

Assessing Recent Proposals to Reform the Investment Treaty Arbitration System

by

Thomas A. Falcone
B.A, Kwantlen Polytechnic University, 2012

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Supervisory Committee

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Abstract

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Economic globalization, the liberalization of markets, and the opening of once closed societies have all heralded the remarkable emergence of the current system of investment treaty arbitration. The current system, however, has attracted significant criticism and calls for reform. This thesis reviews the historical employment of arbitration in international society and the circumstances that lead to the emergence of the current system of investor-state dispute settlement. Following this, two recent proposals for reform of the current system are outlined: the creation of an international court of investment and the implementation of appellate mechanisms for investment treaty arbitration. The thesis concludes by offering an assessment of these proposals and argues for the rejection of the proposal to replace the current system with an international investment court, but offers a cautious endorsement of appellate mechanisms.

Table of Contents

Supervisory Committee	ii
Abstract	iii
Table of Contents	iv
Acknowledgments	v
Chapter 1: Introduction	1
The scope of this project	1
Methodology	4
Theoretical considerations	7
Outline of this thesis	16
Chapter 2: History of Arbitration in International Society and the ITA System	18
Arbitration in international society	18
Arbitration in antiquity	18
Arbitration in modernity	22
The emergence of the contemporary investment treaty arbitration system	26
Chapter 3: The Proposal to Create an International Court of Investment.....	37
Overview	37
Institutional overhaul: The case for an international investment court.....	37
A cure without a disease? A review of Van Harten’s four criteria of public law adjudication.....	46
<i>Accountability</i>	47
<i>Openness</i>	48
<i>Coherence</i>	50
<i>Independence</i>	51
The Investment Treaty Arbitration System and Contemporary Global Governance ...	56
<i>Disaggregated Global Governance</i>	56
<i>The ITA System and Global Administrative Law</i>	62
Chapter 4: Appellate Mechanism(s) for the ITA System: The Way Forward?	66
A modest reform proposal?.....	66
Background on proposals to create appellate mechanisms for the ITA system	67
Consistent inconsistencies? Examining concerns over consistent jurisprudence in international investment arbitration	70
The way forward: Placing appellate mechanisms appropriately in the disaggregated network of the ITA system	76
Chapter 5: Conclusion.....	79
Review	79
Benefits of the ITA System and future research possibilities.....	81
<i>Public Policy and Arbitral Decisions</i>	81
<i>Advancing the rule of law?</i>	85
Bibliography	87
Cases and Statutes Cited	95

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ありがとう、真理ちゃん。愛してます。

Chapter 1: Introduction

The scope of this project

Studies of international law are often shadowed by the looming question of whether the very field of inquiry under investigation is actually deserving of critical examination.

Consider that in 1917 scholarly journals published articles asking “Does International Law Exist?”¹ and that 87 years later, in 2004, the scope of the skepticism had seemingly changed little, as the American Society of International Law deemed the question “Does International Law Matter?”² worthy of extensive deliberation.

This thesis, however, examines a specific area of international law that has experienced considerable growth and has been the focus of widespread critical review from both scholarly and mainstream publications. Investment treaty arbitration (ITA) is a reality that affects the worlds of law, politics, economics, and international business. The current ITA system emerged haphazardly and is currently underpinned by a decentralized assortment of some 3,000 bilateral investment treaties (BITs) and regional trade and investment agreements. The ITA system is not merely an object of theoretical speculation created by international lawyers. Rather, it is a hard-and-fast reality that has established “actual treaties setting out hard legal obligations for the state hosting the investment and

¹ Arthur Cobb, “Does International Law Exist?” *The North American Review*, Vol. 205, No. 737 (1917), pp. 638-639.

² David D. Caron and Michael J. Glennon, “Does International Law Matter?” *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 98 (2004), pp. 311-317.

enforceable rights for the foreign investor.”³ International law as a whole may continue to be dogged by existential self-doubt, but the goal of this thesis is to examine an emerging subfield of international law that is not only very real but is of significant concern to international lawyers, policymakers, and business leaders.

The current ITA system’s infrastructure is somewhat complex and opaque. Later in this thesis, I will elaborate how the system works and explain the history of international arbitration that preceded it and why the current system looks like it does today. At this point, it will suffice to generalize my description of the system in unsatisfactorily broad terms. In essence, the ITA system allows for foreign investors to sue the government of the country in which they have invested in front of an international arbitral panel. A state that is party to a BIT that passes legislation or engages in conduct that a foreign investor thinks is in violation of the treaty will have to defend itself before arbitrators. Investment treaties are thus a mechanism by which non-state actors are given a direct legal right to take action against a state – a revolutionary development in international law. Foreign investors have disputed the legality of a wide range of state conduct before arbitrators: bans on fuel additives⁴, the granting of broadcasting licenses⁵, and emergency fiscal measures undertaken during financial crisis⁶ are but a small sampling of the assortment of public policies challenged by foreign investors in front of

³ See: “Investment Treaties.” International Institute for Sustainable Development. <<http://www.iisd.org/investment/law/treaties.aspx>>

⁴ *Methanex v United States* (Final Award) (3 August 2005) <<http://italaw.com/sites/default/files/case-documents/ita0529.pdf>>

⁵ *CME Czech Republic B.V. v Czech Republic* (Partial Award) (13 September 2001) <<http://www.italaw.com/sites/default/files/case-documents/ita0178.pdf>>

⁶ *CMS Gas Transmission Company v Republic of Argentina* ICSID Case No. ARB/01/8 (Award) (12 May 2005) <<http://italaw.com/sites/default/files/case-documents/ita0184.pdf>>

international arbitral panels constituted pursuant to bilateral and regional investment agreements.

It is perhaps unsurprising that – given the contentious nature of the public policies often litigated before international arbitrators⁷ – the current ITA system has attracted considerable criticism, both scholarly⁸ and mainstream⁹. Criticism of international investment regimes spans the ideological spectrum in democratic societies, as voices on the left¹⁰ and the right¹¹ have expressed deep reservations about the contours of the ITA system.

A chorus of criticism is usually followed by a shopping list of proposed reforms. This thesis will assess two major reform proposals to the current ITA system: (i) Gus Van Harten's proposal to replace the current system of *ad hoc* international tribunals with a permanent international court of investment; and (ii), the proposal to create an appellate body or appellate mechanisms for the current system. My hypothesis is that the first proposal should be rejected and the second proposal may be deserving of some

⁷ Jason Webb Yackee, for instance, notes that ITA cases require arbitral panels to deal with “complex and politically fraught value-balancing exercises.” See: Jason Webb Yackee, “Controlling the International Investment Law Agency.” *Harvard International Law Journal*, Vol. 53, No. 2 (2012), p. 393.

⁸ See, for instance: Susan D. Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions.” *Fordham Law Review*, Vol. 73, No. 4 (2005), pp. 1521-1626 and Gus Van Harten, *Investment Treaty Arbitration and Public Law*. (Oxford: Oxford University Press, 2007)

⁹ See, for instance: Anthony DePalma, “Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say.” *New York Times*. March 11, 2001. <<http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html>> Accessed January 28, 2014.

¹⁰ Gus Van Harten, “Open letter to Stephen Harper: Fourteen reasons the Canada-China FIPA needs a full public review.” *Rabble.ca*. October 12, 2012. <<http://rabble.ca/news/2012/10/open-letter-stephen-harper-fourteen-reasons-canada-china-fipa-needs-full-public-review>> Accessed January 28, 2014.

¹¹ Patrick J. Buchanan, “Defeat NAFTA.” *Washington Times*. July 26, 2005. <<http://www.washingtontimes.com/news/2005/jul/26/20050726-085615-4529r/?page=all>> Accessed January 28, 2014.

consideration. Before outlining the thesis further, however, I will set out this thesis' methodology and theoretical considerations.

Methodology

I have chosen to employ a historical institutionalist analysis for this project. Peter Hall and Taylor Rosemary explain that historical institutionalism regards

the institutional organization of the polity or political economy as the principal factor structuring collective behaviour and generating distinctive [policy] outcomes. [Historical institutionalists] look more closely at the state, seen no longer as a neutral broker among competing interests but as a complex of institutions capable of structuring the character and outcomes of group conflict.¹²

A key concept in the historical institutionalist theoretical framework is the idea of *path dependency*, which is “a conceptual framework through which one analyzes how current actions or decisions are constrained by choices made in the past and by expected returns in the future.”¹³

Historical institutionalists, then, tend to see policy and political outcomes as arising from previous decisions, conventions, and rules made within institutions. In other words, the histories of institutions give rise to the shapes of the policies which those institutions produce. A historical institutionalist attempts to understand why certain political choices are made by referencing how previous choices constructed the limitations within which current choices can be made. Popular research methods employed by this framework include analyzing an institution's historical documentation in order to paint a picture of what kind of trajectory preceded the policy decision in

¹² Peter A. Hall, and Taylor C. R. Rosemary, “Political Science and the Three New Institutionalisms.” *Political Studies*. Vol. 44, No. 4 (1996), pp. 937-938.

¹³ J. Eijmberts, “Path dependency”. In *Encyclopedia of nanoscience and society*. By D. Guston, ed. (Thousand Oaks, CA: SAGE Publications, 2000), p. 619.

question.¹⁴ The common thread that links historical institutionalist analysis in political science is its focus on how historical decisions in institutions factor into and restrain contemporary policy and political outcomes.

While historical institutionalism has traditionally been associated with the policy studies and policy analysis sub-disciplines of political science, I think that institutionalist methodologies are of equal value to international relations studies. As Orfeo Fioretos argues, “historical institutionalism holds significant potential for IR, especially in anchoring the substantive study of international political development—that is, the processes that shape, reproduce, and alter international political institutions over time.”¹⁵

As Jonathon Moses and Torbjørn Knutsen note, however, “‘methodology’ is sometimes used as a fancy synonym for ‘method.’ Thus it is worth repeating that these two terms are *not* synonyms. Method refers to research techniques, or technical procedures of a discipline. Methodology, on the other hand, denotes an investigation of the concepts, theories and basic principles of reasoning on a subject.”¹⁶ The primary research methods I employ in this thesis are document analysis and comparative analysis. Document analysis can helpfully be defined as an “approach to document content [that] involves the adoption of some form of content analysis. At its simplest, content analysis concentrates on word and phrase counts as well as numerical measures of textual

¹⁴ Kathleen Thelen and Sven Steimo, “Historical Institutionalism in Comparative Analysis.” In *Structuring Politics: Historical Institutionalism in Comparative Analysis*. By Kathleen Thelen and Sven Steimo, eds. (Cambridge: Cambridge University Press, 1992), pp. 1-33.

¹⁵ Orfeo Fioretos, “Historical Institutionalism in International Relations.” *International Organization*. Vol. 65, No. 2 (2011), p. 370.

¹⁶ Jonathon W. Moses and Torbjørn L. Knutsen, *Ways of Knowing: Competing Methodologies in Social and Political Research*. (New York: Palgrave Macmillan, 2012), p. 5.

expression.”¹⁷ The documents analyzed consist primarily of peer-reviewed articles and judicial and arbitral decisions. I did not conduct any official interviews nor did I engage in any statistical analysis.

I also engage in comparative analysis. Melinda Mills notes that, “Comparison is at the heart of most social sciences research. Comparison can take place between different entities, such as individuals, interviews, statements, settings, themes, groups, and cases, or at different points in time. These entities or time periods are then analyzed to isolate prominent similarities and differences, a process that is described by the term *comparative analysis*.”¹⁸ I compare the current system of ITA with two proposed alternatives: one a complete overhaul of the current system (Van Harten’s proposal) and the other a more modest proposal to add appellate mechanisms to the current system.¹⁹ Moses and Knutsen note that this kind of comparative analysis is described as a *within-case approach*, where “the analyst’s focus is trained on the nature of developments internal to a particular case or object of study. [...] To understand the nature of complex systems, we have to take them apart as units to examine complex relationships and mechanisms internal to the case under study.”²⁰

The methodical aspect of this thesis can be neatly summarized as follows: I adopt a historical institutionalist methodology, which is to say that I analyze the processes of

¹⁷ Lindsay F. Prior "Document Analysis." In *The SAGE Encyclopedia of Qualitative Research Methods*, by Lisa M. Given, ed. (Thousand Oaks, CA: SAGE Publications, Inc., 2008), pp. 231-233.

¹⁸ Melinda C. Mills, "Comparative Analysis." In *The SAGE Encyclopedia of Qualitative Research Methods*, by Lisa M. Given, ed. (Thousand Oaks, CA: SAGE Publications, Inc., 2008), p. 101.

¹⁹ Notably, however, I am not comparing two *existing* systems but rather an existing system with two hypothetical alternatives. The comparison is, thus, subjective.

²⁰ *Ibid.* Moses and Knutsen, pp. 309-310.

institutions and recognize that institutions often make policy and political outcomes path dependent; and my primary research methods are document and comparative analysis.

Theoretical considerations

This thesis sits on the border of two academic sub-disciplines: international relations and international law. I examine an emerging area of international law – investment treaty arbitration – but I do so primarily by engaging with proposals to reform the current ITA system *institutionally*. Furthermore, my normative assessment of the proposals (especially, as we will see, with Van Harten’s proposal) is based on certain set of liberal assumptions about the nature of contemporary global governance. Before outlining the liberal theories of international politics and law that animate this thesis, however, I will briefly offer a few thoughts on how the international relations and international law intersect in scholarly work.

Yasuaki Onuma usefully points out that international relations scholars and international lawyers have, for the most part, developed their sub-disciplines along trajectories that are mostly separate from each other.²¹ The two sub-disciplines have been marked by a dismissive attitude toward each other. As Onuma notes, “when international lawyers argue that a particular issue is not a problem of law but of politics or policy, there is a tendency on their part to simply abandon any further professional or scholarly exploration of the issue.”²² However, this kind of mutual intellectual seclusion is clearly not conducive to rigorous analytical interrogation of pressing questions of global public

²¹ Yasuaki Onuma, “International Law in and with International Politics: The Functions of International Law in International Society.” *European Journal of International Law*. Vol. 14, No. 1 (2003), pp. 105-139.

²² *Ibid.*, p. 106.

policy and international law. Thus, I share Onuma's desire for increased collaboration between international relations scholars and international lawyers.²³ Onuma explains at length that there is some reason for optimism that the two sub-disciplines may be beginning to move toward a more collegial relationship:

During the last two decades, a number of international lawyers in the US and in Europe have sought to bridge the gap between studies of international law and international relations. Especially since the 1990s, both the *American Journal of International Law* and the *European Journal of International Law* have published a number of stimulating articles dealing with law and politics in international society. In 2002, the American Society of International Law hosted an Annual Meeting entitled "The Legalization of International Relations/The Internationalization of Legal Relations." Some international relations scholars, especially institutionalists and constructivists, have dealt with relevant treaties and decisions and/or resolutions of international organizations in such fields as international trade, global environment, disarmament, human rights and 'humanitarian intervention'.²⁴

But despite these positive developments Onuma describes, there remain significant obstacles to improving the working relationship between international relations and international law. Onuma argues that a central obstacle is the common notion among many international relations scholars that international law is simply unimportant. "In continental Europe, Asia and other regions of the world, the study of international relations has more or less underestimated the significance of international law in international society, following the tendency of international relations studies in the US."²⁵ The dominant streams of international relations scholarship – especially in the United States – continue to trace their genealogical roots to the founding fathers of realism such as E. H. Carr and Hans Morgenthau, both of whom were dismissive of the 'utopianism' of international law.²⁶ It is thus perhaps unsurprising when Onuma notes

²³ Ibid., p. 109.

²⁴ Ibid.

²⁵ Ibid., p. 111.

²⁶ See: Edward Hallett Carr, *The Twenty Years Crisis, 1919-1939*. (New York: Perennial, 2001) and Hans J. Morgenthau *In Defense of the National Interest* (New York: Alfred A. Knopf, 1951). For a

that, “most scholars of international relations, for their part, have substantially ignored the *raison d’être* of international law precisely because they have believed that states, or more specifically government officers or policy makers, do not necessarily observe law.”²⁷

A detailed discussion of the question of compliance in international law – and more broadly, of the merits of realism and neorealism’s criticisms of the validity of international law – is beyond the scope of this thesis project. The fact that both international relations and international law have been dominated by realist and legal positivist perspectives, respectively, has had the effect of making both scholarly fields marked by state-centric analyses. But state-centricity is being increasingly challenged by contemporary trends. Thus, I agree with Onuma when he argues that mainstream international relations scholars have “ignored the fact that states have in most cases acted, whether consciously or unconsciously, in accordance or coincidence with rules and principles of international law as an established institution in international society.”²⁸ Similarly, he is right to criticize international lawyers who are too quick to punt questions they regard as being ‘political’ into the realm of international relations scholars.²⁹ There is rich potential in the space between international relations and international law. It is my hope that this thesis will stand as an example of the fruitfulness of endeavours undertaken in that space.³⁰

detailed discussion of Morgenthau’s dismissal of ‘utopianism’, see: Robert Kaufman, “Morgenthau’s Unrealistic Realism.” *Yale Journal of International Affairs*. Vol. 1, No. 2 (2006), pp. 24-38.

²⁷ Ibid Onuma, p. 116.

²⁸ Ibid., p. 112.

²⁹ Ibid., p. 106.

³⁰ For more on the relationship between international relations and international law, see: Ingrid Detter De Lupis, “The Relationship Between International Relations and International Law.” *Millennium* –

Having discussed the intersecting relationship between international relations and international law, I will now turn to the theoretical assumptions that underpin this thesis. As I mentioned earlier, the assessments of proposed reforms to the ITA system that I offer in this thesis are based in a liberal conception of international politics and international law. I will now briefly review each in turn.

Andrew Moravcsik offers a compelling account of liberal international relations theory.³¹ He is concerned with articulating a liberal theory of international relations that is clearly distinct from the neoliberal institutionalism³² which, along with neorealism, is one of the dominant theoretical paradigms in the sub-discipline of international politics. Indeed, on Moravcsik's account there is in fact very little that is *liberal* about neoliberal institutionalist theory. He argues that this is

because most of the analytic assumptions and basic casual variables employed by institutionalist theory are more realist than liberal. Like realism, institutionalism takes state preferences as fixed or exogenous, seeks to explain state policy as a function of variation in the geopolitical environment...and focuses on ways in which anarchy leads to suboptimal outcomes.³³

Since Moravcsik contends that “most of the analytic assumptions and basic casual variables employed by institutionalist theory are more realist than liberal”³⁴ he wants to present a positive theory of liberalism that is capable of accurately describing the processes of international politics. He is also sensitive to the long-standing realist critique

Journal of International Studies. Vol. 16, No. 2 (1987), pp. 353-355 and Robert O. Keohane, “International Relations and International Law: Interests, Reputation, Institutions.” *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 93 (1999), pp. 375-379.

³¹ Andrew Moravcsik, “Taking Preferences Seriously: A Liberal Theory of International Politics.” *International Politics*. Vol. 51, No. 4 (1997), pp. 513-553.

³² Neoliberal institutionalism is classically articulated in the work of Robert Keohane and Joseph Nye. See: Robert O. Keohane and Joseph Nye, *Power and Interdependence*. (New York: Pearson, 2011) and Robert O. Keohane and Joseph Nye, “Power and Interdependence Revisited.” *International Organization*. Vol. 41, No. 4 (1987), pp. 725-753.

³³ *Ibid* Moravcsik, p. 535.

³⁴ *Ibid.*, p. 536.

that liberalism in international relations amounts to little more than an unfocused and purely normative assessment of how things *should* be, as opposed to realism's concern with how they really are. Moravcsik wants to show us that liberal theory is quite capable of doing exactly this.

Three central assumptions underpin a liberal theory of international relations, according to Moravcsik. The first assumption he sub-titles as *the primacy of societal actors*, which is the assumption that “the fundamental actors in international politics are individuals and private groups, who are on average rational and risk-averse and who organize exchange and collective action to promote differentiated interests under constraints imposed by material scarcity, conflicting values, and variations in societal influence.”³⁵ To an otherwise relatively well-educated observer outside of the sub-discipline of international relations, this may seem intuitively obvious: but it is a remarkably controversial claim to make, given the fact that realism – from its position of dominance within the discipline – posits the state as the most fundamental and important unit of analysis in international politics.

The second assumption Moravcsik claims underlies the liberal theory he sub-titles *representation and state preferences*. This is the assumption that “states (or other political institutions) represent some subset of domestic society, on the basis of whose interests state officials define state preferences and act purposively in world politics.”³⁶ In other words, states are not monolithic entities that advance fixed sets of preferences on the world stage. Instead of viewing states as being driven by an overarching, singular national interest, states represent a complex and diverse set of interests defined

³⁵ Ibid., p. 516.

³⁶ Ibid., p. 518.

domestically. Moravcsik goes on to elaborate that “in the liberal conception...the state is not an actor but a representative institution constantly subject to capture and recapture, construction and reconstruction by coalitions of social actors.”³⁷

The third and final assumption that underlies this liberal theory sits under the subtitle *interdependence and the international system*, which Moravcsik explains as assuming that “the configuration of interdependent states preferences determines state behavior.”³⁸ This is essentially the assumption that states will advance their preferences within the frameworks established by other states advancing their preferences. Thus, states are interdependent. Critically important to liberal theory is the assumption “that the pattern of interdependent state preferences imposes a binding constraint on state behavior”³⁹ – the state is not then, contrary to realist suggestions otherwise, the ultimate actor in world politics.

It is perhaps useful at this point to quote at some length from Anne-Marie Slaughter, who helpfully summarizes Moravcsik’s liberal theory of international relations in concise bullet-point form:

1. It is a bottom-up view [of international politics] rather than a top-down view.
2. It is an integrated view that does not separate the international and domestic spheres but, rather, assumes that they are inextricably linked.
3. It is a view [in which]...states bear no resemblance to billiard balls, but rather to atoms of varying composition, whose relations with one another, either cooperative or conflictual, depend on their internal structure.

³⁷ Ibid.

³⁸ Ibid., p. 520.

³⁹ Ibid.

4. It is a view that transforms states into governments. By requiring us to focus on the precise interactions between individuals and “states,” it leads us to quickly identify and differentiate between different government institutions, each with distinct functions and interests.⁴⁰

Crucial to Moravcsik’s project is the notion that “*liberal theory offers a plausible explanation for the distinctiveness of modern international politics.*”⁴¹ He wants to present a liberal theory of international relations that is not normative in nature but rather positive, or descriptive, and he thinks that liberalism as he articulates it is better positioned than neorealism and its cousin, neoliberal institutionalism, to explain the contemporary political world.

Just as neorealism (along with its cousin, neoliberal institutionalism) has enjoyed dominance in international relations studies, legal positivism⁴² has dominated the theoretical conversations of international law. But as Armstrong et. al. note, “[liberal] theory challenges the core principle of positivism, namely, that law is and should be separate from morality. For liberal IL scholars, this position robs law of its purpose, which is to serve progressive social ends.”⁴³ A critical tenet of liberal international law theory is that the barrier erected between law and morality by the legal positivist tradition is unsustainable. Ronald Dworkin, in a recent and posthumously published article in *Philosophy & Public Affairs*, offers a sophisticated liberal account of international law.⁴⁴

⁴⁰ Slaughter, Anne-Marie. “A Liberal Theory of International Law.” *Proceedings of the Annual Meeting (American Society of International Law)*. Vol. 94 (2000), .p. 241

⁴¹ Ibid. Moravcsik, p. 535. Original italics.

⁴² See: H.L.A. Hart, *The Concept of Law*. (Oxford: Clarendon Press, 1994)

⁴³ D. Armstrong, T. Farrell and H. Lambert, “Three Lenses- realism, liberalism, and constructivism,” in D. Armstrong, T. Farrell and H. Lambert, *International Law and International Relations* (Cambridge University Press, 2007), p. 88.

⁴⁴ Ronald Dworkin, “A New Philosophy for International Law.” *Philosophy & Public Affairs*. Vol. 41, No. 1 (2013), pp. 2-30.

Dworkin's project in outlining his theory of international law is to call into question the familiar notion that international law is ultimately underpinned by the consent of states. As Dworkin argues, "if the theory that consent is the ultimate basis of international law were persuasive, then we would quickly come to an interpretive dead end on [substantive questions of international law]."⁴⁵ There must, in fact, be something else – a fundamental moral principle – that underpins international law. As Dworkin explains at length:

We need an explanation why the citizens of contemporary Ruritania have an obligation under international law that cannot be canceled by any new Ruritanian political process. It does not serve to declare that international law contains a more basic principle – *pacta sunt servanda* – that treaties must be respected over generations. What makes that more basic principle part of international law? It would, once again, be circular simply to reply that states consent to that principle when they sign treaties. Compare the familiar institution of promising. As many philosophers have pointed out, there is a mystery to the bare assumption that promising creates obligation. How can an individual change a moral situation just by speaking a runic phrase? If we want to explain why promises do create moral obligations, we must point to different, more basic moral principles that a promise invokes... We must look for similar, more basic principles within international law.⁴⁶

In other words, when a treaty is signed a state is obliged under international law to respect that treaty.⁴⁷ But *why*? The ultimate force does not come from the mere fact that a state has signed a treaty, but rather from the basic moral principle that that act invokes. Dworkin goes on to offer an account of what that more fundamental principle is.

Dworkin notes that in the post-Westphalia world order, questions of political legitimacy evolved into questions of justice within each of the sovereign states that constituted the world order. The primary question of political philosophy was the best way to structure a democratic society: the unit of analysis was confined to individual states. Dworkin notes that the nature of these questions is evolving yet again: "...the

⁴⁵ Ibid., p. 8.

⁴⁶ Ibid., p. 10.

⁴⁷ Vienna Convention on the Law of Treaties. May 23, 1969, U.N.T.S. Vol. 1115.

modern question – what justifies coercive political power? – arises not just *within* each of the sovereign states but also *about* the system itself: that is, about each state’s decision to respect the principles of that system.”⁴⁸ The grounding of the question, however, may not have shifted entirely. For Dworkin, the justice of the Westphalian order is intrinsically tied to the justice within the sovereign states that constitute that order. “For those principles [of the Westphalian order] are not independent of but are actually part of the coercive system each of those states imposes on its citizens. It follows that the general obligation of each state to improve its political legitimacy includes an obligation to try to improve the overall international system.”⁴⁹ Herein lies the fundamental moral principle that Dworkin proposes underpins international law. Since states must maintain their own political legitimacy and that legitimacy is in turn connected to the legitimacy of the international system – including international law – the underlying principle that provides the moral foundation of international law is the requirement that a state must “accept feasible and shared constraints on its own power. That requirement sets out, in my view, the true moral basis of international law.”⁵⁰ This postulation seems especially compelling when we consider Dworkin’s subsequent argument that, in an increasingly interdependent world marked by pressing public policy issues that can only be solved by international co-operation, the greatest threat to the legitimacy of the international order is the unrestrained sovereignty of states.⁵¹

⁴⁸ Ibid. Dworkin, p. 17.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid., pp. 18-29.

Of course, Dworkin's body of jurisprudential work has been subject to considerable criticism.⁵² The point of the preceding discussion was not to offer a complete and persuasive (or even satisfactory) overview of liberal theories of international relations or international law. Rather, I have briefly outlined some of the ideas of Moravcsik and Dworkin in order to explain the theoretical lenses that this thesis adopts.⁵³

Outline of this thesis

This thesis consists of five chapters. In this introductory chapter I have briefly discussed the scope and basic nature of the arguments that will be presented. I have also elaborated on the project's methodology and research methods, as well as the theoretical assumptions that underpin the thesis as a whole.

In the second chapter, I provide an overview of the history of arbitration in international society. I touch on the employment of arbitration in antiquity and the pre-Westphalia period before discussing how states have used arbitration in public international law to settle disputes in the modern era. I then discuss the emergence of the ITA system and explain how the system operates.

⁵² See, for instance: Justine Burley, ed. *Dworkin and his Critics: With Replies by Dworkin*. (Malden, MA: Blackwell, 2004)

⁵³ It is also worth noting at this point the influence of Hedley Bull on my discussion of the place of arbitration in "international society." While Bull drew from a realist perspective and maintained state-centric approach to the study of international relations, I borrow and broadly interpret his definition of international society as: "a group of states (or, more generally, a group of independent political communities) which not merely form a system, in the sense that the behaviour of each is a necessary factor in the calculations of the others, but also have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognise their common interest in maintaining these arrangements." Hedley Bull and Adam Watson, eds. *The Expansion of International Society*. (Oxford: Oxford University Press, 1984), p. 1. Claire Cutler usefully summarizes Bull's landmark definition of international society as "[consisting] of the positive rules, practices and institutions of international society which embody the common interests and values of states." See: A. Claire Cutler, "The 'Grotian Tradition' in International Relations." *Review of International Studies*, Vol. 17, No. 1 (1991), .p. 55

Having set the background of international arbitration and investment treaty arbitration, I then proceed to analyze in the third chapter Van Harten's proposal to replace the current ITA system with a permanent international investment court. I review Van Harten's critique of the current system and then re-state his case for his reform proposal. I then offer a normative assessment of two critical aspects of Van Harten's work: first, I argue that many of his criticisms of the ITA system are unsustainable; second, I argue that his reform proposal should be rejected because firstly, his criticisms of the current system are unpersuasive, and secondly because it is incongruent with contemporary and realistic models of global governance.

In the fourth chapter, I discuss the second reform proposal that this thesis will analyze: the creation of appellate mechanisms for the current ITA system. I review the various rationales for this reform proposal and outline arguments for the creation of appellate mechanisms sparked in part by a 2004 ICSID Secretariat discussion paper. My assessment of this proposal is marked by cautious optimism: I conclude this chapter by arguing that appellate mechanisms may be a welcome addition to the ITA system given a recent backlash against investor-state dispute settlement provisions in trade and investment agreements, but only if their implementation is conducted in a decentralized fashion.

I conclude in the fifth chapter by recasting some of the themes and issues that emerged in the preceding chapters. I finally argue that while the recent proposals to reform the ITA system assessed in this thesis offer some excellent commentary on the evolution of the system, ultimately the current regime of investment arbitration is a legitimate system that upholds the rule of law for foreign investment.

Chapter 2: History of Arbitration in International Society and the ITA System

Arbitration in international society

As a prelude to a discussion of the nature of the current ITA system, it is worthwhile briefly overviewing the place of arbitration in international society. As we will see, arbitration has long been associated with dispute resolution between states and individuals in international society. The international public law order in modernity is no exception to this long history. The proceeding discussion of arbitration in international society is divided into three sections: first, we will examine the use of arbitration in antiquity; second, we will briefly review the modern employment of arbitration in public international law; and, thirdly, we will discuss the emergence of the current ITA system and how it works.

Arbitration in antiquity

As Gary Born notes, “international arbitration was a favored means for peacefully settling disputes between states and state-like entities in Antiquity.”⁵⁴ Arbitration was widely practiced by the ancient Greeks. Indeed, so widespread was the employment of arbitration in ancient Greece that ancient Grecians “assumed its existence among the

⁵⁴ Gary B. Born, *International Commercial Arbitration*. (The Netherlands: Kluwer International Law, 2009) p. 1.

gods.”⁵⁵ Greek mythological tales are, according to Jackson Ralston’s account of arbitration in antiquity, littered with stories of the Greek gods submitting their disputes over territorial possession and other concerns of the deities to arbitration.⁵⁶ For instance, Athena and Poseidon submitted their dispute over possession of Aegina to Zeus for arbitration, who decided that the two gods should mutually administer that island.⁵⁷ But arbitration in antiquity was not limited to the realm of the supernatural.

Records indicate that arbitration was used to peacefully resolve disputes between two Sumerian cities as early as 400 B.C.⁵⁸ There are also extensive records of arbitrations between various Greek city-states. Indeed, Ralston goes so far as to consider the use of arbitration in ancient Grecian times to indicate the existence of a proto-system of international law. As he argues, “where arbitrations have been shown, the existence of international law in some way or other is recognized.”⁵⁹ The most common disputes that were referred to arbitration were questions related to the proper territorial boundaries of the city-states, though Ralston notes that “differences did not always relate to frontiers.”⁶⁰ He lists several cases which involved other non-territorial disputes: “the lack of proper treatment on the part of another Greek town of a neighboring village, the citizens of which were deprived unceremoniously of their property; the disagreement between Athens and Delos on the subject of the right of administering the Sanctuary of Apollo at

⁵⁵ Jackson H. Ralston, *International Arbitration from Athens to Locarno*. (Stanford: Stanford University Press, 1929), p. 153.

⁵⁶ *Ibid.*

⁵⁷ Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*. (London: MacMillan, 1911), p. 129.

⁵⁸ *Ibid.* Ralston.

⁵⁹ *Ibid.*, p. 154.

⁶⁰ *Ibid.*, p. 158.

Delos; the difference between the town of Lebedos in Asia Minor and a neighboring village with reference to the priest of Zeus; and the question of whether Lepreum was obliged to pay rent to the Temple of Zeus at Olympia.”⁶¹

Moving forward in history, we also find evidence of arbitration in the time of Rome, despite that great empire’s popularized image of violence and conquest. While “the Romans...never dreamed of an impartial arbitration of their differences with neighboring nations”⁶² the Roman Senate was often called upon to arbitrate disputes between polities that Rome exercised suzerainty over. States in conflict would appeal to the Roman Senate to assist in the resolution of disputes, which were usually territorial in nature. The Senate would dispatch commissioners who were charged with arbitrating the dispute. Ralston provides us with a number of such arbitrations facilitated by Rome: a dispute between Sparta and Messene was settled in favour of Messene by the Senate⁶³; a territorial dispute between Ateste and Vicetia was “settled by the proconsul appointed by the Roman government to officiate as arbitrator”⁶⁴; the Senate also facilitated the adjudication of territorial disputes in Africa.⁶⁵

It is worthwhile at this point to quote Ralston at length as he notes the parallels between disputes arbitrated by the Roman Senate between polities under its suzerainty and disputes between states in the United States of America:

[The disputes arbitrated by the Roman Senate] were had not between nations which were independent, as in the theory of international law usually today, but between nations which were subordinate to the superior power of Rome. In this respect they offer a certain kinship to the conditions prevailing between the several states of the American Union and the central power of

⁶¹ Ibid.

⁶² Ibid., p. 168. Ralston notes, however, a “cited award rendered between them and the Samnites.”

⁶³ Ibid., p. 171.

⁶⁴ Ibid., p. 172.

⁶⁵ Ibid.

the United States of America. Through the Supreme Court of the United States the differences between states are determined, and through the Senate of Rome the manner in which the differences between nations subject to Rome should be settled was determined.⁶⁶

Employment of arbitration did not cease with the fading of the era of Grecian and Roman antiquity. As Born informs us, “international arbitration between state-like entities in Europe experienced a revival during the Middle Ages. Although historical records are incomplete, scholars conclude that international arbitration ‘existed on a widespread scale’ during the Middle Ages.”⁶⁷ Like many other facets of life in the Middle Ages, international arbitration was largely shaped by the immense power of the Papacy. Ralston notes that states submitted their disputes to the Papacy for arbitration in a similar vein as polities under Roman suzerainty submitted their disputes to the Senate for arbitration.⁶⁸ Thus while “all notion of equality between states, and consequently of common duties and rights, was absent from its politics [...] nevertheless, we may observe that the great powers which tended to prevent war in its international relations during the Middle Ages were the papacy and the [Holy Roman] Empire, which made themselves judges of conflicts menacing European peoples.”⁶⁹

Despite the crucial role the Papacy played in international arbitration during the Middle Ages, Ralston is quick to note that “progress during the Middle Ages in the idea of arbitration was not by any means confined to countries most markedly under churchly influence.”⁷⁰ Thus Born notes that “the states of the Swiss Confederation and the Hanseatic League, as well as German and Italian principalities, turned with particular

⁶⁶ Ibid., p. 173.

⁶⁷ Ibid Born, p. 3.

⁶⁸ Ibid. Ralston, p. 175.

⁶⁹ Ibid.

⁷⁰ Ibid., p. 176.

frequency to arbitration to settle their differences, often pursuant to agreements to resolve all future disputes by arbitration.”⁷¹

So far, this historical overview of international arbitration has been notably Western-centric. Interestingly and importantly, however, there is some record of the employment of arbitration in pre-Meiji Japan in the English-language literature:

...among the Japanese people as they were before the invasion of Western ideas – arbitration and compromise, instead of being merely subsidiary to legislation as in Ancient Greece and Rome, were the primary means of setting disputes. [...] Hence it came about that in Old Japan, at any rate, it was an ingrained principle of the social and legal system that every dispute, if possible, should be smoothed away by resort to private or public arbitration. If friendly mediation failed, the machinery of the local government was employed under the old *regime* – in fact no efforts were spared, and the great majority of disputes were disposed without litigation.⁷²

Arbitration in modernity

Born notes that by the sixteenth century, “the popularity of international arbitration as a means of resolving interstate disputes apparently declined significantly.”⁷³ And while antiquity and the Middle-Ages saw widespread use of arbitration to settle disputes between states and state-like entities, the foundations for the modern employment of arbitration in public international law were laid in the eighteenth century by the newly-independent United States and that country’s former colonial master, the United Kingdom. As Ralston elaborates, “the modern era of arbitral or judicial settlement of international disputes, by common accord among all writers upon the subject, dates from the signing on 19 November 1794 of Jay’s Treaty between Great Britain and the United States. Prior to this time arbitrations were irregular and spasmodic; from this time

⁷¹ Ibid Born. Ralston quotes at length from the early treaty that gave birth to the Swiss confederation providing for arbitration of disputes: “if any difference should arise between the confederates the wisest men among them will intervene by arbitration to appease the difficulty as it may seem to them suitable, and if any other of the parties violate their sentence, the other confederates will declare themselves against him.” Ralston, p. 76.

⁷² “Arbitration in Old Japan.” *Speaker: The Liberal Review*. Vol. 15, No. 386 (1907), p. 522.

⁷³ Ibid. Born, p. 4.

forward they assumed a certain regularity and system.”⁷⁴ This wide-ranging treaty established three separate arbitration mechanisms to deal with territorial disputes, British national-U.S. disputes, and American national-U.K. disputes.⁷⁵ This period also marked the beginning of the negotiation of Treaties of Friendship, Commerce, and Navigation between states. These treaties were designed to lay the groundwork by which countries could develop rules governing their interactions and came to be the “medium *par excellence* through which nations [sought] a general settlement to secure reciprocal respect for their normal interests abroad.”⁷⁶

The United States and the United Kingdom frequently resorted to arbitration to settle disputes in the aftermath of Jay’s Treaty. Numerous territorial disputes between the two countries were referred to arbitral panels for adjudication – the last of which, involving the Alaskan-Canadian border, was settled in 1903.⁷⁷ Pecuniary disputes between nationals of the two countries and the others’ governments were also referred to arbitration with great frequency.⁷⁸ Arbitration was also employed to settle disputes stemming from fishing disputes, the U.S. civil war⁷⁹, and other commercial (especially maritime) related disputes.⁸⁰

⁷⁴ Ibid. Ralston, p. 191.

⁷⁵ Ibid., pp. 191-192.

⁷⁶ Herman Walker Jr., “Modern Treaties of Friendship, Commerce, and Navigation.” *Minnesota Law Review*. Vol. 42 (1957), p. 805.

⁷⁷ Ibid., pp. 194-195.

⁷⁸ Ibid., pp. 195-196.

⁷⁹ Of note regarding civil war arbitrations were the *Alabama* claims, which were adjudicated pursuant to the claims-settlement process outlined in the Treaty of Washington. See: Tom Bingham, “The Alabama Claims Arbitration.” *The International and Comparative Law Quarterly*, Vol. 54, No. 1 (2005), pp. 1-25.

⁸⁰ Ibid., pp. 197-202.

While the Jay's Treaty marked "the beginning of the modern era of arbitrations,"⁸¹ international arbitrations since 1796 have of course not been limited to the settlement of disputes between the United States and the United Kingdom. Ralston notes a history of arbitration between the United States and Mexico dating back to 1839 – the primary issues of contention in the arbitral history between these two countries being "claims arising on the part of the citizens of the two countries against the government of the other."⁸² Born informs us that

"between 1800 and 1910, some 185 separate treaties among Latin American states included arbitration clauses, dealing with everything from pecuniary claims, to boundaries, to general relations. [...] Moreover, many Latin American states engaged in interstate arbitrations arising from contentious boundary disputes inherited from colonial periods, which the disputing parties submitted to a foreign sovereign or commission for resolution."⁸³

During the same time period, the United States also referred to arbitration disputes between itself and Brazil, Chile, China, Colombia, Costa Rica, Denmark, the Dominican Republic, Ecuador, France, Germany, Guatemala, Haiti, the Netherlands, Nicaragua, Norway, Panama, Paraguay, Peru, Portugal, Russia, El Salvador, Siam, Spain, and Venezuela.⁸⁴ The majority of the issues at stake in these arbitrations involved maritime disputes, property seizures or damages, and other commercially-related issues.⁸⁵

International arbitrations were also held between states which did not involve the United States as a litigating party during the modern period. Ralston lists many cases involving disputes between European states and European and Latin American states that

⁸¹ Ibid., pp. 194.

⁸² Ibid., pp. 203-207.

⁸³ Ibid. Born, p. 5.

⁸⁴ Ibid. Ralston, pp. 208-224.

⁸⁵ Ibid.

were adjudicated by arbitral panels.⁸⁶ Again, in the interest of avoiding too much of a Western-centric historical overview of arbitration in international society, I will specifically draw attention at this point to a dispute between China and Japan in 1874 that was referred to the U.S. and the U.K for adjudication:

In 1874 a claim arose on the part of Japan against China for the murder of Japanese subjects by Chinese in the Island of Formosa. The cabinets of Great Britain and the United States induced these countries, which were about to go to war, to refer the claim to arbitration. It was decided by the British Minister at Peking, who awarded 100,000 taels to be paid by China.⁸⁷

We have now canvassed the history of arbitration in international society from antiquity to modernity. It is clear based on the preceding discussion that arbitration has played a critical role in the affairs of states and individuals in international society for centuries. In the post-World War II era, the sorts of state-to-state disputes that historically were referred to *ad hoc* tribunals (as overviewed above) are now within the jurisdiction of the International Court of Justice or other United Nations judicial bodies, such as the International Tribunal for the Law of the Sea. The Permanent Court of Arbitration in the Hague, established by the Hague Peace Conference of 1899, has also assumed many of the responsibilities once undertaken by *ad hoc* tribunals established pursuant to individual agreements between disputing states.⁸⁸ A detailed jurisprudential history of the ICJ or the PCA is obviously beyond the scope of this project.⁸⁹ Suffice is to say that these

⁸⁶ *Ibid.*, pp. 227-239.

⁸⁷ *Ibid.*, p. 230.

⁸⁸ For a tidy historical overview of the ICJ and PCA, see: "History." International Court of Justice. <<http://www.icj-cij.org/court/index.php?p1=1&p2=1>>

⁸⁹ For an interesting discussion on the relationship between ICJ jurisprudence and the ITA system, see: Alain Pellet, "The Case Law of the ICJ in Investment Arbitration." *ICSID Review*. Vol. 28, No. 2 (2013), pp. 223-240.

institutions now enjoy paramount importance in public international law.⁹⁰ The evolution of international society, however, has been interwoven with the development of international arbitration.

The emergence of the contemporary investment treaty arbitration system

It is perhaps somewhat cliché to claim that “for as long as there has been foreign investment, there have been foreign investment disputes.”⁹¹ Nevertheless, this statement is an accurate portrayal of the history of international investment disputes. Since the merchants of antiquity set course for foreign lands in which to conduct trade and business, disputes have arisen between the foreign trader and the host government. As M. Sornarajah notes, “the history of foreign investment in Europe can be traced to early times. There is no doubt that such investment existed in Asia, the Middle East, Africa and other parts of the world.”⁹² The question that dominated discussion of the early days of international investment law was the appropriate legal standing of the foreign investor: should the investor have equal standing with nationals of the host state, or should they be held to a differentiated regime of rules and regulations?⁹³

In practice, foreign investors had two options in seeking recourse to settle disputes that arose surrounding their investments.⁹⁴ The first option was for a foreign

⁹⁰ On the specific role of the ICJ in the mechanics of the United Nations, see: Mohamed Sameh M. Amr. *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*. (The Hague: Kluwer Law International, 2003)

⁹¹ Daniel S. Meyers, “In Defense of the International Treaty Arbitration System.” *Houston Journal of International Law*. Vol. 31, No.1 (2008), p. 51.

⁹² M. Sornarajah, *The International Law on Foreign Investment*. (Cambridge: Cambridge University Press, 2004), p. 18.

⁹³ *Ibid.*, pp. 18-19.

⁹⁴ The limited options foreign investors were faced with was due in part to the doctrine of legal personality in international law, which traditionally had not been inclined to extend a legal personality

investor to appeal to the domestic judicial system of the host state – an option often held to be unappealing since domestic courts “were often unsympathetic to the foreign investors.”⁹⁵ The second option available to foreign investors was to seek a remedy through their home state through the principle of diplomatic protection. As Andrew Newcombe notes, “the theory underlying the principle of diplomatic protection is that an injury to a state’s national is an injury to the state itself, for which it may claim reparation from any responsible state.”⁹⁶ In other words, a foreign investor could request that her home state initiate a claim against the host state for compensation on her behalf. As Newcombe goes on, “in the vernacular of international claims, the home state ‘espouses’ the claim of its national.”⁹⁷

Daniel S. Moyers elaborates on the limitations of the recourse to the principle of diplomatic protection. He notes that “whether an investor’s state even acceded to a request for diplomatic protection depended on a number of factors outside of the investor’s control. Most importantly, such requests required that the government of the investor be willing to expend the political capital necessary to challenge the actions of the host state.”⁹⁸ The critical issue with limiting recourse to diplomatic protection was the lack of agency it extended to the foreign investor. In the eras before European imperial conquest and before the emergence of the current ITA system, the rights of foreign investors were left to the mercy of the domestic judicial systems of the states that hosted

to non-state actors. See: Hans Aufrecht, “Personality in International Law.” *The American Political Science Review*, Vol. 37, No. 2 (1943), pp. 217-243.

⁹⁵ R. Doak Bishop, James Crawford, William Michael Reisman. *Foreign Investment Disputes: Cases, Materials, and Commentary*. (The Hague: Kluwer Law International, 2005), p. 3.

⁹⁶ Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties*. (The Hague: Kluwer Law International, 2009), p. 5.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.* Moyers, p. 52.

their investments or to the whims of political officials in the administrations of their home states. Clearly, neither ameliorative option was particularly desirable or confidence-instilling.⁹⁹

The discussion surrounding the legal standing of foreign investors and the proper regime to subject their disputes to was shifted in the eighteenth and nineteenth centuries with the rise of the European countries as colonial powers. During this era, “investment was largely made in the context of colonial expansion. Such investment did not need protection as the colonial legal systems were integrated with those of the imperial powers and the imperial system gave sufficient protection for the investments which went into the colonies.”¹⁰⁰ Thus foreign investors simply sought recourse to their home legal systems, since these systems’ jurisdiction had expanded into the colonies in which investments were being made. The application of extraterritorial jurisdiction by the courts of imperial powers was not limited to countries that were colonized. As Newcombe notes, “extraterritorial jurisdiction, which allowed foreign powers to apply their laws to their nationals in foreign states, was exercised under treaties. In some cases, these regimes were imposed by force through treaties of capitulation. Extraterritorial jurisdiction in one form or another existed in China, Japan, Thailand, Iran, Egypt, Morocco, Turkey and other parts of the Ottoman Empire.”¹⁰¹ Foreign investors in the colonial period were thus generally able to depend on the imperial stretch of their home

⁹⁹ Newcombe lays out several additional problems with the diplomatic protection principle: see Newcombe and Paradell, p. 6.

¹⁰⁰ Ibid. Sornarajah, p. 19.

¹⁰¹ Ibid. Newcombe and Paradell, p. 11.

judicial system whether or not the country they conducted business in retained sovereignty or not.¹⁰²

The decline of colonialism and the rapid decolonization of large swaths of the world reignited the discussion on the rights of foreign investors. As Sornarajah explains, “it was only after the dissolution of empires that the need for a system of protection of foreign investment came to be felt by the erstwhile imperial powers which now became the exporters of capital to the former colonies and elsewhere.”¹⁰³ Much of the sudden anxiety felt by foreign investors was triggered by the tendency of the newly established anti-imperialist governments of the formerly-colonized world to adopt socialistic economic policies that involved widespread nationalizations of foreign-owned enterprises.¹⁰⁴

Amidst the turmoil that engulfed the newly decolonized world was the development of the doctrine in international law of the minimum standard of treatment. Newcombe informs us that “by the early 1900s, there was a general agreement amongst international lawyers in Europe and the US that there existed a minimum standard of justice in the treatment of foreigners.”¹⁰⁵ While this doctrine mostly arose from incidents in which foreigners had been victim of violence, eventually “there was a consensus amongst capital exporting states that expropriation of property required compensation.”¹⁰⁶ It is important to note the political economy background in which this

¹⁰² It is worthwhile to point out that the literature on international investment law also includes extensive commentary on the definition of “investment.” A detailed review of this discussion is beyond the scope of this thesis, but see: M. Sornarajah, pp. 1-9.

¹⁰³ Ibid. Sornarajah, p. 2.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid. Newcombe and Paradell, p. 11.

¹⁰⁶ Ibid., p. 12.

consensus emerged.¹⁰⁷ The socialistic policies pursued by newly sovereign governments of former colonial dependencies often-involved dramatic expropriations of foreign-owned enterprises.¹⁰⁸ Particularly famed among these is the Abadan Crisis that stemmed from the Iranian government of Mohammad Mosaddegh's decision to nationalize the country's foreign-owned oil assets. This crisis resulted in a joint American-British operation to overthrow the Mosaddegh government.¹⁰⁹ The Egyptian government of Abdel Nasser nationalization of the Suez Canal in 1956, which led to a military confrontation between Western powers and Egypt, and expropriations of foreign-owned assets following major social revolutions such as the Cuban Revolution in 1959 also helped to form the political economy backdrop in which international lawyers began to develop a consensus on the need for a minimum standard of justice in the treatment of international investors.¹¹⁰

As the decolonized world embarked upon alternative economic programs that included nationalization of foreign-owned property, an important question thus resurfaced in international society: what recourse should foreign investors have to settle their disputes with the governments of the states that host their investments? Since many

¹⁰⁷ Noteworthy, as well, was the role of Treaties on Friendship, Commerce, and Navigation that were negotiated before the emergence of the ITA system. Many of the concerns over expropriation helped to give birth to these treaties but since then "many of the rights historically vouchsafed by FCN treaties have migrated to other legal texts" such as modern BITs. See: John F. Coyle, "The FCN Treaty in the Modern Era." *The Columbia Journal of Transnational Law*. Vol. 51 (2013), p. 305.

¹⁰⁸ J. Frederick Truitt, "Expropriation of Foreign Investment: Summary of the Post World War II Experience of American and British Investors in the Less Developed Countries." *Journal of International Business Studies*, Vol. 1, No. 2 (1979), pp. 21-34.

¹⁰⁹ Mark J. Gasiorowski and Malcolm Byrne, eds. *Mohammad Mosaddeq and the 1953 Coup in Iran*. (New York: Syracuse University Press, 2004)

¹¹⁰ See Martin Domke, "American Protection Against Foreign Expropriation in the Light of the Suez Canal Crisis." *University of Pennsylvania Law Review*, Vol. 105, No. 8 (1957), pp. 1033-1043. Domke notes (at pp. 1033) – revealingly as to the sentiment of international lawyers at the time – that the effect of the crisis will be the enshrining "of a basic tenet of international law; namely, that expropriation of foreign property will be recognized only when accompanied by 'adequae, effective and prompt compensation.'"

disputes were ending with obviously undesirable political violence, the question was much more than a theoretical exercise.

For a time in the immediate post-World War II era, the answer appeared to lay in a multilateral agreement on international investment. As Newcombe explains, “the post-WWII political and economic climate stimulated a series of initiatives with the goal of establishing a multilateral legal framework for investment.”¹¹¹ These initiatives, however, all failed to produce a comprehensive single multilateral agreement to create a unified structure for international investment. The efforts to forge a multilateral investment agreement in the aftermath of the Second World War can be traced back to the failed negotiations to create an International Trade Organization and the drafted but never adopted Havana Charter.¹¹² Several non-state international actors also attempted to develop a multilateral agreement to create legal architecture for international investment, including the International Chamber of Commerce and the International Law Association – initiatives from both of these organizations were ultimately not successful.¹¹³ Another notable attempt at forging a multilateral investment agreement was the Abs-Shawcross Draft Convention which was the first such draft agreement that contained investor-state dispute resolution arbitration mechanisms.¹¹⁴

While the post-WWII era is marked by the failure of international society to agree on a single multilateral agreement that would have created a single legal framework for international investment, two important multilateral agreements did emerge from this time period that have come to form the foundations of the current ITA system. The first

¹¹¹ Ibid., p. 19.

¹¹² Ibid., pp. 19-20.

¹¹³ Ibid., pp. 20-21.

¹¹⁴ Ibid., pp. 21-22.

of these is the landmark 1958 New York Convention “which provides for the recognition and enforcement of foreign arbitral awards and limits the grounds upon which local courts may refuse to recognize and enforce awards.”¹¹⁵ The New York Convention was important because it represented international society’s recognition of the growing importance of international arbitration as a means of settling transnational disputes between commercial entities. As Born remarks,

the treaty is by far the most significant contemporary legislative instrument relating to international commercial arbitration. It provides what amounts to a universal constitutional charter for the international arbitral process, whose sweeping terms have enabled both national courts and arbitral tribunals to develop durable, effective means for enforcing international arbitration agreements and arbitral awards.¹¹⁶

The second agreement that emerged from this era of critical importance to the development of the current ITA system was the creation of the International Centre for Settlement of Investment Disputes (ICSID) by the World Bank in 1965. Established under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, the ICSID created a facility with “the stated purpose of providing facilities for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.”¹¹⁷ Critically, the ICSID does not establish a permanent court or tribunal which enjoys jurisdiction over all international investment disputes. It is a permanent facility but does not create permanent judicial bodies. As Newcombe elaborates,

[the ICSID] provides a legal and organizational framework for the arbitration of disputes between Contracting States and investors who qualify as nationals of other Contracting states. The ICSID Convention makes the agreement to arbitrate an investment dispute before the ICSID

¹¹⁵ Ibid., p. 25.

¹¹⁶ Ibid. Born, pp. 31-32.

¹¹⁷ P. F. Sutherland, “The World Bank Convention on the Settlement of Investment Disputes.” *International and Comparative Law Quarterly*. Vol. 28, No. 3 (1979), p. 378.

a treaty obligation. Thus, an arbitration agreement providing for ICSID proceedings engages the state's international responsibility. The ICSID allows investment disputes to be arbitrated without interference from domestic political or judicial organs in the same manner as a dispute between states can be made subject to international adjudication by an international court or tribunal.¹¹⁸

The ICSID thus sits as the central facility and framework to an international investment dispute resolution regime that is, as we shall see, otherwise remarkably decentralized.¹¹⁹

The failure of various mid-century efforts¹²⁰ to forge a multilateral investment agreement did not, however, dampen the need for the creation of an international legal regime that would protect the rights of foreign investors and instill them with confidence to invest abroad. The movement to establish an international investment regime thus shifted from a movement to forge a single multilateral agreement to a process by which “capital exporting states began concluding BITs [bilateral investment treaties] dedicated to foreign investment promotion and protection.”¹²¹ The first BIT to contain reference to investor-state dispute resolution by international arbitration was the Indonesia-Netherlands BIT in 1968.¹²² While the years following the signing of this BIT did not see a flurry of bilateral arrangements for the promotion and protection of international investment, “the end of the 1980s and 1990s witnessed an exponential growth in the conclusion of international investment and trade treaties”¹²³ as well as the signing of the

¹¹⁸ Ibid. Newcombe and Paradell, p. 28.

¹¹⁹ For more on the ICSID's history, see: Antonio R. Parra, *The History of ICSID*. (Oxford: Oxford University Press, 2012)

¹²⁰ See Newcombe and Paradell, pp. 30-35 for other failed efforts to create a single multilateral agreement on international investment. For a review of more recent proposals by the OECD and the WTO for a multilateral agreement, see Soranajah pp. 26-30. The specific reasons for the failure of these various initiatives are beyond the scope of thesis (although in chapter 3 I argue that centralized governance structures are generally out-of-step with contemporary thinking on global governance), but see: Eric Neumayer, “Multilateral agreement on investment: lessons for the WTO from the failed OECD-negotiations.” *Wirtschaftspolitische Blätter*, Vol. 46, No. 6 (1999), pp. 618-628.

¹²¹ Ibid. Newcombe and Paradell, p. 41.

¹²² Ibid., p. 44.

¹²³ Ibid., p. 47.

landmark regional trade and investment agreement with provision for investor-state arbitration, the North American Free Trade Agreement (NAFTA).

This process set the stage for the architecture that is the current ITA system. The system can best be described as a decentralized, bottom-up network of bilateral and regional treaties that employ international facilities such as the ICSID to provide the framework necessary to establish *ad hoc* arbitral tribunals on dispute-by-dispute and BIT-by-BIT basis to settle disputes between foreign investors and the states that host their investments.¹²⁴ There are as of writing 2,781 BITs and 337 other international investment agreements currently existing.¹²⁵ The ITA system has facilitated a massive increase in investor-state arbitrations in recent years¹²⁶ and, indeed, only continues to grow.¹²⁷

The emergence of the current ITA system is remarkable for several reasons that deserve special attention here. The first is that its emergence calls into question the state-centric approach international lawyers and international relations scholars have tended to embrace. As this chapter's historical overview has made clear, most international arbitrations tended to be state-state litigations. States would employ arbitration in order to settle disputes between themselves or, less frequently, states would pursue arbitration

¹²⁴ Claire Cutler provides a similar description of the ITA system, which she writes "is constituted by a complex and dense web of institutions, rules, and practices that govern the settlement of transnational commercial disputes." See: A. Claire Cutler, "Public and Private Authority in Transnational Dispute Resolution: International Trade and Investment Arbitration." *The Global Community: Yearbook of International Law & Jurisprudence*. Vol. 1, No. 1 (2012), p. 3. Cutler's article also provides a neat review of the two other international instruments other than the ICSID which are employed to facilitate the arbitration of investor-state disputes in the current ITA system: *ad hoc* tribunals established under UNICTRAL Rules and the ICC International Court of Arbitration.

¹²⁵ Statistics available through the United Nations Conference on Trade and Development. Available at <<http://investmentpolicyhub.unctad.org/IIA>> Accessed July 12, 2014.

¹²⁶ *Ibid.* Newcombe and Paradell, p. 59.

¹²⁷ See, for instance: Andrew de Lotbinière McDougall, Jonathan C. Hamilton, Elizabeth Montpetit, "ICSID Growth Continues as Canada Ratifies and Cases Diversify." *White & Case LLP*. November 6, 2013. <<http://www.whitecase.com/alerts-11062013-1/#.UxZo6HfO860>>

against other states on behalf of their citizens who alleged a wrongdoing on the part of a foreign government. But the ITA system allows for non-state actors to sue states *directly*, without the intervention of their government. Thus the ITA system is part of a wider trend within international law of non-state actors being empowered with legally enforceable rights and responsibilities – a trend which challenges the traditional doctrine of international legal personality.¹²⁸

Another noteworthy fact about the emergence of the ITA system is its status as a system of public law adjudication that employs a model of dispute resolution usually associated with private authority.¹²⁹ Stephan Schill observes that, “this field of law combines public international law as the applicable law to investor-state disputes with arbitration which...is most widespread as a mechanism to settle disputes between private parties arising in the context of international commercial transactions.”¹³⁰ On the surface, ITA looks very similar to international commercial arbitration, as the specific mechanism to settle disputes is the same in both systems: arbitration. However, looks can be

¹²⁸ Other examples of this trend include the ability of EU citizens plead before the European Court of Human Rights to enforce their social and political rights, the growth of the International Criminal Court, as well as the emergence of various regional supranational human rights courts, such as the African Court on Human and Peoples’ Rights and the Inter-American Court of Human Rights. There is a wealth of literature on this topic. See, for instance: Andrew Clapham, “The Role of the Individual in International Law.” *European Journal of International Law*, Vol. 21, No. 1 (2010), pp. 25-30; Mikael Rask Madsen, “From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics.” *Law & Social Inquiry*, Vol. 32, No. 1 (2007), pp. 137-159; Frans Viljoen, “A Human Rights Court for Africa, and Africans.” *Brooklyn Journal of International Law*, Vol. 30, No. 1 (2004), pp. 1-66.

¹²⁹ The characterization of ITA as a system of public law adjudication is discussed at length in chapter 3 of this thesis. Note also that Cutler has offered a wide-ranging critical perspective on the employment of private authority in the construction of an international economic legal order – see, for instance: A. Claire Cutler, “The Legitimacy of Private Transnational Governance: Experts and the Transnational Market for Force.” *Socio-Economic Review*, Vol. 8 No. 1 (2010), pp. 157-185.

¹³⁰ Stephan W. Schill, “International Investment Law and Comparative Public Law – An Introduction.” in *International Investment Law and Comparative Public Law*, Stephan W. Schill, ed. (Oxford: Oxford University Press, 2010), p. 10.

deceiving. Schill notes several core differences between ITA and international commercial arbitration:

...unlike commercial disputes, investment treaty arbitrations regularly involve questions about the scope and limits of the host state's regulatory powers...investment treaty arbitrations [also] involve obligations of a different nature than those dealt with in commercial arbitration. The rights invoked by a foreign investor do not originate from a freely negotiated contract, but from obligations the host state has assumed under an international treaty...[furthermore], while commercial relations between private actors are characterized by equality of the parties, foreign investors and host states stand in a hierarchical relationship of super- and subordination...finally [...] arbitral jurisdiction in investment treaty arbitration is not based on contract, but involves a unilateral offer by the host state, given in any investment treaty in generalized and prospective form, that any investor covered by the treaty's provisions can accept by initiating arbitration.¹³¹

We have now canvassed the history of international arbitration and the historical development of the current ITA system. In the following chapters, I will examine critiques of the international investment regime and assess two major proposals to institutionally reform the system.

¹³¹ Ibid., pp. 14-15.

Chapter 3:

The Proposal to Create an International Court of Investment

Overview

This chapter is somewhat ambitious and attempts to do a number of things. I shall proceed accordingly: first, we will review Van Harten's reform proposal for the ITA system – namely, to overhaul the system entirely by creating an international investment court. I then offer an assessment of Van Harten's argument and argue that his case is not persuasive enough to merit the radical proposal he endorses. Finally – and perhaps most ambitiously – I draw from the work of Anne-Marie Slaughter in describing the nature of contemporary global governance and the work of Stephan Schill who neatly places the ITA system within the framework of global governance. Having established that the current system is an important global governance regime, I argue that Van Harten's proposal should be rejected because (i) his case is overstated and (ii) his proposal, even if the need for strong reform *were* persuasively made, is incongruent with contemporary disaggregated global governance.

Institutional overhaul: The case for an international investment court

Claire Cutler notes, as observed earlier, that the international investment system “is constituted by a complex and dense web of institutions, rules, and practices that govern the settlement of transnational commercial disputes.”¹³² Cutler also outlines that the model of dispute resolution employed by the investment treaty regime has traditionally

¹³² A. Claire Cutler, “Public and Private Authority in Transnational Dispute Resolution: International Trade and Investment Arbitration.” *The Global Community: Yearbook of International Law & Jurisprudence*. No. 1, Vol. 1 (2012), p. 3.

been associated with private dispute resolution – that is to say that the evolution and growth of international investment law means that critical issues of public policy are increasingly being determined by private authority models.¹³³

It is this employment of private authority to adjudicate matters of public policy that Van Harten finds problematic and inspires his proposal for the creation of a permanent international court of investment.¹³⁴ Underlying Van Harten’s proposal is his assertion that investment treaty arbitration is best understood as a form of public law adjudication transplanted into the international arena. He notes that, “by consenting generally to investment treaty arbitration, the state submits itself to a particular mechanism for controlling its own regulatory conduct.”¹³⁵ This mechanism is the ability for foreign investors to challenge legislative, administrative, or judicial actions of a host state before an ad hoc international arbitral tribunal established under the authority of an investment agreement to which both the host state and the state of the foreign investor are signatory. Herein, Van Harten argues, lays the rationale for viewing investment treaty arbitration as a form of public law adjudication:

When a judge invokes his or her public law competence to resolve a dispute between the state and a person or organization that is subject to regulation by the state, he or she determines matters such as the legality of governmental activity, the degree to which individuals should be protected from regulation, and the appropriate role of the state. *The role of arbitrators under investment treaties is essentially the same.*¹³⁶

¹³³ Ibid., pp. 4-6

¹³⁴ Van Harten has also written on the employment of private authority models in the governance of global capitalism. See: Gus Van Harten, “Private Authority and Transnational Governance: The Contours of the International System of Investor Protection.” in *Review of International Political Economy*, Vol. 12, No. 4 (2005), pp. 600-623.

¹³⁵ Gus Van Harten, *Investment Treaty Arbitration and Public Law*. (Oxford: Oxford University Press, 2007), p. 65.

¹³⁶ Ibid., p. 71. Emphasis added.

The contemporary international system of investor-state dispute resolution has delegated the authority to settle substantive matters of public law to arbitrators operating within models of private authority – thus some key questions of public policy, once the exclusive domain of judges¹³⁷, are being privatized. This leads Van Harten to conclude that, “investment treaty arbitration most resembles the domestic adjudication of individual claims against the state under administrative or constitutional law.”¹³⁸

Van Harten also argues that other interpretations of the nature of investment treaty arbitration are unpersuasive. One such interpretation is to view investment treaty arbitration as a modified form of international commercial arbitration. This interpretation seems intuitively accurate considering that investment treaty arbitration and international commercial arbitration use the same private adjudicative model to settle disputes – indeed, lawyers and arbitrators who populate the international arbitration community often advise parties or preside over tribunals in both sorts of disputes. Van Harten notes that, “this approach treats investor and state essentially as equal disputing parties in a reciprocally consensual adjudication.”¹³⁹ The investor and the state in investment treaty arbitration, on this account, should be seen as mirroring the same roles as two disputing private entities.

This interpretation is, according to Van Harten, problematic:

The authority for commercial arbitration flows from the consents of the disputing parties to resolve their dispute through arbitration. The authority for investment arbitration, in contrast, comes from the general consents of states given as part of an international agreement. This general consent, which is both prospective and open-ended, is a sovereign act of the state as legal representative of its territory and population; it is not the act of a mere disputing party, acting in a private capacity.¹⁴⁰

¹³⁷ Andrew Le Sueur et al. *Public Law: Text, Cases, and Materials*. (Oxford: Oxford University Press, 2010), pp. 173-212.

¹³⁸ *Ibid.* Van Harten, p. 71.

¹³⁹ *Ibid.*, p. 124.

¹⁴⁰ *Ibid.*, p. 128.

While investment treaty arbitration may resemble international commercial arbitration *in form*, it does not resemble it *in substance*.¹⁴¹

It may at this point be tempting to interpret investment treaty arbitration, then, through the lens of public international law. While Van Harten concedes that this approach may be superior to viewing investment treaty arbitration as a modified form of international commercial arbitration, he still argues that this interpretive approach – often employed by arbitrators in their reasoning – is not entirely accurate. “The promise of international arbitration as an institution lies in the ideal of neutrality between states, not between investors and states. By understanding investment treaty arbitration as a bargain between states, subject to international law, one advances its neutrality as an international institution.”¹⁴² Investment treaty arbitration therefore sits as a form of public international law because the authority upon which it proceeds is based in a bargain between two sovereign states codified in a treaty. Since the basis of investment treaty arbitration is a codified agreement between two states and arbitrators should interpret the relevant investment treaty based on the intentions of the states¹⁴³, then viewing the process as a form of public international law seems appropriate, since it is the agreement of two *states*

¹⁴¹ Ibid., p. 130.

¹⁴² Ibid., p. 131.

¹⁴³ Van Harten notes that this interpretive approach was explicitly adopted in *Loewen v United States*. He quotes this case at length in order to flesh out the public international law analogy:

“NAFTA claims have a quite different character [from actions brought under private law], stemming from a corner of public international law in which, by treaty, the power of States under that law to take international measures for the correction of wrongs done to its nationals has been replaced by an ad hoc definition of certain kinds of wrong, coupled with specialist means of compensation.” Ibid., p. 134 quoting *Loewen Group, Inc and Raymon L Loewen v United States of America* (Merits) ICSID Case No. ARB(AF)/98/3 at 233.

that underpin the process.¹⁴⁴ But, according to Van Harten, this approach does not fully appreciate the individualization of claims brought under investment treaties. Individual foreign investors act as claimants in investment treaty arbitrations, not states whose role is limited to that of the respondent. As Van Harten argues, “the individualization of claims, especially in as far-reaching a form as under investment treaties, transforms international adjudication by expanding the degree to which it engages the regulatory sphere, thus superimposing the analytical framework of public law.”¹⁴⁵ In other words, what differentiates investment treaty arbitration from the public international law framework is that claims are individualized – brought about by individual foreign investors, not states – and that the questions under the purview of the arbitral tribunals relate to domestic regulatory regimes. Issues of public international law involve questions of state-to-state relations and arrangements, whereas issues of investment treaty arbitration involve substantive questions of domestic public policy (such as regulatory and distributive policies).

We return, then, to Van Harten’s assertion that investment treaty arbitration is best understood as a form of public law adjudication conducted at the international level using a mechanism traditionally employed to settle private disputes. He argues that use of a private model of dispute resolution sullies investment treaty arbitration because this mechanism violates four fundamental principles of public law adjudication: accountability, openness, coherence, and independence. I will now explore Van Harten’s arguments to this effect in turn.

¹⁴⁴ James Crawford, *Brownlie’s Principles of Public International Law*. (Oxford: Oxford University Press, 2008)

¹⁴⁵ *Ibid.* Van Harten, p. 135.

Van Harten argues that current system of investor-state dispute resolution fails to live up to the principle of accountability. He notes that, under the various institutional arrangements that underpin the system, decisions rendered by arbitral tribunals are generally subject to very limited judicial review by courts. While Van Harten does note that there is some ability for parties to request review of decisions by the courts of the jurisdiction in which the arbitration was held, ultimately the current standard is for the courts “to show a high level of deference to international arbitrators.”¹⁴⁶ Since the arbitral tribunal decisions are not generally subject to judicial review, the system does not adequately incorporate the principle of accountability otherwise expected of public law adjudicative bodies. This restriction of judicial supervision “operates to insulate the authority of arbitrators to interpret public law.”¹⁴⁷

The second principle violated is that of openness. Van Harten defines openness in terms of the ability of the public to access information related to investment treaty arbitration as well as the ability for *amicus curiae* to file briefs before arbitral tribunals.¹⁴⁸ Regarding public access, he argues that this principle – otherwise a norm in public law adjudication – is “subordinated to the rules of confidentiality”¹⁴⁹ in the current system of investor-state dispute resolution. With regards to increased public participation in arbitral proceedings, Van Harten notes that while progress had been made – especially under NAFTA – “without intervention by the states parties to BITs to require the release of documents, more diverse representation of the public is a non-starter.”¹⁵⁰ While some

¹⁴⁶ Ibid., p. 155.

¹⁴⁷ Ibid., p. 158.

¹⁴⁸ Ibid., p. 159.

¹⁴⁹ Ibid., p. 161.

¹⁵⁰ Ibid., p. 163.

openness has emerged from the patchwork, the system falls short of living up to the principle.

The third principle Van Harten thinks the current system does not uphold is coherence, defined as the “capability of an adjudicative system to resolve inconsistencies that arise from different decisions.”¹⁵¹ The reason why the current system fails to ensure jurisprudential coherence is its disaggregated nature and lack of a unifying appellate body. While he concedes that the current system does contain some elements that allow for limited development of a coherent jurisprudence, these elements do not do “as much as a hierarchical system that gives a single judicial body the power to correct legal errors by lower courts”¹⁵² would.

The final principal at issue – and on Van Harten’s account the most problematic – is the failure of the current system to ensure independence. The crux of his critique is that since arbitrators do not enjoy the security of tenure that judges do, they are made dependent on the perpetuation of the system and the proliferation of claims brought about under investment treaties. It is worth again quoting Van Harten at length here:

Do arbitrators satisfy this standard of independence where, like judges, they are given comprehensive jurisdiction to exercise vital functions of public law [free from external pressures that may influence their sound judgement]? Unfortunately, they do not. Arbitrators are appointed under investment treaties on a case-by-case basis, either by one of the disputing parties or by an external authority... This method is acceptable in [a] context where the parties have freely decided to resolve disputes between them in a way that is not genuinely independent, in the judicial sense, agreeing instead that each will have a say in appointing the arbitrator(s) and that any disagreements between them will be resolved by a designated authority. In public law adjudication, on the other hand, where only investors bring the claims that trigger the appointments, this method of appointment seriously undermines judicial independence by foreclosing security of tenure. As a result, *arbitrators are made dependent on two powerful actors in the system: executive officials and prospective claimants.*¹⁵³

¹⁵¹ Ibid., p. 164.

¹⁵² Ibid., p. 165.

¹⁵³ Ibid., p. 169. Emphasis added.

The lack of independence stems from the fact that arbitrators, if they seek to continue being arbitrators, are interested in maintaining an ample supply of cases to which they may be appointed. Furthermore, since the current system is facilitated by certain international institutions,¹⁵⁴ it is also in the interest of arbitrators to maintain positive relationships with these institutions. The point Van Harten is ultimately trying to make here is that the current system of investor-state dispute resolution does not ensure adjudicative independence because it is in the professional interests of arbitrators to develop reputations congruent with the interests of multinational corporations and the institutions that facilitate international arbitration.

More recently, Van Harten has attempted to sharpen his case for an international investment court by marshalling empirical evidence to support his claims about alleged lack of independence in the current ITA system. In a recent study, Van Harten analyzed a large set of arbitral awards in order to determine whether or not there was any evidence of bias in the system. He concludes that the study “found evidence of systemic bias”¹⁵⁵ in that – while no empirical study can be *entirely* conclusive of any systemic trends in investment arbitration – in the ITA system “overall, arbitrators tended to favour claimants in general and claimants from major Western capital-exporting states in particular. These tendencies, especially in combination, give tentative cause for concern and provide a

¹⁵⁴ Namely the World Bank’s International Center for the Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL), the New York Convention, and the Arbitration Institute of the Stockholm Chamber of Commerce.

¹⁵⁵ Gus Van Harten, “Arbitrator behaviour in asymmetrical adjudication: an empirical study of investment treaty arbitration.” *Osgoode Law Journal*, Vol. 50, No. 1 (2012), p. 216.

basis for further study and reflection on the system's design.”¹⁵⁶ I shall comment on Van Harten’s empirical observations further in the next part of this chapter.¹⁵⁷

Van Harten presents a sophisticated argument that the current system is flawed. His argument can be summarized as starting from the contention that investment treaty arbitration is a form of public law adjudication. It is therefore a mechanism that is used to settle substantive issues of domestic public law. However, it is distinctive from other public law adjudication in that it is transplanted to the international level and employs a private model of dispute resolution. This results in the system failing to ensure four fundamental principles of public law adjudication: accountability, openness, coherence, and – critically – independence. The problems of the current system are thus structural and inherent in the system itself: they can “only be remedied by moving away from private arbitration and back to the model of public courts.”¹⁵⁸

Just reform of investment treaty arbitration, then, demands that investor-state arbitration be done away with. The problems and controversies that arise in international investment law stem from the employment of private models of dispute resolution. The answer is thus the creation of a permanent international investment court staffed by judges who are appointed to tenure on either a life or long-term basis. As Van Harten argues, “the strategy is to encourage states...to support a multilateral code that would establish an international court with comprehensive jurisdiction over the adjudication of

¹⁵⁶ Ibid.

¹⁵⁷ Van Harten’s empirical case for radical reform of the ITA system is further elaborated in his book *Sovereign Choices and Sovereign Constraint: Judicial Restraint in Investment Treaty Arbitration* (Oxford: Oxford University Press, 2014)

¹⁵⁸ Ibid., p. 175.

investor claims.”¹⁵⁹ He goes on to discuss hypothetical possibilities for the make-up of the court’s bench, judicial appointment process, appeals procedure, and potential for this proposal to come into fruition.¹⁶⁰ Our interest in this chapter, however, is less in the technical structure of the proposed international investment court, but rather the feasibility and desirability of the proposal more generally. It is to this question we now turn.

A cure without a disease? A review of Van Harten’s four criteria of public law adjudication

First, I accept the assertion that investment treaty arbitration is best interpreted as a form of public law adjudication transplanted to the international level. The argument set out in *Investment Treaty Arbitration and Public Law* to this effect is persuasive. There is little doubt that arbitral tribunals established pursuant to investment treaties are adjudicating important public law issues – i.e., the proper regulatory relationship between the state and the individual.¹⁶¹ Schill has made similar arguments as to the proper legal categorization of ITA.¹⁶² No argument opposed to Van Harten’s assertion that our subject matter is a species of public law will thus be presented here.

Given this premise, we will analyze Van Harten’s critiques from the four criteria he suggests that public law adjudicative systems must adhere to: accountability,

¹⁵⁹ Ibid., p. 180.

¹⁶⁰ Ibid., pp. 181-185.

¹⁶¹ A recent example of this is illustrated by the decision in *Achmea v Slovakia*, in which the investor sought to challenge the legality under the Netherlands-Slovakia BIT of the Slovakian government’s move toward a single-payer universal healthcare system. See: *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (Available at <http://www.italaw.com/cases/417>)

¹⁶² See: Ibid. Schill.

openness, transparency, and – most importantly – independence.¹⁶³ Let us now analyze each of these criteria in turn.

Accountability

Van Harten argues that the current ITA system lacks adequate accountability measures that a system of public law adjudication ought to have. There are several problems, however, with this assertion.

First, the system in its current form does incorporate some basic mechanisms to ensure accountability that – while insufficient for Van Harten – do offer limited safeguards against flagrant abuse. While the ICSID and New York Conventions notably limit the scope of review for arbitral awards, article 52 and article V of these conventions respectively do allow for review where there is evidence of arbitrator bias. Thus as Meyers argues, “while most good faith errors in law may not be reviewed, the system guards against errors of law that are associated with arbitrator bias or corruption.”¹⁶⁴

Van Harten’s critique, however, expects much more of a system of public law adjudication than protections against obvious abuse and corruption. But it is unclear why a more stringent level of accountability for the ITA system could not be achieved through more modest reform as opposed to the kind of wholesale-approach that Van Harten advances. Implementing appellate mechanisms that could review the decisions of arbitral tribunals stands as an obvious measure that could be taken that would inject a higher level of accountability into the system. Assessing the appellate review option is the topic of the next chapter and I will return to this reform proposal in due course.

¹⁶³ This is also the method of analysis employed by Meyers (*Ibid.* 2008), whose useful article was of considerable influence to my assessment of Van Harten’s arguments.

¹⁶⁴ *Ibid.* Meyers, p. 72.

The final problem with the critique from the accountability perspective is that it fails to appreciate the critical role that states play in interpreting dispute resolution provisions of investment treaties. The “dual role” of states in investment treaties – as both respondents in individual claims but also as treaty parties – is the subject of an illuminating article written by Anthea Roberts.¹⁶⁵ Contrary to what Van Harten seems to suggest, citizens and their democratic governments that have signed investment treaties are not helpless to the sweeping powers of secretly-constituted tribunals that interpret the treaties in order to dictate on public policy matters. The missing ingredient in Van Harten’s analysis of the accountability of arbitral tribunals is that states are not *only* respondents in litigation, but also parties to the treaties themselves. Thus, as Roberts explains, “investment tribunals and treaty parties share interpretive power, and the parties can influence the tribunals in a variety of ways, including through the process of interpretive dialogue.”¹⁶⁶ Democratic governments are able to hold tribunals to account in part because they are able to participate in the process of treaty interpretation and, accordingly, shape the contours of arbitral decisions that tribunals constituted pursuant to that treaty render. This, in fact, has happened, as when the NAFTA parties issued a joint interpretive statement affirming the right of the public to submit *amicus curiae* briefs to NAFTA arbitrations.¹⁶⁷

Openness

This line of critique is perhaps the most problematic and least persuasive of the four-criteria of public law adjudication that Van Harten measures the current ITA system

¹⁶⁵ Anthea Roberts, “Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States.” *The American Journal of International Law*, Vol. 104, No. 179 (2010), pp. 179-225.

¹⁶⁶ *Ibid.*, pp. 191

¹⁶⁷ This joint statement is discussed further on p. 49 of this thesis.

against. Barton Legum concisely captures the fundamental problem with the argument that the current system is too secretive or lacks adequate transparency when he suggests that the

... notion that secrecy and treaty arbitration are incompatible has become so well accepted in arbitration circles as to be almost trite. And, in recognition of this new paradigm, it is now commonplace for awards and even orders in treaty cases to be made available on the Internet within a matter of days or hours after they are rendered. Transparency, to use a much-misunderstood word, has become the norm in investment treaty cases.¹⁶⁸

Furthermore, there have been a number of recent initiatives that have even further increased the level of transparency in the system. In 2013, the United Nations Commission on International Trade Law adopted a new set of rules and standards for investor-state dispute resolution.¹⁶⁹ The new rules required that arbitral documents related to investment treaty disputes be available publicly on a central-repository, that arbitral proceedings be open (subject to some limitations regarding confidentiality), and that arbitrations be open to *amicus curiae* submissions.¹⁷⁰ *Amicus curiae* submissions are indeed increasingly the norm in arbitration proceedings following the 2003 NAFTA Free Trade Commission interpretive statement that clarified – in the wake of the *Methanex*

¹⁶⁸ Barton Legum, “Options to Establish an Appellate Mechanism for Investment Disputes.” in *Appeals Mechanism in International Investment Disputes*, Karl P. Sauvant, ed. (Oxford: Oxford University Press, 2008), p. 71.

¹⁶⁹ “UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.” The 2014 Rules can be found at: <http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency.html>

¹⁷⁰ For an overview of the 2013 Rules, see: Lise Johnson and Nathalie Bernasconi-Osterwalder, “New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps.” *Investment Treaty News*. 18 September 2013. <<http://www.iisd.org/itn/2013/09/18/new-uncitral-arbitration-rules-on-transparency-application-content-and-next-steps-2/>> Accessed 8 June 2014. Importantly, however, the new rules will not apply retroactively. The expiration and renewal of investment treaties may provide an opportunity to address this and ensure compliance with the new rules on transparency. For more on opportunities that may come with the expiration of investment agreements, see: “Opportunities arising from expiration of BITs.” *United Nations Conference on Trade and Development*, 2014. <http://investmentpolicyhub.unctad.org/Upload/webdiaepcb2013d9_en.pdf>

proceedings – that such submissions should be accepted by tribunals.¹⁷¹ ICSID rules have also been clarified to affirm the authority of tribunals constituted under that framework to accept submissions from the public and, given the strong transparency standards adopted by UNICTRAL, further transparency reforms may be forthcoming from the ICSID.¹⁷²

Between the wide-variety of online resources that publish and disseminate ITA cases, the increasing attention paid to ITA cases by scholars of international law and politics, as well as recent reforms regarding the openness of and public access to arbitral tribunal proceedings, Van Harten’s concerns about the “openness” of the system seem unfounded.¹⁷³

Coherence

In chapter 4, we examine the proposal to reform the ITA system by implementing appellate mechanisms. As I will discuss in detail, this reform proposal has largely been animated by the concern over the jurisprudential coherence of the international investment law. Given also that this concern – if founded – would be addressed by appellate review of investment dispute arbitrations, I will refrain from offering any

¹⁷¹ See: “Statement of the Free Trade Commission on non-disputing party participation.” Available at: <<http://www.state.gov/documents/organization/38791.pdf>> Accessed 8 June 2014.

¹⁷² Antonio R. Parra, “Enhancing transparency at ICSID.” *Oxford University Press Blog*, 17 February 2014. <<http://blog.oup.com/2014/02/enhancing-transparency-at-icsid/>>

¹⁷³ Of course, different mechanisms and venues for facilitating arbitrations offer varying levels of transparency. Cutler, for instance, notes that the scope for third-party participation and openness of procedures in arbitrations made under the auspices of the International Chamber of Commerce are far more limited than ICSID or UNICTRAL investor-state arbitrations (see: *Ibid.* Cutler 2012, pp. 24-27). This is an important point, but it is also noteworthy that 90% of investor-state arbitrations have so far been under the ICSID or UNICTRAL, with only 6 cases (or 5%) ever having been brought under the ICC (see: “Recent Developments in Investor-State Dispute Settlement.” *United Nations Conference on Trade and Development*, 2014, p. 9. Available at <http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf>). Thus, the vast majority of investor-state arbitrations are facilitated by institutions and governing frameworks that are trending toward significant improvements in transparency.

commentary on Van Harten's concerns over the system's coherence and refer the reader to chapter 4.

Independence

Van Harten argues that the “most troubling issue”¹⁷⁴ that plagues the current system is the alleged lack of independence of arbitrators who adjudicate disputes between foreign investors and sovereign states. To recall, the argument he presents is that since arbitrators are dependent on the perpetuation of the system and re-appointment to tribunals for their livelihood, they lack the security that tenure-appointed judges enjoy that allows for adequate judicial independence.¹⁷⁵ Furthermore, Van Harten's more recently has claimed that there is empirical evidence for the claim that investment treaty arbitrators are biased.¹⁷⁶ I will address these two related lines of argument – that the nature of the ITA system's structure is incongruent with proper judicial independence and that there is empirical evidence to support the same – in turn.

Meyers writes that Van Harten “relies on a short-sighted psychological analysis”¹⁷⁷ to support the claim that arbitrators are biased in favour of claimants in international investment disputes. Meyers argues that “even assuming that the decisions of arbitrators are dictated by their own self interest (and not by a good faith, objective application of law to facts), such interests are not furthered by adopting an exclusively pro-investor agenda. *The ITA system is ultimately a state-driven system.*”¹⁷⁸ The current system was constructed by states and underpinned by institutional-arrangements –

¹⁷⁴ Ibid. Van Harten 2007, p. 167.

¹⁷⁵ Ibid, pp. 167-174.

¹⁷⁶ See Van Harten 2012 and Van Harten 2014.

¹⁷⁷ Ibid. Meyers, p. 76.

¹⁷⁸ Ibid. Emphasis added.

bilateral and regional investment treaties, and international conventions that facilitate the operation of the system such as the ICSID and the New York Convention – to which states are party and, ultimately, which they may choose to deconstruct.¹⁷⁹ Roberts makes a similar argument in her seminal article on the role of states in investment treaties.

Some argue that arbitrators are actually or apparently biased because of their interest in the expansion of the field, so that there will be more work for arbitrators and counsel as a group. This claim must be weighed against their interest in (1) preventing a backlash by states against unreasonable interpretations, which might endanger existence or significantly curtail the field in the future; and (2) demonstrating their independence, impartiality, and legal acumen so as to increase their individual chances of future appointments or clients. (Arbitrators may have an interest in increasing the size of the pie and their slice of it, but surely these interests are secondary to the pie's existence.)¹⁸⁰

Indeed, choosing to render arbitral decisions that consistently disappoint the actors that created and sustain the system (states) and jeopardize the very survival of the system would seem a very unusual strategic move for arbitrators to make if they are ultimately governed purely by self-interest. But more than this, the very claim that arbitrators are little more than self-interested entrepreneurs eagerly seeking their next panel appointment is highly suspect.¹⁸¹ Those appointed as arbitrators are highly-experienced experts in international law, retired judicial officials, and tenured professors – individuals with reputations and integrity that have been earned through years of public service and

¹⁷⁹ The question of *why* states increasingly create international tribunals is beyond the scope of this thesis, but for an interesting discussion on this point see: Laurence E. Helfer and Anne-Marie Slaughter, “Why States Create International Tribunals: A Response to Professors Posner and Yoo.” *California Law Review*, Vol. 93, No. 3 (2005), pp. 899-956.

¹⁸⁰ *Ibid.* Roberts, p. 198.

¹⁸¹ To be fair, Van Harten himself seems to offer a caution against his critique being interpreted as a direct attack on the credibility of international arbitrators and investment lawyers. He notes that, “Some arbitrators have been repeatedly appointed to tribunals by investors and host states alike. This is no doubt because they have an impeccable reputation for fairness and balance. But the problem here is one of perceived bias, not actual bias. Even the most reputable arbitrator is open to the reproach that he will favour claimants, one way or another, so as to encourage claims.” (Van Harten 2007, pp. 173) But this begs the question: if the ‘independence problem’ with the current system is not an *actual* problem but rather a *perception* problem, is radical institutional reform really necessary? Or would better public relations efforts on the part of the international arbitration community not be a more appropriate way to combat a public perception problem?

thoughtful work, but also individuals who we would not expect to rely on arbitral appointments to avoid financial ruin. Surely those appointed to tribunals prize their appointments as signs of tremendous trust and respect, but it seems a highly dubious suggestion that they would sacrifice a lifetime of reputation-building just to secure an appointment that their careers may benefit from but can ultimately do without.¹⁸²

The second related line of argument than Van Harten has more recently developed is that there is empirical evidence to support his claim that international investment arbitrators are biased. One such area where he claims his research demonstrates limited empirical evidence for is “tentative support for expectations of systemic bias in investment treaty arbitration in the resolution of contested jurisdictional issues.”¹⁸³ In other words, arbitrators are biased in favour of outcomes that expand their jurisdiction to adjudicate on a wide-spectrum of foreign investment related disputes.¹⁸⁴ Catherine Rogers, however, offers an alternative hypothesis to explain the alleged tendency of arbitrators to increase the scope of their jurisdictional authority:

One potential alternative explanation for the expansive approach to jurisdiction observed in investment arbitration is that all adjudicators, both judges and arbitrators, have a proclivity toward expanding their own jurisdiction. That proclivity, in other words, is not tied to arbitrators’ incentive to be appointed in future arbitrations, but to other more general explanations about the way adjudicators view their function. In fact, judges with permanent and fixed term appointments have, in various national legal systems, been observed as adopting positions and interpretations that expand their jurisdiction. The pattern may arguably be even more exaggerated among permanent international tribunals, where there is a prevailing “assumption that judges share an

¹⁸² A fascinating insight into the world of the international arbitration community can be found in: Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. (Chicago: University of Chicago Press, 1996)

¹⁸³ *Ibid.* Van Harten 2012, p. 214.

¹⁸⁴ Again, Van Harten is careful to caution against too radical a reading of his research findings. While he does posit that there is some empirical evidence for arbitrators generally being biased toward expansive jurisdictional outcomes, he offers the caveat that there are a “range of possible explanations for the results—some of which do not at all entail inappropriate bias.” Van Harten 2012, p. 215.

interest in expanding the reach of their court and that governments seek to present such occurrences.”¹⁸⁵

If tenured judges, then, are perhaps even more likely to seek an increase in their jurisdictional authority, it is questionable whether or not the establishment of a permanent international investment court would limit the scope of public policy matters litigable by foreign investors.

Rogers also questions whether the creation of an international investment court staffed by tenured judges would address any issues of embedded-biases that arbitrators appointed to *ad hoc* tribunals created under the current system allegedly hold. The problem, she argues, is that it is unclear what other epistemic community counts amongst its membership individuals with the specific expertise to adjudicate international investment disputes. It is worth again quoting her at length here:

Van Harten and others who advocate for a permanent investment court seem to assume that judges would be drawn from something other than the pool of existing investment arbitrators, or from among a group of professionals with markedly different professional profiles. A sudden willingness by States to put forward an entirely new slate of investment judges who can replace investment arbitrators, and have a more State-sensitive outlook, may be overly optimistic.¹⁸⁶

More generally, Rogers suggests that empirical research into judicial decision-making, such as Van Harten’s recent work, may have utility only insofar as they can “be tested and evaluated in light of other forms of research.”¹⁸⁷ Specifically, she argues that empirical research into arbitral decisions must be augmented “with qualitative research and comparative institutional analysis.”¹⁸⁸ Van Harten’s assertion that his case against the

¹⁸⁵ Catherine A. Rogers, “The Politics of International Investment Arbitrators.” *Santa Clara Journal of International Law*, Vol. 12, No. 52 (2013), p. 243, quoting Erik Voeten, “The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights.” *International Organizations*, Vol. 61, No. 4 (2007), p. 671.

¹⁸⁶ *Ibid.* Rogers, p. 244.

¹⁸⁷ *Ibid.*, p. 246.

¹⁸⁸ *Ibid.*, p.. 222

current ITA system is backed by empirical evidence is of little persuasive value for the reform proposal to establish a permanent international investment court.

Before we turn to the next part of this chapter, it is interesting to note that Van Harten's critiques of the ITA system have recently attracted judicial discussion. Since Van Harten argues that public law issues raised by foreign investment disputes should be adjudicated by tenured judges in a permanent court as opposed to arbitrators in *ad hoc* tribunal, it is worth discussing what a tenured judge has had to say about Van Harten's arguments. In the Canadian Federal Court case of *Hupacasath First Nation v. Canada (Foreign Affairs)*¹⁸⁹ Van Harten was called upon by the claimants in the case to submit an expert report on how ISDS provisions in a proposed Canada-China BIT would affect the self-governance rights of aboriginal peoples under Canadian law. Remarkably, in Chief Justice Crampton's decision he wrote that – because of Van Harten's public campaigning against the ITA system – his “ability ‘to assist the court impartially’ ... would appear to be somewhat compromised.”¹⁹⁰ Moreover, Crampton C. J. went on to hold that, “Van Harten's evidence did not materially assist [the claimants] to demonstrate that the potential impact of the [China-Canada BIT] on its Aboriginal interests is appreciable and non-speculative [...] To a large extent, this was due to the fact that his assertions on key issues were baldly stated and unsubstantiated.” As many of the points raised in Van Harten's expert opinion in *Hupacasath* mirror those he articulates in *Investment Treaty Arbitration and Public Law*, I think that the fact that his arguments received little judicial accord is particularly undermining to his case. Since the case against the current ITA

¹⁸⁹ *Hupacasath First Nation v. Canada (Foreign Affairs)*, 2013 FC 900.

¹⁹⁰ *Ibid.*, para. 38.

system is clearly overstated, the reform proposal to replace the current system with an international investment may be a cure in search of a disease.

The Investment Treaty Arbitration System and Contemporary Global Governance

While my argument in the previous section of this chapter was that Van Harten's proposal should be rejected because his case against the current ITA system is overstated, there is a further problem with the proposal to create an international investment court. In this section, I will argue that – even if Van Harten's critique of the current system *were* persuasive – a permanent international investment court is an idea that is incongruent with the contemporary disaggregated nature of global governance. First, drawing primarily from the work of Anne-Marie Slaughter, I will outline what contemporary global governance looks like to illustrate how an international investment court would be a mismatch in the disaggregated world order. Secondly, drawing from the world of Benedict Kingsbury and Stephan Schill, I will discuss how the current system functions not only to settle disputes between foreign investors and host states, but also as an important part of global administrative law.

Disaggregated Global Governance

The twilight of the Gilded Age was marked by a plethora of optimism about the possibility of a future utopia in which nations would come together under the umbrella of a world government. Elaborate proposals for supranational legislatures, executives, judiciaries, and even police forces were drawn up¹⁹¹, and the United Kingdom's poet

¹⁹¹ Ibid. Hoss, p. 40.

laureate wrote poems longing for the arrival of the *Parliament of Man*.¹⁹² This was the early idealism that international relations came to hold much disdain for, as the promise of world government went unfulfilled and Europe was thrown into great violence.¹⁹³ A liberal world order created from the top down, in which powerful international institutions guaranteed global peace, security, and rule of law through the consent of national governments has not emerged.¹⁹⁴ As Slaughter notes,

this world order is a chimera. Even as a liberal internationalist ideal, it is infeasible at best and dangerous at worst. It requires centralized rule-making authority, a hierarchy of institutions, and universal membership. Equally to the point, efforts to create such an order have failed. The United Nations cannot function effectively independent of the major powers that compose it, nor will those nations cede their power and sovereignty to an international institution.¹⁹⁵

But the concept of global governance nevertheless survives. Indeed, Slaughter presents a persuasive account of how global governance operates in the contemporary world.

Instead of a world government, she invites us to imagine global governance as a world of government networks. Increasingly, Slaughter argues, governance is crafted in such a way that “the institutions that perform the basic functions of governments – legislation, adjudication, implementation – inter[act] both with each other domestically and also with their foreign and supranational counterparts.”¹⁹⁶ States remain critical actors in world politics, but states no longer resemble billiard balls – singular, unchanging actors – but rather have become *disaggregated* and interact with each other in complex ways.

¹⁹² Alfred Lord Tennyson, *Locksley Hall*. Available at <<http://rpo.library.utoronto.ca/poems/locksley-hall>> Accessed November 19, 2013.

¹⁹³ Edward Hallett Carr, *The Twenty Years Crisis, 1919-1939*. New York: Perennial, 2001. Some, however, have tried to offer a reassessment of early idealism in international relations theory. See, for instance: Andreas Osiander, “Rereading Early Twentieth-Century IR Theory: Idealism Revisited.” *International Studies Quarterly*, Vol. 42, No. 3 (1998), pp. 409-432.

¹⁹⁴ Some, however, have argued to the contrary. See, for instance: Paul Kennedy, *The Parliament of Man: The Past, Present, and Future of the United Nations*. (New York: Random House, 2006)

¹⁹⁵ Anne-Marie Slaughter, “The Real New World Order.” *Foreign Affairs*, Vol. 76, No. 5 (1997), p. 183.

¹⁹⁶ Anne-Marie Slaughter, *A New World Order*. (Princeton: Princeton University Press, 2004), p. 5.

In this disaggregated world order, the structural core of global governance is “a set of horizontal networks among national government officials in their respective issue areas, ranging from central banking through antitrust regulation and environmental protection to law enforcement and human rights protection.”¹⁹⁷ These horizontal networks are both formal and informal: they are the meetings of regulators, legislators, lawyers, and other officials meeting both in structured settings and on the side-lines of institutions in which legal, political, and economic elites share ideas and build consensus. These horizontal networks work in conjunction with vertical networks operating within and between traditional international organizations. Networked global governance is multifaceted in that it moves in different directions – but the point is that a disaggregated world order is “a world order latticed by countless government networks; networks for collecting and sharing information of all kinds, for policy coordination, for enforcement cooperation, for technical assistance and training, perhaps ultimately for rule making. They [are] bilateral, plutilateral, regional, or global. Taken together, they [form] the skeleton or infrastructure for global governance.”¹⁹⁸

It is important to note that while, on Slaughter’s account, the nature of state power in the international system is changing, she does not suggest that the state is disappearing or becoming utterly irrelevant. In contrast with liberals of a more idealistic streak – who argue for the replacement of state-centred national governance structures with supranational centralized decision-making – and those who suggest that the state is in

¹⁹⁷ Ibid Slaughter 2004, p. 19.

¹⁹⁸ Ibid., p. 15-16.

total retreat¹⁹⁹, Slaughter posits that, “the state is not disappearing, it is disaggregating into its separate, functionally distinct parts.”²⁰⁰ We are left with an image of global politics in which world government has become as illusory as the notion of a dominant state actors animated only by unified, unbounded self-interest.²⁰¹

What does the exercise of authority and global governance look like under this framework? For our purposes in this thesis, it is most useful to engage with Slaughter’s description of the emerging global community of judicial officials that are changing the way in which crucial legal matters are settled. This unfolds in several ways. First, judges are citing decisions made in foreign courts more frequently. A leading example of this is the Constitutional Court of South Africa’s landmark decision in 1995 that abolished the death penalty, a decision in which the justices cited decisions from jurisdictions around the world.²⁰² Further, Slaughter notes that judges in different jurisdictions are also becoming increasingly communicative with each other. Judges are meeting face-to-face to discuss pressing legal issues at a variety of settings organized by legal conferences, law schools, and other international institutions.²⁰³ These interactions, Slaughter argues, “serve to educate and to cross-fertilize. They broaden the perspectives of the participating judges. [...] They socialize their members as participants in a common global judicial

¹⁹⁹ See, for instance: Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*. (Cambridge: Cambridge University Press, 2000)

²⁰⁰ Ibid. Slaughter 1997, p. 184. Slaughter also acknowledges the clear influence on her hypothesis from Robert Keohane and Joseph Nye’s work. See: Robert Keohane and Joseph Nye, *Power and Interdependence*. (New York: Pearson, 2011.)

²⁰¹ This sort of neorealist analysis has, of course, not gone away. Indeed, its adherents muster an impressive assortment of arguments to defend their project. A comparative critical analysis of liberalism and realism is obviously not the aim of this paper, but for a classic example, see: Kenneth Waltz, “Structural Realism after the Cold War.” *International Security*. Vol. 25, No. 1 (2000), pp. 5-41.

²⁰² *S v. Makwanyane* [1995] ZACC 3.

²⁰³ Ibid. Slaughter 2004, pp. 96-99.

enterprise. That awareness is importance for convincing judges to try and uphold global norms of judicial independence and integrity in countries and at times when those are under assault.”²⁰⁴ Another way in which judicial authority is transformed by the emergence of a disaggregated world order tied together by this kind of elite networking is the increasing willingness of judges to co-operate in order to solve complex multi-jurisdictional problems. Slaughter notes that this development is best exemplified by “cases of global bankruptcy, where judges increasingly communicate directly with one another with or without international treaty or guidelines to ensure a cooperative and efficient distribution of assets.”²⁰⁵

Judges, in the new disaggregated model of global governance, are constructing what looks like a world community of courts. This is in contrast to what early liberals envisioned the future of international law becoming. The system that is emerging, Slaughter argues, “is a far different kind of system than has been traditionally assumed by international lawyers. That vision has always assumed a global legal *hierarchy*, with a world supreme court such as the International Court of Justice resolving disputes between states and pronouncing on rules of international law.”²⁰⁶ This is not to diminish the role of supranational courts in global adjudicating processes. Recall that Slaughter recognizes that disaggregated global governance is underpinned by the simultaneous functioning of horizontal and vertical networks and institutions. Indeed, she notes that, “the most advanced form of judicial cooperation is a partnership between national courts and a

²⁰⁴ Ibid., p. 99.

²⁰⁵ Ibid., p. 94-95.

²⁰⁶ Ibid., p. 67. Emphasis added.

supranational tribunal.”²⁰⁷ What is important, however, is that a global legal system is emerging that is animated by dialogue between and within judicial networks that come together to form a global community of courts, and the contemporaneous operation of relationships between national and supranational courts.

As Francis Fukuyama observed, the new reality in the 21st century is that “in place of global government, we will have to be satisfied with global governance... a liberal world order that is both just and feasible would have to be based not on a single, overarching global institution, but rather on a diversity of international institutions that could organize themselves around functional issues, regions, or specific problems.”²⁰⁸ The actuality of the liberal project of global governance is likely to be a much more complicated creature than early visionaries imagined.²⁰⁹ Global governance in the 21st century is not a top-down affair. Supreme authority is not vested in supranational institutions that are able to enforce legislative, administrative, or judicial agendas downward through a myriad of bodies onto passive states. Rather, networking and dialogue between a host of institutions and actors results in a bottom-up flow of information sharing that sustains the perpetuation of a global judicial system. Disaggregated global governance is bottom-up global governance.

It is difficult to see how establishing a hierarchically-situated international investment court is congruent with the emerging order of disaggregated global governance. The *zeitgeist* of contemporary global governance is a rejection of centralized-institutions (such as a permanent court of international investment) with final

²⁰⁷ Ibid. Slaughter 1997, p. 188.

²⁰⁸ Francis Fukuyama, *The End of History and the Last Man*. (New York: Avon), p. 351.

²⁰⁹ See, for instance: George W. Hoss, “A World-Government–World Peace.” *The Advocate of Peace (1894-1920)*, Vol. 67, No. 2 (1905), pp. 39-41.

authority on a wide-range of contentious matters. Global public policy concerns are increasingly dealt with, as Slaughter explains, in an *ad hoc* manner – when a regulatory or judicial issue of concern arises it is dealt with through the interactions of policy-makers and elite epistemic communities.²¹⁰ Investor-state arbitrations should be seen as a sub-species of this wider global governance framework. States remain the pillars of international society, just as the ITA system is ultimately a state-driven system in that arbitral tribunals are formed pursuant to treaties negotiated by and perpetuated by states. The point, however, is that tribunals are an important new addition in a wider array of voices that contribute to public policy making at the national and transnational level. Again, Slaughter’s argument is not that the state is losing its importance in international society but rather that the actors that shape the contours of policymaking are more diverse and horizontal than vertical. Arbitral tribunals are one of these actors.

In this regard, it is apparently that the current investment treaty arbitration system appears to be much more a judicial species of contemporary global governance than a new top-down international investment court would be. We turn now to discuss the place of the current ITA system in the wider framework of global governance.

The ITA System and Global Administrative Law

Kingsbury and Schill offer an illuminating elucidation on how investor-state arbitral tribunals fit into contemporary global governance. It is important to set out that their vision of global governance essentially mirrors Slaughter’s model I outlined in the previous section.

²¹⁰ Much in the same way that investment disputes are dealt with – when an issue arises over a state’s public policy, an investor can seek redress in front of an *ad hoc* tribunal specially formed to adjudicate on the dispute at hand.

much of global governance can usefully be analyzed as administration. Instead of neatly separated levels of regulation (private, local, national, inter-State), a congeries of different actors and different layers together form a variegated “global administrative space” that includes international institutions and transnational networks, as well as domestic administrative bodies that operate within international regimes or cause transboundary regulatory effects. The idea of a “global administrative space” differs from those orthodox understandings of international law in which the international is largely inter-governmental, and there is a reasonably sharp separation of the domestic and the international. In the practice of global governance, transnational networks of rule-generators, interpreters and appliers cause such strict barriers to break down.²¹¹

So Kingsbury and Schill imagine global governance not as a hierarchical top-down construction in which states yield their sovereignty to central supra-national authorities, but rather as complex inter-workings between a diverse set of national and transnational actors.

According to Kingsbury and Schill, the investor-state arbitrations are not just mechanisms by which foreign investors may resolve their public law disputes with the governments of the countries that host their investments. Rather, they play an important part in developing the emerging global administrative law of contemporary global governance. Tribunals create, develop, and apply certain standards and principles through the interpretation of investment treaties and the resolution of individual cases they are called upon to adjudicate. In this way, they help to craft norms and expectations that govern the regulatory relationship between investors and states.

The standards thus reinforced or created by arbitral tribunals reflect general principles for the exercise of public power that are applicable not only to State conduct, but likely will be applied over time, *mutatis mutandis*, to the activities of arbitral tribunals themselves. *Investor-State arbitration is thus developing into a form of global governance.* These tribunals exercise power in the global administrative space.²¹²

²¹¹ Benedict Kingsbury and Stephan Schill, “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law.” *New York University Public Law & Legal Theory Working Paper Series*, Working Paper No. 09-46 (2009), p. 5.

²¹² *Ibid.*, p. 2. Emphasis added.

If we liken contemporary global governance to a conversation between a diverse mix of national and transnational authorities, then the ITA system is a critical component of global governance because arbitral tribunals contribute to this authoritative conversation – through their arbitral decisions and reasoning – and thus help to change and create legal and public policy norms and expectations. As Kingsbury and Schill argue, “Tribunals are therefore helping to define standards of good administration by States.”²¹³

While the ITA system may be an important component of global governance, a critic may suggest that this only, in fact, reinforces Van Harten’s critique of the accountability of the system. Does a system in which appointed arbitrators adjudicate on important issues of public policy meet our standards of public law accountability? Kingsbury and Schill argue that tribunals do indeed meet our expectations of democratic legitimacy. They write that, “participation by the defending State [in arbitrations], and its public, in the actual arbitral proceedings can help somewhat with democratic legitimation, as the elected government engages in appointing a member of the arbitral tribunal it consented to establish, and argues its case.”²¹⁴ But the fact that a state’s democratically elected government is a participant in the arbitral process is only half of the democratic legitimization of investor-state arbitrations playing a key role in global governance. For Kingsbury and Schill, what is also of fundamental importance is that arbitrators consistently apply certain fundamental principles when adjudicating disputes.

Adherence by tribunals to global administrative law principles (where these principles are applicable to the work of such tribunals) can play a role in generating and/or enhancing the legitimacy of investment treaty arbitration. Key global administrative law principles for investor-State tribunals obviously include good process, legality and freedom from bias or arbitrariness in the decision-making process.²¹⁵

²¹³ Ibid., p. 6.

²¹⁴ Ibid., p. 44.

²¹⁵ Ibid.

On the account offered by Kingsbury and Schill, the ITA system not only sits as part of the wider order of contemporary global governance, but also has the potential to be a democratically legitimate component of the same.

This chapter has traversed a rather ambitious terrain. We first presented Van Harten's wide-ranging and thoughtful criticism of the current investment treaty arbitration system. The crux of his argument is that the system is best understood through the lenses of public law adjudication and, as a result, when we apply the criteria of proper public law adjudication in a democratic society, the system is deeply flawed because it lacks accountability, transparency, consistency, and – mostly troubling for Van Harten – independence. Given the wholesale nature of Van Harten's rejection of the current system, it is unsurprisingly that his proposed reform proposal is similarly wholesale: the current system of *ad hoc* arbitrations should be replaced by the creation of a permanent international court of investment. This is the first of two major reform proposals this thesis assesses, and the second part of this chapter offered an assessment of Van Harten's proposal. I argued that the proposal should be rejected because *a*) Van Harten's critique of the current system is overstated and ultimately unpersuasive, and thus such radical reform is unsubstantiated; and *b*) creating a top-down centralized world court for investment disputes is incongruent with contemporary global governance and, moreover, the current system is already contributing to the emergence of a global administrative law. Even if Van Harten's case for an international investment court was persuasive, then, there remain good reasons to nevertheless remain highly skeptical about the value of his proposal.

Chapter 4:

Appellate Mechanism(s) for the ITA System: The Way Forward?

A modest reform proposal?

This chapter examines a proposal to reform the ITA system that is decidedly less radical than the proposal assessed – and ultimately rejected – in the preceding chapter. At the tail-end of the preceding chapter, I noted that a critical reader may have been convinced that Van Harten’s strong case against the current ITA system is not entirely convincing; furthermore, the critical reader may also have been convinced that the proposal to replace the current system with a permanent international investment court (pursuant to a vast multilateral agreement) is incongruent with the emergent nature of contemporary global governance. Notwithstanding her general agreement with the assessment I presented in chapter 3, however, the critical reader may nonetheless continue to hold lingering suspicions about certain aspects of the current ITA system. Surely, he may posit, there is room for modest institutional reform of the system.

The proposal that this chapter assesses – the creation of an appellate mechanism or appellate mechanisms – is in line with a more modest proposal for institutional reform than the total institutional overhaul that Van Harten advances. This chapter will first provide an overview of arguments in favour of some sort of appeals mechanism put forward by several scholars and commentators following in the wake of a 2004 ICSID Discussion Paper that discussed the potential for the ICSID to incorporate an appeals facility into its framework. Following this review, I will engage with the issue that has underpinned much of the discussion regarding the alleged need for an appellate

mechanism in the ITA system: inconsistent arbitral jurisprudence being rendered by tribunals. I conclude the chapter by offering a cautious and limited endorsement of appellate mechanisms for the ITA system – despite the less-than-persuasive argument that supposed-inconsistencies threaten the legitimacy of the system – with the critical caveat that the mechanisms must be crafted with consideration for the unique place of the ITA system within the emergent disaggregated order of global governance.

Background on proposals to create appellate mechanisms for the ITA system

The arguments put forward in favour of an appellate mechanism for the ITA system have – as I will discuss in more detail in the proceeding section – centred around concerns over jurisprudential consistency in arbitral awards. However, other benefits have been hypothesized. It has been suggested that an appellate mechanism “might help allay public concern that awards affect important public policy issues and interests could be enforced despite serious error”²¹⁶ and that in creating an international body (or bodies) to review arbitral awards, the ITA system would better uphold the principle of neutrality than it currently does.²¹⁷

Discussion surrounding the proposal to create an appellate mechanism for investment arbitration was initiated in part by the release of an ICSID discussion paper in 2004 that devoted some space to commenting on the appellate body proposal. The paper noted that several signed BITs feature clauses allowing for future creation of some sort of

²¹⁶ Katia Yannaca-Small, “Improving the System of Investor-State Dispute Settlement: The OECD Governments’ Perspective.” in *Appeals Mechanism in International Investment Disputes*, Karl P. Sauvant, ed. (Oxford: Oxford University Press, 2008), p. 224.

²¹⁷ *Ibid.*, pp. 224-225.

appellate mechanism.²¹⁸ Addressing the concern of inconsistency in arbitral decisions, the paper also noted that “there clearly is scope for inconsistencies to develop in the case law, given the increased number of cases, as well as the fact that under many investment treaties disputes may be submitted to different, ICSID and non-ICSID, forms of arbitration.”²¹⁹ Helpfully, the paper also discusses what an appeals facility at the ICSID would look like. Critically, it was suggested that “in keeping with their consensual nature, the Appeals Facility Rules would be flexible and subject to adjustment in the underlying consent instrument.”²²⁰ A concern over the potential multiplication of appellate mechanisms within different institutional frameworks was also recognized, so it was suggested that, “the Facility would best be designed for use in conjunction with both forms of ICSID arbitration, UNCITRAL Rules of arbitration and any other form of arbitration provided for in the investor-to-State dispute-settlement provisions of investment treaties.”²²¹ The paper also noted that the creation of an appellate body under the auspices of the ICSID would need to be treaty-pursuant and it discussed the potential administrative structure of the facility.²²² Despite the commendable detail that was put into analyzing the proposal, to date there remains no sort of appellate mechanism at the ICSID.²²³

²¹⁸ “Possible Improvements on the Framework of ICSID Arbitration.” *ICSID Secretariat Discussion Paper*. October, 2004. p. 14.

²¹⁹ *Ibid.*, p. 15.

²²⁰ *Ibid.*, “Appendix.” p. 3.

²²¹ *Ibid.*, p. 1.

²²² *Ibid.*, p. 1-8.

²²³ It is important to note that the ICSID’s annulment procedures are not an appellate mechanism. Annulment committees – which may be appointed at the request of a party to a dispute being arbitrated by an ICSID tribunal – are not empowered to review errors in law. Rather, their jurisdiction is simply limited to correct for gross injustices or complete breakdowns in tribunal proceedings. See *ICSID Convention*, Article 52(1).

While the ICSID's important discussion paper may not have led to the implementation of the appellate mechanism reform proposal, much ink has been spilt by commentators and scholars on the alleged need for such a mechanism. In a seminal article in international investment law scholarship, Susan D. Franck argues that, "a single, unified permanent body charged with developing international law and creating consistent jurisprudence will promote legitimacy more than disaggregated arbitrations that come to different conclusions on the same issue."²²⁴ G. Bottini argues that an appeals "mechanism could considerably contribute to the legitimacy of investment arbitration."²²⁵ Importantly, however, Bottini stresses that the core problems that the appellate proposal could address – namely, consistency issues – would continue to plague the ITA system if there were several different appellate bodies operating. As he writes, "it can hardly be denied that some of the main advantages of an appeal mechanism would be lost if several such mechanisms were created instead of only one."²²⁶ Regarding the structure of a hypothetical appeals mechanism, Bottini argues that it would need to be made up of permanently appointed members of "the highest professional and moral standing"²²⁷ and that the body properly balance capital importing and exporting states.²²⁸ Similarly, Eun Young Park argues that, "considering the public interest ramifications of investor-state

²²⁴ Susan D. Franck, "Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions." *Fordham Law Review*, Vol. 73, No. 4 (2005), p. 1617.

²²⁵ G. Bottini, "Reform of the investor-State Arbitration Regime: the Appeal Proposal." *Transnational Dispute Management*, Vol. 11, No.1 (2014), p. 3.

²²⁶ *Ibid.*

²²⁷ *Ibid.*, p. 8.

²²⁸ *Ibid.*

dispute settlement proceedings, it is hard to deny that there is a need to provide a mechanism to safeguard the jurisprudence of investment treaty law.”²²⁹

Consistent inconsistencies? Examining concerns over consistent jurisprudence in international investment arbitration

Having reviewed the background and some of the supportive literature on the proposal to create an appellate mechanism for the ITA system, we will now shift our analysis to look at the primary concern that has underpinned most of the calls for this reform: alleged inconsistency in arbitral decisions.

There are two sets of cases which have received considerable scrutiny from commentators concerned with jurisprudential consistency in investment arbitration.²³⁰ The first set that critics have pointed to are *CME v Czech Republic* and *Lauder v Czech Republic*.²³¹ In *CME*, an arbitral tribunal constituted pursuant to a BIT between the Netherlands and the Czech Republic awarded CME – a Dutch company owned by an American businessperson - \$353 million for damages related to a regulatory decision made by the Czech government.²³² However, a claim launched pursuant to a BIT between the United States and the Czech Republic – *Lauder* – by the same businessperson who owned CME was dismissed by the tribunal in that case, despite the existence of similar

²²⁹ Eun Young Park, “Appellate Review in Investor State Arbitration.” *Transnational Dispute Management*, Vol. 11, No. 1 (2014), p. 5.

²³⁰ The set of decisions examined in this thesis are not exhaustive of cases which have been subject to the inconsistency critique, but they do emerge with great frequency in the literature. For a discussion the inconsistency of the *SGS* cases, for an example similar problems, see: Franck (2005), pp. 1569-1574.

²³¹ See, for instance, Van Harten 2007, pp. 7-8.

²³² *CME Czech Republic BV v The Czech Republic*, UNCITRAL (Documents available at <http://www.italaw.com/cases/documents/282>)

facts.²³³ This *prima facie* seems to be obviously problematic: if a consistent set of jurisprudential principles underpins international investment law, then shouldn't that body of law's adjudicators render decisions when presented with like-facts that are consistent?

Park provides a useful overview of the second set of cases that have attracted substantial criticism. The cases emerged from Argentina's fiscal crisis in the final years of the 20th century which led the Argentinian government to make various regulatory decisions that adversely effected various companies that had invested in Argentina's public utility systems. Argentina pleaded before various tribunals that the regulatory measures were necessary given the emergency circumstances that they were made in. As Park explains, "the tribunals in the *CMS v. Argentina*, *Sempra v. Argentina*, and *Enron v. Argentina* arbitrations dismissed Argentina's necessity defense [...] however, other tribunals such as those in *LG&E v. Argentina* and *Continental Casualty v. Argentina* arbitrations upheld Argentina's position" and dismissed the cases.²³⁴ Park goes on to note that annulment proceedings at the ICSID did not result in any satisfactorily coherent correction to the diverse set of decisions.²³⁵

Franck argues that the presence of incoherence in the jurisprudence of international investment law threatens the continued legitimacy of the very project of ensuring a legal framework governing the rights of foreign investors. She claims that "conflicting awards based upon identical facts and/or identically worded investment treaty provisions will be a threat to the international legal order and the continued

²³³ *Ronald S. Lauder v. The Czech Republic*, UNCITRAL (Award available at <http://www.italaw.com/cases/documents/611>)

²³⁴ *Ibid.* Park.

²³⁵ *Ibid.*

existence of investment treaties.”²³⁶ A system is legitimate in part only if those who rely on it can have faith that the adjudication the system provides is reliable and not arbitrary.²³⁷ This supposed threat to the ITA system is further elaborated by José E. Alvarez who writes that “the prospect that, over time, awards by different...tribunals will expound different interpretations...sends chills up the spines of investment lawyers who fear that their emerging regime will self-destruct for failing the first test of any real ‘system’ of rules.”²³⁸ So, if inconsistency is not only a clearly unfair aspect of the ITA system but a threat to the existence of international investment law, then the case for some sort of appeals mechanism is seemingly persuasive.

But there are two questions that need to be addressed before we issue final judgment on the persuasiveness of the case for this reform proposal: 1), just how inconsistent is international investment law’s jurisprudence? and 2), is the existence of some element of inconsistency really as problematic as proponents of this reform claim? I will now examine these two questions in turn.

Barton Legum argues that concerns raised about legitimacy in the system may have been overstated. Legum first points out that the ITA system is still in its infancy. International investment lawyers and arbitrators can hardly draw from the long and sophisticated jurisprudence that other legal fields enjoy. As Legum notes, “we are still in the early days of investment treaty jurisprudence. The cumulative docket of 200-some

²³⁶ Ibid. Franck 2005, p. 1583.

²³⁷ A more scathing assault on inconsistency in the ITA system may point out that distinguished legal scholars such as Lord Bingham have argued that the rule of law itself is dependent on the law being known to all. How can those subject to law know what the law is when the jurisprudence stemming from lacks any consistency?

²³⁸ José E. Alvarez, “Implications for the Future of International Investment Law.” in *Appeals Mechanism in International Investment Disputes*, Karl P. Sauvant, ed. (Oxford: Oxford University Press, 2008), p. 29.

investment treaty disputes over the past 40 years is less than that handled by a single judge in a New York domestic court in a single year.”²³⁹ Further to this point, recall this thesis’ second chapter in which I outlined a cursive history of international arbitration. While arbitration has long played an important role in international society, this has not resulted in a cohesive jurisprudence in part because of the nature of arbitration.

Legum further argues that critics fail to appreciate the details of the cases they claim demonstrate a lack of consistence and that an appellate mechanism – able only to review cases for errors of law – would not necessarily solve situations such as the *CME* and *Lauder* cases:

The poster child for lack of consistency in investment arbitration is the pair of decisions in *Lauder v. Czech Republic* and *CME v. Czech Republic*. The tribunals in those two cases did indeed reach different decisions based on the same factual records and arguments by the same counsel for the same or closely related parties. But the different decisions stemmed from a contrasting appreciation of the facts of the case, not from a fundamentally different understanding of the applicable law. Under the model of appellate review adopted by the few international appellate bodies in existence today, this difference is in appreciation of the facts would be corrected on appeal only if no reasonable arbitrator could have possibly so understood the facts of the case. I do not believe that either *Lauder* or *CME* would be subject to correction on appeal under such a standard of appellate review.²⁴⁰

The issues raised by Legum should give some pause to the argument that inconsistency threatens the very legitimacy of international investment law.

The second problem with the inconsistency argument is that the presence of some inconsistency in the ITA system may not be as problematic as proponents of an appellate mechanism suggest. Indeed, Irene Ten Cate argues that too vigorous a promotion of consistency in ITA would come at the cost of other important goals of international investment law. She concedes that arbitral decisions contribute to the development of

²³⁹ Bartom Legum, “Options to Establish an Appellate Mechanism for Investment Disputes.” in *Appeals Mechanism in International Investment Disputes*, Karl P. Sauvant, ed. (Oxford: Oxford University Press, 2008), p. 237.

²⁴⁰ *Ibid.*

substantive norms surrounding foreign investment²⁴¹ – what adjudicators decide reverberates beyond the case before them. But while she does not deny that arbitrators have a duty to be aware of precedent, she argues that too narrow a focus on consistency comes at too great a cost. If arbitrators are constrained by a powerful *stare decisis* doctrine then the sincerity of their adjudications will suffer. It is worthwhile quoting Cate at length here:

By letting go of consistency as a goal and precedent as the method to achieve it, arbitrators do not need to face the choice between reaching a decision that they believe to be incorrect or concealing what they are doing. As *SGS v. Philippines* demonstrates, the open expression of disagreement with earlier awards could foster a continuing dialogue between tribunals. A secondary, but significant, benefit is that greater transparency stimulates scholarly debate on the merits of different decisions, allowing future tribunals to draw on richer scholarship.²⁴²

This point should be well taken especially in light of this thesis' emphasis on the role that ITA plays in the emerging order of disaggregated global governance. Effective decentralized global governance requires that there is dialogue between different institutional actors involved in the making of transnational legal and regulatory decisions. If ITA is going to continue to play a role in global governance, then Cate's argument that "international investment law is better served by abandoning efforts to implement a consistency norm in favor of a more immediate focus on the quality of decision-making and the merits of awards"²⁴³ is persuasive. Newcombe observes that while it is obvious that predictability and consistency are hallmarks of any legal system based on the rule of law, "the overriding duty of [investment] arbitrators is one of providing clear reasons for

²⁴¹ Irene Ten Cate, "The Costs of Consistency: Precedent in Investment Treaty Arbitration." *Columbia Journal of Transnational Law*, Vol. 51, No. 2 (2013), p. 423.

²⁴² *Ibid.*, p. 465.

²⁴³ *Ibid.*, p. 420.

their decisions”²⁴⁴ – including when they deem it necessary to diverge from previous decisions.

What do these points raised in response to the critical observation that ITA has produced some arbitral awards that are difficult to reconcile? There is no doubt that it is important that investors and states who plead before arbitral tribunals are confident that they can expect predictability and an element of consistency. The rule of law demands little less. But it is important that critics do not overstate the extent to which the ITA system may be marked by incoherent arbitral decisions. Perhaps more importantly – the principle of consistency must not squeeze out other crucial principles, such as the need for arbitrators to contribute to the development of normative rules and expectations that are part of a wider network of contemporary global governance. Consistency is important, but it cannot blunt the duty of arbitrators to “foster a continuing dialogue between tribunals.”²⁴⁵ Moreover, in a disaggregated system underpinned by thousands of different treaties, different kinds of problems may not be easily solvable by “one size fits all” solutions.²⁴⁶ Ultimately, different countries will present a wide-range of views on proper treaty interpretation and therefore a certain amount of inconsistency in the jurisprudence of international investment law may be unavoidable.

²⁴⁴ Andrew Newcombe, “Should Investment Treaty Tribunals Fly in Flocks? Predictability and Consistency in Arbitral Decision Making.” *Kluwer Arbitration Blog*. 31 March 2013. <<http://kluwerarbitrationblog.com/blog/2013/03/31/should-investment-treaty-tribunals-fly-in-flocks-predictability-and-consistency-in-arbitral-decision-making/>> Accessed March 31, 2014.

²⁴⁵ *Ibid.* Cate, p. 465.

²⁴⁶ I am indebted to Andrew Newcombe who highlighted this point to me during this thesis’ revision process.

The way forward: Placing appellate mechanisms appropriately in the disaggregated network of the ITA system

Where does the preceding discussion leave the reform proposal to create an appellate mechanism (or mechanisms) for the ITA system? Having reviewed the background on this proposal and discussed the merits of the concern that underpins the reform proposal – jurisprudential consistency – I will now conclude this chapter by offering an assessment of the prospect of an appellate mechanism.

This proposal should be assessed in the context of a growing backlash against investor-state dispute settlement through the use of international arbitration.²⁴⁷

Negotiations for large multilateral trade and investment agreements – such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) – have occasioned a growing chorus of critical voices that threaten to derail the negotiation processes.

The argument for the creation of an appellate mechanism for the ITA system, if based entirely on addressing alleged inconsistencies in investment law jurisprudence, is weak. It is not clear that the inconsistencies are as prevalent as critics suggest and, furthermore, there are competing principles that may suffer from too strong an emphasis on the promotion of rigid consistency. However, as the backlash against the ITA system generated in the wake of TPP and TPIP negotiations has demonstrated, there remain substantial sections of civil society that are concerned about the employment of arbitration to settle investor-state disputes. To what extent, then, does the negotiation of these wide-ranging multilateral agreements present an opportunity to re-examine the

²⁴⁷ Note, for instance, that the European Commission has at the time of writing temporarily suspended TTIP negotiations in order to hold public consultations on ISDS. See: “European Commission launches public online consultation on investor protection in TTIP.” *European Commission Press Release*. 27 March 2014. <http://europa.eu/rapid/press-release_IP-14-292_en.htm> Accessed April 4, 2014.

proposal to institute some sort of an appeals body for the ITA system? This question seems especially felicitous given that the European Commission has made clear that “the EU aims to establish an appellate mechanism in TTIP so as to allow for review of ISDS rulings.”²⁴⁸

Legum addresses this possibility in a recent article. He notes that he remains unconvinced of the need and viability of an appeals mechanism but that in the context of TPP and TPIP negotiations “it is worth a second look.”²⁴⁹ Giving the reform proposal a fresh review is occasioned by these negotiations in part because “each of these negotiations could individually result in a unitary agreement capable of consistent interpretation.”²⁵⁰ This is an important point. As this thesis has stressed at length, the nature of the ITA system is inherently decentralized and disaggregated. Consequently, it fits neatly into the contemporary framework of global governance and is able to effectively generate norms and expectations as a part of that framework. A single appellate body – created by some sort of ambitious new multilateral agreement²⁵¹ – would face the same problems as an international court of investment in terms of realistic chances of coming to fruition and congruency with modern global governance. However, the negotiations for large regional trade and investment agreements such as the TPP and the TPIP provide an opportunity to create appellate mechanisms. The proposal could thus

²⁴⁸ “Public consultation on modalities for investment protection and ISDS in TTIP.” *European Commission*, 2014. Available at http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf

²⁴⁹ Barton Legum, “Appellate Mechanisms for Investment Arbitration: Worth a Second Looks for the Trans-Pacific Partnership and the Proposed EU-US FTA?” *Transnational Dispute Management*, Vol. 11, No. 1 (2014), p. 5.

²⁵⁰ *Ibid.*, p. 3.

²⁵¹ Or, perhaps, through the revision of an already-existing multilateral agreement such as the ICSID Convention. This would still be a Herculean task and would only provide for an appellate body for a single arbitral framework, thus providing little solace for the ITA system’s harshest critics.

be implemented in a decentralized manner: instead of a single multilateral agreement, states could craft the appellate mechanism to service the specific needs of the regional agreement in question. In this way, appellate mechanisms could (i) escape the problems presented by Van Harten's proposal, (ii), demonstrate to civil society critics that reform of the system is possible and that safeguards can be put in place, and (iii) continue to contribute to an on-going dialogue between tribunals and appellate bodies in the fashion described by Cate (given the existence of more than one body²⁵²). Investment agreement negotiators, international public policymakers, and the arbitration community would be wise to utilize this opportunity to indeed take a cautious second look at creating appellate mechanisms for investment arbitrations.

²⁵² Recall that Bottini argues that the existence of multiple appellate bodies would be problematic. I disagree. As Cate persuasively argues, consistency cannot be the overriding goal of the ITA system. The system's ability to foster dialogue and develop norms and expectations must be protected. The existence of a few appellate bodies would allow for this to continue, much in the same way that national courts of final appeal quote each other's decisions with increasing frequency and operate in dialogue with each other. See: Slaughter 2004, pp. 65-100.

Chapter 5: Conclusion

Review

This thesis has straddled the boundary between the scholarly fields of international relations and international law by investigating and analyzing two recent proposals to reform the relatively recently developed investment treaty arbitration system. I have conducted my research for this thesis by analyzing textual and historical documents to understand why and how the system emerged, the reasons for the reform proposals discussed, and to offer a normative assessment of the proposals based on the evidence presented. Underpinning my research has been a liberal theoretical approach, which is to say that the basic assertions and principles of liberal theory in law and politics are assumed to be both positively and normatively correct – that is to say liberalism gets it right about how international law and politics *is* and also how it *should be*. The outcomes of the reform proposals I assessed are therefore in part measured against the backdrop of a liberal theoretical framework.

Before offering final thoughts on some of the benefits of the current ITA system and possible future research possibilities, I will briefly review the ground we have covered through this thesis. I began by exploring the history of arbitration in international society in order to create a firm historical foundation from which the topic of this thesis could be researched. Flowing from this was an explanation of how the current system emerged and how it functions.

After offering this historical analysis, I turned to the first major reform proposal: Gus Van Harten's proposal to overhaul the system by creating an international investment court. Van Harten's sophisticated and multifaceted critique of the current system was first rehashed. In essence, the core problem with the current system is that – because it is best understood as a mechanism of public law adjudication – it fails to live up to the proper standards of public law adjudication, because it has inappropriately imported a model of dispute resolution commonly used by and better suited to international commercial disputes, or disputes between two international private parties. Van Harten's solution is to replace *ad hoc* arbitrations with a permanent world investment court. I argued that this proposal should be rejected for two reasons: first, Van Harten's critique of the current system is overstated and not entirely accurate, and thus the rationale for such radical reform is ultimately unsustainable; and second, I argued that the proposal is incongruent with the contemporary model of global governance and that, moreover, the current nature of the system fits rather well with global governance as it actually works in the world today. Thus even if Van Harten's critique of the system was persuasive – which this thesis ultimately found it was not – there remain strong reasons, for proponents of global governance, to reject the proposal nonetheless.

I then turned to the second reform proposal. This proposal was markedly less radical than the first analyzed and assessed. Instead of total institutional overhaul, the second proposal instead involved institutional addition by way of creating an appellate mechanism – or mechanisms – for the investment treaty arbitration system. I found that the unifying concern of advocates of this proposal was that the current system creates an inconsistent jurisprudence and that an appellate body would be able to harmonize the

case law of international investment law. In assessing this proposal, I argued that the concern over inconsistency in the system may be somewhat overblown and, moreover, that placing too much emphasis on consistency may have undesirable side-effects. Ultimately, however, in part because of the political reality of strong criticism of the current system from certain elements of civil society, I offered a cautious endorsement of this proposal, so long as its implementation was congruent with the wider system of global governance.

Through the course of my research on these two reform proposals, I became increasingly sympathetic to the current system. By way of a conclusion to this thesis, I will offer some brief thoughts on benefits of the current system and future research possibilities for scholars of international relations and international law.

Benefits of the ITA System and future research possibilities

As I wrote in chapter 2, the current system emerged in response to the inadequacies of the traditional methods foreign investors attempted to employ – namely, recourse to domestic judicial authorities or the principle of diplomatic protection – in the face of political upheaval and violence in the post-war era. But aside from offering a solution to the problem of dispute resolution between foreign investors and the sovereign states that host their investments, does the current system offer any other benefits?

Public Policy and Arbitral Decisions

Many of the criticisms of the ITA system implicitly suggest that the problem with referring disputes to arbitration is that arbitral decisions will result in policy outcomes that are conservative and undesirable. As Rogers writes of Van Harten's critiques, "Although framed as a structural critique of investment arbitration, at least some aspects

of Van Harten's proposal appear to be implicitly intertwined with policy preferences and a presumption that those preferences may be more likely to prevail in a more traditional court structure."²⁵³ Indeed, recent public commentary offered by critics of the system have suggested that the signing of trade and investment treaties that contain ISDS provisions would result in the erosion of indigenous self-governance rights²⁵⁴, the likely approval of a contentious energy pipeline in Canada²⁵⁵, and the claw back of democracy itself.²⁵⁶ But if part of the concern of critics of the ITA system is that the decisions of arbitral tribunals will set back or place undue limitations on a progressive policy agenda, the concerns are ultimately unfounded.²⁵⁷ There are two reasons to doubt that the ultimate consequences of investment arbitrations are conservative public policy outcomes.

First, the fundamental principles that arbitrators may use to ground their decisions on are familiar principles of justice in a liberal democratic society. Common to the provisions in investment treaty dispute resolution provisions is the need to afford investors 'fair and equitable treatment.' While vague, there has been considerable commentary from arbitrators on the substance of fair and equitable treatment provisions.

Kingsbury and Schill outline a persuasive interpretation:

²⁵³ Ibid. Rogers, pp. 217

²⁵⁴ Andrea Palframan, "Hupacasath First Nation vs. Canada-China FIPA agreement." *Rabble.ca*, 12 June 2014 <<http://rabble.ca/news/2014/06/hupacasath-first-nation-vs-canada-china-fipa-agreement>> Accessed 17 June 2014.

²⁵⁵ Beth Hong, "Chinese companies can sue BC for changing course on Northern Gateway, says policy expert." *Vancouver Observer*, 12 October 2012 <<http://www.vancouverobserver.com/sustainability/chinese-companies-can-sue-bc-changing-course-northern-gateway-says-policy-expert>> Accessed 17 June 2014.

²⁵⁶ "Still not loving ISDS: 10 reasons to oppose investors' super-rights in EU trade deals." *Corporate Europe Observatory*, 16 April 2014 <<http://corporateeurope.org/international-trade/2014/04/still-not-loving-ids-10-reasons-oppose-investors-super-rights-eu-trade>> Accessed 17 June 2014.

²⁵⁷ The suggestion that ISDS provision in trade and investment treaties would result in negative consequences for the regulatory state and public welfare has continued to find voice in scholarly literature as well. See, for instance: Christiane Gerstetter and Nils Meyer-Ohlendorf, "Investor-State Dispute Settlement Under TTIP – A Risk for Environmental Regulation?" *Heinrich Böll Stiftung TTIP Series* (2013).

Five clusters of normative principles recur in the more detailed specification by arbitral tribunals of elements of fair and equitable treatment. These principles are (1) the requirement stability, predictability and consistency of the legal framework, (2) the protection of legitimate expectations, (3) the requirement to grant procedural and administrative due process and the prohibition of denial of justice, (4) the requirement of transparency, and (5) the requirement of reasonableness and proportionality.²⁵⁸

Arbitrators are thus guided by principles familiar to citizens of a democratic society that they would expect to be applied to disputes where a government's public policy or regulatory regime is being challenged. There is nothing controversial in a democracy about state action being subject to judicial scrutiny and/or review – international investment arbitration only transplants a familiar democratic process to the international arena. The point of the ITA system is not the promotion of a certain socio-economic ideology but rather to strengthen fundamental principles that are generally uncontested, such as the right to fair and equitable treatment. As Schill and Kingsbury note, “Among such deeper justifications [for the ITA system] might be the promotion of democratic accountability and participation, the promotion of good and orderly State administration, and the protection of rights and other deserving interests.”²⁵⁹

Second, there is evidence in the case law that arbitrators are indeed sensitive to states' public policy objectives and considerations that can widely construed to be progressive. A prime example of this is the decision of the NAFTA tribunal in *Glamis Gold v The United States*.²⁶⁰ This case involved a Canadian resource extraction company that filed a claim against the United States government. The company pleaded that various regulatory decisions made by the Californian state government amounted to a violation of the NAFTA. At issue were environmental protection measures and the

²⁵⁸ Ibid. Kingsbury and Schill, p. 10.

²⁵⁹ Ibid., p. 8.

²⁶⁰ *Glamis Gold, Ltd. v The United States of America*, UNICTRAL (Available at <http://www.italaw.com/cases/documents/505>)

policies designed to protect the cultural integrity of indigenous American peoples who's sacred sites would be threatened by the company's investment project. The claim was ultimately denied by the tribunal who found in favour of the U.S. government.²⁶¹ In their reasoning, the arbitrators took into account the obligations of the United States under domestic legislation for the protection of indigenous peoples' interests as well as their international obligations.²⁶² Thus contrary to the concerns of critics that arbitral panels are motivated by a desire to run roughshod over progressive public policy initiatives,²⁶³ there is evidence in leading international investment law jurisprudence that arbitrators are highly sensitive to objectives such as indigenous cultural integrity.²⁶⁴ Rather than calling for the ITA system to be abolished or radically reformed – or for the process of economic liberalization and free trade to come to a halt – critics should instead focus on ensuring that tribunals adopt the correct interpretive reasoning when adjudicating cases.²⁶⁵

Kingsbury and Schill make a similar point when they posit that, “investor-State arbitration tribunals can themselves help to meet such legitimacy demands, even without any fundamental change in the current system, by improving the quality of their

²⁶¹ See *Glamis*, para. 18: “The Tribunal denies Glamis’ Article 1105 claim that it did not receive fair and equitable treatment from both the US federal government and the State of California during its efforts to utilize its federally granted mining right, on the ground that Glamis Gold has not established that any of the cited actions, whether viewed individually or together as a whole, violate the obligation of the United States to provide fair and equitable treatment.”

²⁶² *Glamis*, paras. 76-84.

²⁶³ Some have argued, however, that “The approach taken in *Glamis Gold* does not restore states’ regulatory power.” For this alternative perspective, see: Joshua Elcombe, “Regulatory powers vs. investment protection under NAFTA’s Chapter 1110: *Metalclad*, *Methanex*, and *Glamis Gold*.” *University of Toronto Faculty of Law Review*, Vol. 68, No. 1 (2010)

²⁶⁴ The arbitrators in *Glamis* acknowledge this directly when they noted at para. 8: “The Tribunal is aware that the decision in this proceeding has been awaited by private and public entities concerned with environmental regulation, the interests of indigenous peoples, and the tension sometimes seen between private rights in property and the need of the State to regulate the use of property.”

²⁶⁵ See my arguments on the role of democratic governments in the accountability of tribunals on pp. 47-48.

reasoning and their engagement with prior decisions.”²⁶⁶ A benefit of the current ITA system is that it adds a welcome addition to the mix of voices engaged in public policy creation and review. Further research on this subject would be fruitful.²⁶⁷

Advancing the rule of law?

Another possible benefit of the current system that has been subject to recent empirical research is the extent to which international investment arbitrations contributes to the advancement of the rule of law.²⁶⁸ In a forthcoming article, Thomas Schultz and Cedric Dupont utilize a dataset of 541 investment claims to determine the policy implications of arbitral decisions.²⁶⁹ Their findings are cautious but nonetheless offer a useful rejoinder to the ITA system’s critics.

the overall picture of investment arbitration seems to have changed in the mid-to-late nineties, when the system shifted from what may best be described as a neo-colonial instrument to an instrument that on the whole appears (appears, hedging is apposite here) to promote the international rule of law.²⁷⁰

Interestingly, the empirical findings of Schultz and Dupont suggest that the policy implications of international investment arbitration seem to have shifted through the

²⁶⁶ Ibid. Kingsbury and Schill, p. 7.

²⁶⁷ A related issue is effect of investment treaty arbitration on the economic prosperity of states party to trade and investment agreements. This thesis is not written by an economics student and an investigation of the economic impact of the ITA system is beyond its scope. However, it is interesting to point out that there is some recent evidence that when a state is a frequent respondent in investment arbitrations no perverse economic effects will necessarily follow. Argentina, a respondent in numerous and oft-cited arbitrations in the wake of its financial crisis in the early 2000s (and a recent respondent before the United States Supreme Court in cases such as *BG Group v The Republic of Argentina*, which affirmed an arbitral award in favour of an investor), has not seen a decline in foreign investment despite the flurry of arbitration and litigation brought about by foreign investors. See: Elaine Moore and Vivianne Rodrigues, “Argentina’s fight with creditors fails to spoil investor appetite.” *Financial Times*, June 19, 2014. <<http://www.ft.com/intl/cms/s/0/386b5792-f6d7-11e3-8ed6-00144feabdc0.html?siteedition=intl#axzz372aFAbqs>> Accessed July 12, 2014.

²⁶⁸ The rule of law is, of course, a notoriously difficult concept to define, but for a persuasive overview see Lord Bingham’s 2006 speech on the subject available through the *Centre for Public Law* available at <http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php>

²⁶⁹ Thomas Schultz and Cedric G. Dupont, “Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study.” Forthcoming in *European Journal of International Law* (2014) Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399179> Accessed 28 May 2014.

²⁷⁰ Ibid., p. 4.

years: while “investment arbitration appears to have been used, until the mid-to-late nineties, as a sword in the hands of the economic interests of investors from rich countries against governments of poorer countries,”²⁷¹ it has since then evolved to “also been used significantly by investors from rich countries against other rich governments”²⁷² and now appears to strengthen the rule of law. This study should serve to inspire further qualitative and quantitative research into relationship between investment arbitration and the rule of law. It would be of particular interest to attempt to extrapolate the relationship – if any – between recent reforms of the ITA system (such as increasing transparency and use of *amicue curiae* briefs) and the system’s role in promoting the rule of law.

It is almost trite to remark that economic liberalization and globalization have had a significant impact on shaping our world. But as these often contentious processes march onward, questions will continue to be asked as to what the legal order governing the development of globalization should look like. This thesis has ultimately attempted to offer a modest contribution to this discussion by arguing that, of the two major reform proposals for the system of investment treaty arbitration, appellate mechanisms deserve cautious consideration whereas the replacement of the system with an international investment court does not.

²⁷¹ Ibid.

²⁷² Ibid.

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