer 2020); see also N. Jansen Calamita, *The Challenge of Establishing a Multilateral Investment Tribunal at ICSID* (2017) 32(3) ICSID Review 611.

Union's investment court,[17] etc. Though certain Model BITs,[18] IIAs[19] and even some international arbitration institutions[20] have provided for an optional appeal mechanism, the question of whether there should be an appeal mechanism in the ICSID regime has remained unsettled.

On the other hand, certain scholars have also argued against the introduction of an appellate system in ISDS. The major arguments of this school of thought have been centered around the finality of awards,[21] party autonomy in the selection of arbitrators,[22] and additional costs on the parties.[23] While criticizing the introduction of an appellate mechanism in ISDS based on these grounds, these scholars have put forward certain alternative models. These include consolidation of cases to ensure uniformity in decisions arising out of the same dispute,[24] introducing a system of precedents in ISDS,[25] taking the opinion of the International Court of Justice[26] (**"ICJ"**) and widening the scope of the powers of the ICSID Annulment Committee.[27] However, all of these methods come with their own set of drawbacks, and

17. European Court of Arbitration, *Arbitration Rules*, art. 28, para 5 http://cour-europe-arbitrage.org/archivos/documentos/22.pdf accessed 7 September 2020.
18. 2012 US Model Bilateral Investment Treaty, art. 1, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf accessed 4 Sept. 2020.
19. Singapore-United States Free Trade Agreement (signed 6 June 2003, entered into force 1 Jan. 2004) (Singapore-USA FTA) art. 15.19(10); Australia-Republic of Korea Free Trade Agreement (signed 8 Apr. 2014, entered into force 12 Dec. 2014) (Australia-Korea FTA) art. 11.20(13), annex. 11-E; Costa Rica-Peru Free Trade Agreement (signed 21 May 2011, entered into force 1 June 2013) (Costa Rica-Peru FTA) art. 12.21(9); Comprehensive Economic and Trade Agreement between Canada and the European Union (signed 30 Oct. 2016, provisionally entered into force 21 Sept. 2017) (CETA).
20. Judicial Arbitration and Mediation Services, JAMS Optional Arbitration Appeal Procedure (JAMS Rules) https://www.jamsadr.com/appeal/ accessed 5 Sept. 2020; International Institute for Conflict Prevention and Resolution, Rules for Administered Arbitration of International Disputes, 2019 (CPR Rules) https://www.cpradr.org/resource-center/rules/international-other/arbitration/2019-international-administered-arbitration-rules accessed 5 Sept. 2020.
21. K. Andelic, *Why ICSID Doesn't Need an Appellate Procedure, and What to Do Instead* (2014) 11(1) Transnational Dispute Management 1, 3.
22. Eric van Ginkel, *Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur* (2003) 3 Pepperdine Dispute Resolution Law Journal 157, 201-02.
23. Christoph H. Schreuer and A. de la Brena, *Does ISDS Need an Appeal Mechanism* (2020) 17(2) Transnational Dispute Management 1.
24. Tams (n 4) 44.
25. Rodgers (n 11).
26. Tams (n 4) 45.
27. *Id.*, 43.

thus, have not been deliberated upon further by the legal academia as a suitable alternative to the suggestion of an Appeals Facility.

Through this paper, the author seeks to widen the horizon of the discussion on the subject by suggesting one more alternative to the appellate mechanism. The author suggests an equally efficient but more cost-effective model of reform, namely, Preliminary Rulings System ("**PRS**"). The PRS would work as an advisory body to the international investment arbitration tribunals and ensure consistency and coherence in the decisions rendered by arbitral tribunals. This model was proposed in detail by Katharina Diel-Gligor in her work in 2017.[28] In this paper, the author seeks to build upon the idea by suggesting certain changes to the proposed mechanism and recommending it as a suitable alternative to an ICSID Appeals Facility.

For the purpose of this paper, the author has adopted a five-sectional approach to propose the mechanism for PRS and argue why the system is a better option than an Appeals Facility. Section 1 put forwards the basic working of the proposed PRS and recommends certain changes to the system proposed by Diel-Gligor. Section 2 elucidates how the proposed PRS will fulfil all the objectives of the much-suggested Appeals Facility. Section 3 points out certain additional advantages of the proposed PRS and how it would overcome criticism faced by the suggested Appeals Facility. Section 4 contemplates certain aspects which still need development in order to make an informed decision for a possible future reform. Lastly, the concluding remarks have been incorporated in Section 5.

2. HOW WILL THE PRELIMINARY RULINGS SYSTEM WORK?

Article 64 of the ICSID Convention allows the contracting States to approach the ICJ for resolution of disputes "*concerning the interpretation or application of this Convention*".[29] On such referral, the ICJ would have the power to exercise its advisory jurisdiction over the matter and deliver its decision which would be binding on the contracting States.[30] Thus, the concept of referring a dispute for the 'interpretation of the law' is not against the objectives of the ICSID Convention. In light of this, the author suggests the 'Preliminary Rulings System', as proposed by Diel-Gligor, wherein the parties to the dispute in an ongoing arbitral proceeding can

28. Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (Brill Nijhoff 2017).
29. ICSID Convention, art. 64.
30. Tams (n 4) 47.

refer a question of law for an advisory opinion of a reviewing body to be established under the ICSID Convention.

While the author agrees with the proposed mechanism of the system as proposed by Diel-Gligor,[31] it would be in the interest of better functioning of the proposed system that certain aspects as discussed below be added or substituted with the system as proposed by Diel-Gligor. Hence, the discussion in this section is limited to the suggested changes in the proposed system only.

A. Composition of the PR Panel

The most important question to be answered is: What would be the structure of the Preliminary Rulings Panel ("**PR Panel**")? The answer to this question lies in an already made proposal. Scholars have suggested that the ICSID should incorporate a World Trade Organisation ("**WTO**") like appellate body to create a two-tier arbitration system.[32] The WTO Appellate Body ("**WTO AB**") has also been argued to bring coherence, consistency and finality in the field of international trade law.

1. A WTO Appellate Body inspired model

Diel-Gligor suggested that the PR Panel should be same as the WTO AB.[33] However, the author herein suggests that the PR Panel should work on a modified WTO AB model, in the limited context of the basic functions and purpose only.

Like the WTO AB, the PR Panel would work in the furtherance of the preservation of the rights and obligations of the state parties under the IIAs.[34] It would clarify the purpose of the provisions of the given IIAs and the institutional rules wherever required.[35] The PR Panel would be allowed to interpret the decision based on the text of the applicable treaties and the customary principles of international law.[36] This would ensure the coherence of the decisions of the PR Panel with that of the applicable

---

31. Diel-Gligor, *Towards Consistency in International Investment Jurisprudence* (n 28).
32. McRae (n 15).
33. Diel-Gligor, *Towards Consistency in International Investment Jurisprudence* (n 28) 415.
34. WTO Agreements, Understanding on Rules and Procedures Governing the Settlement of Disputes, annex 2 to WTO Agreement, (1994) 33 ILM 1226, art. 3.2. (DSU)
35. *Ibid.*
36. *Ibid.*

principles of public international law.[37] However, unlike the WTO AB which answers questions of facts as well as law, the matters would come for the perusal of the PR Panel for seeking opinion only on the specific question of law.

Further, in contrast to the seven-member appellate body of the WTO which was also suggested by Diel-Gligor to be incorporated in the PR Panel as well,[38] the author suggests that the PR Panel could comprise of only five members. This would be cost-friendlier. Also, given the fact that most of the international arbitral tribunals are comprised of three arbitrators,[39] it would be desirable that a conclusive decision on the matter be given by a larger bench of arbitrators. This could be achieved by having only 5 members PR Panel as against a 7-member Panel. Further, instead of having the Panel sit in smaller benches of 3 or 4 like the WTO AB,[40] it is suggested that the PR Panel should give decisions on full strength where the majority vote would decide the legal issue. This would ensure consistency within the decisions rendered by the PR Panel on questions of law which otherwise would be open to inconsistency among themselves if different questions of law are answered by different benches.

2. Appointment of the members of the Panel

At this stage, one more question needs to be answered: How will the members of the PR Panel be appointed? There are two possible ways in which this can be done: firstly, like the WTO AB, the members of the PR Panel would be appointed by the members of the ICSID Convention on a rolling basis for a set period of years; and secondly, the institution would appoint a five-member panel on its own which would work for a specified period of years.

While Diel-Gligor suggested appointment of members of the PR Panel in a manner similar to that of the WTO AB, the research did not cover the alternatives available for the appointment of the members.[41] Both the above-

37. McRae (n 15) 373.
38. Diel-Gligor, *Towards Consistency in International Investment Jurisprudence* (n 28) 417.
39. Grant (n 10) 1120; James H. Carter, *The Selection of Arbitrators* (1994) 5 Am Rev Intl Arb 84, 86; see generally C. Giorgetti, *Who Decides Who Decides in International Investment Arbitration?* (2014) 35 U Pa J Intl L 101 (2014).
40. Diel-Gligor, *Towards Consistency in International Investment Jurisprudence* (n 28) 496.
41. *Id.*, 417-20.

mentioned systems have their own pros and cons which will be further discussed in Section 4.1. below. This discussion is further necessitated post the recent WTO AB crisis which has effectively dismissed the appellate body. However, to answer the question briefly in the interim, the author suggests that the members to the Panel should be appointed by the contracting state parties instead of the arbitral institutions as done in the WTO AB and also put forth by Diel-Gligor.

B. Right to approach the Preliminary Rulings Panel

1. Either of the parties or the arbitral tribunal to approach the Panel

In the Appeals Facility model where the appellate body would exercise jurisdiction over the matter after the arbitral tribunal has rendered its award. In contrast to this, the author suggests that the PR Panel should be accorded with the jurisdiction at any stage of the arbitration whenever a substantial question of law arises. Unlike Diel-Gligor, who suggested that the question of law should only be referred by the arbitral tribunal;[42] the author herein suggests that either of the parties should also be allowed to refer the question of law to the PR Panel directly in order to avoid a scenario wherein one of the parties feels that despite confusion regarding a question of law, the arbitral tribunal is not referring it for a PR Panel ruling.

However, it is reiterated that this right to approach the PR Panel should be reserved only for the issues of law. This would serve a twofold purpose: firstly, the PR Panel, the primary aim of which would be to give an opinion on the matter of law so that different tribunals do not render inconsistent decisions, would not be burdened by the responsibility to review facts of the case which could be done by the arbitral tribunals; and secondly, some scholars have argued that the current annulment committee's scope of review is very narrow and they cannot decide whether the decision of the arbitral tribunal is based on an error in law.[43] Allowing the PR Panel to give its opinion on the question of law would thus overcome the defect of the existing mechanism.

---

42. *Id.*, 430.
43. Christoph H. Schreuer, *From ICSID Annulment to Appeal: Half Way Down the Slippery Slope* (2009) 10 Law & Practice Intl Ct & Tribunals 211; see also Katharina Diel-Gligor, *Competing Regimes in International Investment Arbitration: Choice between the ICSID and Alternative Arbitral Systems* (2011) 22(4) Am Rev Intl Arb 677.

2. *An opt-out right*

While Diel-Gligor has discussed at length the procedure of presenting the questions of law to the PR Panel,[44] the research hasn't covered the nature of the right vested upon the parties to refer the questions to the PR Panel. It is not necessary that all the state parties while entering into an IIA would want to procure the benefits associated with the PR Panel keeping in mind the extra time that would be taken during the referral process. Inarguably, one of the fundamental features of international arbitration is party autonomy and the consequent freedom to choose the procedure.[45] Therefore, it would be against the objectives of arbitration to impose a mandatory referral system on the parties. The parties have the right to uphold the finality of the awards and also to waive a procedural right which they do not want to be a part of the process.[46] Thus, the parties should be given the option to opt-out of the right to refer the dispute to the PR Panel in the IIA itself.

Apart from this, the author is suggesting an opt-out right for a twofold reason as well: firstly, the right to refer the matter for the opinion of the PR Panel should be made the general procedure and any deviation from it should be done by the express contract of the parties; and secondly, the opt-in method would require an express mention of the right of the parties to refer the matter to the PR Panel.[47] Thus, if the parties fail to expressly mention it in the IIA due to poor drafting of the same, they would be devoid of the referral mechanism due to a technical error.

3. HOW WILL THE PROPOSED PRS MECHANISM FULFILL THE OBJECTIVES OF AN APPELLATE SYSTEM?

Predictability, legitimacy and correctness form the three pillars of all the proposals for an ICSID Appeals Facility. It has been argued time and again that the current ISDS mechanism lacks these three qualities.[48] Thus, the Appeals Facility has been put forward as a suggestion to fulfil these three

---

44. Diel-Gligor, *Towards Consistency in International Investment Jurisprudence* (n 28) 430-9.
45. Jamshed Ansari, *Party Autonomy in Arbitration: A Critical Analysis* (2014) 6(6) Researcher 47, 53; Sunday A. Fagbemi, *The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?* (2015) 6(1) Journal of Sustainable Development, Law and Policy 222, 224.
46. David R. Sedlak, *ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold* (2004) 23(1) Penn St Intl L Rev 147, 161-70.
47. Jean Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design* (2013) 53(2) Va J Intl L 309, 322.
48. Laird and Askew (n 8); Feldman (n 9); Grant (n 10).

desirable objectives. In this section of the paper, the author will elucidate how the proposed PRS mechanism also fulfils all the given objectives.

A. Predictability

It cannot be denied that the regime of investment arbitration has suffered from inconsistent decisions by different tribunals while dealing with the same question of law. This inconsistency in decisions has made the system unpredictable. Below, the author discusses two instances of such an inconsistency and explains how the proposed PRS mechanism could resolve it.

1. The curious case of the necessity defence in deciding Argentina's liability

The decisions of the arbitral tribunals in five cases arising out of the US-Argentina BIT (*viz. CMS,*[49] *Continental Casualty,*[50] *Enron,*[51] *LG&E,*[52] and *Sempra*[53]) on the scope of the defence of necessity is one of the often-cited scenarios to show the inconsistent nature of investor-state arbitration.[54] In these cases, the claimants invested in Argentina, the host-State, as part of Argentina's privatization program in the early 1990s whereby Argentina also committed that they would stabilize the tariff structure notwithstanding the strong fluctuation in their economy. However, after a few years, Argentina suffered a huge economic breakdown to address which they took certain measures including a law on tariff adjustments.[55] When the investors approached the arbitral tribunals against Argentina for

49. CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8, Award (12 May 2005).
50. Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (5 Sept. 2008).
51. Enron Corpn. and Ponderosa Assets, LP v. Argentine Republic, ICSID Case No. ARB/01/3, Award (22 May 2007).
52. LG&E Energy Corpn., LG&E Capital Corpn., and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (3 Oct. 2006).
53. Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award (28 Sept. 2007).
54. Irene M. Ten Cate, *International Arbitration and The Ends of Appellate Review* 44 Intl L & Politics 1109, 1174; Tsai-Yu Lin, *Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?* (2012) 5(1) Contemporary Asia Arb J 1, 20.
55. CMS Award (n 49) [65].

violations of its treaty obligations including that of the Fair and Equitable Treatment (FET),[56] Argentina took the defence of necessity.[57]

While in *CMS*,[58] *Enron*[59] and *Sempra*[60] the arbitral tribunals found that Argentina's actions did not qualify for the necessity defence, the tribunals in *LG&E*[61] and *Continental Casualty*[62] found otherwise. This led to inconsistent decisions arising out of the same set of facts and legal texts.

2. The dual nationality conundrum of the Spain-Venezuela BIT

In a more recent example of inconsistency, the applicability of general principles of international law in determining the fate of the claims of a dual national was under scrutiny in two disputes arising out of the Spain-Venezuela BIT.[63] In both the disputes, namely *Serafin Garcia*[64] and *Manuel Garcia*,[65] the claimants were dual nationals of Spain and Venezuela and invested in the latter. In both the cases, claims of expropriation were raised by the investors to which the host-state objected by arguing that the investors should not be allowed to raise a claim against the State of his own nationality.[66] However, both the tribunals came to completely opposite decisions. Though these disputes were governed by the UNCITRAL Rules and not the ICSID Convention, it is the perfect example of inconsistency in the interpretation of the text of the treaties, in recent times.

On one hand, the *Serafin Garcia* tribunal rejected the application of international law in investor-state arbitration and allowed the investor to raise the claim.[67] On the other hand, the *Manuel Garcia* tribunal applied the customary rules of international law and used the principle of effective

56. *Id*., [88].
57. *Id*., [91]-[99].
58. *Id*., [383]-[394].
59. Enron Award (n 51) [343]-[345].
60. Sempra Award (n 53) [392]-[397].
61. LG&E Award (n 52) [85]-[86].
62. Continental Casualty Award (n 50) [266].
63. Agreement between the Kingdom of Spain and the Republic of Venezuela on the Reciprocal Promotion and Protection of Investments (signed 2 Nov. 1995, entered into force 10 Sept. 1997) (Spain-Venezuela BIT).
64. Serafín García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela, PCA Case No. 2013-3, Decision on Jurisdiction (15 Dec. 2014).
65. Manuel García Armas v. Bolivarian Republic of Venezuela, PCA Case No. 2016-08, Award on Jurisdiction (13 Dec. 2019).
66. Serafin Garcia (n 64) [110]-[115]; Manuel Garcia Armas (n 65) [256]-[322].
67. Serafin Garcia (n 64)[154], [173].

nationality of the dual national to decide the matter.[68] On the application of the effective nationality principle to the facts of the case, the *Manuel Garcia* tribunal found the dominant nationality to be that of Venezuela and thus rejected the claims of the investor.[69]

3. Explaining how the PRS mechanism would have avoided the inconsistencies

As discussed in Section 1, the PR Panel would consolidate all the disputes arising out of the matter and put a stay on all the relevant ongoing arbitral proceedings. Thus, in the matter of Argentina, as discussed in Section 2.1.1., the specific question of whether the actions of the host-State Argentina would qualify for the defence of necessity could have been referred to the PR Panel. When the matter would have been referred, as per the proposed system by the author, the PR Panel would have first ensured a stay of arbitral proceedings and then consolidated the rest of the cases as well. After this, the PR Panel would have reviewed the specific question of law and delivered its opinion which would have been binding on all five arbitral tribunals. Thus, it would have ensured consistency in decisions and offered predictability in future decisions.

Similarly, as discussed earlier in Section 1, the decisions of the PR Panel would be binding on the arbitral tribunal which referred the issue to it as well as on the future arbitral tribunals. In the matter of Venezuela, the question of law that whether international law is applicable in international investment arbitration and if yes, would the principle of effective nationality be applied, could have been referred to the PR Panel. The PR Panel would have conclusively decided upon the matter in consonance with the language of the treaty and the applicable principles of international law, its decision would have been binding on both the Serafin Garcia tribunal and the *Manuel Garcia* tribunal which would have avoided the inconsistent interpretation.

In light of the abovementioned, the author argues that the proposed PRS mechanism if incorporated would ensure consistency and predictability in the field of investment arbitration. Therefore, the proposed mechanism would fulfil the objective of achieving predictability in ISDS which has served as one of the three pillars for incorporating an appellate system.

68. Manuel Garcia (n 65) [645]-[650].
69. *Id*., [740]-[741].

B. Legitimacy

Legitimacy depends in large part upon factors such as determinacy and coherence, which can in turn bring predictability and reliability.[70] Determinacy involves using rules to convey clear and transparent expectations.[71] However, most of the investment treaties just vaguely mention the rights and obligations of the investors and the participating States which leaves certain legal loopholes prone to be used a justification for non-compliance.[72] This indeterminate nature of the investment arbitration regime gives rise to legitimacy issues. One such issue of legitimacy is the authoritativeness of the decisions of the arbitral tribunals. It has been argued that the award in the investment arbitration regime lack authority as they are prone to challenges at the enforcement stage.

Some domestic jurisdictions[73] have restricted the scope of the inquiry into the merits of the decisions of the international arbitral tribunals in respect of the obligations under the New York Convention.[74] Further, Article 52 of the ICSID Convention also restricts the scope of review of the decision of the arbitral tribunals by the annulment committee only to the set grounds mentioned in the Article.[75] There have been instances where the annulment committee has exceeded its scope of review and has annulled the arbitral awards on grounds which were not even argued by the parties at the first instance.[76] However, when it comes to compliance of the ICSID awards, apart from few exceptions where the enforcement of ICSID awards faced a

70. Thomas M. Franck, *The Power of Legitimacy Among Nations* (OUP, 1990) 49.
71. *Id*., 352.
72. Franck (n 2) 1584.
73. Nouveau code de procedure civile (NCPC) art. 1520 (France); Philippe Malaurie, Les *Précédents* et le Droit: Rapport *Français,* in Ewoud Hondius (ed.), Precedent and the Law (Bruylant Bruxelles Publishers 2007) 139, 144-47; see also Gabrielle Kaufmann-Kohler, Arbitral Precedent: Dream, Necessity, or Excuse? (2007) 23 Arbitration International 357, 359.
74. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (adopted 10 June 1958, entered into force 7 June 1959) (New York Convention).
75. Schreuer, *From ICSID Annulment to Appeal* (n 43); see also Diel-Gligor, *Competing Regimes in International Investment Arbitration* (n 43).
76. Hussein Nuaman Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7, Decision on Annulment (5 June 2007) [85]; Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28, Decision on Annulment (1 Mar. 2011) [212]; Amco Asia Corpn. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Annulment (16 May 1986) [95], [97]; Schreuer (n 23) 215-24; C.H. Schreuer and others, *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press, 2009) art. 52, paras 230-232.

challenge,[77] most of the awards have been complied with, with full vigour.[78] Further, the language of Articles 53 and 54 of the ICSID Convention ensure the enforcement of an ICSID award in the territory of the member States "*as if it were a final judgment of the courts of a constituent state*." Therefore, in the author's opinion, the argument for legitimacy fails in the first instance itself.

Irrespectively, it cannot be denied that the ICSID mechanism does not provide for a proper review of the decisions of the arbitral tribunals on merit or for an error in law.[79] It merely provides the parties with an extra remedy by way of the annulment of the award based on certain procedural grounds. It has been argued that the appellate system would provide legitimacy to the system as the losing parties would be less willing to again challenge the award in domestic courts.[80] Likewise, the domestic courts would also respect that the matter has already gone two stages of arbitral scrutiny.[81]

The author agrees with the scholars on the principle that there is a need for a review mechanism in ICSID arbitration and ISDS in general. However, the author reserves his support for an appeals mechanism and suggests that the proposed PRS mechanism would achieve the same goals. In the proposed mechanism, when the arbitral tribunals or the parties would refer the specific question of law for the opinion of the PR Panel the decision in such case would also have gone scrutiny at two levels. Further, the binding nature of the decisions of the PR Panel on the future tribunals would ensure a consistent approach to the specific issue. Therefore, the author argues that the proposed PRS mechanism would fulfil the objective of legitimacy as well.

---

77. SARL Benvenuti & Bonfant v. People's Republic of the Congo, Courd'appel, Paris, 26 June 1981, 1 ICSID Reports 369, 108 Journal du Droit International 365/6, 843, 845 (1981); *Liberian Eastern Timber Corpn.* LETCO v. Liberia, US District Court SDNY, 5 Sept. 1986, 12 Dec. 1986, 2 ICSID Reports 383-389.
78. Tams (n 4) 35.
79. G. Bottini, *Reform of the Investor-State Arbitration Regime: The Appeal Proposal* (2014) 11(1) Transnational Dispute Management 1, 4-6.
80. William Knull, III and Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?* (2000) 11 Am Rev Intl Arb 531; Noam Zamir and Peretz Segal, *Appeal in International Arbitration – An Efficient and Affordable Arbitral Appeal Mechanism* (2019) 35(1) Arbitration International 79, 85.
81. *Ibid.*

C. Correctness

It is believed that in a domestic courts system, an appellate review fulfils two purposes: error correction and lawmaking.[82] Thus, when scholars suggested for an appeals mechanism the intent was to ensure the correctness of the decision.[83] The motive was to mitigate the error in law which the arbitral tribunal would have made.[84]

Though there exists an annulment committee in the ICSID regime, but due to the limited scope of its powers there have been some inconsistent decisions on disputes arising out of the same subject matter and the same treaty. For instance, in the Argentinian cases discussed earlier in Section 2.1.1, the matters in *CMS*,[85] *Enron*[86] and *Sempra*[87] were taken to the annulment committee. All the three committees scrutinized the respective awards on the ground mentioned under Article 52(1)(b) of the ICSID Convention i.e., "*that the Tribunal has manifestly exceeded its powers*". While the annulment committee found the decision of all the three tribunals in the error of law, it annulled the *Enron* and *Sempra* awards, but only partially annulled the *CMS* award.

Further, the reasoning of the committee was different in all three cases: in *CMS*, the committee held that the wrong application of the law does not amount to 'manifest excess of powers' and that the committee cannot substitute its own view of facts and law for those of the tribunal;[88] in *Enron*, the committee was of the opinion that the decision of the arbitral tribunal did not apply the principles of customary international law;[89] and in *Sempra*, the committee reasoned that the tribunal failed to apply the provisions of the treaty by applying the principles of customary international law.[90]

82. David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*' (2003) 56 Vand L Rev 57, 74; Chad M. Oldfather, Universal De Novo Review (2009) 77 Geo Wash L Rev 308, 316.
83. Feldman (n 9).
84. UNGA Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Sixth Session (2018) UN Doc A/CN.9/964 para 57.
85. CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8, Annulment Decision (25 Sept. 2007).
86. Enron Corpn. and Ponderosa Assets, LP v Argentine Republic, ICSID Case No. ARB/01/3, Annulment Decision (30 June 2010).
87. Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Annulment Decision (29 June 2010).
88. CMS Gas Transmission Co. (n 85) [136].
89. Enron Corpn. (n 86) [386]-[395].
90. Sempra Energy International (n 87) [196]-[219].

Therefore, in the aforementioned scenario, three different opinions were recorded by the committee on a dispute arising out of the same subject matter. This raises concerns regarding the correctness of the decisions giving rise to the need for an additional review facility with powers wider than that of the annulment committee.[91] The reasons accorded by the CMS *Annulment Committee* are to be given special weightage in the scenario when they note that it "*cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal*".[92] It points towards the lack of reviewing power with the committee and the need for a body to review the issues of law.

In light of the above, the author argues that the proposed PRS mechanism would fulfil this criterion as well. As under the proposed system by Diel-Gligor the related cases would be consolidated, the ongoing arbitral proceedings will be stayed, PR Decisions will be binding on the tribunals. Thus, in the annulment scenario above if the matter was instead forwarded to the PR Panel then the issue would have been resolved at a preliminary stage itself. Therefore, the PR Panel would ensure the correctness of the law and maintain consistency at the same time and thus fulfils all the three objectives of an appellate system.

4. WHAT ARE THE ADDED BENEFITS OF THE PROPOSED PRS MECHANISM?

In the previous section, the author established how the proposed PRS mechanism is as efficient as the proposed appellate mechanisms. This section highlights certain aspects in which the proposed mechanism has an edge over an appellate mechanism. As mentioned in the introductory remarks, certain scholars have criticized the incorporation of an appellate mechanism in ICSID due to finality of awards and the additional costs. To ensure that the proposed mechanism does not undergo a similar criticism, the author will establish how it satisfies these criteria as well.

A. Finality of Awards

One of the fundamental features and benefit of arbitration is the finality of awards.[93]As there is no appellate review of the awards of the ICSID tribunals at present, their words on the matters of facts and law are

91. Cate (n 54) 1174-84.
92. CMS Gas Transmission Co. (n 85) [136].
93. Laird and Askew (n 8) 286.

considered final unless annulled on specified grounds under Article 52 of the ICSID Convention. These awards are then enforced as per the text of the ICSID Convention,[94] thus ensuring finality of the awards.

1. *Interaction with Article 53 of the ICSID Convention*

With the rising support for the introduction of an appeals mechanism in ICSID arbitration, the principle of finality of awards had to give way to the desire of achieving consistency and predictability in ISDS.[95] This goes against the text of Article 53 of the ICSID Convention which expressly states that "*the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention*" (emphasis added). The plain reading of the Article provides for the finality of 'awards' and their binding nature on all the member states.

Scholars have pointed out that to incorporate appeals mechanism in ICSID, the Convention will have to be amended which would require amendment of the Convention.[96] It has been highlighted that the awards rendered by the appeals facility might not be enforceable under Article 54 unless the definition of the term 'award' is changed to include the awards rendered by the appeals facility. However, the practicality of such an amendment looks dubious as it is unlikely to have the assent of all the member States[97] on the inclusion of a second tier of arbitration.[98]

2. *Interaction with Article 41 of the Vienna Convention on the Law of Treaties*

Article 41(1)(b)(i) the Vienna Convention on the Law of Treaties[99] ("**VCLT**") provides that any modifications to the treaty can be made only if it does not affect the rights of the other parties. In the present case, even if some of the parties agree and intend to modify the ICSID Convention, it would

94. ICSID Convention (n 13) ch. IV.
95. Kim (n 14); see also Diel-Gligor, *Competing Regimes in International Investment Arbitration* (n 43); Christopher Smith, *The Appeal of ICSID Awards: How the AMINZ Appellate Mechanism Can Guide Reform of ICSID Procedure* (2013) 41(2) Ga J Intl & Comp L 567.
96. Schreuer and Brena (n 23).
97. ICSID Convention (n 13), art. 66(1).
98. Albert Jan van den Berg, *Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions* (2019) 34(1) ICSID Review 169.
99. Vienna Convention on the Law of Treaties (entered into force 27 Jan. 1980) 1155 UNTS 331 (VCLT).

affect the rights of the other parties under Article 54 of the Convention. As Article 54 requires all the member States to enforce the ICSID awards in their territory it would be an added burden on them.[100] Thus, it would go against the text of Article 41(1)(b)(i).[101]

Further, Article 41(1)(b)(ii) of the VCLT requires that any modification should "*not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole*". As mentioned earlier, Article 53 of the Convention expressly prohibits the review of an award by the appellate authority. Read with Article 54 of the Convention, this would render the award unenforceable which would run directly against the purpose of the treaty as a whole which aims at the compliance with the arbitral awards.[102]

In light of the above-mentioned, the author here argues that the PRS mechanism would escape this criticism. In the proposed mechanism, the PR Panel would give its opinion during the proceedings based on which the arbitral tribunals would deliver their awards. Thus, the award rendered by the tribunals would not be subject to any further scrutiny except the annulment committee on the limited procedural grounds. Further, the award would be enforceable under the ICSID Convention in the existing manner itself. Therefore, the proposed mechanism would guarantee finality of awards as well as fulfil all the objectives of an appeals system as discussed in Section 2.

B. Time and Costs

One of the reasons for the shift from traditional litigation to arbitration is the time-bound manner in which the decisions can be rendered in the latter.[103] However, the costs involved in the process are very high.[104] The cost of arbitration includes fees for arbitrators, administration, legal representation

100. ICSID Convention (n 13), art. 54: "(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State".
101. Schreuer and Brena (n 23).
102. ICSID Convention (n 13), Preamble: "and that any arbitral award be complied with".
103. Robert Cooter and Tom Ulen, *Law and Economics* (6th ed, Pearson Addison Wesle 2012) 450; see Michael Faure and Wanli Ma, *Investor-State Arbitration: Economic and Empirical Perspectives* (2020) 41 Mich J Intl L 1 (2020).
104. See Gabriel Bottini and others, *Excessive Costs and Recoverability of Cost Awards in Investment Arbitration* (2020) 21(2–3) JWIT 251; see also Susan D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (OUP, 2019).

and experts.[105] Clubbed together, these all factors already include a huge amount of arbitral costs and adding an appellate system would further add to it. Therefore, reviewing the case on facts as well as law at the appellate stage would give rise to the above-mentioned costs again.[106]

The reform to the existing system should rather be affordable and in reach of the concerned parties.[107] The proposed PRS mechanism would ensure timely redressal of the dispute at not exceedingly high added costs. As discussed in Section 1, the PR Panel would have to deliver its opinion on the referred question within a short span of time. In contrast, the appeals facility would be undertaking the whole process on the disputed issues again which might take the same amount of time as the original arbitral proceedings, if not more. Below, the author discusses certain cost issues already incumbent in the investment arbitration regime to ultimately establish how the appeals system might not be able to overcome these issues, but the proposed PR system would.

1. Existing costs in investment arbitration

Various reports studying the average costs involved in an investment arbitration matter have been conducted till as late as the latter of 2010s. The latest available study on the subject based on the cases till early half of 2019 shows that the average cost incurred by a claimant is 6,067,184 USD and that of a respondent is 5, 223, 974 USD; while the costs incurred by the tribunals are comparatively is very low, 1 million USD.[108] It is also important to highlight here that these numbers have increased considerably from earlier, as the report of 2017 indicated claimant's costs as 6,019,000 USD, respondent's costs as 4,855,000 USD and those of the tribunal as 933,000 USD.[109]

105. Diana Rosert, *The Stakes are High: A Review of the Financial Costs of Investment Treaty Arbitration* (International Institute for Sustainable Development, 2 Oct. 2014) https://www.iisd.org/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration#:~:text=The%20amounts%20at%20stake%20in,claims%2C%20which%20are%20increasingly%20common. accessed 11 Sept. 2010.
106. Tams (n 4) 41.
107. See UNCITRAL Doc. A/CN.9/WG.III/WP.153, para 12.
108. See, citing to the figures in Daniel Behn and Ana Maria Daza, The Defense Burden in Investment Arbitration?' (2019) PluriCourts Working Paper.
109. Matthew Hodgson and Alistair Campbell, Damages and Costs in Investment Treaty Arbitration Revisited Allen & Overy (14 Dec. 2017) accessed 4 July 2019.

2. *The amount the parties get in damages is not proportionate to the costs involved*

Further, this has to be seen in the light of the amount of damages the parties actually get. It has been pointed out by various scholars that though the parties might receive the damages for their losses, the high cost of arbitration mitigates the actual compensation which they are getting.[110] Therefore, adding an additional forum which would again incur high costs is not viable for the parties from the costs-perspective. With the PRS mechanism in place, the review authority would have limited work which would have to be done in a limited period of time, and thus would be more cost-effective than an appeal mechanism.[111]

3. *The burden of costs might deter smaller countries or smaller investors*

While the big multinational corporations might be able to afford the costly arbitral proceedings against the host-states, it is unlikely that the smaller corporations would be able to continue the process.[112] Similarly, the countries with smaller economies might also not be able to continue the proceedings owing to adequate finances for the purpose of one arbitral proceeding.[113] Therefore, the proposed appeals facility is not a cost-effective or affordable mode of resolving disputes. Though it cannot be denied that the appeals facility has its own benefits over the existing system,[114] but one needs to ask whether the high costs at which it comes is really worth the reform?

---

110. See Jeffery P. Commission, *How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years* (Kluwer Arbitration Blog, 29 Feb. 2016) http://arbitrationblog.kluwerarbitration.com/author/jefferycommission-2/ accessed 9 Sept. 2020; Luke Nottage and Ana Ubilava, *Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry* (2018) 21 International Arbitration Law Review 4.
111. Andelic (n 21) 3; D.W. Rivkin and S.J. Rowe, *The Role of the Tribunal in Controlling Arbitral Costs* (2015) 81(2) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 116.
112. Catherine Rogers, *The Arrival of the "Have-Nots" in International Arbitration* (2007) 8 Nevada L J 341, 357.
113. Thomas Walde, *Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?* (2005) 2 Transnational Dispute Management 71.
114. Feldman (n 9).

An appeals system would effectively mean that all the above charges would be borne again by the parties in the form of fees and expenses of counsel, witnesses and experts. This would unnecessarily burden the parties financially. On the other hand, a PR System would overcome this lacuna. The PR Panel would be delivering the ruling based only on the written submissions of the parties with respect to the specific legal question.[115] This would ensure that the party expenses are not borne again and only costs pertaining to the tribunals are incurred. As discussed in Section 3.1.1., the tribunal costs are very low when compared to the average cost incurred by the parties. Therefore, the only additional cost borne in a PR System would that be of the PR Panel as compared to the party costs plus the tribunal costs in an appeals system.

5. WHAT STILL NEEDS TO BE ANSWERED?

In the previous sections, the author established that the PRS mechanism is an efficient and affordable alternative to the often-suggested appeals facility in ICSID arbitration. While the proposed PRS mechanism has the ability to escape the criticism faced by the appeals facility proposal in some aspects, it cannot be claimed that the system is perfect. Therefore, in this section, the author aims to highlight certain aspects on which the proposed PRS mechanism might face similar criticism as an appeals facility. The author also attempts to counter any future criticism and establish that the proposed PRS mechanism would prove to be a better alternative than an appeals facility.

A. Selection of arbitrators

As of now, the general practice is that each of the parties appoints one arbitrator each, and these two appointed arbitrators select the third arbitrator who also serves as the presiding arbitrator.[116] This way the parties experience a certain level of control over the proceedings and have confidence in the tribunal.[117] However, with the proposals of the appeals facility or the author proposed PR Panel, if the parties are again allowed to choose the arbitrators for the reviewing authority then the practice would

115. Diel-Gligor, *Towards Consistency in International Investment Jurisprudence* (n 28) 494.
116. James Wangelin, Effective Selection of Arbitrators in International Arbitration (1999) 14 Mealey's Intl Arb Rep 69, 70.
117. William W. Park, Arbitrator Integrity: The Transient and the Permanent (2009) 46 San Diego L Rev 629, 644-45.

become redundant.[118] Thus, there is a need for a different approach to appointing the members of the author proposed PR Panel. This can be done in two ways as mentioned in Section 1:

1. Appointment by the arbitration institution

The first method of appointing arbitrators to the PR Panel would be to let the arbitration institution appoint the review body on its own.[119] This mode of appointment of the Panel would ensure a threefold purpose: firstly, ensure depoliticization of the process of appointment of arbitrators as the members will be directly appointed by the institution;[120] secondly, bring more transparency to the appointment of the members as the institution would appoint the arbitrators based on set criteria unlike the State nominated arbitrators which might be selected just for political concerns; and thirdly, ensure flexibility and independence of the arbitrators who would be free from any political pressure.[121]

2. Political appointments by the ICSID member States

The second method of appointing the arbitrators would be to allow the member States to nominate people with relevant expertise in the field of arbitration to serve as the members of the PR Panel in rounds for a fixed period of time.[122] This would serve a twofold purpose: firstly, the members of the PR Panel would be appointed in a way similar to any other internationally recognized judicial organ like the ICJ or the WTO; and secondly, if the States are allowed to participate in the nomination of the members of the Panel they would have more faith in the decisions of the members and would be more likely to actively enforce the arbitral awards.

However, this method of appointing members of international judicial organs has been criticized for the risk of politicization of the arbitration system.[123] It is also considered desirable that the members of the review

118. Sergio Puig and Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach* (2017) 46 J Legal Studies 371, 374.
119. Hans Smit, *Contractual Modifications of the Arbitral Process* (2009) 113 Penn St L Rev 995, 1007.
120. Cate (n 54) 1158.
121. *Ibid*.
122. Cate (n 54) 1154; Michael and Wanli (n 103).
123. Katia Yannaca-Small, *Improving the System of Investor-State Dispute Settlement: The OECD Governments' Perspective* in Karl P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (OUP, 2008) 223, 224-25; J. Paulsson, *Avoiding*

authorities be impartial especially when their appointment is for a fixed period of time and not merely for one case.[124] Further, the process of filling vacancies on the bench, with the political implications it entails, may lead to longer proceedings, thereby increasing costs for attending parties.[125] Therefore, this mode of appointing arbitrators is prone to the politicization of the process which should be avoided to maintain the independence of arbitrators.[126]

On the other hand, it is also to be taken into consideration whether the participating States would agree to an independent appointment of panel members for deciding inter-States issues. With the recent crisis of WTO AB and the reservations brought forward by the United States, it has become even more doubtful if an arbitral institution appointed Panel would survive in the long term.[127] Certain scholars have also pointed out, and rather correctly, that the States are more likely to participate and show trust in international bodies if the members are nominated by the participant states rather than independent appointment.[128]

Unintended Consequences, in K.P. Sauvant (ed.), Appeals Mechanism in Investment Disputes (OUP, 2008) 241, 258-62.

124. Chiara Georgetti, *Independence and Impartiality of Arbitrators in Investor-State Arbitration: Perceived Problems and Possible Solutions* (EJIL: Talk!, 4 Apr. 2019) https://www.ejiltalk.org/independence-and-impartiality-of-arbitrators-in-investor-state-arbitration-perceived-problems-and-possible-solutions/ accessed 11 Sept. 2020; Riddhi Joshi, *The Threshold for Challenges in ICSID Arbitration: Interpreting the 'Manifest Lack' Standard* (Kluwer Arbitration Blog, May 7 2020) http://arbitrationblog.kluwerarbitration.com/2020/05/07/the-threshold-for-challenges-in-icsid-arbitration-interpreting-the-manifest-lack-standard/ accessed 11 Sept. 2020.
125. International Bar Association, Consistency, Efficiency, and Transparency in Investment Treaty Arbitration: A Report by the IBA Arbitration Subcommittee on Investment Treaty Arbitration (November 2018) 1, 53 https://www.threecrownsllp.com/wp-content/uploads/2018/12/InvestmentTreatyArbitrationReport2018.pdf accessed 13 Sept. 2020.
126. Aida Torres Pérez, *Can Judicial Selection Secure Judicial Independence? Constraining State Governments in Selecting International Judges*, in Michal Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Court* (OUP, 2015) 185.
127. Aditya Rathore and Ashutosh Bajpai, *The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead?'* (*Jurist*, 14 Apr. 2020) https://www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/ accessed 23 Jan. 2021.
128. Jan Paulsson, *Moral Hazard in International Dispute Resolution* (2011)8(2) Transnational Dispute Management; James Crawford, *The Ideal Arbitrator: Does One Size Fit All?* (2017) 32 Am U Intl L Rev 1003, 1020.

It is to be noted that the above two issues would be similar in an appeals facility and the proposed PRS mechanism. Therefore, the parties' right to appoint the arbitrators of their own choice would be taken away in both scenarios. However, the author argues that the right to select the arbitrator could be waived by the parties[129] in light of the bigger objectives of consistency and independence in arbitration. Further, in light of the advantages of political appointment, taking into consideration the example of the WTO AB crisis, the author suggests that the members to the PR Panel should be appointed by the participating States only to channelize greater participation of states in the PR system.

3. *Different treaties, different standards*

In investor-state arbitration, the primary source of reference for the arbitral tribunals for the resolution of any dispute is the treaty itself.[130] If the treaty is silent on any issue then only the arbitral tribunals tend to fall back on the domestic law of the participating states or the applicable principles of public international law,[131] which also have to be read in consonance with the language of the treaty.[132] However, the legal standards in different treaties entered into among different States vary from one another.[133] Though certain clauses like expropriation, fair and equitable treatment, most-favoured nation clauses etc. make constant appearances in the treaties, the standard of proof required and their interpretation along with other provisions of the treaty varies.[134] Based on this, scholars have argued that the decisions of the appeals facility would not achieve the desired authoritative value and consistency in arbitration because the interpretation of the law given by them would vary from treaty to treaty.[135]

---

129. See Dongdoo Choi, *Joinder in International Commercial Arbitration* (2019) 35(1) Arbitration International 29.
130. Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP, 2010) 191, 193-5.
131. J. Christopher Thomas and Harpreet Kaur Dhillon, Applicable Law Under International Investment Treaties (2014) 26 Singapore Academy of Law Journal 975, 993-7.
132. Id., 993, 997-8.
133. See generally Alireza Ansari Mahyari and Leila Raisi, *International Standards of Investment in International Arbitration Procedure and Investment Treaties* (2018) 15(2) Revista Jurídicas 11.
134. Ibid.
135. Berg (n 98) 157.

The author speculates that the proposed PRS mechanism might also undergo a similar criticism. Therefore, the author attempts to counter the expected criticism in the following manner:

Firstly, as discussed in Sections 2.1. and 2.3., there have been instances where the arbitral tribunals and the annulment committees have rendered inconsistent decisions on disputes arising out of the same treaty. Therefore, *in arguendo*, even if it is considered that the system might not be efficient for disputes arising out of different treaties, it is contended that the proposed mechanism would hold good for the disputes arising out of the same treaty and would ensure consistency.

Secondly, it cannot be denied that different treaties have different legal standards and obligations of the parties. However, it has been pointed out by scholars that despite the BITs being signed or entered into by different States, their texts are very similar.[136] Thus, it is argued that the decisions of the PR Panel would at least have authority in disputes arising out of treaties with identical or similar clauses.

Thirdly, though there exists no established rule of precedents in investor-State arbitration,[137] one cannot undermine the influential value running through the broader understanding of precedents.[138] Therefore, though the decisions of the PR Panel may not be considered binding on tribunals dealing with completely different treaty standards, the decisions would still hold persuasive value[139] on the tribunals dealing with the same question of law.

In light of the above, the author argues that the introduction of a review system should not be stopped merely on the ground that different treaties would have different standards. Rather, it should be kept in mind that the

136. K. Vandevelde, *The Political Economy of a Bilateral Investment Treaty* (1998) 92 AJIL 621, 628.
137. Christopher S. Gibson and Christopher R. Drahozal, *Iran-United States Claims Tribunal Precedent in Investor-State Arbitration* (2006) 23 J Intl Arb 521, 525; Roberto Castro de Figueiredo, *Previous Decisions in Investment Arbitration* (Kluwer Arbitration Blog, 23 Dec. 2014) http://arbitrationblog.kluwerarbitration.com/2014/12/23/previous-decisions-in-investment-arbitration/?doing_wp_cron=1593670802.1553978919982910156250#:~:text=It%20is%20well%20settled%20that,are%20often%20observed%20and%20followed accessed 7 Sept. 2020.
138. J. Jackson, *Sovereignty, The WTO and Changing Fundamentals of International Law* (Cambridge University Press, 2006) 177.
139. Rodgers (n 11).

underlying principles of the rights and obligations in the treaties are similar, interpretation of which should be consistent. Further, as the future tribunals would have an option to deviate from the previous decisions for reasons recorded in writing, there is no harm in introducing a review system.

6. CONCLUDING REMARKS

The debate of finality versus consistency has become prevalent in the present-day investment arbitration regime and scholars are pushing for consistency and legitimacy in the field over the finality of the arbitral awards. However, there exist reasonable and pressing concerns about the practicality of incorporating an appellate system in investment arbitration. The dubious interaction of such a system with the ICSID Convention, one of the most sought-after investment arbitration institutions, creates more issues regarding its implementation in international arbitration. Further, with the high level of additional costs which such a system would bring for the disputing parties, it is reasonable to ask: Is it the right time to implement such a method of review? And is it necessary to do away with the finality of awards to achieve the desired objectives?

It can also not be denied that there have been some inconsistencies in the arbitral awards passed in the past and an additional review system might bring the desired consistency and legitimacy to the system. Therefore, the main question is what kind of review mechanism would serve the interest of all the concerned parties.[140] With this question in mind, the paper suggests an efficient and affordable review mechanism in the form of the Preliminary Rulings System which not only fulfils all the objectives of the appeals facility but also escapes certain aspects of criticism faced by the latter. The proposed mechanism would resolve the issues of law conclusively before the award is delivered by the arbitral tribunal, thus maintaining the finality of the awards. Further, as discussed in Section 3.2., it would also be more cost-effective than an appeals facility. Thus, taking into consideration the discussion in the previous sections of the paper, the author concludes that the PRS mechanism is an efficient, affordable and a better alternative for a review mechanism than the appellate system.

It is also clarified here that the intent of the paper is not to criticize or go against the proposal of an appeals facility, but merely to inform future discussions on the subject. With this, the author hopes that the relevant research groups will study the practicality of the proposed PRS mechanism

140. Zamir and Segal (n 80) 93.

in investment arbitration. Further, it is hoped that the ICSID as well as other international arbitration institutions will consider incorporating the suggested changes in their rules which unlike the appeals facility wouldn't require drastic amendments or modifications.